

**Regulating a Global Technology within the American Federalist System: The  
Ideological Origins of the 1926 Air Commerce Act**

by

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## Abstract

The 1926 Air Commerce Act represented the institutionalization of a specific mental model for aviation regulation within the United States. This dissertation focuses on how individuals and groups responded to three distinct influences—(1) the Constitution’s state/federal separation of powers; (2) the 1919 Convention Relating to the Regulation of Aerial Navigation; and (3) practical aerial experience along the U.S.–Canadian border—to develop a regulatory system that corresponded to America’s particular socio-political traditions. I argue that the development of aviation regulation in the United States, a process previously presented as a solely domestic narrative, can only be fully understood when approached from a global perspective.

As a device capable of three-dimensional movement, the airplane possessed the innate ability to undermine state sovereignty. Though pioneering regulatory advocates in the United States believed the airplane’s speed and freedom of movement necessitated federal legislation, states and municipalities turned to their constitutionally-sanctioned police powers to regulate the airplane as early as 1908. The airplane’s use in World War I accentuated the need to constrain this potentially radical technology, but constitutional questions remained. Although the 1919 convention’s ties to the League of Nations precluded official American membership, the regulatory uniformity necessary for international flight resulted in American acceptance of the convention’s principles and norms. I present the idea of “techno-regulatory peer pressure”—the modification of a government’s regulations to correspond to those of another to facilitate the cross-border use of technology—as a means of placing the Air Commerce Act within its appropriate international context.

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Archivists are a historian's best friend and in many ways the unsung heroes of our craft. I would like to thank David A. Langbert of the National Archives for his assistance in navigating the State Department's voluminous records. The assistance offered by Richard McCulley and William Davis at the Center for Legislative Archives went beyond all expectations, and I am most appreciative to Bill for helping me sort through various drafts of multiple aviation bills. Through their intimate knowledge of the collection, Matthew Schaefer and Spencer Howard at the Herbert Hoover Presidential Library provided invaluable assistance. Archivists at the Library of Congress, the Smithsonian Institution Archives, and the Library and Archives Canada continuously offered their time and energy to track down documents, and always with a smile. They all deserve a pay raise.

I came to Alabama knowing not a single soul, and I end my graduate career at Auburn University with a host of life-long friends. I wish to thank Leslie Whatley, Guy Shields, Wade Meadows, and others for always being there and keeping me centered. I am grateful to fellow graduate students Hector and Hesper Montford, Zack Wakefield, Charles Wexler, and others who forced me to socialize. Chris Eklund and Amy Wallhermfechtler were always available to both commensurate with the trials and share the joys of the dissertation process. A special thank you goes to Kristan Christoff, who kept me sane during an intense writing process. To all those who shared their experience, strength, and hope with me throughout the years, thank you.

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## **Introduction**

This dissertation analyzes the domestic and international influences that contributed to the first federal regulation of civil aviation in the United States. President Calvin Coolidge's May 20, 1926, signature of the Air Commerce Act marked a significant milestone in American aviation history for several reasons: it represented the next step in a dialogue concerning the place of new technologies within America's constitutional framework that stretched back to the nation's founding; it began a nearly century-long regulatory relationship between aviation and the federal government; and it delineated the contours of the aerial relationship between the United States and its fellow nations. The 1926 Air Commerce Act represented the institutionalization of a shared mental model that attempted to reconcile the Constitution's federalist system with the 1919 Convention Relating to the Regulation of Aerial Navigation in light of practical experience along the U.S.-Canadian border. Rather than viewing this foundational document as an imperfect precursor of later legislation such as the 1938 Civil Aeronautics Act, the Federal Aviation Act of 1958, and the Department of Transportation Act of 1966, this study approaches the Air Commerce Act as the culmination of various ideas and influences to provide a better understanding of the forces that shape how governments approach new technologies.

The airplane represents a radical technology, which can be defined as any device that undermines traditional notions of security, social norms, and jurisprudence. By allowing movement in three dimensions, the airplane called into question a nation's ability to secure its borders. As such, it challenged a central element within the concept of sovereignty, the ideological foundation for international relations since the 1648 Peace of

Westphalia ended the Thirty Years War. The dual-use nature of aircraft, with their ready conversion from civilian to military use, further affected the established balance of international security. While a member of James Ramsay MacDonald's coalition government in 1932, prior and future British Prime Minister Stanley Baldwin combined the inability of a sovereign government to prevent aerial intrusions with the airplane's potential for death and destruction when he famously declared "the bomber will always get through."<sup>1</sup>

As the historian Joseph Corn shows, American aviation enthusiasts projected the airplane's freedom of movement onto society, prophesying profound social changes arising from the miracle of flight. Even after the horror of World War I, this "winged gospel" continued to present the airplane as both a socially constructive and destabilizing force, "an instrument of reform, regeneration, and salvation, a substitute for politics, revolution, or even religion." In addition, the airplane turned the atmosphere into an avenue for human movement, calling into question the applicability of existing laws to this novel means of conveyance. While a few pioneering individuals took up the question of aerial law before World War I, the subject remained unrecognized by the American legal profession until the 1920s. The common law maxim of *cujus est solum ejus est usque ad coelom*—he who owns the soil owns up to the sky—directly confronted the

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<sup>1</sup> *The Times* (London), November 11, 1932. While the nature and definition of sovereignty has changed over the years as a result of international events, scholars agree that at its core it pertains to the recognition of supreme authority within inviolable borders. See Daniel Philpott, "Ideas and the Evolution of Sovereignty," in *State Sovereignty: Change and Persistence in International Relations*, ed. Sohail H. Hashmi (University Park, PA: The Pennsylvania State University Press, 1997), 17-22; Thomas J. Biersteker and Cynthia Weber, "The Social Construction of State Sovereignty," in *State Sovereignty as Social Construct*, ed. Thomas J. Biersteker and Cynthia Weber (Cambridge: Cambridge University Press, 1996), 3; Daniel Philpott, *Revolutions in Sovereignty: How Ideas Shape Modern International Relations* (Princeton: Princeton University Press, 2001), 89-96; Thomas J. Biersteker, "State, Sovereignty and Territory," in *Handbook of International Relations*, ed. Walter Carlsnaes, Thomas Risse, and Beth A. Simmons (London: Sage Publications, 2002), 161-64;

airplane's freedom of movement, resulting in a modification of traditional notions of private property. If the establishment of a scholarly journal serves as the visible evidence of a discipline's permanent status, the 1930 inaugural publication of *The Journal of Air Law* speaks volumes on the uncertain relationship between aviation and the law in the first three decades of the twentieth century. The Wright brothers' 1903 flier heralded the dawn of the air age and the realization of an ancient dream, but it also challenged the established norms of security, society, and law.<sup>2</sup>

As the ultimate protector of its citizens, it seems only natural the state should intervene to mitigate the airplane's challenge to the established order. Sovereign governments theoretically possess complete and unlimited power within their territory, and the act of regulation—either defined broadly as a “principle or rule (with or without the coercive power of law) employed in controlling, directing, or managing an activity, organization, or system,” more narrowly as rules “used to carry out [or administer] a law,” or as “an attempt to control some private-sector economic decisions to which the government is not a party”—represents one of the fullest domestic expressions of state power. The regulation of technology establishes a legally-sanctioned system of use that addresses such varied elements as the criteria for operators, the rights of owners and users, and liability. In most cases, regulatory development constitutes a purely domestic process; possessing absolute authority within their borders, sovereign states may erect whatever regulatory frameworks they choose. But certain “global” technologies—such as

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<sup>2</sup> Joseph J. Corn, *The Winged Gospel: America's Romance with Aviation* (Baltimore, MD: The Johns Hopkins University Press, 1983), 30.



radio, satellites, the internet, and the airplane—cannot be contained within state borders and tend to foster a level of international regulatory cooperation.<sup>3</sup>

Whether occurring in a domestic or international context, developing a regulatory framework for a technology does not occur within a vacuum—human beings rely on previous experience to make sense of the new. Individuals construct mental models, “representation[s] that corresponds to a set of situations...that [have] a structure and content that captures what is common to these situations,” based on previous knowledge and experience. These mental models, which tend to be “pictorial or imagelike rather than symbolic,” then serve as the point of cognitive embarkation when confronting the new, unknown, or unfamiliar. As Robert J. Sternberg argues, past experiences matter and strongly influence possible approaches to current problems.<sup>4</sup>

Arthur T. Denzau and Douglass C. North present a theoretical framework to explain how institutions come into being: (1) the creation of a mental model, or “individual representations that individual cognitive systems create to interpret the environment”; (2) the acceptance of an ideology defined as “the shared framework of mental models that groups of individuals possess that provide both an interpretation of the environment and a prescription as to how the environment should be structured”; and (3) institutionalization, the creation of “formal and informal constraints constructed...to structure and order the environment.” Dialogue remains central to this process, as “mental models are shared by communication, and communication allows the creation of

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<sup>3</sup> Business Dictionary.com, s.v. “regulation,” accessed January 11, 2013, <http://www.businessdictionary.com/definition/regulation.html>; Jack P. Friedman, *Dictionary of Business Terms*, 2nd ed. (Hauppauge, NY: Barron’s Educational Series, Inc, 1994), s.v. “regulation.”

<sup>4</sup> P.N. Johnson-Liard, “Formal Rules versus Mental Models in Reasoning,” in *The Nature of Cognition*, ed. Robert J. Sternberg (Cambridge, MA: MIT Press, 1999), 60 ; Robert J. Sternberg, “A Dialectic Basis for Understanding the Study of Cognition,” *The Nature of Cognition*, ed. Robert J. Sternberg (Cambridge, MA: MIT Press, 1999), 51; William B. Rouse and Nancy M. Morris, “On Looking Into the Black Box: Prospects and Limits in the Search for Mental Models,” *Psychological Bulletin* 100 (November 1986): 350, 356.

ideologies and institutions in a co-evolutionary process.” While evidence describing the process of individual mental model creation remains scarce, sources detailing the contention among the various interested parties’ mental models (the very dialogue that gives rise to ideologies) are readily available to researchers within archival sources, periodicals, and both successful and unsuccessful legislation. This dissertation illustrates how this three-step process of institutionalization occurred within the United States concerning the subject of aviation regulation and the influences on American policymakers during each step of the process.<sup>5</sup>

Although regulatory system creation often represents the epitome of social construction, historians of technology have not fully analyzed its development.<sup>6</sup> In many ways, regulation represents the antithesis of technological determinism. Where within the automobile does one find the necessity to drive on the right side of the road, stop at a red light, or travel a maximum speed in certain areas? Wiebe E. Bijker and Trevor Pinch have addressed the importance of social factors in the creation, acceptance, and modification of artifacts such as the safety bicycle and Bakelite, but application of the Social Construction of Technology (SCOT) remains largely at the device level. I approach the development of a regulatory system as an element of the relationship

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<sup>5</sup> Arthur T. Denzau and Douglass C. North, “Shared Mental Models: Ideologies and Institutions,” *KYKLOS* 47 (February 1994): 3-4, 20. Historian Morris Bian illustrates this three-fold process when analyzing the origins of China’s state enterprise system in *The Making of the State Enterprise System in Modern China* (Cambridge, MA: Harvard University Press, 2005). Avner Grief and Joel Mokyr both recognize the importance of shared beliefs in the creation of institutions in their respective studies *Institutions and the Path to the Modern Economy* (Cambridge: Cambridge University Press, 2006) and “The Institutional Origins of the Industrial Revolution,” in *Institutions and Economic Performance*, ed. Elhanan Helpman (Cambridge, MA: Harvard University Press, 2008), 64-119.

<sup>6</sup> Some notable exceptions to this trend exist. See Steven W. Usselman, *Regulating Railroad Innovation: Business, Technology, and Politics in America, 1840-1920* (Cambridge: Cambridge University Press, 2002), Ruth Schwartz Cowan, *More Work for Mother: The Ironies of Household Technology from the Open Hearth to the Microwave* (New York: Basic Books, 1983), and Thomas P. Hughes, *Networks of Power: Electrification in Western Society, 1880-1930* (Baltimore, MD: The Johns Hopkins University Press, 1983).

between technology and society of equal importance to the process of invention and diffusion. The regulatory framework erected around a particular technology represents the culmination of a dialogue among interested parties—or relevant social groups to use SCOT’s terminology—on the “proper” use of a technology within society. In his discussion of technological systems, Thomas Hughes termed regulations “legislative artifacts,” one of several components alongside the physical artifact, organizations, scientific components, and natural resources. While such a view places regulation within a larger context, it fails to address adequately the nontechnological forces that influence legislation during the mental model creation, ideological acceptance, and institutionalization phases.<sup>7</sup>

While the institutionalization of a specific regulatory framework may occur through democratic means, the process leading up to that point more than likely represents the desires of specific interested parties. Regulatory ideas are rarely the sum total of a conscious dialogue among all of society’s citizens, even though the resulting system may profoundly affect the daily lives of everyone. As Langdon Winner points out, while technologies may “appear to be nothing more than useful instruments,” they establish “enduring frameworks of social and political action.” Regulations represent a similar summation of a society’s political and cultural values at the time of creation that,

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<sup>7</sup> For discussions of SCOT see Trevor J. Pinch and Wiebe E. Bijker, “The Social Construction of Facts and Artifacts: Or How the Sociology of Science and the Sociology of Technology Might Benefit Each Other,” in *The Social Construction of Technological Systems*, eds. Trevor J. Pinch and Wiebe E. Bijker (Cambridge, MA: The MIT Press, 1989), 17-50; Wiebe E. Bijker, *Of Bicycles, Bakelites, and Bulbs: Towards a Theory of Sociotechnical Change* (Cambridge, MA: The MIT Press, 1995); Donald MacKenzie, *Inventing Accuracy: A Historical Sociology of Nuclear Missile Guidance* (Cambridge, MA: The MIT Press, 1990). Thomas Hughes, “The Evolution of Large Technological Systems,” in *The Social Construction of Technological Systems*, 51.

like Hughes's technological systems, "are both socially constructed and society shaping."<sup>8</sup>

An overview of the current literature illustrates the need for a study that places aviation regulation within the wider view. While historians of United States foreign policy such as William Appleman Williams and Frank Costigliola have successfully undermined the image of an isolationist 1920s America, this shift has yet to take hold firmly within aviation literature. International aeronautical connections during this period are generally discussed in the context of discrete events such as the Navy's 1919 Atlantic flight, the Army's 1924 World Flight, and Lindbergh's 1927 solo Atlantic crossing. Two foundational books on the subject of American aviation—Henry Ladd Smith's *Airways: The History of Commercial Aviation in the United States* and *Airways Abroad: The Story of American World Air Routes*—physically embody the national/international divide that permeates aviation history. Though historians such as Jeffrey A. Engel, Wesley P. Newton, and Jenifer Van Vleck have worked hard to collapse the national and international into a single narrative, distinguishing between the two remains the dominant approach. This national/international divide also permeates the literature on early American aviation regulation, a separation this dissertation exposes as a false dichotomy. I argue that the development of aviation regulation in the United States, a process previously presented as a solely domestic narrative, can only be fully understood when approached from a transnational perspective.<sup>9</sup>

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<sup>8</sup> Langdon Winner, *The Whale and the Reactor: A Search for Limits in an Age of High Technology* (Chicago: The University of Chicago Press, 1986), x; Thomas Hughes, "The Evolution of Large Technological Systems," in *The Social Construction of Technological Systems*, eds. Trevor J. Pinch and Wiebe E. Bijker (Cambridge, MA: The MIT Press, 1989), 51.

<sup>9</sup> Frank Costigliola, *Awkward Dominion: American Political, Economic, and Cultural Relations with Europe, 1919-1933* (Ithaca: Cornell University Press, 1984); William Appleman Williams, "The Legend of Isolationism in the 1920's," *Science & Society* 18 (Winter 1954): 1-20; Henry Ladd Smith, *Airways: The*

In *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933*, Morton Keller approaches aviation regulation as one more component in the larger American trend towards regulatory system creation. In the two pages devoted to aviation, he focuses on how aviation undermined longstanding legal assumptions and the Air Commerce Act's failure to place intrastate aviation under federal regulation. Harry P. Wolfe and David A. NewMyer address early aviation regulatory developments while studying the federal regulation of aviation over the course of the twentieth century. Wolfe and NewMyer condense events from 1903 to 1926 into six pages, discussing the need for federal regulation and providing an overview of the first two major pieces of federal aviation legislation: the 1925 Air Mail Act and the 1926 Air Commerce Act. When integrated into broad horizontal studies such as Keller's or vertical ones like Wolfe and NewMyer's, early aviation regulation in the United States receives only cursory treatment.<sup>10</sup>

Studies of international aviation regimes over the course of the twentieth century treat the 1919 Convention Relating to the Regulation of Aerial Navigation in a similarly perfunctory manner. Dawna L. Rhoades compresses the 1910 Paris Conference, the 1919 Paris Convention, and the 1928 Havana Convention within two paragraphs, distinctly separate from domestic developments within the United States. In his study of commercial aviation, T. A. Heppenheimer does not even mention the international

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*History of Commercial Aviation in the United States* (New York: Alfred A. Knopf, 1942); Henry Ladd Smith, *Airways Abroad: The Story of American World Air Routes* (Madison: University of Wisconsin Press, 1950); Jeffrey A. Engel, *Cold War at 30,000 Feet: The Anglo-American Fight for Aviation Supremacy* (Cambridge, MA: Harvard University Press, 2007); Wesley P. Newton, *The Perilous Sky: U.S. Aviation Diplomacy and Latin America, 1919-1931* (Coral Gables, FL: University of Miami Press, 1978); Jenifer Van Vleck, *Empire of the Air: Aviation and the American Ascendancy* (Cambridge, MA: Harvard University Press, 2013).

<sup>10</sup> Morton Keller, *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933* (Cambridge, MA: Harvard University Press, 1990), 74-76; Harry P. Wolfe and David A. NewMyer, *Aviation Industry Regulation* (Carbondale, IL: Southern Illinois University Press, 1985), 16-25.

conventions or the relationship between the airplane and sovereignty. The primary focus of such century-long chronological studies remains the post-World War II regime initiated with the 1944 Chicago Convention, resulting in interwar attempts at international regime creation being portrayed as a regulatory dead-end of little consequence. John C. Cooper's 1947 study of the international aviation regime, *The Right to Fly*, remains an exception to this trend, although his analysis of American participation in drafting the 1919 convention remains embedded within a polemic on the need for a decidedly different postwar system.<sup>11</sup>

Stuart Banner provides a more in-depth analysis of early American aviation regulation in his study *Who Owns the Sky?* Focusing on how the airplane forced a redefinition of airspace and the concept of aerial trespass, he traces the issue from the theoretical questions of the late nineteenth century to the Cold War debate over the ownership of outer space. Banner also recognizes the limitations imposed on American aircraft due to the United States' failure to ratify the Paris convention, particularly in its relationship with Canada, but does not analyze how the convention influenced the domestic regulatory debate. By applying a sweeping temporal scope to a specific question Banner skillfully illustrates "the relationship between technological change and legal change," connecting these two often disparate subjects within their proper historical context. His chapters on uniform aviation law and the airplane's relationship to interstate commerce were valuable resources for this study.<sup>12</sup>

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<sup>11</sup> Dawna L. Rhoades, *Evolution of International Aviation: Phoenix Rising* (Aldershot, Hants, England: Ashgate, 2003), 14-15; T. A. Heppenheimer, *Turbulent Skies: The History of Commercial Aviation* (New York: John Wiley & Sons, Inc., 1995); John C. Cooper, *The Right to Fly: A Study in Air Power* (New York: Henry Holt and Company, 1947).

<sup>12</sup> Stuart Banner, *Who Owns the Sky? The Struggle to Control Airspace from the Wright Brothers On* (Cambridge, MA: Harvard University Press, 2008), 3, 65-67.

Since its original publication in 1978, Nick Komons's *Bonfires to Beacons: Federal Civil Aviation Policy under the Air Commerce Act, 1926-1938* has remained the primary work on the subject. In the first of three parts, "Background to the Air Commerce Act, 1918-1926," Komons analyzes the period leading up to the Air Commerce Act through a strictly domestic lens. His discussion of the international convention consists of three sentences, and as such he fails to place domestic regulatory developments within a larger international context. Komons's primary contribution to the subject of aviation regulation revolves around his revision of the historical legacy and importance of William P. MacCracken, the first Assistant Secretary of Commerce for Aeronautics, in the creation of an American regulatory system for aviation. MacCracken had been tainted in the popular narrative due to his role in Senator Hugo Black's 1934-1935 airmail hearings, and Komons benefited from the recent publication of Michael Osborn and Joseph Riggs's edited oral biography of MacCracken, *Mr. Mac: William P. MacCracken, Jr. on Aviation, Law, Optometry*. By illustrating the important role he played in the American Bar Association (ABA), the National Aeronautic Association, the Commerce Department, in private consulting, and his actions in the 1930 "spoils conference" and subsequent fallout, Komons identifies MacCracken as the single most important figure in the creation of federal civil aviation policy during the 1920s.<sup>13</sup>

In first part of his study, Komons drew extensively from Thomas W. Waltermann's 1970 Ph.D. dissertation, "Airpower and Private Enterprise: Federal-Industrial Relations in the Aeronautics Field, 1918-1926." Although he spends several pages on the

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<sup>13</sup> Nick A. Komons, *Bonfires to Beacons: Federal Civil Aviation Policy under the Air Commerce Act, 1926-1938*, 2nd ed. (Washington, DC: Smithsonian Institution Press, 1989); Michael Osborn and Joseph Riggs, "Mr. Mac": *William P. MacCracken, Jr. on Aviation, Law, Optometry* (Memphis, TN: Southern College of Optometry, 1970).

international air convention, Walterman considers the Senate's failure to ratify the document as suitable reason to avoid studying it at length, an approach endemic in the historiography. Walterman places the relationship between government and aviation within the context of the modified Progressivism of the Republican 1920s. He argues that the lessons derived from the development of the railroad, notably that the government should proactively prevent destructive competition and regulatory fragmentation, "became the cohesive force of a quasi-progressivism which lacked the broad social aims of the whole-hearted progressive movement, but which was, nevertheless, sincere in its sponsorship of legislation capable of injecting order and efficiency into America's distributive industries." Walterman presents Commerce Secretary Herbert Hoover as the embodiment of the business-oriented faction within Progressivism, a component of the movement that had existed as far back as 1885 but only came to ascendancy after the fall from dominance of the social wing under President Woodrow Wilson. Ellis W. Hawley, David D. Lee, and Randy Johnson approach the subject of early American aviation regulation through the person of Hoover, linking the passage of the Air Commerce Act to his dominant personality and belief in a distinct government/business relationship that Hawley terms associationalism. While recognizing Hoover's important contributions, this dissertation shows that he plugged into an existing dialogue concerning the nature of aviation regulation within the American federalist framework and the United States' relationship with the emerging international civil aviation regime that had begun in the Wilson administration.<sup>14</sup>

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<sup>14</sup> Thomas W. Walterman, "Airpower and Private Enterprise: Federal-Industrial Relations in the Aeronautics Field, 1918-1926" (Ph.D. diss., Washington University, 1970), v, 236-40. Hoover's role in aviation regulation has received the attention of several historians. See Ellis W. Hawley, "Three Facets of Hooverian Associationalism: Lumber, Aviation, and Movies, 1921-1930," in *Business and Government in*



Documentary evidence shows that three forces played defining roles in the creation of a shared ideology concerning aviation regulation in the United States: (1) the Constitution's federalist system of government; (2) historical interpretations of the Constitution's commerce clause as a justification for the creation of domestic regulatory regimes for inland waterways, railroads, and the automobile; and (3) practical aerial experience along the U.S.–Canadian border. The Constitution—ratified by the requisite nine states in 1788—established a federalist system of government that divided power between the national government and the several states. In seven articles, it delineated the three components of the nation government, established the contours of the federal-state relationship, and provided an amendment process as a means of adapting the document to ever-changing circumstances. The Tenth Amendment, part of the Bill of Rights ratified in December 1791, stated that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” As the drafters of the Constitution could not possibly address the place of future technologies within this federalist system, the question of where regulatory power over new developments rested remained open to debate.<sup>15</sup>

Discussions over the nature of aviation regulation in the first decades of the twentieth century constituted yet another episode in the historic struggle between ever-broader interpretations of the interstate commerce clause—with their corresponding increase in federal authority—and state police powers, a central tension within American political history. This dialogue first developed around inland waterway shipping.

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*America since 1870*, ed. Robert F. Himmelberg, (New York: Garland, 1994), 213-55; David D. Lee, “Herbert Hoover and the Development of Commercial Aviation, 1921-1926,” *Business History Review* 58 (Spring 1964): 78-102; and Randy Johnson, “Aviation, Herbert Hoover and his ‘American Plan’,” *The Journal of Aviation/Aerospace Education and Research* 10 (Spring 2001): 35-59.

<sup>15</sup> U.S. Const. art. I, § 8, cl. 3 and cl. 18, § 9, cl. 5.

Railroads and the automobile reignited this debate, while the particularities of each specific technology and the contemporary political climate recast its contours. Like living blueprints, regulatory approaches to earlier transportation technologies, arising out of this larger constitutional debate and stamped with the political and economic culture of their time, influenced discussions concerning the domestic regulatory framework for aviation in the early twentieth century. In their attempt to reconcile aviation with the federalist system, American policymakers relied upon prior and contemporary interpretations of the Constitution concerning inland waterways, railroads, and the automobile, modified to allow for the specific technology of the airplane. As Robert J. Sternberg argues, past experiences matter. Chapter One of this study looks at the constitutional debates surrounding these earlier transportation technologies and the regulatory systems that arose out of them, and Chapter Two addresses prewar regulatory developments based largely on the automobile's state-based system.

Powered flight represented a truly radical development in human history, and the airplane could not be made to neatly fit within any of the existing transportation regulatory frameworks. As this dissertation shows, the technology of the airplane itself strongly influenced ideas concerning the shape of its regulatory regime. In his influential work *The Structure of Scientific Revolutions*, Thomas Kuhn discusses the differences between normal science (the incremental increase in knowledge within the existing paradigm) and extraordinary or radical science (the result of a reoccurring anomaly within the tradition of normal science that brings about a restructuring of the normal science paradigm). Technology holds a central position for Kuhn in precipitating the crisis of normal science. "Without the special apparatus that is constructed mainly for

anticipated functions, the results that lead ultimately to novelty could not occur.” As an anomalous technology, the airplane’s inherent freedom of movement caused some advocates of federal regulation to reinterpret the Constitution’s commerce clause to support their argument for sole federal regulatory control.<sup>16</sup>

World War I fundamentally changed the nature of the aviation regulatory discussion, and its importance in how people viewed the airplane cannot be overstated. The sustained existential crisis of global warfare channeled the airplane’s development along more militaristic lines, while new ideas concerning its use in battle accentuated the potential for aerial death and destruction. As the historian Morris Bian points out, “the more severe and the more sustained a crisis, the more complete and thorough the alteration of mental models, and the more radical and revolutionary the outcome of institutional change.” In the minds of air power advocates, the airplane became a means of avoiding the horrors of future trench warfare. For many civilians, it became a symbol of insecurity and powerlessness. For Allied policymakers, the war accentuated the international implications of powered flight and the airplane’s challenge to national security.<sup>17</sup>

In response, Allied representatives at Versailles drafted the 1919 Convention Relating to the Regulation of Aerial Navigation to address the airplane’s place in the international system. This treaty, based largely on wartime experience, established an international civil aviation regime that delineated the “principles, norms, rules, and decision-making procedures” for using the airplane in peacetime and created a permanent body with ties to the League of Nations—the International Commission on Aerial

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<sup>16</sup> Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 3rd ed. (Chicago: The University of Chicago Press, 1962, 1996), 65.

<sup>17</sup> Bian, *State Enterprise System*, 10.

Navigation (ICAN). Most important, this international convention recognized national governments as the proper regulatory authority for aviation, a subject that remained open to constitutional debate within the United States. Chapter Three analyzes the role of the United States in this process of international regime creation while Chapter Four addresses the Wilson administration's response to the convention.<sup>18</sup>

The creation of an international civil aviation regime profoundly influenced the American approach to aviation regulation in the immediate postwar era. The domestic political tone after the Republican victory in the 1918 congressional elections precluded official U.S. membership in any international body tied to the League of Nations. In spite of this, elements of the international regime pervaded the internal debate concerning aviation regulation and came to be institutionalized in the 1926 Air Commerce Act. When analyzing the international aerial situation in 1930, Secretary General of the ICAN Albert Roper pointed to the general acceptance of the convention's provisions. "If...the network of special conventions as between state and state is considered, it is seen that by the system of special agreements—compulsorily conforming to the International Convention—concluded by contracting states with non-contracting states, a great number of these latter find themselves led to apply indirectly the provisions of the general convention."<sup>19</sup>

A year later, Northwestern University political science professor Kenneth Colegrove also recognized the universality of many aspects of the international

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<sup>18</sup> Stephen Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," *International Organization* 36 (Spring 1982): 185. The ICAN may also be referred to by its French acronym, CINA, for Commission Internationale de Navigation Aérienne.

<sup>19</sup> Albert Roper, "Recent Developments in International Law," *Journal of Air Law* 1 (October 1930): 410-11.

convention, presenting eight general components of all aviation agreements regardless of a nation's official adherence:

1. Every aircraft must have a nationality, that is to say, it must be entered on the register of the country to which it belongs.
2. Every aircraft must be provided with a technical document certifying that it is airworthy (navigation permit, certificate of airworthiness, etc.) and also a log book.
3. Every member of the crew of an aircraft must be in possession of documents proving his identity and competency to undertake his duties.
4. No aircraft must carry wireless apparatus without special authorization.
5. Every aircraft used for commercial purposes must carry a list of passengers' names and documents required by Customs in regard to the transport of goods.
6. The authorities of one contracting State are entitled to visit aircraft belonging to the other State.
7. The principle of equality of treatment for national aircraft and aircraft belonging to the other contracting party as regards the operation of aerodromes open to public use and measures of assistance and salvage.
8. Both contracting States must communicate to each other periodically full particulars concerning the regulation of air navigation in general (laws, regulations, decrees) or particular operations, (customs, aerodromes, prohibited areas, etc.).<sup>20</sup>

Drawing on Stephen Krasner's definition of regimes as "principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue area," Christer Jönsson presents the primary components of the convention's international regime that came to define the aviation policy of all nations in the era of "unrestricted sovereignty" from 1919-1944. He writes: "in short, the international aviation regime created after World War I rested on the *principle* of unrestricted state sovereignty. This implied the *norm* that each state have the power to decide on all air transport within its airspace. The principal *rule* guiding international air transport was thus that government approval must be acquired for overflight and landing. Given the extensive government control over aviation at the time, bilateral government negotiations became the main *decision-making procedure*." While these general elements all came to

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<sup>20</sup>Kenneth Colegrove, "A Survey of International Aviation," *Journal of Air Law* 2 (January 1931): 22-23.

be embodied within American regulatory legislation, this dissertation shows that American policymakers adopted more specific components of the international regime, even in the absence of official adherence, to facilitate international flight. Chapters Five through Seven discuss how American policymakers adopted the primary tenets of the international convention—even in the absence of official membership—and Chapter Eight details their institutionalization within the 1926 Air Commerce Act and Air Commerce Regulation.<sup>21</sup>

Due to its connections to the British Empire, Canada became an official member of the ICAN and America's northeast border became a primary focal point for the diffusion of international principles and norms into the United States. An official U.S.-Canadian air agreement did not come into effect until 1929, but the aerial relationship between the two nations began with the passage of Canadian wartime legislation in 1914, and the 1920 Canadian Air Regulations provided a regulatory system based on the international convention. During the following six years, practical experience of cross-border flight and the activities of American subsidiaries in Canada provided proof for American policymakers of the need either to join the international regime or to enact complementary regulations. The U.S.-Canadian aerial relationship before 1929 has received little attention within the historiography, the exception being Stephen Latchford's 1931 study. The importance of this relationship on American regulatory thought remains a dominant thread throughout the second half of this study.<sup>22</sup>

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<sup>21</sup> Christer Jönsson, *International Aviation and the Politics of Regime Change* (London: Frances Pinter, 1987), 24, 29; Stephen Krasner, "Structural Causes and Regime Consequences: Regimes as Intervening Variables," in *International Regimes*, ed. Stephen Krasner (Ithaca: Cornell University Press, 1983), 9.

<sup>22</sup> Stephen Latchford, "Aviation Relations between the United States and Canada Prior to Negotiation of the Air Navigation Arrangement of 1929," *Journal of Air Law* 2 (July 1931): 335-41.

This dissertation contributes to the history of technology through the introduction of the concept of “techno-regulatory peer pressure”—the modification of a government’s regulations to correspond to those of another to facilitate the cross-border use of technology—as a means of placing the seemingly internal process of regulatory development within a wider context. While sovereignty theoretically marks states as the ultimate regulatory authority, the use of technology permeates borders, necessitating dialogue, cooperation, and a level of compatibility among political entities. Just as first adopters strongly influence the development of the technology itself, first regulators exert a powerful influence on the shape of a technology’s system of use. Once a regulatory system becomes institutionalized within a dominant political entity, surrounding states become compelled to adopt its principles and norms. As this process continues, a specific regulatory approach achieves critical mass, becoming the standard for all those using the technology. Both Chapter One’s discussion of the reciprocity struggle among American states concerning automobile legislation and the process of shared mental model formation regarding aviation regulation and its institutionalization detailed in Chapters Four through Eight serve as examples of this process. My research suggests that states adopt technological standards of use through three possible avenues: (1) membership in an official regime such as the International Commission on Aerial Navigation arising from the 1919 convention; (2) the acceptance of established principles and norms through voluntary action as attempted in the 1925 American Aeronautical Safety Code; and (3) the adoption of principles and norms through domestic legislation as embodied in the 1926 Air Commerce Act and subsequent Air Commerce Regulations.

In taking an interdisciplinary approach, this dissertation analyzes the passage of the Air Commerce Act from a wider view in order to understand the process by which individuals and governments reconcile the potentially disruptive aspects of technology with society. As such, it not only fills a gap in the existing literature but also provides a possible framework for understanding the nature of regulatory development within an increasingly interconnected world.



## Chapter 1

### **The Historical Debate over the Federal Regulation of Transportation**

In January 1923, Frederick P. Lee of the Legislative Drafting Counsel of the House of Representatives produced a memorandum outlining H.R. 13715, the proposed Civil Aeronautics Act. Though not enacted into law, this bill provided an arena for discussions concerning the relationship between the federal government and aviation during the early interwar period. Section 221 of the bill approached air navigation “as a unit,” declaring “that the Federal Government cannot effectively regulate, prevent interference with, and safeguard interstate and foreign commerce by air navigation without incidental regulation of intrastate commerce by air navigation and of air navigation for other than commercial purposes.” To justify this federal co-option of regulatory power Lee pointed to the commerce clause of the United States Constitution, a single sentence that provides Congress with the power “to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Declaring that the Constitution “keeps pace with new developments of time and circumstance,” Lee looked to shipping, railroads, and automobiles as precedents for H.R. 13715’s all-encompassing approach. In so doing he placed the issue of federal regulation of aviation within the broader historical context of transportation regime creation. In order to fully understand how American policymakers approached the issue of aviation regulation, one must first look at the systems established for waterway shipping, railroads, and the

automobile.<sup>1</sup>

Debate over the federal government’s constitutional power to develop waterways and various Supreme Court rulings during the early nineteenth century over the nature of the commerce clause set the parameters for all subsequent deliberations regarding transportation regulation. The first issue concerning waterways revolved around the nature of their use—whether they would be free or under the ownership and control of individuals, groups, or states. Both the 1763 and 1783 Treaties of Paris provided signatories free navigation of the Mississippi River, while the Northwest Ordinance of 1787—one of the last acts of the Confederation Congress—included a provision for the free use of waterways in the Ohio territory. The acceptance and institutionalization of freedom of the waterways had a profound influence upon aviation later, particularly the notion of freedom of the air, but did not settle questions of shipping regulation. What level of government held this power and what were its limits? Proper delineation of regulatory power cut right to the heart of republicanism, an ideology that sought to balance “power, liberty and virtue” in order to bring about “a virtuous and harmonious society, whose members were bound together by mutual responsibility.” The Articles of Confederation had failed to mention waterways or the power to regulate them. Article II’s affirmation of state sovereignty over all aspects not expressly given to Congress conflicted with Article IV’s declaration that citizens shall enjoy free movement and “all the privileges of trade and commerce” between states. Such ambiguity threatened the fledgling republic’s unity, legally justifying the passage of protective tariffs in Rhode Island, Massachusetts, Pennsylvania, New Hampshire, and New York in 1785. Trade

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<sup>1</sup> “Memoranda in Re Section 221 of the Proposed Civil Aeronautics Act,” in *Law Memoranda Upon Civil Aeronautics: Printed for the Use of the Committee on Interstate and Foreign Commerce House of Representatives*, (Washington, DC: GPO, 1923), 48; U.S. Const. art. I, § 8, cl. 3.

conventions in Mount Vernon and Annapolis attempted to overcome these defects within the Articles of Confederation and “led like stepping stones to the Constitutional Convention.”<sup>2</sup>

The United States Constitution, according to the Federalists, represented “the culmination of the American effort to establish an independent national economy” through a republican framework. It specifically placed the power to regulate interstate and domestic trade within the realm of the newly constituted federal government, empowered Congress to “make all laws which shall be necessary and proper” to achieve its mandate, and forbade the erection of taxes or duties between states. In his defense of the Constitution future Treasury Secretary Alexander Hamilton argued that the nature of commerce among the states necessitated a unified and strong national government and that “there is no object, either as it respects the interests of trade or finance, that more strongly demands a federal superintendence.” Future President James Madison portrayed the federal government as the only means with which to prevent the states from erecting tariff barriers and thus destroying the economic ties that facilitate and strengthen political union.<sup>3</sup>

The question of the federal government’s role in internal improvements closely coincided with those concerning the extent of its regulatory power. On December 5, 1791, Treasury Secretary Alexander Hamilton argued in his *Report on Manufacturers* that the scope and costs of road and canal projects necessitated action and planning at the

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<sup>2</sup> William J. Hull and Robert W. Hull, *The Origin and Development of the Waterways Policy of the United States* (Washington: National Waterways Conference, Inc., 1967), 3, 5-7; Treaty of Paris, Great Britain-France-Spain, February 10, 1763; Treaty of Paris, United States-Great Britain, September 3, 1783; Northwest Ordinance of 1787, <http://www.ourdocuments.gov/doc.php?doc=8&page=transcript>; John F. Kasson, *Civilizing the Machine: Technology and Republican Values in America, 1779-1900* (New York: Grossman Publishers, 1976), 4, 18, 33; Articles of Confederation. art. II, IV.

<sup>3</sup> Alexander Hamilton, Federalist No. 22, and James Madison, Federalist No. 24, in *The Federalist* (Project Gutenberg, <http://thomas.loc.gov/home/histdox/fedpapers.html>).

national level. Arguing that these projects benefited the nation as a whole, he addressed counterarguments decrying regional favoritism. Hamilton, along with Washington, James Madison, and other like-minded contemporaries, believed communication and transportation improvements were vital for four interrelated reasons: they allowed for an increase in trade and commerce (thus adding to the wealth of the nation as a whole), facilitated settlement and economic development in frontier areas, bound “the states securely together and promote[d] a sense of unity,” and provided “a powerful check against regional dissension and fragmentation.” Desires of the early Federalists clashed with a governmental system specifically designed to limit the centralization of power and a culture sensitive to any such concentrations. In addition, many citizens questioned the wisdom of a far-off government making decisions that affected their daily lives, preferring that issues be handled locally.<sup>4</sup>

Once in power, Republican presidents, having criticized the national programs proposed under Federalist presidents Washington and Adams, adopted “the same centralizing, consolidating tendencies” without fully discarding their strict, pro-state constitutional interpretation. The overriding question—similar to that of post-World War I aviation—was not whether something needed to be done but exactly what and at what level of government. All three Republican presidents regularly issued public statements calling for and extolling the benefits of internal improvements (Jefferson even signed the

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<sup>4</sup> Ronald E. Shaw, *Canals for a Nation: The Canal Era in the United States* (Lexington, KY: The University of Kentucky Press, 1990), 7-9; John Lauritz Larson, ““Bind the Republic Together”: The National Union and the Struggle for a System of Internal Improvements,” *Journal of American History* 74 (September 1987): 366-68; Kasson, *Civilizing*, 35-36; Alexander Hamilton, *Report of the Secretary of the Treasury of the United States on the Subject of Manufactures presented to the House of Representatives, December 5, 1791*, found at [https://play.google.com/store/books/details/United\\_States\\_Dept\\_of\\_the\\_Treasury\\_Report\\_of\\_the\\_S?id=V8dMAAAAYAAJ&feature=search\\_result#?t=W251bGwsMSwyLDEsImJvb2stVjhhTUFBQUFZQUFKII0](https://play.google.com/store/books/details/United_States_Dept_of_the_Treasury_Report_of_the_S?id=V8dMAAAAYAAJ&feature=search_result#?t=W251bGwsMSwyLDEsImJvb2stVjhhTUFBQUFZQUFKII0). Both James Madison and Thomas Jefferson worked alongside Washington in the Potomac Company, and all three recognized the difficulties embedded within the interstate nature of waterway improvements.

1806 National Road Act), but their constitutional philosophy led them to view an amendment as the only means to legitimize broad federal action. One of the most significant developments of this prolonged debate, which directly influenced later aviation discussions, was the coalescing, with the aid of John Marshall's Supreme Court, of a shared mental model that viewed a constitutional amendment as unnecessary. Instead legislation, buttressed by constitutional interpretation, could allow for a federally-created transportation system and regulatory regime, though only the latter came to be institutionalized during the nineteenth century.<sup>5</sup>

Albert Gallatin's 1808 *Report of the Secretary of the Treasury on the Subject of Public Roads and Canals* represented the pinnacle of nineteenth century federal transportation planning. As Treasury Secretary for first Jefferson and then Madison, he continued Hamilton's national approach in the hopes of overcoming the obstacles of limited capital, long distances, and the fear of minimal return on investment. To "effectually...strengthen and perpetuate that union, which secures external independence, domestic peace, and internal liberty," Gallatin presented an integrated system of water and land transport to allow for a truly national commercial network at an estimated cost of \$16,600,000. Seeing a possible constitutional wrinkle in his plan as "the United States cannot, under the Constitution, open any road or canal, without the consent of the state through which such road or canal passes," he advocated for a constitutional amendment. Preempting criticisms grounded in economy, Gallatin posited that the necessary funds could be met with an annual appropriation of two million dollars dispersed through federal loans to both states and private companies and federal stock purchases over a ten-

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<sup>5</sup> Paul Chen, "The Constitutional Politics of Roads and Canals: Inter-Branch Dialogue Over Internal Improvements, 1800-1828," *Whittier Law Review* 28 (Winter 2006): 629-34; Larson, "Bind," 365-66; Shaw, *Canals*, 21-22.

year period. The federal debt rose during the War of 1812 from \$45,000,000 to \$128,000,000 in 1815, undercutting the financial basis of Gallatin's plan but not his fundamental argument for federal action.<sup>6</sup>

The War of 1812 accentuated the need for improved transportation and communication within the United States. Representatives Henry Clay of Kentucky, John C. Calhoun of South Carolina, and Daniel Webster of New Hampshire persistently argued for federally-supported internal improvements independent of a constitutional amendment. Calhoun's 1817 Bonus Bill, based on an interpretation of the Constitution's "necessary and proper" clause, presented a less ambitious plan than Gallatin's. It proposed a federal fund for internal improvements supported by revenue derived from the National Bank but did not specify how or on what projects such federal money would be spent. The Bonus Bill's two-vote passage illustrates a growing congressional belief that a constitutional amendment was unwarranted, and President Madison shocked many when he vetoed the bill on constitutional grounds.<sup>7</sup> Monroe's 1822 veto of the National Road Repair Bill, John Quincy Adams's support for the first rivers and harbors bills, Congress's \$1,000,000 appropriation in 1828 for the Chesapeake and Ohio Canal, Andrew Jackson's repeated attacks on Henry Clay's "American System" (while increasing federal spending for local and regional improvements), and Polk's veto of the 1846 and 1847 rivers and harbors bills illustrate the continued political tension over federal authority and

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<sup>6</sup> Albert Gallatin, *Report of the Secretary of the Treasury on the Subject of Public Roads and Canals* (Washington, DC: R. C. Weightman, 1808), 8, 21, 40, 51, 53-58, 73-78; George Rogers Taylor, *The Transportation Revolution 1815-1860*, 3rd ed. (New York: M.E. Sharpe, Inc., 1977), 355. Larson argues that the Gallatin plan suffered from "a steady erosion of authority in the national government that followed the Jefferson years." Larson, "Bind," 374.

<sup>7</sup> James Madison to Congress, "Veto Message," March 3, 1817; Hull and Hull, *Origin*, 12; Larson, "Bind," 379; Chen, "Constitutional," 346-47; Shaw, *Canals*, 26-27. The Hulls argue that the three proimprovement representatives drew upon English tradition concerning the role of Parliament, whereas Larson and Chen argue they derived their position from the Constitution's "common welfare and defense" clause in the preamble.

centralization embedded within the pre-Civil War internal improvements debate. Indirect and piecemeal federal assistance, rather than a centralized plan, came to be the accepted norm and defined transportation system creation throughout the nineteenth century.<sup>8</sup>

The lack of a clear consensus at the federal level put the primary impetus for internal improvements on the states, and antebellum canal developments vividly illustrate the flexibility inherent in local initiative as well as the hazards of decentralization.<sup>9</sup> In response to Gallatin's desire to link the Hudson River with Lake Erie, the New York legislature appointed a commission to look into the matter in 1810. Former mayor of New York City De Witt Clinton managed to secure passage of a \$5 – 6 million project in a state of one million citizens. The Erie Canal, begun in 1818 and fully completed in 1825, and the Champlain Canal, approved with the Erie and completed in 1823, saw a state independently putting into action a major sectional component of Gallatin's 1808 plan. In the first two years of operation the Erie Canal took in almost one and a half million dollars, and its phenomenal success precipitated a "canal boom" that placed a

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<sup>8</sup> Hull and Hull, *Origin*, 12-19; Larson, "Bind," 387; Chen, "Constitutional," 641; William Augustus Meese, *Abraham Lincoln: Incidents in His Life Relating to Waterways* (Moline, IL: Desaulniers & Co., 1908), 30-44. A national bank, protective tariffs, and internal improvements marked the three pillars of Clay's "American System."

<sup>9</sup> The following draws chiefly from Julius Rubin, "An Innovating Public Improvement: The Erie Canal" and Harvey H. Segal, "Cycles of Canal Construction" and "Public Funds in Canal Construction, 1815-60" found in Carter Goodrich, ed., *Canals and American Economic Development* (New York: Columbia University Press, 1961) as well as Shaw, *Canals for a Nation* and Taylor, *The Transportation Revolution*. A profuse and detailed literature exists concerning the development, use, and cultural significance of specific American canals. See Lynn Metzger and Peg Bobel, eds., *Canal Fever: The Ohio & Erie Canal, From Waterway to Canalway* (Kent, OH: Kent State University Press, 2009); David H. Mould, *Dividing Lines: Canals, Railroads and Urban Rivalry in Ohio's Hocking Valley, 1825-1875* (Dayton, OH: Wright State University Press, 1994); Ralph D. Gray, *The National Waterway: A History of the Chesapeake and Delaware Canal* (Urbana, IL: University of Illinois Press, 1967); Walter S. Sanderlin, *The Great National Project: A History of the Chesapeake and Ohio Canal* (Baltimore, MD: The Johns Hopkins Press, 1946); Peter L. Bernstein, *Wedding of the Waters: The Erie Canal and the Making of a Great Nation* (New York: W.W. Norton, 2005); Madeline S. Waggoner, *The Long Haul West: The Great Canal Era, 1817-1850* (New York: Putnam, 1958); and Julius Rubin, *Canal or Railroad? Imitation and Innovation in the Response to the Erie Canal in Philadelphia, Baltimore, and Boston* (Philadelphia: American Philosophical Society, 1961).

major financial burden upon states.<sup>10</sup>

According to historian Harvey H. Segal, the first cycle of canal development, beginning in 1815, resulted in 3,326 miles of canals through various state-financed regional projects at a cost of \$125,000,000. The recession of 1834, the growing dispute between Andrew Jackson and the Second Bank of the United States, and the completion of the majority of projects marked an end of this first phase. The much more volatile second cycle of 1834 to 1844 relied heavily on foreign loans, increased state foreign indebtedness by 71.4 percent—from an 1820s average of \$85 million to \$297 million in 1839—and resulted in states defaulting on “about \$60 million [worth] of...state bonds.” The federal government did provide direct aid to the Chesapeake and Ohio and the Chesapeake and Delaware between 1815 and 1860, but the majority of federal aid for canal construction came through indirect land grants. States therefore bore the primary burden of costs in the construction of canals.<sup>11</sup>

During the canal era the Supreme Court became the primary arena for discussions concerning the nature of republican government and the scope of the commerce clause. President John Adams appointed his Secretary of State John Marshall to the position of chief justice in 1801. A Virginia Federalist whose service in the Revolutionary War “shaped his attitudes toward nationalism, political institutions, and the role of the military,” Marshall’s constitutional interpretations profoundly influenced the course of American history. Marshall set the tone of discussion, instituted the practice of issuing a single opinion rather than individual ones, and strove to detach the court from politics. In

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<sup>10</sup> Rubin, “Innovating,” 40, 47, 65; Taylor, *Transportation Revolution*, 32-34. While smaller canals had been developed before the Erie Canal they amounted to a total of no more than 100 miles, with the Middlesex Canal connecting the Merrimack River with Boston Harbor being the longest at 27.25 miles.

<sup>11</sup> Segal, “Cycles,” 179, 182-91, 202-3, 214-15; Taylor, *Transportation Revolution*, 52; Shaw, *Canals*, 176-77.



doing so he championed the idea of judicial impartiality, greatly improved the public image of the Supreme Court, and set the boundaries for all subsequent debates over the commerce clause and police powers.<sup>12</sup>

A fear of sectionalism and disunion underlined Marshall's legal philosophy of "constitutional nationalism," which saw "the need for a strong central government as the indispensable bulwark...of the nation." Fundamental to this question was whether the states, in ratifying the Constitution, had entered into a compact among themselves or had instead created a government with its own sphere of authority. Marshall, as a nationalist, believed that the framers originally intended for a broad interpretation of the Constitution, empowering the federal government to act as a counterweight against the centrifugal tendencies inherent in republicanism. After establishing the principle of judicial review in *Marbury v. Madison* (1803), three cases—*McCulloch v. Maryland* (1819), *Gibbons v. Ogden* (1824), and *Willson v. Blackbird Marsh Co.* (1829)—addressed the nature of the commerce clause, the concepts of *implied* and *police* powers, and set the parameters of future discussions concerning transportation regulation and subsequent regime creation.<sup>13</sup>

The central question in *McCulloch v. Maryland* concerned the supremacy of government. Marshall, after ruling that Congress did indeed possess the power to establish a national bank, took the opportunity to address a more profound question—the relationship between state and federal authority. He declared that the federal government

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<sup>12</sup> David Robarge, *A Chief Justice's Progress: John Marshall from Revolutionary Virginia to the Supreme Court* (Westport, CN: Greenwood Press, 2000), 28, 249.

<sup>13</sup> Felix Frankfurter, *The Commerce Clause Under Marshall, Taney, and Waite* (Chapel Hill, NC: The University of North Carolina Press, 1937), 14; Robarge, *Chief Justice's Progress*, 254; Charles F. Hobson, *The Great Chief Justice: John Marshall and the Rule of Law* (Lawrence, KS: University Press of Kansas, 1996), 112-13, 119, 142. George Anastaplo, *Reflections on Constitutional Law* (Lexington, KY: The University Press of Kentucky, 2006), 49.

was not a collection of sovereign states, but rather the creation of its citizens. “The government of the Union...is, emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them and are to be exercised directly on them, and for their benefit.” Marshall went on to assert that the federal government, “though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land.” He applied this doctrine of supremacy not only to constitutionally enumerated powers, but also to the authority to enact any and all legislation allowing for the full implementation of said powers based on the Constitution’s “necessary and proper” clause. Rather than creating strict guidelines for federal power, Marshall argued that the Constitution established “great outlines” that provided Congress flexibility in carrying out its enumerated powers.<sup>14</sup>

Chief Justice Marshall’s decision, while putting “a constitutional foundation under the second Bank of the United States,” had important implications for transportation regime creation. First, the doctrine of implied powers offered a justification for a federal system of internal improvements. Second, Marshall’s contention that the Constitution as currently written did not dictate the entire scope of congressional authority—the central tenet behind his implied powers doctrine—offered a means for the federal regulation of future transportation technologies. Finally, the doctrine of supremacy offered the possibility for federal regulation of new technologies rather than a myriad of conflicting state regulations.

The *McCulloch* case set the stage for subsequent Supreme Court rulings

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<sup>14</sup> *McCulloch v. Maryland*, 4 Wheat. 159 (1819); Hobson, *Chief Justice*, 117-19; R. Kent Newmyer, *John Marshall and the Heroic Age of the Supreme Court* (Baton Rouge, LA: Louisiana State University Press, 2001), 294-97.

concerning federal regulation of inland waterways. Beginning with Marshall's decision in the landmark case *Gibbons v. Ogden* (1824), the commerce clause came to be construed as a check on state regulatory power, though the supremacy of federal power waxed and waned under the rulings of succeeding courts. The commerce clause was the legal basis for much of the twentieth-century regulatory state, and "no part of the Constitution has proved a more fertile source of national power." *Gibbons v. Ogden*, also known as the Steamboat Monopoly Case, concerned the validity of Robert Livingston and Robert Fulton's New York-sanctioned steamboat monopoly, granted in 1811, which included both the Hudson River and coastal waters between New York and New Jersey. In an attempt to foster local corporations, nearby states soon began passing laws forbidding ships licensed under the New York monopoly from navigating their waterways, a clear return to the mercantilist policies that had existed under the Articles of Confederation. Aaron Ogden's steamboat operation between New York City and Elizabethtown, New Jersey, licensed under New York's legal monopoly, conflicted with that of Thomas Gibbons, who operated under the Federal Coastal Licensing Act of 1793. Which of the two laws, and therefore sources of government power, reigned supreme?<sup>15</sup>

In order for the doctrine of supremacy from *McCulloch* to apply, transportation or navigation had first to be placed under the commerce clause. The chief justice ruled against the state-sanctioned monopoly, asserting that in ratifying the Constitution the states had established a union and not a compact. In addition, he declared that the Constitution enumerated the contours of federal authority rather than strictly defining them, because a strict construction "would deny to the government those powers which the words of the grant...import [and] would cripple the government and render it unequal

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<sup>15</sup> Hobson, *Chief Justice*, 139-40; Newmyer, *Heroic Age*, 302-3.

to the object for which it is declared to be instituted.”<sup>16</sup>

Marshall then proceeded to define commerce as not only the act of buying and selling, but also “the commercial intercourse between nations” that included an implied power to regulate navigation. Applying the doctrine of supremacy, Marshall declared that “the power to regulate...like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.” Having established navigation as a proper arena for federal regulation, Marshall discussed the extent of this power as it related to the states. “The word ‘among’ means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.” Thus any and all commerce not wholly within a single state could be subject to federal regulation.<sup>17</sup>

Marshall recognized that states possessed what he termed “police power,” the right to pass laws for the general welfare and well-being of their citizens, but left unclear the relationship between this state prerogative and Congress’s power to regulate interstate commerce. The chief justice also dismissed the distinction between steam and sail embedded in New York’s law. Ruling that differences in means of propulsion did not exempt new means of conveyance from earlier legislation, Marshall provided for the future incorporation of new technologies within existing regulatory frameworks without a constitutional amendment. Ultimately, Marshall ruled the New York law invalid because it conflicted with the Federal Coastal Licensing Act of 1793 rather than because it contradicted federal constitutional authority, a conservative approach that left an area of

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<sup>16</sup> *Gibbons v. Ogden* 22 U.S. 1 (1824).

<sup>17</sup> *Ibid.*

ambiguity concerning the nature of the federal/state regulatory relationship.<sup>18</sup>

Marshall's desire to foster a national market, a central tenet of federalist ideology, remained tempered by a responsibility to uphold the constitutional balance between the federal government and the states. In the 1829 case *Willson v. BlackBird Marsh Co.*, the state of Delaware argued that the construction of a dam across a small tidewater creek rested within its police powers, while the defendant, who had damaged the dam, contended that it constituted an infringement on federally-regulated commerce. The opinion, delivered by Marshall, found in favor of the State of Delaware because Congress had passed no act concerning small navigable creeks—hence there existed no conflict with federal law. In declaring “this abridgement, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance,” the Supreme Court recognized “that in the absence of Federal action the respective states may authorize improvements, changes, and obstructions...in navigable streams,” though they may later be overruled through federal legislation. *Willson* thus affirmed a post-*Gibbons* arena for state authority over the avenues of commerce.<sup>19</sup>

Such state authority greatly expanded under Marshall's successors. Though the antebellum Supreme Court of Roger Taney may not have “accomplished a wholesale reversal of Marshall's doctrines,” it did radically bolster the scope of state regulatory authority at the expense of the federal government. *Cooley v. Board of Wardens* (1851) addressed whether a Pennsylvania half-pilotage fee—to be used in support of the Society

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<sup>18</sup> *Gibbons v. Ogden* 22 U.S. 1 (1824); Hobson, *Chief Justice*, 124-26; Nemyer, *Heroic Age*, 313; Robarge, *Chief Justice's Progress*, 250.

<sup>19</sup> *Willson v. Blackbird Marsh Co.* 27 U.S. 245 (1829); Hobson, *Chief Justice*, 147; Frankfurter, *Commerce Clause*, 27-28; John C. Donnelly, “One Phase of Federal Power under the Commerce Clause of the Constitution,” *Michigan Law Review* 2 (1904): 671.

for the Relief of Distressed Pilots, their Widows, and Children—amounted to an unconstitutional tax on interstate commerce. Concurring with Marshall’s earlier extension of the commerce clause to navigation, Whig Justice Benjamin R. Curtis’s opinion placed the regulation of the means of commerce alongside the act of commerce. The question remained as to which level of government possessed such power. Combining the Taney Court’s proclivity for strict constructionism with the Marshall Court’s decision in *Willson*, Curtis stated that “the mere grant of such a power to Congress did not imply a prohibition on the States to exercise the same power,” that “States may legislate in the absence of congressional regulations,” and that “the nature of the subject...leave[s] no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation, drawn from local knowledge and experience, and conformed to local wants.” This clear movement away from the federalists’ national vision reflected the Jacksonian Era emphasis on local authority. The era established a precedent for the regulation of transportation at the state level so far as such laws did “not interfere with any system which Congress has established by making regulations, or by intentionally leaving individuals to their own unrestricted action.”<sup>20</sup>

The American Civil War, the ultimate struggle between state and federal power, did not automatically settle the question of the states’ place in transportation regulation. In deciding the constitutionality of a bridge over the Schuylkill River approved by the Pennsylvania legislature in *Gilman v. Philadelphia* (1865), the Supreme Court under Salmon P. Chase offered a comprehensive framework for delineating the line between federal and state power.

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<sup>20</sup> *Cooley v. Board of Wardens* 53 U.S. 299 (1851); Frankfurter, *Commerce Clause*, 49.

The States may exercise concurrent or independent power in all cases but three:

1. Where the power is lodged exclusively in the Federal Constitution.
2. Where it is given to the United States and prohibited to the States.
3. Where, from the nature and subjects of the power, it must necessarily be exercised by the National Government exclusively.

Subsequent rulings during the Gilded Age acknowledged the supremacy of Congress—when it chose to act—and saw the steady extension of federal authority over inland waterways. *South Carolina v. Georgia* (1876) affirmed the power of Congress to place obstructions within waterways to facilitate navigation and commerce. *Monongahela Navigation Co. v. United States* (1893) called for just compensation in the federal appropriation of waterway improvements along with the more far-reaching conclusion, particularly for aviation, that “the power of Congress is not determined by the character of the highway” and that “the regulation of commerce implies as much control...over an artificial as over a natural highway. They are simply the means and instrumentalities of commerce, and the power of Congress to regulate commerce carries with it power over all the means and instrumentalities by which commerce is carried on.”<sup>21</sup>

The Supreme Court’s decisions concerning inland waterway regulation, while cutting to the heart of the state-federal conflict within the Constitution, established an ambiguous, multifaceted, and at times contradictory web of precedent. Clearly an extension of federal authority characterized the general trend, but this centralizing trajectory, so evident in the history of inland waterways, faced a challenge in the decentralized nature of railroad regulation. The two foundational principles of waterways regulation—freedom of use and federal supremacy over navigation—profoundly influenced the aviation regulatory debate in the twentieth century.

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<sup>21</sup> *Gilman v. Philadelphia*, 70 U.S. 713 (1865); *South Carolina v. Georgia*, 93 U.S. 4 (1876); *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

Economic competition within a barely regulated market defined early railroad development in the United States. Initially viewed as a means to compete with canal projects—a prime factor behind the 1827 chartering of the United States’ first railroad, the Baltimore and Ohio Railroad—the amalgamation of steam engine, iron and steel rails, and rolling stock plugged into a desire to promote regional economic growth and fostered a new type of technological enthusiasm. The tenor of antebellum politics profoundly shaped early railroad development. The question of the role and power of the federal government, debated with such intensity by Federalists and anti-Federalists, continued into America’s adolescence. Jacksonian Democrats and Whigs offered competing national visions, with the former looking to the quantitative expansion of agrarian economic equality and the latter espousing qualitative improvements. The Jacksonian penchant for limited federal government allowed only for “sweeping exercises of federal authority that would leave little need for sustained management in their wake,” such as Indian removal, tariff reduction, and territorial expansion. Whigs, on the other hand, looked to large internal improvements such as canals, turnpikes, and railroads as a means of fostering economic growth, regional markets, and national cohesion, believing that regional developments benefited the entire nation. Whig ideology embodied a broader interpretation of the Constitution closely tied to the earlier Federalists and not constrained by a strict interpretation of the Tenth Amendment.<sup>22</sup>

As they did with canals, state legislatures took the initiative in the absence of federal action and attempted to fill the regulatory void, with state charters to private railroad corporations becoming the *modus operandi*. Historian James W. Ely, Jr., argues that state charters—by determining the amount of stock issued, corporate makeup, routes,

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<sup>22</sup> Glyndon G. Van Deusen, *The Jacksonian Era: 1824-1848* (New York: Harper & Row, 1959).



and granting eminent domain—set a precedent of state-delineated private railroad ownership and marked the continuation of the common law practice of granting government-authorized certificates of public convenience and necessity to common carriers. In exchange for near-monopolistic privileges, carriers were expected to provide equal service to all at a reasonable price and were responsible for the safety and care of goods and passengers during delivery.<sup>23</sup> As a regulatory framework, charters left much to be desired. Each required separate approval from state legislatures, bogging down the government apparatus in constant railroad deliberations. Many addressed only maximum rates (if they touched upon rates at all), and lacked a credible enforcement mechanism. Though not an optimal solution—as illustrated by public support for increased regulation after the Civil War—state charters effectively fostered railroading technology during its experimental and formative stages.<sup>24</sup>

The structure of railroads differed markedly from canals and turnpikes in one important respect: the ownership of the right of way. Traditionally, a clear separation existed between the public and private spheres in the realm of transportation.

Development and maintenance of roadways and waterways generally fell to the state, and

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<sup>23</sup> The technological, economic, and political intricacies of state-centric development can most clearly be seen in the “Erie War” of 1853, wherein the Pennsylvania legislature promoted a different railway gauge to secure local economic benefits at the price of increased regional costs and reduced efficiency. See James W. Ely, Jr., *Railroads and American Law* (Lawrence, KS: University of Kansas Press: 2001), 13-15, and Douglas J. Puffert, *Tracks across Continents, Paths through History: The Economic Dynamics of Standardization in Railway Gauge* (Chicago: University of Chicago Press, 2009) 118-19.

<sup>24</sup> Ely, *Railroads*, 2, 75-76; Theodore E. Keeler, *Railroads, Freight, and Public Policy* (Washington, DC: The Brookings Institution, 1983), 20-21; Joseph H. Tedrow, *Regulation of Transportation: Practice and Procedure before the Interstate Commerce Commission*, 3<sup>rd</sup>. ed. (Dubuque, IA: Wm. C. Brown Company, 1964), 6, 12-13. Discussion of the importance of railroads in the Civil War lies beyond the scope of this study. For detail analysis of this fascinating issue see George Edgar Turner, *Victory Rode the Rails: The Strategic Place of the Railroads in the Civil War* (Lincoln, NE: University of Nebraska Press, 1992); William G. Thomas, *The Iron Way: Railroads, the Civil War, and the Making of Modern America* (New Haven, CT: Yale University Press, 2011); and John E. Clark, *Railroads in the Civil War* (Baton Rouge, LA: Louisiana State University Press, 2001). Heather Cox Richardson provides an insightful analysis of the importance of the railroad to post-Civil War nation building in *West from Appomattox: The Reconstruction of America after the Civil War* (New Haven, CT: Yale University Press, 2007).

multiple private carriage services then utilized these rights of way. Railways “combined the building and maintaining of a road, which had always, in every country, been regarded as a State function, with the operation of traffic on that road.” In combining the right of way with transportation services, railroads undermined this historic public-private distinction. In addition, railroads, for reasons of safety, fostered a monopoly of use as opening a railway to all possible traffic could lead to chaos or even death. This “technological predilection” toward monopoly and the unclear public-private relationship of railroads constituted anomalies within the historic common-carrier paradigm, and exclusive use of the railways became a standard component of state charters during the 1840s. The use of the term “toll,” mileage-based rates, and early attempts to foster open carrier competition illustrate the power that the concurrent paradigm of water transportation exerted on the similar yet distinctly different technology of rail.<sup>25</sup>

States addressed the shortcomings of charters through the enactment of general railroad incorporation laws and the establishment of state railroad commissions, though the power and responsibilities of the latter varied widely. Rhode Island established the first such regulatory body in 1839—vested with broad power to supervise and report—while the commissions of New Hampshire (1844), Connecticut (1853), Vermont (1855), and Maine (1858) focused on safety issues. The Massachusetts Railroad Commission, established in 1869 to supervise all aspects of the states’ railroads, investigate charter compliance and accidents, and make recommendations, relied solely upon publicity and

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<sup>25</sup> *Extension of Tenure of Government Control of Railroads: Hearings Before the Committee on Interstate Commerce* (Washington, DC: GPO, 1919) (statement of W.M. Acworth, Esq., London, England); Ely, *Railroads*, 72-73. The Maryland charter establishing the Baltimore and Ohio Railroad, the first such document in the United States, clearly outlawed all third-party traffic and use “without the license or permission of the president and directors of said company.” An Act to Incorporate the Baltimore and Ohio Rail Road Company, MD (passed February 28, 1827) found in *Laws and Ordinances Relating to the Baltimore and Ohio Railroad Company* (Baltimore, MD: John Murphy & Co., 1850), 24-25.

public opinion. This “supervisory-advisory type” of commission spread rapidly across New England. Western and southern states approached railroads differently. The Illinois Constitution of 1870 declared that railroads fell under the heading of public highways, thus nullifying any technological distinction (as Marshall had in the case of steamboats in *Gibbons v. Ogden*) and subjecting them to existing rate regulation. State representatives established a “supervisory-mandatory” commission empowered to set maximum rates and prosecute railroads for noncompliance, shifting the burden of proof to the railroads. Such “Granger” commissions, so named because they followed an active lobbying campaign on the part of the National Grange of the Order of Patrons of Husbandry, quickly spread to Iowa, Minnesota, and Wisconsin and contributed to major variances in interstate rates and safety regulations. To raise capital for maintenance, operation, investment, and dividends, railroads increased unregulated rates in states that lacked “harsh” regulatory regimes.<sup>26</sup>

In 1872 the United States Senate, acting on the suggestion of President Ulysses S. Grant, appointed a seven-member committee to investigate the current state of “transportation between the interior and the seaboard.” The Windom Committee, named after its Republican chairman William Windom of Minnesota, issued its report in 1874. Faced with such a monumental task, the committee approached water and rail transportation as a comprehensive national system and set out to determine the extent of federal power to address railroad abuses. The committee determined that “insufficient facilities, unfair discrimination, and extortionate charges” existed in rail transportation

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<sup>26</sup> Ely, *Railroads*, 84-87; Joshua Bernhardt, *The Interstate Commerce Commission: Its History, Activities and Organization* (Baltimore, MD: Johns Hopkins University Press, 1923), 3-4; Ari and Olive Hoogenboom, *A History of the ICC: From Panacea to Palliative* (New York: W.W. Norton & Co., 1976), 6-7.

due to a lack of year-round competition. The committee called the federal government to task for failing to develop water transportation, forcing “the commerce of the country...to accept the more expensive methods afforded by railroads.” The committee considered stock inflation or “watering,” arising from a combination of mismanagement, inadequate state/federal regulatory cooperation, and unprecedented rapid expansion of railroads, as the greatest single root cause of unfair charges and discrimination.<sup>27</sup>

To reconcile the situation the Windom Committee presented a tour de force of federal prerogative. Arguing that the federal government derived its power from its citizens, not from the states, and pointing out that the Supreme Court consistently upheld congressional power not only to regulate the direct act of interstate commerce but also the means to aid and facilitate it, the committee presented a five-point framework for the application of the commerce clause. Their report argued that Congress could regulate “the *instruments, vehicles, and agents* engaged in *transporting* commodities” to and through states; appropriate funds for canal and railroad construction; “incorporate a company” for such construction; “exercise the right of eminent domain within a State;” and “take for the public use, paying just compensation therefor, any existing railway or canal owned by private persons or corporations.”<sup>28</sup>

Declaring that the wording of the commerce clause intentionally invited broad interpretation, the committee asserted “transportation by rail...in all its parts...is subject to the full scope and extent of the operation of that congressional power by which commerce is to be regulated.” The committee viewed the commerce clause as a constructive power that could be used to build a comprehensive national system and, in

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<sup>27</sup> *Select Committee on Transportation Routes to the Seaboard*, S. Rep. 43-307, pt. 1 (Washington, DC: GPO, 1874), 7, 71.

<sup>28</sup> *Ibid.*, 80-81. Italics in original.

direct contradiction to pre-Civil War Jacksonian ideology, plainly asserted the power of the federal government to incorporate a railway or canal. The committee adopted two recommendations from an 1872 report of the British Parliamentary Committee on Railway Amalgamation: federally-mandated publication of rates and state/federal cooperation regarding railroad mergers and consolidations. Going yet further, the committee declared that “the only means of securing and maintaining reliable and effective competition between railways is through national or State ownership, or control, of one or more lines, which, being unable to enter into combinations, will serve as regulators of other lines.” The construction, subsidization, or outright purchase of a government-owned and operated carrier to serve as a standard with which to determine reasonable and just private rates was estimated at \$75,000-\$100,000. Although it did not lead to legislation, the Windom Committee’s report provided a powerful ideological framework for federal regulation that influenced subsequent discussions concerning railroads<sup>29</sup>

While regulation via state commission did not provide a perfect solution, the Supreme Court initially sustained the power of the states to regulate railroads in two key 1877 decisions: *Munn v. Illinois* and *Chicago, Burlington & Quincy Railroad Company v. Iowa*. In *Munn*, Chief Justice Morrison Waite’s majority opinion concerning the power of the state of Illinois to regulate maximum rates at grain warehouses affirmed Marshall’s police power, declaring that “when private property is devoted to a public use, it is

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<sup>29</sup> Ibid., 85, 90-91, 137-39, 155-56, 242. The committee looked to several Supreme Court cases to support this approach, particularly *Gibbons v. Ogden* 22 U.S. 1 (1824) and *Reading Railroad Company v. Pennsylvania* 82 U.S. 284 (1872). The notion of a government-owned and operated entity to determine appropriate industry rates was applied to the aviation industry in the interwar period and institutionalized in the Naval Aircraft Factory at League Island, Philadelphia. For a full account see William F. Trimble, *Wings for the Navy: A History of the Naval Aircraft Factory: 1917-1956* (Annapolis, MD: Naval Institute Press, 1990).

subject to public regulation.” Recognizing a lack of federal legislation on the subject, *Munn* extended the justification for state regulation in the *Cooley* decision to a decidedly interstate business.<sup>30</sup>

In *Chicago, Burlington & Quincy Railroad Company v. Iowa*, Waite extended the essence of *Munn* directly to railroads. The Supreme Court abruptly reversed this state-regulatory position in 1886 with its decision in *Wabash, St. Louis & Pacific Railway Company v. Illinois*. By declaring that rate regulation possessed a “general and national character” that could “only appropriately exist” within the authority of “the Congress of the United States under the Commerce clause of the Constitution,” the Waite court placed railroads within the “nature and subjects” rationale for federal exclusivity offered in *Gilman v. Philadelphia*. While the court’s about face left an immediate regulatory vacuum, demand for federal railroad regulation had been building for some time. By the 1880s a consensus had developed among eastern merchants, western commodity producers, railroad executives, and their political representatives concerning the need for federal regulation of the railroad industry. The regulatory crisis arising out of the *Wabash* decision provided the impetus for rapid action.<sup>31</sup>

In 1885, President Grover Cleveland asked New York attorney Simon Sterne to undertake a European fact-finding mission to “investigate the relations of the

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<sup>30</sup> *Munn v. Illinois*, 94 U.S. 113 (1877).

<sup>31</sup> *Chicago, Burlington & Quincy Railroad Company v. Iowa* - 94 U.S. 155 (1877); *Wabash, St. Louis & Pacific Railway Company v. Illinois*. 118 U.S. 557 (1886); Ely, *Railroads*, 87-88, 93; Hoogenboom and Hoogenboom, *ICC*, 17. For a detailed analysis of how railroads influenced constitutional interpretations see Richard C. Cortner, *The Iron Horse and the Constitution: The Railroads and the Transformation of the Fourteenth Amendment* (Westport, CT: Greenwood Press, 1993); Albro Martin, “The Troubled Subject of Railroad Regulation in the Gilded Age – A Reappraisal,” and Stephen Skowronek, “National Railroad Regulation and the Problems of State-Building: Interests and Institutions in Late Nineteenth-Century America,” in *The Rise of Big Business and the Beginnings of Antitrust and Railroad Regulation, 1870-1900*, ed. Robert F. Himmelberg (New York: Garland, 1994). Gabriel Kolko’s *Railroads and Regulation: 1877-1916* (New York: W.W. Norton & Company, 1965) offers a controversial history wherein the railroad companies themselves provided the primary force behind federal railroad regulation.

Governments of Western Europe to the railway systems within their jurisdictions.” Sterne had become interested in the “railroad problem” through his work with the Hepburn Committee—established in 1879 to address the question of railroad regulation in New York—and he had also drafted the state’s Railroad Commission Bill, passed by the New York state legislature in 1881 under then-Governor Cleveland. After traveling to Europe to study the railway regulatory systems of England, France, Prussia, Italy, Austria, Belgium, and Holland, Sterne pointed to three central tenets within the European government-private relationship: rate increases only with government approval; the public posting of rates; and government power to modify rates. He presented Britain’s regulatory system as a possible model, with its Railroad Commission empowered with the ability to establish rates, approve or reject mergers, prohibit the merging of water and rail transportation companies to maintain competition, and serve as a venue for appeals. Fearful of the potential for corruption that might accompany the government-ownership model of Prussia and Italy, Sterne nevertheless recognized that “the nature of the railway enterprise” required government to take a dominant position for the betterment of all parties.<sup>32</sup>

As consultant for Senator Shelby M. Cullom’s Committee on Interstate Commerce and the joint “Cullom” committee that reconciled his Senate bill with the more punitive House version, Sterne’s views influenced the shape of the Interstate Commerce Act (ICA). This piece of legislation, signed by Cleveland on February 4, 1887, marked the first federal regulation of an industry. It prohibited the use of rebates, preferential rates, rate discrimination between short and long hauls, and pooling, and it

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<sup>32</sup> Simon Sterne, “Report to the Honorable Thomas F. Bayard, Secretary of State, on the Relations of the Governments of the Nations of Western Europe to the Railways,” 49th Cong., 2<sup>nd</sup> sess., Misc. Doc. No. 66, (Washington, DC: GPO, 1887), 1, 42.

called for the public posting of rates. In addition, the act established a presidentially-appointed Interstate Commerce Commission (ICC) empowered to investigate the railroad industry, conduct hearings of complaint, determine whether a rate was “reasonable and just,” and refer any case to the federal circuit court. The creation of the ICC shows that American policymakers did not disconnect themselves from overseas regulatory developments but rather judged possible foreign examples against the current political situation and deep-seated cultural beliefs.<sup>33</sup>

Many historians view the Progressive push to strengthen the ICC as a reaction to the railroad industry’s shift toward greater consolidation in response to the Panic of 1893 and subsequent depression. Alexander J. Cassatt, future president of the Pennsylvania Railroad, introduced the idea of a community of interest, or intermingled stock ownership. He saw this tactic as a means to curtail the self-inflicted wounds of rate cutting, avoid pooling and rate agreements expressly forbidden in the ICA, and present a united front against large shippers such as John D. Rockefeller’s Standard Oil that continued to demand rebates. The community of interest idea quickly spread throughout the country, further removing railroads from local governance and giving rise to calls for increased regulatory action. The 1890 Sherman Antitrust Act, while outlawing contracts

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<sup>33</sup> John Foord, *The Life and Public Services of Simon Sterne* (London: Macmillan, 1903), 24; Dumas Malone, ed., *Dictionary of American Biography*, vol. xviii (New York: Charles Scribner’s Sons, 1935), s.v. Sterne, Simon; An Act to Regulate Commerce, Pub. L. No. 49-41, February 4, 1887 (Enrolled Acts and Resolutions of Congress, 1789-; General Records of the United States Government, 1778 – 1992, Record Group 11, National Archives), <http://www.ourdocuments.gov/doc.php?flash=true&doc=49>. Theodore E. Keeler argues that the Interstate Commerce Act was “patterned” on the British Canals and Railways Act of 1854 in *Railroads, Freight, and Public Policy* (Washington, DC: The Brookings Institution, 1983), 22; Clarence A. Miller. *The Lives of the Interstate Commerce Commissioners and the Commission’s Secretaries* (Washington, DC: Association of Interstate Commerce Commission Practitioners, 1946), 15-16; Morton Keller. *Regulating a New Economy: Public Policy and Economic Change in America, 1900-1933* (Cambridge, MA: Harvard University Press, 1990), 45; Ely, *Railroads*, 45, 93. The Hoogenbooms praise the ICC’s first chairman Thomas M. Cooley’s effective leadership style, one that “tempered...laissez-faire notions” of property rights with “an overriding commitment to equal rights and a belief in judicial restraint.” Hoogenboom and Hoogenboom, *ICC*, 19, 25.



and combinations in restraint of trade, did not clearly apply to the already regulated railroad industry. The 1897 Supreme Court case *United States v. Trans-Missouri Freight Association* finally settled the issue, placing the railroad industry under the purview of the Sherman Act and opening new avenues for legislative action.<sup>34</sup>

A top-down dynamic distinguished Progressive Era railroad legislation from that of the Gilded Age. President Theodore Roosevelt, in his fifth address to Congress, called for legislation allowing the ICC or another congressionally-authorized body to set maximum rates, a clear increase in federal authority analogous to the British practice discussed in Sterne's 1887 report. While Roosevelt opposed certain restraints on competition, he did not view all industrial agreements as inherently negative. "The power vested in the Government to put a stop to agreements to the detriment of the public should, in my judgment, be accompanied by power to permit, under specified conditions and careful supervision, agreements clearly in the interest of the public." This distinction between harmful and beneficial trusts represents an important exception to Roosevelt's antitrust stance that contrasted sharply with Woodrow Wilson's New Freedom ideology of the following decade. In addition to punishing James J. Hill's and Edward H. Harriman's Northern Securities, considered a "bad trust," Roosevelt came out against the idea of public ownership of the railroads, placing the power of the executive in support of the deeply ingrained American private enterprise tradition.<sup>35</sup>

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<sup>34</sup> Hoogenboom and Hoogenboom, *ICC*, 40-41; William Z. Ripley, *Railroads: Rates and Regulations* (New York: Longman, Green and Co., 1916), 487-88; Ely, *Railroads*, 99-100; *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

<sup>35</sup> Theodore Roosevelt, *Fifth Annual Message* (December 5, 1905). See Robert F. van der Linden, *Airlines and Air Mail: The Post Office and the Birth of the Commercial Aviation Industry* (Lexington, KY: The University Press of Kentucky, 2002). Roosevelt saw increased federal regulation as a means to address discontent with the railroads while allowing for their continued privatization, viewing the courts' power to negate as an insufficient substitute for the affirmative power of legislation. The railroad issue became a

Four major Progressive Era railroad acts—the 1903 Elkins Act, the 1906 Hepburn Act, the 1910 Mann-Elkins Act, and the 1914 Clayton Anti-Trust Act—were measured steps to modify and strengthen the existing federal regulatory framework. Viewed through Steven Krasner’s definition of regime as “principles, norms, rules, and decision-making procedures around which actor expectations converge in a given issue area,” this cluster of legislation shows that American railroad regulatory developments after the Interstate Commerce Act steadily amended the rules and decision-making procedures established in 1887 rather than fundamentally changing the regime’s principles and norms. Though not perfect, the subsequent framework for railroad regulation established a sound basis for federal control over interstate commerce while providing an evolutionary precedent for further regime modification.<sup>36</sup>

Two Supreme Court cases immediately before World War I buttressed constitutional interpretations advocating the predominantly federal nature of railroad regulation. In the 1913 *Minnesota Rate Case*, Justice Charles Evans Hughes argued for the systemic and unitary nature of railroad transportation, concluding that “there has never been a separation, and it is impracticable, in the exercise of fair economy, to make a separation, between the interstate and intrastate business in the case either of freight or of passengers. By far the larger part of the traffic is interstate.” Justice Hughes further expanded federal jurisdiction over elements of intrastate commerce in *Houston E. & W. Tex. Ry. Co. v. United States*, the so-called Shreveport Case, when he declared “wherever the interstate and intrastate transactions of carriers are so related that the government of

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dominant theme throughout TR’s presidency, mentioned at length in his fifth, seventh, and eighth annual congressional messages as well as two special messages from 1905 to 1908.

<sup>36</sup> Hoogenboom and Hoogenboom, *ICC*, 44-5; Ripley, *Railroads*, 492-94; Steven Krasner, “Structural Causes and Regime Consequences: Regimes as Intervening Variables,” *International Organization* 36 (Spring 1982): 185.

the one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field.”<sup>37</sup>

World War I fostered a radical change in the government/railroad relationship. In his third annual message to Congress in 1915, President Wilson focused on America’s relationship to the European conflict and declared industrial preparedness the top national priority. He specifically pointed to the railroads, already experiencing logistical strains due to increased European demand for material, and called on Congress to establish a “commission of inquiry” to study the entire structure of railroad regulation. Seeking “national efficiency and security,” Wilson challenged such a commission “to look at the whole problem of coordination and efficiency in the full light of a fresh assessment of circumstance and opinion” and determine the necessity of additional regulatory actions.<sup>38</sup>

In response, Congress established the Joint Subcommittee on Interstate and Foreign Commerce, composed of five senators and five congressmen from each chamber’s commerce committee. Named after its Democratic chairman Senator Francis G. Newlands of Nevada, a proponent of national railroad incorporation, the committee set out to devise a “harmonious system of transportation...that will meet the demands of interstate as well as foreign commerce.” Though it ceased meeting in November 1917 without drafting definitive recommendations, the Newlands Committee was an important

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<sup>37</sup> *Minnesota Rate Case*, 230 U.S. 352 (1913); *Houston E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914).

<sup>38</sup> Woodrow Wilson, *Third Annual Message* (December 7, 1915); Hoogenboom and Hoogenboom, *ICC*, 62-65; K. Austin Kerr, *American Railroad Politics 1914-1920: Rates, Wages, and Efficiency* (Pittsburgh: University of Pittsburgh Press, 1968), 22-25. For an in-depth discussion of the Progressive drive for efficiency see Edwin T. Layton, Jr., *Revolt of the Engineers: Social Responsibility and the American Engineering Profession* (Cleveland, OH: Press of Case Western Reserve University, 1971).

forum for ideas concerning the federal regulatory role. Most significant, its discussion of possible government ownership and/or operation of the railroads *before* America's entry into World War I—a notion earlier discounted by both Sterne and Theodore Roosevelt—illustrates how Progressive efficiency and wartime preparedness combined to undermine the traditional public-private distinction.<sup>39</sup>

In his eight days of continuous testimony before the committee, Alfred Thom, counsel to the Railroad Executives' Committee, portrayed the existing dual system of state and federal regulation as the single greatest threat to an efficient national transportation system. Pointing to the precedent of the Shreveport Case, Thom called on the federal government to exercise its Constitutional authority to regulate not only the act of commerce but also the means (the railroads themselves) and “fix standards of efficiency” so as to “protect it against destruction.” This idea that intrastate distinctions had to be abandoned in order to allow for a more efficient system of federal regulation also dominated aviation regulation discussions in the early 1920s. Thom went on to propose a five-part plan: elevation of the federal government to sole regulator of transportation; compulsory federal incorporation to allow for sanctioned consolidations and mergers; transference of the ICC's legislative and executive powers to a new Federal Railroad Commission consisting of a network of regional commissions along the lines of the Federal Reserve system; the empowerment of the ICC to set minimum rates to ensure railroads received “a living wage”; and a system of rate setting that recognized both the cost and value of service. Max Thelen, President of the California Railroad Commission,

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<sup>39</sup> Public Resolution No. 25, 64<sup>th</sup> Cong. (1916) found in *Joint Subcommittee on Interstate and Foreign Commerce*, (1916-1917), 3-10 (hereafter referred to as the *Newlands Committee Report*) in 65<sup>th</sup> Cong., 3<sup>rd</sup> sess., *Extension of Tenure of Government Control of Railroads: Hearings Before the Committee on Interstate Commerce* (Washington, DC: GPO, 1919).

argued vehemently that the industry's welfare was not government's responsibility. Former presidential candidate and Secretary of State William Jennings Bryan, fearing that the limited federal bureaucracy would be overwhelmed by the sheer scope and scale of the railroads, argued against detaching the transportation issue from local government.<sup>40</sup>

The war in Europe subjected America's transportation network to major strains—particularly along the eastern seaboard—which allowed for more widespread acceptance of revolutionary regulatory ideas. Faced with the additional labor costs arising out of the 1916 Adamson Act's mandatory eight-hour day for railroad employees, railroads were hesitant to invest in new facilities, rolling stock, and right of way in a period of uncertainty. Congestion began to occur in 1915, and “by the fall of 1916 car shortage had become acute.” The Railroads' War Board, a private coordinating organization, faced serious challenges: industry still had to adhere to the antipooling and antitrust provisions of the Sherman and Interstate Commerce Acts; the board's recommendations were considered strictly voluntary; and a confusing priority system initiated after America's official entry into the war saw the Navy and War Departments, the Shipping Board, and the Fuel and Food Administrations each issuing competing orders for car space. Even Wilson's appointment of Robert S. Lovett, lawyer and head of the Union Pacific Railroad, as Priorities Director did not alleviate the situation. By the fall of 1917, to use but one example, 85 percent of all traffic through the Pittsburgh Division of the

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<sup>40</sup> Newlands Committee Report (statements of Mr. Alfred Thom, counsel to the Railroad Executive's Committee; Max Thelen, President CA Railroad Commission; and William Jennings Bryan). The Railroad Executives' Committee represented the following railroad corporations: Missouri Pacific; Chicago, Milwaukee & St. Paul; New York, New Haven & Hartford; Seaboard Air Line; Chicago Burlington & Quincy; Delaware & Hudson; Union Pacific; Illinois Central; Pennsylvania; New York Central; Erie; Atlantic Coast Line; Baltimore & Ohio.

Pennsylvania Railroad consisted of “priority” freight. Private cooperation achieved some limited success, but any increased efficiency under the Railroads’ War Board, such as the reduction of coal classifications from 1,156 to 41, spoke not so much to its ability to meet rising logistical challenges but rather to the major inefficiencies that existed before the war.<sup>41</sup>

Though the ICC worked closely with the Railroads’ War Board and offered official sanction to its activities, the situation continued to deteriorate. In December 1917, with the Northeast facing a coal shortage as it went into the winter months, the ICC submitted a report to President Wilson. In it they placed the needs of the wartime emergency over the competitive principle embedded within federal regulation. Looking to the precedent of limited federal action during the Civil War and the 1916 Army Appropriations Act’s provision allowing for presidential control of wartime transportation, ICC chairman Henry C. Hall recommended either the suspension of antitrust and antipooling legislation or presidential operation under the Constitution’s war powers clause. Commissioner Charles Caldwell McChord further argued that “our experience with railroad committees during the past year makes me believe that no voluntary committee can accomplish what the situation demands.”<sup>42</sup>

On December 26, 1917, Wilson issued a proclamation wherein the federal government, through Secretary of War Newton D. Baker, took possession and control of “each and every system of transportation...within the boundaries of the continental

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<sup>41</sup> Interstate Commerce Commission, *Thirty-First Annual Report* (Washington, DC: GPO, 1917), 62-65; “Robert S. Lovett Strong for Wilson,” *New York Times*, October 9, 1916; Kerr, *Railroad Politics*, 44-49; Walter D. Hines, *War History of American Railroads* (New Haven: Yale University Press, 1928), 10-16; Frank H. Dixon and Julius H. Parmelee, *War Administration of the Railroads in the United States and Great Britain* (New York: Oxford University Press, 1918), 20-21, 28-29, 37-38.

<sup>42</sup> Hines, *War History*, 22; *Special Report of the Interstate Commerce Commission* 65<sup>th</sup> Cong., 2<sup>nd</sup> sess., H.R. Doc. No. 503 (Washington, DC: GPO, 1917), 2, 6; Woodrow Wilson, Proclamation No. 1419, “Government Assumption of Control of Transportation Systems” (December 26, 1917).

United States and consisting of railroads, and owned or controlled systems of coastwise and inland transportation, engaged in general transportation, whether operated by steam or by electric power” and all “equipment and appurtenances commonly used upon or operated as a part of such rail or combined rail and water systems of transportation.” In a joint address to Congress on January 4, 1918, Wilson argued that only government control allowed for the level of coordination the crisis demand, called for legislation to provide railroad companies with sufficient guarantees concerning maintenance and compensation, and recommended an average of the net operating revenue of the three-year period from June 30, 1914, to June 30, 1917, as a standard for recompense. The resulting Federal Control Act, signed by Wilson on March 21, 1918, called for the creation of government-railroad contracts, adopted Wilson’s financial compensation formula, provided \$500,000,000 to cover necessary maintenance and improvements, and stipulated that federal control must end no later than seventeen months after the ratification of a peace treaty. The United States Railroad Administration—first under the direction of Treasury Secretary William G. McAdoo and after January 1919 his former assistant Walter D. Hines—drafted agreements with railroad companies to formalize the system of federal control for the duration of the wartime emergency. Thus World War I provided the rationale for federal regulation of the railroads, an idea advocated at various levels of intensity over the previous half-century by Populists, Progressives, legislators, railroad executives, and others.<sup>43</sup>

In postwar hearings addressing the desirability of extending federal control over

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<sup>43</sup> Wilson, Proclamation 1419; Hines, *War History*, 22-29; Federal Control Act [as amended], 40 Stat. 451 (1918); Woodrow Wilson. “Address to a Joint Session of Congress on Government Administration of Railways” (January 4, 1918); Kolko, *Railroads*. For a detailed history of how Wilson came to this decision see K. Austin Kerr, “Decision for Federal Control: Wilson, McAdoo, and the Railroads, 1917,” *Journal of American History* 54 (December 1967): 550-60. Kolko, *Railroads*.

transportation before the Senate Committee on Interstate Commerce, McAdoo hinged his defense of the Railroad Administration's wartime record on increased efficiency. He pointed to the system's achievements to recommend a continuation of the wartime system: the effective movement of troops, European food exports, averting a New England coal crisis, transportation of commodities (specifically oil), the elimination of more than 47 million passenger miles and circuitous routes, and the adoption of a permit priority system to ease congestion. McAdoo portrayed federal coordination as an unqualified success and recommended extending the permit system, the practice of heavy car loadings, and the Railroad Administration's uniform rate system and common timetables; the elimination of redundant and unnecessary trackage; the pooling and consolidation of repair shops, terminals, and ticket offices; and the standardization of equipment. Though declaring "I am not committed to any particular plan," McAdoo professed a belief that the railroads were "public servants" whose primary purpose consisted of providing "adequate service at the lowest possible cost" and that competition from water transport would not lower costs alone "if the railroads are turned back to private control."<sup>44</sup>

McAdoo argued that for federal control to be effective "all traffic must be treated as interstate traffic" and proposed a five-year extension of government control coincident with federal control over shipping—as established by the Shipping Act of 1916 and later Merchant Marine Act of 1920—to allow for a grand experiment in transportation rationalization. If Congress refused to grant such an extension, McAdoo recommended the immediate return of railroads to private ownership. At the same hearing Edgar E.

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<sup>44</sup> Committee on Interstate Commerce, United States Senate, 65<sup>th</sup> Cong., 3<sup>rd</sup> sess., *The Extension of Time for Relinquishment by the Government of Railroads to Corporate Ownership and Control* (Washington, DC: GPO, 1919), 4-16, 24, 29, 30-31, 53.



Clark of the ICC pushed for a more cooperative relationship between government and the railroads that combined strict oversight with sanctioned mergers, united rail and waterways within a single system, and empowered the ICC to set minimum as well as maximum rates without an extension of federal control. Declaring that Washington possessed exclusive power over all aspects of the instrumentalities of interstate commerce, Association of Railway Executives chairman Thomas DeWitt Cuyler called for placing the ICC's executive and legislative power into a newly formed Department of Transportation, the amendment of existing antitrust legislation to allow for mergers and acquisitions, federal regulation of railroad securities, and compulsory federal incorporation of all railroads.<sup>45</sup>

The 1919 hearings show that a broad consensus had developed regarding the relationship among the federal government, the states, and the railroad industry. Although particulars varied, each of these three groups wished to prevent a return to the suboptimal prewar situation by increasing federal regulatory authority. The experience of federal control during World War I had facilitated the widespread adoption of scientific management ideology. As the historian K. Austin Kerr points out, a growing belief existed that "railroad competition was wasteful and unification therefore desirable; that instability in the industry's capital structure damaged the economy and called for precise rules of ratemaking based on a fair evaluation of property investment; and that railroad strikes, since they crippled the prosperous, uninterrupted flow of business demanded by the public interest, required mandatory arbitration." World War I elevated the principle of efficiency to prominence and placed the idea of a government-sanctioned railroad

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<sup>45</sup> Ibid., 40-43, 53, 232-35, 308-11. For a detailed history of the United States Shipping Board see Darrell H. Smith and Paul V. Betters, *The United States Shipping Board: Its History, Activities and Organization* (Washington, DC: The Brookings Institution, 1931).

monopoly in near-equal contention with free market traditions.<sup>46</sup>

Congress did not extend the period of federal control. The Transportation Act of 1920, signed into law on February 28, defined the transportation situation throughout the decade. It returned the railroads to private ownership and operation, created a new Railway Labor Board for arbitration, empowered the ICC to set minimum rates and direct rail operation in emergency situations, divided the nation into four districts for the recapturing of excessive earnings based on valuation, and called on the ICC to develop a non-mandatory nationwide consolidation plan.<sup>47</sup>

Over a period of roughly one hundred years the relationship between the railroad industry and various levels of government ran the full gamut of possibilities. Beginning from a state of regulatory detachment, railroad regulation developed first within the realm of state power, evolved into a tenuous federal-state blend, and finally—as a consequence of U.S. involvement in the sustained crisis of World War I—came to be seen as a predominantly federal concern. This interactive process of trial and error took time. Those grappling with aviation regulation after World War I confronted the question of whether the railroad’s regulatory framework, evolved over a period of decades, could be immediately applied to the airplane.

Like the railroad, the automobile’s regulatory framework provided a powerful

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<sup>46</sup> Kolko discusses this process of ideology formation within the railroad industry both before and during World War I. Kolko, *Railroads*, 217-26.

<sup>47</sup> Rogers MacVeagh, *The Transportation Act 1920: Its Sources, History, and Text, Together with its Amendments to the Interstate Commerce Act* (New York: Henry Holt & Co., 1923). Both the ICC and William Z. Ripley undertook consolidation plans over the course of the 1920s that were ultimately cast aside. A detailed discussion of both can be found in Stuart Dagget, *Railroad Consolidation West of the Mississippi River* (New York: Arno Press, 1981) and Richard Saunders, *Merging Lines: American Railroads, 1900-1970* (DeKalb, IL.: Northern Illinois University Press, 2001), 47-55.

state-centered model for aviation.<sup>48</sup> Those in favor of postwar national aviation regulation decried that the federal government had “failed to exercise its power of regulation” concerning the automobile and that in relinquishing its constitutional authority Congress had allowed states to establish a “great diversity of laws for the licensing of vehicles, for determining the qualifications and licensing of operators, and for the establishment of rules of the road and licensing fees.” Advocates of states’ rights, on the other hand, held up the automobile system and the federal highway aid program as the epitome of federal-state regulatory cooperation, one that could and should be applied to the airplane.<sup>49</sup>

Many used the same arguments for federal regulation of inland waterways and railroads to advocate for national automobile licensing and registration, but these responsibilities remain within the realm of state police powers to this day. Because the first automobiles could easily be regulated at the municipal level, cities quickly passed various ordinances. Licensing and registration arose out of a desire to end “scorching” (speeding), rein in reckless drivers, track down those leaving the scene of an accident, and, as car ownership spread, provide a growing source of funds for municipal and state government. Automobilitists reacted strongly against early regulatory action, arguing

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<sup>48</sup> A multitude of studies exist detailing the history of road construction in the United States, a process that led to a blended federal-state system, and the importance of the automobile to that narrative. For important scholarly works on the subject see Taylor, *Transportation Revolution*; W. Stull Holt, *The Bureau of Public Roads: Its History, Activities and Organizations* (Baltimore, MD: The Johns Hopkins University Press, 1923); John B. Rae, *The Road and the Car in American Life* (Cambridge, MA: The MIT Press, 1971); Charles L. Dearing, *American Highway Policy* (New York: Arno Press, 1978); Steven B. Goddard, *Getting There: The Epic Struggle between Road and Rail in the American Century* (Chicago: University of Chicago Press, 1994); Tom Lewis, *Divided Highways: Building the Interstate Highways, Transforming American Life* (New York: Viking, 1997); and *The History and Accomplishments of Twenty-Five Years of Federal Aid for Highways*, papers presented before the 30th Annual Convention of the American Association of State Highway Officials (Cincinnati, Ohio: November 28, 1944). Bruce E. Seely masterfully links the development, dissemination, and institutionalization of a mental model advocating a federalist approach to road construction to Progressive ideology in *Building the American Highway System* (Philadelphia: Temple University Press, 1987).

<sup>49</sup> “Memoranda in Re Section 221 of the Proposed Civil Aeronautics Act,” in *Law Memoranda Upon Civil Aeronautics: Printed for the Use of the Committee on Interstate and Foreign Commerce House of Representatives* (Washington, DC: GPO, 1923), 49.

against any such distinctions based on technological differences similar to Marshall's steamboat position in *Gibbons v. Ogden*. Automobilists mobilized through organizations such as the New York City-based Automobile Club of America (1899), the Chicago Automobile Club (1900), the American Automobile Association (1902), the American Motor League (1902), and a plethora of smaller clubs. Members questioned the general opinion that automobiles were less safe than horses and portrayed auto-specific legislation as discriminatory. As automobile ownership jumped from 8,000 registered vehicles in 1900 to 458,300 in 1910 and again to 8,131,500 in 1920, arguments against licensing and registration based on class discrimination lost their foundation.<sup>50</sup>

In 1899 New York City, Boston, and Chicago saw debates over the erection of municipal regulatory ordinances. A 1900 Chicago licensing and registration law included a driver's examination, eight-mile-an-hour speed limit, mandatory bells and brakes, and set fines between \$5 and \$25. A further revision required automobiles to display tags illustrating their owners' license number after June 8, 1903. That year, in the case of *A.C. Banker v. Chicago*, Justice Farlin Q. Ball of the First District Appellate Court issued an injunction declaring the city's licensing law discriminatory because it applied solely to automobiles. When the city continued to enforce the ordinance, Sidney S. Gorham, the Chicago Automobile Club's attorney, obtained personal injunctions for the club's leadership and worked with the city's counsel to draft new legislation. The club argued that registration numbers were an ineffective means of law enforcement, called attention

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<sup>50</sup> Peter D. Norton provides an in-depth analysis of the development of traffic regulations in response to safety issues and the redefinition of the city street with a post-World War I focus in *Fighting Traffic: The Dawn of the Motor Age in the American City* (Cambridge, MA: The MIT Press, 2008); James J. Flink, *America Adopts the Automobile, 1895-1910* (Cambridge, MA: The MIT Press, 1970), 150; U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970*, Bicentennial Edition, Part 1&2 (Washington, DC: GPO, 1975), 716.

to the discriminatory power it provided the mayor, and declared that state laws better served to curtail reckless drivers. Ultimately bowing to public pressure and the majority's desire to present a positive image of motoring, the Chicago Automobile Club unanimously voted to accept both the registration and licensing ordinances on October 17, 1904, while passing a concurrent resolution reaffirming the club's opposition to the latter.<sup>51</sup>

Municipal regulation spread rapidly, forcing intercity motorists to obtain multiple licenses and make sense of often conflicting regulations. In some cities, such as Cincinnati, the local automobile clubs proactively worked with the municipal government to draft broadly acceptable regulations, while in some cities motorists asked "what's the use?" The growing disparity between municipal regulations negatively affected intercity automobile use and became a central feature within regulatory discussions. *The Horseless Age* regularly discussed the "evils of local ordinance" and called on automobilists to push for regulation at the state level. An Automobile Club of Maryland-supported 1906 test case settled a conflict between Baltimore's speed limit ordinance (six miles-per-hour) and the state's (twelve miles-per-hour) in favor of the latter. A similar question of municipal/state variance plagued the motorists of Spokane, Washington, and the Automobile Club of Seattle specifically pushed for state legislation to "prevent local authorities" from passing "ordinances which might be different and cause motorists annoyance." The years 1904 to 1906 mark a decisive turn away from municipal-level

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<sup>51</sup> "Want all Motor Vehicles Licensed," *The Horseless Age*, June 21, 1899, 6; "Boston Aldermen Seek to Control Motor Vehicle Licenses," *The Horseless Age*, July 26, 1899, 19; "Anti-Motor Legislation in Chicago," *The Horseless Age*, July 5, 1899, 1; "Chicago Automobilist Wins Legal Fight Against Local Licensing Ordinance," *New York Times*, June 21, 1903; "Chicagoans Fight Tags," *Motor Age*, April 14, 1904, 8; "Chicago Law in Court," *Motor Age*, August 18, 1904, 12; "Club Will Use Numbers," *Motor Age*, October 20, 1904, 8; "To Fight License Law," *Motor Age*, July 7, 1904, 17; "But What's the Use?" *Motor Age*, November 3, 1904, 11; Flink, *America Adopts the Automobile*, 169, 174.

struggles. Rather than embark on a long battle and sully their local reputations, automobilists increasingly pushed for the passage of state legislation.<sup>52</sup>

State regulation of the automobile began almost concurrently with municipal legislation. New York passed the first statewide licensing/registration provision in 1901, requiring drivers to submit their contact information, vehicle description, and \$1 fee to the Secretary of State and also adhere to various safety and speed regulations.

Connecticut, Massachusetts, New Jersey, Pennsylvania, Minnesota, and Missouri enacted similar legislation in 1903. New York's 1904 Hill-Cocks bill settled the question of municipal versus state legislation with its state supremacy clause. It also set minimum speed limits and exempted nonresidents from mandatory registration as long as they displayed proper documentation from their home state.<sup>53</sup> By 1915 the push toward state supremacy had become firmly established, and all forty-eight states and the District of Columbia had passed licensing and registration bills. During the first decade of the twentieth century fees "were barely sufficient to cover the cost of administering the regulatory measures." After 1909 lawmakers began turning to graduated rates based on horsepower and annual registrations as a means to generate revenue in the face of declining property taxes.<sup>54</sup>

State-level regulation did not necessarily ease the plight of automobilists.

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<sup>52</sup> "Evils of Local Ordinances," *The Horseless Age*, February 13, 1907, 255; "State Law Supersedes Baltimore Ordinance," *The Horseless Age*, May 23, 1906, 737; "City and State Laws Differ," *Motor Age*, November 28, 1907, 30; "Want State Laws," *Motor Age*, December 15, 1904, 13.

<sup>53</sup> "Automobile Licenses," *New York Times*, May 3, 1901; "Hearing on the Hill-Cocks Automobile Bill," *The Horseless Age*, February 24, 1904, 231; "Progress on the Hill-Cocks Automobile Bill," *The Horseless Age*, March 23, 1904, 343; "Hill-Cocks Bill Now a Law," *The Horseless Age*, May 11, 1904, 497; "New York Bill Signed," *Motor Age*, May 2, 1904, 12; Flink, *America Adopts the Automobile*, 166; James W. Martin, "The Motor Vehicle Registration License," *Bulletin of the National Tax Association* 12 (April 1927): 194.

<sup>54</sup> Flink, *America Adopts the Automobile*, 169; Martin, "Registration License," 195; Rudy Higgins-Evenson utilizes quantitative analysis on a state-by-state basis to discuss the rise of state reliance upon automobile-related taxation in "Financing a Second Era of Internal Improvements: Transportation and Tax Reform, 1890-1929," *Social Science History* 26 (Winter 2002): 623-51.

Missouri's legislation, signed into law on March 24, 1903, limited the maximum speed in the state to nine miles-per-hour, required drivers to yield to horse-drawn vehicles, and permitted each county and any city with its own inspectors to enact its own \$2 fee. Cries of discrimination resulted as fees for an occasional trip from Kansas City to Independence came to "\$4 plus... [a] vehicle tax of \$5, [for] a total of \$9, against \$2 for the man with the buggy." Penalties for violations ranged anywhere from \$100 to \$1,000 and/or one to six months in jail. Total licensing and registration costs to drive through the entire state of Missouri amounted to \$295.50. The outcry of the state's automobilists spurred the passage of legislation in 1907 providing for a flat state fee of \$5.<sup>55</sup>

State supremacy spread rapidly during the 1910s. Following New York's lead, the Pennsylvania legislature included a state supremacy clause in its 1909 automobile bill. In 1913 Wisconsin representatives approved legislation specifically prohibiting municipal and county automobile regulations, and in 1914 the National Automobile Chamber of Commerce resolved to "discourage by all proper means" any legislation that allowed for regulation at the local level. The Federal-Aid Road Acts of 1916 and 1921, the first substantial federal appropriations for road construction, cemented the concentration of regulatory authority at the state level.<sup>56</sup>

Expanding automobile ownership, technological improvements enabling longer journeys, and the adoption of varying registration and licensing practices accentuated the issue of nonresidents and state law. Possessing equal sovereignty, states could legally require all drivers to buy and display their unique license and registration, resulting in the

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<sup>55</sup> "The New Missouri Automobile Law," *The Horseless Age*, April 8, 1903, 463; "Missouri Laws Complex," *Motor Age*, November 10, 1904, 12; Flink, *America Adopts the Automobile*, 172.

<sup>56</sup> "Wisconsin's New Motor Code Declared to be Model Law," *Motor Age*, August 7, 1913, 13; "Makers Discuss Legislation," *Motor Age*, March 12, 1914, 13; Edward C. Fisher, *Vehicle Traffic Law*, 1974 rev. ed. by Robert H. Reeder (Evanston, IL: The Traffic Institute, Northwestern University, 1961), 22-23.

erection of usage tariffs roughly analogous to those under the Articles of Confederation. Two possible courses arose to rectify this complex situation: reciprocal agreements providing for mutual recognition among states, and federal legislation. Reciprocal provisions allowed a motorists' license and registration, obtained in his or her state of residence, to be considered valid in another state provided their home state granted complementary privileges. A period of trial and error extending over roughly two decades saw the institutionalization of a nationwide state-centric system of reciprocity that undercut the possibility of federal regulation.<sup>57</sup>

The reciprocity struggle between New Jersey and New York illustrates the power politics inherent within the issue of automobile regulation. Between 1907 and 1912, New York and New Jersey disagreed on the rights and requirements of nonresident motorists. While New York extended a courtesy to motorists in surrounding states New Jersey did not include any such reciprocal provision in its 1903 law, requiring nonresidents to obtain a New Jersey license at a cost of \$1. In retaliation, New York legislators replaced their policy of open recognition with one contingent on reciprocal conditions when they passed Assemblyman Albert S. Callan's automobile bill in 1910, thus leaving the restrictions placed on out-of-state motorists visiting the Empire State up to their home legislatures. The New Jersey legislature, under much pressure from the state's automobile organizations, responded on April 2, 1912, allowing nonresidents a maximum of fifteen days per year of tax-free touring provided their home state offered complementary

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<sup>57</sup> Keller, *New Economy*, 70. The Rhode Island legislature specifically looked to the damage that out-of-state vehicles inflicted upon state roads, especially during summer holiday travel, as validation for a nonresident registration fee. ("Rhode Island Makes Plans," *Motor Age*, December 12, 1907, 28.) Flink, while providing an excellent history of the spread of automobile licensing and registration, spends little time discussing the rise of reciprocity and calls for federal legislation, limiting his discussion to a single paragraph. (Flink, *America Adopts the Automobile*, 172-73.)



courtesies. Conflicts over reciprocal regulations were by no means confined to New York and New Jersey, with clashes arising between the District of Columbia and Maryland, Pennsylvania and Delaware, and Rhode Island and Massachusetts. Despite these growing pains, some sort of reciprocal provision was in effect in almost every state by 1920.<sup>58</sup>

Such reciprocal provisions appeared to contradict Article 4, Section 2 of the Constitution providing that “the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.” Council for the Professional Chauffeur’s Club of America and regular legal contributor to *The Horseless Age* Xenophon P. Huddy questioned the legality of reciprocity, arguing that “every citizen of this country has the inviolable right to travel into and through any State he wishes as long as he complies with the laws governing the local inhabitants. Any law discriminating against non-residents under certain conditions, depending upon the action of the home State of these non-residents, is null and void.”<sup>59</sup>

Two cases between 1914 and 1916 brought questions concerning the validity of state reciprocity agreements before the United States Supreme Court. The first, decided on January 5, 1915, concerned the case of John T. Hendrick, a resident of the District of Columbia, who was arrested for lacking Maryland registration and fined \$15 while driving in Prince George’s County. Although Maryland’s law included a reciprocal

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<sup>58</sup> “Discriminating License Tax Bill to Be Introduced in the New York Legislature,” *The Horseless Age*, January 16, 1907, 119; “Jersey Legislation,” *Motor Age*, April 22, 1909, 19; “New Jersey Relents,” *Motor Age*, February 24, 1910, 31; “Auto Touring Reciprocity,” *New York Times*, March 25, 1910; “Assembly Passes Auto Bill,” *New York Times*, April 20, 1910; “Jersey Motorists Want Laws Changed,” *New York Times*, August 7, 1910; “Auto Reciprocity Law for Jersey,” *New York Times*, Dec 21, 1911; “New Jersey Passes Reciprocity Bill,” *Motor Age*, April 4, 1912, 19; “Reciprocity in the District of Columbia,” *Motor*, June 1911, 37; “District of Columbia Board Retaliates,” *Motor Age*, January 23, 1913, 15; “Rhode Island Will Retaliate,” *Motor Age*, April 9, 1908, 29; “Pennsylvania and Delaware at War,” *Motor Age*, November 23, 1916, 11.

<sup>59</sup> U.S. Const. art. IV, § 2, cl. 1; “Is All Our Automobile Legislation Constitutional?” *The Horseless Age*, July 7, 1906, 6; “Exemption From Registration Based Upon Reciprocity,” *The Horseless Age*, January 9, 1907, 38.

provision, it specifically excluded the District of Columbia. Hendrick appealed his case based on the Constitution's privileges and immunities clause, the interstate commerce clause, and the Fourteenth Amendment's equal protection clause. In an opinion delivered by Justice James C. McReynolds, the Supreme Court held that the law's discriminatory clause did not constitute "adequate grounds for us now to declare it altogether bad," acknowledged that states could regulate the automobile in the absence of federal legislation, and asserted that such regulatory action "does not constitute a direct and material burden on interstate commerce."<sup>60</sup>

*Kane v. New Jersey*, argued during the fall of 1916, further cemented *Hendrick v. Maryland*. Delivering the opinion, Justice Louis Brandeis reaffirmed the states' police power to regulate the automobile of both residents and nonresidents. The court declared that requiring a state license and registration for all drivers put "nonresident owners upon equality with resident owners" and the absence of reciprocal provisions required states to treat all drivers equally before the law. Huddy and Brandeis's approach—based on an equal applicability of state laws—addressed Constitutional questions but lacked practicality as both automobile ownership and driving distances increased throughout the twentieth century.<sup>61</sup>

How could states determine if nonresidents had overstayed their welcome? The *New York Times* raised this central question when it asked, "who determines when this ten-day period of touring expires? In other words, does it ever expire? The ten-day reciprocity clause, owing to its non-enforcement, virtually gives complete freedom to tourists." Enforcing adherence to various reciprocal clauses proved more difficult than

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<sup>60</sup> *Hendrick v. State of Maryland* 235 U.S. 610 (1915).

<sup>61</sup> "Is Touring Commerce?" *Motor Age*, November 9, 1916, 15; *Kane v. State of New Jersey* 242 U.S. 160 (1916); "Upholds Taxing of Non-Resident Motorists," *Motor Age*, December 7, 1916, 34.

the universal enforcement of a state's laws. Only the meticulous keeping of ferry records allowed the Automobile Bureau's New York City office to collect \$30,976 in fees from New Jersey residents in 1916, but it would be prohibitively expensive to apply the same level of scrutiny along every mile of a state's border.<sup>62</sup>

State officials looked to the Constitution's compact clause as a possible remedy. At the tenth annual banquet of the Automobile Club of America—held in New York City on March 25, 1909—New Jersey Governor Franklin Fort discussed the possibility of an interstate agreement among New York, New Jersey, Connecticut, Rhode Island, Massachusetts, and Maryland. In the spring of 1913, New Jersey Motor Vehicle Commissioner Job H. Lippincott, arguing that “reciprocity, as now established, is a failure,” proposed an interstate licensing and registration agreement. Though no legislative action arose out of these ideas they illustrate the view of many that uniformity could be accomplished independent of the federal government.<sup>63</sup>

The question of reciprocal recognition of automobile licensing and registration extended beyond state relations and into the international realm. While New York motorists required a Canadian license and surety bond to tour in Quebec, early New York open-border legislation did not apply to Canadians because they did not live within “another *State*, or *Federal district*.” The passage of the Callan bill and Quebec's

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<sup>62</sup> “Features of the Touring Season,” *New York Times*, September 11, 1910; “Making Reciprocity Pay,” *New York Times*, January 28, 1917.

<sup>63</sup> U.S. Const. art. I, § 10, cl. 3; “New Jersey Governor Talks Motor Law,” *Motor Age*, April 1, 1909, 9; “A New Jersey Idea,” *Motor*, May 1913, 77; “Inter-state Auto License Proposed,” *New York Times*, March 25, 1913; “Features of the Touring Season,” *New York Times*, September 11, 1910. The Port Authority of New York, established in 1921, represents a prime example of such interstate compacts. Richard H. Leach and Redding S. Sugg, Jr., *The Administration of Interstate Compacts* (Baton Rouge, LA: Louisiana State University Press, 1959), 16. For further discussion of state compacts see Paul T. Hardy, *Interstate Compacts: The Ties That Bind* (Athens, GA: Institute of Government University of Georgia, 1982); Joseph F. Zimmerman, *Interstate Cooperation: Compacts and Administrative Agreements* (Westport, CT: Praeger, 2002); and Marian E. Ridgeway, *Interstate Compacts: A Question of Federalism* (Carbondale, IL: Southern Illinois University Press, 1971).

subsequent granting of registration reciprocity to New York residents in 1911 facilitated international automobile travel. The question of licensing was settled in 1916 when, after a two-year wartime delay in negotiations, Ontario and New York each agreed to recognize the license of the other. Under the agreement New York motorists could undertake a northern tour of no more than thirty days without having to obtain a Canadian license. Customs collectors at points of entry along the border issued a certificate, with the description of the automobile and entry date, to be surrendered upon return to New York. The government of Ontario negotiated with individual state governments to secure reciprocal recognition of licenses, expanding the thirty-day touring exemption to twenty-six states by August 1918. The Motor Vehicle Act, passed by the Ontario Legislative Assembly of Ontario in 1920, provided all-encompassing automobile regulations and incorporated a reciprocal clause for nonresident motorists.<sup>64</sup>

Federal regulation of motorists and their automobiles quickly became another thread in the Progressive trend toward centralized regulation. In 1902 the National Association of Automobile Manufacturers (NAAM) hired a lobbyist to push for federal legislation, but a lack of consensus among motorists concerning both the need and shape of such legislation combined with the limited influence of the automobile on interstate commerce at the time to undermine this early effort. Nevertheless, the call for federal legislation to ease the interstate plight of motorists continued to grow. By 1905 “several federal automobile bills were introduced” but none of them overcame constitutional

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<sup>64</sup> “Want Treaty with Canada,” *Motor Age*, November 17, 1904, 9; “The Quebec Law,” *The Horseless Age*, March 28, 1906, 491; “Canadian Motor Car and Customs Laws,” *Motor*, August 1909, 42; “Quebec Grants Road Reciprocity,” *Motor*, June 1911, 37; “Ontario Offers Reciprocity,” *Automobile Topics*, May 27, 1916, 241; “Border Reciprocity Wins,” *The New York Times*, September 24, 1916; “For Motorists Who Cross the Border,” *Motor Age*, August 22, 1918, 20; “Reciprocal Licenses With Canada,” *Motor Age*, June 3, 1920, 23.

questions and made it out of committee. *The Horseless Age*, moving away from its earlier belief that a federal license law would be “incompatible with our system of government,” established a Federal and Uniform Automobile Legislation Department in 1906 to channel and coordinate calls for federal regulation. Speaking for the periodical, Huddy argued that “when there is need for uniform legislation, then action of Congress is not only desirable, but authorized,” likened highways to waterways, advocated a national highway system, and—relying on the connection between regulation and navigation established in *Gibbons v. Ogden*—connected its construction to interstate licensing and registration under the commerce clause. Recognizing that Congress would not pick up the issue on its own accord, he urged automobile clubs across the country to debate the issue and unite in pushing for action. To facilitate debate, *The Horseless Age* proposed federal automobile legislation centering on the creation of a three-member Automobile Commission along the lines of the ICC.<sup>65</sup>

On February 26, 1907, chairman of the AAA’s legislative committee Charles T. Terry journeyed to Washington, DC, to lobby for the introduction of AAA-drafted legislation. Less than two month later *The Horseless Age* threw its support behind the automobile club and turned over to the association all data and communications it had on the matter. While in DC, Terry found a willing advocate in William W. Cocks, the representative from Long Island who had co-sponsored New York’s 1904 state supremacy bill. Though submitted too late for action in the Fifty-Ninth Congress, Cocks

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<sup>65</sup> “National Drivers’ Licenses Again,” *The Horseless Age*, December 10, 1902, 629; Flink, *America Adopts the Automobile*, 172-73; “Federal Control of Motoring,” *The Horseless Age*, March 14, 1906, 414; “Federal Automobile Legislation,” *The Horseless Age*, September 12, 1906, 320; “The Suggested Federal Law,” *The Horseless Age*, October 10, 1906, 437; “Automobile Legislation,” *The Horseless Age*, November 5, 1902, 491; “Federal Legislation Movement Progressing,” *The Horseless Age*, February 13, 1907, 233; X.P. Huddy, “Why Not Have a Federal Automobile Law, and Have it Now?” *The Horseless Age*, January 9, 1907, 67; X.P. Huddy, “Interstate Highways,” *The Horseless Age*, January 23, 1907, 151.

reintroduced his bill in 1908. It called for an annually renewable \$5 federal license and registration in addition to existing state requirements. This federal license number, granted only after motorists had adhered to all regulatory laws in their home state, would provide nationwide driving privileges under the administration of a new Motor Vehicle Bureau in the Department of Commerce and Labor. The Judiciary Committee's reception did not match the prehearing optimism. The bill died in committee after Republican Chairman John J. Jenkins of Wisconsin and fellow New York representative Democrat DeAlva S. Alexander expressed constitutional concerns.<sup>66</sup>

Armed with the endorsement of the National Grange, Cocks reintroduced his bill as H.R. 5176 on March 26, 1909.<sup>67</sup> Terry's testimony before the Committee on Interstate and Foreign Commerce on behalf of the bill illustrates the difficulty in balancing the commerce clause with state police powers. After an initial exchange with Republican chairman James R. Mann of Illinois set a confrontational tone, Terry relied solely on an analogy with waterway to link highways to the commerce clause, emphasizing that the bill left speed limits, headlights, and other safety issues to the states. Mann raised three primary objections to the bill. First, he argued that licensing and registration clearly fell under a state's police power. Second, because it provided that "it shall not be construed to interfere with the regulation of a State" the bill would be open to various interpretations based on its compatibility with existing state laws. Finally, if a federal license for interstate commerce could only be obtained after adhering to the laws of one's home

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<sup>66</sup> "Proposed Federal Automobile Law," *The Horseless Age*, February 6, 1907, 217-18; "A.A.A.'s Federal Bill," *The Horseless Age*, March 6, 1907, 352; "Federal Legislation," *The Horseless Age*, April 3, 1907, 488; "Federal License Bill," *Motor*, February 1908, 66; "Congress May Enact Federal Auto Law," *New York Times*, December 3, 1907; "Federal Auto Bill Urged By Motorists," *New York Times*, February 19, 1908; "Federal Auto Bill Gets Hard Blow," *New York Times*, March 13, 1908.

<sup>67</sup> "For Federal Auto Registration," *New York Times*, December 6, 1908; "Federal Licenses for Automobiles," *New York Times*, March 27, 1909; Flink, *America Adopts the Automobile*, 172-73.

state, then interstate commerce would in actuality occur under the laws of the various state governments rather than Congress, granting “power to carry on interstate commerce from one State on one set of terms and from another State on another set of terms entirely at variance with the first.” Terry countered that the automobile “is an interstate vehicle now,” that “carrying passengers is intercourse” as defined by Justice Marshall, that a single tag would increase the convenience of motorists while fostering further economic exchange, and that the estimated \$1 million per year generated from the \$5 fee would cover the necessary expenses of the bill.<sup>68</sup>

Pennsylvania Republican Irvin P. Wagner raised the question of whether a state that required an examination of its residents would be forced to accept the federal license of a driver whose home state required no such examination. Terry responded that H.R. 5176 provided states with a right to petition the Motor Vehicle Bureau “to refuse licenses to the residents” of another state “until they comply with other requisites,” putting pressure on the lax state either to revise its laws to meet the requirements of other states or have its citizens submit to guidelines established by the head of the bureau. Terry enthusiastically claimed that “the matter of licensing of operators would be made uniform in a jiffy after this bill becomes law.” In effect the new federal bureau would be the mediator of state uniformity with the majority being forced to comply with the highest standards of the few.<sup>69</sup>

H.R. 5176 underwent various amendments in subcommittee under consultation

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<sup>68</sup> Committee on Interstate and Foreign Commerce, United States House, 61st Cong., 2nd sess., *Providing for Regulation, Identification, and Registration of Motor Vehicles Engaged in Interstate Travel* (Washington, DC: GPO, 1910), 12-13, 21, 25-27.

<sup>69</sup> *Ibid.*, 31-33. In countering Mann’s points Terry relied strongly upon the Supreme Court’s 1894 split decision to uphold the Kentucky Court of Appeals which ruled that the movement of individuals across state lines constituted interstate commerce in *Covington and Cincinnati Bridge Co. v. Kentucky*, 154 U.S. 204 (1894).

with Terry. The revised bill, H.R. 32570—first introduced on February 7, 1911, and referred to the Committee of the Whole House three weeks later—increased the annual federal registration fee to \$10 and placed administrative authority in the hands of the Department of Agriculture’s Office of Public Roads instead of a new government bureau. It also attempted to address the concerns of Congressman Wagner by making all automobiles and their drivers operating outside their state of residence subject to “all the requirements of the laws” within the state visited “except as to the display of the distinctive state number and the state authorization to operate therein.” The committee recommended passage of the bill based on the commerce clause, the precedent of waterway navigation, and a perceived noninterference with states’ police power. Four committee members submitted a minority report arguing against H.R. 32570. On March 1, Georgia Republican Charles L. Bartlett represented the dissenters on the floor of the House to “earnestly and vigorously protest against the enactment of such a law” due to its infringements on a state’s police powers. Two days later, on the second to last day of the 61st Congress, the full text of H.R. 32570 was read into the *Congressional Record*. Timing combined with serious constitutional questions to undermine the best chance for a federal licensing and registration law that many automotive groups had previously viewed as inevitable. In addition, the AAA lost a major congressional advocate for federal licensing when Cocks failed to win reelection in the fall of 1910.<sup>70</sup>

Subsequent legislative attempts to secure direct federal regulation of automobiles based on the commerce clause, such as those proposed by Democratic Congressman

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<sup>70</sup> “Will Re-Draw Federal Bill,” *Motor Age*, May 12, 1910, 11; Automobiles Engaged in Interstate Commerce, H.R. Rep. No. 61-2270 (1911); Automobiles Engaged in Interstate Commerce, H.R. Rep. No. 61-2270, pt. 2 (1911); 46 *Cong. Rec.* H 2112 (February 7, 1911); 46 *Cong. Rec.* H 3695 (February 28, 1911); 46 *Cong. Rec.* H 3842 (March 1, 1911); 46 *Cong. Rec.* H 4175 (March 3, 1911).



Andrew J. Peters of Massachusetts in 1913, New Jersey Republican Theodore F. Appleby in 1921, and Republican Ogden L. Mills of New York in 1922, all met with similar fates. The Adamson-Pittman bill, introduced in both houses of Congress in 1917 by Representative William C. Adamson of Georgia—a signatory of the minority report on Cocks’s earlier bill—and Nevada Democratic Senator Key Pittman, provided only for federally-recognized, uniform reciprocal rights between states. Though the AAA tied its acceptance of wartime automobile and gasoline taxation to a system of universal reciprocity, even this limited bill could not achieve passage. Another attempt at federally-mediated reciprocity proposed by Republican Congressman Burton E. Sweet of Iowa gained little traction. The primary legislative victory for motorists at the national level occurred in 1919 with the passage of the National Motor Vehicle Theft Act, or Dyer Act. This piece of legislation, drafted by the National Automobile Dealers’ Association and sponsored by Congressmen Leonidas C. Dyer and Cleveland A. Newton of Missouri, made the interstate transport of stolen vehicles a federal crime subject to a \$5,000 fine and/or five years in prison. Despite repeated attempts, federal regulation of automobile licensing and registration could not overcome an imperfect yet operational state-based system that complemented the American federalist tradition.<sup>71</sup>

Although the commerce clause bestowed regulatory power on Congress, questions concerning its applicability to new transportation technologies and the definition of interstate commerce sparked reoccurring debate over the scope of federal

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<sup>71</sup> “New Federal Registration Bill Filed,” *Motor Age*, April 24, 1913, 15; “Appleby Bill Provides Special Tax on Cars and Federal Licenses for Drivers,” *Motor Age*, August 4, 1921, 21; “Would Have Motor Vehicle Registration Mandatory,” *Motor Age*, April 27, 1922, 39; “The Bill That Failed,” *Automobile Topics*, December 22, 1917, 727; “A.A.A. Urges Full Reciprocity,” *Motor Age*, August 30, 1917, 15-16; “Reciprocal Licenses Urged,” *Motor Age*, November 6, 1919, 47; “Proposed Theft Act Carries Ten-Year Penalty,” *Motor Age*, September 11, 1919, 13; “National Motor Theft Law Operative,” *Motor Age*, October 30, 1919, 12.

regulatory authority. Questions over the nature of airplane regulation marked the next step in this interpretive process. Policymakers attempted to draw on previous experience, but prior frameworks could not be fully applied to such a decidedly different technology. The three-dimensional capabilities of the airplane combined with its use during World War I tied its regulation to national security at a level not seen in earlier debates over inland waterways, railroads, or automobiles. Most important, the airplane's ability to transcend physical boundaries and barriers accentuated its international nature, providing an impetus for a transnational regulatory system.

## Chapter 2

### The Prewar Dialogue and Pioneering Regulations

Orville Wright's first powered flight on December 17, 1903, heralded the dawn of the air age. As the so-called "Early Birds" took to the skies before World War I, interest in heavier-than-air flight spread. Crowds gathered to witness the miracle of flight in a device made of cloth, wood, and wire that could, at any moment, succumb to the grip of gravity and result in injury or death for the operator and bystanders below. One might expect that America's regulatory approach to the airplane would follow along the lines of previous transportation technologies: initial local legislation passed to protect the citizenry would, as the state of aeronautical technology improved, give way to either state or federal control. Whereas municipal governments quickly developed regulations for the automobile, the airplane's status as a curiosity and plaything of the wealthy few limited calls for its regulation. As late as 1911 a treatise on motor vehicle law declared that "at the present time the law of the air rests almost entirely in conjecture" and that the nature of the airplane made water and rail precedents "of little or no value as authority." Before 1914 only a handful of states and municipalities in the United States exercised any regulatory power over aviation. Though small in number, pre-World War I attempts at regulating the airplane at both the local and state level illustrate how policymakers endeavored, both successfully and unsuccessfully, to place this new technology within pre-existing regulatory frameworks. Prewar legislation, easily dismissed as imperfect and haphazard, offers an example of how individuals and societies approach new

technologies through existing mental models derived from analogous, yet distinctly different, prior experiences.<sup>1</sup>

Mayor T. M. Murphy of Kissimmee, Florida, roughly twenty-five miles south of Orlando, proposed the first aviation ordinance in the United States on July 17, 1908, as a means of bringing recognition to the small town. It required city council approval for all hangars and repair depots as well as a \$100.00 annual licensing fee for all aviation-related structures. A classification system established the costs of annual licensing based on the type of flying apparatus: balloons were distinguished as either stationary (\$20.00); powerless (\$30.00); or dirigible (\$50.00) while heavier-than-air machines were classed as airplanes (\$100.00); helicopters (\$150.00); ornithopters (\$200.00); and “all other types” (\$300.00).<sup>2</sup>

Interestingly, the Kissimmee ordinance did not regulate the use of specific safety devices or procedures but rather deferred to “the rules and regulations adopted and enforced by the aeronautic and aerostatic bureaus of the United States government,” which at the time were practically nonexistent. According to Murphy, copies of the ordinance were sent to England and Holland, published in a Paris daily, and commented upon by “almost every paper published in the United States.” Harold D. Hazeltine, an eminent British scholar of international law, mentioned the town’s ordinance in his

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<sup>1</sup> Berkeley R. Davids, *The Law of Motor Vehicles* (Northport, RI: Edward Thompson Company, 1911), 282, 284.

<sup>2</sup> “An Ordinance Regulating the Status and Employment of Aircraft Within the Town of Kissimmee City, FL., 1908,” Call #248.211-83K, IRIS # 160079, AFHRA, Maxwell AFB, AL; William C. Lazarus, *Wings in the Sun: The Annals of Aviation in Florida* (Orlando, FL: Tyn Cobb’s Florida Press, 1921), 2-8. The origins of America’s first airplane regulations remain unclear. According to the City of Kissimmee’s website, the ordinance came about after “the owner of a new flying school...hit a cow” during takeoff during Fourth of July festivities. Lazarus, who maintains that the ordinance began as a joke, found no evidence that this event ever occurred, pointing out that the proposed ordinance “ante-dates by approximately eight months the first known appearance of an airplane in the state and by a year and a half the first successful flight of an airplane in Florida.” (<http://www.kissimmee.org/index.aspx?page=254>, accessed 9/3/2013; Lazarus, 8.)

December 7, 1910, guest lecture at King’s College entitled “The Fundamental Problem: The Rights of States in the Air-Space.” Thus less than two weeks after Glenn H. Curtiss’ demonstration flight of the “June Bug” at Hammondsport, New York, and almost two months before Orville Wright’s September 3, 1908, demonstration flight for the U.S. Army at Fort Myer, Virginia, a municipal government had made headlines for its pioneering attempt to channel and restrain the new technology of the airplane through a licensing system surprisingly similar to that of the automobile.<sup>3</sup>

Two major issues defined global legal discussions concerning aviation before World War I: whether the air remained freely open to navigation or existed within the realm of national sovereignty; and whether the rights of landowners extended forever upwards under the common law maxim of *cujus est solum ejus est usque ad coelom*—he who owns the soil owns up to the sky. Due to the close geographical proximity of multiple nations, Europe became the center of prewar legal discussions concerning the practical application of aeronautics. At the invitation of the French government, representatives of Austria-Hungary, Belgium, Bulgaria, Denmark, France, Germany, Great Britain, Italy, Luxembourg, Monaco, the Netherlands, Portugal, Romania, Russia, Spain, Sweden, Switzerland, and Turkey met in Paris from May 10 to June 29, 1910, for the first official international conference concerning aviation and aerial navigation. The French wished to focus on noncontroversial technical issues, but discussions concerning two important questions—the extent of national sovereignty over airspace and whether foreign aircraft were to be treated the same as domestic aircraft—dominated the

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<sup>3</sup> “An Ordinance Regulating the Status and Employment of Aircraft Within the Town of Kissimmee City, FL., 1908,” Call #248.211-83K, IRIS # 160079, AFHRA, Maxwell AFB AL; Judge T. M. Murphy to Major E. L. Jones, 20 September 1919, Call #248.211-83K, IRIS # 160079, AFHRA, Maxwell AFB, AL; Harold D. Hazeltine, *The Law of the Air* (London: University of London Press, 1911), 47-48.

conference. Although adjourning without concluding a formal international agreement, the conference led to the establishment of the Comité Juridique International de l'Aviation, a permanent body of jurists committed to addressing international legal questions inherent in powered flight. This unofficial body hosted two more international conferences on the subject before the outbreak of World War I.<sup>4</sup>

The 1910 Paris Convention proved important in the formulation of prewar ideas concerning the international use of the airplane. It forced the British government, recently shocked by Louis Blériot's cross-channel flight, to formulate and solidify an air sovereignty stance that became the official position of the British Empire. The 1910 Convention also saw the tacit acceptance of several general principles for international aviation concerning "aircraft nationality, registration, aircraft certificates, crew licenses, logbooks, rules of the road, transport of explosives, photographic and radio equipment within aircraft, special provisions dealing with public aircraft," the notion of prohibited zones, an exclusive national right to cabotage (carriage between two areas in the same state), as well as the solidification of the view that all "usable space above the lands and waters of a State" fell within its territorial jurisdiction. These ideas first formally expressed in 1910 came to be officially accepted after World War I in the 1919 Convention Relating to the Regulation of Aerial Navigation. Discussions in Europe

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<sup>4</sup> See Stuart Banner, *Who Owns the Sky? The Struggle to Control Airspace from the Wright Brothers On* (Cambridge, MA: Harvard University Press, 2008), for a study of the legal questions arising out of human flight both in the United States and Europe. For an overview of the debate over air sovereignty and ownership occurring during the period, as well as the views of major international thinkers, see Blewett Lee, "Sovereignty of the Air," *The American Journal of International Law* 7 (July 1913): 470-96. For details concerning the 1910 Conference see Alfred M. Gollin, *The Impact of Air Power on the British People and Their Government, 1909-14* (London: The Macmillan Press, 1989), 134-58; Hazeltine, *Law of the Air*, 131-32; Lee, "Sovereignty of the Air," 489-92; John C. Cooper, *The Right to Fly: A Study in Air Power* (New York: Henry Holt and Company, 1947), 17-22; and John C. Cooper, "The International Air Navigation Conference, Paris 1910," *The Journal of Air Law and Commerce* 19 (Spring 1952): 127-43. In addition to the 1910 Paris Conference the Comité Juridique International de l'Aviation met again in Geneva in 1912 and in Frankfurt in 1913.

concerning international aviation offered American jurists a point of reference with which to approach the issue of domestic regulation. The thoughts and actions of two prominent jurists—Simeon E. Baldwin and Arthur K. Kuhn—illustrate how Americans placed themselves within this international dialogue, adapted it to their specific historical context, and proposed complementary yet distinct domestic policies.<sup>5</sup>

A founding member of the American Bar Association (ABA) in 1878, president of the ABA from 1890 to 1891, and Connecticut Supreme Court justice from 1897 to 1910 (serving as its Chief Justice from 1907 to 1910), Simeon Eben Baldwin won the gubernatorial election in 1910 after reaching the state Supreme Court's mandatory retirement age of seventy. Securing reelection in 1912, he held the governor's office until January 1915. Baldwin viewed government as the proper authority for addressing the socially disruptive aspects of technological change, and his interest in the new technology of the airplane arose out of safety and liability concerns.<sup>6</sup>

Four months before the Paris Conference, in the pages of *The American Journal of International Law*, Baldwin placed three major legal issues pertaining to aviation—ownership of the airspace, aviation regulation's proper governmental level within the federalist system, and the necessity of an international convention—in an American

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<sup>5</sup> After "several years of intense research" between the publication of *The Right to Fly* and his article in *The Journal of Air Law and Commerce*, Cooper came to believe that the draft convention voted on at the 1910 conference showed a general acceptance of air sovereignty and that it was not the divisive issue he and others had early portrayed it to be. Rather, the major issue of contention at the conference—and that which undermined an international agreement—concerned the equality of foreign aircraft within sovereign states. (Cooper, "International Air Navigation Conference," 143).

<sup>6</sup> "Connecticut Governor Simeon Eben Baldwin," National Governors Association, Former Governor's Bios, [http://www.nga.org/cms/home/governors/past-governors-bios/page\\_connecticut/col2-content/main-content-list/title\\_baldwin\\_simeon.html](http://www.nga.org/cms/home/governors/past-governors-bios/page_connecticut/col2-content/main-content-list/title_baldwin_simeon.html), accessed 8/7/2013; Robert Sobel and John Raimo, eds., *Biographical Directory of the Governors of the United States, 1789-1978*, vol. 1 (Westport, CT: Meckler Books, 1978), 194; "Simeon Eben Baldwin," Connecticut State Library, <http://www.cslib.org/gov/baldwins.htm>, accessed 8/9/2013. For a biographical study of Baldwin see Frederick H. Jackson, *Simeon Eben Baldwin: Lawyer, Social Scientist, Statesman* (New York: Columbia University King's Crown Press, 1955).

context. After arguing that the airship had reached a level of development that placed it in a position to undermine the existing system of sovereignty, he asserted that “every independent nation must have the right to regulate the use of the air above its territory” as the state, not the individual property owner, constituted “the ultimate owner of the soil and all upon it.” Looking to clauses within the German Imperial Code of 1900 and Swiss Civil Code of 1907 that limited ownership of the air to that space needed only for practical use of the land, Baldwin called for a modification of the common law maxim “in accordance with the spirit of our times” wherein “government tends, at all points, to push the public good farther and farther into what was formerly thought the inviolable domain of private right.” For Baldwin, the airplane necessitated a reinterpretation of the traditional American notion of private property and a reevaluation of the limits of governmental authority.<sup>7</sup>

Having elevated government interests over those of the private landowner, Baldwin suggested dual regulation of aviation divided between the state and federal government based on the nature of each flight. For those flights “wholly within any particular State, the State would be the source” of any license or franchise while interstate flight would fall within the jurisdiction of Congress under the Constitution’s commerce clause. He further added that the federal government already held the Constitutional authority to set occupancy requirements, fix required in-flight documentation, establish and administer crew examinations, determine customs procedures, and draft safety inspection criteria for all interstate and foreign flights. Baldwin pointed directly to the emerging system of reciprocal recognition of state automobile licenses to argue that “in

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<sup>7</sup> Simeon Baldwin, “The Law of the Air-Ship,” *The American Journal of International Law* 4 (January 1910): 96, 98; Banner, *Who Owns the Sky*, 112.



the absence of federal legislation... such a [state-issued] license might... be accepted as *prima facie* evidence that the voyage is a lawful one” and argued for the formal extension of this reciprocity principle to the international sphere through “adequate international agreements.” Thus even before the Paris Conference of 1910 a prominent American jurist had engaged with the larger international legal dialogue and adapted it to the American experience by addressing the relationship between the airplane and the federalist system, offered a tentative framework based on experiences with the automobile, and advocated international action to facilitate cross-border flights.<sup>8</sup>

Arthur K. Kuhn—founding member of the American Society of International Law, member of the ABA and International Law Association, and professor of law at Columbia Law School—immediately followed Baldwin’s article in *The American Journal of International Law* with a discussion of the current state of international, private, and criminal aviation law and its relationship to the United States. Looking to a not-too-distant future of frequent powered flight, Kuhn recognized a role for government even at this early stage of the airplane’s development because, as a radically new technology, the airplane’s potential to influence society had to be properly channeled and controlled. “As with all other advances in material science of a worldwide and permanent character, new relationships between states and individuals are imminent and to adjust and control them in an orderly manner is the task of government through law.” Kuhn cautioned, however, against a rush to draft an international convention at this stage, arguing that “experience alone can demonstrate the real necessities of international intercourse.” In doing so he manifested an American legal tradition that leaned heavily on the development of case law through adjudication rather than the European proclivity for

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<sup>8</sup> Baldwin, “Air-Ship,” 101, 104, 106.

*a priori* legal development, an important political-cultural distinction that influenced both the drafting of American aviation legislation and the United States' interactions with the international civil aviation regime throughout the interwar period.<sup>9</sup>

Kuhn further posited that national self-interest would bring about a pragmatic international framework for aviation that “will promote rather than impede aerial traffic.” He drew on the same European codes as Baldwin to declare that the *cujus est solum* maxim pertained solely “to the airspace as it is *appurtenant* to the land,” seconded Baldwin’s call for a system that divided regulatory power between federal and state government with “some degree of uniformity and cooperation” between the states, and recognized the necessity of an international convention to establish global uniformity on such technical issues as markings, “rules of the road, symbols, and ceremony.”<sup>10</sup>

Baldwin took his interest in aviation to that year’s American Bar Association meeting in Chattanooga, Tennessee, from August 30 to September 3. As director of the association’s Comparative Law Bureau, he made recent developments in international aviation law the first point of his annual address, presenting the following nine general principles agreed upon at the unofficial International Juridical Congress for the Regulation of Aerial Navigation held at Verona, Italy, three months earlier:

1. Every airship ought to have a particular nationality and carry what proves it.
2. The criterion for determining its nationality should be the same for all nations.
3. The preferable criterion is the nationality of the owner.
4. Nationality should be conferred by an entry of matriculation in a public register.
5. It would be useful to designate certain landing places for airships, to be entered on charts. Descents on public grounds should be regulated by the administrative

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<sup>9</sup> “In Memoriam: Arthur K. Kuhn, 1876-1954,” *The American Journal of Economics and Sociology* 14 (January 1955): 198; George A. Finch, “Arthur K. Kuhn, November 11, 1876-July 8, 1954,” *The American Journal of International Law* 48 (October 1954): 592-97; Arthur K. Kuhn, “The Beginnings of an Aerial Law,” *The American Journal of International Law* 4 (January 1910): 110, 114.

<sup>10</sup> Kuhn, “Beginnings,” 115, 123, 127, 131.

- authority of the government.
6. In case of necessity, permission to land on private property, reserving the right to eventual compensation for all damages, ought not to be withheld; nor should a descent be obstructed by the landowner; the necessity for its being a thing to be presumed, in the absence of the contrary.
  7. The space above the territory and territorial waters of each state ought to be considered as space subject to its sovereignty. The space above uninhabited lands (*territori non occupati*), or the open sea, ought to be considered free.
  8. In the space so subject to a particular sovereignty, voyaging by airship ought to be free, subject to the necessary safeguarding of public and private interests, and to the legal effects resulting from the nationality of the air ship.
  9. Such voyaging in the free space ought, as far as necessary, to be regulated by international agreements, and in the application of revenue, sanitary, and military systems the several nations should not overburden too much the freedom of aerial navigation.

The shared mental model approved at Verona also received expression at the Paris Conference and formed the ideological foundations of both the postwar international aviation regime and, with modification, domestic legislation within the United States. Baldwin thus served as an important link between ideological development occurring in Europe and the beginning stages of mental model formation in the United States. To reconcile the principle of state sovereignty agreed to at Verona with the federalist system, Baldwin reasserted his previous contention that a system of licensing for both aviators and aircraft divided between state and federal governments based on the nature of the flight—rather than licenses issued by private enthusiasts’ associations such as the Aero Club of America—best allowed for the advancement of aeronautics in the interest of the American public.<sup>11</sup>

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<sup>11</sup> Simeon E. Baldwin, “Annual Address of the Director of the Bureau of Comparative Law,” in *Report of the Thirty-Third Annual Meeting of the American Bar Association Held at Chattanooga, Tennessee August 30 and 31, and September 1, 1910* (Baltimore, MD: The Lord Baltimore Press, 1910), 900-903. The Verona Conference met May 30-31, 1910. Secretary of the Smithsonian Dr. Charles Walcott declined an invitation to present a paper at this conference as, unlike his predecessor Dr. Samuel P. Langley, aeronautics at that time constituted “a line of research to which I have given little personal attention.” Charles Walcott to Giuseppe Cavazzana, 4 May 1910, folder 13, box 13, Office of the Secretary, 1890-1929 Series 1: Correspondence, 1890-1929, RU 45, Smithsonian Institution Archives, Washington, DC. For a history of the Aero Club of America and its organizational offspring, the National Aeronautic

At the same annual meeting, Baldwin presented a draft bill entitled “An Act to Regulate Commerce by Air-Ships.” This proposed legislation was referred to the ABA’s Committee on Jurisprudence and Law Reform and printed in Baldwin’s second 1910 article on the subject of aviation regulation. The bill asserted government sovereignty over the air, placed regulatory power over all foreign and interstate flights within the federal sphere, required the visible marking of flags and numbers, and necessitated registration with the office of the Collector of Internal Revenue in the owner’s district of residence along with a surety bond of no less than \$1,000. It called for the licensing of pilots through a certificate of competency issued “by the District Attorney of the United States for any Judicial District,” prohibited the licensing of minors, set specific fees for licenses and registration, and stipulated that any violation of the act’s provisions constituted a misdemeanor “punishable by a fine not exceeding \$1000 or by imprisonment for not exceeding thirty days, or by both, at the discretion of the court.” Baldwin also looked to the Conference of Commissioners on Uniform State Laws to address uniformity of state legislation. He based his justification of federal action concerning interstate and foreign flights on the commerce clause, the Mann-Elkins Act’s extension of ICC regulatory authority to the telegraph and telephone that past June, and his view that “the art of aviation has now been sufficiently developed to warrant and to call for such legislation.”<sup>12</sup>

While ABA members deliberated his draft legislation in the break between annual meetings, Baldwin wasted no time in pursuing his interest at the state level after

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Association, see William Robie, *For the Greatest Achievement : A History of the Aero Club of America and the National Aeronautic Association* (Washington, DC: Smithsonian Institution Press, 1993).

<sup>12</sup> Simeon E. Baldwin, “Liability for Accidents in Aerial Navigation,” *Michigan Law Review* 9 (November 1910): 20, 25-27.

winning Connecticut's gubernatorial election. His first message to the legislature as chief executive called for a statute requiring the registration of all aircraft, the licensing of all operators, and a declaration of full liability on the part of the "owners, lessee or charterer." A comparative analysis between Connecticut's 1911 aviation law—the nation's first state legislation on the subject—and its 1905 automobile law illustrates that prior experience with the automobile heavily influenced the state's approach towards aviation regulation.<sup>13</sup>

The 1911 Connecticut act began with a near verbatim inclusion of the definitions offered at the beginning of Baldwin's proposed national bill. By declaring that "no airship shall be flown from any point in this state or to any point in this state unless...registered as provided" within the act, Section 2 placed the subject of aviation regulation within the state sphere rather than at the municipal level. Though it did not directly address the *cujus est solum* maxim, the act placed the authority to register airships, to license pilots upon successful examination, to collect the necessary fees, and to suspend or revoke licenses under the jurisdiction of the Secretary of State. It did not include a mandatory surety bond as provided for in Baldwin's national bill, though it did provide an exception for nonresident operators with the inclusion of a reciprocal provision—one clearly drawn from a similar statement in Section 8 of the state's 1905 automobile act:

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<sup>13</sup> "Laws to Regulate Aviation," *Virginia Law Register* 16 (February 1911): 778.

Section 8 of “An Act Concerning the Registration, Numbering, Use and Speed of Motor Vehicles,” approved July 15, 1905.

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Any non-resident of this state who shall have complied with the laws of any other state or territory of the United States requiring the registration of owners of motor vehicles, or motor bicycles, or of both, and the display of identification numbers of such state or territory, in accordance with the laws thereof, together with the initial letter or letters of the state or territory issuing the same, to be displayed on his motor vehicle while used or operated upon the public highways of this state may use such highways, for a period not to exceed fifteen days in any one year, without complying with the provisions of the foregoing sections of this act.

Section 9 of “An Act Concerning the Registration, Numbering and Use of Air Ships, and the licensing of Operators thereof,” approved June 8, 1911.

Any non-resident of this state who has complied with the laws of the state within which he resides, relative to airships and the direction of operation thereof, may operate an air ship in this state not exceeding ten days in any year without complying with the provisions of this act relative to the registration of air ships and the licensing of aeronauts; provided, that the said non-resident shall be a resident of a state requiring the registration of air ships and licenses to direct and operate the same and shall have been so licensed to operate and said air ship shall have been registered in said state.

Though the number of days differed, the concept of reciprocity previously applied to the automobile came to be incorporated into aviation regulation from the beginning as a means to facilitate interstate flight in the absence of federal legislation. Because no state enacted similar legislation until Massachusetts in 1913 (which gave authority to regulate aviation to the state’s Highway Commission), the Connecticut act in effect constituted a legal ban on all nonresident flights in and through the state. Such restrictions on interstate flights, though existing on paper, proved even more difficult to enforce than those placed on automobile travel. On June 30, 1911, Harry Atwood, a recent graduate of the Wright flying school, flew from Boston to New London, Connecticut, to watch the Harvard-Yale Regatta. While his flight caused a stir—he even took the mayor of New London up for a brief flight—his actions, according to Baldwin’s legislation enacted a month earlier, constituted a crime. A second flight from Boston to Washington, D.C., officially completed on July 14, necessitated again flying through the state of Connecticut, making

Atwood a repeat offender. These public and publicized flights “ruthlessly burst through the invisible barriers so carefully erected by the Connecticut Legislature” and exposed the limitations of state-centered regulation even in the early days of powered flight.<sup>14</sup>

The Committee on Jurisprudence and Law Reform reported on Baldwin’s proposed federal aviation bill at the Thirty-Fourth Annual Meeting of the American Bar Association held in Boston at the Massachusetts Institute of Technology on August 29-31, 1911.<sup>15</sup> In its report the committee declared it “cannot recommend the adoption of the resolution” as “the navigation of the air has not become so general as to permit uniform legislation [and] commerce by air has not yet attained sufficient growth on which to justify its regulation by Congress.” Only after contentious debate in the years following World War I did a new generation of lawyers prove that aviation had reached a level of development that necessitated federal regulation.<sup>16</sup>

Sporadic attempts at both municipal and state aircraft regulation occurred both before the entry of the United States into World War I and during the conflict itself. On March 22, 1915, Hawaii followed in the footsteps of Connecticut and Massachusetts when the territorial legislature passed Act 14 of the Session Laws of 1915. This legislation limited itself to the issue of licensing and required operators of “an aeroplane, balloon, or other aircraft in or across the Territory of Hawaii” to hold either a governor-issued license or to be documented pilots of the U.S. Army, Navy, or Hawaiian National Guard. This act was slightly revised and reissued as Act 107 on April 19, 1917, and, due

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<sup>14</sup> 1911 Conn. Public Acts c. 86; 1913 Mass. Acts c. 663; Howard Mansfield, *Skylark: The Life, Lies, and Inventions of Harry Atwood* (Hanover, NH: University Press of New England, 1999), 27-29; “Startling Feat Crowns Trip of Aviator Atwood,” *Washington Herald*, July 15, 1911; “The Connecticut Statute for the Regulation of Aerial Navigation,” *Bench and Bar* 26 (July 1911): 10.

<sup>15</sup> MIT moved from Boston to Cambridge in 1916.

<sup>16</sup> “Report of the Committee on Jurisprudence and Law Reform,” in *Transactions of the Thirty-Fourth Annual Meeting of the American Bar Association held at Boston, Massachusetts August 29, 30 and 31, 1911* (Baltimore, MD: The Lord Baltimore Press, 1911), 380-84; Banner, *Right to Fly*, 136-38.

to the geographical nature of the Hawaiian Islands, this territory-based approach served as a viable though limited regulatory mechanism. The actions of Connecticut, Massachusetts, and Hawaii constituted anomalies rather than expressions of a new paradigm: a State Department survey of state aviation laws conducted in September 1915, at the request of the Netherlands Delegation, showed that forty-five out of forty-eight states had no laws whatsoever regulating aviation.<sup>17</sup>

The city of Nutley, New Jersey, passed a municipal ordinance on August 22, 1916, in response to the actions of a parachuting company in neighboring Belleville. After several injuries and instances of property damage, the Nutley board of commissioners under Mayor Emil Diebitch passed an ordinance specifically prohibiting any descent within the city limits not under the complete control of the operator as well as forbidding the dropping of any object onto the ground from the air. Either action was subject to a \$25.00 fine for the first infraction and thirty days in jail for each subsequent offense. Scattered and uncoordinated prewar aviation legislation either arose from particular safety concerns, such as in Nutley, or attempted to create a comprehensive regulatory system hindered by its state-level focus.<sup>18</sup>

Before America's entry into World War I, aeronautical activity at the federal level was limited in scope and fragmented among the Army's Signal Corps, the work of Capt.

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<sup>17</sup> "Hawaii Aviation, Aeronautic Laws, 1915-1942," found at <http://hawaii.gov/hawaiiaviation/evolution-of-aviation-air-maillaws/1915-1941>, accessed 8/12/2013; F.G. Munson, War Department, Office of the Judge Advocate General to Chief of the Publication and Library Section, Memorandum Regarding Laws and Regulations Relating to Aircraft Traffic, 1 October 1920; Robert Lansing to Rappard, 13 September 1915; both in box 7695, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD. In addition to CT and MA, the State Department survey included regulations governing the "Aviation Squadron of the Nebraska National Guard...promulgated by General Orders No. 17, A.G.D., Series 1915, Nebraska Adjutant General Office to State Department, 27 August 1915, Records of the Department of State, box 7695, RG 59, National Archives at College Park, College Park, MD

<sup>18</sup> "An Ordinance to Prevent Persons From Alighting or Dropping Objects from Aircraft into the Streets, Trees, and Parks of the Town of Nutley, New Jersey" enclosed in Emil Diebitsch to Director of Air Service, 27 September, 1919, 248.211-83K, 1916, Call #248.211-83K, IRIS # 160079, AFHRA, Maxwell AFB, AL.



Washington Irving Chambers within the U.S. Navy, the office of Assistant Postmaster Otto Praeger, and the newly-established National Advisory Committee for Aeronautics (NACA). While a Joint Army-Navy board allowed for limited aeronautical coordination between the two branches of the armed forces as early as 1898 and the NACA began working with Praeger on the viability of aerial mail delivery in 1916, these four federal agencies approached aviation from their own specific organizational needs rather than from that of a centralized and coordinated national plan. The Post Office looked at aviation as another technological development to increase the speed and efficiency of mail delivery—just as it had earlier promoted inland waterways, rail, and the telegraph—while the War Department viewed the airplane as a component of its existing system of artillery observation and reconnaissance, though some younger officers saw great potential in aerial warfare. The Navy, typically viewed as the most conservative branch of the armed forces, undertook innovative experiments such as the first ship take-off in November 1910 and first shipboard landing two months later. Assistant Secretary of the Navy Franklin D. Roosevelt, cognizant of overseas developments, requested that the State Department forward any reports “as may be secured from time to time on the Progress of Aviation in France, Germany, Russia, Italy, Japan, and the Argentine Republic.”<sup>19</sup>

While prewar actions of the War Department, Navy, and Post Office were generally limited to furthering aviation as it related to each individual organization’s

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<sup>19</sup> Roy A. Grossnick, *United States Naval Aviation, 1910-1995* (Washington, DC: Naval Historical Center, Department of the Navy, 1997), 1-4; Franklin D. Roosevelt to Secretary of State William Jennings Bryan, 2 April 1913, box 7245, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD. For a detailed study on the relationship between the Post Office and aviation both before and after World War I see William M. Leary, *Aerial Pioneers: The U.S. Air Mail Service, 1918-1927* (Washington, DC: Smithsonian Institution Press, 1985).

interest, some saw a need for a larger federal role. Alan R. Hawley, president of the Aero Club of America, saw a clear connection linking the federal government to the international needs of his organization and the ever-advancing state of aeronautics. In a March 31, 1914, letter to Secretary of State Bryan, he brought up the possibility of American representation, either officially or unofficially, at a special meeting of the Fédération Aéronautique Internationale (FAI)<sup>20</sup> to discuss the unification of national aeronautics laws. The Aero Club's desire for federal action to facilitate international flight mirrored the contemporaneous call of the AAA. First in 1911 and again two years later the AAA wrote Secretary of State William Jennings Bryan detailing how the lack of federal automobile regulation precluded America's participation in the reciprocal system established in Paris in 1909, making it unnecessarily difficult for American motorists to obtain international identification plates. Though Hawley did not specifically mention the need for a convention to facilitate international air travel, State Department counselor (and future Secretary of State) Robert Lansing forwarded his letter to Secretary of War Lindley M. Garrison with the assumption that such an agreement would be the only possible means to achieve the requested global regulatory uniformity. In his reply to Lansing, Assistant Secretary of War Henry S. Breckinridge, as acting Secretary, dismissed Hawley's call since the FAI was "private in character and has for its object the control of aeronautical sport." It would take action of a more official nature to rouse the interest of the War Department.<sup>21</sup>

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<sup>20</sup> The FAI, also known as the International Aeronautical Federation and headquartered in Paris, constituted the official worldwide recordkeeping organization for aeronautics.

<sup>21</sup> Hawley to Bryan, 31 March 1914; Bryan to Garrison, April 8 1914; and Breckinridge to Bryan, 13 April 1914; all in box 7245, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD; Robert P. Hooper, President of AAA, to Secretary of State Philander D. Knox, 2 May 1911 and A.G. Batchelder, Chairman of AAA Executive Board, to Bryan, 29 August 1913, both in box 7701, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD. It

The NACA constituted the primary federal commitment to the broader development of aviation during the prewar period, but its creation and structure illustrate the limited nature of that commitment. Established as the result of a rider on the 1915 Naval Appropriations Bill, the NACA consisted of twelve members—two from the War Department, two from the Navy, one from the Smithsonian, one from the Weather Bureau, one from the Bureau of Standards, and five additional individuals “acquainted with the needs of aeronautical science”—who served without compensation. Initially provided with a paltry annual budget of \$5,000, the committee’s mission was “to supervise and direct the scientific study of the problems of flight, with a view to their practical solution, and to determine the problems which should be experimentally attacked, and to discuss their solution and their application to practical questions.” The NACA’s mandate for aeronautical investigation focused on the scientific and technical nature of powered flight (a tribute to its Smithsonian origins) and did not mention the issue of regulation, though one could argue that the phrase “application to practical questions” remained open to interpretation.<sup>22</sup>

Recognizing the constraints of time and funding the Executive Committee—the real authority within the NACA under the chairmanship of Secretary of the Smithsonian Charles D. Walcott—focused on technical issues such as stability, aircraft form, motors, and propellers, along with the standardization of nomenclature and production specifications. As the NACA possessed no laboratory space of its own it contracted with the Massachusetts Institute of Technology, the U.S. Rubber Company, and Columbia and

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was possible for American motorists to receive international identification plates through the courtesy of the British or French governments but only on a case-by-case basis.

<sup>22</sup> Public Law 271, 63d Cong., 3d sess., passed 3 March 1915 (38 Stat. 930) cited in Alex Roland, *Model Research: The National Advisory Committee for Aeronautics, 1915-1958*, vol. 1 (Washington, DC: NASA Scientific and Technical Information Branch, 1985), 1:394-95.

Cornell Universities for scientific studies. Secretary Holden C. Richardson (USN) contacted “112 universities, 10 manufacturers, 22 aero clubs and 8 government departments” to ascertain what aeronautical work they had already completed, current projects, existing and needed facilities, their research interests, and funding situation. Establishing the rules and procedures for the NACA as well as creating ties with the various aeronautical interests throughout the country occupied the committee’s attention throughout 1915.<sup>23</sup>

At its meeting of December 7, 1916, the NACA Executive Committee authorized, at the request of the Post Office’s newly-appointed and forward-minded Second Assistant Postmaster Otto Praeger, a Committee on Aerial Mail Service to “cooperate with the Post Office” on the viability of aerial mail delivery. Walcott appointed Col. George O. Squier of the U.S. Army Signal Corps, Dr. Charles F. Marvin of the Weather Bureau, and Dr. Samuel W. Stratton of the Bureau of Standards to this committee. One of its first tasks was convincing the Post Office to agree to the adoption of the metric system, “the international language of science and engineering,” for use in “all drawings and calculations on aeronautical matters.” On November 15, 1917, the Committee on Aerial Mail Service morphed into the Committee on Civil Aerial Transport. Dr. William F. Durand of Stanford, Virginius E. Clark of the Army, and John H. Towers of the Navy joined Stratton and Marvin for the purpose of addressing issues related to airmail as well as “problems connected with the application of aircraft to civil purposes,” thus initiating the NACA’s first tentative steps in the realm of aviation regulation. Before America’s

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<sup>23</sup> *Aeronautics: First Annual Report of the National Advisory Committee for Aeronautics, 1915* (Washington, DC: GPO, 1916), 13-17; Minutes of the NACA Executive Committee, 8 July 1915, both in folder 6, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Minutes of the NACA Executive Committee, 8 August 1915, folder 6, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

entry into World War I the aircraft patent issue came to dominate the NACA. A cross-licensing agreement, drafted by the end of July 1917 as a wartime production measure, marked what one historian deemed the committee's "finest hour in the Great War."<sup>24</sup>

The war increased calls for changes in the administrative apparatus of aeronautics within the federal government, an issue closely associated with regulatory control.<sup>25</sup> On April 2, 1917, democratic representative George Murray Hulbert from New York's northernmost 21<sup>st</sup> district (which shares a border with Canada) placed a bill entitled "To Establish a Department of Aeronautics, and for Other Purposes" in the hopper just hours before President Wilson called on a joint session of Congress to declare war against Germany. Two days later Texas Democrat Morris Sheppard presented the same bill in the Senate. The main features of this sweeping legislation called for the creation of a cabinet-level position to address all current and future aeronautical applications, charged this new department with the supervision and promotion of "all matters pertaining to aeronautics...to improve and develop the science of flying...and for the purpose of extending commerce or other such ends as may be found practical for the general betterment of the country," divided the new department into seven different bureaus roughly corresponding with the current divided makeup of federal aeronautical activities,

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<sup>24</sup> Stratton to Postmaster General Burleson, 12 December 1916, box 44, Records of the Post Office Department, RG 28, Office of the Second Assistant Postmaster General, Division of Air Mail Service, Government-Operated Air Mail, Central Files, 1918-1927, National Archives Building, Washington, DC; Minutes of the NACA Executive Committee, 15 November 1917, folder 6, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Minutes of the NACA Executive Committee, 7 December 1916, folder 7, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington DC; Roland, *Model Research*, 37. For more information on the patent dispute between the Wrights and Glenn Curtiss see Tom Crouch, *The Bishop's Boys: A Life of Wilbur and Orville Wright* (New York: W.W. Norton, 1989); William F. Trimble, *Hero of the Air: Glenn Curtiss and the Birth of Naval Aviation* (Annapolis, MD: Naval Institute Press, 2010); and Roland, *Model Research*, chapter 2.

<sup>25</sup> Indiana's Democratic Congressman Charles Lieb had introduced H.R. 13838, "To establish a Department of Aviation and for other purposes" on March 28, 1916 during the 64<sup>th</sup> Congress, but the prevailing neutrality sentiment of the country helped ensure it would die in the House Military Affairs Committee, 53 *Cong. Rec.* H 5054 (March 28, 1916).

established a seven-man advisory board whose participants would also become auxiliary members of the NACA, and authorized the Treasury to disburse \$1,000,000 in support of the new department. Testimony during subcommittee hearings of the Senate Military Affairs Committee, chaired by Sheppard, showed a heavy reliance upon the British example of a unified Air Ministry, and a Royal Flying Corps officer testified in its favor. The bill attempted to apply the British model to the United States with only slight modifications, something contrary to established American politico-cultural traditions. Presented as an emergency wartime measure, the bill's provisions guaranteed that nothing about this new Department of Aeronautics would be temporary. The impassioned testimony of Rear Adm. Richard E. Peary, one of the drafters of the bill, could not overcome its sweeping nature or price tag, and it died in committee.<sup>26</sup>

In May 1917, the National Aerial Coast Patrol Commission lobbied Arizona's Democratic representative Carl T. Hayden in support of the Hulbert/Sheppard bill, promoting the legislation alongside the Aero Club of America and aviation periodical *Aerial Age Weekly*. Like a good politician, Hayden forwarded the letter to the Secretary of War before taking a position, who in turn sent it to Walcott for his advice. In a reply to then Brigadier General Squier on May 19, Walcott declared that "in view of existing conditions, the National Advisory Committee for Aeronautics does not consider the question of the formation of a distinct department advisable at the present time." The NACA's Executive Committee concurred with its chairman and adopted his position as its own on May 26, 1917. Not surprisingly, the NACA, a body composed of the pre-

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<sup>26</sup> 55 *Cong. Rec.* H 121 (April 2, 1917); 55 *Cong. Rec.* S 189 (April 4, 1917); *S. 80: A Bill to Establish a Department of Aeronautics and for Other Purposes, Hearings Before a Subcommittee of the Committee on Military Affairs*, 65<sup>th</sup> Cong. (1917); Komons, 36. Peary himself brought up the fact that the creation of such a department would necessitate the establishment of corresponding House and Senate committees and thus a level of bureaucracy beyond the executive branch.

existing aeronautical interests within government, held on to this antiunification stance throughout the war and into the postwar period.<sup>27</sup>

When the Dominion of Canada followed Great Britain into the fight against Germany on August 5, 1914, the neutral United States shared, “excluding Alaska, approximately 3,987 miles” of border with a nation at war. Though technically authorized to shoot down any unauthorized aircraft, sentries were instructed to hold their fire until comprehensive wartime rules were issued, and on September 17, 1914, the Governor General of Canada, Prince Arthur William Patrick Albert, Duke of Connaught and Strathearn, issued “Orders and Regulations respecting Aerial Navigation.”<sup>28</sup>

This order, the only national regulation applicable to United States aviators, created a ten-mile prohibited zone in the airspace around nineteen major Canadian population centers and thirty-nine wireless stations, closed all borders to aircraft except that shared with the United States, and required all flights entering from the United States to apply for clearance beforehand, land immediately at one of eleven designated landing areas for inspection upon entering Canadian territory, and adhere to a twelve-hour waiting period before continuing. Upon landing pilots were to complete an application providing: (1) the aircraft’s name, registration number, and type; (2) the name,

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<sup>27</sup> Hayden to Secretary of War Baker, 14 May 1917; Walcott to Squier, 19 May 1917; both in box 138, Records of the National Aeronautics and Space Administration, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD; Minutes of the NACA Executive Committee, 26 May 1917, folder 8, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington DC; *Aeronautics: Third Annual Report of the National Advisory Committee for Aeronautics, 1917* (Washington, DC: GPO, 1918), 18; Henry Woodhouse, “United States has the Machinery Needed to Make America First in Aeronautics and Only Needs Cooperation of Efforts,” *Aerial Age Weekly*, December 11, 1916; Komons, 36.

<sup>28</sup> Janice Cheryl Beaver, CRS Report for Congress: “U.S. International Borders: Brief Facts,” November 9, 2006, <http://www.fas.org/sgp/crs/misc/RS21729.pdf> accessed 8/18/2013; Privy Council Order 2389, 17 September 1914, enclosed in Foster to Bryan, 21 September 1914, Records of the Department of State, RG 59 (National Archives Microfilm Publication M51, roll 1435), National Archives at College Park, College Park, MD.

nationality, and place of residence of pilot and passengers; and (3) declare any cargo, the purpose of the flight, and proposed destinations. The carrying of explosives, firearms, photographic apparatus, carrier or homing pigeons, and mails were forbidden, and the subsequent flight through Canadian airspace was to be “effected within the time and by the route specified in the clearance” issued by the inspecting officers. Aviators were to return to a designated landing station before leaving Canada and failure to adhere to any of these rules risked a \$5,000 fine and/or up to five years imprisonment. In almost every respect, Canada’s 1914 wartime aerial regulations applied to the airplane on a national scale the same components of the system of cross-border automobile travel Ontario and New York agreed upon two years later.<sup>29</sup>



The cities affected by Canada’s wartime aviation regulation were, from right to left, (1) Sydney, Nova Scotia; (2) Charlottetown, Prince Edward Island; (3) Halifax, Nova Scotia; (4) St. John, New Brunswick; (5) Fredericton, New Brunswick; (6) St. Jean, Quebec; (7) Quebec, Quebec; (8) Valcartier, Quebec; (9) Montreal, Quebec; (10) Ottawa, Ontario; (11) Kingston, Ontario; (12) Toronto, Ontario; (13) London, Ontario; (14) Winnipeg, Manitoba; (15) Regina, Saskatchewan; (16) Edmonton, Alberta; (17) Calgary, Alberta; (18) Vancouver, British Columbia; and (19) Victoria, British Columbia. Map created using Microsoft Bing Maps, found at <http://www.bing.com/maps/>.

<sup>29</sup> Privy Council Order 2389, 17 September 1914, enclosed in Foster to Bryan, 21 September 1914, Records of the Department of State, RG 59 (National Archives Microfilm Publication M51, roll 1435), National Archives at College Park, College Park, MD.



The State Department became unofficially aware of these Canadian wartime stipulations within a week of their passage, and British ambassador Colville Barclay sent an official copy of the Privy Council's report on October 7. In a letter to the Governor General's Secretary requesting the forwarding of the Privy Council's order to the United States, Under Secretary of State for External Affairs Joseph Pope pointed out that the St. Lawrence Canal system was extensively patrolled and American aviators, "especially at night...run a certain amount of risk, by approaching within range of the sentries' rifles." The State Department requested ten more copies of the Orders and Regulations and distributed them to the governors of Maine, New Hampshire, New York, Vermont, Pennsylvania, Ohio, Michigan, Wisconsin, Washington, Idaho, and Montana "with the request that the information contained therein be made public."<sup>30</sup>

Creating rules governing flights into Canada and enforcing those rules constitute two very different things. In British Columbia American pilots failed to comply with Canada's wartime regulation on at least twenty-four different occasions, resulting in the State Department receiving unofficial notice that such aircraft risked being fired upon and a second letter from Bryan to Washington Governor Ernest Lister. Four months later Colville Barclay, writing on behalf of British Ambassador Sir Cecil Spring-Rice, officially protested the consistent disregard American aviators gave to Canadian rules of entry and reiterated that "danger of regrettable incidences" existed if the practice continued. In response, now Secretary of State Robert Lansing issued another round of letters to border-state governors. While reckless disregard for the rules may have been a

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<sup>30</sup> Felix S. Johnson, American Consul in Kingston, to Bryan, 18 September 1914; Barclay to Bryan, 7 October 1914; Pope to the Governor General's Secretary, 22 September, 1914; and Bryan to Cecil Spring-Rice, 14 November, 1914; all in Records of the Department of State, RG 59 (National Archives Microfilm Publication M51, roll 1435), National Archives at College Park, College Park, MD.

factor, ignorance of Canadian regulations and an inability to determine whether one had crossed the border during flight were more than likely the causes behind the majority of infractions. The shared border between the United States and Canada remained a major regulatory focal point during the ensuing years.<sup>31</sup>

When President Woodrow Wilson charged Brig. Gen. John J. Pershing with pursuing Francisco (“Pancho”) Villa into Mexico in March 1916, the Signal Corps’ newly created 1<sup>st</sup> Aero Squadron—under future head of the Air Service Capt. Benjamin D. Foulois—mustered eight chronically underpowered, single-engine, cloth and wood Curtiss JN-3 biplanes. By Armistice Day, November 11, 1918, pilots of the American Expeditionary Force’s Air Service—a number of whom were trained north of Toronto at Camp Borden—had demonstrated exceptional skill flying French Nieuport 28s, SPAD XIII, and the British Sopwith Camel, aircraft all far superior to the American-built Curtiss JN-4 trainer. In 1918, the Junkers J9 all-metal monoplane signaled the beginning of a new direction in aircraft design and construction. The rapid rate of technological change increased during World War I and “each year of the war showcased new developments: 1914, the airplane as reconnaissance system; 1915, the fighter; 1916, the strategic bomber; 1917, the ground attacker; 1918, carrier-based aviation.” By the armistice, military aircraft had passed through “no less than five separate technical generations.”<sup>32</sup>

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<sup>31</sup> American Consul Mosher to Bryan, 6 April 1915; Lansing to Lister, 6 April 1915; Barclay to Lansing, 28 July 1915; and Lansing to Governors, 5 August 1915; all in Records of the Department of State, RG 59 (National Archives Microfilm Publication M51, roll 1435), National Archives at College Park, College Park, MD.

<sup>32</sup> Roger G. Miller, *A Preliminary to War: The 1<sup>st</sup> Aero Squadron and the Mexican Punitive Expedition of 1916* (Washington, DC: Air Force History and Museums Program, 2003), 1, 10-11; Richard P. Hallion, *Taking Flight: Inventing the Aerial Age from Antiquity through the First World War* (Oxford: Oxford University Press, 2003), 352-53. For a discussion of how cultural prejudices influenced the shift from wood to metal in airframes see Eric Schatzberg, *Wings of Wood, Wings of Metal: Culture and Technical Choice*

In addition to technical advancements, World War I also changed ideas concerning the wartime use of the airplane. During the Mexican Punitive Expedition the 1<sup>st</sup> Aero Squadron was limited to observation and reconnaissance. In September 1918, Brig. Gen. William (“Billy”) Mitchell, Chief of Air Service for the First Army, amassed 1,481 planes under a unified command for operations at Saint Mihiel and a smaller coordinated group of about 800 aircraft for the Meuse-Argonne offensive, putting into practice his concept of “air force.” In November of the previous year, Maj. Edgar S. Gorrell—a veteran of Pershing’s Mexican campaign—crafted a comprehensive plan for American bombardment that focused on targeting the enemy’s key industrial centers. Though unused during World War I, this document became the foundation for the doctrine of strategic bombing (further developed at the Air Corps Tactical School under Lt. Col. Harold L. George, Lt. Col. Kenneth Walker, Maj. Haywood S. Hansell, Maj. Laurence S. Kuter, and others during the interwar years) that served as the ideological guide for the Army Air Forces during World War II.<sup>33</sup>

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*in American Airplane Materials, 1914-1945* (Princeton, NJ: Princeton University Press, 1999). See James R. Hansen’s *The Bird is on the Wing: Aerodynamics and the Progress of the American Airplane* (College Station, TX: Texas A&M University Press, 2004) and Roger E. Bilstein’s *The American Aerospace Industry: From Workshop to Global Enterprise* (New York: Twayne Publishers, 1996) for an analysis of how the change in airframe material fit within the larger “design revolution” of the interwar period. Robert F. van der Linden uses the Boeing Airplane Company as a case study to illustrate how the adoption of metal opened new design possibilities while presenting unique challenges in *The Boeing 247: The First Modern Airliner* (Seattle, WA: National Air and Space Museum for the University of Washington Press, 1991).

<sup>33</sup> For a discussion of the war’s place in the larger history of aviation see Tom D. Crouch, *Wings: A History of Aviation from Kites to the Space Age* (New York: W.W. Norton & Company, 2003); Roger E. Bilstein, *Flight in America: From the Wrights to the Astronauts* (Baltimore, MD: The Johns Hopkins University Press, 1984, 2001); and Hallion, *Taking Flight*. In *The Winged Gospel: America’s Romance with Aviation* (Baltimore, MD: The Johns Hopkins University Press, 1983) and *A Passion for Wings: Aviation and the Western Imagination, 1908-1918*, Joseph Corn and Robert Wohl, respectively, illustrate how World War I shaped cultural connotations of aviation, either strengthening prewar conceptions as in the American case and painting the airplane with more ominous tones in Europe. Works that focus directly on World War I aerial combat include James J. Cooke, *The U.S. Air Service in the Great War, 1917-1919* (Westport, CT: Praeger, 1996); Herbert A. Johnson, *U.S. Army Aviation through World War I* (Chapel Hill, NC: The University of North Carolina Press, 2001); Bert Frandsen, *Hat in the Ring: The Birth of American Air Power in the Great War* (Washington, DC: Smithsonian Institution Press, 2003); John H. Morrow, *The*

Although American participation in the Great War was relatively brief and its aviation contribution comparatively insignificant, four years of warfare on an unprecedented scale brought about an increased focus on the airplane's military potential and its relationship to national security. What earlier appeared as merely apocalyptic fantasies from the mind of H. G. Wells came to be seen as a distinct possibility in the not-too-distant future. For many individuals, World War I transformed the airplane from "a thing of wonder and hope...a peacetime marvel...to a fearsome tool of war, a bringer of destruction and death." As a result of World War I "immature technologies such as aircraft [and radio] were forced to develop in different, more practical directions" along exceedingly militant lines. The needs of national survival and a desire to kill the enemy more effectively affected the physical structure of the airplane in profound ways, which in turn changed the way policymakers perceived both the device itself and its relationship to the existing international system. While the experience of World War I may not have extinguished the "winged gospel" in the United States, American postwar actions show that an increasing number of intellectuals and policymakers perceived the airplane differently after that conflict.<sup>34</sup>

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*Great War in the Air: Military Aviation from 1909 to 1921* (Smithsonian Institution Press, 1993); Aaron Norman, *The Great Air War* (New York: The Macmillan Company, 1968); and Lee Kennett, *The First Air War, 1914-1918* (New York: The Free Press, 1991). Studies analyzing the importance of World War I on future strategic bombing doctrine include Tami Davis Biddle, *Rhetoric and Reality in Air Warfare: The Evolution of British and American Ideas About Strategic Bombing, 1914-1945* (Princeton: Princeton University Press, 2002); Michael Sherry, *The Rise of American Air Power: The Creation of Armageddon* (New Haven, CT: Yale University Press 1987); Mark Clodfelter, "American Air Campaign Planning before Pearl Harbor," *Journal of Military History*, 58, (January 1994): 75-101; and Thomas H. Greer, *The Development of Air Doctrine in the Army Air Arm, 1917-1941* (Maxwell Air Force Base, AL: USAF Historical Division, Research Studies Institute, Air University, 1955). These works represent but a portion of the considerable body of literature on World War I aviation.

<sup>34</sup> Arnold Pacey, *The Maze of Ingenuity: Ideas and Idealism in the Development of Technology* (Cambridge, MA: The MIT Press, 1974, 1992), 240; Hallion, *Taking Flight*, 337; Corn, *Winged Gospel*, 38. For a discussion of the profound psychological changes resulting from the use of the airplane in World War I see Sherry, *Rise of American Air Power* and Biddle, *Rhetoric and Reality*.

Changes in both the technology itself and ideas concerning its use—two intimately intertwined and reinforcing dynamics—shaped the nature of postwar discussions concerning the proper place for aviation regulation within the federalist system. American experiences during 1918 and 1919 created new regulatory challenges for policymakers: whether federal regulation was necessary, what shape it should take, and the extent to which the United States should participate in an international regulatory system for aviation.

## Chapter 3

### Crafting the Postwar International Civil Aviation Regime

By accentuating the military application of the airplane and increasing awareness of its potential security risks, World War I redirected the development of aviation regulation. Wartime experiences, coupled with the airplane's potential for delivering future death and destruction, brought about a postwar desire to constrain aviation within the existing international security framework. Within the United States the war brought about calls for centralized federal control over aviation similar to those occurring simultaneously concerning the railroads. Such calls, though not realized during the conflict, continued into the postwar period.

Federal control over civilian aviation was first introduced as a wartime security measure through two separate presidential declarations. A prohibition on private aeronautical exhibitions, designed to safeguard technical advances, began on January 1, 1918, and continued until December 16. On February 28, two months after declaring federal control over the nation's rail network, Wilson proclaimed the entirety of the United States and its territorial possessions, including the Panama Canal, a war zone. This second order restricted flying to military pilots and those individuals possessing a license issued by the Joint Army and Navy Board on Aeronautical Cognizance.<sup>1</sup> This six-

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<sup>1</sup> Minutes of Regular Meeting of Executive Committee, 25 July 1919, folder 10, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Newton and Daniels to Menoher, 24 June 1919, in *United Air Service: Hearings Before a Subcommittee of the Committee on Military Affairs* 66<sup>th</sup> Cong. 16-31 (1919), 578. Presidential Proclamation No. 1420, 1 January 1918; Presidential Proclamation No. 1432, 28 February 1918; Presidential Proclamation No. 1505, 16 December 1918. On June 24, 1919, the Joint Army and Navy Board on Aeronautical Cognizance was renamed the Joint Army Navy Board on Aeronautics. This joint board represented one of hundreds established in the years between the Spanish-American War and World War II to coordinate various issues of interest for both the Army and Navy. Such joint boards were permanently replaced by the creation of the Joint Chiefs of Staff with the passage of the National Security Act of 1947. For more information see

member military body—under the chairmanship of Major General Squier and including Col. Henry H. (“Hap”) Arnold—“refused to grant licenses to civilians,” resulting in a de facto restriction on civilian flying that remained in effect until July 1919. As with the railroads, the war provided a rationale for federal control over aviation, but since Congress had passed no legislation along the lines of the Federal Control Act, these wartime restrictions were rescinded without a formal debate over the question of their postwar extension. As Cdr. John H. Towers’s November 7, 1918, inspection of the U.S. Naval Air Station at Bay Shore, Long Island, illustrates, detailed standard operating procedures for takeoffs, landings, turns, and passing other aircraft in midair existed within the military—the question remained how best to transfer them to the realm of civilian flying.<sup>2</sup>

While the war saw the beginnings of federal regulation in the domestic sphere, the use of aircraft at the front called for a level of international aeronautical cooperation unheard of during peacetime. Two Allied consultative bodies developed to address the strategic and technical elements of aerial warfare: the Inter-Allied Expert Committee on Aviation of the Supreme War Council and the Inter-Allied Aviation Committee. The Inter-Allied Expert Committee on Aviation, established by the Supreme War Council’s adoption of Joint Note No. 7 on February 1, 1918, met at Versailles on May 9, May 31,

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Robert G. Albion, *Makers of Naval Policy, 1798-1947* (Annapolis, MD: United Naval Institute Press, 1980).

<sup>2</sup> Sec. of War Baker to Sec. of State Robert Lansing, 18 December 1918, Attorney General Gregory to Acting Sec. of State Polk, 27 December 1918, both in box 7695, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD; “Notes of Aerial Policy in Foreign Countries,” box 18, Office of the Second Assistant Postmaster General, Division of Air Mail Service, Government-Operated Air Mail, Central Files, 1918-1927, RG 28, Records of the Post Office Department, National Archives Building, Washington, DC; Inspection of the United States Naval Air Station at Bay Shore, Rules of the Air, Road and Beach, General, box 147, General Correspondence initiated in Office of the Chief of Naval Operations, 1917-1925, RG 72, Records of the Bureau of Aeronautics, National Archives Building, Washington, DC; Presidential Proclamation No. 1532, 31 July 1919; “Licenses for Air Flights,” *New York Times*, April 13, 1918.

and July 21-22. This committee, consisting of French Gen. Marie Victor Charles “Maurice” Duval, British Gen. Frederick Sykes, Italian Gen. Luigi Bongiovanni, and U.S. Brig. Gen. Benjamin D. Foulois, analyzed the equipment needs of Allied aviation, the creation and deployment of strategic formations, the “systematic and scientific obliteration” of munitions supplies behind enemy lines, and the concentration of air power against Turkish communications.<sup>3</sup>

While the Expert Committee focused on strategic considerations, the representatives of France, Great Britain, Italy, and the United States on the Inter-Allied Aviation Committee concentrated on issues of production and technical standardization. In a telegram dated June 25, 1918, Gen. Mason M. Patrick emphasized the consultative nature of the committee.

The Inter-Allied Aviation Committee is composed of all the Allies. It considers and discusses all questions relating to aviation which concern more than one of the Allies. It has access to all sources of information and at its meetings there is a free and full interchange of data. The representatives of no country have any power to commit it to any course or upon any question. The representatives of the United States have never assumed to commit or to bind the United States. Seeing clearly the situation in the light of all the data represented at these meetings they report to me and from time to time cables have been sent by me embodying recommendations based upon their reports.<sup>4</sup>

During its six official gatherings between December 1917 and August 1918, the Inter-Allied Aviation Committee focused on the production and distribution of Liberty engines, the pairing of engines with cellules (complete airplanes lacking only engines),

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<sup>3</sup> Resolutions Outlining Subjects to be Considered by the Inter-Allied Committee on Aviation at its First Session; Records of the Supreme War Council, compiled 11/17/1917 - 03/21/1919 (National Archives Microfilm Publication M923, roll 0010); Record Group 120, [www.fold3.com/image/#17995682](http://www.fold3.com/image/#17995682); Proces Verbal of the Second Session Versailles Inter-Allied Aviation Committee, May 31, 1918; Records of the Supreme War Council, compiled 11/17/1917 - 03/21/1919 (National Archives Microfilm Publication M923, roll 0010); Record Group 120, 1-5, found at [www.fold3.com/image/#17995922](http://www.fold3.com/image/#17995922); Department of State, *Papers Relating to the Foreign Relations of the United States: The Lansing Papers, 1914-1920* (Washington, DC: GPO, 1940), 2: 243-44.

<sup>4</sup> Patrick, “Telegram No. Z14 P, June 25, 1918,” Call #167.403-229, IRIS # 1145014, AFHRA, Maxwell AFB, AL.



the harvesting, shipment, and quality of American woods, the shipment of castor seeds and manufacture of castor oil, and the production and distribution of fabrics for both aircraft and hangars. The Inter-Allied Aviation Committee's ability to coordinate aviation materiel laid the groundwork for subsequent cooperation on aeronautical matters during the Versailles Peace Conference.<sup>5</sup>

On November 12—the day after the Armistice at Rethondes ended hostilities between Germany and the Allies—the State Department received an informal note from Colville Barclay, the British Chargé d'Affaires ad interim, requesting information concerning laws regulating aviation in the United States “with a view to drafting an International Convention on Aerial Navigation.” The State Department forwarded the request to the War Department, which in turn submitted it to the NACA. Walcott's reply of November 23 pointed to Wilson's February 28 proclamation as the sole federal regulation in the country and admitted that “to the best of our knowledge” the laws of Massachusetts constituted the only state regulations. That the chairman of the NACA's Executive Committee was unaware of the Connecticut law of 1911 illustrates how little attention aviation regulation had been given before the armistice. On the same day as Walcott's reply to the State Department, the NACA sent letters to the Secretary of State in each of the forty-eight states to collect “all state laws and regulation, orders of public utilities commissions, etc., bearing on this subject.”<sup>6</sup>

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<sup>5</sup> The subject of Allied technical cooperation in aeronautics, the 1918 Inter-Allied Conference on Standards in London, and the United States' relationship to the postwar work of the International Aircraft Standards Commission deserves its own monograph. The minutes of the Inter-Allied Aviation Committee can be found in Col. Edgar S. Gorrell, *History of the American Expeditionary Forces Air Service, 1917-1919*, series A, vol. 2. (National Archives Microfilm Publication M990, roll 0001); Record Group 120, 215-216, <http://www.fold3.com/image/#14540666>

<sup>6</sup> Polk to Sec. of War Baker, 12 November 1918, Walcott to Sec. of State Lansing, 23 November 1918, both in folder 25-30, State Department 1916-1921, box 153, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, Records of the National Aeronautics and Space

In its fourth *Annual Report*, formally submitted to the president on November 29, 1918, the NACA addressed the issue of postwar aviation regulation and advocated federal legislation covering “the licensing of pilots, inspection of machines, uses of landing fields, etc.,” though it did not offer specifics. To develop this statement of principle further the NACA called a conference of the various executive departments interested in the subject. On the morning of December 6, Walcott met Col. Arthur Woods and Col. George C. Kenney of the Army, Rear Adm. William R. Shoemaker and Commander Towers representing the Navy, Director of the Bureau of Standards Samuel W. Stratton, and Second Assistant Postmaster Otto Praeger “with a view of preparing” federal legislation governing aerial navigation. To serve as a basis for discussion, Walcott distributed copies of the British Air Force Act and the King’s Regulations and Orders for the Royal Air Force of Great Britain. The meeting’s minutes show a general consensus on the desirability of federal regulation to foster aviation’s civil applications while also providing a reserve force in times of war. The committee adjourned after declaring itself the Interdepartmental Conference on Aerial Navigation under the chairmanship of Walcott, establishing a drafting subcommittee consisting of Shoemaker, Woods, Stratton, and Praeger, and agreeing to work closely with the NACA’s Subcommittee on Governmental Relations (consisting solely of Walcott and Stratton).<sup>7</sup>

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Administration, National Archives at College Park, College Park, MD; Letter from Walcott to the Sec. of State of Maine, 23 November 1918, Table showing replies from states, 10 December 1918, both in folder 37-4A, box 180, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Minutes of Special Meeting of the Executive Committee, December 2 1918, folder 9, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

<sup>7</sup> *Aeronautics: Fourth Annual Report of the National Advisory Committee for Aeronautics, 1918* (Washington, DC: GPO, 1920), 27; Minutes of Conference of Representatives of War, Navy, Commerce, and Post Office Departments, to Consider Legislation Concerning Aerial Navigation, 6 December 1918, folder 15.02 NACA, box 44, Office of the Second Assistant Postmaster General, Division of Air Mail

President Wilson's almost messianic arrival in Brest, France, on December 13, 1918, illustrated both public support for his "peace without victory" and the high level of expectations attached to the coming peace conference. The president, reeling from a midterm Republican congressional victory, still held to the philosophy of "progressive internationalism," chiefly embodied in the proposed League of Nations, as a means to establish a new world order to ensure lasting peace. Joining him on the American Commission to Negotiate Peace (ACTNP or AmMission) were Secretary of State Lansing, Gen. Tasker H. Bliss, and former ambassador to France Henry White. Before Wilson's arrival, his confidant and chief advisor Col. Edward M. House had secured assurances from the French, British, and Italians that the president's Fourteen Points would constitute the underlying principles of the peace.<sup>8</sup>

Back in Washington, Walcott brought the work of the Interdepartmental Conference to the attention of the NACA Executive Committee at its December 14 meeting. During the course of the conversation the link between domestic legislation and foreign regulations became apparent. Recognizing a lack of information on the subject, the committee allotted \$800 for the creation of a compilation of all existing international laws. At the suggestion of Stratton a resolution passed that authorized Walcott to

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Service, Government-Operated Air Mail, Central Files, 1918-1927, October 28, 1916-September 8, 1919, Records of the Post Office Department, RG 28, National Archives Building, Washington, DC.

<sup>8</sup> A vast body of literature exists on the Paris Peace Conference, a subject that lies beyond the scope of this study. The following paragraphs draw from Arthur Walworth, *Wilson and His Peacemakers: American Diplomacy at the Paris Peace Conference, 1919* (New York: W.W. Norton & Co., 1986); Thomas J. Knock, *To End All Wars: Woodrow Wilson and the Quest for a New World Order* (New York: Oxford University Press, 1992); Frank S. Marston, *The Peace Conference of 1919: Organization and Procedure* (London: Oxford University Press, 1944); Margret MacMillan, *Paris, 1919: Six Months that Changed the World* (New York: Random House, 2002); Charles L. Mee, Jr., *The End of Order: Versailles, 1919* (New York: E.P. Dutton, 1980); and George A. Finch, "The Peace Conference of Paris, 1919," *The American Journal of International Law* 2 (April 1919): 159-86.

communicate with President Wilson the urgent need for “some statement of principles which might lead to an international agreement concerning navigation of the air.”<sup>9</sup>

Walcott’s letter to Wilson, dated December 18, 1918, and “understood to have been transmitted to him in Paris,” presented an international aeronautical conference as the best means to avoid “future irritation and international complications.” It presented four conceptual pillars upon which such an international agreement could be built: the freedom of the atmosphere; navigation of the atmosphere; an international board; and national boards. At first glance it may appear that Walcott was advocating for the complete freedom of the air. In reality he limited such freedom to “all waters outside of territorial limits,” thus supporting national sovereignty in the air within a nation’s borders and over its territorial waters. He also argued that navigation of such free areas should be conducted under the same “rules and regulations fixed by treaties...of the open seas.” The proposed international board would consist of representatives from “each of the several nations” who would draft the rules and regulations for navigation within the “open overhead ocean,” while national boards would draft such rules and regulations at the national level and serve as vital links to the international board.<sup>10</sup>

At its official meeting on December 31, 1918, the Interdepartmental Conference’s Subcommittee, under the chairmanship of Admiral Shoemaker, agreed on draft legislation authorizing the president to create a national board “consisting of the Secretaries of State, War, Navy, Commerce, and Treasury, and the Postmaster General...authorized and directed...to prepare rules and regulations governing

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<sup>9</sup> Minutes of Regular Meeting of Executive Committee, 14 December 1918, box 94, folder 9, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

<sup>10</sup> “International Aeronautical Navigation” enclosed in letter from Walcott to Wilson, 18 December 1918, folder 2, box 96, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington DC.

aeronautical navigation within the borders of the United States and its dependencies.”

Not even two months after the armistice, the NACA had gone on record advocating U.S. participation in a convention to regulate international aviation and tied such an undertaking to the domestic regulatory situation. By February 1919, Admiral Shoemaker had been transferred to duty at sea, Army representative Arthur Woods had been discharged, and “the interdepartmental committee itself dissolved for lack of replacements.”<sup>11</sup>

Shortly after Wilson arrived in Europe, the French Chargé d’Affaires ad interim brought the possibility of American participation in an international aerial convention to the attention of the State Department. On December 26, Acting Secretary of State William Phillips consulted with the War and Navy Departments for their views on the matter. All three agreed that “since the matter may come before the Peace Conference, it might be unwise to start an independent inquiry until after the Conference adjourns.” The State Department requested copies of the proposed French draft for study, and Bliss forwarded a translation from Paris on January 6, 1919.<sup>12</sup>

On January 2, Acting Secretary of State Frank Polk cabled the American Mission in Paris to request their views on the French-proposed Conference for the Adoption of Rules for Aerial Navigation scheduled to meet on February 10. Over the ensuing weeks

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<sup>11</sup> Minutes of Meeting of the Subcommittee on Aerial Legislation of the Interdepartmental Conference on Aerial Navigation, 31 December 1918, folder 15.02 NACA, box 44, Office of the Second Assistant Postmaster General, Division of Air Mail Service, Government-Operated Air Mail, Central Files, 1918-1927, October 28, 1916-September 8, 1919, Records of the Post Office Department, RG 28, National Archives Building, Washington, DC; Walcott to the Sec. of State, 4 January 1919, box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Minutes of Regular Meeting of Executive Committee, 23 January 1919, folder 10, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Minutes of Regular Meeting of Executive Committee, 17 February 1919, folder 10, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Archives, Washington, DC; Roland, *Model Research*, vol. 1, 52.

<sup>12</sup> Translation of Project for Control of Aerial Navigation enclosed in letter from Bliss to Sec. of State, 6 January 1919, box 5613, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

the French continued to raise the subject of US participation in communications with the State Department while Georges Clemenceau, in a January 24 letter to Wilson, recommended modifying the wartime Inter-Allied Aviation Committee to act as “a consulting organization on aeronautical questions,” during the Peace Conference.<sup>13</sup>

The decision to participate in the drafting of an international convention arose from President Wilson’s decision to attend the Peace Conference. A handwritten memo from the Office of the Third Assistant Secretary, dated January 23, shows that Polk made the decision to accept the French invitation. The next day he sent a telegram to the American Mission in Paris notifying them of this decision and requested the War and Navy Departments to choose delegates. ACTNP Secretary Joseph C. Grew’s reply to Polk’s earlier memo, stating that “it is the opinion of the American Mission that the subject is one which does not pertain to the Peace Conference,” was not received at the State Department until January 25; by then the wheels in Washington were in motion. Having received word of Polk’s acceptance, the American Mission requested that he “do nothing further in this matter unless it has reached such a point that you would not be able to retract from the position...without impropriety and causing embarrassment.” Secretary of War Baker forcefully argued that if only one American delegate could be sent it should be someone from the Army. He recommended Maj. Gen. Mason M. Patrick

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<sup>13</sup> State Department to President Wilson, telegram, 5 March 1919 (National Archives Microfilm Publication M367, roll 0395); Record Group 59, <http://www.fold3.com/image/#60096083>; Baker, *World Settlement*, 448; Marston, *Peace Conference*, 81. Third Assistant Secretary of State Breckenridge Long, Memorandum of Conversation with the French Chargé d’Affaires Concerning the Conference for Aerial Navigation, 18 January 1919, box 5613, Records of the State Department, RG 59, National Archives at College Park, College Park, MD. A copy of Clemenceau’s memo included within Appendix A of “Report of the United States Delegates to the Aeronautical Commission of the Peace Conference” (National Archives Microfilm Publication M367, roll 0435); Record Group 59, Appendix A-1, <http://www.fold3.com/image/#61927458> (hereafter referred to as Report of Delegates), is dated January 25, but this more than likely refers to the date of U.S. receipt. Frank L. Polk was appointed Assistant Secretary of State on June 26, 1919, and traveled to Paris in July, assuming responsibility of the American mission on July 28 (Walworth, *Wilson and the Peacemakers*; U.S. Department of State, Office of the Historian, Frank Lyon Polk, <http://history.state.gov/departmenthistory/people/polk-frank-lyon>, accessed 8/17/2013).

for the position. Secretary of the Navy Josephus Daniels presented Rear Adm. Harry S. Knapp as his department's representative. These two, already stationed in Paris, were to be joined by Dr. William F. Durand on Walcott's recommendation, but his return to the United States on January 31 removed Durand from participation in the work of the proposed aeronautical commission.<sup>14</sup>

Focused on his Fourteen Points, Wilson remained convinced that the Peace Conference was not the proper place for such an international convention. His February 7 reply to Clemenceau shows that he viewed aviation within a different context than his European colleagues, primarily because nothing resembling regular civilian air service had yet begun in the United States.<sup>15</sup> Wilson agreed "in principle" to the existence of a consultative commission, but saw questions regarding postwar aviation as holding "no pertinency to the peace Conference." Seeing some value in transforming the wartime Inter-Allied Aviation Committee into a permanent body, he nevertheless argued against its expansion. Wilson's reply shows that he agreed with Walcott's basic principles—and even saw the Inter-Allied Aviation Committee as a possible international board—but the

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<sup>14</sup> Handwritten memo, 23 January 1919; telegram, Polk to Ammission, 24 January 1919; Grew to Polk, 25 January 1919; Baker to Sec. of State, 30 January 1919; Daniels to Sec. of State, 5 February 1919; Paraphrase of Cable to Department of State (undated but before letter from Wilson to Clemenceau, 12 February 1919); U.S. Embassy in Paris to Sec. of State, 27 February 1919; all in box 5613, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD; Minutes of Regular Meeting of the Executive Committee, 17 February 1919, folder 10, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

<sup>15</sup> In the United States the only developments even closely resembling regular air service began on May 15, 1918, when the Army Signal Corps began delivering mail between Washington, DC and New York via Philadelphia under the auspices of the Post Office Department. A second full route between New York and Chicago did not open until May 15, 1919—despite Praeger's desire to speed up the process—and the establishment of airmail service within the United States faced continuing funding issues and political questions during the immediate postwar years. In Europe, on the other hand, governments quickly supported regular air service, and such activities took on an international dimension from the beginning. Within four months of the armistice the Farman brothers had begun a regular Paris-Brussels service and calls for a London-Paris line resulted in the British concern Air Transport and Travel establishing regular service between the two capitals in August. For a full history of the trials and successes in the establishment of U.S. airmail service see Leary, *Aerial Pioneers*. R. E. G. Davies provides details concerning the development of commercial aviation in Europe almost immediately after the armistice in *A History of the World's Airlines* (London: Oxford University Press, 1964), 14-20.

subject ranked below other priorities. Christian Herter, a member of the American delegation and future Secretary of State, brought up U.S. involvement in a possible aerial navigation convention at a January 31, 1919, meeting of commissioners and technical advisors, where it was reiterated that “the President did not see any great utility in the proposed conference.” The British reply to Clemenceau called for a new body separate from any wartime committee that remained “tied up with the military establishment and thus under the direction of the French high command.”<sup>16</sup>

The Canadian government took an active interest in the issue of postwar international aviation but, due to its Dominion status, did so indirectly through Great Britain. Established on May 22, 1917, the British Civil Aerial Transport Committee analyzed the issue of postwar commercial aviation in the domestic, imperial, and international context. Under the chairmanship of newspaper magnate and aviation advocate Lord Alfred Northcliffe, its membership included Maj. Gen. William S. Brancker of the Air Ministry, High Commissioner to the United Kingdom for Canada George H. Perley, and representatives from the Dominions, the Post Office, the Admiralty, and the Meteorological Service. In its final report, published in July 1918, the committee addressed the legal basis for both the domestic and international regulation of aviation, the technical requirements and business aspects of regular air service, labor issues, the importance of continued scientific research, and the proper training of engineers. Believing an international agreement to be “of urgent importance for the purpose of encouraging civil aerial transport,” the committee built upon the incomplete

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<sup>16</sup> Woodrow Wilson to Georges Clemenceau, 7 February 1919, Report of Delegates, appendix A-1b3; Lord Milner to Clemenceau, 12 February 1919, Report of Delegates, appendix A-1b4; State Department to President Wilson, telegram, 5 March 1919; Minutes of the Daily Meetings of the Commissioners Plenipotentiary, 31 January 1919, *Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference 1919*, 9 (Washington, DC: GPO, 1946), 5; Baker, *World Settlement*, 449.



work of 1910 to draft a convention for international aviation as well as an imperial air navigation bill which were then distributed to the colonial governments for comment.<sup>17</sup>

Canada's Minister of Justice and one of that nation's four plenipotentiaries to the Paris Peace Conference, Charles J. Doherty, analyzed the British draft convention "bearing upon the position of the Dominions generally, and of Canada in particular." In a letter submitted to Canadian Prime Minister Robert Borden in Paris on January 7 and forwarded to Lt. Col. Maurice Hankey of the British War Cabinet the same day, Doherty argued that each of the "self-governing Dominions" should choose whether to adopt any international aviation convention based on its own situation, and that the adherence of Britain should not automatically apply across the empire. In addition, he declared that the proposed imperial air navigation bill was unconstitutional because it placed the regulation of aviation throughout the British Empire under the control of the mother country whereas "under the provisions of the Canadian Constitutional Acts, all these matters are proper subjects of legislation either by the Parliament of the Dominion, or the legislatures of the provinces."<sup>18</sup>

At its January 30 meeting, the Privy Council of Canada seconded Doherty's call for separating the mother country's adherence from that of the Dominions but found the British draft "generally acceptable." In February, a Committee on Aerial Transport composed of representatives from the Dominions and Air Ministry—including Canada's Judge Advocate General Lt. Col. Oliver M. Biggar and Borden's foreign policy advisor Loring C. Christie—met to revise the British draft convention into something more

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<sup>17</sup> *Interim and Final Reports of the Civil Aerial Transport Committee with Appendices* (London: Air Ministry, July 1918), Robert Borden Papers, MG 26, vol. 429, Library and Archives Canada, Ottawa, Ontario.

<sup>18</sup> Doherty to Borden, 7 January 1919; Borden to Hankey, 7 January 1919; both in Robert Borden Papers, MG 26, vol. 429, Library and Archives Canada, Ottawa, Ontario.

amicable to the various governmental entities within the British Empire. During its meetings, the distinction between Britain's adherence and that of Canada came to be incorporated into the British draft convention. While the Americans were debating whether civil aviation regulation should even be discussed, the Canadian government had already declared it a vital issue subject to its own authority and successfully shaped the British position.<sup>19</sup>

Back in Paris, the first peace conference meeting of the Supreme Council of Ten, "an enlarged session of the Supreme War Council" consisting of two representatives from the United States, France, Great Britain, Italy, and Japan, occurred on January 12, 1919. Over the following days the Council of Ten established a three-tiered structure of "representation and participation" as well as rules and procedures for the organization of the conference.<sup>20</sup> Six days later the first plenary session with representatives from all assembled nations met and elected Clemenceau as president. Thus a two-tiered power structure was institutionalized within the Peace Conference from its beginning. The division of responsibility between the Council of Ten and the Plenary Conference remained a point of contention throughout the peace conference, and as negotiations progressed it became apparent that the Great Powers assumed that the larger assembly's main purpose was simply to sign off on their decisions.

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<sup>19</sup> Certified Copy of a Report of the Committee of the Privy Council Approved by His Excellency the Governor General on the 30<sup>th</sup> January, 1919, Lambert to Christie, 19 March 1919, Committee on Aerial Transport, Notes on a Conference, 7 February 1919, all in Robert Borden Papers, MG 26, vol. 429, Library and Archives Canada, Ottawa, Ontario.

<sup>20</sup> The three tiers consisted of (1) The United States, the British Empire, France, Italy, and Japan, constituting "belligerent Powers with general interests" empowered to attend all sessions; (2) "belligerent powers with special interests" entitled to attend sessions concerning them and included Belgium, Brazil, the British Dominions and India, China, Cuba, Greece, Guatemala, Haiti, Honduras, Liberia, Nicaragua, Panama, Poland, Portugal, Romania, Serbia, Siam, and the newly-founded Czecho-Slovak Republic; (3) Bolivia, Ecuador, Peru and Uruguay who had broken off diplomatic relations and could attend only those sessions directly pertaining to them (Finch, "The Peace Conference of Paris, 1919," 165).

On February 16, Clemenceau agreed to a proposal forwarded by Lord Alfred Milner of Britain calling for the establishment of a new consultative body, consisting of two representatives from each of the five Great Powers and five representatives chosen from among the Lesser Powers, to discuss aviation issues.<sup>21</sup> This new committee joined the commissions established to address the League of Nations, war responsibility and enforcement of penalties, international labor legislation, the international control of ports, waterways, and railways, and responsibility for reparations. The aviation committee, established without consulting the Plenary Conference, was called upon:

- (a) To study all aeronautical questions referred to it by the Supreme Council of the Peace Conference
- (b) To study all aeronautical questions which the Committee considered should be submitted to the Supreme Council of the Peace Conference
- (c) To draft a Convention in regard to International Air Navigation in time of peace.<sup>22</sup>

While the representatives of the Great Powers ironed out the particulars of this new aeronautical committee, the NACA became more concerned with the ramifications of aeronautical anarchy within the United States. On February 17, Walcott relayed to the Executive Committee General Kenly's decision to suspend the sale of all War Department aircraft and parts because he hesitated to "assume responsibility for the consequences of unregulated aerial traffic" and believed that the necessary regulatory authority remained outside the licensing power granted to the Aeronautical Cognizance Board. After discussing various means of stimulating prompt congressional action, it was

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<sup>21</sup> Report of Delegates, appendix A-1; Baker, *World Settlement*, 450; Clemenceau to Wilson, 16 February 1919, *Report of Delegates*, appendix A-1b5.

<sup>22</sup> Report of Delegates, 2.

“the sense of the meeting that the duty of administering regulations...should be placed under the Department of Commerce.”<sup>23</sup>

The issue was the subject of a special meeting of the Executive Committee four days later. Kenly recounted the tenuous position he was in, Adm. David W. Taylor concurred in the necessity of immediate action, and Director of the Air Service Gen. Charles T. Menoher relayed the nascent aeronautical industry’s fear that accidents resulting from the unregulated use of aircraft would further hurt the public’s image of flying and undermine sales. Walcott circulated copies of draft legislation—an amalgamation of the Department of Commerce’s current radio regulations and the Steamboat Inspection Service’s navigation laws—while Stratton made it clear that Commerce Secretary William C. Redfield had not “at any time” pushed to bring aviation within his department’s regulatory control. The Executive Committee approved the following temporary legislation providing for the federal regulation of aerial navigation and it was submitted to President Wilson the same day.

That no person, company, or corporation within the jurisdiction of the United States and its dependencies, other than duly accredited officers and enlisted men of the Army, Navy, and Marine Corps, shall use or operate any aircraft in aerial navigation from one State or Territory of the United States or the District of Columbia, or from one place in a State or Territory or the District of Columbia to another place in the same State or Territory or the District of Columbia, or between the United States or its dependencies and any foreign country or any international waters, except under and in accordance with a license, revocable for cause, granted by the Secretary of Commerce upon application therefor, and the Secretary of Commerce is hereby authorized to grant such licenses and to make and publish all needful rules and regulations for the licensing and navigation of such aircraft: any violation of such rules or regulations to be punished by a fine not to exceed \$5000, and the Secretary of Commerce shall submit, by December tenth, nineteen hundred and nineteen, a report to Congress giving in detail the action taken by him hereunder, together with his recommendations for further and

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<sup>23</sup> Col. B. F. Castle to Walcott, 11 February 1919, in Minutes of Regular Meeting of Executive Committee, folder 10, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

more detailed legislation with respect to the navigation of aircraft and the licensing and regulation thereof. For the enforcement of this act and the rules and regulations made in pursuance thereof, including personal services in the District of Columbia and in the field, the sum of \$25,000 is hereby appropriated.<sup>24</sup>

When compared to national legislation proposed after the drafting of the 1919 Convention, this legislation stands out for its brevity and simplicity. It does not offer technical details but rather empowers the Secretary of Commerce to determine the particulars necessary to regulate domestic aviation based on consultation and experience. This proposed legislation placed both interstate and intrastate aviation within the federal regulatory sphere, an issue that would overshadow discussions of federal regulation over the next seven years. Also, because the NACA clearly regarded it as a temporary, almost emergency, measure, one must be wary of projecting the NACA's later commitment to a bureau within the Department of Commerce to this earlier period of mental model formation. Only two months earlier, in December, Walcott had proposed general principles and the NACA had recommended a board structure. The existence of this temporary legislation should not be taken as proof that a clear consensus concerning the shape of federal regulation had already coalesced within the NACA.

President Wilson arrived in Boston on February 24. The next day he approved the NACA's temporary legislation, and the Treasury Department transmitted it to Congress on February 26. For someone in the midst of a struggle to create a global system for the prevention of war, Wilson must be given credit for even forwarding the NACA's temporary legislation. Republicans in Congress, soon to be the majority, were more focused on the promises he was making overseas. Though carrying the endorsement of

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<sup>24</sup> Minutes of Special Meeting of Executive Committee, 21 February 1919, folder 10, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Proposed Law Governing Aerial Navigation in the United States and Its Dependencies and Between the United States and Foreign Countries, H.R. Doc. 1828-65 at 2-3 (25 February 1919).

Secretary of War Baker, Secretary of the Navy Daniels, Secretary of Commerce Redfield, and President Wilson, the temporary legislation of February 21 failed to pass before the 65<sup>th</sup> Congress's Democratic majority adjourned on March 4.<sup>25</sup>

Because Knapp's and Patrick's commissions provided only for their participation in Clemenceau's original Conference for the Adoption of Rules for Aerial Navigation proposed for February 10, they required new commissions to participate in the newly constituted Inter-Allied Aeronautical Commission. Grew informed them of their presidential appointment one day before the commission's first scheduled meeting, and the two Americans joined Colonel Dhé and Captain Chauvin of France, Major General Seely and Major General Sykes of Great Britain, Mr. Chiesa and General Moris of Italy, and interpreter Capt. Albert Roper of France the morning of March 6 at Allied Aeronautical Headquarters, 280 Boulevard Saint Germain, Paris.<sup>26</sup>

At this first meeting it was agreed that the new Inter-Allied Aeronautical Commission "shall be the consulting board to the Peace Conference with regard to all questions of aviation" and that it "shall continue to exist after the war as a permanent body to which all aviation questions of international importance shall be submitted." The assembled representatives of the Big Four also determined the organization of the advisory body, "its procedure and the program of its work," appointed two secretaries for

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<sup>25</sup> *Aeronautics: Fifth Annual Report of the National Advisory Committee for Aeronautics, 1919* (Washington, DC: GPO, 1920), 17; Regulation of Civil Aerial Navigation, Including Estimate of Appropriation, H. R. Doc. No. 65-1828 (1919) Roland, *Model Research*, 52-53; Frank Barth, *The Lost Peace: A Chronology: The League of Nations and the United States Senate, 1918-1921* (New York: The Woodrow Wilson Foundation, 1945), 16; Minutes of Regular Meeting of Executive Committee, 7 March 1919, folder 10, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

<sup>26</sup> "Aeronautical Commission," *Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference, 1919*, vol. 3, 78; Grew to Knapp, 5 March 1919, box 5613, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD; Knapp to Sec. of State, 6 March 1919, box 5613, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD.

each of the Great Powers, and established three subcommissions: (1) Military; (2) Technical; and (3) Legal, Commercial and Financial. Each nation's representatives submitted a draft convention for the perusals of their peers, documents that all complemented each other without any "evident contradictions."<sup>27</sup>

According to the official report of the delegates to the State Department, the United States presented two different draft conventions. The lack of prior American interest in the subject combined with the almost verbatim duplication of wording supports John C. Cooper's view that "the first draft...seemed to be nothing more than a redraft of the British proposal." The second American draft "stated the official United States position" in a condensed form. It dropped the definitions of "aircraft" and "territory" that had constituted Article 1 of the first draft, affirmed aerial sovereignty, and allowed for innocent passage in time of peace between signatories. Article 2 affirmed the right of member states to "establish such regulations and restrictions" necessary for national security and public safety. These were to apply to all foreign aircraft without discrimination, "but it is agreed that any one contracting state may refuse to accord to the aircraft of any other contracting state any facilities which the latter does not itself accord under its regulations." Thus the United States delegation carried over an element of reciprocity, a central component of American automobile regulation also found in the British draft. The second American draft's Article 5 allowed for a state's military and

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<sup>27</sup> Minutes of the Aeronautical Commission of the Peace Conference, 6 March 1919, *Report of Delegates*, 6-7, appendix B-1; Baker, *Woodrow Wilson*, 460. For a comparative analysis of the drafts presented by representatives of the Big Four see John C. Cooper, "United States Participation in Drafting Paris Convention 1919," *The Journal of Air Law and Commerce* 18 (Summer 1951): 266-80. The British delegation also provided a copy of currently proposed national legislation concerning civil aviation for the commission's use.

state aircraft to enter its prohibited zones though it forbade all other domestic flights within such areas, reflecting American security concerns in the Panama Canal Zone.<sup>28</sup>

The Inter-Allied Aeronautical Commission had two primary and complementary objectives: to determine issues regarding aviation as they related to the peace treaty and to create an international regime for civil aviation. A dynamic developed between the Supreme Council and the Aeronautical Commission concerning the first point wherein the leaders of the Big Four set the overall vision while leaving the particulars to the commission. The Convention Relating to the Regulation of Aerial Navigation marked the culmination of the commission's second objective and absorbed the majority of its attention.

The most immediate aeronautical issue concerned the status of German aviation in the peace treaty. At its March 12 meeting the Supreme Council—with Major Gen. Patrick, Brig. Gen. Percy Robert Clifford Groves, and General Duval in attendance—adopted strict aeronautical conditions for the defeated nation. Germany was to have “100 hydroplanes or water gliders for the purposes of seeking out submarine mines” supported by 1,000 personnel, no airships, no land-based military aircraft, and no aviation industry “until the signature of the definite Treaty of Peace.” In addition, the Supreme Council established a *cordon sanitaire* of landing fields along Germany's frontiers while guaranteeing Allied aircraft the right to full and free transit, passage, and landing within its territory.<sup>29</sup>

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<sup>28</sup> Second American Draft Convention, *Report of Delegates*, appendix C-5; Cooper, “Participation,” 269-70. The Panama Canal Zone heavily influenced American aviation diplomacy during the interwar period, a process begun before World War I with the establishment of a no-fly zone over the area under President Wilson's Executive Order No. 1810 of August 1913 and subsequent wartime restrictions. Wesley P. Newton, *Perilous Sky*, 42.

<sup>29</sup> Minutes of the Supreme War Council, 6 March 1919, *Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference 1919* (Washington, DC: GPO, 1943), vol. 9: 239-41; Minutes



Disagreement developed within the Supreme Council concerning postwar civilian aviation in ex-enemy states. United States plenipotentiary Secretary of State Robert Lansing first broached this issue on March 12 when he questioned the Supreme Council's decision to restrict large airships entirely, though he ultimately accepted the clause. British Foreign Secretary Arthur Balfour recognized the difficulty in differentiating military and civil aviation, while General Groves argued that aircraft were "inherently an implement of war." Lansing and Clemenceau recommended that the question of distinguishing between military and commercial aviation be turned over to the Inter-Allied Aeronautical Commission. On Balfour's motion, the council officially recognized the commission and tasked it with determining the line between civil and military uses of the airplane as well as "whether Germany should possess commercial aviation."<sup>30</sup>

Two Japanese representatives and newly appointed Supreme Council liaison General Duval joined the Aeronautical Commission for its second meeting on March 14. Discussion centered on the relationship between civil and military aviation and the extent to which the former should be suppressed in Germany. General Groves, representing Britain, reasserted his belief that "any machine intended for the transport of passengers could be converted into a bomb-carrying machine in one or two days," and Chiesa, Knapp, and Tanaka of Japan "concurred unreservedly" with this stance. Contention arose, however, over the means of restricting civil aviation in Germany and whether this was even possible. General Groves proposed three alternatives: total suppression of

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of the Supreme War Council, 12 March 1919, *Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference 1919*, (Washington, DC: GPO, 1943), vol. 9: 334. The Council of Four incorporated such stipulations, with minor modification, into the treaties with Austria, Hungary, and Bulgaria.

<sup>30</sup> Letter of Supreme Council of Peace Conference, 12 March 1919, *Report of Delegates*, appendix A-3a; Minutes of a Meeting of the Supreme War Council, March 12, 1919, *Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference, 1919*, (Washington, DC: GPO, 1943), vol. 9: 337-45.

aeronautical construction; limitations on construction; and “the employment of economic weapons to prevent Germany from building up an aeronautical industry of any importance.” The Italians and French called for twenty years of complete suppression while the British delegation pushed for complete suppression for five years. The American representatives, recognizing that “in consequence of her [America’s] privileged geographical position, the question appeared to them in a different light to that in which it appeared to European States,” believed that the suppression of civil aviation for any period after the signing of peace would, “without adequate motive, cause the most profound irritation in Germany.” The American delegation expressed “every reservation” against the commission’s decision to insert the phrase *and for a period after the signature of peace* in Article IV of the peace treaty.<sup>31</sup>

A memorandum from the Office of Chief of the Air Service, issued the same day, may explain America’s hesitation to forbid all German aeronautical activities after the peace. It argued that the doctrine of aerial sovereignty accepted by both belligerent and neutral nations during the war, combined with stipulations requiring the licensing of aircraft and personnel based on nationality, would alone serve to “greatly restrict German aerial activity” by excluding Germany “from the air over the territories of the powers which agreed to the convention.” Thus rather than directly abolishing German aeronautical activities within the peace treaty—an approach that would require continual

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<sup>31</sup> Minutes of the Aeronautical Commission of the Peace Conference, 14 March 1919, *Report of Delegates*, appendix B-2. Not until the Inter-Allied Aeronautical Commission’s March 31 plenary meeting were the delegates representing “powers with limited interests” from Belgium, Brazil, Cuba, Greece, Portugal, Romania, and Serbia present, and even then their membership on subcommittees was limited. The Supreme Council appointed these representatives; the Lesser Powers did not vote for these representatives as was the case with the other peace conference commissions.

enforcement while arousing negative sentiment—an international air convention could serve as a means to limit German aviation within its borders.<sup>32</sup>

Though the Aeronautical Commission's mandate was two-fold, Knapp and Patrick were uncertain of their authority. Requesting clarification two days after the commission's second meeting, they considered themselves empowered to advise the Peace Conference on aeronautical issues, believing that their presidential charge did "not in any way authorize us to take part in the work which this Committee may do toward framing a convention in regard to international aerial navigation in time of peace."<sup>33</sup>

Grew assured Rear Admiral Knapp the next day that "it is the desire of the Commission that you and General Patrick join with the other members" in their efforts to codify a regime for postwar international civil aviation.<sup>34</sup>

Following the suggestion of President Dhé, the commission agreed to a set of twelve principles to guide the three subcommittees in their work at its March 17 meeting. They are significant for two reasons. First, as the twelve principles constituted the points of agreement drawn from the various draft conventions submitted at the Aeronautical Commission's first meeting, their ready acceptance illustrates that a level of mutual understanding concerning the relationship between aviation and the international system had come to exist by 1919. Second, these principles embodied the general standard for international aerial relations that all nations adhered to, with slight modification based on official treaty membership, throughout the interwar period.<sup>35</sup>

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<sup>32</sup> Memorandum, American Expeditionary Force, U.S. Air Service, Paris, Office of Chief of Air Force, 14 March 1919, *Report of Delegates*, appendix B-2; John C. Cooper, *Right to Fly*, 73.

<sup>33</sup> Knapp and Patrick to J.C. Grew, 16 March 1919, *Report of Delegates*, appendix A-5;

<sup>34</sup> J.C. Grew to Knapp, 17 March 1919, *Report of Delegates*, appendix A-6.

<sup>35</sup> Kenneth Colegrove's analysis of the elements of postwar aviation agreements among both member and nonmember states illustrates the broad acceptance of the general principles put forth by the Inter-Allied



**Interallied Aeronautical Commission of the Peace Conference, Which Wrote the International Aerial Convention.**

Upper row, left to right: Colonel Blandy, R.A.F. (Tech. and Radio); Captain Finzi, R.I.A. (Tech.); Mr. J. L. H. White-Smith, Great Britain (Commercial); Captain Boulanger, French Army; Mr. Yamakawa, Japan (Delegate); Lieutenant Sando, Italy (Secretary); Captain Tindal-Atkinson, R.A.F. (Secretary and Legal); Major Poli-Marchetti, French Army (Military); Lieutenant Colonel Pajo, French Army (Secretary General); Lieutenant Ralph Kieley, U. S. Navy (Secretary and Technical); Lieutenant Sevier, French Army; Lieutenant Colonel A. Guidoni, Italian Navy (Secretary and Technical); Captain Roper, French Army (Assistant to Secretary-General and Interpreter); Captain Nishihori, Japan (Secretary); Lieutenant Armand, French Army. Front row, left to right: Captain Chauvin, French Navy, Chief of French Naval Aviation (Delegate); Rear-Admiral H. S. Knapp, U. S. Navy (Delegate); Major-General Seely, R.A.F., British Under-Secretary of State for Air (Delegate); Mr. Eugenio Chiesa, Italy (Delegate); Colonel Paul Dhé, French Army, Chief of French Military Aviation (Delegate and President of Aeronautical Commission); Major-General Sykes, R.A.F., British Controller, General of Civil Aviation (Delegate); Lieutenant-General Tanaka, Japanese Army (Delegate); General Moris, Italian Army; Rear-Admiral Orzini, Chief of Italian Naval Aviation (Delegate). The commission's duties were: (a) To study all aeronautical questions in which the Peace Conference was concerned; (b) To draft a Convention relating to International Air Navigation in time of peace. The Convention was completed in May, 1919, and after modifications was adopted on October 11, 1919, the United States making a number of reservations. The Convention is printed in full in the "Textbook of Aerial Laws and Regulations for Aerial Navigation."

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### General Principles of the Inter-Allied Aviation Commission

- 1) Air Sovereignty: Nations possessed full and absolute sovereignty over all airspace above their territory and territorial waters.
- 2) Admission of Contracting States: To allow for the "greatest freedom of international aerial navigation," entrance of the aircraft of contracting parties was only to be denied due to reasonable national security concerns.
- 3) Equality of Treatment: Aircraft were to be treated no differently concerning landing and flight due to nationality. (On the insistence of Admiral Knapp, this equality of treatment did not extend to issues of customs, immigration, and health inspection.)
- 4) Principle of Nationality: All aircraft would be registered in one state only and all such registers would be regularly circulated among contracting states.
- 5) Safety Regulations: Necessity of a certificate of airworthiness for all aircraft, the licensing of all wireless apparatus, the licensing of all pilots and personnel, the mutual recognition of such certificates and licenses by all contracting states, and the creation of international standards for signals, lights, landing facilities, and procedures.
- 6) Control of State Aircraft: Special treatment of military, naval, and state aircraft

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Aeronautical Commission in 1919. Kenneth Colegrove, "A Survey of International Aviation," *The Journal of Air Law* 2 (January 1931): 22-23.

<sup>36</sup> *Flying* 9 (February 1919): 43.

- 7) Right of Transit: Right of through flight between two points outside of a contracting state while recognizing the right of states flown over to restrict internal traffic to their own national carriers.
- 8) Non-Discrimination of Landing: Aircraft of contracting states to have access to all public aerodromes at the same cost regardless of nationality.
- 9) Indemnity for Damage: State to cover any damages caused by official aircraft in the territory of a contracting state. Private aircraft to provide proof of third party insurance before embarking upon any international flight.
- 10) Necessity for a Permanent International Aeronautical Commission.
- 11) Binding Character of the Convention: Each contracting state obligated to pass whatever national legislation necessary to allow for the full implementation of the Convention.
- 12) Non-Binding Nature of the Convention during Times of War: The Convention would in no way limit the rights and actions of contracting states while under a state of war.<sup>37</sup>

The Military Sub-Commission, still consisting only of representatives from the Five Great Powers, met from March 19 to March 21. Presided over by British Brigadier General Groves, with Brigadier General Foulois representing the United States and General Duval sitting for France, it analyzed the “measures to be taken to prevent the possibility...of a German military or civil aerial fleet, future prohibition of airplane manufacture,” and “measures of control.”<sup>38</sup> Its March 20 meeting focused on the Supreme Council’s decision three days earlier—passed at “the insistence of President Wilson”—to allow enemy states a civilian aerial fleet. The subcommission unanimously agreed that any such aircraft represented “a grave danger for the peace of the future” due to their ease of conversion to military use.<sup>39</sup> Groves removed the possibility of complete aerial suppression in Germany and proposed checking German aviation through economic sanctions by the Allies consisting of the complete exclusion of German aircraft

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<sup>37</sup> Minutes of the Aeronautical Commission of the Peace Conference, 17 March 1919, *Report of Delegates*, appendix B-3.

<sup>38</sup> Minutes of the Aeronautical Commission of the Peace Conference, 17 March 1919, Annex: List of the Questions for Study by the Sub-Committees, *Report of Delegates*, appendix B-3, 12.

<sup>39</sup> Minutes of the Military Sub-Commission of the Inter-Allied Aeronautical Commission, 20 March 1919, *Report of Delegates*, appendix D-2, 1; Cooper, *Right to Fly*, 79.

and pilots from Allied territory as well as the complete removal of Germany from all aspects of international aviation, a restriction on German ownership of stock in foreign aeronautical enterprises, and a prohibition on the export of German aircraft by both land and sea.<sup>40</sup>

Recognizing the constraints placed upon them by the Supreme Council, the lack of precedent, and the economic nature of the proposed mechanisms of control, members of the Military Sub-Commission questioned their ability to approach the subject. After much debate Groves recommended that the issue be discussed in a joint meeting with the Legal, Commercial and Financial Sub-Commission. Before adjourning, the Military Sub-Commission agreed to define aerial frontiers as “a zone of ten kilometers in depth...on either side...of the vertical wall having as its base the terrestrial or maritime frontier” and the prohibition of all flying in this area except along designated international routes.<sup>41</sup> At its final meeting the Military Sub-Commission came to several important conclusions concerning any proposed international convention and national security. Among them were decisions that neutral zones between contracting states were unnecessary, that each contracting state retained the right to establish forbidden zones that would apply equally to all aircraft of all contracting states, and that landings should only occur at designated airports.<sup>42</sup>

Lt. Cdr. John Lansing (“Lanny”) Callan, in charge of U.S. naval operations in Italy from April to October 1918 and then Aide for Aviation in Italy until February 1919, joined Lieut. Ralph Kiely of the U.S Navy and the Army’s Lt. Col. Arthur D. Butterfield

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<sup>40</sup> Ibid., 2.

<sup>41</sup> Ibid., 5.

<sup>42</sup> Minutes of the Military Sub-Commission of the Inter-Allied Aeronautical Commission, 21 March 1919, *Report of Delegates*, appendix D-3.

as American representatives on the Technical Sub-Commission.<sup>43</sup> With Butterfield presiding, this body addressed questions relating to the standardization of certificates of airworthiness, licensing, log books, aircraft markings, rules of aerial traffic, lighting and signals, rules for the use of wireless devices, maps, and rules for traffic around airdromes.<sup>44</sup> Having access to all the draft conventions, the subcommission “more closely followed” that of the British in drafting the technical regulations within Annexes A through D of the convention. A unanimous decision at its second meeting on March 20 saw the adoption of the metric system as the international aeronautical standard.<sup>45</sup>

By its third meeting the Technical Subcommittee had agreed to an intricate system of markings presented by British representative Col. L.F. Blandy. Within this system every aircraft was given a call sign consisting of five Roman characters—the first representing the nationality of an aircraft and the following four constituting the registration and identification marks with a hyphen after the nationality letter—allowing for identification from the ground and for wireless communication. This system would allow for the registration of anywhere between 9,000 and 220,000 aircraft per country depending on the agreed-upon allotment. The proper location of said marks were agreed to be along the upper and lower surfaces of the aircraft, along the fuselage, and along the rudder. Their size was set at a minimum of four-fifths of the depth of the chord, as large as possible on the rudder, with width at two-thirds of their height and thickness at one-sixth of said height. It was also determined that for private aircraft such lettering should

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<sup>43</sup> Lester D. Gardner, *Who's Who in American Aeronautics* (New York: The Garner, Moffat Co., 1922), 31-32. For a thorough history of Callan's wartime activities in France and Italy see Geoffrey L. Rossano, *Stalking the U-Boat: U.S. Naval Aviation in Europe During World War I* (Gainesville, FL: University Press of Florida, 2010).

<sup>44</sup> Minutes of the Aeronautical Commission of the Peace Conference, 17 March 1919, Annex: List of the Questions for Study by the Sub-Committees, *Report of Delegates*, appendix B-3, 13.

<sup>45</sup> Progress Report of the Technical Subcommission of the Inter-Allied Aviation Commission, 29 March 1919, *Report of Delegates*, appendix E-1.

be underlined. The need for a universal identification system remained a primary point of agreement among nations during the interwar period.<sup>46</sup>

On April 1 representatives of the Big Five from the Legal, Commercial and Financial Sub-Commission and Military Sub-Commission met in a joint session to determine the proper economic measures for restricting aviation development in the defeated Central Powers. The British delegation proposed Brigadier General Groves's system of economic controls. In the absence of a complete check on all enemy aviation, the French suggested that the defeated powers be forced to hire Allied aircraft and called for a complete ban on the manufacture of explosives "other than those authorized for land and sea artillery."<sup>47</sup> Members of the joint commission voted to repeat to the Supreme Council their call for the complete restriction of enemy aviation for a period after the peace treaty as well as the proposed ban on aerial explosives, but voted three to two against the French suggestion concerning the hiring of Allied aircraft. The United States backed the British proposal to close foreign markets to both enemy aircraft sales and airlines and, with the additional vote of Japan, the Inter-Allied Aeronautical Commission adopted Groves's plan at its April 4 meeting. The United States expressed concerns on two points: the level of peacetime control required to enforce the expulsion of the defeated powers from the international aviation industry; and the loss of access to inventions that may occur in those nations, particularly Germany.<sup>48</sup>

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<sup>46</sup> Minutes of the Technical Subcommittee of the Inter-Allied Aeronautical Commission, 21 March 1919, Draft of Recommendations of the Technical Subcommittee, *Report of Delegates*, appendix D-3.

<sup>47</sup> Report of the Joint Legal and Commercial and Military Sub-Committees, 1 April 1919, *Report of Delegates*, appendix D-4.

<sup>48</sup> Minutes of the Aeronautical Commission of the Peace Conference, 4 April 1919, *Report of Delegates*, appendix B-5.



The Provisional Report to the Supreme Council, submitted April 7, offers a snapshot of the work occurring within the Inter-Allied Aeronautical Commission up to that point. The first section presented the twelve principles the commission used as a guide. Next the commission officially stated its objection to the Supreme Council's decision to permit commercial aviation activities within the defeated enemy states, again pointing to the ease of which such devices and infrastructure could be converted to wartime use. Adhering to the decision of the Supreme Council, the commission presented the possible economic and technical provisions agreed to during the joint meeting between the Legal, Commercial and Financial Sub-Commission and the Military Sub-Commission, adding a prohibition against "the manufacture of bombs, bomb throwers, and explosives for use from the air" similar to the suggestion of France. The report's final section included a summary of the Technical Subcommittee's work dealing with such issues as required documentation, the inspection of aircraft, licensing of pilots, and aerial "rules of the road."<sup>49</sup>

Meanwhile, the Legal, Commercial and Financial Subcommittee had been hard at work on the body of the proposed aerial convention. U.S. representatives Commander Pollock, Capt. H. S. Bacon, and Lt. Commander Callan represented the United States. They were joined by British lawyers Captain Tindal-Atkinson and White-Smith, Professor Buzzati (a participant in the 1910 Verona Conference), two other Italian lawyers, and eight French lawyers. Buzzati produced a draft based on the 1910

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<sup>49</sup> Report of the Commission on the Measures to be taken with Regard to Aviation in Enemy Countries After the Treaty of Peace, in Provisional Report Presented to the Supreme Council of the Allies by the Aeronautical Commission, *Report of Delegates*, transmitted 7 April, 1919, appendix F-1b.

convention that served as the basis for the Legal Sub-Committee's work.<sup>50</sup> Major d'Aubigny of France presided over the subcommittee as it determined the legal basis for the twelve principles adopted on March 17 and how they should be expressed in the convention. While wartime experience had ultimately settled the question of sovereignty, uncertainty remained concerning the uniformity of domestic legislation, the mutual recognition of licenses and certificates, and the obligations of states to allow for the creation of international aerial routes.

In its April 11 report, the Legal Subcommittee concurred with the Military Subcommittee that forbidden zones, established in interests of national security and public safety, should equally apply to all nongovernment aircraft. Establishing three categories of aircraft—military, state, and commercial—the subcommittee determined that cabotage, the transportation of passengers or goods between two points within the same country by foreign aircraft, did not fall under “innocent passage.” In a classic example of *legalese*, the subcommittee, after defining innocent passage and asserting the obligation of all contracting states to grant it to fellow convention members, subordinated such obligations to the greater question of state sovereignty by asserting that “the establishment of international lines of aerial communication is made subject to the consent of the States flown over.” Thus the creation of international air routes would ultimately depend upon an agreement between individual states even if the two parties in question were members of the convention—nothing in the convention compelled a state to open its airspace to the aircraft of a fellow signatory. The aerial transportation of arms

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<sup>50</sup> Cooper, “U.S. Participation,” 274; Legal, Commercial and Financial Sub-Committee of the Aeronautical Commission of the Peace Conference, Report of Delegates, appendix H-1; Minutes of the Aeronautical Commission of the Peace Conference, 31 March 1919, *Report of Delegates*, appendix B-4b.

and explosives were forbidden, and carriage of photographic and wireless apparatuses was left to the discretion of the states flown over.<sup>51</sup>

The Legal, Commercial and Financial Sub-Committee's draft convention constituted the main topic of discussion at both the morning and afternoon meetings of the Inter-Allied Aeronautical Commission on April 15, spilling over into the morning of April 16. The commission discussed the draft text one article at a time, and, out of the forty-one articles, twenty were unanimously adopted as written, twelve unanimously adopted after amendment, five adopted with the reservation of a single state, and four adopted after a mixed vote. Recommendations for slight modification of language, as well as more substantial points such as the extension of a state's sovereignty over the territory and territorial waters of its "Dominions, colonies, protectorates and zones of influence" and the recognition that Dominions would count as states for the purposes of the convention, were adopted at the Aeronautical Commission's May 6 meeting. Two days later Captain Roper of France and five others were appointed to a Drafting Committee to produce a final revision for presentation to the Supreme Council.<sup>52</sup>

The seemingly contradictory clauses granting aerial sovereignty and innocent passage and the means by which enemy powers could adhere to the international convention took on special meaning with respect to Germany. At its April 16 morning session the Aeronautical Commission voted unanimously for the adoption of a clause

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<sup>51</sup> Legal, Commercial and Financial Sub-Committee of the Aeronautical Commission of the Peace Conference, *Report of Delegates*, appendix H-1.

<sup>52</sup> Minutes of the Aeronautical Commission of the Peace Conference, 15 April 1919, *Report of Delegates*, appendix B-7 and B-8; Minutes of the Aeronautical Commission of the Peace Conference, 16 April 1919, *Report of Delegates*, appendix B-9 and B-10; Minutes of the Aeronautical Commission of the Peace Conference, 6 May 1919, *Report of Delegates*, appendix B-12; Minutes of the Aeronautical Commission of the Peace Conference, 8 May 1919, *Report of Delegates*, appendix B-14; Additional Report Presented to the Aeronautical Commission by the Legal, Commercial and Financial Sub-Committee, *Report of Delegates*, H-2a.

providing the Allied and Associated Powers full rights within the airspace of enemy powers without reciprocity “until their admission to the League of Nations or the Aeronautical Union.”<sup>53</sup> This became one of seven articles concerning aerial navigation that the Aeronautical Commission submitted for inclusion in the peace treaty with Germany that became the subject of debate at the April 26 meeting of the Council of Foreign Ministers. Secretary Lansing proposed several amendments to the submitted clauses as he felt their real purpose was to eliminate future German aerial competition. The articles ultimately agreed upon became Part XI of the Versailles Treaty.

Article 316, submitted by British Foreign Under-Secretary Charles Hardinge, constituted a new addition to the Aeronautical Commission’s proposed clauses. By offering Germany a level of control over its own airspace it accommodated Lansing’s concerns regarding the “aerial colonization” of Germany while providing a certain level of reconciliation between the notion of air sovereignty and the obligations of a defeated power. The inclusion of a date of expiration for nonreciprocal rights was also included at Lansing’s insistence. This assured that such uneven aerial terms would end regardless of Germany’s admittance into the League of Nations, a step that “would depend upon the assent of her economic rivals, who would necessarily be opposed to her obtaining any aerial commercial privileges.” The Council of Ministers charged the Inter-Allied Drafting Committee with revising Article 40 of the convention “so as to permit Germany and other countries to adhere under certain conditions to the air convention, should they so desire.”<sup>54</sup>

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<sup>53</sup> Minutes of the Aeronautical Commission of the Peace Conference, 15 April 1919, *Report of Delegates*, appendix B-7.

<sup>54</sup> Secretary’s Notes of a Conversation of the Foreign Ministers, April 25 1919, *Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference 1919*, (Washington, DC: GPO, 1943),

Redrafting Article 40 initiated a debate over how neutral and ex-enemy states could adhere to the convention, and led to a clear difference of opinion between the United States and Britain at the Inter-Allied Aeronautical Commission's May 6 meeting. Both agreed that a nation's admittance to the League of Nations allowed for its adherence to the convention if desired. In the absence of League membership the British requested a unanimous vote from the members of the proposed permanent international aeronautic commission until January 1, 1923, while the United States saw a three-fourths vote by the signatory powers as sufficient at any date after the signing of peace. After some discussion the commission unanimously adopted the British version.<sup>55</sup>

Throughout this drafting process the British delegation remained in contact with the Dominion governments. After the commission adjourned on May 8 to allow the Drafting Committee to prepare its final draft, Groves, Chief of the Air Section, forwarded the current working draft to Borden and requested that he determine "the terms of reservations (if any) under which Canada proposes to sign the Convention." The Canadian government had pressed for the insertion of a clause sanctioning a special agreement between it and the United States due to the two nations' "particular geographic conditions," but the British delegation had been unable to overcome the commission's belief that such bilateral agreements would undermine the uniformity of the entire system.<sup>56</sup>

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9: 616-623; *The Versailles Treaty*, June 28, 1919, <http://avalon.law.yale.edu/imt/parti.asp>, accessed 8/18/2013.

<sup>55</sup> Minutes of the Aeronautical Commission of the Peace Conference, 6 May 1919, *Report of Delegates*, appendix B-12.

<sup>56</sup> Aeronautical Commission, "Notes for the Representatives of the Dominions and India with Regard to the Present Draft Convention," undated but before May 8, 1919, Groves to Borden, 8 May 1919, "To meet the views of the Canadian Government, two alternative courses were suggested," undated memo but before May 8, all in Robert Borden Papers, MG 26, vol. 429, Library and Archives Canada, Ottawa, Ontario.

While recognition of the Dominions as states for the purpose of convention adherence marked a major victory, concerns remained over the fact that Britain and the Dominions collectively counted as one state in the proposed commission for voting purposes. Arthur L. Sifton, Minister of Customs and Inland Revenue and a Canadian plenipotentiary to the Peace Conference, saw nothing in the convention designed to meet the needs of Canada. “Even if all the other provisions of the convention were sound instead of absurd,” Canada’s absence on the proposed permanent commission would alone provide grounds for rejecting the convention. “Under no circumstances could I imagine that it would be of advantage to have [Canada’s] affairs in this important respect decided by an International body sitting in Europe and composed almost entirely of people representing countries with absolutely different conditions, many ignorant and practically all careless as to our particular circumstances.” Though devoid of Sifton’s harsh tone, the official response of the Canadian plenipotentiaries to the British delegation on May 10 stated that the proposed convention did not meet Canada’s aeronautical needs, that any signing of the convention was to “be regarded as wholly tentative and provisional,” and that such signatures would not imply future ratification or even require the Canadian government to submit the convention to the Parliament in Ottawa.<sup>57</sup>

The Inter-Allied Aviation Commission approved its official report to the Supreme Council along with the Drafting Committee’s final draft at its last meeting on May 22, 1919. As several members of the commission were not vested with plenipotentiary powers, signatures were attached to the final report rather than to the convention. Two

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<sup>57</sup> Sifton to Borden, 10 May 1919, Memorandum by the Canadian Plenipotentiaries Respecting the Draft Convention on International Air Navigation, both in Robert Borden Papers, MG 26, vol. 429, Library and Archives Canada, Ottawa, Ontario.

days later, British plenipotentiary Robert Cecil wrote Colonel House to inform him that General Seely, the British delegate on the Aeronautical Commission, would be presenting amendments to Articles 35 and 38 that placed the proposed International Commission for Air Navigation under the League of Nations and established the Permanent Court of International Justice, another League entity, as the primary arbitrator for aerial disagreements.<sup>58</sup> Five days later Admiral Knapp informed Colonel Pujo, Secretary General of the Aeronautical Commission, of the U.S. delegation's acceptance of the League amendments and they were incorporated into the final text of the convention.<sup>59</sup>

The convention provided the general framework for all subsequent international aviation. Through forty-five articles in nine chapters the convention established the principles of air sovereignty; criteria for nationality and the marking of aircraft; the proper method of licensing, registration, and airworthiness certification for aircraft; necessary in-flight documentation; a permanent International Commission for Air Navigation (ICAN) tied to the League of Nations; and the Permanent Court of International Justice as the proper arbitration body for disputes between members.<sup>60</sup>

The convention's eight technical annexes provided a detailed manual for the practical application of the commission's agreed-upon general principles. Considering that no formal rules for international aviation existed before World War I, the scope of these eight annexes—addressing the proper marking of aircraft (Annex A); the issuance of certificates of airworthiness (Annex B), log books (Annex C), and rules of lights,

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<sup>58</sup> Cecil to Colonel E. M. House, Paris, 24 May 1919, *Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference 1919*, (Washington, DC: GPO, 1943), appendix I to CF-32, 9: 33.

<sup>59</sup> Knapp to Pujo, 29 May 1919, *Report of Delegates*, appendix M-1b; Baker, *World Settlement*, 464-65.

<sup>60</sup> Minutes of the Aeronautical Commission of the Peace Conference, 22 May 1919, *Report of Delegates*, appendix B-15.

signals, and the air (Annex D), the specifics for licensing tests for pilot and navigators as well as minimum standards for medical examinations (Annex E); the standardization of maps and ground markings (Annex F); the process for collecting and sharing meteorological information (Annex G); and the universalization of customs procedures (Annex H)—testify to the work of the Technical and Legal Sub-Commissions. These guidelines served, in almost all cases, as the operating procedure for all international flights. The vast majority of these technical provisions were also incorporated into American regulations during the second half of the 1920s, allowing a level of standardization that facilitated international flight independent of America’s official treaty adherence.

In keeping with diplomatic precedent, the delegations were provided the opportunity to submit reservations for inclusion within the commission’s final report. The U.S. delegation submitted six such reservations. One pertained to what was deemed an unnecessary and obscure sentence in Article 15 and another questioned Article 18’s stipulation that any claims on patent infringement had to be pursued in the aircraft’s country of origin. Due to constitutional concerns, Knapp and Patrick objected to the entirety of Article 25’s requirement that all airdromes within a contracting state be open to the aircraft of all signatories, doubting “whether the Federal Government can exercise over all aerodromes in the United States the measure of control of rates and charges as required by the article as here drafted.” The last three reservations dealt with the convention’s customs provisions. The U.S. delegation voiced a “general reservation” in regard to Annex H’s uniform customs system, declaring that “it should not properly be a part of this Convention on Aerial Navigation” and references to the annex in Articles 37



and 40. The submission of the Inter-Allied Aeronautical Commission's final report to the Supreme Council officially marked the end of that consultative body.<sup>61</sup>

On May 1, with the aerial situation in the United States still unsettled, Secretary of War Baker directed Assistant Secretary of War Benedict Crowell to lead a fact-finding mission to Europe. Officially dubbed the American Aviation Mission but popularly known as the Crowell Commission, its members sailed for Brest, France, on May 22, the same day that the Inter-Allied Aeronautical Commission held its last meeting. Its members included Col. Halsey Dunwoody, Chief of Air Service Supply, Lt. Col. James A. Blair of the General Staff, Capt. Henry C. Mustin of the U.S. Navy, chairman of the Aircraft Production Board of the Council of National Defense Howard Coffin, president of the Wright-Martin Aircraft Company George H. Houston, vice-president of the Curtiss Airplane and Motor Corporation Clement M. Keys, and general manager of the Manufacturers' Aircraft Association (MAA) Samuel S. Bradley. Crowell wrote Walcott about the possibility of Stratton representing the NACA, but commitments in Washington made it impossible for him to travel. The mission had five primary objectives underlying its visits to France, England, and Italy:

1. To obtain information as to the possibilities of international cooperation in the development of the aircraft art, particularly in its commercial phases.
2. To consult with the allied authorities with the view to establishing a basis of active cooperation in the establishment of the international conventions necessary for the government of the navigation of the air.
3. To consult with allied aeronautical authorities concerning the relations of the civil, military and naval branches of aeronautical development and the governmental methods best designed for their control.
4. To establish permanent and definite channels of contact insuring a free interchange of aircraft data and the adoption of international standards.
5. To visit such civil and military works related to aircraft as may be of special

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<sup>61</sup> Knapp and Patrick to Pujo, Paris, 29 May 1919, Report of Delegates, appendix K-1b; Report Presented to the Conference of the Peace by the Aeronautical Commission, Annex VI: Reservations Formulated by the Delegation of the United States of America, *Report of Delegates*, appendix R-1.

interest in the future development of the air.<sup>62</sup>

As these five priorities make clear, the purpose of the Crowell Commission was not simply to scout out the aeronautics establishments in Allied nations solely for domestic policy ideas but rather to obtain information to allow the United States to participate in a global aeronautical system. Because the NACA had already authorized Lt. William Knight of its Paris Office to undertake a similar European tour, the State Department recommended that the two missions cooperate for the sake of economy and informed the British, French, and Italian governments that, as a “working Mission,” no formal entertainment was expected. Fresh from his subcommittee work, Callan joined the American Aviation Mission as Mustin’s aide in June, thus serving as a vital link between the Inter-Allied Aeronautical Commission and the Crowell Commission.<sup>63</sup>

While executive departments in the United States discussed the necessity of aviation regulation and the delegates at the Paris Peace Conference analyzed the convention, the Canadian government declared its authority to regulate aviation within the Dominion. On June 6, 1919, the Canadian Parliament passed the Air Board Act. This act—based on a draft bill submitted by Assistant Deputy Minister of the Navy and future Controller of Civil Aviation John Armistead Wilson—authorized the creation of the Canadian Air Board to address both military and civilian aviation issues. The Privy Council appointed the following individuals to the Air Board on June 23: Arthur L.

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<sup>62</sup> Minutes of Regular Meeting of Executive Committee, 20 May 1919, folder 10, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Memorandum from Crowell to Acting Sec. of State Polk, 20 May 1919, box 7245, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD.

<sup>63</sup> Minutes of Regular Meeting of Executive Committee, 10 April 1919, folder 10, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Second Assistant Sec. of State Memorandum, 22 May 1919, box 7245, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD; Polk to American Embassy in London, box 7245, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD. Komons does not focus on the international aspects of the American mission; see *Bonfires to Beacons*, 40-41.

Sifton, chairman; Oliver Biggar, vice-chairman; Canadian Minister of Militia and Defense Maj. Gen. Sydney C. Mewburn; Minister of the Naval Service Charles C. Ballantyne; Deputy Postmaster Robert M. Coulter; Assistant Deputy Minister of the Naval Service John A. Wilson; and Chief Inspector of the Department of Customs and Inland Revenue E. S. Busby.<sup>64</sup> In a letter to Lt. Col. J. T. Cull of the Royal Canadian Naval Air Service then stationed in London, Wilson summed up the commonly-held mentality that had resulted in the Air Board Act. “It would appear to me that seeing that the Militia Department and Naval Service had not been able to make anything of their efforts, and that practically no service existed in Canada, that the field was open for a unified service covering all Branches and that no good purpose would be served by creating three bodies, a Naval, Military and Civil to deal with a matter still in its infancy.” This idea of a unified administrative apparatus, one also held in Britain, had yet to reach a point of acceptance among American policymakers though it had its adherents as illustrated by the earlier Hulbert-Sheppard bill.<sup>65</sup>

The newly-constituted Air Board first met on June 25 and two days its later draft regulations, derived mainly from those of Britain, were deemed “substantially sufficient.” The question of international flights was addressed on July 2 when Biggar—chairman in all but name—proposed a substitute for Schedule 8 of the British Regulations that authorized the Air Board to “give such special directions as may appear necessary with

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<sup>64</sup> Wilson to Cull, 2 May 1919, J. A. Wilson resume, ca. 1928, both in John A. Wilson Fonds, MG 30, microfilm reel 10779, Library and Archives Canada, Ottawa, Ontario; B. M. Greene, ed., *Who's Who in Canada* (Toronto: International Press Limited, 1922), 682, 1310, 1376; “The Canadian Air Board,” *Flight*, May 27, 1920; W. A. B. Douglas, *The creation of a National Air Force: The Official History of the Royal Canadian Air Force*, vol. 2 (Toronto: University of Toronto Press, 1986), 44.

<sup>65</sup> Letter from Wilson to Cull, 2 May 1919, John A. Wilson Fonds, MG 30, microfilm reel 10779, Library and Archive Canada. For discussion of Hull’s wartime contributions to the Canadian Naval Air Service see J. D. F. Kealy and E. C. Russell, *A History of Canadian Naval Aviation, 1918-1962* (Ottawa, The Naval Historical Section, Canadian Forces Headquarters, Department of National Defense, 1965).

regard to the conditions to be observed in respect of the departure from or landing in Canada.” The board voted to approve this clause but, at the suggestion of the Department of External Affairs, the issue of international aviation was put on hold until Secretary of State Lansing returned from Paris to allow for coordination with the United States. Privy Council order 1379, passed July 7 on the Air Board’s recommendation and effective in August, marked the only official regulations during this flourish of summer activity. It forbade low-level flying over urban areas, “trick...or exhibition flying” over cities or public gatherings, and the intentional or unintentional dropping of articles from aircraft. Though it provided the bare minimum of safety requirements, it offered a stark contrast to the complete lack of federal aeronautical regulation in the United States. By the end of July, members of the Air Board agreed that aerial patrols at the American-Canadian border were unnecessary and that aerial relations between the two countries should be based upon a system of reciprocity. The Air Board recessed until November while its members hammered out a more comprehensive set of air regulations.<sup>66</sup>

As the American Aviation Mission made its way to the Allied capitals and the Air Board addressed Canadian aviation regulations, Peace Conference delegates turned to the nearly-completed draft convention. When the matter of ratification came up among the heads of the Big Five’s delegations on the afternoon of July 9, Lansing informed his colleagues that “he was unable to act on the subject,” declared that the convention had to be submitted to Washington for approval, and—repeating Wilson’s earlier stance—suggested that “as the matter did not really concern the Peace Conference” it might be

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<sup>66</sup> Minutes of the Canadian Air Board, 25, 27 June, and 2, 9, 28 July 1919, all in “Air Board” series, vol. 3510, Department of National Defence Fonds, RG 24, Library and Archive Canada, Ottawa, Ontario; Orders in Council no. 1379, 7 July 1919, *The Canadian Gazette* 53 (July 19, 1919): 184; “The Canadian Air Board,” *Flight* 12 (May 27, 1920): 574-75.

finalized through diplomatic means at a later date. When the subject was raised again the next day, Lansing, with Knapp in attendance, stated that the U.S. delegation “had no authority to negotiate an agreement” and reaffirmed his lack of authority to sign any such convention. Though Balfour pushed for the convention’s early acceptance, Lansing, unconvinced of the need to sign it immediately, preferred to wait until American industry had a chance to analyze the document thoroughly. Under continued pressure to accept the convention without modification, Lansing objected to “the disposition shown [by the Allies] to press the American Delegation to accept what it did not approve.” The Steering Committee accepted Clemenceau’s recommendation of a three-week extension to allow for a closer examination of the convention and, on a motion from Balfour, it was agreed that the document could be published for public scrutiny. At the direction of Lansing, Patrick provided Crowell’s commission with a copy of the convention for its consideration before its return to the United States, and Gorrell submitted a copy to the State Department for analysis on July 21, 1919.<sup>67</sup>

Crowell drafted the American Aviation Mission’s report to Secretary of War Baker, dated July 19, 1919, on his return trip to the United States aboard the R.M.S. *Aquitania*. Based on discussions with wartime aeronautical experts such as Winston Churchill and Maj. Gens. Hugh Trenchard, Frederick Sykes, and William Brancker of Britain, as well as their counterparts in France and Italy, the mission recommended the creation of a “single government agency...co-equal in importance with the Departments

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<sup>67</sup> Minutes of a Meeting of the Heads of Delegates of the Five Great Powers, 9 July 1919; Minutes of Meeting of the Steering Committee, 24 July 1919; both in *Papers Relating to the Foreign Relations of the United States: The Paris Peace Conference 1919*, (Washington, DC: GPO, 1946), 9: 62-63, 467; Gorrell to State Department, 21 July 1919, box 7695, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD. The complete report of the American Aviation Mission can also be found in *United Air Service: Hearings Before a Subcommittee of the Committee on Military Affairs*, 66<sup>th</sup> Cong. 16-31 (1919).

of War, Navy and...Commerce” under civilian direction to coordinate all military, commercial and technical aviation matters. Thus the mission presented a slightly modified version of the British and Canadian systems as the best means to provide for the national defense while fostering a fledgling industry heavily reliant upon government contracts. Pointing to the proposed international convention as the vital first step in the creation of an international system of aviation regulations, Crowell placed his domestic policy recommendation within the larger international context. “The need in each country for a single authoritative point of contact for the conduct of all international aviation affairs, legal, operation, technical, and political, is imperative. Such agencies have already been set up in England, France and Italy. The United States has under the terms of the International Convention no option but to follow these leads.” The American Aviation Mission saw a single unified air service, with all international aspects of aviation “fall[ing] within the jurisdiction of the Secretary of Air,” as the only means of creating a “national board”—to use Walcott’s terminology of eight months earlier—to connect the United States to the emerging international regime.<sup>68</sup>

Captain Mustin, the Navy representative on the American Aviation Mission, did not agree with the majority position. In two separate memoranda attached to the mission’s report, Mustin stated his agreement with the report subject to certain reservations that effectively retained naval aviation as a separate entity under direct control of the Navy. He did, however, recommend that the question of an independent air arm “be left open, pending further investigation.” Thus Mustin—in consultation with

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<sup>68</sup> Report of American Aviation Mission, box 5613, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD.

Callan—advocated continuing the current domestic separation of forces in spite of the complications it may cause to America’s connection with the international regime.<sup>69</sup>

The mission’s report caught Secretary Baker by surprise as Crowell had earlier opposed the Hulbert-Sheppard bill. Publicly releasing the American Aviation Mission’s report on August 12, Baker sided with Mustin in declaring that it went “too far” and that each branch of the military faced aeronautical needs and requirements distinct from the other as well as commercial aviation. While agreeing that some government agency was needed to “lay down the necessary rules, national and international, for aircraft operation, prevent discouraging lack of uniformity in State regulation, and generally stimulate private and public enterprise in perfecting and using commercially this mode of transportation,” the Secretary of War did not see a unified air department as the proper bureaucratic arrangement for achieving these goals.<sup>70</sup>

That same day, the full text of the convention made its way to the Aero Club of America via the British magazine *Flight*. The national association saw it as a positive force for overcoming regulatory barriers similar to those that had hampered automobile use during the previous decade. Aero Club of America Law Committee member W. W. Young argued that “the publication of the convention means that important national, State, and local legislation governing the conduct of aircraft can now be put through, being thus provided with a uniform basis. Were it not for the fundamental laws contained in the international convention, local legislation would result in great confusion.” Young

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<sup>69</sup> Mustin, Memorandum 1 and 2, Report of American Aviation Mission pages 25 and 26, box 5613, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD.

<sup>70</sup> “Baker Opposes Single Air Bureau,” *New York Times*, August 13, 1919; “Secretary Baker’s Statement,” reprinted in *United Air Service: Hearings Before a Subcommittee of the Committee on Military Affairs*, 66<sup>th</sup> Cong. 31 (1919); Komons, *Bonfire*, 40.

recognized that the convention, by its mere existence, would exert a standardizing effect on nations, provinces, and municipalities.<sup>71</sup>

On July 25, Ames submitted fellow NACA member Dr. William F. Durand's "Report of Civil Aerial Transport" to the Executive Committee. This document built upon Durand's extensive wartime aeronautical experiences overseas to present possible solutions to the problems facing both domestic and international commercial aviation. While addressing a wide range of aeronautical subjects, Durand divided the issue of aviation regulation into five broad categories: the national and international issuance and recognition of licenses; inspection of aircraft; aerial "rules of the road"; liability for possible damages on the ground; and smuggling. Though leaving the particulars open for further discussion, he advocated a federal body to provide navigational aids and foster regulatory uniformity to eliminate the "intolerable" possibility of conflicting state and municipal ordinances. Concerning licensing, Durand proposed either a direct federal license or a system of state-issued licenses "in connection with... a federal body" that would allow for standardization and uniform acceptance of such state licenses nationwide. He believed that the latter option—strikingly similar to the system Charles Terry advocated for automobile licenses before the Committee on Interstate and Foreign Commerce in 1909—appeared "to be the more workable of the two" due to the unresolved question of federal authority. He conceded that a direct federal system would better facilitate the international recognition of licenses.<sup>72</sup>

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<sup>71</sup> Young to State Department, 28 August 1919, box 5613, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD; "International Air Laws Received Here," *New York Times*, August 13, 1919, 14.

<sup>72</sup> William F. Durand, *Civil Aerial Transport*, enclosed with letter from Victory to Walcott, 4 August 1919, Office of the Secretary Records, 1903-1924, RU 45, box 94, folder 10, Smithsonian Institution Archives, Washington DC.



In the absence of a single federal agency for aeronautics, Durand presented a two-pronged federal system for the regulation of aviation consisting of a civil aeronautics bureau in the Department of Commerce and an interdepartmental board made up of representatives from those executive departments “concerned with the development or use of air transport,” the NACA, and industry. The two regulatory entities working in tandem would thus serve as Walcott’s “national board,” allowing connections with the larger international regime. The NACA printed and distributed Durand’s report to various aeronautical interests throughout the country as well as mentioning it in that year’s *Annual Report*.<sup>73</sup>

As Baker mulled over the American Aviation Mission’s report, the State Department submitted copies of the convention to Assistant Secretary Crowell, Cdr. Warren G. Child of the Office of Naval Aviation, Chief of the Weather Bureau Charles F. Marvin, the Geological Survey, the Customs Bureau, the Patent Office, the Post Office Department, and the NACA for their advice. On July 31, the Patent Office reported nothing contrary to U.S. law in Article 18 of the convention, and seven days later the Treasury Department—concerned with the matter of customs—wholeheartedly supported Knapp’s and Patrick’s reservations to Annex H.<sup>74</sup>

On August 14 a special meeting of the NACA’s Executive Committee was held to address the State Department’s request for the committee’s views on the convention.

Although the NACA’s Interdepartmental Conference on Aerial Navigation had been

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<sup>73</sup> Victory to John R. Freeman, 24 July 1919, folder 25-30, box 153, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, Records of the National Aeronautics and Space Administration, National Archives at College Park, College Park, MD; *Aeronautics, Fifth Annual Report of the National Advisory Committee for Aeronautics, 1919* (Washington, DC: GPO, 1920), 18.

<sup>74</sup> Telegram, Lansing to Knapp, 30 July 1919; Commissioner of Patents James T. Newton to Lansing, 31 July 1919; Assistant Treasury Secretary James H. Moyle to Lansing, 6 August 1919; all in box 5613, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD.

provided in March with the French draft convention, its unofficial report to the president on June 4 came too late to affect the final draft of the convention. Cdrs. Child and Callan of the Navy and James A. Edgerton of the Second Assistant Postmaster General's Office joined NACA members Ames, Stratton, Marvin, Major General Menoher and Lieutenant Colonel Jones (sitting in for Col. Thurman Bane). The Army, Navy, Post Office, and Weather Bureau representatives admitted they had not yet had time to dissect the convention and, as Lansing urgently requested information to formulate America's position, a Special Subcommittee on International Air Navigation was established under the chairmanship of Marvin to coordinate the convention's analysis among the interested executive departments.<sup>75</sup>

Marvin called the first meeting of the special subcommittee on the morning of August 20 with Gorrell of the Army, Child and Callan of the Navy, Edgerton from the Post Office, Dr. George Smith of the Geological Survey, and Commissioner of Patents James Newton in attendance. Based on Gorrell's recommendations, the subcommittee suggested that the United States ratify the convention. Concluding that Articles 15 and 18 were not contrary to the interests of the United States, the subcommittee advocated dropping Knapp's and Patrick's reservations to them. It was further agreed that the customs stipulations of Annex H were expressed in such a "broad manner" as not to affect America's sovereign right to enact customs legislation—the same position held by the majority of the Inter-Allied Aeronautical Commission three months prior. The only reservation of the delegates the subcommittee seconded concerned Article 25 with its

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<sup>75</sup> Minutes of Regular Meeting of Executive Committee, 20 June 1919, folder 10, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Victory to Praeger, 19 March 1919, box 44, Office of the Second Assistant Postmaster General, Division of Air Mail Service, Government-Operated Air Mail, Central Files, 1918-1927, Records of the Post Office Department, RG 28, National Archives Building, Washington, DC; *Aeronautics, 1919*, 16

requirement that all airdromes be open to foreign aircraft, but the subcommittee felt assured that the proper federal legislation would allow the United States to accept this provision. While recognizing a possible problem with the ICAN's connection to the League of Nations, the subcommittee stressed that the convention should be viewed as "independent of the Peace Conference" and its acceptance "wholly independent of the peace treaty."<sup>76</sup>

At its final meeting six days later the subcommittee agreed to present Gorrell's recommendations with slight modification to the NACA's Executive Committee. Though Samuel Bradley was unable to represent the Manufacturers' Aircraft Association at either meeting, he informed the subcommittee that the MAA was in the process of thoroughly vetting the convention and would submit a report as soon as possible. Marvin submitted the subcommittee's report to Walcott on September 9, and the Executive Committee approved its recommendations. Ames forwarded the committee's views to Secretary Lansing six days later.<sup>77</sup>

From August to October, State Department Solicitor W. Clayton Carpenter received feedback concerning the convention from various organizations. William R. Manning in the State Department's Office of the Foreign Trade Advisor submitted a long

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<sup>76</sup> Minutes of Meeting of Special Subcommittee on International Air Navigation, 20 August 1919, folder 32-6, box 177, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD.

<sup>77</sup> Minutes of Meeting of Special Subcommittee on International Air Navigation, 26 August 1919; Bradley to Marvin, 25 August 1919, enclosed in letter from Marvin to Assistant State Department Solicitor W. Clayton Carpenter, 2 September 1919; both in folder 32-6, box 177, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Minutes of Regular Meeting of Executive Committee, 12 September 1919, folder 10, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Ames to Lansing, 15 September 1919, box 5613, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD; *Aeronautics, 1919*, 16. Joseph Nevius of the Customs Service was present at the subcommittee's second meeting, and Callan was the sole Navy representative.

analysis of the convention a day before the second meeting of the NACA special committee. He questioned the blanket application of Article 3's prohibited zones to all aircraft, suggesting that the United States may find it desirable to forbid foreign aircraft in certain areas while still allowing for domestic military and commercial flights. Because there was no guarantee that all nations in the Western Hemisphere would adhere to the convention, Manning seriously objected to Article 5's limitation of flights between contracting and noncontracting states only on a "special and temporary" basis. He feared that such an exclusionary clause could result in "awkward or uncomfortable if not strained relations." Finding a great benefit in a unified system of aerial customs provided for in Annex H, Manning believed that if the United States issued a reservation on this clause it should push for a separate international convention concerning the matter as soon as possible.<sup>78</sup>

On August 29, Acting Postmaster General J. C. Koons submitted the Post Office Department's stance, which exactly mirrored that of the NACA subcommittee. While conceding that the technical annexes were excessive in a technology so prone to rapid advances, Koons nevertheless concluded that "the Post Office Department considers all objections, recommendations and reservations of secondary importance when compared with the need of immediate action relative to the regulation of International Air Navigation, especially as it seems to concern the formation of a national body for the control and advancement of aeronautics in this country." Again, developments in the international sphere were directly tied to those in the domestic. Secretary of Agriculture David S. Houston reported favorably on the convention while forwarding the concerns of

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<sup>78</sup> Manning to Carpenter, 26 August 1919, box 5613, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD.

Marvin's Weather Bureau pertaining to possible clashes with the work of the International Meteorological Committee.<sup>79</sup>

Crowell, in reporting the position of the American Aviation Mission, presented international action as a necessary prelude to federal control of aviation. "In view of the enactment, actual or proposed, of legislation controlling air navigation in several states, the importance of early ratification is apparent, in order that adequate federal legislation, in accordance with international practice thus established, may cover the field and thus forestall further state action." Though not expressly stated, Crowell argued that ratification of the convention would provide justification for the passage of national legislation under the Constitution's treaty powers, thus allowing for uniform domestic aviation regulation. The mission placed itself at odds with the NACA when it declared that Article 18 "cannot be accepted in its present form," advocated upholding the delegates' reservation to Article 25 due to constitutional concerns, and saw Annex H as a suitable basis for the international unification of aeronautical customs law. Despite "certain defects" in the convention, Crowell called for its ratification and passage of federal legislation necessary for its application at the earliest possible date.<sup>80</sup>

Along with the American Aviation Mission's recommendations, Crowell forwarded the report of the Manufacturers' Aircraft Association's International Convention Committee. The seven-person committee included three members of the American Aviation Mission: George H. Houston, Clement M. Keys, and Samuel S. Bradley. Continuing the call of the American Aviation Mission, the MAA committee

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<sup>79</sup> Koons to Lansing, 29 August 1919, Houston to Lansing, 26 September 1919, both in box 5613, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD.

<sup>80</sup> Crowell to Lansing, 26 September 1919, box 5613, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD; U.S. Const. art. II, § 2, cl. 32; U.S. Const. art. I, § 10, cl. 1.

advocated a cabinet-level Department of Air as the best means of enacting the convention provisions and called on Congress to pass immediate provisions regarding the use of aircraft in domestic interstate commerce as well as with Canada and Mexico. Expressing a concern that aeronautical development could outpace the convention's technical provisions, the MAA committee found the contents of Annexes A through F generally acceptable as a means to foster local, state, and international uniformity. In conclusion, the committee supported Knapp's and Patrick's reservations to Articles 15, 18, 25, 37, 40 and Annex H while recommending the convention's "immediate acceptance and ratification independent of the... League of Nations." The committee recognized that because the ICAN was "so interwoven with those provisions of the Treaty of Peace providing for a League of Nations...it is very doubtful if the Convention could be accepted and ratified at this time." Thus even before the League of Nations debate exploded in the Senate, industry saw Lord Cecil's successful attempt to tie the proposed global aviation regime to Wilson's international body as a major stumbling block to US adherence. Both Newton of the Patent Office and Commissioner General Anthony J. Caminetti of the Department of Labor's Bureau of Immigration also reported favorably on the convention, and Secretary of the Navy Daniels fully concurred with the NACA's position.<sup>81</sup>

By the time Captain Roper submitted the final draft of the convention to the Supreme Council on September 27, American policymakers had developed a shared mental model that viewed adherence to the convention, with a reservation to Article 25,

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<sup>81</sup> Report of the International Convention Committee of the Manufacturers Aircraft Association, Inc., 15 September 1919, Newton to Second Assistant Sec. of State Alvah Adee, 30 September 1919, Caminetti to Carpenter, 7 October 1919, Daniels to Lansing, 3 October 1919, all in box 5613, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD.

as beneficial to both the domestic and international interests of the United States.<sup>82</sup>

Nevertheless, major obstacles remained: the Wilson administration's preoccupation with other matters; the ICAN's connection to the League of Nations; questions over the extent of federal authority to regulate aviation; and—most important—what shape a “national board” should take to allow for America's connection to the international regime. Should the domestic administrative apparatus be at the federal level, the state level, or a blend of the two? Should it combine military and civilian aviation along the lines of the British and Canadian models or maintain their separation? Should it be a cabinet-level department or a bureau within an existing agency? America's political tradition, the emerging international civil aviation regime, and the necessities of flight all combined to shape the answers to these questions in the ensuing years.

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<sup>82</sup> The Supreme Council approved this final draft of the convention on the same day. International Commission for Air Navigation, *The International Air Convention of 13<sup>th</sup> October, 1919: Its Preparation, Its Entry in Force, Its Application*, May 1929, Call # 248.211-118, IRIS # 160166, in USAF Collection, AFHRA, Maxwell AFB AL.

## Chapter 4

### The Wilson Administration's Response to the 1919 Convention

Developments between the fall of 1919 and the following June demonstrate the importance American policymakers placed in linking domestic aviation regulatory developments with the larger international regime and illustrate the lack of consensus on how best to bring about such a connection. This period saw the creation and dissolution of an interdepartmental board to draft legislation, the beginning of a sustained effort to achieve national regulation, America's acceptance of the 1919 convention subject to certain reservations, and the coalescence of a unique U.S.-Canadian aeronautic relationship. While economics and safety—factors traditionally within the domestic sphere—played a part in fostering desires for federal regulation of aviation during this immediate postwar period, the evidence clearly shows that the flurry of activity during the twilight of the Wilson presidency arose primarily in response to international events. Ideas developed and decisions made during this crucial period set the contours for debate during the subsequent Harding and Coolidge administrations, culminating in the 1926 Air Commerce Act.

In the final months of 1919, U.S. policymakers faced three primary aviation issues: America's response to the air convention; regulation of U.S.-Canadian flight; and the shape of Walcott's so-called "national board." By the end of August—before the Supreme Council even saw the final draft—the governments of the United States and Canada recognized the importance of coordinating their responses and reservations to the convention. The State Department, desirous to avoid doing "anything out of harmony with Canada's attitude," requested a meeting with Canadian representatives, but the



absence of Canadian Judge-Advocate General and Vice-Chairman of the Air Board Lt. Col. Biggar from Ottawa on official business, coupled with a lack of interest in facilitating such a meeting on the part of Britain, postponed any such action before the opening of the convention to signatures on October 13.<sup>1</sup>

Historical decisions that had established the U.S.-Canadian border combined with the airplane's inherent ability to fly over political boundaries to shape the postwar aeronautical relations between the two countries. From April to September, Lt. Col. Henry B. Clagett led a group of seven De Haviland DH-4s on a recruiting tour that spanned from Dallas to Boston and back by way of the Midwest. On September 4, Clagett wrote the War Department from Long Island's Hazlehurst Field of his plan to have six aircraft fly from Buffalo to Selfridge Field, just outside Detroit, Michigan, on or around September 8. The most direct route between the two cities—one that took full advantage of the speed and freedom of the airplane—lay entirely within Canadian territory, and Clagett asked the War Department to obtain the necessary permission. The War Department, in turn, forwarded the matter to the Secretary of State.<sup>2</sup>

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<sup>1</sup> Telegram, Lindsay to Governor General Cavendish, 14 August 1919; telegram, Cavendish to Lindsay, 30 August 1919; telegram, Devonshire to Lindsay, 12 September 1919; telegram, Lindsay to Devonshire, 19 September 1919; all in Robert Borden Papers, MG 26, vol. 429, Library and Archives Canada, Ottawa, Ontario. Memo, Long to Carpenter, 14 August 1919; telegram, Lansing to Polk, 20 August 1919; all in box 5613, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

<sup>2</sup> Telegram, Clagett to Director of Military Aeronautics, 4 September 1919, Records of the Department of State, RG 59 (National Archives Microfilm Publication M51, roll 1435), National Archives at College Park, College Park, MD; Maurer Maurer, *Aviation in the U.S. Army, 1919-1939* (Washington, DC: GPO, 1987), 8; "Henry Black Clagett, *Who's Who in American Aeronautics*, Lester D. Gardner, ed. (New York: The Gardner, Moffat Co., 1922), 35; "Brigadier General Henry B. Clagett," official biography, available at <http://www.af.mil/AboutUs/Biographies/Display/tabid/225/Article/108040/brigadier-general-henry-b-clagett.aspx>.



A distance of 200 miles separates Buffalo from Selfridge Field on a direct route, but this extends to roughly 325 if the aircraft remains in US territory. Map created using Microsoft Bing Maps, found at <http://www.bing.com/maps/>.

On September 5, acting Secretary of State William Phillips forwarded the particulars of Clagett's request to American Consul John G. Foster in Ottawa. Canadian Undersecretary of State for External Affairs Joseph Pope replied positively to the consul's request the next day with an understanding that the aircraft would not land except in case of emergency, and Foster forwarded this note along with similar assurances from the Canadian Air Board and Customs Department to Washington. While this diplomatic dialogue worked well enough for a single military flight, continuous and reoccurring crossings—particularly of non-governmental aircraft—would be better served through a more permanent agreement rather than on a case-by-case basis.<sup>3</sup>

In a nation of laws, regulation—no matter how urgent the need—must lie on a firm legal justification. At the September meeting of the Conference of Delegates of State

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<sup>3</sup> Telegram, Phillips to Foster, 5 September 1919; telegram, Foster to Sec. of State, 6 September 1919; Pope to Foster, 6 September 1919, enclosed in letter from Foster to Sec. of State, 6 September 1919; all in Records of the Department of State, RG 59 (National Archives Microfilm Publication M51, roll 1435), National Archives at College Park, College Park, MD.

and Local Bar Associations in Boston—the preliminary gathering for the ABA’s annual conference—William V. Rooker of Indiana offered a resolution that stated “it is the sense of this Conference that aeronautics and aerography lie within the admiralty jurisdiction of the United States” and called for the creation of a committee to “make further inquiry into this question and report its conclusions” to the ABA at its 1920 annual meeting in St. Louis. Rooker’s interest in the subject stemmed from the lack of legal jurisprudence in the wake of a July 21 crash of the Goodyear Tire and Rubber Company’s dirigible *Wingfoot* in Chicago’s business district. This tragedy, responsible for the deaths of thirteen people and injuries to twenty-eight, prompted Illinois Senator Lawrence Y. Sherman to introduce S. 2593, “A Bill to Regulate the Navigation of the Air,” two days later. The bill, granting the Secretary of War the power to establish airways and license aircraft, never made it out of New York Senator James Wolcott Wadsworth, Jr.’s Committee on Military Affairs. Rooker’s resolution passed the conference under the presidency of former Secretary of War Elihu Root and marked the tentative beginnings of the ABA’s postwar work to define the legal justifications for federal aviation legislation. The belief that aviation fell under the scope of the federal government’s admiralty power was not universally accepted, however, in light of Judge Cushman’s decision in *Crawford Brother No. 2*, 215 Fed. 269. In this 1914 district court case, Cushman ruled that an aircraft upon the water did not fall under admiralty jurisdiction regarding salvage, calling into question the applicability of this established body of jurisprudence to the new field of aeronautics.<sup>4</sup>

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<sup>4</sup> “Conference of Delegates of State and Local Bar Associations, Boston, Mass., September 2, 1919,” *The American Bar Association Journal*, 6 (January 1920), 42-43; “11 Killed, 27 Hurt in Blazing Blimp’s Fall in Chicago,” *New York Times*, July 22, 1919; Memorandum in Regard to the Proposed Convention Relating to International Air Navigation, 8-10, box 5614, Records of the State Department, RG 59, National Archives

The near monopolization of postwar American aeronautics within the War and Navy Departments ensured that defense considerations would remain paramount in any future federal legislation. Nevertheless, military leaders recognized the benefits of civilian aeronautics as a means both to foster technical development and provide training between mobilizations. In a September 15 report Capt. Laurence W. Miller of the Air Service elaborated on the Crowell Commission's link between commercial aviation and national defense. He presented government support of civil aviation as the most cost-effective means of ensuring continued aeronautical advancement, arguing that "it will be impossible to give the time necessary for the normal development [of aeronautics] to take place as was the case with roads, railroads and merchant marine." In a memo to General Mitchell ten days later Miller advocated the creation of governmental agencies to facilitate commercial aviation developments abroad, especially pointing to the possibility of establishing air routes in China and the Far East. Secretary of War Baker held similar views and recommended to Secretary of Commerce Redfield that his department's "most important work...in connection with commercial aviation" revolved around helping "commercial manufacturers entering foreign markets and promoting the manufacturing industry in this country." Sustained and substantial governmental support would require legislation, but what shape should it take?<sup>5</sup>

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at College Park, College Park, MD; "A Bill to Regulate the Navigation of the Air," S. 2593, 66<sup>th</sup> Cong. (1919) in Records of the United States Senate, RG 46, 66<sup>th</sup> Cong., Bills & Resolutions Originating in the Senate, Original Senate Bills, Box 11, National Archives Building, Washington, DC; Carl Zollmann, "Admiralty Jurisdiction in Air Law," *Marquette Law Review*, 23 (April 1939): 114. For detailed accounts of the *Wingfoot* disaster see Howard L. Scamehorn, *Balloons to Jets: A Century of Aeronautics in Illinois, 1855-1955* (Chicago: Henry Regnery Co., 1957), 234; David Young and Neal Callahan, *Fill the Heavens with Commerce: Chicago Aviation, 1855-1926* (Chicago: Chicago Review Press, 1981), 113-19; and David M. Young, *Chicago Aviation: An Illustrated History* (DeKalb, IL: Northern Illinois University Press, 2003), 17-20.

<sup>5</sup> Laurence W. Miller, "Suggestions for the Development of Commercial Aviation Through Government Channels," 15 September 1919; memorandum, Miller to Mitchell, 25 September 1919; memorandum

In an attempt to make sense of the aeronautical situation the Joint Army and Navy Board on Aeronautics, under the Director of Air Service Gen. Charles T. Menoher, passed a resolution in late August calling for the creation of an interdepartmental board to draft domestic legislation and, at Secretary Baker's suggestion, investigate the international aspects of the issue. With presidential sanction, Baker appointed a "Board to draft a proposed act covering Air Navigation and Civil Aviation in the United States and its island possessions" on October 10 (from here on referred to as the Inter-Departmental Board). Under the chairmanship of Col. John F. Curry from the War Department's Air Service, the Inter-Departmental Board consisted of the Navy's Commander Callan, Stanley Parker of the Treasury, W. Clayton Carpenter of the State Department's Solicitor's Office, Marvin from the Weather Bureau in the Department of Agriculture, Second Assistant Postmaster Praeger, Samuel Stratton of the Bureau of Standards, John B. Lennon from the Department of Labor, and Ames of the NACA. Thus the Inter-Departmental Board included among its members a person who took part in drafting the convention (Callan), someone intimately familiar with it (Carpenter), and three members of the NACA who had previously analyzed its provisions (Marvin, Stratton, and Ames).<sup>6</sup>

The Inter-Departmental Board met in Gen. Menoher's office on October 20—a week after the opening of the convention for signatures in Paris. Callan, Parker, and Ames were absent for this first meeting, but Maj. Henry Selden Bacon—U.S.

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concerning possible aviation mission to China, 1 October 1919; all in folder 11-9, box 40, Records of the National Aeronautics and Space Administration, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD; Baker to Redfield, 25 September 1919, Records of the Army Air Service, Records of the Office of the Chief of Air Service, 1917-21, box 2, folder 13, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD.

<sup>6</sup> Baker to Sec. of State, 26 August 1919, box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Letter of Appointment, Newton D. Baker, 10 October 1919, folder 13, box 2, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD; Walterman, *Airpower and Private Enterprise*, 215.

representative on the Inter-Allied Aeronautical Commission’s Legal, Commercial and Financial Sub-Committee as well as its Drafting Subcommittee—attended. Members “discussed the question of laws governing aerial navigation in the United States,” came to the conclusion that legislation “should be drafted ...as soon as possible,” and concluded that “such laws [should] be in agreement with the provisions of the I.C.A.N.” Bacon advocated a top-down approach to U.S. regulatory development, stating that “the best way is to start with the international convention and begin with providing for the selection of two American representatives, and then providing for the putting into force rules for international flight based on the rules provided in the annexes on the subject of international development.” A Drafting Subcommittee was established consisting of Curry, Callan, Stratton, Praeger, and Carpenter. The Inter-Departmental Board accepted Stratton’s proposal that any legislation should be based on three central tenets:

1. Representatives to the International Convention for Aerial Navigation;
2. Establishment of a national commission to draft rules and regulations for aerial navigation, such a commission to have as much latitude as possible;
3. Establishment of a Bureau of Aerial Navigation in some Department of the Government, said Bureau to be charged with the enforcement of such regulations as the National Commission should draw up.<sup>7</sup>

The proposed national commission—similar to that proposed by Durand in July—would consist of representatives from “the various aviation interests” to allow for the speedy revision of national laws in response to both changes in the state of the art and the regulations of the ICAN. Uncertainty existed concerning the proper location of an enforcement bureau—with the Departments of War, Navy, Post Office, and Commerce all offered as possibilities—but Stratton forcefully argued that “Congress will not give to

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<sup>7</sup> Minutes of Meeting of Committee on Aerial Navigation, 20 October 1919; Meeting of a Board to Draft a Proposed Act Covering Air Navigation, 21 October 1919; folder 13, box 2, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD.

[the] military proper civil function. The civil should be free to make its own regulations.” While the Inter-Departmental Board acknowledged that such a bureau would naturally fall under any future Department of Aeronautics, its members agreed that their mandate “had nothing to do with determining” the desirability of such a unified approach.<sup>8</sup>

The Inter-Departmental Board’s primary concern revolved around the enactment of immediate legislation to allow for U.S. participation in the emerging international regime. To provide flexibility the recommendation was made to divide rulemaking and enforcement, two elements that had been combined in the Interstate Commerce Act’s regulatory approach to the railroads. A rough draft of possible air regulations compiled on October 23 sheds light on the evolving mindset of the Inter-Departmental Board’s members while illustrating the importance they placed on the international regime. Its eighteen articles completely complemented the ICAN, pointed to specific clauses within the convention for justification and guidance, and placed responsibility for registration and documentation within the Department of Commerce.<sup>9</sup>

The Inter-Departmental Board’s Drafting Subcommittee met on November 4. With all members in attendance, the subcommittee used a draft copy of legislation provided by Colonel Curry as its starting point. After discussing the necessity of the NACA’s representation on any future regulation drafting board, disagreement developed over the extent of federal authority. Although members agreed that federal control over “intrastate operation would be desirable and...might become necessary,” Carpenter and Stratton were united in their view that “without the support of a treaty behind it” any such

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<sup>8</sup> W. Clayton Carpenter, “Memorandum of First Meeting of Board to Draft Act Covering Air Navigation and Civil Aviation in the United States,” 21 October 1919, box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

<sup>9</sup> “Regulations for Aerial Navigation in the U.S.,” 23 October 1919, folder 13, box 2, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD.

provision would be “undoubtedly unconstitutional.” Despite these concerns, the revised draft legislation arising out of this subcommittee meeting retained the federal regulation of intrastate flight as the members felt that any necessary modification would occur within the appropriate congressional committee.<sup>10</sup>

In a report to the State Department on the draft bill Carpenter saw three major issues that could undermine its passage. First, the bill stated as its purpose the enforcement of ICAN, of which the United States was not yet officially a member. Second, Carpenter viewed the retention of federal control over intrastate flying as nearly impossible without convention ratification and the Constitution’s treaty power as justification. (Letters to Curry from Col. Thomas D. Milling on behalf of Brigadier General Mitchell as well as Allen Sinsheimer, Washington editor of *The Automobile*, also expressed this view.) Finally, Carpenter pointed to the lack of specifics, arguing that leaving such wide latitude to draft regulations within the Department of Commerce—in effect to legislate—would face stiff congressional opposition. Carpenter concluded that “if it is the desire of the Government Departments to obtain an early act of Congress to cover aerial navigation, it seems to me that a more thorough and careful draft should be submitted. Otherwise it places the burden upon the Congressional Committee of drafting the details.” While seeing the need to connect the domestic arena to the international, Carpenter recognized the constitutional difficulties of achieving such a goal.<sup>11</sup>

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<sup>10</sup> W. Clayton Carpenter, “Memorandum of First Meeting of Sub-Committee of Board to Draft Act Covering Air Navigation and Civil Aviation in the United States,” 4 November 1919, box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; A Bill to Cover Aerial Navigation in the United States and its Dependencies and Between the United States and Foreign Countries enclosed in letter from Col. Curry to Inter-Departmental Board, 5 November 1919, folder 13, box 2, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD.

<sup>11</sup> W. Clayton Carpenter to Sec. of State, 12 November 1919, box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Milling to Curry, 15 November 1919;



Carpenter's concerns formed the basis of the State Department's comments on the draft bill submitted at the Inter-Departmental Board's second meeting on November 14. Ames was unable to attend, but he informed Curry that he "thoroughly approve[d]" of the Drafting Subcommittee's draft bill. The Army and Navy both submitted their own respective draft bills but neither substantially differed from that of the Drafting Subcommittee. The major issue of contention revolved around whether the national board—now viewed as an interdepartmental board and presumably a continuation of the very body currently meeting—should be empowered to execute its own recommendations or serve solely in an advisory capacity. Praeger believed that the Secretary of Commerce should have the power to "say yes or no to the rules and regulations submitted by the Board" while the Army and Navy preferred that he merely execute the board's decisions. Because the Inter-Departmental Board could not reach a final conclusion on the matter at the time, Curry recommended drafting two different bills: one providing for an Inter-Departmental Board with full executive power and the other establishing an Advisory Board with the Secretary of Commerce as the creator and executor of aviation regulations. Other than two specific clauses concerning the placement of ultimate authority the two versions were identical.<sup>12</sup>

On November 13, the Solicitor's Office in the State Department received a total of forty copies of the air convention ready for signature in Paris. These were distributed

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Sinsheimer to Curry, 14 November 1919; both in folder 13, box 2, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD.

<sup>12</sup> Meeting of Full Committee on Aerial Navigation, 14 November 1919, folder 13, box 2, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD; W. Clayton Carpenter, "Memorandum of Second Meeting of Board to Draft Act Covering Air Navigation and Civil Aviation in the United States," 14 November 1919, box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Ames to Curry, 11 November 1919, folder 13, box 2, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD; Curry to Carpenter, 20 November 1919, box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

in house to Lansing, Third Assistant Secretary of State Breckenridge Long, State Department Solicitor Lester H. Woolsey and his assistant Carpenter, and Trade Advisor William R. Manning as well as externally to Bacon, Curry, Callan, Chief of the Air Service Information Group Horace Meek Hickam, Ames, Marvin, Stratton, Crowell, Postmaster General Albert S. Burlison, Secretary of Commerce Redfield, Secretary of Labor Lennon, Treasury Secretary Carter Glass, and Bradley of the MAA. This final version included some changes from the one distributed to the various executive departments for approval in August, the most important being the removal of the provision concerning criminal jurisdiction of patent infringement. The State Department, awaiting any word of any change in position of the various executive departments, delayed making an official recommendation regarding U.S. signature.<sup>13</sup>

While the State Department awaited analysis from the various executive departments, the Canadian government was under considerable pressure from the British to follow suit with the mother country and sign the convention. In a report to Minister of Public Works and Air Board Chairman Arthur Sifton, Lieutenant Colonel Biggar questioned the convention's full applicability to Canada's unique situation but recognized that "as a guide to standard practice throughout the world the value of the Convention can hardly be over-estimated." He called attention to both Article 5 and Annex H and recommended that Canada declare certain reservations at the time of signature. Most significant, Biggar recommended close cooperation with the United States in this matter as "Canada's immediate international interests in Air Navigation relates almost solely to the United States, and if the United States does not adhere to the Convention... Canada

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<sup>13</sup> Grew to Sec. of State, 21 October 1919; Grew to Sec. of State, 31 October 1919; handwritten note entitled "Enclosures Disposed of as Follows," undated; all in box 5613, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

would herself practically be forced into refusal.” In forwarding Biggar’s report to Prime Minister Borden, Sifton concurred in the necessity for reservations and the utmost importance of coming to an understanding with the United States before taking any action on the convention. Borden requested that High Commissioner for Canada George H. Perley, stationed in London, await the drafting of such reservations before signing the convention on behalf of the Dominion.<sup>14</sup>

Ames reported the Inter-Departmental Committee’s inability to come to an agreement on the shape of the federal bureaucratic apparatus to regulate aviation at the NACA’s Executive Committee meeting on November 25. After some discussion, the NACA’s members reaffirmed their belief that federal regulation of aviation should be placed under the Department of Commerce but remained silent on the proposed Advisory Board, possibly out of concern that its existence would undercut the NACA. It became increasingly clear that before federal regulation of aviation could occur the question had to be answered whether a single entity—either in the form of a Department of Air or Inter-Departmental Board—or multiple bureaus within existing departments provided the best structure for aviation regulation. Walcott, realizing that Congress or the President might call upon the NACA for its opinion on this issue at any moment, urged the creation of a new committee to study the current aeronautical activities of the Army, Navy, and Post Office and the current state of congressional and public opinion while articulating the NACA’s official position. Walcott, Stratton, and Praeger joined chairman Ames on this new Special Committee on Organization of Governmental Activities in Aeronautics. Thus three members of the Inter-Departmental Board joined the Secretary of the

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<sup>14</sup> Report from Biggar concerning the convention, 22 November 1919, enclosed in Sifton to Borden, 24 November 1919; telegram from Borden to Perley, 13 December 1919; both in Borden Papers, reel C-4317, Library and Archives Canada, Ottawa, Ontario.

Smithsonian in looking at the subject of federal regulation of aviation with a focus on “the need for the development of commercial aviation generally.”<sup>15</sup>

When the Inter-Departmental Board met the next day Col. Thomas D. Milling had replaced Curry as chairman of the Inter-Departmental Board by order of Secretary Baker, but the former chairman joined Milling, Callan, Praeger, and Carpenter to ease the transition. With Ames, Praeger, and Stratton absent, the remaining members discussed the two different versions of the bill and “the majority of the members present expressed the opinion that the Board to regulate Aerial Navigation should be put under the Dept. of Commerce” rather than be an independent body with executive powers as was the case with the ICC. Responding to Carpenter’s insistence that the bill lacked sufficient details, the Inter-Departmental Board authorized him to amend the document and Carpenter dropped any direct reference to the ICAN (instead referring to “subsequent acts or treaties”) while tightening the language.<sup>16</sup> This version met with the board’s general approval on December 6 and received its final acceptance, after minor revisions, twelve days later.<sup>17</sup>

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<sup>15</sup> Minutes of Regular Meeting of Executive Committee, 25 November 1919, folder 10, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC. In his discussion of the NACA during this period, Roland makes it clear that the committee was acutely aware of its tenuous position within the governmental structure.

<sup>16</sup> Newton to Milling, 21 November 1919; Minutes of Meeting of Committee on Aerial Navigation, 26 November 1919; Minutes of Meeting of Committee on Aerial Navigation, 6 December 1919; Minutes of Meeting of Committee on Aerial Navigation, 18 December 1919; all in folder 13, box 2, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD. Memorandum of Third Meeting of Board to Draft Act Covering Air Navigation and Civil Aviation in the United States, 3 December 1919, box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

<sup>17</sup> Parker, Lennon, Stratton, Ames, and Marvin were not present at the November 26 meeting. Parker submitted suggestions directly to Curry the day before and Lennon informed Curry that he supported the bill allowing for an independent board over that placing authority within the Department of Commerce (Parker to Curry, 25 November 1919; Lennon to Curry, 25 November 1919; both in folder 13, box 2, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD). Stratton, Marvin, and Lewis were at the December 6 meeting that approved the near-final draft while Lewis represented Ames and Brown stood in for Stratton at the December 18 meeting. Praeger submitted his approval of the penultimate draft legislation to Curry on December 17 (Praeger to Curry, 17 December

The final draft legislation, entitled “A Bill to Regulate Air Navigation in the United States and its Dependencies, and Between the United States and Its Dependencies and any Foreign Country” represented the first concerted effort by the various executive departments to regulate aviation and provided the ideological foundation for all subsequent attempts. The Inter-Departmental Board’s belief in the importance of international developments and the urgent nature of such legislation can be seen in the bill’s first paragraph:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that, for the immediate and better protection of navigation through the air and for the purpose of providing for the enforcement of the provisions of any Act or Treaty relating to International Air Navigation which may be hereafter enacted or entered into by the United States.<sup>18</sup>

The bill created an Air Navigation Board composed of one member from the Departments of War, Navy, Commerce, Treasury, Post Office, State, Agriculture and the NACA empowered to draft and recommend regulations that would then be “approved and promulgated by the Secretary of Commerce,” authorized the Air Navigation Board to fix licensing fees based on a majority vote, exempted government aircraft from its provisions except those pertaining to “lights, signals, and rules of the air,” and required the licensing of pilots, aircraft, and public airdromes through the Department of Commerce (with an exception made for temporary flights by foreign nationals whose home country adhered to the same treaties as the United States). It also authorized a \$1,000 fine and/or one year in prison for violating the rules and regulations arising from the act, allowed the Secretary of Commerce to revoke and/or suspend aviation licenses at

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1919, folder 13, box 2, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD).

<sup>18</sup> Final draft of bill enclosed in Callan to Carpenter, 19 December 1919, box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

his discretion, called on all executive departments, bureaus, and commissions to aid the Department of Commerce in enforcing aviation regulations, required the Secretary of Commerce to submit an annual report to Congress, and included an invalidity clause stating that if any part of the act should be considered unconstitutional “such judgment shall not affect, impair, or invalidate the remainder thereof.”<sup>19</sup>

This final draft was circulated to the Departments of War, Navy, Treasury, Agriculture, Labor, Commerce, and State as well as the NACA on December 19, where it met with widespread approval but not unquestioning acceptance. Both Marvin of the Weather Bureau and Secretary of the Navy Daniels expressed concern over the constitutionality of the bill—particularly federal regulation over intrastate flying—and Bacon recommended to Assistant Secretary Crowell that the bill be withheld from Congress until the Air Service had determined its final stance on the subject. Curry also drafted a set of air regulations during November to be adopted after the passage of the proposed Air Navigation Act. This forty-six page document provided for the registration of aircraft, licensing of personnel, issuance of certificates of airworthiness, nationality markings, procedures for log books, prohibited areas, “rules as to lights and signals and rules of the air,” and entry and departure of foreign aircraft within the United States “based upon the regulations contained in the International Air Convention and on British regulations” while authorizing the Secretary of Commerce to supplement such provisions as he saw fit. Milling remained convinced that the convention’s rules for air navigation

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<sup>19</sup> Ibid.

could “with few changes, be made adaptable for use in this country.” Having completed its task, President Wilson officially dissolved the Inter-Departmental Board on March 2.<sup>20</sup>

As the Inter-Departmental Board debated the particulars of draft legislation, the Air Board approved Canada’s air regulations at its November 30 meeting. Biggar submitted the details to the Privy Council on December 22, which approved them the same day. As the only official legislation guiding the U.S.-Canadian air relationship until 1926, the Canadian Air Regulations of 1920 deserve careful study. The document divided the subject into eleven parts. The first, a long definition of terms, “generally [followed] the provisions of the International Convention” with the only major difference being a clear distinction among commercial, freight, and passenger aircraft. Part Two, “Registration and Marking,” applied “the principles of the International Convention” at the national level. It required all aircraft flown in Canada to be registered with the Air Board and defined Canadian aircraft as those wholly owned by a British subject or British corporation. Of utmost importance for U.S. relations, clause eight allowed foreign aircraft to possess a secondary Canadian registration as long as they met three conditions: (1) a convention existed between Canada and the aircraft’s home country; (2) the aircraft was duly registered in its home country; and (3) any such aircraft refrained from engaging in commercial activities between two points within Canada. All aircraft operating in Canada had to possess Air Board-issued certificates of airworthiness or “if it has been secondarily registered in Canada, then by the Air Board or by the proper authority in that one of His

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<sup>20</sup> Marvin to Milling, 26 December 1919; memorandum, Bacon to Crowell, 17 December 1919; Daniels to Milling, 14 January 1919; memorandum, Milling to Westover, 19 February 1920; all in folder 13, box 2, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD; Note from Carpenter attached to “General Regulations for Flying,” 26 November 1919; unsigned letter to Daniels, 2 March 1920; both in box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

Majesty's dominion or foreign country." Fees were based upon those found in the British Air Regulations of 1919.<sup>21</sup>

Part Three of the Canadian regulations required all "airharbours" to possess a license issued by the Air Board and provided detailed technical provisions beyond those of the convention. The Air Board's licensing of pilots within Part Four closely followed the air convention while recognizing the licenses of pilots of secondarily-registered aircraft. The technical provisions in Parts Five through Eight concerning lights, signals, rules of the air, and traffic were directly pulled from the international convention with only minor modifications derived from the British Air Navigation Regulations. Part Nine incorporated the Privy Council's earlier provisions against dangerous or "trick" flying. Responding to concerns over Annex H, Part Ten placed much of the convention's customs provisions with those modified from the existing Customs Act and required all aircraft entering or departing Canada to land at a licensed "airharbour." Part Eleven, "General Provisions," forbade the commercial transportation of explosives, authorized the Privy Council to establish prohibited zones applicable to all aircraft, required proper documentation to be carried within the aircraft at all times, placed liability for failure to comply with regulations and any damages arising therefrom on the owner, pilot and crew, and required express written permission from the Air Board for any foreign military flight over Canadian territory.<sup>22</sup>

The enactment of the Air Regulations of 1920 provided Canada with a domestic regulatory framework compatible with the convention but did not settle the question of

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<sup>21</sup> Air Regulations, 1920, John A. Wilson Fonds, MG 30, Minutes of the Air Board, 30 November 1919; O. M. Biggar, The Air Board Submission accompanying the Air Regulations of 1920, 22 December 1919, microfilm reel 10783, Library and Archives Canada, Ottawa, Ontario.

<sup>22</sup> Ibid.



U.S.-Canadian regulatory cooperation. On December 26 Prime Minister Borden informed Perley of his decision to postpone signing the convention until Canadian representatives could meet with their American counterparts to ascertain the latter's position and the possibility of special arrangements between the two governments. On January 20, 1920, Biggar met with Assistant State Department Solicitor Carpenter and James Garfield in the offices of the State Department. Biggar presented Canada's newly-passed Air Regulations, a copy of his November 22 report concerning Canada's reservations to the convention, and an analysis of the ways in which the Canadian regulations differed from those of the convention. Carpenter then discussed America's concerns with the convention as derived from responses to the State Department's earlier inquiries. The meeting adjourned with "the suggestion that Canada and the United States would probably desire to follow the same line of action" in their responses to the convention. Eight days after this meeting, acting Secretary of State Frank L. Polk forwarded Biggar's memorandum to Milling of the Inter-Departmental Board for his consideration.<sup>23</sup>

The issue of U.S.-Canadian aviation cooperation had to await the creation of a bureaucratic apparatus to regulate aviation in the United States, but a lack of consensus remained concerning its proper shape. While neither the Inter-Departmental Board nor the NACA supported a unified Department of Air, such an approach had its adherents within the government but faced significant hurdles, most notably a deep-seated

American tradition of civil-military separation. The case of the so-called New Bill

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<sup>23</sup> Memorandum, Borden to Christie, 23 December 1919; telegram, Borden to Perley, 26 December 1919; both in Borden Papers, Reel C-4317, Library and Archives Canada, Ottawa, Ontario; Memorandum in Regard to the Proposed Convention Relating to International Air Navigation, 8-10, box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Memorandum of Conference among James Garfield of Mr. Long's Office, Mr. W. C. Carpenter, Assistant Solicitor, on Behalf of the Department of State and Colonel Bigger (sic) of the Air Board of Canada, Held at the Department of State, January 20, 1920, box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

illustrates the difficulties in adopting the British system in the United States as per the Crowell Commission's recommendation. First introduced by Indiana Republican Harry Stewart New in the Senate on July 31 as S. 2693 and reintroduced as S. 3348 after subcommittee revisions, "it alone out of 17 similar measures introduced during the first and second session of the 66<sup>th</sup> Congress managed to clear committee." Mitchell and Foulois "vigorously supported the bill" while Secretary of War Baker stood solidly against it. The wording of the New bill left no doubt that the primary focus of the proposed Department of Air would be the military application of flight as it hardly mentioned commercial and civilian flying. Before the Military Affairs Subcommittee under the chairmanship of Senator Wadsworth, Menoher testified that "the Air Service should be allowed to remain where it is" and "be made a permanent fighting branch of the Army." He also called for the creation of a bureau, "under, say, the Department of Commerce," to handle all civilian aspects of aviation, working with the military air services on a "control board" to coordinate in areas of overlapping interests. Thus as early as August 20 we find the basic outline of the Inter-Departmental Board's draft legislation being offered in response to the idea of a unified air service.<sup>24</sup>

Senate debate on S. 3348 shows the fundamental difficulties facing any federal aviation legislation in the immediate postwar period. Major issues underlying opposition to the New Bill concerned the fear of runaway appropriations, pork barrel spending, and the creation of a new level of bureaucracy. While S. 3348 was not an appropriations bill, Senator New—under pressure from Idaho Republican William E. Borah (the preeminent League of Nations "Irreconcilable") offered an estimated budget of "something like

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<sup>24</sup> Komons, *Bonfires to Beacons*, 41; S. 2693 in *Reorganization of the Army: Hearings before the Subcommittee of the Committee on Military Affairs on S. 2691, S. 2693, and S. 2715* 66<sup>th</sup> Cong. 1255-1256 (1919), 3-7; Testimony of General Menoher, *ibid.*, 278-79.

\$97,000,000” for the new Department of Air. With no less than three congressional investigations into the misuse of wartime aviation appropriations and the recognition that bureaucratic costs invariably ended up higher than initial estimates, New’s bill did not stand a chance of passage. Senate debate resulted in the insertion of a letter from Rooker to the members of the Committee on the Jurisprudence of Aeronautics and Aerography of the Conference of State and Local Bar Associations of America, justifying federal aviation legislation based on admiralty jurisdiction within the *Congressional Record*, but his legalistic argument could not overcome deep-seated objections to S. 3348’s sweeping provisions. After three days of debate, New asked that the bill be returned to the Military Affairs Committee “for their further consideration.” Congressional concerns prevented the institutionalization of the British model during this vital period of ideology formation. When placed within the larger context of the American regulatory experience, a Department of Air would have constituted a radical response to a new technology but its creation would have provided an immediate and clear link between the domestic sphere and the larger international regime.<sup>25</sup>

Though absences from Washington precluded a formal meeting of the NACA’s recently constituted Special Committee on Organization of Governmental Activities in Aeronautics, discussion among its members continued via correspondence. Mustin’s minority report to the Crowell Commission “greatly struck” Special Committee chairman Ames and he was also “greatly impressed” with Menoher’s report calling for the continued separation of Army aviation. These two documents, combined with a concern over how the creation of a Department of Air would affect the NACA, crystallized a

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<sup>25</sup> 59 *Cong. Rec.* S 2185-2186, 2189-2190 (January 29, 1920); 59 *Cong. Rec.* S 2301 (January 31, 1920). For a more in-depth discussion of congressional investigations into the aircraft industry see Walterman, *Airpower*, 54-77 and Komons, *Bonfires to Beacons*, 38-39, 41.

mental model in Ames's mind that advocated the continued separation of aeronautical activities among the Army, Navy and Post Office, the retention of the NACA as an independent, "largely...scientific" body, and the creation of a new government agency tasked with fostering civilian aeronautics and technical developments.<sup>26</sup>

By its January 29 meeting, members of the Executive Committee had come to accept Ames's mental model. Two weeks later, Walcott—drawing on this now shared mental model—presented draft legislation at Ames's request that included a Bureau of Aviation in the Department of Commerce, separate aviation bureaus for the Army, Navy, and Post Office Departments, and a joint board consisting of representatives from the Departments of War, Navy, Post Office, Commerce and the NACA authorized to "settle questions" on "all...matters in which the several agencies may be jointly interested." Thus by the beginning of February 1920 the NACA had accepted the fundamental elements of the Inter-Departmental Board's draft bill but with a smaller and more authoritative joint board.<sup>27</sup> This stance was further articulated when the NACA's primary principles for the federal regulation of aviation were forwarded to the president on March 5:

1. a single department for all government aeronautical activities was "not desirable at the present time"
2. a separate agency, "preferably in the form of a bureau in the Department of Commerce," should be established to regulate non-military aviation empowered to promulgate "rules and regulations governing international, interstate, and intrastate flying"

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<sup>26</sup> Ames to Praeger, 11 December 1919; Ames to Praeger, 12 December 1919; both in box 18, Records of the Post Office Department, RG 28, Office of the Second Assistant Postmaster General, Division of Air Mail Service, Government-Operated Air Mail, Central Files, 1918-1927, National Archives Building, Washington, DC

<sup>27</sup> Minutes of Meeting of Executive Committee, 29 January 1920; Minutes of Meeting of Executive Committee, 12 February 1920; both in folder 11, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Roland, *Model Research*, 53-54. The connection among Ames, Praeger, and Stratton and the Inter-Departmental Board undermines Roland's belief that these three central tenets originated with Ames and the NACA.

3. the Army and Navy should retain control of their own aviation interests
4. a joint military-civilian board should be established to “bring about full cooperation” in aeronautical matters.<sup>28</sup>

While the Inter-Departmental Board placed the final touches on its draft bill, Ralph S. MacElwee, Acting Director of the Bureau of Foreign and Domestic Commerce in the Commerce Department, fulfilled Secretary Baker’s earlier suggestion to aid commercial aviation. During 1919, U.S. industry produced a total of 780 aircraft: 682 went to the military with roughly 88 percent of the remaining machines exported. With demobilization flooding the national market with military surplus, the drying up of military orders, and a near complete lack of domestic civil air transport, foreign trade quickly came to be seen as the primary means of keeping the American aviation industry alive. Writing to the NACA’s George Lewis on December 18, 1919, MacElwee requested aid in creating a new interdepartmental body to foster commercial aviation to assist American industry at home and abroad.<sup>29</sup> This newly established Sub-Committee on Commercial Aviation of the Economic Liaison Committee, under MacElwee’s chairmanship, quickly found that the lack of uniform national regulation constituted the greatest barrier to the development of commercial aviation. Composed of members from the Departments of Commerce, State, War, Navy and Post Office as well as from the Forest Service, NACA, and the MAA, this unofficial subcommittee became in effect a

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<sup>28</sup> Minutes of Special Meeting of Executive Committee, 1 March 1920, folder 11, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Letter from Walcott to Wilson, 5 March 1920, folder 4, box 96, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

<sup>29</sup> MacElwee to Lewis, 18 December 1919, folder 13-3, box 41, Records of the National Aeronautics and Space Administration, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD; U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970, Bicentennial Edition, Part 1&2* (Washington, DC: GPO, 1975), 768. According to Waltermann, MacElwee met with “representatives of the Foreign Trade Advisor’s Office of the State Department [and] the Air Service of the War and Navy Departments” in July 1919 to discuss governmental assistance in securing overseas markets for American aircraft, particularly in Latin America. (*Airpower*, 144-45.)

second interdepartmental board that met regularly over the next two years.<sup>30</sup> That Lewis forwarded copies of the Inter-Departmental Board's draft bill to members of the subcommittee at MacElwee's request within the first month of the new subcommittee's existence illustrates the importance this new informal body quickly placed on regulatory issues.<sup>31</sup>

Although various executive departments were aware of the need for federal legislation, the question of the proper governmental sphere for the regulation of aviation remained uncertain. Several states followed Connecticut's prewar lead and passed legislation based on their police powers. By 1922, the legislatures of California, Kansas, Minnesota, Maine, and Oregon had passed bills dealing with registration, licensing, and nonresident flying but not New York, the nation's most populous and prosperous state. Considering New York's pioneering role in both railroad and automobile regulation, that state's apparent lack of interest in aviation requires explanation.<sup>32</sup>

Chief of the Air Service Information Group Horace Meek Hickam's statement during the February 5 meeting of the Sub-Committee on Commercial Aviation may shed light on this apparent regulatory anomaly. Beginning on January 17, a veritable who's who of aviation appeared before New York Governor Al Smith's newly-appointed

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<sup>30</sup> Membership in the Sub-Committee on Commercial Aviation changed over the course of its existence. During its first two months it consisted of the following individuals: Commerce: R. S. MacElwee, Bureau of Foreign and Domestic Commerce and L. J. Briggs, Bureau of Standards; War: Lt. Col. Horace Meek Hickam, Air Service; Navy: Cdr. W. G. Child; State: W. R. Manning and R. B. Pendergast, Far East Division; Post Office: John C. Edgerton; NACA: John F. Victory and George Lewis; Forest Service: R. Headly and J. D. Jones; Manufacturers' Aircraft Association: Samuel S. Bradley. A change in meeting place from MacElwee's office in the Bureau of Domestic and Foreign Commerce to the NACA's conference room as well as a shift to official NACA letterhead supports the notion that the subcommittee became a part of the NACA sometime between its July and August meetings.

<sup>31</sup> Lewis to MacElwee, Hickam, Child, Manning, Pendergast, Briggs, Headly, and Edgerton, 28 January 1920, box 41, folder 13-3, Records of the National Aeronautics and Space Administration, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD.

<sup>32</sup> "Statutes Regulating Aviation," *Columbia Law Review* 22 (December 1922): 754-55; "Uniform Aircraft Laws to be Sought," *Lawrence Journal-World*, September 23, 1925.

Aviation Commission in a series of public hearings.<sup>33</sup> Several key people committed to federal regulation—Menoher, Hickam, Oscar M. Westover, Fuller, Miller, and Thurman Bane from the Air Service; former New York representative and Chairman of the Aero Club of America’s Juridical Committee Murray Hulbert; Mustin, Callan, and Lt. Ralph Kiely of the Navy (secretary of the American Delegation to the Inter-Allied Aeronautical Commission), World War I ace Capt. Eddie Rickenbacker; Aero Club board member and editor of both *Flying* and *Aerial Age Weekly* Henry Woodhouse; and future National Aeronautic Association president Godfrey L. Cabot—were among the ninety-three witnesses from military and civilian life that also included Orville Wright, Glenn Curtiss, and Glenn Martin.<sup>34</sup>

In his report to the Sub-Committee on Commercial, Aviation Hickam believed that the Air Service witnesses “were successful in persuading the Committee of the desirability of National rather than State control in this field.” He further stated that the New York commission’s members promised they would “recommend to the Governor that he urge upon the State’s representatives in Washington the necessity of immediate National legislation.” The events in New York reverberated beyond the Empire State as a representative of Illinois Governor Frank O. Lowden, also present at the meeting, agreed

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<sup>33</sup> This state commission, appointed in October 1919, consisted of Chairman Col. Jefferson DeMont Thompson, Henry Beaumont Herts, Frank S. Voss, Robert Graves, Alan R. Hawley of the Aero Club of America, Frederick H. Allen, Chauncey D. Hakes, and secretary Augustus Post. “Report of the Aviation Commission” submitted to the New York State Legislature on April 14, 1920, in *Public Papers of Alfred E. Smith, Governor, 1920* (Albany, NY: J. B. Lyon Company, 1921), 263-64; Henry Woodhouse, *Textbook of Aerial Laws and Regulations for Aerial Navigation, International, National and Municipal, Civil and Military* (New York: Frederick A. Stokes Company, 1920), 95.

<sup>34</sup> Report of the Aviation Commission, submitted to the New York State Legislature on April 14, 1920, in *Public Papers of Alfred E. Smith, Governor, 1920* (Albany, NY: J. B. Lyon Company, 1921).

to forward the same recommendation to the executive of the nation's second most populous and prosperous state.<sup>35</sup>

The New York Aviation Commission's report shows that Hickam's optimistic view was not unfounded. It recommended the commission be converted into a permanent body responsible for the collection of aeronautical data, coordination between the state and federal levels, the creation of air routes, the licensing of pilots, and the registration of aircraft. Most significant, the commission did not draft detailed legislation along the lines of Connecticut or Massachusetts and "no action was taken by the New York legislature" on the subject. Considering that a general consensus for federal legislation existed within the executive branch, the multitude of connections between Washington and New York, the composition of the witness pool before the New York Aviation Commission, the difficulties arising from the existing system of state-based automobile regulation, and the contemporary truism that "as New York goes, so goes the nation," the idea that a concerted effort to delay regulatory action in the nation's largest and wealthiest state occurred is not too far-fetched. According to historian Thomas W. Walterman, during this tentative period "military delegates regularly importuned state governments to refrain from enacting regulatory legislation, counseling instead reliance on a national statute providing substantive and procedural uniformity." A gubernatorial policy of delaying state action, at the behest of Washington, while simultaneously pushing for federal

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<sup>35</sup> Minutes of the Fourth Meeting of the Sub-Committee on Commercial Aviation, 5 February 1920, folder 13-3, box 41, Records of the National Aeronautics and Space Administration, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD. Official statistics show that New York and Illinois ranked first and second in the nation, respectively, in population and total income due predominantly to the exploding metropolises of New York City and Chicago. 1920 population: New York, 10,385,000; Illinois, 6,485,000. 1929 total income (the earliest date available): New York, \$14,171,000; Illinois, \$7,291,000. *U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1970, Bicentennial Edition, Part 1&2* (Washington, DC: GPO, 1975), 24-36, 243-245.



legislation may help to explain the inaction of the New York legislature as well as the commitment of the state's congressional representatives to federal regulation during the early 1920s.<sup>36</sup>

In his first report to the Economic Liaison Committee, MacElwee presented the following eleven reasons for federal legislation:

- a. Uniformity of laws and regulations necessary.
- b. Impossibility of demarking state boundaries in the air.
- c. Impossibility of meeting conflicting state regulations immediately upon crossing state borders.
- d. Speed of aircraft.
- e. Physical freedom (distinguished from legal freedom) with which aircraft may choose any path with respect to elevation and direction.
- f. Airlines must be established upon national rather than state basis.
- g. Better insures drafting rules and regulations by those most conversant with problems involved.
- h. Saves multiplicity of effort to determine and execute proper control
- i. Conformity with International Aeronautical Convention better insured.
- j. Insurance problems require uniform rules and regulations and their solution must remain suspended pending...legislation.
- k. Other nations have already adopted the policy of Federal control.<sup>37</sup>

The above constitute the clearest and most concise synopsis offered to that point in defense of federal aviation regulation and reveal MacElwee's intimate understanding of the multiple layers of aviation regulation. He saw federal legislation as the only means to address issues arising from the nature of the device such as speed, freedom of movement, and the inability to determine state borders along with the need for

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<sup>36</sup> Report of the Aviation Commission; George Gleason Bogert, "Problems in Aviation Law," *Cornell Law Quarterly* 6 (May 1921): 271. To argue his point, Walterman looked to letters from Menoher to Massachusetts Governor Calvin Coolidge and from Westover to R. C. Swan (Walterman, *Airpower*, 95). According to Young and Callahan, the Aero Club of Illinois had come to believe that aviation regulation, due to its ties to national defense, lay within the federal sphere as early as August 1919 and pressed state and local officials to await congressional action (Young and Callahan, *Fill the Heavens*, 119). Scamehorn chronicles the multiple attempts at aviation legislation in Illinois from 1919 to 1926 and illustrates how a belief that the issue remained a national rather than a state concern undercut their passage (*Balloons to Jets*, 234-36).

<sup>37</sup> "Report of Activities to Date by the Sub-Committee on Commercial Aviation to the Economic Liaison Committee," 10 March 1920, folder 13-3, box 41, Records of the National Aeronautics and Space Administration, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD.

compatibility with the emerging international regime. He further posited that any such legislation “should...be along the lines provided in the Milling Bill”—the popular name for the Inter-Departmental Board’s draft legislation—but it should “omit, as far as possible, all controversial factors which might seriously delay its passage” (such as any explicit connection to ICAN and the League of Nations).<sup>38</sup>

Federal legislation required congressional action. With the Senate’s final vote on the League of Nations occurring on March 19, demobilization in full swing, concerns with overspending, and a host of other issues on Congress’ calendar, the subcommittee looked for nonlegislative means to secure aeronautical uniformity. After a presentation by Lyman J. Briggs and Morton G. Lloyd of the Bureau of Standards detailing that agency’s past success in fostering standardization, the subcommittee resolved that “it would be desirable for the Bureau of Standards to proceed with the codification of flying rules, aircraft construction rules, and aircraft equipment.” In this preliminary work the Bureau of Standards drew upon existing Army, Navy, Post Office, and international regulations to establish criteria for the licensing of pilots, certificates of air worthiness, and the drafting of aerial “rules of the road.”<sup>39</sup>

Even at this early date, the lack of an American regulatory system for aviation affected international civil aeronautics. On February 14, the State Department forwarded a letter to the NACA from the Aerial Transport and Taxi Company, Ltd., of Winnipeg, Manitoba, expressing a desire to establish an air service between that city and St. Paul,

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<sup>38</sup> Ibid.

<sup>39</sup> Minutes of the Fifth Meeting of the Sub-Committee on Commercial Aviation, 12 February 1920; Minutes of the Tenth Meeting of the Sub-Committee on Commercial Aviation, 1 April 1920; both in folder 13-3, box 41, Records of the National Aeronautics and Space Administration, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD. It was reported that the Economic Liaison Committee adopted the subcommittee’s report at the latter’s April 1 meeting.

Minnesota. At a meeting two weeks later members of the Executive Committee agreed that “pending ratification” of the convention “or the enactment of appropriate legislation, no agency of the Government” possessed “authority to properly deal with this question on behalf of the United States.” Until the United States established some mechanism for regulating the airplane scheduled international flights remained an illusion.<sup>40</sup>

Many in Washington continued to see the international convention as the best means to bring about federal regulation. In response to a verbal request for his views on the convention, Secretary of War Baker informed Lansing that his department “has no objection to the Convention being signed,” and “strongly recommend[ed] such action.” He also tied the acceptance of the convention to the passage of domestic legislation. “In my opinion it is not only highly desirable that the United States should become a signatory to this Convention because of the necessity of an agreement among the nations on this important subject, but also because of the effect such action will have in eliminating constitutional objections to the legislation that will perforce in the near future be requested of the Congress for the regulation of air navigation in the United States.”<sup>41</sup>

As the State Department awaited the revised views of the Treasury, Third Assistant Secretary of State Bainbridge Colby informed U.S. Ambassador in Paris Hugh Wallace that he had been bestowed with “full power” to sign the convention on behalf of the United States but only after he received the final U.S. reservations. On March 30, Biggar, now a full colonel, forwarded a copy of Canada’s reservations as sent to High Commissioner Perley to Carpenter, thus providing a frame of reference with which to

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<sup>40</sup> Minutes of Special Meeting of Executive Committee, 1 March 1920, folder 11, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

<sup>41</sup> Baker to Lansing, 16 March 1920, box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

coordinate those of the United States. The Privy Council authorized Perley to sign the convention with the following stipulations: an understanding that Article Five would not preclude “reciprocal arrangements with the United States” if the United States chose not to become party to the convention, the complete repudiation of Annex H’s applicability to Canada, and six minor reservations to discrete technical clauses found in Annexes A through G. The British Air Ministry pressured the Canadian Government to abandon these reservations but Arthur Sifton, now Canada’s Secretary of State, insisted on their preservation.<sup>42</sup>

On March 26, “in view of former Secretary Lansing’s instructions that it was desirable for this Government to work in harmony with the Canadian Government,” Foulois, Hickam, and Colonel Blair of the U.S. Army, now civilian Henry S. Bacon, Bradley and J. P. Tarbox of the MAA, and Carpenter met to discuss the Canadian reservations. All agreed that, because the United States did not possess any existing legislation in conflict with the technical aspects of the convention, Canada’s reservations to the annexes need not be adopted. If any future conflicts arose between U.S. regulations and the annexes’ technical provisions it was believed that the ICAN “could, and probably would, rectify obvious errors and objectionable provisions.”<sup>43</sup>

The Treasury Department belatedly delivered its views on the final draft of the convention to the State Department on April 2. Because the convention empowered the

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<sup>42</sup> Certified Copy of a Report of the Committee of the Privy Council, Approved by His Excellency the Governor General on the 7<sup>th</sup> February, 1920, enclosed in letter from Biggar to Carpenter, 30 March 1920; Colby to Wallace, 29 March 1920; both in box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Colby to President Wilson’s secretary Joseph F. Tumulty, 31 March 1920, box 5613, Records of the State Department, RG 59, National Archives at College Park, College Park, MD. Sifton to Rowell, 31 March 1920; cable, Foster to Perley, 5 April 1920; both in Borden Papers, reel C-4317, Library and Archives Canada, Ottawa, Ontario.

<sup>43</sup> Memorandum in RE Reservations to be Attached to Signature of Convention for the Regulation of International Air Navigation, 5 April 1920, box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

ICAN to modify “the provisions of any one of the Annexes” provided such changes “have been approved by three fourths of the total possible vote,” the department pointed to a possible loss of sovereignty over customs and therefore America’s power to regulate its own borders. In addition, the Treasury Department found several particular clauses within Annex H to be “pregnant with possible conflict with our own customs laws and regulations,” repeating its earlier recommendation that the United States issue a reservation concerning Annex H.<sup>44</sup>

Perley left London for Paris to sign the convention for Canada with the Privy Council-approved reservations on the morning of April 6 but found that the French Foreign Office, under a Supreme Council resolution passed in late September to avoid weakening the treaty’s provisions through multiple reservations, refused to accede to this usual diplomatic practice. He recommended to Acting Prime Minister George E. Foster that Canada sign the convention without reservations, instead submitting them to the ICAN before formal treaty ratification. Following orders from Foster, Perley signed the convention “in its present form [while] at the same time notifying the Governments of Great Britain and France that if [the] United States Government does not adhere [to] the Convention in its present form [it] would not be suitable to Canadian conditions and the Canadian Government therefore could not ratify it except with such reservations as would protect Canadian interests and make its provisions applicable to Canadian conditions.”<sup>45</sup>

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<sup>44</sup> Acting Treasury Secretary to Lansing, 2 April 1920; Adey to Secretary of the Treasury, 21 April 1920; both in box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

<sup>45</sup> Cable, Perley to Foster, 8 April 1920; Perley to Millerand, 13 April 1920; Perley to Foster, 15 April 1920; all in G-1 vol. 1256, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario; cable, Foster to Perley, 10 April 1920, reel C-4317, Borden Papers, Library and Archives Canada, Ottawa, Ontario.

By the time Perley signed the convention the members of the Canadian Air Board had resigned, their task of drafting air regulations having “now been accomplished.” A Privy Council order of April 19 reconstituted this administrative body “for the purpose of enabling it efficiently to perform its dual duty of regulating civil aviation and administering the Canadian air force.” This second incarnation of the Air Board—central to U.S.-Canadian aviation relations in the next three years—more accurately represented the various government agencies interested in aviation. Its membership now included Minister of Militia and Defense Hugh Guthrie as chairman, Capt. Walter Hose of the Navy, Air Vice-Marshal and Inspector General of the newly-constituted Canadian Air Force Sir Willoughby Gwatkin, and Edouard G. D. Deville from the Department of the Interior. Vice-Chairman Biggar, director of flying operations Lt. Col. Robert Lackie, Certificates Branch superintendent Lt. Col. J. Stanley Scott, and John A. Wilson as secretary provided operational continuity between the two iterations of the Air Board and ensured a continued focus on civil aviation.<sup>46</sup>

On April 9, Third Assistant Secretary of State Colby cabled the following three reservations, approved by President Wilson two days earlier, to Ambassador Wallace:

1. The United States expressly reserves, with regard to Article 3, the right to permit its private aircraft to fly over areas over which private aircraft of other contracting States may be forbidden to fly by the laws of the United States, any provision of said Article 3 to the contrary notwithstanding;
2. The United States reserves complete freedom of action as to customs matters and does not consider itself bound by the provisions of Annex H or any articles of the Convention affecting the enforcement of its customs laws;
3. The United States reserves the right to enter into special treaties, conventions,

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<sup>46</sup> Wilson to Biggar, 20 March 1920; Wilson to Biggar, 30 March 1920; both in MG 30, microfilm reel 10783, John A. Wilson Fonds, Library and Archives Canada, Ottawa, Ontario; Sifton to Foster, 15 April 1920, reel C-4317, Borden Papers, Library and Archives Canada, Ottawa, Ontario; Privy Council Sessional Papers No. 47, 19 April 1920, reel C-6947, Library and Archives Canada, Ottawa, Ontario; Douglas, *Creation of a National Air Force*, 46.

and agreements regarding aerial navigation with the Dominion of Canada and/or any country in the Western Hemisphere if such Dominion or country be not a party to this Convention.<sup>47</sup>

Wallace brought these reservations to the attention of the French and faced the same antireservation position as Perley. The French Foreign Office recommended that Wallace either submit an informal note containing U.S. reservations at the time of signature before the April 12 cutoff date, “or else request the conference of Ambassadors to extend the time limit for signature” to allow for further consultation with Washington.

Canada and the United States were not the only countries taking issue with Article Five’s exclusionary clause. In a memorandum dated November 30, 1919, Switzerland pointed out that Article Five, when combined with its geographic position, placed it in a tenuous position vis-à-vis central Europe. As a neutral state, Switzerland was unable to take advantage of peace treaty provisions providing Allied and Associated Powers full overflight rights over ex-enemy states—the convention would force Switzerland to exclude German and Austrian aircraft, and the two nations would then close their borders in retaliation. The Council of Ambassadors addressed this conundrum in Paris at its April 15 meeting and voted to implement the following Protocol to Article Five: “The High Contracting Parties are prepared to grant, at the request of the signatory states or interested adherents, and only where they are of the opinion that the reasons assigned are worthy of being taken into consideration, derogations to Article V of the Convention.” Derogations would be approved on a case-by-case basis and expire after a predetermined length of time, and the protocol placed the burden of proof on the state making the

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<sup>47</sup> Secretary of State to Wilson, 7 April 1920; telegram, Colby to Wallace, 9 April 1920; both in box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

request. As a result of this modification the Council of Ambassadors extended the period for signing the convention to June 1.<sup>48</sup>

The French refusal to accept reservations at the time of signature—a deviation from established diplomatic practice—thoroughly shocked Colby. He instructed Wallace on two possible courses of action: press for the creation of a protocol listing the reservations of all signatory states and, if this was not possible, present a signed declaration at the time of signature stating the United States signed the convention under the aforementioned three reservations and request that this declaration be sent to all signatory states. Second Assistant Secretary of State Alvey A. Adee sent out requests to the interested executive departments and the MAA on May 1 for their views concerning the protocol to Article Five. As responses came in over the next two weeks a consensus emerged that found no objection to American adherence to the protocol.<sup>49</sup>

As work continued at the international level, events pertaining to Walcott's "national board" continued to unfold. The Milling Bill had underwent further modifications within the War Department. This new version differed only slightly from the Inter-Departmental Board's final approved draft, the one major difference being an additional clause offering a justification for federal regulation based on admiralty along the lines of the Conference of State and Local Bar Associations' resolution the previous

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<sup>48</sup> Memorandum, State Department Office of the Solicitor to the Secretary of State, 22 May 1920, box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Paraphrase of Excerpt of Cablegram from Wallace, 15 April 1920, enclosed in Adee to the NACA, 1 May 1920, folder 32-6, box 177, Records of the National Aeronautics and Space Administration, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD. "Note by the Secretary General," 14 February 1929, International Conference on Air Navigation, (Paris), 1929, Correspondence, 1929 August-1931, box 15, William MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA.

<sup>49</sup> Colby to Wallace, 21 April 1920; Bradley to Adee, 7 May 1920; Crowell to Sec. of State, 17 May 1920; Alexander to the Sec. of State, 17 May 1920; Acting Sec. of the Navy to Sec. of State, 19 May 1920; all in box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.



September. Unable yet to harness the Constitution's treaty power as a foundation, the bill declared that "such portions of the air as are navigable by aircraft and all aircraft navigating the air are hereby declared to be within the admiralty jurisdiction of the Federal Courts." The Secretary of War forwarded copies of the bill to Republican Congressman Julius Kahn of California and Senator Wadsworth "by direction of the President" in early May for submission to their respective legislative bodies. Kahn deposited H.R. 14061 in the House hopper on May 13, and Wadsworth took complementary action with S. 4470 sixteen days later. The bills went to the House Committee on Interstate and Foreign Commerce under the chairmanship of Wisconsin Republican and future ICC chairman John J. Esch and Senator Albert Cummins's Commerce Committee, where they languished in legislative limbo.<sup>50</sup>

A letter from Baker to Esch in support of H.R. 14061 demonstrates that the Secretary of War clearly saw a close connection between international developments and national regulation. Pointing to the Canadian Air Regulation scheduled to go into effect on May 18, Baker argued that "it is absolutely necessary that legislation be speedily enacted for the protection of the rights of American aircraft and aviators." He presented the Advisory Board-Commerce Bureau apparatus within H.R. 14061 as the most rapid, economical, and flexible means to facilitate a system of federal licensing and registration necessary for international flying. Baker's views on the influence of Canadian

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<sup>50</sup> Baker to Esch, 22 May 1920, Records of the House of Representatives, folder HR 66A-D14 HR 14061-14158, box 128, RG 233, 66<sup>th</sup> Cong., Committee on Interstate and Foreign Commerce, Papers Accompanying Specific Bills and Resolutions, National Archives Building, Washington, DC; "A Bill to Regulate Air Navigation within the United States and its Dependencies, and Between the United States or any of its Dependencies and any Foreign Country or Its Dependencies," S. 4470, 66<sup>th</sup> Cong. (1920) in box 23, Records of the United States Senate, RG 46, 66<sup>th</sup> Cong., Bills & Resolutions Originating in the Senate, Original Senate Bills, National Archives Building, Washington, DC; Minutes of Regular Meeting of Executive Committee, 11 June 1920, folder 11, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington DC.

developments on the domestic issue of aviation regulation clearly drew upon an April 28 letter from R. C. Swan of New Hampshire to Menoher, and the Secretary of War forwarded a copy of it to both Esch and Wadsworth. As manager of the aviation department in a pulp and paper firm that owned land on both sides on the border, Swan became familiar with the international dimensions of aviation. Although Article Eight of the Canadian Air Regulations allowed for secondary registration of foreign aircraft, Swan pointed to two elements that prevented American pilots from taking advantage of this provision: the lack of a convention between the two nations and the absence of a national system of registration within the United States.<sup>51</sup>

The NACA, meanwhile, had been busy drafting legislation as well (an action that went beyond their official presidential mandate). Walcott joined fellow NACA members Adm. David W. Taylor and Navy Capt. Thomas T. Craven to draft a bill in coordination with New York Congressman Hicks. H.R. 14137 was introduced on May 20, a day after Hicks submitted legislation establishing a Navy Bureau of Aeronautics. Building on the draft bill presented by Walcott at the Executive Committee's February 12 meeting, H.R. 14137 called for a new Bureau of Aeronautics in the Commerce Department headed by a Commissioner of Aeronautics (to ease the burden of additional work on the Secretary of Commerce) assigned to "foster, develop, and promote all matters pertaining to civil or commercial aeronautics," retained an Aeronautical Board empowered to approve the commissioner's regulations and air routes, and affirmed the existence of distinct

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<sup>51</sup> Swan to Menoher, 28 April 1920, enclosed in Baker to Esch, 22 May 1920, Records of the House of Representatives, folder HR 66A-D14 HR 14061-14158, box 128, RG 233, 66<sup>th</sup> Cong., Committee on Interstate and Foreign Commerce, Papers Accompanying Specific Bills and Resolutions, National Archives Building, Washington, DC; Baker to Wadsworth, 22 May 1920, folder S. 4470 66<sup>th</sup>, box 59, Records of the US Senate, RG 46, 66<sup>th</sup> Cong., Papers Relating to Specific Bills and Resolutions, National Archives Building, Washington, DC.

aeronautical agencies in the Departments of War, Navy, and Post Office, thus incorporating all of the recently agreed-upon NACA principles.<sup>52</sup>

Subtle differences between H.R. 14137 and its predecessors show that, despite the stated desire to foster commercial aviation, the NACA's shared mental model associated the airplane most closely with military concerns. The War and Navy Departments were given two representatives on the proposed Aeronautical Board as compared to one for each of the other departments. In addition, the Aeronautical Service under the Commissioner of Aeronautics was to be organized as a reserve force, a position outwardly expressed through an approved uniform. Each separate aeronautic agency retained its experimental programs, but the Aeronautical Board was to act as a coordinating agency for such work and all budget requests were to go through it before submission to Congress. Two key elements differentiated the NACA-written H.R. 14137 from S. 4470. The first revolved around the bills' connection to future international treaties. In a clear attempt to eliminate controversy, the Hicks bill removed all mention of the emerging international regime. Second, S. 4470 clearly established federal authority over all flights within the jurisdiction of the United States—international, interstate, and intrastate—whereas the Hicks bill left such matters unmentioned and thus subject to further debate. H.R. 14137 represented an amalgamation of the different domestic approaches to the emerging international regime up to that time—the fundamental framework of the Inter-Departmental Board's draft legislation mixed with the NACA

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<sup>52</sup> 59 *Cong. Rec.* H 7325 (January 29, 1920): To Create a Bureau of Aeronautics in the Department of Commerce, and Providing for the Organization and Administration Thereof; Walcott to Hicks, 19 May 1920; both in folder 4, box 96, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; *Aeronautics: Sixth Annual Report of the National Advisory Committee for Aeronautics, 1920* (Washington, DC: GPO, 1921), 14-18. It appears that the three NACA members actually drafted the bill, submitting the final draft to Hicks on May 19 for submission to the House. The copy of H.R. 14137 in the NACA's *Annual Report on 1920* is the result of revisions to the bill over the summer and not the bill as originally introduced on May 20 (see Roland, *Model Research*, 55-56).

principles of March 1, with a dash of the Sub-Committee on Commercial Aviation's cautious approach to increase the likelihood of rapid passage.

To facilitate flying between Canada and the United States while Americans considered the shape of domestic legislation, the Canadian Air Board, on the recommendation of Vice-Chairman Biggar, agreed to "certain temporary Regulations affecting pilots and aircraft of United States nationality" at its May 17 meeting. In anticipation of "the organization...of a body having authority to issue Civil Certificates to Air personnel," the Air Board exempted "qualified American military Pilots" from the requirement to hold foreign licenses until November 1. Of even greater importance, the Air Board allowed aircraft "which would under the Convention relating to International Air Navigation be registerable in the United States of America" to enter Canadian airspace until the same date, provided that:

- a. full particulars of the aircraft are furnished;
- b. the aircraft is marked in accordance with the Regulations with a nationality and registration mark of which the first letter in the letter "N" and the second letter is the letter "C";
- c. if such aircraft is one which under the Regulations would require a certificate of air worthiness, a temporary certificate of air worthiness is issued;
- d. in all cases the same fees are paid as in the case of Canadian aircraft.<sup>53</sup>

As a result of these temporary regulations, forwarded to the State Department via the British Embassy, U.S. aircraft were now able to cross the border "under the same conditions [as] if that Government had passed regulation similar" to Canada.<sup>54</sup>

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<sup>53</sup> Minutes of the Canadian Air Board, 17 May 1920, "Air Board" series, vol. 3510, Department of National Defence Fonds, RG 24, Library and Archives Canada, Ottawa, Ontario.

<sup>54</sup> J. A. Wilson to the Under-Secretary of State, 18 May 1920, G-1 vol. 1256, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario.

Unable to convince the French of the need for a protocol compiling the reservations of signatory states, Wallace requested Washington's authorization to follow Colby's second plan of action—an informal presentation of U.S. reservations—along with instructions as to whether he should also sign the protocol to Article Five. Adee, in turn, urgently requested the NACA's opinion as to the best course of action and the Special Subcommittee on International Air Navigation reconvened on May 28 under Marvin's chairmanship. With Assistant State Department Solicitor Howard S. LeRoy in attendance, the subcommittee considered the three reservations sent to Wallace and found them to be of such paramount importance that they unanimously declared "if the American Ambassador is not permitted to sign the Convention with these reservations it is recommended that signature be withheld." Colby immediately cabled Wallace to follow the second plan of action and to withhold signature if necessary. In light of the possibility that the United States might not sign the convention, the French agreed to allow the separate submission of U.S. reservations and Wallace signed both the Convention Relating to the Regulation of Aerial Navigation and the Protocol to Article Five on May 31, one day before the deadline.<sup>55</sup>

Instructed to sign the protocol to Article Five only if the United States did so as well, Perley signed the protocol for Canada on June 6 "with the

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<sup>55</sup> Telegram, Wallace to Sec. of State, 24 May 1920; telegram, Wallace to Sec. of State, 26 May 1920; Memorandum discussing Special Subcommittee meeting, 28 May 1920; telegram, Colby to Wallace, 28 May 1920; telegram, Wallace to Sec. of State, 31 May 1920; all in box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Resolution of the Special Subcommittee on International Air Navigation, 28 May 1920, folder 25-30, box 153, Records of the National Aeronautics and Space Administration, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD; Minutes of Regular Meeting of Executive Committee, 11 June 1920, folder 11, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

understanding that its construction and enforcement shall in no way interfere with the entire freedom of Canada to arrange and negotiate with the United States of America as regards the regulation and control of aerial navigation between the two countries.” Finding that Wallace had submitted U.S. reservations to the convention informally via a separate note at the time of signature, Perley did likewise for Canada. Agreement existed on both sides of the border that, while a step in the right direction, the Protocol to Article Five did not adequately address the North American situation.<sup>56</sup>

By the second week of June 1920 the major elements that would define the American aviation regulatory discussion over the next six years were in place. Both the United States and Canada were signatories to the international convention; Canada had extended a special courtesy to American pilots and aircraft; the NACA’s thought had evolved to champion a four-pronged approach to aviation within the federal government; and the belief that civil aviation should be placed within the Department of Commerce had become generally accepted among federal agencies. Though the idea never entirely disappeared, advocates of a unified Department of Air had come the closest they ever would to achieving their vision with the New bill—on June 4 the Army Reorganization Act of 1920, with its official congressional sanction of the Air Service, marked the first step in the institutionalization of four distinct aeronautical entities within the United States Government.

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<sup>56</sup> Biggar to Guthrie, 28 May 1920, reel C-4317, Borden Papers, Library and Archives Canada, Ottawa, Ontario; Perley to Millerand, 1 June 1920; telegram, Perley to Derby, 4 June 1920; Perley to Borden, 7 June 1920; all in G-1 vol. 1256, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario.

## Chapter 5

### Delineating the Contours of Federal Regulation

Within the American constitutional system, treaty signature does not equal ratification. American acceptance of the Convention Relating to the Regulation of Aerial Navigation—printed as Senate Document 91 on September 15, 1919—became interwoven with the wider controversy concerning the Versailles Treaty, particularly the League of Nations established in Articles 1 to 23. One could argue that the international air convention was a casualty of the rancorous four-way debate between Wilson and his supporters and three groups of Senators: strong reservationists under the leadership of Henry Cabot Lodge; mild reservationists such as Minnesota Senators Frank B. Kellogg and Knute Nelson; and the Irreconcilables, those completely opposed to the League such as William E. Borah of Idaho, California Senator Hiram W. Johnson, Philander C. Knox of Pennsylvania, and Nebraska Senator George W. Norris. On November 19, 1920, the Senate rejected the Treaty of Versailles with a vote of thirty-eight for and fifth-three against without reservations and thirty-nine for and fifty-five against with Lodge's reservations. The treaty fared no better when it was reconsidered on March 19, 1921.<sup>1</sup>

The Senate debate over the peace treaty had a profound though indirect effect on America's acceptance of the international air convention. Battling for his particular

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<sup>1</sup> U.S. Const. art. II, § 2, cl. 2. The League of Nations debate in the U.S. Senate has been a subject of interest to diplomatic and political historians since it occurred. See Frank Barth, *The Lost Peace, A Chronology: The League of Nations and the United States Senate, 1918-1921* (New York: The Woodrow Wilson Foundation, 1945); John Milton Cooper, Jr. *Breaking the Heart of the World: Woodrow Wilson and the Fight for the League of Nations* (Cambridge, Cambridge University Press, 2001); Herbert F. Margulies, *The Mild Reservationists and the League of Nations Controversy in the Senate* (Columbia: University of Missouri Press, 1989); Ralph A. Stone, ed., *Wilson and the League of Nations: Why America's Rejection?* (New York: Holt, Rinehart and Winston, 1967); Ralph A. Stone, *The Irreconcilables: The Fight Against the League of Nations* (Lexington, KY: University of Kentucky Press, 1970); and William C. Widenor, *Henry Cabot Lodge and the Search for an American Foreign Policy* (Berkeley: University of California Press, 1980).

postwar vision and uncommitted to the Convention Relating to Aerial Navigation, Wilson never submitted it to the Senate. If the Versailles Treaty could not make it out of the Senate, how would the air convention, with its ties to the League of Nations, hope to attain the votes of two-thirds of senators as required in Article II, Section II of the Constitution? As the chances of ratification receded as the Wilson administration came to an end, events show that U.S. policymakers, while taking issue with the convention's rules and decision-making procedures, generally agreed with its principles and norms. Questions concerning the scope of federal authority continued to serve as a major obstacle to the creation of any domestic regulatory system for aviation.

Twenty-six nations had signed the convention but only three of them—Belgium, Portugal, and Siam (Thailand)—had ratified it by December 17, and the International Commission for Air Navigation had not yet convened. Questions remained over whether signatory states were even aware of the American reservations and whether they would accept them. In spite of this uncertainty, the convention offered United States policymakers a much-needed framework for international interactions in the absence of federal legislation. An exchange between Second Assistant Secretary of State Alvey A. Adee and NACA Executive Committee chairman Joseph Ames concerning possible flights between Canada and Montana by the Canadian Lethbridge Aircraft Corporation illustrates the power of the convention as a guiding force even in its unratified form. In replying to Adee's request for the NACA's opinion on the matter, Ames pointed to the fact that both the U.S. and Canada had signed the convention and saw no reason to deny such flights provided that the company "adhere strictly to the rules laid down in the Convention and the reservations specified by the United States." Though no evidence



exists that the Lethbridge Aircraft Corporation actually made flights into the United States, this episode shows that American policymakers believed that the convention provided sufficient guidelines for international flight regardless of official Senate ratification.<sup>2</sup>

The question of Canadian ratification of the convention remained uncertain as 1920 gave way to 1921. Unable to commit readily to ratification as had the other Dominions due to Canada's relationship with the United States and conflicts between the convention and 1920 Air Regulations, the Air Board recommended waiting until the first meeting of the ICAN before taking further action. Though not in agreement with the rest of the British Empire on the convention, the Canadian government found no conflict between its reservations and those of the United States. Recognizing that America's desire to allow its national aircraft into areas deemed off-limits to foreigners "may give rise to inconvenience," belief existed that such a position would not undermine U.S.-Canadian air relations. Both nations continued in their agreement on Article 5, and Air Board Secretary Wilson assured U.S. Consul General John G. Foster that "the authorities of the United States may count on the closest co-operation of the Canadian Air Board at all times."<sup>3</sup>

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<sup>2</sup> Wallace to Sec. of State, 17 December 1920, Third Assistant Sec. of State Merle-Smith to Hackworth, 20 October 1920, both in box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Ames to Adey, 1 July 1920, folder 25-30, box 153, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, Records of the National Aeronautics and Space Administration, National Archives at College Park, College Park, MD.

<sup>3</sup> Milner to the Officer Administering the Government of Canada, 30 July 1920, vol. 1256, G-1, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario; Minutes of the Air Board, 19 August 1920, vol. 3510, Department of National Defence Fonds, RG 24, Library and Archives Canada, Ottawa, Ontario; Foster to Sec. of State, 10 March 1921, folder 25-30, box 153, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD.

Two episodes during the second half of 1920 further illustrate how geography combined with the capabilities of the airplane to foster a unique U.S.-Canadian aeronautical relationship. The first, Gen. William “Billy” Mitchell’s flight from New York City to Nome, Alaska, from July 25 until October 20, saw Army Air Service aircraft enter Canadian airspace on multiple occasions with the permission and aid of the Canadian government. Arising from a desire to fly aircraft to Asia as well as “photograph unmapped areas of Alaska,” the New York-Nome flight succeeded in showing the capabilities of the Air Service’s pilots and aircraft while bringing important publicity to the organization. The long dialogue to obtain special permission from the Canadians via the British ambassador accentuated the need for a permanent air agreement between the two North American nations to allow for the rapid and continuous transfer of men and material to America’s northern-most territory in time of emergency.<sup>4</sup>

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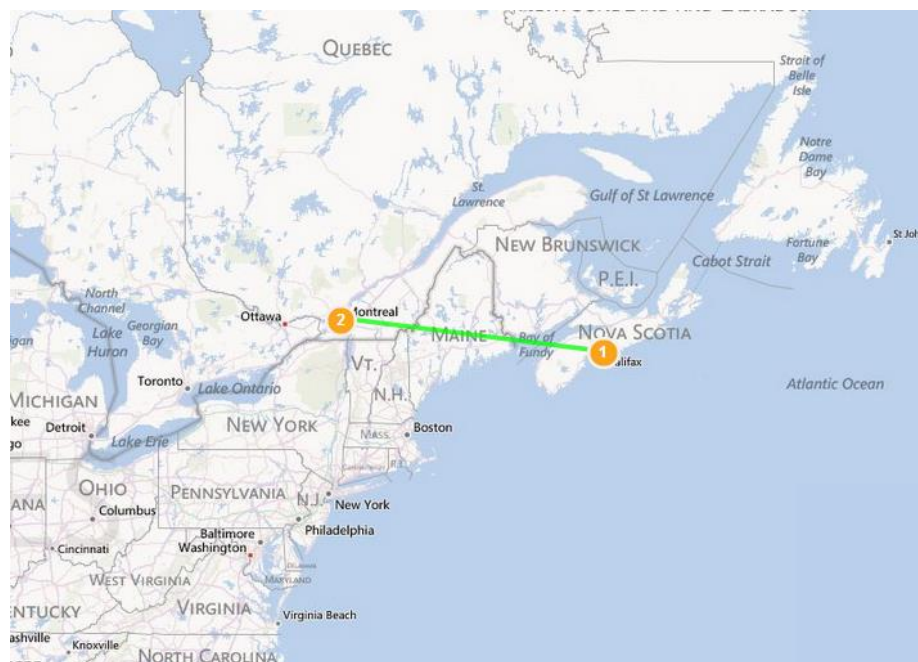
<sup>4</sup> Memorandum, Manning to Hickam, 19 August 1920, box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Maurer, *Aviation in the Army*, 174-76. Galen Roger Perras and Katrina E. Kellner place the New York-Nome flight within Mitchell’s career-long fascination with the possibility of a U.S.-Canadian air defense partnership in ““A Perfectly Logical and Sensible Thing”: Billy Mitchell Advocates a Canadian-American Aerial Alliance against Japan,” *Journal of Military History* 72 (July 2008): 785-823.



Map based on Maurer, *Aviation in the Army* and created using Bing maps:  
<http://www.bing.com/maps/?FORM=Z9LH2>

The complex process of diplomatic exchange arising from Canada’s position within the British Empire was also evident in a Canadian request for a survey flight across Maine to establish a possible air route between Halifax, Nova Scotia, and Montreal, Quebec. New Secretary of State Bainbridge Colby forwarded Ambassador Auckland C. Geddes’s September 21 inquiry to Maine’s Republican governor Carl E. Milliken and the War Department. Milliken informed Colby that “no necessity apparently exists for formal assent” and “personally...none of us can see any reason for objection.” More than a month after Geddes’s initial request, the War Department provided its wholehearted approval, including a commitment to have the air officer stationed in Boston “render all assistance consistent with proper military policy.” On October 27 the State Department requested the views of the Treasury Department, the Navy, and the

NACA. Having received a favorable reply from the Treasury and Navy, Colby informed Geddes on November 29 “that this Government perceives no objection to permitting such an examination.” By the time Ames informed Colby of the Special Subcommittee on International Air Navigation’s approval in a letter dated January 18, the Canadian government had already decided a month earlier to postpone the flight due to winter weather conditions. This extended turnaround, a total of four months in this case, plainly shows the less than ideal nature of aeronautical relations between the two nations.<sup>5</sup>



Map created using Bing maps: <http://www.bing.com/maps/?FORM=Z9LH2>

The congressional recess from June to December also affected U.S.-Canadian air relations. With the Hicks, Kahn, and Wadsworth bills collecting dust in Washington, U.S.

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<sup>5</sup> Geddes to Colby, 21 September 1920; Colby to Milliken, 30 September 1920; Colby to Baker, 30 September 1920; Milliken to Colby, 7 October 1920; Davis to Sec. of the Navy, 27 October 1920; Davis to Sec. of the Treasury, 27 October 1920; Davis to the NACA, 27 October 1920; Acting Sec. of War to Colby, 23 October 1920; R.E. Coontz to Colby, 1 November 1920; Shouse to Colby, 8 November 1920; Adee to Geddes, 29 November 1920; Ames to Colby, 18 January 1921; all in box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Minutes of Special Meeting of Special Subcommittee on International Air Navigation, 11 January 1921, folder 15.02, NACA June 8, 1921 to November 2, 1923, box 45, Office of the Second Assistant Postmaster General, Division of Air Mail Service, Government-Operated Air Mail, Central Files, 1918-1927, Records of the Post Office Department, RG 28, National Archives Building, Washington, DC.

legislation could not be enacted before the November 1 expiration of Canada's special courtesy to American fliers. Under directions from the State Department, Foster contacted Wilson to sound out whether the Canadian government would consider extending the courtesy. Secretary of State Colby, in a letter informing Geddes of this request, specifically pointed to the existence of H.R. 14061 in the House as proof of the United States' good faith in moving forward on domestic legislation and included a copy of the Kahn bill in this correspondence. The Air Board approved America's request for an additional six-month courtesy extension at its November 25 meeting. Those on both sides of the border continued to view the situation as a temporary one soon remedied through congressional action. Colby informed Geddes "it is hoped that, before the expiration of this additional period, Congress may have passed appropriate legislation providing for the regulations of air navigation." As the dates between the expiration of the initial courtesy and the decision to extend it show, a gap existed wherein American pilots were technically barred from Canadian airspace, though no evidence exists that they were ever forbidden from flying into Canada during this window. According to the NACA's *Sixth Annual Report*, "the entire incident... serves to emphasize the need for Federal legislation for the regulation of air navigation."<sup>6</sup>

Even with the extension of this courtesy, reports continued of American pilots "entering Canada at one point, flying to another and then back to the United States without complying with the Canadian Air Regulations which require the machine to be

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<sup>6</sup>Colby to Geddes, 2 September 1920, Records of the Department of External Affairs, RG 25, G-1 vol. 1256, Library and Archives Canada, Ottawa, Ontario. Hengstler to Foster, 3 September 1920; Wilson to Foster, 26 November 1920; Foster to Sec. of State, 29 November 1920; all in Records of the Department of State, RG 59 (National Archives Microfilm Publication M51, roll 1435); Minutes of the Air Board, 25 November 1920, vol. 3510, Department of National Defence Fonds, RG 24, Library and Archives Canada, Ottawa, Ontario. *Aeronautics: Sixth Annual Report of the National Advisory Committee for Aeronautics, 1920* (Washington: GPO, 1920), 18.

inspected and the pilot to be qualified.” Because the Canadian government viewed only U.S. military and naval pilots as qualified, civilian pilots were in a catch-22: they could only illustrate their qualifications by possessing a government-issued license, but the lack of American aviation legislation at both the state and federal level precluded them from obtaining one. Difficulties in determining the international border from the air and in apprehending offenders contributed to noncompliance, and repeated occurrences led the Canadian Superintendent of the Certificates Branch, Lieutenant Colonel James S. Scott, to recommend prosecutions so the word would finally spread throughout “aviation circles in the United States” that Canada took its air regulations seriously. Although “the number of infractions reported were not many,” they cut to the very heart of state sovereignty, a central element of international relations that the airplane allowed pilots to disregard with impunity.<sup>7</sup>

In a conversation with Air Board Secretary Wilson, American Vice-Consul Horace M. Sanford inferred “that the Canadian Government feels that the Government of the United States is somewhat lax in regulating their Air Service and would gladly welcome co-operation by the United States Government in the matter of licensing pilots, inspection of machines and any other regulations which would tend to lessen accidents in flying.” Geddes warned the State Department of possible future prosecutions, and the Secretary of State requested that the Departments of War, Navy, and the NACA impress upon American fliers the importance of adhering to Canadian regulations. Secretary of the Navy Daniels assured the State Department that all U.S. naval air stations would receive a copy of the Canadian regulations along with explicit instructions to adhere to

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<sup>7</sup> Minutes of the Departmental Committee, 11 October 1920, vol. 3192, Department of National Defence Fonds, RG 24, Library and Archives Canada, Ottawa, Ontario; Sanford to Sec. of State, 7 December 1920, Records of the Department of State, RG 59 (National Archives Microfilm Publication M51, roll 1435).

them in any flights into Canadian territory, though according to NACA member Capt. Thomas T. Craven “no Naval Air Stations [are] so located that flying across the boundary line is probable.” Secretary Baker informed the Secretary of State that “regulations now in force forbid flights across the border of a foreign country except upon permission from the War Department” and that the New York-Nome flight, undertaken with special authorization, constituted the only such cross-border Army flight to date. Thus the problem centered on civilian flying, an element of aeronautics completely independent of any regulatory system in the United States.<sup>8</sup>

While federal action would have to wait until Congress reconvened, regulatory developments continued elsewhere. Municipalities addressed safety concerns arising from low-flying aircraft over highly-populated areas. The Board of Commissioners of Newark, New Jersey, passed a local ordinance in the interest of public safety on May 6, 1920. It forbade flights under 4,000 feet over the city, required pilots to possess a U.S. government-issued license (thus limiting flights within city limits to military personnel), made the “central portion of the city” a no-fly zone, required a \$25 Department of Public Safety license to drop circulars, stipulated the location of lights on aircraft for night flying, and set penalties for infraction. Director of the Atlantic City Department of Public Safety William S. Cuthbert proposed a similar document, Ordinance 31, to his Board of Commissioners just over a month later. Building upon the stipulations of the Newark ordinance, it lowered the legal flight ceiling over Atlantic City to 3,000 feet, recognized

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<sup>8</sup> R. L. Craigie to Sec. of State, 12 November 1920; Sanford to Sec. of State, 7 December 1920; Merle-Smith to Sec. of War, 20 December 1920; Merle-Smith to Sec. of the Navy, 20 December 1920; Daniels to Sec. of State, 11 January 1920; Baker to Sec. of State, 20 January 1920; all in Records of the Department of State, RG 59 (National Archives Microfilm Publication M51, roll 1435). Memorandum, T. T. Craven to Director of Naval Intelligence, 11 December 1920, folder 25-30, box 153, Records of the National Aeronautics and Space Administration, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD.

an Aero Club of America license in addition to a United States-issued one, and required proof of an aircraft's airworthiness.<sup>9</sup>

The Board of Supervisors of Los Angeles followed suit with much more detailed legislation on June 16. Ordinance No. 620 established an Aircraft Examining Board empowered to issue operator's licenses valid for one year. Such licenses, required to operate a balloon or aircraft within Los Angeles County, would only be issued if the applicant already possessed a government-issued license, held a license issued by the Federation Aeronautique Internationale, or was over eighteen years of age with a documented minimum ten hours experience in a balloon/flying machine or twenty-five hours in an airship. For Section 10: Rules of the Air, the Los Angeles County Ordinance incorporated verbatim Sections 3 and 4 of Annex D of the international convention, thus applying elements of an unratified treaty directly to municipal regulation. In addition to relying upon the convention, the Los Angeles County ordinance also drew on the existing automobile framework. Once the County Inspector of Aircraft determined an aircraft's airworthiness a license plate was issued for attachment to the aircraft at all times, registrations were annual, and the verb "driven" was used throughout the ordinance instead of "flown."<sup>10</sup>

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<sup>9</sup> An Ordinance to Regulate Aviation and the Use of Airplanes, Flying Machines, Balloons and All Other Apparatus Used for the Purposes of Navigating the Air In and Over the City of Newark, New Jersey (passed 6 May 1920); An Ordinance to Regulate Aviation and the Use of Aeroplanes, Flying Machines, Balloons and All Other Machines Used for the Purpose of Navigating the Air In and Over Those Portions of the City of Atlantic City herein Designated as District No. 1, Atlantic City, New Jersey ordinance no. 31 (introduced 10 June 1920); both in box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

<sup>10</sup> An Ordinance to Regulate the Use of Aircraft in the County of Los Angeles, to Provide for the Registration and the Identification of Aircraft, to Provide for the Licensing of Persons Operating Aircraft, to Create an Aircraft Department of Los Angeles County, and to Provide for the Organization and Conduct Thereof, and to Provide Penalties for Violations of Provisions of This Act, Los Angeles County ordinance no. 620 (passed 16 June 1920), box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.



The possible adoption of automobile “plates” in aircraft registration was not limited to Los Angeles County. At its meeting on September 2, members of MacElwee’s Sub-Committee on Commercial Aviation discussed Maryland’s recent adoption of a tag system for automobile registration. Foreign Trade Advisor William R. Manning, by this time chairman of the subcommittee, “stated that some such means of identification could no doubt be successfully carried out in regard to airplanes.” Whereas the international convention provided for large text on the fuselage and wings, the automobile paradigm provided another framework.<sup>11</sup>

While the number of municipalities regulating aviation continued to grow, the NACA worked on the Hicks and Kahn bills during the congressional recess. At the Executive Committee’s June 6 meeting, Ames recommend that the Aeronautic Board be eliminated from H.R. 14137 and its proposed powers transferred to the NACA. Over the next two weeks he worked on a revised draft of H.R. 14137 and forwarded it to Walcott under strict confidence four days before presenting the bill at a special meeting of the Executive Committee on June 28. At this gathering Stratton, Marvin, and Menoher recommended further changes, and George Lewis incorporated them along with others suggested at the Executive Committee’s meeting a month later. These adjustments did not substantially change H.R. 14137’s domestic regulatory framework but, as historian Alex Roland points out, they did fundamentally alter the proposed locus of regulatory power. The modified Hicks bill as included in the NACA’s *Sixth Annual Report* made the new Commissioner of Air Navigation within the Commerce Department a member of the NACA, required the commissioner to submit proposed rules and regulations to the

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<sup>11</sup> Minutes of the 20<sup>th</sup> Meeting of the Subcommittee on Commercial Aviation, 2 September 1920, folder 13-3, box 41, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD.

NACA (which would then forward them to the Secretary of Commerce for promulgation), recognized the NACA as the official advisory body on all aviation matters, and empowered the NACA to submit unsolicited recommendations to the various government agencies involved in aeronautical activities. While fitting well with the economic frugality of Congress, this move “had all the markings of a sweeping grab for power by the NACA.” The revised Hicks bill would place the NACA at the very heart of all aviation developments within the United States, an administrative apparatus that even some of its members took issue with.<sup>12</sup>

In the NACA’s handling of Congressman Kahn’s H.R. 14061 one sees the power and pervasiveness of the Advisory Committee’s four-bureau mental model. Whereas H.R. 14137 underwent relatively minor surgery at the hands of the NACA (but with major ramifications), the Kahn bill was subjected to a major reconstructive procedure during the congressional recess. In accordance with discussions during the Executive Committee’s August meeting, Ames sent a revised version of the Kahn bill to Walcott on August 10. While “minor changes in the text” occurred throughout the draft, the first four sections of the original bill were completely replaced with the first three in the revised version of H.R.14137, and sections 10, 11, 12, and 23 of the revised Hicks bill became sections 7, 8, 9, and 19 of this new Kahn bill. As a result of this editorial work, H.R. 14061 and H. R. 14137 became essentially the same document, the only difference being that the latter made the NACA the coordinating body in all governmental matters

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<sup>12</sup> Minutes of Special Meeting of Executive Committee, 28 June 1920; Minutes of Regular Meeting of Executive Committee, 29 June 1920, both in folder 11, box 94, RU 45, Office of the Secretary Records, 1903-1924, Smithsonian Institution Archives, Washington, DC; Ames to Walcott, 25 June 1920, Lewis to Walcott, 1 July 1920, Ames to Walcott, 8 July 1920, all in 1903-1924, folder 4, box 96, RU 45, Office of the Secretary Records, Smithsonian Institution Archives, Washington, DC; *Aeronautics: Sixth Annual Report of the National Advisory Committee for Aeronautics, 1920* (Washington, DC: GPO, 1920), 14-18; Roland, *Model Research* vol. 1, 54-58.

pertaining to aviation. Whereas H.R. 14061 began as the House complement to Wadsworth's S. 4470—both introduced at the behest of Secretary of War Baker—in the hands of Ames it became a variation of the NACA-drafted Hicks bill, and the committee viewed it as providing “the minimum amount of legislation” needed to address the “existing situation.” The Subcommittee on Commercial Aviation, recognizing the prerequisite of federal legislation to allow for commercial aeronautics, viewed the revised Kahn bill as merely “adequate.” Manning saw little hope for its rapid passage, believing “that the machinery of Congress was not organized for the handling of aeronautical bills.”<sup>13</sup>

This new version of H.R. 14061 met with the approval of the NACA Executive Committee at its November 11 meeting, and it recommended that the measure be brought “to the attention of Congress in the proper manner.” The revision of HR 14061 illustrates that the window of what key members of the NACA believed was an acceptable governmental system for the regulation of aviation had closed considerably, a process that included jettisoning the Aeronautical Board, an administrative feature that the Advisory Committee had supported just a year before.<sup>14</sup>

In the American federalist system, national laws must exist within the bounds of the Constitution. During the congressional recess the National Conference of

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<sup>13</sup> Ames to Walcott, 10 August 1920, folder 4, box 96, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Minutes of Regular Meeting of Executive Committee, 20 September 1920, folder 11, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Minutes of the Twenty-Fourth Meeting of the Subcommittee on Commercial Aviation, 4 February 1921, folder 13-3, box 41, Records of the National Aeronautics and Space Administration, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD. For the similarities in H.R. 14061 and H.R. 14137 as modified by the NACA see *Aeronautics: Sixth Annual Report of the National Advisory Committee for Aeronautics, 1920* (Washington, DC: GPO, 1920), 11-18. Ames's revised Kahn bill is the version presented in the NACA's Sixth Annual Report. As Roland looks only to the *Annual Report*, he does not mention the major revisions that occurred to H.R. 14061; *Model Research* vol. 1, 54.

<sup>14</sup> Minutes of Regular Meeting of Executive Committee, 11 November 1920, folder 11, box 94, RU 45, Office of the Secretary Records, 1903-1924, Smithsonian Institution Archives, Washington, DC.

Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association established committees to study the legality of aviation regulation at their annual meetings held consecutively during the last two weeks of August in St. Louis. As an organization focusing on establishing uniformity of legislation among states, it was only natural that the NCCUSL would take up the issue of aviation regulation at its Thirtieth Annual Conference. Recognizing that “many states in the Union now have scores of aviators constantly flying from state to state carrying commerce between the states,” the conference called for the establishment of a committee to draft a uniform aviation law for voluntary state adoption. This committee, formed under the chairmanship of Baltimore lawyer John Hinkley, included George G. Bogert of Cornell University Law School among its members.<sup>15</sup>

The American Bar Association (ABA) held its annual meeting the following week. Chicago lawyer William P. MacCracken, a recently decommissioned Army pilot interested in aviation law, journeyed to St. Louis to hear the first ABA report on the subject since Simeon E. Baldwin’s 1910 presentation. This first postwar report, based upon William V. Rooker’s earlier paper for the Conference of Delegates of State and Local Bar Associations, failed to satiate MacCracken’s appetite for definitive answers. According to MacCracken, the report “rambled on and on about the law of the sea and how it might be extended to aviation. When this excursion into metaphysics was completed...they were ready to let the entire subject sink back into limbo.” Instinctively viewing aviation as a national issue rather than a state one, he believed that “it ought to be the ABA leading the fight for adequate laws” and not the NCCUSL. With the aid of

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<sup>15</sup> Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirtieth Annual Conference, St. Louis, Missouri, August 19-24, 1920, 7, 120.

two Executive Committee members—fellow Chicago lawyer John T. Richards and New York lawyer Charles A. Boston—MacCracken succeeded in getting the ABA to establish a Committee on the Law of Aviation under Boston’s chairmanship to further analyze the subject. Orrin N. Carter of the Illinois Supreme Court, William P. Bynum of North Carolina, MacCracken, and George G. Bogert rounded out the committee, with the latter serving as an important link between the NCCUSL and the ABA.<sup>16</sup>

That both organizations officially chose to study the question of aviation regulation at roughly the same time shows that, while a consensus may have developed in the executive branch over the soundness of federal regulation, this view was not yet universally accepted among lawyers. In a letter to Hinkley, Bogert broke the subject of aviation regulation into four separate issues: licensing based on tests; the development of “rules of the road” for air; the relationship between aviators and those on the surface (including questions of liability); and “the question of interstate rights: to what extent is one state obliged to allow citizens of another state to fly over its territory and what restrictions may it impose? Is this a question of the regulation of interstate commerce and hence a federal question?”<sup>17</sup>

The two aviation committees proceeded along different avenues to address whether the federal government possessed the constitutional authority to regulate aviation. The work of the ABA and NCCUSL committees may have complemented each other—Boston saw his committee as possessing “a wider scope” and “an international

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<sup>16</sup> Report of the Forty-Third Annual Meeting of the American Bar Association Held at St. Louis, Missouri, August 25-27, 1920 (Baltimore, MD: The Lord Baltimore Press, 1920), 147; Michael Osborn and Joseph Riggs, *Mr. Mac: William P. MacCracken, Jr. on Aviation, Law, and Optometry* (Memphis, TN: Southern College of Optometry, 1970), 34-38.

<sup>17</sup> Bogert to Hinkley, 16 October 1920, Aviation, Air Law, States, Uniform Aviation Laws 1930-38, box 54, William MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA.

and national aspect,” while Hinkley’s NCCUSL committee focused solely on the state level—but their ultimate goals placed them at odds. If enough states adopted uniform aviation laws before federal legislation then aviation regulation could come to be seen as a de facto extension of a state’s police powers, with the result being a decentered regulatory system similar to that of the automobile. Many saw this possibility as woefully inadequate due to the airplane’s defining characteristics of speed and directional freedom. Whereas Hinkley’s group held out the possibility that aviation fell within the federal sphere but proceeded as if it did not, Boston’s sought to address the legal justification for national regulation. The ABA special committee chairman saw his task as a difficult one and considered “a conflict between National and State authority...almost inevitable.” Unconvinced by Rooker’s admiralty argument, Boston questioned H.R. 14061’s reliance on it as the justification for federal legislation.<sup>18</sup>

Boston sent a preliminary report to the ABA’s Executive Committee at its meeting in New Orleans in early January 1921. This report, sent without the prior consultation of his fellow committee members, best shows the chairman’s position on the legal dynamics of aviation regulation. Drawing on communiques with several individuals—Simeon Baldwin, Hinkley, Secretary of Commerce Joshua W. Alexander, Bureau of Standards Director Samuel W. Stratton, members of a complementary committee of the Aero Club of America, and several others—Boston presented the following as the central elements within the subject of aviation regulation:

1. That the experience of foreign nations regarding insurance showed the “vital importance” of covering “as big a territory as possible by the same regulation, and this...calls for Federal laws and Federal supervision.”

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<sup>18</sup> Boston to Hinkley, 10 November 1920; Boston to the Editor of the *Literary Digest*, 16 December 1920; both in American Bar Association 1920-26, Aviation Law Committee, box 36, William MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA.

2. That the inherent nature of the technology itself called for federal control, as “any legislation by single States...will ultimately be detrimental to a branch of transportation by which its very nature is successfully possible only if employed over great distances.”
3. That the “tendency to rush to the National Government with all grievances” has resulted in an attempt to place aviation regulation under federal authority “regardless of the constitutional view that it is a Government of limited powers.” In a constitutional system, “powers not expressly granted, or necessarily implied in the actual grant are reserved for the States,” and “it is far better that the express power should be conferred...by amendment” rather than through the “incidental relation of aviation to other subjects” as seen in the argument for admiralty jurisdiction.

Boston saw the benefit and near necessity of federal aviation regulation but, as one trained in constitutional law, he believed that an amendment—though a long process with no guarantee of success—provided the most legitimate means to achieve that end.<sup>19</sup>

The question of whether the federal government possessed regulatory authority over the air, while it may seem academic from our current vantage point, represented the greatest obstacle to the widespread acceptance of any federal regulatory model in postwar America. The Tenth Amendment’s express declaration that “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or the people” appeared to undercut the federal legislation that many viewed as vital. The Chief of Air Service’s Advisory Board studied this matter extensively during the fall of 1920. Under the leadership of Lt. Col. A. L. Fuller this body, which included Maj. Horace M. Hickam and Air Service Legal Advisor Maj. Elza Johnson among its members, was convinced of the urgent need for federal regulation over aviation but saw “the necessity of a constitutional amendment,” believing public interest would assure its passage and ratification in just two years. “In the

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<sup>19</sup> Boston to Members of the Committee on the Law of Aviation, 7 January 1921, American Bar Association 1920-26, Aviation Law Committee, box 36, William MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; American Bar Association, Special Committee on the Law of Aviation, “First Preliminary Report to the Executive Committee” (3 January 1921), 4-6.

meantime, federal legislation...is impossible and state legislation is largely impracticable except under police powers. Past experience has shown that legislation under police powers is almost invariably repressive rather than fostering. Consequently, state legislation is to be discouraged.” Thus the board concluded that the only way to both foster commercial aviation and achieve regulatory uniformity—thus preventing a repeat of the automobile’s regulatory system—rested with the modification of the nation’s founding document. With four amendments ratified between 1913 and 1920, Americans were familiar with the process and committed to it as the proper means of expanding federal authority.<sup>20</sup>

By the end of the Wilson administration a full understanding of the multifaceted nature of aviation regulation as well as its precarious place within the American federalist system existed within the Office of the Chief of the Air Service:

It is manifest that if the navigation of the air is to be successful both in a military sense and commercially, uniformity of regulation is necessary. This cannot be expected if the police powers of the several States are left to make the rules. The regulations of...air travel should be universal and therefore international. To insure this, it would be necessary that control of the air should be vested in the Federal Government and not left to the conflicting ideas of State legislatures. There is but one way...and that is to ask the individual citizen to grant by vote to his State the authority to approve [a] constitutional amendment giving to the United States the absolute control of all airspace above some uniform distance from the earth and granting police power to the Federal Government for control of the air.<sup>21</sup>

During the final session of the 66<sup>th</sup> Congress, Manning discussed the issue of federal regulation of aviation in light of the current Canadian situation with Senator New

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<sup>20</sup> Johnson to Director of Air Service enclosed in Fickel to Fuller, 8 October 1920; A. L. Fuller, Memorandum for Executive, 3 November 1920; Advisory Board, Memorandum for Executive, 3 November 1920; all in folder 187, box 10, Records of the Air Service Advisory Board, Records of the Office of the Chief of the Air Service, 1917-21, RG 18, National Archives at College Park, College Park, MD; U.S. Const. amend. X; Banner, *Who Owns the Sky*, 155-57.

<sup>21</sup> “Legal Questions Affecting Federal Control of the Air,” *Air Service Information Circular 2* (February 26, 1921): 13.



and Congressman Kahn, and the two requested copies of any documents pertaining to U.S.-Canadian air relations previously forwarded to various executive departments. Questions arose within the State Department as to the propriety of such an action, with suggestions that the documents should “go formally to the chairmen of the appropriate committees” rather than directly to individual members of Congress. When a request was made to the NACA for clarification, secretary of its Sub-Committee on Commercial Aviation George Lewis saw “no objection to this information being given to members of Congress in their individual capacity” and “warmly approve[d] it as helping to emphasize the need of legislation.” Though advocating different administrative approaches to the federal regulation of aviation, these two airminded congressmen were clearly aware of the Canadian situation and how a lack of federal legislation negatively influenced air travel between the two nations.<sup>22</sup>

Disagreements over the legal justification of federal regulation of aviation and its proper administrative apparatus combined with the U.S. political cycle to undermine congressional action in the waning days of the Wilson administration: H.R. 14061, H.R. 14137, and S. 4470 all failed to clear their respective committees during the 66<sup>th</sup> Congress’s lame-duck third session. Several bills calling for a unified aeronautics department—California Republican Charles F. Curry’s H.R. 7925, H.R. 9804, and H.R. 16151, Iowa Republican Harry Edward Hull’s H.R. 10380 and H.R. 12134, Kahn’s H.R. 13803, Senator New’s S. 2693 and S. 3348, and Pennsylvania Republican John M. Morin’s H.R. 11206—shared the same fate as those calling for a bureau of aeronautics,

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<sup>22</sup> Memorandum to Accompany Letters to Senator New and Representative Kahn, Transmitting Reports from Ottawa Regarding Aircraft Regulations, 8 January 1921; handwritten note, 11 January 1921; memorandum, 25 January 1921; Acting Sec. of State Norman H. Davis to Kahn, 26 January 1921; all in Records of the Department of State, RG 59 (National Archives Microfilm Publication M51, roll 1435).

but their existence shows that the idea of a single aviation department possessed strong support on Capitol Hill.

To address issues of safety and insurance, private interest stepped in to fill the regulatory void. In 1916 the Society of Automobile Engineers had welcomed its “aeronautical brethren into the fold” and changed its name to the Society of Automotive Engineers to reflect this broader focus on mobility. The American Engineering Standards Committee (AESC), “associated with the Bureau [of Standards] since its establishment in 1909,” underwent reorganization in 1919 and became the “national clearinghouse for engineering and industrial standardization” under the leadership of executive secretary Dr. Paul G. Agnew of the Bureau of Standards. Although Congress had failed to act upon two bills that would have authorized official U.S. participation in the International Aircraft Standards Commission—Wadsworth’s Senate Joint Resolution No. 56 and Representative Kahn’s H.R. 4469—a meeting gathered in the NACA’s conference room on August 11, 1920, to discuss the feasibility of unofficial American participation in this postwar extension of the wartime body. During the course of the conference “frequent reference was made to the question of the formation of a National Aircraft Standards Committee” and, though such a body was not officially established, this meeting brought about an increased interest in aviation, particularly safety standards, from both the Bureau of Standards and AESC.<sup>23</sup>

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<sup>23</sup> Minutes of Conference on American Representation on the International Aircraft Standards Commission, 11 August 1920, folder 2-12, box 35, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, Records of the National Aeronautics and Space Administration, National Archives at College Park, College Park, MD; Tom D. Crouch, *Rocketeers and Gentlemen Engineers: A History of the American Institute of Aeronautics and Astronautics...and What Came Before* (Reston, VA: American Institute of Aeronautics and Astronautics, Inc., 2006), 11-16; Rexmond C. Cochrane, *Measure for Progress: A History of the National Bureau of Standards* (Washington, DC: National Bureau of Standards, U.S. Department of Commerce, 1966), 255-56. The following individuals were present at the August 11 meeting: Cdr. Patrick N. L. Bellinger, Lt. Comdr. Sydney M. Kraus, and Lt.

Lloyd, the Bureau of Standards representative on the National Safety Code Committee of the AESC, discussed the National Safety Code Committee's desire to build upon the Bureau of Standards' preliminary work to establish a safety code for aeronautics at the Sub-Committee on Commercial Aviation's September 16 meeting. By January 1921, the Bureau of Standards and the SAE were both officially sponsoring this aviation safety code and Drs. Briggs and Lloyd were in the process of drafting tentative provisions. The NACA believed in the absolute necessity of legislation "of the type indicated by the Kahn or the Hicks Bill...before any constructive work can be done in connection with aircraft standards, safety codes for aviation, or the promotion of civil aviation," while professional engineering organizations—spurred to action by a distinct Progressive ethos—took the initial steps to address "the public's distrust of flying" arising from its negative image and poor safety record.<sup>24</sup>

Closely tied to the issue of safety, prohibitively high insurance rates also undermined the development of commercial aviation. Towards the end of 1920 several large insurance companies came together as the National Aircraft Underwriters' Association (NAUA) to address the uncertain state of aircraft insurance, and they turned

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Comdr. Garland Fulton of the Navy, Capt. Henry W. Harms of the War Department, Lyman J. Briggs and Morton G. Lloyd of the Bureau of Standards, Charles I. Stanton of the Post Office, W. J. Humphreys of the Department of Agriculture, George Lewis from the NACA, L. C. Hill of the SAE, Samuel S. Bradley of the MAA, George Burgess, John Mathews and C. Warwick from the American Society of Testing Materials, John Cautley and C. B. LePage of the American Society of Mechanical Engineers, Chairman of the AESC A. A. Stevenson, and AESC secretary P. G. Agnew.

<sup>24</sup> Minutes of the Twenty-First Meeting of the Subcommittee on Commercial Aviation, 16 September 1920, Minutes of the Twenty-Third Meeting of the Subcommittee on Commercial Aviation, 7 January 1921, both in folder 13-3, box 41, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, Records of the National Aeronautics and Space Administration, National Archives at College Park, College Park, MD; Lewis to Clarkson, 28 February 1921, folder 63-5, box 285, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, Records of the National Aeronautics and Space Administration, National Archives at College Park, College Park, MD; Komons, *Bonfires to Beacons*, 28-29. For a detailed discussion of engineering ideology see Edwin Layton, *Revolt of the Engineers: Social Responsibility and the American Engineering Profession* (Cleveland, OH: Press of Case Western Reserve University, 1971).

to the Chicago-based Underwriters' Laboratory (UL) to collect data and provide information for the setting of rates. In cooperation with "engineering societies, aero clubs, the War, Navy, and Post Office Departments...the Air Board of Canada, manufacturers, pilots, owners, [and] insurance interests," the UL applied the same rigid system of testing it had initially developed to prevent electrical fires to aeronautics. In addition to recommendations concerning construction materials and safety devices, the UL developed an Aircraft Register patterned on Lloyd's Register for Vessels and a Register of Aircraft Pilots over the course of the next two years. With criteria "based upon the provisions of the Convention for the Regulation of Air Navigation" and "very closely [following] the air regulations of the Canadian Air Board," the UL system provided for the licensing of pilots, registration of aircraft, issuance of certificates of airworthiness, and international markings in compliance with existing international norms. As a voluntary system designed to assist the insurance industry, the UL's registers were unable to address the crux of aviation's public image problem: the gypsy flier. Five months into the program, only twenty-five pilots had registered under the system. Nevertheless, the private issuance of pilot and aircraft documentation based on a system drawn directly from the international convention shows the extent to which industry looked to that document as a guide and the ways in which its technical provisions infiltrated the domestic sphere regardless of Washington's official adherence.<sup>25</sup>

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<sup>25</sup> "Organize to Classify Airplane," *The Standard* 87 (December 4, 1920): 691; "American Aircraft Insurance," *Aviation and Aircraft Journal* 9 (December 20, 1920): 447; "First Year's Results in Aircraft Underwriting," *Aviation and Aircraft Journal* 10 (February 21, 1921): 243; "Underwriters' Laboratories Aviation Record," *Aviation* 12 (February 6, 1922): 159-60; "Certificates of Airworthiness," *Aviation* 12 (March 6, 1922): 291; "The Status of Aircraft Insurance," *Aviation* 13 (October 30, 1922): 599; Harry Chase Brearley, *A Symbol of Safety: An Interpretive Study of a Notable Institution Organized for Service—Not Profit* (New York: Doubleday, Page & Co., 1923), 221-34; Roger E. Bilstein, *Flight Patterns: Trends of Aeronautical Development in the United States, 1918-1929* (Athens, GA: The University of Georgia Press, 1983), 138-39; Komons, *Bonfires to Beacons*, 30; Walterman, *Airpower*, 246-47.

While the private sector addressed the symptoms of an unregulated industry, calls continued for what many saw as the ultimate cure: federal legislation. Proponents of a national approach looked to past transportation regulatory systems, whether as positive or negative examples, to support this position. *Aviation and Aircraft Journal* tied the National Conference on Highway Traffic Regulations' recent decision to push for uniform automobile regulation to the existing state of affairs in aviation. "This represents an effort to overcome the confusion resulting from the variety of state motor laws which we are now afflicted with. It is a lesson for aviation in that it shows the bad results of a lack of federal law in a very similar field. If the word airplane be substituted for automobile, pilot for motorist, and airports for cities...this summary would be as applicable as an argument for a federal aerial traffic law." The Society of Automotive Engineers—having recently establishing an aeronautical section under the chairmanship of Glenn L. Martin—also called for the federal government to act "in the same manner that it has encouraged and supported navigation on the seas. In the one instance the Government furnished maps, charts, lighthouses, whistling buoys, life-saving apparatus and the like. Why should it not furnish landing-fields, illuminated airdromes, wireless directional apparatus, licenses, proper legislation and all the things calculated to make commercial aviation successful?"<sup>26</sup>

Industry and professional societies were not the only ones publicly calling for the federal regulation of aviation. In his annual report, General Menoher addressed the

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<sup>26</sup> "Automobile Laws and Aerial Laws," *Aviation and Aircraft Journal* 9 (December 27, 1920): 475; Bullock to Victory, 31 January 1921, folder 2-2, box 32, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; "S.A.E. Report on Commercial Air Navigation," *Aviation and Aircraft Journal* 10 (January 17, 1921): 78; Annual Meeting of the Society of Automotive Engineers, Inc., New York City, January 11-13, 1921 in *Transactions of the Society of Automotive Engineers, Inc.* Part I, 16, 1921 (New York City, 1922): 18-19.

“imperative need of federal legislation for the adequate control of various national and international matters” that simply existed beyond the reach of state authority. He viewed the limited number of state laws to date as “setting an undesirable precedent, which, if adopted by other states, would soon lead to serious confusion” and pointed to the Air Service’s efforts to “discourage the enactment of state legislation prior to... federal legislation.”<sup>27</sup>

For many both inside and outside the United States, convention ratification appeared to be the solution to America’s aeronautical problems. Geddes, in informing the Secretary of State of the British decision to ratify the convention on behalf of the entire Empire except Canada, emphasized “the great importance which [the British Government] attach to the ratification of the Convention by the United States.” By the end of the first week of April the Canadian government submitted to British pressure and finally agreed to the principle of ratification “subject to reservation of its complete freedom of action in relations to [the] United States.” American ratification of the convention now offered the potential to kill two birds with one stone by providing both a basis for federal authority over the air via the Constitution’s treaty clause and a permanent legal system for U.S.-Canadian cross border flights. Ladislas d’Orcy, author of *D’Orcy’s Airship Manual*, argued that, if the convention’s ties to the League removed it from U.S. consideration, “the next best thing... is to enact... national air legislation which would be based on the text of the Paris convention” while recognizing U.S. reservations. In its *Aircraft Year Book: 1921*, the Manufacturers’ Aircraft Association took the position that “the International Aerial Convention should become the foundation of our national code of the air.” The 1920 election, four-month lame duck period, and the

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<sup>27</sup> “General Menoher’s Annual Report,” *Aviation and Aircraft Journal* 9 (December 20, 1920): 448.

appointing of high-level officials within the new Harding administration pushed any possible consideration of the convention well into 1921.<sup>28</sup>

Although the Wilson administration ended without domestic legislation or ratification of the international convention, the ideal of aviation regulation had undergone profound change in the short time since World War I: the four-pronged bureau framework continued to gain ground over that of a unified department of air within the executive branch; the question of federal regulation had evolved from whether it should occur to how it could constitutionally be enacted; the ABA had committed itself to studying the issue of aviation law; state and municipal actions continued to provide an impetus for federal regulatory uniformity; and private organizations had begun acting on a voluntary basis to fill the legislative void. Through it all the international convention provided a means to address America's aeronautical dilemma, either as an officially signed agreement or as a guide for domestic action.

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<sup>28</sup> Geddes to Colby, 25 February 1921, folder 25-30, box 153, Records of the National Aeronautics and Space Administration, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, National Archives at College Park, College Park, MD; Biggar to Pope, 7 April 1921, vol. 1288, G-1, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario; d'Orcy, "International Aircraft Marking," *Aircraft and Aeronautical Journal* 9 (December 27, 1920): 484; *Aircraft Year Book* (Boston Small, Maynard & Co., 1921), 71.

## Chapter 6

### Continuity and Change during the Harding Administration

Inaugurated as the twenty-ninth President of the United States on March 4, 1921, Ohio Republican Warren G. Harding stood for “administrative efficiency...sound business practices...the omission of unnecessary interference of Government with business...an end to Government’s experiment in business, and...more efficient business in Government administration.” Although this new administration took a different stance regarding the government/business relationship than its predecessor (government operation of the railroad industry would never occur under Harding), it is important to note that most bureaucratic positions within the government do not experience a turnover in personnel as a result of elections. This continuity of personnel can best be seen in the makeup of the NACA: ten out of twelve members of the full committee and six out of eight from the Executive Committee carried over from one administration to the next. Continuity, not change, characterized aviation policy as the United States shifted to its first true postwar administration.<sup>1</sup>

On Thursday, March 31, the newly-confirmed Secretary of War John W. Weeks, Secretary of the Navy Edwin Denby, Secretary of Commerce Herbert Hoover, and Postmaster General William H. Hays met with Major General Menoher, Admiral Moffett, Samuel W. Stratton and the Post Office’s E. C. Zoll to discuss “the existing situation in

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<sup>1</sup> Warren G. Harding, “Inaugural Address, March 4, 1921, <http://www.presidency.ucsb.edu/ws/?pid=25833>, accessed 9/4/2013. The two changes in NACA personnel from the 1920 *Annual Report* to the 1921 *Annual Report* (submitted to the president on November 20, 1920, and December 7, 1921, respectively) were Rear Adm. William A. Moffett—appointed Chief of the Bureau of Aeronautics in July 1921—replacing Thomas T. Craven and Mason M. Patrick replacing Maj. Gen. Charles T. Menoher as Chief of the Air Service; both served on the Executive Committee. Charles D. Walcott, Samuel W. Stratton, Joseph S. Ames, Maj. Thurman H. Bane, William F. Durand, John F. Hayford, Charles F. Marvin, Michael I. Pupin, Rear Adm. David W. Taylor, and Orville Wright remained NACA members throughout the administrative transition.



aeronautics.” As a result, Secretary Weeks instructed Menoher to create an ad hoc committee to draft a letter for the new President’s signature. This letter, the result of work by Menoher, Moffett, Stratton, and Zoll on the morning of April 1, directed the NACA to establish a special subcommittee “with representatives from the War, Navy, Post Office and Commerce Departments, and civil life” to study “the question of Federal regulation of air navigation, air routes to cover the whole United States, and cooperation among the various departments of the Government concerned with aviation.” Walcott forwarded it to Harding immediately, and the president signed and returned it to the NACA chairman the same day.<sup>2</sup>

To determine “what can and should be done without further legislation” and “what legislative actions are necessary to carry into effect the recommendations of the subcommittee,” Menoher and Maj. Walter G. Kilner of the Air Service, Rear Admiral Taylor and Cdr. Kenneth Whiting of the Navy, Zoll and Charles I. Stanton of the Post Office, Stratton and Eugene T. Chamberlain of the Commerce Department, president of the Detroit Aviation Society Sydney D. Waldon, Glenn F. Martin, and Vice President of the Curtiss Aeroplane and Motor Corporation and Secretary of the MAA Frank H. Russell met under the chairmanship of Walcott, with John F. Victory as secretary, as the Special Subcommittee on Federal Regulation of Air Navigation from April 5 to 8. Their conclusions, submitted to Harding on April 9, were not unexpected. The subcommittee recommended that the Army and Navy retain “complete control of the character and

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<sup>2</sup> Walcott to Keen, 30 November 1917, folder 1, box 2, Charles D. Walcott Collection, 1851 to 1940 and undated, RU 7004, Smithsonian Institution Archives, Washington, DC; Menoher to Walcott, 1 April 1921, National Advisory Committee for Aeronautics 1921-1926, box 427, Herbert Hoover Papers, Herbert Hoover Presidential Library, West Branch, IA; Harding to Walcott, 1 April 1921, folder 5, box 96, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Minutes of Special Meeting of Executive Committee, 4 April 1921, folder 12, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington DC; Komons, *Bonfires to Beacons*, 44-45.

operations of [their] own air service” and that the government should continue to support and expand the Post Office’s airmail service. Fearful of “independent and conflicting legislation by the various States” that would “hamper the development of aviation,” the subcommittee considered it the “pressing duty” of the federal government to regulate aeronautics and pointed to the modified Kahn bill’s establishment of a Commerce Department bureau as the best administrative means to do so. Though the subcommittee noted that the “federal regulation of air navigation cannot be accomplished under existing laws,” its members did not see a constitutional amendment as necessary.<sup>3</sup>

In a minority report, Waldon, Kilner, Martin, and Russell—those subcommittee members holding only a peripheral connection to the “four-bureau clique” continuing from the Wilson administration—called for the “consideration of a Department of the Air, a Unified Service, or an Independent Air Force” and requested that the President reconvene the same subcommittee to study this possible avenue. Walcott forwarded their position with the subcommittee’s report but noted in his message to Harding that “the large majority of the committee considered it neither desirable nor permissible under your letter to embark upon such discussion.” This episode illustrates that, while the four-bureau model may have crystallized within the Advisory Committee, it still had to compete with potential administrative alternatives within the larger marketplace of ideas.<sup>4</sup>

In addition to forwarding the special subcommittee’s report to Congress on April 19, Harding publicly supported the NACA’s regulatory vision a week earlier before a

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<sup>3</sup> H. R. Rep. No. 17, at 2-4 (1921); Minutes of Special Meeting of Executive Committee, 8 April 1921, folder 12, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

<sup>4</sup> Minutes of Regular Meeting of Executive Committee, 14 April 1921, folder 12, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Roland, *Model Research* vol. 1, 59-60.

joint session of Congress. In a speech wherein the new president talked at length about the necessity for continued railroad regulation (but not federal ownership), the need for a strong “federal influence” to guide highway construction, America’s desire to create “a great merchant marine,” the “need for effective regulation of both domestic and international radio operation,” and the establishment of “government-owned [radio] facilities...available for general uses,” Harding placed the regulation of aeronautics into the larger Progressive expansion of federal authority—thus the Republican’s policies differed from Wilson not in substance but degree. Repeating the special subcommittee’s recommendations almost verbatim, the new president declared that “it has become a pressing duty of the Federal government to provide for the regulation of air navigation; otherwise independent and conflicting legislation will be enacted by the various States which will hamper the development of aviation.” To achieve this end Harding called for the creation of a bureau in the Department of Commerce along with the establishment of a Bureau of Aeronautics in the Navy and the continued existence of the separate Army Air Service. In office for just over a month, Walcott and his fellow NACA members had convinced Harding of both the need for federal action and the soundness of their particular mental model.<sup>5</sup>

On Monday, April 11, 1921, the first day of the first session of the 67<sup>th</sup> Congress, Congressman Kahn introduced H. R. 201, “A Bill to Regulate Air Navigation within the United States and its Dependencies, and Between the United States or any of its Dependencies and any Foreign Country or its Dependencies.” The body of this piece of legislation, “substantially the same as H.R. 14061 and S. 4470 introduced at the request

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<sup>5</sup> Address of Warren G. Harding, President of the United States, delivered at a joint session of the two houses of Congress, 12 April 1921 (Washington, DC: GPO, 1921), 6-1

of the President during the 66<sup>th</sup> Congress,” would place the federal regulation of aviation under the joint direction of the Secretary of Commerce and an Air Navigation Committee. Kahn had rejected the NACA’s mental model—embodied within the revised version of H.R. 14061—and returned to the administrative apparatus proposed by the Inter-Departmental Committee of the Wilson administration.<sup>6</sup>

On the same day, Hicks presented two aeronautics bills. The first, H.R. 271, may have shared the same title as Kahn’s H.R. 201, but the similarities ended there: this proposed legislation marked the reintroduction of the NACA’s “modified Kahn Bill” from the 66<sup>th</sup> Congress. The particulars of H.R. 281, the second bill that Hicks proposed that day, show that he was not completely convinced that the NACA’s model constituted the best or only possible route. “A Bill to Create a Bureau of Aeronautics in the Department of Commerce and providing for the Organization and Administration Thereof” harkened back to the Inter-Departmental Board’s model. It called for the creation of an Aeronautical Board under the chairmanship of the Commerce Department’s new Commissioner of Aeronautics along with one member from the Air Service, the recently-proposed Navy Bureau of Aeronautics, and the NACA to act in a purely advisory capacity for the coordination of aeronautical activities. Although H.R. 281 did not receive the support of the NACA or the Air Service, the existence of two bills in the House based on the work of the Inter-Departmental Board—one from the same individual proposing legislation based on the NACA’s mental model—illustrates that

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<sup>6</sup> Analysis of H.R. 201 – 67<sup>th</sup> Congress, First Session; Fuller Memorandum to Executive, 16 May 1921; both in folder 282, box 14, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD.

differences still remained over the details concerning the Department of Commerce model.<sup>7</sup>

Three elements connected the aeronautical approach of the Wilson and Harding administrations: presidential support of the NACA's mental model for aviation regulation; the nature of proposed legislation; and executive indifference to the international convention. In response to a question from British ambassador Geddes concerning the United States government's position on convention ratification, Under Secretary of State Henry P. Fletcher asked the NACA and the War Department on April 23 whether their positions had changed. While both reaffirmed their official recommendation from the Wilson administration, the State Department's request may simply have been a formality: Ames had informed the Executive Committee at its meeting nine days earlier that "he had been advised unofficially by the State Department that the International Convention for the Regulation of Air Navigation was so interwoven with the League of Nations that the State Department would not seek its ratification by the Senate, but would proceed with the preparation of a separate treaty with Canada for the regulation of air navigation." The Harding administration, with its "return to normalcy," saw no reason to risk division within the Republican Party and chose not to take action on a convention tied to the previous Democratic administration. Thus a continuity of inaction in regards to the international air convention, albeit for different reasons, connected the Wilson and Harding administrations.<sup>8</sup>

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<sup>7</sup> Menoher to Adjutant General of the Army, 18 July 1921; Fuller to Col. McCaskey, undated memorandum; both in folder 282, box 14, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD; Minutes of Regular Meeting of Executive Committee, 14 April 1921, folder 12, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

<sup>8</sup> Minutes of Regular Meeting of Executive Committee, 14 April 1921, folder 12, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Fletcher to

While the Kahn and Hicks bills awaited action by the 67<sup>th</sup> Congress, Canada's special courtesy to American pilots again faced expiration on May 1. Anticipating this eventuality at its March 25 meeting, the Subcommittee on Commercial Aviation believed "it would be imposing...to ask for another extension" and sought to harness public discontent over the situation to spur congressional action. Members felt that "it might be advisable to let the pressure of the people who wish to send aviators into Canada come to Congress to hasten action, and then, if necessary, we might ask for an extension again." The Canadian Air Board's proactive approach to the situation undercut this possibility; at its April 15 meeting the Air Board decided to initiate the process of extension through Under-Secretary of External Affairs Pope, who forwarded the request to Geddes who then passed it along to Hughes. Having received the United States government's affirmation, the Air Board extended the special courtesy for six months beginning May 1. While Hughes expressed the Harding administration's gratitude to the Canadian government for its cooperative attitude, such extensions ultimately hurt the passage of domestic legislation by enabling Congress's continued inaction.<sup>9</sup>

The extension of Canada's courtesy cemented the connection between the international and domestic situations in the mind of the new Secretary of State. The

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NACA, 23 April 1921; Ames to Hughes, 2 July 1921; both in folder 25-30, State Department, 1922-1924, box 153, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Fletcher to Weeks, 23 April 1921, box 5613, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

<sup>9</sup> Minutes of the Twenty-Sixth Meeting of the Subcommittee on Commercial Aviation, 25 March 1921, folder 13-3, box 41, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Wilson to Pope, 15 April 1921; Pope to Davies, 18 April 1921; Davies to Geddes, 19 April 1921; Geddes to Hughes, 23 May 1921; Wilson to Pope, 1 June 1921; Pope to Davies, 2 June 1921; Devonshire to Geddes, 4 June 1921; Wilson to Pope, 11 June 1921; Hughes to Geddes, 21 June 1921; all in vol. 1288, G-1, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario; Fletcher to NACA, 23 April 1921; Fletcher to Sec. of War, 23 April 1921; Hughes to Geddes, 23 April 1921; all in box 5613, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

NACA's Executive Committee, in its response to Hughes's request for opinions concerning a possible extension of the Canadian courtesy, pointed out that "the existing situation is highly unfavorable, and serves to emphasize the need for the early enactment of Federal legislation...in the matter proposed in the pending bill, H.R. 271." On June 30, Hughes contacted Weeks, Denby, Hoover, Secretary of Agriculture Henry C. Wallace, Secretary of the Interior Hubert Work, Secretary of the Treasury Andrew W. Mellon, and Postmaster General Hays to solicit their views regarding the NACA's position. This was not the first time that Hoover had been approached concerning the NACA's vision of federal aviation regulation. A week before the inter-departmental meeting of March 31, Walcott had presented the Advisory Committee's four-bureau framework to the new Secretary of Commerce in a March 23 letter—one would expect it to have been viewed favorably as Walcott had recommended Hoover for membership in the American Philosophical Society not four years earlier based on "personal acquaintance."<sup>10</sup>

In a memorandum dated July 5, Eugene T. Chamberlain, Commissioner of the Commerce Department's Bureau of Navigation and a holdover from the Wilson administration, informed Hoover that "the existing situation calls for the early enactment of federal legislation and H.R. 271 was approved by the Department of Commerce's representatives." In his reply to Hughes three days later, Hoover assured Hughes that he was "heartily in favor of an early enactment of H.R. 271." On July 18, "representatives of the Aero Club of America, the Manufacturers Aircraft Association, National Aircraft

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<sup>10</sup> Minutes of the Regular Meeting of Executive Committee, 12 May 1921, folder 12, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Hughes to Hoover, 30 June 1921, National Advisory Committee for Aeronautics, 1921-1926, box 427, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; Hughes to Weeks, 30 June 1921, folder 282, box 14, Records of the Air Service Advisory Board, Records of the Office of the Chief of the Air Service, 1917-21, RG 18, National Archives at College Park, College Park, MD; Walcott to Keen, 30 November 1917, folder 1, Ho-Hy, 1879-1928 and undated, box 2, Charles D. Walcott Collection, 1851 to 1940 and undated, RU 7004, Smithsonian Institution Archives, Washington, DC.

Underwriters Association and the Society of Automotive Engineers” met in Hoover’s office. Bradley, Crowell, Coffin, and others urged the passage of federal legislation to aid investment in the fledgling industry but expressed their displeasure with H.R. 271’s awarding of increased authority to the NACA, an organization without industry representation. “Practically the first inquiry Mr. Hoover made...was whether the most urgent need for regulation was the protection of public life and property.” Pointing to the unsafe operating conditions of the gypsy flier, they assured Hoover of the connection and “he agreed to cooperate in securing legislation.”<sup>11</sup>

Much has been made of this meeting between Hoover and representatives from the aviation industry, but this gathering did not “convince” Hoover of the need for federal regulation nor did his interest mark the “awakening” of the Commerce Department to the issue. Hoover had been exposed to the NACA’s framework for aviation regulation within his first weeks as secretary—both through correspondence with Walcott and his attendance at the March 31 interdepartmental meeting—and he had already communicated his support of H.R. 271 over a week before this meeting with industry representatives. Both Stratton’s membership on the NACA and the establishment of MacElwee’s Subcommittee on Commercial Aviation show that the Commerce Department’s interest in aviation regulation preceded Hoover’s appointment to its top position. The July 18 meeting was significant for three reasons: it showed that Hoover’s Commerce Department would actively campaign to assume regulatory power over

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<sup>11</sup> Hoover to Hughes, 8 July 1921, National Advisory Committee for Aeronautics, 1921-1926, box 427, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; *Aircraft Year Book* (New York: Aeronautical Chamber of Commerce of America, Inc., 1922), 33; Bradley to Hoover, 11 April 1922, Commerce Department, Aeronautics, Bureau of, Legislation, 1922, box 121, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; Komons, *Bonfires to Beacons*, 46; Roland, *Model Research*, vol. 1, 63.



aviation (a clear break from Redfield's more passive approach); it marked the first communication of such intentions to industry; and it adjourned with an "understanding that the delegation would take responsibility for drafting an appropriate bill."<sup>12</sup>

Industry was not the only interested group that took issue with elements of H.R. 271. In a report to the Army Adjutant General, Menoher recognized the "pressing necessity" for federal legislation and conceded that H.R. 271 met that need. He further supported the State Department's "consideration...of entering into a treaty which will cover the requirements of air navigation so far as the United States and Canada are concerned" (thus supporting Walcott's earlier statement that Harding's State Department had shifted away from supporting the convention's ratification and more towards a bilateral aeronautical treaty between the two North American nations). Though generally supportive of H.R. 271, Menoher took issue with two central elements within the bill: its provisions providing for the creation of new commercial airdromes at public expense could lead to duplication and waste; and its extension of NACA authority to the establishment of aerial routes and airdromes. For Menoher, "these airdromes are airports and the relation of the federal government to them is much the same as its relation to seaports and navigable streams. The common use of government controlled airdromes for Military, Naval, Commercial and other governmental purposes, under a proper system of control and regulation, is not inconsistent with the[ir] operation." Secretary of War Weeks adopted the Air Service chief's positions on both the Canadian situation and H.R. 271 in his July 26 reply to Hughes's letter of June 30.<sup>13</sup>

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<sup>12</sup> Roland, *Model Research*, vol. 1, 63.

<sup>13</sup> Menoher to Adjutant General of the Army, 18 July 1921, folder 282, box 14, Records of the Air Service Advisory Board, RG 18, National Archives at College Park, College Park, MD; Weeks to Hughes, 26 July

Concerns existed regarding H.R. 271, but the NACA moved forward as if assured of its passage. At the Executive Committee's April 14 meeting, Ames pointed out that "if the modified Kahn bill [now Hicks's H.R. 271] is enacted in any form, the Department of Commerce will immediately ask this Committee for assistance in the preparation of rules and regulations for air navigation." At the suggestion of Menoher and David Taylor a motion passed to create a Special Subcommittee to Prepare Regulations, and Ames was chosen to "ascertain from the State Department if it intends to do anything definite in regards to [the] international air convention."<sup>14</sup>

On the afternoon of June 7 Maj. Percy E. Van Nostrand and First Lt. Albert J. Clayton of the War Department, Cdr. Kenneth Whiting and Lt. Cdr. Zachary Lansdowne of the Navy, the Post Office's Zoll and Edgerton, Stratton from Commerce, Ralph W. S. Hill of the State Department's Solicitor's Office, NACA representatives George Lewis and Navy Lt. Cdr. Jerome C. Hunsaker, Frank H. Russell, and Temple Joyce of the Maryland State Aviation Commission joined Secretary John F. Victory under the chairmanship of Ames to address the issue of federal aviation regulations. After a brief opening statement, Ames read the international convention, the Canadian Air Regulations of 1920, the British Air Navigation Regulations of 1919, and twelve other foreign regulatory laws. Discussion followed wherein it became apparent that all present "were more or less familiar" with the ICAN's provisions and "it was recorded as the sense of the meeting that air regulations for the United States should be in accord, as far as practicable, with the International Convention." As to the proper method, "the committee

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1921, folder 282, box 14, Records of the Air Service Advisory Board, Records of the Office of the Chief of the Air Service, 1917-21, RG 18, National Archives at College Park, College Park, MD.

<sup>14</sup> Minutes of Regular Meeting of Executive Committee, 14 April 1921, folder 12, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

used the Canadian Air Regulations as a basis” for their work. The subcommittee went through the Canadian Regulations “paragraph by paragraph including the appendixes,” modifying them to suit American needs. Changes were mainly of a technical nature and included such things as the placement of a circle before the nationality symbol to denote a private aircraft (rather than underlining) and setting the size of such nationality markings at one half the chord as opposed to the four-fifths stipulated in both the convention and Canadian regulations.<sup>15</sup>

At its meeting the next morning (without Zoll, Hill, or Hunsaker) the subcommittee agreed that every aircraft should be inspected before the issuance of an airworthiness certificate that “should conform to Annex B of [the] International Convention.” Before finally adjourning at 4:00 p.m., and with a substantial list of U.S.-specific modifications as a guide, the subcommittee appointed a further subcommittee consisting of Van Nostrand, Lansdowne, Edgerton, Joyce, and Victory to draft the actual regulations. A June 17 memorandum from the War Department offered Van Nostrand two primary tenets to guide in the drafting of air regulations: “rules should be simple, brief, and as few in number as possible” and “there should be international standardization as much as possible.” It also recommended a policy of reciprocal aircraft registration between the United States and Canada to ensure an unencumbered “freedom of intercommunication from North to South,” and suggested sending a group of flying officers to Ottawa to obtain information concerning the operation of the Air Board’s

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<sup>15</sup> Member List, Special Committee to Prepare Regulations for Air Navigation, 8 June 1921, Minutes of First Meeting of Special Subcommittee to Prepare Regulations for Air Navigation, 7 June 1921, Memorandum to Gen. Mitchell, Chief, Training & Operations Group, 10 June 1921, all in folder 54-2, box 276, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, Records of the National Aeronautics and Space Administration, National Archives at College Park, College Park, MD. Ernest C. Corkhill from the Treasury’s Division of Customs and W.J. Peters from the Bureau of Immigration were available to furnish information on request.

regulations firsthand. Van Nostrand's involvement in the Army-Navy bombing tests of Billy Mitchell's First Provisional Air Brigade and his "hasty departure...for Europe to return on the R-38" airship prevented the completion of the drafting subcommittee's work.<sup>16</sup>

The creation of the Special Subcommittee to Prepare Regulations may appear to be "putting the cart before the horse," because the legal basis for federal aviation regulation remained uncertain. In a memorandum to Leland Harrison in the Office of the Under Secretary of State, Hill called into question the legal basis of H.R. 271 and thus the work of the Special Subcommittee to Prepare Regulations. Foreseeing a constitutional issue concerning intrastate flights, he recommended "that the Convention should be ratified before a law is enacted attempting to place under federal control all aerial navigation in the United States." This would allow for the federal government's treaty powers to come into effect and support the bill's constitutionality in the courts, although "H.R. 271 would, of course, have to be suitably amended so as to state that it is enacted in pursuance of such Convention." Like Crowell earlier, Hill saw aviation regulation as a two-tiered process beginning at the international level.<sup>17</sup>

As they approached their 1921 annual conventions, the aviation committees of the ABA and the NCCUSL prepared to present their findings. The continued passage of municipal and state legislation, most notably by New York City and California,

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<sup>16</sup> Minutes of Second Meeting of Special Subcommittee to Prepare Regulations for Air Navigation, 8 June 1921, Memorandum for Major Van Nostrand, 17 June 1921, enclosed in Van Nostrand to Victory, 2 July 1921, all in folder 54-2, box 276, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, RG 255, Records of the National Aeronautics and Space Administration, National Archives at College Park, College Park, MD; "Bombing Tests of Warships on June 21," *Aviation and Aircraft Journal* 10 (June 6, 1921): 714; Maurer, *Aviation in the US Army*, 116-17; Tom D. Crouch, *Wings: A History of Aviation from Kites to the Space Age* (Washington, DC: Smithsonian National Air and Space Museum, 2003), 230.

<sup>17</sup> Hill to Harrison, 22 July 1921, box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

accentuated the need for a uniform state law in the eyes of the NCCUSL's Committee on Uniform Aviation Law, now under George Bogert's chairmanship. Section one of the New York City ordinance, drafted by President of the Board of Aldermen Fiorello H. La Guardia in consultation with "representatives of the Army Air Service," stated that the law's provisions "shall automatically cease and become void" once Congress passed sufficient national legislation. Seven months into the Harding administration, seventeen states had passed some sort of law addressing aviation, though only California, Connecticut, Kansas, Massachusetts, Minnesota, New Jersey, Oregon, and the Territory of Hawaii directly regulated the use of the airplane.<sup>18</sup>

From August 24 to 30, the thirty-first meeting of the NCCUSL took place in Cincinnati. Bogert's report on behalf of the aviation committee closely mirrored his recent article in *Cornell Law Quarterly* entitled "Problems in Aviation Law." After an extensive analysis of international law, the convention, and foreign air legislation, Bogert's solution to the American situation centered on the creation of a dual federal-state system of regulation. Similar to that proposed by Terry for the automobile in 1910 and by Durand for aviation immediately after World War I, this system would have the federal government exercise control over international and interstate flights with states regulating purely intrastate flights. While his analysis of constitutional law may have

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<sup>18</sup> An Ordinance to Amend an Ordinance in Relation to the Operation of "Aircraft" Over the City of New York, Ordinance No. 52, approved 23 February 1921, Aviation, Air Law, States, Individual. New York Statutes and City Ordinances, 1921-24, box 53, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; "New York Regulates Flying," *Aviation and Aircraft Journal* 10 (January 17, 1921): 78; "An Act Concerning the Registration, Numbering, and Use of Aircraft, and the Licensing of Operators Thereof," California Assembly Bill No. 14, Chapter 783, approved 3 June 1921, Aviation, Air Law, States, Statutes, 1921-25, box 54, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; Manufacturers Aircraft Association, "State Legislation: Bulletin No. 8," Aviation, Air Law, States, Statutes and Municipal Ordinances, Digest, 1921-25, box 54, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA.

been sound, Bogert failed to take into account the speed of the aircraft and near impossibility of distinguishing between intrastate and interstate flight.<sup>19</sup>

Believing the Constitution did not provide the federal government with all-encompassing regulatory authority over aviation, the NCCUSL's committee found a wide area for state power concerning licenses, the recognition of out-of-state licenses, the establishment of no-fly zones over cities, and the designation of landing areas. In drafting the NCCUSL's first tentative uniform act, Bogert "examined...the International Air Navigation Convention" and "carefully studied" the British Air Navigation Act. The very existence of a uniform law supported the belief that aviation regulation lay within the state sphere and opened up the possibility of conflicting state laws similar to those of the automobile. Such a possibility remained contrary to the desires of the NACA, the War and Navy Departments, and industry.<sup>20</sup>

While putting the finishing touches on the ABA committee's report, Charles Boston contacted the NACA and requested information as to the current aeronautical relationship between the United States and Canada. After discussing the recent extension of Canadian courtesy, Victory presented H.R. 271 as "the one measure for the Federal regulation of air navigation on which there seems to be generally favorable opinions, at least among governmental agencies involved" and included a copy for Boston's perusal. At the ABA's forty-fourth annual meeting, Boston discussed the "humiliating position" of the United States in the international community "now that, under the Air Convention

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<sup>19</sup> Bogert, "Problems in Aviation Law," *Cornell Law Quarterly* 6 (March 1921): 271-309. This article became a part of the *Congressional Record* on February 14, 1922.

<sup>20</sup> "Report of Committee on Uniform Aviation Law," *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirty-First Annual Meeting, Cincinnati, Ohio, August 24-30, 1921*, 286-92; Reasons for the Enactment of the Uniform State Law for Aeronautics, December 1922, Aviation, Air Law, States, Uniform Aviation Laws, 1920-38, box 54, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA.

that has been signed by many nations, we are technically under boycott” and pointed to the impending expiration of Canada’s courtesy as a call to action. Faced with constitutional questions and the tenacity of the common law maxim of ownership up to the heavens, Boston reiterated his committee’s stance that a constitutional amendment offered “the best ultimate solution” for establishing federal jurisdiction over the air in the face of common law.<sup>21</sup>

Boston motioned that the ABA accept the committee’s four recommendations: (1) that aviation be recognized as a proper subject for the organization’s attention; (2) that copies of the committee’s report be presented to the President, members of Congress, the NACA, the Library of Congress, the Smithsonian Institution, and the Commissioners on Uniform State Laws, with one thousand additional copies printed for distribution throughout the nation; (3) that the ABA press upon Congress the need for a constitutional amendment “instead of attempting to adopt devices of questionable constitutionality;” and (4) that the committee “be continued as a special committee of the Association.” Bogert rose to second this motion, adding that the attitude of the NCCUSL’s committee was “entirely in harmony with...Boston’s report.”<sup>22</sup>

During open discussion it became apparent to MacCracken that Boston had run “right into a hornet’s nest.” William Rooker immediately took issue with the committee’s discarding of his argument calling for the extension of admiralty law to aviation. He

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<sup>21</sup> Boston to NACA, 16 June 1921; Victory to Boston, 13 July 1921; Victory to Boston, 18 July 1921; all in folder 37-4, box 180, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; *Report of the Forty-Fourth Annual Meeting of the American Bar Association held at Cincinnati, Ohio, August 31, September 1 and 2, 1921* (Baltimore, MD: The Lord Baltimore Press, 1921), 79-83.

<sup>22</sup> “Report of the Special Committee on the Law of Aviation,” *Report of the Forty-Fourth Annual Meeting of the American Bar Association held at Cincinnati, Ohio, August 31, September 1 and 2, 1921* (Baltimore, MD: The Lord Baltimore Press, 1921), 498-99.

considered it “humiliating” that the archaic common law “should be presented to an intelligent audience,” relegating the belief that the air constituted private property to the same intellectual trash heap as the geocentric theory of the universe. W. Jefferson Davis of California pointed out that both the Committee of the Conference of Delegates of State and Local Bar Associations and the NACA opposed the necessity of a constitutional amendment, considered those in support of an amendment as possessing “an extremely pessimistic view,” and called for the ABA to support the immediate ratification of the international convention to provide a constitutional basis for federal legislation. MacCracken, rising to Boston’s defense, agreed with Davis on the desirability of ratifying the international convention but cautioned against the ABA formally endorsing its passage since “it is so connected with the League of Nations and the Treaty of Versailles that to do so would be taking political action.” Although at this point still undecided “as to the authority and power of the federal government to enact aviation laws under the present provisions of our Constitution,” MacCracken urged the full adoption of the committee’s report. Boston’s closing remarks betrayed his shock and sadness at the reaction of his colleagues and, while the ABA voted to adopt his report, he resolved that “under no circumstances would he serve again on the committee, either as chairman or as a member” and MacCracken took over as committee chairman. While the ABA’s members widely accepted the need for federal regulation, they remained divided over constitutional questions.<sup>23</sup>

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<sup>23</sup> *Report of the Forty-Fourth Annual Meeting of the American Bar Association* (Baltimore, MD: The Lord Baltimore Press, 1921), 84, 86, 94-97; “Report of the Special Committee on the Law of Aviation,” in *Report of the Forty-Fourth Annual Meeting of the American Bar Association* (Baltimore, MD: The Lord Baltimore Press, 1921), 529-30; Osborn and Riggs, *Mr. Mac*, 28-39.



With the legal basis for federal regulation still unclear, legislation continued to be introduced in Congress. The NACA, pointing to the “virtual unanimity in aeronautical circles that Congress should establish a bureau of air navigation in the Department of Commerce” and believing that “the most effective course...would be first to enact the legislation deemed necessary...and let...the constitutionality [of it] be tested in due course,” continued to push for the immediate enactment of federal legislation. Harding’s July 13, 1921, signing of the 1922 Naval Appropriations Bill—the end result of Congressman Hicks’s H.R. 273 and New Hampshire Senator Henry W. Keyes’s S. 656—cemented the second pillar of the four-bureau framework for aviation with the creation of a Bureau of Aeronautics (BuAer) in the Navy under Admiral Moffett. While this provided momentum for continued attempts to establish a corresponding commercial aviation bureau within the Commerce Department, consensus concerning the legislative details remained elusive. In addition, individuals possessing the power to block legislation had yet to adopt that particular mental model.<sup>24</sup>

A committee under the chairmanship of Howard Coffin—composed of the same industry representatives that had met with Hoover in July—drafted legislation with the goal of achieving federal regulation without a constitutional amendment. Senator Wadsworth, Chairman of the Senate’s Military Affairs Committee, submitted their bill as S. 2448, “A Bill to Create a Bureau of Civil Aeronautics in the Department of Commerce, to encourage and regulate the Operation of Civil Aircraft in Interstate and Foreign Commerce, and for Other Purposes,” on August 22. It embodied the major tenets

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<sup>24</sup> *Aeronautics: Seventh Annual Report of the National Advisory Committee for Aeronautics, 1921* (Washington: GPO, 1922), 12. For a history of BuAer and the central role of Admiral Moffett in its creation see William F. Trimble, *Admiral William A. Moffett: Architect of Naval Aviation* (Washington, DC: Smithsonian Institution Press, 1994), 64-86.

of H.R. 271 but with one major difference: it removed any and all mention of the NACA. In addition, the proposed Commissioner of Civil Aeronautics would work with the Secretary of Commerce to promulgate and enforce air regulations drafted “in conformity with and carrying into effect international aeronautical agreements and treaties,” with the bill specifically designating the new bureau as the point of contact with foreign governments concerning all aeronautical matters. On November 17, Hicks introduced an identical bill in the House as H.R. 9184. Recognizing that his committee’s bill was not perfect Coffin, “having gone through the unsatisfactory legislative experiences of the motor car industry,” pushed for Patrick’s support of the bill “to head off [the] indiscriminate enactment of local legislation throughout the country.”<sup>25</sup>

The Hicks-Wadsworth bill, as it came to be called, seemed to offer a solution to the constitutionality question. For Davis, Section 8’s declaration “that it shall be unlawful to fly or to navigate or operate any civil aircraft in violation of the provisions of this Act, or of any rule or regulation promulgated in conformity therewith, or to fly or to navigate or operate any civil aircraft in interstate or foreign commerce,” strictly limited the applicability of the act to interstate commerce, providing legal justification through the Constitution’s commerce clause and removing both the necessity for a constitutional amendment or the convention’s ratification as prerequisites to federal legislation. Such

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<sup>25</sup> A Bill to Create a Bureau of Civil Aeronautics in the Department of Commerce, to Encourage and Regulate the Operation of Civil Aircraft in Interstate and Foreign Commerce, and for Other Purposes, S. 2448, 67<sup>th</sup> Cong. (1921); Coffin to Patrick, 2 November 1921; Patrick to Coffin, 4 November 1921; Coffin to Moffett, 16 November 1921; Coffin to Patrick, 17 November 1921; Patrick to Coffin, 19 November 1921; all in box 3, Correspondence of Maj. Gen. M.M. Patrick, Chief of the Air Service and the Air Corps, 1922-1927, Records of the Office of the Chief of the Air Corps, 1917-44, Records of the Army Air Forces, RG 18, National Archives at College Park, College Park, MD; Walterman, *Airpower*, 328-29. According to Frank H. Russell’s testimony before the Senate Subcommittee, the individuals joining Coffin in drafting S. 2448 were Aero Club of America president Benedict Crowell, president of Wright Aeronautical Corporation George H. Houston, MAA manager Samuel Bradley, and president of Curtiss Aeroplane and Motor Corporation Clement Keys with an unknown “representative of the Bar Association.” (*Aviation in the Department of Commerce, Hearings Before a Subcommittee of the Committee on Commerce, United States Senate, Sixty-Seventh Congress, Second Session, on S. 2815, 67<sup>th</sup> Cong. 24 [1921].*)

authority might afterward be extended into purely intrastate activities as had occurred with federal railroad regulation in the *Minnesota Rate Case* and *Houston E. & W. Tex. Ry. Co. v. United States* Supreme Court decisions. Davis's view was not universally accepted—though not assuming control over all aviation within the jurisdiction of the United States as had H.R. 271, Section 8 could just as easily be interpreted as applying to both interstate and intrastate flight. Hoover, drawing on a report from his Solicitor's Office, tentatively supported its passage.<sup>26</sup>

In a memorandum to Patrick analyzing S. 2448 and H.R. 9184, President of the Chief of Air Service's Advisory Board Lt. Col. A. L. Fuller pointed to two fundamental flaws. First, by removing all references to the NACA, Coffin's committee had eliminated the intergovernmental coordinating element within H.R. 271 without providing a substitute. Fuller feared that such an omission would rekindle calls for a unified Department of Aeronautics, an idea that "responsible opinion" had moved away from in the past year. As a solution he suggested that the bill be amended to allow for an Air Board, the same mechanism originally proposed by the Inter-Departmental Committee.<sup>27</sup>

Fuller's second issue with the Hicks-Wadsworth bill concerned duplication and waste. Section 10 excluded all airdromes and air stations "under the control of other departments" from the bills' provisions, effectively creating two distinct systems throughout the country unless control of existing military facilities was "passed to the Department of Commerce." Echoing Menoher's earlier concern over H.R. 271, Fuller saw this strict division between military and commercial aviation stations as an

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<sup>26</sup> Davis to Mitchell, 7 September 1921, Aviation, Air Law, Federal, 1920-22, Proposed Bills, box 50, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; Waltermann, *Airpower*, 331.

<sup>27</sup> Fuller to Patrick, 28 November 1921, folder 282, box 14, Correspondence and Reports Relating to Air Service Policy, Organization, Programs, and Legislation, 1919-21, Records of the Air Service Advisory Board, Records of the Army Air Forces, RG 18, National Archives at College Park, College Park, MD.

unnecessary duplication, bound to foster contention between commercial and military aeronautics. S. 2448 also called for the Commerce Department to establish and operate its own meteorological service, although the Department of Agriculture's Weather Bureau could easily provide such information. The NACA Executive Committee took issue with the duplication of weather services as well as with Clause D of Section 3 empowering the commissioner to "encourage or undertake... aeronautical investigations and research," a provision clearly placing the new bureau in conflict with the NACA's mandate. The Executive Committee adopted Moffett's view that the bill was too general and concerned itself too closely with commercial aviation, a practically nonexistent field.<sup>28</sup>

In correspondence discussing S. 2448, Patrick and Coffin agreed on the benefits of American adherence to the convention and, barring this possibility, that "it ought to be made insofar as possible the foundation for everything that we may do here." *Aviation and Aircraft Journal* pointed to "the ever growing speed and range of aircraft" to argue for the necessity of global uniformity and recognized that "the International Convention, imperfect as it may be, affords this instrument of worldwide aerial regulation." Feelings in the State Department, however, remained mixed. In writing to Undersecretary Fletcher, Harrison believed that, even with Wallace's reservations, "ratification... would, by Articles 34 and 37, constitute a recognition of the League of Nations and of the jurisdiction... of the Court of International Justice" and as such "it would not be desirable to submit the Convention for the approval of Congress." Article 34 stipulated that the International Commission on Aerial Navigation would not meet until half the original signatory states ratified the convention. As a means of encouraging ratification, the

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<sup>28</sup> Ibid.; Minutes of Regular Meeting of Executive Committee, 15 September, 1921; Minutes of Regular Meeting of Executive Committee, 15 November 1921; both in folder 12, box 94, Office of the Secretary Records, 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

French, British, and Belgian governments decided upon a procès verbal amending the convention so as to allow the suspension of Article 5 between ratifying states and signatory states until the international body met to address the issue. When informed of this, the State Department's Office of the Solicitor recommended "a mere acknowledgement of the note" because such a declaration at the time of ratification did not address the full reservations of the United States nor the ICAN's ties to the League. While the international community attempted to modify the convention to address the concerns of nonratifying signatory states, a belief that several key tenets of the convention ran counter to American interests continued to affect the United States' official relationship to the emerging international regime.<sup>29</sup>

The basic substance of S. 2448 and H.R. 9184 underwent two rounds of revision during the 67<sup>th</sup> Congress. The first addressed the concerns of Moffett, Patrick, and the NACA and resulted in H.R. 9407 and S. 2815, submitted by Hicks and Wadsworth on December 9 and December 15, respectively. These two bills resolved the lack of coordination embodied in their predecessors by stipulating that the commissioner would formulate rules and regulations "after cooperation with other established governmental agencies." They also dropped any mention of such regulations being in agreement with international treaties, thus mirroring in legislation the State Department's retreat from the convention. They also retained S. 2448's Section 8 in its entirety, a move that left the bill

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<sup>29</sup> Coffin to Patrick, 17 November 1921; Patrick to Coffin, 19 November 1921; both in box 3, Correspondence of Maj. Gen. M.M. Patrick, Chief of the Air Service and the Air Corps, 1922-1927, Records of the Office of the Chief of the Air Corps, 1917-44, Records of the Army Air Forces, RG 18, National Archives at College Park, College Park, MD; Harrison to Fletcher, 26 September, 1921; Bearn to Sec. of State, 26 September 1921; both in box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Churchill to Devonshire, 8 August 1921; Memorandum for Canadian Prime Minister, 17 August 1921; Memorandum for the Acting Prime Minister, 17 November 1921; all in vol. 1288, G-1, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario; "Federal Air Legislation," *Aviation and Aircraft Journal* 11 (November 28, 1921): 621.

open to attacks from states' rights advocates. "The result of conferences between the private and commercial interests concerned, the Army and Navy Air Service," and the NACA, these two new bills represented "the latest thought on the subject" of federal control over aviation. The American Legion's California Department, the Aero Club of America, *Aviation and Aircraft Journal*, the Boston Chamber of Commerce, and chairman MacCracken of the ABA's Committee on the Law of Aeronautics all came out in favor of the bills.<sup>30</sup>

On the afternoon of December 19, Republican Senator Wesley L. Jones's Committee on Commerce, joined by Senator Wadsworth, heard the testimony of Patrick, Moffett, Ames, Frank H. Russell, and Second Assistant Postmaster Edward H. Shaughnessy in favor of S. 2815. Though the hearings lasted a mere two hours and drew the attention of only five members of the Senate committee, the testimony provided illustrates how the shared mental model of the "four-bureau clique" had crystallized into an ideology, one that looked to the international air convention for justification while still contending with the same constitutional issues that had undermined prior attempts at federal automobile legislation.

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<sup>30</sup> A Bill to Create a Bureau of Civil Aeronautics in the Department of Commerce, to Encourage and Regulate the Operation of Civil Aircraft in Interstate and Foreign Commerce, and for Other Purposes, S. 2815, 67<sup>th</sup> Cong. (1921); Walcott to Shaughnessy, 12 December 1921, folder 15.02, box 44, Office of the Second Assistant Postmaster General, Division of Air Mail Service, Government-Operated Air Mail, Central Files, 1918-1927, Records of the Post Office Department, RG 28, National Archives Building, Washington, DC; Harris C. Allen to Hoover, 24 December 1921, Commerce Department, Aeronautics, Bureau of, Legislation, 1921, box 121, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; Aero Club Resolution, received at Commerce Department 21 January 1922, Commerce Department, Aeronautics, Bureau of, Legislation, 1922, box 121, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; MacCracken to NACA, 12 January 1922, folder 37-4, box 180, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; "The Wadsworth-Hicks Civil Aviation Bill," *Aviation and Aircraft Journal* 11 (December 26, 1921): 730-31; "Boston C. of C. on Air Laws," *Aviation* 12 (February 13, 1922): 194.

Patrick's testimony, the first of the afternoon, immediately turned to the international situation, and he tied America's lack of commercial aviation to its failure to adhere to the international convention. During the course of his questioning Senator Jones and Florida Democrat Duncan Upshaw Fletcher disagreed over the interpretation of Section 8, with the former viewing the bill as applying to all flights within the United States and the latter understanding the bill was applicable only to interstate and foreign flights. S. 2815 thus had failed to achieve the central prerequisite of any successful legislation: clarity. Issues of constitutionality carried over into Moffett's statement. He pointed to broad public support to argue his belief that the bill "would go through even if not constitutional." In his testimony, Ames returned to the international situation. He declared it "a great mistake" for the U.S. not to adhere to the convention and presented its acceptance as a means to resolve the "highly undesirable" Canadian situation. (Ironically, British Ambassador Geddes initiated a further extension of the Canadian courtesy that very day.) Ames viewed S. 2815 as a stopgap until ratification because it allowed the new Commissioner of Civil Aviation to enact regulations along the lines of the convention. Frank Russell shared the Curtiss Corporation's experiences with airplane inspection under the Canadian Air Board to illustrate the benefits to citizens, property, and aviation's public image of a universal, centralized, and government-controlled system of airworthiness. Second Assistant Postmaster Edward H. Shaughnessy pointed to the history of railroads, particularly the unsatisfactory nature of state-based regulation, to support the bill. Even with such overwhelming support, several members of the Senate committee remained unconvinced of the bill's constitutionality.<sup>31</sup>

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<sup>31</sup> *Aviation in the Department of Commerce, Hearings Before a Subcommittee of the Committee on Commerce, United States Senate, Sixty-Seventh Congress, Second Session, on S. 2815, 67<sup>th</sup> Cong. 8, 13, 19,*

The second round of revisions to the Hicks-Wadsworth bill resulted in differences between the House and Senate versions. On the same day as the Senate subcommittee's hearing on S. 2815, Hoover recommended changes in H.R. 9407 to Massachusetts Republican Samuel E. Winslow, chairman of the House Committee on Interstate and Foreign Commerce. These additions clarified the ultimate power of the Commerce Secretary and limited the issuance of licenses to U.S. citizens and citizen-owned and controlled corporations. On December 20, Hicks submitted Hoover's revisions "in toto in a new bill" as H.R. 9657.<sup>32</sup>

Even though a long NACA-sponsored review by a New York law firm affirmed the constitutionality of S. 2815, the Senate Committee on Commerce considered it to be "most sweeping in its terms and scope." Consequently, the bill underwent substantial changes in committee and "doubtful constitutional provisions [were] omitted." S. 3076, submitted by Wadsworth on January 26, 1922, differed in many key respects from its predecessor: it incorporated Hoover's recommended changes that had precipitated H.R. 9657; it required rather than suggested that the Commissioner of Aeronautics consult with interested agencies before drafting air regulations; it placed aviation-related litigation within the federal district courts without mentioning admiralty; and it defined commerce as specifically applying to "the flying, navigating, or operating of any civil aircraft in interstate or foreign commerce, or in, over, or through" any territory solely under the federal government's jurisdiction. This last modification fundamentally

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21, 26, 28 (1921); Geddes to Sec. of War, 19 December 1921, box 7695, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD; *Aeronautics: Seventh Annual Report of the National Advisory Committee for Aeronautics, 1921* (Washington, DC: GPO, 1922), 25.

<sup>32</sup> Draft of a Bill, enclosed in Hoover to Winslow, 19 December 1921; Hicks to Hoover, 27 December 1921; both in Commerce Department, Aeronautics, Bureau of, Legislation 1921, box 121, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA.



changed the entire nature of the bill, making it appear to many desirous of a single and uniform national system as “nothing but a scrap of paper.” S. 3076 also included two new elements not seen in the 67<sup>th</sup> Congress’s previous legislation. Section 9 stated that “operators and pilots of aircraft duly licensed under State laws shall be deemed to be duly licensed operators and pilots under this Act.” This provision, an obvious nod to states’ righters, would result in the same type of dual system that Charles T. Terry had advocated in 1910 concerning the automobile, opening up the same potential for states to indirectly regulate interstate commerce. Section 10 incorporated an international reciprocal provision, placing America’s international aviation relations on a quid pro quo basis. While H.R. 9657 remained bottled up in Winslow’s committee, S. 3076 was reported to the Senate with recommendation for passage on January 25. Judge Advocate Johnson, while recognizing the constitutional foundation of its sole focus on interstate commerce, questioned S. 3076’s apparent delegation of legislative authority to the Commerce Department, an executive agency, and Section 19’s placement of aeronautic cases within federal courts.<sup>33</sup>

Debate on the Senate floor concerning S. 3076 illustrates the hurdles that even a watered-down bill faced in the Harding administration as well as the difficulty of recruiting new members to an ideology. Speaking in support of the bill, Wadsworth compared aviation to previous transportation networks by illustrating the similarities between the provisions of S. 3076 and the Steamboat Inspection Service, equating the

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<sup>33</sup> A Bill to Create a Bureau of Aeronautics in the Department of Commerce, to Encourage and Regulate the Operation of Civil Aircraft in Interstate and Foreign Commerce, and for Other Purposes, S. 3076, 67<sup>th</sup> Cong. (1922); Bureau of Aeronautics in Department of Commerce, S. Rep. No. 460, at 2,3 (1922); Waltermann, *Airpower*, 394-99; Johnson to Fuller, 3 February 1922, folder 282, box 14, RG 18, Records of the Air Service Advisory Board, National Archives at College Park, College Park, MD; J. Parker Kirlin and John M. Wooley to the NACA, “In RE S. 2815 Being a Bill to Create a Bureau of Civil Aviation, etc.,” Aviation, Air Law, Federal, 1020-22, Proposed Bills, box 50, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA.

issue of aircraft safety with that of the railroad, and contrasting the near-absence of air regulations with the plethora of automobile traffic rules. Even with the modifications to S. 3076, Wadsworth betrayed his belief in the need for federal regulation over all flights when he declared that “aerial flying is essentially interstate flying; 90 per cent of it, yea, 98 per cent of it, will be interstate, and so it is a Federal problem infinitely more than it is a State problem.”<sup>34</sup>

Republican Senator George Norris of Nebraska took issue with Section 9 of S. 3076, fearing that having to accept state-issued licenses would nullify the desired uniformity of licensing regulations. “The State issuing the license may be perfectly lax, may have no regulations, except a requirement for a fee to be paid by the applicant, but it may put them on an equal basis with the man who passes a rigid examination.” Norris’s stance mirrored Congressman James R. Mann’s concern over H.R. 5176’s two-tier system of automobile licensing during the 61<sup>st</sup> Congress. After continuous prodding from Norris over the origins of Section 9, Senator Jones admitted that the provision was inserted into the legislation in order to placate one member of the committee “pretty strongly opposed to the entire bill” in order to obtain a unanimous report. Democratic Senator Thaddeus H. Caraway of Arkansas viewed the existing state-based system of automobile and attorney licensing as positive examples to be followed, displaying shock and dismay that representatives of sovereign states would “express so much disdain for State government.” Senator Norris’s amendment to remove Section 9 passed thirty-four to sixteen, with forty-six Senators not voting. Section 19, with its provision placing air litigation within the federal district court, was removed on the motion of Utah Democrat William H. King. S. 3076 as amended passed the Senate on February 14 and went to the

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<sup>34</sup> 62 *Cong. Rec.* 2531-2532 (1922).

House Committee on Interstate and Foreign Commerce the next day. While falling short of providing the strong federal legislation advocates desired, *Aviation* pointed out that “many changes can be made” to the legislation in both the House and joint conference committees and called on those interested in seeing a stronger bill along the lines of S. 2815 to write Congressman Hicks.<sup>35</sup>

The three versions of the Hicks-Wadsworth bill present a process of refinement followed by confrontation. The first two stages, from H.R. 9184 and S. 2448 to H.R. 9407 and S. 2815, occurred largely within the aeronautical community by individuals vested in the ideology arising out of the Inter-Departmental Committee’s immediate postwar work. While H.R. 9657 incorporated minor changes at the behest of Hoover—a latecomer to the four-bureau clique—S. 3076 as submitted to the House illustrates the limits of the ideology’s acceptance by uninitiated outsiders. The related notions of states’ rights and limited government, central pillars of the American politico-cultural tradition, continued to exert a powerful force even after the centralizing tendencies of World War I.

Applying solely to interstate and foreign commerce, S. 3076 left several areas open to state legislation. In a letter to Bogert, Victory recognized that questions of aerial sovereignty and ownership remained with the states and, in his opinion, “uniform state laws along the lines suggested by you would be supplemental to the proposed Federal law.” As a result of S. 2815’s revision into S. 3076, the meeting between the Aviation Law Committees of the ABA and the NCCUSL on February 25, 1922 took on special importance.<sup>36</sup>

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<sup>35</sup> *Ibid.*, 2545-548; “Senate Passes Bureau of Aeronautics Bill,” *Aviation* 12 (February 27, 1922): 261; Komons, *Bonfires to Beacons*, 47

<sup>36</sup> *Joint Meeting of Committee of the Conference of Commissioners on Uniform State Laws and Committee on the American Bar Association on the Law of Aeronautics*, 25 February 1922, American Bar Association,

With MacCracken presiding, most of the major figures in American aeronautics joined the members of the two committees in the Willard Hotel in Washington.<sup>37</sup>

MacCracken presented four areas for consideration: the “matter of pending legislation before the Congress...Federal legislation regardless of whether it is pending...a uniform State Law...and then the advisability of an amendment to the Constitution” to provide the federal government exclusive jurisdiction over aeronautics. Bogert, recognizing that the vast majority of flights would be interstate in nature, pointed to provisions in the uniform state law wherein states agreed the possession of a federal licensing superseded the necessity of a state-issued one, illustrating that his committee was not ideologically committed to a state-centered system.<sup>38</sup>

Patrick, disagreeing with Bogert that aviators would naturally choose federal licenses over state-issued ones, argued that federal legislation should be broad in nature to “empower a proper official” to draft regulations along the lines of the international

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1922 Aeronautics law, Transcript of Proceedings, Pages 1-120, box 36, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA.

<sup>37</sup> Those present included Patrick, Moffett, retired Rear Adm. William F. Fullam, Col. Frederick Brown of the Army, Army Judge Advocate Elza Johnson, Chief of the Commerce Department’s Automotive Division Gordon Lee, Chief of the Commerce Department’s Transportation Division Eugene S. Gregg, Superintendent of the Air Mail Service C. F. Egge, the NACA’s John Victory, Temple N. Joyce of the Maryland State Aviation Commission, and General McChesney, chairman of the Conference of Commissioners on Uniform State Laws and chairman of the Chicago Air Board. Industry and aviation organization representatives included Dayton-Wright aeronautical engineer Virginius S. Clark, Edmund Ely of the National Aircraft Underwriters’ Association, Howard Coffin, the Aeronautical Chamber of Commerce’s Samuel Bradley, General Counsel for the Curtiss Aeroplane and Motor Corporation Chester W. Cuthell, Aero Club of America Executive Secretary H. E. Hartney, James R. Bibbins of the U.S. Chamber of Commerce, Fiorello La Guardia, Charles Thaddeus Terry for the National Aircraft Association, and Frank H. Russell. Secretary of the International Law Association Arthur Kuhn and University of South Carolina law professor J. Nelson Frierson also attended, and both Commerce Department solicitor Judge William E. Lamb, representing Hoover, and Charles Boston arrived later in the day.

<sup>38</sup> Victory to Bogert, 18 February 1922, folder 37-4, box 180, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; *Joint Meeting of Committee of the Conference of Commissioners on Uniform State Laws and Committee on the American Bar Association on the Law of Aeronautics*, 25 February 1922; Hoover to MacCracken, 15 February 1922, Commerce Department, Aeronautics, Bureau of, Legislation 1922, box 121, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; Osborn and Riggs, *Mr. Mac*, 39; “Aviation and the Law,” *Aviation* 12 (March 20, 1922): 344.

convention's annexes that would then "be imposed on all flyers and all operators of aircraft." Patrick believed that providing a regulatory authority, whether a commission or commissioner, with the power to modify regulations would eliminate the need to consult Congress for every minor modification arising from the ever-changing state of aeronautics. Patrick concluded by saying that, if possible, a provision in the uniform state law requiring state aeronautical authorities to apply any and all federal regulations to intrastate flying would allay his reservations concerning state legislation, and Rear Admirals Moffett and Fullam concurred in his opinion.<sup>39</sup>

Patrick was not the only one to link the domestic situation with international developments. Arthur Kuhn, author of the 1910 article "The Beginnings of an Aerial Law," found it "regrettable" that the United States was unable to adhere officially to the convention. He pointed to the "long frontier between us and our neighbor to the north" in stressing the need for a federal bill that allowed the United States to "accord...reciprocal rights and privileges" at the international level, something outside the power of the individual states. Coffin pointed to how the lack of a "single recognized authority on this side of the water" precluded American participation in international aeronautic conferences and conventions, hoping that S. 3076 would rectify the situation. Repeating his testimony before the Senate Subcommittee a month earlier, Russell shared his experiences with the Canadian Air Board's airworthiness inspection process and how a similar system in the United States would greatly assist American industry.<sup>40</sup>

Existing transportation regulatory frameworks were looked to as well. Colonel Brown proposed reinserting S. 2815's intrastate provision into S. 3076 in light of past

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<sup>39</sup> *Joint Meeting of Committee of the Conference of Commissioners on Uniform State Laws and Committee on the American Bar Association on the Law of Aeronautics*, 25 February 1922.

<sup>40</sup> *Ibid.*, 30, 107, 140-41.

experiences in water and rail transportation, but Major Johnson saw them as imperfect analogies and thus inapplicable to aviation. For Charles T. Terry, the steady expansion of the interstate commerce clause in relation to water and rail transportation illustrated its flexibility, allowing justification for complete federal regulation of aviation without constitutional amendment. In discussing the desirability of federal legislation over a uniform state law, Terry—a member of the Conference of Commissioners on Uniform State Laws—shared his prior experience in working towards uniform automobile regulation:

We started out with the idea that we could get decent, reasonable, proper laws to enable that industry and form of amusement to go on and prosper, and we failed. We worked at it for ten years and failed, long before the Conference of Commissioners was well on its way to a uniform law on the subject. Then we came down to Congress and said, “Gentlemen, it has got to be a matter of Federal regulation.”

Of what nature? A Federal bill which should provide in substance two main sets of provisions like this: one a system for the registration of those vehicles and the taking out of a license and an identification number which should be good in any State in the Union. The other...a minimum of regulation to the rules of the road and regulations of the vehicle...leaving to the States, if they chose, [to] exercise within that broad general set of provisions...what they might regard as necessary further police regulations.

Now there, I submit to you, is our precedent. We can have a national bill providing for the registration of aircraft; we can have a set of regulations in general, at least, in that bill with reference to signs and so-called rules of the road. We may have a provision for reference to a minimum set of safety requirements, brakes and that kind of thing, lights, and then leave it to the states anything they think is left for the protection of their little territory within their imaginary geographical limits. There I think is where the matter lies, and I think there may be that kind of State regulation, but that must wait until the Federal Government takes up this instant thing, and it is instant.<sup>41</sup>

Based on past difficulties in securing national automobile legislation, Terry recognized that the existence of a uniform state law would lend credence to the belief that aerial

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<sup>41</sup> Ibid., 85, 89-90, 114-17.

regulation fell within a state's police powers, adversely affecting the development of aviation, the flow of interstate commerce, and the national defense.

It was the general consensus of the witnesses present that even with a uniform law, state action should wait the enactment of federal legislation and the vast majority saw S. 3076, now in the House Committee on Interstate and Foreign Commerce, as the best means of achieving it. Not surprisingly, Judge Advocate Major Johnson held to his opinion concerning the necessity of a constitutional amendment. Former chairman of the ABA's Committee on the Law of Aeronautics Charles Boston agreed, and he pointed to the existence of the invalidity clause in S. 3076 as proof that even its framers were unconvinced of its constitutionality. Edmund Ely of the National Aircraft Underwriters' Association viewed an amendment as the "ultimate salvation of the [insurance] industry." Despite these strong opinions, the belief that a constitutional amendment must precede federal regulation remained a minority view. After several resolutions were proposed and no votes were taken, MacCracken adjourned the meeting for an executive session of the two aviation committees.<sup>42</sup>

Several areas of agreement developed while committee members considered testimony in private session. At Bogert's initiation members of both committees agreed that some components of the uniform state aviation law—particularly issues of liability—would never fall within federal jurisdiction, necessitating some sort of state legislation. The committee agreed to remove sections nine through twelve of the uniform law, thus eliminating any reference to state-based licensing and registration. It was taken as the "sense of this meeting" that, concerning a constitutional amendment, "no action be taken until the initial legislation has been enacted by Congress, the idea being [that] to discuss a

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<sup>42</sup> *Ibid.*, 67, 164.

constitutional amendment will only tend to delay action upon initial legislation.” Bogert proposed a resolution for communication to Congressman Winslow wherein the Joint Meeting expressed the desirability of federal legislation as soon as possible and its willingness to cooperate with his committee, and the motion unanimously passed. As a result, MacCracken “was delegated to go up on the hill to see Congressmen Samuel Winslow.”<sup>43</sup>

As Victory pointed out, this February 25 meeting marked “the first chance that the aviation people...had of presenting their views to the legal authorities on the American Bar Association and the State Commissions,” and as such it holds a position of unique importance in understanding the spread of American ideas concerning aviation regulation. Both the ABA’s Committee on the Law of Aeronautics and the corresponding NCCUSL committee officially reversed their previous constitutional amendment stance and recognized the constitutionality of the Wadsworth bill. While the Senate subcommittee hearings on S. 2815 and debate on the Senate floor concerning S. 3076 show the difficulties in presenting an ideology to outsiders, the February 25 Joint Meeting marked the full incorporation of MacCracken into the fold. The chairman of the ABA’s Committee on the Law of Aeronautics also became acquainted with Commerce Solicitor Judge William E. Lamb and Howard Coffin, two relationships that would shape both the regulation of aeronautics and his career in the ensuing years.<sup>44</sup>

Meeting with Winslow in his office on February 26, MacCracken secured Winslow’s cooperation and was also introduced to Assistant Legislative Counsel for the

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<sup>43</sup> Ibid., 25 February 1922, 181-83, 213-14; Second Tentative Draft of Proposed Uniform Law for Aeronautics, Aviation, Air Law, States, Bills, n/d, 1922, box 53, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; Osborn and Riggs, *Mr. Mac*, 39-40.

<sup>44</sup> *Joint Meeting of Committee of the Conference of Commissioners on Uniform State Laws and Committee on the American Bar Association on the Law of Aeronautics*, 156.



House, and his future law partner, Frederick P. Lee. Rather than attempt to modify S. 3076 or Hicks's H.R. 9657, Winslow paired the two to write a new bill and promised that "whatever you agree upon, I'll introduce and get through the House." This meant a further delay in passing federal legislation while MacCracken, Lee, and Commerce Department Solicitor Lamb worked on a new bill.<sup>45</sup>

Those arguing for the necessity of federal regulation over intrastate flight received a boost on February 27, when the Supreme Court announced its decision in the case of *Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy Railroad Co.* The issue in question concerned Section 416 of the Transportation Act of 1920, amending the Interstate Commerce Act, which empowered the ICC to discard and replace "any such rate, fare, charge, classification, regulation, or practice [that] causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce." Delivering the opinion of the court, Chief Justice William Howard Taft recognized that the Transportation Act of 1920 had fundamentally changed the nature of the ICC. Rather than protecting citizens from a predatory industry, the postwar ICC became an instrument to foster and maintain America's primary transportation network—making its duties analogous to that of S. 3076's proposed aeronautics bureau. In destroying a strict interstate/intrastate dichotomy, Taft provided ammunition for those desiring all-encompassing federal aviation legislation:

Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit, and does not regard state

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<sup>45</sup> Osborn and Riggs, *Mr. Mac*, 40-41; Komons, *Bonfires to Beacons*, 55-56.

lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the Nation, cannot exercise complete effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso.<sup>46</sup>

In spite of this decision, constitutional questions within the ABA continued to delay the new bill. By late May Winslow became frustrated with the slow pace of the lawyers. When visiting the Commerce Department to inquire as to his bill's status, Winslow shared "a few emphatic sentiments on the 'efficiency' of our Solicitor's office" with Director of the Bureau of Foreign and Domestic Commerce Julius Klein. Responding to Hoover's request for clarification as to the delay, Lamb explained that MacCracken had only recently succeeded in allaying the concerns of ABA members and that their work would "practically remove opposition to the bill."<sup>47</sup>

An incident at the Memorial Day dedication of the Lincoln Memorial accentuated the need for federal regulation of aviation and fueled demands for action. With thousands in attendance—including Vice President Coolidge, Chief Justice Taft, and Secretary of War Weeks—a pilot flew over the ceremony during President Harding's address, flying so low as to drown out his words and cause serious safety concerns. The flight of Herbert J. Fahy—future chief test pilot for the Lockheed Aircraft Company—incensed both the President and Weeks. Although "requested beforehand to keep...outside a two mile radius of the Memorial," Fahy broke no laws and therefore criminal action could not be taken against him. Upon finding out of Fahy's status as a second lieutenant in the Air

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<sup>46</sup> Transportation Act of 1920, in effect March 1, 1920 (Cambridge: Cambridge University Press, 1920), 45; *Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy Railroad Co.* 257 U.S. 563 (1922).

<sup>47</sup> Weeks to Hoover, 11 April 1922; telegram, Lamb to Hoover, 15 April 1922; Dinby to Hoover, 18 April 1922; Coffin to Hoover, 18 April 1922; Klein to Emmet, 25 May 1922; telegram, Emmet to Lamb, 25 May 1922; telegram, Lamb to Hoover, 26 May 1922; all in Commerce Department, Aeronautics, Bureau of, Legislation, 1922, box 121, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA.

Service Reserves, Weeks immediately cancelled his commission, and the Secretary of War stressed to Harding the need for prompt passage of S. 3076. *Aviation* tied the incident to the Wadsworth-Hicks bill as well, wondering “just what will it take to make Congress give us federal air legislation?” On June 1, Oklahoma’s Republican Congressman Lorraine M. Gensman proposed H.R. 11826, allowing the Commissioners of the District of Columbia to inspect aircraft, issue licenses, establish air routes, and “formulate all necessary and proper rules and regulation respecting air navigation and air traffic.” Luther Bell of the Aeronautical Chamber of Commerce of America—the postwar attempt to reinvent the aviation industry’s public image—implored the commissioners to push for national legislation rather than district regulation. Though Fahy’s flight resulted in calls for yet “another piece of sectional legislation,” it also publicized the need for national legislation.<sup>48</sup>

On June 12, Hoover forwarded the new draft legislation to Winslow with the approval of “all the lawyers that could be brought to bear upon it.” The next day, Hoover wrote a second letter to Winslow disavowing the forwarded bill and “regret[ing] intensely that we must go back and start again.” What happened? In drafting the bill MacCracken, Lee, and Lamb had followed Winslow’s desire for a unified department of aeronautics rather than a bureau in the Commerce Department. Having read the bill in detail only after forwarding it, Hoover now saw that “it goes beyond anything that has

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<sup>48</sup> Luther K. Bell to the Board of Commissioners of Washington, DC, 2 June 1922, enclosed in Bell to Patrick, 2 June 1922, box 2, General Patrick Correspondence, RG 18, National Archives at College Park, College Park, MD; “Congress ‘Dare-Devil’ Ready for Stunts,” *New York Times*, May 26, 1922; “Harding Dedicates Lincoln Memorial; Blue and Grey Join,” *New York Times*, May 31, 1922; “Weeks Urges Control of Civil Aviation,” *New York Times*, June 2, 1922; “Drops Reserve Flier By Orders of Harding,” *New York Times*, June 3, 1922; “Regulating Commercial Aviation,” *New York Times*, June 3, 1922; “Lacking Air Legislation,” *Aviation* 12 (June 12, 1922), 687; “Aviation Bill for D. of C.,” *Aviation* 12 (June 19, 1922), 724; 62 *Cong. Rec.* 7937 (1922); A Bill to Regulate Air Navigation within the District of Columbia, H. R. 11826, 67<sup>th</sup> Cong. (1922); “Starts Solo Flight Seeking New Record,” *New York Times*, May 26, 1929.

ever been discussed in the Government...and...a Department of Aeronautics looks to me to be a political dream. The question of a Secretary of Aeronautics has never been discussed by the Administration and...I do not think it will receive support.” Rather than removing opposition to the bill, the lawyers had spent over three months drafting legislation diametrically opposed to Hoover’s mental model. Upon hearing Hoover’s stance on the matter Winslow immediately dropped any attachment to the idea of a unified department, keeping copies of this original draft legislation in his office “under lock and key.” Hoover sent a revised bill creating a bureau in the Commerce Department to Winslow a week later and received assurances that it would receive the House Interstate and Foreign Commerce Committee’s immediate attention.<sup>49</sup>

Hoover’s revised bill continued S. 3076’s broad, enabling nature while containing important differences. Relying unabashedly on the commerce clause for constitutionality, it allowed the president to take possession and control of all aircraft, landing fields, and air stations regulated under the act in time of emergency, specifically forbade the use of rebates in civil air transportation, made not-for-hire aircraft subject to the act’s provisions, included a mechanism to hear and resolve complaints initiated with the ICC, left the determination of just compensation for new air routes up to the Supreme Court of the District of Columbia, placed absolute liability for damage or injury on the owner and operator of the aircraft, declared hydroplanes on the water subject to admiralty laws, and—bowing to industry desires—abolished the NACA as an independent entity and transferred its “organization, property, and all funds and obligations” to the Department

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<sup>49</sup> Hoover to Winslow, 12 June 1922; Hoover to Winslow, 13 June 1922; Klein to Emmet, 14 June 1922; Hoover to Winslow, 19 June 1922; Winslow to Hoover, 20 June 1922; all in Commerce Department, Aeronautics, Bureau of, Legislation, 1922, box 121, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; Komons, *Bonfires*, 56.

of Commerce. When comparing this draft legislation to the Senate committee's S. 3076, one can see both the influence of the joint ABA/NCCUSL committee meeting and Secretary Hoover.<sup>50</sup>

By the end of June, the House bill had become “a dead issue.” In correspondence with NACA Secretary John Victory, Winslow admitted that “he did not expect, or even hope, to have it reported out of his committee during the present session of Congress.” This was good news for the NACA, as its members took issue with their committee's dissolution and desired time to amend the bill before its presentation to the whole House. Winslow tended to follow Hoover's recommendations—in contrast to the NACA's close relationship with Hicks—but Ames remained convinced that the measure had no chance of passage. According to the historian Alex Roland, the Commerce Department draft placed the NACA “in the uncomfortable position of opposing legislation that it badly wanted.” Yet, having called for a bureau in the Commerce Department for the past three years, the NACA “would not sacrifice itself to the need for civil-aviation legislation.”<sup>51</sup>

The suboptimal aviation relationship with Canada continued as Lee and MacCracken—at Winslow's request and without Lamb, who had retired as Commerce Department Solicitor in May—continued to revise the Commerce Department's draft legislation. The unauthorized landing of an Army airplane at Camp Borden on February

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<sup>50</sup> A Bill to Authorize the Creation and Establishment in the Department of Commerce of a Bureau of Aviation for the Purpose of Regulating the Use of the Air in the Operation of Aircraft in Commerce, for the Uniform Regulation of Commerce Carried on by Means of Aircraft in Navigating the Air, for the Prevention of Interference with such Commerce or Subjecting the Same to Unjust Discrimination, and to Encourage, Foster, and Develop Civil Aviation, and for Other Purposes,” enclosed in Hoover to Winslow, 19 June 1922, House of Representatives, Winslow, Samuel E. 1921-1922, box 277, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA.

<sup>51</sup> Minutes of Meeting of Executive Committee, 29 June 1922, Minutes of Regular Meeting of Executive Committee, 31 August 1922, folder 13, box 94, RU 45, Office of the Secretary Records, 1903-1924, Smithsonian Institution Archives, Washington, DC; “What Happened to the Wadsworth Bill?” *Aviation* 13 (November 20, 1922): 683; Roland, *Model Research*, vol. 1, 64.

26 without identifying documentation, thought to have “arose, no doubt, from unfamiliarity with the regulation[s],” resulted in Secretary of State Charles Evans Hughes promising future compliance. Such assurances proved presumptuous: on July 17, U.S. Fishery and Forestry Department’s hydroairplane “Northbird” departed from Seattle, entered Canadian territory without obtaining the necessary advance permission, and landed at Prince Rupert, British Columbia, before departing for Ketchikan, Alaska. These two episodes involved government aircraft whose pilots should have known the Canadian regulations; ensuring compliance from civil pilots proved even more difficult.<sup>52</sup>

When Aeromarine Airways—the only successful commercial aviation operation in the unregulated United States—moved north for the summer and opened a Detroit-to-Cleveland route, it specifically avoided crossing the Canadian border. Looking at the images to the left, one cannot help but think that Aeromarine Airways’ President Charles F. Redden and Manager of Operations for the company’s Great Lakes Division Roland Rohlf intentionally chose to sacrifice the airplane’s inherent speed advantage in order to avoid conflicting with certain political realities.<sup>53</sup>

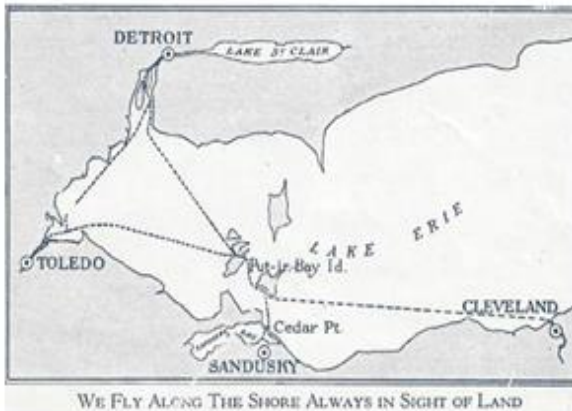
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<sup>52</sup> Wilson to Pope, 8 March 1922; Bing of Vimy to Geddes, 10 March 1922; Hughes to Geddes, 25 April 1922; Wilson to Pope, 20 July 1922; all in vol. 1308, G-1, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario; Minutes of Departmental Meeting, 19 July 1922, vol. 3192, Department of National Defence Fonds, RG 24, Library and Archives Canada, Ottawa, Ontario; Hoover to Lamb, 12 May 1922, Lamb, William E., 1922-1928 and undated, box 355, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA.

<sup>53</sup> “Cleveland-Detroit Airway Inaugurated,” *Aviation* 13 (July 24, 1922): 94-95; William Stephen Grooch, *From Crate to Clipper with Captain Musick, Frontier Pilot* (New York: Longmans, Green and Co., 1939), 55, 66; Map created using Bing maps: <http://www.bing.com/maps/?FORM=Z9LH2>; Map from interior of Detroit to Cleveland brochure, Aeromarine Airways, Inc. (Great Lakes Division), 1922. <http://www.timetableimages.com/timages/aerom22y.htm>, accessed 9/16/2013. For a discussion of Aeromarine Airways’ activities in the early 1920s and an analysis of why it failed to expand along the same lines as Pan American Airways a few years later see William M. Leary, Jr., “At the Dawn of Commercial Aviation: Inglis M. Uppercu and Aeromarine Airways,” *Business History Review* 53 (Summer 1979): 180-93.



The most direct air routes from Cleveland to Detroit places over half the distance within Canadian territory.



Aeromarine Airways' actual route, though longer, ensured their aircraft never left U.S. territory.

American private and commercial aircraft could undertake unscheduled trips into Canada but only under strict conditions and with advanced approval. Nonactive military pilots had to forward “two passport photographs...and a copy of [their] graduation or discharge certificate from the United States Air Service.” Thus such flights were largely limited to those with military training, although pilots able to provide “proof of qualifications” equivalent to those necessary for a Canadian license could receive an exception. For those commercial aircraft not possessing an

Underwriters' Laboratory-issued registration number, the Air Board would issue one “commencing with the letter N-C” as provided for in the international convention. For commercial aircraft, an inspection of air-worthiness occurred in instances where the aircraft lacked any such certificate, but private aircraft did not require such documentation. Both commercial and private aircraft were forbidden to engage in any commercial operations between two points within Canada.<sup>54</sup>

<sup>54</sup> H. W. Brown, Acting Deputy Minister, Department of Militia and Defence, “Inter State Flying Between Canada and the United States,” 2 October 1922, enclosed in Brown to Pope, 2 October 1922, vol. 1308, RG 25, G-1, Records of the Department of External Affairs, Library and Archives Canada, Ottawa, Ontario.

House action on the aviation bill remained to be seen as the NCCUSL and the ABA met for their respective annual meetings in San Francisco that August. In its report to the Thirty-Second Annual Meeting of the NCCUSL, Bogert's Committee on a Uniform Aviation Act pointed to the Supreme Court's decision in the *Wisconsin* case to declare "there is no doubt that this court would support a Federal statute giving the Federal government exclusive power to register aircraft, license pilots, and establish rules for aerial navigation." At the recommendations of the committee sections nine through twelve of the uniform law pertaining to state licensing and regulation were removed, and the NCCUSL approved the proposed uniform law for aeronautics. MacCracken's ABA committee, meeting the next week, concurred with the NCCUSL committee that discussion of a constitutional amendment should be tabled until the Taft court decided on the constitutionality of federal regulation. The report also proposed that the ABA work to forestall state legislation until the passage of a federal law. If state legislation could not wait, members were urged to "see that it conforms *in toto*" to the agreed-upon uniform state law. With the ABA's approval of MacCracken's report, both national organizations had publicly distanced themselves from the necessity of a constitutional amendment and recommended federal legislation before state action.<sup>55</sup>

Before Congress adjourned for its summer recess from June 30 to August 16, Winslow turned over the Commerce Department's draft legislation to Lee for further revision. Calls for action intensified as the summer slipped away into fall. *Aviation* went so far as to place a share of the blame for aviation accidents on those blocking federal

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<sup>55</sup> *Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the Thirty-second Annual Meeting, San Francisco, California, August 2-8, 1922*, 320-21; *Report of the Forty-Fifth Annual Meeting of the American Bar Association held at San Francisco, California, August 9, 10 and 11, 1922* (Baltimore, MD: The Lord Baltimore Press, 1922), 97-98, 413-15; "Bar Association Favors Air Code," *Aviation* 13 (September 4, 1922), 287; Banner, *Who owns the Sky?*, 126.



legislation. Samuel S. Bradley of the ACCA repeatedly requested information from the Commerce Department as to the status of the House bill, particularly the ways in which Lee's revisions differed from S. 3076. Unable to "secure any information regarding the present status of this legislation" from either Lee or Winslow and sensing no forward movement on the project, Bradley sent Hoover a letter on August 24, calling on him to "urge upon the House Committee on Interstate and Foreign Commerce the necessity of holding hearings and reporting this Bill at the earliest possible date." To emphasize the need for action, Bradley began the letter with details of eighteen reported incidences of unsafe flying over the past three months, beginning with Fahy's Memorial Day flyover in Washington (Bradley simply referred to him a "reckless pilot"). Bradley's link to safety worked. Hoover forwarded the letter to Winslow and requested clarification as to the cause of the delay. Winslow responded on September 15 that "I am still of a mind, after consideration with representatives of your department and others involved, that we have not yet completed a bill which would do more than stir up meritorious criticism in large amounts." In the case of the Winslow bill, perfect had become the enemy of the good. As a result, Winslow considered it improbable that his committee would even consider the bill before December.<sup>56</sup>

International developments continued as many awaited congressional action. On June 1, Canada deposited its ratification of the convention alongside that of Belgium, Bolivia, Britain, Australia, South Africa, New Zealand, India, France, Greece, Japan,

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<sup>56</sup> Bradley to Lamb, 3 August 1922; Hoover to Bradley, 10 August 1922; Bradley to Hoover, 16 August 1922; Hoover to Bradley, 22 August 1922; Bradley to Hoover 24 August 1922; Winslow to Hoover, 15 September 1922; all in Commerce Department, Aeronautics, Bureau of, Legislation, 1922, box 121, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; Hoover to Winslow, 30 August 1922, House of Representatives, Winslow, Samuel E., 1921-1922, box 277, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; "Responsibility for Airplane Accidents," *Aviation* 13 (August 21, 1922): 213.

Portugal, the Kingdom of the Serbs, Croats and Slovenes, and Siam. When the treaty entered into force on July 11, Article Five of the convention became fully applicable to the U.S.-Canadian situation, further complicating matters between the two North American nations. Meeting for the first time on that very day under the presidency of Sir Sefton Brancker with Albert Roper as secretary, the ICAN decided to address the possibility of amending Article Five at its next meeting in October.<sup>57</sup>

On September 21, Secretary of War Weeks contacted Hughes concerning a matter of continued inconvenience arising from the current arrangement with Canada. Because all flights into Canada required special permission from the Air Board in advance, routine flights between Selfridge Field and Cleveland and Selfridge Field and Buffalo were unable to make consistent use of the shortest route through Canadian territory. The need to remain south of the border extended flights to and from Cleveland from 102 miles to 148 miles and those to and from Buffalo from 208 miles to 314 miles, resulting in greater fuel consumption, unnecessary travel time, and greater wear on equipment. "In view of the frequent necessity of these flights," Weeks requested Hughes to ascertain if the Canadian government would be willing to grant "blanket authority...to make [such] flights...without the formality of first securing authority from the Canadian Air Board in each case," assuring him that such flights would strictly adhere to Canadian regulations.<sup>58</sup>

Hughes forwarded Weeks's request to British Ambassador Geddes five days later.

As the request made its way through the various levels of the Canadian government, the

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<sup>57</sup> "Inter-state Flying Between Canada and the United States," enclosed in Fiset to Pope 19 September 1922, vol. 1308, RG 25, G-1, Records of the Department of External Affairs, Library and Archives Canada, Ottawa, Ontario; International Commission for Air Navigation, *The International Air Convention of 13<sup>th</sup> October 1919: Its Preparation; Its Entry Into Force; Its Application* (May 1929), Call #248.211-118, IRIS # 160166, AFHRA, Maxwell AFB, AL; "International Air Convention," *Aviation* 13 (August 21, 1922): 218.

<sup>58</sup> Weeks to Hughes, 21 September 1922, box 7695, RG 59, Records of the State Department, National Archives at College Park, College Park, MD.

ICAN met in London and voted to accept the French proposal to amend Article Five to include the following italicized clause:

No contracting State shall, except by a special and temporary authorization, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State, *unless it has concluded a special convention with the State in which the aircraft is registered. The stipulations of such special convention must not infringe the rights of the contracting parties to the present Convention, and must conform to the rules laid down by the said Convention and its annexes. Such special convention shall be communicated to the International Commission for Air Navigation, which will bring it to the knowledge of the other contracting States.*<sup>59</sup>

While this offered a means of establishing a bilateral agreement between the United States and Canada in the future, it did not meet the needs of the present situation. America's legislative delay postponed the creation of a domestic regulatory agency and the Canadian government recognized that "until such a body is created it will not be possible to negotiate an agreement with the United States Government in regard to interstate flying between the two countries." Discussing Weeks's request for blanket overflight rights in a letter to Pope, Assistant Deputy Minister of the Department of Militia and Defence H. W. Brown affirmed that Canada was "favourably inclined towards granting the request," but recognized that any such grant of permanent overflight rights would rely upon a specific derogation from Article Five as amended. In addition, he pointed to the similar need for Canadian aircraft to fly around Maine when travelling between St. John and Halifax on the east coast and Montreal and Quebec, requesting that the United States grant reciprocal overflight provisions if the ICAN approved the

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<sup>59</sup> Protocol Relating to an Amendment to Article 5 of the Convention for the Regulation of Aerial Navigation of the 13<sup>th</sup> October 1919, 27 October 1922, vol. 1338, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario; ICAN, "Official Bulletin No. 1" (August 1922), box 5618, RG 59, Records of the State Department, National Archives at College Park, College Park, MD (italics in document); "International Commission for Air Navigation: Resume of Proceedings at First Session, London, October 72," *Aviation* 13 (November 27, 1922): 718; Albert Roper, "Recent Developments in International Aeronautical Law," *Air Law Journal* 1 (October 1920): 296.

derogation. Geddes forwarded the Canadian Government's official response to Hughes on November 22. Hughes took up the possibility of reciprocal overflight rights with the "appropriate authorities," and both Secretary Weeks and Governor of Maine Percival P. Baxter saw no issue with the granting of such privileges. Hughes informed Geddes of America's willingness to grant overflight reciprocity relating to these specific routes on January 3, but a decision from ICAN concerning the necessary derogation would have to wait at least until its third session on February 28. Secretary of War Weeks, desiring a permanent solution to the situation, recommended to Hughes "that steps be taken to conclude a treaty with Canada governing flying between the two countries" along the lines of the convention, but the lack of domestic legislation continued to undercut this possibility.<sup>60</sup>

In Washington, MacCracken and Lee spent three November days hammering out the Winslow bill. The finished product did not correspond to the desires of the military and industry for broad enabling legislation. Succumbing to the lawyer's affinity for detail, the two had drafted a bill that was—according to MacCracken—"somewhat ahead of its time" and more suited to the New Deal era than the early 1920s. Through sixty-four pages the Civil Aeronautics Act of 1923, introduced as H.R. 13715 on January 8, 1923,

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<sup>60</sup> Hughes to Geddes, 26 September 1922; Geddes to Hughes, 22 November 1922; Hughes to Weeks, 4 December 1922; Hughes to Baxter, 20 December 1922; Hughes to Geddes, 3 January 1923; Hughes to Weeks, 19 January 1923; all in box 7695, RG 59, Records of the State Department, National Archives at College Park, College Park, MD; Weeks to Hughes, 29 December 1922, box 6635, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Brown to Pope, 31 October 1922; Hughes to Geddes, 4 December 1922; both in vol. 1308, G-1, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario; Memorandum, enclosed in Scott to Director, Canadian Air Force, 5 February 1923, vol. 1338, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario. By its Annual Report for 1923, the NACA came to recognize that a treaty with Canada, either the ICAN or a bilateral one, would be useless without a domestic regulatory agency. *Aeronautics: Ninth Annual Report of the National Advisory Committee for Aeronautics, 1923* (Washington, DC: GPO, 1924), 14.

delineated a vast field of federal authority in copious detail. In an obvious allusion to Taft's decision in the Wisconsin case, Section 221 placed all flying under federal control:

Inasmuch as air navigation is a unit and does not regard State lines, and the elements thereof ordinarily subject to regulation by the States are so mingled with those elements subject to regulation by the Federal Government, that *the Federal Government cannot effectively regulate, prevent interference with, and safeguard interstate and foreign commerce by air navigation without incidental regulation of intrastate commerce* by air navigation and of air navigation for other than commercial purposes, the provisions of this title shall apply in respect of all air navigation in the United States, and to aircraft and airmen engaged, and to air navigation facilities used, in such navigation.<sup>61</sup>

A comparison of the sections concerning penalties in S. 3076 and H.R. 13715 illustrates the level of extreme detail present throughout the Winslow bill. Section 12 of S. 3076 declared “any violation of the provisions of this Act, or any rule or regulation promulgated in conformity therewith, shall be punishable by a fine not exceeding \$500 or by imprisonment for a term not exceeding six months, or both.” H.R. 13715 divided the subject into civil and criminal penalties and, over the course of six pages, provided eight different categories of offense with fines ranging from \$200 to \$5,000 as well as details on the proper procedure for collection. Title Three, Part Four of the bill included five pages of detailed specifications concerning the liability of common carriers—something never mentioned in prior air legislation—and Title Four's fifteen pages specified amendments to no less than seven laws. Rather than abolishing the NACA, H.R. 13715 expanded its membership with the inclusion of a representative from the Bureau of Civil Aeronautics, the Assistant Postmaster General's office, and the Coast Guard. In addition, it called for the creation of a Civil Aeronautics Consulting Board to facilitate communication between the Secretary of Commerce and industry. The bill declared U.S.

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<sup>61</sup> Civil Aeronautics Act of 1923, H. R. 13715, 67<sup>th</sup> Cong. (1923) (italics added for emphasis); Osborn and Riggs, *Mr. Mac*, 41; Komons, *Bonfires to Beacons*, 56; Waltermann, *Airpower*, 403.

sovereignty over its airspace, forbade foreign military aircraft from flying within said airspace without permission from the Secretary of State or an existing treaty, and included an invalidity clause.<sup>62</sup>

In explaining the delay Winslow stated that, upon receipt of S. 3076, “it was soon apparent that it would be necessary to redraft the proposed legislation in respect of Constitutional questions involved; the situation presented by the International Air Convention; certain departmental differences” and various other details. *Law Memoranda Upon Civil Aeronautics*, printed for members of the House Committee on Interstate and Foreign Commerce on January 31, 1923, provides an insight into the thoughts of Lee and MacCracken. Beginning with a detailed discussion of the current state of the international convention, Canada’s reservations, and the convention’s full text, this one-hundred-page document also contained extracts from the ABA and NCCUSL aviation committee reports, Bogert’s “Problems in Aviation Law,” and the proposed Uniform State Aviation Act. It also included memoranda from Lee concerning the constitutionality of Section 221. Looking to the commerce clause as the primary justification for federal regulation, Lee dismissed the need for a constitutional amendment as too time-consuming and unnecessary, admiralty law as being too distinct from aviation, and the treaty power as impossible due to the president’s refusal to submit the convention to the Senate for consent and ratification.<sup>63</sup>

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<sup>62</sup> S. 3076, 67<sup>th</sup> Cong. (1922); Civil Aeronautics Act of 1923, H. R. 13715, 67<sup>th</sup> Cong. (1923). The acts that would have been amended by H.R. 13715 were the Tariff Act of 1922, An Act Granting Additional Quarantine Powers and Imposing Additional Duties upon the Marine-Hospital Service of 1893, the 1917 Immigration Act, the 1922 Narcotic Drugs Import and Export Act, the Criminal Code, An Act to Increase the Efficiency and Reduce the Expenses of the Signal Corps of the Army, and to Transfer the Weather Service to the Department of Agriculture of 1890, and the Espionage Act of 1917 (technically no longer in force).

<sup>63</sup> *Law Memoranda Upon Civil Aeronautics* (Washington, DC: GPO, 1923), 48-51.

Arguing that “the commerce power of the Constitution...keeps pace with new developments of time and circumstances,” the Legislative Counsel pointed out that in the case of water and rail transportation federal regulations concerning licensing, registration, navigation, contracts, and safety equipment extended into intrastate commerce. Lee pointed to the current situation of automobile regulation as a warning of what could happen without federal action:

In the case of motor-vehicle transportation the Federal Government has failed to exercise its power of regulation and has allowed...motor-vehicle traffic to grow up without Federal regulation. The result has been great diversity of laws for the licensing of vehicles, for determining the qualifications and licensing of operators, and for the establishment of rules of the road and license fees. Nor has there been any supervision of the contract of carriage of the motor-vehicle carrier or of any of its activities as a common carrier.

The Proposed Civil Aeronautics Act attempts, while the industry is yet new, to avoid that diversity of State regulation which has arisen in respect of motor-vehicle traffic and to provide for air transportation the beginning of a uniform system of Federal regulation covering some of the fields now regulated by the Federal Government in the case of water and rail carriers. The proposed Civil Aeronautics Act applies these regulations to intrastate transportation and to noncommercial transportation (just as Congress now does in many instances in respect to rail and water carriers) in those cases where complete uniformity of regulation seems necessary for the protection of interstate and foreign commerce. Such cases are, mainly, the inspection of aircraft and airdromes, licensing of pilots, signals, and rules of the air.<sup>64</sup>

Winslow circulated copies of the bill for comment to the Departments of War, Navy, State, Post Office, Interior, Labor, Agriculture, Commerce, and Treasury as well as the Attorney General, NACA, Interstate Commerce Commission, and the Shipping Board on January 9, and responses began coming to Lee on the last day of the month. While Hoover confirmed that “the provisions of the bill meet with [his Department’s] entire approval” and Weeks found the bill to be “the most complete and best suited for the purpose intended,” many saw the need for revision, and Weeks, Hughes, and Ames all

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<sup>64</sup> Ibid., 49.

provided substantial suggestions. The NACA took issue with the Civil Aeronautics Consulting Board and requested clarification as to the relationship between the two bodies. The desire for comprehensiveness may have removed regulatory uncertainty and concerns over the delegation of legislative authority to an executive agency but it also provided multiple and specific points of disagreement from interested parties.<sup>65</sup>

Although national legislation remained elusive during the first two years of the Harding administration, work progressed on the voluntary aeronautical safety code sponsored by the SAE and the Bureau of Standards, one of 106 such projects under the auspices of the American Engineering Standards Committee. At its first meeting on September 2, 1921, the thirty-one-member Sectional Committee elected Henry M. Crane of the SAE as chairman, Ames as vice-chairman, Morton G. Lloyd of the Bureau of Standards as secretary, and Arthur Halstead of the Bureau of Standards as assistant secretary. It further divided the subject into nine parts: Part I, Airplane Structure, Design, Fabrication and Tests; Part 2, Power Plants, Design, Assembly and Tests; Part 3, Equipment, Maintenance and Operation of Airplanes; Part 4, Signals and Signaling Equipment; Part 5, Airdromes and Airways; Part 6, Traffic and Pilotage Rules; Part 7, Qualifications for Airmen; Part 8, Balloons (Free and Captive); Part 9, Airships.<sup>66</sup>

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<sup>65</sup> Winslow to Weeks, 9 January 1923; Winslow to Hughes, 9 January 1923; Winslow to Ames, 9 January 1923; Winslow to Hoover, 9 January 1923; Winslow to Denby, 9 January 1923; Hoover to Winslow, 12 January 1923; Hughes to Winslow, 31 January 1923; Weeks to Winslow, 31 January 1923; Ames to Winslow, 2 February 1923; Weeks to Winslow, 17 February 1923; all in folder HR67A-D15 HR13715-13715, box 124, Papers Accompanying Specific Bills and Resolutions, Committee on Interstate and Foreign Commerce, 67<sup>th</sup> Congress, Records of the U.S. House of Representatives, RG 233, National Archives Building, Washington, DC; Stratton to Hoover, 27 January 1923, Commerce Department, Aeronautics, Bureau of, Legislation, 1923-1924, box 121, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; "Proposes Control of Civil Aviation," *New York Times*, January 8, 1923; Waltermann, *Airpower*, 404-405.

<sup>66</sup> "American Engineering Standards Committee Handling 106 Projects," folder 2-12, box 35, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD;



The Sectional Committee divided these sections among five subcommittees that used the earlier work of the Bureau of Standards as a starting point. MIT professor and American Society of Mechanical Engineers (ASME) member Edward P. Warner chaired the Subcommittee on Airplane Structure, Chief Engineer for the Wright Aeronautical Corporation and SAE member George Mead chaired the Subcommittee on Power Plants, ASME and SAE member Archibald Black chaired the Subcommittee on Equipment and Maintenance of Airplanes, the SAE's Ralph H. Upson chaired the Subcommittee on Lighter-than-Air Craft, and Halstead became chairman of the Subcommittee on Airdromes and Traffic Rules. Halstead's subcommittee was placed in charge of parts 4, 5, 6, and 7—those most closely aligned with governmental regulations—and he recognized that “we must, of course, keep very close to international convention in the Safety Code. Where reasons are sufficiently good we can, however, depart from these regulations.” Halstead began work on preliminary drafts of the safety code in the summer of 1922, taking “what he thought best from the rules and regulations of the Canadian Air Board and of the British Air Ministry and from the French regulations.”<sup>67</sup>

The Sectional Committee met on November 8, 1922, with representatives from the SAE, Bureau of Standards, ASME, MAA, NACA (George Lewis), Underwriters' Laboratories, Coast Guard, Forest Service, Weather Bureau, and the Departments of War, Navy, and Post Office. Having met earlier on March 10 and July 23, Halstead's subcommittee presented preliminary drafts of Parts 4, 5, and 7, and “it was pointed out

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*Aeronautics: Eighth Annual Report of the National Advisory Committee for Aeronautics, 1922* (Washington, DC: GPO, 1923), 8-9; “Aeronautical Safety Code,” *Aviation* 13 (October 30, 1922): 606.

<sup>67</sup> Lewis to King, 17 August 1922, folder number unknown (damaged), box 281, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; “N.A.A. on Safety Code Committee,” *Aviation* 13 (November 27, 1922): 724, Lester D. Gardner, *Who's Who in American Aeronautics* (New York, The Gardner, Moffat Co., 1922); *Aeronautics: Eighth Annual Report of the National Advisory Committee for Aeronautics, 1922* (Washington, DC: GPO, 1923), 8-9.

that much of the subject matter in these preliminary reports was covered in the report of the International Convention for the regulation of aerial navigation and in the rules of the Federation Aeronautique Internationale.” At this same meeting it was also decided that the National Aeronautic Association (NAA), recently incorporated with the legal aid of MacCracken, should be included on the Sectional Committee. At its third meeting on November 9, Halstead’s subcommittee discussed Part 6 and produced a draft sufficient to submit to the Sectional Committee as a preliminary report.<sup>68</sup>

The Subcommittee on Airdromes and Traffic Rules invited British Air Attaché Malcolm G. Christie to attend its fourth meeting on January 16, 1923. Christie provided “valuable remarks” concerning Part 5 and promised to place the Sectional Committee “in direct touch with international standardization now being carried on in Europe.” The next day Christie wrote Brancker to inform him of developments in the United States. Forwarding a copy of H.R. 13715, he pointed out that “this Safety Code really deals with the standards of construction, maintenance, etc., referred to on page 12, section 224 (a), of the Winslow Bill and correspond[s] to our Convention Annexes” while “the spirit of both the Winslow Bill and the Safety Code seemed in...close harmony with that embodied in the International Convention and its annexes.” Christie forwarded Halstead’s contact information to enable closer contact between him and the ICAN so that “air regulations [may] be drawn up on almost identical lines.” Christie recognized

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<sup>68</sup> Minutes of Meeting of Sectional Committee for the Aeronautical Safety Code, 8 November 1922; Halstead to Lewis, 7 September 1922; Minutes of the Meeting of the Subcommittee on Airdromes, Traffic Rules, Etc., 9 November 1922; Halstead to Members of the Subcommittee on Airdromes, Traffic Rules, Etc., 5 December 1922; all in folder number unknown (damaged), box 281, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; “Safety Code Committee Meets,” *Aviation* 13 (November 30, 1922), 698; “N.A.A. on Safety Code Committee,” *Aviation* 13 (November 27, 1922): 724. For further information on the creation of the NAA see Bill Robie, *For the Greatest Achievement*.

that the safety code combined with the Winslow Bill provided a means to achieve international regulatory uniformity in the absence of America's ratification of the convention. By February, Christie could confidently tell the NACA's George Lewis, based on discussions with Lloyd and Halstead as well as a "perusal of the Winslow Bill," that the "projected regulations for aero navigation for [the] U.S.A. are becoming almost identical in both form and principle with the International Convention and its annexes." Any hope for rapid uniformity was overly optimistic as the Safety Code, when completed, remained voluntary. In addition, Winslow's committee had "deemed it unwise to undertake the consideration of the subject" before the 67<sup>th</sup> Congress adjourned on March 4, 1923, and H.R. 13715 died in committee.<sup>69</sup>

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<sup>69</sup> Minutes of Meeting of the Subcommittee on Airdromes, Traffic Rules, Etc., 16 January 1923; Minutes of the Sectional Committee Meeting for the Aeronautical Safety Code, 20 February 1923; both in folder 58-4, Safety in Aviation, Jan-May, 1923, box 281, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Christie to Brancker, 17 January 1923; Christie to Lewis, 7 February, 1923; both in folder 32-6, International Air Navigation, 1922-1923, box 177, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Winslow to the ACCA, 19 February 1923, excerpt reprinted in *Aviation* 14 (March 5, 1923): 274.

## Chapter 7

### Breaking Down the Barriers to Legislative Action

Events from the beginning of 1923 until March 1925—roughly the end of the 67th Congress through the end of the 68th—mark the period as one of ideological convergence and diffusion. Continued discussions concerning the pros and cons of the multiple manifestations of the Winslow bill illustrate that, while proponents of the federal regulation of aviation had honed their arguments to a fine edge, they were unable to cut through the final obstacles to legislative action. Members of the House of Representatives remained to be convinced not only of the immediate need for federal regulation but also the “proper” administrative structure of any such system. The two most powerful impulses driving the development of the Department of Commerce bureau model—the ICAN and concern that inaction would lead to a state-based regulatory system for the airplane—brought with them a level of political baggage that precluded them from assisting in the further spread of that ideology. Rather, the dualistic nature of the airplane (simultaneously a tool of war and instrument of commerce) combined with the political ramifications of defense to rouse the “public interest and support” that Harding had considered necessary before federal regulation. As discussion concerning the American aeronautical landscape moved out of its more limited confines and into the public sphere, the U.S.-Canadian air relationship and the newly-instituted international regime under the ICAN exuded a continually subtle, though at times direct, influence upon domestic developments.<sup>1</sup>

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<sup>1</sup> Harding to ACCA, 23 June 1922, in *Aircraft Year Book, 1923* (New York: Aeronautical Chamber of Commerce of America, Inc., 1923), 12.

Key changes both in Canada and in its relationship to Britain during the first two years of Mackenzie King's Liberal government—the first minority government in the nation's history—held the potential to influence the U.S.-Canadian aviation relationship. In January 1923, the National Defence Act, passed in June of the previous year, went into effect. Designed to achieve economy in defense spending, the act dismantled the Air Board and, when combined with the Aeronautics Act of 1922, placed responsibility for both civil and military aviation under the recently-constituted Canadian Air Force, which achieved the official status of "Royal" (RCAF) in 1924. The Air Board's civilian staff were either incorporated into the new military structure or released from service. John A. Wilson, originally interested in the position of Director of Contracts in the new department, became secretary of the RCAF—one of three assistant directors under Group Capt. James S. Scott—where he "retained his responsibilities for civil aviation."<sup>2</sup> This unified governmental structure, an idea that still held sway with many in the United States, among them Republican Representative Charles F. Curry of California and Brig. Gen. William "Billy" Mitchell, sacrificed aviation development at the altar of economy. According to Wilson, rather than increasing efficiency, lumping together all things aviation into one administrative unit with a single appropriation resulted in the RCAF possessing "no well-defined policy for development," a "confusion of ideas in its direction and congestion in its working," and a "consequent loss of efficiency and dissatisfaction throughout the Service." Wilson continued to take exception to this unified

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<sup>2</sup> Department of National Defence Act, R.S.C., ch. D-34, s. 1 (1922); Douglas, *Creation of a National Air Force*, 62-63; Peter Russell, *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa, Carleton University Press, 1990), 87; Chris Madsen, *Another Kind of Justice: Canadian Military Law from Confederation to Somalia*, (Vancouver, BC: University of British Columbia Press, 1999), 58-59; John Hilliker, *Canada's Department of External Affairs Vol. I: The Early Years, 1909-1946* (Montreal: McGill-Queen's University Press, 1990), 87.

air system until the 1927 establishment of the Directorate of Civil Government Air Operations within the Department of National Defense provided for a level of separation between civil and military aeronautics in Canada.<sup>3</sup>

While the National Defense Act's reorganization marked a distinct move away from the policies of the Borden and Meighen governments, King's administration continued its predecessors' practice of incrementally exerting Canada's independence in foreign affairs. In September 1922, Mustafa Kemal led a Turkish independence movement that pushed into former Ottoman territory in direct violation of the Treaty of Sevres, threatening British access to the Dardanelles. When Lloyd George's government floated the possibility of British and Dominion military involvement, King declared nonparticipation in events where "we have had nothing to do with policy and no agreement," refusing to commit Canadian troops. King also refused to help draft or sign the Treaty of Lausanne that officially established the borders of present-day Turkey ten months later. This so-called Chanak Crisis, named after the location of a British contingent in the region, led to the collapse of Lloyd George's government and served notice to the British that they could no longer assume the unequivocal support of the Dominions.<sup>4</sup>

In addition to establishing a precedent concerning Canadian entanglements with British affairs, King also delineated an area for independent international action. In November 1919, the Canadian government had submitted a proposed treaty to the United

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<sup>3</sup> Wilson to King, 15 July 1922; Wilson to Desbarats, 21 May 1923; Wilson to Desbarats, 21 October 1925; all in John A. Wilson Fonds, MG 30, microfilm reel 10779, Library and Archives Canada, Ottawa, Ontario; Wilson to Desbarats, 2 November 1923, John A. Wilson Fonds, MG 30, microfilm reel 10781, Library and Archives Canada, Ottawa, Ontario; Douglas, *Creation of a National Air Force*, 80.

<sup>4</sup> Michael Graham Fry, Erik Goldstein, and Richard Langhorne, *Guide to International Relations and Diplomacy* (London: Bloombury Academic, 2004), 212-13; Hilliker, *External Affairs*, 91-92.

States “concerning port privileges of fishing vessels, protection of halibut fishery, lobster fishing, etc.” off the Pacific Coast. Responding almost two years later, Secretary of State Hughes informed Geddes of the Harding administration’s desire to address only the halibut fisheries issue, and over the course of the next four months both sides solidified the details. King saw the 1923 Convention for the Preservation of the Halibut Fishery as an issue that did not concern Britain, deciding that Canada should sign it alone. The signature of Canadian Minister of Marine and Fisheries Ernest Lapointe next to that of Secretary of State Charles Evans Hughes marked the first steps towards a new era in Canadian foreign policy characterized by an increasing level of direct diplomacy between the two North American nations. As the British consistently pressed for American ratification of the 1919 air convention, Canada’s newly acquired foreign policy freedom increased the likelihood of a bilateral U.S.-Canadian agreement independent of the ICAN.<sup>5</sup>

As legislative activity remained on hold during the nine-month recess between the 67<sup>th</sup> and 68<sup>th</sup> Congresses, work continued on the Aeronautical Safety Code. The actions of Halstead’s Subcommittee on Airdromes and Traffic Rules demonstrates the almost magnetic pull that both the ICAN and the Canadian relationship exerted upon this seemingly domestic document. The issue of aligning the Safety Code with existing international standards arose at the Sectional Committee’s February 20 meeting in response to British Air Attaché Malcolm G. Christie’s recommendations to Halstead the

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<sup>5</sup> Geddes to Hughes, 29 August 1922; Hughes to Geddes, 14 December 1922; both in *Papers Relating to the Foreign Relations of the United States, 1922, Volume I* (Washington, DC: GPO, 1938), 673-675; *Convention between the United States of America and Great Britain, Signed at Washington, March 2, 1923* in *Papers Relating to the Foreign Relations of the United States, 1922, Volume I* (Washington, DC: GPO, 1938), 468-470; Hilliker, *External Affairs*, 92-93; Desmond Morton, *A Short History of Canada*, 2nd ed. (Toronto: McClelland & Stewart Inc., 1994), 186.

previous month. After some discussion, the Sectional Committee suggested that “whenever Subcommittees make departures from the requirements of the International Convention, the reasons for such choice shall be submitted by the Subcommittee to the Sectional Committee.” Thus the convention became the norm for the American code, and any deviation from it required sufficient justification. At the same meeting, Part 5: Airdromes and Airways (drafted under consultation with Christie), Part 8: Balloons, and Part 9: Airships were submitted for final comments to the Sectional Committee while Part 3: Equipment, Maintenance and Operation, Part 4: Signals and Signaling Equipment, Part 6: Traffic and Pilotage Rules, and Part 7: Qualifications for Airmen were circulated for draft comments.<sup>6</sup>

In a letter to his superior officer Wing Commander Scott, Wilson discussed the possibility of Canadian representation at the next Sectional Meeting in Washington. Seconding Christie’s belief that the Winslow Bill, once passed, would rely upon the work of the Sectional Committee as the basis for regulation, Wilson hoped that “we may be able to influence them a little in keeping as nearly along the same lines as the Canadian regulations as possible” and mentioned that a Canadian representative could serve as a vital link between ICAN president Brancker and American developments. Wilson’s presence at the Sectional Committee’s May 25 meeting proved beneficial. In discussing Canadian air regulations and their practical application, Wilson assured committee members that the “N” designation given to the United States by the ICAN and required

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<sup>6</sup> Minutes of the Sectional Committee Meeting for the Aeronautical Safety Code, 20 February 1923; Lloyd to Members of the Sectional Committee, 28 February 1923; Lloyd to Members of the Sectional Committee, 9 March 1923; all in folder 58-4, Safety in Aviation, January-May 1923, box 281, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD.



on all aircraft flying into Canada had not been changed, discounting reports that Norway had adopted the nationality letter.<sup>7</sup>

When ICAN secretary Albert Roper heard of the Sectional Committee's work, he dispatched a letter to Halstead directing the committee's attention to the convention's technical annexes to ensure international uniformity. Halstead replied that the members of the committee were familiar with the convention and its annexes, that "it is expected that the requirements of the American Aeronautical Safety Code will parallel closely those existing in the annexes and their revisions," and forwarded the available preliminary drafts. Both domestic and international policymakers recognized the importance of regulatory uniformity, even in the absence of American ratification of the convention. Roper need not have worried, as Halstead's subcommittee ensured that their sections either paralleled or were in general agreement with the ICAN's corresponding annexes. In April the NAA expressed interest in having local chapters follow the Safety Code's stipulations (themselves based on the convention) for establishing local airdromes.<sup>8</sup>

While Halstead's committee worked on adopting the ICAN's provisions for a voluntary code in the United States, NACA secretary John Victory approached the

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<sup>7</sup> Wilson to Scott, 13 March 1923, John A. Wilson Fonds, MG 30, microfilm reel 10779, Library and Archives Canada, Ottawa, Ontario; Minutes of the Meeting of Sectional Committee for the Aeronautical Safety Code, 25 May 1923, folder 58-4, Safety in Aviation, January-May 1923, box 281, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; "W for Wright," *Aviation* 14 (April 2, 1923): 363.

<sup>8</sup> Roper to Halstead, 24 March 1923; Halstead to Roper, 16 April 1923, "Comparison of Preliminary Draft Part 6 with International Air Convention" enclosed in Halstead to Members of the Subcommittee on Airdromes, Traffic Rules, Etc., 7 April 1923; "Comparison of Part 5 Airdromes with the International Convention," enclosed in Halstead to Members of the Subcommittee on Airdromes, Traffic Rules, Etc., 11 April 1923; Halstead to Crane, 3 April 1923; all in folder 58-4, Safety in Aviation, January-May 1923, box 281, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD.

possibility of American ratification of the convention “informally with the proper subordinate official of the State Department.” Victory reported to NACA Executive Committee Chairman Joseph Ames on March 26 that the State Department now saw the convention’s tie to the League of Nations as an unbridgeable chasm which the Senate would never cross. He forwarded two possibilities to Ames: the elimination of the clause in Article 34 establishing the ICAN as “a permanent Commission placed under the direction of the League of Nations” or the creation of an entirely new convention divorced from the League. If the latter occurred without United States participation or the present convention’s connection to the League was removed, the State Department “would be willing to seek authority of law to ‘adhere’ to the convention” with respect to Wallace’s earlier reservations. Lord Cecil’s desire to tie the postwar international aviation regime to Wilson’s vision remained the primary stumbling block to the convention’s ratification, precluding its introduction to the Senate.<sup>9</sup>

Ames forwarded Victory’s report to Patrick, who saw drafting a new convention as “utterly impractical.” He pointed to two possible courses of action to allow for United States participation in the international civil aviation regime—U.S. ratification with reservations pertaining to the convention’s ties to the League or the negotiation of bilateral treaties “framed along the general lines of the present Convention,” viewing the former as “the more practicable” solution. The convention was such a nonissue in the Senate at this time that Henry Cabot Lodge, chairman of the Committee on Foreign Relations, informed Undersecretary of State William Phillips on May 7 that he had only

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<sup>9</sup> Victory, “Memorandum for Chairman, Executive Committee, Subject: International Agreement on Air Navigation,” 26 March 1923; Minutes of Regular Meeting of Executive Committee, 6 April 1923; both in folder 13, box 94, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

“recently come across” it and requested “any information as to its present status.” After being provided with a full history of America’s relationship with the convention up to that point, Lodge remembered that it had been printed as Senate Doc. No. 91 in 1919. Comparing the level of discussion concerning the convention within the executive branch—conversations that had fostered the growth of a shared regulatory ideology for aviation—with that of Lodge illustrates the ideological divide between those desiring action and those empowered to act during the immediate postwar period.<sup>10</sup>

Because the United States was not the only country to take issue with Article 34, its amendment became an early subject of discussion within the ICAN. Whereas the United States desired to eliminate all connections with the League, the ICAN’s members—themselves all members of the League of Nations—saw no reason to disconnect the two bodies. Thus the United States found itself in the difficult position of wanting to bring about fundamental change but, as an outsider, lacking the power to do so. Rather than address the connection to the League, members voted to amend the elements of Article 34 concerning proportional voting and distribution of the commission’s expenses at the ICAN’s fourth session in London from June 26 to 30. Wording providing the U.S., Britain, France, Italy, and Japan with an artificial majority was replaced with a flat one-vote-per-state system, with the British Empire counting as a single state (to the displeasure of the Dominions). In addition, the five allied states assumed financial responsibility “in the proportion of two shares” with all other member states each contributing one share. While bringing about a level of equality, and thus

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<sup>10</sup> Patrick to Ames, 30 March 1923, folder 32-6 International Air Navigation, 1922-1923, box 177, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Lodge to Phillips, 7 May 1923; Phillips to Lodge, 18 May 1923; Lodge to Phillips, 21 May 1923; all in box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

removing a major point of contention that blocked ratification for some nations, the protocol to Article 34 did not address the fundamental concerns of the United States.<sup>11</sup>

On May 31, 1923, when Canada's special courtesy to American pilots expired, Henry G. Chilton, writing on behalf of Geddes, contacted the State Department to ascertain whether the United States wished for a one-year extension. In addition to the issue of courtesy extension, Chilton's letter of June 18 requested clarification as to whether the United States government would be willing to provide certification of airworthiness as "informal conversations with this end in view" had already occurred between representatives of the two nations' military organizations.<sup>12</sup>

In a letter to Air Attaché Christie a week before the courtesy expired, Wilson reaffirmed the five elements required of every American aircraft entering into Canada; (1) an application to the Department of National Defense for entrance into Canada; (2) details of the proposed flight; (3) details concerning the strength of the machine "for the purpose of providing a Certificate of Air worthiness"; (4) "evidence that the pilot is a qualified military or naval pilot"; and (5) two 3" x 2" passport photographs. As "no central authority" for aircraft inspection yet existed within the United States, the RCAF carried out airworthiness inspections after an American aircraft landed in Canada. Wilson stated that the RCAF was "prepared to accept as a Certificate of Airworthiness a letter from the Navy Department, or the War Department, stating that the machine in question is of a type which has been investigated by them and found to be airworthy, and further

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<sup>11</sup> "Protocol Relating to an Amendment to Article 34 of the Convention Relating to the Regulation of Aerial Navigation, 30 June 1923, enclosed in ICAN General Secretary to Sec. of State, 31 August 1923, box 5619, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; "International Air Commission," *Aviation* 15 (August 20, 1923): 221.

<sup>12</sup> Chilton to Hughes, 18 June 1923, vol. 1338, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario.

that the particular machine has been examined by a competent Naval or Military Officer and found to be true to type.” This process applied only to those types that the U.S. Navy or Army had approved after January 1, 1919—all types before that date still had to be personally inspected by an RCAF official—and also applied to U.S. military-approved engine types as well. Wilson stressed that “it is essential that all machines entering Canada should be given registration letters by which they can be easily identified” and pointed to the work of the Underwriters’ Laboratories and the provision of “N” designations on American aircraft as examples to be followed. Christie forwarded Wilson’s memorandum to Director of Naval Intelligence Capt. Luke McNamee, who in turn sent it to the Chief of Naval Operations, the General Board, the Naval War College, BuAer, and the NACA.<sup>13</sup>

Phillips requested the opinions of the War and Navy Departments on both questions while also desiring the NACA’s views on a possible one-year extension of the Canadian courtesy. Not surprisingly, all three responded in the affirmative. Weeks and Denby both assured Hughes that their respective organizations would provide inspection services for aircraft flying into Canada with the caveat that they were not held responsible for any damages caused by said aircraft while in Canadian territory. On October 12, Chilton informed Hughes of the Canadian government’s decision to extend the courtesy for a period of one year from May 1, and Hughes forwarded this information to the NACA and War and Navy Departments six days later. It is important to note that, although occurring after the signing of the Halibut Fisheries Treaty, diplomatic

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<sup>13</sup> Wilson to Christie, 23 May 1923; Christie to McNamee, 30 May 1923; McNamee to Naval Operations, General Board, Naval War College, Bureau of Aeronautics, and the NACA; all in folder 32-6, International Air Navigation, 1927, box 177, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD.

exchanges continued to go through the office of the British ambassador until Canada established an independent legation in Washington in 1927.<sup>14</sup>

On November 19, Secretary of the Navy Denby forwarded a copy of Capt. Alfred W. Johnson's memorandum to Hughes—composed at Moffett's behest—detailing the Navy's inspection process. After an aircraft owner showed “bona fide intention of entering Canada,” “competent officers” of the Aeronautic Organization of the Navy were to confirm that the type had been adopted for Navy service since January 1, 1919, that it was “air worthy and materially in good condition,” “true to type,” and that the aircraft used a Navy-approved engine. The inspecting officer and the unit commanding officer would then sign the airworthiness certificate.<sup>15</sup>

It was hoped that this system would eliminate the problem of Americans flying across the border without adhering to Canada's requirements, but this does not seem to have been the case. By the end of October, not a single application for a certificate of airworthiness had been submitted to either department of the military. Though the State Department and the NACA informed the American aeronautical community, neither the War or Navy Department had, according to *Aviation*, “made any public announcement” of the new policy. Practical application aside, that the Royal Canadian Air Force was willing to defer responsibility for airworthiness inspections to the U.S. Army and Navy illustrates that, even without official American adherence to the convention or a bilateral

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<sup>14</sup> Minutes of Regular Meeting of Executive Committee, 13 September 1923, folder 13, box 94, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Chilton to Hughes, 12 October 1923, vol. 1338, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario; Phillips to Denby, 18 October 1923; Phillips to Weeks, 18 October 1923; Phillips to Walcott, 18 October 1923; all in box 6635, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

<sup>15</sup> The Chief of Bureau of Aeronautics, “Examination for Air Worthiness for American Civil Aircraft Desiring to Enter Canada,” 12 November 1923, enclosed in Denby to Hughes, 19 November 1923, box 7699, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

agreement, standards for airworthiness remained remarkably similar between the two nations. The November 23 request of Berkeley H. Taylor, manager of United Airways, for permit application blanks to fly into Canada in late November shows that knowledge of the airworthiness inspection agreement had begun to spread. That he submitted his request to the State Department and not to the Army or Navy also shows that much remained to be done to educate American fliers. Lack of blanket overflight rights continued to require pilots to obtain advanced permission for each cross-border flight, though enforcement remained nearly impossible. In its 1923 *Annual Report*, the NACA continued to view the Canadian situation as “unsatisfactory,” but recognized that neither of the two possible remedies—ICAN ratification or a bilateral treaty—“could be effective in the absence of an agency for the regulation of civil air navigation in the United States.”<sup>16</sup>

Harding’s death on August 2, 1923, did not result in an increase in executive action regarding America’s aeronautical policy. Just over two months after being sworn into office, Coolidge received a letter from businessman E. H. Threadgill of Miami asking for his views on aviation and its commercial future as well as any recommendations for those seeking to establish a commercial service. Aware of the political implication of aviation policy, Campbell Bascom Slep, Coolidge’s personal

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<sup>16</sup> Patrick to Victory, 23 October 1923, folder 32-6 International Air Navigation, 1922-1923, box 177, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Walcott to Hughes, 25 October 1923, folder 25-30, State Department, 1922-1924, box 153, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Taylor to State Department, 23 November 1923; Third Assistant Sec. of State J. Butler Wright to Taylor, 1 December 1923; both in box 7699, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Desbarats to Pope, 8 October 1923; Byng of Vimy to the British Charge d’Affaires in Washington, 15 October 1923; Chilton to Governor General of Canada, 5 December 1923; Chilton to Byng of Vimy, 17 December 1923; all in vol. 1338, Records of the Department of External Affairs, RG 25, Library and Archives Canada, Ottawa, Ontario; *Aeronautics: Ninth Annual Report of the National Advisory Committee for Aeronautics, 1923* (Washington, DC: GPO, 1924), 14; “Flying into Canada,” *Aviation* 15 (October 29, 1923): 554.

secretary, contacted Hoover for advice on how best to reply. Following Hoover's recommendations, Slemph assured Threadgill that the president was "deeply interested" in the growth of aviation but that it "would not be proper" to give specific recommendations "to any special enterprise." In his first message to Congress on December 6, Coolidge offered a single sentence on the subject, declaring "Laws should be passed regulating aviation." He did not mention the issue again in an annual message to Congress until December 8, 1925. Rather than use the power of his office to guide aviation legislation out of its current congressional morass, "Silent Cal" waited for the issue to achieve critical mass.<sup>17</sup>

The change in the White House did prompt the State Department to look anew at the possibility of submitting the international convention to the Senate for ratification. In a long memorandum to Assistant Secretary of State Leland Harrison, Ralph W. S. Hill of the State Department's Solicitor's Office discussed possible means of overcoming both Article 34's placement of the ICAN "under the direction of the League of Nations" and Article 37's reference to the Permanent Court of International Justice as the ICAN's official mechanism for arbitration. Hill recounted that in 1920 it had been the commonly-held view within the State Department that, owing to the anti-League sentiment at the time, submitting the convention to the Senate "would be futile" and thus no such recommendation was issued. Hill recognized that the first step in the ratification process was to convince his superiors that the convention could be reconciled with the Senate's clear aversion to the League. With Lodge still chairing the Foreign Relations Committee

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<sup>17</sup> Threadgill to Coolidge, 3 October 1923; Slemph to Hoover, 6 October 1923; Hoover to Slemph, 10 October 1923; Slemph to Threadgill, 11 October 1923; all in reel 108, Calvin Coolidge Papers, 1915-1932, Library of Congress, Washington, DC; Calvin Coolidge, Message of the President of the United States to Congress, 6 December 1923, *Papers Relating to the Foreign Relations of the United States, 1923*, vol. 1 (Washington, DC: GPO, 1938), xvi; Waltermann, *Airpower*, 303-305.



and Irreconcilables such as Borah and Nelson in the Senate, had the political winds shifted enough in the past three years?<sup>18</sup>

Drawing on a December 4, 1922, letter from Brancker, Hill stated that “in practice the Commission is practically autonomous” from the League and suggested that “an explanation of this fact” be sent to the Senate with the convention rather than a formal reservation to Article 34. The issue thus became whether “practically autonomous” status would be sufficient to override Senate objections to the convention’s explicit connection to the League. According to American Consul General in London Leslie E. Reed, U.S. concerns over the relationship between the ICAN and the League stemmed from the inclusion of the phrase “as part of the League of Nations” within Senate Document No. 91—printed in September 1919 and based off a preliminary draft of the convention—rather than the clause “placed under the direction of the League of Nations” within the final text as signed by Wallace. The question remained as to whether the Senate would view this discrepancy as a substantial difference or merely a matter of semantics.<sup>19</sup>

Hill saw no need even to mention Article 37 when submitting the convention for ratification as Harding had submitted the Resolution Concerning the Establishment of a Permanent Court of International Justice for the Senate’s approval on February 24 and Coolidge had declared his support for American membership in his first message to Congress. Both the Permanent Court of International Justice—established by League members via a special protocol—and the ICAN provided a means for non-League members to join, and presidential support for U.S. adherence to the former set a

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<sup>18</sup> Hill to Harrison, 1 October 1923, box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

<sup>19</sup> Hill to Harrison, 1 October 1923; Hughes to American Consul General, London, 7 November 1923; Reed to Hughes, 13 November 1923; all in box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

precedent that could be brought to bear on the latter. Hughes found “no insuperable obstacle” to U.S. participation in the Permanent Court of International Justice, viewing the judicial body as “an establishment separate from the league, having a distinct legal status resting upon the protocol and statute.”<sup>20</sup>

Hill recognized that the same argument could also apply to the Convention Relating to the Regulation of Aerial Navigation, justifying its submission to the Senate despite the ICAN’s connection to the League. He recommended carrying over Wallace’s reservations at the time of signature as well as new reservations concerning Articles 34 and 37 if the Senate considered them necessary. Such a plan required a president willing to take possibly divisive action, and Calvin Coolidge was not such an executive. Rather, Coolidge preferred to “remain silent until an issue is reduced to its lowest terms, until it boils down into something like a moral issue.” As for the International Court, Coolidge continued the policies of his duly-elected predecessor—had Harding submitted the ICAN for ratification before his death it is conceivable that Coolidge would have also supported its ratification at the beginning of his presidency.<sup>21</sup>

In the last weeks of 1923 the State Department forwarded ICAN Official Bulletin No. 4—detailing the proposed amendments to Articles 5 and 34 as well as modifications to Annexes A through F—to the Secretaries of War, Navy, Commerce, and the NACA

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<sup>20</sup> Hill to Harrison, 1 October 1923, box 5614, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; S. Doc. No. 67-309 (1923); Hughes to Harding, 17 February 1923, in *Foreign Relations of the United States 1923*, vol. 1 (Washington, DC: GPO, 1938), 10-17; “Senate’s Consent is Asked,” *New York Times*, February 25, 1923. According to Lee Nash, Harding’s submission of the Resolution Concerning the Establishment of a Permanent Court of International Justice “surprised” the Senate and initiated a division between pro- and anti-League Republicans. Lee Nash, *Herbert Hoover and World Peace* (Lanham, Maryland: University Press of America, Inc., 2010), 49.

<sup>21</sup> Coolidge, Message of the President of the United States to Congress, 6 December 1923; “Senate Suspicion of World Court Means Long Delay,” *New York Times*, February 26, 1923; Coolidge to Judson Welliver, quoted in William Allen White, *A Puritan in Babylon: The Story of Calvin Coolidge* (New York: Macmillan, 1938), 433.

for their opinions as to whether such changes affected their previous views on ratification. Victory forwarded the matter to former chairman of the NACA's Special Subcommittee on International Air Navigation Charles Marvin for his analysis, informing Marvin that he had been "advised informally that the Department is endeavoring to secure ratification by the American Senate" and as such "would like to have a report from our Committee saying that the amendments to Articles 5 and 34...and...to the annexes...are not objectionable." At the Executive Committee's January 12 meeting Marvin reported, in a prime example of political speak, that such amendments "would not justify the United States in objecting to ratification." Capt. Emory S. Land of BuAer and Lt. Col. James E. Fechet, representing Patrick, both concurred in this view. Ames informed Hughes of the NACA's position regarding the ICAN's recent changes three day later. The Commerce Department agreed with its fellow executive agencies, seeing the changes in ICAN as presenting no stumbling block to American ratification.<sup>22</sup>

H.R. 13751, generally supported by the executive departments involved, provided a means to create the very government agency that the NACA viewed as a prerequisite to either U.S. membership in the ICAN or a bilateral aerial treaty with Canada. On February 5, 1923, Lt. John Parker Van Zandt of the Air Service, Cdr. Harry B. Cecil of BuAer, John Victory of the NACA, Harold E. Hartney and other members of the NAA, and

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<sup>22</sup> Phillips to NACA, 12 December 1923; Victory to Marvin, 7 January 1924; Ames to Hughes, 15 January 1924; all in folder 25-30, State Department, 1922-1924, box 153, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Marvin to Victory, 9 January 1924, folder 32-6, International Air Navigation, 1924-1926, box 177, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Harrison to Hoover, 16 February 1924, box 435, Records of the Civil Aeronautics Administration, RG 237, National Archives at College Park, College Park, MD; Minutes of Regular Meeting of Executive Committee, 12 January 1924, folder 14, box 94, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

Samuel Bradley and Luther Bell of the ACCA met at the Willard Hotel in Washington to coordinate views of the various departments “so that a unified front would be presented before the [House] committee.” At the suggestion of Van Zandt, who had responsibility for studying the relationship between civil aviation and defense for the Air Service, all agreed on their approach to three possibly contentious elements within H.R. 13715. The first concerned section four’s stipulations of percentage ownership of American aeronautical companies—inserted at the behest of Hoover—and all agreed “that no opposition would be made to this particular paragraph if it would in any way impede passage of the bill.” Concerning the Civil Aeronautics Consulting Board, all concurred that if objections were raised during the committee hearings “no argument will be made for its retention.” Finally, regarding section 231’s placing of the responsibility for airway creation and maintenance under the Secretary of Commerce, all understood that they would not oppose this clause “if it would in any way impede the passage of the bill.” The conference members also agreed that the NAA should serve as the primary publicity body for promoting the Winslow bill. With their strategy planned, they awaited calls to testify before the House Committee on Interstate and Foreign Commerce.<sup>23</sup>

In late February, vocal advocate of independent air power Billy Mitchell flew to Canada for an inspection of Camp Borden, north of Toronto. Through this trip and a three-month tour of Europe a year earlier, Mitchell received first-hand exposure to the workings of various types of unified air departments and their relationship to civil aviation. As historians Galen Roger Perras and Katrina E. Kellner have shown, the possibility of an aerial alliance with Canada naturally complemented Mitchell’s belief

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<sup>23</sup> Conference on Winslow Bill, 5 February 1923; Minutes of Special Meeting of Executive Committee, 7 February 1923; both in folder 13, box 94, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

that America's aeronautical future lay in Asia. Benefits of a U.S.-Canadian air partnership included a permanent air route to Alaska—the shortest distance between the United States and Asia—as well as a potential ally in what Mitchell viewed as an inevitable future war against Japan.<sup>24</sup>

While in Ottawa, Mitchell delivered a speech at the Canadian Club on February 22, 1923. Focusing primarily on civil aeronautics, he addressed the link between commercial operations and military preparedness, discussed the ways in which the Air Service had assisted the Weather Bureau and the Forestry Service, and looked to European successes to argue that “definite highways...meteorological facilities...and emergency landing fields” in North America could allow commercial operation at “practically...no loss.” Such a system—something beyond the vision and means of local government—required a degree of planning and operation only possible at the national level. While praising European achievements, Mitchell stopped short of making any public predictions or recommendations concerning aviation's regulatory future in the United States. In conclusion, he pledged continued collaboration between the two nations “as much as possible...in the development of air routes” and the development of “transportation lines through the air to Europe on the one side and to Asia on the other.” Before such cooperation could occur, the issue of the U.S. government's authority to regulate aviation had to be addressed.<sup>25</sup>

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<sup>24</sup> Wilson to Scott, 13 March 1923, John A. Wilson Fonds, MG 30, microfilm reel 10779, Library and Archives Canada, Ottawa, Ontario; Galen Roger Perras and Katrina E. Kellner, ““A Perfectly Logical and Sensible Thing”: Billy Mitchell Advocates a Canadian-American Aerial Alliance against Japan,” *Journal of Military History* 72 (July 2008): 785-823; Alfred F. Hurley, *Billy Mitchell: Crusader for Air Power* (Bloomington, IN: Indiana University Press, 1964, 1975), 73-80; James J. Cooke, *Billy Mitchell* (Boulder, CO: L. Rienner, 2002), 133-36; Douglas, *National Air Force*, 127-28.

<sup>25</sup> William Mitchell, “The Future of Aviation,” speech delivered at the Canadian Club of Ottawa in *The Canadian Club Yearbook* (1922/23-1923/24), 137-48; Wilson to Scott, 13 March 1923, John A. Wilson

Over the course of the congressional recess, both the particulars and the ideological fundamentals of H.R. 13715 were debated within an ever-growing, but still limited, public sphere. The Winslow bill, with its complex system of regulation, forced the aeronautical community to address the underlying question of whether the airplane constituted a device for entertainment or commerce. On the one side stood organizations such as the NAA, MAA, and, ACCA, whose leadership hoped to develop aviation into a respectable commercial enterprise. On the other stood the so-called “gypsy flier,” unregulated barnstormers who flew “for pure sport and entertainment with little organized competitiveness and even less remuneration, no rules or regulations, and more than a hint of foolhardiness and danger.” In its 1923 *Aircraft Year Book*, the ACCA contrasted the nearly 50 percent reduction in serious accidents among “established operators”—twelve in 1921 to seven in 1922—with those of the gypsy flier—126 accidents with 62 fatalities and 100 injuries in 1922, an increase from the 114 accidents with 49 fatalities and 89 injuries the previous year. Such a divide between the gypsy flier and “respectable” operators had been absent in the 1922 *Aircraft Year Book*.<sup>26</sup>

In a May 19 letter to the editor of the *New York Times* in response to an editorial entitled “Risks of Airplane Travel” three days earlier, the ACCA pointed to the distinction between reputable aeronautical activities and dangerous ones. “Our comparative figures indicate that flying when carried on by responsible individuals or organizations is very rapidly increasing in reliability and efficiency, which is to say

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Fonds, MG 30, microfilm reel 10779, Library and Archives Canada, Ottawa, Ontario; Perras and Kellner, “Billy Mitchell.”

<sup>26</sup> Dominick A. Pisano, “The Greatest Show Not on Earth: The Confrontation between Utility and Entertainment in Aviation,” in *The Airplane in American Culture*, ed. Dominick A. Pisano (Ann Arbor, MI: The University of Michigan Press, 2003), 51; Aeronautical Chamber of Commerce of America, *Aircraft Year Book, 1923* (New York: Aeronautical Chamber of Commerce of America, 1923), 102-103.

safety; whereas flying by the itinerant or gypsy pilot who is without legal restraint or financial responsibility is becoming increasingly dangerous.” The ACCA pointed to H.R. 13715 as a means to ensure safe operation of all flights within the United States. In its 1924 edition of the *Aircraft Year Book*, the ACCA explicitly tied continued aviation accidents to the lack of legislative action, asserting that responsibility for the majority of the “470 civilian accidents, involving death to 221 persons and injury to 391” between 1921 and 1923 lay with the “irresponsible itinerant class of fliers,” and that the situation should be “justly attributed to the failure of Congress to enact regulatory legislation.” As historians Bill Robie and Nick Komons show, “the legislation seemed to favor big business,” and many gypsy fliers who had joined the NAA during its initial membership drive over the summer of 1923 now “assumed...that they had been singled out as targets.”<sup>27</sup>

President of the NAA Howard Coffin endorsed the Winslow bill the day after its submission to Congress, but support for H.R. 13715 was not unanimous within the new organization. In a letter to the editor of the *New York Times* discussing both the NAA’s membership drive and work to rally support for the Winslow bill, Vice-President Bernard H. Mulvihill presented a much more homogeneous ideological cohesion within the new organization than really existed. The leadership of the NAA and the ACCA believed that the Winslow bill, by confronting unsafe flying practices, could recast aviation’s image from an unsafe and reckless activity to that of a respectable mode of transportation.

Current fliers, on the other hand, saw the Winslow bill as potentially repressive. At the

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<sup>27</sup> Aeronautical Chamber of Commerce of America, *Aircraft Year Book, 1924* (New York: Aeronautical Chamber of Commerce of America, 1924), 103; “Risks of Airplane Travel,” *New York Times*, May 16, 1923; “Hazards of Flight,” *New York Times*, May 19, 1923; Robie, *For the Greatest Achievement*, 111-13; Komons, *Bonfires to Beacons*, 58-61.

NAA's second national convention the organization's Legislative Committee presented four resolutions: (1) the ratification of bilateral aviation treaties with Canada and Mexico; (2) the passage of the Winslow Bill; (3) the passage of legislation empowering the Post Office to let airmail contracts to private carriers; and (4) one calling on members do their utmost to ensure that any state-based aeronautical legislation conformed with the NCCUSL's Uniform State Aviation Law. While serving as NAA President from 1923 to 1924, Frederick B. Patterson forwarded the first resolution directly to President Coolidge, who in turn forwarded it to the State Department.<sup>28</sup>

In an article for the *American Bar Association Journal*, W. Jefferson Davis, now a member of the ABA's Aviation Committee, presented H.R. 13715—with its extreme attention to detail—as “by far the best expression of thought on the subject of federal legislation...introduced in Congress,” noting that this piece of legislation “follows closely” the ICAN's regulations, thus allowing for a level of international uniformity not provided for in past bills. At the ABA's annual meeting in Minneapolis, MacCracken succeeded in securing the ABA's endorsement of federal legislation “substantially as set forth in H.R. 13715.” Over the course of 1923 the ASME—following the recommendations of its Aeronautics Division under the chairmanship of Edward P. Warner—and the American Legion's Air Committee also publicly supported H.R. 13715. Although congressional and public acceptance remained elusive, acceptance of the Commerce Department bureau model by nongovernmental organizations during the

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<sup>28</sup> “Report of the Legislative Committee of the Second National Convention of the National Aeronautic Association, U.S.A.,” Aviation, National Aeronautic Association, Correspondence, 1922-26, box 61, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; Patterson to Coolidge, 5 November 1923, box 6635, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; “Backs Up Aviation Bill,” *New York Times*, January 10, 1923; “Progress in Aeronautics,” *New York Times*, June 3, 1923.



course of 1923 shows the adoption of that particular ideology outside of the executive branch. With the question of national legislation remaining unanswered during this period, Delaware, Michigan, Nevada, North Dakota, Tennessee, Utah, Vermont, the territory of Hawaii, and San Francisco all adopted the NCCUSL's uniform aviation law.<sup>29</sup>

Three days after the 68<sup>th</sup> Congress convened on December 3, 1923, Wadsworth introduced S. 76. This bill, practically a word-for-word reintroduction of S. 3076, differed from the bill in the 67<sup>th</sup> Congress in two clauses: section 9's declaration that pilots licensed under state laws were considered "duly licensed...under this Act" and section 19's placing of jurisdiction for "claims and controversies" within the federal district courts. On December 13, Winslow reintroduced all sixty-four pages of H.R. 13715 as H.R. 3243 and distributed it to the interested executive departments for comment five days later. After minor amendments, Senator Wesley Jones's Committee on Commerce reported S. 76 to the Senate as a whole for consideration on January 7. Undergoing slight language changes on the floor of the Senate, the bill passed the next day and was sent to Winslow's House committee. Rather than acting on the bill as passed in the Senate, "Winslow struck out all but the enacting clause and substituted his own bill as an amendment." Showing his willingness to follow Winslow's lead, Wadsworth

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<sup>29</sup> "Aeronautics Bureau Asked by Engineers," *New York Times*, February 22, 1923; "A.S.M.E. for Civil Air Bureau," *Aviation* 14 (March 5, 1923): 273; W. Jefferson Davis, "The Civil Aeronautics Act of 1923," *American Bar Association Journal* 9 (July 1923): 420-22; "Minneapolis Meeting Shows Association's Increasing Strength," *American Bar Association Journal* 9 (September 1923): 604-605; ACCA Press Release, "American Bar Association Unanimously Endorses Enactment of Federal Legislation to Regulate Aviation," 10 September 1923, Aviation, Aeronautical Chamber of Commerce of America, 1922-29, box 49, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; "Report of American Legion's Air Committee," *Aviation* 15 (November 26, 1923): 656; Nathan William MacChesney, "Progress in Passage and Formulation of Uniform State Laws," *American Bar Association Journal* 9 (October 1923): 657; Banner, *Who Owns the Sky*, 129. By the time of the ABA's 1923 convention William E. Lamb had joined the ABA's Law of Aeronautics committee under MacCracken's chairmanship.

introduced a version of the House bill in the Senate as S. 1538. Neither of these bills made it out of their respective committees.<sup>30</sup>

While the Commerce Department unreservedly supported H.R. 3243's passage, the Departments of War, Navy, State, and the NACA submitted suggestions to Winslow along the same lines as those recommended for H.R. 13715. Though agreement existed as to the general contours of federal regulation, the detailed provisions of the Winslow bill left it open to criticism. Weeks included a new element in addition to the War Department's previous suggestions—that civil aviation in the Canal Zone “be under the control of the Governor of the Panama Canal and not controlled by a government department in Washington.” Responding to Winslow's request for comment, Coolidge recommended he refer the matter to Hoover and wrote beneath the official typed reply, in his characteristic brevity, “it seems ok to me.”<sup>31</sup>

A subcommittee of the House Committee on Interstate and Foreign Commerce recommended tentative changes to H. R. 3243 along the lines suggested and issued its report on April 11, but conclusion of the 68<sup>th</sup> Congress's first session on June 7 postponed further legislative action. In correspondence with Brancker, Wilson lamented that “things are still tied up in the States” but remained convinced that the United States would set its aeronautical house in order during the next session of Congress. The renewal of Canada's special courtesy, which had expired on May 1, was addressed during

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<sup>30</sup> S. 76, 68<sup>th</sup> Cong. (1923); 65 *Cong. Rec.* S705 (January 8, 1924); Report to Accompany S. 76, H.R. Rep. No. 68-1262 (1924); Komons, *Bonfires to Beacons*, 57.

<sup>31</sup> Weeks to Winslow, 29 January 1924; Hughes to Winslow, 18 January 1924; Walcott to Winslow, 14 January 1924; Denby to Winslow, 15 May 1924; all in folder 68A-D15, box 61, Records of the U.S. House of Representatives, 68<sup>th</sup> Congress, RG 233, National Archives Building, Washington, DC; Minutes of Regular Meeting of Executive Committee, 12 January 1924, folder 14, box 94, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Winslow to Coolidge, 10 December 1923; Coolidge to Winslow, 20 December 1923; both in reel 26, Coolidge Papers, Library of Congress, Washington, DC.

the congressional recess. After consultation with the War and Navy Departments and the NACA, Acting Secretary of State Joseph Grew informed the new British Ambassador to the United States Esme Howard of America's desire for a one-year extension along with the continuation of the War and Navy Department airworthiness inspection procedures agreed to the previous year.<sup>32</sup>

Political ideology combined with the dual-use nature of the airplane to initiate developments in the first session of the 68<sup>th</sup> Congress that set the stage for the future passage of the Air Commerce Act. As the historian Thomas W. Walterman shows, the Progressive wing of the Republican Party in the House took up the aviation issue "as a point of attack on the Administration." Ever mindful of the possibility of an "aircraft trust," Progressives fused their indignation at the emerging scandals of the Harding presidency with warning calls from Air Service officials and the promised efficiency of the unified department model to challenge the Coolidge administration.<sup>33</sup>

Five years of postwar appropriation cuts had taken their toll on American air power. Beginning at \$33 million for fiscal year 1921, Air Service appropriations dropped to \$19.2 million in 1922, \$12.9 million in 1923, and \$12.6 million in 1924. With Congress unwilling to invest in new equipment due to the stigma of scandal in wartime production and the fiscal conservatism of the times, the Air Service was unable to replace World War I-era aircraft. On March 17, Weeks appointed a board under Maj. Gen.

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<sup>32</sup> Minutes of Regular Meeting of Executive Committee, 12 June 1924, folder 14, box 94, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Minutes of Annual Meeting of National Advisory Committee for Aeronautics, 16 October 1924, folder 15, box 4, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Wilson to Brancker, 31 July 1924, reel 10781, John A. Wilson fonds, Library and Archives Canada, Ottawa, Ontario; Chilton to Hughes, 9 September 1924; Grew to Howard, 14 October 1924; Howard to Hughes, 11 November 1924; all in box 6635, Records of the Department of State, RG 59, National Archives at College Park, College Park, MD.

<sup>33</sup> Walterman, *Airpower*, 412-13.

William Lassiter to study the current state of the Air Service. The Lassiter Board recommended limited organizational restructuring as well as “\$25 million for the Air Service each year for ten years” for new aircraft, but it would take more than one board’s report to change Congress. In his report for fiscal year 1923, Patrick painted a grim picture, declaring that “the Air Service is now entirely incapable of meeting its war requirements and . . . the present critical shortage of equipment and personnel portends rather a period of retrogression.” In response, the editors of *Aviation* wrote to Coolidge calling for the creation of an Air Defense Commission “of three or four public-spirited men” to investigate all aspects of American aeronautics.<sup>34</sup>

While Patrick’s warnings were meant to loosen Congress’s purse strings, such a bleak situation caused many to question the very foundation of American’s nascent aeronautical apparatus. Though unintended, the calls of Lassiter, Patrick, and others lent credence to those who had long supported a single department of air such as Mitchell, LaGuardia, Curry, and Progressive elder statesman Robert H. LaFollette. Over the next two years aeronautics came to be a major arena in the struggle between the socially-conscious strain of Progressivism—most associated with Theodore Roosevelt—and the new, business-minded and efficiency-focused version embodied in Commerce Secretary Hoover. Not surprisingly, the contours of the aviation debate in the United States during this period mirrored the earlier debate under Mackenzie King’s government that had culminated in the National Defence Act. Whereas Canadians had adopted a unified service, the American response to similar postwar pressures took a different route.

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<sup>34</sup> *Annual Report of the Chief of the Air Service, 1923*, quoted in “General Patrick’s Annual Report” and “An Indictment and a Warning,” *Aviation* 14 (January 28, 1924): 85-86; “Needed—An Air Defense Commission,” *Aviation* 15 (October 29, 1923): 543; Maurer, 45, 72-73; Robert Frank Futrell, *Ideas, Concepts, Doctrine: Basic Thinking in the United States Air Force, 1907-1960* (Maxwell Air Force Base, AL: Air University Press, 1989), 42; Trimble, *Moffett*, 414.

On January 29, 1924, Wisconsin Representative John M. Nelson, first elected to Congress in the Progressive wave of 1904, took to the floor of the House to call attention to the sad state of American aeronautics. Claiming to be in possession of “more than 7,000 documents” showing that “the same firms who participated in the loot of more than \$500,000,000 of the people’s money...are still getting...contracts under the same conditions and provisions,” he called for a congressional investigation into the matter. Nelson branded the MAA a trust “in absolute violation of the Sherman antitrust law,” casting further suspicion on the industry-supported Winslow and Wadsworth bills. Before Congress adjourned for the day, Nelson had proposed House Resolution 163 providing for a nine-member committee to investigate all aspects of government aeronautics. Over the next month Nelson proposed three similar resolutions. His tenacity paid off when the House agreed to H. Res. 192 on March 24. This resolution, reported out of New York Republican Bertrand H. Snell’s Committee on Rules a month earlier after testimony from Patrick, establishing the Select Committee on Inquiry into Operations of the United States Air Services.<sup>35</sup>

Another key event of great importance to the domestic aeronautical debate occurred during the first session of the 68<sup>th</sup> Congress. On April 6, 1924—just over a month after the Air Service’s pioneering Central American Flight—four specially

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<sup>35</sup> 68 *Cong. Rec.* H1625-1626 (daily ed. January 29, 1924) (statement of Rep. Nelson); 68 *Cong. Rec.* H4816 (daily ed. March 24, 1924); Minutes of Regular Meeting, 19 August 1924, folder 13, box 94, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Alexander M. Fisher, Memorandum RE: Activities of the Select Committee of Inquiry into Operations of the United States Air Services, enclosed in Hart to Bascom, 11 December 1924, reel 109, Calvin Coolidge Papers, Library of Congress, Washington, DC; Komons, *Bonfires to Beacons*, 74; Walterman, *Airpower*, 412-15. In testimony before the Lampert committee December 12, 1924, Nelson discussed meeting with Henry Woodhouse, the editor of *Aerial Age* whose calls for investigations into contracts and advocacy of a unified department of air contributed to several members of the Aero Club of America breaking away and establishing the NAA, before taking to the floor of the House. See *Hearings Before the Select Committee of Inquiry into Operations of the United States Air Services*, 68<sup>th</sup> Cong. 52 (1925) (hereafter referred to as the *Lampert Hearings*).

designed versions of the Navy's Douglas DT-2 bomber, designated Douglas World Cruisers, began their westward flight from Seattle in an attempt to complete the first around-the-world flight. Though not without trials (only two of the original four aircraft completed the full flight), meticulous planning and close Army/Navy coordination along with cooperation from foreign governments assisted in making Americans the first to fly around the world. On September 6, six months after leaving American shores, the *Chicago*, *New Orleans*, and *Boston II* (the prototype World Cruiser that had replaced the *Boston* damaged off Nova Scotia) landed in Boston. The world fliers flew south three days later for a presidential reception at Bolling Field outside Washington (where Coolidge gave the planes an impromptu executive inspection), and reached Seattle on September 28.<sup>36</sup>

The 1924 World Flight, the greatest American aeronautical achievement between the 1919 Atlantic crossing and Lindbergh's solo flight of 1927, affected the aviation dialogue within the United States in three ways. First, as historian Jenifer Van Vleck points out, it greatly enhanced U.S. prestige around the world while adding to and expanding upon a unique American vision of empire. Second, the flight dealt a serious blow to the dominant belief that the United States could remain safely behind its "ocean moats" while it determined the best course to take in a future war. In his statement before the Select Committee on Inquiry into Operations of the United States Air Services on January 8, 1925, Lt. Leigh Wade, pilot of the *Boston*, matter-of-factly stated that the world flight "indicates that there is no place on the face of the globe that you cannot

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<sup>36</sup> "Fliers at Capital; President Waits in Rain Four Hours," *New York Times*, September 10, 1924; Carroll V. Glines, *Around the World in 175 Days: The First Round-the-World Flight* (Washington, DC: Smithsonian Institution Press, 2001); Ernest A. McKay, *A World to Conquer: The Epic Story of the First Around-the-World Flight* (New York: Arco Publishing, 1981); Maurer, *Aviation*, 186-89. For a discussion of the Central American Flight see Wesley P. Newton, *The Perilous Sky*, 48-53.

travel by air” and stressed the possibility of regular intercontinental flights with existing technology. When asked before the same Select Committee about the potential for air attacks against the United States, Lt. Leslie P. Arnold—the mechanic aboard the *Chicago* with pilot Lt. Lowell Smith—responded that the world flight “proves that such a thing is possible.”<sup>37</sup>

By illustrating the current level of global aerial connectivity, the 1924 World Flight offered a glimpse of future commercial possibilities. Even before the fliers had returned to American shores, a full-page story in the *New York Times* asserted that the flight’s success “makes [it] a certainty” that “more people can profit commercially and culturally during the next five years...than have profited by aviation in all the twenty years that have passed since the Wright brothers first began.” Declaring that the world flight “demonstrated...the practicality and usefulness of air travel,” the article adopted and conveyed the ACCA’s argument that a lack of regulatory legislation remained the major roadblock to American commercial aviation. The newspaper expressly connected the World Flight to the domestic situation, positing that the further development of commercial aeronautics “depends upon Congressional and popular support. And the round-the-world flight has already aided, and will further aid, the enlistment of this support.” The article also reported Patrick’s belief that international commercial flights would be greatly hindered without American membership in a multinational aeronautical organization such as the ICAN.<sup>38</sup>

Just as *The Horseless Age* had taken action to galvanize support for national automobile legislation in 1906, Lester Gardner’s *Aviation* launched a campaign to codify

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<sup>37</sup> *Lampert Hearings* 703-13; Jenifer Van Vleck, *Empire of the Air: Aviation and the American Ascendancy* (Cambridge, MA: Harvard University Press, 2013), 30-40.

<sup>38</sup> “World Fliers Open New Era in Air Travel,” *New York Times*, August 31, 1924.

the desires of the aeronautical community in July 1924. Published under the heading “A Suggested National Air Policy” and based on “suggestive and constructive recommendations” from “several thoughtful friends of aeronautical progress,” it appeared within the pages of the journal along with letters from readers suggesting modifications throughout the rest of 1924 and into the next year. Expansive in its scope, the governmental section of the proposed policy called for a cabinet-level civilian position to promote governmental and commercial aviation, aircraft committees in the House and Senate, the elimination of duplication among multiple departments, the creation of a national airway system, legislation regulating aviation (but no specific reference to the Department of Commerce model), and U.S. membership in the ICAN. In a letter to Walcott, Victory dubbed Gardner’s actions “consistent propaganda” that showed “he is still working for a separate air service.”<sup>39</sup>

Within this atmosphere, full of uncertainty and pregnant with possibility, the Select Committee on Inquiry into Operations of the United States Air Services officially began its work with a public hearing on August 4. Its membership, appointed by Republican Speaker of the House Frederick H. Gillett of Massachusetts, consisted of Republicans Albert H. Vestal of Indiana, Randolph Perkins of New Jersey, Charles L. Faust of Missouri, Frank R. Reid of Illinois, and chairman Florian Lampert of Wisconsin. Joining them were Democrats Clarence F. Lea of California, Anning S. Prall of New York, Patrick B. O’Sullivan of Connecticut, and William N. Rogers of New Hampshire. Although the committee originated out of concerns over aircraft procurement in World

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<sup>39</sup> Victory to Walcott, 8 August 1924, folder 7, box 96, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; “A Suggested National Air Policy,” *Aviation* 17 (July 14, 1924): 760; “A Suggested National Air Policy,” *Aviation* 17 (October 27, 1924): 1206; “A Suggested National Air Policy,” *Aviation* 17 (November 17, 1924): 1291; “A Suggested National Air Policy,” *Aviation* 17 (December 15, 1924): 1414.



War I, Lampert envisioned a wider scope for its work and promised to avoid “mud-slinging” and to do “something constructive.” As a member of this new investigative body and Winslow’s Committee on Interstate and Foreign Commerce, Lea provided a link between the more focused issue of commercial aviation legislation and the broader work of the new House committee. In a letter to Walcott, Victory recognized that the Lampert Committee was under “great pressure” to recommend the creation of a unified department of air but confidently stated “personally, I do not think they will do it.”<sup>40</sup>

The committee wasted no time, beginning with a tour of Bolling Field, the Anacostia Naval Air Station, and the Bureau of Standards the next day. On the morning of August 6, committee members joined Moffett and Patrick on a tour of Langley Field and the NACA’s Langley Laboratory before moving on to the Naval Air Station at Hampton Roads in the afternoon. Over the next two months committee members visited the Dayton international air races, McCook Field, Wilbur Wright Field, and other locations to view the existing aeronautical situation firsthand. The Lampert committee must be given credit for their extensive fieldwork. Gardner directly connected the committee’s work with his calls for a national air policy in a September 17 letter to Coolidge, urging the president to exert his power of office to ensure that witnesses “outside the government” were called to allow for the adoption of “a more business-like plan.” Empowered as a subcommittee of one while in California for the 1924 campaign, Lea held public hearings and heard testimony from naval officers including Capt.

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<sup>40</sup> *Report of the Select Committee into Operations of the United States Air Services*, H.R. Rep. no. 68-1653, at 1 (1925) (hereafter cited as the *Lampert Committee Report*); Victory to Walcott, 8 August 1924, folder 7, box 96, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Minutes of Regular Meeting of Executive Committee, 19 August 1924, folder 14, box 94, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

Thomas T. Craven and Lt. Col. Frank P. Zahm, who both supported passage of the Winslow bill.<sup>41</sup>

Eight days after the second session of the 68<sup>th</sup> Congress began on December 1, 1924, Winslow introduced H.R. 10522, a new version of H.R. 3243 that incorporated the subcommittee's amendments and Weeks's suggested exemption of the Canal Zone. The domestic discussion continued to be placed within the context of the larger international aviation regime even though the president still had not submitted the convention to the Senate. In a preliminary note to the full text of the convention with amendments up to June 1924—printed on the opening day of the 68<sup>th</sup> Congress for the House committee's "consideration in connection with" H.R. 10522—the Office of the Legislative Counsel (most likely Lee) pointed out that:

In general, save where particular conditions exist, it is desirable that the federal regulations in respect of safety inspection, rules of the air, signals, qualifications of crew, identification marks, and registration of aircraft, should conform to the similar provisions of the convention, found in Articles 5 to 25, inclusive, and Annexes A to E, inclusive. Sections 22, 23, 24, 26, and 27 of the proposed Act, therefore, leaves the Secretary of Commerce full discretion as to the details of the federal regulations.<sup>42</sup>

Thus the Legislative Counsel took the same position as the Sectional Committee working on the Aeronautical Safety Code—conformity to the international standard was desired regardless of America's official adherence to the convention.

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<sup>41</sup> *Lampert Committee Report*, 1; Victory to Walcott, 8 August 1924, folder 7, box 96, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Minutes of Regular Meeting of Executive Committee, 19 August 1924, folder 14, box 94, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; telegram, Gardner to Coolidge, 17 September 1924, Calvin Coolidge Papers, 1915-1932, reel 108, Library of Congress, Washington, DC; *Lampert Hearings*, 292-93.

<sup>42</sup> Office of the Legislative Drafting Counsel, "Preliminary Note: The Relation of the Convention to the Proposed Civil Air Navigation Act," in *International Air Navigation Convention, Text of Articles and Annexes Together with Amendments Issued Thereunder Up To June, 1924* (Washington, DC: GPO, December 1, 1924), 1.

The Legislative Counsel went on to connect other specific details within the two documents. Section 201 of H.R. 10522 wholeheartedly adopted Article 1's principle of air sovereignty, Section 26 (f) established reciprocity as the guiding principle concerning international overflight rights to allow the United States to take advantage of the Protocol to Article 5 (approved at the ICAN's second meeting in 1922), Section 204's exclusion of foreign military aircraft from American airspace without special permission aligned closely with Article 32, and the creation of prohibited zones (though not equally applicable to both domestic and foreign aircraft) in Sections 41 and 42 were similar in nature to Articles 3 and 4 of the convention. In addition, H.R. 10522 called for the Department of Agriculture's Weather Bureau to collect and distribute meteorological information and for the Secretary of Commerce to publish maps and charts, two responsibilities placed upon ICAN members. While the bill did not adopt the customs provisions of Annex H—keeping in line with Wallace's reservations at the time of signature—it made “our existing customs laws better adapted to air navigation” by “providing an administration similar to that now prevailing in this country in respect of [sic] vessels.” The Legislative Counsel also brought up the discrepancy concerning the ICAN's relation to the League of Nations that existing between Senate Document No. 91's version of the convention and that within the final text, an issue that had receive the attention of the State Department the previous year.<sup>43</sup>

The sections in H.R. 10522 mentioned by the Legislative Counsel were carried over, practically word for word, from H.R. 13715, and their incorporation into that earlier bill shows the level of thought that MacCracken, Lamb, and Lee placed in aligning their piece of domestic legislation with the international regime from the beginning. That the

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<sup>43</sup> Ibid., 2.

sections mentioned were carried over practically verbatim throughout the four manifestations of the Winslow bill from December 1923 to January 1925—and that they never became the subject of substantive debate—illustrates that a recognition of the need to achieve a certain level of regulatory compatibility with the international regime had been established well before the passage of legislation. This desire made the Commerce Department bureau model attractive as it provided a level of flexibility to conform to shifting international standards that would be harder to achieve in a military-dominated department of air. As the Canadian regulations were themselves based on the ICAN’s provisions, H.R. 10522 would also provide for a level of regulatory compatibility between the two North American nations.<sup>44</sup>

The House Committee on Interstate and Foreign Commerce held hearings on H.R. 10522 from December 17 to 19. In his statement before the committee Hoover talked in general terms, pointing to a “lack of inspection” as the primary cause of aviation accidents. He argued that H.R.10522, “the most comprehensive” measure yet “undertaken in any country,” would protect life and property while promoting the fledgling aviation industry. Commerce Department Solicitor Stephen B. Davis and Communications Expert P. E. D. Nagle also testified, bringing the full weight of the department to bear in support of the bureau model. Lieutenant Van Zandt represented the War Department and, while suggesting the inclusion of a small amendment recognizing the department’s current authority to establish, maintain, and control their own

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<sup>44</sup> An undated handwritten note by MacCracken—more than likely from some time in 1924 due to references concerning a meeting with Judge Stephen B. Davis, the new Commerce Department Solicitor, and to the Lampert Committee established in March of that year—shows that both the ICAN and the “Canadian situation” were in the forefront of MacCracken’s thoughts during this period. (Handwritten note, undated, Aviation, National Aeronautic Association, Legislative Committee, 1924-25, box 62, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA).

meteorological stations, fully recommended its passage. Cdr. Marc A. Mitscher of BuAer expressed the Navy's desire for uniform national rather than local legislation while pointing to two areas of concern. First, he concurred with Van Zandt concerning military weather stations. Second, he questioned the creation of an entirely new bureau as it would result in duplication of duties with existing agencies such as the Bureau of Standards, the Coast and Geodetic Survey, and the Weather Bureau. Lt. Cdr. Stephen S. Yeandle of the Coast Guard, Charles Marvin, and Commissioner General of Immigration William W. Husband also testified in support of the bill. Green H. Hackworth of the State Department's Solicitor's Office reported that section 204's exclusion of foreign military aircraft—the only clause within the bill directly pertaining to foreign relations—remained “satisfactory.” Second Assistant Postmaster General Paul Henderson expressed his department's full “sympathy” with the provisions of H.R. 10522.<sup>45</sup>

As chairman of the ABA Committee on the Law of Aeronautics, MacCracken testified on the second day of the hearings. After a brief history of the ABA's involvement with aviation legislation, he pointed to two elements within the Winslow bill of “controlling importance”: vesting exclusive authority over all aviation within the new commissioner's office, even intrastate, and empowering the Secretary of Commerce and commissioner to draft regulations based on the ever-changing state of the art. MacCracken's conviction that Congress possessed sole authority to regulate intrastate flights “in order to properly protect interstate commerce” proved a tough sell to some

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<sup>45</sup> *Bureau of Civil Air Navigation in the Department of Commerce: Hearings before the Committee on Interstate and Foreign Commerce*, 68<sup>th</sup> Cong. (1924), 22-23, 30-32, 48, 53.

members of the House committee, and section 21 of H.R. 10522, with its declaration of federal authority over all flights, became the primary subject of questioning.<sup>46</sup>

An exchange between MacCracken and Democratic Congressman George Huddleston of Alabama, a staunch states' rights advocate, illustrates the ideological gulf that still existed between those championing aviation regulation and those holding the power to enact it.

**MacCracken:** Inasmuch as all of the air space is available for interstate commerce, the same as all navigable water is available for interstate commerce, the commerce becomes a unit which does not regard State lines. You cannot safely protect interstate commerce by air without regulating all commerce by air, or all navigation by air, I should say.

**Huddleston:** Then you think the mere possibility that the air might be used for interstate commerce would give to the Federal Government jurisdiction to prohibit going into the air at all?

**MacCracken:** It does, so far as navigable waters are concerned. I see no reason why the same principle should not be applied to the navigable air.<sup>47</sup>

The question thus came down to whether the House committee would agree with this analogy between water and air navigation and the necessary extension of the commerce clause, the same tactic Charles Terry attempted to use when arguing for automobile regulation during the 61<sup>st</sup> Congress. In an attempt to gauge the extent of MacCracken's conviction, Huddleston asked the hypothetical question of whether Congress possessed the power to regulate craft on a privately-owned and enclosed lake. MacCracken answered that Congress did indeed possess regulatory power in even this case since—though the shoreline may be privately owned—the water remained free for navigation “by an airplane equipped with pontoons.” Texas Democrat Sam Rayburn, Republican Homer Hoch of Kansas, and Democrat Clarence F. Lea of California also pressed MacCracken on the subject of federal regulation over intrastate flights. Newly-elected

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<sup>46</sup> Ibid., 55.

<sup>47</sup> Ibid., 59.

NAA president Godfrey Cabot felt confident that even if section 21 were eliminated the economic advantage in obtaining federal licensing and airworthiness certificates would result in any regulatory system denoting a clear interstate/intrastate divide skewing naturally towards the federal sphere.<sup>48</sup>

Even though this extension of federal authority in response to technology proved “unpalatable to a significant section of the House committee membership,” the bill that emerged from the committee on January 15, 1925, H.R. 11667, still included section 21’s declaration of unified federal authority over both interstate and intrastate flights. The committee hearings over H.R. 10522 illustrate that ideological consensus concerning the necessity for some sort of federal regulation over aviation had spread over the ensuing year, though differences remained on the extent of such authority and its bureaucratic apparatus. Huddleston questioned MacCracken’s basis for disregarding the common law of air ownership but never came out entirely against the idea of federal regulation; the issue for Huddleston was not existential but one of degree. Even Charles Dickinson—president of the Chicago Aero Club and spokesman for the so-called Anti-Winslow bill faction at the House hearings—did not come out against the principle of federal legislation but rather the particulars of the long bill. Recognizing the need for some level of regulation, he called for a “clear cut simple law, which is a registration of the pilot, a registration of the machine...and a very heavy fine if a man is found under the influence of liquor, drugs, or anything of that kind.”<sup>49</sup>

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<sup>48</sup> Ibid., 65-66, 78-79; Komons, *Bonfires to Beacons*, 63.

<sup>49</sup> Ibid., 89; Minutes of Meeting of Executive Committee, 12 June 1924, folder 14, box 94, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; National Aeronautic Association, “Annual Report of the President, 1924-1925,” Report to Governors’ Meeting, New York, 7 October 1925; Komons, *Bonfires to Beacons*, 63.

The House committee's report accompanying S. 76, submitted on January 20, 1925, discussed the reasoning behind substituting Winslow's bill for the Senate bill. It discussed S. 76's failure to provide aids for air navigation, its lack of "adequate provisions for...foreign air commerce," its acceptance of state licenses, and overall lack of comprehensiveness. The report also explicitly tied the Winslow bill to the ICAN, recognized that America's "failure to enact legislation carrying out the terms of the convention" resulted in discrimination through Article 5, reasserted the bill's high level of compatibility with the convention, and presented the bill as a possible stepping stone to future ratification. The report's annex, offering comments on each section of the House substitute, "presumed" that the Secretary of Commerce would follow the convention regarding identification marks—through the adoption of the "N" designation—and that the American Aeronautical Safety Code, "together with the corresponding regulations in the annexes of the International Air Convention, would serve as a basis for the formulation of...regulations." With less than two months before the end of the 68<sup>th</sup> Congress and Winslow's retirement from the House, H.R. 11667 experienced the same fate H.R. 3243 had in the 67<sup>th</sup> Congress.<sup>50</sup>

Meanwhile, the Lampert Committee had reconvened on December 12—three days after the introduction of H.R. 10522—in the Caucus Room of the House of Representatives Office Building in Washington, just across Independence Avenue from Winslow's committee. Over the course of the next four months, more than a hundred witnesses from the Departments of War, Navy, Post Office, and Commerce as well as industry and private life testified on the current aeronautical situation. While the wartime

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<sup>50</sup> Committee on Interstate and Foreign Commerce, Civil Air Navigation Bill, H.R. Rep. No. 68-1262 at 4-5,7-8, 14-15 (1925).



cross-licensing agreement, the question of a unified air department, aircraft appropriations, the battleship bombing tests of 1921 and 1923, and the technical differences between naval and land-based aircraft remained dominant themes throughout the committee hearings, the dual-use nature of the airplane meant that questions concerning civil aviation and its regulation remained a relevant secondary thread of discussion. The hearings thus served as a critical juncture where select House members were exposed to the regulatory ideology developed in the various executive departments over the past years.

Midmorning on December 17, roughly an hour after Hoover's statement before Winslow's committee, General Mitchell took the witness stand before the Lampert Committee for the first of five such appearances. Mitchell presented America's current air organization, one divided piecemeal among different departments, as "terribly backward" compared to other nations. To rectify this administrative decentralization, he advocated the creation of a "department of aeronautics coequal with the Army and Navy" consisting of "three principal divisions: a department of fabrications" responsible for construction, testing, and so forth; a "department of civil aviation"; and a department of "military aviation" combining all elements of military aeronautics. Though relying primarily on the British model as an example, Mitchell's proposal effectively mirrored the three-assistant-director system—Air Staff and Personnel, Supply and Research, and Civil—established in Canada with the National Defence Act of 1922 that he had observed during 1923. As Scott, Wilson, and others to the north were finding out, the high level of demand for civil operations engulfed the time and attention of the RCAF, calling into question its military preparedness in time of war and contributing to

reorganization in 1927. The unified structure Mitchell proposed, while complementing progressive notions of efficiency and the 1920s obsession with government austerity, presented its own challenges.<sup>51</sup>

Specifically discussing commercial aviation, Mitchell believed that, due to cost, its initial development rested upon government. He recognized the need for balanced regulation to address safety while not stifling innovation and also recommended releasing the government's stock of Liberty engines for commercial use. The following exchange between Perkins and Mitchell shows the strong connection Mitchell held between the unified air department model and the future of commercial aeronautics.

**Perkins:** What is the failure of the development of a plan [to foster aviation] due to, in your opinion?

**Mitchell:** The Army and Navy. You see, as they are the agencies for handling this thing, and the only interest they have in it is not a primary interest. It is only secondary to the infantry in the Army, and in the Navy it is secondary to the battleship. You also should have a system of education so that the people of the country will know what it is all about.

**Perkins:** So...you think that so long as the Air Service is under the military and naval services we will not develop an economical commercial aviation?

**Mitchell:** It is impossible.<sup>52</sup>

During further testimony that afternoon, Mitchell specifically pointed to H. R. 10147, Congressman Curry's latest unification bill submitted two weeks earlier, as the best legislative means for fostering aviation. Thus his approach to commercial aviation development, even with a civilian head of a Department of Aviation, ran contrary to the basic premise of the ideology that had developed among executive departments in response to the 1919 convention. When directly asked about American membership in

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<sup>51</sup> *Lampert Hearings*, 292-94 (statement of Brig. Gen. William Mitchell, 17 December 1924); Douglas, *National Air Force*, 76. In addition to December 17, 1924, Mitchell appeared before the Lampert Committee on January 31, February 6, February 19, and February 20, 1925, to respond to the testimony of other witnesses.

<sup>52</sup> *Lampert Hearings*, 297-300 (statement of Brig. Gen. William Mitchell, 17 December 1924).

the convention, Mitchell expressed the opinion that the United States should not join the predominantly European members of the ICAN as “our problems...and our methods are different from theirs,” seeing America’s international routes developing first to Asia. Lea, having heard testimony before the House Committee on Interstate and Foreign Commerce that morning in support of H.R. 10522, questioned Mitchell on the connection between military and commercial aviation and also asked for a brief synopsis of the Curry bill. At the end of the day the committee extended Curry the courtesy of questioning Mitchell, and the two discussed European advances in commercial aviation under unified systems, the similarities between government support for air routes and public roads, and the economic and operational efficiency to be gained from a unified service. Lester D. Gardner, testifying immediately before Mitchell’s return in the afternoon, submitted his magazine’s “Suggested National Air Policy” to the Lampert Committee for its consideration.<sup>53</sup>

Over the course of the coming weeks—with a holiday break from December 23 to January 5—the Lampert committee heard testimony from several witnesses both for and against a unified air department, with many of those in the latter category advocating a separate bureau for civil aviation along the lines of the Winslow bill. Representative La Guardia, founding member of the NAA Harold E. Hartney, and several Air Service aviators (prompted primarily through concerns over promotion) joined Mitchell and Gardner in support of a unified service. Howard Coffin, member of the Crowell Commission and first NAA president, also came out in support of a unified organization. Rather than point to defense and efficiency concerns, Coffin argued that the international nature of aviation necessitated a unified administrative structure “to serve as a channel

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<sup>53</sup> Ibid., 329-41.

for the orderly interchange of technical, legal, and commercial views with the accredited representatives of other governments.” He called for an “aggressive effort” to ensure the United States “at least an equal voice” in the establishment of international air law but stopped short of advocating ratification of the convention. While reading excerpts from the Crowell Commission’s report during his day-long testimony it became apparent that the committee members were unaware of its recommendations, and the report was submitted into the record.<sup>54</sup>

Not surprisingly, the preponderance of testimony landed firmly against a unified department and for the separation of civil and military aviation. Secretary of the Navy Curtis D. Wilbur and Adm. William S. Sims both came out strongly against the principle of a unified service. After Lea brought up the Winslow bill, Patrick and Weeks both declared their support for it. Cabot, Moffett, Brig. Gen. Hugh A. Drum of the Army, and Hiram S. Bingham, the freshman Senator from Connecticut, supported H.R. 10522 as well, specifically mentioning it by name. While not directly citing the Winslow bill, Ames, Hoover, and Van Zandt supported federal legislation to foster commercial aviation along the same lines as H.R. 10522’s provisions. The Lampert hearings thus provided an arena by which the Commerce Department bureau model could spread to key members of the House, the final barrier to federal aviation legislation. Public hearings at the Waldorf-Astoria Hotel in New York City from January 15 to 17 also show the importance the committee placed on commercial aviation in their investigation. Here Lampert, Perkins, Reid, Prall, and Lea heard from members of the business community such as President of the Loening Aeronautical Engineering Corporation Grover Loening, Clement Keys of the Curtiss Airplane and Motor Company, Vice President and General Manager of the

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<sup>54</sup> Ibid., 1200.

Wright Aeronautical Corporation Charles L. Lawrance, Charles F. Redden of Aeromarine Airways, and Juan T. Trippe from Long Island Airways.<sup>55</sup>

The issue of the proper administrative apparatus for federal regulation lacked the appeal necessary to stimulate public interest and sell newspapers; fortunately Mitchell's multiple appearances before the Lampert committee offered drama in spades. Dispute over procedure during the bombing of the *Ostfriesland* on July 21, 1921, and testimony detailing Mitchell's failure to follow a presidential request that he submit any articles to his superiors before publication offered sensationalistic elements that propelled the work of the Lampert Committee into the public consciousness. Headlines such as "Mitchell Defiant, Widens His Attack on Aviation Policy," "Conflict Over Aircraft Policy," "No Mitchell Rebuke, He Renews Attacks," and "Mitchell Defiant as Air Inquiry Ends" ensured that the public took notice of the Lampert hearings. Mitchell's failure to convince committee members of the soundness of his approach can be seen as early as his second appearance on January 31. After a long discussion between Lea and Mitchell, Lea stated that "the question occurs to me, in connection with this idea of changing to a new organization, that maybe we have got an organization that has learned its lesson, that is now on the point of producing results, and if we revamp our scheme and set up another organization we may be making a mistake." Testimony from representatives from the War and Navy Departments "so impressed" Lea's fellow committee members that, although sympathetic to Mitchell's ideas, they remained unconvinced of the desirability of a unified service even after Mitchell's third appearance.<sup>56</sup>

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<sup>55</sup> Ibid.; "Air Service's Needs Bring Inquiry Here," *New York Times*, January 15, 1925.

<sup>56</sup> *Lampert Hearings*, 1696, 2135-44, 3020-21; Note regarding conversation between Coolidge and Mitchell, 12 November 1924, reel 109, Calvin Coolidge Papers, Library of Congress, Washington, DC; "Mitchell Defiant, Widens His Attack on Aviation Policy," *New York Times*, February 7, 1925; "Conflict

The Lampert Committee finished its hearings on March 2, 1925, and, unable to continue working during the long recess, planned to submit its report after the 69<sup>th</sup> Congress convened in December. Regardless of the report's findings, Mitchell's "challenge to the Navy" and "his attack on War Department conservatism... stirred Congress and the country to demand some authoritative answer to these questions." Mitchell paid for this publicity when Weeks refused to extend his appointment as Assistant Chief of the Air Service. Reverting back to the rank of colonel, Mitchell left Washington—embittered but not defeated—for reassignment to San Antonio as head of the Eighth Army Corps at the end of April.<sup>57</sup>

While the Lampert Committee heard witnesses and the Winslow bill sat in legislative purgatory, other aviation developments occurred in Washington that increased the likelihood of action in the next Congress. The House Committee on Military Affairs held nine days of hearings on Curry's H.R. 10147 between January 8 and February 17. Through testimony from twenty-one witnesses—including Mitchell, Moffett, Cabot, Drum, Henderson, and Wilbur—and letters from individuals such as Weeks, the committee's twelve Republicans and nine Democrats were exposed to the same debate occurring within the Lampert Committee as well as the Commerce Department bureau model. In beginning the hearings, Republican chairman John C. McKenzie of Illinois stated his position of neutrality on the issue but recognized it to be "a very important matter," presenting the proceedings as an unbiased fact-finding process to allow for

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Over Aircraft Policy," *New York Times*, February 15, 1925 "No Mitchell Rebuke, He Renews Attacks," *New York Times*, February 20, 1925; "Mitchell Defiant as Air Inquiry Ends," *New York Times*, March 3, 1925; Cooke, *Billy Mitchell*, 161-63.

<sup>57</sup> "Discipline Threat for Gen. Mitchell for Aviation Views," *New York Times*, February 4, 1925; "Publisher's News Letter," *Aviation* 18 (February 16, 1925): 197; Komons, *Bonfires to Beacons*, 73-74; Cooke, *Billy Mitchell*, 175-76; Michael L. Grumelli, "Trail of Faith: The Dissent and Court-Martial of Billy Mitchell" (PhD diss., Rutgers University, 1991), 95-102.

action during the next Congress. In his testimony on January 27, Wilbur shared that “I am authorized by the President, whom I saw this morning, to say to you that he is, as at present informed, opposed to a separate air service,” and every Navy representative before the committee concurred in this position.<sup>58</sup>

Cabot’s testimony on February 2 before the House Military Affairs Committee represented a tour de force against a united air service. He questioned why members of Congress, with their power of the purse, would limit their say in the various aspects of aviation by creating one department under the president with a single appropriation. When viewed in light of Canada’s experience with a unified air service during this period, the ability to stimulate certain elements of aeronautics through separate appropriations served as a powerful argument against a unified department. Speaking on behalf of the NAA and its commercial aviation interests, he stated “the one thing that we need this year from Congress is the Winslow bill. Give us this additional safety and the result will be [an] immediate increase in confidence and a steady geometric growth of commercial aviation until it attains the same supremacy over commercial aviation outside our territory that has been achieved by our automobile industry.” Brigadier General Drum—speaking for the Secretary of War a day before testifying in front of the Lampert Committee—expressly took issue with H.R. 10147’s subordination of commercial aviation to that of the military, viewing it as a departure from “our customary national policy” and recommended that Congress pass the Winslow bill. When the committee

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<sup>58</sup> *Hearings Before the Committee on Military Affairs on H.R. 10147*, 68<sup>th</sup> Cong. 2, 134 (1925); “Coolidge Opposes Single Air Service,” *New York Times*, January 28, 1925; Representative Julius Kahn of California had recently died on December 18, 1924, and his position on the Military Affairs Committee remained vacant for the last few months of the 68<sup>th</sup> Congress.

concluded its hearings on February 17, no further steps were taken on H.R. 10147, evidence that members remained unconvinced of the need for immediate action.<sup>59</sup>

In his testimony before McKenzie's committee, Cabot had also recommended the passage of a bill allowing the Postmaster General to contract airmail service to private carriers.<sup>60</sup> That very day, Coolidge signed the Air Mail Act of 1925, popularly referred to as the Kelly Bill after H.R. 7064's sponsor, Pennsylvania Republican Melville Clyde Kelly. The latest in a series of bills proposing to turn over mail service to private carriers, the Kelly Act provided a major impetus to commercial aviation in the United States. It set the airmail rate at ten cents per ounce, allowed private air carriers to receive eight cents per ounce on transported mail, and authorized the Postmaster General to extend the existing airmail system. The act allowed for a type of "subsidy based on service" more palatable to the traditional American public/private relationship than the direct subsidies of Europe. In a move that complemented the industry's desire for broad legislation, the act empowered the Postmaster General to "make such rules, regulations, and orders as may be necessary to carry out the provisions of this Act."<sup>61</sup>

In Ottawa, John A. Wilson noted that, "pending further action," the U.S. Post Office Department now served as the regulatory authority for American commercial aviation, a position Hoover's Commerce Department had desired since 1921. He saw the passage of the 1925 Air Mail Act as a long-awaited acknowledgment of America's "responsibility for inspection of aircraft and pilots" engaged in civil aviation. Though

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<sup>59</sup> Ibid., 253-55, 272, 274, 279, 293.

<sup>60</sup> Ibid., 256.

<sup>61</sup> Air Mail Act, Pub. L. No. 359, 68 Stat. 825 (1925); "Signs Air Mail Bill," *New York Times*, February 3, 1925; F. Robert van der Linden, *Airlines and Air Mail*, 9-10; Harry P. Wolfe and David A. NewMyer, *Aviation Industry Regulation* (Carbondale, Ill: Southern Illinois University Press, 1985), 21. For a detailed discussion of the debate and passage of the 1925 Air Mail Act see Waltermann, *Airpower*, 415-25.



historian Nick Komons justifiably claims that “federal air regulation now appeared a foregone conclusion,” it is dangerous to assume the passage of the 1926 Air Commerce Act as predestined in the wake of the Air Mail Act—nothing in the latter stipulated the bureaucratic apparatus ultimately chosen or the specific nature of any future regulations.<sup>62</sup>

As the 68<sup>th</sup> Congress came to a close at the beginning of March, progress in crafting an American regulatory system for aviation remained uneven. The suboptimal situation at the northern border continued as the one-year extension of Canada’s courtesy remained in effect until May. While Winslow’s, Lampert’s, and McKenzie’s committees heard testimony on the existing aeronautical situation, the State Department continued to watch the ICAN’s amendment process and determine whether the protocols to Articles 5 and 34 allowed for U.S. adherence to the convention.<sup>63</sup>

Congress had not yet acted, yet significant progress had been made in other areas. Work on the Aeronautical Safety Code continued. By the beginning of April 1924, Parts 3, 4, 5, 8, and 9 had been made available for distribution in pamphlet form and work on the final form of the Safety Code was nearing completion in early 1925. In submitting “What the Bureau of Standards has done for Aeronautics” at his testimony before the Lampert Committee on January 21, Director of the Bureau of Standards George K. Burgess had brought the Safety Code to the committee’s attention. Most significant, domestic and international events during the 68<sup>th</sup> Congress propelled the aeronautical situation into the minds of a greater number of Congressmen as well as the public. The

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<sup>62</sup> Wilson, “Civil Aviation in the United States,” undated memorandum, John A. Wilson Fonds, MG 30, microfilm reel 10781, Library and Archives Canada, Ottawa, Ontario; Komons, *Bonfires to Beacons*, 66.

<sup>63</sup> Memo, State Department Solicitor to Harrison, 16 January 1925, box 5616, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

various hearings over December 1924 and January 1925 exposed a wider range of House members to the Department of Commerce bureau model than had been previously, offering an avenue by which to convert the last holdout to legislative action to the dominant ideology within the executive branch. Though the 1925 Air Mail Act set the stage for increased government regulation of aviation, the shape of such regulations remained to be seen.<sup>64</sup>

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<sup>64</sup> MacDill to Crane, 17 March 1924; Warner to Halstead, 20 March 1924; Burgess to Ellis, 3 April 1924; Minutes of Sectional Committee for Aeronautical Safety Code, 8 April 1924; all in folder 58-4 Safety in Aviation, box 281, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; *Lampert Hearings*, 1506-59. Briggs and Dryden also testified before the Lampert Committee the same day.

## Chapter 8

### Achieving Critical Mass

The twenty-two months from March 1925 to the end of 1926 represent a period of ideological consolidation and institutionalization concerning the “proper” means of regulating aviation in the United States. As a result of key public events, an aura of crisis enveloped the “aviation question” and the multitude of ideas regarding the appropriate bureaucratic apparatus that had enjoyed relatively equal support in the marketplace of ideas came to be eliminated one by one. Left standing was the Commerce Department bureau model, which underwent further modification at the hands of Congress to bring it in line with the concerns for economy that pervaded the era. When 1926 came to an end a legislative framework had been established that recognized the historical particularities of the American federalist system, the international convention had been presented to the Senate for its advice and consent, and a series of regulations for aircraft engaging in commerce had been created that paralleled the standards of the international regime.

With Congress in recess, advocates for federal regulation attempted to build upon the increased awareness of the aeronautical situation brought about by the Lampert Committee’s public hearings. As the premier nationwide aviation organization, the National Aeronautic Association took the lead in trying to maintain momentum. In a March 6 letter to Coolidge, NAA president Cabot forwarded a statement detailing the organization’s position. This document, forwarded to the press three days later and printed in *Aviation* under the heading “The N.A.A. National Air Policy” at the end of the month, clearly defined the organization’s vision and the congressional action required to bring it about. The NAA—an organization that included individuals such as Arthur

Halstead of the Bureau of Standards, George W. Lewis of the NACA, Glenn L. Martin, and Edward P. Warner on its Board of Governors and Howard Coffin and William MacCracken as Governors-at-Large—called for the Winslow bill’s passage in the next session of Congress and declared that a unified department, as proposed in the Curry bill and advocated by Mitchell, “would increase the evils that it seeks to remove, and in particular would introduce greater delay, greater confusion, greater expense and less efficiency,” outcomes anathema to the Coolidge administration.<sup>1</sup>

Cabot’s insistence, combined with the antics of Mitchell and uncertainty regarding the Lampert Committee’s final recommendations, compelled Coolidge to write his old Amherst College friend, current J. P. Morgan partner, and future Ambassador to Mexico and father-in-law of Charles Lindbergh Dwight W. Morrow on March 11. In his typically short and direct style, Coolidge informed Morrow that “I have in mind that I may like to have you look into the subject of airplanes for me, in connection with such two or three other advisors as you might wish to associate with yourself. Suppose you think this over, and think who you would wish to join with you, in case I want to call on you. You might want both civilians and military men.” On March 14, Cabot wrote Coolidge again to remind him that the Republican Party’s 1924 platform had called for “the early enactment of such legislation and the taking of such steps by the government as will tend to promote commercial aviation.” It took the dramatic events of 1925,

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<sup>1</sup> NAA press release enclosed in Cabot to Coolidge, 6 March 1925; Sanders to Cabot, 10 March 1925; all in reel 109, Calvin Coolidge Papers, 1915-1932, Library of Congress, Washington, DC; “The N.A.A. National Air Policy,” *Aviation* 18 (March 30, 1925): 344.

however, to create the moral imperative that Coolidge deemed necessary for presidential action.<sup>2</sup>

While continuing to press for federal legislation, the NAA adopted a platform calling for the ratification of the ICAN and pushed for active American participation in the international aviation regime. As mentioned in Hill's 1923 memorandum, the State Department continued to be the first obstacle to official U.S. membership in the ICAN as, due to political considerations, it refused to recommend that the president submit the document to the Senate for its advice and consent. Cabot had personally become convinced of the need for America to connect with global developments, and the ICAN's upcoming eighth session in London offered a prime opportunity to initiate such action. On March 10, 1925, Cabot wrote Secretary of State Frank B. Kellogg, Secretary of War Dwight F. Davis, and Secretary of the Navy Curtis D. Wilbur expressing hope for American representation. Over the next three weeks Under Secretary of State Joseph Grew, First Assistant Secretary Leland Harrison, and Steven Latchford of the Solicitor's Office coordinated a response to Cabot's suggestion.<sup>3</sup>

Harrison discussed the matter with future director of naval intelligence Capt. William W. Galbraith, who disclosed that on orders from Admiral Moffett he had already instructed Cdr. John H. Towers, naval attaché in London, to serve as an unofficial representative at the ICAN's coming session. The State Department responded that—as the United States was not a member of the ICAN nor in receipt of an invitation to send an

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<sup>2</sup> Coolidge to Morrow, 11 March 1925, reel 25, series I, subseries 2, correspondence, Dwight W. Morrow Papers, Amherst College Archives and Special Collections, Robert Frost Library, Amherst, MA; Cabot to Coolidge, 14 March 1925; Sanders to Cabot, 17 March 1925; both in reel 109, Calvin Coolidge Papers, 1915-1932, Library of Congress, Washington, DC; "Republican Party Platform of 1924," <http://www.presidency.ucsb.edu/ws/?pid=29636>. Harold Nicolson, *Dwight Morrow* (New York: Harcourt, Brace and Company, 1925), 281.

<sup>3</sup> Cabot to Kellogg, 10 March 1925, box 5618, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

unofficial representative—the United States could not participate either officially or unofficially, that such an invitation should not be sought, and that Towers could follow the proceedings and attend public sessions but should “not press his entrance at all.” Harrison went so far as to state that “unless [Towers] can find out that he would be welcome he should not even try to go.” On March 25, Grew sent a letter to Cabot informing him of the department’s decision not to pursue the matter, assuring him that the United States government would receive copies of the official proceedings “as has been done with respect to previous meetings.”<sup>4</sup>

Cabot sought to have the NAA fill the void. First, he informed the State Department on March 26 that the organization planned to send someone to represent it at the ICAN’s next session. This representative would be instructed to meet with U.S. military and naval attaches in London beforehand to determine the government’s position on possible topics for conveyance to members of the ICAN. Cabot also mentioned to Captain Galbraith the possibility of using the NAA’s contacts in Europe to secure an invitation for America’s informal participation.<sup>5</sup>

Cabot’s attempts to ensure some level of U.S. participation in the ICAN’s eighth session met with indignation at the State Department. A draft reply to Cabot’s March 26 letter considered it inappropriate for the NAA to take any such action, pointed to the “impropriety” of the suggestion, and conveyed a clear tone of exasperation. The letter Grew sent to Cabot on April 6 removed much of the biting nature of the original draft,

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<sup>4</sup> Latchford to Harrison, 23 March 1925; Under Secretary of State memorandum, 23 March 1925; Grew to Cabot, 25 March 1925; Harrison to Grew, 26 March 1925; Under Secretary of State memorandum, 27 March 1925; all in box 5618, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

<sup>5</sup> Cabot to Kellogg, 26 March 1925; Under Secretary of State memorandum, 27 March 1925; both in box 5618, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

simply stating “the Department trusts that your representatives will refrain from setting forth to the other delegates any views as being those of the Government of the United States.” Kellogg sent a telegram to the American embassy in London informing them of the Department’s position and authorized the forwarding of the telegram to the military and naval attachés, ostensibly to cut off any attempts by NAA representatives to communicate with them. On April 2, one day before the opening of the ICAN’s eighth session, Secretary of the British delegation F.C.L. Bertram wrote Cabot that “Commander Tower[s]...would have been welcome at the meetings if it had been officially possible for him to attend.” The State Department received no report from Towers concerning the meetings, and as late as December had no proof that he was present at the ICAN’s eighth session.<sup>6</sup>

Cabot forwarded Bertram’s letter to Kellogg on April 14 as evidence that the current relationship of the United States towards the ICAN was potentially damaging to the interests of both the nation and industry. The NAA president offered three pieces of evidence to argue that the time for America’s ratification of the convention had come: (1) the nation’s extensive northern and southern borders; (2) recent successful long-range flights such as that of the ZR-3—christened the *Los Angeles*, from Friedrichshafen, Germany, to Lakehurst, New Jersey—as well as the 1924 World Flight; and (3) the future safety implications arising from a lack of regulatory uniformity at the international level.

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<sup>6</sup> Bertram to Cabot, 2 April 1925; undated draft letter to Cabot; Grew to Harrison, 6 April 1925; Grew to Cabot, 6 April 1925; telegram, Kellogg to American Embassy in London, 7 April 1925; all in box 5618, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Latchford to Harrison, 6 December 1926, box 5619, Records of the State Department, RG 59, National Archives at College Park, College Park, MD. In his study of Towers, Clark G. Reynolds states that while naval attaché he represented the United States at the April 1925 session of the ICAN, but he relies solely upon Moffett’s March 16 order to the director of naval intelligence and not subsequent communications from the State Department. See Reynolds, *Admiral John H. Towers: The Struggle for Naval Air Supremacy* (Annapolis, MD: Naval Institute Press, 1991), 183, 580 n37.

Using phrases such as “we beg to strongly emphasize,” “we respectfully urge,” and “we urgently remind you,” there is no question of Cabot’s position on America’s adherence to the convention, and he placed the full resources of the NAA at the State Department’s disposal. Cabot’s follow-up letter of April 23 pointed to the discrepancy between Senate Document No. 91 and the final version of the convention regarding the ICAN/League of Nations relationship, something that Hill had already brought to the attention of his superiors in the State Department. In replying to both letters, Harrison assured Cabot that the matter “has been receiving and will continue to receive the Department’s careful consideration,” a phrase often used in the coming months. With the domestic aeronautical situation still unsettled, the State Department continued its cautious approach to the international air convention.<sup>7</sup>

Undeterred, Cabot made the ratification of the convention a subject of the April 30 NAA Board of Governor’s meeting in St. Joseph, Missouri. At this gathering, the board passed MacCracken’s resolution establishing a three-member committee to petition the Secretary of State and the President in support of the ICAN’s ratification “with such reservations as our welfare requires.” By the end of the meeting, the governors had adopted a thirteen-point program that included actively supporting ratification in addition to the organization’s call for legislation along the lines of the Winslow bill. On May 28, Cabot sent a letter to Coolidge and Kellogg detailing the Board of Governors’ position on the ICAN. Pointing to the impossibility of delineating national borders in flight and America’s tradition of “international amity,” he stated that the NAA’s Board of

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<sup>7</sup> Cabot to Kellogg, 14 April 1925; Cabot to Kellogg, 23 April 1925; Harrison to Cabot, 1 May 1925; Harrison to Cabot, 8 May 1925; all in box 5618, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; “USS *Los Angeles* (ZR-3), Airship 1924-1939,” <http://www.history.navy.mil/photos/ac-usn22/z-types/zr3.htm>.



Governors “greatly fear[ed] the continuance of neglect.” Cabot personally handed a copy of the agreed-upon thirteen-point program to Harrison two weeks later, asserting that the NAA’s “sole purpose was to overcome inertia” and spur government action.<sup>8</sup>

On June 13, assistant to the NAA president Adm. William F. Fullam, NAA Governor-at-Large and Secretary of its Washington, D.C., chapter Arthur Halstead, and President of the American Flying Club Col. Laurence LaTourette Driggs met first with Kellogg and then Harrison as the NAA’s three-member committee. Following Harrison’s advice, Kellogg simply stated that he was “in sympathy” with the ICAN’s principles and would give the matter his “personal consideration.” Harrison expressed the opinion that submitting the convention to the Senate should await the creation of a federal regulatory agency, possibly pushing such action well beyond December. Five days later, the NAA issued a press release that publicly stated its position on the ICAN’s ratification and discussed the meeting with the Secretary of State, but any further activity would have to await congressional action. Cabot followed up on the issue with presidential secretary Sanders in a September 3 letter, also forwarded to Coffin. In it he discussed the particulars of the meetings between Halstead’s group and Kellogg and Harrison, the State Department’s “extreme timidity, offish and non-cooperating attitude” concerning the convention, and the immediate need for American adherence to address the suboptimal U.S.-Canadian situation. He further offered assurance that the convention would not tie

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<sup>8</sup> Cabot to MacCracken, 24 April 1925, Aviation, NAA Correspondence, 1922-1926, box 61, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; Resolutions Adopted at the Meeting of the Board of Governors, National Aeronautic Association of U.S.A., at St. Joseph, Missouri, April 30, 1925; Cabot to MacCracken, 24 April 1925, Aviation, NAA Correspondence, 1922-1926, box 61, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; Resolutions Adopted at the Meeting of the Board of Governors, National Aeronautic Association of U.S.A., at St. Joseph, Missouri, April 30, 1925; Cabot to Kellogg and Coolidge, 28 May 1925; both in box 5616, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

the United States into any undesired international entanglements, comparing it to existing international agreements regarding navigation laws and signal codes.<sup>9</sup>

While Cabot, MacCracken, Halstead, and other NAA members pushed for the convention's ratification, work concluded on the American Aeronautical Safety Code, a document closely in line with the convention's provisions. On April 23, the Sectional Committee gathered for the first time in more than a year at the Bureau of Standards in Washington to consider "comments of the printed draft...in order to complete the Code...for final approval." From 9:30 a.m. until 6:30 p.m., the committee went through each section of the Safety Code and amended the text to remove ambiguity. In addition to Briggs, Lloyd, Halstead, Edward Warner and others representing military, government, and commercial interest, John A. Wilson of the Canadian Department of Defence attended as a guest. In his post-meeting report, Wilson mentioned that the only point of serious disagreement among committee members concerned the issue of "rules of the road of the air." Lt. Cdr. Robert R. Paunack and Lt. Cdr. Eugene E. Wilson, representatives from the Navy's Bureau of Aeronautics, wanted to "adopt the rules of the road at sea in their entirety." After a long discussion, "it was decided to adopt the rules as laid down in the International Convention," thus aligning U.S. practices with those "throughout the world." In keeping in line with the Canadian Air Regulations, a clause was included requiring aviators to have had experience with a type of aircraft before flying it for commercial purposes. Wilson considered Lloyd and Halstead to be "strong

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<sup>9</sup> Harrison to Kellogg, 11 June 1925, box 5616, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Halstead to Lewis, 13 June 1925, folder 32-6, International Air Navigation, 1924-1926, box 177, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; NAA Press Release, 18 June 1925, Aviation, Air Law, Foreign, 1925, General, box 52, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; Cabot to Sanders, 3 September 1925, reel 109, Calvin Coolidge Papers, 1915-1932, Library of Congress, Washington, DC.

supporters” of the ICAN, a statement affirmed by the latter’s activity on the NAA’s Board of Governors. As the Safety Code largely represented the work of these two individuals, it contained “few, if any, divergences in practice from the International Convention and the Canadian Air Regulations.”<sup>10</sup>

By the end of June, members of the Sectional Committee had approved the final draft of the Safety Code via letter ballot and it had received the endorsement of the Bureau of Standards. Chairman of the Society of Automotive Engineers’ Aeronautic Division Edward P. Warner presented the Safety Code to that organization’s Standards Committee at its semi-annual meeting in White Sulphur Springs, West Virginia, on June 18. After receiving the Standards Committee’s approval, the code then went out to all members of the SAE through letter ballot along with twenty-five other proposed standards. The final position of SAE members concerning the adoption of the code was 228 for, 1 against, and 77 not voting.<sup>11</sup>

During the SAE-sponsored Aeronautical Meeting at the Hotel Astor in New York on October 7, chairman of the Safety Code’s Sectional Committee Henry M. Crane presented a paper detailing the code’s history. In reporting the event, the SAE’s journal recognized that “the underlying idea” behind the code had been that it would serve as the foundation for future air regulations “when such control shall have been placed under the

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<sup>10</sup> Lloyd to Members of the Sectional Committee, 6 April 1925; Minutes of the Sectional Committee for Aeronautical Safety Code, 23 April 1925; Lloyd to Members of the Sectional Committee, 6 May 1925; both in folder 58-4, Safety in Aviation, 1924-1925, box 281, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; “Aeronautical Safety Code Meeting,” undated memorandum, John A. Wilson Fonds, MG 30, microfilm reel 10781, Library and Archives Canada, Ottawa, Ontario; “Aeronautical Safety Code Completed,” *Aviation* 18 (June 1, 1925): 600.

<sup>11</sup> Minutes of the Sectional Committee for Aeronautical Safety Code, 23 April 1925; Lloyd to Members of the Sectional Committee, 6 May 1925; Submission of the Safety Code for Aeronautics; Report of Sectional Committee for Code; all in folder 58-4, Safety in Aviation, 1924-1925, box 281, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD.

jurisdiction of the Department of Commerce, as is likely to be the case.” The list of honored guests at the banquet that evening illustrates the high level of exposure that the code had within the aeronautical community: Crane (toastmaster), Clement Keys (speaker), Chief of the Air Service General Patrick, Assistant Chief of the Air Service General Fechet, Coffin, Cabot, Paul Henderson, Colonel Foulois, Chief of the BuAer’s Design Branch Cdr. Holden C. Richardson, director of the RCAF Capt. James S. Scott, and Orville Wright. By the end of October, the American Engineering Standards Committee gave its final approval and, after five years of effort, the code became the tentative American aeronautical standard.<sup>12</sup>

With the stated desire “to establish a uniform and consistent set of safety standards for the construction, equipment, maintenance and operation of aircraft and the conduct of aerodromes,” it is no surprise that the sections of the American Aeronautical Safety Code pertaining to aircraft inspection, pilot licensing, rules of the road in the air, and other related areas closely conformed to—if not outright copied—the international convention, therefore correlating with the Canadian Air Regulations. A brief overview of a few points within these documents illustrates this high level of compatibility. In the code, the matter of aircraft lights expressly followed the ICAN: white lights at the front and rear with green on the right side and red on the left. The list of possible emergency signals also remained the same between the two documents, and the rules for air traffic in flight were in unison as well. The code adopted the ICAN’s order of right-of-way (balloons then airships then airplanes), its ban on passing by diving, its stipulations regarding right turn corrections in case of possible collision, and its provision that aircraft

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<sup>12</sup> “Attendance at Aeronautic Meeting 300,” “Airplane Design and Construction,” and “Aeronautic Banquet a Success,” all in *Journal of the Society of Automotive Engineers* 17 (November 1925): 419-21.

should keep to the right side of established airways. Whereas the ICAN listed 200 meters as the minimum safe distance between aircraft in flight, the Safety Code increased this to 1,500 feet, or 457.2 meters. While both documents prohibited acrobatic flying within a similar radius around airdromes (2,000 meters in the ICAN and 6,000 feet, or 1,828.8 meters, in the Safety Code) and required landing to occur upwind if possible, the Safety Code included a minimum flight ceiling of 2,000 feet over airdromes.<sup>13</sup>

Concerning the issues of aircraft identification and necessary in-flight documentation, the Safety Code stated that they “shall be in accordance with the current revision of the International Air Convention” and included the ICAN’s current regulations as an appendix to Part 3. The code also adopted the “N” designation as the nationality mark of the United States, keeping with both the ICAN’s international standard and Wilson’s suggestion to Halstead’s subcommittee at its May 25, 1923 meeting. For all practical purposes, the Safety Code’s provisions concerning the licensing of pilots mirrored those in Annex E of the ICAN. It carried over the international convention’s division of pilot’s licenses into private and commercial/public transport, while also incorporating its testing procedures (with the necessary changes in units of measurement) for each category. Minor additions were added to the code’s testing process—such as criteria for seaplanes, an emergency maneuvers test for commercial pilots, and a stipulation that navigators show proficiency in using the U.S. Weather

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<sup>13</sup> Aeronautic Safety Code: Tentative American Standard, approved by the American Engineering Standards Committee, October 1925, Bureau of Standards, American Aeronautical Safety Code, June-November 1923, box 55, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; *International Air Navigation Convention, Text of Articles and Annexes Together with Amendments Issued Thereunder Up To June, 1924*, (Washington, DC: GPO, December 1, 1924).

Bureau's meteorological codes—but they did not fundamentally alter the mirrored nature of the two documents.<sup>14</sup>

Concerning the physical qualifications of pilots, both documents required “the absence of any mental, moral or physical defects,” a minimum age of nineteen for public pilots, and general surgical, medical, eye, and ear examinations with reexamination every six months. Whereas the ICAN provided detailed medical requirements for pilots, the Safety Code did not include the same level of detail, leaving the specifics to be worked out in actual practice. Its requirement for a preflight inspection, an element not mentioned in the international convention, allowed for uniformity with the Canadian Air Regulations, but the Safety Code went a step further in also calling for a postflight inspection. As the United States lacked an authoritative body for aircraft registration, the code remained silent on the subject. Though not having the force of law, the Safety Code established best practices for the use of aircraft, offering a level of compatibility between the United States and other nations that could serve as the basis for international flight while also providing a level of assurance to passengers and insurance companies.<sup>15</sup>

Business became increasingly attracted to commercial aviation after the passage of the Kelly Air Mail Act. On March 19, 1925—just over a month after the act's passage—Edsel Ford announced the Ford Company's interest in aviation. Three weeks later, Ford began operating an air freight service between its Detroit and Chicago plants. The younger Ford envisioned the mass use of aircraft—and the Ford Company's production of them—in the same vein as the automobile, declaring that the “not too distant future” would be “the age of the air.” With his father, visionary and genius Henry

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<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

Ford, believing “there is not a doubt in the world that commercial aviation can be successful,” legitimate business interest in aeronautics hit an all-time high. Ford’s actions caused a stir, and the Curtiss Aeroplane and Motor Company was “flooded with inquiries about commercial flying machines,” prompting a company spokesman to predict that 1925 would be a banner year for aviation.<sup>16</sup>

Ford’s announcement lent much-needed credibility to aeronautical enterprises, and Cabot sought to take advantage of the increased public interest. He again wrote Coolidge, this time to petition for a presidential proclamation establishing “Aviation Week” as a means to call attention to progress in American aviation while galvanizing public opinion behind legislative action. While Sanders assured Cabot that the President remained “very much in favor of the activity” he considered it impossible to issue such a proclamation. Even amid increasing public discussion, Coolidge continued to “restrain the impulse to butt in or to be dragged into trouble.”<sup>17</sup>

On May 22, 1925, the *New York Times* announced the creation of National Air Transport (NAT) as the result of a meeting of prominent aviation leaders at the Drake Hotel in Chicago. Over the course of that spring MacCracken had been busy raising seed money for the company in the Chicago area while Chester W. Cuthell, a successful New York lawyer with ties to the Curtiss Company, did the same in the Big Apple. By the middle of May the two had secured \$10 million. Howard Coffin became president of the new enterprise, Clement Keys Executive Committee chairman, Charles L. Lawrance of

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<sup>16</sup> “Aircraft Engines Planned by Fords,” *New York Times*, March 20, 1925; “Air Freight Line, Detroit to Chicago, Started by Fords,” *New York Times*, April 14, 1925; “Edsel Ford Sees Airplanes For All,” *New York Times*, April 19, 1925; “Sees Big Aviation Year,” *New York Times*, June 23, 1925; Leary, *Aerial Pioneers*, 224; van der Linden, *Airlines*, 20.

<sup>17</sup> Cabot to Coolidge, 14 May 1925; Sanders to Cabot, 19 May 1925; “Aviation Week;” Welliver to Sanders, 31 July 1925; all in reel 109, Calvin Coolidge Papers, 1915-1932, Library of Congress, Washington, DC; White, *A Puritan in Babylon*, 433.

the ACCA one of three vice-presidents, MacCracken and Cuthell co-counsel, and William A. Rockefeller sat on the Board of Directors. Paul Henderson, Second Assistant Postmaster in charge of the airmail, announced that he would resign in August to serve as the company's general manager. The creation of NAT and several other air transport companies over the next year—including Colonial Air Lines, Pacific Air Transport, and Northwest Airways—proved that the Kelly Act had indeed provided the necessary economic incentive for private industry. Even with the increase in commercial interest, Coolidge maintained a safe public distance from the aviation issue—when NAT's Traffic Manager Luther Bell, former Traffic Manager for the Air Mail Service, sent a letter to Coolidge requesting a presidential statement on aviation he received a similar reply as Cabot. On September 15, the Post Office Department opened the bidding to operate eight airmail routes, awarding five contracts three weeks later to Robertson Aircraft Corporation, entrepreneur Walter T. Varney, Western Air Express, Colonial Air Lines, and National Air Transport, with MacCracken representing the last three.<sup>18</sup>

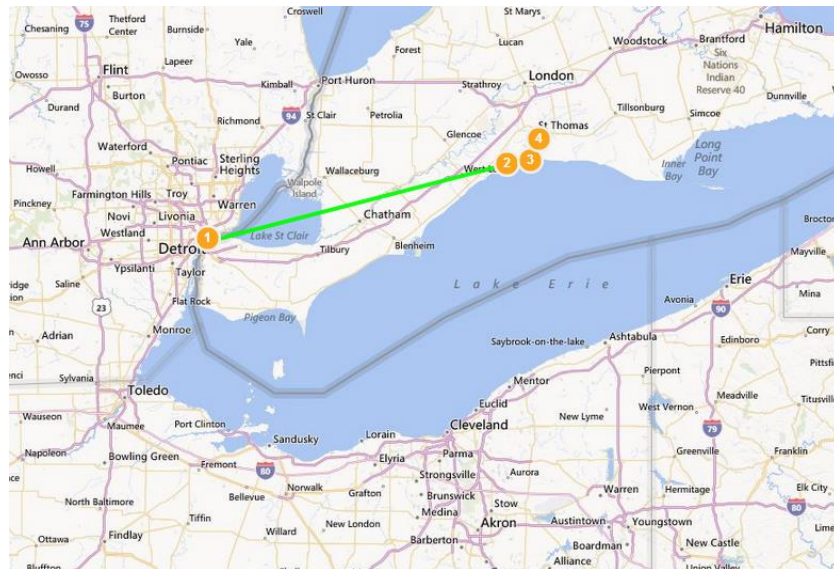
As Cabot had mentioned in his letter to Sanders, the Canadian situation continued to be a source of frustration. An incident in the fall of 1925 shows that, even with multiple attempts to inform them over the years, American pilots still failed to adhere to Canadian requirements when entering Canada. During September, an aircraft owned by the firm C. A. Pfeffer and Associates left Detroit and traveled to a piece of property outside of “the village of Port Talbot...with the object of converting it into a summer

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<sup>18</sup>Sanders to Bell, 5 August 1925, reel 109, Calvin Coolidge Papers, 1915-1932, Library of Congress, Washington, DC; “National Air Transport Organized,” *Aviation* 18 (June 1, 1925): 598-600; “\$10,000,000 Air Line for Freight Formed,” *New York Times*, May 22, 1925; “Another Air Line for Freight Planned,” *New York Times*, May 23, 1925; “17 Air Mail Bids for 8 New Routes,” *New York Times*, September 16, 1925; “Government Gives Air Mail Contracts,” *New York Times*, October 8, 1925; Osborn and Riggs, *Mr. Mac*, 44-48; van der Linden, *Airlines*, 19-24.



resort.” Circling the area, J. Kalec of the Detroit aerial photography firm Kalec and Forster took photographs, ostensibly for the purpose of advertising the property. After landing at the farm of James Todd, the Imperial Oil Company supplied the aircraft with fuel before it returned to Detroit.<sup>19</sup>



1) Detroit, 2) Port Talbot, 3) Port Stanley, 4) Saint Thomas.  
Map made using Bing maps <http://www.bing.com/maps/?FORM=Z9LH2>.

Catching Canadian authorities unawares, the flight caused grave concern at the Department of Defence. Though Customs offices existed at both Port Stanley and Saint Thomas, the Pfeffer aircraft had not landed as per Canadian regulations, and officials at the two stations learned of the flight only after the fact. Supplying fuel to the aircraft constituted unregulated international trade, and the taking of unauthorized aerial photographs represented a major security risk for the British Empire. The Canadian government expressed its dismay to the State Department via the British embassy at the end of September. In response, Kellogg contacted Michigan’s Republican Governor Alex J. Groesbeck, while Assistant Secretary of State J. Butler Wright wrote Walcott for

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<sup>19</sup> Chilton to Kellogg, 25 September 1925, box 7699, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

suggestions on how to bring the Canadian regulations to the attention of American fliers. Groesbeck's secretary Elton R. Eaton assured Kellogg that the Canadian regulations would be brought to the attention of the two companies involved in the incident. NACA Secretary Rear Adm. David W. Taylor informed the State Department that "in the absence of any executive agency...empowered to deal effectively with the problems of air navigation" the responsibility for informing the public fell upon the State Department, and he recommended the usual circulation of notices throughout the aeronautic community. He included a list of the names and addresses of aircraft manufacturers, engineering firms, operators, distributors, and aeronautical publications, offering the NACA's assistance in "handling the details." Taylor took the opportunity to point out that "this incident serves to emphasize the need for the creation of a Federal agency for the regulation of air navigation." After multiple years and attempts at refinement, the temporary ad hoc agreement between the United States and Canada had failed to reconcile the commercial potential of the airplane and national security needs.<sup>20</sup>

When bringing the actions of C. A. Pfeffer and Associates to the attention of the State Department, Chargé d'Affaires ad interim of Great Britain Henry Chilton referenced the Canadian courtesy as the basis for complaint even though the agreement had officially expired on May 1. The incident at Port Talbot prompted the State Department to take action to secure a further extension of the agreement until May 1, 1926, on the presumption that the necessary legislation to rectify the situation would occur during the next session of Congress. Following Taylor's earlier suggestion,

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<sup>20</sup> Chilton to Kellogg, 25 September 1925; Kellogg to Chilton, 1 October 1925; Kellogg to Groesbeck, 1 October 1925; Eaton to Kellogg, 6 October 1925; Wright to Walcott, 6 October 1925; Taylor to Wright, 20 October 1925; all in box 7699, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

Harrison requested that the NACA assist it in publicizing the extension along with the criteria for flying into Canada.<sup>21</sup>

Adhering to Canada's regulations may have addressed issues of national sovereignty and security, but it adversely affected the fledgling American aeronautics industry. In a letter dated November 4, General Manager of the Buffalo Chamber of Commerce George C. Lehmann brought the situation to the attention of Republican Congressman Clarence MacGregor. Lehmann detailed the plight of a Buffalo aerial photography company that was losing potential Canadian clients due to the necessity of obtaining permission for each flight into Canadian territory, resulting "in a wait of a week or two...forcing them to undergo delays in cases where a picture is wanted on short notice." Lehmann questioned "whether there is any possibility of securing reciprocity in this matter" as Canadian aircraft could enter the United States at will. When followed, the Canadian courtesy imposed time restrictions on American businesses, nullifying a primary advantage of the airplane and undercutting potential revenue from activities north of the border.<sup>22</sup>

As the State Department dealt with the aftermath of the C. A. Pfeffer and Associates flight, events in the early days of September transformed the aviation question into the moral issue Coolidge believed necessary for presidential action. On September 1, the Navy launched two PN-9 flying boats for a nonstop flight from San Francisco to Honolulu. Neither aircraft reached its destination. The first PN-9 to come down was

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<sup>21</sup> Memorandum, "Agreement with Canada Regarding American Aircraft in Canada," State Department, Office of the Solicitor, 22 October 1925, box 7699, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Kellogg to Howard, 28 October 1925; Howard to Kellogg, 25 November 1925; Harrison to the NACA, 5 December 1925; all in box 6635, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

<sup>22</sup> Lehmann to MacGregor, 4 November 1925; MacGregor to Kellogg, 5 November 1925; both in box 7699, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

safely towed back to San Francisco, but the other—under the command of Cdr. John Rogers—could not be found. Many feared the loss of the five-member crew as the search extended over nine days. Newspapers reported a lack of fuel as the cause of Rogers's crash, hurting the Navy's image. Two days into this blossoming public relations nightmare came the news that a storm over Ava, Ohio, had wrecked the Navy airship *Shenandoah*, resulting in the death of fourteen crew members including its captain, Lt. Zachary Lansdowne. Many questioned the reasons behind such flights, forcing Wilbur and Coolidge to declare publicly that safety concerns always triumphed over political considerations.<sup>23</sup>

The greatest challenge to the Coolidge administration's authority came from San Antonio. In a seventeen-page statement released to the press on September 5, Colonel Mitchell gave the opinion that "these accidents are the direct result of the incompetency, criminal negligence and almost treasonable administration of the national defense by the Navy and War Departments." He further added:

The conduct of affairs by these two departments, as far as aviation is concerned, has been so disgusting in the last few years as to make any self-respecting person ashamed of the clothes he wears. Were it not for the patriotism of our air officers and their absolute confidence in the institutions of the United States, knowing that sooner or later existing conditions would be changed, I doubt if one of them would remain with the colors, *certainly not if he were a real man.*

With the dust finally settling over the scandals of the Harding administration, such glaring insubordination could not go unanswered. Two days after Mitchell's announcement to the press, reports appeared concerning a possible court-martial. With

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<sup>23</sup> "Navy Plane Missing in a Stormy Sea, Its Fuel Exhausted," *New York Times*, September 2, 1925; "No Trace of Fliers in Pacific Search," *New York Times*, September 4, 1925; "Squall Splits Big Airship," *Special to The New York Times*, September 4, 1925; "President Expects a New Shenandoah" and "Secretary Denies Politics in Flight," both in *New York Times*, September 5, 1925; Trimble, *Moffett*, 155-60; Komons, *Bonfires to Beacons*, 74; Alfred F. Hurley, *Billy Mitchell*, 100-101.

Coolidge's blessing, the War Department undertook an investigation of the matter and presented Mitchell with official charges on October 5.<sup>24</sup>

Coolidge's decision to court-martial Mitchell was not the only one the president made in response to the twin aviation disasters. On the night of September 12—ostensibly at the request of Secretary of the Navy Wilbur and acting Secretary of War Davis—Coolidge announced a presidential commission to investigate the aviation issue. The nine members appointed to the President's Aircraft Board, who all learned of Coolidge's call to service through the next day's paper, included Dwight Morrow, William F. Durand, Maj. Gen. James G. Harbord (retired), Rear Adm. Frank F. Fletcher (retired), Sixth Circuit Court of Appeals Judge Arthur C. Denison (a 1911 Taft appointee), Howard Coffin, ranking Democrat in the House Committee on Naval Affairs Carl Vinson of Georgia, New York Republican Congressman James Parker, and Connecticut's freshman Republican Senator Hiram Bingham. Coffin tried to get MacCracken appointed as counsel for the board but, as it already had three lawyers and no additional funds, he instead retained MacCracken as his personal advisor. Over the course of the next few days the members confirmed their participation and met for a luncheon with Coolidge at the White House on September 17. While there they selected Morrow as chairman, Denison as vice-chairman, and Durand as secretary. The president and Secretary Hoover both emphasized the importance of addressing the issue of

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<sup>24</sup> "Mitchell Charges 'Gross Negligence' in Shenandoah Loss," *New York Times*, September 6, 1925 (italics added for emphasis); "Mitchell Reopens Controversy," *New York Times*, September 6, 1925; "Plan Court-Martial for Col. Mitchell on Air Accusations," *New York Times*, September 7, 1925; "Believe President Must Act," *Special to The New York Times*, September 7, 1925; "Mitchell Obtains Details of Charges," *Special to The New York Times*, October 6, 1925; Michael L. Grumelli, "Trail of Faith," 106-109, 122; Hurley, *Billy Mitchell*, 101.

commercial aviation, and Coolidge stressed his desire to have the report ready for Congress in December before the release of the Lampert Committee's report.<sup>25</sup>

The choice of members clearly illustrates Coolidge's commitment to continue the aviation policy of Harding and Wilson. Long-time friend Morrow could be counted on not to deviate from the president's wishes. As a member of the NACA and president of the ASME, Durand's views were a matter of record. Howard Coffin's status as a member of the NAA Board of Governors, his long-held desire to develop commercial aviation, and his reliance on MacCracken's counsel all assured his support for a bureau in the Commerce Department. Parker, recently-appointed chairman of the House Committee on Interstate and Foreign Commerce, had been a member of that committee during the multiple iterations of the Winslow Bill and had by this time accepted its fundamental principles. Just over a month after his testimony in front of the Lampert Committee in favor of a bureau in the Department of Commerce, *Aviation* had designated Hiram Bingham—the famed “discoverer” of Machu Picchu and World War I aviator—as “a leader of aeronautical thought in Congress.” On page twenty-three of the very same issue of the *New York Times* that announced the creation of the President's Aircraft Board lay a full-page story detailing Bingham's call for legislation along the lines of the Wadsworth bill. Though he had not publicly supported the Commerce Department bureau, the continuance of a “rather bitter feud” between Harbord and Mitchell arising during the

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<sup>25</sup> Telegram, Bingham to Sanders, 13 September 1925; telegram, Durand to Coolidge, 13 September 1925; Harbord to Coolidge, 14 September 1925; Vinson to Coolidge, 14 September 1925; Fletcher to Coolidge, 16 September 1925; telegram, Parker to Sanders, 16 September 1925; Sanders memorandum for Mrs. Coolidge, 14 September 1925; memorandum concerning meeting, 17 September 1925; all in reel 109, Calvin Coolidge Papers, 1915-1932, Library of Congress, Washington, DC; Latchford to Harrison, 6 November 1925, box 5618, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; “Coolidge Appoints Board to Inquire Into Air Defense,” *New York Times*, September 13, 1925; “Air Board to Begin Its Inquiry Monday,” *New York Times*, September 18, 1925; Osborn and Riggs, *Mr. Mac*, 50.

former's tenure as Assistant Chief of Staff for General Pershing meant Harbord could be counted on to oppose Mitchell's unification proposal. Nothing in the past utterances of Fletcher, Denison, and Vinson gave any reason to believe they would support a unified air service or department of defense.<sup>26</sup>

The President's Aircraft Board was not the only investigative body that Durand and MacCracken participated in during the 1925 congressional recess. Hoover had approved the establishment of the Joint Committee of the Department of Commerce and the American Engineering Council—presumably before leaving Washington on June 11 for an eight-week trip to the West Coast—with a focus on commercial and civil aviation to “supplement the work of the Lampert Committee.” This six-member Joint Committee consisted of Assistant Secretary of Commerce J. Walter Drake as chairman, New York University engineering professor Joseph W. Roe as both vice-chairman and staff director, Durand, MIT professor and member of the ASME's Committee on Civil Aircraft Legislation Edward P. Warner, Luther P. Bell of NAT, ACCA Board of Governors member C.T. Ludington, Lieutenant Van Zandt, Secretary of the ASME's Aeronautical Division and Guggenheim School of Aeronautics professor Alexander Klemin, and Chief of the Transportation Division Eugene S. Gregg. About the same time that Coolidge announced the creation of the President's Aircraft Board MacCracken began assisting with the Air Regulation section of the Hoover committee's report. By the end of

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<sup>26</sup> “Publisher's News Letter,” *Aviation* 18 (March 30, 1925): 359; “Senator Bingham Calls for a New Air Policy,” *New York Times*, September 13, 1925; “The Nation Seeks the Truth About Aviation,” *New York Times*, September 27, 1925; draft of MacCracken speech “Aviation by Investigation,” to be read at the Law Club, December 11, 1925, Aviation, Air Law, Speeches by Wm. P. MacCracken, Jr., 1925-1925, box 52, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; Grumelli, “Trial of Faith,” 123; Komons, *Bonfires to Beacons*, 75-76. According to Cooke, Harbord “gave the orders sending Mitchell to the psychopathic ward at Walter Reed Army Hospital” in 1921 (Cooke, *Billy Mitchell*, 182).

September two committees that shared multiple points of contact had joined the Lampert Committee in its investigation of aviation.<sup>27</sup>

The President's Aircraft Board began public hearings in the hearing room of the House Committee on Interstate and Foreign Commerce on Monday, September 21. The board arranged its witnesses into four categories: Army, Navy, the airmail service, and the aeronautics industry. While it drew on the work of both the Lampert Committee and the Curry bill hearings, it was not simply a rehash of earlier investigations. The board called a total of ninety-nine witnesses, only thirty-one of which had testified earlier in front of the Lampert Committee. Many of the remaining sixty-eight individuals were military aviators or members of the aircraft industry. The board "designedly gave the greater portion of the time to hearing those men with actual air experience," something the Lampert Committee and House Committee on Military Affairs hearings did not do.<sup>28</sup>

Meeting from September 21 to October 16, with two evening sessions lasting until eleven p.m., the board heard testimony on the proper organization of the military air services, the issue of promotion and pay for military aviators, and how best to foster the

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<sup>27</sup> "Survey Is Planned for Air Commerce," *New York Times*, 21 July 1925; Herbert Hoover's Daily Calendar, Herbert Hoover Presidential Library, <http://www.ecommcode2.com/hoover/calendar/dayView.cfm?seqNum=1772>; Roe to MacCracken, 21 September 1925; Minutes of Meeting of Executive Committee of the American Society of Mechanical Engineers Aeronautic Division, 3 December 1925, folder 2-2, ASME, 1917-1927, box 32, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Roe to MacCracken, 28 September 1925, Aviation, Commerce Department, Committee on Civil Aviation, 1925, Correspondence and Drafts, box 61, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; draft of MacCracken speech "Aviation by Investigation," to be read at the Law Club, December 11, 1925, Aviation, Air Law, Speeches by Wm. P. MacCracken, Jr., 1925-1925, box 52, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; Aeronautical Chamber of Commerce of America, Inc., *Aircraft Year Book, 1926* (New York: ACCA, 1926), 6. Hoover met twice with Cabot the week before he left Washington, on June 2 and 3. Warner also had a connection to the Morrow Board. He worked with the NACA's European representative John Ide to compile a Report on American and Foreign Air Force Equipment.

<sup>28</sup> "To Call Davis First in Aviation Inquiry," *New York Times*, September 19, 1925; *Report of the President's Aircraft Board, November 30, 1925* (Washington, DC: GPO, 1925), 2.



growth of commercial aviation. Those who addressed the issue of commercial regulation during the Morrow Board hearings invariably came down in favor of the Commerce Department bureau model, undercutting the unified air department option. Acting Secretary of War Davis, Brigadier General Drum, General Patrick, Admiral Moffett, Postmaster General New, Paul Henderson, and Secretary Hoover all reaffirmed their support for placing commercial aviation under the purview of the Commerce Department, “where it belongs.” In a series of questions from Senator Bingham, Commissioner of Lighthouses George R. Putnam—who had not testify before the Lampert Committee—discussed the extensive federal aid the Department of Commerce provided for water transportation not did not currently extend to aviation. In his testimony Cabot addressed the negatives inherent within a state-based system of aviation, called for a bureau in the Department of Commerce, and recommended ratification of the international convention. In support of this last point he called attention to America’s membership in the 1912 International Radio Telegraphic Convention, its adherence to the International Postal Laws, and the need for compatibility with Canada’s Air Regulations.<sup>29</sup>

Many anticipated that Mitchell’s testimony on Tuesday, September 29 would be the hearing’s main event, but the Morrow Board’s approach of allowing witnesses to say whatever they wanted for as long as they wanted backfired on the former general. During six hours and twenty minutes of testimony over the course of Tuesday and Wednesday morning, Mitchell read from a nine-part prepared statement totaling more than eighty-nine pages in the hearing’s official transcripts. He proposed the same model presented

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<sup>29</sup> *Hearings before the President’s Aircraft Board* (Washington, DC: GPO, 1925), 5-6, 54-55, 72-73, 308, 319, 333-34, 1189, 1482-86. While the frontispiece for Part IV of *Hearings before the President’s Aircraft Board* states that the hearings ended October 15 it includes the testimony of eleven individuals before the board on October 16.

before the Lampert Committee—a single department of aeronautics with three divisions for military aviation, fabrication, and civil/commercial aviation. On Wednesday morning, Mitchell answered questions from board members in a nonconfrontational manner, using “moderate...language” so as to avoid “severe condemnation of persons” before returning to his prepared statement. Facing court-martial and with nothing substantially new to add, Mitchell’s “fire had gone out. He had said everything he had to say and had reached a point where only theatrics were left, and they did not materialize.” Much has been made of Mitchell’s “failure” before the Morrow Board. Some see Morrow’s decision to allow Mitchell all the time he wanted as a strategy to “let Mitchell hoist himself by the petard of his own prolix harangue,” but the board took the same approach with all of its witnesses. Others see Mitchell’s long statement as a desire to bait the board into interrupting him, allowing him to don the cape of underdog and victim he had worn so well in his prior clashes with the military establishment.<sup>30</sup>

Though the burden of proof rested on Mitchell, the Morrow Board’s decision to discount the department of defense and unified air service models cannot be laid solely at the feet of one man. The president had hand-picked the board’s nine members for a reason, and they had already been exposed to Mitchell’s position through his earlier testimony before the Lampert Committee. There is no reason to believe that a perfect showing on Mitchell’s part would have swayed them in the slightest. Military aviators, under direct questioning from Senator Bingham, refused to support a unified service almost to a man and instead heavily favored Patrick’s idea of elevating the Air Service to the same position as the Marine Corps. Rather than serving as a forum for debating

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<sup>30</sup> Ibid., 497-586; “The Nation Seeks the Truth About Aviation,” *New York Times*, September 27, 1925; Hurley, *Billy Mitchell*, 102-103; Cooke, *Billy Mitchell*, 182; Grumelli, “Trial of Faith,” 136-37; Komons, *Bonfires to Beacons*, 76-78; Trimble, *Moffett*, 164.

various bureaucratic models for aviation, the Morrow Board hearings provided a presidentially-sanctioned, public venue within which to present the shared separate bureau ideology to Congress and the nation.

On November 30, one week before the 69<sup>th</sup> Congress convened, the Morrow Board submitted its report to President Coolidge. Written by a drafting committee consisting of Morrow, Denison, and Durant (and based on the recommendations of the board's Army, Navy, and industry subcommittees), the unanimous report advocated the continued separation of military and commercial aviation, the establishment of "a Bureau of Air Navigation under an additional Assistant Secretary of Commerce," and concluded that a department of defense was not prudent at this time. In addition, the board stood firmly against a unified department of air based on the differing needs of land and water aviation. The board recommended the creation of three new Assistant Secretary positions in the Departments of War, Navy, and Commerce and that the Air Service be renamed the Air Corps, a nod to Patrick's idea. While the report was generally praised, not everyone was happy with the board's recommendations. In a December 3 telegram to Coolidge, Cornelius Vanderbilt, Jr., lamented that the report "falls into the error...of attempting executive administration through a board of three instead of a single executive." Though not designated as such, the Morrow Board's recommendation that the three new assistant secretaries "jointly...coordinate so far as may be practicable" informally established the sort of joint board continuously recommended since 1919, though without the authority to draft and propose legislation.<sup>31</sup>

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<sup>31</sup> *Report of the President's Aircraft Board, November 30, 1925* (Washington, DC: GPO, 1925), 10; telegram, Vanderbilt to Coolidge, 3 December 1925, reel 109, Calvin Coolidge Papers, 1915-1932, Library of Congress, Washington, DC.

In drafting its report the Morrow Board had at its disposal the report of the Department of Commerce-sanctioned Joint Committee, which had submitted its report on civil and commercial aviation to President Coolidge on November 6. Though not released for general distribution until January 24, 1926, a copy of the Joint Committee's report was sent to the Aircraft Board at the president's request. After recognizing Coffin's financial support, the report was divided into four parts, the first of which, Legal Status and Control, most directly relates to this study. The Joint Committee recommended (to no one's surprise) the creation of a Bureau of Civil Aeronautics in the Department of Commerce with responsibility for regulating aviation through the licensing of pilots, registration of aircraft, establishment and maintenance of air routes and navigation facilities, and the administration of "international air navigation regulations as they affect the United States." The report declared the American Aeronautical Safety Code to be "perhaps the most complete text of its kind ever prepared" that "should be of assistance in drafting air regulations." It also expressed the belief embodied in the Winslow bill that federal regulation of both interstate and intrastate commerce represented the only way to ensure the safe operation of aircraft.<sup>32</sup>

Throughout the Legal Status and Control section of the report, the Joint Committee presented the federal regulation of aviation as the best means to prevent contradicting state legislation and connect the United States with the existing international regime. In calling on the president to submit the international convention to

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<sup>32</sup> Drake to Coolidge, 6 November 1925; Sanders to Drake, 6 November 1925; both in reel 109, Calvin Coolidge Papers, 1915-1932, Library of Congress, Washington, DC; *Civil Aviation: A Report by the Joint Committee on Civil Aviation of the U.S. Department of Commerce and the American Engineering Council* (New York: McGraw-Hill Book Company, Inc., 1926), 2-3, 107, 120; "Promoting Civil Aviation," *New York Times*, November 7, 1925; "Urges Federal Aid for Civil Aviation," *New York Times*, January 24, 1926. The other three parts of the Joint Committee's report were Government Policy Regarding Civil and Industrial Uses of Aircraft, Commercial Aircraft and Equipment, and Public and Business Support.

the Senate for ratification with reservations, the Joint Committee addressed the negatives of continuing the current policy of indifference.

Not only will aircraft of the United States be barred from countries which have ratified the convention, but the delay on the part of the United States in so doing prevents our participation in the formation of the amendments and regulations *to which American aircraft must eventually conform*. It can hardly be presumed that the interest of our own aircraft industry and commercial air transport will be protected by foreign competitors in the formulation of rules and regulations relating to international air navigation. Further delay in ratifying this convention merely increases the difficulty which will confront our representatives when they take their place in the international conference.

Thus the Joint Committee—in consultation with MacCracken—recognized the global nature of aviation regulation, believed in the necessity of American participation in the existing framework to safeguard national interests, and saw such participation as inevitable. As the international convention provided the basis for the air regulations of most foreign nations, the Joint Committee argued that, even in the absence of ratification, it “can and should be followed in its main lines by the United States.”<sup>33</sup>

On December 14, a week after the beginning of the 69<sup>th</sup> Congress, the Lampert Committee submitted its report. The House Select Committee unanimously concurred with the Joint Committee and the Morrow Board in recommending the creation of a Bureau of Air Navigation in the Department of Commerce. It also rejected Mitchell’s proposed department of air but did recommend a unified Department of Defense along with a plan of production and procurement.<sup>34</sup>

Thus over a span of six weeks three different committees had advocated the same bureaucratic approach for the federal regulation of civil aviation. While some argue that they “contributed nothing new in the way of ideas or proposals” from previous

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<sup>33</sup> *Ibid.*, 8, 107 (italics added for emphasis).

<sup>34</sup> Select Comm. of Inquiry into Operations of the United States Air Services, Report, H.R. Rep. No. 1653, at 8-9 (1925).

recommendations over the preceding six years, the voluminous hearings and trio of final reports illustrate that the Commerce Department model had achieved critical mass by 1925. No longer were various organizations and executive departments singly or in small groups advocating a certain course of legislative action. Rather a preponderance of nearly all interested parties supported this mental model in all three investigations, providing a unified call for congressional action. While the Morrow Board has received the majority of scholarly attention, the most significant report was that of the Lampert Committee. Because the Senate had passed the Wadsworth bill on three previous occasions, the House of Representatives represented the central arena of contention between the various views concerning the federal regulation of aviation, and its Select Committee of Inquiry's recommendations provided a means to break the ideological stalemate. By forcing individuals to confront the issue and pick sides, Mitchell played a central role in crystallizing support for an aviation bureau by the end of 1925.<sup>35</sup>

Congressmen introduced numerous bills in the opening days of the 69<sup>th</sup> Congress designed to bring these recommendations into reality. Of these, only four in the House and one in the Senate specifically addressed civil aviation. On December 7, Republican Congressman Clarence J. McLeod of Michigan submitted H.R. 196, which called for the establishment of a \$100,000,000 fund to provide direct federal loans to aviation start-ups, and it found its way to Parker's Committee on Interstate and Foreign Commerce. The Lampert Committee, the Morrow Board, and the Joint Committee had all expressly opposed direct government subsidies, instead advocating indirect government support through the creation and maintenance of airways and navigational aids similar to those provided for water transportation. In a move to ensure its death in Parker's committee,

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<sup>35</sup> Komons, *Bonfires to Beacons*, 79.

Ames shared with Parker the NACA's view that "this bill goes too far." H.R. 196 had almost no chance of becoming law. A day after McLeod submitted his bill, Congressman Curry presented H.R. 4084, a renumbered H.R. 10147 from the previous Congress. Considering the Morrow Board's and Lampert Committee's report, H.R. 4084's call for a Mitchell-style Department of Air now existed so far outside the accepted framework that it was dead on arrival. Illinois Republican Congressman John J. Gorman introduced H.R. 6516 on January 4, 1926. The measure called for the creation of a five-member Bureau of Civil, Commercial, and Strategic Aeronautics made up of representatives from the Departments of War, Navy, Commerce, Post Office, and Interior. In effect, the bill marked a return to the 1919 Interdepartmental Board's framework—one that had undergone a process of debate, revision, and ultimate rejection within the executive branch and aeronautical community years earlier. The NACA strongly advised Parker against supporting H.R. 6516, viewing it as "unnecessary and undesirable."<sup>36</sup>

On September 23, two days after the Morrow Board began public hearings, Hoover had written Bingham to offer the services of Commerce Department Solicitor Judge Stephen Davis to assist "with the legislative problem." Three weeks later—as the board's hearings came to a close—Bingham took Hoover up on the offer, assured that any bill Davis came up with would meet with Hoover's approval. Hailing from Connecticut (the first state in the nation to have passed a state aviation bill in 1911 under Governor Simeon Baldwin), Bingham did not share the belief of MacCracken and others of the necessity for all-encompassing federal legislation, and the resulting bill

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<sup>36</sup> Ames to Parker, 20 January 1926; Victory to Moffett, 16 January 1926; Ames to Parker, 20 January 1926; all in folder 15-6, Commerce, Department of, Bureau of Air Commerce, 1926, box 135, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD.

corresponded closely to the previous Wadsworth bills. On December 8, just hours before the president publicly supported the Morrow Board's report in his annual State of the Union address, Bingham introduced S. 41 in the Senate. Section 1 expressly limited its application to the "flying, navigating or operating of any civil aircraft in interstate or foreign commerce, or in, over, or through the District of Columbia, the Territories and dependencies of the United States," leaving a large area for state-based regulation. S. 41 carried over, with only minor changes in syntax, nine out of the ten responsibilities within Section 4 of Wadsworth's S.76 from the previous Congress. These included the by now standard set of regulatory responsibilities for licensing, airworthiness, marking, and air routes, as well as the authority "to exchange with foreign governments through existing channels information pertaining to civil aviation." Section 16's call for the transfer of the NACA to the Department of Commerce marked the return of a bureaucratic vision that Joseph Ames and his fellow members had consistently fought against since the NACA's establishment.<sup>37</sup>

Rather than call for a new bureau—as the Morrow Board had recommended in accordance with the dominant ideology—S. 41 provided only for a new Assistant Secretary to assist the Secretary of Commerce in fulfilling his duties, a tactic that undercut any objections to bureaucratic enlargement. While it forbade all foreign-owned aircraft from participating in interstate commerce within the United States and its territories, the draft bill did not include any declaration of air sovereignty or mention the international aspects of flight. Parker introduced Davis's bill in the House two days later

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<sup>37</sup> Hoover to Bingham, 23 September 1925; Bingham to Hoover, 13 October 1925; both in Bureau of Aeronautics, Legislation, 1925-1926, box 121, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; A Bill to Regulate the Use of Aircraft in Commerce, and Other Purposes, S. 41, 69<sup>th</sup> Cong. (1925).



as H.R. 4772, where it was referred to his Committee on Interstate and Foreign Commerce.<sup>38</sup>

By the second week of December, Hoover's ideas concerning aviation regulation had undergone a subtle yet important shift from supporting all-encompassing legislation along the lines of the Winslow bill towards a broader enabling bill. At a meeting with Iowa Senator and president pro tempore Albert B. Cummings in November, Hoover suggested that Clarence M. Young—secretary for the Bureau of Municipal Research of Des Moines, president of the city's NAA chapter, and member of the Iowa Budget Appeal Board—look over the Winslow bill and offer his opinion. Cummins had recommended Young to Hoover as a possible candidate for a position in the Department of Commerce five months earlier, describing the thirty-five-year-old Yale graduate and wartime aviator as “a remarkable man” and “just the sort...you would like.” In a letter dated December 7 and received at the Commerce Department two days later, Young attributed the Winslow bill's multiple failures to its “complicated and arbitrary” nature. MacCracken's and Lee's vision “attempted to impose too much in the way of regulation” and “proposed to establish a complete air navigation code...without a practical premise for it.” Arguing that the question of aviation regulation could not be “suitably solved by a theoretical discussion of specific proposals in anticipation of a present development[al] trend which may or may not take place,” Young recommended a broader bill that allowed

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<sup>38</sup> Message of the President of the United States to Congress, December 9, 1925, 19-20; A Bill to Regulate the Use of Aircraft in Commerce, and Other Purposes, S. 41, 69<sup>th</sup> Cong. (1925); Cabot to Hoover, 17 April 1925, Aviation, National Aeronautic Association, Legislative Committee, 1924-25, box 62, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; Komons, *Bonfires to Beacons*, 82; Osborn and Riggs, *Mr. Mac*, 52.

for the creation and modification of regulations based on experience through a series of conferences with aeronautical authorities after the passage of legislation.<sup>39</sup>

Faced with Young's recommendations, the Winslow bill's track record, and the recommendations of both the Joint Committee and the President's Aircraft Board, Hoover dropped his previous support for all-encompassing legislation. In a letter to Chairman of the Senate Committee on Interstate Commerce Wesley L. Jones later in the week, Hoover shared that he had become "convinced that [S. 41] is a much simplified method of setting up a civil aviation agency" as it avoided the "contentious questions" arising from a desire to "anticipate difficulties." Hoover also shared that his ideas concerning the necessity of an entirely new bureau had changed. The Secretary of Commerce now saw an Assistant Secretary vested with power to coordinate the work of existing Commerce Department bureaus as the most cost-effective and efficient means to administer federal aviation regulation. The shift in attitude on the part of Secretary Hoover—taking place sometime after his September 23 testimony before the President's Aircraft Board—may explain why S. 41 dropped any mention of a new bureau, the defining element of the Department of Commerce model for nearly six years.<sup>40</sup>

On December 14, after less than a week, Jones's Committee on Commerce recommended the passage of S. 41 with the elimination of Section 16. In discussing the bill on the floor of the Senate the next day, Bingham presented the new Assistant Secretary position as a coordinator who would work with the Bureaus of Standards,

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<sup>39</sup> Cummins to Hoover, 2 June 1925; memo for Senator Cummins concerning Clarence M. Young, undated, enclosed in Cummins to Hoover, 2 June 1925; Stokes to Cummins, 11 June 1925; all in Young, Clarence M., 1923-1927, box 719, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; Young to Hoover, 7 December 1925, Bureau of Aeronautics, Legislation, 1925-1926, box 121, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA. Cummins met with Hoover on November 12 and 24; it is unclear at which meeting Young was present.

<sup>40</sup> Hoover to Jones, 9 December 1925, Bureau of Aeronautics, Legislation, 1925-1926, box 121, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; Komons, *Bonfires to Beacons*, 81.

Foreign and Domestic Commerce, Lighthouses, and Navigation as well as the Coast and Geodetic Survey within the Commerce Department. He pointed out that the elimination of the clause creating a new bureau marked the only principal difference between his bill and the twice-passed Wadsworth bill. Bingham compared the Army's air activities over established routes with the ACCA's accident statistics for gypsy fliers to argue that "when there is Government inspection of planes, Government inspection and certification of pilots, and Government control over routes over which they fly, the flying can be made very safe." Bingham argued that this bill simply extended the current government support offered to water navigation to the air, but in a more economic manner than the previous two bills passed by the Senate.<sup>41</sup>

The Senate set aside S. 41 as unfinished business on December 15, and it was debated the next day. Six amendments calling for minor adjustments in wording were adopted as well as the elimination of Section 16. Perhaps the most interesting exchange occurred between Utah Democrat William H. King and Bingham concerning King's amendment calling for the elimination of the new Assistant Secretary position. King contended that the creation of a new position carried with it the need for staff and offices—in effect, S. 41 would establish a new bureau without expressly claiming to do so. Decrying the insincerity of Republican calls for economy, he saw no reason why the Secretary of Commerce could not directly oversee aviation or designate someone already employed in his department to do so. Bingham fiercely objected to King's amendment. He argued that the promotion of civil aviation needed the full time and attention of someone familiar with the subject, acknowledged a precedent for S. 41 in the Senate's

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<sup>41</sup> Committee on Commerce, *The Promotion of Commercial Aviation, Report to Accompany S. 41*, S. Rep. No. 69-2 (1925); 59 *Cong. Rec.* S827-832, 842, 855 (daily ed. December 14, 1925).

previous passage of two bills providing for an entirely new bureau, and pointed to the recommendations of the President's Aircraft Board. The Senate rejected King's amendment, heard S. 41 a third time, and passed it.<sup>42</sup>

Bingham's bill arrived at Parker's House committee on December 17, the same day Mitchell's court-martial ended in a guilty verdict. Committee members Parker, Connecticut Republican Schuyler Merritt, Lea, and Michigan Republican Carl Mapes met as a subcommittee before the holiday recess and "save for Mr. Parker, the subcommittee did not take kindly to the proposal that it adopt the Bingham bill." S. 41's restriction of federal regulation to interstate and foreign commerce did not sit well with MacCracken and others who had, due to the nature of flight, come to see a holistic approach as the only viable one. In addition, Parker had informed Cabot in April that he would introduce comprehensive legislation similar to the Winslow bill in the 69<sup>th</sup> Congress, but to do so now—with the administration seeking a quick resolution to the aviation question—would result in even longer delays. MacCracken, believing that the time to develop the proper regulatory framework was before a bill's passage and not via amendment after the fact, approached Parker's friend and fourth-ranking Republican on the House committee Schuyler Merritt. He offered a new bill, drafted in the first weeks of November, as a substitute for S. 41. This bill went through four redrafts over the course of January (three of them being confidential committee prints) while the NACA's Assistant Secretary John Victory offered unofficial comments. A week after completing the third confidential committee draft, MacCracken wrote Coolidge on February 8 to ask his support of this new House bill as it proved "more satisfactory" than the Senate bill. Even at this late date

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<sup>42</sup> 69 *Cong. Rec.* S917-926 (daily ed. December 15, 1925).

Coolidge remained above the fray, recommending that MacCracken confer with the House committee—something he had been doing all along.<sup>43</sup>

On February 5, Ames submitted the NACA's official views on H.R. 4772 to Parker. While he viewed federal regulation over both interstate and intrastate aviation as "desirable," he saw this as an evolutionary process that would naturally develop regardless of whether the bill limited itself to the constitutionally-safe area of interstate and foreign commerce. Due to the "failure of all previous efforts to enact similar legislation" the NACA was "loath to recommend changes at this time," and Ames suggested the House committee "adhere to the text of the [Senate] bill except where deemed advisable." The changes he saw as vital related mainly to international flight: a clause authorizing the president to establish air reservations, a declaration of air sovereignty, and an extension of immigration and customs law to aviation. In conclusion, Ames stressed the need to "avoid the introduction of controversial elements which are not essential, such as the extension of Federal control to intrastate air commerce or the Federal establishment of airports." After more than six years of struggle the NACA had dropped its support for a perfect bill and recognized political reality, a sign that the Committee was reverting back to its original and less controversial purpose—research.<sup>44</sup>

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<sup>43</sup> "First Tentative Draft, November 16, 1925," Aviation, Air Law, Federal, 1925 Drafts and Notes, box 51, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; Lee to MacCracken, 29 December 1925, quoted in Komons, *Bonfires to Beacons*, 82-83; Cabot to Hoover, 17 April 1925, NAA, Legislative Committee, 1924-25, box 62, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; Victory to Merritt, 18 January 1926; Victory to Merritt, 1 February 1926; Victory to Davis, 1 February 1926; all in box 135, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Sanders to Hoover, 8 February 1926; Sanders to MacCracken, 8 February 1926; both in reel 109, Calvin Coolidge Papers, 1915-1932, Library of Congress, Washington, DC.

<sup>44</sup> Ames to Parker, 5 February 1926, box 135, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Roland, *Model Research*, vol. 1, 69-71.

Ames had not been the only person Parker had requested opinions from concerning H.R. 4772. His December 15 letter to Kellogg initiated an analysis by Steven Latchford in the State Department's Office of the Solicitor. In a January 5 memorandum, Latchford expressed the opinion that H.R. 4772 "would confer upon the Secretary of Commerce certain broad powers...that would in a very large measure enable [him] to give effect to the provisions of the Air Convention, if ratified by this Government." Recognizing that the State Department was leaning towards recommending that the president submit the Convention to the Senate for ratification, Latchford believed the Bingham-Parker bill could serve as the vital domestic legislative link between domestic aviation and the international regime. He mentioned that H.R. 4772 did not include any reference to immigration, a point Kellogg forwarded to Parker in his January 20 response.<sup>45</sup>

As work continued on the House version of S. 41, developments within the international sphere provided further reasons for passing federal legislation during the current session of Congress. Over the course of January, Assistant Postmaster General Warren Irving Glover, Adm. Hilary P. Jones, Glenn H. Griffith of the Treasury Department's Customs Division, Maj. George Strong of the War Department, Assistant Secretary of Commerce Drake, Eugene S. Gregg, and Assistant Secretary of State Leland Harrison met to determine the appropriate response to the planned northern expansion of the Colombian-registered but German-financed La Sociedad Colombo-Alemana de Transportes Aéreos, or Scadta, under the direction of Dr. Peter Paul von Bauer Chlumecký. The extension of a foreign-owned operator into the Caribbean would affect

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<sup>45</sup> Parker to Kellogg, 15 December 1926; Latchford to Hackworth, 5 January 1926; Kellogg to Parker, 20 January 1926; all in box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Civil Air Navigation Bill [Committee Print No. 1], H.R. —, 69<sup>th</sup> Cong. (1926).

American prestige in Latin America, introduce competition into nearby foreign markets, and raise defense considerations, particularly pertaining to the Canal Zone. While the U.S. government could deny Scadta an airmail contract, the best way to prevent foreign domination of Caribbean airspace was to develop an American airline, but no legal framework existed for such an operation. Those gathered unanimously recommended the immediate passage of legislation along the lines of the Bingham-Parker bill and called on the State Department to work towards the ratification of the international convention, recognizing that further recommendations would have to await congressional action.<sup>46</sup>

On January 20, the State Department sent a telegram to the American embassy in Paris to request updated information and documents pertaining to the present status of the amendments to Articles 5 and 34, as well as the ICAN's current operating expenses and their division among its members. The next day, Under Secretary of State Grew requested the opinion of interested government agencies as to whether they supported the ratification of the international convention with reservations, and the department received affirmative replies over the course of the following weeks. By March 3, Harrison had reported to Grew that all interested agencies remained "in favor of ratification with suitable reservations," the same position first expressed almost six years earlier. At the end of the month Cabot and Halstead were again in Harrison's office requesting that the State Department initiate ratification proceedings as soon as possible, and this time they found the department more receptive to their position.<sup>47</sup>

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<sup>46</sup> Davis to Kellogg, 14 August 1925; Kellogg to Hoover, 31 October 1925; Drake to Kellogg, 23 November 1925; Redraft of Memorandum, enclosed in Harrison to Drake, 27 January 1926; all in box 436, Records of the Civil Aeronautics Administration, RG 237, National Archives at College Park, College Park, MD; Newton, *The Perilous Sky*, 70-75.

<sup>47</sup> Grew to Hoover, 21 January 1926, box 435, Records of the Civil Aeronautics Administration, RG 237, National Archives at College Park, College Park, MD; Grew to the NACA, 21 January 1926, 32-6, International Air Navigation, 1924-1926, box 177, National Advisory Committee for Aeronautics, General

A modification of the U.S.-Canadian aerial relationship occurred while the State Department considered action on the convention. On December 24, 1925—in order to obtain advanced permission to fly over Ontario—the War Department submitted to the State Department a list of eighty-eight Army flights scheduled over the course of 1926 between Selfridge Field, Michigan, and Buffalo, New York. The Canadian Department of Defence had originally recommended, through the British embassy, that any changes or additions to the flight schedule could be made via telephone “when insufficiency of time would preclude following the usual procedure by correspondence.” On March 1 British Ambassador Esme Howard informed Kellogg that the Canadian government no longer viewed even a telephone call as a prerequisite for U.S. Army flights across the southern section of Ontario as “the aircraft do not intend to land in Canada en route.” Though no treaty existed between the two nations and the United States still lacked domestic legislation, the Canadian government granted limited overflight rights to the Army Air Service along a specific route. All other aircraft crossing the border had to continue to adhere to the provisions of the Canadian courtesy, which was renewed for another year by the end of April 1926 at the initiation of the State Department.<sup>48</sup>

Blanket overflight privileges would remain limited to Army aircraft until the United States passed appropriate legislation. The final draft of the House committee’s

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Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Herrick to Kellogg, 26 January 1926; Herrick to Kellogg, 2 February 1926; Davis to Kellogg, 3 February 1926; Ames to Kellogg, 5 February 1926; Drake to Kellogg, 5 February 1926; Harrison to Kellogg, 29 March 1926; all in box 5616, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Harrison to Grew, 3 March 1926, box 5617, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

<sup>48</sup> Assistant Secretary of War Hanford MacNider to Kellogg, 24 December 1925; Davis to Kellogg, 16 January 1926; Howard to Kellogg, 1 March 1926; Kellogg to Howard, 20 March 1926; Howard to Kellogg, 21 April 1926; Harrison to Cabot, 28 April 1926; all in box 6635, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; “Canadian Border Flying Regulations,” *Aviation* 20 (May 17, 1926): 749.



new bill—a “hybrid” possessing “both the simplicity of Wadsworth’s approach and the power of Winslow’s”—came in at twenty pages as compared to fifty-six in the last Winslow bill and eleven in S. 41. Remarkably similar to the Senate bill in several respects, this so-called Merritt bill dropped the detailed provisions of earlier House legislation, granted broad powers to the Secretary of Commerce, and eliminated any mention of a new bureau, instead creating only a new Assistant Secretary position. It also included a declaration of air sovereignty in Section 6 (something the committee report linked directly to the international air convention), authorized the transfer of postal routes and airports to the Secretary of Commerce, and provided for criminal penalties as opposed to the civil penalties of the Senate bill. While incorporating Ames’s specific suggestions, this substitute legislation, submitted on March 17, retained the Winslow bill’s controversial extension of federal regulation to all aircraft, causing many to foresee a fierce fight in the House. When looking over the House bill, Coolidge took issue with the possibility that the Secretary of Commerce could establish airports through his authority to buy and operate air navigation facilities. Assistant Secretary of Commerce Drake assured Coolidge that an amendment would be included in conference “expressly stating” that such authority did not exist.<sup>49</sup>

The House took up the Merritt bill, or thoroughly amended S. 41, on April 12. In his opening remarks on the floor of the House, Parker believed that the bill’s extension to

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<sup>49</sup> Committee on Interstate and Foreign Commerce, Report to Accompany S. 41 [Committee Print, March 16, 1926], H.R. Rep. No. — (1926); Committee on Interstate and Foreign Commerce, Report to Accompany S. 41, H.R. Rep. No. 572 (1926); An Act to Encourage the Use of Aircraft in Commerce, and Other Purposes, Union Calendar No. 190 [Report No. 572], 69<sup>th</sup> Cong. (1926); Victory to Stratton, 22 March 1926, box 135, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Sanders to Hoover, 23 March 1926; Drake to Sanders, 19 April 1926; both in reel 109, Calvin Coolidge Papers, 1915-1932, Library of Congress, Washington, DC; Komons, *Bonfires to Beacons*, 83; “The Merritt Bill Amends Bingham Bill,” *Aviation* 20 (March 22, 1926): 404-06.

both interstate and intrastate aviation marked the only controversial element within the bill but one necessary to assure safety. Merritt linked the clauses in the bill declaring air sovereignty and authorizing the president to establish prohibited zones to similar provisions in the convention, admitting that the committee “thought it best and safest in the end to pay attention to some of the provisions, at least, of that international convention.” Lea seconded Merritt’s connection, stating on the floor of the House that “practically everything that is in the bill is in the international air navigation convention.”<sup>50</sup>

Texas Democrat Thomas L. Blanton rose against the bill, arguing that if the administration were sincere about its calls for economy it would support a unified department of defense. While speaking against the Merritt bill’s extension of federal power, the continued centralization of the executive branch around the “dictator” Hoover, and the federal government’s assumption of jurisdiction over all U.S. airspace, Alabama Democrat George Huddleston nevertheless resigned himself to the bill’s passage. He offered eight amendments that would collectively limit the application of the bill to foreign and interstate commerce, which were all rejected in a sixty-eight-to-sixteen vote. Kansas Republican Homer Hoch’s proposed amendment also limited the bill to foreign and interstate commerce, but allowed the Secretary of Commerce to regulate certain intrastate flights after a thorough investigation established their interference in interstate commerce. Parker urged his fellow members to vote against Hoch’s amendment, and it also failed to pass. An amendment proposed by Virginia Democrat Schuyler O. Bland—similar to that of Senator King five months earlier—called for the elimination of the new Assistant Secretary position. This, too, was rejected sixty-six-to-thirty-four. After

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<sup>50</sup> *Cong. Rec.* H7312-7330 (daily ed. April 12, 1926).

Huddleston's motion to recommit the bill to committee also failed, the House passed S. 41 as amended with 229 voting for and 80 against. Thus, after six years of repeated attempts, both houses of Congress had passed legislation regulating civil aviation, although with distinctly different provisions. On April 14, Jones moved that the Senate reject the House amendment, and Senators Jones, Bingham, Democrat Duncan Fletcher of Florida, Maine Republican Bert M. Fernald, and Louisiana Democrat Joseph E. Ransdell were chosen to represent that body in joint conference. The next day the House appointed Parker, Merritt, Lea, Texas Democrat Samuel T. Rayburn, and Ohio Republican John G. Cooper to meet with the Senate delegation.<sup>51</sup>

With the conference members chosen, the supporters of the two different bills each attempted to secure the approval of the NACA. Cabot wrote to Victory on April 14 to sound out his views on the constitutionality of the House bill, and the next day Bingham wrote Walcott to request that the NACA look over the House version and provide a "full report." Victory's response three days later could not have pleased Cabot. Victory believed that the federal regulation of interstate, intrastate, and even private flying within the House version of S. 41 to be "without constitutional basis and...in fact unconstitutional." Victory recognized that federal regulation of intrastate and private flying could be justified if they interfered with interstate commerce but believed that "we have not come to that stage in the development of aviation where the facts would justify such an extension of Federal power." Cabot forwarded Victory's analysis to MacCracken. His all-encompassing legislation in jeopardy, MacCracken expressed exasperation at the conservative stance of the NACA, informing Cabot that "Mr. Victory apparently believes in going along with the nine-hundred and ninety-nine whose business

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<sup>51</sup> Ibid.; *Cong. Rec.* S7397 (daily ed. April 14, 1926); *Cong. Rec.* H7522 (daily ed. April 15, 1926).

it is to tell you what you can't do, rather than the one who tells you how to do what you want to do." With the Commerce Department ideology now widely accepted, MacCracken found himself the outsider due to his advocacy of an expanded version of that ideology.<sup>52</sup>

In response to Bingham's request for feedback on April 17, Walcott brought the question to the attention of the NACA during its semi-annual meeting five days later at the Langley Memorial Aeronautical Laboratory at Langley Field. With Walcott and Marvin engaged in prior commitments, Admiral Taylor, Ames, Burgess, Major Curry, Durand, Captain Land, Admiral Moffett, Major General Patrick, Stratton, and Wright decided to create a Special Subcommittee on the Encouragement and Regulation of Aircraft in Commerce composed of all NACA members then in attendance. Acting chairman Taylor declared a recess to allow the subcommittee to "consider the questions before it and prepare its report." The subcommittee selected Durand as chairman, who in turn designated Victory as secretary. Victory circulated the House version of S. 41 and "also presented a draft of a proposed report." Only one substantive addition to Victory's report occurred—a recommendation to eliminate the word "periodic" in the bill's discussion of pilot examinations and certificates, leaving the issue "to the discretion of the Secretary of Commerce." The subcommittee unanimously endorsed Victory's report

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<sup>52</sup> Bingham to Walcott, 15 April 1925, folder 13-10, Subcommittee on Encouragement and Regulation of Aircraft in Commerce, 1926, box 53, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Victory to Cabot, 17 April 1926, folder 15-6, Department of Commerce, Bureau of Aeronautics, 1926, box 135, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Cabot to Victory, 23 April 1926; Cabot to MacCracken, 23 April 1926; MacCracken to Cabot, 28 April 1926; all in NAA Correspondence, 1922-26, box 61, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA.

with minor amendments, and reconvened again as the NACA to both accept the subcommittee's report and recommend its forwarding to Senator Bingham.<sup>53</sup>

Seconding Coolidge's earlier concern, the subcommittee took issue with the inclusion of airports as possible aids to air navigation provided by the Department of Commerce. This possibility opened the door to unlimited government spending and subsequent regional rivalry for federal dollars, an unwelcome return to the Hamiltonian debate over internal improvements. The subcommittee strictly adhered to the Morrow Board's analogy between federal support for air and water transportation. It pointed out that the establishment, operation, and maintenance of ports rested with municipal authorities and that the federal government should limit itself to the charting of airways, markers, lights, emergency landing fields, weather service, and inspection and licensing.<sup>54</sup>

The NACA subcommittee's report incorporated practically in its entirety Victory's stance on intrastate and private flying that he had relayed to Cabot on April 17. The subcommittee members also expressed concern that overregulation at this time would eliminate private flying altogether, and believed that regulating it and intrastate commerce would, in the long run, work against the fostering of aviation. The report's conclusion offered strong language for the congressional joint committee working to reconcile the House and Senate versions of the bill.

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<sup>53</sup> Minutes of Semiannual Meeting, 22 April 1926, National Advisory Committee for Aeronautics, 1925-1926, box 53, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC; Bingham to Walcott, 15 April 1925; Minutes of Meeting of Special Subcommittee on the Encouragement and Regulation of Aircraft in Commerce, 22 April 1926; both in folder 13-10, Subcommittee on Encouragement and Regulation of Aircraft in Commerce, 1926, box 53, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD.

<sup>54</sup> Report of Special Subcommittee on the Encouragement and Regulation of Aircraft in Commerce, 22 April 1926, National Advisory Committee for Aeronautics, 1925-1926, box 53, Office of the Secretary Records 1903-1924, RU 45, Smithsonian Institution Archives, Washington, DC.

We are strongly in favor of the enactment of legislation to encourage and regulate commercial aviation. We believe that the objections presented to the principle of Federal establishment of airports and to the principle of Federal regulation of private flying at this time and in the manner proposed in this bill are fundamental, and that *it would be better that the bill should fail of enactment than that either of these principles should be retained.*<sup>55</sup>

No evidence exists to lead one to believe that any substantive discussion on the House version of S. 41 occurred on April 22. Rather, the NACA officially endorsed a report drafted by Victory before the meeting that incorporated the same points on the limits of federal jurisdiction that Ames had expressed to the House committee in February. Within its various editorial recommendations, the NACA subcommittee specifically mentioned that the provision authorizing the president to establish air reservations should remain “in order that he may have the same power that is vested in the sovereigns of other nations under the International Convention for Air Navigation.” Walcott forwarded the report to Bingham the next day, concurring in the report and drawing Bingham’s attention to the conclusion.<sup>56</sup>

Bingham submitted his conference report to the Senate on May 10, and Parker did the same in the House the next day. The agreed upon legislation, now referred to as the Air Commerce Act of 1926, combined the concern for constitutionality within the Bingham bill with the international focus of the House amendment. It limited federal licensing and inspection to those pilots and aircraft expressly engaged in interstate commerce, adopted the civil penalties in the Senate bill as opposed to the criminal penalties in the House bill, and carried over the Assistant Secretary position called for in

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<sup>55</sup> Ibid. (italics added for emphasis)

<sup>56</sup> Ibid.; Walcott to Bingham, 23 April 1926, in folder 13-10, Subcommittee on Encouragement and Regulation of Aircraft in Commerce, 1926, box 53, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Komons, *Bonfires to Beacons*, 84.

both versions. In addition, it incorporated the NACA's suggestion that Post Office airports be turned over to municipal authorities and specifically exempted airports from the list of air navigation facilities to be provided by the Department of Commerce. The Air Commerce Act authorized the Secretary of Commerce to "establish air traffic rules for the navigation, protection, and identification of all aircraft...safe altitudes of flight...lights, and signals" and declared that any such rules of the road of the air would apply equally to all aircraft—including military, foreign, and private—within the United States. On the floor of the Senate, Bingham presented this universal applicability of air traffic laws as a compromise between the House and Senate versions and a necessary step to ensure safety in operation. The House and Senate both agreed to their respective conference reports on May 13, resulting in a letter of congratulations from Walcott to Bingham.<sup>57</sup>

Cabot immediately sent a letter to Coolidge asking the president to sign the bill, but he need not have worried. As the measure aligned closely with the recommendations of the Morrow Board, Coolidge found much to like in the proposed legislation. The State Department approved of it as well. In a long memorandum to Harrison dated May 15, Latchford detailed the many ways that the new domestic legislation allowed the Secretary of Commerce to ensure compatibility with international traffic rules and licensing and inspection standards, viewing the compromise bill as far superior to H.R. 4772. Harrison forwarded this memorandum to Grew four days later. In a letter to Bingham, Kellogg

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<sup>57</sup> S. Doc No. 69-108 (1926); H.R. Rep. No 69-1162 (1926); *Cong. Rec.* S9351-9356 (daily ed. May 13, 1926); *Cong. Rec.* H9386-9391 (daily ed. May 13, 1926); Walcott to Bingham, 13 May 1926, folder 13-10, Commerce, Subcommittee on Encouragement and Regulation of Aircraft in, 1926, box 53, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; Komons, *Bonfires to Beacons*, 86.

recognized that “under the broad powers conferred upon the Secretary of Commerce under the Air Commerce Act he would have authority to adopt regulations that would carry out the general purposes of the Air Convention if ratified by this Government.” The Secretary of State could have easily left off the last part of that statement, as there was nothing prohibiting the Commerce Department from establishing such regulations in the absence of U.S. ratification; indeed, the borderless nature of the airplane necessitated such a level of compatibility.<sup>58</sup>

President Coolidge’s May 20 signing of the Air Commerce Act marked the culmination of a twenty-year process of ideological creation, refinement, and acceptance. While ostensibly a domestic law, the act, by nature of the subject matter, was a piece of international legislation as well. Four sections in particular, all taken from the House version of S. 41, offered the potential to place American aviation firmly within the established system of international norms. Section 2 granted the Secretary of Commerce the power to “exchange with foreign governments through existing governmental channels information pertaining to civil air navigation,” establishing the Commerce Department as the official representative of America’s aeronautical policy to the world. Section 4 authorized the president to establish airspace reservations. Section 6 incorporated a declaration of sovereignty that included the Canal Zone, forbidding the entry of foreign aircraft unless the airplane’s nation of registry “grants a similar privilege in respect to aircraft of the United States.” Foreign aircraft were, however, barred from

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<sup>58</sup> Cabot to Coolidge, 14 May 1926, Bureau of Aeronautics, Legislation, 1925-1926, box 121, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; Latchford to Harrison, 15 May 1926; Harrison to Grew, 19 May 1926; both in box 7695, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; Air Commerce Act of 1926, Pub. L. No. 69-251, 44 Stat. 344 (1925-1927); Kellogg to Bingham, 6 July 1926, box 5617, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.



engaging in interstate commerce within the United States. Section 7 addressed issues of customs and immigration, authorizing the Secretary of the Treasury and Secretary of Labor to designate certain places as points of entry for foreign aircraft and aliens and to apply existing customs and immigration laws to aviation. The Air Commerce Act thus offered the United States a legal framework to foster domestic aviation as well as a means to connect with other nations and the international civil aviation regime.<sup>59</sup>

The Air Commerce Act allowed the United States to participate in international aviation through reciprocal arrangements but establishing multiple agreements would require much time and effort. The international convention presented a ready means for achieving aeronautic agreements with its nearly thirty members, and ratification would also allow the United States a say in the amendment process. On June 15, just over three weeks after Coolidge signed the Air Commerce Act into law, Secretary of State Kellogg petitioned Coolidge to submit the 1919 Convention Relating to the Regulation of Aerial Navigation along with the protocols for Articles 5 and 34 to the Senate for ratification with reservations. He provided a detailed history of the convention's creation and adoption, a discussion of Wallace's earlier reservations, and affirmed the ICAN's "practically autonomous" status. To alleviate any possible concerns in the Senate relating to a possible connection between the ICAN and the League of Nations, he suggested the possibility of new reservations for Article 34 and Article 37 similar to those recommended by Ralph W. S. Hill in October 1923. Kellogg included authentic copies of

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<sup>59</sup> Air Commerce Act of 1926, Pub. L. No. 69-251, 44 Stat. 344 (1925-1927).

the convention and protocols along with his assurance that the NACA and the Departments of War, Navy, and Commerce all supported ratification.<sup>60</sup>

Coolidge forwarded Kellogg's letter to the Senate the next day with his signature attached to a note drafted by Latchford and Harrison concurring with Kellogg's recommendation. The final paragraph of the presidential declaration of support called for the advice and consent of the Senate "in view of the increasing importance of aviation as a means of international communication, and of the desirability of adopting uniform rules governing international traffic by aircraft, and in order that citizens of the United States may be in a position to share the benefits to be derived from international co-operation of the character contemplated by the convention."<sup>61</sup> After seven years of debate and three rounds of advice from interested departments, the international convention finally bridged the chasm between the executive and legislative branches.

By the time the first session of the 69<sup>th</sup> Congress ended on July 3, legislation had been enacted to implement the Morrow Board's recommendations concerning military aviation as well. On June 24, Coolidge signed H.R. 9690, the Naval Aircraft Expansion Act. This legislation initiated a five-year aircraft procurement program and created a new Assistant Secretary of the Navy for Aeronautics. Edward Warner, no stranger to the aviation debate over the previous years, took over the new position two weeks later after a recommendation from Bingham. With the president's signature on H.R. 10827, the Air Corps Act became law one day before the congressional recess. It changed the name of the Air Service to the Air Corps, stipulated that a percentage of its officers had to be

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<sup>60</sup> Kellogg to Coolidge, 15 June 1926, box 5616, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

<sup>61</sup> Coolidge to the Senate, 16 June 1926, box 5616, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

fliers, dealt with issues of rank and promotion, established an air section in the General Staff, stipulated flight pay, authorized a five-year procurement policy similar to that of the Navy bill, and created an Assistant Secretary of War for Aeronautics. With a strong recommendation from Commander Towers in the Navy's Bureau of Aeronautics, Coolidge appointed Frederick Trubee Davison, lawyer and director of the Guggenheim Fund for the Promotion of Aeronautics, to the new position. Within a span of two months the bureau model for aviation administration had been institutionalized in a modified way that accounted for the Coolidge administration's concerns for economy.<sup>62</sup>

The position of Assistant Secretary of Commerce for Aeronautics remained to be filled. According to MacCracken, the new position was first offered to Paul Henderson, but he declined upon learning that the NAT board of directors would not allow him a three-year leave of absence. Hoover next approached Hollinshead N. Taylor, businessman and vice-president of the Philadelphia Chamber of Commerce, but he "found himself unable to arrange his business affairs in such a way that he could feel free to take on the responsibilities" of the position. On June 26, Bingham wrote Hoover and recommended Maj. Thurman H. Bane, who from 1919 to 1923 had served as Chief of the Engineering Division at McCook Field and Air Service representative on the NACA. Orville Wright and Senator Jones both seconded Bingham's support of Bane, but Hoover offered the new position to MacCracken. Hoover was looking for a civilian, and Bane was a military man. While not a businessman, MacCracken received the support of the

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<sup>62</sup> Naval Aircraft Expansion Act, Pub. L. No. 69-422, 44 Stat. 668 (1925-1927); Air Corps Act, Pub. L. No. 69-446, 44 Stat. 721 (1925-1927); Bingham to Coolidge, 12 June 1926, reel 109, Calvin Coolidge Papers, 1915-1932, Library of Congress, Washington, DC; Towers to Morrow, 8 December 1925, reel 1, Series IX, Dwight W. Morrow Papers, Amherst College Archives and Special Collections, Robert Frost Library, Amherst, MA; Trimble, *Moffett*, 177; Maurer, *Aviation in the Army*, 191-93.

NAA, the ABA, Paul Henderson, and was “strongly put forward to the President by the Illinois delegation” in Congress.<sup>63</sup>

Not everyone supported MacCracken. In a confidential memorandum from Walcott to Coolidge detailing possible candidates, Walcott lumped MacCracken into the category of those individuals “whose appointment might ultimately prove embarrassing” due to his supposed agitation for a separate air service. When Bingham, vacationing in Puerto Rico, heard of the possible appointment of the person he held most responsible for the House committee’s amendment of S. 41, he informed Hoover in a cable that he remained “very doubtful of advisability of suggested appointment on account of many reasons.” In January, Hoover had assured Bingham that his opinions would be taken into consideration before any appointment was made, and Bingham had no difficulty expressing his feelings concerning MacCracken. Illustrating the importance Hoover placed on Bingham’s assent, he cabled him during his return trip to inform him that MacCracken enjoyed “practically unanimous...support” among the “principal elements in the aviation world.” He attempted to soothe Bingham’s fears by telling him that he and Drake would personally work with MacCracken in order to “prove him out” and rein in any possible policies that may be of concern. Having secured the consent of Bingham after his return to Washington, Hoover officially recommended MacCracken to Coolidge on August 3 and, much to the pleasure of Coffin, received the president’s consent. On

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<sup>63</sup> Bingham to Hoover, 22 January 1926; Bingham to Hoover, 26 June 1926; Wright to Hoover, 29 June 1926; Jones to Hoover, 31 July 1926; all in Bureau of Aeronautics, Applications, A-B, 1926, box 120, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; “H.N. Taylor Picked for Hoover’s Aide, *Philadelphia Public Ledger*, June 17, 1926; Hoover to Senator Pepper, 23 June 1926; both in Bureau of Aeronautics, Assistant Secretary in Charge of Aviation, 1926, box 120, Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; Osborn and Riggs, *Mr. Mac*, 56-58; Komons, *Bonfires to Beacons*, 87-88.

August 11, 1926, William P. MacCracken became the first Assistant Secretary of Commerce for Aeronautics<sup>64</sup>

By mid-August, the United States possessed regulatory legislation and an Assistant Secretary of Commerce for Aeronautics with responsibility for drafting specific regulations. With MacCracken at its head, the new Aeronautics Branch consisted of five units. Of these, only the Air Regulations Division and the Air Information Division were entirely new entities. Keeping with S. 41's desire to achieve economy, the Airways Division existed within the Bureau of Lighthouses, the Aeronautical Research Division in the Bureau of Standards, and the Air Mapping Section in the Coast and Geodetic Survey. On July 1, 1927, MacCracken established the position of Director of Aeronautics in charge of the daily operations of the Aeronautics Branch and appointed Clarence Young to the post, finally bringing the Iowan into the Department of Commerce.<sup>65</sup>

As a central player in the process of mental model formation and institutionalization since 1921, MacCracken had been exposed to both the operating procedures of the international regime, the suboptimal Canadian situation, and the desires of the American aeronautical community. While drafting the American air commerce regulations in the fall of 1926, MacCracken had direct access to the ICAN's regulations. As counsel for Coffin on the President's Aircraft Board, MacCracken had talked with Latchford about obtaining copies of any foreign aviation laws the State Department may

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<sup>64</sup> Undated confidential memo, Walcott to Coolidge, reel 109, Calvin Coolidge Papers, 1915-1932, Library of Congress, Washington, DC; cable from Bingham to Hoover enclosed in McIntyre to Hoover, 29 June 1926; radiogram from Hoover to Bingham, 30 July 1926; Hoover to Coolidge, 3 August 1926; Coffin to Hoover, 13 August 1926; all in Bureau of Aeronautics, MacCracken, William P., 1926-1928, box 120 Commerce Papers, Herbert Hoover Presidential Library, West Branch, IA; "MacCracken to Head Civil Aviation Bureau," *Aviation* 21 (August 23, 1926): 322.

<sup>65</sup> FAA Historical Chronology, [http://www.faa.gov/about/history/chronolog\\_history/](http://www.faa.gov/about/history/chronolog_history/); *Annual Report of the Director of Aeronautics to the Secretary of Commerce for the Fiscal Year Ended June 30, 1927* (Washington, DC: GPO, 1927), 1-2; Komons, *Bonfires to Beacons*, 93.

have as well as copies of the ICAN's bulletins. Harrison made a special request to the Paris embassy to obtain copies of the bulletins, which he received on December 24, 1925, and forwarded to MacCracken in Chicago, who received them four days later. With a full account of the ICAN's appendixes, MacCracken ensured compatibility with international standards when drafting the American regulations.<sup>66</sup>

The Air Commerce Regulations underwent several rounds of revision. Drafted by Assistant Solicitor in the Department of Commerce Ira Grimshaw, MacCracken, and Alexander Klemin in consultation with the Army and Navy over the first weeks of September, the document drew heavily upon the Aeronautical Safety Code, the international convention, and the Canadian Air Regulations. It included detailed criteria for the awarding of airworthiness certificates, pilots and mechanics licenses, certification of air navigation facilities, and air traffic rules. Ever conscious of Hoover's associationalism style and the opinions of his friends in the business world, MacCracken circulated this first draft among interested government agencies, aircraft manufacturers, and operators. *Aviation* printed the proposed air regulations in their entirety. The issue's editorial labelled "certain particulars" as "drastic," concluding that this initial version must represent "a suggestive study....based on the preliminary work of the Safety Code."<sup>67</sup>

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<sup>66</sup> Latchford to Harrison, 6 November 1925; Harrison to Herrick, 10 November 1925; Harrison to MacCracken, 24 December 1925; all in box 5618, Records of the State Department, RG 59, National Archives at College Park, College Park, MD; MacCracken to Harrison, 28 December 1925, box 5619, Records of the State Department, RG 59, National Archives at College Park, College Park, MD.

<sup>67</sup> "Regulations for the Licensing of Pilots and Aircraft of the United States as Proposed by the Department of Commerce in Collaboration with the Army Air Corps and the Naval Air Service," enclosed in Klemin to Lewis, 14 September 1926; Lewis to Langley Memorial Aeronautical Laboratory, 16 September 1926; both in folder 15-6, Department of Commerce, Bureau of Aeronautics, 1926, box 135, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942, Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; "The Proposed Air

As a result of a series of meetings in the conference room of the Commerce Department during October, these “hastily prepared...wholly unnecessary and restrictive regulations” underwent further revision. MacCracken’s conference copy of the tentative regulations, dated October 4, 1926, shows a multitude of recommendations and included sample forms of licensing and inspection certificates. It also included an entirely new chapter devoted specifically to foreign aircraft. It exempted nonmilitary foreign aircraft from U.S. registration, rating, and certification provided its home country offered a reciprocal courtesy and “if the Secretary of Commerce finds that the law[s] of such country...are adequate for the navigation of such aircraft on the United States.” In other words, if the laws of a foreign nation corresponded with those of the United States, international aircraft could enter the United States under the laws of their home nation. The next section declared that the Secretary of Commerce considered all the signatories of the international convention as constituting nations with such complementary laws. Thus the Commerce Department viewed an agreement expressing reciprocal privileges as the only thing standing in the way of regular flights between these nations and the United States, not any regulatory differences. Although replaced in the final draft with a single paragraph establishing reciprocity, these provisions show that, regardless of ratification, the framers of American air regulations saw no operational difference between U.S. regulations and those of the ICAN.<sup>68</sup>

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Regulations” and “Publisher’s News Letter,” both in *Aviation* 21 (September 27, 1926 ): 548-58, 570; Osborn and Riggs, *Mr. Mac*, 63.

<sup>68</sup> “Regulations for the Licensing of Pilots and Aircraft of the United States as Proposed by the Department of Commerce in Collaboration with the Army Air Corps and the Naval Air Service,” conference copy, 4 October 1926, Aeronautics Branch, Air Commerce Regulations, Printed Material, 1926-1931, box 12, MacCracken Papers, Herbert Hoover Presidential Library, West Branch, IA; “The New Air Regulations,” *Aviation* 21 (October 11, 1926): 621.

Thomas Carroll, chief test pilot at the NACA's Langley Laboratory, attended the final Commerce Department conference on October 13. In his report to engineer-in-charge Henry J. E. Reid, Carroll provided examples of the conciliatory and understanding tone of these conferences. The initial draft of the regulations placed the minimum age for a private pilot license at eighteen. Commercial operators "argued at length and with no intimation of compromise" that the age for private pilots should be sixteen and against the suggestion that commercial pilots had to be twenty-one, declaring that "the so-called best pilots" were between eighteen and twenty-one. MacCracken took these comments to heart, incorporating a minimum age of sixteen for private pilots and eighteen for commercial pilots in the final draft of the Air Commerce Regulations. At the same meeting a representative of an unnamed Canadian operator took issue with the restriction of pilots licenses to American citizens. After discussion, those present agreed to a compromise wherein the issue became incorporated within the subject of reciprocity, an idea that carried over into the final draft. After a total of seven conferences and various suggestions from industry representatives, MacCracken produced a final draft of the Air Commerce Regulations on November 15, 1926. Three days later R. S. Moore submitted a study for the Aeronautics Branch comparing the requirements for airworthiness within this final draft to the corresponding ICAN provisions. Recognizing that the convention represented a set of minimum international standards, he found that the proposed U.S. regulations provided "more definite instructions on all phases of the ICAN regulations" except in regard to airworthiness testing, which was more "stringent" in the international convention.<sup>69</sup>

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<sup>69</sup> Carroll to Reid, 19 October 1926, in folder 15-6, Department of Commerce, Bureau of Aeronautics, 1926, box 135, National Advisory Committee for Aeronautics, General Correspondence, 1915-1942,



On December 29, 1926, the Department of Commerce unveiled its Air Commerce Regulations. A comparison of this document with the ICAN and the Safety Code clearly shows their influence. Minor differences existed, but nothing in the Air Commerce Regulations conflicted with the ICAN's provisions or the Canadian Air Regulations. Concerning aircraft lights, the Air Commerce Regulations adopted the ICAN's provisions for white lights forward and aft, green on right side, and red on the left, but reduced the required range of visibility. The Air Commerce Regulations also generally adopted the same emergency signaling procedures as did the ICAN, Canadian Regulations, and Safety Code. On the subject of air traffic rules, the Air Commerce Regulations incorporated in toto the established norms concerning the order of right-of-way, flying on the right side of airways, and course adjustments to the right as stipulated in the ICAN, Canadian Regulations, and Safety Code.<sup>70</sup>

The Air Commerce Regulations went beyond these other regulatory documents in some significant ways. It set the necessary safe distance between aircraft at 300 feet, less than half that provided in the ICAN and Canadian Regulations and a fifth of that proposed in the Safety Code. Whereas the Safety Code had established a graduated system for minimum ceilings over populated areas (anywhere from 1,000 feet to 5,000 feet based on the size of the town), the Air Commerce Regulations stipulated a uniform 1,000-foot ceiling over towns and assembled crowds. The Commerce regulations also went beyond the simple private/public pilot dichotomy by dividing the public side into

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Records of the National Aeronautics and Space Administration, RG 255, National Archives at College Park, College Park, MD; R.S. Moore memorandum, "Comparison of ICAN Regulations and U.S. proposed Regulations for Airworthiness of Aircraft," 18 November 1926, box 435, Records of the Civil Aeronautics Administration, RG 237, National Archives at College Park, College Park, MD; "Series of Aeronautical Conferences End," *Aviation* 21 (November 8, 1926): 808.

<sup>70</sup> Department of Commerce, Aeronautics Branch, *Air Commerce Regulations, effective December 31, 1926* (Washington, DC: GPO, 1926); "New Rules Issued for Air Traffic," *New York Times*, December 30, 1926.

three categories—commercial, transport, and industrial—but testing procedures for the three remained generally in line with those of the ICAN and Safety Code. Unlike the earlier regulatory documents that it drew upon, the Air Commerce Regulations applied only to aircraft and left the airworthiness and licensing requirements for airships and balloons up to “special orders of the Secretary of Commerce.”<sup>71</sup>

One major point of difference between the new Air Commerce Regulations and the ICAN revolved around markings. The first draft of the Air Commerce Regulations in September incorporated a provision wherein “aircraft of the United States engaged in foreign commerce or flying over a foreign country shall bear the nationality mark, N, in addition to its identification mark.” This “N” designation was to precede a four-tiered system of markings based on the ownership and use of aircraft: “C” for commercial, “M” for mail, “S” for state, and “P” for private. While this four-tiered system of domestic markings remained in each subsequent draft as well as the final version of the Air Commerce Regulations, the provision concerning the “N” designation for international aircraft had fallen out of use by MacCracken’s October 4 conference draft. Considering that the Canadian Air Regulations specifically required an “N” designation on all American aircraft entering Canada, that the National Aircraft Underwriters Association had issued thirty-three voluntary registration certificates using that letter designation between 1921 and 1923, the Safety Code’s incorporation of it, and the high level of concern that the Air Commerce Regulations drafters clearly placed in compatibility with international norms, the elimination of this provision seems odd. The desire of foreign nations to identify American aircraft by the “N” designation meant that any U.S. aircraft

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<sup>71</sup> Department of Commerce, Aeronautics Branch, *Air Commerce Regulations, effective December 31, 1926* (Washington, DC: GPO, 1926).

flown internationally would still need to include it in front of their domestic number, and ambiguity remained concerning its use on domestic aircraft until the amending of the Air Commerce Regulations in 1929.<sup>72</sup>

As the United States entered 1927, it possessed a framework for domestic and international aviation that drew from existing international norms appropriately modified to domestic concerns. The Air Commerce Act brought about the federal regulation that many had long sought, but it reserved certain regulatory elements to state policy powers. Advocates of all-encompassing federal regulation were unable to convince key policymakers that the technology of the airplane had called into question the continuation of the traditional federalist division of powers. It would take years of practical application of the Air Commerce Act and the increase in federal authority arising from the sustained crisis of the Great Depression before regulatory control over aircraft came to be placed solely within the federal sphere. In addition, domestic legislation combined with continued pressure from the NAA had finally removed serious political concerns within the State Department regarding the international convention. Whether the Senate would act to approve that document remained to be seen. Regardless of such legislative action, subsequent events would show that the Air Commerce Regulations provided America with the means to participate in the developing system of international aviation without official adherence to the ICAN's regime.

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<sup>72</sup> Ibid., American Aviation Historical Society, "What's in an N-Number?" <http://www.aahs-online.org/articles/N-number.php>.

## Conclusion

As this dissertation shows, domestic and international influences, historical and contemporary developments, and the nature of the airplane combined to shape the American debate concerning aviation regulation that culminated in the 1926 Air Commerce Act. Before World War I, pioneering individuals looked to prior interpretations of the Constitution's commerce clause and the airplane's ability to transcend both state and international borders to justify federal action, but early legislation occurred at the state and municipal levels similar to that regulating the automobile. The sustained crisis of World War I transformed perceptions of the airplane from a novelty of the wealthy and reckless to a weapon of war that could be used to devastating effect in future conflicts. In response, the Allied powers attempted to reconcile the commercial possibilities of the airplane and the international system of state sovereignty with the 1919 Convention Relating to the Regulation of Aerial Navigation. Although America's participation in World War I was comparatively brief, aeronautical developments arising out of it affected how key individuals within the United States government perceived the relationship between aviation and federal authority. American representatives played a central role in drafting the convention, and the way that various departments within President Wilson's executive branch responded to that document shaped the subsequent dialogue concerning federal regulation.

Many believed the United States to be isolated from direct air attack due to its geographic location, yet events in the years immediately following the war—particularly the Navy's 1919 Atlantic flight and the Army's 1924 World Flight—showed that any such security would not be long-lasting. In addition, the United States was forced to

confront questions concerning aviation and sovereignty in its relationship with its northern neighbor. Canada's regulatory actions—shaped by its imperial imperative to conform to the international aviation regime—played an important role in shaping ideas of what was considered desirable in any future American regulatory framework for aviation. From the beginning, international considerations shaped the ideas of American policymakers, accentuating the need for domestic federal legislation that complemented the emerging international regulatory standard. The first federal regulation of the airplane can no longer be approached through the lens of an isolationist 1920s America. Rather, the process resulting in the Air Commerce Act must be viewed as an element in the larger shift toward independent internationalism, a postwar foreign policy approach that Joan Hoff Wilson defines as “a pragmatic method for conducting foreign affairs” with the “implicit assumption...that the United States should cooperate on an international scale when it cannot, or does not want to, solve a particular diplomatic problem through unilateral action.” The airplane's inherent freedom of movement, its potential for global connectivity, and Canada's adherence to the international convention's regulatory framework inhibited the possibility of unilateral regulatory action. Although constitutional considerations precluded official American adherence to the postwar regime, its fundamental elements came to be incorporated into domestic legislation.<sup>1</sup>

In light of this study, the role of the United States in the drafting of the International Convention on Commercial Aviation, popularly known as the Havana Convention, takes on new importance. Passed by the Conference of American States at its Sixth International Conference in Havana, Cuba, from January 16 to February 20, 1928,

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<sup>1</sup> Joan H. Wilson, *American Business and Foreign Policy, 1920-1933* (Lexington, KY: The University Press of Kentucky, 1971), xvi.

this convention mirrored the 1919 Paris convention but incorporated those reservations that Ambassador Hugh Wallace had submitted when he signed the latter in 1920. Even as Pan American Airways began stretching southward with the aid of the Foreign Air Mail Act of March 8, 1928, the United States did not abandon the treaty approach as a possible means of achieving blanket access to foreign airspace. While the 1919 convention languished in the Senate, William P. MacCracken led a group of American representatives at the ICAN's Extraordinary Session of June 1929 in the hopes of amending the convention to allow for the adherence of nonmember states such as China, Brazil, Germany, and the United States. Even while attempting to create an international regime more responsive to its needs, the United States established a permanent bilateral agreement with Canada after repeated temporary courtesies in October 1929. This bilateral agreement became the model for all subsequent agreements with foreign nations—some members of the ICAN—over the course of the 1930s.

This study raises broader questions concerning the relationship between technology and American foreign policy. As a nation outside the International Commission for Aerial Navigation, the United States possessed no means of amending its international civil aviation regime. Thus the United States was in the awkward position of having to align domestic regulation with a system that could change without warning or American participation throughout the interwar period. Franklin Delano Roosevelt brought a vision of freedom of the air distinctly different than that of the current unrestricted sovereignty regime—a change evident in his request that the Senate return all documents related to the 1919 convention—but it took the events of World War II and America's postwar position as a hegemonic

power to allow for the creation of a new civil aviation regime based on his five freedoms of the air. In a nuclear world, the possibility that a similar “reset” event could occur absent complete global annihilation seems unlikely. In addition, the drift away from hegemonic power towards a more multipolar world over the course of the twenty-first century combined with the inability of a single nation to redirect the path-dependent process of technological regime creation forces one to ask whether the United States can afford to exclude itself from emerging and future global technological regimes for political reasons.<sup>2</sup>

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<sup>2</sup> Secretary of State Frank B. Kellogg, Submission to the Senate of the International Convention Relating to the Regulation of Aerial Navigation, Done at Paris, October 13, 1919, *Papers Relating to the Foreign Relations of the United States, 1926*, vol. 1: 145-51. Alan Dobson discusses the Roosevelt’s unique aeronautical vision in *FDR and Civil Aviation: Flying Strong, Flying Free* (New York: Palgrave Macmillan, 2011). In *Conquest of the Skies: A History of Commercial Aviation in America* (Boston: Little, Brown, 1979), Carl Solberg presents FDR’s five freedoms as (1) right of transit; (2) right of technical stop; (3) right to discharge passengers; (4) right to pick up passengers; and (5) right to pick up and unload passengers between two foreign airports.

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