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In the

Supreme Court of the United States

CITY OF BURBANK, et al.,

Appellants

v.

LOCKHEED AIR TERMINAL, INC., et al.,

Appellees

No. 71-1637

Washington, D. C.
February 20, 1973

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CITY OF BURBANK ET AL, APPELLANTS	:	
v.	:	No. 71-1637
LOCKHEED AIR TERMINAL, INC. ET AL, APPELLEES	:	

Washington, D. C.

Tuesday, February 20, 1973

The above-entitled matter came on for argument at 10:04 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

RICHARD L. SIEG, JR., Esq., Assistant City Attorney, City Hall, 275 East Olive Avenue, Burbank California 91502 for the Appellants

NICHOLAS C. YOST, ESQ., Deputy Attorney General, 600 State Building, 217 West First Street, Los Angeles, California 90012 for the Appellants (as Amicus Curiae)

APPEARANCES, Continued

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for the Appellants (as Amicus Curiae)

WARREN M. CHRISTOPHER, ESQ., 611 West Sixth Street, Los Angeles, California 90017
for the Appellees

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 71-1637, the City of Burbank and others against Lockheed Air Terminal and others.

Mr. Sieg, you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD L. SIEG, JR.,

ON BEHALF OF THE APPELLANTS

MR. SIEG: Mr. Chief Justice, and may it please the Court:

The subject of this case is an airport, a privately-owned and operated airport in a thickly-populated area almost entirely within the City of Burbank. The problem with respect to this airport began in approximately 1965, when jet aircraft began using this airport on a regular basis. As jet traffic increased, the problem became more serious.

The problem was first officially noted by the FAA tower chief at this airport in 1967 when he issued the first of a series of four runway abatement preferences. He noted at the time that the problem in the vicinity of airports had become increasingly serious and that if the problem could not be resolved, it might be necessary to close runways and even entire airports.

After this, he issued three other and different runway preference orders. None of these provided any substantial relief. The last of these orders was issued in

September of 1969.

Thereafter, the Council of the City of Burbank took the matter in hand and in March of 1970, adopted the ordinance which is before the court.

The ordinance makes it unlawful for the operator of the Hollywood-Burbank Airport to allow a pure jet aircraft to take off between the hours of 11:00 p.m. and 7:00 a.m., except in emergencies. The same prohibition is applied to the pilots of these aircraft.

As noted by the Court of Appeals in its decision, the express purpose of the ordinance was to abate the serious environmental problems caused by the taking off of jet aircraft during sleeping hours. As found by the Trial Court, the ordinance interfered with one Sunday night intra-state flight and with flights of jet aircraft of at least three per week.

Some of those who have filed briefs in this case had mistakenly used the figure of 60 per month as the number of corporate jet flights interfered with by the ordinance. This number 60 is the total number of jet -- corporate jet aircraft flights during night-time hours, as testified to by the President of Lockheed. He was unable to state how many of these flights occurred during the proscribed hours.

Q Well, it would be a little difficult to predict the pattern of private aircraft, would it not?

MR. SIEG: Yes, your Honor, it would. I assume it

was irregular, but the plaintiffs in this case did not go into that in any detail.

Q When you say "night take-offs," you mean sunset to sunrise?

MR. SIEG: Yes, the testimony as found in the record refers to the fact that since the aircraft, corporate jet aircraft, took off during the night-time hours, and that word was specifically used and I followed that answer with a questions as to how many of these occurred during the proscribed hour and the President of Lockheed was unable to state how many. He first said, "Maybe half," and then he had to state that he couldn't testify to that fact.

May I continue, your Honor?

The evidence in this case established that airports, whether publicly or privately owned, had not been brought into the orbit of federal control with one exception. The exception is found in section 612 of the Federal Aviation Act of 1958, which was adopted in 1970 and became effective after the trial of this case on May 27, 1972.

That section is very peculiarly worded. It provides that any person who desires to serve aircarriers -- the word "desires" is used in the section -- aircarriers certificated by the Civil Aeronautics Board may apply for an airport operating certificate. The section further provides that the Federal Aviation Administrator must issue such a certificate

if he finds that the person is able to conduct a safe operation, that is all. The administrator may attach conditions to these certificates that further this particular end, that is, the safe operation.

Section 611 of the Federal Aviation Act of 1958, which played a prominent part in this case, was added in 1968. It confers on the Federal Aviation Administrator the power to issue such rules and regulations as he may find necessary to provide for the control and abatement of aircraft noise and sonic boom. If this section conferred on the administrator the power to regulate airports in terms of noise, he had specifically refrained from so doing and, as repeatedly affirmed, the freedom of aircraft proprietors to exclude aircraft from their airports on the basis of noise considerations.

The District Court, in its decision, held the ordinance to be invalid on the ground of premption, conflict and the unreasonable burden which the ordinance would have if it were applied to all major airports throughout the United States.

The Court of Appeals, in its decision, did not reach the commerce clause issue and restricted its decision to the supremacy clause matters. It held the ordinance to be repugnant to the supremacy clause of the United States' Constitution on the ground of preemption and also on the

ground of conflict and the conflict issue had cited the last of the FAA tower chiefs noise abatement runway procedures and also the fact that the ordinance interfered with the Sunday night intrastate flight of PSA.

The Court of Appeals broadly held in its decision that the pervasiveness of the federal regulation in the field of air commerce, the national interest in such regulations and the nature of air commerce itself precluded state and local governments from enacting this type of regulation.

The District Court, in its decision holding that the ordinance had to be viewed in the aspect as if it were applied to all major airports in the United States, was a holding along with the broad holding of the Court of Appeals which made it necessary that we apply to this Court for hearing.

The ordinance comes before this Court with the presumption that it was reasonable and necessary. The evidence introduced by the plaintiffs in this case demonstrated the airport's inadequacy. The airport is simply not operable without the use of adjacent private property for its approachways and its takeoffs. Both the District Court and the Court of Appeals specifically noted the seriousness of the problem that the airport created to those that resided in its vicinity.

This problem was further underscored by the various statements made by the FAA tower chief in these various noise

abatement runway procedures. He stated, for example, that the area within five miles of the airport was noise sensitive. He made further reference to the numerous complaints, the possible result of requiring the closing down of runways and entire airports.

This brings me to the point that I would like to elaborate on. It is against the background that I just stated that we have noted in our brief, that the commerce clause cannot shield those who invade Fifth Amendment rights and that legislation such as the Burbank ordinance must be sustained if that amendment is to have any real meaning.

We pursue this especially in view of this court's recent decision in Rowe versus Wade. By that decision, it is now firmly established that a right of privacy exists, notwithstanding the fact that there is no specific mention of this right in the Constitution.

As we understand the court's opinion, this fundamental right is founded on the 14th Amendment concept of personal liberty and restriction on state action. If this be so, then the same right of privacy must exist under the Fifth Amendment as a restriction on the powers of the Federal Government.

This decision, along with Griswold versus Connecticut, in our view, gives form and substance to the belief of the signers of the Declaration of Independence that

certain unalienable rights existed, including the right to life, liberty and the pursuit of happiness.

Q Mr. Sieg, that right of privacy that was mentioned in those cases was a right as against governmental action. When an airplane takes off owned by a private carrier, that is not the government invading anybody's right of privacy, is it?

MR. SIEG: It is in this respect. If the decision of the court of appeals and the district court in this case, is correct, in holding that the Federal Government has preempted the right of states and local governments and the people from doing something about this invasion into their right of privacy, then we feel that this particular decision is most important and is applicable as against the Federal Government.

Q I still have a little difficulty in seeing when an executive jet owned by a private company takes off, how that is governmental action, because that is what is the -- it is the noise from that jet owned by the XYZ Corporation that invades what you call the "right of privacy" and that is not government invading the right of privacy, is it?

MR. SIEG: I agree with that, your Honor. What I am trying to get to is that a declaration of preemption, whether it be by Congress or by the court, which leaves unprotected fundamental rights of the people such as are

involved in this case --

Q It is a freedom. It is a freemdom that government cannot invade.

MR. SIEG: That is correct.

Q But the invasion is by a private corporation.

MR. SIEG: But the invasion of a declaration of preemption is by the government, the Federal Government. If it leaves fundamental rights unprotected, it is, in our view, unpermissable.

Let me pursue it just a little further and maybe I can more appropriately demonstrate what I am driving at.

Q Are you saying that the government action is the prohibition by the Federal Government of any effort on the part of the local people to protect themselves.

MR. SIEG: That is correct.

Q That is the governmental action you are talking about.

MR. SIEG: That is the governmental action, your Honor and I would submit to you, now I recognize that in Rowe versus Wade, we have a certain right of privacy that is not exactly comparable to the right of privacy that we feel is involved here. What we say is, that the right of privacy involved in this case is based on the same principle of personal liberty and based on the same considerations.

Noise pollution, as we see it, whatever its form,

impinges on the right to be let alone and invades the right of privacy. It disturbs thought and contemplation. It intrudes into the home, interfering with family life, conversation and sleep. It has other more drastic side effects such as hearing loss and irritation which, if long continued, can interfere with man's ability to deal with other aspects of his environment.

Q Would that also apply to the Federal Government to clean up a navigable stream?

MR. SIEG: I have indicated something along that line in my brief and I thought it best, since I had this problem of presentation, that I restrict myself to noise pollution because noise pollution does invade the right of privacy. I would believe until this court enunciates a further unenumerated right existing in the Constitution, I would have been going beyond the scope of my endeavor here to have gotten into those areas.

Q What about a noisy railroad train?

MR. SIEG: If it produced the volume and the effects of jet aircraft, yes, but I -- there is no proper comparison between the two.

Q Well, they do have jet engines now.

MR. SIEG: I was not aware of that, your Honor.

Q Well, would your same rule apply to the jet engines driving a locomotive?

MR. SIEG: If it --

Q In interstate commerce?

MR. SIEG: If it produced the same kind of problem that the jet engine in an aircraft produces, yes, your Honor.

Q We'd have to do a little business with quite a few cases, wouldn't we?

MR. SIEG: Not if the rule that I hope to present to the Court is adopted by the Court.

I -- I feel, as Mr. Chief Justice Burger indicated, that this is in a declaration of premption -- is impermissible when it leaves unprotected fundamental rights, whatever they may be. If it is water pollution, air pollution, noise pollution or whatever may affect -- substantially affect -- the health and safety of people. But that, of course, is going beyond what I intended to argue in this matter.

Q Mr. Sieg, supposing that there were no issue of federal preemption here at all, that Congress had said nothing and there really weren't any argument that Congress had preempted the matter. Do you think that the citizens around the Burbank Airport would have some sort of a constitutional claim against these air carriers without any governmental action at all?

MR. SIEG: no, sir -- I -- no, sir. If preemption isn't involved, obviously the ordinance is valid. It is valid anyway on the grounds that we have argued in our brief

that there is no federal premption, no conflict, but as we view the matter, the rights reserved to the people can be protected by any level of government. It is not in the exclusive power of the Federal Government to protect those rights. The people have many means. The courts, of course, are the primary right and the primary method, at least in this century, of vindicating fundamental rights, especially civil rights.

We are dealing in this case with human rights and we need some rule that allows action by the people to whatever governmental body will listen to them to protect these rights reasonably. We do not contend in this case that the fundamental right of privacy involved here is absolute. We say that the right has to be viewed in terms of its effect and there has to be a balancing. That is, that the people are entitled to all reasonable and necessary protection, not absolute protection.

The balancing that we feel is proper is somewhat along the lines suggested in Southern Pacific versus Arizona. The extent of the intrusion should be weighed against the effect on interstate commerce and if the enactment, the ordinance or the state law or whatever it may be, provides substantial and necessary relief, it should have a greater weight in the balancing.

I might add that the Court may recall -- and again,

I am striking at this doctrine of preemption and conflict, but the first two of the grievances that are set forth in the Declaration of Independence against the King of Great Britain, were these two: "He has refused his assent to laws, the most wholesome and necessary for the public good. He has forbidden his government to pass laws of immediate and pressing importance unless suspended in their operation till his assent should be obtained."

The similarity between these grievances and the grievances that are set forth in the declarations of pre-emption contained in the more recent Congressional enactments, especially the Noise Control Act of 1972, are worthy of note.

We submit as a proposition worthy of this Court's consideration that a Congressional declaration of preemption cannot be considered a rightful exercise of legislative authority where the net effect is to leave fundamental rights to the people unprotected.

What we are really saying is the application here of the dormant and unexercised power rule that is set forth in Head and Colorado Anti-Discrimination Commission even though there is express or implied Congressional declaration of preemption, the country has to have it.

When you observe that for more than ten years, some 7-odd million people of the United States have had to bear the burden of air commerce with the only remedy afforded, if

you can call it a remedy, is the right to seek damages -- the right to seek damages if they own the property on which they reside as against the airport proprietor. This, to us, is contrary to the fundamental rights guaranteed by the Federal Constitution.

We equally feel that the time has come for the courts to take a direct hand in this matter. The Solicitor General affirms, in his brief and I assume he will argue accordingly, that states and local governments, whether they are proprietors or nonproprietors, can enact reasonable regulations to control the noise problem in connection with airports within their jurisdiction.

But suppose the local governmental entity having jurisdiction refuses or fails to give the residents in their vicinity appropriate and necessary relief. Only the courts are then available.

It seems to us that the problem has escalated to such a point that the lower federal courts should take a hand in the matter and, if necessary, require from these airport proprietors, the submission of plans which will eventually reduce the problem of noise to levels which the people can stand.

Q Your argument is going way, way beyond the issues in this case, isn't it? At least, the argument you are now making.

MR. SIEG: It is -- it is only -- yes, it is. I -- I simply put it as another possibility. What we need is a solution. That is what I am trying to say. The Burbank ordinance provides a solution for a very limited group of circumstance. That is the gist of what I am saying.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Sieg.

Mr. Yost.

ORAL ARGUMENT OF NICHOLAS C. YOST, ESQ.,

ON BEHALF OF AMICUS CURIAE, SUPPORTING APPELLANTS

MR. YOST: Mr. Chief Justice, and may it please the Court. I'll first discuss the applicability of the National Environmental Policy Act, the Environmental Quality Improvement Act and the Noise Control Act and then apply them to the facts of this particular case.

Together, these establish a a national policy cf preservation of the environment in general and of the reduction of noise pollution in particular and this policy has been relegated by the Appellees to the obscurity of a footnote on page 67 of their brief. It deserves more.

Their rationale is that given by the Ninth Circuit that, given the generality of a national policy, it must yield to the more specific activities of the federal regulatory agency in the authorizing statute in the field of aviation and that contention, quite simply, is wrong.

It was the purpose of Congress in enacting the National Environmental Policy Act to, rather than pore through the statutes, the codes, one by one and amend the authorizing bill for each specific single-purpose board or commission, to amend them all with one stroke and it did that with the enactment of NEPA, the National Environmental Policy Act and in the words of Senator Jackson, the bill's author on the floor, in explaining the bill, this constitutes a statutory enlargement of the responsibilities and concerns of all instrumentalities of the Federal Government.

What portions, then, of the National Environmental Policy Act are applicable? Section 101 declares the policy but Congress wasn't content with a mere declaration of policy lest it be considered merely hortatory and something not to be ahdered to. It inserted three devices which Senator Jackson on the floor in explaining the bill referred to as, "action forcing." Now, of these three, the ones with which most people are most familiar, is of course, first the Environmental Impact statement. Secondly, the requirement that there be consultations with experts and comment. And, third, is the one which Senator Jackson put first and which is the one which is most pertinent to this case.

As he explained it on the Senate floor, to insure that the policies and goals defined in this act are infused into the ongoing programs and actions of the Federal

Government, the Act also establishes some important action-forcing procedures. Section 102 authorizes and directs all federal agencies to the fullest extent possible to administer their existing laws and regulations in conformance with the policies set forth in this act and that essential wording, then, appears in section 102 of the Act.

Three months later, Congress passed the Environmental Quality Improvement Act and in that Act, it reiterated the national policy and, secondly, it said that the primary responsibility for implementing that national policy rested with the state and local governments.

And, finally, we get to the Noise Control Act and there are four sections of that that I want to talk about. First, section 2-B. Congress declared there was a policy of preserving an environment for all Americans free from noise that jeopardizes their health or welfare.

Next is section 4-A and that says that every federal agency must adhere to the policy which I previously outlined in section 2-B. Now, the Appellees in their argument, again in a footnote, say that this means only that the FAA must balance environmental considerations with the considerations of aviation which is, in a sense, a truism but it also reduces the Act to nothing because that was a preexisting obligation, at least since the enactment of NEPA.

The third section that I want to refer to is, I

think, the most important one, section 4-B, which says that Federal agencies must comply with state and local noise requirements for the control of noise to the same extent that any person is subject to that requirement and the Appellees, this time in half a footnote, dismiss that by saying that the statement assumes the validity of the local ordinance.

Well, of course that is true. But that misses the entire point of what Congress was trying to do. Congress has made the local ordinance valid by enacting section 4-B. Until that time, any time state and local government tried to regulate noise against the federal entity, somebody would come in and say, "supremacy clause, you can't do that," and Congress, by enacting 4-B, has reversed that and has said, it is valid. You can do that unless the specific measures presecribed in section 4-B for the President to exempt a particular activity are affirmatively undertaken by the President. Fine -- yes?

Q Mr. Yost, it is one thing to say that a local ordinance can't regulate a federal activity that isn't otherwise covered by statute, just by virtue of the supremacy clause, and it is another thing to say that a local ordinance is negated by an affirmative federal statute which itself occupies the field.

MR. YOST: I am not sure that I follow that, Justice Rehnquist. In this particular case, were it not for

federal activity within the area which -- activity such as the FAA purporting by its runway preference order to take action which would invalidate a local ordinance, if not for that, the local ordinance would be valid and Congress is now stepping in and saying the Federal Government has to obey the local ordinance unless there is affirmative action by the President.

Q As I understand the Appellee's contention, though, it is not just that the FAA order was preempted, but that the whole federal statutory scheme was preemptive and the contrast I was trying to draw was between that type of an argument and, say, an argument that the City of Burbank couldn't regulate military takeoffs -- takeoffs of military planes quite apart from any federal statute just because that is a federal activity.

MR. YOST: I think those are both aspects to it. One, perhaps, to which I was addressing myself was more the conflict aspect and you have been addressing yourself more to the aspect of preemption and it is my contention that pre-emption may no longer be envisioned as it has in the past, solely as a question of taking one statutory scheme that pre-existed, the various environmental acts, and looking at that alone. It becomes a question of defining what you mean by the field alleged to be preempted.

I suppose the aviation purist will say, "well, it's the field of aviation and you look at all the Federal

Government has done in this area and you need unitary control and so on"and the environmental purist will say, "Well, it's the field of noise, and this is a state and local matter and you've got to have one authority of unitary control over that because if you control some noise sources but not other noise sources, you haven't gotten anywhere."

Well, both of those really miss the point. The point of this case is that it is neither a pure aviation case nor a pure noise case, but it is a case which involves the inter-relationship of the two and here, I think, it is important to get into just what has happened in the field of the regulation of aircraft noise.

Is there, to use the California Supreme Court's words in Loma Portal, what is described as a "lacuna" in the federal regulatory scheme. Let's look at the possibilities for regulation of aircraft and airport noise. Look at land use, siting, compatible zoning around an airport, the Federal Government has done nothing.

You look at single event noise limits such as we have heared the Port Authority in New Jersey and New York has been applying since the 1950's. The Federal Government has done nothing, though, of course, New York has.

You look at the cumulative mechanism for watching the overall exposure to noise and reducing that, the system which we are now experimenting with in California and section

783 of the Noise Control Act says that that is one of the matters that EPA is to study and to report back to in Congress and I know that they are watching the California experiment.

You look at time limitations such as Burbank-imposed, Santa Monica-imposed. Again, the Federal Government has done nothing except at Washington National which it owns.

You look at mandating the use of quieter airplanes, something which Los Angeles has proposed on which the Federal Government has done nothing.

You look at runway preference orders. There is an area where the Federal Government has taken some steps , though we learned from Port Authority against Eastern Airlines that that is ultimately the responsibility of the proprietor rather than the Federal Government and, finally, noise limitations on individual aircraft types, the so-called "type certification" of the new aircraft and here the Federal Government has done a little, but not very much, such that the legislative history of the Noise Control Act shows a letter from Senator Tunney to Senator Muskie to the effect that by 1975 18.6 percent of the aircraft will have been controlled in that way.

In other words, in the field of the regulation of aircraft and airport noise, taking both these fields together and meshing them, the Federal Government has just barely stepped onto the edge of that field. It is in the

light of that, that I think this matter must be viewed.

So what statutes, then, are the statutes which are applicable to this field? It is not, as would have been the case five years ago, just the Federal Aviation Act. It is, instead, the Federal Aviation Act, the National Environmental Policy Act, the Environmental Qualtiy Improvement Act and the Noise Control Act.

It is no longer enough just to view single-purpose regulatory statutes by themselves without reference to the more recent Congressional enactments which are sort of reduced to Congressional dicta by the Appellee's views, sort of words in the form of a statute, but without the command of statute.

So we have these action-forcing devices that there is a national policy that all branches shall enforce that national policy. The Congress has placed primary responsibility for that national policy upon state and local governments.

With respect to noise in particular, Congress has said that absent a specific affirmative Presidential exemption, federal agencies are bound by the state and local requirements and the City of Burbank has implemented that statement, that national policy.

So what do we have? A national environmental policy which of the three branches of government, the legislative branch has originated, the executive branch will appear in support of as a friend of the court, and we ask that the

third branch of government, this Court, lend its support to the National Environmental Policy and make it whole.

Thank you.

Q Mr. Yost, as I have understood your argument, it is directed to the Appellee's claim in this case, that there is A, preemption and, B, specific conflict between federal and local law which was the basis on which the Court of Appeals decided this case.

Your argument is not directed at all, is it, to the claim that this ordinance is an unconstitutional burden on interstate commerce?

MR. YOST: Only insofar -- insofar as in -- you mean, commerce burden issue? I think the United States' brief handles that rather well but only insofar as one of the matters to be considered in determining whether there is a burden is the congressional enactments concerning the environment.

Q But there is nothing in those enactments, is there, that authorizes what would otherwise be an unconstitutional burden on interstate commerce?

MR. YOST: They --

Q You could argue, I suppose, that the necessary implication of the legislation is, but I don't -- you haven't argued that, have you,really?

MR. YOST: Well, I think I -- I have -- I have not

argued it but I will argue it, that it becomes sort of ridiculous to put aside the recent Congressional enactments in the area if you then say that it has got to be --- the burden question has to be viewed in sort of abstract apart from what Congress' most recent ---

Q Well, it is a separate issue. It is a separate Constitutional question, is it not?

MR. YOST: That is an accurate statement. It certainly is.

Q And your argument has been directed, has it not, at least primarily, to the preemption and the conflict aspect of this case.

MR. YOST: That is correct.

Q Well, I suppose you could argue equally well that if Congress has authorized local regulation, Congress, with its plenary power over interstate commerce, has removed any commerce argument from the case.

MR. YOST: That would --

Q You could argue that Congress has authorized local government to impose what would otherwise be an unconstitutional burden on interstate commerce and since the congressional power is plenary over interstate commerce, presumably it has complete power to do so.

MR. YOST: That is correct. I adopt Justice Rehnquist's statement of it.

Q Excuse me, and the state could bar all jet aircraft from that airport.

MR. YOST: I would take the same view that the United States has, Justice Marshall, that each airport would have to be viewed by itself on --

Q But if this airport in this case had had an ordinance put on it barring all jet aircraft, period.

MR. YOST: I am reluctant to venture an opinion on something which we haven't tried and there is no record on. In the particular facts of the situation, they were barring something where there was, in fact, no burden on interstate commerce because there were no interstate commerce flights shown. I would want to examine a record which fully went into the question of the implications for that particular airport --

Q Well, assume it did have half and half. Could you bar them all?

Because they were noisy.

MR. YOST: I think, and again, looking at the U.S. analysis, at the Solicitor General's analysis, that as a generality, the answer is yes. However, it would have to be viewed in its specific application, the importance of the particular airport in the nationwide scheme and so on.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Yost.

Mr. Friedman.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF AMICUS CURIAE SUPPORTING APPELLANTS

MR. FRIEDMAN: Mr. Chief Justice and may it please the Court:

In both of the lower courts in this case, a brief was filed in behalf of the Federal Aviation Administration taking the position that this ordinance was invalid. The argument we made was that there was preemption of the subject of noise by the Federal Government and that this ordinance constituted an impermissable burden upon interstate commerce.

The brief's discussion of the commerce -- sorry, of the preemption point had almost no analysis of the legislative history. It was discussed one or two places very briefly, a couple of quotations and references to committee reports.

Now, when this Court noted probable jurisdiction of this appeal, the Federal Government undertook a lengthy and detailed analysis of this case and of the issues. The Department of Transportation, of which the Federal Aviation Administration is a constituent agency, studied the case very carefully and the Department of Justice itself, both in the civil division and the Solicitor General's office, studied the legislative history in depth. We went into the thing in great detail and the unanimous conclusion of all these people after

this study, was that the prior position we had taken on behalf of the Federal Aviation Administration in this case with respect to the preemption and commerce clause issues was erroneous and, accordingly, the United States has now filed a brief in this case and I am arguing here today taking the position that the Burbank ordinance is valid.

Q You were an amicus below for the FAA.

MR. FRIEDMAN: The FAA was an amicus in both the District Court and the Court of Appeals.

Q Certainly I would imply no criticism in this question because, paraphrasing Justice Frankfurter, you -- one should welcome wisdom, even though it comes late but it does kind of -- it is rather -- this rather is alien to the adversary system of justice, isn't it? It is a little bit unfair to the District Court and the Court of Appeals and ultimately to this Court to have a very influential amicus, certainly with the expertise of the agency it is, to completely change positions in the course of litigation.

MR. FRIEDMAN: Well, I think, Mr. Justice, we feel we have an obligation to this Court to present to this Court --

Q I am not being critical at all.

MR. FRIEDMAN: -- the point of view that we think is the right one.

Q But the end result is, perhaps, that it is a little bit unfair to the whole judicial adversary system,

isn't it?

MR. FRIEDMAN: If I may suggest rephrasing, I think it was unfortunate that the case developed this way, but before this Court, there has been a complete development of the fullest adversary positions. In fact --

Q And it amounts to a one hundred percent confession of error on the part of the amicus.

MR. FRIEDMAN: You might say that, Mr. Justice.

Q I know. That's about what it is.

MR. FRIEDMAN: On the other hand, our opponents have filed a separate brief, a long 43-page brief specifically answering all points, so there is no question in this case that the adversary process has been fully developed --

Q Well, except not in the District Court and the Court of Appeals.

MR. FRIEDMAN: Not in the District Court and the Court -- but there is no question, Mr. Justice, in this case with respect to any of the facts. This is not a situation in which/failure to present our arguments in the lower courts the might have been unfair in the sense of not presenting sufficient evidence or a case in which the legal arguments perhaps because they were not as fully developed in the lower courts, have in any way prejudiced the the other side in this Court.

The issues are fully developed and they are, we think, legal issues and I acknowledge it is an unusual situation.

Unfortunately, it is not perhaps the first time that the Federal Government has shifted position in this Court, but we think --

Q This is never a happy situation.

MR. FRIEDMAN: This is not a happy situation. It is one that we feel it is our obligation --

Q In its practical impact, I mean.

MR. FRIEDMAN: And, of course, the governmental interest involved in this case, also, the interests of the Department of Transportation which are broader, perhaps, than those of the Federal Aviation Administration.

Q This sometimes happens even in fields which are not evolving and changing fields, doesn't it, when the United States Attorney takes a position, perhaps, in the southern district of California and when the case finally gets to you in Washington, you come to us and take a different position and then we now send it back and let you tell the government's view to the trial court all over, or the Court of Appeals.

MR. FRIEDMAN: That has happened, Mr. Chief Justice. I say, I agree with Mr. Justice Stewart. It is an unhappy situation, but one I think that is inevitable under the complicated government system that we have today.

Now, the Burbank ordinance in this case reflects an exercise of traditional police power of the states. What

is involved here, basically, through the exercise of this ordinance is the abatement of a nuisance, a traditional nuisance noise. This is a usual area of police power. The state has the authority to deal with noxious odors, with unpleasant sights and with loud noises. There is no question about that. And this Court itself recognized in the Rice case in 331 U.S. that when you are dealing with the traditional power of the state, the police power to deal with these subjects, that power is superceded by federal legislation only if that was the clear and manifest purpose of Congress.

Q Well, then, you would concede that any airport could control all noises, then?

MR. FRIEDMAN: Our position is that the airport has authority to control noises with the exception that it is at the airport. It has no power to control flight of aircraft. That is the distinction we --

Q I know, but I was reading some studies made in Long Island of the effect of noise from airports on the public school children and that was much more disturbing than anything I have seen in this record.

Would you say that New York State could ban jet flights out of Kennedy or LaGuardia because they upset schools?

MR. FRIEDMAN: I would think, as far as preemption is concerned -- just as far as preemption is concerned -- I would think that the state would have the authority, if it

wished to prohibit jet flights in and out of a particular airport.

To answer Mr. Justice Marshall's question earlier, I would think as far as preemption is concerned -- and I stress just the preemption point, that there is nothing in the federal regulatory scheme that would bar the City of Burbank from prohibiting all jet aircraft from using the flight. Indeed, the --

Q That is still commerce.

MR. FRIEDMAN: No, commerce is another issue. But I am just talking of preemption. In fact, there is nothing in either the preemption or the commerce clause that would prevent the Burbank Airport from shutting itself down if it wanted to. There might be other contracts to cover.

Q Now, we are talking here -- we are mixing up two very important things and that is, the right of an airport to shut itself down or to limit the hours of flight or to limit all jets; the right of an airport owner and operator to do that is one thing and it may be quite a different right from what the right of a municipality has to tell an unwilling airport operator you have to do it.

I think it is, as I read the briefs and the statutes and the legislative history, there may be a considerable difference between those two things.

MR. FRIEDMAN: Our position, Mr. Justice, is that

under the statutes, the Congress has not thus far preempted the local governmental body from dealing with the question of noise at the airport level. This is our position. We say that the plenary power of Congress over interstate commerce is broad enough to enable it to exercise its power. We acknowledge that Congress could, if it wished, say there shall be no curfews at airports or that there shall be, or prescribe.

Our position is, Congress hasn't done it and that the legislative scheme indicates that while it has left great responsibility to the FAA in this area, the FAA itself has not thus far undertaken to regulate this. Now, if I may address myself to the distinction between the airport operator as a proprietor and the airport -- the authority of the local government to --

Q I mean, your point is here, the airport operator does not want this curfew. He is being compelled to do it and that is a great big difference from all you find in the legislative history of his right to have a curfew when he wants one.

MR. FRIEDMAN: Well, this, Mr. Justice, if I may respond on two levels to this. First, this is true, I suppose, in any case where the state undertakes to abate a nuisance.

Q Well, except, as I, again, read the facts of the matter, 99 and a half percent of the airports in the country are operated by governmental agencies, so this question

doesn't arise. If the governmental agency wants to impose a curfew, it does so.

MR. FRIEDMAN: That -- that is correct --

Q And here is a private commercial airport, a private airport, privately owned, serving scheduled airlines which is almost unique, isn't it, factually?

MR. FRIEDMAN: Factually, yes. In fact, we suggest that that fact indicates how anomalous it would be if Congress --

Q Well, maybe it would be. There are lots of things in the law that are anomalous.

MR. FRIEDMAN: But I suggest, Mr. Justice, the question is whether the Congress -- whether the Congress has manifested an intention to preempt this field and under the analysis of the Court of Appeals in this case, the effect is that Congress has preempted only basically the Burbank Airport. It has said, as far as Burbank is concerned, Burbank has no authority to impose this curfew.

As far as the Los Angeles International Airport, 20 miles away and a much larger airport, under its theory, that airport does have the authority --

Q Yes.

MR. FRIEDMAN: -- to impose a curfew because it is the proprietor. Now, we think that's --

Q Because that is what the law is. That's what

they held.

MR. FRIEDMAN: That's -- we think, Mr. Justice, that when the various committee reports referred to the authority of the airport owner, local municipal body as the proprietor of the airport, they were not attempting to draw the distinction between the local government body as proprietor of the airport and the local government body exercising its police power. We think all these statements were made at the time when it was generally regarded that -- generally believed that the airports of this country, the major airports, were being used, being run and operated by local governmental bodies and this was --

Q Your statements talked about operators of airports, didn't they?

MR. FRIEDMAN: The statements talked about operators, yes, but --

Q And the theory was that the owner and operator of an airport, that's his property and he can do with it what he wishes. Isn't that the theory that you find recurring in the legislative history?

MR. FRIEDMAN: I don't, in all fairness, agree with that, Mr. Justice. We have other indications to the contrary in the legislative history of this. If I may refer to an item at page 29 of our brief, which is a report made by the House Commerce Committee in 1962 after a three--ear study of

the whole problem of noise at airports and this is paragraph 7.03 and this is what the committee said, "Until federal action is taken, the local governmental authorities must be deemed to possess the police power necessary to protect their citizens and property from the unreasonable invasion of aircraft noise."

Q Mr. Friedman, I am still not clear. Is it your position that the City of Los Angeles, today, could enact an ordinance precisely like the Burbank ordinance and say no jet flights shall take off from Lost Angeles International Airport between 11:00 p.m. and 7:00 a.m. the next morning?

MR. FRIEDMAN: Insofar as the question of preemption is concerned, our answer is yes.

Q Well, insofar as any federal regulation is concerned?

MR. FRIEDMAN: Well, there may be a problem under the commerce clause. We don't know. There may be a problem under the commerce clause because obviously, the impact upon commerce of a ban on jet flights at night from the Los Angeles Airport may be a very different thing than the ban on the take off of jet flights at the Burbank Airport where the record shows there were no commercial interstate flights at all. But insofar as the question of preemption is concerned, as far as preemption, yes, we think that there is nothing in the federal regulatory scheme that would bar the City of Los

Angeles from adopting such an ordinance and if I may just refer to one other thing, Mr. Yost spoke about the Noise Control Act of 1972. In addition to the general provisions dealing with noise, there is the specific provision of that statute relating to aircraft noise and one of the things that this statute did was to direct the administrator of the Environmental Protection Agency to make a study and report to Congress within nine months on a variety of topics relating to aircraft noise, one of which was additional measures available to airport operators and local governments to control airport noise. Such a study is now being made.

Now, it seems to us this very clearly indicates that the Congress that passed this law wanted to see what could be done by both the local operators and by the local governmental authorities to deal with aircraft noise. And it would be rather anomalous, we think, for Congress on the one hand to have been requesting this additional information to see how we could implement the power, how we could implement the power under local government agencies and at the same time -- at the same time, in effect, to be saying, "But we have taken away from the local government authorities any power to deal with this."

We think the basis -- the basic thrust of all of this legislative history is that there is nothing in this Act to indicate that Congress ever intended, at least until there

had been further action by the Federal Government, either the Congress or the FAA, to bar the local governmental authorities from dealing with this serious and difficult problem of noise and that is the way it stands and we think on that basis the Burbank ordinance has not been preempted.

Q Mr. Friedman, is it a paraphrase of your answer to Mr. Justice Stewart that insofar as the preemption point is concerned with Congressional interest in uniform policy, it really doesn't make any difference whether the local initiative comes from the voluntary action of an airport owner or from a municipal ordinance imposing a local requirement on the private proprietor for the premption.

MR. FRIEDMAN: Yes, that is correct, Mr. Justice.

Q Have you -- you, too, have not really addressed, except in your answer to Mr. Justice Powell, but your basic argument is not addressed to the claim that this is an unconstitutional burden on interstate commerce?

MR. FRIEDMAN: Just --

Q In your brief, I know you have said it should be studied airport by airport.

MR. FRIEDMAN: We have discussed it in our brief.

Q Yes.

MR. FRIEDMAN: Unfortunately, with the limited time available, I couldn't cover it, but our answer --

Q I understand. No, I just want to be sure that

I understood your argument, that it is not directed to that question.

MR. FRIEDMAN: That is correct. We have dealt with that in our brief.

Q I understood so.

MR. FRIEDMAN: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Mr. Christopher.

ORAL ARGUMENT OF WARREN M. CHRISTOPHER, ESQ.,

ON BEHALF OF THE APPELLEES

MR. CHRISTOPHER: Mr. Chief Justice and may it please the Court:

The Federal Aviation Act of 1958 is the cornerstone of the statutory scheme here involved and I think we have come to the point in the argument where it would be worthwhile to stop for a minute and consider the high points of that act and the legislative history of that act.

Now, in enacting the 1958 act, Congress responded to two fundamental and closely related defects in the prior statutory history. First, as the Senate Committee said about the 1958 act, there had previously been a diffusion of authority among many committees and boards.

Second, as the Senate Committee said, there was a lack of any clear authority in the statutes for centralized air space management. By 1958, it had become crucially

necessary for Congress to do something about this situation. There had been a vast increase in air traffic and even by that early date, Congress recognized that the nation's air space was a diminishing and vital national resource.

Now, to correct this splintering of authority, Congress vested, in the 1958 act, unquestionable authority for all aspects of air space management in the FAA. Indeed, Congress went so far investing this plenary authority to say explicitly that the administrator of the FAA should not be required to submit his decisions regarding air space to any other organization.

In addition, in this 1958 act, Congress -- and it is important to recognize this -- authorized the administrator to issue regulations for the efficient utilization of air space as well as for the safety of aircraft. This dual purpose runs all through the statute, all through the actions of the administrator, the purpose of achieving safety and the purpose of having an efficient use of a navigable airspace.

Now, in the 1958 act, Congress also gave the FAA authority to issue regulations for the protection of persons and property on the ground. The amicus brief for the United States vastly understates the importance of this provision, asserting that the provision was only designed to provide protection from insecticides sprayed during crop dusting and saying that it was wholly unrelated to Congressional

consideration of the aircraft noise problem.

This is a demonstrably faulty reading of the legislative history and unfortunately, this faulty premise infects the entire government's argument. The government has failed in its characterization of this section to note the statements in the 1962 hearings by Congressman Orin Harris, the long-time chairman of the House Commerce Committee and an architect of the 1968 Act, who explicitly said that that provision of the 1958 act was addressed to the problem of aircraft noise. He said that the problem of crop dusting was not the sole reason for Congress' enactment of that particular section, but rather the section was in order to give broad rule-making authority to the FAA in the field of aircraft noise.

The government is also wrong as a matter of history in saying that the authority conferred by this section of the 1958 act was used only at a few noise-sensitive airports. The fact is, as CAB Chairman Boyd testified, noise abatement runway patterns were established under this section at every major airport in the United States as early as 1962.

By this 1958 act which, as I say, is the cornerstone and has to be our beginning point here, Congress vested in the FAA plenary authority for airspace management and the regulation of aircraft operation. Under this statutory authority of the administrator of the FAA, has issued

regulations which have been described as being of formidable proportions, impressive detail and manifest sophistication.

Now, to understand the scope and the breadth of federal control, I'd like to ask you to consider with me, as one of the witnesses did at the trial, the trial, the impact of federal regulation on a typical flight from Hollywood-Burbank Airport to San Francisco and the example I am using here, I have chosen a flight from Hollywood-Burbank to San Francisco because that is the most frequent destination, but the scope of control would be the same if the flight had gone to Phoenix or on the Burbank-Seattle route or any other commercial flight.

Perhaps I should begin the description of this imaginary flight by saying that each commercial aircraft on this route has an airworthiness certificate and it has a type certificate covering not only the airframe and the engine, but every appliance on the aircraft and each aircraft is flown in accordance with operation specifications which authorize its operation into and out of each airport that it serves.

Furthermore, each pilot must have a transport certificate and each flight engineer must be certificated by the FAA.

Q Mr. Christopher, so far, everything you have told us is really what the ships and their personnel had to

have in the Huron Portland Cement, isn't that correct? The ship had to be licensed, so did the crews, remember, they had to follow the Coast Guard safety patterns and so on.

MR. CHRISTOPHER: The fundamental difference between that case and this, your Honor, is that in that case, the federal regulation was directed solely at safety on the seas and the waterways.

Q I suppose that is what an airworthiness certificate is directed to, too, isn't it?

MR. CHRISTOPHER: Yes, your Honor, but the FAA under both the 1958 act and the 1968 act is explicitly required to balance not only those interests but environmental interests as well. As the Court of Appeals pointed out, the FAA has to take into account the multiple national interests involved, national defense, aviation and environmental considerations. That is a fundamental and basic distinction between this case and the Huron case.

If I can continue on with my imaginary flight to San Francisco, I think it is important to know that long before this flight takes place, perhaps as much as 30 days, a flight plan will have been filed with the FAA air traffic control center for Southern California, a center that is responsible for managing all the air space in Southern California and which stores these flight plans in a computer. Thirty minutes before the flight takes place, the FAA center electronically informs

the tower, the FAA tower at Hollywood-Burbank Airport of the anticipated flight so the tower can be ready to give the necessary clearances to the pilot. Whether the pilot gets his clearance will depend upon conditions in the navigable airspace.

These conditions are frequently abnormal or subnormal, depending on matters such as weather, congestion, terminal repairs, accidents or a combination of those factors and when this happens, the FAA control center for Southern California may tell the FAA tower at Hollywood-Burbank to hold that aircraft on the ground or to modify the departure in some respect.

Now, if the tower at Burbank is not directed by the FAA center to hold the aircraft on the ground or given some other direction, then the clearance would go from the tower to the pilot but it is important at this point to note that when the aircraft is loaded, when the door is shut, the pilot cannot begin to taxi on the runways of that airport until the FAA tower clears him to taxi and clears him to the runway which is assigned to that flight. The runway which is assigned will be the result of a number of factors including federal noise abatement procedures.

Now, after taxiing to the designated runway, the pilot must get a further clearance for takeoff from the FAA tower. I think it is important for our purposes to notice

that before a plane can take off into the navigable airspace, it has to be cleared by the FAA tower. The FAA tower acts as a control valve regulating access to the navigable airspace.

After takeoff, the airplane is monitored, directed, supervised very closely by the Hollywood-Burbank tower as long as it is within the tower's airspace. Then it is transferred to the center for Southern California; about halfway to San Francisco, it is passed off to the Oakland center which, indeed, then monitors it with great care and precision until it is in the vicinity of the San Francisco Airport and then the FAA tower at San Francisco guides it down into landing and once again into the taxiing process.

It is by no means a hyperbole to say that every aspect of this flight from the planning for it as much as 30 days ahead, the entry into navigable airspace and every detail of the execution of the flight is supervised by the Federal Airspace Manager, the FAA.

Now, it is our basic position, which I'll be reiterating here, is that if there are to be restrictions imposed into the entry into the navigable airspace, they should come from the federal agency which has been authorized by the Congress to weigh the national interests involved and to determine whether or not those restrictions should be imposed.

Q Mr. Christopher, what if the Burbank Airport

had voluntarily, on its own motion, decided to impose this same restriction on flights between 11:00 and 7:00? Would that decision be acceptable under your line of analysis?

MR. CHRISTOPHER: Well, Mr. Justice, that raises the question which is not here as to the scope and extent of the power of an airport proprietor. That power, being based upon ancient property concepts, would no doubt depend somewhat on the law of each state but beyond that, I would want to say that although the question is not here, there would be important barriers at several levels to that action.

First, there might be constitutional barriers. Such a curfew might well involve an abridgement of rights under the commerce clause.

Second, such a proposal might well be in conflict with federal law in some respect and, finally, I think that it is worthwhile saying that there may be contractual provisions that would prevent the establishment of such a curfew by the proprietor.

That question is not here. Unquestionably, the proprietor has been saved from the full scope of the preemption under the 1968 act, but what the scope of the proprietor's rights are is not yet determined.

Q Well, are you suggesting, Mr. Christopher, that a private airport, having been licensed, becomes something of a common carrier in the sense that it must receive all

flights that are authorized by FAA?

MR. CHRISTOPHER: Well, the private airport would be in substantially the same situation as other public airports, Mr. Chief Justice. If they have established service and if the ending of that service would involve a violation of the commerce clause, I can see the possibility of insistence on the continuation of that service. There is no question but that once a private airport undertakes to begin to serve the public, it has obligations that may continue. That would be particularly true if that private airport had received federal funds.

This airport received federal funds for control tower and other navigational equipment, but not for its runways.

Now, as I move forward in this preemption argument, I think it is very significant to me that the United States concedes in this brief that airspace management is an exclusively federal responsibility . In our view and, we believe, in the view of Congress, airspace management is a comprehensive and invisible concept which includes all regulation of the use of navigable airspace.

Any entity, we say, which regulates the hours that air traffic may flow into the navigable airspace, is inevitably involved in airspace management. To allow local entities to regulate this flow would, we say, fractionalize

air space management in direct opposition to the Congressional purpose.

A curfew acts as a blockade on traffic in a manner which we think is sharply inconsistent with the efficient operation of the system. We all know that congestion, with its attendant threats to safety and efficiency, is one of the principal problems of our air transportation system. Yet curfews not only increase congestion, but they aggravate it in the hours on the shoulders of the curfew where the congestion is already the worst, so it is particularly the hours between 6:00 and 10:00 in the evening.

The adverse effects of a curfew are greatly aggravated, greatly multiplied in a country as broad as ours where the impact is spread over six time zones and thus magnified because of the effects of the time zones on scheduling.

Once again, to come back to the central point, restrictions so severe and debilitating to the system as a curfew and as we believe a curfew to be, should be imposed, if at all, only by the agency entrusted by Congress with overall airspace management.

Now, I have been at some pains to discuss the 1958 Act --

Q Mr. Christopher, do you believe that nothing has been done to establish curfews by the Federal Government?

And I emphasize the word "nothing."

MR. CHRISTOPHER: Well, Mr. Justice Marshall, the Federal Government, acting through the Federal Aviation Agency and the manager being the manager of the National Airport, has established a curfew at National Airport. Now, at that National Airport, the curfew is established by the proprietor of that airport, by the Federal Government in its role as airspace manager.

Q Well, may I exclude the Federal Government in Washington?

MR. CHRISTOPHER: Yes, your Honor. The Federal Aviation Agency has not established curfews at any of the airports around the country. Indeed, the FAA has chosen another strategy. They have chosen the strategy of runway use patterns to minimize the noise. They have chosen the strategy of special techniques for landing and takeoff. They have chosen the strategy of special departure patterns, but they have not adopted or imposed a curfew any place in the country and I think --

Q But you don't agree that they haven't done anything about noise abatement?

MR. CHRISTOPHER: I certainly don't agree that they haven't done anything about noise abatement. I think they have done all that they could do within the state of the art.

Now, I have dwelled --

Q But you haven't done anything for these people who want to sleep between 11:00 and 7:00 in this particular town of Burbank, which is Mr. Sieg's point, as I understand it.

MR. CHRISTOPHER: Your Honor, I could not agree that they have done nothing there. They have established a runway use program and the planes now take off on the least sensitive of the runways and they are required to do. The local airport FAA tower chief has established this runway use procedure which, in his judgment is the best way to minimize the noise at night.

Now, I've dwelled on the scope of the 1958 act because I think it is a crucial backdrop for the 1968 amendment by Congress. In 1968, Congress adopted an amendment which explicitly provided that the administrator of the FAA shall prescribe regulations for the control and abatement of aircraft noise. In the hearings on that bill, the Secretary of Transportation was asked about the status of local and state governments under the amendment. He asked Heim to submit a letter. He submitted a letter. The letter was adopted by the Senate Committee and it has become a focal point in this litigation.

Now, this letter, as the Justices have already pointed out, makes a sharp distinction between the police powers of local and state governments and the proprietary

power of an airport operator. As to police powers, the letter says, state and local governments will remain unable to use their police powers to control aircraft noise.

In contrast, the letter says, airport owners operating as proprietors will attain rights to take certain actions with respect to noise.

Q That letter is printed, I guess, several places in the brief. Can you just tell me one place in one of the briefs?

MR. CHRISTOPHER: Yes, your Honor, it is printed at the back of the --

Q Government brief?

MR. CHRISTOPHER: No, it is printed at the back of the Burbank brief, your Honor, the Appellant's brief.

Q We have quite a few briefs in this case, as you know.

MR. CHRISTOPHER: We are at least partly responsible for that, your Honor.

This is the back of that grey brief of the Appellants, their main brief and it is in the first Appendix. The sentences I am referring to, your Honor, are on page number one, which is an unnumbered page, but down in the middle of the page, you see the sentences;"HR3400 would merely expand the 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."

Q Then "However."

MR. CHRISTOPHER: Then, "However, the proposed legislation will not affect the rights of a state and local public agency as the proprietor of an airport and so on.

Q Right. And this was a letter from the Secretary, was it?

MR. CHRISTOPHER: Yes, your Honor, this was a letter from the Secretary of Transportation to the Senate Committee which he submitted after he had asked for an opportunity to submit a letter and this was adopted by the Senate Committee, which issued the authoritative report on this legislation adopted by this Senate Committee as its statement of the rights of local and state governments.

Q The Secretary was over there testifying and he -- I remember he --

MR. CHRISTOPHER: Yes, sir, he was over there testifying.

Q -- asked a question and he then asked permission to file a letter. This was the letter.

MR. CHRISTOPHER: That's correct.

Q And the letter, you say, was adopted in the committee report?

MR. CHRISTOPHER: Yes, your Honor.

Q As its own.

MR. CHRISTOPHER: As its statement of the respective rights of the local and state governments.

You see, your Honor, at the beginning of the Appendix section which we have been reading together, the Senate Committee says, "In this regard, we concur in the following views set forth by the Secretary in this letter to the Committee."

Continuing, then, I think it is important to note that this same distinction is made in the unpublished letter from the Department of Transportation to Congressman Fridell, which the United States has printed as an appendix to its amicus brief.

That is the grey brief.

Now, at page 67 of that grey brief, I think it is quite significant to look at the sentence in the middle of the page where, once again, the Department of Transportation was telling Congress, this time the other House of Congress, as a practical matter and as ATA concedes in its testimony, the only regulatory authority left to local communities or airport operators is the authority of the airport operator in the exercise of its proprietary function to limit on noise grounds the kind of aircraft which may use its facility.

It is hard for me to imagine a clearer statement of

the distinction between proprietary power and police power than is embodied, first, in the letter of the Secretary to the Senate Committee and then, in this more recently available letter from DOT to Congressman Fridell.

Q This doesn't become a very important case, then, if that is the distinction, does it, because, at least as I understand it from the briefs, this is perhaps the only airport in the whole United States that is privately owned and that serves scheduled aircarriers.

MR. CHRISTOPHER: Your Honor, I am glad to have a chance to address that question. I noted it when you asked it of others. Although this is one of the few privately-owned airports in the country, nevertheless the distinction will be very important to many publicly-owned airports, for although many cities own and operate airports, they very frequently own and operate them in areas outside of their own jurisdiction.

Q In other words, Kentucky could pass a law for the Cincinnati Airport, you mean?

MR. CHRISTOPHER: That's right and we have shown in our brief at page 35 and 36 the very many examples there are of airports which are operated by cities or by counties but which exist at least all or in part in other jurisdictions, San Francisco, Baltimore, Cincinnati, Atlanta.

Q This question isn't here, is it, Mr. Christopher,

because, as I gather, the Burbank Airport is almost entirely within the confines of the City of Burbank.

MR. CHRISTOPHER: The question is here, Mr. Justice, in response to the government's argument that it would be so bizarre to have the preemption be this narrow. The preemption is very important, not just for Burbank but to any city airport which is operated in an area not wholly within its own jurisdiction.

Q Well, wouldn't other constitutional and statutory principles come into play if you had the State of Kentucky enacting an ordinance that purported to effect in the airport that was operated on the Ohio side of the river or something like that?

Q But it is on the Kentucky side. The Greater Cincinnati Airport is on the Kentucky side.

Q But others might.

MR. CHRISTOPHER: Well, others might, Mr. Justice, but this one certainly would and I think that is a fundamental position that we will be taking throughout the case.

Now, the distinction we are talking about here is not at all an irrational one. Indeed, the distinction is rooted in the decision of this Court in Griggs versus Allegheny County. As we all know, in that case, this Court held that the airport proprietor has to pay the bill if flights are held to have constituted taking from this landowners

property. Because the airport owner must bear the liability, Congress created this narrow exception from federal preemption so that the proprietor could protect himself. It reserved these rights to the proprietor but it did not reserve them to cities because the reason for the distinction, the reason for the narrow exemption from preemption did not exist for the cities.

Q Then do I understand you to be saying, Mr. Christopher, or conceding that if your client, the owner and operator of the airport, which is the -- what, the Lockheed Corporation or a subisdiary?

MR. CHRISTOPHER: Yes.

Q If your client wanted to impose this curfew, it could freely do so without running into any problems of either preemption or conflict?

MR. CHRISTOPHER: Your Honor, I would have to say that the scope of the proprietor's rights depends upon state law and you'd have to examine very carefully whether or not there might be some conflict with existing federal regulations. You'd have to also examine whether or not the enactment of such a curfew or the imposition of it by an airport operator would run afoul of the commerce clause or of contractual obligations.

Q But I am talking only about preemption or conflict. As I understood your argument, you have said that

the legislative history and the statutes show that the owner-operator, so far as preemption and conflict with federal law go, could freely do this.

MR. CHRISTOPHER: Your Honor, I would say that --

Q Have I misunderstood you?

MR. CHRISTOPHER: Your Honor, I would say that that is more true of preemption than it is of conflict. If there is an explicit FAA order saying that the airport shall remain open at night, you might find that that would run afoul of what the proprietor did here. I would say that, while preemption and the full rigors of preemption may not be visited on the airport proprietor, the conflict doctrine remains. Federal law would be supreme if the Federal Government imposed a restriction which is absolutely contrary to what the proprietor has done.

Q But there is no such --

MR. CHRISTOPHER: There is no such restriction.

Q Neither in this case nor anywhere else that I see in the briefs. I'd thought that the whole idea was that, as developed in your brief and in the Port of New York Authority brief and so on, was that airport operators, under the law and under the regulations, were kept free to do what they wanted with their airports.

MR. CHRISTOPHER: That certainly is our position, your Honor. I -- I simply did not want to mislead the Court

because I think that question will come up with a record that indicates -- will indicate there may be problems under the Constitution of a different character or problems under the contract of a different character.

I think that question is not here and it may be quite a difficult question when it comes.

Q Well, then, was the reservation of the power in the Secretary's letter and other things that you rely on to private airport proprietors really kind of an illusory thing that doesn't amount to much in practice?

MR. CHRISTOPHER: Not at all. I think it is a very important reservation of power that airport proprietors will be exercising and have indeed exercised in the past, as the Port of New York Authority's brief indicates.

Q After all, as you pointed out, if, under the law, the airport proprietor is liable to adjoining property owners for -- under the cases of this Court, he certainly should have the commensurate power to cease the conduct that would cause the liability. Isn't that correct?

MR. CHRISTOPHER: Yes, your Honor. I don't know all the things that were in the mind of Congress when they created the distinction, but certainly that one thing was in the mind of Congress when they created the distinction, but certainly that one thing was in the mind of Congress, as you can see from the committee reports and the letter to the

committee by DOT.

Now, the briefs of our adversaries have a difficult time with this legislative history. The brief reflecting the views of the Department of Transportation tried to discount it on the ground that Congress did not focus on the distinction which seems to me to be a very strange position for an agency which advanced the distinction and persuaded Congress to accept it to be taking.

The United States also argues that it would be bizarre to have the federal preemption apply only to a few private airports but the fact is that the federal preemption operates with respect to all airports, both public and private, and it prevents the exercise of local police power to control aircraft operations at those airports, whether they are publicly owned or privately owned.

As I said to Mr. Justice Stewart, the situation very frequently exists that an airport owner must face the fact that he is in the jurisdiction of more than one entity and he may be in a jurisdiction of quite a different entity than his public body, the public body which -- of which he is a member and this situation exists all over the country.

With respect to the Hollywood-Burbank Airport, to pick up on a question from Mr. Justice Rehnquist, even that airport is subject to two jurisdictions, the City of Los Angeles and the City of Burbank and they might well enact

conflicting or inconsistent regulations which would have a very great potential for interference with the national air transportation system.

As my time is going here, I'd like to move next to the conflict issue, which I think is very significant in this case. It was the issue on which the Court of Appeals found itself unanimous.

Now, the conflict arises here because, prior to the enactment of the Burbank ordinance, the FAA had focused on the subject of nighttime takeoffs and issued a noise abatement order and b y this order, they established a certain runway as the noise abatement runway which was to be used between 11:00 p.m. and 7:00 a.m.. The Court of Appeals held that this order represented a considered determination by the FAA that the Burbank order is below the lowest practicable minimum. The tower chief had announced the noise abatement procedures contained in this order were designed to reduce noise exposure to the lowest practicable minimum and then the Court of Appeals followed that up by saying that the order represented a considered d determination that the Burbank order was beneath the lowest practicable minimum and then the Court of Appeals held that because this was so, the Burbank order interfered with the balance set by the FAA in accordance with the power vested in it by Congress. Now, the United States attempts to attack this conflict holding by

saying that the FAA order simply did not represent any consideration of a locally-administered curfew. The government doesn't offer any citation of authority for this simply did not consider statement and there is none.

On the contrary, the district judge, who heard the testimony of the tower chief and the other witnesses, found that in issuing the order, the FAA had taken in hand the subject of nighttime takeoffs. We don't need to guess about the views of the FAA with respect to this order in their amicus briefs in the lower court. The FAA cited, appended and relied on this order which the Court of Appeals then found to be in conflict.

Q What was the time sequence, Mr. Christopher, between the issuance of the FAA order and the enactment of the municipal ordinance?

MR. CHRISTOPHER: Well, the FAA order was substantially before the enactment of the ordinance.

Now, in trying to avoid this conflict which the Court of Appeals found, the brief for the United States asserts that the opposition to a curfew at Burbank by the FAA would have constituted a major change in policy. We say not at all. In the appendix to our brief, this blue supplemental brief, we have cited a number of examples in recent years in which the FAA has gone on record as being opposed to curfews at various airports around the country, in Southern California, in Texas

and New York State.

One of the most significant examples occurred right in Los Angeles when, in 1960, the FAA explicitly considered a nighttime restriction but decided against it because of the serious problems that it posed for the national air transportation system.

Q Maybe you said this and I didn't hear it, but I have been attentive. Has the FAA itself, on any privately owned and operated airport, imposed any absolute restrictions on nighttime takeoffs or landings?

MR. CHRISTOPHER: Your Honor, I know of none. The only curfew imposed by the FAA of which I know is the one at Washington National.

Q And that, apparently is, in your submission, not even a curfew, it is a voluntary agreement.

MR. CHRISTOPHER: Yes, that's a voluntary agreement, but the most significant aspect of it to me is that it is imposed by the airport proprietor and it is imposed by the national airspace manager, the Federal Aviation Agency.

Q Do you -- I suppose you not only would conceive but would insist on the power of the FAA to do this if it wanted to, wouldn't you?

MR. CHRISTOPHER: Yes, by all means, your Honor. You know, there are over 10,000 landing fields in the United States. There are over 346 of those landing fields that have

FAA towers and there are about 140 airports which are air carrier airports which serve more than 100,000 people a year.

Now, I certainly would not contend that each of these 10,000 airports need to be operated all night. I would --

Q Well, there are many small airports, are there not, still that cannot be and are not operated at night for safety reasons?

MR. CHRISTOPHER: You are absolutely right, your Honor. Many of them do not have lights. What we are saying is that this is a question of power, not a question of whether there should be curfews but who has power to impose them and our basic argument is that if curfews are to be imposed, they represent such a severe and debilitating effect on the national air transportation system that they should be imposed only by a centralized agency.

Now, the City of Burbank attacks the conflict on one other ground that I need to note. Burbank claims that the procedures set forth in this FAA order are nonmandatory. The record, however, is to the contrary. The record shows that the procedures became mandatory through incorporation into the aircraft clearance. Thus, the district judge explicitly found that the preferential runway assignment is incorporated into the aircraft clearance as an instruction to the pilot. If the pilot violates this instruction, he becomes subject to a civil penalty and he may become subject to a

revocation of his license. Testimony in trial court showed that this runway procedure, which was embodied in the FAA order, was followed except on a few occasions, when the tower itself permitted a deviation because of weather or other operating conditions affecting safety.

So the net of the matter, as we see it, is the FAA order is a considered determination regarding nighttime take-offs by the agency empowered to do so and therefore is in conflict with the Burbank ordinance.

In the remaining time, I would at least, as far as my portion of the argument would go, I would like to discuss the commerce issues which seem to me to have been perhaps not adequately attended to up to this point, certainly not by me.

Now, the commerce clause has two separate and independent aspects and I think they both deserve a great deal of consideration.

The first aspect relates to the holding of the District Court that the Burbank ordinance operates in an area where regulations must be prescribed by a single authority and therefore, the commerce clause standing alone invalidates the ordinance under the rule laid down in Southern Pacific versus Arizona. The test under this phase of the commerce clause is not whether regulations at each airport must be precisely the same. We recognize, as I was saying a minute ago that different airports would require different treatment.

The test is whether regulation should come, in this instance, from a single authority and we say that it must because of the volume of air commerce, the speed with which it is conducted and the technical complexity of airline scheduling and aircraft maintenance.

Only through the uniform application of a national policy, through centralized control by a federal agency, can we properly cope with this unique form of transportation.

Q Your argument basically relies on the inevitable interrelationship of the airports around the country because of speed and time and if something can't take off from the west coast, then it can't take off from somewhere else during the daytime and so on. Is that it?

MR. CHRISTOPHER: Absolutely, your Honor.

Q The basic interrelationship.

MR. CHRISTOPHER: The basic interrelationship and we say that that is a reason independent of burden, independent of a burden analysis for holding here that the commerce clause requires that these restrictions be imposed, if at all, by a centralized authority.

Now, the national character of the system which Mr. Justice Stewart was just referring to is demonstrated very clearly by the FAA's flow control system. Flow control involves the metering of aircraft so as to cope with congestion or weather or other impediments to interstate

commerce. Now, this flow control, as I illustrated in my imaginary trip, may involve holding aircraft on the ground at various airports. It may involve establishing a special separation between them in navigable airspace.

Flow control was initiated by the FAA in 1969 and at that time, they made it the responsibility of the FAA center in each one of the regions of the country. However, only a few months after flow control was put in by the FAA, the FAA found it essential to establish a centralized flow control center in Washington, D. C. to provide national coordination of these flow control decisions. The FAA found none of the regional centers had enough information to make wise decisions for the system as a whole and I would say and emphasize that national coordination is necessary for this flow control. It is vastly more necessary for such a lasting restriction at airports as would be a night curfew.

I find it very interesting that in 1971 the Department of Transportation took almost precisely the same position with respect to the commerce issue as I have been asserting here. This position was taken in a brief filed in the Supreme Judicial Court of Massachusetts and with your permission I'll read just one or two sentences from it:

"Air Transportation," said the DOT, "perhaps more than any other form of commerce, requires regulation by a single authority. Even before 600-mile-per-hour flights

became the custom, Congress recognized this need by the establishment of the Federal Aviation Agency," and to continue this sentence from the DOT's brief, "It would indeed be a harmful and regressive step to permit a compromise of the FAA's authority through permitting the enforcement of local laws or regulations regarding the use of navigable airspace."

This bried filed by the DOT in the Supreme Judicial Court of Massachusetts is quoted in full in the answering brief of the Port of New York Authority. Now, I certainly don't challenge the right of the government to change its position in this matter. I have no criticism of it but I hope it won't be improper for me to say it seems to me they were right the first time.

Q That was in a case in Massachusetts, an opinion of the justices having to do with proposed legislation?

MR. CHRISTOPHER: Yes, your Honor. That was an advisory opinion of the justices with respect to legislation banning certain supersonic aircraft from Massachusetts.

Q And the court advised that it would be unconstitutional legislation?

MR. CHRISTOPHER: Yes, your Honor.

Now, the net of this first argument under the commerce laws is our view that independent of other aspects of the discussion today, independent of preemption, independent of conflict, independent of the burden aspects of the

commerce clause, that under Southern Pacific versus Arizona, the court should find that air commerce, because of its speed and complexity, requires centralized management.

Now, the other aspect of the commerce argument involves the holding of the District Court, that local ordinances would constitute an unconstitutional burden on interstate commerce. This is the burden issue. The decisions of this Court teach us that an ordinance such as Burbank's cannot be considered as an isolated phenomenon but must be weighed and tested as if imposed on a national basis. This rule has been uniformly applied, I believe, in decisions of this court and it is especially appropriate, as this Court has said, where the restriction might interfere with the efficient use of the channels of interstate commerce.

For instance, in the Southern Pacific case, the Court said that it had to consider the consequences if all 50 states had sought to regulate train lengths. Similarly, in Hood and Sons versus DuMond, this Court considered the effect on commerce if other states were to have adopted regulations comparable to those adopted by the State of New York for the milk industry.

In this particular case, the importance of considering local curfews on a national basis is emphasized by the finding of the District Court that if upheld here, curfews will proliferate and be adopted by virtually all

cities surrounding airports. It is a very, very contagious business. Several witnesses have testified to this contagious character of the curfews and there seems little doubt that many cities, as reported in the press, are watching the outcome of this litigation and will enact curfews if they are upheld here.

Now, the government takes the rather unusual position that the nationwide effects of a restriction on commerce might be appropriate in some cases, but is not appropriate here. I think this is an assertion on their part that is unsupported and I find no support for it in the decisions of this Court. Moreover, the government even revealed some doubt about its own theory when it says in a footnote that it would be appropriate to consider a curfew in relation to existing curfews, previously enacted curfews when weighing it under the commerce clause.

I think you'll soon see that this is an extraordinary theory which would produce very extraordinary results. Presumably the footnote means that at some point a proliferation of curfews could result in a violation of the commerce laws. Does that mean if there are ten curfews creating a violation that all ten are invalid? Or does it mean that the tenth one is invalid and the first ones are valid, thus creating a race to the City Council to see who can get there first. Or does it mean on the other hand that

the tenth one makes the first one invalid but the tenth one continues to be valid itself?

Well, I think you can see that the rationality of the results from such a test confirms the wisdom of this Court's long-standing rule that restrictions on commerce should be judged as if applied nationally. Evaluated on a national basis --

Q Is the Bibb case --

MR. CHRISTOPHER: Yes, the Bibb case is very much in point.

Q -- helps you in this aspect of the case, does it?

MR. CHRISTOPHER: Yes, your Honor. Restrictions on commerce, especially those which interfere with the national system, must be weighed and tested as if imposed on a national basis.

Evaluated on a national basis, the records seems to me to demonstrate overwhelmingly that night curfews would cause massive disruptions in commerce. Curfew on jet take-offs alone, without a curfew on landing, simply a curfew on take-offs alone like the Burbank curfew, would require cancellation of more than 1,000 flights every single night. Because over 48 percent of the airmail moves at night, a curfew would delay not millions, but billions of pieces of mail, at least one day, a delay which is certainly in sharp

conflict with our postal policy, which says that overnight transportation of letter mail is the primary goal of postal operations.

The effect of a night curfew on air cargo service would be equally drastic. Forty-two percent of air cargo moves at night and, indeed, the whole industry exists dependent upon its ability to move cargo on an overnight basis from one part of the country to the other and I think we can see that the imposition of curfews on a nationwide basis would have a severe hobbling effect if it wouldn't completely destroy this growing air cargo industry.

Continental Airlines, one of the carriers serving Hollywood-Burbank Airport, made a thorough study of the financial effect of the imposition of a Burbank curfew on its entire system. Continental Airlines found that its operating costs would be increased by more than 25 percent if there were a curfew throughout its system. It would be required alone to cancel 48 flights a night and it would have to purchase six new jet aircraft to replace the cancelled services.

Q Was Continental affected at all by simply the application of the Burbank curfew?

MR. CHRISTOPHER: Mr. Justice, Continental had just commenced its service at Hollywood-Burbank when this case was tried. It was affected in the sense that its witnesses or

its witness testified that it was inhibited from filling out its service pattern on a flight from Seattle back to Burbank, or would have been if the curfew was in effect, but I would have to say that it was too early in Continental Airlines service at Hollywood-Burbank for it to have really felt the effect of the curfew on it.

Now, I'd like to briefly recur to one or two of the points made earlier in the argument that with respect to the National Environmental Policy Act, it seems to me that this act is not at all consistent with the result below. That act requires federal agencies to consider environmental matters in their decision-making process but it also explicitly provides that Congress shall not exclude other essential considerations of national policy in determining what policy shall be imposed finally by the federal agency.

It is important to note that the National Environmental Policy Act in a sense duplicates the 1968 amendment with respect to aircraft noise. Under both NEPA and the 1968 amendment, the FAA must and does take into account environmental factors in its decisionmaking but neither this statute nor the other statute cited was intended to make environmental factor controlling over all other factors.

Similarly, I think that it can be said that the Environmental Quality Improvement Act is not inconsistent

with the result below, nor is its statement that state and local government shall have primary responsibility for implementing nationational environmental policy.

These general expressions of congressional intent cannot hardly overcome the special responsibilities which have been imposed upon federal agencies and particularly the FAA by Congress in the 1958 act, the 1962 and again, the 1972 act.

There has been a reference here also to the 1972 Noise Control Act and I think I should briefly mention that the 1972 Act does nothing to alter the power relationships as they were -- existed prior to that act and as they are imposed by the '58 and 1968 Act.

In the 1972 Act, Congress reaffirmed its intention to look to the FAA for rulemaking in the noise abatement field. The EPA, under that new act, is called upon to use its expertise to recommend regulations but authority to issue the regulations is retained in the FAA and in deciding what regulations to issue, that 1972 Act again directs the FAA to balance the multiple national interest involved.

Both the House and Senate report on the 1972 Act stressed that it was not intended to change the law with respect to the respective authorities of the local and state governments, the Federal Government and the airport proprietors as they existed before.

I confess to being somewhat puzzled by the assertion that this case is controlled by Rowe versus Wade. Looking again at the slip opinion of that case, it seems to me that -- the Court, of course, will be much more familiar with its holding than I am -- there a state statute had invaded a personal zone of privacy and was therefore struck down as unconstitutional. The Court held that the right of personal privacy includes the abortion decision. It -- it rather baffles me as to how this can indicate the ordinance before the Court.

This case does not deal with any claim of invasion of personal rights. This deals with the validity of a local municipal ordinance. If there had been a Fifth Amendment taking or some other sort of taking, the property owners might have brought an action. That case is not here and has not been done and so I could only express at least some puzzlement as to the effect of that particular argument on the issues before the Court.

There has been some discussion here also stressing that neither the statute nor the regulations involved specifically deal with curfews, that they neither prevent them nor impose them and therefore, the locally-imposed curfews must be permitted.

I think if we look back at the decisions of this Court, we'll find that that argument is not borne out. The

leading case on this point is Napier versus Atlantic Coastline, 272U.S.605, where the Court held that it was without legal significance. I believe that was Mr. Justice Brandeis held it was without legal significance, that it was no explicit federal provision inconsistent with the local legislation.

The Napier case itself, if the Court will remember, the Court struck down a state statute on automatic firebox doors for locomotives, even though the ICC had not dealt with that subject.

Q How about all the states with full crew laws?

MR. CHRISTOPHER: No response.

Q You know the cases I am talking about. I can't mention them by name.

MR. CHRISTOPHER: Yes, I know the cases.

Well, I don't think they are inconsistent with the result here, your Honor. In every instance you go back to What was the intention of Congress? Did Congress intend to preempt the field and where it has intended to preempt the field, the fact that the administrative agency has not issued an explicit regulation on the subject involved does not prevent the subject involved from being held to be within the preempted area.

Q Well, wasn't there some reliance in the opinions in those cases upon the fact that neither Congress nor the Commission had acted in the area?

MR. CHRISTOPHER: Your Honor, I think if there was reliance in those cases, but it was reliance in order to try to eliminate the intention of Congress. The failure of Congress to touch a subject, of course, is the touchstone here and it is what the whole discussion is about. I mention in passing also that the Napier case was followed by the BEthelehem Steel case in 330 U.S. at 769 and once again, the Court held that the failure of federal regulations to cover a particular subject matter did not mean that that subject matter was not within the preempted field.

Coming to the conclusion of the argument here today, your Honors, I would like to once again return to the question of airspace management, which I think is central to this appeal./common grounds at least between the Appellees and the United States that airspace management is exclusively a federal responsibility. We say that any entity which controls the hours that aircraft can enter the navigable airspace is inevitably involved in airspace management.

It is

As we have seen, curfews have dramatically an adverse effect on the congestion problem, on scheduling and on maintenance and on the system as a whole and we urge that restrictions which have such a severe and adverse effect on transportation, air transportation particularly, should come from a centralized agency which has been entrusted by Congress with all aspects of airspace management.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Mr. Sieg, I think we'll let you resume and not split your argument. You have four minutes left and there is only a minute and a half now.

We will recess.

(Whereupon, at 11:58 o'clock a.m., the Court was recessed for luncheon.)

AFTERNOON SESSION 1:00 p.m.

MR. CHIEF JUSTICE BURGER: Mr. Friedman, I understand you have about five minutes left before this Court.

REBUTTAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. FRIEDMAN: Five minutes. Thank you, Mr. Chief Justice. I have five points I would like to make in those five minutes.

The critical distinction, we think, that appears in this legislation in terms of what Congress is attempting to do here was between the regulation of flying and all aspects of flying which we think has been preempted by the federal legislation and the regulation of airports, which has not.

The comprehensive regulation is a regulation of the airspace, a regulation of safety, a regulation of the flight of aircraft. But we think it is not a regulation of the airport itself. Now, of course, things that happen on the airport are related to flight. Obviously, if the airport refuses to build an additional runway that is necessary, it is going to make it more difficult for flight to take place, but that is not the kind of thing, we think, that Congress is referring to when it keeps speaking in these terms and I'd like to refer specifically to the letter from the Secretary at the Appendix to the Appellants' brief which Mr. Christopher referred to. What the court letter said was,

"The courts have held that --"

Q What page are you on in that Appendix?

MR. FRIEDMAN: This is the first unnumbered page of the Appendix after --

Q All right.

MR. FRIEDMAN: -- the green-blue slip at the end. "The courts have held that the Federal Government presently preempts the field of noise regulation insofar as it involves controlling the flight of aircraft." And in the next sentence they cite a case called The Town of Hempstead which was just that, the village of Hempstead attempted to control the flight of aircraft in and out of Kennedy Airport by saying that a plane could not fly over the village of Hempstead if he emitted noise beyond a certain level. That's what they were talking about, which was repeated again at the end of that paragraph, "State and local governments will remain unable to use their police powers to control aircraft noise by regulating the flight of aircraft."

And, of course, that is precisely what the preferential runway regulation that is involved in this case attempts to do. That controls the flight of aircraft. That determines how a plane is to take off, in which direction.

Q What about the other language in that letter? I'm not sure to what it refers. The language is, "The legislation," and I'm not sure of the antecedent, "operates

in an area committed to federal care and noise limiting rules operating as do those of the ordinance --" I assume that is the Hempstead ordinance.

MR. FRIEDMAN: That's right.

Q "-- must come from the federal source."

MR. FRIEDMAN: But that, Mr. Chief Justice, is with reference to an ordinance that attempted to control the flight of aircraft. What Hempstead was attempting to do to control the way in which planes landed and took off and approached the Kennedy Airport by saying planes which make more than a certain amount of noise cannot fly over our city and that is, we think, what Congress had reference to when it spoke of controlling the flight of aircraft.

And we think the whole policy that is reflected in this congressional debate in the FAA's consideration of it is the recognition that when you are dealing with such things as whether planes should or should not be permitted to take off from an airport, that is a matter of fundamental local policy. There are conflicting interests involved. On the one hand are the interests of the members of the traveling public and the industry in the area of getting the best possible air service obtainable.

On the other hand -- on the other hand, there is an equally strong, perhaps a greater interest of the people, the interest of the people in these areas of being able to get a

good night's sleep and this is the kind of balancing of conveniences that traditionally is left to the local governing bodies to decide. The town council of Burbank made the judgment that whatever may be the effects of this on air service -- and it seems quite clear it is minimal here -- that, nevertheless, that adverse effect is more than outweighed by the benefits to the people in this surrounding area of having freedom from the noise when they are trying to sleep.

Now, the runway preference order, I might add one other thing about it. There is no authority, the FAA informs us, in an airtower controller to impose a curfew. The only thing he can do is these preference runways. These preference runways are not mandatory. Page 454 of the record which contains text of the order at the second full sentence in that paragraph is saying the procedures are not mandatory on the part of the pilot, however, traffic controllers must be noise-abatement conscious and emphasize noise abatement in order to obtain the highest degree of voluntary cooperation from the pilots.

Q Mr. Friedman, could Hempstead pass an ordinance saying you couldn't fly over Hempstead between 11:00 and 7:00?

MR. FRIEDMAN: I would say most clearly not, Mr. Justice. Hempstead could not do that. That would be a regulation of flying.

Q No.

MR. FRIEDMAN: Pardon?

Q You just say, there shall be no flying.

MR. FRIEDMAN: No flying overhead?

Q The same as this.

MR. FRIEDMAN: Pardon?

Q That is not a regulation of flying.

MR. FRIEDMAN: No, but if there were an airport, if there were an airport within the City of Hempstead, Hempstead could say no plane could take off from that airport between the hours of 11:00 and 7:00.

Q If Kennedy was in the same county as Hempstead, that county could pass a regulation in Kennedy saying that you can't fly any planes out of Kennedy between 11:00 and 7:00.

MR. FRIEDMAN: As far as the Federal Aviation Act is concerned, yes, Mr. Justice. That might present a different commerce problem at Kennedy than it presents at Burbank, but --

Q I was just saying, this is so unimportant, this little Burbank Airport, but I think Kennedy does have a few flights.

MR. FRIEDMAN: Kennedy has many flights, but, Mr. Justice, in terms of the impact on commerce, it seems to us it does make a substantial difference whether you are dealing with a little airport like Burbank, which has no commercially-scheduled flights --

Q But you said the same rule would apply to

Kennedy.

MR. FRIEDMAN: With respect to preemption. With respect to preemption, yes. That is, if I may restate it, as far as the federal regulatory scheme is concerned. The federal regulatory scheme does not operate to prevent an aircraft -- prevent an airport from being told it cannot take -- permit certain noise things at the airport as distinguished from the actual commencement of the flight. Once the plane is on the runway and starts to take off, even though that is in the airport, that is an integral part of the flight. That is the beginning of the flight and that is preempted. And all we are saying is that it is not preempted now. At least, thus far, Congress has not attempted to take over the regulation of airports. Congress could do it under its broad power over interstate commerce, Congress could do it, either itself directly or Congress could do it acting through the FAA and maybe someday it will do it. The matter is under study.

Maybe a year from now the FAA will conclude either that there should be a ban on curfews or decide to put in curfews. Our point is, unless and until Congress affirmatively does that. Unless that happens, this matter is within the control and the authority of the local police power.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Friedman.

Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:08 o'clock p.m., the case was submitted.)