AVIATION LAW—FEDERAL PREEMPTION—EFFICIENT UTILIZATION OF AIRSPACE—*Lockheed Air Terminal, Inc. v. City of Burbank*, 318 F. Supp. 914 (C.D. Cal. 1970).

> To millions of Americans who live near major airports and are being driven frantic by the noise from jet engines, President Johnson must seem the luckiest guy in the world. No planes, propeller or jet, are permitted to fly over his home, and when the boisterous world of air transportation intrudes on his private or political life, he can silence the intruder with a command—as he did recently during Carl Sandburg services at the Lincoln Memorial. The commercial airliners landing and taking off from National Airport were interfering with outdoor eulogies and Johnson, not wanting his own speech interrupted, told a Secret Service man to call the airport tower and have the planes temporarily rerouted. They were.[1]

Unfortunately, this simplistic solution to the problem of aircraft noise is not so readily available to the ordinary taxpayer. Noise emission has developed into possibly the most formidable aviation related problem of the seventies, and as such, looms as the greatest obstacle to the future progress of air transportation.[2] With the increasing number of jet aircraft landing and departing in close proximity to surrounding communities, a conflict has arisen between the desire of inhabitants to enjoy quiet and the public need for an efficient national airport system. Local governments have attempted to cope with this problem by enacting ordinances or seeking injunctions in order to restrict the flight of aircraft above their communities or to limit their right to take off and land.[3]

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1 Sherrill, *The Jet Noise is Getting Awful*, N.Y. Times, Jan. 14, 1968, § 6 (Magazine), at 24.

2 For an in depth study of the legal aspects of aircraft noise, *see* Dygert, *An Economic Approach to Airport Noise*, 30 J. AIR L. & COM. 207 (1964); Harvey, *Landowners' Rights in the Air Age: The Airport Dilemma*, 56 MICH. L. REV. 1313 (1958); Hill, *Liability for Aircraft Noise—The Aftermath of Causby and Griggs*, 19 U. MIAMI L. REV. 1 (1964); Nagel, *The Causby Case and the Relation of Landowners and Aviators—A New Theory for the Protection of the Landowner*, 14 J. AIR L. & COM. 112 (1947); Roth, *Sonic Boom: A New Legal Problem*, 44 A.B.A.J. 216 (1958); Tondel, *Noise Litigation at Public Airports*, 32 J. AIR L. & COM. 387 (1966); Comment, *Federal Liability for Sonic Boom Damage*, 31 S. CAL. L. REV. 259 (1958).

3 American Airlines, Inc. v. City of Audubon Park, 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir. 1969); American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969); Allegheny Airlines, Inc. v. Village of Cedarhurst, 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956); Stagg v. City of Santa Monica, 2 Cal. App. 3d 318, 82 Cal. Rptr. 578, 11 Av. Cas. 17,404 (Ct. App. 1969); Township of Hanover v. Town of Morristown, 108 N.J. Super. 461, 261 A.2d 692, 11 Av. Cas. 17,436 (Ch. 1969).

In *Lockheed Air Terminal, Inc. v. City of Burbank*,[4] the validity of just such an ordinance, prohibiting jet takeoffs between the hours of 11:00 p.m. and 7:00 a.m., was contested. The city council of Burbank, California was attempting to regulate noise generating from nearby Hollywood-Burbank Airport. An action was instituted by the owner and operator of the airport and an intrastate carrier, seeking an injunction and declaratory relief to invalidate the ordinance. The federal district court, in a thoroughly analytical "memorandum opinion," held that the federal government has preempted the use of air space and regulation of air traffic, thereby invalidating and precluding enforcement of the local ordinance.[5] The court pinpointed the tests, set forth by the Supreme Court in *Rice v. Santa Fe Elevator Corp.*,[6] that must be applied to determine whether the federal government intended to preempt a field:

> So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such a purpose may be evidenced in several ways. (*1*) The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it. . . . (*2*) Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . . Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. . . . (*3*) Or the state policy may produce a result inconsistent with the objective of the federal statute. . . . It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.[7]

The court felt that from the broad scope of federal statutes and regulations, "Congress intended to centralize full and dominant control of the navigable air space in the Federal Government so as to provide for its safe and most *efficient* use."[8]

To properly evaluate this decision it is necessary to briefly examine the statutes and regulations governing air traffic and the use of airspace. The broad congressional policy for air transportation is

4 318 F. Supp. 914 (C.D. Cal. 1970).
5 *Id.* at 925.
6 331 U.S. 218 (1947).
7 318 F. Supp. at 922-23.
8 *Id.* at 925 (emphasis added).

manifested by the Federal Aviation Act of 1958,[9] which states that "[t]here is recognized and declared to exist in behalf of any citizen of the United States a public right of freedom of transit through the navigable airspace of the United States."[10] The Act authorizes and directs the Federal Aviation Administrator

> to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable airspace 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 airspace.[11]

The Act confers upon the Federal Aviation Administration (FAA),[12] and its Administrator, broad powers to regulate air commerce in the "public interest."[13] To effectuate this mandate, the Administrator is authorized to develop plans and formulate policy with respect to the use of "navigable airspace," which is defined as that airspace "above the minimum altitudes of flight prescribed by regulations issued under this chapter, and [including that] *airspace needed to insure safety in take-off and landing of aircraft.*"[14] The Administrator is empowered to allot the use of such airspace as he deems proper;[15] prescribe rules governing the flight of aircraft;[16] promote air commerce by establishing and maintaining air navigation facilities;[17] conduct tests and undertake research and development of airplanes and airplane equipment;[18] and prescribe certain types of

9 49 U.S.C. §§ 1301 *et seq.* (1964). For a history of this statutory scheme, *see* Lindsey, *The Legislative Development of Civil Aviation, 1938-1958*, 28 J. AIR L. & COM. 18 (1961-62).

10 49 U.S.C. § 1304 (1964).

11 49 U.S.C. § 1348(a) (1964) (emphasis added).

This key section is considered the "heart" of the Act. S. REP. No. 1811, 85th Cong., 2d Sess. 14-15 (1958).

12 The FAA was established by 49 U.S.C. § 1341(a) (1964).

13 49 U.S.C. § 1303 (1964).

14 49 U.S.C. § 1301(24) (1964) (emphasis added). The minimum altitudes of flight prescribed by regulation, 14 C.F.R. § 91.79 (1970), are as follows:

> Except when necessary for takeoff or landing, no person may operate an aircraft below the following altitudes:
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> (a) *Anywhere.* An altitude allowing, if a power unit fails, an emergency landing without undue hazard to persons or property on the surface.
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> (b) *Over congested areas.* Over any congested area of a city, town, or settlement, or over any open air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet of the aircraft.
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> (c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In that case, the aircraft may not be operated closer than 500 feet to any person, vessel, vehicle, or structure.

15 49 U.S.C. § 1348(a) (1964).

16 49 U.S.C. § 1348(c) (1964).

17 49 U.S.C. §§ 1303(d), 1348(b) (1964).

18 49 U.S.C. § 1353(b) (1964).

equipment airplanes must utilize.[19] In addition to these expressly enumerated powers, the Administrator is given the general authority to issue such orders, rules, and regulations as he deems necessary to execute his duties and carry out the provisions of the Act.[20]

One specific and relevant example of this general power is the Administrator's authority to prescribe air traffic regulations "for the protection of persons and property on the ground."[21] In 1968, Congress expressly dealt with the problem of noise abatement by amending the Act to require the Administrator to prescribe "such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise."[22]

This complete and dominant statutory and regulatory[23] scheme served as the basis for the district court's finding that the FAA preempted the field of aircraft control within the "navigable airspace."[24] Prior to *Lockheed*, this scheme was the basis for several federal court decisions holding that the federal government had preempted the field of "air traffic control" and "flight patterns." In 1952, a municipal ordinance was enacted by the Village of Cedarhurst, Long Island, prohibiting flights over its territory at altitudes lower than one thousand feet. The ordinance was designed to minimize the noise interference from a nearby international airport by controlling the flight path of aircraft. Federal air traffic regulations, however, required aircraft using the airport to fly over the village at low altitudes, and the federal district

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19 49 U.S.C. § 1423(a)(1) (1964).

20 49 U.S.C. § 1354(a) (1964).

21 49 U.S.C. § 1348(c) (1964).

22 49 U.S.C. § 1431(a) (Supp. V, 1970). The Senate Report on the new legislation declared:

> In this regard, we concur in the following views set forth by the Secretary [of Transportation] in his letter to the committee of June 22, 1968:
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> The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft. Local noise control legislation limiting the permissible noise level of all overflying aircraft has recently been struck down because it conflicted with Federal regulation of air traffic. American Airlines v. Town of Hempstead, 272 F. Supp. 226 (U.S.D.C., E.D., N.Y. 1966). The court said, at 231, "The legislation operates in an area committed to Federal care, and noise limiting rules operating as do those of the ordinance must come from a Federal source." H.R. 3400 would merely expand the Federal Government's role in a field already preempted. It would not change this preemption. State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft.

S. REP. No. 1353, 90th Cong., 2d Sess. 6 (1968); 2 U.S. CODE CONG. & AD. NEWS 2693-94 (1968).

23 The regulations are set forth in 14 C.F.R. (1970).

24 318 F. Supp. at 925.

court in *Allegheny Airlines, Inc. v. Village of Cedarhurst*,[25] found the ordinance invalid, declaring:

> [T]he legislative action by the Congress together with the regulations, adopted pursuant thereto, have regulated air traffic in the navigable airspace in the interest of safety to such an extent as to constitute preemption in that field. . . . The States . . . are thus precluded from enacting valid contrary or conflicting legislation.[26]

Subsequently, in the case of *American Airlines, Inc. v. Town of Hempstead*,[27] an ordinance which regulated noise levels by denying the lower airspace to aircraft and thereby closing the landing approaches and takeoff paths of a nearby airport was contested. The federal district court, in invalidating the enactment, reached these conclusions:

> It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation.[28]

> The federal regulation of air navigation and air traffic is so complete that it leaves no room for such local legislation as the Hempstead Ordinance.[29]

Federal preemption of airspace management was also a basis of decision in *American Airlines, Inc. v. City of Audubon Park, Kentucky*,[30] where the court invalidated an ordinance making it unlawful to fly any aircraft over the corporate limits of the city at a height of less than 750 feet. The court concluded that "[t]he statutes enacted by the Congress clearly expressed an intent fully to preempt the field of law and regulation of interstate and foreign air traffic."[31]

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25 132 F. Supp. 871 (E.D.N.Y. 1955), *aff'd*, 238 F.2d 812 (2d Cir. 1956).

26 *Id.* at 881. The *Cedarhurst* court, in determining that preemption existed, interpreted the provisions of the 1938 Civil Aeronautics Act which were less comprehensive than the provisions of the 1958 Act. Therefore, a rather cogent a fortiori argument can be asserted that the intent to preempt would necessarily be implied under the successor law.

Prior to *Cedarhurst*, and contrary to it, courts ordered alterations in flight patterns by prohibiting aircraft from flying below a certain height over the landowner's property, Johnson v. Curtiss Northwest Airplane Co., 1928 U.S. Av. 42 (Minn. Dist. Ct. 1923) or from flying over it altogether, Mohican & Reena, Inc. v. Tobiasz, 1938 U.S. Av. 1 (Mass. Super. Ct. 1938), Hyde v. Somerset Air Service, Inc., 1 N.J. Super. 346, 61 A.2d 645 (Ch. 1948). However, such decrees conflict with federal safety regulations, and thus appear to be no longer valid.

27 272 F. Supp. 226 (E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969).

28 272 F. Supp. at 232.

29 *Id.* at 233.

30 297 F. Supp. 207 (W.D. Ky. 1968), *aff'd*, 407 F.2d 1306 (6th Cir. 1969).

31 297 F. Supp. at 212.

Thus, in the *Cedarhurst, Hempstead* and *Audubon Park* cases, the courts indicated that local control of "flight patterns" and "air traffic control" was preempted by Congress and therefore invalid. The *Lockheed* decision extended preemption to include "takeoffs," thereby preventing local initiative from interfering with the express provisions of the federal government controlling airspace for "safety and *efficiency*."

Two state courts have recently reached contrary conclusions, however. In *Stagg v. City of Santa Monica*,[32] an ordinance restricting jet aircraft takeoffs between the hours of 11:00 p.m. and 7:00 a.m. was held to be a valid exercise of the municipality's police power:

> Article XI, section 11 of the California Constitution empowers cities and counties to make and enforce "such local, police, sanitary and other regulations *as are not in conflict with general laws*." As above pointed out, there is no specific state legislation on the subject of noise abatement; the ordinance does not conflict with existing legislation in the general field of aviation; there has been no express declaration of legislative intent which would preclude local regulations in the field, or any general plan or scheme which is so comprehensive that an intent to occupy the field may be implied.[33]

The court dismissed the preemption argument,[34] relying upon the reasoning in *Loma Portal Civic Club v. American Airlines, Inc.*,[35] where the California Supreme Court, although denying injunctive relief which would have restricted flight operations at a nearby airport, stated:

> [T]he supremacy clause precludes the enforcement of state law which conflicts with federal law, e.g., we could not enjoin a pilot from flying in the landing pattern that he was ordered to follow by the control tower, and it is for this reason, not preemption, that a state may not prohibit that which federal authority directs.[36]

The *Stagg* court concluded that not all local action had been preempted by federal regulation in the field of air transportation. However, applying the *Rice* tests that preemption is a matter of legislative intent,[37] it seems clear that enforcement of this local ordinance would conflict with the purposes of federal legislation to insure the *efficient utilization*[38] of airspace, and is therefore unenforceable.

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32 2 Cal. App. 3d 318, 82 Cal. Rptr. 578, 11 Av. Cas. 17,404 (Ct. App. 1969).

33 *Id.* at 323, 82 Cal. Rptr. at 581, 11 Av. Cas. at 17,406 (emphasis added).

34 *Id.* at 320, 82 Cal. Rptr. at 579, 11 Av. Cas. at 17,405.

35 61 Cal. 2d 582, 394 P.2d 548, 39 Cal. Rptr. 708, 9 Av. Cas. 17,156 (1964).

36 *Id.* at 592, 394 P.2d at 554, 39 Cal. Rptr. at 714, 9 Av. Cas. at 17,161.

37 *See* notes 6-7 *supra*, and accompanying text.

38 A significant example of FAA action to achieve the "efficient utilization" of air-

Similarly, the New Jersey Superior Court, Chancery Division, in *Township of Hanover v. Town of Morristown*,[39] enjoined jet aircraft operations between specified hours at Morristown Municipal Airport. Plaintiffs sought a permanent injunction forbidding certain planned physical alterations and extensions of facilities at the Morristown Airport, or in the alternative, a direction of the court curtailing use and operation of the airport. The court made clear that where certain airport activities were in conflict with the ordinary and expected comfortable environment of persons living and working near the airport, it would attempt to accommodate both the interest that the public has in flight, and the conflicting public interest in a quiet environment.[40] The court stated that it would not order a total cessation of flights, but would instead prohibit jet operations during specified hours, except in emergency situations.[41]

The court noted that the federal commerce power does not deny the states the power to act as long as state and federal action are consistent.[42] In determining whether a conflict existed, the court relied upon the decision of the United States Supreme Court in *Huron Portland Cement Co. v. City of Detroit*,[43] where a municipal smoke control ordinance which applied to a vessel operating in interstate commerce and powered by federally inspected and licensed boilers was held valid. There the conflict was not evident, the Court felt, since the purpose of the federal licensing system was to insure safety, while the purpose of the municipal ordinance was to protect the health and welfare of the community against excessive smoke.

The *Morristown* court, determining that there was no evident

space is provided by the "High Density Traffic Airports" rule contained in 14 C.F.R. §§ 93.121-31 (1970). This rule assigns certain high density traffic airports a specific number of reservations per hour which reflects the number of aircraft operations each of those airports can bear without becoming unduly congested. Commenting on just this point, the *Lockheed* court stated:

> By way of comment on the regulations applying to . . . high density airports, it is reported in [the] Federal Register . . . that the allocation of flights was to provide relief from excessive delays, not to correct safety problems. [T]he FAA Administrator says: "* * * the public interest in efficient, convenient, and economical air transportation requires more effective use of airport and airspace capacity. The authority of the FAA to regulate aircraft operations to reduce congestion is clear. The plenary authority conferred by the Federal Aviation Act to regulate the flight of aircraft to assure the safe and efficient utilization of the navigable airspace is well established by practice and judicial decision."

318 F. Supp. at 923.

39 108 N.J. Super. 461, 261 A.2d 692, 11 Av. Cas. 17,436 (Ch. 1969).

40 *Id.* at 486, 261 A.2d at 705, 11 Av. Cas. at 17,445.

41 *Id.* at 492, 261 A.2d at 708, 11 Av. Cas. at 17,448.

42 *Id.* at 476, 261 A.2d at 699, 11 Av. Cas. at 17,441.

43 362 U.S. 440 (1960).

conflict in the controversy before it, stated: "[W]here there is state action consistent with the avowed second purpose of F.A.A., suppression of noise, a state court may act."[44] Applying the *Rice* tests, however, it appears clear that an injunction restricting takeoffs and landings would conflict with the purpose and intent of federal regulations to insure the *efficient* utilization of airspace.

In addition to the statutory scheme mentioned earlier, and subsequent to the *Morristown* decision, the FAA issued a bulletin which described noise abatement procedures to be incorporated at the Morristown Airport.[45] The FAA has recently established the Office of Environmental Quality, which supplants the Office of Noise Abatement in handling aviation related environmental problems. This office will develop policy in the areas of smoke emission, exhaust pollution, aircraft noise, aircraft waste and also apply, on a continuing basis, noise reduction technology to both current and future aircraft.[46] Furthermore, a Senate report which concerned itself with the problems of noise abatement stated:

> The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft.[47]

Therefore, the complete and dominant statutory scheme, the legislative history, and the rules promulgated pursuant thereto, all indicate that Congress intended to centralize, for the purposes of safety and efficiency, absolute control of both airspace management and noise suppression in the Federal Aviation Administration. Curtailing the use of "navigable airspace" to combat the problem of noise emission is not the solution. The process of regulating noise by regulating flight patterns, or ultimately by controlling the right of aircraft to take off and land, is inherently an effort by local communities "to regulate a consequence while disclaiming regulation of the cause."[48] The *Lockheed* opinion therefore represents the better reasoned interpretation

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44 108 N.J. Super. at 478, 261 A.2d at 700, 11 Av. Cas. at 17,442.

45 FAA, Morristown Airport Traffic Control Tower Bulletin No. 70-1, Morristown Airport Noise Abatement Runway System and Procedures for TurboJet and Large Piston Aircraft (Oct. 21, 1970). The stated purpose is "[t]o describe the noise abatement runway system and procedures established for turbojet and large (maximum certificated takeoff weight more than 12,500 pounds) piston type aircraft at Morristown Municipal Airport in accordance with Federal Aviation Regulations, FAR 91.87f and FAR 91.87g."

46 AVIATION DAILY, Jan. 20, 1971, at 97.

47 S. REP. No. 1353, 90th Cong., 2d Sess. 6 (1968); 2 U.S. CODE CONG. & AD. NEWS 2693-94 (1968).

48 American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226, 235 (E.D.N.Y. 1967).

needed to maintain a viable and effective system of national airspace control. If change is necessary, then national action must be the vehicle for that change, rather than attempts at local appeasement by municipal ordinance or state courts.

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