THE AVIATION NOISE ABATEMENT CONTROVERSY: MAGNIFICENT LAWS, NOISY MACHINES, AND THE LEGAL LIABILITY SHUFFLE†

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I. INTRODUCTION

Citizens of this nation, especially those residing near airports,¹ have endeavored for two decades to stem the burgeoning tide of airport noise, which may cause significant physical or psychological injury² or may be simply annoying.³ Since the commercialization of jet aircraft, federal, state and local governments have enacted a plethora of laws...
designed to attain relief from noise. Meaningful relief, however, has not been achieved.

Through legislation, Congress has attempted to create a uniform national noise abatement plan directed and monitored by one entity: the Federal Aviation Administration (FAA). Unfortunately, this goal has not been realized. Apparently in an effort to limit federal government liability, the FAA has failed to assume the responsibility envisioned in the federal legislation. In addition, the recent trend of decisions by courts that have held airport proprietors liable for personal injury and property damages caused by aircraft noise, and Congress' retreat from its previous policy favoring financial aid to noise-impacted airports, have also undermined the movement for a uniform national aviation noise abatement plan.

The FAA's abdication of leadership, adverse court decisions, and the reduction in federal financial aid have left airport proprietors to fend for themselves. Spurred on by a rash of noise lawsuits, local airport proprietors, in a legitimate effort to minimize their liability exposure, have adopted noise abatement regulations based on parochial, rather than national, interests. These local regulations, in turn, have caused further divisions in the effort to create a national aircraft noise abatement plan.

The unfortunate consequence is that the liability for aviation noise has been partially disconnected from the responsibility for aviation noise abatement. This is a result of decisions in which various courts have held that the liability for aviation noise damages rests solely on the hundreds of individual airport proprietors, while responsibility for aviation noise abatement resides collectively among federal, state and local governments, air carriers, and airport proprietors. This "single liability/shared responsibility" situation promotes, rather than discourages the growth of additional airports, and makes the development of noise abatement methods and technologies possible. It is unfortunate that the FAA has failed to assume its responsibility for national aviation noise abatement.

4. See supra text accompanying notes 8-27.
5. See supra text accompanying notes 54-74, 109-27.
6. See Burtz, Legal Rave Over Jet Noise, The Nat'l L.J., Dec. 1, 1980, at 4, col. 5. "In the last four years, at least 16 other cities (other than Los Angeles) have been faced with airport noise claims in excess of $250 million." Id at 10, col. 1.

In addition, aircraft noise has resulted in curfews and other operational constraints which have retarded the use of existing facilities, and have caused problems relating to the safety of the system. Because of noise emanating from the operations at airports, full utilization and expansion of airports to accommodate current and future traffic have been hampered.

Id.
AVIATION NOISE ABATEMENT

1981

1. Federal Aviation Act of 1958—the beginning

Federal regulation of airspace and air commerce is authorized under the Federal Aviation Act of 1958 (1958 Act) which entrusted certain powers to the FAA and to the Civil Aeronautics Board (CAB). The FAA's responsibility under the 1958 Act, to be carried out primarily through the promulgation of Federal Aviation Regulations (FARs), was to promote air safety, regulate the use of the navigable airspace, establish air navigation facilities, operate a national system of air traffic control, and certify airports, airplanes and certain airports for commercial use. This exclusive federal control was based on Congress' recognition that the public has a basic right to air travel. Moreover, the power to ensure such travel was declared to be a right of national sovereignty.


2. The authority of the CAB is consensual primarily with the economic aspects of the aviation industry. For the CAB's area of responsibility, see 49 U.S.C. §§ 1311-1339 (1976 & Supp. III 1979). Theoretically, the CAB could replace aircraft under by refusing to certify new routes or by suspending or changing existing ones. However, Congress, in §401(a)(4) of the 1958 Act, placed limits on the CAB's power to do this. Moreover, the CAB has never exercised this power; and, in light of the recent enactment of the Airline Deregulation Act of 1978, Pub. L. No. 95-524, 92 Stat. 1702 (constituted in sessions of 18, 49 U.S.C. (Supp. III 1979)), it is unlikely to do so in the future. The Airline Deregulation Act will gradually eliminate the CAB's control over routes and fares. The Airline Deregulation Act also provides for the phased elimination and transfer of the CAB's remaining functions to other governmental agencies: the Department of Transportation, the Postal Service, and the Department of Justice. By January 1, 1985, the CAB's functions will be transferred.


4. Id. at § 1506.

5. Id. at § 1504.

6. Id. at § 1506.

7. Id. at § 1504.

8. Id. at § 1506.

9. Id. at § 1506.

10. Id. at § 1506.
2. Federal Aviation Act Amendments of 1968—aircraft noise problem recognized

While the 1958 Act seemingly granted the FAA responsibility for all aspects of aviation, it did not specifically authorize the FAA to establish limits on aircraft noise emissions or otherwise to regulate for noise abatement purposes. In 1968, however, Congress added section 611 to the 1958 Act. This section recognized that there was a noise problem and authorized the FAA to prescribe standards for the measurement of aircraft noise and to establish regulations to control and abate such noise. This grant of authority was limited, however. The standards and regulations had to be "consistent with the highest degree of safety" and be "economically reasonable, technologically practicable, and appropriate for the particular type of aircraft." Thus, the resulting regulations were directed at the source of noise—the aircraft itself—rather than at airport proprietors.

3. Part 36—FAA attempts to control noise at its source

In response to section 611, the FAA promulgated FAR Part 36 in 1969. Part 36 was the embodiment of the FAA's attempt to control aircraft noise at its source. It provided a mechanism by which aircraft noise could be uniformly measured. It also established maximum allowable noise levels (depending on weight and number of engines) that aircraft of new design could not exceed in order to obtain type certification. It did not address possible changes in flight procedures to reduce noise, nor did it apply to then-currently operating aircraft. The noise levels were expressed as an Effective Perceived Noise Level (EPNdB) and permitted heavier aircraft to make more noise. The adoption of Part 36 encouraged new airplane types to be marketed

14. For example, although the FAA, in accord with 49 U.S.C. § 1442(c) (1976), could certify aircraft as "airworthy," the certification had to be based on safety considerations, not noise.
18. Before an aircraft may fly, it must first be type certified. The FAA Administrator is vested with the power to issue type certificates for aircraft. 49 U.S.C. § 1423 (1976). Type certificates concern the basic design of an aircraft. Once a general design is type certified, all other aircraft built according to that design are entitled to type certificates. See Monson v. Dow, 259 F.2d 1328 (10th Cir. 1958).
20. For example, depending upon the type of engine, the standard for model B-377-100 aircraft is approximately 108 EPNdB, the maximum noise output allowable. U.S. DEPT OF
querier than the generation of turbojets developed in the late 1950s and early 1960s.

Since 1969, Part 36 has been amended several times to expand its coverage from newly designed domestic subsonic jet aircraft to all jet powered and propeller driven aircraft. For example, by extending the standards to newly manufactured domestic subsonic aircraft of older design, the 1973 amendment significantly increased the number of aircraft subject to Part 36. In a 1976 amendment, the FAA tackled the most controversial aspect of controlling aircraft noise at its source by requiring currently operating domestic subsonic aircraft with maximum gross weights over 75,000 pounds to meet Part 36 standards. This was accomplished by establishing a phased compliance program for all operating aircraft. Whether by retrofitting or otherwise, all operating aircraft were required to comply with Part 36 standards or before January 1, 1985. However, effective February 1, 1981, the compliance dates were extended for some types of aircraft to January 1, 1988.

1. Federal Aviation Admin., Advisory Circular No. 36-13, CERTIFICATED AIRCRAFT NOISE LEVELS (1977); Noise Abatement Policy, supra note 1, at 36.

2. It was controversial primarily because of the potential economic impact on the airline industry of being required to retrofit (automatically modify by applying sound absorbing materials, replace or replace noncomplying aircraft, or Fed. Reg., 36,049 (1976). For example, in 1976, the FAA estimated that modification of all affected aircraft would cost close to one billion dollars. Id. at 36,052.

3. This was accomplished by adding a new Subpart E to 14 C.F.R. § 91, 41 Fed. Reg. 56,044, 36,052-56 (1976); current version at 14 C.F.R. §§ 91.100-111 (1981). The FAA adopted the phased compliance program because, as of the effective date of the amendment, only 250 of the United States fleet of 2,100 large jet aircraft complied with Part 36, 41 Fed. Reg. 56,046 (1976).

4. These include certain two-engine or three-engine aircraft under F.A.A. approved replacement plans and certain two-engine aircraft under the small communities exemption provisions, 43 Fed. Reg. 79,502, 79,513 (1980). Interestingly, neither Congress, which mea-
Part 36 was made applicable to foreign as well as domestic aircraft.\textsuperscript{25} The last amendment was in direct response to a congressional mandate.\textsuperscript{26}


In 1972, Congress, apparently dissatisfied with the progress of the FAA,\textsuperscript{27} passed the Noise Control Act of 1972.\textsuperscript{28} Among other things, the Act amended section 611. In essence, it prohibited the FAA from issuing an original type certificate to any aircraft that failed to meet Part 36 noise standards.\textsuperscript{29} The Act also recognized a role for local governments, but added the Environmental Protection Agency (EPA) to the regulatory process and required both the FAA and EPA to consider the effect of aircraft noise on the public health and welfare. While the FAA maintained regulatory authority over aircraft noise, it was mandated to hold public hearings on EPA proposed aircraft noise regulations. The FAA, however, was not required to adopt the regulations. As a result, the EPA has had minor influence on the regulatory process—certainly all EPA proposals have been rejected.\textsuperscript{30} Sometimes after基数 this exception, nor the FAA defined what constituted "small community service." One might have thought that the rationale was to encourage air carriers to provide service to small communities and thus permit noisier aircraft to serve those communities. In practice, however, the exemption applies to particular aircraft whether they fly to a community with a population of 5,000 or 10,000,000.


27. During the first four years after the addition of \S 611 to the 1918 Act, the FAA had promulgated only one noise regulation, Part 36. That regulation applied only to new designs for domestic aircraft and not both operating and foreign aircraft unregulated.


29. 49 U.S.C. \S 1431(9)(E) (1976). In other words, Congress wanted the FAA to apply Part 36 standards to all newly produced aircraft, even though aircraft of that type were already in operation, as opposed to those merely on the drawing boards. Aircraft that do not comply with Part 36 standards as originally promulgated in 1969 include all B-707s and DC-8s depending on engine type, most B-727s, DC-9s, and BAC 1-11s, some B-747s, and a few B-747s. All DC-10 and L-1011 aircraft comply. \textit{Noise ABATEMENT POLICY}, supra note 1, at 34.

30. To date, the EPA has proposed 11 regulations; only one has been adopted in full.
long delays.


It is one thing for Congress to enact legislation and profess its intent through committee reports. It is quite another for the federal bureaucracy to interpret the meaning of the legislation and promulgate regulations. In 1976, the FAA issued its interpretation of congressional intent in the area of aviation noise abatement when it published its Aviation Noise Abatement Policy. In the FAA's view, "single liability" for noise damages resides in the airport proprietor, but "shared responsibility" for aviation noise abatement resides jointly among federal, state and local governments, air carriers, airport proprietors, and citizens. Taking into account the entire breadth of legislative history concerning aviation noise law, the FAA posited a "legal framework" that is best stated in its own words:

1. The federal government has preempted the areas of airspace use and management, air traffic control, safety and the regulation of aircraft noise at its source. The federal government has substantial power to influence airport development through its administration of the Airport and Airway Development Program.

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 airspace management.

3. State and local governments may protect their citi-
ass through land use controls and other police power measures not affecting aircraft operations. In addition, to the extent they are airport proprietors, they have the powers described in paragraph 1.\textsuperscript{12}

To alleviate the burden of these proprietary powers, the FAA declared that it would support local airport proprietors' actions to abate noise; however, it reserved the right to block the implementation of such actions under either the supremacy or the commerce clause of the Constitution.\textsuperscript{13} The FAA was, and still is, asserting that the extensive federal role envisioned by congressional legislation should be fragmented and accomplished piecemeal by local airport proprietors but, importantly, with no federal liability.\textsuperscript{14} Thus, exclusive airport proprietor liability exists in the midst of pervasive federal control of aircraft flight operations.


Partially to speed up FAA response to EPA proposals, Congress further amended section 611 in the Quiet Communities Act of 1978.\textsuperscript{15} It specified a ninety-day time limit for FAA response to EPA suggested regulations for noise abatement. It further required the FAA to provide the public with a detailed analysis and response to the EPA proposals.

In 1979, Congress continued its march toward pervasive controls and enacted the Aviation Safety and Noise Abatement Act of 1979 (ASNA).\textsuperscript{16} ASNA required the Secretary of Transportation to estab-

\textsuperscript{12} Id. at 34.

\textsuperscript{13} See id. at 18, in which the FAA discusses its review procedures of airport proprietors' use restrictions. See also U.S. Const., art. I, \S 5.

\textsuperscript{14} It is possible that the FAA is reevaluating that position. In a speech given on February 18, 1982, FAA Administrator J. Lynn Helms asserted in this reevaluation when discussing proposed legislation involving FAA review of local noise regulations.

The FAA, under the bill being drafted, would consider those national consequences and determine if the benefits to the national users from keeping the airport open for those hours were greater than the costs to the local residents. If so, that hour will be preserved. The FAA would propose to accept the economic consequences of such a judgment. That is, the FAA would make the judgment for the incremental difference between a reasonable local viewpoint and a purely national perspective.

Address of J. Lynn Helms, 16th Annual Southern Methodist University Air Law Symposium (Feb. 18, 1982).

\textsuperscript{15} Quiet Communities Act of 1978 § 3, 49 U.S.C. § 1431(c)(1) (Supp. III 1979). Note that it took the FAA fifteen months to reject the EPA suggested two-segment approach procedures. See supra note 10.

ish federal standards for measuring and assessing noise as it impacts residents near airports. Additionally, airport proprietors were made eligible under the Airport and Airways Development Act of 1970 to obtain federal funds to assist them in airport noise compatibility planning.

Interestingly, according to ASNA, airport proprietors may, but are not required to, submit "noise exposure maps" and "noise compatibility programs" to the Secretary. The map, if submitted, must set forth the incompatible land uses existing near the airport as well as the projected effects of airport operations in 1985. The program should list the measures taken or to be taken to reduce any incompatible noise. However, after the first map is submitted, the proprietor must report any changes that create a "substantial new incompatible use in any area surrounding [the] airport." Importantly, if the Secretary approves a noise program and allocates funds, the United States Government is not "liable for damages resulting from aviation noise by reason of any action taken by the Secretary or the Administrator of the Federal Aviation Administration under this section."

Again, the negative aspect of liability is apparent. Although Congress excluded federal liability for noise damages related to the approval of a noise compatibility plan around a federally supported airport, it failed to address the thorny question of what liability, if any, an airport proprietor should have for noise damage resulting from the proprietor's management of its airport. This statutory program could represent the ultimate "Catch-22" for the airport proprietors who seem to be in dire need of assistance to protect their dual-focused interest of economic survival and airport noise abatement.

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77. 49 U.S.C.A. § 1102 (West Supp. 1981). EPNA was the standard used by the FAA to measure aircraft noise. Congress wanted the FAA to establish a standard for assessing the impact of the noise on the community. See infra note 20.
79. See id. at § 2104(a), 2104(a).
82. Id. at § 2104(a).
84. "It's kind of a Catch-22 situation," said Maureen E. George, chairwoman of the National Institute of Municipal Law Officers' airport litigation committee.
85. "This is an issue that has to be handled with care," she said.
86. "But on the other hand, [these courts] are finding that noise is noise for the damages stemming from that noise."
87. Id. at 16, col. 3-4 (brackets in original).
B. Federal Funding of Airport Development

For over thirty-five years Congress has experimented with different methods of aiding the aviation industry. In 1970, finding the airport and airway system inadequate to meet the requirements of the then projected growth in aviation, Congress enacted the Airport and Airway Development Act of 1970 (AADA) as the vehicle for expanding and improving the system. Congress included in the AADA a provision establishing a ten-year program (1970 through 1980) for increased federal matching grants to airport proprietors for eligible "airport development" projects. Eligible projects included construction, equipment purchases, and land and easement acquisitions related to improving the safety of airports. Significantly, eligible projects did not include noise abatement projects.

The FAA, under the direction of the Secretary of Transportation, was charged with administering this program. Hundreds of millions of dollars per year were spent on airport development. An Airport and Airway Trust Fund was established in the United States Treasury, with revenues derived from various taxes on airport activities, to meet the obligations incurred under the AADA. At least one-third of the amount authorized was to be distributed at the discretion of the Secretary of Transportation. In 1973, Congress amended the AADA to increase federal financial assistance to airports and to prohibit the levy of a "head" tax on aviation passengers by state or local governments; the latter could have been used by airport proprietors to supplement their revenues.

In 1976, Congress recognized that aircraft noise was becoming a

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46. Id. at §§ 2, 14 (current version at 49 U.S.C. §§ 1701, 1714 (1970)).
47. Id. at § 112(2) (current version at 49 U.S.C. § 1711(2) (1970)).
49. Id. at §§ 2, 14 (current version at 49 U.S.C. §§ 1701, 1714 (1970)).
50. Id. at § 112(2) (current version at 49 U.S.C. § 1711(2) (1970)).
51. Id. at § 226, as amended, 49 U.S.C.A. § 1707 (West 1976 and Supp. 1981), after September 30, 1980 the revenues received from these taxes no longer go into the Trust Fund but remain in the general fund of the United States Treasury.
major problem. It amended the definition of "airport development" contained in the AADA to include "any acquisition of land or of any interest therein necessary to ensure that such land is used only for purposes which are compatible with the noise levels of the operation of a public airport." Thus, airport proprietors were eligible to receive funds for such projects as the construction of physical barriers, landscaping to diminish noise, and the purchase of land for noise abatement purposes. In addition, the 1976 amendment increased the federal government's matching share of airport development projects for large airports from 50% to 75%.

In 1978, Congress authorized the FAA to grant airport proprietors funds for the development of noise abatement plans around airports. In 1980, funding for noise compatibility purposes was expanded. The FAA received authority to award grants not only for the development of airport noise compatibility planning studies, but also to make limited amounts available for those projects approved by the FAA as contained in an approved noise compatibility program. Eligible projects included the construction of barriers and acoustical shielding, soundproofing of buildings, and the acquisition of land and air easements for noise compatibility purposes. This funding created the potential for a greatly expanded program to reduce the amount of noise inflicted on residents surrounding airports. The program, however, was never fully developed, primarily because funding for such projects was discontinued when, on September 30, 1980, the ten-year funding program contained in the AADA expired in accordance with its own terms.

50. (Aircraft noise has resulted in curfews and other operational constraints which have restricted the use of existing facilities, and have caused problems relating to the safety of the system. Because of noise emanating from the operations at airports, full utilization and expansion of airports to accommodate current and future traffic have been hampered.)


56. Id. at § 2104(e)(7) (C).

57. See Pressed, Airport Aid Dwindles Until 1987 Expects, AVIATION WEEK & SPACE TECH., Oct. 12, 1980, at 34. Because of Congress' failure to act to renewize the funding provisions of the AADA, two of the largest United States Airport Associations recently told
III. Judicial Decision

a. In re Molineux (1886)

In the landmark case of Molineux v. United States, 163 U.S. 55 (1896), the Supreme Court of the United States addressed the issue of when a person could be held liable for damages resulting from an act of government. The Court held that in order to establish liability, the plaintiff must show that the government acted in an unconstitutional manner.

b. In re Molineux (1914)

In the case of In re Molineux, 239 U.S. 1 (1915), the Court further clarified the doctrine of sovereign immunity, which states that the federal government is not liable for damages resulting from its actions, except in certain limited situations.

c. In re Molineux (1934)

The case of In re Molineux, 71 F.2d 1015 (9th Cir. 1934), extended the doctrine of sovereign immunity to include the states, as well.

The legislative history described above clearly illustrates the reluctance of Congress to place heavy burdens on the states and local governments. Although the federal government has not fully preempted local jurisdiction, it has not totally precluded it, either. Despite the federal government's broad powers, the power to regulate local affairs remains under the control of Congress. However, the power to regulate local affairs has not been granted to the federal government without authority. The federal government has not assumed the role of primary responsibility for local affairs; rather, it has assumed the role of secondary responsibility. Thus, the refusal by Congress to vest total responsibility in the federal government was not simply an exercise of the power to regulate local affairs. Rather, it was an exercise of the power to regulate local affairs in a manner that would not interfere with the states' sovereign immunity.

The doctrine of sovereign immunity is a fundamental aspect of the federal system. It reflects a recognition of the principle that the federal government may not interfere with the states in a manner that would undermine their authority. The doctrine is not a blanket protection for the federal government; rather, it is a recognition of the federal government's limited power to regulate local affairs.
aircraft noise cases which constitute the foundation upon which the lower courts have determined that the airport proprietor is liable for certain consequences of aircraft noise. These cases are United States v. Caudy, 64 Griggs v. Allegheny County, 44 and City of Burbank v. Lockheed Air Terminal, Inc. 46 Interestingly, all three majority opinions were written by Mr. Justice Douglas.

In Caudy, decided in 1946, military aircraft had repeatedly passed over a chicken farmer's land at an altitude of eighty-three feet. The noise from these aircraft was sufficient to destroy the residential and commercial value of the farmer's land. The Supreme Court agreed with the landowner's contention that his property had been taken by the federal government (the airport proprietor) without compensation in violation of the fifth amendment.47

The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what these precise limits are. Flights over private land are . . . a taking, if they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.48

Caudy was not the last word on the parameters of federal liability for aircraft noise.49 Griggs v. Allegheny County50 extended the general

64. 228 U.S. 226 (1913).
65. 369 U.S. 64 (1962).
67. See U.S. CONST. amend. V, which provides in part: "[N]or shall private property be taken for public use, without just compensation."
68. 228 U.S. 226, 246 (1946).
69. Lower federal courts have applied Caudy narrowly. In Doolin v. United States, 306 F.2d 700 (9th Cir. 1962), cert. denied, 371 U.S. 922 (1963), which also involved military aircraft, property owners were denied the right to recover damages as a result of noise and vibration caused by aircraft that did not reach the plaintiffs' airspace or render the property unmarketable. Thus, when the federal government is the airport proprietor, recovery is permitted for a "taking" only when an aircraft physically invades the property's airspace.

Some courts, however, in interpreting the just compensation clauses contained in their state constitutions, have allowed recovery for less than physical invasion of airspace. See, e.g., Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 112 Cal. Rptr. 162 (1974), cert. denied, 415 U.S. 1122 (1974). The Aaron court was of the view that physical invasion was not necessary because aircraft noise is capable of tasting measurement. The court concluded that in California there is a "non-invasion" taking if there is a measurable interference in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the [adjacent] property, and the interference is sufficiently direct and sufficiently peculiar that the [property] owner, if uncompensated, would pay more than his property share in the public utilizing. Id. at 484; 112 Cal. Rptr. at 176 (emphasis added).
70. 219 U.S. 34 (1905).
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68. 225 U.S. 256, 264 (1912).
69. Lower federal courts have applied Casady narrowly. In Barton v. United States, 205 F.2d 180 (10th Cir. 1953), cert. denied, 347 U.S. 923 (1953), which also involved military aircraft, property owners were denied the right to recover damages as a result of noise and vibrations caused by aircraft that did not invade the plaintiff’s airspace of render the property unmarketable. Thus, when the federal government is the airport proprietor, recovery is permitted for a “taking” only when an aircraft physically invades the property’s airspace.

Some courts, however, in interpreting the just compensation clause contained in their state constitutions, have allowed recovery for less than physical invasion of airspace. See, e.g., Aarons v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974), cert. denied, 419 U.S. 122 (1974). The above court was of the view that physical invasion was not necessary because aircraft noise is capable of accurate measurement. The court concluded that in California there is a taking if there is a measurable reduction in market value resulting from the operation of the airport in such manner that the noise from aircraft using the airport causes a substantial interference with the use and enjoyment of the adjacent property, and the interference is sufficiently direct and sufficiently peculiar that the property owner, if uncompensated, would pay more than his proper share to the public undertaking.

70. 369 U.S. 64 (1962).
concept enunciated in Causby to local airport proprietors via the four-
teenth amendment. In Griggs, the defendant, Allegheny County, oper-
nated the Greater Pittsburgh Airport. The aircraft utilizing the airport
drew so low and near Mr. Griggs’ residential property that his family
was forced to move. The Court reasoned that the airport proprietor
was responsible for acquiring sufficient land adjacent to the airport to
reduce the impact of aviation noise and, if it failed to perform that
function, it was liable for the resulting aircraft noise damage to Mr.
Griggs’ property because a “constitutional taking” had occurred.71
Justice Douglas set the tone for airport operator liability by stating that
“[r]espondent in designing . . . [the airport] had to acquire some pri-
ivate property. Our conclusion is that by constitutional standards it did
not acquire enough.”72 The airport proprietors, rather than the FAA
or the airlines operating out of the commercial airport, were held liable
for any noise damage.

In a strong dissent, Justice Black, joined by Justice Frankfurter,
urged that because “Congress has over the years adopted a comprehe-
sive plan for national and international Air Commerce, regulating in
minute detail virtually every aspect of air transit,”73 it would be unfair
to saddle localities such as Allegheny County with a heavy financial
burden or to throw a “monkey wrench into Congress’ finely tuned na-
tional transit mechanism.”74 Thus, even early on, serious dissension
existed within the Supreme Court as to whether local proprietor liabil-
ity was the equitable solution to the aircraft noise problem.

Griggs seems to have a narrow holding that is often soft-pedaled or
ignored; the airport proprietor had the original opportunity to
purchase enough land possibly to prevent the noise damage and, be-
cause it did not, it was liable. The Court’s rationale does not indicate
what the result would have been had some damage still resulted from
federally approved flights even though the airport proprietor had done
all that reasonably could have been done to prevent noise damage.
Under what fact pattern would the Court have absolved the proprietor
yet held the federal government liable?

C. Municipalities Are Permuted from Imposing Airport Use
Restrictions—Or Are They?

Eleven years after Griggs, the Supreme Court decided City of Bur-

71. Id. at 89-90.
72. Id. at 90.
73. Id. at 91 (Black J., dissenting).
74. Id. at 94.
burbank v. Lockheed Air Terminal, Inc. 75 In 1970, the City of Burbank, through exercise of its police powers, enacted an ordinance establishing an 11:00 p.m. to 7:00 a.m. curfew on jet aircraft operations at the then privately owned Hollywood-Burbank Airport. The airport operator sued for an injunction against the enforcement of the Burbank ordinance. After reviewing the provisions of the Federal Aviation Act of 1958, the Noise Control Act of 1972, and the regulations enacted pursuant to them, the Supreme Court held the ordinance to be an impermissible intrusion into a federally preempted area. 76 Justice Douglas, again writing for the Court, stated that the Noise Control Act of 1972 “reaffirms and reinforces the conclusion that the FAA, now in conjunction with the EPA, has full control over aircraft noise, pre-empting state and local control.” 77 Justice Douglas continued by observing that while the “[c]ontrol of noise is of course deep-seated in the police powers of the States . . . [t]he pervasive control vested in EPA and in FAA under the 1972 Act seems to us to leave no room for local curfews or other local controls.” 78

The Burbank Court did not set forth “the ultimate remedy . . . for aircraft noise which plagues many communities and tens of thousands of people.” 79 However, it hinted that the remedy might be found in the procedures adopted in accordance with the Noise Control Act of 1972 and in the procedures involved in the implementation of various rules and regulations relating to the control of aircraft noise. The Court noted that the Administrator of the FAA had already imposed regulations relating to takeoff and landing procedures, runway preferences, and noise standards which aircraft must meet as a condition to type certification. 80 Moreover, “[a]ny regulations adopted by the Administrator to control noise pollution must be consistent with the highest degree of safety.” 81 The interdependence of these factors, the Court concluded, “requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.” 82 Thus, the rationale for the Burbank decision is that the delicate balance between aircraft safety and efficiency man-

76. Id. at 638.
77. Id. at 633 (emphasis added).
78. Id. at 638 (emphasis added).
79. Id. (emphasis added).
80. Id.
81. Id. at 639 (quoting 49 U.S.C. § 1410(d)(3)).
82. 411 U.S. at 638. Justice Douglas wrote that a municipality cannot control the hours of operation of its airport through its police powers. I.e., impose a curfew. Id.
dated by the Federal Aviation Act requires a uniform and exclusive system of federal regulation. Burbank seemed to offer a simple point of law: the federal government's control over aviation noise abatement is pervasive and preemptive. It would have remained a simple case had the Court used only thirteen footnotes. Justice Douglas' footnote 14, however, hinted at an airport proprietor might have power to regulate the use of its airport that a nonproprietor municipality did not have. The issue was not resolved because it was not before the Court. Footnote 14, though politely hidden, turned out to be a dormant volcano waiting to erupt.

D. The "Proprietor Exception" to Preemption—Airport Proprietors Have Limited Power

Notwithstanding the lack of specific Supreme Court recognition, there has been legislative, executive, and judicial reliance on what has become known as the "proprietor exception" to Burbank's preemption decision. Such reliance has created a legal anomaly. Because federal preemption was the basis for striking down the curfew in Burbank, one could hardly believe that Congress would accept an airport proprietor's tinkering with the national transportation system, but not accept

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13. Footnote 14 provides:

The letter from the Secretary of Transportation also expresses 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 setting 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." This passage was quoted with approval in the Senate Report.

Appellants and the Solicitor General submit that this indicates that a municipality with jurisdiction over an airport has the power to impose a curfew on the airport, notwithstanding federal responsibility for the area. 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. While the Hollywood-Burbank Airport may be the only major airport which is privately owned, many airports are owned by one municipality yet physically located in another. For example, the principal airport serving Cincinnati is located in Kentucky. Thus, although 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 in a municipality as a proprietor.

15. Id.
16. See generally Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927, 929 (C.D. Cal. 1979); id. at 935 F.2d 103 (9th Cir. 1991); Brief of the United States of America, Armenia Carson, Santa Monica Airport Ass'n v. City of Santa Monica, et al.; Brief of the United States of America, Armenia Carson, San Diego United Port Dist. v. Clauser, 457 F. Supp. 283 (S.D. Cal. 1978); id. at 631 F.2d 1030 (9th Cir. 1981).
a sovereign state or political subdivision's intrusion. Furthermore, the Supreme Court, to validate such an interpretation, would have had to conclude that the ill-effects of a curfew imposed by a proprietor/municipality are acceptable, while the ill-effects of a curfew imposed by a nonproprietor/municipality are not. 87 Unfortunately, though the Supreme Court clearly decided the specific preemption issue in Burbank, it left somewhat of a "sticky wicket" in its wake, particularly the controversy regarding proprietor/municipality powers.

An objective view of Burbank suggests that the Supreme Court knew exactly what it was doing: placing limits on local interference with federal management of the airspace—be the interferor a proprietor or nonproprietor. The Supreme Court accepts cases because of their national import. It may be beyond credibility that the Supreme Court granted certiorari in Burbank to reach a decision that would apply solely to Hollywood-Burbank Airport, the only privately owned major airport in the United States. Consequently, footnote 14 might well be the latest in a long list of convenient "red herrings." 88

The Caughy, Gripp, and Burbank decisions have established a classic confrontation, and their progeny reflect the resulting confusion. While Gripp represents proprietor liability in the midst of a sea of federal regulatory actions, Burbank represents federal preemption in the midst of a sea of locally imposed airport use restrictions. Can the two principles coexist?

An early test came in Air Transport Association v. Court, 89 where the Air Transport Association sought a determination of whether air-

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87. In discussing the effects of a curfew along with the FAA's position, the Supreme Court pointed out that according to the testimony at trial, the increased congestion and incivility brought on by Burbank-type curfews would aggravate the noise problem. See 411 U.S. at 627-28.

88. This view was supported by the EPA in a 1973 study. However, the Supreme Court does not have probable jurisdiction and affirm a case such as Burbank unless a substantial Federal question is presented. If, after reviewing probable jurisdiction, the Court finds that the appealing party cannot state a case of one or two and that no broad question is therefore presented, the case will be dismissed. When the Court affirm s a proceeding pending action it "must" have believed that state and local government owned airports could be included within the preemption rationale. . . . Nothing in the opinion explicitly suggests the foregoing except that, with as exception or two, all are airport airports are owned by states or political subdivisions thereof. If all such airports can be achieved by their owners as owners, the Burbank opinion means little.

Brief for Plaintiffs/Appellants and Plaintiffs-Intervenors/Appellants, Santa Monica Airports Ass'n v. City of Santa Monica, 689 F.2d 100 (9th Cir. 1982) (quoting Environmental Protection Agency, Aircraft/Airport Noise Report—Legal and Institutional Analysis of Aircraft and Airport Noise Abatement of Authority Between Federal, State and Local Government, at 2-46 (July 27, 1973)).

89. 369 F. Supp. 2d (N.D. Cal. 1975).
lines were subject to California’s aircraft noise standards. In answer, a three-judge district court opined that because Griggs established that airport proprietors are responsible for damage to private property as a result of aircraft using their facilities, the proprietors have a consensual right to control the use of their airports. In addition, the court used footnote 14 to support its decision that such airport proprietor action is an exception to the presumption rule of Burbank. Thus, the Griggs-supported rationale enabled the court to sustain a public airport’s right to select the type of air service it desires. The court held that California’s use of Community Noise Equivalent Levels (CNEIL) as a standard for measuring aircraft noise was not per se invalid as an

90. In 1969, the California Legislature enacted legislation directing the State Department of Aeronautics (now the Department of Transportation) to adopt noise standards for airports operating under a state permit. CAL. PUB. UTILITY CODES §§ 21664-21669.4 (West Supp. 1981). Pursuant to this statutory authorization, the Department subsequently adopted “noise standards,” 21 CAL. ADMIN. CODES §§ 10050, 10060.1 (1979).

These standards seek to achieve a gradual reduction in the amount of noise generated by aircraft landings and takeoffs at California airports. They establish what is known as a Community Noise Equivalent Level (CNEIL). CNEIL provides a method for computing on a 24-hour basis an average noise exposure level. A cumulative analysis (e.g., nighttime operations are penalized six times) takes into account the total noise generated by aircraft “events” over a given period of time. In graduated areas, no airport is to have a “noise impact boundary” containing an “unacceptable land use” in excess of 65 dBA on the CNEIL scale by 1982.

The CNEIL standards require an airport operator to operate its airport so as not to exceed the applicable CNEIL noise level. 21 CAL. ADMIN. CODES § 10060.1 (1979). An operator unable to comply with the noise standards must apply to the Department for a variance. 21 CAL. ADMIN. CODES § 10070 (1979). As a practical matter, the noise standards are so stringent that all of the major airports in California—including those at Los Angeles, San Francisco, San Jose, Burbank, San Diego, and Ontario, as well as John Wayne Airport in Orange County—must apply on an annual basis for a variance as a matter of course. FED. REPORTER EXPOSES NURSE TO FERROUS AS MORE USE AIRCRAFT PORT, THE SAN (Ontario, Calif.), June 2, 1981 at 37, vol. 2.

91. See 119 F. Supp. at 63-64.

92. Id. at 63. The court stated:

We believe that the Airliner’s total reliance on Burbank is misplaced. The factual posture supporting Burbank is of narrow focus, a single police power ordinance of a municipality—not an airport proprietor—regulating the noise of aircrafts by some degree aircraft flight at certain night hours. The holding in Burbank is limited to that presumption of construing an unwise exercise of police power in a field pre-empted by the federal government, and we take as gospel the words in footnote 4 to Burbank: “[A]s long as a municipality may have as a landowner is not necessarily competent with its police power. We do not consider here what interest, if any, apply to a municipality as a proprietor.”

Id. (emphasis in original).

93. Id. at 63-64. Perhaps Burbank is the final word on California’s CNEIL methodology. In San Diego United Fire Dist. v. Chastain, 47 F. Supp. 2d 1357 (S.D. Cal. 1997), aff’d, 231 F.3d 1120 (9th Cir. 1999), a district court found that California’s attempt to condition the granting of a variance from its CNEIL requirement for the operation of the San Diego airport was a nonproprietary regulation permissible under Burbank. See supra note 132.
invasion of a federally preempted area. 94 However, the same court also cited Burbank to strike down California's Single Event Noise Exposure Levels (SENELs) because the use of this standard was an attempt to regulate "noise levels occurring when an aircraft is in direct flight [which is an unlawful intrusion] into the exclusive federal domain of control over aircraft flights and operations." 95

If liability follows responsibility, the Court decision suggests two propositions: first, airport proprietors are liable for damage that they can control (noise from an aircraft while on the ground at the airport and possibly noise that could be excluded by preventing or limiting air service); and, second, the federal government preempts airport proprietor liability for noise damage that the proprietor cannot control (aircraft in flight). However, Court did not go the "extra mile" because it said nothing about federal liability for noise damages caused by aircraft while under FAA control in the air. 96

The culprit is Burbank; it left some "daylight" for proprietor-initiated restrictions on airport use that were ultimately supported in principle by the FAA in its 1976 Noise Policy and in other pronouncements. 97 Courts could then use congressional vagueness, executive interpretations, and judicial dicta to support an exception to the Burbank preemption rule. But that is not always such an easy task, and our court's difficulty was aptly expressed by Judge Peckham in National Aviation v. City of Hayward: 98

Thus, this court finds itself caught on the horns of a particularly sharp dilemma: If on one hand, we follow the dicta

94. 359 F. Supp. at 64-65. The court left for another day the decision of whether the CENL provisions were invalid as actually applied. Id. at 65.
95. Id. at 65.
96. Although the Court court viewed CENL as a legitimate manner of measuring and regulating noise near airports in a recent speech, FAA Administrator John Heppner remarked a contrary conclusion. According to Mr. Heppner, the FAA is drafting regulations to require FAA approval of local restrictions on airport noise. Specifically addressing California's use of the CENL concept, Mr. Heppner commented that "non-statutory California noise standards will either shut down significant segments of the air transportation industry or create compromise on safety." Heppner continued. "Clearly, the California noise laws are putting such pressures on the airport operator that the operators are seeking solutions which make tradeoffs between noise and safety." Finally, the FAA Administrator considered that such measures "could cripple our air transportation system and hurt this nation's continued economic development." See Jackman, Airline Noise Rules Called Too Strict, Los Angeles Times, Feb. 19, 1976 at 23, col. 4. Query: Would a requirement of prior approval by the FAA of all local aircraft noise regulations result in the final link in the chain (leading to absolute preemption, thus modifying airport proprietors' common law liability)?
97. See NOISE ABATEMENT POLICY, supra note 1, at 54.
in footnote 14 of the Burbank opinion, which is intended to
comply with the court's holding in Griggs, we will severely
undercut the rationale of Burbank's finding of preemption. If
on the other hand, we disregard the proprietor exception as
dicta in order to fully effectuate the Burbank rationale, we im-
pose upon airport proprietors the responsibility under Griggs
for obtaining the requisite noise easements, yet deny them the
authority to control the level of noise produced at their
airports.

Hayward involved an action brought by four airplane operators at
the Hayward Municipal Airport, a noncommercial airport, to declare
unconstitutional an ordinance enacted in the City's capacity as airport
proprietor. The ordinance prohibited aircraft exceeding certain noise
levels from taking off between 11 p.m. and 7 a.m. In harmonizing Bur-
bank and Griggs, the court held that preemption did not forbid the en-
forcement of the Hayward ordinance. In the court's view, Congress
intended only to preclude a municipal authority that was not an airport
proprietor from enacting police power regulations regarding airport
noise. It did not intend to preclude an airport proprietor from taking
steps to exclude aircraft on the basis of noise considerations.100

The court also found that there was insufficient evidence to con-
clude that the Hayward ordinance did more than "incidentally" burden
interstate commerce. Moreover, the court viewed, as it more speculation,
the possibility that other airport proprietors might adopt similar ordi-
nances, which together would create an impermissible burden.101

Hayward did not resolve the liability/responsibility dilemma be-
cause Judge Peckham seemed to be searching for total preemption,
which, of course, he did not find. The decision, however, implies that
Congress and the FAA could take charge and preempt most local noise
abatement efforts while simultaneously curtailing expensive litiga-
tion.102 Also, the FAA could more clearly establish the acceptable lim-
its of locally imposed use restrictions. However, because neither the

99. Id. at 424.
100. Id. at 424-25.
101. Id. at 425.
102. Judge Peckham was not the only judge to suggest the potential for federal preemp-
tion. James Kehoe, of the dissent in Burbank:
Clearly Congress could preempt the field to local regulations if it chose, and very
likely the authority conferred on the Administrator of FAA by 49 U.S.C. § 1431 is
sufficient to authorize him to promulgate regulations effectively preempting local
action. But neither Congress nor the Administrator has chosen to go that route.
411 U.S. at 413 (Rehnquist, J., dissenting).
Court nor the Hayward court found sufficient evidence of preemption, it was left for another day and another court to determine Congress' intent in this area.

Such a day came when the Second Circuit Court of Appeals addressed the Concorde landing rights issues in British Airways Board v. Port Authority (Concorde I) \(^{103}\) and British Airways Board v. Port Authority (Concorde II). \(^{104}\) In these cases, the Port Authority of New York tried to ban the operation of the Concorde at John F. Kennedy Airport after the United States Secretary of Transportation had ordered a sixteen-month operational test to consider the feasibility and desirability of supersonic transport service to selected American airports. In two separate opinions, the court acknowledged that both airport proprietors and the FAA have a stake in airport noise abatement but that there were significant limitations to proprietary actions as well as to the degree of federal preemption. \(^{105}\) Accordingly, the court recognized and accepted an implied sharing of responsibility. It noted that “Congress repeatedly has declined to alter this cooperative scheme... [T]he legislative history clearly states that the statute [the Federal Aviation Act] was merely intended to strengthen the FAA's regulatory role within the area already totally preempted—control of flights through navigable airspace.” \(^{106}\) While recognizing that the FAA had broad executive powers, the court in Concorde I observed that “the Supreme Court [in Burbank] has refrained from holding that Congress has occupied the field of noise regulation to the exclusion of airport proprietors.” \(^{107}\) Thus, airport proprietors can impose use restrictions. However, according to the court, an airport proprietor is subject to two important constitutional restrictions: first, proprietor-imposed noise regulations must not create an undue burden on interstate or foreign commerce; second, such restrictions may not unreasonably discriminate between different categories of airport users. \(^{108}\)

While it is easy to speak of congressional intent and two-tiered responsibility, it is much more difficult to discuss two-tiered liability. In fact, after all its in-depth reading of federal statutory schemes, the Second Circuit did not even hint that the federal government could or should be liable for any noise damages it might have caused. If there is

\(^{103}\) 288 F.2d 73 (2d Cir. 1961).
\(^{104}\) 294 F.2d 1037 (2d Cir. 1961).
\(^{105}\) 288 F.2d at 77; 294 F.2d at 1035-36.
\(^{106}\) 288 F.2d at 82-84 (footnotes omitted).
\(^{107}\) Id. at 84.
\(^{108}\) Id.
no federal liability, can pervasive federal presence shield the airport
proprietor from liability for noise damage?

E. Airport Proprietor Personal Injury Liability—A Split Decision

That question can be addressed by examining San Diego Unified
Port District v. Superior Court.\(^9\) in which the court denied an attempt
by a group of noise-distressed residents to recover nuisance damages
from an airport proprietor because the federal government controlled
the flight of the airplanes. In San Diego, the plaintiff homeowners sued
under nuisance and negligence theories, claiming that the airport pro-


\(^{10}\) See also D'Allesandro v. County of Milwaukee, 371 F. Supp. 1040 (E.D. Wis. 1974), aff'd in part, vacated and remanded in part, 511 F.2d 847 (7th Cir. 1975); San Diego Unified Port

\(^{11}\) In Lamotte, the Seventh Circuit affirmed the district court's refusal to permit residents
who were aggrieved by aircraft noise from seeking, among other remedies, nuisance damages under Wisconsin law. The court noted:


\(^{13}\) Id. at 383, 582 P.2d 340.
honored. In two 1974 cases, the City of Los Angeles attempted to pass noise damage liability to air carriers, manufacturers, and the federal government. The courts, however, concluded that the airport proprietor was solely liable for failure to acquire air easements.

The city's fortunes remained poor when a group of homeowners adjacent to Los Angeles International Airport sued to recover for injuries from aircraft noise. In *Greater Westchester Homeowners Association v. City of Los Angeles*, the plaintiff sought damages under both inverse condemnation and nuisance theories. The California Supreme Court rejected the city's claim of federal preemption, concluding that no federal shield existed to insulate the airport proprietor from tort damages. After an exhaustive study of congressional intent, federal and state case law, and FAA regulatory actions, the court determined that neither Congress nor the FAA expressly precluded either local noise abatement actions or concurrent state remedies for personal injury awards arising out of an inverse condemnation suit. Moreover,

Since the federal laws and regulations have preempted local control of aircraft noise, however, the plaintiffs may not, in the absence they comply with the federal laws and regulations, be charged with negligence or creating a nuisance. Similarly, § 11404 of the Wisconsin Statutes cannot be invoked to make unlawful the design which is in accordance with federal laws and regulations. If the plaintiffs allege the aircraft design has resulted in the "taking" of their property, the plaintiffs have access at law to recover just compensation from the County, Cong., supra. To the extent that the County may be violating the federal laws or regulations, the plaintiffs should . . . exercise their administrative remedies.

82 P.2d at 391.

114. *City of Los Angeles v. Julian Airlines Co.* 41 Cal. App. 3d 416, 118 Cal. Rptr. 69 (1974) (city an owner-operator of Los Angeles International Airport liable because California statute provided a mechanism for city to acquire air easements absent constitutional agreements or legislative mandate; air carriers did not have to indemnify city); *Aspen v. City of Los Angeles*, 46 Cal. App. 3d 471, 115 Cal. Rptr. 162, cert. denied, 419 U.S. 1222 (1974) (federal control of navigable airspace no defense for airport proprietor's failure to purchase adequate air easements—city held in *City of Los Angeles*).

115. 41 Cal. App. 3d at 429-29, 118 Cal. Rptr. at 78; 46 Cal. App. 3d at 486-487, 113 Cal. Rptr. at 172-73.


117. Id. at 99, 603 P.2d at 1234, 160 Cal. Rptr. at 739. In a concurring opinion, Chief Justice Bird disagreed with the majority's reliance upon inverse condemnation law to support his holding. He wrote that the majority had not preempted the aviation noise abatement field. Id. at 106-107, 603 P.2d at 1235, 160 Cal. Rptr. at 742-43 (Bird, C.J., concurring). She argued that "the city was liable because of its failure to take actions, such as construction of ground barriers or soundproofing of homes, to reduce airport noise. These actions, the Chief Justice noted, would have been within the rights of, and consistent with, federal and state laws." Id. at 107, 603 P.2d at 1236, 160 Cal. Rptr. at 744.

Chief Justice Bird's concurring opinion suggests that had the proprietor done all it could, it may have been absolved of liability. Id. at 104, 603 P.2d at 1234-35, 160 Cal. Rptr. at 744. Furthermore, her statement that "federal regulations cannot preempt con-
the court believed that airport proprietors had the power to limit their liability under Griggs because Congress had preserved proprietary control over airport design, planning, and use. This limited power of airport proprietors to impose certain controls doomed them. After finding "no appellate agreement on the scope of the so-called 'proprietor exception' to the federal preemption rule [of Burbank] and its effect on the tortious liability of airports," the California Supreme Court found no basis for federal preemption of personal damage awards.

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119. Id. at 97, 603 P.2d at 1334, 160 Cal. Rptr. at 734.
120. Id. at 96, 603 P.2d at 1333-34, 160 Cal. Rptr. at 733.
121. Id. at 100, 603 P.2d at 1339, 160 Cal. Rptr. at 739.
122. The city's argument for preemption was as follows: (1) Burbank provided that a nonairport proprietor cannot regulate aircraft noise; (2) the State of California is a nonairport proprietor; (3) the award of tort damages is a form of regulation, and therefore (4) the State of California is preempted from imposing tort damages on an airport proprietor.
123. Authority for the proposition that the award of tort damages is a form of regulation is found in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 235 (1959). In Garmon, the Supreme Court, speaking through Justice Frankfurter, held that because it was arguable that certain union activities involved in that case fell within the ambit of the "unfair labor practices" or the "unfair labor practices" provisions of the National Labor Relations Act, state jurisdiction to award tort damages was preempted. Concerning this issue, Justice Frankfurter wrote:

Now is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain although it could not compensate. Our concern is with determining areas of action which must be free from state regulation if national policy is to be left unimpaired. Such regulation can be as effectively carried through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed, is designed to be, a potent method of preventing unlawful and controlling policy. Even the States' remedial effort to restrain private wrongs or grant compensation for past acts cannot be deemed to make activity that are potentially subject to the exclusive federal regulatory scheme. [Problems emerged.] It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the existence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern.

Id. at 240-47.
Not only are there noise problems in Burbank and San Diego, but also in Santa Monica as well. In *Santa Monica Airport Association v. City of Santa Monica*, Judge Hill upheld the night departure curfew and the 100 dBA SENEL despite the plaintiffs' argument that the SENEL standard was too high. Judge Hill noted that the SENEL standard was adopted in 1976 and that the plaintiffs had not challenged the standard's constitutionality. Despite the FAA's argument that the SENEL standard was based on noise levels measured at the airport, Judge Hill found that the SENEL standard was constitutional.

One interesting aspect of the *Santa Monica* case concerns the issue of federal preemption and implied liability. The FAA, in its amicus brief, urged the court to hold the SENEL unconstitutional because it invaded a federally preempted area. The FAA justified this conclusion by arguing that Congress had intended that the FAA control all matters affecting aircraft in flight and that because pilots try to "beat the meter" which measures the single noise event, the SENEL "affects aircraft in flight" and is thus preempted. Despite the FAA's explicit advancement of federal preemption, Judge Hill upheld the Santa Monica SENEL. To do so, Judge Hill implicitly must have found that the FAA was not an armed force or an instrumentality of the government subject to the "federal preemption" doctrine.

All of this remains rather perplexing because neither the judiciary nor Congress has adequately dealt with the subject of liability. The FAA, interpreting the federal role, has acknowledged that "although many aspects of the aircraft noise problem are appropriate for local control, the range of remedial measures available to the airport proprietor has been somewhat limited by the exercise of the paramount authority to adopt local noise regulations."
authority of the United States to regulate commerce."127

One point seems clear, however. If airport proprietors are eventually shackled with sole liability for property damages and personal injuries resulting from aircraft noise, they will, in self-preservation, devise airport use restrictions with only their local interests in mind, thus destroying the hope for a uniform national air transportation system.

IV. Recommendations—The Search for Smooth Air

To say the least, it is not an easy task to summarize this complex subject and to fashion simple recommendations. Exploration of the major congressional acts dealing with aviation noise and discussion of the myriad of relevant court opinions reveal that a heated controversy exists over whether the FAA should be the country’s leading proponent for ensuring a coordinated effort to reduce aircraft noise.

While the FAA is perfectly willing to share responsibility, on its own terms, it, along with Congress, dreads the thought that the federal government should help pay for the current shortcomings in the national aircraft noise abatement effort. Moreover, the courts have supported the federal government’s position and have made airport proprietors the scapegoats for damages caused by aviation noise. As a result of the courts’ refusal to place a portion of the liability on the federal government, airport proprietors face the unavoidable honor of being solely liable for potentially unlimited damages, even though they have only limited rights to impose use restrictions to minimize aviation noise.

Not only does this shared responsibility/sole liability scheme impose liability on the least likely candidates—those with the least financial resources, the least power, and the least knowledge—it is inherently unfair. The remaining portion of this article will discuss two alternative approaches that would more equitably apportion the cost of reducing aircraft noise and the payment of noise damages.

A. The Federal Government Should Share Liability

The federal government should accept liability for the aviation noise damages caused by situations under its control, such as aircraft in flight. Alternatively, the courts should impose liability on the federal government if it refuses to accept such liability.

This shared responsibility/shared liability approach would reflect
the divisions within the aviation noise abatement effort. The airport
proprietor's sphere of influence in the noise abatement field generally
encompasses airport site location and design, adequate zoning and pro-
curement of air easements, fair and reasonable access to the airport,
and management of ground facilities. Conversely, the federal govern-
ment's role encompasses noise abatement actions related to quieter en-
gines, aircraft operational procedures and flight patterns, review and
approval of local-use restrictions, and management of the air traffic
control system.126 Airport proprietors should be liable only for the avi-
ation noise damages they actually cause or fail to prevent. In turn, the
FAA should be held proportionately liable for aviation noise damages
caused by situations over which it has control.127 This division is simi-
lar to a comparative negligence approach.

The judiciary must be made aware that there exists a rationale for
a shared responsibility/shared liability approach. For this concept to
become a reality, Griggs would not have to be overruled per se. It
simply must be viewed in the context of present-day conditions.
Griggs was decided in 1962, well before the enactment of most of the
airport noise legislation that has been reviewed. A fresh look would
reveal that the federal government's involvement in this area has be-
come pervasive. The CAB certifies airlines for economic reasons; the
FAA certifies airlines, airports, and airplanes, and controls the flight of
aircraft from the clouds to the runway. The federal government should
be liable if it has "pervasive control" of the situation but fails to fulfill
its responsibility to reduce or avoid aviation noise damage.128 Rather
than being detrimental to the national interest, shared liability would
prompt the federal government to take a more aggressive role in the ef-
fort to reduce aircraft noise.

Congress may not have intended complete federal preemption, but

126. NOISE ABATEMENT POLICY, supra note 1, at 5.
127. The Air Transport Association (ATA) has argued that the imposition of liability on
the FAA is preferable to the scrapping of the national air transportation network by a
series of locally imposed airport-use restrictions. For example, in a recent petition to the
FAA urging it to adopt noise abatement rules, the ATA discussed federal responsibility and
potential liability:

[Even if the court ... determines that liability should attach to the Federal Gov-
ernment by virtue of the FAA's admission and assertion of federal preemption, it
would be a small price to pay to prevent uncoordinated and unilateral restric-
tions at various [sic] airports from working separately [sic], or in combination, to en-
der the maintenance, promotion and development of the national air transporta-
tion system.

128. See American Airlines, Inc. v. Town of Hempstead, 472 F. Supp. 224, 228 (E.D.N.Y.
1979), aff'd, 578 F.2d 1369 (2d Cir. 1978), cert. denied, 441 U.S. 1017 (1980).
neither has it discouraged shared liability. The legislators probably were unaware that airport proprietors would be saddled with complete liability for the failures of the federal government. Yet the FAA continues to imply, not necessarily in specific terms, that the only way for the federal government to assume any liability would be for it to assume complete preemptory status.121 However, the FAA has not explained why its liability cannot coexist with airport proprietors' liability. Room exists for compromise, but the FAA has chosen an all or nothing approach. The consequences of this position is that federal leadership in aviation noise abatement is being stifled because of a fear of liability.122

121. See Noise Abatement Policy, supra note 1, at 24, where the FAA magnanimously proclaims:

Our concept of the legal framework underlying this policy statement is that proprie-
tors retain the flexibility to impose such restrictions if they do not violate any
Constitutional provisions. We have been urged to undertake—and have consid-
ered carefully and rejected—all and complete federal preemp tion of the field of
aviation noise abatement. In our judgment the control and reduction of airport
noise must remain a shared responsibility among airport proprietors, users and
governmental units.

122. The federal presence, or lack thereof, in the form of active leadership in aviation
noise abatement, is an interesting adjunct to another California case, San Diego United
Port Dist. v. Glassman, 487 F. Supp. 283 (L.D. Cal. 1979), aff'd, 611 F.2d 1506 (9th Cir.
1980). The California Department of Transportation (CalTrans) conditioned its grant of a
CIVIL waiver on the Port District for its operation of Lindberg Field on the Dis-
ter's consent to its voluntary curfew from six to eight hours. Id. at 286. After receiving
the variance from CalTrans, the Port District sued for injunctive and declaratory relief on
the ground that the “curfew condition” was unconstitutional because it invaded a field pre-
empted by the federal government. Id. at 286-88. The district court found that CalTrans' apt
attempt to extend San Diego's curfew was a nonproprietary regulation of an airport prohib-
ited by Bennett; id. at 227, and granted the Port District's application for a preliminary
injunction. Id. at 291.

While the court's decision was clear, the FAA's position in this case is not easily under-
stood. Before Judge Schwartz heard the merits of the case, he ruled that the Port District
was required to exhaust its administrative remedies by complying with a CalTrans request
that it seek FAA review of the curfew extension. Id. at 286 n.1. However, after being pro-
vided with full background information on the issue by all the parties, the FAA announced
that "it would not provide any response and that no written statement concerning its review
would be forthcoming." Id. at 287. The FAA's refusal to respond clearly violated its 1976
Noise Abatement Policy which encouraged such requests. See Noise Abatement Policy,
supra note 1, at 29.

One additional point stands out. When San Diego originally established the voluntary
night curfew in 1975, the FAA "expressed the hope that Port District would suspend the
night restrictions pending completion of the FAA's efforts to develop a noise policy under
which all parties concerned could move together in a comprehensive nationwide noise
abatement program." and thus while the FAA would publish the curfew it "would not 'deny
take-off or landing clearance' because it 'would not affect or cause any embarrassment' to
the airlines because of the appearance of final approval of the restrictions by FAA." Brief for United States of America, Amicus Curiae, at 11. San
The entire aviation community depends upon an integrated, comprehensive, and safe national air transportation system. The traveling public and airport neighbors want a safe system too, but they also would appreciate a quieter environment. Consequently, no party can or should be permitted to shirk its responsibilities or hide from its liabilities. Unless some positive national leadership is assumed by the FAA, all hopes for maintaining a modicum of order and for avoiding potential systemwide chaos will be dashed.

Although the Supreme Court ultimately may resolve the responsibility/liability issue, continuous resort to the courtroom is not the most efficient way to run a national air transportation system. It is time for federal authorities, within constitutional limits, not only to take charge but also to assume their liability, if necessary, through appropriate legislation.

B. An Aviation Noise Abatement Trust Fund

If the shared responsibility/sole liability concept persists, airport proprietors will continue to incur judgments for the diminution in value of private property and, in some jurisdictions, for the personal injury damages caused by noise emanating from aircraft utilizing their facilities. In response, airport proprietors will continue and, perhaps, increase their efforts to promulgate noise abatement programs designed to reduce their liability exposure. These efforts, which may include the institution of curfews, jet bans, prohibitions against all but Part 36 aircraft or limitations on service, will be parochial in nature.132 Little effort will be exerted to consider their impact on the nation’s air transportation system. As a result, Congress’ attempt to achieve a uniform national transportation system will be thwarted.

What else might be done to prevent the balkanization of the air transportation system? One option is the creation of a program that

[132] District asked the FAA for advice, three years after the FAA had published its Noise Abatement Policy, the FAA refused to respond.

133. Examples of compliance or proposed airport use restrictions by airport proprietors to reduce aircraft noise include (1) nighttime operating restrictions (Lindbergh Field, San Diego, California; Pearl Harbor, Oahu, Washington National, Washington, D.C.), (2) curfews (Savannah Municipal Airport, California; Waterown Municipal Airport, Wisconsin), (3) excluding non-part 14 aircraft (Los Angeles International, Logan International, Boston), (4) limiting the number of aircraft operations (Stewart Airport, New York), (5) excluding particular types of aircraft (Los Angeles International and Logan International have promulgated SSTI), (6) limiting number of aircraft operations (Minneapolis—St. Paul), (7) operational noise limits (TFS International), (8) displaced threshold (Logan International and many more), and (9) preferential runways (Atlanta: Miami; Tampa; San Juan; O’Hara, Chicago; Denver; Moisani, New Orleans; Newark and many more).
would satisfy the concerns of both those in and those affected by the air transportation industry. The FAA should remain at the helm of any program so that the transportation industry remains both national and regional; airport proprietors should not be the sole entity to bear the liability burden; air carriers should not be faced with the uncertainty resulting from locally designed noise abatement rules and regulations; noise impacted residents should not continue to be subjected to high levels of aircraft noise and, most importantly, the users of the system, passengers, the airline industry, and others, should pay for the damages caused by aircraft noise.

These concerns can be satisfied by the creation of a federal matching grants program similar to the plan created by the Airport and Airway Development Act. However, the framework established in AADA is not adequate. For one reason, although currently more than three billion dollars remain in the Airport Trust Fund,¹³⁴ the FAA presently has authority to award only minor grants for noise abatement projects. Second, user taxes are no longer funneled into the Trust Fund; since September 30, 1981, they have been siphoned off into the general fund.¹³⁵ The following is a compendium of the essential components of a noise abatement program that should satisfy most of the concerns of all parties involved:

1. A Noise Abatement Trust Fund (NATF) should be created. The NATF must be separate from the Trust Fund established by AADA or its replacements. Additionally, the AADA Trust Fund should no longer fund the limited noise abatement projects it now funds. A certain portion of the existing AADA Trust Fund should be transferred to NATF so that NATF is funded from its inception.¹³⁶ This amount should approximate the amounts that would reasonably have been allocated to noise projects from the AADA Trust Fund. Moreover, the NATF should be scrupulously administered so that the monies received are actually spent on valid noise abatement projects and not squandered in the federal treasury or spent for non-trust fund purposes.

¹³⁴ As of October 31, 1980, the Airport and Airway Trust Fund balance was $3.26 billion, down from $5.44 billion at the end of September, 1980. In addition, no user fees were collected during October, 1980. 213 AVIATION DAILY 4 (1981). As of May, 1981, $3.6 billion remained.
¹³⁶ This may prove difficult, however, Capital Hill sources indicate there may be a battle over what happens to the Airport Trust Fund proceeds, and it does not appear that noise abatement has high priority on the allocation list. Id. at 54.
2. The current "user taxes" established by AADA must continue with a portion of the revenues going to the AADA Trust Fund and a portion to the NATF. The prohibition against state and local "head taxes" should continue, so that the user taxes will remain uniform throughout the United States. Whether such taxes should be increased or decreased would depend on projected needs.

3. The FAA should continue in its role of determining which noise abatement projects should be funded. Thus, most of the FAA's decisions in this area would remain discretionary. However, where there is an overriding public necessity, the FAA would be mandated to make specific noise abatement grants.127

4. No airport proprietor or other governmental agency should be eligible for grants unless the airport proprietor first submits a "noise exposure map" and an "airport noise compatibility plan" as currently outlined by both the Aviation Safety and Noise Abatement Act of 1979 and its implementing regulations.128 Several airports are in the process of preparing such plans.129

5. All legitimate noise claims within a certain noise exposure area would be eligible for grants once an appropriate "Airport Noise Compatibility Plan" is approved by the FAA. These grants should be funded from the NATF. Legitimate claims would include only those permitted by that particular state, thus new causes of action would not be created. Preferably the entire claims system would be administrative, perhaps modeled after the workers compensation claim process. The LAX 65 noise contour130 proposed in Part 150 would be an adequate compromise. It is envisioned that an airport proprietor's airport noise compatibility plans will contain alternative noise abatement rec-

127. This suggestion is not unlike that made by FAA Administrator J. Lynn Heims in a recent speech in Dallas, Texas. Mr. Heims indicated that the FAA is preparing legislation for presentation to Congress this summer that would require some form of FAA review and approval of local airport noise abatement. Mr. Heims stated that the FAA's perspective on this review process would be "national in scope ... recognizing that the closing of an airport even for one hour has effects on the national air transportation system well beyond the local community." See Simon, FAA Fights 'Crisis' in Airport Noise Regulation, Daily News (Van Nuys, Cal.) Feb. 19, 1981 at 1, col. 4.


129. For example, Los Angeles International Airport has its Airport Noise Control and Land Use Compatibility Study (ANCLUC) in progress. Representatives of the cities of Los Angeles, Inglewood, El Segundo, and Hawthorne, as well as the County of Los Angeles, meet on a regular basis to gather data in order to prepare a noise exposure map and the required noise compatibility plan. It should be completed within a year. Statement of Maurice Lallm, Los Angeles International Airport Environmental Coordinator, to John M. Westch (July 1, 1981).

130. See supra note 26 for a discussion of LAX.
ommendations. Such recommendations would be made by the airport proprietor after consultation with representatives of noise-affected communities and other public interest groups within the D4 Ldn contour. The recommendations might urge soundproofing certain homes and/or schools, construction of sound barriers on or near the airport, land conversion of one form or another, acquisition of air easements by the airport proprietor, condemnation of the most severely impacted residential properties, or, perhaps even the institution of a "dollars for dollars" fee at a particular airport.\footnote{Some commentators have suggested that noise-based landing fees, keyed to the noisiest aircraft, should be part of a comprehensive plan for the abatement of aircraft noise. See James R. Fukasawa, Legal Aspects of Airport Noise, 15 J.L. & ECON. 1, 70 (1972); Ellingsworth, Noise Policy: Same Industry/Different Disease, AVIATION WEEK & SPACE TECH., Dec. 6, 1976, at 26; Bell & Bell, Airport Noise: Legal Development and Economic Alternatives, 5 ECOLOGY L.Q. 607, 608 (1980).}

The FAA would have discretion in determining what is a legitimate claim. Most likely, it would be guided by the number of claims in a particular area, and perhaps it would place limits on the amount a claimant could receive for nonphysical (e.g., emotional distress) personal injury claims. After all, in part, the purpose of the NATF is to pay for noise damage and reduce the impact of aircraft noise.

6. In order to qualify for grants, the airport proprietor would have to follow the reasonable recommendations of the FAA with reference to noise abatement procedures that must be instituted by the proprietor. For example, if the FAA approves a plan to construct a sound barrier, the airport proprietor would have to comply or risk not only being declared ineligible for a specific grant, but also risk absorbing 100% of future noise damage claims.

7. The federal government would be legally liable only for the payment of airport noise-related damage claims as provided for in the NATF program. Thus, within constitutional limitations the federal government could not be made a defendant in an aircraft noise suit.

V. Conclusion

Throughout this article it has been assumed that Congress wishes to maintain a uniform national air transportation system. If this is correct, something must be done before the system becomes chaotic. The concept of sole liability hangs over the heads of airport proprietors like the sword of Damocles, and they can react in only one way: self-defense. The authors' recommendations offer a reasonable compromise between total premption and complete federal abdication. The former
is probably too costly and ignores local prerogatives, while the latter is equally costly at the local level and is potentially destructive of any national transportation scheme. Either the institutionalization of shared liability or the creation of proper noise abatement funding would go a long way toward helping to prevent the fractionalization of the nation’s air transportation system by nonuniform local or court-imposed solutions to airport noise problems. Simultaneously, the adoption of either approach would eliminate the airport proprietors' greatest continuing fear: shared responsibility/single liability.