



---

Volume 18 | Issue 6

Article 8

---

1973

## Skyjacking: Problems and Potential Solutions

Benjamin O. Davis Jr.

Joel M. Gora

John B. Hannum

John T. Dailey

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/vlr>

 Part of the [Air and Space Law Commons](#), [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Criminal Law Commons](#), and the [Transportation Law Commons](#)

---

### Recommended Citation

Benjamin O. Davis Jr., Joel M. Gora, John B. Hannum & John T. Dailey, *Skyjacking: Problems and Potential Solutions*, 18 Vill. L. Rev. 1056 (1973).

Available at: <https://digitalcommons.law.villanova.edu/vlr/vol18/iss6/8>

This Symposia is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

## SKYJACKING: PROBLEMS AND POTENTIAL SOLUTIONS

## I. AFTERNOON PANEL DISCUSSION

PROFESSOR DOWD: At this point, we would like to entertain questions or statements from our guests.

PROFESSOR BUTKYS:\* We now have an order that every passenger boarding a plane must be searched. This indicates that everybody is suspected of being a hijacker, a concept which is directly contrary to our fundamental tenet that one is innocent unless proven guilty. It appears that we are operating under some sort of pseudo-martial law. I interject the word *martial* law because we are working under an excitement situation. Usually, the exercise of martial law is tied to a time limitation, but I see no limitation in the order on the basis of which this particular exercise of power can be reviewed. I, personally, think there should be some sort of time limitation no matter what kind of system the DOT, FAA, or anybody else designs. Do you think that the fact that we do not have any time limit on this edict is a legitimate concern?

GENERAL DAVIS: We do not regard the imposition of a universal search as being martial law in any sense of the word. We do regard it as being permanent as far as achieving an objective is concerned. I think we all agree that it is presently being done in a rather clumsy fashion and, consequently, the manner of the search should be refined. However, I cannot, in any way, see a relaxation of the electronic search, which is really the heart of your question. Regarding the handling of baggage, for example, I saw a device yesterday afternoon which would eliminate the need for opening any baggage. The baggage is placed on a conveyor belt, passed along and that is the end of it. Yet, that is a search just as it is a search of an individual who passes through a magnetometer. If those methods of electronic search are determined to be illegal or unconstitutional, it will be necessary that we accommodate and find a method that is constitutional and achieves the same objectives. I hope that I have answered the question.

PROFESSOR BUTKYS: You said that if the present system is found unconstitutional we may have to find another method that would conform to the Constitution. Why wait that long?

---

\* Professor of Business Administration, College of Commerce and Finance, Villanova University.

GENERAL DAVIS: First, I do not agree that the present system is unconstitutional. It has not been shown to be unconstitutional, and until it is, I see no need to make any changes, except perhaps from the standpoint of alleviating the "harassment of passengers." Towards that end, the system should be refined. It should be done in a manner which would avoid having to go through a woman's purse, not necessarily a pleasant thing to do. One should be able to achieve the objective without opening up a man's bag and examining his dirty laundry.

MR. GORA: Let me disagree with General Davis very briefly. What has been upheld by the courts is the prior system. The difference between that system and the one in effect today has already been described. The prior system was arguably in line with fourth amendment doctrine. I have yet to hear a good argument, other than Judge Friendly's which was based on the danger of skyjacking alone, that the present system is constitutional.

I think that the suggestion of the analogy to martial law is very appropriate. If there were checkpoints set up at major intersections in connection with racial or urban disorder of some kind, we would assume that those actions were being taken under a principle of martial law. Checkpoints here are being set up in the airports to accomplish a similar purpose. It does not help the analysis any to deny that that is what they are. I think it is a potent form of martial law applied in a limited context. I do not think the fact that the context is limited makes it less objectionable.

THE HONORABLE JOHN B. HANNUM:\* Mr. Gora, in connection with the heavy responsibility of the court in sentencing, I wonder what your views would be with respect to the presence in court of someone who might present a somewhat sterner viewpoint which the court could consider when pronouncing sentence. The defendant is represented at the time of sentence by defense counsel who presents extenuating circumstances for passionate consideration on behalf of the defendant. What would you think about having someone from the Airline Pilots Association, for example, present at that time to articulate another viewpoint?

MR. GORA: I think it would be the same as if the views of the family of the victim of any violent crime were to be taken into consideration by the courts in passing sentence. I do not attempt to minimize the danger of hijacking or to suggest that it is anything less than

---

\* District Judge, United States District Court for the Eastern District of Pennsylvania.

terrifying for those involved. What I did try to say earlier was that if danger alone in this context justifies what I consider to be extraordinary measures, then danger in any other context justifies extraordinary measures — that is what concerns me. If the question is in terms of the appropriateness at sentencing of considering the danger or the harm that was posed by the defendant, I would imagine that the courts could consider that. If the question is whether a representative of those threatened by that harm should be allowed to participate in the sentencing procedure, I am not so sure that the same considerations would be involved.

JUDGE HANNUM: In other words, you would not object philosophically to a representative who might present the sterner side?

MR. GORA: I think I would object procedurally to having such a representative there. As I understand it, that is not part of the sentencing procedure. I would not necessarily object, philosophically, to a judge taking into consideration the nature of the attempted crime when the sentence is being determined.

PARTICIPANT: In light of the fact that he has defended the indiscriminate search tactics on the grounds that there had been a rash of outbreaks of air violence, I would like to ask General Davis if that rationale does not necessarily imply some time limit and that, as soon as possible, we should revert to a selective approach?

GENERAL DAVIS: The direct answer to your question is that we attempt a continuous evaluation of the situation. I have heard a lot of optimism expressed here this afternoon that I think is currently unwarranted. Captain Fenello was correct when he noted that we have had these periods of lull before. While I believe very strongly that our methods of dealing with hijacking must be continually evaluated, I feel that we cannot return to the selective method because I do not believe that people will do the job. They have shown that they will not do the job, and that they just cannot maintain their attention with the volume of air travel that we have in this country — one-half million passengers a day, on 2,200 airplanes at over 500 airports. Getting these thousands of people to do exactly as Dr. Dailey's system prescribes has not yet shown itself to be possible. However, I would not rule out any change in the system if the conditions that we thought existed indicated that such a change should be made.

DR. DAILEY: I would like to bolster what General Davis says. We have had lulls and it is going to be very difficult to tell when the

threat really has diminished. Two incidents which involved violence and death occurred in October 1972, and came after the longest lull we had had in 3 or 4 years.

CAPTAIN O'DONNELL: If we look at the type of hijacking we had in this country back in 1963, 1964, and 1965, foreign policy considerations aside, we see but one type of humorous joy ride to Cuba and other places. Then the acts became vicious, with hijackers who brutally beat passengers and shot crew members. When the court attempted to give one of those men parole, we had the wife of a murdered copilot with four children brought to the parole hearings. The man who committed the murder was going to be let out on parole in 14 months. We delayed his parole 18 months but he is now free — he got out in 3 years. The captain of one hijacked west coast flight was a young fellow who had a very attractive career ahead of him; he is now totally blind as a result of the incident. That hijacker was out on parole in 2 years. The viciousness of a Southern Airlines hijacking, which was not reported by the press, involved an attempt by one of the hijackers to rape a woman passenger in the back of the aircraft.

The crime has changed from one level of viciousness to another. The reason the airline pilots are concerned, and I am sure Captain Fenello and General Davis will agree with me, is that while hijacking today is very vicious, it is going to change even more and it is probably going to get worse. The hijacker that General Davis mentioned a few minutes ago is evolving into something that none of us in this room can imagine. Some man who is sick and deranged is going to come up with a new system of extorting money and causing havoc, disruption of the airways system, and loss of aircraft. As I said earlier, pilots are deathly concerned that they are going to lose a 747 or some large airbus-type aircraft, full of people, because of some sick person, and our concern does not end with the man in the cabin. We are also concerned about the baggage that goes into the belly of the aircraft. At some point in time, some *nut* is going to find out that that is the way to start extorting money and will place live bombs on the airplane.

The loss of the TWA 707 is a good example of what the hijacker can do. People wonder why we get so upset — it is because we feel we are put in a corner where we have no other choice but to say that a system should be totally safe or it is not safe enough for us to fly at all.

I am not a lawyer so I am not going to attempt to debate the question of fourth amendment rights, but I will say that we need a

sterile air transportation system. If we have to step on a few toes to protect the 190 million passengers who travel in this country, then we are going to have to step on toes. I do not say this as a threat, but we do not have any alternative. The Administration is doing what they can to achieve a certain level of security at the airports. I have had people trying to assist the State Department, putting the pressure on at the right time to get adequate programs and documents out of the ICAO conference. We know what our State Department has done and we have the greatest admiration for everything it has attempted to do.

MR. CURRAN :\* I think there is a point to be made at this juncture when we talk about the fourth amendment and the sterile corridor program that Mr. Gora has glossed over. I do not mean to imply that it is a policy of the ACLU to gloss over the issue, but I think it is important and belongs in this discussion. The magnetometer search that is conducted at the airport under the new program is not a custodial or police-oriented search, but rather, it is a consensual search. There are signs at the airport which announce what the airlines themselves are doing and that the airlines are the ones who are conducting the search. Perhaps that is part of Captain Fenello's objection to the program, but that is a crucial point which must be considered and which undermines the foundation of the fourth amendment objection. There is ample opportunity for anyone to remove any guns or contraband they may have whether they be passengers or guests at the corridor. I agree with General Davis, and I think that from a general standpoint, we may well say that we are not really interested in prosecutions if we can assure the safety of the traveling passenger. That would satisfy us in the long run. I think that the sterile corridor program is achieving the objective of the FAA to insure safe flights in a very constitutional manner. Terms such as "indiscriminate search" are not applicable to the searches that are being applied.

MR. BROWER: In a nutshell, you might say the question is not whether, in this situation, a citizen has a right to be free from an unreasonable search, but whether he has a right to fly.

MR. CURRAN: I think you have an option. When you go to the airport, the signs announce that if you choose to fly you must present yourself to airline personnel who are going to check your carry-on baggage and require you to walk through the magnetometer. If you do not agree to adhere or consent to their requirements, then your option is not to fly.

---

\* United States Attorney for the Eastern District of Pennsylvania.

MR. GORA: Having been charged with glossing over the issue of the consensual nature of the search, let me indicate why I did. My understanding from reading the half-dozen or so decisions on airport searches is that in not one of them was the Government's contention that this was a valid consensual search accepted by the court.

MR. CURRAN: Those cases apply to a police officer's search, not a private airline's search.

MR. GORA: Well, I think that when the federal government mandates that private airlines impose a certain kind of system, it is difficult to contend that it is a private search. The federal government's requirements are the cause of the searches, and I think the argument that these are not government searches is open for discussion.

MR. CURRAN: I think that is an argument that can be raised. Whether it is valid or not, or whether there is any substance to it, will be determined by the courts. When you are discussing the sterile corridor program you must at least present the issue that it is a non-police search. When you discuss the constitutionality of the sterile corridor concept a very important aspect is the fact that the search is a nonpolice search; it is a search which is being conducted by airlines' personnel. I think that fact is at the foundation of this particular program.

MR. GORA: If the electronic screening of each passenger and the search of his baggage, regardless of who conducts it, is mandated by federal regulations, I do not understand how that can be private search. Up to now the courts have said that these can not be justified as consensual searches. I would assume that if the Government directs that they go forward, even if the airlines privately add the wrinkle of the sterile concourse, at the moment they are searching my bags, they are acting under government direction.

CAPTAIN FENELLO: In response to the reference to the airline's objections to the present system, let me point out my position. Quite frankly, the airline's real concern is whether or not the search is accomplishing the required objective. To declare everyone suspect may, in fact, be providing less security than we had before when we were trying to be selective by taking a very close and careful look at someone who appeared to warrant closer examination under Dr. Dailey's system. I think today the problem with the search — bypassing the legal question for the moment — is that we are looking at everything and perhaps seeing nothing. I personally think that the

system we are employing now is suspect. I think it lends itself to carelessness. The requirement to search everyone will just result in a system where we are actually accomplishing very little in the way of security.

MR. CURRAN: I think there is a problem of carelessness in both systems, and that carelessness will always be there. As a matter of fact, if anyone was careless under the profile system it was, perhaps, the airlines in pointing out selectees initially. I am not belittling the airlines, but our experience indicated that that was true. When I referred to the airlines, I was merely questioning whether your constitutional objections to the sterile corridor program would be as strong if Senate bill 39 were to become law, and, instead of the airlines being saddled with the responsibility for the sterile corridor, some federally funded police agency would assume the task.

CAPTAIN FENELLO: I do not think that there is any magic about the sterile corridor that makes it a better system than any other one. The sterile corridor is just a way of accomplishing the same job with fewer people. Eastern, for example, is capable of applying the security at the gate if necessary. Quite frankly, the closer you apply that security to the door of that airplane, the better off you are. Even with the supposedly sterile concourse, there are hundreds of yards available in which some skulduggery could take place. Ideally, the frisk, if necessary, would take place at the door of the aircraft.

I do not think you make a valid point when you discuss a breakdown of the selective system. There has never been, to my knowledge, a hijacking when the complete system was in operation and used properly. I can say with certainty that it never happened on Eastern Airlines. We know, for example, that we have had breakdowns with our agents where they did not apply, or backed away from the system because they did not have any law support at the gate. I can cite the case in Raleigh-Durham where one of our airplanes was taken to Cuba. We called that agent while the flight was still en route and she said, "I knew he was a selectee and I knew we should have taken a look at him, that he should have been stopped, but there was no law enforcement support available and who was I to try to stop him." We had another case in Detroit where one of our airplanes was taken. We called for the marshal and asked the man to step aside, but apparently the selectee suspected what was about to happen and whipped out his gun, forced his way onto the airplane and off he went.

I think that the selective system, with all due respect to General Davis, has never really had a good test. The Government backed



away from its responsibility. When the system was devised, everyone agreed that one of the basic ingredients was the presence of law enforcement support at the gate. What happened was that we pleaded for 2 years to get more law enforcement support but only a minimum was made available. Hundreds of airports in this country — I dare say about 50 on Eastern's system — were devoid of any law enforcement support to back up the system. I think our agents were justified, many times, in backing away from what they thought was an ugly and tough situation that they were not trained to handle.

MR. CURRAN: If the Government underwrote the cost of the sterile corridor program, would you then be in favor of it?

CAPTAIN FENELLO: The cost of it is ultimately going to have to be passed on to somebody. The argument that is taking place is whether the airlines should pay for it or whether the Government should pay for it. That is really not my chief concern. As I stated previously, we are primarily concerned with whether we are providing the security we need. However, the question of cost is an issue which must be faced. For example, it is costing Eastern alone \$5 million this year just to plough through luggage. We have contracted out the task and do not do it ourselves; some airlines do it differently. When you add the cost of law enforcement support at the gates, you are talking about, for Eastern alone, another bill for an additional \$5 to \$10 million per year. We represent only 10 per cent of the traveling public. If you multiply our cost by 10, you get an idea of the size of the problem. The airlines' great profits will not pay for the system — there have been no great profits. It will be John Q. Public, the ordinary citizen, who will have to pay for it one way or another.

MR. FERNALD:\* As contract representatives of the airlines, we are involved in the daily grind of looking into people's luggage, purses, and so forth. My statement in general is to the effect that as we can prohibit the carrying of illegal material on the highway, so can we prohibit the carrying of certain materials into the cabin of a plane. The purpose of our search procedure in Philadelphia and elsewhere is to prevent a dangerous object from being available on an airplane to whomever would use it. The public has not seemed to be offended by this safety measure, but rather, has seemed to respect and appreciate it. If the public as a whole is not responding in any way to indicate that this is an affront to its dignity or its rights, and the

---

\* Manager of Physical Security, Wackenhutt Corporation.

program is operated just to achieve these objectives, are not we taking a step in the right direction?

CAPTAIN FENELLO: As I indicated in my previous statement, it does appear, at least at this point in time, that public opinion seems to be carrying the day and even overriding, for the moment, the constitutional considerations.

PROFESSOR DOWD: As a constitutional lawyer, the answer I might give you is that the measure of the protection of a minority under the Bill of Rights is not the agreement of the majority as to whether or not there is an infraction.

I am afraid that it is time to conclude this afternoon's discussion. Thank you for being with us and we look to seeing you again this evening.

## II. EVENING PANEL DISCUSSION

PROFESSOR DOWD: I should like to welcome you to this evening's session of the Ninth Annual Villanova Law Review Symposium. We are looking for questions and statements from our audience and we expect that our panel will use this as an opportunity to respond to each other — the restraint this afternoon was just remarkable. After a good dinner and a libation, perhaps restraint will be less evident this evening. Let us start off this evening's session with a brief statement from each of our panel members.

CAPTAIN O'DONNELL: I would like to respond to some of the points made this afternoon. Mr. Brower has great hopes for the ICAO meeting this August. He has hopes of nations getting together and developing a meaningful document that will provide for a procedure by which member nations can request sanctions against a nation which encourages or provides sanctuary to hijackers. I wish I had the same high hopes. We, the airline pilots, have watched the actions of the United Nations and ICAO very closely. The first treaty dealing with the hijacking problem was signed in 1963, but today the nations that violate the provisions of that treaty have not ratified it or signed it. They have no intentions of signing such documents and I would suspect that Mr. Brower is not going to be able to get a document out of the ICAO conference which will be able to unilaterally provide sanctions against these nations for the reasons he, himself, has stated. We do not hold much hope that the aviation arm of the United Nations will take any direct action. However, we will say, as we have in the past, that we will give the State Department every assistance

we can because we feel that there is no avenue that we can afford to ignore.

It was stated today, by Captain Fenello and others, that the new system is not going to work. It was also suggested that the profile surveillance was no longer going to be effective. I believe that the continuing use of the profile surveillance, where it can be used, is absolutely essential. It represents the first step in any antihijacking program, the identification of the selectee.

I support the Administration program completely. My only contention with the Administration is over the adequacy of the law enforcement at the boarding gate or sterile corridor. When the program was first announced — I think it has since changed — it was thought that certain select people from different airports were going to be trained in the FAA program. These people were to come back and become supervisors, training the other local personnel. I believe that the plan is now for the FAA to train more, perhaps to the extent that all law enforcement people at the gates will go through the federal program. I am sure General Davis can respond to that.

The most important point that must be made about the anti-hijacking effort is that there must be *no* relaxation of the program. If we have adequate law enforcement at the gate, if we have properly trained airline personnel using metal detectors, if we have an adequate number of airline employees who are in a position to use the profile system, the only thing that would remain to be dealt with is the argument that was espoused by several people here, particularly Mr. Gora, that the searching of passengers' baggage is an unreasonable search. We, the airline pilots, for the last 5 years have said that we have the solution to that problem, but it is going to inconvenience people. It is very simple. Eliminate *all* carry-on luggage. However, that would definitely be an inconvenience to the traveling public of which I am quite frequently a member. Businessmen will not favor it because they like to carry their briefcases. It would inconvenience the doctor who carries a medical bag on board, and the woman with a young child who carries hand luggage containing diapers, bottles, or whatever else is carried in those bags. I think that we can afford to live with the search of carry-on luggage even if it is offensive to a small portion of the public. The alternative is to inconvenience a much larger group of people. If they are not prepared to suffer the small inconvenience of a search of a bag, then that bag should not go on the airplane.

I think we can let the courts argue the constitutionality of the searches and let the airlines and airport owners continue their arguments with the federal government as to who is to pay for it, but in

the meantime, we must provide the security. Then, I think with all the attention focused on the problem, the crime is going to be substantially reduced and hopefully, in the next year, eliminated.

CAPTAIN FENELLO: The common thread that tied all of our presentations together is that there should be no compromise with safety, and while we may have some different opinions as to procedures, certainly our objective is the same. That point needs to be said often and loudly for fear some of you might walk out of here thinking that our differences are so great that they might jeopardize your next flight. Nothing could be further from the truth.

It was mentioned that the SOS program was not universally successful in accomplishing the pilots' objective, which was to set every airliner on the ground. Although Eastern certainly did not agree with the approach, when our pilots evidenced that they were solidly behind the program set by the IFALPA and endorsed by the ALPA, we were one of the two United States carriers that supported its pilots. We set our airlines on the ground for 24 hours and for those of you who tend to equate all of these actions to costs, it was to the tune of about \$2.5 million in lost revenue with a very slight, if any, offset in expense. That, perhaps, just serves to emphasize the fact that we all have, and feel very strongly about, the same objective.

There are, however, some differences of opinion. We have a difference of opinion with the Administration, for example, as to how this whole program should be administered. We feel that, just as it is the airlines' job to process our passengers expeditiously, gracefully, and with a minimum invasion of their personal privacy, so it is the federal government's responsibility to provide the law enforcement support. Our people are neither trained nor have the inclination to be police officers, nor do we want them to be police officers. We feel, too, that the present position of the Administration to ask that every community provide the law enforcement is a rather flimsy one in that they are going to get little uniformity in the application of a good strong security system. We feel that there is a force capable of doing that. While the United States marshals were involved in the program, although not in sufficient numbers, they provided perfect support where they were present. We will take the FAA support if that is all we can get, however, we would prefer the support of the Justice Department since the scope of its power is less subject to question. We think that utilizing local law enforcement officers introduces more questions than it solves, one being a question of jurisdiction if it comes to an arrest.

There was reference made earlier to the passengers having vivid memories of hijackers; some of our crews also have some very vivid memories. One captain can describe the feeling of having a bullet, which was inadvertently fired off by a hijacker who nervously tried to light a cigarette after landing at the Cuban airport, whiz past the top of his head. Some of our flight attendants have felt the press of a knife blade on their throat. With the threat of a hijacker and things like that happening to your crews, there is strong motivation for an airline like Eastern to take this whole question very seriously, whether it requires supporting pilots on a 24-hour shutdown or spending \$2.5 million as we did to purchase 300 magnetometers and train almost 4,000 agents to protect the profile and apply it properly. You may have wondered why we sometimes object to what the press has to say. Both ALPA and the industry have protested at some of the press coverage of hijackings. One of the reasons we have is that we feel that these crimes tend to feed on themselves and that the less said about some of these things, at least the details of the crime — how it was accomplished or how we attempted to thwart it — the better.

There was one interesting press interview following a hijacking which involved an entire family working their way back to Cuba and using one of our airplanes as a means of transportation. This fellow jumped up in the back of the airplane with a trusty Zippo lighter (you know they never fail) and a make-shift bomb composed of a toilet ball float and a couple of bottles filled with some kind of a flammable fluid wrapped around it with black tape. He ignited the liquid in the bottles and ran the length of the cabin toward the front of the airplane. To make a long story short, that is a pretty terrifying experience. The airplane got to Cuba and came back safely after depositing the family. As is usually the custom, the press interviewed the returning crew and then tried to get some facts from the passengers on board. One woman who was sitting up near the forward end of the airplane stated, in response to the questioning, "I saw this fellow go by with the bottles, and flames were shooting out" (of course every time the story is told the flames get higher). "Since it came right after dinner I thought they were serving a flambeau or something." That illustrates some of the interesting reactions we do get to what takes place.

DR. DAILEY: It is difficult for me to talk about the profile because I cannot tell you what the profile is, and of course I'm not about to do so.

To give you a feel for the methodology behind the profile, I would like to refer to a manual designed for training police to walk their beats and patrol efficiently. It posits that certain officers who are very successful in apprehending criminals on the street have a special sense that tells them "that man is wrong." It points out that some can do this intuitively while others can do it on the basis of things we put into language. I would like to share just a few of these things with you because they are analogous to the type of thing you can do if you are trying to decide which passengers should be looked at most carefully when operating under an interim system as we did.

The basic rule set forth in the manual is to look for the differences, the unusual acts, methods of dress, or ways of doing things that may set a criminal apart from the ordinary citizen. I would like to emphasize that it is the *way* of doing things, that one must watch for because often the potential criminal will do some things quite differently than the ordinary citizen. The manual points out, for example, that a person who pays too much attention to you, watches your every move, notices which way you turn, might bear watching. On the other hand a person who seems to avoid you, acts as though you are not there, is totally indifferent to you, is also suspicious. The manual directs officers, in observing traffic, to notice drivers who are not familiar with the operation of the car, who have difficulty in shifting, skid the wheels suddenly when making a routine stop, or stall the motor. If the driver is a woman this does not indicate a great deal. However, if the driver is a man, particularly a young man, you have a good prospect for an auto thief. The manual does not say to search him, it merely says to watch him for a while. Some officers even let a suspicious person in a car know he is being followed, then watch him to see what he does. He may be using the rearview mirror constantly to observe you. He might stall along to see if you pass him, or he may turn off.

The manual contains other suggestions, such as watching for certain patterns of behavior that people normally follow when they are walking down the street. For example, if you see a pair of men walking the street together late at night and they are not conversing, that is exceedingly suspicious. If they are walking along talking to each other, that is not suspicious. These are examples of what we mean by behavior — doing things in a pattern that is different from the way people usually do them. There are certain areas where people normally congregate — on corners and in front of stores, for example. This type of observation suggests that in an interim system some

types of flights might be given more attention than others, for example, domestic flights versus international flights, or flights at different times of the day or different days of the week.

One interesting behavioral profile was developed approximately 300 years ago, by a highwayman in England. He was apprehended, and while repenting in prison, decided to write a book to help people protect themselves from highwaymen. One of the sections contained hints to innkeepers for recognizing highwaymen so they could keep them from hanging around their premises. He described certain indicia that appeared very significant. He noted that highwaymen were likely to hang around the windows, looking out at all the passengers going by, and then all of a sudden run out, jump on their horses, and go after some passer-by. One of the most important things he pointed out was that, while the ordinary customer at the inn would have a saddlebag crammed full of all sorts of things, the highwaymen would have empty bags so they could travel faster and outrun the police if chased. He gave examples of other traits, including the fact that highwaymen will not look you straight in the eye.

I think this gives you some feeling for the type of approach we use with the behavioral profile. I might add that it really is behavioral. It is not based on the assumption that we can quickly train a person to become an amateur psychiatrist and analyze people and their personalities. But rather, it is based on very concrete things that people do or do not do or the way they do them. The average person thinks that all you have to look for is the person with the beard and the long hair. Now, I do not think it is violating security to say that the one thing that does not correlate with the particular hijacker profile is a man with long hair. I hope I have given you a little bit of a feel for what we have really done, although you understand I cannot tell you what it is.

GENERAL DAVIS: Despite the confidential nature of the profile which Dr. Dailey has discussed, there was a time about 11 months ago when this classified information was officially given to the press by Jack Shaffer, the Administrator of the FAA, and Captain O'Donnell. This was done with the most serious intent in the world at a time when the press was giving wide coverage to hijackings and divulging the few tactics and techniques that the federal government had to combat hijackings. On Captain O'Donnell's initiative, the entire working press of Washington, D.C. was called to the University Club, and following a briefing by Captain O'Donnell, Mr. Shaffer, and myself, we told them everything we knew. This involved every secret we had

regarding how we attempt to catch hijackers after they hijack an airplane and how we try to keep them from getting aboard the aircraft. It worked for a while, and had a good effect. But this was the only time, to my knowledge, that everything was laid on the table in a plea to the press to restrain themselves and not give away details so that future hijackers could benefit from having that knowledge. The press plays an important part in the hijacking phenomenon because, as we indicated earlier, the power of suggestion seems to be very powerful indeed. You may recall a television program written by Rod Serling about the placing of a bomb in the airplane and a facsimile of it in a locker. The hijacker then called up the airport and said, "In such and such a locker you will find a bomb. That's aboard your particular airplane flying around." That happened in Sydney, Australia, about 2 months after Rod Serling's telecast. It happened again in a very similar fashion in Canada and again in the United States. Such ideas about hijacking are appealing to people with sick minds or those who think they are smarter than others and can get away with a hijacking.

Professor Dowd indicated earlier that there were not enough fireworks here. All the panelists seem to speak the same language. The reason for that is that we get together quite frequently. We look at this problem and try for the life of us to arrive at the best way to combat it. Dr. Dailey has been at this job for more than 2 years, I have been involved about 2½ years, and I am sure for these other gentlemen it has been much longer. We do not have a representative of the ACLU at the meetings that I conduct every month, but we do have representatives from the Justice Department. Representatives of all the governmental agencies involved — are present and we discuss the problem, much as we have discussed it here this afternoon, trying only to avoid repetition of the things that seem to be common knowledge. Also, once every month we have a meeting between the airline industry and the Government involving the same type of discussion. We have arrived at a system which I would not change if I had the power to do so. I think for today's situation it represents the best way to beat the hijacking threat.

Of what does the system basically consist? Deterrents are first on the list. We do not want the hijacker to get aboard the airplane. Previously, we went through the sky marshal program, but everybody knows that the worst place you can combat a hijacking is at 20,000 feet. You want to keep the hijacker from getting aboard the airplane. If he does get aboard the airplane, you do not want to let him go home



free. If he does make it, if he gets a million dollars; if he gets where he wants to go, then you are simply inviting repetition. We have a very great deterrent force in the FBI which will always be part of the antihijacking system. It is right there the minute an airplane is hijacked and it takes charge of the hijacking by written agreement between the Secretary of Transportation and the Attorney General of the United States. This is not only absolutely necessary, but also, quite successful. In the first big year of hijacking, 1969, there were 40 hijackings of which 34, or 82 per cent were successful. In 1970, about 67 per cent of the hijackings were successful, which means that the hijacker was getting what he wanted. Last year we think that we really turned the corner since the percentage of successful hijackings fell to 32 per cent. More importantly, the only person we can identify as connected with the money he has extorted is D. B. Cooper, the parachutist who hijacked a plane, demanded and received ransom, and jumped out over Seattle in 1971. The rest of the people who demanded large sums have been separated from the money and, in all except the one case of \$2 million that Southern Airways took down to Havana last November, the money has been returned. It therefore appears that a hijacker is a real loser and we try very hard to have everybody who thinks about hijacking understand that he is probably not going to do anything but make his bad position worse.

I would like to make a few comments regarding the question of constitutional rights. We do not want to kill commercial aviation in order to save it from hijacking. We do not want to prevent hijacking and at the same time undermine the principles which are the foundation of our country. We do not want to hurt the country but at the same time we want to stop hijacking.

The system that is currently in effect is not one dreamed up by the Department of Transportation. It is one that has been approved by the Secretary of Transportation who has a highly qualified general counsel. It is one coordinated by the Department of Justice which is headed by the Attorney General of the United States, and it is approved by the President of the United States. The courts, to the best of my knowledge and belief, have not ruled as to the unconstitutionality of this system. If the courts decide that this system is unconstitutional, however, we will change it and we will comply with the law, as rapidly as we can with respect to the question of search, and the exclusion of evidence. If a law enforcement officer is looking at somebody for antihijacking reasons only and he comes upon some marihuana, I think there is some question as to the use that should

be made of that evidence. To my mind, however, the answer becomes crystal clear if the law enforcement officer comes upon some heroin. I will leave it up to the lawyers, however, to decide what is right and what is wrong. As a matter of fact, I think I will just throw the problem to you. Is there a difference between the individual who is caught with a packet of heroin and the one who has a few joints when the object of the search was antihijacking only?

MR. BROWER: I find that symposia are inherently dangerous to one's intellectual development. The reason is that by their very structure they tend to view a problem in isolation. Always remember that no problem exists in isolation. Never forget that the ideal solution to any problem engenders other problems. When you look at the panel before you this evening you must conclude that five of the six panelists in this context represent a parochial, provincial perspective. Four of the panelists are occupied full time professionally with aviation. The fifth panelist is occupied full time professionally with concern as to what government is doing to the governed. The United States Government, in confronting the hijacking problem internationally, must view it in the broad context of all the problems with which we must deal in the world. Captain O'Donnell, I believe, has characterized me as an optimist and admitted to being a pessimist. I did not realize how great the contrast was until I learned after my arrival this morning that, whereas I was willing to accept the minimal hijacking risk in connection with the short flight from Washington to Philadelphia, Captain O'Donnell had come by train.

Captain O'Donnell has focused on the question of international efforts to eliminate sanctuaries. Our battle cry has been that no hijacker should find a sanctuary anywhere in the world. To achieve this end the United States Government must expend effort, as indeed it has, to bring about the adoption of an international convention providing for sanctions against countries which fail to either prosecute or extradite hijackers. It is not easy. How easy do you think it is for the United States Government to support, as it has, an automatic sanctions mechanism to be imposed against a country which has failed to meet its international obligations at a time when a substantial portion of the world believes that the United States has failed to meet *its* international obligations with respect to the United Nations sanctions against Rhodesia? How easy do you think it is for one of the five governments which possess the veto power, and therefore some control over the deliberations of the Security Council, which has the power to impose sanctions, to agree to a mechanism for the automatic imposi-

tion of sanctions over which it would not have such control? The United States alone, of those five powers, has been willing to divest itself of this authority in the hijacking context. It is easy for us to criticize what to some extent has been a Middle Eastern or Arab problem, not a hijacking problem. However, we have found from bitter experience that one man's hijacking or terrorism is another man's national liberation. Do you think for a moment that some African countries will deliver up to the Portuguese government an Angolan rebel who has hijacked an airplane for what he believes to be a high interest? It might be better, as some one pointed out, if the United States agreed to some form of mandatory extradition of hijackers. To adopt mandatory extradition, however, would cut against our historic policy of refuge and asylum.

In closing, let me point out one other aspect in which it is apparent that this problem cannot be viewed in isolation. The point has been made that foreign sanctuaries should be eliminated. Captain O'Donnell made a point earlier which you might describe as arguing that domestic sanctuaries should be eliminated. What is a sanctuary? A sanctuary is any place where one can go to be free of the consequences of his act. Is not some of the criticism of the handling of the hijacking problem in this country really part of a broader criticism of our judicial system? Is it not, to some extent, representative of a misunderstanding of the system? Everytime we talk about hijackers we talk about crazy people. Some *nut*, Captain O'Donnell said earlier, is going to put something in the baggage compartment of an airplane that will blow it up. Some *sick person* is going to get on a jumbo jet and do this or that. By definition, under our system, sick people do not bear criminal responsibility. Are we really looking in the right direction? Is this not simply one aspect of the whole treatment of the criminal problem in our country?

While symposia may be inherently dangerous to intellectual development, they also give people like myself the rare privilege to pose questions without having to provide the answers. Thank you.

MR. GORA: Let me just start by saying that the approval of a program by the current occupant of the White House does not seem to me to be particularly strong evidence of its constitutionality. I have never regarded the President as the strongest defender of civil liberties and I do not think we can judge the validity of the current regulation by virtue of his approval. General Davis was absolutely correct when he said that the courts have not yet ruled on the constitutionality of the current system, it just went into effect in its full form. I think, in

part, it caught us — and by us I mean those who congenitally challenge whatever the Government tries to do — somewhat by surprise. I never really believed it could happen. For 2 years we witnessed a carefully developed selective system, which has been described today in great detail that singled out a very small percentage of the air traveling public, and required that a number of conditions be met, even as to that small percentage, before their privacy could be intruded upon in any way. That limited system, which I think was arguably consistent with the principles of the fourth amendment, was approved by courts in three or four decisions. What happened, factually and statistically, was that the limited authority to search for weapons, which the courts approved, quickly degenerated into a wholesale search for everything else. The problem is more than just what a marshal, who is honestly searching for a gun, should do when he comes upon a quantity of heroin. The fact that there were twice as many people arrested for possession of drugs than were arrested for possession of a weapon leads me, and many others, to think that, after a while, those marshals were not looking for guns, but rather, they were looking for drugs. I think it is an example of how law enforcement at that level, given limited authority, will tend to abuse that authority.

I was under the impression that the former screening system, which Dr. Dailey was instrumental in developing, was a more or less permanent measure. But it was indicated earlier today that it was intended just as a stop-gap. Perhaps the theory was that, once the courts approved the limited system, then the federal officials responsible for aircraft safety would try something broader. I think that illustrates the very danger inherent in allowing even initially slight departures from the requirements of the fourth amendment.

When I attempt to board an airplane I think the only fact that I present to the person in charge of security is that I am a male, I am dressed a certain way, and I intend to board the airplane. Now how in the world he can go from just those facts to the conclusion that there are reasonably adequate grounds to believe that I am armed and dangerous is beyond me. Yet, the current system assumes precisely that. Or, if it does not assume that each individual is armed and dangerous, it assumes that the possibility of hijacking is such a danger that the danger alone is sufficient to justify a universal search. I think that is simply a limitless principle. Our society is so filled with danger in so many different contexts, that if we allow the Government, in the interest of safety and security, to search all of us in one limited context then there is nothing to prevent the Government, in the interest

of safety, from searching all of us in another limited context. At the risk of being quarrelsome, I am not sure that the pattern of hijacking in the last year poses a sufficient danger to justify what is being done now, even if danger alone were a justifiable basis. I believe that Captain O'Donnell gave us some statistics earlier today that 2,000 or so passengers had been aboard hijacked airplanes in the last year, and that the air traveling public numbers about 200 million a year. I did some quick arithmetic and if it is right, that means the chance of someone being hijacked is one in 100,000. I also did statistics on the number of murders in New York City per year and divided it into the people in the city, although that may be a faulty statistical method, and found that it is five times more dangerous to live in Manhattan than to get into an airplane. It would seem, then, that if the dangers of hijacking, which I think at this point are statistically quite remote, justify the search of everyone, surely the dangers of being a resident of New York City justify measures far sterner than we have now. Now we just have policemen walking the streets. Conceivably, the danger is great enough that we should have policemen stopping and checking everyone on the streets, let us say, after 10 o'clock at night — a kind of permanent curfew. It was also suggested earlier today that searches at the airport are consensual. We could also have a consent system with our street search. If you want to go out in New York City after a certain hour at night, you do so by consenting to be searched at the corner by the first policeman who sees you. I have yet to be satisfactorily told the difference between that bizarre hypothetical and the justification for searching everyone today who tries to go aboard an airplane.

I think two phenomena have troubled us. First, the limited authority the courts gave people to search certain individuals at the airports has become abused. Second, the search system is operating on a principle of danger which I think is contrary to the fourth amendment and is inherently limitless.

As a final note, let me raise the following problem which Dr. Dailey briefly alluded to earlier today. I have accepted the validity of the profile as a method for singling out a small group of people who pose a high possibility of danger as probable hijackers. Judge Weinstein of the United States District Court of New York, in considering the constitutional issues raised by the limited search system, had evidence developed about the profile in chambers with Dr. Dailey testifying. They both found out, quite to their amazement, that not only was it very effective in singling out potential hijackers but it was

also very effective in singling out narcotics smugglers. I would venture to say that in certain areas of New York City a great many people would welcome the elimination of the drug problem, and would welcome measures based on the profile. After all, if you can guarantee with 90 per cent reliability that a person who meets the characteristics is going to be a drug dealer, that beats probable cause in terms of certainty. What I really am suggesting is that the disquieting implications of using this profile as a law enforcement device have not received the attention that they deserve.

PROFESSOR DOWD: Before we entertain questions and statements from the general audience, we will have the pleasure of hearing from Mr. Culver of the Criminal Division of the United States Department of Justice. Mr. Culver will give us a picture of the anti-hijacking program from the perspective of the Department of Justice.

MR. CULVER: It is indeed a pleasure to have this opportunity to discuss the Department of Justice's participation in the Federal Civil Aviation Security Program with you. The Criminal Division's role is largely in the area of prosecuting offenders and thus, hopefully, deterring future hijackers with swift and sure justice. We are also necessarily involved in the resolution of the legal questions inherent in the investigatory and arrest process.

Potential hijackers have reason to be deterred in light of recent events. You have heard the figures before, but I would like to review them again: In 1969, 34 out of 40 hijackings were successful; in 1970, 18 out of 27; down to 12 out of 27 in 1971; and, in 1972, 10 successes in 31 attempts. If the decreasing probability of getting away with it does not give pause to the would-be air pirate, then perhaps the consequences of failure will. Last year, one hijacker was sentenced to 45 years, one to 40 years, one to 30 years, six others to 20 years, and three hijackers were sentenced to life imprisonment. Two others are undergoing pre-sentence study. Thus far in 1973, one skyjacker has been sentenced to 20 years, and another was convicted and is awaiting sentencing. 1973's only would-be skyjacker has pleaded guilty to related charges of interstate transportation of a stolen weapon and armed assault on a federal officer and has received a 20 year sentence. Another air piracy case resulted in mistrial and will be retried soon. In the same period, three skyjackers have been shot and killed, and another wounded. This, I think, certainly does not make hijacking an appealing prospect as a source of extra cash or thrills.

However, I would be less than candid if I did not expose some of the problems we have in prosecution. First, the number of fugitives

is quite substantial, and they are mostly international fugitives. Today, no nation is really a haven for the extortionist variety of hijacker. In this regard, every hijacker for ransom of an American plane who has succeeded in getting to another nation has been separated from his money, even though some have been granted asylum. As you know, the United States and Cuba have recently concluded an agreement which would appear to eliminate the Cuban sanctuary, and Algeria has expressed interest in talking about the problem. Additionally, some progress is being made on the international scene in the form of ICAO conventions, but it is slow in coming because of the political overtones so frequently a part of international hijackings.

The second major area of difficulty lies in the fact that a large proportion of those in custody are mentally incompetent to stand trial or were insane at the time of the offense. In a survey made last July, it was found that mental issues have been raised in at least 58 of 68 air piracy trials since 1961, and that in 17 of those cases charges had to be dismissed because of incompetency, or the defendants were acquitted because of evidence of insanity. In cases now pending, these mental issues are being raised at least as frequently. What makes this particular problem so difficult is that when a substantial insanity question goes to the jury and a defendant is acquitted, there is no provision in federal law for his institutionalization and treatment. Legislation is now being considered to rectify the situation.

Against this background, let us consider the Justice Department's policies and programs, and let me emphasize that they come from the highest level. The Attorney General twice last year reiterated, in teletype messages to all United States Attorneys, the long-standing department position that aircraft hijacking and related offenses are to be prosecuted vigorously and expeditiously. Also, the Attorney General has directed all United States Attorneys to give these offenses the highest priority for prosecution. We think these directions are being carried out. In the 15 months since D. B. Cooper's extortion-hijacking, there have been 21 more such extortion-hijacking attempts, and the imitators have received most of the severe sentences that I mentioned earlier. In this age of crowded trial dockets, getting this many convictions and sentences in so short a time is no mean achievement.

Although air piracy, and especially the extortion cases, are the most spectacular and excite the press and public interest, it should not be assumed that the Department of Justice is limiting its action to those incidents. Rather, we are engaged in extensive review and supervision of the prosecution of the lesser aircraft offenses such as

carrying concealed weapons aboard aircraft, bomb hoaxes, and false statements regarding hijackings. The false statement and bomb hoax cases present difficult problems, for the offenders are frequently misguided comedians and drunks without prior criminal offenses. Understandably, juries are reluctant to convict in such circumstances. The civil penalty provision in the bomb hoax statute minimizes this problem, for, while \$1000 out of the pocket hurts, no federal criminal record results. We sought, in the proposed Aircraft Piracy Amendments of 1972, such a civil penalty for making false statements regarding air piracy and related offenses and we support such legislation in the current Congress. With respect to both of those crimes, the inherent evidentiary problems must be recognized. Also, conviction depends on what the defendant said, and thus on testimony of those who heard his words. Often, there is just one witness to the defendant's statement. Nevertheless, it is departmental policy to prosecute these cases when sufficient evidence is available, and, of course, the *swift and vigorous* guidelines apply. I am sure, however, that you will appreciate the difficulties, for you know how often witnesses' statements are inconsistent or inconclusive.

The same is true of the weapons offense — often the violators are *respectable* people with otherwise *legitimate* reasons for being armed, who do not realize that it is a federal crime merely to carry a concealed deadly weapon aboard an aircraft. We feel, however, that we are vindicating the purposes of Congress by directing prosecution in those circumstances, for the statute requires no specific intent for conviction. As an aside, I would like to note that it has been in these cases, along with some narcotics prosecutions arising out of the preflight screening process, that we have repeatedly won approval by the courts of the Federal Civil Aviation Security Program.

As might be expected, there are violators of these sections who are not misguided *good guys*. It is for them that there are felony provisions in the false statement statutes, and the Department's policy certainly includes prosecution under those sections when the facts show willfulness and maliciousness. Although we do not presently have reliable statistics, I can state that in the few cases which have come to our attention, the individuals involved have received substantial sentences.

Another aspect of the Justice Department's contribution to the federal security program consists of the airport security meetings now being held throughout the country. The Attorney General directed United States Attorneys throughout the country to convene meetings of law enforcement and industry officials to consider aircraft and airport



security matters as they relate to investigation and prosecution of hijacking and related offenses. These meetings are doing much to coordinate the efforts of government and industry at the local level in dealing with this menace. We, in the Department of Justice, are carefully reviewing the reports of these meetings, which contain numerous useful suggestions. We are taking action to implement certain of these suggestions; others are being coordinated with and considered by various federal agencies. The Attorney General's teletype message of July 14, 1972, called upon all United States Attorneys to schedule such meetings on a regular, and at least quarterly, basis. Most recently, the thrust of these meetings has been toward getting local law enforcement support for the aviation security program, and smoothing the transition to the strengthened system required by the new FAA regulations.

I have alluded briefly to our legislative program, and now would like to fill in some of the details. On the international implications of aviation security, the United States has enacted the legislation necessary for full compliance to the Tokyo Convention. The last session of Congress was presented with a bill to implement the Hague Convention, and such a bill has been reintroduced. As you may know, the Hague Convention calls for the extradition or prosecution of hijackers by all nations. Legislation to implement the Montreal Convention has been drafted and is being coordinated within the federal government for Administration approval. Further, representatives of our Government are participating in the preliminary meetings on a sanctions convention.

Domestically, we had the Aircraft Piracy Amendments of 1972. This bill would have added a section making threats of hijackings or related offenses punishable even if they do not fall within the Hobbs Act or other criminal statutes, that is to say, for example, where there is no extortion involved. This bill would have provided us with a civil penalty for the making of false statements regarding hijacking or related offenses, and broadened the venue provisions as to those offenses providing for civil penalties. This legislation will do much to facilitate law enforcement in this area. Finally, the amendments would make it a felony to carry a concealed deadly weapon aboard an aircraft willfully and with reckless disregard for human safety.

In conclusion, I would like to say that the best security program in the world is fatally flawed without an energetic prosecution policy which is fully implemented. In this program, you need not worry about that. Thank you.

CAPTAIN FENELLO: I would like to respond to Mr. Culver. I appreciate very much his recounting the list of recent cases, and by recent I am talking about the last year and a half. I think that the record needs to be told over and over. Even though we are reassured by what is now being done in our courts, much of our concern stemmed from what has happened in the past. Many in this room probably recall a hijacker from Philadelphia whose sentence was only 2 years. Some of you may recall reading within the past year of a hijacker who was released and subsequently was killed while engaged in some other criminal act in New York City. The sentences given, coupled with the long periods of delay between the time a man was apprehended and the actual sentencing are the things that concern us. I have to agree that the recent history of prosecutions seems to have cured that problem, for which we are grateful.

PARTICIPANT: I would like to know whether or not we are setting an important constitutional precedent with all these federal anti-hijacking measures which are clearly designed for an indefinite time period but which are labelled by our President as emergency measures? What guarantee do we have that in the so-called national interest this idea will not spread to fields other than air transportation?

GENERAL DAVIS: The *emergency* part of that action is related to the Administrative Procedures Act in that we did not go through the public hearing period that is normally required in a notice of proposed rulemaking. I would say that I cannot foresee any change other than refinement of the system that we currently have, and it is my thought that the way things are happening in this society in which we live, that there will be other actions in other fields of a similar nature.

MR. GORA: What I do not understand is why we suddenly needed a total security system when the profile system seemed to be working? Indeed, it has been pointed out that no flight which was fully covered by the former screening system had ever been hijacked. Also, the number of hijackings had decreased and the situation seemed to be coming under some kind of control. My guess is that the reason for the implementation of the total security system is a desire to reduce the number of hijackings to zero, which would be a laudable goal, and one which we would all approve. I have a terrific suggestion for reducing the number of armed robberies of banks to zero. Develop a profile of the average bank robber; station a magnetometer at the entrance to the bank; inspect all briefcases and purses; and electronically frisk all persons entering the bank. To reduce bank robberies to zero

is a laudable social goal, but, obviously, we must recognize that security is not the only goal that we pursue in our society. We have other conflicting goals provided by the Constitution, and privacy is one of them. The goal of security has to be conditioned and limited by the interest of privacy and other constitutional values. I do not see that that is being done in the present situation.

PARTICIPANT: Would the technological inability to find an effective, alternate antihijacking method bias Supreme Court decisions to the extent of compromising the fourth amendment? In other words, would the Court be put into a position where it must weigh the welfare of 190 million air travelers a year against the welfare of all United States citizens and feel compelled to hold that what is good for the airline passengers is good for the country?

MR. BROWER: Can we give you nine addresses?

PARTICIPANT: Dr. Dailey, it seems to me that your methodology is to try to delineate the characteristics of the typical and normal air traveler so that you can then identify the atypical and abnormal 1 per cent of that group. I presume this would include primarily criminal types but I suggest that it might also include artists and other aberrational groups. It seems to me that you have, in fact, enrolled your psychological expertise as a sort of architect of the brave new world which Mr. Gora is suggesting. You have scientifically made justifiable a device which we would not tolerate if it were based merely on credence.

DR. DAILEY: There is a great danger that the technology that has been applied in profiling could go too far in other areas. The protection against that danger is our judicial system. Anything you come up with is going to have to bear the scrutiny of the courts and I think the courts will protect us.

GENERAL DAVIS: This profile, in no way — and I will let Dr. Dailey verify this — describes anybody, except a potential hijacker. The methodology employed in creating the profile was to go back and look at every hijacker and to pick out the characteristics common to each. It does not include characteristics of heroin addicts, or thieves, or bank robbers; it includes only the characteristics of people who have hijacked airplanes.

DR. DAILEY: I studied the recorded case histories of 31 known hijackers, who had hijacked American airplanes from 1961 through 1968. Studying these characteristics, I found that there was a pattern

found in 30 of the 31 hijackers that was very, very rare among air travelers generally. So, empirically, the basis for the profile is what differentiated those hijackers from the general traveling air public. It seems amazing that something based on only 31 cases might hold up during a period of 3 years, but it did. However, do not be misled into thinking that the profile is all that good. What we do when we use the profile is take a calculated risk that we will not identify 13-15 per cent of the potential hijackers. During what I call interim periods that might be acceptable. But at a period of high risk we want to reduce that to zero. The profile might screen out nearly 90 per cent of the hijackers but it does not screen out all of them and that is the big difference. The public has demanded a system that will reduce the risk to zero if it can possibly be done.

CAPTAIN FENELLO: It is important to remember that the behavioral profile was just one of the wickets in a system that was applied. The profile reduced the scope of our attention to a manageable number of people. We then subjected that number to another step in the process, the magnetometer. That step further reduced the number of people to be looked at, and was followed by a request for identification and a chance to explain any positive readings on the magnetometer. So, you must not focus on just the behavioral profile as the system.

PARTICIPANT: In several skyjacking incidents in the past, there has been a clear conflict between the authority of the FBI on the ground and the authority of the pilot commanding the aircraft in the sky. Now, Captain Fenello, you have said that Eastern Airlines and all the other airlines would make no compromise with safety. In your efforts to avoid any compromise with safety, do you believe that the captain who pilots and commands the airliner should have the sole responsibility to determine what happens to his aircraft and the authority to discharge that responsibility, as opposed to the FBI?

CAPTAIN FENELLO: Yes, I do. Of course, we welcome the assistance of the FBI or any agency that can help us. But we do believe that the captain aboard that airplane probably has the most information with regard to the hijacker once he is on the airplane and has the best knowledge of the situation on that aircraft. Now this is not to say that the FBI, once the hijacker has been identified, cannot find out certain things about that individual that perhaps the captain himself does not know. For example, the man may have left a death note and said that this is his last trip, something the captain does not know. However, generally speaking, our policy is that the captain

is in command of that airplane and should be given the opportunity to concur in whatever action is taken to stop the hijacking.

CAPTAIN O'DONNELL: I swear I did not plant that question. I agree with Captain Fenello up to a point.

The Southern Airlines incident, where FBI agents shot out the tires of the aircraft, was a situation where Mr. Gray, the Acting Director of the FBI, made the decision to terminate the hijacking. As a result of the FBI interference, one of the hijackers pulled the copilot out of his seat, made him sit upon a passenger's seat as an example for the passengers, pointed a gun at his right eye, and squeezed the trigger. The copilot dove behind the seat to prevent being killed and was hit in the shoulder. The hijacker intended to kill him. The hijacker then went into the cockpit, put the gun to the captain's head and said, "You take off." The captain said, "I can't my tires are shot." The hijacker said, "Well, you better take off because if you don't you are a dead man." He started to hit him on the top of the head with a hand grenade and then pulled the pin of the hand grenade. He said, "You have one choice, you take off or die here." I have flown the DC-9 for about 3,000 hours. I know the airplane and I would have bet that the captain could not have gotten the airplane off the ground. Captain Haas said that if he ran out of runway, as many of us do in emergencies, he intended to pull the landing gear up and belly the airplane off the end of the runway. It could have ended up in a holocaust, but he somehow got the airplane off the ground. Mr. Gray, probably to his credit, took full responsibility for that decision and said that in his judgment, with the gun against the captain's head, the pilot was no longer in command of the aircraft.

We, the Air Line Pilots, have told the President of the United States, the Attorney General, the Department of Transportation, and the Department of Justice that under *no* circumstances shall anybody terminate a hijacking without the cooperation and coordination of the captain. This is the difference between Captain Fenello's position and mine. We feel very strongly about this. We are not going to be second-guessed by someone on the ground who is not fully aware of what is going on in that airplane.

The reason we take such a strong position with regard to someone else making a final decision is that on the several occasions when people outside the aircraft tried to interfere, they totally aggravated the situation. Captain Haas, the pilot on the Southern Airlines flight, almost had the passengers off that aircraft a few times during that hijacking. We have asked General Davis, the airlines, and the Depart-

ment of Justice to see if they could work out a procedure whereby we could let the people on the ground have a sense of what was going on in that airplane. But, until that time when the people on the ground have exactly the same flavor that the pilot has, they had better not second-guess us or attempt to terminate another hijacking. The Board of Directors of ALPA, on December 2, 1972, passed a unanimous resolution that if there is another termination of the pilot's command during the entire decisionmaking process, the airplanes will go down and stay down until we get new agreements. I do not care what it requires; there is no way we will allow somebody else to make the decisions when our lives and the lives of the passengers entrusted to our care are the ones on the front line.

**PARTICIPANT:** Is it not true that the average passenger who boards a plane wants to be searched, and that, given a choice, he would choose to board that plane where all the passengers were being searched rather than the one where no one was being searched?

**CAPTAIN O'DONNELL:** Almost all the passengers, not just the average ones, would make that choice. Mr. Gora made the statement that if, in the search procedure, a gun were removed from a man, it would be all right to let him go aboard the airplane. Well, you must remember that on board an aircraft there are many weapons that can be used for hijacking an airplane. One I have right here in my hand — a pencil. Someone could stick the pencil in the stewardess' ear, take his hand and say, "If you don't take me to Cuba (or wherever else he wants to go) I am going to push with my hand against this pencil." That's a hijacking weapon. If you let that type of person on board the airplane, we are going to have some sort of a problem. I agree with you, the traveling public is accepting the search procedure. We test the system daily and will be issuing a report as to the degree of success of the Administration's program. The system is being handled very well by the airlines and by the security people that are available. Everyone seems to be putting 150 per cent effort into it. There is no question in my mind that the traveling public is totally behind the security program. They want to know that they are going to get to the destination for which they bought their tickets.

**MR. GORA:** I think if I were given a choice between boarding one plane where the other passengers and I did not have to be searched and boarding another where the passengers were searched, I would prefer to take my chances. Maybe I am just a freak about fourth amendment values and about their application to me; however, I do not like

anybody rifling through my briefcase, whether or not I have a pair of dirty socks in there. I think a lot of people share that view. It is interesting to note the pattern of letters we have been getting at the ACLU. The type of person who has been writing us about this problem has changed radically since the first week in January. We used to get a lot of letters from young people, or counterculture types. Now we are getting them from lawyers, doctors, and other professional men. One television executive called me up fuming about the system 2 days after it went into effect. So, I am not sure that the great majority of passengers approve of the search. I think a lot of people find it offensive. Even beyond that, you just cannot condition constitutional guarantees on what the majority likes or does not like. I am sure the majority would like to get rid of noisy street demonstrations and radicals but you cannot do that. I think the same rationale applies here. The majority certainly prefers security, but, and I do not mean this pontifically, the Bill of Rights was written to protect the minority against the views of the majority.

PROFESSOR DOWD: I think the time has come for a number of thanks. Our first thanks this evening is to the Law Enforcement Assistance Administration for the financial contribution which has helped to make this symposium possible.

Our major thanks following that is obvious, and that is, our thanks to the panel. To have a panel of people who are employed in defending the Government, or involved in aviation, or even the practice of law, which is somewhat of a useful occupation, give the University and the Law School a day of their time, their best thoughts, and their companionship, it seems to me is a great gift and one which we appreciate enormously. Thank you.