Marquette Law Review

Volume 39
Issue 4 *Spring 1956*

Article 2

1956

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Repository Citation
John A. Eubank, *Jurisdictional Control of Airflight*, 39 Marq. L. Rev. 324 (1956).
Available at: https://scholarship.law.marquette.edu/mulr/vol39/iss4/2

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JURISDICTIONAL CONTROL OF AIRFLIGHT

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Through the development of airflight, the necessity of some form of jurisdictional control in that field became apparent. Because of the conflicting interest of the groundsmen on the one hand with reference to property rights in airspace and the aircraft operator on the other with relation to the right of flight,[1] this necessity became more acute for governmental authorities to take both regulatory and nonregulatory action concerning airflight. The question then arose as to what form such action should take and by what governmental authority it should be exercised. Should the Federal Government or should the States attempt to control and regulate airflight, or should there be concurrent control?

Jurisdictional control of airflight being one phase which has given much diffiiculty in the development of aeronautical jurisprudence, and about which there is not entire agreement, a background of the studies and efforts made in the past thirty-five years in connection with the subject, is appropriate at this juncture.

Wide differences of opinion have arisen among students of aeronautical law and also in the Halls of Congress[2] as to whether there should be both state and federal jurisdictional control over airflight, or

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[1] *The Right of Airflight,* John A. Eubank, DICKINSON LAW REVIEW, Jan. 1954.

[2] H.R. REP. No. 3420 and H.R. REP. No. 3491 (Lee and Reece Bills), 78th Cong. 1st Session.

solely exclusive federal control. In the broad sense of course jurisdictional control embraces both regulatory and nonregulatory control. In attempting to meet the problem constitutional inhibitions were confronted. With reference to these constitutional phases of the problem, a committee of the American Bar Association[3] in the year 1921 stated as follows:—

> "The Constitution neither expressly delegates to the United States powers over air flight as such nor prohibits them to the states; presumptively, therefore, they still reside either with the states or the people, but they do not reside with the United States nor with Congress."

Continuing further the Committee said:

> "While we also recognize that as incidental to the power to lay taxes, or to regulate interstate or foreign commerce, or to pass laws to carry out the provisions of treaties, or in the exercise of other specific powers, Congress may legislate respecting air flight, we also recognize that without an unprecedented extension of the claims of the exercise of constitutional power, and unprecedented judicial recognition of an unprecedented claim, there can be no complete control of the subject by national legislation."

Subsequently another Committee of the American Bar Association in collaboration with a committee of the Conference of Commissioners of Uniform State Laws, concluded that Congress was possibly possessed with the necessary limited powers to regulate airflight, and that a constitutional amendment was not advisable; that until the Supreme Court had determined the extent of federal control over airflight, no further consideration should be given to the question of a constitutional amendment to vest exclusive jurisdiction in the federal government.

Congressional Committees as well as committees from the War, Navy and Post Office Department together with outside agencies finally decided that the Commerce Clause of the Federal Constitution was the avenue through which airflight might be regulated by the federal government. Such clause, of course, provides that Congress shall have the power to regulate commerce with foreign nations and among the several states and with the Indian tribes. A committee of Congress having the matter under consideration, in advocating the use of the Commerce Clause as a means of regulating airflight said:

> "The committee is of the opinion that the Federal Government may assert under the Commerce Clause and other constitutional powers a public right of navigation in the navigable airspace, regardless of the ownership of the land below and regardless of any question as to the ownership of the air or the airspace itself."[4]

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[3] 46 AMERICAN BAR ASSOCIATION REPORTS, p. 498-99.

[4] *What About the Airspace?*, John A. Eubank, CANADIAN BAR REVIEW, February, 1930.

The outgrowth of the decision to utilize the Commerce Clause was the enactment of the AIR COMMERCE ACT of 1926 wherein Congress asserted jurisdiction over the airspace of the lands and waters of the United States and the Canal Zone. In preliminary discussions in Congress with reference to measures and bills covering interstate air commerce regulation and control, it was said that the intention of such measures was to guide rather than to coerce. Also it was stated that the purposes of the measures was to give to the Secretary of Commerce authority to regulate and control civil aircraft engaged in interstate commerce but with care being taken to avoid constitutional entanglements, and the intention was that intrastate flying would be left to the control of the States. Under the AIR COMMERCE ACT of 1926 jurisdicion was restricted to interstate commerce. This was in due regard to the inherent and reserved police powers of the States. With respect to the navigable airspace, Section 10 of the AIR COMMERCE ACT of 1926 stated:—

> "As used in this Act, the term 'navigable airspace' means airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority under Section 3, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this Act."

In enacting the AIR COMMERCE ACT of 1926, Congress thus utilized the Commerce Clause as the primary sources of power. Since the States delegated to Congress the power to regulate commerce, a superior right to either that of the States or individuals in the interest of interstate aerial commercial navigation was exercised. The assertion in Section 6 of the AIR COMMERCE ACT that the Government of the United States had to the exclusive control of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States, including the Canal Zone, was the exercise of a nonregulatory jurisdictional control of the airspace or the use thereof for aerial navigation. Whereas Section 10 of the Act heretofore quoted, was in a sense an exercise of jurisdictional regulatory control of aerial navigation by the Federal Government. In 1938 the AIR COMMERCE ACT of 1926 was superseded by the CIVIL AERONAUTICS ACT of 1938. Section 3 of that act provides that there is hereby recognized and declared to exist in behalf of any citizen of the United States a public right to freedom of transit in air commerce through the navigable airspace of the United States.

Regulation of air transportation in the United States is complicated because of our dual form of sovereignty, federal and state. Proof of this is found in the declaration by the Federal Government that it has exclusive sovereignty in the airspace; and on the other hand the assertion of sovereignty in the same airspace by the forty-eight sovereign

states through their adoption of legislation and other forms of governmental expression judicial and otherwise. A number of the states have expressed their state sovereignty in the airspace by the enactment of Section 2 of the UNIFORM STATE LAW FOR AERONAUTICS or similar provisions as such Section 2. This latter reads as follows;

> "Sovereignty in the airspace above the lands and waters of this State is declared to rest in the State, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of this State."

This dual form of government results in clashes between governmental authorities, by the federal government exercising its powers under the Commerce Clause of the Federal Constitution, the CIVIL AERONAUTICS ACTS and regulations thereunder and prescribed flight patterns, pursuant thereto, on the one hand, and state and local authorities by the exercise of police powers, on the other. The federal government is an entity of delegated powers whereas the states powers are inherent. All powers "not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved in the States, respectively, or to the people," reads the Constitution. (Tenth Amendment).

Fundamentally, by virtue of the Commerce Clause the United States has the power to regulate interstate and foreign air commerce (U.S. CONST. Art. I, §8). Such powers are carried out through the CIVIL AERONAUTICS ACT and amendments thereto and regulations thereunder. If the exercise of power is within the delegated powers of the Constitution, expressed or implied, then such is the supreme law of the land (U.S. CONST. Art. VI, Par. 2). On the other hand, should the exercise of such powers by federal authority be unreasonable and beyond the delegated powers, delegated to the United States in the Constitution either by express terms or by implication, and such powers infringe on the inherent powers reserved in the States, then such acts are invalid and unconstitutional.[5] In the Massachusetts case of *Smith v. New England Aircraft Co.*[6] the Court in speaking of federal and state sovereign powers, said:

> "Every government completely sovereign in character must possess power to prevent from entering its confines those whom it determines to be undersirable. That power extends to the exclusion from the air of all hostile persons or demonstrations, and to the regulation of passage through the air of all persons in the interest of the public welfare and the safety of those on the face of the earth. This jurisdiction was vested in this Commonwealth when it became a sovereign State on its segregation from Great Britain. So far as concerns interstate commerce, postal

[5] Livingston v. Van Ingen, 9 Johns (N.Y.) 507.
[6] 270 Mass. 511.

> service and some other matters, jurisdiction over passage through the air in large part was surrendered to the United States by the adoption of the Federal Constitution. Constitution of the United States, Art. 1, section 8."

Obviously, in the broad sense, the federal government cannot take exclusive jurisdictional control. Such government is one of merely delegated powers and the inherent and reserved police powers are still vested in the states with no degree of uncertainty under the doctrine of "state rights." Broadly speaking jurisdictional control of airflight is concurrent but, exclusive in some fields and overlapping in others.[7] The conflict of jurisdictions, federal and state, and the overlapping of power arises in many instances with respect to air traffic rules and the minimum altitudes of flight.[8] In the case of *Parker v. Granger,*[9] the Supreme Court of the State of California denied an attempt to apply the FEDERAL AIR TRAFFIC RULES (on the basis of the "burden theory" on interstate commerce) to strictly intrastate flight and challenged the federal government assertion of authority to regulate and control strictly intrastate aerial navigation. The Court said that the State of California alone had the authority and right to regulate and control such form of aerial navigation. On a writ of certiorari the Supreme Court of the United States refused to review the case and upheld the lower court.[10] In the court of first appellate jurisdiction[11] the decision declared:

> "The flight of the planes herein mentioned were intrastate, and under the federal constitution and the California Aircraft Act enacted in 1929 (Stats. 1929 p. 1874), the State of California was vested with exclusive power to prescribe air traffic rules to govern the operation of aircraft in flying in purely instrastate flights. No such rules had been made by the legislature when the accident herein occurred, and the conduct of the pilots and others involved in the accident would be measured and judged only under the general law and rules of negligence pertinent and applicable to the same."

When a state or a political subdivision thereof, such as a city, county, town or village, enacts legislation in the exercise of its inherent police powers for the health and safety of its inhabitants and such measure, for example, is adopted to protects the inhabitants of the community from low, dangerous flying and other objectionable acts in connection with aerial navigation authorized by federal authority (aeronautical or otherwise), and which acts would imperil the lives and endanger the property of the people of the community, then such

[7] Gardner *et al.* v. County of Allegheny, Pa. Supreme Ct., 1955 U.S. Av. Reports, 409.
[8] Parker v. Granger, 298 U.S. 644.
[9] 52 P.2d 226.
[10] 298 U.S. 644.
[11] 39 P.2d 833.

local enactment is a valid exercise of the police power of the sovereign state as represented by the local community which is a political entity as a subdivision of the soverign state. This is true because the local action is a measure to protect the community from unlawful and unconstitutional acts authorized by federal authority. A long line of decisions of the courts, known as the "Railroad Cases" have upheld such state and local action. In *Crutcher v. Kentucky*,[12] it was stated that,

> ". . . states may make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce."[13]

Therefore under the guise of a delegated power in the Federal Constitution, federal authority cannot destroy "life, liberty or property" or interfere with "the pursuit of happiness" guaranteed to the people in the "Bill of Rights," embodied in the first Ten Amendments of the Federal Constitution and in the Declaration of Independence. Moreover the Ninth Amendment of our fundamental federal law states that "the enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." This and other Amendments were adopted as safeguards to prevent federal encroachments on the fundamental rights of the people.

Very definitely the basis for the exercise of police powers by the state or local government must be a very sound and substantial one. It cannot be founded on caprice or be a frivolous reason. Infrequent low flying or occasional objectionable occurrences or other minor annoyances from the flight of aircraft or the commonly accepted inconveniences incident to airport operations generally experienced by nearby residents to flying fields, are wholly insufficient to justify invoking police powers and enacting legislation against the flight of aircraft generally or in connection with the operation of airports. In any new activity or development, particularly in this technological age, people must expect to be subject to some inconvenience as the result thereof.[14] In the rapid tempo of present day life, the population accepts certain conditions, inconveniences and annoyances if you will, which would not be tolerated in the comparatively leisurely life of a generation or two ago. To invoke the police powers of a state or local government there must be a pressing need, a real emergency as the result of a situation which is

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[12] 141 U.S. 47.
[13] See also All American Airways v. Village of Cedarhurst, 201 F.2d 273.
[14] *Pro Bono Publico Doctriné*, Kuntz v. Werner, 257 Wis. 405.

alleged is a menace and which threatens the health and safety of the people and endangers their property.[15]

These conflicts in the jurisdictional control of the subjacent airspace in connection with flight of aircraft has for the past quarter of a century been engaging the attention of students of aeronautical jurisprudence. Fortunately these clashes between federal and local authority can in a large measure be prevented. Nevertheless the problem is a serious one.[16]

A typical example of clashes between national and state sovereignties' jurisdictional control of airflight arose in the case of *All American Airways et al v. Village of Cedarhurst et al.*[17] In this matter the Village of Cedarhurst enacted an ordinance prohibiting flight of aircraft over the community at an altitude less an 1,000 feet. Airlines and others using Idlewild Airport known as International Airport, and which airport was close to the Village of Cedarhurst, sought a permanent injunction against the enforcement of the enactment, pleading that the flight patterns authorized by federal authorities for those using the airfield required flights as low as 518 feet. The United States Circuit Court of Appeals for the Second District declared that it was unable to resolve the issues without the benefit of a full trial and record, and continued the injunction against enforcement of the ordinance, pending the trial of the issues. In a well balanced and discerning opinion, Justice Clark declared in part, as follows:

> "We think it clear there is sufficient question of the validity of the Cedarhurst Ordinance as against the supremacy of a national power so that we are in no way justified in now declaring it valid and overturning the injunction on this score.
> "On the other hand, we do not think we should take the position urged by the plaintiffs, and substantially followed by the District Court, of declaring the ordinance clearly invalid at this preliminary stage of the proceedings.
> "Nor do we feel at this stage we should say that the Village does not possess authority under the police power, N.Y. Village Law, Sec. 90, 93, to prohibit repeated trespasses or nuisances over the land of its inhabitants, if, in fact, they exist.
> "Here there is no question of the power of the Village to adopt ordinances for the public health and safety of its inhabitants and protection and security of their property. N.Y. Village Law, Sec. 90, 93 *supra;* and there can be no doubt, as none is suggested, of the meaning of the ordinance and its direct clash with the federal regulations as interpreted by the plaintiffs.
> "It follows, therefore, that the injunction should be continued *pendente lite* and that no final decision should be made at this time, as to either the validity of the claims set forth in the de-

[15] *Conflict In Jurisdictions In Control of Airflight,* Prof. John A. Eubank, U.S. AIR SERVICES, May 1953.
[16] See Greater Pittsburgh Airport Case, 1955 U.S. Av. Reports, 409.
[17] 201 F.2d 273, 1953 U.S. Aviation Reports, p. 36.

fendants' counterclaim or their eventual impact upon the validity of the ordinance itself."

The opinion concluded with the very significant statement that in view of the importance of the issues involved and the potentially far-reaching effects of a decision, the case, including the counterclaim should proceed to trial as rapidly as possible and the decision should of course rest upon the complete record.

Subsequently the case came to trial. In the meantime the plaintiff All American Airways changed its name to Allegheny Airlines. The Court rendered its decision on June 27, 1955.[18] It was held that the ordinance of the Village of Cedarhurst was unconstitutional and void. Judge Bruchausen of the District Court wrote an exhaustive but somewhat rambling decision. Quoting from *Northwest Air Lines v. Minnesota,*[19] the court stated that Congress has recognized the national responsibility for regulating air commerce and that federal control is intensive and exclusive, and that local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.

The Court also declared that while the exercise of the Congressional power to regulate commerce does not prevent the States from exercising their inherent powers outside of the fields preempted by Congress, it does preclude the States from regulating those phases of national commerce which because of the need of a national uniformity, demand that regulation, if any, be prescribed by a single authority. Again quoting from another case, *California v. Zook,*[20] a FEDERAL MOTOR CARRIER ACT case, the Court declared that absent congressional action, the familiar test as to state or national power over interstate commerce is that of uniformity versus locality, and if a case falls within an area in commerce thought to demand a uniform national rule, then state action is struck down. If the activity is one of predominantly local interest, state action is sustained. But the court in continuing its quotation from the *Zook* case said that "more accurately, the question is whether the state interest is out-weighed by a national interest in the unhampered operation of interstate commerce." The foregoing may be sound, practical, progressive, realistic and expedient legal philosophy but it is certainly stretching provisions of the Federal Constitution.

Along more realistic lines, the court declared that it is apparent that Congress, by the enactment of the 1938 AERONAUTICS ACT, adopted a comprehensive plan for the regulation of air traffic in the navigable airspace.

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[18] 1955 U.S. Av. Reports, p. 59.
[19] 322 U.S. 292, 303, 1944 U.S. Av. Reports, p. 1.
[20] 336 U.S. 725.

The Court upheld the plaintiff's contention that the legislative action by the Congress together with the regulations, adopted pursuant thereto, have regulated air traffic in the navigable airspace in the interest of safety to such an extent as to constitute preemption in that field. "The States," said the Court "including the Village of Cedarhurst, are thus precluded from enacting valid contrary or conflicting legislation."

It was declared in the decision, that the fact that a number of States had legislated in the field of air traffic regulation was no indication that Congress did not intend to preempt the field, but that on the contrary such state action pointed toward an intent of Congress of preemption in the interest of uniformity as a prerequisite of safety. If there was lack of uniformity there might be some soundness in this statement. Aeronautics and students of aeronautical jurisprudence have been striving for years for uniformity in air traffic regulation. Notwithstanding legislation by the forty-eight sovereign states, a large measure of uniformity was achieved.

In speaking of ownership in airspace, the court in referring to *U.S. v. Causby,*[21] reaffirmed in principle the Doctrine of the Airspace Zone of Effective Possession.[22]

It would be well if this case was carried to the United States Supreme Court for final determination. The issues involved are too important, too vital to risk any possibility of having conflicting decisions in different District Courts.

In the *Greater Pittsburgh Airport Case* it was held that Congress has not preempted the field of navigable airspace below or outside the minimum safe altitudes of flight, and the State Courts have the jurisdiction and power which Congress has neither limited nor destroyed to enjoin trespasses arising from frequent interstate or intrastate flights over a landowner's property below or outside the minimum safe altitudes of flight. In part the court stated that landsmen fraught with imminent peril cannot jeopardise their lives while they wait for a solution by the Supreme Court of the United States or of the Supreme Court of Pennsylvania of all the intricate legal problems involved—that would be placing too large a price on abstract theory and procedure and too small a price on life.[23]

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[21] 328 U.S. 256.

[22] *The Doctrine of the Airspace Zone of Effective Possession,* John A. Eubank, BOSTON UNIVERSITY LAW REVIEW, June 1932, AMERICAN BAR ASSOCIATION JOURNAL, December 1932.

[23] Gardner et al. v. County of Allegheny, Trans-World Airlines, Inc., et al., 1955 U.S. Aviation Reports, p. 409 (Pa. 1955).