The United States' Response to International Air Safety

Shirlyce Manning

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation
https://scholar.smu.edu/jalc/vol61/iss2/7

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
THE UNITED STATES' RESPONSE TO INTERNATIONAL AIR SAFETY

Shirlyce Manning*

TABLE OF CONTENTS

I. INTRODUCTION ....................................... 505

II. HISTORICAL OVERVIEW OF TERRORISM AND INTERNATIONAL AIR SAFETY: THE NATIONAL AND INTERNATIONAL REGULATORY FRAMEWORK ........................................ 507
   A. Federal Aviation Administration ...................... 508
   B. International Civil Aviation Organization .... 511

III. THE PRESIDENTIAL RESPONSE .......................... 514
   A. Nixon ............................................ 514
   B. Carter .......................................... 515
   C. Reagan ......................................... 517
   D. Bush ............................................ 522
   E. Clinton ......................................... 526

IV. COUNTERTERRORIST INITIATIVES ....................... 529
   A. Airport Security and Technology ...................... 529
   B. Criminal Prosecutions/Extradition Measures ........ 532
   C. Economic Sanctions ................................ 533
   D. Military Deployment ................................ 534
   E. Safety Oversight of Foreign Air Carriers ........ 500

V. CONCLUSION ......................................... 537

I. INTRODUCTION

THE UNITED STATES government has a responsibility and interest in protecting the safety of its citizens who travel and live abroad. Nevertheless, travel today for American citizens has never been more dangerous. Statistics reveal that over 450 million passengers board 6.5 million flights annually at American

* The author would like to thank Robert Papkin and Alan Mendelsohn for their assistance and contributions.
Recent studies show that, except for the record year of 1985, more people died in airline accidents during the first part of 1994 than in the same time period of any other year in the last decade. It is thus clear that safety abroad affects many Americans.

International air safety initiatives involve issues related to terrorism, hijackings, and airplane and airport safety. In light of recent events, Americans must not assume that terrorism occurs only in the Middle East or is an outdated issue from the 1970s. Although anti-American terrorist attacks around the world declined by almost fifty percent since 1992, government officials have warned American citizens that there are ominous signs that terrorism will escalate in the future. In fact, in view of recent events such as the World Trade Center bombing in New York, the killing of two CIA employees in a Washington suburb, and several airplane hijackings in 1993, Americans must be aware that they are still the targets of choice for terrorists.

In addition to the safety threat posed by foreign "bullies" who cowardly endanger American lives, American travelers also face the possibility that the aircraft they select may not meet minimal safety standards. The Federal Aviation Administration has inves-

---

2 Airline Deaths Above Average, FLIGHT INT'L, July 20, 1994, at 6. According to the Flight International Airline Safety Review published the week of July 20, 1994, there is a growing safety standard disparity between countries, with the most serious crashes involving Asian carriers. See also Lyndon McClain, Trend Towards Safer Flying Upset by Recent Tragedies, FIN. TIMES (U.K.), Jan. 10, 1989, at 7 (reporting that air crashes during the 1980s upset the long-term trend towards improved air safety, which had leveled off in the 1970s).
4 See Alfred Borcover, Fear of Traveling? You Don't Have to Hunker in a Bunker, CHI. TRIB., Feb. 3, 1991, at 2. A former State Department Office of Counter-Terrorism official stated, "We are facing a very serious threat of international terrorism that we probably haven't faced before .... We have now virtually every leader of every Middle East terrorism organization pledging support to Saddam Hussein, which suggests a concerted campaign against us and all those in the alliance against Iraq." Id. See also Douglas Jehl, Iran-backed Terrorists Are Growing More Aggressive, U.S. Warns, N.Y. TIMES, Mar. 18, 1993, at A8 ("Iranian-backed militant groups have expanded their bases of support well beyond the Middle East and represent the greatest threat."); Brian Jenkins, Picking up the Pieces: Trade Center Bomb Shattered a Taboo, NEWSDAY, Mar. 24, 1993, at 93.
tigated this issue for the last few years.\textsuperscript{5} In fact, a recent Clinton Administration ban on nine foreign aircraft carriers who fail to meet international safety standards highlights this issue.\textsuperscript{6}

Several urgent matters must be addressed by American aviation policy administrators, the federal government, and the president. The most serious matter is the threat of terrorism. The U.S. government's failure to adopt a coherent and effective policy to combat the growing danger of terrorism and international air safety is a tragedy. The government, from Nixon to Clinton, has addressed the problem in various ways. Some of the initiatives include establishment of airport security checkpoints, implementation of federal legislation, creation of task forces that review programs, and use of military force. But these governmental programs require improvement, and more action must be taken.

This Comment traces the development of the U.S. response to terrorism and international air safety, and suggests a unified international effort as a possible solution. Part One presents a historical overview of terrorism and international air safety, examining the regulatory framework of the Federal Aviation Administration and International Civil Aviation Administration. Part Two looks at the progression of counterterrorist policies beginning with an overview of the most recent presidential administrations. Lastly, Part Three shifts to specific counterterrorist initiatives and an identification of recommendations.

\section*{II. HISTORICAL OVERVIEW OF INTERNATIONAL AIR SAFETY}

The year 1968 is widely recognized as the beginning of the modern era of international terrorism.\textsuperscript{7} This new era was ushered in by a wave of aerial hijackings, bombings, kidnap-

\footnotesize{\begin{itemize}

pings, assassinations and murders which shocked the nation and the world.\textsuperscript{8} Hijacking became one of the most serious threats to international and domestic air safety. As a result of the technological advances of the early 1970s which introduced the rise in American air travel, the United States began to seriously address the issue of hijackings and international air safety.\textsuperscript{9}

\section*{A. Federal Aviation Administration}

In the United States, the Federal Aviation Administration (FAA) is responsible for promoting safe air travel and enforcing security measures affecting aircraft and air terminals.\textsuperscript{10} The FAA works under the authority of the Department of Transportation. Congress mandated the FAA to “carry out . . . [the] duties and powers of the [DOT] Secretary related to aviation

\begin{quote}
(1) Three armed members of the Popular Front for the Liberation of Palestine seized an El Al airliner and forced it to fly to Algeria—launching a campaign of air piracy that has been a hallmark of terrorism ever since; (2) [i]n West Germany, the Baader-Meinhof gang gained prominence by torching a Frankfurt department store; (3) [i]n Egypt, the Palestine Liberation Organization, sobered by Israel’s victory in the “six-day war” in 1967, made Yasser Arafat its leader; (4) [i]n the United States, Martin Luther King, Jr. was assassinated, unleashing a spate of domestic violence by groups such as the Black Panthers and Weathermen; [and] (5) [i]n Mexico City, street marches culminated in protests at the Olympic Games, aiding growth of a terrorist movement with Cuban and Soviet connections.
\end{quote}

\textit{Id.} The lack of a generally accepted definition of “terrorism” has only added to the problem of establishing a cohesive international and national strategy for eliminating the terrorist threat. A study completed in 1983 reported the existence of more than 100 separate definitions by various analysts and scholars. See David C. Rappoport, \textit{Fear and Trembling: Terrorism in Three Religious Traditions}, 3 \textit{Am. Pol. Sci. Rev.} 658-77 (1984).

\textsuperscript{8} See Wardlaw, \textit{supra} note 7, at 206-07; see also Dow, \textit{supra} note 1, at 1151 (identifying the first recorded American aircraft hijacking in 1961 and a decline in the number of hijackings of American commercial airplanes during the period between 1961 and 1967).

\textsuperscript{9} The 1970s witnessed a number of technological factors that affected international aviation security: (1) live television became the “stage” for terrorist demands; (2) increased air travel throughout the world provided an easy target for terrorists (in 1969 there were 33 hijackings of U.S. aircraft, compared to 16 between 1930 and 1968); and (3) weapons became very sophisticated and advanced. See Kidder, \textit{supra} note 7, at 137.

The FAA has "exclusive responsibility for the direction of any law enforcement activity affecting the safety of persons aboard aircraft in flight." The FAA's security department is the regulatory arm of the government's counterterrorist program. Since its inception, it has focused on identifying security threats involving aircraft piracy, prescribing security requirements for airlines, aircraft, and airports, and providing technical assistance regarding these measures. In 1961, the FAA's programs were given a major legislative push.

1961 marked the year of the first federal legislation addressing aircraft hijacking. Later that year, the Federal Aviation Act of 1958 was amended to punish "aircraft piracy" offenders. By 1968, hijacking episodes had become a major problem for the United States and its citizens. In response, the government called on a special task force of the FAA to develop a method for detecting individuals attempting to board aircraft with concealed weapons. Despite ongoing protest and debate, the

13 Aircraft piracy is the umbrella term for aircraft hijackings, bomb threats at airports, and interference with flight crew. See EDWARD MCWHINNEY, AERIAL PIRACY AND INTERNATIONAL TERRORISM: THE ILLEGAL DIVERSION OF AIRCRAFT AND INTERNATIONAL LAW 5-6 (1987) (defining piracy under international law).
15 Act of Sept. 5, 1961, Pub. L. No. 87-197, §§ (i)-(h), 75 Stat. 466 (current version at 49 U.S.C. § 1472(i)-(m),(o) (1988)).
16 49 U.S.C. app. §§ 1301-1557 (1988). This act made aircraft piracy a crime punishable by death or imprisonment and also identified a lesser offense of "interference with flight crew or cabin crew," punishable by a monetary fine or imprisonment. See Humphrey G. Dawson, Civil Aviation, Hijacking and International Terrorism: An Historical and Legal Review, 15 INT'L BUS. LAW. 57, 60 (1987).
17 Dow, supra note 1, at 1159. In 1968, the United States was hit by eighteen successful hijacking attempts on American aircraft. Id.
18 Id. at 1160-61. "The task force developed and implemented the first anti-hijacking system which included: (1) notices to the general public, (2) the use of a hijacker profile, (3) the use of magnometers to detect any metal objects on passengers who met the profile, (4) interviews with selected passengers, and (5) frisks or searches of suspected passengers." Id.
19 For a discussion of the Congressional debate regarding FAA baggage screening and security proposals, see Stephen P. Halbrook, Firearms, the Fourth Amendment, and Air Carrier Security, 52 J. AIR L. & COM. 585 (1987), and see Dow, supra
FAA made the screening programs mandatory fixtures at American airports beginning in 1973.20

In 1974, the airline security problem escalated, prompting Congress to pass two new statutes directed at the problem of hijacking.21 The Anti-hijacking Act of 1974 identified a general prohibition against carrying a concealed weapon on board aircraft.22 The Air Transportation Security Act of 197423 authorized screening for weapons in carry-on baggage and required that screening procedures be uniform for all airlines.24

The FAA and the government’s focus on preventive security measures and deterrence continued in 1985. The focus, however, shifted to foreign air carriers and airports. The Foreign Airport Security Act was signed into law on August 8, 1985.25 The Act expanded the DOT’s and FAA’s role in combatting air piracy. Specifically, the Act mandated FAA assessment of foreign airport security procedures and the security procedures utilized by foreign air carriers serving the United States.26 Prior to this Act, the American government did not have any legal grounds for either identifying high-risk foreign international airports, or conveying information or warnings to users of such dangerous facilities. Furthermore, the American government had no procedures in force for correcting the problems. The provisions of the Act were threefold: (1) the DOT Secretar periodically was to assess the security programs at foreign airports; (2) the DOT Secretary was to notify foreign governments operating the airports of any failure to maintain or administer effective security measures; and (3) sanctions could be imposed in the event the foreign government did not remedy the security

20 Evans & Murphy, supra note 12, at 10.
21 Halbrook, supra note 19, at 604-10.
24 Id. § 1357(a)(2)(c).
26 See Rokita, supra note 11, at 217-18.
deficiency. Although these statutes were repealed, later legislative efforts and FAA initiatives continued and will be addressed at length in the next section.

B. INTERNATIONAL CIVIL AVIATION ORGANIZATION

Reference has been made to the evolution of U.S. legislation and programs relative to the control of aircraft hijacking. International air safety and terrorism has been a nagging concern of the international community.

The United Nations (UN) and its specialized agencies such as the International Civil Aviation Organization (ICAO) have worked to eradicate the terrorist threat on international aviation. Conventions and protocols have been adopted regarding hijacking of aircraft and terrorist attacks on international airports. The efforts of the international community help focus needed attention on the problem. Nevertheless, the true result has been a lack of consensus and effective concerted action aimed at eliminating terrorist attacks.

Fifty years ago, the participants at the Chicago International Aviation Convention established the principal objectives of the ICAO: "The Chicago Convention was designed to ensure safe and orderly growth of international civil aviation throughout the world and to promote safety of flight in international air navigation." ICAO has developed international measures for controlling attacks on civil aviation. "The Tokyo, Hague, and Montreal conventions constitute the basic international law re-

---


28 The International Civil Aviation Organization was established in 1944 when delegates from 52 nations gathered in Chicago to sign the Convention on International Civil Aviation. The ICAO, as an arm of the United Nations, identifies its goals and objectives as follows: to "develop the principles and techniques of international air navigation, and to foster the planning and development of international air transport." *Treatise on Air-Aeronautical Law* 187 (1981).

29 Id. Paul Sheppard & Eugene Sochor, *Setting International Aviation Security Standards*, in AERIAL PIRACY AND AVIATION SECURITY 3 (Yonah Alexander & Eugene Sochor eds., 1990). The Chicago Convention also identifies two other objectives of the ICAO:
   1) [t]hat ICAO promotes safety of flight in international aviation;
   2) [t]hat ICAO, through the development of its Standards and Practices, meets the needs of the peoples of the world for safe, regular, efficient, and economical air transport.

lating to the facilitation of unlawfully interrupted flights, the offense of hijacking, and the offense of sabotage of aircraft, respectively.\textsuperscript{30} The Tokyo Convention\textsuperscript{31} was the first international treaty to address hijacking.\textsuperscript{32} Its provisions dealt primarily with jurisdiction over offenses committed on board aircraft in flight.\textsuperscript{33} Although the Tokyo Convention attempted to deal with hijackings, it has nevertheless been criticized.\textsuperscript{34} The main criticisms involved its failure to list any offenses that state parties are required to suppress and to impose any obligations involving the prosecution or extradition of offenders.\textsuperscript{35}

\textsuperscript{30} EVANS & MURPHY, supra note 12, at 20.
\textsuperscript{33} LAMBERT, supra note 32, at 51.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
The Hague Convention,\textsuperscript{36} which followed, defined the offense of unlawful seizure of aircraft:

Any person who on board an aircraft in flight: (a) Unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of that aircraft, or attempts to perform any such act, or (b) is an accomplice of a person who performs or attempts to perform any such act commits an offence.

The Hague Convention falters on several points: it imposes penalties without identifying or defining what these penalties should be; the geographic limitations contained in article 1 conflict with the punitive measures outlined in the overall convention; and it sets out a confusing jurisdictional scheme.\textsuperscript{37}

The best attempt to control the international hijacking problem was the Montreal Convention, signed into law in 1971.\textsuperscript{38} The Convention was an ambitious attempt at controlling and preventing the terrorist incidents affecting international aviation. Nevertheless, there are still gaps in the counterterrorist attack:

\textsuperscript{36} Hague Convention, \textit{supra} note 22.

\textsuperscript{37} \textit{Id.} at art. 1.

\textsuperscript{38} Abeyratne, \textit{supra} note 30, at 487.

\textsuperscript{39} The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 23 Sept. 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 [hereinafter Montreal Convention]. The Montreal Convention was directed at preventing sabotage and other acts of general violence directed against aircraft. Its purpose was to supplement the specific hijacking prohibitions and protective controls of the Hague Convention. As a result of the increased success in the detection and prevention of air piracy, the offenders began employing alternative methods and became more difficult to apprehend. McWhinney, \textit{supra} note 13, at 45. The definition of the offense of "Unlawful Acts against the Safety of Civil Aviation" is found in Article 1:

Any person commits an offence if he unlawfully and intentionally: (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or (b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

Montreal Convention, \textit{supra}, at art. 1.
a) the conventions do not provide for and guarantee the trial of an offender, and do not specify adequate punitive measures; b) no obligation is cast on contracting states for the extradition of an offender; c) no provision is made for the universal adoption of standards of precaution and safety; and d) the initial attempt, albeit somewhat unsophisticated, of the Tokyo Convention at a remedial approach has been thwarted by the repressive attitude of the two subsequent conventions.

III. THE PRESIDENTIAL RESPONSE

A. Nixon

Nixon's administration was the first to address the issue of terrorism seriously. The first U.S. government program to combat terrorism was introduced in response to the massacre at the Olympic Village in Munich, Germany in 1972. Following the aftermath of the Munich massacre, the Nixon Administration created the Cabinet Committee to Combat Terrorism. The committee met for the first and only time on October 2, 1972. Membership included the secretaries of state, treasury, defense, and transportation; the attorney general; the director of the CIA; the national security advisor; and the acting director of the FBI. The committee's main task involved the coordination of federal agencies to combat terrorism. Additionally, the committee decided to encourage international cooperation in the

41 The massacre at the Olympic Village in Munich occurred during the 1972 Olympic Games. Eight members of the Black September Organization—a Palestinian extremist group—killed seventeen people, including eleven Israeli athletes, one policeman, and five of their own group. This tragic event came on the heels of a series of hijackings and terrorist activities. The dawn of technology ensured that the events were broadcast throughout the world on television. See Simon, supra note 7, at 106-07; William R. Farrell, Organized to Combat Terrorism, in Fighting Back 50, 51 (Neil C. Livingston & Terrell E. Arnold eds., 1987).
43 More specifically the Committee was to:
(1) Coordinate, among the government agencies, ongoing activity for the prevention of terrorism. This will include such activities as the collection of intelligence world wide and the physical protection of U.S. personnel and installations abroad and foreign diplomats and diplomatic installations in the United States.
(2) Evaluate all such programs and activities and where necessary recommend methods for their effective implementation.
fight against terrorism; one such plan involved providing new initiatives for the ICAO.44

Unfortunately, as often happens with governmental initiatives, the committee was a bureaucratic failure. Most of the committee work was done by the Working Group on Terrorism, comprised of senior representatives from each of the agencies represented on the committee.45 Some of the problems hampering the working group involved the size of the group, the failure of agencies and departments to exchange information, and various individuals' wavering interest in pursuing the original goals.46

B. CARTER

The Carter era began with a complete revamping of the institutional machinery organized to respond to terrorism. The changes came about as a result of an extensive review of U.S. Government policy and capabilities with regard to the problem of responding to and combatting terrorism.47 The review, ordered by the National Security Council (NSC), prompted the issuance of Presidential Review Memorandum 30 (PRM-30),48 which recommended a number of changes to the U.S. counterterrorism program. A tri-level organizational structure was introduced in conjunction with four basic program components: prevention, deterrence, reaction, and prediction.49

The Carter memorandum (PRM-30) abolished the Nixon Cabinet Committee, replacing it with a Special Coordination Committee (SCC) of the NSC.50 The SCC functioned under the leadership of the Assistant to the President for National Security

---

44 Id. at 33.
46 Id. at 19; FARRELL, supra note 42, at 35.
47 Id. at 34-35.
48 Id. at 35.
49 Id. at 35.
50 Id. at 35.
Affairs. The SCC operated as a policy-directing body as well as an advisory body, and engaged in three main functions: (1) supervision and coordination of senior-level interagency groups dealing with terrorism; (2) resolution of any jurisdictional problems that might surface during a terrorist situation; and (3) ensuring that all necessary decisions concerning terrorism were made at the highest levels of government.  

President Carter's administration became the first to falter under the political game associated with fighting international terrorism. Ultimately Carter's downfall, the event that destroyed his presidency, involved a terrorist crisis. On November 4, 1979, a group of militants seized the U.S. embassy in Tehran and held Americans hostage for 444 days. The hostage crisis was an opportunity for Carter's administration to utilize the thirty organizations comprising the government's antiterrorism structure. Unfortunately, the organizational structure would not prove effective, as a number of factors worked to exacerbate the situation. First, Carter's patient, nonforceful approach allowed the Iranian government and militants the perfect opportunity to manipulate the President and his administration. Second, the television age made it possible for terrorists to depend on the media to convey their political motives, threats to the government, and hostage-related demands. 

Eventually Carter left office with a painful reminder of how the United States could be manipulated by foreign terrorists who knew how to play the terrorism game. Carter's revamping of the government's counter-terrorist organizational structure remained intact through Reagan's presidency. Yet, the patient approach to international terrorism would be replaced in the

---

52 CELMER, supra note 45, at 20.
53 Id. at 22-23; see also SIMON, supra note 7, at 121.
54 See SIMON, supra note 7, at 125-66. The author points out that the legacy of the 1979-81 Iran hostage crisis became a lesson in the power of terrorism. Id. at 122. Without causing a single casualty to any American civilian (although eight U.S. servicemen were killed), the Iranian government, militants and others in post-revolutionary Iran were able to orchestrate the longest and most agonizing crisis for the United States in the Post-World War II era. Id.
55 CELMER, supra note 45, at 20.
56 SIMON, supra note 7, at 121-66.
57 Id. at 269.
58 Id. at 121.
59 CELMER, supra note 45, at 23.
Reagan Administration by an approach that treated terrorism as an act of war.  

C. REAGAN

The Reagan Administration came to office in 1981, on the heels of the Iranian hostage crisis, with tough new rhetoric concerning terrorism. President Reagan immediately made efforts to combat terrorism a top priority for his administration. During his first term, there were few substantive initiatives, either legislative or administrative, addressing the issue of terrorism. But, beginning in 1983, a number of unprecedented attacks on U.S. diplomatic facilities and military installations in the Middle East occurred, bringing the issue of terrorism back to the forefront of American politics.

On October 23, 1983, Iranian-backed Shi'ite terrorists bombed the headquarters of the U.S. Marine peace-keeping force in Beirut. Following the terrorist bombing that killed 246 Marines, the Reagan Administration began strengthening its intelligence agencies and developing its proactive response to terrorism.

In response to the bombing in Beirut, the Pentagon established the Long Commission to investigate the U.S. anti-terrorist policy. The Long Commission's most important and lasting legacy was its message that "terrorism had become tantamount..."

---

60 Simon, supra note 7, at 166.

61 Id. at 166-67. President Reagan greeted the hostages, who were freed a few moments after he was sworn in as president, with the following remark which reflected how his administration would approach the issue of international terrorism: "let terrorists beware that when the rules of international behavior are violated, our policy will be one of swift and effective retribution." Id. at 167.


64 Wolf, supra note 62, at 56. The author explains, The Department of Defense (D.O.D) formed three new antiterrorist organizations. The United States Navy’s Antiterrorist Indication and Warning Alert Center, which is one of these new groups, was formed on December 19, 1984, and assigned the mission of gathering antiterrorist information from domestic and foreign sources and distributing a finished product. Often, its report is a specially tailored terrorist-threat assessment, released to designated U.S. Navy and Marine commanders.

Id.

65 Id. at 57.
to an act of war." Headed by retired Admiral Robert J. Long, the Commission called on the U.S. government to activate a strong, active counterterrorist policy.

A few months after the Long Commission report, President Reagan introduced important counterterrorist legislation. On April 3, 1984, he signed National Security Decision Directive 138 (NSDD 138). This document officially established the American government policy for the use of military force against terrorists. The still classified document identifies the chief themes under the NSDD 138:

- No nation can condone terrorism.
- Every country has the right to defend itself.
- Terrorism is a problem for all nations.
- The United States will work with other governments to deal with terrorism. U.S. policy aims to deal with all forms of terrorism but regards state terrorism as a special problem.
- States that use or support terrorism cannot be allowed to do so without consequences.
- The United States will use all available channels to dissuade states from supporting terrorism.
- The United States will heighten its efforts to prevent attacks and to warn and protect its citizens and allies.
- The United States will seek to hold acts of state terrorism up to the strongest public condemnation.
- When these efforts fail, the United States has a right to defend itself.

The signing of NSDD 138 signified a shift in the U.S. response to terrorism. It detailed the "Reagan administration's desire to deter and prevent terrorism through the use of more unilateral methods . . . [than] used by past administrations." From the early 1970s until the spring of 1984, the U.S. response to terror-

---

66 Id. at 56.
67 Id. at 56-57; see also SIMON, supra note 7, at 178 n.28 (quoting the Commission's message).
68 Neil C. Livingstone, Proactive Responses to Terrorism: Reprisals, Preemption and Retributions, in FIGHTING BACK, supra note 41, at 109, 112.
69 SIMON, supra note 7, at 179.
70 Livingstone, supra note 68, at 112-13.
71 See id. at 113. The author notes that another element of the directive was its reference to article 51 of the U.N. Charter, identifying states' rights of self-defense in fighting terrorism. The United States was actively promulgating its proactive counterterrorist policy. The NSDD served to warn terrorists that the United States would no longer passively submit to terrorist outrages without engaging in military action to defend its citizens and punish terrorist bullies. Id.
72 CELMER, supra note 45, at 63.
ism was based on a passive, reactive and patient defense. During Reagan's term in office, the focus shifted to a "no compromise" and very proactive approach (although some commentators will argue this is not an accurate evaluation of the Reagan Administration). Clearly, at the end of his first term, President Reagan had placed international terrorism at the top of his foreign policy agenda. The remaining years of Reagan's term would allow the President the opportunity to test his proactive strength.

On April 26, 1984, President Reagan submitted several legislative proposals to Congress. He requested enactments of the following: enabling legislation for the Convention Against the Taking of Hostages adopted by the United Nations on December 17, 1979; enabling legislation for the Convention on Suppression of Unlawful Acts Against the Safety of Civil Aviation, adopted by the ICAO on September 23, 1971 in Montreal; authority to pay rewards for information concerning international terrorist acts; and final authority to prohibit the training or support of international terrorist organizations. The legislative response was positive. Congress approved legislation authorizing increased security of American diplomats abroad, the payment of rewards for information on international terrorist acts, and danger pay for U.S. personnel serving in high threat posts.

---

73 See Livingstone, supra note 68, at 113-19; Simon, supra note 7, at 167-217. In fact, both authors identify Secretary of State Shultz as being the most outspoken, "rhetoric-driven" member of Reagan's administration. Livingstone, supra, at 114-15; Simon, supra, at 167-217. Simon explains that a speech by Shultz before the Park Avenue Synagogue in New York City "set off alarm bells in Washington." Id. at 181-82. Throughout Reagan's administration, Shultz publicly campaigned for a bold policy to combat terrorism.

74 President's Message to the Congress Transmitting Four Proposed Bills, 20 WEEKLY COMP. PRES. DOC. 590, 591 (Apr. 26, 1984) [hereinafter President's Message].


76 President's Message, supra note 74, at 592; Legislation Hearings, supra note 75, at 197.

77 President's Message, supra note 74, at 592; Legislation Hearings, supra note 75, at 214.

78 President's Message, supra note 74, at 593; Legislation Hearings, supra note 75, at 206. For an overview of the bills, see Marian N. Leich, Four Bills Proposed by President Reagan to Counter Terrorism, 78 AM. J. INT'L L. 915 (1984).

During 1985, the Committee on Foreign Affairs addressed international terrorism within the context of its authorization and oversight of the International Security and Development Cooperation Act of 1985\textsuperscript{80} and the Department of State Authorization Act of 1985.\textsuperscript{81} The committee undertook three legislative initiatives that helped impact bilateral and multilateral responses to international terrorism: the Foreign Airport Security Act of 1985,\textsuperscript{82} the International Maritime and Port Security Act of 1986,\textsuperscript{83} and the Omnibus Diplomatic Security and Antiterrorism Act of 1986.\textsuperscript{84} Responding to a number of international terrorist incidents in 1985,\textsuperscript{85} the United States implemented a number of security improvements at international airports. Congress enacted the Foreign Airport Security Act\textsuperscript{86} which addresses the increasing number of terrorist acts targeted at U.S. citizens traveling via foreign airports. Additionally, the Foreign Airport Security Act addresses the international aviation industry’s concern with terrorist acts committed at international airports. The House Committees on Foreign Affairs and Public Works and Transportation concluded that no formal mechanisms existed in the U.S. government for identifying international airports having a serious risk, for informing the public of those risks, or for taking the necessary preventive measures to avoid security


\textsuperscript{84} \textit{Id.} at 190.


\textsuperscript{86} Foreign Airport Security Act, \textit{supra} note 82.
problems. The Foreign Airport Security Act establishes guidelines for dealing with these problem areas.

In the spring of 1985, the Committee on Foreign Affairs engaged in extensive hearings involving the implementation of the Foreign Airport Security Act. In addition, the Committee's Staff Task Force on International Terrorism and Diplomatic Security conducted two investigative trips to review the adequacy of foreign airport security at high-risk foreign airports in Rome, Frankfurt, London, and Athens. As a result of this oversight activity, the Staff Task Force concluded that, to ensure a universally high level of security at foreign international airports, foreign flag carriers should establish security procedures equivalent to the standards required of U.S. carriers under the Foreign Airport Security Act.

The important legislation introduced during the Reagan Administration did not conclude with the passage of the Foreign Airport Security Act. In conjunction with that Act, Congress enacted the Anti-Terrorism Training Assistance Program. This program provided Congress with additional funding for upgrading security at international airports, specifically in the areas of training and equipment identified in the Foreign Airport Security Act. Also, in 1984, the Hostage Taking Act was enacted to

---


88 A few of the specific mandates include: (1) the Secretary of Transportation, through the Federal Aviation Administration, is to conduct periodic security assessments of foreign international airports used by United States carriers, and (2) the Secretary of State is to seek multilateral and bilateral agreements to strengthen enforcement measures and standards for compliance with respect to aircraft sabotage, aircraft hijacking, and airport security. See Foreign Airport Security Act, supra note 82, § 551.

89 See International Terrorism Hearings, supra note 87.


91 Id. at 6.


93 Foreign Airport Security Act, supra note 82, § 501.

remedy specific problems of terrorism that pose the greatest threats to American citizens.\textsuperscript{95}

In 1986, the American people were introduced to a new wave of counterterrorist legislation. After approval of the Foreign Airport Security Act in 1985, the Committee on Foreign Affairs undertook further hearings which culminated in the approval of the Omnibus Diplomatic Security and Antiterrorism Act of 1986. This Act contained two Committee initiatives, the International Maritime and Port Security Act,\textsuperscript{96} and the establishment of an international coordinating committee on antiterrorism.\textsuperscript{97} Lastly, the United States government had become frustrated with its inability to prosecute terrorists and thus passed the Terrorist Prosecution Act on February 19, 1986.\textsuperscript{98}

The bill "provide[s] for the prosecution and punishment of persons who, in furtherance of terrorist activities or because of the nationality of the victims, commit violent attacks upon Americans outside the United States or conspire outside of the United States to murder Americans within the United States."\textsuperscript{99}

Although Reagan did not leave office unscathed by controversy,\textsuperscript{100} he was able to leave feeling proud of some of his accomplishments involving his battle against international terrorism. He was the first president since Jefferson to use military force in his counterterrorist initiatives and policy.\textsuperscript{101} Although he focused on the United States' unilateral counterterrorist efforts, he urged American allies to join together in their efforts to stop the terrorist threat.\textsuperscript{102} President Reagan also increased security

\textsuperscript{95} Id.


\textsuperscript{97} The purpose of this initiative was to establish a coordinating committee focusing the attention of like-minded governments on the problems and necessary responses to international terrorism. Omnibus Diplomatic Security and Antiterrorism Act, \textit{supra} note 96, § 701(b).

\textsuperscript{98} S. 1429, 99th Cong., 2d Sess., 132 \textit{CONG. REC.} S1382-88 (daily ed. Feb. 19, 1986). This bill passed the Senate by a vote of 92 to zero. \textit{Id.}

\textsuperscript{99} \textit{Id.} § 2331(f).

\textsuperscript{100} The Iran-Contra affair involving the Reagan Administration's "arms for hostages" deal ruined the political careers of many high-ranking Reagan Administration officials.

\textsuperscript{101} \textit{SIMON}, \textit{supra} note 7, at 215.

\textsuperscript{102} \textit{Id.} at 215.
measures at U.S. installations abroad, and diligently worked to bring terrorists to justice in American courts.103

D. BUSH

President Bush’s administration would also face a major terrorist tragedy with the bombing of Pam Am Flight 103. Unlike terrorist crises during prior administrations, this event involved a direct terrorist attack on a major American air carrier. The U.S. aviation industry would never be the same.

Pan Am Flight 103 began its journey in Frankfurt, Germany, changed aircraft at London’s Heathrow airport, then departed for New York. The plane was loaded with aviation fuel, 259 passengers and crew, and twenty tons of cargo. Only thirty-nine minutes after departing Heathrow airport, at an altitude of 31,000 feet, the plane was destroyed. The news spread quickly and shocked the world. Pan Am Flight 103 was the deadliest aviation incident in American history.104 The tragedy triggered the proposal of several bills that attempted to improve international air safety for American travelers.105

The Pan Am Flight 103 bombing prompted the government to take a closer look at airport security and airline bomb detection measures. Only a few months after the tragedy, two aviation security-related bills were introduced: the Airport Technology and Research Act of 1989 (ATRA)106 and the Aviation Security Act of 1989.107 Shortly thereafter, President Bush created the President’s Commission on Aviation Security and Terrorism to evaluate the government’s aviation security policies in general and with respect to the Pan Am disaster in particular.108 Following the Commission’s report, delivered in May of

---

103 Id. at 216.

Among its findings reported on May 15, 1990, the Commission asserted the following:
1990, President Bush signed the Aviation Security Improvement Act of 1990 into law. After the tragedy, the relatives of the victims did not focus only on their grief. The "Victims of Pan Am Flight 103," as the relatives of those killed came to be called, were ordinary American citizens, but were able to organize into various committees to oversee their lobbying efforts. These lobbying efforts proved quite successful as their demands for an independent investigation of the disaster were largely responsible for President Bush's next move.

On August 4, 1989, President Bush issued Executive Order 12,686, establishing the President's Commission on Aviation Security and Terrorism. The commission's function was to conduct a comprehensive study and appraisal of practices and policy options with respect to preventing terrorist acts involving aviation. The commission immediately began its work, which included researching and investigating security measures in place at airports in the United States and Europe, conducting

---

- Serious flaws exist in the civil aviation security system in the United States.
- The system has failed to provide the proper level of protection for the traveling public.
- The Federal Aviation Administration (FAA) is a reactive agency lacking adequate contingency planning to anticipate threats against civil aviation.
- Pan American World Airways' apparent security lapses and FAA's failure to enforce its own regulations followed a pattern that existed for some time before the destruction of Pan Am flight 103.


111 The group consisted of a board of directors which headed four committees, including a legal committee to oversee legal matters (both criminal and civil liability); a political committee responsible for lobbying efforts; a financial committee which raised money; and an emotional support group. Id. at 765-66.


113 Charter of the President's Commission on Aviation Security and Terrorism. See Exec. Order No. 12,686, supra note 112.
hearings (most notably with the “Victims of Pan Am Flight 103”), and holding committee meetings.\textsuperscript{114}

The Commission eventually called for a sweeping overhaul of a seriously flawed American aviation security system, charging the government with failing to adequately protect the traveling public from the threat of terrorist attack . . . at foreign and domestic airports. In addition, the Commission called for dozens of steps to combat terrorism aimed against civil aviation. A portion of the Report focused on the aviation security system in general, and pointed to the unique difficulties encountered by international carriers. Specifically, there is no uniform international civil aviation security system in place to assure a consistent level of security for passengers. Although many nations have adopted the standards of the ICAO, these standards only prescribe a minimum level of security that is inadequate for “high-threat” international airports. The Report identified the role of the FAA which was created in 1958 and is responsible for ensuring air safety for American travelers. In 1985, the FAA’s role in aviation security expanded significantly with the passage of the International Security and Development Cooperation Act. This Act requires the FAA to assess security at foreign airports served by U.S. carriers, and the security procedures of foreign air carriers flying to the United States.\textsuperscript{115}

Another measure triggered by the Pan Am Flight 103 tragedy was the Airport Technology and Research Act of 1989 (ATRA). The stated purposes of ATRA were the following: “first, to support cost-effectiveness and operational feasibility evaluations of alternative explosives detection systems for possible implementation at airports; and secondly, to promote accelerated research and development of future explosives detection technologies for use in airports.”\textsuperscript{116} ATRA was a direct legislative response to the bombing of Pan Am Flight 103 and drew additional support from another incident, the bombing of the French UTA Flight 772 over Niger by extremist Shi’ite Moslems in mid-September of 1989.\textsuperscript{117} The legislation reflected the realization that the technology of terrorists had surpassed the ability of existing conventional airport devices to detect weapons and explosives. For

\textsuperscript{114} See Giebler, \textit{supra} note 110, at 782.

\textsuperscript{115} \textit{Id.} at 782-83 (citations omitted).

\textsuperscript{116} Airport Security Technology and Research Act, \textit{supra} note 106, \textsection 2(b).

example, metal detectors and x-ray machines would be entirely ineffective in detecting the Semtex plastic explosive used in the Pan Am Flight 103 bomb. Whereas the Airport Security Act of 1990 was primarily directed toward developing a specific security device, ATRA was concerned with providing funds for evaluating the effectiveness and operational feasibility of a variety of new aviation detection systems.

The Bush Administration should be commended for swiftly pushing the aviation security legislation through both houses of Congress. The lessons from Pan Am Flight 103 are a reflection of the courageous human spirit and effort of the “Victims of Pan Am Flight 103.” The legislation, specifically the Aviation Security Improvement Act of 1990, was an excellent weapon in the U.S. arsenal for combatting international terrorism and improving air safety. The focus on improving bomb detection at airports and developing detection devices continued in the Clinton Administration.

E. CLINTON

President Clinton’s administration began almost twenty-four years after Nixon’s administration ushered in the “modern era of terrorism.” Some may ask what has been accomplished and what has changed. Unfortunately, some of the players and their weapons have changed.

The year 1992 can be characterized as a year of transition, not only for Clinton, but for the entire international community concerned with terrorist threats. The strong anti-terrorist rhetoric of the 1980s was waning. The Cold War was quickly fading from the memories of most Americans, although the blood-shed in Bosnia-Herzegovina reminded Americans that world conflict was still festering. The last major terrorist attack against the United States was the bombing of Pan Am Flight 103; but the calm would soon change.

The 1993 World Trade Center Bombing brought Americans back to reality about the terrorist threat.118 The Trade Center

---

118 Brian Duffy et al., What Kind of Terror Network?, U.S. NEWS & WORLD REP., July 5, 1993, at 26 (stating that bombing shattered any American complacency). The planned bombing of the U.N. Building, a government office, and two New York Tunnels was intended to send the message that the United States could be the victim of a terrorist attack at any time. The message was well taken by the FBI and State Department. It was apparent that the American borders were being invaded by people who harbored undeniable hostility toward the United States. Id.
attack, when it occurred, was the worst terrorist incident ever to take place on American soil. The State Department responded to terrorist activities by issuing warnings to U.S. travelers. The warnings to American travelers within the United States and internationally would continue for the next few years.

A rash of terrorists attacks, both domestic and international, occurred in 1995. The Oklahoma City bombing occurred on April 19, 1995 and arguably surpassed the magnitude of the World Trade Center Bombing. The summer of 1995 saw the nation's airports under the highest security alert since the Gulf War as a result of threats by Islamic groups. Airport security was also increased in some regions, as a result of the Unabomber's threats to blow up an airline out of Los Angeles. Other news reports also identified security consultant concerns regarding inadequate airport security measures. The consultants pointed out that airlines do not have the technological capabilities to detect all explosives. Additionally, the airlines fail to match bags on domestic flights, citing inconvenience problems for passengers. The security consultants also

121 Some of the terrorist incidents from the first eight months of 1995 include: A March 20 poisonous gas attack in the Tokyo subway system that killed 12 and injured thousands. On April 19, the Alfred P. Murrah Federal Building was bombed, killing 168 people. Basque separatists are suspected of the April 19 car bombing in Madrid that injured Spanish opposition leader Jose Maria Aznar. The Shining Path is suspected in a May 24 car bombing that killed four people. Members of an anti-government Islamic group in Malawi, Egypt allegedly killed 10 people in two separate shootings on June 3. A June 26 assassination attempt in Cairo failed to injure Egyptian President Hosni Mubarak. Six people were killed and 33 injured when a bomb destroyed a commuter bus on July 24 in Tel Aviv. Seven people were killed and 97 injured by bombings in Paris on July 25 and August 17. Explosives, hidden in the luggage of a University of Florida professor by Amsterdam police, arrived in Orlando on August 18. Five people, including one American, were killed, and 100 injured, when a bomb destroyed a commuter bus in Jerusalem on August 21. Georgian President Eduard Shevardnadze suffered minor injuries when his motorcade was bombed in Tbilisi, Georgia on August 29. Editorial, *Airport Security: Your Stake in It; Threats Are Genuine—Precautions Not Hyped*, ORLANDO SENTINEL, Sept. 3, 1995, at G3.
called for the elimination of the present curbside baggage program utilized by most of the nation's airports. The better method for detecting terrorists, the consultants explained, is to have ticket agents who are trained to spot terrorists check in all luggage.\textsuperscript{125}

The Clinton Administration responded to the ominous and deadly terrorist threat around the world and passed sweeping anti-terrorist legislation in 1995. The Omnibus Counter-Terrorism Act of 1995\textsuperscript{126} was the first legislative measure since the 1990 Aviation Security Act.\textsuperscript{127} The $2 billion dollar measure drafted by the Senate passed by a vote of ninety-one to eight.\textsuperscript{128} Some of the key provisions include:

- authorizes the hiring of 1000 new federal law enforcement personnel;
- increases federal penalties for terrorist crimes as well as for conspiracies involving explosives and creates a new death penalty for terrorist murders;
- requires that tiny traceable materials, called taggants, be placed in most chemicals that can be used to make bombs;
- expands use of "roving" wiretaps, which are applied to several telephone lines used by the same suspect;
- allows the FBI access, through court orders, to credit reports, hotel records and telephone records in foreign cases;
- imposes a one-year limit for death-row inmates to appeal their sentences in federal courts;
- establishes new procedures for deporting alleged terrorist aliens;
- allows use of the military to aid civilian law enforcement in cases involving chemical or biological weapons of mass destruction, in addition to its current permitted use in nuclear weapons cases;
- bans fund-raising for foreign organizations designated as terrorist by the Secretary of State;
- bans U.S. aid to countries that assist terrorist nations; and
- allows U.S. citizens to sue terrorist nations for personal injuries caused by terrorist acts.\textsuperscript{129}

\textsuperscript{125} Id.
\textsuperscript{126} S. 735, 104th Cong., 1st Sess. (1995). It is worth noting that President Clinton did not propose this legislation following the World Trade Center bombing. Nevertheless, he did introduce the legislation during his January 1995 State-of-the-Union address months before the Oklahoma City bombing in April.
\textsuperscript{127} See Aviation Security Act, \textit{supra} note 107.
\textsuperscript{128} Marcy Gordon, \textit{Senate Passes Anti-Terrorism Bill}, \textit{The Courier J.} (Louisville, KY), June 8, 1995, at 5A.
\textsuperscript{129} Id.
President Clinton was very pleased with the Senate's swift, bipartisan support of the bill. The President remarked: "This legislation will give law enforcement the tools it needs to do everything possible to prevent this kind of tragedy from happening again. It will also help us prosecute and punish terrorists more effectively."\(^\text{130}\)

The House did not respond quickly with its version of the anti-terrorist bill. The bill has been tied up in Congress by conservative Republican opposition.\(^\text{131}\) The complaints and concerns involve fear that the bill expands federal government power at the expense of civil liberties.\(^\text{132}\) Certain conservative groups also criticize the bill's broad definition of terrorism.\(^\text{133}\)

The success of the legislation discussed above will surface in the coming months and years. The pattern of reactive, rather than strong proactive leadership may be continuing in the Clinton Administration. Terrorist episodes have hit our backyards. The need for increased attention to both domestic and international terrorism must not be a secondary concern of the Clinton Administration.\(^\text{134}\)

V. COUNTERTERRORIST INITIATIVES

A. AIRPORT SECURITY AND TECHNOLOGY

History has shown that expert technological devices and good airport security measures are important tactics in deterring terrorism.\(^\text{135}\) The best security systems make a terrorist's job more difficult and raise the confidence level of airline passengers.\(^\text{136}\) Providing competent and effective physical security at U.S. and foreign airports has become a "never-ending technological race against terrorists."\(^\text{137}\) This "technological race" began with the first counterterrorist program.

---

\(^{130}\) Statement On Senate Passage of Anti-terrorism Legislation, 31 WEEKLY COMP. PRES. DOC. 993 (June 7, 1995).


\(^{132}\) Id.

\(^{133}\) Id.

\(^{134}\) "Attention to legislation to combat domestic and international terrorism has faded along with public memory of the crumbling federal building," Henry Hyde, the Judiciary Committee Chairman remarked in August of 1995. Id.

\(^{135}\) Simon, supra note 7, at 396.


\(^{137}\) Simon, supra note 7, at 396.
The first counterterrorism measure following the dawn of the "modern age of terrorism," the FAA task force of 1968, developed the first anti-hijacking system, which included: 

1. notices to the general public,
2. the use of a 'hijacker profile,'
3. the use of magnetometers to detect any metal objects on passengers who met the profile,
4. interviews with selected passengers, and
5. frisks or searches of suspected passengers.  

The 1970s witnessed the introduction of metal detectors and x-ray machines. Unfortunately the technological advances only served to increase the creativity of terrorists, as they developed new weapons that became almost undetectable.

In the late 1980s, following the Pan Am Flight 103 tragedy, the government pushed for improved technology involving bomb detection. One method, thermal neutron analysis (TNA), had been developed in the early 1980s. TNA consists of "neutron bombardment of luggage to stimulate gamma ray emissions from the baggage, which are then analyzed for the presence of explosives." The TNA machine is approximately the size of a small tractor trailer and can detect all commercial and military explosives. But TNA machines have not been installed at all major airports because of their size (tractor trailer), cost ($1 million), and speed (slower than conventional x-ray equipment).

Instead the TNA machine has been relegated to the government's "technology-development" shelf. Another problem facing the development and implementation of the systems is the fact that it can easily become obsolete. Terrorists are constantly updating and changing their weapons arsenal, and the factors listed above have forced the government into a hesitant state.

Recently, a Massachusetts manufacturer of explosive detection systems exposed the inadequacies of U.S. airport bomb detection equipment. Vivid Technologies, a company supplying equipment throughout Europe and Asia, demonstrated to mem-

---

138 Dow, supra note 1, at 1160.
139 SIMON, supra note 7, at 397. "There is not much doubt that the federal law adopted in 1973 requiring passengers to pass through metal detectors has worked well. There have been no hijackings in this country since 1991." Air Security Tighter But Flawed, ORLANDO SENTINEL, Aug. 20, 1995, at A8.
140 SIMON, supra note 7, at 397.
141 Marx, supra note 136, at 100.
142 Id. at 100-01.
143 Air Security Tighter, supra note 139, at A8.
144 Id.
bers of Congress how current conventional x-ray machines do not adequately screen baggage for explosive devices. Vivid Technology has developed a screening device capable of quickly scanning airline baggage to detect explosive devices. Many explosives can be easily molded and shaped to resemble commonly packed items—such as food or cloth—making them easy to disguise and harder for screening operators to detect.

The Vivid Rapid Detection System uses an advanced dual-energy X-Ray technique which screens up to 1500 bags per hour and automatically identifies explosive material. The system has been implemented in over ninety percent of airports in Europe using bomb detection technology.

Another problem facing airport security involves the lack of adequate training for airport security personnel. Improved technology is vital to the government’s counterterrorist program, but without competent personnel to implement and oversee the security systems any advances are futile. The government, through the FAA, provides the leadership and sets the standards for aviation security. The airlines are responsible for implementing security measures and absorbing the costs. In the United States, airlines employ the security personnel who screen baggage. Employees are poorly trained, and there is a very high turnover rate. The result is that most monitors are not attentive and dangerous terrorists have an opportunity to board and terrorize unsuspecting passengers and crew.

---

146 Id. Following the Pan Am Flight 103 tragedy, Congress required the FAA to create standard criteria for certifying explosive detection systems. “The resulting standard creates a ‘Catch-22’ by requiring that equipment meet unrealistic performance levels while simultaneously scanning luggage fast enough to be used by major airports. [As a result, no] action can be taken until explosive detection equipment is available which is able to meet both of these goals.” Id.

147 Id.

148 Id. Co-founder and president, S. David Ellenbogen, explained to Congress, “Conventional X-Ray systems were designed to detect weapons, not explosives. The old perception that civil aviation in the United States is immune to terrorist threat is changing quickly. Explosive detection technology for the screening of checked baggage has been embraced by aviation officials outside of the United States. The irony is that all but a handful of countries are making air travel safer using American technology which our legislation does not allow using at U.S. airports.” Id.

149 See supra notes 10-14.

150 MARx, supra note 141, at 103. This protocol differs from many foreign airlines who benefit from government subsidized airport security.

151 Id.
Improved technology is only part of the answer. Without a "watchdog agency" to regulate security personnel, the improved technology is futile. Airports must be the frontline of defense, and a DOT report from 1993 reveals that they are failing in this regard. Additionally, a successful security program will also involve joint cooperation with foreign airports and air carriers. The idea of raising only the standards of U.S. airports is only a partial solution. Increased security procedures called for after the Pan AM Flight 103 disaster have not been carried out at high-risk airports.

The FAA and the ICAO need to jump to the lead in developing and implementing safety standards for foreign airports. If the United States acts unilaterally, its actions will not increase the level of awareness among foreign countries. Multilateral cooperation is the answer.

B. CRIMINAL PROSECUTIONS/EXTRADITION MEASURES

A very important but often frustrating component of the U.S. counterterrorist agenda is the extradition process. It is often the most frustrating device because it almost completely depends on the cooperation of foreign governments. Extradition treaties have been characterized as "agreements where both (or all) parties have the same expectation." Here is where the problem lies—if there is no agreement or cooperation, the extradition process falls through, and the offenders escape punishment.

In traditional extradition proceedings, one country formally requests (pursuant to treaty terms) the presentment of a person to stand trial in the requesting nation. The requesting nation complies with the request. The defendant is sent to the country of the victim's citizenship. Currently, the United States is a party to over 102 extradition treaties. The government has

---

153 FAA Faulted on Training for High-Risk Airports, CHI. TRIB., Dec. 19, 1989, at 8C.
155 Id. at 31.
156 Id.
157 Kristin B. Weissman, Extraterritorial Abduction: The Endangerment of Future Peace, 27 U.C. DAVIS L. REV. 459, 467 (1994). The United States does not have extradition treaties with 56 countries, including Iran, Libya, and Syria. Id.
had trouble prosecuting terrorists from countries without extrad-

The biggest obstacle to successful extradition is the “political

permits the State of capture to refuse to extradite a suspect de-

This concept further highlights the problem created by the lack

A classic example of the ineffectiveness of the extradition pro-

Our government has found a way to crack the loophole. “Ex-

158 Id.
159 Liam G. B. Murphy, A Proposal on International Legal Responses to Terrorism, 2
160 See supra note 7 and accompanying text.
161 Id.
162 Allan, supra note 154, at 333-34.
163 Id.
164 Id. See generally Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989), aff’d,
165 Allan, supra note 154, at 335.
166 See Weissman, supra note 157, at 468.
167 Id.
C. ECONOMIC SANCTIONS

The most notable American aviation boycott of a foreign country's air carrier took place during President Reagan’s term. On September 1, 1983, a Soviet Air Force Unit shot down Korean Airlines Flight 007, which had flown over Soviet coastal territory en route to Seoul, Korea. In response to this incident, President Reagan requested that the Civil Aeronautics Board take strict actions against the country. These actions included: "reaffirming suspension of its operating rights, barring its right to sell air services in the United States, precluding carriage of traffic by United States carriers where Aeroflot (Soviet airliner) was on the itinerary, and precluding U.S. carriers from accepting tickets or shipping documents issued by Aeroflot."  

The sanctions were not effective because the termination of flights to the Soviet Union by other nations was only temporary and had no real effect on the Soviet Union. Economic sanctions imposed independently are not effective. An organized international boycott is the best answer and would be the most effective. In the future, the United States must use its influence to coordinate a united effort with the help of the ICAO and other international agencies.

D. SAFETY OVERSIGHT OF FOREIGN AIR CARRIERS

The United States has continually shown that it understands its role in protecting American citizens from foreign enemies. The Aviation and Security Improvement Act, among other legislative programs, is evidence of this. The United States also arguably understands its role in the international framework of international aviation. Recently, however, the FAA released a list of nine nations that are forbidden to serve the United States because of inadequate safety oversight by the countries. At


170 Lisa Burgess, DOT Lists Foreign Airlines Deemed Unsafe, J. COM., Sept. 6, 1994 ("Transportation Secretary Federico Pena said Belize, the Dominican Republic, Gambia, Ghana, Honduras, Nicaragua, Paraguay, Uruguay and Zaire do not meet international aviation-safety standards. The countries have been told by the FAA that their aircraft cannot fly to the United States unless the safety deficiencies are resolved."); Paul Takemoto, FAA: Carriers From Nine Countries Banned From U.S. Service, TRAVEL WKLY., Sept. 8, 1994, at 31 ("The investigations began in 1991 following a series of accidents in the United States involving foreign aircraft, including the crash of a Colombian Avianca 707 jetliner on New York's Long Is-
first glance it appears this is a giant step by the FAA and DOT to ensure the safety of American citizens who travel abroad on foreign airlines. But a closer look reveals the many problems with this new announcement and policy. First, the unilateral action on the part of the U.S. transportation organizations puts a major

land, on January 25, 1990. Until now, the FAA had been keeping the names of countries under scrutiny confidential, but . . . this was not consistent with the Clinton administration's policy of openness.

Compiled as part of the first worldwide survey of 93 governments by the FAA, the table has also followed the Clinton doctrine of open government by reversing the organization's normal practice of keeping the names secret. The countries have been told that they may work with third countries to certify compliance with international regulations or they may lease United States aeroplanes with American crews to operate their services under the national flag, thus providing the aviation administration with direct jurisdiction over safety . . . . Federico Pena, the Transportation Secretary, said the FAA was passing judgment on country safety standards, not those of their national airline. He drew the distinction because many of those named lease crews and aircraft from the U.S. The administration sends four people to each country to discover whether there is a civil aviation authority, the required expertise and a genuine inclination to enforce the safety standards of the ICAO.

Rhodes, supra, at A4; see also Poor Pilot Training, Maintenance Erode Foreign Aviation Safety, AVIATION DAILY, Sept. 6, 1994, at 382 ("Pena said that from now on when people fly commercially on foreign carriers serving U.S. cities, passengers will have a new, valuable tool to help them choose a carrier that has an approved civil aviation authority overseeing its operations."); Edward H. Phillips, GAO TO FAA: Increase Foreign Airline Safety, AVIATION WK. & SPACE TECH., Oct. 24, 1994, at 38.

According to the ICAO agreement, primary responsibility for safety oversight rests with the nation in which the aircraft are registered. The FAA relies on these governments to make the comprehensive safety inspections of airlines flying into the U.S. As a result of its studies, the GAO is recommending that the FAA:

1. perform more in-depth inspections of foreign airlines that are known to have safety problems;
2. inspect U.S.-registered, foreign-operated aircraft before they re-enter service in the United States, especially if those aircraft have been operated by nations that do not comply with ICAO standards;
3. ensure through follow-up methods that an airline has taken steps to correct deficiencies identified previously by the agency;
4. require owners of U.S.-registered aircraft to notify the agency when an aircraft is transferred from a foreign to a U.S. lessee;
5. identify the parties involved in the transaction, and inspect the aircraft before it enters service in the U.S. The FAA has not responded to the last three recommendations, but will address these in the near future, Anthony J. Broderick said.

Id. at 38.
dent in the credibility of international cooperation in air safety.171 In essence, the FAA’s Foreign Aviation Assessment Programme (FASAP) is a good idea. Nevertheless, in going it alone the FAA missed the opportunity of incorporating the views of countries that do not share the advantages of wealth and experience which the United States has. In so doing, it has done nothing to ensure that the rest of the world will have any sympathy for its actions or be encouraged to improve international air safety. That, in turn, means that the airlines and countries that have failed the FAA test of acceptability will have little incentive to do anything other than the bare minimum to get off the FAA’s list of “under-achievers.”172

Secondly, the action may have unfairly blemished all of Latin American aviation.173 Although there were ten Central and South American countries, plus the several members of the Organization of Eastern Caribbean States that have adhered to the Annex 6 standards set by the Chicago Convention, the impression is that all of Latin America’s carriers are unsafe.174 While some of these countries can improve their aviation oversight, the truth is that most of the Latin countries recently banned have been operating to the United States for many years with a high degree of safety.175 The intent of the U.S. actions is noble; increased awareness is certainly important for improved international air safety. But we must also question the cost to interna-

In an ideal world, the correct approach of the FAA would have been to take its findings, not in isolation, but having completed its assessment, to the ICAO, or a similar international body, and asked that body to consider those findings and rule accordingly . . . . The lack of united action means that the FAA’s initiative cannot be guaranteed to have any positive effect on the nations which have been branded as inadequate.

Id.

172 Latin Interests Want DOT to Clarify Oversight Issue, AVIATION DAILY, Sept. 20, 1994, at 463 (“Latin American airline interests are worried that the DOT’s recent revelation that a number of Latin countries are among governments that do not meet international safety oversight standards may have, or is having, an adverse impact on some of the region’s carriers.”).

173 Id.

174 ROBERT D. PAPKIN, SOME OBSERVATIONS ON THE U.S. GOVERNMENT POLICY REGARDING FOREIGN AVIATION OVERSIGHT PROGRAMS (1994) (Robert D. Papkin is an attorney in Washington, D.C. who specializes in aviation litigation and currently represents a number of the Latin American countries in their dealings with the FAA and other United States aviation organizations).

175 Id.
Papkin identifies two major problems with this unilateral action:

First, the lesson of the economic sanction should have been a lesson learned for the government; unilateral action is not as effective as multilateral negotiations and cooperation. The ICAO is the governing body for international aviation, and therefore they should be the organization to oversee the safety oversight of the foreign air carriers in the long run. Secondly, the problem of international cooperation is thrown out of the door by this action. The contracting states to the Chicago Convention and who fall under the auspice of the ICAO will not be pleased with the United States.

V. CONCLUSION

The U.S. and international response to international air safety and terrorism falls along an interesting continuum. The methodology has been a gradualist approach rather than a clear, comprehensive program. The historical development of the FAA and ICAO programs reveals a framework that can be improved. Both agencies must come together and bolster the international community's legal and problem-solving framework. The immediate focus should be on strengthening existing multilateral conventions on hijacking and terrorist attacks. Words look great on paper, but a sound enforcement mechanism in the form of an international court for terrorists can provide a proper forum for punishing offenders.

The government must continue to support multilateral cooperation. The United States has an important leadership role in the post-Cold War era. As the reigning "Superpower" we must continue to improve on our past successes. Technological improvements for aircraft and airports must be quickly funded, researched, and implemented. The faster terrorists improve their weapons or change their mode of attack, the quicker our government must be able to develop new weapons for the counter-attack. In the area of technology, we must continue to pool our resources and capabilities to ensure that our airports are safe and secure for all travelers.

176 Id.
177 Id.
178 In 1992, the FAA and U.S. Air Force began work on developing a "bomb-resistant jet." This is an example of important new technology that may make our skies safer. See William M. Carley, Transportation: Idea of a Bomb Resistant Jet Takes Off, WALL ST. J., Jan. 16, 1992, at B1.
The use of military force is another option. The U.S. armed forces encompass a well-trained and professional group. If given the right terrain and leadership directive, the use of military strikes may serve as a major deterrent to terrorists nationwide.

The American judicial system is another component that should not be overlooked. The government must ensure that bilateral extradition treaties are respected. The remaining nations who are not parties to our extradition agreements must be joined.

Lastly, the importance of the individual men and women who work so hard at implementing the above programs should not be disregarded. The real heroes of the Bush Administration counterterrorist program are the “Victims of Pan Am Flight 103.” The “first line of defense” at our nation’s airports is the group of men and women who screen our luggage at the airport terminals. The flight crews who train and work daily to provide a safe and comfortable flight are important factors, instrumental to our counterterrorist program.

The recent fiftieth anniversary of the Chicago Convention is a testament to the courage and cooperation of those concerned with international air safety. The challenge for the ICAO, FAA, and the U.S. bureaucracy involves making the commitment to act together and move forward into the next century with a clear, organized, and effective “attack” against all international terrorist “bullies.”
Current Literature