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## THE PROVINCE OF FEDERAL AND STATE REGULATION OF AERONAUTICS

CLARENCE M. YOUNG\*

Within the province of aeronautical regulation, the question which has arisen and which has been partially settled, is the most advantageous division of powers or control between the States and the Federal Government. The coordinated action by both is necessary to the satisfactory regulation of the air space of the United States. Either of these agencies, the State or the Federal, cannot cope effectively with the problems without the active cooperation of the other. To serve the needs and purposes of uniformity, it becomes imperative that overlapping and overreaching legislation be avoided as a potential danger to the advancement of one of the nation's most promising industries. It follows then that State and Federal efforts in this direction should be coordinated to the highest degree and neither should attempt the performance of the other's duties under its apportioned authority. The distribution of authority between the two powers is a problem of no small importance. Upon this depends the success or failure of the system of control.

The development of aeronautical regulation has not been without a considerable amount of precedent to act as a guiding force. The other forms of transportation, land and water, have faced many difficulties of much the same nature in the past, the solutions of which have made possible a more accurate progress of aeronautical legislation. Full advantage has been taken of this previous experience in designing the air regulatory measures up to the present time. It has been due in no small measure to this wise and equitable legislation, that our nation has been able to achieve the commercial leadership in the air. In any new industry or activity, controlling legislation may foster and develop, or on the other hand, may hinder and retard the normal and natural growth.

The essential character of the question itself dictates to a large degree the type of control most suitable to all interests involved. In considering the province of State and Federal regulation of

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aeronautics, it will at once be obvious that the regulatory system must be comprehensive enough to embrace the entire field which it is sought to control. To be otherwise would be in direct contradiction to the basic principles of any governing system.

Aeronautics, as it has developed, has brought with it many changes in various aspects of our national existence. It has greatly diminished the size of the country and trips of great distances are no longer considered as arduous journeys—the same distances are now reckoned in flying minutes. Chronologically speaking, the United States is a very small territory; in fact, according to some recent flights, it is approximately 12 hours east and west and some nine hours north and south. And when nations are measured in hours and states are measured in minutes, it is necessary that the force which regulates and controls should be uniform in all its phases and basically provided by an authority empowered to speak for the nation.

Aircraft cannot recognize state lines and it may be said that international borders are only slightly stronger barriers—such is the nature of aerial traffic. The advent of air transportation has resulted not only in national legislation, but the subject has demanded international attention, even as early as 1911 the Institute of International Law adopted rules governing the international circulation of aircraft. The subject is at the same time, national and international, which fact precludes exclusive and independent legislation by the several states, in view of the constitutional impediment to the enactment of foreign agreements by any power other than the national.

Judged in the light of past legislation, both State and Federal, and upon the opinions of recognized authorities whose studies have aided in the development of our present system, the true province of State control is in the functions of "enforcement" and "promotion," apportioning to the Federal Government the exercise of the powers granted to it by the Air Commerce Act of 1926, including the fostering of air commerce and the necessary regulatory measures.

Many states have recognized the advantages of uniformity and consequently the legislation enacted in these states has reflected their desire to give to aeronautics every possible opportunity to develop, and at the same time to supply the necessary control to protect all interests concerned. Twenty states have enacted laws requiring Federal licenses for all aircraft and airmen, while nine states require Federal licenses for all aircraft and airmen engaged

in commercial flying. Seven states have enacted provisions whereby either State or Federal licenses are sufficient. In six states, State licenses only are required, while in the remaining six states, there are no aeronautical laws covering the subject.

The enactment of State laws requiring Federal licenses for all intrastate air activities has proven to be the most satisfactory method of accomplishing uniformity of requirements for aircraft and air-men throughout the nation. This procedure sets up within the states identical requirements and obviates the necessity of a separate State inspection, licensing and an approval system with its attendant difficulties, complications and expense.

In the case of *Swetland v. Curtiss Airports et al* in the District Court of the United States for the Northern District of Ohio, Eastern Division, the Honorable George P. Hahn makes pertinent statements in this regard. The following quotation appears in his opinion on page 29:

"It (the Ohio Act) was passed with an intention on the part of the Ohio Legislature that aviation in the State of Ohio should be, insofar as possible, subject to regulation by the Air Commerce Act of 1926. The Act manifests an intention, on the part of the Legislature to take advantage of the extensive administrative machinery which had been established by the Department of Commerce under the enabling provisions of the Air Commerce Act of 1926. Pursuant to this policy, the Ohio Act does not provide for a method or system for the licensing of persons engaged in operating aircraft in intrastate commerce."

Judge Hahn further stated on page 30:

"Both of the provisions of the Ohio Act just referred to, recognize, and in express language state, that the provisions of the Federal Act are adopted because the 'public safety' requires it and the 'advantages of uniform regulation' make it desirable in the interest of aeronautical progress."

Especially pertinent also are the remarks of the same judge that,

"The Ohio Legislature recognized that the regulation of aviation is largely a national problem; that there should be uniformity of regulation as between the State and the Nation; and that if the necessities of the situation required it, the act of Congress might in many respects be paramount. It seems to us that many of the regulatory measures and traffic rules promulgated under the Air Commerce Act of 1926 would be very difficult to enforce if the State were permitted to adopt different regulations and different traffic rules for intrastate commerce."

In addition to the requirement of Federal licenses by some states, there is an alternative method whereby a number of states

have required either a State or a Federal license for all aircraft and airmen operating within the borders of the state, under which airmen and aircraft operating intrastate shall be licensed by the state authorities if they do not already hold licenses issued by the Department of Commerce for interstate operation. Upon careful examination, this plan offers certain disadvantages which makes it less desirable than the requirement of Federal licenses only. It was presumed that because the Federal licenses permitted interstate flying, they would be so much more desirable than State licenses that the ultimate effect would be a universal preference for the former and that the state agencies would thus avoid the necessity of issuing any licenses.

The plan on its face seems satisfactory but experience has shown the situation to be quite different. As will easily be seen, the applicants in many instances for State licenses will be those to whom Federal licenses have been refused for reasons of unairworthiness, or insufficient qualifications in the case of aircraft and pilots. The State authorities would need to be prepared to issue licenses upon application for them, and this would entail expense for the extensive inspection and licensing forces. And the State Inspectors will be called upon to pass on the same aircraft and airmen that have been inspected and disqualified by Federal inspectors and arrive at independent conclusions, which may or may not be the same in all cases.

This is a duplication of effort between the State and Federal authorities and the avoidance of like situations is one of the advantages of uniformity and a single licensing authority acting for the entire country. It should also be remembered that the licensing of aircraft in existence at the present time is not the only duty devolving upon the licensing power. There is also the new production of known designs and the approval of new designs in aircraft and engines. This question involves decisions on structural requirements, load factors, workmanship, soundness of materials, suitability of design and flight characteristics, all of which demand the services of technically trained personnel. Therefore, an independent State inspection system would need to contemplate the initial approval of aircraft and engines because not all manufacturers have yet met the federal requirements, and those lacking such approval are potential applicants for State licenses. A suitable and adequate technical staff would thus be an essential part of any State system.

It is an exceedingly difficult task to organize and develop an

inspection agency or system—one competent and broad enough to include all phases involved. Likewise it is burdensome in the matter of expense. The Department of Commerce has made a painstaking effort to organize such a system. It has trained its personnel, and has made results uniform throughout its entire inspection and engineering staffs. The requirements imposed by it are only the minimum consistent with safety in aircraft operation. Any modification of them would not be in the interests of either intrastate or interstate ownership or operation, and, therefore would unfavorably affect the general advancement of air transportation.

Too much regulation and legislation is easily possible and it is important to minimize the requirements as much as possible without sacrificing safety. States should not attempt individual control to the extent that the aeronautic industry is penalized or that the natural flow of air traffic is diverted around them.

The primary problem involved is the proper adjustment and distribution of control between the two governmental powers so that the benefits of uniformity will be guaranteed to the nation and that the progress of aeronautics will not be impeded.

The question of uniform airport rules is of primary importance. Airport rules, like other aeronautical regulations, should be strictly uniform throughout the country to prevent confusion and to facilitate the free movement of all aerial traffic. It is easy to imagine that the difficulties in the path of a pilot flying from coast to coast would be almost overwhelming, if different airport rules were encountered in every state along the route.

The Aeronautics Branch of the Department of Commerce has published Aeronautics Bulletin No. 20 on this subject, which is entitled, "Suggested City or County Aeronautics Ordinance and Uniform Field Rules for Airports," and represents the fruits of an extensive study of the question. This publication is available, free, upon request to the Aeronautics Branch.

The importance of uniform air marking of airports and cities also should not be overlooked. Again, the Aeronautics Branch has devoted considerable research into this matter, the results of which have been published in Aeronautics Bulletin No. 4, entitled "Air Marking," which also may be obtained from the Aeronautics Branch upon request.

These two phases of aeronautical work are quite appropriate for State attention and cooperation, since the states are in an ad-

mirable position to urge the adoption of uniform rules for airports and a uniform system of air marking.

The province of national control is more definitely described and defined; and a brief consideration of our regulatory system as it has evolved will tend to demonstrate the entire system of aeronautical regulation in its various phases.

The authority of Congress to provide for the regulation and promotion of air commerce is derived from Article One, Section 8 of our Federal Constitution, which gives to Congress the power to regulate and control interstate commerce. The necessity of legislation affecting this new form of transportation led to the passage of the Air Commerce Act of 1926. Under this Act, the Secretary of Commerce is obliged to foster and encourage air commerce, and to provide the necessary regulatory system.

The two-fold provisions of this Act have been actively carried forward during the four-year period of its existence, as is evidenced by the present aeronautics growth and activity. The establishment of airports has been encouraged by the Department, whose airport specialists are continuously conferring with municipalities and civic and trade organizations desiring assistance in the selection of airport sites and requesting information regarding the requirements for the development of suitable airports.

Further, the Department of Commerce is developing a system of airways over which all aircraft may fly in ever increasing safety. The airways system includes, beacon lights, radio range beacons, radio marker beacons, radio communication whereby weather and other information may be communicated to planes while in flight; intermediate landing fields, boundary lighted for use at night and established every 30 miles along the airways; and automatic telegraph typewriter systems for dissemination of weather information along the airways. The system as developed provides a network of aerial highways, the use of which has contributed in a great measure to the success of the scheduled air transportation routes operating in all sections of the country today, as well as the itinerant operation of aircraft.

Also, within the province of the Federal agency is the investigation, recording, and analyzing of aircraft accidents. The results of this work are utilized in promulgating fitting and proper rules for the operation of aircraft, intended, of course, to prevent recurrences of accidents and casualties wherever possible.

In connection with this subject of accidents, I would like to take occasion to call attention to the fact that as long as there is

transportation, there will be transportation accidents. Accidents are in no sense peculiar to air transportation, although one might gain that impression from the amount of attention which they receive. Railroad trains are derailed or collide, busses and autos skid off the road or are struck at grade crossings, steamers sink or burn, airplanes become involved in similar difficulties, all with serious or fatal results. They are no more excusable or inexcusable in the one case than the other, nor should they be made the subject of a greater criticism or condemnation.

Under the Air Commerce Act, the Secretary of Commerce is authorized to conduct research into the many questions involved in the subject of aeronautics and to request cooperation of, and to make suggestions to, other governmental agencies in behalf of aeronautic development. Further, the Department of Commerce is charged with the duty of maintaining suitable regulations governing the licensing, inspection and approval of aircraft and airmen, operating interstate. The Federal Government has extended the advantages of Federal registration and approval to those so desiring it within the limits of the several states. The entire authority of the Federal Government in this matter is based on the provision for regulating interstate commerce. The only section of the Federal regulations affecting intrastate activities and the main exception to the general rule is the Air Traffic Rules. As far as these Rules are concerned, intrastate aircraft lose such identity when they are in the air, and they are just as amenable to the same rules as to passing, crossing, signalling, landing, etc., as are licensed aircraft. It follows then that regulations covering aeronautics will admit of but one standard of airworthiness, only a limited range of piloting ability and no variation in the traffic rules. The interstate character of aircraft in the air is commented on to some extent by Judge Hahn and the following quotation from his opinion in the case previously referred to is of interest:

"As we have seen the legislation of this State (Ohio) pertaining to aeronautics is different from that of other States; it acquiesces in and, in a measure, adopts the legislation of Congress. It is complementary to the legislation of Congress to the end that interstate and intrastate commerce may, so far as possible under present constitutional provisions, be a unit regardless of State lines. No doubt, also, the State Legislature of this State acquiesced in the view attributed to Congress that it had the power to enact and that it enacted the Air Commerce Act, under its express grant of power to regulate interstate and foreign commerce."



Judge Hahn quoted Mr. Chief Justice Taft in the case of *Railroad Commission v. Chicago B. and Q. R. Co.*, 257 U. S. 563, as follows:

"Commerce is a unit and does not regard State lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of State authority."

This quotation emanating from the Supreme Court exemplifies the application of the "burden theory" to railroad cases. There have already been cases in which the burden principle or theory has been applied to the regulation of intrastate air traffic.

Judge West, in deciding the case of *Neiswonger v. Goodyear Tire and Rubber Company*, U. S. District Court, N. D. Ohio E. D., 35 Fed. (2nd) 761, said that

"If the circumstances and conditions under which air commerce is carried on are such that it is necessary for the traffic rules to apply to and regulate intrastate flights in order to protect interstate movements, then it will so apply the same as to interstate flight. . . . It is apparent that all or nearly all of these rules (Air Traffic) must be applied to both interstate and intrastate craft in order to secure the safety of the latter, and that with respect to these matters, the Federal Regulations must be paramount. Conflicting State rules could not be allowed."

The court here applies the burden theory, as developed by the railroad, by watercraft, and the telegraph cases to aircraft with the apparent result that the Federal Government is to control all flying so far as the rules of flights are concerned. The *Neiswonger* case, in supporting the burden principle as applied to air flights, has followed the trend of the Supreme Court as indicated very clearly by its decisions of the "burden cases," especially the Safety Appliance Cases and the Rate Cases. The same attitude has been adopted in the decisions involving Federal control over radio.

Prior to the passage of the Air Commerce Act of 1926, there was some question as to the proper clause of the constitution under which the Federal powers could be exercised over aeronautics. The treaty making power, power over commerce, the admiralty power, and the war power were all suggested as being sufficient to support a Federal Air Act. The power over commerce was adopted by Congress as being the most appropriate and effective basis for Federal control over aviation. As soon as Government control of

aeronautics was conceived necessary, it was also realized that the control and regulation, whether Federal or State, must be uniform. Most writers doubted the power of Congress to control all aviation; accordingly, a Uniform State Law was advocated; others thought it possible that the Supreme Court would uphold the Federal control of all aviation under the commerce power and under the "burden theory." The air Commerce Act passed in 1926 left the power divided between the Nation and the States, except that it provided that all flying must be done in conformity with the Air Traffic Rules.

In conclusion, the province of State and Federal regulation of aeronautics may be summarized as follows, provided that we may assume the universal application of the Air Traffic Rules to both interstate and intrastate traffic for which theory there is ample support: The Department of Commerce, being in an unequaled position for obtaining data and information on all phases of the subject, is the more logical and more efficient agency to promulgate needed rules and regulations governing the licensing, inspection and approval of aircraft and airmen, together with other incidental items coming within the sphere of regulated activities. The fact that the Department of Commerce has already perfected an extensive organization to perform these duties, supports strongly the advisability of Federal Regulation.

On the State side of the question, greater economies and perfect uniformity can be achieved by taking this view of Federal leadership. Obviously, therefore, the method by which the States would take advantage of the present Federal system would be to require Federal licensing and identical Air Traffic Rules. With such requirements in effect, the next item within the province of State activity would be the local enforcement of penalties for violations. Local enforcement has been found to be necessary for the successful functioning of the entire system. Further, State agencies or commissions devoted to the advancement of aeronautics within the individual State are of recognized and established value. Examples of this plan are in gratifying evidence in several States at this time.

It is not important what method or means are adopted by the State or what title the officer or agency receives in connection with the enforcement of its air laws, as long as the results achieved are in accordance with the principles of uniformity and are favorable to the unhindered progress of aeronautics.

The agency should be headed by someone who is thoroughly practical and who possesses an adequate understanding of aero-

nautical problems, and the limit of his authority should be the power to revise existing State requirements to conform to changes in the Federal requirements. His efforts and time should not be consumed by the conception of new requirements which he considers peculiar to the needs of his state, as such action would detract from the fundamental principles of uniformity. (Applause.)

CHAIRMAN HADLEY: I am sure you have all been greatly interested in listening to this very interesting address, and I am sure you would all like the privilege of discussing this question. However, I feel, with your permission, we had better withhold the discussion until we have listened to the next address, which will be along an allied subject, and perhaps we can discuss the two of them at the same time and cover the same general territory.

I am a little embarrassed as I attempt to introduce the next speaker. While it has been a number of years since I left the classic halls of this university that permits us to gather here today, still it is not far enough away so that I do not still stand in awe of a law professor, and the next speaker is a gentleman who is a professor in a law school, the Washington University Law School, at St. Louis. In addition to that, he lectures in certain aviation schools.

He is a lawyer of renown in one of our adjoining states. He is known very well throughout the country, with a great practice at the bar, and he has for a long time been greatly interested in aviation, until today at the bar he stands as one of the acknowledged leaders on the question of aviation, and he has consented to talk to us today on the subject of, "The Interstate Commerce 'Burden Theory' Applied to Air Transportation."

It gives me great pleasure to introduce the Honorable George B. Logan at this time. (Applause.)