Journal of Air Law and Commerce

Volume 11 | Issue 3 Article 2

1940

Federal Control of Air Commerce

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FEDERAL CONTROL OF AIR COMMERCE

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Development of a body of law govening the use of the air as a medium of travel has been hampered by legal uncertainty from the very start. Those who were most interested in aviation have sought a means whereby the right of flight and the regulations governing the conditions of flight might emanate from a central unchallenged source. Another, and by far the larger group, having neither interest in nor desire to use the air as a highway, feared the effect of its use, and, acutely conscious of the historical limitations on the federal power to regulate commerce in the development of the railroads, actively opposed or urged caution in any federal law on aviation.

The smaller group, at one time regarded as visionary, believing tenaciously in the ultimate NECESSITY of central control, has advanced one theory after another to justify the United States Government regulating all phases of aviation.

Prior to the first federal law in 1926, there was much toying with the thought that the air was analogous to navigable waters, and a law controlling its use could be invoked under the admiralty powers of the Federal Government. A constitutional amendment was also suggested. General use of the airplane, demanding the regulation of a law, arrived before there was any unanimity of legal thought on what kind of a law would be best. This produced a multiplicity of statutes, both state and federal. Conflict of legal thought has continued. Thus, for two decades prior to the passage of the Civil Aeronautics Act of 1938, legal writers have argued the question—Has the Federal Government under its Treaty Power, Postal Power, War Power, power to regulate interstate commerce, or any other power, or legal theory growing therefrom, the right, to the exclusion of the forty-eight sovereign states, to regulate and control aviation?

Observing this debate, I have become increasingly convinced that the lawyers are relatively helpless—as has so often been true when law attempts to impede the rising tide of scientific development. They are unable, by any theory or historical interpretation of constitutional powers, to prevent the law from finally adapting itself to the necessities of the scientific growth.

Although the Civil Aeronautics Act of 1938 falls short of openly declaring exclusive jurisdiction of the Federal Government over air

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transportation, it so practically covers the field that there is very little left for the states to do in aviation except, perhaps, establish and maintain airports, and cooperate with the Federal Government. A study of what has been done by the Civil Aeronautics Authority since it was established in 1938 shows this. By supervision of aircraft, licensing of airmen, control of aviation schools, establishment of a system of air highways (belts 20 miles in width linking all the great cities of the United States), there is from a practical standpoint so little of aviation left for the states to operate on that the realist must surely see that states' rights on this subject are moving into the sunset, just as surely as rights of the American Indian dissolved before the expanding nation.

However, there still exist two rival legal camps, and, believing as I do in the necessity and inevitability of a national law excluding state law, it seems to me pertinent to mention briefly the various federal powers and legal theories which have been argued in the past, and which still may be used to bulwark national control—if and when it is challenged as it continues to reach out to govern more and more elements of air transportation. Theories, advanced from time to time to justify the right of the Federal Government occupying this field of law exclusively, are the more likely to be needed because it seems to be the general view that for everything the Federal Government is now doing, it must find authority in the constitutional power to regulate interstate commerce. As the United States Government fines airmen, revokes licenses, condemns craft, issues and denies certificates of convenience and necessity for new lines, establishes and denies airways and polices them, controls the use of radio, establishes standards of manufacture, maintenance and repair, and hours of service, and promulgates regulations on all the other subjects which may prove necessary, conflict is likely to arise with state law, or the federal authority may be challenged as not deriving sufficient power under the commerce clause of the constitution. To meet such a challenge, the government may cite some or all of these other powers as an aid to its power under the commerce clause.

In 1928 the United States signed the Pan American Convention on Commercial Aviation which pledged that each signatory would "procure as far as possible uniformity of laws and regulations governing aerial navigation."

In 1932 the Committee on Aeronautical Law[1] posed the American Bar Association with the question—"Has not the Congress of the United States now the power and duty (in order to put the Pan American Convention into effect) to pass requisite legislation

1. 57 Reports of A.B.A., pp. 376-81.

irrespective of the difference between interstate and intrastate commerce?"

The Federal Constitution calls treaties of the United States a part of the "supreme law of the land." Courts have, therefore, recognized them as equivalent in operative force to the constitution.

The idea that a treaty may actually add to the delegated powers of the Federal Government over the subject-matter forming the obligations of the treaty was premised upon the case of *Missouri v. Holland,*[2] which upheld a law regulating the killing of migratory birds enacted to make a treaty effective. The law, except for such treaty, would probably have been unconstitutional.

Although there are no American cases in which the treaty power has been construed to enlarge federal jurisdiction over aviation, an opinion by Lord Sankey of the Privy Council of England, *In Re Regulation and Control of Aeronautics in Canada,*[3] presents an interesting analogy. There, the question propounded was whether the Parliament of the Dominion of Canada should alone legislate on the control and regulation of aeronautics, or whether it is so related to provincial property and civil rights as to be properly controlled by province laws with the Dominion's jurisdiction correspondingly limited. The Paris Convention relating to the regulation of aerial navigation was signed by the representatives of allied and associated powers, including Canada, and ratified in June 1922.

In the Canadian courts argument had endeavored to bring the general subject of aeronautics within the class of subjects assigned respectively by the British North America Act of 1867 et seq. to the Dominion, or to the provinces. But a quotation from the opinion of the Privy Council shows that it was the treaty which influenced their decision:

> Their Lordships are of opinion that it is proper to take a broader view of the matter * * * They consider the governing section to be Section 1932, which gives to the Parliament and Government of Canada all powers necessary and proper for performing the obligations toward foreign countries arising under the treaties between the Empire and such foreign countries. * * * It would therefore appear to follow that any Convention of the character under discussion *necessitates Dominion legislation* in order that it may be carried out . . .[4]

In assigned and reserved powers between the provinces and the Dominion, Canada and the United States are not alike. But the Privy Council based its conclusions upon the necessity of the Dominion carrying out a treaty, because under Section 132, the

2. 252 U.S. 416 (1920).

3. Great Britain, Judicial Committee of Privy Council, Oct. 22, 1931, (1932) A.C. 54; 146 L.T. 76; 1932 U.S. Av. 85.

4. Throughout this article italics are supplied unless otherwise indicated.

Dominion has sole power to execute treaties. And—in that respect, our Federal Government is exactly like the Dominion Government; it also has exclusive power to carry treaties into effect.

Arguments advanced for control of aviation by the Federal Government under the constitutional powers of Congress to establish post roads and to provide for the common defense have been persuasive. Indeed, much of the power of the present law in establishing airways rests on the Postal Power. But, although the plenary power of Congress over aviation during war time is readily admitted, the advisability of using it to effect regulation during peace times has been doubted and so it has, to date, been seldom used. With war enveloping Europe, we will likely hear more of this power, justifying air defense expansion and perhaps almost totalitarian acts of control.

In considering the power of the Federal Government to legislate in, and control the field of air law to the exclusion of the states, writers on the subject have mentioned, but it seems to me, have failed to give sufficient emphasis to an interpretation of the commerce clause of the constitution known as the "uniformity of regulation" theory. It first appeared in the case of *Cooley v. Port Wardens*[5] in 1851, and has continued to be recognized in an unbroken line of decisions by the Supreme Court of the United States. These cases point out that there exists a field where the Federal Government may act under the interstate commerce power because factually the problems are so inherently national in character that they require uniformity of regulation affecting all the states alike.[6]

Factually it is becoming clearer every day that aviation in all its phases is so inherently national in character, that it requires absolute uniformity of regulation affecting all planes, all pilots, and all instrumentalities of air commerce alike. But when the legal problems of flying first arose, that was not so plain. To have applied the uniformity of regulation theory then, Congress and the courts would have had to concede that aviation inherently did not admit of state control. In those barnstorming days Congress and the courts did not foresee the stratoliner, or even the small free roving sport planes with a cruising range far wider than state lines. If, however, the question were one of first instance now, with courts able to take judicial notice of the airplane's use in the "blitzkrieg," prob-

5. 12 How. (U.S.) 299, 13 L. ed. 996.

6. See Comment Note to Kelly v. Washington, (302 U.S. 1), 82 L. ed. at p. 14, for other examples. *Mobile County v. Kimball*, 102 U. S. 691, 26 L. ed. 238 (1881) (Case involved improvement of harbors by state) "Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe." *Missouri ex. rel Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298, 68 L. ed. 1027, 1931. "The paramount interest (moving of natural gas from producing field) is not local but national—admitting of and requiring uniformity of regulation.

ably few would be heard to say that aviation is not inherently national in character.

With various theories before it, supporting in different degree federal control of aviation, Congress in 1938 passed the Civil Aeronautics Act.[7] The purposes of the Act, stated in the declaration of policy are 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," the regulation of aviation to promote safety and economical operation, and "the encouragement and development of civil aeronautics."

That is a pretty comprehensive purpose, but apparently it was not the immediate congressional intention to wipe out state regulation. At the Senate hearings[8] in reply to a witness who testified as to the need for federal regulation to the exclusion of the states, SenatorMcCarran expressed the legislative aim:

> Senator McCarran. The thought that you are exploiting now is one that the author of S. 3659 himself (Senator McCarran) had in mind, but he did not want to become revolutionary with one stroke. In other words, he thought that with proper coordination between federal authorities and the state authorities for a period of time, at least, eventually if it were deemed proper, we would come to the condition whereby control of the air would not recognize State lines.

The Act itself is couched in broad terms. Those terms, in the light of the legislative history, lead to the conclusion that although Congress may not have intended the immediate abolishment of all state law and regulation, it did intend to invoke the full strength of all powers of the Federal Government of every kind, both express and implied, and to have them used in a practical way, irrespective of state boundaries.

The theme of this paper is to suggest that step by step in conformity with such legislative aim, the Federal Government is Covering the entire field of aeronautics to such an extent that state law or regulation is becoming unnecessary, save where it can assist or facilitate federal control.

By a rather unusual use of definitions, federal responsibility is extended practically and factually to all phases of aeronautics, all persons engaged in flying, and to almost all instrumentalities of aviation save actual acquisition and operation of airports.

The important definitions are "Air Carrier", "Air Transportation", and "Air Commerce". "Air Carrier means any citizen of the United States who undertakes . . . to engage in air trans-

7. June 23, 1938, C. 601, 52 Stat. 973.
8. S. 3659, 75th Cong., 3d Sess., April 6-7, 1938. See *Rhyne*, Civil Aeronautics Act Annotated (1939).

portation." The definition of "Air Transportation" is included within the definition of "Air Commerce".

Title VI imposes federal responsibility for safety regulations,[9] such as minimum standards, airman certificates, aircraft certificates, airworthiness certificates, maintenance of equipment, inspection, etc. and Section 610 declares it to be unlawful "for any person to operate in air commerce" unless certificates are first obtained from the Authority.

Title I, Section 1(3) of the Act defines "Air Commerce" as

> "'Air commerce' means interstate, overseas, or foreign air commerce or the transportation of mail by aircraft or 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."

To illustrate the broad scope of jurisdiction given to the Authority by this definition of Air Commerce, I have broken it into four parts, each forming the subject of discussion of a separate kind of federal jurisdiction. It will be seen that some powers are old and well accepted, others are novel, and, as yet unsettled in application.

(*a*) *"Interstate, overseas, or foreign air commerce"*

This, of course, is the usually accepted sphere of federal power. For the purposes of this article, it needs no discussion.[10]

(*b*) *"transportation of mail by aircraft"*

To protect the United States mails, and if necessary, to police the craft which carries the mails or the route it takes, is so generally understood to be a field of federal control that it merits only passing mention.

(*c*) *"any operation or navigation of aircraft within the limits of any civil airway"*

The United States Constitution grants to Congress the power to establist post offices and post roads. When this power was surrendered to the Congress by the states, it was a complete power, and carried with it the right to do all necessary to make the power effective.[11] It is, therefore, a governmental duty to provide highways for the carriage of mail.[12] Just as this provision of the constitution

9. A Safety Board was set up in the Act, but by Executive Order, the President abolished this Board and consolidated its functions with the Civil Aeronautics Authority, which hitherto independent Board was transferred to the Commerce Department. The Executive Order is operative as law unless within 60 days thereafter Congress disapproves it. On May 15, 1940 the resolution of disapproval failed in the Senate. Since there was no diminution of federal powers, but only a shift of where the powers would be administered, the Executive Order has no effect on the subject under discussion.

10. Tarney, Methods for Differentiating Interstate Transportation from Intrastate Transportation, (1938) 6 Geo. Wash. Law Review 553.

11. *Ex parte Rapier*, 143 U.S. 132, 36 L. ed. 93.

12. *Ada County v. Wright, State Auditor*, 92 P. (2d) 134, 410 (Sup. Ct. of Idaho 1939).

authorized the development of post roads, so is it invoked in this Act to designate "roads of the air" and their improvement by lights and radio beams.

Title I, Section 1(16) of the Act defines these roadways of the air.

> "'Civil Airway' means 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 air commerce."

A vast network of "airways" has been established, ostensibly, as in the case of post roads, for the mails to pass, but actually, for the use of all who travel. They are twenty miles wide and link almost all the large cities of the United States. Thus the already cover most of the flyable territory of the United States and embrace a large percentage of the population. The Federal Government is given exclusive jurisdiction of the operation of any aircraft coming within the boundary of these roadways of the air, which means that, irrespective of our theories about federal or state jurisdiction, the Federal Government is actually exercising exclusive control over both inter and intrastate aviation in large areas of every state.

To illustrate the extent of this network of civil airways within which no aircraft or pilot may operate without a certificate from the Civil Aeronautics Authority, reference is made to the map on the following page. It shows that every state in the Union is crossed by an airway and practically all the larger cities, with a population of 100,000 or more, are terminal points.

In 1935 federal airways covered 434,280 square miles, but by June 1940 this had increased to 575,122 square miles—or an increase of 32%.[13] As of May 3, 1940, there were one hundred applications for new air routes pending before the Authority, and twenty-five applications for amendments to existing certificates for extensions or to include additional stops.

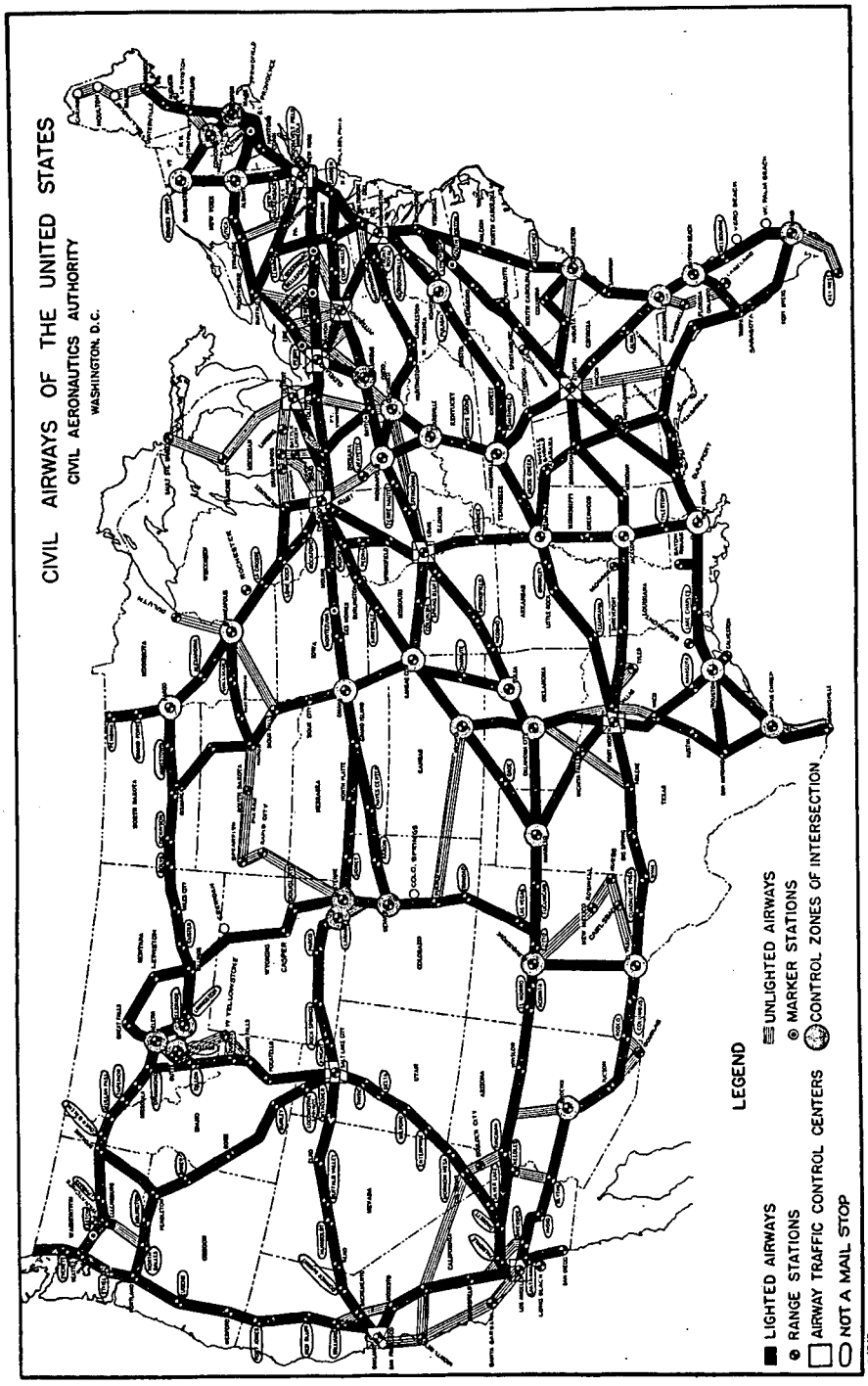
Also the number of certified aircraft and pilots is constantly increasing.[14]

By establishing airways and linking city after city into the network, the Federal Government is steadily acquiring jurisdiction over the territory and the population of all the United States, without, as Senator McCarran prophesied, any recognition of state lines.

The following table, to be studied with the map, gives a better idea of the practical importance of physical coverage of these airways:

13. First Annual Report of Civil Aeronautics Authority, p. 49 (1939) and Department of Statistics of C.A.A.

14. From April 1939 to April 1940, certificated aircrafts increased 16.9% and certificated pilots 35.8%.


CIVIL AIRWAYS OF THE UNITED STATES
CIVIL AERONAUTICS AUTHORITY
WASHINGTON, D.C.
LEGEND
LIGHTED AIRWAYS
RANGE STATIONS
AIRWAY TRAFFIC CONTROL CENTERS
NOT A MAIL STOP
UNLIGHTED AIRWAYS
MARKER STATIONS
CONTROL ZONES OF INTERSECTION

DIVISION AND STATE	AREA IN SQUARE MILES Total	Federal Airways	Percent	POPULATION Total	Cities on Airway Stops	Percent
NEW ENGLAND						
Maine	29,895	3,200	10.7	797,423	187,045	23.4
New Hampshire	9,031	2,000	22.1	465,293	102,062	21.9
Vermont	9,124	3,100	34.0	359,611	32,626	9.1
Massachusetts	8,039	5,240	65.2	4,249,614	931,088	21.9
Rhode Island	1,067	700	65.6	687,497	252,981	36.8
Connecticut	4,820	3,660	75.9	1,606,903	164,072	10.2
Total	61,976	17,900	28.9	8,166,341	1,669,874	20.4
MIDDLE ATLANTIC						
New York	47,654	14,000	29.4	12,588,066	8,168,392	64.9
New Jersey	7,514	4,580	61.0	4,041,334	561,037	13.8
Pennsylvania	44,832	13,760	30.7	9,631,350	2,996,273	31.1
Total	100,000	32,340	32.3	26,260,750	11,725,702	44.6
EAST NORTH CENTRAL						
Ohio	40,740	19,860	48.7	6,646,697	2,388,893	35.9
Indiana	36,045	14,100	39.1	3,238,503	593,697	18.3
Illinois	56,043	19,620	35.0	7,630,654	3,523,531	46.2
Missouri	68,727	19,540	28.4	3,629,367	1,221,706	33.7
Total	201,555	73,120	36.2	21,145,221	7,727,827	36.5
WEST NORTH CENTRAL						
Minnesota	80,858	9,240	11.4	2,563,953	858,046	33.5
Iowa	55,586	9,220	16.6	2,470,939	248,497	10.1
Michigan	57,480	4,620	8.0	4,842,325	2,130,755	44.0
Wisconsin	55,256	6,760	12.2	2,939,006	578,249	19.7
North Dakota	70,183	11,420	16.3	680,845	39,709	58.3
South Dakota	76,868	7,620	9.9	692,849	70,162	10.1
Nebraska	76,808	12,280	16.0	1,377,963	320,041	23.2
Kansas	81,774	8,740	11.0	1,880,999	239,088	12.7
Total	554,813	69,900	12.6	17,448,879	4,484,547	25.6
SOUTH ATLANTIC						
Delaware	1,965	345	17.3	238,380	.....	...
Maryland	9,941	2,700	27.2	1,631,526	804,874	49.4
Dist. of Columbia	62	62	100.0	486,869	486,869	100.0
Virginia	40,262	15,360	38.1	2,421,851	272,980	11.3
West Virginia	24,022	5,140	21.4	1,729,205	135,980	7.9
North Carolina	48,740	6,960	16.3	3,170,276	173,623	5.5
South Carolina	30,495	9,180	30.1	1,738,765	171,723	9.9
Georgia	58,725	16,440	28.0	2,908,506	469,561	16.1
Florida	54,861	26,140	47.6	1,468,211	510,737	34.8
Total	269,073	82,322	30.6	15,793,589	3,026,347	19.2
EAST SOUTH CENTRAL						
Kentucky	40,181	4,380	10.9	2,614,589	307,745	11.8
Tennessee	41,687	13,660	32.8	2,616,556	632,609	24.2
Alabama	51,279	9,900	19.3	2,646,248	394,678	14.9
Mississippi	46,362	10,220	22.0	2,009,821	103,906	5.2
Total	179,509	38,160	21.3	9,887,214	1,438,938	14.5
WEST SOUTH CENTRAL						
Arkansas	52,525	5,740	10.9	1,854,482	81,679	4.4
Louisiana	45,409	10,000	22.0	2,101,593	592,174	28.2
Oklahoma	69,414	14,820	21.3	2,396,040	326,647	13.6
Texas	262,398	56,100	21.4	5,824,715	1,457,482	25.0
Total	429,746	86,660	20.2	12,176,830	2,457,982	20.2

MOUNTAIN						
Montana	146,131	24,980	17.1	537,606	123,727	23.0
Idaho	83,354	10,440	12.5	445,032	47,444	10.7
Wyoming	97,548	14,760	15.1	225,565	42,516	18.8
Colorado	103,658	8,900	8.6	1,035,791	371,194	35.8
New Mexico	122,503	16,900	13.8	423,317	41,451	9.8
Arizona	113,810	16,500	14.5	435,573	94,419	21.7
Utah	82,184	13,060	15.9	507,847	140,267	27.6
Nevada	109,821	10,940	10.0	91,058	26,911	29.5
Total	859,009	116,480	13.6	3,701,789	887,929	24.0
PACIFIC						
Washington	66,836	14,500	21.7	1,563,396	513,321	32.8
Oregon	95,607	12,580	13.2	953,786	319,443	33.5
California	155,652	31,160	20.0	5,677,251	2,675,406	47.1
Total	318,095	58,240	18.3	8,194,433	3,508,170	42.8
UNITED STATES[15]	2,973,776	575,122	19.3	122,775.046	36,927,316	30.0

The United States has an area of 2,973,776 square miles and of this 575,122 square miles, or 19.3 per cent, is covered by Federal airways. The East North Central, Middle Atlantic, South Atlantic and New England states have a total area of 632,604 square miles and 205,682 square miles, or 32.5 per cent, are traversed by airways.

The Mountain states are 13.6 per cent covered by airways; the West North Central states by 12.6 per cent and the Pacific states by 18.3 per cent. These smaller percentages for the western states are readily understandable when consideration is given to topography and population.

In considering the population statistics in the above table, it must be kept in mind that column five, population of cities on airway stops, represents only those cities that are in an airway and also actually on a scheduled stop. Naturally the percentages shown in column six would have been larger if data could have been obtained to show all the population of cities, towns and rural areas that are really within the path of an airway.

The table reveals, as is to be expected, that the State of New York has the highest percentage of its population—64.9%—living within airways and on scheduled stops. Over 60% of the areas of the States of New Jersey, Massachusetts and Rhode Island are now embraced within civil airways and consequently under federal jurisdiction. And Connecticut, still asserting a vigorous policy of state control, has only 25% of her territory left where her state licensed planes may fly. Seventy-five per cent of the area of the state has come into the system of civil airways and under the control of the Federal Government.

15. Population figures and square mile area of states obtained from *United States Department of Commerce, Bureau of Census, United States Summary* (1930). Miles of civil airways from *C.A.A.*, as of June 30, 1940.

(*d*) *"any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."*

This jurisdiction over *any* aircraft, whatever its mission, or wherever it is found, *if* it is likely to endanger safety in interstate commerce extends the arm of the United States well beyond the territory embraced within civil airways. It is the penumbra of federal jurisdiction.

But control over operations intrastate in character in order to protect interstate commerce is justified to some extent under the early cases upholding the Safety Appliance Acts on railroads,[16] by the Minnesota Rate Cases,[17] and by related decisions where state laws or regulations have been invalidated or federal requirements upheld, because, on the one hand, the state had imposed an undue burden on interstate commerce,[18] or because the subject-matter of the federal law was so inherently national in character that uniformity of regulation was necessary.[19]

An uncertified pilot flying an aircraft that is not airworthy in intrastate commerce may directly affect or endanger safety in interstate air commerce.

Such a pilot will surely use the airways, and will land on ports accommodating transport and mail planes. It thus becomes *necessary* from a practical standpoint for the Federal Government to control him.

A large proportion of the miles flown over the airways are by private fliers on unscheduled flights. This is shown by the following comparative table:

CLASSIFICATION OF USES OF FEDERAL AIRWAYS, 1926-38[20]

AVERAGE ANNUAL PLANE-MILES FLOWN OVER FEDERAL AIRWAYS

	1926-1930		1931-1934		1935-1938[21]	
	Plane Miles	Percent	Plane Miles	Percent	Plane Miles	Percent
(a) Government, except air mail	10,981,000	23.0	21,247,800	23.0	39,389,000	26.0
(b) Scheduled transport:						
Non-mail flights	7,222,500	15.1	14,871,000	16.1	24,732,500	16.3
Mail flights	7,740,000	16.2	29,651,000	32.1	37,659,000	24.9
Total	14,962,500	31.3	44,522,000	48.2	62,391,500	41.2

16. *Southern Railway Co. v. United States*, 222 U.S. 20, 56 L. ed. 72 (1911) The Safety Appliance Acts apply to all cars used on interstate railroads without respect to whether engaged in interstate commerce.

17. Minnesota Rate Cases, 230 U.S. 352; 57 L. ed. 1511 (1913).

18. *Atlantic-Pacific Stages v. Stahl*, 36 F. (2d) 260 (1929) state statute regulating motor vehicle carriers held void under commerce clause, in so far as it attempted to require carriers to apply for certificates of convenience and necessity for interstate transportation. *Station WBT, Inc. v. Poulnot*, 46 F. (2d) 671 (1931). A state law imposing a tax on radio receiving sets held unconstitutional as imposing burden on interstate commerce.

19. See Comment Note to Kelly v. Washington (302 U.S. 1), in 82 L. ed. 14, Subdiv. II "Instances of Need for Uniform Regulation," p. 17 et seq.

20. *Federal Coordinator of Transportation*, Public Aids to Transportation, Vol. 1, Air Transport (1940).

21. 3.5 years to June 30th.

(c) Non-scheduled civil aviation.	21,801,000	45.7	26,612,000	28.8	49,716,000	32.8
Grand Total	47,744,500	100.0	92,381,000	100.0	151,496,500	100.0

Approximately one-third of the miles flown over airways is by private or non-scheduled fliers. This phase of aviation is so likely to become a hazard to mail and transport planes that it must be under the federal power. It is not enough merely to control the private flier *while he is on the airway*. His ship, its equipment, and repair, and his own experiences are where danger may lurk. To control these factors, the government must follow him off the airways and supervise him before he enters them.

It is probable that if an air school sending untrained pilots up on practice flights were established near, but not actually on an airway, the Authority could control or stop its operations even though all flights were intrastate in character. Undoubtedly Congress in using the words "*may* endanger" intended to give latitude to the Authority to supervise, if necessary, airport operations, to regulate the private flier's use of airways and to exercise a sound discretion in issuing certificates of convenience and necessity.

The Civil Aeronautics Authority has not as yet had to go before the courts to protect its right to control allegedly intrastate flight because it may affect interstate air commerce. Jurisdiction has been questioned only once, and that case was decided on another point.

In *Condor Air Lines, Inc.*[22] application was made by Condor for a certificate of public convenience and necessity to operate between two points in California. United Airlines intervened, claiming the Authority lacked jurisdiction even to conduct a hearing because the proposed operations were to be intrastate. Jurisdiction was maintained, however, because applicant connected with the United Airlines Transport Corporation and Transcontinental and Western Air, Inc., which carriers are engaged in interstate transportation of passengers and property.[23]

State and Federal Cooperation

No argument is here advanced to exclude the states from the entire field of aviation. In Section 205 (b) of the Act, Congress provides for cooperation between the Federal Government and the

22. C.A.A. Opinions, Vol. 1, Temporary page No. LXXXVI, decided March 8, 1940.

23. Of connecting rail lines serving as a through route, the Supreme Court in *Norfolk and Western R. Co. v. Pennsylvania*, 136 U.S. 114, 119, said: " * * * any one of the roads forming a part of, or constituting a link in, that through line, (from Pennsylvania out of the state) is engaged in interstate commerce, * * * "

states. The acquisition and operation of airports is a subject that demands cooperation. But modern air transportation can not recognize state lines; it requires uniformity of regulation, and firmness and finality of control. The great majority of the states have recognized this and have passed state laws adopting federal rules, and enforcing their observance. That is real cooperation.

The Civil Aeronautics Authority has set up a State Coordination Section. Thirty-two assist by requiring federal licenses for all aircraft, and five additional states require their commercial aircraft to have federal licenses. Thirty-three states require federal licenses for all pilots and four additional states require all commercial pilots to have federal licenses. Seven states require their aircraft and pilots to have federal *or* state licenses (which is confusing) and two states—Connecticut and New Jersey—require *only* state certificates.[24] However, 75.9% of the area of the State of Connecticut is covered by air highways, and New Jersey is traversed by airways to the extent of 61.0% of her surface. Even granting a pilot could navigate in either one of these two states without entering the limits of any civil airway, it does not follow that he might not directly affect, or endanger safety in interstate air commerce.

Radio law started by a recognition that all radio communication is necessarily interstate in character.

As stated in *Whitehurst v. Grimes:*[25]

> *Radio communications are all interstate.* This is so, though they may be intended only for intrastate transmission; and interstate transmission of such communications *may* be seriously *affected* by communications intended only for intrastate transmission. Such communications admit of and require a *uniform system of regulation* and control throughout the United States and Congress has covered the field by appropriate legislation.

In *Technical Radio Laboratory v. Federal Radio Commission,*[26] the court said:

> It is clear, however, that the broadcasting service of WTRL cannot be exclusively intrastate, for its location is such that *its electric waves may cross state lines, and may also interfere with the reception of radio communications from other states.*

As the new science of Radio first presented legal problems it inspired no landowner with fear for his life and his property; whereas the airplane did. Although to most of us it seems just as true that the airplane "may cross state lines" as it does that the radio waves will cross state lines, the law of aviation started off

24. U.S. Civil Aeronautics Authority, State Aeronautics Legislation Digest and Uniform State Laws, Bulletin No. 4 (1939).

25. 21 F. (2d) 787 (1927).

26. 36 F. (2d) 111, 113 (1929).

with a dual jurisdiction and still has that handicap to overcome. The Civil Aeronautics Act of 1938 has done much to remove it painlessly. A wise administration of the Act by the Civil Aeronautics Authority has kept conflict down, and developed air commerce jurisdiction.

My earliest personal recollection is of traveling day after day with my mother and father in a covered wagon, westward against the sun. They were to "run for" a claim in southwest territory, called the Cherokee strip, near what is now known as the Cimarron Valley. Waiting on the line, aspirants for land at the signal of a pistol shot, "ran" on horseback, in wagons or in teams. Many were equipped with plows, and finding a site that pleased, they started running a furrow, to establish "squatter's rights", around their chosen acres.

These memories of mine of pioneer conditions are not shared by leaders in aviation. To a great extent, it is dominated in both its legal and operative fields by young men and women. However, aviation is still pioneering. And I have lived long enough to know that squatter's rights, as they were understood by the pioneer, may, through continued peaceful, constructive occupancy, become exclusive legal rights.

Under the Civil Aeronautics Act of 1938 the Federal Government is "plowing its furrow" around the entire field of aviation. Even the skeptic on the subject of federal control must concede that it is acquiring by peaceful, constructive occupancy, at least a squatter's right over all the flyable surface of the land, without reference to state lines.

Since practically everyone joins in desiring the extension of our system of airways, with all their aids to safe flying, why not view the legal question realistically, and recognize that the role of the state is no longer to regulate, but only to supplement and help enforce federal law and federal regulations, and to cooperate in the establishment of airports?

Why not concede that it is not a wise function of the state to set up rival licensing or regulating bodies?

Here, as in other fields, necessity is leading the law!

Why not, then, admit it, and cooperate in ripening even what some may regard as "squatter's rights" of the Federal Government into an exclusive jurisdiction of the air!