

1931

Air Freedom: The Second Battle of the Books

Joseph F. English

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Joseph F. English, *Air Freedom: The Second Battle of the Books*, 2 J. Air L. & Com. 356 (1931)
<https://scholar.smu.edu/jalc/vol2/iss3/5>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

AIR FREEDOM: THE SECOND BATTLE OF THE BOOKS*

JOSEPH F. ENGLISH†

In 1608 a young lawyer by the name of Grotius, employed by the Dutch East India Company, who had written, "the greatest gift any lawyer ever gave to the world"¹ published his *Mare Liberum*. This work was answered by John Selden of the Inner Temple, with a work entitled *Mare Clausum*. The war was on. But the gods of battle fought against Selden and today the world rejoices in the freedom of the seas.

Three hundred years later the international lawyers of the world were again marshaled in a similar conflict. This time the *casus belli* was the freedom of the air.

The first gun of this modern "Battle of the Books"—which was so abruptly ended by the ultimatums of 1914, thereby closing the air frontiers of the European countries—was fired as far back as the Franco-Prussian War, when French balloons flew over German lines seeking information, and Bismarck threatened to treat their occupants as spies.²

The Grotius of this battle was the French jurist, M. Paul Fauchille, who in 1901 hurled the projectile carrying the message that the air was free; while the Seldens were once again English, among whom were Dr. Hazeltine, Professor Westlake, Sir Erle Richards and Dr. Lycklama à Nijeholt,³ who responded with a shot from an old musket that the air was closed.

This time, as we shall see, the gods of battle ably assisted the English and their allies, and today the world rejoices in the enclosure of the air.

It should prove interesting, at this date, as a lesson in history, to review the struggle and to study its effects. Has the armistice that resulted in the Paris Convention of 1919 completely silenced the booming of the guns, or will the muffled throb of the crippled

*This paper is a semester essay prepared under the direction of James J. Hayden, Catholic University School of Law, Washington, D. C.

†Mr. English is a graduate student at Catholic University School of Law.

1. *Blewett Lee*, *Sovereignty of the Air*, 7 *Am. Jour. Int. Law*, 470.
2. *Bogert*, *Problems in Aviation Law*, 6 *Cornell Law Quart.*, 271-309.
3. Dr. Jenny Lycklama à Nijeholt, included here because teaching at an English university.

artillery of the defeated champions of air freedom burst forth in a final endeavor to free aerial navigation from its prison within the confines of the subjacent state? That it will has been recently stated by Henry-Couïannier, when he said that sovereignty will either be accepted for a short time only, or remain a dead letter, in view of the ever-pressing necessity to yield to the requirements of international air navigation.⁴ Or has a new principle of international law been "established as the result of custom adhered to through the World War and finding its sanction in modern aerial jurisprudence?"⁵

The outbreak of the struggle found the defeated army, then large in numbers, bombarding the original handful of courageous victors so fiercely that the result trembled in the balance; and only the strategic maneuvers of Professor Westlake and his handful of followers, who "sent the sword of sovereignty clanging into the scales,"⁶ saved the day for the contenders for the sovereignty of the air.

At the threshold of the struggle we find that the plan of campaign advanced by the various contenders can be no better shown than by resorting to the 1913 report of the committee on aviation of the International Law Association.

As to whom the air space over a subjacent state belongs, the report stated that there were two main schools of thought: (1) Those who maintain that the air space is of its nature free—this theory being that of the freedom of the air space. (2) Those who maintain the theory of the sovereignty of the subjacent state in the air space above its territory.

The first school may again be divided into partisans of: (a) Air freedom without restriction. (b) Air freedom restricted by some special rights (not limited as regards height) of the subjacent state. (c) Air freedom restricted by a territorial zone.

Those who maintain the sovereignty theory may also be subdivided into partisans of: (a) Full sovereignty up to a limited height only; (b) Full sovereignty restricted by the right of innocent passage for aerial navigation. (c) Full sovereignty without any restrictions.⁷

4. *Henry-Couïannier*, *Éléments Createur Du Droit Aérien*, Paris, 1929, Pp. 144-145.

5. *Spiropoulos*, *Der Luftraum Integrierender Teil Des Staatsgebietes* Pp. 115, 116.

6. *Spaight*, *Aircraft in Peace and the Law*, p. 5.

7. 28 Reports International Law Association, 530.

Air Freedom Without Restriction

The view that the air is completely free was held by a number of publicists of distinction. Wheaton, Bluntschli, Pradier-Fodere, Stephan and Nys were the staunch supporters of this contention. Expressions such as these formed the basis upon which rested the theory: "The sea is an element that, like the air, belongs to all, and for this reason no nation has a right of possessing it." "States have no authority in the air, because they are unable to enclose it within their boundaries." "The great currents of air are not legally under the control of the State." "Air space is incapable of ownership or of sovereignty, and therefore free to all."⁸

All of the writers who defend the liberty of the air without restriction are, as Hazeltine pointed out, with the exception of Nys, thinking of the air as an element.⁹ This thought had its inception in the works of Grotius and in the Roman Law.

Under the Roman Law the air, as an element, was considered *res communis* with respect to all mankind. The fragment "*aer res communis*" is repeated in the following passages from the Corpus Juris Civilis:

- I. 2, 1, 1, "the following things are by natural law common to all: the air, running water, the sea."
- D. 1, 8, 2, 1 (Marcianus) ". . . by natural law, the following things are common to all: The air, flowing water, the sea."
- D. 43, 8, 3, 1 (Celsus) ". . . the use of the sea is common to all, and the use of the sea shores, and that of the air."
- D. 43, 10, 13, 7 (Ulpian) "The sea and the sea shore is common to all, as also the air."

According to Sohm, the Romans "applied the word *res* to any thing that can form a part of a person's property. . . . Things must necessarily be the object of human rights. . . . Certain things are prevented by a rule of law from being the object of private rights. Such things are called *res extra commercium*. Of *res extra commercium* we have three classes: *res divini juris*, *res publicae*, *res omnium communes*. . . . *Res communes* are not, properly speaking, things in the legal sense of the term, just as little as the sun, the moon and the stars, or the atoms and the ultimate particles of the naturalists, are things. For the atmosphere

8. Hazeltine, *The Law of the Air*, p. 11.

9. *Op. cit.*, p. 11.

of the earth, the ocean, and the flowing water of a natural stream (*aqua profluens*) are not, as such, susceptible of human dominion."¹⁰

Grotius stated that the sea was "common" to all men, which he followed up with: "The same may be said of the air as common property, except that no one can use or enjoy it without at the same time using the ground over which it passes or rests."¹¹

As was very early pointed out, those writers did not "touch upon the question which is, of course, at the present time, the important one, as to the rights of states in the *air space* as such."¹² Merely for the sake of showing the distinction between the air as an element—"the atmosphere which completely envelopes the earth" and which "may be considered as a fluid sea at the bottom of which we live, and which extends upward to a considerable height, probably two hundred miles, constantly diminishing in intensity as the altitude increases"¹³—and the air space, let us use the words of Professor Lycklama à Nijeholt, who said: "First of all . . . the old error . . . of considering the air as the object of discussion instead of the air space . . . is obvious. Sovereignty wants a sphere, a domain, where it can be exercised. In theory it is of no account what there may be in that sphere; and in practice, is the fact that it is filled with a moving element, where fixed marks cannot well be imagined, enough to make sovereignty there practically impossible? We think not. We think rather this conclusion has again its origin in too great a wish for analogy. Because on land the signs of sovereignty—buildings and boundary marks—can have a fixity, which in sea and air is out of the question, is sovereignty there quite unacceptable. . . . Does it not sound more rational to judge every sphere after its own nature? Difference in substance can ask for difference in application of the sovereignty principle. This principle is: he is sovereign who rules within a certain sphere; if he manages to rule without fixed boundary marks, he is nevertheless sovereign. There is no reason why one should make it a condition that sea and air frontiers must be established in a way such as to make it impossible to respect them literally to an inch, which, of course, is only possible on land."¹⁴ Or we might quote Mr. Hine's conclusion after reading the case

10. *Sohm*, Institutes of Roman Law (Ledlie's Trans.) 3 ed. London 1907, p. 303.

11. *Grotius*, Rights of War and Peace (Campbell's trans.) London 1814, p. 229.

12. *Hazeltine*, The Law of the Air, p. 11.

13. *Bowditch*, American Practical Navigator, 1918 reprint, p. 206.

14. *Lycklama à Nijeholt*, Air Sovereignty, p. 22.

of *Butler v. Frontier Telegraph Company*.¹⁵ "Another favorite argument of advocates of freedom of the air is that the air is constantly in motion and therefore not susceptible of private ownership. The right of the owner of the surface, however, to exclude trespassers from the air space does not depend on his ownership of the fugitive air, but on his ownership of the space temporarily occupied by the fugitive air."¹⁶ In discussing Public Utility Air Rights Mr. Theodore Schmidt says: "Air rights . . . is the expression commonly used to describe the right to occupy the space above the surface or lower levels of land. . . . It does not accurately describe the nature of the right: for the upper occupier is not interested in the air as such . . . but the upper occupier is interested rather in the *right to occupy* with a building or other structure and appurtenances, *the space above a certain level* of a given tract of land."¹⁷

Nys was conscious of this distinction but nevertheless argued for the complete freedom of the air space. In his report to the Institut de Droit International at Brussels in 1902, he contended that there was no real necessity for the right of preservation and defense, and that if the existence of such a right were admitted the principle of the freedom of the air would be lost in a mass of protectional rules and regulations by the territorial State.¹⁸ He looked upon the air as a world-sea and upon air vehicles as vessels sailing through this sea of air. Just as the sea itself is open and free to the maritime trade of the world, so the air-sea is open and free to the aerial trade of the world. Just as vessels on the high sea are viewed as detached portions of the homeland, so vessels in the air are to be viewed as detached portions of the homeland of the air vessels. He places the high seas of water and the high seas of air upon a fully and completely equal footing.¹⁹

The doctrine of air freedom without restriction, while it received early consideration, was soon abandoned by most writers. It is based upon the theory that the air is by its nature free, just as is the sea. Kuhn in discussing the reasons advanced by Grotius in denying all sovereignty over the sea said: ". . . Roman ideas of private property had been supplanted by the modern theory that the freedom of the seas is predicated on the impossibility of effective control by any state. Therein lies the difference, for the

15. 186 N. Y. 486.

16. *Hine*, Home versus Aeroplane, 16 Am. Bar Ass'n. Journal, 220.

17. *Schmidt*, Public Utility Air Rights, 1 JOURNAL OF AIR LAW, 53.

18. *Hazeltine*, The Law of the Air, p. 12.

19. *Hazeltine*, The Law of the Air, p. 14.

states are not thus impotent in respect of the abutting air space. It is true that their control may not be complete, any more than it is upon the land; but as soon as the art has been regularly established, states will be able to execute their will upon the zone abutting them from above. As one writer has said, "the air is at all events not the sea, an aircraft no ship, and a complete analogy is neither made *de lege lata* nor advisable *de lege ferenda*"²⁰ Another writer has said, "Those publicists who insisted upon complete freedom of the air were found not to have given sufficient consideration to two facts: First, that the law of gravity makes all heavier-than-air craft potentially dangerous to the inhabitants of the subjacent land while such craft are passing through the air space over such land; and second, that aircraft must avail themselves of the use of the surface of the earth and the surface air space . . . in alighting and taking off. Control of the airspace was therefore necessary in order that the subjacent state might adequately protect itself from attack or unintentional injury and might adequately enforce its customs, immigration, and health laws."²¹ The all too ready impulse to argue from analogy has led the writers to such a position that its logical effect would result in an absurdity; for the territorial state could not prevent a fleet of airship from flying over its territory carrying bombs or photographic apparatus. Even within the marginal seas, health regulations and laws for the protection of the littoral state are universally recognized.

Air Freedom Restricted by Some Special Rights—Not Limited as Regards Height

The weight of authority before the war favored the freedom of the air subject to some special rights of the subjacent state. The lesser number of publicists did not restrict the exercise of these rights as regards height. The Institute of International Law, at a session at Ghent, 1906, drafted a project which stated that the air is free. States have no authority over it, in time of peace or in time of war, other than that which is necessary for their own preservation.²² This was the result of a discussion over the jurisdiction of the air space which came up in a practical form in relation to the control of wireless telegraphy. At this session, which occurred just before the diplomatic conference of Berlin on radiotelegraphy, Professor Westlake of Cambridge introduced the sover-

20. *Kuhn*, *Beginnings, Aerial Law*, 4 *Am. Jour. Int. Law*, 113.

21. *Lee*, *Civil Aeronautics, Leg. History of Air Commerce Act*, p. 121.

22. *Supp. 7 Am. Jour. Int. Law*, 147 (1913).

eignty theory.²³ At its session in Madrid in 1911, the Institute again voted in favor of the freedom of the air subject to the right of the ground state to take measures necessary for the proper security of themselves and of the persons and property of their inhabitants.²⁴ Meili, in 1908, stated: "That the air, together with the aerial space, is free, that is to say, it is at the disposition of all nations, under this reserve, that each territorial state can do that which is necessary for its own preservation." He later stated that the air should be free for aerial navigation, but that each state should have certain rights, not limited horizontally for the preservation of their interests, enabling them to defend themselves against balloons and aeroplanes.²⁵

This theory is based on the argument that the "air is physically incapable of appropriation because it cannot be continuously occupied."²⁶ Grotius relied upon this argument in his attack upon the Portuguese. All property, he says, is grounded upon occupation, which requires that moveables shall be seized and that immoveable things shall be enclosed; whatever therefore cannot be so seized or enclosed is incapable of being made a subject of property. The vagrant waters of the ocean are thus necessarily free. The right of occupation, again, rests upon the fact that most things become exhausted by promiscuous use, and that appropriation consequently is the condition of their utility to human beings. But this is not the case with the sea; it can be exhausted neither by navigation nor by fishing, that is to say, in neither of the two ways in which it can be used.²⁷ Dr. McNair pointed out in one of his lectures at the Air Law Institute that sovereignty does not really involve continual presence any more than private law involves possession. "A state can exercise sovereignty over a huge desert, for instance, if it is in de facto control and is in a position to suppress internal disorder and repel external attack."²⁸

Air Freedom Restricted by a Territorial Zone

Of those writers who advocated the complete freedom of the air, subject to certain right of self preservation, the majority favored the institution of a zone within which those rights could be exer-

23. *Meyers*, *The Freedom of the Air*, 24 *Green Bag*, 430.

24. *Lee*, *The Sovereignty of the Air*, 7 *Am. Jour. Int. Law*, 478.

25. *Lycklama à Nijeholt*, *The Sovereignty of the Air*, p. 11, 12.

26. *McNair*, 1 *JOURN. AIR LAW*, 384.

27. *Grotius*, *Mare Liberum*, Cap. 5.

28. *McNair*, *op. cit.* p. 384.

cised by the subjacent state. Above that zone the air was completely free from any interference by the ground state.

The father of this plan was M. Paul Fauchille, well known as the editor of the *Revue générale de droit international public*, and to him is probably due the honor of being the pioneer in this field of legislation. As early as 1900, at an annual conference of the Institute of International Law, he proposed as a subject to constitute part of the order of the day for the next session, *Le Régime juridique des aérostats*. This was accepted and, accordingly, at the following session Fauchille presented a detailed study of the subject, supplemented by a proposed legislative draft consisting of thirty-two paragraphs.²⁹

The arguments advanced by the above writers who favored the complete freedom of the air and those who restricted it with some special rights, not limited as regards height, were also used by Fauchille and his followers. "The air is free in principle, they allege, though the state must have certain rights, perhaps by analogy with the coast waters."³⁰ Despagnet said: "In itself the air does not seem susceptible of being the object of a right of property or of sovereignty, but each state ought to have the right of preventing such use of the air as is dangerous to its own security. The analogy of the maritime belt could be applied to the air space above the land."³¹ Merignhac maintained that the air is free except a territorial atmosphere, the height of which can be fixed by conventions. Oppenheim claimed that the territorial atmosphere is not a special part of the territory of the state, but each state can exercise jurisdiction up to a certain height.³² Because the views of Fauchille received such wide acceptance before the World War they will be set out more fully. His views are expressed very clearly in the seventh article of his draft code submitted to the Institute of International Law at its Brussels meeting in 1902. The seventh article reads as follows: "The Air is free. States have in the air in time of peace and in time of war only those rights which are necessary for their preservation. These rights relate to the prevention of espionage, to customs and sanitary regulations, and to the necessities of defense." He argues that you cannot own the air because you cannot appropriate and continuously occupy it. For the same reasons you cannot exercise sovereign jurisdiction in the

29. *Kuhn*, *Beginnings of Aerial Law*, 6 *Am. Jour. Int. Law*, p. 111.

30. *Lycklama à Nijeholt*, *Sovereignty of the Air*, p. 12.

31. *Hazeltine*, *Law of the Air*, p. 16.

32. *Lycklama à Nijeholt*, *Sovereignty of the Air*, p. 12.

air. Though admitting that space can be dominated by the cannon and human vision he claims that they are only means of preserving a sovereignty which has already been acquired. In answer to the question as to how can the free use of the atmosphere by states be kept within proper limits he replied that the principle of international law would take care of the situation. A state has the right to defend itself against any act that interferes with its "territory, its population, its material wealth."³³ From this we see that Fauchille gives to the states only those rights in the air over their territory as are necessary to its preservation and defense.

Dr. Hazeltine has briefly summarized certain consequences that can be drawn from Fauchille's theory, viz: (1) The state can therefore prohibit the circulation of air-vehicles below (but not above) a certain height, except for the purpose of arrival upon the state's territory and except for the purpose of departure. He thus fixes a zone of air from which the traffic of air-vehicles is essentially excluded. The height at which he would fix this zone has not been constant. His first height was 1500 meters, while he later reduced it to 500 meters. (2) The second consequence is that in order to protect itself from espionage the state has the right to prohibit aerial navigation in certain regions of the atmosphere, more especially those aerial regions which surround fortifications. (3) The state can protect its own economic and sanitary interests in the aerial space. (4) Both public and private air-vessels are subject, for acts which take place upon them, only to the law and justice of the country whose flag they fly. (5) The territorial state can prevent the passage of foreign military airships.³⁴

These zone theories are also based upon the analogy of the high seas. Lycklama à Nijeholt admits that the analogy has some application since "the general disposition and nature, the wide expanse, the continually changing of both sea and air certainly justify a comparison to some extent. For why do we compare? To find cases where existing rules can be applied, to lighten the work of lawmakers. And in the air there will certainly be cases where maritime rules will apply." The claim is made that arguing from analogy will lead to the establishment of original rules that will determine the position of the air space in the law of nations, and will further show that existing rules can have no application. In discussing the relation between the air space and the underlying sovereign territory and the sea and the land Lycklama à Nijeholt

33. *Hazeltine, Law of the Air*, p. 18-19.

34. *Hazeltine, The Law of the Air*, p. 21-23.

admitted that, "The sea being *res nullius* does not hurt the rights of any state. . . . The farther we are off in a horizontal direction, the less direct utility and the less direct danger the land may expect from us. . . . What happens outside the maritime belt is not often likely to re-act upon the land," but at the same time it was insisted that "above the land" is a different thing from "at the side of the land." *Lycklama à Nijeholt* showed that "a great distance in a vertical direction by no means implies proportionally less danger from the underlying land."³⁵ In commenting upon the above analogy Professor Zollmann wrote: "The analogy itself is unsatisfactory, for the distance in the case of the sea is horizontal, and hence affords protection from attack, while in the case of the air, it is vertical, and affords no such protection. Furthermore, in the case of the sea, it is a narrow fringe along the shore, while in the case of the air, it is a layer even broader than the land itself."³⁶ Dr. Hazeltine found that the "analogy of the high seas is not satisfying, and indeed very little is really left of the conception of freedom after supporters of the theory have accorded the territorial state various rights to be exercised either without limit in height or within a certain fixed zone."³⁷ "Fauchille and his school give with the one hand and take away with the other. They give to aerial navigation a so-called 'freedom of the air' and at the same time they rob this so-called freedom—of much, very much—of its significance by giving the territorial state most important rights within this protective zone, for it is precisely within the limits of such a zone—the air space above the land up to a certain height—that aerial navigation must largely be carried on. Fauchille's theory of freedom therefore, turns out to be not strictly a theory of complete freedom at all, but a theory of limited freedom."³⁸

Full Sovereignty Up to a Limited Height Only

The view that the ground state has sovereign rights in the air space was expressed very early in the debate over the freedom of the air. All of the publicists do not assert that the state has full sovereign rights in the air space. They restrict this right by a territorial zone where the ground state may exercise full jurisdiction, and not merely the right of conservation, and above which the air is

35. *Lycklama à Nijeholt*, *Sovereignty of the Air*, p. 21-24.

36. *Zollmann*, *Law of the Air*, p. 2.

37. *Hazeltine*, *Law of the Air*, p. 24-25.

38. *Ibid.*, p. 27.

completely free. H. B. Leech, writing in the *Fortnightly Review* for August, 1912, favored the view that the portion of the atmosphere which is within the range of artillery situated upon the ground should be regarded as similar to the territorial waters of all nations, while aerial heights beyond the reach of artillery should be regarded like the high seas and free alike to airships of all nations.³⁹ The freedom theory and this theory of sovereignty agree to the extent of saying that above a certain height the air is completely free. The writers who support this zone theory of sovereignty are at variance as to the height of this zone. "Thus, von Holzen-dorf places the upper limit of the zone at 1000 meters from the surface of the earth, measured from the highest point of land. Von Bar places the upper limit of the zone very much lower, only 50 or 60 meters from the land; von Liszt in 1902 expressed the view that the limit of the zone should be placed as high as the air space can be actually dominated, either by ordnance or by aerial navigation. So, to, Rivier, Pietri and Hilti place the limit of this zone at the height reached by artillery upon the earth."⁴⁰

The desire for analogy has again made itself apparent because the above theory is based upon the law as applicable to marginal seas. But as the original reason given for the establishment of the three mile limit—the range of artillery then in use—would not be accepted today were it for the first time to be announced, neither will the reason advanced by these writers for the establishment of a zone over which the state is sovereign find a sympathetic ear. Modern invention will laugh to scorn any attempt to invade the air at a height that cannot be reached by a gun. The strongest argument that can be used against the writers expresses itself in the fact that above this sovereign zone foreign airships would be free to navigate at will in the air space.

This section of the discussion will be closed with a reference to the article by Meyers. In speaking about the analogy of the seas to the air he said, "The analogy is wrong in practice and therefore wrong in law, which has for one of its important functions the recognition of distinctions not apparent to the laymen, and of effecting justice by that recognition." The land inhabitant has no general interest in what occurs upon the sea which is at the side of the land where he dwells. "We read of a wreck at sea—we who have no maritime investments of loved ones or money—and by no possible method of philosophy can we conjure up a legal

39. *Lee*, 7 *Am. Jour. Int. Law*, p. 474, citation.

40. *Hazeltine*, *Law of the Air*, p. 32.

interest in the incident. . . . The beach or shore is a neutral zone, inevitably dividing the sea from the land. All aircraft operate above, not at the side of, the land. Except over water, no water, no aviator can even throw out ballast without it reaching somebody's property and there is no neutral zone of beach to receive it or act as a buffer between the two elements. The sea wreck affects only the individuals who have intrusted persons or cargo to the vessel; it sinks in a waste of water where no man has an interest. The aerial wreck will fall upon occupied territory, will affect those landholders who have no special interest in the machine or its cargo. . . . The air is an appendage indivisible from the earth, and any use made of it should be predicated upon the legal theory that recognizes that fact."⁴¹

Sovereignty to an Unlimited Altitude But Restricted by a Servitude

At the beginning of this battle over the freedom of the air the foremost opponents that the contenders had were Westlake and Meurer. They argued for the sovereignty principle but, recognizing the need of unimpeded aerial navigation, were willing to permit the right of innocent passage through the air. What Westlake said at the opening of the general discussion of Fauchille's report to the meeting of the Institute of International Law, will be set out in full. "I accept battle upon the base of the report, that is, upon the principle of the liberty of the air, or more exactly, of the aerial space. The air is itself something that cannot be possessed. It is transported from place to place at the will of the winds, today in Belgium, tomorrow in France or in Holland; that which we have around us is not air, it is aerial space. Oceanic space and aerial space are two spaces upon which the adjacent state has a 'droit de conservation' and the other state a 'droit de passage innocent.' Conservation and passage—how can these two rights be combined? Which of them is the rule and which the exception? For the reporter (Fauchille) it is the right of passage which is first and fundamental. For me it is the right of conservation. Of these two rules that one which deserves to be the rule is the one which is the more precise; and yet the 'droit de conservation' is much clearer than the 'droit de passage.' That is why the Institute, when it was faced with this question à propos of the oceanic space, replied that in the territorial sea the 'droit de souveraineté' is the rule and the 'droit de passage' the exception. If that holds

41. *Meyers, Sovereignty of the Air*, Vol. 24, Green Bag, p. 229.

good as regards the oceanic space it ought also to hold good as regards the aerial space. The only difficulty is that it is not possible to limit this solution to a certain height. On the sea the farther people go from the coast the less is the risk of their causing destruction and disturbance upon the coast. In the air the higher one ascends the greater becomes the destructive force of objects thrown from the balloon upon the earth. If there does exist a limit to the sovereignty of the state in the oceanic space, such a limit does not exist in the aerial space. The right of the territorial state remains the same whatever the distance from the earth."⁴²

At the meeting of the International Law Association held in Madrid in 1913, the Association adopted the following resolution:

1. It is the right of every state to enact such prohibitions, restrictions, and regulations as it may think proper in regard to the passage of aircraft through the air space above its territory and territorial waters.
2. Subjacent to the right of the subjacent state liberty of passage ought to be freely accorded to the aircraft of every nation."⁴³

This doctrine was enunciated at a time when the majority of international publicists and organizations favored the freedom of the air principle.

This association saw the best solution in recognizing that the subjacent state was sovereign over the air space though it at the same time insisted that in the interest of the progress of aerial navigation, each state should grant the right of innocent passage through its air space.

Blewett Lee holds that the air is under the jurisdiction of the subjacent state because; "The underlying state is able by physical force to control to a great extent the use of the air just as in case of territorial waters; So long as the right of innocent passage is preserved to private airships of other nations under reasonable regulations for the protection of the underlying state, they have no real grievance" ⁴⁴ Kuhn suggests that, "The right of the craft of one nation freely to traverse the air space of another might be compared with that of vessels of one state freely to navigate the river of a co-riparian state, especially when the river becomes navigable within its own territory. The doctrine now generally accepted recognizes a right of absolute exclusion, though its exercise would be deemed harsh and, unless required by actual necessity, unjustifiable from the point of view of neighborly conduct and comity."⁴⁵

42. *Hazeltine*, *Law of the Air*, p. 34-35 citation.

43. Report 28th Conference, Int. Law Ass'n., 1914, p. 533.

44. 17 *Am. Jour. Int. Law*, 491.

45. *Kuhn*, *Beginnings of Aerial Law*, 4 *Am. Jour. Int. Law*, 114, citation.

Here we have again a theory that rests upon the analogy of the high seas—this one more particularly of the marginal seas. It gives to the states the same rights in the air space as international law gives them in the territorial waters. But to argue, "that because there exists at the present time a right of innocent passage through the territorial waters, there should also exist a right of free passage through the air, is to argue from an analogy that is not logically and practically sound"⁴⁶ because, "the great difference lies in the fact that whereas the maritime belt is not strictly necessary for the existence of the state, the air space is"; for "as human beings cannot live in a plane, the state, having to deal with living people, is obliged to have a domain of three dimensions. And man preferring to live not under, but above the surface of the earth, the state must needs have the necessary third dimension extend above the surface too. Placing the air frontier just where the land ceases would therefore make the land worthless, the existence of the state practically impossible. . . . There is no reason, anyhow, to claim the right of free passage for aeronauts by analogy of the right of free passage through the territorial waters."⁴⁷

Full Sovereignty Without Any Restriction

We have now arrived at the prevailing view and the theory that is presumed when international conventions are being framed.

As early as 1910, Lycklama à Nijeholt stated the view that the passage of time was to support. It was said: "We therefore conclude that the state sovereignty reaches quite as high as the state's interest can reach, the possibility of which ends at the uppermost limit of the atmosphere . . . in principle the air space belongs to the sovereign state territory, so that has full sovereignty to an unlimited height, which sovereignty can only be abolished or restricted by treaty."⁴⁸

In 1911 Professor Hazeltine published a series of three lectures that were delivered at Kings College in 1910. At that early date he also favored the complete theory of sovereignty without any restriction whatsoever and argued that any aerial navigation over the foreign state could be taken care of by international conventions. He pointed out that states at that date had exercised sovereign rights in the lower stratum of the air—that is that stratum occupied by buildings and other structures with the encircling atmosphere. He pointed out that laws enacted by the states with reference

46. *Hazeltine, Law of the Air*, p. 44.

47. *Ibid.*, p. 37.

48. *Lycklama à Nijeholt, Sovereignty of the Air*, p. 46.

both to wire and wireless telegraphy clearly assume the state's right of dominion in the air space. Furthermore the recognition by various systems of law that the owner of land owns up to the heavens is clearly a recognition that the state has the right to concede to land-owners this extensive proprietary right on the air space. He showed, by referring to an ordinance, regulating the status and employment of airships within the town of Kissimee City in Florida that the town claimed "jurisdiction as high as twenty kilometers, and asserting that it proposes to establish an aerial police." He said further that, what is more important, some of the great powers, such as France and Germany, have put in force national regulations of traffic in the air, thus assuming that they have sovereign rights in the air space. Indeed the Berlin National Convention of 1916 relative to wireless telegraph tacitly assumes that the contracting parties have sovereign rights in the air space. He prophesied the turn the battle over the freedom or the sovereignty of the air was to take at the outbreak of the World War when he said: "Indeed, recognition of each state's full right of sovereignty will not be an obstacle to the proper and legitimate development of aerial navigation, while at the same time it will safeguard state and private rights and interests. Just as states have welcomed and adopted the principle of internationalism as regards sea navigation in territorial waters, international railway and motor traffic on land, inter-wireless communication, and admission of aliens to the enjoyment of the laws and privileges of the territorial state, so, too, the self-interest of states will naturally lead them to welcome and develop this new method of navigation along international as well as national lines."⁴⁹

That the Hazeltine prophesy was well founded can be shown by referring to a statement made by Rolland in 1916, who in speaking about the closing by neutral states of their air frontiers said: "There is now a veritable custom . . . the prohibition issued seems to have been considered quite natural practically everywhere. . . . All the elements of a custom are here combined; practice, a doctrinal solution in agreement with it, public opinion to support it."⁵⁰ In 1919 Spaight speaks of "the recognition of a new rule of international law. That new rule is that in war time air frontiers are closed. . . . Right or wrong, the principle has been established that states control the atmosphere over their territories."⁵¹ Bouvé points out that Spiropoulos states that

49. *Hazeltine, Law of the Air*, Pp. 46-52.

50. *Revue de droit international*, 577.

51. *Spaight, Aircraft in Peace and the Law*, p. 10.

"with the conclusion of the international convention of October, 1919, in Paris, the sovereignty theory was recognized to its fullest extent. . . . This new principle of international law, established as the result adhered to through the World War, has found its sanction in modern aerial jurisprudence. To those principles of international law already recognized, this new one is to be added: "Aerial space above territorial land and water included within the boundaries of a state constitute an integral part of the sovereignty of a state." He cites Oppenheim as asserting, "At the Convention for the Regulation of Aerial Navigation, which was drawn up at the Peace Conference . . . the parties recognized that every state has complete and exclusive sovereignty over the air space and its territorial waters."

Bouvé, in discussing this particular point, stated that in the interest of navigation in the air it became necessary to provide for the enjoyment of innocent passage of the air craft from one state through and over the territory of another. "Since such freedom did not exist, owing to absence of a law of nations under which it could be asserted—since, on the contrary, the principle of aerial sovereignty born of international custom observed during the World War was silent on the point of innocent passage, it was necessary that steps be taken to bring about if possible a common recognition of the desired and necessary privilege. But this privilege could be declared only as the result of international action . . . the outstanding example of group action taken by various states is the Air Navigation Convention of October 13, 1919."⁵²

The first article of this convention states that:

"The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space over its territory."

Article Two of the same convention reads as follows:

"Each contracting state undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting state, provided that the conditions laid down in the present convention are observed."

The same provisions will be found in the Pan-American Convention held at Havana, February 20, 1928, and in the Spanish-American Convention of 1926. Bouvé concludes that: "The fact that all civilized states the world over are enacting domestic legislation covering air navigation over their territories is evidence of the extent to which public opinion has accepted the principle of air sovereignty."⁵³

52. *Bouvé*, Development International Rules of Conduct in Air Navigation, 1 Air Law Rev. 2.

53. *Ibid.*

THE JOURNAL OF AIR LAW

Published in January, April, July, and October
by Northwestern University Press

\$5.00 PER YEAR

PRICE OF THIS NUMBER \$3.00

EDITORIAL BOARD

FRED D. FAGG, Jr., Editor-in-Chief

Documents:

Federal Regulation:

E. McD. KINTZ

State Regulation:

GEORGE B. LOGAN

HOWARD WIKOFF

International Regulation:

KENNETH COLEGROVE

MARGARET LAMBIE

Foreign Jurisprudence:

CARL ZOLLMANN

JULIUS I. PUENTE

Notes, Comments, Digests:

ROBERT KINGSLEY

THOMAS H. KENNEDY

Book Reviews:

KURT J. KREMLICK

The Reference Column:

MARGARET LAMBIE

RICHARD SALLET

LORRAINE ARNOLD

France

ANDRÉ HENRY-COUANNIER

Professor de droit aérien à l'Institut des Hautes Études Internationales, Paris, France.

ROBERT HOMBURG

Secretary-General, Comité Juridique International de L'Aviation.

ALBERT ROPER

Secretary-General, Commission, Internationale de Navigation Aérienne, Paris, France.

EDMOND SUDRE

Editor Droit Aérien, and Secretary-General, Comité International Technique d'Experts Juridiques, Aériens.

Germany

DR. ALFRED WEGERDT

Ministerial Counselor at the Ministry of Communication of The Reich, Berlin.

Great Britain

ARNOLD D. McNAIR

Fellow and Senior Tutor of Gonville and Caius College and Lecturer in Law in the University of Cambridge; Barrister-at-Law, Cambridge, England.

Italy

ANTONIO AMBROSINI

Direttore dell'Istituto internazionale di diritto aeronautico, Rome, Italy.

Latin America

ANTONIO SANCHEZ DE BUSTAMANTE

Judge, Permanent Court of International Justice; formerly Dean of the Faculty of Law of the University of Havana.

United States

GEORGE G. BOGERT

University of Chicago School of Law.

HENRY BRECKINRIDGE

Of the New York Bar.

KENNETH COLEGROVE

Professor of Political Science, Northwestern University.

CHESTER W. CUTHELL

Formerly Chairman, Committee on Aeronautical Law, American Bar Association.

FRED D. FAGG, JR.

Professor of Law, Northwestern University School of Law; Managing Director, Air Law Institute.

ROWAN A. GREER

Captain, J. A. G. D., United States Army.

WILLIAM G. HALE

Dean, School of Law, University of Southern California.

THOMAS H. KENNEDY

Of the California Bar.

ROBERT KINGSLEY

Professor of Law, University of Southern California School of Law.

E. McD. KINTZ

Chief, Legal Section, Department of Commerce, Aeronautics Branch.

KURT J. KREMLICK

Professor of Air Law, University of Detroit School of Law.

MARGARET LAMBIE

Of the District of Columbia Bar.

FREDERIC P. LEE

Of the District of Columbia Bar.

GEORGE B. LOGAN

Chairman, Committee on Aeronautical Law, American Bar Association.

NATHAN WM. MacCHESNEY

General Counsel, National Association of Real Estate Boards.

WM. P. MacCRACKEN, JR.

Formerly Assistant Secretary of Commerce for Aeronautics.

JUSTIN MILLER

Dean, School of Law, Duke University.

WM. A. MOFFETT

Rear Admiral, United States Navy; Chief of the Bureau of Aeronautics.

JULIUS I. PUENTE

Of the Illinois Bar.

HOWARD WIKOFF

Member, Committee on Aeronautical Law, American Bar Association.

CLARENCE M. YOUNG

Assistant Secretary of Commerce for Aeronautics.

CARL ZOLLMANN

Professor of Law, Marquette University School of Law.

The Journal of Air Law prints matter it considers worthy of publication. However, no responsibility is assumed for the soundness of the views expressed.