AIRPLANE NOISE: A TAKING WITHOUT COMPENSATION?

Batten v. United States
306 F.2d 580 (1962)

Plaintiffs, who are property owners residing near Forbes Air Force Base, commenced an action against the United States under the Tucker Act[1] to recover for an alleged taking of property without compensation in violation of the fifth amendment of the United States Constitution. The plaintiffs had purchased their lots and erected homes after the base had been deactivated, but subsequently the base was reopened and enlarged to accommodate jets. The property was outside the flying pattern of all aircraft operating at the base.

The complaints arose from aircraft operations on the base. After trial, the district court found the following facts which are not disputed.[2] The operation and maintenance of military jet aircraft produced noise, vibrations, and smoke which the plaintiffs claimed interfered with the use and enjoyment of their property; RB-47 and B-47 jet aircraft operated all six engines for 30 minutes on a parking ramp which is 650 feet from plaintiffs' property at its nearest point; at a warm up pad, 2000 feet from plaintiffs' property, the engines were run at idling speed during final pre-flight checks; about one-half of the flights began at a point 2,280 feet from the nearest property of the plaintiffs where the engines were operated at maximum output for 30 seconds; during seven months of the year a water-alcohol injection system was used on the jets and this system increased the characteristic trial of black smoke left by the jets; maintenance work was done 3,420 feet from the plaintiffs' property and the engines were operated at power settings of from 50% to 100%;[3] power generators on the parking ramp were run from 8 to 10 hours during the day and sometimes at night. These activities produced shock and sound waves which caused vibrations, making windows and dishes rattle, made conversation and use of the telephone, radio, and television facilities frequently impossible, and also interrupted sleep; and black smoke emitted from the jets on take-off left oily black deposits on the houses and laundry of the plaintiffs.

The case was based upon the Tucker Act which provides that claims against the United States may be founded "upon the Constitution . . . or

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1 36 Stat. 1093 (1911), 28 U.S.C. § 1346(a)(2) (1958).

2 Batten v. United States, 306 F.2d 580 (1962). The court of appeals had previously remanded the case so that the district court could make findings of fact. The district court had granted the government's motion to dismiss after withholding its ruling until after trial and accepted the facts established in the plaintiffs' complaint. See Batten v. United States, 292 F.2d 144 (1961).

3 *Id.* at 582. "During engine operation in the 100% range the sound pressure level measured in decibels varies from 90 to 117 on the plaintiffs' properties. Ear plugs are recommended for Air Force personnel when the sound pressure reaches 85 decibels and are required at or above 95 decibels."

upon any express or implied contract with the United States. . . ." The statute also provides for damage claims in cases not sounding in tort.[4] This statute is a fulfillment of the obligation imposed on the government by the fifth amendment of the Constitution which forbids "private property to be taken for public use without just compensation."[5]

The court of appeals, in this case of first impression, affirmed the district court and denied recovery on the ground that the plaintiffs did not prove a direct physical invasion of their property.[6] The court explained that harm alone is not enough, otherwise the "carefully preserved distinction" between "damage" and "taking" would be obliterated.[7] It is true that this distinction can be seen in the comparison of the fifth amendment with many state constitutions which provide for compensation for property taken or damaged,[8] but it is questionable whether it has really been carefully preserved in the federal courts.

Not every harm caused to a landowner by the government must be compensated. The government activity is presumptively useful, and the government should not be burdened with claims for insignificant harm to every trifling interest which may be asserted. But these plaintiffs had clearly experienced severe damage to their recognized right to enjoy their property without unreasonable interference from others. This is the interest usually

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[4] *Supra* note 1.

[5] The cause of action seemingly might fall under the Federal Tort Claims Act, 60 Stat. 842 (1946), 28 U.S.C. § 1346(2)(b), §§ 2671-2678, § 2680 (1958). The act covers Air Force personnel acting in the line of duty by its express terms and by interpretation. Indian Towing Co. v. United States, 350 U.S. 61 (1955). Dalehite v. United States, 346 U.S. 15 (1953), is authority for the interpretation that the act does not extend to the tort of nuisance. 91 C.J.S. *United States* 139. The *Dalehite* case did not deal with nuisance either specifically or indirectly so such interference springs solely from *obiter dicta.* Furthermore, the interpretation of the Federal Tort Claims Act is of questionable validity because of inroads into its doctrine by subsequent cases. Indian Towing Co. v. United States, *supra;* Rayonier, Inc. v. United States, 352 U.S. 315 (1956). The act requires either "negligence or wrongful act or omission of any employee of the government acting within the scope of his employment . . . ." 60 Stat. 843 (1946), 28 U.S.C. § 1346 (2) (b) (1958). The cases uniformly require that negligence be a factor on which liability may be predicated. Indian Towing Co. v. United States, *supra*; Rayonier, Inc. v. United States, *supra*; Dahlstrom v. United States, 228 F.2d 819 (1958); Bartholomae Corp. v. United States, 253 F.2d 716 (1958). The activity in the principal case is not negligent. However, it could be argued that it was a "wrongful act" within the meaning of the statute. But an exception denies recovery on that basis because the provisions do not apply to "any claim based upon the act . . . of an employee of the Government, exercising due care, in the execution of a statute or regulation . . . ." 60 Stat. 845 (1946), 28 U.S.C. § 2680(a) (1958).

[6] The court found authority for their general proposition in Transportation Co. v. Chicago, 99 U.S. 635 (1878); Gibson v. United States, 166 U.S. 269 (1897); United States v. Willow River Power Co., 324 U.S. 499 (1945).

[7] Batten v. United States, *supra* note 2, at 584, citing Nunnally v. United States, 239 F.2d 521 (1956).

[8] *E.g.*, Ohio Constitution, Art. I, § 1 and § 19. Kansas does not have such a provision.

protected by the law of nuisance. Their claim is surely not within the scope of any principle of *de minimis*.

The concept of "taking" has not been rigidly confined to complete confiscation. Landowners may be entitled to compensation even though they are left with some nominal status as owners. The majority of the court had some difficulty in distinguishing some of these cases and were forced to concede that if the noise, shock waves, and smoke were intentionally directed at the plaintiffs' property, a taking could be said to exist.[9] But no reason is suggested as to why the intention or state of mind of the government officials should control the right of the individuals to compensation when the public benefits at his expense.

The majority also suggested that a taking might have been recognized if the plaintiffs' home had been rendered totally uninhabitable.[10] This is also a doubtful distinction. Doubtless many would regard the plaintiffs' homes as being uninhabitable, as reflected in the proved depreciation in values. If all were unanimous on the point, the taking would still not be completely confiscatory, because the owners would be free to put the property to other uses or to hope that the houses may be occupiable as residences in the distant future. A similar plaintiff who had chosen to live on property best suited to industrial use might suffer less harm than these plaintiffs, but, nevertheless, be allowed relief upon application of this test. Such a result makes little sense.

Most difficult to distinguish were the decisions of the United States Supreme Court in *Causby v. United States*[11] and *Griggs v. Allegheny County*.[12] In these cases, the Court held that there had been physical invasions by airplane overflights. The damage to the plaintiffs was occasioned by noise and vibration. The overflights were a trespass as well as a nuisance,[13] but in the *Causby* case, the Court stated that flights over private land were not takings, unless so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land.[14] Thus, no taking could exist unless a substantial nuisance was created imposing a servitude on the property. The property right protected was the same right to peaceful enjoyment.

In assessing the harm, the court in the *Causby* case stated: "The noise is startling. . . . As a result of the noise, respondents had to give up their chicken business . . . (and) are frequently deprived of their sleep."[15]

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[9] *Supra* note 2, at 585.

[10] *Ibid.*

[11] 328 U.S. 256 (1945).

[12] 369 U.S. 84 (1962).

[13] Trespass cases have extended to instances of shooting across land. Whittaker v. Strangvick, 100 Minn. 386, 111 N.W. 295 (1907); Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943). Invasion by smoke has been characterized historically as a nuisance cause of action in tort. McCarty v. Natural Carbonic Gas Co., 189 N.Y. 40, 81 N.E. 549 (1907).

[14] *Supra* note 11, at 266.

[15] *Id.* at 259.

Similarly in the *Griggs* case, the court quoted the Board of Viewers of the Pennsylvania Court of Common Pleas by saying that the noise of the airplanes was comparable "to the noise of a riveting machine or steam hammer" on take-off and comparable "to that of a noisy factory" on let-down.[16] In addition, the court's opinion quotes a dissenting opinion from the state supreme court as a summary of the uncontroverted facts as follows; "[I]t was often impossible for people in the house to converse or talk on the telephone. The plaintiff and members of his household (depending on the flight which in turn sometimes depended on the wind) were frequently unable to sleep even with ear plugs and sleeping pills; they would frequently be awakened by the flights and the noise of the planes; the windows of their home would frequently rattle and at times plaster fell down from the walls and ceilings. . . ."[17]

Despite the striking similarity in the extent and nature of the harm experienced by the present plaintiffs with those in the *Causby* and *Griggs* cases, the court distinguished them on the basis of the trespassory overflight. The trespass was a direct displacement of the landowner and compensable whereas the nuisance was indirect and not compensable. The forms of action distinction between trespass and trespass on the case are thus embalmed as the fifth amendment and the Tucker Act. The distinction is clearly unsatisfactory.

Surely most takings involve an actual physical invasion.[18] But recovery has been permitted in several instances where no physical invasion occurred where the taking was accomplished by indirect non-trespassory interference.[19] It surely cannot be said that the overflight in *Causby* in and of itself caused the injury. It is the injury occasioned by noise, vibration, etc. resulting from the overflight which is the basis for finding a constitutional taking. Exactly the same injury of noise, vibrations, and smoke is found in the principal case and other non-physical invasion cases.

The economic interest asserted here is identical with that taken in the physical invasion cases like *Causby* and *Griggs*, and the means by which the interest is taken are no different. That the interference comes from a vertical direction rather than a lateral one should surely be a matter of indifference to a fairly administered scheme of compensation.[20]

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16 *Supra* note 12, at 87.

17 *Ibid.*

18 Numerous cases are included in Chief Judge Murrah's dissenting opinion, *supra* note 2, at 586.

19 Armstrong v. United States, 364 U.S. 90 (1960) (lien destruction); Richards v. Washington Terminal, 233 U.S. 546 (1913) (smoke and gases); Thomburg v. Port of Portland, 376 P.2d 105 (1962). In the latter case, the Oregon Supreme Court supported the dissenting opinion in the principal case although the case was remanded to send the question of taking to the jury. The alleged taking involved nuisances from airport operations without substantial direct overflights.

20 "The compensable 'taking' in an action initiated by the landowner consists not in an appropriation of the landowner's property in a zone or column of airspace but rather in the creation of noise which substantially interferes with surface use and enjoy-

It must be conceded that a line must be drawn somewhere and that it will be necessarily arbitrary with respect to some close cases. But the problem involved with defining the limits of recovery are no more difficult than those in numerous nuisance cases. The interference should be more inconsequential before society should dismiss the claims of the individual as a trifling burden to be borne as a cost of civilization.

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ment." "Airplane Noise: Problems in Tort Law and Federalism," 74 Harv. L. Rev. 1581 (1961) at 1585. See also Hayes, "United States v. Causby: An Extension Thereof." 3 Wm. & M. L. Rev. 36 (1961) at 45.