

## FEDERAL PRE-EMPTION AND AIRPORT NOISE CONTROL

Commercial air travel has produced great social and economic benefits. Benefits derived from technological advances, however, are seldom achieved without concomitant disadvantages. Extensive airplane service, including frequent flights day and night, has resulted in a serious noise problem.<sup>1</sup> Community displeasure with jet aircraft noise has led in turn to a number of local efforts to reduce its impact on airport neighbors.<sup>2</sup>

In response to complaints by those living nearby, the Burbank, California, City Council enacted a curfew ordinance making it unlawful for jet aircraft to take off from the Hollywood-Burbank Airport between 11:00 p.m. and 7:00 a.m.<sup>3</sup> Lockheed, as airport proprietor, filed suit in federal district court seeking to enjoin enforcement of the ordinance.<sup>4</sup> A permanent injunction was awarded and affirmed

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1. The extent of the problem is reflected in the increasing amount of attention by commentators. See, e.g., Anderson, *Some Aspects of Airspace Trespass*, 27 J. AIR L. & COM. 341 (1960); Berger, *Nobody Loves an Airport*, 43 S. CAL. L. REV. 631 (1970) [hereinafter cited as Berger]; Cohen & Sharon, *Noise and the Law: A Survey*, 11 DUQUESNE L. REV. 133 (1972); Kramon, *Noise Control: Traditional Remedies and a Proposal for Federal Action*, 7 HARV. J. LEGIS. 533 (1970); Tenzer, *Jet Aircraft Noise: Problems and Their Solutions*, 13 N.Y.L.F. 465 (1967); Tondel, *Noise Litigation at Public Airports*, 32 J. AIR L. & COM. 387 (1966); Note, *Urban Noise Control*, 4 COLUM. J.L. & SOC. PROB. 105, 108-14 (1968); Comment, *Airport Noise: An Inadequate Judicial Response*, 4 CONN. L. REV. 634 (1972); Note, *Jet Noise in Airport Areas: A National Solution Required*, 51 MINN. L. REV. 1087 (1967). For a discussion of studies relating to the severe detrimental effects of excessive or unwanted noise see Comment, *Sounding Brass: Military Aircraft Noise Pollution*, 2 ECOLOGY L.Q. 159, 185-91, app. I (1972). See generally Vittek, *Airport Noise Control—Can Communities Live Without It? Can Airlines Live With It?*, 38 J. AIR L. & COM. 473 (1972).

2. See *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F.2d 812 (2d Cir. 1956); *Virginians for Dulles v. Volpe*, 344 F. Supp. 573 (E.D. Va. 1972); *American Airlines, Inc. v. Audubon Park*, 297 F. Supp. 207 (W.D. Ky. 1968); *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967); *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964).

3. Burbank, Cal., Ordinance 2216, March 31, 1970. The ordinance also made it unlawful for the airport operator to allow jet aircraft to depart during this period, but made an exception for emergency flights if the permission of the city police chief was obtained.

4. *Lockheed Air Terminal, Inc. v. City of Burbank*, 318 F. Supp. 914 (C.D. Cal. 1970).

by the Ninth Circuit.<sup>5</sup> In *City of Burbank v. Lockheed Air Terminal, Inc.*,<sup>6</sup> the Supreme Court, four justices dissenting, held that the federal government had pre-empted the field of airport noise control and that the local ordinance was impermissible.

Historical development of the federal pre-emption doctrine leaves no doubt that Congress can, if it chooses, establish exclusive regulatory authority within any area in which it is constitutionally competent to act.<sup>7</sup> The relevant question in each instance is whether the legislation enacted either requires the federal government to be the sole regulator or reflects a congressional intent that it be so.<sup>8</sup> Congress can be explicit in this respect,<sup>9</sup> but seldom is.<sup>10</sup> Consequently, the courts must determine what Congress intended, if indeed it had any intent at all regarding pre-emption. A variety of conceptual tools have been developed to determine whether an intent to pre-empt may be implied.<sup>11</sup>

In *Gibbons v. Ogden*,<sup>12</sup> the Supreme Court broadly interpreted federal pre-emptive power, stating that when Congress legislates on

5. *Lockheed Air Terminal, Inc. v. City of Burbank*, 457 F.2d 667 (9th Cir. 1972).

6. 411 U.S. 624 (1973).

7. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). In *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), the Court said: "The test, therefore, is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State." *Id.* at 236.

8. See *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959); *California v. Zook*, 336 U.S. 725 (1949).

9. See, e.g., *The Clean Air Act*, 42 U.S.C. § 1857 *et seq.* (1970).

10. See Biklé, *The Silence of Congress*, 41 HARV. L. REV. 200 (1927); Powell, *Supreme Court Decisions on the Commerce Clause and State Police Power, 1910-1914 II*, 22 COLUM. L. REV. 28 (1922); Note, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959). See generally Note, "Occupation of the Field" in *Commerce Clause Cases, 1936-46: Ten Years of Federalism*, 60 HARV. L. REV. 262 (1946).

11. In *Hines v. Davidowitz*, 312 U.S. 52 (1941), Justice Black said:

This Court . . . has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. . . . In the final analysis . . . [o]ur primary function is to determine whether, under the circumstances . . . [the challenged regulation] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

*Id.* at 67.

12. 22 U.S. (9 Wheat.) 1 (1824).

a matter affecting interstate commerce it appropriates the *entire* field, leaving no room for concurrent or supplementary state or local regulation. Subsequent decisions have taken a more limited view; state or local regulations designed to protect the health, safety and general welfare of citizens have frequently been allowed to stand.<sup>13</sup> *Cooley v. Board of Wardens*,<sup>14</sup> a leading case on the issue of federal pre-emption, focused on the *nature* of the subject matter in setting forth the following test: "Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."<sup>15</sup> Another approach focuses on the *pervasiveness* of federal legislation in the particular area. If the federal legislative scheme appears all-encompassing, a congressional intent to preclude state or local action will be implied.<sup>16</sup>

The *Burbank* Court, in discussing the nature of the air transportation system, pointed out that the Federal Aviation Administration (FAA) is directed to insure a safe and efficient system of air transportation,<sup>17</sup> as well as a technologically and economically feasible method of noise abatement consistent with the need for safety.<sup>18</sup> The

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13. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *California v. Zook*, 336 U.S. 725 (1949); *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938); *Kelly v. Washington*, 302 U.S. 1 (1937); *Willson v. Black Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829). For local regulations not allowed to stand see *Perez v. Campbell*, 402 U.S. 637 (1971); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pac. Co. v. Arizona*, 325 U.S. 761 (1945); *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926); *Charleston & W. Carolina R.R. v. Varnville Furniture Co.*, 237 U.S. 597 (1915).

14. 53 U.S. (12 How.) 299 (1851).

15. *Id.* at 319. This approach was expanded in *Hines v. Davidowitz*, 312 U.S. 52 (1941), in which the Court said, "whether or not [the scheme] is of such a nature that the Constitution permits only of one uniform national system, it cannot be denied that the Congress might validly conclude that such uniformity is desirable." *Id.* at 73.

16. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Northern States Power Co. v. Minnesota*, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972); *Commonwealth Edison Co. v. Pollution Control Bd.*, 5 Ill. App. 3d 800, 284 N.E.2d 342 (1972).

17. 49 U.S.C. § 1348(a) (1970) provides: "The Administrator is authorized and directed to . . . insure the safety of aircraft and the efficient utilization of . . . [the navigable] airspace."

18. 411 U.S. at 639, *citing* 49 U.S.C. § 1431(d)(3) (Supp. II, 1972), which provides that the FAA shall "consider whether any proposed standard or regu-

interdependence of these factors, the Court believed, called for a uniform system of regulation.<sup>19</sup> An additional factor influencing the *Burbank* Court was trial court testimony asserting that widespread adoption of such curfews would result in bunched flights, increased congestion, and a loss of efficiency. Necessary rescheduling would aggravate noise levels during the periods of greatest annoyance. These consequences, the Court stated, would be totally inconsistent with federal policy.<sup>20</sup>

The Court also considered the pervasiveness of federal legislation designed to control and abate airport noise.<sup>21</sup> It noted that by a July 1968 amendment to the Federal Aviation Act,<sup>22</sup> the FAA Administrator was directed to take steps toward the control and abatement of aircraft noise.<sup>23</sup> The Administrator's responsibilities were extended under the Noise Control Act of 1972,<sup>24</sup> which also directed the Environmental Protection Agency (EPA) to participate in decision-making as part of what the Court described as "the comprehensive scheme of federal control of the aircraft noise problem."<sup>25</sup>

The *Burbank* dissent agreed that Congress could pre-empt the field of airport noise control if it wished, and that the 1968 amendment to the Federal Aviation Act had probably given the Administrator sufficient authority to promulgate regulations pre-empting local action, but felt that a clear and manifest purpose to prohibit the exer-

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lation is consistent with the highest degree of safety in air commerce or air transportation in the public interest." 49 U.S.C. § 1431(d)(4) (Supp. II, 1972) further requires the FAA to determine "whether any proposed standard or regulation is economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply."

19. 411 U.S. at 639.

20. *Id.* at 627-28. See also EPA, REPORT TO THE PRESIDENT AND CONGRESS ON NOISE, S. Doc. No. 92-63, 92d Cong., 2d Sess. (1972) [hereinafter cited as REPORT ON NOISE].

21. 411 U.S. at 633.

22. 49 U.S.C. § 1431 (1970), as amended, 49 U.S.C. § 1431 (Supp. II, 1972). The amendment, titled "Control and Abatement of Aircraft Noise and Sonic Boom" reads in pertinent part:

In order to afford present and future relief and protection to the public . . . from aircraft noise and sonic boom . . . [the Administrator] shall prescribe and amend . . . such regulations as [he] may find necessary to provide for the control and abatement of aircraft noise and sonic boom. . . .

23. *Id.* § 1431(a), as amended, 49 U.S.C. § 1431(b)(1) (Supp. II, 1972).

24. 49 U.S.C. § 1431 (Supp. II, 1972), amending 49 U.S.C. § 1431 (1970).

25. 411 U.S. at 628-29.

cise of the local police powers must appear on the face of the statute or in the legislative history before an intent to pre-empt could be implied. The dissent then concluded that nothing in the Federal Aviation Act of 1958 or the 1968 Noise Abatement Amendment indicated such intent. Since the dissent believed that the Noise Control Act of 1972 merely altered inter-governmental procedures for dealing with aircraft noise problems, the Act could not be read as altering the status quo.<sup>26</sup> The legislative history of the 1968 amendment included a comment from the House Report stating that the bill was directed at the "*reduction of noise at its source.*"<sup>27</sup> The dissent concluded from this that Congress intended the federal government's role to be limited solely to the study and regulation of the technical aspects of jet engine and aircraft design.<sup>28</sup>

An examination of the statutory scheme and its legislative history reveals conflicting language and opinions that would support either the majority or the dissent. The Federal Aviation Act of 1958 by itself was not meant to pre-empt the area of aircraft noise control. High noise levels and resulting complaints were not common until after the introduction of jet aircraft for commercial use in late 1958.<sup>29</sup> Congress' paramount concern at the time was to consolidate control over aviation in one agency of the Executive Branch in the interest of safety and efficiency. To that end, Congress pre-empted control of the navigable airspace<sup>30</sup> and charged the Administrator with its management.<sup>31</sup>

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26. *Id.* at 652.

27. *Id.* at 647, citing H.R. REP. NO. 1463, 90th Cong., 2d Sess. 4 (1968).

28. 411 U.S. at 650.

29. REPORT ON NOISE 2-52:

The growth of community noise levels due to commercial aircraft operations is closely related to the introduction of the commercial jet aircraft in 1958 and the growth of air travel during the following decade. First, the jet aircraft were noisier . . . than piston-engined aircraft they replaced. Secondly, although the number of major airports has increased only slightly since the late 1950's, the quantity and frequency of air travel has grown many times over. Finally, vast new residential communities have been established in the vicinity of nearly all busy airports. This combination of expanding air travel and residential growth has resulted in a growing airport-community noise problem.

30. 49 U.S.C. § 1508(a) (1970) provides in part that "the United States of America is declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States. . . ."

31. 49 U.S.C. § 1348(a) (1970) gave the Administrator broad power "to insure the safety of aircraft and the efficient utilization of . . . [the navigable] airspace."

The legislative history of the 1968 Noise Abatement Amendment, on the other hand, indicates serious concern with the problems of aircraft noise and its control.<sup>32</sup> The House Report<sup>33</sup> mentions three methods of attacking the problem: changed engine design, new flight techniques and procedures, and plans for compatible land use in areas adjacent to airports. Requiring altered engine designs is within the competence and power of the FAA,<sup>34</sup> while land use planning is traditionally a function of state and local governments.<sup>35</sup> Control and coordination of interstate flight techniques and procedures, however, requires federal authority with the capacity to develop a national plan.<sup>36</sup>

The Noise Control Act of 1972<sup>37</sup> is the most recent and comprehensive congressional statement on the matter. The *Burbank* majority concluded that its provisions made clear that the FAA, in conjunction with EPA, has complete control over aircraft noise, precluding state or local action.<sup>38</sup> The dissent, however, pointed to remarks in the Senate Report evincing an intent to maintain a status quo that the dissent interpreted as non-pre-emption. The Report states:

[C]ertain actions by State and local public agencies, *such as zoning to assure compatible land use*, are a necessary part of the total attack on aircraft noise. *In this connection* the question is raised whether this bill adds or subtracts anything from the powers of State or local governments. It is not the intent of the committee . . . to effect any change in the existing apportionment of power between the Federal and State and local governments.<sup>39</sup>

It is more probable that this disclaimer of pre-emption was addressed to the land use issue than to the authority of localities to enact ordinances directly or indirectly affecting aircraft flight.

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32. S. REP. NO. 1353, 90th Cong., 2d Sess. 2688 (1968) [hereinafter cited as S. REP. NO. 1353].

33. H.R. REP. NO. 1463, 90th Cong., 2d Sess. 4 (1968).

34. See S. REP. NO. 1353 at 5. See also 49 U.S.C. § 1431(b)(4) (1970), as amended, 49 U.S.C. § 1431(d)(4) (Supp. II, 1972).

35. See *Jankovich v. Indiana Toll Rd. Comm'n*, 379 U.S. 487 (1965); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

36. S. REP. NO. 1353 at 5-6 states: "Because of the relationship between noise regulations and safety . . . , the House concluded that responsibility for noise regulation should be placed directly with the Administrator. . . . The ultimate policy decisions on aircraft noise abatement will continue to be the province of the Secretary [of Transportation]."

37. 49 U.S.C. § 1431 (Supp. II, 1972), amending 49 U.S.C. § 1431 (1970).

38. 411 U.S. at 633.

39. S. REP. NO. 1353 at 6 (emphasis added).

In spite of contrary or ambiguous statements regarding pre-emption, the history and pervasiveness of federal legislation in the area of aircraft noise control favors the result reached by the *Burbank* Court. If, as the dissent maintains, it were necessary to find an expression of the intent to pre-empt the exercise of the local police powers, the courts would never have to imply it. In this instance, the need for national uniformity in regulating air transportation, the pervasive legislative scheme, and the evils that would flow from diverse local rules make the judicial implication of an intent to pre-empt a fair one.

The Court's decision in *Burbank*, one more frustration for residents of communities surrounding airports, was foreshadowed by the majority of lower court opinions dealing with similar local efforts.<sup>40</sup> Prior to the introduction of commercial jets in 1958, Cedarhurst, New York, seeking relief from the noise of landings and departures at Kennedy International Airport, passed an ordinance barring overflights below a certain altitude. In *Allegheny Airlines, Inc. v. Village of Cedarhurst*,<sup>41</sup> the Second Circuit held the ordinance pre-empted on the ground that the federal government had assumed exclusive control of the navigable air space.<sup>42</sup> After Cedarhurst's failure, Hempstead, New York, also a Kennedy neighbor, tried another approach. As part of a comprehensive scheme of noise control, the town enacted an ordinance providing for penalties if the noise, measured at surface level, exceeded permissible limits. In *American Airlines, Inc. v. Town of Hempstead*,<sup>43</sup> a federal district court held that, since the aircraft and its noise were indivisible, to bar the noise was to bar the aircraft.<sup>44</sup> The court said that the ordinance operated in an area

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40. See *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F.2d 812 (2d Cir. 1956); *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967); *City of Newark v. Eastern Airlines, Inc.*, 159 F. Supp. 750 (D.N.J. 1958); *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964). *Contra*, *Stagg v. Municipal Court*, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578 (Dist. Ct. App. 1969).

41. 238 F.2d 812 (2d Cir. 1956).

42. *Id.* at 815. One commentator points out that compliance with the Cedarhurst ordinance would have been possible by re-routing air traffic, but it was feared that similar action by other communities would follow, making it impossible for the airport to function. Berger 705-06.

43. 272 F. Supp. 226 (E.D.N.Y. 1967).

44. *Id.* at 230. For an ingenuous argument that the aircraft and its noise are divisible see Berger 709-11.

committed to federal care, and that noise-limiting rules of this sort must come from a federal source.<sup>45</sup> The court also expressed concern over the effect on air transportation if the ordinance were upheld and other communities followed suit. Viewed as only one of many such ordinances enacted by communities surrounding the airports, it was apparent to the court that the ordinance would be, in effect, a significant regulation of aircraft flight since alternate routes would be unavailable.<sup>46</sup>

Localities are now clearly precluded from imposing altitude,<sup>47</sup> noise level,<sup>48</sup> or hours limitations<sup>49</sup> on aircraft. Whether any powers are retained by municipalities acting not in their governmental capacity but in their proprietary role as owners and operators of airports remains unanswered.<sup>50</sup> The few instances in which the issue has been raised leave little reason to believe that municipal operators of airports will be in any better position than the City of Burbank.

The experience of the San Diego airport authority illustrates how difficult it is for a municipality operating an airport to impose certain restrictions. In 1967, due to increasing infractions by commercial airlines of a gentleman's agreement to avoid takeoffs and departures between 12:00 a.m. and 6:00 a.m., the airport's attorney proposed an ordinance placing a limit on the hours of operation.<sup>51</sup> When the FAA indicated that the proposed restriction would violate commitments under the city's Federal Aid to Airports grant, San Diego abandoned the curfew plan.<sup>52</sup>

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45. 272 F. Supp. at 231.

46. *Id.* at 231-32.

47. *Allegheny Airlines, Inc. v. Village of Cedarhurst*, 238 F.2d 812 (2d Cir. 1956).

48. *American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226 (E.D.N.Y. 1967).

49. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973).

50. *Id.* at 635-36 n.14, which reads in part:

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. . . . 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.

51. *Berger* 717.

52. *Id.* But see the position taken by the FAA in *In re Dreifus*, FAA Regulatory Docket No. 9071 (July 10, 1969), cited in *Berger* 718 n.355, in which the FAA apparently sought to avoid issuance of noise regulations for Santa Monica on the ground that it was up to the airport operator.



The Port Authority of New York, as operator of La Guardia Airport, appears at first glance to have fared somewhat better than its San Diego counterpart. In *Port of New York Authority v. Eastern Airlines, Inc.*,<sup>53</sup> plaintiff obtained an injunction barring use of two runways as a noise abatement measure, in spite of an FAA order making the runways available (albeit of last priority) in its scheme of preferential runways. A close analysis of the federal district court's opinion, however, reveals a hollow victory and potentially severe restrictions on the proprietor's power to regulate flights in order to control noise. Although granting the Port Authority's request, the court limited the injunction to such time as two new runways could be completed. The court also stated that, should wind conditions be adverse and the Port Authority unable to arrange landings at alternate airports nearby, use of those runways would be required.<sup>54</sup> The court mentioned that it was unnecessary to determine whether the FAA had the power to pre-empt decisions regarding runway preferences since the agency had not attempted to do so.<sup>55</sup>

After *Burbank*, it appears most likely that airport operators, regardless of their status, will be left with whatever marginal controls can be exercised through runway planning and utilization, and then only so long as such controls meet with FAA approval.<sup>56</sup> In light of the Supreme Court decision in *Griggs v. Allegheny County*,<sup>57</sup> placing the locus of liability for damage resulting from aircraft noise on the municipal airport operator rather than on either the federal government or the commercial airlines, the operator apparently bears the burden of compensating injured parties for the consequences of an activity over which the airport has little control.<sup>58</sup> Localities must now apparently look to the FAA for relief. Certainly the power to

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53. 259 F. Supp. 745 (E.D.N.Y. 1966). By Port Authority regulation, aircraft were temporarily prohibited from taking off on runway 22 and landing on runway four. The regulation coincided with an order of the FAA, however, issued on October 8, 1962, which provided an exception to the prohibition should a pilot decide the runway's use to be necessary in the interest of safety. *Id.* at 749.

54. *Id.* at 754.

55. *Id.* at 752.

56. REPORT ON NOISE 4-28.

57. 369 U.S. 84 (1962).

58. REPORT ON NOISE 4-25 to -28. *See also* *Griggs v. Allegheny County*, 369 U.S. 84, 91 (1962) (Black, J., dissenting).

act has been granted the FAA by the extensive legislative scheme.<sup>59</sup> Yet there is ample room for concern whether the FAA will prove willing to impose costly requirements upon a powerful industry.<sup>60</sup> The FAA has been criticized as being more a captive than a regulator of the airline industry, and it may be reluctant to exercise its authority to alleviate airport noise.<sup>61</sup>

Recent federal legislation establishes a mechanism that may push the FAA in the direction of more effective control of airport noise. The National Environmental Policy Act of 1969,<sup>62</sup> adopted in response to the critical need for a national approach to environmental problems, requires all federal agencies to commit themselves to careful examination of activities under their control in order to minimize adverse environmental impacts. To this end, the Act also created the Council on Environmental Quality to review and appraise federal programs.<sup>63</sup> The Noise Pollution and Abatement Act of 1970<sup>64</sup> established within EPA an office charged with investigation of the effects of noise on public health and welfare. By its terms, any federal

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59. See notes 23-25 and accompanying text *supra*. Several commentators have argued that only federal control can provide effective solutions to the aircraft noise problem; see, e.g., Hildebrand, *Noise Pollution: An Introduction to the Problem and an Outline for Future Legal Research*, 70 COLUM. L. REV. 652 (1970); Tondel, *Noise Litigation at Public Airports*, 32 J. AIR L. & COM. 387 (1966); Note, *Jet Noise in Airport Areas: A National Solution Required*, 51 MINN. L. REV. 1087 (1967).

60. Note, *Federal Regulation of Air Transportation and the Environmental Impact Problem*, 35 U. CHI. L. REV. 317, 338 (1968).

61. In the opinion of one expert, a substantially quieter jet engine is well within the state of the art but does not exist because there is no economic incentive for its development on the part of the airlines, and because no local unit of government has the power to require the production and use of quieter aircraft. Address by Fisher to the Society of Automotive Engineers, April 3-5, 1968, cited in Berger 710 n.321; S. REP. NO. 1353 at 5.

In support of this view, another commentator points out: "The principal forces which move private enterprise are profits and regulations. There are no profits in reducing noise and there are no regulations to control it." Letter from E. Thomas Burnard to Senator A. S. Monroney, June 25, 1968, reprinted in *Hearings on S. 707, H.R. 3400, Before the Subcomm. of the Senate Commerce Comm. on Transportation and Aeronautics*, 90th Cong., 2d Sess., 90-72, 81-86 (1968). But see 34 Fed. Reg. 453, 456 (1969); 35 Fed. Reg. 16980 (1970).

62. 42 U.S.C. §§ 4321-47 (1970). Section 4332(2)(c) orders all agencies of the federal government to "consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." See also Cohen & Sharon, *supra* note 1, at 159.

63. 42 U.S.C. §§ 4342, 4344 (1970).

64. *Id.* § 1858.

agency in control of a noise-producing activity determined objectionable by the agency's standards must discuss with the EPA Administrator possible means of abatement. In addition, the Noise Control Act of 1972<sup>65</sup> specifically requires the FAA, after consultation with the Secretary of Transportation and with EPA, to establish aircraft noise standards. The Act also requires that EPA submit to the FAA proposed regulations considered necessary for protection of the public.<sup>66</sup> These recent statutes clearly illustrate that excessive and unwanted noise is a serious environmental problem worthy of immediate and effective attention. Under all three Acts, the duty of the FAA to take action toward alleviating the jet aircraft noise problem has been established. More importantly, the FAA must now comply with standards imposed from without by those federal agencies whose primary concern is the quality of the environment.

*Burbank* severely limits the ability of airport proprietors, under pressure from disgruntled neighbors, to initiate any short-term, effective solutions to the noise problem. Local attempts to deal with noise problems have been struck down in favor of pre-emptive federal authority. Community opposition to much needed expansion of airport facilities may therefore be exacerbated by the lack of local power to assume any control over the resultant noise problem. Nevertheless, substantive procedures to deal with jet aircraft noise exist at the federal level. The FAA must develop affirmative plans to abate airport noise—plans that meet with the approval of federal agencies hopefully more responsive to the public interest. The *Burbank* Court correctly points out that a fragmental approach is inappropriate when dealing with the nationwide air traffic industry since safety and efficiency are critical concerns. It remains to be seen, however, whether relief for airport neighbors will be forthcoming from those federal agencies committed, at least statutorily, to finding a solution to the problem of airport noise pollution.

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65. 49 U.S.C. § 1431 (Supp. II, 1972), amending 49 U.S.C. § 1431 (1970).

66. *Id.* § 1431(c)(1), amending 49 U.S.C. § 1431 (1970).

