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

by
*John M. Werlich**
*Richard P. Krinsky***

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 injury[2] or may be simply annoying.[3] Since the commercialization of jet aircraft, federal, state and local governments have enacted a plethora of laws

† The opinions expressed herein are those of the authors and are not necessarily endorsed by the Department of Airports, City of Los Angeles or the Federal Aviation Administration.

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1. "Approximately six million U.S. citizens currently reside on 900,000 acres of land exposed to levels of aircraft noise that create a significant annoyance for most residents." U.S. DEP'T OF TRANSP. FEDERAL AVIATION ADMIN., AVIATION NOISE ABATEMENT POLICY 17 (1976) [hereinafter cited as NOISE ABATEMENT POLICY]. For a discussion of the methodology of measuring noise, see *infra* notes 20 & 90.

2. *See, e.g., Birth Defects Linked to Airport Noise*, MED. WORLD NEWS, Apr. 3, 1978, at 84 (increased incidence of birth defects linked to aircraft noise); Herridge & Chir, *Aircraft Noise and Mental Hospital Admission*, 6 SOUND 32 (1972) (nervous breakdowns found more prevalent around Heathrow Airport than in quieter areas); Meecham & Smith, *Effects of Jet Aircraft Noise on Mental Hospital Admission*, 11 BRIT. J. AUDIOLOGY 81 (1977) (higher proportion of mental hospital admissions found near Los Angeles International Airport than in less noisy areas).

3. "Although there may be indirect and subtle social and psychological harms, aircraft noise is predominantly an annoyance problem. It does not present any direct physical health danger to the vast majority of people exposed." NOISE ABATEMENT POLICY, *supra* note 1, at 17; *see also* Glorig, *Non-Auditory Effects of Noise Exposure*, SOUND & VIBRATION May 1971, at 28 (to date, studies of the effects of noise exposure have failed to reveal any harmful health effects).

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).[4] 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 the personal injury and property damages caused by aircraft noise,[5] 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,[6] local airport proprietors, in a legitimate effort to minimize their liability exposure, have adopted noise abatement regulations based on parochial, rather than national, interests.[7] 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 discour-

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4. *See infra* text accompanying notes 8-57.

5. *See infra* text accompanying notes 64-74, 109-27.

6. *See* Burke, *Legal Roar Over Jet Noise*, The Nat'l L.J., Dec. 1, 1980, at 1, col. 2. "In the last four years, at least 16 other cities [other than Los Angeles] have been faced with airport noise claims in excess of $260 million." *Id.* at 10, col. 1.

7. *See* H.R. REP. No. 594, 94th Cong., 2d Sess. 14, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 1600, 1603.

> In addition, 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.

Id.

ages, confusion. The result is unwarranted agony for all the parties—particularly citizens living near airports.

This article will (1) review national aviation noise legislation and its implementation by the FAA, (2) analyze the judicial decisions that discuss the imposition of liability for aircraft noise, and (3) offer two alternative approaches that would more equitably apportion liability.

II. Federal Laws And FAA Implementation

A. Regulatory Provisions

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)[8] which entrusted certain powers to the FAA and to the Civil Aeronautics Board (CAB).[9] 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,[10] and certify airmen, airplanes and certain airports for commercial use.[11] This exclusive federal control was based on Congress' recognition that the public has a basic right to air transit.[12] Moreover, the power to ensure such travel was declared to be a right of national sovereignty.[13]

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8. 49 U.S.C. §§ 1301-1552 (1976 & Supp. III 1979). The 1958 Act, as amended, is the basis of federal aviation regulations. This article is not intended to review all of its provisions.

9. The authority of the CAB is concerned primarily with the economic aspects of the aviation industry. For the CAB's area of responsibility, see 49 U.S.C. §§ 1302, 1321-1389 (1976 & Supp. III 1979). Theoretically, the CAB could regulate aircraft noise by refusing to certify new routes or by suspending or changing existing ones. However, Congress, in § 401(e)(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. 95-504, 92 Stat. 1705 (codified in scattered sections 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 terminate.

10. 49 U.S.C. § 1348 (1976).

11. *Id.* at §§ 1421-1432.

12. *Id.* at § 1304.

13. *Id.* at § 1508(a). "The United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States . . . ." *Id.*

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.[14] In 1968, however, Congress added section 611 to the 1958 Act.[15] 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*."[16] 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[17] (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.[18] It did not address possible changes in flight procedures to reduce noise, nor did it apply to then currently operating aircraft.[19] The noise levels were expressed as an Effective Perceived Noise Level (EPNdB) and permitted heavier aircraft to make more noise.[20] The adoption of Part 36 encouraged new airplane types to be markedly

14. For example, although the FAA, in accordance with 49 U.S.C. § 1423(c) (1976), could certify aircraft as "airworthy," the certification had to be based on safety considerations, not noise.

15. Federal Aviation Act Amendments of 1968, Pub. L. No. 90-411, § 611, 82 Stat. 395 (current version at 49 U.S.C. § 1431 (1976 & Supp. III 1979)).

16. 49 U.S.C. § 1431(d)(3)-(4) (1976) (emphasis added).

17. 34 Fed. Reg. 18,364 (1969) (current version at 14 C.F.R. § 36 (1981)).

18. Before an aircraft may fly, it must first be type certificated. 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 certificated, all other aircraft built according to that design are entitled to type certificates. *See* Morton v. Dow, 525 F.2d 1302 (10th Cir. 1975).

19. 34 Fed. Reg. 18,364 (1969).

20. For example, depending upon the type of engine, the standard for most B-747-100 aircraft is approximately 108 EPNdB, the maximum noise output allowable. U.S. DEP'T OF

quieter 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,[21] 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.[22] This was accomplished by establishing a phased compliance program for all operating aircraft.[23] Whether by retrofitting or otherwise, all operating aircraft were required to comply with Part 36 standards on or before January 1, 1985. However, effective February 1, 1981, the compliance dates were extended for some types of aircraft to January 1, 1988,[24] and

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TRANSP. FEDERAL AVIATION ADMIN., ADVISORY CIRCULAR NO. 36-1B, CERTIFICATED AIRPLANE NOISE LEVELS (1977); NOISE ABATEMENT POLICY, *supra* note 1, at 36.

Because people's reactions to noise differ widely, it is difficult to establish a simple mathematical formula that accurately represents human reaction to noise annoyance. For example, the noise emanating from a waterfall may produce more sound energy than the screech of chalk across a blackboard. To many, however, the latter is much more annoying. Even the experts are not in agreement on the relative merits of expressing noise impact in terms of dB, dBA, dBD, PnL, EPNL, EPNdB, SEL, SENEL, CNR, NEF, CNEL, ASDS, LdN or Leq. For the purposes of type certification, see *supra* note 18, the FAA utilizes units of EPNdB (a unit of perceived noise that attempts to take into account the actual sound energy received by a listener, the ear's response to that sound energy, the added annoyance of any pure tones or "screeches," and its duration). NOISE ABATEMENT POLICY, *supra* note 1, at 13-14. On the other hand, the FAA has recently designated decibels (dBA) and the yearly day-night average sound level (LdN) as the standards for determining the level of airport noise exposure. 47 Fed. Reg. 8,338, 8,339 (1981) (to be codified in 14 C.F.R. § 150). For further information, see Callahan, *Noise and its Measurement*, MINNESOTA CITIES, Feb. 1980, at 26; Alekshun, Jr., *Aircraft Noise Law: A Technical Perspective*, 55 A.B.A.J. 740 (1969).

21. 38 Fed. Reg. 29,569 (1973).

22. It was controversial primarily because of the potential economic impact on the airline industry of being required to retrofit (acoustically modify by applying sound absorbent material), reengine or replace noncomplying aircraft. 41 Fed. Reg. 56,049 (1976). For example, in 1976, the FAA estimated that modification of all affected aircraft would cost close to one billion dollars. *Id.* at 56,052.

23. This was effectuated by adding a new Subpart E to 14 C.F.R. § 91. 41 Fed. Reg. 56,046, 56,055-56 (1976) (current version at 14 C.F.R. §§ 91.301-.311 (1981). The FAA adopted the phased compliance program because, as of the effective date of the amendment, only 500 of the United States fleet of 2,100 large jet aircraft complied with Part 36. 41 Fed. Reg. 56,046 (1976).

24. These include certain two-engine or three-engine aircraft under FAA approved replacement plans and certain two-engine aircraft under the small communities exemption provisions. 45 Fed. Reg. 79,302, 79,313 (1980). Interestingly, neither Congress, which man-

Part 36 was made applicable to foreign as well as domestic aircraft.[25] The last amendment was in direct response to a congressional mandate.[26]

4. Noise Control Act of 1972—EPA climbs aboard

In 1972, Congress, apparently dissatisfied with the progress of the FAA,[27] passed the Noise Control Act of 1972.[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.[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 meager influence on the regulatory process—nearly all EPA proposals have been rejected,[30] sometimes after

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dated this exemption, nor the FAA defined what constitutes "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 service those communities. In practice, however, the exemption applies to particular aircraft whether they fly to a community with a population of 5,000 or 5,000,000.

25. In its Aviation Noise Abatement Policy, the FAA stated that it would unilaterally impose its own aircraft noise standards on foreign air carriers unless the International Civil Aviation Organization (ICAO) established a noise abatement schedule substantially similar to Part 36. NOISE ABATEMENT POLICY, *supra* note 1, at 42. The ICAO is responsible for setting international noise standards. This was not done to the FAA's satisfaction, so the FAA considered itself mandated by the Aviation Safety and Noise Abatement Act of 1979, Pub. L. No. 96-193, 94 Stat. 50 (1980) (codified in scattered sections of 49 U.S.C.A. (West Supp. 1981)), to apply Part 36 standards to foreign air carriers. 45 Fed. Reg. 79,302, 79,305-310 (1980).

26. 45 Fed. Reg. 79,302, 79,305-06 (1980).

27. During the first four years after the addition of § 611 to the 1958 Act, the FAA had promulgated only one noise regulation, Part 36. This regulation applied only to new designs for domestic aircraft and left both operating aircraft and foreign aircraft unregulated.

28. 42 U.S.C. §§ 4901-4918 (1976), 49 U.S.C. § 1431 (1976). Actually, the Act addressed much more than aircraft noise. Among other things, it mandated the EPA to set noise standards for all products in interstate and foreign commerce.

29. 49 U.S.C. § 1431(6)(2) (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-737s, DC-9s, and BAC 1-11s; some B-727s; and a few B-747s. All DC-10 and L-1011 aircraft comply. NOISE ABATEMENT POLICY, *supra* note 1, at 36.

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

long delays.

5. FAA's Noise Abatement Policy of 1976—a self-serving document

It is one thing for Congress to enact legislation and proffer 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.[31] Taking into account the entire breadth of legislative history concerning aviation noise law, the FAA postulated 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 also 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-

Statement of Walter C. Collins, Noise Abatement Officer at Los Angeles International Airport (June 23, 1981). For example, on August 29, 1975, the EPA proposed two amendments to the Federal Aviation Regulations which would have required pilots of all civil turbojet-powered aircraft to utilize a two-segment approach to a landing runway. Generally, a two-segment approach procedure requires the pilot to fly an initial steep glide path segment (six degrees) and to intercept the conventional glide path (three degrees) at 700 feet above the elevation of the airport. This procedure was to be used under certain circumstances during clear weather and upon approach to a runway that had an FAA approved two-segment Instrument Landing System (ILS) approach procedure. Both proposals were rejected for safety reasons. 41 Fed. Reg. 52,388 (1976).

31. NOISE ABATEMENT POLICY, *supra* note 1, at 5-6, 29-34.

> zens 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 2.[32]

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.[33] 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.[34] Thus, exclusive airport proprietor liability exists in the midst of pervasive federal control of aircraft flight operations.

6. Quiet Communities Act of 1978 and the Aviation Safety and Noise Abatement Act of 1979

Partially to speed up FAA response to EPA proposals, Congress further amended section 611 in the Quiet Communities Act of 1978.[35] 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).[36] ASNA required the Secretary of Transportation to estab-

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32. *Id.* at 34.

33. *See id.* at 58, in which the FAA discusses its review procedure of airport proprietor use restrictions. *See also* U.S. CONST., art. I, § 8.

34. It is possible that the FAA is reevaluating this position. In a speech given on February 18, 1982, FAA Administrator J. Lynn Helms hinted at 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 that hour 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 become liable for the incremental difference between a reasonable local viewpoint and a truly national perspective.

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

35. 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 30.

36. Pub. L. No. 96-193, 94 Stat. 50 (1980) (codified in scattered sections of 49 U.S.C.A. (West Supp. 1981)).

lish federal standards for measuring and assessing noise as it impacts residents near airports.[37] 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.[38]

Interestingly, according to ASNA, airport proprietors may, but are not required to, submit "noise exposure maps" and "noise compatibility programs" to the Secretary.[39] 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.[40] 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 noncompatible use in any area surrounding [the] airport."[41] 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."[42]

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-faceted interest of economic survival and airport noise abatement.[43]

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37. 49 U.S.C.A. § 2102 (West Supp. 1981). EPNdB 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 supra* note 20.

38. 49 U.S.C.A. § 2104(c)(1) (West Supp. 1981).

39. *See id.* at §§ 2103(1), 2104(a).

40. 49 U.S.C.A. § 2103(1) (West Supp. 1981). The regulation promulgated to implement ASNA, 14 C.F.R. § 15, defines incompatible uses in general to include mobile homes, churches, schools, concert halls, residential properties, and libraries. 46 Fed. Reg. 8,316 (1981).

41. 49 U.S.C.A. § 2103(2) (West Supp. 1981).

42. *Id.* at § 2104(d).

43. *See* Burke, *Legal Roar Over Jet Noise*, Nat'l L.J., Dec. 1, 1980, at 1, col. 1.

> "It's kind of a Catch-22 situation," said Maureen R. George, chairwoman of the National Institution of Municipal Law Officers' airport litigation committee.
>
> "The courts are saying that cities have no authority to control noise," she said. "But on the other hand [some courts] are finding that cities are liable for the damages coming from that noise."

Id. at 10, 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.[44] 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)[45] 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.[46] Eligible projects included construction, equipment purchases, and land and easement acquisitions related to improving the safety of airports.[47] 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.[48] 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;[49] the latter could have been used by airport proprietors to supplement their revenues.

In 1976, Congress recognized that aircraft noise was becoming a

44. *See, e.g.*, Federal Airport Act, Pub. L. No. 79-377, 60 Stat. 170 (1946) (repealed 1970).

45. Pub. L. No. 91-258, 84 Stat. 219 (1970) (codified in scattered sections of 16, 42, 49 U.S.C.).

46. *Id.* at §§ 2, 14 (current versions at 49 U.S.C. §§ 1701, 1714 (1976)).

47. *Id.* at § 11(2) (current version at 49 U.S.C. § 1711(3) (1976)).

48. Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, 84 Stat. 236 (codified in scattered sections of 26, 49 U.S.C.). The Trust Fund was established by § 208 of the Act. The users of aviation pay for the program. Trust Fund revenues are received from, among other sources, an 8% tax on airline tickets. 26 U.S.C. § 4261(a) (1976). However, pursuant to § 208, as amended, 49 U.S.C.A. § 1742 (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.

49. Airport Development Acceleration Act of 1973, § 7(a), 49 U.S.C. § 1513 (1976). The purpose of the federal head tax was to ensure both that passengers and air carriers would be taxed at a uniform rate and that the flow of interstate commerce and the development of air transportation would not be inhibited by local head taxes. *See* S. REP. No. 12, 93d Cong., 1st Sess. 4, *reprinted in* 1973 U.S. CODE CONG. & AD. NEWS 1434, 1435.

major problem.[50] 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."[51] 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 attenuation purposes.[52] In addition, the 1976 amendment increased the federal government's matching share of airport development projects for large airports from 50% to 75%.[53]

In 1978, Congress authorized the FAA to grant airport proprietors funds for the development of noise abatement *plans* around airports.[54] 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.[55] 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.[56] 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.[57]

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50. [A]ircraft 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.

H.R. REP. NO. 594, 94th Cong., 2d Sess. 13, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 1600, 1603.

51. Airport and Airway Development Act Amendments of 1976, § 3(a)(1), 49 U.S.C. § 1711(3)(C) (1976).

52. H.R. REP. NO. 594, 94th Cong., 2d Sess. 39, *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 1600, 1613.

53. Airport and Airway Development Act Amendments of 1976, § 9(a), 49 U.S.C. § 1717(a) (1976).

54. Quiet Communities Act of 1978, § 2, 42 U.S.C. § 4913 (Supp. III 1979).

55. Aviation Safety and Noise Abatement Act of 1979, § 104(c), 49 U.S.C.A. § 2104(c) (West Supp. 1981).

56. *Id.* at § 2104(a)(3), (5).

57. *See* Feazel, *Airport Aid Delay Until 1981 Expected*, AVIATION WEEK & SPACE TECH., Oct. 13, 1980, at 36. Because of Congress' failure thus far to reinstitute the funding provisions of the AADA, two of the largest United States Airport Associations recently told

The legislative history described above clearly illustrates the congressionally created atmosphere of pervasive federal involvement in the area of aviation noise abatement. Although the federal government has not totally preempted local proprietors from exercising certain responsibilities, the FAA's role has certainly been predominant. However, despite its predominance, the FAA has consistently refused to accept primary responsibility for noise abatement or any liability for aircraft noise damages. This refusal has led to extensive litigation over the powers, rights, and obligations of local airport proprietors. Because legislative intent in this area is not perfectly clear, and because the FAA's actions have been below apparent congressional authorization, the courts have played a major role in attempting to resolve these issues. In that light, this article will leave the partly cloudy world of legislators and regulators to go to the partly sunny world of adjudicators.

III. JUDICIAL DECISIONS

A. Introduction—Room for the Litigious Litigant

Citizens, individually or as a group, may sue an airport proprietor to recover damages for injuries to property or person resulting from aircraft noise; they may also seek injunctive relief.[58] Moreover, air carriers and aviation associations can sue airport proprietors for injunctive relief to modify or eliminate airport proprietor or local government imposed airport use restrictions (e.g., curfews) designed to reduce aircraft noise.[59] Conversely, an airport proprietor can sue an airline or aviation

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Congress that a program allowing members to withdraw voluntarily from participation in the airport development program and impose their own head taxes "must be included in any final legislative package." 260 AVIATION DAILY 165 (1982).

58. For a discussion of "inverse condemnation" and "taking" actions, see Griggs v. Allegheny County, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1946); Luedtke v. County of Milwaukee, 371 F. Supp. 1040 (E.D. Wis. 1974), *aff'd in part, vacated and remanded in part*, 521 F.2d 387 (7th Cir. 1975); Greater Westchester Homeowners Ass'n v. City of Los Angeles, 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), *cert. denied*, 449 U.S. 820 (1980); Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162 (1974), *cert. denied*, 419 U.S. 1122 (1975); Adams v. County of Dade, 355 So. 2d 594 (Dist. Ct. of App.), *cert. denied*, 344 So. 2d 323 (Fla. 1976); Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100 (1962).

For cases discussing airport proprietors' potential liability for tortious management, see Luedtke v. County of Milwaukee, 371 F. Supp. 1040 (E.D. Wis. 1974), *aff'd in part, vacated and remanded in part*, 521 F.2d 387 (7th Cir. 1975); Greater Westchester Homeowners Ass'n v. City of Los Angeles, 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), *cert. denied*, 449 U.S. 820 (1980); San Diego Unified Port Dist. v. Superior Ct., 67 Cal. App. 3d 361, 136 Cal. Rptr. 557, *cert. denied*, 434 U.S. 859 (1977).

59. *See, e.g.*, City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973) (curfew);

group to enjoin violations of airport proprietary rules designed either to maintain the current level of airport noise or to reduce it.[60] Additionally, an airport proprietor may sue a state or other governing body to enjoin interference with an airport proprietor's operating rights and prerogatives.[61] Of course, the federal government, through FAA action, may sue an airport proprietor to enjoin airport use restrictions that unduly interfere with both interstate commerce and aircraft flight operations.[62] Finally, any "injured party," most notably airlines or airport proprietors, can petition the FAA through the rulemaking process to carry out its congressional mandate to formulate uniform national aviation noise operating standards.[63]

Embedded in these avenues of relief is a confluence of economic, governmental, and social interests that will, in combination, influence a court's decision regarding the key issues of liability and responsibility for aircraft noise. Court decisions will also be guided by congressional intent. Accordingly, a review of the major aircraft noise cases should help to reveal whether the judiciary has left room for the FAA to exercise more affirmatively its noise abatement responsibilities, and whether maneuvering room is left for judicial interpretation of congressional and administrative intent so as to establish once and for all who is responsible and who is liable for aviation noise.

B. Airport Proprietors Are Liable for Property Damages Caused by Aircraft Noise

In the past thirty-five years, the Supreme Court has decided three

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British Airways Bd. v. Port Auth., 588 F.2d 75 (2d Cir. 1977) (supersonic aircraft restrictions); British Airways Bd. v. Port Auth., 564 F.2d 1002 (2d Cir. 1977); Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979) (night curfew, jet ban), *aff'd*, 659 F.2d 100 (9th Cir. 1981); National Aviation v. City of Hayward, 418 F. Supp. 417 (N.D. Cal. 1976) (curfew); Air Transp. Ass'n v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975) (CNEL and SENEL limitations).

60. *See, e.g.*, Burbank-Glendale-Pasadena Airport Auth. v. Hughes Air Corp., No. NC C 17926B (Super. Ct. County of Los Angeles, filed Feb. 7, 1980).

61. *See, e.g.*, San Diego Unified Port Dist. v. Gianturco, 457 F. Supp. 283 (S.D. Cal. 1978), *aff'd*, 651 F.2d 1306 (9th Cir. 1981) (this suit was in response to the granting of a conditional variance by the State of California to an airport operating permit).

62. No recent cases have been filed by the FAA invoking the supremacy or commerce clause of the Constitution. However, the FAA, through the Justice Department, filed *amicus curiae* briefs in Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981) and in San Diego Unified Port Dist. v. Gianturco, 457 F. Supp. 283 (S.D. Cal. 1978), urging that airport use restrictions be enjoined and intervened in Pacific Southwest Airlines v. County of Orange, Civil No. 81-3248 TJH (GX), (C.D. Cal. 1981).

63. *See, e.g.*, Petition for Rulemaking of the Air Transport Association of America, Airport Noise Abatement Plans: Regulatory Process, 44 Fed. Reg. 52,076 (1979).

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. Causby*,[64] *Griggs v. Allegheny County*,[65] and *City of Burbank v. Lockheed Air Terminal, Inc.*[66] Interestingly, all three majority opinions were written by Mr. Justice Douglas.

In *Causby*, 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:[67]

> The airspace, apart from the immediate reaches above the land, is part of the public domain. We need not determine at this time what those 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.[68]

Causby was not the last word on the parameters of federal liability for aircraft noise;[69] *Griggs v. Allegheny County*[70] extended the general

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64. 328 U.S. 256 (1946).

65. 369 U.S. 84 (1962).

66. 411 U.S. 624 (1973).

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

69. Lower federal courts have applied *Causby* narrowly. In Batten v. United States, 306 F.2d 580 (10th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963), 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 or render the property uninhabitable. 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.

State 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, 115 Cal. Rptr. 162 (1974), *cert. denied*, 419 U.S. 1122 (1975). The *Aaron* 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.

Id. at 484, 115 Cal. Rptr. at 176 (emphasis added).

70. 369 U.S. 84 (1962).

concept enunciated in *Causby* to local airport proprietors via the fourteenth amendment. In *Griggs*, the defendant, Allegheny County, operated the Greater Pittsburgh Airport. The aircraft utilizing the airport flew 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 private 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 comprehensive 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 national transit mechanism."[74] Thus, even early on, serious dissension existed within the Supreme Court as to whether local proprietor liability 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, because 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 Preempted 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.

bank 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-

75. 411 U.S. 624 (1973).

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. § 1431(d)(3)).

82. 411 U.S. at 638. Justice Douglas wrote that a municipality cannot control the hours of operation of an 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,[83] however, hinted that 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.[84] 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.[85] Such reliance has created a legal anomaly.[86] 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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83. Footnote 14 provides:

> 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." This portion as well was quoted with approval in the Senate Report.
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> 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 in 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, 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 proprietor.

Id. at 635 n.14 (emphasis in original).

84. *Id.*

85. *See generally* Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927, 932 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir. 1981); Brief of the United States of America, *Amicus Curiae*, Santa Monica Airport Ass'n v. City of Santa Monica, *id.*; Brief of the United States of America, *Amicus Curiae*, San Diego Unified Port Dist. v. Gianturco, 457 F. Supp. 283 (S.D. Cal. 1978), *aff'd*, 651 F.2d 1306 (9th Cir. 1981).

86. Air Transp. Ass'n v. Crotti, 389 F. Supp. 58 (N.D. Cal. 1975).

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 interferer 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 *Causby*, *Griggs*, and *Burbank* decisions have established a classic confrontation, and their progeny reflect the resulting confusion. While *Griggs* 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. Crotti*,[89] where the Air Transport Association sought a determination of whether air-

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 inefficiency 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 note probable jurisdiction and affirm a case such as *Burbank* unless a substantial Federal question is presented. If after noting probable jurisdiction, the Court finds that the appellant [sic] constitute a class of one or two and that no broad question is therefore presented, the case will be dismissed. When the Court affirms with a precedent setting opinion 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 an exception or two, all air carrier airports are owned by states or political subdivisions thereof. If all such airports can be curfewed by their owners as owners, the *Burbank* opinion means very little.

Brief for Plaintiff/Appellant and Plaintiffs-Intervenors/Appellants, Santa Monica Airport Ass'n v. City of Santa Monica, 659 F.2d 100 (9th Cir. 1981) (quoting Environmental Protection Agency, Aircraft/Airport Noise Report—Legal and Institutional Analysis of Aircraft and Airport Noise Apportionment of Authority Between Federal, State and Local Government, at 2-46 (July 27, 1973)).

89. 389 F. Supp. 58 (N.D. Cal. 1975).

lines were subject to California's aircraft noise standards.[90] 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 concomitant right to control the use of their airports.[91] In addition, the court used footnote 14 to support its decision that such airport proprietor action is an exception to the preemption rule of *Burbank*.[92] Thus, the *Griggs*-supported rationale enabled the court to sustain a public airport's right to select the type of air service it desires.[93] The court held that California's use of Community Noise Equivalent Levels (CNELs) as a standard for measuring aircraft noise was not per se invalid as an

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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. UTIL. CODE §§ 21669-21669.4 (West Supp. 1981). Pursuant to this statutory authorization, the Department subsequently adopted "noise standards." 21 CAL. ADMIN. CODE §§ 5000-5080.5 (1979).

These standards seek to achieve a gradual reduction in the amount of noise generated by aircraft takeoffs and landings at California airports. They establish what is known as a Community Noise Equivalent Level (CNEL). CNEL provides a method for computing on a 24-hour basis an average noise exposure level. A cumulative analysis (e.g., nighttime operations are penalized ten times) takes into account the total noise generated by aircraft "events" over a given period of time. In graduated steps, no airport is to have a "noise impact boundary" containing an "incompatible land use" in excess of 65dB on the CNEL scale by 1985.

The CNEL standards require an *airport operator* to operate its airport so as not to exceed the applicable CNEL noise level. 21 CAL. ADMIN. CODE § 5062 (1979). An operator unable to comply with the noise standards may apply to the Department for a variance. 21 CAL. ADMIN. CODE § 5075 (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 routine. Feit, *Experts Expect Noise To Worsen As More Jets Use Ontario Airport*, The Sun (Ontario, Cal.), June 3, 1981 at B7, col. 2.

91. *See* 389 F. Supp. at 63-64.

92. *Id.* at 63. The court stated:

> We believe that the Airlines' total reliance on *Burbank* is misplaced. The factual picture supporting *Burbank* is of narrow focus, a single police power ordinance of a municipality—not an airport proprietor—intending to abate aircraft noise by *forbidding* aircraft flight at certain night hours. The holding in *Burbank* is limited to that proscription as constituting an unlawful exercise of police power in a field pre-empted by the federal government, and we take as gospel the words in footnote 14 in *Burbank*: "[A]uthority 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 proprietor.*"

Id. (emphasis in original).

93. *Id.* at 63-64. Perhaps *Crotti* is not the final verdict for California's CNEL methodology. In San Diego Unified Port Dist. v. Gianturco, 457 F. Supp. 283 (S.D. Cal. 1978), *aff'd*, 651 F.2d 1306 (9th Cir. 1981), a district court found that California's attempt to condition the granting of a variance from its CNEL requirement for the operation of the San Diego airport was a nonproprietary regulation prohibited by *Burbank*. *See infra* 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 *Crotti* 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, *Crotti* 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 one 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. 389 F. Supp. at 64-65. The court left for another day the decision of whether the CNEL provisions were invalid as actually applied. *Id.* at 65.

95. *Id.* at 65.

96. Although the *Crotti* court viewed CNEL as a legitimate manner of measuring and regulating noise near airports, in a recent speech FAA Administrator J. Lynn Helms reached a contrary conclusion. According to Mr. Helms, the FAA is drafting legislation to require FAA approval of local restrictions on airport noise. Specifically addressing California's use of this CNEL concept, Mr. Helms commented that "unrealistic California noise standards will either shut down significant segments of the air transportation industry or create compromises on safety." Helms continued, "Clearly, the California noise laws are putting such pressures on the airport operators 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 stifle this nation's continued economic development." *See States Airport Noise Rules Called Too Strict*, Los Angeles Times, Feb. 19, 1982 at 20, col. 4. Query: Would a requirement of prior approval by the FAA of all local aircraft noise regulations represent the final link in the chain leading to absolute preemption, thus insulating airport proprietors from nuisance liability?

97. *See* NOISE ABATEMENT POLICY, *supra* note 1, at 34.

98. 418 F. Supp. 417 (N.D. Cal. 1976).

> in footnote 14 of the *Burbank* opinion, which is intended to comport 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 impose 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.[99]

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 *Burbank* and *Crotti*, the court held that preemption did not forbid the enforcement 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 conclude that the Hayward ordinance did more than "incidentally" burden interstate commerce. Moreover, the court viewed, as mere speculation, the possibility that other airport proprietors might adopt similar ordinances, which together would create an impermissible burden.[101]

Hayward did not resolve the liability/responsibility dilemma because 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 litigation.[102] Also, the FAA could more clearly establish the acceptable limits of locally imposed use restrictions. However, because neither the

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99. *Id.* at 424.

100. *Id.* at 424-25.

101. *Id.* at 428.

102. Judge Peckham was not the only judge to suggest the potential for federal preemption. Justice Rehnquist did the same in his dissent in *Burbank*:

> Clearly Congress could pre-empt the field to local regulation 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 pre-empting local action. But neither Congress nor the Administrator has chosen to go that route.

411 U.S. at 653 (Rehnquist, J., dissenting).

Crotti 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 issue 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 unjustly 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. 558 F.2d 75 (2d Cir. 1977).
104. 564 F.2d 1002 (2d Cir. 1977).
105. 558 F.2d at 83; 564 F.2d at 1010-11.
106. 558 F.2d at 83-84 (footnote 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*,[109] 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 proprietor had failed to enact adequate regulations, such as a curfew, for the control of noise. The court used federal preemption to shield the airport proprietor from liability.[110] It reasoned that because a *non*airport proprietor could not impose a curfew, neither could an airport proprietor. In the court's view, the impact of the curfew remained the same—congestion and interference with flight schedules.[111] The Port District, according to the court, did not have the authority to impose a curfew and thus could not be liable for failing to do what it was not authorized to do.[112] No mention was made, however, of federal liability. Interestingly, the court indicated that the supremacy clause, the basis for preemption, would not shield the proprietor from liability for tortious mismanagement of those noise abatement aspects under its control.[113] Although this court did shield the proprietor from one aspect of liability, the principle of shared responsibility was basically reinforced.

It is an understatement that airport proprietors would rather not have the distinction of being the sole entity liable for aircraft noise. However, to date, but for a few exceptions,[114] that distinction has been

109. 67 Cal. App. 3d 361, 136 Cal. Rptr. 557, *cert. denied*, 434 U.S. 859 (1977).

110. *Id.* at 376, 136 Cal. Rptr. at 566.

111. *Id.* at 368, 136 Cal. Rptr. at 561. The court of appeal, in referring to the proprietor exemption theory, doubted that the United States Supreme Court intended that municipalities could do as proprietors what they were forbidden to do under the cloak of the police power.

112. *Id.* at 376, 136 Cal. Rptr. at 566.

113. *Id.* at 377, 136 Cal. Rptr. at 567.

114. *See* Luedtke v. County of Milwaukee, 371 F. Supp. 1040 (E.D. Wis. 1974), *aff'd in part, vacated and remanded in part*, 521 F.2d 387 (7th Cir. 1975); San Diego Unified Port Dist. v. Superior Ct., 67 Cal. App. 3d 361, 136 Cal. Rptr. 557, *cert. denied*, 434 U.S. 859 (1977).

In *Luedtke*, 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 stated:

honored. In two 1974 cases,[115] 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.[116]

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*,[117] the plaintiffs 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 concomitant state remedies for personal injury awards arising out of an inverse condemnation suit.[118] Moreover,

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> Since the federal laws and regulations have preempted local control of aircraft flights, *Burbank*, *supra*, the defendants may not, to the extent they comply with such federal laws and regulations, be charged with negligence or creating a nuisance. Similarly, § 114.04 of the Wisconsin Statutes cannot be invoked to make unlawful flights which are in accordance with federal laws and regulations. If, as the plaintiffs allege, the aircraft flights have resulted in the "taking" of their property, the plaintiffs have actions at law to recover just compensation from the County. *Griggs, supra* . . . . To the extent that the County may be violating the federal laws or regulations, the plaintiffs should . . . exhaust their administrative remedies.

521 F.2d at 391.

115. City of Los Angeles v. Japan Airlines Co., 41 Cal. App. 3d 416, 116 Cal. Rptr. 69 (1974) (city as owner-operator of Los Angeles International Airport liable because California statute provided a mechanism for city to acquire air easements; absent contractual agreements or legislative mandate, air carriers did not have to indemnify city); Aaron v. City of Los Angeles, 40 Cal. App. 3d 471, 115 Cal. Rptr. 162, *cert. denied*, 419 U.S. 1122 (1974) (federal control of navigable airspace no defense for airport proprietor's failure to purchase adequate air easements—as held in *Griggs*).

116. 41 Cal. App. 3d at 428-29, 116 Cal. Rptr. at 78; 40 Cal. App. 3d at 486-87, 115 Cal. Rptr. at 172-73.

117. 26 Cal. 3d 86, 603 P.2d 1329, 160 Cal. Rptr. 733 (1979), *cert. denied*, 449 U.S. 820 (1980).

118. *Id.* at 100, 603 P.2d at 1336, 160 Cal. Rptr. at 739. In a concurring opinion, Chief Justice Bird disagreed with the majority's reliance upon inverse condemnation law to support its holding that federal legislation had not preempted the aviation noise abatement field. *Id.* at 104-05, 603 P.2d at 1339, 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 spirit of, and consistent with, federal and state laws. *Id.* at 108, 603 P.2d at 1340, 160 Cal. Rptr. at 744.

Chief Justice Bird's concurring opinion suggests the possibility that had the proprietor done all it could, it may have been absolved of liability. *Id.* at 108, 603 P.2d at 1340-41, 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.[119] 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,"[120] the California Supreme Court[121] found no basis for federal preemption of personal damage awards.[122]

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stitutionally protected rights," *id.* at 105, 603 P.2d at 1339, 160 Cal. Rptr. at 742, implies that perhaps the federal government should be jointly liable for inverse condemnation damages.

119. *Id.* at 97, 603 P.2d at 1334, 160 Cal. Rptr. at 738.

120. *Id.* at 96, 603 P.2d at 1333-34, 160 Cal. Rptr. at 737.

121. *Id.* at 100, 603 P.2d at 1336, 160 Cal. Rptr. at 739. The city's argument for preemption was as follows: (1) *Burbank* provides 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.

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. 236 (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 "concerted activities" or the "unfair labor practice" provisions of the National Labor Relations Act, state jurisdiction to award tort damages was preempted. Concerning this issue, Justice Frankfurter wrote:

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted 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 governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. [citations omitted]. 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 incidence 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 246-47.

122. No longer can it be asserted that this problem is isolated to the peculiar proclivities of California tort law. Fomented by *Greater Westchester*, the state of Georgia has aligned itself with California in a case almost identical to it. In Owen v. City of Atlanta, 157 Ga. App. 354, 122 S.E.2d 338 (1981), *cert. denied*, 50 U.S.L.W. 3916 (U.S. May 12, 1982), the Supreme Court of Georgia held that the City of Atlanta, as proprietor of Hartsfield Atlanta International Airport, was subject to state tort liability because residents in the vicinity of the airport were allegedly injured by noise emanating from aircraft using its airport.

Other courts are also taking the precepts enunciated in *Greater Westchester* seriously. In a recent small claims case heard in South San Francisco Municipal Court, for example, a judge awarded 150 residents $750.00 each because they were annoyed by aircraft noise near San Francisco International Airport. Most troubling are Judge Duncan's reasons for awarding the damages. He appeared particularly disturbed that the airport proprietor had neither

Not only are there noise problems in Burbank and San Diego, but in Santa Monica as well. In *Santa Monica Airport Association v. City of Santa Monica*,[123] a federal district court upheld, *inter alia*, a proprietor-imposed night departure curfew and the use of a SENEL standard while striking down the airport's total ban on jet aircraft.[124] Judge Hill upheld the night departure curfew and the 100 dBA SENEL despite commerce clause, equal protection, and supremacy clause arguments from the plaintiffs, Santa Monica Airport Association, and plaintiffs-intervenors, National Business Aircraft Association and General Aviation Manufacturers Association.[125]

One interesting aspect of the *Santa Monica* case concerns the issues 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[126] 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 Santa Monica potentially subject to *Griggs*-type liability in order to permit it to go so far as to *limit* its liability by imposing a SENEL. Thus, the question raised is whether the local proprietor or the federal government should have *Griggs*-type liability for noise damages resulting from aircraft in flight.

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 au-

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adopted a limited curfew nor prohibited the noisiest aircraft. *See* Workmen, *Residents Win $750 Each in S.F. Jet Noise Case*, San Francisco Chron., Jan. 23, 1982 at 1, col. 1.

Judge Hill is not the only one who is on the "horns of a particularly sharp dilemma." *National Aviation*, 418 F. Supp. at 424. Should the airport proprietor take the initiative and impose strict noise regulations en route to being second-guessed by the FAA, or do something in between and be second-guessed by judge and jury? The airport proprietor must walk a fine line.

123. 481 F. Supp. 927 (C.D. Cal. 1979), *aff'd*, 659 F.2d 100 (9th Cir. 1981).

124. *See id.* at 938-39, 941, 943.

125. *Id.* at 935.

126. *See* Brief of the United States of America, *Amicus Curiae*, at 10-20, Santa Monica Airport Ass'n v. City of Santa Monica, 481 F. Supp. 927 (C.D. Cal. 1979).

thority 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 scapegoat 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 unenviable 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

127. *Id.*

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 procurement of air easements, fair and reasonable access to the airport, and management of ground facilities. Conversely, the federal government's role encompasses noise abatement actions related to quieter engines, aircraft operational procedures and flight patterns, review and approval of local use restrictions, and management of the air traffic control system.[128] Airport proprietors should be liable only for the aviation 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.[129] This division is similar 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 overturned 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 become pervasive. The CAB certifies airlines for economic fitness; 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.[130] Rather than being detrimental to the national interest, shared liability would prompt the federal government to take a more assertive role in the effort to reduce aircraft noise.

Congress may not have intended complete federal preemption, but

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128. NOISE ABATEMENT POLICY, *supra* note 1, at 5.

129. The Air Transport Association (ATA) has argued that the imposition of liability on the FAA is preferable to the strangulation of the national air transportation network by a maze 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:

> [E]ven if the courts . . . determine that liability should attach to the Federal Government by virtue of the FAA's affirmation and assertion of federal preemption, it would be a small price to pay to prevent uncoordinated and unilateral restrictions at varius [sic] airports from working separatedly [sic], or in combination, to endanger the maintenance, promotion and development of the national air transportation system.

44 Fed. Reg. 52,076, 52,081 (1979).

130. *See* American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226, 232 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

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.[131] 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 consequence of this position is that federal leadership in aviation noise abatement is being stifled because of a fear of liability.[132]

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131. *See* NOISE ABATEMENT POLICY, *supra* note 1, at 34, where the FAA magnanimously proclaims:

> Our concept of the legal framework underlying this policy statement is that proprietors retain the flexibility to impose such restrictions if they do not violate any Constitutional proscription. We have been urged to undertake—and have considered carefully and rejected—full and complete federal preemption 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 governments.

132. 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 Unified Port Dist. v. Gianturco, 457 F. Supp. 283 (S.D. Cal. 1978), *aff'd*, 651 F.2d 1306 (9th Cir. 1981). The California Department of Transportation (CalTrans) conditioned its grant of a CNEL noise variance to the Port District for its operation of Lindbergh Field on the District's extension of 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 preempted by the federal government. *Id.* at 286-88. The district court found that CalTrans' attempt to extend San Diego's curfew was a nonproprietor regulation of an airport prohibited by *Burbank, id.* at 292, and granted the Port District's application for a preliminary injunction. *Id.* at 295.

While the court's decision was clear, the FAA's conduct in this case is not easily understood. 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 provided 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 59.

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 restriction 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 that while the FAA would publish the curfew it "would not 'deny take-off or landing clearances' because to do so might give the appearance of tacit approval of the restriction by FAA." Brief for United States of America, *Amicus Curiae*, at 11, San Diego Unified Port Dist. v. Gianturco, 457 F. Supp. 283 (S.D. Cal. 1978). Yet when the Port

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.[133] 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

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 completed 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) total jet ban (Santa Monica Municipal Airport, California; Watertown Municipal Airport, Wisconsin), (3) excluding non-Part 36 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 prohibited SSTs), (6) limiting number of nighttime operations (Minneapolis—St. Paul), (7) operational noise limits (JFK International), (8) displaced threshold (Logan International and many more), and (9) preferential runways (Atlanta; Miami; Tampa; San Juan; O'Hare, Chicago; Denver; Moisant, 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 uniform; 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 replacement. 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 to put NATF solidly on its feet 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.

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134. As of October 31, 1980, the Airport and Airways Trust Fund balance was $5.36 billion, down from $5.44 billion at the end of September, 1980. In addition, no user taxes were collected during October, 1980. 253 AVIATION DAILY 4 (1981). As of May, 1981, $3.6 billion remained. Creedy, *Vital Issues Up For Grabs in Legislative Grist Mill*, COMMUTER AIR, May 15, 1981, at 55 [hereinafter cited as Creedy].

135. Creedy, *supra* note 134, at 55.

136. This may prove difficult, however. Capitol 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.[137]

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.[138] Several airports are in the process of preparing such plans.[139]

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 LdN 65 noise contour[140] 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-

137. This suggestion is not unlike that made by FAA Administrator J. Lynn Helms in a recent speech in Dallas, Texas. Mr. Helms 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 restrictions. Mr. Helms stated that the FAA's perspective in 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* Simison, *FAA Fighting 'Unrealistic' Airport Noise Regulations*, Daily News (Van Nuys, Cal.), Feb. 19, 1982 at 1, col. 4.

138. 46 Fed. Reg. 8,338 (1981) (to be codified in 14 C.F.R. § 150).

139. 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 Laham, Los Angeles International Airport Environmental Coordinator, to John M. Werlich (July 1, 1981).

140. *See supra* note 20 for a discussion of LdN.

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 65 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 decibels" fee at a particular airport.[141] 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 preemption and complete federal abdication. The former

141. 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* Baxter & Altree, *Legal Aspects of Airport Noise*, 15 J.L. & ECON. 1, 70 (1972); Ellingsworth, *Noise Policy Stirs Industry/DOT Debate*, AVIATION WEEK & SPACE TECH., Dec. 6, 1976, at 24; Bell & Bell, *Airport Noise: Legal Developments and Economic Alternatives*, 8 ECOLOGY L.Q. 607, 608 (1980).

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.