

1938

## Editorials

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## EDITORIALS

### APPOINTMENTS TO THE CIVIL AERONAUTICS AUTHORITY

On July 7, 1938, President Roosevelt appointed all but one of the officers of the Civil Aeronautics Authority requiring presidential commissions. The five members of the Authority named were: Edward J. Noble, chairman, Harlee Branch, vice-chairman; Robert Hinckley; G. Grant Mason; and Oswald Ryan. Clinton M. Hester was named Administrator. But two of the three members of the Air Safety Board have as yet been named: Colonel Sumpter Smith, chairman, and Thomas O. Hardin.

By and large the Authority proper was not chosen for its expert knowledge of aeronautics. Quite the contrary—and perhaps purposely so, because the chief duty of the Authority is to sit as an administrative court either performing quasi-judicial functions or quasi-legislative functions in which the judicial form predominates. Chairman Noble is a successful industrialist who has had the varied background of participation in the building of a unique nation-wide corporation, of a majority in the Army service of supply during the World War and of the personal ownership of aircraft, including an autogiro, and the every-day use of air travel generally.

Vice-chairman Branch brings to the Authority not only his charm and experience as a former newspaper man, but his expert knowledge of air mail, both foreign and domestic, and a splendid administrative record as Second Assistant Postmaster General. Mr. Branch also did yeoman service as a member of the President's Inter-Departmental Committee on Civil Aviation which furnished the first drafts of and the impetus to the Civil Aeronautics Act of 1938. All this makes most logical his selection for vice-chairman and for the longest term (six years) of the present staggered appointments.

Mr. Hinckley is a Utah business man, typical of the west. He has had much experience at sheep growing and wool selling, and for the past ten years has operated a large auto sales business. Most recently he has been Assistant Administrator of the Works Progress Administration with a high record for efficiency in this difficult assignment. In this capacity he had much to do with airport development in the mountain and Pacific states,—a carry-over

interest from early participation in the Wells Brimhall flying service and as an energetic member of the aviation committee of the Ogden Chamber of Commerce—one who really flew on his business trips.

Mr. Mason is an experienced air carrier operator in the overseas and foreign field. He was one of the early builders of the Pan American Airways system and most recently has had headquarters at Havana in charge of the Cuban Division of that air transport company. It might be said that he is the one member of the Authority who has expert aeronautical knowledge, but even this is confined largely to over-water operations with water aircraft. The problems of our private flyers and of our domestic air carriers are of greater quantitative, and equal qualitative, importance.

Mr. Ryan has been the general counsel of the Federal Power Commission since 1932. His background in economic regulation is excellent not only as an office and court room lawyer but as a student and philosopher. His presence in important utility cases has not unfrequently marked the beginning of new or clarified doctrine. His argument to the United States Supreme Court on November 11, 1937, in the *Pacific Gas and Electric Company v. Railroad Commission of California* case was a landmark in the advancement of the prudent investment method of rate-making. Mr. Ryan should make a great contribution to the logical and reasonable development of the new economic regulation of air carriers, with its novel rate-making formula, provided for in the 1938 Act.

Whatever may be said about the lack or limit of the aviation experience of the members of the Authority, it must be said for each of them that they are enthusiastic users of air travel and have an abiding faith in the present necessity and the future enlargement of the art of flying. They are seasoned men, all several cuts above the average and of the kind that are likely to become expert very quickly on matters of most any variety to which they apply themselves. While it is true that the aviation industry was disappointed at the selection of an Authority without at least a majority of the members of long standing in the business to be regulated, it is equally true that those who were appointed have already demonstrated capacity and warm friendship for aeronautics, therefore, everyone who is to be regulated will do well to cultivate this opportunity.

The appointment of Clinton M. Hester as Administrator has been applauded everywhere except in that small group who insist

that all of the appointees should have long aviation backgrounds. Mr. Hester is a civil servant of the successful career type which we have been trying so hard to develop in our government. He knows administrative work and procedure as few people do in Washington, and he has had a most intimate connection with the Civil Aeronautics Act of 1938 as the chairman of the drafting committee of the Inter-Departmental Committee on Civil Aviation and as the personal representative of the President before Congress in connection with the hearings on the legislation. He is a man of unusual industry and ability and, from the day of his appointment, has been engaged in an exhaustive study of the practical aspects of aviation and the activities of the old Bureau of Air Commerce. It is safe to say today that Clinton Hester is more at home in an airplane than any other means of travel—and few people know it because of his modesty. He will make an ideal executive officer for the Authority.

The Air Safety Board is headed by Colonel Sumpter Smith, who has a long and honorable Air Corps record and an equally impressive connection with private flying and airport development. Thomas O. Hardin was an active airline pilot of 10,000 hours experience at the time of his appointment, and he was a recognized leader in his group—and would be in any group for that matter. The statutory requirement of "not less than three thousand hours in scheduled air transportation" has been more than met in the Hardin appointment. Certainly both of these men have aviation experience in abundance but the new and obviously difficult job of the Board cannot have well-rounded results until its third member, of at least equal ability and experience, is appointed and functioning.

#### **ORGANIZATION OF THE CIVIL AERONAUTICS AUTHORITY\***

The pattern, new to American government, for a quasi-judicial commission, as prescribed in the Civil Aeronautics Act, has been worked out by the Civil Aeronautics Authority in its organization chart just completed.

Unlike other regulatory statutes, the Civil Aeronautics Act imposes the duty of "encouragement and development" as well as of regulation. To meet this twofold requirement, as well as to avoid the anomalies developed in the older regulatory bodies and culminating several years ago in the Humphrey decision of the Supreme

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\* From a Press Release, issued by the Civil Aeronautics Authority for October 30, 1938.

Court, Congress permitted the Civil Aeronautics Authority so to organize that the executive and administrative duties confided to it could be separated from the quasi-legislative and quasi-judicial.

This the Authority has done in the organization pattern now completed. All executive and administrative duties are assigned to three bureaus and their divisions under the Administrator. The Air Safety Board, as prescribed in the Act, has a separate and independent organization for the duties assigned it by Congress. Directly under the Authority itself are only three "service" units—the General Counsel's office, the office of the Secretary of the Authority, and the Director of Liaison and Information, all of whose services are likewise available to the Administrator and Air Safety Board.

Under the Administrator, according to this plan, are grouped all of the divisions of the Bureau of Air Commerce, taken over from the Department of Commerce, and of the Bureau of Air Mail, taken over from the Interstate Commerce Commission. These involve the ownership and operation of considerable physical plant, such as in the Federal airways, radio facilities, and other aids to aerial navigation.

The new element in the organization is the Bureau of Economic Regulation, through which for the first time air carriers' rates and services will be regulated. Here, again the distinction between the administrative and quasi-judicial functions is adhered to. In this bureau under the Administrator will be filed all of the routine accounts and reports, the rates and tariffs, and the studies of international civil aeronautic practices which the law requires. It will also supervise the routine of formal proceedings before the Authority and of compliance with its decisions. Within this bureau are the divisions of Formal Procedure and Compliance, Accounts and Reports, Rates and Tariffs, and the International Division just created.

The Bureau of Safety Regulation and Information carries on the Division of Inspection and Certification of both aircraft and airmen hitherto carried on by the Bureau of Air Commerce with its cognate tasks in a Division of Regulation and Enforcement and also the Division of Publications and Statistics.

In the Bureau of Airways and Development are the Airways Engineering Division, the Airways Operation Division, formerly in the Bureau of Air Commerce, and a third Division of Private Fly-

ing and Planning, in which is included the private flying section with its enlarged planning functions.

The exercise of all these administrative and executive duties through the Administrator, it is pointed out, leaves the Authority itself free for the purely legislative and judicial duties imposed on it by Congress. In the legislative sense the Authority makes the regulations which have the force and effect of law, whether they pertain to safety requirements in construction or to the use of the airways or to the granting of certificates of convenience and necessity or to the establishment of rates. But when, for instance, one of the divisions under the Administrator brings an alleged violation of the regulations before the Authority, it is pointed out that the Authority is not both judge and prosecutor and that while, through the Administrator's organization, it may be well and specially informed upon the subject, it is not, as has been complained of other regulatory bodies, in effect passing upon its own acts.

This distinction is further brought out by the fact that while the five members of the Authority are appointed by the President with the advice and consent of the Senate for definite terms, and may only be removed for cause, the Administrator is appointed by the President with the advice and consent of the Senate, but without special term, and may be removed by the President the moment he feels his work is not effective.

This provision particularly meets the situation developed in the *Humphrey* case. There the Supreme Court ruled that though the Chief Executive found the work of a member of the Federal Trade Commission unsatisfactory, he could not remove him because, the court held, he was the servant of Congress as a member of the quasi-legislative and quasi-judicial tribunal. The members of the Civil Aeronautics Authority are, therefore, in function as well as in legislative intent, the servants of Congress through the organization plan carried out under the Act.

Thus, even in the determination of the justice and adequacy of rates, any evidence that may develop through the correlation of the schedules filed in the Bureau of Economic Regulation, is not the evidence of the Authority, but of the Administrator, and the Authority in its quasi-judicial capacity, views it in the same light and of the same weight as evidence of any other litigant before it.

The Act, recognizing the special importance of safety in aeronautics, not only created the Air Safety Board as an independent

agency within the Authority, but specified particular duties for it in Section 702 (a) of the Act, as follows:

- "1. Make rules and regulations, subject to the approval of the Authority, governing notification and report of accidents involving aircraft;
- "2. Investigate such accidents and report to the Authority the facts, conditions, and circumstances relating to each accident and the probable cause thereof;
- "3. Make such recommendations to the Authority as, in its opinion, will tend to prevent similar accidents in the future;
- "4. Make such reports and recommendations public in such form and manner as may be deemed by it to be in the public interest; and
- "5. Assist the Authority in ascertaining what will best tend to reduce or eliminate the possibility of, or recurrence of, accidents by investigating such complaints filed with the Authority or the Board, and by conducting such special studies and investigations, on matters pertaining to safety in air navigation and the prevention of accidents, as may be requested or approved by the Authority."

Hence the Air Safety Board has set up its own organization with its own legal adviser, technical adviser and executive office. Under the last named it has set up an investigation division with regional offices, its information and publication division, and its recommendations division.

This independent organization is already at work on more complete analyses of existing accident figures. Its regional inspectors have already been rushed to the scene of one airline accident where they took an active part in the investigation and study of probable causes.

The action of the Air Safety Board and its representatives in these inquiries will be, it is believed, much more far reaching and effective than previous investigations of accidents. Under the previous law, special boards had to be appointed for each accident and were without power to disclose or discuss their findings until finally approved by their immediate superiors and eventually by the Secretary of Commerce.

The present Act has been construed to enable the Air Safety Board not only to make authoritative findings of fact at the earliest reasonable time following the accident, but to make them public as soon thereafter as practicable. It is hoped this procedure will go far in dispelling the mystery which has often involved previous crashes until long after they have disappeared from public consciousness.

### THE UNIFORM AERONAUTICAL CODE

At the annual meeting of the National Conference of Commissioners on Uniform State Laws, Cleveland, Ohio, July 18-28, 1938, a special committee reported its final draft of the Uniform Aeronautical Code and asked for its promulgation. The committee's distinguished chairman is William A. Schnader of Philadelphia, former Attorney General of Pennsylvania. Its other members are no less able. The Conference approved the Code with but slight changes and it is printed, as so revised, in this issue of the *JOURNAL OF AIR LAW*. The Code is three-part, consisting of the Uniform Aviation Liability Act, the Uniform Law of Airflight and the Uniform Air Jurisdiction Act. Briefly, the first provides for absolute limited liability and compulsory insurance with respect to passengers, baggage and property in flight and to persons and property on the ground, with criminal penalties for those not carrying the insurance as well as loss of the limited liability benefits; the second legislates as to when flight is lawful and, by fiat as well as implication, when it is unlawful; and the third attempts to give a situs to contracts and to torts and crimes executed and committed in flight.

Aviation has been confronted with no more important legislative proposals and they have had all too little consideration by those connected with aeronautical enterprises, including the insurers. The framers of the proposed acts have earnestly sought the counsel of all air groups, but with little success. This is understandable because the framers are not aviation men (they sincerely felt they could not be and create an impartial work), and naturally enough did not approach the right people or in the right manner. Furthermore the aviation industry had been so busy trying to survive and to get passed and in operation the Civil Aeronautics Act of 1938, its entire energies have been consumed in doing first things first.

Be all this as it may the proposals are ready. They are the product of some of our best legal scholars. The effort is a sincere one and deserves the respect of everybody in aviation. Likewise it commands their attention since more than forty state legislatures meet in 1939. The *JOURNAL OF AIR LAW* has been much concerned about this situation and has tried to arouse a general interest. In 1937 and 1938 (8 *JOURNAL OF AIR LAW* 359, 589, 505 and 9 *JOURNAL OF AIR LAW* 132) you were given the then current drafts of these legislative proposals and the brief of the Air Transport Association in opposition. Indeed the July, 1937, issue was devoted to all phases of liability, domestic and international. In the current issue



you have not only the final draft of the Code but General Schnader's paper in explanation and support thereof, the report of the special study committee of the National Association of State Aviation Officials in opposition, except as to the Jurisdiction Act, the reply of the Schnader committee to this report, and the remarks of Mrs. Mabel Walker Willebrandt, Chairman of the Committee on Aeronautical Law of the American Bar Association, at the 1938 annual meeting of the National Association of State Aviation Officials. These are the best documents presently available on the subject matter. If an intelligent result is produced—one that will not harm aviation—these documents and every bit of source material must have our painstaking examination and thorough study.