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NOISE LITIGATION AT PUBLIC AIRPORTS

By Lyman M. Tondel, Jr.

I. BACKGROUND

A. The Underlying Facts

Most airports, like Kennedy, O'Hare, Seattle-Tacoma, and Los Angeles, were originally located in thinly populated outskirts of metropolitan areas. However, the subsequent geographical growth of cities, the nationwide exodus to suburbs, and the tendency of airports, with their collateral access roads, to attract real estate developers have brought more and more residents into areas adjoining airports. At the same time, the volume of intercity passenger travel by air has so greatly expanded in this country that it now exceeds, in passenger miles, the volume of intercity public transportation by buses and railroads combined; and the unwarrantedly feared—but noisy—jets handle more and more of this traf-
fic. Jet planes in increasing numbers have been landing and taking off closer to more and more residences, and the natural desire of their occupants to enjoy quiet has been brought into conflict with the need of the community for modern airports. The airport noise problem is not unique. Noise is also an unfortunate concomitant of many of today's machines and household conveniences.

The public importance of the air transport industry and of a nationwide system of first-class airports, both for air commerce and for the national defense, has been recognized by Congress. It has not only declared the navigable airspace to be in the public domain, and created the CAB and the FAA to regulate, respectively, the economics and safety of air traffic, but also has necessarily preempted the regulation of air traffic. States, and their political subdivisions, have recognized such pre-committee on Regulatory Agencies of the House Committee on Interstate and Foreign Commerce, Investigation and Study of Aircraft Noise Problems, H.R. REP. No. 36, 88th Cong., 1st Sess. 25 (1963) (hereinafter cited as the 1963 Report), in which the Subcommittee found as follows:

2.01 There is no evidence before the subcommittee of any permanent physical injury to persons or extensive physical damage to property as a direct result of noise created by civil transport aircraft.

From 1950 to 1963, the number of nonoccupant fatalities in the United States resulting from accidents of transportation media were approximately as follows:

- Automobiles (excluding taxis) 121,853
- Buses 4,908
- Railroad passenger trains 12,830
- Air carrier aircraft (excluding propeller accidents involving non-moving aircraft) 38

Eleven of the thirty-eight deaths were in the two Elizabeth, New Jersey crashes on 22 January and 11 February 1952. National Aircraft Noise Abatement Council, News Letter, 1 July 1964. See also note 52 infra.

Even by the end of 1963, 420 of the 1,837 aircraft owned by the commercial airlines were pure jets, and 263 were turbo-prop aircraft. However, these 683 aircraft handled more than 80% of the traffic. AIR TRANSP. ASS'N OF AMERICA, 1964 FACTS AND FIGURES 6, 11-12.

As early as 1934, long before the jet age, the rising noise level in urban communities was recognized as a growing problem. Lloyd, Noise as a Nuisance, 82 U. PA. L. REV. 567, 582 (1934). See also Schonberg, The Sound of Sounds That Is New York, N. Y. Times, 23 May 1965, § 6 (Magazine), p. 38.


The Civil Aeronautics Board was established in its present form by § 201 of the Federal Aviation Act of 1958, 72 Stat. 741, 49 U.S.C. § 1321 (1964). It was created, however, by the Civil Aeronautics Act of 1938, 52 Stat. 980, under the name Civil Aeronautics Authority, and redesignated as the Civil Aeronautics Board by Reorganization Plan No. IV of 1940.


In Allegheny Airlines v. Village of Cedarcoust, 318 F.2d 812, 815 (2d Cir. 1962), it was held that, "The federal regulatory system . . . has preempted the field [of air traffic] below as well as above 1,000 feet from the ground." This has been frequently confirmed. See, e.g., City of Newark v. Eastern Airlines, 119 F. Supp. 730 (D.N.J. 1958); Scandinavian Airlines Sys. v. County of Los Angeles, 16 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rep. 25 (1961) (dictum). However, in Loma Portal Civic Club v. American Airlines, Inc., 61 Cal. 2d 182, 394 P.2d 548, 554-55, 39 Cal. Rep. 708, 714-15, 3 AV. L. REP. (9 Av. Cas.) ¶ 17,156 (1964), the Supreme Court of California said in dicta that Congress did not intend the federal legislation to be exclusive and, therefore, that state action affecting flight operations is not precluded so long as it does not conflict with federal requirements.
Meanwhile, numerous public airports have been authorized to handle the burgeoning air traffic, for which the competition has been keen. When threatened with a cutback in operations at a neighboring airport, or even a failure to maintain competitive jet service, localities have sought more or better operations despite noise problems.

As a bridge requires approaches, so an airport requires, for safety, clear zones and zones free of obstructions above specified heights. While the location of a public airport is the owner's decision, the airport must meet detailed standards fixed by the FAA, including those relating to clear zones, if it is to receive federal aid. Even if no aid is sought, airport construction or alteration plans must be cleared with the FAA. The FAA does not, however, even as a condition to receiving federal aid, require airport owners to acquire adjacent properties for the sole purpose of noise abatement, and the extent to which airport owners have done so, if at all, has been up to them individually.

Every runway approach area in the country is different, not only topographically but also in its residential history, its local government, its zoning laws, its ambient noise, its leadership, its economic status, and the ability and willingness of its residents to adjust to nearby airport operations. In addition, every airport owner and operator differs in its attitude with federal law. Since the FAA exercises such broad powers of regulation of air traffic and the enforcement thereof, it is not apparent how such state (or local) regulation of commercial air traffic could fail to be in conflict with federal regulation.

CAL. PUB. UTIL. CODE § 21240: This State recognizes the authority of the Federal Government to regulate the operation of aircraft and to control the use of the airways, and nothing in this act shall be construed to give the commission [of aeronautics] the power to so regulate and control safety factors in the operation of aircraft or to control use of the airways.

12 The 1963 Report stated at 17-18 that in 1963 there were about sixty-five existing airports in the United States equipped with facilities adequate to accommodate jet-powered transport-type aircraft and that the national airport development plan for the next four years envisioned the further improvement of sixty-five additional airports to accommodate jet-propelled aircraft.

13 Harris Committee Hearings at 518: There was a very vociferous group around the Midway Airport that had much to say about the noise problem, about the activity of Midway Airport, at one time the world's busiest airport. There is not today a scheduled airline serving Midway Airport, and it is my understanding that that same group now, because of the economic blight that has hit the merchants and the people in the area, would like to have, and have come to the CAB in one form or another, to require some service still to be performed at Midway Airport. Testimony of Leslie O. Barnes. See also the Newark Star-Ledger, 9 January 1962, where City Council President Bontempo was quoted as saying that barring jets from Newark Airport during 1960 had "caused a 30.5% drop in business there" but that "with the coming of jets 'things are humming again.'"

14 Ft. Worth Investigation, CAB Docket No. 7382, CAB Order No. E-15770 (14 Sept. 1960) (supplemental opinion). There, Fort Worth successfully contended that its air service would be "inadequate" unless jet service was provided.


16 In fact, it is debatable whether the FAA has the power to require a public airport owner to acquire lands for noise abatement reasons alone. However, under the Federal Airport Act, 60 Stat. 170 (1946), as amended, 49 U.S.C. §§ 1101-19 (1964), the Administrator of the FAA may not approve an airport project for a federal grant until he receives written assurances that:

- appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft.

towards the complaints of airport neighbors, in its authority and ability, financial and otherwise, to deal with them, and in its determinations as to how much property (including air easements), if any, should be acquired in order to mitigate annoyance to airport neighbors. A balancing of interests is required, and it must not be overlooked that, at least in the first instance, public airport authorities usually must use taxpayers' money to acquire any such property rights.

In spite of the continuing efforts of the air transport industry and the Government to reduce the noise of airport operations—because all concerned recognize the seriousness of the problem—there are necessarily some property owners who feel that the noise created by arriving and departing aircraft has interfered with the enjoyment of their homes to such a degree that they should be compensated. However, very few have seriously sought to have flights at a publicly owned and operated airport enjoined and, when attempted, such efforts have been uniformly unsuccessful.

Most complainants seek only noise reduction and an understanding attitude rather than relief in the courts. When suits for damages are actually brought they present only another example of the age-old question of how far the individual must tolerate public improvements that interfere with the use or enjoyment of his property before he is entitled to compensation. It is important not to allow the novelty of flight and the rather revolutionary nature of jets to make it seem that the legal problems involved are without precedent. Railroad cases, smoke cases, stench cases, and others by the hundreds have dealt with similar problems.

A failure to see these problems in perspective and in the context of legal history.
resulted in the Martin decision,\textsuperscript{23} to which further reference will be made later.

The role law and lawyers can play in reducing noise attendant to airport operations must not be exaggerated. The FAA has led the way, as it must (since it is responsible for air safety), in noise abatement operating techniques, with very substantial and expensive cooperation from air carriers and pilots. Engine and airframe manufacturers, the Federal Government, and many engineers and scientists, both in government and in industry, are conducting extensive research and development programs to try to reduce the noise at the source. Progress in these technical areas cannot be dictated by law or by the courts.

The third major means of noise abatement, more compatible land use around airports, is not a problem that can be dealt with by a neat formula or by a single nationwide approach. The individuality of each airport and of each approach area precludes uniform treatment.\textsuperscript{24} Effective federal legislation requiring land acquisitions or restricting land use in existing approach areas, even if financially feasible, would raise both policy questions of home rule and legal problems of constitutionality.\textsuperscript{25} There might, however, be a possibility of evolving practical and constitutional federal legislation of more limited scope. Such legislation might, for example, authorize the FAA to contribute or lend federal funds toward the acquisition of further properties or easements for the purpose of reducing noise annoyance. This might be based upon a detailed showing of the necessity for such an acquisition and upon specified conditions, including perhaps a binding commitment by the appropriate governmental authority not to permit incompatible land uses in prescribed areas near the airport.\textsuperscript{26}

In this connection legal scholars might usefully devote more attention to the powers of municipalities and airport owners to acquire or condemn land for noise abatement and to the legality, under the police power, of zoning for that purpose. Greater knowledge and imaginative thinking in this field might prove useful. It is unfortunately true that efforts to date to persuade local authorities to refuse building permits for homes or apartment houses under approach paths have frequently been futile, even where residents already living near the building site had suits pending against the airport for noise annoyance.\textsuperscript{27}

\textsuperscript{23} Martin v. Port of Seattle, 64 Wash. 2d 309, 391 P.2d 140, 8 Av. Cas. 518, 324 (1964), cert. denied, 379 U.S. 989 (1965).

\textsuperscript{24} See testimony of Crocker Snow, Harris Committee Hearings at 661-62.

\textsuperscript{25} Many property owners under approach paths do not want to move out of the affected area, even though they naturally would like a reduction in noise. See 1961 Report at 26. Thus, even a local, let alone a federal, land acquisition program would be likely to antagonize many residents. Furthermore, federal legislation requiring land acquisition or forbidding residential land use in specified areas around airports solely because of the noise problem would have to be justified under the commerce power.

\textsuperscript{26} For the most recent federal legislation that relates to this problem, see note 16 supra.

\textsuperscript{27} E.g., in the San Francisco Bay Area, the substantial Flamingo Apartments were built in Bayside Manor, Millbrae, at the south end of Runway 1 at the San Francisco International Airport, even though residents of Millbrae who live in the same neighborhood were suing the City and County of San Francisco because of airport noise.

Furthermore, in the area just south of the Seattle-Tacoma Airport, where at least 196 property owners had brought suits as the result of airport noise, a development of about sixteen homes was undertaken.
An authoritative study on the law of annoyance would also be of great value. Such a study should not just relate to noise and airplanes but should be a comprehensive analysis of all English and American legislation, cases, and commentaries that concern alleged injury to interests in property or interference with the use or enjoyment thereof caused by any type of annoyance, public or private, as distinguished from tangible physical injury. Such a study would serve to guide the developing law, legislative and administrative, as well as judicial, into principled channels.

The discussion which follows deals with public airport noise litigation, since cases involving private airports reflect quite different considerations. Although noise cases at private airports may have led to some false notions as to the law of noise at public airports, the private airport cases have been of increasingly little significance. Since federal regulation of the scheduled airlines (the primary users of public airports) is "intensive and exclusive," especially in the vicinity of airports that have control towers, and since the penalties for violating FAA regulations or control tower orders are severe, this discussion is concerned almost entirely with noise from aircraft landing and taking-off in accordance with regulations. Negligent or illegal flights raise different questions that are more easily answered under familiar rules of law.


The only papers published to date on the law of noise, generally, seem to be Lloyd, supra note 5, and Spater, Noise and the Law, 63 MICH. L. REV. 1373 (1965), which, within the confines of an article, does approach liability for noise in the analytical manner suggested in this text. No other published article or treatise has been discovered which discusses liability for noise alone, from whatever the source the noise is derived. Professor Allison Dunham of the University of Chicago did something of the generic sort suggested in the text, after the Griggs decision, with respect to the Supreme Court’s doctrine on the law of expropriation. Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1966 SUP. CT. REV. 63.

20 For instance, in Swetland v. Curtiss Airports Corp., supra note 29, the plaintiffs successfully obtained an injunction against the operation of a private airport in Ohio. When Cuyahoga County sought to acquire the same site for a public airport fourteen years later the nearby residents brought an unsuccessful taxpayers' suit to enjoin the acquisition claiming, inter alia, that the prior decree barred the county from using the site as an airport. State ex rel. Helsel v. Commissioners of Cuyahoga County, 37 Ohio Op. 38, 79 N.E.2d 698 (Ct. C.P. 1947), aff’d, 50 Ohio L. Abs. 338, 78 N.E.2d 694 (Ct. App.), appeal dismissed, 149 Ohio St. 183, 79 N.E.2d 911 (1948). As the plaintiffs learned, the law draws a substantial distinction between public and private airports.

21 In Northwest Airlines v. Minnesota, 322 U.S. 292, 301 (1944), the Court stated:

Congress has recognized the national responsibility for regulating air commerce. Federal control is intensive and exclusive. Planes do not wander around in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. (Mr. Justice Jackson in a concurring opinion.)

22 See FAR § 91.87.

23 See Federal Aviation Act of 1958, § 901, 72 Stat. 783, 49 U.S.C. § 1471 (1964); FAR § 13.15 (civil penalties); FAR § 13.17 (seizure of aircraft); and FAR § 13.19 (loss of pilot's certificate).
II. INJUNCTION CASES AND ADMINISTRATIVE RECOURSE

A. Injunction Cases

While a few injunctions were issued in early cases to prohibit either the continuance of operations or to restrict the use of airfields that were privately owned and operated, or merely privately operated, the operations of a publicly owned and publicly operated airport have not been suspended or restricted by court action. Where airport neighbors have gone to court seeking injunctions as an alternate form of relief, the public need for a public airport, expressed either through the "legalized nuisance" doctrine or otherwise, has always been found to outweigh the complainants' desires to close the public airport or restrict its operation.

Injunctions have not been issued because our national airport system is vital. For valid, practical reasons, the Congress properly preempted the field of air traffic regulation, and any injunction that might affect air safety or the regulation of air traffic, directly or indirectly, would be in conflict with the proper and safe operation of the airways under federal control. Even an injunction that closed an important airport for only part of every day would raise havoc with traffic control not only at that airport but also at connecting and even more remote airports due to the rerouting and congestion that would result.

B. Administrative Relief—On The Books And In Practice

Since airport neighbors are likely to want to keep their homes in spite of the noise caused by the neighboring airport operations, and usually seek noise reduction rather than damages, how may they proceed to

34 Swetland v. Curtis Airports Corp., 55 F.2d 201, 1 Av. Cas. 315 (6th Cir. 1932); Gay v. Taylor, 19 Pa. D. & C. 31, 1 Av. Cas. 381 (Ct. C.P. 1932).
36 See Note, Airplane Noise: Problem in Tort Law and Federalism, 74 Harv. L. Rev. 1581 (1961). In at least the following cases injunctions were granted with respect to airports that were publicly owned but privately operated: Burnham v. Beverly Airways, Inc., 311 Mass. 628, 42 N.E.2d 575, 1 Av. Cas. 1014 (1942); Reynolds v. Wilson, 2 Av. Cas. § 14,863 (Ct. C.P., Pa. 1949); and Dlugas v. United Air Lines, 53 Pa. D. & C. 402, 1 Av. Cas. 1140 (Ct. C.P., 1944).
37 See text accompanying note 62 infra.
38 See N.Y. Times, 6 June 1963, p. 25, col. 3 for President Kennedy's description of the importance of the civil air transport system.
39 Cases cited note 10 supra. As a practical matter, how could jets traveling 600 miles per hour safely be subject to multi-state regulation?
40 In City of Newark v. Eastern Air Lines, Inc., 159 F. Supp. 750, 757, 5 Av. Cas. § 17,828, 17,833 (D.N.J. 1958), the court stated:
   An attempted amendment of the present regulations by the Court . . . would be an unwarranted interference with the regulatory power vested in the . . . Board and could result only in an unseemly conflict between the administrative agency and the court. If the courts undertook, by judicial decree, to promulgate regulations and establish flight patterns peculiarly applicable to each major airport . . . the uniformity contemplated by the Civil Aeronautics Act and essential to a comprehensive regulatory system would soon be impaired.
41 For instance, if there were a 10:00 p.m.-7:00 a.m. curfew on night flights in London and New York, only three hours a day would be unrestricted in each city. Testimony of John R. Wiley, Harris Committee Hearings at 528-30.
42 See note 25 supra.
achieve this result if they cannot obtain an injunction? Congress has provided that:

(a) Any person may file with the [Federal Aviation] Administrator or the [Civil Aeronautics] Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of.

Therefore, any operation of an airplane contrary to an Air Traffic Control instruction is a violation subject to investigation and sanction.

The FAA's enforcement power also extends to its regulations governing air traffic that are intended to reduce objectionable noise. Such regulations include those that require aircraft to climb as quickly as possible to remain above specified heights as long as practicable on landing, and to use, whenever possible, preferential runways designed to route planes over relatively unpopulated areas. Furthermore, the FAA's regulations provide that "any person who knows of a violation of the Federal Aviation Act . . . or of any regulation . . . issued under it, may report it to appropriate personnel of an FAA . . . office," and that such reports shall be investigated by FAA employees. For the purpose of conducting such investigations the agency is empowered to conduct public hearings, take evidence and depositions, issue subpoenas, and compel testimony.

The only administrative hearing conducted to date by the FAA on noise complaints was at New Orleans in 1962. This well-attended and well-publicized hearing served not only to bring to the FAA's official attention the complaints and suggestions of some of the people in the particular approach zone involved, but also to acquaint the complainants with the problems involved in controlling traffic in and out of a major

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42 In passing, it should be noted that at many major airports either the FAA, the airport operator, or some form of airport committee has a noise abatement office or complaint center where airport neighbors are invited to come with their complaints and with any suggestions as to how the noise may be reduced, consistent with safety.


44 FAR § 91.73(b). See sanctions cited note 33 supra.

46 FAR § 91.87(f)(2).

47 FAR § 93.33.

48 FAR § 91.87(g).

49 FAR § 13.1(a).

50 FAR § 13.3.

51 A group of airport neighbors petitioned the FAA to conduct an investigation and hearing of complaints, and to discontinue turbojet aircraft operations at Moisant International Airport (New Orleans) or, as an alternative, revise existing traffic patterns on landings and take-offs. Rosemary Angell & Mrs. A. Angell, FAA Regulatory Docket No. 861 (31 May 1962). The Administrator's denial of the petition, supported by a nine page opinion, was upheld in Angell v. FAA, Civil No. 17188, D.C. Cir., 21 May 1963 (per curiam).

52 Many such suggestions prove to be unusable because they are based on factual misconceptions. Even certain elemental facts regarding airports are surprisingly little known. For example:

(a) Runways are not located by whim, as some believe, but, necessarily, in accordance with the prevailing winds in the area; and

(b) Jet engines have proved to be much more (rather than less) reliable than piston engines.

This last aspect is of substantial importance because fear of jets has undoubtedly been an important factor in the minds of plaintiffs. See Harris Committee Hearings at 506. See also note 3 supra.
airport. This case resulted in no FAA changes in traffic patterns, but it did demonstrate one way for airport neighbors formally to press their complaints before the appropriate administrative body if they so desire.

III. Damage Cases

A. Extent Of Damages Heretofore Recovered

Before exploring even superficially the extraordinarily interesting history of the legal theories used in damage suits predicated on airport noise, it should be observed that the damages recovered in public, non-military airport noise cases have been astonishingly small in view of the professional and public attention such cases have attracted.

In the last eleven years, damages have been actually recovered in only nine such cases in this country. In eight of them, a total of $470,334 was recovered against civil airport operators on the ground that there had been a constitutional taking or, in two Washington cases, a constitutional damaging. In the remaining case, $12,500 was recovered against Lockheed Aircraft Corporation on a nuisance theory. Insofar as the critical issues in Lock heed were concerned, the airport was public only in a technical sense because the flights in question were test flights by the defendant manufacturer.

In addition, $751,770 has been recovered over the past eleven years in twenty-two cases brought against the United States Government involving military airports. Twenty-one of these recoveries were based on a constitutional taking theory and one, the Weisberg case, on a negligence

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theory. One reason for the greater success that plaintiffs have had against the United States is that in many cases the Government has admitted a taking—leaving only the amount of compensation to the court.

There have, of course, been many more cases in which there was no recovery.

B. Volume Of Current Litigation

Presently there is a substantial volume of airport noise litigation pending in various American courts (in addition to one known case abroad, in Nice, France). Based on data collected by the National Aircraft Noise Abatement Council (NANAC) as of June, 1965, there were 87 airports that reported neither pending or recent noise litigation, nor any pending claim involving airport noise that had not been made the basis for court action. At 34 other airports, either one or more cases (in several places, many cases) were pending in June, 1965, or one or more suits had been disposed of in 1964. At 3 airports claims had been made, but no suits were pending.

The suits at 8 of the aforementioned 34 airports had been decided for the defendants or disposed of and those at 2 had been dormant for some time. Suits were pending at the remaining 24 airports; but in all of the suits at 2 of these airports there had been a preliminary ruling for the defendant, and at 1 there had been a preliminary ruling for the plaintiff. This leaves only 21 airports at which there is other pending litigation out of the total of 124 that had reported to NANAC (14 airports did not report). When these facts are considered together with the relatively small amount of damages actually recovered during the last eleven years, the liability exposure of public airports appears far less than frequently thought.

C. Theories Of Airport Noise Suits

Airport noise suits have usually been based on one or more of the theories of: trespass, nuisance, taking, and constitutional damaging. As later discussed, the taking theory has developed almost to the exclusion of the others.

1. Trespass

The trespass notion is predicated on a physical invasion of the airspace over one's property. Although the word trespass is sometimes still used, the theory has fallen into disuse due to the 1946 Supreme Court decision in United States v. Causby and Section 104 of the Federal Aviation Act. In Causby the Court put an end to the ancient maxim of ad coelum ownership. The Court held that ownership to the sky "has no place in the modern world," and then went on to decide, "the airspace, apart from

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58 328 U.S. at 261.
the immediate reaches above the land, is part of the public domain."\(^{10}\)

Section 104 states:

There is hereby 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.

In addition, section 101 (24) provides that:

"Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft.\(^{10}\)

Since navigable airspace, within these limits, is public domain and includes the airspace necessary for take-off or landing, it is evident why the trespass theory has fallen into disuse. There is only one recent airport noise case where damages on the trespass theory were allowed, and they were only nominal. On appeal even that decision was reversed.\(^{2}\)

2. Nuisance, Including the Theory of "Legalized Nuisance"

A nuisance case involves weighing the plaintiff’s interest in the peaceful enjoyment of his premises against the interests of the defendant and of the public in the airport and in air transportation. However, where a public airport created pursuant to a statute or ordinance is involved (which is usually the case with a large public airport), the doctrine of "legalized nuisance" comes into play. Simply stated, where a public or quasi-public enterprise, like a railroad, a power plant, or an airport is expressly authorized by legislation, nuisance claims that arise out of its proper operation are to be denied. The theory is that even if the activity in question would, if privately conducted, constitute a nuisance, it has been legalized within constitutional limits by the legislative body on behalf of the public.\(^{6}\)

The California Supreme Court, in the Loma Portal\(^{6}\) case, reaffirmed the California version of this rule that applies where, as in Loma Portal, an injunction is sought. The California rule is that, as a matter of public

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policy, where private property has been put to public use by a public
service corporation and the public interest has intervened, an injunction
restricting the use will not be issued.

Therefore, activities that have resulted in a "legalized nuisance" are
usually actionable only if an actual taking is involved or, in some states,
if there is a sufficient interference to support a constitutional damaging
claim. While the application of the "legalized nuisance" theory varies from
state to state, it has been quite generally followed in recent airport noise
cases where the issue has arisen.64

After surveying all of the public airport noise cases in the last eleven
years, it appears that there were only two cases in which the nuisance
theory was considered a proper basis for recovery. In Lockheed,65 which
involved a public airport only in a technical sense, $12,500 in damages
was recovered. In the other case, which arose in Georgia, the court held
that the complaint stated a cause of action, so that the case should not
have been dismissed on the pleadings.66 Thus the nuisance theory, although
expressed and referred to as such in most complaints in this field, has had
little success.

3. Constitutional Taking (Inverse Condemnation)

The theory upon which most recoveries for airport noise have been
based in whole or in part is that the plaintiff's property has been taken by
the airport owner by necessitating flights over it, and that, under either
the fifth or the fourteenth amendment of the federal constitution, or under
a similar provision of the state constitution, he is entitled to be paid for the
property taken. The famous Causby case rested upon this theory. In fact,
twenty-seven of the thirty-one cases in the last decade in which damages
have been recovered were decided on the theory of constitutional taking—
six involving public civil airports and twenty-one growing out of opera-
tions at military airports.

(a) Requirements for a Taking—What constitutes a taking is one of the
questions of primary current importance. In Causby the Supreme Court
stated, "Flights over private land are not a taking, unless they are so low
and so frequent as to be a direct and immediate interference with the enjoy-
ment and use of the land."67

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64 E.g., Price v. Eastern Air Lines, Inc. & Greenville-Spartanburg Airport Dist., Ct. C.P., S.C.
App. 1964). (The court essentially applied the "legalized nuisance" doctrine, although it spoke in
terms of private nuisance.) In Louisville & Jefferson County Air Bd. v. Porter, 397 S.W.2d 146, 3
Av. L. Rep. (9 Av. Cas.) § 17,934 (Ky. Ct. App. 1965), the court reversed a judgment for the
plaintiff, even though the Kentucky Constitution contains an "injuring" provision, because, using a
nuisance analysis, there was not a sufficient over-all inequity to support a recovery. The court indi-
cated that in its view the use of such a balancing approach is necessary if governmental units in
states with damaging or injuring provisions are not to be subjected to liability for activities for
which private defendants could not be held responsible.

accompanying note 54 supra.


67 United States v. Causby, 328 U.S. 216, 266 (1946).
In the *Griggs* decision in 1962,8 the Supreme Court recognized, as it did in the *Causby* case in 1946, that "the use of land presupposes the use of some of the airspace above it,"9 but indicated again, as it had in *Causby*, that the test for a taking is whether the overflights make "the property unusable" for the purpose for which it was being used.10

In *Causby* the Court said that a taking existed where it had been found that overflights on landing and take-off were so low and so frequent over Mr. Causby's commercial chicken farm that about 150 of the chickens had flown into the walls from fright and had killed themselves, resulting in "the destruction of the use of the property as a commercial chicken farm."11 In *Griggs*, which came up without any evidence being introduced for the defense, flights varying in altitude between thirty and three hundred feet over the plaintiff's country home were said to be "regular and almost continuous,"12 and it was testified that the Griggs family had moved from their home because it was "undesirable and unbearable for their residential use."13 In both cases low and frequent overflights were either proved or alleged without proof to the contrary; in both cases the occupants in fact ceased their use of the property because of the overflights; and in both cases the Supreme Court made it clear that a taking resulted because the land, with improvements, was rendered unusable for the use to which it was being put.14

In the much-cited and much-discussed *Batten v. United States*,15 in which the court held that there was no taking in the absence of overflights, it stated:

> [T]he federal courts have long and consistently recognized the distinction between a taking and consequential damages. In Transportation Company...
the Supreme Court held that governmental activities which do not encroach on private property are not a taking within the meaning of the Fifth Amendment even though the consequences of such acts may impair the use of the property.\(^{76}\)

In Batten the court also emphasized that there was "no deprivation of 'all or most' of the plaintiffs' interests" and no suggestion that the property had been rendered "uninhabitable." Leavell v. United States,\(^{77}\) in following Batten, expressly mentioned that the plaintiff had continued to live in her residence during the entire period. There the court said that there was no taking,

although there was, indeed, a substantial interference with the use and enjoyment [of the property]. . . . Although plaintiff's property was located in an area of major noise, there was no actual invasion of her property rights by overflights or otherwise, and any damages suffered by her are no more than a consequence of the operations of the Base.\(^{78}\)

Since every state constitution requires compensation for a taking or its equivalent, a case that raises the issue may be decided in a state court without any reliance on federal law. While the courts' language may differ from state to state, where the issue has arisen both state and federal courts have consistently held that, in order to prove a constitutional taking, it is not enough that a claimant prove low and frequent flights. He must also, and even more importantly, show that the result has been a substantial, if not complete, deprivation of the use of his property.

In Thornburg v. Port of Portland,\(^{79}\) the Oregon Supreme Court stated the rule of what constitutes a taking in this context:

> The idea that must be expressed to the jury is that before the plaintiff may recover for a taking of his property he must show by the necessary proof that the activities of the government are unreasonably interfering with his use of his property, and in so substantial a way as to deprive him of the practical enjoyment of his land. This loss must then be translated factually by the jury into a reduction in the market value of the land.\(^{80}\)

(Emphasis added.)

In a Note written for the Harvard Law Review entitled Airplane Noise: Problem in Tort Law and Federalism, it was stated:

The degree of interference on the ground should be regarded as the most relevant indicium of actionable injury, and the height of the planes overhead is not necessarily correlative with that interference.

\(^{[1]}\)n fact the courts have consistently refused to grant compensation for a "taking" unless there has been a substantial interference.\(^{81}\) (Footnotes omitted.)

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\(^{76}\) Id. at 583. See generally the Notes appearing in 49 CORNELL L.Q. 116 (1963); 29 J. AIR L. & COM. 72 (1963); 24 OHIO ST. L.J. 579 (1963); 111 U. PA. L. REV. 837 (1963); and 16 VAND. L. REV. 430 (1963).


\(^{78}\) Id. at 739. See also Bellamy v. United States, 235 F. Supp. 139 (E.D.S.C. 1964).

\(^{79}\) 233 Or. 178, 376 P.2d 100, 8 AV. CA. 17,281 (1962).

\(^{80}\) Id. at 110, 8 AV. CA. at § 17,289. See generally Notes appearing in 1963 DUKE L.J. 163, and 41 TEXAS L. REV. 827 (1963).

\(^{81}\) Note, Airplane Noise: Problem in Tort Law and Federalism, 74 HARV. L. REV. 1581, 1583-84 (1961). For a discussion of recent Florida cases bearing on this question, see note 91 infra. In an-
While the degree of interference is, in theory, not necessarily correlative with the altitude "of the planes overhead," a review of the cases in the last decade where compensation for a taking was finally awarded has disclosed that, insofar as it is possible to ascertain from the opinions, in only two such cases were the usual flights more than 200 feet in altitude over plaintiffs' properties, and in both of those cases there were some flights that caused physical contact with the ground. In one, military flights were sometimes so low that afterburners scorched the foliage; and in the other, where a taking was not denied, there was a "frequent falling of dangerous objects." 

(b) Thornburg v. Port of Portland—As indicated above, it was held in Batten that there is a taking only if there are overflights. In the aforementioned review of the airport noise cases in this country since 1955, no case was found where damages ultimately were allowed for a taking due to flights unless there were in fact overflights. However, in its first opinion in Thornburg v. Port of Portland, the Supreme Court of Oregon held that overflights are not a prerequisite of a taking and that a "noise-nuisance can amount to a taking." There were only a few overflights and in its initial four-to-three decision the court ruled that evidence of the more frequent flights near, but not over, the plaintiffs' property had been erroneously excluded and remanded the case for trial. In its discussion the court said that a nuisance could be a taking "any time a possessor is in fact ousted from the enjoyment of his land." It emphasized that if noise problems were treated as a nuisance, rather than a trespass question (with its emphasis on metes and bounds), "the gravity of the harm to the plaintiff" could be balanced by the jury "against the social utility of the airport's conduct." The Oregon Supreme Court was thus more liberal in admitting evidence from not only the plaintiff but also from the defendant, with the possible result of making it more, rather than less, difficult for a plaintiff to recover. This liberalization in the admission of evidence also enabled the tribunal to obtain a more comprehensive view of all the facts relating to both the plaintiff and the airport. By inquiring whether the alleged noise-nuisance constituted a taking and by using a
nuisance approach in ruling on the admissibility of evidence, the Supreme Court of Oregon invited greater emphasis on the interests of the public than the usual taking approach would entail.

The dissenting opinion in *Thornburg*, perhaps because of the public discussion of "judicial legislation" and the importance of the doctrine of stare decisis, discussed the classic differences between the theories of taking and nuisance and suggested that the Oregon court should have left the task to the people's elected representatives if this distinction were to be destroyed. It also noted that there was no precedent for the majority's holding that evidence of lateral flights should be admitted in an action for a taking. The dissent concluded that if the plaintiffs wished to sue for damages for a nuisance they could do so, but that the trial court had committed no error in the action for a taking. However, both the majority and the minority in the original *Thornburg* opinion concluded that the plaintiffs must show substantial interference in order to obtain relief.

On remand the jury found against the plaintiffs in *Thornburg*, and they appealed on eleven assignments of error that challenged instructions

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84 Justice Perry, who wrote the dissent (in which Chief Justice McAllister and Justice Rossman joined) stated at 113-16, 8 Av. Cas. at § 17,291-93, that:

> [T]he definition of a constitutional taking has consistently been grounded in the appropriation of an interest in the realty itself.

* * *

A nuisance, although a tort, does not contemplate a physical invasion of the property of another, but the use of a person's own property in such a way as to interfere with another's free enjoyment of his property.

* * *

It is the right of an owner of land to use his land in any lawful manner, and it is only when the manner of use creates a grave interference with another's enjoyment of his property that the law will seek to redress this type of wrong. This is a natural requirement of organized society. There must be some give and take to promote the well-being of all. The underlying basis in nuisance law is the common-sense thought that in organized society there must be an adjustment between reasonable use and personal discomfort. No such consideration is involved in the law of trespass . . . it is the taking of an owner's possessory interest in land as compared with interfering with an owner's use and enjoyment of his land that distinguishes a trespass which is a "taking" from a nuisance, which is not.

* * *

An owner's use of his own land will not create liability unless his use causes substantial interference with another's enjoyment of his property . . . Also, the utility of the use that creates the nuisance must be weighed against the "gravity of the harm."

* * *

Such considerations are foreign to the law of trespass.

The dissenters also pointed to the difference in results:

A nuisance takes none of the title of the property. The full legal title rests in the owner. If the nuisance is abated in any manner, the damage suffered has ended and the land is again restored to its full value to the owner. On the other hand, if there is a taking, the property right of ownership or some interest therein has been transferred from the owner to the sovereign, and does not again revert to the original owner even though the use to which the property has been put by the sovereign ceases.

89 The dissenters said with respect to this political course:

> As pointed out by the majority in *Batten v. United States*, supra, this course has been taken in many states by its citizens, and this is the course which should be taken in this state, if the entire burden is to be borne by the public. *Id.* at 116; 8 Av. Cas. at § 17,293.


In the last of the above quotations the dissenters were referring to states with constitutional damaging, as well as taking, provisions. The State of Washington, where Martin v. Port of Seattle, infra note 90, was decided, is such a state.
to the jury. In June 1966, in an opinion as yet unreported, the Supreme Court of Oregon unanimously reversed on the ground that dictum in its earlier opinion had led the trial court into the error of "abstract, repetitious and conflicting instructions" which overemphasized the social utility of the airport. While this later opinion seems to have reaffirmed the substantiality test, it also appears to have reversed the court's earlier emphasis on the social utility of the airport.

In sending the case back "for yet another trial," the Oregon Supreme Court said that it was up to the trial judge to"rule out the mere annoyance, or interference of a kind that would be objectionable only to the supersensitive." Then, if there is a jury question, it is for the jury to decide whether the interference with use and enjoyment is "substantial enough to result in a loss of market value," and thereby constitute a taking. The trial court's special instructions may point up the difference "between negligible, or inconsequential, interferences which all property owners must share and the direct, peculiar, and substantial interferences which result in a loss of market value to the extent that a disinterested observer would characterize the loss as a taking." The court concluded that it was error to tell the jury to consider the airport's utility "in deciding whether the plaintiff's property had been depreciated in value by the defendant's activities."

4. Constitutional Damaging

Martin v. Port of Seattle' was decided in 1964 by the Washington Supreme Court, sitting en banc. Regardless of whether a nuisance, a constitutional taking, or a constitutional damaging is alleged, Martin is the only known case in which damages have actually been recovered without any requirement of a showing that the damages claimed are at least "substantial."'
Martin and its companion case, Aarhus v. Port of Seattle, were brought by 196 plaintiffs, who lived within sixteen blocks of the southern end of the clear zone at Seattle-Tacoma Airport, against the Port of Seattle as owner-operator. Some plaintiffs were subject to overflights; some were not. Takings were alleged as resulting from noise and vibration caused by low and frequent flights of jets. The plaintiffs relied on both the Washington and United States Constitutions. In addition, all plaintiffs alleged constitutional damaging under the Washington constitution. As will be seen, the decision disregarded the taking problem and rested solely on the conclusion that there had been damaging. By stipulation, the only issue originally tried before the judge was liability, with damages reserved for subsequent jury trials. The trial judge held the Port liable to all the plaintiffs, en masse, without any effort to ascertain the degree of interference with the individual plaintiff's use of his property. Although the Washington Supreme Court had earlier decided in Ackerman v. Port of Seattle that the claimants there would have to prove that the value of their vacant land had been, as alleged, "substantially diminished," the trial judge in Martin said that under Causby and Griggs:

[T]he United States Supreme Court has held that it is contrary to the provisions of the Fourteenth Amendment for any government operating an airfield to not condemn and pay for reasonable use of air space adjacent to airports. This was patently in error. The difference is self-apparent between requiring payment for the "reasonable use of air space adjacent to airports" and requiring compensation for a taking under the tests of Causby, Griggs, Thornburg, and even Ackerman.

The Supreme Court of Washington unanimously affirmed but on differ-
ent grounds. It relied on the constitutional damaging clause of the state constitution and saw no need for drawing any distinction between what constitutes a taking and what does not because, in any event, under the constitutional damaging clause, the Port was liable for any damage caused any of the plaintiffs by aircraft operations. Damage was held to mean any proven decline in the market value of real estate that resulted from the operation of jet aircraft in and out of the airport. This test is far easier for a plaintiff to meet than that set out in the second Thornburg opinion which requires proof of "direct, peculiar and substantial" interference which results in a loss of market value "to the extent that a disinterested observer would characterize the loss as a taking."

The court expressly rejected the contention that, whether a taking or mere damaging were alleged, the constitution requires compensation only if there is at least substantial interference with the plaintiffs' property. The Washington Supreme Court ignored its prior railroad decisions where it had rejected the contention that damages were recoverable under Washington's constitutional damaging provision if proper, non-negligent operation of a railroad depreciated the value of the plaintiff's property. Such damages it had said were "damnum absque injuria" even though the railroad operations had allegedly caused great damage, including fires.

The Washington Supreme Court also stated that the so-called inverse condemnation cases are the same as direct condemnation cases in which the state must pay whatever damage is assessed, regardless of the substantiality of interference or the amount of the damage. However, the court overlooked the fundamental fact that in a condemnation case the public body exercising the power of eminent domain has already made an administrative determination that the property in question (or a part thereof or interest therein) is required and is to be used by the public, and must therefore be paid for. In an inverse condemnation case, the public body has made the opposite decision—that it will not be using the plaintiff's property. Having in mind the grayness of the area between private and public rights in such situations, should not the plaintiff in an inverse condemnation case thus be required to show that the alleged interference with his property is not just the necessary and incidental concomitant of proper operation of the public facility, the burden and benefits of which are shared by the whole community, but is instead so direct, peculiar, and substantial as to require his property to be bought and paid for out of the tax funds of the community of which he is a part? This was the theory of the leading railroad case in the United States Supreme Court. It is

90 E.g., Taylor v. Chicago M. & St. P. R.R., 85 Wash. 592, 148 Pac. 887 (1915), and cases cited therein. See also Wilkening v. State, 54 Wash. 2d 692, 344 P.2d 204 (1959); Drainage Dist. No. 6 v. Snohomish River Boom Co., 142 Wash. 591, 253 Pac. 1072 (1927); and Barry v. Murray, 131 Wash. 670, 231 Pac. 10 (1924). See also note 93 supra.

97 Richards v. Washington Terminal Co., 233 U.S. 546 (1914). Spater, Noise and the Law, 63 Mich. L. Rev. 1373 (1965), concludes, on the basis of a careful analysis of the federal cases, that under the federal constitution there can be no taking of tangible property unless there is a physical or direct "invasion" of the property and the invasion is of a type which results in its "exclusive and permanent appropriation"; and therefore that noise alone cannot constitute a taking as defined in such cases. Support for this view may be derived from the fact that the existing uses
also, in essence, the theory of the leading constitutional damaging freeway case in California which, like Washington, has a constitutional damaging provision.

By early 1966, after separate trials on the issue of liability had been begun in both Martin and Aarhus, separate settlements were negotiated in both cases. Under the settlements the Port of Seattle obtained defined avigation easements in return for payments of approximately $150,000 (to the Martin plaintiffs) and $250,000 (to the Aarhus plaintiffs). Meanwhile, however, the Washington Supreme Court decided another taking case, Anderson v. Port of Seattle, where constitutional damaging was not before it. In that case the court seems to have followed Batten in requiring overflights to constitute a taking while also going part way in requiring substantial interference with use in order for there to be a taking.

In Martin, in order to avoid the ten-year statute of limitations applicable to a taking, the plaintiffs contended (unsuccessfully) that the operation of piston planes had not amounted to a taking. In Anderson, an older case which was wending its way through the courts more slowly, it had been stipulated that the alleged overhead flights of piston planes had constituted a taking, but the trial court had held that the takings had occurred shortly after the airport was opened in 1947 and that damages for the takings were therefore barred by the ten-year statute of limitations. On appeal the plaintiffs sought some form of the strict taking test so that the takings would be held to have occurred some years later, when flights were more frequent. This would in turn have meant that their claims would not have been barred. In addition, three plaintiffs appealed from the trial court's dismissal of their claims upon a finding, as a matter of law, that their properties "were not under the low and regular flight pattern."

Since no constitutional damaging claims were before the Washington Supreme Court in Anderson (having been held to have been barred by the applicable three-year statute of limitations), it was faced with deciding not only the test for a taking (i.e., when the taking occurred) but also whether there can be a taking without "low and regular" overflights. On 17 June 1965, the Supreme Court of Washington held that there was no taking until there were "continuing and frequent low flights" and also affirmed the dismissal of the three plaintiffs' claims, thereby, at least by implication, following the Batten case, although it was not cited. Since

of the premises had been terminated by the plaintiffs in both the Causby and Griggs cases and from the comments by the courts in the Batten and Leavell cases, where the courts held that there had been no taking, that the properties in question had not been rendered uninhabitable. (See notes 71-76 and related text.)

99 See note 53 supra.
102 Super. Ct., King County, Wash., 29 June 1960.
constitutional damaging claims were not involved, the *Martin* decision does not appear to have been affected.

IV. CONCLUSION

The intention of this article is to put the public airport noise problem in some perspective, to show the extent to which the constitutional taking theory has been the usual ground for such suits, and to highlight the central problem of when there is liability on such a theory. The public airport noise problem is comprised of many parts, but as far as legal theory is concerned it is essentially just another chapter in the long history of accommodation between public needs and private rights. A major service could be performed by a first-rate, full-length study by a legal scholar acquainted with the field, which would be specifically designed to put all annoyance cases, whether involving aviation, railroad, highway, school, hospital, prison, or other source and whether concerned with noise, vibration, smoke, or other annoyance, into proper context with one another and with the development of related law. Meanwhile, the danger of a decision like *Martin* is that, while it reflects sympathy for the affected community and excitement over the newness of jet flight, it is lacking in perspective. It establishes, under Washington's constitutional damaging provision, a law for public airport noise problems that is sui generis. The decision thereby puts an unequal burden on the reasonable development of air transportation as compared with that of other modern facilities.