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DEPARTMENT OF STATE

# AIRGRAM

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HANDLING INDICATOR

TO : BONN, BERLIN

INFO: PARIS, LONDON, MOSCOW, NMR SHAPE FOR POLAD, US ELEMENT LIVE OAK, CINCEUR FOR POLAD, USAFE WIESBADEN

APR 2 2 48 PM '65

FROM : Department of State

DATE:

SUBJECT : Allied Right to Local Flights in the Berlin Control Zone

REF : Bonn's A-780 of October 27, 1964.

The enclosed legal-historical study documents the unrestricted nature of Allied rights with respect to local flights. Heretofore, provisions of the Four-Power Berlin Flight Rules (inter alia, paragraph 3(c) of DAIR-P(45)71 Second Revise) have given rise to varying subjective interpretations such as that contained in the referenced airgram. The study prepared by the Office of the Legal Advisor delves into the negotiating record on the local flight issue and, thus, provides a sound basis for interpreting the meaning of the language used in paragraph 3(c) of the Flight Rules.

The main conclusions of the legal paper are:

1. The Allies' right to make local flights within the Berlin Control Zone is an integral and essential part of their right to unrestricted air access to Berlin.

2. It is clear from the 1947 and 1948 negotiating record that paragraph 3(c) of the Flight Rules does not limit local flights by Allied aircraft to their national sectors; mere hortatory language was used in that paragraph.

3. Therefore, Soviet permission is not required for United States local flights over East Berlin or that portion of East Germany within the Berlin Control Zone.

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Enclosure:

Legal Study of Allied Rights re Local Flights

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E.O. 12958 Sec. 3.5  
NLJ-S 96001  
By cb NARA, Date 7-6-00

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FORM DS-323

Drafted by GER:BTf:PLAYIward/L:EUR:ATDowney/jd

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~~CONFIDENTIAL~~Enclosure 1, page 1  
to A- to BonnLegal Study of Allied Rights re Local Flights in the Berlin Control ZoneIn General

The Allied right of unrestricted air access to Berlin arises from the defeat of the German Reich and the joint occupation of Germany by the Allies in accordance with the Declaration Regarding the Defeat of Germany of June 5, 1945. Almost six months later, on November 22, 1945, the Allied Control Authority Air Directorate\* submitted a report to the Coordinating Committee calling attention to the necessity of providing adequate safety of Berlin flights.

"1. Because of the increasing number of flights between the Greater Berlin area and the respective occupied zones of the four Allied Powers in Germany and because their flights must often be undertaken in conditions of poor visibility or at night, involving risk of collisions, there is a real need to ensure safety of flights over the occupied zones and the Greater Berlin area by means of a system of air corridors under strict rules of flight for all aircraft using the corridors." (CORC/P(45)170) [Emphasis added.]

To achieve flight safety, the Air Directorate requested the Coordinating Committee to route Berlin air traffic to certain corridors. The specific request stated:

"(1) To confirm the proposals for the establishment of air corridors West of Berlin as follows: BERLIN-HAMBURG, BERLIN-BUCKEBURG, BERLIN-FRANKFURT ON MAIN, each twenty English miles wide. Flight over these routes (corridors) will be conducted without previous notice being given, by aircraft of the nations governing Germany. [Emphasis added.]

"(2) To instruct the Air Directorate to compile rules of flight and means of safeguarding flights along the corridors stated in para. (1) above."

The Coordinating Committee approved the Air Directorate's report on November 27, 1945, and agreed to submit it to the Control Council for confirmation. (CORC/M(45)23.) The report was submitted to the Control Council as document CONL/P(45)63. On November 30, at its thirteenth meeting, the Control Council:

\* The relevant military government organization (the Allied Control Authority) consisted of: (1) the Control Council--composed of the four Commanders-in-Chief of the Zones--the highest level of joint executive authority in Germany; (2) the Coordinating Committee, composed of one representative of each of the four Commanders-in-Chief; (3) the Air Directorate, one of twelve functional control divisions under the Coordinating Committee; and (4) the Air Committee, one of various special subordinate committees under the jurisdiction of the Air Directorate.

~~CONFIDENTIAL~~

~~CONFIDENTIAL~~Enclosure 1, page 2  
to A- to Bonn

"(a) approved the establishment of three air corridors from Berlin to the Western zones as defined in CONL/P(45)63." (CONL/M(45)13.)

The Allied right to unrestricted air access to Berlin was not put in question by any of these decisions. As quoted above, the proposal for the establishment of the corridors affirmed that: "Flight over these routes (corridors) will be conducted without previous notice being given, by aircraft of the nations governing Germany."

Allied air access rights did not spring from these November 1945 decisions; the Allies were exercising their right of access months before. Such rights arose from the defeat of and assumption of supreme authority over Germany; the decisions of the Control Council described above merely channeled the exercise of existing rights by Allied aircraft for safety purposes into certain routes.

At the December 8, 1945, meeting of the Air Directorate, the Directorate decided:

- "a - to note the decisions of the Control Council and to comply therewith.
- "b - to instruct the Committee on Aviation to prepare for submission at the next meeting of the Air Directorate the rules of flight and requirements for navigational aids for airplanes using the approved corridors." (DAIR/M(45)17.)

The Air Directorate discussed the report of the Committee on Aviation (DAIR/P(45)71) at a meeting on December 18th and approved it, subject to certain minor amendments (DAIR/M(45)18). The Second Revise\* of DAIR/P(45)71, dated October 22, 1946, still controls as to flight rules.

#### Flight Rules

The stated object of the Flight Rules approved by the Air Directorate is to "ensure the maximum safety in flight of all aircraft flying in corridors and in the Berlin Control Zone under all conditions." (DAIR/P(45)71 Second Revise.) The Berlin Control Zone (BCZ) refers to the area controlled by the Berlin Air Safety Center (BASC), established by the Flight Rules document. The BCZ is defined in paragraph 3a of the Flight Rules as:

". . . the air space between ground level and 10,000 feet (3000 meters) within a radius of 20 miles (32 kilometers) from the Allied Control Authority Building in which is established the Berlin Air Safety Center (B.A.S.C.)."

\* A chronology of the evolution of the Flight Rules from DAIR/P(45)71 to DAIR/P(45)71 Second Revise appears as an Appendix.

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Enclosure 1, page 3  
to A- to Bonn

Paragraphs 3b and 3c provide:

"b. The Berlin Control Zone is a zone of free flight for all aircraft entering the zone to land on the Berlin airfields or taking off to depart therefrom.

"c. It is desirable that, wherever possible, local flights (testing, training, etc.) be executed above the national sectors. However, if necessary they may be executed above the remainder of the Control Zone, subject to normal clearance by the Berlin Air Safety Center."

The establishment of a zone to administer air safety for Berlin--the BCZ-- was a natural development from the "real need to ensure safety of flights over the occupied zones and the Greater Berlin Area...." (see CORC/P(45)170, above). The Safety Rules did not attempt to create a right of flight within Berlin separate from the existing right of flight "over the occupied zones and the Greater Berlin Area."

Reference to "local flights" within the BCZ--as distinct from flights within the BCZ as part of flights to and from Berlin--first appears in the Flight Rules document. The right to engage in local flights within the area of the BCZ is an integral and essential segment of the Allied right to unrestricted air access to Berlin. The right to local flight was not created by paragraph 3c of the Flight Rules document.

Why, then, were "local flights" the subject of the special treatment in the Flight Rules? The reasoning may have been as follows: aircraft safety control is best maintained when the aircraft is above its respective national sector. Due to the landing patterns of flights between the Western Zones and the Berlin airfields, operations over only one national sector would be nearly impossible. (It would have been pointless, therefore, to include mention of that type of flight operation in paragraph 3b of the Flight Rules.) It would be appropriate to separate--for the administration of flight safety--local flights from the Berlin-Western Zone flights, and to note in paragraph 3c the desirability of local flights being made over respective national sectors. It may be for this reason that local flights received separate treatment in the Flight Rules.

The right of unrestricted local flight within the BCZ could not be and was not diminished by paragraph 3c of the Flight Rules. The phrase, "subject to normal clearance", in that paragraph contains no element of decision, control or permission by any authority other than the one whose aircraft makes the flight. Furthermore, merely hortatory language was used in paragraph 3c-- "It is desirable that, wherever possible...."

It is immaterial whether the United States chooses to exercise this right with helicopters instead of fixed-wing aircraft. None of the documents dealing with the Allied right of unrestricted air access attempt to distinguish the type of aircraft used.

~~CONFIDENTIAL~~

~~CONFIDENTIAL~~Enclosure 1, page 4  
to A- to Bonn

Practice since 1945 indicates that the United States has repeatedly and routinely made local flights within the Berlin Control Zone, including the Soviet Sector.

Amendments Proposed by the Soviets

There were at least two occasions when the Soviets attempted to limit Allied air rights by proposing amendments to DAIR/P(45)71, Second Revise. In the June 26, 1947 meeting of the Air Directorate, the Soviet Delegate complained about "contravention" of flight rules because the British had made a training flight in the corridors. The Soviet Delegate states:

"The rules of flight for aircraft flying in the Berlin corridors and in the Berlin Control Zone stipulate that training flights for aircrews are prohibited (DAIR/P(45)71, 2nd Revise, Paragraph 3, subparagraph (c) )." (DOCS/M(47)14.)

The Directorate decided to invite the Soviet Delegate to submit the matter to the Air Committee for study.

The Soviets then submitted to the Air Committee a paper proposing amendments to DAIR/P(45)71, Second Revise. DOCS/AIR/P(47)16. One of the proposed amendments would have altered paragraph 3(c) to read:

"Local flights (testing, training and practice flights) may be carried out only over the national sectors and in cases of absolute necessity these flights may be carried out over sectors of the other powers provided that permission is given by the Commander of the appropriate Zone. Testing, training and practice flights in the established air corridors are prohibited." (DOCS/AIR/P(47)16.)

This amendment would have made the right to carry out local flights over other national sectors contingent upon absolute necessity and permission of the appropriate Zone Commander. (Paragraph 3(c) of DAIR/P(45)71, Second Revise, does not limit local flights to certain purposes; testing and training are noted parenthetically as illustrative of local flights. That other purposes were contemplated can be seen by the use of "etc." after the two types listed. The Soviet amendment also would have deleted "etc." and specified three types of flights, thereby attempting to limit local flights to certain purposes.)

At the September 8, 1947 meeting of the Air Committee the Soviet Delegate reported that he had submitted his paper because he wished to clarify the existing Flight Rules to safeguard flight safety. (DOCS/AIR/M(47)9) The United States Delegate stated that it appeared the Soviets were trying to revise CONL/P(45)63--which defined the air corridors--and not DAIR/P(45)71 Second Revise which set the Rules of Flight in those corridors. The Air Committee was unable to reach unanimous agreement, and withdrew the item from discussion

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Enclosure 1, page 5  
to A- to Bonn

upon the insistence of the United States, French and British Delegates. The Soviet Delegate reserved his right to raise the question again in the future at the Combined Services Directorate.\* (DOCS/AIR/M(47)9.)

A completely revised and more restrictive paper, DOCS/P(48)7, was submitted by the Soviet Delegate to the Combined Services Directorate on March 11, 1948, for discussion at the Directorate meeting of March 17. The Soviet paper provided, inter alia:

"SECTION II

"GENERAL FLIGHT RULES

"(a) Local flights by single aircraft (various test, proficiency and instructional flights) may only be made over the respective national sectors of the Greater Berlin Zone.

"(b) Flights over other national sectors of the Greater Berlin Zone may only be made with the permission of the appropriate command.

"(c) All kinds of experiments, testing of aircraft or radio equipment, proficiency and training flights in the adjacent air corridors are categorically prohibited.

. . . .

"RULES OF FLIGHT IN DIFFICULT METEOROLOGICAL CONDITIONS

. . . .

"(e) Local flights in cloud over the Greater Berlin Zone are categorically forbidden." [Emphasis in original.] (DOCS/P(48)7.)

At its meeting on March 17 the Directorate agreed to refer the Soviet paper to the Air Committee for consideration at its March 23 meeting. (DOCS/Memo(48)27.) That meeting was never held, quadripartite activity in the Allied Control Authority having come to a complete halt on March 20, 1948, when the Soviets refused to attend further meetings.

Even though the Air Committee did not meet on March 23, a position paper was prepared on March 22 for the United States Member. Referring to DOCS/P(48)7, the United States brief reported:

\* By this time the Combined Services Directorate had assumed the functions of the Air Directorate.

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Enclosure 1, page 6  
to A- to Bonn.

" . . . .

"3. The new Soviet paper is a deliberate attempt to restrict flying operations into or within the Soviet Zone of Germany. The following are major points which they are endeavoring to adopt.

"a. Local flights within the Berlin Control Zone will be restricted to the national sectors except by permission of the appropriate command. This takes the aspect that the Berlin Control Zone is not a zone of free flight subject to coordination by BASC as stated by the present regulation."

. . . . .

"f. Local flights on instruments are denied. This prevents any possibility of testing or conducting proficiency instrument flying in the Berlin area at any time."

The position paper recommended that the United States Member make the following statement:

" . . . 7. I AM NOT FAVORABLE TOWARD ANY PROPOSAL WHICH RESTRICTS AERIAL FREEDOM AND BY SUCH RESTRICTIONS IS APT TO BE CAUSE FOR CONTROVERSIAL INFRINGEMENTS OF FLIGHT RULES."

The amendments to the Flight Rules proposed by the Soviets demonstrate the Soviet attempt to limit the right to unrestricted local flights within the Berlin Control Zone as reflected in paragraph 3(c) of DAIR/P(45)71, Second Revise.

Attachment:

Appendix.

L/EUR:ATDowney:mmp

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~~CONFIDENTIAL~~Enclosure 1, page 7  
to A- to Bonn.APPENDIX

Copies of DAIR/P(45)71 or its First Revise have not been located. The point is somewhat academic, however, since in October of 1946, the Air Directorate decided that the Second Revise should be the only document relating to Flight Rules. The following is a chronology--as accurate as possible with the documents at hand--of the progression of the Flight Rules document to its Second Revise.

- December 18, 1945 Air Directorate approved DAIR/P(45)71 and made minor amendments. [DAIR/M(45)18.]
- January 8, 1946 Air Directorate approved the document with the amendments and signed DAIR/P(45)71 Revise. [DAIR/M(46)2.]
- April 3, 1946 Air Committee reported to Air Directorate that existing flight rules excellent, but recommended that B.A.S.C. Controllers submit recommendations for the establishment of "Airfield Traffic Zones" around each Berlin airfield. [DAIR/P(46)63.]
- May 17, 1946 Air Committee recommended to Air Directorate the proposals by B.A.S.C. Controllers for aerodrome traffic zones (presently paragraph 4 of Flight Rules). This recommendation was approved by Air Directorate on May 28, 1946. [DAIR/P(46)78.]
- August 6, 1946 Air Committee reported on B.A.S.C. recommendations re altitude limits, airfield traffic and the radius of BCZ. Part of the Report stated:
- "(2) LOCAL FLIGHTS IN THE BERLIN CONTROL ZONE.
- "All aircraft flying in the Berlin Control Zone, at a height of less than 3,000 meters and within a radius of 20 miles from the A.C.A. Building, must be reported before take-off to the B.A.S.C. Controllers."
- [DAIR/P(46)90 Revise.]
- August 13, 1946 Disagreement in Air Directorate over the above report. Soviets proposed a new draft. Decision to submit the whole question to Air Committee. [DAIR/M(46)21.]

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~~CONFIDENTIAL~~Enclosure 1, page 8  
to A- to Bonn

September 20, 1946 Air Committee submitted report to Air Directorate, pursuant to its above decision. The Report recommended:

"(a) That the paper DAIR/P(46)78 be amended to include two additional airfield traffic zones, Schönewalde and Elsthal.

"(b) That the Committee instruct the Controllers of the B.A.S.C. to study the necessity for free flights in the Berlin Control Zone for report to the Committee."  
[DAIR/P(46)122.]

September 25, 1946 Air Committee submitted report to Air Directorate. Report noted that agreement could not be reached re whether prior notification or prior authorization to B.A.S.C. is required for flights inside the BCZ. Report recommended Directorate decide. [DAIR/P(46)134.]

September 26, 1946 Air Directorate discussed the above report. "General Kutsevalov stated he had studied the paper in great detail and had come to the conclusion that aircraft of all four Allies did require a Zone, 20 miles in radius, in order to contend with difficulties in approach and landing. He therefore made the following proposals:- (a) that the Berlin Control Zone should be considered as a zone of free flight only for the purpose of landing on or taking off from the Berlin airfields. That all flights for any other purpose should be made over the respective National Sectors." The Directorate decided to refer the matter to the Deputies for study. [DAIR/M(46)24.]

October 7, 1946 The Directorate Deputies discussed:

"(1) Freedom of Flight for aircraft entering the Berlin Control Zone to land, or taking off to depart therefrom.

"(2) Freedom of Flight for all other aircraft (testing flights, training flights, etc.).

"(3) Safety of Flight in the corridors.

"After discussion of the various delegates' points of view, the Deputies agreed to submit the following proposals to the Air Directorate:

~~CONFIDENTIAL~~

~~CONFIDENTIAL~~Enclosure 1, page 9  
to A- to Bonn.

- "I. The Berlin Control Zone is a zone of free flight for all aircraft entering the Zone to land on the Berlin Airfields or taking off to depart therefrom.
- "II. It is desirable that wherever possible local flights (testing, training, etc.) be executed above the national sectors. However, if necessary, they may be executed above the remainder of the control zone, subject to normal clearance by the Berlin Air Safety Centre.
- . . . . .
- "IV. The above-mentioned rules will not be embodied in a new paper. They will be added to paper DAIR/P(45)71 Revise, which, for the sake of simplicity must be the only paper regulating flights in the aerial corridors of Germany and in the Berlin Control Zone." [DAIR/P(46)139.]

October 11, 1946 Air Directorate decided to forward the Deputies' report to the Aviation Committee, instructing it to include its information in DAIR/P(45)71 Revise, "which will be the only existing document." [DAIR/M(46)25.]

October 22, 1946 Aviation Committee submitted the revision to Air Directorate. [DAIR/P(46)144.]

October 25, 1946 Air Directorate approved the Committee paper as DAIR/P(45)71 Second Revise and decided to send it to the Military Missions accredited with the Control Council. [DAIR/M(46)26.]

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