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A TRIBUTE TO PROFESSOR DANIEL BERMAN

It is an honor and privilege to contribute these few words to this issue of the American University Law Review dedicated to Professor Daniel Berman.

During a large part of his lifetime Professor Berman was my close personal friend. He was one of those rare persons endowed with complete intellectual honesty, who always went where his conscience led him. He and I had many heated arguments about political and social policies but we always emerged from them with our friendship unabated.

It was my pleasure to be present when he and Aline were married. The ceremony was a beautiful one, combining the traditional rituals of the Chinese and Hebrew. I saw them many times in their happy home with Aline's son and their own bright-eyed little daughter.

The world lost a brave and gallant fighter for the things in which Dan believed when he died at such an early age. I personally lost a helpful and treasured friend.

Hugo L. Black
Associate Justice
Supreme Court of the United States.

February 27, 1969

AIR CRASH LITIGATION: A JUDICIAL PROBLEM AND A CONGRESSIONAL SOLUTION

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In 1968 commercial airline crashes in the United States claimed 303 victims, making it the second most deadly year in aviation history.[1] Each air crash was a major tragedy for a large number of widows, children and others dependent upon those killed in the crash. For many of these dependents the only compensation can come through the long process of legal action. Nevertheless, at the present time the system of handling aircraft crash litigation involves untold expense to the litigants, a vast expenditure of judicial time and considerable delay in the administration of justice. The litigation arising out of the 1960 crash in Boston Harbor of a Lockheed Electra aircraft operated by Eastern Air Lines, Inc. serves as a representative case history.

In October, 1960, a flight originating in Philadelphia crashed in the Boston Harbor killing 62 of the 72 persons on board. This air tragedy produced 114 law suits in the Federal District Court of Massachusetts, 48 in the District Court for the Eastern District of Pennsylvania and several suits in the state courts of New York.

After eight years, three trips to the United States Court of Appeals for the Third Circuit[2] and one trip to the Supreme Court,[3] not all of the Boston Harbor airplane crash cases have yet been finally determined. A number of cases are still pending in the Eastern District of Pennsylvania.

The typical modern air crash, such as the one in Boston Harbor, involves passengers who are domiciliaries of a number of different states, and who are flying from one state to another, over innumerable intervening states. Defending the litigation resulting from the crash will be the United States government, the carrier, the

* United States Senator from Maryland; Chairman, Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary; Member of the Maryland Bar.

1. The Washington Post, Jan. 5, 1969, § A, at 9, cols. 1-8.

2. Scott v. Eastern Air Lines, Inc., 399 F.2d 14(3d Cir. 1968), *cert. denied*, 393 U.S. 979(1968); Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965); Barrack v. Van Dusen, 309 F.2d 953 (3d Cir. 1963), *rev'd and rem'd*, 376 U.S. 612 (1964). *See also* the related case of Weinstein v. Eastern Airlines, Inc., 316 F.2d 758 (3d Cir. 1963), *cert denied*, 375 U.S. 940 (1963).

3. Van Dusen v. Barrack, 376 U.S. 612 (1964).

airplane manufacturer and possibly one or more of the manufacturers of the component parts of the airplane, each of which will have its principal place of business in a state other than that in which it is incorporated. In each case the court faces the initial problem of determining which state's law will govern the litigation. Despite the complexity of the litigation arising from the Boston Harbor crash, it would have presented few conflict of law problems until the present decade. The District Court of Massachusetts, the District Court for the Eastern District of Pennsylvania and the New York State courts would all have relied on the rule lex loci delicti with the resulting application of the substantive law of Massachusetts.[4]

The existence of that rule as a citadel of the law contributed certainty, at least, to multistate, multiparty litigation. The situs of an accident, however, is often merely fortuitous, bearing little or no relationship to the other aspects of the accident. This is particularly true in cases arising out of air crashes. As our mobility has increased, the fairness of the results wrought by the application of lex loci delicti has decreased. Consequently, in recent years new approaches to the conflict-of-laws problem were sought.[5]

One of the first major judicial attacks on the rule was made by the Court of Appeals of New York in *Kilberg v. Northeast Airlines*,[6] a case arising from an airplane crash which occurred in Massachusetts. That court, while ostensibly binding itself to apply lex loci delicti, refused to apply the $15,000 limitation of the Massachusetts Death Statute,[7] and held that the measure of damages was procedural or

4. Discussion of the New York cases can be found in Babcock v. Jackson, 12 N.Y.2d 473, 479-80, 191 N.E.2d 279, 282, 240 N.Y.S.2d 743 (1963), and of the Pennsylvania cases in Griffith v. United Air Lines, Inc., 416 Pa. 1, 8-9, 203 A.2d 796, 801 (1964). Massachusetts would still apparently apply the rule *lex loci delicti*. *See* Brogie v. Vogel, 348 Mass. 619, 205 N.E.2d 234 (1965). The federal district courts would, of course, be bound to apply the same law that the courts of the state in which they were sitting would apply. Klaxton Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941); *See also* Erie R.R. v. Tompkins, 304 U.S. 64 (1938). This is true even under the Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346(b)(c), 1402(b), 1504, 2110, 2401(b), 2402, 2411(b), 2412(c), 2671-80 (1964). Richards v. United States, 369 U.S. 1 (1962). For a discussion of the history of *Richards v. United States* see Dostal, *Aviation Law Under the Federal Tort Claims Act*, 24 FED. B.J. 165, 185-86 (1964). *Compare* Restatement of Conflicts of Laws § 379 (1934) *with* Restatement (Second) of Conflict of Laws § 145 (Proposed official Draft Part 11, May 1, 1968).

5. *See* Griffith v. United Air Lines, Inc. 416 Pa. 1, 11-16, 203 A.2d 796, 802-806 (1964) and Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 746-50, 747 nn. 4 & 5, 191 N.E.2d 279, 281 nn.4 & 5 (1963).

6. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961).

7. Having since been raised several times, the present limitation in Massachusetts is $50,000. Mass. Ann. Laws ch. 229, § 2(Supp. 1967).

remedial and controlled by the public policy of the State of New York.[8] In *Pearson v. Northeast Airlines*,[9] a case arising out of the same accident, the approach of the New York court was, in effect, found not to be a violation of the full faith and credit clause of the Constitution. Finally, in the landmark decision of *Babcock v. Jackson*,[10] the "paramount interest" rule evolved. Although it exists in a variety of forms, as set forth in the proposed official draft of the Restatement (Second) of Conflict of Laws the "paramount interest" rule is as follows:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, as to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.[11]

On the whole, the new flexible approach represented by the "paramount interest" rule has been received with great enthusiasm.[12] Some commentators, however, perceiving the problems which it might well engender, have adopted a "wait and see" attitude.[13]

Their attitude is a reasonable one. Whatever justification there

8. 9 N.Y.2d at 38-42, 172 N.E. 2d at 527-29, 211 N.Y.S. 2d at 135-38.

9. 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963).

10. 12 N.Y.2d 473, 191 N.E. 2d 279 (1963), 240 N.Y.S. 2d 743.

11. Restatement (Second) of Conflict of Laws § 145 (Proposed Official Draft Part 11) (emphasis added).

12. Haller, *Death in the Air: Federal Regulation of Tort Liability a Must*, 54 A.B.A.J. 382, 383 (1968). Haller himself does not appear to share that enthusiasm.

13. *Id.* at 384-86. Particularly appropriate is the following statement of Professor Weintraub, quoted by Haller:

> This kind of 'State-interest' analysis must still win general acceptance by proving that it can be utilized by courts and lawyers and not only by conflicts professors. It must further be demonstrated that the results this method produces are rational, just, and sufficiently predictable to avoid the spectre of *ad hoc* adjudication.

Id. at 386 quoting from Weintraub, *Choice of Laws for Products Liability*, 44 TEXAS L. REV. 1441 (1966). It is also worth noting that lex loci is still being applied with vigor by a large number of courts. *See* cases collected in Haller, *supra* note 12, at 386 n.14.

might be for the new conflict of laws rule in the sociological phenomena which have made us a mobile population, it is, nonetheless, a rule which tends drastically to increase the potential complications of multiparty, multicourt litigation.[14]

The history of the Boston Harbor crash cases is demonstrative of some of the potential problems. The controversy in these cases was sparked by the fact that at that time Massachusetts had a low ($20,000) limit on wrongful death recoveries[15] while Pennsylvania, the destination of the flight and the domicile of many of the passengers, had no limitation.[16] Initially, the fight centered on the question of transferring the Pennsylvania cases to Massachusetts. Defendants sought this transfer in the belief that the Massachusetts District Court would apply the low Massachusetts death limit, while plaintiffs resisted in the hope that the Pennsylvania District Court would not. This stage of the fight ended in a draw when the Supreme Court determined that the transfer would simply be a "change of courtrooms," with the Massachusetts District Court bound to apply the same law, including the choice of law rule, that the Pennsylvania District Court would have applied.[17] This ruling in itself did not eliminate the problems, since it was not yet certain whether the courts of Pennsylvania would follow the *Kilberg* and *Pearson* decisions, which apparently would lead to the application of Pennsylvania law, or would follow the traditional lex loci rule, and apply Massachusetts law. The ruling did, nevertheless, remove much of the impetus for transferring the Pennsylvania cases.

As a result, one group of cases was finally tried in Pennsylvania.[18] Meanwhile in *Griffith v. United Air Lines, Inc.*,[19] Pennsylvania had abandoned the lex loci rule, substituting a paramount interest approach.[20] Consequently, the trial court applied Pennsylvania law and the cases produced verdicts of up to $180,000, far in excess of the

14. Mr. Haller effectively describes the various possible combinations and permutations which might arise in choosing the appropriate body of law under the "paramount interest" test. *Id.* at 385-86.

15. *See* note 7 *supra*. Eight other states restrict maximum recovery of damages for death in amounts varying from $35,000 to $110,000. COLO. REV. STAT. § 41-1-3 (1967)($35,000); KANS. STAT. ANN. § 60-1903 (1967)($35,000); MINN. STATS. § 573.02 (1967)($35,000). REV. STAT. MO. § 537.09- (1967)($50,000); N.H. REV. STAT. ANN. § 556.13 (1967)($60,000); VA. CODE § 8-636 (1968)($65,000); W. VA. CODE § 55-7-6 (1967)($110,000).

16. *See* PA. STAT. ANN. title 12 §§ 1601-14 (1953).

17. Van Dusen v. Barrack, 376 U.S. 612 (1964).

18. Rapp v. Eastern Air Lines, Inc. 264 F. Supp. 673 (E.D. Pa. 1967).

19. 416 Pa. 1, 203 A.2d 796 (1964).

20. 416 Pa. at 21-22, 203 A.2d 806-07.

Massachusetts limit.[21] On appeal, however, the Third Circuit initially pronounced the tort "maritime" since it occurred in the navigable waters of Boston Harbor.[22] For such wrongful death actions, admiralty law traditionally borrows the local law of the jurisdiction wherein the waters lie. The circuit panel indicated that this was not a tradition which could be altered by a district court by any weighing of interests. Thus, the Pennsylvania District Court had apparently erred in following a conflicts rule other than the traditional admiralty rule which pointed to the Massachusetts law and its low death recovery limitation. Rehearing of this decision was eventually granted, but pending the rehearing a second group of cases was given a full trial in the Pennsylvania District Court, this time using Massachusetts law and producing verdicts of from $16,000 to $20,000.[23]

On rehearing, however, the Third Circuit, sitting *en banc*, found that the claim was not for a maritime tort, but rather for "breach of contract of nonnegligent carriage."[24] As a contract claim it was "rooted in Pennsylvania law," and, applying the Supreme Court's decision in *Klaxton Co. v. Stentor Elec. Mfg. Co.*,[25] the district court was to look to the choice of law rule of the state in which it was sitting. Using the paramount interest test adopted in *Griffith*, the Circuit Court determined that Pennsylvania would apply its own law.[26]

As an alternative reason for applying Pennsylvania law, the Circuit Court found that even as to maritime tort claims, the Supreme Court, in *Lauritzen v. Larsen*,[27] and *Romero v. International Terminal Operating Co.*,[28] had moved to a weighing of significant contacts approach. Using this maritime choice of law precept rather than a rigid lex loci approach, the Circuit Court believed that Pennsylvania law should be applied.[29]

A petition for certiorari on this decision has just recently been denied.[30] Meanwhile, it now appears that the second group of cases

21. Rapp v. Eastern Air Lines, Inc., 264 F. Supp. 673, 681 (E.D. Pa. 1967).
22. Scott v. Eastern Air Lines, Inc., 399 F.2d 14 (3d Cir. 1967).
23. Because of subsequent events described in the next paragraph of the text, these decisions are not officially reported.
24. Scott v. Eastern Air Lines, Inc., 399 F.2d 14 (3d Cir. 1968).
25. 313 U.S. 487 (1941).
26. 399 F.2d at 681.
27. 345 U.S. 571 (1953).
28. 358 U.S. 354 (1959).
29. 399 F.2d at 26-28.
30. 89 S. Ct. 446 (1968).

tried in Pennsylvania erroneously applied Massachusetts law. Other cases filed in Pennsylvania have never yet been tried.

This somewhat extended rehearsal of the Boston Harbor crash cases is intended to demonstrate that conflict of laws problems may be, and most frequently are, tremendous obstacles to the disposition of aircraft crash claims. The determination of the proper law to be applied can involve much waste of money and time by both the litigants and the courts. The trials in Pennsylvania have required some 65 days of jury time and over 80 days of judicial time, exclusive of the time spent on appeals. Furthermore, the uncertainty as to the proper law to be applied tends to inhibit settlements and to force more cases to trial. Because parties are not certain as to whether or not limits on recovery may be applied, they do not have a realistic basis for reaching settlements. In the Boston Harbor crash, for instance, only 3 of the 48 cases filed in Pennsylvania were settled during the nearly eight years prior to the decision of the Third Circuit sitting *en banc*. Inevitably, these long delays so postpone relief that the ultimate settlement is of little assistance to the dependents during the time of their greatest need.

The lack of uniformity and certainty has the subsidiary effect of increasing the cost of aviation liability insurance, since the underwriters compute the premiums on the basis of the most unfavorable standards. The additional insurance cost is, of course, passed on to the public.[31]

The Boston Harbor crash also illustrates another potential problem in the trial of modern aircraft crash cases—that is, the possibility of multiple trials of the same issues. At one time, in this case, the possibility loomed that there would be trials of the same issue in New York, Massachusetts, and Pennsylvania. Settlements actually eliminated the need for trials in New York and in Massachusetts, but, because all of the Pennsylvania cases could not be consolidated, the District Court in Pennsylvania has already had two trials of the same issues,[32] and expects to have two and possibly three more. This is an extravagant waste of time yet it is dictated by the present mechanics of our judicial system.

Judge Peirson M. Hall, of the Central District of California, recognized the absurdity of multiple trials of the same issues in

31. Hardman, Aircraft Passenger Accident Law: A Reappraisal, INS. L.J. 688, 697 (1961); Sweeney, *Is Special Aviation Liability Legislation Essential?* Part 1, 19 J. AIR L. & COM. 166, 174 (1952).

32. Rapp v. Eastern Air Lines, Inc. 264 F. Supp. 673 (E.D. Pa. 1967). *See* note 23, *supra*.

handling cases arising out of a mid-air collison over Nevada.[33] Although he was unable to consolidate the cases filed in Nevada and those filed in California, Judge Hall avoided multiple trials on the question of liability by holding that in the Nevada cases, to which he was specially assigned, the airline was "collaterally estopped to deny liability to the plaintiffs . . . under the doctrine of res judicata by virtue of the verdicts and judgments in the cases tried at Los Angeles . . . ."[34] As he admitted in his decision, the rule of res judicata, as frequently stated, requires an identity of parties, a mutuality of estoppel, which is not present in these aircraft crash cases. Judge Hall, nonetheless, relied on the "Bernhard Doctrine,"[35] to establish the proposition that res judicata is available *"where the thing to be litigated was actually litigated in a previous suit, final judgement entered, and the party against whom the doctrine is to be invoked had full opportunity to litigate the matter and did actually litigate it."*[36]

Judge Hall's task was facilitated because all parties agreed that the conflicts law of California required that the substantive law of Nevada be applied to the cases, so that they were tried by the United States District Court in Los Angeles as if it were sitting as a Nevada state court, applying Nevada law. It would, of course, have been impossible to have applied the doctrine of res judicata to prevent multiple trials of the liability question had the California District Court been compelled by the California conflicts law to apply California substantive law while the Nevada District Court was bound by the Nevada conflicts law to apply Nevada substantive law. Had California adopted the contacts theory of conflicts, just such a situation could have existed. Such a situation would probably have existed, in the Boston Harbor case, had not the Massachusetts cases been settled, since Massachusetts very likely would have applied lex

33. United States v. United Air Lines, Inc. 216 F. Supp. 709, 729 (E.D. Wash. D. Nev. 1962), *modified, sub nom.* United Air Lines, Inc. v. Weiner, 335 F.2d 379 (1964), petition for cert. dismissed, 379 U.S. 951 (1964). For a discussion of the mass of litigation arising out of this crash see Judge Hall's testimony at *Hearings on S. 3305 and S. 3306 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th. Cong., 2d Sess. at 11-25 (1968); Dostal, *Aviation Law Under the Federal Tort Claims Act*, 24 FED. B. J. 165, 193 (1964).

34. 216 F. Supp. at 729.

35. Bernhard v. Bank of America Nat. Trust & Sav. Ass'n, 19 Cal.2d 807, 122 P.2d 892 (1942). *See* Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957).

36. 216 F. Supp. at 726 (italics in original).

loci[37] with the resulting application of Massachusetts substantive law while the cases tried in Pennsylvania were tried with the application of Pennsylvania substantive law. This, of course, would also raise the disquieting possibility that different courts would resolve the question of liability differently with regard to passengers on the same plane, even though these people were all victimized by the same crash in the same manner. Elaborate forum shopping is obviously a natural concomitant of this possibility. While helpful, the "Bernhard Doctrine" is clearly no solution to the problems which I have been discussing.

II.

The litigation which follows modern aircraft crashes is a morass for both the litigants and the judiciary. Solutions must be found for the choice of law problems and the procedural problems which result from multiparty, multicourt litigation.

These are problems which are rapidly becoming more acute. The advent of ever larger aircraft, such as the Boeing 747 or the new supersonic jets which will carry some 500 people, makes it certain that in the future, we must expect greater tragedy to result from any aircraft crash. The FAA expects revenue passenger-miles in scheduled domestic and international service to triple in the next 10 years and the number of passengers to increase from 153.5 million to 444 million in such service in the same time.[38] Therefore, even if we anticipate greater air safety and fewer crashes per million passenger-miles with the newer planes,[39] it seems almost inevitable that there will still be more air crashes and more passenger fatalities per year in the future than at present.

Nor does it appear that the courts themselves are able adequately to develop mechanisms to deal with the problems of modern aircraft crashes. In fact, judicial developments in the conflict of laws field appear to be increasing rather than decreasing the complications involved. Developments in the law with regard to res judicata growing out of the *Bernhard* decision do not appear to be sufficiently useful or adequately widespread to give great hope of improvement in the near

37. *See, e.g.*, Brogie v. Vogel, 348 Mass. 619, 205 N.E.2d 234 (1965).

38. FAA, Office of Policy Development, Economics Division, *Aviation Forecasts Fiscal Years 1968-1979*, Table 1 at 23. (Jan. 1968).

39. Hopefully this anticipation will be realized despite the findings of the Committee on Aeronautical and Space Sciences of the United States Senate that "aviation safety has not improved much over the past 17 years." S. REP. NO. 957, 90th Cong., 2d Sess. 17 (1968).

future in the avoidance of multiple trials.[40] Nor on the whole do existing rules and statutory provisions facilitate the handling of these cases.

The most significant development to date and a clear step in the right direction is the Multidistrict Litigation Act, now embodied in 28 U.S.C. § 1407.[41] That Act provides for the consolidation for pretrial purposes of civil actions involving one or more common questions of fact if the judicial panel or multi-district litigation finds that the transfer will be "for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions."[42] This act, however, does not permit consolidation beyond the pretrial stage, nor, of course, does it apply to cases filed in the state courts, and therefore its usefulness is somewhat limited in aircraft crash cases.[43] In addition, of course, it is not easy to conduct a valuable consolidated pretrial where the cases eventually have to be returned to the various district courts, each of which may then be required to apply a different substantive law in trying its cases.

Any solution to the aircraft crash litigation problems must recognize that the common and crucial issue in any aircraft disaster case is a determination of fault for the crash. The negligence or fault involved is uniform with respect to all of the passengers, and since all were killed or maimed in the same disaster, it would seem that a uniform rule of liability should be applicable. The best way to ensure a uniform and expeditious result would be to consolidate all cases arising from a single accident for pretrial purposes and also for trial of the common question of liability, applying a single body of law. Such a trial would join and bind all of the various parties to the crash—the passengers, the airline, the manufacturer, and any other potential party.

Such a uniform and expeditious method of disposition of aircraft cases cannot be effected under existing federal or state laws or with the retention of state court jurisdiction over major aircraft crash cases.

40. The approach taken in Bernhard is gaining increasing acceptance, Walcott, *Collateral Estoppel and Other Practical Approaches to Commercial Aircraft Claims*, 13 N.Y.L.F. 509 (1967).

41. 28 U.S.C. § 1407 (Supp. III, 1965-68).

42. 28 U.S.C. § 1407 (a) (Supp. III, 1965-68).

43. It should be noted that the Attorney General recommended to the Multidistrict Litigation panel which prepared this legislation that the provisions permit consolidation for trial of aircraft cases in which the United States was a defendant. This suggestion was rejected as part of a general determination to limit the legislation to pretrial proceedings at that time.

Ever since the airplane was converted by World War I from a device for the entertainment of carnival crowds to a vehicle with unlimited commercial possibilities, the desirability for a uniform law of the air has been apparent. Initially, the airways were thought to be navigable bodies sufficiently analagous to the ocean as to be subject to the Federal Maritime laws. This somewhat forced interpretation gained little favor.[44] Nevertheless, admiralty jurisdiction has been extended by the federal courts to include every airplane accident arguably within its range, with the result that rules not tailored to air transportation have been tortuously applied to situations where they are often inappropriate.[45]

In 1938 a state by state approach to the problem was attempted by the National Commission on Uniform State Laws when it approved the Uniform Aviation Liability Act.[46] The Act, which incorporated a combination of strict liability and maximum levels of recovery, was at that time too controversial to gain widespread acceptance and was withdrawn in 1943.[47] In 1956 the National Commission recommended that a new aeronautical code be drafted.[48] As yet, none has been produced. It is unlikely that any Uniform Aviation Act could gain the approval of a sufficient number of the 50 state legislatures to make it meaningful and, even if adopted, it would probably not alleviate the multistate, multitrial procedural problems engendered by the growth of air travel. Congressional action is clearly indicated.[49]

There should be no doubt of Congress' power to provide a solution. The problems presently existing in the law relating to aircraft litigation are a hindrance to the development of air commerce, the rapid development of which is a clear objective of federal policy. The subsidies to stimulate aircraft developments are but one example of the Congressional interest in air commerce.

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44. Moore and Palaez, *Admiralty Jurisdiction—The Sky's the Limit*, 33 J. AIR. L. & COM. 3, 5 (1967).

45. *Id.*

46. Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Forty-Eighth Annual Conference. 68-94 (1938).

47. Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Fifty-Third Annual Conference 67 (1943).

48. Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Sixty-Fifth Annual Conference. 179-80 (1956).

49. *See* Haller, *Death in the Air: Federal Regulation of Tort Liability a Must*, 54 A.B.A.J. 382 (1968); Moore and Palaez, *Admiralty Jurisdiction—The Sky's the Limit*, 33 J. AIR L. & COM. 3 (1967); Sweeney, *Is Special Aviation Liability Legislation Essential?* 19 J. AIR L. & COM. 166 (1952); Comment, *Conflict of Laws—Desirability of Federal Legislation in Commercial Aviation*, 18 VAND. L. REV. 1632 (1965).

As Mr. Justice Jackson, concurring in *Northwest Airlines v. Minnesota*,[50] said:

> Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis on to a runway it is caught up in an elaborate system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and orders. Its privileges, rights and protection, so far as transit is concerned, it owes to the federal government alone and not to any state government.[51]

The Air Commerce Act of 1926,[52] the Civil Aeronautics Act of 1938[53] and the Federal Aviation Act of 1958[54] are all indications of Congress' rightful concern for the development of air commerce.

In *Braniff Airways v. Nebraska Board*[55] the Supreme Court said, "These Federal Acts regulating air commerce are bottomed on the commerce power of Congress . . . ."[56] The power over air commerce is analagous to the power over navigation. "Its breadth covers all commercial intercourse."[57]

Congress' authority to establish all encompassing regulation in this area is clear. "There can be no air pocket so closed and confined within the geographical limits of any state as to be incontiguous to the interstate and international highways of the air."[58]

Congressional action can establish a degree of uniformity and predictability hitherto unknown and not otherwise achievable. It can also bring some rationality to the procedural problems engendered by multicourt, multiparty airplane litigation.

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50. 322 U.S. 292 (1944).

51. *Id.* at 303.

52. 49 U.S.C. §§ 1301, 1472, 1473, 1507-1509 (1964).

53. 49 U.S.C. §§ 1301-1542 (1964).

54. 5 U.S.C. §§ 133(t) note, 133(z) 15 note; 14 U.S.C. §§ 81, 82, 90; 15 U.S.C. § 45; 16 U.S.C. § 7(a); 31 U.S.C. § 686; 40 U.S.C. § 474 (14); 48 U.S.C. § 485-485(d); 49 U.S.C. §§ 212, 486 note, 1101-03, 1105, 1108, 1111, 1116, 1151, 1152, 1155, 1157, 1160, 1301 et. seq.; 50 U.S.C. § 123; 50 U.S.C. App. §§ 1622-1622(c) (1964).

55. 347 U.S. 590 (1954).

56. *Id.* at 596.

57. *Id.* at 597. Obviously the power to provide for the national defense is also significant in regulating aviation. *See* Allegheny Airlines v. Cedarhurst, 132 F. Supp. 871, 874-80 (E.D. N.Y. 1955).

58. *In re* Veterans Air Express Co., 76 F. Supp. 684, 690 (D. N.J. 1948). *See also* United States v. Drumm, 55 F. Supp. 151 (D. Nev. 1944).

III.

a. Jurisdiction and Substantive Law

I have introduced into Congress legislation which attempts to achieve these results.[59] This legislation establishes exclusive federal jurisdiction for those aircraft crashes which ordinarily involve substantial numbers of people and multiple courts and which, therefore, create the most serious problems for the court system. Specifically, the bill provides for exclusive federal jurisdiction over actions arising from accidents occurring in the course of the flight, takeoff or landing of an aircraft operating as a common carrier, or having a seating capacity of more than 10 passengers, as well as accidents which proximately result in the death or personal injury to five or more persons.

Concurrent federal and state jurisdiction is provided for accidents arising from ground activity incidental to any of these operations and for accidents arising from the operations of other defined "large," "high performance," and "public aircraft."[60] Exclusive federal jurisdiction is retained for all aviation activity claims arising out of an occurrence which also gives rise to a claim arising under the Federal Tort Claims Act.

In drafting these jurisdictional provisions an attempt has been made to avoid any unnecessary net increase in federal court jurisdiction. Under existing law, most aviation cases are brought into the federal courts through either the admiralty jurisdiction,[61] the jurisdiction over

59. S. 961, 91st Cong., 1st Sess. (Introduced Feb. 7, 1969). S. 961 is substantially the same as S. 4089, 90th Cong., 2d Sess. (Introduced Sept. 24, 1968). S. 4089 was introduced following hearings on two predecessor bills, S. 3305 and S. 3306, 90th Cong., 2d Sess. (Introduced April 10, 1968). S. 3305 was basically drafted by Judge Alexander Holtzoff of the District of Columbia District Court. S. 3306 was originally drafted by a special committee of the Los Angeles Bar Association. Both were suggested to me by Judge Peirson M. Hall of the United States District Court for the Central District of California. Special thanks for his significant and extensive help in formulating and drafting the legislation must also go to Jordan A. Dreifus of the California Bar.

60. If any cases arising from the operations of these aircraft also fall within the provisions for exclusive jurisdiction, then the jurisdiction over such claims is exclusively federal. In addition exclusive federal jurisdiction is also provided for all actions arising out of space activity.

The definition of the term "public aircraft" is incorporated by reference from the Federal Aviation Act, 49 U.S.C. § 1301 (30)(1964); however, it is slightly modified to cover aircraft in the hands of a contractor under a government contract. This provision makes it clear that aircraft such as those of the National Guard are included within the coverage of the jurisdiction provision. (Most of "public aircraft" are United States military aircraft, whose operations are within the Federal Tort Claims Act in any case.)

61. 28 U.S.C. § 1333 (1964).

actions against the United States,[62] the jurisdiction over diversity actions,[63] or the jurisdiction over actions by the United States.[64] Among these, the most significant are diversity jurisdiction and jurisdiction over actions against the United States. The frequent operational involvement of the United States and the ordinary diversity of citizenship between passengers, airlines and other defendants today combine to bring most major aviation accident cases into the federal courts. The new legislation leaves unaffected the jurisdiction over these classes of cases.

Since, under the proposed legislation, federal jurisdiction is provided only for the classes of operations and types of aircraft specified, there will actually be a reduction in jurisdiction over at least one important group of claims. Presently every case arising "over" the "high seas" is apparently an admiralty case under 28 U.S.C. §1333.[65] Under that section and existing concepts the traditional exclusive federal court jurisdiction over maritime cases would eventually lead to a substantial increase in unwanted federal court cases due to the rapidly increasing numbers of small pleasure aircraft capable of operating in or "over" the "high seas." As to this mass of small aircraft there is no necessity for federal jurisdiction and it would be eliminated by the proposed legislation.

In addition to its jurisdictional provisions the legislation establishes a body of federal substantive law which, with some limited exceptions, is applied to all aviation and space activity, including public and general aviation activities. The only cases for which federal jurisdiction but not federal substantive law is provided are those arising out of incidental ground activity. While it seems desirable to provide concurrent federal jurisdiction over such cases to minimize the possibility of time-consuming threshold jurisdictional disputes and the potential loss of a claim to the statute of limitations in situations where the lawyer chose the wrong court, it does not seem necessary to provide federal substantive law to cover these matters which have intimate connections with the locality in which they occur.

The development of a body of federal substantive law to cover all activities in the air seems to be the most feasible solution to the conflict of laws problem, which, as I have attempted to show, is the major stumbling block to the prompt, efficient and uniform

62. 28 U.S.C. § 1346 (1964).
63. 28 U.S.C. § 1332 (1964).
64. 28 U.S.C. § 1345 (1964).
65. *See* Moore and Palaez, *supra* note 44.

disposition of air crash cases. I do not believe that the Congress should move either affirmatively or negatively in the general developments which are taking place in the courts concerning conflict of laws rules. The establishment of exclusive federal law avoids committing the Congress with regard to these general developments, while disposing of the conflicts problem in aircraft cases.

I also believe that the substantive law provided in the bill should be limited to the immediate goal, which is to remove the difficulties created by present differences in state law rather than to accomplish any revolutionary change in the tort law applied to air commerce. For this reason, the legislation which I propose avoids the temptation of adopting such proposals as liability without fault, now being urged by some of the leaders in the aviation field.[66] At the same time, however, it is designed so as not to inhibit any further development in the law.

Basically the approach of the legislation is to leave the details of the basis of liability to be worked out by the courts as a body of uniform federal law drawing principally from the common law as found in prior decisions of the state and federal courts and from federal laws and regulations. More revolutionary change in the substantive law is, I believe, best reserved for some future study.

For death cases an action is established which will incorporate where feasible the law of the decedent's domicile with respect to such matters as the determination of the dependents entitled to share in the recovery. The wrongful death recovery is to be measured by the pecuniary loss sustained by those for whose benefit the right of action exists. There is no monetary limitation on the amount of recovery except as provided by treaty or other valid international agreement. In this last respect, the new legislation differs from the law of a small minority of states which impose a limitation on the amount of the recovery. On the whole, however, the recovery provided represents a compromise between such limitations and recovery for such speculative items as loss of companionship now allowed by some states.[67]

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66. *See* testimony of Charles F. McErlean, Exec. Vice President and General Manager of United Air Lines, Inc., at *Hearings on S. 3305 and S. 3306 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Committee on the Judiciary*, 90th Cong., 2d Sess. at 104-09(1968). *See also* Hardman, *Aircraft Accident Law: A Reappraisal*, 1961 INS. L.J. 688; Sweeney, *supra* note 49.

67. *See* Speiser, *Recovery for Wrongful Death* §§ 3:42-3:44 (1966).

b. Procedural Provisions

The new legislation has broad venue provisions and provides nationwide service of process for those actions over which the federal courts have exclusive jurisdiction. These provisions will facilitate the initiation of actions in any locality, in the contemplation that they will eventually be consolidated in a court convenient for all of the parties.

The consolidation is to be achieved by an extension of the provisions of the Multidistrict Litigation Act[68] beyond the pretrial stage to include the actual trial of the case. The same considerations of convenience and "just and efficient" conduct of the litigation applicable in the Multidistrict Litigation Act to pretrial procedure consolidation are to be applicable in the consolidation of aircraft crash litigation. In addition to ensuring that there is no more than one trial of the liability issue, consolidation for trial as well as for pretrial will ensure that the familiarity with the case which a judge obtains during pretrial will not be lost at trial.

Early consolidation of the cases is facilitated in the new legislation by a one year statute of limitations. This one year statute of limitations replaces the statutes of limitations of the states which vary from one to six years. A uniform and relatively short statute of limitations is necessary in order to avoid delaying the initiation of the disposition of the cases while awaiting the potential filing of claims in jurisdictions with longer statutes of limitations. Since today the Federal Rules of Civil Procedure and most state procedural rules do not require detailed pleadings[69] and liberally allow for amendment,[70] no real problem is presented in filing suit within a year's time, even if every detail of the cause of a particular crash is not known or available within that period. A number of states have successfully operated their aircraft crash litigation with one year statutes of limitations.[71]

In addition to the consolidation provisions, the proposed legislation also includes new provisions for the separation of cases. Separate trials may be had of any claim, cross-claim, counter-claim, third-party claim, or any separate issue arising in the cases. Upon the separate trial of any such issue or claim, the court is empowered to

68. 28 U.S.C. § 1407 (Supp. III, 1965-68).
69. FED. R. CIV. P. 8.
70. FED. R. CIV. P. 15.
71. *See, e.g.*, CAL. CODE OF CIV. P. § 340 (3)(1954).

direct the entry of a final judgment as to one or more but fewer than all of the parties or issues upon an express determination that it is in the interest of the efficient administration of justice to do so. This provision will allow the courts on appropriate occasions to have a consolidated trial of the liability issues, enter judgment thereon, and then separate the cases for local trials on the issues of damages, thereby allowing for local considerations in the measure of damages, even though the basic rule of damages is, of course, uniform. Of course, these cases need not be separated for trial on the damages issue. Actually it may be anticipated that after a judgment is entered on the liability issue, most of the cases will be swiftly settled. The new procedure, therefore, should reduce the amount of time necessary to try cases.

c. Space Activities

The legislation which I have proposed will cover space activity as well as aviation activity. It is designed so as not to infringe on the provisions of any existing or future international agreement which might bear on the law of space. For example, it has recently been reported[72] that representatives of the United States along with other members of the Legal Subcommittee of the United Nations Outer Space Committee are engaged in negotiations on the drafting of four treaties dealing with liability for space activities. According to these reports the discussions and the drafts under consideration deal with the extent and scope of international liability and the problems of recognition or nonrecognition of the defenses of sovereign immunity of nations and groups of nations engaged in space activity. Substantial further development of law in this area can be expected.

IV. Conclusion

I have attempted to show that the situation with regard to the judicial treatment of aircraft crash litigation is serious and constantly getting worse. Nor is there any prospect of improvement of the situation through judicial innovation. In fact, all signs indicate that judicial developments of the doctrine of conflicts of law are tending to exacerbate rather than to ease the problem of aircraft crash litigation.

It therefore seems to me that a legislative solution of the problems which arise in aircraft crash litigation is mandatory. The principal problems are resolution of the conflict of laws among the various

72. Aviation Week and Space Technology; June 24, 1968, at 32-33.

states, and the avoidance of multiple trials which presently occur with undesirable frequency. To avoid these problems, it seems necessary to establish federal jurisdiction and a federal body of substantive law. I have introduced legislation to accomplish these purposes.

As engineers are improving airport facilities and revising aircraft safety procedures in the anticipation of the greater demands soon to be placed by increased air travel and larger aircraft, lawyers and legislators have an obligation to keep pace. It is my hope that the proposed legislation will operate to bring the judicial resolution of aircraft crash litigation into the modern era.