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UNITED STATES v. CAUSBY:
AN EXTENSION THEREOF

STUART RANDOLPH HAYS*

"In the beginning God created the heavens and the earth . . .¹

"Cujus est solum ejus usque ad coelum . . . Who's is the soil, his it is up to the sky.² He who owns the soil, or surface of the ground, owns to an infinite height."³

Since the earliest embryological state of property ownership, the common law has reflected the Creation in terms of property ownership. Adding *et ad infernos* to *cujus est solum ejus usque ad coelum* further reflects this concept:

"From the bowels of the earth to the heavens above, belongs the air and the earth to he who would own the surface."⁴

With a "flat" earth and a short distance to heaven this earliest concept was satisfied. When to our own horror we discovered the earth was round, the rule was never modified, even though it meant the property owner held only a pie-shaped wedge to the *et ad infernos*.

Finally, on a windy day in 1903 at Kitty Hawk, North Carolina, the archaic rule of the common law was dealt its mortal wound. With heavier-than-air flight a reality, the common law was forced into an evolution so radical as to signify the end of an ageless rule. Invasion of the air space of another was a necessity to the fledgling art of flying. The articulate rules of Lord Coke as enumerated by Blackstone and Kent became a hiatus in the

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¹GENESIS, 1:1.

²CO. LITT. 4a.

³1 COKE, Inst. (19th Ed., 1832), c. 1, § 1(4)(a).

⁴CO. LITT. 4a, 2 Bl. Comm. (1902) 18, 3 Kent Comm. (1896) 621.

swift change. The conservative attitudes of some early courts resisted the change for a while.⁵ Theories evolved quickly and soon it was recognized that the air itself belonged to no one; indeed, the space above the "usable heights" belonged to everyone.⁶

The purpose of this article is to explore the realm of property ownership as it pertains to flight, especially as it relates to military flights and the governmental function of national defense. The nature of the sovereign's proprietary functions must be examined closely to determine the aptness of a special series of rules by which the courts need to examine the military function. It should be borne in mind that America is engaged in a fight for existence in a vast fight for man's mind and body; that this fight is not a recognized military action, but a war of self-survival based in part on military readiness and massive retaliation. It is with this readiness and retaliation that this article is most concerned.

The Fifth Amendment should remain a bulwark to the protection of the citizen, but it should not subvert the military needs of the nation, as a whole, to unnecessary expenses. This, basically, is the problem surrounding the creation of "aerial easements" and "sonic boom" damage claims. In some instances, these claims are costing the United States Government untold millions of dollars which should not, in all instances, be paid as damages. The citizen tends to regard the Federal Government as a mythical Santa Claus prepared to pay damages at the slightest provocation. This give-away would cease if the courts of the United States would pay close and proper attention to the rules of the law.

U. S. v. Causby: The Starting Place

The non-directional wanderings of the various courts, both state and federal, ceased in 1946. It was in this year that the United States Supreme Court handed down its 5-3-1 decision in *United States v. Causby*.⁷ The common law rule became legal history.

⁵U.S. v. One Pitcairn Biplane, 11 F. Supp. 4 (D.C.N.Y. 1935).

⁶U. S. v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 (1946).

⁷*Ibid.*

An examination of the *Causby* case is the logical beginning of the study of aviation easements and the resultant issue of aviation easement damages. An autopsy of this case will reveal that there was a "taking" of property for "public use" without "just compensation" within the meaning of the Fifth Amendment. The respondent, Causby, owned several acres of farm land on what has been a private airport near Greensboro, North Carolina. The airport had been "taken" for the duration of World War II by the United States Army, Air Force and Navy, as a training area for single and multi-engined aircraft. The north-south runway was 2,220 feet from the respondent's chicken coop and 2,275 feet from his home. A glide pattern 100 feet wide and 1,200 feet long passed directly over the respondent, Causby's, home and chicken coop, and thence to the end of the north-south runway. The angle of ascent and descent was 30 feet to 1 foot, which was within the current CAB (FAA) minimum requirements.⁸ Aircraft in this pattern of ascent and descent passed at heights not less than 83 feet over the ground, 67 feet over the barn, and 18 feet over the highest trees on the Causby property. Approximately 4% of all flights used the north-south runway from 1942 through 1946. The noise of the aircraft at such low altitudes kept the family awake at night and frightened during the day. The chickens refused to lay, and about 150 of them killed themselves when they flew into panic from the noise above and smashed themselves into the walls of the chicken coop.

These are the facts that solidified the nebulous graspings of the earlier courts and began to lay down the ground rules of aero-space law. But *Causby* applies only to low level ascending and descending flights, not to sonic disturbances created in the upper atmospheric areas or to flights occurring at more than 1000 feet above any urban area or 500 feet above any country area.

The majority of the Supreme Court could not agree with the minority in that the landowner could claim right to only his usable and reasonable air space and that he could not lay claim to a greater amount. Thus is born an aerial version of the English Doctrine of Ancient Lights.

⁸C.F.R. Cum. Supp., Title 14, c. 1, C.A.R. pt. 61, § 61.7400, 61 7401.

The majority (Justices Rutledge, Stone, Reed, Frankfurter and Murphy) then went further and created a new property concept — an aerial easement. This is an easement without foundation on the earth, but one created out of the air itself. This opinion is based on a single factor: the glide pattern as prescribed by the CAB (FAA) is below the minimum altitudes prescribed by the Congress.⁹ The invasion of this less than minimum prescribed altitude is a "taking of property" for the "public use" under the Fifth Amendment, and just compensation must follow. In order for this compensation to flow, the Supreme Court created the aerial easement.

Fortunately for the majority, the creation of an easement by eminent domain does not require a passing of seizin. What would they have done in that instance? It would seem the majority of the court wanted a reason on which to place its result. Why is the exception to the minimum altitude rule an invasion of air space sufficient to create an easement, when the aircraft were within the minimum altitude glide pattern exception to the minimum altitude rule? Are aircraft expected to rise mysteriously to the 500 or 1000 foot level? Should a "noise easement" be granted to people who suddenly find themselves next to a railroad or turnpike on which heavy trucks or trains are passing constantly?

The dissenting justices (Justices Black and Burton, Justice Jackson not participating), based their dissent on five independent factors, but agreed with the majority on the abolition of the old common law rule of ownership: "from the bowels of the earth to the height of the heavens above."

FIRST: Any action that did lie should be the creation of a private nuisance or possibly a public nuisance. Such cause of action would sound in tort and not in contract under eminent domain proceedings.

SECOND: The Court of Claims did not have proper jurisdiction over the subject res. The sovereign, the United States Government, did not consent to this suit under the meaning of the Tucker Act.¹⁰

⁹49 U.S.C. 180, 10A F.C.A. 49, § 180.

¹⁰*Tucker Act*, 24 Stat. 505, 28 U.S.C. 1402.

THIRD: There was no violation of the CAB regulations. The aircraft were within the minimum prescribed ascent-descent pattern, as was prescribed by the CAB regulations. These regulations have the force and effect of statutory law.

FOURTH: The Congress should be given a chance to act in establishing minimum glide patterns via Congressional legislation as it did in establishing the minimum prescribed altitudes.

FIFTH: The majority decision is an opening wedge into further judicial interference with the power of the Congress to develop new solutions to new problems. Under the provisions of the commerce clause of the Constitution, the Federal Government, via the powers of the Congress, is empowered to develop and enact into statutory law new solutions to new concepts that may arise in commerce and the intercourse between the various states. Witness the case of *Paul v. Virginia* and later its complete reversal in *Southeastern Underwriters v. United States*.¹¹

In determining the effect of the *Causby* decision on military air invasion, several factors must be considered: What is an easement? Can the Government proceed in eminent domain? What constitutes a "taking" under the Fifth Amendment? What damages are assessable, if there is a "taking"? What court or courts have proper jurisdiction? These issues must be resolved historically in order to predict the future of military and, indeed, all aircraft operations, when viewed in light of the *Causby* decision.

A Taking of Property and Just Compensation under the Fifth Amendment

"... nor be deprived of life, limb, or property without due process of law; nor shall private property be taken for public use, without just compensation."¹²

Under these particular ground rules, there must be a "taking" for which "just compensation" must be made. Both of these terms are nebulous statements of constitutional policy at best and mean all things to all people.

¹¹*Paul v. Virginia*, 8 Wall 168, 19 L. Ed. 357 (1869); *U.S. v. Southeastern Underwriters Assn.*, 322 U.S. 533, 64 S. Ct. 1162, 88 L. Ed. 1440 (1943).

¹²U.S. Const., Fifth Amend.

"... when inroads are made upon the owner's use of it to an extent that as between private parties, a servitude has been acquired either by agreement or in a course of time, there is a "taking" of property . . ." ¹³

While this is a rather definitive statement of policy, it is interesting when viewed in the light that some days earlier the same court had said:

"We think it is the function of [Congress] to decide what is a taking." ¹⁴

Traditionally, the Supreme Court has recognized that restrictions by the Federal Government or State Government can be a "taking" of property within the Fifth Amendment. In every instance, all factors should be considered to determine whether the restriction has, in fact, resulted in a "taking" or whether the restriction is merely within the normal police powers under the Constitution. ¹⁵ For example, the destruction of all uses of property by floodlights reflecting from an airport has been held to be a "taking" of property under the Fifth Amendment. ¹⁶

"Acts done in the proper exercise of Government powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a 'taking' within the meaning of constitutional provisions." ¹⁷

It should be especially noted at this time that because damages may result this does not mean that, in fact, there has been a

¹³U.S. v. Dickenson, 331 U.S. 745, 67 S. Ct. 1382, 84 L. Ed. 1789 (1946); War Production Board Order (1942) L-208, 7 F. Reg. 7992, 7993.

¹⁴U.S. ex rel TVA v. Welch, 327 U.S. 546, 66 S. Ct. 715, 90 L. Ed. 843 (1946); U.S. v. Central Eureka Mining Co., 357 U.S. 155, 78 S. Ct. 1097, 2 L. Ed. 2d 1228 (1958); *reversing*, 134 Ct. Cl. 1, 138 F. 2d 281.

¹⁵U.S. v. Causby, *supra*; U.S. v. Kansas City Life Insurance Co., 339 U.S. 799, 70 S. Ct. 885, 94 L. Ed. 1277 (1949); Pennsylvania Coal v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322, 28 A.L.R. 1321 (1922).

¹⁶U.S. v. Welch, 217 U.S. 333, 30 S. Ct. 527, 54 L. Ed. 823, 28 L.R.A. (NS) 385, 19 Am. Cas. 680 (1910); *Pumpelly v. Green Bay & M. Co.*, 13 Wall (U.S.) 166, 20 L. Ed. 557 (1871).

¹⁷U.S. v. Welch, *supra*.

constitutional "taking" of property.¹⁸ The character of the invasion determines whether the "taking" has occurred. Where war-time Government regulations deprived the property owner of the most productive use of his property, this was not held to be a "taking" even though damages did result. If damages were the sole criteria, this would have been sufficient "taking" of property within the meaning of the Fifth Amendment.¹⁹ This particular case involved federal regulations that were designed to shift workers from nonessential industries to essential war-gearred industries. Only Justice Harlan, in a minority decision, determined that this constituted an invasion of property rights under the Fifth Amendment. This view certainly would place Justice Harlan with the majority in the 1946 *Causby* decision. It should be noted that the federal regulations enacted at this time were enacted under the war powers of the Constitution. The war powers do not cease upon the end of immediate and active hostilities. They continue during the emergency period.²⁰ Regulations enacted after hostilities may be upheld under the war powers.²¹ The "cold war" situation is not sufficient to invoke the war powers.²²

When President Truman seized the steel mills in 1950 under an Executive Order, the full scope of the war powers, under the "cold war" situation, was again examined.²³ *Youngstown Sheet and Tube Company v. Sawyer* stands for all things to all people.²⁴ Justice Black, in the majority opinion (6-3), spoke of the right of the Congress in exercising its war powers, but stated that the Executive Branch of Government could not exercise its concurrent war powers until there was an actual hot war. America was not in an active theater of war, nor was there a formal declaration of war. Justices Frankfurter, Douglas, Jackson, Burton and Clark

¹⁸U.S. v. Welch, *supra*; Pumpelly v. Green Bay & M. Co., 13 Wall (U.S.) 166, 20 L. Ed. 557 (1871).

¹⁹U.S. v. Cress, 243 U.S. 316, 37 S. Ct. 380, 61 L. Ed. 746 (1916); Nunnally v. U.S., 239 F. 2d 521 (4th Cir. 1956).

²⁰Woods v. Lloyd W. Miller Co., 333 U.S. 138, 68 S. Ct. 421, 92 L. Ed. 596 (1947).

²¹Woods v. Lloyd W. Miller Co., *supra*; Housing and Rent Act of 1947, 50 Stat. 751, 752, c. 754, 28 U.S.C. 349(a), F.C.A. (title 28) 349(a).

²²Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 72 S. Ct. 863, 96 L. Ed. 1153, 26 A.L.R. 2d 1378 (1951).

²³*Ibid.*

²⁴*Ibid.*

all concurred in separate opinions. Thus, there were nine opinions given here, one for each of the Justices. It would appear that the *Youngstown* case stands for a recognition of the "cold war" and its activities, but it would indicate that the court was, perhaps, not yet ready to extend the war power of the Executive Branch of the Government into a period of "declared peace" and "co-existence" even though there was a continuing police action waxing hot in Korea.

There is no doubt that the Federal Government is not responsible for property injured in a military operation in a theater of war.²⁵ Based on experiences during the Civil War, the Congress declared as a statement of policy that Federal Regulations should differentiate between property requisitioned and property destroyed in the actual area of operation.²⁶ Upon this background, the Supreme Court in both World Wars determined that property requisitioned out of the actual battleground was within the meaning of property taken under the Fifth Amendment for which just compensation must be made.²⁷

It is, then, obvious that the war powers are not the military answer to avoiding the *Causby* results. At this time, the country is not engaged in any form of hot or declared war. We are, however, engaged in a continuing cold war which may wax hot at any moment or may remain in the form of limited aggression. The rationale of the *Youngstown Sheet and Tube* case is not sufficient to allow the Executive the use of the war powers. Perhaps a re-examination of the war power under the cold war situation is the solution to some of the problems arising under the *Causby* decision. Very definitely the cold war situation should be sufficient to eliminate the great majority of claims arising from sonic boom when the aircraft creating the disturbance are actively

²⁵U.S. v. Pacific R.R. Co., 120 U.S. 227, 7 S. Ct. 490, 30 L. Ed. 634 (1887); U.S. v. Russell, 13 Wall 623, 20 L. Ed. 474 (1871); reversing, Mitchell v. Harmon, 13 How. 115 (1852).

²⁶H.R. Rep. No. 262, 43rd Cong., 1st Sess., 39-40 (1874).

²⁷U.S. v. Commodities Trading Corp., 339 U.S. 121, 70 S. Ct. 547, 94 L. Ed. 707 (1950); Kimball Laundry Co. v. U.S., 338 U.S. 1, 69 S. Ct. 1434, 93 L.E. 1765 (1949); U.S. v. Toronto Navigation Co., 338 U.S. 396, 70 S. Ct. 217, 94 L. Ed. 195 (1949); U.S. v. Cors, 337 U.S. 325, 69 S. Ct. 1086, 93 L. Ed. 1392 (1949); U.S. v. John Felin & Co., 323 U.S. 373, 68 S. Ct. 1238, 92 L. Ed. 1614 (1948); U.S. v. Petty Motor Co., 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1945).

engaged in proprietary Governmental functions of national defense.

Where a dam raised the level of an intersecting nearby stream in a manner so as to eliminate the prior existing subsurface drainage but in a manner so as not to flow upon the property, there was held to be a taking of the property.²⁸ In this instance, the elimination of the subsurface drainage allowed the normal flow of water to back up onto the property, thus invading it and rendering it useless for its current purpose. The Court found that a taking of property could occur without an actual physical invasion by a foreign agency where the value of the property was reduced or eliminated. This result was reached after the decision in the *Causby* case and there was cited as a partial basis for its rationale the *Causby* case and the creation of aerial easements. The imposition of a limitation upon the owner's free use of the property may be a "taking" where a servitude has been acquired by the Government. Such servitude reduces the alienability of the property, which, in turn, reduces its actual value. Where the tideland oil areas were declared in the public domain, by Executive order, there was no "taking" of property within the Fifth Amendment. Note that in the *Tideland oil cases* property titles did not change, but merely the primary jurisdiction of the sovereign.²⁹ The United States asserted its primary sovereignty forcing

Thus, it may be seen that "taking" is without definition—it must, by necessity of our times, remain in the penumbral zone of judicial determination. To define it would be to lose the flexibility of Constitutional reasoning and to substitute *ex mero moto*, a yardstick of strict stare decisis. Assuming that there has been a "taking" within the meaning of the Fifth Amendment, what then constitutes "just compensation"? "Just compensation" is not a measure of actual or physical damages, nor is it the rule by which damages are proved. It has been defined as the full equivalent in money's worth.³⁰ It must be made prior to the actual taking

²⁸U.S. v. Kansas City Life Ins. Co., 339 U.S. 799, 70 S. Ct. 885, 94 L. Ed. 1277 (1949).

²⁹U.S. v. California, 332 U.S. 19, 67 S. Ct. 1658, 91 L. Ed. 1889 (1946). the state into the position of secondary sovereignty.

³⁰*Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 13 S. Ct. 662, 37 L. Ed. 463 (1893).

of the property.³¹ Here is a pillar of judicial reasoning in a hiatus of changing constitutional theories. Here is a solidarity on which to base the question of actual damages. The question of "just compensation" is judicial and not legislative.³² "Just compensation" is satisfied when a reasonable standard is applied to damages directly resulting and not those held to be consequential or indirect.³³

In summary, a restriction upon property which results in a declining of its value, usage, or which results in reduced salability is generally held to be a "taking" of the property within the meaning of the Fifth Amendment. "Just compensation" as used in the Fifth Amendment is basically the receipt of full value for the property taken.

Easements: Aerial and Otherwise

The *Causby* doctrine creates a property right in the land of another where the minimum glide pattern of ascent and descent are below the prescribed minimum level. It gives rise to the invasion of property rights where flights occur below the minimum prescribed altitude. It creates a servient tenement previously non-existent in either the common or statutory law. Generally, easements can be created in four ways. Most common is the creation by an express written grant between the property owners. Generally, the Government, both state and federal, relies upon the right of eminent domain to create its necessary easements. The other two modes are generally little used and the subject of much litigation. They are easements by prescription and by implication (negative and reciprocal-negative easements). Seldom, if ever, do military easements arise through prescription or implication. However, they may arise as an easement by implication if an easement apparent is so classified. At least one court has refused to recognize the creation of a private flight easement via prescription. At least one court has refused to recognize the creation of a private flight easement via prescription. In this case, a commercial airline could not claim a prescriptive right in the glide pattern over the land of another where such

³¹*Hurley v. Kincaid*, 285 U.S. 95, 52 S. Ct. 273, 76 L. Ed. 637 (1932).

³²*Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 13 S. Ct. 662, 37 L. Ed. 463 (1893).

³³*The Legal Tender Cases*, 12 Wall. 457, 20 L. Ed. 287 (1871).

glide pattern was below the minimum altitude, as prescribed by Congress, but within the minimum altitude glide pattern prescribed by the CAB (FAA).³⁴

Glide pattern easements created in the *Causby* case differ from other easements. If seizin were an element in the creation of an easement, then there could be no creation because there is no touching of the land. Seizin, however, is not an element in the creation of the easement and hence an easement may be created in the air space without touching the earth. The courts have defined easements pertaining to aircraft and their glide patterns in two categories: clearance of aviation easements.

A "clearance" easement is a negative easement in that it requires the owner of the servient estate to refrain from exercising certain rights. A "clearance" or "obstruction" easement restricts the construction or growth of objects or the combination of both on the servient hereditament. Here there is no physical taking of the property, but merely a restriction upon its use by the owner.³⁵ It does not include an easement of flight over the property.³⁶ A "flight easement" is an affirmative easement that results in an actual invasion of the owner's air space as per the *Causby* case. It results in a "taking" of property through the physical invasion of the air and it acts as a negative easement or a clearance easement in that it prohibits the construction or obstruction of the air space. It is a mixed easement, consisting of affirmative and negative elements. The affirmative elements is the right to invade air space, while the negative element is the duty of the landowner of a servient estate to keep the flight pattern free of all structures and natural growth.

In construing these two forms of easements, the courts look to the intended usage by the owner of the dominant hereditament to determine what form of easement should ensue.³⁷ The tend-

³⁴*Hinman v. Pacific Air Transport Co.*, 84 F. 2d 755 (9th Cir. 1937); *cert. den.*, 300 U.S. 654, 57 S. Ct. 431, 81 L. Ed. 865 (1939).

³⁵*U.S. v. Brondum*, 272 F. 2d 642 (5th Cir. 1959).

³⁶*U.S. v. Brondum, ibid.*; *U.S. v. 4.443 Acres of Land*, 137 F. Supp. 567 (N.D. Tex. 1956); *U.S. v. 64.88 Acres of Land*, 244 F. 2d 534 (3rd Cir. 1957).

³⁷*U.S. v. Brondum, ibid.*; *U.S. v. 48.10 Acres of Land*, 144 F. Supp. 258 (S.D.N.Y. 1959); *U.S. v. 29.80 Acres of Land*, 131 F. Supp. 84 (N.J. 1956); *modifying U.S. v. Russell*, 13 Wall 623, 20 L. Ed. 474 (1871).

ency is to favor clearance or obstruction easements because that results in the least amount of property taken within the meaning of the Fifth Amendment.³⁸

Once a flight or obstruction easement is created, it becomes an easement apparent as to subsequent transferees provided there are regular flights occurring near or over the property itself. Mere knowledge of the existence of a nearby airport should be sufficient knowledge to create such an easement. It should be obvious to the landowner that aircraft do not rise mysteriously to the 500 or 1000 foot level and that they are not noiseless in their ascent and descent. It is self-evident that aircraft require a glide pattern of ascent and descent and that they are noisy.

Eminent Domain: The Creator of Easements

Before the Government may exercise its power of eminent domain, it must show that under the Fifth Amendment the property is for "the public use."³⁹ Public uses do not remain static but are as varied and changeable as history itself. With this in mind, the Supreme Court, on numerous occasions, has refused to bind itself to a single universal test as to what constitutes the "taking" for "the public use."

Where Congress has given the Secretary of War (Defense) the power to determine what shall constitute a military use, the courts will not look behind this determination as to the *necessity* of taking the property.⁴⁰ Necessity, as used by the courts in these instances, applies to the military use of property and is the same as a "taking" for a public use under the more normal situation of a taking for a non-military use.⁴¹ The military function is always held to be a public use; therefore, that part of the Fifth Amendment is *prima facie* satisfied. Therefore, the term "necessity" is used to determine whether the military installation is needed and not whether it is a public use. Necessity in these instances is the same as "taking" for a public use under the Fifth Amendment. In one instance the Government must affirmatively show that

³⁸*Ibid.*

³⁹U.S. Const., Fifth Amend.

⁴⁰*City of Oakland, Calif. v. U.S.*, 124 F. 2d 959 (6th Cir. 1942); *cert. den.*, 316 U.S. 679, 62 S. Ct. 1106, 86 L. Ed. 1754 (1942).

⁴¹*U.S. v. Forbes*, 259 Fed. 585 (Ala. 1919).

the public does, in fact, have a use in the property. In the second instance, the Government need not show that there is a use in the public domain for the property, but only that it is needed by the military for use in the national defense.

As we have seen, public use is the only limitation placed on the sovereign's power of eminent domain. The state cannot limit the power of the Federal Government, as its sovereignty is less than that of the Federal Government.⁴² To take property under eminent domain proceedings the Federal Government must proceed on its own sovereignty and not on the sovereignty of the state in which the property is located.⁴³ Nor may it proceed under state statutes and then receive the property as a "gift" from the state, if the original proceeding under the state statute was for the sole benefit of the Federal Government.⁴⁴ The armed forces' right of eminent domain is merely another facet of the Federal Government's supreme sovereignty. In some instances, it may also be regarded as an extension of the war powers or an extension of the law of necessity. Normally, the military rights of eminent domain are the same as would be used by all other functions of Government. They must meet the test of need in lieu of public interest, but are otherwise restricted under the same circumstances. However, under the war powers, the sovereign may enter upon the lands of another for a common defense or in the exercise of the right of *posse comitatus*. While this is not the exercise of eminent domain sovereignty, it is basically similar and the courts view the process in the same light.⁴⁵ Under the war power theories, mere declaration of war is not sufficient, nor is it a condition precedent to the free use of the property of others. Rather, the property taken must be in the support of troops and in the actual theater of military operations.⁴⁶ Three tests must be met

⁴²U.S. v. Lynch, 188 U.S. 445, 23 S. Ct. 349, 47 L. Ed. 539 (1903); U.S. v. California, 322 U.S. 19, 67 S. Ct. 1658, 91 L. Ed. 1889 (1946).

⁴³People ex rel Trombley v. Humphrey, 23 Mich. 471, 9 Am. Rep. 94 (1889); Darlington v. U.S., 82 Pa. 382, 22 Am. Rep. 766 (1876).

⁴⁴*Ibid.*

⁴⁵George v. Consolidated Lighting Co., 87 Vt. 411, 89 Atl. 635, 52 L.R.A. (N.S.) 850, Am. Cas. 1916 C 416 (1914).

⁴⁶Roxford Knitting Co. v. Moore, 265 Fed. 177 (2d Cir. 1921), 11 A.L.R. 1415; *cert. den.*, 253 U.S. 498, 40 S. Ct. 588, 64 L. Ed. 1031 (1921); Taylor v. Nashville and C. R.R. Co., 6 Cold. (Tenn.) 646, 98 Am. Cas. 474 (1820).

then to invoke the war power theory of Constitutional extraordinary powers; that of need, of troop or logistic support, and of an active theater of operations. The cases supporting this threefold test date from long before the current cold war situation, and are based, in a great part, upon the struggle during the Civil War and in part on World War I, but viewed in light of *Youngstown Sheet & Tube*, they appear still to be ruling case law. Again, it must be emphasized that currently the cold war situation is insufficient to allow the Executive Branch of Government to invoke its extraordinary Constitutional powers under the war powers clause of the Constitution.

Destruction, which is a "taking" under the Constitution that has resulted from an invocation of a doctrine of necessity, is a combination of the war powers and the police powers. It is similar to eminent domain in that it does not require remuneration by the sovereign. The theory of necessity is that society must satisfy immediate emergency needs through property destruction in order to preserve itself and large masses of property and civilian life. The destruction by fires deliberately set as backfires in the San Francisco conflagration is an example of the use of the doctrine of necessity. It does not need, as the condition precedent, an immediate emergency but rather an indefinable emergency need. It arises when the public safety is endangered; it is the sovereign's most superior right of self-preservation.⁴⁷ It is based solely on emergency needs and not on prospective emergency needs. Martial law may be used to care for prospective emergency needs, but the law of necessity cannot. The current cold war activities are not sufficient to be considered a condition precedent such as is required to satisfy the requirements of the law of necessity.

When the sovereign takes possession of the tenant's physical space, it is exercising its right of eminent domain as if it had proceeded prior to the physical invasion in a court of law with a condemnation suit.⁴⁸ The owner is entitled to reasonable, certain

⁴⁷*Wallace v. Richmond, City of*, 95 Va. 204, 26 S.E. 586 (1897); *Bowditch v. Boston*, 101 U.S. 16, 25 L. Ed. 980 (1879).

⁴⁸*Cambell v. U.S.*, 266 U.S. 368, 45 S. Ct. 1115, 69 L. Ed. 328 (1925); *Intertype Corp. v. Clark Congress Corp.*, 240 F. 2d 375 (7th Cir. 1957); *U.S. v. Merchants Transfer & Storage Co.*, 144 F. 2d 324 (9th Cir. 1944).

and adequate provisions for obtaining just compensation before his occupancy is disturbed, but it is not a condition precedent to the exercise of the right of invasion of the physical space.⁴⁹ If at all possible, the suit should precede the invasion; however, invasion prior to this suit does not in any way effect the property taken. But interest accrues from the date of the taking to the date of the bringing of the cause of action.⁵⁰

The Secretary of the United States Air Force can condemn property and retain title in fee simple in the name of the United States Air Force, such suit being brought in the court of competent jurisdiction in the name of the United States Government.⁵¹ This power of the Secretary of the Armed Forces is limited in one instance. It is a requirement that the advice and consent of the Senate and House Armed Forces Committee approve that property to be condemned is valued in excess of \$25,000.00, and is located within the Continental limits of the United States, Alaska, and Hawaii.⁵² Each branch of the Armed Forces has the same right. A fortiori if the Secretary of the Air Force can take in fee he may take a lesser estate.⁵³ However, where a fee is taken, the jurisdiction of the state ceases provided the property is for military usage.⁵⁴ The Federal Government has restricted itself, by regulation, to accepting exclusive jurisdiction only when the state so cedes and there is a meeting of intentions, which is analogous to a meeting of the minds in other contractual situations.⁵⁵ If it is to be found that there has been no meeting of intentions, then the jurisdiction of the state and of the federal government is concurrent.⁵⁶ Jurisdiction or process under eminent domain is in the district court of the district where the res is

⁴⁹*Cherokee Nation v. Southern Kansas R.R.*, 135 U.S. 651, 10 S. Ct. 965, 34 L. Ed. 295 (1890).

⁵⁰72 Stat. 1565, 70A Stat. 148, 10 U.S.C. 2663.

⁵¹10 U.S.C. 9773(d)(3).

⁵²10 U.S.C. 2662.

⁵³*U.S. v. South Dakota*, 212 F. 2d 14 (8th Cir. 1954).

⁵⁴*Ft. Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525, 5 S. Ct. 995, 29 L. Ed. 264 (1885).

⁵⁵*People v. Dycer Flying Service*, U.S. Av. R. 21 (1939); 24 Op. Attny. Gen. 1903-617; 20 Op. Attny. Gen. 1893-611.

⁵⁶*Ibid.*

located.⁵⁷ If the state is a party then the court of original jurisdiction is the Supreme Court of the United States without regard to the location of the res.⁵⁸ If a physical invasion has preceded the suit for condemnation then the jurisdiction can be determined under the Tucker Act and may lie either in the district court in which the res is located or in the Court of Claims, unless a state is a party and then the jurisdiction will be original to the Supreme Court of the United States.⁵⁹

In summary, the right of eminent domain is a sovereign right of the Federal or State Government and is limited by the Fifth Amendment. The right of eminent domain may be exercised by the Federal Government and, specifically, by the Armed Forces of the United States either in a condemnation suit or in an actual physical invasion of the property prior to the condemnation suit. Insofar as the military is concerned, there is no need to prove that the taking is for a public use. There is only a condition precedent that there must be a need for the *military* use of the property. Such need may be established *prima facie* by an act of Congress or by adequate regulations. The courts will, however, judicially examine the amount and mode of assessing just compensation unless there is a writing entered into between the parties which is independent of the condemnation proceedings or there is a settlement dependent upon the ceasing of the condemnation proceedings.

*Flights of Aircraft—The Creation of Aerial Easements by
Eminent Domain or Condemnation Proceedings*

“An entry above the surface of the earth, in the air space in the possession of another, by a person who is travelling in an aircraft, is privileged if the flight is conducted:

- (a) for the purpose of travel through the air space or for any legitimate purpose;
- (b) in a reasonable manner;

⁵⁷28 U.S.C. 1331.

⁵⁸28 U.S.C. 1201.

⁵⁹28 U.S.C. 1491 (Ct. Cl.); 28 U.S.C. 1313 (D.C.); 88 U.S.C. 1201 (S. Ct.); *Jacobs v. U.S.*, 290 U.S. 13, 54 S. Ct. 26, 78 L. Ed. 142 (1933); *U.S. v. Great Falls Mfg. Co.*, 112 U.S. 645, 5 S. Ct. 360; 28 L. Ed. 846 (1884).

(c) at such heights as not to interfere unreasonably with the possessor's enjoyment of the surface of the earth and the air space above it, and

(d) in conformity with such regulations of the state and federal aeronautic authorities as are in force in the particular state (in which the invasion occurred)."⁶⁰

Thus falls the old rule of *cujus est solum ejus usque ad coelum et ad infernos* in favor of a much more realistic view.⁶¹ The justifiable degree of exclusive possession by the landowner extends upward only to that point necessary for the full use and enjoyment of the property. That which is not exclusive remains as open and navigable air space.⁶²

Thus we find that the property owner does not own the air any more than under the English rule of Ancient Lights he could own the rays of the sun itself. Naturally, the state courts have followed several divergent views. Some are in favor of following the usable air space theory as outlined above.⁶³ At least one court followed the common law rule until 1950.⁶⁴ Other states follow the common law rule but regard flights as a privileged entry into air space and do not allow a cause of action for the mere invasion.⁶⁵ States following this view require an additional nexus to give rise to a cause of action for the invasion. What this nexus is, is again an unanswered question. It may be excessive noise, dust, or low altitude flight.

⁶⁰RESTATEMENT, TORTS, § 194.

⁶¹Co. Litt. 4a, 3 Kent Comm. (1896) 621, Coke. Inst. (1832) c. 1, 4(1)(a), 2 Bl. Comm. (1902) 18.

⁶²Hinman v. Pacific Airtransport Co., 84 F. 2d 755 (9th Cir. 1936); *cert. den.*, 300 U.S. 654, 57 S. Ct. 431, 81 L. Ed. 865 (1937).

⁶³Warren Twp. School Dist. v. Detroit, 308 Mich. 460, 14 N.W. 2d 134 (1944); Delta Air Corp. v. Kersey, 193 Ga. 862, 20 S.E. 2d 245, 140 A.L.R. 1342 (1942); Thrasher v. Atlanta, 178 Ga. 514, 173 S.E. 819, 99 A.L.R. 158 (1934); Rochester Gas and Electric Corp. v. Dunlop, 148 Misc. 849, 266 N.Y.S. 469 (1933).

⁶⁴U.S. v. One Pitcairn Biplane, 11 F. Supp. 4 (E.D.N.Y. 1935).

⁶⁵Northwest Airlines v. Minnesota, 332 U.S. 292, 64 S. Ct. 950, 88 L. Ed. 1283 (1946); Guith v. Consumers Light & Power Co., 36 F. Supp. 21 (Mich. 1940); Swetland v. Curtiss Airplane Co., 55 F. 2d 201 (6th Cir. 1932), 83 A.L.R. 319, U.S. Av. R. (1932) 1 (1932); Commonwealth v. Nevin, 2 Pa. D. & C. 241, U.S. Av. R. (1928) 39 (1922).

With the advent of the aero-space age, it is anticipated that the jurisdictions regarding flight as a privileged invasion will modify their course and fall more directly in line with those following the usable air space theory. It is difficult to imagine clinging to the idea of privilege in the coming age of space and its exploration. The privilege theory, in effect, recognizes the necessity of allowing the penetration of privileged flights, but still holds firm to the *cujus est solum ejus usque ad coelum et ad infernos* theory.

The mere noise of flights passing over the property is generally not actionable unless it is found to be harmful to the health.⁶⁶ Of course, it can be argued that all noise is harmful to the health, but the line of cases so holding is limited to hospitals, schools, and children's camps. In circumstances where the noise is intense and medically harmful, flights may be enjoined.⁶⁷

As a general rule of tort law, noise is not actionable. Aviation should not be required to follow a different set of tort rules. The noise created by trains, boats, and automobiles, and other motor vehicles, may be as loud, if not louder than a noise created by aircraft ascending and descending and flying over the property of others. A new mode of transportation should not create a new cause of action merely because of the creation of the new mode of transportation. Rather the courts should apply the existing standards modified to the new needs.

The creation of excessive dust caused by low flying aircraft may be enjoined.⁶⁸ But note, there is a physical invasion of the property by a foreign substance and not a mere moving of the air as by sound waves. This stand is similar to the requirement in the law of torts that fright must be accompanied by actual harm in order that it may be actionable. Flights at low altitude for landing and taking off by private aircraft, even though the private aircraft are within the CAB (FAA) glide patterns, may be enjoined

⁶⁶Batchelder v. Commonwealth, 176 Va. 109, 10 S.E. 2d 529; Smith v. New England Aircraft Co., 270 Mass. 511, 170 N.E. 385, 69 A.L.R. 300 (1930).

⁶⁷Warren Twp. School Dist. v. Detroit, City of, 308 Mich. 460, 14 N.W. 2d 134 (1944).

⁶⁸Thrasher v. Atlanta, 178 Ga. 514, 173 S.E. 819, 99 A.L.R. 158 (1934); Gay v. Taylor, 19 Pa. D. & C. 31 (1932).

decisions are reached by attaching to the abstraction of noise the physical invasion of the dust or the bright lights, or the invasion of the air space, and are not a cause of action created on the basis of pure noise or fright alone.⁷⁰ The courts look at the general for the creation of excessive noise and dust, or for light reflecting either from the aircraft itself or the landing field.⁶⁹ These noise level of urban living and recognize that noise is inevitable to our civilization.⁷¹ Thus it would be possible for a suit to be brought to enjoin the operation of a boiler factory whose noise level is far above that of the general noise level of urban living and is a constant nuisance. Irregular noises are not as actionable generally as are high continuing noises. It should be noted that the injunction lies as a cease and desist order aimed at curbing a nuisance, either private or public. These injunctions are not aimed at the "trespass" aspects of the invasion.

Just as the aircraft may not interfere with the property owner's rights, the property owner may not interfere with the aircraft.⁷² This includes the erection of interfering objects, the growth of trees and plants, and the projection of lights in a manner so as to make landing and taking off difficult, if not impossible.⁷³

Earlier cases are split as to what constitutes the creation of an aviation easement and whether an invasion of the landowner's air space is actionable. This problem has arisen in several ways. Bombing ranges do not give the adjoining property owner a cause of action.⁷⁴ Low-flying flights enroute to and engaging in bombing practice do not create a cause of action.⁷⁵ However,

⁶⁹*Hinman v. Pacific Air Transport Co.*, *supra*; *Vanderslice v. Shawn*, 21 A. 2d 87 (1942); *Delta Airways v. Kershey*, 193 Ga. 862, 20 S.E. 2d 245, 140 A.L.R. 1352 (1942).

⁷⁰*Nebraska Silver Fox Corp. v. Boeing Air Transport*, U.S. Av. R. (1932) 164 (1931).

⁷¹*Ibid.*

⁷²*United Airports v. Hinman*, U.S. Av. R. (1940) 1 (1939); *Commonwealth v. Von Bestecki*, 30 Pa. D. & C. 137, U.S. Av. R. (1937) 1 (1937); *Iowa City v. Tucker*, U.S. Av. R. (1936) 10 (1935).

⁷³*Iowa City v. Tucker*, *supra*; *Air Terminal Properties Inc. v. New York*, 172 Misc. 945, 16 N.Y.S. 2d 629 (1939).

⁷⁴*U.S. v. Clark*, 59 Ct. Cl. 940 (1924).

⁷⁵*Ibid.*

shelling across the property of another does constitute an invasion of the air space sufficient to create an easement.⁷⁶ Here it is impossible to determine whether there is an easement appurtenant or an easement in gross. The court does not discuss this vital difference, nor is it able to reconcile its decision with the others mentioned.

It should be observed at this point that under the commerce clause of the Constitution, the Federal Government has the power to regulate air traffic.⁷⁷ Under the Civil Aeronautics Act of 1938, as subsequently amended, the commerce clause has been the basis upon which the constitutionality of these acts has been upheld. It is true, however, that these acts have never been truly challenged. The reason for this is that the criteria and legislative intent that would be challenged have been challenged unsuccessfully on prior occasions.⁷⁸ Where a city attempted to create a higher minimum altitude than the Federal law had established, the attempt was held to be unconstitutional. This holding was based on the theory that the Federal Government had pre-empted the field of aviation navigation under the commerce clause.⁷⁹ In this instance the defendant contended that the CAB (FAA) Act, Section 551 (a)(7) and Section 601 (a)(7), which allowed the CAB to set minimum altitudes were delegations in excess of the constitutional prerogative within the meaning of the doctrine of

⁷⁶*Portsmouth Harbor and Land Hotel Co. v. U.S.*, 250 U.S. 1, 39 S. Ct. 415, 63 L. Ed. 809 (1919); *Peabody v. U.S.*, 231 U.S. 530, 34 S. Ct. 159, 58 L. Ed. 351 (1913).

⁷⁷U.S. Const., Art. I, § 8, Cl. 2.

⁷⁸U.S. Const., Art. I, § 8, Cl. 18; See, also, Prentice and Egan, *THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION* (1898 ed.) 14. See also, the following cases cited in *U.S. v. Causby*, *supra*, as to why the Congress has the right to legislate air traffic as interstate commerce: *Gibbons v. Ogden*, 9 Wheat 168 (1824); *The Trade Mark Cases*, 100 U.S. 82 (1879); *The Lottery Cases (Champion v. Ames)*, 188 U.S. 321 (1898); *The License Cases (Thurlow v. Mass.)*, 5 How. 504 (1847); *The Daniel Ball*, 10 Wall 577 (1881); *Granger Law Cases*, 94 U.S. 113 (1877); *the Shreveport Case (Houston E. & W. T. R.R. Co. v. U.S.)*, 234 U.S. 342 (1914); *Pipe Line Case (U.S. v. Ohio Oil Co.)*, 234 U.S. 548 (1914); *In re Debs*, 158 U.S. 564 (1898); *Sugar Trust Case (U.S. v. E. C. Knight)*, 156 U.S. 1 (1895); *The Danbury Hatters' Case*, 208 U.S. 274 (1908).

⁷⁹*Hinman v. Pacific Air Transport Co.*, 84 F. 2d 755 (9th Cir. 1937); *Allegheny Airlines v. Village of Cedarhurst*, 238 F. 2d 812, *affirming* D.C. E.D.N.Y., 132 F. Supp. 871 (1955).

the "Hot Oil" cases.⁸⁰ It was held that there was a sufficient standard by which to delineate the delegation of the authority to the CAB (FAA).⁸¹ Such a standard does not need to be mathematically precise, but merely an intelligible principle by which to guide the courts in their judicial interpretation of the rules and regulations proposed under the standard.⁸²

These federal acts which regulate air commerce are bottomed on the commerce power of the Congress, not upon national ownership of the navigable air space, as distinguished from national sovereignty.⁸³

In reporting the bill which became the Air Commerce Act (now repealed), forerunner of the CAB (now FAA) it was said:⁸⁴

The public right of flight . . . owes its source to the same constitutional basis, which, under the decisions of the Supreme Court, have given rise to a public easement of navigation in the navigable waters of the United States, regardless of the ownership of the adjacent soils.⁸⁵

Therefore, the federal acts regulating air traffic are deemed judicially an extension of the commerce clause.⁸⁶ These acts are a pre-emption of the states' right to legislate under the Tenth Amendment.⁸⁷ The pre-emption by the United States Govern-

⁸⁰*Allegheny Airlines v. Village of Cedarhurst*, *supra*; *Panama Refining Co. v. Ryan*, 293 U.S. 338, 55 S. Ct. 241, 79 L. Ed. 446 (1934); *Schechter Poultry Co. v. U.S.*, 295 U.S. 495, 55 S. Ct. 836, 79 L. Ed. 1570 (1934); 49 U.S.C. § 551(a)(7) & 601(a)(7).

⁸¹*Lichter v. U.S.*, 324 U.S. 472, 68 S. Ct. 1294, 92 L. Ed. 1994 (1947).

⁸²*Lichter v. U.S.*, *supra*; *J. W. Hampton Co. v. U.S.*, 276 U.S. 394, 48 S. Ct. 348, 72 L. Ed. 624 (1927).

⁸³*Braniff Airways v. Nebraska*, 347 U.S. 590, 74 S. Ct. 757, 98 L. Ed. 967 (1953).

⁸⁴49 U.S.C. c. 9 et seq.

⁸⁵H.R. Rep., 69th Cong., 1st Sess., p. 10.

⁸⁶*U.S. v. Perko*, 108 F. Supp. 315 (1952); *U.S. v. United Aircraft Corp.*, D.C.D.C., 80 F. Supp. 52 (1948); *In re Veterans Export Co.*, D.C.N.J., 76 F. Supp. 684 (1947); *U.S. v. Batre*, 69 F. 2d 673 (9th Cir. 1934).

⁸⁷U.S. Const., Tenth Amend.

ment, in addition, does not allow an action in a state court based upon the tort of nuisance.⁸⁸ It should be noted that this pre-emption by the Federal Government could have, indeed, been more strict in application. Witness the Atomic Energy Acts of 1946 and 1954.⁸⁹ Under these acts the privileges of patent have been suspended from those inventions pertaining to nuclear weapons and inventions pertaining to the use of nuclear material. It also severely restricts the ownership sale and possession of certain enumerated nuclear substances.

In summary, there must be an invasion of the rights of the landowner in a physical manner. This may occur either when an aircraft penetrates the perimeter of the landowner's mythical line drawn to the heavens, or it may occur in the instance of a foreign substance penetrating the close of the landowner's property. In any or all instances, it is exceptionally unusual for a cause of action to be sustained if it is solely based on the tort of noise or the tort of fright; however, noise or fright coupled with a physical invasion is sufficient to give rise to a cause of action. This cause of action may be either in tort or in condemnation proceeding under theories of eminent domain alleging that there was a taking of property for the public use within the Fifth Amendment. We discover that there is a close analogy between navigable water and navigable air space;⁹⁰ that this analogy has resulted in some courts attempting to apply the laws of admiralty to the laws of flight without regard to the fact that the laws governing flight should be somewhat modified in view of the fact that an aircraft is capable of three-dimensional flight where the average ship is capable only of surface navigation. The *Causby* case is the starting place and not the ending place in considering aviation easements. The Supreme Court has stuck to the *Causby* decision as a rock on which to throw the rope of stare decisis, but with the changing world the *Causby* case is to be viewed as the Alpha and not the Omega.

⁸⁸*Anderson v. Souza*, 38 Cal. 2d 824, 243 P. 2d 497 (1952); *Crew v. Gallagher*, 358 Pa. 541, 58 A. 2d 179 (1948); *State ex rel Helsel v. Board of County Commissioners of Cuyahoga County*, 79 N.E. 2d 698 (1947); 72 Stat. 740, 49 U.S.C. 1304.

⁸⁹Atomic Energy Acts of 1946 and 1954; 42 U.S.C. 2011, 60 Stat. 755.

⁹⁰18 AM. JUR. *Eminent Domain*, § 68; 72 Stat. 798, 49 U.S.C. 1508(a).

Statutes: Their Application to the Causby Doctrine

The Preamble to the Civil Aeronautic Board Act declares that the Federal Government shall have exclusive and complete national sovereignty over air commerce and transportation.⁹¹ This sovereignty is within the rationale of *California v. United States* in that it grants exclusive regulatory control to the Executive Branch of the Federal Government and is not a statement of property ownership.⁹²

The term navigable air space is defined as the minimum safe altitude of flight as prescribed by Congress.⁹³ This confers an interstate right of air transit on behalf of any citizen.⁹⁴ It also confers an interstate right of transit based on the Federal preemption under the commerce clause.⁹⁵

The administration and promulgation of rules and regulations by the CAB (FAA) is designed to foster, develop and operate a common system of air traffic with control of navigation consistent with military and civilian standards.⁹⁶ In exercising this authority, the administrator must give full consideration to the needs and requirements of the military.⁹⁷

When it is essential to the defense of the United States because of military emergency or urgent military necessity, and when appropriate military authority so determines, and when prior notice thereon is given, the administrator, or such military authority may authorize deviation by military aircraft of the national defense force of the United States from air traffic rules.⁹⁸

⁹¹U.S. v. California, 332 U.S. 19, 67 S. Ct. 1658, 91 L. Ed. 1889 (1946).

⁹²44 Stat. 574, 52 Stat. 1028, 48 U.S.C. 180, 72 Stat. 740, 49 U.S.C. 1304, 72 Stat. 806.

⁹³72 Stat. 740, 49 U.S.C. 1340.

⁹⁴*Antoniv v. Chamberlain*, 81 Ohio App. 465, 78 N.E. 2d 752 (1947).

⁹⁵72 Stat. 746, 49 U.S.C. 1303(a).

⁹⁶72 Stat. 740, 49 U.S.C. 1340.

⁹⁷72 Stat. 749, 49 U.S.C. 1348(f).

⁹⁸72 Stat. 806.

The President of the United States has the additional power to set aside for the exclusive use of the United States' defensive forces exclusive area of territorial air space;⁹⁹ this shall be done by Executive order.¹⁰⁰ This delegation of authority to the President by the Congress has been held to be constitutional, as a proper standard is used in defining the term "national defense."¹⁰¹ The Congress, and not the President has the additional right to enact laws consistent with aviation and aircraft safety alone.¹⁰²

The Secretary of the Air Force, as well as the Secretaries of the other armed forces, has the right to designate routes in the navigable air space for use solely as military routes.¹⁰³ He may prescribe rules and regulations which do not need to correspond to existing or proposed civilian rules and regulations.¹⁰⁴ Thus, military aircraft which are engaged in national defense of the territorial United States may have their own exclusively defined air routes. In addition, they may have regulations that are dissimilar from those prescribed by the Federal Aviation Agency. These may include a glide pattern ratio less than the currently prescribed 30-1 ratio. It should be remembered that the basis of the *Causby* case was that an easement was established as a taking of property because the flights were below the minimum prescribed altitudes as enacted by the Congress. It should be obvious at this point that the Congress has the power to specially legislate in favor of a minimum altitude for the military lower than the currently enacted 1000 and 500 foot altitude level. There is nothing to prevent the Congress from reducing the 1000 and 500 foot levels to a minimum altitude of zero, thereby abolishing the basis for the *Causby* case.

It becomes more apparent after a perusal of the various statutes that *Causby* is a product of equitable thinking rather

⁹⁹52 Stat. 1029, 49 U.S.C. 174(a).

¹⁰⁰*Neiswonger v. Goodyear Tire and Rubber Co.*, 35 F. 2d 761 (D.C. Ohio 1923).

¹⁰¹*U.S. v. Pan American Airlines*, 39 F. Supp. 297, *cert. den.*, 320 U.S. 751, 64 S. Ct. 56, 88 L. Ed. 447 (1941).

¹⁰²72 Stat. 806.

¹⁰³*Ibid.*

¹⁰⁴44 Stat. 570, 52 Stat. 1028; 1940 Reorg. Plan, No. 4, § 7, 5 F.R. 2421, 49 U.S.C. 174(e), 54 Stat. 1235, 61 Stat. 501.

than the result of the application of legal theories. It would seem that the Supreme Court wanted a result and then supplied an opinion expressing this result based on faulty reasoning as exposed in the dissenting opinion.

If it is true that in the instant case the Court wanted a result without regard to legal reasoning and *stare decisis*, it would have been far simpler merely to have stated that such flights constituted an invasion of the usable air space of the landowner. It is not the result that appears to be so wrong, but the reasons behind it. A house with a poor foundation does not stand long. For the sake of the application of the rules of law in future cases, there should be a valid rationale to follow. It has been demonstrated that the result of *Causby* could be destroyed by merely altering the rules upon which its flimsy basis has been laid. The rules should not be subject to such legal erosion. The Court should have waited for Congress to act, rather than attempt to enact legislation judicially.

Damages: The Result of Causby

The Fifth Amendment provides that in the instances of a "taking," "just compensation" shall be made.¹⁰⁵ "Just compensation" is a term to be used in lieu of damages.¹⁰⁶ In many law suits, once the cause of action is established and approved, the most basic issue is that of damages, and to what extent the plaintiff has been injured in terms of money's worth.

Generally, under the *Causby* case, and most cases following it, consequential damages have not been allowed. Under nearly all modern eminent domain proceedings where the Government is a party, consequential damages are not allowed.¹⁰⁷ This result is reached especially in cases where the landowner adjoining the injured party has suffered an actual injury.¹⁰⁸ The courts often neglect to mention that these instances are in reality incidental

¹⁰⁵49 U.S.C. 174.

¹⁰⁶U.S. ex rel TVA v. Powelson, 319 U.S. 279, 63 S. Ct. 1047, 87 L. Ed. 1399 (1942); Mitchell v. U.S., *supra*; Bothwell v. U.S., *supra*; Sharp v. U.S., 191 U.S. 341, 24 S. Ct. 114, 48 L. Ed. 211 (1903).

¹⁰⁷Sharp v. U.S., *supra*.

¹⁰⁸U.S. v. General Motors Corp., 323 U.S. 373, 65 S. Ct. 357, 89 L. Ed. 311 (1945); Mitchell v. U.S., *supra*.

damages and not consequential damages. Where property is taken in fee, consequential damages may include, but are not limited to the destruction of business, expenses of moving, and the loss of good will.¹⁰⁹ Such damages are not recoverable.¹¹⁰ Where the Government took over a laundry during World War II, the majority (5-4) of the Supreme Court allowed recovery in damages for the injury done to the trade routes of the plaintiff because of non-use.¹¹¹ In this instance, the plaintiff was unable to service its customers along the trade route established by it. After the War many of these customers went to other laundries to do their business, thus the plaintiff had an actual economic decline in business due to the fact that the Government was running its laundry and was not operating the trade routes. The dissent in this case, *Kimball Laundry v. United States*, is important because it supports the majority of cases disallowing consequential damages.¹¹² It is important to remember that neither *Kimball Laundry* nor *Causby* was a taking in fee but merely the creation of a lesser estate. Does this mean that under the doctrine of the *Kimball Laundry* case consequential damages will now be allowed where previously they were considered not actionable? Justice Black, who gave the majority opinion in the *Causby* case, wrote the dissenting opinion in the *Kimball Laundry* case. Perhaps this indicates that under the *Causby* doctrine there will be no such allowances of consequential damages as under the *Kimball Laundry* rule. Justice Frankfurter stands with the majority in both cases. Justice Douglas wrote the majority opinion in the *Causby* case and dissented in *Kimball Laundry*. Thus two of the three remaining judges, who delivered the *Causby* opinion in 1946, dissented in the *Kimball Laundry* extension of damages theory in 1948. It certainly is not impossible that the Supreme Court will decline to extend the *Kimball* theory further; however, insufficient data are available to determine whether *Kimball Laundry* and its implications will be extended to include con-

¹⁰⁹*Northwest Airlines v. Minnesota*, 332 U.S. 292, 64 S. Ct. 950, 88 L. Ed. 1283 (1946); *U.S. v. Dickenson*, 331 U.S. 745, 748, 67 S. Ct. 1382, 1384, 91 L. Ed. 1789, 1790 (1946).

¹¹⁰*Kimball Laundry Co. v. U.S.*, 338 U.S. 1, 69 S. Ct. 1434, 93 L. Ed. 1765 (1949).

¹¹¹*Kimball Laundry Co. v. U.S.*, *supra*; *Mitchell v. U.S.*, *supra*; *Bothwell v. U.S.*, *supra*; *U.S. ex rel TVA v. Powelson*, *supra*.

¹¹²*U.S. v. Central Eureka Mining Co.*, 357 U.S. 155, 78 S. Ct. 1097, 2 L. Ed. 2d 1228, *reversing*, 134 Ct. Cl. 1, 138 F. 2d 281 (1958).

sequential damages resulting from an application of the *Causby* doctrine and its resultant easements. The case of *Eureka Mining Company v. United States*, a 1958 Supreme Court case, would appear to indicate that perhaps the *Kimball Laundry* doctrine has not yet received its blessing from the newer members of the Supreme Court.¹¹³ It would appear from this that the Supreme Court has recognized some of the problems inherent in an extension of the *Kimball Laundry* case, and yet is also cognizant of the fact that in some instances consequential damages are most equitable.

Where the damaged party is a licensee or lessee he has a sufficient interest in the property to support a cause of action.¹¹⁴ Therefore, he should share in the damages awarded, but should not be the sole recipient. In the instances where the property taken amounts to less than a fee the court must consider what is left to the landowner as well as to the lessee or life tenant.¹¹⁵ Value, in money or money's worth, is the full value of the fee less the remaining value to the landowner.¹¹⁶ Hence, what is full value must first be established before the remaining value may be subtracted therefrom to give the present measure of damages to be awarded the lessee or life tenant. This is perhaps the closest the courts have come in applying a mathematical formula to the computation of damages, yet, even this formula has several unknown factors, namely the full value and remaining value of the property. At least one district court has held it to be a jury question as to what constitutes the proper measure of damages where a leasehold, life estate, or other such lesser estate is involved.¹¹⁷ It would seem obvious that the formula of fee value less remaining value equals damages, is a superior mode of assessing the amount of damages than throwing the question open to a layman jury. Where a leasehold is taken, it may be treated as a fee in computing damages where there is no fair

¹¹³A. W. Duckett & Co. v. U.S., 266 U.S. 129, 45 S. Ct. 38, 69 L. Ed. 216 (1925).

¹¹⁴U.S. v. 1177 Acres of Land, 51 F. Supp. 84 (Fla. 1943); U.S. v. 9.94 Acres of Land, 51 F. Supp. 478 (S.C. 1942).

¹¹⁵*Ibid.*

¹¹⁶*Ibid.*

¹¹⁷U.S. v. Petty Motor Co., 327 U.S. 372, 66 S. Ct. 596, 90 L. Ed. 729 (1945).

market value for leases.¹¹⁸ This particular mode of computation does not fit under the "remaining value" formula. Damages can also be what the tenant lost or what is needed to put him in his original position.¹¹⁹ This latter mode may include consequential or incidental damages, and for this reason should be avoided. Obviously, the instructions to the jury will have to be carefully drawn, but it is still questionable whether the jury would be capable of understanding the fine lines drawn between "direct," "incidental," and "consequential" damages. Thus, the mode of computing damages becomes important in that it should be a mode whereby the jury has definitive standards by which to assess damages. The formula approach would appear to be the best one under these circumstances. Where the damages result from a temporary seizure and the property is later returned, under the *Kimball Laundry* doctrine, "consequential" damages may be allowed.¹²⁰ Currently, the allowance of consequential damages under the *Kimball Laundry* case is limited to "temporary" seizures; subsequent cases indicate that consequential damages may be allowed for permanent seizure.

There are various modes in assessing damages under eminent domain proceedings, but one method appears to be far superior. This method is the application of the formula that damages are equal to the fee value less the value remaining to the property owner. Application of the formula will not solve the problems arising under the creation of a negative (or clearance) easement. In this instance the fee value of the property does not decline nor does the replacement value, which is generally equal to the fee value, decline. The negative easement prohibits doing something. This means that the damages may, in certain instances, be equal to the cost of keeping the property clear, such as the physical pruning of trees, branches, and bushes. Damages in this instance may include the value of the land without a tall antenna. What value is there to a piece of property without antenna? What is the measure of damages to the owner when he is unable to have tall trees screening his property? It becomes apparent that the

¹¹⁸*Seaboard Airlines Co. v. U.S.*, 261 U.S. 299, 43 S. Ct. 354, 67 L. Ed. 664 (1922).

¹¹⁹*U.S. v. Pewee Coal Co.*, 341 U.S. 114, 71 S. Ct. 670, 95 L. Ed. 809 (1950); *Kimball Laundry Co. v. U.S.*, *supra*; *U.S. v. Petty Motor Co.*, *supra*.

¹²⁰*U.S. v. Sharp*, 191 U.S. 341, 24 S. Ct. 114, 48 L. Ed. 211 (1903).

standard mode under which damages are measured do not in every instance apply to the creation of affirmative or negative aviation easements.

The application of rules pertaining to navigation and roadway-created easements are no longer applicable to airway-created easements. It is readily apparent that a tract once contiguous can be made non-contiguous by the intrusion of a highway, but what is not so apparent is the concept of a non-contiguous tract in the air which does not affect the physical boundaries of the tract on earth. The courts must meet this problem head-on and create new rules of damages from the existing criteria by which damages have been determined in the past.