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Philip Larmon Jr.

James T. Lloyd

Edward A. Peterson

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CURRENT LEGISLATION AND DECISIONS

Airline Depreciation Policy

The American trunk airlines have followed different policies with respect to accounting for aircraft depreciation and the investment tax credit provision of the 1962 Revenue Act.[1] These policies have resulted in differences in profit reporting, tax consequences, and cash flow which make year to year comparisons of the airlines' stated financial reports somewhat unreliable.

The basic policy of all the trunk lines is to compute depreciation and obsolescence by the straight line method over the estimated useful life of their aircraft and engines in their reports to the Civil Aeronautics Board and for use in their balance sheets.[2] This contrasts sharply with depreciation for federal income tax purposes which is uniformly reported on an accelerated basis in accordance with certificates of convenience and necessity and the "declining balance" or "sum of the years digits" methods. This is to reduce or eliminate current tax liabilities and increase the cash flow of the airline industry. This depreciation supports the credit extended to purchase new equipment.[3] Cash which is generated by depreciation charges is available for debt retirement as well as to meet current operating expenses and thus provides encouragement to lenders. Between 1958 and 1961, the period of major jet aircraft initiation, depreciation accruals for equipment for the domestic trunk airlines increased eighty-two per cent from 120 million dollars to 218 million dollars and has remained stable since.[4]

The income statements of the airlines contain an account for deferred federal income tax liability to reflect the reduction in current tax resulting from depreciation taken for tax purposes in excess of depreciation provided for in the corporations' depreciation accounts. These accounts will be restored to earnings in the future when depreciation allowable for tax purposes is less than that yielded by the straight line method. The following chart indicates the potential profit not yet reported.

Provision for Deferred Income Tax Liability in 1962[5]

American	$10,339,000	Northwest	$5,665,500
Braniff	796,000	United	2,189,000
Continental	1,814,381	Delta	5,682,000
National	411,000	Pan American	1,189,177

The major policy differences in airline depreciation result from differences in the estimated useful life of equipment. The experience of the airlines prior to the jet age indicated that technological advances forced obsolescence of various aircraft types very quickly although the equipment was still very serviceable. It was generally believed, as reflected in

[1] Int. Rev. Code of 1954, §§ 38, 46, 48, and 181.
[2] 1963 Moody's Transportation Manual p. 1270 *et. seq.*
[3] 113 The Magazine of Wall Street and Business Analyst p. 606 (1964).
[4] Value Line Investment Survey, Jan. 31, 1964, p. 204.
[5] 1963 Moody's Transportation Manual p. 1270 *et. seq.*

the depreciation policies followed, that a ten-year life was a conservative period for depreciation purposes at the start of the jet age with the expectation that supersonic transports were at least ten years away. The trunk carriers felt that frequent re-equipping cycles were in the past and that, if and when the SST was introduced, it would come in gradually allowing a normal retirement of existing craft.

In 1960 American Airlines began an industry trend by extending the useful life of turbojet aircraft and engines to twelve years and adopted the policy of charging rentals of leased turbine engines to expense rather than amortizing this over the life of related aircraft.[6] This accounting change increased "earnings" 970,000 dollars in 1960. This change in management attitude toward obsolescence has spread in the industry to include in varying degrees Eastern, National, Pan American, Western, and United. Effective January 1, 1962, Eastern began to amortize rental payments for leased jet aircraft over thirteen years (the lease term including options to purchase) and extended the estimated useful life for owned jet aircraft to twelve years with a fifteen per cent residual value. United extended the depreciation period to fourteen years with very low estimated residual values. Several carriers have not extended useful life estimates and have fully depreciated a significant proportion of their fleet.[7]

These accounting changes have a great affect on profits reported and make year to year comparisons unreliable indicators of actual operational success. If Eastern Air Lines had restated its 1961 results in terms of its present policy of depreciation, the changes in estimated useful life would have resulted in 21,000,000 dollars less depreciation and rental expense in that year. This distortion is compounded by differences in residual values and in the length of the time the crafts had been operated before the accounting change was made. These changes obviously affect the stated book value of assets so that comparative figures on return on investment are not reflecting an equal basis. Because changes in accounting practices have been made at different times, if at all, and because there are in addition varying useful life estimates, the value of aircraft is determined by as many methods as there are trunk carriers. An industry wide figure is therefore not a valid criteria for measuring a given airline's profitability.

The national policy of encouraging investment in capital assets was reflected in the Internal Revenue Code of 1962.[8] The intent of Congress was to provide an amount of investment credit to be applied to the federal income tax liability actually payable in a given year and this was the result obtained for most corporations. As a result of accelerated depreciation used for federal income tax purposes, several airlines cannot use this credit or can use only a part of it because they have not had significant current tax liability. Braniff Airways records this by recognizing forty-eight per cent of the potential credit as income in the year in which qualified equipment is acquired.[9] Continental Air Lines accounts for its unused credit by applying it as a reduction of provisions for deferred income taxes ratably over the useful life of the equipment to which the credit

[6] *Id.* at 1271.

[7] *Id.* at 1319. Delta Air Lines has fully depreciated most of their DC-7's and thirteen of twenty-one Convairs of the 340/440 series and seven of eleven DC-6's.

[8] Int. Rev. Code of 1954, §§ 38, 46, 48, and 181.

[9] Moody's, *op. cit. supra* note 7 at 1274.

relates.[10] The amount of credit that is unused significantly affects financial statements. T.W.A. had an investment credit for 1962 of approximately 8,000,000 dollars, principally applicable to aircraft and engines which it was unable to use because the carrier showed a loss for the year.[11] If reserve accounts were established in accord with normal accounting practice there would be no distortion or reported income. However, when federal income taxes actually payable are accrued and straight line depreciation is recorded, the income reported is overstated.

The airline that actually pays little or no federal income tax receives no benefit at all in the current year because its cash position remains the same. Only those carriers that have sufficient revenue to take advantage of the credit in the year it becomes available are helped. Profitable carriers that can use the credit and those that account for it partially as income in the year it is first available are artificially increasing reported earnings now at the expense of later years when the credit has expired and accelerated depreciation becomes less than straight line. At this point taxable income will go up and reported earnings will be understated. Prior to this year[12] carriers that had revenue insufficient to incur current income tax liability carried the credit forward much the same as a net operating loss carry forward into which it might be eventually converted in the event of extended losses by taking it as a deduction from income in the sixth year. It is likely that this provision of the Revenue Code not only causes distortion in profit reporting but will never help those carriers who are most in need of financial assistance and equipment modernization.

The 1964 Revenue Act in section 203(e)[13] counters the policy in regulated industries that any benefit from tax reduction should "flow through" immediately to the customers. If the investment credit is considered as a reduction in operating costs, it would call for corresponding rate reductions. The new law makes the treatment of any tax benefit from investment credit as a cost reduction the option of the regulated carrier so that the intended benefit, if any is available, will go to the investing corporation in accordance with the original purpose of the investment credit.

If the airline industry continues to improve financially, it may be that the CAB will consider profit as expressed as return on investment as a major criteria in rate making. This would demand an extended uniform system of accounting to establish fairly comparable measures of capital investment. This would have the favorable side effect of easing investor analysis. The experience of the ICC in promulgating depreciation guide lines in the rail industry may be applied to the air transport industry.

As long as airline profits do not appear excessive, this is more a theoretical problem than an immediate one. As the re-equiping cycle seems to be stable for the near future, profit differences resulting from varying depreciation policies should tend to even out before the SST's are introduced. The carriers' reported depreciation for tax purposes in dollars

[10] *Id.* at 1279.

[11] *Id.* at 1303.

[12] Int. Rev. Code of 1954, § 203(a)(3)(B) of the 1964 Revenue Act repealed former § 181 which permitted a deduction in future years of unused investment credit. Under current law this credit will be lost to some carriers.

[13] *Ibid.*

should on the average approach the dollars of depreciation under the straight line method so as to be very nearly identical with that reported to the CAB. If a given carrier elects to retain the same estimated useful life for its aircraft, gradual retirement of old, and introduction of new equipment will result in equivalent statements of investment in capital assets without CAB depreciation guide lines.

Philip Larmon, Jr.

Governmental Liability — The December 1960 Air Disaster — Is Executive Settlement Desirable?

On October 23, 1963, the United States Government, specifically the Department of Justice, agreed to pay twenty-four per cent of whatever damages are fixed as a result of claims and lawsuits arising from the collision of a United Air Lines DC-8 jet with a Trans World Airlines Super Constellation over Staten Island on December 16, 1960. United Air Lines and Trans World Airlines agreed to pay sixty-one and fifteen per cent respectively. The United States Government is involved due to the fact that Federal Aviation Agency tower controllers were responsible for initial routing instructions which had been given to each plane prior to approaching its intended destination. It must be pointed out initially that the government did not and has not admitted any liability for the accident, but certain "rulebook departures" on the part of FAA controllers involved apparently led the government to feel that it should assume a portion of the responsibility.[1]

The United Air Lines jet was bound for Idlewild Airport via the Preston "holding pattern" in New Jersey, while the Trans World Airlines Constellation was scheduled to land at LaGuardia Airport by way of the Linden, New Jersey "holding pattern." These holding patterns are defined areas in which a plane may be kept circling while traffic is routed to the intended airfields.[2] The holding patterns, or intersections as they are sometimes called, are similar to traffic circles in that they provide a distribution area for nearby destinations. These two particular holding patterns are approximately five to six miles apart, which is not a great distance at present-day aircraft speeds.[3] All planes approaching the New York area are routed initially by an area control center, then as the planes come within a twenty-five mile radius from their respective destinations, the approach control in the particular tower takes charge of further routing and landing instructions.[4]

The Civil Aeronautics Board Aircraft Accident Report lists the probable cause of the collision as the fact that the United jet flew approximately eleven miles beyond the Preston intersection coupled with the additional factor of a change of clearance which reduced the en route flight by about the same distance.[5] However, a similar investigation by representa-

[1] N.Y. Times, Oct. 23, 1963, p. 1, col. 3.
[2] *Id.*, p. 33, col. 1.
[3] *Ibid.*
[4] C.A.B. Aircraft Accident Report, June 18, 1962, p. 17.
[5] *Id.*, p. 26.

tives of the Air Line Pilots Association made in conjunction with the CAB investigation was outlined in a report by the A.L.P.A. which presented a conclusion differing markedly from that of the CAB.[6] The A.L.P.A. report stated that a primary contributing factor was the failure of the area control center controller to properly maintain identification and monitor the progress of the United jet during certain periods of time as well as failure of area control to relay proper routing and estimates to Idlewild approach control.[7] In addition, the report found that the LaGuardia approach control had failed to attempt a determination of the identity of the United jet as it intruded into LaGuardia's airspace.[8]

United Air Lines was not amenable to the CAB report and filed a petition for reconsideration with the CAB in which it sought to point out a number of "rule book departures" which it alleged were made by FAA personnel at the time of the accident.[9] The FAA, however, made it quite clear that it was in complete accord with the CAB report and made a direct refutation of United's assertions.[10] It should be emphasized, that although the CAB report may not be used directly as evidence, it is the "official" report and its exoneration of the FAA controllers would certainly seem to present a weighty argument for the FAA's position. However, in a hearing before a special master, individuals among the FAA witnesses did acknowledge several rule book departures which were not unlike those pointed out by United and A.L.P.A.[11] Apparently, the Department of Justice, in choosing to settle for payment of twenty-four per cent of the damages, felt that United's accusations along with other strong evidence of laxity on the part of FAA controllers, should warrant consideration.

The FAA has consistently maintained that although there may have been some variance with rule book operating procedure, this variance in no way contributed to the accident.[12] It is questionable whether a departure from FAA rule book operating procedure is, in itself, negligence. Unlike certain statutes which may give rise to negligence when violated, these rules are the internal guides for FAA personnel and may not fall into the statutory negligence category. Certainly, rule book departures may be evidence of negligence, but this writer could find no instance where the theory of statutory negligence was ever propounded as applying to these particular circumstances.

This accident involves an agency of the government and necessarily presents the initial question of governmental liability as a matter of law. This case concerns the federal government; and this article, due to space limitations, must restrict itself to the problem of liability of the federal government in such matters.

In considering governmental liability as a matter of strict law, one is initially faced with the common law principle that a government cannot ordinarily be held legally liable to those whom it has wronged.[13] There

[6] A.L.P.A. Accident Investigation Report, April 4, 1964, p. 15.
[7] *Ibid.*
[8] *Ibid.*
[9] Petition For Reconsideration before C.A.B., United Airlines, Docket No. SA-361, p. 5.
[10] F.A.A. News, No. 9, Jan. 18, 1961.
[11] New York Times, *Supra* note 2.
[12] *Ibid.*
[13] Wilber Nat. Bank v. U.S., 294 U.S. 120 (1934). A list of cases advocating this principle may be found in 54 Am. Jur., sec. 94.

is a public policy argument for governmental immunity based upon the proposition that, for fiscal stability, a government cannot be responsible for the untold myriad of claims which may be made against it.[14] In addition, the old legal maxim that "the King can do no wrong" was a culmination of the religious concept of the divine right of kings and has been reflected in numerous early court decisions denying governmental liability.[15]

The federal government has waived its immunity in certain instances by:

1. creating a method whereby private bills may be sent through the legislative process.[16]
2. allowing itself to be sued by virtue of statutory enactment.[17]

With the enactment of the Federal Tort Claims Act of 1946, the federal government created a more expedient method of allowing relief, and any discussion of governmental tort liability must now necessarily concern itself with this act. Section 1346 (b) of the Federal Tort Claims Act provides, in part, the following basis for liability:

> The District Court shall have exclusive jurisdiction of civil actions or claims against the United States, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[18]

The above waiver of immunity would seem to be relatively clear, however the act provides the following exception which, as will be seen later, has given the courts some difficulty:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.[19]

It becomes obvious that the act is capable of being interpreted in a number of ways, especially with respect to the aforementioned "exception clause." The particularly troublesome areas with which the courts have had to deal are the "exclusively governmental" ramifications of section 1346 (b) and the "discretionary function" problems caused by the exception clause of section 2680 (a).

These troublesome areas are dealt with in three well-known cases. The first, *Dalehite vs. United States*,[20] is a case involving the negligence of the federal government in the handling and control of ammonium nitrate

[14] In Kawananakoa v. Polyblank, 205 U.S. 349 (1907), Justice Holmes stated that a sovereign is exempt from suit, not because of any formal conception or absolute theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the laws on which the right depends.

[15] Minnesota v. U.S., 305 U.S. 382 (1938). For a historical development of the divine right of kings, see Sabine, A History of Political Theory 391 (3rd ed. 1961).

[16] German Bank v. U.S., 148 U.S. 573 (1893).

[17] Federal Tort Claims Act, 28 U.S.C. § 1346 (b) (1948).

[18] *Ibid.*

[19] 28 U.S.C. § 2680 (1948).

[20] 346 U.S. 15 (1953).

fertilizer which resulted in an explosion, causing extensive personal injury and property damage. The United States Supreme Court held four to three for the government, stating that the decisions which eventually culminated in the disaster were made on a planning rather than an operational level, thus coming within the statutory exception of claims based upon a failure to perform a "discretionary function or duty." The court also pointed out that the act is applicable only to situations involving negligence, thus precluding the doctrine of strict liability.

Two years later, in 1955, the Supreme Court, in *Indian Towing Company vs. United States*,[21] reasserted the position it had taken in the *Dalehite* case regarding the distinction between decisions carried out on a planning level and on an operational level. This particular distinction was not at issue in this case since the government had conceded that the Coast Guard personnel, who had been negligent in failing to repair a light in a lighthouse, had acted on an operational level. The *Indian Towing Company* case did give rise to the problem of the language of the act dealing with those "circumstances where the United States, if a private person, would be liable to the claimant."[22] Those circumstances mentioned in section 1346 (b) may be described as "uniquely governmental" functions, i.e. those functions which the government alone handles. In the *Indian Towing Company* case, the government argued that the act, specifically section 1346 (b), permits liability only in situations in which a private individual would be involved as well as the government and that the Coast Guard personnel were doing an act which was "uniquely governmental." Mr. Justice Frankfurter, speaking for the majority, found fault with the government's argument and pointed to the familiar concept that "one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner." Justice Frankfurter also found that it was quite difficult to think of any governmental activity on the operational level which is uniquely governmental in that, at one time or another, it could have been or may have been privately performed. The opinion outlined the purpose of the act with the following words:

> The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws.

The *Indian Towing Company* case indicates that liability in the present situation is highly probable, as the case makes clear the impending liability of a negligent act done at an "operational level."

A case which may have some direct application to the situation under discussion is *Eastern Airlines, Inc. vs. Union Trust Company*.[23] This case concerned the negligence of a federal tower controller who was responsible for directing aircraft at the Washington National Airport when a mid-air collision occurred between an Eastern DC-4 and a Bolivian P-38

[21] 350 U.S. 61 (1955).

[22] An excellent discussion of this particular area is found in Ravonier v. U.S., 352 U.S. 316 (1956).

[23] 221 F.2d 62 (D.D.C. 1955) cert. den. 350 U.S. 911 (1957).

military plane. The government argued that its tower operators perform governmental function of a regulatory nature, and that no private individual had such power of regulation; therefore, this particular set of facts did not come within the provision of the act which specified liability only under circumstances in which a private person would also be liable.[24] The court traced the historical development of airport control and found an indication that private ownership and control of airports did then exist (November 1, 1949) and had existed throughout the development of the aircraft industry. In addition, it would also seem that the government's argument regarding the "uniquely governmental" aspect of airport control might possibly fall subject to Justice Frankfurter's "good samaritan" argument in the *Indian Towing Company* case.[25]

The government also argued, as it had in the *Dalehite* case, that a controller's exercise of judgment is a matter of discretion and would come under the exemption of section 2680 (a). However, the court held that tower operators merely handle operational details which are outside the area of discretionary functions and falling within the "operational level" category. The *Eastern* case dealt with controllers operating at the airport itself, and perhaps a distinction may arise between that case and the present situation which involves controllers operating in the area control center which is not a part of the particular approach control centers at the individual airports.

Mr. Najeeb Halaby, in his testimony before a House Subcommittee on Appropriations for the 1965 budget, gave the following general reason for the Justice Department's desire to settle in this particular case:[26]

> The Department of Justice, after carefully looking over that case, said that the litigation risk of the judge and/or jury holding the government culpable indicated that we had better settle, and so the judge got the parties together —that was United Airlines, T.W.A., and of course, they were represented by insurers, and the FAA represented by the Department of Justice—and worked out a formula.

Mr. Halaby indicated that the FAA was not altogether satisfied with the settlement, and the Justice Department responded to the FAA's trepidations. This response was related to the Subcommittee by Mr. Halaby:

> The answer from the Department of Justice was—perhaps to you technicians that is clear, but with a judge and a jury the risk is that they might find the United States entirely liable for not having taken some affirmative action to vector the innocent aircraft away or to vector the overtaking aircraft away.

One clarification is required here. The Tort Claims Act provides specifically that any claim against the United States is to be tried without a jury.[27] Mr. Halaby's testimony should be read with this fact in mind. One may conclude that previous judicial interpretation of the Tort Claims Act, as well as Mr. Halaby's testimony, would certainly indicate a strong possibility that the government would have been held liable had the case gone to trial.

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[24] Note 19 *supra.*

[25] Note 21 *supra.*

[26] Hearings before the Subcommittee of the Committee on Appropriations, House of Representatives, 88th Cong., 2d. Sess., pt. 1 at 1155 (1964).

[27] 28 U.S.C. § 2402 (1948).

Mr. Halaby, in his testimony before the House Subcommittee, indicated that 104 cases have arisen out of this collision and that fifty-eight had been settled at that time.[28] The fifty-eight cases had produced a total liability of 7,347,000 dollars. As indicated previously, the Justice Department had agreed to settle for twenty-four per cent of the total liability, thus creating an already determined liability of the government for 1,763,000 dollars.[29] FAA officials indicated that total liability from all 104 cases should be approximately 12,000,000 dollars with governmental liability of approximately 3,000,000 dollars.[30] Mr. Halaby also pointed out to the Subcommittee that awards have been steadily increasing, and as of December 31, 1963, 371 cases amounting to 153,000,000 dollars were pending against the FAA. It is interesting to note that if the case had been tried and lost, the Justice Department would have been responsible for paying the judgment out of its budget. However, since the case was settled, the FAA is liable out of its budget.[31] However, the pros and cons of liability in general, and this settlement in particular, must be judged in the light of an ultimate taxpayer liability.

There are two general conflicting public policy arguments concerning governmental liability. One argument, as pointed out by the Supreme Court in *Rayonier vs. United States*,[32] is the desirability of having the cost of some mishap spread rather thinly among the taxpayers rather than being heaped upon an individual merely because of a doctrine of immunity. This benevolent approach is countered by the argument that there is an increasing cost of paying these claims which not only are growing in number but in size. These two valid arguments should be reconciled to create a moderate, workable approach. Both bear merit, but neither is desirable without modification by the other.

In discussing the pros and cons of an out-of-court settlement by an executive department, factors to be taken into consideration include:

1. population growth;
2. expansion of the federal government both in size and in the number of services performed; and
3. increasing dollar awards.

An out-of-court settlement by an executive department is not necessarily a precedent for future judicial determination (that is, not a basis for *stare decisis*) but could be the basis for future executive settlement.[33] In other words, if the Justice Department can settle for 3,000,000 dollars today, then why not 6,000,000 dollars tomorrow, ad infinitum? Is the executive bound by the same criteria that surround a judicial decision? Would those standards set by the Supreme Court as discussed previously be strictly adhered to by the executive; or would social, economic and, more importantly, political considerations cause these standards to be stretched beyond those of even the most liberal court?

Assuming, for purposes of expediency, that an executive settlement can, with limitation, be desirable, what presently checks the power of the executive and what may necessarily be needed in the future should these

[28] *Id.* p. 1158.
[29] *Id.* p. 1159.
[30] *Ibid.*
[31] Note 28, *supra.*
[32] Note 22, *supra.*
[33] Note 29 *supra*, see the statement by Rep. Harold C. Ostertag.

present checks prove ineffective? The Tort Claims Act provides that such settlements may be made by the Attorney General with approval of the District Court.[34] It is questionable, however, whether a court would devote as much attention and care to granting its approval as it would in determining the final outcome of a lawsuit being heard before it. The act also provides that the head of the federal agency concerned in the settlement will pay such settlement out of appropriations available to such agency.[35] To this extent, Congress presumably could exercise some supervision over such settlements through its control over appropriations. The issue then becomes whether these two aforementioned controls are sufficiently effective. Assuming that some control over the executive is necessary and desirable under our form of government, should additional controls be created which would provide some check on the executive, yet not hamper the effectiveness of an expedient, practical method for out-of-court settlements? Certainly some sort of middle ground should be reached. A few possible additional controls would be:

1. a dollar limit set by Congress.
2. annual responsibility by the Justice Department to an enlightened Congressional Committee.
3. closer scrutiny by courts before granting approval.

The first suggestion could prove to be impractical due to its inflexibility. The third suggestion is desirable, but difficult to regulate. The second suggestion would seem to provide a partial solution, providing such a Congressional Committee would not devote most of its time to "witch hunting" and would allow sensible expenditures. The settlement of October 23, 1963, will have its long-term ramifications not only in the airline industry,[36] which will necessarily call for further settlements of this type, but in almost every phase of governmental activity falling within the Tort Claims Act.

James T. Lloyd

Constitutional Law — Eminent Domain — Airport Noise

Plaintiffs, owners of 196 homes south of the primary north-south runway of the Seattle-Tacoma International Airport, brought inverse condemnation suits against the Port of Seattle, owner of the airport, seeking damages for an alleged taking or damaging of their property for public use caused by take-off and landing of jet aircraft at defendant's airport. Plaintiff contended that the use of the airport by jet aircraft had unreasonably interfered with the use and enjoyment of their properties[1] and

[34] 28 U.S.C. § 2677 (1948).
[35] 28 U.S.C. § 2672 (1948).
[36] The problem is particularly acute with respect to airline disasters, involving extensive property damage and loss of life among persons whose earning capacity is correlative with air travel. See note 26 *supra*.

[1] Plaintiffs describe the noise of the jets as a "short, penetrating and piercing . . . whining, shrill sound" like a "piece of chalk on a blackboard screeching." When a jet passes overhead or close by, conversation is halted, radio and television reception disrupted and the sound obliterated, sleep

had caused substantial depreciation in the value of those properties, sufficient to constitute a "taking" under both the United States[2] and Washington[3] Constitutions, or a "damaging" under the Washington Constitution. In the alternative, plaintiffs claimed damages on a nuisance theory.[4] The trial court found that the overflights of jet aircraft over the homes of 140 of the plaintiffs[5] amounted to a *taking* of an air easement without just compensation and as to the other group of fifty-six plaintiffs that the regular low flights near by amounted to a *damaging* of the properties without payment of just compensation. The plaintiffs were denied recovery on the nuisance theory. The matter of actual damages was left to showing of proof on a plot-by-plot basis in subsequent proceedings. *Held:* In pleading the interference with the use and enjoyment of their land, with a subsequent decline in market value, plaintiffs stated a claim upon which relief could be granted. The Washington Supreme Court, sitting in banc, unanimously (9-0) declined to require direct overflights as necessary in order to recover for either taking or damaging.[6] *Martin et. al. v. Port of Seattle, Aarbus et. al. v. Port of Seattle,* 64 Wash.2d 324, 391 P.2d 540 (1964).[7]

Inverse condemnation, as defined in *Thornburg v. Port of Portland,*[8] is the popular term describing an action brought against a governmental entity having the power of eminent domain to recover the value of property which has been appropriated with no exercise of the power of condemnation.[9] This power of condemnation, or eminent domain, is an inherent political right founded upon grounds of common interest and necessity to preserve the sovereign's existence in perpetuity[10] and permits the sovereign to condemn property for public use without the owner's

disrupted, and many persons, especially small children, are frightened. The vibration makes it necessary to hammer the nails back into the siding of the homes about every six months and to tighten the light fixtures, and the vibration is sometimes so bad that crystal "will walk on the table." Brief for Respondent, p. 5.

[2] U.S. Const. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use, without just compensation." U.S. Const. amend. XIV: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

[3] Wash. Const. art I, § 16, amend. 9: "No private property shall be taken or damaged for public or private use without just compensation having been first made. . . ."

[4] See, *e.g.,* Delta Air Corporation v. Kersey, 193 Ga. 862, 20 S.E.2d 245 (1945); Thrasher v. City of Atlanta, 178 Ga. 514, 173 S.E. 817 (1934); Burnham v. Beverly Airways, 311 Mass. 628, 42 N.E.2d 575 (1942); Hyde v. Somerset Air Service, Inc., 1 N.J. Super. 346, 61 A.2d 645 (Ch. Div. 1948); Crew v. Gallagher, 358 Pa. 541, 58 A.2d 179 (1948).

[5] All forty-six of the plaintiffs in Martin and ninety-four of the plaintiffs in Aarhus owned property lying directly beneath the "localizer beam" of the Instrument Landing System while the property of the remaining plaintiffs in Aarhus is located outside the localizer beam but within the approach area to the north-south runway. Brief for Respondent, p. 18. Pilots use the localizer beam on an instrument approach to obtain horizontal information and, on a proper landing, an aircraft will stay within the beam limits, preferably midway between each outer limit. The center of the beam is directly down the center of the runway extended, with a beam width of four degrees. The arc thus described is 1,315 wide at the northern boundary of the litigated area, 1,760.8 feet wide at the southern edge. Brief for Respondent, pp. 70-71.

[6] 391 P.2d 540, 545:

> Recovery for interference with the use of land should [not] depend upon anything as irrelevant as whether the wing tip of the aircraft passes through some fraction of an inch of the airspace directly above the plaintiff's head. The plaintiffs are not seeking recovery for a technical trespass, but for a combination of circumstances engendered by the nearby flights which interfere with the use and enjoyment of their land.

[7] Cases were filed separately, but consolidated both for trial and on appeal.

[8] 233 Ore. 178, 376 P.2d 100 (1962).

[9] 376 P.2d at 101.

[10] Kohl v. United States, 91 U.S. 367 (1876).

consent.[11] The subject matter of any inverse condemnation suit is always private property, and in the airport noise cases, the only property right having any value to the possessor of the land is his ability to use and enjoy his land, whether his interest is in fee, for life, for years, or a mere incorporeal interest such as an easement.[12] Property consists not merely of technical ownership and possession, but also of the unrestricted right of use,[13] enjoyment and disposal.[14] The taking[15] may be trespassory,[16] but it may also be nuisance,[17] as "a nuisance can be such an invasion of the rights of a possessor as to amount to a taking, in theory at least, any time a possessor is in fact ousted from the enjoyment of his land."[18] The court in *Thornburg* further said that while the argument of the majority in *Batten v. United States*[19] apparently adhered to the rule that only a trespass in the airspace, *i.e.* an overflight, would give rise to an action for a taking, and that in actions against the government nuisance principles should not be applied, yet such a view does violence to the law of servitudes, though it may have some basis as a policy argument.[20]

The court based its holding on its own earlier decision in *Ackerman v. Port of Seattle*[21] and that of the United States Supreme Court in *Griggs v. County of Allegheny*,[22] while expressly declining[23] to follow the Tenth Circuit in *Batten v. United States*.[24] In *Ackerman*, plaintiffs were owners of vacant and unoccupied land in the vicinity of the Seattle-Tacoma International Airport, and sought to recover damages for the diminution of value of their land by numerous low flights directly over the property. In deciding that the plaintiffs, in alleging a constitutional taking, had stated a cause of action, the Washington high court recognized the considerable interest and significance in this relatively new problem, and the probability of its becoming more important in the future.[25] Holding that the alleged continuing and frequent low flights over the plaintiffs' land amounted to taking an air easement for the purpose of flying airplanes

[11] Scott v. Toledo, 36 Fed. 385 (N.D. Ohio 1888).

[12] 376 P.2d at 105.

[13] "The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right." Spann v. City of Dallas, 111 Tex. 350, 235 S.W. 513 (1921).

[14] Ackerman v. Port of Seattle, 55 Wash.2d 400, 348 P.2d 644 (1960).

[15] United States v. Cress, 243 U.S. 316, 328 (1917): ". . . it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *Cf.* Richards v. Washington Terminal Co., 233 U.S. 545 (1914); Baltimore and P.R.R. v. Fifth Baptist Church, 108 U.S. 317 (1883); Guith v. Consumers Power Co., 36 F.Supp. 21 (E.D. Mich. 1940).

[16] *E.g.*, United States v. Causby, 328 U.S. 256 (1946); Batten v. United States, 306 F.2d 580 (10th Cir, 1962), cert. denied, 371 U.S. 955 (1963); Ackerman v. Port of Seattle, *supra* note 14.

[17] See *supra* note 8.

[18] 376 P.2d at 105.

[19] 306 F.2d 580 (10th Cir. 1962), cert. denied 371 U.S. 955 (1963). Noted 29 J. Air L. & Com. 72 (1963).

[20] 376 P.2d at 104.

[21] 348 P.2d 664 (1960).

[22] 369 U.S. 84 (1962). The Supreme Court relied upon Ackerman in reaching its decision, as follows: ". . . an adequate approach way is as necessary a part of the airport as is the ground on which the airport, itself, is constructed." 369 U.S. at 90.

[23] 391 P.2d 540, 545. The court said: "[T]hat a landowner show a direct overflight as a condition precedent to recovery of the damages to his land, is presently stressed by some federal courts in construing the 'taking' as contemplated by the Fourteenth Amendment to the Federal Constitution. Batten v. United States (10th Cir. 1962), 306 F.2d 580. *We are unable to accept the premise. . . .*" (Emphasis supplied).

[24] See *supra* note 19.

[25] 348 P.2d at 668.

over the land,[26] the court said that the Port of Seattle was liable because it had failed to secure an approachway sufficient to protect the private airspace of adjacent landowners.[27] In *Batten,* ten property owners brought suit against the United States for an alleged taking of their property, adjacent to Forbes Air Force Base, Kansas, under Tucker Act provisions[28] allowing actions against the United States for certain claims in non-tort cases. In a split decision, the Tenth Circuit denied recovery on the grounds that there must either be a direct encroachment on the property by a physical object,[29] or government action so complete as to deprive the owner of "all or most"[30] of his interest in the land.[31]

In the instant case, in arriving at its decision, the court also swept aside the arguments revolving around "substantial" interference[32] as opposed to "incidental" damaging.[33] The idea that the individual must bear part of the inconvenience and loss of peace and quiet as the cost of living in a modern society is inherent in the "substantial interference" theory. The court reasons, however, that since in an inverse condemnation action, the plaintiff seeks no recovery for his "individual suffering, damage, loss of quiet, or other disturbance,"[34] but only for the decreased market value of his land,[35] the balance of interest which might be necessary in a tort action, where these elements are cognizable, need not be accomplished as a distinct process since lowering of market value of the property reflects the lessened desirability of the land to the general public. Hence, where there is only "incidental" injury, there would be no provable or measurable decline in market value traceable to the flights, and the necessary balancing would be the net result. The court agreed with defendant's contention that certain portions of the airspace were placed in the public domain by Congress in a series of enactments, beginning with the Air Commerce Act of 1926,[36]

[26] 348 P.2d at 671.

[27] *Ibid.*

[28] Actions on claims "not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort" may be maintained under the Tucker Act. 28 U.S.C. § 1346 (a)(2)(1952).

[29] Jensen v. United States, ___Ct. Cl.___, 305 F.2d 444 (1962).

[30] United States v. General Motors Corp., 323 U.S. 373 (1945).

[31] Chief Judge Murrah, in his dissent, found it unnecessary to adhere to a strict trespass rule, and suggested compensation whenever the interference with the use of the land is of sufficient directness, peculiarity and magnitude "that fairness and justice, as between the State and the citizen, requires the burden imposed to be borne by the public and not by the individual alone." 306 F.2d at 587.

[32] "The terms 'substantial injury' and 'substantial interference' appear commonly in the decided cases, sometimes as if it were the *sine qua non* of recovery. The terms are not pertinent, however, in the 'inverse condemnation' context, where . . . the plaintiff . . . is usually claiming a partial taking or damaging rather than a total loss of the land itself." 391 P.2d at 546.

[33] *But see* Bedford v. United States, 192 U.S. 217 (1904). The United States had constructed revetments on the Mississippi which directed the river against the claimants' land six miles below, eroding and overflowing 2300 acres. In affirming the dismissal of the action by the Court of Claims, the Supreme Court said, "The Constitution provides that private property shall not be taken without just compensation, but a distinction has been made between damage and taking, and that distinction must be observed in applying the constitutional provision."

[34] Personal inconvenience or discomfort to the owner of land does not provide an independent basis for liability under the principles of eminent domain law. 2 Nichols, Eminent Domain § 6.4432(2) at pp. 348-49 (3d ed. 1950).

[35] *Contra,* U.S. v. 3276.21 Acres of Land (Miramar), 222 F.Supp. 887 (S.D. Cal. 1963) wherein the court said: "We hold that the inconvenience, injury or damage suffered by a landowner by flights which did not become so extensive or oppressive as to constitute a *taking* are not matters which may be considered in a condemnation case."

[36] Ch. 344, § 10, 44 Stat. 574 (1926). "As used in this Act, the term 'navigable airspace' means airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce under

and continuing basically unchanged until the Federal Aviation Act of 1958[37] redefined navigable airspace[38] to include any and all airspace "needed to insure safety in take-off and landing of aircraft."[39] However, it was emphasized that "it does not follow from the inability of the landowner to enjoin the use of the navigable airspace . . . that he should be unable also to recover for a decline in the market value of his land which was brought about or inflicted for the public benefit."[40] There is a privilege to use the navigable airspace, but this does not constitute relief from liability for damage or provable pecuniary loss to property owners below, whether in the process of take-off[41] or landing or above 500 feet.[42]

The Port of Seattle also advanced the argument that if there was a taking in a constitutional sense, it was the United States which was liable because of the 1958 inclusion of the air space necessary for take-offs and landings within the navigable airspace.[43] While the *Martin* court did not expressly rule on this, it would appear to be foreclosed by the United States Supreme Court's language in *Griggs:*

> It is argued that though there was a 'taking,' someone other than respondent was the taker—the airlines or the C.A.A. 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.[44]

The decision in *Martin* is diametrically opposed, in most aspects, to the holdings of the lower federal courts, especially *Batten.*[45] It would appear that *Martin* is more closely in line with the Supreme Court's holding in *Griggs* and that whenever the Supreme Court is required to rule on this question, it is most likely to follow the lead of the Washington court and allow recovery regardless of the presence or absence of actual trespassory overflights, overruling *Batten* in the process. It is possible, of course, that the distinction will be retained as between military and civilian airport operations, but this distinction would be grossly unfair and is unwarranted. In the meantime, property owners afflicted with falling property values because of airport operations, have a progressive, forward-looking case upon which to base their claims.

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Section 3, and such navigable airspace shall be subject to a public right of freedom of interstate and foreign air navigation in conformity with the requirements of this Act."

[37] 72 Stat. 737, 49 U.S.C.A. § 1301 (24) (Supp. 1962).

[38] Federal Aviation Authority regulations prescribe the minimum altitude of flight to be 500 feet (1,000 feet over congested areas). 14 C.F.R. § 91.79 (1964).

[39] See *supra* note 37.

[40] 391 P.2d at 544. See also Hyde v. Somerset Air Service, 1 N.J. Super. 346 61 A.2d 645 (Ch. Div. 1948).

[41] Matson v. United States, 145 Ct. Cl. 225, 171 F.Supp. 283 (1959).

[42] Thornburg v. Port of Portland, 233 Ore. 178, 376 P.2d 100 (1962).

[43] Brief for Appellant, pp. 193-202; Brief for Respondent, pp. 57-58.

[44] 369 U.S. at 89.

[45] See *e.g.*, Moore v. United States, 185 F.Supp 399 (N.D. Tex. 1960); Freeman v. United States, 167 F. Supp. 541 (W.D. Okla. 1958).

Jurisdiction — Construction of Statute — Aircraft Piracy

On April 13, 1962, the pilot of a private airplane, a Cessna 172, was kidnapped at gun point and forced by David Thomas Healy and an accomplice to fly from Dade County, Florida, to the Republic of Cuba. A federal grand jury returned a two-count indictment against the defendants in the United States District Court for the Southern District of Florida, charging: (1) that the defendants had violated the Federal Kidnapping Act[1] and; (2) that the defendants had committed "aircraft piracy" in violation of a 1961 amendment to the Federal Aviation Act of 1958.[2] Prior to the trial, the district court dismissed both counts of the indictment and, as to the second count, ruled that the alleged piracy of the private aircraft did not come within the "aircraft piracy" amendment, because the Cessna 172 was not "an aircraft in flight in air commerce" as required by the statute.[3] The district court construed the language of the statute to apply only to commercial airlines engaged in the carriage of goods and persons for hire. The Supreme Court granted a writ of certiorari.[4] *Held:* A private aircraft is "an aircraft in flight in air commerce" within the statute defining aircraft piracy.[5] *United States v. Healy*, 376 U.S. 75 (1964).

The great variance in state laws which provide for jurisdiction and venue[6] and the lack of federal legislation concerning crimes committed in the air has been of such significance that several crimes committed aboard aircraft have gone unpunished.[7] Prosecutors have had considerable trouble in these cases because of the difficulty in determining a proper forum in order to bring persons guilty of air crimes to trial. The difficulty had

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[1] 18 U.S.C. § 1201 (1948).

[2] 75 Stat. 466, 49 U.S.C. § 1472 (i) (Supp. IV, 1961):

> (i) (1) Whoever commits or attempts to commit aircraft piracy, as herein defined, shall be punished—
>
> (a) by death if the verdict of the jury shall so recommend, or, in the case of a plea of guilty, or a plea of not guilty where the defendant has waived a trial by jury, if the court in its discretion shall so order; or
>
> (b) by imprisonment for not less than twenty years, if the death penalty is not imposed.
>
> (2) As used in this subsection, the term "aircraft piracy" means any seizure or exercise of control by force or violence and with wrongful intent, of an aircraft in flight in air commerce.

[3] United States v. Healy, 8 Av. L. Rep. (1963 Aviation Cases) 17,521 (S.D. Fla. September 17, 1962).

[4] United States v. Healy, *cert. granted*, 372 U.S. 963 (1963): A direct appeal is permitted from a United States District Court by or on behalf of the United States when the dismissal of an indictment is based on the construction of the statute on which the indictment is based, pursuant to 18 U.S.C. § 3731. The United States petitioned for rehearing in the United States District Court and rehearing being denied, notice of appeal was filed within thirty days from the date of denial of rehearing, but not within thirty days from the date of entry of the original judgment. The Supreme Court, in considering the respondent's contention that they were without jurisdiction due to the Governments extension of the time for appeal stated that, "A rehearing petition, at least when filed within the original period for review may . . . extend the time for filing a petition for certiorari by a criminal defendant . . . [and] criminal judgments are nonfinal for purposes of appeal so long as timely rehearing petitions are pending." See, e.g., Panico v. United States, 375 U.S. 29 (1963).

[5] United States v. Healy, 376 U.S. 75 (1964) at 81: In reversing the district court the Supreme Court held that the first count of the indictment had been improperly dismissed and that a motive of pecuniary profit was not required under 18 U.S.C. § 1201.

[6] See, *e.g.*, Ill. Ann. Stat. ch. 38 §§ 1-6 (1961); N.Y. Code of Crim. Proc. Ann., Book 66, Part 1, § 137; Cal. Pen. Code § 177.

[7] See 1 U.S. Code Cong. & Ad. News 2564 (1961); N.Y. Times, July 25, 1961, p. 1, col. 7; Id., Aug. 10, 1961, p. 1, col. 4.

arisen when an aircraft's point of departure was in one state and its point of destination in another.[8] In order to bring a criminal to trial prior to the 1961 aircraft piracy amendment to the Federal Aviation Act of 1958, a prosecutor had to prove that the crime had been committed in the airspace over the state in which the trial was to be conducted. In many instances prosecutors have been unable to establish the requisite jurisdiction and venue.[9] *United States v. Bearden*[10] is an example of federal prosecution of an aircraft hijacking prior to the 1961 aircraft piracy amendment. Leon Bearden and his son, aboard a commercial flight from Phoenix, Arizona, to Houston, Texas, announced to the crew that they were taking command and intended to proceed to Mexico and then to Cuba. The Beardens were apprehended in El Paso, Texas, and a six count indictment was brought against Leon Bearden,[11] charging him with "knowingly transporting in interstate commerce persons whom he had unlawfully seized for purpose of stealing aircraft knowing it to have been stolen, and obstruction and attempt to obstruct commerce by extortion."[12] Bearden was convicted but the case was later reversed because of an improper jury charge.[13] This case illustrates the variety of statutes that federal prosecutors were compelled to utilize prior to the 1961 aircraft piracy amendment.[14] In at least one other case of a criminal act committed aboard an aircraft in flight, the federal government was unable to prosecute the offender because of the absence of a federal statute.[15] Prior to the 1961 amendments to the Federal Aviation Act of 1958 there was no federal statute directly in point. Jurisdiction of crimes committed in the airspace and territorial waters of the states were considered within the jurisdiction of the state courts under the theory of retained police power.[16]

In light of the problem which existed in relation to crimes committed aboard aircraft in flight, the Congress, in September 1961, passed Public Law 87-197[17] amending in part the Federal Aviation Act of 1958. The 1961 aircraft piracy amendment sets forth the following elements which constitute the crime of aircraft piracy: (1) seizure or exercise of control; (2) by force or violence or threat of force or violence; (3) with wrongful

[8] See generally Bradford, *The Legal Ramifications of Hijacking Airplanes*, 48 A.B.A.J. 1034 (1962).

[9] See *Hearings on S. 2268, S. 2370, S. 2373, and S. 2374 Before an Aviation Subcommittee of the Senate Committee on Commerce*, 87th Cong., 1st Sess. (1961).

[10] 304 F.2d 532 (5th Cir. 1962), *rehearing denied*, 307 F.2d 506 (5th Cir. 1962), *cert. granted, judgment vacated*, 372 U.S. 252 (1962), *reversed and affirmed in part*, 320 F.2d 99 (5th Cir. 1963), *cert. denied*, 376 U.S. 922 (1964).

[11] Defendant's son Cody Bearden was also indicted and pleaded guilty under the Juvenile Delinquency Act, 18 U.S.C. § 5031.

[12] In order to obtain a conviction in the *Bearden* case the government had to make use of the several statutes including 18 U.S.C. § 1201 asserting violation of the Federal Kidnapping Act, 18 U.S.C. § 2312 asserting the transportation of a stolen vehicle, and 18 U.S.C. § 1951 asserting interference with commerce by threats or violence (racketeering).

[13] 320 F.2d 99 (5th Cir. 1963) at 103: The court reversed its own decision on the grounds that the district judge failed to properly instruct the jury as to the main elements of counts one and three of the indictment which dealt with transportation.

[14] United States v. Bearden, 304 F.2d at 540: Judge Rives, in a dissenting opinion, pointed out that the new "aircraft piracy" amendment would have been applicable had not the hijacking by the Beardens been committed prior to the passage of the amendment. See note 12, *supra*.

[15] Graham v. People, 134 Colo. 1290, 302 P. 2d 737 (1956).

[16] See generally Brown, *Jurisdiction of United States Courts over Crimes in Aircraft*, 15 Stan. L. Rev. 45 (1962-1963).

[17] 75 Stat. 466, 49 U.S.C. § 1472 (i)-(n) (Supp. IV, 1961); 75 Stat. 467, 49 U.S.C. § 1473 (a) (Supp. IV, 1961); See 1 U.S. Code Cong. & Ad. News 2563 (1961).

intent.[18] The preceeding elements constitute aircraft piracy only if the aircraft is "an aircraft in flight in air commerce." The passage of this legislation, which extended the Federal Aviation Act to cover the criminal acts of aircraft piracy, murder, manslaughter, assault, maiming, carrying concealed weapons, and stealing personal property, and which provided for venue for these offenses,[19] was accelerated because of the occurence of several criminal acts, including hijacking, aboard aircraft during 1961.[20] This legislation was accompanied by Special Civil Air Regulations[21] issued by the Federal Aviation Agency to aid in the prevention of aircraft hijacking. By enacting this legislation, Congress apparently did not intend to pre-empt the jurisdiction of the states, but merely to supplement it, therefore, giving the federal government concurrent jurisdiction with the states in order to facilitate the protection of air commerce and effectively administer justice.[22]

In deciding the *Healy* case, the Supreme Court construed the term "an aircraft in flight in air commerce" to include a private aircraft, stating that "The Cessna 172 was 'an aircraft'; it was 'in flight'; [and] it was in flight 'in air commerce'."[23] In support of their holding, the Court relied on the Federal Aviation Act of 1958, section 101,[24] the legislative history of the aircraft piracy amendment,[25] and statements from the *Congressional Record*.[26] The Court referred to the legislative history repeatedly, with the most forceful showing of legislative intent being a distinction made between subsections (*l*) and (i) of Section 1472.[27] Subsection (*l*) is applicable only to an aircraft being operated "by an air carrier in air transportation," in contrast to the term "an aircraft in flight in air commerce" as required by subsection (i). This distinction shows that a broad connotation was apparently intended by the drafters of subsection (i) when the term "an aircraft in flight in air commerce" was utilized. Further

[18] 75 Stat. 466, 49 U.S.C. § 1472 (i) (Supp. IV, 1961), *supra* note 2.

[19] 75 Stat. 467, 49 U.S.C. § 1473 (a) (Supp. IV, 1961):

> (a) The trial of any offense under this chapter shall be in the district in which such offense is committed; or, if the offense is committed out of the jurisdiction of any particular state or district, the trial shall be in the district where the offender, or any one of two or more joint offenders, is arrested or is first brought. If such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia. Whenever the offense is begun in one jurisdiction and completed in another, or committed in more than one jurisdiction, it may be dealt with, inquired of, tried, determined and punished in any jurisdiction in which such offense was begun, continued, or completed, in the same manner as if the offense had been actually and wholly committed therein.

[20] See U.S. Code Cong. & Ad. News, *supra* note 17; N.Y. Times, *supra* note 7.

[21] Special Civil Air Regulation No. SR-448, 26 Fed. Reg. 7009 (1961) (superseeded Oct. 9, 1961); Special Civil Air Regulation No. 448A, 26 Fed. Reg. 9669 (1961).

[22] See U.S. Code Cong. & Ad. News, *supra* note 17 at 2565.

[23] United States v. Healy, *supra* note 5 at 83.

[24] 72 Stat. 737, 49 U.S.C. § 1301 (4) (1958):

> (4) "Air Commerce" means interstate overseas, or foreign air commerce or the transportation of mail by aircraft or any operation or navigation of aircraft within the limits of any federal airway or any operation or navigation of aircraft which directly affects, or which may endanger safety in, interstate overseas, or foreign air commerce.

[25] U.S. Code Cong. & Ad. News, *supra* note 17.

[26] 107 Cong. Rec. 16545 (1961) (remarks of Congressman Harris); 107 Cong. Rec. 16547-16548 (1961) (remarks of Congressman Williams); 107 Cong. Rec. 15243 (1961) (remarks of Senator Engle).

[27] 75 Stat. 466, 49 U.S.C. § 1472 (1) (Supp. IV, 1961); 75 Stat. 466, 49 U.S.C. § 1472 (i) (Supp. IV, 1961), *supra* note 2.

evidence of the broad intent of the term in question, which was not brought out by the Supreme Court, includes Special Civil Air Regulations issued by the Federal Aviation Agency. The FAA, in issuing Special Civil Air Regulation No. SR-448A, pointed out that paragraph 1 of SR-448 applied only to aircraft being operated in "air commerce," in order ". . . to broaden the scope of the provision to provide similar protection to those general aviation operations and operations conducted for compensation or hire which are not considered as air transportation under the Federal Aviation Act of 1958."[28]

The *Healy* case is the first reported case[29] under the 1961 aircraft piracy amendment and is significant for several reasons. The case illustrates the effect which the legislation has had on the jurisdictional problems which existed prior to the 1961 amendment. The *Healy* case illustrates the types of aircraft that the new aircraft piracy statute encompasses. The Supreme Court construed the term "an aircraft in flight in air commerce" to include private aircraft, and in construing the term in this manner has given it a broad meaning in line with the legislative intent, and has also interpreted the statute to provide for jurisdiction and venue over both commercial and private aircraft in flight if and when a criminal act is committed aboard such aircraft. Although the *Healy* case stands primarily for the Supreme Court's recognition of a private aircraft as "an aircraft in flight in air commerce," it is also illustrative of the venue provisions in Section 1473 which relate to all crimes set out in Section 1472. In the instant case the offense was begun in the Southern District of Florida and completed in the Republic of Cuba.[30] It can be seen by reference to the 1961 amendment to Section 1473, that the amendment was apparently relied upon by the prosecutors in the *Healy* case. A portion of the amendment states, "Whenever the offense is begun in one jurisdiction and completed in another . . . it may be dealt with . . . in the same manner as if the offense had been actually and wholly committed therein." It appears that the 1961 amendments to the Federal Aviation Act of 1958, taken in conjunction with the Supreme Court's construction of the section relating to aircraft piracy, have effectively solved the problems of jurisdiction and venue which were present prior to the enactment of the 1961 legislation, and that any person who commits a crime aboard an aircraft in flight in the future, will find himself amenable to federal and, in many instances, state prosecution.

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[28] Special Civil Air Regulation No. 448 A, *supra* note 22; See 72 Stat. 737, 49 U.S.C. 1301 (10) (1958): Air transportation is there defined as "interstate, overseas, or foreign air transportation or the transportation of mail by aircraft."

[29] United States v. Albert Miller Brooks, Criminal Information No. 6372 (W.D. Va. 1962), was the first case to be prosecuted under the new law. The defendant was charged and pleaded guilty.

[30] See N.Y. Times, April 22, 1962, p. 7, col. 1: The Republic of Cuba returned David Thomas Healy, M. Oeth (his accomplice), and the pilot to the United States, but retained the airplane.