

1932

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Recommended Citation

Carl Zollmann, *State Control of Aeronautics in 1931*, 3 J. AIR L. & COM. 68 (1932)
<https://scholar.smu.edu/jalc/vol3/iss1/5>

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STATE CONTROL OF AERONAUTICS IN 1931*

CARL ZOLLMANN†

The passage by Congress of the Air Commerce Act of 1926 removed from the power of the various states the regulation of interstate flying but left the subject of intrastate flying untouched. In 1926 a number of the states had more or less extensive statutes on the subject. Massachusetts and Connecticut (the latter under the leadership of former Chief Justice Baldwin) had been the pioneers in this field and had found followers. Most of this legislation though it covered interstate as well as intrastate flying was not hostile to any prospective action by Congress. Some of it actually was enacted with the very view of filling the void only until Congress could act. Thus the statute of California passed in 1921 provided that "until the Congress of the United States passes legislation to control and direct the operation of all aircraft over all the territory and territorial waters of the United States, at which time the provisions of this act shall automatically cease and become void, all aircraft operating within the geographical limits of the state of California shall be governed by the provisions hereof."¹ A statute of Florida passed in 1925 provided that such act shall remain in effect "until the Congress of the United States passes legislation of a Federal nature directing the operation of aircraft over all the territory of the United States."²

When Congress decided to bottom the Air Commerce Act on the interstate commerce clause rather than on the admiralty, or treaty or war clause (all of which had been proposed by zealous advocates) it distinctly made the subject of intrastate flying a state matter. That a more or less pronounced variation in the policy of the forty-eight states would result from this situation was a foregone conclusion. Professor Roling, in his recent work on National Regulation of Aeronautics, divides the states, at the beginning of 1931, into the following five groups: (1) Twenty-one states, namely, Arizona, California, Idaho, Indiana, Iowa, Kentucky,

*Paper presented before the Round Table Conference on Public Law, at the Twenty-ninth Annual Meeting of the Association of American Law Schools, Chicago, Illinois, December 29, 1931.

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1. California Statutes, 1921, Ch. 783, section 448; 1928 USAvR 448.
2. Florida Laws 1925, Ch. 11339, section 15; 1928 USAvR 481.

Maryland, Michigan, Mississippi, Missouri, Montana, New Mexico, North Dakota, Rhode Island, South Carolina, South Dakota, Texas, Vermont, Washington, Wisconsin and Wyoming required federal licenses for *all* aircraft and airmen flying within their jurisdiction. (2) Nine states, namely, Colorado, Illinois, Nebraska, New Jersey, New York, Nevada, North Carolina, Ohio and West Virginia required federal licenses only for aircraft and airmen engaged in *commercial* flying within their jurisdiction. (3) Six states, namely, Delaware, Maine, Minnesota, New Hampshire, Oregon and Virginia required *either* a state or federal license for all aircraft and airmen flying within their jurisdiction. (4) Six other states, namely, Arkansas, Connecticut, Florida, Kansas, Massachusetts and Pennsylvania required *state* licenses for all aircraft and airmen within their jurisdiction. (5) The remaining six states at the beginning of 1931 had no requirement whatsoever. These states were Alabama, Georgia, Louisiana, Oklahoma, Tennessee and Utah.

We need not concern ourselves unduly with the correctness of this classification. Classifying statutes is no easy matter. It is not surprising therefore that other compilers do not agree with Mr. Roling in all particulars. By stressing minor differences it is possible to classify the states into eight groups.³ We may however accept Mr. Roling's classification with its defects, if any, and by comparing it with the legislation passed in 1931 gain a vivid picture of the legislative trend. Three states in group five joined the first group. They are Alabama, Oklahoma and Utah. Two states from group four, namely, Florida and Kansas joined group one. Oregon advanced from group three to group two. Illinois, New Jersey, New York and Ohio changed from the second to the first group.⁴ The result is that, in 1931, group five has been reduced from six to three states; group four from six to four states; group three from six to five states; and group two from nine to six members. What all these groups have lost, group one has gained. The universal tendency thus is toward group one. This movement is by no means sectional but is as strong in the south as it is in the north. It bids fair to sweep the states. States rights theories seem impotent to check its onward march. An amendment of the air commerce act by which intrastate air commerce would be drawn into the federal sphere on the ground that it is inextricably connected with interstate flying would seem therefore to be uncalled

3. See *Fred. D. Fagg, Jr.*, "The Trend toward Federal Licensing" 2 JOURNAL OF AIR LAW 542-544.

4. For these statutes, see 1931 USAvR.

for even if the constitutionality of such action be conceded. The contention which the commerce department has consistently made in favor of group one thus is bearing ample fruit.

It is obvious that group five calls for no government machinery. It is further obvious that groups one and two can manage to do without any such machinery, since the licenses required by it are furnished by the federal authorities. However, the states in group three and four are not able to dispense with such machinery. If they require a state license, they must create a commission, or a commissioner to issue such license or lodge such authority in some existing officer or commission. A commission or commissioner can be useful even in the states which could manage to get along without such machinery. The Uniform Aeronautical Code proposed by the committee of the American Bar Association on Aeronautical Law enumerates the following purposes to which such a body could devote its energies:

(a) To encourage the establishment of airports, civil airways and other air navigation facilities.

(b) To make recommendations to the Governor and the State Legislature as to necessary legislation or action pertaining thereto.

(c) To study the possibilities for the development of air commerce and the aeronautical industry and trade within the State and to collect and disseminate information relative thereto.

(d) To advise with the Aeronautical Branch of the Department of Commerce and other agencies of the Federal Government, and of the Executive Branch of this state in carrying forward such research and development work as tends to create improved air navigation facilities.

(e) To exchange with the Department of Commerce and other State Governments through existing governmental channels information pertaining to civil air navigation.

(f) To cooperate in the establishment and creation of civil airways and air navigation facilities with the State Highway Commission.

(g) To enforce the regulations and air traffic rules promulgated as provided hereunder through the assistance and cooperation of State and local authorities charged with the enforcement of law in their respective jurisdictions."⁵

Compilations have been made of the form which such bodies have taken.⁶ Some states have separate commissions with or without salary, others have a single commissioner, some work full and others only part time and in a number of cases the duties have devolved upon some existing board such as the highway com-

5. 2 JOURNAL OF AIR LAW 552, 553; 1931 USAvR 272; 56 Reports of American Bar Association

6. See *Fred D. Fagg, Jr.*, "A Survey of State Aeronautical Legislation," 1 JOURNAL OF AIR LAW 452, 462.

mission or the motor vehicle commission. Since uniformity in this respects is of no particular consequence we may safely pass to the next subject for consideration. It is far more important indeed that such a body be thoroughly integrated with the other state machinery than that it be more or less alike in the various states.

There is perhaps no other subject of legislation that has received more attention within the last three or four years than that relating to airports. The United States Aviation Reports for the years 1929, 1930 and 1931 contain 828 pages of state legislation in regard to aviation. Of this mass, apparently more than half relates to airports. Something like 2000 such airports in various stages of development are now available. Again, we need not be very much concerned with the question of uniformity. It is more important to procure the airports than to accomplish this result in a uniform manner. It is more important that the taxation or bonding provisions be workable under the established system in a particular state than that they be uniform. To classify the mass of legislation which now clusters around the subject would seem to be a useless task. It can be stated however that the universal attitude on the part of legislatures is very friendly toward airports and that the courts take exactly the same viewpoint. The power of a municipality to establish and maintain an airport has therefore been sustained without hesitation and without a single exception in the ten or fifteen cases in which the question has been presented to the courts.

The Uniform State Law of Aeronautics proposed in 1922 by the Commissioner on Uniform Legislation and which in 1929 had been adopted in twenty-one states has become a battle ground to such an extent that no state adopted the act in 1931 and one state (Idaho) repealed its previous adoption of it. A strong assault has been made on section 3 which provides that "the ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in section 4." The limited recognition which this section accords to the old maxim *Cujus est solum eius est usque ad coelum* is the point of attack. There are those who would wish the maxim to be destroyed in its entirety rather than have it adapted to present needs. The Standing Committee of the American Bar Association on Aeronautical Law in its 1931 report therefore submits a "Uniform Aeronautical Code" copying various sections from the Uniform State Law of Aero-

navitics but omitting section four and comments on this omission as follows:

"The committee unanimously believes, in view of exhaustive studies made not only by this committee and its predecessors, but by other eminent students of aviation law, and particularly by able counsel in the two important litigated cases arising since the approval of the Uniform Aeronautics Act, that the statement as to the ownership of airspace proclaims a legal untruth.

"No decided case has even held that 'airspace' was 'owned' by the landowner to unlimited heights. Indications of such a legal belief appear by way of dicta only. It is manifest that prior to the use of aircraft and prior to the use of upper airspaces, there could have been no authoritative pronouncement on this subject.

"Since the arrival of aircraft and since the use of upper airspace, there has been one indefinite indication of such pronouncement by the Supreme Court of Massachusetts, and one by a Federal District Court, in a case presently on appeal.

"It is the committee's belief, though, that enough has been said in these cases apparently in opposition to the old pronouncement to indicate that the broad statement as contained in the old Uniform Aeronautics Act, was, as it stood, incorrect.

"The presence of this declaration in an Aeronautical Law Code would simply lend color to the assertion of non-existent and unnecessary rights by litigiously inclined persons, to the great nuisance and possible destruction of aviation."

On the other hand, the American Law Institute in its tentative draft on the law of torts submitted on May 7, 1931, states that a trespass may be committed by entering or remaining (a) on the surface of the earth, or (b) beneath the surface thereof or (c) above the surface thereof, and says in commenting on clause c. "An unprivileged entry or remaining in the space above the surface of the earth, at whatever height above the surface, is a trespass. A temporary invasion of the air space by aircraft, while traveling for a legitimate purpose at such a height as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air column above it, is privileged." In the explanatory notes attached to this section, the reporter further says: "On the whole, the Reporter and his Advisers believe that the most satisfactory view is that the column of air is in the possession of the possessor of the surface of the land subject to a privilege of use by travellers, in so far as they do not unreasonably interfere with the enjoyment of his premises by the possessor."⁸

7. 1931 USAvR 260; 56 Reports of American Bar Association

8. 1931 USAvR 280, 281, 287.

Another controverted section of the Uniform State Law of Aeronautics is section five. This reads as follows:

"The owner of every aircraft which is operated over the lands or waters of this state is absolutely liable for injuries to persons or property on the land or water beneath, caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or part by the negligence of the person injured or of the owner or bailee of the property injured. If the aircraft is leased at the time of the injury to person or property, both owner and lessee shall be liable, and they may be sued jointly, or either or both may be sued separately."

The objection urged against this provision is that it lays down too stringent a rule of liability. Says the report of the standing committee of the American Bar Association on Aeronautical Law:

"Your committee feels that this declaration of liability is, however, erroneous. The owner actually negligent in the operation of an aircraft is placed upon the same footing as the owner of an aircraft forced to descent by storm or other act of God; on the same footing as the owner whose aircraft is forced to earth by collision resulting solely from the gross negligence of another aircraft; on the same footing as the owner whose aircraft has been loaned or leased to a person using it solely for his own pursuits; on the same footing as the owner whose aircraft has been stolen from its hangar and used without his knowledge or consent."⁹

Accordingly four of the states which adopted the Uniform Aeronautics Act in 1929 omitted this section, Montana and Missouri absolutely, while Pennsylvania and Arizona formulated substitute provisions. The provision of Pennsylvania is as follows:

"The owner and the operator, or either of them, of every aircraft which is operated over the lands or waters of this Commonwealth, shall be liable for injuries or damage to persons or property on or over the land or water beneath, caused by the ascent, descent, or flight of aircraft, or the dropping or falling of any object therefrom in accordance with the rules of law applicable to torts on land in this Commonwealth."¹⁰

The Arizona substitute reads as follows:

"Each pilot shall be responsible for all damage to any person or property caused by any aircraft directed by him or under his control, which damages shall have resulted from the negligence of such pilot, either in controlling such aircraft himself or while giving instructions to another, and, if such pilot be the agent or employee of another, both he and his principal or employer shall be responsible for such damage."¹¹

9. 1931 USAvR 265; 56 Reports of American Bar Association

10. Pennsylvania Law, 1929, Act 317, section 6; 1929 USAvR 752.

11. Arizona Laws, 1929, Ch. 38, section 11; 1929 USAvR 406.

The state of Idaho in 1931 repealed the Uniform State Law of Aeronautics and in its stead adopted another act which copies the provisions of the Pennsylvania statute just noted. This is also the solution adopted in the "Uniform Aeronautical Code" proposed by the Standing Committee of the American Bar Association on Aeronautical Law. The objection that this throws too great a burden on the injured or damaged landowners is met by providing in section 6 that "proof of injury inflicted to persons or property on the ground by the operation of any aircraft, or by objects falling or thrown therefrom, shall be *prima facie* evidence of negligence on the part of the operator of such aircraft in reference to such injury." The Committee in commenting on this provision says:

"The committee recognizes, however, and deems it essential that the inequality of the landsman and the aviator, with respect to the availability of evidence as to what has taken place in the air, and as to what causes an aircraft to descend out of control be adjusted. This makes it necessary that some rule be adopted which relieves the landsman of the unequal load of carrying the burden of proof as to negligence. This, we believe, the committee has solved in the rule announced in these sections.

"This section omits the use of the all-inclusive term of 'owner.' It simply provides a presumption of evidence which relieves the landsman of the burden of proving negligence by the preponderance of the evidence.

"It leaves open to the aviator, or owner, or operator, to establish the common law defenses now pertinent to such actions, namely, the defense of contributory negligence on the part of the plaintiff; the defense of an act of God; the defense of the exercise of all possible care; and as to the owner, the defense of a lack of agency or employment relationship between himself and the actual operator."¹²

The foregoing discusses questions which at the present time are live issues before legislative assemblies on which the policy of the various states is in the process of being formulated. Many pages could be filled with the odds and ends, the windings and twistings of legislative efforts along the line of aircraft legislation. The writer does not believe that an attempt to weave this mass into this paper can possibly be worth the effort. Even though a complete picture of the present situation by way of a competent digest of the existing legislation were accomplished no group, no matter how intelligent, could be expected to carry away an adequate image of this picture. Besides the next meeting of the various legislatures would throw the picture completely out of focus.

12. 1931 USAvR 266; 56 Reports of American Bar Association