

Airports: Full of Sound and Fury and Conflicting Legal Views

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I. INTRODUCTION

The United States is probably the noisiest nation on earth. People who live near airports are acutely aware of the problem. Aircraft noise disrupts their sleep and interferes with such ordinary endeavors as watching television, conversing, and enjoying music. While the federal government is taking an increasingly active role in the aircraft-airport noise issue, it may be decades before the problems are solved.

The Supreme Court of California in *Loma Portal Civil Club v. American Airlines, Inc.* set forth the major problems in the airport noise area which will be addressed in this article:

The use of large and powerful aircraft has created certain annoyances—noise, vibrations, and in some cases apprehension—to many people. The questions as to whether an individual should have redress for such annoy-

ances, and, if so, under what theory and against whom, are very troublesome. These problems have become aggravated by the advent of jets, which are noisier than reciprocating engine craft and that require longer and shallower glide paths. The problems are peculiarly acute for landowners near airports, who suffer not only from the increase in the general noise level but particularly from their proximity to the low-level flying which is a necessary part of takeoff and landing. On the other hand, the great public benefit, in terms of commerce, transportation and defense, which is derived from the use of jet aircraft is obvious.¹

This paper will consider noise—how it is measured and defined, as well as the relevant federal regulations promulgated to control noise, particularly as they pertain to aircraft and airspace use. The history of the three primary theories of relief (trespass, nuisance, and inverse condemnation) used by persons adversely affected by noise from aircraft will be examined. Finally, the issues of federal preemption will be viewed vis-a-vis local police power and airport proprietary authority in regulating airport noise.

II. NOISE

Noise has been defined as "unwanted sound."² Americans may have more of this unwanted sound than anyone else on the planet.³ While noise emanates from many sources, aircraft are one of the primary offenders. The Department of Transportation estimates that in the United States approximately six million people live in areas where aircraft noise is a significant annoyance.⁴ More than 600,000 people live in areas that are severely impacted by aircraft noise.⁵

Noise can be measured in a number of ways. Decibels, or dbA's, measures sound in terms of intensity level by calculating pressure on the ear.⁶ To put this in perspective: a four-engine jet at take-off generates between 115 to 120 decibels. A dbA reading of 95 is considered to have a response criteria of "very annoying" and 135 dbA's is "painfully loud."⁷ Factors other than intensity of sound, however, are important in determining a sound's annoyance to human beings. The other important aspects of sound are its duration, pitch, and frequency.

PNdB (*i.e.*, "perceived noise level") takes into account frequency and pitch as well as intensity.⁸ In measuring jet noise this distinction is important

1. *Loma Portal Civil Club v. Am. Airlines, Inc.*, 61 Cal. 2d 582, 394 P.2d 548, 550 (1964) (citation omitted).

2. J. HILDEBRAND, *NOISE POLLUTION AND THE LAW* 5 (1970).

3. *Id.* at 4.

4. U.S. DEP'T OF TRANSPORTATION, *AVIATION NOISE ABATEMENT POLICY* 17 (1976) [hereinafter cited as DOT NOISE POLICY].

5. *Id.*

6. A. LOWENFELD, *AVIATION LAW* V-124 (1972).

7. F. GRAD, *ENVIRONMENTAL LAW* 6-2 (1971).

8. LOWENFELD, *supra* note 6.

because the high-pitched scream of the jet engine is more annoying than an equal intensity level of a lower-pitched piston driven engine. EPNdB (*i.e.*, "effective perceived noise decibels") adds duration of the noise as a component to be calculated.⁹

Aircraft noise can also be measured in terms of "noise footprints", technically known as "single event noise contour", using monitors which plot the geographical radius of PNdB or EPNdB measurements as a result of take-off or landing by a single aircraft.¹⁰ Further, the Noise Exposure Forecast (NEF) describes cumulative noise used to measure sound generated at given points around an airport in a twenty-four hour period.¹¹ A grasp of these basic measurements will be helpful in understanding the cases discussed below.

III. FEDERAL STATUTES REGARDING AIRSPACE USE, AIRCRAFT SOUND EMISSION, AND NOISE CONTROL

There are basically three federal statutes dealing with airspace, aircraft, and airport noise regulation. They are the Federal Aviation Act of 1958,¹² the Noise Abatement Amendments of 1968,¹³ and the Noise Control Act of 1972.¹⁴

A. FEDERAL AVIATION ACT OF 1958

The Federal Aviation Act gave the Federal Aviation Administration (FAA) power to regulate the nation's navigable airspace. Section 1508 provided in part that "the United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States. . . ."¹⁵ The FAA is to use this power "to insure the safety of aircraft and the efficient utilization of such airspace. . . ."¹⁶ The Administration is directed to "prescribe air traffic rules and regulations governing the flight of aircraft . . . for the protection of persons and property on the ground."¹⁷ These provisions have been the basis for numerous court decisions holding that airspace regulation, even as it pertains to aircraft noise, has been federally preempted.

9. *Id.*

10. Donin, *British Airways v. Port Authority: Its Impact on Aircraft Noise Regulation*, 43 J. AIR. L. & COM. 691, 700 (1977).

11. *Id.*

12. 49 U.S.C. §§ 1301-1542 (1970).

13. *Id.* § 1431 (1970 & Supp. III 1973).

14. 42 U.S.C. §§ 4901-4918 (Supp. III 1973).

15. 49 U.S.C. § 1508 (1970).

16. *Id.* § 1348(a) (1970).

17. *Id.* § 1348(c) (1970).

B. 1968 AMENDMENTS

In 1968, Congress passed an aircraft noise abatement amendment to the 1958 Act. Its primary purpose was "to afford present and future relief and protection to the public from unnecessary aircraft noise and sonic boom"¹⁸ Section 611 of the Act, as amended, requires the Administrator of the Federal Aviation Administration, after consultation with the Secretary of Transportation, to prescribe and amend standards for the measurement of aircraft noise and sonic boom and to prescribe rules and regulations necessary to provide for the control and abatement of aircraft noise and sonic boom.¹⁹

In November of 1969, the FAA promulgated the first aircraft noise regulations, commonly known as FAR 36 (Federal Aviation Regulations, Part 36).²⁰ These regulations set limits on noise emissions from large aircraft of new design²¹ and adopted a uniform system for measuring aircraft noise emissions.²² FAR 36 also dictated that the standards adopted would extend to newly manufactured aircraft of existing design when the required technology was developed.²³ In effect, FAR 36 requires aircraft manufacturers to meet specified noise standards in order to obtain a type certificate which is needed before a new plane design can be put into production.²⁴

The new regulations under FAR 36 have been criticized because 1) they do not apply to all aircraft, 2) they do not mandate the development of new noise reduction technology, and 3) their effect is being counteracted by the rapid growth of commercial aviation.²⁵ The last objection focuses on the fact that while individual planes are becoming quieter, the aggregate noise is greater because there are more planes in operation.

In 1976 the FAA issued its "retrofit" rule which requires all aircraft over 75,000 pounds to meet FAR 36 requirements by 1985.²⁶ However, in 1980 Congress extended the 1985 deadline in certain limited situations.²⁷

Retrofitting can be accomplished in several ways: old planes can be replaced by new aircraft; engines can be replaced; engines can be refan-

18. *Id.* § 1431 (1970). The amendments were adopted by Congress July 21, 1968, Pub. L. No. 90-411, 82 Stat. 395.

19. *Id.*

20. 14 C.F.R. § 36 (1977).

21. DOT NOISE POLICY, *supra* note 4, at 30.

22. 14 C.F.R. § 36.101 (1977).

23. *Id.* § 36.2 (1970).

24. Bell, *Airport Noise: Legal Developments and Economic Alternatives*, 8 *ECOLOGY L. Q.* 607, 637 (1980).

25. *Id.* at 638.

26. 41 Fed. Reg. 56,045 (1976) (codified in 14 C.F.R. § 91.301).

27. Aviation Safety and Noise Abatement Act of 1979, Pub. L. No. 96-193, §§ 303, 304, 94 Stat. 56 (1980).

ned; or the engine housing can be equipped with sound absorbant material (SAM).²⁸ SAM is the least effective of the retrofit methods, but also the least expensive. Hence, it will probably be the option deemed most attractive by the airline industry.²⁹

C. NOISE CONTROL ACT OF 1972

As one author has noted, Congress passed the Noise Control Act of 1972³⁰ in response to what it perceived as "foot dragging" by the FAA.³¹ The 1972 Act set up a complicated arrangement between the Environmental Protection Agency and the FAA. Under the Act, the EPA was instructed to conduct a nine-month study of, 1) the adequacy of FAA flight and operational noise controls, and 2) the adequacy of noise emission standards for new and existing planes.³² The Act further provided that the EPA should propose noise control rules to the FAA.³³

The FAA has been accused of "regulatory paralysis."³⁴ While it acted swiftly in regulating noise emission standards for aircraft of new design in 1969 and newly manufactured aircraft of types that had already been certificated in 1973, it was dilatory with respect to aircraft that were already in operation.³⁵ Over 77% of the operating fleet in 1977 were older aircraft which contributed most to the noise problem and which could not meet federal noise standards.³⁶

In November of 1976, with the adoption of the Aviation Noise Abatement Policy,³⁷ the FAA finally took action concerning these older aircraft. The "retrofit" provisions are discussed above. Aircraft which could not meet the deadlines for complying with FAR 36 requirements could be retrofitted—or retired.³⁸ President Ford was instrumental in insuring action by the FAA and DOT. In the fall of 1976, he directed the FAA to set noise compliance standards not later than January 1, 1977.³⁹

28. Bell, *supra* note 24, at 640.

29. *Id.*

30. 42 U.S.C. § 4901 *et. seq.* (1970).

31. Muss, *Aircraft Noise: Federal Pre-emption of Local Control, Concorde and Other Recent Cases*, 43 J. AIR. L. & COM. 753, 773 (1977).

32. 42 U.S.C. § 4906 (1977).

33. 49 U.S.C. § 1431(c)(1) (Supp. V 1975). The FAA must publish the proposed rules in 30 days and commence hearings thereon in 60 days. The FAA is required within a reasonable time either to adopt the proposed rule or publish notice declining to promulgate the rule and explaining its reasons therefor.

34. North, *Current State of the Law in Aircraft Noise Pollution Control*, 43 J. AIR L. & COM. 799, 814-15 (1977).

35. *Id.*

36. *Id.* at 815.

37. DOT NOISE POLICY, *supra* note 4.

38. *Id.* at 6-7.

39. *Id.* at 1.

The Aviation Noise Abatement Policy of 1976 contains a Federal Action Plan, an Air Carrier Action Plan, and a plan calling for Local Actions. Operating procedures are part of the Federal Action Plan and include such things as minimum altitude rules and approach procedures.⁴⁰ An airport development aid program is also a part of the Federal Action Plan and calls for the FAA to establish a high priority for the use of Airport and Airway Trust Funds for airport land acquisition, for the purchase of noise suppressant equipment and for other noise reducing measures.⁴¹ The Air Carrier Action Plan deals primarily with FAR 36 compliance and the necessary retrofit financing.⁴²

The Local Actions Plan calls for land use planning and zoning in areas surrounding airports to ensure that land use is compatible with noise exposure in those areas. It also provides that notice of aircraft noise exposure should be given to purchasers of real estate near airports.⁴³ In addition, Congress recently enacted the Aviation Safety and Noise Abatement Act of 1979 which limits recovery for damages caused by airport noise to purchasers who acquired the effected real estate after February 19, 1980, and had actual or constructive knowledge of the noise exposure map of the area. Those persons may recover only by showing that subsequent to their acquisition of the property, a significant change in airport operations resulted in additional noise.⁴⁴

The Policy summarizes the legal framework regarding aircraft and airport noise and provides, *inter alia*:

1. The federal government has preempted the areas of air space use and management, air traffic control, safety and the regulation of aircraft noise at its source.
2. Other powers and authorities to control airport noise rest with the *airport proprietor*—including the power to select an airport site, acquire land, assure compatible land use, and control airport design, *scheduling and operations*—subject only to Constitutional prohibitions against creation of an *undue burden on interstate and foreign commerce*, unjust discrimination, and interference with exclusive federal regulatory responsibilities over safety and air space management.⁴⁵

Although great technological strides are being made and the federal

40. *Id.* at 8.

41. *Id.*

42. *Id.* at 9.

43. *Id.* at 10.

44. Aviation Safety and Noise Abatement Act of 1979, Pub. L. No. 96-193, § 107, 94 Stat. 53 (1980).

45. DOT Noise Policy, *supra* note 4, at 34 (emphasis added). The Policy also provides that the federal government has substantial power to influence airport development through its administration of the Airport and Airway Development Program. Further, the state and local governments may protect their citizens through land use controls and other policy measures not affecting aircraft operations.

government is taking an increasingly active role in aviation noise control, the problem is far from solved. Land owners near busy and noisy airports are not content to wait until science and the government can eliminate the noise. Property owners have based post legal actions on a number of theories in an effort to alleviate the problem or to recover compensation for living in noise-impacted areas. A discussion of these various legal theories and the applicable cases follows.

IV. TRADITIONAL AVENUES OF RECOVERY AVAILABLE TO PROPERTY OWNERS AND A REVIEW OF CASES

A. TRESPASS THEORY

In the common law, a landowner owned all of the airspace from the heavens to the depths of the earth.⁴⁶ However, in 1946 the United States Supreme Court addressed the issue of how much airspace a landowner does own in *United States v. Causby*.⁴⁷ *Causby* dealt with an action by a landowner whose property was directly below the take-off and landing glide paths of military aircraft. Although the planes never touched the surface of the plaintiff's ground (a trespass), they did pass as low as 67 feet above his house which caused him considerable anxiety. In addition to the plaintiff's personal apprehensions, the noise and vibrations frightened Causby's chickens and disrupted his poultry business. The Court recognized that Congress had placed the navigable airspace within the public domain⁴⁸ but held that these flights were not within the navigable airspace. The Court stated:

Superadjacent airspace is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think that the landowner, as an incident to his ownership, has a claim to it and that invasions of it are in the same category as invasions of the surface.⁴⁹

The *Causby* case combined elements of trespass with elements of nuisance (a substantial, unreasonable interference with a person's use and enjoyment of his land) and marked "the advent of the theory of inverse condemnation."⁵⁰

46. 3 Bl. Com. 217 (1781).

47. 328 U.S. 256 (1946).

48. Under the Air Commerce Act of 1926, 44 Stat. 568, 49 U.S.C. § 171, as amended by Civil Aeronautics Act of 1938, 52 Stat. 973, 49 U.S.C. § 401, the United States has "complete, and exclusive national sovereignty in the airspace" over this country. 49 U.S.C. § 176(a). "Navigable airspace" is "airspace above the minimum safe altitudes of flight prescribed by the Civil Aeronautics Authority." 49 U.S.C. § 180.

49. *Causby v. United States*, 328 U.S. at 265.

50. Russell, *Aircraft/Airport Noise: Current Legal Remedies and Future Alternatives*, 42 INS. COUNS. J. 92 (1975).

B. INVERSE CONDEMNATION

Inverse condemnation is really eminent domain—with a twist. It has been defined as “the popular description of a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant even though no formal exercise of the power of eminent domain has been attempted by the taking agency.”⁵¹

*Griggs v. Allegheny County*⁵² was based on an inverse condemnation theory. The question before the Court was whether the county has taken an air easement over Griggs’ property for which it should pay just compensation. Griggs’ home was 3,250 feet from the end of a runway at Greater Pittsburgh Airport. The airport was owned by Allegheny County. Planes passed within 30 feet of Griggs’ residence and on take-off, the noise of the aircraft was likened to “the noise of a riveting machine or steam hammer.”⁵³ During the flights, which were often only minutes apart, it was extremely difficult for people in the house to talk or sleep; windows in the house rattled and plaster fell from the walls and ceilings. In deciding the case, the Court reviewed *Causby* and said:

Following the decision in the *Causby* case, Congress redefined ‘navigable airspace’ to mean ‘airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft. . . . By the present regulations the ‘minimum safe altitudes’ within the meaning of the statute are defined, so far as relevant here, as heights of 500 feet or 1,000 feet, [e]xcept where necessary for take-off or landing.’⁵⁴

While the airspace above Griggs’ house was necessary for take-off and landing, in the opinion of a majority of the Court, the interference with Griggs’ property amounted to an unconstitutional “taking” of an air easement for which the county, not the United States, should pay.

Justice Black wrote a dissent which expressed the opinion that the United States and not Allegheny County should have been required to pay the just compensation. He stated:

These airspaces are so much under the control of the Federal Government that every takeoff from and every landing at airports such as the Greater Pittsburg Airport is made under the direct signal and supervisory control of some federal agent. . . .⁵⁵ And where Congress has already declared airspace free to all—a fact not denied by the Court—pretty clearly it need not again be acquired by an airport. . . . Having taken the airspace of Griggs’ private prop-

51. *Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100, 101 n. 1 (1962).

52. 369 U.S. 84 (1962).

53. *Id.* at 87.

54. *Id.* at 88 (citation omitted; footnote omitted).

55. *Id.* at 93.

erty for a public use, it is the United States which owes just compensation.⁵⁶

The lower federal courts which have dealt with the issue of inverse condemnation have almost unanimously allowed recovery only to those property owners located directly below the flight-path.⁵⁷ *Batten v. United States*⁵⁸ held that a physical trespass on or above the plaintiff's property is a requirement of a "taking." In the *Batten* case, noise, vibration and smoke emission from jet planes at a nearby military base lessened the property owners' use and enjoyment of their property. There was no direct overflight or physical invasion of their premises. The plaintiff's in *Batten* argued that in *Causby* recovery had been allowed for vertical sound and shock waves and that they should be allowed a like recovery for lateral waves. Nonetheless, the *Batten* court held that recovery should be uniformly denied unless there was overflight.

Judge Murrah dissented in *Batten* stating:

[T]he constitutional test in each case is first whether the asserted interest is one which the law will protect; if so, whether the interference is sufficiently direct, sufficiently peculiar and of sufficient magnitude to cause us to conclude that fairness and justness, as between the state and the citizen, requires the burden imposed be borne by the public and not by the individual alone. . . . The interference shown here was sufficiently substantial, direct and peculiar to impose a servitude on the plaintiffs' homes quite as effectively as the overflights in *Causby* and *Griggs*. . . .

I would, therefore, hold the damages constitutionally compensable.⁵⁹

The dissent has been the basis for a good deal of criticism of the majority rule. The "opposing school of thought has been adopted by a substantial number of state jurisdictions."⁶⁰ One explanation of why some state courts may favor the more lenient test could be the wording of their state constitutions. A number of states provide that "private property shall not be *taken or damaged for public or private use, without just compensation.*"⁶¹ In contrast, the Fifth Amendment to the U.S. Constitution provides "nor shall private property be taken for *public use, without just compensation.*"⁶²

C. NUISANCE

Nuisance is a theory of recovery whereby a property owner seeks relief for a substantial, unreasonable interference with the use and enjoyment of his property. Property owners have brought many suits in nuisance to enjoin airport noise.

56. *Id.* at 93.

57. *Alevizos v. Metropolitan Airports Comm'n*, 298 Minn. 471, 216 N.W.2d 651 (1974).

58. 306 F.2d 580 (10th Cir. 1962).

59. *Id.* at 587.

60. Russell, *supra* note 50, at 93.

61. COLO. CONST. art. 2, § 15 (emphasis added).

62. U.S. CONST. amend. V (emphasis added).

*Brooks v. Patterson*⁶³ was an early nuisance suit initiated by a number of individuals against the City of St. Petersburg to prohibit the city from allowing planes to fly at altitudes of less than 500 feet above their property. It was, in fact, a suit to enjoin the airport from operating at all, as no take-offs or landings would be possible if planes had to remain above 500 feet.

The Supreme Court of Florida held: "The airport is not a nuisance per se. So long as the defendants operate the airport, in the usual, normal and customary manner for operation of airports of this character, it cannot be declared a nuisance and its operation cannot be enjoined by plaintiffs. . . ."⁶⁴ The Court further stated that "[t]he individual, although harassed, annoyed, and subjected to inconvenience, cannot stand in the way of progress but must yield to the . . . greatest good for the greatest number."⁶⁵

In 1964 the Supreme Court of California decided *Loma Portal Civil Club v. American Airlines, Inc.*⁶⁶ The suit was brought by owners of property near a public airport to enjoin commercial airlines from certain flight operations. "The Complaint attempted only to set forth a cause of action sounding in nuisance, *i.e.*, unreasonable interference with plaintiffs' use of their property, and sought only injunctive relief."⁶⁷ The Court denied injunctive relief stating: "It is well established that public policy denies an injunction . . . where private property has been put to a public use by a public service corporation and the public interest has intervened."⁶⁸

The plaintiffs in *Virginians For Dulles v. Volpe*⁶⁹ sought injunctive relief from alleged pollution from aircraft emissions and aircraft noise. The Court then found that a balancing of the equities was appropriate. In balancing the opposing rights, the rights of the individual property owners were deemed to be outweighed by the public interest. The Court said: "Burden-some as it may be, plaintiffs must submit to the great annoyance in the public interest"⁷⁰

The principal stumbling blocks to the successful assertion of the nuisance theory appear to be the virtual impossibility of obtaining injunctive relief and the "balancing of the equities." When an individual property owner pitted his problems against the public good, he was almost certain to be defeated.

If the plaintiff lived in a jurisdiction that gave relief in an inverse con-

63. 159 Fla. 263, 31 So.2d 472 (1947).

64. *Id.*

65. *Id.*

66. 61 Cal.2d 582, 394 P.2d 548 (1964).

67. *Id.* at 552.

68. *Id.*

69. 344 F. Supp. 573 (E.D. Va. 1972).

70. *Id.* at 579.

demnation suit only if there was direct overflight, was there any alternative for someone whose enjoyment and use of his property had been adversely effected by planes which passed nearby, but not directly overhead? Some courts found that where there was a will, there was a way

D. THE THORNBURG-MARTIN LINE

Based on the *Batten* dissent, an approach to inverse condemnation known as the Thornburg-Martin line was fashioned. It is derived from a 1962 Oregon Supreme Court case, *Thornburg v. Port of Portland*,⁷¹ and a 1964 case in the Supreme Court of Washington, *Martin v. Port of Seattle*.⁷²

In *Thornburg*, the Court considered whether a noise-nuisance could amount to a taking where flights were close by, but not directly over the plaintiff's property. "The Court concluded that a nuisance can amount to a taking whenever a possessor is ousted from the enjoyment of his land."⁷³ Noise was held to amount to a nuisance and a taking, whether it was "coming straight down from above" or "from a direction other than the perpendicular."⁷⁴ Similarly, the *Martin* Court held:

We are unable to accept the premise that recovery for interference with the use of land should depend on anything so irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's land. The plaintiffs are not seeking recovery for a technical trespass, but for a combination of circumstances engendered by the nearby flights which interfere with the use and enjoyment of their land.⁷⁵

The primary advantages of the Thornburg-Martin test are that the jury is not asked to balance the equities as in a pure nuisance action, and direct overflight is necessary. Instead, if the trier finds that the plaintiff has been deprived of the practical enjoyment of his property and the invasion has resulted in a definite diminution of its market value, his recovery is measured by this decrease in market value.

V. LOCAL NOISE CONTROL REGULATION: FEDERAL PREEMPTION AND COMMERCE CLAUSE CONSIDERATIONS

Between 1971 and 1976 noise-related litigation for both inverse condemnation and nuisance actions cost airport owners in excess of \$28 million.⁷⁶ Municipal airport owners have endeavored to reduce their liability through a number of regulatory and statutory enactments directed at reduc-

71. 233 Or. 178, 376 P.2d 100 (1962).

72. 64 Wash.2d 309, 391 P.2d 540 (1964), *cert. denied*, 379 U.S. 989 (1964).

73. Russell, *supra* note 50, at 95.

74. *Thornburg*, 376 P.2d at 106.

75. *Martin*, 391 P.2d at 545.

76. DOT NOISE POLICY, *supra* note 4, at 18.

ing noise at their airports. They have met numerous obstacles which will now be discussed.

Local governments have attempted to reduce aircraft noise through regulation based on their police powers as well as their rights as airport proprietors. In regulating noise, they face potential conflicts between state and federal areas of control and possible Supremacy Clause and Commerce Clause problems. In attempting to resolve these conflicts, courts have viewed the cases from two perspectives: the kind of power exercised (police power v. proprietary power), and the types of controls used (active v. passive).⁷⁷

The landmark case dealing with local attempts at noise control is *City of Burbank v. Lockheed Air Terminal*.⁷⁸ To better understand *Burbank*, it is helpful to look at the cases which preceded it.

A. PRE-BURBANK CASES

In *Allegheny Airlines v. Village of Cedarhurst*⁷⁹ the Court dealt with an ordinance passed by the Village of Cedarhurst, New York which prohibited planes from flying over Cedarhurst at an altitude of less than 1000 feet. Cedarhurst was located near the airport, but was not the owner or operator of it. The Second Circuit Court of Appeals struck down the ordinance despite the fact that federal regulations required all flights over populated areas to be at altitudes in excess of 1000 feet. The Court held that the federal government had preempted the field of air traffic regulation under the Commerce Clause and further, that the ordinance was in direct conflict with federal statutes and regulations.

Twelve years later, in *American Airlines Inc. v. Town of Hempstead*⁸⁰ the Second Circuit Court of Appeals invalidated a town ordinance forbidding anyone from operating a device (including aircraft) which created noise in the town exceeding a certain ground level decibel limit. The Court based its decision on the ground that the ordinance was in direct conflict with federal law. This time, however, the Court passed over the preemption doctrine announced in *Cedarhurst*.

State and local statutes can run afoul of the scheme of federal regulation in two ways: 1) by being in direct conflict with a federal statute in a field which the Constitution has reserved for the federal government, and 2) by having its entire power to regulate in an area negated under the concept of preemption.⁸¹

77. *Muss, supra* note 31, at 795.

78. 411 U.S. 624 (1973).

79. 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956).

80. 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

81. *Muss, supra* note 31, at 765.

Preemption is more sweeping in its effect than is an exercise of federal power in striking down a conflicting law. A state regulation can be preempted where it is "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁸² In 1963, the U.S. Supreme Court developed two guidelines for determining Congressional intent to preempt a field. It will find this intent where "the nature of the regulated subject matter permits no other conclusion or that Congress has unmistakably so ordained."⁸³

In 1947, Justice Douglas, writing for the U.S. Supreme Court, summarized the tests for Congressional intent for preemption. In *Rice v. Santa Fe Elevator Corp.*⁸⁴ he stated: "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways."⁸⁵ Preemption could be found where:

- (1) The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.⁸⁶
- (2) [T]he act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.⁸⁷
- (3) [T]he object sought to be obtained by the federal law and the character of obligations imposed by it may reveal [the intent to preclude local regulation].⁸⁸
- (4) The state policy may produce a result inconsistent with the objective of the federal statute.⁸⁹

Where *Hempstead* backed away somewhat from the total preemption finding in *Cedarhurst*, the California Supreme Court in *Loma Portal Civil Club v. American Airlines, Inc.*,⁹⁰ stated that it was not persuaded by the soundness of the contention that "state action affecting any aspect of flight operations is precluded by the extensive pattern of federal regulation in this field."⁹¹ The *Loma* Court conceded that a state law which conflicted with a federal law could not be enforced under the Supremacy Clause, but it would not accept the broader argument that federal regulations occupied

82. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

83. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963).

84. 331 U.S. 218 (1947).

85. *Id.* at 230.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. 61 Cal.2d 582, 394 P.2d 548 (1964).

91. *Id.* at 591.

the entire field of aircraft control.⁹² In general, however, most pre-*Burbank* decisions invalidated local attempts to control noise.

B. THE BURBANK DECISION

In 1973, the U.S. Supreme Court decided *Burbank* which dealt squarely with the issue of federal preemption of airport noise regulation. In this case a group of private owners of an airport brought suit against the City of Burbank, California, seeking an injunction against a city council ordinance which made it illegal for jets to take off from Hollywood-Burbank Airport between 11 PM and 7 AM. The ordinance affected only one intrastate flight each evening at 11:30 PM. In enacting the ordinance, the City was attempting to avoid the *Cedarhurst* and *Hempstead* pitfalls by limiting the hours of airport use instead of regulating the flights of the aircraft themselves.

Justice Douglas, expressing the views of five members of the Court, stated that "the pervasive nature of the scheme of federal regulation of aircraft noise . . . leads us to conclude that there is preemption."⁹³ The Court went on to add:

If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.⁹⁴

The Court reviewed the federal statutory scheme at length and concluded that the "FAA, now in conjunction with EPA, has full control over aircraft noise, preempting state and local control."⁹⁵ However, the Court limited the preemption to the states' *police power*. In the much-quoted footnote 14, the Court stated:

The letter from the Secretary of Transportation also expressed the view that 'the proposed legislation will not affect the rights of a State or local public agency, as the *proprietor of an airport*, from issuing regulations or establishing requirements as to the permissible level of noise which can be created by aircraft using the airport. Airport owners *acting as proprietors* can presently deny the use of their airports to aircraft on the basis of noise considerations so long as such exclusion is nondiscriminatory. . . . But, we are concerned here not with an ordinance imposed by the City of Burbank as 'proprietor' of the airport, but with the exercise of police power. . . . Thus, authority that a municipality may have as a landlord is not necessarily congruent with its police power. We do not consider here what limits, if any, apply to a municipality as a

92. Cassel, *Local Regulation of Aircraft to Reduce Noise: Santa Monica Tests the Limits of Burbank*, 58 NEB. L. REV. 494, 505 (1979).

93. 411 U.S. 624, 633 (1973).

94. *Id.* at 639.

95. *Id.* at 633.

proprietor.⁹⁶

Justice Rehnquist, joined by three other members of the Court, dissented. As one commentator points out, "for each cite offered, Judge Rehnquist, dissenting, countered with authority that the Congressional intent was *not* to disturb the existing federal, state, and local governments balance of power."⁹⁷

Justice Rehnquist's dissent relied largely on a letter from the Secretary of Transportation to the Senate Commerce Committee⁹⁸ in which the Secretary expressed the following opinion with regard to the effect of the 1968 Noise Abatement Act⁹⁹ as it amended the Federal Aviation Act of 1958:¹⁰⁰

HR 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft. . . . Just as an airport owner is responsible for deciding how long the runways will be, so is the owner responsible for obtaining noise easements necessary to permit the landing and takeoff of the aircraft. . . . [T]he Federal Government is in no position to require an airport to accept service by noisier aircraft, and for that purpose to obtain additional noise easements. . . . [T]he Federal Government should not substitute its judgment for that of the States or elements of local government who, for the most part, own and operate our Nation's airports. *The proposed legislation is not designed to do this and will not prevent airport proprietors from excluding any aircraft on the basis of noise considerations.*¹⁰¹

Burbank left open the possibility that airport operators, acting in their proprietary role, could regulate aircraft noise so long as they did not attempt to regulate flight or interfere with aviation safety. Several recent cases have dealt with this proprietary exception.

C. POST-BURBANK CASES

In *Air Transport Association of America v. Crotti*,¹⁰² a three-judge federal court reviewed the constitutionality of a California statute which required the California Department of Aeronautics to promulgate noise regulations for the operation of all aircraft at all airports in California, except those operated by the federal government. The standards adopted by the Department of Aeronautics were of two kinds: 1) Community Noise Equivalent Levels (CNEL) which established maximum levels of airport

96. *Id.* at 635-36.

97. Warren, *Airport Noise Regulation: Burbank, Aaron and Air Transport*, 5 ENV'T'L AFF. 97, 104 (1976).

98. S. REP. No. 1353, 90th Cong. 2d Sess. 7 (1968) (citing a June 22, 1968 letter from the Secretary of Transportation to the Senate Commerce Committee).

99. 49 U.S.C. § 1431 (1968).

100. *Id.* § 1301-1542 (1970).

101. Burbank, 411 U.S. at 649 (emphasis added).

102. 389 F. Supp. 58 (N.D. Cal. 1975).

noise around residential communities and required airports to monitor and measure noise levels; and 2) Single Event Noise Exposure Levels (SENEL) which established maximum noise emission levels for planes in flight.

The plaintiff, Air Transport Association, sought declaratory and injunctive relief on the ground that the noise standards were invalid under the Supremacy Clause. The Court found that the plaintiff's total reliance on *Burbank* was misplaced¹⁰³ and stated:

It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport. . . . [He is liable under *Griggs* for "takings."] Manifestly, such proprietary control necessarily includes the basic right to determine the type of air service a given airport proprietor wants its facilities to provide, as well as the type of aircraft to utilize those facilities.¹⁰⁴

The ultimate holding of the court was that the CNEL regulations were constitutional because they did not attempt to regulate aircraft in flight (which is federally preempted), while the SENEL provisions were unconstitutional because they would interfere with the federal regulatory scheme by prescribing noise levels for planes in flight.¹⁰⁵

In *National Aviation v. City of Hayward*,¹⁰⁶ one Judge Peckham found himself "caught on the horns of a particularly sharp dilemma." Here, commercial airplane operators challenged the constitutionality of a city ordinance which prohibited aircraft exceeding 75 dbA from taking off between 11 PM and 7 AM from the Hayward Air Terminal. The ordinance, which was almost identical to the one in *Burbank*, had been passed by the City of Hayward in its airport proprietor's capacity. The court in upholding the ordinance relied on footnote 14 of *Burbank* to allow the city, acting in its proprietary capacity, to do that which it could not have done in exercising its police power.¹⁰⁷

The supersonic Concorde controversy is the most recent to deal with the two-tiered (police power vis-a-vis proprietary regulation) scheme of regulating airport noise. In *British Airways Board v. Port Authority of New York & New Jersey*¹⁰⁸ the proprietor of John F. Kennedy International Airport (JFK) banned Concorde operations at that airport. After a long court battle, British Airways Board finally obtained an injunction prohibiting enforcement of the ban. In the final Court of Appeals decision, the court reviewed some of its earlier proceedings and concluded:

103. *Id.* at 63.

104. *Id.* at 63-64.

105. Leschner, *The Concorde and Local Control of Airport Noise: Federal Preemption?*, 13 *NEW ENG. L. REV.* 473, 493 (1978).

106. 418 F. Supp. 417, 424 (N.D. Cal. 1976).

107. *Id.*

108. 431 F. Supp. 1216 (S.D.N.Y.), *rev'd*, 558 F.2d 75 (2d Cir.), *on remand*, 437 F. Supp. 804 (S.D.N.Y.), *modified*, 564 F.2d 1002 (2d Cir. 1977).

Our initial opinion in this case delineated the extremely limited role Congress had reserved for airport *proprietors* in our system of aviation management. Common sense, of course, required that exclusive control of airspace allocation be concentrated at the national level, and *communities were therefore preempted from attempting to regulate planes in flight*. . . . The task of protecting the local population from airport noise, however, has fallen to the agency, usually of local government, that owns and operates the airfield. . . . It seemed fair to assume that the proprietor's intimate knowledge of local conditions, as well as his ability to acquire property and air easements and assure compatible land use . . . would result in a rational weighing of the costs and benefits of proposed service. *Congress has consistently reaffirmed its commitment to this two-tiered scheme* . . . The maintenance of a fair and efficient system of air commerce . . . mandates that each airport operator be circumscribed to the issuance of reasonable, nonarbitrary and nondiscriminatory rules defining the permissible level of noise which can be created by aircraft using the airport. *We must carefully scrutinize all exercises of local power* . . . to insure that impermissible parochial considerations do not unconstitutionally burden interstate commerce or inhibit the accomplishment of legitimate national goals.¹⁰⁹

At the court's request, the Justice Department filed an *amicus curiae* brief which argued that while President Carter and the Secretary of Transportation favored allowing the Concorde to land at JFK, they were not attempting to preempt the Port Authority's power to regulate noise at that airport.¹¹⁰ The government's brief even asserted that under present law, the executive could *not* preempt the airport proprietor's right to promulgate noise regulations. This point was undoubtedly made to emphasize the government's position that it did not want *Griggs* reversed. A finding that the federal government had completely preempted the aircraft noise field would reverse *Griggs* and make the federal government liable for all inverse condemnation "takings," rather than the local governmental entity which owns and operates the airport.

VI. CONCLUSION

At first glance, the distinction between noise regulation enacted by a municipality in its proprietary role and that based on its police power may seem contradictory. However, if a municipality which was not the proprietor could, under its police power, enact regulations affecting the noise emissions of an airport, then an airport located amidst several localities could be subject to many conflicting regulations. The specter of this "fractionalized control" was precisely what concerned the Court in *Burbank*. On the other hand, where only one controlling entity (the proprietor) establishes the per-

109. *British Airways Board v. Port Authority of New York & New Jersey*, 564 F.2d 1002, 1010-11 (emphasis added; citations omitted; footnote omitted).

110. Brief for the United States, as *amicus curiae* at 4, *British Airways Bd. v. Port Auth. of N.Y.*, 558 F.2d 75 (2d Cir. 1977).

missible noise levels at its airport it will probably not be disturbed by the courts so long as it does not create an impermissible burden on interstate commerce. The reason behind allowing a proprietor to exercise some measure of control is an economic one. The federal government does not want to preempt the entire area of airport and aircraft noise control, because to do so would make it liable for all "takings" which might occur. Since, under *Griggs*, it is the local authority which bears the burden for "takings" resulting from aircraft noise, the local authority should have a corresponding right to regulate that noise.

If no preemption of the proprietary power is assumed, courts must look at each conflict on a case-by-case basis to examine the nature of the proprietor's regulation and determine whether it is reasonable, nondiscriminatory, and not unduly burdensome to interstate commerce. The Second Circuit Court of Appeals' comment in *British Airways* sums it up best:

[S]ince the operator controls the location of the facility, acquires the property and air easement and is often able to assure compatible land use, he is liable for compensable takings by low-flying aircraft. The right of the proprietor to limit his liability by restricting the use of his airport has been thought a corollary of this principle. It is perhaps more important, however, that the inherently local aspect of noise control can be most effectively left to the operator, as the *unitary local authority* who controls airport access.¹¹¹

Allowing an airport proprietor to take an active role in the regulation of the type, number, and frequency of flights at its facility seems only a fair balance against its liability in inverse condemnation actions. Until technology advances to the point where plane noise is no longer a burden to society, the trade-off appears both equitable and necessary.

Mary Jo Soenksen

111. *British Airways Board v. Port Authority of New York & New Jersey*, 558 F.2d 75, 83 (emphasis added) (2d Cir. 1977).