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# ACCESS TO THE AIRWAYS AFTER SEPTEMBER 11: DO AVIATION BUSINESSES DEVASTATED BY THE RESTRICTIONS HAVE A FIFTH AMENDMENT REMEDY?

by ELTON UEOKA DODSON\*

## I. Introduction

The attacks of September 11, 2001 evoked a sense of panic throughout aviation. This use of our own commercial aircraft was the first direct assault on our nation's airspace system, resulting in the grounding of all air traffic.<sup>1</sup> Commercial carrier operations were restored as quickly as possible, and within a matter of days, the only substantial government imposed flight restrictions on these commercial flights were in the terminal buildings.<sup>2</sup> With the exception of the no-fly zones in the immediate areas around the attacks in New York and Washington, D.C., commercial airlines were

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1. The order grounding the flights was solemn, technical, and to the point. As all special pilot information is dissemination from the Federal Aviation Administration, this one came in the form of a Notice to Airmen (NOTAM): "FDC 1/9731 FDC Special Notice - Due to extraordinary circumstances and for reasons of safety. Attention all aircraft operators, by order of the Federal Aviation Command Center, all airports/airdromes are not authorized for landing and takeoff. All traffic including airborne aircraft are encourage to land shortly." (Sept. 11, 2001).

2. The restoration of flight for the major airlines came just two days after the attacks on September 13, 2001. Public notice of this came first from a press release from Secretary of Transportation Norman Y. Mineta. Press Release, Department of Transportation (Sept. 13, 2001) (on file with author). As soon as commercial carriers got a green light from the Department of Transportation, most, like Southwest Airlines, "quickly returned to full service." Greg Johnson, *Southwest Resuming TV Campaign With 2 Ads*, L.A. TIMES, September 19, 2001, at C4.

fully restored to their pre-attack freedoms. However, while the commercial carriers were back in the air (buoyed by a multi-billion dollar federal aid package),<sup>3</sup> general aviation was largely ignored.

“General aviation” is a general term for aviation activities falling outside of commercial carrier operations, and is generally covered under Part 91 of the Federal Aviation Regulations (FAR).<sup>4</sup> These flights are undertaken by Federal Aviation Administration (FAA) licensed pilots for business trips, pleasure, and for general transportation (just as we might use our car or the subway). General aviation businesses include flight schools, banner-towers, support services, and news and traffic watch services. General aviation flight was, of course, grounded along with commercial carrier operations on the morning of September 11.<sup>5</sup> The difference has been the time and process by which general aviation and commercial operations have been allowed back in the air.<sup>6</sup>

On September 14, flights under “instrument flight rules” were allowed back in the air with some restrictions.<sup>7</sup> Because flying under instrument flight rules requires a special rating (an Instrument Rating), most general aviation pilots remained grounded.<sup>8</sup> Phil Boyer, the president of the Aircraft Owners and Pilots Association (AOPA), the largest general aviation advocacy organization in the world, has testified to Congress that only about fifteen percent of

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3. Stephanie Stoughton, *Grounded by Air Security Restrictions, Aerial-Advertising Firms Struggle to Survive*, THE BOSTON GLOBE, Fri., Oct. 26, 2001 at C1.

4. 14 C.F.R. pt. 91 (2002). Part 91 “prescribes rules governing the operation of aircraft . . . within the United States.” *Id.* at pt. 91.1(a).

5. *See supra* note 2.

6. For an excellent week by week account of the events following September 11 as they relate to general aviation, see the web based news archive that the Aircraft Owners and Pilots Association continues to update. AOPA, *AOPA News in Review*, at <http://www.aopa.org/whatsnew/newsitems/news02q1.html> (last visited June 12, 2003).

7. Press Release, Department of Transportation (Sept. 14, 2001) (on file with author). Instrument Flight Rules, or IFR, are “a set of rules governing the conduct of flight under instrument meteorological conditions.” FED. AVIATION ADMIN., AERONAUTICAL INFO. MANUAL PCG I-3 (2002). IFR rules were designed to enable safe flight in bad weather or very poor visibility. *Id.* This is as opposed to Visual Flight Rules (VFR), which generally govern flights in good weather below 18,000 feet above sea level. *Id.* at PCG V-1.

8. *See* 14 C.F.R. pt. 61.65 (2002) (outlining the official requirements necessary to obtain an instrument rating). Note that a pilot holding only a private pilot’s license with no instrument rating is barred from flying under instrument conditions at any time. The requirements for the instrument rating are strenuous and require very different skills and training than the private pilot license. In addition, there are strict currency requirements (continuous training requirements) that are necessary to remain qualified to fly under instrument flight rules. *Id.* at pt. 61.57.

licensed pilots are instrument current, leaving eighty-five percent of U.S. pilots grounded.<sup>9</sup> On September 19, 2001, pilots without instrument ratings were allowed back in the air in some parts of the country.<sup>10</sup> However, non-instrument rated pilots and most general aviation businesses operating in the airspace near the nation's thirty largest cities were still grounded.<sup>11</sup> This left an estimated 41,000 aircraft stuck throughout the country, serving as nothing more than very expensive paperweights to their owners.<sup>12</sup> The final lifting of most of these restrictions allowed businesses dependent on the skies back in the air, but did not occur until December 20, 2001.<sup>13</sup>

Obviously, these absolute restrictions on general aviation businesses were devastating. In just the two weeks following the attacks, it is estimated that general aviation businesses lost around 400 million dollars.<sup>14</sup> Banner-towers could not tow their banners, crop dusters left crops untreated, and fixed-base operators ceased renting their aircraft. It is difficult to imagine that these "mom-and-pop" businesses could survive for over three months with no income, while still paying for aircraft maintenance, rent, payroll, and the other myriad costs of running an aircraft based enterprise.<sup>15</sup> The examples of this economic devastation are numerous. An owner of a banner-towing company in Florida was forced to lay off 45 of his 65 employees;<sup>16</sup> a flight school in Texas lost 27,000 dollars after the imposition of the flight restrictions,<sup>17</sup> and once thriving businesses all over the country faced red-ink and bankruptcy.<sup>18</sup>

In examining these incredible losses, one must be cognizant that they are not a direct result of the September 11 attacks, but of airspace restrictions specifically targeting a segment of aviation that

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9. AOPA, *Boyer asks Congress to help free the GA 41,000*, at <http://www.aopa.org/whatsnew/newsitems/news02q1.html> (last visited June 12, 2003).

10. See *infra* section The Airspace Restrictions Following the Attacks.

11. See *id.*

12. Jewel Gopwani, *FAA Restrictions Clip the Wings of Many General Aviation Companies*, FORT WORTH STAR-TELEGRAM, Oct. 5, 2001.

13. AOPA, *AOPA work leads to end of enhanced Class B airspace nationwide*, at <http://www.aopa.org/whatsnew/newsitems/news02q1.html> (last visited June 12, 2003).

14. Gopwani, *supra* note 12.

15. "[H]undreds of mom-and-pop businesses in this small industry are racking up staggering losses and worrying about their survival." Stoughton, *supra* note 3 at C1.

16. Ken Kaye, *Miami Airspace Reopened; Private Pilots Can Again Use Nearby Airports*, S. FLA. SUN-SENTINEL, Oct 23, 2001 at 4B.

17. Gopwani, *supra* note 12.

18. See Kaye, *supra* note 16.

was in no way associated with the attacks in New York and Washington, D.C. The carnage at the World Trade Center and the Pentagon was caused less by the impact of the jets than by the extreme temperatures caused by thousands of gallons of burning jet fuel, something that could be accomplished only by the large planes operated by the commercial airlines.<sup>19</sup> Nevertheless, these giant airliners were back in service after only two days while general aviation businesses withered for three months.<sup>20</sup> The more recent incident in Florida, where a minor apparently committed suicide by flying his small, single-engine plane into a skyscraper proves in a tragic way that general aviation poses very little threat to the public.<sup>21</sup> Nevertheless, few pilots would argue that the federal government need refrain from taking necessary measures to protect American citizens. However, in this case, where the property of one group is regulated into economic uselessness for the greater good, that burden must be shared by all.

The Fifth Amendment of the U.S. Constitution states that citizens cannot “be deprived of life, liberty, or property, without due process of law,” and that “private property cannot be taken for public use without just compensation.”<sup>22</sup> In *United States v. Causby*, the U.S. Supreme Court established that the navigable airspace in the U.S. is properly public property.<sup>23</sup> Federal law gives citizens “a public right of transit” through this airspace, subject to the regulatory management power of Congress.<sup>24</sup> This note will demonstrate that the federal government’s severe restriction of airspace following the September 11 attacks effected a regulatory taking requiring just

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19. A fully laden Boeing 767 contains 23,980 gallons of jet fuel. *Boeing 767 Technical Specifications*, at <http://www.boeing.com/commercial/767family/technical.html> (last visited June 12, 2003). “New York’s World Trade Center was designed to withstand airplanes crashing into the buildings. They could not survive the devastating fires that followed.” Edward Gunts, *Engineers blame collapses on fires Burning jet fuel’s heat softened steel supports of WTC towers, they say; Sprinklers disabled, outmatched*, THE BALTIMORE SUN, September 13, 2001 at 19A. Temperatures in the World Trade Center “likely reached as high as 2,000 degrees,” where steel softens between 1,600 to 1,700 degrees. *Id.* A Cessna 172, the most common general aviation aircraft in use, holds about 53 gallons of avgas. *Skyhawk, Specification and Description*, available at [http://skyhawk.cessna.com/spec\\_eq.html](http://skyhawk.cessna.com/spec_eq.html) (last visited June 12, 2003).

20. See Sloughton, *supra* note 3.

21. Brad Smith, *15-Year-Old In Stolen Airplane Ignores Orders To Land, Flies To His Death*, TAMPA TRIBUNE, January 6, 2002, at 1A.

22. U.S. CONST. amend. V.

23. 328 U.S. 256, 266 (1946).

24. 49 U.S.C. § 40103 (2002).

compensation under the Fifth Amendment.<sup>25</sup> Even where the federal government legitimately exercises its police power because of a national emergency, it cannot evade its responsibilities under our Constitution.

Part II of this note will outline the classification of federal airspace by the Federal Aviation Administration, including a description of the changes and restrictions imposed after September 11, 2001. Part III will briefly survey the modern state of the law of Fifth Amendment regulatory takings. Part IV will demonstrate how regulatory takings law provides a compelling argument for the payment of just compensation to general aviation businesses devastated by the post-September 11 restrictions.

## **II. The Airspace Restrictions Following the Attacks.**

The Federal Aviation Administration is charged with regulating the use and classification of the nation's airspace.<sup>26</sup> Designation of this airspace into "classes" is accomplished through the creation of rules in the Federal Aviation Regulations.<sup>27</sup> Each class carries differing burdens on the pilots that operate within them. Generally, the more densely populated the skies of a given class are anticipated to be, the more restrictive the requirements on the pilot. For the purposes of this note, there is no need to have a detailed grasp of these varying responsibilities for each class. Therefore, a brief overview of each class will be described, followed by a detailed explanation of the restrictions at issue. The following will describe only the six major airspace classifications pictured in figure 1, though there are many more designations, mostly dealing with military operations that are not relevant to this note.

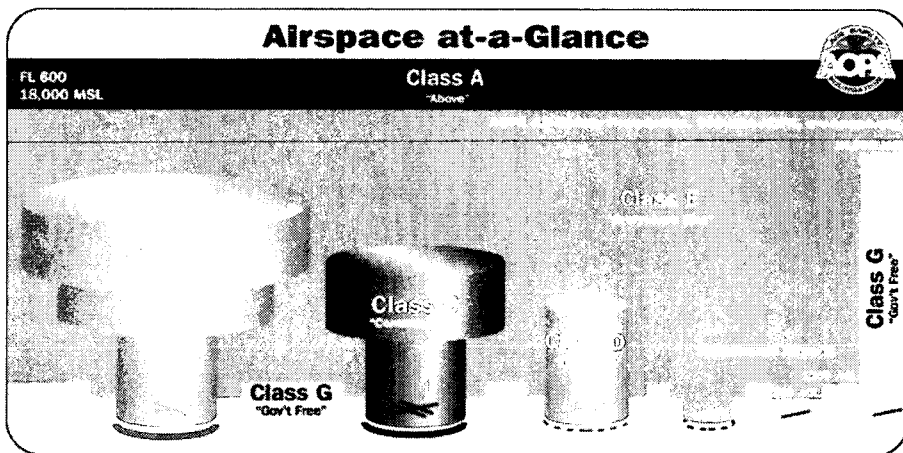
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25. U.S. CONST. amend. V.

26. 49 U.S.C. § 40103(b).

27. See 14 C.F.R. pt. 71 (2002). These rules are authorized by the Administrative Procedure Act. 5 U.S.C. § 553 (1996).

## A. Classification of National Airspace by the Federal Aviation Administration.



**Figure 1. Aircraft Owners and Pilots Association, *Airspace at-a-Glance*, at <http://www.aopa.org>.**

### 1. Class A Airspace.

Class A airspace is controlled airspace,<sup>28</sup> which includes all airspace above 18,000 feet above mean sea level to FL600<sup>29</sup>. Class A airspace is positive control airspace, which means that all aircraft are required to fly under instrument flight rules.<sup>30</sup> With the exception of the two days immediately following the attacks, there were no restrictions that affected class A.

### 2. Class B Airspace.

Class B<sup>31</sup> airspace was the most heavily restricted airspace in the country following the September 11th attacks. This airspace is

28. "Controlled" airspace is that airspace in which federal air traffic control services are offered in accordance with the airspace classification, and does not necessarily refer to direct control or authority by air traffic control over the aircraft in the airspace. FED. AVIATION ADMIN., AERONAUTICAL INFO. MANUAL 3-2-1 (2002).

29. Flight level means "a level of constant atmospheric pressure related to reference datum of 29.92." 14 C.F.R. pt. 1.1 (2002). Flight levels are stated in three digits that represent hundreds of feet. Thus, FL600 means that when the atmospheric pressure knob on a given aircraft's altimeter (the instrument which reports altitude above mean sea level) is set to 29.92 inches of mercury, the instrument will register 60,000 feet.

30. 14 C.F.R. §§ 71.31-71.33 (2002).

31. Class B airspace is usually referred to by pilots and air traffic controllers as "bravo

reserved for the nation's largest and busiest airports, which naturally tend to be located near the nation's largest cities. Generally, Class B airspace extends from the surface to 10,000 feet mean sea level.<sup>32</sup> However, the specific configuration of each Class B airspace area in the country is individually tailored to the airport it protects and in some areas is quite complex. The most common shape for a Class B area is best described as an upside-down wedding cake, as shown in figure 1. As you can see from figure 1, the bottom limits (or floor) of Class B airspace descend closer and closer to the surface so that its borders, within 10 miles of the airport itself, begin at the ground level. The structure is consistent with large numbers of aircraft descending from their en route altitudes as they begin their arrivals and approaches to their destination airports.<sup>33</sup>

### 3. Class C and Class D Airspace.

Class C and D airspace are designated to protect specific airports by allowing air traffic control greater flexibility and control of aircraft in our nation's busier segments of airspace.<sup>34</sup> As shown by figure 1, Class C and D airspace is always centered on an airport. The primary difference between the two is that Class C airspace is always serviced by radar and a control tower (thus signifying a busier airport) while Class D airports are serviced by a control tower only.<sup>35</sup>

### 4. Class E Airspace.

Essentially, all controlled airspace that is not classified as Class B, C, or D airspace is referred to as Class E airspace.<sup>36</sup> As is evident from figure 1, the majority of an aircraft's enroute time between airports is spent in Class E airspace.

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airspace" after the letter "B's" phonetic identifier.

32. FED. AVIATION ADMIN., AERONAUTICAL INFO. MANUAL 3-2-2. "Mean Sea Level" refers to the altitude above the average world sea level, rather than the actual height above ground.

33. Once an aircraft is underway, there are three general portions of the flight. "En route" refers to that portion in which the aircraft is flying level at its target altitude, while "arrival" and "approach" describe those portions where the aircraft begins to descend and finally approach its target airport for landing.

34. FED. AVIATION ADMIN., AERONAUTICAL INFO. MANUAL 3-2-5 (2002).

35. *Id.* at 3-2-7.

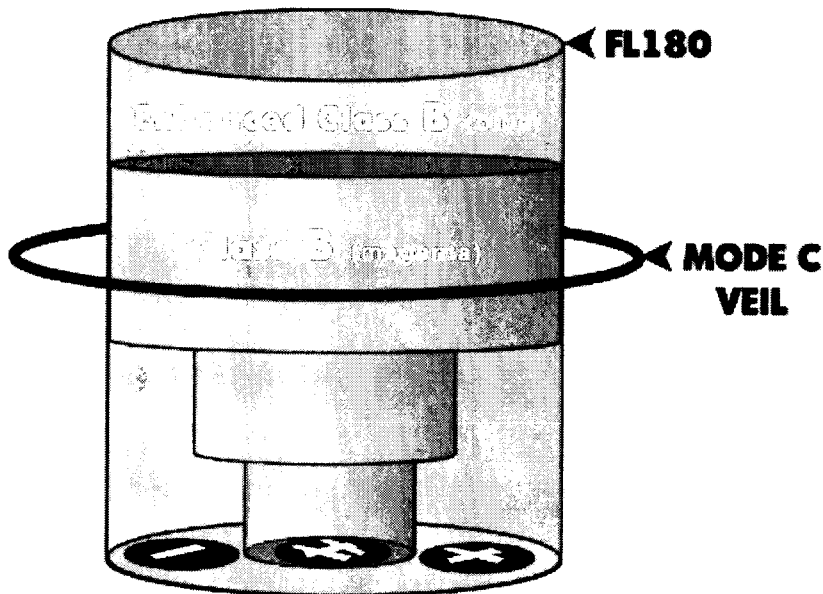
36. *Id.* at 3-2-8.



## 5. Class G Airspace.

Class G airspace is considered “uncontrolled”<sup>37</sup> and thus the regulations pertaining to this part of the nation’s airspace are the most relaxed.<sup>38</sup> However, since the rapid growth of general and commercial aviation since World War II, Class G airspace is very rare and many pilots may spend their entire flying career without ever entering Class G airspace.

### B. Federal Airspace After the Restrictions.



**Figure 2. Aircraft Owners and Pilots Association, *Enhanced Class B Airspace*.**<sup>39</sup>

Once the National Security Council began to allow air traffic access to the skies following the attacks, Class B airspace had been replaced by what the FAA called Enhanced Class B airspace. For one, the multiple altitude based borders of the airspace had been eliminated. The new Class B airspace was defined as stretching from the surface to the 18,000 feet within the “extreme lateral limits” of the previously defined airspace. In other words, the wedding cake had become a solid cylinder. Figure 2 depicts the “old” typical Class B wedding

37. Of course, “uncontrolled” is somewhat of a misnomer, as FAA regulations concerning requirements for both VFR and IFR flight still apply. *Id.* at 3-4-1.

38. *Id.*

39. Available at <http://www.aopa.org>.

cake airspace configuration within the new Enhanced Class B airspace. From this it is easy to see the greater volume of airspace contained within Class B airspace. Importantly, the figure shows that smaller airports which previously underlay Class B (and thus aircraft could take off and land without entering Class B airspace) were now fully contained within the Enhanced Class B airspace.<sup>40</sup>

With the creation of Enhanced Class B (ECB), all Visual Flight Rule (VFR) operations were banned within it. In addition, virtually all general aviation commercial operations were grounded. This included banner-towing operations, fixed-wing and helicopter traffic reporting and news operations, certain flight training, and sight-seeing. Also, because virtually no aircraft could get in or out of these airports, ground based aircraft business such as maintenance and fuel facilities immediately lost their customers.<sup>41</sup> While many private pilots were finally able to fly when the Visual Flight Rules ban was largely lifted by October 24, 2001, general aviation business were not allowed back in the air within the Enhanced Class B airspace until December 20, 2001.<sup>42</sup> To a large extent, many citizens and even pilots that were aware of these restrictions supported them as prudent and because the banned operations seemed trivial. However, the small business owners affected by the restrictions soon found themselves in red-ink, which in some cases meant bankruptcy and for family businesses proved to be financially disastrous.

### III. The Current State of Regulatory Takings Law.

The Fifth Amendment of the U.S. Constitution declares that no one shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use,

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40. While figure 2 is obviously condensed and the scale exaggerated, the impact on small airports is phenomenal. It has been estimated that there are some 41,800 general aviation aircraft based on 282 airports inside the 30 enhanced Class B airspace areas. Gopwani, *supra* note 12. Those aircraft would normally account for some 21 million operations a year. *Id.*

41. See, e.g., Sylvia Adcock, *America's Ordeal: It's That Empty Feeling; Republic Pinched By No-Fly Zone*, *NEWSDAY*, Oct. 2, 2001 (Local airport's traffic "dropped by 96 percent, and about 50 businesses, including flight schools, fuel suppliers and maintenance shops, face tough times.").

42. *AOPA work leads to end of enhanced Class B airspace nationwide*, at <http://www.aopa.org/whatsnew/newsitems/news02q1.html> (last visited June 12, 2003). While outside the scope of this note, it should be immediately apparent that the lifting of restrictions on VFR private pilots well before registered business owners seems irrational (as the legitimate purpose of the restrictions would seem to be to keep potentially dangerous pilots out of the air) and presents possible equal protection issues.

without just compensation.” The Fifth Amendment is recognition of the government’s power of eminent domain rather than an express grant of it.<sup>43</sup> The Amendment serves as a check on the government’s use of eminent domain. The actual physical occupation or taking of property is not a necessary condition for the activation of the Fifth Amendment.<sup>44</sup> When “the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”<sup>45</sup> Thus, while the government may use its eminent domain powers to severely restrict the use of property (even to the point of making it useless), the Fifth Amendment requires reasonable compensation to the property owner.<sup>46</sup>

The Court has used many tests and approaches for determining when a regulation has gone too far and crossed the line into eminent domain. This has left takings law either in a shady netherworld of ad-hoc fact-based determinations or a more recent categorical approach adopted by the Supreme Court, which seems to leave years of lower court decisions in doubt.<sup>47</sup> However, the federal courts have been unambiguous in defining what constitutes “property” properly protected by the Fifth Amendment, thus quelling debates over whether land is the only protected category.<sup>48</sup>

#### **A. Police Powers versus Eminent Domain: The Public Use Dilemma.**

The government is prohibited from exercising its takings powers unless the property seized is for “public use.”<sup>49</sup> However, defining the public use has been problematic.<sup>50</sup> The Supreme Court has expressly proclaimed that it will give great deference to the legislature’s definition of “public use.”<sup>51</sup> Thus, where the legislature

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43. See *United States v. Carmack*, 329 U.S. 230, 241-242 (1946) (Holding that the Fifth Amendment is merely “a tacit recognition of a pre-existing power”).

44. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 122 n.25 (1978) (“[W]e do not embrace the proposition that a ‘taking’ can never occur unless government has transferred physical control over a portion of a parcel.”)

45. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992).

46. *Id.*

47. See *infra* notes 14-34 and accompanying text.

48. See *infra* note 27.

49. U.S. CONST. amend. V.

50. See Lawrence Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203, 205 (1978) (“[T]he precise meaning of the ‘public use’ requirement has varied over time.”).

51. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242-243 (1984) (“When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear

has pursued a legitimate state objective in its exercise of eminent domain in a rational way, the Court will generally not enter the debate.<sup>52</sup> This relatively clear definition of a Fifth Amendment taking is limited to instances where the government objective is achieving a public good.<sup>53</sup> In contrast, the Court has held that regulations which use the state's police powers to restrict the use of property to curb a nuisance or "public bad" do not amount to a compensable taking.<sup>54</sup>

The public good versus public bad test has been heavily criticized.<sup>55</sup> The difficulty in differentiating between the use of noncompensable police power and Fifth Amendment eminent domain via this harm-benefit test becomes apparent after a survey of takings cases which use this analysis.<sup>56</sup> For example, in *Just v. Marinette County*, the Wisconsin Supreme Court found no taking by a regulation restricting wetlands development, even though the regulation prevented property owners from having any economic use of the land.<sup>57</sup> The debate in that case centered on whether preventing the development of the wetlands area conferred a benefit on the public or prevented a public harm.<sup>58</sup> Equally compelling arguments can be (and were) made for both views.<sup>59</sup> For example, is the baseline the current state of the wetlands (i.e., that the wetlands are already providing the benefit), or is the baseline the expansion of development in the area (which means the property owner would be

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that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts”).

52. *Id.*

53. See *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (Ordinance restricting the manufacturing of bricks on property where clay was located not a compensable taking, even where it would be unprofitable to transport clay elsewhere for manufacture).

54. *Id.*

55. See, e.g., Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1196 (1967) ("Such a method will not work unless we can establish a benchmark of 'neutral' conduct which enables us to say where refusal to confer benefits . . . slips over into readiness to inflict harms."); see generally Glynn S. Lunney, Jr., *Responsibility, Causation, and the Harm-Benefit Line in Takings Jurisprudence*, 6 FORDHAM ENVTL. L.J. 433 (1955).

56. See *Miller v. Schoene*, 276 U.S. 272 (1928) (Owners of property forced to cut down all red cedars on property to prevent spread of disease capable of killing apple trees); *Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907 (3d Cir. 1987) (A poultry quarantine is imposed on poultry farms to prevent spread of avian influenza harmless to humans but threatening to chickens).

57. 201 N.W.2d 761 (1972).

58. *Id.*

59. *Id.*

conferring a benefit by stopping this trend)? Without a reference line of neutrality by which to judge benefit versus harm (and because such a line is arguably impossible or inappropriate for the court to draw), it becomes apparent that this test is unworkable.<sup>60</sup> As I will demonstrate, this conflict is important in analyzing the post-September 11 restrictions.

The use of this standard has led courts to objectionable results, and courts have sometimes stacked a fairness standard on the harm-benefit test to find a compensable taking even where they have found the regulation prevented a harm rather than a conferred a benefit.<sup>61</sup> Possibly recognizing this grave deficiency in the standard, the Supreme Court has moved away from using the harm-benefit test in certain categories in recent cases.<sup>62</sup> In *Lucas v. South Carolina Coastal Council*, the Court reversed the South Carolina Supreme Court's use of the "harmful or noxious use" principle to deny compensation to a property owner who had been denied any development of his property.<sup>63</sup> In so ruling, the Court went so far as to hold that the "distinction between regulation that 'prevents harmful use' and that which 'confers benefits' is difficult, if not impossible, to discern on an objective, value-free basis; and that, therefore, noxious-use logic cannot be the basis for departing from this Court's categorical rule that total regulatory takings must be compensated."<sup>64</sup> This "categorical rule," which the Court implies was so clear that the South Carolina Supreme Court should not have missed it, actually appears to be a new bright-line rule for regulatory takings.<sup>65</sup>

The Court has held that there are two "discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint."<sup>66</sup> First is the case of any sort of physical occupation of the property.<sup>67</sup> The second encompasses the situation "where regulation denies all economically beneficial or productive use of land."<sup>68</sup> This would seem to call into

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60. See Michelman, *supra* note 55.

61. See, e.g., *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972).

62. *Lucas v. Coastal Council*, 505 U.S. 1003 (1992).

63. *Id.*

64. *Id.* at 1004.

65. *Id.*

66. *Id.* at 1015.

67. *Id.*

68. *Id.*

question many previous cases which denied compensation to property owners in cases where a strong argument could be made that the regulation in question had removed all economic value from the property.<sup>69</sup> Therefore, the current standard for regulatory takings dictates that where a regulation denies all economic value of the property, there is no need to apply a public benefits test of any kind, as the state action is automatically considered a taking requiring compensation.<sup>70</sup>

## **B. What Constitutes “Property” Covered by the Fifth Amendment?**

The seminal cases in takings law have almost exclusively dealt with real property.<sup>71</sup> That does not mean, however, that the Fifth Amendment’s reference to property is limited. The federal courts have consistently held that personal property, including even intangible property like stock holdings and interest from bank accounts, is properly included in Fifth Amendment takings protections.<sup>72</sup> “The essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement.”<sup>73</sup> Thus, courts have found a taking in the case of a boat,<sup>74</sup> money,<sup>75</sup> and inmate trust accounts.<sup>76</sup> It is, therefore, not a stretch at all to consider aircraft with market values ranging from twenty-thousand dollars to thirty million dollars as personal property compensable under the takings clause of the Fifth Amendment.

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69. See *supra* note 45.

70. *Lucas*, 505 U.S. 1003.

71. “Real property” is defined as land and the permanent buildings and structures on that land as opposed to “personal property,” which is everything else, including mobile objects and intangible interests such as stock ownership. GILBERT LAW SUMMARIES LAW DICTIONARY 243, 272 (1997).

72. *Haldeman v. Freeman*, 558 F. Supp. 514, 519 n.11 (D.C. 1983) (“The taking [sic] clause of the Fifth Amendment covers personal property as well as real property.”); *Warner/Elektra/Atlantic Corp. v. County of DuPage*, 991 F.2d 1280, 1285 (7th Cir. 1992) (Holding that taking real property as distinct from personal property for Fifth Amendment purposes is “not merely wrong, but imprudent.”); *Am. Pelagic Fishing Co., L.P. v. United States*, 49 Fed. Cl. 36, 46 (2001) (“[T]he Takings Clause has applicability to both tangible and intangible personalty.”); *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1338 (D.C. Cir. 2001) (“It is . . . clear that a fund of money can be property protected under the Takings Clause.”).

73. *Nixon v. United States*, 978 F.2d 1269, 1275 (D.C. Cir. 1992).

74. *Osprey Pac. Corp. v. United States*, 41 Fed. Cl. 150 (1998).

75. *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (D.C. Cir. 2001).

76. *Schneider v. Cal. Dept. of Corr.*, 91 F. Supp. 2d 1316 (N.D. Cal. 2000).

## **IV. Modern Law on Regulatory Takings Entitles General Aviation Business Owners to “Just Compensation” Under the Fifth Amendment.**

### **A. Authority to Regulate U.S. Airspace.**

Federal law specifies that “a citizen of the United States has a public right of transit through the navigable airspace,” while the “United States Government has exclusive sovereignty of airspace.”<sup>77</sup> Originally, the United States adopted from common law the “ancient doctrine that . . . ownership of the land extended to the periphery of the universe.”<sup>78</sup> The advent of air travel has made that concept impractical, thus prompting Congress to declare navigable airspace a “public highway.”<sup>79</sup> Thus, while federal law makes it clear that citizens have a “right” to use the public highways of the skies, it is unclear how much the federal government may restrict that right through its exclusive regulatory dominion of U.S. airspace.

Congress has delegated to the FAA the powers and responsibilities of regulating the flight of aircraft in federal airspace.<sup>80</sup> This regulatory authority is for the purpose not only of maintaining the safety of aircraft utilizing the airspace, but also of “protecting individuals and property on the ground.”<sup>81</sup> Further, the FAA may “establish areas in the airspace the Administrator decides are necessary in the interest of national defense.”<sup>82</sup> The regulation of our public airspace has been tailored to “further the right” of citizens to transit navigable airspace while ensuring “the safety of aircraft and efficient use of airspace.”<sup>83</sup>

The tragedies on September 11, 2001 threw a wrench in the works of our airspace system. Suddenly, and without warning, the federal government was forced to shut down the very airspace system it had worked years to make accessible and efficient. That the

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77. 49 U.S.C. § 40103(a) (2002).

78. *United States v. Causby*, 328 U.S. 256, 260 (1946).

79. *Id.* at 261. As the Supreme Court points out in this case, modern air travel would be impossible under the ancient common law, as private landowners would have a private right of action in trespass for every over flight of their land.

80. 49 U.S.C. § 40103 (2002).

81. *Id.* “The purpose of the Federal Aviation Act of 1958 is to promote aviation safety. Such purpose extends to the safety of persons on the ground.” *Himmler v. United States*, 474 F. Supp. 914, 916 (E.D. Pa. 1979).

82. *Id.*

83. 49 U.S.C. § 40103(b)(1).

government needed to take immediate action to prevent further attacks like those in New York and Washington, D.C. was certain. It is also clear that the FAA, via delegation of powers to it by Congress, had the right to shut down our nation's airspace as it did almost immediately after the World Trade Center attacks.<sup>84</sup> This note does not address the legality of the subsequent airspace restrictions, including the Enhanced Class B and stadium rules. The fact that the government's actions might have been legal (and arguably extremely necessary) does not bear on the right of aircraft and aviation business owners to compensation under the Fifth Amendment.

There are no instances in which a Fifth Amendment takings argument is necessary when the government takes property illegally: the police power of the state to take or modify the use of private property is legally exercised only where the action has been "deemed necessary to promote the public interest."<sup>85</sup> Also, even when government action constituting a taking under the Fifth Amendment is conducted out of necessity because of a national security emergency, the affected owner is still owed just compensation for her loss.<sup>86</sup> In *United States v. Causby*, the plaintiff sought compensation for damage to his property caused by low altitude flights by military aircraft.<sup>87</sup> The plaintiff's primary source of income was the raising of chickens. The plaintiff claimed that the chickens had stopped producing and that several chickens had killed themselves as they flew into the walls of their coops as a result of the fear of large aircraft flying as low as sixty-three feet above the coops.<sup>88</sup>

The airfield adjacent to the plaintiff's property had been authorized by the federal government for military use as a result of the "national emergency" (World War II), and the Court did not question that an operational air force was necessary to aid in a United States victory in the war.<sup>89</sup> However, even while acknowledging the extreme government need for these flight operations, the Court found that the damages caused by the over flights constituted a compensable taking under the Fifth Amendment.<sup>90</sup> Even though there was no direct intrusion on or regulation specifically targeting

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84. See *supra* note 47.

85. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

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

87. *Id.* at 258.

88. *Id.* at 259.

89. *Id.* at 258-59.

90. *Id.* at 261.



the plaintiff's property, the economic damage suffered as a result of the military activities was sufficient to require just compensation.<sup>91</sup>

**B. American Citizens Have a Right to Use Federal Airspace, Subject to Reasonable Conditions.**

A potential barrier to finding a taking as a result of the airspace restrictions would be the lack of a fundamental right to the airspace. If businesses affected by the Enhanced Class B airspace in fact never had a claim to use the airspace, then a restriction of that airspace would seemingly not effect a taking of property.<sup>92</sup> Thus, the critical question is simply: what right do citizens have to use the airways? Understanding the actual effect of the statutory language granting citizens a "public right of transit through the navigable airspace" is critical.<sup>93</sup> At least one court has held that this statutory right is a federally granted license.<sup>94</sup> While this decision is not supported by any Supreme Court ruling, any license granted by the airspace use statute is necessarily irrevocable.<sup>95</sup> More likely, public airspace must be analyzed as having the same rights of access and conditions of use as a public highway.<sup>96</sup> If that is the case, access to the airspace is "a right which all qualified citizens possess subject to reasonable regulation under the police power of the sovereign."<sup>97</sup> In either analysis, any aircraft owner has a right to expect reasonable access to the nation's airspace.

*1. Use of Federal Airspace as a "License."*

Despite all parallels that may be imagined between airspace and real property, there are significant differences. Thus, maintaining that the federal government has in some way licensed airspace carries with it the multitude of claims associated with any other real property, such as easements, estoppel, prescription, and adverse possession. The ability of the Federal Aviation Administration to manage airspace subject to such claims is certainly questionable. Also, viewing the right of access as a license requires a view that puts

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91. *Id.*

92. Even if, in fact, the property was nonetheless rendered useless.

93. *See supra* note 77.

94. *Fiese v. Sitorius*, 526 N.W.2d 86 (Neb. 1995).

95. *See infra* notes 98-107 and accompanying text.

96. Congress has, in fact, referred to federal airspace as a "public highway." *See supra* note 79.

97. *Campbell v. Super. Ct. Maricopa County*, 479 P.2d 685, 688-89 (Ariz. 1971).

the federal government as the owner of the land as apart from "public" ownership of the land (i.e. you cannot 'license' property to yourself where you are already the owner). Nevertheless, at least one state supreme court has held that federal law granting a public right to use airspace is, in fact, a license.<sup>98</sup> Because of the serious problems this rule would raise for airspace management and the concept of public ownership, it is doubtful that the Nebraska Supreme Court's analysis would stand in the U.S. Supreme Court. Nevertheless, it bears examining here because it is a possible analysis.

A license under the common law is a granting of permission by the owner of the property to another person to perform some act that would otherwise be a trespass.<sup>99</sup> The Restatement of Property admits to confusion over the rights created by the granting of a license.<sup>100</sup> Thus, the term "interest of land" as used in the definition of a "license" is used loosely and does not necessary mean that the grantee has an absolute interest in the actual property.<sup>101</sup> Where the interest in the property by the grantee does not represent a direct interest in the land, the license is freely revocable by the grantor.<sup>102</sup> However, where the grantee has a vested interest in the land itself, usually via the erection of structures or improvements, the "licensor may not revoke the license."<sup>103</sup>

While it is impossible to erect structures in thin air (at least using current technology), it is possible to "improve" the airspace. This is accomplished via enhanced radar facilities, weather briefing technology, and aircraft improvements which make air travel safer, cheaper, and more accessible. Many of these improvements, such as new aircraft transponders,<sup>104</sup> new navigation systems such as GPS devices,<sup>105</sup> and TCAS monitors<sup>106</sup> are directly purchased by aircraft

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98. *Fiese*, 526 N.W.2d at 90.

99. Specifically, the Restatement defines a license as an interest in the land which: (a) entitles the owner of the interest to a use of the land, and (b) arises from the consent of the one whose interest in the land used is affected thereby, and (c) is not incident to an estate in the land, and (d) is not an easement. RESTATEMENT (FIRST) OF PROP. § 512 (1944).

100. *Id.* at cmt. c.

101. *Id.*

102. *Holbrook v. Taylor*, 532 S.W.2d 763, 764 (Ky. 1976).

103. *Id.*

104. A transponder is a device which sends a signal to ground based air traffic control officials which greatly assists in tracking aircraft in federal airspace.

105. The Global Positioning System, or GPS, is a satellite based navigation system which is enabling cutting edge new systems to be contemplated that may greatly increase aircraft safety and the efficiency of our airspace.

operators. These rather expensive improvements are useful only while the aircraft is airborne in federally "licensed" airspace. Thus, while it may be impossible to erect a structure that defies gravity, it is a fact that many of the devices in modern aircraft are designed solely to improve the quality of federal airspace. This direct interest in the land backed by such large investments by the aircraft operators strongly suggest that any license granted by the federal government is irrevocable.<sup>107</sup> Therefore, even if the Nebraska Supreme Court is correct in asserting that the right to access federal airspace is a license, it is a license which can be revoked only at the risk of owing just compensation under the Fifth Amendment.

## 2. *The Use of Federal Airspace as a Public Skyway.*

Federal airspace should be viewed in the same way as public highways. The very wording of the federal statute suggests this,<sup>108</sup> as do Congressional references to the federal airspace as a "public highway."<sup>109</sup> "The use of highways for purposes of travel and transportation is not a mere privilege, but a common and fundamental right."<sup>110</sup> It is established, therefore, that the public right of access to public highways must be free of unreasonable or arbitrary state interference.<sup>111</sup> Thus, requiring a citizen to register her car does not effect a taking where she refuses to register and as a result is barred from pulling out of her driveway. Where the restriction exceeds normalcy, such as the categorical ban on all use of the public "skyway" in Enhanced Class B regardless of the compliance by the

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106. The Traffic Collision Avoidance System, or TCAS, is a system designed to read the transponder signals of other aircraft and display them to the pilot, thus greatly assisting in air traffic control workload while providing "traffic separation" (keeping aircraft from colliding).

107. "[T]he licensor may not revoke the license . . . after the licensee has exercised the privilege given by the license and erected the improvements at considerable expense." *Holbrook*, 532 S.W.2d at 764.

108. See *supra* note 77.

109. See *supra* note 79.

110. 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 217 (1998).

111. *Campbell v. Super. Ct. Maricopa County*, 479 P.2d 685, 689 (Ariz. 1971); *Escobedo v. State Dep't of Motor Vehicles*, 222 P.2d 1, 5 (Cal. 1950) (Holding that the use of public highways "is an inalienable right of every citizen."); *Duff v. State*, 546 S.W.2d 283, 285 (Tex. 1977) (Stating that citizens have the "right to travel on the public roads without unreasonable interference."); *Thompson v. Smith*, 154 S.E. 579, 583 (Va. 1930) ("[R]ight of a citizen to travel upon the public highways . . . is a common right which he has under his right to enjoy life and liberty, to acquire and possess property, and to pursue happiness and safety.").

property owners with all regulations, the government has exceeded its use of regulatory police powers.

The majority of cases that deal with public access to public roads are concerned with the legality of various requirements and conditions on use.<sup>112</sup> In *Escobedo v. State Department of Motor Vehicles*, for example, the plaintiff challenged the revocation of his driver's license because of a failure to post a damage deposit;<sup>113</sup> the plaintiff in *Campbell v. Superior Court In and For Maricopa County* sued over the legality of drug testing on public highways;<sup>114</sup> and the plaintiff in *Thompson v. Smith* challenged the revocation of his driver's license for charges unrelated to access to public highways.<sup>115</sup> Two things should be noted from these cases. First, the cases solidly demonstrate that the power of the state to regulate public highways is limited and must be reasonable.<sup>116</sup> Second, the police power to punish via additional restrictions is limited to those who fail to comply with established conditions on use.<sup>117</sup>

In this case, there was absolutely no way general aviation business owners could follow any procedure to have access to the Enhanced Class B airspace. The ban on business such as banner-towers was absolute: the aircraft could not move from their hangers. There can be no greater restriction on airspace. Courts have censured the Federal Aviation Administration for much less. In *Southern California Aerial Advertisers' Association v. Federal Aviation Administration*, the Ninth Circuit nullified an airspace restriction prohibiting banner-towing aircraft from flying through a section Los Angeles airspace because the government had failed to properly involve general aviation businesses in the airspace review process.<sup>118</sup> If indeed the nation's airspace is regulated under the same conditions as public highways, there is no doubt that the restrictions following September 11, 2001 utterly trampled "an inalienable right of every citizen."<sup>119</sup>

### C. Ad-Hoc Public Benefit-Harm Analysis or Categorical Taking; A

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112. See *supra* note 111.

113. *Escobedo*, 222 P.2d 1.

114. *Campbell*, 479 P.2d 685.

115. *Thompson*, 154 S.E. 579.

116. See *supra* note 111.

117. 39 AM. JUR. 2D *Highways, Streets, and Bridges* § 219 (1998).

118. 881 F.2d 672 (9th Cir. 1989).

119. See *Campbell*, 479 P.2d at 689.

### **Taking Either Way.**

Whether via the irrevocable license argument or under the public highway analogy, it is apparent that American citizens have a right to access federal airspace so long as they follow the reasonable regulatory requirements of government. With that the case, the final step in analyzing whether or not the restrictions constituted a taking lie with picking a standard of examination: the ad-hoc based approach led by the benefit-harm analysis or the more clear categorical approach used by the Supreme Court in *Lucas v. South Carolina Coastal Council*.<sup>120</sup> As the following analysis shows, either method proves the necessity for just compensation under the Fifth Amendment.

#### *1. The Loss of Value Conferred a Public Benefit.*

After *Lucas* it seems unlikely that the benefit-harm test is appropriate here.<sup>121</sup> However, since the horror and damage of the September 11 attacks were so great, and the incentive to prevent further damage so urgent, on an emotional level the restrictions seem to be a prevention of harm. Also, there are general aviation businesses that may have been able to continue a small part of their business, utilizing their aircraft outside of Enhanced Class B airspace for limited purposes. Thus, they may not fit neatly into the categorical approach. Even if the categorical approach discussed below does not automatically place the airspace restrictions in the area of Fifth Amendment takings, there is a compelling argument that the loss of value by aircraft operators conferred a substantial public benefit.

The purpose of a terrorist attack is to weaken the resolve of the civilian population of the target nation through fear and panic.<sup>122</sup> As discussed in Part I of this note, any continued aerial threat after the attacks rested in aircraft capable of holding enough fuel to do real damage, which leaves general aviation out.<sup>123</sup> Therefore, the largest effect the restrictions had was in soothing and comforting a very fearful public. This is, of course, speculative since there has been no

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120. 505 U.S. 1003.

121. *Id.*

122. The Irish Times, published in a part of the world that knows terrorism well, argues that "[t]he attacks are designed to have a profound psychological effect on the civilian population. In short, they are designed to instill fear, paranoia and panic." Tom Clonan, *Response to Terror*, IRISH TIMES, WED., Oct. 17, 2001 at 12.

123. See *supra* note 20.

judicial determination as of yet in this regard, and the National Security Council and Department of Transportation have yet to offer a justification for the restrictions despite Congressional demands for one.<sup>124</sup>

Nevertheless, courts that have refused to grant compensation under the Fifth Amendment under the harmful or noxious use theory have, without fail, done so because the property at issue specifically posed some sort of harm to the general public.<sup>125</sup> In issuing the restrictions at issue, the federal government at no time attempted to show that any individual aircraft owned by general aviation pilots or businesses posed a threat to the American public. As a result, even if a court were to hold that the restrictions reasonably and justifiably were imposed to prevent a specific public harm, fairness issues would dictate the payment of just compensation.<sup>126</sup>

## *2. The Categorical Approach Adopted by the Supreme Court Provides a Clear Remedy for General Aviation.*

The categorical approach adopted by the U.S. Supreme Court in *Lucas* states that “where [a] regulation denies all economically beneficial or productive use of land,” a taking has occurred which requires just compensation.<sup>127</sup> Quite simply, if an aircraft cannot taxi to a runway and take-off, it is essentially nothing more than several thousand dollars (or several million dollars) worth of useless aluminum, wiring, avgas, and Plexiglas. An aircraft in this state is utterly useless to its owner. While *Lucas* dealt with real property, personal property comes under the same analysis.<sup>128</sup> Therefore, in cases where owners and operators were completely unable to utilize their aircraft due to the airspace restrictions, no ad hoc analysis need apply.<sup>129</sup> Rather, the restrictions must be regarded as a categorical Fifth Amendment taking under the decision in *Lucas*.

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124. THE WEEKLY OF BUSINESS AVIATION, VOL. 73, NO. 22, November 26, 2001, at 245. Congress, in fact, actually debated legislation that would require the FAA to allow general aviation operators back in the air in Enhanced Class B within thirty days of enactment unless the “Department of Transportation publishes an explanation in the Federal Register of the reasons for the restrictions.” *Id.* It is perhaps not coincidental that the Enhanced Class B restrictions were lifted two weeks later. Many members of Congress are pilots and members of the Aircraft Owners and Pilots Association, and, thus, had personal reasons for their desire to see the airspace bans lifted.

125. See *supra* note 56.

126. See *supra* note 61.

127. *Lucas*, 505 U.S. at 1015.

128. See *supra* notes 71-76 and accompanying text.

129. *Lucas*, 505 U.S. at 1015.

## V. Conclusion.

Viewing these airspace restrictions as a Fifth Amendment taking involves delving into two areas of law which are ambiguous and difficult: the nature of U.S. airspace and the current state of regulatory takings. However, an analysis of the law that exists on these subjects paves the way for a remedy for those financially decimated by the airspace restrictions. While there are multiple takings analyses which could be applied in this case, each one leads to the same conclusion: the Fifth Amendment requires the payment of just compensation as a result of the takings.

The restrictions arguably reduced the psychological impact of the September 11th attacks. Thus, owners and operators giving up their freedom to fly conferred a substantial benefit on the public, thus satisfying the harm-benefit test.<sup>130</sup> Even if this test applied and it was not satisfied, case law suggests that just compensation nevertheless must be paid in the interests of fairness since no owner or operator was culpable in any way in regard to the September 11th attacks.<sup>131</sup> The Supreme Court in *Lucas* called into question the need to use the harm-benefit test at all.<sup>132</sup> Rather, that case holds that no ad hoc factual determination need be made where the property owners lost all economic use of their property.<sup>133</sup> Either way, the restrictions eliminated a codified fundamental right to public airspace,<sup>134</sup> and the Fifth Amendment demands a remedy.

Hindsight is 20/20, and gives great insight into the flaws of prior actions, particularly when those actions necessarily came with great pressure for swift, direct action. In this time of more calm, rational reflection, the airspace restrictions pose many concerns, amongst them procedural due process and equal protection problems which are outside of the scope of this note. From a policy perspective, the terrorist attacks on September 11 demonstrate the continuing importance of the Fifth Amendment takings clause in American jurisprudence. Where sweeping policy decisions using the emergency powers of executive agencies are deemed necessary, individuals innocent of any wrongdoing must have a remedy when they are unfairly singled out for the greater good. Anything less

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130. See *supra* notes 120-125.

131. See *supra* note 125.

132. See *supra* notes 126-127.

133. See *supra* note 126.

134. See *supra* notes 91-118.

undermines our continuing vigilance to root out and eliminate the use of terror against American citizens.



