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## Recommended Citation

Morris, Eugene J. (1970) "The Federal Navigation Servitude: Impediment to the Development of the Waterfront," *St. John's Law Review*: Vol. 45 : No. 2 , Article 1.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol45/iss2/1>

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## THE FEDERAL NAVIGATION SERVITUDE: IMPEDIMENT TO THE DEVELOPMENT OF THE WATERFRONT

EUGENE J. MORRIS\*

The impact of the federal navigation servitude upon the development of waterfront areas throughout the country is of increasing and critical significance as our population expands and our available land resources contract. The servitude, which finds its legal basis in the United States Constitution,<sup>1</sup> and which has been a matter of little concern for almost two centuries, is finally being carefully scrutinized in view of its retarding influence upon the use of areas in our overcrowded urban centers which would otherwise be available for development. This scrutiny, hopefully, will lead to modifications which will tend to eliminate, or at least alleviate, this inhibitory result.

This article will discuss the state of the law regarding the navigation servitude and current efforts to modernize the doctrine so that it may better accommodate the new priorities of our society.

### THE NAVIGATION SERVITUDE

The navigation servitude is the paramount right of the federal government, under the commerce clause of the United States Constitution,<sup>2</sup> to compel the removal of any obstruction to navigation, without the necessity of paying "just compensation" ordinarily required by the fifth amendment of the Constitution. It has been held to apply to all waters up to the high-water mark which are "navigable in fact,"<sup>3</sup> whether tidal or nontidal,<sup>4</sup> and even to nonnavigable tributaries of navigable waters.<sup>5</sup>

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<sup>1</sup> See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824).

<sup>2</sup> U.S. CONST. art. I, § 8.

<sup>3</sup> *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

<sup>4</sup> See *The Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

<sup>5</sup> See, e.g., *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

Analysis of the judicial doctrine appears in Morreale, *Federal Power in Western*

The scope of the servitude permitting the taking of property without compensatory payment where the regulation of navigation is involved has recently been interpreted by the United States Supreme Court in *United States v. Rands*<sup>6</sup> to bar compensation for the value of riparian rights when fast land is taken by the federal government and the land is adjacent to waters deemed navigable. It has also been interpreted by the Court of Appeals for the District of Columbia in *United States v. Martin*<sup>7</sup> to apply to land extending back to the 1794 waterline, irrespective of whether the area was covered by natural accretion or fill since that time.

As so broadly construed by the courts, the servitude constitutes a serious cloud upon many titles to real property in proximity to water. Much fast land, which is now a considerable distance from water, may well be subject to the navigation servitude depending upon its history, specifically, whether it fills in a once navigable area. Typical illustrations of this problem are found in New York City and downtown Boston. Generally, whenever the navigation servitude might conceivably be held applicable by the courts, title companies or attorneys refuse to insure or certify titles without an exception as to the servitude. As a practical matter, some title companies and attorneys will pass titles if they are inland of streets or of other government construction. This practice rests upon the assumption that a taking by the federal government in aid of navigation would be unlikely under such circumstances.

The inability to obtain clear title where the servitude is involved makes it impossible to develop areas affected by the servitude because of the lack of good and marketable title and because of the inability of the developer to finance the project since lenders will refuse to mortgage the property where the title cannot be insured.

#### DEVELOPMENT OF THE LAW RELATING TO THE NAVIGATION SERVITUDE

Title to the land underlying navigable waters is, as a rule, vested in the state in which the land is located,<sup>8</sup> unless it has previously been conveyed to a municipality or to a private upland owner. These areas are impressed with a trust or servitude in favor of the general public of the state in which they are located, requiring them to be used for the

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*Waters: The Navigation Power and the Rule of No Compensation*, 3 NAT. RES. J. 1 (1963). See also Turner, *The Navigation Servitude*, TITLE NEWS, Jan. 1969, at 42; Note, *Effect of the Navigation Servitude on Land Reclamation*, 2 COLUM. J.L. & SOC. PROB. 75 (1966).

<sup>6</sup> 389 U.S. 121 (1967).

<sup>7</sup> 177 F.2d 733 (D.C. Cir. 1949).

<sup>8</sup> See 3 AMERICAN LAW OF PROPERTY § 12.27b (A. J. Casner ed. 1952).

purposes of navigation, fishing, commerce or other water use. Although this trust authorizes the states and their political subdivisions to issue regulations controlling the use of these waters, in all instances these regulations are subject to the paramount right of the navigation servitude in the United States.

This supreme federal authority with respect to navigable waters up to the high-water mark is, as previously stated, derived from the constitutional power to regulate commerce.<sup>9</sup> Accordingly, it has been held that Congress is authorized to make all laws necessary to control the "navigable waters of the United States," irrespective of who owns the land under water or the riparian rights.<sup>10</sup> Although this control was initially held applicable to tidewaters only,<sup>11</sup> the scope of authority was later expanded to provide that "navigability in fact," irrespective of tide, was the criterion for federal control.<sup>12</sup> Furthermore, once the waterway is deemed navigable under this definition, federal power extends over its entire course up to the high-water mark even though portions are in fact nonnavigable.<sup>13</sup>

The courts have consistently upheld the rights of the federal government under the navigation servitude.<sup>14</sup> For example, in the *Rands* case, the Supreme Court was asked to decide whether the compensation which the United States is constitutionally required to pay when it condemns riparian land includes the land's value as a port site. The trial court held that the land was limited to its value for sand, gravel and agricultural purposes, and that any special value as a port site could not be considered. The Court of Appeals for the Ninth Circuit reversed,<sup>15</sup> and held that the United States had taken a compensable right of access to navigable waters and remanded for a new trial on the issue of just compensation. By interpreting the navigation servitude as barring compensation even for the ownership of riparian rights, the Supreme Court reversed and reinstated the judgment of the district court on the authority of *United States v. Twin City Power Co.*<sup>16</sup>

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<sup>9</sup> See notes 1-2 and accompanying text *supra*.

<sup>10</sup> See *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186 (1937); see generally 65 C.J.S. *Navigable Waters* § 10 (1966).

<sup>11</sup> See *The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825).

<sup>12</sup> See, e.g., *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870); *The Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851).

<sup>13</sup> See *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

<sup>14</sup> See, e.g., *Louisville Bridge Co. v. United States*, 242 U.S. 409 (1917); *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912); *United States v. Bethlehem Steel Co.*, 235 F. Supp. 569 (D. Md. 1964).

<sup>15</sup> 367 F.2d 186, 193 (9th Cir. 1966).

<sup>16</sup> 350 U.S. 222 (1956).

But under *Twin City* and like cases, these rights and values are not assertable against the superior rights of the United States, are not property within the meaning of the Fifth Amendment, and need not be paid for when appropriated by the United States. Thus, when only part of the property is taken and the market value of the remainder is enhanced by reason of the improvement to navigable waters, reducing the award by the amount of the increase in value simply applies in another context the principle that special values arising from access to a navigable stream are allocable to the public, and not to private interest. Otherwise the private owner would receive a windfall to which he is not entitled.<sup>17</sup>

The broad scope thus given to the navigation servitude by the courts has a pervasive effect on the development of waterfront areas throughout the country. When considered in light of the rapidly accelerating growth of all metropolitan areas, which growth has given rise to urgent need for the creation of a new and largely untapped space resource along the waterfront, we can appreciate the increasingly baneful impact of the navigation servitude on real estate development and the necessity for blunting its effect.

#### REGULATION BY CONGRESS OF NAVIGABLE WATERS

Congress has retained control of the exercise by the federal government of its rights under the navigation servitude. The only limitation upon its exercise of the power is that the action be in aid of navigation and that it not be unreasonable.<sup>18</sup> Consequently, there is no authorization for the executive department, to which Congress has delegated specific responsibilities in the regulation of navigation,<sup>19</sup> to vary or modify the navigation servitude in any manner — that power being reserved entirely in the Congress.

In the exercise of that power, Congress has on a number of occasions passed legislation which has the effect of relinquishing the navigation servitude as to a specific area. This has been accomplished by declarations of Congress to the effect that certain waters are "nonnavigable," thereby removing the incidence of commerce and eliminating the constitutional foundation for the navigation servitude. Of the fifty-three instances where Congress has declared specific waters to be non-navigable, the right to repeal has been reserved in twenty-eight instances and has not been reserved in twenty-five instances.<sup>20</sup>

<sup>17</sup> 389 U.S. at 126.

<sup>18</sup> See *United States v. Martin*, 177 F.2d 733 (D.C. Cir. 1949).

<sup>19</sup> See discussion at pp. 193-94 *infra*.

<sup>20</sup> See 33 U.S.C. §§ 21-59(i) (Supp. V 1969), which codify the fifty-three congressional enactments dating from as early as 1884. Typical language of reservation in a declaration of nonnavigability appears as follows:

Doubt has been expressed as to whether these declarations of non-navigability, even where Congress has not reserved the right to repeal the declaration, would effectively relinquish the navigation servitude and thereby require the payment of just compensation upon a taking, particularly where the waters involved are, in fact, navigable.<sup>21</sup> However, despite these doubts, title companies generally are prepared to insure title without an exception as to the navigation servitude where the congressional declaration of nonnavigability omits the reservation of a right to repeal. Until tested in the courts, this method will continue to permit some waterfront development, albeit highly limited, since few developers are able to tread their way through the extensive congressional labyrinth to obtain an enactment relating to their specific property.

Derived from the authority to regulate commerce upon navigable waters, Congress has the power to establish harbor lines and otherwise regulate the use of navigable waters, including the establishment of limitations on the right of an owner to build wharves, piers, docks or other structures beyond established harbor lines.<sup>22</sup> This power to establish harbor lines has been delegated by Congress to the Secretary of the Army, subject, of course, to the invariably supervening effect of the navigation servitude.

In 1886, Congress delegated the authority to fix the harbor lines to the then Secretary of War for the purpose of establishing the line beyond which the deposit of certain industrial debris would not be permitted.<sup>23</sup> Pursuant to statute in 1890,<sup>24</sup> the Secretary of War was autho-

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All that portion of the East River, in the County of Brown, State of Wisconsin, extending from Baird Street, in the city of Green Bay, east and south is declared to be a nonnavigable stream within the meaning of the Constitution and Laws of the United States of America. The right of Congress to alter, amend, or repeal this section is expressly reserved.

49 Stat. 1048 (1935), 33 U.S.C. § 29(a) (1964). Enactments in which there is no reservation are typified in the following provision:

That portion of the East River, in New York County, State of New York, lying between the south line of East Seventeenth Street, extended eastwardly, the United States pierhead line as it existed on July 1, 1965, and the south line of East Thirtieth Street, extended eastwardly, is hereby declared to be not a navigable water of the United States within the meaning of the Constitution and the laws of the United States.

79 Stat. 1094 (1965), 33 U.S.C. § 59(c) (Supp. V 1969).

<sup>21</sup> *Model Land Use Code; The Navigation Servitude*, 2 A.B.A. REAL PROP., PROBATE & TRUST J. 597 (1967).

<sup>22</sup> See, e.g., *Seattle v. Oregon & Washington R.R.*, 255 U.S. 56 (1921); *Greenleaf Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915); *Philadelphia Co. v. Stimson*, 223 U.S. 605 (1912); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907); *Scranton v. Wheeler*, 179 U.S. 141 (1900); *Gibson v. United States*, 166 U.S. 269 (1897).

<sup>23</sup> Act of Aug. 5, 1886, ch. 929, § 2, 24 Stat. 329.

The title of Secretary of War was later changed to Secretary of the Army, and the War Department was designated the Department of the Army by virtue of section 205(a) of the Act of July 26, 1947, ch. 343, tit. II, 61 Stat. 501.

<sup>24</sup> Act of Aug. 11, 1888, ch. 860, § 12, 25 Stat. 425, as amended, Act of Sept. 19, 1890,

rized to establish harbor lines beyond which construction of piers and wharves became subject to his regulation. This legislation was thereafter included in the Rivers and Harbors Appropriation Act of 1899.<sup>25</sup> Based upon this authorization the Secretary of the Army has promulgated rules and regulations whereby control over harbor lines is vested in the Secretary of the Army acting through the United States Army Corps of Engineers.<sup>26</sup>

These regulations were recently amended to expand the basis upon which the regulation by the Corps of Engineers can be conducted,<sup>27</sup> and include regulations promulgated by the Corps of Engineers, which has been delegated the responsibility of regulating construction.<sup>28</sup> Permits are now required for construction in navigable water whether channelward or shoreward of the harbor lines which the Secretary may establish, whereas heretofore it was believed that fill could be made at least to the bulkhead line without a permit. Furthermore, in considering applications for such permits, the Corps will now base its decision upon

an evaluation of the impact of the proposed work on the public interest. Factors affecting the public interest include, but are not limited to navigation, fish and wildlife, water quality, economics, conservation aesthetics, recreation, water supply, flood damage prevention, ecosystems, and, in general, the needs and welfare of the people.<sup>29</sup>

Under the new regulations, a letter of permission in lieu of a permit would suffice in cases where the proposed work "would not have sufficient impact on environmental values" and "involves either (1) minor work in unimproved waterways or (2) minor work in areas of improved waterways which are removed from the fairway used for navigation."<sup>30</sup> In addition, the amendment provides for detailed notice and hearing procedures which were not previously required.<sup>31</sup> These changes extend considerably both the jurisdiction and control of the Corps of Engineers over the navigable waters of the United States.

ch. 907, § 12, 26 Stat. 455.

<sup>25</sup> Act of Mar. 3, 1899, ch. 425, § 11, 30 Stat. 1151, *codified*, 33 U.S.C. § 404 (1964).

<sup>26</sup> 33 C.F.R. § 209.150 (1970).

<sup>27</sup> Reg. No. 1145-2-304, 35 Fed. Reg. 8280 (1970).

<sup>28</sup> 30 Stat. 1151 (1899), 33 U.S.C. § 403 (1964).

<sup>29</sup> Dep't of Army, Office of the Chief of Engineers, Reg. No. 1145-2-303, ¶ 6(a) (Mar. 18, 1970). *Cf. Zabell v. Tabb*, 430 F.2d 199 (5th Cir. 1970); National Environmental Policy Act of 1969, 33 C.F.R. § 209-120(d)(1) (1970).

<sup>30</sup> Dep't of Army, Office of the Chief of Engineers, Reg. No. 1145-2-303, ¶ 2(e).

<sup>31</sup> *Id.* ¶¶ 4 & 5.

In addition to the powers of the Corps of Engineers to fix harbor lines and regulate the use of navigable waters, the state in whose jurisdiction the waters lie is likewise authorized to prescribe limitations on their use. In fact, the state system of tidewater licensing predates the system of federal controls, which did not start until 1886. These provisions, of course, vary from state to state and consequently require checking before use may be made of any area within federally established harbor lines. In many jurisdictions the state has delegated regulatory authority to the municipality appurtenant to navigable waters, and their regulations must likewise be carefully checked to determine the limitations on available uses. In any case, however, it must always be borne in mind that the federal power under the navigation servitude supersedes local regulatory provisions.

#### CURRENT ACTIVITIES TO SET UP PROCEDURES PERMITTING MODIFICATION OR RELINQUISHMENT OF THE NAVIGATION SERVITUDE

The shorefront represents a new frontier for our congested cities and urban areas faced with a shortage of property available for real estate development. The shorefront also offers a resource for new construction involving no relocation or demolition of existing facilities. Moreover, these areas of our great American ports, *e.g.*, Manhattan and Boston, have been described as unsuitable for cargo operations due to technological developments in that field resulting from the extensive and increasing use of containers in the shipping field. A combination of these two factors lead inexorably to a situation where the development of waterfront, with housing, business and industrial uses not connected with port facilities, is inevitable.

As a result of this ground swell of pressure against the obstacle to such development presented by the navigation servitude, various organizations are taking steps to permit the federal government to relinquish or modify its right under the navigation servitude. This, of course, can only be accomplished by federal legislation setting up an administrative procedure which would serve as an alternative to the present unsatisfactory method of a declaration of nonnavigability as to a particular area by the Congress.

One of the organizations which has become involved in the problem is the American Bar Association, through its Section of Real Property, Probate and Trust Law. That section created the Special Committee on the Navigation Servitude, which after more than three years of study, has offered a proposal which would amend section 403 and add a new section 404a to title 33 of the United States Code. These



sections govern the creation of any obstruction within navigable waters of the United States, including wharves, piers, excavations and fill.

Recognizing the inherent difficulty of developers in obtaining congressional declarations of nonnavigability on a piecemeal basis, the ABA recommendation would modify the procedure by which these permits are granted by the Corps of Engineers and would allow the Secretary of the Army to authorize irrevocable permits, where, in his discretion, after public hearings, authorization would be appropriate, or alternatively to make permits effective on a limited basis, as for a specified number of years.<sup>32</sup> The concept involves the issuance of permits to cover permanent structures irrespective of their involvement with navigation. Proposed section 404a would provide that, if any area in navigable waters were to be filled or had already been filled pursuant to the procedures outlined in section 403 and were to be taken later by eminent domain, just compensation would have to be given.<sup>33</sup>

The ABA proposal was presented at a public hearing before the Senate Committee on Public Works, Subcommittee on Flood Control—Rivers and Harbors on May 12, 1970, by the Chairman and one

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<sup>32</sup> Section 403, as modified by the ABA proposal, would read as follows (proposed new language italicized):

Obstruction of navigable waters generally; wharves, piers, etc., excavations and filling in. The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures, *whether the same be temporary or permanent or in aid of or connected with navigation*, in any port, roadstand, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstand, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or the channel of any navigable river of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same. *The Secretary of the Army is authorized to grant revocable or irrevocable permits for the erection of temporary or permanent structures within or beyond harbor lines as in his discretion shall appear to be appropriate, after notice and opportunity for hearing in such classes of cases and pursuant to such rules and regulations as he shall prescribe, and he may make any such permit effective for a specified period of years.*

<sup>33</sup> The proposed new section 404a would read as follows:

- (1) Whenever an area within the boundaries of navigable waters of the United States has heretofore been filled or shall hereafter be filled, as provided in Subparagraph (2) hereof, the United States shall, if it takes or otherwise affects the same, pay just compensation for the value of the land and improvements, or either of them, so taken.
- (2) In order for the area so filled to be affected by the provisions of Subparagraph (1) hereof, such area, at the time of such filling, must have been, or must hereafter be, inside the bulkhead line of an established harbor line, or, if such area be outside such bulkhead line, or be where no harbor line has been established, then, such area must have been, or must be filled pursuant to plans recommended by the Chief of Engineers, and authorized by the Secretary of the Army by permit issued under authority of Section 403.

member of the Special Committee on the Navigation Servitude. In that presentation, the proposal was submitted to the Senate Committee along with supporting data giving the background and current situation with respect to the navigation servitude. The hearing was presided over by Senator Jordan of North Carolina, who, at the end of the presentation, commented as follows:

Senator Jordan. With that condition existing, it renders a great deal of property as almost valueless. If a man has a piece of property on which he is paying taxes but can't borrow money on it and no one wants to buy it, it is not benefitting anyone.

Mr. Morris. That is exactly what happens. The materials I included with my statement for this hearing offer documentary support for the statements we have made.

Senator Jordan. These materials will be in the printed record, of course. We will refer this matter to the Corps of Engineers and other Government agencies and ask for their views and comments, and I can assure you this committee will review their findings and see if we can come up with a legislative remedy to the situation.

I think it is very evident that something ought to be done to correct it because, as you pointed out, the growth of the population is making it necessary that waterfront property be developed not only on the oceans and the lakes, but on rivers.

The Mississippi and other large rivers are subject to that very same thing. I know of some cases where great stretches of waterfront just cannot be sold to anyone because nobody can get any clear deed to the property on which to build without maybe having it taken away from them at a later date.

We are glad to have this information and I am sure it will be taken under advisement. Thank you all very much for being with us.<sup>34</sup>

The proposal does not address the problem of the navigation servitude as it affects the owner of riparian land. In the *Rands* decision, compensation for riparian land condemned by the United States for navigable purposes was held not to include any special value accruing from the port site value of the land. This principle that access to navigable waters in such a proceeding is not compensable is being followed by the lower courts.<sup>35</sup>

In order to accommodate this problem, identical bills, which would eliminate the *Rands* doctrine insofar as it relates to the bar created by the navigation servitude by permitting an award for riparian

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<sup>34</sup> *Hearings Before the Subcomm. on Flood Control—Rivers and Harbors of the Senate Comm. on Public Works*, 91st Cong., 2d Sess., at 205 (1970).

<sup>35</sup> See, e.g., *United States v. Birnbach*, 400 F.2d 378 (8th Cir. 1968).

value in a taking by the United States for navigable purposes, were introduced in early May of this year in the Senate and House.<sup>36</sup>

These proposals would amend section 301 of the Land Acquisition Policy Act of 1960<sup>37</sup> to provide that just compensation be paid for any land taken by the United States for public works projects and provide explicitly for the award of fair market value to owners of riparian land above the high-water mark "disregarding the exercise of any navigation servitude by the United States involved in the taking itself or any potential future exercise of such servitude." In order to facilitate negotiated settlements, the proposal would authorize the Secretary of the Army or his designated representative to pay a negotiated purchase price which would reflect these considerations.

At a recent meeting with representatives of the Corps of Engineers, it was indicated that they did not think the various legislative proposals herein discussed deal with the problem adequately or, indeed, whether there is a problem to be dealt with at all. There was an indication, however, that if the Senate Committee on Public Works should enact legislation, as part of the 1970 Rivers and Harbors Bill, setting up an Advisory Committee to study the problem, the Corps would cooperate fully.

Accordingly, the staffs of the Senate Subcommittee and the ABA are drafting a proposed section of the 1970 Rivers and Harbors Bill which would direct the Secretary of the Army to undertake a study of the need for new procedures permitting the waiver or modification of the navigation servitude in appropriate circumstances and the manner in which the waiver or modification could be effectuated.

The Advisory Committee should consist of representatives of the United States Departments of the Army, Justice, Housing and Urban Development, Commerce, Interior, and Transportation, as well as a representative of the President's Council on Environmental Quality and several public members. The Advisory Committee's finding would be reported back to Congress and constitute the basis for such congressional action as may be deemed necessary.

#### CONCLUSION

To argue that the practical proposals which have been discussed conflict with the United States Constitution and the power of the federal government to act in an unlimited manner with respect to the navigation servitude, is to accept without question the judicial doctrine

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<sup>36</sup> S. 3815, H.R. 17505, 91st Cong., 2d Sess. (1970).

<sup>37</sup> 74 Stat. 502, 33 U.S.C. §§ 596-97 (1960).

of the navigation servitude. Although the servitude has been repeatedly sustained by the United States Supreme Court — indeed even expanded by the Court in some of its recent decisions — this does not alter the fact that there is a pressing need for reexamination of that doctrine in light of its debilitating effect upon the utilization of our waterfront areas in a manner which is consistent with the existing requirements of our modern urban society.