The original documents are located in Box 11, folder "Cuba - Request to Establish Civilian Air Service Across U.S. Air Space" of the John Marsh Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

WASHINGTON

March 17, 1976

MEMORANDUM FOR: DICK CHENEY

FROM: JACK MARSH

Are you aware there is a request being made by Cuba to overfly on a regular basis for schedule of airliners of the Continental United States?

This option paper was run by me and I objected to the permission.

yes
It is under control

MAR 19 1976

MEMORANDUM

NATIONAL SECURITY COUNCIL

~~CONFIDENTIAL~~/XGDS

ACTION
March 22, 1976

MEMORANDUM FOR: BRENT SCOWCROFT

FROM: STEPHEN LOW

SUBJECT: Cuban Overflight Request

Attached is a memorandum to the President on Cuban overflight informing him of the new Cuban note and requesting his approval.

RECOMMENDATION:

That you initial the memorandum to the President at Tab I.

Attachments

~~CONFIDENTIAL~~/XGDS

XGDS of E.O. 11652 by authority of Brent Scowcroft; Exemption Category Section 5 (B)(3).

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

~~CONFIDENTIAL~~/XGDS

ACTION

MEMORANDUM FOR THE PRESIDENT

FROM: BRENT SCOWCROFT

SUBJECT: Cuban Overflight Request

On Saturday, we received a new note from the Cubans through the Swiss formally requesting the right to exercise the privilege under the international civil aviation convention of establishing a civilian air service across US air space. The note, a translation of which is attached at Tab A, is politely phrased. It makes no reference to previous communications on the subject but constitutes a formal request through diplomatic channels which complies in literal and exact form with the requirements of our 1973 note on the subject. This is the second note we have received from them on the subject.

We are legally obliged under the International Air Services Transit Agreement to designate a corridor for civil air transportation on request.

Our 1973 note requires that a request for permission to overfly be filed through diplomatic channels 48 hours in advance of a flight. We now believe even this requirement lacks a legal basis. Whether or not it does, the Cubans have complied with it and we are under some obligation to reply to their note. It would, of course, be possible to ignore the note but to do so would create a precedent in a communication exchange which has proven useful to us in cases of search and rescue, highjackings, and other matters.

We can expect that if we do not reply to the Cuban note within a reasonable time the Cubans will either begin denying requests to our nonscheduled aircraft and eventually perhaps to some of the

XGDS of E.O. 11652 by authority of Brent Scowcroft; Exemption Category Section 5 (B)(3).

scheduled aircraft or denounce the US in the International Civil Aviation Organization for failure to abide by its treaty obligations. The matter will soon attract publicity. Eventually we will be faced with having to grant the overflight right and appear to be backing away from an earlier hesitation to do so, or jeopardize the IASTA agreement from which our civil aviation derives considerable benefit. If we approve this Cuban request, there is no reason why the matter should receive any significant publicity. It has not done so to date.

RECOMMENDATION:

That you authorize me to approve the Cuban request for a civil air route across US air space.

Approve _____ Disapprove _____

Attachments:

Tab A--Cuban note of March 20
Tab B--My memorandum to you of March 10.

Cuban Note of March 20

Cubana Airlines wishes to initiate regular air service between Cuba and Canada under the provisions of the agreement on air transport subscribed between both countries. These flights constitute a regular international air service and require overflight of US territory. Cuba being, as well as the United States, contracting partners to the agreement relative to the transit of international air services, MINREX submits along with this note a program of flights with schedules and frequency of flights soliciting from the authorities for regular international air service of Cubana the exercise of the privilege of crossing its territory without landing under the provisions of the referenced accord.

MINREX awaits receipt from the Department of State its most rapid reply to the formulated request.

~~SECRET~~-XGDS

1148 REWRITE
3/10/76

MEMORANDUM FOR THE PRESIDENT

FROM: BRENT SCOWCROFT

SUBJECT: Response to Cuban Request for Scheduled Service Transiting United States Air Space

United States commercial carriers overfly Cuba from 35 to 50 times daily through two designated airways, filing only routine flight plans. To initiate such scheduled service, US carriers must make arrangements for payment of an overflight fee which usually requires a number of weeks. Cuba requires nonscheduled US flights to file plans 48 hours in advance and receive the "decision" and route before flying.

No commercial Cuban service overflies the US. To establish regular scheduled service over the US, Cuba must submit a request for routes and transit authority through diplomatic channels to the US government. For nonscheduled Cuban overflights of the US, the US, in a diplomatic note of 1973, requested two working days' advance notice through diplomatic channels.

For some months Canada and Cuba have been discussing a regular air service between Havana and Montreal. The Cubans have leased two Canadian DC-8s for the service, to be managed by Cubana Airlines. Until the Cubans are fully trained, Canadian crews have been operating the planes. We have been kept informed of the process by the Canadians and we informally warned them some weeks ago that the Cubans would have to request overflight permission for any regular service.

On February 18 and 25 Cuban flights transited US air space after filing routine flight plans. When the second request was referred to the State Department, a note was sent through diplomatic channels stating that Cubana Airlines should not undertake further flights transiting US territory until the Cuban Government had requested through diplomatic channels that the US Government authorize transit of US territory and provide designated transit routes. The following day a Cuban plane filed a flight plan for transit of US air space. At our request, the FAA informed the crew that until the Cuban Government had responded to our note,

~~SECRET~~ - XGDS

XGDS of E.O. 11652 by authority of Brent Scowcroft; Exemption Category Section 5 (B) (3).

transit of US air space was not authorized. A similar request from the Cubans for an overflight on March 9 was also denied by the FAA while the matter was being discussed in diplomatic channels.

Last Friday, March 5, the FAA received a request for permission to establish a regular service beginning March 10 and following a prescribed air corridor which the FAA has designated as "non-sensitive" for use by communist countries. On the same day, State received through the Swiss a note (Tab B) from the Cuban Foreign Ministry, of conciliatory tone, denying any intention to violate the territory of the US and noting that its flights had conformed to the International Civil Aviation Convention. It did not mention our 1973 note requiring two working days' notice or Cuba's similar requirement for nonscheduled flights. Finally, the note asked for current, applicable US regulations.

Cuba, Canada, and the US are parties to the Chicago Convention and the International Air Services Transit Agreement. These treaties give air carriers of contracting parties the right to overfly the territory of other signatories after filing flight plans through designated corridors but without the need to seek special permission. Under US domestic law, foreign civilian aircraft must notify and obtain the approval of the FAA for each flight plan. State and FAA lawyers are of the view that we have no sustainable legal basis for denying the Cuban request for regular commercial overflight of the US through the designated non-sensitive corridor. They further believe that to do so would be to jeopardize US service south across the Caribbean and damage international air agreements from which we gain more than we give. It might also result in legal suits in US domestic courts.

Consequently, State prposes to reply to the Cuban note approving the proposal to establish the service and designating the corridor to be used. The note (Tab A) would further say that procedures with regard to nonscheduled flights should continue to conform to our note of 1973 requiring 48 hours' notice.

I believe, and Phil Buchen concurs, that we unfortunately have no choice but to approve this service. To refuse to do so would result in substantial harm to US commercial and diplomatic interests.

RECOMMENDATION:

That you approve our sending the note attached at Tab A.

Approve _____ Disapprove _____

APR 21 1976

THE WHITE HOUSE

WASHINGTON

April 21, 1976

Ray — Excellent memo, even if you didn't come up with the right answer. What is view of ALPA? M

MEMORANDUM FOR: JACK MARSH

FROM: RAY WALDMANN Ray W.

SUBJECT: CUBAN OVERFLIGHTS

At your request, I have looked into the problem of Cuban overfights. Certain non-scheduled, Cuban training flights overflew the United States on February 18th and 25th with permission routinely granted through the FAA. Subsequently, the United States sent a note to Cuba requesting that any further flights be preceded by a request through diplomatic channels. Cuba filed a flight plan for a proposed schedule service from Havana to Montreal, and on March 5th sent a note explaining the earlier non-scheduled flights and requesting copies of applicable U.S. regulations. On March 20th, a second Cuban note was received which submitted a program of flights with schedules and frequencies soliciting from U.S. authorities the "exercise of the privilege of crossing its territory" and "waits receipt from the Department of State its most rapid reply to the formulated request."

It has been the position of the FAA, the State Department and the NSC that the Chicago Convention and the International Air Services Transit Agreement (IASTA) to which both Cuba and the United States are signatories, requires no prior approval in the case of non-scheduled flights and only approval of a flight plan with respect to scheduled flights. There are certain exceptions provided in the Chicago Convention for national emergencies and time of war which are not applicable.

It could be argued, however, that the United States and Cuba by agreement have taken themselves out of the terms of the Chicago Convention and the International Air Services Transit Agreement. It could be argued that the United States initiated this by its note of April 6, 1973, which stated that the Government of the United States should be informed ahead of time

through diplomatic channels of flights by aircraft of Cuban registry which are intended to enter the airspace of the United States, and "in order that the Government of the United States has sufficient time to respond, in the case of overflights, the information should be received no less than two working days before the proposed flight." In fact, the Cubans have now through their most recent note of March 20th, complied with and thus accepted the terms of this revised, non-Chicago agreement. They have not only submitted flights scheduled through the requested diplomatic channels, but have also said "they wait receipt from the Department of State its most rapid reply to the formulated request." By having thus established a separate regime for approval of flights which is outside the terms of the Chicago and IASTA Agreements, Cuba and the United States have recognized the strained relationship between the two countries. There is therefore a basis for asserting a discretion in the U.S. with respect to Cuban flights which the United States does not have with respect to overflights by other signatory countries.

I would argue, however, that it would be unwise for us to deny overflights on this or any other basis. There are several factors to bear in mind:

1. The United States overflies many countries around the world and we rely on the terms of the Chicago and IASTA Agreements. Others are frequently seeking ways to pressure us on various issues. We could expect other countries to set up unilateral procedures, using similar reasoning against us.

2. With respect to Cuba, the balance of overflights is clearly in our favor; some 25 to 50 flights a day of U.S. registry overfly Cuba or use the Cuban controlled flight information region. Cuba proposes 4 a week, through routing which we control.

3. Cuba could obviously retaliate against our flights, causing difficulty and uneconomic rerouting (as Cuba now flies to Montreal outside of U.S. airspace and down the St. Lawrence).

4. Since the United States is bound by treaty, and since overflight matters with Cuba have been handled by the FAA at a technical level, the President need not be seen to have been involved in this dispute.

5. We have something to lose in the security field if Cuba abrogates the anti-hijacking agreement, which it well understands is something of value to us.

6. The argument for denying the privilege of overflight would not, in the view of Department of State lawyers, fare well in court. The Cubans could pursue legal actions against us in our own courts, at the International Civil Aviation Organization (where we could lose our vote for not adhering to the terms of the Chicago Convention) or at the International Court of Justice.

7. The tone and nature of the communications from the Cuban authorities has been temperate and conciliatory, suggesting that the technical authorities are still working well with each other, much to our benefit.

8. We have not heard from the Canadians who have an interest in seeing the Agreement they concluded with the Cubans put into effect; if Cuba is forced to continue flying outside U.S. airspace, Cuba may have to suspend their services, thus throwing into imbalance the basic agreement, causing a renegotiation on the basis that both sides understood that the United States would adhere to its treaty obligations and is not now doing so.

9. The matter is now public (in the Canadian press and at the United States Air Transportation Association). The ATA has recently written a letter to the State Department strongly advising that the Cuban overflights be granted. ATA fears restrictive actions would be taken against U.S. aircraft. To deny Cuba would undoubtedly force some action on Cuba's part.

Attachments: U.S. note of April 6, 1973; Cuban note of March 5, 1976; Cuban note of March 20, 1976.

Note
April 6, 1973

First paragraph: complimentary opening

Second paragraph:

The Department of State has asked the Federal Aviation Administration to bring to the attention of the Government of Cuba the results contained in the attached report of violations of regulations of the Federal Aviation Administration committed by Cuban Flight 877, which involved an airplane of the type Antov 24 piloted by Claudio Rey Morina, who landed at New Orleans International Airport on October 26, 1971.

Third paragraph:

In the interest of aviation security and in conformity with the applicable regulations of the United States, the Government of the United States should be informed ahead of time, through diplomatic channels, of flights by aircraft of Cuban registry which are intended to enter the air space of the United States. In order that the Government of the United States has sufficient time to respond, in case of overflights, the information should be received no less than two working days before the proposed flight; and in cases in which the aircraft intends to make stops at points in the United States, no less than 15 days prior to the flight.

At the request of the Department of State there is annexed the enforcement investigative report.

Complimentary closing.

Mr. Smith

H - 4245 March 5, 1976

Subject: Violation of U.S. Airspace by Cuban DC-8

Embassy received the attached message from Havana:

MINREX is pleased to inform USG that the flight of a Cubana aircraft over US territory on 25 February 1976 corresponds to a non-scheduled international airline service and that, in the realization of said flight, it was not the intention to violate the territory of said country, and measures were taken to make this flight in accordance with Article 5 of the Convention on International Civil Aviation, in conformance with the information about US regulations available to the airline company and continuing the practice followed in previous flights over US territory.

MINREX has not exactly understood the text of the reference note in respect to the SD interpretation of Article 5, paragraph 1, because the general principle of this article is that all aircraft which are not engaged in regular international air service have the right, subject to conformance with the requirements of the Convention, to cross the territory and make non-commercial stops, without the necessity of obtaining prior permission. The exception indicated in this paragraph of Article 5 is established for instances in which an aircraft wishes to fly over inaccessible areas or ones without adequate air navigation facilities,

in which case the contracting state reserves the right to designate routes or require that special clearance be obtained for said flights.

Cuba adheres to this text of Article Five and to the general principle that aircraft in non-scheduled international air services are not required to obtain prior clearance, with the exception established in Article 5 paragraph 1 established for reasons of flight safety. In consonance with this interpretation, US aircraft overfly Cuban territory.

In the case of the Cubana DC-8 aircraft which overflew US territory on 25 February 1976, MINREX [manifests to] SD that, on the part of Cuba, it was assumed that the interpretation on the part of both states with respect to Article 5 should have been the same, in accordance with its text.

In the above mentioned flight, it is evident that Cubana did not intend to violate US territory, which is proven by the fact that an advanced flight plan was filed to all ATC along the route by messages 251106 MUHACUOW and two subsequent messages to notify delays in the flight 25/200 MUHACUOW and 251350 MUHACUOW.

In these messages it was indicated that the flight was COBUS (Company business) of Cubana in non-scheduled air service, as understood in Article 5 of the Convention.

Prior clearance was not solicited because the practice followed in prior cases had been this and it had not been indicated incorrect by US authorities. The last previous instance was when the same DC-8 flew from Canada to Cuba on

February 18. But, primarily, according to the Cubana Department of Operations, prior clearance was not requested because, after reviewing the US AIP manuals, nothing was found to establish the prior clearance requirement.

MINREX would like to emphasize that Cubana works with publications which contain US regulations as well as US AIP and the Jeppessen manuals. However, MINREX cannot assure that these publications are complete or up to date given the unquestionable difficulties in communication.

MINREX would appreciate it if US aviation authorities would provide Cubana by rapid and secure means, the current applicable regulations or indicate the manner by which they may be obtained.

Unquote.

Informal translation: ARA/CCA:TLHolladay
3/8/76

Translation of Note H-4267 Message from Swiss Embassy-Havana

SUBJECT: CUBAN AIR SERVICE HAVENA-MONTREAL
(STANDARD OPENING)
..... and requests you communicate the following to the Department of State:

Cubana Airlines wishes to initiate regular air services between Cuba and Canada under the provisions of the Agreement on Air Transport subscribed between both countries. These flights constitute a regular international air service and require overflight of US territory. Cuba being as well as the United States contracting partners to the agreement relative to the transit of international air services, MINREX submits, along with this note, a program of the flights with schedules and frequency of flights, soliciting from US authorities for regular, international air services of Cubana, the exercise of the privilege of crossing its territory without landing under the provisions of the referenced accord.

MINREX waits receipt from the Department of State its most rapid reply to the formulated request.

UNQUOTE

Annex: Program of regular flight of Cubana between Cuba and Canada

Aircraft: DC-8 43
Registration: CU-T 1200 and CU-T 1201

Flight 480			Flight 481
Wednesday	22:30GMT	Havana	21:40GMT (Thursday)
Thursday	02:30GMT	Montreal	17:30GMT "
Approximate time of entrance to US territory	22:55GMT		Approx.time of entrance to US territory 17:42GMT

Flight 482			Flight 483
Sunday	12:00 GMT	Havana	21:40GMT Sunday
Sunday	16:00 GMT	Montreal	17:30GMT Sunday

Approximate time of entrance to US territory: 12:25GMT

Approx.time of entrance to US territory: 17:42GMT