To the Vanderbilt Legal History Colloquium:

Thank you all 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 place for 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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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.¹ 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.

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 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 before considered noise issues, 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.² 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.³

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.”⁴ Residents near the San Francisco airport


³ Statement of James B. Baton, 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.

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 disorders.” 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.” (Jet noise was not simply an American, or a human, problem; once jets began flying into London’s Heathrow Airport, elephants at the nearby Windsor Safari Park were fitted with earmuffs to prevent jet noise-induced stampedes.)

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

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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.” 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.” 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.

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 opened in 1962 in Chantilly, Virginia. 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

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8 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).
planes. 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.” 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.”)


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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.\textsuperscript{15} National Airport, named one of the “10 Most Active U.S. Civil Airports in 1962,”\textsuperscript{16} 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).\textsuperscript{17}

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 predicted, residents complained immediately.\textsuperscript{18} 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.”\textsuperscript{19} 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\textsuperscript{20}) group that at various times had included the controller of the FDIC; the marshal

\footnotesize{15} Metrorail service to National Airport began in the late 1970s; after many delays, Metrorail service to Dulles Airport is currently in progress.


\footnotesize{20} https://www.mappingsegregationdc.org/index.html#maps
of the Court of Customs and Patent Appeals; Associate Justice of the United States William O. Douglas; and Bill and Taffy Danoff, founders of the Starland Vocal Band. Residents’ fight against airport noise drew on their history of efforts to keep the neighborhood quiet and residential. The decades-old Palisades Citizens Association (PCA) had, over the past several decades, successfully 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. Such efforts were consistent with a broader history of Americans using noise bans, zoning, and land use restrictions to keep certain areas quiet, residential, and white. More specifically, scholarship in “annoyance studies” has

demonstrated that airport noise 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.\textsuperscript{25} 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”). 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). Members of the PCA could and did complain to FAA officials about the noise in their homes and backyards; as the PCA president said in 1967, “Both the airlines and the FAA know us well.” 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. 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?”31 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?”32 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.33

At the same time, however, the FAA was proposing to expand National Airport to allow more jet traffic. The Committee Against National (CAN), formed in December 1966 by Washington residents reacting to these expansion plans, soon joined the PCA’s efforts.34 PCA member Frank C. Waldrop, a former executive editor of the Washington Times-Herald, became the first chair of the CAN and the editor of its newsletter.35 The CAN sought to close National Airport entirely and see “its property converted to better human use[.]”36 The 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.37

33 Palisades Citizens' Association resolution, June 7, 1966, Folder 95, Box 3, Palisades Citizens' Association Records, 1916-2001 (MS 0627), DCHS.
36 CAN Resolution, n.d., Folder Committee Against National (1966-1969), Box 1, Virginians for Dulles records, GMU.
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.38

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. 39


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.

The CAN sponsored a neighborhood rally in March 1967, hosting speakers, presenting anti-National Airport resolutions, and showing a film (the “Case Against FAA”).40 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.”41 By the end of April, the CAN had gathered thousands of signatures on a petition asking the airport authority to close National Airport entirely.42

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.43 (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.44) 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

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41 The Facts of the Airport Question – Arlingtonians for Dulles, April 10, 1967, p. 11, Box 1, Virginians for Dulles records, GMU.
would not interfere with his activities.\textsuperscript{45} 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.”\textsuperscript{46}

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.”\textsuperscript{47} 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.”\textsuperscript{48} 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 unless something changed, “people will just say ‘Sorry, we don’t want airplanes around anymore; we don’t want to travel that way.’”\textsuperscript{49}

\textsuperscript{49} 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.
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.\textsuperscript{50} 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.”\textsuperscript{51} 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.\textsuperscript{52} 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 elsewhere in the country, where companies offered helicopters as a faster alternative to ground travel.\textsuperscript{53}

\textsuperscript{50} House Committee on Interstate and Foreign Commerce, Subcommittee on Transportation and Aeronautics, Hearings, 90\textsuperscript{th} Congress, 1\textsuperscript{st} and 2\textsuperscript{nd} sess. (1967-68).
\textsuperscript{51} House Committee on Interstate and Foreign Commerce, Subcommittee on Transportation and Aeronautics, Hearings, 90\textsuperscript{th} Congress, 1\textsuperscript{st} and 2\textsuperscript{nd} sess. (1967-68), 186 (Waldrop testimony).
\textsuperscript{53} 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, \textit{Airport Transportation: A Study of Transportation Means
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. \(^{54}\) Competing helicopter companies and airlines sought to offer such service in order to quickly transport passengers to and among downtown Washington, 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.” \(^{55}\)

Noise had never been a factor 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 determination, both applicants and board officials focused on the economic feasibility of unsubsidized service in the area. \(^{56}\)

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 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-

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\(^{54}\) 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).


\(^{56}\) Report of Prehearing Conference, Feb 6, 1967; Docket 17765 v. 1, RG 197, NACP.
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.⁵⁷)

The CAB’s inquiry into the viability of helicopter service would force the board to contemplate the noisy consequences of its decisions 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.⁵⁸ 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, and control over, air traffic rules, regulations, and


flight patterns.”59 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.60

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.”61 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 loss of property value, and the potential loss of enjoyment of life.”

60 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 Visak, 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.
the interference with enjoyment of recreational, scenic and other natural resources, the
disruption of the normal amenities of the human condition, and the diminution of property
values.”62 Even more, “Sonic pollution violates our fundamental rights.”63

Given the CAB’s procedures for intervention, residents’ demand for intervention
required the board to consider the heart 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.64 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.65 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.”66

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. This would
allow them to not just participate in the initial hearing, but also file briefs and exceptions after

62 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.
63 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.
the hearing, and participate in oral argument before the CAB.\textsuperscript{67} One observer noted the “significant advantages” 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.\textsuperscript{68}

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[.]”\textsuperscript{69} 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

\textsuperscript{67} 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, 91st Congress, 1st Session (Sept. 9, 1969), 5.

\textsuperscript{68} Comment, “Public Participation in Federal Administrative Proceedings,” \textit{University of Pennsylvania Law Review} 120 (1972): 702-845, 780?

values." Thus, their intervention was aimed at raising the question of the effects of helicopter noise and disruption, not to decisively answer it.

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. 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.

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.\(^{73}\) 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.\(^{74}\)

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.\(^{75}\) 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

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\(^{74}\) Lifset, *Power on the Hudson*, 51-52.

\(^{75}\) *Scenic Hudson Preservation Conference v. Federal Power Commission*, 354 F.2d 608, 616 (2d Cir. 1965).
active and affirmative protection at the hands of the Commission.”76 The court declared (in language soon quoted by the Concerned Citizens77) 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.”78 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.79 A few years later (and just a few weeks before the residents made similar claims to the CAB), the Supreme Court in Udall v. Federal Power Commission similarly questioned the FPC’s grant of a license for a hydroelectric power project because the commission had failed to consider the pros and cons of not building a dam on the Snake River.80

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.”81 (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.82) 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.”\(^8\) 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 sheets, proposed heliport sites, information about travel times and sample schedules, 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.\(^4\) Information about estimated noise pollution could easily be added.

The helicopter companies objected to the residents’ requests, arguing that the helicopter investigation was already underway, and that noise concerns were irrelevant.\(^5\) 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.”\(^6\) Such matters, they argued, were really for the FAA, which was supposed to manage “the competing interests of

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\(^4\) Washington-Baltimore Helicopter Airways, Inc., Index of Exhibits, Docket 17765 v. 9, Box 13, RG 197, NACP


\(^6\) 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.
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.\(^{87}\)

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.\(^{88}\) 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 addition to the principal sources of noise[.\]”\(^{89}\) 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.\(^{90}\)

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.”\(^{91}\) 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

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\(^{87}\) 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.

\(^{88}\) CAB Order E-25435 (July 19, 1967), 47 CAB 1033 (1967).

\(^{89}\) CAB Order E-25435 (July 19, 1967), 47 CAB 1033 (1967).

\(^{90}\) CAB Order E-25435 (July 19, 1967), 47 CAB 1033 (1967).

baggage counters. Customers have been stacked up nearly 10 deep at ticket counters during peak periods.[92] 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.[93]

Although the investigation was formally about congestion, the well-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!”[94] Although the CAB was focused on passenger inconvenience, “If the CAB 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.”[95] 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 Cemetary [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.

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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.96

Sen. William Spong (D-Va.) and Rep. William L. Scott (R-Va.) also 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.”97) The existence of this concurrent congestion proceeding, in which the CAB largely ignored the question of jet noise (and which 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.

In the helicopter proceeding, 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 argued that 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

96 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.
delegated authority.” 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 kept creating 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. As the PCA emphasized, “It is common knowledge that helicopters are noisy.” 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 really is.” 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.”

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
obliged to consider.\textsuperscript{103} 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.\textsuperscript{104} 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.\textsuperscript{105} 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 service.”\textsuperscript{106} (Frank C. Waldrop described his “stunned and total admiration” for the DOT’s stance.\textsuperscript{107})

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

\textsuperscript{103} Petition by Concerned Citizens for Board Review of Staff Actions, July 28, 1967, p. 7, Docket 17765 v. 1A, Box 16, RG 197, NACP.

\textsuperscript{104} 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.

\textsuperscript{105} 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[.]”

\textsuperscript{106} 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.

“the possible effects on person and property on the ground that may result from operations under a resulting license.” 108 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.” 109 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.” 110 (The Second Circuit in Scenic Hudson had 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.” 111 )

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.” 112 Instead, judges

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112 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,
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.”

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.

In the past, 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 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.

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. The D.C. Circuit had similarly rebuked

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113 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.

114 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.

115 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.

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. 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 procedural ways to prevent that. Instead, “[t]he problem here is that there are no intervenors representing the interests alleged by the petitioners.” 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.”

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.

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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.\textsuperscript{121}

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.\textsuperscript{122} 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.\textsuperscript{123} 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 intervenor status; “participation under rule 14 is not an acceptable substitute for intervention in this case.”\textsuperscript{124}

The CAB’s decision caught the attention of the \textit{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.”\textsuperscript{125}

\textsuperscript{121} 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 S. Misc. Research, Board Orders,” Box 12, Selected Appeals Litigation Case Files, 1944-69, Office of the General Counsel, Litigation Division, RG 197, NACP.
\textsuperscript{122} CAB Order E-25704 (Sept. 19, 1967), 47 CAB 1075, 1076 (1967).
\textsuperscript{123} CAB Order E-25704 (Sept. 19, 1967), 47 CAB 1075, 1076 (1967).
\textsuperscript{124} CAB Order E-25704 (Sept. 19, 1967), 47 CAB 1075, 1077 (1967) (Minetti and Gillilland, dissenting).
to the 3-2 decision, Waldrop told a *New York Times* reporter that the CAB was “shaking in their boots.”\(^{126}\) 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.”\(^{127}\)

Relegated for the moment to Rule 14 status, residents were still able to raise their noise concerns during the hearings before the examiner.\(^{128}\) Bardin enthusiastically cross-examined the helicopter companies’ witnesses about their experience with noise and noise complaints in other markets they served.\(^{129}\) 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 Washington area.\(^{130}\) 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


\(^{129}\) 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.

\(^{130}\) DOT-T-1 and DOT-T-2, Docket 17665 v. 11, Box 14, RG 197, NACP.
irritating.” 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.

After the hearing, the CAN, the PCA, and the Concerned Citizens complained 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, they 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. 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.

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 noise—at National Airport. The residents argued “there isn’t a shred of evidence” that any

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131 Statement of Position of Department of Transportation, n.d., 3, 4, Docket 17665 v. 11, Box 14, RG 197, NACP.
132 Statement of Position of Department of Transportation, n.d., 10, Docket 17665 v. 11, Box 14, RG 197, NACP.
133 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.
134 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.
135 Statement of Position of DOT, n.d., p. 3-4, 14-15, Docket 17665 v. 11, Box 14, RG 197, NACP.
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.\footnote{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.}

At the end of the helicopter proceedings, the hearing examiner recommended against
helicopter service to the airports, but mostly because it appeared economically infeasible
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.”\footnote{Brief of the Bureau of Operating Rights, Dec. 8, 1967, Docket 17665 v. 12, RG 197, NACP.} The examiner also thought that safety concerns
might preclude flight service over the densely developed D.C. area.\footnote{Initial Decision of Examiner William J. Madden, 49 CAB 346, 396 (May 8, 1968).} 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.\footnote{Initial Decision of Examiner William J. Madden, 49 CAB 346, 379 (May 8, 1968).}

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 “prejudiced by absence of intervention” in the ongoing proceedings.140 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.

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.”141 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.”142 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 –

140 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.
141 Oral Argument before CAB, July 24, 1968, p. 133, Docket 17665 v. 13, RG 197, NACP.
142 Oral Argument before CAB, July 24, 1968, p. 138, Docket 17665 v. 13, RG 197, NACP.
many members of the interested public, all tend to pooh-pooh the reality of what one talks about.”

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?

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. The board nodded to the residents’ concerns, but concluded that “the record contains adequate data for the discharge of the Board’s

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143 Oral Argument before CAB, July 24, 1968, pp. 143, 146, Docket 17665 v. 13, RG 197, NACP.
144 Brief of Concerned Citizens et al, Aug 19, 1968, p. 3, Docket 17665 v. 13, RG 197, NACP.
145 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.)
responsibilities with respect to environmental impact.” Based on the generalized information about noise and some 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.” After all, airplane traffic was loud, and “The 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.” While this was little more than a guess, “the Department’s position has been generally accepted elsewhere, and we accept it here.”

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[.]” 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.” 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.” Indeed, in recent

146 49 CAB at 352 (1968).
147 49 CAB at 353 (1968).
148 49 CAB at 353 (1968).
149 49 CAB at 353 fn. 20 (1968).
150 49 CAB at 353-54 (1968).
151 49 CAB 346, 353-54 (1968).
152 49 CAB 346, 353-54 (1968).
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.” Congressional intent could also be gleaned from the fact that Congress had repeatedly authorized the building of a heliport in downtown Washington. Any consideration of noise 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. However, the court took the opportunity to criticize the board’s traditionally rather cavalier approach to noise concerns. 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."\textsuperscript{156} The CAB was supposed to be looking out not just for air passengers but for the "general public at large" and thus could not, say, approve flights that would poison the public.

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.\textsuperscript{157}

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 of the Federal Aviation Act. The Civil Aeronautics Board has been given the scales of public interest. It must effect a balance."\textsuperscript{158} 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."\textsuperscript{159}

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 \textit{should} be considered

\textsuperscript{156} Palisades Citizens Association, Inc. v. Civil Aeronautics Board, 420 F.2d 188, 191 (D.C. Cir. 1969).
\textsuperscript{157} Palisades Citizens Association, Inc. v. Civil Aeronautics Board, 420 F.2d at 191.
\textsuperscript{158} Palisades Citizens Association, Inc. v. Civil Aeronautics Board, 420 F.2d at 192.
\textsuperscript{159} Palisades Citizens Association, Inc. v. Civil Aeronautics Board, 420 F.2d at 192.
led the CAN’s Waldrop to claim that “We lost the battle but won the war[.]”

Perhaps they did; the CAB going forward would agree that “our duty to determine the public interest encompasses environmental matters” and later litigants would cite the D.C. Circuit case before the board as they pushed for 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. The National Capital Planning Commission consistently refused to amend municipal law to allow a heliport to be built. There was never enough support for a downtown heliport, since space was scarce and noise concerns were a sticking point. As one woman from the Citizens Association of Georgetown argued, helicopters “take your privacy away. They can hang right over your garden when you’re sunbathing without a stitch on.” 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.

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161 Natural Resources Defense Council, Complaint, Docket 23254, 57 CAB 607, 609 (July 26, 1971)
This request provoked a new proceeding at the CAB about helicopter service in the area. 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.

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[].” 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 consequences—and that NEPA now required more of the CAB. A particularized study was needed to determine what the consequences of proposed service on those below.

But the residents were again disappointed. 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,

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166 CAB Order 70-11-85 (Nov. 19, 1970).
170 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.
and the knowable environmental effects consequent” the board had not done anything. 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.” 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.” 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.” The area simply could not support helicopter service.

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This particular small skirmish over helicopters did not provoke the CAB to do 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.  

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171 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.
172 Pioneer Airlines, Inc., Brief to the Examiner, March 10, 1972, p. 40, Docket 17665 v. 18, Box 16, RG 197, NACP.
173 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.
174 Reopened Washington/Baltimore Helicopter Service Investigation, 60 CAB 673, 674 (Dec. 11, 1972).
175 CAB Order 70-40134. See Croker 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
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[].”\textsuperscript{176} 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 \textit{Washington Post} noted that local airport noise was “One of Greater Washington's evergreen controversies[].”\textsuperscript{177}

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 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]