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FBI's Expanding Role in International Terrorism Investigations

By

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American experience with terrorism is not new. In the late 18th and early 19th century, the United States was confronted with Barbary Coast pirates who were seizing U.S. vessels and kidnapping seamen. After much inaction and payment of ransom demands on the part of the United States to these pirates, Thomas Jefferson took action to end this reign of terror against our ships and seamen. In 1805 on the shores of Tripoli, the U.S. Marines forced the reigning pasha to stop terrorist actions against U.S. ships and seamen. It had taken 11 years of terrorism before America listened to the warning of Thomas Jefferson in 1784, after the first hijacking of a U.S. vessel, "an insult unpunished is the parent of others." While this is not to suggest that force is the only method to combat terrorism, it does suggest that all legal means available must be used to pro-

secute terrorists.

Today, the United States is making new inroads in its fight against international terrorism. Intelligence capabilities have never been more strategic, and Congress has given new impetus to law enforcement efforts to stem terrorism. This article addresses the new role of the FBI and its expanding investigative jurisdiction with regard to terrorism. This jurisdiction presents new demands and challenges for the FBI and the intelligence community.

Until recently, on-site FBI investigation of terrorist incidents abroad was rare.¹ Extraterritorial application by the FBI in Federal criminal law first began to expand in 1978 with the FBI investigation and eventual prosecution of Larry Layton for the death of Congressman Leo J. Ryan and the wounding of Deputy Chief of Mission Richard Dywer while they were visiting Jonestown,

Guyana.² On appeal from his indictment, Layton argued that he was not within the territorial jurisdiction of the United States at the time of the alleged acts. The district court concluded that a Federal crime was committed if the victim was an internationally protected person who, at the time of the offense, represented the United States in a foreign country, even though the offender was not within the "territorial jurisdiction" of the United States at the time of the offense and even where the crimes were committed outside the territorial boundaries of the United States. The Layton case provided some authority for the FBI to investigate crimes overseas and proceed with seeking an indictment, even in the absence of any reason to believe that any U.S. citizen was involved in the commission of the offense.³

By 1982, the U.S. Government's

"In distinguishing between actions in furtherance of legitimate national liberation movements and individual/group acts of terrorism whose sole aim is the indiscriminate killing of civilians...."

response to terrorism rested largely on the lead agency concept and the U.S. Department of State (USDS) was the lead agency responsible for managing terrorist incidents abroad, while the FBI had similar responsibilities for managing the response to incidents in the United States.⁴ This lead agency concept took into consideration the fact that the lead agency would coordinate the U.S. Government's response to terrorism and recognized that many Federal agencies, plus local and State authorities, have responsibilities in the counterterrorism area.

However, a major difficulty in deterring terrorism by bringing terrorist fugitives to justice remained in distinguishing between actions in furtherance of legitimate national liberation movements and individual/group acts of terrorism whose sole aim is the indiscriminate killing of civilians. Historically, this lack of agreement between nations prevented the extradition of known terrorists for trial,⁵ and in some cases, led to an accommodation to terrorist demands.

Despite these limitations, a variety of statutes did exist which gave the FBI some extraterritorial authority to investigate terrorist crimes committed overseas. Chief among these statutes were the following:

—*Aircraft Piracy and Related Offenses* (Title 49, U.S.C., App. 1472 l - n) wherein pursuant to the Hague Convention, the Federal Aviation Act of 1958 prohibited the seizure, by force or violence, of any aircraft within the special aircraft jurisdiction of the United States, interference with the flight crew while aboard such aircraft, the carrying of concealed weapons or explosives aboard such aircraft and the commission of certain crimes while aboard such aircraft. (Murder - 18 U.S.C. 1111;

Manslaughter - 18 U.S.C. 1112; Maiming - 18 U.S.C. 114; Rape - 18 U.S.C. 2031; Assault - 18 U.S.C. 113; and Robbery - 18 U.S.C. 2111)

This act gave the United States the authority to prosecute aircraft piracy outside the special aircraft jurisdiction of the United States as long as the offender is later found in the United States. The Federal Aviation Act authorized the government to seek the death penalty if the death of another person resulted from aircraft piracy as defined in this statute.⁶

—*Crimes Against Internationally Protected Persons* (18 U.S.C. 112, 878, 1116, 1201 (a)(4) wherein anyone who murders, kidnaps, assaults, or threatens certain internationally protected persons could be prosecuted by the United States, regardless of the nationality of either the victim or the offender, if the offender is present in the United States. The internationally protected person was limited to any Chief of State, head of government or Foreign Minister and their families when they are out of their own country, as well as any diplomatic personnel protected by the Vienna Conventions while they are overseas.

—*Crimes Against Select United States Officials* (18 U.S.C. 111, 351, 1114, 1201 (a)(5), 1751) The United States has jurisdiction to prosecute the murder, kidnapping, or assault of its major Government officials (The President and his staff, the Vice President and his staff, Members of Congress, Supreme Court Justices, the heads of Executive Departments and their seconds in command, the Director and Deputy Director of the CIA, and designated law enforcement officials).

—*Crimes Committed Within the Special Maritime Jurisdiction of the*

United States (18 U.S.C. 7, 113, 114, 1111, 1112, 1201, 2031, 2111) These statutes authorize the United States to prosecute the crimes of murder, manslaughter, maiming, kidnapping, rape, assault, or robbery committed on the high seas or any other waters within the admiralty and maritime jurisdiction of the United States that is outside of the jurisdiction of any particular state. This prosecutive authority exists regardless of the nationality of the persons committing the enumerated crimes if the crimes are committed against United States citizens or are committed on U.S. civil or military vessels.

—*Piracy* (18 U.S.C. 1651) Since 1819, the United States has had jurisdiction to prosecute anyone who commits the crime of piracy, as defined by the law of nations, on the high seas and is later brought to or found in the United States.

The foregoing statutes are still law and a few of these statutes have been used in indictments pending against the perpetrators of several recent international attacks against U.S. persons.

During 1983, several violent terrorist acts occurred, directed specifically at U.S. personnel overseas. On April 18, 1983, the American Embassy, Beirut, Lebanon, was bombed by an improvised explosive device deployed in a pickup truck killing 89 people, 17 of whom were Americans. On October 23, 1983, the 24th Marine Amphibious Unit which was assigned as part of the multinational peace-keeping force was bombed in Beirut, killing 255, 241 of whom were U.S. military personnel.

The Attorney General authorized explosives specialists from the Laboratory Division of the Federal Bureau of Investigation to provide on-site assistance in the collection and analysis of debris from these bombings. The tech-

"The United States has jurisdiction to prosecute the murder, kidnapping, or assault of its major Government officials...."

nical assistance had been provided at the request of the military. Materials recovered from the scene currently are in the FBI Laboratory for further examination and testing. The purpose of this forensic examination was to develop information concerning the perpetrators and the construction and deployment of the explosive devices used in the bombings. Experience gained from these incidents has revealed the importance of investigations in an effort to obtain evidence for prosecuting terrorists.

By 1984, the President and Congress reacted to these and similar acts of terrorism by passing new legislation, which was signed into law. On October 12, 1984, the President signed the Comprehensive Crime Control Act (CCCA) of 1984 establishing a new Federal statute, the Hostage Taking statute,⁷ to implement the International Convention Against the Taking of Hostages,⁸ which was ratified by Congress in 1981. The statute became effective on January 6, 1985, when the United States became a party to the convention after having deposited its instruments of ratification with the United Nations on December 7, 1984.

The statute provides that "whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or a governmental organization to do or abstain from doing any act as an explicit or implicit condition for the release of the person detained, or attempts to do so, shall be punished by imprisonment for any term of years or for life." If the conduct of the offense occurs outside the United States, one of the following factors

must be present:

- 1) The offender or the person seized or detained is a national of the United States,
- 2) The offender is found in the United States, or
- 3) The governmental organization sought to be compelled is the Government of the United States.⁹

New Era

As a result of the new legislation, a new era began for the FBI of expanded involvement in the investigation of international terrorism because of congressional application of extraterritorial jurisdiction to these statutes. Within 2 years, FBI personnel were investigating a series of international terrorism incidents abroad in which extraterritorial jurisdiction was exercised. Among the most noteworthy were the following:

- 1) June 1985: Hijacking of TWA Flight 847 (Hostage Taking, Crime Aboard Aircraft, Air Piracy),
- 2) October 1985: Hijacking of Achille Lauro (Hostage Taking, Piracy),
- 3) November 1985: Hijacking of Egypt Air Flight 648 (Hostage Taking, Crime Aboard Aircraft, Air Piracy),
- 4) April 1986: Bombing of TWA Flight 840 (Crime Aboard Aircraft, Destruction of Aircraft),
- 5) September 1986: Hijacking of Pan Am Flight 73. (Hostage Taking, Murder of U.S. National, Attempted Air Piracy, Aircraft Sabotage).

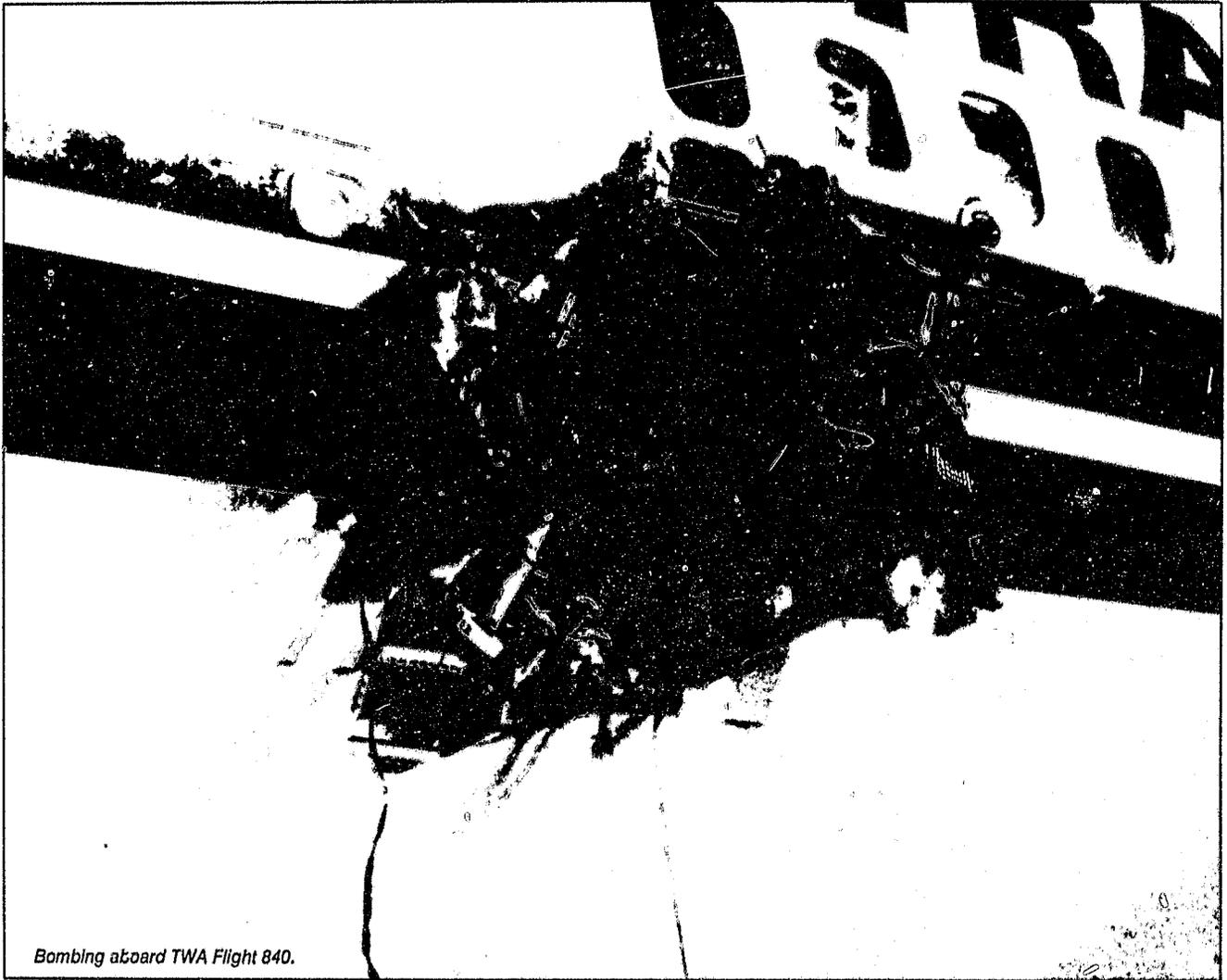
In many of the foregoing investigations, indictments are pending against the persons allegedly responsible for the terrorist acts.

On August 27, 1986, the President signed into law the Omnibus Diplomatic Security and Antiterrorism Act (OD-

SAA) of 1986 (Public Law 99-399).¹⁰ This act consists of 13 titles and is directed at providing enhanced diplomatic security, as well as combating international terrorism. Title 12 of this act creates extraterritorial jurisdiction for investigating any terrorist murder or manslaughter of and serious bodily injury on any U.S. national abroad. To ensure that this statute is used only for its intended purpose, this act requires that the Attorney General certify that in his judgment, such offense was intended to coerce, intimidate, or retaliate against the U.S. government or civilian population.¹¹

All of the above statutes provide that where specified conditions are satisfied, charges can be brought against a perpetrator and arrest warrants issued, regardless of where in the world the particular violation occurs and that prosecution by the United States can take place in the event that the perpetrator can be brought within the territorial jurisdiction of the United States. Once a warrant is issued, it will constrain the movements of the subject of the warrant by preventing him or her from entering countries with which the U.S. Government has judicial assistance treaties. Consequently, should the subject ever be located in a country willing to extradite him, the legal mechanisms will already be in place. Once located, attempts would be made to bring the fugitive to the bar of justice in the United States through legal means, such as extradition proceedings. However, if the fugitive is brought within the jurisdiction by means other than extradition, the U.S. Government is not precluded from prosecuting the subject.¹²

It is recognized that the United States would probably not be able to extradite the perpetrators of terrorism offenses from some countries;



Bombing aboard TWA Flight 840.

however, it is possible that the United States would subsequently locate them in another country which would agree to release them to the United States either formally (i.e., pursuant to a bilateral or multilateral extradition treaty) or informally.¹³

The fact that the United States has laws granting extraterritorial jurisdiction does not imply that the FBI can become operational in a foreign country without

the permission of that government. Normal procedure in these matters is to obtain permission to deploy a team of FBI investigators through the State Department. Once permission has been received and the team is deployed, relations with authorities of the host country are normally effected through the U.S. Embassy. In all cases, the FBI carries out the investigation in these matters

with the support and the cooperation of the host government.

What is significant regarding the CCCA of 1984 and OSDAA of 1986 is that these laws provide for the prosecution of violators of Federal law in crimes committed outside the territorial jurisdiction of the United States. As such, investigations conducted considerable distances from our shores present

"This new legislation, for the first time, presents a situation where efforts can be made to prosecute individual terrorists of any nationality located in any country."

unique problems entirely different from those previously encountered by the FBI. The FBI is now placed in the delicate position of establishing functional, logistical, and operational liaison between the investigative foreign law enforcement agency, the American Embassy, the Central Intelligence Agency and often, U.S. military intelligence in the country(s) in which these incidents occur. Often during these investigations, the FBI's duties and obligations mandated by law in criminal procedural matters are not fully understood by agencies outside the FBI.

The FBI's role in terrorism matters abroad is to investigate criminal acts found to be in violation of Federal criminal laws, to include collecting evidence which will ultimately bring a suspect to trial. This new legislation, for the first time, presents a situation where efforts can be made to prosecute individual terrorists of any nationality located in any country. The FBI is tasked with investigating these terrorist incidents abroad with the goal of building a case for prosecution. This has caused new challenges in the intelligence community, in that, no longer is our overseas mission only for intelligence gathering but also for prosecution. In this vein, certain constitutional procedural rights apply which previously were not applicable when only collecting intelligence information. For example, searches conducted by U.S. agents require fourth amendment restrictions; the fifth amendment self-incrimination provisions may attach to confessions; the CIA and U.S. military intelligence agencies have had to be apprised of the possible ramifications of the Jencks Act¹⁴ and the *Bruton* Rule,¹⁵ wherein the possibility exists that the notes of interviews of subjects and witnesses, as well as the individuals mak-

ing the notes, could be subpoenaed by the defense for trial. U.S. intelligence agencies are understandably concerned at having the thrust of their questions and the intelligence on which these questions are based revealed in open court and possibly examined by hostile foreign intelligence services.

Conclusion

It is clear that violent acts of international terrorism in the Middle East, Europe, and possibly the United States will continue at an increasing rate as the United States solidifies its position of not negotiating with terrorists and enacts antiterrorism legislation. Libyan and Iranian support of terrorism through surrogate groups has demonstrated that they have no hesitation in causing massive loss of life. The taking of American hostages for political gains will likely continue as long as any foreign government uses international terrorism as an important part of their foreign policy, and/or refuse to extradite the persons responsible for making war on U.S. citizens.

Footnotes

¹Evidence developed by foreign police agencies in FBI cases had been, on occasion, successfully introduced in courts of law in the United States, but generally that evidence collection effort was strictly voluntary on the part of the foreign local police and conducted within the parameters of both their willingness and ability to perform that effort as requested by the FBI. This voluntary assistance of foreign police created difficulties, since the method of evidence collection could neither be controlled nor supervised by the FBI.

²*United States v. Layton*, 509 F. Supp. 212 (N.D. Cal. 1981), appeal dismissed, 645 F.2d 681 (9th Cir. 1981), cert. denied, 452 U.S. 972 (1981).

³In *Layton*, the court stated that the Crimes Against Internationally Protected Person statutes were enacted to implement the Convention of the Prevention and Punishment of Crimes Against Internationally Protected Persons, 28 U.S.T. 1975, T.I.A.S. No. 8532. That convention indicates that the contracting states are to have jurisdiction over crimes against internationally protected persons when the victim is a representative of that country. (See Paragraph 1(c), Article 3 of the Convention.) The court concluded in *Layton* that in enacting legislation implementing the convention, Congress intended to meet all its obligations under the convention's terms.

⁴The basic authority for the conduct of investigations by the FBI is 28 U.S.C. Section 533 which provides, in part:

inent part:

- "The Attorney General may appoint officials—
- (1) to detect and prosecute crimes against the United States;
 - ... ; and
 - (3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General."

This section is implemented by 28 CFR Section 0.85, which provides:

"The Director of the Federal Bureau of Investigation shall: (a) Investigate violations of the laws, including the criminal drug laws, of the United States and collect evidence in cases in which the United States is or may be a party in interest, except in cases in which such responsibility is by statute or otherwise specifically assigned to another investigative agency. . . ."

National Security Decision Directives designate the FBI as the lead agency within the Department of Justice for operational response for terrorist incidents which take place within U.S. territory. The lead agency concept was first implemented in 1982.

⁵From the early League of Nations resolutions in the 1930's to the reports and conventions drawn up and debated during the United Nations Sixth (Legal) Committee throughout the 1970's, the international community has been unable to define terrorism. See 29 U.N. GAOR 6th Comm. (1471st Mtg.) at 42. See also, Bouthoul, "Definitions of Terrorism," in *International Terrorism and World Security* (D. Carlton and C. Schaefel ed. 1975). The FBI defines terrorism as the unlawful use of force or violence against persons to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives.

⁶As to the death penalty issue, the Supreme Court struck down the death penalty provisions of many laws in *Furman v. Georgia*, 408 U.S. 238 (1972) and *Gregg v. Georgia*, 428 U.S. 153 (1976). Following the decisions of *Furman* and *Gregg*, Congress enacted the death penalty provision of the air piracy statute, taking into consideration these constitutional challenges to the death penalty statutes. To implement the death penalty provisions of the air piracy statute at this time, it is necessary to prescribe adequate procedures or guidelines for its enforcement. To date, no Federal guidelines have been established for the use of the death penalty in Federal cases. However, there is some impetus to have the U.S. Sentencing Commission draft standards for the imposition of the federal death penalty.

⁷18 U.S.C. Sec. 1203.

⁸International Convention Against the Taking of Hostages, 17 December 1979, U.N. GAOR (XXXIV), A/34/819.

⁹18 U.S.C. Sec. 1203.

¹⁰18 U.S.C. Sec. 2331.

¹¹Id.

¹²The *Ker-Frisbie* doctrine holds that regardless of the manner in which the accused is brought within the jurisdiction of the court, the court will still exercise its jurisdiction over the accused. (See *Ker v. Illinois*, 119 U.S. 436 (1886); *Frisbie v. Collins*, 342 U.S. 519 (1952) *contra*, *United States v. Toscanino*, 500 F.2d 267 (2d Cir. 1974) (suggesting that outrageous means of bringing a defendant into a court's territorial jurisdiction might constitute a violation of "due process rights").

¹³It is not unusual for persons wanted in this country to be obtained from foreign nations by means less formal than extradition, e.g., deportation. Indeed, Larry Layton (supra) was not extradited, but rather merely placed by the Guyanese government on an airplane bound for the United States.

¹⁴18 U.S.C. 3500 *Jencks v. United States*, 353 U.S. 657 (1957)

¹⁵*United States v. Bruton*, 391 U.S. 123 (1968).