LEGISLATIVE PROGRAM FOR AVIATION

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BACKGROUND OF EXISTING LEGISLATION

Federal legislation dealing with aviation has been remarkably successful, particularly when one considers the dynamic character of the industry with which Congress was dealing in enacting these statutes. There have been few more difficult drafting jobs than those presented to the draftsmen of our Federal aviation legislation for no one has been able to forecast the future of aeronautical development for a period more extensive than a few months. Notwithstanding this, two major regulatory statutes have been adequate to guide, promote, and control the development of aviation in this country from its earliest beginnings to the present advanced state when aircraft cross the violent North Atlantic with the regularity and almost the frequency of trolley cars.

The first of these statutes was the Air Commerce Act of 1926.1 Its preparation must have caused its authors many anxious moments. The primary purpose of the statute was to provide for the regulation of aviation from a safety standpoint. While the authors drew heavily upon the general principles of our shipping laws, they very wisely made the Air Commerce Act much more general in its terms. The statute provided for the examination and inspection of aircraft and the issuance of certificates of airworthiness for them. It authorized the issuance of certificates attesting the competence of airmen, such as pilots and mechanics. The promulgation of air traffic rules was authorized and the registration of aircraft provided for. All this was done in very general terms with the Secretary of Commerce given broad powers of regulation and broad discretion in determining the airworthiness of aircraft and the competence of aviation personnel.

The decision to regulate in this way was a wise one because the administrative agency was thus empowered to adjust its regulations to this rapidly developing field. The Secretary was able to issue airworthiness certificates for the wood and fabric airplanes of the day of the Act's enactment and was able to follow the development of the aircraft during succeeding years until a decade later when the DC-3, even now the standard airline airplane, was given its certificate. With very minor amendments in the law, the administrative agency was able to supervise and regulate the airlines as they developed from the carriage of mail in single-engine aircraft to the inauguration of the transpacific operations in huge flying boats.

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Finally, however, the lusty infant burst its seams. By 1938 the Air Commerce Act of 1926 was no longer adequate and the Civil Aeronautics Act of 1938 was proposed and passed. Its major contribution to the regulation and development of aviation was the inauguration of economic regulation. This subject had not been touched in the Air Commerce Act of 1926. While airlines under the latter Act were required to meet strict safety requirements, no effort had been made to impose upon them the traditional public utility regulation. The Civil Aeronautics Act accomplished this and apparently just in time for the evidence presented to the Congress while that Act was being considered clearly showed that this nation's airlines were in a chaotic financial state. It appeared that without relief a large part of our airline industry was doomed to failure.

The new Act provided economic regulation for the common carrier by aircraft who carried mail or participated in the transportation of passengers or cargo moving in interstate commerce. A new independent agency, the Civil Aeronautics Authority, was created to perform this task and almost all other governmental functions relating to aviation. Air carriers were required to secure certificates of convenience and necessity from the Authority as a condition precedent to operation. Their rates were subject to control, their accounts were required to conform to specified standards, and agreements among them were required to be filed. The Authority was given the power to establish the rates the carriers would be paid for transporting United States mail.

While a number of Federal statutory provisions relating to aviation were left unaffected by the enactment of the Civil Aeronautics Act, that Act was virtually a code of Federal aviation law, made up partially of new legislation, such as the economic regulation just described, and partially of revised and modernized provisions drawn from previous laws. The Act was wholly successful in curing the evils which had impelled its enactment. The years thereafter saw the airlines recover fully from the nearly disastrous financial condition in which they had found themselves. Beyond these direct benefits the Act proved to be an inspiration to the development and progress of aviation for it made known to the industry, the state and local governments, and to the public that the Federal Government recognized the value of aeronautics to this country's commerce, prestige, and security and was determined to provide for the general welfare through its continued development.

Notwithstanding the unquestioned excellence of the present law, its authors did not, in 1938, perform the impossible. The legislative needs of the industry were not fully recognized and met. Consequently, Congress has turned again to the con-
consideration of aviation legislation and seeks further to improve the Federal law so that aviation can, without legislative impediments, continue its spectacular development.

No effort will be made here to detail each small amendment to the Civil Aeronautics Act that is required. Most of them are minor clarifications and not of sufficient significance to justify discussion. There are three legislative requirements for an aviation program at this time which are of such overwhelming importance that they justify extended discussion. The relationship between the Federal and State Governments in the regulation of aviation must be clarified. The status under Federal law of contract carriers by air must be made plain. Multiple taxation of air carriers must be avoided.

**State and Federal Regulation**

The division of jurisdiction to regulate aeronautics between state and Federal governments has long been discussed and many efforts have been made to settle this question by Federal statute. As early as 1913 legislation was introduced by Senator Penrose and Congressman Vare, under which the regulation of flight everywhere in the air space over the United States would have been the exclusive responsibility of the Federal Government. Thereafter, in the years preceding the enactment of the Air Commerce Act of 1926, there was much discussion in Congress and elsewhere of the wisdom of providing for exclusive regulation of aviation by the Federal Government. As a matter of fact, it appears that in Sections 3(e), 10, and 11(a)(5) of the Air Commerce Act of 1926 the Secretary of Commerce was authorized to adopt and enforce air traffic rules applying throughout the navigable air space. This question arose again when the bills, which later became the Civil Aeronautics Act of 1938, were pending before Congressional committees. It was agreed, in a discussion before the Senate Committee on Interstate Commerce, that in aviation it would be necessary to forget state lines, that it was impossible to have “home rule” in aeronautical regulations. In these discussions the similarity between aviation and radio was mentioned and it was contended that since radio is generally recognized to be a matter of exclusive Federal concern, the regulation of aeronautics should be similarly treated.

In recent years, since the enactment of the Civil Aeronautics Act of 1938, a number of proposals have been made in Congress to strengthen further the Civil Aeronautics Act in this respect. A bill which was introduced in 1943 by Congressman Lea of California, Chairman of the House Interstate and Foreign Commerce Committee, provided for virtually exclusive regulation of aeronautics in all its aspects by

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4 No effort is made here to deal with liability legislation which is of vital significance to air transportation, since that subject is being dealt with elsewhere in this symposium. See Reiber, *Some Aspects of Air Carriers' Liability*, supra, p. 524. Also, no effort is made to discuss legislation necessary to implement international aviation arrangements since the need for, and exact character of, such legislation has not been fully developed. See, in this symposium, Waldo, *Sequels to the Chicago Convention*, infra p. 609.


6 *Hearings before Committee on Interstate Commerce on S. 3659, 75th Cong., 3d Sess. (1938), 10, 11.*
the Federal Government. Mr. Lea has subsequently introduced similar legislation, though much more limited in scope, pending at the date of this writing.

In order to understand the need for and the effect of this proposed legislation it is necessary to consider safety regulation of aeronautics separately from economic regulation. Also, the discussion of safety regulation naturally breaks down into that relating to private flying and that relating to the safety regulation of commercial operators.

The above mentioned pending bills would extend Federal jurisdiction to cover all private flying. They also provide that, without the consent of Congress, no state regulation may be imposed upon private flying which hinders, burdens, or interferes with the conduct of interstate air navigation or which impairs the uniformity under which such air navigation is conducted. These bills also give the consent of Congress to the enforcement of Federal private flying regulations by state agencies and state courts.

Thus, they provide for the establishment of uniformity of regulation throughout the United States by extending the jurisdiction of the Civil Aeronautics Board to all flying, and at the same time permits the states to deal with private flying matters of purely local concern without hindrance from the Federal Government.

In addition, the bills would lay the groundwork for a development which is very badly needed. It is essential that flying rules be uniform throughout the United States, but it is also essential that those rules be enforced. If that is to be accomplished it seems clear that the great enforcement agencies of the states must be called in to aid the Federal Government in this effort. It is interesting to note that in 1926 the House Interstate and Foreign Commerce Committee recommended to the House, and the House adopted, a bill which was drawn on this same theory. The Federal Government was to make uniform flying rules for the entire country but give consent to the enforcement of these rules by the states. The provision for uniform flying rules was preserved in the final act but the enforcement section was dropped out in conference.

Actually, by extending the jurisdiction of the Federal Government to regulate private flying from a safety standpoint at any place within the United States, the bill merely constitutes a clarification of existing law. The Federal authorities may now impose this type of regulation not only upon interstate and foreign aviation but also any flying on a civil airway and any flying which directly affects or may endanger safety in interstate or foreign air commerce.


The extent to which State officers and State courts can participate in the enforcement of Federal statutes is a subject sufficiently difficult and significant to merit very extensive treatment. It may be said here that the State and Federal enforcement agencies could cooperate very effectively in the enforcement of Federal aviation laws and regulations with very little, if any, additional State law. See, in this connection, Claffin v. Houseman, 93 U. S. 130 (1876); Miller v. Municipal Court of the City of Los Angeles, 22 Cal. (2d) 818, 142 P. (2d) 297 (1943); Indiana ex rel. United States v. Killigrew, 117 F. (2d) 863 (C. C. A. 7th, 1941). These decisions contain an excellent review of the decided cases on this subject.

S. 41, 69th Cong., 2d Sess. (1926) as passed by the House of Representatives April 12, 1926.
The constitutionality of the Federal regulation of intrastate flying on a civil airway, as provided for in the Civil Aeronautics Act, was recently upheld in the Rosenhan case. The validity of Federal regulation of intrastate operation of a civil airway received judicial approval in the Drumm case, which arose as follows: Acting under the provision which grants the Civil Aeronautics Board power to regulate flying which "directly affects or may endanger safety in" interstate or foreign air commerce, the Board, shortly before the war began, promulgated a regulation which required all pilots and aircraft flying anywhere within the United States to have Federal safety certificates. Prior to that time this requirement had been limited to operations on the civil airways, or in interstate or foreign commerce. In issuing this regulation the Board found that any flying within the United States directly affected, and might endanger, safety in interstate or foreign air commerce.

The Board's power to adopt and enforce this regulation was challenged in the Federal District Court of Nevada in the Drumm case. In that case the defendant pilot had operated an aircraft without a Federal certificate while he himself had no Federal certificate, but had stayed away from the civil airways and had not operated commercially across state lines. Consequently, the question was raised directly as to whether the Federal authorities could control intrastate flying off the civil airways. On May 1, 1944, a decision was handed down in this case by District Judge Frank H. Norcross, fully sustaining the findings of the Board and the regulations issued in accordance with these findings. Thus, the power of the Federal authorities to regulate flying anywhere in the United States, whether intrastate or interstate or on or off the civil airways, has received judicial approval. Consequently, the proposal made in H. R. 674 and H. R. 3383, insofar as it affects private flying, constitutes nothing more than a clarification of existing law, having as its purpose the elimination of further litigation.

Now as to the proposals contained in this legislation with respect to the safety regulation of commercial operators: H. R. 3383 proposes that all air carriers shall be regulated exclusively by the Federal Government and prohibits the imposition of safety regulations upon such carriers by the states without the consent of Congress. From this requirement are excepted those commercial operators who operate wholly within a metropolitan area and those who do not carry any interstate traffic.

This proposed legislation relies for its validity upon the responsibility of Congress to regulate interstate and foreign commerce and to protect it from burdensome state legislation and to promote the free flow of such commerce throughout this country and the world. Consequently, Congress must pass upon two issues: First, whether the enactment of such legislation is required as a matter of public policy, and, second, whether, upon the basis of all the facts, it is necessary to take such action in order to discharge this responsibility to protect interstate and foreign commerce. These two questions actually merge and become one, for an affirmative

answer to either of them requires an affirmative answer to the other. Congress has wide discretion in determining what measures are necessary in order to solve problems affecting interstate and foreign commerce. Thus, the factual situation relating to the regulation of aviation and the possible significance of state regulation must be examined to determine whether sound public policy requires the enactment of H. R. 3383 or similar legislation.

We are necessarily led to inquire as to the extent of Federal regulation of aviation under present law. This is best illustrated by considering the regulations applicable to air carriers. All of their airplanes must have certificates of airworthiness issued by the Federal Government. Before this is done, engineers and test pilots for the Government have been over the drawings for the airplane, they have tested the material and various components of the airplane in order to make sure that it is strong enough. They have flight-tested the airplane for airworthiness. Then when the air carrier acquires the airplane it must be presented to an air carrier inspector, who must approve that specific airplane for use on the particular route proposed. After this is done the carrier is required to maintain the airplane in accordance with the most strict and detailed regulations. He is told the number of hours he can operate the engines between overhauls. He is told when particular parts must be changed. He is told when these engines must have periodic checks, and the character of these checks. The carrier is told when he must overhaul the airplane, and when each component of the airplane must be renewed. Maintenance facilities must be approved by the Government before the carrier can operate.

The same things said about the original certification and maintenance of the airplane and engines are equally true of instruments, radio, and propellers. If a mechanical failure or mishap of any kind occurs, the carrier must quickly report it to the Government. And lastly, if any question arises as to the safety of airline equipment, it can be grounded by order of the Government upon a moment’s notice. The operation of the entire airline can be stopped with the snap of a finger.

Now as to other airline personnel: All first pilots must hold airline transport pilot certificates, which can be secured only after the most gruelling of physical examinations and written and flight tests. The same is true of co-pilots, except that they may act as co-pilot although holding only a commercial pilot certificate with an instrument rating, the qualifications for which are almost as strict as those for the airline pilot certificate. Even this does not actually qualify them to fly the airline. They must be checked and approved by a Government inspector, and they must fly many familiarization runs over their routes before they are permitted to fly them.
with passengers. Then when they are qualified they are constantly subject to check by air carrier inspectors, and must have periodic flight and physical examinations. Dispatchers must go through much the same process in order to serve in that capacity, and they also must be individually approved for their particular segment of the route. A large part of the maintenance personnel of an airline must pass rigid examinations and obtain certificates.

The equipment to be carried on the airplane is very carefully prescribed, and if any required item of equipment fails, the airplane must be landed at the first available place, and cannot go forward until that equipment is repaired. Methods of operation are prescribed in great detail. Traffic control procedures designed to permit the Government air traffic control operator to know where airplanes are at all times must be complied with, and in coming into airports under instrument conditions carefully defined let-down procedures must be followed.

Airports are examined by air carrier inspectors and the airline can be ordered to stop using an airport at a moment's notice. Weather minimums are carefully prescribed for each airport as are the gross weights at which airline airplanes can land and take off.

So much for airline safety.

Economic regulation is almost equally detailed. Before an airline can start an operation it must prove the necessity for the operation to the Civil Aeronautics Board and convince the Board that it is fit, willing, and able to perform the service. Tariffs must be filed, including the rates and regulations applicable to airline service, and these rates and regulations are subject to the constant supervision of the Board. An air carrier's accounts are prescribed by the Board, and its books are audited periodically to make sure that the prescribed accounting system is complied with. Almost all contracts entered into among carriers must be filed with, and approved by, the Board. Any interlocking directorate in which an airline is involved must be approved by the Board, and any consolidations, mergers, or acquisitions of control affecting airlines must likewise be approved. The Board has power to prevent unfair competitive practices, and generally to inquire into the management of any airline. The Board may at any time demand and secure special reports from air carriers, and does require regularly the submission of monthly and annual financial and operating reports. Airline operations are generally subject to the prescribed economic regulations of the Board.

The safety and economic regulation which has just been sketched briefly is not objectionable. It has been generally good for the industry. However, there appears to be no need for further regulation by the states. No good, and much harm, can result to the air transport industry from piling duplicating and conflicting state regulation on top of that prescribed by Federal law.

It is sometimes urged that before Congress would be justified in assuming complete jurisdiction over the regulation of aviation there should be some indication that duplicating and conflicting state regulation would result from failure of Congress
so to act. No proof should be required that regulations promulgated by forty-eight independent state agencies would lack uniformity and would conflict not only with Federal regulations but also those of other states. If regulation were undertaken by the states, presumably every effort would be made by them to maintain the desired uniformity. However, it seems clear that it would be literally impossible for them to do so for there is no machinery through which each detailed regulatory action could be coordinated. Even if there were, such machinery would necessarily be so cumbersome as to prevent the speedy action required in the regulation of so dynamic an industry as aviation. It is not necessary, however, to speculate as to whether state regulation would be uniform as between states and with the Federal Government, for the past two years have seen demonstrations of what might occur if state regulation of aviation is generally accepted.

In the spring of last year the Public Utilities Commission of Colorado proposed a set of regulations for imposition upon air carriers operating within that state. They filled forty-three single-spaced typewritten pages, and they covered both the operation of interstate and intrastate operators in the greatest of detail. They prescribed that ash containers should be installed in passenger cabins and pilot cockpits, and they required that all pilots carry flashlights with them.

The Public Utilities Commission proposed to designate the route over which an air carrier should fly through the State of Colorado. Since the Federal Government does that also, the regulation raised a substantial question as to what would occur if the conclusion of the Federal authorities and the state authorities should differ in this instance.

The Public Utilities Commission was to determine whether or not the air carriers' aircraft were safe. The Federal Government does that also, thus presenting another possibility of conflict.

The Public Utilities Commission would determine whether the members of the crew of the aircraft were competent to perform their duty. The Federal Government does that also, and a disagreement between Federal and state authorities in this instance would make impracticable airline operation into and out of the State of Colorado. The Commission also reserved the right to determine the number of crew members to be employed in carrying intrastate traffic. The Federal Government now prescribes that air carrier aircraft shall have a pilot and co-pilot. If Colorado determined that to this crew should be added a radio operator and a flight engineer, aircraft operating into Colorado would have to be specially designed in order to provide space for this additional personnel.

The Public Utilities Commission was to prescribe the equipment which must be carried on air carrier aircraft. Here is a very broad field for conflict of jurisdiction.


15 These regulations were discussed in detail by the Hon. A. L. Bulwinkle, member of Congress from North Carolina, in a speech before the House of Representatives. 79 Cong. Rec., May 23, 1944, at A2702.
between the Federal and state governments, for the Federal regulations are extremely detailed and specific on this subject.

Another direct conflict between state and Federal regulations appearing upon the face of the proposed Colorado regulations was that which would have required the pilot to take up the tickets of passengers. If this regulation were enforced with respect to air transportation, the pilot on a flight carrying intrastate passengers would be required to be in two places at once, for the Federal regulations require the pilot to be checking his controls, his weather, and the traffic situation when the passengers are getting on board.

These are a few of the difficulties with which the interstate air carrier would have been faced in attempting to operate under the Colorado regulations, and Colorado is just one state. One of the major airlines operates through twenty-three states. As can be readily seen, the imposition of this type of regulation by each one of those twenty-three states would have made the continued operation of this airline impossible, or at least so expensive that the benefits of air transportation would have been denied to all but a wealthy few. The regulations proposed by the Colorado Commission have not been issued in their final form. However, they serve as an example of what may happen to the air transport industry unless protective legislation is passed.

Now, as to economic regulation. H. R. 3383 would provide exclusive economic regulation of air carriers by the Federal Government, and would prohibit the establishment of such regulations by the states without the consent of Congress. Here again, operators who engage in business solely within metropolitan areas, and operators who do not participate in interstate traffic, would not be covered and would be subject to such regulation as the state saw fit to impose upon them.

The impossibility of effecting uniformity in economic regulation has also been recently demonstrated. The National Association of Railroad and Utility Commissioners is sponsoring in State Legislatures a so-called uniform bill, providing for economic regulation of air carriers operating within a state. It does not limit its regulation to the purely intrastate operator. It also applies to the interstate carrier if that carrier transports intrastate traffic within the state. The interstate carrier would have to secure a state certificate to carry intrastate traffic. Its intrastate rates would be subject to control by the state public utilities commission, and even its interstate rates would be subject to investigation by the commission. It would be subject to suit before the state commission for reparations. It would have to file tariffs containing its intrastate rates and time tables showing its schedules.

It could be forced to extend its lines within the state, and could not abandon an operation without approval of the commission. It would have to file surety bonds to guarantee payment of liabilities, and the commission could force it to establish through service and joint rates with other air carriers. It would have to keep an accounting system prescribed by the state commission, and make such reports to the commission as the commission required. The state commission would have even
more control over service than the Civil Aeronautics Board. If the commission decided that the airline was not operating enough aircraft or enough schedules between two points, the airline could be ordered to put on more service. It could be ordered to add stops, and to change its schedules, and could be "called on the carpet" by the commission for failing to maintain schedules in a way the commission thought proper.

It should take no argument to demonstrate that this type of regulation could not be kept uniform throughout the twenty-five or thirty states through which a particular airline might be operating, but even if it were possible to maintain the uniformity of these regulations the burden of complying with the same regulations twenty-five or thirty times would be staggering to the interstate air carrier. Certainly the Constitution does not deny the Congress the right to protect interstate commerce against a threat of this magnitude, while at the same time imposing upon Congress the responsibility for looking after the welfare of persons engaged in such commerce. But more than this, if state regulatory action cannot be guided by Congress in this instance, it would be quite impossible for Congress to insure the execution of the policies relating to interstate and foreign commerce which it clearly has the power to adopt.

The proposal to give the states power to deny to the interstate carrier the right of carrying intrastate traffic is directly contrary to the principle upon which the Civil Aeronautics Act of 1938 was enacted. That Act states in Section 2 that Congress regards it as being in the public interest that there be developed an air transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the postal service, and of the national defense. In Section 2 Congress also declares to be in the public interest the regulation of air transportation in such manner as to foster sound economic conditions in such transportation. The Civil Aeronautics Board was directed to carry out these policies, but if the states are permitted to grant or deny the right of the interstate carrier to carry intrastate traffic, the Board will not be able to carry these policies into effect. The Board has always endeavored to grant certificates only when the new service was economically justified, and when it provided a proper segment of the national air transport system. The presence or absence of available intrastate traffic has an important bearing upon whether or not a particular route is economically justified, and if the Board cannot be sure that the carrier will have the right to carry intrastate traffic it can never be certain whether or not it is carrying out the policy of Congress. If the route is authorized and the right to carry intrastate traffic is denied, the expense of carrying these empty seats will have an important effect upon the entire

16 During the first six months of 1945, 44 State legislatures met in regular session and the Railroad Commissioners' proposed uniform bill, and bills similar to that proposed by the Railroad Commissioners were introduced in twenty-four of them. Even upon introduction in the legislature very few of these bills were exactly like that proposed by the Commissioners, thus indicating the impossibility of securing uniformity even in the terms of the law itself without regard to its administration. These bills passed in only three of the States and in those three interstate air carriers were excepted from the operation of the legislation.
system of the interstate carrier. With these possibilities in mind, it certainly cannot be argued that by participating in this type of regulation the states are regulating a purely local matter. Their regulations will have a sweeping national effect.\footnote{This consideration, as well as others referred to in this article, has been emphasized by Mr. Oswald Ryan, member of the Civil Aeronautics Board. See Ryan, \textit{Economic Regulation of Air Commerce by the States} (1945) 31 Va. L. Rev. 479, 522.}

The same thing can be said of the rate regulation proposed in the Railroad Commissioners' bill. As has been pointed out, the largest of the domestic air carriers operates in twenty-three states. If the bill is adopted generally it would be necessary that this airline file tariffs in twenty-three states, that it participate in reparation cases and in rate proceedings in each one of those states, and that in addition to the rate proceedings related to intrastate rates, it would also be required to participate in investigations of its interstate rates. The mere administrative cost of submitting to such regulation would be enormous. But quite aside from the administrative expense of filing all of this material and participating in all of these proceedings, the Civil Aeronautics Board certainly could not be held responsible for the continued economic soundness of the air carrier if all of its intrastate rates were subject to adjustment by a large number of state commissions with entirely different ideas as to what the proper principles of rate-making might be. Even if it be assumed that the Civil Aeronautics Board might have jurisdiction to correct discriminations arising from intrastate rates fixed by a state, the administrative litigation involved would be overpowering.

These two forms of state regulation are the best examples of interference with Federal policy, but other matters covered in the proposed economic regulatory bill, when taken in the aggregate, loom just as large. The power in the state commission to require the carrier to extend service, and its power to refuse permission for abandonment, can have important effects upon the entire airline system, as can the power to require the establishment of through service and joint rates. The power of the state commissions to prescribe airline accounts contains obvious possibilities of conflict. While the bill attempts to answer this in advance by requiring as much uniformity as possible between the state and Federal accounting systems, it is certainly unlikely that twenty-three groups of men, acting independently, could approach uniformity even under this requirement. The monthly and annual financial and operating reports which must be filed with the Civil Aeronautics Board are regarded by some as unduly burdensome. If they are multiplied twenty-three times, the full time of many employees will be devoted to the preparation of reports. Moreover, if the states were to adopt the Federal reporting requirements, and the Board should determine to alleviate their severity, it would be necessary to go from state to state, urging the state commissions to follow the Board's example.

The service regulation proposed in the new bill has already been discussed. It seems clear that the net effect of all these requirements in each state through which an airline operates would be to deprive Congress of all power to foster and
supervise the development of air transportation in this country, and turn that responsibility over to forty-eight state commissions.

So much for the factual justification of H. R. 3383. The constitutional validity of the legislation now comes into question. The Congress by this legislation would be asserting the right to regulate the intrastate business of the interstate air carrier and it has been argued that this would constitute an invasion of the states' power to regulate their internal commerce.18 The validity of the legislation can be sustained on a number of grounds. Reference need only be made to those decisions of the Supreme Court relating to Congress' control over the navigable waters to find support for the legislation. In this field the plenary power of Congress has long been recognized even though the Constitution does not specifically state that all commerce on the navigable waters is subject to the jurisdiction of Congress. The basis for the complete Congressional power is found in the commerce clause and arises because such waters "are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted..."19 The power of Congress with respect to the navigable waters was further explained and amplified in the Appalachian Power case.20 No distinction can be found between the navigable air space and the navigable waters for the air space is equally susceptible of use as a highway for commerce. This concept was particularly well stated in the concurring opinion of Mr. Justice Jackson in the Northwest Airlines case:

"Students of our legal evolution know how this court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. Gibbons v. Ogden, 9 Wheat. 1, to United States v. Appalachian Electric Power Co., 311 U. S. 377. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time."21

Even without reference to the analogy between the navigable air space and the navigable waters, Congressional regulation of intrastate air commerce is fully sustained by the long established constitutional doctrine that Congress may regulate intrastate commerce if it is necessary as a practical matter in order to protect or promote interstate commerce. This concept is exemplified in the Southern Railway decision.22 There the court held that Congress could regulate the use of safety appliances on railroad cars moving wholly intrastate. This conclusion was reached on the theory that since intrastate cars and interstate cars would move over the same tracks the regulation of the former was essential in order to carry out the purpose of the statute insofar as it related to interstate operations. This concept of Congressional power also affected the decision in the Rosenham case, wherein the court

18 Hearings, supra note 14, at 67 (testimony of Mr. Benton).
19 The Daniel Ball, 10 Wall. (U. S.) 557, 563 (1870).
22 Southern Railway Co. v. United States, 222 U. S. 20 (1911).
upheld that provision of the Civil Aeronautics Act of 1938 which authorizes Federal regulation of intrastate aircraft operations if they are on a Federal civil airway and stated:

"The appellant contends that on a trial of the case he could have shown that the flight of his aircraft in the designated civil airway did not in any way endanger or interfere with safety in interstate commerce. We may concede that he could have shown that at the time the aircraft in question was in flight through, or upon, the designated airway no other aircraft was within dangerous range, but he cannot avoid the incidence of the Act by showing that these particular flights did not actually endanger interstate commerce. Congress has not seen fit to limit the question of safety in these circumstances to a manifestation of actual danger, rather it has sought to eliminate all potential elements of danger. . . . We conclude that such statutory precautions do not transcend the powers granted to the Congress over interstate commerce, or unduly encroach upon the powers reserved to the sovereign states."23

The facts involved in these decisions bear primarily upon safety regulation and it might be argued that while exclusive Federal safety regulation would be valid, exclusive economic regulation of air transportation would not. There is no validity in this argument for, as has been fully demonstrated by the factual statement made previously in this discussion, enormous burdens could be imposed upon interstate air carriers by proposed state economic regulation and the Congressional policy governing the development and regulation of air transportation could be completely thwarted. The Supreme Court has recently passed upon a situation similar in principle to the one under discussion here and has upheld the exercise of Federal power. Wickard v. Filburn24 involved the constitutional validity of the quota provisions of the Agricultural Adjustment Act applicable to the growing of wheat. The court held that under the commerce clause, Congress may restrict the right of a farmer to grow wheat even for his own consumption on his own farm, and stated in explanation of this conclusion that:

". . . this record leaves us no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect of defeating and obstructing its purpose to stimulate trade through increased prices."25

Thus, the Filburn case leaves no question but that Congress is not only empowered to establish policies with respect to the development and regulation of interstate air transportation but is also given such additional powers as necessary to make certain that these policies can be fully executed.

The preceding discussion justifies the conclusion that Congress may assume full power to regulate aviation even though in some instances it may be intrastate in character. The pending H. R. 3383 goes further than this, however, and states specifically in Section 7(b) that the states shall not regulate air carriers or impose regulation upon other branches of aviation which would hinder, burden, or obstruct interstate or foreign air commerce. This provision, though rather unique in state-

22 Supra note 11, at 935. 24 317 U. S. 111 (1942). 25 Id. at 128, 129.
ment, embodies an old and well-established constitutional concept. It has long been recognized that state regulation of persons engaged in interstate commerce may be so burdensome as to render the state statute involved unconstitutional. In these instances the Supreme Court has struck down the statute. However, it has always been necessary for the court to explore very carefully the factual situation concerning the application of the state statute and to determine whether or not it was intended by Congress that the Federal statute and the state statute governing the same subject matter should co-exist. The necessity for the searching inquiry and long debate preceding the reaching of conclusions in these cases has impelled the court to suggest that if Congress wishes to establish exclusive jurisdiction over a particular subject matter and to invalidate pre-existing state laws with respect to that subject matter, Congress should make its intention absolutely clear by saying so. This was well expressed in a recent case by Mr. Justice Frankfurter:

"To require the various agencies of the Government who are the effective authors of legislation like that now before us to express clearly and explicitly their purpose in dislodging constitutional powers of states—if such is their purpose—makes for care in draftsman and for responsibility in legislation. To hold, as do the majority, that paralysis of state power is somehow to be found in the vague implications of the Federal-renovated butter enactments, is to encourage slipshodness in draftsman and irresponsibility in legislation."26

Section 7(b) of H. R. 3383 is an effective response to this suggestion that if exclusive regulation is deemed necessary Congress should leave no doubt as to its desire in this respect. Considered as such, and in light of all the facts and circumstances relating to the impact of state regulation upon aviation, there can be little question of the validity of that section of the proposed act.27

In conclusion on this point, the case for exclusive Federal regulation of air commerce can be briefly stated. Due to the speed and mobility of aircraft and the delicacy of the instrumentality itself, the establishment of exclusive Federal regulation is the only means by which the further unhampered development of aviation can be insured. For reasons already stated, uniformity of regulation cannot be expected if agencies of all the forty-eight states plus the Federal Government may participate in regulation. Even if uniformity in regulation could be expected, the duplication of requirements resulting from the efforts of these forty-nine agencies would constitute a burden so intolerable as to smother aviation progress. The policies of Congress with respect to the development and regulation of this industry would be completely thwarted if it were also subjected to this duplicating and conflicting state regulation. These being the circumstances facing Congress, the con-

27 The assumption by Congress of exclusive jurisdiction to regulate aviation can be justified by reference to powers other than that relating to interstate and foreign commerce. The postal power and that relating to national defense can be relied upon and in view of the broad international aspects of aviation the treaty making power will also have its effect. The significance of recent developments in international aviation and its regulation is ably discussed in Seago and Furman, Internal Consequences of International Air Regulations (1945) 12 U. of Chi. L. Rev. 333.
stitutional power of that body to take the action necessary to avoid these results to an essentially interstate enterprise cannot be questioned.

**Economic Regulation of Contract Carriers**

H. R. 674 provides economic regulation for *contract* carriers by air. The economic regulation contained in the Civil Aeronautics Act of 1938, previously described, applies only to *common* carriers, thus leaving unregulated an activity in air commerce which bids fair to become a substantial competitive factor in the industry. Space does not permit a full review of the development of the contract motor carrier and the effect of that type of operation upon the common carrier. It is only necessary to point out that in preparing the Motor Carrier Act of 1935 the Congress considered it necessary to regulate both of these types of operation. This was done because of evidence before the Congress at that time which indicated that the contract carrier whose obligations to the public were very limited could skim the cream from the available traffic, thus depriving the common carrier trucker of substantial revenues. It was also considered unfair to bring the common carrier under strict regulation while leaving a strong and dangerous competitor free from regulation. The regulatory provisions of the Motor Carrier Act of 1935 as they apply to contract carriers were obviously motivated by a desire on the part of Congress to provide contract carrier service where it is most useful but at the same time to protect the common carrier system from disruption by unregulated contract truckers. There seems to be no question but that the welfare of the common carrier system was regarded as a paramount consideration from the standpoint of public interest because of the extensive public responsibilities which are imposed upon such carriers.

Up to this time aircraft have been most useful in the carriage of passengers. The cargo business has not been of great significance. Consequently, contract carriage by air has not developed substantially for contract carriage finds its greatest usefulness in the transportation of cargo. A new era is dawning in aviation, however. Thousands of pilots and other aeronautical personnel are being released from the Army and thousands of transport aircraft of proven types are being sold or leased by the Federal Government under favorable financial arrangements. Moreover, the war has demonstrated the utility of the aircraft in the carriage of freight. All these things have resulted in an upsurge of interest in contract carriage by air and this interest is being manifested in the establishment of very substantial contract operations within the country. Unless cognizance is taken of this development by the Congress within a short time, it can be expected that the highway carrier experience will be repeated and our well-established common carrier industry will be severely damaged before appropriate regulation is provided for.

The provisions of H. R. 674 dealing with the regulation of contract carriers are closely akin to those contained in the Motor Carrier part of the Interstate Commerce Act. They place the regulation of these carriers under the Civil Aeronautics Board.

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as are the air carriers. They provide that the inauguration of contract carrier operations must be preceded by the issuance of a license by the Civil Aeronautics Board and the Board is required to issue such a license upon application if the applicant is fit, willing, and able to perform the service proposed and this service is required by the public interest. Air contractors are required to file tariffs with the Board and to adhere to them. Rebating is prohibited and no change in a tariff may be made except upon specified notice. Air contractors are required to establish reasonable minimum rates for their service and to maintain specified minimum wages and maximum hours for the pilots and co-pilots, to maintain their accounts under Board regulation, to file agreements, and to adhere generally to the economic regulations specified by the Board. It should be emphasized that the rate regulation provided for under H. R. 674 for air contractors is limited to minimum rates. Thus, while an air contractor may charge more than the rate specified, he is forbidden to charge less. The Board is given substantial latitude in exempting air contractors or classes of air contractors, totally or partially, from the economic regulation provided for, thus permitting a gradual application of the regulatory provisions proposed.

The theory of this proposed legislation is clearly based upon a desire to permit the sound growth of both contract and common carriers in the air transportation business—to permit them to exist side by side, each providing the public service for which each is best fitted. It is designed to prevent a repetition of the highway carrier experience by placing in the hands of the regulatory agency the power to determine whether a part of the common carrier system would be damaged by the inauguration of contract carriage and to determine whether, on the basis of all the facts, the public interest in the additional service would be sufficient to justify that damage. The bill would eliminate the unfairness, under existing law, which outlaws certain competitive practices for common carriers but permits contract carriers to engage in them.

It has been alleged that the bill goes too far—that the necessary purposes of the bill could be accomplished by statutory provisions far less stringent and by covering a narrower scope of contract operations. It is stated that because of this over-regulation many types of commercial aircraft operation of a character beneficial to the public would have to be discontinued. It is possible that this is true and this argument should be carefully weighed by the Congress in finally enacting contract carrier regulation. Nevertheless, it seems clear that Congress should move promptly in enacting such provisions as do appear necessary to protect the common carrier industry from unfair competition and to avoid the much more difficult legislative task which will come later if action is not taken now.

MULTIPLE TAXATION OF AIR CARRIERS

On June 12, 1945, H. R. 3446 was introduced in Congress. It was entitled “A Bill to Provide for the Avoidance of Multiple Taxation of Air Commerce, and for

\[28a\] For a discussion of problems included in seeking to eliminate multiple taxation of aviation, see Welch, *The Taxation of Air Carriers*, infra this symposium, p. 584.
Other Purposes.” In order properly to understand the result sought to be achieved
by the bill, and the means devised for that achievement, it is necessary to consider
briefly the background of the bill.

In the *Northwest Airlines* case, a the Supreme Court upheld a property tax
assessment by Ramsey County, Minnesota, on the entire fleet of aircraft owned by
Northwest Airlines, despite the fact that portions of that fleet were subjected to
property taxes in other states in which Northwest operated, specifically Oregon,
Washington, Montana, North Dakota and Illinois. With regard to the *Northwest*
decision, the Hon. Alfred L. Bulwinkle, Member of Congress from North Carolina,
stated as follows:

“That decision foreshadowed possible chaos in the state taxation of air carriers. Destruc-
tive multiple taxation became a possibility, and inequity in the sharing of air carrier taxes
among the states was virtually certain to follow.”

Principally as a result of the *Northwest* decision Congress passed an Act direct-
ing the Civil Aeronautics Board to consult with the appropriate authorities of the
several states, Territories and possessions, and subdivisions thereof, with a view to
developing means for eliminating and avoiding multiple taxation of persons engaged
in air commerce and their employees, by those jurisdictions, and other taxation, by
those jurisdictions, which has the effect of unduly burdening or unduly impeding
the development of air commerce. The Board was directed to report to the Con-
gress the results of its consultations, and such recommendations as it might deem
advisable, including recommendations for legislation by the Congress if such legis-
lation appears necessary or appropriate.

The Board’s report was transmitted to Congress under date of April 3, 1945. It
contains such a wealth of data and is such a comprehensive analysis of the problem,
that space permits a statement here of only its most salient points.

The Board concludes that the term “multiple taxation” is properly applied to
taxation which arises from the territorial overlapping of jurisdiction to tax, and that
state or local taxes on, or measured by, personal property, net income, capital stock
or gross receipts, state or local taxes on aviation fuel, and state pilot license fees, are
presently or potentially productive of multiple taxation. The Report states in part
as follows:

“For the purpose of this study, . . . the term ‘multiple taxation’ is restricted to tax-
ation which arises from the territorial overlapping of jurisdiction to tax. The multiplicity
arises from differences among state tax laws and administrative interpretations as to the
part of the property, net income, capital stock, or gross receipts of a business that is
properly regarded as within the taxing jurisdiction of the state. By indirection, multiple
 taxation may be defined as the type of taxation that would be eliminated (1) if business
transactions and operations were confined to a single taxing jurisdiction—for practical pur-

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29 *Supra* note 21.
30 91 Cong. Rec., June 12, 1945, at A3043.
(1945).
33 *Id.* at 27 et seq.
poses, if they were exclusively intrastate, (2) if the only taxes on business were levied by the Federal Government, or, (3) if the states uniformly applied identical rules for determining taxable situs.

"The Northwest Airlines case provides an excellent example of the nature of multiple taxation. . . . while Minnesota was taxing the entire fleet of planes, the states of Oregon, Washington, Montana, North Dakota and Illinois adopted the theory that portions of the fleet had taxable situs within their boundaries on an allocation basis. Thus, the difference in situs theories led to multiple taxation."

It will be noted the Act above referred to was directed at taxation which has the effect of unduly burdening air commerce, as well as multiple taxation of such commerce. The Board concluded that state taxes on aviation fuel are unduly burdensome, as well as potentially multiple, taxes. The report states in part: "Fuel taxes, the third important component of the airline's tax payments, qualify as being unduly burdensome and as potentially impeding normal-air carrier development. " Only an historical accident has resulted in the imposition of tax on the air carriers' source of power. If they had been able to use coal, kerosene, fuel oil, or some other means for the propulsion of their equipment, doubtless the question of fuel taxation would never have arisen. Although the fuel tax imposed by the Federal Government might properly be regarded as a user tax to defray the cost of constructing and maintaining such special facilities as the airways, there is little that can be said for state fuel taxes in this respect."

The report concludes: "The case against the continuance of state taxes on aviation fuel used by interstate carriers is conclusive." After formulating the above conclusions regarding state and local taxation which is, or may become, multiple or unduly burdensome taxation, the Board's report concludes further that the problems arising from such taxation:

". . . are not self-correcting, that the courts are not in a position to eliminate burdens upon interstate commerce arising out of conflicting state tax policies, and that only the Congress is properly equipped to solve the problem."

The solution recommended by the Board is the enactment of a Federal statute which would provide for the allocation among the several states, in accordance with prescribed formulae, of the bases for taxes on, or measured by, property, net income, capital stock, and gross receipts. Also recommended is that provision be made for a Federal agency to interpret and administer the prescribed allocation formulae, assisted in this function by an advisory committee of five members appointed from a panel of state and local tax officials and experts.

The Board recommends also that the proposed statute expressly forbid the imposition by the states of state pilot license fees on pilots engaged in interstate or foreign air commerce. While, as indicated above, the Board recognizes that state taxes on aviation fuel are discriminatory and burdensome, it takes the position that the solution of that problem involves consideration of the general fiscal relationships

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34 Supra note 31. 36 Id. at 64. 35 Multiple Taxation of Air Commerce, supra note 32, at 35. 37 Id. at 36.
between the Federal Government and the states, and the Board, therefore, recommends that a separate study be undertaken looking to the formulation of an equitable legislative solution of the problem.

H. R. 3446 is designed to carry into effect the Board's recommendations. That the Congress has the power, under the Commerce Clause of the Constitution, to prevent multiple, and other unduly burdensome, taxation of interstate air commerce, and that only the Congress is, as the Board has concluded, "properly equipped to solve the problem," is quite clear. The *Northwest* decision, which focused national attention on the problem, also demonstrated that the United States Supreme Court had no doubt but that Congress had the authority to solve that problem and that the only practical solution would be a Congressional one. In the principal opinion in the *Northwest* case, Mr. Justice Frankfurter, speaking of the doctrine of tax apportionment which had been applied by the court in cases involving state taxation of vehicles used in interstate land transportation, says:

"To what extent it should be carried over to the totally new problems presented by the very different modes of transportation and communication that the airplane and the radio have already introduced, let alone the still more subtle and complicated technological facilities that are on the horizon, raises questions that we ought not to anticipate; certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship."

Mr. Justice Black, in his concurring opinion in the *Northwest* case, referring to "The difficulties inherent in the judicial formulation of general rules to meet the national problems arising from state taxation which bears in incidence upon interstate commerce," concludes:

"These problems, it seems to me, call for Congressional investigation, consideration and action. The Constitution gives that branch of government the power to regulate commerce among the states, and until it acts I think we should enter the field with extreme caution."  

The concurring opinion of Mr. Justice Jackson contains the strongest statement of the power of Congress over state taxation of interstate carriers:

"Congress has not extended its protection and control [of aviation] to the field of taxation, although I take it no one denies that constitutionally it may do so. It may exact a single uniform Federal tax on the property or the business to the exclusion of taxation by the states. It may subject the vehicles or other incidents to any type of state and local taxation, or it may declare them tax free altogether. . . .

"It seems more than likely that no solution of the competition among states to tax this transportation agency can be devised by the judicial process without legislative help."

It is likewise clear that the proposed Federal statute preventing multiple and other burdensome taxation of interstate air carriers should be based on the principle of

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59 Id. at 302.
60 Id. at 303-304, 306.
the apportionment of the carrier’s property and operations for taxing purposes. This is the concept of taxation embodied in H. R. 3446. The undesirability of an exclusive Federal tax (of the type mentioned by Mr. Justice Jackson in the above quotation) is apparent. Taxation on that basis runs counter to our American doctrine of dual sovereignty, in that the states are totally divested of their residual taxing power. Without a state sharing in the exclusive Federal tax, the states are also divested of revenues, and, if sharing is attempted, the problem of a fair allocation remains to be solved. Equally undesirable would be a statute based on the concept that only one state, for example the state of “commercial domicile” (viz., in which the principal place of business is located), shall have jurisdiction to tax an interstate air carrier. The right of a state to tax net income earned therein by a corporation and that portion of its capital stock representing property in the state, whether or not the corporation was incorporated in that state, has been established by decisions of the Supreme Court and is widely exercised. A limiting of income or capital stock taxes to the state of commercial domicile would, therefore, be a change of major proportions. Moreover, such a limitation would deprive states, other than the domiciliary state, of jurisdiction to tax an air carrier even though they may furnish important governmental services and benefits to that carrier.

H. R. 3446 is in all respects sound in principle, but during its study of this legislation Congress should give consideration to amendments needed to strengthen the bill and simplify its administration. Space does not permit a full discussion of these amendments. Prompt consideration by Congress of this legislation appears to be essential, since the Northwest decision had the effect of introducing complications into state taxation, not only for the air carriers but for the state tax administrators as well. If enacted, it would permit air transportation to develop without fear of a crushing burden of multiple state taxation, and would permit state taxing authorities to be sure that each would get its fair share of the total taxes levied against air transportation and not be deprived of needed revenues.