STATE OF KANSAS

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ATTORNEY GENERAL OPINION NO. 79-215

The Honorable J. E. "Ernie" Talley
State Representative, Ninety-Fourth District
535 Westshore Dr.
Wichita, Kansas 67209

The Honorable Wesley H. Sowers
State Senator, Thirty-First District
527 Union Center
Wichita, Kansas 67202

Re: Intoxicating Liquors and Beverages--Prohibitory Acts--Extent of Territorial Applicability

Synopsis: Pursuant to authority vested in the Congress of the United States by the Commerce Clause of the U. S. Constitution, the federal government has preempted states' regulation of aviation in the navigable airspace of the United States. Such preemptive regulation, including regulation of the in-flight sale, service and consumption of alcoholic beverages, precludes the State of Kansas from asserting its jurisdiction over such activities. Even though the State of Kansas has broad police powers to regulate the sale and consumption of alcoholic beverages, and such powers have been strengthened and enhanced by the Twenty-First Amendment to the U. S. Constitution, the interest of the state in the exercise of such powers is so slight, and the effect thereof on the welfare of Kansas' citizens is so minimal, that the State's interest must yield to the substantial interest of the federal government in maintaining uniform and efficient service to passengers of interstate commercial airlines.

* * *

Gentlemen:

You have requested our opinion as to the authority of commercial airlines to serve alcoholic beverages to their passengers while flying over the State of Kansas. That question and various ancillary aspects thereof have been addressed by this office on numerous prior occasions. Considering these previous opinions collectively, it has been the position of this office that, in light of existing state statutes, it is unlawful for commercial airlines to sell or allow consumption of alcoholic liquor on flights landing at or departing from any point in this state.

This posture has been premised on the applicability of various prohibitory provisions of the Kansas Liquor Control Act and the Private Club Licensing Act in the airspace above Kansas. Such applicability has been postulated on the provisions of K.S.A. 21-3104(5) which prescribe the territorial applicability of our criminal laws, specifying that "[t]his state includes the land and water and the air space above such land water with respect to which the state has legislative jurisdiction." (Emphasis added.) Prior opinions have, in effect, regarded this provision as having extended upward the geographical boundaries of the state, thus enabling the legislature to proscribe criminal conduct not only on the surface but within all of the territory encompassed by the extended borders.

Thus, since K.S.A. 41-803, which deems it a misdemeanor "to own, maintain, operate or conduct . . . an open saloon," does not exclude commercial airlines from the purview of its definition of "open saloon" (in essence, any place, other than a licensed private club, selling liquor by the drink), prior opinions have concluded that it is unlawful to sell liquor by the drink on commercial airlines traversing Kansas' airspace. Similarly, these opinions have reasoned that, absent legislative sanction of passengers of these common carriers consuming alcoholic liquor, it is unlawful, by virtue of K.S.A. 41-2604, for a commercial airline to allow such consumption by its passengers. We disagree with these conclusions.

Prior to explaining the basis for our disagreement, it might be well to point out that, in reaching our conclusion, we have not considered whether a commercial airline is or is not an "open saloon" within the provisions of K.S.A. 41-803 or within the prohibitory language of Article 15, Section 10 of the Constitution of Kansas. Such consideration is not pertinent

to our analysis. Our basic point of departure from the opinions of our predecessors involves the interpretation of 21-3104(5), quoted above. In our judgment, the portion that we emphasized in quoting this statutory language operates to preclude application of the state's prohibitory liquor laws to passengers on interstate air carriers. That is, the Kansas Legislature has no authority to legislate regarding the sale or consumption of alcoholic liquor in the airspace above our state, and absent such authority, the prohibitory statutes referenced above obviously have no application.

The foregoing conclusion is based on our determination that Congress has preempted Kansas and other state governments from regulating services provided on interstate commercial airline flights. Such preemption has been accomplished through various statutory enactments and administrative regulations promulgated thereunder. These laws and regulations manifest and implement a clear congressional intent that the regulation of aviation in the navigable airspace of the United States is subject exclusively to federal control. The territory in which such preemption is operative is defined by 49 U.S.C. §1301(26), as follows:

> "'Navigable airspace' means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in takeoff and landing of aircraft."

The basic statement of the federal government's sovereignty regarding airspace is set forth in 49 U.S.C. §1508(a), as follows:

> "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction."

Congress further has made it one of the functions of the Civil Aeronautics Board to regulate airline service. 49 U.S.C. §1302(c) assigns to the Board the responsibility for the "promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices." The ability to effectuate these statutory objectives is vested in the Board by 49 U.S.C. §1324(a):

> "The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedure, pursuant to and consistent with the provisions of this chapter, as it shall deem necessary to carry out the provisions of, and to exercise and perform its powers and duties under, this chapter."

Pursuant to these statutory provisions, the Board has exercised its power by adopting numerous regulations, including those relating to the service of alcoholic beverages. For example, 14 C.F.R. §121.575 provides:

> "(a) No person may drink any alcoholic beverage aboard an aircraft unless the certificate holder operating the aircraft has served that beverage to him.
>
> "(b) No certificate holder may serve any alcoholic beverage to any person aboard any of its aircraft who--
>
> "(1) appears to be intoxicated;
>
> "(2) is escorting a person or being escorted in accordance with §121.584; or
>
> "(3) has a deadly or dangerous weapon accessible to him while aboard the aircraft in accordance with §121.585(a).
>
> "(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."

Also, 14 C.F.R. §121.577, which is of a general nature, has apparent application to the service of alcoholic beverages:

> "(a) No certificate holder may take off or land an airplane when any food, beverage, or tableware, furnished by the certificate holder is located at any passenger seat.
>
> "(b) No certificate holder may take off or land an airplane unless each passenger's food and beverage tray and each serving cart is secured in its stowed position.
>
> "(c) Each passenger shall comply with instructions given by a crew-member in compliance with this section."

Additionally, the provisions of 14 C.F.R. §91.11 state:

> "(a) No person may act as a crew-member of a civil aircraft--
>
> "(1) Within eight hours after the consumption of any alcoholic beverage;
>
> "(2) While under the influence of alcohol; or
>
> "(3) While using any drug that affects his faculties in any way contrary to safety.
>
> "(b) Except in an emergency, no pilot of a civil aircraft may allow a person who is obviously under the influence of intoxicating liquors or drugs (except a medical patient under proper care) to be carried in that aircraft."

Finally, it should be noted that pursuant to the Airline Deregulation Act of 1978 (P.L. 95-504), the Congress has further manifested its preemption of state regulations. Section 105(a) of that Act states, in part:

> "(1) Except as provided in paragraph (2) of this subsection, no state or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of this Act to provide interstate air transportation."

In furtherance of this recently promulgated congressional policy, the Board has adopted Regulation PS-83, amending Part 393 of the Board's statements of general policy. Such amendatory regulation was adopted by the Board on February 7, 1979, taking effect on February 14, 1979. In the explanatory material prefacing the amended regulations, the Board explains the congressional action as follows:

> "Congress enacted a provision (section 4 of P.L. 95-504; section 105 of the Federal Aviation Act) specifically preempting state regulation of the rates, routes or services of air carriers having authority under Title IV of the Federal Aviation Act to provide interstate air transportation.
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> . . . .
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> ". . . [A] state may not interfere with the services that carriers offer in exchange for their rates and fares. For example, liquidated damages for bumping (denial of boarding), segregation of smoking passengers, minimum liability for loss, damages and delayed baggage, and ancillary charges for headsets, alcoholic beverages, entertainment, and excess baggage would clearly be 'service' regulation within the meaning of section 105.
>
> . . . .

> "Accordingly, we conclude that preemption extends to all of the economic factors that go into the provisions of the quid pro quo for passenger's fare, including flight frequency and timing, liability limits, reservation and boarding practices, insurance, smoking rules, meal service, entertainment, bonding and corporate financing; and we hereby occupy these fields completely." (Emphasis added.)

In furtherance thereof, the Board added a new Subpart J to these regulations, with §399.110 thereof reading in pertinent part:

> "(a) Section 105 of the Act states, that except as provided in paragraph (d), no State or political subdivision thereof and no interstate agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under Title IV of the Act to provide interstate air transportation.
>
> . . . .
>
> "(d) Examples of regulatory actions preempted under this section includes [sic], but are not limited to, tariff filing, certification, regulations governing flight frequency, mode of operation, in-flight amenities, liability, insurance, bonding, and capitalization." (Emphasis added.)

Clearly, the foregoing federal statutory and regulatory provisions manifest and implement an unequivocal federal policy to occupy the field of airline regulation, including in-flight service of alcoholic beverages, thus attempting to preclude any preemptive or concurrent state regulation thereof.

It should be noted that the federal government's preemptive control of navigable airspace has been judicially recognized. There are numerous decisions regarding this matter, and we will not burden this opinion by an exhaustive review, but we commend the following excerpt from United States v. City of New Haven, 367 F.Supp. 1338 (1973), affirmed 496 F.2d 452 (1974), cert. denied 419 U.S. 958, 42 L.Ed.2d 174, 95 S.Ct. 1184, as being a representative statement of judicial opinion on this question:

> "Congress has enacted a thorough and detailed system of regulation of air traffic.
>
> "'It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation.' American Airlines, Inc. v. Town of Hempstead, 272 F.Supp. 226, 232 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), cert. denied, 393 U.S. 1017, 89 S.Ct. 620, 21 L.Ed.2d 561 (1969).
>
> "In particular with respect to the regulation of 'navigable airspace,' Congress has legislated so pervasively that state provisions inhibiting that regulation, whether in the form of legislation or judicial decision, must be declared invalid under the supremacy clause.

> "The full breadth of federal pre-emption of regulation of navigable airspace is demonstrated by an examination of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1301 et seq. Section 1301(24) defines the term: "'Navigable airspace' means airspace above the minimun altitudes of flight prescribed by regulations . . . and shall include airspace needed to insure safety in takeoff and landing of aircraft." Because of the paramount concern for safety, courts have interpreted that definition to encompass airspace below the minimum flight altitude. Allegheny Airlines v. Village of Cedarhurst, 238 F.2d 812 (2d Cir. 1956); City of Newark v. Eastern Airlines, 159 F.Supp. 750 (D.N.J. 1958). Section 1304, bestowing upon 'any citizen of the United States a public right of freedom of transit, through the navigable airspace of the United States,' has also been read to indicate a congressional intention to pre-empt the field of air traffic regulation. American Airlines, Inc. v. Town of Hempstead, supra, 272 F.Supp. at 231; City of Newark v. Eastern Airlines, supra, 159 F.Supp. 750. Finally, § 1348(a) grants extremely broad power to the FAA administrator to formulate policy and prescribe rules governing the use of navigable airspace." 367 F.Supp. at 1340, 1341.

Further, the treatment of this issue in Kohr v. Allegheny Airlines, Inc., 504 F.2d 400 (1974), is particularly pertinent:

> "That the federal interest in regulating airways is predominant was long ago recognized by Justice Jackson in Northwest Airlines v. Minnesota, 322 U.S. 292, 303, 64 S.Ct. 950, 956, 88 L.Ed. 1283 (1944):
>
> "'Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control.

Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23, to United States v. Appalachian Power Co., 311 U.S. 377 [61 S.Ct. 291, 85 L.Ed. 243]. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.

"'Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls. It takes off only by instruction from the control tower, it travels on prescribed beams, it may be diverted from its intended landing, and it obeys signals and order. Its privileges, rights, and protection, so far as transit is concerned, it owes to the Federal Government alone and not to any state government.'

"With the passage of the Federal Aviation Act of 1958, 49 U.S.C. § 1301 et seq., Congress expressed the view that the control of aviation should rest exclusively in the hands of the federal government . . . .

. . . .

"The explicit objective of the Act is to foster the development of air commerce. 49 U.S.C. § 1346. To that end, it has been recognized that the principal purpose of the Act is to create one unified system of flight rules and to centralize in the Administrator of the Federal Aviation Administration the power to promulgate rules for the safe and efficient use of the country's airspace.

> United States v. Christensen, 419 F.2d 1401 (9th Cir. 1969); Air Line Pilots Association v. Quesada, 276 F.2d 892 (2d Cir. 1960)." Id. at 403, 404.

While the foregoing cases acknowledge preemption of navigable airspace by the federal government, it is important to note that the scope and extent of such preemption are matters to be determined on a case-by-case basis. This is due, in part, to the fact that "a state may legislate upon matters which are local in character although embraced within the federal authority, until such time as the federal authority may be exercised by act of Congress." (Footnote omitted.) 16 Am.Jur.2d Conflict of Laws §8.

> "The mere fact that Congress has power to legislate in regard to a certain subject does not in all instances exclude the right of the states to legislate on the same subject. There is a field of concurrent power in which the state may legislate until the power is actually exercised by Congress." (Footnote omitted.) Id.

Applying the foregoing principle of concurrent jurisdiction to the matter before us, the question arises whether Congress has acted so as to create a conflict with state regulation. However, in this instance, even an affirmative answer does not necessarily resolve the issue, since the State of Kansas is not merely exercising its police power in regulating the sale and consumption of alcoholic beverages, it is acting pursuant to authority vested in the states by the Twenty-First Amendment to the U. S. Constitution.

In our judgment, there is, in fact, conflict between our state's prohibitory liquor laws and the federal regulatory action regarding sale and consumption of alcoholic beverages on commercial airlines. The federal statutes and regulations previously quoted herein clearly contemplate the authority of such airlines to sell and the passengers thereon to consume alcoholic beverages, pursuant to guidelines established by such regulations. Obviously such authority is contrary to the state's liquor laws. Therefore, the question arises as to the scope and extent of the federal preemption. Can Congress under the Commerce Clause authority preempt state action taken pursuant to the Twenty-First Amendment?

Of course, we are not suggesting that, merely because Congress or a federal administrative agency declares its intention to preempt state activity, ipso facto such preemption is accomplished. We clearly recognize that the efficacy of the regulations of the C.A.B. is dependent on the validity of the enabling congressional legislation; that the congressional authority to enact such legislation is derived from the Commerce Clause of the U. S. Constitution; and the applicability of the Commerce Clause, so as to permit preemption of state regulatory action under the Twenty-First Amendment to the U. S. Constitution, requires a finding that the interests protected by such state regulation are subservient to those promoted by the preemptive congressional action under the Commerce Clause. We believe such findings can be made.

The need for balancing these respective interests has been recognized by the United States Supreme Court. In Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964), the Court prescribed the following guidelines for resolving this question:

> "Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of the other, and in the context of the issues and interests at stake in any concrete case." Id. at 332.

In Idlewild, the Court identified the issue under consideration, as follows:

> "[T]he basic issue we face is whether the Twenty-First Amendment so far obliterates the Commerce Clause as to empower New York to prohibit absolutely the passage of liquor through its territory, under the supervision of the United States Bureau of Customs acting under federal law, for delivery to consumers in foreign countries." (Footnote omitted.) Id. at 329.

In addressing this question, the Court recognized its position in earlier cases that "a state is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." Id. at 330. However, it concluded that:

> "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been pro tanto 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect." Id. at 331.

Based on this conclusion, the Court determined the necessity of weighing the respective interests to be protected under these constitutional provisions, as previously quoted. Ultimately, this case held that federal regulation was paramount to the interest of New York. Concededly, however, Idlewild and other cases of similar import have involved transportation of liquor through a state into a federal enclave or foreign country, and in rejecting the various states' attempted regulation, the courts have found the states had no jurisdiction within such territory. See, e.g., Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 82 L.Ed. 1502, 58 S.Ct. 1009 (1938); Murphy v. Love, 249 F.2d 783 (1957); United States v. State Tax Commission of Mississippi, 412 U.S. 363, 37 L.Ed.2d 1, 93 S.Ct. 2183 (1973); and United States v. State Tax Commission of Mississippi, 421 U.S. 599, 44 L.Ed.2d 404, 95 S.Ct. 1872 (1975).

While Idlewild was subsequently distinguished on this point in Seagram & Sons v. Hostetter, 384 U.S. 35, 16 L.Ed.2d 336, 86 S.Ct. 1254 (1966), reh. den. 384 U.S. 967, 16 L.Ed.2d 679, 86 S.Ct. 1583 (1966), the Seagram case did, in fact, reiterate the principle stated in Idlewild, that "the second section of the Twenty-first Amendment has not operated to repeal the Commerce Clause in the area of the regulation of traffic in liquor." 384 U.S. at 42. This principle was restated in California v. LaRue, 409 U.S. 109, 34 L.Ed.2d 342, 93 S.Ct. 390 (1972). In discussing earlier cases, standing for the

proposition that a state is totally unconfined by traditional Commerce Clause limitations with respect to the regulation of the importation of liquor, the Court stated:

> "These decisions did not go so far as to hold or say that the Twenty-first Amendment supersedes all other provisions of the United States Constitution in the area of liquor regulations . . . . But the case for upholding state regulation in the area covered by the Twenty-first Amendment is undoubtedly strengthened by that enactment:
>
> "'Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.' Hostetter v Idlewild Liquor Corp., 377 US, at 332, 12 L Ed 2d 350."

This same portion of the Idlewild case was again quoted in Craig v. Boren, 429 U.S. 190, 50 L.Ed.2d 397, 97 S.Ct. 451 (1976), reh. den. 429 U.S. 1124, 51 L.Ed.2d 574, 97 S.Ct. 1161 (1977). The following statement preceding such quotation is relevant:

> "The Twenty-first Amendment repealed the Eighteenth Amendment in 1933 . . . . This Court's decisions since have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause . . . . Even here, however, the Twenty-first Amendment does not pro tanto repeal the Commerce Clause . . . ." 429 U.S. at 205, 206.

Both the LaRue and Boren cases were quoted and discussed in the recent Kansas Supreme Court case of Baxter Springs v. Bryant, No. 50,747 (August 9, 1979). In Bryant, the Court considered the propriety of a city's exercise of its police power in light of certain other fundamental principles of law, and was not faced with a Twenty-first Amendment - Commerce Clause conflict. However, it is important to our discussion here that, predicated on its discussions of the LaRue and Boren cases, the Kansas Supreme Court recognizes that "state or local regulations in the field of alcoholic beverages must not conflict with other provisions of the Constitution." Bryant, supra at p. 12.

Based on our understanding of the foregoing cases, we conclude that it is necessary and appropriate to weigh the respective interests being promoted by this state's prohibitory liquor regulations, on the one hand, with the federal government's regulation of in-flight service, sale and consumption of alcoholic beverages on interstate commercial airlines, on the other.

It is well-settled law that the state's regulation of intoxicating liquors is a function of its police power. In discussing the constitutional parameters of legislative power, the Kansas Supreme Court in Manning v. Davis, 166 Kan. 278 (1948) stated:

> "Among the powers retained by the people is the exercise of the police power, or the power to pass legislation for the general welfare of the people. And it is generally recognized that under this power they may pass such laws respecting the manufacture, sale, possession, transportation, or use of intoxicating liquors as the people, through their legislature, may deem necessary or proper." Id. at 281.

This principle is reiterated in Murphy v. Curtis, 184 Kan. 291 (1959), as follows:

> "It is unnecessary to dwell at length on the fundamental principle that the regulation and control of all phases of the liquor traffic are within the inherent police power of the state and that it is within the power of the legislature to prescribe the conditions under which liquor may be sold to the public." Id. at 296.

In upholding the Private Club Act (K.S.A. 41-2601 et seq.) as a valid exercise of the legislature's police power, the Court stated in Tri-State Hotel Co. v. Londerholm, 195 Kan. 748 (1965):

> "It is well settled in this state that the subject of alcoholic liquor in all its forms may be regulated by the legislature through the exercise of the police power of the state in determining its policy that the general welfare, health and safety of persons and property should be protected." Id. at 754.

Therefore, even though there are provisions in both the Kansas and United States Constitutions bearing upon the Kansas Legislature's regulation of intoxicating liquors, it is clear that such regulatory authority is an inherent power and could exist even in the absence of such constitutional provisions. Further, even though there are a number of judicial decisions (including cases previously cited herein) determining that the Twenty-first Amendment must be viewed as strengthening or enhancing a state's police power when the exercise thereof conflicts with other constitutional provisions, it is clear that state action thereunder must be analyzed according to police power standards, i.e., promotion of the public health, safety and general welfare.

The question arises, then, as to the nature of the interest being protected by the exercise of the state's police power in regulating the sale and consumption of alcoholic beverages. In State v. Payne, 183 Kan. 396 (1958), the Court stated an oft-repeated conclusion that, as part of the manifest purpose of the comprehensive legislative scheme of regulating, licensing and taxing alcoholic liquor, these laws are intended "to minimize the commonly attendant evils." Id. at 402. See, also, State ex rel. v. Kansas Retail Liquor Dealers Foundation, Inc., 192 Kan. 293, 298 (1963), and State v. Logan, 198 Kan. 211, 215 (1967). What are these evils sought to be controlled? The State's authority to regulate liquor has been judicially upheld in numerous, specific instances; however, a general characterization of these evils is found in Mugler v. Kansas, 123 U.S. 623, 31 L.Ed. 205, 8 S.Ct. 273 (1887). Here, the Court recognized that idleness, disorder, vice, pauperism, debauchery and crime may be traceable to the general use of intoxicating drinks. 31 L.Ed. at 210.

Thus, in examining the application of the State's statutory prohibitions regarding sale and consumption of alcoholic beverages in light of these principles, we cannot but conclude that such regulation by the State on in-flight commercial aircraft can be of only minimal benefit in controlling the evils traceable to the general use of intoxicating liquors. The federal regulations cited earlier preclude serving or consumption of alcoholic beverages during take-off or landing. This means, in effect, that alcoholic beverages can be consumed in commercial aircraft only when such aircraft is at cruising altitude, and not when the aircraft is ascending after take-off or when it is in final descent for landing. Considering the speed of modern aircraft, that period of time when alcohol could be consumed on aircraft landing or taking off in Kansas and traversing Kansas navigable airspace, is extremely short, measurable in minutes. Obviously, the amount of alcohol to be consumed during this period of time is small. Further, federal regulations preclude serving alcoholic beverages to intoxicated persons. Thus, as regards the evils of debauchery and intoxication, these facts mitigate against a finding of any significant state interest in regulating consumption of alcoholic beverages on commercial airlines.

Thus, in our judgment, the effect of applying the State's prohibitory liquor laws to in-flight service of alcoholic beverages on commercial airlines is slight, and the benefit to be derived thereby is negligible. When related to the interest of Congress in maintaining uniform and efficient service to passengers of such interstate commercial airlines, the State's interest pales in comparison and, in our judgment, is superseded thereby.

In reaching such conclusion, we recognize the need to note the decision in National Railroad Passenger Corporation v. Miller, 358 F.Supp. 1321 (D. Kansas, 1973), sometimes popularly referred to as the "Amtrak case." There, the Federal District Court concluded that the application of Kansas' prohibitory liquor statutes to Amtrak was a valid exercise of the State's police power and did not constitute a burden on interstate commerce.

Id. at 1330. We do not quarrel with that decision, but in our judgment, it would be inappropriate to apply such decision to the question considered here. We believe the Amtrak case is factually distinguishable.

Of significance, it is apparent that a passenger train's contact with the State of Kansas is of a different nature than that of the interstate commercial airline. We previously noted that, as merely a matter of time and space, the State's ability to prevent the in-flight use of alcohol in a commercial airline is substantially curtailed. Unlike the commercial passenger train, which may labor eight to ten hours to traverse the state, adequate time in which passengers may consume substantial quantities of alcoholic beverages, jet aircraft of today remain above the Kansas geography only a short time, a substantial portion of which, for flights landing or taking off in Kansas, the consumption of alcohol is prohibited by federal regulations. The fact is, the effort to regulate such activity on commercial airlines is more symbolic than substantive; more rhetorical than practical. Unlike the case of commercial rail travel, where the time and space of the method of transport permit the enforcement of state law and thereby the achievement of the State's salutary interests, the State's interests with regard to air travel, are served, if at all, in minuscule proportions.

There should be no question that the enforceability of the State's laws is an element to be considered in measuring the extent of the State's interest. In this regard, certainty of application is of concern. Rail passengers and a railroad's employees serving beverages can discern the Kansas borders with greater certainty than can passengers or flight attendants of commercial airlines, thus minimizing speculation and confusion regarding application of the pertinent criminal statutes. Furthermore, while there are no practical means for enforcing the State's liquor laws on commercial airlines, the Amtrak case itself demonstrates the practicality and feasibility of enforcing these same laws on interstate rail carriers. Thus, while the nature of rail passage actually permits the enforceable restriction of alcoholic consumption to a substantial and meaningful extent, we fail to see how the State's regulation of the sale and consumption of alcoholic beverages on airplanes under such conditions promotes the general welfare of the State, to the extent that it should prevail over the federal scheme for regulating all phases of in-flight services afforded commercial airline passengers.

Therefore, it is our opinion that, even though the State of Kansas has broad police powers to regulate the sale and consumption of alcoholic beverages, and such powers have been strengthened and enhanced by the Twenty-First Amendment to the U. S. Constitution, the interest of the State in the exercise of such powers is so slight, and the effect thereof on the welfare of Kansas' citizens is so minimal, that the State's interest must yield to the substantial interest of the federal government in maintaining uniform and efficient service to passengers of interstate commercial airlines.

Thus, we have concluded that the federal statutes and regulations declaring federal preemption and occupation of the field of regulating aviation in the navigable airspace over the United States, including regulation of the in-flight sale and consumption of alcoholic beverages, do, in fact, preempt state regulation thereof. As a result, we also conclude that, due to such preemption, the State does not have "legislative jurisdiction," within the meaning of K.S.A. 21-3104(5), in this area, and the extent of the State's criminal jurisdiction is circumscribed accordingly.

Very truly yours,

Robert T. Stephan

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RTS:WRA:gk