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JUDICIAL AND REGULATORY DECISIONS

COVERAGE OF CROP-DUSTING EMPLOYEES UNDER
THE FAIR LABOR STANDARDS ACT

AERIAL CROP-DUSTING has finally come of age. Today, as never before, many farmers have turned to this field of aviation as a solution to the problem of insect control. At least eight thousand planes are presently used in dusting crops, and the figures promise to grow even larger as the industry emerges from its infancy.¹

In a recent case, Tobin v. Wenatchee Air Service, Inc.,² the Federal District court held that the service employees of a local crop-duster are covered by the Fair Labor Standards Act.³ The case involved an employer who recorded a fixed number of hours worked per week for each of his employees regardless of how long they actually worked. Thus, even though an employee might work more than forty hours one week and less than forty hours the next week, his pay for both periods was the same.⁴

The Wenatchee case dealt with a firm on the very fringe of the coverage provisions of the Wage and Hour Laws. The trade involved was one close in nature to agriculture, an industry which is exempt from the FLSA. Also, the firm was a small business and one essentially local in nature. With these facts in mind, can we say that the Wenatchee case was correctly decided? Would Congress have ever intended a local duster to fall within the purview of the FLSA?

The criterion for inclusion under the FLSA is that an employee be engaged in the production of goods for Interstate Commerce.⁵ The term production is not limited to direct productive activities, but is extended to include all activities performed by employees which are "in any closely

¹ McSurley, Growth of Agricultural Plane Use, 51 Avi. Week 43 (Oct. 10, 1949). Statistics given are for 1949. Hasbrook, What a Spray Plane Should Have, 52 Avi. Week 25 (Feb. 13, 1950). "After World War II, better and less expensive insecticides became available as a result of accelerated war-research. This, plus the necessity of producing more and more food for ourselves and the rest of the world, further boosted the demand for aerial dusting, spraying, seeding."

² Note, Liability for Crop-dusting, 17 J. Air L. 364 (1960). (Deals with the question of liability for damages resulting from aerial crop-dusting.)

³ The court also held that the company had violated the hourly (forty hour week, time and one-half for overtime) and record keeping provisions of the Act. 52 Stat. 1063 (1938), 29 U.S.C. 207(a) (1946); 52 Stat. 1066 (1938), 29 U.S.C. 211(c) (1946).

⁴ The employees of the company affected by the court's action were the bookkeeper, the mechanics, the parts man, and the lineman. The status of the pilots was not considered, probably because it was conceded that they might qualify for the agricultural exemption because they work on the farm (actually over the farm). See note 19 infra.

⁵ The Act applies to employees (1) engaged in Commerce or (2) engaged in the production of goods for Commerce, if they have not otherwise been exempted. Interp. Bull., General Coverage of the Wage and Hour Provisions of the FLSA of 1938, as amended, (May 1950).

The employees of the Wenatchee Air Service Company could not be engaged in Commerce, since all of the dusting activities of the firm are carried on in the State of Washington. In every instance, coverage is determined by the activities of the individual employee. It is possible that part of the employees of a company may be subject to the Act, while other employees of the same company may not be covered or may be exempt. Davis v. Goodman Lumber Co., 133 F.2d 54 (4th Cir. 1943); Fleming v. Hawkeye Pearl Button Co., 113 F.2d 52 (8th Cir. 1940).
related process or occupation directly essential to the production” of goods for Commerce. The Act provides many exemptions for specific trades and industries, the majority of these exemptions applying to small businesses and local enterprises.

The court in the Wenatchee case found that the employees of the company were engaged in the production of goods for Commerce. The defendant contended that the sole connection his employees have with Commerce is servicing planes which spray crops that are eventually harvested and shipped through Interstate channels, and that this does not constitute a sufficiently close connection with Commerce to place these employees within the scope of the Act.

The defendant's position is that the FLSA Amendments of 1949 and their legislative history suggest that the service employees of a aerial cropduster are not engaged in the production of goods for Commerce. These amendments had the effect of narrowing the coverage of the Act. The word produced in the original law included workers engaged “in any process or occupation necessary to the production” of goods for Interstate Commerce. The law as amended narrowed the meaning of produced by substituting the words closely related and directly essential for the single term necessary. Thus, under the new law, the employees of a local concern who perform activities too remote from production are to be removed from the purview of the Act.

However, the legislative history of the 1949 Amendments is not without confusion. True, the House Conference Report manifests a desire to narrow coverage, and even mentions the McComb v. Super-A Fertilizer Works case

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9 And Rule 776.2, Id., states that under the new law, “an examination of the character of the employer’s business will in some borderline situations be necessary in determining whether the employee’s occupation bears the requisite close relationship to production for Commerce.”
10 Immediately after the enactment of the 1949 Amendments, one writer took the position that the Act had been considerably reduced in coverage with the intent to cut down the broad interpretation that it had been given by the courts and by the Administrator. The writer concluded that, henceforth, “fringe” employees formerly held to be within the coverage of the Act would now be eliminated from the purview of the Act. Howlett, Fair Labor Standards Act Amendments of 1949, 29 Mich. S.B.J. 36 (April 1950).
11 But see the remarks of Congressman Lesinski of the House Conference Committee, 96 Cong. Rec. 14942 (1949), that the Amendments do not radically change the “coverage of the Act as it has been interpreted by the Courts in the past.”
12 And Smethurst & Halsam, The Fair Labor Standards Act Amendments of 1949, 18 Geo. Wash. L. Rev. 187 (1949-50), where the authors indicate that there is likely to be little actual change in the interpretation of the law.
13 See also Tobin v. Pennington-Winter Construction Co., 198 F.2d 334 (10th Cir. 1952), where both majority and dissent reach a different conclusion because the majority gave less emphasis than the dissent to the intention under the amended law to narrow coverage.
14 Under the old definition of "produced," the courts always interpreted the term necessary to production very broadly, holding an employee covered if his occupation was found to be necessary to the production of an article for Commerce. The requirement was not that the employee's work be indispensable to production, but only that it was "needed in such production and would if omitted handicap such production." Roland Electric Co. v. Walling, 326 U.S. 664 (1946).
15 165 F.2d 824 (1st Cir. 1948). The House Conference Report on the 1949 Amendments, 96 Cong. Rec. 14928 (1949), stated that henceforth a firm such as the Super-A Fertilizer Works should be excluded from the coverage of the Act "because the activities involved... are not closely related or directly essential to production."
as an example of a local fertilizer manufacturer to whom the new law should not apply. That case involved a local fertilizer manufacturer in Puerto Rico whose entire product was sold to local sugar growers. The sugar cane plants were eventually harvested, refined, and moved in Interstate Commerce. The District court had ruled that the employees of this fertilizer manufacturer were engaged in the production of goods for Commerce because their work was necessary to the production of sugar cane.

The attitude of Congress towards the Super-A Fertilizer case is significant because the position of a local fertilizer manufacturer is somewhat analogous to that of a local crop-duster. Both are agricultural service industries. Both produce an item for an industry which is itself exempt (agriculture), but the product of which flows in Interstate Commerce.

The House Conference Report goes on to state, however, that no major changes are being made in the law, and even lists specific categories of employees still subject to the Act. The two most important categories for our purposes being:

1. "Employees ... who make, repair, or maintain machinery or tools and dies used in the production of goods for Commerce."

2. "Employees of public utilities furnishing ... water to firms within the State engaged in ... production for Commerce."

Mention of these two categories in the House Conference Report would appear to evidence Congressional approval of the holdings in the Roland Electric Company v. Walling\(^{11}\) and in the Farmers Reservoir & Irrigation Company v. McComb\(^{13}\) cases. In the Roland Electric case, the mechanics of a local electrical firm that repaired motors for firms producing goods for Commerce, were themselves held to be engaged in the production of goods for Commerce. In the Farmers Reservoir case, the field employees of a non-profit cooperative irrigation company that provided water for Colorado farmers, were held to be engaged in the production of goods for Commerce.

Yet, in spite of the seeming inconsistencies, the House Conference Report makes clear that under the new law, "An employee will not be covered unless he is shown to have a closer and more direct relationship to the producing, manufacturing, etc., activity than was true,"\(^{14}\) in a number of court decisions and administrative rulings.

The position of the government attorneys which the court in the Wenatchee case accepted was, "That the activities of defendant's employees

\(^{11}\) 95 CONG. REC. 14928 (1949).

\(^{12}\) 326 U.S. 664 (1946). The motor repair employees of the Roland Electric Company were held to be engaged in the production of goods for Commerce because their work was found to be necessary to the production of producers of goods for Commerce. The court cited Kirschbaum v. Walling, 316 U.S. 517 (1942), to the effect that "the work of petitioner's employees has such a close and immediate tie with the process of production for Commerce, and was such an essential part of it, that the employees are to be regarded as engaged in an occupation necessary to the production of goods for Commerce." p. 665.

\(^{13}\) 337 U.S. 755 (1949). Here, a group of Colorado farmers organized a non-profit irrigation company to provide water for their crops. The crops were eventually harvested and moved in Interstate Commerce. The Supreme Court held that the field employees of the irrigation company were engaged in producing goods for Commerce because their work was necessary to the production of agricultural commodities. The court rejected the notion that the field employees were employed in agriculture, and, thus, exempt from the Act by reason of the agricultural exemption. In 1949, however, Congress amended the agricultural exemption provision to provide for the exemption of non-profit irrigation companies.

\(^{14}\) 95 CONG. REC. 14928 (1949). No clear indication is given of where coverage under the Act should cease. But, seemingly, several limiting factors that bear heavily on the question of coverage are (1) employment by a local firm and (2) the doing of work that has but a "remote or tenuous" relation to production or to the operations of a producer of goods for Commerce.

have at least as close a relationship to production as did those of the employees in the Roland Electric Company and Farmers Reservoir cases; . . . "  

They argued, too, that the Super-A Fertilizer case has little applicability to the case of a crop-duster because Super-A's employees were more than one step removed from the production of agricultural commodities.  

If any logic can be made out of the legislative history of the 1949 Amendments, it would appear that the case of a crop-duster is more closely analogous to the case of a fertilizer company than to the cases of a motor repair firm or an irrigation company. These latter two firms perform services that are directly essential to the production of the producers of goods whom they service. Industrial producers cannot do without motors, nor can farmers in arid country do without water. By comparison, the work of a crop-duster or fertilizer company is only in furtherance of, but is not directly essential to the production of the producers of goods whom they service. Naturally, crop yield would be considerably reduced without the application of insecticide or fertilizer. Yet, neither are as essential to the growth of plant life as water. Nor are fertilizer or insecticide as essential as are motors in relation to industrial production.  

Rule 776.19(b) (4) of the Interpretive Bulletin promulgated by the Wage and Hours Administrator, also, appears capable of a construction that lends weight to the view that the employees of a duster were not meant to be within the scope of the FLSA. This Rule explains that Congress meant to withdraw from coverage, people such as fertilizer employees whose product is "assimilated by the soil" rather than by the plant because what they do is "considered less directly essential to the production of farm products" than what is done by employees whose product enters directly into the plant. But, water, seed, and feed employees who are engaged in the production of commodities which "enter directly into the very product that moves in Commerce and are indispensable to its production . . . and without which such production would not be possible" are to remain covered by the Act. Employing this rule as a frame of reference, it is clear that insecticides are not "assimilated directly into the plant." Rather, the employees of a crop-duster seem to fit into the category of "assimilation by the soil" because their work product is not indispensable to the production of agricultural commodities. Hence, the conclusion follows that a local aerial crop-duster was not meant to be subject to the Wage and Hour Laws.  

Quite apart from the significance of the term production and the degree to which an employee must be engaged in production for Commerce to be covered by the Act, Congress has provided a number of specific exemptions from the FLSA. The majority of these exemptions exist for the benefit of small businesses and local enterprises. One such provision excludes agricultural labor from the scope of the Act. Similar provisions apply with respect to certain types of retailers, laundry and cleaning establishments, fishermen,  


16 The argument of the attorney's for the government runs as follows: The crop-duster's pilot is engaged in producing crops in the same way that a ground crew applying insecticides is so engaged. Then, obviously, the bookkeeper, mechanic, and the other service help of the company are only one step removed from production. The House Conference Report on the 1949 Amendments specifically mentioned that coverage would continue to exist for employees, "who make, repair, or maintain machinery or tools . . . used in the production of goods for Commerce." This pronouncement should be taken as Congressional approval of the decision in the Roland Electric case, which likewise involved employees who were one step removed from production and who were engaged in repairing or servicing machinery. The Roland Electric case, is, therefore, a binding precedent in the Wenatchee case.  

small newspapers, and other miscellaneous categories of trades, professions, and industries.\(^8\)

The defendant corporation in the *Wenatchee* case advanced the additional argument that even if their employees were held to be engaged in production as contemplated by the Act, then the firm should have been granted an agricultural exemption. On the face of the statutory language defining agriculture, however, there is little basis for contending that the service employees of a crop-duster were employed in agriculture. They were not employed by a farmer; nor did they do the ordinary type of work "performed by a farmer or on a farm . . ."\(^9\) Legislative history indicates, too, that the agricultural exemption was not ordinarily meant to apply to activities organized on a separate economic basis from farming, which if performed by the farmer himself would be exempt.\(^20\) Another factor negating the idea that Wenatchee's employees were employed in agriculture, is the policy consideration that a remedial statute such as the FLSA should be given the widest possible application,\(^21\) but exceptions should be strictly construed.\(^22\)

Yet, there, is a logical contradiction in the court's reasoning that a crop-duster is not entitled to an agricultural exemption. To reach the conclusion that Wenatchee's employees are covered by the Wage and Hour Laws, the court must hold that they are engaged in the production of agricultural commodities for Interstate Commerce. But, if these workers are engaged

\(^{18}\) See note 7 supra. The usual reason given for exempting an industry is that it is local in nature, and best left to State regulation. It is evident, however, that certain industries, notably agriculture, have been exempted for the additional reason that they possess a lot of political backing. Thus, to obtain support for the passage of the FLSA from the farm bloc, those Congressmen desiring to obtain the benefits of the Act for industrial workers, had to agree to exempt agricultural labor. In this connection, one writer has argued that through the method of political compromise, the farm bloc has almost consistently been able to exclude farm labor from the benefits of social legislation. Comment, *Legislation and Agricultural Labor*, 1949 Wis. L. Rev. 563; *Forsythe, Legislative History of the FLSA*, 6 Law & Contemp. Prob. 464 (1939).

The case reports state that Congress exempted agricultural labor because it is not subject to sweat shop working conditions. Also, that this type of labor is difficult to regulate because a substantial part of an agricultural workers' income must of necessity be for room and board. Bowie v. Gonzalez, 117 F.2d 11 (1st Cir. 1941); Jordan v. Stark Bros. Nurseries & Orch. Co., 45 F. Supp. 769 (D.C. Ark. 1942).

\(^{19}\) 52 STAT. 1060 (1938), 29 U.S.C. 269(f) (1946). "Agriculture" includes farming in all its branches and . . . includes the cultivation and tillage of the soil, dairying, cheese-making, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . , the raising of livestock, fur-bearing animals, or poultry, and any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations . . ."

But is it not probable that the pilot operating the spray plane would be found to be exempt from the Act because he is engaged in work on the farm (actually, over the farm), and is, therefore, employed in agriculture.


Note, too, that a farmer could dust his crops with a tractor attachment, and this activity would then be exempt because performed by a farmer.


\(^{22}\) Phillips v. Walling, 324 U.S. 490 (1945); Miller Hatcheries, Inc. v. Boyer, 131 F.2d 283 (5th Cir. 1942); Bowie v. Gonzalez 117 F.2d 11 (1st Cir. 1941); Walling v. Home Loose Leaf Tobacco Warehouse Co., Inc., 51 F. Supp. 914 (E.D. Ky. 1945). But see Damutz v. Pinchbeck, 158 F.2d 882 (2d. Cir. 1946), where a greenhouse employee who fired the boilers in a greenhouse was held to be employed in agriculture, and where the court said that "although this exemption provision in a remedial statute should be strictly construed, it should of course be given due effect . . . which shows the intent of Congress to make the term agriculture cover more than what might be termed ordinary farming activities."
in the production of agricultural commodities, then why are they not considered to be employed in farming, and thus exempt from the Act. This is in substance the position that Mr. Justice Jackson took in his dissenting opinion in the Farmers Reservoir & Irrigation Company v. McComb case, where a similar problem with reference to the agricultural exemption was raised. The majority answered Justice Jackson by saying that production was used in a special sense in sec. 203(j) in defining the word "produced," and is used in another sense in sec. 203(f) in defining "agriculture." However, this explanation is not completely satisfying; nor is the explanation convincing that the reason for the use of the word production in the definition of agriculture was to obtain an exemption for those engaged in tapping trees for turpentine and rosin. Even accepting the merit in the court's argument, it still seems that if one is engaged in agricultural production, then he is employed in agriculture.

The preceeding discussion should make obvious the difficulty of attempting to proceed logically in a field of the law where there is a great deal of confusion. In truth, the legislative history of the 1949 Amendments is both confusing and contradictory, and it is doubtful if the conflicting cases that bear on this subject can be rationally reconciled or distinguished. Nor is Interpretive Rule 776.19(b)(4) a useful criterion for coverage, when applied to the case of a crop-duster. One may rationalize in either direction and conclude that the Wenatchee case was decided rightly or wrongly, but such efforts at rationalization are futile. In this case, it was the FLSA Administrator who brought enforcement proceedings against the company. Can it be said that the FLSA Administrator exhibited that degree of flexibility necessary to wise administration when he decided to institute these proceedings against the Wenatchee Air Service Company?

There are many reasons why Wenatchee should not be within the coverage of the FLSA. For one, the firm is local in nature and fairly remote from production for Commerce. Then, too, all the economic, natural, and meteorological factors which underly the agricultural exemption, exist in the case of a farm service industry organized on a local basis such as this crop-duster. Both farmers and crop-duster are strongly influenced by local conditions, the changes of season, the variations of weather, and the need for long working hours at peak seasons of the year. Lastly, Wenatchee is a small business, and as such, should be considered for special and more lenient treatment. Many of the present statutory exemptions exist for the benefit of small business, and it is, therefore, not unreasonable to assume that Congress would have intended the enforcement of the FLSA to be

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23 337 U.S. 755 (1949). See Jackson's dissent at p. 770. The definition of agriculture contains within it the word production (see note 19 supra.). Now, if production as used in the definition of agriculture (§203 (f) is to be given the same weight or meaning as production as used in the definition of produced (§203 (j), then, it is argued that the agricultural exemption should include all occupations and processes that are closely connected with agriculture and whose only connection with Commerce is through farming. Thus, if the employees of a crop-duster are held to be doing work that is closely related or directly essential to agricultural production, as is contended by the government, then they should be exempt from coverage. See Farmers Reservoir & Irrigation Co. v. McComb, Id., p. 764, where a similar argument was advanced by the defendant corporation and was rejected by the court.

24 Farmers Reservoir & Irrigation Co. v. McComb, Id., p. 764. The court argued that an exemption does not carry with it all occupations whose only connection with Interstate Commerce is through the exempted occupation; Also, that an exemption should not be granted merely because a firm's only connection with Commerce is through an enterprise itself exempt.

25 Farmers Reservoir & Irrigation Co. v. McComb, Id., p. 765. But the court also pointed out that if production as used in §203 (f) were meant in the same sense as production as used in §203 (j), then it would make surplusage of the rest of the words in the clause defining agriculture in which the word production is included, to wit: "cultivation," "Tillage," "growing" and "harvesting." p. 764.
less strict and more flexible, with respect to small business. It is more than
probable that the social advantages that coverage would obtain for the
employees of a firm of this size would less than outweigh the social burden
that the Act would place on this company.

It cannot be said that the Statutory definition of the word *produced*
predicated the District court from finding that Wenatchee's employees were
engaged in the production of goods for Commerce. But such a finding does
not seem in keeping with the spirit and objectives of the Wage and Hour
Laws. The solution to the problems raised by the *Wenatchee* case may lie
in the administration of the Wage and Hour Laws. Why did not the Ad-
ministrator use his discretion and leave this firm alone when he saw that
this was a borderline case involving a small business local in nature and
closely allied to agriculture? The way to avoid absurd borderline cases is to
refrain from instituting proceedings in the first instance. Merely through
a great use of his discretionary powers, the Administrator can do much to
improve the administration of the FLSA.

**FEDERAL CONTROL OF LAND TO PROTECT
AIRPORT APPROACHES**

During the past year tragic air crashes in crowded residential areas
surrounding airports have resulted in a re-examination of the effective-
ness of the protection accorded both aircraft and neighboring residents by
government regulation of the use of land in the airport area. Prompted in
part by the investigations and recommendations of a group of presidentially
appointed experts—the Doolittle Commission*—a bill was introduced in the
last session of Congress designed to expand federal control over building
heights and the nature of land use around airports. Senate Bill 31291 would

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28 The results of the 1952 National Election could conceivably have a great
deal of effect on the manner in which the FLSA will be administered for the next
four years. The Republican Party Platform opposes any extensions of govern-
ment control, and criticizes the present day regulatory laws as hardly permit-
ting "a phase of our economic and social life today in which government does
not attempt to interfere." See Text of the Republican Party's 1952 Campaign
Platform Adopted by the National Convention. New York Times, Friday, July 11,
1952.

The likelihood, therefore, is that the near future will not see any extensions
in the coverage of the FLSA. If, anything, coverage might possibly be reduced,
particularly with respect to borderline cases such as a crop-duster.

1 S. 3129, 82d Cong., 2d Sess. (1952). A bill to authorize the Secretary of
Commerce to remove obstructions or hazards to air navigation, to prevent future
obstructions or hazards to air navigation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United
States of America in Congress assembled, That this Act may be cited as the
"Civil Aeronautics Act of 1952."

Sec. 2. Section 1 of the Civil Aeronautics Act of 1938, as amended, is
amended by adding the following definitions: "(33) 'Secretary' means Secretary
of Commerce. (34) 'Structure' means any object constructed or installed, includ-
ing, but not limited to, buildings, towers, smokestacks, and overhead transmis-
sion lines."

Sec. 3. The Civil Aeronautics Act of 1938, as amended, is further amended
by adding thereto a new title XIV, as follows:

"TITLE XIV — REGULATION OF GROUND HAZARDS TO AIR NAVIGATION

"Sec. 1301. Findings and Declarations of Policy. (a) It is hereby declared
to be essential to (1) the proper exercise of national sovereignty, (2) the de-
velopment and regulation of commerce, (3) the development and protection of
military aeronautics, (4) the exercise of the power to provide for the common
defense, and (5) the protection of the value of the investment of funds of the
United States in landing areas and other air-navigation facilities, that there
be carried out a program of regulating the height, type, and location of struc-
grant to the Secretary of Commerce power to regulate the height, type of
structures and objects of natural growth in the vicinity of landing areas where the
safety or freedom of aerial navigation may otherwise be impaired. Such program
shall be developed and carried out with consideration for (1) the achievement of
maximum useful height of landing areas consistent with their physical character-
istics, the surrounding terrain, and the type of aircraft operation for which the
landing area was designed or is used; (2) the interests of safety through the
establishment of standards for the height, type, and location of structures and
objects of natural growth in the vicinity of landing areas as uniform as possible
considering the physical characteristics of the landing area, the surrounding
terrain and the use made thereof, and the type of aircraft operation for which
the landing area was designed or is used; (3) the necessity for the utmost free-
dom in the mobilization and tactical employment of military aircraft at any time
for the defense of the United States; (4) the comparative economic effects of
regulating the height, type, and location of structures and objects of natural
growth in the vicinity of landing areas sufficiently to achieve the foregoing ob-
jectives or relocating such landing areas. (b) In order to achieve the foregoing
objectives, the Secretary shall enlist the cooperation of the States and the political
subdivisions in its execution and shall take necessary action to insure safe and
uniform conditions.

"Sec. 1302. The United States of America heretofore has declared by law
its possession and exclusive national sovereignty in the airspace above the United
States, its Territories and possessions. In furtherance of this declaration, all
such airspace which is five hundred feet or more above the surface of the sub-
jacent land and which is unoccupied on the effective date of this title or which
hereafter becomes unoccupied and remains unoccupied for a period of seven
years, is declared to be an easement for the purpose of aerial navigation and its
occupancy shall be subject to regulation and control for the furtherance of that
purpose.

"Sec. 1303. Establishment of Standards. The Secretary is authorized after
consultation with the Secretary of Defense and the Civil Aeronautics Board, to
establish standards for determining under what conditions structures and ob-
jects of natural growth are or would become physical obstructions or hazards to
air navigation, giving consideration to — (1) topography; (2) type of urban or
industrial development; (3) flight characteristics of aircraft using or which may
reasonably be expected to use the airspace; (4) type and amount of air traffic;
(5) regulations governing the operation of aircraft; and (6) size and nature of
landing areas.

Revision of such standards shall be maintained at all times in accordance
with actual or anticipated technological development of military and civil aero-
nautics.

"Sec. 1304. All Federal agencies constructing or altering, or authorizing the
construction or alteration of, any structure, or furnishing financial assistance in
connection therewith, shall adhere to the standards established and regulations
issued by the Secretary, or require adherence thereto.

"Sec. 1305. No application of the standards established under §1303 shall
be made by regulation or acquisition as hereinafter provided unless the
areas within which they are so applied either (1) underlie the paths of flight
through the navigable airspace where substantial air traffic exists or is reason-
able anticipated, or (2) are in the vicinity of (a) landing areas owned, leased,
or substantially used by the Federal Government, (b) landing areas used or au-
thorized for use by air carriers, or (c) landing areas which in the opinion of the
Secretary are essential for use by aircraft engaged in air commerce.

"Sec. 1306. Regulations. (a) With respect to all areas in which the Sec-
retary is authorized by §1305 to apply the standards established pursuant to
§1303, the Secretary shall promulgate regulations limiting the height, type
of construction, and nature of occupancy to which future structures or objects
of natural growth may be extended or built into the airspace. No such regulations
shall be issued unless the Secretary shall have determined that it is necessary and
reasonable as applied to the area to which it relates. All regulations and notices
issued hereunder required to be published in the Federal Register by the Adminis-
trative Procedure Act shall also be published in one local newspaper of general
circulation in each county or other appropriate political subdivision of the State
in the area where the regulations are to apply.

(b) Any person believing that a regulation issued hereunder unreasonably
interferes with the use and enjoyment of his property to the extent that it con-
be necessary to remove or prevent hazards to navigation. This paper will explore the constitutionality—as well as necessity and wisdom—of these proposed ventures by the Federal Government.

**The Scope of Federal Power**

Federal control of the activities of airports and their neighbors may be defended as an exercise of the commerce, war, or postal powers. The proposed legislation recites the first two in justification of its provisions. Since constitutes a taking without just compensation, contrary to the Fifth Amendment to the Constitution, may file a request for relief with the Secretary: Provided, That all claims for relief hereunder shall be barred if not presented to the Secretary within one year after the date of publication of such regulation. The Secretary shall determine, after notice and opportunity for hearing, whether any taking has occurred, and whenever the Secretary shall find that a taking has occurred, he shall by order either: (1) fix the amount found due as compensation for such taking, or (2) grant such relief by exception to the regulations, or otherwise, as he may deem necessary. The Secretary shall promptly certify to Congress a statement of the amounts he has found due under this section, together with copies of the pertinent orders.

"Sec. 1307. Permits. Any person who desires to construct or alter any structure or to allow any object of natural growth to grow into the airspace above five hundred feet, contrary to any rule, regulation, or order issued under §1306 (a), may apply to the Secretary for a permit therefore. If, after notice and opportunity for hearing, the Secretary finds that such action is necessary in the public interest and is not inconsistent with the policies and purposes of this title, he shall issue a permit, subject to such terms, conditions, and limitations as he may consider desirable in the public interest. Such permit shall not be revoked, except after notice and opportunity for hearing and then only for violation of the terms, conditions and limitations thereof, unless compensation is granted, in the manner provided in §1306 (b), for any loss caused by such revocation.

"Sec. 1308. Acquisition of Property Rights. With respect to all areas in which the Secretary is authorized by §1305 to apply the standards established pursuant to §1303, the Secretary is authorized, within the limits of available appropriations, to acquire by purchase, lease, or condemnation, such easements or other interests in airspace or other interests in property as he may determine to be necessary to—(1) remove, relocate, or alter an existing structure or object of natural growth so that it will no longer constitute an obstruction or hazard to air navigation; (2) prevent the construction, alteration, or growth of any structure or object of natural growth in such a way that it would constitute an obstruction or hazard to air navigation; or (3) permit the identification by appropriate means of existing structures and objects of natural growth which constitute obstructions. The Secretary shall not exercise the authority contained in subdivision (2) hereof except to the extent he cannot accomplish the policies and purposes of this title by regulations authorized by §1306 (a). In the exercise of the authority granted herein, the Secretary may utilize the authority contained in §302 (c): Provided, That in condemnation proceedings conducted pursuant to the authority granted under the Act of February 26, 1941 (40 U.S.C. 257 et seq.), a plan of the land taken need not be contained in or annexed to the declaration of taking if the property rights taken thereunder consist of rights in airspace only.

"Sec. 1309. Removal of Obstructions. The Secretary is authorized to order the removal or alteration of any structure or object of natural growth extending into the airspace either (1) above five hundred feet without permit therefor duly issued by the Secretary, or (2) contrary to any regulation issued by the Secretary pursuant to §1306 (a). In the event that such order is not complied with within a reasonable time, the Secretary is authorized to enter upon the property and to remove or alter such structure or object of natural growth as may be necessary to effect conformance with the requirements of this title. The cost involved in such removal or alteration shall be a lien against the property upon which the structure or object of natural growth is or was situated, which lien may be foreclosed in the manner otherwise provided by law.

"Sec. 1310. Notices of Construction. Where necessary, the Secretary is authorized, by rule or regulation, to require all persons to give adequate notice in the form and manner prescribed by him of the proposed construction or alteration of any structure within any area in which the Secretary is authorized by §1305 to apply the standards established under §1303.

"Sec. 1311. Procedure and Judicial Review. The proceedings conducted by
the commerce power in peace time is at least as broad as the other two in matters involving commercial air transportation, the discussion here will be confined largely to a consideration of the limitations of the commerce clause.\textsuperscript{2}

The Civil Aeronautics Act of 1938 has given to the Civil Aeronautics Board the power to prescribe rules of flight for aircraft.\textsuperscript{3} Acting under this authorization, the CAB has promulgated flight regulations and traffic patterns for airports wherever this has been found necessary to the safety of air commerce.\textsuperscript{4} The power of the Federal Government to control flight procedure in this manner is undisputed, at least where interstate flights are involved.\textsuperscript{5} But what happens, e.g., if the factory adjoining the airport erects a smokestack so tall that it is impossible to observe the approach procedure which has been found necessary and prescribed for the safety of the aircraft? This problem has become more and more acute as the increase in the speed of planes and the proportionate reduction in their maneuverability have necessitated a longer, shallower landing approach to airport runways.

Clearly if the safety regulations of the CAB are to be effective, there must be, from some source, control of the height of structures in airport areas. There appears to be adequate power in the Federal Government to regulate the height of present and future structures about airports through zoning and eminent domain. A more difficult problem will arise, however, if the government attempts to prescribe also the nature of the occupancy of adjacent land and the use to which it could be put.

CONTROL OF THE HEIGHT OF STRUCTURES

Eminent Domain

The power of the Federal Government to condemn or appropriate existing structures presents no constitutional questions of any novelty or substance. The grants of plenary authority under the commerce, war, and postal clauses empower Congress to acquire property within the states and to construct, maintain, and operate instrumentalities in furtherance of the powers

\textsuperscript{2}The Congress shall have Power \ldots To regulate Commerce among the several States. U.S. CONST. ART. I. §8.

\textsuperscript{3}49 U.S.C. §401 et seq. (1946).

\textsuperscript{4}See e.g., C.A.A. Technical Standards Order N-18, April 26, 1950, prescribing ideal flight patterns and airport approaches.

\textsuperscript{5}There is some dispute whether federal law controls purely intra-state flights and airports handling only such traffic. See Northwest Airlines v. Minnesota, 322 U.S. 292 (1944); Rosenhan v. United States, 131 F.2d 932 (10th Cir. 1942). But see Parker v. James Granger Inc., 4 Cal.2d 668, 52 P.2d. 266 (1935).
bestowed. This power has been utilized already to acquire land rights in Virginia necessary to the construction of the completed Washington National Airport and the secondary Washington airport that was to have been constructed near Burke, Virginia. Dealing with the question whether the acquisition of the land for the Burke airport was a valid exercise of federal power, the United States District Court for the District of Columbia declared that "... when it is clear that the use for which it is sought to condemn property by eminent domain is a public one, there is no substantial question ... as to the constitutionality of the statute." Construction of an airport was held to be such a use.

The condemnation of property is not likely to lose its character as an acquisition for public use merely because the property is adjacent to, rather than within, the borders of the airport. The power to make and keep the airport usable is a necessary concomitant of the power to acquire and construct it. The Administrator of Civil Aeronautics does in fact hold and has exercised the power of eminent domain to acquire "... easements through or other interests in airspace immediately adjacent [to air navigation facilities] and needed in connection therewith." This power is limited, however, to facilities owned by the United States and operated by the Administrator.

Although the power of eminent domain is as broad as any of the expressed powers of the Federal Government which it complements, it is subject to the practical infirmity of the requirement of compensation for the landowner whose property is acquired. Whenever a "taking" of property is involved, the duty to compensate arises, and the use of eminent domain involves by nature a taking rather than a mere regulation of the use of property. It is this practical difficulty which forces the Government to adopt instead the use of regulatory measures which are less likely to be regarded as a "taking" of property.

**By Zoning**

Although the use of the zoning power is customarily associated with the activity of state governments, it seems clear that a counterpart of the state's power to zone exists in the Federal Government. It exists not as an inherent power but rather is collateral to the general powers of the United States. Whatever the limits of national power may be, it is certain that the express grants of authority to Congress in the commerce and other clauses cannot be frustrated by an inability to implement them with appropriate regulations. That these regulations occasionally penetrate an area of state interest does not necessarily render them void. "... When the United States exerts any of the powers conferred upon it by the Constitution, no valid objection can be based upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police power..."

The use of the federal "police power" to zone was upheld in 1919 in *McKinley v. United States.* There the Secretary of War had been authorized to zone the areas around army camps to prohibit prostitution. The Supreme Court found such a scheme to be a reasonable measure for the protection of the armed forces which Congress had the duty and authority to raise and support under the war power. It was necessary for Congress to reach into...

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7 49 U.S.C. §302 (c) (2) (1946).
8 There are but three such airports — the two mentioned in Virginia and a third in Alaska.
10 Hamilton v. Kentucky Distilleries, 251 U.S. 146, 156 (1919).
11 249 U.S. 397 (1919).
an area generally subject to state authority alone in order to insure the protection of a federally created instrumentality.

It is not the source of the threat to commerce, the armed forces, or the postal service that determines congressional power. The threat itself creates the authority to provide for its removal in a reasonable manner. Once Congress has reasonably determined that the removal of high structures adjacent to airports is necessary to the safety of air commerce, it may adopt means appropriate to attain the end, even if the measures employed involve an interference with the rights of landowners under state law.

A situation strikingly similar to the airport problem is often presented in the course of the improvement of navigable streams and bays, when it becomes necessary to remove or prevent the construction of objects which hinder free passage in the channels of water traffic. In Ashwander v. TVA\(^\text{12}\) the Supreme Court gave broad scope to the federal power in this regard when it stated that "...The power to regulate interstate commerce embraces the power to keep the navigable rivers of the United States free from obstruction to navigation and to remove such obstructions when they exist." While the highways of air traffic are less perceptible than the channels of a navigable stream; they are no less real and are certainly a good deal more dangerous if obstructed. In some cases, it is true, the path of air traffic may be more easily rearranged than the channel of a river by moving the runways or even the entire airport. This would be a factor to be taken into account in assessing the reasonableness of the zoning regulations. It would not of itself prohibit them. In many cases the cost of removing an entire airport may present a practical impossibility. This seems particularly true in metropolitan areas where the present danger from obstructions existing and threatened is the greatest.

The postal power is a third source upon which to base federal control of building heights around airports. Congress may take whatever action is reasonably necessary to protect the post roads it has established. Under the federal acts, the established air routes have been designated as post roads.\(^\text{13}\) Since airport obstructions pose a direct threat to the safety of the mails, Congress should be considered capable of removing the threat in an appropriate manner.

No constitutional bar exists then to a federal system of zoning laws which would regulate the height of structures and natural growth in the areas adjacent to airports. Such a scheme should effectively protect air traffic. But, as noted in the beginning, a good part of the criticism of our present facilities has sprung from what is believed to be a menace to the lives of the persons on the ground, the neighbors of the airport, who face the risk of falling planes. The proposed legislation intends to alleviate this menace by granting the Secretary of Commerce the power to regulate the nature of the occupancy of any future structures in the area. By this means the areas in which the danger existed could be prevented from developing into residential or other populous districts. The wisdom and constitutionality of this proposal bears some consideration.

**Federal Power to Zone Land Use**

As noted, the constitutional basis offered for federal zoning laws limiting the height of structures in areas adjacent to the nation's airports is the protection of air commerce, the flow of which, being subject to direct regulation, must be aided also by indirect regulation where this is necessary to maintain the effectiveness of the original laws. The very statement of this rationale exposes the problem presented where the objective is not to zone

\(^{12}\) 297 U.S. 288, 328 (1936).
against unreasonable height, but to zone against the development of the adjacent land into a residential neighborhood with crowded school and other public buildings.\textsuperscript{14} The Federal Government ostensibly has no direct interest in the health and safety of the citizens of a state. Its sole authority is to protect the flow of commerce, and it is difficult to discern any threat to air commerce from residential or any other use of land which does not intrude upon the navigable airspace.

The idea of federal regulation of land use for the protection of the users is novel enough that precedent is apparently non-existent and opinions by writers nearly so. The legal advisers of the Doolittle Commission, however, have offered as a possible basis for such regulation the theory that, if the adjacent lands are allowed to develop into a residential area, the owners may be able to enjoin the operation of the airport as a nuisance because of its noise, dust, glaring lights, and danger to its neighbors.\textsuperscript{15} This would put the airport out of business and inflict a direct injury upon commerce. This approach would tie the proposed regulation to a recognized power of Congress.

Whether even the authors of this theory give it much credence is questionable, however. In an earlier part of the same article in which it is proposed, they have noted the situations in which courts have, in the past, granted injunctions against airport operations as constituting a nuisance.\textsuperscript{16} Two cases were cited, the latest in 1932, which granted a total injunction against airport operations. Others were noted which curtailed operations in varying degrees or which refused any injunction. The authors stated: "Many recent cases refuse to issue any injunction at all on facts where earlier decisions would surely have done so."

It does not seem likely that the operation of a metropolitan airport could today be enjoined by neighboring residents except in the most extreme of circumstances, and the possibility of the injunction, therefore, scarcely seems such a threat to commerce as would justify federal interference with the land law of the states.\textsuperscript{18}

The proponents of the theory of the threat to commerce from the injunction have suggested, as an additional source of support, the cases which impose upon riparian owners a "servitude" in the Federal Government for purposes of regulation. They have cited only a secondary source\textsuperscript{19} to which they direct the reader for an identification and discussion of the cases. This source, however, was concerned with the question of zoning against heights and of compensation, and did not consider the possibility of the federal zoning of land use. Nor do the river cases themselves seem properly analogous. They do not deal with the use of land for purposes of protecting its owner from the hazards of commerce, but protecting commerce from threats of obstruction by riparian owners.\textsuperscript{20} Furthermore, most of them are concerned

\textsuperscript{14} The problem of community encroachment upon areas adjacent to airports is particularly pressing in fast growing communities such as Los Angeles. REPORT OF THE PRESIDENT'S AIRPORT COMMISSION, THE AIRPORT AND ITS NEIGHBORS 6 (1952).

\textsuperscript{15} Pogue and Bell, The Legal Framework of Airport Operations, 19 J. AIR L. 253 (1952).

\textsuperscript{16} Id. at 259.

\textsuperscript{17} Ibid.

\textsuperscript{18} Though the possibility of the injunction seems too remote, the danger that public furor may cause the suspension of airport operations as it did in Newark is certainly a threat to commerce. Whether it is a factor of which a court would take cognizance, however, is very doubtful. It is interesting to note that the spectacular and tragic Newark crashes were due solely to mechanical failures in the aircraft and were in no way caused by inadequacies in airport facilities or approaches.

\textsuperscript{19} Memorandum by Mr. Howard Westwood, Hearings, House Committee on Interstate and Foreign Commerce, on H.R. 1012, 78th Cong. 1st Sess. 249 (1943).

\textsuperscript{20} Ashwander v. TVA, supra note 10; Luxton v. North River Bridge Co., supra note 7.
solely with the problem of compensation to the owner for an alleged taking.\textsuperscript{21}

Even apart from the constitutionality of the proposal, it seems difficult to justify the regulation of the use of the property of a man who poses no threat to any one and who chooses freely to accept whatever risk is involved in living near an airport. The application of the commerce power to deny a citizen the use of his land for residential purposes, for example, is a rather startling proposition. In addition, the problems it raises in terms of compensation may render the whole plan impractical.

**THE MATTER OF COMPENSATION**

The Doolittle Report recommended that the responsibility for zoning be left to the states for the present.\textsuperscript{22} An important consideration underlying this decision was the fear that the extensive regulation required to render many airports safe would often result in such a diminution in value of the affected property as to result in a compensable “taking” under the Fifth Amendment.\textsuperscript{23} The financial outlay required might well be prohibitive.

The problem of what sort of governmental intrusion will constitute a compensable taking has never been clearly delineated. In *Pennsylvania Coal Co. v. Mahon*\textsuperscript{24} Mr. Justice Holmes said that the power of a state to appropriate property “... must have its limits, or the contract and the due process clauses are gone. One fact for consideration ... is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. ...”\textsuperscript{25} Since the determination must be largely an *ad hoc* judgment by a court, there is great difficulty in predicting the cost of any project, and a regulatory scheme which must be planned on a limited budget becomes something of a gamble.

There are, however, two general criteria which have been judicially developed to test the presence or absence of a “taking.” The first, as noted by Mr. Justice Holmes, is the extent of the reduction in value of the property.\textsuperscript{26} This seems to mean the relative devaluation of the property rather than the absolute amount of the loss. This factor is set in the balance against the weight of the public interest involved. The second factor, at least as important, is whether the regulation has a retroactive or only a prospective effect.\textsuperscript{27} Where established structures are involved, the likelihood of a taking being found is much greater than where only future use of the land is curtailed.

In *United States v. Causby*\textsuperscript{28} a chicken farmer recovered compensation for an implied easement in the usable airspace above his farm which was “taken” by the repeated flights of military aircraft into and out of the adjoining air field. The decision depended to some extent upon the fact that the Civil Aeronautics Authority had not included any of the navigable airspace under 500 feet “in the public domain.” But the opinion was more concerned with the thought that a private business had suffered a substantial reduction in value by the acts of the government. However, since the proposed regulation would affect only the future use of property, it is not so clear that any taking would be found, unless the height restrictions were so

\textsuperscript{21} Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893); Union Bridge Co. v. United States, 204 U.S. 364 (1907).

\textsuperscript{22} REPORT OF THE PRESIDENT’S AIRPORT COMMISSION, op. cit. supra note 14, at 9.

\textsuperscript{23} Id. at 74.

\textsuperscript{24} 280 U.S. 393 (1922).

\textsuperscript{25} Id. at 413.

\textsuperscript{26} But see Hadacheck v. Sebastian, 239 U.S. 394 (1916).

\textsuperscript{27} Dutton v. Mendocino County, 1949 U.S. Av.R. 1 (1949) and cases cited therein. See also Pogue and Bell, supra note 15, at 263.

\textsuperscript{28} 328 U.S. 294 (1946).
low as to render the land useless for most purposes. The possibility of compensation being required will, of course, be greatest in the land nearest the end of the landing strips where the building heights would be most restricted.

Whatever comfort landowners might experience from the *Causby* case may well be chilled by such decisions as that in *Sebastian v. Hadacheck*, decided by the Supreme Court in 1915. There a city ordinance prohibiting the operation of brickyards in residential districts reduced the value of the plaintiff's brickyard from $800,000 to $60,000. The ordinance was upheld as a valid regulatory measure requiring no compensation. The Court said, "... it may ... seem harsh ... but the imperative necessity for its [the regulation] existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. ..." The decision is in harmony with neither the test of substantial reduction in value nor that of interference with vested rights, unless the prohibition of brickyards is considered more necessary than the operation of military aircraft, or unless the power of the state as against the due process clause exceeds that of the Federal Government as against the Fifth Amendment. Whether the decision in the *Hadacheck* case would be supported on the same facts today is questionable.

The problem of compensation in airport zoning has been compared to that of giving relief to property owners who have suffered damage as a result of federal action taken to clear and protect navigable waters. In those cases the establishment of public easements and structures either required the demolition of existing structures or rights, or prevented access to deep water by riparian owners. The analogy asserted is that between the federally established paths of flight for air traffic and the channels in navigable waters whose obstruction by adjoining owners was prohibited. The analogy is appealing; the difficulty is that the cases do not help a great deal in deciding when compensation must be paid.

There is a significant line of cases which refuse compensation to riparian owners against federally asserted power. In *Scranton v. Wheeler* compensation was unnecessary where the owner was denied access to navigable water by the construction of a pier, even though, by local law, the land was his to the middle of the stream. Also, where the activities resulted in a flooding of a claimant's land, no relief was allowed. In *Greenleaf-Johnson Lumber Co. v. Garrison* the Secretary of War was authorized to draw a harbor line as the limit of construction. The plaintiff built a pier out to the line established. Later the line was moved closer to shore, and the plaintiff's pier was removed without compensation.

Another line of cases has found compensation necessary in strikingly similar circumstances. In *Monongahela Navigation Co. v. United States* the government had purchased for use the locks and dams of the plaintiff but had excluded from the purchase price the value of the right to take tolls. The Supreme Court required compensation for this right. A distinction may be made in that the property was to be used in the same form as held by the plaintiff, but later cases have not articulated this point. In *Portsmouth Co. v. United States* an easement was found to have been impressed upon the property of the claimant by the firing of coastal defense guns across his land, and compensation for the loss was required.

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29 239 U.S. 394 (1915).
30 Id. at 410.
33 237 U.S. 251 (1915).
34 148 U.S. 312 (1893).
35 260 U.S. 327 (1922).
Which line of authority will prevail seems impossible to predict. Suffice it to be said that regulation requiring the removal of existing structures and prohibiting the erection of future structures above certain levels presents a significant danger that, in many case, "taking" will be found and compensation required. S. 3129 recognizes the problem and provides machinery by which an aggrieved property owner may appeal to the Secretary of Commerce and seek compensation. If a taking is found to have occurred, compensation will be granted.

. POLICY OBJECTIONS TO FEDERAL ZONING OF LAND USE

The prospect of the Federal Government controlling the nature of the occupancy of land about an airport presents not only seemingly insurmountable constitutional difficulties but practical objections as well. As we have just seen, whether such regulation would require compensation in any or all cases is not entirely clear. It is likely that it will do so in many situations. The financial problem is apparent. Since 1946, Congress, under the Federal Airport Act, has appropriated only $169 million for airport improvement out of an authorized $500 million. If this is any indication of the amounts available for such projects, it can hardly be expected that there would be enough available for the purchase of rights in huge tracts of land, much of it in metropolitan areas.

Another disquieting prospect is the flood of litigation that would result from regulation of the land use. Each aggrieved landowner would have to be given his day in court and the proposed bill provides an avenue for the determination of the fact of taking and the amount. And, once the possibility of compensation under some circumstances is admitted, summary treatment cannot be given to the great bulk of cases, as the present use of each tract of land may be dissimilar and present a unique problem. Due process might well run amok.

Perhaps the most significant objection to the use of federal zoning to protect the neighboring citizens is that it is largely unnecessary. The danger is principally a product of newspaper sensationalism. From 1946 through the summer of 1952 there was one accident causing death to a person on the ground for every 4,000,000 landings and take-offs on scheduled and non-scheduled airlines. "Even bicycles kill more innocent bystanders annually than airplanes." Such a substantial interference with the property interests of landowners can hardly be justified on the basis of such slight danger. It is the air traffic that is in jeopardy and needs protection, and it is to that area alone that legislative efforts should be directed. The needed reforms should not be tied to an unconstitutional scheme which may vitiate the whole plan.

SUGGESTIONS AND CONCLUSION

If the provision permitting federal control of land use were removed from the bill, S. 3129 of the 82nd Congress, the proposed legislation would appear as an intelligent solution to the problem. It would make available to the Civil Aeronautics Administrator the new weapon of eminent domain with which to eliminate existing obstructions where the owner is unwilling to do so himself and the state is unwilling to compel him. The use of eminent

37 REPORT OF THE PRESIDENT'S AIRPORT COMMISSION, op. cit. supra note 14, at 94.
38 The question of compensation is "... always open to interested parties to contend." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).
domain would suffice to remove odds and ends of buildings, towers, trees, and poles which have plagued so many of our airports. The cost would not seem too great. Most of the obstructions are single objects whose lowering or complete removal can be effected quite simply. The Administrator would probably not attempt wholesale removal of groups of buildings, for his funds are restricted to "the limits of available appropriations." 40

The use of the zoning power would be limited to the prohibition of future obstructions. Its exercise would raise fewer questions of constitutionality, and it is unlikely that any taking would be found, except, possibly, in the areas within a few hundred yards of the ends of the runways. Litigation would be infrequent, and except where the owner showed a projected industrial use, it would seem that the courts could create a rule of thumb for disposing of cases. For example, if the height limit were above thirty-five or forty feet, 41 it could be assumed that there was no taking of residential property; and if the height set were below this level, there would be a question for the court to decide whether projected building plans of the owner would be substantially frustrated.

The use of federal power should be tempered and kept in reserve, however, as it has been in the past. The bulk of the work should be given to the states when they are willing to accept it. Under the Federal Airport Act of 1946 42 which created a grant-in-aid program of airport development, the national government can withhold federal funds from state projects until adequate assurance of proper zoning and removal of obstructions is had. This has been the practice of the Civil Aeronautics Administration in the past and has been in part successful, though limited by lack of funds. 43

The states have also cooperated in the past by joining with the federal agencies in drafting model state airport zoning acts and municipal airport acts. 44 Practically all states now have passed enabling acts based on the model acts which give the necessary zoning power to the municipalities. The local groups have, however, often shown themselves reluctant to take the steps necessary to give adequate protection to airport operations. Broadening the federal power may have the desired effect of stimulating the municipalities to act to insure the safety of their airports by proper zoning and removal of obstructions before the problem is taken from their hands.

DIGEST OF RECENT CASES

RES IPSA LOQUITUR — APPLICABILITY UNDER MISSOURI LAW

Cudney v. Midocontinent Airlines,
254 S.W. 2d 662 (Mo. Sup. Ct. Feb. 9, 1953)

Plaintiff brought an action against the Airlines and the pilot of the plane on which she was a passenger, for injuries sustained when she was thrown from her seat by a sudden dropping, jerking, and jolting of the plane while

40 S. 3129, 82d Cong. 2d Sess., §1308 (1952).
41 In a draft bill prepared by the CAA, from which much of S 3129 seems to have been taken, the power of the Administrator to limit building heights would commence only at the 35 foot level.
43 Interview with Mr. John Hunter, CAA Counsel, Division of Airports.
44 See Department of Justice Reprint of "Suggested State Legislation, Program for 1947" (including Municipal Airports Act, State Airport Zoning Act, and Airport Condemnation Amendment). These acts were prepared by the cooperative efforts of the CAA, the Department of Justice, and the Council of State Governments.
in flight. It was shown during the trial that the cause of this dropping, jerking and jolting was the result of the plane hitting a downdraft which neither the company nor the pilot could anticipate. Plaintiff's case was primarily based on an allegation of the doctrine of res ispa loquitur, on the theory that the airplane was in the sole and exclusive control of the defendants, who possess superior knowledge or superior means of information as to the cause of the occurrence, and that the injury which plaintiff suffered would not have ordinarily happened if those in charge had used due care. The Supreme Court of Missouri, in this, a case of first impression, held that on the facts and conditions as alleged the doctrine of res ispa loquitur is inapplicable.

EVIDENCE — PRIVILEGE — JUDICIAL POWER — MILITARY PLANE CRASH — PRODUCTION OF REPORT OF OFFICIAL CRASH INVESTIGATION

United States v. Reynolds,
73 Sup. Ct. 528 (March 9, 1953)

This is an action under the Federal Tort Claims Act arising out of a military plane crash in which several civilian observers were killed. During the course of the trial the government had refused to produce the report of the official crash investigation, on the grounds that under 5 U.S.C. §22 (1946) it is within the sole province of the Secretary of the Air Force to determine whether there is privileged material in such report, and that the Secretary had determined that the policy of insuring collection of all pertinent information regarding aircraft accidents in order to maximize the promotion of flying safety, requires that such reports should not be released for use in litigation. The opinion of the Court of Appeals for the Third Circuit, denying this defense, is digested at 19 J. AIR L. & C. 114 (1951). The court there held that upon such motion it is proper for the district court to look into the facts and determine whether or not it was necessary for such a privilege to lie.

The United States Supreme Court has reversed the holding of the Appellate Court. In an opinion by the Chief Justice for a divided court (6-3) it was held that when a formal claim of privilege for an Air Force report of an accident is filed by the Secretary of the Air Force, under circumstances indicating a reasonable possibility that military secrets were involved, there is a sufficient showing of privilege to cut off any further demand for production of said report. The case was remanded to the district court for further proceedings.

ACCORD AND SATISFACTION — EFFECT OF PROCEEDING BEFORE CAB ON LIABILITY OF CORPORATE OFFICERS FOR IMPROPER USE OF CORPORATE FUNDS

Colonial Airlines, Inc. v. Janas,
202 F. 2d 914 (2d Cir. March 16, 1953)

Plaintiff corporation brought this action against certain of its officers to recover damages for alleged defalcations and diversions of corporate funds. Defendants based their answer on an alleged accord and satisfaction arising out of a prior proceeding before the Civil Aeronautics Board in which the Board had issued a cease and desist order requiring defendants to refrain from further violations of the Civil Aeronautics Act and the Board's Economic Regulations and Uniform System of Accounts for Air Carriers. The order was based on substantially the same facts as the complaint in this case, and had incorporated by reference the terms of an
agreement whereby defendant was required to resign as an officer and pay plaintiff $75,000. The district court granted defendant's motion to dismiss the complaint. The Court of Appeals reversed, holding that while views of the Board might be given consideration in determining the existence of an accord and satisfaction, there must be sufficient evidence as to the intent of the parties to create such, and the determination of the Board in that regard is not conclusive even though payments were made and accepted pursuant to that order.

LIBEL — REPORT CONCERNING PILOT'S QUALIFICATIONS — QUALIFIED PRIVILEGE

*Johns v. Associated Aviation Underwriters,* 203 F. 2d 208 (5 Cir. April 3, 1953)

Airline pilot brought this action for alleged libel arising out of a report promulgated by the defendant association concerning his qualifications as a flier. The plaintiff alleged that he lost his job as a pilot as the result of libelous statements in a report made to his former employer by the association, which had made said report after an investigation arising out of the request of the employer for insurance. The district court had directed a verdict for the defendant. The Court of Appeals affirmed, holding that such a report qualifiedly privileged, and that no action for libel could arise out of it in the absence of a showing of malice.

WRONGFUL DEATH ACTION — NONRESIDENT AIRCRAFT — SERVICE OF PROCESS


Passenger who boarded airline in New York City was killed by crash of plane in California mountains. Survivors brought wrongful death action against the airline by service of process on New York Secretary of State, under state statute authorizing this. The lower court opinion held this service valid. See case digest at 20 J. AIR L. & C. 117 (1953). The Appellate Division has just reversed, holding the statute unconstitutional insofar as it is applicable to accidents or collisions which did not occur within or over the territorial limits of the state or which had no causal connection to acts within or over said limits.

FEDERAL REGULATION OF AIR COMMERCE — ACCIDENT RESULTING FROM NEGLIGENCE OF PUBLIC AIRPORT PERSONNEL — WAIVER OF GOVERNMENT IMMUNITY FROM WRONGFUL DEATH ACTIONS

*Union Trust Co. v. United States,* 3 Avi. 18,177 (D.D.C. May 5, 1953)

Actions were brought against the United States for wrongful deaths of certain individuals as the result of an air collision in the vicinity of the Washington National Airport. Deceased had been passengers of a commercial airline, and the accident is alleged to have been caused by the negligence of agents of the government who were operating the airport. The United States District Court for the District of Columbia held that where the government has taken upon itself the regulation of air commerce and the responsibility of regulating the flow of traffic at a public airport, and any injury or death results as a consequence of the negligence of its servants or agents in so doing, the immunity of the government from legal
actions is waived under the Federal Tort Claims Act. Thus, where the collision of a scheduled air carrier and a military aircraft was due to the negligence of the control tower personnel at a public airport the government is liable for damages for wrongful deaths resulting from the accident.

INJURY OF CHILD BY RUNAWAY HORSE — LOW FLYING AIRCRAFT AS CAUSE — LIABILITY OF OWNER OF AIRCRAFT

Hoebee v. Howe,
3 Avi. 18,186 (N.H. Sup. Ct. May 5, 1953)

Plaintiff's minor child was injured by a runaway horse. The horse had been frightened and caused to runway by a low-flying airplane owned by defendant, and being operated by a student who had rented it. The plane was at the time flying below the minimum altitudes allowed by both state and federal statutes. The Supreme Court of New Hampshire held the owner of the plane liable for the injury thus caused. They said that both the state and federal statutes place liability on the owner, whether he is in control or not, when the plane is operated in some manner which violates other provisions of the statutes or the regulations thereunder.

AIR FREIGHT CARRIER — INTERPRETATION OF PROVISION OF CIVIL AERONAUTICS ACT AUTHORIZING CHARTER TRIPS AND SPECIAL SERVICES

Flying Tiger Line, Inc. v. Civil Aeronautics Board,
21 U.S.L. Week 2545, 3 Avi. 18,190 (D.C. Cir. May 7, 1953)

Plaintiff carrier is certificated to carry freight by air over a designated route under the provisions of section 401 of the Civil Aeronautics Act. It claims that under the last sentence of section 401 (f) of that statute, which reads, "Any air carrier may make charter trips or perform any other special service, without regard to the points named in its certificate, under regulations prescribed by the Board," it is authorized to carry passengers by charter or to perform any other special service between any points. The Court of Appeals for the District of Columbia has upheld a CAB determination that this sentence of the statute allows a carrier to make charter trips or perform any other special service without regard to the terminal points named in the certificate, but does not affect any limitation contained in the certificate with respect to the type of service to be rendered. Therefore it alone does not allow a carrier which is certified to carry freight to carry passengers.

MERGER OF AIR CARRIERS — SUPERIORITY OF CAB RULING AS TO SENIORITY OF NEW PERSONNEL BEING INTEGRATED

Kent v. Civil Aeronautics Board,
21 U.S.L. WEEK 2561, 3 Avi. 18,194 (2d Cir. May 8, 1953).

The Court of Appeals for the Second Circuit has ruled that under section 408 (b) of the Civil Aeronautics Act, the CAB has jurisdiction to direct the integration of a merged airlines' employees into the surviving airline's seniority list by giving length of service with the merged airline the same effect as length of service with the surviving airline. The collective bargaining contract between the surviving carrier and the union bargaining agent of its employees must yield to the paramount power of the Board.