

1977

British Airways V. Port Authority: Its Impact on Aircraft Noise Regulation

Robert B. Donin

Recommended Citation

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

<https://scholar.smu.edu/jalc/vol43/iss4/4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

BRITISH AIRWAYS V. PORT AUTHORITY: ITS IMPACT ON AIRCRAFT NOISE REGULATION

ROBERT B. DONIN*

INTRODUCTION

On November 22, 1977, an Air France Concorde carrying a full complement of passengers and dignitaries touched down at John F. Kennedy International Airport, marking the first scheduled arrival by a civil supersonic transport to America's principal international gateway. Among the guests on board was M. Maurice Bellonte, age 81, who on September 1, 1930, had flown his Breuget airplane on the first non-stop flight from Paris to New York, a journey of 37 hours, 18 minutes.¹ This day's trip over the same route was to last only 3 hours, 30 minutes. And 90 seconds after the arrival of the Paris flight, a Concorde in British Airways livery set down behind it, opening the service to London.²

For many observers, the highly-publicized event proved anticlimactic. Preliminary route-proving flights had already appeared to confirm the claim of Concorde's supporters that the SST could operate within the noise limits long applied to subsonic airplanes by the Port Authority of New York and New Jersey, which administers Kennedy Airport—at least during the cooler months of the year and through the adroit selection of flight paths.

For Concorde's British and French developers, however, the inaugural passenger flight represented the successful culmination of

* B.A., Colgate University, 1971; J.D., University of Pennsylvania, 1974. Fulbright/Hays Scholar, 1977-78, University of London. The author served as an attorney in the Office of the General Counsel, U.S. Department of Transportation, during the time the litigation discussed in this paper was in progress. The author is solely responsible for the views contained herein.

¹ The first aviator to make the flight non-stop in the reverse direction, of course, was Charles A. Lindbergh who on May 21, 1927, completed the trip in 33 hours, 29½ minutes.

² Chronicled in *The Times* (London), Nov. 23, 1977, at 1.

a legal and political battle that had ranged over twenty months. Weeks earlier, the United States Supreme Court³ had declined to disturb the decision of the Court of Appeals for the Second Circuit in *British Airways Board v. Port Authority of New York and New Jersey*⁴ that the Port Authority's ban on Concorde flights to JFK was unreasonable, discriminatory, and therefore illegal. With New York's vast pool of transatlantic traffic now open to Concorde service, realistic efforts could begin to recoup the \$60 million spent by British Airways and Air France on each plane, and the \$3 billion invested by the British and French governments on research and development. Hence, it became a matter of conviction for the plane's backers that "as New York goes, so goes the Concorde." Ironically, airport-neighboring communities and environmental groups that fought Concorde's entry undoubtedly adhered to the same maxim, though with plainly contrary hopes as to the outcome.

As in all cases, however, more was at stake in *British Airways v. Port Authority* than the future of one historic and controversial airplane. Through the suit over Concorde landing rights at New York, the opposing parties would test established principles regarding aircraft noise regulation, and possibly shape new ones. It is for this reason that the case merits considerable attention. The purpose of this article is to examine the decisions generated by this dispute and assess their impact on the regime of aircraft noise regulation. I will first briefly sketch the development of the Concorde and the simultaneous growth of laws and regulations addressing environmental quality in general, and aircraft noise in particular. After describing the setting of domestic and international law in which the litigation took place—including the Secretary of Transportation's authorization of a sixteen month demonstration and

³ On October 17, 1977, Justice Marshall of the Supreme Court rejected a request by the Port Authority to maintain its Concorde ban until the court had an opportunity to review the lower court's decision. — U.S. —, 98 S.Ct. 291 (1977).

⁴ 564 F.2d 1002 (2d Cir. 1977). In addition to the Supreme Court order denying review, four decisions were rendered: the initial decision of the District Court, 431 F. Supp. 1216 (S.D.N.Y. 1977); the decision of the Court of Appeals reversing and remanding for an evidentiary hearing, 558 F.2d 75 (2d Cir. 1977); the decision of the District Court on remand, 437 F. Supp. 804 (S.D.N.Y. 1977); and the affirmation of that decision, as modified, by the Court of Appeals, 564 F.2d 1002 (2d Cir. 1977).

the Port Authority's adoption of a Concorde ban—I will present the decisions rendered by the district court and court of appeals. Finally, I will attempt to analyze how, if at all, these decisions have transformed the law governing the regulation of aircraft noise by federal, state and local entities.

THE DEVELOPING CONTROVERSY

In late summer 1975, British Airways and Air France initiated the formal process of introducing limited Concorde service from London and Paris to New York and Washington. No substantive action by the Civil Aeronautics Board (CAB) was required since the United States' bilateral air transport agreements with Britain and France provided for these services without any specific restriction as to type of aircraft;⁵ British Airways and Air France already held foreign air carrier permits issued by the CAB authorizing service on the routes.⁶ Before Concorde operations could begin on a scheduled, commercial basis, however, it was necessary for the carriers to secure amendment by the Federal Aviation Administration (FAA) of their respective "operations specifications."⁷ The so-called "op specs" are, quite literally, specifications about the flights to be undertaken: the type of aircraft to be flown, the airports to be served, and the routes and flight procedures to be followed.

Although approval of such amendments by the FAA in the past had been virtually automatic, the ecological issues raised by Concorde made it likely that this latest "op specs" decision could constitute a "major Federal action significantly affecting the quality of the human environment" under the National Environmental Policy Act of 1969 (NEPA).⁸ Accordingly, the FAA undertook preparation of an Environmental Impact Statement on the proposed

⁵ United States-Great Britain Air Transport Services Agreement (Bermuda I), 60 Stat. 1499, T.I.A.S. No. 1507 (1946); superseded during the course of the litigation by a replacement agreement (Bermuda II), — Stat. —, T.I.A.S. No. — (July 23, 1977); see Dep't of State Bulletin, Vol. LXXVII, No. 1990 (Aug. 15, 1977); United States-France Air Transport Services Agreement, 61 Stat. 3445, T.I.A.S. No. 1679 (1946).

⁶ See section 402, Federal Aviation Act of 1958, as amended; 49 U.S.C. § 1372 (1970).

⁷ See, 14 C.F.R. § 129 (1977).

⁸ 42 U.S.C. § 4321, 4332 (1970).

flights. The unusual importance of the environmental, technological, and international questions posed by the Concorde operators' requests, moreover, led then-Secretary of Transportation William T. Coleman, Jr. to announce that he would personally judge the application, notwithstanding that "op specs" were typically handled as routine matters by the FAA bureaucracy.

By this time, Concorde had already become the focus of a heated international debate. The Anglo-French Concorde Treaty of 1962 committed the two nations "to develop and produce jointly a civil supersonic transport aircraft."⁹ The formidable technological challenge posed to British Aircraft Corporation and Aerospatiale France by this terse declaration was the development of an aircraft with both the aerodynamic characteristics necessary for long-haul supersonic flight and the economic characteristics essential for profitable operations. In 1965 the joint manufacturers made the crucial selection of engines, thereby effectively "fixing" the design of the plane for the future. The aircraft that finally emerged is a comparatively small (by modern commercial standards) delta-wing plane powered by four Rolls-Royce (Bristol) SNECMA Olympus 593 engines, mounted in pairs in underwing nacelles and equipped with afterburners. Cruising at approximately 1,350 miles per hour (or twice the speed of sound), at an altitude of between 50,000 and 60,000 feet, it can carry up to 125 passengers over a range of approximately 4,000 miles.

Concorde's manufacturers appreciated the importance of noise abatement, if only out of self-interest. But they had little to show for the \$100 million invested in noise suppression efforts over the period of development. The difficulty lay in the limitations inherent in the design and powerplant of a supersonic transport. The noise generated by jet engines depends in large part on the velocity of jet exhaust. Because of the thrust necessary for takeoff and supersonic propulsion, Concorde's jet exhaust must have an extremely high velocity. Moreover, because of the slender shape compulsory in a plane of this type, it is particularly ill-suited to the high-bypass ratio turbofan engines used so successfully to quiet subsonic jets.¹⁰ In the context of the early sixties, Concorde's

⁹ British Command Papers, Cmnd. 1916; 453 U.N.T.S. 325.

¹⁰ Department of Transportation/Federal Aviation Administration, *Final Environmental Impact Statement on Concorde Supersonic Transport* (1975) IV-10

noise appeared to its developers as a disturbing distraction, but surely not one which either overshadowed the enormous benefits that would be wrought by supersonic flight, or threatened the viability of the project.

Even as the Concorde prototype took off on its first flight in 1969, however, the climate of public opinion regarding an aircraft of this type had begun to change dramatically. NEPA, enacted in 1969, committed the federal government to "create and maintain conditions under which man and nature can exist in productive harmony."¹¹ A year earlier Congress had, for the first time, ordered federal action "to afford present and future relief and protection to the public health and welfare from aircraft noise and sonic boom . . ." by adding section 611 to the Federal Aviation Act of 1958.¹² In the Noise Control Act of 1972 Congress declared that "it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health and welfare."¹³ The same legislation strengthened section 611 by transferring to the Environmental Protection Agency (EPA) the power to draft noise regulations for consideration by the FAA, and by prohibiting the FAA from issuing new type certificates for aircraft "for which substantial noise abatement can be achieved" unless noise emission standards for those aircraft are first in place.¹⁴ In performing its task, the FAA is to consider whether any proposed standard or regulation is "consistent with the highest degree of safety in air commerce"¹⁵ and whether it is "economically reasonable, technologically practicable, and appropriate for the particular type of aircraft, aircraft engine, appliance, or certificate to which it will apply."¹⁶

Using the power conferred by section 611, the FAA in 1969 pro-

[hereinafter cited as *Environmental Impact Statement*]. FAA recently stated that "there is no known technology which would reduce Concorde noise levels" 42 Fed. Reg. 55,176 (1977). A good summary of the problems associated with applying known aircraft noise suppression techniques to SSTs is found in Montgomery, *The Age of the Supersonic Jet Transport: Its Environmental and Legal Impact*, 36 J. AIR L. & COM. 577, 580-83 (1970).

¹¹ NEPA, Section 101; 42 U.S.C. § 4331 (1970).

¹² 49 U.S.C. § 1431 (1970).

¹³ 42 U.S.C. § 4901(b) (1970).

¹⁴ 49 U.S.C. § 1431(b)(2) (1970).

¹⁵ 49 U.S.C. § 1431(d)(3) (1970).

¹⁶ 49 U.S.C. § 1431(d)(4) (1970).

mulgated Part 36 of the Federal Aviation Regulations,¹⁷ requiring that newly type-certificated subsonic aircraft comply with prescribed standards for noise, as measured at certain points under the takeoff and landing paths and to the side of the runway. This requirement was later extended to apply to individual subsonic aircraft of a type certificated in 1969 but not manufactured before 1974—the extension having been made possible by the introduction of the new noise suppression technology for the current models of earlier generation aircraft. By a separate regulation adopted in 1973, flight by civil aircraft at supersonic speed over the United States—and the accompanying sonic boom—was outlawed.¹⁸

At the time British Airways and Air France applied for amendment of their operations specifications to permit Concorde service to New York and Washington, however, the FAA had not yet adopted either certification or operation regulations¹⁹ limiting the noise created by SSTs when flying at subsonic speeds.²⁰

In the international sphere, the International Civil Aviation Organization (ICAO) recognized the need for worldwide coordination of aircraft noise standards and, in 1971, adopted "Inter-

¹⁷ 14 C.F.R. § 36 (1977).

¹⁸ 14 C.F.R. § 91.55 (1977).

¹⁹ As noted, *supra*, text accompanying notes 17-18, a certification regulation generally establishes specified limits on engine noise as a precondition to issuance of a United States type or airworthiness certificate. An operational rule, by contrast, may apply to all aircraft, even if already certificated, or if flown in the United States pursuant to the certification of another nation. *See* Convention on International Civil Aviation (Chicago Convention), art. 33, 61 Stat. 1180, T.I.A.S. No. 1591 (1946) [hereinafter cited as Chicago Convention] and text accompanying notes 82-86, *infra*. In addition, an operational rule is generally aimed at mitigating aircraft noise through means other than the design of engines, such as curfews, the use of preferential runways, the use of special approach and departure procedures, or the exclusion of particular aircraft types from certain airports.

²⁰ The adoption of such regulations now appears imminent. On October 11, 1977, DOT and FAA issued a Notice of Proposed Rulemaking on SST noise. 42 Fed. Reg. 55,176 (1977). If adopted, the 16 Concorde completed or currently under construction would be permitted to operate at 13 United States airports, subject to a 10 p.m. - 7 a.m. curfew and to the prerogative of airport proprietors to limit SST operations "in a manner which is not unjustly discriminatory and not unduly burdensome on commerce." *Id.*, *see* text accompanying notes 107-18, *infra*. Any additional SST's would not be permitted to operate in the United States unless they met the same Part 36 noise emission criteria applied to subsonic jets. An announcement stated that the "allowance for aircraft already completed or presently under construction is consistent with the standard practice of excepting existing aircraft from proposed, prospective noise rules." Department of Transportation News Release, Sept. 23, 1977.

national Standards and Recommended Practices on Aircraft Noise" in Annex 16 to the Convention on International Civil Aviation, 1944 (Chicago Convention).²¹ Following the FAA's approach, Annex 16 mandated that, after January 6, 1972, all ICAO member States require compliance with specified noise standards—as measured at takeoff, landing, and sideline points—before issuing an airworthiness certificate to subsonic aircraft engaged in international air navigation.²²

Although the Annex 16 requirements have never been applicable to SSTs, a resolution by the ICAO Assembly as early as 1962 urged that countries developing civil supersonic aircraft ensure that those aircraft "not create a noise exceeding the level then accepted for the operation of subsonic jet aircraft."²³ In addition, Chapter 4 of Annex 16, entitled "Supersonic Aeroplanes" advises that

the provisions of Chapter 2 applicable to subsonic jet aeroplanes may be used as guidelines for supersonic aeroplanes for which the application for a certificate of airworthiness for the prototype was accepted or another equivalent prescribed procedure was carried out by the certifying authorities, on or after 1 January 1975.²⁴

Perhaps the most visible evidence of changing attitudes, however, was the vote by Congress in 1971 to cut off funds for the American supersonic transport being developed by the Boeing Company. Although critical Congressmen appeared primarily to be opposed to pouring public dollars into an essentially commercial venture, a number of legislators also pointed to the potential en-

²¹ See Chicago Convention, arts. 37 and 54, *supra* note 19. Annexes may be formulated with regard to a broad range of subject including those "concerned with the safety, regularity and efficiency of" aviation. *Id.*, art. 37(k).

²² Like the Part 36 standards established by the FAA pursuant to § 611 of the Federal Aviation Act, *see* notes 17-18, *supra*, the Annex 16 requirements have been amended over time to (1) require compliance by new production versions of aircraft already certificated at the time Annex 16 became applicable; and (2) apply more stringent emission standards to be newest types of aircraft being introduced.

²³ ICAO *Assembly Resolutions in Force* A14-7, Doc. 9,124 (1975). *See also* Resolution A16-4, adopted in 1968. *See generally*, Kalsi, *Aircraft Noise Abatement via Annex 16 of the Chicago Convention—A Viable Alternative*, 9 TEXAS INT. L. J. 1 (1974).

²⁴ Applications to the British, French, and United States aviation authorities for certificates of airworthiness for the current model Concorde were accepted prior to this date.

vironmental risks posed by an American SST.²⁵ The wide-body B-747, DC-10, and L-1011 planes which came into service instead—equipped with high bypass-ratio turbofan engines—were the cleanest and quietest large commercial aircraft manufactured to date.

To many observers, Concorde boldly cut against this grain of progress. "[W]hat nobody noticed because no one was responsible for looking at it," acknowledged Anthony Wedgwood Benn, the former British Minister of Technology, "was that at the time the aircraft was born, speed was everything and by the time it has been produced, the environment is everything."²⁶ A number of environmentalists argued that Concorde operations would cause an increase in skin cancer by emitting nitrogen exhaust, reducing the concentration of ozone in the stratosphere, and permitting more ultraviolet radiation to reach the earth's surface.²⁷ Others condemned Concorde for its thirsty consumption of scarce fuel resources.²⁸ By far the greatest source of criticism, however, was Concorde's noise. While there was no danger of Americans being rocked by supersonic booms (supersonic flight over the United States being prohibited),²⁹ Concorde was perceived as noisier than existing aircraft when flying at subsonic speeds. This aspect of Concorde's performance is so central to the overall controversy surrounding the aircraft that it merits a substantial digression at this point.

²⁵ See, J. COSTELLO and T. HUGHES, CONCORDE: THE INTERNATIONAL RACE FOR A SUPERSONIC PASSENGER TRANSPORT 166-190 (1975); A. WILSON, THE CONCORDE FIASCO 75-85 (1973); *Critical Vote Nears for SST Funding*, AV. WEEK & SPACE TECH., March 15, 1971, at 26-28.

²⁶ G. KNIGHT, CONCORDE: THE INSIDE STORY 137 (1976).

²⁷ This theory was described in the Concorde Environmental Impact Statement, *supra* note 10, at VI-107-187 and evaluated by the Secretary of Transportation in his *Decision on Concorde Supersonic Transport*, February 4, 1976, at 36-41 [hereinafter cited as *Secretary's Decision*]. It is summarized by the author in an earlier article regarding Concorde, *Safety Regulation of the Concorde Supersonic Transport: Realistic Confinement of the National Environmental Policy Act*, 8 TRANS. L. J. 47, 52 (1976).

²⁸ Concorde consumes 20,857 gallons of fuel to carry 110 passengers over 3,000 nautical miles. By comparison, the Boeing 747 uses 24,285 gallons of fuel to carry 375 passengers over the same distance. See, *Secretary's Decision*, *supra* note 27, at 29.

²⁹ 14 C.F.R. § 91.55 (1977). In retrospect, it is intriguing to note that, prior to the promulgation of this regulation, commentators focused their concern almost entirely on the effect of sonic booms. See, e.g., Kline, *The SST and Inverse*

1. Concorde Noise

Scientists and psychologists have developed several "descriptors" for measuring aircraft noise. The simplest method, of course, is to measure the noise emitted by a single aircraft flying overhead in terms of the widely-known scale of decibels (db), which measures pressure on the ear. To more accurately represent a sound in terms of human annoyance it creates, however, one must describe sound not only in terms of intensity but also in terms of duration, pitch, and frequency. Hence, descriptors such as the PNdB unit (perceived noise in decibels) and the EPNdB Unit (effective perceived noise in decibels) have been developed to reflect the added irritation generally caused by lengthy duration or high frequency. Using any one of these standards, the relative noisiness of different aircraft at a given measuring point may be gauged. (One must, of course, remember that the noise measurement recorded reflects not only inherent characteristics of the aircraft design and engines but also the rate of climb, flight path, and engine thrust setting employed during any particular overflight.)

Using the EPNdB standard, the Environmental Impact Statement prepared for the Secretary of Transportation's decision compared Concorde to several subsonic transport category aircraft at the standard measuring points used in the FAA's Part 36 noise regulations.³⁰ Although Concorde proved slightly quieter than a B-707 on landing, it was approximately half-again as loud as a B-707 and more than twice as loud as a B-747 on takeoff.³¹

Condemnation, 15 VILL. L. REV. 887 (1970); Baxter, *The SST: From Watts to Harlem in Two Hours*, 21 STAN. L. REV. 1 (1968).

³⁰ See text accompanying notes 17-18.

³¹ The *Environmental Impact Statement*, *supra* note 10, VI-7-8 compared Concorde's noise levels in EPNdB to those of large subsonic transports at the Part 36 measuring points.

	Concorde	B-707-300	DC-8-61	B-747-200	DC-10-30
Takeoff	119.5	113	116	107	104
Sideline	112.0	102	103	98	97
Approach	116.5	118	117	106	108

A 10 decibel increase in sound level is considered a doubling of the perceived loudness or noisiness of a sound. *Id.*, VI-39.

Following are some typical EPNdB levels encountered in daily life:

busy restaurant	78
home vacuum cleaner at 10 feet	82
heavy city traffic	105
home lawn mower	111
air hammer	120

Id., VI-46-47.

Moreover, it was not merely the level of Concorde's noise which caused objections. A given decibel level emitted by one aircraft may extend out over a much broader geographical area—and envelop many more people—than the same level of noise emitted by another aircraft. To measure this dimension of aircraft noise impact, experts have developed the so-called "single event noise contour" or "noise footprint." Under this system, monitors plot the geographical radius of various PNdB or EPNdB levels as a result of a takeoff or landing by a particular aircraft. On this basis, Concorde was, to use the jargon, a 'large noise contour' aircraft. On takeoff, for example, Concorde subjected 47.6 square miles of land to noise levels of at least 100 EPNdB, as compared with 7.49 square miles for the B-707 and 2.91 square miles for the B-747.³²

In addition to these techniques for measuring the noise generated by a single flight, experts have developed means of measuring the cumulative noise generated at given points around an airport during a twenty-four hour period. One such descriptor of cumulative noise is the Noise Exposure Forecast (NEF), which is also corrected for particularly irritating sounds such as high-pitched jet whine or late-evening flights. As with the single event noise measures, the cumulative noise measurements at various geographical points may be linked to form contours. In general, areas within the NEF 30 contour are thought to be moderately noise-impacted; areas within the NEF 40 contour are thought to be seriously noise-impacted; and areas within contours greater than NEF 40 are thought to suffer unacceptably high levels of noise.³³ By observing the enlargement of high NEF contours caused by the introduction of operations by a given aircraft, one may describe the annoyance specifically attributable to those flights over and above the noise already suffered at the airport in question. Forecasts in the Environmental Impact Statement projected that while Concorde operations at Dulles Airport would not significantly increase the number of people within either the NEF 30 or NEF 40 contours,

³² *Environmental Impact Statement*, *supra* note 10, VI-9-10; VI-15-16; VI-18.

³³ *Environmental Impact Statement*, *supra* note 10, VI-64. See also *FAA Certification of the SST Concorde: Hearings Before the Government Activities and Transportation Subcommittee of the House Committee on Government Operations*, 94th Cong., 1st & 2d Sess. 345 (1975-1976) (statement of John E. Wesler).

Concorde flights to Kennedy Airport would add 2,000 people to each zone.³⁴

Finally, analysis indicated that the noise emitted by Concorde's engines also contained a greater proportion of low frequency sound which could induce vibration in homes and other buildings located near airports, as well as their contents. The Environmental Impact Statement found:

The low frequency noise content of the Concorde is likely to induce or produce some vibrations given the volume of low frequency energy and the lesser attenuation of low frequency energy. This in turn is likely to induce, during the time of a Concorde takeoff—approximately 30 seconds—some household rattle of dishes, pictures, lamps and other bric-a-brac being disturbed (especially objects in contact with walls). This in turn could produce secondary sources of noise which may disturb people because of the psychological influence of private possessions being disturbed.³⁵

2. *The Coleman Decision and the Port Authority's Response*

On February 4, 1976, the Secretary of Transportation issued a sixty-one page decision approving the amendment of the operations specifications of British Airways and Air France to allow four Concorde flights per day to Kennedy Airport and two flights per day to Dulles Airport, but only for an experimental sixteen month period and subject to a curfew, as well as other operating limitations.³⁶

In his decision, later described by the Court of Appeals for the

³⁴ *Environmental Impact Statement*, *supra* note 10, VI-154.

³⁵ *Environmental Impact Statement*, *supra* note 10, VI-97.

³⁶ *Secretary's Decision*, *supra* note 27, at 3. The conditions under which the demonstration flights must be carried out include:

1. No flight may be scheduled for landing or take-off in the United States before 7 A.M. local time or after 10 P.M. local time.
* * *
3. Authorization of any commercial flights in addition to those specifically permitted by this action shall constitute a new major federal action within the terms of NEPA and therefore require a new Environmental Impact Statement.
* * *
5. The FAA is authorized to impose such additional noise abatement procedures as are safe, technologically feasible, economically justified, and necessary to minimize the noise impact, including, but not limited to, the thrust cut-back on departure.

Second Circuit as "the very paragon of a clear and considered administrative action,"³⁷ Coleman conducted a detailed review of the probable environmental effects of Concorde flights, as well as the implications an absolute rejection of Concorde would have for future technological development and United States relations with Great Britain and France. With respect to the issue of Concorde's low frequency sound, he found that overflight would cause brief and "barely perceptible" vibration of walls and floors but that these vibrations "do not present any danger of structural damage and little possibility of annoyance."³⁸ Furthermore, none of the available descriptors, Coleman concluded, adequately reflected the subjective nature of aircraft noise or dictated a decision.

The noise analysis is quite complete, yet it gives me no clear direction. The cumulative noise descriptor shows that the increase in the number of people who live in the NEF 30 area at JFK would constitute substantially less than one per cent of those currently exposed to NEF 30. At the same time, the cumulative noise figures show that hundreds of thousands of people would find that they lived in a somewhat noisier environment.

* * *

Perhaps even more significantly, the noise data provide me with only a descriptive and statistical view of the noise impact. Noise is not an objective experience; people do not agree on how objectionable a given sound may be.

* * *

The EIS indicates to me that the marginal impact of six additional flights would be small. Given the subjective nature of human response to noise, however, I must conclude that if any flights at all are justified—that is, if there is sufficient affirmative reason for permitting Concorde flights that we are willing to suffer some environmental effect—those flights should be authorized only on a temporary basis, in order to permit a more intelligent and responsible decision to be made at some point in the future, after we have collected information on the subjective response to Concorde during actual operations.³⁹

Since Dulles Airport, located in Virginia, is owned by the federal government and operated by the FAA, Coleman's decision cleared the way for the sixteen month Concorde demonstration

³⁷ 558 F.2d 75, 80 (2d Cir. 1977).

³⁸ *Secretary's Decision*, *supra* note 27, at 43.

³⁹ *Secretary's Decision*, *supra* note 27, 48-50.

to begin there.⁴⁰ In New York, the Secretary recognized, the situation was less clear. As he observed in a footnote:

The FAA is the proprietor of Dulles and it is therefore part of my decision today to direct the Federal Aviation Administrator to permit one Concorde flight per day at Dulles by each carrier under the conditions noted. The situation with respect to JFK may be complicated by the fact that under federal policy that has hitherto prevailed a local airport proprietor has had authority under certain circumstances to refuse landing rights. If for any legitimate and legally binding reason it should turn out that the JFK part of the demonstration could not go forward—and no one has indicated to me any such final disposition by JFK's proprietor—that would obviously be extremely unfortunate and would greatly diminish, but in my opinion it would not destroy, the validity of the demonstration.⁴¹

To date, the Port Authority had adopted two aircraft noise abatement regulations. The first, adopted in 1951 and still in force, prohibits any jet from landing or taking off without the Port Authority's permission. Although employed to ban airplanes on several early occasions, this rule was overshadowed, as a practical matter, by a 1958 regulation setting 112 PNdB as the maximum permissible noise level of aircraft on takeoff, as measured by noise monitors installed at selected points in communities around the airport. The designation of 112 PNdB was not based upon any psychological evaluation of what noise level is tolerable, but rather upon the noise level produced by the DC-6B piston airplane. Hence, the 112 PNdB rule was designed essentially to prevent further deterioration of the existing noisy environment by the introduction of jets.⁴²

These remained the only noise regulations administered by the Port Authority until, on March 11, 1976, approximately one month after the Secretary of Transportation's decision giving fed-

⁴⁰ Concorde flights to Dulles Airport did, in fact, begin on May 24, 1976, after a number of plaintiffs unsuccessfully challenged the Secretary of Transportation's decision on a variety of grounds. *Environmental Defense Fund et al. v. Department of Transportation*, No. 76-1105 (D.C. Cir., May 19, 1976). This litigation was described in an earlier article by the author cited, *supra*, note 27.

⁴¹ *Secretary's Decision*, *supra* note 27, n.3.

⁴² The bi-state agency's efforts to deal with the aircraft noise problem are recounted by counsel for the Port Authority in Lesser, *The Aircraft Noise Problem: Federal Power but Local Liability*, 3 *URBAN LAWYER* 175, 198 (1971).

eral approval, the Port Authority adopted a resolution banning supersonic aircraft from Kennedy Airport "until after at least six months of operating experience (at Dulles, Heathrow, and De-Gaulle Airports) has been evaluated, after a report on such experience has been made to the Board, and pending further action thereon by the Board."

One week later, British Airways and Air France filed suit in the District Court for the Southern District of New York to have the Port Authority's Concorde ban declared invalid.

THE LEGAL BACKGROUND

In its principal counts, the complaint of the British and French airlines seeking landing rights for Concorde at Kennedy Airport appeared to ply familiar—if nonetheless murky—waters in aviation noise litigation by invoking the doctrine of federal supremacy. Specifically, the carriers alleged that the Port Authority ban (1) invaded an area preempted by the federal government for its exclusive control; (2) conflicted with, and frustrated, the valid exercise of regulatory authority by the federal government; and (3) unduly burdened foreign commerce. In addition, they advanced the more novel argument that the ban was invalid in that it (4) violated treaties and international agreements made by the United States with the British and French governments; and (5) interfered with the federal government's conduct of foreign relations.

Constitutional law has witnessed the formulation of several doctrines that refine the general directives of the Supremacy⁴³ and Commerce⁴⁴ Clauses. In examining the issues in *British Airways v. Port Authority*, however, it is well to distinguish three principal doctrines so derived: "conflict"; "preemption"; and "burden on commerce."⁴⁵

⁴³ U.S. Const. art. VI, cl. 2.

⁴⁴ U.S. Const. art. I, § 8, cl. 3.

⁴⁵ Lest these categories take on lives of their own, it is worthwhile recalling Justice Black's observation in *Hines v. Davidowitz*, 312 U.S. 52, 67-68 (1941):

This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one cry-

"Conflict" may be said to arise when a state or local measure directly contradicts a federal law or regulatory action; in any such case the State or local measure may not validly be enforced.⁴⁶ "Preemption," by contrast, arises when a state or local measure, though not in direct contradiction of federal law, invades a field reserved by Congress for exclusive federal supervision.⁴⁷ In *Rice v. Santa Fe Elevator Corp.*, Justice Douglas described the hallmarks of preemptive Congressional intent.

The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . Or the state policy may produce a result inconsistent with the objective of the federal statute.⁴⁸

The power of Congress "to regulate Commerce . . . among the several states" places a separate but closely related constraint on the power of states and localities. In general, a state or local law or regulation will pass Commerce Clause scrutiny only if it is rationally related to a legitimate state interest and the burden it imposes on interstate commerce is outweighed by the state purpose involved.⁴⁹

Separately and in combination, "preemption," "conflict," and "burden on commerce" have been invoked by litigants to strike down a wide variety of state and local regulations. In the aviation context, however, the doctrines have had a sui generis development.

stal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

⁴⁶ See, e.g., *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Perez v. Campbell*, 402 U.S. 637, 649 (1971); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 141 (1963).

⁴⁷ See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 229-30 (1947); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605, 612-13 (1926); *Pennsylvania v. Nelson*, 350 U.S. 497, 504-05 (1956).

⁴⁸ 331 U.S. 218, 230 (1947).

⁴⁹ See, e.g., *Pike v. Bruce Church Inc.*, 397 U.S. 137, 142 (1970); *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 524 (1959). Compare, *S.C. Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938).

To fully understand this one must first understand the law assigning liability for aircraft noise damages, as well as the evolving character of federal regulation.⁵⁰

In *Griggs v. Allegheny County*,⁵¹ the Supreme Court held that the county as owner-operator of Pittsburgh Airport was the "taker" of an aircraft noise easement and the entity required by the Fourteenth Amendment to pay compensation.⁵² The Court specifically rejected the contention that the federal government, rather than the county, should be held liable because of its promotion of national airport development—including the approval and funding of airport development plans—and its regulation of the national airspace system.⁵³

⁵⁰ See, generally, A. LOWENFELD, *AVIATION LAW: CASES AND MATERIALS*, Chap. V (1972); Vittek, *Airport Noise Control—Can Communities Live Without It? Can Airlines Live With It?*, 38 J. AIR L. & COM. 473, 496-502 (1972).

⁵¹ 369 U.S. 84 (1962).

⁵² The principle that overflight could result in a compensable taking within the meaning of the Fifth Amendment had been accepted by the Supreme Court many years earlier in *United States v. Causby*, 328 U.S. 256 (1946), a case involving operations by army and navy aircraft over a commercial chicken farm to an airfield leased by the United States. While approving a taking theory, *Causby* sounded the death knell for noise suits based on a trespass theory, observing that the ancient maxim *cujus est solum ejus est usque ad coelum* (he who owns the land, it is his up to the heavens) has no place in the modern world. 328 U.S. at 261. See § 104 of the Federal Aviation Act, 49 U.S.C. § 1304 (1970), which provides that there is "recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."

⁵³ Justice Douglas, for the Court majority, observed:

It is argued that though there was a "taking," someone other than respondent was the taker—the airlines or the C.A.A. [i.e., the Civil Aviation Authority, predecessor of the FAA] acting as an authorized representative of the United States. We think, however, that respondent, which was the promoter, owner, and lessor of the airport, was in these circumstances the one who took the air easement in the constitutional sense. Respondent decided, subject to the approval of the C.A.A., where the airport would be built, what runways it would need, their direction and length, and what land and navigation easements would be needed. The Federal Government takes nothing; it is the local authority which decides to build an airport *vel non*, and where it is to be located. We see no difference between its responsibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built.

369 U.S. at 89.

Justice Black, joined by Justice Frankfurter, dissented, citing the extensive involvement of the federal government in airport development and placing particular emphasis on § 1108 of the Federal Aviation Act, 49 U.S.C. § 1508 (1970),

Although they must bear the brunt of financial responsibility under *Griggs*, the ability of airport operators to take defensive measures was thrown seriously into doubt by a series of cases which suggested that federal authority in the field was exclusive. In *Allegheny Airlines v. Village of Cedarhurst*⁵⁴ the Second Circuit Court of Appeals struck down a village ordinance prohibiting overflights at an altitude of less than 1,000 feet on the ground that the federal government had preempted the field of air traffic regulation pursuant to the Commerce Clause and that the village ordinance conflicted with federal statutes and regulations. Employing similar reasoning, the same court in *American Airlines, Inc. v. Town of Hempstead*⁵⁵ held invalid a town ordinance forbidding the operation of aircraft which created a noise within the town exceeding specified limits. The crux of the court's holding was that Hempstead's ordinance, no less than Cedarhurst's, invaded the federal domain of air traffic control since "some noise ordinances necessarily regulate flight paths."⁵⁶

Since the regulations at issue in *Cedarhurst* and *Hempstead* had a direct impact on air traffic control—a critical safety function which, by its very nature, must be the exclusive preserve of the FAA—the court in these two cases was able to identify a conflict with Federal law and, in the case of *Cedarhurst* only, a narrow form of preemption limited to airspace management.⁵⁷ Neither

which declares that the United States possesses "complete and exclusive national sovereignty in the airspace of the United States." 369 U.S. at 90-93.

⁵⁴ 238 F.2d 812 (2d Cir. 1956).

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

⁵⁶ *Id.*, at 376.

⁵⁷ See also *American Airlines, Inc. v. City of Audubon Park, Ky.*, 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir. 1969), *cert. denied*, 393 U.S. 845 (1969), holding invalid an ordinance similar to that involved in *Cedarhurst* on grounds, *inter alia*, that Congress has preempted the field of air traffic control. *Id.*, at 212.

An earlier case, *Loma Portal Civic Club v. American Airlines, Inc.*, 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708 (1964), had stated in dictum that Congress did not intend to preempt even the field of airspace management and that state action affecting flight operations is not precluded, provided it does not conflict with federal regulation. Since airspace management is the quintessential example of a field which admits "only of one uniform system, or plan of regulation," *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), it is not surprising that the view expressed in *Loma Portal* did not gain acceptance. Both the Supreme Court in *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 627 (1973) and the Second Circuit in the principal case considered in this paper, *British Airways v. Port Authority*, 558 F.2d 75, 83 (2d Cir. 1977), clearly as-

court, however, needed to decide whether a broader preemption ousted state and local authorities totally from the field of aircraft noise regulation, even where there was no impact on safety. Equally important, as would be seen in later cases, was the fact that in both *Cedarhurst* and *Hempstead* the regulations successfully attacked had been promulgated by a town or village situated near the airport, rather than the proprietor of the airport itself.

By the time the issue received Supreme Court attention in *City of Burbank v. Lockheed Air Terminal*,⁵⁸ federal authority to regulate the flight of aircraft had been supplemented by a federal commitment to reduce aircraft noise, in the form of section 611 of the Federal Aviation Act.⁵⁹ Pursuant to the statute, enacted in 1968 and amended by the Noise Control Act of 1972, the FAA had already prescribed maximum noise emission levels for new transport category aircraft. While referring to possible conflicts with federal air traffic control,⁶⁰ the Court in *Burbank* explicitly identified preemption as the basis for holding invalid a city ordinance that prohibited jet takeoffs between 11 p.m. and 7 a.m. from the privately owned Hollywood-Burbank Airport. Speaking through Justice Douglas, the Court held: "It is the pervasive nature of the scheme of federal regulation of aircraft noise that leads us to conclude that there is pre-emption."⁶¹ The Court further stated:

Control of noise is of course deep seated in the police power of the States. Yet the 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. . . . The procedures under the 1972 Act are under way. In addition, the Administrator has imposed a

sumed that all units of state and local government, whether acting as airport proprietor or exercising police power, are preempted from this field. *But see* Port of New York Authority v. Eastern Air Lines, Inc., 259 F. Supp. 745 (E.D.N.Y. 1966) (proprietary scheme prohibiting the operation of jets on noise-sensitive runways held not preempted by federal authority over airspace management).

⁵⁸ 411 U.S. 624 (1973).

⁵⁹ 49 U.S.C. § 1431 (1970).

⁶⁰ 411 U.S. at 627.

⁶¹ *Id.*, at 633. Four Justices, led by Justice Rehnquist, dissented, contending that under § 611 and other provisions of the Federal Aviation Act Congress intended only to preempt lesser authorities from regulating flight operations and the reduction of noise at the source (i.e., the design and manufacture of aircraft and aircraft engines), while expressly leaving other noise abatement techniques available to local jurisdictions. 411 U.S. at 640-54.

variety of regulations relating to takeoff and landing procedures and runway preferences. The Federal Aviation Act requires a delicate balance between safety and efficiency, . . . and the protection of persons on the ground. . . . Any regulations adopted by the Administrator to control noise pollution must be consistent with the "highest degree of safety." . . . The interdependence of these factors requires a uniform and exclusive system of federal regulations if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.

If we were to uphold the Burbank ordinance and a significant number of municipalities followed suit, it is obvious that fractionalized control of the timing of take-offs and landings would severely limit the flexibility of the FAA in controlling air traffic flow. The difficulties of scheduling flights to avoid congestion and the concomitant decrease in safety would be compounded.⁶²

Yet at the same time that it found compelling reasons against "letting the States and municipalities in on the planning"⁶³ of noise abatement procedures through techniques such as curfews, the Court left open the possibility that the identical antinoise techniques, when imposed by the airport owner-operator, could survive constitutional attack. A crucial footnote, reviewing the legislative history of section 611, noted:

The letter from the Secretary of Transportation [to the Senate Commerce Committee] 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. [S. Rep. No. 1353, 90th Cong., 2d Sess. 6]

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

⁶² *Id.* at 638-39.

⁶³ *Id.* at 640.

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.⁶⁴

This qualification to the Court's otherwise sweeping language finding preemption raised several perplexing questions. The first grew out of the fact that, as the Court acknowledged, Hollywood-Burbank Airport was one of the only commercial airports in the country under private ownership. If, as in so many other cases, airports were owned and operated by the municipality in which they were situated, what reality lay in the distinction between "proprietary power" and "police power?" If the proprietary authority suggested by the Court were, indeed, established in a subsequent case, the exception to *Burbank's* finding of preemption would envelop the rule; as a practical matter, federal preemption would remain viable only in the rare instances where municipalities sought to regulate noise from privately owned airports or airports in another jurisdiction.⁶⁵ No less troubling was the fact that the underpinnings of the *Burbank* decision itself—the need for centralized control of air traffic flow, the pervasive nature of the scheme of federal regulation of aircraft noise, and the FAA's role in ensuring that efficiency and safety are not sacrificed in the effort to achieve noise abatement—apply just as forcibly to proprietary as to non-proprietary restrictions.

The Supreme Court in *Burbank* had been able fortuitously to sidestep the conflict between persuasive policy considerations favoring exclusive federal power, on the one hand, and apparent Congressional intent to leave a measure of authority to airport proprietors, on the other. But in *National Aviation v. City of Hayward*, Judge Peckham found himself squarely "caught on the

⁶⁴ *Id.* at 635-36, n.14 (emphasis supplied). The intent not to preempt was reaffirmed by Congress when it strengthened § 611 in the Noise Control Act of 1972. See S. Rep. No. 92-1160, 92d Cong., 2d Sess. 10-11 (1972); H.R. Rep. No. 92-842, 92d Cong., 2d Sess. 10 (1972).

⁶⁵ In dissent, Justice Rehnquist observed: "It simply strains credulity to believe that the Secretary, the Senate Committee, or Congress intended that all airports except the Hollywood-Burbank Airport could enact curfews." 411 U.S. at 652.

horns of [this] particularly sharp dilemma.”⁶⁶ At issue was an ordinance enacted by the City of Hayward, California, but adopted by the city in its capacity as proprietor of Hayward Air Terminal. The measure prohibited all aircraft which exceed a noise level of 75 dBA⁶⁷ from landing at or taking off from the field between 11 p.m. and 7 a.m. Plaintiffs argued that the Hayward ordinance invaded a field preempted by federal law and, in addition, that it imposed an unconstitutional burden on interstate commerce. With regard to the first claim, the court reviewed the statements contained in the legislative history of section 611 expressing the intent not to preempt proprietor controls, as well as the preface to Part 36 of the Federal Aviation Regulations in which the FAA declares that “[r]esponsibility for determining the permissible noise levels for aircraft using an airport remains with the proprietor of that airport.”⁶⁸ Judge Peckham reasoned:

If on one hand, we follow the dicta in footnote 14 of the *Burbank* opinion, which is intended to comport with the court’s holding in

⁶⁶ 418 F. Supp. 417, 424 (N.D. Cal. 1976). Previously, in *Air Transport Association of America v. Crotti*, 389 F. Supp. 58 (N.D. Cal. 1975), a three-judge court held that a California statute requiring that airport operators develop and implement measures to achieve a specified level of noise reduction was not per se invalid. The court stated:

It is now firmly established that the airport proprietor is responsible for the consequences which attend his operation of a public airport; his right to control the use of the airport is a necessary concomitant, whether it be directed by state police power or his own initiative [footnotes omitted].

389 F. Supp. at 63-64. No specific regulation was under review, however.

In another case decided after the enactment of § 611 of the Federal Aviation Act but before *Burbank*, the Supreme Court of Massachusetts concluded in an advisory opinion that a proposed state statute denying the use of airports located within the state to SST’s would be invalid. The decision anticipated *Hayward* by assuming, based on the legislative history of § 611, that airport proprietors could continue to exercise noise control powers, and striking down the proposed statute on the grounds that it “is not framed in terms of a State or local public agency acting as an airport proprietor and operator” and thus “exceeds any area which may still be left subject to State regulation.” Opinion of the Justices, 359 Mass. 778, 271 N.E.2d 354, 358 (1971). The opinion, however, went on to observe that even if the bill were framed in terms of proprietary authority, there would still be “serious doubt” about its constitutionality because the FAA had recently published a notice of proposed rulemaking on SST noise. The precise legal effect of this regulatory act was not spelled out, although the court noted that it might “conflict” with the proposed Massachusetts law. *Id.*

⁶⁷ “A-weighted” decibels, another noise descriptor.

⁶⁸ 34 Fed. Reg. 18,355. See also 14 C.F.R. § 36.5A (1977) (“No determination is made, under this part, that these noise levels are or should be acceptable or unacceptable for operation at, into, or out of, any airport.”).

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. This is, of course, exactly what the Senate Commerce Committee indicated that the 1972 amendment to section 611 of the Federal Aviation Act was *not* intended to do. See Senate Report No. 1353, 90th Cong., 2d Sess. pp. 6-7.

In the opinion of this court, it is ultimately this clear expression of legislative intent which must control our decision. . . .⁶⁹

With regard to the Commerce Clause argument, the court found, on the facts presented, that the burden imposed on plaintiffs' commercial operations was "incidental at best and clearly not excessive" in view of the city's legitimate goal of noise abatement.⁷⁰

In resolving the issue of proprietor power left unanswered in *Burbank*, however, the decision in *Hayward* spawned its own new questions. What limits, if any, would remain on the prerogative of airport operators to regulate aircraft noise? Presumably, the prohibition on interference with federal airspace management—applied in relation to non-proprietors in *Hempstead* and *Cedarhurst*—would also be a check on proprietors because of the catastrophic events which could follow from the absence of centralized air traffic control. Less clear was the fate of proprietor-imposed curfews. In *Burbank*, Justice Douglas had observed that such ordinances, if imposed at airports across the country, could have the deleterious effect of "bunching" flights around the time of the curfew.⁷¹ Although the noise reduction technique approved in *Hayward* itself was a curfew, it applied only to aircraft exceeding a noise level of 75 dBA and on the particular facts of the case was shown to affect very few commercial operations. Given a different pattern of operations, a somewhat more restrictive curfew, or a complete ban on certain types of noisy aircraft, might the same court have dismissed the preemption count but invalidated the measure as an undue burden on commerce? Less severe regulations,

⁶⁹ 418 F. Supp. at 424.

⁷⁰ *Id.* at 427.

⁷¹ 411 U.S. at 627-28.

such as a limitation on engine "run ups"⁷² or a requirement that aircraft be towed to runway takeoff positions, were presumably safe from attack on this ground.

In addition to these remaining constitutional checks, however, lay the conditions for the exercise of proprietary powers laid down by Congress itself. The legislative history of section 611 of the Federal Aviation Act conveyed Congress' intention to abstain from preempting airport operators, but also suggested that this abstention was conditional. In reporting favorably on the 1968 Act the Senate Commerce Committee had quoted with approval a letter from former-Secretary of Transportation Alan S. Boyd observing that "[a]irport 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*."⁷³ This qualification was implicitly reaffirmed by Congress in amending section 611 in the Noise Control Act of 1972, through statements by the relevant committees that the new act was not intended to alter the pre-existing apportionment of powers.⁷⁴

Finally, notwithstanding the residue of proprietary control seemingly mandated by Congress, none of the previous cases, including *Hayward*, had directly involved international aviation. Were international flights affected, questions might still arise as to the vitality of proprietary restrictions in light of the United States' obligations under the system of multilateral and bilateral aviation agreements. While the Chicago Convention⁷⁵ establishes the framework for international safety regulation and the reciprocal recognition by nations of standards of airworthiness and competence, it does not establish operating rights for scheduled services between nations.⁷⁶ Rather, the exchange of traffic rights is negotiated between nations and incorporated into bilateral agreements which generally go on to set out broad provisions with regard to fares, capacity, and other conditions of operation.⁷⁷ Although the practice

⁷² The ground testing of aircraft engines at full power after maintenance.

⁷³ S. Rep. No. 1353, 90th Cong., 2d Sess. 7 (1968) (emphasis added).

⁷⁴ H.R. Rep. No. 92-842, 92d Cong., 2d Sess. 10 (1972); S. Rep. No. 92-1160, 92d Cong., 2d Sess. 10-11 (1972).

⁷⁵ *Supra* note 19.

⁷⁶ *Id.* art. 6.

⁷⁷ See generally, B. CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 25,

of including specific terms regarding aircraft noise is not unprecedented,⁷⁸ it is highly unusual. Consistent with the general pattern, the bilateral air transport agreement between the United States and France⁷⁹ (which is virtually identical in relevant respects to the United States bilateral agreement with Great Britain,⁸⁰ as well as the United States standard form bilateral agreement⁸¹) does not refer either to environmental regulation or to the type of aircraft that may be used. Article II(b), however, states:

The designated air carrier or carriers may be required to satisfy the aeronautical authorities of the Contracting Party granting the rights that it or they is or are qualified to fulfill the conditions prescribed by or under the laws and regulations normally applied by those authorities to the operations of commercial air carriers.⁸²

It is this provision, among others, to which the Secretary of Transportation pointed as the legal justification for applying NEPA to the carriers' applications for amended operations specifications.⁸³ But may proprietary regulations, too, be sanctioned under this article? Probably not, in view of the definition of "aeronautical authorities" in Article IX: with respect to the United States the term includes only federal aviation authorities, and not local airport operators.⁸⁴

289-356, 411-53 (1962); Lissitzyn, *Bilateral Agreements on Air Transport*, 30 J. AIR L. & COM. 248 (1965).

⁷⁸ The 1957 air transport agreement between Britain and the Soviet Union provided in the Annex, Paragraph 18, that noise measurements would be carried out and that the designated airlines would "carry out any modifications" including the use of engine mufflers or special operating procedures "to reduce aircraft noise to an acceptable level." The provision apparently was included at the insistence of the British government because of concern over the noise level of the Russian TU-104 jet transport. B. CHENG, *supra* note 77, at 329-30, 588.

⁷⁹ United States-France Air Transport Services Agreement, *supra* note 5.

⁸⁰ *Supra* note 5.

⁸¹ United States Standard Form of Bilateral Air Transport Agreement (1971), CIVIL AERONAUTICS BOARD, AERONAUTICAL STATUTES AND RELATED MATERIALS 668 (1974).

⁸² For parallel provisions see Bermuda I, *supra* note 5, art. 2(2); Bermuda II, *supra* note 5, art. 3(6)(b); United States Standard Form of Bilateral Air Transport Agreement, *supra* note 81, art. 3.

⁸³ See § 1102, Federal Aviation Act; 49 U.S.C. § 1502 (1970) (Secretary of Transportation shall exercise his powers "consistently with any obligation assumed by the United States in any treaty, convention or agreement . . .").

⁸⁴ For parallel provisions see Bermuda I, *supra* note 5, art. 12; Bermuda II, *supra* note 5, art. 1; United States Standard Form of Bilateral Air Transport Agreement, *supra* note 81, art. 1.

At the same time, however, Article V—which restates Article 11 of the Chicago Convention⁸⁵—provides in part:

The laws and regulations of one Contracting Party relating to the admission to or departure from its territory of aircraft engaged in international air navigation, or to the operation and navigation or such aircraft while within its territory, shall be applied to the aircraft of the other Contracting Party, and shall be complied with by such aircraft upon entering or departing from or while within the territory of the first party.⁸⁶

Unlike the term “aeronautical authorities” in Article II, the term “Contracting Party” employed in Article V is not circumscribed to include only the CAB and FAA. Rather, it is undefined. Hence, it appears that a proprietary noise regulation would be enforceable against carriers of foreign States such as Britain and France whose air transport agreements with the United States incorporate provisions such as that quoted above—assuming of course that the restriction in question genuinely relates to “admission,” “departure,” “operation,” or “navigation” and that it is otherwise valid under domestic law.

To characterize a maximum takeoff noise limit, or even a ban on takeoffs by certain aircraft types, as regulations relating to “admission,” “departure,” or “operation” does no violence to the language of the agreement. Absent such an interpretation, moreover, yet another anomaly of aircraft noise regulation would be created: airport operators would be barred from enforcing against foreign carriers the same restrictions which, under *Hayward*, they may freely impose upon U.S. carriers. Assuming hypothetically that the Port of New York Authority were to adopt a takeoff noise limit exceeded by B-707 aircraft, B-707 flights from Kennedy Airport by Trans World Airlines would be barred, while those by Air France would be allowed. Application of such a double standard would raise the spectre of discrimination and, if permitted to function, have massive competitive impact on U.S. carriers.

Therefore, from a logical as well as a textual point of view, forceful arguments could be made that local noise regulations

⁸⁵ Chicago Convention, *supra* note 19, art. 11.

⁸⁶ For parallel provisions see Bermuda I, *supra* note 5, art. 5; Bermuda II, *supra* note 5, art. 4; United States Standard Form of Bilateral Air Transport Agreement, *supra* note 81, art. 5.

should be permitted under any bilateral agreement embodying a provision such as Article V of the United States-France Air Transport Agreement. Yet such a result would have far-reaching implications which a court would surely be entitled to take into account in deciding whether this interpretation was reasonable. The system of international aviation, like the system of international law of which it is a part, is built on the fundamental principle of responsibility. The process of bilateral negotiation, described by Professor Lowenfeld as "much playing with small weights on a scale,"⁸⁷ may extend to every ground rule of international air transportation, defining the conditions under which the two nations' airlines will later compete and under which their citizens will later be served. An agreement is initiated only when each side perceives that it has obtained the most advantageous set of ground rules for future operations—politically, economically, and in terms of service—that it can reasonably expect under the circumstances. If one party subsequently refuses, or is unable, to adhere to an agreed provision, the bargain struck may be illusory. Yet precisely this danger was suggested by the proprietary power to impose aircraft noise regulations on foreign air carriers.⁸⁸ Certainly some forms of noise regulation, such as a requirement that aircraft be towed to runways, could be complied with without materially impairing the agreement. More severe measures imposed by an airport proprietor, however, such as a curfew, a maximum takeoff noise limit, or an outright ban on certain aircraft types, could seriously disrupt a carrier's scheduling, diminish the productivity of its aircraft investment, and effectively deny an operating right for which some important concession was paid in bilateral negotiations.

International lawyers have long held the view that "the federal system of government is particularly ill-adapted to international

⁸⁷ Lowenfeld, *The High Stakes In a New Air Pact*, N.Y. Times, July 3, 1977, Financial Section at 1, 12.

⁸⁸ While concentrating his focus on the actions of national governments—rather than local authorities—one commentator writing nearly a decade ago predicted that, under the guise of environmental and safety regulation, the major countries engaged in international civil aviation would resort to "operational regulatory skirmishes . . . as a means of offsetting the economic competition brought about by supersonic air transportation." Robinson, *The Regulatory Prohibition of International Supersonic Flights*, 18 INT'L & COMP. L. Q. 833, 846 (1969).

cooperation."⁸⁹ Traditionally, the international system dealt with the problem of the division of competence in federal states by ignoring it. As the Permanent Court of International Justice observed in *Treatment of Polish Nationals in Danzig*, "[a] State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."⁹⁰ Undoubtedly, the United States possessed sufficient constitutional power to overcome contrary local legislation in order to fulfill its international obligations.⁹¹ But this was not the issue. Rather, the issue was whether the contracting parties had, albeit perhaps inadvertently, agreed in Article V that such local regulations should apply. If the resulting scenario—of a foreign nation losing through airport noise regulations the traffic rights it had previously gained in bilateral air transport negotiations—appeared to veer outside traditional channels of international responsibility and offend American concepts regarding the centralized conduct of foreign affairs, then those were matters relevant to the court in its consideration of whether, indeed, proprietary noise restrictions were countenanced under Article V.

THE DECISION

District Court

On May 11, 1977, having heard oral argument on the legal issues, United States District Court Judge Milton Pollack granted summary judgment to British Airways and Air France and declared the Port Authority Concorde ban illegal.⁹² Finding it unnecessary to address the question of whether the Concorde ban offended international law, the district court declared that the Port Authority resolution was "in irreconcilable conflict with the federal examination of the question and the federal orders thereon"⁹³ and therefore invalid under the Supremacy Clause.

⁸⁹ Sorensen, *Federal States and the International Protection of Human Rights*, 46 AM. J. INT'L L. 195, 218 (1952).

⁹⁰ Advisory Opinion, Permanent Court of International Justice ser. A/B, no. 44, at 24 (1932). With regard to this problem, see generally I. BERNIER, INTERNATIONAL LEGAL ASPECTS OF FEDERALISM (1973); Looer, *Limitations on the Treaty Power in Federal States*, 34 N.Y.U. L. REV. 1045 (1959).

⁹¹ U.S. Const. art. VI, cl. 2. See *Missouri v. Holland*, 252 U.S. 416 (1920).

⁹² 431 F. Supp. 1216 (S.D.N.Y. 1977).

⁹³ *Id.* at 1226.

The vague and rather general grounds quoted in the preceding sentence are representative of the reasoning presented throughout the decision. The constitutional conflict identified by the court was not with any single federal statute or regulation, but with an amalgam of federal powers underlying the Secretary of Transportation's decision to authorize a sixteen month Concorde demonstration. The Department of Transportation and the FAA, Judge Pollack observed, are vested with broad powers under their organic legislation. In addition to the power to regulate the use of the navigable airspace,⁹⁴ these include the powers "to encourage and foster the development of civil aeronautics and air commerce in the United States and abroad,"⁹⁵ to develop "national transportation policies and programs conducive to the provision of fast, safe, efficient, and convenient transportation,"⁹⁶ to "stimulate technological advances in transportation,"⁹⁷ and to "undertake or supervise such developmental work and service testing as tends to the creation of improved aircraft engines, propellers, and appliances."⁹⁸ Moreover, the agency has a special responsibility with respect to aircraft noise. The Department of Transportation Act authorizes it to "promote and undertake research relating to transportation, including noise abatement, with particular attention to aircraft noise,"⁹⁹ while section 611 of the Federal Aviation Act, as amended by the Noise Control Act of 1972, confers the wide-ranging aircraft noise abatement authority at the heart of the Supreme Court's decision in *Burbank*.

It was pursuant to all of these powers, the court observed, that the Secretary of Transportation conducted his detailed analysis and concluded that federal approval should be given for a limited, sixteen month demonstration of Concorde service to Dulles and Kennedy airports. Were the Port Authority resolution permitted to stand, the Secretary's goal of "testing the environmental conse-

⁹⁴ Federal Aviation Act, § 307, 49 U.S.C. § 1348 (1970).

⁹⁵ Federal Aviation Act, § 305, 49 U.S.C. § 1346 (1970).

⁹⁶ Department of Transportation Act, § 2(a), 49 U.S.C. § 1651(a) (1970).

⁹⁷ Department of Transportation Act, § 2(b)(1), 49 U.S.C. § 1651(b)(1) (1970).

⁹⁸ Federal Aviation Act, § 312(b), 49 U.S.C. § 1353(b) (1970).

⁹⁹ Department of Transportation Act, § 4(a), 49 U.S.C. § 1653(a) (1970).

quences and commercial viability of the Concorde"¹⁰⁰ in actual operation would be substantially frustrated.

But what of the proprietary right to impose noise limits, mandated in the legislative history of section 611, given judicial sanction in *Hayward* and recognition by Secretary Coleman in his Concorde decision? For two reasons, the court suggested, its decision was fully consistent with the general concept of noise regulation by airport operators. First, although sometimes using the terms interchangeably, the court indicated that its holding was based on "conflict" rather than "preemption," and limited to the special facts of the case.¹⁰¹ Thus, while the Port Authority was not totally preempted from enforcing measures to mitigate aircraft noise, it had in this instance sought to block a unique test that the Secretary of Transportation, as a matter of national policy and pursuant to statute, had decided should take place.

Secondly—and more importantly—the district court characterized the proprietary noise control power as "a delegated authority reviewable by and subject to the overriding control of federal authority when exercised."¹⁰² That is, the FAA had permitted airport proprietors to exercise limited noise control power as a matter of regulatory power. As this grant of power was discretionary, however, it could be withdrawn by the FAA on an ad hoc basis where necessary for fulfillment of important federal goals.

It is true, the court acknowledged, that the FAA's policy of shared responsibility had been described approvingly in Congressional reports on section 611; but in doing so, Congress merely was signalling its intent neither to overrule the agency's fluid policy nor to transform it into binding law. The fate of proprietary noise controls, the court read Congress to be saying, should continue to rest with the FAA.

[The] Congressional statement refers, not to any restriction on the pervasive power granted in the statute, but to the voluntarily granted authority as a matter of FAA policy, delegated to local airport proprietors in the matter of regulating noise. This dele-

¹⁰⁰ Secretary's Decision, *supra* note 27, at 22.

¹⁰¹ Citing the Supreme Court's recent observation in *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), that "Congressional enactments that do not exclude all state legislation in the same field nevertheless override state laws with which they conflict."

¹⁰² 431 F. Supp. at 1222.

gation was at the will and subject to the ultimate pervasive federal control.¹⁰³

Restated in constitutional terms, the FAA had power in appropriate cases to reserve its acquiescence in local regulation, thereby creating a Supremacy Clause conflict. The Concorde experiment, in Judge Pollack's view, presented just such a case.

Court of Appeals

The district court's decision was reviewed by a panel of the Court of Appeals for the Second Circuit composed of Chief Judge Kaufman and Circuit Judges Mansfield and Van Graafeiland. Prior to oral argument that panel issued requests for amicus curiae briefs to the Departments of Transportation and State asking that they address, respectively, the domestic and international legal questions in issue.

In a single amicus curiae brief submitted on behalf of both agencies, the Department of Justice declined to address the question of whether the Port Authority ban violated the United States' international obligations on the ground that negotiations with Great Britain on a replacement for the Bermuda Agreement were then in the final and most sensitive stages.¹⁰⁴ With respect to the constitutional question upon which the district court decision had been based, however, the brief concluded that the Secretary's order provisionally amending the operations specifications of British Airways and Air France to allow a sixteen month Concorde demonstration did not render the Port Authority ban invalid on Supremacy Clause grounds. The basis for this disagreement with the district court lay in differing interpretations of Congressional intent. What Judge Pollack read as merely a description of current FAA largesse, subject to withdrawal, the government read as an affirmative instruction that proprietors not be displaced, provided that their actions did not interfere with the FAA's regulation of safety, or impose an undue burden on interstate or foreign commerce.

The government brief went on, however, to suggest an alternative ground on which Judge Pollack's decision might be affirmed. In enacting section 611, the Senate Commerce Committee had

¹⁰³ *Id.* at 1221.

¹⁰⁴ See note 5 *supra*.

cautioned that airport proprietors could exclude aircraft on the basis of noise considerations "so long as such exclusion is non-discriminatory."¹⁰⁵ The only objective noise standard adopted by the Port Authority was the rule establishing a maximum takeoff noise of 112 PNdB at monitoring points in adjacent communities. This test, it was thought, Concorde could pass. The court might determine that the Port Authority's indefinite ban on Concorde, then in its fourteenth month, coupled with its failure to adopt any regulation excluding SST's according to an objective standard of noise emission, constituted arbitrary, unreasonable, and therefore discriminatory action.

The court of appeal's decision followed closely the argument suggested by the government brief. Characterizing the grounds for Judge Pollack's grant of summary judgment as "simply untenable and erroneous," the court reviewed the "repeated disavowal by federal officials of any attempt to preempt the Port Authority's right to subject the Concorde to reasonable noise regulations . . ."¹⁰⁶ In particular, it repeated Secretary Coleman's own statements regarding the right of airport proprietors to refuse landing rights on environmental grounds, and the reaffirmation of this position by his successor as Secretary of Transportation, Brock Adams.

But this did not settle the matter. The court found that "the government has raised an important and viable point"¹⁰⁷ in stressing the conditional nature of Congress' acquiescence in noise regulation by airport operators.

We believe the scope of the Port Authority's power as an airport proprietor to impose use restrictions based on noise considerations is defined by the limited role Congress reserved for it in the national scheme we have briefly sketched. The proper domain of the operator is the "issu[ance of regulations] or establish[ment of requirements] *as to the permissible level of noise* which can be created by aircraft using the airport." S. Rep. No. 1353, *supra* at 6. It is clear to us that the Port Authority is vested only with the power to promulgate reasonable, nonarbitrary and nondiscriminatory regulations that establish acceptable noise levels for the airport and its immediate environs.¹⁰⁸

¹⁰⁵ See text accompanying notes 73-74 *supra*.

¹⁰⁶ 558 F.2d at 82.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 84 (emphasis added).

In any event, the court pointed out, the obligation of airport proprietors to adopt only reasonable and nondiscriminatory aircraft noise standards did not need to be implied from legislative history. Two independent sources imposed the same limitation. First, the Airport and Airway Development Act, which establishes the terms and conditions under which federal funds are channeled to the Port Authority, expressly requires that Kennedy Airport be made "available for public use on fair and reasonable terms and without unjust discrimination."¹⁰⁹

Secondly, under the Commerce Clause, unfair or discriminatory conduct would "unconstitutionally burden the commerce Congress sought to foster."¹¹⁰ This was underscored, in the court's view, by a "striking"¹¹¹ analogy to the recent Supreme Court decision in *Douglas v. Seacoast Products, Inc.*¹¹² In that case, plaintiff, holder of federal fishing licenses, challenged Virginia statutes which limited the issuance of state fishing licenses to United States citizens and barred nonresidents from fishing in the Virginia portion of the Chesapeake Bay. As a United Kingdom-owned corporation incorporated in Delaware, Seacoast was subject to both exclusions. Relying on *Gibbons v. Ogden*,¹¹³ the Supreme Court held that under the Supremacy Clause, plaintiff's federal license constituted a grant of authority to fish in Virginia waters on the same terms as Virginia residents, to which the conflicting state restrictions, aimed at aliens and nonresidents, must yield. The federal license, however, while prohibiting state exclusion of nonresidents, did not confer immunity from all state regulation. Rather, the Court held that the states may impose upon federal licensees reasonable nondiscriminatory conservation and environmental protection measures

¹⁰⁹ Airport and Airway Development Act (AADA), § 18(1), 49 U.S.C. § 1718(1) (1970). See *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773 (5th Cir. 1974), *reh. denied*, 496 F.2d 1407 (5th Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974), *reh. denied*, 420 U.S. 913 (1975) (city, as airport proprietor and recipient of federal funds under AADA, could not exclude airline so long as airport continued to operate); *Aircraft Owners & Pilots Ass'n v. Port Authority*, 305 F. Supp. 93 (E.D.N.Y. 1969) (proprietary system of landing fees designed to divert general aviation away from large commercial airports to less congested airports during peak hours held not unjustly discriminatory).

¹¹⁰ 558 F.2d at 84.

¹¹¹ *Id.* at 85.

¹¹² 431 U.S. 265 (1977).

¹¹³ 22 U.S. (9 Wheat.) 1 (1824).

"to effectuate a legitimate local public interest."¹¹⁴

In the *Concorde* case, as in *Douglas v. Seacoast Products, Inc.*, the Second Circuit reasoned, local and federal regulation could co-exist, provided the local regulations were exercised in a non-discriminatory fashion and complemented federal policy.

Congress has reserved to proprietors the authority to enact reasonable noise regulations, as an exercise of ownership rights in the airport, because they are in a better position to assure the public weal. Under this scheme, foreign commercial airlines are not immunized from the operation of the normal incidents of the local power. But pervading this strategy of national-local cooperation, and inherent in it, is the understanding and, indeed, necessity that the local body will not unreasonably hinder the accomplishment of legitimate national goals.¹¹⁵

Finally, the court examined briefly the Port Authority's responsibilities under international law and found that they paralleled closely those arising under domestic law. By their actions, the carriers had acknowledged that, under the American system of shared responsibility, they are not exempt from generally applied local regulations merely because their operations are conducted pursuant to the Chicago Convention and relevant bilateral agreements. Indeed, the court observed, "British and French airlines have complied with JFK's rule excluding jet aircraft producing more than 112 PNdB for nearly two decades, apparently without complaint."¹¹⁶ Accordingly, "new and reasonable regulations tailored to the special noise characteristics of the SST"¹¹⁷ would not be invalid merely because *Concorde* is operated only by foreign airlines. On the other hand, disparate treatment of U.S. and foreign airlines based on unspecified or unscientific factors unrelated to the noise characteristics of the aircraft involved would raise a serious ques-

¹¹⁴ 431 U.S. 278. *Accord*: *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960) (ship boilers licensed and inspected in accordance with federal law held subject to municipal anti-pollution regulations); *Manchester v. Massachusetts*, 139 U.S. 240 (1891) (out-of-state resident holding federal fisheries license held subject to nondiscriminatory state ban on certain types of fishing tackle); *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855) (federally licensed vessel held subject to nondiscriminatory state law regarding implements that could be used in oyster fishing).

¹¹⁵ 558 F.2d at 85.

¹¹⁶ *Id.* at 86.

¹¹⁷ *Id.*

tion of "compatibility with American treaty arrangements."¹¹⁸ To resolve whether the Port Authority's thirteen month ban and accompanying failure to adopt any new noise standard governing Concorde and other airplanes was so exclusive as to be unreasonable, arbitrary, or discriminatory—and therefore illegal—a remand to the district court for an evidentiary hearing was ordered.

District Court: Remand

The question before Judge Pollack, then, was whether any reasonable justification existed for the Port Authority's indefinite ban. On the basis of the evidence adduced, he concluded there was none.¹¹⁹ First, the court found, there was no longer any reasonable doubt that Concorde could meet the Port Authority's 112 PNdB limit; the aircraft had demonstrated its ability to "beat the meter" in simulations conducted at Tolouse and Casablanca in 1974.¹²⁰

Although the Federal Environmental Impact Statement prepared for the Coleman decision projected that Concorde's noise contour at JFK would be far larger than those created by subsonic jets, British Airways and Air France had recently proposed a plan to reduce operating weights and confine takeoffs, to the maximum extent feasible, to less noise-sensitive runways. The result, confirmed as technically accurate by the FAA, was to shrink Concorde's noise footprint at Kennedy to the point where it was comparable to that of a Boeing 707-320-B, one of the noisiest subsonic jets. Hence, the court concluded, this feature of Concorde noise could no longer be put forward by the Port Authority as a basis for denying the aircraft a test.¹²¹

One dimension of Concorde's performance still marked by a measure of uncertainty, however, was its vibrational effect. Owing to the greater proportion of low-frequency sound in Concorde's noise emission, as compared with subsonic aircraft, an equivalent level of SST noise might result in a higher level of annoyance. The Port Authority argued that time was needed to commission further studies of Concorde-induced vibration, and it was on this

¹¹⁸ *Id.*

¹¹⁹ 437 F. Supp. 804, 806 (S.D.N.Y. 1977).

¹²⁰ *Id.* at 810.

¹²¹ *Id.* at 815.

basis that it sought to justify its indefinite ban.¹²² Although the Port Authority's psychoacoustic expert had devoted months to the task, he had been unable to develop any technique for predicting the additional human annoyance, if any, caused by Concorde's low-frequency content. To answer this elusive question, the evidence showed, could require six to twelve months and cost as much as \$1 million—a project upon which the Port Authority showed no inclination to embark.¹²³

In sum, the court found, several apprehensions concerning Concorde's noise impact at Kennedy Airport had been allayed; the remainder had already been subjected to thorough study in the Federal Environmental Impact Statement, the sixty-one page Coleman decision, the monthly monitoring reports of Concorde service to Dulles and reports by the Port Authority's own consultants. On March 11, 1976, when the Port Authority adopted its Concorde ban there already existed "a vast quantity of reference works and studies and known scientific data concerning supersonics, including community response thereto and graphic portrayals thereof."¹²⁴ The research on vibration performed by the Port Authority's consultants "established nothing beyond what was adequately considered and reported on by Secretary Coleman."¹²⁵

It is unreal for P.A. to say we are helpless to theoretically quantify the additive effect of the vibration created by Concorde on Concorde's noise—and at the same time to bar use of the airport under the circumstances shown herein under the guise of conducting more studies to resolve the unknown aspects of the variables. Yet, this is precisely what P.A. espouses to be concerned with.

The conclusion is inescapable from the evidence presented to the Court and the Court finds that the P.A. has no intention of taking the responsibility of setting the present or another noise standard applicable to the Concorde.¹²⁶

The Port Authority had refused either to allow test flights or to issue a generally applicable noise standard that would take account of low-frequency vibration; at the same time it was "re-

¹²² *Id.* at 812.

¹²³ *Id.* at 807.

¹²⁴ *Id.* at 812.

¹²⁵ *Id.* at 817.

¹²⁶ *Id.* at 818.

ploughing old ground and doing reviews of scientific and theoretical data previously available."¹²⁷ This conduct, Judge Pollack concluded, was "unreasonable, discriminatory and unfair and an impingement on commerce"¹²⁸ under the conditions for proprietary power established by Congress and interpreted by the court of appeals.

The court of appeals concurred in this finding by the district court and affirmed, with minor modification, its order enjoining the Port Authority from enforcing its anti-Concorde ban.¹²⁹ The Supreme Court declined review.¹³⁰

CONCLUSIONS

As a news event, *British Airways v. Port Authority* is likely to be viewed as a serious setback for airport operators seeking to ameliorate aircraft noise. In reality, of course, it is neither a setback nor an advance. Rather, the law remains in the same ambivalent and somewhat contradictory state; airport proprietors are at once told that their noise abatement authority has not been preempted, and at the same time warned to tread delicately so that their standards and procedures do not create an actual conflict with FAA regulation in the safety or noise control fields, are not unreasonable or unjustly discriminatory, and do not impose an undue burden on interstate or foreign commerce.

In the end, the Second Circuit Court of Appeals shed little new light on the broad claims under domestic and international law asserted by British Airways and Air France. Perhaps the panel was mindful of the maxim that hard—and politically charged—cases make bad law; or perhaps it was simply guided by a natural tendency to judicial conservatism. In any event, by tying its decision closely to the Port Authority's dilatory conduct, the court has left a number of important questions to continuing debate.

Although pointing to statements by former Secretary Coleman and his successor as evidence that the federal decision approving a sixteen month Concorde demonstration was not intended to

¹²⁷ *Id.* at 817.

¹²⁸ *Id.* at 818.

¹²⁹ 564 F.2d 1002 (2d Cir. 1977).

¹³⁰ — U.S. —, 98 S.Ct. 291 (1977).

preclude the Port Authority in this instance, the court of appeals voiced no opinion on the question of whether the DOT or the FAA may ever supersede airport operators through selective regulatory action. The decisions in *Port Authority of New York v. Eastern Air Lines, Inc.*¹³¹ and *Opinion of the Justices*,¹³² as well as Justice Rehnquist's dissenting opinion in *Burbank*,¹³³ all appear to take the position that although airport proprietors are not preempted, the exercise of federal administrative authority will oust proprietary regulation with which it conflicts. Given the federal disavowal of any attempt to displace regulation of Concorde by the Port Authority, the panel was not required to decide whether the legislative history of section 611 constitutes a restriction by Congress of such administrative latitude. Hence, while terming the district court's initial decision "simply untenable and erroneous,"¹³⁴ it would appear that this characterization was directed less to Judge Pollack's overall concept of ad hoc federal supremacy, and more to his finding about whether such power had, in fact, been exercised in this case.

The court of appeals obviously was sensitive to the consequences its decision might have for the regime of aircraft noise liability. A number of commentators have called for the reversal of *Griggs v. Allegheny County*,¹³⁵ arguing that the ruling in that case places "the financial burden of aircraft noise on the segment of the aviation community that [can] do the least about it."¹³⁶ Another de-

¹³¹ 259 F. Supp. 745 (E.D.N.Y. 1966). The decision upheld the airport operator's runway preference regulation against the claim of federal preemption turned on a finding that the FAA "is not prepared at the present time to direct [the use of the prohibited runway] in the interest of safety or to pre-empt the regulation of its use in contradiction of Port Authority's rules and regulations." *Id.* at 753.

¹³² 359 Mass. 778; 271 N.E.2d 354, 358 (1971). See discussion at note 66, *supra*.

¹³³ 411 U.S. 625, 641-54. Justice Rehnquist observed:

Clearly Congress could pre-empt the field to local regulation if it chose, and very likely the authority conferred on the Administrator of the Federal Aviation Administration by [section 611 of the Federal Aviation Act] is sufficient to authorize him to promulgate regulations effectively pre-empting local action.

Id. at 653.

¹³⁴ 558 F.2d at 82.

¹³⁵ 369 U.S. 84 (1962).

¹³⁶ Berger, *You Know I Can't Hear You When the Planes Are Flying*, 4

cision denying noise control power to an airport proprietor might have been the straw that broke *Griggs*' back and transferred liability for the taking of air easements to the federal government. The decision in *British Airways v. Port Authority* does not provide that straw.

The court of appeals' initial decision also supplies a practical rationale for the much-criticized distinction between proprietary power and police power drawn in *City of Burbank v. Lockheed Air Terminal*.¹³⁷ It is not merely a distinction needed for consistency with *Griggs*. Undoubtedly, the need to allow airport operators some regulatory tools to minimize their exposure to noise suits is one basis for the distinction. But there is also another explanation. As the court observed:

It is understandable that the numerous localities in the vicinity of major airports cannot be permitted an independent role in controlling the noise of passing aircraft. The likelihood of multiple, inconsistent rules would be a dagger pointed at the heart of commerce—and the rule applied might come literally to depend on which way the wind was blowing. The task of protecting the local population from aircraft noise has, accordingly, fallen to the agency, usually of local government, charged with operating the airport. [Footnotes] Indeed, since the operator controls the location of the facility, acquires the property and air easement and is often able to assure compatible land use, he is liable for compensable takings by low-flying aircraft, [citing *Griggs*]. The right of the proprietor to limit his liability by restricting the use of his airport has been thought a corollary of this principle. *It is perhaps more important, however, that the inherently local aspect of noise control can be most effectively left to the operator, as the unitary local authority who controls airport access.*¹³⁸

In short, the chaotic consequences which could ensue from regulation by a patchwork of airport-neighboring communities with each attempting to enforce its own rule, are absent where regulation is effected by the "unitary" airport operator. The validity of this distinction is underscored, as a practical matter, when one bears in mind that the airport operator, unlike communities im-

URBAN LAWYER 1, 22 (1972); Lesser, *The Aircraft Noise Problem: Federal Power but Local Liability*, 3 URBAN LAWYER 175, 202 (1971).

¹³⁷ 411 U.S. 624 (1973).

¹³⁸ 558 F.2d at 83 (emphasis added).

mediately adjacent to the airport, has a commercial interest in promoting airline service to his terminal which counterbalances his desire to avoid noise liability. Seen in this manner, the practice of allowing a unit of local government wearing its proprietor's hat to exercise the same noise control powers forbidden to it when wearing the police power hat, does not seem nearly as anomalous or artificial.

With regard to international law, perhaps the most significant feature of the court of appeals' decision is its express reliance on Article V of the United States-France Bilateral Air Transport Agreement, and the corresponding provision of the United States-Britain agreement, in stating that the operations of Air France and British Airways are subject to proprietary noise control regulations.¹³⁹ At the same time, the court cautioned, international law requires that such regulations be nondiscriminatory in application. In this connection, two additional provisions not specifically discussed by the court, might profitably have been invoked. First, as noted earlier, Article II of the United States-France bilateral agreement,¹⁴⁰ and the parallel provision of the United States-Britain agreement,¹⁴¹ state that designated air carriers may be required to demonstrate compliance with "the laws and regulations *normally applied*" to the operation of commercial air carriers (emphasis added). To similar effect, Article 15 of the Chicago Convention¹⁴² states that every airport in a contracting State open to public use by its national aircraft "shall likewise . . . be open *under uniform conditions* to the aircraft of all the other contracting States." Although admittedly the Port Authority's Concorde ban did not discriminate—either facially or as enforced—on the basis of nationality,¹⁴³ the gravamen of the court's holding was that Concorde had been subjected to higher regulatory hurdles than those placed before other aircraft, both now and in the past.

The finding of discrimination made *British Airways v. Port Authority* a relatively easy case under international (as well as domes-

¹³⁹ *Id.* at 85.

¹⁴⁰ United States-France Air Transport Services Agreement, *supra* note 5, art. II.

¹⁴¹ Bermuda I, *supra* note 5, art. II.

¹⁴² Chicago Convention, *supra* note 19, art. 15 (emphasis added).

¹⁴³ 558 F.2d at 85.

tic) law. A more difficult case will be posed if the Port Authority accepts the court of appeals' invitation to adopt new, nondiscriminatory noise standards¹⁴⁴ and if those standards permit access by all jet transports except SST's. But this project only serves to highlight the broader problem which it illustrates. Even as tempered by the requirement of nondiscrimination, the typical bilateral provisions permitting the application of "laws and regulations" of the host country¹⁴⁵ contain a remarkable degree of elasticity. A nation that imposes a ban on overland supersonic flight to prevent sonic boom today may impose a ban on jumbo jets to prevent airport congestion tomorrow (without mentioning, of course, that jumbos represent the addition of capacity that the host country views with disfavor); a nation that routes particularly noisy foreign aircraft away from heavily populated areas today may increase the circuitry of the routings tomorrow (while denying that this is an anti-competitive artifice). For the United States' counterparts in bilateral air negotiations, the problem is compounded by the role of the airport proprietor.

Presumably, both problems are amenable to solution through the development of new and more exacting bilateral provisions. Yet it is interesting to note that in formulating Bermuda II, two nations keenly aware of this problem—the United States and Britain—carried forward virtually unchanged the "laws and regulations" provisions of Bermuda I.¹⁴⁶ For the foreseeable future, at least, the precise bounds of proprietary noise control power will require case-by-case determination.

¹⁴⁴ *Id.* at 86.

¹⁴⁵ See, e.g., United States-France Air Transport Services Agreement, *supra* note 5, art. V; Bermuda I, *supra* note 5, art. V.

¹⁴⁶ Bermuda II, *supra* note 5, art. IV.