



Operation Safe Pilot and The Death of Privacy

Revised July, 2018

**Stanmore Cooper
San Francisco, California**



Operation Safe Pilot and the Death of Privacy

Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that, in the administration of the criminal law, the end justifies the means – to declare that the Government may commit crimes in order to secure the conviction of a private criminal – would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

-U.S. Supreme Court Justice Louis Brandeis, 1928

The Central Question Raised by Operation Safe Pilot

Should government agents who willfully and intentionally violate laws they have sworn to uphold be held accountable for their violations?



Operation Safe Pilot and the Death of Privacy

Operation Safe Pilot was, at best, a Conspiracy to Violate the Privacy Act

- **The Operation Safe Pilot investigation plan clearly violated the privacy act –**
 - There were no named individuals under active investigation as required for database matches using personally identifying information such as names and SS numbers
 - The matches searched the FAA and SSA databases for common personally identifying information
 - Notices of the database matches in the *Federal Register* as required by law were never published
 - DOT-OIG and SSA-OIG attorneys responsible for ensuring investigations are performed in accordance with the privacy act and other applicable laws approved the investigation
- **Kenneth Mead, the DOT-IG, and Patrick O'Carroll, the SSA-IG, both approved the investigation as proposed –**
 - FAA attorneys, NTSB attorneys, NTSB Administrative Law Judges, and U.S. Attorneys all enthusiastically joined the conspiracy in spite of advice from OSP defendants' attorneys who declared in court documents soon after the certificate revocations that there were almost certainly privacy act violations committed during the investigation.

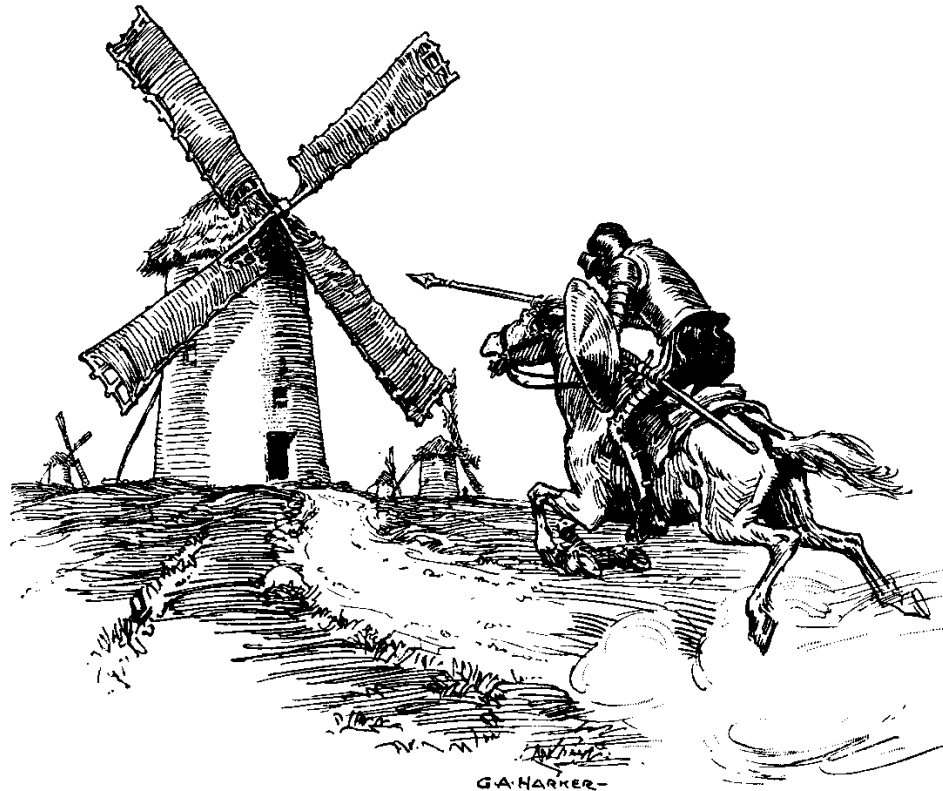


CATO@LIBERTY

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Operation Safe Pilot and the Death of Privacy



The authorization of suits against the government for “**actual damages**” in the Privacy Act of 1974 is not sufficiently clear to constitute a waiver of sovereign immunity from suits for mental and emotional distress.

U.S. Supreme Court in FAA v. Cooper 10-1024

March 28, 2012



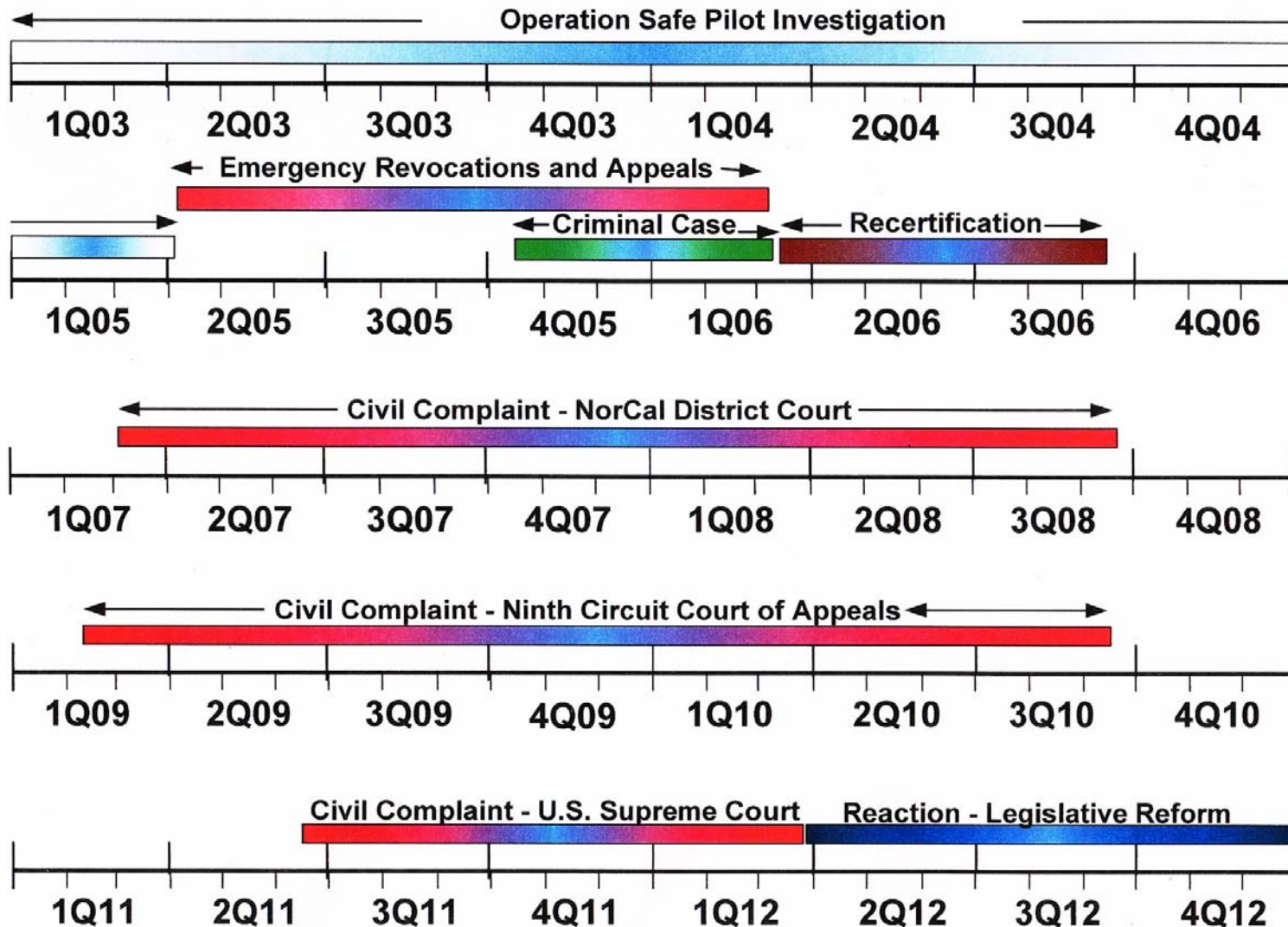
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Operation Safe Pilot and the Death of Privacy

Operation Safe Pilot Timeline





The Privacy Act of 1974 as Amended

- **Post Watergate law enacted to limit sharing of personal information among government agencies**
- **Governs the collection, maintenance, use, and dissemination of personally identifiable information about individuals that is maintained in systems of records by federal agencies**
- **Requires that agencies give public notice of their systems of records by publication in the *Federal Register***
- **Forbids disclosure of information from a system of records without the written consent of subject individuals, unless the disclosure is pursuant to one of twelve statutory exceptions, none of which applied in the OSP investigation**
- **The Computer Matching and Privacy Protection Act of 1988 became an amendment to the Privacy Act, and stipulates restrictions on automated database matches using personally identifiable information, e.g. SSN, name, etc.**



The Privacy Act of 1974 (cont'd)

Congress tasked the Office of Management and Budget to formulate guidance for federal agencies to interpret the Privacy Act. Here is an excerpt of the final guidance published in the *Federal Register*, June 19, 1989.

25818

Federal Register / Vol. 54, No. 116 / Monday, June 19, 1989 / Notices

OFFICE OF MANAGEMENT AND BUDGET

Privacy Act of 1974; Final Guidance Interpreting the Provisions of Public Law 100-503, the Computer Matching and Privacy Protection Act of 1988

AGENCY: Office of Management and Budget.

ACTION: Issuance of final guidance.

(d) *Law Enforcement Investigative Matches Whose Purpose is to Gather Evidence Against a Named Person or Persons in an Existing Investigation.* Certain matches performed in support of civil or criminal law enforcement activities that otherwise would be covered because they seek to establish

or verify Federal benefit eligibility or use Federal personnel or payroll records, are excluded from coverage by this section. To be eligible for exclusion, the match must be done by an agency or component whose principal statutory function involves the enforcement of criminal laws, i.e., an agency that is eligible to exempt certain of its record systems under section (j)(2) of the Privacy Act such as the Federal Bureau of Investigation, the Drug Enforcement Agency, or components of agencies' Office of Inspectors General.

The match must flow from an investigation already underway which focuses on a named person or named persons; "fishing expeditions" in which the subjects are identified generically as "program beneficiaries," are not eligible

for this exclusion (note that the investigation may be into either criminal or civil law violations). The use of the phrase "person or persons" in this context broadens the exclusion to include subjects that are other than "individuals" as defined by the Privacy Act. Thus, for example a business entity could be the named subject of the investigation, while the records matched could be those of customers or clients. This does not mean however, that the rights afforded by the Privacy Act are extended by this section to other than "individuals."

Finally, the match must be for the purpose of gathering evidence against the named person or persons.

What the government did during the Operation Safe Pilot "investigation" precisely meets the OMB's definition of a "fishing expedition" since there were no named persons before the database match was performed.



Genesis of Operation Safe Pilot

- In 2002, a DOT-OIG Special Agent named Stephen Jackson, and a SSA-OIG Special Agent named Sandra Johnson, jointly investigated an Auburn, CA private pilot and A&P/I.A. named David F. Slavens, for defrauding SSA of more than \$190,000 between 1988 and 2002. He was convicted and forced to pay \$197,384 in restitution, and sentenced to 21 months in prison.
- Agents Jackson and Johnson reasoned that there may be other pilots collecting disability benefits while not revealing their disabilities on FAA medical applications, and proposed a database match between the SSA Title 2 and Title 16 disability databases and the FAA medical certificate database.
- The match was approved by SSA and DOT Inspectors General in spite of internal concerns about the project violating the Privacy Act.
- Operation Safe Pilot was arguably the largest deliberate violation of the Privacy Act since it was codified.



What The Government Did

- The database matches between SSA and DOT violated multiple provisions of the Privacy Act and was approved by DOT-OIG and SSA-OIG attorneys and the Inspectors General themselves.
- Through Discovery in the Civil Complaint, it became increasingly clear that the government deliberately chose to violate the law rather than conduct the investigation legally.
- Confidential SSA medical records of over 40,000 Northern California pilots were illegally shared with DOT and FAA.
- 3,200 with current medical certificates were either collecting or had collected SSA disability benefits. The 40 “most egregious violators” had their airman and medical certificates revoked or suspended and were indicted on felony criminal charges.
- In the introduction to the July 17, 2007, congressional hearing on the FAA’s oversight of falsified airman medical certificate applications, it was noted that the DOT-IG believed “hundreds more [airmen] could have been pursued if the U.S. Attorney’s resources had not been constrained.”



What The Government Did (cont'd)

- The SSA-OIG attorney who had approved Operation Safe Pilot and was responsible for ensuring IG investigations complied with the Privacy Act, submitted a sworn declaration to Federal District Court in the criminal cases stating that OSP was a post-9/11 investigation with the primary purpose of verifying pilots' identities, and that the discovery some pilots were receiving SSA disability was "ancillary to the purpose of the investigation".
- I believe this attorney, Jonathan Lasher, who had personally approved Operation Safe Pilot with full knowledge that its sole purpose was to identify pilots who had failed to disclose potentially disqualifying medical conditions on FAA medical certificate applications, deliberately misled the Court in his sworn declaration opposing my motion to suppress the evidence because he didn't want the privacy act violations discovered.
- The government obstructed my Motion to Compel Further Discovery in the civil lawsuit by claiming release of discovery we were seeking would compromise national security. This refusal to provide discovery to which I was entitled was, I believe, an effort to conceal the Privacy Act violations.



What The Government Did (cont'd)

SSA-OIG Attorney Jonathan Lasher

Approved Project Plan (excerpt) TRUTH

1. SSA-OIG to conduct a SSN computer matching run based on the FAA pilot data provided by DOT-OIG. This data would contain all active private and commercial pilots with active medical certificates.
2. SSA-OIG also runs the FAA Database when the pilot's name and SSN match against the MBR and SSR records to identify active pilots who are receiving disability benefits.
3. **The resulting data from the two runs would be broken down into various suspect categories:**
 - a. SSN mismatches would be reviewed for identity theft or fraud issues.
 - b. **SSN matches which reveal that the pilot (number holder) is receiving SSA disability benefits would be compared to FAA medical certifications for fraudulent statements. Potential cases include:**
 1. **Pilots who have provided false medical information to FAA in order to receive or maintain a pilot's license.**

Sworn Declaration (excerpt) VS. COMPLETE FABRICATION

The purpose of the review, as approved by the SSA-OIG, was to identify any active FAA-licensed pilot who had obtained a license through misrepresentation, generally of an SSN, on an FAA application. *The review as approved was not intended to verify benefit eligibility, effectuate savings to the SSA or to terminate benefits; it was intended to ensure that pilots with FAA licenses were who they claimed to be.*

As the investigation progressed, it became clear that a number of license-holders under review for potential SSN misuse were in fact drawing benefits from the SSA based on total disability, while certifying their fitness to the FAA. *However, these discoveries were ancillary to the SSA-OIG's original intent in conducting the data review.* (Emphasis mine – SCC)

From Discovery in the civil suit, it is clear that the government agencies used the 9/11/2001 terrorist attacks to conduct an illegal investigation



What a Difference Two Years and a Lawsuit Make

**FAA Associate Administrator for Aviation Safety
Nicholas Sabatini Statements –
July 18, 2005 and July 17, 2007**

Northern California U.S. Attorney Press Release, July 18, 2005

“The fraud and falsification allegedly committed by these individuals is extremely serious and adversely affects the public interest in air safety. The FAA has cooperated closely with the Department of Transportation's Office of Inspector General at every phase of its investigation and has begun revoking the Airman and Medical Certificates of those individuals found to have falsified their certificate applications.”



What a Difference Two Years and a Lawsuit Make (cont'd)

The same Nicholas Sabatini two years later -

Congressional Hearing - Subcommittee on Aviation, July 17, 2007

“In order to proceed with cross-checking applicants for airman medical certificates against the SSA disability database, or any other database, FAA must first revise the system of records notice for FAA's ‘Aviation Records on Individuals’ to permit disclosure of the records through a routine use. This will require publishing a notice of the revised system of records in the *Federal Register*, and a period for public comments, before the records may be disclosed, and FAA can begin any cross-checking. This process may take six to twelve months to complete.”



Operation Safe Pilot and the Death of Privacy

Who I Am and What I Did

- Private Pilot ASEL Airman Certificate issued September 11, 1964.
- 50 years of safe, accident and incident free flying (in January 2015).
- USAF Veteran – Active Duty From May 8, 1961 – May 7, 1965.
- Retired in 2003 as Vice President, Global Strategy and Planning, for a Large Financial Institution.

Lowry AFB, Colorado - 1962



Original Private Pilot Certificate - 1964

I. UNITED STATES OF AMERICA FEDERAL AVIATION AGENCY							III. CERTIFICATE NO.
II. TEMPORARY AIRMAN CERTIFICATE							PENDING
THIS CERTIFIES THAT			IV. STANMORE CAUTION COOPER V. 2814 LAKE SHORE BLVD. JACKSONVILLE 10, FLORIDA				
DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES	SEX	NATIONALITY	VI.
6/12/42	72 IN.	175	BROWN	BLUE	M	U.S.A.	
IX. has been found to be properly qualified and is hereby authorized in accordance with the conditions of issuance on the reverse of this certificate to exercise the privileges of PRIVATE PILOT							
RATINGS AND LIMITATIONS XII. AIRPLANE SINGLE-ENGINE LAND							
XIII. THIS IS <input checked="" type="checkbox"/> AN ORIGINAL ISSUANCE <input type="checkbox"/> A REISSUANCE DATE OF SUPERSEDED AIRMAN CERTIFICATE							
BY DIRECTION OF THE ADMINISTRATOR							
X. DATE OF ISSUANCE	X. SIGNATURE OF EXAMINER OR INSPECTOR			EXAMINER'S DESIGNATION NO. OR INSPECTOR'S REG. NO.			
9/11/64	J. CLAIR WHITELEY			78-10-8 DATE DESIGNATION EXPIRES 7/31/85			

Form FAA-1710 T (5-59)



Operation Safe Pilot and the Death of Privacy

Who I Am and What I Did (cont'd)



With N2686U, the 1963 Cessna 172D I spent 3 years upgrading and was forced to sell in order to pay Operation Safe Pilot related legal expenses.



Who I Am and What I Did (cont'd)

- **1985 – Tested positive for HIV and stopped renewing medical.**
- **1994 – Renewed medical solely to act as safety pilot; never as PIC, but failed to disclose HIV infection on application. I lied. This was not my finest hour.**
- **1995 – In August, with health deteriorating, applied for and received SSA long term disability.**
- **1995 – In November, chosen by lottery to receive new HIV drug, a protease inhibitor. Combined with RTIs, this combination became known as the HAART cocktail.**
- **1996 – By February, gaining weight and energy, CD4+ cells increasing, viral load plummeting.**
- **1996 – In August, after 1 year on disability, I terminated SSA benefits and returned to work. I never defrauded the Social Security Administration.**



Who I Am and What I Did (cont'd)

- **1998 – Early in the year, I became aware that beginning in November, 1997, the FAA had begun issuing “special issuance” medical certificates to HIV positive pilots on anti-retroviral drugs.**
- **1998 – In June, I called the FAA Western-Pacific Region and asked about the medical criteria for an SI medical. I was told that the criteria were not public information, and the FAA would have to review my medical records for previous 10 years, and in 9 months to a year I would be advised if I qualified.**
- **During this period and until at least October, 1999, CAMI’s standards for AMEs stated explicitly, “Applicants who are HIV positive who have not had symptoms and are not on medication, even for prophylactic use, are eligible for certification. Once they are on medication, or show symptoms of AIDS related diseases, they will NOT be considered for certification.”**



Who I Am and What I Did (cont'd)

- With these mixed signals, I feared that even if I went through all of the hoops, I might be arbitrarily disqualified.
- In 2000, 2002, and 2004, I applied for and received third class medical certificates without revealing my HIV status. I feared that if I reported my HIV status, I would be prosecuted for falsifying the 1994 and 1998 applications.
- Sometime around 2001, I found that the criteria for a SI medical had been published, and I met *and had met* all of the criteria except for the CogScreen-AE cognitive deficit test (which I had not taken). At every quarterly blood test, I verified that I met the CD4+ and viral load standards for special issuance.
- In February, 2005, I flew in Jim Gabbert's Encore and saw a copy of a PowerPoint presentation by Quay Snyder, MD, among the reading materials. It included a letter from Warren Silberman encouraging pilots with previously unreported disqualifying conditions to self-report, and offered a possible amnesty from criminal prosecution if they met certain conditions.



Who I Am and What I Did (cont'd)

- In late March, 2005, I was preparing my medical records to self-report my omissions on my previous applications, when I received an answering machine message from a Lisa Glazzy, who said she was with the Department of Transportation and wanted to meet with me to discuss some “irregularities” related to my medical certificate.
- Lisa Glazzy and Stephen Jackson, both DOT-OIG special agents, met with me the following morning, March 23, 2005, and presented me with a stack of SSA files related to my 1995/96 disability. They gave me a courtesy copy of an emergency revocation order dated March 22, 2005, revoking my airman and medical certificates, and asked me to surrender them along with my logbook.
- I surrendered the requested documents.



The Emergency Revocations

- After surrendering my certificates, I contacted the AOPA Legal Services Plan asking them for an aviation attorney referral. They suggested Michael Dworkin in San Francisco whom I retained.
- We filed an appeal promptly, and suggested in one of our early responses to the FAA's admissions request that the agencies had violated the Privacy Act: *"Respondent is informed and thereon believes, that pursuant to the Privacy Act of 1974 (5 U.S.C. § 522, et seq.), government agencies may only share an individual's confidential information only after having posted in the Federal Register a notice of an agreement to share information. As of the date of these Responses, no such notice was provided or posted by either the Complainant or the Social Security Administration."*
- In April, 2005, a month after the emergency revocations, the FAA in a Request for Admissions asked me to "admit that since at least 1997, and until at least March 22, 2005, you applied for and received SSA disability payments for HIV-related symptoms, including peripheral neuropathy." This question proves the sloppiness of the 'investigation' since even a cursory review of the records would have revealed that my SSA disability payments were terminated in 1996 and the symptoms, including peripheral neuropathy had resolved at that time.
- The Administrative Law Judge denied my motion to suppress the evidence and ultimately ruled in favor of a motion for summary judgment against me by the FAA.
- We appealed to the full NTSB, which upheld the FAA's revocations and published its judgment containing details of my case - including my HIV infection - on the NTSB website where it is still available for download.
- One year after the revocations, I sought permission from the FAA to apply for recertification, and permission was granted by the FAA Western-Pacific Regional Counsel on April 6, 2006.



The Criminal Case

- On July 18, 2005, the U.S. Attorneys for the Northern District and the Eastern District of California released a four page press release:

OPERATION SAFE PILOT

40 AIRPLANE PILOTS CHARGED ACROSS 5 MAJOR CALIFORNIA CITIES IN CRIMINAL AIR TRAFFIC SAFETY INVESTIGATION JOINTLY SUPERVISED BY THE UNITED STATES ATTORNEYS IN EASTERN AND NORTHERN DISTRICTS OF CALIFORNIA

Defendants Charged with Lying to the Federal Aviation Administration about Disqualifying Medical Conditions and Criminal Histories in Order to Obtain Pilot's Licenses

- All of the defendants were named in the press release, along with their ages and city of residence. Defendants included a number of airline transport and commercial pilots, as well as medical doctors.



The Criminal Case (cont'd)

- The criminal indictment charged me with three felony counts, each punishable by 5 years in prison, a \$250,000 fine, or both.
- I was offered a plea agreement *which would have required me to waive my rights to confront and cross-examine government witnesses, to move to suppress evidence or raise any other fourth or fifth amendment claims.* The agreement would have reduced the charges to a single misdemeanor, with a \$250 fine and two years probation. I refused the plea agreement and decided to go to trial.
- Another defendant also refused the same plea agreement. His name is Russell Johansen, and he is a retired Delta B-777 captain and check pilot. He did nothing to deserve the revocations and criminal charges, and went to trial. The jury deadlocked, with nine of the twelve jurors saying they wouldn't convict him of anything.



The Criminal Case (cont'd)

- Following Russ Johansen's hung jury, the U.S. Attorney offered us both a plea agreement in which we pleaded guilty to a single misdemeanor, were fined \$1,000 each, and served a two year unsupervised probation, *but we did not have to waive our rights as in the initial plea agreement.*
- Most of the OSP defendants had Federal Public Defenders who convinced them to accept the original plea agreement, thereby waiving their right to sue the government in civil court.
- Russ Johansen and I were, I believe, the only two defendants with standing to file a civil lawsuit against the government.
- On May 1, 2006, after a thorough review of all of his medical records, Russ was issued a new unrestricted third class medical certificate. The emergency revocations of his ATP airman certificate (with all of his type ratings) as well as the criminal prosecution clearly lacked materiality.



The Criminal Case (cont'd)

- The plea agreements Russ Johansen and I signed in March, 2006 ended the criminal cases against us, and resulted in misdemeanor convictions on our records.
- The importance of a conviction is that *because we pleaded guilty, the hundreds of thousands of dollars in legal expenses we incurred in appealing the revocations and defending ourselves in the criminal case could not be used as “pecuniary damage” in subsequent civil lawsuits against the government for violating the Privacy Act.*



My Recertification

- The FAA has a policy of permitting pilots who have had certificate revocations to request recertification after one year.
- On April 6, 2006, a little more than a year after the emergency revocations, I received a letter from the FAA Regional Counsel granting my request for recertification.
- After a thorough physical examination by a senior AME specified by the regional FAA flight surgeon, a thorough review of all of my medical records for the previous ten years, and taking the CogScreen-AE computerized cognitive test, I was issued a new SI third class medical on August 5, 2006.
- After months of coaching and dual instruction from friend, NGPA member, and CFI Mike Hart, I passed the written, oral, and practical tests for my private pilot airman certificate on September 11, 2006, exactly 42 years to the day after receiving my first license. **THANK YOU, MIKE!!!**



Operation Safe Pilot and the Death of Privacy

After 18 Months, a Pilot Again!

Applicant ID: 1998023354

UNITED STATES OF AMERICA Department of Transportation Federal Aviation Administration						
MEDICAL CERTIFICATE THIRD CLASS						
This certifies that (Full name and address): STANMORE CAWTHON COOPER [REDACTED ADDRESS]						
Date of Birth	Height	Weight	Hair	Eyes	Sex	
06/12/1942	72	195	BROWN	BLUE	M	
has met the medical standards prescribed in part 67, Federal Aviation Regulations, for this class of Medical Certificate.						
Limitations	Must wear corrective lenses. Not valid for any class after September 30, 2006.					
Date of Examination 03/28/2006			Examiner's Designation No. 13578			
Examiner	Signature <i>Walter S. Silberman, D.O.</i>					
	Typed Name W.S. Silberman, D.O. 00029-8					
AIRMAN'S SIGNATURE <i>Stanmore C Cooper</i>						

FAA Form 8500-9 (3-99) Supersedes Previous Edition

NSN: 0052-00-670-7002

I UNITED STATES OF AMERICA		XI	
DEPARTMENT OF TRANSPORTATION • FEDERAL AVIATION ADMINISTRATION			
IV NAME STANMORE CAWTHON COOPER			
V ADDRESS [REDACTED]			
VI NATIONALITY	USA	SEX	HEIGHT
IVa D.O.B.	12 JUN 1942	M	72
WEIGHT	195	HAIR	BROWN
EYES	BLUE		
IX HAS BEEN FOUND TO BE PROPERLY QUALIFIED TO EXERCISE THE PRIVILEGES OF			
II PRIVATE PILOT			
III CERTIFICATE NUMBER		3182233	
X DATE OF ISSUE		11 SEP 2006	
XIV <i>Walter S. Silberman</i>		VIII ADMINISTRATOR	

STANMORE CAWTHON COOPER		XII RATINGS		3182233	
PRIVATE PILOT					
AIRPLANE SINGLE ENGINE LAND					
XIII LIMITATIONS					
VII SIGNATURE OF HOLDER <i>Stanmore C Cooper</i>		63087 08/06			



Operation Safe Pilot and the Death of Privacy

Captain Russell H. Johansen





Captain Russell H. Johansen (cont'd)

- Russ Johansen is a retired Airline Transport Pilot who was employed by Delta Airlines as a Boeing 777 captain and FAA certified check pilot.
- In March, 1993, Captain Johansen was the pilot of a Delta Boeing 727 on approach to Guadalajara, Mexico, when his airplane was struck by another airplane whose pilot had erroneously reported his position to air traffic controllers. Captain Johansen was able to safely land his crippled airliner without any injuries to passengers or crew.
- For his heroism and superb airmanship, Captain Johansen was awarded a Presidential Citation by ALPA President Randy Babbitt.
- In the process of handling the mid-air emergency, Captain Johansen exacerbated a previous work related back injury. This exacerbation would continue to plague him for years, and ultimately led to numbness in his neck, shoulders, and arms, which made it increasingly difficult for him to complete his physically demanding international flight schedule.
- Captain Johansen dutifully reported his disabilities on each and every application for his first class medical certificate every six months until his disability retirement in 2002 at age 59.



Operation Safe Pilot and the Death of Privacy

Captain Russell H. Johansen (cont'd)




AIR LINE PILOTS ASSOCIATION

Presidential Citation

PRESENTED TO

CAPTAIN RUSSELL JOHANSEN, DAL

FOR DEMONSTRATING GREAT SKILL
AND PROFESSIONALISM AFTER
EXPERIENCING A MID-AIR COLLISION
NEAR GUADALAJARA, MEXICO. YOUR
ACTIONS DURING AND FOLLOWING
THIS INCIDENT LEND CREDIT TO OUR
PROFESSION AND DESERVE THE
RECOGNITION OF YOUR PEERS.


J. RANDOLPH BABBITT, PRESIDENT
September 27, 1994

WHEREAS

Captain Russell H. Johansen

was in command of Delta flight 488 LAX-GDL on
March 15, 1993, and

WHEREAS through no fault of the crew, DL 488 was
involved in a midair collision with a Cessna 206
operating on a VFR approach into GDL, and

WHEREAS Captain Johansen and his crew performed a
safe landing of the Boeing 727 with no injuries to
passengers and crew and with no additional damage to
the aircraft, and

WHEREAS the safe conclusion of this flight was an
outstanding example of superior airmanship, and

WHEREAS the Air Line Pilots Association bestows the
ALPA Superior Airmanship Award in recognition of
such actions,

THEREFORE BE IT RESOLVED the Delta MEC nominates
Captain Russell H. Johansen for the Superior Airmanship
Award and congratulates him for a job well done.





Captain Russell H. Johansen (cont'd)

- In 2001, Delta Airlines and Captain Johansen agreed he should go on long term disability.
- After his disability was approved by the SSA and his first class medical certificate obtained just before he went on disability had expired, Russ applied for and received a third class medical certificate in order to continue flying his privately owned Cessna 340A twin engine airplane. On his application, he absent-mindedly and unintentionally failed to note the previously reported disabilities or that he was receiving SSA disability benefits. His AME, who knew about his SSA disability, failed to catch the omission.
- The illegal database match during the Operation Safe Pilot investigation identified Russ as an individual with a current FAA medical certificate who was also receiving SSA disability benefits.



Captain Russell H. Johansen (cont'd)

- Captain Johansen's Airline Transport Pilot airman certificate with all of his type ratings and his third class medical certificate were revoked in an Emergency Order of Revocation on July 14, 2005. After a distinguished aviation career, Russ was no longer a pilot.
- At his criminal trial, Russ was charged with falsifying his medical application form FAA 8500-8, a violation of Title 18, U.S. Code, Section 1001, as follows:
 - He indicated he had never been diagnosed with a cognitive mental disorder when he knew he had been.
 - He indicated he had never been diagnosed with degenerative disk disease when he knew he had been.
 - He indicated he had never been diagnosed with high or low blood pressure when he knew he been diagnosed with hypertension.
 - He indicated he did not visit certain health professionals within three years before March 23, 2004, when he knew he had.



Captain Russell H. Johansen (cont'd)

- At trial, Captain Johansen's defense attorney demonstrated that:
 - The government's assertion that Russ knew he had been diagnosed with a cognitive mental disorder was based on timed "Trails A" and "Trails B" test results administered by an SSA contracted psychologist *who did not advise Russ the test results were based on time taken to complete the tests as well as accuracy*. Russ was never advised that he had failed the Trails tests due to his having taken too much time to complete the test.
 - Degenerative disk disease is an inevitable part of the aging process. Virtually everyone over age fifty has "degenerative disk disease."
 - Russ' blood pressure never exceeded the FAA's limits, nor was the medication he had been prescribed on the FAA list of prohibited substances. The FAA Form 8500-8 asks about medications "you are currently taking", and Russ had been controlling his blood pressure and cholesterol with diet and exercise for the 90 days preceding the application, so he "wasn't taking" the prescribed medications.
 - The physicians visits should have been listed on the application, but were an oversight without making any material difference.



Captain Russell H. Johansen (cont'd)

- Captain Johansen's trial resulted in a hung jury, with the majority of jurors polled after being dismissed saying they would not convict Russell Johansen on any of the charges.
- After pleading guilty to a single misdemeanor, and paying a \$1,000 fine, Russ was allowed to seek recertification.
- Following a complete physical examination and a thorough review of his medical records, Captain Russell H. Johansen was issued an unrestricted third class medical certificate by the FAA on May 1, 2006. The revocations were based on charges that lacked materiality.
- After taking the private pilot written examination, multi-engine and instrument rating examinations, oral examinations, and practical (flight test) examinations, Captain Johansen was issued a new private pilot airman certificate with multi-engine and instrument ratings on April 25, 2014.



Operation Safe Pilot and the Death of Privacy

Captain Russell H. Johansen (cont'd)

Applicant ID: 1996434427

UNITED STATES OF AMERICA Department of Transportation Federal Aviation Administration						
				No: FF4990056		
MEDICAL CERTIFICATE THIRD CLASS AND STUDENT PILOT CERTIFICATE						
This certifies that (Full name and address): RUSSELL HARRISON JOHANSEN [REDACTED] [REDACTED] CA [REDACTED]						
Date of Birth	Height	Weight	Hair	Eyes	Sex	
09/22/1943	68	230	GRAY	BLUE	M	
has met the medical standards prescribed in part 67, Federal Aviation Regulations, for this class of Medical Certificate.						
Limitations	Must wear corrective lenses.					
Date of Examination			Examiner's Designation No.			
05/01/2006			13578			
Examiner	Signature <i>Walter S. Silberman, D.O., M.P.H.</i>					
	Typed Name W.S. Silberman, D.O. 00029-8					
AIRMAN'S SIGNATURE						

FAA Form 8420-2 (3-99) Supersedes Previous Edition

NSN: 0052-00-870-9002

I UNITED STATES OF AMERICA		XI	
DEPARTMENT OF TRANSPORTATION • FEDERAL AVIATION ADMINISTRATION			
IV NAME RUSSELL HARRISON JOHANSEN			
V ADDRESS [REDACTED]			
VI NATIONALITY USA	SEX M	HEIGHT 68	WEIGHT 230
IVa D.O.B. 22 SEP 1943		HAIR GRAY	EYES BLUE
IX HAS BEEN FOUND TO BE PROPERLY QUALIFIED TO EXERCISE THE PRIVILEGES OF			
I PRIVATE PILOT			
II CERTIFICATE NUMBER		1524195	
X DATE OF ISSUE		25 APR 2014	
XIV [Signature]			XV ADMINISTRATOR

RUSSELL HARRISON JOHANSEN		XII RATINGS		1524195	
PRIVATE PILOT		AIRPLANE SINGLE & MULTIENGINE LAND; INSTRUMENT AIRPLANE			
ENGLISH PROFICIENT.		XIII LIMITATIONS			
VI SIGNATURE OF HOLDER		<i>Russell H. Johansen</i>			



My Civil Lawsuit Against the FAA, DOT and SSA

- **During the criminal case, when I moved to suppress the evidence because it had been obtained illegally, the judge in denying my motion said that my remedy was not to suppress the evidence introduced by the government in the criminal case, but to file a civil suit against the agencies in federal court. I believe the judge's decision to deny my motion was based in large part on SSA-OIG Attorney Lasher's declaration.**
- **After my recertification, I began looking for an attorney to help me file a civil complaint.**
- **Through the AIDS Legal Referral Panel (ALRP), I was connected with Jim Wood, a partner with Reed Smith, LLP, who agreed to represent me *pro bono*.**
- **My motivation in filing the civil complaint was not about money, but instead it was about holding the non-elected government bureaucrats who intentionally broke the law accountable.**



My Civil Lawsuit Against the FAA, DOT and SSA (cont'd)

- I knew that filing the lawsuit would be controversial and that my personal life would be on public display.
- Because Russ Johansen and I were probably the only two OSP defendants with standing to sue, and Russ had decimated his retirement savings appealing the revocations and defending himself in the criminal trial, exposing the government's misconduct was left to me.
- The civil complaint was filed on March 8, 2007, in U.S. District Court – District of Northern California.
- The case was assigned to Chief Judge Vaughn R. Walker, who had presided over my criminal case.
- The lawsuit made its way through Northern California U.S. District Court, the U.S. Ninth Circuit Court of Appeals, and ended with the March 28, 2012 U.S. Supreme Court Decision.



What the Courts Said – U.S. District Court

- After months of delay and obfuscation by the government defendants, in January, 2008, we filed a motion to compel further discovery, including documents, e-mails, OIG agent handbooks, etc., all evidence to which we were legally entitled.
- The government filed an objection to our motion to compel, supported by sworn declarations from senior FAA, DOT, and SSA officials who stated that revealing the requested discovery would inhibit investigations and potentially threaten national security.
- On February 21, 2008, Judge Walker ordered that “The government shall produce the documents read on the record no later than February 26, 2008.”
- On August 22, 2008, Judge Walker issued an Order finding for the government defendants.



What the Courts Said – U.S. District Court (cont'd)

- On August 22, 2008, Judge Walker found for the government.
- In his Order, Judge Walker found that:
 - The government agencies had violated the Privacy Act multiple times during the Operation Safe Pilot investigation,
 - I had presented triable evidence that these violations were willful and intentional,
 - I had suffered “an adverse effect” as a result of the violations,



What the Courts Said – U.S. District Court (cont'd)

- In his Order, Judge Walker found that (cont'd)
 - But because I had claimed no “pecuniary loss”, and there was a circuit court split* over whether mental and emotional distress could be “actual damage” in a Privacy Act case, the government’s motion for summary judgment against me was granted since the 9th Circuit had never ruled on the question.

* Two federal appeals courts had ruled in Privacy Act cases that because “actual damage” is an ambiguous term, the Doctrine of Sovereign Immunity requires the term must be narrowly construed to mean only pecuniary (financial) losses. A third federal appeals court ruled that provable mental and emotional distress is “actual damage”, hence the circuit court split.



What the Courts Said – Ninth Circuit Court of Appeals

- After Judge Walker’s decision, we appealed his judgment based only on his narrow interpretation of “actual damage”, to the 9th Circuit Court of Appeals. In our appeal, we claimed that Black’s Law Dictionary defines “actual damage” as “proven, not presumed” without mentioning whether the damage must be financial loss. Our argument was that mental and emotional distress can be proven with a psychiatric diagnosis, and that the purpose and the legislative history of the Privacy Act point to Congress’ intent to include mental and emotional distress as “actual damage” since embarrassment and emotional distress over the disclosure of personal, highly confidential information is the only damage in most Privacy Act cases.
- The three judge panel of the Ninth Circuit unanimously agreed with us, and reversed Judge Walker’s decision.



What the Courts Said – U.S. Supreme Court

- After the three judge panel in the circuit court unanimous decision to reverse and remand, the government asked the 9th Circuit for a rehearing en banc, meaning that at least nine of the 9th Circuit judges should rehear the case. The 9th Circuit denied the government's request.
- The only option left for the government was an appeal of the 9th Circuit's decision to the U.S. Supreme Court, which it did.
- The Supreme Court granted Certiorari on June 20, 2011.
- After written briefs and oral arguments, on March 28, 2012, the U.S. Supreme Court ruled that the authorization of suits against the government for “actual damages” in the Privacy Act of 1974 is not sufficiently clear to constitute a waiver of sovereign immunity from suits for mental and emotional distress. The opinion was written by Justice Alito, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Kennedy.



What the Courts Said – U.S. Supreme Court (cont'd)

- A powerfully written dissenting opinion, authored by Justice Sotomayor, was joined by Justices Ginsburg and Breyer. Justice Kagan took no part in the discussions or decision as she had served as U.S. Solicitor General when the case was before the Ninth Circuit.

- In her dissent, Justice Sotomayor wrote:

“Today the Court holds that ‘actual damages’ is limited to pecuniary loss. Consequently, individuals can no longer recover what our precedents and common sense understand to be the primary, and often only, damages sustained as a result of an invasion of privacy, namely mental or emotional distress. That result is at odds with the text, structure, and drafting history of the Act. And it cripples the Act’s core purpose of redressing and deterring violations of privacy interests. I respectfully dissent.”



Operation Safe Pilot and the Death of Privacy

At the Supreme Court After Oral Arguments



David Bird

Stan Cooper

Jim Martin

Tom Pohl

Tiffany Thomas

Ray Cardozo

Jim Wood



What Was Accomplished by the Civil Lawsuit?

- A planned “Operation Safe Pilot” investigation in the state of North Carolina was abruptly terminated.
- A project proposing a database match between the FAA medical certificate database and the Veterans Administration disability database was abruptly terminated.
- A one year amnesty from criminal prosecution for pilots who self-reported previously undisclosed potentially disqualifying conditions was enacted following recommendations at the July 17, 2007, Congressional hearings on FAA’s oversight of falsified airman medical certificate applicants.
- Finally, in 2010, six years after the illegal Operation Safe Pilot database matches, the agencies took the required legal steps to make similar investigations conform to the provisions of the Privacy Act of 1974 as amended.



Making Things Right

- The Order of Emergency Revocation Of Russ Johansen's medical and ATP airman certificates with all of his type ratings, and his criminal prosecution was an outrage that should disturb every American citizen. These were the acts of overzealous investigators and prosecutors who violated the law and wasted millions of taxpayer dollars.
- Since the revocations lacked materiality (Johansen was issued a new unrestricted third class medical certificate after a thorough review of his medical records) and both the revocations and the criminal prosecution were completely without merit, the revocation of his ATP Airman Certificate with all of his type ratings should be rescinded, and his certificate restored.
- The agencies and prosecutors involved should be reprimanded for their deliberate violations of the law, and should apologize in writing to each and every one of the more than 40,000 Northern California pilots whose medical records were illegally shared.



Next Steps – Legislative Reform

- Privacy activists are outraged at the Supreme Court decision.
- The Electronic Privacy Information Center (EPIC), a D.C. advocacy organization, urged Senator Daniel Akaka (D-HI), Chairman of the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, to include wording in S.1732, The Privacy Act Modernization for the Information Age Act of 2011, to include language changing the definition of “Actual Damages” to include proven mental and emotional distress.
- Senator Akaka has proposed this amendment to the Privacy Act:
 - (1) by striking “actual damages” and inserting “provable damages, including damages that are not pecuniary damages,”; and
 - (2) by striking “, but in no case shall a person entitled to recovery receive less than the sum of \$1,000” and inserting “or the sum of \$1,000, whichever is greater.”.
- Republicans filibustered Senator Akaka’s amendment.



Unanswered Questions

- Should government agents sworn to uphold the law, who then willfully and intentionally violate the law and commit perjury to conceal those violations, be held accountable or should they be allowed to continue violating the law with impunity?
- Where was congressional oversight during the Operation Safe Pilot investigation, certificate revocations, and criminal prosecutions, especially among members of the California delegation where the investigation took place?
- How could the Privacy Act of 1974, written in plain English and carefully crafted to prevent exactly the kind of personal information exchange conducted during Operation Safe Pilot, be so willfully violated over a period of years in spite of many warnings in court documents during the certificate actions and criminal prosecutions that the government was in violation of the law?
- Except for Justices Sotomayor, Ginsburg, and Breyer who dissented, how could the United States Supreme Court find that there is no remedy for citizens who claim proven non-pecuniary harm for willful violations of the Privacy Act in spite of evidence in the legislative history of the Act to the contrary?



Acknowledgements

Special thanks to the following organizations and individuals for their extraordinary contributions and support in the interest of justice.

- **The National Gay Pilots Association for persuading the FAA Civil Aeromedical Certification Institute in 1997 that its then current policy of refusing certification to healthy HIV infected pilots on anti-retroviral medications could be changed without compromising aviation safety**
- **Aircraft Owners and Pilots Association Legal Services Plan**
- **Michael Dworkin, Attorney, who appealed my emergency revocations**
- **James Pokorny, Attorney, who was my defense attorney in the criminal case**
- **AIDS Legal Referral Panel (ALRP) which connected me with James Wood and his colleagues**
- **ReedSmith LLP attorneys James Wood, Tiffany Thomas, David Bird, Ray Cardozo, James Martin, and Tom Pohl, for representing me *pro bono* in my civil lawsuit, and steadfastly supporting me through the appeals all the way to the U.S. Supreme Court**
- **The amazing group of organizations and their attorneys who filed *Amicus Curiae* briefs in my behalf with the Supreme Court of the United States:**

AIDS Foundation of Chicago, AIDS Legal Referral Panel, APICHA, Inc., Electronic Privacy Information Center, Gay and Lesbian Advocates and Defenders, Gay City Health Project, Global Network of People Living with HIV, HIV Law Project, Interior AIDS Association, Lambda Legal Defense and Education Fund, Inc., Legal Action Center, Metro TeenAIDS, National Black Gay Men's Advocacy Coalition, National Center for Lesbian Rights, National Immigrant Justice Center, National Whistleblower Center, National Women's Health Network, Transgender Legal Defense and Education Fund, and Whitman-Walker Health



Operation Safe Pilot and the Death of Privacy

Operation Safe Pilot and Stanmore Cooper

FAA and NTSB Administrative Actions and Criminal and Civil Court Cases

<u>Action</u>	<u>Case Number</u>
FAA Western-Pacific Region Emergency Revocations	2005WP900005
NTSB Emergency Revocations Appeal	NTSB Order EA-521
Criminal Case, Federal District Court-Northern District of California	CR-05-00549-VRW
Civil Complaint, Federal District Court-Northern District of California	3:07-cv-01383-VRW
Civil Complaint Appeal, Federal Appeals Court, Ninth Circuit	08-17074
Civil Complaint Appeal, Supreme Court of the United States	10-1024



Operation Safe Pilot and the Death of Privacy



THANK YOU!
QUESTIONS?