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“Going South” – Air Piracy and Unlawful Interference with Air Commerce†

The terse radio message from pilot to control-center, “Going south!” has come to signify another hijacking of a U.S. aircraft to Cuba. Since the beginning of the year, there have been 30 hijackings or attempts against United States registered aircraft. Twenty-two of the 30 have been successful, and all have gone to Cuba. In the rest of the world this year there have been seven hijackings. During the month of January, hijacking of U.S. registered aircraft occurred at the rate of one every 70 hours.

Aircraft hijacking is a very recent phenomenon. The first known case of hijacking of a United States aircraft occurred in May, 1961. It ended in Cuba. Since that time, until this year, there have been 32 cases of hijacking of U.S. aircraft. All but one were taken to Cuba. In short, this year there have already been nearly as many hijackings of U.S. aircraft as in all previous years combined.

Most frustrating of all, these criminal acts have been carried out in the face of strenuous combined efforts of the airlines, the FBI, the Department of State and the FAA. The problem has been rendered even more difficult of solution by the absence of any apparent *pattern* to the offenses. After a period of relative quiet lasting several years, aircraft hijackings suddenly shot up in 1968 and 1969 at a startling rate—an increase of more than sixteen-fold.

Considerable attention has been given by government and industry to a study and analysis of hijacking cases to discover some rationale or relation-

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ship to each other or to other events. Computers have been employed to sort the facts surrounding each case and attempt to relate them to others. But the effort has been largely unproductive. A few significant relationships between incidents have been discovered. These discoveries have not been publicly revealed, because they might incite or aid other attempts. Generally, however, little has been gleaned from analyzing incidents. The Department of Justice states flatly that "no definite pattern" can be perceived in the statistics of hijackings.

Only three things stand out in most hijacking incidents:

First, the overwhelming number of United States hijackings are to *Cuba*, rather than some other destination. Some attempts have been made to hijack to Hong Kong, Mexico, Viet Nam, Korea and Spain. But of the successful hijackings of U.S. aircraft, all but one have been to Cuba. This is reasonably to be explained on the obvious ground that Cuba, under present abnormal U.S.-Cuba diplomatic relationships, is the only practical destination which appears to offer some possibility of asylum or sanctuary to the hijacker. Added to this, of course, is the fact that a great many of the hijackers are Cuban nationals, using the hijacking as a means of returning to Cuba. There has been some reason to believe that some incidents have involved the return to Cuba of Cuban agents working in the United States. Except for United States citizens, more U.S. aircraft have been hijacked by Cubans than by citizens of any other country, or in fact, by citizens of all of the seven known other countries of hijacker nationality combined.

The second significant common denominator of the U.S. hijackings is that they have been *cyclical*, and have occurred in flurries. There has been some evidence of political conspiracy in the timing and *modus operandi* of some of the cases, particularly by violent extremist groups in the United States such as the "Black Panthers." But the evidence in this respect is inconclusive in a majority of the cases. In the report on hearings on "Air Piracy in the Caribbean Area" by the House Subcommittee on Inter-American affairs, it is stated that, "... there is no evidence available to show that the Castro regime has sponsored these activities."

Many believe that these epidemics of hijackings feed on the inordinate publicity which accompanies nearly every incident. A study committee of the Air Line Pilots Association reported at the beginning of the year that the coverage of hijacking cases by the news media has been "sensational and disproportionate" and had thereby tended to encourage publicity-seeking offenders and mentally disturbed persons.

Both government and industry have levelled an obverse criticism at the news media for giving insufficient publicity to the drastic federal criminal

penalties for aircraft piracy, and to the harsh treatment understood to be handed out to hijackers by the Cuban government. While these criticisms were probably justified at one time, more recent news treatment of hijacking, particularly by such newspapers as the *Christian Science Monitor*, has included thoughtful analyses of the problems involved and fairly detailed accounts of prosecution and punishment of offenders by both Cuba and the United States. It would seem fair to state that most media recently have demonstrated a high degree of journalistic responsibility in their handling of air hijacking incidents.

A third feature of U.S. hijackings is that a large proportion of them involve mentally-disturbed persons and persons in difficulty with the law. Many are known criminals. In the most recent hijacking incident, in fact, the aircraft was commandeered by an unarmed federal prisoner being transported by guards. Assistant Attorney General General Will Wilson reports that of the 49 hijackers or would-be hijackers of U.S. aircraft who have been identified with some certainty, 14 have verified criminal records. Of the remaining 35, 19 were either wanted on some criminal charge or had records of previous mental disturbance. For purposes of criminal indictment and prosecution, of course, even some of the normal persons involved comprise special cases because they were juveniles.

What is the significance of these common features of the hijacking phenomenon? Foremost, is their effect upon legal solutions to the problem. Because of one or all of these special factors, the offense of aircraft hijacking—or more accurately "aircraft piracy"—is exceedingly difficult to deal with as a matter of law.

Normally, crimes aboard aircraft are punishable by the state over which the crime was committed. In the substantial absence of any state statutes in the United States expressly directed at hijacking (or "highjacking"), aircraft piracy, or unlawful interference with the operation of an aircraft, the offense would normally be prosecuted under state statutes covering kidnapping, robbery, larceny, etc.

Added to the problem is the further difficulty of apprehending and prosecuting under even these latter laws. The difficulties arise primarily because the state over which the crime was committed is often not the state in which the aircraft lands. The second state has no jurisdiction over the crime and cannot even arrest the offender when the crime was completed over the first state. If the first state is disposed to act, it has first to collect the evidence that the crime was in fact committed within its jurisdiction. All of that evidence usually followed the aircraft to the state of landing. Witnesses would have dispersed soon after landing. Assuming that

an indictment may be returned in the first state, there remains the question of extradition from the landing state to the overflowed state. Not all crimes are extraditable. Time and expense are involved, and protracted litigation with respect to extradition is frequently required.

At the same time, there did not exist before 1961 any federally defined crime of aircraft piracy. For these reasons, Congress acted quickly following the commission of the first U.S. aircraft hijacking in 1961. Within four months, Congress passed Public Law 87-197 making "aircraft piracy" a federal capital crime. At the same time, it made certain other offenses committed aboard an *aircraft in flight in air commerce* a federal crime. Section 902 of the Federal Aviation Act was amended to make it a federal crime (1) to commit or attempt to commit aircraft piracy; (2) to interfere with, assault, intimidate or threaten any flight crew member or attendant in the performance of his duties; (3) with certain exceptions, to carry concealed deadly weapons aboard an *air carrier* aircraft; (4) to commit certain named special jurisdiction crimes such as assault, murder or robbery while in flight in air commerce; and (5) to give false information about any of the foregoing crimes.

The punishment for aircraft piracy and for interference with flight crew members or attendants is spelled out. For piracy it is the death sentence if the jury so recommends (or in the case of a plea of guilty, or a plea of not guilty if the defendant has waived a trial by jury, and if the court in its discretion so orders). If the death penalty is not imposed, the minimum sentence for aircraft piracy or attempt is 20 years.

Congress also authorized air carriers to refuse to transport persons or property, when in the opinion of the air carrier, such transportation "would or might be inimical to safety of flight."

Even before the adoption of these stringent federal criminal provisions, several convictions had been obtained under other federal statutes. In one such case, the offender received a 20-year sentence for obstruction of commerce by extortion. During the eight years since air piracy was made a Federal crime, there have been nearly 60 hijackings of U.S. aircraft. Yet, according to the recent House Commerce Committee report on hearings on "Air Piracy," only two convictions have been obtained for violation of the air-piracy statute; and both defendants were involved in the same hijacking incident.

What is the explanation? No one has contended that the existing United States laws respecting aircraft hijacking are inadequate. On the contrary, there is nearly universal agreement that we have all the laws we need on the subject. One answer is that suggested by the preceding discussion of

the common features of most hijacking cases: *viz.*, that many of the offenders are mentally disturbed and others are juveniles. Thus, while there have been only two convictions under the air-piracy statute, there have been acquittals based on insanity and indeterminate sentences of juveniles under the provisions of the Youth Corrections Act. In addition, there have been two cases involving servicemen who were turned over to the military for general court-martial on charges arising out of a seizure. They both received four years confinement at hard labor.

There are also a substantial number of complaints and several piracy indictments now pending. It is, of course, possible that some or all will result in conviction, even though more than half of the indicted defendants are under mental observation, according to the testimony given the House Commerce Committee by Assistant Attorney General Wilson.

It is apparent that the major difficulty with applying the law to aircraft hijacking is not the inadequacy of available statutes, nor insufficiency of prosecution. As Mr. Wilson testified,

Where we have been able to establish identity with enough certainty, indictments have been immediately returned. . . We have not found difficulty in maintaining prosecutions, but our problem, as you know, is obtaining jurisdiction over the person. These individuals remain outside the boundaries of the United States and therefore prosecution has not been successfully completed in most of the cases.

Mr. Wilson added that the problem is not so much of the law enforcement as "the whole situation with regard to Cuba."

There has been a feeling in many quarters that if more hijackers could be gotten back from Cuba and successfully prosecuted, the deterrent effect would stop or significantly reduce the incidence of hijackings. A great deal of effort has gone into this approach, without much result. The notion assumes, of course, that a significant number of such hijackers would be prosecutable, would be indicted and convicted, and that this would deter others.

A difficulty with these assumptions is that, to a large degree, they run counter to the aforementioned common features of hijacking cases to date. As we have seen, a substantial number of offenders are known mental cases. The Assistant Attorney General himself has pointed out that more than half of his pending indictments are undergoing mental observation. Two of the four cases which have been prosecuted for aircraft hijacking have resulted in acquittal for insanity or referral as a juvenile. Even in the case of rational offenders, it is doubtful that the death penalty has any considerable deterrent effect. Significantly, the Assistant Attorney General

has indicated that only "some deterrence" will result from convictions in pending cases.

Nevertheless, it must be conceded that, although only a few potential offenders might be deterred, every effort should be made to bring back offenders for prosecution. Here, problems of a different sort are encountered. In view of the suspension of U.S.-Cuban diplomatic relations, the obligations of the extradition treaty are similarly suspended. Even if the United States had normal relations with Cuba, however, other major difficulties would be involved. First, the crime of aircraft piracy is not an extraditable offense under the existing U.S.-Cuba extradition treaty. If extradition were sought under other treaty crimes, such as kidnapping or robbery, it is still doubtful that there would be a return of most of the hijackers to date. This is because the Cuban extradition treaty contains the usual provision excepting "political" offenses. The circumstances surrounding many of the hijackings to Cuba to date merely underline the probable assertion by Cuba that they were "political" in nature.

For the same reason, the proposed Protocol to the Tokyo Crimes Convention, which would require any party to return a hijacker to the state of registration of the hijacked aircraft, or in the alternative to prosecute him for the offense under its own national law, would be unavailing as applied to Cuba. To begin with, Cuba has not ratified the Tokyo Convention. (Nor, for that matter, has the United States yet filed its ratification.) To be sure, the hijacker Protocol, as proposed, would permit even a non-party to Tokyo to join the Protocol. But it is difficult to perceive why states such as Cuba, which are the problem states, would do so. Even if Cuba joined the Protocol, or some other multilateral extradition arrangement covering hijacking, there would be the usual exception for "political offenses" which would render the extradition obligation largely futile.

It is interesting, in this connection, that it was Cuba itself which first proposed that the United States and Cuba enter into a bilateral agreement for the return of both aircraft and hijackers. The proposal was advanced by none other than Ernesto (Che) Guevara at the Inter-American Economic Conference at Punta del Este in August, 1961, following the very first hijacking of a U.S. aircraft to Cuba in May of that year. It is not clear from any of the records what ever happened to the Cuban proposal.

In any event, the presently proposed Protocol to the Tokyo Convention would give parties the alternative of prosecuting the hijacker under their own national laws. On its face, this option might appear acceptable. As applied to the concrete situation under discussion, however, it again renders the obligation substantially a nullity. There is no requirement as to

how serious a crime air piracy would have to be under any such national law. In theory, at least, it could be treated as the equivalent of a mere misdemeanor, and the penalty could be negligible.

Even now, it has been reported through official sources that Cuba has brought prosecutions and secured convictions of hijackers under its existing national laws for illegal entry, and has imposed sentences of up to five years, the maximum permitted. In terms of deterrence, it is difficult to speculate whether five years in a Cuban jail or chopping cane is more effective or less effective than a 20 year term in a United States federal prison.

In its proposal for a hijacker Protocol, the United States government has created a curious anomaly. On the one hand, the FAA is vigorously pushing a campaign to publicize the federal crime of air piracy. The core of this program is to stress the death penalty. Three-colored signs, in English and Spanish, have been posted at strategic points in air terminals throughout the country gravely warning that death is the penalty for piracy. But at the same time that it is stressing the death penalty as a supposed major deterrent, the United States is proposing to the United Nations' International Civil Aviation Organization (ICAO) that the United States will waive the death penalty on request of any nation which will sign the Protocol.

Rationalizing this anomaly, the Department of State points out that many foreign states—particularly some of the emerging nations such as the African states—find the death penalty offensive, and that the United States must make this concession to gain their support. Absent in this rationale, however, is any explanation of how the mere extradition of hijackers would deter piracy, if extradition were purchased at the sacrifice of the death penalty as a prime deterrent. The most that has been suggested as an answer is that the death penalty has perhaps been overrated: *e.g.*, there have been few death penalties assessed for any federal crime, and none for air piracy. Nevertheless, the United States government does not propose to eliminate the federal statutory death penalty for air piracy. It would merely selectively waive the death penalty on an *ad hoc* basis in the case of those foreign states which demand it as a condition for returning a hijacker. It appears to be assumed that this could be done by the President or by the Attorney General of the United States acting on his own initiative.

Clearly there are basic questions of constitutionality raised by the United States proposal to waive the federal death penalty for air piracy selectively. For example, it is suggested that, in lieu of an *ad hoc* determination, the Attorney General might actually promulgate a blanket waiver *in*

futuro as to all foreign states known to object to capital punishment. Under this proposal, the statute would plainly have unequal application as between an air pirate who consummated the hijacking to such a country and one who hijacked an aircraft to a non-objecting country, or who were guilty of only attempted piracy.

Constitutional questions aside, the proposal to waive the death penalty selectively for some hijackings is objectionable in principle. In its effect, it places a premium on successfully completing the crime. It would reward the air pirate who carries his criminal act through to the end, however aggravated the circumstances and irrespective of the consequence to passengers and crew. Even if the aircraft were ultimately destroyed as a result of the crime, killing all of the crew and passengers except the hijacker, the United States proposal would waive the death penalty if the harboring state happened to dislike capital punishment.

Piracy in the air deserves no such concession. The federal air piracy statutes were designed to equate aircraft in flight in air commerce to ships on the high seas. Clearly, the forcible seizure of an aircraft in flight is at least as grave a crime as seizure of a ship, or more so. As the FAA has pointed out, interference with a ship's crew would not present the same dangers as are inherent in interference with the crew of an aircraft in flight. Ships on the seas can be reached by other ships; aircraft in the skies cannot. The incapacitating of a ship's crew would not cause the vessel to sink; an aircraft cannot stay in the air without a crew.

The time factor is different: delaying an airliner or diverting it from its planned course can cause it to run out of fuel and place the lives of many persons in terrible danger. Even the federal bank robbery statutes provide that the offender who, in committing the act, kills any person or forces any person to accompany him without his consent shall be punished by death if the jury so directs. The piracy of an aircraft in flight is far more violent and reprehensible. There is imminent danger, even though by accident, of the death of all the persons on the aircraft. Aircraft piracy is a more serious crime than that of a bandit stealing a car and taking a hostage along with it, which now calls for death penalty under federal law. The seriousness of the crime of air piracy thoroughly justifies the prescription of the death penalty, whether or not it has ever been assessed. The typical air pirate mentality cannot be expected to know the statistics of death penalties, and the United States proposal to waive the death penalty should not rest on such statistics.

It is appropriate, of course, to seek solutions of international law to the problems of unlawful interference with air commerce, particularly air pira-

cy. Most of the proposals which have been made, however, are of doubtful acceptability to the foreign states which are the main concern, especially Cuba.

Following the attack on an Israeli airliner by Arab commandos at Zurich Airport, the United Nations in February considered the question of international action against unlawful interference with aircraft. One of the proposals was that the United Nations declare air piracy to be an international crime, and take appropriate action to secure the adoption of municipal laws by United Nations member states against air piracy and unlawful interference with aircraft.

This proposal raised the questions, first, whether the United Nations has the authority to brand an act an "international crime"; second, whether it would not be redundant in all events, since piracy is already recognized by customary rule of international law as a universal crime—*jure gentium*. "A pirate is an outlaw—*hostis humani generis*," losing the protection of his home state, and thereby his national character. Under customary international law, a pirate may be brought to justice anywhere, by anyone, as an enemy of every state. There is universal tacit consent to the suppression of piracy by all states, by virtually any means.

In all events, the United Nations' consideration has so far been unavailing. It ended with a reference by the Secretary General of the entire question to the International Civil Aviation Organization (ICAO) for action. Within ICAO, the course of action has been similarly unproductive. The direct relationship between ICAO and the United Nations is a tenuous one, at best. The 116 members of ICAO are anything but agreed on the underlying premise that international action against unlawful interference with aircraft is imperative. In the ICAO conference on hijacking called last year at the instance of the United States, only 11 ICAO member states appeared, not including Cuba. Even in the 27-nation Governing Council, the proposal that ICAO take action against air piracy has been objected to, *e.g.*, by the Congo (Brazzaville) as "out of order."

It has also been proposed that the Organization of American States be asked to resolve that the state of an aircraft's registration have exclusive jurisdiction over all offenses committed aboard, and that the nation to which an aircraft is hijacked be obligated to return the aircraft, passengers, and the pirate regardless of citizenship. The penalty would be sanctions under Article 8 or the 1947 Rio Treaty.

It is considered as to Cuba that its isolation within the hemisphere is already so marked that additional sanctions would be futile, but that Mexico might provide the required leverage. Some credibility is lent to this idea

by the recent announcement that Mexico and Cuba have at least concluded a bilateral treaty under which the Castro regime would return Mexican airline hijackers. Notably, the treaty would also send fugitive Cubans back to Castro. The Mexico-Cuba treaty would be the first of its kind involving the return for prosecution of hijackers. Under Mexican law, hijackers could be sentenced to a maximum of 40 years in prison. The treaty would apply only to Mexican aircraft.

Because of the uncertainties in the actions of the United Nations and the International Civil Aviation Organization, private agencies have threatened more direct action to get at the hijacking problem. The International Federation of Air Line Pilots Associations (IFALPA), representing 44,000 pilots in 54 countries, has adopted a resolution threatening worldwide boycotts and global strikes against those countries who fail to act against hijacking. The resolution, entitled "Pilots Freedom of Transit and Human Rights," authorizes direct action by pilots against states which fail to prevent or punish hijacking. Two of the principal measures authorized by the resolution would be: (1) A ban on all air traffic into the offending state; (2) Coordination by IFALPA pilots with other private organizations to limit the movement of aircraft into the offending state, and to restrict movement of cargo to and from the state, including both air and surface cargo.

IFALPA refers to itself as a strictly nonpolitical organization. It has, nevertheless, been regarded as having had some influence in the resolution of political problems involving interference with aircraft and crews, *e.g.*, a threatened boycott by IFALPA of Algeria to force release of the crew of a hijacked Israeli airliner last year. The scheduled boycott was cancelled after agreement was reached with the Algerian government for the release of the crew. Both plane and crew were ultimately released.

The principal deficiency of the IFALPA proposal is that the airlines of only four countries: Spain, Mexico, Czechoslovakia and the Soviet Union, fly into Cuba. Czechoslovakia and the Soviet Union, moreover, are not represented by IFALPA. Interestingly, however, the Soviet Aeroflot representatives, including the Soviet Aviation Workers Union, have privately indicated their agreement with IFALPA that the problem of hijacking must be solved by such drastic international action, particularly since there have been "several incidents within the U.S.S.R." It is doubtful, however, whether a pilots' boycott of Cuba would produce a significant result so long as Cuba remains isolated from world commerce.

Similarly, it has been suggested that the 1958 Convention on the High Seas provides a legal basis for return of hijackers. Article 14 requires all

parties to cooperate "to the fullest extent in the repression of piracy." Piracy is defined under Article 15 as including any illegal acts of violence, detention or depredation committed for private ends against a ship, aircraft, persons or property in a place outside the jurisdiction of any state. However, while the Convention on the High Seas has been signed by the United States and Cuba, as well as most of the other Latin American nations, Cuba has never ratified it. Even were it to do so, Cuban jurisdiction over American aircraft over the high seas would be questionable, under prevailing theories of extraterritorial criminal jurisdiction.

The conclusion must be drawn that, unencouraging as results have been, diplomatic and political solutions must be found for the problem of air piracy. The form of the solution is of less importance than the substance. New treaties aside, there is ample basis in international law for the return of aircraft pirates under the universal principle of Grotius that,

... sovereign princes and states are answerable for their neglect if they use not all the proper means within their power for suppressing piracy and robbery.