Northwestern Journal of International Law & Business

Volume 6
Issue 3 *Fall*

Fall 1984

Warsaw Convention Liability Limitations: Constitutional Issues

Thomas J. Dolan

COMMENTS

Warsaw Convention Liability Limitations: Constitutional Issues

I. INTRODUCTION

The Warsaw Convention[1] is a multilateral treaty adhered to by the United States in 1934, which establishes a uniform set of substantive and procedural rules governing international air transportation.[2] Article 22[3]

[1] The Warsaw Convention is the informal title for Convention for the Unification of Certain Rules Relating to International Transportation by Air, concluded at Warsaw, Poland, *opened for signature* October 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *reprinted in* 49 U.S.C.A. app. at 430 (West Supp. 1976) (adhered to by the United States June 27, 1934).

[2] Article 1(2), which defines "international transportation," reads:

> For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention. *Id.* at 3014, T.S. No. 876, 137 L.N.T.S. at 15, *reprinted in* 49 U.S.C.A. app. at 430 (West Supp. 1976).

[3] Article 22 of the Convention reads:

> (1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodic payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability. (2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to

of the Convention establishes liability limitations[4] for international air carriers of baggage, cargo, and passengers.

The Montreal Agreement[5] is a special contract signed by the airlines in 1966. The Agreement increases the limitation on liability per passenger from the Convention's gold limit equivalent of $8,300 to a dollar limit of $75,000.[6] This increase affects only the limitation on liability for personal injury or death.[7] The Agreement does not affect the limitations on liability for baggage and cargo.[8] As a result, the current limitation on liability for personal injury or death, on one hand, and the limitations on liability for cargo and baggage, on the other, are expressed in different units: the former in dollars, the latter in milligrams of gold.[9]

---

the consignor at delivery. (3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger. (4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65 milligrams of gold at the standard fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Id. at 3019, T.S.No. 876, 137 L.N.T.S. at 25, *reprinted in* 49 U.S.C.A. app. at 434 (West Supp. 1976).

4 The liability limitations have become increasingly controversial. Ever since the United States adhered to the Convention in 1934, the controversy has focused on the view that the liability limitations are too low. "[T]he underlying and recurring theme of all the discussions [following the United States adherence in 1934] was whether the limit had been set at the right level." Lowenfeld and Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 504 (1967).

5 CAB Order No. E-23680, 31 Fed. Reg. 7302 (1966) [hereinafter cited as CAB order], *reprinted in* Civil Aeronautics Board, Aeronautical Statutes and Related Material, at 425 (1970).

The Montreal Agreement is a private agreement signed by the airlines under the auspices of the International Air Transport Association (IATA) and the Civil Aeronautics Board (CAB). *Id.* The Agreement is under the authority of Article 22(1) of the Warsaw Convention, which provides that "by special contract, the carrier and the passenger may agree to a higher limit of liability" with regard to the limitation on liability per passenger. *Id.*

On November 15, 1965, the United States Government gave notice of denunciation of the Warsaw Convention under authority of Article 39. *Id.* Article 39 of the Convention reads in part:

(1) Any one of the High Contracting Parties may denounce this convention by a notification. . . .

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

The United States emphasized that the sole reason for the notice of denunciation was that the liability limitations for personal injury or death were too low. CAB Order No. E-23680, 31 Fed. Reg. 7302 (1966). The United States withdrew the notice of denunciation in return for the airlines' signatures to the Montreal Agreement. *Id.*

The Montreal Agreement increases the per passenger liability limitation for personal injury or death to $75,000 including legal fees, or $58,000 exclusive of legal fees and costs where awards are so separated. *Id.* In addition, the Montreal Agreement provides that the airlines waive the due care defense of Article 20(1) of the Convention. Article 20(1) of the Warsaw Convention reads: "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." As a result, the Montreal agreement established strict liability of air carriers. *Id.*

6 *Id.*

7 *Id.*

8 *Id.*

9 The limitation on liability for personal injury or death is $75,000 per passenger. *See supra*

The Montreal Protocols are a recent proposal for legislative modification of the Warsaw Convention-Montreal Agreement.[10] The Protocols, if they had been ratified, would have expressed all liability limitations in terms of the SDR, a unit based on an international basket of currencies.[11] Under the Montreal Protocols, the limitation on liability for personal injury or death would have increased from $75,000 to 100,000 SDRs (equivalent to about $120,000).[12] The limitation on liability for cargo, on the other hand, would have remained about the same.[13] Nevertheless, on March 8, 1983, the Senate's 50-42 vote in favor of the Montreal Protocols fell short of the two-thirds majority required for consent.[14]

In *T.W.A., Inc. v. Franklin Mint Corp.*, the United States Supreme Court held that "the (Warsaw) Convention's cargo liability limit remains enforceable in the United States."[15] Nevertheless, the Court did not address the question of whether any of the liability limitations of the Warsaw Convention-Montreal Agreement are unconstitutional. Nor had the Second Circuit in *Franklin Mint* reached that question.[16]

---

note 5. The limitation on liability for cargo and checked baggage is 250 francs per kilogram. For unchecked baggage the limit is 5,000 francs per passenger. The sums in francs refer to French francs each equivalent to 65 milligrams of gold. *See supra* note 3.

10 SENATE COMMITTEE ON FOREIGN RELATIONS, MONTREAL PROTOCOLS NOS. 3 AND 4, S. Rep. No. 1, 97th Cong., 1st Sess. 27 (1983).

11 *Id.* at 29-32.

12 *Id.* at 4.

13 *See* T.W.A. Inc. v. Franklin Mint Corp., 104 S. Ct. 1776, 1785-86 (1984).

14 129 CONG. REC. S2270 (daily ed. March 8, 1983).

The Montreal Protocols were defeated in part because they would have made the liability limitations unbreakable even in cases of willful misconduct. That is, the Montreal Protocols would have abolished Article 25(1) of the Warsaw Convention, which reads:

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

Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* October 12, 1929, 49 Stat. 3020, T.S. No. 876, 137 L.N.T.S. 27, *reprinted in* 49 U.S.C.A. app. at 434 (West Supp. 1976).

More importantly, the Protocols failed ratification because even with the proposed increase, the liability limitations were viewed as still too low. The opponents of the Montreal Protocols urged that defeat of the Protocols would lead to the result they ultimately desired—unlimited liability. This result, so the opponents theorized, would follow from either United States withdrawal from the Convention or refusal by United States courts to enforce the liability limitations. In theory, these reactions would stem from dissatisfaction with the intolerably low liability limitations. *See* Kreindler, *Montreal Protocols Defeated*, N.Y.L.J., April 4, 1983, at 1, col. 1; *See also* Hollings, *Defeat of the Montreal Protocols: Victory for Airline Passengers*, 19 Trial 20 (May, 1983); Hollings, *The Montreal Protocols: A Threat to the American System of Jurisprudence*, 18 Trial 69 (Sept., 1982).

15 *T.W.A.*, 104 S. Ct. at 1787.

16 Franklin Mint Corp. v. T.W.A., Inc., 690 F.2d 303 (2d Cir. 1982), *aff'd*, 104 S. Ct. 1776 (1984) (The Supreme Court affirmed the court of appeal's judgement enforcing in the case before it

Similarly, in *In re Aircrash in Bali, Indonesia*, the Ninth Circuit did not reach the question of the constitutionality of the Warsaw Convention-Montreal Agreement liability limitations.[17] Nevertheless, the court of appeals *sua sponte* raised the question of whether the Warsaw Convention-Montreal Agreement's limitation of liability to $75,000 per passenger is a "taking of property without just compensation."[18] The court held that the court of claims would be the proper forum for a determination on the "taking" issue.[19] The Ninth Circuit explained that if the liability limitations effected a "taking," then the plaintiffs would be entitled to compensation from the United States under the Tucker Act.[20]

The claim that the Warsaw Convention-Montreal Agreement liability limitations are unconstitutional takes many forms. The most plausible constitutional challenge against the liability limitations, however, is that they are irrational because their original purpose, to aid development of international air transportation, is now anachronistic.[21] Statistics demonstrating the current maturity of the international air transportation industry strongly support this challenge.[22] If evaluated on this basis alone, the liability limitations could be found to unconstitution-

---

the Warsaw Convention limitation on liability for cargo, but reversed the Second Circuit's prospective ruling that the liability limitation would after sixty days no longer be enforceable.)

17 684 F.2d 1301 (9th Cir. 1983).

18 *Id.* at 1310; *see also infra* notes 150-58 and accompanying text.

19 684 F.2d at 1311.

20 The Tucker Act reads in part: "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon the Constitution." 28 U.S.C. § 1491 (1982).

The Supreme Court in the context of considering the Tucker Act, has stated that "a claim founded upon a taking of property for public use . . . without just compensation would fall within the literal words of 'any claim against the United States founded . . . upon the Constitution.'" Regional Rail Reorganization Act Cases, 419 U.S. 102, 126 (1974). The Court concluded that "taking" claims against the United States are within the jurisdiction of the court of claims. *Id.*

The "treaty" exception to the Tucker Act reads: "Except as otherwise provided by Act of Congress, the United States Claims Court shall not have jurisdiction of any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations." 28 U.S.C. § 1502 (1982). In In re Aircrash in Bali, Indonesia, the Ninth Circuit maintained that the statutory language "growing out of or dependent upon" should be construed narrowly. 684 F.2d 1301, 1311 (1982). The court cited Hughes Aircraft Co. v. United States, 534 F.2d 889 (Ct. Cl. 1976). *Id.* at 1311. The court of claims in Hughes Aircraft established that "the test under § 1502 is whether the plaintiff's claim could conceivably exist independently of, or separate and apart from, the subject treaty." Hughes Aircraft Co. v. United States, 534 F.2d 889, 903 (Ct. Cl. 1976). Under this test, claims that "could conceivably" be based on domestic law in the absence of the Convention fall outside the treaty exception to the Tucker Act. For example, the treaty exception did not apply in Bali because the wrongful death actions were based on California law. *See* In re Aircrash in Bali, Indonesia, 684 F.2d at 1311.

21 *See infra* notes 76-81 and accompanying text.

22 *See infra* note 80 and accompanying text.

ally violate substantive due process.[23]

However, the liability limitations also have a second purpose—to induce foreign nations to adhere to the Warsaw Convention-Montreal Agreement.[24] The legitimacy of this international bargaining objective depends on whether the other provisions of the Warsaw Convention-Montreal Agreement are a *quid pro quo* for the liability limitations.[25] If they are, then the liability limitations are rationally related to a legitimate purpose, and so will be upheld against a due process challenge.[26] This challenge may succeed, on the other hand in the absence of a *quid pro quo*.[27] Nevertheless, the potential success of such a challenge under such circumstances is uncertain, because the Supreme Court has not yet determined whether due process requires a *quid pro quo* for limitations on liability.[28]

Still, even if they are a rational means to a legitimate purpose, the liability limitations could conceivably effect a "taking of property without just compensation."[29] A "taking" challenge should fail, however, because the liability limitations limit rather than eliminate claims.[30] For this reason, the Ninth Circuit in *Bali* should not have remanded for a determination on the "taking" question. Instead, the Ninth Circuit needed to reach the plaintiffs' equal protection, substantive due process, and right-to-travel challenges in order to decide the case before it.

The equal protection claim closely tracks the substantive due process claim. Both claims will succeed only if the liability limitations prove not to be means rationally related to a legitimate purpose.[31]

A right-to-travel challenge to the liability limitations should also fail.[32] The liability limitations simply do not restrict travel.[33] Nor do the liability limitations impose a prohibitive penalty on international air travelers.[34] There is no constitutional right to the most desirable liability terms nor to the least expensive transportation.[35]

Even after the Supreme Court's decision in *Franklin Mint*, there re-

23 *See infra* notes 93-97 and accompanying text.
24 *See infra* note 73 and accompanying text.
25 *See infra* note 149 and accompanying text.
26 *See infra* notes 131-37 and accompanying text.
27 *See infra* note 138 and accompanying text.
28 *See infra* notes 127-88 and accompanying text.
29 *See infra* notes 150-202 and accompanying text.
30 *See infra* notes 195-202 and accompanying text.
31 *See infra* note 75.
32 *See infra* notes 203-29 and accompanying text.
33 *See infra* notes 224-29 and accompanying text.
34 *See infra* notes 206 and 219-25 and accompanying text.
35 *See infra* notes 228-29 and accompanying text.

mains the question of whether the liability limitations, converted to dollars at the last official price of gold, are unconstitutionally low. Whether the liability limitations are unconstitutionally low, however, may depend on whether the other provisions of the Warsaw Convention-Montreal Agreement still provide an adequate *quid pro quo* for the liability limitations.[36]

This Comment is concerned with the merits of constitutional challenges to the liability limitations.[37] Section II[38] defines two important terms, "means" and "purpose." Section III[39] addresses the question of whether the liability limitations violate substantive due process. The principle question there is whether the liability limitations are a means rationally related to a legitimate purpose. Section IV[40] raises the question of whether the other provisions of the Warsaw Convention-Montreal Agreement are a *quid pro quo* for the liability limitations. Section V[41] addresses the question of whether the liability limitations violate the fifth amendment by affecting a "taking without just compensation." Finally, Section VI[42] addresses the question of whether the liability limitations violate the fundamental right to travel.

II. MEANS AND PURPOSES

A. Definitions

In *T.W.A., Inc. v. Franklin Mint Corp.*,[43] the United States Supreme Court found that the Civil Aeronautics Board's (CAB's)[44] use of the last

---

36 *See infra* note 149 and accompanying text.

37 A potential non-constitutional challenge to the Warsaw Convention's gold-based limitation on liability for baggage and cargo could be based on congressionally mandated consistency between agency action and the Convention itself. Such a challenge would allege that the agency (formerly the CAB, but now the Department of Transportation. *See infra* note 44.) has failed to adjust the gold-dollar unit of conversion as necessary to effectuate the Convention's purpose of international uniformity. Such a challenge, however, is contingent on both "the dollar's changing value relative to other western currencies" and "changes in the conversion rates adopted by other Convention signatories." 104 S.Ct. at 1785. This Comment, however, is concerned only with constitutional challenges.

38 *See infra* notes 58-74 and accompanying text.

39 *See infra* notes 75-126 and accompanying text.

40 *See infra* notes 127-49 and accompanying text.

41 *See infra* notes 150-202 and accompanying text.

42 *See infra* notes 203-29 and accompanying text.

43 104 S. Ct. 1776 (1984).

44 The CAB no longer exists. 49 U.S.C. § 1551 (1984). The Department of Transportation, in consultation with the Department of State, now has the Federal Aviation Program authority with respect to foreign air transportation. 49 U.S.C. § 1551(b)(1)(B) (1984). For simplicity, however, this Comment will follow the Supreme Court's example of referring only to the CAB. *See* 104 S. Ct. at 1780 n.3.

official price of gold[45] as the unit of conversion[46] to dollars for the Warsaw Convention's gold-based[47] liability limitations is consistent with the Convention's purposes.[48] In reaching this conclusion the Court identified two purposes of the Warsaw Convention: first, to set *some* limitation on liability; and second, to set a stable, predictable and internationally uniform limit that would encourage development of the then fledgling airline industry.[49] The Court concluded that the CAB's use of the last official price of gold as the unit of conversion is consistent with both of these purposes.[50]

The Court also considered as a third purpose of the Convention the setting of liability limitations that would keep step with inflation.[51] The Court found that use of the last official price of gold as the unit of conversion was inconsistent with this purpose.[52] The Court excused the inconsistency, however, because during the first fifty years of the Warsaw Convention's operation, the signatory nations, including the United States, had allowed the real value of the liability limitations to decline substantially.[53] The Court viewed this long-established practice as a course of performance useful for construing a " 'contract' among nations."[54] Accordingly, the Court concluded that use of the last official price of gold as the unit of conversion, even though the purchasing power of the dollar had declined, was not inconsistent with the purposes of the Convention.[55] Implicitly, then, setting liability limitations that would keep step with inflation is not really a purpose of the Warsaw Convention. Otherwise, the Court could not have found frustration of this goal to be consistent with the purposes of the Convention.

---

45 Effective 1978, Congress repealed the official price of gold. Bretton Woods Agreement Act of 1976, Pub. L. No. 94-564, § 6, 90 Stat. 2660 (1976); *See T.W.A.*, 104 S. Ct. at 1782 n.15.

In Franklin Mint, the Court found that congressional repeal of the official price of gold was not intended to affect the Warsaw Convention. *Id.* at 1784. Accordingly, the Court concluded that use of the last official price of gold ($42.22 per ounce) as the unit of conversion for the Warsaw Convention's gold-based liability limitations was consistent with domestic legislation. *Id.* at 1787 & n.26.

46 Article 22(4) of the Warsaw Convention permits conversion of its gold-based liability limitations into any national currency, but the Convention provides no rates of conversion. *See Id.* at 1784 n.26; *see supra* note 3.

47 The liability limitation for personal injury or death is $75,000 per passenger under the Montreal Agreement, but the liability limitations for baggage and cargo remain the original Warsaw Convention amounts in millimeters of gold. *See supra* note 9 and accompanying text.

48 104 S. Ct. at 1787 (1984).

49 *Id.* at 1785.

50 *Id.*

51 *Id.* at 1786.

52 *Id.*

53 *Id.* at 1786-87.

54 *Id.* at 1787.

55 *Id.*

In *Franklin Mint*, the Court identified the Warsaw Convention's purposes, not to test the constitutionality of the liability limitations, but in order to test for consistency between CAB action and the Convention itself.[56] Such consistency was required not by the Constitution, but by congressional legislation.[57] As a result, although the Court held that the use of the last official price of gold as the unit of conversion is consistent with the Warsaw Convention, there remains the question, unaddressed by the Supreme Court in *Franklin Mint*, of whether the Warsaw Convention-Montreal Agreement liability limitations are themselves constitutional. Accordingly, when constitutionality of the liability limitations is at issue, the purposes of the Convention should be examined in a different light.

When the constitutionality of a treaty provision is at issue, it is helpful to think of the purpose of the treaty or treaty provision as the objective, goal, or end for which the treaty or provision is designed. By contrast, the means of a treaty provision may be viewed as the directive, or command, designed to achieve the treaty's purpose.

Unfortunately, in a case where constitutional issues were raised (though not reached), the Ninth Circuit did not adopt the above distinctions between purpose and means. In *In re Aircrash in Bali, Indonesia*,[58] the court stated that the Warsaw Convention's "purposes are two-fold: providing uniformity in respect to documentation and certain procedural matters, and imposing limitations on liability."[59] The first purpose defined by the Ninth Circuit should have included uniformity of substantive rules as well.[60]

The court's definition of the second purpose, however, contains a more egregious flaw. By defining "imposing limitations on liability" as a purpose of the Convention, the court implicitly nullified any claim that the liability limitation is not rationally related to the purpose of the Convention. A liability limitation will always be rationally related to the purpose of "imposing limitations on liability."

Apparently, the Ninth Circuit did not realize that "imposing limitation on liability" is a means to an end rather than an end itself. That is, "imposing limitations on liability" is not, of itself, a purpose of the Convention.[61] Properly analyzed, the issue is whether the liability limitations are rationally related to their purpose of aiding development of interna-

---

56 *See supra* notes 43-55 and accompanying text.

57 *See* 104 S. Ct. at 1781; 49 U.S.C. § 1502(a) (1984).

58 684 F.2d 1301 (9th Cir. 1982).

59 *Id.* at 1307.

60 *See infra* note 74 and accompanying text.

61 *See supra* note 3 and *infra* note 74.

tional air transportation, for only then may they be found reasonable. An additional requirement of reasonableness, of course, is that aiding development of international air transportation be a legitimate purpose.[62]

The Ninth Circuit is not the only court which, in analyzing the liability limitations, confused the distinction between purpose and means. In *Reed v. Wiser*,[63] the Second Circuit stated: "It is beyond dispute that the purpose of the liability limitation proscribed by Article 22 was to fix at a definite level the cost to airlines of damages sustained by their passengers and of insurance to cover such damages."[64]

The Second Circuit's definition of purpose makes the liability limitation virtually unassailable by a rationality challenge. The liability limitation is certainly rationally related to the purpose of fixing at a definite level the cost of insurance to the airlines. A better test of rationality would have examined the relationship between the liability limitations and the development of international air transportation.

B. Legislative History

The Senate ratified the Warsaw Convention in 1934 without hearings or debates.[65] As a result, the primary source of legislative history relied upon by the courts is a letter written by Secretary of State Cordell Hull. Mr. Hull's letter accompanied the Convention in its transmission to the Senate in 1934. The portion of the Hull letter pertaining to the liability limitations reads:

> It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges.[66]

The first effect attributed to the liability limitations—"to afford a more definite basis of recovery"—does not square with the facts. Article 22 did not affect the basis of recovery. The liability limitations were not amounts assured to successful claimants. Rather, claimants had to prove

---

62 *See* Bennet, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 CALIF. L. REV. 1049, 1060 (1979).

63 555 F.2d 1079 (2d Cir. 1977).

64 *Id.* at 1089.

65 *See* In re Aircrash in Bali, Indonesia, 684 F.2d at 1308.

66 Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, S. Exec. Doc. No. G, 73d Cong., 2d sess. 3-4 (1934).

the extent of their damages.[67] The liability limitations of Article 22 would be applied only in cases where recovery founded on some other basis, such as Article 17's presumption of liability,[68] would have exceeded the limits. Hence, the liability limitations are not bases for recovery, but ceilings on recovery. As a result, the first effect specified by the Hull letter must be disregarded.

The second effect specified by the Hull letter—"to lessen litigation"—is more plausible. By limiting the range of possible recoveries, the liability limitations reduce uncertainty about the costs and benefits of trial vis-a-vis settlement. By reducing this uncertainty, the liability limitations increase the likelihood of settlement. The increased likelihood of settlement, however, is the direct result of improving the bargaining position of carriers vis-a-vis passengers and shippers. As a result, the amount of the settlement will surely be lower than that in a regime of unlimited liability. The reduction in litigation resulting from the liability limitations alone, then, is strictly a one-sided benefit to carriers.

The third effect listed in the Hull letter—"to aid in the development of international air transportation"—made sense in 1934. The means, as distinguished from the purpose, of Article 22 is limited liability.[69] Limited liability, then, was the means to the end of developing international air transportation.

According to Secretary Hull, however, there are two intermediate effects between the means of limited liability and the ultimate purpose of

---

[67] No article of the Warsaw Convention guarantees the amount of recovery for successful claimants. Article 24(1) of the Warsaw Convention reads: "In cases covered by Articles 18 and 19, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." Articles 17 and 18 of the Warsaw Convention establish the presumption of carrier liability. *See infra* note 68.

[68] Article 17 of the Convention creates the presumption of carrier's liability for personal injury and death of passengers. Article 17 reads:

> The carrier shall be liable for damage 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 of embarking or disembarking.

Article 18(1) creates the same presumption for damage to or loss of baggage and cargo. Article 18(1) reads: "The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air."

The effect of Articles 17 and 18(1) is to shift the burden of proof on the liability issue from passenger or shipper to the airlines. Airlines could, however, shift the burden of proof back to the passenger or shipper under Article 20(1), which provides for an affirmative defense of due care. Article 20(1) reads: "The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures." Nevertheless, under the Montreal Agreement, the airlines waived their Article 20(1) defense. *See supra* note 5.

[69] *See supra* note 3.

aiding development of international air transportation. The first intermediate effect of limited liability was to "afford the carrier a more definite basis on which to obtain insurance rates."[70] This first intermediate effect was a means to the second intermediate effect—"to reduce operating expenses for the carrier."[71] This second intermediate effect was in turn a means to the ultimate purpose of liability limitation—"to aid the development of international air transportation."[72] As a result, it is possible to view these intermediate effects not so much as independently significant purposes, but more fundamentally as mere means to an ultimate purpose.

Whether these intermediate effects are considered means or purposes is critical to the determination of whether the liability limitations are rationally related to their purpose. Here, it is easier to find a rational relationship if the intermediate effects are considered purposes, too, then if only the ultimate purpose is considered a purpose. For example, it is easier to show that limited liability is a rational means to the end of more definite bases for insurance rates than to show that limited liability is a rational means to the ultimate purpose of developing international air transportation.

Finally, the Hull letter omits a major purpose of the liability limitations—to induce foreign nations to adhere to the other provisions of the Convention.[73] In sum, the liability limitations of Article 22 have two main purposes—to aid development of international air transportation and to induce foreign nations to adhere to the other provisions of the Convention. To these two purposes, the Warsaw Convention as a whole adds a third purpose—to provide uniformity of documentation and rules applicable to international air transportation.[74]

---

70 *See supra* note 66 and accompanying text.

71 *Id.*

72 *Id.*

73 "Some (countries) even contended that the limit (on liability) was too high, thus discouraging a number of countries . . . from adhering to the Convention. Raising the limits, therefore, would only further impede the desired universality." Lowenfeld and Mendelsohn, *supra* note 4, at 504.

74 *Id.* at 498-500. Although Lowenfeld and Mendelsohn label limited liability a "goal" of the Convention rather than a "means," implicitly they recognize that limited liability is a means to "enable airlines to attract capital that might otherwise be scared away for fear of a single catastrophic accident." *Id.* at 499. Nevertheless, the authors are explicit in their recognition of uniformity in rules and documentation as the other purpose of the Convention. *Id.* at 498-99.

III. SUBSTANTIVE DUE PROCESS:[75] RATIONAL MEANS; LEGITIMATE PURPOSES

A. In re Aircrash in Bali, Indonesia: *The District Court Level*

In *In re Aircrash in Bali, Indonesia*,[76] the district court correctly identified one of the Warsaw Convention's two major purposes: "The need to protect the infant airline industry was a clear rationale behind the adherence by the United States to the Warsaw Convention."[77] The district court seemed poised to decline to enforce the liability limitations on grounds that they are no longer rationally related to their purpose. The court said, "the limitation imposed by Warsaw made sense at the time because the developing airline needed to have some assurance that it would not be financially wiped out by a catastrophic accident. A totally

---

75 In Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978), the Supreme Court stated:

> Although the District Court also found the Price-Anderson Act to contravene the "equal protection provision that is included within the Due Process Clause of the Fifth Amendment," appellees have not relied on this ground since the *equal protection arguments largely track and duplicate those made in support of the due process claim.* In any event, we conclude that there is no equal protection violation. The general rationality of the Price-Anderson Act liability limitations—particularly with reference to the important congressional purpose of encouraging private participation in the exploitation of nuclear energy—is ample justification for the difference in treatment between those injured in nuclear accidents and those whose injuries are derived from other causes. Speculation regarding other arrangements that might be used to spread the risk of liability in ways different from the Price-Anderson Act is, of course, not pertinent to the equal protection analysis. *Id.* at 93-94 (emphasis added).

In this Comment also, the equal protection analysis would "largely track and duplicate, the substantive due process analysis." *Id.* at 93. For this reason, the claim that the liability limitations violate equal protection is not explicitly analyzed in this comment. The equal protection analysis is implicit in the due process analysis.

76 462 F. Supp. 1114 (C.D. Cal. 1978), *rev'd*, 684 F.2d 1301 (9th Cir. 1982). This case involved wrongful death actions brought against Pan American World Airways, Inc., by survivors of two passengers killed in the April 22, 1974 aircrash. At the district court level, the jury awarded under state law damages of $300,000 for one passengers and $651,500 for the other. The district court refused to reduce each award to the $75,000 per passenger Warsaw Convention-Montreal Agreement liability limitation. The district court reasoned that (1) the $75,000 per passenger Warsaw Convention-Montreal Agreement liability limitation is contractual between passenger and airline; (2) under California law, a decedent's contract is unenforceable to the extent it compromises the survivor's right to a wrongful death recovery; therefore, (3) the $75,000 per passenger Warsaw Convention-Montreal Agreement liability limitation is unenforceable against the passenger's survivors' wrongful death damage awards. *Id.* at 1116-17.

If the district court had stopped its reasoning at this point, it would have at least been logically consistent. Instead, the court went on to contradict itself. After first stating that the basis of the Warsaw Convention-Montreal Agreement liability limitation was contractual, the court then mentioned that "[t]o the degree that the Warsaw Convention has effect in this court, it has so as a federal treaty. In deciding its interpretation, this court must consider what result is demanded by federal public policy." *Id.* at 1124. To consider federal public policy relevant to the question of whether the $75,000 liability limitation was enforceable is inconsistent with the district court's initial premise that the liability limitation was purely contractual.

77 *Id.* at 1125.

different situation exists today."[78] The district court explained that the air transportation industry had completely emerged from its infancy at the time of United States adherence to the Convention in 1934.[79] The court cited statistics demonstrating sharp increases in passenger miles and dramatic improvements in safety.[80] The court concluded that the airline industry today is "technologically and commercially mature."[81] In effect, the district court decided that a purpose of the passenger liability limitation—to aid development of international air transportation—was no longer a legitimate purpose. For the district court, that purpose had lost its legitimacy because of changes in federal public policy.

Nevertheless, the district court did not explicitly consider whether the liability limitation is still rationally related to its purpose. Instead, the district court maintained that "to the degree that the Warsaw Convention has effect in this court, it has so as a federal treaty. The court's interpretation must take into account the result demanded by federal public policy."[82]

The district court cited recent Civil Aeronautics Board (CAB) orders and the Airline Deregulation Act of 1978[83] to support the proposition that federal public policy towards airlines had shifted from an infant industry's protectionist-oriented approach to a competitive market-oriented approach.[84] On this basis, the district court concluded that modern federal public policy required nonenforcement of the liability limitations.[85]

The district court ignored the second purpose of the liability limitations—to induce foreign nations to adhere to the other provisions of the Convention. More generally, the district court overlooked an important difference between domestic legislation and federal treaties. Treaties depend on voluntary associations of self-policing entities. Domestic legislation, of course, does not. Domestic legislation is based on purposes grounded on exclusively national interests. In negotiating a treaty, however, the same national interests must be compromised in order to induce foreign nations to adhere to the treaty. For example, the United States has compromised its interest in full compensation in order to induce foreign nations to adhere to the other, more beneficial, provisions of the

78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.*
82 *Id.* at 1124. *See supra* note 76.
83 49 U.S.C. § 1301 note (1982).
84 462 F. Supp. at 1125-26.
85 *Id.* at 1126.

Warsaw Convention.[86] As a result, federal public policy is a poor guide to assessing the purpose of a treaty provision. Domestic policy ignores the international bargaining aspects of seemingly undesirable treaty provisions such as Article 22.

B. In re Aircrash in Bali, Indonesia*: The Court of Appeals Level*

1. Rejection of The District Court's Public Policy Approach

In *In re Aircrash in Bali, Indonesia,*[87] the United States Court of Appeals, Second Circuit, criticized the district court's public policy analysis. The court of appeals stated: "Unfortunately, we know of no doctrine that would allow us to examine congressional enactments to see if they still serve the purpose for which they were designed."[88] This statement reveals that the court of appeals misunderstood the district court. The district court did not base its decision on whether the Warsaw Convention still served its original purpose. Instead, the district court determined that federal public policy had evolved in tandem with the development of the air transportation industry.[89] The district court refused to enforce the liability limitations.[90] The district court's refusal,

---

86 *See infra* notes 147-49 and accompanying text.

87 684 F.2d 1301 (9th Cir. 1982). *See supra* note 76.

Here, the court of appeals concluded that the district court was correct to apply California law. Nevertheless, the Second Circuit held that the $75,000 per passenger Warsaw Convention-Montreal Agreement liability limitation preempts state law. The Second Circuit reasoned that: (1) the Warsaw Convention is a valid treaty of the United States and is therefore federal law; (2) federal law preempts any state law that "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress"; (3) one of the dual purposes of the Warsaw Convention is to impose a limitation on liability; therefore (4) the Warsaw Convention as modified by the Montreal Agreement requires reduction of damage awards to the $75,000 per passenger liability limitation, notwithstanding California law. *Id.* at 1307-08.

Both the district court and the court of appeals interpreted the Warsaw Convention as a federal treaty. Nevertheless, the two courts reached opposite results. The court of appeals focused on the original purpose of the framers of the Convention, *Id.* at 1308, whereas the district court had reasoned that changes in federal public policy had negated the original purpose of the Convention. 462 F. Supp. at 1124-26. These differences in approach not only explain the differences in results, but also illustrate the controversy about the appropriate role of the judiciary in interpreting federal treaties.

The court of appeals' approach is preferrable to that of the district court. It is appropriate to consider the intent of the framers and the original purpose when interpreting or applying a federal treaty provision. It is extrajudicial, however, to decide against the clear language and intent of a federal treaty provision merely because the court determines that enforcement is contrary to current public policy. This approach taken by the district court is legislative rather than judicial.

The court of appeals, however, was mistaken to dub limitation of liability a "purpose" rather than a "means" to achieving purposes.

88 684 F.2d at 1308.

89 462 F. Supp. at 1124-25.

90 *Id.* at 1124.

however, was not because the means of limited liability no longer served its original purpose. Rather, the district court found that the original purpose of aiding development of international air transportation was no longer legitimate in light of modern federal public policy.[91]

A more egregious flaw in the statement by the court of appeals is that it ignores the fundamental principle that Congressional enactments must be rationally related to a legitimate purpose. In the context of this rationality requirement, the district court's statistics on development of the air transportation industry would have found their proper place. The district court could have reasoned that as a result of dramatic improvements in safety, finance, and availability of insurance, the liability limitation was no longer rationally related to the purpose of aiding development of international air transportation.

Whether a challenge to the rationality of the liability limitation could succeed depends upon the definition of purposes. The court of appeals stated that limited liability is one of the dual purposes of the Convention.[92] Under this definition, the challenge that the means is not rational will always fail. A means that is one in the same with its end is always rationally related to that end. Hence, a liability limitation is a means always rationally related to the end of limiting liability.

The court of appeals should have recognized that limiting liability is a means rather than an end. The court could have then directly formulated the rationality analysis into the appropriate questions: Is the liability limitation a rational means for the purpose of aiding development of international air transportation? Is this purpose legitimate?

2. Substantiality of the Due Process Challenge

In *Bali*, the Ninth Circuit never reached the substantive due process challenge to the liability limitation, but did find that the plaintiffs' argument was "substantial."[93] The court of appeals prefaced its finding of a "substantial" due process argument with a reiteration of the plaintiffs' statistical demonstration that the "airline industry is no longer in its infancy."[94] Moreover, the court noted the absence of any allegation that domestic airlines, without the protection of the Warsaw Convention, had been unable to procure insurance.[95] The court also cited statistical sources suggesting that "the increased cost of insurance if the Warsaw

91 *Id.* at 1124-26.
92 684 F.2d at 1307.
93 *Id.* at 1310.
94 *Id.*
95 *Id.*

limitation were removed would be insignificant."[96] In addition, the court noted that "it appears that the cost to airlines of additional insurance would be less than the cost to individual passengers of purchasing trip insurance."[97]

All of these statements by the court of appeals imply that the liability limitations are no longer rationally related to their purpose of aiding development of international air transportation. Alternatively, the court's statements imply that the latter purpose has become anachronistic.

C. Duke Power Co. v. Carolina Environmental Study Group

In *Bali*,[98] the court of appeals compared plaintiffs' substantive due process and equal protection challenges to those made before the United States Supreme Court in *Duke Power Co. v. Carolina Environmental Study Group*.[99] The court of appeals concluded that the liability limitation of the Warsaw Convention-Montreal Agreement, like that of the Price-Anderson Act[100] at issue in *Duke Power*, was an "economic regulation which would be constitutional under the Commerce Clause unless arbitrary or unreasonable."[101] The court of appeals premised its conclusion on its determination that "the treaty at issue here must withstand essentially the same tests as would domestic legislation against a claim that it denies rights guaranteed by the Constitution.[102]

In *Duke Power*, the Supreme Court upheld the Price-Anderson Act's $560 million limitation on liability for nuclear accidents in federally licensed plants.[103] The dual purpose of the Act was to "protect the public and encourage the development of the atomic energy industry."[104] The $560 million ceiling consisted of contributions from licensees ($315 million), the maximum available coverage under private insurance ($140 million) and a remainder borne by the Federal Government ($105 million).[105] The Act also provided that "in the event of a nuclear incident involving damages in excess of [the] amount of aggregate liability, the Congress . . . will take whatever action is deemed necessary and proper

96 *Id.*
97 *Id.*
98 *Id.* at 1309.
99 438 U.S. 59 (1978).
100 42 U.S.C. § 2210 (1976).
101 684 F.2d at 1309.
102 *Id.*
103 438 U.S. 59 (1978).
104 *Id.* at 64.
105 *Id.* at 67.

to protect the public."[106] Moreover, those plants indemnified under the Act in effect waived "all legal defenses in the event of a substantial nuclear accident."[107]

The Court found the Price-Anderson Act's limitation of liability to be "a classic example of an economic regulation—a legislative effort to structure and accommodate 'the burdens and benefits of economic life.' "[108] Accordingly, the Court tested the liability limitation for rationality. The limit would survive the substantive due process challenge unless it was determined to be arbitrary or unreasonable. The Court emphasized that the litigants challenging the Act had not questioned that some liability limitation might be reasonable.[109] Instead, at issue was the *amount* of the liability limitation—i.e., the "*particular figure* of $560 million."[110] The Court concluded that this amount was reasonable.[111]

The Court stressed that its finding of reasonableness was "predicated on two corollary assumptions."[112] The first "corollary assumption" was that the risk of an accident involving total claims in excess of $560 million was "exceedingly remote."[113] The second "corollary assumption" was that Congress, as expressly provided for in that Act, would procure extraordinary relief in the event of such an accident.[114]

The Court's finding of reasonableness on the basis of these two corollary assumptions demonstrates that the Court's rationality analysis focused on the relationship of the $560 million liability limitation to the purpose of protecting the public. The other purpose of the Price-Anderson Act—development of private nuclear energy—was not really at issue. If that purpose had been at issue, then the court would have had to conclude that the lower the liability limitation, the more rationally related it would be to the development of private nuclear energy. By contrast, the Court would have also concluded that the lower the liability limitation, the less reasonably related it would be to the purpose of protecting the public.

In sum, at issue in *Duke Power* was the question of whether the Price-Anderson Act established a liability limitation that was too low to be rationally related to its purpose of protecting the public. It is still an

106 *Id.* at 66-67.
107 *Id.* at 65.
108 *Id.* at 83.
109 *Id.* at 84.
110 *Id.* at 84 (emphasis in original).
111 *Id.* at 86-87.
112 *Id.* at 85.
113 *Id.* at 86.
114 *Id.* at 85.

open question whether the Court would have found $560 million to be reasonable in the absence of the "two corollary assumptions."

D. Liability Limitations: Rational Means to Legitimate Purposes?

In *Bali*, the Second Circuit was correct to note that domestic legislation, such as the Price-Anderson Act, and federal treaties, such as the Warsaw Convention, must withstand essentially the same tests in the face of constitutional challenges.[115] Nevertheless, the Second Circuit was not justified in dubbing the Warsaw Convention liability limitation an "economic regulation."[116]

One of the two basic purposes of the Warsaw Convention liability limitation is to induce foreign nations to adhere to the other provisions of the Convention.[117] Given this international bargaining purpose, the Warsaw Convention liability limitation does not fit neatly into the Supreme Court's definition of "economic regulation."[118]

In *Duke Power*, the Court implied that an economic regulation is a "legislative effort to structure and accommodate 'the burdens and benefits of economic life.' "[119] Inducing foreign nations to adhere to a treaty is not the same as structuring and accommodating economic burdens and benefits. Hence, the liability limitation, as an international bargaining concession, is not an economic regulation.

Nevertheless, the Warsaw Convention liability limitation has another purpose—to aid development of international air transportation.[120] In light of this purpose, the liability limitation looks more like an economic regulation. The Court's definition of an economic regulation[121] envisages two groups—(1) those who receive a net benefit at the expense of (2) those on whom a net burden is imposed. The Price-Anderson Act, for example, benefits consumers of nuclear energy while imposing a net burden on those residing close to nuclear power plants.

The Warsaw Convention liability limitation, by contrast, benefits airlines but, in theory, does not impose a net burden on passengers and shippers. In theory, at least, passengers and shippers benefit from the liability limitation because the limit aids development of international air transportation. That development in turn increases the supply of international air transportation necessary to meet the demand of passengers

115 684 F.2d at 1309.

116 *Id.*

117 *See supra* notes 73-74 and accompanying text.

118 *See supra* text accompanying note 108; *see infra* text accompanying note 119.

119 438 U.S. at 83.

120 *See supra* notes 73-74 and accompanying text.

121 *See supra* text accompanying notes 108 and 119.

and shippers. As a result, the liability limitation imposes a net burden on neither airlines nor passengers and shippers.

Arguably, the absence of a group that suffers a net burden by itself takes the liability limitation outside the Court's definition of an economic regulation. Regardless, the liability limitation's international bargaining purpose cannot be reconciled with the Supreme Court's definition of an "economic regulation."

Nevertheless, in *Bali*, the Ninth Circuit was correct to test the $75,000 per passenger Warsaw Convention-Montreal Agreement liability limitation against a standard of rationality.[122] Whether the liability limitations are a rational means to a legitimate purpose is still an open question, however, because the Ninth Circuit never reached the constitutional issues. Unfortunately, the court's comparison of liability limitations of the Warsaw Convention to those of the Price-Anderson Act hinders more than it helps in answering this question.

In *Duke Power*, the Supreme Court expressly stated that its finding of reasonableness of the Price-Anderson Act's $560 million liability limitation was based on "two corollary assumptions."[123] Those twin assumptions of extremely remote risk and extraordinary government relief, however, have no parallel in the Warsaw Convention-Montreal Agreement liability limitation. International air disasters occur with some regularity, and the federal government has yet to supplement the $75,000 per passenger limit.[124] Moreover, the Price-Anderson Act lacks the international bargaining purpose inherent in the Warsaw Convention-Montreal Agreement liability limitation. For these reasons, the test of reasonableness of the Warsaw Convention-Montreal Agreement liability limitation must track a course different from that of the Price-Anderson Act.

Whether the Warsaw Convention-Montreal Agreement liability limitation is unreasonably low depends upon the two purposes of the liability limitation. With respect to aiding the development of international air transportation, the liability limitation is arguably no longer a rational means because of changed circumstances. Improvements in safety, finance and availability of insurance may indicate that international air transportation is beyond the stage where the risk of unlimited liability would retard its development. Alternatively, even if the liability limitation somewhat aids the further development of the air transportation industry, such a purpose may now be anachronistic because of the

122 *See supra* notes 101-02 and accompanying text.
123 *See supra* notes 112-14 and accompanying text.
124 *See supra* note 14.

industry's maturity.[125]

By contrast, the liability limitation could never be found unreasonably low with respect to its international bargaining purpose. In fact, the lower the liability limitation the more reasonable it is as a means of inducing foreign nations to adhere to the Convention. This reasonableness, however, does not mean that the liability limitation can always be upheld against constitutional attack. Although the relationship of the liability limitation to its international bargaining purpose is unassailable on rationality grounds, it can be argued that the other provisions of the Convention do not provide an adequate *quid pro quo*[126] for the liability limitation.

IV. SUBSTANTIVE DUE PROCESS: *QUID PRO QUO*

A. Bali *and* Duke Power

In *Bali*, the Second Circuit acknowledged plaintiff's argument that the benefits that passengers and shippers derive from other provisions of the Warsaw Convention "do not constitute a *quid pro quo* for the liability limitation."[127] On the other hand, the Second Circuit also acknowledged that the United States, apparently as amicus curiae, had argued that those provisions could substantially benefit passengers and shippers.[128] In its only comment on the merits of this *quid pro quo* dispute, the court appeared to be partially convinced by the plaintiffs: "[I]t has been *persuasively* argued that, for U.S. plaintiffs at least, the Convention confers no procedural benefits in personal injury suits."[129]

Moreover, later in its opinion, the Second Circuit responded to footnote 32 of the Supreme Court's opinion in *Duke Power*:

> The Supreme Court, in a footnote to *Duke Power*, observed that '[a] person has no property, no vested interest, in any rule of the common law' . . . . The cases cited for this proposition, with one exception, dealt with statutes creating, not extinguishing, liability. . . .
>
> Furthermore, we are not dealing here with a change in a rule of the common law. Plaintiffs are not complaining of a change in law, but of the limitation of an independently existing right under state law. . . .
>
> The Court further observed that 'statutes limiting liability are rela-

125 *See supra* note 81 and accompanying text.

126 *See infra* notes 132-35 and accompanying text.

127 684 F.2d at 1310.

128 *Id.*

129 *Id.* (emphasis added). The court of appeals, however, did not say that the Convention failed to confer substantive benefits. Even in the absence of procedural benefits, the substantive benefits to plaintiffs from the presumptions of carrier's liability in Article 17 and 18(1) of the Convention, and from the strict liability rules established by the Montreal Agreement, could possibly constitute a *quid pro quo* for the liability limitations. *See infra* notes 131-49 and accompanying text.

> tively commonplace and have consistently been enforced by the courts.' Id. at 88 n.32, 98 S. Ct. at 2638 n.32. The cases cited for this proposition are most notable for their lack of authority. . . . [For example,] *Indemnity Ins. Co. of North America v. Pan American Airways*, 58 F. Supp. 338 (S.D.N.Y. 1944), involved a due process challenge to the Warsaw Convention, that was rejected in a single sentence.[130]

In *Duke Power*, appellants had claimed that the Price-Anderson Act violated due process by not providing "a satisfactory *quid pro quo* for the common law rights of recovery" which had been abrogated by the Act's liability limitation.[131] The Supreme Court began its decision on the *quid pro quo* challenge with the statement: "Initially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy."[132] In footnote 32, which accompanied this statement, the Court maintained, as seen above, that:

> Our cases have clearly established that '[a] person has no property, no vested interest, in any rule of the common law.' . . . Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts . . . *Indemnity Ins. Co. of North America v. Pan American Airways*, 58 F. Supp. 338 (S.D.N.Y. 1944) (Warsaw Convention limitation on recovery for injuries suffered during international air travel).[133]

Nevertheless, the Court found it unnecessary to reach the question of whether due process requires a *quid pro quo* because the Court concluded that "the Price-Anderson Act does, in our view, provide a reason-

---

130 *Id.* at 1312 n.10.

The Second Circuit's criticism, if not rejection, of the authority cited by the Supreme Court in Duke Power raises questions about the proper role for lower courts when interpreting higher court precedent. The authority of a proposition made by the Supreme Court does not derive solely from the force of the support cited by the Court. That the Supreme Court has made the proposition is by itself authority for the proposition. A court of appeals cannot properly disregard that authority by restricting its inquiry to the supporting citations made by the Supreme Court. Instead, the court of appeals must recognize that once it has interpreted the Supreme Court to have made a certain proposition, the court of appeals cannot then reach a decision inconsistent with that proposition.

On the other hand, it is not clear that a proposition made by the Supreme Court, in the way of example or in order to explain its reasoning, should be interpreted by courts of appeals as a steadfast Supreme Court ruling on that proposition. It may be pure *dicta*. The Supreme Court may not have intended that the proposition be strictly followed, particularly in later cases in which much more is at stake on the proposition. In such cases, the courts of appeals may actually be under a duty to examine more closely the cases cited by the Supreme Court in support of the proposition. In this way, the court of appeals may determine just how heavily to weigh the authority for the proposition. Nevertheless, because the Surpeme Court has made the proposition, the court of appeals, when giving little weight to the proposition, should be fairly certain that the Supreme Court would do the same on appeal.

131 438 U.S. at 87-88.

132 *Id.* at 75.

133 *Id.* at 75 n.32.

ably just substitute for the common law or state tort law remedies it replaces."[134] In other words, since the Price-Anderson Act would be upheld regardless of whether due process requires a *quid pro quo*, the Court could decide the "particular case before it"[135] without determining whether due process does in fact require a *quid pro quo*.

In upholding the Price-Anderson Act against the *quid pro quo* challenge, the Court relied on its earlier decision in *New York Central R. Co. v. White*.[136] In *Duke Power*, the Court stated:

> [I]n *New York Central R. Co. v. White*, the Court observed that the Due Process Clause of the Fourteenth Amendment was not violated simply because an injured party would not be able to recover as much under the Act as before its enactment. "[H]e is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages." The logic of *New York Central* would seem to apply with renewed force in the context of this challenge to the Price-Anderson Act. The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for compensating victims of a catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation. Moreover, the Act contains an explicit congressional commitment to take further action to aid victims of a nuclear accident in the event that the $560 million ceiling on liability is exceeded. This panoply of remedies and guarantees is at the least a reasonably just substitute for the common law rights replaced by the Price-Anderson Act. Nothing more is required by the Due Process Clause.[137]

Without a Supreme Court determination of whether due process requires a *quid pro quo* for liability limitations, it is not clear that the Warsaw Convention-Montreal Agreement limits are constitutional. There are significant differences between the liability limitations of the Price-Anderson Act, on the one hand, and those of the Warsaw Convention-Montreal Agreement, on the other. As a result, it is not certain that because the Supreme Court has upheld the Price-Anderson Act's liability limitation against a *quid pro quo* challenge in *Duke Power*, the Court would likewise uphold the Warsaw Convention-Montreal Agreement liability limitations.

Footnote 32 in *Duke Power* may be viewed as a Supreme Court *imprimatur* on the Warsaw Convention liability limitation. Nevertheless, a *quid pro quo* challenge that adequately distinguishes the Warsaw Convention-Montreal Agreement from the Price-Anderson Act might succeed. It cannot be forgotten, however, that such a challenge would first

---

134 *Id.* at 75.
135 Marbury v. Madison, 1 Cranch 137 (1803).
136 New York Central Ry. Co. v. White, 243 U.S. 188 (1817).
137 438 U.S. at 93.

have to establish that due process requires a *quid pro quo*.[138]

B. Quid Pro Quo

Unlike the Price-Anderson Act, the Warsaw Convention-Montreal Agreement does not "guarantee a level of net compensation generally exceeding that recoverable in private litigation."[139] For example, in *Bali*, the jury had awarded the two plaintiffs damages of $300,000 and $651,000.[140] Each of these amounts exceeds the $75,000 per passenger Warsaw Convention-Montreal Agreement liability limitation. Nor does the Warsaw Convention-Montreal Agreement suggest a congressional commitment to procure extraordinary relief when damages exceed the liability limitation.[141] In spite of these differences, however, the other provisions of the Convention may still constitute an adequate *quid pro quo* for the liability limitations.[142]

The fundamental bargain underlying the Warsaw Convention is that passengers and shippers exchange limitations on carriers' liability in return for benefits derived from other provisions of the Convention. Chief among these benefits is the presumption of carrier liability.[143] In addition, Article 23[144] prohibits carriers from establishing contractual liability limitations at levels lower than those established under Article 22.

The essential bargain of the Montreal Agreement is that the airlines received continued United States adherence to the Convention in return for strict liability and an increase in the liability limitation to $75,000 per passenger.[145] The Montreal Agreement took the Convention's presumption of liability a step further. The Montreal Agreement established strict liability through the airlines' waiver of the due care defense previously enjoyed under Article 20(1) of the Convention.[146]

As a result, under the Warsaw Convention as modified by the Montreal Agreement, passengers and shippers receive a system of strict liability in exchange for the modified liability limitations. In addition,

---

138 *See supra* text accompanying note 132.

139 *See supra* text accompanying note 137.

140 *See supra* note 76.

141 *See supra* text accompanying note 114.

142 *See infra* note 149.

143 *See supra* note 68.

144 Article 23 of the Warsaw Convention reads:

> Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

145 CAB Order No. E-23680, 31 Fed. Reg. 730 (1966). *See supra* note 5. *See also* O'Rourke v. Eastern Airlines, Inc., 553 F. Supp. 226, 229 (N.D.N.Y. 1982).

146 O'Rourke, 553 F. Supp. at 229.

passengers and shippers are assured a right of recovery, are protected from the provisions of foreign law, and are freed from problems otherwise created by conflicts of laws.[147] Moreover, passengers and shippers share with carriers in the benefits from the Convention's "creation of a uniform body of substantive aviation liability law, applicable regardless of the place of injury, domicile of the passenger or shipper, or the nationality of the airline involved."[148] Nevertheless, the question remains whether all of these benefits together constitute a *quid pro quo* for the liability limitations.[149]

V. TAKING WITHOUT JUST COMPENSATION

A. The Taking Issue Raised Sua Sponte

In *In re Aircrash in Bali, Indonesia*,[150] the United States Court of Appeals, Ninth Circuit, *sua sponte* raised the question of whether the reduction of plaintiffs' damages to the $75,000 per passenger liability limitation of the Warsaw Convention-Montreal Agreement constitutes a "taking without just compensation."[151] The court of appeals remanded

147 *See* Reed v. Wiser, 555 F.2d 1079, 1091-92 (2d Cir. 1977).

148 The Second Circuit cited the language quoted here to a May 26, 1965 letter written by the Civil Aeronautics Board. *Id.* at 1901.

149 In Reed v. Wiser, the Second Circuit implied that other provisions of the Warsaw Convention-Montreal Agreement do provide a *quid pro quo* for the liability limitations. *Id.* at 1091-92. By contrast, the most frequently cited law review article about the Warsaw Convention narrows the advantages of the Warsaw Convention-Montreal Agreement to speed and economy of settlement. Lowenfeld and Mendelsohn, *supra* note 4, at 516-32. Lowenfeld and Mendelsohn conclude however that the $75,000 per passenger limit "looks reasonable at this time [1967]." *Id.* at 601. Nevertheless, the authors imply that the limit would continue to be reasonable only if "the prediction that cases will be settled quickly and economically" is accurate. *Id.* at 600.

A *quid pro quo* analysis should exclude from consideration any benefits inhering in the Warsaw Convention-Montreal Agreement that United States negotiators could have obtained without making a concession on the liability limitations. For example, uniformity of documentation and rules could likely have been obtained without such a concession, because all the parties and nations involved had a shared interest in uniformity. Under such a *quid pro quo* analysis, the essential question is whether strict carrier liability under the Montreal Agreement is a *quid pro quo* for the $75,000 per passenger liability limitation. For cargo and baggage, the question is whether presumed carrier liability under the Warsaw Convention is a *quid pro quo* for liability limitations converted from gold to dollars.

In 1967 the *quid pro quo* for the $75,000 per passenger liability limitations may have been adequate. Nevertheless, today the reduced real value of the liability limitations may imply that this *quid pro quo* is no longer adequate. Since 1967, the real value of the $75,000 per passenger liability limitation has been eroded by inflation. Similarly, the real value of cargo and baggage liability limitations, evaluated at the artificially depressed official price of gold, have also been eroded by inflation. Although the *quid pro quo* may be adequate for some level of liability limitation, the particular low level of today's real-valued liability limitations may make that same *quid pro quo* inadequate.

150 684 F.2d at 1310.

151 "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

to the court of claims for a determination on the "taking" issue. The court of appeals explained that if the court of claims were to find a taking, then the plaintiffs would receive compensation from the United States under the Tucker Act.[152] The court of appeals noted that if the plaintiffs were to receive compensation in this manner, they could not then successfully challenge the constitutionality of the liability limitations.[153] By raising the taking issue *sua sponte* and then remanding to the court of claims, the court of appeals avoided the substantive due process, equal protection, and right to travel issues that the plaintiffs had raised.[154]

Although the court of appeals left the final determination on the "taking" question to the court of claims, the Ninth Circuit did make some preliminary determinations. The Ninth Circuit established that plaintiffs' claims for compensation were "property."[155] The court also indicated that the value of those claims were $300,000 and $651,000, the amounts that had been awarded by jury under state law.[156] Presumably, if the court of claims were to find a taking, the amount of compensation due plaintiffs from the United States would be such amounts minus the $75,000 per passenger liability limitation.

The court of appeals guided the court of claims' determination on the taking issue. The Ninth Circuit explained its view of current "taking" jurisprudence: "We take it to be the view of the majority of the Supreme Court that '[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.' "[157] The court of appeals then came close to actually ruling on the merits when it observed: "We can see no reason why these plaintiffs' claims are any different, for fifth amendment purposes, from the claims of various creditors against the government of Iran, *see Dames & Moore v. Regan*, 453 U.S. at 689, 101 S. Ct. at 2992."[158]

B. Dames & Moore v. Regan

In *Dames & Moore v. Regan*,[159] the issue was whether Congress, by

152 684 F.2d at 1310. *See supra* note 22.

153 "[I]f the loss claimed is compensable, the regulation will not be found unconstitutional." 684 F.2d at 1311.

154 *Id.* at 1310-11.

155 *Id.* at 1312.

156 *Id.* at 1312 n.11; *see supra* note 69.

157 684 F.2d at 1311 n.7.

158 *Id.* at 1312.

159 453 U.S. 654 (1981).

enacting the International Emergency Economic Powers Act (IEEPA),[160] had authorized certain emergency measures taken by the President. During the 1979-81 hostage crisis with Iran, the President through various executive orders and regulations did two things. First, the President nullified attachment of Iranian assets and transferred those assets to Iran.[161] Second, the President suspended claims against Iran pending in American courts.[162]

In *Dames & Moore*, the Supreme Court held that the IEEPA expressly authorized the President's nullification of attachments and transfer of assets.[163] The Court explained that the attachments were not property for fifth amendment purposes because those attachments were completely subordinate to and dependent upon the President's power under IEEPA.[164]

The Court's holding on the suspension of claims was more complex. The Court concluded that IEEPA did not expressly authorize Presidential suspension of the claims.[165] Nevertheless, the Court concluded that the President was authorized to suspend the claims for two other reasons. First, the IEEPA together with the Hostage Act of 1868 implied a broad scope of executive action under the circumstances.[166] Second, international claim settlement by the executive had been "a systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned."[167] As a result, the President's suspension of claims enjoyed a presumption of congressional consent.

Although the Court held that the President's suspension of claims was authorized, the Court expressly left open the question of whether the suspension of claims constituted a "taking."[168] The Court held that the court of claims, under the Tucker Act, would have jurisdiction of the "taking" issue.[169]

Justice Powell[170] concurred in the Court's opinion, except that he disagreed with the Court's holding that nullification of attachments did

---

160 50 U.S.C. § 1701.

161 453 U.S. at 660.

162 *Id.* at 660.

163 *Id.* at 674.

164 *Id.* at 673 and 674 n.6.

165 *Id.* at 675.

166 *Id.* at 676-86.

167 *Id.* at 686. The language quoted is that cited by the Court from Justice Frankfurter's concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

168 453 U.S. at 688-89 n.14.

169 *Id.* at 689-90.

170 *Id.* at 690-91 (Powell, J. concurring in part and dissenting in part).

not effect a "taking."[171] Instead, Justice Powell would have left the issue open for determination by the court of claims.[172] Justice Powell explained that: "[t]he Government must pay just compensation when it furthers the nation's foreign policy goals by using as 'bargaining chips' claims lawfully held by relatively few persons and subject to the jurisdiction of our courts."[173]

In spite of the Ninth Circuit's assertion to the contrary, the taking issue in *Bali* is distinguishable from that in *Dames & Moore*. The President's nullification of attachments and suspension of claims in *Dames & Moore* benefited the hostages and advanced the national interest generally. Nevertheless, these Presidential actions did not render commensurate reciprocal benefits to those whose attachments were nullified or claims suspended.

By contrast, the liability limitations at issue in *Bali* may confer reciprocal benefits upon claimants in the form of the *quid pro quo* derived from the other provisions of the Convention.[174] Although it is true that the liability limitation was used as an international "bargaining chip,"[175] the bargaining for the Warsaw Convention was in part designed ultimately to benefit the interests of passengers and shippers.[176] These reciprocal benefits to claimants in *Bali* have no parallel for claimants in *Dames & Moore*. Whereas the lack of reciprocal benefits to claimants in *Dames & Moore* support the finding of a taking in that case, the presence of reciprocal benefits to claimants in *Bali* arguably suggests that no "taking" had occurred. Even if the reciprocal benefits are an inadequate *quid pro quo*, however, they may still be substantial enough to preclude a "taking."

Nevertheless, some commentators,[177] have argued that continued

---

171 *Id.* at 690 (Powell, J., concurring in part and dissenting in part).

172 *Id.* (Powell, J., concurring in part and dissenting in part).

173 *Id.* at 691. (Powell, J., concurring in part and dissenting in part).

174 *See supra* notes 143-49 and accompanying text; *see also supra* note 5.

175 *See supra* note 173 and accompanying text.

176 Though the carriers received the chief benefit from Warsaw, the passenger was not entirely neglected. In the first place, the Convention rendered null and void any provision tending to relieve the carrier of liability or to fix a limit lower than the one provided in its text (Article 23). Second, while retaining the principle of liability on the basis of negligence, the Convention shifted the burden of proof so that the carrier was presumed liable unless it could show that it had taken all necessary measures to avoid damages, or that it was impossible for it to take such measures (Article 20).
Lowenfeld and Mendelsohn, *supra* note 4, at 500. *See supra* notes 5 and 68 for the text of article 20(1) of the Warsaw Convention. Article 23 of the Warsaw Convention reads:

> Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject of the provisions of this convention.

177 *See supra* note 14.

United States adherence to the Warsaw Convention is no longer motivated by concern for the interests of passengers and shippers.[178] Instead, these commentators suggest that considerations of foreign policy and international prestige are the predominating concerns.[179] If these commentators are right, then the United States may be continuing to adhere to the Warsaw Convention despite the absence of a *quid pro quo* for the liability limitations. Without such a *quid pro quo*, passengers and shippers have their claims limited, but do not enjoy commensurate benefits. Under these circumstances, the taking issue in *Bali* becomes like that in *Dames & Moore*. In sum, if these commentators are right, then the question whether the liability limitations effect a "taking" remains open.

C. Penn Central Transportation Co. v. New York City

In *Penn Central Transportation Co. v. New York City*,[180] the Supreme Court specified two independent grounds for finding a "taking." A "taking" may occur when a government interference with a property interest is "not reasonably necessary to the effectuation of a substantial public purpose."[181] Alternatively, a "taking" may occur when the interference has an "unduly harsh"[182] impact upon an owner's use of his property. The Court implied that government interference would not be considered "unduly harsh" unless it amounted to virtual destruction of the owner's ordinary use of his interest in the property.[183] The Court stressed that even "substantial individualized harm"[184] would not necessarily constitute or amount to a "taking."

Moreover, in *Penn Central*, the Court maintained that " 'taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in the segment have been entirely abrogated."[185] Instead, appropriate analysis of the taking question focuses on the "parcel as a whole."[186] In addition, the Court expressed greater willingness to find a "taking" when the nature of the government interference was physical invasion than when the "interference arises from some public program adjusting the benefits and burdens of eco-

178 Hollings, *Defeat of the Montreal Protocols: Victory for Airlines Passengers*, 19 TRIAL 20, 24 (1983).
179 *Id.*
180 438 U.S. 104 (1978).
181 *Id.* at 127.
182 *Id.*
183 *Id.*
184 *Id.* at 125.
185 *Id.* at 130.
186 *Id.* at 131.

nomic life to promote the common good."[187]

Justice Rehnquist,[188] dissenting, contended that government interference with interests in property constitutes a "taking" unless either of two exceptions applies. The first exception is that interference with noxious uses of property is not a "taking."[189] The second exception is that government interference with non-noxious uses of property is not a "taking" if an "average reciprocity of advantage" results.[190] Zoning is a perfect example of this second exception, because all property owners in a zone are reciprocated by the advantage of neighboring properties being similarly restricted.[191]

The majority and the dissent disagreed over the appropriate interpretation of some earlier decision[192] in which the Court had declined to find a "taking." Justice Rehnquist concluded that these decisions do fall within his noxious use exception.[193] The Court, however, concluded that "[t]hese cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were *reasonably related* to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property."[194]

The Court's statement implies an adoption of the reasonableness standard for review of the "taking" question. A reasonableness analysis for "takings" purposes would be identical to the reasonableness analysis that was applied earlier[195] in the context of the due process challenge to the liability limitations. Presumably, a finding of unreasonableness would imply a "taking."[196] If, however, the liability limitations were found to be reasonable, the inquiry would not be complete. The next question would be whether the liability limitations impose an "unduly harsh" economic impact on claimants.[197]

It is doubtful that the Court would find the liability limitations to be "unduly harsh." The liability limitations do not amount to virtual de-

187 *Id.* at 124.

188 *Id.* at 138-53 (Rehnquist, J., dissenting).

189 *Id.* at 144-46 (Rehnquist, J., dissenting).

190 *Id.* at 147-50 (Rehnquist, J., dissenting).

191 *Id.* at 147 (Rehnquist, J., dissenting).

192 Goldblatt v. Hempstead, 369 U.S. 590 (1962); Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915).

193 438 U.S. at 145 n.8 (Rehnquist, J., dissenting).

194 *Id.* at 103 n.30 (emphasis added).

195 *See supra* notes 77-126 and accompanying text.

196 *See supra* text accompanying note 194.

197 *See supra* text accompanying notes 181-82.

struction of the value of a wrongful death claim.[198] The claimant still retains damages up to $75,000 per passenger. The amount the claimant would have otherwise recovered minus the $75,000, however, does constitute a portion of the claim that is completely destroyed by the liability limitation. Nevertheless, the Court has refused to examine on a piece-by-piece basis interference with property interests.[199] Hence, the claimant's ability to recover $75,000 will preclude his "taking" claim. Moreover, given the longstanding nature of the liability limitations, the notice provisions of the Convention,[200] and the availability of individual insurance, the recovery of $75,000 per passenger constitutes the ordinary and expected interest of the claimant.

The Court has expressed less willingness to find a "taking" "when public programs are involved than when a physical invasion has occurred."[201] Perhaps the rationale for this distinction is that public programs involve distributions of benefits and burdens in a manner that is, relative to physical invasions, less arbitrary. Following this rationale, the Court should be even less willing to find that the liability limitation is a "taking," because the liability limitation is even less arbitrary than social programs. Whereas social programs redistribute benefits and burdens from one group to another, the liability limitation as an international bargaining concession burdens the same group it benefits—passengers and shippers. In short, assuming that the other provisions of the Convention constitute a *quid pro quo* for the liability limitations, those limits would not be found arbitrary. Under this assumption, the liability limitations satisfy Justice Rehnquist's even stricter requirement of an "average reciprocity of advantage."[202] The liability limitations are somewhat analogous to zoning in the sense that those burdened by the liability limitations have shared in reciprocal benefits derived from the other provisions of the Convention.

---

198 *See supra* text accompanying note 183.

199 *See supra* text accompanying notes 185-86.

200 Article 3 reads in part:

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars . . .
(e) A statement that the transportation is subject to the rules relating to liability established by this convention.
(2) . . . 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.

201 *See supra* text accompanying note 187.

202 *See supra* text accompanying note 188.

VI. RIGHT TO TRAVEL

A. The Supreme Court's Right to Travel Doctrine

In *In re Aircrash in Bali, Indonesia*,[203] the United States Court of Appeals, Ninth Circuit, did not reach the plaintiffs' claim that the $75,000 per passenger Warsaw Convention-Montreal Agreement liability limitation unconstitutionally violates the right to travel.[204] Nevertheless, the court of appeals established that international travel is a fundamental right constitutionally protected against restrictions not "carefully tailored to serve a substantial and legitimate government interest."[205] The court also maintained that a "penalty on the exercise of the right to travel is the constitutional equivalent of a direct restriction."[206] Finally, the court concluded that the decedent's survivors have standing to bring constitutional claims based on the decedent's right to travel.[207]

Three of the four Supreme Court right-to-travel decisions relied upon by the court of appeals in *Bali* involved intentional denials of passports by either Congress or the Secretary of State. In *Aptheker v. Secretary of State*,[208] the Supreme Court held that § 6 of the Subversive Activities Control Act of 1950[209] was on its face an unconstitutional violation of due process under the fifth amendment.[210] Section 6 made it unlawful for any member of a registered Communist organization who had knowledge or notice of such Communist registration, to apply for or use a passport.[211] The notice requirement, however, was satisfied merely by publication in the Congressional Record.[212] As a result, even those members who were unaware of their organization's Communist registration could be denied passports under § 6.[213] For this and similar reasons, the court found that § 6 swept so broadly that it unconstitutionally violated the fundamental right to travel.[214] The court stated that "[t]he denial of a passport is in effect a prohibition against world-wide foreign travel."[215]

---

203 684 F.2d 1303 (9th Cir. 1983).
204 *Id.* at 1310.
205 *Id.* at 1309.
206 *Id.* at 1310.
207 *Id.*
208 378 U.S. 500 (1964).
209 50 U.S.C. § 782 (1962).
210 378 U.S. at 505 and 514 (1964).
211 *Id.* at 501-22.
212 *Id.* at 509.
213 *Id.* at 509-10.
214 *Id.* at 509-14.
215 *Id.* at 507.

In *Zemel v. Rusk*,[216] however, the Supreme Court upheld the Secretary of State's refusal to validate passports for travel to Cuba. Here the Court distinguished its earlier decision in *Kent v. Dulles*,[217] explaining that:

> [T]he issue involved in *Kent* was whether a citizen could be denied a passport because of his political beliefs or associations. In finding that history did not support the position of the Secretary of State in that case, we summarized that history "so far as material here"—that is, so far as material to passport refusals based on the character of the particular applicant. In this case, however, the Secretary has refused to validate appellant's passport not because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens.[218]

Finally, the Ninth Circuit, in *Bali*, used the Supreme Court's decision in *Shapiro v. Thompson* to support the proposition that for right-to-travel purposes, a penalty is equivalent to a direct restriction.[219] In *Shapiro*,[220] the issue was whether a one-year residency requirement for eligibility to receive welfare benefits was unconstitutional.[221] One of the purposes of the residency requirement was to prevent indigents from moving into the jurisdiction in order to obtain larger welfare benefits.[222] The Supreme Court held that the residency requirements unconstitutionally penalized the exercise of the right to move from one jurisdiction to another.[223]

B. The Liability Limitations and the Right to Travel

The four Supreme Court right-to-travel decisions relied upon by the Ninth Circuit in *Bali* all involved restrictions or penalties that were intentional and direct. By contrast, the effects of the liability limitations on the exercise of the right to international travel are incidental. In fact, the liability limitations' ultimate purpose is to facilitate international air travel. The liability limitations are designed to aid the development of international air transportation.[224] Moreover, unlike passport denials, the liability limitations do not prohibit travel. Instead, the limitations in effect shift the cost of insurance from the airlines to the passengers and shippers.

---

216 381 U.S. 1 (1965).
217 357 U.S. 116 (1958).
218 381 U.S. at 13.
219 684 F.2d at 1310. *See supra* text accompanying note 206.
220 394 U.S. 618 (1960).
221 684 F.2d at 1309-10.
222 *Id.* at 623.
223 *Id.* at 641-42.
224 *See supra* notes 65-74 and accompanying text.

That passengers and shippers must purchase their own insurance, however, cannot realistically be viewed as a penalty so severe as to amount to a direct restriction on travel. For right-to-travel purposes, the liability limitations are clearly distinguishable, for example, from the residency requirements at issue in *Shapiro v. Thompson*.[225]

The Supreme Court's distinction between *Kent v. Dulles*, on one hand, and *Zemel v. Rusk*, on the other, stressed that even direct prohibition of the exercise of the right-to-travel would be constitutional if based on adequate foreign policy considerations.[226] Therefore, the liability limitations' purpose to induce foreign nations to adhere to the Convention may constitute a foreign policy consideration worthy of deference in the face of constitutional challenges.

Finally, in *San Antonio Ind. School Dist. v. Rodriquez*,[227] the Supreme Court made a statement that is applicable by analogy to the right to travel claim against the liability limitations. The Court asserted:

> The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.[228]

Similarly, the Court has protected the fundamental right to travel by strictly scrutinizing constitutionally challenged interference.[229] Nevertheless, neither the Court nor the Constitution guarantees international airline passengers the most desirable liability terms or the least expensive transportation.

CONCLUSION

The most plausible constitutional challenge to the Warsaw Convention-Montreal Agreement liability limitations is that their purpose is illegitimate.[230] This challenge would succeed if the only purpose of the liability limitations was the anachronistic one of aiding the development of international air transportation.[231] The liability limitations, however, have a second purpose—to induce foreign nations to adhere to the other provisions of the Convention.[232] This purpose is legitimate only if the

---

225 *See supra* text accompanying notes 219-23.
226 *See supra* text accompanying note 218.
227 411 U.S. 1 (1972).
228 *Id.* at 36 (emphasis in original).
229 Aptheker, 378 U.S. at 507-8.
230 *See supra* notes 75-126 and accompanying text.
231 *See supra* notes 76-97 and accompanying text.
232 *See supra* note 73 and accompanying text.

other provisions of the Convention are a *quid pro quo* for the liability limitations.[233] The appropriate inquiry—whether such a *quid pro quo* exists—is still an open question.[234]

Enforcement of the liability limitations does not effect a taking without just compensation.[235] The liability limitations do limit the amount of recovery, but do not eliminate the claim.[236] Recovery up to the amount of the liability limitation is no less than the claimant's reasonable expectation of recovery.[237] Because the liability limitations do not affect a taking, courts should not remand to the United States Claims Court on this issue.

Nor can a right-to-travel challenge succeed. The liability limitations neither directly restrict nor prohibitively penalize the exercise of the fundamental right-to-travel.[238]

Thomas J. Dolan

233 *See supra* notes 127-49 and accompanying text.
234 *See supra* note 149 and accompanying text.
235 *See supra* notes 150-202 and accompanying text.
236 *See supra* note 198 and accompanying text.
237 *See supra* note 200 and accompanying text.
238 *See supra* notes 203-23 and accompanying text.