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EDITORIALS

THE RESIGNATION OF DIRECTOR FAGG

Director FRED DOW FAGG, JR., of the Bureau of Air Commerce in the Federal Department of Commerce, having accepted an appointment as Dean of the School of Commerce of Northwestern University, presented his resignation as Director of the Bureau, to take effect on April 15, 1938.

The news of Mr. Fagg's departure from the Government service will be heard with sincere regret by all persons throughout the realm of aeronautics. His short term of service as Director (a little over a year) has been marked by notable advances in all activities of the Bureau. Possessing the entire confidence of Colonel J. Monroe Johnson, Assistant Secretary of Commerce in charge of Aeronautics, and the hearty support of his many able and devoted associates on the staff of the Bureau, he was able to effect remarkable progress in the internal reorganization of the Bureau's work and personnel, and to inspire a spirit of loyal team-work which has been all to the good. As an experienced aviator, he was conversant with all the technical needs of the service. As the Secretary of the National Association of State Aviation Officials he had come into close touch with the zealous and earnest men who are supervising the interests of aeronautics in every region. As a former legal adviser to the Federal Aviation Commission, he had become thoroughly familiar with the needs of revision of Federal aeronautical legislation. And as consulting expert, since 1936, in the revision of the Department's Civil Air Regulations, he was in a position to direct to completion that huge and complex task.

His too brief term of service will long be remembered with satisfaction by all who were interested in the work of the Bureau.

In his new post, Mr. Fagg returns to the field of his earlier career,—that of education in Economics. Besides the School of Commerce of 500 students in the College of Arts and Sciences, his jurisdiction now includes the evening School of Commerce in Chicago, a body of 9,000 students—probably the largest of the kind in the country. Its members are earnest, mature, and ambitious workers in every kind of business and industry, seeking to master the Science of Commerce, and taught by some 200 experts in the various branches. His responsibilities and his power of influence in this field of work may well satisfy his highest ambitions.

THE NEW DIRECTOR OF THE BUREAU OF AIR COMMERCE

DENIS MULLIGAN, who became Director of the Bureau of Air Commerce on April 16, 1938, brings to that post a remarkable combination of experience as soldier and sailor, aviator and advocate. In his mental and moral make-up, besides a calm temperament, an unfailing native courtesy, a capacious memory, a sturdy independence of convictions, and as unusual talent for dependable accuracy in all tasks of research, are also joined a wide experience in matters military, marine, and mid-air, as well as that legal equipment so necessary in aeronautical administration.

Besides his military training at West Point (where he was captain of the football team) Mr. Mulligan has collected the degrees of B.S., LL.B., and J.S.D., during various periods of study at the University of Pittsburgh, Columbia University, Fordham University Law School, and St. Lawrence University (Brooklyn Law School). Upon graduating from West Point in 1924 with a commission in the Air Corps, Mr. Mulligan completed primary and advanced aviation training at Army flying schools at Brooks and Kelly fields and was qualified as airplane pilot and airplane observer. He was then sent to Mitchell Field, Long Island, New York, for duty with troops and service as Adjutant and Engineering Officer of the First Observation Squadron. He was seven years in the 27th Division Aviation Observation Unit of the New York National Guard; and has also been an officer in the Air Corps Reserve for a number of years, holding now commission as captain in that branch.

On resigning from the Army, he had seen the world as a sailor in the merchant marine, travelling more than 60,000 miles in a year and a half.

Back in New York City, he entered insurance work and engaged in commercial aviation on the side while studying law. From 1931, when he was admitted to the Bar in New York, until he joined the Bureau of Air Commerce in 1934, he was associated with the law firm of Mengel and Conroy, proctors in admiralty, New York City.

First appointed Chief of the Enforcement Section of the Bureau in 1934, Mr. Mulligan was later detailed to the Solicitor's Office of the Department of Commerce and assigned to matters requiring legal attention in the Bureau of Air Commerce. In April of 1937, he returned to the Bureau as Chief of the Regulations and

Enforcement Division. In October of 1937 he was appointed Assistant Director of the Bureau.

Meanwhile, his duties and his legal experience led to giving special attention to the international aspects of our air commerce, and he acted as liaison officer with the Department of State in dealing with the various international problems. As one of the four members of the United States delegation on the International Technical Committee of Legal Aeronautical Experts (CITEJA), he has attended in Paris, Bucharest, Lima, and elsewhere.

These varied experiences and attainments guarantee the highest qualifications for dealing with all the varied problems of administration and legislation that present themselves to the Bureau.

THE CIVIL AERONAUTICS ACT OF 1938

The Congress and the President have given the country and aviation the Civil Aeronautics Act of 1938. It is printed in full in this issue. It is a constructive labor that has been given but little public attention and perhaps fortunately, because aviation has already had too many over-publicized launchings. The Act creates an independent agency of government to handle all aeronautic matters which come within the scope of federal regulation. In this respect it goes further than regulation of travel in other mediums,—but so did the Air Commerce Act of 1926 to its extent. It adds the entirely new field of economic regulation of air carriers. It merges in the new agency and refines the treatment of the aviation problems previously handled by the Department of Commerce, the Interstate Commerce Commission and the Post Office Department,—only leaving to the Post Office Department those matters similar to its control of the transportation of mail by land and water carriers. Lastly, it attempts to separate in an administrative agency the three well known and fundamental divisions of our government, namely, executive, legislative and judicial. It anticipated in its early drafts and preserves in its final draft, and even enlarges, the full and fair hearing required by the United States Supreme Court in *Morgan* v. *United States* (April 25, 1938, 58 S. Ct. 773, 82 L. Ed. 757).

The foregoing of course picks out only the high points. The legislation contains many other beneficial refinements that are not so spectacular. Likewise, it contains some rough spots and some contradictions that must be resolved and which will likely disappear in administration. If not, the Act provides for an annual and

special reports to Congress and the system should provide a ready means to care for corrections without fuss and feathers. The wonder is that such a good bill has emerged in the treatment of a problem in which there were so many conflicting interests and different competent ideas, and with reference to which there were so many opinions and suggestions by self-appointed and self-annointed experts. The legislation had also to avoid the pitfalls of accepting all of the undesirable features of other forms of regulation of transportation which were advanced as honorable precedents.

Too much credit cannot be given the Interdepartmental Committee on Civil Aviation; to Colonel J. Monroe Johnson, its chairman; to Fred D. Fagg, Jr., its secretary; and to Clinton M. Hester, the chairman of the drafting committee of the Inter-departmental Committee on Civil Aviation, and his equally able and indefatigable assistants, Stuart G. Tipton and George C. Neal. In Congress the laboring and steering oars in the House and Senate respectively were carried by Congressman Lea and Senator Truman. Fine service was also rendered by Congressmen Bulwinkle and Meade and Senator McCarran and the late Senator Copeland. Above all stood Congressman Lea with never failing persistence, patience and intelligence, and all this coupled with like abilities in Mr. Hester and the helpful and intelligent interests of the President through his son, James Roosevelt, furnished the key to the present result. Perhaps this can be better understood by referring to the draft of the Lea Bill introduced in the House of Representatives as H. R. 9738 on March 4, 1938, and reported in full in 9 JOURNAL OF AIR LAW 296.

The Civil Aeronautics Act is somewhat of an experiment in administrative law. Yet since it uses for the experiment the fundamental concepts of our constitutional government it is really no innovation, but merely an extension of such concepts to the field of administrative law and regulation. It comes on the threshold of tremendous technical advancements in the art of aviation. It accompanies an upturn in the enlargement and increase of aviation business and more particularly of private flying. It should mark an epoch in aeronautics. By way of comparison it will be interesting to note in this issue a reprint from the Green Bag of an article entitled "A Closed Chapter in Aeritime Law," purporting to be a paper read before the Bar Association on March 16, 1975, but in reality prepared by a well-known attorney of St. Louis, Missouri, in November of 1907.

HOWARD C. KNOTTS.

BOMBING OF CIVILIANS

A Resolution was passed by the Senate of the United States on June 16, 1938, recording unqualified condemnation of the inhuman bombing of civilian populations. A study of this subject and of the general problems of neutrality will be made by some members of the Senate Foreign Relations Committee in preparation for the reconvening of Congress. The Chairman of the Committee on Foreign Affairs of the House of Representatives has stated that revision of the neutrality law will probably come before the House in the form of questions as follows: Shall Congress give the Administration the power it has sought to brand aggressor nations in an effort to curb war? Shall the sale of bombing planes be permitted or shall steps be taken to prevent the bombing of civilian populations by products of American manufacture? Shall the present arms embargo policy of the United States be abandoned or shall American munitions makers be permitted to sell to any nation, or only to the defending nation in clear cases of aggression? The Secretary of State of the United States had previously made protests to Japan because of the campaign waged by the latter's air force against the helpless people of Canton. Secretary Hull urged that individual American manufacturers be discouraged from selling aircraft to nations guilty of bombing civilians. Such an excluding policy, it has been suggested, should be extended to other essential supplies and also to credits. In certain cases boycotts are already being tried by citizens of the United States independently of government action.

What are aeronautical leaders doing to assist the political leaders? Undoubtedly they, too, are studying and formulating plans along their various lines, but the situation calls for immediate and concerted mobilization of ideas. A conference representing all fields of aeronautics, civil, military, manufacturing, personnel and the public, together with legislators, technical experts and legal advisers, should be called at once. This is not alone a Congressional and Administrative burden. The best minds of the country, working in collaboration now, may later save this country and others from many horrors, if their efforts go beyond palliative measures into fundamental principles. The principles are based not only upon international law and social order, but upon a higher than human law.

This JOURNAL has consistently stood for research in the field of air law from small details in rules and regulations to important

legal concepts embodied in legislation and international agreements. The JOURNAL OF AIR LAW is alive to changing conditions brought about by the invention of aircraft and publishes constructive suggestions of a legal nature relative thereto. It primarily advocates law and order in the use of the air. But aeronautical use of the air presents certain principles which long antedate actual conquest of the air commenced slightly more than three decades ago. An aeronautical conference, therefore, in discussing air bombing, will find itself deep in questions of disarmament involving land, air and naval personnel and equipment, international collective action, security, international law, systems of justice, sanctions, as well as proposals for internationalization of civil air transport and for an international air police force with abolition of military aircraft, use of force for defense only by one nation against another nation, use of force by a government against its own nationals in the course of administering international law, and many other problems.*

The immediate need of curtailing air bombing of civilians is concurred in by a number of nations. The British government has protested to Japan against the bombing of Chinese and neutral civilians and has initiated an international commission to study the subject of the bombing not only of civilians in Spain, but also of British and French shipping near Spanish ports. The governments of Norway and Sweden have joined with Great Britain to try and determine whether air raids on civilians in Spain had definite military objectives.

Great Britain finds herself a bit embarrassed by a reservation her delegates made at Geneva in 1933 at the Disarmament Conference of the League of Nations, in which reservation they proposed that bombing of frontiers be completely prohibited "except for police purposes in certain outlying districts." That exception helped to nullify the efforts of the Conference. Great Britain has used bombs in Palestine, Arabia, Irak, and along the northwest frontier of India, after warning the inhabitants to be sure, but those bombs have now become, as it were, boomerangs. With London rather vulnerable to air attacks, the British are not exactly comfortable. The British government has offered to abandon her "humane" aerial bombings, "if such practices stand in the way of a general agreement to abolish bombing from the air, as exemplified at its worst in Spain and China." Ghosts of ship's cannon balls, too, are flitting about. A recent cartoon called "There Is Some

* For brief discussion of some of these problems see "Aeronautical Use of the Air," by *Margaret Lambie*, 8 JOURNAL OF AIR LAW, 1 (1937).

Precedent," shows Franco reminding John Bull that Spanish galleons had been sunk by one Sir Francis Drake. The inviolability of British shipping is so traditional that Prime Minister Chamberlain's unwillingness to take any measures to stop the recent bombing of British merchant vessels engaged in commerce with the Spanish Republic called forth protests. Complicating this situation is the treaty of friendship signed last April by Great Britain and Italy, for the Italian press has boasted that planes and fliers responsible for the attacks on British ships are in some cases of Italian origin. The Prime Minister apparently declined to draw a parallel between torpedoing of American ships by German submarines, which was instrumental in bringing the United States into the world war, and bombing of British ships by Italian and German planes in the service of Spanish insurgents. The Prime Minister claimed that air attacks present a new problem, and, moreover, cannot be compared to pirate submarine attacks in the Mediterranean and on the high seas where international control is possible. He stated that effective protection could not be guaranteed to British ships trading with ports in the war zone while the ships are in territorial waters, unless Great Britain is prepared to take an active part in the hostilities. This would involve the British air force, because sea power alone could not prevent the bombing from the air.

A refreshing and unusual gesture was made by China in May, 1938. According to reports, China retaliated against Japan by sending two war planes to Nagasaki which bombarded the city with leaflets only, thereby emphasizing "the vast superiority of China's civilization over the parvenu nation." This is reminiscent of a French pilot who, in 1916, dropped bombs of paper proclamations on Berlin.

Wars in the past have maintained a certain honor between combatants, together with a regard for organized tactics and rules of warfare including treatment of civilian populations, albeit the standards have varied and have not been efficacious in preventing by-products of terror and suffering among civilians. When, therefore, there is a present renewed demand for negotiating an international convention or agreement to "humanize the rules and practices of war," is it not wise to consider what has previously been done along those lines and to visualize where such a course might lead? The appeal is immediate for a remedy, but what means are sufficiently fundamental to reach *the* remedy?

Modern technics have made mediaeval weapons amusing to behold from the point of view of their futility in war today, yet

machine guns and 2-ton air bombs may look just as ineffective to future antiquarians, if this armament race does not cease. The cross bow, as a too deadly instrument, had an anathema put upon it in 1139, but both the cross bow and long bow were used and later were supplanted by the musket. During two or three centuries enemy musketeers were severely treated, many of them when captured being slain without mercy for using such an inhumane weapon. The introduction of firearms was considered an unfair innovation on the rules of lawful war. Red hot shot at first was strongly censured. The poisoning of potable water used not only by soldiers but by civilians is an old strategy which differs little in principle from modern air bombs of gas which devastate a countryside and poison its inhabitants. Pouring burning oil from a tower may be considered the precursor of aerial bombardment, the chief difference in result being that the newest bombs have greater potentiality numerically against human beings. The end is not in sight to which invention may be extended, aeronautically speaking. Hope for the civilized world is that end will soon come to the use of any invention for purposes of destruction.

This hope transports one from the observation of tangible things, such as aircraft and weapons, to the consideration of law and order and to the contemplation of moral principles. When, for example, duelling as a method of settling personal disputes became out-moded among individual leaders, decrees out-lawed duelling among the less enlightened masses. In other words, the authorities recognized as obsolete the hitherto accepted custom that individuals, under "codes of honor," could take each other's lives with sword and pistol. Law and order as to duelling were established, and the prohibition of the Decalogue prevailed:—Thou shalt not kill.

It is otherwise with nations. They have always accepted war as a final recourse for settlement of their disputes. Many writers on international law divide texts into the laws of peace and the laws of war. The Covenant of the League of Nations recognizes war as the ultimate solution. Most nations have made their history upon the foundation of war, and it is probable that the majority of persons today believe in the sanction of war when it is "justifiable," or in other words when it is for self-defense or in support of another nation believed to be wrongly attacked. Conquest of territory as a motive for war was supposedly shown by the World War to be out of step with the growth of civilized standards of social responsibility, but totalitarian governments, largely the result of that

war, are now perpetrating thinly disguised conquest, even as imperialists were wont to do.

If democracies consider such conduct reversion to barbarism, they must not forget that their own emergence from periods of conquest and intervention is none too remote. Even the conscience of the United States is perhaps a bit uneasy. Boastfulness on the part of democracies is vulnerable on the score that nations as units, where force is concerned, have not arrived in their conduct toward each other at the stage of development reached some time ago by individuals. Physical destruction of one individual by another is no longer "done," either because of moral conviction or impulsion from criminal law and its consequences. But by nation against nation various phases of destruction are still allowed under rules of the war game,—the slaughter of soldiers, ruination of fortified towns, and incidentally thereto, if unavoidable, the killing of civilians, destruction of private property. The present frightfulness in China and Spain merely indicate a *difference of degree.*

Differences of degree are sometimes amenable to the changing of undesirable conditions. But through the ages the method of ameliorating conditions of war has been tried in attempts to "humanize" them. Countless have been the failures to bring about that result. Rules of war have never kept pace with advance in science, which, when used for belligerent purposes, has always increased the degree of frightfulness. Amelioration simply does not work in war. War is a medium in which differences of degree rapidly merge into invasion and defiance of rules, legislation and treaties.

The trouble lies with war itself. As a principle war is wrong; rules of war are built upon quicksands. New rules of war or revision of old rules based upon war can never serve humanity, for civilization values life—and not only the life of men, but of animals and of trees.

If all nations would renounce recourse to war, governments would at last have progressed to the negation of murder, and find themselves ready to carry out the positive command which begins, "Do unto others . . ." This command calls for action.

Action commences with the acceptance of the 2000-year-old rule, which has for its only test "as ye would that they should do unto you." This individual standard, applied to the conduct of nations, furnishes a conference of aeronautical leaders, legislative and administrative heads, with the fundamental means to test substantive laws for peace.

One of the many principles to be examined is collective action for security which has been tried under the system of balance of power and under the League of Nations. Failure to guarantee security may be due to various causes, such as anticipation of final resort to war, nationalistic aspirations, and distrust. Certain peace advocates maintain that the failure would be remedied by an association of nations with force used only against individuals, never against states. This plan, worked out by William Ladd, was published in 1840 under the title, "Essay on a Congress of Nations for the Adjustment of International Disputes Without Resort to Arms."

The Constitution of the United States incorporates international law and treaties into the law of the land. Article I, Section 8 states, "The Congress shall have power . . . to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations; . . .", and Article VI states, "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; . . ." The term "law of nations" as used in the Constitution connoted what is today spoken of as "international law." The question therefore arises as to what composes international law and whether that part of international law based upon precedents of war has become obsolete in spirit. If the latter question is answered affirmatively, there is a challenge to the moral courage of leaders and government authorities.

With international law incorporated into the Constitution of the United States, the administration of international law as it affects the United States is in the government. The supreme law of the land is enforced through courts of justice and police power against recalcitrant individuals, and similarly the administration of all international law of peace should, according to the plan of Ladd, be intrusted to national governments maintaining adequate police forces to cover their respective jurisdictions for land, air and sea. Each national government would act upon its own citizens and upon aliens within its territory who commit offenses against international law. Precedents for the national control of citizens who commit offenses against international law cannot be enumerated here, nor can the refinements of the question be discussed, but take for example embargos on sales of munitions, the Alabama Claims Arbitration, and the present proposals to prohibit or limit the sales of bombers and other supplies, a British suggestion of excess profits

tax upon ships trading with Spain during military operations, and other incidents showing the trends.

Having such power to act under the Constitution and having the will to be a good neighbor as expressed by the President, the United States is finding itself handicapped by part of the present international law. Other states may be in the same position, if their national laws and diplomatic policies are comparable. Presuming. then, that the above power and will are based upon the fundamental test, there is hope that a large number of states are interested in working out constructive plans, re-defining international law exclusively for peace, and encouraging all nations to bring their national laws and administration into line. Demonstrations of practicability having been made by the United States since its beginning and by other nations, it becomes a matter of degree and of how soon steps can be taken toward furthering the progress of civilization by discarding the principle of war.

Caution! In attempting remedies, build upon the right foundation, and beware degrees of error which lead into dictionary mazes for definitions of "aggressor" (evaded by undeclared war), "open" town (ignored in China and Spain), "self-help" (illustrated by the old case of The Caroline), measures "short of war" (backed by threats), and "good will" expeditions (made by bombers).

Instead of advocating an international agreement to "humanize war," now is the time for aeronautical leaders, who are at the pivot of world fate, to take the initiative in planning civil education of industries, pooling inventions, distributing air routes, and studying other ways to create international friendship through universal service. With governments cooperating to ensure defense against hostile acts committed by their citizens, and by patriotism substituting for fighting a higher than physical courage, the fear of air raids will be lulled to sleep by peaceful humming of mail-planes.

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