

STATEMENT OF THE GENERAL COUNSEL OF THE  
UNITED STATES DEPARTMENT OF TRANSPORTATION

PHILLIP D. BRADY

BEFORE THE

COMMITTEE ON MERCHANT MARINE AND FISHERIES  
SUBCOMMITTEE ON COAST GUARD AND NAVIGATION

HOUSE OF REPRESENTATIVES

OCTOBER 2, 1990

10:00 A.M., ROOM 1334, LONGWORTH HOUSE OFFICE BUILDING

AIRBORNE DRUG TRAFFICKING DETERRENCE

GOOD MORNING MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE,

I AM PLEASED TO HAVE THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY TO DISCUSS THE SERIOUS PROBLEM OF AIRBORNE DRUG TRAFFICKING. ACCOMPANYING ME IS ADMIRAL WALTER T. LELAND, CHIEF OF THE COAST GUARD'S OFFICE OF LAW ENFORCEMENT AND DEFENSE OPERATIONS, WHO WILL BE AVAILABLE TO RESPOND TO ANY SPECIFIC OPERATIONAL QUESTIONS THAT THE SUBCOMMITTEE MAY WISH TO ASK.

BEFORE I BEGIN, I WOULD LIKE TO CONVEY TO CONGRESSMAN COUGHLIN THE APPRECIATION OF THE DEPARTMENT OF TRANSPORTATION AND THE ADMINISTRATION FOR THE VERY SERIOUS AND THOUGHTFUL APPROACH HE HAS TAKEN TOWARD ADDRESSING THE PROBLEM OF AIRBORNE DRUG TRAFFICKING. SIMILARLY, THIS SUBCOMMITTEE IS TO BE COMPLEMENTED FOR ITS ATTENTION TO THIS IMPORTANT ISSUE AND TO SCHEDULING THIS HEARING TO OBTAIN THE NECESSARY LEGISLATIVE RECORD.

TODAY THE SUBCOMMITTEE WILL HEAR TESTIMONY FROM A WIDE RANGE OF WITNESSES ON THE BEST WAY TO DETER AIRBORNE DRUG TRAFFICKING. ALTHOUGH OUR APPROACHES MAY DIFFER, WE ARE UNITED IN OUR GOAL. WE ALL SHARE THE FRUSTRATION OF THE COAST GUARD PILOT WHO CAN FOLLOW AN AIRBORNE DRUG TRAFFICKER TO A DROP SITE, VIDEOTAPE THE DROP FOR PROSECUTION PURPOSES, AND YET HAVE NO PRACTICAL WAY OF PHYSICALLY ARRESTING THE PILOT AND BRINGING HIM TO TRIAL.

WHILE IT IS DIFFICULT TO DETERMINE WITH PRECISION THE QUANTITY OF NARCOTICS SMUGGLED INTO THE UNITED STATES BY AIR, A SUBSTANTIAL AMOUNT OF THE COCAINE THAT ENTERS THE UNITED STATES IS BROUGHT, AT LEAST PART WAY, BY AIRCRAFT. OVER THE YEARS, AND IN RESPONSE, WE BELIEVE, TO THE IMPORTANT PRIORITY WE HAVE PLACED ON INTERDICTION, WE HAVE SEEN AIRBORNE DRUG SMUGGLING SHIFT FROM SMALL PLANES LANDING AT REMOTE LANDING STRIPS TO THE CURRENT "SAFE-HAVEN" SCENARIO, WHERE AIRBORNE DRUG TRAFFICKERS DROP NARCOTICS TO WAITING VESSELS. THIS MODE OF SMUGGLING IS BEING CONDUCTED IN A WIDE RANGE OF COASTAL AND OFFSHORE AREAS THROUGHOUT THE CARIBBEAN. WHILE THE COAST GUARD IS ABLE, WITH VARYING DEGREES OF SUCCESS, TO SEIZE THE WAITING VESSELS, CONTRABAND AND CREWS, THE IMMEDIATE APPREHENSION OF THE AIRBORNE DRUG TRAFFICKER CAN BE EXTREMELY DIFFICULT. IN ORDER TO TAKE THE PILOT INTO CUSTODY, THE AIRCRAFT MUST FIRST LAND.

IT HAS BEEN SUGGESTED THAT PROVIDING THE COAST GUARD WITH THE AUTHORITY TO USE DEADLY FORCE AGAINST SUSPECTED DRUG SMUGGLING AIRCRAFT WOULD SUBSTANTIALLY DETER THE AIRBORNE FLOW OF NARCOTICS

INTO THE UNITED STATES. THIS IS THE APPROACH TAKEN IN CONGRESSMAN COUGHLIN'S BILL, H.R. 5301. THIS BILL WOULD AUTHORIZE THE COAST GUARD TO ORDER AN AIRCRAFT "REASONABLY BELIEVED" TO BE TRANSPORTING ILLEGAL DRUGS TO LAND. IF THE AIRCRAFT DOES NOT COMPLY WITH THE ORDER TO LAND, SPECIFIC PROCEDURES ARE SET FORTH TO BE FOLLOWED TO COMPEL THE AIRCRAFT TO LAND. THE BILL WOULD REQUIRE DRUG INTERDICTION AIRCRAFT TO BE EQUIPPED WITH IDENTIFYING INSIGNIA AND LIGHTS TO COMMUNICATE WITH SUSPECTED AIRCRAFT BY ALL MEANS AVAILABLE. THE BILL PROVIDES FOR THE USE OF WARNING SIGNALS, UNDER CAREFULLY PRESCRIBED CIRCUMSTANCES, AND THE USE OF WEAPONS AGAINST THE AIRCRAFT IF IT DOES NOT COMPLY WITH THE ORDER TO LAND.

THE BASIC AUTHORITY FOR COAST GUARD LAW ENFORCEMENT ACTIVITIES IS FOUND IN 14 U.S.C. 89(a). IT AUTHORIZES THE COAST GUARD TO MAKE INQUIRIES, EXAMINATIONS, INSPECTIONS, SEARCHES, SEIZURES AND ARRESTS ON THE HIGH SEAS AND WATERS OVER WHICH THE UNITED STATES HAS JURISDICTION FOR THE PREVENTION, DETECTION AND SUPPRESSION OF VIOLATIONS OF THE LAWS OF THE UNITED STATES. FOR SUCH PURPOSES, IT AUTHORIZES COMMISSIONED, WARRANT, AND PETTY OFFICERS OF THE COAST GUARD TO GO, AT ANY TIME, ON BOARD ANY VESSEL SUBJECT TO THE JURISDICTION, OR TO THE OPERATION OF ANY LAW, OF THE UNITED STATES TO ADDRESS INQUIRIES TO THOSE ON BOARD, EXAMINE THE SHIP'S DOCUMENTS AND PAPERS, AND EXAMINE, INSPECT, AND SEARCH THE VESSEL AND USE ALL NECESSARY FORCE TO COMPEL COMPLIANCE. IN THE CASE OF VESSELS, THE COAST GUARD IS AUTHORIZED

TO USE DISABLING FIRE BY 14 U.S.C. 637(a). IT IS DIRECTED AT THE VESSEL'S ENGINES AND STEERING EQUIPMENT AFTER WARNINGS ARE GIVEN FOR ALL PERSONS ON BOARD TO EVACUATE THE AREA. DISABLING FIRE IS NOT USED UNTIL ALL OTHER MEANS OF STOPPING THE VESSEL ARE DETERMINED TO BE UNSUCCESSFUL OR UNPRODUCTIVE.

GRANTING THE COAST GUARD THE PROPOSED AUTHORITY TO USE DEADLY FORCE AGAINST AIRCRAFT COULD CREATE SUBSTANTIAL LOGISTICAL PROBLEMS. CURRENTLY, NONE OF THE COAST GUARD'S 180 AIRCRAFT IS EQUIPPED WITH FIREPOWER. OF THOSE, THE NINE HU-25C (FALCON INTERCEPTOR) AIRCRAFT COULD BE CONSIDERED FOR MODIFICATION WITH WEAPON SYSTEMS. IF THESE AIRCRAFT WERE MODIFIED WITH WEAPONS SYSTEMS, ADDITIONAL "ORDNANCEMEN" BILLETTS, ARMORY SPACE, MAINTENANCE AND WEAPONS SYSTEM TRAINING FOR THE FLIGHT CREWS WOULD BE NECESSARY. FURTHERMORE, RULES OF ENGAGEMENT WOULD HAVE TO BE DRAFTED AND DECISIONS REGARDING THE APPROPRIATE LEVEL OF FIREPOWER MADE. INTELLIGENCE WOULD HAVE TO BE COORDINATED CLOSELY TO INSURE THAT THE COAST GUARD DID NOT ACCIDENTLY FIRE ON ANY AIRCRAFT CARRYING U.S. UNDERCOVER AGENTS.

THE FEDERAL AVIATION ADMINISTRATION (FAA) ALSO WOULD BE PRESENTED WITH PRACTICAL PROBLEMS IF THE COAST GUARD WERE GIVEN THIS AUTHORITY. MANY OF THESE PROBLEMS ARISE BECAUSE THE PROPOSED AREAS OF INTERCEPTION ARE WITHIN UNITED STATES AIR DEFENSE IDENTIFICATION ZONES (ADIZ). SUCH ZONES ARE OUTSIDE OF THE TERRITORY OF THE UNITED STATES. THE FAA HAS NO AUTHORITY TO PRESCRIBE REGULATIONS GOVERNING THE OPERATIONS OF FOREIGN AIRCRAFT

BEYOND U.S. TERRITORY THAT ARE NOT ENTERING U.S. AIRSPACE. NEITHER FAA REGULATIONS NOR INTERNATIONAL RULES OF THE AIR REQUIRE GENERAL AVIATION AIRCRAFT OPERATING UNDER VISUAL FLIGHT RULES OUTSIDE OF U.S. AIRSPACE TO HAVE A RADAR TRANSPONDER, A TWO-WAY RADIO, OR TO MONITOR SPECIFIC RADIO FREQUENCIES. THEREFORE, AT ANY TIME OF THE DAY, COMMUNICATION OF AN ORDER TO LAND WOULD BE PROBLEMATIC AND WOULD LIKELY DEPEND ON AN UNDERSTANDING OF VISUAL INTERCEPTION SIGNALS. AT NIGHT, OR UNDER LOW-LIGHT CONDITIONS, SUCH SIGNALS PROBABLY WOULD NOT BE RECOGNIZED AS COMING FROM A LAW ENFORCEMENT AIRCRAFT BY A NUMBER OF GENERAL AVIATION PILOTS.

FURTHERMORE, THE PROPOSED LEGISLATION REQUIRES THE SECRETARY OF TRANSPORTATION, THROUGH THE FAA, TO PROVIDE PUBLIC NOTICE TO AIRCRAFT OPERATORS OF THE PROPOSED PROCEDURES AND THE CONSEQUENCES OF THE FAILURE TO ABIDE BY THEM. THE FAA COULD ISSUE SUCH A NOTICE, BUT THERE IS NO CERTAINTY THAT A MAJORITY OF GENERAL AVIATION PILOTS, ESPECIALLY FOREIGN PILOTS, WOULD BE AWARE OF IT. WHILE CONSTRUCTIVE PUBLIC NOTICE IS OFTEN CONSIDERED ADEQUATE FROM A LEGAL STANDPOINT, IN THIS CONTEXT, GIVEN THE POTENTIAL CONSEQUENCES, RELYING ON CONSTRUCTIVE NOTICE COULD BE PROBLEMATIC.

WHILE WE DEFER TO THE DEPARTMENT OF JUSTICE, WE NOTE THAT H.R. 5301 ALSO RAISES CERTAIN UNSETTLED CONSTITUTIONAL ISSUES. THE USE OF DEADLY FORCE BY LAW ENFORCEMENT OFFICERS WAS DISCUSSED AT LENGTH BY THE SUPREME COURT IN A 1985 DECISION, TENNESSEE V. GARNER, 471 U.S. 1 (1985). IN GARNER, THE COURT DETERMINED THAT USE OF DEADLY FORCE TO APPREHEND A FELONY SUSPECT IS A SEIZURE

SUBJECT TO THE REASONABLENESS REQUIREMENT OF THE FOURTH AMENDMENT AND CHARACTERIZED THE INTRUSIVENESS OF SUCH A SEIZURE AS "UNMATCHED." THE COURT HELD THAT IT IS NOT CONSTITUTIONALLY UNREASONABLE FOR A LAW ENFORCEMENT OFFICER TO PREVENT ESCAPE BY USING DEADLY FORCE IF THE OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT THE SUSPECT POSES A THREAT OF SERIOUS PHYSICAL HARM, EITHER TO THE OFFICER OR OTHERS. IT IDENTIFIED TWO SITUATIONS WHERE THE USE OF DEADLY FORCE WOULD BE CONSTITUTIONALLY ACCEPTABLE:

[I]F THE SUSPECT THREATENS THE OFFICER WITH A WEAPON OR THERE IS PROBABLE CAUSE TO BELIEVE THAT HE HAS COMMITTED A CRIME INVOLVING THE INFLICTION OR THREATENED INFLICTION OF SERIOUS PHYSICAL HARM, DEADLY FORCE MAY BE USED IF NECESSARY TO PREVENT ESCAPE, AND IF, WHERE FEASIBLE, SOME WARNING HAS BEEN GIVEN.

GARNER, 471 U.S. AT 11-12.

WE NOTE THAT THE FINDINGS AND PURPOSE SECTION OF H.R. 5301 INCLUDES A FINDING THAT

AIRBORNE DRUG TRAFFICKERS, ESPECIALLY THOSE PENETRATING A UNITED STATES AIR DEFENSE IDENTIFICATION ZONE WITHOUT AUTHORITY, POSE AN IMMEDIATE DANGER OF SERIOUS HARM TO THE PEOPLE OF THE UNITED STATES BY CONTRIBUTING TO DRUG CONSUMPTION AND DRUG-RELATED VIOLENCE.

SECTION 2(A)(4).

WE UNDERSTAND THAT THIS STATEMENT WAS INCLUDED IN THE BILL IN AN EFFORT TO ENSURE THAT USE OF DEADLY FORCE BY COAST GUARD

OFFICERS AGAINST AIRBORNE DRUG TRAFFICKERS COMPLIES WITH THE CONSTITUTIONAL STANDARDS ARTICULATED IN TENNESSEE V. GARNER.

WE NOTE THAT THE SUPREME COURT HAS RECOGNIZED THE VIOLENCE ASSOCIATED WITH NARCOTICS TRAFFICKING AND THE SEVERE EFFECTS OF NARCOTICS USE ON PUBLIC HEALTH, SEE E.G., NATIONAL TREASURY EMPLOYEES UNION V. VON RAAB, 109 S.CT. 1384, 1392 (1989).

NEVERTHELESS, IT IS AN OPEN QUESTION WHETHER THE COURTS WOULD FIND THAT THE "SERIOUS HARM" REFERRED TO IN GARNER WAS SATISFIED BY H.R. 5301.

EQUALLY IMPORTANT, ALTHOUGH WE WOULD DEFER TO THE DEPARTMENT OF STATE, THERE APPEAR TO BE INTERNATIONAL LAW ISSUES INVOLVED WITH THE USE OF DEADLY FORCE AGAINST CIVIL AIRCRAFT, OR AGAINST FOREIGN NATIONALS. UNDER ARTICLE 3(D) OF THE 1944 CONVENTION ON INTERNATIONAL CIVIL AVIATION (THE "CHICAGO CONVENTION"), STATES ARE OBLIGATED TO HAVE DUE REGARD FOR THE SAFETY OF CIVIL AVIATION IN DIRECTING THEIR MILITARY, CUSTOMS, AND POLICE AIRCRAFT. IT HAS BEEN THE POSITION OF THE UNITED STATES AND THE WORLD AVIATION COMMUNITY THAT INTERNATIONAL LAW PROHIBITS THE USE OF WEAPONS AGAINST CIVILIAN AIRCRAFT NOT POSING A CLEAR AND PRESENT DANGER, IN THE MILITARY SENSE, TO THE SECURITY OF A NATION. ACCORDINGLY, THE UNITED STATES STRONGLY CONDEMNED THE SOVIET SHOOTDOWN OF KAL FLIGHT 007 IN MAY OF 1984, DESPITE SOVIET ASSERTIONS THAT THE AIRCRAFT'S ENTRY INTO THEIR AIRSPACE WAS A CRIMINAL OFFENSE UNDER SOVIET LAW.

PROPOSED ARTICLE 3 BIS OF THE CHICAGO CONVENTION, WHICH WAS

APPROVED UNANIMOUSLY BY THE INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO) ASSEMBLY TO CODIFY EXISTING CUSTOMARY INTERNATIONAL LAW IN THE WAKE OF THE KAL 007 SHOOTDOWN, PROVIDES THAT "EVERY STATE MUST REFRAIN FROM RESORTING TO THE USE OF WEAPONS AGAINST CIVIL AIRCRAFT IN FLIGHT AND THAT, IN THE CASE OF INTERCEPTION, THE LIVES OF PERSONS ON BOARD AND THE SAFETY OF THE AIRCRAFT MUST NOT BE ENDANGERED." AS REFLECTED IN ARTICLE 3 BIS, THE USE OF FORCE IN SELF-DEFENSE AGAINST ARMED ATTACK IS THE ONLY GENERALLY RECOGNIZED EXCEPTION TO THIS RULE. THEREFORE, WE ARE CONCERNED THAT LEGISLATION THAT DOES NOT ADHERE TO THE PRINCIPLES OF ARTICLE 3 BIS COULD SUBJECT THE UNITED STATES TO INTENSE INTERNATIONAL CRITICISM AND UNDERMINE LONGSTANDING U.S. EFFORTS TO ENSURE THE SAFETY OF CIVIL AVIATION. AS DR. ASSAD KOTAITE, PRESIDENT OF THE ICAO COUNCIL NOTED IN A LETTER DISCUSSING THE POSSIBLE USE OF WEAPONS AGAINST AIRCRAFT CARRYING DRUGS, SUCH ACTIONS "WOULD NOT ONLY BE CONTRARY TO THE SPIRIT OF THE CONVENTION ON INTERNATIONAL CIVIL AVIATION BUT COULD ALSO VIOLATE SOME OF ITS SPECIFIC PROVISIONS OTHER THAN THE NEW ARTICLE 3 BIS."

FURTHERMORE, IT IS QUESTIONABLE WHETHER THE UNITED STATES COULD ADOPT SUCH A POLICY, EVEN FOR DRUG TRAFFICKERS, WITHOUT SIGNALLING ITS APPROPRIATENESS FOR OTHER NATIONS, SOME OF WHICH COULD BE FAR LESS CAREFUL THAN THE UNITED STATES. FOR MANY YEARS, WE HAVE OPPOSED, FOR BOTH LEGAL AND SAFETY REASONS, OTHER COUNTRIES' OCCASIONALLY ANNOUNCED INTENTIONS TO SHOOT AT CIVIL AIRCRAFT. ONCE SUCH A PRACTICE BEGINS, IT COULD HAVE DANGEROUS

AND WIDESPREAD CONSEQUENCES THAT COULD AFFECT THE SAFETY OF INNOCENT PEOPLE WORLDWIDE. AS THE WORLD LEADER IN CIVIL AVIATION, THE UNITED STATES WOULD HAVE MORE TO LOSE THAN ANY OTHER COUNTRY IN THE DEVELOPMENT OF SUCH A PRACTICE.

FOR THE REASONS DISCUSSED, THE ADMINISTRATION PREFERS ITS APPROACH TO DETERRING AIRBORNE DRUG TRAFFICKING, CONTAINED IN TITLE III OF H.R. 5055 AND IN THE COUGHLIN AMENDMENT TO THE CRIME BILL, H.R. 5269. THIS LEGISLATION MAKES IT A CRIMINAL OFFENSE FOR AIRCRAFT SUSPECTED OF DRUG SMUGGLING TO FAIL TO COMPLY WITH AN ORDER TO LAND ISSUED BY THE COAST GUARD OR CUSTOMS SERVICE. FAILURE TO COMPLY SUBJECTS THE PILOT TO UP TO TWO YEARS IMPRISONMENT AND UP TO \$25,000 IN CIVIL PENALTIES. IT GIVES THE FEDERAL AVIATION ADMINISTRATION THE AUTHORITY TO REVOKE SUMMARILY THE UNITED STATES REGISTRATION AT THE MOMENT THE AIRCRAFT FAILS TO COMPLY WITH AN ORDER TO LAND. THE AIRCRAFT THEN BECOMES "STATELESS" AND MAY BE SUBJECTED TO THE CRIMINAL JURISDICTION OF ANY NATION. FURTHERMORE, THE AIRCRAFT CAN BE SEIZED AND FORFEITED UNDER THIS BILL.

IF ENACTED, THE ADMINISTRATION'S APPROACH WOULD SERVE AS A POSITIVE MODEL THAT THE WORLD COMMUNITY COULD FOLLOW, FOSTERING INTERNATIONAL COOPERATION. WHILE WE RECOGNIZE THAT IT MAY NOT ALWAYS SOLVE THE PROBLEM OF SUSPECTED DRUG SMUGGLING AIRCRAFT THAT REFUSE TO COMPLY WITH AN ORDER TO LAND, WE MUST NOT LOSE SIGHT OF OUR GOAL, DRUG INTERDICTION. ALTHOUGH THE COAST GUARD MAY NOT IMMEDIATELY APPREHEND THE PILOT, IT STILL HAS AN OPPORTUNITY TO

INTERDICT THE DRUGS. THROUGH ENHANCED SURVEILLANCE AND INTELLIGENCE GATHERING, WE ARE INCREASINGLY ABLE TO INTERDICT VESSELS TRANSPORTING DRUGS TO OUR COASTLINE. NOTABLY, THE PROVISIONS IN OUR BILL WILL ADD TO OUR ABILITY TO APPREHEND AND PROSECUTE AIRBORNE DRUG TRAFFICKERS WITHOUT RAISING CONSTITUTIONAL ISSUES OR POTENTIALLY PRECIPITATING FOREIGN ACTS OF AGGRESSION AGAINST OUR CIVIL AIRCRAFT.

AT A MINIMUM, BEFORE CONSIDERING EMBARKING ON A POLICY AUTHORIZING THE USE OF DEADLY FORCE AGAINST SUSPECTED AIRBORNE DRUG TRAFFICKERS, WE SHOULD GIVE THE ADMINISTRATION'S APPROACH A CHANCE TO WORK. UNTIL WE DRAMATICALLY DECREASE THE AMERICAN MARKET IN ILLEGAL DRUGS, SMUGGLERS WILL FIND NEWER AND MORE NOVEL MEANS OF SUPPLYING THAT MARKET. BEFORE WE EXPOSE UNITED STATES CIVIL AVIATION TO THE THREAT OF DEADLY FORCE BY FOREIGN COUNTRIES, WE MUST WEIGH THE COSTS OF USING DEADLY FORCE AGAINST THE REDUCTIONS THIS WOULD BRING IN THE TOTAL QUANTITY OF DRUGS SMUGGLED INTO OUR COUNTRY.

THAT CONCLUDES MY PREPARED REMARKS. I COMMEND THE SUBCOMMITTEE FOR ITS INTEREST IN THIS SUBJECT AND LOOK FORWARD TO A CONTINUING DIALOGUE WITH IT AS IT CONSIDERS A LEGISLATIVE APPROACH TO ENHANCING THE COAST GUARD'S ABILITY TO DETER AIRBORNE DRUG TRAFFICKING.

ADMIRAL LELAND AND I WOULD BE HAPPY TO RESPOND TO ANY QUESTIONS THAT THE COMMITTEE MIGHT HAVE.