Skyjacking and Airport Security

R. S. Maurer
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There has been a noticeable decline of airplane hijackings in recent years. In this speech given on March 22, 1973, Mr. R. S. Maurer examines the various factors that have brought about this trend. Mr. Maurer draws upon his experience as an officer of Delta Air Lines to relate the history of skyjacking. He then examines the methods developed by the airlines and the federal government to meet this problem and the constitutional and practical consequence of those methods.

I. THE PROBLEM OF SKYJACKING

PIRACY has occurred in all stages of history. The piracy—or hijacking—of an airplane is a concept as alien to us in the airline industry as it is to the traveling public. The policy problems involved for our federal government invoke international problems of types not focused upon since the days of the infamous Barbary pirates of the seventeenth century.

From our earliest days, the airline industry has invested both its capital and its labor in a continuing effort to make passenger boarding and handling procedures as convenient, as rapid, and as efficient as possible. Now, under pressures arising from the legal necessity of taking all reasonable efforts to protect the safety of our passengers, and under federal directives about the nature and extent of those efforts, we must resort to measures that in many ways work to negate that speed and convenience.

Insofar as economic efficiency is concerned, suffice it to say that despite the increased costs incurred by the airlines and by

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airport managements in implementing these security programs, until March 14th the CAB refused to permit even an interim increase in fares to cover those expenses,\(^1\) estimated to be over one hundred million dollars per year for the industry.\(^2\) The result inevitably has been a deteriorating profit position for a large number of airline companies which are not yet earning that level of return on investment which the CAB itself has held in the minimum for the financial health and continuing growth of these companies.

By way of introduction to my comments on the legal rights of those exposed to security procedures, let me tell you about a few of my own company's experiences in the hijacking field. We have had fifteen legitimate hijacking attempts. Seven have been successful—six going to Cuba and one to Algeria.

These were widely covered by the media at the time of their occurrence. But, with the peculiar judgment exercised with respect to what is and what is not front page news, little if any coverage has been extended to the eight instances when the attempted hijacking was thwarted while in progress, and virtually no coverage has been given to the ultimate fate that befell those hijackers who were provided gratuitous transportation to their desired destinations or to those hijackers whose attempts were thwarted.

We have been deluged, however, with a great deal of well-intentioned advice about how we should handle hijacking cases in those instances when the criminal has penetrated our initial security barriers. To illustrate the variety of factual situations with which airline management is confronted, and the difficulties faced in assuring our passengers of our exercise of the "highest degree of care" imposed upon common carriers by the law, let me outline the facts about a handful of our actual experiences.

Our tenth hijacking attempt occurred on May 25, 1970, when Delta Flight 199, an early morning departure out of Atlanta destined for Miami, was diverted to Havana. The hijacker was

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\(^1\) CAB Order No. 73-3-46 indicated a willingness to accept tariff filings imposing approximately 34¢ per enplanement as an average carrier cost for implementing the federally-prescribed security program. Subsequent CAB orders have permitted tariff filings imposing a total charge of 64¢, on a temporary basis, pending final determination of the lawful rate, to cover both the carriers' and the aircraft operators' security costs. See CAB Order No. 73-5-12.

later identified as a twenty-eight-year-old, female Cuban alien, who was accompanied by her eleven-year-old son. Shortly after the flight reached cruise altitude, this relatively young woman approached the forward stewardess wielding a Smith and Wesson revolver, with instructions in broken English to proceed to Havana. The flight crew observed that the woman displayed an extremely nervous condition. In addition, despite the fact that she had assumed a well-positioned stance beyond grappling reach, the crew was able to see that there were bullets in the chamber of the revolver. As a result, the flight proceeded to Havana as requested. While an indictment has been returned in federal court, this hijacker's return to the United States is not expected.

By unusual coincidence, a Mexican airliner, hijacked only the night before, had not yet departed Havana at the time of the Delta flight's arrival at the Havana Airport. And to further compound the coincidence, as the Delta flight started its engines for the return trip to the United States, an American Airlines Boeing 727, also hijacked, made an approach and landing at the Havana airfield.

Three months later on August 20, 1970, Delta Flight 435, a DC-9 with seventy-eight passengers on board was forced to Cuba, this time by a lone black male carrying a black attache case allegedly containing an explosive device. Under the circumstances, the flight crew did not require physical confirmation of the explosive content. The flight proceeded to Havana and the attache case was confiscated by the Cuban authorities.

On March 31, 1971, while Delta Flight 400 was boarding passengers in Birmingham, Alabama, a fourteen-year-old, white male, flaunting a loaded revolver, pushed his way onto the aircraft and demanded that he be taken to Cuba. The flight crew and a gate agent stalled the flight for over an hour and, with the aid of a stewardess, convinced the juvenile to relinquish his gun and surrender.

In April of 1972 shortly after take-off of a Delta flight from West Palm Beach to Chicago, a middle-aged, white male, sitting in the aft section of the tourist compartment, passed a note to one of our stewardesses stating that he possessed a gun, wanted $500,000 upon landing in Chicago and direct air transportation from Chicago to Nassau. The note also requested that the crew
"act normal." Upon landing in Chicago, and after convincing the hijacker to allow the passengers to deboard, the First Officer stalled departure for more than an hour while he talked the hijacker into surrendering.

Occasionally, hijacking will have humorous aspects. This one did. The hijacker in this incident stated that his gun was contained in a paper sack which covered his right hand. The hijacker's initial note was handed to a stewardess along with two one dollar bills for the purchase of a beverage. The stewardess, quite busy at the time and assuming that the note was—as usual—either a proposition or a complaint, tucked the note into her apron pocket while she continued taking orders. This occurred shortly after take-off from West Palm Beach en route to Chicago. Beverage orders were completed, change returned to numerous passengers, including the hijacker, and meal service was begun. Almost one hour later, our stewardess read and acknowledged the note. I can only imagine that the hijacker regretted having asked the crew to act normal. The paper sack was later determined to be empty. One can also wonder at the helplessness of a hijacker whose threat was inadvertently ignored when an empty paper sack was the only weapon at his disposal!

On another occasion, in January of 1972, Pacific Southwest Airlines had one of its smaller jet aircraft in California commandeered to Cuba. Due to the short range of the aircraft, the flight landed at Tampa for refueling. During the approach, the Pacific Southwest pilot radioed the Tampa tower that the hijackers desired to transfer to a larger, four-engine aircraft capable of long-distance, over-the-water flights. During this period, Delta Air Lines had the sole four-engine aircraft on the airfield, preparing for departure from Tampa. Tower personnel informed our Station Manager of the request. Within minutes, all passengers were deboarded, the flight crew dispatched to downtown motels, hydraulic jacks were placed under the wings of the aircraft and cowlings stripped from two engines. Mechanics proceeded to dismantle an engine. The aircraft was obviously and effectively grounded for mechanical reasons. Needless to say, the "down" status of the Delta aircraft did not change until the short-range Pacific Southwest aircraft had departed for Cuba.

Perhaps our most widely-publicized encounter with hijackers
occurred this past August. Delta Flight 841, Detroit to Miami, with ninety-four passengers on board, was held for one million dollars in ransom. Following release of the passengers, the aircraft was forced to Algeria, where the hijackers remain today. They have not as yet been granted asylum, and our latest information indicates that they continue to express their extreme displeasure with the living conditions and personal restrictions imposed by their Algerian hosts. On this occasion, the hijackers consisted of three men, two women, and three children, members of a black revolutionary group. Their disregard for personal safety if their extortion demand was not met and their requested destination was not reached was readily apparent to our flight crew and was immediately transmitted to our flight supervisors on the ground.

The idea of a “shoot-out” with five armed, adult revolutionaries on a DC-8 jet aircraft loaded with passengers was not entertained for long, despite prompting about alternate procedures from certain sources. The receipt of extremely profane threats to the effect that a deadly countdown was about to be undertaken eliminating passengers one by one, was sufficiently convincing to us that we promptly set about collecting one million dollars in small bills. This was not an easy task on the spur of the moment, but our best judgment was that this was not an appropriate occasion to try to set an example of undue heroism.

As you may be aware, Delta merged with Northeast Airlines the first day of last August. Unfortunately, on July 31st the hijacked flight became Delta’s inaugural flight from Miami to Boston via Algeria.

The aircraft and crew arrived safely in Algeria. The crew and aircraft returned the following day. The ransomed million dollars was taken from the hijackers by the Algerian government immediately after landing, and returned to Delta several weeks later. Communications between Delta and the Algerian government were friendly and cordial—after translation, of course.

As can be seen from the foregoing examples of purely Delta experiences, there is no longer what one could call a “typical” hijacker, if indeed there ever was one. Through the decade of the sixties, the commonality that most hijackers shared was their destination—Cuba. Based on recent experience, however, it appears that the commonality of the Cuban destination is a thing of
the past and has been replaced by the desire to raise large sums of money, either for personal or vengeful motives.

Furthermore, the recent (February 15, 1973) signing of an executive agreement (not requiring Senate ratification) between the United States and Cuba calling for either extradition or imposition of "severe punishment" on persons using one country as a base to mount a violent attack against the other,³ is most helpful. As a practical matter, Cuba is now foreclosed as a destination for all but the most pathological hijackers who attempt to leave the United States.

With this background, a brief review of the statistical history of the hijacking of U. S. aircraft is in order.

In terms of total numbers, hijackings are a comparatively recent phenomenon. For example, during the thirty-seven year period from 1930 through 1967, it appears that there were a total of only twelve hijacking attempts in the United States, of which seven were carried out successfully.⁴

For record-keeping purposes, the FBI and the FAA seem to generally agree that the tone for the modern hijacking syndrome was set on May 1, 1961, when a National Airlines Convair 440 on a scheduled flight from Miami to Key West was hijacked to Cuba. Since that date there have been 160 recorded hijacking attempts of registered U. S. aircraft.⁵

From the National incident through 1967, hijacking attempts, both unsuccessful and successful, were sporadic. In fact, during the three-year period 1962-64 and the two-year period 1966-67, there were no attempted hijackings of commercial air carriers in the United States.⁶

Beginning in early 1968, hijackings of commercial air carriers began at an alarming and almost epidemic rate. As the year progressed, it became increasingly obvious to those in both industry and government that a threat of unknown magnitude, with the

³ Almost simultaneously with the signing of the U.S.-Cuban accord, it was announced that the Cuban and Canadian Governments also entered into an agreement similar to the U.S.-Cuban pact. Aviation Daily, Feb. 16, 1973, at 258.


⁵ Id.

⁶ Id. In 1962, 1964, and 1967, there was one hijacking in each year of a charter aircraft from either Miami or Hollywood, Florida to Cuba. There were no hijacking attempts in the United States in 1963.
capacity to literally paralyze the air transport system of the United States, was in the making.

By late 1968, a task force was appointed to consider a unified method of dealing with the problem of hijacking. This task force was comprised of persons both in the airline industry and in government with specialties in law enforcement, psychology, law, and administration. As a result of the work of this group, by early 1972 the so-called "hijacker profile" was implemented by the airlines under federal directive in an effort to stem the alarming increase in attempted hijackings. In practice, most of the carriers actually started using the profile on their own initiative in early 1971.

While the motives (or lack thereof) and psychological makeup of would-be hijackers vary widely, it was found from the task force study and from common experience in the industry that those persons most likely to attempt a hijacking shared certain common habits or traits, sufficiently common to warrant further investigation of persons evidencing one or more of these traits while attempting to board an aircraft. Since the profile is still a limited part of our present security system, no detailed discussion of its composition is permissible. I should like to note parenthetically, however, that contrary to popular misconception, racial or ethnic origin is not a formal part of the profile officially adopted by the carriers. On the other hand, while the profile has scientific reliability, there do exist sufficient exceptions to make it only partially effective.

While the profile and other detection methods used by the airlines received unofficial government approval, prior to 1972 there existed no real, direct government participation in the implementation of airport security, although armed federal law enforcement officials began riding on U. S. air carriers operating over international routes in 1970. U. S. Marshals also frequently were available at ticket counters and other screening stations to assist agents of the airlines in case of trouble and occasionally assisted in the

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7 Cf. Whet v. American Airlines, Determination and Order After Investigation, New York State Division of Human Rights, involving a black who filed a complaint charging racial discrimination because he was subjected to a personal search by U.S. Marshals before being permitted to board an American flight from New York to Chicago. The Commission held that no discrimination was involved and noted that three other prospective passengers, all white, were not permitted to board the flight after having been subjected to the same procedures.
normal inspection of those persons who met the profile. At some international points of debarkation, customs agents also assisted in the pre-departure screening of passengers and in some instances actually carried out the physical search of carry-on luggage of those who met the profile or did not pass the magnetometer test, to the extent magnetometers were then in use.

Prior to the end of 1971, of the previous 124 hijacking attempts, there had been only one in which extortion was involved. Then in November 1971, the infamous "D. B. Cooper" extortion of two hundred thousand dollars from Northwest on a flight from Portland to Seattle set the theme for the hijacking menace of the year 1972. Of the thirty-one hijacking attempts involving United States aircraft in 1972, a full eighteen, nearly sixty per cent of the total, involved extortion attempts, ranging from fifty thousand dollars to five million dollars each.\(^8\)

There were twenty-seven hijacking attempts in 1971 and thirty-one in 1972.\(^9\) By late 1972 it had thus become apparent that the security precautions implemented by the individual airlines, even as supplemented by the presence of "sky marshals" on some flights, were not achieving the success required to deter hijackings.

As a result, in December 1972 the Administrator of the FAA amended Part 107 of the Federal Aviation Regulations,\(^10\) which now has as its basic theme the securing of the perimeters of the airport by each airport operator, limiting access to personnel in operating areas of the airport, and otherwise calling for each airport to develop its own master security plan, including identification procedures and other steps designed to protect parked aircraft. Dovetailing with the amendments to Part 107, the Administrator also amended Part 121,\(^11\) directing air carriers to develop security plans for their entire operation, finding as follows:

I find that an emergency exists requiring immediate action with respect to safety in air transportation and air commerce. Therefore, in accordance with §121.538 the security program... is hereby amended effective January 5, 1973, without stay, to include the following minimal acceptable procedures:

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\(^8\) See note 3, supra.

\(^9\) Id.


1. The certificate holder shall not permit any passenger to board its aircraft unless:
   A. The carry-on baggage items are inspected to detect weapons, explosives, or other dangerous objects, and
   B. Each passenger is cleared by detection device without indication of unaccounted for metal on his/her person (hand metal detection units may be used until walk-through units are available), or
   C. In the absence of a detector, each passenger has submitted to a consent search prior to boarding.

It is seen, then, that the carriers are now required by federal regulation to visually inspect items of carry-on luggage and to clear the person boarding an aircraft either by a detection device or a personal search. Conceptually, with the airport operator now responsible for the integrity of the perimeters of the airport under Part 107 and the airlines responsible under Part 121 for their specific operating areas, we have now arrived at what is popularly called a "sterile passenger concept," which means that every revenue passenger, without regard to age, color, sex, appearance or any other criteria, is to be subjected to a personal search before he or she is permitted to enter the boarding area of an aircraft.

Is the "sterile passenger concept" working? To say the least, it is helping. Through the end of March 1972 there were seven air carrier hijacking attempts, only one of which was successful in diversion to Cuba, and six of which ended with the would-be hijackers shot or captured. In 1973 to date there has been just one attempted hijacking, unsuccessful, which occurred before the amendment to Part 121 became effective.

Only time will tell if the present system is really successful, and as I will discuss in a few moments, there are many seminal issues involved in arriving at a one hundred per cent foolproof system for the deterrence of hijackings. Suffice it to say at this point that the results of the present operation, although costly and time consuming, lead us in the industry to a bit of cautious optimism about the future.

Let me digress just a moment to talk about what happens to hijackers who are captured and brought to trial, an area where I believe the media has been grossly remiss in not insisting upon the widest possible exposure.

In 1972, the minimum sentence imposed on a convicted hijacker
was twenty years imprisonment. Of the fourteen hijackers prosecuted in 1972, the results are as follows:

(i) three were given life sentences;
(ii) one received a sentence of forty-five years;
(iii) one received a sentence of forty years;
(iv) one received a sentence of thirty years;
(v) five received a sentence of twenty years; and
(vi) three are undergoing pre-sentence study.

This contrasts sharply to the relatively mild sentences which convicted hijackers received in the 1960’s and represents a growing recognition by the courts of the heinous nature of the crime.

II. SKYJACK PREVENTION AND INDIVIDUAL RIGHTS

Turning now to the strictly legalistic questions, in our society any type of system that imposes a personal search on an individual, no matter whether that search be consensual or not, has repugnant overtones, at least in the abstract. A serious legal question has arisen whether the fourth amendment to the Constitution, consistent with our mobile society with its emphasis on individual rights, can tolerate the search of a person as a precondition to his mobility by air. I think the answer is a clear “yes.”

Not surprisingly, to date there have been only a limited number of cases dealing directly with the issue of whether a pre-boarding search of a passenger can be held to be consensual in nature and whether the fruits of such a search can be used as evidence in crimes, whether or not related to a crime committed on board the aircraft. When a passenger enters an airport, he is almost immediately put on notice by large, conspicuously-posted signs that both his person and any luggage that he may be carrying on board an aircraft with him will be subject to search before he is permitted to board. Normally, the hand luggage a person may be carrying is subject to a visual inspection by opening and examining the contents by private individuals who have been hired by the airport or the airline for the purposes of conducting such searches, and the passenger himself is asked to walk through a magnetometer which will determine whether he has an accept-

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able or unacceptable level of metal on his person, an unacceptable level meaning a reading high enough to indicate the possibility of a concealed weapon. If the magnetometer reading is high enough, the person is then asked to submit to a frisk or "patdown" by these agents.

Let me emphasize at this point that so far as I am aware, and certainly in the case of Delta, it is the standard operating procedure for the carriers not to detain or press upon any person not wishing to submit to a search of his person or his baggage. The simple fact is that he must understand that, absent such search, he cannot proceed on board the aircraft or penetrate more deeply into the sterilized area.

The alarming increase in hijackings over the past few years has already been documented; the dangers presented to innocent bystanders of these crimes are apparent. Therefore, when these obvious dangers are combined with the inherent difficulties in attempting to prevent hijackings, an individual's expectation of privacy or freedom from questioning or search should not be as high when boarding an aircraft as it is in other places, as on the street or in his home.\footnote{People v. Botos, 27 Cal. App.3d 774 (1972). See also United States v. Lindsey, 451 F.2d 701 (3d Cir. 1971); Comment, Airport Security Searches and the Fourth Amendment, 71 COLUM. L. REV. 1039 (1971).}

It may be, then, that the question of consent is not even germane to the issue, insofar as it involves passenger pre-boarding of airlines. Unless he is truly illiterate, a person can hardly fail to observe the many conspicuous notices given him that he will be searched if he attempts to go past a certain area in the airport. Presumably, therefore, the passenger knows exactly what he is getting into at the time he reaches the area where the search is being conducted; he is free to desist from going further at any time. Even if he refuses to submit to the search at the place where it is conducted, standing instructions are to deny him further access to the boarding area, but without further action.

Is there, however, some point of no return after which a person will have attracted enough suspicion to himself to be questioned or searched further? I think, realistically, that there is. Consider the situation when a passenger has had his hand luggage cleared, but after walking through the magnetometer there is a reading...
that indicates the passenger is carrying metal of sufficient density to be a weapon. Assume that he then refuses to consent to a personal frisk or "patdown" by the airport security agents. Theoretically he should be given the option of having his luggage returned and told that he cannot proceed further.

But let us assume that a zealous agent is concerned about this would-be passenger and, exercising his own judgment, calls over a law enforcement officer who theretofore had not been assisting in the searches or inspection, but had merely been standing by in case of trouble. The only basis for calling over the officer has been the fact that the magnetometer reading was high and the individual refused to submit to a personal search. The officer then asks the individual to accompany him to a more remote area for either interrogation or a personal search or both. I think it is a fair premise that at this point he is legally in custody, although not actually arrested, and the consensual nature of further search is placed in issue. Although one case seems to hold that the mere fact of the defendant's being in custody when he consents to a search is sufficient to render the consent invalid unless the government can point to some affirmative indication of voluntariness, there are many cases supporting the conclusion that a person may validly consent to a search even though the consent is given while he is in custody and that the fact of custody does not inherently render the consent invalid.

There are other factors, of course, that relate to the conduct of the search if a person is in custody. For example, if the search is conducted only after coercion, deceitful conduct on the part of the officers conducting the search, or even the failure of the officers to inform the suspect of his constitutional rights, one must consider the guidelines laid down in Miranda which, although dealing

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14 The word "arrest" includes "custody" but the converse is not necessarily so. The term "custody" normally indicates the situation in which an individual's freedom of movement has been restricted, as by . . . instructing him to accompany officers to a certain place, . . . but in which he has not been placed under formal arrest. Validity of Consent to Search Given by One in Custody of Officers, 9 A.L.R.3d 858 (1966).


with the admissibility of confessions taken from an accused while he is in custody, would implicitly have ramifications in the area of consent to a search and seizure given in similar circumstances, especially in view of the Court's assertion that:

[U]nless adequate protection devices are employed to dispel a compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.  

Thus there may be some doubt cast upon the continuing applicability of those cases which hold that searches while in custody can be voluntary, because Miranda presents the basic issue of waiver of constitutional rights by an accused while in custody, which is the same issue underlying the search and seizure cases. I submit, however, that there is a substantial difference in the typical situation of taking a person into custody on the streets and the one involving a person who, up to a point, has voluntarily and knowingly placed himself in the position of a possible search and then refuses to permit the search to be carried out in its entirety.

The Supreme Court has stated that there is no ready test for determining reasonableness of a search other than by balancing the need to search against the invasion which the search itself entails. I am confident that the balance lies heavily in favor of the need to search to protect as contrasted with the invasion that the search might involve, particularly in light of the potential magnitude that the crime of hijacking portends against innocent citizens as compared with the minor inconvenience imposed on the individual who has elected to "test the system."

It has been suggested that when serious injury is suffered by a passenger in a hijacking, the burden of proof should be placed on the airlines to ensure that they have done everything possible to avert the attack, on the theory that the airline is in a position to prevent the hijacker from accomplishing his criminal act, while the passenger is in no way capable of doing so. This theory, of course, rises in the context of civil liability, but lends further appeal:

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18 384 U.S. at 458.
to the need—indeed, to a demand—for the exercise of maximum security precautions at the nation's airports.

In the foregoing theoretical case the umbrella of the fourth amendment was invoked by the presence of a law enforcement officer. But what if the agent himself had detained the subject and personally searched him?

Except for limited indications to the contrary, most courts have agreed that evidence obtained as the result of a wrongful search by a private individual may be admitted into evidence in a criminal prosecution against the victim of the search, if that search was not in any way instigated or participated in by government agents. This is consistent with the Supreme Court's holding in Burdeau v. McDowell,²¹ wherein the Court held that the protection of the fourth amendment applies to government action only, its origin and history clearly showing that it was intended as a restraint upon the activities of sovereign authority and was not intended to be a limitation upon other than governmental agencies.

The cases arising under airline searches when the searches were conducted entirely by employees of the airline have been consistent in their holding that evidence discovered as the result of these searches is admissible in criminal prosecutions. For example, in Gold v. United States,²² an airline employee search was upheld as not being so connected with government participation or influence that it could be characterized as a search by government agents. The Ninth Circuit Court of Appeals stated:

We conclude that the initial search of the packages by the airline's employee was not a federal search, but was an independent investigation by the carrier for its own purposes.²³

This is also the holding of United States v. Burton,²⁴ wherein an experienced Braniff employee discovered a pistol in the defendant's luggage after he had been aroused by the fact that the defendant not only met the profile, but, in addition, his luggage had a peculiar feel to it. In that case the luggage was opened entirely on the initiative of the Braniff employee and no federal agents were pres-

²¹ 256 U.S. 465 (1921).
²² 378 F.2d 588 (9th Cir. 1967).
²³ Id. at 591.
ent during the search and indeed were not called into the picture until the suspect was preparing to board his flight.

The opposite result was reached in *Corngold v. United States*, as like *Gold*, a Ninth Circuit case, but with facts entirely different in that customs agents followed a shipper to the airport and requested the airline to open some packages after the shipper had left. In that case, the airline employee testified that he had opened the packages *only* because the government agents had requested that he do so and that the government agents actively joined in the search. The evidence [marijuana] was suppressed at a subsequent criminal prosecution of Corngold.

The most publicized case dealing with the use of the profile as a tool for the selection of persons to be searched under the pre-1973 security program is *United States v. Lopez*. There was a general negative reaction to *Lopez* when it first was decided, but this was due in large part to the fact that the judge suppressed as evidence heroin found on the defendant when he was searched following a high reading on the magnetometer as he was about to board an aircraft. The case is worth reading and discussing, though, because it is a creditable memorandum of law by Judge Weinstein, covering virtually all the issues raised by the use of an anti-hijacking system.

Consider first what *Lopez* does in an affirmative sense:

(i) It sustains as constitutional the utilization of the profile when the characteristics that go into the profile are easily observable and are operable without the exercise of subjective judgments;

(ii) It accepts for judicial notice the fact that the magnetometer, when operated properly, serves the function for which it was designed;

(iii) It sustains a limited right to hold *in camera* investigations in protecting the secrecy of the profile system;

(iv) It rules that evidence discovered during a weapons frisk pursuant to the anti-hijacking procedure, insofar as it utilizes the profile correctly, would normally be admissible,

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25367 F.2d 1 (9th Cir. 1966).

even though there had been no consent to the search and
the suspect was in custody of federal agents without a
warrant having been issued for his arrest; and

(v) It sustains the constitutionality under the fourth amend-
ment of the seizure of evidence of crimes other than those
involved in boarding a plane with a weapon when dis-
covered during a frisk conducted in good faith to locate
weapons believed to be present.

We certainly cannot quarrel with these holdings, and indeed,
applaud them.

Almost ironically, the opinion in Lopez dealt with the suppres-
sion of the evidence obtained from the search as almost an after-
thought. Apparently an employee of Pan American, the airline
through which the screening was being conducted, without author-
ity, had introduced another element—that of ethnic origin—into
the particular profile check being conducted at the time Lopez was
arrested. The record is silent about whether Lopez would have
been detained otherwise, but the fact that led to the detention of
Lopez and his subsequent personal search was that he produced a
high reading on the magnetometer when he walked through it, a
highly objective measure of determining whether a person should
be further searched. It seems to me that having approved the meth-
ods used by the marshals in searching Lopez, the judge then threw
the baby out with the bathwater in arriving at his decision.

The judge also ruled that the signs posted at the boarding gates,
notifying the passengers that they and their baggage are subject
to search, did not amount to an implied consent to be searched. I
must disagree with the judge on this point.

As one columnist has noted, 7 everyone desiring to visit the office
of the Supreme Court of the United States, including lawyers, is
required to submit to a search of both the person and the briefcase.
Let us also not forget that any time a passenger embarks on inter-
national travel he and his baggage are subject to search by customs
officials in every country which he visits, as well as the customs
officials of his own country when he returns to his port of embar-
kation.

In my opinion, once a person has been put on notice that air-

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7 Buckley, Armed Stewardesses to Deter Hijackers? The Washington Evening
Craft hijacking is a federal crime, punishable by death, and that he and his baggage are subject to search, and he then continues the boarding process in the face of such a caveat, he has done so willingly, and I say that with all due regard to the niceties involved in the relinquishment of fundamental constitutional rights. I take some comfort in this position from a California state case decided after Lopez, wherein the California Court of Appeals placed great weight on the fact that there were signs and announcements in the boarding area that passenger luggage would be searched, and sustained the trial judge's finding that the defendant consented to the search voluntarily and that marijuana found as a result of that search was not subject to suppression even though a police officer had assisted in the search.\footnote{People v. DeStrulle, 28 Cal. App.3d 477, 104 Cal. Rep. 639 (Ct. App. 1972).}

Today everyone is subject to the search and the profile, while still intact, does not remain the critical criteria for determining who is searched—everybody is. One need only be a casual observer in any major terminal in the United States to see the anti-hijacking procedures in operation. To argue that one who freely and willingly enters the line that forms as baggage and persons are searched, but later complains that the search was not voluntary, certainly is far less persuasive today than it was at the time when only a selected few were required to stand the inspection.

III. Hijack Prevention in the Future

In a lighter vein, as you know Americans have fertile imaginations and we receive anti-hijacking proposals from all walks of life. One gentleman assured us that he has the hijacking solution in hand and that all he wants is four per cent of Delta's gross revenues for the next ten years and four free passes anywhere in the world over the same period of time—this would amount to something over one hundred million dollars—but without giving us a single clue as to what he has in mind. A convict in a State penitentiary in North Carolina advised us that he spends sixteen hours a day in his cell and, having had ample time to think it over, he was confident that the solution to the hijacking problem is the introduction of tear gas into the cabin while the flight crew don oxygen masks. He even took the time to carefully sketch out a
system which he thought might work. Considering the fact that this gentleman apparently doesn’t have much opportunity to travel at all and wasn’t asking for compensation, we thought his attitude was a charitable one indeed.

Some of the more thoughtful letters concerning anti-hijacking devices involve suggested means of identification and record keeping which would permit the airlines to keep fairly close tabs on their passengers. One gentleman suggested that we have identification cards for all passengers that, when placed in a computer, would give a printout on the person’s background and identity. Matching of fingerprints has been suggested as another idea and, quite frankly, while we don’t know all the answers yet, some of these thoughts that people have passed along to us, or some variance thereof may provide additional useable solutions to the hijacking dilemma some day.

We have considered some of the legal issues involved in skyjacking and the practical problems that they present, as well as the responsibility of the airport operator and the airlines, vis-a-vis their respective security areas. The question remains—have we taken all reasonable measures for the prevention of skyjacking?

First, let me say that I believe that we are now approaching a point of diminishing returns with regard to the maintenance of security in airport terminals insofar as the security “sterilization” of our passengers is concerned. One must remember that we are dealing with 531 commercial airports in which 500,000 people are being processed on a transportation system involving 14,000 flights daily. Of course, we could achieve one hundred per cent assurance of skyjacking prevention by simply ceasing to fly. Obviously, the answer lies short of such action—or inaction.

Secondly, in Las Vegas terms, the odds are all in the passenger’s favor. As I mentioned a moment ago, in the United States today, some 14,000 airline flights will be flown—that’s 168,000 a month, or over 2,000,000 a year. How many “attempts” are made annually? Only a handful. But those of the handful that were successful did make spectacular headlines. And alas, as I said at the outset, those that fail often are relegated to the back pages of our newspapers, if they are reported at all. And they are failing with increasing frequency. In 1968 and 1969, eighty-two per cent of the attempts were successful; in 1970, sixty-seven per cent; in 1971,
forty-four per cent; in 1972, only thirty per cent; and in 1973 to date, none have succeeded. In other words, last year seven out of ten tries ended in complete failure.

And the attempt is no longer very profitable. Of the more than nine million dollars paid to hijackers to date, if Cuba returns the two million dollars to Southern as it has promised to do, ninety-five per cent will have been recovered. And five hijackers have been killed, six more have been shot and still three more chose suicide as a way out. Hardly a very profitable or permanent way of making a living.

On the other hand, we do not know how long the traveling public will accept thorough searches of their bodies and their personal belongings, as well as the occasional attendant delays. We are quite aware of the outraged protestations of certain segments of the population, contending that these searches are illegal or otherwise infringe on individual liberties. While still minor, over a period of time these protests may increase.

We also fear the threat of deterioration in customer relations. Our industry has been built upon service, convenience, courtesy and safety, and these attributes must not be lost. Security has become the latest addition to this list. We must convince our passengers that security is a necessity, even though it may well interfere with convenience, and that flights may occasionally be delayed. With the strengthening of law enforcement at the airport, these terminal areas may soon display a more secure environment than those we experience in the residential areas of our large metropolitan centers.

We have noted that prosecution of hijackers has taken on new intensity, and that our courts are meting out increasingly severe and more appropriate sentences for convicted hijackers. Accordingly, it is my feeling that we must now concentrate on the most conspicuous aspect of deterrence, and that is the elimination of safe havens to which a skyjacker can proceed. The recent agreement with Cuba is a refreshing break in the international political logjam which has prevented agreement for extradition among certain countries. We must renew with vigor our effort to obtain international agreement for extradition and effective prosecution of skyjackers.

When there remains no place where a skyjacker can anticipate
refuge, the problem will be much nearer solution. No country must allow a perpetrator of a skyjacking, with its inherent endangerment to so many innocent lives, to go unpunished. In addition, I would strongly urge that the President of the United States be given discretionary powers to suspend all air service between the United States and nations that harbor air criminals, and that he should be strongly encouraged to exercise that authority.

While I have avoided any philosophical comment in my discussion of the problem, it is incumbent upon me to make a very few observations which may serve to place the measures implemented, and the measures to be implemented, in perspective. So long as the industry, our government and the vast majority of people in our country place the value of human life above property, there can be no certain and final solution to the skyjacking problem. I submit that we cannot and must not change our priority of values.

Short of playing Russian roulette with each psychotic hijacker, we must deal with each problem as it arises within certain acceptable parameters in the hope that the example made will deter the next psychotic hijacker. The measures being taken today, along with renewed effort to obtain satisfactory international agreement for extradition and prosecution, are within these parameters.

While many of the preventive measures now being taken reduce the necessity to balance life against property, it is possible today, and will remain possible in the foreseeable future, for a person using reasonably sophisticated means to commandeer a commercial airliner and obtain compliance with his demands. Knowing full well that were I to publicly suggest such means today, in all probability tomorrow they would be tried somewhere, I will not attempt such a recitation. But I am certain that those of you with imagination can envision numerous techniques without my prompting.

The threat to life is the initial consideration in an airline’s handling of each skyjacking attempt; it must—and it will—remain so.