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A Uniform Program for Aeronautical Promotion and Control

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A UNIFORM PROGRAM FOR AERONAUTICAL PROMOTION AND CONTROL*

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Nowhere have man's achievements been more notable or important than in the field of transportation. The triumph of today is the commonplace of tomorrow. Columbus and Magellan have been eclipsed by Lindbergh and Post, and the world which Alexander conquered is a mere locality in the eyes of Admiral Byrd.

The many advances in transportation have presented a succession of perplexing but fascinating social and economic problems. Railroads a hundred years ago provided an agency for the prompt opening up of our vast western area including this great State of Wyoming. Interstate commerce, previously inconsequential, became almost overnight a major factor in the economic life of our country, making possible the development of our national resources, and the free interchange of the products of human endeavor. Laws were needed to control this new agency, and the states and the federal government in time enacted statutes creating regulatory commissions and giving rise to the large and growing body of public utility law that is now so important a part of our jurisprudence. More recently science and art have produced the motor vehicle, which is contributing greatly to the richness of American life, and, like the railroads, serving to bring about a more complete national unity. It has been interesting to observe the effect of these great changes in the world of reality, upon our government and our jurisprudence. Many dogmatic dicta of earlier years have been modified for the accommodation of conditions in modern life not clearly foreseen by our forefathers. As Mr. Justice Cardozo charmingly phrased it: "The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow; it must have a principle of growth."

Although my subject is broad enough to include a full discussion of the technical aspects of aviation, and questions of national defense, I shall confine my remarks to a consideration of some legal and governmental problems involved in the promotion

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and control of civil aviation. At the outset I would say that any rational program must be conceived and laid out with due regard to the existence of that inexorable "principle of growth" to which Mr. Justice Cardozo has referred; it must not be shortsighted either in respect to geography or in respect to time; it must anticipate and expect in the years just ahead of us a rapid unfolding of truth in science, in art and in human relationships and it should be planned for a corresponding social and economic order.

If aviation is to attain its greatest usefulness it must have not only the support of the research engineers; it must have the intelligent interest of society as a whole, and society must through law promote and control it. The nature of air navigation makes it a matter of universal rather than local interest. It cannot be developed within the confines of any one city, however lavish may be that city's support—nor within any one state. Air transportation, in our country involves airports and facilities maintained in various political subdivisions and states, and any effective program of promotion and control must have the complete cooperation of local, state and federal governments. The rapidly increasing range of flight has already made the international phase of civil aviation more important than the domestic phase in Europe. Even in a country so extensive and so isolated as our own, international flight is making tremendous strides and demanding the formulation of an intelligent American international aviation policy.

In the short time allotted me I shall discuss, first, the local and national situation, and, secondly, the international situation.

One of the most important single contributions that can be made to the rapid and safe development of aeronautics in this country is standardization in regulatory laws.[1] It is unthinkable that a person who flies over a half dozen states in one day should be expected to conform to the diverse and conflicting rules and regulations that as many sovereigns might prescribe. Uniform regulation is equivalent in legislation to standardization in mechanical construction. In the early days of railroading there were broad gauge railroads and railroads with a narrow gauge, and the two could not connect. Finally the gauges of all railroads were standardized and now the cars of every railroad can be used on the tracks of every other railroad and no one would think of returning

1. See various addresses and debates in Proceedings of the National Conference on Uniform Aeronautic Regulatory Laws, Dec. 16-17, 1930, published by U. S. Government Printing office, 1931; *Fred D. Fagg, Jr.*, "National Conference Held on Uniform Aeronautical Regulatory Laws," 17 Am. Bar Ass'n Journal 77 (1931); *N. W. MacChesney*, "Uniform State Laws—A Means to Efficiency, Consistent with Democracy," 91 Central Law Journal 297.

to the old system. In aviation, differences in regulatory requirements do not entirely prevent flight, but are confusing, and dangerous, and destroy speed which is its most valuable attribute.

Granting the need for uniformity, should the regulation of air navigation be centralized in the federal government to the exclusion of the states? Unquestionably Congress has the power, under the commerce clause of the Constitution, to regulate interstate commerce. In the Shreveport case,[2] Mr. Justice Hughes declared that the federal government may in certain circumstances, when necessary to protect interstate commerce from local interference, even go so far as to exercise regulatory powers over intrastate commerce. Mr. Chief Justice Taft a few years later in *Railroad Commission* v. *C., B. & Q. R.*,[3] declared: "Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of State authority." Therefore, the federal government may regulate local flying as far as may be necessary to make interstate aviation safe and otherwise free from unreasonable local interference.[4]

Likewise the Constitution places the treaty making power in the federal government, and declares that treaties duly entered into by this country shall be regarded as a part of the supreme law of the land.[5] Therefore the federal government may through the making of international treaties on the subject of aviation acquire broad regulatory powers over aviation in all its phases in this country. Our Supreme Court[6] has declared that by this country's entering into a treaty with Great Britain on the subject of migratory birds, Congress acquired a power it did not previously possess, to legislate upon that subject. Under the war powers conferred by the Constitution, Congress may legislate in respect to aviation.[7]

2. *Houston, E. & W. Texas Railway Co. et al* v. *U. S. et al*, 234 U. S. 342 (2), 34 S. Ct. 833, 58 L. Ed. 1341 (1914). See also *Am. Expr. Co.* v. *State of S. D.*, 244 U. S. 617, 37 S. Ct. 656, 61 L. Ed. 1352 (1916); *U. S.* v. *Spotless Dollar Cleaners*, 6 F. Supp. (N. Y.) 725, 730 (1934).

3. 257 U. S. 563 (8), 42 S. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086 (1922).

4. *A. H. Tuttle* and *D. E. Bennett*, "Extent of Power of Congress over Aviation," 5 Cincinnati Law Review, page 261.

5. *Askura* v. *City of Seattle*, 265 U. S. 332, 44 S. Ct. 515 (1924).

6. *Missouri* v. *Holland*, 252 U. S. 416, 40 S. Ct. 382 (1920).

7. See U. S. Constitution, Article 1, §8; Also *George Bogert*, "Problems in Aviation Law." 6 Cornell Law Quarterly 271 (1921); *Arver* v. *U. S.*, 245 U. S. 366, 38 S. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361 (1918); *McKinley et al* v. *U. S.*, 249 U. S. 397, 39 S. Ct. 324, 63 L. Ed. 668 (1919); *Hamilton* v. *Ky. Distilleries & Warehouse Co.*, 251 U. S. 146, 40 S. Ct. 106, 64 L. Ed. 194 (1919).

It was early suggested by some students of aeronautical law that federal regulation of aviation not only could, but ought to, be premised on the maritime provisions in the Constitution.

But however many powers the federal government may find it possible to exercise under the Constitution in the field of air navigation and transportation, I am convinced that in respect to civil aeronautics it ought not at this time to undertake regulation beyond that reasonably necessary for the promotion and protection of interstate and international traffic and the establishment of uniform standards for the guidance of the states.

Although between the date of the Kitty Hawk flight and the world war there was much respectable legal opinion throughout the world to the effect that air space was internationally free, as is the sea, the powers at the beginning of the world conflict promptly proclaimed the doctrine of national sovereignty in air space, which doctrine is now generally accepted.[8] In the Paris convention on international air law, drafted in 1919, this idea was incorporated, and, while our country has not ratified that Convention, a similar provision appears in our Air Commerce Act of 1926, and in the Havana convention ratified by the United States in 1931. The effect upon state power of this provision for national sovereignty of air space, appearing in a treaty ratified by this country, and also in an Act of Congress, has not yet been developed by court decisions, but a distinguished student of international air law suggests that the further provision in the Havana Convention that "the contracting states shall procure as far as may be possible uniformity of laws and regulations governing aerial navigation" has the effect, under the doctrine of the Migratory Bird case, of giving Congress unlimited power to prescribe uniform regulation for aerial navigation, local and interstate.[9] I do not believe that this country in adhering to the Havana convention has prohibited state regulation. The language of the convention, and the circumstances leading up to it and surrounding its ratification, as well as the nature of the subject-matter, indicates that no such momentous step in our national polity was intended.[10]

What, indeed, has been done in this country to regulate aviation, nationally or locally? The civil side of the industry with a

8. See *Emory H. Niles*, "The Present Status of Ownership of Air Space," 5 Air Law Review 132 (1934); *Hampton D. Ewing*, The Right of Flight (1932); *Roger F. Williams*, "The Existence of the Right of Flight," 79 Pa. Law Review, 729 (1931).

9. *John C. Cooper, Jr.*, "The Pan American Convention on Commercial Aviation, and the Treaty Making Power," 19 Am. Bar Ass'n Journal 22 (January, 1933).

10. See *John H. Wigmore*, "Did the Federal Government Acquire Exclusive Aerial Jurisdiction Two Years Ago?" 4 JOURNAL OF AIR LAW 232 (1933).

few local exceptions, grew without legislation, until in the year 1926 it was realized that in the interest of safety and further expansion steps had to be taken to coordinate and regulate the various aeronautical activities under a few fundamental principles. Congress assigned the federal share of that duty to the Department of Commerce under the Air Commerce Act of 1926. As civil aeronautics continued to expand, the need for further regulatory measures, national, state and local in character, became apparent. Two outstanding points have been emphasized in the development of this regulatory program: (1) restricting the law making as far as may be consistent with safety and public protection, and (2) the maintenance of uniformity.

Generally speaking the Air Commerce Act gave the Secretary of Commerce the power and duty to "foster air commerce," by (a) encouraging the establishment of airports, civil airways and other facilities, (b) aiding in establishment of weather information service, (c) disseminating information on ways and means to develop air commerce, (d) cooperating with the Bureau of Standards in research on aviation aids and equipment; and further required him to register aircraft, rate aircraft, airmen and air navigation facilities, and to establish air traffic rules, and such regulations as are necessary to execute the functions vested in him by the Act.[11] While the operation of aircraft is essentially interstate, and the federal government is charged with the responsibility of inspecting and licensing aircraft engaged in interstate and foreign air commerce, and examining and licensing airmen engaged in the operation of such aircraft, and, in general, regulating interstate air commerce, there remains much flying activity that is not reached by federal law or federal regulation. Congress has left a definite field to be covered by state legislation in the matter of airworthiness, and competent operation of aircraft in intrastate activities.

How may desired uniformity be attained without such exclusive federal regulation as would destroy local self-government? In 1889 the American Bar Association, recognizing the pressing need for national uniformity in the law of commercial paper and in many other branches of the law relating to business conducted on a nationwide scale, moved to establish a voluntary professional body whose duties it would be from year to year to draft and recommend to the several states for enactment uniform laws on various subjects. The result was the creation of the Conference of Commissioners on Uniform State Laws which, for more than forty

11. See *Henry G. Hotchkiss,* Aviation Law, pp. 83, 89.

years, has rendered a most valuable service in the expert drafting of many uniform acts that have been generally adopted by the states of this country. Some fifteen years ago the Commissioners undertook the formulation and drafting of uniform state aeronautical legislation. In 1922, four years before Congress legislated on commercial aviation, the Commissioners adopted their draft of what was known as the "Uniform State Law for Aeronautics" which later was enacted in many states. Subsequently they adopted their "Uniform Air Licensing Act," which also has become law in several states. The American Bar Association's Committee on Aeronautical Law gave much thought to the formulation of uniform legislation, and its 1931 suggestions for a "Uniform Airports Act" and a "Uniform Aeronautical Code" (differing in several essentials from the "Uniform State Law for Aeronautics" and the "Uniform Air Licensing Act") have been used as the basis for legislation in a number of states. The passage of the federal Air Commerce Act in 1926, and the experience acquired in the past decade have rendered obsolete much of this early state legislation. In fact some provisions actually are harmful. Therefore, the Commissioners on Uniform State Laws, during the current year, in cooperation with the American Bar Association's Committee on Aeronautical Law, have determined to review the entire field of aeronautical law for the purpose of drafting a comprehensive "Uniform State Aeronautical Code" that will take into account federal legislation and the recent judicial decisions, as well as the experience acquired in the industry since the earlier drafts. It is proposed that the Code be in three parts: (1) An Act to provide for state regulation of aeronautics; (2) An Act relating to the establishment and policing of airports; and (3) An Act relating to substantive questions such as the right of flight, and liabilities incidental to aeronautical operations. The Commissioners have just completed and adopted their draft of the airports enabling act which doubtless will be submitted to many legislatures in 1935. It is expected that the other two acts of the code will be drafted within the current year.

What should the state laws contain? Obviously, it is highly desirable and important that all aircraft, regardless of whether intrastate or interstate, commercial or private, be thoroughly and intelligently inspected before they are permitted to take the air, and it is of equal importance that all airmen meet certain high standards before they are permitted to operate such aircraft. The desirability of uniformity is nowhere more acute than in the matter of the regulation of pilots and planes, and in the air traffic and field rules.

Indeed the federal government has so keenly felt the importance of uniform air traffic rules that it has provided that its "Air Traffic Rules" shall be applicable to all flight in this country, regardless of its nature. Although some lawyers have expressed doubt as to the power of the federal government to so regulate strictly local flying activities under the commerce clause of the Constitution,[12] I am convinced that such regulation will be sustained by the courts as reasonably necessary in the regulation and protection of interstate aviation operations. In fact a federal district court in the *Neiswonger* case [13] has so held.

This desire for uniformity, however, should not lead us to ask that the federal government assume the whole burden of regulation, or that the states submit to federal jurisdiction as to all types of flying. There is splendid opportunity for cooperation. The personnel of the Department of Commerce is not sufficient in number to police all flying in the United States, or to enforce all the regulation in respect to it. There is nothing in the Constitution, or the Air Commerce Act, to prevent the states from requiring an appropriate license of airworthiness and competency for all aircraft and airmen operating within their borders, so long as the requirements do not burden interstate commerce. I do not believe that the Air Commerce Act has so preempted the regulatory field as to prevent the states from exercising a reasonable police jurisdiction even over interstate flying.[14] Obviously, however, it would be burdensome and inconvenient to require every flyer to qualify himself and his airplane by taking tests and obtaining licenses in each state in advance of a contemplated interstate trip, and, aside from this inconvenience, most of the states could ill afford to maintain at great expense a staff of experts and the engineering equipment necessary for making adequate tests for the occasional licenses applied for. The federal government makes its licensing facilities available for the testing and licensing of local equipment and local airmen, and all the arguments in respect to expense, convenience, efficiency and uniformity are in favor of a state act that would require federal licenses of all aircraft and airmen as a condition precedent to flight

12. *Henry G. Hotchkiss*, Aviation Law, p. 70; *George B. Logan*, Proceedings of the National Conference on Uniform Aeronautic Regulatory Laws, Dec. 16-17, 1930, p. 85 (U. S. Government Printing Office).

13. 35 F. (2d) 761 (1929). See also *Railroad Commission of Wisconsin et al* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563 (8), 42 S. Ct. 232, 66 L. Ed. 371, 22 A. L. R. 1086 (1922); *State of N. Y. et al* v. *U. S. et al*, 257 U. S. 591 (4), 42 S. Ct. 239, 66 L. Ed. 385 (1922); *T. & P. Railway Co.* v. *Rigsby*, 241 U. S. 33 (3), 36 S. Ct. 482, 60 L. Ed. 874 (1916); *Charles E. Hughes*, The Supreme Court of the United States, pp. 153, 155.

14. See *Smith* v. *State of Alabama*, 124 U. S. 465, 8 S. Ct. 564, 31 L. Ed. 508, (1888); *Johnson Transfer & Freight Lines et al* v. *Perry*, 47 F. (2d) 900 (2) (1931).

within the state. While there are distinguished members of my profession who believe that such a provision would in most states be held an unconstitutional delegation of state legislative authority to the federal government,[15] I am firmly of the opinion that it is not subject to such attack. It is not a delegation of legislative authority—it is not even incorporation of legislation by reference, but is merely the requirement of the fulfillment of a reasonable condition precedent to flying, to-wit, taking and passing certain appropriate tests conducted by a body of aeronautical experts designated by the state, the body designated happening to be the best equipped in this country. The Department's occasional modification of its test would not be an unlawful federal usurpation of the state's prerogative. Such would be merely an administrative matter.[16]

Most states, constitutionally, may go further and adopt by reference the existing "Air Commerce Regulations" and "Air Traffic Rules" and make them the state law,[17] but this appears to be unnecessary and undesirable in the promotion of uniformity. Although it is permissible to incorporate *existing* legislation by reference, no state constitution would permit the incorporation by reference of *future* legislation promulgated by the federal government.[18] Aviation is changing so rapidly that we reasonably may expect desirable changes frequently to be made in the federal regulations, and in the air traffic rules, and at times when state legislatures are not in session, and such changes could not automatically become a part of the state law by previous legislative incorporation by reference. Some states have gone so far as literally to enact into state law, the federal rules and regulations as they existed on a given date, but this also is objectionable from the practical standpoint. An ideal method for preserving local self-government and

15. *Chester W. Cuthell*, Proceedings of the National Conference on Uniform Aeronautic Regulatory Laws, Dec. 16-17, 1930, pp. 53, 68.

16. *Smith* v. *Alabama*, 124 U. S. 465, 8 S. Ct. 564, 31 L. Ed. 508 (1888); *Dent* v. *W. Va.*, 129 U. S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1888); *Field* v. *Clark*, 143 U. S. 649, 12 S. Ct. 495, 36 L. Ed. 294 (1892); *Buttfield* v. *Stranahan*, 192 U. S. 470, 24 S. Ct. 349, 48 L. Ed. 525 (1903); *J. W. Hampton, Jr.* v. *U. S.*, 276 U. S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1928); *U. S.* v. *Spotless Dollar Cleaners*, 6 F. Suppl. 725; *Welton et al* v. *Hamilton et al*, 176 N. E. (Ill.) 333 (1, 4) (1931); *Ex Parte Lewis*, 135 So. (Fla.) 147 (1931); *Mowry et al* v. *Dept. of Public Works*, 177 N. E. (Ill.) 753(5) (1931); *Sapiro* v. *State Board*, 11 Pac. (2nd) (Colo.) 555 (1932). And see conversely *Florida* v. *Mellon*, 273 U. S. 12, 47 S. Ct. 265, 71 L. Ed. 511 (1926); *Poe* v. *Seaborn*, 282 U. S. 101, 51 S. Ct. 58, 75 L. Ed. 239 (1930); *Phillips* v. *Commissioner*, 283 U. S. 589, 51 S. Ct. 608, 75 L. Ed. 1289 (8, 9) (1930); *Continental Ill. Bank & Trust Co.* v. *U. S.*, 65 F. (2nd) 506 (1933). Also see cases applying federal bankruptcy act allowing varying exemptions provided by state laws.

17. *Kendall* v. *U. S.*, 12 Peters 524, 9 L. Ed. 1181 (1838); *Green* v. *Atlanta*, 162 Ga. 641(5), 135 S. E. 84 (1926); *Featherstone* v. *Norman*, 170 Ga. 370(4), 153 S. E. 58 (1930).

18. *In re Heath*, 144 U. S. 92, 12 S. Ct. 615, 36 L. Ed. 358 (1892); *Santee Mills* v. *Guerry*, 122 S. C. 158, 115 S. E. 202 (1922). See *In re Opinion of Justices*, 239 Mass. 606, 133 N. E. 453 (1921).

at the same time maintaining up-to-the-minute uniformity, is to adopt a basic aeronautical code (such as the Commissioners on Uniform State Laws are now drafting in three parts), and in it provide that the state aeronautical board shall promulgate reasonable rules and regulations for the promotion and control of aeronautical activity within the state, according to outlined standards, and that it is the policy of the state that its regulation shall be in conformity with that of the federal government.[19] The state board then could adopt from time to time, as state rules and regulations, those of the Department of Commerce, with appropriate local modifications not affecting fundamental uniformity. Under such arrangement state and local officers could provide much needed assistance in policing the industry. Such local regulation could not conflict with federal regulation affecting interstate or foreign air commerce, nor could it conflict with the air traffic rules even in respect to local flying, but there would seem to be no constitutional objection to the states' duplicating that regulation, and adding other provisions called for by peculiar local conditions. A distinguished lawyer has suggested that, since the federal "Air Traffic Rules" expressly apply to all air navigation, the federal government has given notice to the states that it has elected to assume exclusive jurisdiction of the field, and that states may not adopt similar or different rules.[20] That suggestion was inspired by the statement of Mr. Justice Lamar in the case of *Southern Railway Co.* v. *The R. R. Commission of Ind.*,[21] that: "It is sufficient here to say that Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances, as to supersede existing and prevent further legislation on that subject. The test, however, is not whether the state legislation is in conflict with the details of the Federal law or supplements it, but whether the state had any jurisdiction of a subject over which Congress had exerted its exclusive control." I may say that an examination of the entire opinion and the opinions in other cases indicates that each situation will be determined on its merits and on a practical consideration of the peculiar circumstances, including the purpose of the attempted regulation and the reasonableness and appropriateness of the method provided.[22] The

19. See *Albert Langeluttig*, "Standards in Aviation Legislation," 4 JOURNAL OF AIR LAW 29 (1933); *State* v. *Larson*, 160 A. (N. J.) 556.

20. *George B. Logan*, Proceedings of the National Conference on Uniform Aeronautic Regulatory Laws, Dec. 16-17, 1930, p. 86.

21. 236 U. S. 439, 35 S. Ct. 304, 59 L. Ed. 661 (1915).

22. See *Savage* v. *Jones*, 225 U. S. 502, 32 S. Ct. 715, 56 L. Ed. 1182 (1912); *A. C. L. Railroad Co.* v. *State of Ga.*, 234 U. S. 280, 34 S. Ct. 829, 58 L. Ed. 1312 (1914); *Mo. Pac. R. Co.* v. *Norwood*, 283 U. S. 249 (10), 51 S. Ct. 458, 75 L. Ed. 1010 (1931); *Dickson* v. *Ullman Grain Co.*, 288 U. S. 188 (5), 53 S. Ct. 362, 77 L. Ed. 691, 83 A. L. R. 492 (1932).

attitude of the Supreme Court has been one of open-mindedness, in keeping with the statement of Mr. Justice Holmes that "The life of the law has not been logic; it has been experience."[23] Chief Justice Waite appropriately observed that "The powers thus granted are not confined to the instrumentalities of commerce—known or in use when the constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances. They extend from the horse with its rider to the stage-coach; from the sailing vessel to the steamboat; from the coach and steamboat to the railroad—as these new agencies are successively brought into use to meet the demands of increasing population and wealth."[24] Some students of the law have suggested that in any event the states cannot adopt and enforce the federal rules and regulations without an act of Congress expressly authorizing the states to do so. But this to me appears unnecessary upon a consideration of other decisions of the Supreme Court.[25] It is possible for a single aeronautical occurrence to constitute a crime punishable by both state and federal governments, but a state cannot enforce the federal criminal laws, as such, or inflict punishment for their violation.[26]

As private local flying becomes more common it will become more difficult for the federal government to carry the entire burden of enforcement of regulation, and more necessary that the states police the industry under state laws. Although fundamental uniformity is absolutely essential, and federal regulation is necessary, I am confident that it is not the desire of the federal government to assume exclusive regulatory jurisdiction. On the contrary, the nature of the industry, and the present attitude of the Department of Commerce, convince me that the federal government earnestly desires and needs a full measure of intelligent regulatory cooperation from the states and local governments. Should the states and municipalities fail to lend their aid to the federal government in policing the industry, or should they adopt conflicting regulatory policies, the federal government may find it necessary to exercise the power it possesses under the Commerce Clause and other provisions of the Constitution or under the provision of the Havana Convention, and assume full and exclusive regulatory jurisdiction over the industry to foster and protect it.

23. See *Edwin F. Albertsworth*, "Constitutionality of State Registration of Interstate Aircraft," 3 JOURNAL OF AIR LAW 1, 4, 23, 24 (1932); also dissenting opinion in *Di Santo* v. *Pa.*, 273 U. S. 34 at pp. 42, 43, 47 S. Ct. 267 (1927).
24. *Pensacola Tel. Co.* v. *W. Union Tel. Co.*, 96 U. S. 1 (1878).
25. *U. S.* v. *Lanza*, 260 U. S. 377, 43 S. Ct. 141, 67 L. Ed. 314 (1922).
26. *U. S.* v. *Marigold*, 9 How. 560, 13 L. Ed. 257 (1850); *Cross* v. *N. C.*, 132 U. S. 131, 33 L. Ed. 287, 10 S. Ct. 47 (1889).

It is highly desirable that each state should follow the lead of the federal government and adopt for local enforcement the federal regulations, the air traffic rules and uniform field rules recommended by the Department of Commerce.[27] The Bureau of Air Commerce, during the eight years it has functioned as federal regulatory authority for aviation, has demonstrated its ability to deal understandingly with an industry which is destined to play an important part in the economic development of our country as well as in its national security and which still needs aid and encouragement more than restrictive regulation. I believe that in the years immediately ahead the federal authority should either be centralized in the Bureau or placed in a special body, empowered to aid the industry by the establishment of further air navigation facilities, and to control it by the issuance of certificates of public convenience and necessity, the fixing of fair and reasonable mail, passenger and express rates, and other regulatory details. It is apparent to all of us that the industry at the present time is suffering from this country's lack of a definite and stable policy, and from the division of regulatory and promotional duties and responsibilities between widely scattered and disconnected departments and bureaus of the government. And it is essential that the government's program for promotion and control of civil aeronautics be so administered as to keep it free from the blighting influences of partisan politics.

Let us now consider the international situation. The World War brought about a general acceptance of the notion that each nation has exclusive sovereignty over the space above its territory, and at the same time demonstrated the great importance of international air navigation. Fearing chaos due to a threatened plethora of national laws on aviation and desiring to foster international flying, the powers represented at the Paris Peace Conference drafted the International Convention for the Regulation of Aerial Navigation, which was signed October 13, 1919. While the United States was represented in the drafting of that Convention, this country has never ratified or become a party to it. That Convention, as between the countries which are parties to it, regulates in general the right of aircraft of one nationality to fly through the air space of another country, party to the Convention. It has been adhered to and ratified by most of the countries of Europe, as well as by Canada, Japan, Australia, and South Africa, and it establishes

27. See *Ewing Y. Mitchell*, "The Program of the Aeronautics Branch of the Department of Commerce," 4 JOURNAL OF AIR LAW 499 (1933); *J. Carroll Cone*, "The Dividing Line Between Federal and State Promotion of Aeronautics," 4 JOURNAL OF AIR LAW 473 (1933).

two primary principles, to-wit: (1) that every nation has complete and exclusive sovereignty over the air space above its territory, and (2), that each of the contracting nations undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting nations, provided the conditions laid down in the Convention are observed. It contains a statement of other fundamental principles applicable to the public aspects of international flight; and likewise a series of annexes or detailed rules and regulations subject to revision from time to time by a permanent body (International Commission on Aerial Navigation, known as the C.I.N.A.) created and established under the terms of the Convention for the further study and codification of public international aeronautical law.[28]

Upon Spain's withdrawal from the League of Nations in 1926, that country called in Madrid a conference of countries of Spanish culture and tradition for the drafting of the Ibero-American Convention, which in many respects followed the provisions of the Paris Convention, but has been ratified only by Spain, Portugal and a few Latin American nations.

Having failed to ratify the Paris Convention, and realizing the growing importance of international aviation, this country, after the passage of the Air Commerce Act of 1926, took a leading part in drafting the Havana Convention on Commercial Aviation signed Feb. 20, 1928, by the delegates to the Sixth International Conference of American States.[29] That Convention, which has now been ratified by the United States, Guatemala, Mexico, Nicaragua, Panama, Dominican Republic, Costa Rica, Haiti, Honduras, and Chile, contains substantially the same provisions as the Paris Convention regarding national sovereignty over air space and the peace-time right of innocent flight as between the countries party to that Convention; but it lacks the definiteness and completeness of the Paris Convention and it failed to provide for a permanent body of legal experts charged with the duty of studying and codifying the rapidly growing principles of public international aeronautical law. It did contain a provision obligating the countries becoming parties thereto to obtain as far as may be possible uniformity in the regulation and promotion of air navigation. It is apparent that this Convention is merely regional, whereas the Paris Convention is world wide in its scope and purpose.

28. See *Albert Roper*, "The Organization and Program of the International Commission for Air Navigation," 3 JOURNAL OF AIR LAW 167 (1932).

29. See *Stephen Latchford*, "Havana Convention on Commercial Aviation," 2 JOURNAL OF AIR LAW 207 (1931); *Leland Hyzer*, "Pan-American Air Regulation: a Comparative Study," 4 JOURNAL OF AIR LAW 531 (1933).

An International Sanitary Convention for air navigation was signed on behalf of the United States by the American minister at the Hague on April 6, 1934, but has not yet come into force as to any country.

The Conventions mentioned are concerned only with the development of *public* international air law, and are designed to facilitate and encourage convenient and unhampered peace-time flight, by agreement upon certain uniform diplomatic procedure, and by the removal of international barriers, and the simplification of such matters as the clearance of aircraft, customs, immigration, and quarantine services. In view of the general acceptance of the notion of national sovereignty over air space it is apparent that it will be extremely difficult for flyers of any country not a party to a broadly organized aeronautical treaty or Convention to participate in extensive international flights. In the absence of a treaty or other agreement giving the right of flight of aircraft of one nation over the territory of another, no right of international flight exists, unless and until the nation through whose air space the flight is to take place, gives its specific authority to the owner and operator of the aircraft; and such authority must be obtained in advance through the various state channels, this procedure being usually slow and most cumbersome. Because of the fact that the United States is not a party to the Paris Convention which has been adhered to or ratified by substantially all of the leading World powers, this country heretofore from time to time has been forced to enter into special reciprocal agreements with other countries not members of the Havana Convention to acquire for its airmen in some measure the privileges accorded the other great powers by the Paris Convention. Such executive agreements not having the dignity of treaties, have been entered into by our country with Canada, Italy, Germany, Belgium, Sweden, Norway, the Union of South Africa, Denmark, Columbia and possibly others. The conventions and executive agreements I have mentioned indicate the development of the public phase of international aeronautical law.

Another phase of the development—which may be termed "the private international law of aeronautics,"—is illustrated by a series of international conventions in process of being drafted, seeking to make uniform the rights and liabilities of the owners and operators of aircraft while engaged in international flight. International commercial aviation early reached a position of such importance in Europe, that, to supplement the international Convention of 1919, France in 1925 called a conference of representatives of the world

powers which met in Paris in 1926 to consider the formulation of a code of *private* international air law. It was known as the First International Conference on Private Aerial Law. The result of that conference was the organization of the International Technical Committee of Aerial Legal Experts (commonly called the C.I.T.-E.J.A.), which created within itself four commissions, each charged with the studying and drafting for codification of certain phases of private international air law.[30] The first draft approved was the convention signed October 12, 1929 (during the Second International Conference on Private Aerial Law), at Warsaw, to make uniform certain rules relating to international transportation by air, particularly with reference to the relations between the owners and operators of aircraft on the one hand and passengers and shippers of goods on the other. The United States did not participate in these conferences, but in May, 1933, this country was represented at the Third International Conference on Private Air Law, held at Rome, where two other conventions were adopted, one covering liability of the operator of aircraft for damage to third persons and property on the ground, and the other with reference to the attachment of aircraft.[31] Neither of the conventions adopted at Rome has as yet come into force as to any country. The Warsaw convention, however, has been ratified by and is in force as to, Spain, Brazil, Roumania, Yugo-Slavia, Poland, France, Latvia, Great Britain, Italy, The Netherlands, Germany, and Mexico. The United States having on June 15, 1934, agreed to adhere, that convention will come into force as to this country in the near future.

At the Seventh International Conference of American States, held at Montevideo, December 3-26, 1933, two resolutions were adopted which may be of considerable importance in the development of aeronautical law in this hemisphere.[32] The first of these resolutions recommends that the American nations adopt certain specified rules and principles relating to jurisdiction of crimes committed on board private aircraft while in a foreign state or in international flight. This second resolution provides for the creation of a commission of experts by the governing board of the Pan American Union for the purpose of studying means of further

30. See *John J. Ide*, "The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C. I. T. E. J. A.)," 3 JOURNAL OF AIR LAW 27 (1932).

31. See *J. W. Muller*, "The C. I. T. E. J. A. and Liability Toward Third Persons on the Surface," Editorial in 4 JOURNAL OF AIR LAW 235 (1933); *Robert Kingsley* and *Sam E. Gates*, "Liability to Persons and Property on the Ground," 4 JOURNAL OF AIR LAW 515 (1933); *Andre Kaftal*, "The Problem of Liability for Damages Caused by Aircraft on the Surface," 5 JOURNAL OF AIR LAW 179, 347 (1934).

32. See *Margaret Lambie*, Editorial, 5 JOURNAL OF AIR LAW 314-316 (1934).

accelerating inter-American aviation by the establishment of aeronautical aids such as radio stations, beacons, and aerodromes along the line of existing routes and others considered desirable.

International uniformity in the fundamental principles of aeronautical law and regulation is almost as essential as is national uniformity, and can be achieved only under the aegis of a generally recognized international convention. It cannot be achieved through a multiplicity of regional conventions operating independently and at cross purposes. Our country can never occupy a commanding position in world air commerce until it places the industry in this country on equal footing with that in the leading countries of the world—enjoying the same international flying and merchandising privileges enjoyed by the industry elsewhere. The Paris and Havana Conventions rest on fundamentally different conceptions and in some respects are in direct conflict, making it impossible for any single nation consistently to adhere to both. This has been well pointed out by the learned vice-chairman of the Federal Aviation Commission, Mr. Edward P. Warner, in an article appearing in the Air Law Review.[33]

In view of the fact that the greater portion of international flying today is being done under the aegis of the Paris Convention and that the C.I.N.A. functioning under that convention has made considerable progress in the development of international air law it would seem that our country, with certain reservations and modifications, ought to ratify the Paris Convention and take its proper place in world air commerce before the other powers have completely occupied and developed the international field.

For several years European countries have conducted a successful Trans-Atlantic air service to Brazil. Such service between our country and Europe is bound to come in the immediate future. We now boast of leadership in the manufacturing of aeronautical equipment and in domestic air commerce. Given equal legal and diplomatic advantages there is no reason why the industry in this country should not immediately assume leadership in international air commerce. For more than a decade we have played the role of on-looker while the fundamental concepts of international air law were being formulated and codified under the influence of legal systems differing in many respects from our own, and we have seen our flyers and flying concerns forced to resort to special negotiation for international flight, and our producers of the world's best aero-

33. *Edward P. Warner*, "The International Convention for Air Navigation: and The Pan-American Convention for Air Navigation: a Comparative and Critical Analysis," 3 Air Law Review 221 (1932).

nautical equipment in a measure handicapped in reaching world markets by the absence of a broad multilateral agreement regarding certification, registration and other formalities.[34]

On the eve of overnight service from New York to London and Continental Europe, it is obvious that international flight must be regulated, and governed in respect to liabilities, in accordance with a generally accepted international plan. Even in railway and marine transportation these international problems have been met by the Berne Conventions of October 14, 1890, and the Brussels Conventions of August 25, 1924.[35]

In the near future "floating islands" may be established in the Atlantic and in the Pacific. Their presence would be of both commercial and military significance and would call for the formulation of new and unique principles of international law.[36] If this country wishes the privilege of taking part in the evolution of these important international developments which necessarily must affect our welfare, we must abandon our isolation. Modern transportation and communication have brought all peoples together and it will avail us little to ignore this fact.

It is gratifying to know that President Roosevelt not only favors this country's representation in the C.I.T.E.J.A. but that he early this year recommended that Congress grant a liberal appropriation for defraying the expenses of our members while participating in its activities.[37] Secretary Hull, suggesting such appropriation, declared:

> Due to the mobility of aircraft, it seems probable that international laws adopted on both the regulatory and private air law phases of aircraft operation, will have a decided influence on the national regulation and law of aircraft. This condition makes it imperative that this country have a voice in the development of Conventions of aeronautic matters prior to the submission of these Conventions to international conferences for consideration.

Unquestionably careful consideration should precede this country's promotion of or participation in, agencies for international

34. See *Clarence M. Young*, "Problems in International Flying," Air Commerce Bulletin, Feb. 1, 1930; also discussion of reciprocal agreements and conventions, Air Commerce Bulletin, Dec. 15, 1933, p. 151.

35. See also, *Manley O. Hudson* and *A. H. Feller*, "The International Unification of Laws Concerning Bills of Exchange," 44 Harvard Law Review 333 (1931); *A. H. Feller*, "The International Unification of Laws Concerning Cheques," 45 Harvard Law Review 668 (1932); *J. H. Wigmore*, "Problems in World Legislation and America's Share in Them," 4 Va. Law Review 423 (1917).

36. See *Rowland W. Fixel*, "The Seadrome and International Law," 2 JOURNAL OF AIR LAW 24 (1931).

37. See 5 JOURNAL OF AIR LAW, pp. 321-326.

cooperation, but sufficient evidence has been adduced to indicate the need for a more universal air program.[38]

I have spoken more of aeronautical control than of promotion. The two however are inseparable, there being no better way to promote aviation than to make it safe, orderly and dependable through intelligent and sympathetic regulation. Lack of correct information and occasional inability to visualize the future have been responsible for some unsatisfactory regulation and administration and it is reasonable to expect that some mistakes will be made in the future—but air transportation represents solid achievement and will outlive any errors committed by its well-intentioned sponsors. As someone aptly has said: "The astronomers cannot damage the stars."

We properly may expect the State and Federal governments not only to provide aeronautical aids and encouragement, as aids and encouragement have been liberally provided for maritime, railroad and highway transportation, but also to enact laws and provide regulation that will at once protect the industry, the government in its dealings with the industry, and each individual citizen. And we must correct the impression that prevails in some quarters that the interests of government and industry are diametrically opposed. The industry can be greatly aided by wise and tolerant laws, set up to license instead of prohibit, encourage rather than discourage, and promote rather than retard its continued growth.

I believe that if commercial aviation in this country is properly encouraged and protected it will outgrow the need of air mail subsidy within a few years. But civil aviation as a whole should continue to have the support of the federal government in the establishment and maintenance of navigation aids and facilities. States and municipalities have made a beginning in the establishment of airports, but must do more to supplement the federal aids, as private and local flying become more popular. It would seem that the State and Federal governments could well afford to embark upon a cooperative aeronautical construction program similar to the Federal aid highway program. Airports and navigation aids will be to air transportation what improved highways have been and are to motor transportation. Aviation, although having tremendous possibilities, is still an infant industry producing small revenues, and it would seem that the states, until the industry has attained substan-

38. See *Kenneth Colegrove*, "A Survey of International Aviation," 2 JOURNAL OF AIR LAW 1 (1931); *Kenneth Colegrove*, "The International Aviation Policy of the United States," 2 JOURNAL OF AIR LAW 447 (1931); *Salvatore Cacopardo*, "The Collective Aeronautical Conventions and the Possibility of Their Unification," 2 Air Law Review 207 (1931).

tial growth, could, in line with the federal policy of promoting aviation, well afford to relieve air transportation of the gasoline tax which was conceived as an equitable charge for use of public highways. Such taxes were not imposed upon motor transportation until the industry was well established and the road improvement program has been far advanced by use of general funds.[39]

The present federal administration definitely has recognized the importance of aviation and indicated its intention to lend it every reasonable encouragement. The recently created Federal Aviation Commission is now engaged in a study of all phases of the industry looking to the formulation of a national aviation policy. This Commission is made up of outstanding Americans who will deal with this subject intelligently and impartially and whose recommendations doubtless will go far toward bringing stability to the industry and hasten the universal acceptance of flying as a part of every-day American life.

May I in conclusion quote again from Mr. Justice Cardozo who some years ago observed:[40]

> Aviation is today an established method of transportation. The future, even the near future will make it still more general. The city that is without the foresight to build the ports for the new traffic may soon be left behind in the race of competition. Chalcedon was called the city of the blind, because its founders rejected the nobler site of Byzantium lying at their feet. The need for vision of the future in the governance of cities has not lessened with the years. The dweller within the gates, even more than the stranger from afar, will pay the price of blindness.

39. See *Cyril C. Thompson*, "State and Local Taxation Affecting Air Transportation," 4 JOURNAL OF AIR LAW 479 (1933).

40. *Hesse* v. *Rath*, 164 N. E. (N. Y.) 342.