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Individual Rights v. Skyjack Deterrence: An Airline Man's View

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INDIVIDUAL RIGHTS V. SKYJACK DETERRENCE: AN AIRLINE MAN'S VIEW

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ON A SPRING NIGHT in 1937 near Frankfurt, Germany, a small group of passengers boarded the giant airship Hindenberg for what was to be its fatal flight to Lakehurst, New Jersey. Each passenger was subjected to an extremely intensive search. Ostensibly, the purpose was to prevent carriage of any items, such as cigarette lighters and photo flashbulbs, which could ignite the dirigible's volatile hydrogen. However, the Hindenberg had also been the object of numerous bomb threats,[1] and the presence of Gestapo agents on the scene would make one wonder whether safety of the airship was the only consideration for the search.

In 1937, and in the years that followed, the searching of air travelers became a routine aspect of German life. William Shirer, in his best selling book "Berlin Diary," expressed outrage at the forced disrobing and bodily search of his wife prior to boarding a commercial airliner.[2] At the time, Americans considered this as typical only of the evil Nazi regime. It seemed terrible to us, who, fortunately, had the fourth amendment to prevent such degrading practices.[3]

It seems ironic that 35 years later, we find ourselves in a situation where each and every air traveler in the United States is treated as a criminal suspect as soon as he enters an airline terminal.[4] It would seem strange to the citizen of 1937 that air travelers today not only submit willingly to searches of their person and carry-on baggage, but actually laud the virtues of and need for such action.

It is indeed fortunate that public concern about the threat of skyjacking has brought widespread initial support of the restrictive measures presently in use. The major questions now are: (1) how long will this public support prevail, and (2) how long can we continue this procedure, either as a practical measure, or in face of the legal challenges it will generate.

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1. A. HOEHLING, WHO DESTROYED THE HINDENBERG 26 (1962).

2. W. SHIRER, BERLIN DIARY 91 (1961).

3. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.

4. *See* Emergency Order of FAA, U.S. Dep't of Transp. Press Release No. 103-72 (Dec. 5, 1972).

Both of these considerations were of paramount concern to Eastern Airlines when it first embarked on a hijack deterrent program in early 1969. It may be recalled that our airline was a favorite among Cuba-bound individuals at that time, reaching a peak frequency of about one diverted flight a week.

When we sat down with a team of operations authorities and psychologists at the Federal Aviation Administration (FAA), we developed a deterrent system that proved to be quite effective. It involved three essential ingredients: (1) a behavioral profile to isolate suspicious individuals, or "selectees,"[5] (2) a magnetometer to disclose the presence of metal common to weapons; and (3) a federal marshal to conduct searches and arrests.[6] Most importantly, this system could function with a minimum of interference to innocent travelers, while at the same time have the blessing of the courts.[7] It has been held that application of the behavioral profile in conjunction with the magnetometer is sufficient to establish a legal cause for detainment and limited search of the selectee.[8]

There was a fourth ingredient, perhaps an ancillary one, which we considered important to the success of the program. I speak of an openness with the news media. It was agreed that if a maximum deterrent effect was to be achieved, potential skyjackers should know that we were establishing a screen to snare them. In addition, public knowledge of all aspects, except details of the behavioral profile, would hopefully assure our regular customers that we were seriously trying to stop skyjackings.

Initially, the newspaper, radio, and television coverage given our program was most beneficial. However, there were other times when it came to be a handicap of major proportions. Not only did the media, perhaps unwittingly, give major attention to clandestine actions aimed at apprehending skyjackers, but they even began to play childish games. For example, there were numerous incidents where television crews tried to sneak through our screen, or slink through back doors in the ramp areas. Yet, on balance, I should say that the media has been of true assistance in recent months. News of the hijacker prosecutions by the courts is now receiving much more prominent attention, as is the hostile reception being given skyjackers in Cuba and Algeria.[9]

5. The selectee was the result of a comprehensive profile of skyjackers developed by Dr. John T. Dailey. For insights into the make-up of the selectee's profile, *see* Dailey, *Development of a Behavioral Profile for Air Pirates,* 18 VILL. L. REV. 1004 (1973).
6. *See* United States v. Lopez, 328 F. Supp. 1077, 1083 (E.D.N.Y. 1971).
7. *Id.* at 1084.
8. *Id.* at 1097.
9. *E.g.,* Washington Post, Feb. 27, 1973, at B15, cols. 6-7.

The return of ransom money has likewise been widely publicized. Such news presentations cannot help but discourage any prospective skyjacker.

In a different vein, we thought from the outset that judges would render heavy penalties against those skyjackers who were caught. Instead, until very recently, there have been many instances in which the minimum penalty was imposed. Unfortunately, there are still people walking the streets who were apprehended in the act of skyjacking an aircraft.

For some reason — perhaps the increasingly violent character of skyjackings — the courts are being much tougher today.[10] The consequent stronger sentences are, in turn, generating broader news media attention for which we can be thankful.

The problems we had were ancillary, and did not alter our feeling that we had a system which would work, and which all parties involved would accept.

In the more than 3 years that this system was utilized it withstood all constitutional challenges. In turn, we reduced our hijack frequency among United States airlines from one in three in 1969 to less than 2 in 33 by the end of 1972. Over 1,000 suspicious persons were denied boarding of our aircraft, an option allowed under the federal tariffs regulating us,[11] and over 600 others were taken into custody at our gates on a variety of charges including illegal possession of firearms, possession of narcotics, and flight to avoid prosecution.

It is significant to point out that Eastern spent more than $2.5 million of its own money in developing this system, mostly for the purchase of magnetometers and the training of personnel. We organized a special Hijack Task Force within the airline with members from each operational department of the company, along with officials of both our unions and governmental agencies. The job of this task force was to stay abreast of developments in the screening program and to evaluate any changes that might make our procedures more effective. It has been an extremely active, hard-working group.

To be candid, Eastern's zeal in this effort, unfortunately, was not matched by other members of the airline industry. As a result, while we achieved a dramatic reduction in the number of hijackings on our airline, there was less impressive improvement among carriers as a whole. Worse still, the severity of the incidents rose to a point

10. Judge Craven expressed his concern over the seriousness of the hijacking crisis and the violent character of the various hijackings in United States v. Epperson, 454 F.2d 769, 771-72 (4th Cir. 1972).

11. Federal Aviation Act § 1111, 49 U.S.C. § 1511 (1970).

where people were killed either in the hijacking process or by law enforcement personnel attempting to stop the crime.[12] All of this generated a great amount of pressure on the federal agencies, which were increasingly embarrassed by extremely prominent and detailed news media accounts of the incidents. It reached the point where the White House itself felt the heat.[13] At Eastern, we were fully conscious of the unfortunate path the situation was taking. While we were steadily trying to maintain and perfect an effective, legal program of deterrence, the Government was resorting to measures which were dramatic, highly visible, and designed more on the basis of political considerations than practicality.

First, we had the sky marshal program, an unbelievably expensive project which, while generating mass publicity, did not bring about a single arrest or stoppage of a hijacking.[14] Ultimately, it was discontinued.[15] Then we entered the "get tough" phase, with the federal agencies determining to stop hijackings once they were underway by shooting out tires,[16] bringing in sharpshooters, and the like. Some aircraft were stopped, but in some instances passengers or crew members were killed or wounded.[17] It was not surprising that public concern was evolving into sheer terror. To our dismay at Eastern, the outcry was drowning out our contention that an acceptable solution was available if only we would "get our act together." In other words, we needed to implement a nationwide application of the deterrent system that had already proven itself effective, and we needed to force a concentrated drive toward closing skyjacker havens through international agreements. Regrettably, the hysteria reached a point where no one was interested in such an approach. In meeting after meeting, representatives of various nations refused to take any collective action to close the havens.[18] They could not even gain unanimity on the Tokyo or Hague Conventions.[19] Before we knew it, the Secretary of Transportation stepped forth with a federal order that is totally unprecedented in this nation's history.[20] For the first time, and this

12. *See* 37 Fed. Reg. 25934 (1972).
13. *Id.*
14. *See* S. REP. No. 93-13, 93d Cong., 1st Sess. 10 (1973). While FAA would contend that arrests were made during this activity, there were no apprehensions made "in flight", which was the focal point of the sky marshal campaign. It is contended that those arrests which occurred on the ground would have come about without the sky marshals.
15. *Id.* at 11.
16. Washington Post, Feb. 27, 1973, at B15, cols. 6-7.
17. *See* 37 Fed. Reg. 25934 (1972).
18. S. REP., *supra* note 14, at 4-5.
19. *Id.* at 2-4.
20. Emergency Order of FAA, U.S. Dep't of Transp. Press Release No. 103-72 (Dec. 5, 1972).

includes wartime security measures, we have imposed a mass mandatory search on a private segment of our society.[21]

What is happening in the nation's airline terminals today is precisely what Eastern sought to avoid when designing its deterrent program in 1969. Today, that program is nonexistent. In its place is another expensive, highly visible, politically motivated exercise — if you will permit an operating man to call a spade a spade.

Up to this point, it might appear that I am being critical of the way things have gone. Before proceeding, let me emphasize that the hat I wear is grey rather than purely black or white. I question the strategy and not the mission. Eastern Airlines has demonstrated its dedication to deterring hijacking. In fact, we were pretty lonely in that endeavor for quite a long time. So, when we express our opinion on the subject, we feel that we have justified the right by experience.

As mentioned earlier, the procedure in effect today is based upon the premise that each and every air traveler is now a suspect, or as we've referred to him earlier, a selectee.[22] This premise is based upon no justifiable cause other than the fact that the individual has bought a ticket for a ride on a commercial airliner. At that point, he apparently surrenders any inalienable right so far as personal privacy is concerned. He can refuse to be searched, however, in such case, we have no alternative but to deny him boarding of the aircraft. If we do let him on, we are subject to a fine of up to $1,000 by the FAA.[23] This has happened, for example, in the case of the Honorable Vance Hartke, Senator from Indiana. Two airlines permitted him to board after he pleaded special immunity as a member of the Senate and were subsequently fined.[24]

Notably, Senator Hartke was the object of fierce public reaction when news of his actions were publicized. Numerous editorials and letters-to-the-editor were written condemning him, not only for his attitude, but also for his endangering the overall antihijack program.[25] Indeed, it is this very strong public support of the program that is currently protecting the airlines and the federal government from a mass of charges that we are tramping all over the fourth amendment.

21. 14 C.F.R. § 121.538 (1973).

22. *See* note 5 *supra*. *See also* United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971).

23. To allow an unscreened individual to board an aircraft would violate the provisions of 14 C.F.R. § 121.538(h) (1973) which states that "each certificate holder shall at all times maintain and carry out the [approved] screening system. . . ."

24. Washington Post, Jan. 28, 1973, at A25, cols. 1–3.

25. *E.g.*, Washington Post, Feb. 5, 1973, at A20, col. 5.

To me, as an airline operating official, this aspect of the skyjacking problem has been particularly intriguing. It would appear that public opinion is the one powerful force in this nation that can override constitutional protections. One might say that that is fortunate in view of the extreme measures we have adopted. However, as a citizen, I am bothered by the thought that this little infringement on our personal liberties, if accepted, may only serve to inure us to further infringements — a step by step erosion of our constitutional rights[26] — and, as an airline operating man, I must wonder, how long we can continue with the present procedure, how long the public will continue to support us.

It may well be that my concern over punitive action against the airlines is unnecessary. After all, we are merely complying with an order from the federal agency which, by congressional act, is charged with regulating our operations.[27] If there is a dispute, then it is clearly between the federal government and the offended party.

Frankly, we in airline operations have our hands full simply tying to stop hijackings. The current procedures, while very distasteful and exceeding what we at Eastern feel is necessary, have been of assistance toward that end. But in my opinion, and this opinion is based on discussions with Eastern's legal counsel, these new procedures pose real problems to you in the legal profession.

At present, we have abolished all the earlier conditions which supported reasonable cause for search and detainment.[28] We may have deterred hijackings to a large extent, but we have also seriously complicated the processes by which we would hope to prosecute those violators caught in our snare.

Our original antihijack system was upheld under the standard set forth in *Terry v. Ohio*.[29] *Terry* concerned the arrest of an individual who was acting suspiciously and turned out to be carrying a concealed pistol.[30] The Court ruled that the policeman's instincts and powers of observation as an experienced lawman — plus the consideration of protecting himself and others from possible danger — were sufficient to justify a limited search for weapons.[31]

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26. This thought has also been reflected by other commentators. *See, e.g.*, Gora, *The Fourth Amendment at the Airport: Arriving, Departing, or Cancelled?*, 18 VILL. L. REV. 1036 (1973).

27. Federal Aviation Act § 101, 49 U.S.C. § 1341 (1970).

28. *See generally* United States v. Bell, 464 F.2d 667 (2d Cir. 1972); United States v. Epperson, 454 F.2d 769 (4th Cir. 1972); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971).

29. 392 U.S. 1 (1968).

30. *Id.* at 6.

31. *Id.* at 20–27.

United States v. Lopez[32] is the landmark case upholding the constitutionality of searches conducted under our original antihijack program. *Lopez* involved search, confiscation of narcotics, and arrest after the suspect, a selectee, triggered the magnetometer at an airport.[33] Judge Weinstein upheld the system because of its selectivity, and cautioned against a program that involves mass search.[34]

It must be understood that the entire situation has changed since the incident which gave rise to Judge Weinstein's decision. The mass search is now the order of the day and there is no prior basis for suspicion. The traveler must, if he wishes to board, submit to search of both his possessions and person. If it turns out that the traveler is carrying narcotics or is fleeing to avoid prosecution, it is not clear whether his arrest can be justified if he were apprehended pursuant to antihijacking measures. Further, it is not yet known how a court will decide when faced with an argument that the arrest was illegal since there was no reason whatever to suspect that skyjacking was the individual's intent. In addition, it should be noted that under the new Government regulations, arrests are now made by local police instead of the federal marshals used heretofore.[35] In that case, there may be a question as to which governmental entity — local, state, or federal — has jurisdiction to prosecute the alleged violation. All in all, these and other questions represent some interesting new twists for those of you who have chosen law as your profession.

For myself and others in the airline industry, we are going to continue with the mission of trying to halt skyjackings. I sincerely hope we can find a way out of this blind canyon through which we seem to be flying. It appears that, at the moment, we are faced with a procedure which will be very difficult to halt or to replace with a less obstrusive but more effective means of screening passengers and luggage for weapons. With our old procedures, we could have quietly and discreetly phased out the security measures if it were eventually deemed that skyjacking was no longer a menace. But now, we have thrown up a highly visible, awkward checkpoint, and its discontinuation will seem to announce to every sick mind in the country that it is once again open season on the airlines and their passengers.

Frankly, there are some benefits to us and others in the present situation. Our gate agents like the present system because it cuts down on congestion in airport concourses. Law enforcement people

32. 328 F. Supp. 1077 (E.D.N.Y. 1971).
33. *Id.* at 1081–82.
34. *Id.* at 1101–02.
35. 14 C.F.R. §§ 107.1, .4 (1973).

like it because it gives them a chance to check on literally millions of people who might be violating *something*.[36] The only ones inconvenienced are the passengers, or their friends and relatives who want to greet or see them off at the airport. Yet, as I have said, we have had no major outpouring of complaints, to date, from that contingent.

Just when, or if, we can discontinue these severe search measures is a question no one can answer at the moment. We can only wait and see what the Administration will do.

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36. *See* S. REP., *supra* note 14, at 9. *See also* 328 F. Supp. at 1098–99.