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John W. Gelder S.Ed.
University of Michigan Law School

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AIR LAW—THE FEDERAL AVIATION ACT OF 1958—On August 23, 1958 the President signed into law the most important piece of aviation legislation to come out of Congress in the past two decades.¹ After several study groups had worked on the air safety problem, the President acted in February 1956 by appointing Edward P. Curtis as his Special Assistant for Aviation Facilities Planning. In May 1957 the now famous Curtis Report was submitted to Congress in which it was suggested that an independent aviation agency be set up by 1959. It took several major air tragedies, however, to awaken Congress and the nation to the need for immediate action. Two crashes in 1958, occurring within one month of each other,² between military and civilian aircraft pointed up the need for unified control of the flight of both military and civilian aircraft. On June 13, 1958 the President submitted a message to Congress recommending immediate formation of an independent Federal Aviation Agency,³ and the important and far-reaching legislation which will be the subject of this comment was enacted within three months.

Congress has stated that the legislation has two major purposes.⁴ First, it creates an independent air agency free from the Executive Department's control and directly responsible to Con-

¹ Federal Aviation Act of 1958, enacted as Public Law 85-726, 72 Stat. 737, 49 U.S.C.A. (Supp. 1958) §1301 et seq.

² April 21, 1958 mid-air collision killing all persons on board and May 20, 1958 collision killing all but the jet pilot.

³ H. Doc. 406, 85th Cong., 2d sess. (1958).

⁴ S. Rep. 1811, 85th Cong., 2d sess., p. 10 (1958).

gress. Second, it provides that a single unified agency has responsibility for both the promotion and development of air safety, including air safety regulations, and for the regulation of all airspace for both civilian and military use.⁵ Thus Congress has sought to rectify what many felt were the two biggest stumbling blocks to an efficient air safety program under prior law.

I. *Legislative Background*

To understand the significance of the changes under the new act, it is necessary to consider briefly the legislative development of air law. In 1926 Congress passed the Air Commerce Act.⁶ It was to have an important bearing on the failure of adequate airspace regulation because it effectively split the control of airspace between the civil and military by providing that the President could reserve and set apart airspace for military use.⁷ This division of military and civil authority was carried through the Civil Aeronautics Act of 1938. The Air Commerce Act has been repealed by the 1958 act,⁸ and the President's power to reserve airspace for security purposes has been deleted from the present law.⁹

The second problem arose out of the Civil Aeronautics Act of 1938. As originally enacted it provided for a unified, independent agency comprised of a five-member Civil Aeronautics Authority, an administrator, and a three-member Air Safety Board.¹⁰ The five-member authority was the regulatory branch with the responsibility for economic and air safety regulations. The administrator was responsible for the establishment and operation of civil airways and the Air Safety Board had the duty of investigating aircraft accidents. Two years later, however, the agency was divided into separate rule making and operational bodies by Reorganization Plans III¹¹ and IV¹² of 1940. The Civil Aeronautics Board, which consisted of five members, with quasi-legislative and quasi-judicial functions assumed the regulatory func-

⁵ Federal Aviation Act, §103(c), 72 Stat. 740, 49 U.S.C.A. (Supp. 1958) §1303.

⁶ 44 Stat. 568, 49 U.S.C. (1952) §171.

⁷ Air Commerce Act of 1926, §4, 44 Stat. 570, 49 U.S.C. (1952) §174.

⁸ Federal Aviation Act of 1958, §1401(a).

⁹ *Id.*, §1202, 72 Stat. 800, 49 U.S.C.A. (Supp. 1958) §1522. For comparison see the Civil Aeronautics Act of 1938, §1201, added 64 Stat. 825 (1950), 49 U.S.C. (1952) §701.

¹⁰ 52 Stat. 980, 981, 1012 (1938), 49 U.S.C. (1952) §421.

¹¹ 5 Fed. Reg. 2109, 54 Stat. 1233 (1940).

¹² 5 Fed. Reg. 2421, 54 Stat. 1235 (1940).

tions of the Civil Aeronautics Authority and the investigative functions of the Air Safety Board, which was abolished. The remaining functions of the Civil Aeronautics Authority were transferred to the new Administrator of Civil Aeronautics, who was placed under the control of the Department of Commerce. Thus arose the division of responsibility between the independent regulatory and investigative agency and the civilian enforcement administration under Executive Department control. The division of authority between military and civilian control and the division of responsibility within the civilian authority created untold confusion. To help solve one problem, that of airspace allocation, the President in 1946 created an Air Co-ordinating Committee.¹³ The committee could act only with unanimous consent and handled airspace allocation on a case by case basis. Needless to say, this only increased the existing confusion¹⁴ and accomplished little toward developing an adequate regulatory system for already overcrowded airspace. Congress has attempted to remove these problems in the 1958 act by investing a single individual, the new Federal Aviation Administrator, with all safety regulation powers including the responsibility for allocation of all airspace. To avoid the possibility that the administrator might be divested of airspace control, as was the fate of the independent authority under the 1938 act, Congress has provided in the 1958 act that the administrator shall not be bound ". . . by the decisions or recommendations of, any committee, board, or other organization created by Executive order."¹⁵ It is clear that Congress wishes to keep the new Federal Aviation Agency free from Executive Department control and to avoid the confusion and delay caused in the past by multiple interagency operations.

II. *Summary of 1958 Act*

The existing Civil Aeronautics Board is continued under the new Federal Aviation Act, but is now independent of the Executive Department because of the repeal of section 7 of Reorganization Plan Number IV of 1940.¹⁶ The Board has been stripped

¹³ Executive Order 9781, 11 Fed. Reg. 10645 (1946).

¹⁴ The Senate Committee reported that it had been informed 75 intra-agency groups were working on different phases of aviation safety planning. S. Rep. 1811, 85th Cong., 2d sess., p. 6 (1958).

¹⁵ Federal Aviation Act of 1958, §301(a), 72 Stat. 744, 49 U.S.C.A. (Supp. 1958) §1341(a).

¹⁶ *Id.*, §1401(c).

of most of its regulatory functions, but retains its investigative functions. A new provision has been added establishing "super grade" positions, enabling the Board to obtain highly paid, skilled, technical assistants to aid in the performance of its duties.¹⁷

Title III of the 1958 act establishes the new Federal Aviation Agency and sets forth the powers and duties of its administrator. It provides for a civilian administrator¹⁸ with aviation experience to be appointed by the President with the advice and consent of Congress. The deputy administrator may be either a civilian or a member of the armed services.¹⁹ The act provides for military participation with the administrator in carrying out his functions relating to regulation and protection of air traffic, thereby recognizing the needs and special problems of the armed forces. Military personnel assigned to the FAA are absolved from all responsibility to their superiors and are directly responsible to the administrator.²⁰ It is clear that Congress definitely intended to establish a civil agency free from possible military coercion.²¹ Also, in recognition of the special problems which arise during armed conflict, the act directs the administrator, with the assistance of the Department of Defense, to develop plans for the operation of the FAA in time of war and directs the administrator to submit such a plan to Congress before January 1, 1960.²² Congress has further increased the administrator's potential power by allowing the President to transfer to him rights, powers and duties of the Executive Department which relate to air navigation.²³

Undoubtedly the most important single provision of the new act is section 307, entitled "Airspace Control and Facilities." The powers prescribed in this section were vested in the Board under the 1938 act,²⁴ but Congress after much debate and hesitation provided for unified control in the administrator. The

¹⁷ *Id.*, §202(b), 72 Stat. 741, 49 U.S.C.A. (Supp. 1958) §1322(b).

¹⁸ *Id.*, §301(b), 72 Stat. 744, 49 U.S.C.A. (Supp. 1958) §1341(b).

¹⁹ "Nothing in this chapter or other law shall preclude appointment to the position of Deputy Administrator of an officer on active duty with the armed services. . . ." Federal Aviation Act of 1958, §302(b), 72 Stat. 744, 49 U.S.C.A. (Supp. 1958) §1342(b).

²⁰ *Id.*, §302(a)(2), 72 Stat. 745, 49 U.S.C.A. (Supp. 1958) §1343(a)(1) and (2).

²¹ "The language of the act and its legislative history leave little doubt that civilian rather than military control is to be dominant." McDougle, "Legislation for the Jet Age," *JAG JOURNAL* (Nov. 1958) p. 22.

²² Federal Aviation Act of 1958, §302(c), 72 Stat. 745, 49 U.S.C.A. (Supp. 1958) §1343(c).

²³ *Id.*, §304, 72 Stat. 749, 49 U.S.C.A. (Supp. 1958) §1345.

²⁴ Civil Aeronautics Act of 1938, §601, 52 Stat. 1007, 49 U.S.C. (1952) §551.

vast increase in the number and speed of aircraft²⁵ necessitates a more efficient, better regulated air control system than has existed for the past two decades. A single administrator is now for the first time given the power to regulate and assign all navigable airspace—both military and civilian.

One of the biggest disagreements in Congress concerned the question whether to divest the Board of its power to prescribe air traffic rules,²⁶ and invest this power in the administrator. Those against the change argued that the issuance of air traffic rules was a quasi-legislative function which should not be entrusted to a possibly arbitrary or capricious administrator. Those in favor of allowing the administrator to prescribe the air traffic rules pointed to the fact that most of the rule-making authority had been delegated by the Board to the CAA under the 1938 act anyway,²⁷ and the rules which were promulgated by the Board had been amplified by more detailed regulations issued by the CAA. The rule-making function was transferred to the administrator, but to allay the fears of those who doubted the propriety of investing such complete regulatory power in one individual, certain checks were placed on the administrator by subjecting his exercise of authority to the Administrative Procedure Act,²⁸ and by allowing the Board to sit as an interested party at any rule-making hearing of the administrator.²⁹

Even though the Federal Aviation Act is applicable to both military and civilian aircraft, Congress has left the military an escape hatch by providing that the air traffic rules do not apply to them during periods of "military emergency or urgent military necessity."³⁰ Not only is this language somewhat indefinite, but Congress has left it to the military authorities to determine when such "emergencies" or "necessities" exist, and the administrator may be hamstrung in his effort to provide an effective air traffic control system by arbitrary military determinations that situations exist which necessitate an exemption from the air traffic rules for certain military aircraft. Only time will tell whether the

²⁵ General Curtis reported that in the past 20 years aircraft registrations jumped from 29,000 to 90,000 and that aircraft landings and take-offs increased from 5 million to 65 million per year. S. Rep. 1811, 85th Cong., 2d sess., p. 4 (1958).

²⁶ Civil Aeronautics Act of 1938, §601, 52 Stat. 1007, 49 U.S.C. (1952) §551.

²⁷ *Id.*, §601(c), added 62 Stat. 1217 (1948), 49 U.S.C. (1952) §551(c).

²⁸ Federal Aviation Act of 1958, §307(d), 72 Stat. 749, 49 U.S.C.A. (Supp. 1958) §1348(d).

²⁹ *Id.*, §1001, 72 Stat. 788, 49 U.S.C.A. (Supp. 1958) §1481.

³⁰ *Id.*, §307(f), 72 Stat. 749, 49 U.S.C.A. (Supp. 1958) §1348(f).

military will be able to or want to avoid its obligation under the new act. Nevertheless, the administrator of the FAA "will be a virtual aviation czar."³¹

An important extension of control over the construction or alteration of airports has been established in the new act by requiring the administrator's approval of military airports, missile and rocket sites.³² In the past some military air bases have been built so close to civilian airports as to interfere with the flight of civilian aircraft.³³ Under the new act the administrator may be able, to some extent, to avoid this situation in the future. As originally drafted the administrator was given veto power over the construction of military sites, but, though the Senate Committee registered its strong disapproval,³⁴ the act provides that the President will be final arbitrator of any disagreement between the administrator and the Department of Defense on the location of military sites. The administrator is also placed in charge of research and development for the nation's common system of air traffic control.³⁵ It is his duty to develop and place in operation an effective traffic control system satisfactory for both military and civilian navigation.³⁶

Title IV, Air Carrier Economic Regulations, the most prolific source of regulations and decisional law under the Civil Aeronautics Act of 1938, has been re-enacted without substantial change,³⁷ and remains within the jurisdiction of the Board. The short time in which the new act was drafted prohibited a complete

³¹ Pirie, "The Federal Aviation Act of 1958," JAG JOURNAL (Nov. 1958) p. 3.

³² Federal Aviation Act of 1958, §308(b), 72 Stat. 750, 49 U.S.C.A. (Supp. 1958) §1349(b).

³³ As an example of the reason for the extension of §308, the Senate Committee cited a situation which arose in Louisiana where a military field was constructed with one runway leading immediately into the landing pattern of a nearby community airport. S. Rep. 1811, 85th Cong., 2d sess., p. 16 (1958).

³⁴ S. Rep. 1811, 85th Cong., 2d sess., p. 17 (1958).

³⁵ Federal Aviation Act of 1958, §312, 72 Stat. 752, 49 U.S.C.A. (Supp. 1958) §1353.

³⁶ In the House Committee Report, reference was made to the so-called "TACAN controversy" as one cause for interest in the new legislation. The old CAA, after extensive studies, approved two systems called VOR (visual system) and ME (bad weather guidance system). Because one VOR system was not operational at sea or in military areas, the military adopted the TACAN system which was not co-ordinated with civilian agencies. This led to duplication and confusion, and the Airways Modernization Board was created in the first session of the 85th Congress to develop and establish a common system. H. Rep. 2360, 85th Cong., 2d sess., p. 5 (1958). [Under Administrative Order 1, the administrator established the Bureau of Research & Development which will take over the work of the Airways Modernization Board. 1 CCH Avia. L. Rep. ¶12,633.]

³⁷ "The present measure makes no substantive change whatsoever in the provisions governing air carrier economic regulations." S. Rep. 1811, 85th Cong., 2d sess., p. 9 (1958).

change in existing law and Congress apparently felt that the area of economic regulations was least in need of immediate attention. Though the 1938 provisions were re-enacted without substantial change, the committee reports make it clear that courts need not consider the re-enactment as congressional approval of present administrative interpretations or practices, thereby leaving the door open for the courts to reinterpret existing provisions made a part of the new act.³⁸

Title V, dealing with the nationality and ownership of aircraft which was formerly under the control of the old CAA, places this under the control of the administrator.³⁹ The only new provision in this title, which concerns the registration of aircraft, engines, and other aircraft parts and recordation of aircraft ownership, is a provision permitting the issuance of dealers' aircraft registration certificates which would provide for mass registration of all aircraft of a qualifying dealer.⁴⁰

The issuance of safety rules and regulations—as distinguished from air traffic rules—which had been within the domain of the Board, has also been transferred to the administrator under Title VI of the new act.⁴¹ The administrator now has exclusive authority to issue, modify, amend, or revoke airman certificates, aircraft certificates, air carrier operating certificates and the air agency ratings. Because Title VI refers exclusively to civil aircraft, the air-traffic rules found with the other safety provisions in Title VI of the 1938 act were transferred to section 307 of the 1958 act, since Congress intended that the air-traffic rules apply to both military and civilian aircraft.

The new act as originally drafted provided that all safety regulations could be appealed to the Board where economic hardship could be shown, but this qualification was deleted from the final draft because Congress felt that as a practical matter such a pro-

³⁸ "The committee of conference wishes to make it clear that it endorses, as expressing the intention of the managers on the part of the Senate and the managers on the part of the House, the statements in the House debate, and the house committee report to the effect that the Congress does not intend that this re-enactment of the portions of the Civil Aeronautics Act of 1938 shall constitute legislative adoption of administrative interpretations and practices or of judicial decisions under this act." H. Rep. 2556, 85th Cong., 2d sess., p. 90 (1958).

³⁹ Federal Aviation Act of 1958, §501 et seq., 72 Stat. 771, 49 U.S.C.A. (Supp. 1958) §1401 et seq.

⁴⁰ Id., §505, 72 Stat. 774, 49 U.S.C.A. (Supp. 1958) §1405.

⁴¹ Id., §601, 72 Stat. 775, 49 U.S.C.A. (Supp. 1958) §1421. For a comparison of provisions under Civil Aeronautics Act of 1938, see note 24 supra.

vision would make all regulations appealable. But Congress did provide that the Board could participate in regulatory proceedings under Title VI in cases where no appeal was provided, to temper somewhat the conduct of the administrator.⁴² Even though the Board has admittedly been stripped of many of its regulatory functions in the safety area, appeal to the Board is still permitted a person affected by a modification, suspension or revocation of his certificate.⁴³ Furthermore, though the administrator's refusal to issue one of the various certificates is generally not appealable under the new act,⁴⁴ a refusal by the administrator to issue an airman's certificate may still, as under the 1938 act, be appealed.⁴⁵ Even this provision has been modified to some extent, however, by denying a right of appeal to airmen, adversely affected by the administrator's ruling, who are currently under suspension or who have had their certificates revoked within one year.⁴⁶ In all appeals under the new act, the Board is given a free hand to decide the case on its merits and is not bound by the administrator's finding of fact.⁴⁷ This provides, to the extent to which appeals are allowed, a further check on any arbitrary or capricious activity by the administrator and protects persons adversely affected by an order of suspension, modification or revocation. The filing of an appeal stays the effectiveness of an order unless the administrator advises the Board that an emergency exists.⁴⁸

Investigation of aircraft accidents, dealt with in Title VII, is a quasi-judicial function and was rightfully left within the power of the Board. However, Congress recognized the administrator's interest in this area and has provided that he may participate in the investigations, though he is not permitted to participate in the determination of probable cause.⁴⁹ The Board is also empowered to delegate its investigative powers to the administrator if it so desires and has already done so to a limited ex-

⁴² *Id.*, §1001, 72 Stat. 788, 49 U.S.C.A. (Supp. 1958) §1481.

⁴³ *Id.*, §609, 72 Stat. 779, 49 U.S.C.A. (Supp. 1958) §1429.

⁴⁴ A new amendment to the Civil Air Regulations, however, does contain a provision for informal petition to the administrator for reconsideration of his action in refusing issuance of a certificate.

⁴⁵ Federal Aviation Act of 1958, §602(b), 72 Stat. 776, 49 U.S.C.A. (Supp. 1958) §1422(b).

⁴⁶ *Ibid.*

⁴⁷ *Id.*, §§602(b), 609, 72 Stat. 776, 779, 49 U.S.C.A. (Supp. 1958) §§1422(b), 1429.

⁴⁸ *Id.*, §609, 72 Stat. 779, 49 U.S.C.A. (Supp. 1958) §1429.

⁴⁹ *Id.*, §701(g), 72 Stat. 781, 49 U.S.C.A. (Supp. 1958) §1441(g).

tent.⁵⁰ A new provision recommended by the President in his message to Congress provides for the Board's participation with military authorities in investigating accidents involving either military and civilian aircraft or solely military aircraft.⁵¹ Since several of the recent mid-air crashes have involved military aircraft, this new provision will enable the Board to determine with greater certainty the exact cause of the accident and perhaps enable the administrator to promulgate regulations designed to prevent similar tragedies. Furthermore, to facilitate the investigation of major air tragedies between civilian and military aircraft, Congress has authorized the CAB to create new "Special Boards of Inquiry," with full investigative powers.⁵² This special board is not intended to investigate all military-civilian aircraft accidents, but only the "more severe accidents involving a high degree of public interest."⁵³ It is questionable whether a special board, undoubtedly consisting of new members each time it convenes, will be more qualified to determine the "probable cause" of an accident than the permanent members of the CAB, who will under the new act be devoting most of their efforts to this problem. Since the Board is now authorized to fill certain "super grade" positions with persons of technical skill to assist them in their various functions, it would seem difficult to find a more qualified investigative body than the CAB itself, no matter how "severe" the accident.

The remaining portions of the new Federal Aviation Act are re-enactments of portions of the Civil Aeronautics Act of 1938 without substantial change. Title VIII provides that the President shall retain control over the registration of aircraft which are engaged in foreign air transportation and the Chief of the Weather Bureau shall cooperate with and advise the administrator with respect to weather conditions. Title IX, dealing with civil and criminal penalties, is substantially unchanged from similar provisions under the 1938 act except that violations of Title III (air-traffic rules) and Title XII (security provisions) have been deleted from the old criminal penalty provisions,⁵⁴ and are now

⁵⁰ Under §701(f), 72 Stat. 781, 49 U.S.C.A. (Supp. 1958) §1441(f), the Board has authorized the new administrator to investigate accidents of aircraft under 12,500 pounds in weight. Public Notice 13.

⁵¹ Federal Aviation Act of 1958, §702, 72 Stat. 782, 49 U.S.C.A. (Supp. 1958) §1442.

⁵² *Id.*, §703, 72 Stat. 782, 49 U.S.C.A. (Supp. 1958) §1443.

⁵³ H. Rep. 2360, 85th Cong., 2d sess., p. 10 (1958).

⁵⁴ Civil Aeronautics Act of 1938, §902, 52 Stat. 1015, 49 U.S.C. (1952) §622.

under the provisions dealing with civil penalties.⁵⁵ Since the new air-traffic rules apply to both civil and military airmen, however, a new proviso, section 901(a), was necessary to exempt from penal and civil sanctions members of the armed services who violate the act in the performance of their official duties. To compensate for this exemption the act makes the appropriate military authorities responsible for taking proper disciplinary action against military violators and making a report of such action to the administrator. This is a sensible and natural solution to the problem. By this device the military is brought under the purview of the statute without a civil agency unnecessarily interfering with problems of military discipline. Title X, which concerns the procedure for handling complaints and the conduct of proceedings before the administrator or the Board, is also substantially unchanged.

In recognition of the need in the interest of national defense and security for certain areas where only military aircraft should be permitted to fly, Congress has authorized the administrator to set apart air zones for the exclusive use of the military.⁵⁶ Historically this power has been vested in the President,⁵⁷ but consistent with the plan to charge the administrator with responsibility for regulating all airspace and to avoid the disadvantages so patently obvious with a division of authority between the control of military and civilian aircraft, Congress has handed the administrator this additional power as well.

III. *Interpretative Problems Arising From the New Act*

In its attempt to resolve some interpretative difficulties under the 1938 act, Congress has created new problems of interpretation and questions of legislative intent under the 1958 act. Some possible "trouble spots" under the new act will be considered here.

The question has been debated for some time whether the federal government has exclusive control of the navigable airspace. In *Gardner v. Allegheny County*⁵⁸ the Pennsylvania Supreme Court held that the federal government did not have ex-

⁵⁵ Federal Aviation Act of 1958, §901, 72 Stat. 783, 49 U.S.C.A. (Supp. 1958) §1471.

⁵⁶ *Id.*, §1202, 72 Stat. 800, 49 U.S.C.A. (Supp. 1958) §1522.

⁵⁷ "The President is authorized to provide by Executive order for the setting apart and the protection of airspace reservations in the United States for national defense. . . ." Air Commerce Act of 1926, §4, 44 Stat. 570, 49 U.S.C. (1952) §174.

⁵⁸ 382 Pa. 88, 114 A. (2d) 491 (1955).

clusive control over navigable airspace and that a state court could grant compensation for a "taking." But in *City of Newark v. Eastern Airlines*⁵⁹ the federal court dismissed an action for injunctive relief from low flying aircraft on the ground that Congress had intended to place in the Civil Aeronautics Board exclusive control of navigable airspace, such airspace to include not only the space above the minimum safe altitudes prescribed by the CAB regulations, but also ". . . that space below the fixed altitude and apart from the immediate reaches of the land."⁶⁰ Any injunctive relief, the court argued, would impair the uniformity of safety regulations contrary to congressional intent. In *Allegheny Airlines v. Village of Cedarhurst*⁶¹ the Second Circuit invalidated a municipal ordinance which conflicted with the CAB's regulations on the ground that it was the congressional purpose to grant the CAB exclusive power to regulate the safe altitudes of flight. Thus the federal courts have refused to allow a state or municipality to interfere with the Board's regulations and the courts themselves have declined to interfere on the premise that the Board's power was exclusive. While an individual landowner might under the doctrine of *United States v. Causby*⁶² recover damages in a state court if the flights were low enough and continual enough to constitute a "taking," injunctive relief was improbable.

While congressional reports remained silent as to whether the federal government was to have exclusive control of the navigable airspace, certain language changes in the Federal Aviation Act of 1958 indicate that perhaps the federal government was intended to have exclusive control. Congress has deleted the words ". . . in air commerce . . ." from the declared right of public transit and has substituted ". . . a public right of freedom of transit through the navigable air space of the United States."⁶³ Congress seems to be attempting to regulate the flight of aircraft whether engaged in commerce or not,⁶⁴ and seems to be broadening the

⁵⁹ (D.C. N.J. 1958) 159 F. Supp. 750.

⁶⁰ *Id.* at 756.

⁶¹ (2d Cir. 1956) 238 F. (2d) 812.

⁶² 328 U.S. 256 (1946).

⁶³ Federal Aviation Act of 1958, §104, 72 Stat. 740, 49 U.S.C.A. (Supp. 1958) §1304.

⁶⁴ The federal courts have constantly held that the regulations are constitutional and may be applied to a person whose flight is wholly within intrastate commerce because the flight may affect the safety and efficiency of flights in interstate commerce. *Rosenhan v. United States*, (10th Cir. 1942) 131 F. (2d) 932; *United States v. Drumm*, (D.C. Nev. 1944) 55 F. Supp. 151.

scope of the statute to include the regulation of all airspace, exclusive of state control. Furthermore under section 307(c) of the 1958 act,⁶⁵ the administrator is authorized “. . . to prescribe air traffic rules . . . for the protection of persons and property on the ground. . . .” This provision may be directed at the problem of falling aircraft or may indicate that Congress intended to extend the administrator’s control beyond the airspace above the minimum safe altitudes of flight to the lower reaches of airspace immediately above the land. Here again the congressional reports remain silent, but the language leaves open the possibility of an extension of federal control in this area.

A second problem which has plagued the courts is whether “the navigable airspace” includes the area necessary for landing and taking off. At the time of the *Causby* decision, the CAB regulations did not provide for space necessary to take off and land. The Supreme Court had little difficulty in saying that flights below the minimum safe altitudes were not within the navigable airspace which Congress placed within the public domain.⁶⁶ Shortly thereafter the CAB included within the minimum safe altitudes of flight the airspace “. . . necessary for take-off or landing . . .”⁶⁷ and interpreted this glide path as being within the navigable airspace.⁶⁸ The Supreme Court has not since had occasion to pass on the Board’s interpretation. But Congress in the Federal Aviation Act has laid to rest all questions as to the status of the glide path by including in the new definition of “navigable airspace” the “airspace . . . needed to insure safety in take-off and landing of aircraft.”⁶⁹ Under the reasoning of the *Causby* case this airspace now becomes part of the “public domain” and raises new questions as to the liability for a “taking” when the objectionable flights are within the glide path prescribed by the administrator. The Court of Claims recently had an opportunity to examine the new language of the Federal Aviation Act. Speaking

⁶⁵ 72 Stat. 749, 49 U.S.C.A. (Supp. 1958) §1348(c).

⁶⁶ *United States v. Causby*, 328 U.S. 256 (1946).

⁶⁷ “*Minimum safe altitudes*. Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes. . . .” 14 C.F.R. §60.17 (1957).

⁶⁸ “Since this provision [speaking of regulation 60.17] does prescribe a series of minimum altitudes within the meaning of the act, it follows, through the application of section 3, that an aircraft pursuing a normal and necessary flight path in climb after take-off or in approaching to land is operating in the navigable airspace.” Civil Air Regulations, Interpretation 1, 19 Fed. Reg. 4603 (1954).

⁶⁹ Federal Aviation Act of 1958, §101(24), 72 Stat. 737, 49 U.S.C.A. (Supp. 1958) §1301(24).

through Justice Reed, the court stated that though the new definition of navigable airspace includes an area needed for landing and taking off, this does not preclude the landowner from recovering compensation with regard to land over which government planes take off and land.⁷⁰ Since the doctrine of "taking" apparently is still applicable, it only remains to be seen who must pay for land "taken" to provide a safe glide path for civilian plane landings and take-offs. In the *Gardner* case, which arose under the 1938 act, the government took the position that it was not liable unless government planes were involved in the "taking."⁷¹ However, it has been suggested⁷² that since Congress has under the 1958 act possibly extended the power of the administrator to the control of all airspace, and since the glide path has been included within the navigable airspace, if a civilian airplane is flying within the navigable airspace and yet so low as to constitute a "taking," the United States might be liable for the damage caused the landowner. While it is difficult to understand how the United States can be held liable when the "taking" is actually caused by the civilian aircraft's continuous low flights, the possibility is certainly arguable since the United States has given civilian aircraft the prescriptive right to fly within the airspace above the immediate reaches of the land. Holding the United States liable for a "taking" caused by civilian planes would solve many of the present problems connected with the maintenance of such a damage action. The allocation of damages between individual tortfeasors would no longer be necessary and the complex problems of proper parties defendant would be eliminated bringing a separate action against the United States.

IV. Conclusion

The Federal Aviation Act is a new phase in aviation legislative history. The responsibility for the promotion of air traffic control facilities, the promulgation of air traffic regulations and the regulation of all airspace is placed in one individual, independent of Executive Department control and responsible only to Congress. The Civil Aeronautics Board has properly been

⁷⁰ *Matson v. United States*, (U.S. Ct. Cl. 1959) 171 F. Supp. 283.

⁷¹ For a thorough discussion of the problem of fixing liability for a "taking" see Harvey, "Landowners' Rights in the Air Age: The Airport Dilemma," 56 MICH. L. REV. 1313 (1958).

⁷² Calkins, "The Landowner and the Aircraft, 1958," 25 J. AIR LAW 373 (1958).

stripped of its legislative function in the safety field and is left only with the quasi-judicial responsibility of enforcing the economic regulation provisions, investigating accidents and reviewing orders of the administrator modifying, suspending or revoking various certificates authorized under the new act. For the first time both military and civilian aircraft will be under the control of one unified agency, and the military, the largest user of the airspace today, will no longer be free from the air traffic rules so necessary to air navigation safety.

Moreover, some significant omissions from the 1938 act and some new provisions included in the 1958 act make it possible that Congress has sought to pre-empt the field of air navigation and exclude state action. The new definition of "navigable airspace" opens up the possibility that the United States may be held responsible for a "taking" even when caused by civilian aircraft. Although it is impossible yet to say what significance the courts will attach to the language changes, if the courts decide that the United States is liable for any "taking" by civilian aircraft resulting from flights within the navigable airspace Congress has designated as public domain, the simplified proceeding for bringing the damage action against the United States would undoubtedly cause a flood of litigation in this area.

John W. Gelder, S.Ed.