COMMENT

IN-FLIGHT LIQUOR SERVICE: A DILEMMA OF SOVEREIGNTY

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Service of intoxicating liquor aboard commercial passenger aircraft in interstate (or international) flight gives rise to questions that test the delicate line of sovereignty between state and nation. Yet courts and administrative bodies have scarcely touched on the problem of whether a state's liquor laws may validly be extended *ad coelum*.

A third of the states (Arizona, Florida, Illinois, Iowa, Kansas, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Mexico, New York, South Carolina, Texas, Utah, Virginia, Washington) have by statute made some effort at controlling in-flight liquor service, by license or otherwise. Of these, South Carolina by statute[1] and New Mexico under an opinion of the state attorney general[2] refrain from attempting to extend their restrictions to aircraft in interstate flight.

Even those states imposing licensing requirements seemingly make no effort to enforce their liquor statutes *in toto* by requiring airline personnel and passengers to comply with diverse regulations—hours of sale, size of containers, service by licensed bartenders—while an aircraft crosses state lines and time zones, and even hopscotches between wet and dry counties. Any attempt at literal compliance with the myriad of state laws and even county ordinances conjures a vision of monumental madness comparable only with a Marx Brothers movie. Yet the practical difficulty of enforcement does not answer the question of the *right* of enforcement.

If the matter be one of federal jurisdiction, applicable regulations are a far cry from the detailed liquor laws of most states. Regulations of the Federal Aviation Administration provide simply:

> (a) No person may drink any alcoholic beverage aboard an aircraft unless the certificate holder operating the aircraft has served that beverage to him.
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> (b) No certificate holder may serve any alcoholic beverage to any person aboard any of its aircraft if that person appears to be intoxicated.

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1. CODE OF LAWS OF SOUTH CAROLINA § 4-83.
2. ATT'Y GEN. OPS. 435 (1956).

(c) No certificate holder may allow any person to board any of its aircraft if that person appears to be intoxicated.

(d) Each certificate holder shall, within five days after the incident, report to the Administrator the refusal of any person to comply with paragraph (a) of this section, or of any disturbance caused by a person who appears to be intoxicated aboard any of its aircraft.[3]

The juridical vacuum has its origin in the unique wording of the Twenty-first Amendment, which, following language repealing the Eighteenth, provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Is consumption of liquor in the airspace over a state "use therein" within the meaning of the amendment?

Aircraft have been found to be "within" the state whose airspace they occupy, however fleetingly, for purposes of service of process,[4] forfeiture proceedings,[5] and, to at least a limited extent, control of traffic.[6]

The question of jurisdiction over the airspace was left unanswered when Congress by statute declared the United States possesses and exercises "complete and exclusive national sovereignty in the airspace of the United States" to the exclusion of other *nations*.[7]

The House Committee on Interstate and Foreign Commerce, in a report on 1961 legislation broadening the Federal Aviation Act to cover hijacking and certain other acts committed aboard aircraft,[8] treated airspace as being within the concurrent jurisdiction of the underlying state and the federal government for purposes of the criminal law. The committee viewed the problem as being primarily a practical one of enforcement. Its report states in part:

> [C]rimes committed in the airspace over a State pose peculiar and extremely troublesome problems of enforcement which are not present when such crimes take place on the ground. When a criminal moves the scene of his activity to an aircraft in flight he is able to take advantage of practical and physical difficulties that may

3. 14 C.F.R. § 121.575.
4. Grace v. MacArthur, 170 F. Supp. 442 (Ark. 1959).
5. U.S. v. One Pitcairn Biplane, 11 F. Supp. 24 (N.Y. 1935).
6. Erickson v. King, 15 N.W. 2d 201 (Minn. 1944).
7. 49 U.S.C. § 1508.
8. 49 U.S.C. § 1472.

> seriously impair effective apprehension and prosecution, particularly if the offense is one against the law of a State rather than against Federal law. Furthermore, in the case of offenses against State law, State officials are often faced with an insuperable task in trying to establish that a particular act occurred in the airspace over that State—and in some cases, under State law, it would be necessary to prove that the offense was committed over a particular county in the State. It is obvious that such proof may be very difficult and often imposible if the offense is committed on a jet aircraft traveling at 600 miles per hour at an altitude of 30,000 feet. . . .
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> We wish to emphasize that it is not our intent to divest the States of any jurisdiction they now have. This legislation merely seeks to give the Federal Government concurrent jurisdiction with the States in certain areas where it is felt that concurrent jurisdiction will contribute to the administration of justice and protect air commerce.[9]

An analogy to the problem of in-flight liquor service may be sought in Foppiano v. Speed,[10] which upholds the power of the state to exact a license fee as a condition of the right to sell intoxicating liquor over the bar of a steamboat navigating interstate waters.

Yet is air traffic truly analogous? May a plane flying miles above the earth, perhaps never touching down within the state, be likened to a river craft? Judge J. Smith Henley, in *Grace v. MacArthur*, supra, suggests otherwise:

> It may be conceded, perhaps, that a time may come, and may not be far distant, when commercial aircraft will fly at altitudes so high that it would be unrealistic to consider them as being within the territorial limits of the United States or of any particular State while flying at such altitudes. . . .[11]

Prof. Joseph H. Beale[12] suggests the upper air may be likened to the sea, and jurisdiction accordingly divided:

> The analogy of the superjacent air to the border seas is a close one; and the same boundary of jurisdiction should be fixed. In all that concerns the peace and safety of the subjacent land and in the regulation of all aerial acts that do not have to do with navigation of

9. 2 U.S. Code Cong. & Ad. News (87th Cong., 1st Session, 1961) 2563-65.
10. 82 S.W. 222 (Tenn. 1904), *aff'd* 199 U.S. 501 (1905).
11. *Supra* note 4, at 447.
12. A TREATISE ON THE CONFLICT OF LAWS 286 (1935).

> the air and the communication of intelligence, the jurisdiction of the state within whose vertically prolonged boundaries the air lies is complete. The state, however, has no jurisdiction to interfere with the peaceful commerce of the air, or with the purely internal affairs of passing aircraft.

The question of sovereignty has been perhaps most squarely put—and most frankly avoided—in a motion before the Civil Aeronautics Board in the case of *Capital Airlines, Inc. v. Northwest Airlines, Inc.*[13] Capital complained that its competitor unfairly advertised in-flight liquor service, and served liquor, over states where such practice was forbidden by statute.

The Chief of the Office of Enforcement had decided action on the complaint would not be in the public interest. He noted the case involved resolution of a multiplicity of state and local laws, as well as the question of jurisdiction, and "policing of such aircraft for possible violations would, as a practical matter, be well nigh impossible."

The C.A.B. agreed, holding the matter to be peculiarly within the province of the state courts. The crucial question of sovereignty was relegated to a footnote: "Of course, there is also involved the question of whether State prohibition laws may be made applicable to operations of aircraft in the navigable air space over such States."

The Attorney General of Texas, in a 1968 opinion directed to the Texas Liquor Control Board,[14] relied in part on the 1961 report of the House Committee on Interstate and Foreign Commerce (*supra*) to conclude that the state possessed jurisdiction over its airspace, that it might exercise police powers therein where the powers had not been granted to nor assumed by the federal government, and that in-flight liquor sales therefore were unlawful under state statutes then in effect, without regard to whether a particular flight originated or terminated within or beyond the state's boundaries. (Texas has since adopted a licensing statute.[15])

The dilemma may perhaps be resolved by application of the rule in United States v. Causby,[16] a landmark decision turning upon the extent of the property owner's right in airspace. The court in the Causby case divided the airspace into a lower zone in which private property is permitted and in which one may assume state law applies, and an upper zone where the rights of the federal government are paramount.[17]

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13. 18 C.A.B. 145 (1953).
14. ATT'Y GEN. OPS. M-227 (1968).
15. TEXAS PENAL CODE Article 666-15.
16. 328 U.S. 256 (1946).
17. For a comprehensive discussion of the historical antecedents and the impact of

Such a division for purposes of liquor control is suggested by DeForest Billyou:[18]

> The liquor laws of the several states are most diverse, and highly individualistic, and, it is fair to say, the service of liquor on board aircraft in such airspace does not, and probably can not, comply with the diverse regulatory pattern of state liquor laws. . . .
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> Isn't the appropriate and complete answer, and one which should add to the cheer of the weary traveler, that aircraft in the airspace over the United States are in an area where the federal government possesses and exercises "complete and exclusive national sovereignty," an area that is not part of any state; that there exists, by force of federal statute, "a public right of freedom of transit through the navigable airspace of the United States" in behalf of any citizen of the United States;[19] and that the delivery or use of intoxicating liquors in such area cannot be subjected to regulation by the laws of any state of the United States?

Such an answer admittedly would do violence to the concept of dual jurisdiction implicit in the report of the House Committee on Interstate and Foreigh Commerce, *supra*. Yet until this solution or another be reached, the question of jurisdiction over in-flight liquor service will continue to present in microcosm the whole problem of federal-state sovereignty in the skies.

Causby, apart from the instant problem, see Cooper, State Sovereignty vs. Federal Sovereignty of Navigable Airspace, 15 J. AIR L. & COM. 27 (1948) and Dinu, State Sovereignty in the Navigable Airspace, 17 J. AIR L. & COM. 43 (1950).

18. AIR LAW 37-38 (2nd ed. 1964).

19. 49 U.S.C. § 1304.