

Thanks to all participants in the ABF/Northwestern Legal History Colloquium for reading my paper.

This is a draft chapter from a book manuscript I'm working on, about airline regulation in the 1960s-1980s (through deregulation but not particularly focused on deregulation). I'm interested in the way airline regulation, and especially the Civil Aeronautics Board, became a site of activism around race and apartheid, disability rights, environmental concerns, and consumer activism in this period. Each chapter will offer a case study of one of these conflicts/sets of concerns; you have here my draft chapter on airline regulation, the environment, and the public interest.

This is still very much a work in progress, so please do not circulate or cite without my permission. Thanks for reading, and I look forward to your comments.

Sincerely,

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## **Loud Flights, Angry Neighbors, and Indifferent Bureaucrats: The Civil Aeronautics Board Confronts Noise Pollution**

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By the middle of 1966, residents of Washington D.C.'s Palisades neighborhood were fed up. They had long found the sounds of propeller planes flying in and out of nearby National Airport annoying, but new jet planes—which began service to National Airport in April 1966—brought a whole new level of noise to neighbors' lives. While jet planes were not necessarily *louder* than propeller planes as measured in decibels (db), they rated higher in perceived noise decibels (PNdb) and operated at noticeably different and more annoying frequencies.<sup>1</sup> Joining Americans around the country who complained that jet planes interfered with their ability to live, work, and sleep in peace, National Airport neighbors organized themselves into civic associations, called their congressmen, petitioned government agencies, and went to court to demand an end to all this noise.

Specifically, neighbors sought an end to jet flights at National Airport, and maybe even the closure of the airport entirely. After all, an obvious alternative was right there: Dulles International Airport was brand new, designed for jet planes, and in an area far from residential development. But travelers then (as now) found National Airport just so much more convenient, and airlines wanted to serve their customers. How to make Dulles International Airport more attractive to travelers? According to helicopter promoters, the answer was helicopters. Helicopter travel from downtown Washington D.C. to Dulles Airport and to Friendship Airport in Baltimore

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<sup>1</sup> Laymon N. Miller, Leo L. Beranek, and Karl D. Kryter, "Airports and Jet Noise," *Noise Control* 5 (1959): 24-31; FAA, *A Citizen's Guide to Aircraft Noise* (Washington: GPO, 1963), 11; Gordon McKay Stevenson, Jr., *The Politics of Airport Noise* (Belmont, CA: Duxbury Press, 1972), 13-21. And as a 1954 study indicates, airport noise was already pretty disruptive before jet planes. See National Opinion Research Center, *Community Aspects of Aircraft Annoyance* (Report No. 54, University of Chicago, 1954).

could save time and avoid ground traffic. Plus, by increasing demand for flights at other airports, helicopter travel might divert flight traffic, and thus noise, away from National Airport.

However, local residents were skeptical that the constant drone of low-flying helicopters would *solve* the noise problem, given that multiple helicopter flights would be needed to transport even a single airplane's worth of travelers to Dulles Airport. Helicopters seemed like a solution to the noise problem that would increase area noise—and thus not a solution at all.

Since new helicopter service required a federal permit from the Civil Aeronautics Board (CAB), National Airport neighbors' frustrations with noise and disruption and flight allocation played out through the narrow constraints of the helicopter permitting process. The CAB, an insular agency mostly unknown to or ignored by everyone outside the airline industry, was not an advantageous arena for disgruntled residents. Board members understood their role to be expanding and promoting air service. The board had never considered noise issues before, and had little intention of starting now. However, active, organized, and well-resourced airport residents were well versed in law and eager to demand that the CAB start thinking about not just about airlines and passengers but also about the people underneath the flights. They had on their side federal courts who had begun revisiting older ideas about who got to participate in administrative proceedings and what the public interest really was.

### **I. Jet Noise at National Airport**

Jet planes began flying into several American cities in 1958; they were so loud that within a year, subcommittees of the House Committee on Interstate and Foreign Commerce were holding hearings around the country for residents to complain about the noise. Although scholars have largely ignored noise pollution and grassroots campaigns against aircraft noise in their histories of the modern environmental movement, fights against noise pollution have much in

common with those against air and water pollution.<sup>2</sup> Like many who felt that the benefits of economic progress failed to consider the costs of air and water pollution, people who lived near airports resented having to suffer through airport noise in service to the benefits those flights offered to others—to local businesses, to area employment, and to American enterprise in general.<sup>3</sup>

In these hearings, local residents and community organization representatives who lived near airports in New York City, San Francisco, Chicago, and Los Angeles implored Congress to ameliorate the catastrophic effect jet noise was having on their lives. Residents complained over and over of disruptions to church services and to teaching in schools, of personal conversations, telephone calls, radio, and television being drowned out, and of disturbances to sleep and relaxation. One Long Island man described noise at Idlewild as “so bad, it seems as though a locomotive was running through the house.”<sup>4</sup> Residents near the San Francisco airport described how their loss of sleep “has resulted in loss of efficiency to the people, general rundown condition, weakness, and susceptibility to disease and all its ramifications and physical

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<sup>2</sup> More than a decade ago, Peter Coates argued that historians needed to start incorporating noise into their studies of environmental history; this remains a useful suggestion. See Peter A. Coates, “The Strange Stillness of the Past: Toward an Environmental History of Sound and Noise,” *Environmental History* 10 (2005): 636-665. A few scholars have shown how the successful campaign against supersonic transport in the 1960s drew on environmental arguments. See Erik M. Conway, *High-Speed Dreams: NASA and the Technopolitics of Supersonic Transportation, 1945-1999* (Baltimore, MD: The Johns Hopkins University Press, 2005); David Suisman, “The Oklahoma City Sonic Boom Experiment and the Politics of Supersonic Aviation,” *Radical History Review* 121 (2015): 169; David Suisman, “The American Environmental Movement’s Lost Victory,” *Public Historian* 37 (2015): 111-131. On the politics of the SST, see also Edmund Preston, *Troubled Passage: The Federal Aviation Administration During the Nixon-Ford term, 1973-1977* (Washington, D.C.: U.S. Dept. of Transportation, Federal Aviation Administration, 1987), ch. 10.

<sup>3</sup> Statement of James B. Batton, Howard Beach Association Trustee, Subcommittees of the House Committee on Interstate and Foreign Commerce, 40; Roger C. Kipp, Laurelton Civil Association, Inc., to Hon. Oren Harris, Sept. 9, 1959, reprinted in Subcommittees of the House Committee on Interstate and Foreign Commerce, 95.

<sup>4</sup> Burney K. Martin, Union Township, NJ, to Hon. Oren Harris, Sept. 12, 1959, reprinted in Subcommittees of the House Committee on Interstate and Foreign Commerce, 96.

disorders[.]”<sup>5</sup> Noise also caused headaches, earaches, and hearing loss; as one resident testified: “Many citizens have had to seek medical relief; many are under doctor's care.”<sup>6</sup>

Washington D.C. and Virginia neighbors were spared this noise until 1966, not least because the FAA clearly anticipated significant resistance from D.C. neighbors. An April 1961 FAA study concluded that flying large jets into National Airport “would definitely invoke adverse community reaction and produce speech interfering characteristics which will be judged with more severity in a city such as Washington.”<sup>7</sup> And a Virginia representative wrote to FAA administrator Najeeb Halaby that year that “I believe the jets would precipitate such violent objections from the residents of Northern Virginia that it would have a harmful effect on the entire operation at that airport.”<sup>8</sup> A 1965 meeting on the jet question suggested that perhaps “a public relations program to condition interested parties to turbojet operations” might be of use in the D.C. area.<sup>9</sup>

The FAA’s decision to keep jet planes out of National Airport long after they had started flying to other cities was not just a nod to local noise concerns, but also an effort to encourage traffic to the new, very modern, and very expensive Dulles International Airport, which had

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<sup>5</sup> Joseph Bridgewater, President of Bayside Manor Improvement Club and Chairman of the Citizens’ Jet Noise Committee, Subcommittees of the House Committee on Interstate and Foreign Commerce, 133.

<sup>6</sup> Joseph Bridgewater, President of Bayside Manor Improvement Club and Chairman of the Citizens’ Jet Noise Committee, Subcommittees of the House Committee on Interstate and Foreign Commerce, 133.

<sup>7</sup> James L. Goddard, Civil Air Surgeon to Chief, Operations and Safety Division, CA-40, April 18, 1961, p. 3, Folder 2-2 Washington National Airport ADO 1961, Box 30, Administrator’s Subject/Correspondence File, 1959-1982, Office of the Administrator, Records of the Federal Aviation Administration, Record Group 237 (hereafter RG 237), National Archives and Records Administration, College Park, MD (hereafter NACP).

<sup>8</sup> Rep. Joel T. Broyhill to Najeeb E. Halaby, FAA, May 24, 1961, p. 1, Folder 2-2 Washington National Airport ADO 1961, Box 30, Administrator’s Subject/Correspondence File, 1959-1982, Office of the Administrator, RG 237, NACP.

<sup>9</sup> “Report of findings of the airline Group which met February 2, 1965 to discuss operational problems incident to the inauguration of turbojet aircraft operations at Washington National Airport,” n.d., p. 3, Folder Washington National Airport 1965, Box 160, Administrator’s Subject/Correspondence File, 1959-1982, Office of the Administrator, RG 237, NACP.

opened in 1962 in Chantilly, Virginia.<sup>10</sup> Dulles Airport was located well outside the D.C. city center, built in the middle of undeveloped land with runways specifically built to handle jet planes.<sup>11</sup> One magazine writer described how “boarding a plane at Dulles is as much of an exciting pleasure as the smoothest jet flight, soft music, martinis, smiling stewardesses, and all.”<sup>12</sup> But whatever technological and aesthetic advantages the beautiful Eero Saarinen-designed airport offered once one got there, it was outside the city and hard to get to. (The same writer mentioned going “the 30 miles out of their way from Washington to enjoy its unique convenience.”<sup>13</sup>) Ground transportation from downtown Washington D.C. to Dulles Airport was costly and time-consuming, and travelers preferred the ease of flying into National Airport.<sup>14</sup> National Airport, named one of the “10 Most Active U.S. Civil Airports in 1962,”<sup>15</sup> thus continued to see its traffic swell (almost 5 million in fy. 1960, and more than 7.6 million in fy. 1966) while Dulles—built to handle more passengers than National—remained largely empty (only 1.1 million passengers in fy. 1966).<sup>16</sup>

By 1966, however, the FAA gave into airlines’ and travelers’ desire for jet service at National Airport. Jet planes began flying in and out of National Airport on April 24, and, as

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<sup>10</sup> Ray W. Clark, “A Public Airport for the District of Columbia: The History of Washington Dulles International Airport” (Ph.D. diss., George Mason University, 2017); Richard J. Kent, Jr., *Safe, Separated, and Soaring: A History of Federal Civil Aviation Policy 1961-1972* (Washington, DC: U.S. Department of Transportation, 1980), 161-62. For a 1958 film promoting the many advantages of Dulles International Airport, see <https://youtu.be/6C3iKBJhgZM>.

<sup>11</sup> Federal Aviation Agency, *Sounds of the Twentieth Century* (Washington, D.C.: Government Printing Office, 1961), 15.

<sup>12</sup> Wolf Von Eckardt, “Redesigning American Airports,” *Harper’s Magazine*, March 1, 1967, 66-75, 67.

<sup>13</sup> Wolf Von Eckardt, “Redesigning American Airports,” *Harper’s Magazine*, March 1, 1967, 66-75, 67.

<sup>14</sup> Metrorail service to National Airport began in the late 1970s; after many delays, Metrorail service to Dulles Airport is currently in progress.

<sup>15</sup> FAA, *A Citizen’s Guide to Aircraft Noise* (Washington: GPO, 1963), 25.

<sup>16</sup> Bureau of National Capital Airports, FAA, Washington National Airport (FAA, 1961), 1; Bureau of National Capital Airports, FAA, National Capital Airports, Annual Report FY 1967, 1; Bureau of National Capital Airports, FAA, National Capital Airports, Annual Report FY 1967, p. 2.

predicted, residents complained immediately.<sup>17</sup> One reporter described how some local residents “complain that their children wake up screaming that Bat Man (not Peter Pan) has flown in through their windows.”<sup>18</sup> Since FAA operational guidelines directed pilots to fly over water whenever possible, to minimize disruption to residential neighborhoods, the noise problem was particularly acute for people who lived near the Potomac River.

Residents of the Palisades neighborhood, bordered by the Potomac River to the east and Georgetown to the west, quickly moved into action. Palisades residents were an elite (and mostly white<sup>19</sup>) group that at various times had included the controller of the FDIC; the marshal of the Court of Customs and Patent Appeals; Associate Justice of the United States William O. Douglas<sup>20</sup>; and Bill and Taffy Danoff, founders of the Starland Vocal Band.<sup>21</sup> Residents’ fight against airport noise was consistent with their long history of efforts to keep the neighborhood quiet and residential. The decades-old Palisades Citizens Association (PCA) had, over the past several decades, fought a liquor store in the area (for fear of “drinking and ribaldry by fishermen” in the nearby C&O canal), opposed proposals for a bus line and an expressway to run through the neighborhood, and ensured that zoning laws would preserve the Palisades’s existing residential character.<sup>22</sup> Such efforts were consistent with a broader history of Americans using

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<sup>17</sup> Federal Aviation Agency Paper on Jet Decision for Washington National Airport, April 13, 1966, p. 7, Folder VFD - Subject Files -1966, Box 4 (pt. 1), Virginians for Dulles Records, Special Collections Research Center, George Mason University, Fairfax, VA (hereafter GMU). See also Richard J. Kent, Jr., *Safe, Separated, and Soaring: A History of Federal Civil Aviation Policy 1961-1972* (Washington, DC: U.S. Department of Transportation, 1980), 161-63.

<sup>18</sup> Ann Cottrell Free, “Rising Decibels at National,” *Baltimore Sun*, March 7, 1967, A10.

<sup>19</sup> <https://www.mappingsegregationdc.org/index.html#maps>

<sup>20</sup> Justice Douglas had led a hike along the Chesapeake & Ohio canal towpath in Maryland in 1954. See Lynch, John A. Jr. (2005) "Justice Douglas, the Chesapeake & Ohio Canal, and Maryland Legal History," University of Baltimore Law Forum: Vol. 35: No. 2, Article 2.

<sup>21</sup> Palisades Citizens’ Association News Letter, v. 14, no. 4, Jan. 1963, Folder 79, Box 2, Palisades Citizens’ Association records, 1916-2001 (MS 0627), Historical Society of Washington, D.C., Kiplinger Research Library (hereafter DCHS); Terrence Downs, “Sunset on the Palisades: Watching the quiet passing of a fragile Washington Neighborhood,” *Washington Post*, Feb. 5, 1978, SM1, 22.

<sup>22</sup> “Liquor Store Applicant Vows to Scorn Drunks,” *Washington Post and Times Herald*, April 3, 1957, B1. (On cross-examination, the PCA president who warned of drunk fishermen reportedly “admitted he had never seen an

noise bans, zoning, and land use restrictions to keep certain areas quiet, residential, and white.<sup>23</sup>

More specifically, scholarship in “annoyance studies” has demonstrated that airport noise

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inebriated fisherman on the canal” and “had no reason to believe that the fishermen would molest women in the area.”); John J. Lindsay, “Ribald ‘Gayety’ of Canal Fishermen Told at Hearing on Liquor License,” *Washington Post* and *Times Herald*, April 2, 1957, B1. Various zoning efforts including opposing changes to existing yard sizes, opposing tall apartment buildings, opposing a proposed movie theater, and barring someone from running a small real estate business out of their home. “New Route Asked for D-4 Buses,” *Washington Post*, July 13, 1950, B7; “Citizen Group Asks Zoning Law Changes,” *Washington Post*, Sept. 27, 1953, M13; “Citizens Vote Down Link Through Palisades,” Wendell Bradley, “Citizens Fly Over Anti-Noise Light,” *Washington Post and Times Herald*, April 3, 1957, B2; Jack Eisen, “Overtime 240 Hearing to be Continued Today,” *Washington Post*, Jan. 7, 1958, B1; Palisades Citizens’ Association News Letter, v. 14, no. 4, Jan. 1963, Folder 79, Box 2, Palisades Citizens’ Association records, 1916-2001 (MS 0627), DCHS; Palisades Citizens’ Association News Letter, v. 17, no. 8, May 1966, Folder 80, Box 2, Palisades Citizens’ Association records, 1916-2001 (MS 0627), DCHS.

<sup>23</sup> On zoning and segregation, see Nayan Shah, *Contagious Divides: Epidemics and Race in San Francisco’s Chinatown* (Berkeley: University of California Press, 2001); Michael Allan Wolf, *The Zoning of America: Euclid v. Amber* (Lawrence: University Press of Kansas, 2008); Gabriel J. Chin & John Ormonde, “The War Against Chinese Restaurants,” *Duke Law Journal* 67 (2018): 681-741; Jessica Trounstein, *Segregation by Design: Local Politics and Inequality in American Cities* (Cambridge University Press, 2018); and Elizabeth A. Herbin-Triant, *Threatening Property: Race, Class, and Campaigns to Legislate Jim Crow Neighborhoods* (New York: Columbia University Press, 2019). Similar instincts led elites to classify certain local sounds (including music, the calls of street hawkers, and the thrum of industrial businesses) as “noise” to be regulated, as a way of drawing strict racial and class lines around themselves and their land. As Rowland Atkinson argues, “The sovereignty derived from wealth is, in part, an ability to manifest control over potential auditory disturbance in one’s home as much as it might be about maximising the amenity of location. Atkinson, “Ecology of Sound: The Sonic Order of Urban Space,” *Urban Studies* 44 no. 10 (2007): 1905–1917, 1910. See also Raymond W. Smilor, “Cacophony at 34<sup>TH</sup> and 6<sup>TH</sup>: The Noise Problem in America, 1900-1930,” *American Studies* 18 (1977): 23-3; Raymond W. Smilor, “Personal Boundaries in the Urban Environment: The Legal Attack on Noise 1865-1930,” *Environmental Review: ER* 3 (1979): 24-36; Emily Thompson, *The Soundscape of Modernity: Architectural Acoustics and the Culture of Listening in America, 1900-1933* (Cambridge, MA: MIT Press, 2002); Derek Vaillant, “Peddling Noise: Contesting the Civic Soundscape of Chicago, 1890-1913,” *Journal of the Illinois State Historical Society* 96 (2003): 257-287; Clare Corbould, “Streets, Sounds and Identity in Interwar Harlem,” *Journal of Social History* 40 (2007): 859-894; Alexander Russo, “An American Right to an ‘Unannoyed Journey’? Transit Radio as a Contested Site of Public Space and Private Attention, 1949–1952,” *Historical Journal of Film, Radio and Television* 29 (2009): 1-25; Jennifer Stoever-Ackerman, “Splicing the Sonic Color-Line: Tony Schwartz Remixes Postwar Nueva York,” *Social Text* 28 (2010): 59-85; Ronda L. Sewald, “Forced Listening: The Contested Use of Loudspeakers for Commercial and Political Messages in the Public Soundscape,” *American Quarterly* 63 (2011): 761-780; Lilian Radovac, “The ‘War on Noise’: Sound and Space in La Guardia’s New York,” *American Quarterly* 63 (2011): 733-760; Mark M. Smith, “The Garden in the Machine: Listening to Early American Industrialization,” in *The Oxford Handbook of Sound Studies*, eds. Trevor Pinch and Karen Bijsterveld (New York: Oxford University Press, 2012), 39-57; Robert Hawkins, “‘Industry Cannot Go On without the Production of Some Noise’: New York City’s Street Music Ban and the Sound of Work in the New Deal Era,” *Journal of Social History* 46 (2012): 106-123; Lilian Radovac, “Muting Dissent: New York City’s Sound Device Ordinance and the Liberalization of the Public Sphere,” *Radical History Review* 121 (2015): 32-50; Jennifer Stoever, “‘Just Be Quiet Pu-leeze’: The New York Amsterdam News Fights the Postwar ‘Campaign against Noise,’” *Radical History Review* 121 (2015): 145-68; Brandi Thompson Summers, “Reclaiming the Chocolate City: Soundscapes of Gentrification and Resistance in Washington, D.C.,” *EPD: Society and Space* 39, no. 1 (2021): 30-46.

As Daniel Bender, Duane J. Corpis, and Daniel J. Walkowitz have argued, in directing attention to histories of sound, campaigns against noise “produce and reinforce hierarchies of inclusion and exclusion, power and privilege.” Daniel Bender, Duane J. Corpis, and Daniel J. Walkowitz, Editors’ Introduction, “Sound Politics: Critically Listening to the Past,” *Radical History Review* 121 (2015): 1-7, 2. As Jennifer Stoever-Ackerman similarly explains, “sound is not merely a scientific phenomenon—vibrations passing through matter at particular



complaints generally correlated not just with perceived decibel levels or time of day, but also with greater wealth, more existing community activism, and more knowledge of how to complain and who to complain to.<sup>24</sup> No one liked airport noise, but wealthier neighborhoods were more likely to complain and demand change.

However, airplane noise posed a different jurisdictional problem. Washington D.C. zoning laws could do little to regulate an airport located in Virginia, and nuisance law was of no use against airports (which were generally created by governments and thus fell into the category of “legalized nuisances”).<sup>25</sup> Residents instead had to turn to the federal government to demand relief. Unlike most airports in the United States (which were owned and operated by local and state authorities), National Airport was owned and operated by the federal government (specifically, the Bureau of National Capital Airports within the FAA).<sup>26</sup> Members of the PCA could and did complain to FAA officials about the noise in their homes and backyards<sup>27</sup>; as the

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frequencies—it is also a set of social relations.” Jennifer Stoeber-Ackerman, “Splicing the Sonic Color-Line: Tony Schwartz Remixes Postwar Nueva York,” *Social Text* 28 (2010): 59-85, 60.

<sup>24</sup> Leo L. Beranek, Karl D. Kryter, and Laymon N. Miller, “Reaction of People to Exterior Aircraft Noise,” *Noise Control* 5, 23 (1959); Erland Jonsson, “Annoyance Reactions to External Environmental Factors in Different Sociological Groups,” *Acta Sociologica* 7 (1964): 229-263; Paul N. Borsky, “Effects of Noise on Community Behavior,” *Proceedings of the Conference Noise as a Public Health Hazard* (Washington D.C. June 13-14, 1968), 187-92, ASHA Reports 4 American Speech and Hearing Association (Feb. 1969); U.S. Department of Transportation, Office of the Secretary, Office of the Assistant Secretary for Environmental and Urban Systems, *Airports and their Environment: A Guide to Environmental Planning* (Cambridge, MA: CLM/Systems, 1972), 81; Thomas Lindvall & Edward P. Radford, eds., “Measurement of Annoyance Due to Exposure to Environmental Factors,” *Environmental Research* 6 (1973): 1-36; Robert F. Goodman and Bruce B. Clary, “Community Attitudes and Action in Response to Airport Noise,” *Environment and Behavior* 8 (1976): 441-70; Rainer Guski, “An Analysis of Spontaneous Noise Complaints,” *Environmental Research* 13 (1977): 229-36; Milton E. Harvey, John W. Frazier and Mindaugas Matulionis, “Cognition of a Hazardous Environment: Reactions to Buffalo Airport Noise,” *Economic Geography* 55 (1979): 263-286, 278; David W. Gillen & Terrence J. Levesque, “A Socio-Economic Assessment of Complaints About Airport Noise,” *Transportation Planning and Technology* 18 (1994): 45-55.

<sup>25</sup> Lyman M. Tondel Jr., “Noise Litigation at Public Airports,” *Journal of Air Law and Commerce* 32 (1966): 387-, 397.

<sup>26</sup> James M. Goode, “Flying High: The Origin and Design of Washington National Airport,” *Washington History* 1, no. 2 (1989): 4-25.

<sup>27</sup> Wendell Bradley, “Citizens Fly Over Anti-Noise Light,” *Washington Post and Times Herald*, Nov. 21, 1957, C7; Bureau of National Capital Airports, FAA, National Capital Airports, *Annual Report FY 1965*, p. 7; Arnold E. Briddon and Ellmore A. Champie, *Federal Aviation Agency Historical Fact Book: A Chronology, 1926-1963* (Washington, DC: Office of Management Services, Federal Aviation Agency, GPO, 1966), 47, 49, 50; Richard J. Kent, Jr., *Safe, Separated, and Soaring: A History of Federal Civil Aviation Policy 1961-1972* (Washington, DC:

PCA president said in 1967, “Both the airlines and the FAA know us well.”<sup>28</sup> The PCA asked its members to keep records of noisy planes, and provided them with the direct contact information for Arven Saunders, the director of the Bureau of National Capital Airports, so members could complain more efficiently.<sup>29</sup> Hostile questions the PCA submitted to Saunders in advance of a June 1966 meeting included: “Many citizens bought homes in the Foxhall-Palisades area in the belief that Dulles was built for jets. Is this new policy not a breach of faith with the public?”<sup>30</sup> And, complaining that the FAA had refused to hold a hearing about noise before authorizing jet service into National Airport: “If we cannot turn to the FAA – the official spokesmen for the public – to whom can we turn?”<sup>31</sup> In June 1966, less than two months after jet service had begun, the PCA passed a formal resolution supporting the reduction of flights at, and perhaps even the closing of, National Airport.<sup>32</sup>

By the end of the year, the PCA was joined in opposition by the Committee Against National (CAN), an organization formed in December 1966 by Washington residents reacting to a new FAA proposal to expand National Airport to allow *more* jet traffic.<sup>33</sup> PCA member Frank C. Waldrop, a former executive editor of the *Washington Times-Herald*, became the first chair of

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U.S. Department of Transportation, 1980), 158, 83; George Johnson, *The Abominable Airlines* (New York: Macmillan, 1964); Gordon McKay Stevenson, Jr., *The Politics of Airport Noise* (Belmont, CA: Duxbury Press, 1972), 25-27.

<sup>28</sup> [check] Testimony of William G. Smith, PCA President, before CAB, p. 2, Docket 18712, July 17, 1967, Folder 95, Box 3, Palisades Citizens' Association records, 1916-2001 (MS 0627), DCHS.

<sup>29</sup> Palisades Citizens' Association News Letter, v. 17, no. 7, p. 2, April 1966, Folder 80, Box 2, Palisades Citizens' Association Records, 1916-2001 (MS 0627), DCHS.

<sup>30</sup> James W. Anderson, chair, PCA, to Arven H. Saunders, Director, Bureau of National Capital Airports, FAA, May 28, 1966, Folder 95, Box 3, Palisades Citizens' Association records, 1916-2001 (MS 0627), DCHS.

<sup>31</sup> James W. Anderson, chair, PCA, to Arven H. Saunders, Director, Bureau of National Capital Airports, FAA, May 28, 1966, Folder 95, Box 3, Palisades Citizens' Association records, 1916-2001 (MS 0627), DCHS.

<sup>32</sup> Palisades Citizens' Association resolution, June 7, 1966, Folder 95, Box 3, Palisades Citizens' Association records, 1916-2001 (MS 0627), DCHS.

<sup>33</sup> News from CAN, Vol. 1, no. 1, Dec. 15, 1966, p. 2, Folder Committee Against National (1966-1969), Box 1, Virginians for Dulles Records, GMU.

the CAN and the editor of its newsletter.<sup>34</sup> The CAN to close National Airport entirely and see “its property converted to better human use[.]”<sup>35</sup> CAN gathered copies of letters in support of its efforts from groups including the Sisters of the Visitation of Georgetown, the Mount Vernon Seminary and Junior College, Georgetown University, Dumbarton Oaks, and the Alexander Graham Bell Association for the Deaf, Inc.<sup>36</sup>

Other groups of Washington residents similarly felt ignored by the FAA’s decision to promote jet service with no regard for the effect on those on the ground. Groups mobilizing and signing petitions against noise—and the possibility of even more noise—at National Airport included Virginians for Dulles (another anti-National Airport group, established in 1968), Arlingtonians for Dulles, the Interfederation Council, the Federation of Citizens Associations of the District of Columbia, the Burleith Citizens Association, residents of Chevy Chase Terrace, the County Council of Montgomery County (MD), the Montgomery County Civic Federation, the Potomac Valley League, the Bannockburn Civic Association, the Federation of Citizens’ Associations (D.C.), and the Committee of 100 on the Federal City.<sup>37</sup>

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<sup>34</sup> “Waldrop Resigns at Times-Herald,” *Washington Post*, May 31, 1953, M2. Years earlier, Waldrop had cowritten a book on television and the FCC, so presumably he knew something about federal agencies and commissions. Frank C. Waldrop and Joseph Borkin, *Television: A Struggle for Power* (New York, William Morrow and Company, 1938).

<sup>35</sup> CAN Resolution, n.d., Folder Committee Against National (1966-1969), Box 1, Virginians for Dulles records, GMU.

<sup>36</sup> Mildred Brown, President, to Arven Saunders, FAA, Jan. 24, 1967; Mother Cecilia Clark, Superior, Monastery of the Visitation, to Frank Waldrop, Feb. 1, 1967; Peter D. Pelham, president, Mount Vernon Seminary and Junior College, to Saunders, Jan. 23, 1967; George S. Roper, Assistant Vice President, Georgetown University, to Mrs. Frank A. West, Jan. 26, 1967; John S. Thatcher, Dumbarton Oaks, to Mrs. Frank A. West, Jan. 26, 1967; George W. Fellendorf, Executive Director, Alexander Graham Bell School for the Deaf, Inc., to Waldrop, Jan. 31, 1967; all in Folder VFD - Subject Files -1967 - pt. 1, Box 4 (pt. 1), Virginians for Dulles Records, GMU.

<sup>37</sup> Palisades Citizens’ Association News Letter, v. 18, no. 3, Dec. 1966, Folder 80, Box 2, Palisades Citizens’ Association records, 1916-2001 (MS 0627), DCHS; Motion, Federation of Citizens Associations of the District of Columbia, Jan. 26?, 1967, Folder VFD - Subject Files -1967 - pt. 1, Box 4 (pt. 1), Virginians for Dulles Records, GMU; Robert R. Curtiss, President, Burleith Citizens Association, to Sen. Monroney, Jan. 10, 1967, Folder VFD - Subject Files -1967 - pt. 1, Box 4 (pt. 1), Virginians for Dulles Records, GMU; The Facts of the Airport Question – Arlingtonians for Dulles, April 10, 1967, p. 11, Box 1, Virginians for Dulles records, GMU; Press Release, Text of Statement by Frank C. Waldrop Feb. 28, 1967, p. 2, Folder VFD - Subject Files -1967 - pt. 2, Box 4 (pt. 2), Virginians for Dulles Records, GMU; Petition by residents of Chevy Chase Terrace, n.d., Folder Committee

By February 1967, the PCA president was comparing National Airport to a rabid dog as he argued against airport expansion:

If a neighbor has a dog, we know how to live with it. If that dog goes mad, we have to change our attitude toward it. It has to be put away, because people cannot live with a mad dog. It is inconceivable that we would help build it a new kennel in the hopes that it would be easier to live with.

Just so with the airplanes. We have lived with them for years. Officials at FAA and the representatives of the airlines and pilots know our organization because we have worked with them for over 10 years on problems of low flying and noisy airplanes. But jets are different.<sup>38</sup>

The CAN sponsored a neighborhood rally in March 1967, hosting speakers, presenting anti-National Airport resolutions, and showing a film (the “Case Against FAA”).<sup>39</sup> As Arlingtonians for Dulles argued in their own flyer, “The central question in the determination of National’s future is whether the public interest or transportation interests will prevail.”<sup>40</sup> By the end of April, the CAN had gathered thousands of signatures on a petition asking the airport authority to close National Airport entirely.<sup>41</sup>

These Washington-area neighborhood associations had support from high places. Many local congressional representatives, including Sen. Daniel Brewster (D-Md.), Sen. Harry F. Byrd Jr. (D-Va.), and Rep. William Lloyd Scott (R-Va.), supported their constituents’ complaints.<sup>42</sup>

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Against National (1966-1969), Box 1, Virginians for Dulles records, GMU; Resolution [Virginians for Dulles], n.d., Folder Committee Against National (1966-1969), Box 1, Virginians for Dulles Records, GMU.

Not all correspondence was positive. Some residents wrote to VFD, or to the CAB, that they liked having the airport nearby and did not understand the complaints. One correspondent stated, in response to a solicitation, “I resent receiving such trash in the mail.” July 11, 1967, p. 1, Folder VFD - Subject Files -1967 - pt. 1, Box 4 (pt. 1), Virginians for Dulles Records, GMU.

<sup>38</sup> Testimony of William G. Smith, PCA President, before National Capital Planning Commission, Feb. 28, 1967, p. 2, Folder 95, Box 3, Palisades Citizens' Association records, 1916-2001 (MS 0627), DCHS.

<sup>39</sup> Palisades Citizens' Association News Letter, v. 18, no. 7, April 1967, p.2, Folder 80, Box 2, Palisades Citizens' Association records, 1916-2001 (MS 0627), DCHS.

<sup>40</sup> The Facts of the Airport Question – Arlingtonians for Dulles, April 10, 1967, p. 11, Box 1, Virginians for Dulles records, GMU.

<sup>41</sup> “9000 Residents of Potomac Shores Sign Petition to Close National Airport,” *Washington Post, Times Herald*, April 30, 1967, B1.

<sup>42</sup> “Phasing-Out Plan Backed,” *Baltimore Sun*, Dec. 8, 1966, A17; Sen. Harry F. Byrd to John W. Brewer, Nov. 20, 1967, Folder VFD - Subject Files -1967 - pt. 1, Box 4 (pt. 1), Virginians for Dulles Records, GMU; Rep. William Lloyd Scott to John W. Brewer, Nov. 22, 1967, Folder VFD - Subject Files -1967 - pt. 1, Box 4 (pt. 1), Virginians for Dulles Records, GMU.

(Not surprisingly, members of Congress who flew to Washington from their districts remained fans of National Airport for their own ease of travel even as they expressed concern about airport noise in their own districts.<sup>43</sup>) Complaints about jet noise even came from the White House, where President Johnson more than once had asked the FAA divert flights so the noise would not interfere with his activities.<sup>44</sup> Jet noise had interrupted the Carl Sandburg memorial service at the Lincoln Memorial, and, one reporter described, “when a noted cast of actors performed scenes from ‘Sunrise at Campobello’ in the East room, there were times when their voices—even Charlton Heston’s as F.D.R.—were almost drowned out by thunder from the airport.”<sup>45</sup>

President Johnson ordered a study of airport noise in 1966, calling such noise “a growing source of annoyance and concern to the thousands of citizens who live near many of our large airports.”<sup>46</sup> And in March 1967, Johnson sent all federal agencies a memo instructing administrators to consider aircraft noise where relevant: “It is imperative to the growth of aviation and to the welfare of our people that means be found to contain such noise within levels compatible with the pursuit of other desirable activities and the quiet enjoyment of property.”<sup>47</sup> By late 1967, M. Cecil Mackey, Assistant Secretary of Transportation for Policy Development, told attendees at the American Institute of Aeronautics and Astronautics annual meeting that

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<sup>43</sup> For letters of support for jet service, see Rep. Samuel B. Stratton (NY) to McKee, Nov. 10, 1965; Rep. Edward J. Gurney (Fla.) to McKee Nov. 30, 1965; and Rep. Dante B. Fascell (Fla.) to McKee, Dec. 6, 1965, all in Folder Washington National Airport 1965, Box 160, Administrator’s Subject/Correspondence File, 1959-1982, Office of the Administrator, RG 237, NACP. For complaints about airport noise in their home districts, see House Committee on Interstate and Foreign Commerce, Subcommittee on Transportation and Aeronautics, Hearings, 90<sup>th</sup> Congress, 1<sup>st</sup> and 2<sup>nd</sup> sess. (1967-68).

<sup>44</sup> Robert Burkhardt, “Time, Government Patience Running Out on Noise Issue,” *Airline Management and Marketing*, Feb. 1967, p. 60, Folder VFD-Subject Files-1967-pt. 1, Box 4 (pt. 1), Virginians for Dulles Records, GMU; Robert Sherrill, “The Jet Noise is Getting Awful,” *New York Times*, Jan. 14, 1968, pg. SM24.

<sup>45</sup> Ann Cottrell Free, “Rising Decibels at National,” *Baltimore Sun*, March 7, 1967, A10.

<sup>46</sup> Lyndon B. Johnson, Special Message to the Congress on Transportation, March 2, 1966. Online by Gerhard Peters and John T. Woolley, The American Presidency Project <https://www.presidency.ucsb.edu/node/238076>.

<sup>47</sup> Lyndon B. Johnson, Memorandum on Aircraft Noise and Compatible Land Use in the Vicinity of Airports, March 22, 1967 - Gerhard Peters and John T. Woolley, The American Presidency Project <https://www.presidency.ucsb.edu/node/237823>

unless something changed, “people will just say ‘Sorry, we don’t want airplanes around anymore; we don’t want to travel that way.’”<sup>48</sup>

Pressure mounted to do *something*. In late 1967 and early 1968, the House Committee on Interstate and Foreign Commerce’s Subcommittee on Transportation and Aeronautics held a new set of hearings on aircraft noise.<sup>49</sup> CAN chairman Frank Waldrop testified before the subcommittee about the problem of noise at National Airport and the need to establish standards. Cannily assessing his audience, he suggested that National might be set aside *just* for members of Congress and the executive branch – “make it a Government business airport, put all the other business at Dulles and Friendship.”<sup>50</sup> Congress ultimately passed the Aircraft Noise Abatement Act in 1968, giving the FAA administrator authority to promulgate regulations regarding aircraft to be certificated in the future.<sup>51</sup> But addressing future airplane noise did not solve the problem of current airplane noise, and did nothing to reduce the noise at National Airport.

## **II. Helicopter Service at National Airport**

Shifting some or all flights from National Airport to Dulles International Airport was perhaps a more immediate solution to the problem of Potomac-area noise. However, travel to Dulles via car or taxi or bus was time consuming and thus disfavored by passengers. One possible alternative was helicopter service. This option already existed at some airports

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<sup>48</sup> M. Cecil Mackey, Assistant Secretary of Transportation for Policy Development, speech to the fourth annual meeting of the American Institute of Aeronautics and Astronautics, Quoted in *Clean Air News*, V. 1 No. 41 Oct 31, 1967, p. 14.

<sup>49</sup> House Committee on Interstate and Foreign Commerce, Subcommittee on Transportation and Aeronautics, Hearings, 90<sup>th</sup> Congress, 1<sup>st</sup> and 2<sup>nd</sup> sess. (1967-68).

<sup>50</sup> House Committee on Interstate and Foreign Commerce, Subcommittee on Transportation and Aeronautics, Hearings, 90<sup>th</sup> Congress, 1<sup>st</sup> and 2<sup>nd</sup> sess. (1967-68), 186 (Waldrop testimony).

<sup>51</sup> Aircraft Noise Abatement Act of 1968, P.L. 90-411, 82 Stat. 395 (1968).

elsewhere in the country, where companies offered helicopters as a faster alternative to ground travel.<sup>52</sup>

In fact, the CAB was already considering helicopter service to National Airport. In August 1966, on the prodding of helicopter companies and airlines, the CAB had authorized an investigation of possible helicopter service among Washington-area airports, downtown Washington, and downtown Baltimore.<sup>53</sup> Competing helicopter companies and airlines sought to offer such service in order to quickly transport passengers to and among Dulles International Airport, National Airport and Baltimore's Friendship Airport. One applicant estimated travel times at "4 minutes from downtown to National, 13 minutes from National to Dulles, and 14 minutes from Dulles to downtown Washington."<sup>54</sup>

Noise had never considered in earlier CAB route determinations, and the CAB's helicopter investigation began in much the same way. Instead, the board set out to determine whether area helicopter service would promote the public convenience and necessity (as statutory language required), and, if so, which of the competing applicants should provide that service. In making this broad determination, the applicants and board officials focused on the economic feasibility of unsubsidized service in the area.<sup>55</sup>

However, National Airport neighbors soon turned the CAB's helicopter investigation into a forum for debating the board's responsibility for airport noise. They were skeptical that

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<sup>52</sup> Chicago Helicopter Airways, Inc., transferred passengers among Midway, O'Hare, Meigs Field, Gary (Indiana), and Winnetka (as of 1961); helicopters transferred passengers among LGA, Idlewild, and Newark, and White Plains, Stamford, and Teterboro Airports. Peter G. Nordlie, *Airport Transportation: A Study of Transportation Means Between Airports and the Metropolitan Areas They Service* (Human Sciences Research for Bureau of Research and Development, FAA, Feb. 1961), 76 (Chicago), 106 (NY).

<sup>53</sup> CAB, Order E-24133, Aug. 29, 1966, Docket 17765 v. 1, Box 12, Selected Docket Files 1938-84, Office of the Secretary, Docket Section, Records of the Civil Aeronautics Board, Record Group 197 (hereafter RG 197), National Archives and Records Administration, College Park, MD (hereafter NACP).

<sup>54</sup> "Airlines Announce Plans for Helicopter Service," *Washington Post, Times Herald*, Aug. 17, 1967, A8.

<sup>55</sup> Report of Prehearing Conference, Feb 6, 1967; Docket 17765 v. 1, RG 197, NACP.

helicopters would solve the problem of noise from National Airport by encouraging travelers to choose Dulles instead. It seemed much more likely that helicopters would only add to the ever-increasing din. (Here they only had to look to New Yorkers angry about the disruption caused by helicopter service via a heliport atop the Pan Am building in midtown Manhattan.<sup>56</sup>)

The CAB's inquiry into the viability of helicopter service would insert the board squarely into the noise question for the first time. The CAB, like the FAA, had long seen its job as facilitating more and easier air transportation for travelers and shippers; it had never formally considered the practical consequences of all of these flights for the people on the ground. Environmental historians have reminded us of the government's role in causing environmental harm, not just when government actors pollute, but also when government actors authorize polluting activities without considering the consequences.<sup>57</sup> This rings particularly true in the air travel context. A 1966 government report had emphasized that airplane noise was as much an environmental problem as air pollution and water pollution—but “the Federal Government may be more directly accountable for aircraft noise” given its “responsibility for the regulation of most aspects of air carrier operations including the certification of aircraft and establishment of,

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<sup>56</sup> “City Is Reconsidering Heliport After Complaints About Noise,” *New York Times*, March 3, 1966, 33; Murray Schumach, “Foes and Friends of Heliport Picket on 42d Street: Two Points of View Find Expression on Picket Line,” *New York Times*, May 4, 1966, 49; Thomas P. Ronan, “Night Copter Flights Halt At Pan Am to Cut Noise: Pan Am Heliport Closing at Night,” *New York Times*, May 8, 1966, 1; Sydney H. Schanberg, “After Year and a Half, Copter Critics Are Quieter: After a Year and a Half, Helicopter Critics Are Quieter—But the Copters Serving Airports Aren't,” *New York Times*, July 23, 1967, 1.

<sup>57</sup> Richard N. L. Andrews, *Managing the Environment, Managing Ourselves: A History of American Environmental Policy*, 2<sup>nd</sup> ed. (New Haven, CT: Yale University Press, 2006), xiv. For general histories of the environmental movement, see also Richard J. Lazarus, *The Making of Environmental Law* (University of Chicago Press, 2004); Robert Gottlieb, *Forcing the Spring: the Transformation of the American Environmental Movement*, rev. ed. (Washington DC: Island Press, 2005); Thomas Raymond Wellock, *Preserving the Nation: The Conservation and Environmental Movements, 1870-2000* (Wheeling, IL: Harlan Davidson Inc., 2007); Benjamin Kline, *First Along the River: A Brief History of the U.S. Environmental Movement*, 3<sup>rd</sup> ed. (Lanham, MD: Rowman & Littlefield Publishers, Inc., 2007); Karl Boyd Brooks, *Before Earth Day: The Origins of American Environmental Law, 1945-1970* (Lawrence: University Press of Kansas, 2009).



and control over, air traffic rules, regulations, and flight patterns.”<sup>58</sup> The FAA handled most of these operational functions—and heard most of the complaints—but the CAB’s exclusive authority to approve airline routes in the first place meant that each route permit it had granted in the region contributed to the noise problem neighbors now protested.

In late June 1967, after the helicopter proceedings were well underway, the PCA, the CAN, and a handful of concerned citizens (soon formally known as the “Concerned Citizens”) asked the CAB for permission to participate in the CAB’s helicopter investigation so they could raise the question of helicopter noise and, more broadly, ask the CAB to interpret the “public convenience and necessity” and “public interest” standards to include people on the ground—like them—within the “public” whose interests were being considered.<sup>59</sup>

The PCA and CAN petitioned to intervene as groups of residents tormented by noise; the PCA noted they represented a neighborhood “assaulted daily by the noise and air pollution and health and safety hazards caused by the approximately 660 flights per day in and out of National Airport—half of which fly over this neighborhood in any given day.”<sup>60</sup> The Concerned Citizens similarly discussed the injury to their property, and objected that helicopter service “is likely to result in increased aircraft traffic along the Potomac in the immediate vicinity of petitioners’ homes, thereby intensifying the safety hazard to life and limb, the injury to health, the interference with enjoyment of recreational, scenic and other natural resources, the disruption of

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<sup>58</sup> Office of Science and Technology, Executive Office of the President, *Alleviation of Jet Aircraft Noise Near Airports: A Report of the Jet Aircraft Noise Panel* (GPO: March 1966), 3.

<sup>59</sup> The Concerned Citizens comprised Livia and David Bardin (the latter a lawyer at the Federal Power Commission who was active in the PCA), PCA member Carl Visek, Jessie and Archer Bush, and Anne H. Labovitz and David E. Labovitz (the latter a member of the Del. N.W. Council of Citizens Association). See Palisades Citizens’ Association News Letter, v. 18, no. 1, p. 3-4, Oct. 1966, Folder 80, Box 2, Palisades Citizens’ Association records, 1916-2001 (MS 0627), DCHS.

<sup>60</sup> Petition of Palisades Citizens Association for Leave to Intervene under Rule 15 in the Washington-Baltimore Helicopter Case and All Related Certificate Proceedings, June 24, 1967, p. 1, Docket 17765 v. 1, RG 197, NACP.

the normal amenities of the human condition, and the diminution of property values.”<sup>61</sup> Even more, “Sonic pollution violates our fundamental rights.”<sup>62</sup>

Given the CAB’s procedures for intervention, residents’ demand for intervention required the board to consider the meat of their claims. Scholars have described the significant expansion of administrative participation and standing rights in the 1960s and 1970s as crucial to breaking through agencies’ traditional and insular decisionmaking processes, but the CAB had always had fairly generous participation rules.<sup>63</sup> Under Rule 14, “Any person” could appear at a permit hearing, present the examiner with “any evidence which is relevant to the issues” and, with the examiner’s permission, cross-examine witnesses.<sup>64</sup> Neighbors could thus easily present their claims to the hearing examiner in the initial phase of the proceedings. The D.C. Circuit had recently held that although these intervenors were “not parties in the traditional sense,” in this way “their interests and representations can be brought to the attention of the Examiner and, through the Examiner, to the Board.”<sup>65</sup>

However, local residents wanted to be recognized as formal intervenors who (under the CAB’s Rule 15) had the same status and participation rights as the permit applicants. They could participate in the initial hearing, but also file briefs and exceptions after the hearing, and participate in oral argument before the CAB.<sup>66</sup> One observer noted the “significant advantages”

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<sup>61</sup> Joint and Several Petition to Intervene under Rule 15 by David J. Bardin et al, received June 26, 1967, p. 1, Docket 17765 v. 1, RG 197, NACP.

<sup>62</sup> Joint and Several Petition to Intervene under Rule 15 by David J. Bardin et al, received June 26, 1967, p. 1, Docket 17765 v. 1, RG 197, NACP.

<sup>63</sup> See i.e. Elizabeth Magill, “Standing for the Public: A Lost History,” *Virginia Law Review* 95 (2009): 1131-1200; Sabin, “Environmental Law and the End of the New Deal Order”; Sabin, *Public Citizens*.

<sup>64</sup> 27 Fed. Reg. 12548 (1962) s. 302.14(b). 14 CFR 359 (1967) S. 302.15(b).

<sup>65</sup> *San Antonio v. Civil Aeronautics Board*, 374 F.2d 326, 332 (D.C. Cir. February 7, 1967).

<sup>66</sup> Response of the Civil Aeronautics Board to Sen. Kennedy, April 7, 1969, reprinted in Responses to Questionnaire on Citizen Involvement and Responsive Agency Decision-Making, Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary, Committee Print, 91<sup>st</sup> Congress, 1<sup>st</sup> Session (Sept. 9, 1969), 5.

held by Rule 15 formal intervenors, who not only could participate after the initial hearing but also were not dependent on the examiner's good graces.<sup>67</sup>

Did residents' noise concerns mean they should be recognized as formal parties? Some factors the CAB considered when granting Rule 15 status included "the nature and extent of the property, financial or other interest of the petitioner"; "the effect of the order ... on petitioner's interest"; "the availability of other means whereby the petitioner's interest may be protected"; "the extent to which petitioner's interest will be represented by the existing parties"; and "the extent to which petitioner's participation may reasonably be expected to assist in the development of a sound record[.]"<sup>68</sup> While the CAB was skeptical, the PCA, CAN, and the Concerned Citizens all argued that they did, in fact, have a distinct interest that was relevant to the investigation and that no one else was protecting.

They stopped short of claiming expertise, however. Residents did not bring to the CAB their own studies of helicopter noise, nor did they have the capacity to commission such studies. Instead, they argued, their job was to push the Board itself to undertake "a comprehensive inquiry into all facets of the public interest, including such matters as sonic pollution, disruption of communication and education, impairment of cultural activities, detrimental effects on historical and scenic sites, and diminution of scenic and property values."<sup>69</sup> Thus, their intervention was aimed at raising the *question* of the effects of helicopter noise and disruption, not to decisively *answer* it.

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<sup>67</sup> Comment, "Public Participation in Federal Administrative Proceedings," *University of Pennsylvania Law Review* 120 (1972): 702-845, 780?

<sup>68</sup> 27 Fed. Reg. 12548 (1962) s. 302.15(a)(2)-(6); 14 CFR 359 (1967) S. 302.15(b).

<sup>69</sup> Exceptions of Concerned Citizens to Report of Further Prehearing Conference, June 30, 1967, p. 2, Docket 17765 v. 2, RG 197, NACP.

The residents may not have had anything more than a common sense understanding of how loud helicopters were, but they did have the legal expertise to draw on a new line of cases in federal administrative law that backed them up. In recent challenges to administrative actions at the Federal Power Commission (FPC) and Federal Communications Commission (FCC), federal judges had ordered administrators to let in outside groups and to rethink who “the public” was and what their “interests” were.<sup>70</sup> These cases came out of mid-century and New Left critiques of power and expertise, new models of organization and protest, and more capacious definitions of the “public interest” that had turned a generation of liberals against the same institutions the previous generation had built and valorized, and toward the courts that that generation had derided.<sup>71</sup>

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<sup>70</sup> Butzel, “Intervention and Class Actions Before the Agencies and the Courts,” 139. On *United Church of Christ v. FCC*, see Kay Mills, *Changing Channels: The Civil Rights Case That Transformed Television* (Jackson, MS: University Press of Mississippi, 2004); Steven D. Classen, *Watching Jim Crow: The Struggles Over Mississippi TV, 1955-1969* (Durham, NC: Duke University Press, 2004); Brian Ward, *Radio and the Struggle for Civil Rights in the South* (Gainesville: University Press of Florida, 2004). On *Scenic Hudson v. FPC*, see Robert Lifset, *Power on the Hudson: Storm King Mountain and the Emergence of Modern American Environmentalism* (Pittsburgh, PA: University of Pittsburgh Press, 2014). On the NLRB and the FPC, see Sophia Z. Lee, *The Workplace Constitution: From the New Deal to the New Right* (Cambridge: Cambridge University Press, 2014). On the Social Security Administration, see Karen M. Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935-1972* (New York: Cambridge University Press, 2016).

<sup>71</sup> See Norman J. Landau and Paul D. Rheingold, *The Environmental Law Handbook* (A Friends of the Earth/Ballantine Book, 1971); Michael P. Smith, “Alienation and Bureaucracy: The Role of Participatory Administration,” *Public Administration Review* 31 (1971): 658-664; Albert K. Butzel, “Intervention and Class Actions Before the Agencies and the Courts,” *Administrative Law Review* 25 (1973): 135; Richard B. Stewart, “The Reformation of American Administrative Law,” *Harvard Law Review* 88 (1975): 1667-813; David Vogel, “The Public-Interest Movement and the American Reform Tradition,” *Political Science Quarterly* 95 (1980-1981): 607-627; Gottlieb, *Forcing the Spring*, ch. 3; Andrews, *Managing the Environment*, 218-21, 241-42; R. Shep Melnick, *Regulation and the Courts: The Case of the Clean Air Act* (Washington, DC: Brookings Institution, 1983); David Vogel, “The ‘New’ Social Regulation,” in *Regulation in Perspective*, ed. Thomas K. McCraw, 155-86; Michael McCann, *Taking Reform Seriously: Perspectives on Public Interest Liberalism* (Ithaca: Cornell University Press, 1986); Sidney M. Milkis, “Remaking Government Institutions in the 1970s: Participatory Democracy and the Triumph of Administrative Politics,” *Journal of Policy History* 10 (1998): 51-74; Reuel E. Schiller, “Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945-1970,” *Vanderbilt Law Review* 53 (2000): 1389-1453; Reuel E. Schiller, “Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s,” *Administrative Law Review* 53 (2001): 1139-88; Sidney M. Milkis, “The Federal Trade Commission and Consumer Protection: Regulatory Change and Administrative Pragmatism,” *Antitrust Law Journal* 72 (2005): 911-41; Elizabeth Magill, “Standing for the Public: A Lost History,” *Virginia Law Review* 95 (2009): 1131-1200; Grisinger, *The Unwieldy American State: Administrative Politics Since the New Deal* (Cambridge: Cambridge university Press, 2012); Paul Sabin, “Environmental Law and the End of the New Deal Order,” *Law and*

One case where progressives had turned to the courts to challenge administrative action was particularly on point for Palisades residents. In *Scenic Hudson Preservation Conference v. Federal Power Commission* (1965), local residents had challenged ConEd’s proposal to build a power plant at New York’s Storm King Mountain.<sup>72</sup> The FPC granted the permit, following its general pro-development approach to regulating, but the permit was challenged by groups demanding that the proceedings be reopened for the FPC to gather and consider evidence of environmental consequences alongside the economic and technological ones.<sup>73</sup>

The Second Circuit agreed, finding that the FPC needed to consider “the public interest in the aesthetic, conservational, and recreational aspects of power development” and that people interested in those things could challenge the commission’s findings.<sup>74</sup> The court’s construction of the public interest was broad: “the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.”<sup>75</sup> The court declared (in language soon quoted by the Concerned Citizens<sup>76</sup>) that the FPC “must see to it that the record is complete” and “has an affirmative duty to inquire into and consider all relevant facts.”<sup>77</sup> That meant that the FPC—as part of its “specific planning responsibility”—needed to collect and consider information about everything, including the consequences of not building the dam.<sup>78</sup> A few years later (and just a

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*History Review* 33 (2015): 965-1003; Paul Sabin, *Public Citizens: The Attack on Big Government and the Remaking of American Liberalism* (New York: W.W. Norton & Company, 2021).

<sup>72</sup> Robert D. Lifset, *Power on the Hudson: Storm King Mountain and the Emergence of Modern American Environmentalism* (University of Pittsburgh Press, 2014).

<sup>73</sup> Lifset, p. 51-52

<sup>74</sup> *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 616 (2d Cir. 1965).

<sup>75</sup> *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 620 (2d Cir. 1965).

<sup>76</sup> Exceptions of Concerned Citizens to Report of Further Prehearing Conference, June 30, 1967, p. 2, 4, Docket 17765 v. 2, Box 12, RG 197, NACP.

<sup>77</sup> *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 620 (2d Cir. 1965).

<sup>78</sup> *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 620 (2d Cir. 1965).

few weeks before the residents made similar claims to the CAB), the Supreme Court in *Udall v. Federal Power Commission* similarly questioned an FPC license for a hydroelectric power project because the FPC had failed to consider the pros and cons of not building a dam on the Snake River.<sup>79</sup>

Drawing on these cases, residents argued to the CAB that the board was similarly obligated to reconsider its own pro-development approach to public interest calculations: “Like the Federal Power Act, the Federal Aviation Act cannot be assumed to command the immediate certification of as much air service as possible.”<sup>80</sup> (Concerned Citizen David Bardin, named “The Outstanding Younger Federal Lawyer 1966” by the Federal Bar Association for his work at the FPC, was presumably quite familiar with these cases.<sup>81</sup>) Thus, they argued, the CAB should require applicants for helicopter permits to “introduce evidence on the environmental and other public consequences of their proposals and a comprehensive comparison of their proposals with alternative modes of transportation.”<sup>82</sup> Such extensive and specialized information was the responsibility of the CAB to consider, and this was an easy enough way to get it. Such a requirement would not unduly burden the applicants, which were already required to send the board a huge amount of information. Washington-Baltimore Helicopter Airways, Inc., for example, had provided the CAB with more than 100 exhibits, including organization charts and balance sheet, proposed heliport sites, information about travel times and sample schedules,

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<sup>79</sup> *Udall v. Federal Power Commission*, 387 U.S. 428 (1967). See also Comment, "Federal Regulation of Air Transportation and the Environmental Impact Problem," *University of Chicago Law Review* 35, no. 2 (Winter 1968): 317-341, 322-25; Karl Boyd Brooks, *Public Power, Private Dams: The Hells Canyon High Dam Controversy* (Seattle: University of Washington Press, 2006), 219-25

<sup>80</sup> Exceptions of Concerned Citizens to Report of Further Prehearing Conference, June 30, 1967, p. 8, Docket 17765 v. 2, RG 197, NACP.

<sup>81</sup> Palisades Citizens' Association News Letter, v. 18, no. 1, Oct 1966, p.3, Folder 80, Box 2, Palisades Citizens' Association records, 1916-2001 (MS 0627), DCHSR.

<sup>82</sup> Exceptions of Concerned Citizens to Report of Further Prehearing Conference, June 30, 1967, p. 3, Docket 17765 v. 2, RG 197, NACP.

forecasts of operations, maintenance, and equipment expenses, anticipated passenger and mail demand, passenger trends at area airports, and information about the “helicopter penetration experience” at airports in Los Angeles, San Francisco, and New York City.<sup>83</sup> Information about estimated noise pollution could easily be included.

The helicopter companies objected to the residents’ requests, arguing that the helicopter investigation was already underway, and that noise concerns were irrelevant.<sup>84</sup> Helicopter interests also warned of the “administrative chaos” that would might result from hearing from the “literally hundreds of thousands of property owners who conceivably could be under the flight paths of flights serving the Washington/Baltimore area.”<sup>85</sup> Such matters, they argued, were really for the FAA, which was supposed to manage “the competing interests of aircraft owners and users of air transportation, on the one hand, and the interests of property owners on the ground, on the other hand” after service was up and running.<sup>86</sup>

The hearing examiner agreed, on the grounds that giving the residents full Rule 15 status “will unduly broaden the issues and delay the proceedings[.]” Rule 14 intervention, where the residents could raise their arguments before the examiner but not the board, would suffice.<sup>87</sup> The examiner was also dismissive of residents’ noise concerns, declaring in passing (and without citing any evidence) that the helicopter service under discussion “will constitute a negligible

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<sup>83</sup> Washington-Baltimore Helicopter Airways, Inc., Index of Exhibits, Docket 17765 v. 9, Box 13, RG 197, NACP

<sup>84</sup> Answer of Washington-Baltimore Helicopter Airways, Inc. to petition of the Committee Against National for Leave to Intervene, July 11, 1967, p. 2, Docket 17765 v. 2, RG 197, NACP; Answer of National Capital Airlines, Inc. in opposition to petitions of the Palisades Citizens Association, David J. Bardin, et al, and the Committee against National for leave to intervene, July 12, 1967, p. 1, Docket 17765 v. 2, RG 197, NACP.

<sup>85</sup> Answer of National Capital Airlines, Inc. in opposition to petitions of the Palisades Citizens Association, David J. Bardin, et al, and the Committee against National for leave to intervene, July 12, 1967, p. 4, Docket 17765 v. 2, RG 197, NACP.

<sup>86</sup> Answer of National Capital Airlines, Inc. in opposition to petitions of the Palisades Citizens Association, David J. Bardin, et al, and the Committee against National for leave to intervene, July 12, 1967, p. 2, Docket 17765 v. 2, RG 197, NACP.

<sup>87</sup> CAB Order E-25435 (July 19, 1967), 47 CAB 1033 (1967).

addition to the principal sources of noise[.]”<sup>88</sup> The residents’ broader complaint about pre-existing noise from National Airport (which they had not actually raised) was “beyond the scope and reach of this proceeding to correct” and, the examiner noted, was being considered in a concurrent CAB investigation.<sup>89</sup>

However, the investigation referenced—the Washington-Baltimore Airport Investigation—was focused not on the problem of noise for those near National Airport, but rather on the problem of congestion for passengers flying through it. The number of passengers using National Airport kept increasing, while, as one reporter described, the very new and very expensive Dulles Airport “stands in a meadow like a WPA boondoggle.”<sup>90</sup> A 1966 Senate Committee investigation described Dulles Airport as “a ghost town” while at National Airport, “swollen crowds have jammed the facilities of the terminal, crowding gates, hallways, and baggage counters. Customers have been stacked up nearly 10 deep at ticket counters during peak periods[.]”<sup>91</sup> In June 1967 the CAB authorized an investigation into this problem, to consider ordering some or all of the airlines currently flying into National Airport to start flying into Dulles and/or Friendship airports to more evenly distribute airport traffic.<sup>92</sup>

Although the investigation was formally about congestion, the now organized National Airport neighbors thought this might be another opportunity to address the noise question. Virginians for Dulles noted that this investigation was “THE BIGGEST OPPORTUNITY WE HAVE HAD YET!”<sup>93</sup> Although the CAB was focused on passenger inconvenience, “If the CAB

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<sup>88</sup> CAB Order E-25435 (July 19, 1967), 47 CAB 1033 (1967).

<sup>89</sup> CAB Order E-25435 (July 19, 1967), 47 CAB 1033 (1967).

<sup>90</sup> Ann Cottrell Free, “Rising Decibels at National,” *Baltimore Sun*, March 7, 1967, A10.

<sup>91</sup> Senate Committee on Commerce, “Study of Ground Transportation to Dulles Airport,” S. Rept. 1376, 89<sup>th</sup> Congress 2<sup>nd</sup> sess. (1966), 1-3.

<sup>92</sup> Washington-Baltimore Airport Investigation, Order E-25319, June 20, 1967, 32 Fed. Reg. 9115 (1967).

<sup>93</sup> Virginians for Dulles, July 3, 1967, p. 1 (emphasis in original), Folder VFD - Subject Files -1967 - pt. 2, Box 4 (pt. 2), Virginians for Dulles Records, GMU.



should rule that an appreciable number of flights must be moved out of National, WE WILL BE WELL ON THE WAY TOWARD THE CURE OF OUR AIR-TRAFFIC HEADACHES.”<sup>94</sup> The PCA president had the opportunity to testify before the Board about the enormous disruption in residents’ lives:

Jets have destroyed the enjoyment of the Tidal Basin, the Lincoln and Jefferson Memorials, the Washington Monument, the C & O Canal, the reflecting pool, Arlington National Cemetery [sic] and the other historic sites that tourists come to see.

With very few exceptions, every commercial jet from National, over 600 per day, either takes off or lands on the east-west runway over our homes. We are repeatedly forced to wait for the air carriers to do their business before we can continue ours.

We travel – Palisades residents travel by air as much as any in the area.

We talk – Our conversations are interrupted by jets.

We sleep – Jets wake us.

We look – Our television programs are disrupted by jets.

We pay – While our taxes go up, jet noise reduces property values.

We call – Our children at play, or in danger, cannot hear us.

We teach – Our principal reports jets steal 25 classroom minutes each day.

We listen – The Watergate concerts, many of which we used to enjoy, have been drowned out. The Sylvan Theatre is worth attending only to watch, but to hear is impossible with jets thundering overhead.

The situation is intolerable. Moreover, jets disturb hundreds of thousands of residents daily compared with the eight million passengers served at National all of this year.<sup>95</sup>

Sen. William Spong (D-Va.) and Rep. William L. Scott (R-Va.) similarly appeared in the matter to support calls to move flights away from National Airport. (Demonstrating the different approaches here, Scott called on the CAB to move quickly in the helicopter investigation since “helicopter service seems to be our best immediate answer.”<sup>96</sup>) The existence of this concurrent congestion proceeding, in which the CAB largely ignored the question of jet noise (and which

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<sup>94</sup> Virginians for Dulles, July 3, 1967, p. 1 (emphasis in original), Folder VFD-Subject Files-1967-pt. 2, Box 4 (pt. 2), Virginians for Dulles Records, GMU.

<sup>95</sup> Testimony of William G. Smith, PCA President, before CAB, Docket 18712, July 17, 1967, pp. 1-2, Folder 95, Box 3, Palisades Citizens' Association records, 1916-2001 (MS 0627), DCHS.

<sup>96</sup> Statement of Sen. William B. Spong Jr., Docket 18712, July 17, 1967, p. 2, Folder VFD-Subject Files-1967-pt. 2, Box 4 (pt. 2), Virginians for Dulles Records, GMU; Statement of Rep. William L. Scott, Prehearing Conference, CAB, Aug. 3, 1967, p. 6, Folder VFD-Subject Files-1967-pt. 2, Box 4 (pt. 2), Virginians for Dulles Records, GMU.

later petered out without any action), nonetheless convinced the examiner in the helicopter proceeding that noise was being considered elsewhere, so need not be considered here.

The residents quickly petitioned the CAB to revisit the examiner's ruling. They pointed out that they were worried both about existing noise from National Airport flights and new noise from helicopter traffic, and they should be allowed to address the latter before the board. The Concerned Citizens complained that "The orders cited above brush aside our concern and our recommendations as if we were cranks. We are not. We are concerned citizens who conscientiously believe that changing technology, including helicopter aviation, has severe impacts on our environment; and that these impacts impose heavy responsibilities on federal agencies, such as this Board, entrusted to exercise delegated authority."<sup>97</sup> Fighting noise after the fact was much harder than trying to stop it before it began, especially since the CAB's permitting process meant that the initial permit process was the only time such concerns could be raised before the board. This was, of course, the larger issue—by refusing to consider noise pollution before authorizing service, the CAB created a problem that others had to solve.

The residents were particularly annoyed by the examiner's blithe suggestion that helicopter noise would be "negligible" in the grand scheme of things.<sup>98</sup> As the PCA emphasized, "It is common knowledge that helicopters are noisy."<sup>99</sup> The Concerned Citizens suggested that "Either the Examiner has prejudged the service aspect of the case to conclude that only infrequent helicopter service will ever prove feasible or else he is unaware of the noisiness of helicopters. We had presumed that everyone knew how noisy and obtrusive helicopter service

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<sup>97</sup> Petition by Concerned Citizens for Board Review of Staff Actions, July 28, 1967, p. 1, Docket 17765 v. 1A, Box 16, RG 197, NACP.

<sup>98</sup> CAB Order E-25435 (July 19, 1967), 47 CAB 1033 (1967).

<sup>99</sup> Petition for Board Review of Staff Action, PCA, July 31, 1967, p. 6, Docket 17765 v. 2, RG 197, NACP.

really is.”<sup>100</sup> Since the Concerned Citizens were already familiar with the noise of loud military helicopters flying over their houses, they suggested that the Board “adopt the tested common law procedure of ‘taking a view’ and arrange to see and hear for itself the intrusions of helicopters.”<sup>101</sup>

More broadly, the CAN argued that it was time for the CAB to grapple with the role of environmental concerns as part of the “public convenience and necessity” standard it was obligated to consider.<sup>102</sup> On their side was the new Department of Transportation (DOT), which argued that the impact of helicopter service on the environment “is a relevant and important factor to be weighed” in this decision.<sup>103</sup> The DOT (within which the FAA was now placed) had some statutory authority of its own to protect the environment and to engage in research regarding transportation noise.<sup>104</sup> However, the DOT argued that its own environmental responsibilities did not mean the CAB should not also consider environmental concerns as part of its own decisionmaking. And in this case, local residents could help the board do so. Residents were well positioned to offer a broader understanding of the “public convenience and necessity” standard that “embraces the entire public”—“those who assert they would be inconvenienced or adversely affected as well as those who alleged that they will be benefited by the proposed new

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<sup>100</sup> Petition by Concerned Citizens for Board Review of Staff Actions, July 28, 1967, p. 4, Docket 17765 v. 2, RG 197, NACP.

<sup>101</sup> Petition by Concerned Citizens for Board Review of Staff Actions, July 28, 1967, p. 4, Docket 17765 v. 2, Box 12, RG 197, NACP.

<sup>102</sup> Petition by Concerned Citizens for Board Review of Staff Actions, July 28, 1967, p. 7, Docket 17765 v. 1A, Box 16, RG 197, NACP.

<sup>103</sup> Answer of the Department of Transportation to Petitions for Review of Staff Action filed by the Committee Against National Concerned Citizens the Palisades Citizens Association, Aug. 10, 1967, p. 2, Docket 17765 v. 2, Box 12, RG 197, NACP.

<sup>104</sup> Department of Transportation Act, P.L. 89-670, 80 Stat. 931 (1966). Section s. 2(b)(2) of the statute stated that it was “the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites.” Section 4(a) required the Secretary of Transportation to “promote and undertake research and development relating to transportation, including noise abatement, with particular attention to aircraft noise[.]”

service.”<sup>105</sup> (Frank C. Waldrop described his “stunned and total admiration” for the DOT’s stance.<sup>106</sup>)

Local residents’ environmental arguments forced the CAB to grapple internally with whether the new judicial approach meant the board had to change its ways. The examiner defended his own position to the board, pointing out that the CAB had never before considered “the possible effects on person and property on the ground that may result from operations under a resulting license.”<sup>107</sup> Introducing this element, he warned, “could develop into an inordinately time-consuming expedition even in a case with a relatively confined area such as this.”<sup>108</sup> The Chief Examiner was similarly concerned that broadening intervention here would create a dangerous precedent that would slow down CAB operations. Rule 14 should suffice, he suggested, and it might be worth pushing the issue. “If such latitude does not meet the test of due process in procedure, perhaps this is an appropriate case to test it. The time consumed in such a test, if we are successful, would be repaid times over, in our judgment, by greater use of this rule than that of formal party status under rule 15.”<sup>109</sup> (The Second Circuit in *Scenic Hudson* had

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<sup>105</sup> Answer of the Department of Transportation to Petitions for Review of Staff Action filed by the Committee Against National Concerned Citizens the Palisades Citizens Association, Aug. 10, 1967, p. 2, Docket 17765 v. 2, Box 12, RG 197, NACP.

<sup>106</sup> Frank Waldrop, Letter to the editor, Oct. 13, 1967, Washington Post, Times Herald, A24.

<sup>107</sup> Hearing examiner William J. Madden to the Board, Memorandum, Aug. 30, 1967, p. 1, Folder “Palisades Citizens Association, Inc., et al., v. Civil Aeronautics Board, C.A.D.C. No. 21,422 5. Misc. Research, Board Orders,” Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.

<sup>108</sup> Hearing examiner William J. Madden to the Board, Memorandum, Aug. 30, 1967, p. 1, Folder “Palisades Citizens Association, Inc., et al., v. Civil Aeronautics Board, C.A.D.C. No. 21,422 5. Misc. Research, Board Orders,” Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.

<sup>109</sup> Note from Chief Examiner, n.d., p. 2, attached to Madden to the Board, Memorandum, Aug. 30, 1967, Folder “Palisades Citizens Association, Inc., et al., v. Civil Aeronautics Board, C.A.D.C. No. 21,422 5. Misc. Research, Board Orders,” Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.

dismissed this concern as a straw man: “Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken.”<sup>110</sup>)

The CAB’s Assistant General Counsel, however, was not confident that the CAB could continue operating as it always had. In a memo to the Associate General Counsel, he described *Scenic Hudson, United Church of Christ, and Udall v. Federal Power Commission* as demonstrating “a revolutionary new judicial attitude. To be blunt, some judges no longer trust the agencies’ willingness or ability to represent the entire public interest.”<sup>111</sup> Instead, judges had “broadened the agencies’ reading of their statutory goals by requiring them to accept environmental pollution abatement as one ingredient of the public convenience and necessity.”<sup>112</sup>

Why were these cases coming out this way?

First, they were all decided by judges who live in urban areas and who have recently become sophisticated about urban pollution. Like everyone else, they are now acutely aware of pollution. They breathe it, see it, hear it, smell it—and read about it in their newspapers every day. And they know that the most obnoxious forms of pollution are a constant by-product of the industries regulated by the administrative agencies.<sup>113</sup>

Various federal agencies had long considered environmental concerns beyond the scope of their authority;

The judges have reacted, I believe, by telling the agencies to reconsider their scale of values. The judges do not say what weight is to be given to beauty or health; but they

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<sup>110</sup> *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 617 (2d Cir. 1965).

<sup>111</sup> Richard Littell, Assistant General Counsel to Associate General Counsel, Litigation and legislation, Memorandum, Sept. 15, 1967, p. 1, Folder “Palisades Citizens Association, Inc., et al., v. Civil Aeronautics Board, C.A.D.C. No. 21,422 5. Misc. Research, Board Orders,” Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.

<sup>112</sup> Richard Littell, Assistant General Counsel to Associate General Counsel, Litigation and Legislation, Memorandum, Sept. 15 1967, pp. 4, 3, Folder “Palisades Citizens Association, Inc., et al., v. Civil Aeronautics Board, C.A.D.C. No. 21,422 5. Misc. Research, Board Orders,” Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.

<sup>113</sup> Richard Littell, Assistant General Counsel to Associate General Counsel, Litigation and Legislation, Memorandum, Sept. 15, 1967, p. 5-6, Folder “Palisades Citizens Association, Inc., et al., v. Civil Aeronautics Board, C.A.D.C. No. 21,422 5. Misc. Research, Board Orders,” Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.

insist that those intangible interests be considered in the future. Whether or not we agree with the judges, I think that their new doctrine is here to stay.<sup>114</sup>

The CAB's Office of the General Counsel similarly advised the Board that, given the recent opinions where courts had taken agencies to task for ignoring environmental and civil rights concerns, "This office doubts that it could successfully defend a petition for judicial review of a denial of intervention" to these residents.<sup>115</sup> The D.C. Circuit had similarly rebuked the Federal Communications Commission in *Office of Communication of the United Church of Christ v. Federal Communications Commission* for excluding listeners from administrative proceedings, even though listeners had "an obvious and acute concern" in the broadcast station's operations.<sup>116</sup> Here, local property owners arguably had a similarly obvious concern. Nor should the CAB be swayed by the threat that the CAB might then have to hear from every single resident under a flightpath, since there were ways to prevent that. Instead, "[t]he problem here is that there are no intervenors representing the interests alleged by the petitioners."<sup>117</sup> And the DOT's participation was probably insufficient to represent them, given that the court in *United Church of Christ* "rejected contentions that the interests of the persons denied intervention could be championed by a government representative."<sup>118</sup>

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<sup>114</sup> Richard Littell, Assistant General Counsel to Associate General Counsel, Litigation and Legislation, Memorandum, Sept. 15, 1967, p. 5-6, Folder "Palisades Citizens Association, Inc., et al., v. Civil Aeronautics Board, C.A.D.C. No. 21,422 5. Misc. Research, Board Orders," Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.

<sup>115</sup> General Counsel to Board, n.d., p. 1, attached to Madden to the Board, Memorandum, Aug. 30, 1967, Folder "Palisades Citizens Association, Inc., et al., v. Civil Aeronautics Board, C.A.D.C. No. 21,422 5. Misc. Research, Board Orders," Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.

<sup>116</sup> *Office of Communication of the United Church of Christ v. Federal Communications Commission*, 359 F.2d 994, 1002 (D.C. Cir. 1966).

<sup>117</sup> General Counsel to Board, n.d., p. 2, attached to Madden to the Board, Memorandum, Aug. 30, 1967, Folder "Palisades Citizens Association, Inc., et al., v. Civil Aeronautics Board, C.A.D.C. No. 21,422 5. Misc. Research, Board Orders," Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.

<sup>118</sup> General Counsel to Board, n.d., p. 2 fn. 4, attached to Madden to the Board, Memorandum, Aug. 30, 1967, Folder "Palisades Citizens Association, Inc., et al., v. Civil Aeronautics Board, C.A.D.C. No. 21,422 5. Misc. Research, Board Orders," Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.

The General Counsel also suggested that the examiner's factual conclusions were mostly wrong on their own terms:

Even if this case cannot correct existing conditions, petitioners have a legitimate interest in preventing conditions from becoming worse; there is no present factual basis in the record for the statement that any added noise would be negligible (for all we know, the petitioners may find the noise of low-flying helicopters different from, and more annoying than, conventional airplane noise); and the pendency of the [investigation into congestion at National Airport] is not a sound basis for shunting petitioners aside here.<sup>119</sup>

Finally, and most practically, the office noted that the residents were likely to appeal a denial of intervention, and the judicial review of that denial might drag out the proceedings longer than just granting intervention rights would.<sup>120</sup>

Against these warnings, the CAB voted 3-2 to affirm the examiner's denial of Rule 15 intervention on the grounds that residents' claims of environmental harm were "highly generalized" and the alleged effects were "both remote and speculative" and also true of all other low-flying aircraft.<sup>121</sup> The majority of the board concluded that such general claims could be managed through Rule 14, and through the participation of the DOT, rather than the possible participation of residents.<sup>122</sup> The real environmental questions—in the view of the CAB, anyway—would be raised by heliport locations and flight patterns, which were for local authorities, and the FAA, to decide. Two board members dissented, however, arguing that the residents should be allowed to participate "at least through a single spokesman" with formal

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<sup>119</sup> General Counsel to Board, n.d., p. 2-3, attached to Madden to the Board, Memorandum, Aug. 30, 1967, Folder "Palisades Citizens Association, Inc., et al., v. Civil Aeronautics Board, C.A.D.C. No. 21,422 5. Misc. Research, Board Orders," Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.

<sup>120</sup> General Counsel to Board, n.d., p. 3, attached to Madden to the Board, Memorandum, Aug. 30, 1967, Folder "Palisades Citizens Association, Inc., et al., v. Civil Aeronautics Board, C.A.D.C. No. 21,422 5. Misc. Research, Board Orders," Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.

<sup>121</sup> CAB Order E-25704 (Sept. 19, 1967), 47 CAB 1075, 1076 (1967).

<sup>122</sup> CAB Order E-25704 (Sept. 19, 1967), 47 CAB 1075, 1076 (1967).

intervenor status; “participation under rule 14 is not an acceptable substitute for intervention in this case.”<sup>123</sup>

The CAB’s decision caught the attention of the *Washington Post* editorial board, which complained that “the CAB has attempted to wash its hands of the noise and fallout menace. Instead of looking at the issue on its merits, it has simply closed its eyes and ears.”<sup>124</sup> Pointing to the 3-2 decision, Waldrop told a *New York Times* reporter that the CAB was “shaking in their boots.”<sup>125</sup> He threatened to litigate the matter as far as possible, commenting that “the C.A.B. has dismissed individual protestors as crackpots. Maybe we are crackpots. But crackpots as a *class* deserve to be heard.”<sup>126</sup>

Relegated for the moment to Rule 14 status, residents were still able to raise their noise concerns before the examiner during the hearings.<sup>127</sup> Bardin enthusiastically cross-examined the helicopter companies’ witnesses about their experience with noise and noise complaints in other markets they served.<sup>128</sup> All things being equal, a single helicopter passing overhead might be less noisy than a single jet plane flying overhead. But it was not at all clear that all things were equal. How many helicopter flights transporting passengers to Dulles would it take to replace a single jet plane? And, given the relationship between noise and altitude, how close to the ground would each aircraft fly? The DOT submitted some evidence of its own regarding methods by which people could measure aircraft noise; measurements of jet noise at National Airport; information about helicopter noise generally; and the results of a 1961 helicopter demonstration flight in the

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<sup>123</sup> CAB Order E-25704 (Sept. 19, 1967), 47 CAB 1075, 1077 (1967) (Minetti and Gilliland, dissenting).

<sup>124</sup> “CAB and the Noise Menace,” *Washington Post*, Oct. 8, 1967, p. B6.

<sup>125</sup> Quoted in Robert Sherrill, “The Jet Noise is Getting Awful,” *New York Times*, Jan. 14, 1968, pg. SM24.

<sup>126</sup> Quoted in Robert Sherrill, “The Jet Noise is Getting Awful,” *New York Times*, Jan. 14, 1968, pg. SM24.

<sup>127</sup> Joint and Several Petition for Review of Order, Nov. 13, 1967, Folder “The Palisades Citizens Assn., Inc., et al, v. Civil Aeronautics Board 2 C.A.D.C. No. 21,422 5. Misc. Research, Board Orders,” Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.

<sup>128</sup> Hearing transcript, Oct. 2-?, 1967, Docket 17765 v. 3; Brief of the Department of Transportation, Dec. 8, 1967, p. 22-23, Docket 17665 v. 12, RG 197, NACP.



Washington area.<sup>129</sup> Based on these findings about airport noise as a whole, the DOT expressed its support helicopter service as an “immediate aid” in moving flights to Dulles and Friendship airports, thus (possibly) making National Airport “socially less irritating.”<sup>130</sup> The DOT drew on expert testimony to state that “a helicopter is less noisy than a jet,” and touted “the social benefit of trading off the greater noise of jet flights over the city for the lesser noise of helicopter flights”—even as it failed to account for the number of helicopter flights needed to reduce jet flights.<sup>131</sup>

The CAN, the PCA, and the Concerned Citizens complained after the hearing about the lack of any detailed evidence about the effect of recurring helicopter flights for D.C. residents in realistic present-day conditions. And even if the examiner refused to examine the environmental impacts—consideration of which, he argued, “is the Board’s unavoidable legal duty”—he should still deny the service based on what evidence had been presented, unless the benefits to a small number of helicopter passengers were proven to outweigh the interests of the many people on the ground.<sup>132</sup> The DOT’s own evidence demonstrated that helicopters were in fact loud:

helicopter service, whether at 1000 or 1500 feet, will impose much more noise on the communities directly underneath them than the ground noise of a busy, downtown thoroughfare. Helicopter service at an altitude of 1000 feet is the approximate noise equivalent of a heavily-travelled, multi-lane freeway 20 feet away. People under a 1500 foot helicopter flight would be subjected to the noise equivalent of a freeway 100 feet away.<sup>133</sup>

Residents were also frustrated about the loose conjectures being made about how helicopter service to Dulles and Friendship airports would naturally lead to a reduction of flights—and thus

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<sup>129</sup> DOT-T-1 and DOT-T-2, Docket 17665 v. 11, Box 14, RG 197, NACP.

<sup>130</sup> Statement of Position of Department of Transportation, n.d., 3, 4, Docket 17665 v. 11, Box 14, RG 197, NACP.

<sup>131</sup> Statement of Position of Department of Transportation, n.d., 10, Docket 17665 v. 11, Box 14, RG 197, NACP.

<sup>132</sup> Statement of Position of Concerned Citizens, Palisades Citizens Association, and the Committee Against National, Dec 11, 1967, p. 3, Docket 17665 v. 12, RG 197, NACP.

<sup>133</sup> Statement of Position of Concerned Citizens, Palisades Citizens Association, and the Committee Against National, Dec 11, 1967, p. 4, Docket 17665 v. 12, RG 197, NACP.

noise—at National Airport.<sup>134</sup> The residents argued “there isn’t a shred of evidence” that any flights would actually be diverted away from National Airport, or that enough noisy flights would be diverted to make up for the new noise generated by lots and lots of helicopters.<sup>135</sup>

At the end of the helicopter proceedings, the hearing examiner recommended against helicopter service to the airports, mostly because he was skeptical that it was economically feasible without some sort of government subsidy. The CAB’s Bureau of Operating Rights had described a lack of civic enthusiasm for the idea and pointed to the “downward financial spiral which the industry has experienced since its inception and the expectation that the same result could be expected for a service in this area.”<sup>136</sup> The examiner also thought that safety concerns might preclude flight service over the densely developed D.C. area.<sup>137</sup> Briefly addressing noise issues, the examiner noted that each applicant “expressed a willingness to cooperate in all efforts to minimize the noise impact of the helicopter movements” and recommended that if the CAB did award a certificate, the board could include limits on the length of the permit, on air pollution, and on noise control, and could include a process for remedies.<sup>138</sup>

As the matter now passed from the examiner (where Rule 14 intervenors had several opportunities to participate) to the Board (where they had none), residents’ intervenor status became more important. In July 1968 the D.C. Circuit issued a brief per curiam order stating that since the residents “have not at the present time been prejudiced by any final order of the Board,” the D.C. Circuit would retain jurisdiction while waiting to see whether the parties were actually

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<sup>134</sup> Statement of Position of DOT, n.d., p. 3-4, 14-15, Docket 17665 v. 11, Box 14, RG 197, NACP.

<sup>135</sup> Statement of Position of Concerned Citizens, Palisades Citizens Association, and the Committee Against National, Dec 11, 1967, p. 2, Docket 17665 v. 12, RG 197, NACP.

<sup>136</sup> Brief of the Bureau of Operating Rights, Dec. 8, 1967, Docket 17665 v. 12, RG 197, NACP.

<sup>137</sup> Initial Decision of Examiner William J. Madden, 49 CAB 346, 396 (May 8, 1968).

<sup>138</sup> Initial Decision of Examiner William J. Madden, 49 CAB 346, 379 (May 8, 1968).

“prejudiced by absence of intervention” in the ongoing proceedings.<sup>139</sup> A few days later, CAB chair John H. Crooker Jr. sent a telegram inviting the residents to file briefs and participate in oral argument before the full board later that month (essentially granting them the participation rights of Rule 15 intervenors without recognizing them as such). The residents, of course, accepted the invitation to make their case before the board.

During oral argument, Bardin (speaking on behalf of the CAN, the PCA, and the Concerned Citizens) explained that the CAB had a responsibility to consider the noise consequences of its permit process. Either the board, or applicants, needed to generate the evidence necessary for that consideration. “We look to the Board to protect us as individuals and many, many more people who stand in the same shoes as we do in performing its function of protecting the public interest.”<sup>140</sup> Courts had been leaning this way in other environmental contexts, and here noise needed to be part of this consideration. “It may be there are still people in this room who feel noise pollution is just a matter of petty annoyances and not a matter of acute discomfort and acute disruption to the society in which we live. I think the evidence in this case clearly demonstrates the contrary.”<sup>141</sup> Bardin even brought in a tape recording of helicopter noise and asked to play it for the board; when Crooker suggested that board members did, in fact, know what helicopters sounded like, Bardin replied, “We have sensed in this case that some members of the Board staff – and perhaps the Board, itself – many members of the interested public, all tend to pooh-pooh the reality of what one talks about.”<sup>142</sup>

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<sup>139</sup> Order, July 16, 1968, Folder Palisades Citizens Assn., Inc., et al, v. Civil Aeronautics Board C.A.D.C. No. 21,422 2. Legal Documents, Box 12, Office of the General Counsel, Litigation Division, Selected Appeals Litigation Case Files, 1944-69, RG 197, NACP.

<sup>140</sup> Oral Argument before CAB, July 24, 1968, p. 133, Docket 17665 v. 13, RG 197, NACP.

<sup>141</sup> Oral Argument before CAB, July 24, 1968, p. 138, Docket 17665 v. 13, RG 197, NACP.

<sup>142</sup> Oral Argument before CAB, July 24, 1968, pp. 143, 146, Docket 17665 v. 13, RG 197, NACP.

In an August post-hearing brief to the board, residents emphasized again that the balance of the public interest should lie with the huge number of people on the ground, not the small number of air travelers who might enjoy faster travel to Dulles.

If commercial helicopter service is luxury [sic] which would be used by only 2 to 2 ½ percent of the airline passengers in the area,

if it appears to be more dangerous to those on the ground and those in the air than alternative modes,

if it accommodates no more than 28 passengers per trip but at the same time disrupts the lives of hundreds or thousands of people on the ground,

if it causes more noise pollution than doing the job by the alternative transportation modes,

if it probably adds more air pollution to the atmosphere than doing the job by alternative modes,

if it costs more (about \$10 to Dulles airport) than the competing limousine bus and even than taxicabs in some circumstances (group riding),

if it also requires a subsidy of up to \$5 per helicopter passenger to be contributed from the fares of airline passengers who don't use helicopter service,

if it saves only a few minutes at most for each helicopter passenger after allowing for his trip to and waiting time at the helicopter terminal and heliport,

then precisely why does the public convenience and necessity require commercial helicopter service?<sup>143</sup>

The board was unconvinced. In November 1968, the CAB found that helicopter service was indeed in the public convenience and necessity, and issued a permit to Washington Airways, Inc. (WAI) for five years.<sup>144</sup> The board nodded to the residents' concerns, but concluded that "the record contains adequate data for the discharge of the Board's responsibilities with respect to environmental impact."<sup>145</sup> Based on the generalized information about noise and the pretty vague promises by helicopter companies that they would try to minimize disruption, the CAB concluded that "those on the ground are reasonably assured that the operations will not be permitted to intrude unduly upon their lives."<sup>146</sup> After all, airplane traffic was loud, and "The

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<sup>143</sup> Brief of Concerned Citizens et al, Aug 19, 1968, p. 3, Docket 17665 v. 13, RG 197, NACP.

<sup>144</sup> CAB Press Release, Nov. 21, 1968, Preliminary Comments on the Kling Report, Folder VFD-Subject Files-1968-pt. 2, Box 5 (pt. 2), Virginians for Dulles Records, GMU. (The CAB examiner had earlier found that if service was to be granted, it should be granted to WAI—a group of airline carriers—as against the other applicants.)

<sup>145</sup> 49 CAB at 352 (1968).

<sup>146</sup> 49 CAB at 353 (1968).

record establishes that a helicopter is less noisy than a jet. To the extent, therefore, that noise from jet operations into and out of National Airport could be replaced by helicopter noise, and in that the presence of the helicopter service would militate against additional jet operations, the result would be beneficial to those on the ground.”<sup>147</sup> While this was little more than a guess, “the Department’s position has been generally accepted elsewhere, and we accept it here.”<sup>148</sup>

The board also rejected the broader claim that it should play an active role in assessing noise impacts that did not rise to the level of “unusual noise” or “extraordinary hazards or inconvenience to persons on the ground[.]”<sup>149</sup> Airplanes made noise, and the CAB’s job was “to develop a well-rounded air transportation system and actively to promote air service. Where, as here, a new service will achieve these ends, it is required by the public convenience and necessity despite the fact that some additional noise may be the result.”<sup>150</sup> The Board did not consider itself authorized by Congress to deny a permit “merely because it might create some additional noise or be noisier than some other form of transport.”<sup>151</sup> Indeed, in recent congressional consideration of the Aircraft Noise Abatement Act, “Nowhere in the hearings, committee reports, or floor discussion of the legislation is there any suggestion that new route proceedings” before the CAB “are to be a vehicle for coping with the problem of aircraft noise.”<sup>152</sup> Congressional intent could also be gleaned from the fact that Congress had repeatedly authorized the building of a heliport in downtown Washington.<sup>153</sup> Any consideration of noise

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<sup>147</sup> 49 CAB at 353 (1968).

<sup>148</sup> 49 CAB at 353 fn. 20 (1968).

<sup>149</sup> 49 CAB at 353-54 (1968).

<sup>150</sup> 49 CAB 346, 353-54 (1968).

<sup>151</sup> 49 CAB 346, 353-54 (1968).

<sup>152</sup> 49 CAB 346, 355 (1968).

<sup>153</sup> Senate Committee on Public Works, Subcommittee on Buildings and Grounds, Hearings, District of Columbia Heliport, 89th Cong. 2nd sess. (1966); House Committee on Public Works, Subcommittee on Public Buildings and Grounds, Hearings, Heliport, 89th Cong. 2nd sess. (1966). 49 CAB 346, 355 fn. 24 (1968); P.L. 89-759, 80 Stat. 1308 (1966); P.L. 90-264, 82 Stat. 43 (1968). There had been analysis of the noise consequences of various heliport sites. See Folder Airports Heliports 1967, Box 23, Office of the Secretary/Executive Secretariat, Subject Files [General Correspondence] 1967-2000, Department of Transportation Records, RG 398, NACP.

should be left to other agencies to manage after the fact. Thus, with a shrug, the CAB considered the matter resolved.

The residents challenged this permit through their ongoing D.C. Circuit case contesting their Rule 14 status. On the intervention question, the court held that Rule 14 participation, plus the extra consideration and access the CAB had given the parties along the way, had been sufficient to let the intervenors adequately express their position.<sup>154</sup> However, the court took the opportunity to criticize the board's cavalier approach to noise concerns.<sup>155</sup> Although ultimately satisfied with the rather cursory consideration the CAB had given the noise issue, the court expressed concern that the CAB had been so reluctant to take seriously the concerns of people on the ground in the first place. The court reminded the board that "questions relating to environmental impact of proposed services upon persons and property lying below the routes are substantial and clearly relevant to the Board's certification inquiry."<sup>156</sup> The CAB was supposed to be looking out not just for air passengers but for the "general public at large":

For example, were the Civil Aeronautics Board to award a route certificate to a carrier which employs aircraft powered by chlorine gas due to its assertion of cheaper rates to the air traveler, the impact of such an award would not only affect the competing carriers but also the airbreathing public below. Regardless of the efficiency of the air service, the deadly pollution must nullify the grant. To say that the environmental impact of that service is not a proper consideration of the Board in its certification hearing is folly.<sup>157</sup>

The court demanded that the CAB start interpreting its statutory language to consider "the extent to which a grant will affect persons and property on the ground below the route. A certificate to a carrier (or the institution of a service) which would substantially increase the intensity of noise, degree of air pollution or the probability of accidents would be contrary to the spirit and the letter

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<sup>154</sup> *Palisades Citizens Association, Inc. v. Civil Aeronautics Board*, 420 F.2d 188 (D.C. Cir. 1969).

<sup>155</sup> *Civil Aeronautics Board v. State Airlines, Inc.*, 338 U.S. 572 (1949); *Airport Com. of Forsyth County v. Civil Aeronautics Board*, 300 F.2d 185 (4<sup>th</sup> Cir. 1962); *Outagamie County v. Civil Aeronautics Board*, 355 F.2d 900 (7<sup>th</sup> Cir. 1966).

<sup>156</sup> *Palisades Citizens Association, Inc. v. Civil Aeronautics Board*, 420 F.2d 188, 191 (D.C. Cir. 1969).

<sup>157</sup> *Palisades Citizens Association, Inc. v. Civil Aeronautics Board*, 420 F.2d 188, 191 (DC Cir. 1969).

of the Federal Aviation Act. The Civil Aeronautics Board has been given the scales of public interest. It must effect a balance.”<sup>158</sup> The DOT, FAA, and HEW might have their own responsibilities over the environment generally and noise pollution specifically, but “These determinations, however, are merely narrow studies of the ‘species’ of the ‘genus’ environmental impact. There still exists the ‘family’ of public interest in which each of these species belong. As such, the Board must account for them.”<sup>159</sup>

The court’s sharp rebuke to the CAB, combined with its approval of the actual permit at hand, seemed to suggest that a limited accounting of general noise burdens was sufficient; there was no need to directly analyze the burden of the proposed service on the specific people who lived underneath. At least the court’s emphatic assertion that noise should be considered led the CAN’s Waldrop to claim that “We lost the battle but won the war[.]”<sup>160</sup> Perhaps they did; the CAB going forward would agree that “our duty to determine the public interest encompasses environmental matters”<sup>161</sup> and later litigants would cite the D.C. Circuit case to the board as they pushed it toward their own vision of the public’s interest.

As things turned out, residents ended up winning the battle, too. Helicopter service to downtown Washington never got off the ground. There was never enough support for a downtown heliport, since space was scarce and noise concerns were a sticking point.<sup>162</sup> As one woman from the Citizens Association of Georgetown argued, helicopters “take your privacy

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<sup>158</sup> *Palisades Citizens Association, Inc. v. Civil Aeronautics Board*, 420 F.2d 188, 192 (DC Cir. 1969).

<sup>159</sup> *Palisades Citizens Association, Inc. v. Civil Aeronautics Board*, 420 F.2d 188, 192 (DC Cir. 1969).

<sup>160</sup> Waldrop, quoted in Jack Eisen, “Appeals Court Upholds Copter Service,” *Washington Post, Times Herald*, Sept. 13, 1969, B1.

<sup>161</sup> Natural Resources Defense Council, Complaint, Docket 23254, 57 CAB 607, 609 (July 26, 1971)

<sup>162</sup> See correspondence in Folder 3 Heliports, Box 30, Administrator’s Subject/Correspondence File, 1959-1982, Office of the Administrator, RG 237. See also “Helicopters Play Game Over Capitol,” *Washington Post, Times Herald*, March 17, 1960, B1; “2 City Sites Offered for ‘Copter Plan,” *Washington Post, Times Herald*, Aug. 17, 1961, D2; “2 Planners Demur at Noise of SW Heliport,” *Washington Post, Times Herald*, Sept. 14, 1961, D1; Albon B. Hailey, “Area Boom in Helicopter Transportation Forecast,” *Washington Post, Times Herald*, Oct. 29, 1961, B5; Senate Committee on Commerce, Subcommittee on Aviation, Helicopter Air Service Program, March 8-11, 1965, 89<sup>th</sup> Congress 1<sup>st</sup> Sess. (1965).

away. They can hang right over your garden when you're sunbathing without a stitch on."<sup>163</sup> The National Capital Planning Commission consistently refused to amend municipal law to allow a heliport to be built.<sup>164</sup> Thus, within a year, WAI was back before the CAB asking for permission to abandon its helicopter permit, since it was unable to make money without serving downtown D.C.<sup>165</sup>

This request provoked a new proceeding at the CAB about helicopter service in the area.<sup>166</sup> The board did not initially include the PCA, the CAN, or the Concerned Citizens in this proceeding, but these groups—now joined by the Citizens Association of Georgetown—demanded (and this time were granted) Rule 15 intervention in the reopened investigation.<sup>167</sup> And as of 1970, residents had on their side not just the D.C. Circuit's opinion directing the CAB to take noise seriously, but also the new National Environmental Policy Act of 1969 (NEPA), which required all agencies and commissions to consider environmental harm in their decisionmaking, not least by preparing an environmental impact statement before "major Federal actions significantly affecting the quality of the human environment[.]"<sup>168</sup> This kind of affirmative fact-based exploration of the environmental consequences is what the Concerned Citizens, the CAN, and the PCA had wanted in the first place, but the CAB had failed to provide. The residents claimed that the former record was inadequate to really examine the environmental

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<sup>163</sup> Mrs. Harold B. Hinton, quoted in Jack Eisen, "Heliport Backing Refused," *Washington Post, Times Herald*, Aug. 7, 1969, B1, B2.

<sup>164</sup> Jack Eisen, "Heliport Backing Refused," *Washington Post, Times Herald*, Aug. 7, 1969, B1.

<sup>165</sup> Claude Koprowski, "'Start-Up' Problems Plague New STOL Shuttle Firm," *Washington Post, Times Herald*, Feb. 13, 1969, C9. Filed on Sept. 16, 1970, described in Joint Petition to Intervene of Concerned Citizens, the Palisades Citizens Association, Inc., the Committee Against National, and the Citizens Association of Georgetown, Inc., Dec. 10, 1970, Dockets 17665 and 22566, Folder VFD - Subject Files-1970, Box 5 (pt. 5), Virginians for Dulles Records, GMU.

<sup>166</sup> CAB Order 70-11-85 (Nov. 19, 1970).

<sup>167</sup> Joint Petition to Intervene of Concerned Citizens, Palisades Citizens Association, Committee Against National, Citizens Association of Georgetown, Dec. 10, 1970, p. 5, Docket 17665 v. 14, Box 15, RG 197, NACP; CAB Order 71-2-61 Denying Petition to Modify, Consolidating Applications and Granting Leave to Intervene, Docket 17665 v. 14, Box 15, RG 197, NACP. The CAB nodded to NEPA in granting the residents' intervention request.

<sup>168</sup> Pub. L. 91-190, 83 Stat. 852 § 102(C) (1970); see Andrews, *Managing the Environment*, ch. 14.



consequences—and that NEPA now required more of the CAB.<sup>169</sup> A particularized study was needed to determine what the consequences of proposed service on those below.<sup>170</sup>

But the residents were again disappointed in the CAB’s decisionmaking. For all the CAB’s talk about NEPA and the need for evidence of “a clear and exact description of aircraft performance along Route 160, and the knowable environmental effects consequent” the board had not done anything.<sup>171</sup> The helicopter company seeking to take over the route had simply suggested, as before, that the elimination of “the pressures, tensions and annoyance of surface transportation between downtown and the airports” through helicopter and affiliated limo service would “more than outweigh any acoustical or emission detriments resulting from Pioneer’s proposed operations.”<sup>172</sup> The residents fumed: “Is there one sentence in the reopened investigation record to support a contention that the Board, through any action under its authority, has information from any federal agency applicable to an environmental statement? If so, diligent reading and research have not unearthed it.”<sup>173</sup> Ultimately, the CAB did allow the route to be abandoned, although not because of noise; the board concluded that operating the route “will be costly, doomed to failure without substantial public assistance, and will, in any case, produce limited public benefits.”<sup>174</sup> The area simply could not support helicopter service.

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<sup>169</sup> Statement of Position and Request for Information and Evidence by Concerned Citizens, Palisades Citizens Association, Inc., Committee Against National, Citizens Association of Georgetown, Inc., March 18, 1971, Docket 17665 v. 16, Box 15, RG 197, NACP.

<sup>170</sup> NEPA s. 102(2)(c); 35 Fed. Reg. 10583 (June 30, 1970). The CAB suggested in this policy statement that helicopter service would trigger NEPA.

<sup>171</sup> Brief on behalf of Concerned Citizens, Palisades Citizens Association, Inc., the Committee Against National, Citizens Association of Georgetown, Inc., March 10, 1972, p. 11, Docket 17665 v. 18, Box 16, RG 197, NACP.

<sup>172</sup> Pioneer Airlines, Inc., Brief to the Examiner, March 10, 1972, p. 40, Docket 17665 v. 18, Box 16, RG 197, NACP

<sup>173</sup> Brief on behalf of Concerned Citizens, Palisades Citizens Association, Inc., the Committee Against National, Citizens Association of Georgetown, Inc., March 10, 1972, p. 12, Docket 17665 v. 18, Box 16, RG 197, NACP.

<sup>174</sup> Reopened Washington/Baltimore Helicopter Service Investigation, 60 CAB 673, 674 (Dec. 11, 1972).

This particular small skirmish over helicopters did not provoke the CAB to do all that much to change its ways. The CAB's investigation of congestion at National fizzled out in April 1970, without the CAB doing anything to move flights from National Airport to Baltimore or Dulles.<sup>175</sup> Nor did the CAB take noise issues all that seriously going forward, deciding that authorizations of additional service to existing routes were not "major Federal actions significantly affecting the quality of the human environment[.]"<sup>176</sup> While new helicopter service would qualify, meaning this particular set of circumstances was unlikely to recur, the broader issue of the CAB authorizing more service, and thus more noise, remained. Nor did it address the broader noise issues at National Airport. Long after the CAB shut its doors, the *Washington Post* noted that local airport noise was "One of Greater Washington's evergreen controversies[.]"<sup>177</sup>

However, this proceeding does highlight the difficulties of defining the public interest. Who is the relevant public, and what is their interest? It also indicates the possibly limited value of participation in the administrative process. The intervenors here did eventually air their concerns, but to what end? Participation might have been necessary to change the conversation, but it was not sufficient. It also indicates the way that the administrative process narrowly

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<sup>175</sup> CAB Order 70-40134. See Crooker to Volpe, Sept. 24, 1969, Folder National Capital Airports, Box 115, Office of the Secretary/Executive Secretariat, Subject Files [General Correspondence] 1967-2000, Department of Transportation Records, RG 398, NACP; Motion of the U.S. Department of Transportation to Dismiss or Defer the Proceeding, Docket 18712, Oct. 15, 1969, Folder Wash-Balto. Airport Investigation pt. 1, Box 41, Office of the Secretary/Executive Secretariat, General Correspondence of Under Secretary James M. Beggs 1969-1972, Department of Transportation Records, RG 398, NACP. The DOT found that FAA actions had lessened congestion so further inquiry was no longer needed. The department did note that a proposed regional airport authority would be a better place to reallocate flights than the CAB would. One local committee found that it ended "ostensibly because facilities construction at National had removed the problem but realistically because of the insistent opposition of all of the carriers whose routes were involved." Arlington County Chamber of Commerce's National Airport Study Committee, 1969, p. 12, Folder Washington National Airport: A Special Study (ca. 1969), Washington National Airport Noise Analysis (1977), Box 31, Virginians for Dulles Records, GMU. And see Naomi S. Rovner, "Study's End is Blow to Friendship," *Baltimore Sun*, April 28, 1970, C24.

<sup>176</sup> NEPA s. 102(2)(c); 35 Fed. Reg. 10583 (June 30, 1970). See also James M. Burger, "Miami-Los Angeles and NEPA: The Use of the National Environmental Policy Act of 1969 as an Anticompetitive Weapon," *Journal of Air Law and Commerce* 42 (1976): 529.

<sup>177</sup> "Noise and National Airport," *Washington Post*, May 4, 1990.

cabined discussions even when intervenors participated. The only way noise concerns could practically be raised at the CAB was through this new permit hearing, but that meant that the conversation was limited by the terms of the helicopter permit process. The episode also points to the importance of the division of authority across the administrative state. Here the CAB took airport noise as a given, and pointed to the FAA's responsibility for mitigating it. The CAB, in fact, took other agencies' responsibility for managing airplane and airport noise as evidence that the board did not have responsibility of its own for considering the issue. Actual reduction of noise would require the CAB to eliminate routes, however, which could only be justified if it took noise into consideration, which it continued to be reluctant to do.

[I recognize a need for a stronger statement of the primary argument here, but I'm still figuring out both that, and the way this chapter will interact with other chapters in the book. I appreciate all comments on this and other parts of the paper. -jlg]