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FEDERAL LICENSING OF AIRPORTS

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THIS article is directed primarily to the need and merits of Federal licensing and the constitutionality of Federal licensing of airports. The idea of licensing of airports by the Federal Government is not new. The problem was pointed up, however, and considerable interest was renewed following several airplane crashes in the vicinity of airports in the New York area, particularly at the Newark airport. These accidents kindled the spark of investigation and General Doolittle was appointed by President Truman to be Chairman of a Commission to explore the problem of airports, taking into consideration safety, general welfare and the National Defense.

On May 16, 1952, the Commission submitted its report, "The Airport and Its Neighbors." At the same time, there was prepared a legal study of some of the problem involved which study was entitled, "The Legal Framework of Airport Operations."¹ The Doolittle Commission reported 25 recommendations, number 9 of which reads as follows:

"Extend Civil Aeronautics Act to certificate airports. The Civil Aeronautics Act should be amended to require certification of airports necessary for interstate commerce and to specify the terms and conditions under which airports so certified shall be operated. Certificates should be revoked if minimum standards for safety are not maintained. Closing or abandonment of an airport should be ordered or allowed only if clearly in the public interest."

Thereafter, and in the Second Session of the 82d Congress, Senator Edwin C. Johnson of Colorado introduced a bill S.3371 to carry out the above recommendations, which bill was "To Promote Safety in Air Transportation by Amending The Civil Aeronautics Act of 1938, in Order to Require Certain Airports to be Certificated Under the Provisions of Such Act in Accordance with Recommendations of the President's Airport Commission." While the Bill S-3371 was shelved, it was not in conflict with later recommendations of the Airport Panel on the National Airport Program.²

A companion bill to S. 3371 was an earlier introduced Bill S. 3129 of the same Congress which had as its purpose the removal of existing obstructions and the prevention of future obstructions to Air Naviga-

¹ Pogue and Bell, 19 *JOUR. OF AIR LAW*, C. 253 (Summer 1952).

² The National Airport Program, 83d Congress, 2d Session, Sen. Doc. 95.

tion. This Bill was intended to be enabling legislation for a National Zoning Program, a counterpart to the Certificating (Licensing) Program.

In 1953, Mr. D. M. Proctor, President of the National Municipal Association, reported to President Eisenhower his concern over the failure of Congress to advance vitally needed airport appropriations and said,

“... while airports are a great public benefit to the cities they serve, their major benefit is to the Nation. Airports are vital to the Nation and to the progress of our Country. . . .”³

Policy of Present Administration

The Civil Air Policy of the present Administration is contained in a document by that title issued in May 1954. In commenting upon the Federal role in airports, no mention is made of Federal licensing of airports. The omission of comment and the general tenor of the statements indicates that Federal licensing has not been favored by the present Administration.

On January 17, 1955, there was released by Senator John W. Bricker an Aviation Study prepared for the Committee on Interstate and Foreign Commerce of the United States Senate in connection with its hearing on S. 2647 of the 83rd Congress. This very important omnibus aviation bill has many interesting points. In this instance, an effort will be made to mention only such points contained therein as have a bearing on the question of the Federal licensing of airports. The Study indicates that the effect of the changes proposed in S. 2647 would be to eliminate the present slight measure of uncertainty on the question of safety regulations and provide specifically that total responsibility of safety regulation of aviation lies with the Federal Government. It is the contention of the authors that there is more need for clarification of safety regulations at, near and in airports than elsewhere.

Section 601 (a) of the Civil Aeronautics Act of 1938, which imposes the duty on the CAB and the CAA to promote safety of flight in air commerce, has been interpreted as including a mandate to prescribe also safety regulations for persons and property on the ground.⁴ S. 2647 proposes an amendment which would specifically so provide. The Aviation Study appears, at one and the same time, to say this proposal seemed unnecessary but that the importance of this matter may be such that it would be useful to add a provision to make clear beyond question that the aims of safety regulations include the protection of persons on the ground.

Of particular significance are the proposals of S. 2647 to substitute the term “air navigation” for the term “air commerce” and to substitute the term “Federal Airway” for the term “civil airway. The term

³ Municipal L. R. 1954, page 62.

⁴ Aviation Study, Committee on Interstate and Foreign Commerce, Sen. Doc. 163, 83d Congress, page 76 (1955).

“air navigation” is proposed to mean, among other things, the operation or navigation of aircraft in commerce or otherwise upon any airport in the United States or in the airspace over the United States. It is also significant to note that the proposal to use the term “air navigation” as it is defined calls for an amendment to Section 2, the Declaration of Policy of the Civil Aeronautics Act of 1938 so that there shall be considered, among other things, as being in the public interest.

“the regulation of air navigation as to best promote its development and assure the highest degree of safety.”

And it is also significant that the public right of transit as granted by Section 3 of the said Act would be amended by the substitution of the term “air navigation” for the term “air commerce” which broadened term, it is to be remembered, includes airports. It appears that the proposal to substitute the term “Federal Airway” for the term “civil airway” would broaden Federal jurisdiction to include traffic control areas which extend beyond the paths of present civil airways.

The foregoing is believed to be a fairly accurate but not all inclusive summary of the question of Federal licensing of airports which gained a short-lived activity following the report of the President's Airport Commission in 1952, and which is presently coming to the fore again.

While the authors hold no brief for the details and form of the abovementioned Bills S. 3371 and S. 3129 of the 82d Congress and S. 2647 of the 83d Congress, it is submitted that any such proposed legislation is not actually an extension of Federal control, but that such would be merely a continued exercise of an already clearly established Federal power. Such legislation is not only proper but necessary. It cannot be reasonably argued that the field of airport operation, in terms of standards of safety, can be regarded as distinct and apart from the regulation of actual operational flights or travel through navigable airspace, over which Congress has clearly established exclusive Federal jurisdiction, and may in the near future more clearly define.

Before offering to substantiate legally, the position the authors have taken in this article, there are some other points of general public interest which should be noted.

Importance of the Airport

Air travel has outgrown airports, planes and routes, and there exist traffic jams in the sky. This phenomenal growth with its resulting problems is obvious to the air traveler and studies are being made.⁵ Airports serve two well-known and understood functions. One is transportation and the other is National Defense. While all forms of transportation serve National Defense, aviation probably plays the most important part of transportation in our National Defense.

The military has consistently stated that it cannot perform its func-

⁵ Special CAR—Reg. #SR 408 (Oct. 20, 1954).

tion of defending our country from attack if it must rely solely upon military airports and military aircraft and navigation facilities. No one disagrees with this conclusion and it is therefore clear that in considering the airport problem we cannot separate into two separate compartments the Military Airport Problem and the Civil Airport Problem. Further, it is axiomatic that our country must not only have adequate airports but airports properly located.

Here is a good place to recall the Government's legislatively declared policy on aviation, as set forth in Section 2 of the Civil Aeronautics Act of 1938.⁶

"In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity —

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportations, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The regulation of air commerce in such manner as to best promote its development and safety; and

(d) The encouragement and development of civil aeronautics."

The policy clause of the Civil Aeronautics Act of 1938 must ever and always be kept in mind.

It is of little use to have control over the flight of aircraft through the air if one cannot get them down on the ground. As a matter of fact, from the standpoint of safety, the airport and operations in the area above and around the airport, create the greatest problem. Accident statistics show that by far the greatest number of accidents and the greatest losses occur on and in the vicinity of airports.⁷ There is no dispute but that landing and take-offs are the two most critical operations.

As some examples of what occurs when the Federal Government does not fulfill its obligation in air commerce, we observe the fiasco in Texas involving the fight between the cities of Dallas and Fort Worth over air terminal facilities. In the Capital of our Nation, we find a civilian, a Navy and two Air Force fields creating serious problems of safety and reducing the quantity of commercial air transportation because of their proximity to each other and of the civil airport. The problem is not diminishing, but is expanding because of the faster speed of aircraft and the increasingly difficult problems created by speed. This is not the place to outline in detail all of the factors in-

⁶ Pub. Law 706, 75th Cong., Act of June 23, 1938; 49 USC 402.

⁷ CAB Statistical Analysis of Non-Air-Carrier Accidents 1953, issued July 1, 1954.

volved, but it is sufficient to state that these problems which all revolve around airports are some of, if not the most serious, now facing aviation.

A study of the history of the High Density Air Traffic Control Program instituted by the CAB and the CAA for Washington National Airport discloses how serious and far-reaching this problem is. A public hearing which lasted two days was held by the CAA on February 15 and 16, 1955, concerning the proposal of the CAA to establish a "High Density Air Traffic Zone" in the Washington, D. C., area. Testimony was offered by all the main users of the airspace. At the time this is written, the CAA has not issued its final determination of the problem.

We must now recognize that the strength of our National military and our ability to compete and hold our own in the family of Nations economically is tied directly to the strength and progress of our aviation. We are in a field where there can be no compromise with anything less than the best. We assume that as a Nation we have the intelligence and we know we have the resources to assure the highest possible strength and efficiency and usefulness for both our Civil and our Military aviation.

The orderly development of our airport program to insure the necessary coordination between the Civil and Military phases requires that our airport program be a unified one with a minimum of waste and a maximum of availability and usefulness. Such results have never been achieved except where a single Government agency has assumed the responsibility. Even highway networks have been found wanting from the National standpoint and Federal participation has been considered increasingly important. It seems to us that Federal licensing of airports is an absolute necessity if we are to reach and maintain our goal.

Meaning of "Navigable Airspace"

Returning to the Civil Aeronautics Act of 1938 and the extent of the control exercised by Congress in that Act, let us look at the phrase, "Navigable Airspace." The lawmakers undoubtedly used the word "navigable" with the word "airspace" because of the meaning that word had been given with respect to navigable waters. With respect to airspace, it is obvious that airspace that at one time would be considered non-navigable, now with the advent of the helicopter, convertiplanes and the vertical take-off planes, is clearly navigable. In other words, what was not navigable even yesterday is navigable today. There was a lag in the Federalization of inland water transportation⁸ and it is hoped that such will not continue in air transportation, as air as an element in which to navigate is even more inevitably Federalized by the Commerce clause than is navigable waters.

But casting aside all these refinements, it seems clear that all of

⁸ Knauth, *Crime in the High Air*, Vol. XXV, Tulane L. R. 446 (June 1951).

the airspace necessary to land, take-off and adequately maneuver for landing and take-off is in fact navigable airspace. It is not only navigable, but it must be maintained navigable if we are to maintain any semblance of a sound aviation industry. Even the wildest opponents of Federal control do not claim you can operate an airport in non-navigable airspace. Congress has exercised exclusive jurisdiction over that and it must continue to do so if it is to fulfill its obligations.

As the authors have indicated, it is their position that in the interests of National Defense, public welfare, safety and uniformity, airports must be Federally licensed. While we have reached the point of traffic jams in the sky, it is the airport which causes such traffic jams because some of the most technical and skillful phases of flying take place in the take-offs and landings from the airports. It is to the airport and its runways and facilities that civil airways extend.

Federal airways do not stop at some unsettled number of feet above or away from the airport. Logically and of necessity, they extend down and into the airport. It has judicially been said by the Supreme Court of the United States that the moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls which are controlled solely by the Federal Government.⁹

It is high time that it be stated that it is equally, if not more important from the standpoint of safety, for the Federal Government to supervise and regulate the landings and take-offs of airplanes than for instance the flight of airplanes after they have leveled off on their course high above the ground and far from the airport. There are those who have not thought the matter through who believe that, by licensing and certificating the airplane and for an all inclusive word, its handlers, the Federal Government need go no further.

Those who have studied the problem without thought of politics or fear of criticism and with the sole objective of obtaining the best possible facilities for air commerce have concluded that airports should be Federally licensed. This was the conclusion of the President's Airport Commission mentioned above. The Airline Pilots Association revealed at its Air Safety Forum in Chicago, in March 1954, that a comprehensive airport analysis sheet is being compiled in support of the Association's recommendation that airports be certificated. It may well be that further delays in following such recommendations will cause greater loss of lives and greater catastrophies. Delay will certainly increase the cost of aviation.

State-Federal Problem

The problem is complicated by some misconceptions and prejudices. There are those who would see great violation of States' rights. Then there exists timidity on the part of Government officials to carry out the law as it now stands. Lack of Federal appropriations permit a status quo.

⁹ *Northwest Airlines v. Minn.*, 322 US 292 (1944).

The Congressional declaration of intent and interpretation of Federal authority over the airspace is contained in Section 6, paragraph (a) of the Air Commerce Act of 1926. That section states:

“The United States of America is declared to possess and exercise complete and exclusive National sovereignty in the airspace above the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by International law or treaty or convention the United States exercises National jurisdiction. . . .”

In 1930 in the Second National Airport Conference held on May 14th of that year, it was pointed out by the Committee on Traffic Handling that

“Federal control over all traffic movements would probably be the simplest method of adoption and enforcement.”¹⁰

Another expression of Congressional authority is contained in Section 3 of the Civil Aeronautics Act of 1938. That section reads:

“There is hereby recognized and declared to exist in behalf of any citizen of the United States, a public right of freedom of transit in air commerce through the navigable airspace of the United States.”

It is enlightening to note that the Civil Aeronautics Board in 1941 concluded that it must, in carrying out the provisions of the Civil Aeronautics Act of 1938, exercise jurisdiction over all of the navigable airspace. It further, at that time, determined that all of the airspace in which an aircraft could be maneuvered was navigable.¹¹ At that time, the Board after a factual investigation and public hearing in September 1941 determined that all aircraft in the air constituted an “operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce,” and thus constituted “air commerce.” This administrative determination was sustained in *US vs Drumm, et al.*^{11a} When this interpretation is applied to Sections 610 of the Civil Aeronautics Act of 1938, it imposes the requirement that every aircraft that gets off the ground have an airworthiness certificate and every person who pilots an aircraft or serves in the capacity of an airman have a proper Federal airman certificate. The *Rosenhan case* was confined to a civil airway but it supports the above conclusion.¹²

This interpretation has been uniformly applied since 1941, and so far as we know has never been successfully challenged. As a matter of fact, it has been, for the most part, accepted and considered as a proper and beneficial construction of the law.

One of the authors participated in the complete revision of Part 60 of the CARs by the Civil Aeronautics Board in 1945. In drafting the minimum altitude rules (Section 60.17) there was no intention ex-

¹⁰ Proceedings of the Second National Airport Conference of 1930, p. 65.

¹¹ CAR, Regulations Serial #193, Amendment #135, effective Dec. 1, 1941.

^{11a} *U.S. v. Drumm*, 55 F. Supp. 151, 1 AVI 1177 (DC Nev. 1944).

¹² *Rosenhan v. U.S.*, 131 F. 2d 932, 318 US 790; cert. denied (1943).

pressed by any participant in the drafting that these rules were definitions of the "navigable airspace" term used in the Civil Aeronautics Act of 1938. All of the discussions were on the question of what minimum altitudes should be specified to protect the persons on the ground as well as those in the air. The rule was intentionally drafted to permit aircraft to be flown at any altitude between zero and 500 feet when such flight would not endanger the person or property of another. The revision of the rules at that time was a departure from Government paternalism and gave a pilot freedom to operate with risk to himself so long as he was not endangering another.^{12a}

A recent expression of the Civil Aeronautics Board concerning the meaning of the term navigable airspace is contained in Interpretation No. 1 of Part 60, adopted July 22, 1954.¹³ In that the Board construes the words

"except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes,"

which words are contained in Section 60.17 of the Civil Air Regulations, as establishing a minimum altitude rule. In its interpretation of that rule, the Board states:

"It is a rule based on the standard of necessity, and applies during every instant that the airplane climbs after take-off and throughout its approach to land. Since this provision does prescribe a series of minimum altitudes, within the meaning of the Act, it follows, through the application of Section 3, that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in a navigable airspace."

Interstate Commerce Clause

All of the above is an application of the Interstate Commerce Clause of the Constitution. The full extent of the Federal Government's control over the airspace has not yet been determined by the Supreme Court. Those cases which have reached it have given that Court an opportunity to discuss the general issue as well as the specific issue and the language of the Court is significant. For instance, in *Northwest Airlines v Minnesota, supra*, the Court stated:

"Air as an element in which to navigate is even more inevitably Federalized by the Commerce Clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time. Congress has recognized the National responsibility for regulating air commerce. Federal control is extensive 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*

^{12a} Article entitled *The New Rules for Private Flying*, by L. Welch Pogue, former Chairman of the Civil Aeronautics Board, in *Skylady* magazine, Sept./Oct. 1945.

¹³ 19 F. R. 4602. It is believed that CAB issued this interpretation because of confusion resulting from the case of *All. Am. Airways v. Village of Cedarhurst*, 201 F. 2d 273 (CA 2, 1953).

moment a ship taxis onto a runway, it is caught up in an elaborate and detailed 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."
(Emphasis supplied)

AUTHORITY TO LICENSE AIRPORTS

Now what may be the authority for licensing of airports under Civil Aeronautics Act of 1938? Section 606 of the Act authorizes the Administrator

"to inspect, classify, and rate any air navigation (facility) available for the use of Civil aircraft of the United States, as to its suitability for such use. The Administrator is empowered to issue a certificate for any such air navigation facility."

Section 1, paragraph (7) of the Act defines an air navigation facility as

"any facility used in, available for use in, or designed for use in, aid of air navigation, including landing areas. . . ."

Paragraph (22) of that Section defines landing areas as

"any locality, either of land or water, including airports and intermediate landing fields which is used, or intended to be used, for the landing and take-off of aircraft, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo."

Going further, Section 302 (a) of the Act authorizes the Administrator

- "(1) to acquire, establish, and improve air-navigation facilities wherever necessary;
- (2) to operate and maintain such air-navigation facilities."

This authority is useless without funds and it is probable that emergency landing fields were contemplated by the authorities rather than regular commercial airports. The language is clear, however, and all possible ambiguity removed by Section 302 (c) which states the Administrator is authorized

"to acquire by purchase, condemnation, lease, or otherwise, real property or interests therein, including, in the case of air-navigation facilities (including airports) owned by the United States and operated under the direction of the Administrator, easements through or other interests in airspace immediately adjacent thereto and needed in connection therewith."

Section 303 of the Act refers also to the acquisition and certification of landing areas by the Administrator. Section 307 directs the Administrator to make plans for the

"orderly development and location of landing areas . . . as will best meet the needs of, and serve the interest of safety in, Civil aviation."

Whether a certificate as used in the Act is a license may involve some legal refinements not pertinent to this discussion. We consider that, under the Act, the use of an airport not certificated might be prohibited in the same manner as the use of an uncertificated aircraft. This is the purpose of licensing.

It seems clear enough that airports may be certificated under the Civil Aeronautics Act of 1938. Under the literal interpretation of the Act, the authority extends to all airports available for the use of Civil aircraft in the United States. This, at first glance, seems sweeping, but when one considers that all aircraft must conform to Federal Regulations, there seems no basis for the distinction as to airports. So far as civilian operations are concerned, neither the aircraft nor the airport is of any use without the other.

Judicial Decisions Noted

Since the effort and thinking which went into the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938, there have been various judicial decisions which should be noted. Under the authority of *Euclid v Ambler*¹⁴ the "airport area" was regulated through zoning by the Municipality or the State. The Civil Aeronautics Administration has required adequate zoning laws or other protective means before any airport projects under the Federal Airport Act of 1946 are approved.¹⁵

And there appears to be adequate power in the Federal Government to regulate the height of present and future structures about airports through eminent domain and possibly zoning. In the case of *Jasper v Sawyer*, it was stated by Judge Holtzoff:

"It is settled by decisions of the Supreme Court, beyond peradventure of doubt, that the United States is clothed with the power of eminent domain: Even though the power was not expressly conferred by the Constitution, the power is implied and is incidental to carrying out other powers, *Kohl v US*, 91 US 367, 23 L Ed 449. The right of eminent domain which exists in the Federal Government may be exercised by it within the States, so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution. Under its power to regulate commerce between the States, as well as foreign commerce, it is fundamental that Congress may construct, maintain and operate instrumentalities of such commerce."

". . . It is clear that in the light of modern developments an airport is an instrumentality of both foreign and interstate commerce. . . .

". . . The Court feels that it is beyond the realm of debate that an airport is as such an instrumentality of commerce as a highway, a bridge, a lock, a dam, a lighthouse, all of which have been constructed at various times in different places under the authority of Acts of Congress acting under the authority of Acts of Congress acting under the commerce power."¹⁶

¹⁴ 272 US 365 (1926).

¹⁵ Fed. Airport Act 49 USC 1101; Regulations of the Administrator of Civil Aeronautics, Part 550, Sec. 550.11(b)(3), Part III, #7.

¹⁶ *Jasper v. Sawyer*, 100 F. Supp. 423 (DC, DC 1951).

Similarly, it might be argued that the Federal Government has the power to zone, (although the question has never been judicially determined). The constitutional basis for Federal zoning laws which would limit the height of structures in airport approaches is the protection of air commerce, the flow of which, being subject to direct regulation, must be aided also by indirect regulation where this is necessary to maintain the effectiveness of the original laws. The Government's sole authority has been to protect the flow of commerce, except as noted above with respect to the interpretation of Section 601 (a), the Civil Aeronautics Act of 1938.¹⁷

It must also be remembered that State Laws and Police Regulations must yield when they come into conflict with the National power over commerce.¹⁸

With respect to Interstate Commerce, postal service and matters of National Defense, jurisdiction over passage through the air may be said to have been expressly or implicitly surrendered by the States to the United States by the adoption of the Federal Constitution. It has been held that, insofar as these Regulations established by the Federal Government promote safety and efficiency in interstate, overseas or foreign commerce and bear some reasonable relationship to the subject matter, they are supreme and may not be denied.¹⁹

The power of Congress to legislate on that which affects Interstate Commerce was clearly upheld and reaffirmed in the case of *Rosenhan v United States, supra*, which showed that safety regulations apply to all who enter an airway. The Court said that since the Defendant admitted he was operating in an Interstate Airway, he was subject to safety regulations even though there was no present danger from his being there at the particular time. Congress sought to eliminate all potential dangers, and therefore it assumed control over all flights within an Interstate Airway. A later case went even further and stated that any flight in United States airspace could be controlled by the Civil Aeronautics Board Regulation.²⁰ This case seemed to hinge upon the application made of the Civil Aeronautics Act definition of "air commerce." The Civil Aeronautics Act of 1938 gave the Civil Aeronautics Board power to make regulations for flights that "may affect or endanger" Interstate Commerce. Congress has the power to regulate Intrastate Commerce where it affects Interstate Commerce, and its occupation of the field gives the Federal Government exclusive regulatory control over those phases upon which it has acted.²¹ Any State Regulation which conflicted with Federal Regulation would be an unconstitutional burden on Interstate Commerce, and even though the State may have acted in the field first, it cannot exclude Federal

¹⁷ Footnote 4, *Supra*.

¹⁸ *People v. Katz*, 249 NYS 719 (1931).

¹⁹ *Rosenhan v. U.S., Supra, Blalock v. Brown*, 78 Ga. App. 537, 51 SE 2d 610 (1949).

²⁰ *Drumm v. U.S.*, 55 F. Supp 151 (DC Nev. 1944).

²¹ *International Shoe v. Pinkus*, 278 US 261 (1928).

occupation. As stated by Chief Justice Stone in *United States v Wright-wood Dairy Co.*,²²

“No form of State activities can constitutionally thwart the regulatory power granted by the Commerce Clause to Congress.”

Thus, if the subject of the regulation is such as to require uniformity among the States as to air commerce, the power of Congress must be deemed exclusive. The obvious need for regulation of Civil aviation in all phases of its operation, including the establishment and enforcement of minimum standards of safety in the maintenance and operation of airports, clearly demands uniformity in such regulation. Such uniformity can be achieved only at the National level.

Even if the subject were such as to admit of diversity of regulation, it seems clear that a State may regulate only until Congress has occupied the field. In this situation, Congress must clearly indicate its intent to occupy the field,²³ and when clearly expressed, the State Regulation ceases.²⁴ Not only may such repeated expressions of an intent to occupy the field of regulation of safety in Air Commerce activities be inferred from the past rulings and regulations of the Civil Aeronautics Board, and from the broad scope of the Civil Aeronautics Act of 1938, but a further expression of intent with respect to the regulation of airport standards of safety was set forth in express terms in S. 3371 and is now set forth in S. 2647.

It seems obvious that State Laws in this field of airport licensing would be a burden on Interstate Commerce, and whether or not they are of such an unreasonable burden as to render them unconstitutional is beside the point, once it is realized that the magnitude sought to be governed is such that effective Safety Regulations can be achieved only if uniformly applied and that such uniformity can emanate from Federal legislation alone.

The cases mentioned above dealing with navigable airspace put no exact measurement on the same. The cases say that navigable airspace is within the exclusive jurisdiction of the Federal Government all as the authors have endeavored to trace.

While the case of *United States v Causby*²⁵ is generally quoted as being consistent with the foregoing indicated trend, the authors believe the case actually represents a stumbling block and reflects the timidity of Federal officials and the resurgence of States right thinking at the time of the decision. While the opinion does hold that the air is a public highway as Congress has declared and that common sense revolts at the idea that ownership of lands extended up to the sky, the majority opinion went on and held that navigable airspace was that space above the minimum altitude set for cross-country flight as dis-

²² 315 US 110 (1942).

²³ *Missouri Pac. Ry. Co. v. Norwood*, 283 US 249 (1930).

²⁴ *Chicago R. I. & P. R.R. Co. v. Hardwick Farms Elevator Co.*, 226 US 426 (1913).

²⁵ 328 US 256 (1946).

tinguished from the safe-glide angle set for take-off and landing. The effect seems to say that below such minimum altitude the plane descends to the airport under the jurisdiction of the subjacent state. What many difficulties may result? At least a clarification seems essential in view of this case. As we said earlier, we have to get the plane on the ground and it is from the minimum altitude to the ground where the pilot should have more certain and uniform regulations than elsewhere.

Mr. Justice Black wrote a dissenting opinion, concurred in by Mr. Justice Burton, in the above mentioned Causby case, and most properly deplored the majority opinion when he said,

“no greater confusion could be brought about in the coming age of our air transportation than that which would result were Courts by Constitutional interpretation to hamper Congress in its efforts to keep the air free.”

Our above comments about the Causby case also apply to some extent to a recent case in Pennsylvania.²⁶

It is accordingly the view of the authors that in the public interest and in accordance with the public convenience and necessity, all as detailed in the legislatively declared policy of the Civil Aeronautics Act of 1938, it is essential that the Federal Government take the necessary steps to license airports. It is also the view of the authors, as argued above, that it is now beyond the realm of debate that an airport is as much an instrumentality of commerce as any other concept which has been constitutionally placed under the commerce power of the Federal Government, and that all that is needed is appropriate Federal legislation to carry the same into effect.

²⁶ *Gardner v. County of Allegheny*, Pennsylvania Supreme Ct., 4 Avi. 17528 (1955).

