Transportation and Terrorism

January 2004
Volume 52
Number 1

United States
Department of Justice
Executive Office for
United States Attorneys
Office of Legal Education
Washington, DC
20535

Guy A. Lewis
Director

Contributors' opinions and statements should not be considered an endorsement by EOUSA for any policy, program, or service.

The United States Attorneys' Bulletin is published pursuant to 28 CFR § 0.22(b).

The United States Attorneys' Bulletin is published bi-monthly by the Executive Office for United States Attorneys, Office of Legal Education, 1620 Pendleton Street, Columbia, South Carolina 29201. Periodical postage paid at Washington, D.C. Postmaster: Send address changes to Editor, United States Attorneys' Bulletin, Office of Legal Education, 1620 Pendleton Street, Columbia, South Carolina 29201.

Managing Editor
Jim Donovan

Technical Editor
Nancy Bowman

Law Clerk
Marian Lucius

Intern
Courtney Kane

Internet Address
www.usdoj.gov/usao/reading_room/foiamanuals.html

Send article submissions to Managing Editor, United States Attorneys' Bulletin, National Advocacy Center, Office of Legal Education, 1620 Pendleton Street, Columbia, SC 29201.

In This Issue

The Transportation Security Administration: Fighting Terrorism at Our Nation's Transportation Facilities 1
By Jay N. Lerner and Stephen E. Brundage

The Criminalization of Air Violence 5
By Jeff Breinholt

Air Bombings 12
By Jeff Breinholt

Skyjacking 18
By Jeff Breinholt

A Smokescreen for Terrorism 30
By D. Scott Broyles and Martha Rubio

Bolstering Cargo Container Security: How U.S. Attorneys' Offices Can Make a Difference 35
Stephen E. Flynn and Peter Hall

The Transportation Security Administration: Fighting Terrorism at Our Nation's Transportation Facilities

Jay N. Lerner
Deputy Chief Counsel for Criminal Enforcement
Transportation Security Administration

Stephen E. Brundage
Attorney-Advisor, Criminal Enforcement Division
Transportation Security Administration

I. Introduction

The events of September 11, 2001, undoubtedly shocked the nation. In the post-9/11 era, the United States Government is focusing enormous time, energy, and resources on fighting terrorism on all fronts, both domestically and internationally. Numerous laws were enacted aimed at strengthening the Government's ability to combat terrorism. In the wake of the horrific events, certain vulnerabilities in our nation's homeland protection and security were highlighted. One such area was the country's transportation systems, particularly aviation.

To address such vulnerabilities, Congress passed, and the President signed into law, the Aviation and Transportation Security Act, Pub. L. No. 107-71,§ 101, 115 Stat. 597 (2001). In addition, following the events of September 11, 2001, the American public demanded additional investigative resources to enhance airport security and law enforcement. As a result, certain law enforcement responsibilities were assigned to the Transportation Security Administration (TSA). *Id.*

The Aviation and Transportation Security Act (ATSA) is the organic statute that established TSA. Its legislative history demonstrates the country's dissatisfaction with prior enforcement efforts in the area of aviation security. H.R. CONF. REP. NO. 107-296, at 1 (2001). As a result, TSA's mandate is to improve security of the United States' transportation systems and facilities, as well as minimize the risks of another terrorist tragedy in the transportation sector. Quite simply, TSA has the sole mission to protect the nation's transportation systems to ensure freedom of movement for people and commerce.

II. The Transportation Security Administration: Its origins, structure, and goals

A. Origins of the Transportation Security Administration

TSA has redefined aviation and transportation security over the past twenty-three months. This is no small task, given that more than 620 million passengers and 1 billion pieces of luggage pass through United States airports annually. Nevertheless, the agency has operated under the guiding principle of *"Excellence in public service through: Integrity, Innovation, and Teamwork."* http://www.tsa.gov/public/display?theme=7&content=44.

During this time frame, TSA has accomplished the following:

- Recruited, hired, trained, and deployed a security screening workforce for the entire nation;
- Instituted screening procedures for all passengers and baggage boarding aircraft;
- Installed explosive detection devices in nearly all the nation's airports;
- Hardened airplane cockpit doors;
- Trained and deployed federal flight deck officers;
- Developed K-9 explosive units nationwide;
- Initiated enhancements to the Computer-Assisted Passenger Pre-screening System; and
- Began development of national Transportation Worker Identification Card (TWIC).

B. Organizational structure of TSA

When initially created and authorized, TSA was a component agency of the United States Department of Transportation. However, upon the establishment of the Department of Homeland Security, TSA became an integral part of our nation's homeland defense under the Secretary of Homeland Security.

TSA headquarters

The senior leader of TSA is Acting Administrator David Stone. Acting Administrator Stone is supported by Deputy Administrator Stephen McHale, Chief of Staff Carol DiBattiste, Chief Operating Officer Vice Admiral John Shkor, and Chief Logistics Officer Gale Rossides. In particular, the Chief Operating Officer oversees four primary divisions: Aviation Operations, Maritime and Land Operations, Intelligence, and Policy.

Each division is operated by an Assistant Administrator. The largest division, by far, is Aviation Operations, as it has been the primary focus of TSA for the past year. This division is responsible for the day-to-day operations of the nation's airports, including screening of passengers and baggage, law enforcement, and civil enforcement actions, pursuant to aviation security regulations through an administrative process.

TSA field operations

TSA maintains a robust and vital field structure at the more than 400 airports nationwide, and the Federal Security Director (FSD) is responsible for all security operations at these airports. There are 158 FSDs, covering the nation's largest (Category X and I) airports and the geographic region around them. Many FSDs have extensive background and experience as law enforcement officers.

The Administrator has delegated most of his daily operational responsibilities to the FSDs at the airports (through the Assistant Administrator). The FSDs routinely work with federal, state, and local law enforcement and public safety agencies, to ensure the best protection possible at their airports. FSDs generally have three Assistant Federal Security Directors designated for the following areas: law enforcement, regulations, and screening. The FSDs rely heavily upon their staff and a professional cadre of highly trained security screeners. The FSD in each jurisdiction can be located at: http://www.tsa.gov/interweb/assetlibrary/FSD_Contact_List.xls.

TSA Office of Chief Counsel

In order to support an agency of this size, TSA maintains a strong Office of Chief Counsel (OCC) that addresses a variety of legal issues and matters. TSA OCC is comprised of attorneys from various federal and state government agencies, as well as the private sector. There are approximately sixty TSA Field Counsel covering the geographic regions surrounding the nation's thirty largest airports.

The OCC at headquarters is made up of seven divisions specializing in certain areas of the law:

- Criminal Enforcement;
- Civil Enforcement;
- Litigation (primarily Employment and Tort/Liability litigation);
- Regulations;
- Procurement;
- General Law (Ethics, Information/Privacy, and Personnel); and
- Operations (Administrative Functions, Legislation, and International Law).

United States Attorneys are most likely to interface with Field Counsel (many of whom have extensive criminal law and law enforcement backgrounds) in local jurisdictions and/or the Criminal Enforcement Division in Washington, D.C.

The Criminal Enforcement Division (OCC Criminal Enforcement Division) is headed by a Deputy Chief Counsel, and six Attorney-Advisors. These attorneys are highly experienced in the areas of criminal law, law enforcement, background checks, intelligence issues, and general security matters. With their knowledge of aviation and transportation security, the OCC Criminal Enforcement Division can be a valuable asset for United States Attorneys seeking assistance and counsel in Title 49 (aviation security) offenses, as well as unique Title 18 criminal offenses dealing with aviation issues. More specifically, OCC Criminal Enforcement Division stands ready to assist with all facets of a case, including litigation support, research assistance, guidance on charging decisions, and appeals.

Goals of TSA

During TSA's first year in existence, it set out to address aviation security and meet the challenges and deadlines set out in the Aviation and Transportation Security Act (ATSA). In addition, it created an agency from nothing but a single document, a statutory authorization.

With respect to TSA's law enforcement efforts, the guiding tenets are:

- Prevention of harm to the transportation systems and facilities;
- Deterrence of risks to transportation security;

- Monitoring and detection of activities which might affect transportation security;
- Enforcement and punishment of offenders committing violations against transportation security; and
- Minimization of the harms posed by any risks to transportation security.

III. TSA's involvement in the law enforcement community

The ATSA authorizes the Administrator to, among other tasks:

- Assess threats to transportation (49 U.S.C. § 114(f)(2));
- Develop policies, strategies, and plans, for dealing with threats to transportation security (49 U.S.C. § 114(f)(3));
- Coordinate countermeasures with appropriate federal agencies, including the United States Attorneys (49 U.S.C. § 114(f)(4));
- Serve as the primary liaison for transportation security to the intelligence and law enforcement communities (49 U.S.C. § 114(f)(5));
- Manage and provide operational guidance to field security resources (49 U.S.C. § 114(f)(6));
- Enforce security-related regulations and requirements (49 U.S.C. § 114(f)(7)); and
- Oversee the implementation and ensure adequacy of security measures at airports (49 U.S.C. § 114(f)(11)).

In addition, the TSA Administrator has "exclusive responsibility to direct law enforcement activity related to the safety of passengers on an aircraft" involved in a hijacking incident when the aircraft is in-flight. 49 U.S.C. § 44903(e).

IV. TSA enhancing security at airports

A. Presence of law enforcement.

Aviation security and TSA are largely reliant upon the law enforcement capabilities of other existing federal law enforcement agencies (namely, the Federal Bureau of Investigation (FBI), the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATFE), and the Department of Homeland Security Bureau of Immigration and Customs Enforcement) and state and local law enforcement partners. Recently, TSA and FBI initiated a monthly working group to identify areas of joint concern and coordinate policies, particularly where the two agencies share jurisdiction. This working relationship will greatly enhance both agencies' ability to protect the traveling public and combat terrorism.

B. Passenger and baggage screening as administrative searches.

All airplane passengers must pass through an airport screening checkpoint and undergo a security screening. In balancing Fourth Amendment concerns about these limited intrusions against the substantial public interest in protecting the aviation system, federal courts have generally held that such activities are reasonable. *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973). *See also Torbet v. United Airlines*, 2002 U.S. App. LEXIS 15777 (9th Cir. 2002). The security screening must be limited in scope, focused only on finding items that might pose a danger to the security of the aircraft. Nevertheless, courts have also upheld the admission of evidence found during a valid security screening, such as contraband. *United States v. $124,570 U.S. Currency,* 873 F.2d 1240 (9th Cir. 1989). Once again, the OCC Criminal Enforcement Division may be able to assist federal prosecutors in addressing these legal issues, including responses to motions to suppress this type of evidence.

V. Aviation security offenses

There are numerous federal criminal offenses that might affect aviation and transportation security. The following offenses are the primary ones that are likely to be presented to United States Attorneys for consideration:

- Carrying a concealed, dangerous weapon on aircraft and in checked baggage (49 U.S.C. § 46505);
- Interference with a flight crew (49 U.S.C. § 46504);
- Interference with security screening personnel (49 U.S.C. § 46503);
- Aircraft piracy (49 U.S.C. § 46502);
- Federal crime in aircraft in-flight jurisdiction (49 U.S.C. § 46506);
- False information and threats (49 U.S.C. § 46507);
- Passenger screening violations (49 U.S.C. § 46314);
- Destruction of aircraft or aviation facility (18 U.S.C. § 32); and
- Entry to aircraft or secure area of airport by false pretenses (18 U.S.C. § 1036).

The top three priorities of airport offenses are:

Firearms and ammunition offenses: In 2002, nearly 800 firearms incidents were reported at the nation's airports. Only a small percentage were prosecuted federally. *See United States v. Copeland*, 2003 U.S. Dist. LEXIS 6446 (W.D. Tenn. 2003) (Court held that "knowledge" requirement of 49 U.S.C. § 46505 firearms offense was a factual question to be decided by the jury).

Assaults on federal employees: (i.e., security screeners).

False statements on airport applications: TSA aims to maintain the safest workforce and work environment at the airports. Consequently, if an individual is making a materially false statement on airport applications, TSA supports appropriate prosecutions of such offenses. TSA also applauds the efforts of many United States Attorneys around the country who have already assisted in keeping our airports safe in Operation TARMAC.

VI. TSA working with United States Attorneys.

As a new federal agency, TSA is committed to establishing productive working relations with federal, state, and local law enforcement partners. Strong working relationships with each United States Attorney and the FBI are essential to carrying out the joint mission of fighting terrorism on all fronts, including transportation security.

TSA is participating in the United States Attorneys' Anti-Terrorism Advisory Councils (ATACs) around the country. TSA can provide valuable investigative information, intelligence, and resources, to the policy coordination efforts of the ATACs. TSA will also work with United States Attorneys through participation on Law Enforcement Coordinating Committees.

TSA has also designated representatives on each of the FBI's Joint Terrorism Task Forces (JTTFs). These representatives are well trained, experienced, criminal investigators who will participate in terrorism investigations and cases primarily focused on transportation security matters.

TSA will continue to work with United States Attorneys and Congress to propose legislation that will foster federal enforcement relating to aviation and transportation security. The United States Attorneys are encouraged to continue to provide input and guidance to TSA OCC (either Field Counsel or at headquarters) on ways to improve federal enforcement efforts and facilitate prosecution of federal offenses affecting aviation and transportation security.

In addition, TSA may look to United States Attorneys for assistance and possible representation in their role as litigator on behalf of federal agencies. TSA maintains vast amounts of information that is protected by regulation as Sensitive Security Information (SSI), which is akin to law enforcement's "sensitive information." 49 C.F.R. § 1520.7 (2003). Such information must be protected zealously, since disclosure might endanger the traveling public. The following items are examples of materials considered to be protected SSI information: Airport Security Programs; standard operating procedures for passengers and checked baggage; technical specifications for security devices; procedures to test screening equipment; and the like. *Id.* If issues arise in litigation in any court (federal or state), we must strenuously aim to protect this information, and TSA will look to the United States Attorneys' Offices for representation.

Further, TSA must follow agency rules regarding providing fact witnesses for litigation purposes, often referred to as *Touhy* regulations. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). Where a TSA employee is subpoenaed to testify in court, perhaps by defense counsel, state prosecutor, or civil litigants, proper procedures must be followed under the *Touhy* regulations. If such rules are not strictly adhered to, TSA counsel might well contact the United States Attorney's Office seeking representation to defend the TSA employee.

VII. National Transportation System Security Plan

TSA has been designated as the lead component agency to address transportation security within the Department of Homeland Security. Therefore, the TSA Administrator has been asked to provide a National Transportation System Security Plan for the United States. This plan will address security concerns and issues related to virtually all modes of transportation, including the following six pillars of transportation:

- Aviation Security;
- Maritime Security;
- Highway Security;
- Railway Security;
- Security of Mass Transit; and
- Security of Pipelines.

TSA looks forward to working with United States Attorneys and other partners within

the federal, state, and local law enforcement communities in developing a security plan for the nation and protecting the United States from further attacks on its transportation systems and facilities.

VIII. Conclusion

In a little less than twenty-three months, TSA has transformed our notions of airport security and it will continue to improve our efforts to protect all modes of transportation. The work of TSA is but one facet in the fight against global terrorism. TSA has relied on the assistance and guidance of many other entities and is continually looking to build bridges of cooperation. It is important to TSA to have a strong working relationship with United States Attorneys' Offices and with other partners in law enforcement, particularly those at the federal level. We hope this article has presented a small sample of TSA's capabilities and shown how the agency can be a valuable ally in the fight against terrorism.❖

TSA is also pleased to welcome the significant contributions of Carol DiBattiste, former Director, Executive Office of United States Attorneys, Deputy United States Attorney for the Southern District of Florida, and Director of the Office of Legal Education at the Department of Justice (TSA Chief of Staff) and Donna Bucella, former Director, Executive Office of United States Attorneys and United States Attorney for the Middle District of Florida (Aviation Operations, Area Director for the Southeast Region). They are invaluable resources to the agency and provide insight into the world of federal prosecutors.

ABOUT THE AUTHORS

❑**Jay Lerner** was an attorney at the United States Department of Justice, Criminal Division for approximately ten years. Mr. Lerner worked as a Special Assistant to the Assistant Attorney General for approximately four years, and he also worked in the Narcotic and Dangerous Drug Section, the Office of International Affairs, the Office of Overseas Prosecutorial Development Assistance and Training, and the Money Laundering Section in the United States Attorney's Office for the Eastern District of Virginia. Before his tenure as a federal prosecutor, Mr. Lerner practiced at a private law firm participating in the criminal law field.✠

❑**Stephen Brundage** was a Presidential Management Intern with the Drug Enforcement Administration and worked in the Narcotic and Dangerous Drug Section at the United States Department of Justice. Both Messrs. Lerner and Brundage have been working at TSA-OCC largely since the inception of the agency.✠

Contact information: For further information on these subjects, please feel free to contact Jay Lerner at jay.lerner@dhs.gov or Stephen Brundage at stephen.brundage@dhs.gov. or at (571) 227-2662.

The Criminalization of Air Violence

Jeff Breinholt,
Deputy Chief
Counterterrorism Section
Criminal Division

I. Introduction: the American approach to criminalizing terrorism

The American prosecutorial experience with air violence is a microcosm of our law enforcement approach to counterterrorism generally. Understanding this approach helps federal prosecutors fulfill the new post-9/11 public safety mandate: preventing terrorist acts before they occur.

The American treatment of terrorism as a law enforcement matter arises out of our legal tradition. In criminalizing terrorism, we seek to define terrorists by what they do, rather than who they are or what particular beliefs motivate them. In the United States, one cannot be convicted of the crime of being a terrorist because there is no such crime. While there is no general crime of terrorism, there are a number of offenses that are classified as "federal crimes of terrorism," *See* 18 U.S.C. § 2332b(g)(5). This classification, however, is mainly for ease of reference, and is relevant for such things as sentencing enhancements. Each offense listed as a "federal crime of terrorism" is defined by its own section of the U.S. Criminal Code. Those crimes are:

Title 18:

§ 32 (relating to destruction of aircraft or aircraft facilities);

§ 37 (relating to violence at international airports);

§ 81 (relating to arson within special maritime and territorial jurisdiction);

§ 175 or §175b (relating to biological weapons);

§ 229 (relating to chemical weapons);

§ 351(a)-(d) (relating to congressional, cabinet, and Supreme Court assassination and kidnapping);

§ 831 (relating to nuclear materials);

§ 842(m) or (n) (relating to plastic explosives);

§ 844(f)(2) or (3) (relating to arson and bombing of Government property risking or causing death);

§ 844(i) (relating to arson and bombing of property used in interstate commerce);

§ 930(c) (relating to killing or attempted killing during an attack on a Federal facility with a dangerous weapon);

§ 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad);

§ 1030(a)(1) (relating to protection of computers);

§ 1030(a)(5)(B)(ii) through (v) (relating to protection of computers);

§ 1114 (relating to killing or attempted killing of officers and employees of the United States);

§ 1116 (relating to murder or manslaughter of foreign officials, official guests, or internationally protected persons);

§ 1203 (relating to hostage taking);

§ 1362 (relating to destruction of communication lines, stations, or systems);

§ 1363 (relating to injury to buildings or property within special maritime and territorial jurisdiction of the United States);

§ 1366(a) (relating to destruction of an energy facility);

§ 1751(a) - (d)(relating to Presidential and Presidential staff assassination and kidnapping);

§ 1992 (relating to wrecking trains);

§ 1993 (relating to terrorist attacks and other acts of violence against mass transportation systems);

§ 2155 (relating to destruction of national defense materials, premises, or utilities);

§ 2280 (relating to violence against maritime navigation);

§ 2281 (relating to violence against maritime fixed platforms);

§ 2332 (relating to certain homicides and other violence against United States nationals occurring outside of the United States);

§ 2332a (relating to use of weapons of mass destruction);

§ 2332b (relating to acts of terrorism transcending national boundaries);

§ 2332f (relating to bombing of public places and facilities);

§ 2339 (relating to harboring terrorists);

§ 2339A (relating to providing material support to terrorists);

§ 2339B (relating to providing material support to terrorist organizations);

§ 2339C (relating to financing of terrorism); and

§ 2340A (relating to torture).

Title 42:

§ 2284 (relating to sabotage of nuclear facilities or fuel).

Title 49:

§ 46502 (relating to aircraft piracy);

§ 46504 (relating to assault on a flight crew with a dangerous weapon);

§ 46505(b)(3) or (c) (relating to explosive or incendiary devices, or endangerment of human life by means of weapons, on aircraft);

§ 46506 (if homicide or attempted homicide is involved (relating to application of certain criminal laws to acts on aircraft));

§ 60123(b) (relating to destruction of interstate gas or hazardous liquid pipeline facility).

II. Crimes involving air violence in the United States

In the late 1950s, violence and threatened violence on commercial airliners were the most frequently prosecuted of all terrorism crimes. Prior to 9/11, thirty-one of the ninety-three United States Attorneys' Offices had published opinions that deal with the prosecution of air violence. Given the nature of the events of 9/11, this number has most likely increased.

A number of factors caused such extensive enforcement. In the late 1950s, air travel was a fairly new experience for most people. Consequently, some travelers did not realize the serious threat underlying jokes about bombs in their luggage. Furthermore, air travel is unique in that misconduct of one passenger can lead to catastrophic consequences. Due to the potential

dangers that faced airline transportation, there was an aggressive enforcement of criminal laws designed to guard against the possibility of in-flight violence, even including contemplation or discussion of such acts. However, even such aggressive enforcement did not prevent terrorist from using commercial airlines as weapons against the United States.

Overinclusive targeting in the context of air terrorism is a deliberate policy and prosecutorial decision. It is believed to be necessary to guard against the real negative results, bombs and shootings on planes, with all the horrendous consequences. Federal prosecutors have aggressively charged persons who engaged in conduct (i.e., joking about explosives on planes) beyond the mischief that was sought to be prevented (i.e., actual bombs and gunfire).

By studying the United States experience with air crimes enforcement, modern prosecutors and policymakers can gain a better understanding of the appropriate and inappropriate use of overinclusive targeting. Interestingly, unlike overinclusive targeting in the context of other types of terrorism, where the accused has questioned the constitutionality of the very existence of the crime, persons convicted of air crimes have argued that the crime was applied too aggressively against them. For a complete discussion of the concepts of underinclusive, overinclusive, and optimal targeting, *see* Jeff Breinholt, *Philosophy of American Terrorism Crimes,* UNITED STATES ATTORNEYS' BULLETIN, July 2003, at 2.

In the late 1960s and early 1970s, the United States, like many of our allies, was hit with a spate of hijackings that resulted in criminal prosecutions. Air violence was the political attack of choice for Palestinian terrorists, then at the vanguard of terrorist groups, as well as United States-based revolutionaries who sought to show solidarity with Cuba. The hijackings led to two United Nations treaties that required signatory countries to enact laws to deal with the problem. The treaties enacted were:

- The Convention for the Suppression of Unlawful Seizure of Aircraft, negotiated at the Hague, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105;
- The Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, done at Montreal, September 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178; and
- The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, done at Montreal, February 24, 1988, S. Treaty Doc. No. 100-19, 1589 U.N.T.S. 474 (supplementing the 1971 Montreal Convention).

The Anti-hijacking Act of 1974, PUB L. NO. 93-366, 88 Stat. 409 (1974), was enacted to fulfill the United States' obligations under the Hague Convention, which requires signatory nations to extradite or punish hijackers "present in" their territory. The Anti-hijacking Act provides for criminal punishment of persons who hijack aircraft operating wholly outside the "special aircraft jurisdiction" of the United States, provided that the hijacker is later "found in the United States." Originally enacted as 49 U.S.C. App. § 1472(n), this crime is currently codified at 49 U.S.C. § 46502. In addition to this crime, there are six other air-related criminal offenses: destruction of aircraft or aircraft facilities (18 U.S.C. § 32); hoaxes (18 U.S.C. § 35) and violence at international airports (18 U.S.C § 37); interference with flight crew members and attendants (49 U.S.C. § 46504); carrying a weapon or explosive on an aircraft (49 U.S.C. § 46505); and a general provision which allows for the prosecution of certain crimes if committed on an aircraft (49 U.S.C. § 46506).

III. Bad jokes

Some of those ensnared in the net of air crime enforcement may have been guilty of poor judgment and ill-timed attempts at humor, and they may not have been charged if the mode of travel was not so new and the security precautions so intense. These cases involved violations of the hoax statute, 18 U.S.C. § 35, which criminalizes the communication of false information concerning an attempt or alleged attempt to commit air violence. Section 35 contains a misdemeanor, for communicating information known to be false, and a felony, for doing so "wilfully and maliciously, or with reckless disregard for the safety of human life." Consider the following factual scenarios that resulted in criminal prosecutions and published judicial opinions:

- As he was making travel arrangements for his flight in July 1961, Sam Silver told the ticket agent "I have a bomb in my brief case." The plane, carrying eight-eight passengers from Jacksonville, Florida to Washington, D.C. en route to Philadelphia, was delayed some twenty minutes, and Silver was not permitted to board. In his luggage Silver was carrying a can of aerosol bug spray with the words "bug bomb" imprinted on it. According to the

court, there is no doubt that the statement that he had a bomb in his brief case was made in jest. Silver was charged under § 35, and a warrant of removal to the district where prosecution was pending was issued. *United States v. Silver*, 196 F. Supp. 677 (E.D. Pa. 1961).

- In 1962, Bruce Allen and a friend, Roth, were at the ticket counter of an airline in Windsor Locks, Connecticut, Roth intending to fly to Chicago. Roth had two bags, one large and one small. An attendant took the large bag to a scale a short distance down the counter, asking whether Roth was going to carry the small bag. Allen handed Roth the small bag, asking, "Is that the bag with the bomb in it?" The attendant then about six feet away, looked toward Allen, who said to Roth "I don't think he likes me." The bags were searched, revealing no bomb, and Roth took the plane to Chicago. The attendant was initially worried by the remark, leading to the search of the bags, but was soon convinced the bomb remark was made in jest. Allen was convicted of a § 35 misdemeanor offense and sentenced to imprisonment for one year, suspended after six months, with two years probation and a $250 fine. *United States v. Allen*, 317 F.2d 777 (D. Conn. 1963).
- On the evening of August 6, 1962, aboard an airborne Mohawk Airlines Flight en route from New York to Burlington, Vermont, John Humphrey Sullivan asked the flight attendant if his bag was on board. When she answered affirmatively, he said it contained TNT. He was sentenced to a term of one year with the direction that he spend thirty days in jail and eleven months on probation. *United States v. Sullivan*, 329 F.2d 755 (E.D.N.Y. 1964).
- George Albert Rutherford, while on board a United States airplane at a New York airport, said within hearing of the flight attendant, "I have to sit near the back because I have a bomb." After another passenger referred to the "tail blowing off," Rutherford said he did not care because he had "plenty of life insurance." Rutherford was sentenced to imprisonment for one year, suspended after ten days. *United States v. Rutherford*, 332 F.2d 444 (E.D.N.Y. 1964).

The courts in these case left no doubt that these types of statements, even if made entirely in jest, were properly within the coverage of § 35. Allen and Sullivan contended there was no proof from which a finding of evil purpose could be made, and that such evil purpose is necessary to find wilfulness within the meaning of the statute. *Allen*, 371 F.2d at 778; *Sullivan*, 329 F.2d at 756. Silver argued that he could not be convicted under the hoax statute unless he had actual intent to destroy a plane. *Silver*,196 F. Supp at 679. Rutherford went further, claiming at trial that § 35 infringed on his freedom of speech, arguing that it was unconstitutionally vague in that its words permit conviction for innocent acts. *Rutherford*, 332 F.2d at 445. The court rejected each of these claims. In *Rutherford*, the court acknowledged that § 35 could be applied to certain constitutionally-protected speech, but equated its application to the defendant's conduct to the First Amendment exception, articulated by Justice Holmes, of "yelling fire in a crowded theater." *Id.* at 446, *citing Schenck v. United States*, 249 U.S. 47, 52 (1919). As noted by the court in *Silver*, "We cannot help but take judicial notice of similar situations elsewhere where individuals of a completely distorted sense of humor or pranksters with juvenile minds have caused expensive delays, investigations, hardships, and induced fear by such acts." *Silver,* 196 F. Supp. at 679.

One court in this era was not so deferential to this aggressive prosecutorial approach to bad jokes. In 1960, Stanley Carlson was charged in San Diego for giving false information about explosives to an American Airlines flight attendant. On appeal from his conviction, Carlson argued that the charging document failed to describe a § 35 offense. In particular, he took issue with the allegation that he "did wilfully impart and convey to [a flight attendant], false information concerning an alleged attempt being made to wilfully place a destructive substance, to wit: explosives, upon [an American Airlines flight]..., well knowing such information to be false." *United States v. Carlson*, 296 F.2d 909, 909 (9th Cir. 1961). He contended that this charging language failed to allege that his statement involved explosives that had been wilfully placed on an aircraft *with intent to damage the aircraft,* and instead alleged only that he had given false information that explosives had been wilfully placed on an aircraft. The court agreed, concluding that the only false reports which are forbidden by § 35 are those concerning an act "which would be a crime prohibited by this chapter," and reversed Carlson's conviction. *Id.* at 911.

These types of prosecutions are less common in the modern era, undoubtedly because air travelers are aware that jokes are unacceptable. Passengers proceeding through security checkpoints at United States airports, for

example, are accustomed to signs warning them against even nonserious reference to explosives or weapons. On occasion, unfortunate passengers have been prosecuted for relatively benign conduct. Courts that have considered these cases as recently as the 1990s, though prior to 9/11, showed less tolerance for aggressive prosecution of non-dangerous activity.

For example, in *United States v. Grzeganek*, 841 F. Supp 1169 (S.D. Fla. 1993), Grzeganek was a passenger on a charter flight from Fort Lauderdale to Hanover, Germany. Shortly after take-off, he went to the middle of the plane, and, in the court's words "acted as if he thought he was in the toilet." *Id.* at 1170. When stopped by flight attendants, Grzeganek announced "the roof was going to go." *Id.* He then made a broad sweeping gesture which the attendants thought indicated an explosion would occur. He became unruly, and the plane returned to Fort Lauderdale because of fear that he had brought a bomb aboard. A search of Grzeganek's hand luggage, conducted before returning to Fort Lauderdale, yielded a camera, a jar of cold cream, and clothing, but nothing resembling a bomb. Grzeganek was arrested after the plane landed in Fort Lauderdale. As a result, the flight missed its connection in Gander, Newfoundland, causing the company to divert the plane to New York City and pay for overnight lodging and meals for its passengers. Later, at his guilty plea hearing, Grzeganek claimed his gesture was "to show that his bladder was going to explode and not the roof of the aircraft" and elaborated, "well, if my bladder explodes, then also the roof would go." *Id.* at 1171. He also complained that, although he had spoken to one flight attendant in German, she soon left the midship's area and went to the front of the plane, and then only English-speaking personnel were there with him. Although the court was extremely reluctant to accept a guilty plea, it did so because of Grzeganek's lack of any kind of rational explanation for that phrase. He was ultimately sentenced to time served and fined $200, although a written court opinion questioned whether he should have been prosecuted at all.

IV. Hoaxes

Other 18 U.S.C. § 35 prosecutions have involved conduct that was not so benevolent: the intentional conveyance of false information about potential airline violence, apparently in an effort to enjoy the resulting reaction. It is questionable whether these cases represent overinclusive targeting at all, since the hoax act itself may be mischief which should be prevented. False reports, after all, distract finite air security resources. Like the bad joke cases, the malevolent hoax cases span from the early 1960s to the 1990s.

For example, Robert James Smith was convicted under § 35 for telephoning a Federal Aviation Administration (FAA) air traffic controller at the Cincinnati Airport, saying that a bomb was on board an outgoing aircraft. At trial, he contested that he had done what was alleged, claiming that his chief accuser was motivated by a vendetta. He was convicted of a § 35 violation, and his conviction was affirmed despite a vigorous dissent. *United States v. Smith*, 283 F.2d. 16 (5th Cir. 1960). He served his time and paid his fine, and in 1963 he was pardoned by President Johnson. 841 F.2d 1127 (6th Cir. 1988).

The more modern case of *United States v. Sweet*, 985 F.2d 443 (8th Cir. 1993), presents an example of a true malevolent hoax. On August 29, 1991, Sweet made an anonymous phone call to Northwest Airlines from a phone booth at the Minneapolis Public Library, stating that a bomb would blow up a passenger airliner traveling from Minneapolis to Los Angeles later that night. After repeating this threat three times, she hung up. Several minutes later, Sweet walked into the federal courthouse in Minneapolis. A security guard noticed her and detained her in his office. Sweet requested to see Deputy United States Marshal Charles Shay. When Shay arrived, Sweet admitted to him that she had made the bomb threat. She told him that she had researched various criminal statutes on airplanes and automobiles in the public library minutes before making the phone call. She was arrested and later indicted on one count of threatening to destroy an airliner in violation of 18 U.S.C. § 35(b). A jury convicted Sweet, and she was sentenced to thirty months.

On appeal, Sweet unsuccessfully argued that § 35(b) was a specific intent crime and that her jury instructions were erroneous. Rejecting this claim, the court approved the jury instructions on the following four elements of § 35(b) offense:

- the defendant conveyed or imparted information which was, in fact, false;
- when the defendant conveyed or imparted the information, he/she knew it was false;
- the defendant knowingly, intentionally, voluntarily, and maliciously conveyed or imparted the false information; and
- the information imparted or conveyed concerned an alleged attempt being made, or to be made, to place a bomb on a civil aircraft

with the intent that the said aircraft operating in interstate commerce would be destroyed.

V. Non-political acts

Title 18 U.S.C. § 32 (Destruction of aircraft or aircraft facilities) is the key non-hijacking air violence offense. It criminalizes a variety of willful acts:

- setting fire to, damaging, destroying, disabling, or wrecking any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce; § 32 (a)(1)
- placing or causing to be placed a destructive device or substance in, upon, or in proximity to, or otherwise making or causing to be made unworkable or unusable or hazardous to work or use, any such aircraft, or any part or other materials used or intended to be used in connection with the operation of such aircraft, if such placing or causing to be placed or such making or causing to be made is likely to endanger the safety of any such aircraft; § 32 (a)(2)
- setting fire to, damaging, destroying, or disabling any air navigation facility, or interfering by force or violence with the operation of such facility, if such fire, damaging, destroying, disabling, or interfering is likely to endanger the safety of any such aircraft in flight; § 32 (a)(3)
- with the intent to damage, destroy, or disable any such aircraft, setting fire to, damaging, destroying or disabling or placing a destructive device or substance in, upon, or in proximity to, any appliance or structure, ramp, landing area, property, machine, or apparatus, or any facility or other material used, or intended to be used, in connection with the operation, maintenance, loading, unloading or storage of any such aircraft or any cargo carried or intended to be carried on any such aircraft; § 32 (a)(4)
- performing an act of violence against or incapacitating any individual on any such aircraft, if such act of violence or incapacitation is likely to endanger the safety of such aircraft; § 32 (a)(5)
- communicating information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby endangering the safety of any such aircraft in flight; § 32 (a)(6); and
- attempting or conspiring to do any of the above. § 32 (a)(7).

The § 32(a) crimes involve air violence within the United States. In contrast, § 32(b) establishes United States jurisdiction where willful acts occur abroad or are directed against non-United States interests. These latter crimes require the presence of factors that allow the United States to exercise jurisdiction in accordance with customary international law (essentially when the perpetrator or one of the passengers is a United States citizen, or when the perpetrator is "found" in the United States). They are:

- performing an act of violence against any individual on board any civil aircraft registered in a country other than the United States while such aircraft is in flight, if such act is likely to endanger the safety of that aircraft; § 32 (b)(1)
- destroying a civil aircraft registered in a country other than the United States while such aircraft is in service or causes damage to such an aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight; § 32 (b)(2)
- placing or causing to be placed on a civil aircraft registered in a country other than the United States while such aircraft is in service, a device or substance which is likely to destroy that aircraft, or to cause damage to that aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight; § 32 (b)(3) or
- attempting or conspiring to do any of the above. § 32(b)(4).

Section 32(b) was adopted pursuant to the United States' obligations under the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation ("the Montreal Convention"), Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 178; *see also* S. REP. NO. 98-619 at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N 3682. The purpose of the Montreal Convention is to ensure that individuals who attack airlines cannot take refuge in a country because its courts lack jurisdiction over someone who committed such an act against a foreign-flag airline in another nation. Suppression of Unlawful Acts Against the safety of Civil Aviation, 24 U.S.T. at 565, 974 U.N.T.S. at 178. The Montreal Convention requires contracting states to adopt legislation to assert jurisdiction over such an

offender whenever an offender is "present in" the State and the State does not extradite the offender to another State party.

All of the foregoing crimes are twenty-year felonies. Section 32(c) also creates a five-year felony for willfully imparting or conveying any threat to commit an act which would violate any of the above, with an apparent determination and will to carry the threat into execution.

Although § 32 is a terrorism crime, it has been used to prosecute persons for nonpolitical conduct, where damage was relatively minor or nonexistent and the defendant appeared motivated by personal animus. Few legal issues, other than the admissibility of particular evidence and the appropriate venue, were raised in these matters. However, the facts in the following cases illustrate the type of nonpolitical air violence cases that have been prosecuted.

- In *United States v. Havelok*, 427 F.2d 987 (10th Cir. 1970), Lawrence Havelock was convicted of starting a fire in a restroom during a flight to Denver. The fire began just a few minutes before landing. During a period of one hour and ten minutes, Havelock used the lavatory facilities three times for the alleged purpose of shaving. On the initial trip he claimed he was unable to complete the task because the flight was too rough. However, flight personnel and passengers testified that the flight did not experience any turbulence until just outside Denver, long after the first shaving attempt. The second trip apparently was unsatisfactory since he later returned for a third attempt at a "better shave." He entered and remained in the bathroom for about ten minutes, during which time the "fasten seat belt" sign was on and the aircraft was descending into Denver. He was seen wearing yellow rubber gloves as he left the restroom. A few minutes later the fire was discovered. As smoke filled the cabin the passengers, including Havelock, were asked to move to the forward part of the airplane. Havelock was observed near seat 14-C where the yellow gloves containing pieces of matchbook covers were later found. Havelock was convicted of violating 18 U.S.C. § 32.
- In *United States v. Hume*, 453 F. 2d 339 (5th Cir. 1971), Castleberry owned and operated an aircraft used for dusting. On the morning of July 26, 1970, he took off in his aircraft and was dusting in Texas near Burrelle Hume's residence. Hume came out of his house and shot the aircraft with his .22 caliber rifle on two different runs. Hume's shots made a small hole in the aircraft wing and also hit the fuel pump bracket. He was eventually convicted of violating 18 U.S.C. § 32.
- In *United States v. Webb*, 625 F.2d 709 (5th Cir. 1980), a helicopter pilot testified that he was flying past B.H.Webb's house when he saw Webb run out to a parked car, take out a rifle, and start firing. Webb was convicted under 18 U.S.C. § 32, despite proffering expert testimony that he lacked the "propensity to commit a violent act."

VI. Conclusion

The above prosecution examples reflect the outer edge of air crime enforcement, where prudence demands aggressive prosecution of people who did not necessarily intend to send a political message or actually jeopardize the lives of innocents. The other end of the spectrum captures the worst type of air terrorism, the commandeering of airliners through threat of violence, or what has come to be known as "skyjacking." Along with assassinations, the politically-motivated skyjackings are the quintessential terrorist act. Although not all skyjackings are political, they are prosecuted under the same statutes. These cases are addressed in another article.❖

ABOUT THE AUTHOR

❑**Jeff Breinholt** currently serves as the Deputy Chief in the Counterterrorism Section, where he oversees the U.S. nationwide terrorist financing criminal enforcement program. He previously served as the Regional Antiterrorism Coordinator for the Western and Pacific states and as a trial attorney in the Counterterrorism Section's international terrorism branch. He joined the Justice Department with the Tax Division in 1990, and spent six years as a Special Assistant U.S. Attorney in the District of Utah before joining the Criminal Division in 1997. He is a frequent lecturer and author on intelligence and law enforcement matters, and was recently honored with the Attorney General's Award for Excellence in Furthering the Interests of U.S. National Security.✠

Air Bombings

Jeff Breinholt
Deputy Chief
Counterterrorism Section
Criminal Division

I. Introduction

Even more heinous than the act of pirating a plane through threat of force is the intentional placement of explosive devices in and around aircraft. American prosecutors have dealt with this conduct on several occasions over the last forty years.

Air-related bombings predate skyjackings. In October 1933, all seven passengers on board a United Airlines flight were killed when a bomb exploded over Chesterton, Indiana. An explosive device that an aggrieved woman hired ex-convicts to place aboard a Philippines airliner in 1949, in order to kill her husband, caused the death of thirteen persons. That same year, a Canadian jeweler named Albert Guay, in an attempt to attract a teenage mistress who had broken off their relationship, placed an improvised explosive device aboard a flight containing his wife, on whose life he had taken a large insurance policy. The explosion outside of Montreal killed all the passengers, including three Americans. JEFFREY SIMON, THE TERRORIST TRAP: AMERICA'S EXPERIENCE WITH TERRORISM 46 (Indiania Press, 2d ed. 2001).

In the United States, the first criminal prosecution of an air bombing occurred in Colorado state court, and involved John Gilbert Graham, a 23-year old who collected $37,500 in life insurance after a Denver-to-Portland plane carrying his mother exploded. Following an extensive FBI forensic investigation that foreshadowed the terrorism investigations of the 1980s, Graham confessed to placing twenty-five sticks of dynamite and a timing device aboard the plane. Following his jury conviction, Graham was executed. *Graham v. People*, 302 F.2d 737 (D. Colo. 1956). The incident led the U.S. Congress to enact the federal air bombing statute, a crime that has resulted in several published opinions in air bombing prosecutions over the last forty years.

The main statute for this type of terrorism is 18 U.S.C. § 32 (2003), which provides, in relevant part:

§ 32. Destruction of aircraft or aircraft facilities

(a) Whoever willfully–

(1) sets fire to, damages, destroys, disables, or wrecks any aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce;

(2) places or causes to be placed a destructive device or substance in, upon, or in proximity to, or otherwise makes or causes to be made unworkable or unusable or hazardous to work or use, any such aircraft, or any part or other materials used or intended to be used in connection with the operation of such aircraft, if such placing or causing to be placed or such making or causing to be made is likely to endanger the safety of any such aircraft;

(3) sets fire to, damages, destroys, or disables any air navigation facility, or interferes by force or violence with the operation of such facility, if such fire, damaging, destroying, disabling, or interfering is likely to endanger the safety of any such aircraft in flight;

(4) with the intent to damage, destroy, or disable any such aircraft, sets fire to, damages, destroys, or disables or places a destructive device or substance in, upon, or in proximity to, any appliance or structure, ramp, landing area, property, machine, or apparatus, or any facility or other material used, or intended to be used, in connection with the operation, maintenance, loading, unloading or storage of any such aircraft or any cargo carried or intended to be carried on any such aircraft;

(5) performs an act of violence against or incapacitates any individual on any such aircraft, if such act of violence or incapacitation is likely to endanger the safety of such aircraft;

(6) communicates information, knowing the information to be false and under circumstances in which such information may reasonably be believed, thereby

endangering the safety of any such aircraft in flight; or

(7) attempts or conspires to do anything prohibited under paragraphs (1) through (6) of this subsection;

shall be fined under this title or imprisoned not more than twenty years or both.

(b) Whoever willfully–

(1) performs an act of violence against any individual on board any civil aircraft registered in a country other than the United States while such aircraft is in flight, if such act is likely to endanger the safety of that aircraft;

(2) destroys a civil aircraft registered in a country other than the United States while such aircraft is in service or causes damage to such an aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight;

(3) places or causes to be placed on a civil aircraft registered in a country other than the United States while such aircraft is in service, a device or substance which is likely to destroy that aircraft, or to cause damage to that aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft's safety in flight; or

(4) attempts or conspires to commit an offense described in paragraphs (1) through (3) of this subsection;

shall be fined under this title or imprisoned not more than twenty years, or both. There is jurisdiction over an offense under this subsection if a national of the United States was on board, or would have been on board, the aircraft; an offender is a national of the United States; or an offender is afterwards found in the United States.

II. The air bombing cases

A. *United States v. Lyon*, 567 F.2d 777 (8th Cir. 1977)

On December 17, 1966, a dynamite bomb exploded in the St. Louis Municipal Airport terminal, damaging the terminal but causing no injuries. The unexploded bomb was discovered and the terminal evacuated prior to detonation, and the St. Louis County Police and Fire Departments were called. A group of county police officers, led by Major F. J. Vasel, responded. Major Vasel inspected the bomb, which consisted of a wind-up alarm clock, two sticks of dynamite, and caps and wires arranged in a shoe box. As Vasel turned and walked away, the bomb exploded, knocking him to the floor.

Several employees of the McDonnell Aircraft Corporation were suspicious of a co-worker, Verne Lyon. One of the employees, Bryon Rall, told detectives that prior to the bombing, he had overheard a telephone conversation in which Lyon made a reference to the purchase of dynamite. Emil Eisenreich, another McDonnell employee, told detectives that on the day of the bombing, Lyon asked him if he knew anyone who could solder some wires to two flashlight batteries. Eisenreich later observed Lyon with the batteries and wires soldered. Martha Fay Van Diver said that prior to the bombing Lyon had asked her for a shoe box. On the day following the bombing, Lyon told her that he had obtained a shoe box from his landlady.

On December 20th, officers went to Lyon's address and met his landlady, Mollie Lorts, who showed them the second floor room she rented to Lyon. She confirmed that she had given Lyon a shoe box a few days earlier and gave the officers an identical box. The officers went to Lyon's room, looked in, and observed, through the doorway, multi-colored wire on a dresser. A search warrant was obtained and executed. Lyon told the officers that there was dynamite in a suitcase and blasting caps in a dresser drawer, and officers found seven sticks of dynamite in the suitcase, and a box containing four blasting caps in the dresser. *Id.* at 780.

After he was indicted under 8 U.S.C. § 32, Lyon became a fugitive, and was not captured until his 1977 deportation from Peru. *Id.* He was ultimately convicted by a jury and sentenced to fifteen years in prison for the crime of willfully placing a destructive device in the vicinity of an aircraft, plus an additional two years for jumping bail. *Id.* at 780-81. However, his case was reversed and remanded for new trial because of admission of evidence seized under an improperly issued search warrant. *Id.* at 784. The bail jumping conviction was affirmed. On remand, the defendant was again convicted of the 18 U.S.C. § 32 charge. *United States v. Lyon*, 588 F.2d 581 (5th Cir. 1978).

B. *United States v. Cook*, 432 F.2d 1093 (7th Cir. 1970)

In the early 1960s, Earle Cook, on several occasions, discussed having his wife killed. Some of the discussions touched on the possibility of using an explosive device.

On November 12, 1967, Cook drove his wife to the airport to catch a flight to California. He checked two bags for his wife with a sky cap, and received two stubs which he gave her. Cook then returned to his car, took out a third bag, and checked it through another sky cap. He did not give his wife the stub to the third bag, in which a bomb was secreted. There were eighty-one persons on the 727 jet plane. Over Colorado, a bomb exploded in the baggage compartment, depressurizing the aircraft, which was nevertheless able to land safely in San Diego.

The FBI interviewed spouses, friends, and relatives of all the passengers on the plane. *Id.* The investigation indicated that the bag containing the bomb was the third bag Cook checked. While interviewing Cook, FBI agents removed a number of items from his residence: a vise, wire, and other electrical items. *Id.* Cook was ultimately convicted under 18 U.S.C. § 32. *Id.* In the unsuccessful appeal of this conviction, Cook's main argument involved the trial court's refusal to grant him discovery of government forensic tests. *Id.* He was sentenced to two concurrent twenty-year prison terms. *Id* at 1095.

C. *United States v. Bradley*, 540 F. Supp. 690 (D. Md. 1982)

Martin Thomas Bradley's wife was scheduled to fly to Wichita Falls, Texas, on March 2, 1982. *Id.* at 692. After she had packed her suitcase, Bradley, without her knowledge or consent, placed a bomb in her luggage. *Id.* The next day, they drove from their home in Maryland to Washington National Airport in Alexandria, Virginia. *Id.* The bomb failed to detonate and was not discovered until Mrs. Bradley unpacked her suitcase upon her arrival in Texas. *Id.*

Mr. Bradley was charged with willfully causing a destructive substance to be placed in an aircraft in violation of 18 U.S.C. § 32, transporting an explosive device in interstate commerce with knowledge and intent that it would be used to kill his wife and damage an airplane, in violation of 18 U.S.C. § 844(d), and willfully causing an explosive device to be placed on an airplane in violation of 49 U.S.C. § 1472(l)(1)(C) and (2).

D. *United States v. Rashed,* 85 F. Supp. 2d 96 (D.D.C. 1999)

On an August 11, 1982 Pan Am flight from Tokyo, a bomb exploded twenty minutes before the flight was scheduled to land in Hawaii, killing one passenger and wounding fifteen others. *Id.* at 98. At the time of the incident, Mohammed Rashed was a high-ranking leader of the "15th of May" Palestinian terrorist organization. *Id.* Rashed was charged with conspiring to attack the interests of the United States through a series of bombing missions at various locations around the world. *Id.*

In 1987, a federal grand jury indicted Rashed and two codefendants on nine counts. Mohammed Hamdan was arrested in Greece on May 30, 1988. The United States subsequently requested his extradition under its bilateral extradition treaty with Greece. Treaty of Extradition between the United States and the Hellenic Republic, May 6, 1931, 47 Stat. 2185, as further interpreted by the Protocol, Sept. 2, 1937, 51 Stat. 357. In May 1989, the Greek Supreme Court ruled that Rashed could be extradited on seven of the nine counts contained in the U.S. indictment. Nevertheless, the Greek Government delayed handing Rashed over to the United States and instead chose to prosecute Rashed itself. Rashed was found guilty of intentional homicide and placement of explosive devices in an aircraft, but acquitted of charges of illegal seizure of an aircraft and instigation of damage to aircraft. Although sentenced to fifteen years in prison, he was released after serving eight and a half years. In the course of his travels outside Greece, he was taken into custody and arrested by the FBI. *United States v. Rashed*, 234 F. 3d 1280, 1281 (D.C. Cir. 2000).

Rashed was brought to the United States in 1998. As of this writing, his case is still pending. His main pretrial argument, which was rejected by the D.C. Circuit, involved the validity of the American proceedings after he had been tried and convicted by Greek authorities for the same conduct. He argued that the Greek proceedings, which included an American prosecutor in the courtroom (Dan Fromstein of the Counterterrorism Section), were in essence an American prosecution, and that the Double Jeopardy Clause prohibited his subsequent prosecution in a U.S. court. Both the district court and the D.C. Circuit rejected this argument, with the latter noting:

> The central issue in this case is whether Greece, in prosecuting Rashed, was a tool of the United States and the Greek trial a sham. Two facts render Rashed's claim implausible. First, the United States wanted Greece to extradite Rashed, not to prosecute him. Greece stood its ground and refused. Rashed acknowledges both the U.S. preference and the Greek resistance. He points to what we may loosely call evidence that the United States threatened Greece with sanctions, but that evidence itself shows that

> the threats (if made at all) were always intended to secure extradition.

Id. at 1283.

The *Rashed* case illustrates the United States' commitment to redress international terrorism, no matter how long it takes, and gives meaning to the principle that terrorist actors should not rest easy even after the immediate sting of their actions dissipates.

E. *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991)

On June 11, 1985, Fawaz Yunis and four other men boarded a Royal Jordanian aircraft scheduled to depart from Beirut, Lebanon. They wore civilian clothes and were armed with military assault rifles and hand grenades. Yunis took control of the cockpit and the remaining hijackers held the passengers, including two Americans, captive. The hijackers explained that they wanted the plane to fly to Tunis, where a conference of the Arab League was under way, so that they could meet with delegates to the conference.

After a refueling stop in Cyprus, the airplane was denied permission to land in Tunis. A second attempt to land in Tunis also failed. Subsequently, the plane returned to Beirut, where more hijackers came aboard. These included an official of Lebanon's Amal Militia, the group at whose direction Yunis claimed to act.

The plane then headed for Syria, but it was turned away and returned to Beirut. There, the hijackers released the passengers, held a press conference demanding that Palestinians leave Lebanon, blew up the plane, and fled.

The American investigation identified Yunis as the probable leader of the hijackers. After obtaining an arrest warrant, the FBI put "Operation Goldenrod" into effect. Undercover FBI agents lured Yunis onto a yacht in the Mediterranean Sea with promises of a drug deal, and arrested him once the vessel entered international waters. Yunis was placed on a United States Navy ship and interrogated for several days until he was transferred to a Navy aircraft carrier. Yunis was taken to Washington, D.C., where he was arraigned on the original indictment charging him with conspiracy, hostage taking, and aircraft damage. A grand jury subsequently returned a superseding indictment adding additional aircraft damage counts and a charge of air piracy. *Id.* at 1089.

Prior to trial, there was extensive litigation concerning the manner in which Yunis was brought to the United States. The Court of Appeals for the District of Columbia ultimately reversed the district court's opinion suppressing Yunis' confession elicited while en route to the United States. *United States v. Yunis,* 859 F.2d 953, 954-57 (D.C. Cir.1988). The district court rejected Yunis' claim that the manner in which he had been brought to the United States deprived the United States of subject matter and personal jurisdiction over the case. *United States v. Yunis,* 681 F. Supp. 896, 898-99 (D.D.C.1988).

> [At trial,] Yunis admitted participation in the hijacking . . . but denied parts of the government's account and offered the affirmative defense of obedience to military orders, asserting that he acted on instructions given by his superiors in Lebanon's Amal Militia. The jury convicted Yunis of conspiracy, 18 U.S.C. § 371 (1988), hostage taking, 18 U.S.C. § 1203 (1988), and air piracy (then 49 U.S.C. App. § 1472(n)) However, it acquitted him of three other charged offenses: violence against people on board an aircraft, 18 U.S.C. § 32(b)(1) (1988), aircraft damage, 18 U.S.C. § 32(b)(2) (1988), and placing a destructive device aboard an aircraft, 18 U.S.C. § 32(b)(3) (1988). The district court imposed concurrent sentences of five years for conspiracy, 30 years for hostage taking, and 20 years for air piracy.

United States v. Yunis, 924 F.2d 1086, 1089-90 (D.C. Cir. 1991).

Yunis' convictions were affirmed on appeal, with the "obedience to military orders" defense presenting the most unique issue. This ancient common law defense was articulated by the military court in the course of the My Lai Massacre cases in Vietnam:

> The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.

United States v. Calley, 22 C.M.A. 534, 542; 48 C.M.R. 19, 27 (1973). The district court gave a jury instruction which included these principles, but included a charge that Yunis could prevail on this defense only if the Amal Militia was a "military organization." The court further instructed the jury that it could find that the Amal Militia is a military organization only if the group has a hierarchical command structure and

conducts its operations in accordance with the laws and customs of war, and if its members have a uniform and carry arms openly. The appeals court affirmed this instruction, stating that it provided adequate assurance that Yunis did not suffer from parochial projection of American norms onto the issue of whether he should be treated as a soldier for purposes of the obedience defense. 924 F.2d at 1097-98.

III. Ramzi Yousef and the Bojinko Plot

The most extensive treatment of an air violence case by any U.S. court involved what came to be known as the Bojinko Plot, prosecuted in New York in the mid-1990s. Of the ninety-eight-page opinion issued by the Second Circuit, approximately one-third involved legal issues fundamental to the U.S. counterterrorism enforcement program, and the origin and construction of some of the air violence crimes described in these articles.

Ramzi Yousef was one of the masterminds of the first World Trade Center attack in 1993 and, with Eyad Ismoil, drove the bomb-laden van into the center's underground parking structure. Yousef and Ismoil both escaped the United States before being arrested, and were not part of the New York trial of their codefendants. While a fugitive, Yousef traveled to the Philippines and worked with Abdul Hakim Murad on an airline bombing scheme that became known as the Bojinko Plot.

Yousef entered Manila a year after the World Trade Center bombing, under an assumed name, and devised a plan to attack American airliners. According to the plan, five individuals would place bombs aboard twelve U.S.-flag aircraft that served routes in Southeast Asia. They would board an airliner in Southeast Asia, assemble a bomb on the plane, and then exit the plane during its first layover. As the planes continued on toward their next destinations, the time bombs would detonate. Eleven of the twelve flights targeted were destined for cities in the United States.

Yousef and his coconspirators conducted several tests in preparation for the airline bombings. In December 1994, Yousef and Wali Khan Amin Shah placed a bomb they had constructed in a Manila movie theater. It exploded, injuring several patrons. Ten days later, Yousef planted a test bomb on a Philippine Airlines flight from Manila to Japan. Yousef got off the plane during a stopover and on the second leg of the flight, the bomb exploded. One passenger was killed and several were injured.

The plot to bomb the U.S. airliners was uncovered fortuitously only two weeks before the bombings were to occur. Yousef and Murad were burning chemicals in their Manila apartment and accidentally started a fire. The fire department was called and Philippine police subsequently arrived to discover chemicals and bomb components, a laptop computer on which Yousef had outlined the aircraft bombing plans, and other incriminating evidence. Philippine authorities arrested both Murad and Shah. Shah escaped and was not recaptured for nearly a year. Yousef fled the country, but was captured in Pakistan one month later.

On February 21, 1996, a grand jury in the Southern District of New York filed a twenty-count superseding indictment against Yousef and his codefendants. The first eleven counts charged Yousef and Ismoil with various offenses arising from their participation in the February 26, 1993, bombing of the World Trade Center. Counts twelve through nineteen charged Yousef, Murad, and Shah with various crimes relating to the Bojinko Plot. The trial of Yousef, Murad, and Shah on the airline bombing charges began on May 29, 1996, and ended on September 5, 1996, when the jury found all three defendants guilty on all counts. Yousef and Ismoil's trial on the World Trade Center bombing began on July 15, 1997, and concluded on November 12, 1997, with the jury finding both defendants guilty on all counts.

For the World Trade Center convictions, Yousef was sentenced to a total of 240 years of imprisonment, consisting of 180 years on Counts one through eight, plus two thirty-year terms each on Counts nine and ten for violations of 18 U.S.C. § 924(c), to be served consecutively to the 180-year sentence, and to each other. For the Bojinko Plot convictions, Yousef was sentenced principally to a term of life imprisonment, to be served consecutively to his 240-year sentence for the World Trade Center bombing. *United States v. Yousef*, 327 F.3d 56, 79-80 (2d Cir. 2003).

Yousef's conviction was affirmed. *United States v. Yousef*, 327 F.3d 56 (2d Cir. 2003). Among the important principles affirmed by the Second Circuit's opinion were the following:

- *The application of § 32 to conduct that occurs outside the United States does not exceed the government's authority*. Yousef contended that his prosecution violated customary international law limiting a nation's jurisdiction to proscribe conduct outside its borders, and was contrary to the Due Process Clause of the Fifth Amendment of the

United States Constitution. Rejecting this argument, the Second Circuit noted that the Bojinko Plot targeted U.S.-flag aircraft while in flight, and was, therefore, in "the special aircraft jurisdiction of the United States." Also, all but one of the aircraft targeted in the conspiracy were civil aircraft carrying passengers destined for the United States and were, accordingly, "civil aircraft used, operated, or employed in... overseas, or foreign air commerce." 18 U.S.C. § 32(a)(1). Noting that Yousef was also charged with violating 18 U.S.C. § 32(b)(3) for placing a bomb on a civil aircraft registered in another country, a Philippine Airlines flight traveling from the Philippines to Japan on December 11, 1994, the court found that Congress intended § 32(b) to apply to attacks on non-U.S.-flag aircraft. "The statute applies expressly to placing a bomb on aircraft registered in other countries while in flight, no matter where the attack is committed, and provides for jurisdiction over such extraterritorial crimes whenever, *inter alia,* 'an offender is afterwards found in the United States.'" 18 U.S.C. § 32(b). *Id.* at 88.

The court rejected Yousef's argument that, absent a universally agreed-upon definition of "terrorism," and an international consensus that terrorism is a subject matter over which universal jurisdiction may be exercised, the United States cannot rest jurisdiction over him for this "terrorist" act on *either* the universality principle, or on any United States positive law, which, he claimed, necessarily was subordinate to customary international law. The Second Circuit opined that "United States law is not subordinate to customary international law or necessarily subordinate to treaty-based international law and, in fact, may conflict with both." *Id.* at 91. The court found that the charge involving the Philippines aircraft was appropriate "under the *aut dedere aut punire* ("extradite or prosecute") jurisdiction created by the Montreal Convention, as implemented in 18 U.S.C. § 32 (destruction of aircraft) and 49 U.S.C. § 46502 (aircraft piracy), and... under the *protective* principle of the customary international law of criminal jurisdiction." *Id.* at 91-92.

The court noted that Yousef's intent was to destroy United States commercial aircraft and influence United States foreign policy, the making of which clearly constitutes a "governmental function." The bombing of the Philippine Airlines flight, as charged in Count Nineteen, was merely a test-run that Yousef executed to ensure that the tactics and devices the conspirators planned to use on United States aircraft operated properly. *Id.* at 110.

- *Persons forcibly brought to the United States can be considered "found in the United States" for purposes of the § 32(b) extraterritorial jurisdiction*. Yousef argued that, because he was brought here against his will when Pakistan transferred him to U.S. custody for prosecution on charges relating to the World Trade Center bombing, he was not "found in the United States" within the meaning of § 32(b). To support his position, Yousef cited 18 U.S.C. § 1651, in which Congress differentiated between one who is forcibly brought into the country and one who is found in the United States. "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is *afterwards brought into or found in the United States*, shall be imprisoned for life." (emphasis supplied). *Id.* at 88.

  > Yousef reasons that if being "found" in the United States merely requires a defendant's presence here, then the "afterwards brought into" language of § 1651 would be superfluous, arguing that, because he was brought to the United States involuntarily, he was not "found in the United States" for purposes of § 32(b). Upon examining the persuasive interpretation by other courts of an identical jurisdictional provision in a related statute, *see United States v. Rezaq,* 134 F.3d 1121, 1130-32,1143 (D.C. Cir.1998); *United States v. Yunis,* 924 F.2d 1086, 1092 (D.C. Cir. 1991), as well as the purpose and plain language of 18 U.S.C. § 32(b), the court found that Yousef was "found in the United States" within the meaning of § 32(b).

Yousef, 327 F.3d at 88.

IV. Conclusion

Apart from the Bojinko Plot, which stretched across international boundaries and involved complex issues of international law, the air bombing cases are marked by well-settled legal principles. This point follows naturally from the fact that the bombing plots fall squarely within the core of conduct that must be prevented wherever air travel exists, in the interests of public safety. Unlike the more benign type of air-related prosecutions, such as bad jokes and hoaxes, described in the previous article, Title 18 U.S.C.

§ 32 crimes do not reflect the limits of overinclusive targeting. Persons charged with them rarely claim that the crime should not exist, and instead focus on more fact-specific defenses. This point is also borne out by the 1988 explosion of Pan Am Flight No. 103 over Lockerbie, Scotland, in which the Libyan defendants were prosecuted a decade later in a Scottish proceeding venued in the Hague, Netherlands, assisted by American prosecutors. In that matter, the two defendants largely did not contest the heinousness of the terrorist act, and whether it should have been punished. Instead, like many of the defendants described above, they devoted their efforts to trying to show that they were not the ones responsible. One was successful, while the other was not.❖

ABOUT THE AUTHOR

❑**Jeff Breinholt** currently serves as Deputy Chief in the Counterterrorism Section where he oversees the U.S. nationwide terrorist financing criminal enforcement program. He previously served as the Regional Antiterrorism Coordinator for the Western and Pacific states and as a trial attorney in the Counterterrorism Section's international terrorism branch. He joined the Justice Department with the Tax Division in 1990, and spent six years as a Special Assistant U.S. Attorney in the District of Utah before joining the Criminal Division in 1997. He is a frequent lecturer and author on intelligence and law enforcement matters, and was recently honored with the Attorney General's Award for Excellence in Furthering the Interests of U.S. National Security. His forthcoming book, *Counterterrorism Enforcement: A Prosecutor's Guide*, will be available through the Office of Legal Education.✠.

Skyjacking

Jeff Breinholt
Deputy Chief
Counterterrorism Section
Criminal Division

I. Political violence in the air

If bad jokes at airports, bomb hoaxes, and nonpolitical damage to airplanes and airline facilities are crimes on one end of the air violence spectrum, air piracy, the commandeering of airliners through threat of violence, or what has come to be known as "skyjacking," is at the other. Along with assassinations, the politically-motivated skyjackings are the quintessential terrorist act. Although not all skyjackings are political, both political and nonpolitical incidents are prosecuted under the same statutes.

The crime of air piracy is defined in 49 U.S.C. § 465026 as seizing or exercising control, or attempting to seize or exercise control, of an aircraft "by force, violence, threat of force or violence, or any form of intimidation, and with wrongful intent." It is a United States crime to do so if the aircraft is in the special aircraft jurisdiction of the United States or if a national of the United States is aboard the aircraft, an offender is a national of the United States, or the offender is afterwards found in the United States. *Id.*

The elements of the skyjacking offense are:

- a seizure of, or exercise of control over, an aircraft;
- by means of force, violence, or intimidation;
- with wrongful intent; and
- when the aircraft is within the special aircraft jurisdiction of the United States.

49 U.S.C. § 46502*; see. e.g., United States v. Dixon,* 592 F.2d 329, 339-40 (6th Cir. 1979).

According to the airline industry, there were approximately 970 attempted and successful skyjacking incidents between 1948 and 2000. The first known skyjacking occurred in February 1931, when a Peruvian airliner was seized. The second apparently occurred in 1947, when a plane from Romania was forced to fly to Turkey and the first innocent victim, a crewman, was shot dead. In 1948, a Czechoslovakian airliner was hijacked and landed in the U.S. zone of occupied Germany, marking the first of many spates of skyjackings, which appear to occur in cycles. One motivating factor of skyjackings in this era appeared to be migration in that most of the post-World War II skyjackings occurred in Eastern Europe, as

desperate citizens sought to escape from the Soviet Bloc countries to the West. The vast majority of the 970 skyjackings between 1948 and 2000 involved foreign-registered planes; approximately 240 U.S. airliners have been the subject of attempted and successful skyjackings. DESPITE RECENT SEIZURES, AIRLINER HIGHJACKINGS DECLINING, AIR SAFETY WEEK, February 21, 2000; Robert Kearns, *54 Years of Air Piracy,* SEATTLE TIMES, November 30, 1985, at A3.

Most American skyjackings have involved Cuba, and the frequency of such incidents has been directly impacted by the U.S. relationship with Fidel Castro. Beginning in the 1960s, United States airliners were threatened with hijacking at an alarming rate. When the culprits were caught, many claimed mental illness. In the late 1960s and early 1970s, there were several Cuba-related skyjacking undertaken by African-American revolutionaries. After a period of relative calm, the frequency of Cuban skyjackings spiked again in the early 1980s, following the Mariel Boatlift.

II. The Cuban skyjackings

The first of these incidents involving Cuba that resulted in a published U.S. court opinion (albeit written some twenty-five years after the incident) occurred on February 18, 1964, when Reinaldo Lopez-Lima and Enrique Castillo-Hernandez forced pilot Richard L. Wright to fly from Florida to Cuba. They were charged under 49 U.S.C. § 1472(i), the predecessor statute to the current air piracy provision, and remained fugitives from United States authorities because they were jailed by the Castro regime as illegal aliens.

In 1980, Castillo-Hernandez was among the incorrigibles Castro sent to the United States in the Mariel Boatlift. Castillo was promptly arrested by United States authorities upon his arrival. After his first trial ended with a hung jury, he plead guilty, and was given a two-year suspended sentence. Lopez-Lima returned to the United States in 1987. His outstanding indictment was discovered in 1989 after he was approached earlier that year by the United States State Department as a possible source of information regarding Cuba.

In his pretrial motions, Lopez-Lima maintained that he and Castillo were set up by the CIA to pose as defectors from the Cuban exile community who intended to reenter Cuba and support Castro and, once inside, were to assist anti-Castro activists. Lopez-Lima claimed that this CIA operation was designed to look like a skyjacking, so that Cuban authorities would not suspect CIA involvement. The court agreed that he could present this defense. *United States* v. *Lopez-Lima*, 738 F. Supp. 1404 (S.D. Fla. 1990). Judge Kenneth Ryskamp dismissed the indictment, ruling that the government failed to give Lopez-Lima a speedy trial, noting that Cuba had offered to return him in 1972 but that U.S. government refused. Milt Sosin, *Judges dismisses charges in 26-year-old skyjacking,* ST. PETERSBURG TIMES, June 22, 1990, at 7B.

Lopez' and Castillo's act took place shortly after the Bay of Pigs invasion and the Cuban Missile Crisis, although they were not brought to justice until nearly twenty years later. In the interim, several other Cuba-related skyjackings occurred which were addressed in published opinions by United States courts.

A. Cuba and the American Revolutionaries

The late 1960s and early 1970s Cuba-related hijackers were, for the most part, American fugitives and homegrown radicals rather than homesick Cubans. These incidents included several skyjacking by members of the Black Panther Party, who thereafter became disgusted with life in Cuba and decided to come home. For example:

• Raymond Johnson commandeered a November 1968 flight originating from New Orleans to Cuba, and eventually gave media interviews in which he complained about racism and oppression under Castro. Fenton Wheeler, *Life Worse in Cuba, Unhappy Black Panthers Wail,* MIAMI HERALD, June 26, 1969, at 17D. Eighteen years later, he waived extradition and returned to the U.S. along with his Cuban wife and four children, saying "he would feel more like a free man in an American federal prison than he would walking the streets of Havana." State-Times News Services, *Ex-SU student ends Cuba exile,* THE ADVOCATE (THE BATON ROUGE STATE TIMES EDITION), September 12, 1986, at 1-A.

• In 1969, Anthony Garnet Bryant successfully hijacked National Airline flight No. 97 from New York, bound for Miami. He made the mistake of robbing the passengers on the plane, one of them turned out to be a Castro secret agent carrying a briefcase full of cash. As a result, Bryant was treated as a criminal rather than a hero when he landed in Havana, and was incarcerated for twelve years in the Cuban penal system. He was finally released in 1980 after President Carter worked a deal with Castro for the release of thirty American prisoners in Cuba. In a Miami courtroom, he stated "Communism is humanity's vomit. Wipe it out." Mary Voboril, *Hijacker is glad he's back in*

U.S., rails against reds, MIAMI HERALD, October 29, 1980, at 4B.

• On January 22, 1971, Garland Grant hijacked a Northwest Airlines Milwaukee-to-Washington D.C. flight with fifty-nine passengers aboard. Grant originally wanted to go to Algeria, but settled instead for Cuba. He later lost an eye in a Cuban prison beating, and gave an interview in which he stated, "I just want to get back to the United States. I'm living like a dog in Cuba...There are most racism problems here than in the worst parts of Mississippi." Gregory Nokes, *Hijacker Detests Cuba,* WASHINGTON POST, April 26, 1977. He voluntarily surrendered to U.S. authorities in 1978. He eventually gave a series of disjointed speeches in court before being sentenced to fifteen years imprisonment. HIJACKER GETS 15 YEAR TERM, MILWAUKEE JOURNAL, September 6, 1978.

B. 1969-1971

On June 9, 1969, Ronald Bohle, while on board Eastern Airlines Flight No. 831 from Miami to Nassau, Bahamas, used a switchblade knife and threatened to use concealed nitroglycerin and a gun to persuade a flight attendant to take appropriate steps to divert the course of the plane to Cuba. *United States v. Bohle*, 445 F.2d 54 (7th Cir. 1971).

Two years later, passengers on two other flights attempted skyjackings . In June 1971, Bobby Richard White entered a Piedmont Airlines jet which was parked at the airport in Winston-Salem, North Carolina. During a confrontation with Captain Leon Fox, White stated that his bag contained nitroglycerin and sulfuric acid. He ordered Fox to fly him to Cuba, stating, "If I drop this bag it will blow us to bits. I don't give a damn." White was subsequently subdued and the bag was found to contain nothing but personal effects. *United States v. White*, 475 F.2d 1228 (4th Cir. 1973). White was sentenced to imprisonment for a term of four years.

On October 9, 1971, Richard Dixon, armed with a revolver, seized a flight attendant who was assisting boarding passengers on an Eastern Airlines jet at the Detroit Metropolitan Airport, and ordered the pilot to fly to Cuba. Dixon remained in Cuba for some time after the hijacking, though he was ultimately captured. *United States v. Dixon*, 592 F.2d 329 (6th Cir. 1979).

Each of these skyjackers was successfully prosecuted. Bohle, while suggesting the air piracy statute was unconstitutional, became the first of many skyjackers to claim insanity. White, who was found without any lethal explosives, was charged under 18 U.S.C.§ 32 rather than the skyjacking crime. His defense, that his threat was so conditional that he could not be convicted, was similar to those used by defendants charged under the hoax statute. Dixon was charged both with skyjacking (49 U.S.C. §1472(i)) and kidnapping (18 U.S.C. §1201(a)), and his appeal was premised on arguments that the two charges were duplicative. Some of these issues are discussed below.

C. 1979-1980

Cuban-related hijacking hit the United States courts again in the late 1970s and early 1980s. This group, however, eventually followed Bohle's lead, claiming a mental defect.

On July 20, 1979, shortly after takeoff from Denver, Colorado, Ronald Rimmerman, left his seat in the first class section of the plane, walked forward, and knocked on the cockpit door. Jack Earl Rayner, Second Officer and Flight Engineer aboard the aircraft, stated that he opened the door and Rimmerman said, "I have plastic explosives in my pocket, and I want to go to Cuba." Rimmerman took a seat in the cockpit area and, in conversations with the crew, agreed to allow the aircraft to land in Omaha for refueling. Upon arrival in Omaha, FBI agents entered the cockpit area of the aircraft and placed Rimmerman under arrest. He was searched and no explosives were found. Following his bench trial, Rimmerman was found not guilty by reason of insanity. *United States v. Rimmerman*, 483 F. Supp. 97 (D. Neb. 1980).

Three months later, Carlos Jesus Figueroa boarded Eastern Airlines Flight 115 traveling from Tampa to Miami. Fifteen minutes prior to landing, he handed the flight attendant a note and asked that she give it to the captain. The note stated:

> This is a request to take me to Cuba ... Now !
>
> This aircraft is in no danger. But don't take any chances. The life of many people is in your hands.
>
> A powerfull [sic] explosive device is set to go-off on pre-set time in a public location in Tampa. Many inocent people are goin to die-Any loss of life as a result of your haste and negligence and this airline management will be your responsibility. Copy of this note is in the mail to all major T-V networks news media, relatives and friends-They will know what happen in the ground and, who can help at the time Once in Cuba-Not Before. I will

tell you exact location and how to disarm safely the device.

Time is essential.

THANKS-Carlos

The flight attendant took Figueroa's note to the cockpit where it was read to the captain. Figueroa was told that they did not have enough fuel to get to Cuba and that they would have to stop in Miami for fuel. Figueroa explained that he had lost everything and was totally broke. A passenger said something about people on the airline being in danger and he said that was the way things had to be. He apologized three or four times for causing the inconvenience. When the plane landed in Miami, Figueroa was arrested by without incident. He was carrying no weapon. *United States v. Figueroa*, 666 F.2d 1375 (11th Cir. 1982).

A month after Figeuroa's arrest, Rafeal Casteneda-Reyes was one of 125 passengers aboard a commercial flight leaving Miami en route to San Antonio. A few minutes after takeoff, Casteneda approached one of the flight attendants, holding a decal with a Cuban flag on it, stating "We are going to Cuba." Casteneda threatened to set the plane on fire and told the flight attendant, "[W]e are all going to die." He indicated that if his demand to be taken to Cuba was not met, his brother, who he claimed was on board and had a gun, would start shooting people at random. Casteneda was ultimately subdued by flight personnel. Once restrained, he hit his head against the bulkhead several times and stated that he was crazy. *United States v. Castaneda-Reyes*, 703 F.2d 522 (11th Cir. 1983).

That same summer, Jose Antonio Pablo-Lugones, a Mariel Boatlift refugee, was in Miami with another Cuban refugee named Hector Cacares-Pinero, plotting to return to their homeland. Learning that there was a morning Air Florida flight from Miami to Key West, Cacares suggested that they purchase some gasoline, place it in small bottles, and use it to intimidate the flight attendants into diverting the plane to Cuba. Cacares tied his gasoline bottle to a string or rope around his waist. Pablo concealed his bottle of gasoline in a folded jacket, which he intended to carry on board the plane. At a secondary inspection station, the bottle containing gasoline was discovered in Pablo's jacket, while the other bottle of gasoline was discovered tied to Cacares' waist. After being advised of his rights by the FBI, Pablo waived his right to counsel and disclosed their entire plan. *United States v. Pablo-Lugones*, 725 F.2d 624 (11th Cir. 1984).

C. 1983-1987

On September 14, 1983, three Spanish-speaking, Latin males, including Antonio Vigil-Montanel and Elio Bacaro-Garcia, each paid cash for one-way plane ticket to Tampa from Miami International Airport. The ticket agent became suspicious of the three men, primarily because the flight to Tampa was not scheduled to depart for another four hours, and because they were waiting around the lobby, but unwilling to take an earlier flight. She earmarked the tickets and pointed out the three men to her supervisor.

At a concourse checkpoint, a security guard did a routine pat-down of Bacaro-Garcia, finding a plastic bottle filled with gasoline and a cigarette lighter in one of his socks. As the security guard stood up holding the bottle, he said "What is this?" Bacaro-Garcia claimed it was medicine. By this time, Vigil-Montanel had already boarded the plane. Police officers entered the plane, apprehended Vigil-Montanel, and escorted him off the plane. Another bottle of gasoline and a toy plastic gun were discovered in his socks. As Vigil-Montanel was being escorted off the plane he exclaimed in Spanish, "No, no, didn't want to go to Cuba. . . . My friend made me do it." The third person was never apprehended. Bacaro-Garcia and Vigil-Montanel were later interviewed by an FBI agent and both stated that they were approached at the airport by an unknown individual who offered them money (fifteen to twenty dollars) to carry a liquid-filled bottle aboard the aircraft, which they each agreed to do. Vigil claimed that he had found the toy gun on the street and that he had carried it in his sock since. The jury found both defendants guilty as charged, and they were each sentenced to twenty-five years imprisonment. *United States v. Vigil-Montanel*, 753 F.2d 996 (11th Cir. 1985).

Four years later, on June 5, 1987, a Virgin Islands Seaplane, Shuttle Flight 329, left St. Thomas, U.S. Virgin Islands, en route to San Juan, Puerto Rico. As the airplane approached the coast of Puerto Rico, Edward Ramon Mena strode toward the cockpit, clutching, in one hand, a tin can equipped with a wick and protruding brass contacts. In his other hand, he held a cigarette lighter. Referring to the can as a "very sensitive explosive device" and continually flicking his lighter, he threatened to "blow up the aircraft" if he was not flown to Cuba. The pilot explained that the airplane had insufficient fuel to make such a trip so he suggested they refuel in San Juan, offload passengers to increase flying range, and then "island hop" to Cuba, making additional refueling stops along the way as necessary. Mena agreed. Meanwhile, the copilot transmitted an

encoded hijack alert through the aircraft's transponder. Upon landing, security personnel surrounded the plane, the luggage was removed, and the passengers and copilot were allowed to leave. The pilot remained on board for some time, and then deplaned.

Mena took refuge in the cockpit, communicating with the FBI by means of the aircraft's radio and the control tower. During that interlude, he again warned authorities that he had a bomb and added that he had confiscated a flare gun. He repeated his demand to be transported to Cuba. After more than four hours of negotiations, Mena agreed to disembark. On doing so, he was arrested. The tin can was found to contain a petroleum distillate similar to kerosene. *United States v. Mena*, 933 F.2d 19 (1st Cir. 1991).

III. The mental defense to skyjacking

Several of the Cuban skyjackers presented a mental defense. Some were successful. Ronald Bohle, the subject of the first judicial opinion in a Cuban hijacking case, was the person who tried to commandeer the June 1969 Eastern Airlines flight from the Bahamas to Miami. *Bohle*, 445 F.2d 54. He was eventually convicted in Indiana, where he had lived his entire life, and sentenced to twenty-five years in prison. *Id.* On appeal, his conviction was reversed based on the trial court's error in refusing to admit certain evidence relating to Bohle's mental condition. *United States v. Bohle*, 475 F.2d 872 (2nd Cir. 1973).

Carlos Jesus Figueroa, who actually signed the threatening note with his real name along with the word "thanks," and who apologized to his victims for the inconvenience, had a history of mental illness which had required hospitalization and electroshock treatment. *Figueroa*, 666 F.2d 1375. At trial, the defense and government experts agreed that Figueroa suffered from severe depression, but they disagreed on whether it negated his culpability. *Id*. at 1377. Figueroa's psychiatrist expressed the opinion that he suffered from a schizo-affective type that rendered him unable to appreciate wrongfulness and adhere to a realistic, mature way of making decisions and functioning in society. *Id.* The government's psychiatrist testified that, although Figueroa was depressed to the point of extreme apathy, he was fully aware that his conduct was wrong and was capable of conforming his conduct to the requirements of the law, if he chose to do so. *Id.* The appellate court, noting that the jury was free to accept or reject the testimony of either expert on the insanity issue, did not disturb their judgment. It did, however, reverse Figueroa's conviction on other grounds, described below.

As noted, the other hijacker from the summer of 1980, Rafael Castenada, once restrained, began hitting his head against the bulkhead several times and stating that he was crazy. *Castaneda-Reyes*, 703 F.2d 522. After he was indicted, he plead not guilty by reason of insanity and underwent psychiatric evaluation. At trial, he presented two expert witnesses to support his contention that he was legally insane on the day of the incident. The expert opinions by these witnesses, a psychiatrist and a psychologist, supported the appellant's defense. Casteneda's sister also testified in corroboration of his prolonged psychiatric difficulties. The government responded with three expert witnesses, a psychiatrist, a psychologist, and a neurologist, who uniformly refuted the appellant's claim of insanity. As with Figueroa, it became a battle of experts, and the appellate court upheld the jury's determination that the defendant was legally sane.

The mental competency defense was not limited to the Cuba cases, and was also attempted by other unsuccessful skyjackers.

On June 4, 1971, Glen Elmo Riggs boarded a United Airlines flight in Charleston, West Virginia, bound for Newark, New Jersey. Twenty minutes after takeoff, displaying a gun, Riggs demanded that the plane be flown to Israel. After he became convinced that a long-range plane had to be obtained for the transoceanic flight, Riggs permitted the plane to land at Dulles Airport and the passengers and flight attendants to disembark. Then, for more than three hours, Riggs remained in the cabin of the plane talking to Flight Engineer Gregory Colliton. Finally, Riggs placed the gun on a seat and walked over to a water fountain for a drink of water. Colliton took possession of the gun and Riggs was placed in federal custody. He was convicted by a jury of air piracy and was sentenced to two concurrent twenty-year sentences. As in *Figueroa* and *Castenda-Reyes*, the appellate court upheld the jury's determination on Riggs' sanity. *United States v. Riggs*, 470 F.2d 505 (4th Cir. 1972).

Donald Lewis Coleman began acting suspicious on a December 1971 American Airlines' nonstop flight from Chicago to San Francisco, asking the flight attendant for a "rather strange drink" (creme de menthe and bourbon) and having several verbal exchanges with her. At one point, he remarked, "I think I'll hijack a plane" and pulled out a gun and said, "all right now, I mean it." Coleman demanded a large sum of money and warned that the plane was not to go

below 25,000 feet because he had plastic explosives in the cargo compartment. Coleman also brandished a knife and asked several passengers if they were Secret Service agents. When the plane landed in Salt Lake City, Coleman made an unsuccessful attempt to jump out of the side door. When apprehended in front of the airplane, Coleman was crying and said "They wouldn't believe me, they wouldn't believe me." The gun was, in fact, a toy plastic revolver. FBI Agent Charles Shepherd, one of the arresting officers testified that Coleman asked to call his attorney and that he overheard Coleman tell his attorney that he had hijacked an airplane. FBI Agent Harry Jones, another arresting officer, stated that Coleman told him that he had considered hijacking the airplane prior to boarding his flight. It was Coleman's contention that there was insufficient evidence to sustain the government's burden of proving beyond a reasonable doubt that he was mentally competent at the time the crime was committed. This contention was rejected by the jury. *United States v. Coleman*, 501 F.2d 342 (10th Cir. 1974).

William Herbert Greene II boarded a Delta Airlines flight departing from West Palm Beach, Florida, bound for Chicago, Illinois on April 17, 1972. While the airplane was en route, he passed a flight attendant a note reading:

> I have a gun When we land in Chicago want $500,000.00 cash small bills Refuel plane for enough to go to Nassau Bahamas Act normal! Bring money before anyone gets off plane

Greene agreed to allow the flight attendant, as well as the passengers, to disembark in Chicago and only the male crew members remained on board. Once on the ground, Greene agreed to surrender. At trial, the defense acknowledged the facts, but suggested that Greene could not have successfully completed the hijacking because he had no weapon. The jury convicted him. On appeal, Greene unsuccessfully challenged the sufficiency of the evidence to prove sanity beyond a reasonable doubt, argued that the jury should have been required to make a special finding on insanity, claimed that the government psychiatrist violated the defendant's Fifth or Sixth Amendment rights, and argued the trial court should have instructed the jury on diminished capacity. *United States v. Greene,* 497 F.2d 1068 (7th Cir. 1974).

Some of the accused skyjackers argued that the jury instructions erroneously treated air piracy as a general, rather than specific, intent crime. These claims were based on the definition of conduct that comprised air piracy under the predecessor statute, 49 U.S.C. § 1472(i)(2): "any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft in flight in air commerce."

Ronald Bohle, for example, argued that the words "wrongful intent" in the air piracy crime failed to describe the requisite specific intent and rendered the statute unconstitutionally vague. Rejecting this claim, the court refused to find that Congress intended to make aircraft hijacking a crime only if the hijacker intended to permanently deprive the owner of it. The court agreed with the government and the district court that the wrongful intent referred to in the statute is no more than the general criminal intent present when one seizes or exercises control of an aircraft without having any legal right to do so. Rafeal Casteneda tried a similar tactic, contending that the district court erroneously failed to instruct the jury that the air piracy crime he was charged with attempting was a specific intent crime. He too was unsuccessful.

Whether air piracy is a specific or general intent crime is important when a defendant seeks to use a mental defense, since it impacts whether the accused can present a defense of diminished mental capacity, short of a claim of insanity. This issue was addressed in the infamous *Busic* case.

IV. The *Busic* case

One of the strangest air piracy incidents occurred in 1976, when a group of political activists decided to hold a political seminar in the sky . *United States v. Busic,* 592 F.2d 13 (2d Cir. 1978). The following factual account is taken from the court's opinion.

> On Friday evening, September 10, 1976, Trans World Airlines Flight 355 took off from LaGuardia Airport for Chicago. On board the Boeing 727 aircraft were seven crew members and 85 passengers, including Zvonko Busic and Julienne Busic, who were traveling as husband and wife under assumed names, and Marc Vlasic, Petar Matanic, and Franc Pesut, who were separately seated on the aircraft and also travelling under assumed names. All five had boarded the aircraft pursuant to an agreement and instructions masterminded by Zvonko Busic. Each had received a plane ticket and a package of leaflets from Busic, along with departure-time instructions and directions not to congregate at the airport.
>
> Shortly after take-off, Zvonko Busic handed flight attendant, Tom Van Dorn a sealed envelope to deliver to the captain and then proceeded to the lavatory. Inside the cockpit,

> Captain Carey opened the envelope and read the following note:
>
> "One, this airplane is hijacked.
>
> Two, we are in possession of five gelignite bombs, four of which are set up in cast iron pans giving them the same kind of force as a giant grenade.
>
> Three, in addition, we have left the same type of bomb in a locker across from the Commodore Hotel on 42nd Street. To find the locker take the subway entrance by the Bowery Savings Bank. After passing through the token booth there are three windows belonging to the bank. To the left of these windows are the lockers. The number of the locker is 5713.
>
> Four, further instructions are contained in a letter inside this locker. The bomb can only be activated by pressing the switch to which it is attached, but caution is suggested.
>
> Five, the appropriate authorities should be notified from the plane immediately.
>
> Six, the plane will ultimately be heading in the direction of London, England."

Id. at 17.

The captain immediately radioed the contents of the note to authorities and dialed the skyjack code for the air traffic control radar location center. Meanwhile, Zvonko Busic entered the cockpit wearing what appeared to be three sticks of dynamite connected to a battery. Busic ordered Captain Carey to fly the airplane to Europe.

En route to Montreal for a refueling stop, Busic explained that the purpose of the hijacking would become clear when the authorities read the note accompanying the bomb in the subway locker and that, upon receipt of a prearranged code word indicating that their demands had been met, the hijackers would surrender in Europe. At the same time, Julienne Busic was handing out copies of leaflets to the passengers, seeking their support for a free Croatia, independent of Yugoslavia. Zvonko Busic also wanted the leaflets dropped from the airplane over London and Paris.

Throughout the ordeal, Julienne Busic conversed freely with the passengers and encouraged them to ask questions about the propaganda. Petar Matanic's assignment was to stand up at the front of the passenger section with a tear gas gun, apparently to keep order. Like Julienne Busic, Matanic talked with the passengers throughout their ordeal, further explaining the purpose of the hijacking.

Marc Vlasic delivered an order from Zvonko Busic to Franc Pesut that Pesut take a seat in the rear of the aircraft and hold a purported bomb on his lap. Pesut did so for almost the entire trip, although, he twice sat in the cockpit with Captain Carey for about an hour. Throughout the flight, Zvonko Busic reminded Captain Carey that the aircraft could be blown up at any time if the demands were not met.

Meanwhile, responding to the hijack note that Captain Carey had transmitted, members of the New York City Police Department Bomb Squad located subway locker 5713 and found it to contain what appeared to be a bomb and additional propaganda. The highjackers demanded that their materials be published in the following day's editions of the *New York Times*, all three editions, *Los Angeles Times*, *Chicago Tribune*, *International Herald Tribune*, and *Washington Post*. While attempting to deactivate the bomb, one officer was killed and one was seriously injured.

After the aircraft landed in Paris, Zvonko Busic told Captain Carey that they need only await reception of the prearranged code word. Twelve nerve-racking hours followed for Carey and his passengers, and as time passed, still no code word was received. The passengers were twice herded together in the center of the cabin while Zvonko Busic and Vlasic threatened to kill them. Eventually, Julienne Busic left the aircraft to contact information sources in the United States to confirm that the two propaganda texts had been published as demanded. Two hours later Julienne Busic telephoned Zvonko Busic on the aircraft and told him that the demands had been met. The defendants finally surrendered some thirty hours after the seizure began.

All defendants testified at trial. Zvonko Busic freely admitted his role as the mastermind and attempted to take full blame for the hijacking. He also admitted having placed the bomb in the subway locker. He raised a psychological defense, maintaining that he was incapable of forming the requisite intent to commit the offenses charged. Julienne Busic testified that she never intended to participate in the hijacking, but only went along with her husband because she thought she was pregnant and feared she would never see him again if she refused. Matanic and Pesut each testified that he had been invited to accompany Zvonko Busic to Chicago for a secret political meeting where they were to deliver the leaflets. Once on the plane, Zvonko Busic purportedly

forced them to cooperate in the hijacking with the threat of death.

The Busics, Matanic, and Pesut were all convicted of violations of the Anti-hijacking Act of 1974. Specifically, all four defendants were found guilty of aircraft piracy and conspiracy to commit aircraft piracy. The Busics were also convicted of aircraft piracy resulting in the death of another. Vlasic pled guilty to aircraft piracy prior to trial and received a sentence of thirty years' imprisonment with the provision that he would be immediately eligible for parole at the discretion of the United States Parole Commission. Matanic and Pesut each received thirty-year sentences. The Busics received life sentences.

While in prison, Jullienne Busic suffered remorse and considered becoming a nun. She struck an acquaintance with Kathleen Murray, the wife of the New York City police officer killed while trying to deactivate the bomb. After her release in March 1989, Julliene Busic was hired by the Croatian Embassy in the United States to handle cultural and press affairs. David Binder, *Terrorist Bombing Brings Widow, Hijacker Together*, PORTLAND OREGONIAN, December 20, 1994, at A11. In April 1987, Zvonko Busic briefly escaped from his upstate New York prison, but was recaptured as he sat on the porch outside a rural Pennsylvania store. Associated Press, *Hijacker Recaptured After Prison Escape*, WASHINGTON POST, April 19, 1987, at A12. The Croatian Parliament, in December 2002, voted to seek the extradition of Zvonko Busic, who had served twenty-six years of his thirty-year sentence, urging the United States to let him serve out his remaining four years in a Croatian prison. Associated Press, *Parliament seeks extradition of Croat terrorist from U.S.,* ASSOCIATED PRESS NEWSWIRES, December 13, 2002.

V. Nonpolitical skyjackings

The *Busic* case is a classic example of a political crime. Other skyjacking incidents were motivated by more self-serving goals. For example, in the case of William Herbert Greene II, described in Section III above, the defendant demanded $500,000 and the rerouting of a Delta Airlines flight to the Bahamas. Some of these cases, like the following 1972 incident in the Pacific Northwest, illustrate the outer edges of accomplices' liability.

A. Lumomir Peichev (1972)

In June 1972, Lumomir Peichev, Michael Azmanoff, and Dimitr Alexiev traveled to Hope and Puntzi, two remote landing sites, both over 100 miles from Vancouver. While on this trip, they made plans to hijack an airplane and fly it to a remote airport in Canada. There, a fourth person would be waiting to take the skyjackers to an apartment hide-out in the outskirts of Vancouver. Peichev was to rent a private plane and meet them at an auxiliary landing strip in case the hijacked plane was unable to land at the preferred airport.

The three men returned to San Francisco and, on July 1, 1972, met Illia Shishkoff. She agreed to meet Peichev on July 4, at the Vancouver Airport and rent an apartment in the outskirts of the city. On July 3, Peichev withdrew $1,700 from his bank account and borrowed a gun under the guise of a need to protect himself. Later that day he met Alexiev and Azmanoff who gave him a plane ticket to Seattle and told him to take a bus to Vancouver. After meeting Shishkoff in Vancouver, Peichev rented two cars and traveled with Shishkoff to Hope airport, approximately 100 miles, and returned to Vancouver.

The following day, July 5, Peichev rented a private plane and hired a pilot only to learn that the hijack attempt had failed. He proceeded to Puntzi airstrip where he spent the night and then returned to Vancouver. In Vancouver he met Shishkoff, arranged for the return of the rental cars, and then returned to San Francisco. That same day, Azmanoff and Alexiev hijacked a Pacific Southwest Airline flight scheduled to travel from Sacramento to San Francisco. They demanded $800,000, parachutes, and air charts of Canada, Alaska, and the Soviet Union. After the plane landed in San Francisco, an FBI agent, posing as an international pilot, was allowed to board the plane. Gunfire ensued and Azmanoff and Alexiev were killed. Prior to his death, Azmanoff killed one passenger and wounded three others. The FBI agents found a map of British Columbia, Canada, and a small piece of note paper containing the map coordinates of Puntzi airstrip, on the bodies of the hijackers.

Peichev was charged with aiding and abetting aircraft piracy (18 U.S.C. § 2; 49 U.S.C. § 1472(i)), conspiracy to commit aircraft piracy (18 U.S.C. § 371), and conspiracy to commit extortion by means of aircraft piracy (18 U.S.C. § 1951). At trial, Peichev conceded that he rented a plane and flew to the Puntzi airstrip by prearrangement with Azmanoff and Alexiev, but contended that he was coerced to do so. The jury returned a verdict of guilty on all counts. The court sentenced Peichev to life on count one and to twenty years on count three, both sentences to run concurrently.

On appeal, Peichev argued that the evidence was insufficient to support his conviction of aiding and abetting aircraft piracy. He conceded that the evidence was sufficient to show a conspiracy, but argued that the government did not show that he aided and abetted in the perpetration of the crime. The Ninth Circuit held that evidence Peichev assisted in planning the

> hijacking of [an] aircraft and at [the] time of [the] hijacking was in Canada en route to [the] air strip pursuant to [the] plan to assist [the] escape of [the] perpetrators supported conviction as aider and abettor notwithstanding the defendant's substantial distance from site of [the] hijacking and [the] fact that [the] criminal plot was foiled before the defendant could be of assistance.

United States v. Peichev, 500 F.2d 917 (9th Cir. 1974).

B. Charles Compton (1991)

In February 1991, Charles Compton flew on Southwest Airlines from Oakland to Houston via San Diego. Forty-five minutes into the flight, Compton handed the senior flight attendant, Diane Colvin, a note that read:

> I have nitro in my hand and a bomb in my luggage. I want $13 Million ransom for plane and passengers. Stop in New York. Have $13 million waiting. Pick up. Refuel. Fly to Cuba. I am not alone
>
> L.L.A.

Colvin was frightened by the message and believed that the plane was being hijacked. She showed the note to another flight attendant, Maria Blanks. Blanks advised Captain William Schmidt, that the plane was being hijacked. Schmidt notified air traffic controllers. To avert the loss of air pressure in the event of an explosion, Captain Schmidt descended from an altitude of 26,000 feet to 10,000 feet. This maneuver put the plane on a route that Captain Schmidt had never flown before and created a danger to the aircraft and passengers. Schmidt told flight attendants to tell the hijacker that the aircraft did not have enough fuel to make it to New York and that the plane would have to land in San Diego to refuel.

When advised of the need to refuel, Compton announced, "I'm not serious." Colvin continued to believe that he was serious and that there was a bomb and an accomplice on the plane. She was unable to perform her usual duties because she was watching Compton and keeping Schmidt informed of his activities. When the plane landed in San Diego, Compton was arrested. The plane was searched and no bomb was found. Compton later explained that he had attempted to hijack the plane because he was down on his luck and needed money. He said he had written the note before he boarded the plane and that the hijacking had, at first, seemed an easy way to make money, but "after I got into it I decided it wasn't going to work."

Compton was indicted for air piracy in violation of 49 U.S.C.App. § 1472(i), the predecessor statute to § 46502, and with the crimes of interfering with flight crew members by assaulting, intimidating, and threatening flight crew members so as to interfere with the performance of their duties (now codified at 49 U.S.C. § 46504). He was convicted on both counts and sentenced to thirty years imprisonment for the attempted aircraft piracy and twenty years on the second charge, to run concurrently.

On appeal, Compton challenged the sufficiency of the evidence, arguing that he did not interfere with the performance of "a flight crew member" since he merely handed a note to a flight attendant. Noting that the statute did distinguish between a "flight crew member" and a "flight attendant," the appellate court stated that, by the note to Colvin, Compton intended to and did set in motion a chain of events that interfered with the captain. His use of a threat to seize control of the plane was sufficient to constitute aircraft piracy. However, because the interference count was necessarily committed in completing the air piracy offense, the judgment and sentence as to the interference count was vacated. *United States v. Compton*, 5 F.3d 358 (9th Cir. 1993).

C. ConAir

The 1997 film CONAIR (Touchstone Pictures 1997) starred actors John Cusack, Nicholas Cage, and John Malcovic, and was about a group of convicts who plotted to escape from prison while they are traveling aboard a Bureau of Prisons aircraft. Whether or not the film's producers were aware of it, the plot was similar to an actual attempted jail break which turned into a skyjacking. The following account comes from Judge Wesley Brown's opinion in *United States v. Hack*, 782 F.2d 862 (10th Cir. 1986).

Lucas Owens and William Hack were inmates serving their sentences in the Nevada State Prison. On February 18, 1984, they were on board a prisoner-transport plane taking them from Visalia, California, to Rock Springs, Wyoming, where they were scheduled to appear in state court on criminal matters. There were six other inmates on the plane, in addition to the pilot, Gary

Harrington, and the co-pilot, Dianne Witt, who also served as the armed guard. Each prisoner wore a leg iron and was handcuffed to a belly chain that threaded through the inmate's clothing.

On the first leg of the flight, Owens, who had some flight training, selected the seat directly behind the co-pilot. He was very inquisitive about the technical aspects of the plane and its performance capabilities. He asked about the plane's fuel reserve, how far and high it could fly, and the numbers and locations of the scheduled stops they intended to make.

The plane made an intermediary stop at Elko, Nevada, and Witt allowed the inmates to deplane to use the restroom facility in the airport terminal. When they resumed their journey to Evanston, Wyoming, Owens had switched seats with Hack, so that Hack was seated directly behind the co-pilot.

During a stop at Evanston, the inmates were directed to go inside the terminal while the plane was being serviced. Hack said that he needed to use the restroom and during this unobserved opportunity he managed to slip out of his belly chain. Hack tucked the chain back into his pants to disguise that he had unfettered himself and then he re-entered the plane.

On final approach into Rock Springs, Wyoming. Hack stood up from his seat, and threw his loose chain around the neck of the co-pilot. Witt managed to extricate herself from the chain by holding it off her throat with her left hand while using her right hand to prevent Hack from taking her service revolver. During the struggle, Witt, with the assistance from the pilot, was able to retrieve a gun from her flight bag and shoot Hack. Order was soon restored and the pilot, who was also wounded by the bullet that had passed through Hack's mouth, was able to land the plane safely. *Id.* at 864-65.

The jury found Owens and Hack guilty of conspiring to commit air piracy, and Hack guilty of attempted air piracy. Hack was sentenced to a fifty-year prison term to run concurrently with a five-year prison sentence he and Owens received for the conspiracy conviction. *Id.* at 864. On appeal, their convictions were affirmed. *Id.* at 87.

VI. Other skyjacking issues

Some of the foregoing skyjacking cases involved legal issues relevant to air violence, and to counterterrorism jurisprudence generally.

A. The CIA defense

The first American skyjacking, perpetrated in 1964 by Ronaldo Lopez-Lima, involved the CIA or "public authority" defense. *United States v. Lopez-Lima*, 738 F. Supp. 1404 (11th Cir. 1990). When the case finally came to trial in 1990, the court concluded that Lopez-Lima's version of events, if believed, would constitute a legally cognizable defense to the criminal charges against him and would serve to negate his wrongful intent, a requisite element of the skyjacking offense. It held that the classified information that Lopez-Lima sought to introduce to substantiate his version of events was relevant to his defense, and announced it would admit it over the government's objections that it was prejudicial and misleading or violative of the hearsay rule. *Id.* at 1413. The court also announced that Lopez-Lima would be permitted to testify to his version of the facts and to present competent evidence, including classified information, in support of his defense. *Id.*

The "public authority" doctrine is a limited exception to the rule that a defendant's mistake of law is not a defense. If a defendant can show that he believed his actions were sanctioned by a government component with actual, as opposed to apparent, authority to undertake such actions, he can argue that such sanction negates his criminal intent, if the defendant acted in reasonable reliance on an actual U.S. government agent. This doctrine required the *Lopez-Lima* court to enter into an interesting analysis of whether the CIA, at the time of the defendant's 1964 actions, had real authority to authorize an illegal hijacking, and whether some of the persons the defendant listed as contacts were actual CIA assets.

B. Air violence charging decisions

The North Carolina case of Bobby Richard White, who attempted to hijack a Piedmont Airline flight with a phony bag of nitroglycerin and sulfuric acid, as set forth in Section II. A. above, represents an interesting charging decision by prosecutors. Instead of air piracy, White was charged under the felony hoax statute, 18 U.S.C. § 35(b), and ultimately received a four-year prison sentence. White appealed his conviction, arguing that the indictment was fatally defective for failing to allege all the essential elements of the § 35 crime, in that it failed to allege specifically the intent required to constitute a violation of 18 U.S.C. § 32, and that the government failed to prove his intent to damage or destroy an aircraft because his particular threats were always conditional. Rejecting these claims, the court noted that White's threats were of certain, imminent harm to the aircraft unless there was compliance with his demand that he be flown to Cuba, and that the law of criminal assault is filled with examples of such qualified threats which

have served as the basis of convictions. Among the threats uttered by White to Captain Fox was the following: "Well, I don't want to take any children's father with me, but unless we get going, I am going to drop this and blow us up." *United States v. White*, 475 F.2d 1228, 1236 (4th Cir. 1973).

C. Elements and limits of skyjacking offense

The cases of Carlos Figueroa, Section II.B. above, Antonio Vigil-Montanel, Section II.C. above, and Edward Ramon Mena, Section II. C. above, added elements to the law of the skyjacking offense, and guidance for prosecutors faced with these types of cases in the future.

Carlos Figueroa, the polite attempted hijacker whose physical stature hardly made him an intimidating presence, used a note in his 1979 attempt to commandeer a flight to Cuba, but his plan was thwarted. *United States v. Figueroa*, 666 F.2d 1375 (11th Cir. 1982). At his trial, his counsel asked for and received a jury instruction on the lesser-included offense of attempted air piracy. He was convicted of both the attempt and the substantive offense. On appeal, while conceding that he used the threatening note in an attempt to intimidate, and hijack the plane, he argued that the government had presented no proof that he did what he was charged with doing: attempting to hijack by force or violence. He claimed that the government failed to show that he made any physical gesture which constituted force or violence within the traditional meaning of those terms. The prosecution countered that Figueroa's act of threatening imminent harm to innocent people was sufficient to establish the element of force as charged, and that evidence of physical action is not required. The prosecution further argued that a note calculated to compel the pilot to change destinations against his will was clearly sufficient to constitute force.

The Eleventh Circuit agreed with the defense, based on the legislative history of the air piracy statute then existing. *Id.* at 1378. The court noted that, as originally adopted in the 1961 amendments to the Federal Aviation Act of 1958, the definition of aircraft piracy meant only seizure or exercise of control "by force or violence or threat of force or violence." The statute was amended in 1974 by adding the words "or by any other form of intimidation." *Id.* This legislative history, according to the court, meant that the amendment was considered by Congress to be an expansion of the definition, not a reiteration. Confronting the question of whether evidence of threats and intimidation is sufficient to prove the element of force under the air piracy statute, the court concluded it was not. It expressly rejected the argument that the government's proof of threats and intimidation, rather than force or violence, was merely an acceptable variance between the indictment and the proof. Instead, it concluded that Figueroa's conviction constituted a constructive amendment of the indictment rather than a simple variance between the indictment and the proof. As it stated:

> If we allow Figueroa's conviction to stand, we would in effect permit the government to substitute the term "threats and intimidation," which the government proved but the grand jury did not charge, for the term "force and violence," which the grand jury charged but which the government could not prove. This is precisely the alteration of the charging terms of the indictment that Salinas proscribes.

Id. at 1379. The court remanded the case with directions to enter a judgment of conviction of the lesser-included offense and for resentencing.

In his appeal , Edward Ramon Mena tried an argument similar to Figueroa's: that the government failed to prove these elements beyond a reasonable doubt, because Mena failed to seize or exercise control of the plane. *United States v. Mena*, 933 F.2d 19 (1st Cir. 1991). Mena's argument was based on the pilot's coolness under pressure, (for example, alerting the control tower of the hijacking, persuading Mena of the necessity to land in San Juan, and undertaking aeronautical sabotage), arguing that the crew never relinquished control of the aircraft. Defense counsel claimed that, at most, the evidence established merely an attempt, a crime with which he was not charged.

The Mena court rejected this argument, using language which, when compared with the *Figueroa* court's holding, illustrates the importance of the specific facts:

> According to the trial testimony, Mena approached the cockpit in mid-flight, dressed in militaristic garb and carrying what he proclaimed was a "sensitive explosive device." He threatened to blow up the aircraft unless he was flown to Cuba. He was flicking his lighter in a way that indicated a willingness to ignite the fuse. Even after receiving false assurances from the pilot, Mena did not simply repair to his seat; he sat down sideways, assuming a position from which he could watch both the pilots (fore) and the passengers (aft). At all times, he kept the menacing device prominently in view. Moreover, Mena's actions were not

> completely unproductive. The crew did not overtly challenge his hegemony. There was also significant disruption of the flight's normal routine: other aircrafts were vectored out of the way, an unwonted landing priority materialized, and the ordinary taxi run was prolonged. Although the passengers and crew were able to deplane shortly after arrival, the pilot's departure was delayed. Mena himself appropriated the aircraft's flare gun and remained aboard for several hours, in sole physical control of the aircraft, continually demanding to be taken to Cuba.

Id. at 23-24.

The *Mena* court also considered, and rejected, his argument that his conduct was not proven to be "within the special aircraft jurisdiction of the United States" within the meaning of the skyjacking crime. *Id.* at 24. He claimed that his guilt must be judged solely on the basis of his conduct up until disembarkation began. Therefore, because the airplane landed when and where it was scheduled to land, no "forced landing" was involved. *Id.* Refusing to reverse on this ground, the court noted that the landing probably would not have occurred as it did had the pilot not been aware of the menace Mena posed. *Id.* at 25. Thus, the aircraft remained within the special aircraft jurisdiction of the United States until Mena deplaned. The fact that Flight 329 landed on time at its planned destination neither disproved the fact that air piracy may have occurred, nor barred the jury from reaching the reasonable conclusion that Mena had taken control of the aircraft.

Antonio Vigil-Montanel, one of the defendants carrying bottles of gasoline on a 1983 flight from Tampa to Miami and who received a twenty-five year sentence for attempted hijacking, argued in his appeal that there was no direct evidence of his intent to hijack the plane, and that he was convicted merely because he was a Cuban refugee who had recently arrived in the United States. The Eleventh Circuit disposed of these arguments more easily than the courts in *Mena* and *Figueroa:*

> A defendant's intent can be inferred from his conduct and all the surrounding circumstances. In the instant case, criminal intent is easily inferred from the circumstantial evidence found in the record. The jury chose not to accept the appellants' unbelievable explanations of their conduct, and concluded that they were guilty.

United States v. Vigil-Montanel, 753 F.2d 996, 999 (11th Cir. 1985) [citation omitted].

D. The limits of federal jurisdiction over air violence

Finally, the prosecutorial limits to the skyjacking offense are further delineated in the case of Barbara Pliskow, who boarded an aircraft at the Detroit airport on September 24, 1971, armed with two sticks of dynamite and a .25 caliber automatic pistol. Having been informed that Pliskow was going to attempt an airplane hijacking, the United States Marshals ordered that the plane be evacuated under the pretext of mechanical difficulties. After exiting the plane, Pliskow was recognized by Marshals and Detroit police in the terminal. As they approached her, she drew her pistol and shouted that everyone was going to die. Following a struggle, Pliskow was arrested, and the pistol and dynamite seized. The targeted plane never left the terminal gate, and its engines were never started. These factors lead the court to conclude that Pliskow could not be prosecuted under the federal skyjacking statute:

> In the circumstances of this case, since the aircraft was not in flight at the time of the alleged offense, it is clear that the Defendant could not properly be indicted for the consummated offense of aircraft piracy. The Government admits this. It is much less clear, however, whether the actions of the Defendant can serve as the basis for prosecution under Section 1472(i) for attempted aircraft piracy. For reasons which are now a matter of record, this court decided that such a prosecution was not precluded by the fact in the aircraft in question was not "in flight". In doing so, however, it did not have the benefit of the legislative history which has now been brought before the court. . . . In our case, nothing about the "unique requirements of air transportation" dictates that Federal, rather than local, authorities should handle the situation. Defendant had boarded and then exited a plane which was parked at the terminal gate. She was spotted and seized in the terminal with the assistance of Detroit police. Local authorities were clearly capable of handling the situation. It appears clear to this court, from the legislative history of the Act, that it was not the intent of Congress that Federal jurisdiction should attach in these circumstances. . . . This court takes a back seat to no one in deploring "hijackings" which, in spite of their reprehensibility, have become increasingly commonplace. Hopefully, appropriate law enforcement action will some day succeed in preventing such crimes. This court's decision should in no way impede such prevention, but will

instead implement the clear intent of Congress that, in situations such as the one in this case, prosecution of the person accused is best left in the hands of local authorities, without Federal intervention.

United States v. Pliskow, 354 F. Supp. 369,371-73 (E.D. Mich. 1973).❖

ABOUT THE AUTHOR

❑**Jeff Breinholt** currently serves as Deputy Chief in the Counterterrorism Section where he oversees the U.S. nationwide terrorist financing criminal enforcement program. He previously served as the Regional Antiterrorism Coordinator for the western and Pacific states and as a trial attorney in the Counterterrorism Section's international terrorism branch. He joined the Justice Department with the Tax Division in 1990, and spent six years as a Special Assistant U.S. Attorney in the District of Utah before joining the Criminal Division in 1997. He is a frequent lecturer and author on intelligence and law enforcement matters, and was recently honored with the Attorney General's Award for Excellence in Furthering the Interests of U.S. National Security. His forthcoming book, *Counterterrorism Enforcement: A Prosecutor's Guide*, will be available through the Office of Legal Education. ✠

A Smokescreen for Terrorism

D. Scott Broyles
Assistant United States Attorney
Western District of North Carolina

Martha Rubio
Counter Terrorism Section
Department of Justice

I. Introduction

In early 1995, Detective Robert Fromme of the Iredel County, North Carolina, Sheriff's Department, noticed something strange while working off-duty as a security guard for J.R. Tobacco, a wholesale distributor of tobacco products, in Statesville, North Carolina. For several weeks, Detective Fromme observed individuals driving vans with out-of-state license plates making large purchases of cigarettes. These men had grocery bags full of cash, and clearly were not commercial truck drivers. Surveillance tracked some of these vehicles to the Virginia and Tennessee state lines.

What followed from Detective Fromme's observations was a four-year investigation involving over fifteen local, state, federal, and international, law enforcement and intelligence agencies. It led to the arrest and conviction of twenty-six individuals for crimes including immigration fraud, visa fraud, cigarette smuggling, interstate transportation of stolen property, fraud, bank fraud, bribery, money laundering, racketeering, and, most importantly, providing "material support" to Hizballah, a terrorist organization. The case culminated in the trial of *United States v. Hammoud,* 3:00CR-147-MU (W.D. N.C. June 21, 2002) which established new legal precedents, and involved the application of investigative techniques that were previously limited to the national security realm. The case also provided a view of how terrorist organizations operate and raise funds in the United States and, ultimately, an example of how criminal prosecutions can disrupt such activity.

II. The Charlotte Hizballah cell

Hizballah is a radical Shia group, formed in Lebanon in 1982, that is dedicated to increasing its political power in Lebanon and opposing Israel and the Middle East peace negotiations. The group operates primarily in the Bekka Valley in Lebanon, the Southern suburbs of Beirut, and Southern Lebanon. It espouses strong anti-West and anti-Israeli views. Prior to the events of September 11, 2001, Hizballah was responsible for murdering more Americans than any other terrorist group. The group is known, or suspected, of being involved in several notorious attacks

against U.S. interests overseas, including the suicide truck bombing of the U.S. Embassy and U.S. Marine barracks in Beirut in October 1983 that killed over 200 U.S. Marines, and the bombing of the U.S. Embassy annex in Beirut in September 1994. Hizballah was also responsible for the kidnapping of numerous United States and other Western hostages in Lebanon during the 1980s and 1990s, and several airplane hijackings in the Middle East. More recently, several members of the Saudi faction of Hizballah were indicted in the Eastern District of Virginia on charges that they were responsible for the 1993 Khobar Towers bombing in Saudi Arabia that killed nineteen U.S. servicemen and wounded nearly 400 others.

Although Hizballah has not conducted a terrorist operation in the United States, according to the FBI, the group maintains a sizable presence in this country. U.S.-based Hizballah cells, for example, have been involved in activities that provide logistical support to terrorism, such as fund-raising, recruiting, and spreading propaganda inside our country. The investigation in this case eventually established that the group of men Detective Fromme observed purchasing large quantities of cigarettes at J.R. Tobacco were members of such a cell. The cell, led by Mohamad Hammoud, was bound together by family ties, religion, criminal activities, and an association with, and sympathy for, Hizballah. Indeed, members of the group engaged in a wide variety of fraud and other criminal activities which, in turn, funded the group's support of Hizballah.

At the time the investigation unfolded in 1996, Congress had only recently enacted 18 U.S.C. § 2339B, which prohibited the provision of "material support and resources" to a designated foreign terrorist organization. The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), PUB. L. NO. 104-132, 110 Stat. 1214, made it illegal for persons within the United States, or subject to the jurisdiction of the United States, to "knowingly" provide, attempt to provide, or conspire to provide, "material support or resources" to a designated group. *See* AEDPA, § 303; 18 U.S.C. § 2339B(a)(1). The statute defines "material support or resources" to mean "currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine and religious materials." 18 U.S.C. §§ 2339A(b); 2339B(g)(4).

The challenge for prosecutors in this case was to develop charges that would encompass all of the group's activities, while simultaneously exposing the group for what it was, a Hizballah financing cell. Section 2339B and the Racketeer Influenced and Corrupt Organizations Act (RICO) provided such tools. 18 U.S.C. §§ 1961-1968. RICO, in particular, allowed the prosecutors in the case to include acts of illegality that were otherwise time barred because of the length of time it took law enforcement to uncover the illegal activity. It also allowed prosecutors to present evidence of fund-raising activities that dated back a number of years, that were not otherwise covered by the material support statute.

Ultimately, what the jury saw at trial was evidence not only supporting the substantive offenses that were charged, but also chilling examples of trade craft employed by terror support cells in this country:

- the utilization of immigration fraud to enter the United States and to establish residency in this country;
- the reliance on multiple identities to avoid detection by law enforcement;
- the resort to criminal activity to finance a terrorist group's operations;
- the use of propaganda to raise funds for a group; and
- the procurement of weapons and other goods for a terrorist group's use.

Expert testimony introduced at the trial established that members of terrorist support cells often enter into false marriages, or commit other types of immigration fraud, in order to enter the United States. Hizballah operatives, in particular, are known to enter this country through South America. In this case, Mohamad Hammoud, along with two cousins who were eventually charged as coconspirators in the case, entered the United States in 1992 by purchasing fraudulent U.S. visas in Venezuela. Mohamad Hammoud made several previous attempts to obtain a visa from the U.S. Embassy in Damascus, Syria. Upon arriving at JFK International Airport, Mohamad Hammoud presented a Lebanese passport bearing a counterfeit U.S. Non-Immigrant visa stamp. Upon discovery of the fraud in New York, Mohamad Hammoud claimed "asylum," based upon alleged persecution by Hizballah. On December 14, 1993, an Immigration Judge denied Mohamad Hammoud's application for asylum and ordered that he be excluded and deported from the United States. On December 27, 1993, Mohamad

Hammoud filed a Notice of Appeal with the Board of Immigration Appeals.

Once in the United States, Mohamad Hammoud, entered into fraudulent marriages to United States citizens. For example, while his asylum appeal was pending, Mohamad Hammoud applied for adjustment of status based on an alleged December 7, 1994 marriage to a Sabina Edwards. The Immigration and Naturalization Services' (INS) documents submitted by Mohamad Hammoud, and someone purporting to be Sabina Edwards, were denied by the INS on the grounds that the documents were fraudulent. Mohamad Hammoud was given until September 6, 1996 to leave the United States. Undeterred, Mohamad Hammoud then entered into a second fraudulent marriage in order to improve his immigration status, this time to Jessica Wadel. When that marriage failed to secure his residency status, Mohamad Hammoud married Angela Tsioumas on September 12, 1997. He was not divorced from Jessica Wadel at the time. Based on his petition, and documents filed with the INS representing that he was married to Tsioumas, Mohamad Hammoud was accorded Conditional Lawful Permanent Residence Status on July 8, 1998. This status was accorded by the INS without knowledge of Mohamad Hammoud's previous fraudulent marriage to Sabina Edwards.

Mohamad's brother, Chawki Hammoud, and other relatives and members of the cell, engaged in similar conduct. Chawki Hammoud, for example, married a codefendant in the case, Jessica Fortune, on July 12, 1994. Based on the documents filed in connection with his fraudulent marriage to Fortune, Chawki Hammoud was granted Conditional Lawful Permanent Residence on May 1, 1995. Although Jessica Fortune had genuine affection for Chawki Hammoud, they never lived together as husband and wife. During the time of this sham marriage, Chawki Hammoud was actually married to his Lebanese wife, Dalida Darwiche, with whom he had children. The Hammoud's cousins and codefendants, Mohamad Atef Darwiche (married in March 1996), Ali Hussein Darwiche (married in November 1999), and Ali Fayez Darwiche (married in May 1996), also entered into fraudulent marriages for purposes of obtaining their immigration status. Notably, Ali Hussein Darwiche entered into a sham marriage with a local Charlotte woman in exchange for cancellation of a debt she owed.

In some cases, members of the group resorted to bribing government officials. Said Harb, a codefendant and childhood friend of Mohamad Hammoud, induced his employees, Terri Pish and Tonia Moore, to marry his brother, Hassiam Harb, and brother-in-law, Samir Debek, respectively. He also paid $10,000 to a local Charlotte man to travel to Lebanon for the purpose of entering into a sham marriage with his sister, Fatme Harb, Samir Debek's wife. In the process of making those arrangements, Said Harb bribed an official of the United States Embassy in Nicosia, Cyprus, assisted his relatives in obtaining fraudulent United States non-immigrant visas in Nicosia, and, in June and July 2000, attempted to bribe an official of the INS in the United States.

Once members of the cell established residency in this country, they quickly worked to assume the identities of other individuals in order to avoid detection by law enforcement, and to further their criminal activities. The investigation established that Mohamad Hammoud had two valid North Carolina drivers licenses, one in his name and another in an alias. Mohamad Hammoud also obtained other financial identities by purchasing or acquiring them from local Lebanese students who had returned to Lebanon after attending colleges in the Charlotte area. Mohamad Hammoud's codefendant, Said Harb, had so many identities that he needed a notebook in order to keep track of them. Harb told authorities that he would "max out" credit cards that he obtained with a particular identity, declare bankruptcy, then refrain from using the identity for another seven years until the credit record was expunged. When he was arrested, Said Harb had seven sets of false identities. Harb testified at trial that he made at least $150,000 in profit per identity.

In some instances, the cell members never used the identities they acquired. A search of Chawki Hammoud's home uncovered an employment authorization card with his picture, but in another person's name. Law enforcement officials did not come across that name in connection with any of Chawki Hammoud's activities during the entire four-year investigation. An expert witness testified at trial that this was perfect "terrorist trade craft," in that a terror operative would obtain a false identity that would remain unused until absolutely necessary.

With their residency status secured, the group resorted to cigarette smuggling and credit card bust-out schemes to support their activities in the United States and to raise funds for Hizballah, yet another known pattern of a terror support cell's *modus operandi*. In this case, the cigarette smuggling scheme took advantage of varying tax rates on cigarettes in North Carolina and Michigan. At the time of the conspiracy, North Carolina taxed a carton of cigarettes at fifty cents, and no tax stamp was required on the pack or

carton to show the permitted state of possession and resale. Michigan taxed cigarettes at a rate of $7.50 per carton and no tax stamp was required. Accordingly, a mini van loaded with 1,500 cartons of cigarettes purchased in North Carolina had the potential to generate more than $10,000 of profit from sales in Michigan.

In investigating the criminal activities of the group, traditional law enforcement techniques were employed to investigate the smuggling activity:

- physical surveillance;
- seizures;
- subpoenas;
- search warrants;
- cultivation of witnesses;
- investigative grand jury;
- analysis of telephone records;
- placement of pen registers on target phones;
- pole cameras; and
- financial analysis.

By 1999, the investigation had established that a core group of eight Charlotte residents, including the brothers Mohamad and Chawki Hammoud, and their employees, had purchased approximately $8 million worth of cigarettes in North Carolina for resale in the Detroit, Michigan area, generating profits of between $1.5 million and $2.5 million. These profits were laundered through fraudulent shells and alias names, and a large portion reinvested in the smuggling enterprise.

More than a dozen individuals were principals in the smuggling activities, and virtually all of them had multiple identities and forms of credit and financial accounts in each of their identities. The defendants involved in the smuggling routinely used each other's aliases and accounts. The complex financial transactions involved in the group's purchase of the cigarettes, as well as the associated money laundering, would generally follow this scenario. A conspirator, using an alias, would purchase bulk quantities of cigarettes from a wholesale distributor under the account of another conspirator or a front entity. The purchase would be made largely in cash, generating an invoice, but was often supplemented with a credit card in an alias or in a coconspirator's alias, or even a card assigned to a shell entity. Expenses associated with delivery of the cigarettes to Michigan, such as vehicle rentals, gas, and hotels, were charged on different credit cards. In Michigan, the smuggled cigarettes would usually be paid for in cash. At least one indicted Michigan customer wired nearly $500,000 to an alias account belonging to Mohamad Hammoud in Michigan. Hammoud then wired the funds to two Charlotte bank accounts, one in his own name and another in an alias. Funds were dispersed from all three accounts to coconspirators and to cover credit card charges incurred in the smuggling activity. Finally, the credit card debts would be paid from other coconspirators' accounts, often in alias names.

Shell businesses and non-existent entities were created and used in connection with the cigarette smuggling operation. Eastway Tobacco and Queen Tobacco, cigarette stores owned by Chawki Hammoud, were operated by Mohamad and Chawki Hammoud primarily as "front" stores for the smuggling operation. Other businesses, such as Cedars Restaurant and M & A Oil Company, were purchased with cigarette smuggling proceeds.

III. The Charlotte cell's "material support" to Hizballah

Subsequent to the initiation of the smuggling investigation, the FBI approached the U.S. Attorney's Office with information indicating that a Hizballah support cell existed in Charlotte, North Carolina. FBI source information indicated that in 1995, and continuing to July 20, 2000, Mohamad Hammoud was the leader of a group of Lebanese Shia Muslims who met for weekly prayer meetings in Charlotte. As many as forty people might attend the meetings at which, among other things, Mohamad Hammoud would speak about Hizballah operations in Lebanon, screen propaganda videotapes in which Hizballah violence was encouraged and celebrated, and broadcast speeches by such Hizballah leaders as Hasan Nasrallah, the General Secretary of the group. These meetings generally concluded with an appeal for donations that Hammoud would solicit on behalf of Hizballah. Source information also indicated that, in addition to the solicitations, Mohamad Hammoud insisted on setting aside a certain percentage of the illicit proceeds from the cigarette smuggling scheme for Hizballah.

At that time, the U.S. Attorney's Office also learned that codefendants Mohamad Hammoud and Said Harb were the subjects of court-authorized electronic surveillance under the Foreign Intelligence Surveillance Act (FISA). 50 U.S.C. §§ 1801-1811. These wiretaps were eventually declassified and approved, by the Attorney General of the United States, for use at trial. They included evidence not only of cigarette

smuggling, money laundering, and financial frauds, but Hizballah ties as well. Indeed, the FISA intercepts revealed that Mohamad Hammoud was in almost daily contact with individuals in Lebanon, discussing Hizballah's military operations. Among the interceptions were conversations between Mohamad Hammoud and Sheik Abbas Harake, Hizballah's military commander in the Beirut suburbs. Mohamad Hammoud was also captured in conversations with his brothers in which they discussed Hizballah's counter-intelligence operations and high level "martyrs" who were killed in operations against the Israelis in Southern Lebanon.

In addition, during the course of the intelligence investigation, the FBI learned that the Canadian Security Intelligence Service (CSIS) had conducted electronic surveillance of a Hizballah procurement operation in Vancouver, British Columbia. Charlotte codefendant, Said Harb, was part of this procurement effort. The operation was overseen by Hizballah's Chief of Procurement from Lebanon, Hassan Laqis, and carried out by an operative trained by Iran's Revolutionary Guard, Mohamad Dbouk. Hizballah wired tens of thousands of dollars from Lebanon to Canada for the purchase of "dual use" equipment, including night vision devices, GPS systems, laser range finders, high-end computer equipment and aviation software, and sophisticated photography gear. Later in the procurement effort, Hizballah entered into an agreement with its operatives in Canada to purchase equipment with fraudulent credit cards, and pay fifty cents on the dollar for all items procured. In an unprecedented cooperative effort, CSIS granted permission to use its reports of the intercepted communications in the instant case. The district court ordered the CSIS reports received into evidence pursuant to the hearsay exceptions of FED. R. EVID. 803(8) (Public records and reports) and FED. R. EVID. 803(5) (Recorded recollection). CSIS went so far as to provide surveillance photographs of Said Harb and Ali Amhaz, a member of the procurement effort, which were introduced at trial.

Finally, in July 2000, law enforcement agents executed eighteen search warrants in Charlotte and arrested eighteen individuals. Along with the valuable financial evidence seized in the searches, a virtual library of Hizaballah propaganda, including videotapes of Hizballah military operations, incendiary anti-American speeches by Hizballah leaders, books and pamphlets on the subject of Hizbollah and Islamic extremist leaders and operations, were found in the home shared by Mohamad Hammoud and other cell members. Two receipts were found from Shaykh Muhammad Husayn Fadlallah, a "Specially Designated Terrorist," under Exec. Order. No. 12,947, 60 Fed. Reg. 5079 (Jan. 23, 1995) and the "leading ideological figure of Hizballah." Also found was correspondence to Hammoud from a coconspirator confirming Hammoud's role as leader in the Hizballah fund-raising effort, and linking the cigarette smuggling activity to the Charlotte Hizballah Cell.

> As you know brother Mohamad, the Resistance is always in need for support and the distinction is that the Resistance's support is on the shoulders of the weak so, if there was an opportunity to work as you did at the end of the gatherings, donate to the Resistance, and when one of the guys is coming to Lebanon, especially here in the south, they need the support.

Among the correspondence in Hammoud's home were letters to him from Hizballah's military commander for the Beirut suburbs referencing their former relationship and discussing Hizballah's activities. "We knew each other in the several locations where we worked together.... My brother and loved one Mohamad, words are nothing but an illustration, hopefully accurately, towards a dear brother who has not forgotten his field of work...."

All of this evidence was introduced during the five-week trial. In June 2002, Mohamad and Chawki Hammoud were found guilty on all charges. Mohamad Hammoud became the first defendant convicted, by a jury, of providing material support and resources to a designated foreign terrorist organization (Hizballah), of RICO conspiracy alleging the host of crimes of the Charlotte Hizballah Cell, conspiracy to smuggle contraband cigarettes, and conspiracy to launder the proceeds of the smuggling, among other charges. He was sentenced to 155 years in prison. An appeal is pending.❖

ABOUT THE AUTHORS

❑**D. Scott Broyles** has been an Assistant United States Attorney in the Organized Crime Drug Enforcement Task Force Section for the Western District of North Carolina since 1997. Mr. Broyles was awarded the John Marshall Award for Outstanding Legal Achievement for Trial of Litigation for the *U.S. v. Hammoud* trial. Prior to coming to the Department he was in private practice in Augusta, Georgia.

❑**Martha Rubio** is a trial attorney in the Department's Counterterrorism Section. She was

co-recipient of the John Marshall Award with Mr. Broyles. Ms. Rubio has been the Department of Justice nine years. She has been assigned to the Counterterrorism Section for the last three years.✠

Bolstering Cargo Container Security: How U.S. Attorneys' Offices Can Make a Difference

Stephen E. Flynn
Commander, United States Coast Guard (Ret.)

Peter Hall
United States Attorney
District of Vermont

I. Introduction

"Every time you talk about this [subject], it scares me to death," says Michael Shelby, United States Attorney for the Southern District of Texas. Mr. Shelby has good cause for concern. His district includes the Ports of Houston and Galveston that together load and receive more tonnage of material than any other port in the world. Everyone in the U.S. Attorney community should be worried about this issue, whether your district is home to a major seaport, to truck and rail terminals, or just miles of interstate highways. Cargo security remains one of America's gravest vulnerabilities and the stakes are greater than just the potential for a ship, train, or truck, to serve as a low-tech weapons delivery device. If a catastrophic terrorist incident led to even a temporary shutdown of U.S. transportation systems, the cost to the economy would run into the billions of dollars within forty-eight hours. Should U.S. ports remain closed for just three weeks while we struggle to sort things out, the entire global trade system would effectively grind to a halt.

II. The problem

The economic and societal disruption created by the September 11, 2001 (9/11) attacks has opened Pandora's box. Future terrorists bent on challenging U.S. power will draw inspiration from the seeming ease at which America could be attacked, and they will be encouraged by the mounting costs to the U.S. economy, and the public psyche associated with the ad hoc efforts to restore security following that attack. Nineteen men wielding box cutters forced the United States to do to itself what no 20th century adversary could ever have dreamed of accomplishing: a successful blockade of the U.S. economy. If a surprise terrorist attack were to happen tomorrow involving the sea, rail, or truck transportation systems that carry millions of tons of trade to the United States each day, the response would likely be the same–a self-imposed global embargo.

United States prosperity, and much of its power, relies on its ready access to global markets. Both the scale and pace at which goods move between markets have exploded in recent years, thanks in no small part to the invention and proliferation of the intermodal container. These ubiquitous boxes–most come in the 40'x8'x8' size–have transformed the transfer of cargo from a truck, train, and ship, into the transportation equivalent of connecting Lego blocks. As a result, the role of distance for a supplier or a consumer as a constraint in the world marketplace has diminished. Ninety percent of the world's freight now moves in a container. Companies like Wal-Mart and General Motors move up to thirty tons of merchandise or parts across the vast Pacific Ocean from Asia to the West Coast for about $2,500. The transatlantic trip runs just over $1,800.

The system that underpins the incredibly efficient, reliable, and affordable, movement of global freight has one glaring shortcoming in the post-9/11 world–it was built without credible safeguards to prevent it from being exploited or targeted by terrorists and criminals. Prior to 9/11, virtually anyone in the world could arrange with

an international shipper or carrier to have an empty intermodal container delivered to a home or workplace. They then could load it with tons of material, declare in only the most general terms what the contents were, "seal" it with a fifty-cent lead tag, and send it on its way to any city or town in the United States. The job of transportation providers was to move the box as expeditiously as possible. Exercising any care to ensure that the integrity of a container's contents was not compromised may have been a commercial practice, but it was not a requirement.

The responsibility for making sure that goods loaded in a box were legitimate and authorized was shouldered almost exclusively by the importing jurisdiction. As the volume of containerized cargo grew exponentially, the number of agents assigned to police that cargo stayed flat or even declined among most trading nations. The rule of thumb in the inspection business is that it takes five agents three hours to conduct a thorough physical examination of a single, full intermodal container. Last year nearly 20,000,000 containers came across America's borders via a ship, train, or truck. Front line agencies had only enough inspectors and equipment to physically examine about 3 percent of that cargo.

Thus, for would-be terrorists, the global intermodal container system, that is responsible for moving the overwhelming majority of the world's freight, satisfies the age-old criteria of opportunity and motive. "Opportunity" flows from: (1) the almost complete absence of any security oversight in the loading and transporting of a box from its point of origin until it arrives on U.S. shores; and (2) the fact that the growing volume and velocity at which containers move around the planet create a daunting "needle-in-the-haystack" problem for inspectors. "Motive" is derived from the role that the container now plays in underpinning global supply chains, and the likely response by the U.S. government to an attack involving a container. Based on statements by key officials at U.S. Customs and Border Protection, Transportation Security Administration, U.S. Coast Guard, and the Department of Transportation, should a container be used as a "poor man's missile," the shipment of all containerized cargo into our ports and across our borders would be halted. As a consequence, a modest investment by a terrorist could yield billions of dollars in losses to the U.S. economy by shutting down, even temporarily, the system that moves "just-in-time" shipments of parts and goods.

Given the primitive state of container security, it is hard to imagine how a post-event lock-down on container shipments could be either prevented or short-lived. One thing we should have learned from the 9/11 attacks involving passenger airliners, the follow-on anthrax attacks, and even the fall 2002 Washington sniper spree, is that terrorist incidents pose a special challenge for public officials. In the case of most disasters, the reaction by the general public is almost always to assume the event is an isolated one. Even if the post-mortem provides evidence of a systemic vulnerability, it often takes a good deal of effort to mobilize a public policy response to redress it. Just the opposite happens in the event of a terrorist attack–especially one involving catastrophic consequences. When these attacks take place, the general public almost always presumes a general vulnerability unless there is proof to the contrary. Government officials have to confront head-on this loss of public confidence by marshaling evidence that they have a credible means to manage the risk highlighted by the terrorist incident. In the interim, as recent events have shown, people will refuse to fly, open their mail, or even leave their homes.

If a terrorist were to use a container as a weapon-delivery device, the easiest choice would be high-explosives such as those used in the attack on the Murrah Federal Building in Oklahoma City. Some form of chemical weapon, perhaps even involving hazardous materials, is another likely scenario. A bio-weapon is a less attractive choice for a terrorist because of the challenge of dispersing the agent in a sufficiently concentrated form beyond the area where the explosive device detonates. A "dirty bomb" is a more likely threat vs. a nuclear weapon, but all these scenarios are conceivable since the choice of a weapon would not be constrained by any security measures currently in place in our seaports or within the intermodal transportation industry.

This is why a terrorist attack involving a cargo container could cause such profound economic disruption. An incident triggered by even a conventional weapon going off in a box could result in a substantial loss of life. In the immediate aftermath, the general public will want reassurance that one of the many thousands of containers arriving on any given day will not pose a similar risk. Government leaders would have to stand before a traumatized, and likely skeptical, American people and outline the measures in place to prevent another such attack. In the absence of a convincing security framework to manage the risk of another incident, the public would likely insist that all containerized cargo be stopped until adequate safeguards are implemented. Even with the most focused effort, constructing that framework from

scratch could take months–even years. Yet, within three weeks, the entire worldwide intermodal transportation industry would effectively be brought to its knees, as would much of the freight movements that make up international trade.

III. The imperative

To prevent this potential nightmare, what is required is an effective risk management approach to container security. Prior to 9/11, the elements to underpin such an approach were simply not up to the task.

Before the most recent post-9/11 initiatives to enhance container security, the means for concluding that a shipment was legitimate, at its point of origin, was based strictly on an evaluation of the requisite documentation accompanying the shipment. If there were no discrepancies in the paperwork and a shipper had a good compliance track record, the shipments were automatically cleared for entry. However, the requirements surrounding the documentation for these "trusted shippers," charitably put, were nominal. For instance, shippers involved in consolidating freight were not required to itemize the contents or identify the originator or the final consignee for their individual shipments. The cargo manifest would simply declare the container had "Freight All Kind" (F.A.K.) or "General Merchandise." The logic behind taking this approach was straightforward when the primary inspection mandate was to collect customs duties. The presumption was as long as a company maintained appropriate in-house records, the data presented up front could be kept to the bare minimum. Compliance could be enforced by conducting audits.

Inspectors, intent on confirming that the integrity of a container had not been violated on its way to its final destination, relied primarily on a numbered seal that is passed through the pad-eyes on the container's two doors. As long as the number on the seal matched the cargo manifest, and there were no obvious signs of tampering, the container's contents were assumed to be undisturbed. This remains the case today even though front-line enforcement agents have known for some time that there are a number of relatively straightforward ways to break into a container, including removing the door hinges, without disturbing the seal.

A risk management plan, on the other hand, addresses the security risk from a different perspective. At its heart, risk management presumes that there is a credible means to: (1) target, safely examine, and isolate containers that pose a potential threat; and (2) identify legitimate cargo, the movement of which can be facilitated without subjecting it to an examination. The alternative to risk management is to conduct random inspections or to subject every cargo container to the same inspection regime. Risk management is the better of these two approaches for both economic and security reasons. The economic rationale is straightforward. Enforcement resources will always be finite and delays to legitimate commerce generate real costs.

Less obvious is the security rationale for risk management. There is some deterrent value to conducting periodic random inspections. However, over 99 percent of shipments are perfectly legitimate and belong to several hundred large importers. Reliance on random inspections translates into spending the bulk of the time and energy on examining containers belonging to the most frequent users of containerized cargo, which are most likely perfectly clean.

Examining 100 percent of all containers is not only wasteful, but it violates an age-old axiom in the security field that if "you have to look at everything, you will see nothing." Skilled inspectors look for anomalies and invest their finite time and attention on that which arouses their concern. This is because they know that capable criminals and terrorists often try to blend into the normal flow of commerce, but they invariably get some things wrong because they are not real market actors. An aggressive inspection regime that introduces substantial delays and causes serious disruption to the commercial environment can actually undermine an enforcement officer's means to conduct anomaly detection. Accordingly, allowing low risk cargo to move as efficiently as possible through the intermodal transportation system has the salutary security effect of creating a more coherent backdrop against which aberrant behavior can be more readily identified.

Deciding which cargo container deserves facilitated treatment, in turn, requires satisfying two criteria. First, an inspector must have a basis for believing that when the originator loaded the container, it was filled only with legitimate and authorized goods. Second, once the container is on the move through the global intermodal transportation system, an inspector must be confident that it has not been intercepted and compromised. If the inspector cannot point to a reliable basis for assuming these two criteria are satisfied, in the face of a heightened terrorist threat alert, that person must assume that the container poses a risk and target it for examination.

In short, the effort should be to push for point-of-origin to point-of-destination security. That is, know what is being put in the box and secure it in a way to be able to monitor it, and ensure that nothing is added along the route. From a theft-prevention perspective, this system would also help ensure that nothing is removed while the box is in transit.

IV. Addressing the problem/meeting the imperative

In August 2001, a Law Enforcement Coordinating Committee intelligence sub-group comprised of local, state and provincial, and federal officers and agents, principally from Ontario, Quebec, northern New England, and northern New York, gave support to the concept of an interagency, intermodal, and international initiative for cargo container security now called "Operation Safe Commerce–Northeast" (OSC-NE). The working group's aim was to develop a means to enhance cooperation and information sharing between the public and private sectors, and to tap the power of off-the-shelf technologies to monitor and strengthen the integrity of cargo container supply chains from their point-of-origin to their point-of-delivery.

Well before 9/11, all the agencies involved with this initiative were confronting increasingly sophisticated organized criminal operations in close proximity to the border. These involved smuggling of humans and contraband, including drugs and stolen property. For more than a decade, the group worked together and confronted such challenges as drug shipments that arrived via cargo containers in the Port of Montreal, and were then smuggled south into the United States. They also worked to intercept the flow of stolen vehicles from the northeast that were driven across the border to be shipped overseas from Canada by the same method. Additionally, there was a growing amount of theft of high-value goods from container shipments while in and around the port. All this highlighted the vulnerability of containers which could be breached by nefarious elements on a regular basis.

In late August 2001, members of the LECC group led by James Leene of the Office of the U.S. Attorney for the District of Vermont, and Raymond Gagnon, then the U.S. Marshal for the District of New Hampshire, offered to serve as a test bed for a comprehensive container security pilot project first proposed by Stephen Flynn, who was then an active duty Commander in the U.S. Coast Guard. The events of 9/11 sparked a real sense of urgency to forge ahead with this initiative. Everyone involved recognized that the same method used in traditional smuggling of contraband, whether drugs, cigarettes, knock-off products, or other goods, could be used to support terrorist activities with devastating consequences. They were deeply concerned that the United States was in a race to prevent the ultimate nightmare scenario: that the component parts of weapons of mass destruction (WMDs) might be smuggled into the country via a cargo container, then assembled, and set off on Main Street, USA.

The purpose of OSC-NE was to identify where injection and removal points occurred in a simple cargo container supply chain, and to begin testing some possible technologies to detect intrusions and track the container for anomalies. Coming together in this effort were the top federal agency representatives from the Northeast, including the U.S. Customs Service, U.S. Coast Guard, U.S. Immigration and Naturalization Service, U.S. Attorneys' Offices, and U.S. Marshals Service. They joined together to forge a unique partnership with the state economic communities, particularly those of New Hampshire, and importantly, through the state economic development arm, with members of the private sector.

Members of the working group began having serious discussions with representatives of agencies in Washington to secure federal sponsorship for a pilot phase of OSC-NE. In conjunction with this effort, the Volpe National Transportation Systems Center of Cambridge, Massachusetts, prepared a white paper proposing to study a simple cargo container supply chain. The joint Department of Defense/Department of State Technical Support Working Group agreed to fund the Volpe Center's initial effort, and the loose-knit affiliation that had come together to promote this project took on a more structured existence. The United States Attorneys for the Districts of New Hampshire and Vermont appointed a joint law enforcement coordinating committee subcommittee to be tri-chaired by each of them and the Governor of New Hampshire. The rural and economic development arm of New Hampshire provided the necessary and critical linkage to the private sector.

As articulated in its mission statement, Operation Safe Commerce represented a comprehensive coalition of federal agencies, state governments, and private sector businesses committed to the concept of enhancing border and international transportation security, without impeding free trade and international commerce. As the working group reminded itself on a regular basis, it worked together "on a spit and a handshake" basis. Agency egos were "checked at the door." Its limited strategic goal was simple:

provide a demonstration model for the international container shipping system that maintains open borders and facilitates commerce, while improving security practices by using point-of-origin security, in transit tracking and monitoring, and data query capability, designed to validate and facilitate the movement of containerized cargo.

The LECC Working Group convened on a bi-weekly basis either by telephone conference or in face-to-face meetings. Their first priority was to assist Volpe in refining the parameters of the proposed demonstration project. Next they worked to anticipate and clear any potential bureaucratic hurdles that may have slowed down the execution of the project. Finally, they provided an ongoing forum to review and analyze the Volpe reports and assist in the preparation of the final report. Throughout the process, the group's aim was to ensure that the prototype would not be simply a flash in the pan. Their goal was to produce findings which could then be used to promulgate regulations and set new security standards to govern the international transportation of cargo containers. The hope was that this pioneering effort would provide the foundation for a comprehensive risk management approach by striking the optimal balance between facilitating the flow of commerce and protecting the nation from terrorists.

Phase One of the project was accomplished in two parts, both of them involving cargo containers from a plant owned by Osram-Sylvania that manufactured automobile light bulbs in Nove Zamke, Slovakia. Every two weeks, Osram-Sylvania loaded and shipped a full container of the light bulbs via the Port of Hamburg, Germany, to the Port of Montreal, then across the U.S.-Canadian border at Highgate Springs, Vermont, where they were received at an Osram-Sylvania plant in Hillsboro, New Hampshire. In the first stage of the pilot, the Volpe Team studied the actual supply chain for a cargo container, to document the way in which the cargo container was handled, and the various potential problems for intrusion that could occur along the route. Second, Volpe put instrumentation and monitoring devices on a second container to determine whether it could be tracked and monitored effectively with commercially available technology.

The tested container was outfitted with a Global Positioning Satellite (GPS) device capable of tracking and recording the container's movement. The Volpe technicians also installed a series of light and magnetic sensors which could detect an intrusion into the container, much like a home alarm system. If the sensors detected a problem, they could transmit that information to an electronic seal on the exterior door of the container. The GPS tracking data and the intrusion data monitored by the interior sensors were downloaded to nodes at the outset of the container's trip, at the seaport entryways in Hamburg, Germany, and Montreal, at the border port of entry at Highgate Springs, Vermont, and at the receiving company premises in Hillsboro, New Hampshire. This data was then transmitted to Volpe's headquarters in Cambridge, Massachusetts.

The pilot project highlighted a number of potential vulnerabilities that confirmed the anxieties of the working group members. As later discussed in a March 20, 2003 hearing of the U.S. Senate Committee of Governmental Affairs, the loaded container left the manufacturing plant in Slovakia unsealed. The container was not sealed until it cleared Slovak customs. Also, the container involved was held up at a border crossing in Europe for an extended number of hours. The waiting truck traffic at that point was drawn up alongside a tent city that had the kind of age-old attractions likely to tempt a driver to leave his rig unattended, potentially leaving the container susceptible to tampering.

Most distressing was that the container passed through five international jurisdictions and in and out of two seaports without any official ever inquiring about why the container was outfitted with such unusual, and potentially frightening, equipment. This despite the fact that the container door was adorned with a six-inch GPS antenna temporarily held in position with magnets, from which ran several foot-long black wires via the electronic seal to the gasket on the right side of the container door. Nor did they open it up to find an automotive battery and sensor equipment bolted to the side of the internal container wall. None of these agents had been forewarned about the pilot, yet no official, including those at the U.S. border, ever raised a question. Since the container was judged to be a routine and low-risk shipment, it is unlikely that an inspector ever stepped around the back of it to spot this special equipment, even though it was in plain sight.

The OSC–NE, Phase I prototype highlighted a core reality of modern global logistics–even the most trusted shippers currently possess little to no capacity to monitor what happens to their freight when it is in the hands of their transportation providers. As long as it arrives within the contracted time frame, they have had no incentive to do so. The test runs informed the OSC-NE working group, and the agencies represented by the members of that group, that there is a solid and necessary basis for continuing to explore

both container tracking and container intrusion detection.

The group, however, always saw itself as a vehicle for providing data which could be used for setting standards to ensure greater safety from intrusion in the handling and transportation of cargo containers to regulatory bodies within the United States, and through them to international entities. Indeed, in a proposed Phase Two, OSC-NE is partnering with Lawrence Livermore National Laboratory to test additional intrusion detection devices within the container, and monitoring and detection equipment to be used in moving containers at the ports. How soon more comprehensive technical solutions to container tracking and intrusion will be developed depends, of course, on further comprehensive study and monitoring of more complex supply chains for additional vulnerabilities that may be addressed by technology. In the meantime, Operation Safe Commerce grants to the ports of Los Angeles/Long Beach, Seattle/Tacoma, and New York/New Jersey to study a number of additional supply chains were announced by Secretary of Homeland Security, Tom Ridge, in June 2003.

V. Other initiatives and their limitations

Shortly after 9/11, the U.S. Customs Service, now the Bureau of Customs and Border Protection (CBP), began an initiative called the Customs-Trade Partnership Against Terrorism (C-TPAT). The goal has been to encourage greater awareness and self-policing among the private sector participants most directly involved with shipping, receiving, and handling, containerized cargo. Since it was first announced in January 2002, thousands of companies have joined the partnership. However, CBP has virtually no staffing resources to monitor the level of compliance among the C-TPAT participants. Until this lack of auditing capacity is addressed, C-TPAT risks creating a greater degree of confidence in private-sector efforts to tighten up security than the facts may warrant.

CBP has also initiated the Container Security Initiative (CSI), which involves placing U.S. inspectors in foreign ports to support targeting and inspection efforts overseas before containers are loaded on a vessel destined for the United States. CSI represents a true paradigm shift by changing the focus of inspection from the arrival port to the loading port. The potential result is to provide greater strategic depth in identifying and intercepting dangerous cargo, and to improve cooperation among our key trade partners in advancing this vital agenda. As in C-TPAT, CBP is undertaking a daunting and vital task with few additional resources. For instance, there are under ten U.S. inspectors working alongside thirty-five Hong Kong counterparts examining outbound cargo. Their challenge is superhuman since the Port of Hong Kong operates twenty-four hours a day, seven days each week, moving more than a half a million 40' containers each month.

Assigning U.S. inspectors overseas, and playing host to foreign CSI participant inspectors here at home, improves both the timing and quality of targeting which containers should be viewed as high risk and, therefore, subject to inspection. This is why CBP's new "twenty-four-hour rule," requiring manifest data to be in the hands of the inspectors a full day in advance of cargo arrival, is so essential. CSI is meaningless unless the risk assessment that it is intended to support can be accomplished by an inspector in a loading port. Thus, the data must arrive in time for an inspector to analyze it and to follow up on any resulting questions. The "twenty-four-hour rule" alone is unable to correct the longstanding problem of receiving data detailed and reliable enough to inspire real confidence in the capacity of targeting programs to detect anomalies. Indeed, cargo manifests have been notoriously unreliable documents. Accordingly, advance risk assessments must be built around more detailed commercial data that ideally goes all the way back to an original purchase order for an imported good. Failing that, the targeting of shipments, whether conducted at a U.S. port or overseas, will not likely pass the public credibility test following any attack that may involve a precleared shipment.

Current and future projects associated with the Operation Safe Commerce initiative hold out real promise of a comprehensive and credible approach to container security. It builds on C-TPAT and CSI but goes the next step by: (1) creating a greater understanding of the current vulnerabilities within a variety of global supply chains; and (2) ensuring that new technologies and business practices designed to enhance container security are both commercially viable and successful. Nevertheless, OSC will be of little value if the endgame is not ultimately about arriving at common performance based standards that can be quickly developed and adequately enforced within the global transportation and logistics community. At the end of the day, the stakeholders who undertake enhanced security measures must not be at a competitive disadvantage for taking steps to serve broader public interests.

As noted above, there are now other supply chain studies in the works at the three largest

United States load centers: Los Angeles/Long Beach, Seattle/Tacoma, and New York/New Jersey. To date, however, the single Osram-Sylvania shipment organized by the OSC-NE project in the spring of 2002 remains the only complete operational study of supply chain security that has produced findings of this daunting challenge. Given the complexity of the intermodal container transportation system, additional testing of actual supply chains and technical modalities is clearly warranted. The data from all of these sources should be used to detect and analyze vulnerabilities not yet identified, and to articulate best practices, standards, and regulations for the handling of cargo containers that will decrease their vulnerability, and ensure that they can move expeditiously through the cargo container transportation system.

VI. Implications for U.S. Attorneys' Offices

The membership of the OSC-NE working group is built on an LECC model, but from the outset it sought out participants beyond the U.S. law enforcement community. It recognized that the only hope for success in advancing supply chain security was to create a venue where a variety of agencies, across multiple jurisdictions, could roll up their sleeves and work in close partnership with all the relevant private stakeholders. This kind of approach needs to be replicated if we are to succeed at safeguarding many of the critical foundations upon which the American way of life and quality of life rests. U.S. Attorneys' Offices can play an invaluable role in mustering the interagency cooperation and engagement with the private sector and cross-border counterparts that is required to advance homeland security.

With respect to the challenge of supply chain security, if a U.S. Attorney's Office has not already done so, it should assess the scope of the issue in its own district. Know who is receiving containers and who is moving them. Find out their origins and where they may have stopped along the way. By asking questions that our fellow agencies and private partners have to answer, we help educate them about the nature and scope of the problem, and the roles that each must play in achieving a solution.

Understand which agencies may have significant responsibility for regulating or monitoring container freight in the district. If there is a seaport by which containers first arrive, there will be Port Security Committees and Coast Guard and Customs officers who will have initial responsibility. Citizenship and Immigration personnel may have an interest in the crews of the ships delivering the containers. Whether or not there is a port in the district, as the containers move off the docks and into the stream of commerce, transportation agencies, railroad police, and state and local police, may each have encounters with containers. Within the private sector, reach out to shippers and freight forwarders, shipping lines, rail lines, truck lines, and warehouse and terminal operators. Each of these entities can bring its expertise to bear on the security issue.

Use the information gathered to assess the potential problems and vulnerabilities posed by cargo containers in a district, to establish new coalitions, and to enhance existing ones. Determine the training needs identified as a result of these inquiries, and begin to meet them. Finally, as the U.S. Attorneys' Offices have done so often recently, ensure that there are cross-district coalitions in place to address this issue.

At the end of the day, container security is about constructing the means to sustain global trade in the context of the new post-9/11 security environment. That the aim is global in scope does not mean that U.S. Attorneys' Offices, through ATAC's, LECC's, or other coordinated, multiagency efforts, are precluded from playing a role. To the contrary, working to achieve effective coalitions to address serious enforcement and security problems has been something these offices have done effectively for at least two decades. Now that same leadership and coordination must include active participation in formulating solutions to this pressing problem.❖

ABOUT THE AUTHORS

❑**Stephen E. Flynn**, Commander, U.S. Coast Guard (ret.), is a Jeane J. Kirkpatrick Senior Fellow in National Security Studies and Director, Council on Foreign Relations Independent Task Force on Homeland Security Imperatives. Dr. Flynn served in the Coast Guard on active duty for twenty years, retiring at the rank of Commander. He was a Guest Scholar in the Foreign Policy Studies Program at the Brookings Institution from 1991-92, and in 1993-94 he was an Annenberg Scholar-in-Residence at the University of Pennsylvania.

Dr. Flynn ranks among the world's most widely cited experts on homeland security, border control, and trade and transportation security issues. Harper Collins will be publishing his book, AMERICA THE VULNERABLE: THE STRUGGLE TO SECURE OUR HOMELAND" in early 2004. His recent works include *America the Vulnerable*, in FOREIGN AFFAIRS (Jan/Feb 2002), *The Unguarded Homeland* in HOW DID THIS

HAPPEN? TERRORISM AND THE NEW WAR, Public Affairs Books (Nov 2001); and *Beyond Border Control*, FOREIGN AFFAIRS (Nov/Dec 2000). Since 9/11 he has provided testimony on eight occasions on Capitol Hill and has testified before the Canadian House of Commons. He has appeared as a guest commentator on *Nightline*, the *Charlie Rose Show*, *60 Minutes*, *The Today Show*, *Good Morning America*, and NPR's *All Things Considered* and *Morning Edition*. He is the founder of an innovative private-public partnership to advance global container security involving the America's largest ports known as "Operation Safe Commerce" and serves as the principal advisor to the bipartisan Congressional Port Security Caucus.

Peter W. Hall is a United States Attorney for the District of Vermont. He was an Assistant United States Attorney for the District of Vermont from 1978 to 1986, and from 1982 to 1986 served as the First Assistant United States Attorney for that District. From 1986 to 2001, he practiced law in the private sector in Rutland, Vermont.

Since being sworn in as United States Attorney on October 5, 2001, Mr. Hall has been a member of the Attorney General's Advisory Sub-Committee on Border and Immigration Issues, a US co-chair of the Prosecutors' Working Group of the US/Canada Cross-Border Crime Forum, and co-chair, with New Hampshire's United States Attorney, of a joint New Hampshire–Vermont multi-agency working group for Operation Safe Commerce, focused on international cargo container security. Mr. Hall also serves as a member of the multi-agency Executive Steering Committee for Operation Safe Commerce that meets monthly in Washington, D.C. In March 2003, Mr. Hall provided testimony before Congress on the project undertaken by the Operations Safe Commerce–Northeast working group. ✠

NOTES

Request for Subscription Update

In an effort to provide the UNITED STATES ATTORNEYS' BULLETIN to all who wish to receive it, we are requesting that you e-mail Nancy Bowman (nancy.bowman@usdoj.gov) with the following information: Name, title, complete address, telephone number, number of copies desired, and e-mail address. If there is more than one person in your office receiving the BULLETIN, we ask that you have one receiving contact and make distribution within your organization. If you do not have access to e-mail, please call 803-576-7659. Your cooperation is appreciated.