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## Federal and State Jurisdiction with Reference to Aircraft

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## FEDERAL AND STATE JURISDICTION WITH REFERENCE TO AIRCRAFT

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### *The Division of Sovereignty in the United States*

The system of dual sovereignty existing under the United States Constitution presents an infinite variety of legal questions, and the reports are filled with cases in which these questions have been decided. The development of a new means of transportation has added new problems which call for careful consideration.

A State has jurisdiction over all matters within its territory except in so far as that jurisdiction has been transferred by the Constitution to the Federal Government. This territorial sovereignty reaches into the air indefinitely.

By Section 6 of the Air Commerce Act of 1926, "The Congress hereby declares that the Government of the United States has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone."

It must be noted:

1. That this is merely a declaration of sovereignty, whereas in Sections 4 and 10, providing for navigable airspace and airspace reservations, Congress is apparently asserting a property right in the air, which appears to involve an unconstitutional violation of the rights of property owners.<sup>1</sup>

2. That this is a declaration of sovereignty "to the exclusion of all foreign nations" and therefore does not exclude State sovereignty to the extent that such dual sovereignty is provided for by the Constitution.

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1. See 1 JOURNAL OF AIR LAW 346.

The Uniform State Law contains the following provisions:

Section 7. "All crimes, torts, and other wrongs committed by or against an aeronaut or passenger while in flight over this State shall be governed by the laws of this State; and the question whether damage occasioned by or to an aircraft while in flight over this State constitutes a tort, crime or other wrong by or against the owner of such aircraft shall be determined by the laws of this State.

Section 8. "All contractual and other legal relations entered into by aeronauts or passengers while in flight over this State shall have the same effect as if entered into on the land or water beneath."

These sections appear to be simply declaratory, and in the absence of such statute, it may be assumed that the same rules would be applied.

Section 4 of that law contains the following provision:

"Flight in aircraft over the lands and waters of this State is lawful, unless at such low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner, or unless so conducted as to be imminently dangerous to persons or property lawfully on the land or waters beneath."

Aeronautics Bulletin No. 18, on page 3, says that regulatory provisions of State laws are superseded by the Federal Air Commerce Act of 1926, in so far as they are inconsistent with it. The reason for this is that Congress has control of interstate commerce, and that for the protection of that commerce, the Federal rules must govern. This doctrine, it seems, must limit not simply Section 4, but also Sections 7 and 8 of the Uniform State Law.

When Congress enters a field of regulation within its paramount authority, State regulation of that subject-matter is excluded.<sup>2</sup>

At the present time it seems that Section 4 of the Uniform State Law is controlled by Federal legislation, and that Sections 7 and 8 of that law are partially affected by such legislation, although in general those sections are in force. The legal relations described in Sections 7 and 8 are, therefore, in general governed by the law of the State, but if any provision of Federal legislation is involved in connection with such relations, such Federal legislation is controlling.

We have, therefore, to consider what provisions of the Con-

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2. *Texas & Pacific Railroad Co. v. Rigsby*, 241 U. S. 33.

stitution confer on Congress the power to deal with aircraft and air traffic. The powers of Congress with reference to this subject conferred by the Constitution are the following:

1. The power to lay and collect taxes, duties, imposts and excise. (Art. I, sec. 8, cl. 1.)
2. The power to regulate commerce with foreign nations, among the several States, and with the Indian tribes. (Art. I, sec. 8, cl. 3.)
3. The power to establish post offices and post roads. (Art. I, sec. 8, cl. 7.)
4. The power to define and punish piracies and felonies committed on the high seas. (Art. I, sec. 8, cl. 10.)
5. The power of legislation with reference to admiralty and maritime matters conferred by the grant of jurisdiction over such matters to the Federal Courts. (Art. III, sec. 2, cl. 1.)
6. The power to define and punish offenses against the law of nations. (Art. I, sec. 8, cl. 10.)
7. The power to raise and support armies. (Art. I, sec. 8, cl. 12.)
8. The power to provide and maintain a navy. (Art. I, sec. 8, cl. 13.)
9. The power to make rules for the government and regulation of land and naval forces. (Art. I, sec. 8, cl. 14.)
10. The power to provide for the calling forth of the militia. (Art. I, sec. 8, cl. 15.)
11. The power to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States. (Art. I, sec. 8, cl. 16.)
12. The power to make all needful rules and regulations respecting the territory or other property of the United States. (Art. IV, sec. 3, cl. 2.)
13. The power to exercise exclusive legislation over the District of Columbia, and over all places purchased by the consent of the legislature of the State of which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. (Art. I, sec. 8, cl. 17.)
14. The power to enforce the Eighteenth Amendment prohibiting the manufacture, sale, and transportation of intoxicating liquors, and the importation and exportation thereof. (Amendment 18, sections 1 and 2.)

These fourteen powers may be classified as follows:

1. The taxing power. (No. 1, *supra*.) °

2. The commerce power. (No. 2, *supra*.)
3. The postal power. (No. 3, *supra*.)
4. The extra-territorial power. (No. 4, *supra*.)
5. The admiralty power. (No. 5, *supra*.)
6. The international power. (No. 6, *supra*.)
7. The military power. (Nos. 7, 8, 9, 10, 11, *supra*.)
8. The power of territorial sovereignty. (Nos. 12, 13, *supra*.)
9. The prohibition power. (No. 14, *supra*.)

### *The Taxing Power*

With reference to the Federal taxing power, air traffic presents no peculiar problems. There is no legal difference between an excise tax on the sale of aircraft, and a similar tax on the sale of automobiles, nor between a tax on transportation by rail and one on transportation by air. Nor is there any difference between a Federal tax on gasoline furnished to an automobile and that furnished to an aircraft, whether the owner be an individual or a State. Nor is there any difference between Federal license tax on a tobacco shop and a similar tax on a filling station. In fact aviation as yet has seemed to present no legal problems with reference to the Federal taxing power. The question of State taxation as affecting interstate commerce will be discussed hereafter.

U. S. Code, Title 26, Section 1181, provides for the forfeiture of every vessel, boat, cart, carriage, or other conveyance whatsoever, used in the removal of for the deposit or concealment of goods for the purpose of defrauding the internal revenue. This language, unlike that of the National Motor Vehicle Theft Act, is broad enough to cover aircraft.

### *The Commerce Power*

With reference to interstate and foreign commerce, the Federal Government is supreme, while over intrastate commerce the States have exclusive jurisdiction. This statement of the law, while accurate, and apparently simple, affords no idea of the difficult legal problems which actually arise. In the first place, there is a class of cases where State statutes are held valid in the case of non-action by Congress. In the second place, State statutes affecting interstate commerce have in certain cases been held valid as a permissible exercise by the State of its taxing or police power; and in the third place, State statutes affecting intrastate commerce have been held invalid in cases where the effect of such statutes was to

interfere practically with the Congressional plan for the regulation of interstate commerce. To this situation, already very complicated, the development of aviation brings new problems no less difficult than those which have been solved by previous litigation.

Federal regulations regarding interstate commerce may apply:

1. To the aircraft themselves.
2. To the personnel connected with such aircraft.
3. To the navigation of such aircraft.
4. To rates and conditions of carriage of passengers and freight by air.
5. To the employers' liability of interstate carriers.
6. To the construction and maintenance of airports.
7. To the construction and maintenance of beacons and other structures for aid in navigation.
8. To the theft of aircraft in interstate commerce.

#### *Federal Licensing and Registration of Aircraft*

Present legislation proceeds upon the theory that the Federal license for an aircraft is necessary only when the aircraft is actually used in interstate or foreign commerce. This may remain a rule if the action of the States in aeronautical legislation so co-operates with the Federal legislation that the dangers of aviation from aircraft without a Federal license appear negligible. If, on the other hand, the actual operation in intrastate flights of aircraft not having a Federal license should materially interfere with interstate navigation under Federal license, legislation rendering a Federal license necessary for all aircraft would doubtless be held constitutional.<sup>3</sup>

The Air Commerce Regulations of June 1, 1928, Section 2 (B), provide that "Whether licensed or not, all aircraft must display the assigned identification mark." Section 7 is as follows: "The authority to require identification marks for unregistered aircraft is derived from Section 3 (e) of the Air Commerce Act of 1926, giving the Secretary authority to . . . ." The Federal requirement for identification of aircraft not engaging in interstate commerce rests on the ground that the nature of interstate air commerce is such as to require the identification of all aircraft.

The McNary bill provides a system of Federal registration of sales and mortgages of aircraft registered as aircraft of the United States.

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3. *George B. Logan*, The Interstate Commerce "Burden Theory" Applied to Air Transportation, 1 JOURNAL OF AIR LAW 440.

"The system would doubtless be very useful. Whether it could wholly supersede the need of recordation under State recording Acts will present a nice question. The similar provisions concerning ships have been held constitutional by lower courts under the commerce clause; the aircraft provisions would doubtless go the same way."<sup>4</sup>

#### *Federal Licensing of Airmen*

The present law and regulations relating to the licensing of airmen require a license for any person to serve as an airman in connection with any aircraft registered as an aircraft of the United States. This is clearly within the power of Federal control over interstate commerce, but it seems probable that the success of interstate commerce by air may require extension of Federal regulation in this respect. If it ultimately appears that the safety of interstate air traffic depends upon non-interference with that traffic by the action of unlicensed airmen, an extension of Federal control may be expected and may be justified.<sup>5</sup>

#### *Federal Control of Air Traffic*

Recognizing the air over the United States as a Federal highway, Congress has given the Secretary of Commerce authority by regulation to establish air traffic rules, and has made it unlawful to navigate any aircraft otherwise than in conformity with such rules. These Federal rules over-ride any conflicting State rules, but do not prevent the adoption by States of additional rules which do not conflict with the Federal rules.

"In the absence of national legislation covering the subject, a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others. And to this end it may require the registration of such vehicles and the licensing of their drivers, charging therefor reasonable fees graduated according to the horse-power of the engines—a practical measure of size, speed, and difficulty of control. This is but an exercise of the police power uniformly recognized as belonging to the States and essential to the preservation of the health, safety and comfort of their citizens; and it does not constitute a direct and material burden on interstate commerce. The

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4. *A. W. Knauth*, Federal Airship's Foreign Commerce Bill, 2 JOURNAL OF AIR LAW 205.

5. *George B. Logan*, *supra*, 1 JOURNAL OF AIR LAW 433, 440.

reasonableness of the State's action is always subject to inquiry in so far as it affects interstate commerce, and in that regard it is likewise subordinate to the will of Congress. *Barbier v. Connolly*, 113 U. S. 27, 30, 31; *Smith v. Alabama*, 124 U. S. 465, 480; *Lawton v. Steele*, 152 U. S. 133, 136; *N. Y., N. H. & H. R. R. v. New York*, 165 U. S. 628, 631; *Holden v. Hardy*, 169 U. S. 366, 392; *Lake Shore & Michigan Southern Railway v. Ohio*, 173 U. S. 285, 298; *Chicago B. & Q. R. R. v. McGuire*, 219 U. S. 549, 568; *Atlantic Coast Line v. Georgia*, 234 U. S. 280, 291."<sup>6</sup>

In *Neiswonger v. Goodyear Tire Co.*,<sup>7</sup> the Court holds:

1. That a person injured by a violation of the air traffic rules, has a right of action against the wrong-doer.

2. That if the flight were intrastate the Court would still have jurisdiction on the ground of the violation of the air traffic rules if it were necessary to apply the 500 ft. minimum altitude rules to intrastate rights in order to protect interstate movements, and the failure to prove the necessity for applying that rule to intrastate movements would merely constitute a failure of proof, so far as that ground of negligence was concerned, and would not oust the jurisdiction of the Court.

From a constitutional standpoint, the airspace of the entire country should be regarded as a single Federal highway, any portion of which may be utilized under Federal authority for interstate commerce. The air being a Federal highway, any regulation for the protection of such highway is within the power of Congress over interstate commerce. Authority is given by the Act to the Secretary of Commerce to establish civil airways, but this does not affect the use of the air outside of such airways, nor limit the jurisdiction of Congress over the entire airspace.

It must be noted that Federal legislation does not undertake to control intrastate commerce by unlicensed aircraft except by requiring identification marks and compliance with the air traffic rules. While the airspace of the entire country is a Federal highway, the airspace over any State is also a State highway. Federal legislation controlling such State highways is therefore justified only so far as may be necessary or reasonable for the regulation and protection of interstate commerce on the Federal highways.<sup>8</sup>

By Section 24 of the Judicial Code, U. S. Code, Title 28,

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6. *Hendrick v. State of Maryland*, 235 U. S. 610, at p. 622, 623.

7. 35 F. (2d) 761. See: 1 JOURNAL OF AIR LAW, 359.

8. *Neiswonger v. Goodyear Tire Co.*, 35 F. (2d) 761; 1 JOURNAL OF AIR LAW, 359. See also, *G. B. Logan*, supra 1 JOURNAL OF AIR LAW, 437.



Section 41, paragraph 8, United States District Courts have jurisdiction "of all suits and proceedings arising under any law regulating commerce." Under the Air Commerce Act of 1926, and the Air Commerce Regulations issued by the Department of Commerce under that Act, the jurisdiction of the United States Courts in regard to air traffic is very broad. Where the carrier is engaging in interstate commerce, Federal jurisdiction is clear. Where the carriage is intrastate, difficult questions will arise. The Federal jurisdiction conferred by statute is not simply over interstate commerce transactions, but over "Suits and proceedings arising under any law regulating commerce." Can any suit by a passenger on a flight within the State be said to be arising under any Federal law affecting commerce? A carrier's duty to the passenger is to exercise the utmost care. Suppose that the passenger is injured by the neglect of the carrier to comply with the Federal law. It would seem that the passenger's suit, in such case, was one arising under the Federal law regulating commerce. A difference may be noted between the case of a licensed and an unlicensed aircraft. The Federal regulations do not require the Federal license for a carrier carrying persons between two points in one State, unless part of the flight is over another State, or is part of a through carriage between points in different States or countries. If the aircraft has a Federal license, it is governed by the Federal regulations, even though the particular flight is purely intrastate. If it has not a Federal license, and is not required to have one, it is governed by the Federal air traffic rules, but not, in general, by other Federal regulations, except that the identification mark must be displayed. In the case of intrastate flight by a plane not requiring a Federal license, the Federal Court would appear to have jurisdiction only in cases where the suit arose out of some violation of the Federal air traffic rules. In such case, a passenger injured by some negligence of the carrier not constituting a violation of the Federal air traffic rules, would be compelled to sue in the State court unless he could resort to the Federal court upon the ground of diversity of citizenship.

What has been said in regard to the jurisdiction of the Federal courts must also be borne in mind with reference to the question of the removal of causes from State courts.

#### *State Taxation of Interstate Air Traffic*

The same rules apply here as in other cases of interstate commerce.

1. A State may tax property although such property is used in interstate commerce.<sup>9</sup>

2. While a State may tax property used in interstate commerce, it may not tax the use of the property in such commerce. Hence, a State tax on gasoline used in interstate commerce is unconstitutional.<sup>10</sup>

3. If one is engaged in both interstate and intrastate business which are so commingled that a State tax cannot be apportioned between them, the whole tax is unenforceable.<sup>11</sup>

#### *Federal Regulation of Carriage of Passengers and Freight by Air*

The regulations require a license for aircraft engaged in commercial traffic in interstate and foreign commerce. Congress has the same power over such traffic as it has over traffic by rail, but air traffic has not yet been placed under the control of the Interstate Commerce Commission.

#### *Federal Regulation of Employers' Liability*

The respective powers of the Federal and State Governments regarding the regulation of employers' liability are set forth in the following decision:

An employee of a railroad company has a right of action against the company for damages sustained by reason of defective appliances in violation of the Safety Appliance Act even though he was engaged at the time in intrastate, and not interstate, commerce.

Congress may, in the exercise of plenary power to regulate commerce between the States, require installation of safety appliances on cars used on highways of interstate commerce irrespective of the use made by any particular car at any particular time. When Congress enters a field of regulation within its paramount authority, state regulation of that subject-matter is excluded; and so held that, without leave of Congress, a State can no more make or enforce laws inconsistent with the Federal Safety Act giving redress for injuries to workmen or travelers occasioned by absence or insecurity of such safety devices than it can prescribe the character of the appliances.

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9. *Cudahy Packing Co. v. Minnesota*, 246 U. S. 450, 456.

10. *Helson v. Kentucky*, 279 U. S. 245, where four of the Justices found this distinction too subtle; *United States Airways v. Shaw*, State Auditor, 43 Fed. (2d) 148; 2 JOURNAL OF AIR LAW, 104.

11. *Bowman v. Continental Oil Co.*, 256 U. S. 642; *United States Airways v. Shaw*, *supra*.

The right of private action by an employee injured while engaged in duties unconnected with interstate commerce, but injured by a defect in a safety appliance required by act of Congress, has such relation to the operation of such act as a regulation of interstate commerce that it is within the constitutional grant of authority to Congress over that subject.<sup>12</sup>

The liability of common carriers by railroad in interstate or foreign commerce for injuries to employees is regulated by U. S. Code, Title 45, Chapter 2.

A similar liability of the employers of seamen is created by U. S. Code, Title 48, Section 688, which, by reason of the Air Commerce Act, does not apply to the crew of a seaplane.

How far, if at all, the Longshoremen's and Harbor-workers' Compensation Act, U. S. Code, Sup. 3, Title 33, Chapter 18, applies to seaplanes and amphibians, is an interesting question. The Air Commerce Act of May 20, 1926, section 7, clause (a) is as follows: "The navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels, in relation to seaplanes or other aircraft." The following questions then arise:

1. Does the foregoing provision apply to any navigation and shipping laws enacted after the passage of the Air Commerce Act? The answer to this is probably in the affirmative.

2. Is the Longshoremen's Act a navigation or shipping law? The answer to this is probably in the affirmative.

3. Assuming affirmative answers to the foregoing questions, do the terms of the Longshoremen's Act itself affect persons employed on seaplanes?

To answer this question one must look at the specific provisions of the Longshoremen's Act itself. Section 904, clauses 3 and 4 define employee and employer as follows:

"The term 'employee' does not include a master of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

"The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock)."

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12. *Texas & Pacific Ry. Co. v. Rigsby*, 241 U. S. 33.

Section 903 contains the following provision for compensation with certain limitations following:

"Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

These specific provisions are broad enough to include the crew of a seaplane when operating upon the navigable waters of the United States. This statute is a remedial statute, and the strict construction of a criminal statute required by the decision of *McBoyle v. United States*,<sup>13</sup> is therefore not appropriate. Nevertheless it is very doubtful, in view of the Air Commerce Act, if the Longshoremen's Act could be held to apply to the crew of a seaplane. Mr. A. W. Knauth assumes that it does not so apply, and suggests that either this act or the Federal Employers' Liability Act should be applied to employees engaged in foreign flights.<sup>14</sup>

Whether the omission of any such provision in the McNary bill now pending indicates a contrary belief on the part of the author of that bill is not clear.

#### *Federal Control of Airports*

Airports are a legal novelty. They have some analogy to wharves.

"We have said that the reasonableness of wharfage must be determined by the local law until some paramount law has been prescribed. By this we mean, that until the local law is displaced or overruled by paramount legislation adopted by Congress, the courts have no other guide, no other law to administer on the subject than the local or State law. Our system of government is of a dual character, State and Federal. The States retain general sovereignty and jurisdiction over all local matters within their limits; but the United States, through Congress, is invested with supreme and paramount authority in the regulation of commerce with foreign nations and among the several States. This has been held to embrace the regulation of the navigable waters of the United States, of which the Ohio River is one."<sup>15</sup>

"Now wharves, levees, and landing places are essential to

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13. 283 U. S. 453, 51 Sup. Ct. Rep. 340 (1931).

14. 2 JOURNAL OF AIR LAW, 204.

15. *Transportation Company v. Parkersburg*, 107 U. S., 691, 700.

commerce by water, no less than a navigable channel and a clear river. But they are attached to the land; they are private property, real estate; and they are primarily, at least, subject to the local State laws. Congress has never yet interposed to supervise their administration; it has hitherto left this exclusively to the States. There is little doubt, however, that Congress, if it saw fit, in case of prevailing abuses in the management of wharf property—abuses materially interfering with the prosecution of commerce—might interpose and make regulations to prevent such abuses. When it shall have done so, it will be time enough for the courts to carry its regulations into effect by judicial proceedings properly instituted. But until Congress has acted, the courts of the United States cannot assume control over the subject as a matter of Federal cognizance. It is Congress, and not the Judicial Department, to which the Constitution has given the power to regulate commerce with foreign nations and among the several States. The courts can never take the initiative on this subject.”<sup>16</sup>

“It is true no act of Congress has relegated the subject of wharfage to the States, as was done in the case of pilotage; but this was not necessary; the regulation of wharves belongs *prima facie*, and in the first instance, to the States, and would only be assumed by Congress when its exercise by the States is incompatible with the interests of commerce; and Congress has never yet assumed to take that regulation into its own hands, or to interfere with the regulation of the States.”<sup>17</sup>

“From this view, it is plain that the courts of the United States have no authority to ignore the State laws and regulations on the subject of wharves and wharfage, and to declare them invalid by reason of any supposed repugnancy to the Constitution or laws of the United States. As already remarked, the courts cannot take the initiative in this matter. Congress must first legislate before the courts can proceed upon any such ground of paramount jurisdiction. If the rates of wharfage exacted are deemed extortionate or unreasonable, the courts of the United States (in cases within their ordinary jurisdiction) as well as the courts of the States must apply and administer the State laws relating to the subject; and these laws will probably, in most cases, be found to be sufficient for the suppression of any glaring evils.”<sup>18</sup>

*Transportation Company v. Parkersburg* is followed in *Ouachita*

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16. *Ibid.*, 701.

17. *Ibid.*, 703.

18. *Ibid.*, 704.

*Packet Co. v. Aiken*,<sup>19</sup> and the *Minnesota Rate Cases*.<sup>20</sup> It may be regarded, therefore, that following the analogy of wharves, airports will be held entirely subject to State control until Congress undertakes to legislate with reference thereto. The only rating legislation at present is the provision in the Air Commerce Act of 1926, providing for the rating of air navigation facilities, including airports, by the Secretary of Commerce. In case the development of air commerce induces Congress to legislate in reference to airports, their connection with interstate air commerce is so close that Federal legislation will probably be held paramount to State statutes. Nevertheless, the analogy between wharves and airports is not absolute. With reference to wharves, Congress has jurisdiction to regulate the navigable waters of the United States. As a wharf extends into such navigable waters, it must be subject to Federal regulation. An airport, on the other hand, is part of the land of the State and while buildings upon it may extend into the air, they do not extend any higher than other buildings on other land of the State. It is true that the air is as necessary for air commerce as are navigable waters for water commerce, but the right of Congress to control wharves rests upon the fact that they project into navigable waters, over which the Federal Government is expressly given jurisdiction; whereas the fact that a building projects into navigable air clearly confers no right upon Congress to control its erection on that ground alone. The right of Congress to legislate with reference to airports, therefore, does not rest upon a jurisdiction over navigable air analogous to its jurisdiction over navigable waters, but upon the fact that the connection of airports with interstate air commerce is so close that the effective regulation of such commerce requires regulation of the airports as well.

It is now regarded that the establishment of airports is a public purpose, and the power to establish such airports may be exercised either by State or by Federal authority. For the satisfactory operation of an airport, zoning may be necessary to restrict the height of structures in the neighborhood in order to allow for the take-off and landing of aircraft. The law of zoning is new and not entirely settled, but F. B. Williams<sup>21</sup> is of the opinion that there can be no valid zoning regulations especially in the interest of the airport.

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19. 121 U. S. 444.

20. 230 U. S. 352, 405.

21. Harvard City Planning Studies, I, 126.

The rules laid down in the leading case of *Welch v. Swasey*,<sup>22</sup> do not seem to go quite so far:

"A statute limiting the height of buildings cannot be justified under the police power unless it has some fair tendency to accomplish, or aid in the accomplishment of, some purpose for which that power can be used; if the means employed, pursuant to the statute, have no real substantial relation to such purpose, or if the statute is arbitrary, unreasonable and beyond the necessities of the case, it is invalid as taking property without due process of law.

Within the territory of a State the Federal Government has no general police power.<sup>23</sup>

Nor can the power to regulate interstate commerce be exercised as a general police power, or as a power to control the States in the exercise of their police power over local trade and manufacture.<sup>24</sup>

To what extent the power to regulate commerce includes an incidental police power relating only to the "control of the means by which commerce is carried on," is not clear. Mr. Williams rests the power of the State to control the height of buildings in the vicinity of an airport entirely on the idea of zoning for the general benefit of the community without special reference to the airport; but if the establishment of an airport facilitating transportation by air is a public purpose, the establishment of a district in connection with the airport for the purpose of facilitating air traffic may, perhaps, be held to be a valid exercise of the police power of the State. A distinction has been suggested between zoning for public and for private airports.<sup>25</sup>

The Federal Government, of course, has no power to provide for zoning in a State. The commerce power, however, is broad enough to give Congress the right to prevent the erection of structures interfering with commerce by air. What is not clear is the extent to which such action by Congress may be justified under the police power incidental to the commerce power, or whether the commerce power can be utilized to control the construction of airports and the height of buildings in their vicinity only through the exercise of the further power of eminent domain. At the present time the courts would probably be reluctant to extend the

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22. 214 U. S. 91.

23. *United States v. DeWitt*, 9 Wall., 41.

24. *Hammer v. Dagenhart*, 247 U. S. 251.

25. *C. W. Cuthell*, The Scope of State Aeronautical Legislation 1 JOURNAL OF AIR LAW, 525.

police power of the State to the control of the height of buildings without compensation to the owners of the property, merely for the purpose of facilitating air traffic, and would be still more reluctant to recognize the Federal police power in this connection. Possible variations in the extent of the police power, however, are clearly set forth in the opinion of Mr. Justice Holmes in *Noble State Bank v. Haskell*:<sup>26</sup>

"It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States*, 107 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare. Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce."

That "the primary conditions of successful commerce" are being constantly altered by the progress of aviation must be obvious, and the possible effect of such alteration upon future applications of the doctrine of the police power must be equally obvious.<sup>27</sup>

*Federal Regulation of the Construction and Maintenance of Beacons and Other Structures for Aid in Aviation*

It is clear that the commerce power is sufficient to authorize the erection and maintenance of beacons and other structures for aid in navigation, but that the land on which these structures are erected must be acquired by the United States, either by purchase, or by eminent domain. It is equally clear that the commerce power authorizes Congress to prevent the misuse of beacons and signal lights in such a manner as to interfere with air traffic, as it has done in the Air Commerce Act, sec. 11, cl.(e).

It seems probable that the police power of the State is sufficient to sustain State legislation requiring high building to maintain some form of light, or warning signal, to prevent danger to air traffic, and it would seem that the commerce power is broad

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26. 219 U. S. 104.

27. As to the present rights of property owners in the neighborhood of airports, see: *George B. Logan*, The Liability of Airport Proprietors, 1 JOURNAL OF AIR LAW, 269; *Swelland v. Curtiss*, 41 F (2d) 929; 2 JOURNAL OF AIR LAW, 82; *Smith v. New England Aircraft Co.* (Mass.) 170 N. E. 385; 1 JOURNAL OF AIR LAW, 367.

As to intermediate landing-fields, see R. W. Fixel, 1 JOURNAL OF AIR LAW, 486.



enough to give to Congress similar authority. It is settled by a long series of decisions that uncompensated obedience to regulations for public safety under the police power of the State is not a taking of property without due process of law.<sup>28</sup>

The power to require protection to air traffic by warning signals on high buildings without compensation is certainly clearer than the power to limit the height of buildings themselves.

### *Federal Jurisdiction Over Theft of Aircraft*

By virtue of the commerce power, Congress has passed the National Motor Vehicle Theft Act, U. S. Code, Title 18, Section 408:

"The term 'motor vehicle' when used in this section shall include an automobile, automobile truck, automobile wagon, motor-cycle, or any other self-propelled vehicle not designed for running on rails; the term 'interstate or foreign commerce' shall include transportation from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia. Whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than \$5,000, or by imprisonment of not more than five years, or both. Whoever shall receive, conceal, store, barter, sell, or dispose of any motor vehicle, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be punished by a fine of not more than \$5,000, or by imprisonment of not more than five years, or both. Any person violating this section may be punished in any district in or through which such motor vehicle has been transported or removed by such offender. (Oct. 29, 1919, c.89, secs. 1 to 5, 41 Stat. 324.)"

The Supreme Court has just decided that this language is not sufficient to include an airplane.<sup>29</sup>

The power of Congress to amend this statute to include aircraft is obvious.

### *The Postal Power*

The Post Office Department through its airmail contracts has been the principal factor in developing air traffic in this country.

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28. *Northern Pacific Ry. v. Minnesota*, 208 U. S. 583.

29. *McBoyle v. United States*, 283 U. S. 453 (1931).

The constitutional power to establish post roads unquestionably gives Congress power to establish any number of airways as such roads, although the airways provided for in the Air Commerce Act are to be established by the Secretary of Commerce and the Secretary of War. It also gives Congress the power to establish airports for the mail service. It would not require an extraordinary stretch of the Constitution to uphold action by Congress declaring the entire navigable airspace of the country a post road.

Control over mail service necessarily involves control over the incidentals of such service, such as carriage of passengers and goods in connection with the mail.

### *The Extra-Territorial Power*

Congress is given power to define and punish piracies and felonies committed on the high seas. The words "on the high seas" obviously include any action by a seaplane or amphibian upon the water, or in the airspace in which vessels navigate. Do these words also include the air over the high seas and above the airspace in which vessels navigate? In *McBoyle v. United States*,<sup>30</sup> the Supreme Court held that the National Motor Vehicle Theft Act did not apply to aircraft. The definition in that Act included "an Automobile, automobile truck, automobile wagon, motorcycle, or any other self-propelled vehicle not designed for running on rails." The Court says: "Airplanes were well known in 1919, when this statute was passed, but it is admitted that they were not mentioned in the reports, or in the debates in Congress." The Court was unanimous in its strict construction of this criminal statute, and when the question ultimately arises, the attempt will undoubtedly be made to show that the words "on the high seas" do not include the air over the high seas. In this latter case, however, we are dealing, not with the criminal statute, but with the constitutional provision adopted in 1789, when aircraft were unknown. On sound principles of constitutional construction it seems that the Court will hold that the words "on the high seas" as used in the Constitution are broad enough to include the air over the high seas at the present day.

On the other hand, it is a more difficult question whether the words "on the high seas," as used in the United States Code, Title 18, Section 481, *et seq.*, providing for the punishment of piracy and other offenses are broad enough to include the air above the

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30. March 9, 1931, 283 U. S. 453, 51 Sup. Ct. Rep. 340.

high seas. In *McBoyle v. United States*, *supra*, Mr. Justice Holmes uses the following language:

"Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used. *United States v. Thind*, 261 U. S. 204, 209."

Applying this language to the Criminal Code, it would seem that the rule of conduct as laid down in that Code would evoke in the common mind only the picture of acts done in vessels on the water. In construing a statute the same phrase may have different meanings when used in different connections.<sup>31</sup>

*A fortiori*, the same words may have a different meaning in the Constitution and in the criminal statute. Various interesting questions arise in this connection. If the strict construction of the *McBoyle* case is to be applied, an attack on an airship by another aircraft would not be within the statute, but an attack on a vessel by an aircraft would be, because the vessel attacked is on the water. Whether an attack on an aircraft by a vessel is within the statute, is more doubtful. In *State v. Hall*,<sup>32</sup> a person standing in North Carolina shot another in Tennessee. The defendant was first indicted in North Carolina for the killing, but it was held that the crime was committed in Tennessee, and that the North Carolina courts had no jurisdiction to punish him. Under this rule the situs of the act would appear to be in the air when a vessel attacks an airship, and the piracy statute would seem to be inapplicable. On the other hand, a criminal conspiracy is complete where the conspiracy is entered into, and a conspiracy to attack an airship might under certain conditions constitute piracy, as under section 496.

The words "upon the high seas" are used in section 451 of U. S. Code, Title 18, and have been held under that section to apply to the open and uninclosed waters of the Great Lakes.<sup>33</sup>

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31. *American Security Co. v. District of Columbia*, 224 U. S. 491.

32. 114 N. C. 909.

33. *United States v. Rodgers*, 150 U. S. 249.

*The Admiralty Power*

Section 451 of United States Code, Title 18, provides for the punishment of certain crimes and offenses: "First. When committed upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof. Second. When committed upon any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, namely: Lake Superior, Lake Ontario, Lake Michigan, Lake Huron, Lake Saint Clair, Lake Erie, or any of the waters connecting any of said lakes, or upon the River Saint Lawrence where the same constitutes the international boundary line." For the reasons above given in connection with piracy, it may be questioned whether these provisions apply to crime committed in the air. Moreover, with reference to the second paragraph referring to crimes on the Great Lakes, etc., which are also within the territorial jurisdiction of the States, the Federal jurisdiction here rests entirely on the admiralty and maritime jurisdiction of the United States, and it is questionable whether such jurisdiction extends into the air above the waters which are within the territorial jurisdiction of the States. There is an important distinction to be noticed between the different constitutional provisions involved. There is an express grant of power to Congress to define and punish piracies and offenses committed on the high seas. On the other hand, the power to punish offenses committed on any other waters than the high seas rests upon a grant of the judicial power to the Federal courts in all cases of admiralty and maritime jurisdiction. This grant of judicial power to the Federal courts operates as an incidental grant of legislative power to Congress to the same extent.

There is nothing to indicate that the admiralty and maritime jurisdiction of England as it existed in 1789, included any jurisdiction over the air, and in *The Propeller Genesee Chief v. Fitzhugh*,<sup>84</sup> the Court says: "At the time the Constitution of the United States was adopted and our courts of admiralty went into operation, the definition which had been adopted in England was equally

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34. 12 Howard 443, 455.

proper here." Nevertheless in that case the Court gave a new definition and held that admiralty jurisdiction under the Constitution extends to the navigable lakes and rivers of the United States without regard to the ebb and flow of the tides of the ocean. It would therefore be perfectly possible, although the step is a longer one, for the Court to extend the admiralty and maritime jurisdiction of the Constitution to the air over the waters now included in such jurisdiction. There is a practical difference, however, between the extension of such jurisdiction to include the air, and the extension of the power to define and punish felonies on the high seas to include the air above the high seas. In the latter case the extension of such jurisdiction is necessary to insure the punishment of crimes committed in the air above the water, whereas, in the former case crimes committed in the air above waters within the admiralty jurisdiction of the United States are within the jurisdiction of the State in which such waters lie, and the extension of the admiralty jurisdiction to include the air above such waters is therefore unnecessary for the punishment of crimes in general.

It must be noted that in *United States v. Rodgers*,<sup>35</sup> the term "high seas" was held applicable to the open uninclosed waters of the Great Lakes, and that the Federal Court is therefore held to have jurisdiction over a crime committed on a vessel belonging to a citizen of the United States when such vessel is in the Detroit River, out of the jurisdiction of any particular State and within the territorial limits of the Dominion of Canada. With this definition of the high seas, it seems probable that Congress would have jurisdiction to define and punish felonies committed in the air over the Great Lakes upon American aircraft although within the territorial limits of Canada, but it is not so clear, although entirely possible, that Congress would have similar jurisdiction over American aircraft flying over the Canadian side of the Detroit River. The answer to this question depends upon whether the air is to be assimilated to the waters or not. If it is so assimilated, jurisdiction of Congress over American aircraft flying over the Canadian side of the Detroit River would be the same as its jurisdiction over American vessels sailing on the same side of the river. On the other hand, that portion of the air is clearly Canadian territory, and as the whole system of admiralty and maritime jurisprudence relates entirely to the water, it would require judicial legislation to extend that jurisdiction to the air above the water

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35. 150 U. S. 249.

belonging to another State. The law of the high seas may reasonably justify the application of similar rules to the high air above the high seas. It is quite another thing to say that the admiralty jurisdiction of the United States over an American ship in foreign waters is sufficient to give similar jurisdiction over American aircraft in the air above such waters. Here, too, there is room for a conflict of judicial decision. Suppose that A while on an American aircraft flying over the Canadian side of the Detroit River, does an act which violates the laws both of Canada and of the United States, and then escapes to France. Under its extradition treaties it may be presumed that Canada could claim the extradition of the criminal. Whether the United States could also claim extradition is a question in regard to which courts might readily disagree.

It must be noted that the term "high seas" is sometimes used by writers in a more restricted sense and that the sense in which the term is used in a particular statement must therefore be carefully noted.<sup>36</sup>

Section 7 (a) of the Air Commerce Act of 1926 is as follows:

The navigation and shipping laws of the United States, including any definition of 'vessel' or 'vehicle' found therein and including the rules for the prevention of collisions, shall not be construed to apply to seaplanes or other aircraft or to the navigation of vessels in relation to seaplanes or other aircraft."

In *Crawford Brothers, No. 2*,<sup>37</sup> the District Court held that a Court of Admiralty is without jurisdiction of a suit to establish and enforce a lien for repairs against an aeroplane which is not a subject to maritime jurisdiction. As regards aircraft in general, the decision seems sound. However, a seaplane when afloat is just as much a vessel as any other ship and is subject to admiralty jurisdiction.<sup>38</sup>

It is not stated in the Federal Report above cited whether the aircraft was an airplane or a seaplane and no distinction is drawn between the two, but a recent text writer states that the aircraft in question was a seaplane.<sup>39</sup>

While the Air Commerce Act excludes seaplanes from the definition of vessel or vehicle under the navigation and shipping laws, the Air Commerce Regulations, June 1, 1928, Section 74 (J), contain the following provision:

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36. E. g. *A. W. Knauth*, 2 JOURNAL OF AIR LAW, 204.

37. 215 Fed. 269.

38. *Reinhardt v. Newport Floating Service Corporation*, 233 N. Y. 115; 1928 Aviation Reports, 4.

39. *Hotchkiss*, Aviation Law, p. 72.

"Seaplanes on the water shall maneuver according to the laws and regulations of the United States governing the navigation of water craft, except as otherwise provided herein."

As regards salvage, a recent writer is of the opinion that, because the Air Commerce Act of 1926 makes no provision for salvage, the right to demand salvage is non-existent.<sup>40</sup> It is submitted, however, that a seaplane in the water is a vessel in fact, while the Air Commerce Act merely excludes the application to this particular vessel of the navigation and shipping laws, so that any statutory provisions regarding salvage will not apply to a seaplane. But the general doctrine of salvage, being based on the principle of preventing unjust enrichment and upon a maritime practice centuries old, should apply in the case of seaplanes as well as in the case of any other vessels. The Air Commerce Act recognizes that the seaplane is a vessel in fact, but, as a matter of policy, retains control of such seaplane as an aircraft by excluding it from the navigation and shipping laws. The very laws, however, which by the Air Commerce Act do not apply to seaplanes as statutes, are made to apply to their use on water as regulations under Section 74 (J) of the Air Commerce Regulations, June 1, 1928. For the same reason the doctrine of general average should apply to seaplanes while navigating on the water, although statutory provisions with reference thereto would not apply. It would be entirely reasonable, by analogy, to apply the same doctrine to air traffic in general, but not every judge would be willing to do so. The McNary bill proposes to apply the doctrine of general average and salvage to foreign commercial aircraft flights.<sup>41</sup> This bill also provides for the application to aircraft in foreign commerce of numerous acts now applicable to shipping.

#### *The International Power*

In *United States v. Arjona*,<sup>42</sup> the Court says: "The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own domain to another nation with which it is at peace, or to the people thereof; and because of this the obligation of one nation to punish those who within its own jurisdiction counterfeit the money of another nation has long been recognized." Just how far this obligation of one nation to another extends is not clearly settled. Certain obligations of

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40. Ibid.

41. A. W. Knauth, *supra* 2 JOURNAL OF AIR LAW, 204.

42. 120 U. S. 479, 484.

neutrals toward belligerents are generally recognized.<sup>43</sup> These obligations are recognized by the United States and enforced by statutory provisions in U. S. Code, Title 18, Chapter 2. Certain provisions of this chapter relate to vessels. Under the doctrine of *McBoyle v. United States*,<sup>44</sup> these statutes would seem not to apply to any aircraft except seaplanes and amphibians. The Court in *Reinhardt v. Newport Flying Service Corporation*,<sup>45</sup> holds that a hydroplane is a vessel when it is in the fulfilment of its function as a traveller through water. On the other hand, "On Jan. 29, 1915, the Department of State, in opposition to the view of the German Embassy at Washington, announced the conclusion that hydro-aeroplanes were not to be regarded as war vessels, and that Art. VIII of the Hague Convention was not applicable thereto. American White Book, European War, II, 145-146."<sup>46</sup>

It may well be questioned whether this ruling of 1915 would be followed today.

Although the obligations of neutrality are not clearly defined, the principle which forbids the fitting out of a vessel of war, such as *The Alabama*, in a neutral country for a belligerent seems broad enough to apply to the fitting out of aircraft in the same manner for military purposes. Under existing statutes, however, it would seem perfectly lawful to manufacture and fit out such aircraft, not suitable for travel on water, so far as the law of the United States is concerned; so that the present statutes seem defective in not providing against the fitting out of aircraft for belligerents, with the result that the United States may be subject to claims against it for breach of neutrality unless this omission is repaired.

The obligations of a neutral with reference to preventing the fitting out of vessels appear to be limited to those vessels which are intended to cruise or carry on war against another power.<sup>47</sup>

"The ability and disposition of a belligerent to utilize for hostile purposes almost any type of merchant vessel capable of mounting guns, serve to impose upon the neutral the burden of exercising great watchfulness of every vessel constructed within its territory and contemplating departure therefrom for a belligerent port or service. The absence of armament at time of departure is by no means indicative that a vessel may not be specially adapted for hostile operations. Nor does an apparently innocent structural

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43. See *Hyde*, International Law, Vol. II, §849, *et seq.*

44. 283 U. S. 453, 51 Sup. Ct. Rep. 340 (1931).

45. 232 N. Y. 115, 1928 U. S. Av. Rep. 4.

46. *Hyde*, International Law, Vol. II, §854, Note 1.

47. *Ibid.*, §853.



design necessarily preclude the likelihood of the transformation of the ship into a naval auxiliary."<sup>48</sup>

The difficulties in determining whether aircraft are not adapted for hostile operations seem even greater than in the case of ships.

The extent of the obligations of one nation to prevent the taking of any action by persons within its territory for the purpose of violating the laws of another nation is uncertain. There seems, for example, to be no admitted liability on the part of one nation to prevent an attempt by its citizens to smuggle goods into a neighboring country. The constitutional power of Congress to define and punish offenses against the law of nations, however, is unquestionably sufficient to sustain any statute forbidding an attempt in this country to violate a foreign law. It is possible that a claim by a foreign country against the United States for failure to prevent such acts might not be sustained, but if Congress recognizes any obligation of this country toward other countries by forbidding an attempt in this country to violate the laws of other countries, it is not for the wrongdoer to say that he is not guilty of an offense against the law of nations. Under this power, as well as under the commerce power, therefore, Congress has the right to control the use of aircraft going to foreign countries.

#### *The Military Power*

This power is very broad. Aircraft were unknown in 1789, but no one would doubt that the power to raise and support armies, and to provide and maintain a navy includes the power to use aircraft for military purposes. Obviously the power is broad enough to include any legislation necessary to protect interference with military operations by aircraft. Coupled with the commerce power and the postal power, the military power seems to be sufficient to render Federal control of the air supreme over that of the States.

By Section 4 of the Air Commerce Act of 1926, 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. This is an apparent attempt by Congress to appropriate airspace reservations without compensation, and appears to involve an unconstitutional taking of property without due process of law.

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48. *Ibid.*, §854.

*The Power of Territorial Sovereignty*

This power extends:

1. Over all territory or other property belonging to the United States.
2. Over the District of Columbia.
3. Over all places purchased with the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

The power here conferred is that of a territorial sovereign, and includes absolute control over the air above such territory subject to the constitutional rights of property owners.

In Section 4 of the Air Commerce Act of 1926, the President is authorized to provide, by executive order, for the setting apart and the protection of airspace reservations in the United States for national defense and other governmental purposes, and in addition, in the District of Columbia for public safety purposes. The last clause shows that Congress with reference to the District is acting as territorial sovereign, but is apparently attempting to take property by the reservation of airspace without compensation, and therefore without constitutional authority.<sup>49</sup>

*The Prohibition Power*

The Eighteenth Amendment confers upon Congress a power of control over air traffic broader than that conferred under the commerce power of the Constitution. The commerce power is thus defined in *Hammer v. Dagenhart*.<sup>50</sup>

"The power is one to control the means by which commerce is carried on, which is directly the contrary of the assumed right to forbid commerce from moving and thus destroy it as to particular commodities. But it is insisted that adjudged cases in this court establish the doctrine that the power to regulate given to Congress incidentally includes the authority to prohibit the movement of ordinary commodities and therefore that the subject is not open to discussion. The cases demonstrate the contrary. They rest upon the character of the particular subjects dealt with and the fact that the scope of governmental authority, state or national, possessed over them is such that the authority to prohibit is as to them but the exertion of the power to regulate. . . .

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49. See 1 JOURNAL OF AIR LAW, 346.

50. 247 U. S. 251.

In *Clark Distilling Co. v. Western Maryland Ry. Co.*,<sup>51</sup> the power of Congress over the transportation of intoxicating liquors was sustained. In the course of the opinion it was said:

"The power conferred is to regulate, and the very terms of the grant would seem to repel the contention that only prohibition of movement in interstate commerce was embraced. And the cogency of this is manifest since if the doctrine were applied to those manifold and important subjects of interstate commerce as to which Congress from the beginning has regulated, not prohibited, the existence of government under the Constitution would be no longer possible."

"And concluding the discussion which sustained the authority of the Government to prohibit the transportation of liquor in interstate commerce, the court said: '. . . the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guarantees of the Constitution, embrace.'"

Under this ruling it is clear that the commerce power does not permit the prohibition by Congress of interstate commerce in non-intoxicating liquors. The Volstead Act, however, does prohibit the transportation of beverages containing one-half of one per cent of alcohol, and the constitutionality of this provision has been sustained.

Prior to the Eighteenth Amendment Congress had the power to prohibit interstate commerce in intoxicating liquors. The Eighteenth Amendment extended this power to interstate commerce. U. S. Code, Title 27, Section 12, prohibits the transportation of intoxicating liquors, and Section 40 provides for the seizure and destruction of the liquor, and the sale of the vehicle. It must be noted that Section 40, unlike the National Motor Vehicle Theft Act, includes aircraft.

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51. 242 U. S. 311.