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JUDICIAL AND REGULATORY DECISIONS

Department Editors: Norman E. Johnson and Amory O. Moore*

THE CONSTITUTIONALITY OF STATE AND MUNICIPAL AIR TRAFFIC CONTROL

The Civil Aeronautics Act of 1938¹ provides for safety in air commerce by establishing a nation-wide scheme of air traffic control in which federal regulations govern air traffic throughout the country. Enforcement of the regulations, called "air traffic rules," is the responsibility of the Civil Aeronautics Administration, and upon the policing of the airways by that agency's Office of Safety Regulation depends the effectiveness of federal air traffic control in the United States. During the infancy of aviation, such control by a single agency was no doubt adequate. But today the number of non-commercial fliers, among whom are most of the violators of the air traffic rules, is increasing rapidly, and the already overburdened Office of Safety Regulation, whose corresponding growth appears to have been forestalled by an economy-minded Congress,² has found itself unable effectively to enforce the air traffic rules against them.³

The obvious solution to the problem is to supplement federal air traffic control with control by the police agencies of state and municipal governments. The Civil Aeronautics Administration has therefore begun to encourage the imposition of punishment by the states, under their own laws, upon persons flying aircraft recklessly within their jurisdictions. This it has done, in cooperation with the National Association of State Aviation Officials, by drafting and presenting to the state legislatures a suitable "reckless-flying statute" and by participating in state programs to train local police officers in its enforcement and that of other appropriate local law.⁴

The plan of necessity assumes that, in spite of the extensive federal regulation of safety in air commerce, the states retain a power to control air traffic sufficient to enable them constitutionally to prohibit and punish reckless flying over their territories. The purpose of this note is to determine the validity of that assumption. Because of the fact, however, that the various state laws permitting local air traffic control are completely without uniformity,⁵ the inquiry will be general rather than specific. The

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¹ 52 Stat. 977 *et seq.*, 49 USCA §401 *et seq.* (Supp. 1947).

² See, *e.g.*, the bitter debate over a \$4,849,000 item for operating airport traffic control towers proposed for inclusion in CAA's appropriation for fiscal year 1948. 93 Cong. Rec., May 14, 1947, at 5442 *et seq.*

³ See, for discussion of CAA's enforcement program, Elwell, *Enforcement of Safety Regulations*, 14 JOURNAL OF AIR LAW AND COMMERCE 318, 327-330 (1947); for discussion of the problem raised by increased non-commercial aviation and decreased appropriations for CAA, Memorandum to Joint Committee on Federal-State Relations from Assistant Counsel General, Safety, with attachments (CAB, Jan. 3, 1947).

⁴ See Elwell, *supra* note 3, at 330-331; Plaine, *State Aviation Legislation*, 14 JOURNAL OF AIR LAW AND COMMERCE 333, 337-339 (1947); Air Safety Enforcement Guide (CAA, Jan. 15, 1947). The guide is a manual used in the training of local police in the enforcement of state law in conformity with the air traffic rules.

⁵ For Sections 13 and 14 of the State Aeronautics Commission or Department Act, the "reckless-flying statute" recommended by CAA, and for Section 9 of the Uniform Aeronautics Act, see Appendix, *infra*. These statutes, as variously enacted and amended, are the most common statutory provision for local

discussion will merely attempt to ascertain the extent of the power to control air traffic retained in the hands of the state and municipal governments under the existing federal regulations.⁶

The doctrines of supersedure by federal law stem from the Supremacy Clause of the Constitution.⁷ National law made under Congress' power to regulate interstate commerce is exclusive, and the very fact of federal regulation precludes state legislation which affects the activities regulated.⁸ This is true even when the activities regulated are wholly intrastate.⁹ Supersedure does not depend upon conflict between the provisions of the state and the federal regulations, for the former are void even if identical to the latter.¹⁰ Nor will the state legislation be sustained because it was enacted to protect different interests from those protected by the federal regulations.¹¹ State legislation affecting a federally-regulated activity is valid only to the extent that Congress has granted its express or implied consent to state control.¹²

The discussion of the extent of permissible state air traffic control thus requires two determinations. The federal air traffic rules are a series of administrative regulations promulgated by the Civil Aeronautics Board. They purport to regulate all flights of all civil aircraft, and are on their face comprehensive measures in the full exercise of the Board's power.¹³ Such exercise of its power by a rule-making agency precludes state regulation, even of activities left unregulated by the agency, within the field delegated to it.¹⁴ It is first necessary, then, to examine the terms of the grant of regulatory power to the Board to determine if they are broad enough to permit the prohibition of all acts of reckless flying, no matter where or by whom committed.¹⁵ If they are not that broad, the states may

air traffic control. But in the states where those or similar statutes have not been enacted, local air traffic control depends upon the enforcement against reckless fliers of the vehicle codes—if the definition of the term "vehicle" is broad enough to include aircraft—and disorderly conduct statutes. See note (1938) 9 Air L. Rev. 390.

⁶ It is entirely possible that the discussion of this note will soon be of historical interest only, for the CAB has proposed legislation to Congress conferring upon the states concurrent power to enforce the federal air traffic rules. Memorandum, *supra* note 3. There is no doubt that Congress may confer that power upon the states. See note 12, *infra*. Language in *Testa v. Katt*, 330 U.S. 386 (1947), even indicates that concurring legislation by the states may not be necessary. See note (1947) 60 Harv. L. Rev. 966, 972. But it seems probable that before the proposed legislation is in fact enacted, and before either all states have enacted concurring legislation or the fact that concurring legislation is not necessary is squarely determined, the power of the states to enforce local law against reckless fliers will have been in issue many times.

⁷ U.S. Const. Art. VI, cl. 2.

⁸ *Southern R. Co. v. Railroad Comm'n of Indiana*, 236 U.S. 439 (1915). Recent supersedure cases are discussed in note (1947) 60 Harv. L. Rev. 262.

⁹ See *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 229-231 (1947).

¹⁰ *Southern R. Co. v. Railroad Comm'n of Indiana*, 236 U.S. 439 (1915); see *Charleston, etc., R. Co. v. Varneville Co.*, 237 U.S. 597, 604 (1915) ("Coincidence is as ineffective as opposition").

¹¹ *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926).

¹² *International Shoe Co. v. Washington*, 326 U.S. 310, 315 (1945); see Dowling, *Interstate Commerce and State Power*, 47 Col. L. Rev. 547, 552-560 (1947).

¹³ See appendix, *infra*, where four typical air traffic rules are quoted.

¹⁴ *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605 (1926); see *Bethlehem Steel Corp. v. NYLRB*, 330 U.S. 767, 772-775 (1947).

¹⁵ The constitutionality of Congress' power to establish air traffic rules governing all flights of all civil aircraft in the United States is assumed. Early doubts that the power to regulate interstate commerce included the power to regulate remote intrastate flights of private aircraft [see, e.g., Fagg, *Legal Basis of the Civil Air Regulations*, 10 JOURNAL OF AIR LAW AND COMMERCE, 7, 27 (1939)] seem to have been dispelled by *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942) and *Wickard v. Filburn*, 317 U.S. 111 (1942). See Ryan,

prohibit the reckless flying over which the Board has no control. Second, it is necessary to determine the extent to which Congress has consented to state action against reckless fliers within the field delegated to the Board.

I. THE EXTENT OF THE REGULATORY POWER DELEGATED TO THE BOARD.

When Congress, by Section 3(e) of the Air Commerce Act of 1926,¹⁶ granted the Secretary of Commerce the power to promulgate air traffic rules, it made that power as extensive as it could. It provided extrinsically that the rules govern all flights of all civil aircraft, and further stated its intent that the power to make the rules, which were to relate ". . . to the same subjects as those covered by navigation rules and the various State motor vehicle codes," was to be given the broadest possible construction by the courts.¹⁷

The power to promulgate air traffic rules vested in the Civil Aeronautics Board is granted in very similar terms and appears to be equally broad. Section 601(7) of the Civil Aeronautics Act provides that "[t]he Board is empowered . . . to promote safety of flight in air commerce by prescribing . . . air traffic rules for aircraft . . ." ¹⁸ Whether or not the term "air commerce"¹⁹ is broad enough to include remote intrastate flights of non-commercial aircraft, and there is authority to the effect that it is,²⁰ the grant of power extends beyond any narrow definition of air commerce to apply to all flights of all civil aircraft in the United States.²¹ And it remains as broad, in the sense of the number of different kinds of activities permissibly regulated thereunder, as it was under the Air Commerce Act.²²

Economic Regulation of Air Commerce, 31 Va. L. Rev. 479, 495-500 (1945); compare comment (1930) 1 JOURNAL OF AIR LAW 359. In this connection, it seems apparent that the effect of our ratification of the International Civil Aviation Convention upon the power of local governments to control air traffic will be only indirect. Legislation in implementation of a treaty, under the doctrine of *Missouri v. Holland*, 252 U.S. 416 (1920), is of course far more extensive than legislation enacted, for example, under the commerce power. Thus Congress under a treaty may regulate intrastate activities constitutionally beyond the reach of federal control under the commerce power. See Seago & Furman, *Internal Consequences of International Air Regulation*, 12 U. Chi. L. Rev. 333, 340-346 (1945). But here the commerce power is already sufficiently extensive to permit federal regulation of all flights of all civil aircraft. Therefore without a change in existing federal statutes to implement its policies, ratification of the treaty will not affect local air traffic control. In view of our obligation under Article XII of the Convention to keep our air regulations uniform with international regulations, Congress may of course see fit to withdraw its consent to independent local air traffic control (see Section II, *infra*). But since that obligation can be met by administrative revision of the air traffic rules, other changes in the existing federal aircraft regulatory statutes seem unlikely.

¹⁶ 44 Stat. 570.

¹⁷ H.R. Rep. No. 1162, 69th Cong., 1st Sess. (1926), 12. See dissenting opinion of Black, J., and note thereto, in *United States v. Causby*, 328 U.S. 256, 273 (1946).

¹⁸ 52 Stat. 1007 (1938), 49 USCA §551 (7) (Supp. 1947).

¹⁹ Defined by Section 1(3) of the Act to include ". . . any operation or navigation of aircraft which directly affects, or may endanger safety in, interstate, overseas, or foreign air commerce." 52 Stat. 977 (1938), 49 USCA §401(3) (Supp. 1947).

²⁰ *United States v. Drumm*, 55 F. Supp. 151 (D.C. Nev. 1944).

²¹ Because air commerce follows no definite arteries of transportation, as does surface commerce, and because of the speed and mobility of modern aircraft and the great effect of weather conditions upon their courses, any aircraft in flight represents a hazard to air commerce as defined. See H.R. Rep. No. 784, 78th Cong., 1st Sess. (1943), 8-10.

²² *United States v. Causby*, 328 U.S. 256 (1946), note (1947) 14 JOURNAL OF AIR LAW AND COMMERCE 112. Although the power to promulgate air traffic rules was discussed in the dissent, *id.*, at 273, the majority seemed to assume that the power was vested in CAB under the same conditions that it had been vested in the Secretary of Commerce by Section 3 of the Air Commerce Act.

Under Section 601(7), the Board presumably has the power to forbid any unsafe or reckless flying act committed by any civil aircraft flying anywhere in the country. Promulgation of the air traffic rules therefore excludes the states, in the absence of congressional consent, from the exercise of air traffic control.

II. EXPRESS CONSENT TO STATE ACTION.

Whatever power to control air traffic that the states have by express consent of Congress was granted them by Section 4 of the Air Commerce Act of 1926, under which they have the power to “. . . set aside and provide for the protection of necessary airspace reservations . . .”²³ The extent of that power has apparently never been judicially defined.²⁴ It will therefore be examined here at some length.

The power to reserve airspace is the power to exclude aircraft from the air over a specified area of ground.²⁵ Since the air navigation within a federal airspace reservation is subject to the restrictions imposed by the Executive order creating it,²⁶ it must be presumed that the air navigation within a state airspace reservation is likewise subject to the restrictions imposed by the legislation creating it. It would seem, then, that Section 4 permits establishment of state air traffic control systems within whatever airspace they reserve.

The terms of the grant of Section 4 restrict the states' exercise of the power to reserve airspace only by providing that state reservations will not conflict with civil airways or with reservations made by the Federal Government. It would not be inconsistent with the terms of that section for the states to set up independent systems of air traffic control governing all air not federally reserved. Such action would of course defeat the purpose of the legislation providing for federal aircraft regulation.²⁷ It is a familiar principle of statutory construction that the intent of the whole act will control, and that all the parts should be interpreted as subsidiary and harmonious.²⁸ The states' power to regulate air traffic is therefore necessarily restricted by legislative intent and by inconsistent provisions of the statutes.

Section 10 of the Air Commerce Act declared a “. . . public right of freedom of air transit in interstate and foreign air navigation in the navigable airspace.”²⁹ The congressional intent was to create a right similar to the public right of navigation upon navigable waters.³⁰ The latter right entitles

²³ The full text of Section 4 is: “The President is authorized to provide by executive order for the setting apart and protection of airspace reservations in the United States for national defense or other governmental purposes and, in addition, in the District of Columbia for safety purposes. The several States may set apart and provide for the protection of necessary airspace reservations in addition to and not in conflict either with airspace reservations established by the President under this section or with any civil or military airway under the provisions of this subchapter.” 44 Stat. 570, 49 USCA §174 (Supp. 1947).

²⁴ Connecticut's system of air traffic control, apparently based in part on airspace reservations, is discussed in Morris, *State Control of Aeronautics*, 11 JOURNAL OF AIR LAW AND COMMERCE 320 (1940). See discussion of federal power to reserve airspace in *Ingalls, Airman Certificate*, 1 CAA 512 (1939).

²⁵ 52 Stat. 978 (1939), 49 USCA §401(9) (Supp. 1947). See H.R. Rep. No. 1262, 68th Cong., 2d Sess. (1925), 13 (examples of the purposes for which federal airspace reservations may be made).

²⁶ H.R. Rep. No. 1162, 69th Cong., 1st Sess. (1926), 14.

²⁷ “. . . Congress can not effectively ‘foster, protect, control, and restrain’ interstate and foreign commerce by air if . . . federal rules of the air . . . do not extend to all navigation in the navigable airspace. . . . The danger of diverse rules of the air, including traffic rules and signals, is obvious. . . .” H.R. Rep. No. 1262, 68th Cong., 2d Sess. (1925), 15.

²⁸ 2 Sutherland, *Statutory Construction*, §4704 (3rd ed., Horack, 1943).

²⁹ 44 Stat. 574 (1926).

³⁰ H.R. Rep. No. 1162, 69th Cong., 1st Sess. (1926), 14.

the public as a group to free and reasonable use of the water for all legitimate purposes of travel and transportation and, it is suggested, to freedom from unreasonable governmental interference with such travel and transportation.³¹ Section 3 of the Civil Aeronautics Act recognized ". . . 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."³² That right is, of course, directly opposed to the power of the states to reserve airspace, and must be taken as limiting that power.³³

Prior to the passage of the Air Commerce Act of 1926, there was a discussion on the floor of the Senate in regard to the extent of the power granted the states by Section 4.³⁴ It was there made clear that the power was granted primarily to enable the states to protect their citizens from injury by falling aircraft. The Senators felt that it was entirely reasonable that the states exclude aircraft from the air over urban areas or, alternatively, prescribe minimum altitude rules for aircraft flying over such areas. They further indicated that permissible state regulation could be in conflict with federal regulations, and accordingly pointed out that the states were denied the power to enact "rules of the road"—obvious examples are signal rules and rules designed to prevent collisions between aircraft—"which must be uniform if we are to have safety in the air."

The conclusion follows, therefore, that the power to reserve airspace conferred upon the states by Section 4 permits them to enact and enforce air traffic rules of their own under the following conditions:

- (1) such rules must be reasonably calculated to protect persons and property on the ground from danger from the air;
- (2) they must be limited to the air over areas where there are such numbers of persons and accumulations of property that their imposition is justified;
- (3) they must not unreasonably otherwise interfere with the public right of freedom of transit in air commerce; and
- (4) the activities that they regulate must be appropriate for non-uniform regulation without danger to air commerce.

Those restrictions, coupled with the restrictions imposed by the terms of Section 4 itself, make it clear that the air traffic control permitted the states under their power to reserve airspace is extremely limited. It was apparently fairly extensive at its inception, inasmuch as it permitted enforcement of non-uniform statutes even against interstate carriers.³⁵ But as air commerce has grown, and as airports have developed, the skies over the cities have become crossed and recrossed with civil airways. And as the only airspace which the states could permissibly reserve under condition (2) was preempted by the Federal Government, the scope of air traffic control permitted the states under Section 4 has diminished until it is now virtually non-existent. Certainly it cannot support the extensive enforcement of reckless flying statutes now desired by federal aviation authorities.

III. IMPLIED CONSENT TO STATE ACTION.

It can be argued, however, that Congress has impliedly consented to state air traffic control measures regulating intrastate air traffic conformably with the federal air traffic rules. That argument is based on the distinction between punitive and remedial sanctions drawn by the Supreme

³¹ 1 Farnham, *Water and Water Rights*, §§27, 28 (1904).

³² 52 Stat. 980 (1938), 49 USCA §403 (Supp. 1947).

³³ "Words or phrases may be enlarged or restricted to harmonize with other provisions of an act. . . ." 2 Sutherland, *op. cit. supra* note 28, §5706.

³⁴ 67 Cong. Rec. 9355 (1926).

³⁵ *Ibid.*

Court in *Helvering v. Mitchell*³⁶ and reiterated in *United States ex rel. Marcus v. Hess*.³⁷ These cases upheld, against defenses of double jeopardy, exactions of money penalties in civil proceedings against persons who had been acquitted in previous criminal trials for the same acts of fraud against the government. Reasoning from the premise that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense,"³⁸ the Court met the defenses of double jeopardy by finding that the subsequent civil suits for money penalties did not attempt to impose criminal punishments upon defendants. Such penalties, imposed to indemnify the government for losses sustained by the frauds and for the expenses of the investigation, were held to be "remedial" sanctions in the nature of money damages and different from "punitive" damages in the nature of fines imposed to punish the fraud-feasors. The two cases left no doubt that the difference was one of kind, not one of degree.³⁹ It is a perhaps not unwarranted extension of their reasoning to argue that the failure of Congress to provide criminal punishment for acts in violation of the air traffic rules gives the states an implied consent to impose criminal punishment for such acts instead.

The Civil Aeronautics Act provides two sanctions to be applied against violators of the air traffic rules: a civil penalty of a variable sum of money⁴⁰ and revocation, suspension, or limitation of the federal certificates held by them.⁴¹ There is thus provided an integrated non-punitive plan of enforcement by remedial sanction in which the certificates of dangerous and incompetent fliers are controlled to protect air commerce and the public⁴² and in which the costs of enforcement are recovered in civil suits against them.⁴³ Because fliers cannot legally fly without the required federal certificates,⁴⁴ which of course are not susceptible to non-federal control, such a plan is a necessary adjunct to the general plan of federal aircraft regulation. It does not, however, do what Congress had within its power to do—provide criminal punishment for violators of the rules.⁴⁵ It is obvious that some reckless flying practices are so disregardful of the safety of air commerce and of persons on the ground that criminal punishment of the fliers involved is appropriate. Can Congress be said to have denied the states the right to impose such punishments?

³⁶ 303 U.S. 391 (1938).

³⁷ 317 U.S. 537 (1942).

³⁸ *Helvering v. Mitchell*, 303 U.S. 391, 399 (1938); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1942).

³⁹ In *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551 (1942), the Court stated that the civil penalty imposed might subject defendant to punishment "... only in a certain and very limited sense." That, of course, is a long way from admitting that the civil penalty was punishment which, because it did not involve imprisonment, was of a degree not requiring that defendant be granted the procedural safeguards of a criminal trial. See *Helvering v. Mitchell*, 303 U.S. 391, 402-404 (1938). The Court was apparently answering the argument of Mr. Justice Frankfurter that the defense of double jeopardy would be better met by considering the sanctions imposed by the two proceedings as two separate parts of a single punishment, acceptance of which would have required just such an admission. See Frankfurter, J., concurring, in *United States ex rel. Marcus v. Hess*, *supra*, at 553 *et seq.*

⁴⁰ 52 Stat. 1015 (1939), 49 USCA §621(a) (Supp. 1947).

⁴¹ 52 Stat. 1011 (1938), 49 USCA §559 (Supp. 1947).

⁴² See *Brown v. Civil Aeronautics Authority*, 112 F. 2d 737 (C.C.A. 9th, 1940). License revocation is of course a remedial sanction. See *Meffert v. Medical Board*, 66 Kan. 710, 714, 72 Pac. 247 (1903), *aff'd per curiam*, *Meffert v. Packer*, 195 U.S. 625 (1904).

⁴³ 52 Stat. 1017 (1938), 49 USCA §623(b) (Supp. 1947).

⁴⁴ 52 Stat. 1012 (1938), 49 USCA §560(a) (2) (Supp. 1947).

⁴⁵ *United States v. Grimaud*, 220 U.S. 506 (1911) (violation of administrative rules may be made a crime).

This argument cannot be answered by saying that Congress, by failing to provide criminal sanctions, has shown an intention that violators of the air traffic rules should not be punished criminally. In the first place, Congress did not provide criminal sanctions primarily because it did not wish to clutter the federal courts with criminal prosecutions for infractions of the air traffic rules.⁴⁶ In the second place, the Supreme Court requires that Congress, when legislating under the commerce power, manifest clearly an intent to preclude the states from enacting legislation designed to protect the safety of the public.⁴⁷ It is admitted that both of the remedial sanctions used to enforce the air traffic rules have been used to punish violators of other regulations promulgated by the Board, in that they have been applied in cases where they have had no relation either to the costs of investigation⁴⁸ or to the protection of air commerce and the public,⁴⁹ but it seems clear that the theoretical distinction between punitive and remedial sanctions cannot be invalidated merely because remedial sanctions may sometimes be misapplied.

By the same line of reasoning, the federal air traffic rules do not prohibit the enforcement of municipal ordinances against reckless fliers. Although, by the weight of authority, violations of municipal ordinances are not crimes,⁵⁰ fines imposed for such violations are probably punitive sanctions and imposed solely to punish the violators.⁵¹ If the failure of Congress to provide criminal punishment for violators of the air traffic rules permits punishment to be imposed upon them by the states, it must also permit their punishment by municipalities.

Because of the importance to air commerce that federal certificates be subject to revocation, suspension, and limitation by the Civil Aeronautics Board, prosecution of reckless fliers by the states could not be tolerated if it barred subsequent proceedings by the Board. It is well settled, however, that when the same act is forbidden by state and federal law, its commission is two distinct offenses, one against the United States and one against the state; both governments may then prosecute the committer of the act without infraction of the constitutional rule against double jeopardy, which forbids only repeated prosecutions for the same offense.⁵² Similarly, both the United States and a municipality may prosecute the committer of an act forbidden by both federal law and municipal ordinance.⁵³ Air traffic control by local governments, then, insofar as it may be exercised, is concurrent with that of the Federal Government.⁵⁴

In the majority of states, the committer of an act forbidden by both state statute and municipal ordinance may be prosecuted by both govern-

⁴⁶ See Lee, *Air Commerce Act of 1926*, 12 A.B.A.J. 371, 375 (1926).

⁴⁷ See *Southern Pacific R. Co. v. Arizona*, 325 U.S. 761, 766 (1945).

⁴⁸ See e.g. *CAB v. Northwest Airlines*, 69 F. Supp. 482 (D.C. Minn. 1946) (suit for civil penalty because pilot refused CAA inspector admission into pilot's compartment while aircraft was in flight).

⁴⁹ See e.g., *Peters, Airman Certificate*, 5 CAB 479 (1943) (commercial pilot's certificate suspended for 6 months because holder assaulted CAA inspector).

⁵⁰ Clark & Marshall, *Law of Crimes*, 2 (4th ed., Kearney, 1940). The reason given is not that the ordinance imposes a remedial sanction, but that it is not a public law, and that the punishment is not imposed by the state.

⁵¹ In Missouri, for example, where the courts are definitely committed to the holding that violation of a municipal ordinance is not a crime, see *Canton v. McDaniel*, 188 Mo. 201, 228, 86 S.W. 1092 (1905), municipalities are nevertheless required to prove their case beyond a reasonable doubt. *Stanberry v. O'Neil* (Mo. App. 1912), 150 S.W. 1104.

⁵² *United States v. Lanza*, 260 U.S. 377 (1922) (prior conviction by state court not bar to federal prosecution); *Hebert v. Louisiana*, 272 U.S. 312 (1926) (pending prosecution by United States not bar to state prosecution).

⁵³ *United States v. Peterson*, 268 Fed. 864 (W.D. Wash. 1920).

⁵⁴ See *Wallis, Airman Certificate*, 5 CAB 87, 91 (1941).

ments.⁵⁵ Thus in most states reckless fliers may be subject to three, and in all states subject to two, sanctions for each act of reckless flying. This fact brings about the primary restriction on the power of local governments to control air traffic. The Supreme Court would almost certainly hold that it would be an undue burden on interstate commerce to subject interstate carriers to multi-governmental prosecutions for the same act of reckless flying.⁵⁶ Air traffic control by local governments, then, is probably limited to non-commercial aircraft only. It is further the rule that, when Congress has legislated so as to have established a policy, state regulation, even of intrastate activities not specifically within the field of congressional regulation, which is contrary to that policy is void.⁵⁷ The statutes and ordinances, then, by which local governments may enforce air traffic control must be in conformity with the federal air traffic rules.

If the foregoing argument is valid, the states and municipalities have this power to control air traffic: they may enact statutes and ordinances identical to the federal air traffic rules or sufficiently like them so that there is no conflict. A change in the air traffic rules would make conflicting local law void. Those laws may be enforced by punitive sanction and against non-commercial fliers only, but anywhere in the state without regard either to civil airways or to the location of the termini of the flight during which the violation occurred. It is submitted that only by this line of reasoning may the extensive supplementary air traffic control desired by the federal aviation authorities be sustained.

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APPENDIX

TYPICAL STATE STATUTES EXPRESSLY DESIGNED TO CONTROL AIR TRAFFIC:

1. UNIFORM AERONAUTICS ACT, §9: "Any aeronaut or passenger who, while in flight over a thickly inhabited area or over a public gathering within this state, shall engage in trick or acrobatic flying or any acrobatic feat, or shall, except while landing or taking off, fly at such a low level as to endanger the persons on the surface beneath, or shall drop any object except loose water or loose sand ballast, shall be guilty of a misdemeanor . . . [and punished by fine or imprisonment]." 11 Uniform Laws Ann. 164.

This statute is now in force, usually with some slight modification, in the following states: Ariz. Code (1939) §48-115; Del. Rev. Code (1935) §5784; Hawaii Rev. Laws (1935) §6983; Md. Code (1939) Art. IA §9; Minn. Stats. (1945) §360.075 (14, 15); Mo. Rev. Stats. (1939) §15112; N. J. Stats. Ann. (1937) §6:2-11; N. C. Gen. Stats. (1943) §63-18; N. D. Rev. Code (1943) §2-0310; S. C. Code (1942) §7108; S. D. Code (1939) §2.9902; Tenn. Code (1938) §2724; Vt. Pub. Laws §§5245-5247.

2. STATE AERONAUTICS COMMISSION OR DEPARTMENT ACT §13: "It shall be unlawful for any person to operate an aircraft in the air, or on the ground or water, while under the influence of intoxicating liquor, narcotics, or other habit-

⁵⁵ *State v. Tucker*, 137 Wash. 162, 242 Pac. 363, 246 Pac. 758 (1925); see *Kneier, Prosecution Under State and Municipal Ordinance as Double Jeopardy*, 16 Corn. L.Q. 201 (1931).

⁵⁶ *Cf. Southern R. Co. v. Reid*, 222 U.S. 424 (1912). State statutes whose provisions are identical to those of a federal law are of course void. Cases cited *supra*, note 10. Such cases go off on the grounds of national supremacy, but there seems to be no other logical grounds for the application of the doctrine in cases where the two regulations are identical than the obvious one that it relieves interstate commerce of the burden of serving two masters. See note (1946) 60 Harv. L. Rev. 262, 265.

⁵⁷ *Hill v. Florida*, 325 U.S. 538 (1945); see *Southern Pacific R. Co. v. Arizona*, 325 U.S. 761, 766 (1945).

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forming drug, or to operate an aircraft in the air, or on the ground or water, in a careless or reckless manner so as to endanger the life or property of another. In any proceeding charging careless or reckless operation of aircraft in violation of this section, the court in determining whether the operation was careless or reckless shall consider the standards for safe operation of aircraft prescribed by federal statutes or regulations governing aeronautics." Air Safety Enforcement Guide 3 (CAA, Jan. 15, 1947).

This statute is now in force in the following states: Cal. Laws (1947) C. 1379 §13; Conn. Laws (1946) H.B. 2-X §30; Idaho Laws (1947) S.B. No. 66, §12; Md. Laws (1947) C. 896 §92; N.D. Laws (1947) C. 1, §9; Nev. Laws (1947) C. 114; §§1, 2; Okla. Laws (1947) S.B. No. 214, §9; Ore. Laws (1947) C. 328, §4; S.D. Laws (1947) C. 3; Tenn. Laws (1947) C. 132; Wash. Laws (1947) C. 165, §22; W. Va. Laws (1947) S.B. No. 120 §§11, 12.

3. STATE AERONAUTICS COMMISSION OR DEPARTMENT ACT, §14: (a) "It shall be unlawful for any person to operate or cause or authorize to be operated any civil aircraft within this state unless such aircraft has an appropriate effective certificate, permit, or license issued by the United States. It shall be unlawful for any person to engage in aeronautics as an airman in this state unless he has an appropriate effective airman certificate, permit, rating, or license, issued by the United States authorizing him to engage in the particular class of aeronautics in which he is engaged, if such certificate, permit, rating, or license is required by the United States."

(b) "Where a certificate, permit, rating, or license is required for an airman by the United States, it shall be kept in his personal possession when he is operating within the state and shall be presented for inspection upon the demand of any police officer, or any other officer of the state or of a municipality or member, official, or employee of the commission authorized pursuant to Section 21 of this Act to enforce the Aeronautics Laws, or any official, manager, or person in charge of any airport upon which the airman shall land, or upon the reasonable request of any other person. Where a certificate, permit, or license is required by the United States for an aircraft, it shall be carried in the aircraft at all times while the aircraft is operating in the state, shall be conspicuously posted in the aircraft where it may be readily seen by passengers or inspectors, and shall be presented for inspection upon the demand of any peace officer, or any other officer of the state or of a municipality or member, official, or employee of the commission authorized pursuant to Section 21 of this Act to enforce the Aeronautics Laws; or any official, manager, or person in charge of any airport upon which the aircraft shall land, or upon the reasonable request of any other person." Air Safety Enforcement Guide 3 (CAA, Jan. 15, 1947).

This statute is now in force in the following states: Cal. Laws (1947) C. 1379, §14; Idaho Laws (1947) S.B. No. 66 §13; Md. Laws (1947) C. 896 §93; Nev. Laws (1947) C. 114, §§3-8; Okla. Laws (1947) S.B. No. 214 §10; Ore. Laws (1947) C. 328 §§1-3; Wash. Laws (1947) C. 165 §23; W. Va. Laws (1947) S.B. No. 120, §14.

The foregoing, having been appended for illustrative purposes, is not intended to be a complete compilation of state law providing for local air traffic control. It does not include, for example, the many states in which statutes similar to Section 13 of the State Aeronautics Commission or Department Act have been enacted without the provision that the determination of careless or reckless flying shall be made with reference to the standards of safe flying established by federal regulation. Neither does it include those states which have amended Section 9 of the Uniform Aeronautics Act to include one or more of the provisions of Section 13 of the State Aeronautics Commission or Department Act, or those states which have enacted the federal air traffic rules by reference.