

1948

## State Sovereignty vs. Federal Sovereignty of Navigable Airspace

John C. Cooper

Follow this and additional works at: <https://scholar.smu.edu/jalc>

---

### Recommended Citation

John C. Cooper, *State Sovereignty vs. Federal Sovereignty of Navigable Airspace*, 15 J. Air L. & Com. 27 (1948)  
<https://scholar.smu.edu/jalc/vol15/iss1/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# STATE SOVEREIGNTY VS. FEDERAL SOVEREIGNTY OF NAVIGABLE AIRSPACE

By JOHN C. COOPER

Member, Institute for Advanced Study, Princeton, N. J.; Princeton, A.B., 1909. Formerly, Vice President, Pan American Airways 1934-45; chairman, Committee on Aeronautical Law, American Bar Association 1932-34; chairman, U.S. delegation to International Conference on Private Air Law, Rome, 1933; advisor, U.S. delegation, International Civil Aviation Conference, Chicago, Nov.-Dec., 1944, and Geneva conference, Nov. 1947; chairman, Organizing Committee and Executive Committee, IATA 1945; official observer, Assembly, PICAO, 1946, and Assembly, ICAO, 1947. Author of "The Right to Fly."

TWO comparatively recent decisions of the Supreme Court of the United States require an immediate and urgent reconsideration of the respective sovereign rights of the State Governments and the Federal Government in the airspace over the United States.

By its decision in *United States v. Causby*,<sup>1</sup> construing the Air Commerce Act of 1926 and the Civil Aeronautics Act of 1938, the Court has divided the airspace over the United States into two zones. In the lower zone next to the earth's surface, private property in the airspace is permitted and we must assume that in that zone normal relationships exist between State and Federal sovereignty as elsewhere in State territory. But in the upper zone (the navigable airspace) the rights of the Federal Government seem to have been considered so paramount that Congress was able to place the navigable airspace, as stated in the Court's opinion, "within the public domain." The opinion does not indicate what rights, if any, the subjacent State has in that part of the navigable airspace public domain lying over its surface territory.

By its later decision in *United States v. State of California*,<sup>2</sup> the Court found that the State of California is not the owner of the three-mile marginal ocean belt along its coasts or the lands underlying that belt. The opinion in that case indicates that the Court felt that paramount rights in and power over this ocean belt had been acquired directly by the Federal Government since the adoption of the United States Constitution. It must be noted that the *Causby* case is there cited, apparently to sustain the need for the Federal Government having a paramount position as against State sovereignty when national rights are involved.

If these two cases are read together, surprising conclusions result. Either the several States may be held under these rulings to be entirely without sovereignty or right of control in the navigable airspace over

---

<sup>1</sup> 328 U.S. 256 (1946).

<sup>2</sup> 332 U.S. 19 (1947).

their surface territories, or the power and rights of the Federal Government may be found so paramount in the navigable airspace as to produce the same legal results.

If the Federal Government alone has sovereign rights in the navigable airspace, and if such airspace is not part of the territory of the several subjacent States, then the statutes of such States do not govern crimes committed or other wrongful acts occurring in the navigable airspace, and the State courts are without jurisdiction to hear such cases. In addition, the entire problem of the respective rights of the Federal Government and the several States to regulate commerce in the navigable airspace must be fully re-examined. Admittedly these are serious questions — the answers to which should not be delayed.

#### ARGUMENTS FAVORING EXCLUSIVE FEDERAL SOVEREIGNTY

These are not new questions. In 1926 they were raised carefully and forcefully by Mr. Frederic P. Lee (then legislative counsel of the United States Senate), in an article entitled "The Air Domain of the United States."<sup>3</sup> The same questions were later raised by Mr. Clement L. Bouvé in 1936.<sup>4</sup> Lee thus stated the problem:

"If it is found that the airspace above the United States is part of the domain of the United States as against all foreign nations, there then remains the further question as to whether that portion of such airspace above the lands and waters of any one of the United States is a part of the domain of that State. Is the airspace above Massachusetts a part of the domain of Massachusetts, or is it exclusive Federal domain? From the conclusion that such airspace is part of the State's domain, it would follow that the territorial sovereignty of the State or the Federal Government, including its legislative powers, extends to such airspace in the same measure as it extends to the lands and waters of the State; that is, along the ordinary lines of demarcation which the Constitution sets forth as to State and Federal powers. For example, under the commerce power the Federal Government will be able to regulate broadcasting and commercial radio communication or air navigation only if such regulation constitutes 'the regulation of commerce with foreign nations and among the several States.'

"On the other hand, if it is found that the airspace above the lands and waters of any State is not a part of the domain of that State, but only of the Federal Government, then the Federal Government will have, to the exclusion of the States, sole legislative powers as to radio communication and air navigation in such airspace. The various Territories and possessions, the District of Columbia, and the Canal Zone, together with places purchased with the consent of State legislatures for the erection of forts, magazines, arsenals, dockyards, and other needful public buildings, afford examples of land domain over which the Federal Government has exclusive territorial sovereignty as against the States."<sup>5</sup>

---

<sup>3</sup> CIVIL AERONAUTICS LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926, CORRECTED TO AUGUST 1, 1928, U.S. Gov't Printing Office (1943).

<sup>4</sup> Bouvé, *State Sovereignty or International Sovereignty Over Navigable Airspace?* 3 J.D.C. Bar Ass'n 5 (1936).

<sup>5</sup> LEGISLATIVE HISTORY, *op. cit. supra* note 3, at 105.

No one any longer questions the fact that the United States as a single nation exercises complete and exclusive sovereignty in the airspace over the lands and waters of the United States to the exclusion of all foreign governments. This exclusive national sovereignty has been asserted by the United States in the Air Commerce Act of 1926, the Havana Convention of 1928, the Civil Aeronautics Act of 1938, and the Chicago Convention of 1944.

But the fact that we have accepted the doctrine of exclusive national sovereignty as against foreign governments does not necessarily mean that the several States are without sovereign rights in the airspace over their territories so far as the exercise of internal regulatory and police powers is concerned. For, as pointed out by Lee in the memorandum quoted above, if the airspace is not part of the exclusive domain of the Federal Government, such airspace must be considered as part of the domain of the several States in which the Federal Government exercises only those sovereign rights which it holds under the Constitution and as a single nation in the family of nations. This would put the airspace over a State in the same legal and constitutional status as the lands and waters of that State.

Lee concluded, however, in the article cited above, that the navigable airspace is the exclusive territory of the Federal Government, which thus, according to him, has exclusive sovereignty (both external and internal) except as to an airspace strata close to the surface. This strata may be considered, he said, as that part of the airspace which since earliest times has been used by mankind in the construction of buildings and other such similar uses as are required by human dwellers on the earth's surface. As to this "surface strata" he concluded that it was part of the territory of the several States, subject to the same Constitutional control by the Federal government as exists over the lands and waters of State territory. But all other airspace he considered as Federal territory. He reached this conclusion in the following way.

No nation, so he said, acquired any domain in what we now know as navigable airspace until such domain was needed to protect subjacent national territory. "It is necessary," said Lee, "that the domain over the airspace above the lands and waters of the United States be held by the United States so that it may lawfully exercise its sovereignty throughout its airspace in order adequately to protect the occupants of the lands and interior from attack; and regulate air commerce and radio communication to and from land and water ports." But as neither air navigation nor radio communication made substantial and continual use of the airspace until the present century, Lee insisted that no nation anywhere in the world had either by occupation or by need of protection acquired any domain in the upper airspace prior thereto. Accordingly, in his view, the United States did not acquire sovereignty in the upper airspace until long after the adoption of the

Federal Constitution. From this it would follow that the original colonies had no domain in the upper airspace and it was not part of their territory when the Constitution was adopted. After the adoption of the Constitution, no State could acquire territory in the airspace as this would amount, in his judgment, to the acquirement of new or additional domain, a function vested solely in the Federal Government. Airspace domain, therefore, according to Lee, was acquired by the United States, long after the adoption of the Constitution, as exclusive Federal territory and as an addition to the previously existing national public domain. The airspace thus acquired came under the exclusive sovereignty of the Federal Government as would other new territory thus acquired.

"If the conclusion is correct that the Federal government has exclusive sovereignty in the airspace above the surface of the several States," continued Lee, "it would seem to be beyond the power of the State to legislate as to the activities in the upper strata of airspace. So to legislate would be analogous to an attempt by the State to legislate as to activities in the District of Columbia, in the Territory of Hawaii or Alaska, in the possessions of the United States, or in any other area, such as forts, arsenals, magazines, and dockyards, over which the Federal government has exclusive sovereignty."

Mr. Bouvé reached similar conclusions. Writing in 1930<sup>6</sup> he had insisted that the airspace was, in international law, new territory added, as the result of the capacity of man to fly, to the territory previously subject to national sovereignty. Later, Bouvé asserted that "national sovereignty over navigable airspace could not exist in fact until the discovery of the art of human flight over a century following the adoption of the Constitution, during which the capacity to control — a *sine qua non* of national sovereignty — was lacking."<sup>7</sup> Accordingly, Bouvé concluded, as had Lee, that "national sovereignty" in the navigable airspace included sovereignty for all purposes external or internal. He summarizes his conclusions as follows:

"What are the facts of the case of State Sovereignty vs. Federal Sovereignty of Navigable Airspace? First: An attempt on the part of a political subdivision of a national power to extend its territorial domain into an expanse which constitutes a natural channel of international aerial navigation as truly as the high seas constitute a national channel of international water navigation. The considerations which led to the adoption of the doctrine of national air sovereignty with respect to these regions in no way applies to political subdivisions of national States. Second: An attempt on the part of a political subdivision of a national power to project its jurisdiction into regions no portion of which is physically susceptible of occupancy by its citizens in their private capacity or by any instrumentality of the subjacent State, and hence physically insusceptible of private or public ownership. Third: An attempt on the part of a State of the Union to establish

<sup>6</sup> Bouvé, *The Development of International Rules of Conduct in Air Navigation*, 1 Air L. Rev. 1 (1930).

<sup>7</sup> Bouvé, *supra* note 4 at 11.

sovereignty over a region consisting entirely of a navigable medium which, by nature, like the sea, can serve one purpose only — that of navigation; a region, sovereignty over which has been established by the law of nations for one purpose only, to-wit, *national* control in the interests of the subjacent nation. Such control cannot be exercised by a State of the Union under the Constitution. Sovereignty involves the opportunity to exercise political power, and its exercise is the expression of that power; and where, as here, the only form in which that power is capable of being exerted is by the domestic as well as international law entrusted to the National Government the conception of its exercise by a political subdivision of the National State presents an anomaly from the standpoint of both legal systems. Fourth: An attempt on the part of a State of the Union to acquire territory beyond its borders — an attempt to exercise a power prohibited to the States under the Constitution. Fifth: An attempt to create a situation which, until the fallacy of the premise on which it rests is demonstrated and the demonstration accepted will constitute a barrier to the establishment of uniform rules of aerial traffic. These rules come within the exclusive field of Congressional authorization not only by virtue of the Commerce Clause of the Constitution, but because of the national character of the territory which constitutes the navigable airspace of the United States.”<sup>8</sup>

#### OPINIONS OF STATE COURTS BASED ON STATE SOVEREIGNTY

The views put forth by Lee and Bouvé do not express, very naturally, the authoritative opinion of State courts and legislatures. In the best analysis of the State’s Rights position, Chief Justice Rugg of the Supreme Judicial Court of Massachusetts, has said:

“It is essential to the safety of sovereign States that they possess jurisdiction to control the airspace above their territories. It seems to us to rest on the obvious practical necessity of self-protection. Every government completely sovereign in character must possess power to prevent from entering its confines those whom it determines to be undesirable. That power extends to the exclusion from the air of all hostile persons or demonstrations, and to the regulation of passage through the air of all persons in the interests of the public welfare and the safety of those on the face of the earth. This jurisdiction was vested in this Commonwealth when it became a sovereign State on its separation from Great Britain. So far as concerns interstate commerce, postal service and some other matters, jurisdiction over passage through the air in large part was surrendered to the United States by the adoption of the Federal Constitution. Constitution of the United States, Art. 1, §8.”<sup>9</sup>

This language was cited with approval by the Supreme Court of Minnesota in 1944, *Erickson v. King, State Auditor, et al.*<sup>10</sup> In these and other cases affecting internal sovereignty over the airspace, it has been assumed that the airspace over a State is part of the territory of the State and that Federal sovereignty flows from the

<sup>8</sup> *Id.* at 28.

<sup>9</sup> *Smith v. New England Aircraft Co.*, 270 Mass. 511, 521, 170 N.E. 385, 389, 1930 USAvR 1, 9 (1930).

<sup>10</sup> 218 Minn. 98, 15 N.W. (2d) 201 (1944).

Constitution and can be exercised only to the extent needed to protect and assist Federal jurisdiction over interstate and foreign commerce. To sustain this point of view, it is interesting to note that Chief Justice Rugg felt it necessary to hold that sovereignty in the airspace had existed in the Government of Great Britain prior to the Revolution and had passed to the several colonies, and thence to the Federal Government "so far as concerns interstate commerce, postal service and some other matters." Both Lee and Bouvé contended that sovereignty in the airspace was not accepted in international law until the early part of the present century and after man had attained sufficient capacity to fly to indicate a practical ability to use and control the airspace.

In many of the States, as in North Carolina, whose statute is quoted and discussed in the *Causby* case, very definite statutory claim to State airspace sovereignty over navigable airspace has been put forward. In over twenty States there is still in effect the so-called "Uniform State Law of Aeronautics" which contains provisions to the effect that "sovereignty in the space above the land and waters of this State is declared to rest in the State, except where granted to and assumed by the United States pursuant to a Constitutional grant from the people of this State" — that "the ownership of the space above the land and waters of this State is declared to be vested in the several owners of the surface beneath," subject to a right of flight — that crimes, torts, or wrongs committed and all contractual and other legal relations entered into by persons "while in flight over this State" shall be governed by the laws of, or have the same effect as if entered into on the land or water of the subjacent State.

It must be admitted, however, that these or other similar State laws will be invalid in so much of the navigable airspace as may be found not to be within the territory of the several States. It must also be admitted that the declaration of a State that it has sovereignty in the airspace can be based on only one or the other of two theories: either, first, that the several original American colonies became vested with sovereignty over and title to the airspace as part of their original territory and had such territory at the time of the adoption of the Constitution of the United States even though the art of flight did not then exist; or, second, that the States have acquired the airspace as additional territory since the adoption of the Constitution and the development of the art of flight.

Both Lee and Bouvé argue with great force, and it seems to me almost conclusively, that no State has a right to acquire new territory or to extend its boundaries, and that the acquisition of new territory is a function solely of the Federal Government. This would appear to leave the problem dependent on the historic status of airspace sovereignty — *when* did the nations of the world acquire such sovereignty? In other words, has the airspace always been within the sovereign control of the nations of the world, or, as Bouvé contended,

is the airspace new territory that was acquired by the several sovereign nations after man demonstrated his capacity to fly?

#### AIR COMMERCE ACT AND CIVIL AERONAUTICS ACT

In the adoption of the Air Commerce Act of 1926, Congress did not attempt to fix the extent of State sovereignty in the airspace. The report of the Interstate and Foreign Commerce Committee of the House of Representatives, contained in Legislative History of the Air Commerce Act of 1926,<sup>11</sup> includes certain interesting comments. Section 4 of the Act authorized airspace reservations to be established by Executive Order of the President. It also authorized the several States to establish necessary airspace reservations, provided that they were "not in conflict either with airspace reservations established by the President under this Section or with any civil or military airway designated under provisions of the Act." Commenting on this Section, the House Committee said:

"Airspace reservations must necessarily be established in order that domestic and foreign aircraft may not be able to fly over forts and certain other governmental structures, and in order to protect aircraft from dangers of flying over Weather Bureau stations where pilot balloons are used, or over experimental or training fields of the military or naval forces. The power of the President to establish Federal Government airspace reservations in the States in nowise diminishes the power of the States to establish airspace reservations for such other purposes as they deem advisable *so long as such reservations are within the airspace over which the States have acquired or retained sovereignty* under the Constitution and so long as the establishment of the reservation is an exercise of a constitutional power reserved to the States and does not interfere with the Federal airspace reservations or with the Federal airways." (Italics supplied.)<sup>12</sup>

In Section 6 of the Act, Congress declared that the Government of the United States "has, to the exclusion of all foreign nations, complete sovereignty of the airspace over the lands and waters of the United States . . ." <sup>13</sup> Commenting on this Section, the House Committee said:

"Article 1 of the International Air Navigation Convention provides that 'the high contracting parties recognize that every power has complete and exclusive sovereignty of the airspace above its territory.' In this Section the Congress declares that the United States adheres to the same principle and not to the principle urged by some international jurists that there is a free right of flight in the airspace above a nation regardless of the consent or the restrictions by law of that nation.

"The Section in nowise affects the apportionment of sovereignty as between the several States and the United States, but only as between the United States and the rest of the world. *Insofar as the States had sovereignty in the airspace at the time of the adoption of the Constitution* and such sovereignty was not by that instrument delegated to the Federal Government, and *insofar as*

<sup>11</sup> Note 3 *supra*.

<sup>12</sup> LEGISLATIVE HISTORY, *op. cit. supra* note 3, at 36.

<sup>13</sup> AIR COMMERCE ACT OF 1926 §6, 44 Stat. 572, 49 USCA §176 (Supp. 1947).



*the States may have subsequently acquired sovereignty in airspace in accordance with the Constitution, such sovereignty remains unchanged.*" (Italics supplied.)<sup>14</sup>

In Section 10 of the Act,<sup>15</sup> the term "navigable airspace" was defined to mean airspace above the minimum safe altitudes of flight as prescribed in the Act. The Section also provided that "such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this Act."<sup>16</sup> In discussing this definition of navigable airspace, the Committee pointed out that it was the intent of the applicable section ". . . to assert a public right of freedom of navigation by aircraft in the airspace above described within the safe altitudes of flight, which is superior to the right of the owner of the subjacent land to use such airspace for conflicting purpose," and that "this public right of freedom of navigation is analogous to the easement of public right of navigation over the navigable waters of the United States."<sup>17</sup> The Committee also said that it was of the opinion ". . . that the Federal Government may assert under the commerce clause *and other constitutional powers* a public right of navigation in the navigable airspace, regardless of the ownership of the land below and regardless of any question as to the ownership of the air or airspace itself." (Italics supplied.)<sup>18</sup>

It will be noted from the foregoing comments that the House Committee did not state what, if any, airspace sovereignty was held by the States at the time of the adoption of the Constitution, nor whether the States had actually acquired such sovereignty since that time, nor did it base the validity of the Air Commerce Act solely on the commerce clause of the Constitution. The most that can be said is that the Air Commerce Act was not apparently intended by Congress to take from the States such airspace sovereignty, *if any*, which they then had.

In the light of the decision in the *Causby* case, certain changes in the statutes made by the adoption of the Civil Aeronautics Act of 1938 are perhaps of importance.

Section 1 of the Civil Aeronautics Act broadened the term "air commerce" to include (in addition to interstate, overseas, or foreign air commerce) the transportation of mail by aircraft, operation or navigation of aircraft within the limits of any civil airway, or "any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate, overseas, or foreign air commerce."<sup>19</sup>

---

<sup>14</sup> LEGISLATIVE HISTORY, *op. cit. supra* note 3, at 38.

<sup>15</sup> *Id.* §10, 44 Stat. 574, 49 USCA §181 (Supp. 1947).

<sup>16</sup> *Ibid.*

<sup>17</sup> LEGISLATIVE HISTORY, *op. cit. supra* note 3, at 42.

<sup>18</sup> LEGISLATIVE HISTORY, *op. cit. supra* note 3, at 45.

<sup>19</sup> CIVIL AERONAUTICS ACT OF 1938 §1, 52 Stat. 977, 49 USCA §401(3) (Supp. 1947).

The declaration of national sovereignty was changed by amending Section 6 of the Air Commerce Act and striking out reference to "foreign nations" so as to read as follows:

"The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace above the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law or treaty or convention the United States exercises national jurisdiction."<sup>20</sup>

By Section 3 of the Civil Aeronautics Act, the public right of transit was restated to read as follows:

"There is hereby recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit in air commerce through the navigable airspace of the United States."<sup>21</sup>

#### DISCUSSION OF RECENT U. S. SUPREME COURT CASES

In 1936, prior to the adoption of the Civil Aeronautics Act, the Supreme Court of the United States, speaking through Mr. Justice Sutherland, in *United States v. Curtiss-Wright Export Corp., et al.*,<sup>22</sup> said:

"As a result of the separation from Great Britain by the colonies acting as a unit the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. . . . It results that the investment of the Federal Government with the powers of external sovereignty did not depend on the affirmative grants of the Constitution. . . . The power to acquire territory by discovery and occupation, the power to expel undesirable aliens, the power to make such international agreements as do not constitute treaties in the constitutional sense, none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality."<sup>23</sup>

This opinion has affected many subsequent opinions of the Court where national sovereignty is involved.

Such was the situation when the Supreme Court of the United States in 1946 handed down its decision in the *Causby* case. In the first sentence of the majority opinion the case is stated to be "one of first impression." In discussing the Air Commerce Act and the Civil Aeronautics Act, the Court noted that under those statutes the United States has "complete and exclusive national sovereignty in the airspace" over this country; that these Acts grant any citizen of the United States "a public right of freedom of transit in air commerce through the navigable airspace of the United States"; that "the navigable airspace" is defined as "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority."

<sup>20</sup> Note 13 *supra*.

<sup>21</sup> CIVIL AERONAUTICS ACT OF 1938 §3, 52 Stat. 980, 49 USCA §403 (Supp. 1947).

<sup>22</sup> 299 U.S. 304 (1936).

<sup>23</sup> *Id.* at 316.

In deciding the case, the Court refused to accept the ancient doctrine that at common law ownership of the land extended to the periphery of the universe — stating that this “doctrine has no place in the modern world” — that “the air is a public highway, as Congress has declared.” (Italics supplied.) Continuing its opinion and discussing the low flights which were charged by the landowner as resulting in the “taking” of his property, the Court found that “the flights in question were not within the navigable airspace which Congress placed within the public domain.” (Italics supplied.)

Continuing the opinion and stating again that the airspace is a public highway, the Court found nevertheless that if the landowner is to have full enjoyment of the land he must have exclusive control of the immediate reaches of the enveloping atmosphere; that therefore “the landowner owns at least as much of the space above the ground as he can occupy or use in connection with the land.” The Court further noted that, under the statute of the State of North Carolina in which the land was situated, sovereignty of the airspace rests in the State “except where granted to and assumed by the United States,” and that, subject to a right of flight held lawful unless at such a low altitude as to interfere with the then existing use to which the land is put, “ownership of the space above the lands and waters of this State is declared to be vested in the several owners of the surface beneath.” The Court then stated:

“Our holding that there was an invasion of respondents’ property is thus not inconsistent with the local law governing a landowner’s claim to the immediate reaches of the superjacent airspace.” (Italics supplied.)<sup>24</sup>

The opinion does not disclose what rights, if any, the State retained in the navigable airspace in which the right of private property contemplated by the State statute was held in substance to be contrary to the action of Congress in declaring the upper strata or navigable airspace to be a public highway and part of the public domain. Nor does the opinion indicate how or when the State of North Carolina had granted to the United States such complete sovereignty in the upper strata of the airspace that the Congress was empowered to take the action just noted, or whether the Court’s finding is based on the theory (as outlined by Lee in the article discussed above) that State sovereignty exists only in the lower airspace strata near the earth’s surface in which private property can also exist.

Considering the references in the opinion to the claim of the United States that it has complete and exclusive national sovereignty in the airspace, and in the absence of any finding that national sovereignty in the navigable airspace arises solely from the commerce clause of the Constitution and is limited by that clause, we are almost forced to the assumption that the Court was actually of the opinion that no State sovereignty exists in the navigable airspace, or that the Federal

---

<sup>24</sup> *Supra* note 1, at 266.

Government has such paramount power therein as to make State sovereignty of no practical importance.

This conclusion is supported by the decision and opinion of the Court in *United States v. State of California*. In that case, as has been stated earlier, the Court denied the right of the State of California to the oil and other resources under the three-mile marginal ocean belt. The opinion includes the following findings: that the thirteen original colonies did not acquire from the Crown of England title to the three-mile marginal ocean belt nor the land underlying it; that after the United States became a nation our statesmen became interested in establishing national dominion over a definite marginal zone to protect our neutrality; that protection and control of this marginal belt is a function of national external sovereignty; that the State of California was not the owner of the marginal belt along its coast; that the Federal Government rather than the State, has paramount rights in and power over that belt.

No one reading this opinion can fail to note the striking similarity between the line of reasoning adopted by the Court and the position taken by both Lee and Bouvé in asserting that sovereignty in the navigable airspace never was vested in the original colonies nor in the States, but that it was acquired long after the adoption of the Constitution by the Federal Government as exclusive Federal territory needed for national purposes. The importance of the *Causby* case in this line of reasoning, and the force of the decision in the *United States v. Curtiss-Wright Export Corp., et al.*, is evidenced by the fact that the California case opinion cites both of these cases as authority in the finding that "national rights are paramount in waters lying to the seaward in the three-mile belt."

#### CONCLUSIONS

My own personal view has never been in accord with that expressed by Lee and Bouvé. I have always felt that the airspace over a nation was an integral part of the nation's territory. I have never been impressed with the argument that such airspace did not become part of national territory until nations had the physical ability to fly in that territory and thus to control and occupy it. It has always seemed to me that the airspace in the early days was in exactly the same status as those mountain peaks which mankind could not scale or the dense jungles which he could not penetrate. The lack of physical ability to reach and control such parts of a nation's territory can hardly be urged as a reason for denying that such mountains and jungles are under the sovereign domain of a nation if found within its recognized boundaries. The obvious need of a nation to control its own airspace existed from the earliest days when mankind first envisaged the possibility of flight.

Strong legal arguments have, however, been put forward to sustain the view that the airspace did not become part of the territory of any nation until after the art of flight was fully developed in the early

twentieth century. We cannot overlook the very obvious fact that the opinions of the Supreme Court in the *Causby* case and in the *California* case show a definite trend, if not a final decision, challenging the validity of State sovereignty in the navigable airspace. This trend seems to be based both on the argument that the States did not have sovereignty in the airspace at the time of adoption of the Constitution and could not acquire such sovereignty thereafter, and also on the argument that complete and exclusive national control of the navigable airspace is necessary to the nation as a single member of the family of nations.

It is obvious that this matter deserves the serious and early consideration of the Congress of the United States. If there be any doubt as to the existence of State sovereignty in the navigable airspace, Federal legislation should be passed without delay so that State statutes applicable in the territory of a subjacent State would also be applicable in the navigable airspace over that State, except when in direct conflict with other Federal legislation. Perhaps additional legislation should be adopted ceding to each State all Federal territorial claim to the airspace over such State, but reserving to the Federal Government exclusive national sovereignty as against foreign nations. This would eliminate possible sovereignty differences in the upper and lower airspace strata, would include the entire airspace over a state within the territory of that State for local administration, and would leave the constitutional sovereignty relations of State and Federal Governments in the same status throughout the territory within the boundaries of any State, whether on the surface or in the airspace.