FAA Punitive Certificate Sanctions: The Emperor Wears No Clothes; Or, How Do You Punish A Propeller?

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I. INTRODUCTION

Overlooked in the mass of information continually produced by the Federal Aviation Administration (FAA) is a set of statistics published by the Office of Chief Counsel that should be of special concern to pilots and mechanics.[1] These numbers tell us that of 4,000 safety enforcement cases closed by legal action each year, in about 2,400, or 60%, licensees have their FAA certificates suspended or revoked for violation of a safety rule.[2] The balance result in civil money penalties.[3] For private and student pilots (i.e., non-professionals), the proportion of suspensions and revocations rises to an astonishing 87%, the balance resulting in civil money fines.[4] These sanctions are imposed through the use of two entirely separate and independent systems of justice, one administrative, the other judicial. Every year as many as 700 men and women who hold commercial pilot, air transport pilot or mechanic licenses (certificates mandatory for their employment) are suspended for periods up to one year.[5] Aside from the severe monetary loss, suspensions often cause the person to lose his job and substantial inconvenience for employers, particularly the smaller operator who must replace him.

Since 99% of all FAA enforcement cases are first offenses,[6] and generally involve inadvertent violations of traffic and other technical safety regulations[7] which have no criminality attached,[8] the question arises: why is it that such a large proportion of these cases are routinely resolved by means of a punishment far too severe for the offense, rather than the traditional money fine? The answer is that Congress has never authorized use of license suspensions and revocations as punishment for violations of air-safety regulations, nor their imposition in an administrative forum.

In support of this theme are the following propositions: 1) The only

1. FEDERAL AVIATION ADMINISTRATION, CHIEF COUNSEL'S OFFICE ENFORCEMENT REPORT (1979) [hereinafter cited as ENFORCEMENT REPORT].

2. *Id.* at 1, 6.

3. *Id.*

4. *Id.* at 10.

5. *Id.* at 3, 8.

6. *See* FEDERAL AVIATION ADMINISTRATION, SURVEY OF THE ENFORCEMENT PROGRAM, 1971, at app. B (1972) (internal FAA General Counsel document) ("The number of repeat violators are small, probably less than one percent . . . .").

7. Contained in the Federal Aviation Regulations (FARs), 14 C.F.R. §§ 1.1-199.31 (1984), and promulgated pursuant to the Federal Aviation Act of 1958, 49 U.S.C. app. §§ 1301-1552 (1982) [hereinafter cited as F.A. Act of 1958 or 1958 Act].

8. *See* Handbook for Handling Legal Aspects of FAA Enforcement Program, FAA Order 2150.2, ¶ 12.b, at 13 (1968) [hereinafter cited as 1968 Handbook]. This was superceded in 1980, as part of a consolidation of all enforcement handbooks, by 1980 Handbook, *infra* note 17.

time Congress considered what kind of enforcement system to provide for air-safety violations, it chose a civil money penalty scheme with the right to a jury trial; 2) The few cases that have upheld the legality of FAA's punitive certificate sanction system are all based upon a fundamental error concerning legislative authorization; 3) This error has been perpetuated by government aviation officials who are violating the public trust by refusing to correct it; 4) This behavior is part of an ongoing effort to cover up lack of legislative authority for certificate penalties; 5) A major part of this coverup is the FAA's failure to promulgate as formal regulations basic enforcement policies that affect civil rights of airmen, resulting in many serious violations of the Administrative Procedure Act.[9]

Several salient facts underscore the legitimacy of the issues raised. Since 1926, the seminal year for federal regulation of aviation,[10] 50,000 American citizens have had their pilot, navigator, flight engineer or mechanic licenses suspended or revoked for the sole purpose of punishing them for violating an air-safety regulation.[11] Never has the policy of using such penalties, or imposing them through an administrative rather than a judicial system, been debated in Congress or committee. There is not now, nor has there ever been, any statute that authorizes their use. There is no regulation that does so, nor has there been for forty-five years, since the sole governing rule[12] was repealed by government aviation officials.[13] Since that event they have avoided instituting rulemaking procedures through which airmen could challenge the system and force public debate.

The FAA's punitive certificate sanction system is entirely the creation of zealous public officials who in 1926 refused to accept the enforcement system that Congress had just enacted. Ever since, they and their successors, by all manner of devices, have shielded that fact from scrutiny.

II. How Enforcement Works

A. *Background*

The vast majority of air-safety cases involve pilots, mechanics, air carriers and air-taxi operators who are charged with violations of air-traf-

9. 5 U.S.C. §§ 551-576 (1982).

10. See *infra* text accompanying notes 53-56.

11. Author estimate based mainly on sampling count of FAA enforcement docket index cards, and other sources.

12. Department of Commerce, Air Commerce Regulations § 74(a), (f) (1926). ("Pilots' and mechanics' licenses will be suspended or revoked for (A) Violating any provision of the air commerce act of 1926 or these regulations. . . . (F) Violating air traffic rules.") [hereinafter cited as 1926 Rule].

13. For discussion of how and when this rule was eliminated, *see infra* text accompanying notes 138-44.

fic, record-keeping, maintenance and operations regulations. These are prosecuted by either a certificate action pursuant to the claimed authority of section 609 of the Federal Aviation Act,[14] where punishment is by suspension or revocation of a given certificate (license), or by a civil penalty action under section 901 of that Act,[15] which may lead to payment of a money fine by compromise or judicial action.

These two avenues for air-safety enforcement should be distinguished from qualifications actions by the FAA. For example, if an airman applies for a particular type of certificate (pursuant to section 602 of the Federal Aviation Act), and is then denied its issuance on grounds he does not meet "pertinent rules, regulations, or standards," he may appeal that denial to the National Transportation Safety Board (NTSB), which may overrule the FAA and direct that the certificate be issued.[16] After having been issued a certificate, developments may occur which indicate that the holder no longer meets the qualifications set down for it. For instance a pilot may land short and wreck his aircraft, or the FAA may learn that he has a medical problem that he didn't report. He may be asked to take a flight test, or undergo a medical exam by specialists. Should he refuse, the agency will institute an action under section 609 (also appealable to the NTSB) to suspend the certificate or rating in question until he does so, and passes.[17] Should he flunk, the FAA will revoke.[18] These qualifications matters account for only a small minority of section 609 cases appealed to the NTSB.[19] Rather than risk delay, expense and an adverse decision (basically, only the reasonableness of the FAA request can be contested), it is usually far more practical for the airman to take the flight test or exam promptly and resolve the matter.

These cases highlight a key point—section 609 is used for two dis-

14. 49 U.S.C. app. § 1429(a) (1982).

15. 49 U.S.C. app. § 1471(a)(1) (1982). For other discussions of FAA enforcement which mention other safety duties, *see generally* Kovarik, *Procedures Before the Federal Aviation Administration*, 42 J. AIR L. & COM. 11 (1976); Hamilton, *Administrative Practice Before the NTSB: Problems, Trends and Developments*, 46 J. AIR L. & COM. 615 (1981); Pangia, *Handling FAA Enforcement Proceedings: A View From the Inside*, 46 J. AIR L. & COM. 573 (1981). None of these articles address the issues raised here.

16. 49 U.S.C. app. § 1422(b) (1982).

17. *See* Compliance and Enforcement Program, FAA Order 2150.3, ¶ 203.c(1)(c), at 13 (1980) [hereinafter cited as 1980 Handbook].

18. *Id.*

19. The NTSB docket staff has advised the author that the Board receives 700 administrative appeals a year from the FAA (all numbers approximate): 200 are appeals from a denial of an application for a certificate under section 602; 500 are appeals from section 609 actions. Of these 500, 10 cases will involve an airman who refuses to be reexamined for skill purposes, or no more than 2% of section 609 cases; 15 cases, or 3%, involve medical certificates already issued, but a new disability is discovered; the balance, or 475, will be strictly to impose a suspension or revocation as punishment for the violation of a safety rule.

tinct and mutually exclusive purposes—a dichotomy which cannot be discerned from any language in the section itself. One branch involves cases that charge a violation of a safety regulation, the other a failure to satisfy license qualifications.[20] The statute clearly speaks to the latter, but says nothing of the former.[21]

Since certificate sanctions will literally shut down the operation, put people out of work, and disrupt service to the public, they are normally not used against a business entity like an airline, air-taxi operator, or repair shop. Rather, FAA imposes civil penalties which it can be fairly certain will be paid.[22] This is ensured by the cost of legal defense and the need to avoid strained relations with inspectors who may soon return to the certificate holder's shop. The ratio of certificate to civil penalty actions in airline cases, most of which originate with their pilots or mechanics, is about 20/80.[23] In general aviation, this trend is reversed, 67/33, while the overall ratio is 60/40.[24] It is likely because of FAA sensitivity to the great salary loss occasioned by a suspension that airline captains pay a far higher ratio of civil penalties than the commuter pilot or private pilot. Civil penalties for private pilots generally run between $100 and $200; for commercial pilots, $200-$300; and for airline pilots, $300-$1,000.[25] A civil-money fine is, of course, almost always a far less drastic solution to a violation case than a certificate action.

Violation cases are investigated at the local level, then screened at regional headquarters and turned over to regional counsel for prosecution. An enforcement handbook provides overall guidance.[26] Most violations, FAA concedes, are inadvertent[27] and 99% of them are first offenses.[28] If it is minor and a first offense, the inspector may take administrative action by a warning letter.[29]

B. The Basic Problem

The key problem with FAA enforcement is that it consists of two unrelated systems, or tracks, of justice, either of which may be invoked by FAA officials in prosecuting a given offense: 1) Section 901 civil money

20. *See* 1980 Handbook, *supra* note 17, ¶ 203.c(1)(b)(c), at 13.
21. *See infra* text accompanying notes 47-57.
22. *See* 1968 Handbook, *supra* note 8, ¶ 12.b, at 13.
23. ENFORCEMENT REPORT, *supra* note 1, at 4.
24. *Id.*
25. *See* OFFICE OF CHIEF COUNSEL, FEDERAL AVIATION ADMINISTRATION, BRIEFING BOOK FOR TESTIMONY BEFORE ANDERSON AVIATION SUBCOMMITTEE, H.R. 7488, July 1 & 2, 1980 [hereinafter cited as BRIEFING BOOK].
26. *See* 1980 Handbook, *supra* note 17.
27. *See* 1968 Handbook, *supra* note 8.
28. *See supra* note 6.
29. 14 C.F.R. § 13.11 (1984).

penalty actions; 2) Section 609 punitive certificate actions. Subject only to handbook guidelines, rather than any statute or regulation, FAA regional counsel can initiate a given violation case on whichever track he chooses.[30] In one case, the certificate track may be used and the action initiated with a form letter called a Notice of Proposed Certificate Action.[31] It would propose, for example, to suspend the pilot's license for a period of up to one year (the FAA has no fixed penalties), usually in increments of 30, 60, 90 days, and so forth. In another case, which might involve an identical violation, the agency may well impose a civil penalty. This, too, would be initiated by a form letter, informing the accused that the FAA will accept so many dollars in compromise.[32] Regardless of which form letter is used, the allegations of the acts complained of and regulations violated will remain the same.

On the civil penalty track, should the pilot ignore the letter and take the initiative and wish to contest the matter, the FAA must turn the case over to a United States Attorney for action in the United States District Court.[33] There the airman (or government) may "demand trial by jury of any issue of fact."[34] Should he lose and the judge impose a fine, the maximum is $1,000 per violation.[35]

On the certificate track, should the accused ignore the notice, the FAA will issue an order in the name of the Administrator that commands the suspension or revocation of his license.[36] The limit on either is one year.[37] On this track, the burden falls on the airman to appeal to the NTSB, during which appeal, absent an FAA declaration of emergency, the order is stayed.[38] There he will have a trial de novo before an administrative law judge (ALJ).[39] Either side may appeal the ALJ's decision to the full board, which acts in a similar capacity to a court of appeals; from there only the airman may appeal to a United States court of appeals.[40]

Should the NTSB find the airman guilty of a violation and deserving of punishment, it will affirm the FAA order, or modify it by reducing the term

30. *See* 1980 Handbook, *supra* note 17, ¶ 205, at 14.

31. *Id.* at ¶ 1203.c, at 168-70, and fig. 12-8, at 214-18; *see also* 14 C.F.R. § 13.19(c) (1984).

32. 1980 Handbook, *supra* note 17, ¶ 1202.b, at 164, and figs. 12-1 to 12-5, at 201-09; *see also* 14 C.F.R. § 13.15(b) (1984).

33. 49 U.S.C. app. § 1473 (1982).

34. 49 U.S.C. app. § 1473(a), (b)(1) (1982).

35. 49 U.S.C. app. § 1471(a)(1) (1982).

36. 1980 Handbook, *supra* note 17, ¶ 1203.e, at 170-71, and fig. 12-12, at 220-22; *see also* 14 C.F.R. § 13.19 (1984).

37. *See* 49 U.S.C. app. § 1422(b) (1982).

38. 49 U.S.C. app. § 1429(a) (1982).

39. *Id.*

40. 49 U.S.C. app. §§ 1429(a), 1486 (1982).

of suspension or revocation,[41] but it cannot under any circumstances switch to a money penalty. Likewise, the district court judge cannot switch from a pecuniary fine to a certificate suspension or revocation.[42] The two enforcement systems are wholly independent of one another.

Logically, then, the FAA's position must be that it can operate its enforcement program with two separate yet unequal systems (one administrative, the other judicial), and choose either in its sole discretion. Yet Congress guaranteed airmen the right to jury trial[43] for violation of "any rule, regulation, or order."[44] Section 901 also states that airmen "shall be" subject to a civil money penalty.[45] It is improbable that Congress would authorize an executive branch official to deny licensees their statutory privileges by the simple expedient of sending out a form letter that puts the case on the certificate-administrative law track.

To underscore the contradictions of logic and common sense the two-track enforcement program engenders, consider, for example, the pilot against whom FAA has proposed a sixty-day suspension. Suppose he is an airline captain, who then asks FAA regional counsel if he can pay a civil penalty instead, because the suspension will cost him, at $90,000 per year, $15,000. Assume also that he is sincere, has no prior record, and has just accomplished a good checkride. The FAA lawyer can relent and agree to accept a certified check for $500, simultaneously drop the certificate case, and close out the file with a civil penalty letter of receipt.[46]

In the letter of receipt he prepares, the FAA official will flip-flop from citing section 609 as authority for the legal action to section 901, which carries with it a right to jury trial. But this procedure precludes any chance for the airman to ever demand that right! And, as we have just seen, this same lawyer could have started the case off, in the first instance, on the civil penalty track. In short, by claiming it can operate the two tracks in parallel and choose between them at will, FAA takes away the airman's right to jury trial.

III. Enforcement Perspective

The core issue is whether Congress has ever authorized a system of administrative enforcement to decide issues of guilt or innocence, with certificate suspension or revocation as the penalty. If Congress has not

41. 49 U.S.C. app. § 1429 (1982).
42. *See* 49 U.S.C. app. §§ 1471, 1473 (1982).
43. 49 U.S.C. app. § 1473(a), (b)(1) (1982).
44. 49 U.S.C. app. § 1471(a)(1) (1982).
45. *Id.*
46. *See* 1980 Handbook, *supra* note 17, ¶ 1202.d, at 165, and fig. 12-16, at 210; *see also* 14 C.F.R. § 13.15(d) (1984).

so authorized the FAA, how have federal officials been able to continue operating in such a manner for more than half a century?

A. The Act and Legislative History

In looking at FAA enforcement history, the stark contrast in statutory language between sections 901 and 609 is apparent. Section 901 of the Act is written in clear, precise and unequivocal terms:

> Any person who violates . . . any provision of . . . [this Act], or any rule, regulation, or order issued thereunder . . . shall be subject to a civil penalty of not to exceed $1,000 for each such violation . . . .[47]
> Any civil penalty may be compromised by the [Administrator] . . . .[48]
> . . . .
> The trial of any offense under this [Act] shall be in the district in which such offense is committed . . . .[49]

This language is exclusive; nowhere does it even hint of a parallel or alternative enforcement system with a different penalty.

In contrast, section 609 provides in pertinent part:

> The [Administrator] may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the [Administrator], he determines that safety in air commerce or air transportation and the public interest requires, the [Administrator] may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate . . . airman certificate . . . .[50]

The provision contains no language concerning offenses, regulations, violations, sanctions or penalties; this section has remained unchanged in this regard since 1938,[51] and section 901 has been essentially the same since 1926.[52] Yet the FAA claims that the punitive certificate sanction system is authorized by the vague language in section 609, "[if the Administrator] determines that safety in air commerce or air transportation and the public interest requires."

In order to resolve the issue of the extent of legislative authorization,

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47. 49 U.S.C. app. § 1471(a)(1) (1982).
48. 49 U.S.C. app. § 1471(a)(2) (1982).
49. 49 U.S.C. app. § 1473(a) (1982). *See also id.* § 1473(b)(1), which provides:
> Any civil penalty imposed or assessed under this chapter may be collected by proceedings in personam against the person subject to the penalty . . . . Such proceedings shall conform as near as may be to civil suits in admiralty, except that . . . either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be reexamined other than in accordance with the rules of the common law.

50. 49 U.S.C. app. § 1429(a) (1982) (original version at Federal Aviation Act of 1958, Pub. L. No. 85-726, § 609, 72 Stat. 732, 779-80).
51. Civil Aeronautics Act of 1938, ch. 601, § 609, 52 Stat. 973, 1011 (repealed 1958).
52. Air Commerce Act of 1926, ch. 344, § 11(b), 44 Stat. 568, 574.

one must examine Congressional activity in the seminal year of 1926. On May 20, 1926, the same day that it enacted the Air Commerce Act,[53] Congress adopted an official history of that legislation, which proclaimed:

> The enforcement of the provisions of the Air Commerce Act of 1926 and regulations thereunder is for the most part by means of a system of civil administrative penalties similar to those by which the customs and navigation laws have always been enforced. A flat penalty prescribed by the statute is imposed by subordinate Federal administrative officers for the violation. The offender then has the right of appeal to the proper Secretary [Commerce, War and Post Office]—the Secretary of Commerce, for instance, in the case of air traffic rules. The Secretary may mitigate or remit the penalty so as to fit the offense, and his action is final. The penalty as thus finally determined may be collected by proceedings in personam against the person subject to the penalty . . . . These proceedings will conform as nearly as may be to civil proceedings in admiralty, save that trial by jury may be had . . . .[54]

In providing for federal regulation of aviation, Congress wisely gave careful consideration to the kind of enforcement system needed to back up those regulations. It looked at alternatives: the House approved a bill that provided for "[a] criminal penalty of a fine not exceeding $500 or imprisonment not exceeding 90 days."[55] "The Senate bill provided for the enforcement of the provisions of the act and regulations thereunder through a system of flat civil penalties . . . ."[56] In conference committee the Senate scheme prevailed.

The 1926 history reflects that Congress never considered using suspensions or revocations as a form of punishment for rules violations (much less trying them by administrative justice). In creating its enforcement system, Congress asked and answered at least six basic questions: 1) Who would be prosecutor? (United States attorney); 2) How would the case be initiated? (like a civil case in admiralty); 3) In what court? (United States district court); 4) In what venue? (district where offense committed); 5) Right to jury? (yes); 6) What kind of penalty? (money fine).

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53. *Id.*

54. CIVIL AERONAUTICS, LEGISLATIVE HISTORY OF THE AIR COMMERCE ACT OF 1926, at 59 (1928) [hereinafter cited as 1926 History].

55. *Id.* at 45. Also relevant is a comparison of the provisions of the Air Commerce Act of 1926 as passed by the Senate and as passed by the House (S. 41, 69th Cong., as passed by the Senate December 16, 1925, and S. 41, 69th Cong., as passed by the House of Representatives April 12, 1926). The House amendment was in the nature of a substitute for the Senate provisions and struck out all after the enacting clause of the Senate bill. *Id.* at 9.

The criminal penalties were set forth in section 13(a) of the House version of S. 41. *Id.* at 20. Section 13(d) of that version provided that the states as well as the United States may prosecute the offenses prescribed by the act or regulations thereunder, and may also prescribe penalties or forfeitures, civil or criminal, to be imposed for such offenses in lieu of the federal penalties under subdivision (a). *Id.* at 47.

56. *Id.* at 51.

It is indisputable that the sole enforcement system provided by Congress in 1926 was civil money penalties with right to jury trial in regular federal courts. The salient question then becomes: Did Congress thereafter authorize use of a punitive certificate sanction as an additional or alternative method of punishment, and the substitution, in the sole discretion of an official of the executive branch, of a one-man administrative hearing for the right to trial by jury? The FAA lawyers' position has always been that the Civil Aeronautics Act of 1938 established the punitive suspension/revocation system. Yet close scrutiny of regulatory and legislative history reveals that this is manifestly not the case.[57]

B. Cases Challenging the Punitive Certificate Sanction Authority

The use of punitive certificate sanctions has been directly challenged in three reported cases. Remarkably, each holding in these cases is premised on the misconception that punitive suspensions and revocations began in 1938 with the enactment of the Civil Aeronautics Act. Yet, the first rulebook in 1926 told pilots and mechanics their certificates would be suspended or revoked for "[v]iolating any provision of the Air Commerce Act of 1926 or these regulations [or for] violating air traffic rules."[58] Thus, the court in *Wilson v. Civil Aeronautics Board*[59] misconstrued the question by phrasing the key issue as: "Whether, in circumstances in which the Civil Aeronautics Board does not find the pilot to be unqualified to fly, the Board is empowered under section 609 of the Civil Aeronautics Act [of 1938] to suspend his airman certificate as a deterrent sanction."[60]

Similarly, the court in *Hard v. Civil Aeronautics Board*[61] was quite definite in expressing it's belief that the system started with the Act of 1938. The court held: "A protocol statement, part of the Congressional declaration of policy in section 2 of the Civil Aeronautics Act of 1938 is the main prop for Board action under section 609 of the Act . . . ."[62] Finally, *Pangburn v. Civil Aeronautics Board*[63] held:

> Under the provisions of the 1938 Act suspensions were frequently im-

57. *See* 1926 Rule, *supra* note 12; *see also* Brief for Respondent at 21, Wilson v. CAB, 244 F.2d 773 (D.C. Cir.), *cert. denied*, 355 U.S. 870 (1957).

58. *See* 1926 Rule, *supra* note 12.

59. 244 F.2d 773 (D.C. Cir.), *cert. denied*, 355 U.S. 870 (1957). The briefs in this case may be found at Vol. 1163, *Records and Briefs, United States Court of Appeals, D.C.*, of the D.C. Bar Association.

60. 244 F.2d at 773-74.

61. 248 F.2d 761 (7th Cir.), *cert. denied*, 355 U.S. 960 (1957).

62. 248 F.2d at 761-62. Section 2 instructed the Civil Aeronautics Authority (later CAB) that it should consider "as being in the public interest . . . the regulation of air transportation in such manner as to . . . assure the highest degree of safety . . . ."

63. 311 F.2d 349 (1st Cir. 1962).

> posed as a deterrent sanction notwithstanding the apparent technical qualifications of the pilot. The imposition of a suspension as a sanction was challenged under the 1938 Act in *Wilson v. Civil Aeronautics Board* . . . . Relying on the consistent administrative practice of over 4,000 such suspensions during the course of administering the [1938] Act . . . the [*Wilson*] court held that the administrative practice should be sustained . . . ."[64]

In these cases, the courts' focus was on the 1938 Act; the decisions make no mention of the more relevant 1926 Act. Both the courts and the challengers were unaware both that the Civil Aeronautics Board (CAB) and earlier government aviation officials actually relied on the 1926 Act as their legislative authority for the suspension system[65] and of the existence of the 1926 Rule. The challengers' basic argument was that section 609, because it said nothing about violations, offenses, regulations or sanctions, could not possibly have been meant to authorize punitive suspensions.[66] The CAB took advantage of the focus on the 1938 Act, although in their brief in *Wilson* they had acknowledged that the system started earlier[67] and that the 1938 legislation was not determinative.[68]

The decisions in *Wilson*, *Hard* and *Pangburn* rest upon a false premise; this is fundamental to understanding how the punitive certificate sanction system has survived attack. Since the system actually started in 1926 and the government really claimed Congress had authorized it in that year, the only possible relevancy that the 1938 Act could have had was if it modified or clarified the system in some manner, which the government impliedly conceded it did not. Despite their knowledge that the 1938 Act has no relevance to the origins of the punitive certificate sanction system, FAA officials continue to defend section 609 actions by citing *Wilson*, *Hard* and *Pangburn*.[69] Ironically, while they continue to do this, the Agency's own official history relates:

> The familiarization period over, the Aeronautics Branch began meting out other forms of punishment in addition to reprimands—fines, suspensions and revocation. . . . 22 percent had their licenses suspended. The usual fine was $25.
>
> When Young succeeded MacCracken as Assistant Secretary [of Commerce] in October 1929, the Branch gradually began to deal more severely with violators. . . . the Aeronautics branch turned to suspensions as a primary enforcement tool. At the same time revocations were being handed out

64. *Id.* at 354; *see also* Specht v. CAB, 254 F.2d 905 (8th Cir. 1958).

65. *See* Brief for Respondent at 8, 17 n.14, 20, 21, 22, 27, *Wilson*.

66. *See* Brief for petitioner at 13-16 and Reply Brief for Petitioner at 1-11, *Wilson*.

67. See Brief for Respondent at 21, *Wilson*.

68. *See infra* notes 98 and 99 and accompanying text.

69. *See infra* note 73 and accompanying text. *See also* Barnum v. National Transp. Safety Bd., 595 F.2d 859 (D.C. Cir. 1979); Haines v. Department of Transp., 449 F.2d 1073 (D.C. Cir. 1971); Walker v. CAB, 251 F.2d 954 (2nd Cir. 1958).

with greater frequency . . . .[70]

We can see from this history and the existence of the 1926 Rule on the subject that CAB lawyers deliberately led the court in *Wilson* to believe 1938 to be the key year,[71] then cited that case as authority in *Hard*, which came down later the same year.[72] By the time of *Pangburn* in 1962, FAA officials merely needed to cite *Wilson* for authority in order to sustain their certificate actions. This same approach was repeated as late as 1977 in *McGee v. Secretary of Transportation*,[73] the latest challenge to section 609. Nothing in these case decisions or in the public record indicates that FAA officials have ever made any effort to correct this judicial misunderstanding about the 1938 Act. Such government agency failure to correct a gross error upon which the rights of so many citizens depend is an unconscionable breach of public duty. The evidence is compelling that this conduct has been a part of a deliberate effort to cover up the lack of legislative authority for the punitive suspension system.[74] FAA lawyers know full well that the only enforcement system Congress authorized in 1926 was the civil money fine with right to jury.[75]

This history explains why no request to Congress has been made by any government agency for authorization of punitive certificate sanction power and why committee hearings, which would have allowed public input into this major policy, have never been held. It explains why FAA officials, in particular, have never asked Congress to amend section 609 so that it plainly authorizes the current system. Such public action would risk exposing the inconsistencies and paradoxes of the FAA's two-track enforcement program, including the following:

1) Congress, after careful consideration in 1926, clearly stated that in the case of a rules violation, pilots and mechanics had the right to pay a money fine and "demand" a jury trial. Congress has never rescinded that right, yet executive branch officials now deny this right by the simple expedient of sending out a form letter. Neither the FAA nor the courts have ever focused on this blatant inconsistency.

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70. N. KOMONS, BONFIRES TO BEACONS, FEDERAL CIVIL AVIATION POLICY UNDER THE AIR COMMERCE ACT 1926-1938, at 107-08 (1978).

71. *See infra* notes 93 and 94 and accompanying text.

72. *See* 248 F.2d at 764.

73. No. 76-1092 (D.C. Cir. 1977). *See* Brief for Respondent; the briefs in this case may be found at Vol. 2910, *Records and Briefs, United States Court of Appeals, D.C.*, of the D.C. Bar Association.

74. *See infra* sec. VI for details and discussion of this coverup.

75. It has been my experience that if you ask an FAA or NTSB lawyer what year Congress authorized punitive certificate sanctions, he will answer 1938, and cite the *Wilson*, *Hard* and *Pangburn* cases; he will also agree that the only enforcement system Congress authorized in 1926 was the civil money penalty with right to jury trial.

2) Suspension and revocation of any license has always been seen as a harsh form of punishment reserved for flagrant offenses (money fines are the norm). On what basis would Congress, leaving no legislative history to support such a drastic measure, single out aviation and approve this extraordinary use of certificate sanctions rather than money fines?
3) Congress specifically focused in 1926 on the issue of penalties, and ultimately set a limit of $500 per violation ($1,000 after 1938). There is no indication in the 1938 Act that Congress was dissatisfied with this basic system—that Congress increased the maximum fine in 1938 shows that it considered the question of penalties and determined that an increased ceiling, *not* a suspension system, was appropriate. License suspension is totally inconsistent with this increased ceiling, since it often means the loss of thousands of dollars in wages and possibly even the pilot or mechanic's job.
4) Why would Congress authorize a two-track enforcement program that prohibits an ALJ from switching from an extreme form of penalty, suspension or revocation, to the customary money fine, then turn around and give that purely discretionary power to an executive branch lawyer? No such intent is expressed in any of the statutes.

Once one understands that these paradoxes accurately reflect the state of the FAA's two-track program, it can be seen that any agency claim that Congress has ever authorized punitive administrative certificate sanctions is illogical and fails upon careful scrutiny of the public record. In light of these shortcomings in the government's position, it is alarming that this program has been able to endure without being successfully challenged.

IV. THE HEART OF THE CONUNDRUM—THE *WILSON* CASE

It took thirty years after 1926 before anyone mounted a serious legal challenge to punitive certificate sanctions. This time lag was probably due to the cost of litigation, the small size of the aviation community in the 1920's, the Great Depression, World War II, and the past unwillingness of most citizens to believe that their government could be less than honest. That challenge had to await the growth and financial muscle of the Air Line Pilots Association (ALPA) in the 1950's. ALPA launched its first attack in *Wilson v. Civil Aeronautics Board*[76] in 1957; *Hard v. Civil Aeronautics Board*[77] was decided in that same year. *Pangburn v. CAB*[78] followed

76. 244 F.2d 773; *see supra* text accompanying notes 59-60.
77. 248 F.2d 761; *see supra* text accompanying notes 61-62.

in 1962. After a long hiatus, ALPA tried again in 1977 with *McGee v. Secretary of Transportation*.[79] In each case the unsuccessful challenger was an airline captain.

The *Wilson* case became the touchstone for the other rulings. Captain Wilson's lawyers based their challenge on section 609 of the Civil Aeronautics Act of 1938.[80] The reasons they did so and the arguments they used are obvious: the section says nothing of violations, regulations, offenses or punishment. Since Congress so precisely described these procedures in section 901,[81] the lawyers reasoned, why would Congress sanction a new system without plainly saying so? Why would the lawmakers intermingle such a new system and unrelated qualifications matters like "reinspection" and "reexamination"? Why would section 609 include only one animate object in a long list of inanimate objects? (How do you punish a propeller?) Wilson's lawyers made many of these arguments and more.[82]

CAB argued that it needed the punitive suspension power for "discipline" and "deterrence."[83] Its lawyers argued, and the court so held, that "[b]y resting suspension on a Board determination that 'the interest of the public so requires,' Congress conferred broad discretionary authority upon the Board."[84] Offering no rationale in its one-page decision, the court brushed aside any argument that Congress intended section 901 to be the exclusive mechanism for punishing violators.[85] As the 1926 legislative history reflects, this is precisely what Congress did in fact intend,

78. 311 F.2d 349; *see supra* text accompanying notes 63-64.

79. No. 76-1092 (D.C. Cir. 1977).

80. 49 U.S.C. app. § 1429(a) (1982). The 1938 version read, in part:

> The Authority [CAA Administrator] may, from time to time, reinspect any aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, may reexamine any airman, and after investigation, and upon notice and hearing, may alter, amend, modify, or [the Board may] suspend, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate, or air agency certificate if the interest of the public so requires, or [the Board] may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Authority [Administrator] in refusing to issue the holder of such certificate a like certificate.

Civil Aeronautics Act of 1938, ch. 601, § 609, 52 Stat. 973, 1011.

81. 49 U.S.C. § 1471(a)(2) (1982). This point would have been made more clear had Wilson's lawyers argued the premier maxim of statutory interpretation, *expressio unius est exclusio alterius*.

82. *See* Brief for Petitioner, *Wilson*. *See also* Brown v. CAA, 112 F.2d 737 (9th Cir. 1940), *reh'g dismissed as moot*, 119 F.2d 172 (9th Cir. 1941) ("If the suspension [imposed under section 609] was purely punitive the application [for supersedeas] might be granted but the order also requires that . . . the petitioner should take [a] proposed examination before his right to fly is restored."). The court thereby hints it might have found that section 609 did not authorize punitive suspensions, had time not rendered the case moot.

83. *Id.* at 11-19.

84. 244 F.2d at 774.

85. *Id.*

one system (civil) to the exclusion of another (criminal).[86] The basic reason for any system of law enforcement is to provide discipline and deterrence; just how that will be accomplished, and whether it is sufficient for the task, is a legislative decision for Congress, not the courts. Congress clearly chose a particular system in 1926 and did not alter it in 1938. The *Wilson* court's reliance on the "public interest" clause of section 609 placed undue emphasis on that section without examining the entire legislative scheme.

The suggestion by the *Wilson* court that the phrase "if the interest of the public so requires" was intended as a comprehensive grant of power to start a new enforcement system is untenable. The phrase "public interest" is a *condition subsequent* to first reinspecting, reexamining or investigating to determine if the airman, appliance or propeller continues to meet regulatory standards. So long as it was deemed to be "in the public interest," only then could a decision be made to amend, modify, suspend or revoke in order to correct any deficiency. That phrase was clearly intended to be a limitation of the Board's discretion rather than a grant of power to take action.

The appellate court in *Wilson* simply refused to upset a longstanding enforcement system and used the "public interest" clause as a legal handle on which to base its ruling. "This consistent and, until now, unchallenged administrative practice," the *Wilson* court said, "will not be overturned except for very cogent reasons . . . ."[87] Concerned it might harm air-safety if it did so, the court held: "The most cogent of reasons—air safety—supports the administrative practice here under attack."[88] *Hard*, *Pangburn*, and *McGee* all struck the same note. These courts were really making a legislative, rather than a judicial determination—we think it is a good idea that you have this power.

The empty logic of the "public interest" argument has been recently exposed. In *Jensen v. Administrator of Federal Aviation Administration*,[89] the court ruled that the FAA had, in violation of the Alcoholism Act, improperly denied a medical certificate to Jensen, a commercial pilot, who had admitted to a prior history of alcoholism. FAA argued that its "two-tier" procedure (regular application, and if denied, request for exemption), which leaves the matter strictly within the discretion of agency personnel, negated any contention that Jensen was being denied his medical

86. *See* 1926 History, *supra* note 54.

87. 244 F.2d at 774. *Contra* Global Van Lines v. ICC, 714 F.2d 1290, 1295-96 (5th Cir. 1983) ("A general congressional exhortation to go forth and do good, without more, is not a proper foundation for the sound development of administrative law").

88. *Id. See also* Nadiak v. CAB, 305 F.2d 588, 595 (1962) ("The public—including judges who fly—has a vital interest in air safety.").

89. 641 F.2d 797 (9th Cir. 1981), *vacated*, 680 F.2d 593 (9th Cir. 1982).

certificate solely on ground of prior alcoholism in violation of the Alcoholism Act. Finding that argument "without merit," the court explained:

> [E]ven if this court accepted the FAA's "two tier" argument, the exemption procedure does not comport with due process. . . .
>
> Due process requires that for a meaningful review of an agency decision, the agency must have articulated standards governing its determination.
>
> Here, the FAA's only standards for an exemption are that it would be "in the public interest" and "would not adversely affect safety." These standards do not give the court a sufficient basis for review. Neither do they give the applicant any basis for planning his course of action (including the seeking of judicial review).[90]

Jensen pulls the rationale right out from under *Wilson*. Since "public interest" and "safety" do not comport with due process standards, they can hardly provide the foundation for an entire system of enforcement.

By directly attacking section 609 in *Wilson*, the ALPA lawyers failed to seize upon the real issue in the case—when did Congress, having in 1926 designed an enforcement scheme which provided for civil money penalties and a jury trial, thereafter add punitive certificate sanctions and an administrative hearing? The paradox of *Wilson* is apparent: legislative history aside, the key phrase "public interest," on which the court pinned its decision, did not exist in 1926,[91] so it could not have created the system! Had the court recognized that Commerce officials initiated the certificate system in 1926, then CAB's defense of it would necessarily have been forced into that time frame, and the government would have been compelled to admit the internal inconsistency of their program.

Yet astonishingly, the CAB did inform the *Wilson* court—in a roundabout fashion—that punitive suspensions started in 1926, not 1938. It is clear that this acknowledgement evaded the grasp of the court and Wilson's lawyers. The latter made no mention of it in their reply brief[92] and neither the *Wilson* decision nor subsequent cases have recognized this fact. How did such an oversight occur?

The answer is that the CAB lawyers apparently overwhelmed the court and opposing counsel with a series of clever, and often specious, arguments which they loaded with statements about "public interest" and "air safety." They made it seem that they were arguing that Congress authorized certificate sanctions in 1938, but never directly said so: "The situation is simply the familiar one in which more than one sanction is provided for a particular offense, a point made clear, we think, by the

90. *Id.* at 799 (citations omitted).

91. *See* Air Commerce Act of 1926 § 3(f), 44 Stat. 568, 570; *see also* Brief for Respondent at 20-21, *Wilson* ("the safety regulatory provisions of the Civil Aeronautics Act were in substitution for, and largely an extension of, the provisions of the Air Commerce Act of 1926 . . . .").

92. *See* Reply Brief for Petitioner, *Wilson*.

[1938] legislative history."[93] "In our view, the [1938] legislative history removes any possible doubts as to the Board's power to suspend for violations."[94] Yet they cited no language from any such history to support either of these assertions.

They argued that "suspensions and civil penalties were viewed and administered at least as alternate sanctions by the Secretary [of Commerce—after 1926], a fact duly reported to the Congress."[95] This statement was true, but also cleverly misleading because it begged the question whether Congress in 1926 in fact authorized *two* forms of penalty, as well as *two* separate systems of justice? The CAB lawyers knew it had not.

To counter the basic argument that section 609 says nothing of violations, offenses, regulations or sanctions, the CAB attorneys bluffed their way through: "Petitioner's contentions that Congress meant less than it said in section 609 are not persuasive."[96] In another part of the brief they wrote: "The absence of any express provision that suspension might be imposed for violation was not to limit the Board's powers, but to broaden them."[97] This statement was nonsense. They were contending that because Congress had said *nothing* about violations in 609, that meant it had in fact authorized their punitive system. At the same moment that they were conceding that Congress had said nothing, they were criticizing Captain Wilson's arguments on grounds that Congress had said a lot.

Perhaps to make it seem as if they were being forthright, elsewhere they said: "The purpose of the Congress plainly was to continue the familiar pattern of safety regulation established by the Air Commerce Act . . . ."[98] And "there appears to have been no direct reference to the suspensions provisions in the [1938] Congressional debates."[99] It should by now be easy to understand why not.

While certainly some might see these arguments as coming within the bounds of legitimate advocacy, the CAB's brief in *Wilson* (and *Hard*; and *Pangburn*, where FAA lawyers were on the brief) is a major facet of government aviation officials' efforts to cover up their lack of authority for punitive suspensions.[100] As the index to their brief reflects,[101] in not a single instance did they cite any legislative history for the Air Commerce Act of 1926. Yet careful analysis reveals they were contending that sec-

93. Brief for Respondent at 8, *Wilson*.
94. *Id.* at 27.
95. *Id.* at 22.
96. *Id.* at 12.
97. *Id.* at 27.
98. *Id.*
99. *Id.* at 26.
100. *See infra* sec. VI for details and discussion of this coverup.
101. *See* Brief for Respondent at iii-ix, *Wilson*.

tion 3(f) of that Act was their authority for certificate penalties, not the 1938 Act. As stated in the government's brief, section 3(f) was a bare statement that:

> The Secretary of Commerce shall by regulation . . . [p]rovide for the issuance and expiration, and for the suspension and revocation, of registration, aircraft, and airman certificates, and such other certificates as the Secretary of Commerce deems necessary in administering the functions vested in him under this Act.[102]

Nothing in this section (which links animate and inanimate objects with issuance and suspension in a single sentence) suggests authorization for a penalty system, only qualifications matters. A careful reading of the government's brief reveals that the CAB lawyers asserted that they could institute a punitive certificate sanction system because Congress had not forbidden it in section 3(f).[103] Such legislative interpretation has no basis in logic, especially when Congress did speak directly to the subject of enforcement.

As can be seen by comparing the Acts of 1926 and 1938, section 3(f) was the precursor of sections 602 (issuance of certificates) and 609 (suspension and revocation of certificates). In order to clarify section 609's application to qualifications matters, Congress added the terms "reinspection" (for aircraft, propellers, and appliances) and "reexamination" (for airmen). Although the legislative history does not reveal who prompted such a change, it is reasonable to assume that government officials played a major role.

If section 3(f) was these officials' original source of punitive suspension power, why did they not urge that section 609 also be constructed to plainly state that certificates could be suspended or revoked as punishment or sanction for the violation of a safety rule? *Wilson* and *Hard* were decided a full year before the Federal Aviation Agency was created. Section 609 in the Federal Aviation Act of 1958, while retaining the same basic structure as the 1938 Act,[104] was substantially revised to reflect the great shift of power from the CAB to the new agency. How, then, could CAB and CAA officials (the latter, soon to become FAA) fail to urge that section 609 be appropriately amended to clearly support the purported authority that they had claimed existed in *Wilson*? Why has there been no amendment to clarify this anomaly for the past quarter-century? (Nothing found in the public record reveals any such attempt.) The answer is obvi-

102. Air Commerce Act of 1926 § 3(f), 44 Stat. 568, 570.

103. *See* Brief for Respondent at 21, *Wilson* (referring to section 3(f) of the 1926 Act) ("There was no statutory specification of the grounds for suspension or revocation, this being a matter obviously left for the Secretary to establish."). This statement indicates that the CAB lawyers were arrogating the power to determine when and if an airman could ever exercise his right to "demand" a jury trial in a section 901 civil penalty case.

104. *See supra* text accompanying notes 50 and 80.

ous—any public airing of the matter would risk raising tough questions, such as: When did any agency request this punitive certificate power? When did Congress hold hearings to provide for public input?

It did not happen in 1958. The late Senator Mike Monroney, father of the 1958 Act, clearly did not share the agency's view of section 609 and was not aware that it was being used to justify punitive suspensions. In his report on the Act, he said:

> The right of an airman to appeal to the Board the Administrator's denial or nonrenewal of a certificate is retained and strengthened [under section 602], while a party whose right to his current certificate or rating is questioned [under section 609] *as a result of the Administrator's reinspection* is entitled to a hearing and to an appeal to the courts.[105]

Had Senator Monroney been aware that the CAA (to become FAA) was primarily using section 609 for violations, he would not have failed to include violations and sanctions along with reinspection.

Pangburn came down in 1962, when it was clear that *Wilson* and *Hard* were based on a gross misconstruction of the law. Did FAA lawyers seek to correct it? On the contrary, as that decision reflects, they cited *Wilson* for authority. In 1977, they did the same in *McGee*.[106] *Wilson*, *Hard* and *Pangburn* must all fall because the Civil Aeronautics Act of 1938 is not determinative, and punitive certificate sanctions cannot under any circumstances be sustained under the legislation of 1926. The failure of government lawyers to inform these courts of the legislative history of 1926, which shows that Congress carefully chose civil money penalties and that system only, and emphasize that the certificate system started in that year, is inexcusable if not an outright fraud on the courts.

V. CERTIFICATE SANCTIONS

How did those early Commerce officials come to establish the punitive suspension system when its statutory basis was so dubious? Why have their successors maintained it in the face of its many obvious contradictions? Answering the first inquiry is not as speculative as might be expected at this juncture. Those officials violated their mandate from Congress, because they were skeptical about whether civil penalties

105. S. REP. NO. 1811, 85th Cong., 2d Sess. 3 (1958) (emphasis added); *see also* H.R. REP. NO. 2360, 85th Cong., 2d Sess. *reprinted in* 1958 U.S. CODE CONG. & AD. NEWS 3741. There is not the slightest suggestion in the House report that its writers were aware of any connection between safety violations and suspension and revocation of licenses. *Compare id.* at 16 (comments on § 609) *with id.* at 17 (comments on title IX, Penalties) ("This title deals primarily with violations of provisions of the committee amendment which may be punished by the imposition of civil or criminal penalties, or both, and also contains provisions relating to venue and procedure in the case of any such violation. Except as noted below, this title is a reenactment of existing law without substantial change.").

106. No. 76-1092 (D.C. Cir. 1977).

would be an efficient enforcement tool[107] and were unwilling to wait and go back to Congress to ask for change. Instead, they set up their own unauthorized system of summary justice, a system far more efficient than processing civil penalties through reluctant United States Attorneys with the formalities of federal district court, and the potential burden and expense of jury trial. They could see that civil penalties had severe limitations which Congress should have foreseen. Although over the years it is certain that some government lawyers have recognized that the certificate system has never had any basis in law, they have found it best to rationalize their acts and the program in the name of air safety.

The 1926 legislative history helps explain the genesis of the problem. One reason that civil rather than criminal penalties, which were proposed by the House,[108] were authorized was that:

> Under the present crowded condition of the Federal Courts criminal proceedings for the enforcement of minor infractions of the air commerce laws would be extremely expensive, add to the present congestion, and in most cases penalties would be long delayed in their collection. The civil administrative penalty is summary and proceedings are noteworthy for their absence of technical rules of evidence and pleading [in the compromise stage].[109]

The House bill's criminal system did address two problems: 1) although it was unlikely that anyone would go to jail, that threat assured prompt payment of any fine; 2) by allowing prosecution in state courts as well as federal,[110] the scheme increased the number of courts available for enforcement action. When the criminal system was not instituted, early aviation officials must have realized that civil penalties lacked sufficient coercive force to ensure payment. It stood to reason that if United States Attorneys were unwilling to prosecute minor criminal air-traffic infractions, they would be no more likely to take small civil penalty cases, or prosecute them vigorously. This would allow a significant number of violators to escape punishment. To address this problem, a *modus vivendi* was worked out in the late 1970's with the Justice Department so that FAA lawyers could bypass the United States attorney "who indicates a general unwillingness to handle the case" and file the complaint directly in district courts themselves.[111]

More importantly, some FAA officials have developed an effective method to assure payment of a civil penalty. Based upon interviews with FAA field inspectors,[112] it is certain that at least one FAA regional headquarters sometimes changes violation cases against professional pilots

107. *See* 1980 Handbook, *supra* note 17, ¶ 1202.e, at 165-67.
108. 1926 History, *supra* note 54, at 45.
109. *Id.* at 60.
110. *See supra* note 55.
111. 1980 Handbook, *supra* note 17, ¶ 1202.e(6), at 166-67.
112. These took place in May 1980, while working as a consultant to the General Accounting

from the civil penalty recommended by the investigating field inspector to a certificate sanction, out of fear that the airman might be knowledgeable about the weaknesses of the civil penalty system and sit tight, knowing that it is unlikely that the U.S. attorney will vigorously prosecute the case. The same officials assume that the airman, once a suspension is proposed, will ask if he can pay a civil penalty which will surely be paid to avoid the harsh consequences of forced unemployment.[113] Decades ago, the General Counsel of the Civil Aeronautics Administration formally acknowledged that the public criticized this procedure as "blackjacking," and all but forbade it.[114] Because so many shifts from certificate to civil penalty are reflected in the FAA's enforcement docket (shifts resulting in fines of $100-$300, rather than the much more costly suspension proposed), it is a reasonable inference that many, if not most, of these cases were so prearranged.[115]

Office, during a second field trip to Los Angeles. I visited several General Aviation District Offices throughout the state, and interviewed more than a dozen FAA inspectors.

113. *Id.* One inspector (who shall remain nameless) told me that this had occurred in at least five cases during the previous six months. He had recommended civil penalties because, among other reasons, he was aware of the substantial economic impact a suspension would have on these pilots by keeping them from performing their jobs. When regional headquarters in Los Angeles changed his recommendation to one that certificate action be used, he called to find out why. He was told that headquarters was afraid the airmen might know that United States Attorneys might not process the case; the office feared that the airmen might sit back, ignore the matter, and wait to see what happened, and perhaps escape any penalty whatsoever. In at least one case the inspector got the civil penalty restored. So instead of a 30-day suspension, which would have cost the accused around $4,000 during the height of cropdusting season, the pilot paid a $250 civil penalty. Interview of May 29, 1980.

114. CAA, Aviation Safety Manual of Procedure 103, at 65 (1954). In a memorandum to field lawyers appended to this manual, R.E. Elwell told them:

> There has been unfavorable public reaction to the few instances in which the [CAA] has [shifted from certificate to civil penalty action]. . . . Concurrent imposition of sanctions is attacked as "double jeopardy"; the withdrawal of one remedy to pursue another is criticized as "black jacking." The only way to assure the public of [our] good faith is to . . . consider the filing of a complaint for suspension or revocation as an election not to seek civil penalties for the same offense.

Only "under unusual circumstances," Elwell added, could the shift be made, and it would require "prior approval" from Washington.

115. Cases picked at random from FAA's enforcement docket show that in June 1980, of 71 civil penalty cases against individual certificate holders, 26, or 37%, began as certificate actions and that 92% of these airmen held professional licenses. The average suspension proposed (for all certificates) was 53 days, the average money penalty paid instead, $340. The November 1977 docket shows that 28 of 79 cases, or 35%, originated as certificate actions; 82% held professional licenses. Average suspension was 63 days; average penalty paid, $209.

Typically the closing letters in these cases read:

> You are hereby advised that the Notice of Proposed Certificate Action [ATP, 15 days] dated March 5, 1980, is withdrawn in view of the fact that subsequent to its issuance in accordance with the offer of compromise suggested at your informal conference, you submitted a settlement offer of $300 in compromise of the civil penalties arising out of your alleged violation. . . . it has been concluded that the public interest requires no further action . . . .

Another glaring weakness of civil penalties is that they are as difficult to collect as any other civil judgment. How do you levy execution on a $1,000 penalty against some youngster with no assets who buzzed his high school stadium during a football game? Recognizing that the civil penalty system has its weaknesses, this hardly justifies executive branch officials in taking the law into their own hands. Why didn't those early officials conscientiously work with the Justice Department, identify weaknesses, build data on civil penalty actions, then return to Congress and ask for something more effective? The answer lies partly in the nature of bureaucracy to never admit mistakes and the public pressures on aeronautics agencies to fulfill their mission of air safety. That pressure was exacerbated here by the sensationalism and emotionalism always attendant upon aircraft accidents.

Part of the problem was that in 1926, except in a few developed areas, the federal government was not a pervasive regulating force. Air-traffic and maintenance rules were the sort of laws that states and cities routinely enforced. And significantly, they could do this in a well established infrastructure of petit courts where the threat of jail ('ten dollars or ten days') deterred non-payment of fines. To gain use of that infrastructure was no doubt a central reason why the House bill incorporated state courts into its criminal air-safety enforcement system.

FAA officials have attempted to justify their policy by invoking certificate actions in "operational"[116] cases, stating that "the withdrawal of the privileges of certificate is a natural, equitable, and just consequence of the abuse of such privileges."[117] This is the same logic that cuts off the hands of thieves. Moreover, the agency's sincerity in these statements is undercut by its own enforcement manuals, one of which notes that "most

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Ulmer, CE-80-OG-28 (June 18, 1980). Note how with a few spoken words a section 609 action was instantaneously transformed into a section 901 action. Occasionally the file reflects why the shift was allowed: "WHEREAS, you . . . advised that a 60-day suspension of your Commercial Pilot Certificate would render an air-taxi business owned and operated by you insolvent . . . it would be in the public interest to accept the . . . compromise offer [of $1,000]." Faulkner, AL-71-OG-36 (Feb. 25, 1972).

That "blackjacking" is an effective collection tool was amply demonstrated when one airman, allowed to pay $150 in installments of $50 per month, was told: "Please understand that this compromise is for settlement purposes only. If you fail to comply with all the terms of our agreement, we shall then have to enter an Order of Suspension in accordance with our Notice of Proposed Certificate Action dated January 7, 1980." Bell, NW-79-OG-244, (Jan. 24, 1980). *See also* Smith, *FAA Blackjack*, PROFESSIONAL PILOT, Feb. 1981, at 91.

116. *See* 1968 Handbook, *supra* note 8, ¶ 9.c, at 9. ("Certificate actions should generally be used in operational violation cases . . . .") The new manual is less specific. *See, e.g.*, 1980 Handbook, *supra* note 17, ¶ 205.e(1) ("Civil penalties also may be initiated in any case where normally a suspension would be manifestly unfair or create an undue hardship and is not required for aviation safety"), 205.b(4) ("Suspension may be used for punitive purposes where the nature of the violation warrants it . . . .").

117. *See* 1980 Handbook, *supra* note 17, ¶ 205.b(4).

violations are inadvertent,"[118] while another urges that "suspension action should be considered in serious cases where a severe penalty is warranted."[119]

The real reasons FAA officials use certificate actions are: 1) fear that United States attorneys will turn down small civil penalty cases so that the airman goes unpunished;[120] 2) it is an administrative burden to transfer the case or get permission to file directly in court where the FAA lawyer will be a mere technical advisor;[121] 3) under the administrative license sanction procedure the FAA lawyer controls the action, the case moves predictably through the NTSB, and he enjoys the challenge of playing prosecutor and trying the case himself;[122] 4) FAA's desire to put the violation on the certificate holder's record, so if he commits further offenses

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118. *See* 1968 Handbook, *supra* note 8, ¶ 12.b, at 13.

119. *See* Compliance and Enforcement, FAA Order 8030.7A, ¶ 131.a, at 96 (1970 & consolidated reprint 1977) [hereinafter cited as 1970 Handbook]. This manual was superceded by the 1980 Handbook, *supra* note 17, but its policies remain intact.

120. Responding to a request from the FAA General Counsel Office (now Chief Counsel) for comments on proposed changes to the lawyers' 1968 Handbook, *supra* note 8, one official noted that:

> We have found in the past that some U.S. Attorneys are reluctant to process violation actions when the civil penalty involved is relatively small. In states where criminal cases are frequent and the U.S. Attorney's workload is great, the relatively minor civil penalty cases are given priorities which preclude timely disposition.

Letter from Paul J. Baker, Chief, Flight Standards Division, ANE-200, to AGC-30, Office of General Counsel (Mar. 7, 1973). During a later attempt to revise the 1968 Handbook, another noted:

> Many of the civil penalty actions which we are unable to settle are simply not of sufficient significance to warrant referral. The routine transmittal of such cases to the United States Attorney tends to take emphasis away from those cases which are genuinely significant to the agency.

Letter from Lawrence C. Sullivan, Regional Counsel, ANE-7, to AGC-20, Office of General Counsel (Oct. 6, 1977).

121. *See* 1980 Handbook, *supra* note 17, ¶ 1202.e(6), at 166.

122. In another comment on proposed changes to the 1968 Handbook, *supra* note 8, one FAA lawyer explained his frustration with civil penalties:

> We recently had occasion to try a case involving [an airline pilot] before Judge Hill of the U.S. District Court for the Northern District of Texas, Fort Worth, Texas. The Judge dismissed our case. We charged [the captain] with operating an unairworthy aircraft from Tampa . . . to Orlando, Florida. While we do not believe the particular facts warrant discussion here, we do want to point out that during the trial the Judge (and the U.S. Attorney trying the case) became hopelessly confused with our technical phrases and terms. At times the trial was almost a comedy in that the witness, the Assistant U.S. Attorney and the Judge were virtually speaking three different languages. Unfortunately, the true merits of the case were not the basis for the decision. It is our view that in enforcement cases we should avoid, when possible, going into court because, in most cases, none of the participants will have the slightest idea what is going on. While the phrase "unairworthy" is a difficult one for even agency personnel to discuss, we would recommend that you consider substituting certificate actions in lieu of civil penalties in most instances, the obvious reason being, of course, that success in imposing a sanction will greatly depend upon the forum of the case. We definitely recommend that technical matters be kept out of court and be tried before the NTSB if at all possible.

Letter from J.N. Coker, Regional Counsel, SO-7, to GC-1, Office of General Counsel (May 25, 1971). Note the clear assumption here that FAA officials have the unfettered right to determine

the agency can justify more serious action;[123] and 5) as one manual suggests, FAA officials will deliberately put a man out of his job when they think even a stiff money fine would not be sufficiently harsh for the alleged violation.[124]

These reasons illustrate the pressure on FAA officials to unduly emphasize certificate actions, and indicate that the agency's enforcement program has been shaped to suit its, not the public's, convenience. In particular, they underscore the unfairness of a two-track, administrative-judicial enforcement program which allows the agency that initiates the prosecution to choose between the two tracks. That choice necessarily sets in concrete, right from the start, the method by which the accused is going to be punished and the kind of trial he will receive.

VI. THE COVERUP

It is reasonable to assume that a small core of government lawyers have always known of the certificate system's illegal nature. The troubling question is why none of these public officials have ever blown the whistle. The evidence is abundant that a conscious effort has been made by some government officials over the years to hide the lack of legitimacy of punitive suspensions and revocations. This effort has had many facets. We have noted several already: the specious arguments government lawyers have used to defend challenges to section 609; their continued citation to cases they know to be based on fundamental error; their failure to cause, or even attempt to cause, section 609 to be amended to say in plain language what they claim it authorizes them to do. Additionally, two other facets of interest are worth describing: 1) a deliberate effort to avoid telling the public how the FAA enforcement program works, the central feature of which is these officials' failure to promulgate rules that explain the two-track program; 2) the use of euphemisms, or word

whether or not the accused will ever have the opportunity to "demand" his section 903 right to jury trial in a section 901 civil penalty case.

123. *See* 1968 Handbook, *supra* note 8, ¶ 12.a, at 12 ("Among questions to be considered in determining an appropriate sanction is whether the violator has a prior record. If so, its recency and nature should be considered. In an airman case, repetition of similar types of violations would normally require a greater sanction."). Although FAA counsel in my experience will consider a prior civil penalty in proposing the size of a certificate penalty, agency policy is that he cannot introduce that before the NTSB where the ALJ might use it. *See* 1980 Handbook, *supra* note 17, fig. 12-5, at 208 ("[A] settlement will not constitute an admission of violation.").

124. *See* 1968 Handbook, *supra* note 8, ¶ 9.b, at 8. ("Civil penalties . . . should also be used as the normal sanction for less serious violations . . . .") Michael Pangia also relates: "By holding his client in check [at the informal conference] the attorney was able to obtain a reduction of the proposed six-month suspension to a civil penalty." Pangia, *supra* note 15, at 595.

games, to make it seem that certificate sanctions have nothing to do with "punishment."

A. Failure to Promulgate Rules

The efforts of federal aviation officials to prevent the public from comprehending the enforcement program and to deflect attacks on it have involved acts of both omission and commission. For example, the FAA has never in its quarter-century of existence published a simple, comprehensible booklet that explains the program to pilots or mechanics. Although agency officials would argue that their enforcement handbook serves this purpose, the fact remains that this manual, a consolidation of materials intended to be internal documents, is lengthy and complicated. As a matter of agency policy, its enforcement manuals were kept from the public until 1970 when a Freedom of Information Act lawsuit[125] forced their release. The present handbook can sometimes be helpful, but many airmen do not know it exists. It is not readily available at airports or FAA field offices and must be ordered from Washington.

Nor does the FAA mention the handbook in the Notice of Proposed Certificate Action[126] or Civil Penalty Letter,[127] which is when it would be of the most help to the accused. Moreover, this handbook, though the only information source, is as notable for what it does not explain as for what it does. It does not explain how easy it is to go to trial before the NTSB: that an ALJ will fly out from Washington to the airman's hometown to preside over the case; that the trial is much like any traffic court; that many airmen defend themselves without counsel; and that there are no court costs. One regional counsel, when asked why FAA has never prepared a booklet that explains the system in layman's terms, and especially one that explains the NTSB hearing process, underscored the reason for the omission. "If we told pilots how easy it was to go to trial at NTSB, we would be swamped with trials."[128] My own experience confirms that many airmen, even lawyers, do not know about civil penalties and the possibility of switching to a money fine from a suspension. They

125. Smith v. United States, No. 3525-69 (D.D.C. 1969); *see also DOT Gives Copies of Handbooks to Man Who Sued to Release Them*, 187 Aviation Daily 317 (Feb. 20, 1970).

126. *See* 1980 Handbook, *supra* note 17, fig. 12-8, at 214-18.

127. *See id.*, figs. 12-1 to 12-5, at 201-09.

128. Statement by Dewitte T. Lawson, Jr., FAA Western Region Counsel at a Meeting on Jan. 24, 1980, at FAA Western Region Headquarters, Los Angeles. Among those present were Lawson, his assistant Fred Woodruff, U.S. General Accounting Office officials Ken Dobbs and Jeffrey McGowan and myself. The purpose of the meeting was to have Lawson explain to Dobbs and McGowan how FAA enforcement worked. Asked if from a philosophical standpoint (meaning due process) the airman ought to be told how enforcement worked, Lawson replied, "No." Neither did he think the pilot needed to know in advance whether the sanction for a violation was going to be a suspension or a civil penalty.

naturally focus on the certificate notice they have just received and are given no reason to assume there is any other alternative.

The centerpiece of this facet of the coverup is FAA's failure, in violation of the Administrative Procedure Act (APA),[129] to adopt as formal rules a formidable array of enforcement policies. The APA mandates that federal agencies inform the public of their basic policies and procedures and allow public comment when they are formulated and promulgated.[130] Interestingly, one rule FAA did promulgate underscores the basic reason for this failure—FAA officials' sensitivity to their lack of authority for the two-track enforcement program. This rule purports to restate section 901, which provides that "*Any person* who violates . . . *any* provision . . . [of this Act], or *any* rule, regulation or order issued thereunder . . . *shall be* subject to a civil penalty of not to exceed $1,000 for each such violation . . . ."[131] FAA's version, contained in FAR section 13.15, states:

> (a) Under sec. 901 of the Federal Aviation Act of 1958 . . . *a person* who violates any provision . . . of that Act, or any regulation or order issued [thereunder] . . . *is subject* to a civil penalty . . .
>
> (b) The Administrator may compromise any civil penalty. *If a civil penalty is contemplated* and it is considered advisable to compromise it . . . the Regional Counsel concerned sends a letter . . . .[132]

Regardless of how many courts of appeal uphold punitive suspensions, FAA officials realize that the plain command of section 901 ("shall be subject to a civil penalty") cannot be reconciled with their two-track enforcement program. They have subtly twisted the law to fit their rule, rather than fit their rule to the law.[133]

The most striking aspect of the FAA's failure to promulgate rules explaining enforcement is the fact the agency has no rule that tells pilots and mechanics that licenses are at risk for a safety violation.[134] FAA officials

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129. 5 U.S.C. §§ 551-576 (1982).

130. *Id.* § 553.

131. 49 U.S.C. app. § 1471(a)(1) (1982) (emphasis added).

132. 14 C.F.R. § 13.15(a)(b) (1983) (emphasis added).

133. Note that while the rule mentions further proceedings in federal court, it does *not* mention jury trial; were it to, it would raise the obvious questions. *But see* 14 C.F.R. §§ 94.31, 94.310 (1938) (which advised the public of the civil penalty right to jury).

134. The regulations that FAA has promulgated demonstrate that exceptions often prove the rule. *See* 14 C.F.R. §§ 61.15, 91.12, and 67.20 (1985). The first two, by a kind of incorporation by reference, combine to prohibit the operation of civil aircraft "with knowledge that narcotic drugs" are aboard; sec. 61.15(c) makes this action "grounds for suspending or revoking any certificate or rating issued under this part." Section 67.20 provides that "any fraudulent or intentionally false statement on any application for a medical certificate . . . is a basis for suspending or revoking any . . . certificate . . . ." Although the word violation is never used in these, we see here that FAA lawyers *can* write a regulation that tells the public, "you break a rule, we'll take your license." If FAA claims authority to suspend or revoke for *all* violations, why single out just these two?

would claim that FAR section 13.19[135] serves this function. Yet this rule simply paraphrases section 609, which says nothing of violations, offenses or regulations; it speaks only of reinspections and reexaminations, matters unrelated to violations, and is for that reason misleading. Other FAA rules, such as FAR sections 13.11, 13.15 and 13.16,[136] however, do use "violation" and similar terms freely. It is clear that use of the word "violation" was carefully avoided in section 13.19 in order not to draw attention to section 609's deficiencies.[137]

As we have seen, at one time the federal government did have a concise rule that informed pilots and mechanics that their licenses could be suspended or revoked for safety violations.[138] In 1938, this rule, along with an entire body of regulations promulgated under the 1926 Act, was recodified for publication in the seminal edition of the *Code of Federal Regulations*.[139] Then inexplicably, in 1940, this rule, and several related ones, simply disappeared from that Code, never to resurface.[140]

The new five-member Civil Aeronautics Authority, established under the 1938 Act, took office in August of that year. Except for technical changes to assure conformity with the new Act, its members adopted the existing regulations in the *CFR* in toto, which included the violation-suspension rule.[141] A thorough search of original Civil Aeronautics Authority minutes at the Federal Records Center at Suitland, Maryland, unearthed no record of any subsequent action in connection with that rule. So how did it disappear? The only reasonable inference is that former Commerce Department aviation officials, now working for the new Authority, took it upon themselves, when supplying revisions for the 1940 *CFR*, to drop the suspension-revocation rule without Authority members' approval or knowledge.[142]

Why would these men tamper with the regulations? They were faced with a problem, created by an obtuse clause in section 609 of the 1938 Act: "The Authority . . . may revoke, in whole or in part, any such certificate for any cause which, at the time of revocation, would justify the Authority in refusing to issue to the holder of such certificate a like certificate."[143] The 1926 Act contained no such clause, and the 1938 legislative history gives no clue as to its purpose or roots. The clause was

135. 14 C.F.R. § 13.19 (1984).
136. *Id.* §§ 13.11, 13.15, 13.16.
137. When drafting Administrator Langhorne Bond's "get tough" enforcement policy, FAA lawyers used "violations" or similar terms 28 times. *See* FAA Order 1000.9C (Apr. 26, 1979).
138. 1926 Rule, *supra* note 12.
139. *See* 14 C.F.R. §§ 20.37, 20.37110, 20.46, 20.463, 21.27110 (1938).
140. *See* 14 C.F.R. pt. 20 (1941) and 14 C.F.R. §§ 20.35, 20.36 (1943).
141. *See* 10 CAA AIR COM. BULL. 84 (Sept. 15, 1938); *see also id.* at 184 (Jan. 15, 1939).
142. *See* 5 Fed. Reg. 676 (1940).
143. Civil Aeronautics Act of 1938 § 609, 52 Stat. 973, 1011.

later deleted in the 1958 Act, also without explanation.[144]

This clause, in a roundabout fashion, made it plain that licenses were to be revoked only for lack of qualifications, not as a penalty for safety violations. It is fair to assume that these officials, who for the previous twelve years had been doing just that, realized that their rule was now directly contradicted by the new statute. They knew that in order to have the rule amended they would have to go through a hearing process before the Authority. They had to have been painfully aware that the emperor wore no clothes and that their lack of authority in the first instance would become evident, so they decided not to risk public involvement and the questions such a move would entail. At first opportunity, then, they let the suspension-revocation regulation slip through the cracks. Since their successors have also failed to promulgate a replacement, it is now clear why for forty-five years the federal government has had no rule that directly tells pilots and mechanics that their licenses are at risk for a rules violation.

In 1946, the Civil Aeronautics Administration (in 1940 the Authority was split into the CAB and CAA) gave the enforcement rules, which had been retained, a major overhaul. It promulgated a comprehensive rule on procedure that only indirectly referred to certificate sanctions, and which explained that violation cases would be handled by: (a) administrative letter of reprimand; (b) section 901 civil penalties; or (c) filing of a complaint before the CAB "with a view toward the suspension or revocation of a safety certificate issued . . . to the alleged violator."[145] Note that the CAA here cited section 901 but not section 609.

In 1950 this rule underwent major change and each subparagraph was placed in a separate rule of its own.[146] Subparagraph (c) read:

> *Complaints.* Under section 1002 of the act, the Administration [CAA] may file with the Board a complaint in writing, with respect to anything done or omitted to be done by a person in contravention of any provision of the act or any requirement established pursuant to the act. *Under section 609* of the act the Board may suspend, in whole or in part, any type certificate, production certificate . . . airman certificate . . . air agency certificate issued by the Administration, if the interest of the public so requires, or it may revoke, in whole or in part . . . . After such a complaint has been filed, the Board will determine administratively whether a certificate issued by the Administration to the alleged violator shall be suspended or revoked . . . .[147]

This regulation was a calculated misrepresentation of section

144. *See* Laster, 31 C.A.B. 1162 (1960) (indicating that even though the clause was dropped in 1958 the Board continued to act as if it were still there). *See also infra* note 178.

145. 14 C.F.R. § 651.21 (1947). *See also* 14 C.F.R. § 405.21 (1950).

146. 14 C.F.R. § 408.22 (1951) (subpara. (a)); *id.* § 408.23 (subpara. (b)); *id.* § 408.26 (subpara. (c)).

147. 14 C.F.R. § 408.26 (1951) (emphasis added).

1002.[148] That section allows "any person" to file a complaint with the Board; it says nothing of "Administration." That section's main thrust was not safety enforcement but rather, for instance, to allow residents of Cedar Rapids, Iowa, to complain to CAB if United Airlines failed to provide the service called for by its certificate of convenience and necessity.[149] Section 609 says nothing of "complaints."[150]

This was policy searching for a rationale. Coupling section 1002 to section 609 was an attempt to invest the latter with authority it plainly did not contain itself. This long forgotten CAA regulation is compelling evidence that government aviation officials have never acted in good faith when claiming that section 609 authorizes a punitive certificate sanction system of administrative justice.

No such claim about "complaints," invoking section 1002, has ever been made in any subsequent regulation. When, in 1958, many of these same officials, now part of the new Federal Aviation Agency, were required to promulgate new regulations in all areas of the Agency's activities, their solution to the lack of a legal rationale for certificate actions was to remain silent. They simply formulated their new certificate rule, FAR section 408.25[151] (the forerunner to today's section 13.19) to paraphrase section 609.

As mentioned above, public input has never been allowed in the making or shaping of punitive certificate sanction policy. Created in 1958 as a new and independent agency (and since 1966 an "administration" within the Transportation Department), FAA was required to promulgate totally new rules. How, then, did agency officials avoid the APA mandate that "interested persons" be given "an opportunity to participate in the rule making,"[152] when it adopted its new enforcement procedure rules (including FAR section 408.25)? They simply ignored it. Making no mention of APA requirements for public participation, their *Federal Register* notice recited:

> Effective December 31, 1958, Part 408 of the Regulations of the Administrator of Civil Aeronautics is hereby repealed, and a new Part 408 containing the enforcement procedures of the Federal Aviation Agency is hereby adopted to read as follows . . . .[153]

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148. *See* Civil Aeronautics Act of 1938 § 1002(a), 52 Stat. 973, 1018.

149. *See* Nebraska Dep't of Aeronautics v. CAB, 298 F.2d 286 (8th Cir. 1962) (concerning adequacy of certain air service within the state of Nebraska); *see also* Flying Tiger Line v. CAB, 350 F.2d 462 (D.C. Cir. 1965), *cert. denied*, 385 U.S. 945 (1966); Foremost Int'l tours, Inc. v. Qantas Airways, Ltd., 525 F.2d 281 (1975), *cert. denied*, 429 U.S. 816 (1976).

150. *See supra* note 80 for the 1938 version and *supra* text accompanying note 50 for the 1958 version.

151. 14 C.F.R. § 408.25 (1959).

152. Administrative Procedure Act § 4(b), 5 U.S.C. § 553(c).

153. 24 Fed. Reg. 10 (1959). The FAA has also ignored the clear APA directive that a "sanc-

Earlier in this same *Federal Register* issue, in a notice about the new Part 405 on rulemaking procedures, the FAA explained their failure in that instance to allow public participation: "Since this amendment is not a substantive rule but one of Agency procedure, notice and public procedure hereon are unnecessary."[154] Notably—and rather ironically—in their preamble to part 405, the FAA stated:

> The Agency will follow the procedures required by the Administration Procedure Act for prescribing both substantive rules, on the one hand, and interpretative rules, general statements of policy, rules of Agency organization, procedure and practice, on the other hand.[155]

Under the APA, FAA enforcement policies are subject to the following Congressional commands:

> [1] each agency shall separately state and currently publish in the Federal Register for guidance of the public—(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained . . . . (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency.[156]
>
> [2] Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.[157]

The APA and court decisions leave little doubt of its application here, and that the government's failure to promulgate rules is an absolute defense to punitive certificate action.[158] It is surprising that the vulnerability of FAA enforcement to the APA has escaped the attention of the aviation bar for so long. Perhaps this is because too many aviation bar members have never really understood the depth and importance of the APA. Senator Pat McCarran, its sponsor, called that Act: "a bill of rights for the

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tion may not be imposed . . . except within jurisdiction delegated to the agency *and as authorized by law*." 5 U.S.C. § 558(b) (emphasis added). This simply means that the FAA's organic act must state in plain terms that suspension and revocation may be used as a sanction for the violation of a safety rule, which it does not.

154. *Id.* at 8.

155. *Id.* As proof of the obvious, that FAA lawyers know full well what APA requirements are. *See* 35 Fed. Reg. 5464 (1970) ("The purpose of these amendments to Part 13 [Enforcement Procedures] of the Federal Aviation Regulations is to eliminate the FAA formal hearings in certificate proceedings taken by the Administrator pursuant to section 609 [leaving of course the NTSB hearings which they duplicated]. . . . Interested persons have been afforded an opportunity to participate in the making of these amendments by a notice of proposed rule making . . . in the *Federal Register* . . . .").

156. 5 U.S.C. § 552(a)(1)(C)-(D).

157. *Id.* § 552(a)(1)(E).

158. *Id. See also infra* text accompanying notes 162-63; Northern California Power Agency v. Morton, 396 F. Supp. 1187, 1191 (D.D.C. 1975), *aff'd*, 539 F.2d 243 (D.C. Cir. 1976) ("The statute [5 U.S.C. § 552(a)(1)] clearly provides that no administrative action taken pursuant to unpublished procedures can be allowed to stand against a person adversely affected thereby.").

hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the federal government. It is designed to provide guaranties of due process in administrative procedures."[159]

In *NLRB v. Wyman-Gordon Co.*,[160] the Court noted that:

> the rule making provisions of [the APA] . . . were designed to assure fairness and mature consideration of rules of general application . . . . There is no warrant in law for the Board to replace the statutory scheme with a rule-making procedure [here by adjudication] of its own invention.[161]

In the landmark case of *Morton v. Ruiz*,[162] the Court declared agency action void for lack of formal promulgation and publication in the *Federal Register.* Ruiz and his wife were Indians who lived off their reservation but nearby. They were denied special welfare benefits by the Bureau of Indian Affairs (BIA) because a rule in a BIA staff manual limited eligibility to those Indians who were living "on reservations." The Court held that the complainants' rights could not be extinguished since the rule in the manual had not been published. The Court made it plain that if and when BIA should adopt such a rule:

> [I]t would be incumbent upon [the agency] to develop an eligibility standard . . . [and] must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries.
>
> . . . No matter how rational or consistent with congressional intent a particular decision might be, the determination of eligibility cannot be made on an *ad hoc* basis . . . .
>
> The Administrative Procedure Act was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished *ad hoc* determinations.[163]

Morton v. Ruiz is particularly applicable because FAA officials have no publicly known, sensible criteria or standards for making the choice between placing an accused on the certificate track or on the civil penalty track, nor any criteria for switching from one to the other. An airman is left to wonder why another airman was allowed to pay a money fine, and thus save his job, while he was not. Nor do airmen know that all such determinations are made on an ad hoc basis, and are often based on personal whim or prejudice.

Just after its creation, then, in direct violation of the APA, the FAA failed to lawfully promulgate its entire set of enforcement procedures, in-

159. S. REP. No. 248, 79th Cong., 2d Sess. 298 (1946).
160. 394 U.S. 759 (1969).
161. *Id.* at 764.
162. 415 U.S. 199 (1974).
163. *Id.* at 231-32.

cluding the rule they would claim spells out their punitive certificate sanction system. Although minor bits and pieces added later may have been properly adopted, that illegal action has never been rectified. Government aviation officials in 1958—and of course since—knew it was risky to open up the section 609 legal issues by placing on record a purported statement of their statutory authority, that it would likely unleash a hornet's nest of opposition from tens of thousands of pilots and mechanics who to this day do not comprehend the FAA's inordinate use of license suspensions and revocations.

This is also why the FAA has never adopted as formal rules many basic enforcement policies. Among these, critical to airmen's rights is agency policy about "blackjacking:"

> *Shift in sanctions*. Ordinarily it will not be FAA policy to withdraw one remedy, after it has been commenced, to pursue another, although circumstances may arise in which such action is appropriate. An example where such action would be appropriate is when counsel has commenced certificate action against a pilot and thereafter learns that the pilot uses an aircraft in business or a profession and that the proposed suspension would constitute a sanction more severe than is warranted by the violation. Contrary situations will also occur.[164]

Although this power to shift a sanction can affect the livelihood of a pilot, mechanic or air-taxi operator, it is not contained in any formal FAA regulation. The CAA, however, did have a formal regulation that at least indirectly recognized the civil penalty as an alternative to certificate action.[165] When it had its own hearing program, FAA promulgated a rule that authorized its hearing officer to settle any certificate case he was hearing with a civil penalty,[166] but the agency has never had any rule that tells the airman he may ask for the shift, or the criteria for its use. The hearing officer rule is no longer on the books because the program was dropped long ago.[167]

The suggestion in the 1980 handbook that shifts are seldom made, and then only when the pilot's need for his license comes as a surprise to FAA counsel, is a good example of the Agency's lack of candor about its two-track program. Field inspectors invariably find out what the pilot does with his license and note that in their report. It would be highly unusual if counsel was not keenly aware of it. As discussed earlier, the practice of making shifts in sanction has become routine.[168]

The reason FAA officials have never promulgated this major policy as a rule is clear: There is *nothing* in the Federal Aviation Act of 1958 to

164. 1980 Handbook, *supra* note 17, ¶ 1202.1(4), at 163.
165. *See* 14 C.F.R. § 651.21 (1947).
166. 14 C.F.R. § 13.67(a) (1968).
167. *See* 34 Fed. Reg. 20,064 (1969).
168. *See supra* note 115.

back it up. In 1951 the CAA General Counsel tacitly conceded that the procedure was a form of blackjacking;[169] any Notice of Proposed Rulemaking (NPRM) would necessarily rekindle public sentiment, and the extensive use of blackjacking would become apparent. Public debate would then force FAA to address the unanswerable questions concerning the accused's right to jury trial and criteria used to choose the certificate or civil penalty track in the first instance.

As late as 1980, these same officials, in their new handbook, repeated the timeworn claim that they may institute both civil penalty and certificate actions for the *same* offense. They claim that "as a matter of law" an election to impose one sanction is not a bar to a concurrent proceeding to impose another, although "such action has the appearance of 'double jeopardy' and, in the usual situation, it is not necessary . . . ."[170] Were FAA to make a formal rule of this, these officials would have to explain on the record why Congress would authorize an enforcement program in which the FAA could prosecute an airman in federal court where a jury could find him *not guilty*—and in any event impose only a money fine—and at the same time pursue him before NTSB where an ALJ could find him *guilty* of the exact same violation and take away his license as punishment.[171]

The CAB, until 1966, and then NTSB, which assumed CAB's quasi-judicial authority in air-safety cases, as well as accident investigations, bear much of the responsibility for allowing this to go on. In *Petition of Sichel*,[172] the CAB stated that the FAA could not deny an application for a student pilot certificate (by a formerly revoked private pilot) on grounds he lacked "the care, judgment, integrity and responsibility required of the holder of an airman certificate."[173] The Board indicated that it thought FAA had the authority to lay down such standards, but said:

> [I]t does not follow that the administrator may apply such standards to applicants where he has not prescribed [them] . . . in the Regulations . . . .
> [I]t is our view that applicants for certificates are entitled to have notice of the eligibility requirements which they must meet . . . .[174]

This is precisely what the APA commands, and the Board cited that Act as authority for overturning the denial.[175]

Sichel highlights a continuing conundrum, the existence of which re-

169. *See supra* note 114.
170. 1980 Handbook, *supra* note 17, ¶ 1202.a(3), at 163; *see also id.* ¶ 205.a(2), at 15.
171. "It is the present policy of the FAA not to bring both types of actions for the same violation so as to avoid any appearance of double jeopardy, although if the violations are serious enough there is nothing to prevent the FAA from doing so." Pangia, *supra* note 15, at 593.
172. Sichel, 39 C.A.B. 975 (1964).
173. *Id.* at 976-77.
174. *Id.* at 976.
175. *Id.* at 977 n.10.

flects unfavorably on both NTSB and FAA. Although the Board recognized that the APA requires formal promulgation of rules which set forth the standards for a given certificate, it pointed out that it was also CAB policy to approve revocations ordered by the FAA under section 609 that were based on the same grounds that the Agency was using to deny Sichel his student license.[176] Yet the Board made no effort to reconcile the blatant inconsistency of this policy. If there must be rules on the books to deny a certificate, why would there not have to be similar rules and standards on the books in order to take it away?

The NTSB and FAA continue to ignore *Sichel* to this day. The Board, when it believes the airman's "repeated offenses" warrant it, continues to affirm FAA revocations on an ad hoc basis.[177] It does this by sleight of hand: the case often begins as a punitive action for the immediate violation that triggered the case, a violation that usually only deserves a suspension. But with any prior violations tacked on (for which the airman has already paid the penalty), the ALJ may determine that he lacks the "qualifications" to hold his license;[178] or he may determine, also ad hoc, that the infraction alone is serious enough to reflect a lack of qualifications.[179]

One cannot deny there is some logic to linking qualifications and number of violations, but the problem is that there is no rule.[180] There is no specific cutoff period for considering past infractions. In one case, the

176. *Id.* at 976.

177. *See* Air East, Inc., 2 N.T.S.B. 870 (1974); Stewart, 2 N.T.S.B. 1140 (1974).

178. *See* Laster, 31 C.A.B. 1162, 1163 (1960) ("[W]e agree with the examiner's adherence to our traditional view that revocation, unlike suspension, is not warranted absent a showing that the holder is lacking in qualifications to hold the certificate. Although the 1958 Act no longer explicitly makes this distinction between the grounds for revocations and for suspensions, we do not view the amendment of section 609 to require abandonment of this appropriate differential standard adopted by the Board and approved by the courts . . . . Although willful and deliberate disregard of the Civil Air Regulations is evidence of lack of qualifications, respondent's knowing violations, of which only the acrobatics caused a safety hazard, are isolated and not part of a pattern of continuing or defiant disrespect for the regulations."); Bittner, 39 C.A.B. 952 (1964).

179. *See* Otten & Gabrick, 1 N.T.S.B. 1002, 1007 (1970) ("We recognize that a finding of lack of qualifications in cases involving a single flight has traditionally been based on deliberate or reckless violations of the regulations. We also are of the view, however, that carelessness of an extreme nature, such as that involved herein, is grounds for such a finding [on an ad hoc basis]."); Hall, 1 N.T.S.B. 824 (1970).

180. But it cannot be disputed that FAA lawyers know there should be a rule. In a 1971 memorandum, then General Counsel (the title is now "Chief Counsel") George U. Carneal, Jr., told the FAA Deputy Administrator:

> [T]he regulatory proposals are progressing satisfactorily . . . . The project dealing with compliance disposition [a euphemism for "repeated offenses"] has been restructured and returned to Flight Standards for further work. We will by this project require willingness or "compliance disposition" as a prerequisite [for section 602 certificate applications] and continuing element of qualifications [under section 609] for all FAA certificate holders.

FAA Memorandum (Oct. 18, 1971). Never completed, it is my view this project was quietly buried by the bureaucracy after Carneal left. The project is an admission that the FAA has re-

ALJ talked about (but decided not to consider) a violation that was fifteen years old, committed when the pilot was a youngster, but who was now supporting a family as a flight instructor.[181] A review of hundreds of FAA enforcement cases indicates that ALJs routinely look at violations that are five and ten years old. Often the airman is not told up front that any past violations will be used against him, and they are brought up at the last minute when he has no chance to prepare to explain them.[182] Fair warning, standards for what type of past violation will be used, and a sensible cutoff date constitute due process and provide a method for public participation.[183] The Court of Appeals for the Ninth Circuit touched upon the heart of the matter when it said in *Jensen v. Administrator of Federal Aviation Administration*[184] that "public interest" and "safety" as standards, and nothing more, "do not give the court a sufficient basis for review. Neither do they give the applicant any basis for planning his course of action (including the seeking of judicial review)."[185]

Why has this been allowed to go on? FAA lawyers are no strangers to the APA—they have drafted hundreds of regulations in accordance with its procedures. It is no burden on agencies to promulgate their policies as rules, especially when they have been in force for half a century. FAA failure to do so is not from oversight: "The Office of Chief Counsel," an FAA Order commands, "is responsible for . . . [r]eviewing internal directives and advisory circulars to assure they are neither used for nor

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voked hundreds of pilots and mechanics for repeated offenses in violation of due process and the Administrative Procedure Act.

Nor can it be disputed that the Board knows there should be a rule. *See* Bowman, 1 N.T.S.B. 1279, 1280 (1971) (refusing to order revocation of a commercial pilot certificate on grounds of intoxication where the pilot had simply taxied his aircraft several hundred feet without takeoff or incident: "[T]here has been no CAB or NTSB policy requiring revocation for violations of the [alcohol rules], *nor do the FAR's provide for such a mandate.*") (emphasis added); *see also* Robinson, 1 N.T.S.B. 739, 741 (1970) ("Revocation is so serious a sanction that in imposing it, the crucial question is lack of compliance qualification shown by such disdain, contempt, or disregard for law and authority in general and the regulatory authority of the Administrator and the Board in particular, that a similar pattern of conduct or attitude may reasonably be expected to be manifested by the respondent in exercising the privileges and duties for which he has been certificated.").

181. Transcript at 453, 482-83, McGee, No. SE-5047 (N.T.S.B. Nov. 18, 1981).

182. There is no rule on the subject today, but *see* 14 C.F.R. § 301.5 (1956):

> *Record of previous violations.* Where a Respondent has had a certificate suspended or revoked or has had a civil penalty assessed against him for a violation . . . or has been subjected to any previous disciplinary action for violation of air safety standards, the [CAA] Administrator shall serve notice on the Respondent prior to hearing, or to submission of evidence where hearing has been waived, that he intends to call such matters to the attention of the examiner. . . . The Respondent may file with the Administrator such reply as he deems advisable.

See also id. § 301.26.

183. *See supra* notes 158-63 and accompanying text.

184. 641 F.2d 797 (9th Cir. 1981), *vacated*, 680 F.2d 593 (9th Cir. 1982).

185. *Id.* at 799.

have the effect of regulations and are consistent with the regulations."[186] FAA lawyers are keenly aware of their obligations to the public. In 1965, the FAA Associate General Counsel, Regulations and Codification Division, told the Associate General Counsel, Enforcement Division:

> This paper discusses the investigation procedure in the memorandum on "Change No. 13 to Enforcement Handbook Formal Investigation . . . ." This division is concerned in the matter because it will have to write the rules to implement the proposed Handbook Change. *The rules and the Handbook would of course have to be substantially identical. . . .*
>
> *Under sec. 3(a) APA the internal rules cannot be effected via-a-vis the public until the procedural rules are published.*[187]

Each of the policies we have examined here is referred to, at least to some extent, in FAA's enforcement handbook. Although it is the Agency's official position that they need not be formally promulgated, how can it be argued that these policies are less deserving of promulgation as formal regulations than a policy about investigation procedure? The FAA memorandum underscores the logical inconsistencies that FAA officials must ignore in order to maintain their unauthorized punitive certificate sanction system.[188]

FAA officials themselves have acknowledged the importance of their handbook. Administrator Langhorne Bond, who, along with his well-advertised "get tough" policy, instigated the new handbook, said of it: "This not only will help the FAA itself become more consistent, but will also let the public know what they can expect from us."[189] His Chief Counsel Clark Onstad stated: "[A] key advantage of the new 280-page handbook, which replaces four previous handbooks, is that it codifies enforcement procedures for handling proceedings and provides the public with a way to appeal FAA actions."[190] Testifying before a Congressional committee, Deputy Chief Counsel Jonathan Howe stated: "We think we are bound [in hazardous materials cases] just as strongly by the provisions in this handbook and we certainly have, in the past, administered our civil penalty statute [for air-safety cases] in exactly that manner . . . ."[191]

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186. FAA Rulemaking Policies, FAA Order 2100.13, ¶ 33.B, at 14 (1976).

187. FAA Memorandum (Mar. 2, 1965) (emphasis added).

188. *See* FAA Rulemaking Policies, FAA Order 2100.13, ¶ 22.a, at 8 (1976). This counsels FAA officials:

> A primary Congressional consideration underlying the Administrative Procedure Act is that a regulatory agency afford the public an opportunity to participate in its rulemaking processes. Both the letter and the spirit of the rulemaking provisions of this act shall be observed. FAA follows the principle that the public interest is best served when regulatory affairs are open to the pubilc to the fullest extent possible.

189. *See* Leyden, *Enforcement Policies for the 80s*, FAA WORLD, June 1980, at 4.

190. AV. WK. & SPACE TECH., June 9, 1980, at 34.

191. *Providing Additional Civil and Criminal Penalties for Aviation Safety Violations: Hearings on H.R. 7488 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 96th Congress, 2d Sess. 41 (1980).

Despite these grandiose statements, FAA officials continue to operate as if they have never heard of the Administrative Procedure Act. It is clear that although the failure to promulgate rules, and lack of statutory authority for certificate sanctions, are legally distinct issues, on the practical level they are inextricably intertwined. It should be obvious by now that FAA officials do not do the former because they know they lack the latter.

B. The Word Game

A most interesting part of the coverup is the FAA's use of euphemisms designed to make punitive suspensions and revocations seem as if they are something else besides penalties (though just what else is unclear). One FAA lawyer volunteered, during a meeting, that: "When we suspend a man's license for a violation, that is not 'punishment,' that is a 'remedial' action."[192] He freely conceded, however, when asked, that he could have begun the same case as a civil penalty, and that of course would make it punishment; or that having started it off as a certificate action, he could shift it over to the money fine.[193] At the same time, during an informal conversation, an NTSB lawyer related that: "The Board never uses the word 'punishment,' all *our* actions are 'remedial.' "[194] Throwing reality to the winds, both officials were following the company line.

Although most of the hundreds of section 609 punitive certificate cases appealed to the Board every year involve one or more "violations," and the pleadings, parties, ALJ and Board freely use the term, *nowhere* in the Board's rules of procedure for these situations does that term, or "punishment," or "penalty" appear.[195] In one rule it does mention "offenses" and "proposed remedial sanction."[196] It would strain credulity to assert this careful wording was accidental.

The "remedial" fiction is a legacy from the CAB. It may have gotten started in the mid-1950's when sensitivity to the section 609 challenges of Captains Wilson and Hard became acute, or circa 1940 when the 1926 Rule was surreptitiously dropped because of that peculiar clause in section 609 of the 1938 Act which made it clear revocation could be used only for qualifications. In *Wilson*, CAB averred that "[t]he Board's purpose is the remedial one of promoting safety, and not of punishing the offending pilot."[197] This was pure sophistry. The purpose of *any* en-

192. *See supra* note 128.

193. *Id.*

194. This meeting took place during February 1980 with NTSB staff lawyer Margaret Sweeney, in her office (emphasis added).

195. *See* 49 C.F.R. §§ 821.1 to .64 (1984).

196. *Id.* § 821.33, 821.33(b)(2).

197. Brief for Respondent at 7, *Wilson*. Another splendid example of how this patent non-

forcement system is to punish offenders so they will not do it again, and to serve as a warning to others, in order to promote the goals of that particular system of laws or rules. Yet the "remedial" word game has persisted to this day. The effectiveness of this strategy is demonstrated by *Wilson*, where CAB succeeded in causing the Court of Appeals for the D.C. Circuit to become preoccupied with terms like "discipline" and "deterrence"; the same is true for *Hard*, its companion case before the Seventh Circuit. In an apparent putdown, the *Hard* court said: " 'Penalty,' as a symbol repeatedly used by this petitioner is singularly ineffective for gauging the scope of power granted the Board by Congress."[198]

The hypocrisy of this softpeddling of certificate sanctions is no better exposed than by FAA's enforcement manuals: "Suspension may be used for punitive purposes where the nature of the violation warrants it . . . ."[199] "Revocation should also be used for punitive purposes where the nature of the violation warrants it."[200] The field inspectors' manual notes: "Although reexamination of . . . airmen and reinspection [of] . . . aircraft . . . do not involve enforcement in the strict sense of 'punishment of offenses,' they are considered in this handbook because the objective and the procedures are identical with those applicable to enforcement matters.[201] The Agency's very first enforcement handbook provided:

> [I]t should be noted . . . that a violation of any rule, regulation or order issued by the Administrator is punishable either by certificate or civil penalty action. Furthermore, a certificate holder may perform some act which is neither a violation of the Federal Aviation Act nor any rule, regulation or order issued thereunder, which might be considered either as demonstrating a lack of qualification to continue to hold the certificate or as being an act for

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sense is expounded by FAA lawyers came to me from an FAA source. Attached to a letter to Senator John Tower of Texas from FAA official Henry N. Stewart, dated Aug. 27, 1979, APA-3 File No. 2150, is a copy of a constituent's letter to the Senator. Complaining that a suspension "has essentially put me out of business for two months," this helicopter pilot went on to tell the Senator:

> During my informal conference with Mr. Bachman (the F.A.A. Attorney) Mr. Andrus [this pilot's attorney] used the word "punishment" in reference to any potential action on the F.A.A.'s part. Mr. Bachman bristled at the use of this term and stated, "The F.A.A. does not punish people and it's [sic] sole interest is aviation safety.["] In retort, if a two month unpaid vacation isn't a punishment then I'm missing the meaning of the word.

198. 248 F.2d at 761-62.

199. 1980 Handbook, *supra* note 17, ¶ 205.b(4), at 15.

200. 1968 Handbook, *supra* note 8, ¶ 9.d, at 10.

201. 1970 Handbook, *supra* note 119, ¶ 200, at 141. Two more examples come to mind. In their official publication, Commerce Department aviation officials, in recapping enforcement activity, noted that "[t]he penalties assessed for the 345 violations included 28 civil penalties, 48 reprimands, 75 suspensions, 15 revocations, 6 denials of license, and 62 dismissals of charges." 5 DEP'T COM. AIR COM. BULL. 108 (Aug. 15, 1933). Then again, discussing an aircraft accident, they noted: "The penalty exacted of this pilot by the Bureau of Air Commerce was a suspension of license." 7 *id.* at 185 (Feb. 15, 1936).

> which safety in air commerce and the public interest requires he should be punished by a suspension of his certificate.[202]

In this explanation of its own powers, FAA was stating that despite the fact that the airman has *not* committed a violation, or is not technically unqualified to hold his certificate, if FAA does not approve of whatever he did, and FAA deems it to be in the interests of air safety and the public, FAA will punish him by suspension. This attitude towards enforcement and the public's right to know is no better exemplified than by this accompanying directive:

> Manual of Procedure 22 is an internal Agency issuance and is intended solely for the use and guidance of Agency personnel. The contents shall not be released to anyone outside of the Agency nor shall any reference to this manual be cited in oral or written communications to the public.[203]

These formal statements are nowhere to be found today. Nevertheless, that these attitudes remain unchanged can be seen from the actions of FAA's professional bureaucracy.

Underscoring the deceptive nature of the "remedial" word game is the fact that over two decades ago the FAA General Counsel himself undercut any pretension to legitimacy the term might have had. Concerned about problems he felt were created by CAB's proposed new set of procedural regulations,[204] rewritten because of the 1958 redistribution of enforcement power, Daggett H. Howard told FAA's first administrator, Elwood "Pete" Quesada:

> Throughout the rules the Board speaks in terms of "remedial" orders. *This, too, is a discarded concept.* There is no provision in the Act which would prohibit the Administrator from taking certificate action for disciplinary, as well as a remedial, reason, provided he makes the appropriate findings [in the public interest] as required by section 609. This emphasis by the Board on "remedial" orders has serious connotations. For example, it would be quite proper for the Administrator to suspend a pilot certificate *simply as punishment* as a deterrent to the pilot and others. The Board, under the rules, could reverse the Administrator's order merely on the basis the action is not "remedial."[205]

The likely source of Howard's determination that "remedial" was a "discarded concept" was the CAB's brief in *Lee v. Civil Aeronautics Board*.[206] There, the CAA administrator asked the court to overturn a CAB order of dismissal so that the prosecution of two airline pilots for alleged safety violations could proceed. The pilots were involved in a near miss with another airliner for which there was some evidence they

202. FAA Manual of Procedure 22, ¶ 0 (1960).
203. *Id.* at foreword.
204. 24 Fed. Reg. 99 (proposed Jan. 6, 1959).
205. Memorandum dated Feb. 4, 1959 (emphasis added).
206. 225 F.2d 950 (D.C. Cir. 1955).

were responsible. The CAB, in a hearing conducted pursuant to its separate accident investigation powers, determined that they had to grant the pilots immunity from prosecution in order to acquire their testimony. CAA appealed and argued that the pilots were not entitled to immunity. The court dismissed the Administrator for lack of standing.

CAB strenuously argued during these proceedings that suspensions are a "penalty" which would require that immunity be granted:

> This purpose marks the suspensions as punitive in the legal sense, and as a penalty . . . . The Board did not exceed its authority in differentiating between punitive suspensions on the one hand and remedial suspensions and revocations on the other. [T]he fact that law enforcement is in the interest of the public cannot serve to convert punitive action to remedial action . . . . [A suspension] meets all of the tests of a penalty . . . . While it may be said to be remedial in the sense that it promotes safety by discouraging violations, the same can be said concerning the effect of any criminal prosecution.[207]

Yet the lawyers who wrote this brief, two years later in *Wilson*, told the same court that the Board was really only interested in the remedial purpose of promoting air safety, certainly not in punishing pilots.

The Board's desire to defend its immunity policies in *Lee* was understandable, given that the testimony of pilots was crucial to its investigations in those pre-cockpit recorder days. Yet by taking a contradictory position in *Wilson*, the CAB revealed that protection of the Agency's best interests, not the public's, was foremost in their minds.

VII. CONCLUSION

In 1980, in the face of a fifty-four year old law stating that *any* pilot or mechanic who violates *any* FAA regulation "shall be subject to" a civil money fine with right to jury trial, the Agency's Office of Chief Counsel prepared Congressional testimony for Administrator Langhorne Bond that said:

> [W]e as a rule take certificate action in the form of a suspension for violation of operational rules. However, we do give consideration to a person's livelihood and the need for his services as for example use of an aircraft in a person's business or farm operation, company pilots, air taxi pilots and so forth. *These people are often given civil penalties* so that there is no undue financial burden by taking their certificates away from them.[208]

Like so much that FAA officials say about enforcement, this is grossly misleading, and it exposes the insurmountable contradictions of the two-track program. Except for airline pilot cases, FAA's own statistics show that the *majority* of professionals—commuter, air-taxi, corporate pilots

207. Brief for Respondent at 7, 24, 28, *Lee*. Briefs may be found at Vol. 1041, *Records and Briefs, United States Court of Appeals, D.C.*, of the D.C. Bar Association.

208. BRIEFING BOOK, *supra* note 25, at 1 (emphasis added).

and the like—are penalized by *suspension*, not civil penalties.[209]

The institution of punitive suspensions and revocations by government aviation officials in 1926, and their continued use and coverup, constitutes one of the great abuses of power in the history of the federal bureaucracy. One recent case can serve as a vivid example of the human impact of this abuse.[210] A helicopter pilot, instructed by the station's news director to get pre-game shots of the crowd filling the Denver football stadium, took the TV cameraman in closer, lower and slower than FAA officials thought was proper in the event of engine failure. In what was clearly a response to the notoriety of the incident (several in the crowd felt threatened and complained), rather than a justifiable belief that the pilot would do this again, FAA officials issued an emergency order suspending the pilot for *six* months. Although there was no accident or any harm done, the ALJ routinely upheld the FAA.[211]

Caught short by the emergency order, without a job and unable to afford counsel, the airman did not perfect his appeal properly. With this, his first violation in 2,000 hours of combat and civilian flying, this young family man lost his job because his sympathetic employer could not keep it open that long and lost half his modest annual salary. Afterwards, in order to take the only job he could find, he had to uproot his family from the city where he and his wife had settled and move to another state. Ironically, the regulation he allegedly violated leaves much to the judgment of the pilot.[212] The FAA lawyer who prosecuted the case, when interviewed later, agreed that had the man been just 100 feet further from the side of the stadium, and been flying ten miles an hour faster, the case would have been far more difficult to prove.[213] A reasonable person, had he learned that this young man paid a civil penalty of $500, even $250, would have thought that sufficient and justice well served.

Congress as well bears responsibility for these injustices. Never has there been any planned, regular Congressional oversight of federal aviation enforcement. Congress should set up and fund a commission of prominent citizens, including constitutional and administrative law experts, with its own staff, to completely overhaul the FAA enforcement program. This body must hold nationwide hearings so that it will understand the depth and breadth of the problems that need rectifying, and to maxi-

209. ENFORCEMENT REPORT, *supra* note 1, at 1, 6.

210. Jones, No. SE-4889 (N.T.S.B. Dec. 8, 1980).

211. *Id.*

212. 14 C.F.R. § 91.79(a), (d) (1983) (basically that he was operating at an altitude and at less than the minimum airspeed in which an autorotative landing could be safely executed in the event of engine failure).

213. Telephone interview with Allan Horowitz, FAA lawyer—Rocky Mountain Region (Dec. 17, 1980). Horowitz also commented: "If we had only civil penalties, we wouldn't have an enforcement system."

mize public participation. Any revised program should be patterned after auto traffic systems of justice, providing in most cases for fixed penalties and for forfeiture of collateral. Then it can concentrate on repeat offenders and serious offenses. Safety violation cases, when contested, should be heard by federal magistrates. Congress never intended that questions of "guilt or innocence" be heard by a panel, like NTSB, which has direct responsibilities for air-safety. That's like having the policeman serve as traffic judge.

Certainly, there is nothing unfair about making air-safety violations minor misdemeanors (and in some cases more serious crimes), so long as FAA's enforcement program is completely overhauled and Congress makes it clear that most violations are no different than speeding in a national park. It will not be an easy or inexpensive task to revamp the enforcement system so that violations are fairly and equitably handled, but it is one that justice demands.