

1971

A Government Perspective

Bert Rein

Recommended Citation

Bert Rein, *A Government Perspective*, 37 J. AIR L. & COM. 183 (1971)
<https://scholar.smu.edu/jalc/vol37/iss2/5>

This Article 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>.

A GOVERNMENT PERSPECTIVE

BERT REIN*

Mr. Rein analyzes the evolution of the international and domestic governmental interests in hijacking, discusses the available deterrents, and evaluates the United States Government's response. Although a simple solution to the problem is not apparent, he believes that an international mechanism, applying international standards to review a particular nation's action or inaction in response to a skyjacking, is an absolute necessity. The author uses the term "skyjacking" to emphasize acts directed against aircraft. "Aircraft hijacking" is equally acceptable and widely used.

SKYJACKING¹ presents a number of wholly unattractive faces to government officials with responsibilities for the conduct of civil aviation. It is criminal behavior threatening life and property. In international incidents such as the recent diversion and destruction of an Indian airplane in Pakistan² it can be viewed as a hostile act, sponsored by one state against another, which brings underlying hostilities to the fore and provokes retaliation. It is a difficult legal problem as states debate the jurisdictional priorities over those who have offended all their interests. It is, in short, an unnecessary and intentional interference with civil aviation that has diverted enormous resources toward prevention and has increased aviation costs and risks.³ The purpose of this article is

* Deputy Assistant Secretary for Transportation and Telecommunications, Bureau of Economic Affairs, Department of State, Washington, D.C. The author gratefully acknowledges the assistance of David Ortman, Assistant Chief of the Aviation Programs and Policy Division of the Office of Aviation, Department of State.

¹ The term "skyjacking" means the unlawful seizure of control, or attempted seizure of control of an aircraft in flight by a person on board through the use of force, threat, or other form of intimidation. See Art. 1, Convention for the Suppression of Unlawful Seizure of Aircraft, reproduced in Dep't State Press Release No. 354 (Dec. 17, 1970). The definition of "aircraft piracy" contained in 49 U.S.C. § 1472(i)(2) (1964) is somewhat more restrictive. Inherently related to skyjacking is the sabotage of aircraft, which is also discussed herein.

² On January 30, 1971, an Indian Fokker Friendship aircraft was hijacked from Spinijan to Lahore by two Kashmiri youths. The crew and passengers were released 48 hours later and were returned to India by bus. The hijackers remained on board the aircraft, threatening to destroy it unless their demands, one of which involved Kashmiri political prisoners in Indian jails, were met. On the evening of February 2, the hijackers set fire to the aircraft and it was destroyed.

³ The Department of Transportation has requested a \$37.7 million appropriation for fiscal 1972 for the anti-hijacking program. We have no estimate of the cost to the

not to condemn skyjacking—there can be no dispute on that issue—but rather (a) to explore the governmental interests which are involved in the problem and the measures which these interests have led governments to utilize in combating it, (b) the application of these measures to the sources of the threat and their adequacy, and (c) the implications of the international effort to protect civil aviation.

I. THE EVOLUTION OF GOVERNMENT INTEREST

A. *Passenger Safety and Welfare*

While our aviation industry has remained in the private sector, the United States has taken vigorous regulatory action to ensure the safety of the air traveler. Licensing of pilots, airworthiness standards for aircraft, air traffic control procedures and federal supervision of airport operations are illustrative of our appreciation of the inherent vulnerability of air commerce and of our determination to reduce the risks of air travel so that its immensely important benefits can continue to flow to the public. Through the Chicago Convention of 1944,⁴ and the continuing work of the International Civil Aviation Organization established by that convention, 120 nations have recognized their responsibility to undertake a coordinated international effort to meet the potential hazards of international air commerce and to permit international civil aviation to develop as a vital, and often primary, link between the members of the international community.

The enormous progress, domestic and international, toward control of the inherent risks of air travel is illustrated by the growth of civil aviation toward its present primary role in international passenger transportation.⁵ Unfortunately, although we have become more insulated from technical hazards, civil aviation faces increased risks from intentional acts of skyjacking and sabotage. These acts threaten direct personal injury to passengers and crew and, by interrupting communications, changing flight paths and altering landing destinations, strip from the air traveler many of the carefully developed safeguards of the air transport infrastructure.

The risk to life and property from unlawful interference is real and substantial. In 1970-71, thirty-six persons were killed or wounded in the

world's airlines of detection devices, use of personnel for screening passengers and inspecting baggage, and delays arising from inspection and screening requirements.

⁴ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180 (1944), T.I.A.S. No. 1591 (effective Apr. 4, 1947).

⁵ Of passengers traveling between the United States and foreign countries in 1970, 18,959,599 arrived or departed by air and 1,711,404 arrived or departed by sea. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERVICE, REPORTS OF PASSENGER TRAVEL BETWEEN THE UNITED STATES AND FOREIGN COUNTRIES, CALENDAR YEAR 1970 (1971).

course of attempted skyjackings.⁶ Forty-seven lives were lost in a 1970 sabotage incident.⁷ Sixty million dollars worth of property damage was suffered in 1970 alone due to the destruction of aircraft.⁸ The losses occasioned by diversion of aircraft and crews from commercial service were staggering, and the terror imposed on innocent passengers and crews was, by any measure, intolerable. Given the nature and magnitude of this threat to person and property, this government and other members of the international community would have been derelict in their obligations to the traveling public had they not taken strong action to meet it. Governmental interest in aviation safety has, therefore, provided the basic motivation for national and international efforts to combat skyjacking.

B. Safeguarding the Aviation System

Citizen safety and welfare are not, however, the only government interests involved in international civil aviation. As economic forces have created an increasingly interdependent international community, nations have come to realize that the functioning of the transportation and communications systems which tie them together are matters of joint concern. Because skyjacking and sabotage strike at potential passengers in addition to those directly involved, and because the security measures necessary to meet this problem may delay and disrupt all air commerce, a governmental interest exists in protecting the smooth functioning of the international aviation system as well as the safety and welfare of citizen passengers.

The importance of this dual set of interests is more than academic. It is the second interest, or the interest in maintaining the smooth operation of the international aviation system, which justifies the concern of states with skyjackings which do not involve their citizens or property and which permits the international community to place responsibilities upon "uninvolved" states for seeing that skyjackers are apprehended and properly dealt with. It is this system interest which has brought the skyjacking problem before the United Nations and its specialized agencies. Further, it is the system interest which makes the experience in developing international rules and procedures to deal with skyjacking relevant to other international concerns.

C. The Available Tools

The duality of interest is reflected in the measures the United States

⁶ Unofficial statistics maintained by the Office of Aviation, Department of State, Washington, D.C.

⁷ On February 21, 1970, an explosion occurred aboard a Swiss airliner bound for Israel, shortly after takeoff from Zurich, killing 38 passengers and nine crewmembers. N.Y. Times, Feb. 25, 1970, § 1, at 1, col. 2.

⁸ Unofficial estimate, Office of Aviation, Department of State, Washington, D.C.

has taken to combat the threat. Our first reaction was to review the applicable criminal sanctions and to increase the penalties in order that they would reflect the seriousness of the crime. At the same time, the airlines were encouraged to develop screening procedures which would keep potential skyjackers from boarding their aircraft. These measures have continued to be a mainstay in our domestic efforts. Prosecution has been emphasized; preboarding controls have been strengthened by the use of more sophisticated screening profiles and the use of weapons detection devices has been increased; and since last September specially trained sky marshals have been placed on board United States aircraft.

Some of the United States' international efforts have expressed a similar prevention-oriented response. Systematic exchanges of intelligence information on potential hijackers have been established;⁹ we have pooled experience on preventive techniques and last January the United States sponsored a major international conference on detection devices and policy coordination.¹⁰ These efforts, while costly and time consuming for passengers, must continue on certain international flights until the threat is under control.

The first international legal effort related to skyjacking supported welfare and safety interests. The Tokyo Convention of 1963 required signatory states to return skyjacked aircraft to the control of their commanders and to facilitate passengers' return to their scheduled destinations. It also established a basis for national jurisdiction over crimes committed aboard aircraft in international airspace.

As the volume of skyjackings increased, however, and as the danger arose of a real impediment to airline operations, the international community began to more vigorously assert its concern for the system. In a special assembly of ICAO at Montreal in June 1970 and in that fall's session of the United Nations General Assembly, skyjackings were condemned without regard to the claimed political motives of the skyjacker. On October 1, 1970, the Council of ICAO adopted resolutions calling upon states to take joint action, including the suspension of air services, against a state which failed to fulfill its international obligations to protect passengers and aircraft skyjacked for blackmail purposes or to act against the perpetrators.¹¹

In December 1970 the international community achieved a significant breakthrough by adopting The Hague Convention discussed in detail

⁹ Address by John A. Shaffer, Administrator, Federal Aviation Administration, to North Atlantic Council, Oct. 20, 1970.

¹⁰ Seventy-six nations were represented at the International Air Transport Security Meeting held in Washington, D.C. at the Department of State, January 11-13, 1971. Information was exchanged on techniques, systems, and procedures used in detecting potential hijackers and their weapons.

¹¹ LXIII DEP'T STATE BULL. 449-53 (Oct. 19, 1970).

elsewhere in this symposium.¹² By defining the crime of skyjacking in an international convention and by imposing a universal obligation to apprehend and extradite or punish skyjackers, The Hague Convention clearly acknowledged that the actions of states against skyjackers were in part in pursuit of their own police responsibilities and in part in pursuit of their responsibilities to the civil aviation community.¹³ By imposing these responsibilities without exception, the Convention acknowledged that the interest in the international aviation system is sufficient for states to disregard the political issue of furthering their own international interests vis-a-vis a state with which they might be in political conflict.

The Hague Convention has been supplemented by a convention on unlawful acts against the safety of civil aviation.¹⁴ A further innovation sponsored by the United States and Canada, pursuant to the October 1, 1970, resolutions of the ICAO Council,¹⁵ would make an even more significant acknowledgment of the system interest. The United States-Canada proposal would permit an international panel of legal experts to act upon the complaint of a state whose nationals or aircraft were skyjacked and held for blackmail purposes.¹⁶ The experts would determine whether the obligations described in the Tokyo, Hague and other applicable international conventions were complied with. In case of violation, the United States-Canada proposal would permit a joint meeting of involved members of the international community to consider joint action against the state in violation, including suspension of commercial air services.

No doubt, the complex issues raised by the United States-Canada proposal will require extensive international consideration; as it was evident at the recent ICAO Assembly the problems attendant thereto are substantial. But the willingness of the international community to consider means of enforcing substantive obligations related to skyjacking certainly highlights the system interest and strongly suggests that questions of joint international enforcement of obligations necessary to maintain such international systems will become increasingly important in an interdependent world community. This is likely to stimulate the search for means of depoliticizing the necessary compliance pressures.

¹² See Mankiewicz *infra* at 195.

¹³ The recent Hague Convention contains a universal jurisdiction provision which is unique in modern conventions. See Art. 4, Convention for the Suppression of Unlawful Seizure of Aircraft, reproduced in Dep't State Press Release No. 354 (Dec. 17, 1970).

¹⁴ Convention for Suppression of Unlawful Acts against the Safety of Civil Aviation Signed by United States Today in Montreal, Dep't State Press Release No. 213 (Sep. 23, 1971).

¹⁵ ICAO, Decisions of the Council LXXI/6, pt 1, reproduced in LXIII DEP'T STATE BULL. 453 (Oct. 19, 1970).

¹⁶ ICAO, LC/SC CR, Report (Apr. 27, 1971).

II. THE ANTI-SKYJACKING PROGRAM—RISK AND RESPONSE

Regardless of what anti-skyjacking tools are available, the Government bears the responsibility for obtaining maximum deterrence and prevention at minimum cost. This responsibility requires a careful analysis of the potential sources of skyjacking threats and application of the relevant remedies. Such analysis may indicate that improved or additional measures are required.

A. *Outward-Directed Motives*

Seizing control of an aircraft in flight, or placing it in jeopardy by sabotage, gives enormous leverage to the skyjacker or saboteur. In the classic blackmail pattern, this leverage can be utilized to secure goals ranging from publicity for a cause, to release of prisoners, to payment of ransom. In a more limited context the skyjacker may simply use his control to divert the plane and escape from a jurisdiction which denies him exit. Almost all the skyjackings we have experienced have involved either blackmail or escape aspects, although it is not entirely clear that blackmail or escape has been the skyjacker's primary motive. In any event, these outward-directed motives are important and provide a foundation for deterrent efforts addressed to decreasing the possible benefits to skyjackers and increasing the risks they run.

1. *Skyjacking for Blackmail*

Not surprisingly, skyjacking for the common criminal purpose of extorting ransom is a minimum threat. Because of the extensive system of safety controls in aviation, the skyjacker is almost certain to be identified and apprehended upon landing, and escape is essential to the extortionist. In the only known case of cold-blooded extortion for financial gain a group of bandits attempted to take control of a flight from Macao to Hong Kong, met resistance from the crew, shot the pilot and co-pilot, and caused the plane to crash at sea killing all but one bandit.¹⁷

Where the blackmail objective is viewed as political, rather than personal, the virtual certainty of identification and apprehension is a less effective deterrent because the skyjacker's ends may be achieved regardless of his individual fate. Furthermore, what he conceives as the "political" character of his act at least in his own view may afford him safe haven in a sympathetic jurisdiction. Therefore, skyjackings for ostensibly "political" blackmail purposes have created some of our most serious incidents and are a continuing threat to civil aviation.¹⁸

¹⁷ The incident occurred in July, 1948. N.Y. Times, July 28, 1948, § 1, at 18, col. 2; July 31, § 1, at 6, col. 3.

¹⁸ One of the better-known examples occurred on September 6, 1970, when Palestinian guerrillas hijacked three aircraft: a Boeing 707 (TWA), a Douglas DC-8 (Swissair), and a Boeing 747 (Pan Am). The TWA and Swissair aircraft were flown to

To deter such skyjackers, the United States Government has sought to mobilize world opinion behind the proposition that skyjacking is an intolerable act, regardless of the nationality of the target aircraft and the occupants and regardless of the motives of the skyjacker. The declarations of the ICAO and United Nations General Assembly, the requirement in The Hague Convention that skyjackers be apprehended, extradited, or criminally processed "without exception"¹⁹ and the worldwide revulsion at the impositions on passengers in the September 1970 diversions to Jordan have gone far to reduce the incentive to use skyjacking as a means of dramatizing a cause. Government efforts to focus press coverage on the skyjacker's victims and to deglamourise the skyjacker contributed to this effect. Finally, where ransom has been sought as in the Jordan case, the United States has used its diplomatic resources to coordinate the efforts of victim states to ensure that minimum concessions are made to the skyjackers and maximum pressure exerted against any tendency to condone their acts. It is believed that worldwide acceptance of The Hague Convention would strengthen these tactics by ensuring that skyjackers are treated as common criminals.

Government efforts on the side of direct prevention have been aimed at the coordination of international intelligence efforts to follow suspects since such hijackings are usually planned, conspiratorial acts. Behavioral profiles and physical weapons detection devices are useful but may be known to participants and avoidable. The sky marshal program seems to have had a substantial deterrent effect, but the United States Government recognizes the risks of a confrontation in the air and is looking toward the eventual replacement of sky marshals by improved ground security.

On the whole, the rash of blackmail incidents culminating in the September 1970 Jordan affair seems to have faded in the face of international condemnation of such incidents. It is, however, essential not to let up on the effort to force recognition that skyjackers, regardless of claimed "political" motives, offend against the international air transport system as well as against national safety and property interests. Widespread adherence to The Hague Convention is essential to dispell the expectation of asylum and to make clear that civil aviation is out of bounds to those seeking to take political action against the flag state of

Dawson Field in Jordan and were destroyed there on September 12. The Pan Am aircraft was flown to Cairo and destroyed there on the same date. Negotiations for the release of the passengers and aircraft attracted widespread international publicity. See statement of Talcott W. Seelye, Country Director, Lebanon, Jordan, Syria, Arab Republic, and Iraq, Bureau of Near Eastern and South Asian Affairs, Department of State, in *Hearings on Resolutions Referred to the Committee on Foreign Affairs, House of Representatives, Concerning Aircraft Hijacking and Related Matters*, 91st Cong., 2d Sess. 79 (1970).

¹⁹ Art. 7, Convention for the Suppression of Unlawful Seizure of Aircraft, reproduced in Dep't State Press Release No. 354 (Dec. 17, 1970).

the aircraft. A sanctions convention highlighting the responsibility to the international community of each state to join in the international effort to protect civil aviation would mark a juridical breakthrough and would contribute to the effective prevention of skyjacking by providing a practical incentive and rationale for states to act against skyjackers seeking their political sympathy.

2. *Skyjacking for Refuge*

Skyjacking to escape from a jurisdiction barring departure to the skyjacker for political reasons is not a threat to the United States which permits free emigration,²⁰ but it is a continuing risk to the aviation system. Moreover, skyjackers motivated by other concerns may be tempted to assume the guise of refugee.²¹ Unlike the blackmailer, the refugee is seeking control of the plane's destination rather than the passengers and crew. Thus in choosing his escape route, he is critically interested in weighing the risk of apprehension before landing against the risks entailed in alternative escapes. He must also be concerned with finding haven, safe from the risk of extradition.

Because of the virtual certainty of skyjacker apprehension, automatic extradition to the skyjacker's homeland would provide almost absolute deterrence for refugee skyjackers. Thus, in the initial stages of drafting The Hague Convention, the United States argued for a mandatory extradition provision.²² This proposal ran squarely up against the international tradition of political asylum. It was argued that skyjacking from a country not permitting free emigration is inherently a political act and that political asylum in such a case can be warranted. A compromise requiring prosecution for the skyjacking, and leaving extradition optional, was accepted by the United States²³ in recognition of the asylum tradition, and in the hope that severe penalties for skyjacking would limit refugee skyjackings. The incidence of this type of skyjacking depends on a number of factors but increasingly severe sentences in states of landing, generated by system interests, are likely to cause such skyjackers to look carefully for alternative methods of escape.

²⁰ Unlike the practice in a number of foreign countries, no exit visas are required to leave the United States, nor are persons departing the United States normally checked by the Immigration and Naturalization Service.

²¹ Paper presented by H.L. Reighard, M.D., Deputy Federal Air Surgeon, to XVIII International Congress of Aerospace Medicine, Amsterdam, The Netherlands, Sept. 15, 1969 in *FEDERAL AVIATION ADMINISTRATION, TASK FORCE OF AIR PIRACY, HIJACK REFERENCE DATA* (1970).

²² ICAO, LC/SC.SA WD 7 (May 2, 1969). See also Report of ICAO Legal Subcommittee on Unlawful Seizure in *AMERICAN SOCIETY OF INTERNATIONAL LAW, INTERNATIONAL LEGAL MATERIALS* (1969).

²³ Art. 7, Convention for the Suppression of Unlawful Seizure of Aircraft, reproduced in Dep't State Press Release No. 354 (Dec. 17, 1970).

B. Individual, Inner-directed Motives

A substantial number of diversions of United States flag aircraft cannot be fully explained in conventional terms. This is particularly true of skyjackings to Cuba since these skyjackers (other than fleeing criminals) are not barred from going to Cuba by the United States, and many have had the financial means to arrange passage to Cuba via Mexico City.

A prominent psychiatrist, Dr. David Hubbard, who has analyzed twelve such cases in depth,²⁴ believes that many are motivated by a desire to escape personal problems. In some of these cases the desire to assume control over the aircraft itself may be a significant motive and in others the notion of a dramatic and "heroic" escape may be as important as reaching the destination. Because these motives are individual, it is difficult and perhaps impossible to achieve effective deterrence. At the same time these hijackings are a significant threat and have already caused one passenger's death and two injuries this year.²⁵ A combination of measures may, however, be somewhat effective.

The effort to create a negative, "criminal" image of skyjackers has significant potential in undermining the heroic potential of the act. Unfortunately, the sympathy-potential of the political refugee skyjackers is hard to control and creates a role capable of attracting frustrated individuals. Thus, a critical problem of deterrence is to separate alleged from genuine refugees and to provide different standards of treatment for each, of such a nature as to dissuade the individualized-motive skyjacker from assuming a refugee role.

To this end, the United States pressed at The Hague for the principle that extradition would be automatic unless a genuine political refugee were involved. The United States' position was not adopted, but we continue to believe it is necessary. In the present situation, the United States continues to press, with some success,²⁶ for the vigorous screening of alleged refugees and the return of those without true refugee motives.

Because individual motives are hard to determine, efforts have been undertaken to improve direct prevention of these skyjackings. The FAA skyjacker profile is designed to detect the potential skyjacker in the boarding process and, when supplemented with weapon detection devices and searches, is very effective. Deputy United States marshals and

²⁴ See generally D. HUBBARD, *THE SKYJACKER; HIS FLIGHTS OF FANCY* (1971).

²⁵ Unofficial statistics compiled by the Office of Aviation, Department of State, Washington, D.C.

²⁶ On February 25, 1970, Chapin S. Paterson hijacked a Western Airlines flight to Vancouver. Canadian authorities returned him to the United States on March 8, following a court hearing. Robert J. Labadie hijacked a TWA aircraft to Havana, Cuba, on August 24, 1970. He was returned to the United States on a civilian refugee airlift flight on September 24, 1970. James E. Bennett hijacked an Eastern Air Lines flight to Nassau, Bahamas, on May 28, 1971. He was arrested upon arrival and returned to the United States the next day, in the custody of U.S. Marshals.

customs security officers are specially trained to cope with such individuals. On the whole, however, the risk from these skyjackers is hard to counter, and one can only hope that effective action against outward-directed skyjackers and minimization of publicity will turn power drives and escape fantasies into less dangerous channels.

III. THE FUTURE AND THE SPIN-OFFS

While the United States believes that its coordinated program will limit skyjacking, there remains a constant threat which requires continuous countereffort. As Dr. David Hubbard has said:

Actually, any simplistic explanation is doomed. There are many factors operating, and each is important at various levels of the event. Any individual addicted to 'one cause and effect thinking' can hit a snag Times change, people change, circumstances change, physiology alters, politics rumble, war threatens, etc., and out of the aggregate of these forces emerge skyjackers with a variable rate of incidence.²⁷

It is not easy to find a bright spot in this seemingly eternal tolerance of cost and risk. But the international efforts to control skyjacking may provide models for future limitation of risks to economic interdependence, and at least indicate the kinds of problems which must be faced. In this process, the first step is recognition by individual states that certain behavior poses a risk to them which they cannot control without international assistance. A primary response is international recognition of the concerned states' jurisdictional rights, a step taken in the 1963 Tokyo Convention.²⁸

The international implications of the problem become more apparent as states recognize that each manifestation threatens not only a national interest but also a joint interest in the activity endangered. This stage has been reached with respect to assaults on diplomats, the impact of pollution on sea resources and the improper uses of outer space. States must also come to the recognition that common standards of acceptable and unacceptable action and a commitment to enforce those standards are required to protect the common interest, a step taken in The Hague Convention of 1970 and in the Montreal Convention of 1971.²⁹ Finally, states must come to grip with the fact that international standards must be applied if anti-skyjacking efforts are to be effective. So long as the power of application rests with national sovereignty, the international community must exert effective pressure against member states to ensure

²⁷ D. HUBBARD, *THE SKYJACKER; HIS FLIGHTS OF FANCY* 221 (1970).

²⁸ Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sep. 14, 1963 [1969] 3 U.S.T. 1859, T.I.A.S. No. 6768 (effective Dec. 4, 1969).

²⁹ Convention for Suppression of Unlawful Acts against the Safety of Civil Aviation Signed by United States Today in Montreal, Dep't State Press Release No. 213 (Sep. 23, 1971).

action. A needed step is to provide a mechanism for reviewing state action or inaction under international standards; the second, and perhaps harder step, is to provide mechanisms for international community action. It may be that the independent determination of compliance called for in the United States-Canada sanctions proposal would suffice through public pressure to ensure compliance. I believe that where state action is in pursuance of international interests, the international community must ultimately have positive means for influencing that action.

In summation, the lessons we have learned in the continuing fight against skyjacking are valuable. It is regrettable that we have had to endure them, but our ability to apply what we have experienced in other areas may provide some lightening of the burden.

