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Oswald Ryan

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FEDERAL AND STATE JURISDICTION OVER CIVIL AVIATION†

BY OSWALD RYAN*

The question as to the proper field for activity by the State and Federal Governments in respect of the rapidly developing aviation business¹ is a question both of law and of policy. On the policy side we are concerned with such questions as: Is it necessary or desirable that a given aeronautical activity be subjected to public control? If so, should that control be one of state or federal law? On the legal side, we deal with such questions as the constitutional power of the respective governments, and the extent to which that power has been exercised by Congress.² A failure to distinguish between matters of law and of policy sometimes results in confusion, and it is well to keep in mind that in general, the legal validity of a statute is not determined on the basis of its policy or wisdom; nor is discussion of what a statute *ought* to say relevant when we are considering what the law *says*.³

In its everyday, routine functions, the Civil Aeronautics Board⁴ is concerned with the interpretation and application of the provisions contained in the Civil Aeronautics Act of 1938. That Act consti-

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*Member, Civil Aeronautics Board; Chairman, Federal Interdepartmental Committee on Mechanic Training for the Aircraft Industry; Former General Counsel, Federal Power Commission; Member, President's Legal Advisory Committee on Federal Utility Legislation.

1. Current comment on rate and extent of growth is found in testimony before the Subcommittee of the Committee on Appropriations in connection with appropriations for development of airports (Hearings on H. R. 10539, 76th Cong., 3d Session); see also air carrier operating statistics, 1 Civil Aero. Journal 425 (Sept. 15, 1940.)

2. Interesting questions both of law and policy in the regulation of civil aeronautics have been recently discussed. Cf. Willebrandt, "Federal Control of Air Commerce" (1940) 11 JOURNAL OF AIR LAW 204; Morris "State Control of Aeronautics", 11 *id.* 320.

3. Cf. *Cardozo*, "The Nature of the Judicial Process", pp. 14-18; Holmes dissenting in *Hammer v. Dagenhart*, 247 U. S. 251 (1918); pointing out that where Congress speaks under the interstate commerce clause, the Court will not "intrude its judgment upon questions of policy."

4. The Civil Aeronautics Board is the five-member body which exercises the quasi-judicial and quasi-legislative powers delegated by Congress in the Civil Aeronautics Act of 1938. Prior to July 1, 1940, the effective date of the Executive Reorganization Order No. 4, the Board bore the designation "Civil Aeronautics Authority". It is an independent agency in the exercise of its powers, although, by the terms of the Executive Reorganization Order No. 4 it is located within the framework of the Department of Commerce for "administrative housekeeping" services.

tutes the broadest and most significant jurisdiction which the Congress has thus far asserted over civil aviation.⁵

In construing the Act, first reference is naturally to the constitutional principles involved. From section 1 of the Act it is apparent that Congress in asserting this jurisdiction has relied upon its constitutional power over interstate and foreign commerce; as well as its postal power, and in some aspects, perhaps, upon its treaty-making power (in occupying the field of civil aviation). These powers, however broad, are limited by the provisions of the Tenth Amendment, which reserves to the states respectively and to the people all powers not specifically delegated to the Congress.⁶ The line which separates the field of Congressional action, on the one hand, from that of state action on the other, in matters of civil aviation, is not one which may be drawn with any exactitude in the absence of Supreme Court decisions dealing with this subject. How the cases will turn out is more or less a matter of "expert guess." But we have an indication of the probable approach of the court toward the issue when it arises. Justice Holmes, in a case where the sovereign State of Missouri challenged an act of Congress as an interference with rights reserved to the states under the Tenth Amendment made the following significant statement: "We must consider what this country has become in deciding what that amendment has reserved."⁷

No sounder rule of judicial interpretation has been laid down by our highest court than that which was set forth in the Missouri case. We may safely undertake to apply it to the problem before us; for we may be sure that the Court will consider "what this country has become" in the field of aviation in deciding jurisdictional questions which may arise; and we may be equally certain that this realistic view will aid in determining matters of policy in this field.

If we had before us a national air map, that map would graphically reveal, but only in part, "what this country has become" in the field of aeronautical activity. Less than four decades have passed away since the faith of two Americans proved the power of man to fly; yet that brief span has brought a development without any parallel in transportation history. We have seen an early American aircraft of primitive, amateur construction develop into

5. See two articles by the present writer entitled "The New Regulatory Policy Embodied in the Civil Aeronautics Act", *Public Utilities Fortnightly*, Vol. 9, Apr. 27, 1939, pp. 515-25; Vol. 10, May 11, 1939, pp. 597-604.

6. *Kansas v. Colorado* 206 U. S. 89-92 (1907).

7. *Missouri v. Holland* 252 U. S. 416 at 434 (1919). The Supreme Court has well asserted of the Constitution that: "It was made for an undefined and expanding future." 110 U. S. at 530-1.

a flying craft which today challenges the attention of the world. The small sheds where American airplanes had their beginnings have given way to vast manufacturing establishments where scientific research joins with engineering and mechanical skill to produce airplanes of unexcelled performance.⁸

We have seen come into being a vast network of federal airways, twenty miles wide and of unlimited height, marked by visible guide posts on the ground and invisible radio signals in the air. Those airways cross every state in the Union; they cover over 575,000 square miles; they traverse 28,745 miles in length and the network is growing at an unparalleled pace. Over those highways of the air more than 15,400 licensed planes are flown by 45,500 licensed pilots, and the number of planes and pilots is increasing at a rate greater than ever known.⁹

This was substantially the picture presented to the Congress at the time the Civil Aeronautics Bill was under consideration two years ago. Here was a new transportation, a transportation fundamentally different from any that had ever been known. The airplane was the only transportation machine which was not bound by the barriers of mountains or the shores of oceans, or the political boundaries of sovereign states. The Civil Aeronautics Act was drafted in the light of the facts of this new development. Its regulatory provisions were intended to meet realistically the necessities of civil aviation.¹⁰

Let us take a brief glance at the extent of that jurisdiction asserted by the Act. The regulatory jurisdiction, like that imposed upon the railroad industry, is of a two-fold character. First, it embraces the power to regulate the economic aspects of scheduled air transportation and other commercial services. In this respect it is concerned with the issuance of certificates of public convenience and necessity, the regulation of rates, services, consolidations, interlocking relationships and other subjects of economic control. Second, the Act provides for federal control of traffic and other operations, which may be described as "safety regulation." This includes, of

8. In matters of aircraft production, as well as operations, the ink is hardly dry on statistics indicating past growth before these figures are eclipsed by new records. Thus, in the case of factory working space devoted to airplanes, engines and propellers, we find 9,123,143 square feet in Sept. 1939; 16,703,230 square feet in Nov. 1940; and a predicted 33,370,822 square feet at the conclusion of existing expansion programs in 1942 (Aero. Chamber of Commerce Chart circulated Nov. 22, 1940). Among the valuable sources of comparative data are: Foreign Commerce Weekly Reports (U. S. Dept. of Commerce); Civil Aero. Journal (Civil Aeronautics Authority); The Aircraft Yearbook, and other publications of the Aeronautical Chamber of Commerce.

9. Civil Aero. Journal, October 15, 1940, pp. 454-5.

10. I have discussed these provisions in detail in "The New Regulatory Policy Embodied in the Civil Aeronautics Act", 23 Public Utilities Fortnightly, 515, 597.

course, the establishment and enforcement of civil air regulations, the certification of aircraft and airmen, and similar devices for achieving safe operation.

A question as to the economic jurisdiction of the Civil Aeronautics Board is now pending in the District Court of the United States for the Southern District of New York, in an action involving unlicensed operations of the Canadian-Colonial Airways. Since the Civil Aeronautics Board is a plaintiff in that case I believe it proper to avoid discussion of questions as to the Board's economic jurisdiction, now the subject of consideration by the Federal Court.¹¹ I shall confine my remarks, therefore, to the question of our safety jurisdiction.

As implemented by licensing and similar provisions, the Act provides for federal control over (a) all air transportation that traverses the vast system of federal airways; (b) all air navigation which directly affects or may endanger safety upon these airways; (c) all air transportation that carries the air mail, and (d) all air navigation which directly affects or may endanger that air mail transportation. It also extends to (e) the constantly increasing volume of unscheduled air commerce of an interstate character which operates outside the federal airways; and finally (f) to all air navigation that directly affects or may endanger the safety of this "off-the-airways" interstate air commerce.¹² Few, if any, federal regulatory statutes have been enacted with as broad a jurisdiction over an industry as that asserted in the Civil Aeronautics Act of 1938.

It will be apparent from this reference to the safety jurisdiction of the Civil Aeronautics Board that the boundaries of that jurisdiction must necessarily depend upon the particular facts of each case. Those boundaries are not all easy of ascertainment. The jurisdiction that concerns the federal airways should be comparatively easy to define because we know where the federal airways are located;¹³ we should also be able, without difficulty, to determine the air navigation that directly affects or may endanger safety on

11. *Civil Aeronautics Board v. Canadian Colonial Airways, Inc.*, (D. C. S. D. N. Y., civil #10-381, filed Sept. 16, 1940). The action is brought pursuant to sec. 1007 of the Act, to enjoin air transport service conducted by defendant between New York City and Niagara Falls, N. Y., without the certificate prescribed by sections 401 (a) and 604 of the Act. Although the points served are both within the same State, it is alleged that defendant's carriage of passengers originating in, or destined to, other States constitutes "interstate air transportation", as defined. Also that the operation burdens air commerce within the doctrine of *Houston & Texas Ry. Co. v. United States* 234 U. S. 342 (1914).

12. Civil Aeronautics Act, section 1; see also the specific provisions for certificates in sections 601-610.

13. The federal airways are designated by the Administrator of Civil Aeronautics (in the Civil Aeronautics Authority) who has the responsibility for their establishment, maintenance and operation. Act, sections 301-2.

those airways. The difficulty arises when we undertake to determine the scope of the Board's regulatory power over air navigation not traversing federal airways. This traffic includes both a rapidly increasing volume of unscheduled, off the airways interstate flight, and such other intrastate air navigation as directly or potentially affects this off the airways commerce. Here is the twilight zone in the jurisdiction conferred by the Civil Aeronautics Act. Somewhere in that zone the power of the Federal Government theoretically ends and the exclusive jurisdiction of the state theoretically begins.¹⁴

The Civil Aeronautics Board does not undertake to say at this time where the boundary line of federal and state jurisdiction is located in that twilight area. That line must be located with reference to jurisdictional facts which are concerned with the volume, character and location of flying activities outside the federal airways, and those facts have not thus far been determined.

The Civil Aeronautics Board has proposed that this and other jurisdictional questions be made the subject of study by a committee to be composed of representatives of the National Association of State Aviation Officials, the Civil Aeronautics Board and the Administrator of Civil Aeronautics.¹⁵ This jurisdictional committee would undertake to explore both the facts and the law upon which the respective federal and state jurisdictions must depend. It would act in an advisory and consulting capacity from time to time as specific jurisdictional problems may arise. By thus taking common counsel the Board hopes that the solution of jurisdictional problems in the common interest of all civil aviation may be realized.

What, then, is the proper field for state regulatory action? The Civil Aeronautics Board believes that if, upon investigation it is found that there are zones of aeronautical activity requiring public control which are not and cannot be covered by federal regulatory statute because of constitutional limitations, the states should exert their regulatory power to close the resulting gap in public regulation. In other words, if there is found to exist in the air space of the nation a "no-man's land" into which the Federal Government cannot, under the Constitution, enter, and in which the states have not exerted their power, then the states should

14. Cf. Stimson, "Federal and State Constitutions of the United States", Ch. III, and contrast the viewpoint of Corwin, "The Twilight of the Supreme Court", Ch. I (Dual Federalism).

15. This proposal was made by the present writer on behalf of the Board and Administrator in the delivered address to the National Association of State Aeronautics Officials at Louisville, Ky., October 18, 1940. The Association has approved the plan.

exercise in that field a jurisdiction where the situation is such as to call for public control.

While Congress, in the Civil Aeronautics Act, may be found to have extended its jurisdiction over a larger part of the aviation field than was ever before occupied by the Congressional power, it by no means follows that the states have been excluded from participation in the development of American aviation. On the contrary, the states have a vital contribution to make, and the progress of this great industry can best be advanced by the states and the nation marching shoulder to shoulder.¹⁶

One important service which the states can render to aviation would be to provide assistance in the enforcement of the Civil Air Regulations relating to safety in flying. The extraordinary and unparalleled rate at which aviation is expanding is making increasingly difficult the problem of enforcing the Civil Air Regulations in the field of non-scheduled flying. During the calendar year 1939, one out of every ten non-air-carrier passenger flights which resulted in accident was a flight made in violation of our Civil Air Regulation prohibiting student pilots from carrying passengers. Student pilots during that year were responsible for forty-three percent of the fatal accidents in which passengers were involved. In other words, if it had been possible to obtain a one hundred percent enforcement of this one regulation, nearly one-half the fatal accidents involving passengers would in all probability have been avoided and twenty-two percent of the passengers who were killed might now be among the living. It would thus appear that the Civil Aeronautics Board and the Administrator are in a position to welcome the assistance of the states in the enforcement of the safety regulations.

In order to establish a legal basis for that assistance, it may be necessary for the states to re-enact the federal safety regulations and make them applicable to flying within the state, so that a failure to comply with the federal regulations would constitute a violation of state law.¹⁷ The implementing machinery is expected to be the subject of consideration by the jurisdictional committee to which reference has been made. The Civil Aeronautics Board believes, however, that if it should be found necessary for the states to adopt safety regulations, those regulations should be the federal

16. It is significant that the Civil Aeronautics Act specifically recognizes state participation in matters of mutual interest arising under the Act. (Act, sec. 205 (b)).

17. See, for example, the provisions made in the Pennsylvania Aeronautical Code, modeled in part on the draft of a Uniform State Aeronautical Code adopted by the NASAO (sections 301-2, Act of May 25, 1933; P. L. 1001).

regulations; there should be no variance between them. The Board believes this is necessary to insure that uniformity of regulation which is conceded to be essential to the well-being of civil aviation.¹⁸

Finally, the states have an opportunity to make a tremendously valuable contribution to the *development* of civil aeronautics. This involves more promotional than a regulatory function. It is concerned with the encouraging and fostering of activities for the advancement of aviation.

Thus, there is need for the development of a national system of airports. That objective calls for important legislative action by the states, such as legislation to enable municipalities and other political subdivisions of the states to establish, operate and maintain airports and to act in association with one another in the establishment of airports outside municipal boundaries; state laws to provide for state aid to airport development and to permit the acceptance of federal aid where such is provided; legislation for the protection of airport approaches against obstructions; and finally, legislation to insure the proper regulation of airports, especially with respect to their location.¹⁹ Here again uniformity of law is desirable, and the Civil Aeronautics Board believes that the adoption of an adequate Uniform Airports Act will constitute an important step toward the promotion and development of civil aviation.²⁰

The Civil Aeronautics Board is confident that these important problems can and will be solved in a spirit of cooperation and common purpose to advance American aviation. That confidence rests upon a sound foundation; knowledge of the spirit and character of

18. The Committee on Aeronautical Law of the American Bar Association in summarizing prior conflict of opinion concerning jurisdiction to regulate aviation has said: "There has, however, been one point in which all groups of the bar have at all times agreed, namely, that uniformity of law and regulations is desirable." (A. B. A. Journal, 1939).

19. Evolution of a national "system" is presently taking place principally by action of (a) the Federal Government, in allocating relief and defense funds to airport development (Pub. Res. No. 88, 76th Cong., Sec. 1 (c) - (d) and Pub. Law No. 812, 76th Cong.); (b) state aviation and planning boards (e.g. report to the Governor of Texas by the Texas Aeronautical Advisory Committee); and (c) municipalities, who act with a view to foreseeable local airport requirements (e.g. Master Airport Plan submitted Jan. 30, 1940, by the Regional Planning Commission of Los Angeles County to the County Board of Supervisors). Pursuant to sec. 302 (c) of the Act, an airport survey was conducted by the Civil Aeronautics Board and reported March 23, 1939 (House Doc. 245, 76th Cong. 1st Session). Legal problems concerning airport, enabling, zoning and planning legislation have received extensive discussion, and a considerable body of case-law has been built up. Cf. "Report of Committee on Airport Zoning" (1930) published by the Bureau of Aeronautics, U. S. Dept. of Commerce; Rhyne, "The Legal Experience of Airports" (1940) 11 JOURNAL OF AIR LAW 297; Hunter, "Airport Legal Developments—1940" to be published in the yearbook of the municipal law officers, "Municipalities and the Law in Action—1940" (in preparation).

20. The Uniform Airports Act, drafted in 1935 by the Aeronautical Committee of the American Bar Association, has been found inadequate in several particulars; e.g. provision for bonding, zoning, receipt of Federal aid, and joint acting by municipalities. The problem of adequate airport legislation is now under consideration by the Airport Section of the Civil Aeronautics Administration (the staff of the Administrator of Civil Aeronautics).

the state aviation officials.²¹ No group in the United States contributed more of earnest effort to persuade the Congress to grant this broadest jurisdiction ever delegated to a federal agency. State regulatory officials, acting in the best of faith, have frequently urged against the assertion of broad federal jurisdiction over public service industries, fearing an encroachment upon state powers. But the Civil Aeronautics Act of 1938 had the unqualified support of the aviation officials of the various states who strongly urged the need for this legislation.²²

There should not be permitted to grow up in this country a dual system of inconsistent and conflicting regulation to harass American aviation. It would be difficult to imagine a more unhappy fate for American aviation. As a lawyer engaged for more than two decades in the field of public utility law, the present writer was witness to the long conflict between the Federal Government and the states in the regulation of the public utilities and the rail transportation of this nation. Two systems of regulation, federal and state, grew up side by side, while the great public service industries that were regulated by them were burdened by wasteful duplication of regulation and by interminable conflict in the courts.

The Civil Aeronautics Board does not want to see flying in this country made less attractive and more costly by unnecessary regulation, by duplicate regulation, or by conflicting regulation that leads to endless controversy. It believes that this will not happen if the leaders of aviation in the States and in the nation will join forces in a common cause to prevent it.

21. The proceedings of the National Association of State Aviation Officials abound with evidence of the objective viewpoint taken by its members on questions of jurisdictional policy in regulation; e.g. remarks of Fred L. Smith (1934) 5 *JOURNAL OF AIR LAW* 515 at 518; A. C. Blomgren (1934) 5 *id.* 585 at 588; G. R. Wilson (1938) 9 *id.* 4 at 8.

22. Cf. Smith, "The Program of the NASAO" (1935), 6 *JOURNAL OF AIR LAW* 480 at 483; Wilson, "Annual Report of the President" (1938) 9 *id.* 4 at 11. At its 7th annual meeting in 1937 the NASAO, giving "emphasis and concurrence to only one resolution directed toward the solution of the most outstanding problem of the day" went on record as favoring "national legislation which may look toward the ultimate goal of putting all governmental functions concerning civil aeronautics as far as practical under the jurisdiction of a single independent non-political body . . . Such a board or commission should have jurisdiction over all aviation matters, such as rate-making, certification of airmen and equipment, airport construction and foreign air commerce . . ." (with provision for consultation with the Post Office and State Departments). (9 *id.* 130)