1958

The Landowner and the Aircraft - 1958

G. Nathan Calkins Jr.

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ONE of the most pressing problems confronting the air transport industry today is noise. It is pressing from the technical standpoint because local airport authorities are imposing operating restrictions on the use of major airports by jet aircraft. It is pressing from the legal standpoint because the lines of legal responsibility of the air carrier operator are not yet well defined; the roles of the Federal and local authorities have not yet been clearly spelled out; and the area and extent to which the owner of land adjacent to an airport may have a cause of action is currently unpredictable.

Almost anyone connected with aviation will agree that the noise problem is a serious one for the airline, but because there have been only a few instances where the air carriers were individually, immediately, and directly affected, the principal attack on the problem has been to treat it on a case by case basis.

Yet the problems created by air carrier noise are peculiarly incapable of solution by the courts alone. In the absence of a firm holding by the Supreme Court that no cause of action of any kind can exist on the part of any landowner in respect of noise created by a properly operated aircraft flown in accordance with the air traffic rules, the possibility of ham-stringing injunctions, constant litigation, and damaging verdicts will continue unless a Constitutionally sound national program is adopted to solve the problem. Even where a given case is won, the victory may be only transitory. Of what good to the carrier is winning the Cedarhurst litigation\(^1\) if the Port of New York Authority can restrict jet operations to daylight hours, and impose preferential runway requirements\(^2\) and maximum weight limitations\(^3\) for the same

\(^3\) See Aviation Daily for Oct. 28, 1958, p. 482.
reasons that the Cedarhurst ordinance was enacted. What is the good
of a favorable decision in the Federal District Court in the Newark
Airport case, when the Court of Claims, some months later hands
down a decision based upon a principle which if followed would
invalidate the Newark holding at least in part?

It is submitted that the problem of noise is a national problem and
one that must be dealt with on the national level. It is the purpose of
this paper to explore such a possibility and the extent to which ade-
quate legal machinery already exists to accomplish that end.

**The Four Principals**

Before discussing the possibilities of a uniform federal system gov-
erning liability for aircraft noise, it is only prudent to review briefly
the four categories of litigants which may be involved in a landowner-
air carrier suit based on noise. These principals would appear to be
(1) the air carrier noise maker (2) the landowner (3) the federal
government and (4) the State or local governmental authority in both
its regulatory and airport proprietary capacities.

Each of the principals has cross-relationships with the other three—and
these cross-ties must be considered in dealing with the noise prob-
lem. The air carrier is licensed by and conducts its operations under
the control and direction of the federal government. It operates into
airports under contract or other arrangements with the local airport
authority—which in almost all instances today is a public or quasi-public
authority. Lastly it may or may not infringe upon the landowner's
rights.

The landowner is frequently, if not generally, a taxpayer of the
community where the airport is located. He is protected by both the
Fifth and Fourteenth Amendments of the Constitution against depriva-

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4 On Oct. 10, 1958, Donald V. Lowe, Chairman, Port of New York Authority, sent a telegram to the President reading in part as follows:

"As you know, Mr. President, Commissioners of the Port Authority, in full recognition of their public responsibilities, have imposed certain mandatory runway, altitude and power restrictions upon the use of International Airport by these commercial jet aircraft, subject, of course, as we have previously stated, to requirements of CAA air traffic control procedures.

I am taking the liberty of sending you by hand copies of the studies and findings of our acoustical engineers with respect to jet aircraft noise at International Airport. I am also sending you a copy of our press release through which we advised the people of the measures taken by the Port Authority to protect their interest in connection with the noise of jet aircraft in the neighborhood of the airport.

I regret, Mr. President, that it is necessary for the Port Authority immediately to advise the people of Long Island that General Quesada's remarks in no way reflect any change in Port Authority policy. Our Executive Director and our Director of Aviation attempted to meet with General Quesada at International Airport to advise him fully on the grievous jet aircraft noise problem which has prompted the adoption by our Commissioners of jet aircraft flight restrictions at the airport."


tion of his property without due process of law, and if either federal or local government so deprives him, he has the right to object.

The federal government is the regulatory authority over interstate air commerce and the sponsor and endorser of air carriers. Its air traffic rules are supreme, and inconsistent regulatory enactments of local authorities must fall by the wayside. In addition, it is a contractor under the Federal Airport Act with local authorities having jurisdiction over most of the airports of the country served by air carriers. Thus its relation in respect of the local airports is twofold—intergovernmental and contractual. In regard to many landowner suits against air carriers the federal government may stand as umpire, but where it is itself the operator of aircraft (and it is by far the largest operator), it may be the defendant.

The local airport authority is now almost invariably a contractor with the federal government, and as such must have given assurances that the airport to which the contract relates will be available for public use on fair and reasonable terms and without unjust discrimination. In addition the airport itself is a potential defendant in nuisance suits.

The Problem

The noise problem is one that has gradually evolved from a more complex one, where disturbance by lights and fear for personal safety were also elements. Noise has now become the primary factor, and will undoubtedly continue to be. Two developments are responsible for this: the first is the increased power of aircraft engines, larger propellers, and currently, the introduction of jet aircraft. These developments not only increase the noise-making potential of present day aircraft over the older DC-3, but this may increase since turbine power possesses a penetrating quality not present in reciprocating engines.

The second reason that the problem has distilled into one of noise alone is that aviation has become so safe with respect to third persons on the ground there is no longer any cause for legitimate concern. No doubt there is fear still present in the minds of landowners, but statistics show that overflight of aircraft constitute no true menace to the safety of the citizen on the surface. For example, during the year 1956, the Civil Aeronautics Administration reports 6,553,336 air carrier movements for CAA-controlled airports. However, in that year there was not a single person killed on the ground in the entire United States by air carrier aircraft crashing. And over the past five years there has been only one person killed on the ground by a crashing air carrier plane. When it is considered that the air carrier industry in the United States is now the prime public mover of intercity passengers, hauling

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8 Federal Airport Act, Sec. 11, 60 Stat. 176, 49 U.S.C. 1110.
10 CAA Statistical Handbook of Civil Aviation, 1957 Ed., p. 22.
11 Source, CAB Bureau of Safety, Analysis Division.
more of such traffic than either the rails or the buses, these statistics are truly remarkable. The danger to innocent third persons created by buses and trains is incomparably greater.

THE SOLUTIONS

The basic solutions to the problem of aircraft noise appear to be three (a) eliminate or cut down the noise at its source (b) put the airplane further away (c) tolerate the noise but decide who is to pay the costs for the economic loss.

I.

DEVELOPMENTAL

The first solution is obviously developmental, and the extent to which such a program can be successful is not now known. But the question remains: who is to pay the costs for development—the air carriers, who will pass the costs along to the flying public, or the nation at large, by having the federal government assume that responsibility. This decision is one of fundamental policy, but it is one which has in essence already been made. The Civil Aeronautics Act of 1938 was a developmental statute, based on the proposition that the nation as a whole had such an interest in the development of a sound air transportation system that air carriers should be subsidized. The encouragement and development of civil aeronautics was one of the cornerstones of this Act.14

The Federal Aviation Act of 195815 carries forward this policy with greater emphasis. The new act repeats in Sec. 305 the earlier provision that the “Administrator is empowered and directed to encourage the development of civil aeronautics and air commerce in the United States and abroad.” In Section 306 the Administrator is directed to give full consideration to requirements of national defense, of commercial and general aviation, and to the public right of freedom of transit through the navigable airspace. (Italics supplied.) In this connection, the earlier definition of navigable airspace has been modified to include “airspace needed to insure safety in take-off and landing of aircraft.” (Sec. 1 (24)). What good is a right of freedom of transit if the aircraft necessarily makes so much noise that transiting the airspace gives rise to damage suits based on nuisance and to local airport restrictions designed to alleviate the effect of the noise? Moreover the Administrator is now required to adopt air traffic rules, among other purposes, for the protection of persons and property on the ground (Sec. 307 (c)). This undoubtedly includes protection of property from

14 Civil Aeronautics Act of 1938, Sec. 2(f).
damage directly and immediately caused by aircraft noise. But flight patterns prescribed for aircraft in order to protect landowners from noise may be directly contrary to the most efficient use of airspace, which is also enjoined to promote.

The foregoing factors lead directly to the Administrator's powers of developmental planning under Sec. 312.

Paragraph (b) of Section 312 bears repeating in full:

"(b) The Administrator is empowered to undertake or supervise such developmental work and service testing as tends to the creation of improved aircraft, aircraft engines, propellers, and appliances. For such purpose, the Administrator is empowered to make purchases (including exchange) by negotiation, or otherwise, of experimental aircraft, aircraft engines, propellers, and appliances, which seem to offer special advantages to aeronautics." (Italics supplied.)

Thus it is absolutely clear the Administrator has the power to undertake developmental work on aircraft silencing systems. Moreover, self-interest on the part of the government, as the largest operator of jet aircraft, dictates that immediate steps be taken before the endless procession of landowner cases before the Court of Claims against the Air Force raises hob with the national debt.

II.

REGULATORY

The second solution to the noise problem is regulatory in the sense that flight patterns may be prescribed which tend to minimize the effect of noise on the surface. Reference has already been made to the new power of the Administrator under Sec. 307 (c) to prescribe regulations governing the flight of aircraft for the protection of persons and property on the ground.

This new power is a substantial departure from that formerly enjoyed by the Civil Aeronautics Board under the old Civil Aeronautics Act. In that Act, the Board's power was related to "safety of flight in air commerce" (Sec. 601 (a)). The theory was that safety of those on the ground was obviously a concomittant of safety in the air — and of course it is, so far as physical impact is concerned. This was underscored by the further power possessed by the Board to prescribe rules for the prevention of collisions between aircraft and land or water vehicles (Sec. 601 (a) (7)). But aircraft can be flown in perfect safety and comfort to those aboard while raising the noise of all the furies outside. Consequently, it is submitted that the Board never had jurisdiction to protect the landowner's property from deterioration in value through

16 An aircraft engine includes "all parts, appurtenances, and accessories other than propellers" Sec. 101(6). Appliances are "instruments, equipment, apparatus, parts, appurtenances, or accessories of whatever description, which are used, or are capable of being or intended to be used, in the navigation, operation, or control of aircraft in flight . . . and which are not a part or parts of aircraft, aircraft engines, or propellers" (Sec. 101(11)). Silencers would be either one or the other.
aircraft noise. The program heretofore carried on by the C.A.A. to
develop traffic patterns around airports so as to minimize the effect of
noise on the local residents while salutary, was more an example of air
carrier-C.A.A.-local airport cooperation than an exercise of valid regu-
laratory power.

Thus, the Administrator of the new Federal Aviation Agency will
have full regulatory power to deal with flight patterns in the interest
of property owners as well as of air commerce. These flight patterns
can involve not only the track of the aircraft over the surface but also
the angle of climb and descent that must be made good. The present
Civil Air Regulations (14 Code of Federal Regulations) now place
limitations on air carrier aircraft in order to insure that there will be
adequate one-engine out performance to meet emergencies in take off.
At some airports under certain conditions of wind and temperature,
these limitations cut the allowable load well below the certificated gross
weight. See C.A.R. Sec. 40.70 et seq. What is there to prevent the
Administrator, with his new authority, from prescribing on the same
basis, the angle of climb to be made good in the interests of a fast climb
out at a steep angle to protect landowners? This power if exercised
without proper restraint, could have a most adverse effect on air car-
rier operations.

Who else has the regulatory power to protect landowners from air-
craft noise? The *Cedarhurst*17 case is authority for the fact that no
state or local government has regulatory power *per se* since the federal
government has occupied the field and is supreme under the interstate
commerce clause.

There are two other approaches, essentially regulatory in nature,
which have been used by local authority to reach the same ends.

**Conditions Imposed by Airport Authorities**

One of these approaches is that used by the Port of New York
Authority with respect to jet aircraft operation. This Authority has
required each model jet sought to be operated by air carriers and
foreign air carriers to undergo noise test before it would give permis-
sion for the use of such aircraft at Idlewild. It has conditioned its
permission on the use of certain runways, limited jet operation to
certain hours of the day, and prescribed the maximum fuel loads.18

We can be sympathetic with the problems that confront the local
authorities, but the course of action initiated by New York can soon
lead to nationally disastrous results. If New York can impose flight
restrictions on the use of its airport which are not directly related to
the surface use of the facility, so can every other municipality in the
country for reasons which in its unilateral judgment are good and
sufficient. If New York can do this for jet aircraft, why cannot the

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18 See *Aviation Daily* for Oct. 28, 1958, p. 82, *supra* Note 3.
Airport Board of Podunk put preferential runway restrictions on operations and prescribe traffic patterns for all aircraft in order to avoid over-flying the mayor's house. It is submitted that the action of the Port of New York Authority in this instance is just as inimical to aviation and air transportation as the Cedarhurst ordinance.

Admittedly the Port Authority owns or controls the New York City Airports. If it were a private individual or corporation it could place whatever restrictions it chose on the use of the land, reasonable or unreasonable, connected with the land's use as an airport or not.

However, it is not a private corporation. It is a public authority, created as such by the States of New York and New Jersey, and contracting as such with the federal government under the Federal Airport Act. Substantial federal aid was given it under that Act on the basis that its airports will be available for public use on fair and reasonable terms and without unjust discrimination (Federal Airport Act, Section 11(1)).

As a public landowning corporation, it undoubtedly could impose conditions on the use of its airports directly related to the airport itself—it could limit the maximum weight per aircraft wheel in the interests of preserving its runways; it could prohibit operation of aircraft on the airport when these cannot safely be conducted. But here it is placing conditions and restrictions on the use of the airport in the interests of surrounding landowners. (Certainly it cannot be said that the imposition of the conditions on jet operations is for the benefit of the public coming to the airport!)

In so doing, it is submitted that the Port Authority is exercising a governmental function, not a proprietary one, and as such its regulations and restrictions are in the same category as the Cedarhurst ordinance. The purpose of the Authority's conditions and Cedarhurst's ordinance are the same in that both seek to regulate the traffic patterns around Idlewild in the interests of the local citizenry, and both invade a field which the federal government has fully occupied. True, the sanctions are different but the compulsion is there to observe the requirements. In one case a penalty is imposed for violation; in the other case the privilege of landing at the airport would be withdrawn.

An unconstitutional governmental objective cannot be achieved merely by dressing up the sanction, and the withdrawal of a privilege otherwise accorded is just as much a penalty as the imposition of a fine.\(^{19}\)

It is submitted that the Idlewild conditions on Pan American's and BOAC's jet operations are unconstitutional invasions of the federal government's preserve, and as such they cannot be "reasonable terms" within the meaning of the Federal Airport Act.\(^{20}\)

\(^{19}\) See *Carter v. Carter Coal*, 298 U.S. 288; 56 S. Ct. 855; 80 L. Ed. 1160 (1936). (Rebate of a tax to coal producers who would "agree" to the Federal Bituminous Coal Code.)

\(^{20}\) "The airport to which the project relates will be available for public use on fair and reasonable terms." Federal Airport Act, Sec. 11(1).
Court Injunctions

One further way in which regulatory action has been attempted on the local level is the court injunction. This will be referred to in detail under Part III of this article when the Newark Airport case is discussed. But mandatory injunctions are regulatory in nature, and should be mentioned here to bring them into proper relationship with other local regulatory activities.

A mandatory injunction issued at the behest of a private litigant presupposes a private right. In the case of a landowner the right is primarily local and must therefore be derived from the State. Federal courts, except in matters governed by the Constitution or federal statutes are bound to apply the local law. Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817 (1938). Thus whether the landowner's rights are created by State statute or by common law both state and federal courts will apply the same law.

Confining ourselves for the moment to the private right, created by state law, of a landowner to enjoin overflight of his property below certain altitudes, it is obvious that if the injunction should have the effect of imposing a minimum altitude of flight above that prescribed by the Civil Air Regulations (floor of the navigable air space), it would be in direct conflict with the federal power to enact air traffic rules, and particularly contrary to Section 307 (a) of the Federal Aviation Act of 1958 which vests in the Administrator the power and duty to: "assign by rule, regulation or order the use of the navigable air space under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such air space." 22

Thus there would be a conflict between state-created private rights and the federal law. It is now clear that in the event of such conflict, the federal law is supreme, Garner v. Teamsters, Chauffeurs and Helpers, etc., 346 U.S. 485; 74 S. Ct. 161 (1953). In that case, the Court, speaking through Mr. Justice Jackson, said (74 S. Ct. 161, 171):

"We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded. Of course, Congress, in enacting such legislation as we have here, can save


22 Although Section 1106 of both Acts preserves existing common law and statutory remedies, this provision must give way to the overriding provisions of the statute. See Adams Express Co. v. Croninger, 228 U.S. 491; 33 S. Ct. 148; S.S.W., Inc. v. Air Transport Association of America, 199 F. 2d 658; and City of Newark, et al. v. Eastern Airlines, et al., supra, Note 5.
alternative or supplemental state remedies by express terms, or by some clear implication, if it sees fit."

Labor litigation is a prolific source of authority for the proposition that state courts, enforcing state statutes or applying state common law may not enjoin that which the federal government, acting under the commerce clause, has preempted. This is true even though the motive for the state action is to protect a different policy than the federal statute. Thus, the Court in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468; 75 S. Ct. 480 (1955) discussed the various holdings in the field of labor relations and stated with respect to the differing reasons for action:

"Respondent argues that Missouri is not prohibiting the IAM's conduct for any reason having to do with labor relations but rather because that conduct is in contravention of a state law which deals generally with restraint of trade. It distinguishes Garner on the ground that there the State and Congress were both attempting to regulate labor relations as such.

"We do not think this distinction is decisive. In Garner the emphasis was not on two conflicting labor statutes but rather on two similar remedies, one state and one federal, brought to bear on precisely the same conduct.

"And in Capital Service, Inc., v. National Labor Relations Board, *supra*, we did not stop to inquire just what category of 'public policy' the union's conduct allegedly violated. Our approach was emphasized in United Construction Workers v. Laburnum Construction Corp., *supra*, where the violent conduct was reached by a remedy having no parallel in, and not in conflict with, any remedy afforded by the federal Act."

It is submitted that these holdings make it amply clear that once the federal government has preempted the field as in the case of the control of the flight of aircraft, the remedy of mandatory injunction based on a state cause of action is no longer open at least to the extent that the injunction conflicts with the paramount federal authority.

There is, of course, the *caveat* that the federal act must be within the constitutional power of the government. It is axiomatic that the federal government may not, without paying just compensation, take private property for public use. But abolition of the remedy of conflicting mandatory injunction is certainly not in itself such a taking of property as to make it unconstitutional, *Weber v. Anheuser-Busch*, *supra*. Consequently, whether or not a right of action for damages exists for nuisance which is not sufficiently serious to involve a taking, it may not be enforced by injunction, if the injunction impinges on the navigable air space.

At the thresholds of airports under both the Civil Aeronautics Act of 1938, as interpreted by the Board, and the more specific language of Section 101 (24) of the Federal Aviation Act of 1958, the navigable air space slants downward to the ground, and undoubtedly in some instances may intercept the "immediate reaches" above the adjoining land of neighboring property owners.
Here again it is questionable whether the injunctive process is open to the injured landowner in a suit either against the government or the noisy airline. The new act should be given a chance to be constitutionally applied. As heretofore pointed out, the Administrator is authorized and directed to prescribe regulations governing the flight of aircraft "for the protection of persons and property on the ground." Protection of property must mean protection against a taking either by way of nuisance or trespass. It is not to be assumed that the Administrator will ignore that mandate in fixing or revising airport approach patterns. There are, however, many ways in which he may be able to solve the problem—by prescribing different traffic patterns, by ordering higher final approaches and steeper climbs after take-off, by negotiating with local communities for obtaining necessary easements through the air space involved, or by enforcing existing contractual commitments under the Federal Airport Act. Under Section 11(3) of that Act, the project sponsor must have assured the Administrator of Civil Aeronautics in writing that:

"(3) the aerial approaches to such airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment of future airport hazards."

"Airport hazard" is defined in the Act as meaning "any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land near such airport which obstructs the air space required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft." (Section 2(4)).

Thus, a structure or tree which penetrates into the approach path must be removed. Presumably use of neighboring land as a place for burning rubbish would be foreclosed, if such use thereby diminished visibility. Is it not an equal hazard for land to be used in such a way that constitutional guarantees require that the approaches be elevated to avoid a taking of property. Where such elevation impinges upon the safety of normal flight operation, the use of the land for a purpose which aircraft noise would adversely affect is just as much a hazard to safe operation at the airport as having to clear a tree or high tension wires.

Thus there are many ways in which the Administrator will be able to solve the problem of the landowner whose property is taken or threatened to be taken. Since this is so the doctrine of primary jurisdiction will obviously apply to throw the matter to the Administrator in the first instance.

Admittedly, the doctrine of primary jurisdiction has been rejected in the past—insofar as equity power to enjoin a continuing trespass is concerned. In the Greater Pittsburgh Airport Case (Second Opinion)

However, this case, and those upon which it relies, were decided before the enactment of the 1958 act, which should definitely affect the outcome. First, the new Act amended the definition of “navigable air space” to “include air space needed to insure safety in take-off and landing of aircraft.” This, without doubt, is a more far reaching definition than the former interpretation No. 1 to Part 60 of the Civil Aeronautics Board, which regulated the subject in 1955. The Board in that interpretation had decided that the necessary flight paths of each aircraft on take-off and landing established the lower limit of the navigable air space in respect of the specific operation concerned. Thus flight at any lower altitude than necessary for the particular operation would be below the navigable air space, and consequently outside the realm of federal jurisdiction.

With the new amendment, it is obvious that the Congress intended to exercise jurisdiction below that proclaimed by the Board, and down to the obstruction clearance line. In other words it lines up the federal jurisdiction over air space in the Federal Aviation Act with the removal of airport “hazards” under the Federal Airport Act.

Insurance of safety in take-off and landing requires a buffer zone of air space between obstacles on the ground and the usual flight paths followed by aircraft on take-off and landing, and this buffer zone is now proclaimed to be part of the public domain. Thus what was not federal at the time of Greater Pittsburgh now becomes so, and the new Administrator is charged not only with safety of flight in air commerce but the protection of property rights of landowners as well.

To summarize the “regulatory” portion of this article, the federal government has fully occupied the field of aircraft flight regulation; that this fact bars action on the state or local level in respect of aircraft operating in conformity with the Administrator’s regulations, whether it be by legislation, city ordinance, airport authority condition, or court decree, and this is true whether or not there is a taking involved.

III.

The third solution to the noise problem mentioned at the beginning of this article was “tolerate the noise.” Admittedly, this is not a solution at all, but it is essential to go into the question of who is to foot the bill in cases where neither developmental nor regulatory functions eliminate the problem, as well as to determine the circumstances under which landowner recovery is to be had. This brings us to a consideration of certain cases handed down by the courts in 1958.

The first of these is the City of Newark, New Jersey, et al., v. Eastern Airlines, Inc., et al.24 The case was brought by three cities, two townships, six individuals, and the Newark Airport Mayors’ Committee.

24 Supra, Note 5.
Inc., a New Jersey corporation, against seven airlines, the Port of New York Authority, the United States of America, and the Civil Aeronautics Authority. At the close of the plaintiffs' case, defendants moved to dismiss, and the court's opinion is on this motion.

The opinion disposed of two counts in the amended complaint, the first to enjoin the airborne operations of the defendant airlines to and from Newark Airport, to the extent that such operations constituted a public and/or private nuisance, specifically that defendants be restrained from flying below 1200 feet from the ground over regions where the plaintiffs reside. The second count was to enjoin such operations and to award damages therefore to the extent that they constituted a trespass on the properties of the plaintiffs. A third count against the Port of New York Authority and the United States to compel them to acquire by condemnation the properties of the plaintiffs was earlier dismissed.

In deciding the motion for the defendant airlines on both subsisting counts, the Court discussed the authority under which each defendant operated—its certificates of public convenience and necessity—its air carrier operating certificate and the operations specifications attached thereto.

After a preliminary recital of the facts, the Court went in detail into the power of the Civil Aeronautics Board to enact rules for minimum safe altitudes of flight, the rules actually adopted by the Civil Aeronautics Board, and the effect of these rules, citing United States v. Causby, 328 U.S. 256, and Allegheny Airlines v. Village of Cedarhurst, 238 F. 2d 812 (2nd Cir. 1956). The Court, following Cedarhurst, held that the federal regulatory system has preempted the field of safety regulation below as well as above a thousand feet from the ground.

In dealing with the issues of private nuisance under the first count of the complaint, the Court held in effect that for a Court, by judicial decree, to raise the minimum altitudes prescribed by the Civil Air Regulations and to establish flight patterns peculiarly applicable to each major airport would be an unwarranted interference with the regulatory power vested in the Civil Aeronautics Board by Congress and would result only in an unseemly conflict between the administrative agency and the Court. Furthermore, the Court pointed out that such a piecemeal approach if followed in the case of each major airport—of which there are 194—could completely destroy the uniformity contemplated by the Civil Aeronautics Act.

In view of this, the Court held that since the Board had ample power to review the questions presented in this count, the Court should apply the doctrine of primary jurisdiction and dismiss it, leaving the plaintiffs to their remedy before the Civil Aeronautics Board as petitioners for the issuance or amendment of a rule or regulation governing minimum safe altitudes. In so doing the Court stated:
"If, on petition of plaintiffs and after investigation and hearing, the Civil Aeronautics Board amends either the present regulations or the operations specifications, or both, a further resort to this court will be clearly unnecessary."

With respect to the claims for trespass set forth in the second count of the complaint, the Court dealt separately with each plaintiff, but in the end dismissed the count as to each one. Before doing so, however, the Court discussed the *Causby* case and derived from that case a general principle which it stated as follows:25

"There must be evidence not only that the aircraft passed over his lands from time to time but also that there was unlawful invasion of the immediate reaches of his land; in other words, there must be evidence that the aircraft flights were at such altitudes as to interfere substantially with the landowner's possession and use of the air space above the surface."

Thereafter, the Court dismissed the trespass claims of the various plaintiffs for injunction on a number of differing grounds. The claims of the City of Elizabeth and the Townships of Hillside and Union were dismissed because the record was completely devoid of any evidence that any planes invaded the immediate reaches of any specific lands of which these municipalities were the owners.

The claim of the City of Newark was dismissed because—although there was evidence that aircraft passed over a city high school—there was no evidence that these aircraft were at altitudes below the navigable air space and within the superadjacent reaches above the land. Furthermore, there was no evidence that the planes passing over were those of any one or more of the defendants.

The claim of the City of Linden was dismissed because of its failure to answer interrogatories propounded by the defendants.

As to the individual complainants, the complaints of four were dismissed as to the trespass count because they offered no evidence at all with respect to such claims. The trespass complaint of a fifth individual was dismissed on the ground that she was not the real party in interest—the land to which the claim related belonged to her mother rather than to her.

The claim of the sixth individual was dismissed as to the trespass count because, although the airplanes were identified as belonging to the defendants, there was no evidence which would support a determination that the aircraft passed below the navigable air space and within the immediate reaches of the land.

The trespass counts not only asked for an injunction but for damages as well. With respect to all but one of the plaintiffs, the claims for damages for past trespasses were dismissed on the merits (159 F. Supp. 750, 762). However, with respect to the damage claims of one Jay, the Court dismissed on jurisdictional grounds, because the only evidence

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25 159 F. Supp. 750, 760.
of damage adduced by the plaintiff was a cracked wall\textsuperscript{26}\textemdash damage which the Court held could not exceed $3,000. The Court did not discuss the jurisdictional basis for the injunction by this plaintiff, which presumably was over $3,000,\textsuperscript{27} and therefore was confronted by a situation where the injunction aspect of the claim exceeded the jurisdictional amount, but the damages which had already been incurred did not. In such a split situation, it has been held that the Federal courts have jurisdiction to grant not only the injunction but the past damage as well.\textsuperscript{28} If the Court has jurisdiction to award damages in such a situation, it clearly should have jurisdiction to dismiss the damage claim on the merits, and it is therefore submitted that the Court was in error in failing to do so.

However, as the case now stands, there is no doubt that it is a singular victory for the airlines involved and for air transportation in general. Nevertheless, certain elements in the decision raise questions as to the vitality of the opinion as a force in the ironing out of air carrier-landowner controversies.

The opinion rightly and forcefully sets forth the reasons why the matter contained in the nuisance count is in the primary jurisdiction of the Civil Aeronautics Board\textemdash soon the Administrator of the F.A.A. In one respect, however, this action by the Court merely delays the solution. The question remains: what action, if any, will be required by the new Administrator to take care of complaints in this count?

If the landowners are asking no more than that the defendant airlines follow the recommendations of their own National Air Transport Committee\textemdash (See Opinion, 159 F. Supp. 753), and if the airlines concur in the substance of these recommendations, and they appear reasonable and safe to the Administrator, there is, of course, no reason why he should not promulgate them as rules. But suppose that the Administrator finds that the imposition of such requirements would bring about an unsafe condition, and that the currently effective flight patterns at Newark are the only ones which meet aviation's needs. How far must the Administrator take into account the complaints of the New Jersey residents? And if the Administrator does not modify the requirements, are the airlines liable in damages to the residents for continuing to fly the prescribed patterns? In other words, as a matter of substance are the complainants entitled to any relief on the basis of the facts stated?

It is submitted that if no adjustment in flight altitudes and patterns is feasible\textemdash either from the point of view of safety or the efficient handling of air commerce, the carriers would be protected in continuing the present patterns, and as to the landowners, the annoyance caused

\begin{itemize}
\item[26] Jay testified it was his ceiling which cracked. See 159 F. Supp. 750, 760.
\end{itemize}
by noise is *damnum absque injuria*. The factual and legal situation lines up as follows:

A. **Defendants Not Trespassers**

1. The court found no evidence that any of the defendant airlines passed within the immediate reaches of the land of any plaintiff, (159 F. Supp. 750, 762).

B. **Defendants Compelled to Operate into Newark**

2. By the stipulated facts “each flight to or from Newark Airport by each of the defendant airlines was operated pursuant to the requirement and authorization of one or more certificates of public convenience and necessity issued by the Civil Aeronautics Board. Each flight to or from Newark Airport was operated in the manner prescribed by the Civil Aeronautics Act, the Civil Air Regulations of the Civil Aeronautics Board, the Air Navigation Regulations of the Civil Aeronautics Administration, and Operations Specifications annexed to the Air Carrier Operating Certificates issued to said defendant airlines by the Civil Aeronautics Administration. Each flight to or from Newark Airport by each of the defendant airlines was, while approaching, landing at, taxiing on, taking-off from and departing from Newark Airport, under the control of an air traffic controller appointed by the Civil Aeronautics Administration and was operated in accordance with instructions received from such controller.” (159 F. Supp. 750, 754, 755.) Our hypothesis is that these procedures cannot be changed either for reasons of safety or efficiency.

3. It was the fact, although not mentioned by the court, that each of the defendant air carriers was authorized by its certificate of public convenience and necessity to carry the mail.

4. It is the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate (Civil Aeronautics Act, Section 404, Federal Aviation Act, Section 404).

5. No air carrier can abandon any route or part thereof for which a certificate has been issued by the Board without Board approval (Civil Aeronautics Act, Section 401 (k), Federal Aviation Act, Section 401 (j)). Nor may it, without such approval, suspend service at any point it is authorized to serve (Section 205.5 of the Board's Economic Regulations).

6. Air carriers, authorized to carry the mail, must transport it whenever required by the Postmaster General (Civil Aeronautics Act, Section 401 (m), Federal Aviation Act, Section 401 (l)). Schedules must be filed with the Postmaster General (Civil Aeronautics Act, Section 405 (e), Federal Aviation Act, Section 405 (b)), who may designate any such schedule for the transportation of mail (id.). It is understood as a matter of fact that he has designated them all for such carriage. No change in these schedules may be made without ten days'
notice to and approval of the Postmaster General, whose order is subject to review by the Civil Aeronautics Board (id.).

7. All "air routes" which are now or hereafter may be in operation are established post roads (Act of June 8, 1872, as amended by Civil Aeronautics Act of 1938, Section 1107 (a)).

8. The Economic Regulations of the Civil Aeronautics Board provide that air carriers may not change the airport through which they serve a certificated point except with the approval of the Board (Economic Regulations, part 202.3). Thus air carriers, compelled to serve Newark by reason of their certificates and the Civil Aeronautics Act, and soon the Federal Aviation Act, must do so through the Newark Airport unless the Board approves a change.

9. Violation of Title IV of the Civil Aeronautics Act or of any regulation thereunder is punishable by criminal fine (Civil Aeronautics Act, Section 902). The same will be true under the Federal Aviation Act.

10. There can be no doubt, in light of the foregoing, that the federal government has used its full powers to compel service into and out of Newark Airport by the defendant air lines, and in view of the stipulation, each flight so operated by the defendants was operated under such compulsion.29

C. Application of Law to Facts

11. All air space, apart from the immediate reaches above the land, is part of the public domain. United States v. Causby, 328 U.S. 256, 266, 66 S. Ct. 1062, 1068 (1946).

12. Not only were all flights thus in the public domain, but they were in the navigable air space as well. (Stipulation.) It is therefore unnecessary in this case to go into the question of the status of an aircraft in cruising flight which flies below the 1000-foot minimum altitude specified for built-up areas but above the immediate reaches of the land.30 While we may admit that the cruising airplane is committing an illegal act, the one landing or taking-off is not.

D. Railroad Precedents

13. It remains but to apply the case of Richards v. Washington Terminal Company, 233 U.S. 546, 34 S. Ct. 655 (1913). There the Supreme Court held that damage caused to the landowner plaintiff by smoke necessarily discharged and by vibration and noise necessarily made by trains controlled by defendant were damnum absque injuria, except for damage sustained by reason of smoke discharged throughout the length of defendant's tunnel and emitted by a fanning system at the mouth of the tunnel, 114 feet distant from plaintiff's home. In reaching this conclusion the court said (34 S. Ct. 656):

29 Each flight was operated pursuant to the requirement of one or more certificates of public convenience and necessity.

"The tunnel and the tracks leading from it across square 693 were located and constructed and are now maintained under the authority of acts of Congress of February 12, 1901, and February 28, 1903 (31 Stat, at L. 774, chap. 354; 32 Stat, at L. 909, chap. 856), in accordance with plans and specifications approved by those acts. No claim is made by plaintiff that the tunnel, the tracks in square 693, and the trains operated therein and thereon, were constructed, operated, or maintained in a negligent manner; and it is conceded that the tunnel and tracks were built upon property acquired by purchase or condemnation proceedings, and were constructed under authority of the acts of Congress and of permits issued by the Commissioners of the District of Columbia.

"Such being the essential facts to be deduced from the evidence, we have reached the conclusion, for reasons presently to be stated, that with respect to most of the elements of damage to which the plaintiff's property has been subjected, the courts below correctly held them to be damnum absque injuria; but that with respect to such damage as is attributable to the gases and smoke emitted from locomotive engines while in the tunnel, and forced out of it by means of the fanning system through a portal located so near to plaintiff's property that these gases and smoke materially contribute to injure the furniture and to render the house less habitable than otherwise it would be, there is a right of recovery.

"The acts of Congress referred to, followed by the construction of the tunnel and railroad tracks substantially in the mode prescribed, had the effect of legalizing the construction and operation of the railroad, so that its operation, while properly conducted and regulated, cannot be deemed to be a public nuisance. Yet it is sufficiently obvious that the acts done by defendant, if done without legislative sanction, would form the subject of an action by plaintiff to recover damages as for a private nuisance."

With respect to the damage caused by the emission of smoke at the tunnel's mouth, the Court said:

"But the doctrine [immunity from liability for incidental damages], being founded on necessity, is limited accordingly."91

The Court then discussed its decision in Baltimore & P. R. Co. v. Fifth Baptist Church;32 108 U.S. 317, 27 L. Ed. 739, 2 S. Ct. 719, and in the light of that case, said (34 S. Ct. 659):

"The present case, in the single particular already alluded to, that is to say, with respect to so much of the damage as is attributable to the gases and smoke emitted from locomotive engines while in the tunnel, and forced out of it by the fanning system therein installed, and issuing from the portal located near to plaintiff's property in such manner as to materially contribute to render his property less habitable than otherwise it would be, and to depreciate it in value; and this without, so far as appears, any real necessity existing for such damage — is, in our opinion, within the reason and authority of the decision just cited. This case differs

91 34 S. Ct. 654 at 657.
92 This case held that the defendant involved should be enjoined from continuing, unnecessarily, to maintain locomotive repair facilities in close proximity to plaintiff's church.
from that of the Baptist Church, in that there the railroad company was free to select some other location for the repair shop and engine house; while here the evidence shows that the location of the tunnel and its south portal was established pursuant to law, and not voluntarily chosen by defendant. This circumstance, however, does not, as we think, afford sufficient ground for a distinction affecting the result. The case shows that Congress has authorized, and in effect commanded, defendant to construct its tunnel with a portal located in the midst of an inhabited portion of the city. The authority, no doubt, includes the use of steam locomotive engines in the tunnel, with the inevitable concomitants of foul gases and smoke emitted from the engines. No question is made but that it includes the installation and operation of a fanning system for ridding the tunnel of this source of discomfort to those operating the trains and traveling upon them. All this being granted, the special and peculiar damage to the plaintiff as a property owner in close proximity to the portal is the necessary consequence, unless at least it be feasible to install ventilating shafts or other devices for preventing the outpouring of gases and smoke from the entire length of the tunnel at a single point upon the surface, as at present. Construing the acts of Congress in the light of the 5th Amendment, they do not authorize the imposition of so direct and peculiar and substantial a burden upon plaintiff's property without compensation to him. If the damage is not preventible by the employment at reasonable expense of devices such as have been suggested, then plaintiff's property is 'necessary for the purposes contemplated,' and may be acquired by purchase or condemnation (32 Stat. at L. 916, chap. 856, § 9), and pending its acquisition defendant is responsible. If the damage is readily preventible, the statute furnishes no excuse, and defendant's responsibility follows on general principles."

Taking the Baptist Church case, together with the Washington Terminal case, it is submitted that the law as to railroads is as follows:

(1) If railroad operation is authorized by law, it may not be enjoined as a public nuisance (Baptist Church).

(2) The railroad is also immune from private actions based upon incidental inconveniences to adjoining landowners that are unavoidably attendant upon the operation of a railroad (Washington Terminal case).

(3) However, if the damage can be avoided by voluntary removal of the source of the damage to another location, the defendant is compelled to do so (Baptist Church).

(4) Even if the defendant is required by law to remain at the same location, if the damage is otherwise readily preventable, the defendant railroad must do so (Washington Terminal).

(5) In any event, the defendant railroad is not authorized to concentrate all or a substantial part of the incidental damages on any particular landowner (Washington Terminal).

Applying the railroad law to aviation in the context of the Newark case, it is apparent that:
(a) The defendant airlines are required by law to be where they are.

(b) The defendant airlines were not trespassing on plaintiffs' lands.

(c) The damages proved by the plaintiffs were of the same kind and quality (other than smoke) suffered by Richards in the Washington Terminal case.³³

(d) There was no evidence that any of the defendants could readily prevent the damage.

(e) There was no evidence that the defendants concentrated the noise and vibration on any particular landowner. As a matter of fact, such a concentration is impossible. Indeed, applying the familiar rule of plane geometry to the problem—that in the case of a 30°, 60°, 90° triangle the hypotenuse is twice the length of the shortest side—we find that the train is a greater concentrator than the airplane.

A specific example will illustrate this point: an airplane flying at 500 feet will obviously be 500 feet away from the Smith house located on the railroad tracks directly below. However, applying the 30°, 60°, 90° rule, it will be only twice as far from the Jones house located 60° to its side—or 1,000 feet away. Since the intensity of sound varies inversely as the square of the distance from the source, the Smith house will be exposed only to four times the sound intensity that the Jones house will receive. Intermediate houses will vary correspondingly between these two extremes.

Comparing this situation with the noise from the train, we find that the Jones house and the Smith house are located laterally about 866 feet apart (the square root of \(500^2 + 1000^2\) equals 866). If we place the Smith house at 50 feet from the track, the Jones house will be seventeen times as far away from the train—the sound source—and the sound intensity will be \(17^2\) less, or \(1/289\) as great. This calculation makes no allowance for the greater sound absorption by intervening houses of the surface created noise, which effect would further diminish the sound intensity at the periphery. There is no doubt that a greater diffusion of sound occurs in the case of an airplane flying at 500 feet or above, than in the case of the train.

Consequently, if unconcentrated noise from trains is not actionable by neighboring landowners along the railroad tracks, there are even less grounds for holding that the more evenly diffused noise from aircraft would be.

On the basis of the foregoing it is apparent that none of the landowners involved can make a good case that the incidental damage from noise is being concentrated on him and that he is suffering disproportionately with respect to other landowners in the neighborhood.

In essence then, no better case is made out for abating a nuisance than was shown in Smithdeal v. American Air Lines, Inc., 80 F. Supp. 233, wherein it was found that "The occasional tremor is no more

³³ There were no scientific sound measurements reported in the Newark case. See infra p. 395 for comparison of aircraft noise with that of trains, etc.
than that occasioned by a train, heavily loaded and moving at a good pace some distance away."

Suppose, however, that the continual noise of aircraft does very materially affect the plaintiff's property, in a case where the flight path is over adjoining land, under circumstances where no relief is possible by changes in the flight patterns. In Part II of the article we concluded that the remedy of injunction was no longer open to the courts as a result of the enactment of the Civil Aeronautics Act, and particularly the Federal Aviation Act. This accords with holdings of the courts that where the offender is a public service corporation no injunction will issue for noise nuisance, but that a claim for monetary damages will lie, Transcontinental Gas Pipe Line Corp. v. Gault, et al, 198 F. 2d 196 (1952).

In looking at the question of monetary damages, it is necessary to bear in mind the operational facts, rather than to discuss it on the basis of pure theory. It is our hypothesis that the aircraft are being operated in full accord with the Civil Air Regulations. Among these are sections 40.72 (Interstate Air Carrier Certification and Operation Rules) and 41.29 (Certification and Operation Rules for Scheduled Air Carrier Operations Outside the Continental Limits of the United States). These sections both provide, in effect, that an air carrier may not permit its aircraft to take off unless it is possible, with one engine inoperative, to climb to 50 feet inside the airport take-off area and then clear all obstacles outside the airport by a horizontal distance of 300 feet. Normally an airplane does not experience engine failure on take-off, so that only the rare exception would come so close. Here then is a situation where—notwithstanding certain implications of the Highland Park case discussed immediately below—the passage of aircraft well over 300 feet above the land would undoubtedly not constitute a taking in the Constitutional sense. Why then should there be any legally recoverable damages at all? Certainly the tests should be the same, and if an airplane flying directly overhead is operating with impunity in the public domain, so must another airplane flying an equal or greater distance away to the side be regarded as immune from liability.

As has been indicated, the court in the Newark case found no evidence of trespass by any of the defendants over the land of any of the plaintiffs. It laid down the basic principle as follows:

"The principles do not foreclose the right of the landowner to maintain an action for trespass to reality in a proper case but the action may not rest on evidence that the aircraft in flight passed across his land in the navigable air space above the immediate reaches thereof. There must be evidence not only that the aircraft passed over his lands from time to time but also that there was an unlawful invasion of the immediate reaches of his land; in other words, there must be evidence that the aircraft flights were at such altitudes as to interfere substantially with the landowner's possession and use of the airspace above the surface."

The Court of Claims has recently handed down a decision in the case of *Highland Park, Inc. v. The United States.* This case has many disturbing aspects as it affects the problem under review here. It involved jet operations from Hunter Air Force Base, near Savannah, Georgia, and was a suit for just compensation for the taking of plaintiff’s property by the United States.

The material facts—so far as our inquiry is concerned—are as follows: B-47 aircraft flew over plaintiff’s property at the rate of from 30 to 60 a day to and from the base. Their average altitude was 325-375 feet over the plaintiff’s boundary on the airport side, 325-425 feet on the far side. Jet noise over the property on take-off averaged 76 decibels, the highest reading being 92. For landing aircraft, the figures were 70 decibels average, 92 being the highest reading. The GCA approach line sloped across plaintiff’s property, intercepting the far boundary at 400 feet, the near boundary at 275. The 50 to 1 obstruction clearance line crossed the same boundaries at 150 and 100 feet, respectively. The court refers to a zoning ordinance of Savannah and Chatham County, but does not specify what limits the ordinance placed on height. The court subsequently, however, in discussing the obstruction clearance line (Opinion, p. 21), says “No obstructions are permitted to project above this imaginary line in the flight path.”

So much for the facts. The case is remarkable in two aspects—(a) the government *admitted* taking an easement of flight, but defended on the ground that the taking pre-dated plaintiff’s acquisition (Opinion, p. 4); and (b) the court at no time found that there was an invasion of the immediate reaches of the atmosphere above plaintiff’s land, but on the contrary, in applying *Causby,* stated the rule as being: “the air space over the land is a part of the public domain, which may be used with impunity so long as the flights do not substantially interfere with the use and enjoyment of the surface of the ground” (italics supplied). It is submitted that the government, by its admission, and the court, in the elimination of the “lower reaches” doctrine, have devised substantially new law of questionable soundness.

It is apparent that the court’s failure to discuss the “lower reaches” doctrine was not inadvertent. Defendant’s contention was that although the government had taken an easement, it had done so before the plaintiff acquired the property. The court agreed that if this was so, the plaintiff could not recover (Opinion, p. 4). However, it found that the earlier operation of B-29’s and B-50’s was not a taking, even though these aircraft passed over plaintiff’s property at altitudes between 200 and 1,200 feet and over (Opinion, p. 2). While the court baldly makes the statement that the jet bombers flew over plaintiff’s property at a lower altitude than the propeller driven planes (Opinion, p. 2), the

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34 161 F. Supp. 597 (1958) C.Cls. No. 375-55, May 7, 1958. The case, as reported in Federal Supplement does not contain the Court’s findings. Consequently, page references herein are to the slip opinion.

only justification for this statement is that the “glide angle” for the jets was 100 feet at the western boundary, 150 feet at the eastern boundary of plaintiff's property (Opinion, footnote, p. 2). The court itself recognizes that the normal path of the B-47 is “considerably” higher (Finding 21 b., p. 21), and it is obvious that this “glide angle” is the airport obstruction clearance line. It has no more relevance to the flight paths actually flown by the jets than the ground has to the height at which trousers are usually worn. The average elevation of the jets over the property was found to be 325-375 feet on the western boundary and 425-475 feet at the eastern boundary of plaintiff's property (Finding 21d). Undoubtedly this average is lower than the average for the propeller driven aircraft, but there is simply no evidence referred to by the court that the jets flew lower than 200 feet.

If the propeller driven aircraft did not “take” the property subsequently acquired by plaintiff by flying at 200 feet, but the jets did “take” it by flying at 325-375 feet, it is obvious that the court regarded the taking solely as a function of the noise created, rather than an invasion of the lower reaches of the atmosphere. Indeed, the court specifically finds that there was no constant correlation between the height of a plane and the noise it produced at ground level (Finding 20, p. 20).

Thus the basic theory of the case appears to sound in nuisance rather than in trespass, but the court is by no means clear on this point. It describes the action of the government as one of taking an easement, and as part of its action in awarding plaintiff damages for a taking, it vests defendant with a perpetual easement of flight over the property at an elevation of 100 feet or more above the ground with airplanes of any character. This confusion of theories leaves the case in a most unsatisfactory posture. Possibly it could be supported on the basis of the Baptist Church case, supra, on the theory that the government is at liberty to build an airport and operate its jets anywhere it may choose, and was therefore not required to create the base where it did—with the consequence that it would be liable for even a partial taking by way of nuisance. If this had been the theory of the case, it would make it readily distinguishable from the Newark case where the defendants were forced to operate where they did and there would have been no need to rely on Causby as justification.

However, the court did rely on Causby, and in so doing twists it out of shape. “The air space, apart from the immediate reaches above the land, is part of the public domain,” U. S. v. Causby, 328 U.S. 256, 266. With a finding that B-29's and B-50's did not “take” at 200 feet, the law of the case is that everything at that altitude and above is part of the public domain. There is no finding that the jets operated below that altitude. Consequently, Causby simply cannot apply.

If Causby is not applicable and the Baptist Church case is not relied on, is there any other basis on which the Highland Park case can be

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86 Indeed, in finding 19b (Opinion, p. 18), the Court specifically finds that the record "in the case offers no reason to anticipate an abatement of the nuisance."
sustained? Both the Baptist Church case and the Washington Terminal case contained dicta to the effect that a nuisance to an extent amounting to an *entire* deprivation of the use and enjoyment of property was compensable as a taking. Was this the case in Highland Park?

So far as appears from the opinion, no evidence was adduced by defendant to show the comparative noise levels of surface sounds. The Civil Aeronautics Administration has performed an interesting and useful study of this nature. In this booklet it appears that the intensity of the ordinary noise made by steam engines and trains at 400 feet is 83 decibels, when whistling at the same distance, 93 decibels. At 400 feet on a level highway, semi-trailer trucks produce a maximum of 78 decibels, but when they grind uphill in low gear, they produce a husky 83 decibels.

Using the same charts and graphs in this booklet, but applying them to the 90-foot distance between plaintiff's house and the middle of the railroad tracks in the Washington Terminal case, we find a value of approximately 92 decibels for train noise without whistles, and over 100 decibels when whistling. (There was no evidence of such indecorous conduct, however.) Yet the court held the noise—along with other incidental damage—to be *damnnum absque injuria.*

Apart from scientific measurements, the damage and annoyance in the Washington Terminal case closely resembles the type of damage found in the Highland Park case, and the Newark case.

"The house has also been damaged by vibrations caused by the movement of trains on the track or in the tunnel, resulting in cracking the walls and wall paper, breaking glass in the windows, and disturbing the peace and slumber of the occupants." Washington Terminal case, 34 S. Ct. 664, 665).

"When they passed over the property, all conversation had to cease, radio and television reception was disrupted, the windows in the house shook, dishes rattled on the shelves, sleep was disrupted, and the noise was so great as to be painful to the ears of some of the residents." (Highland Park v. U.S., Opinion, p. 2.)

"During the period that I am home I noticed that there are anywhere from thirty to fifty planes until one o'clock in the morning, that is, the period from six o'clock at night to one o'clock in the morning. Some near, some far, some very, very close. These planes come over, both coming from the Airport and going to the Airport. They come over with a terrible roar; they come over, they shake the house; they have caused cracks in the ceiling; they have caused the dishes to jingle in the cupboard, they have caused us to wake up at night. They disturb my sleep and my family's sleep." (Newark case, 159 F. Supp. 750, 762.)

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38 The recital by the court that the noise was painful to the ears of some residents is inconsistent with its specific findings: i.e., "The accepted threshold of feeling, or that point at which noise becomes physically painful to the ears, is about 120 decibels, again at certain frequencies" (Finding 20, p. 19). "The average sound intensity of the B-47 is 76 decibels, the highest reading being 92 decibels." (Finding 20, p. 20).
We can now establish a sort of box score on damages as between the Washington Terminal, the Highland Park, and the Newark cases.

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<tr>
<th>Matter Affected</th>
<th>Washington T.</th>
<th>Highland P.</th>
<th>Newark</th>
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<tbody>
<tr>
<td>Conversation</td>
<td>Difficult</td>
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</tr>
<tr>
<td>Ceiling</td>
<td>Damage not established</td>
<td>Cracked</td>
<td></td>
</tr>
<tr>
<td>Walls</td>
<td>Cracking</td>
<td>Damage not established</td>
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</tr>
<tr>
<td>Dishes</td>
<td>Rattled</td>
<td>Jingled</td>
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<tr>
<td>Windows</td>
<td>Broke</td>
<td>Shook</td>
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</tr>
<tr>
<td>House</td>
<td>Damaged by vibrations</td>
<td>Shook</td>
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<tr>
<td>Sleep</td>
<td>Disturbed</td>
<td>Disrupted</td>
<td>Disturbed</td>
</tr>
<tr>
<td>Peace</td>
<td>Disturbed</td>
<td>Radio and television disrupted</td>
<td>Wake us at night</td>
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One of the peculiar vices of the Highland Park decision is the assumption that because of the jet noise the land in question had only a residual value. This was based on the theory that only a speculator, who would gamble that jet operations at Hunter might be abandoned, would pay anything for it (Opinion, p. 6). So far as other uses are concerned the court refers to certain restrictive covenants with home-owners who had already bought land from the plaintiff company and makes the judicial guess that the existence of the covenants "no doubt makes it impossible for it to sell the remaining lots for other than residential purposes."

The opinion as published in Federal Supplement makes no mention of the fate of the individual owners who had bought homesites from the plaintiff. However, in the slip opinion of the Court, the findings are published, and in finding No. 19 the Court states that "Home-owners were unable, despite efforts, to sell their homes and move elsewhere without sacrificing their investments." Just what sacrifice would have to be made, the opinion doesn’t say, and the only other reference to a sale by a homeowner is in a footnote to finding No. 10 that "... an individual owner of a home in Highland Park resold it in December 1956 under circumstances not disclosed by the record."

The disturbances from noise complained of by the residents were substantially similar to those complained of in the Newark case, as has been shown. Also by way of comparison see the dissenting opinion of Mr. Justice Black in U. S. v. Causby, where he says: "Nor would anyone take seriously a claim that noisy automobiles passing on a highway are taking wrongful possession of the homes located thereon, or that a city
elevated train which greatly interferes with the sleep of those who live next to it wrongfully takes their property.\textsuperscript{30}

Undoubtedly, the jet noise in the neighborhood diminished the value of the land as homesites, but every diminution of land value is not necessarily compensable as a taking. Zoning ordinances have been sustained which had the effect of curtailing land values by more than five times. American Wood Products Co. v. City of Minneapolis, 35 F. 2d 657 (C.C.A. 8, 1929). This was held to be a valid exercise of state police power.

There is no reason why the same tests and conclusions should not be reached where the federal government, in the exercise of its commerce power enacts public measures to safeguard the flying public.

Under \textit{Causby} there was an actual penetration by the aircraft of the lower reaches of the atmosphere. The analogies upon which the court relied were overhanging eaves, putting up an elevated railroad over the property, ability to erect buildings, grow trees and build fences, and the opinion refers to “flight of airplanes, which skim the surface but do not touch it.” These are all activities within 100 or so feet of the ground (other than erection of radio masts and skyscrapers). The court refers with apparent approval to a 300 foot minimum altitude requirement of the Civil Air Regulations as creating a floor of the navigable air space over open country.

Thus it is submitted that jet noise alone does not constitute a taking—there must be an actual invasion by the aircraft of the \textit{immediate} reaches above the land. Once this is shown, undoubtedly the noise produced must be taken into consideration on the question of damages.

The enactment of the Federal Aviation Act presents a splendid opportunity to the new Administrator to deal with the problem directly. He is required to administer the new Act in such a way as to protect property on the ground. Naturally he will exercise this authority to eliminate, or curtail as much as possible, objectionable noise, consistent with safety of flight and efficient use of air space. The police power which he possesses in the regulation of air commerce will give him considerable latitude in the extent that he can authorize approach patterns which impinge upon the value of property below. However, \textit{Causby} says that there is a lower limit below which frequent flights would constitute a taking.

Thus there is need for him to make an administrative determination of where his police powers end and where a taking of property begins. In making this determination he will be helped by the fact that a great many of the country’s airports have been built or improved under the Federal Act and that consequently free approaches are guaranteed down to the obstruction clearance line. In those cases where this obligation has been met by local exercise of eminent domain, in which the air space has been condemned, he has no problem since that is in the

\textsuperscript{30} 328 U.S. 256, 270; 66 S. Ct. 1062, 1070.
public domain by local action and is now defined as navigable air space under the Federal Aviation Act.

In those cases where the responsibility for clear approaches has been met by local zoning ordinances, the problem is more troublesome. Here the landowner is limited by local action in the height of structures he may erect, but in some instances the normal take-off and landing paths, while above the obstruction clearance line will penetrate the lower reaches. Here, it is submitted, the Administrator must exercise his regulatory power over aircraft flights so that a non-trespassing flight path will be produced most of the time. Conceivably it could require re-orientation of the ILS glide path of localizer and a reasonable restriction on fuel or payload to insure steeper take-offs. But the extent to which this type of juggling can go on is very limited, and if the operational restrictions imposed seriously affect the ability of air carriers to utilize the newest equipment to the full limit of their airworthiness certificates, the remedy should be consultation with the local airport authority.

CONCLUSIONS

In conclusion, it is submitted that with the enactment of the Federal Aviation Act of 1958, the legal situation regarding aircraft noise is as follows:

1. The navigable air space now extends by specific Congressional act down to the obstruction clearance line for all airport approaches (Federal Aviation Act, Section 101 (24)).

2. Under the Federal Airport Act there is an obligation on the part of local airport authorities which have benefited from that Act to keep such approaches free of physical obstructions.

3. In some instances the obstruction clearance line will intercept the "lower reaches" of the atmosphere above the property of an adjoining landowner.

4. Such interception does not of itself constitute a taking of property (it is only an intangible line). Only where aircraft penetrate the lower reaches frequently will there be a taking (U. S. v. Causby).

5. The Administrator now has the power and the duty to regulate the flight of aircraft for the protection of property on the ground (Federal Aviation Act, Section 307 (c)).

6. In order to insure that the new Act will not operate unconstitutionally in certain cases, the power to protect ground property must include the power to prevent its taking by low and frequent flights even when such flights are within the navigable air space as now defined.

7. It is therefore an absolute duty of the Administrator, in cases where the "lower reaches" are embraced in the navigable air space by reason of the interception of the obstruction clearance line, to prohibit aircraft flight (except in emergencies) within such lower reaches.
8. In order to insure uniform application of the foregoing regulations throughout the country the Administrator must determine by metes and bounds the uppermost extent of the "lower reaches." He should do this after a full hearing, in which all interests have an opportunity to present evidence, and should give full consideration to the relative noise produced by all types of present day activity.

9. In cases where application of the foregoing regulations would seriously curtail airline operations which otherwise could be conducted at any given airport, query as to whether the Administrator has a cause of action against the local airport authority, if the airport has been built or improved under the Federal Airport Act, to require condemnation of such air space by such airport authority.

10. In addition to the foregoing, the Administrator has the power to require still higher flight paths above the immediate reaches to prevent a diminution of property values through aircraft noise, and to prescribe flight patterns for the same reason. In so doing, however, he should recognize that he is now exercising legitimate police powers, and the interests of the landowner, though they may be adversely affected, must be balanced against consideration of safety and efficient use of the air space. The power here is analogous to the zoning power of municipalities.

11. If it proves impossible for the Administrator to prevent substantial diminution of property values by reason of noise through his regulatory powers, because of the paramount needs of safety and efficient use of the air space, he has full power to develop silencing equipment and to require its use.

12. By virtue of the foregoing, the federal government has effectively and completely occupied the field of regulation of flight and the protection of landowners from flight activities. Factually, it is inconceivable that any air carrier would or could operate aircraft with any degree of frequency below the obstruction clearance line at any airport. Consequently, all normal flight operations will be within the air space over which Congress has vested exclusive control in the Administrator. There will still remain the question of whether the Administrator’s "lower-reaches protective regulation" does in fact protect the landowner against an unconstitutional taking of his property under Causby, but if the regulation has been thoroughly considered, on a nationwide basis, it is quite probable that the courts will defer to the Administrator’s expert judgment.

13. The effect of all the foregoing is as follows:

(a) It would require reversal of the holding in the Pittsburgh Airport case in several respects:

(i) The airline operations would be now within the air space over which Congress has taken complete control, and primary jurisdiction would be in the Administrator.
(ii) If the flights were within the lower reaches and in violation of the "lower reaches regulation," the power to enforce is vested in the Administrator and even parallel enforcement by the State would encroach upon his preserve.\(^{40}\)

(iii) If the flights were within the "lower reaches" but not in violation of any protective or other regulation of the Administrator, the air carriers would not be liable since they would be operating in the navigable air space declared by Congress to be free for transit. Any "taking" involved would be by the United States—more specifically, the Administrator—for failure to take necessary steps to keep the air space within constitutional bounds, and it would thus become a necessary party defendant.

(b) In regard to nuisance suits, not involving penetration of the "lower reaches" over plaintiff's land, the following results would appear to obtain in respect of air carrier aircraft:

(i) where the plaintiff's land is rendered totally valueless for any purpose. This hypothesis is almost impossible to visualize since, if the flight is over adjoining land, airport layout and operational performance requirements would place the aircraft well over 300 feet away. If over plaintiff's land, the "protective regulation" should have taken this factor into account. A very strong presumption will exist that no such taking has occurred. If a complete taking should be established, injunction will not lie and the matter will be in the primary jurisdiction of the Administrator. However an action for damages might be successful.

(ii) in all other cases where the plaintiff's property has been adversely affected, neither suit for injunction nor action for damages will lie. This comes about not so much through the doctrine of primary jurisdiction, as through the thoroughgoing occupation of the field by the federal government. Unlike the case of a taking in the constitutional sense, where some form of remedy must be preserved, the federal government here may abolish all remedies entirely in the exercise of its police power, and the loss becomes *damnnum absque injuria*—either through application of the doctrine of the Washington Terminal case, or via analogy to State zoning power. Whichever of these roads is followed, the result must be the same—the enactment of the Federal Aviation Act has not only fully

\(^{40}\) So far as injunction suits are concerned. Since, like its predecessor the Civil Aeronautics Act, the Federal Aviation Act of 1958 makes no provision for reparations, actions for monetary damages for past trespasses would lie outside the "primary jurisdiction rule." See *S.S.W., Inc. v. Air Transport Association*, supra, Note 22; *Slick Airways v. American Airlines*, 107 F. Supp. 199.
occupied the field, but has prescribed a different mode of attack on the noise problem from an adjudicatory one to a regulatory, developmental, and administrative one in the interest of society as a whole. Here, the fact that reparations are not within the Administrator's or Board's powers under the Act is immaterial, since the issue is not whether Congress has transferred jurisdiction to redress a private wrong from the courts to the agency, but whether Congress, acting within its police power, has abolished the right of private redress entirely.

(c) Conditions regulating approach and take-off tracks or dealing with allowable loads, imposed by local airport authorities in the interest of adjoining landowners, are void as an unconstitutional attempt to regulate flight activity—a field preempted by the federal government. Compare *Village of Cedarhurst v. Allegheny Airlines, et al.* As such they are obviously unreasonable terms and conditions, and the Administrator both as regulator and contractor should take prompt action to enjoin their enforcement.

Washington, D. C.

November 1958