

# OF SECRETS, PLANES, AND PROPERTY: A SCENARIO

By Jordan J. Paust\*

In the fall of 1977, two incidents involving jet fighter aircraft of the Soviet Union and the United States occurred without attracting the attention of international lawyers.<sup>1</sup> In the interest of creative legal scholarship and more effective legal decision-making, however, the following commentary is offered.

On September 18, 1976, *The New York Times*<sup>2</sup> reported that the United States Navy would attempt recovery of an F-14 fighter plane which it had recently lost over the side of the carrier John F. Kennedy in the North Sea. One Navy official told the *Times*, "We are not in a great contest with the Soviets, but we would just as soon not leave the plane lying around on the bottom . . ." The statement undoubtedly was true since the aircraft cost over \$18 million, and if the Soviets, who were on vessels nearby, should "recover the plane, it would be an intelligence windfall comparable to the recent defection to Japan of a Soviet pilot flying a MIG-25, code-named Foxbat by the North Atlantic Treaty Organization." The *Times* also mentioned that one of the highly secret \$500,000 Phoenix missiles was on the plane when it was last seen, 75 miles northwest of Scotland, heading downward to a depth of 1,890 feet.

Another *Times* article<sup>3</sup> noted that Japan was returning the Soviet MIG-25 jet fighter to the Soviet Union—in pieces. The aircraft was recognized as being of Soviet origin and ownership, but was dismantled and inspected while in Japanese control by teams of experts from Japan, the United States, and elsewhere. Under a subheading of "No Longer Top-Secret," the article noted that the Soviets were not too pleased about the over-all handling of their property while in Japanese control: "Relations between officials of the Moscow and Tokyo governments became chilled."

With this background, the factual stage is set. Imagine the following colloquy among several government attorneys. Above all, realize that Academia, the observer, has a near perfect set of facts for dialectical exploration of international legal problems and threats posed to international peace, while government lawyers from the United States and Soviet Union must necessarily appear somewhat clumsy as they shift their arguments from one point to another.

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1. No articles or comments on the incidents are known to date.

2. At 3, col. 5.

3. November 13, 1976, at 3, col. 5.

*(Time: recent past, late evening. Place: a small, dimly-lit restaurant in New York City.)*

U.S. attorney: Property in the mislaid aircraft remains with the United States, especially since the aircraft is a warship, it has United States markings for easy identification, the United States has sovereign immunity in all circumstances, and the aircraft was not abandoned.

Soviet attorney: Precisely our point, and since our aircraft was stolen and similarly marked — not abandoned or lost — it remains the property of the Soviet Union. Japan and/or the United States must return our aircraft.

U.S. attorney: You cannot capture or lift our aircraft from the ocean floor.  
Both: You cannot send vessels or persons to the area and seek to control the aircraft and enter it. An international infraction is committed when one state, not at war with the other, controls the warship-property of another. That is why we can keep others from attempting to control our aircraft.

*(The stage is set for further shifts in debate.)*

Japanese and United

States attorneys: You will get your aircraft back — after we take a look at it; your property *will* be returned.

Soviet attorney: *(anxiously looking for the waiter)* Well, we're not about to keep your plane either; we're just going down for a look-see.

U.S. attorney: *(spilling a glass of wine)* You can't do that! We have property rights in our state secrets. Haven't you read about the control of secret information in this country — break-ins, lawsuits against newspapers, contempt powers and such?

Soviet attorney: *(convincingly)* Then surely we have the better claim; we control even more than you do!

*(Nearly trapped by logic, the U.S. attorney shifts attention to the details of fact:)*

U.S. attorney: *(wiping up the spilt wine)* We win in both cases. You have not captured our aircraft, and since it remains our property, we can prevent you from capturing it; whereas, we already have control of your aircraft.

Soviet attorney: *(quick to counter)* You have our plane, but you have not captured our secrets; we demand an equal right to prevent your capture of our secrets, which are still state property.

*(The colloquy continues, muted, as the stage darkens. Focus now shifts to Academia and Student.)*

Academia: At least we agree. In both cases the aircraft remains the

property of the state from which it was "lost" or stolen. It follows that the Soviet plane should be returned and the United States should have a right of recovery. Can the secrets be protected in either case?

Student:

I suppose.

Academia:

Property theory, though conceptually applicable, is inadequate for the serving of all legal policies at stake. Common expectation and practice also belie its authority to regulate the control of secrets. Will we return a secret set of records unopened to a Soviet embassy from which they were stolen?

Student:

I suppose not.

Academia:

Do we refrain from searching the ocean depths or elsewhere for secreted knowledge?

Student:

Certainly not; nor do the Soviets.

Academia:

But a problem exists: how can law respond adequately to the regulation of secret knowledge? If present law does not function, how can it be more useful in avoiding confrontation on the high seas or the transnational employment of covert violence to destroy captured persons or property, each of which could endanger international peace? Moreover, what effect will changes in the law have upon the control of secrets by the international media or the capture by others of secreted property? Greater attention to the problem and some hard thinking about criteria for decision seem most appropriate. You have the rest of the hour to complete your answer.

*(Curtain)*