Law and Bureacracy: The Shroud of Aviation

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LAW AND BUREAUCRACY:  
THE SHROUD OF AVIATION

PAUL P. FLYNN*

I. INTRODUCTION

AVIATION is now facing a most serious challenge to its newly-developed status as the backbone of the transportation system of the United States. The examination of this threat and its origins and potential impact, as well as a possible solution, serve as the focal point for this article. The condition under examination is called aviation congestion.

Aviation congestion is the result of the interaction of technology, legislation, regulation, financing, travel demand, flight density, safety, and the status of the national economy. While a detailed study of each of these areas could be helpful, it would really be tangential to the main purpose. A general awareness of these factors is, nonetheless, necessary to any consideration of the impact that legislation and regulation have had on the problems of congestion.

Current concern with the problems of congestion seem to rest substantially on two related but distinct grounds. First is the concern with the effect of congestion on the safety of the passenger; secondly, there are the joint factors of convenience and necessity. Concerning necessity, it is noteworthy that in 1950 only one of ten inter-city common carrier passengers traveled by air, while in 1969 seven out of ten chose air travel.¹ The volume of airline traffic has

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exceeded that for rail and bus combined for the last several years, and a clear preference has been established. Transportation is the backbone of our economy, and transportation by air is now the backbone of our common carrier system.\(^3\)

As early as 1958 the number of aircraft was increasing by leaps and bounds, with even more rapid growth in their levels of speed. Until the early 1950's the air traffic control system had placed heavy emphasis on the "see and be seen" principle, that is, on the ability of each pilot to see and avoid other aircraft. That principle has clearly become less and less reliable as both the number and speed of aircraft increase. The field of aviation has burgeoned so fast that traffic congestion has rapidly become the major safety problem for the industry.\(^4\)

An argument may readily be constructed to support the proposition that the real issue is not aviation congestion but rather avigation\(^5\) confusion. The basic theory would be that, given our current technological state, an accident should not occur unless there were an error in judgment. Such an error would not be attributed to overcrowded skies, but to confusion as to who was supposed to do what, and when the action was supposed to have been accomplished. We then reach the point of deciding whether congestion creates confusion, or if confusion creates congestion. It is sufficient for our purposes, however, to note that the two factors currently coexist and serve to multiply each other's effects. Our real issue lies in the fact that relevant statutes, rules, regulations, and procedures currently in force have not only failed to resolve the problems, but in some ways have actually added fuel to the fire.

In 1960, the Air Line Pilots Association (ALPA) stated that the air system was not safe. The organization claimed that incidents involving aircraft subjected to near misses from other aircraft were not being reported due to the punitive action often taken by the Federal Aviation Administration (FAA) against the pilots involved.\(^5\) In 1968, a temporary immunity from prosecution was initiated by the agency, and the number of near misses reported for the year jumped from a previous annual average of 500 to over

\(^2\) Id.

\(^3\) 104 CONG. REC. 10,178 (1958).


2500.\(^6\) After careful investigation, the FAA determined that almost half of the 2500 reports were, in fact, mid-air near collisions with some degree of hazard to property and life. In a similar analysis of 217 reported near collisions during the period of January through August of 1964, the FAA reported that 124, or more than half, were the fault of the Federal air traffic control system.\(^7\)

The danger inherent in a near miss situation is threefold. First, collision itself would result in the loss of lives and substantial damage to related property beneath the aircraft. Secondly, there is the strong possibility of injury to the passengers when the pilot is forced to take evasive action to avoid collision. Thirdly, the most subtle injury of all is the factor of pressure, not only on the pilot and crew, but also on Air Traffic Controllers. While the general public considers flying to be an essentially safe mode of transportation, those who are actively charged with the responsibility for the safety of the passengers on a day-to-day basis must operate under the ever-present awareness that every day several aircraft will be exposed to near-miss situations that present some degree of hazard to the immediate safety of passengers, crew, and citizens in the cities beneath the aircraft.

In 1958, representatives of the Air Transport Association testified that airport planning was the most backward part of aviation.\(^8\) The airplane was then considered to be ahead of the Air Traffic Control System by several years, yet the system itself was far ahead of the airports. The weakest link in the chain of transportation was the capacity and operation of the airport.\(^9\) This condition was neither surprising nor unexpected. As early as 1936 the airports at New York, Cleveland, and Chicago were referred to as "dangerously congested."\(^10\) In the six-year period from 1926 to 1931, the number of registered aircraft rose from some 950 to almost 5,000, the number of passengers from 380,201 to almost two million, and the number of miles flown from just over 7.5 million to almost 75 million.\(^11\) Continuation of this phenomenal growth in the aviation

\(^{7}\) N.Y. Times, Oct. 16, 1964, at 76, col. 1.
\(^{8}\) 103 Cong. Rec. 6841 (1957).
\(^{9}\) 103 Cong. Rec. 6840 (1957).
\(^{10}\) 80 Cong. Rec. 4740 (1936).
\(^{11}\) 75 Cong. Rec. 1176 (1932).
industry was seen in the mid 1960's when passenger traffic grew on the average of 40,000 new passengers per day.\textsuperscript{12}

The scope of the problem, then, encompasses not only the airways, where overcrowding can bring collision and death, but also the airports. John F. Kennedy International Airport is perhaps the worst example of the congestion resulting, in part, from existing density and other complicating factors. As early as 1968, traffic delays of thirty minutes were common, and the director of the Traffic Control Center hypothesized that within a few years, delays of two to three hours could be normal.\textsuperscript{19} At that time, planes coming into New York were being directed into circling columns or "stacks" and there were often so many stacks that a plane had to start circling hundreds of miles away from the airport.\textsuperscript{14} Though traffic into JFK declined seven percent in July of 1968, as compared to July of 1967,\textsuperscript{15} the fact remained that air service continued to exceed airport capacity with the result that congestion delays, conversions, cancellations and related problems continued to grow.\textsuperscript{16}

The concern must be broad enough to include the consideration of the total transportation picture. At the same time, realistic parameters must be drawn so as to make discussion manageable. In consequence, we shall be primarily concerned with aircraft and airways, with only secondary consideration of the airports and the problems of access and egress. In order to place the problem of congestion in perspective, we may look to studies completed by the Civil Aeronautics Board (CAB) in September of 1969.\textsuperscript{17} At that time it was found that roughly seventy percent of all enplaned passengers utilized twenty-two areas and, with the introduction of noise abatement procedures, the situation at these areas would become even more acute.\textsuperscript{18} The problems of these twenty-two

\begin{footnotesize}
\begin{itemize}
\item [13] Id. at 55.
\item [14] Id.
\item [18] The 22 areas in the order of their severity are: New York, Chicago, Los Angeles, Atlanta, Washington, D.C./Baltimore, San Francisco/Oakland, Dallas/Fort Worth, Boston, Miami/Ft. Lauderdale, Detroit/Ann Arbor, Pittsburgh, Philadelphia, Denver, Cleveland, St. Louis, Kansas City, Houston, Seattle/Tacoma, New Orleans, Cincinnati, Las Vegas, Minneapolis.
\end{itemize}
\end{footnotesize}
high density areas served as the basis of the CAB report, *Problems of Airport Congestion by 1975*.\textsuperscript{19}

Considering potential solutions to the problem, three additional dimensions must be kept in mind. First, the airlines currently utilize less than 500 of the nation’s 10,000 airports.\textsuperscript{20} Secondly, business travelers estimate that the value of their traveling time equals forty percent of their wage rate.\textsuperscript{21} Thirdly, the profile of the general aviation pilot also has an impact.\textsuperscript{22}

Although congestion primarily affects only twenty-two of the ten thousand airports in this country, it must be remembered that the impact of this effect is felt throughout the entire system, encompassing both private and commercial flight throughout the whole country. The flight requirements of general aviation pilots, therefore, must be balanced by the needs of both the airlines and their passengers if any effective long-range solution is to be implemented.\textsuperscript{23}

Navigation in the air is based upon a series of known “skyroads.” These are technically known as “airways,” and are channels in the air some fifty miles wide that go from one known spot, marked by a radio beacon, to another similar spot. An aircraft gets from its point of departure to its destination by following a sequence of these spot-to-spot references. These spots are marked with ground based radio beacon stations which transmit a signal on a specific frequency. This naturally tends to create bottlenecks at major bea-

\textsuperscript{19} CAB, *supra* note 17.

\textsuperscript{20} *Hearings on Aeronautical Research Before the Subcomm. on Advanced Research and Technology of the House Comm. on Science and Astronautics, 91st Cong., 1st Sess., at 333 (1969).* Before this Subcommittee Gen. C. F. von Kann, V.P. of Operations and Engineering of the Air Transport Association, testified: “[A]ll the airlines in the country use only 500 out of about 10,000 airports.”

\textsuperscript{21} In general, business travelers estimate the value of their traveling time equals 40% for their wage rate. See Gronau & Reuben, *The Effect of Traveling Time on the Demand for Passenger Airline Transportation*, Columbia University (unpublished Ph.D dissertation, 1967).

\textsuperscript{22} *N.Y. Times, Nov. 3, 1968, at 86, col. 1.* Most general aviation pilots are over forty, (54.9%), married (86.3%), earn $15,000 to $20,000 per year, fly less than one hundred hours per year (51%), and the hours logged are mainly for pleasure (61%).

\textsuperscript{23} The “solution” currently in vogue creates Terminal Control Areas around several high use airports. Access to these airports is severely restricted to general aviation aircraft by regulation and increasingly complex technological requirements.
cons, which result in delays and danger situations. The policy in the past has been to add more beacons and, hopefully, further disperse the traffic. This practice, notably in the northeastern United States, has resulted in a complex of airways which leaves little geographic area for any further expansion. The limited area available for expansion produces the phenomenon often referred to as the "crowded skies." Although prominent in the northeastern United States, the same or similar situations exist in and around many large metropolitan areas. The existence of these aviation transportation centers has generally resulted from the reaction of the airlines and government to passenger needs and desires. The growth and proliferation has been unplanned, unregulated, and sporadic.

In addition to the factors mentioned previously, it must be remembered that basically a traveler is concerned with getting from one point to another safely. A secondary concern of the passenger is speed. He desires to get from one point to another as quickly as possible, subject to the reasonable requirements of safety. This represents a long-standing conflict—speed versus safety. There is little doubt that "speed is the outstanding feature of the airplane . . . but safety is the first consideration in time of peace, and speed must be sacrificed . . . insofar as safety makes it necessary." This appraisal is as accurate today as when it was originally formulated in 1922, and has continually played a pre-eminent role in the resolution of conflicts within the aviation industry.

The late 1960's, however, saw the airlines become primarily concerned with getting an aircraft from one point to another. Although this concern was justified, it failed to take into account the growing demand of the consumer, both cargo and passenger. It is of little use to the consumer to have an aircraft arrive on time if he must leave his home or business hours in advance of the scheduled flight time to get to the airport, and then count on even more hours to reach his actual destination.25

There are numerous entities, both governmental or private, who have in some manner played a role in the continuing development of aviation. Local governments have initiated rules, regulations,
and legislation during the earliest days of flight, and now have substantive control of airport locations, zoning, and related items. Many state governments have enacted legislation, and the majority now have state agencies concerned with planning and development of the aviation industry.

The basic federal regulatory authority at the current time rests upon the Federal Aviation Act. This Act authorizes and directs the adoption by the Federal Aviation Agency of air space, air traffic, and other air safety regulations. Provision is also made for air traffic services and the operation of navigation aids, subject to available funding. This system, initially established by the Civil Aeronautics Act of 1938, is essentially the same as that now in operation, and sets the basic air traffic control function as being the control of all enroute instrument flight rules aircraft, and of all aircraft operating at or near an airport. The clear carry-over of the safety concept as the basis for regulation is seen in the Federal Aviation Regulations, Part I, where air traffic control is defined as a service operated by appropriate authority to promote the safe, orderly, and expeditious flow of air traffic.

As we have seen, congestion is the antithesis of this functional concept of Air Traffic Control, which is now essentially a federal responsibility. The problem of congestion as well as the responsibility for responsive action lies with the federal government. One measure of the effectiveness of its action can be found in aviation accident reports. One of the most tragic incidents was the collision of two commercial aircraft over the Grand Canyon in 1956. After ten months of investigation, the Civil Aeronautics Board listed the probable cause as the failure of the pilots to see each other in time. Among the factors which were found to have contributed to the pilots' lack of ability was the "insufficiency of enroute air traffic advisory information" and, in conjunction with other listed factors, the safety board's conclusion represented "an indictment of the air traffic system as it existed on June 30, 1956."
Concern with congestion has not been limited strictly to the area of safety. Testimony before the House Ways and Means Committee in 1969 indicated that:

the effect of delays and congestion on the economy of New York City is already evident. Last year's congestion and problems in that city, due to inadequacies in the airport/airways system, are estimated to have cost more than $200 million and unless these problems are corrected, the loss is estimated to reach approximately $600 million by 1980.\(^\text{32}\)

Although these figures include the cost of a seven-week shutdown of domestic airlines in New York which was reported to have amounted to a loss of over $20 million in retail sales, and a drop of 1,500 rooms per day in the occupancy rate at some thirty-four hotels,\(^\text{33}\) the potential impact on major cities currently serving as transportation centers is clear. Tangential results of congestion include the hesitancy of the public to invest in airline stock,\(^\text{34}\) as well as the increase in stolen cargo from $877,000 in 1966 to over $2.3 million in 1967.\(^\text{35}\)

In addition to those factors already enumerated, that of competition must also be accounted for in any serious consideration of the problems of congestion. Transportation by air has been considerably improved in the last thirty years. The modern aircraft delivers a passenger-mile-per-hour for roughly one-half the fuel cost of other means, and transcontinental flights are made in one quarter of the former time while comfort levels have been substantially improved.\(^\text{36}\) Competition in the aviation industry is in reality at a minimum. Federal regulations have become so pervasive that virtually every facet of carrier service is subject to control by the Department of Transportation. At the present time this control is exercised through the requirement that carriers file tariffs which specifically delineate all major characteristics of the service they will perform between the designated points on any flight. Prior to deviating from any of these specific items, the carrier must file an


\(^{34}\)N.Y. Times, Apr. 20, 1969, at F2, col. 3.


amended tariff and receive express or implied Federal Aviation Agency approval.

One positive example of the impact of these problems is the Dallas/Fort Worth Regional Airport Complex. This facility was in the planning and initial construction stage for several years, and utilizes almost every modern means to maximize efficient and effective service. The airport is designed with the same number of gate positions as Kennedy International, but the Texas Airport has the capacity for substantial expansion built into the initial plan. The layout of air space, runways, taxiways, and gate positions allows some 178 operations (takeoffs or landings) per hour, as compared to a current maximum of ninety used by the Federal Aviation Agency for Kennedy International. Technologically the airport problem is capable of solution, as shown by the Dallas/Fort Worth Complex. The reality of the situation, however, is that most airports are not in a position to expend the amounts of capital involved in the new Dallas regional complex, and in many areas even if the funds were available, the land is not.

The seeming lack of ability on the part of government to produce satisfactory results has brought about a strong move on the part of private industry to move into this field. Special teams, devoting substantially all of their time to airport development and redevelopment, have been formed by many consulting firms. These groups are comprised of architects, planning consultants with experience in airport development, and specialists from related disciplines. The objective is to be able to handle airport development from initial planning through final construction and thereby save time as well as money. The expectation is that the current seven to ten year lag between initial planning and completion of construction for an airport can be substantially reduced. This should reduce some of the current lag between technological development and implementation that often causes facilities to be obsolete before they are even opened for public utilization.

In considering the difficulties flowing from the factor of cost, we may begin by noting that Senator Monroney, long heavily involved in congressional aviation activity, publicly stated for *Time* maga-

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57 N.Y. Times, Mar. 9, 1969, at 90, col. 2.

58 See, e.g., any of the descriptive material concerning the Dallas/Fort Worth Regional Airport.
zine after the 1968 congestion crisis, that the airspace system needed to build some six hundred airports and receive an immediate fiscal injection of some three billion dollars, with an additional need for eight billion dollars over the next ten years, in order to obviate the difficulties currently encountered.

The cost of equipment is in itself indicative of the extent of the fiscal problems confronting the industry. Federal system expenses are not small by any means. An indicator to show which way the wind is blowing costs $3,500 for an airport without an FAA Control Tower, and $15,000 for an airport that has the "benefit" of a Federal Control Tower. The small signs indicating a turnoff from the runway to the taxiway cost $675 each, and an Air Route Traffic Center (ARTCC) costs $13.6 million. In addition to these equipment costs there is the land, which averages one thousand dollars per acre for rural, ten thousand dollars per acre for suburban, and one hundred thousand dollars per acre for urban areas. These facts should be borne in mind when evaluating previous references to a potential solution calling for increased concrete at currently existing commercial airports. We should also note that in the field of general aviation, the situation is somewhat different in that there is generally little or no need for most of the equipment just mentioned.

The source of financing for the expenses alluded to has been a policy question which has continually generated considerable friction. As late as the congressional hearings of 1969, the Aircraft Owners and Pilots Association (AOPA), generally accepted as one of the major spokesmen for general aviation, took the position "that improvement of air commerce is in the total public interest. As such, the public interest requirements for air commerce facilities have been, and should be, provided from general revenue funds."

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40 The AOPA Pilot, Jan. 1972, at 8. There are many additional items available as examples. For instance, FAA specified runway light bulbs cost $7.00 each and have an 800 hour lifespan, while at least one state uses bulbs with the same candlepower which have a life-span of 20,000 hours and cost 67 cents each! See AOPA Newsletter, Oct. 1973.
41 Id. These are, however, pre-superinflation figures. The current market is so volatile as to make worthless most cost estimates.
With regard to federal support, late 1917 and 1918 witnessed the industry blossom, when the requirements of national interest forced the allocation of funds and resources from the federal level for developmental purposes. The concept of the necessity of subsidizing the industry grew from the meager efforts of the Post Office. The initial operation of uniform traffic control facilities was governmentally controlled in the name of safety and uniformity. This policy of assistance was adapted to direct subsidization in 1944 by a Civil Aeronautics Board experiment to determine transportation needs between smaller communities. This policy developed into a philosophy of route awards which often failed to make the distinction between the transportation service needed and the service performance of the airline. Under such circumstances efficiency is not necessarily the best policy, and from this basis many current problems have grown.

February of 1925 saw the enactment of the Kelly Contract Airmail Carriage Act to stimulate passenger service lines. In 1934 a new Federal Mail Act went into effect. As provided for in this act, the President appointed a Federal Aviation Commission which held hearings in September, October, and November of 1934. The report resulting from those hearings was filed with the President and subsequently embodied in proposed legislation, which was enacted as the Civil Aeronautics Act of 1938. Many of the provisions of the Civil Aeronautics Act of 1938 were not modified by the Federal Aviation Act of 1958, and hence, these original provisions still survive to govern the jet aviation industry of today.

The legislative and administrative branches of the federal government have been at variance concerning the need of aviation for federal financial assistance for some time. In 1959 the Administration announced opposition to any funding of terminal buildings.
Subsequently, the legislation authorizing fiscal expenditures for 1961 contained eligibility requirements for airport buildings that limited the cost of construction to "those buildings or portions thereof that are required for the safety of craft operating to, from, and in the vicinity of, the airport . . . accordingly . . . only buildings or portions of buildings required to house . . . Flight Service Station, Airport Air Traffic Control Quarters, Combined Air Traffic Control Tower/Flight Service Stations, Air Weather Bureau. . . .", are eligible items for federal support.\(^5\) Such limitations substantially reduce the effectiveness of any federal aid. On the other side, the legislative reference service of the Library of Congress urged Congress to spend more on aviation safety as a result of a study of national aviation policies in 1965.\(^5\) At the same time, some fifteen national trade associations protested administration cuts in various budgets for improvements,\(^6\) all to no avail. In 1959 the budget message of President Eisenhower actually advocated the orderly withdrawal of all federal aid to aviation.\(^5\) Shortly thereafter, the Federal Aviation administrator recommended an orderly cutback of the Federal Grant and Aid Program.\(^5\) In 1960 President Eisenhower urged an increase in the general aviation fuel tax to pay for any modernization of the airways and airports that might be needed.\(^5\) The trend was consistently upheld when, in an economy drive in 1964, President Johnson asked the FAA to close forty-two inflight service stations.\(^5\) In the face of violent industry opposition, stations were "consolidated."\(^5\) The result of political pressure combined with the arbitrary evolution of priorities at the highest administrative levels have combined to render ineffective the majority of federal aid programs with regard to airport and airway development.

Additional taxes and user charges are the basis for the current ten-year funding plan incorporated in the Airport and Airways

\(^{50}\) 107 CONG. REC. 17,964 (1961).

\(^{51}\) N.Y. Times, June 5, 1965, at 64, col. 4.

\(^{52}\) N.Y. Times, May 11, 1965, at 77, col. 6.

\(^{53}\) N.Y. Times, Jan. 20, 1959, at 70, col. 3.

\(^{54}\) N.Y. Times, Feb. 11, 1959, at 27, col. 5.

\(^{55}\) Address by President Eisenhower to Congress, Aug. 8, 1959, in N.Y. Times, Aug. 9, 1960, at 14, col. 7.

\(^{56}\) N.Y. Times, Apr. 18, 1964, at 14, col. 4.

\(^{57}\) N.Y. Times, May 27, 1964, at 77, col. 6.
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legislation, despite arguments from industry and labor groups pointing out that ninety-three percent of government financing comes from general taxation purportedly to provide programs in the total public interest, and aviation development is in the total public interest. Nonetheless, the current position of the federal bureaucracy is that non-military aviation is not sufficiently in the public interest to warrant expenditures of tax dollars. All costs of the aviation system are to be recovered from users. The allocation of recovery amounts to the various segments of the industry is now a topic of heated discussion. The FAA determines, in its sole discretion, to install a control tower, at the prices previously outlined, and then requires all aircraft to use the tower. Those objecting to the system point out that general aviation has no need for the vast majority of the sophisticated electronic equipment for which they will have to pay.

Many of the airport and airways problems stem not only from unprecedented growth, but also from poor planning and lack of foresight. The impact of confused federal funding and regulation has been devastating.

II. LEGISLATION AND REGULATION

Our consideration will now focus upon matters of legislation and regulation. The initial concern will be with legislation, both State and Federal. We will then examine regulation, again both State and Federal, as well as evaluating the interaction between legislation and regulation. Due in large part to the extensive nature of legislative and regulatory materials in the field of aviation, it has been necessary to utilize selective materials geared to raise appropriate questions and issues for our consideration.

The first formal state legislation came from Connecticut in 1911. The statute, "An Act Concerning the Regulation, Number, and Use of Airships, and the Licensing of Operators Thereof," was passed at the insistence of Judge Baldwin, then Governor of the state. The Judge had first proposed the material to the com-

mittee on Jurisprudence and Law Reform of the American Bar Association as a resolution. When it refused to pass the resolution, he turned to his state legislature. The statute provided for absolute liability of the aviator for any injury suffered by those beneath his craft, as well as for the licensing of aviators and aircraft.

The Commonwealth of Massachusetts followed this lead in 1913, but went further and established the rules of the air in detail by statute. In 1919, however, Massachusetts repealed the presumption-of-negligence provision of its statute, as well as the detailed regulation which had been set out, and created a commission to promulgate and enforce appropriate regulations.

In 1927 a number of interested parties in Connecticut, active in the field of aviation, concluded that more adequate regulation was essential to the welfare of the industry. The conclusion was reached that an independent aviation department would be best suited to the necessary task. In an action similar to that of Massachusetts, Connecticut created just such a department. The rationale behind the need for the creation of such a department was the fact that the basic regulatory provisions were suffering from a lack of continuity and uniformity. They were being revised by each successive legislature, and the administrative responsibility was being shifted between the Secretary of State and the Commissioner of Motor Vehicles. Not only were Massachusetts and Connecticut the first to enact any formal legislation, they were also the first to begin traveling the road of establishing a specific administrative body charged by statute with the regulation of all matters pertaining to aviation.

It must be noted, however, that a considerable quantity of legislation was considered by many states. The general thrust of most of these acts, however, was to tax the industry, rather than provide means for the growth and regulation. The general context of state

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62 See 16 VA. L. REV. 778 (1911).
66 Id.
67 Id. at 59.
legislation was not conducive to growth in the industry, and the recommended state Uniform Act to the contrary, the relationship between the state and federal government was not very clear.

In order to ensure that uniformity would prevail among the states with regard to the regulation of areas not covered by federal law, the concept of a Uniform State Regulatory Act was developed. In 1935 both the Commissioners on Uniform State Laws and the American Bar Association approved a Uniform Act at their respective annual meetings.

Various philosophies were represented in different uniform acts. We see, for example, the years of work by the Committee on Aeronautical Law of the American Bar Association finally bearing fruit in the proposed Uniform Aeronautical Code as well as the Uniform Airport Act, both of which were to receive widespread acceptance in the states. The availability of so many different "uniform" approaches to the legislation and regulation in the field of aviation resulted in duplication, consternation, and confusion. In general, state legislation prior to 1938 was influenced to a large degree by the Uniform Aeronautic Act, while subsequent legislation was influenced by the suggested model jointly drafted by the National Association of State Aviation Officials, the Civil Aviation Legislative Council, and the National Institute of Municipal Law Offices. The failure of any effective leadership from the federal level resulted in each state weighing and determining, according to its own interest, what was the best course of action for the development of aviation.

The field of regulation and legislation was becoming so cluttered that federal action was imperative, not only to provide uniformity, but to preserve and protect the very safety of the citizens. It seems clear that the state legislatures were declaring sovereignty over the air space and all areas not covered by the federal assumption of control under the interstate commerce clause of the Constitution.

The initial attempts at state uniformity via the Uniform Act pro-

60 Uniform Aeronautical Code § 2. See also 2 J. Air L. & Com. 252, 253 (1931).

70 The Department of Commerce had already adopted a position encouraging states to adopt uniform laws as a safety measure. See N.Y. Times, Sept. 26, 1929, at 8, col. 3.

71 Uniform Law Anno. § 159. See also note 60 supra.

posals were superseded by the Civil Aeronautics Act of 1938 which established federal dominance in the field of air safety, traffic rules, aircraft certification, and airworthiness.\textsuperscript{74} This Act did not, however, affect airport construction, acquisition, or operation except on a secondary level. At the current time, airport certification is finally included within the parameters of formal federal dominance due to various provisions of the Airport and Airways Development Act of 1970.\textsuperscript{75}

\textit{Federal Statutory Basis and Scope}

It is necessary to look briefly to the basis, both conceptual and factual, for federal legislation in order to ensure the maintenance of realistic perspectives throughout the consideration of this problem. As early as 1911 three general bases for legislation pertaining to aerial navigation had been proposed: first, the protection of the public; second, the protection of the lives and property of individuals; third, the protection of aviation.\textsuperscript{76} In seeking to identify the source of constitutional power which would permit federal regulation of the airways, four major clauses of the Constitution were considered.\textsuperscript{77} The commerce clause was ultimately settled upon as providing the soundest basis for the legislation.\textsuperscript{78} There seemed to be little actual doubt that Congress could provide for this unification of existing efforts.\textsuperscript{79} During these constitutional considerations, many of the concepts previously discussed were raised, and the attitude developed that the federal government needed to provide for the uniform regulation of commercial, civil, and military aviation,\textsuperscript{80} rather than simply the unification of then existing programs. It was due to this broadening of the purpose of federal legislation that the consideration of the proper constitutional basis gained significant ramifications.


\textsuperscript{75} Swift, \textit{Present and Proposed Aerial Legislation}, \textit{18 Case & Com.} --, 134-37 (1911).

\textsuperscript{76} U.S. CONST. art. I, § 8 (War Clause); U.S. CONST. art. I, § 8 (Commerce Clause); U.S. CONST. art. II, § 2 and art. I, § 10 (Treaty Making Clause) and U.S. CONST. art. III, § 8 (Admiralty Clause).

\textsuperscript{77} 62 CONG. REC. 2006 (1922).

\textsuperscript{78} 62 CONG. REC. 2005 (1922).

\textsuperscript{79} 62 CONG. REC. 1998 (1922).
Several specific effects flowing from federal legislative efforts over the years are noteworthy at this point. At the time of World War I, in 1919 and 1920, congressional interest in aviation soared from near zero to a frenzy. No less than ten pieces of major legislation were introduced to the House or Senate. Although many of these were generally similar in nature, their complexity was such that it was not until May 13, 1926 that the final conference committee bill was introduced in the Senate. As we have seen, the combin-

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80 S. 2593, 66th Cong., 1st Sess. (1919), Secretary of War given power to regulate all air activities, fix airlines to avoid cities. Referred to the Committee on Military Affairs. S. 3348, 66th Cong., 1st Sess. (1919), Ref. Committee on Military Affairs created "Director of Air," who controls all military and civilian aviation and has power to license and establish rules and routes. S. 2448, 67th Cong., 1st Sess. (1921), provides for the establishment of a Bureau of Aeronautics in the Department of Commerce, administered by a Commissioner of Civil Aeronautics. The Commissioner is given the power, with the approval of the Secretary of Commerce, to issue regulations having the force of law; to license pilots and register and license civil aircrafts and airdromes; to establish the conditions under which civil aircraft may be used for transporting persons or property; to prohibit navigation over military, naval, and postal areas; and to establish the rules of traffic applicable to air routes and stations. S. 41, 69th Cong., 1st Sess. (1926), to establish and regulate the use of aircraft in commerce, and for other purposes. H.R. 9804, 66th Cong., 1st Sess. (1919), to create a department of aeronautics, defining the powers and duties of the director thereof, providing for the organization, disposition, and administration of a United States Air Reserve Force, and providing for the development of civil and commercial aviation; to the Committee on Military Affairs. H.R. 10380, 66th Cong., 1st Sess. (1919), to create a Department of Aeronautics; to the Committee on Military Affairs. H.R. 11206, 66th Cong., 2d Sess. (1919), to create a Department of Aeronautics, defining the powers and duties of the Director thereof, providing for the development, production, operation, and maintenance of aircraft, and providing for the development of civil and commercial aviation; to the Committee on Military Affairs. H.R. 12134, 66th Cong., 2d Sess. (1920), Department of Aeronautics, Director responsible for the production of Government Aircraft and has control of all Government property connected with aeronautics and is charged with establishing rules for air navigation, aerial routes, and licensing. H.R. 13803, 66th Cong., 2d Sess. (1920), Bureau of Air, the Director has limited control of Government and loose commercial control. H.R. 14601, 66th Cong., 2d Sess. (1920), refers to Commissioner representing Departments of State, Treasury, War, Post Office, Navy, Agriculture, Commerce, and National Advisory Commission. The Commission prepares regulations for promulgation by the Department of Commerce, controls all U.S. Aircraft Licensing and inspection of aircraft and fields. The National Advisory Commission was revised so the Commissioner of Air Navigation in the Department of Commerce is the administrating agency. H.R. 14137, 66th Cong., 2d Sess. (1920), Bureau of Aeronautics within the Department of Commerce is managed by the Commissioner of Aeronautics and Aeronautics Board, and designates routes, establishes landing fields, drafts rules and regulations for the board for promulgation by the Secretary of Commerce. (National Advisory Commission is the substitute for the Aeronautics Board.)

81 67 Cong. Rec. 9836 (1926).
ation of the National Advisory Committee on Aeronautics, the decision to bottom the legislation on the commerce clause, and President Harding's personal preference managed to produce the Air Commerce Act of 1926.

The delay between the introduction of legislation in 1919 and its ultimate enactment in 1926 was at least due in part to the approach and attitude of the Harding administration in conjunction with the inherent difficulty of dealing with such a complex issue at the legislative level. The result was that the legislation, instead of being timely and providing an assist to the developing industry, was late and left those who were charged with regulation a great deal of catching-up to accomplish in order to develop the necessary capabilities.

The 1938 Civil Aeronautics Act finally discarded a timidity of Congress regarding federal control of aviation, and assumed complete and exclusive sovereignty in the area. One of the most distinctive features of the Act was that for the first time the federal government clearly assumed full responsibility for aviation safety.

82 62 CONG. REC. 1998 (1922).
84 "The real difficulties in the way of the more complete utilization of aeronautics in commerce are not the lack of technical knowledge by which craft can be built or the ability to fly them, but, rather, the lack of proper conditions under which to operate such craft. These difficulties may be summarized: First. The absence of Federal supervision and regulation. Under this head, which is the crux of the situation, are included the lack of airways throughout the country properly equipped with landing fields, signaling systems, and regular meteorological service; the lack of a body of law to govern and control for purposes of public safety the methods of operation, the issuance of licenses to pilots, and the inspection of planes. Second. The aloofness of capital from investments in this field of enterprise. Third. The lack of education on the part of the public to the advantages of air transportation, coupled with fear of bodily injury." 62 CONG. REC. 1998 (1922) (remarks of Representative Hicks).
86 Compare the Civil Aeronautics Act of 1938 with the Air Commerce Act of 1926. The Civil Aeronautics Act of 1938, ch. 601, § 1107(i)(3), 52 Stat. 1028 amending Air Commerce Act of 1926, ch. 334, § 6(a), 44 Stat. 572 provides: "The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States, including the air space above those portions of the adjacent marginal high seas, bays, and lakes over which by International law or treaty or convention, the United States exercises national jurisdiction. Aircraft a part of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State." See also 12 J. AIR L. & COM. 361, 364 (1941).
The legislation was intended to create a framework for safety that was comprehensive in nature and would extend to all of the social, economic, political, and national defense implications of aviation.87

The Civil Aeronautics Act of 1938 was a compromise which resulted in the merger of the Air Commerce Bureau of the Department of Commerce into the newly created Civil Aeronautics Authority (CAA), with President Roosevelt appointing the personnel.88 The CAA was charged with making the regulations work. Theirs was the job of actually inspecting, licensing, and conducting enforcement activities. In addition, the CAA was given the responsibility of establishing and operating the air traffic facilities necessary to a national airways system.89

The Civil Aeronautics Board was the second part of the body, and was charged with the development of safety standards. These were to be comprehensive, and include construction of the plane, qualifications necessary to fly, maintain, or repair planes, as well as traffic rules for the air.

The general statutory standards and requirements for air traffic rules, certificates of registration, compliance and air worthiness for aircraft, as well as for airmen competency standards, type certificates, air navigation facilities requirements, and others, were all retained in the new Act.90 As a result, neither the states nor their political subdivisions could constitutionally promulgate aviation safety regulations,91 but were primarily restricted to enforcement

88 For news reports of the time, see N.Y. Times, June 6, 1938, at 2, col. 4; N.Y. Times, June 9, 1938, at 22, col. 5; N.Y. Times, June 12, 1938, at 3, col. 1; N.Y. Times, June 14, 1938, at 7, col. 2; N.Y. Times, June 17, 1938, at 16, col. 3 (where the Act is summarized); N.Y. Times, June 24, 1938, at 1, col. 6, and N.Y. Times, July 3, 1938, at 7, col. 2.
89 Civil Aeronautics Act, 49 U.S.C. § 401 et seq. (1970). The administrative structure outlines do not represent the spirit, intent, purpose or provisions of the 1938 Act which has resulted from twelve years of struggle. The description is in the most favorable light possible and represents how the operation was formed within the Department of Commerce as a result of Presidential Reorganization Plans No. 3 and 4. The potential of the original 1938 Act, as distinguished from the realities of its operation, are discussed more completely in the conclusion.
90 Hester, Civil Aeronautics—The State and the Nation Under the Civil Aeronautics Act of 1938, 9 J. Air L. & Com. 635 (1938).
91 One example is the case of Allegheny Airlines v. Village of Cedarhurst, 132 F. Supp. 871 (E.D.N.Y. 1955). After several years of litigation an ordinance enacted by the village prohibiting flights from 1,000 feet (arriving and departing from Idlewild therefore precluded) was declared unconstitutional. Where Congress has preempted the field, other powers may be exercised only so long as,
actions and control of strictly intrastate activities that had no effect on the uniformity of commerce.

Some of the stated objectives of the 1938 Act include:

(a) the creation of an independent administrative agency having broad regulatory power over domestic and foreign transportation as well as other phases of civil aeronautics, including the then current functions of the Air Regulation Division of the Bureau of Commerce;

(b) provisions for the transfer or merger of the agency with any agency later established which would control all transportation;

(c) a wide variety of amendments were also made to the Air Commerce Act of 1926; and

(d) provisions for the codification into one act of all the essential provisions related to Civil Aeronautics and to repeal any conflicting laws.\textsuperscript{9}

In the years immediately preceding the enactment of the Civil Aeronautics Act there were some fifty-two air traffic control towers operating independently throughout the country. In accord with the new federal legislation, provisions were made for the certification of the Air Traffic Control facilities, as well as a minimal outline of uniform procedures to be employed by the Civil Aeronautics Authority in the newly-assumed operation of the towers.

The Presidential Reorganization Act of 1939\textsuperscript{9} required, rather than requested, all Air Traffic Control Towers certified by the CAA to follow the uniform prescribed procedures. By 1949 the Civil Aeronautics Administration was actually operating 165 of the two hundred Control Towers in existence throughout the country. As regulation has become more complex and required equip-


ment so expensive, the privately operated towers have now virtually vanished.

The Federal Aviation Act of 1958 thoroughly reorganized Federal regulation and the administrative format, as well as established the basis for the system now in operation in the United States. By 1961, several members of Congress were publicly advocating the enactment of specific legislation to empower the government to curtail air traffic into areas of high congestion. The final decision, reached after considerable debate, was that the CAB already had authority, but that even after nineteen years it had "not laid out air space patterns except for some of the regular air roads which commercial lines use. Beyond that, there is no air space pattern." Thus, congressional unrest and dissatisfaction were once more coming to a head only three years after major legislation was enacted.

Numerous congressional and private reports have, for a variety of reasons, failed to be fully implemented. As an example, there is the report of "Special Committee #31, Radio-Technical Commission for Aeronautics." The Committee's 1948 Report, as endorsed by the Congressional Aviation Policy Board, was never implemented; in addition, Air Coordinating Committee Special Groups Five (1950) and Thirteen (1957), the Curtis Committee Report of 1957, and Project Beacon Task Force (1961) have been only partially implemented. Many plans, developmental schemes, and formats have been proposed over the years only to be rejected in part or whole; their implementation, even at this late date, could substantially reduce the dimensions of the currently existing problems. The overall lack of foresight, when combined with both political pressure and the lack of consistent development or administration, combined to make an already difficult problem almost unmanageable.

Regulations

The relationship of legal rights and responsibilities between the numerous parties to the development of aviation has generated

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95 N.Y. Times, Feb. 23, 1961, at 52, col. 5.
96 103 CONG. REC. 1465 (1957).
97 Air Transport Association, Air Traffic Control System Planning Group.
volumes of speculation and consideration. There was a distinct awareness, in the early years, of the frailty of the aviation industry. This awareness was clearly present in comments which pointed out that "aerial traffic must not be hampered by a multiplicity of prohibitions of varying stringency which . . . states shall find it desirable to put forth." Thus, there has been a verbalization of an awareness of both the practical requirements of aviation and the necessity for uniformity in treatment, approach, and regulation.

Any attempt at evaluation of the federal regulatory process must be taken within the framework of the prior discussions concerning confusion, contrary policy statements, sporadic growth and funding, and the existence of a major interface between the world of technology, regulation, and the law. The effectiveness of policy development by the agency from 1936 through 1956 is evaluated in the congressional accord for March 2, 1956. There we find that

there is no agency in the United States which has been so afflicted with the inability to get things done as the CAA . . . It has gone forward; it has drawn back . . . Its policies with respect to navigational assistance or systems have been uncertain and indefinite. It has gone forward; declared itself; undeclared itself; returned . . .

and generally failed to follow any discernible, consistent pattern of development. A few years later, in 1958, in the House of Representatives, we see that:

government agencies responsible for handling problems in aviation have failed to treat it as an entire system and consistently have taken action in part of the system without calculating the effect on the whole. As a consequence, we are faced with bottlenecks and conflicts already impairing the capacity of our air transportation facilities.

In addition, "instead of foresight, aggressiveness, and courage in preparation for the age of transportation by air, the CAA has been timid, bound to the mistakes of the past, and either unaware of, or indifferent to, the needs of the future. It has established a woeful lack of leadership and forward thinking." The general conclusion

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100 104 Cong. Rec. 18,323 (1958).
101 Id.
reached was that “the crying need today is not for another huge sum for the CAA to mismanage as in the past. It is for the Congress to insist on better preparatory planning for airports as a part of the new jet airways system.”102 The realization of the coordination and scientific-legal interface required to fulfill the mandate should caution all but the most optimistic to view the potential for success with a high degree of constructive skepticism.

The need for coordination and cooperation between the regulatory and operational branches of the federal government should be self-evident. In the course of Congressional hearings during September of 1956, however, the acting administrator of the Civil Aeronautics Administration informed the subcommittee that he and the chairman of the Civil Aeronautics Board “had agreed to make a study of regulatory problems involved in the delegation of rule-making authority to the CAA.”103 The committee was of the opinion that this was an important step in the improvement of relations between the two branches. Thus, after eighteen years of mutual co-existence, the two divisions began taking steps at least to study the problem of their relationship and its effect on the aviation industry.

In terms of evaluation, it seems clear that federal efforts in the field of regulation over the pasty forty-seven years have left something to be desired. The various federal agencies, layers of responsibility and authority, have been planted, grown mature and borne fruit, all with little or no comprehensive or cohesive plan to act as any kind of framework for this development, or as a guideline by which progress could have been measured. The result has been almost unbelievable confusion, competition and lack of leadership over the years.

The regulatory process can be an effective method of dealing with situations that are subject to change, such as the aviation industry. As a positive example, we may look to the generous route awards made by the CAB in the late 1960's. At that time the agency did not foresee the tight market and failing revenue situation which would face the airlines. The result was that some lines were seriously overextended, and the agency then decided to take a somewhat favorable attitude towards mergers, as well as to allow

102 104 Cong. Rec. 18,327 (1958).
103 Cong. Rec. 10,707 (1956).
some carriers to cut back on their services to small, unprofitable cities. The major difficulty with regulations is not their existence, or the existence of regulatory power, but seems rather to lie in the persistently complex approach that so often characterizes the implementation of 'flexible' policies. As one example, it is noteworthy that a conclusion widely drawn from the results of the Air Traffic Controller slow-down operation was that the multiple safety rules and regulations enacted by the federal government actually resulted in confusion, and even with the need to prevent accidents, that there must be a simpler approach.

In terms of the impact of congestion on travel, we see the International Air Transport Association pointing to New York as, "the world's biggest airport headache because of congestion and [they] declare that unless something is done, the airlines are going elsewhere, to Boston, Washington, Baltimore, or anywhere else." As a further indication, we see that in 1969 Pan American Airways filed a formal request with the Civil Aeronautics Board to operate flights to Europe directly from Bradley International Field in Connecticut. The airline cited New York congestion in support of its request, and claimed increased operating costs of $590,000 in the last two weeks of July that were "... directly attributable to delays caused by congestion at New York."

As a further example of the current results of forty-seven years of government regulation, we look to the findings of Congress as embodied in the Airport and Airways Development Act of 1970 where, we see that:

Congress hereby finds and declares—that the Nation's airport and airway system is inadequate to meet the current and projected growth in aviation. That substantial expansion and improvement of the airway and airway system is required to meet the demands of interstate commerce, the postal service, and the national defense.

Thus, the existing 'Gordian Knot' of rules and regulations that have been implemented, and are currently enforced by the federal

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106 N.Y. Times, Nov. 23, 1968, at 10, col. —.
government, no longer serve the purpose of their creators—to maximize and foster the safe, efficient utilization of the air space of the United States. Complexity is most heavily seen where the government has chosen, or attempted, to regulate all details of an operation, or in fact has assumed the very operation itself. One primary example of this assumption lies in the field of Air Traffic Control operations. This glaring exception to the original intent and policy of regulation—not operation, has colored the entire federal relationship with aviation over the years. In all of our discussions concerning legislation, regulation, and the industry, there has been no evaluation of the appropriateness of federal operation in this sole facet of aviation. The problems we have discussed, however, all relate, in varying degrees to the Air Traffic Control System. The lack of any substantive review of the basic issue of federal regulation versus federal operation, is considered critical in the failure of government to resolve the underlying problems of congestion.

III. Resolution

The problems which we have had under consideration to this point are not expected to disappear in the immediate future. In fact, the Federal Aviation Administration in its ten-year forecast,¹⁰ predicts more of everything—more aircraft,¹¹ more passengers,¹² more regulations, and increased complexity as well as new problems. In addition to economic factors and rising cost, the FAA itemizes airport and ground transportation, and severe congestion, as the factors that will operate as restraints on the further development of the growth of the air transportation system.¹³ FAA spokesmen identified the mix of high and low speed traffic; the mixture

¹⁰ FAAs Ten-Year Forecast, AIR LINE PILOT, June 1972, at 6 et. seq. This article condenses the major points of interest to our discussion. The complete original document, in three volumes, was issued by the Department of Transportation, Federal Aviation Agency Forecast, 1972-1982 (1972).

¹¹ Commercial aircraft movements handled by FAA traffic control centers will rise from 13 million to 15.6 million in 1982 and general aviation movements of the same type will rise from 3.7 million to 18.3 million per year. See FAA's Ten-Year Forecast, AIR LINE PILOT, June, 1972, at 6.

¹² Commercial passenger traffic reached 170 million enplanements in 1972, and by 1982 this is projected to reach 500 million enplanements per year. In addition, passenger revenue miles will go from 132.4 billion to 397.2 billion by 1982. See note 109 supra.

¹³ Supra note 109.
of Instrument Flight Rates and Visual Flight Rules operations; as well as the increased volume of traffic in an already congested airspace as the operational problems whose solution is critical to the continued development of the aviation industry.113

Historically, the field of aviation has been distinguished from other developing areas of law. While many fields develop in a twodimensional framework through a combination of judicial decisions and statutory enactments, there is a substantial third dimension to aviation. This is the development of law by regulation. This third dimension has the statutory enactment as its foundation, but it is the regulatory provision rather than the legislation which constitutes the real body of effective law. Although there was some initial doubt, the power of the Secretary of Commerce to not only regulate interstate commercial flying but to establish rules and regulations pertaining to all flying were judicially settled quickly.114 Thus, this third dimension has continually assumed greater importance over the years, and although the early impact of the judiciary was limited, it was an essential part of the creation of a climate in which the industry could, and did, survive.

In general, any administrative resolution of the problems relating to congestion would have to be implemented from the federal level. As we have consistently noted, this leadership has not been exercised in the last fifty years and there is little to indicate a sudden reversal of this trend.

**Summary and Conclusion**

In review we see that many of the issues raised by the problem of congestion result from the interface of technology, law and regulations. One underlying problem which has continually brought distress to all segments of the industry is that of accurately predicting the growth of the industry. The problem involves two interacting phases; first, airline passenger miles have been growing, and technological advances have been providing larger, more powerful planes to accommodate this increase. Secondly, airport construction involves a span of seven to ten years and facilities now being completed were designed for a past generation of aircraft some ten

113 Supra note 110.

114 For a full discussion, See Documents: State Regulation, 2 J. AIR L. & Com. 545, 556 (1931).
years ago. The technology of the industry has outstripped the fore-
sight of the airport planners. The gap in the early 1920's between
the advance of science and the effective utilization of these ad-
vances continued to widen over the years, and there grew up a re-
liance on written regulations to the detriment of implementing the
products of hard science. In general, a “failure to forecast accur-
ately the growth of air traffic and to anticipate the airways/airport
system's inadequacy for handling traffic demand in key metro-
politan areas has resulted in increasing congestion.” The situation
inflicts hardships on the traveling public, financial losses on the air
carriers, and constraint on the economic growth of the surrounding
communities.

The lack of legislative action prior to 1926 led directly to gen-
eral disorganization, lack of leadership and an undesirably high
risk factor for potential investors. When the immediate and press-
ing need for self-preservation so dictated, sufficient priorities were
created to render necessary assistance to aviation. Immediately
upon the cessation of that need in 1919-1920, this assistance
ceased. The infusion of equipment and personnel generated the first
federal legislation. It was, however, some fifteen years after the
first state action, and was directed primarily to the issues of taxa-
tion and safety. At that time the situation reached the point where
“the need for an air law is so pressing that its method of adminis-
tration is a secondary consideration.”

Federal regulation was a necessary cornerstone for the full de-
velopment of aviation. In 1921, President Harding added a new
dimension when he stated that, “the encouragement of the civil
development of aeronautics is especially desirable as relieving the
government largely of the expense of development and maintenance
of an industry now almost entirely borne by the government
through appropriations for the military, naval, and postal air serv-
ices.” This attitude on the part of the executive branch of govern-

116 The Air Transport Association of America, Air Traffic Control System
Planning Group, final report as cited in Hearings on Aeronautical Research Be-
fore the Subcom. on Advanced Research and Technology of the House Comm.
117 62 CONG. REC. 2008 (1922).
118 62 CONG. REC. 2002 (1922).
119 62 CONG. REC. 1997 (1922).
ment continued throughout the development of aviation up to and including the current time.

The 1926 Act had created the Bureau of Air Commerce within the Department of Commerce. This effectively placed the regulation and control of commercial aviation, as well as private aviation activities, within the executive branch of the government. In the late 1930's, testimony of the Superintendent of Maintenance for the Bureau of Air Commerce revealed that the entire system of navigational aids to aviation was then operating at approximately fifty-five percent efficiency, whereas with proper maintenance and uniform procedure, which had not been utilized in prior years, the system could operate at a ninety-eight percent efficiency rating. The mechanical technology had progressed to a point where flying could have been comparatively safe, but the procedural techniques of administration had allowed the system to grow inefficient, inaccurate, unsafe, and much more expensive than was necessary.

The Congress, reacting to the scandal and the safety needs of the public, subsequently enacted the Civil Aeronautics Act of 1938. In a real sense the 1938 Act can be considered the Magna Carta of aviation. Instead of several agencies involved in the regulation of aviation, there was created a single tripartite agency. There was a five-man Civil Aeronautics Authority responsible for safety and economic regulations, a three-man Air Safety Board responsible for the investigation of accidents, and an Administrator responsible for the general development and operation of air navigation facilities as well as promotional activities. Presidential Reorganization Plans, however, substantially altered the original act without changes being made in the underlying legislation. The net result of Presidential Reorganizational Plan Number Three was to move the position of Administrator of the Civil Aeronautics Authority into the Civil Aeronautics Administrator, thus consolidating two of the three divisions. Plan Number Four abolished the Air Safety Board and transferred its functions to the Civil Aeronautics Authority so there was, in effect, one body. The name of the authority was changed to the Civil Aeronautics Board, and with all functions and responsibilities, this body was made a

120 Supra notes 82 and 84.
unit of the Department of Commerce. The presidential action resulted in recreating a substantially similar administrative organization, as if the 1938 Act had not been substantially revised into the Federal Aviation Act of 1958, but had merely consolidated the aviation activities into one scandal-ridden and politically sensitive Department of Commerce. These actions were taken in the face of strong opposition from all parts of the industry and private aviation organizations.

The Congressional Record for July 8, 1956, points out that "the rules governing air traffic are frequently revised to keep them up-to-date, but the system from which they stem, together with much of the equipment on which control is based, was established in the 1930's." In the time since 1958, there have been significant strides made in the area of technological development potentially applicable to the aviation industry. There has, however, been little or no overall pattern to this progress.

From the private sector, a general framework for public regulation was presented to Congress in 1922. The proposal was broad in scope but emphasized that the most desirable approach would be to delegate rule-making powers to an agency rather than legislating the details of such items as "rules of the airways." The underlying bases for the suggested model were the International Air and Navigation conventions and the British regulations already in existence.

122 Id. Only slight changes were made to accommodate war-time needs, i.e., increasing the number of flying hours allowable on a monthly basis from 85 to 100 (Act of Apr. 20, 1942, ch. 266, 56 Stat. 265, amending Civil Aeronautics Act of 1938, ch. 601, § 401, 52 Stat. 987). Action in 1946 permitted better international collaboration with regard to meteorology (Act of Aug. 8, 1946, ch. 911, 60 Stat. 944, amending Civil Aeronautics Act of 1938, ch. 601, § 803, 52 Stat. 1014). The 80th Congress also authorized an Air Traffic Controller training program and subsequently authorized transfer of powers from the CAB and Air Safety Board to the Civil Aeronautics Administrator.

123 The attitude of many congressional leaders in the struggle to establish a viable solution to the aviation problems is indicated by 102 CONG. REC. 3828 (1956) (Remarks of Senator Monroney). We are fighting a system under which civil aeronautics, with its great and dynamic possibilities, is the captive of an agency which is concerned with weather reports, the merchant marine, weights and standards, and general, ordinary manufacturing business methods, to the point where aviation has been and continues to be, with increasing acceleration, a disenfranchised satellite of a rather cruel and inefficient stepmother in the Department of Commerce.

124 102 CONG. REC. 11,897 (1956).

125 The regulatory portion of the proposal stated that any regulatory code be
During the period, 1919-1920, there were a wide variety of articles clearly and convincingly making a case for federal regulation on the grounds of safety, promotion of the industry, uniformity, and absolute necessity.158

With respect to the effective control of air navigation, we see that as early as 1911

local laws and the exercise of the police power may be found sufficient to protect the public at large against reckless experiments over their heads. But it is certain that, if air navigation becomes extensive enough to require rules and regulations to govern it, that regulation will be the business of the Federal government.159

The results are less than satisfactory. We see the existing concern in a statement to the House Committee on Ways and Means during the 1969 congestion hearings, where the spokesman for the Airport Operators Council International (AOCI) emphasized that “airport capacity, airways capacity, and ground access . . . must develop simultaneously; the air traveler is interested in total elapsed time from his home or office to his ultimate destination and not merely from airport to airport.”160

It is the conclusion of this author that the nature of the problems faced have changed substantively as well as substantially while the efforts at regulation have failed. The key to the solution

158 J. FLYING, Feb. 1919, at 149; AERIAL AGE, Nov. 8, 1920, at 248; 10 AVIATION, Jan. 3, 1921, at 22 and 120; SCIENTIFIC AMERICAN, 1919, at 484; and 6 A.B.A.J. 42 (1920).


160 Hearings on H.R. 12374 Before the House Ways and Means Comm., 91st Cong., 1st Sess., at 184 (1969). In a similar vein, the Presidential message to Congress which accompanied the transmittal of the Airport and Airways Development Act on June 16, 1969, pointed out that “[a] plane travels from airport to airport, but a person travels from door to door.”
of the current problem seems to lie in solving the problems of the Air Traffic Control System. A more direct approach, which reflects an awareness of the relations and ramifications of the federal-space-industry complex should be effective in producing both short-term relief and long-term solutions to the problems of aviation.

In this context, the separation of the operation of the air traffic control function from the government would seem to be an integral and essential factor in providing an overall solution. Appropriate federal legislation could meet many of the aviation needs we have seen consistently demonstrated. The end result of such legislation would be the creation of a quasi-public corporate entity whose sole purpose would be the operation of the Air Traffic Control System. The new corporation, formed by government, industry, and private investors would be in a position to implement the current federal desire to be relieved of financial cost in the operation of the Air Traffic Control System, while being more responsive to the previously stated needs of the industry and users of the system.

On a secondary level, this new corporation would be responsible for submitting a national airport and airways development plan to the Federal Aviation Agency and Congress every two years. The financing of any such corporate venture is not without precedent. The combination of public participation through common stock, combined with the realistic user charge system for necessary services rendered, and the allocation of federal support by placing the management of the Airport and Airways Development Act Trust Fund in the hands of the corporation, would provide more than a sufficient financial base.

In many ways, a simplistic analogy to the current approach to automotive safety is in order. In this latter area we see the complexity of the problem being resolved by the drafting of safety and ecological standards, and the concurrent requirement that the industry meet these requirements by a certain deadline. The design and development of solutions are left to private enterprise. The government does not enter into the operation of making

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129 See Appendix A for a brief outline of a draft statute to implement the suggested solution.

automobiles, and should not operate the Air Traffic Control System.

Governmental agencies could direct their expertise and funding expenditures to the simplification and recodification of regulatory provisions. The corporate efforts could be initially directed at the establishment of a user fee system based upon realistic cost figures for necessary services in accordance with governmental regulations. The streamlining of Air Traffic Control operations and the implementation of available technological methods could provide short term relief while paving the way for the development of a responsive, effective and efficient aviation system that is really safe.

This would result in the alleviation of current pressure on the Federal Aviation Agency, which must operate within the framework of the governmental bureaucratic structure. It also would serve to stimulate government to fulfill a truly regulatory role and diminish the current dissipation of energy and resources that the current operation of the Air Traffic Control System requires.

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131 Levine, Landing Fees and the Airport Congestion Problem, 12 J. Law & Econ. 79 (1969).

128 1974 FAA Budget Item, (Approved by the House Appropriations Sub-Committee). Automatic window washers for 10 FAA towers $407,000.00. Agency difficulty in getting people to wash windows leads to an expenditure of over $40,000 per tower. It should be expected that a corporation, being business oriented rather than bureaucratically entrenched, would be unlikely to spend monies needed for safety programs and technological research in such a manner.