

1939

Report of the Standing Committee on Aeronautical Law

Mabel Walker Willebrandt

Fred D. Fagg Jr.

A. Schnader

Francis B. Upham Jr.

Recommended Citation

Mabel Walker Willebrandt et al., *Report of the Standing Committee on Aeronautical Law*, 10 J. AIR L. & COM. 505 (1939)

<https://scholar.smu.edu/jalc/vol10/iss4/4>

This Current Legislation and Decisions is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

STATE

Department Editors { GILL ROBB WILSON
ELWOOD B. COLE

REPORT OF THE STANDING COMMITTEE ON AERONAUTICAL LAW

RECOMMENDATIONS

Your committee recommends the adoption of the following resolutions:

I

WHEREAS, The Congress of the United States has passed the Civil Aeronautics Act of 1938, and

WHEREAS, The Civil Aeronautics Authority which was created by such Act is now engaged in a study of the desirability of further Federal or State legislation to supplement such Act and has invited the cooperation of the Committee on Aeronautical Law of the American Bar Association,

Be It Resolved, That this Committee be authorized to cooperate with the Civil Aeronautics Authority in such study.

II

WHEREAS, The Association at the Cleveland convention in July, 1938, endorsed the sound principle that the salvage of aircraft lost at sea shall, in the absence of any agreement to the contrary, be regulated by the principles of maritime law, and directed this committee to draw an appropriate bill and cooperate with the Maritime Law Association to the extent found suitable, and

WHEREAS, The Fourth International Conference on Private Air Law at which the United States was represented at Brussels, Belgium, in September, 1938, adopted and signed a convention for the unification of certain rules relative to assistance and salvage of aircraft or by aircraft at sea, which convention now awaits ratification by the United States,

Be It Resolved, That this committee be instructed to hold the bill it has drafted pursuant to last year's resolution of this Association, suspend any activity that might be directed to the passage of legislation on this subject, and to report to the Association concerning final ratification by the United States, particularly advising whether the convention, if ratified, may not make the proposed legislation unnecessary.

III

WHEREAS, It appears that the existing United States Customs and Immigration Laws and Regulations made pursuant thereto, in many instances do not meet the changed conditions of air commerce,

Be It Resolved, That the Association instruct the Committee on Aeronautical Law to make a study of these Customs and Immigration Laws and Regulations to determine in what respect they should be amended, and thereupon to cooperate with the proper government departments and agencies to the end that such amendments be accomplished.

REPORT

PROGRESS TOWARD UNIFORMITY IN THE LAW OF AVIATION

It is probably inevitable that sharp differences of view will arise in a field of law covering a rapidly growing science like aviation. Reports of the Committee on Aeronautical Law from 1921 to the present date reveal this conflict.

In 1922 the American Bar Association passed a resolution approving a proposed Uniform Aeronautics Act to be passed by each state, section 3 of which reads as follows:

SECTION 3. The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight prescribed in section 4.

But in 1936 the *Hinman* case (*Hinman, et al. v. Pacific Air Transport*, 84 Fed. (2d) 755, Cert. denied 57 Sup. Ct. 431) held:

Title to the air space unconnected with the use of land is inconceivable. Such a right has never been asserted. It is a thing not known to the law.

For fifteen years there has been controversy over the right, if any, of flight—whether such right is positive or limited, or at what heights it becomes positive, instead of qualified; whether flying over a landowner's premises is a trespass, or, if unduly interfering, may be a nuisance; the extent to which the federal government may go in efforts to achieve safety and uniformity in the operation of aircraft, and whether the federal government has authority to enter the entire field of law and regulation of aviation through the commerce clause of the Constitution, or through its treaty-making powers. (See 1932 A.B.A. Rep., 372.)

There has, however, been one point on which *all* groups of the bar have at all times agreed, namely, that UNIFORMITY of law and regulations is desirable.

Disputes have arisen over the way uniformity may be accomplished.

Most of the reports of this committee have proceeded on the theory that there must be a state-by-state adoption of a Uniform Aeronautical Code.

While civic aviation was limited in scope, the problem looked reasonably easy for states to cover. But, while the lawyers were arguing, the industry outgrew state regulation.

Necessity for central control culminated first in the Air Commerce Act of 1926.

The industry and the public interest have not ceased to run ahead of the law.

So, the Bar Association has continued to labor over the question—

Can the subject be covered by a state code or is federal legislation and regulation necessary in order to secure uniformity?

From 1926 to 1929, this committee has worked diligently. The practical difficulty in drafting an acceptable law is well stated in the 1929 report—

For several years your committee has been endeavoring to procure uniformity in state legislation. . . . We have found that there is a very real conflict of opinion as to the fundamental theory on which uniform state legislation should be based.

In 1930 when the committee again took over the burden of trying to work out a Uniform State Code, it again pointed out the difficulties, and the slowness of achieving results by such a method. However, the committee reported that a tentative draft of a Uniform State Code had been prepared, but observed:

As the study of this proposed code has gone forward, new and varying problems have arisen as a result of judicial decisions and administrative interpretation of existing state laws. . . . Though substantial progress has been made . . . there is much to be gained by awaiting a clearer interpretation of perplexing fundamental problems. . . .

In 1931 the committee submitted a draft, but pointed out the intentional omission of section 3 of the early 1922 Aeronautics Act, and because of the conflict of opinion over ownership of air space, did not request approval of its draft.

In 1932 the committee expressed doubt whether uniformity could ever be accomplished by means of developing a uniform law for the states, and voiced the idea that perhaps the federal government could resolve the uncertainty by usurping the field through its treaty-making powers, citing *Mis-*

souri v. Holland, 252 U. S. 416. That the United States was one of the signatories to the Pan-American Convention on Commercial Aviation—article xxxii of which provides:

The contracting parties shall procure as far as possible uniformity of laws and regulations governing aerial navigation—

was noted, and the suggestion advanced that in order to put such a treaty obligation into full force and effect, the United States might regulate both intra- and interstate air traffic.

But the federal government continued to occupy only a part of the regulatory field.

From 1933 to date this committee has worked diligently in cooperation with the National Conference of Commissioners on Uniform State Laws to prepare a uniform state aeronautical code.

This work has involved serious questions both of policy and of law.

The code has not been submitted to this Association, and the N.C.C.U.S.L. is not prepared as yet to submit it.

In the meantime, the Congress passed the Civil Aeronautics Act of 1938 creating the Civil Aeronautics Authority.

The Authority is now considering the question whether the entire field of regulation cannot and should not be covered by federal law. It has invited the cooperation of this committee and of the Committee on Uniform State Aeronautical Code of the N.C.C.U.S.L.

We believe that this Association should cooperate in this study, and that all further work on the preparation of state regulation should be postponed until the Civil Aeronautics Authority has completed its study.

Consequently, the committee recommends the adoption of the above Resolution No. 1.

THE CIVIL AERONAUTICS ACT OF 1938¹

Prior to June 23, 1938, federal control of civil aeronautics was divided between three governmental agencies: (1) *The Department of Commerce* charged with (a) providing, operating and maintaining federal airways aids; (b) collecting and disseminating aeronautical information; (c) inspecting aircraft, airmen, and airlines; (d) enforcing federal regulations; and (e) federal promotion of aeronautics; (2) *The Post-Office Department* which awarded contracts for the carriage of air mail, made payments therefor, and enforced certain provisions of the air mail laws; and (3) *The Interstate Commerce Commission* to which was entrusted the responsibility for fixing rates of pay to be made to air mail contractors.

In January, 1938, it was suggested that all federal functions in the field of aeronautics be collected under a single agency.²

The Civil Aeronautics Authority was the final answer of Congress. It is a board of five members created by the Civil Aeronautics Act of 1938 (48 USCA, Sec. 401 *et seq.*), which became a law on June 23, 1938. The law is similar to the Federal Power Act, the Securities Exchange Act, the Interstate Commerce Act, and other governmental regulatory acts.

Appointments of the Authority members, and of the Administrator (an independent executive whose office was also created by the act) were not confirmed until February 17, 1939. The Authority consists of Robert H. Hinckley, chairman; G. Grant Mason, Jr.; Harlee Branch, Oswald Ryan, and Edward P. Warner.

Clinton M. Hester is the Administrator.

The Authority is, like other boards, an agency of Congress with quasi-legislative and quasi-judicial functions. Its decisions are reviewable by courts, but are not subject to presidential supervision or control. It exercises regulatory powers exclusively—economic regulation, and safety regulation.

The economic regulatory power embraces not only the common carriers of the air which operate within the United States and its territorial pos-

1. For a detailed explanation of the act, see statement of the Managers on the Part of the House, in Report No. 2635, of House Report, 75th Congress, 3rd Session, p. 64.

2. See Committee Report, 1938 A.B.A. Rep. 214.

sessions, but also American air carriers engaged in overseas and foreign air transportation and foreign air carriers operating between foreign countries and the United States or its possessions.

Being mindful of previous criticism by the bar of regulatory commissions, the Authority of its own accord, has created from its own personnel, an Economic Compliance Division, which at all hearings acts in the rôle of prosecutor, representing the general public. The object of this is to help the Authority to preserve its judicial attitude and position.

The safety regulatory power of the Authority extends over all civil aircraft, all airmen and ground personnel, as well as over the manufacture, design, and export of aircraft and certification of schools for the training of pilots and mechanics.

The act also establishes within the Authority an Air Safety Board of three members appointed by the President with the advice and consent of the Senate. They are Major Sumpter Smith, chairman; C. B. Allen and Thomas Hardin. This board is an independent investigatory and analytical body, charged with inquiring into all accidents involving aircraft and with the duty of making recommendations to the Authority for the prevention of similar accidents in the future.

Inasmuch as investigation of accidents by this board could involve a criticism of the activities of either the Authority or the Administrator, it is the intent of the act to make this board as completely independent of the Authority and the Administrator as is possible.

The Office of the Administrator

A real problem for Congress in combining such a variety of functions in one unit, was to find a means whereby the President could retain control, in so far as strictly executive functions were concerned, such as over the purchase and improvement of federal property, without control of the judicial powers of the Authority.

Creation of the office of the Administrator, with duties independent of the Authority, was the answer of Congress.

This Administrator is appointed by the President and holds office subject to his will. His primary responsibility is executive, namely, the construction, operation and maintenance of air navigation aids, and the promotion of federal experimentation in the field of aeronautics. His independent duties are clearly outlined in the act, and over his performance of them the members of the Authority exercise no supervision whatsoever. Nor is there any appeal from his decision, to the Authority, or to the courts.

However, the act provides also that the Administrator *may* exercise secondary functions delegated to him by the Authority. The provision has not been generally understood.³

Responsibilities which the Authority may delegate to the Administrator are of a purely routine administrative character. The Authority is precluded from transferring any of its quasi-judicial or quasi-legislative functions. And it is a matter within the Authority's sole discretion whether it assigns any duties whatsoever to the Administrator.

The Authority has so far found the power of delegation of certain duties a wise provision of the law. It is a means of greater coordination, and an opportunity to harmonize action between the Authority and the office of the Administrator.

REVISION OF REGULATIONS

The Authority inherited the old Bureau of Air Commerce Regulations, but is now engaged in the work of adapting these to the provisions of the new act, and the committee is pleased to report it is devoting principal attention to their simplification and modernization.

Although proceeding slowly in this task of revision of rules, the Authority is apparently evincing no timidity in covering, so far as may be nec-

3. See Article by Clinton M. Hester, Administrator, entitled "The Civil Aeronautical Act of 1938," 9 *Journal of Air Law* 451, 1938. Also see lecture delivered by Oswald Ryan, Member of the Authority, at the Harvard Law School, on January 20, 1938, entitled "Administrative Law and Procedure," a copy of which may be obtained by writing to the Authority.

essary to control air commerce, the entire field. The underlying thought is that they may do this under the act. Wide power of intrastate control can, of necessity, be developed, because there is no intrastate flying to speak of today that does not in some manner, use or rely upon the air navigation facilities owned in most instances or controlled by the federal government.

The law furnishes a clearer declaration on the much controverted right of flight for any citizen, as follows:

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 air space of the United States.

The definition of "air commerce" contained in section 1 of the act includes "any operation or navigation of aircraft within the limits of any civil airway, or any operation or navigation of aircraft which directly affects, or which may endanger safety in interstate, overseas or foreign air commerce."

A civil airway is defined in the act as "a path through the navigable air space of the United States identified by an area on the surface of the earth, designated or approved by the Administrator as suitable for interstate, overseas or foreign commerce." These airways have been so extended in recent years that they crisscross every state, and regulations establish an "airway" as a twenty-mile strip along their course. Indeed it is difficult to conceive, even in the large state of Texas, how anyone could conduct an aviation school, or other kind of intrastate aviation enterprise where he would not in his operations make use of an airway or other federal air navigation facilities. And, in so far as he should make any use of them, the law provides that he would thereby subject himself to the federal authority. With such a background of law, regulations upon which the Authority is now working may be expected to cover every phase of aviation.

The Civil Aeronautics Authority must also administer the act consistently "with any obligation assumed by the United States in any treaty convention or agreement that may be in force between the United States and any foreign country." One such treaty is the Pan-American Convention ratified by the United States on August 26, 1931. It has, pursuant to the Constitution of the United States (art. VII, sec. 2) become part of the supreme law of the land. Under article xxxii of it, the contracting governments agree to "procure as far as possible uniformity of law and regulations governing aerial navigation"

It would seem, therefore, that proponents of this new act are prepared to defend its broad scope and its apparently almost unlimited regulation-making powers, under *all* theories, the commerce clause of the Constitution (particularly because of its safety promotion features), and also under the government's treaty powers as well.

NEW DIVISION OF INTERNATIONAL COMMUNICATIONS IN STATE DEPARTMENT

To assist the Civil Aeronautics Authority, and also to render assistance to shipping, moving picture, aviation and telegraphic industries, the State Department has recently created a Division of International Communications. Mr. Thomas Burke is the chief of the division. Mr. Stephen Latchford is chief of its aviation section. This division of the State Department and the Civil Aeronautics Authority have cooperated closely in policies and activities. Formerly in the State Department if a question came up involving aviation in China, it would be handled by the Division of Far Eastern Affairs. If an identical question arose in Peru, it would be handled by the Division of the American Republics. Now, however, instead of the scattered and contradictory attention resulting from assignment solely according to geography, questions involving aviation are converged in the one unit. Thus attention can be given by a specialist versed in aviation problems in various parts of the world, and in the treaty provisions affecting the solution of these problems.

INTERNATIONAL AERONAUTICAL LAW

Salvage of Aircraft Under Maritime Law

This committee was faced with a dilemma from the fact that two months after the Association's 1938 meeting in Cleveland which instructed

the committee to draft a bill making the principles of maritime law with reference to the salvaging of ships applicable to aircraft, the United States participated in an international conference at Brussels, Belgium, which adopted a convention on the same subject.

In this committee's report for 1935 attention was called to the fact that the United States had failed to send representatives to international meetings, because it had no appropriation to cover the expenses of delegates.

In 1938, by reason of the passage of a bill providing for such funds, the United States was able to send a full delegation, which took an active part in the deliberations. These United States representatives report that they met with success in getting most of their major proposals adopted by the conference. The International Agreement governing salvaging of property and persons at sea overlaps the subject-matter of the bill which the Association asked this committee to draft. Although the committee has prepared an "appropriate" bill, as instructed to do, it has not considered the time "suitable" in view of changed conditions, to cooperate with the Maritime Law Association or to take any other steps toward the passage of the bill, because the committee feels that the final ratification of the convention by the United States may make the proposed legislation unnecessary.

Accordingly, therefore, to clarify the committee's work for next year, the above resolution No. II is proposed.

Brussels Conference

The Fourth International Conference on Private Air Law convened at Brussels on September 19, 1938. For an illuminative report on this conference see article by Stephen Latchford, *Journal of Air Law*, Vol. 10, No. 2, April, 1939. The United States was represented by G. Grant Mason, Jr., member of the Civil Aeronautics Authority, Chairman; Stephen Latchford, Department of State, Vice-Chairman; and Denis Mulligan, Consulting Counsel on International Aviation, Civil Aeronautics Authority. Technical advisers accompanying the delegation were Laurel E. Anderson, Legal Adviser of the Maritime Commission at London; Captain L. T. Chalker, Chief Aviation Officer, United States Coast Guard; Arnold W. Knauth, member of this committee in 1938, and J. Brooks B. Parker, Aviation Insurer.

This conference adopted an international convention relating to assistance and salvage of aircraft or by aircraft at sea, embracing the following principles:

- (1) That the commanding officer of an aircraft shall be bound to render assistance to any person who is at sea in danger of being lost, in so far as such assistance may be rendered without serious danger to the aircraft, her crew, her passengers, or other persons.
- (2) Every captain of a vessel shall be bound, under the circumstances contemplated in paragraph (1), and without prejudice to more extended obligations imposed upon him by the laws and conventions in force, to render assistance to any person who is at sea in danger of being lost on an aircraft or as the consequence of damage to an aircraft.
- (3) Any assistance so rendered in discharge of the obligation contemplated above shall call for an indemnity based on the expenses justified by circumstances, as well as the damage suffered in the course of the operations, such indemnity to be payable by the operator of the aircraft assisted, or by the owner or *armateur* of the vessel assisted in accordance with the rules of the national laws or of the contracts governing such vessel. The indemnity cannot exceed the sum of 50,000 gold francs per person saved, and if no persons have been saved, the total sum of 50,000 gold francs. In any case the obligation of the aircraft operator shall be limited to 500,000 gold francs. The owner or *armateur* of the vessel shall not be liable beyond the limits determined by the existing laws and conventions governing his obligation in matters of maritime assistance and salvage.
- (4) In case of assistance and salvage of the aircraft at sea, the remuneration shall be determined upon the following basis:

- (a) The measure of success obtained, the efforts and desserts of those who have rendered assistance, the danger run by the aircraft assisted, her passengers, her crew and her cargo, by the salvors and by the salving aircraft or vessel, the time consumed, the expenses incurred, and the losses suffered, and the risks of liability and other risks run by the salvors, the value of the property risked by them.
- (b) The value of the things salvaged.
- (5) No remuneration is due if the services rendered have no useful result, and the remuneration can never exceed the value of the property salvaged at the conclusion of the operations of assistance or salvage.
- (6) The same rules shall apply in case of assistance or salvage at sea by an aircraft or a vessel, in which case the owner or *armateur* of the vessel shall retain the right to avail himself of the limitation of his liability as determined by existing laws and conventions governing maritime salvage and assistance.
- (7) The operator of the aircraft shall have recourse against the owners of goods for such part of the remuneration as pertains to the assistance and salvage of such goods.
- (8) Indemnity and remuneration actions must be brought within two years from the end of the operations of assistance or salvage, and recourse of operators against the owners of goods shall be barred after a period of one year beginning with the date of the payment of the remuneration for assistance or salvage.
- (9) As soon as five ratifications shall have been deposited with the Government of the Kingdom of Belgium, the convention shall come into force between the High Contracting Parties which shall have ratified in ninety days after the deposit of the fifth ratification. Any ratification deposited subsequently shall take effect ninety days after such deposit.
- (10) The convention, after coming into force, shall be open for adherence by other countries, effective ninety days after notification to the Government of the Kingdom of Belgium.

A complete copy of the convention, including the report of the proceedings, may be obtained by any interested member of the bar from the State Department, Washington, D. C.

The convention also adopted a protocol supplementing the convention for the Unification of Certain Rules Relating to Damages Caused by Aircraft to Third Parties on the Surface, concluded at Rome, May 29, 1933.

Inasmuch as the Rome Convention has not been either ratified or adhered to by the United States, it is not deemed necessary to give any detailed explanation of this protocol.

The C.I.T.E.J.A.

January 23 and 24, 1939, Commissions of the C.I.T.E.J.A. met in Paris to consider matters referred to it by the Brussels Conference of September 28, 1938. The United States was represented by Arnold W. Knauth, member of this committee in 1938, and Denis Mulligan of the Civil Aeronautics Authority. These delegates recommended that the C.I.T.E.J.A. seeks more direct participation in its work from various groups concerned with civil air navigation; that the study of insurance be left to the International Association of Aviation Underwriters and International Air Traffic Association; that the question of salvage on land be worked out with those engaged in the practical operation of aircraft in remote desert or wilderness regions, and that foreign judgments should be studied through the International Association.

The next session of the C.I.T.E.J.A. will be in September, 1939. This committee calls the Association's attention to an interesting and comprehensive report by Mr. Knauth concerning the work being done by C.I.T.E.J.A. It is published in the *Journal of Air Law and Commerce*, Vol. 10, No. 2, April, 1939.

Modernization of the Customs and Immigration Laws

The fundamental immigration and customs laws were enacted many years ago. Most of them were drafted when there was no air commerce at all and made to fit the case of a vessel either tied up at dock or lying in the harbor. For instance, the immigrant whose right to enter was doubted is obliged to remain aboard the vessel until his status is determined. Obviously this procedure is impossible in air commerce since the vessel immediately after discharge of passengers and cargo must be taken ashore for housing, inspection, and if necessary, overhauling.

Section 7 of the Air Commerce Act of 1926 makes immigration and customs laws and regulations relating to the administration of each apply to air navigation. Often difficult and amusing situations occur because their language and procedure are obsolete in the field of air commerce. Some effort has been made by government departments to modernize the regulations, and it is therefore suggested that this committee be authorized to study customs and immigration laws and regulations to determine in what respects they should be amended, and cooperate with the proper government departments and agencies to the end that these revisions be made appropriate to the conditions of air transportation.

Accordingly, resolution No. III above set forth, is advanced for this purpose.

MABEL WALKER WILLEBRANDT, *Chairman*,
FRED D. FAGG, JR.*
WILLIAM A. SCHNADER,
FRANCIS B. UPHAM, JR.,
J. E. YONGE.

* This report was approved as herewith presented by all members of the committee present at its final meeting. Mr. Fagg, who was unable to be present at this meeting, has communicated his dissent to that part of the statement, supporting Resolution I which appears on p. 507, reading, "We believe that this Association should cooperate in this study and that all further work on the preparation of state regulation should be postponed until the Civil Aeronautics Authority has completed its study"; and also to the statement (p. 509), "With such a background of law, regulations upon which the authority is now working may be expected to cover every phase of aviation."

MABEL WALKER WILLEBRANDT,
Chairman.