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AVIATION IN DISCRIMINATION

by
Robert Routh

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ABSTRACT

This study questions the effects that discrimination has had on aviation and what changes, if any, can be expected in the near future. The central theme of the study is discrimination, specifically racial discrimination, sex discrimination and age discrimination. Of particular importance is the discriminatory role that various government agencies have played in labeling a person unfit to serve as a pilot simply because that person happens to be a woman, black or has reached a certain chronological age.

This study questions the position taken by such institutions as the International Civil Aviation Organization, the Federal Aviation Administration and the Joint Aviation Authorities. Where possible, an attempt has been made to show good leadership on the part of these institutions as well as indicate where good leadership was partially or completely missing. The role the courts have played or failed to play over the years in determining the issues of discrimination in aviation has also been included in the study. Case law is used as extensively as possible to trace the positions taken by plaintiffs and defendants in attempting to change what they perceived as discriminatory or unfair law.

The text also includes legislation that addresses issues of discrimination passed by various legislative bodies as well as the efforts of individual organizations, such as the Professional Pilots Federation, the International Federation of Air Line Pilots Associations and others, to end discriminatory practices in aviation.

RÉSUMÉ

Cette étude porte sur les effets que la discrimination ont eus sur l'aviation et les changements éventuels qui peuvent être envisageables dans un avenir proche. Le thème central de l'étude est orienté sur la discrimination raciale, la discrimination sexuelle et la discrimination par l'âge. Les divers organismes gouvernementaux ont joué un rôle discriminatoire particulièrement important en estimant qu'une personne était incapable de servir de pilote simplement parce que cette personne s'avère justement être une femme, une personne noire ou parce que la personne avait atteint un certain âge chronologique.

Cette étude porte sur la position prise par institutions tels que l'organisation internationale d'aviation civile, la gestion fédérale d'aviation et les autorités communes d'aviation. Dans la mesure du possible, une tentative a été faite de montrer les bonnes directions conduites par ces institutions ainsi que d'indiquer où ces bonnes directions ont fait partiellement ou complètement défaut. Le rôle que les cours ont ou n'ont pas joué au cours des années pour déterminer les points de discrimination dans l'aviation a été également inclus dans l'étude. La jurisprudence est utilisée autant que possible pour tracer les positions prises par des plaignants et des défendeurs en essayant de changer ce qu'ils ont perçu en tant que loi discriminatoire ou injuste.

Le texte inclut également la législation abordant des questions de discrimination passées par divers corps législatifs ainsi que les efforts de différentes organisations telle que la fédération de pilotes professionnels, la fédération internationale des associations de

pilotes de compagnie aérienne et autres pour mettre fin aux pratiques discriminatoires dans l'aviation.

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INTRODUCTION

Discrimination in the airline cockpit began when commercial aviation was first born and exists even now. Such discrimination is not limited to one particular country or area of the globe; it permeates commercial aviation worldwide and is a lingering legacy of social discrimination of all forms. Through the years, solutions to the problem of discrimination in aviation have been the subject of various studies.¹ However, to date, not only do we continue to face problems associated with discrimination in a worldwide context, but there also seems to be no responsible leader in aviation attempting to resolve the problem.

Issues of race, sex and age are the triad of discrimination in the aviation industry, and elsewhere in society. Many countries have addressed issues of discrimination and the debilitating effects it has on society.² Yet a large part of our global community continues to tolerate discriminatory policies even as we enter the twenty-first century.

Most modern industrial societies enacted equality laws in the 1960s to place men and women on an equal footing. These laws opened up many new possibilities within the

¹ See ICON, *Competency of Women for Piloting Aircraft* (1924), *infra* note 72 at 74, ann. 4, s. V; *Women's Armed Services Integration Act* 1948, 62 Stat. 356; *United States President Executive Order* 10240, 27 April 1951, *infra* note 165 at 80; *Frontiero v. Richardson*, 411 US 677, 14 May 1973. Numerous State Laws governing sexual relations, gender bias and lifestyle. The numerous policies and practices, such as restrictions on age, sex, weight, handicapped persons excluding them from gainful employment, *Laffy v. North West Airlines, Inc.*, 185 U.S. App. DC 322 (1976).

² Many States have adopted modern legislation to remove injustices in society. Examples of such legislation are the 1982 *Canadian Charter of Rights and Freedoms* and subsequent amendments, the 1990 *New Zealand Bill of Rights Acts* and subsequent amendments, the *United States Civil Rights Act* of 1964 and its subsequent amendments.

aviation industry and elsewhere. Women and minority groups were allowed for the first time in the history of aviation to assume their rightful place in the airline cockpit.³

Even with modern legislation to prevent discrimination based on race, sex and age, it continues to linger in the modern cockpit under the auspices of the International Civil Aviation Organization's (ICAO) international standards and recommended practices found in Annex One and the US Federal Aviation Administration's Age Sixty Rule.⁴ Modern legislation has helped ease the problem of discrimination but the legacies of past discrimination continue to linger within the aviation community and society.

How ICAO, the United States and other leading civil aviation organizations throughout the world deal with this ongoing problem is important to everyone involved in aviation. It is also important that leading aviation States throughout the world indicate to the ICAO that changes must be made.

Discrimination is a political issue and must be addressed as such. The politics of ICAO must address social issues in the cockpit, as well as the technical problems inherent in flying. It seems that ICAO has lost credibility among many member States for failing to

³ See *ibid.*

⁴ 14 Code of Federal Regulations 121(c): "No certificate holder may use the services of any person as a pilot on an airplane engaged in operations under this part if that person has reached his or her 60th birthday..." Department of Transportation, FAA Docket No. 23174; Notice No. 82-10, 47 Fed. Reg. 29,782 (1982). ICAO, *International Standards and Recommended Practices*, "Personnel Licensing, Annex 1 to the Convention on International Civil Aviation," 8th ed. (July 1988), applicable 16 November 1989, 2.1.10 Curtailment of privileges of pilots who have attained their 60th birthday.

address the issues examined in this thesis.⁵ The present leadership at ICAO needs to take a stand against the inherently archaic and discriminatory policies found in aviation.

ICAO is the worldwide forum where aviation issues can be addressed and hopefully resolved. Discrimination in aviation is a tough issue requiring tough international leadership. The question is whether ICAO can help to resolve these problems. Will the new Joint Aviation Authorities in Europe take an enlightened approach towards these issues? Everyone has a stake in seeing discrimination in aviation come to an end. The hurt and indignation of discriminatory policies, especially State-sanctioned discrimination, must be put behind us. Aviation in the twenty-first century should serve as a model of what can be done to end discrimination not only in the workplace but also between fellow human beings.

In this thesis, four key areas of discrimination are addressed. The first is government-sanctioned age discrimination encompassing the military and the airlines. The second area is gender bias, which has deterred our sister aviators from finding employment opportunities for many years. The third area covered is racial discrimination and what is being done to improve the opportunities for minorities in aviation. The fourth and final area covered is the non-traditional domestic partnership. This section of the thesis includes efforts of the gay and lesbian community to achieve an equal non-discriminatory

⁵ States forming the Joint Aviation Authorities in Europe and States elsewhere around the world making changes in their personnel licensing. The curtailment of privileges of pilots who have attained their 60th birthday is a very good example of ICAO's failure to recommend changes that obviously need to be changed in international civil aviation.

working environment along with equal pay and employment benefits that other aviation professionals enjoy.

The heart of this thesis contends that discrimination is like a cancer eating away at what is really good about a society, and like a cancer it needs to be removed. Society must persuade the leading aviation organizations and especially ICAO to help put an end to this malignancy before it becomes so powerful that people who work in aviation are further hurt, disenfranchised or killed by these discriminatory policies.

CHAPTER ONE

IN THE BEGINNING

1.1 History

During the First and Second World Wars it was held by those in authority that if a pilot was in his late twenties he was too old to be a fighter pilot.⁶ They felt that at that age the pilot's reaction time and his general physical condition would leave him at a distinct disadvantage in aerial combat. The absurdity of this belief has been well demonstrated by older Air National Guard, Air Force, Naval and Marine Reserve pilots competing in shoot-out competitions with the younger pilots on active duty.⁷ Nellis Air Force Base, situated near Las Vegas, Nevada, is well-known as the Home of the Fighter Pilot and for hosting Red and Green Flag exercises. Another popular event held at Nellis is the "Gunsmoke" contest. Gunsmoke welcomes pilots from active US Air Force units as well as from Reserve and National Guard Units. Countries from around the world send their top pilots to Nellis to learn and to compete in these activities. The top events as well as overall events are consistently won by older pilots. In Gunsmoke 1989, the South Carolina Air National Guard won the Top Team award, while the overall Top Gun award went to Patric Shay, a 34-year-old airline pilot flying an F-16.⁸

Still, the unfounded belief that older pilots cannot react, learn or adapt to the needs of flight continues to plague the aviation industry, as well as the US Military, even today.⁹

⁶ See ICON, *Minimal Standards* (1922), ann. E., art. 13.

⁷ See P.J. Birtles, "The South Carolina National Guard" (1993) 21:20 Aviation News 947.

⁸ See H.D. Hannant, "Gunsmoke 89" (1989) 16:16 Aviation News 752-753.

⁹ Conversation between Col. J.R. Brown, Wing Commander, USAF, and the author (1996).

1.2 Genesis of the Age Sixty Rule

The Age Sixty Rule, which pertains to the flying of large aircraft operated under FAR Part 121, came into effect in 1960.¹⁰ During the 1950s there were several air crashes that caught the attention of the public, Congress and the White House.¹¹ Congress, in its typical knee-jerk reaction to the dead bodies piling up, called for an investigation and change.¹²

One of President Eisenhower's pilots, during the dark days of the Second World War, was Col. Elwood R. Quesada. General Quesada had risen through the ranks of the US Army Air Force. Between 1933 and 1935 Quesada had the opportunity to serve as an aid to a series of government and military leaders. These assignments helped Quesada to hone the diplomatic skills that would serve him well later in his career. In 1940, Quesada became Maj. Gen. Arnold's Foreign Liaison Chief. In this position Quesada traveled with Gen. Arnold to wartime England and helped to lay the groundwork for the Air Corp's part in the Lend-Lease Program between the United States and Great Britain.

Before the United States entered World War II, Quesada commanded several fighter units in the United States before taking control of the First Air Defense Wing at Mitchell Field. Quesada was promoted to the rank of Brig. General and shortly thereafter took his fighter

¹⁰ Rule issued 1 December 1959, effective 15 March 1960.

¹¹ See G. Sellers, "FAA: Born With the Jet Age" [August 1978] *FAA World Magazine* 4-5.

¹² See R. Kane & A. Vose, *Air Transportation*, 7th ed. (Dubuque, Iowa: Kendall/Hunt Publishing, 1979) at 6-2.

wing to North Africa to join up with the XII Fighter Command. He soon became commander of the XII Fighter Command, where he established a reputation as a tenacious and capable commander. With this wartime experience behind him, he was transferred to England and became the commander of the IX Fighter Command.¹³

It was during his tenure as Commander of the IX Fighter Command and shortly after the invasion of Europe by the Allied forces that Gen. Quesada's flying skills became so apparent to Gen. Eisenhower, future President of the United States. Much to the dismay of Gen. Spats, Quesada took Gen. Eisenhower in a specially designed fighter aircraft on a tour of the front lines where the invasion force could be studied by the Supreme Allied Commander.¹⁴ During the flight, the aircraft carrying Gen. Eisenhower was fully protected by escort fighters, giving Gen. Spats little need to worry.

The flight gave Gen. Eisenhower the opportunity to view what his troops were accomplishing, something a commanding officer seldom gets in a campaign the size of the Normandy Invasion. The flight also gave Gen. Eisenhower a first-hand look at the skills of the future first Administrator of the Federal Aviation Agency (FAA).

After 27 years of service, Gen. Quesada retired from the US Air Force. His decorations included the Purple Heart and the Air Force medal with two Silver Clusters.

¹³ See W.F. Craven & J.L. Cate, *The Army Air Force in World War Two*, vol. III (Chicago, IL: University of Chicago Press, 1951) at 112-120.

¹⁴ See M. Miller, *Ike The Soldier* (New York, NY: Putnam 1987) at 655-656.

After the War, Gen. Quesada held several positions with the aviation industry in the United States, including the Vice President and General Manager of the Missile Systems Division of Lockheed Aircraft Company. He also had an opportunity to experience the developing role of the United States in international aviation. President Eisenhower had a great deal of confidence in the aviation knowledge and abilities of General Quesada, whom he called upon to head a special investigation committee to look into the problems within the aviation industry in the United States.¹⁵ The results of this investigation in the late 1950s led to many changes in the rules and regulations governing commercial aviation under the old *Civil Aeronautics Act of 1938*.¹⁶ These changes included the requirement of better pilot training (especially for copilots), the designation of Aviation Medical Examiner physicians to administer flight physicals, the requirement for specific aircraft to be equipped with radar, and other additions and changes to the old Civil Air Regulations that were promulgated by the Civil Aeronautics Board (CAB).¹⁷ In addition to these changes, Congress was asked to establish a new government agency that would answer directly to the President of the United States - this new agency later became the FAA.¹⁸ Gen. Eisenhower wanted his trusted friend and colleague Pete Quesada to be named the new Administrator, but there were problems that had to be overcome before Quesada could accept the position.

The draft legislation for the *Federal Aviation Act 1958* contained wording that excluded retired military personnel from holding the position of FAA Administrator. There were

¹⁵ See *Federal Aviation Administration History*, web sight, faa.gov/apa/hisfaa/html/ (date accessed: 16 May 1999).

¹⁶ See *Civil Aeronautics Act*, 52 Stat. 973, 1938.

¹⁷ See P.W. DeVore, *Introduction to Transportation* (Worcester, MA: Davis Publications, 1983) at 253.

those in Congress that feared a takeover of the country's airspace by the military and the airlines, thus forcing general aviation operators out of business.

President Eisenhower, himself a retired military general officer, complained to Congress about the provision in the *Federal Aviation Act* requiring that the Administrator be a civilian. The President felt so strongly about this provision that he personally asked Congress to adopt legislation to exempt General Quesada from the civilian only requirement of the *Act*.¹⁹ Congress agreed to exempt Gen. Quesada, but only under special circumstances. In order for Quesada to serve as the first FAA Administrator, it would be necessary under the enabling legislation that he resign his commission as a retired Air Force Officer. The enabling legislation would return Quesada to his former rank once he left the FAA.

There were several members of Congress who felt this enabling legislation not only evaded the letter of the law but its spirit as well.²⁰ Democratic Senator Clair Engle from the State of California was particularly concerned with a military person being in charge of the national airspace for five reasons:

- (1) He was concerned that appointing Quesada, a military officer, would be a clear violation of the legislation and that a military officer would lean heavily towards military thinking and the views of his former comrades-in-arms.

¹⁸ See *Federal Aviation Act 1958*, Title 49 US 101(16); R. Burkhardt, *The Federal Aviation Administration* (New York: F.A. Prager, 1976) at 22.

¹⁹ See R.F. Weigly, *Eisenhower's Lieutenants* (Bloomington, IN: University Press, 1981) at 114, 165 & 166.

²⁰ Comments by U.S. Senator Clair Engle, Democrat, California at 165 & 166.

- (2) Senator Engle feared that General Quesada did not have an impartial attitude toward the various users of the national air space.
- (3) The Senator was concerned about General Quesada's attitude toward the use of "The Black Boxes" to solve problems in aviation. General aviation pilots could not afford the luxury of purchasing these so-called "Black Boxes" for their aircraft.
- (4) Senator Engle feared the continued acquisition of airspace by the Military for restricted military use, thus shutting out the general aviation pilot.
- (5) Another source of concern was General Quesada's opinion about airport construction, especially the use of federal funds for construction of new airports. Senator Engle was afraid he would attempt to stop the flow of these funds that were helping small communities around the United States construct new airports and improve older ones. These small airports being constructed throughout rural America helped attract industry to the towns and cities where they were built, thus creating employment for many local people.

Senator Engle's misgivings had some basis in fact. With a military background and 27 years of military service, General Quesada would naturally bring this experience with him to fulfill the newly created office of FAA Administrator. General Quesada was used to being in command and working through the chain of command. This military philosophy did not sit well with many employees at the FAA, and with the aviation community in general.

After becoming FAA Administrator, Quesada began to tighten up the Federal Aviation regulations and guidelines airline crews were required to follow. The Airline Pilots Association felt that General Quesada's methods of changing old regulations and promulgating new regulations was rather arbitrary and militaristic. The ALPA's policy was to "Schedule with Safety." In fact, the ALPA had helped introduce many rules and regulations relating to safety over the years, and now they felt their ideas about safety were being pushed aside. ALPA pilots were of the opinion that many of the regulations being introduced by Gen. Quesada were unnecessary and imposed undue restrictions on line flight operations.

Two rules that particularly irritated ALPA pilots were that they were required to keep the cockpit door closed during flight and that no pilot could leave his station during flights except to go to the restroom. Pilots were accustomed to taking a walk through the aircraft cabin to talk with passengers. The ALPA pilots pointed out that the Flight Safety Foundation recommended that pilots be allowed to get up out of their seats every hour to restore circulation.²¹ This study did not change the General's mind in the least.

Capt. Clancy Sagen, President of the ALPA, accused Quesada of being arbitrary in his decisions and of disregarding the opinions of the pilots who were actually flying the line. Despite such complaints from the airline union, Quesada did not back down from the changes that he promulgated or the enforcements of those changes. It was noted that the FAA issued 3,822 violations in 1959 and that 5,000 violations were issued in 1960.²²

²¹ See Weigty, *supra* note 19.

²² See *ibid.*

These figures were up from an average of 2,000 violations in the years preceding Gen. Quesada's arrival at the FAA.

The ALPA was not the only organization that found Quesada's handling of the FAA overbearing. The Aircraft Owners and Pilots Association (AOPA), with a membership of more than 13,000 pilots, found his military style particularly abrasive.²³ The AOPA leveled charges at the FAA, stating that "the FAA had grown into an all encompassing giant, costing the public coffers \$9,519.75 dollars per active civil aircraft per year."²⁴ The AOPA also pointed out that there were now more than 40,000 employees at the FAA and that public money had been spent on items that were completely unnecessary.

The AOPA accused General Quesada of implementing a Napoleonic Code whereby an airman was found guilty until proved innocent. There are many in the US aviation industry as well as elsewhere who believe the FAA continues to follow this policy, creating a barrier that impedes safety.

1.3 A Changing World

The United States emerged from the Second World War as a solvent country and the leader in international aviation.²⁵ As such, changes in regulations governing aviation in the United States led directly and indirectly to changes in aviation on a worldwide scale.

²³ See "Editorial" [December 1960] AOPA Magazine.

²⁴ See *ibid.*

²⁵ See T.R. Weitzell, *The Laissez Fair 1990s: Policies and Constancy of Purpose in Reshaping the US Major Airlines* (Thesis, Daytona Beach, FL: Embry Riddle Aeronautical University, 1991) at 29.

One of the new rules that had not been included in the *Civil Aeronautics Act of 1938* was a mandatory retirement age for pilots of large commercial aircraft.²⁶ Of all the rules and regulations enacted by the new FAA, this one rule has precipitated more litigation than all of the others rules combined. Before the Age Sixty Rule was promulgated, there was no restrictive age limit affecting commercial airline pilots. If a pilot passed the rigid flight physical he could continue his career by following company guidelines. There were forty pilots in 1959 flying past the age of sixty, and this number was expected to rise to 250 within a few years.²⁷

The insertion of the Age Sixty Rule created a great deal of debate among everyone involved with solving the safety issues that were before General Quesada's Committee. One side wanted mandatory retirement as early as age fifty-five. The other side, namely the pilots represented by the ALPA, wanted to continue with no upper age limit or at its lowest level, an age limit of sixty-five. The opinions of airline captains carried much more weight concerning union decisions in those days than they do now. For example, not many years had passed since copilots were restricted to only a half vote in union decisions and junior copilots would move up the seniority list if older pilots were forced to retire under the new rule.²⁸

This is no longer the case. First and second officers now have the same vote as captains, and there are many more first and second officers than captains. Each age sixty captain

²⁶ See 14 C.F.R. ss. 40.260(b) 1960, now 121.383(c) 1989.

²⁷ See GAO, *Aviation Safety* (Washington, DC: General Accounting Office, 1989) at 5-6.

²⁸ See G. Hopkins, *Flying the Line: The History of the Airline Pilots Association* (Chicago: University of Illinois, 1982).

forced to retire moves a junior first and second officer up one notch on the very important seniority list of the respective airline. Seniority determines the pilot's pay, the schedule to be flown each month and the type of equipment the pilot can operate.²⁹ For this reason, the ALPA is in favor of the Age Sixty Rule today and pilot safety has very little, if anything, to do with the ALPA's change of stance.

This same scenario is true for airlines in other countries throughout the world. For example, British Airways' Working Agreement requires that pilots retire at age 55.³⁰

In a recent interview between Capt. Barry Borell of the Professional Pilots Association and Mr. Neil Monks of the United Kingdom CAA Flight Crew Licensing Department, Mr. Monks stated that "even though the JAA allows pilots to operate until age 65, British Airways still requires their pilots by contract to retire at age 55".³¹

The agreement for pilots to retire at age 55 came about when British Overseas Airlines and British European Airlines merged. Prior to this, pilots at BEA could fly until age 60, while pilots at BOAC were forced to retire at age 55. This of course is a contract provision and might be changed in the near future as more airlines in Europe begin operating with flight crews over the age of 60 or if a pilot shortage should develop.³²

²⁹ See TWA, *Flight Operations Policy Manual* (1989).

³⁰ See *Agreement Between British Airways and BALPA*, 1973. This is the private working agreement negotiated between airline pilots employed by British Airways and the Company. It covers all working agreements such as flight time, duty regulations, benefits and salaries. All inquiries as to the contents of this Agreement should be directed to British Airways.

³¹ Professional Pilots Federation, P.O. Box 1622, Scranton, PA 18503-1622, Interview between Capt. Barry Borell and Mr. Neil Monks, UK Flight Crew Licensing Department, 6 January 1999.

Mr. Monks also noted that the recent path of changes in Europe have not been without controversy. Pilots in Italy fought for their right to be allowed to fly until age 65, which they are now able to do based on aircraft weight.³³ Spain and Portugal will be changing the age limit for their pilots as JAA rules are phased into effect in those States.³⁴ Mr. Monks pointed out that the French have refused to change their policy to include pilots up to the age of 65 and may indeed prohibit flights over their territory from using pilots over the age of 60.³⁵

Even though British Airways continues to adhere to the age 55 agreement, there is a group of British pilots, the Independent Pilots Association, that has been active in fighting age restrictions and other disparities affecting British pilots.³⁶ This group of pilots has not only had to fight against the British government, but also against British Airways. The Independent Pilots Association is challenged by the same problems that confront the US Professional Pilots Association. The greatest challenges facing these two determined organizations are seniority rights and government bureaucracy.

The result of the late 1950s debate was the creation of the FAA and the adoption of mandatory retirement from flying large aircraft in FAR 121 flight operations at the age of

³² See Weigty, *supra* note 21.

³³ Telephone conversation with Luis Conde, Coordinacion de Recursos de Aviacin Civil Spain, 22 November 1999; telephone conversation with Capt. Elio Mincione, Alitalia Airlines, 2 December 1999; telephone conversation with Col. Del Farra, Italian Embassy Attache, Washington, DC, 8 December 1999.

³⁴ See *ibid.*

³⁵ See *supra* note 31.

³⁶ Independent Pilots Association of Great Britain, 1999, Mr. Trevor Newton, Technical Representative of IPA, ipapilots@iname.com.

sixty. This has led to continuing litigation and challenges to the rule not only in the United States but also in many of ICAO's Contracting States.³⁷

One of the more common sources of litigation since FAR 121.383(c) went into effect in the United States comes in the form of challenges to the FAA's denying of requests for exemption from the Age Sixty Rule. The FAA has allowed medical exemptions for physical and emotional problems since the effective date of FAR 121.383(c) and its application to FAR 121 certified air carriers.³⁸ These exemptions include the issuance of a first class physical to pilots suffering from alcoholism and drug abuse, neurological and psychiatric disorders, heart bypass surgeries and valve replacements, as well as exemptions for diabetes and HIV-positive pilots.³⁹

HIV-positive aviators have had the help and support of ALPA/APA and other aviation organizations in their fight to keep their jobs. As one HIV-positive pilot reported, a call to the physicians at ALPA Aeromedical brought reassurance, compassion and understanding. In HIV-positive cases, the FAA appears to be looking for no progression of the disease and a clean bill of cognitive health. Competent neurosurgeons have apparently developed the "Cogscreen" health screening process to a reliable enough point that the FAA is beginning to approve of this method of screening significant health problems.⁴⁰ If a cognitive screening process can be developed and approved for HIV-positive aviators, it would seem that a similar test could be developed for older pilots who

³⁷ See *US Federal Aviation Agency adopted Age Sixty Rule*, 5 December 1959 (24 FR 9767).

³⁸ See S.R. Mohler, "FAA Discretionary Issuance Permit Medical Certification of Many Pilots Despite Disabilities" (1998) 37:3 FAA News 9-14.

³⁹ See M. Wayda, "Medical Stuff" [April 1998] FAA Aviation News 15.

have been under the medical scrutiny of FAA-Approved Aviation Medical Examiners for thirty years or more.

The Federal Air Surgeon is authorized to issue such exemptions if, in his or her opinion, the problem will not affect the pilot in such a way that his flying would be unsafe or would likely lead to unsafe conditions. The FAA's consistent stand against changing or repealing the Age Sixty Rule is due to the theory that the aging process is unpredictable.⁴¹ The FAA takes this position even though almost all of the medical waivers given in the past would certainly carry just as much likelihood of unpredictability and the possibility of unsafe flying conditions. In the past the FAA has granted medical exemptions and waivers that should never have been allowed. In fact, in many cases the FAA has passed the responsibility on to the airlines to ensure that the exempt pilot fulfills the airlines' minimum acceptable standard for a pilot.⁴²

In reality, in the case of a recovering pilot, the natural tendency is for the company check airman to give the recovering pilot the benefit of the doubt when grading flight proficiency. The company check airman does not want to be responsible for a relapse in the event that the recovering pilot fails his or her check ride. After all, check airmen are only human in their decision making and are prone to be sympathetic to a recovering pilot.

⁴⁰ See K. H., "Someone's Got To Be First" (1999) 8:3 National Gay Pilots Ass. News 13 at 13 & 17. Note, gay pilots do not include their family names in magazine articles for fear of losing their job.

⁴¹ Increase in the possibility of sudden death with age. See *ALPA Int. v. Quesada*, 276 F.2d 892 at 892-898 (1960).

If the FAA can grant medical exemptions for such an array of potentially dangerous physical and physiological problems, why does it take such an arbitrary position towards the age sixty pilot? This arbitrary step in effect forces the most experienced pilots in FAR 121 air carrier operations from serving past the age of sixty. When one looks at this arbitrary stand of the FAA in light of the fact that the sixty-year-old pilot being forced to retire has never had any disqualifying medical problems during his entire flying career, the absurdity of the Age Sixty Rule becomes apparent. It is common sense that if a pilot passed a first-class physical the day before his sixtieth birthday, then his physical condition would not have changed significantly within a twenty-four hour period of time. As Capt. Barry Schiff expressed in AOPA Magazine, "the cockpit is one of the few places left where open age discrimination is still tolerated."⁴³ In thirty-four years of flying for TWA, Capt. Schiff had never scratched an airplane or injured a passenger even though he had flown for over 25,000 hours all over the world. But now he was being told to stop flying by the FAA because he had turned sixty. The fact that Capt. Schiff still had no problem passing a FAA First Class Physical was irrelevant.

In the past, the Federal Courts have consistently upheld the FAA's denial of granting exemptions to the Age Sixty Rule. This stand relieves the Court of any safety responsibility that could possibly develop from an over-sixty pilot flying an aircraft involved in an incident or accident. This ultra-conservative position on the part of the

⁴² Personal knowledge as a former FAA Check Airman.

⁴³ See B. Schiff, "Sentimental Journey" (1998) 41:8 AOPA Magazine 79-81.

Federal Courts may eventually end with enough concrete evidence to demonstrate that older pilots are safer pilots, thereby outweighing any loss of safety with age.⁴⁴

As mentioned earlier, the ALPA, which originally opposed the Age Sixty Rule, has changed sides and now supports the FAA's mandatory retirement for all FAR 121 air carrier pilots when they reach the age of sixty.⁴⁵ The red herring in this change of stance is the nebulous safety issue that the FAA continues to adhere to; that is, that flight safety is at stake. The ALPA's motto of "Schedule With Safety" is tarnishing quickly as it helps the FAA kick its older member pilots out of the cockpit by using this phony safety issue. The ALPA is doing a poor job of defending older pilots, who have paid ALPA dues for many years, against the FAA's stand on the age sixty issue.

1.4 Why the Change in ALPA Policy?

Did the ALPA leadership of the late 1950s really understand the safety issues of the Age Sixty Rule? After all, they fought very hard with the FAA over the issue of age-sixty forced retirement and the rights of pilots. Were these Association leaders the forward-thinking pilots of their day or were they merely trying to protect their own personal interests as leaders of the Association? A casual comparison between ALPA leadership now and the leadership of the late 1950s presents a glaring disparity between the old ALPA and its modern version. Modern ALPA leadership cares much more about the position it holds in the Association than about the true interests of the brotherhood of the ALPA and what the ALPA has historically stood for, that is, safety, unity and solidarity.

⁴⁴ See *Aman v. FAA*, 856 F.2d 946 (1988).

⁴⁵ See B.K. Barklow, "Rethinking the Age Sixty Rule" (1994) 60 J. Air L. & Comm. 334.

In fact, all the ALPA and non-ALPA airline pilots of today are reaping the hard-fought-for and won benefits achieved by those forward-thinking leaders of the 1930s, 1940s and 1950s. The ALPA leadership of the late 1950s understood the injustices forced on the Association by various groups opposed to safety in the airline business as well as those opposed to the brotherhood of airline pilots.⁴⁶

Former Eastern Airlines' pilot Randolph Babbitt is the President of the ALPA. Capt. Babbitt is answerable to the ALPA Board of Directors, whose stand on the Age Sixty Rule is one hundred and eighty degrees away from that of earlier ALPA leaders. The pairing of the Age Sixty Rule with the "One Level of Safety" issue, which was so important to everyone involved with aviation, and public welfare, is more typical of politicians than of true union leaders.⁴⁷ On 29 March 1995, the FAA published a Notice of Proposed Rulemaking (NPRM) on Commuter Operations and General Certification and Operations Requirements.⁴⁸ The NPRM requires that the FAA allow interested parties to comment on the proposed changes to the FARs and that the FAA respond to those comments. One of the requirements set out in the NPRM was that FAR Part 135 pilots meet the age restrictions established by the FAR Age Sixty Rule. Over 3000 comments were received by the FAA in opposition to changing the requirements on the age of pilots flying for FAR 135 operators. Up until the time of the NPRM, there was no age limit on pilots flying for FAR 135 operators. In fact, some FAR135 operators made it a habit to hire experienced FAR 121 pilots who had been forced to retire due to the Age

⁴⁶ See *Air Line Pilots Association v. Quesada*, 182 F. Supp. 595 (1960) [hereinafter *Air Line Pilots Association*]; *Chew v. Quesada*, 182 F. Supp. 231 (1960); *O'Donnell v. Shaffer*, 491 F. Supp. 59 (1974).

⁴⁷ See J.W. Steenblik, "A Banner Day for Aviation Safety" [February 1996] *Air Line Pilot Magazine* 24-25.

⁴⁸ See *ibid.*

Sixty Rule. The FAA chose to ignore the more than 3000 comments, even though the FAR Part 135 operators were desperate for experienced pilots in the cockpit of commuter airliners. The fact that FAR 135 operators need experienced flight personnel is indicated by the numerous accident reports showing lack of experience as a major cause of FAR 135 accidents.⁴⁹ It will be interesting to see how the new President of ALPA, Capt. Duane E. Woerth, handles this ongoing problem. Will he respond to the needs of older union pilots that have supported ALPA over the years or will he turn his back on them? This is an excellent opportunity for Capt. Woerth to demonstrate to the FAA and to the world that ALPA is truly a Band of Brothers and Sisters.

⁴⁹ See Federal Aviation Administration, Notice No. 95-5, 60 FR 16230, 29 March 1995.

CHAPTER TWO

CHALLENGES TO THE RULE

2.1 The Debate

In the past, the Age Sixty Rule has been the subject of lawsuits challenging its creation by the FAA.⁵⁰ More recently, pilots have attacked the Age Sixty Rule using such legislation as the *Age Discrimination Employment Act of 1967*,⁵¹ and its various amendments.⁵² Thus far, the Federal Courts have generally rejected pilots' lawsuits based on the ADEA. The US Supreme Court held in *Western Air Lines, Inc. v. Criswell* that the Age Sixty Rule does not apply to flight engineers but that the Bona Fide Occupational Qualification Exemption (BFOQ) provision of the ADEA would apply to pilots.⁵³ The Courts have rejected the application of the ADEA to FAR 121 air carriers in spite of evidence demonstrating that in many cases older pilots are generally safer than younger ones.⁵⁴

Sadly, the Federal Courts have shown a tendency to agree with the FAA's unyielding stance the FAA's stance in these Age Sixty Rule cases by deferring safety issues to the FAA. This is somewhat of a natural tendency since most federal judges are unfamiliar with aviation issues and tend to look to the expertise of the FAA. However, in a more recent case, *Aman v. FAA*, the Federal Court of Appeals, Seventh Circuit, shied away

⁵⁰ See *Air Line Pilots Association*, *supra* note 46 at 6.

⁵¹ See ADEA, 29 U.S.C. 621-634 (1994), 113 Cong. Rec. 34,743 (Daily Edition: 4 December 1967).

⁵² See *Western Air Lines v. Criswell*, 514 F. Supp. 384 (1981), 427 U.S. 423 (1985).

⁵³ See *ibid*.

⁵⁴ See S. Dietz & W. Thomas, *Pilots Personality and Performance* (New York, Quorum Books, 1991) at 125-140.

from the traditional position adopted by the Courts in previous decisions. The Court of Appeals vacated more than one FAA exemption denial when it remanded the case back to the FAA, stating that “the FAA failed to set forth a sufficient factual or legal basis for rejection of the petitioner’s claim that an older pilot’s edge in flying experience offsets any undetected physical loss.”⁵⁵ The FAA again denied Aman (now Bennett), stating, among other things, “it is technically impossible at the present time to detect problems in older pilots.”⁵⁶

2.2 Old Voices, Old Song

One of the more recent challenges to the Age Sixty Rule comes from the Professional Pilots Federation (PPF), which was founded in 1991 for the sole purpose of eliminating or amending the Age Sixty Rule to fly past the age of sixty.⁵⁷ The PPF is composed of forward-thinking pilots, both young and old, including pilots from Part 121 and Part 135 operators as well as corporate pilots.

The Federation sponsored two recent court actions,⁵⁸ the first being an age discrimination case against Federal Express Airlines, while the second involved an appeal of the FAA’s decision not to initiate rulemaking to change the Age Sixty Rule and to further expand the Rule to certain commuter pilots.

⁵⁵ See *Aman*, *supra* note 44.

⁵⁶ Aman withdrew as petitioner and C.Y. Bennett and J.H. Baker were substituted. See *Baker v. FAA*, 917 F.2d 318 (1990), 111 S. Ct. 388 (1991).

⁵⁷ Professional Pilots Federation, PO Box 1116, Grapevine, TX 76009. See <http://www.ppf.org>.

⁵⁸ See United States Court of Appeals, District of Columbia, Docket Nos. 27264, 28154, 27375 & 28263.

The PPF has not limited its activities to filing lawsuits, appealing decisions and asking for reviews. It has organized efforts in Congress that include mass mailings, and holding “Blitzes”, whereupon members walk the halls of the House and Senate of the United States and meet with Congresspersons. The congressional effort was beginning to garner results until the ALPA interfered and lobbied against the change. The ALPA operates a substantial ALPA Political Action Committee in Washington, DC and has out maneuvered the PPF by spending substantial funds in the appropriate places. The losses in court and Congress have not deterred the PPF, whose members have overwhelmingly voted to continue efforts to see the Rule changed.

On 14 May 1998, the US Supreme Court convened to decide whether to hear the case involving the PPF and the FAA. Four days later, the Court announced that the petition for a writ of certiorari was denied.⁵⁹ Although the PPF case was not heard by the Supreme Court, PPF has continued to fight the age discrimination problem on behalf on behalf of it's members.

It should be obvious to the Courts, the FAA, Congress and everyone else involved that the PPF will not give up its fight as the PPF believes in the rights of pilots both young and old. There is no alternative to justice, and the PPF will prevail with its argument in the long run.

The PPF has expanded its activities recently into the international arena of ICAO politics. The PPF leadership realizes that the Age Sixty Rule and ICAO Annex One are changing

worldwide.⁶⁰ With Japan and the Joint Aviation Authorities in Europe retiring pilots at age sixty-five, and Australia having no upper age limit, things are changing in spite of the FAA.⁶¹

The PPF is in the process of applying for accreditation with ICAO, requesting the same standing as the International Federation of the ALPA. The PPF believes that ICAO will eventually change Annex One's age sixty limit to conform to the overwhelming weight of changes being implemented by Contracting States throughout the world.

2.3 Joint Aviation Authorities

The PPF is encouraged by the actions of the Joint Aviation Authorities (JAA). The JAA evaluated the medical risk when it decided to raise the mandatory retirement age to sixty-five.⁶² The JAA's safety target was that a medically caused accident should occur less than one in a million flights.

⁵⁹ See *supra* note 57.

⁶⁰ Letter from Capt. Barry Borell, Vice President Professional Pilots Federation dated Tuesday, 26 May 1988, outlining the visit of the PPF Board of Directors to ICAO. PPF Officers had the opportunity to visit with Mr. Paul Lamy, Chief Personnel Licensing and Training Section, Mr. Richard Allison, Air navigation Commissioner and Alternate Representative of the United Kingdom, Mr. Colin Torkington, Air Navigation Commissioner Australia, Mr. Kazuo Okada, Representative of Japan and Mr. Jack P. Orlando, Alternate Representative United States.

⁶¹ See ICAO, *ICAO Air Navigation Commission Surveys*, AN-WP/7089 (15 February 1996) and AN/WP, "Air Navigation Commission," ANC Task No. MED-701: upper age limits for flight crew members, 15 February 1996.

⁶² See Joint Aviation Authorities, Flight Crew Licensing (FLC) Committee established in Paris, 14 September 1990. Age limit for single pilot would be maintained at 60 but multiple pilot age limit would be increased to 65 with additional testing and restrictions, as noted in ICAO AN-WP/6940, 18 October 1994. See also letter to Secretary General, International Civil Aviation Organization, AN 5/16-95-14, 10 March 1995, responding to Task No. MED-7101 (upper age limits for flight crewmembers) International Federation Air Line Pilots Association.

Over a ten-year period, each of the disabling disorders looked at by the JAAs occurred only once or twice a year at the IATA airlines. Over 36,000 pilots were at risk, and yet there had been no accidents. After extensive studies, the JAA decided that grounding a pilot simply for attaining the chronological age of 60 was inappropriate, concluding that only epilepsy, cerebral vascular problems, myocardial infraction and syncap posed a threat of accident from a flight crew point of view. In reaching its conclusion, the JAA relied somewhat on the Hilton Report, which had been sponsored by the FAA.⁶³ The JAA stated:

We have seriously considered pathological age, as alluded to in the FAA Age Sixty Project final report dated March 1993. The assessment of each individual by sex, age, risk factors analysis, blood chemistry is imminently scientifically sensible. This would determine a pathological age. Retirement on increasingly risky grounds would be scientifically correct at a predetermined pathological age. However, this would be impractical to apply from a regulatory or legislative viewpoint. The probability of two pilots over sixty being incapacitated on the same flight has been calculated to be negligible.

Opponents of the Age Sixty Rule have tried on several occasions to get US Congress to intervene on behalf of aging pilots. This tactic has had some success and may have a better chance in the future as society ages and Congress becomes more responsive to older voters. One Congressman who has been active in rooting out this injustice to older pilots is Representative James Lightfoot, a Republican from Iowa. Congressman Lightfoot introduced the House of Representative Bill 3498, which would have raised the mandatory retirement age of FAR 121 air carrier pilots to sixty-five, in the First Session of Congress 1988.⁶⁴ Evidently, the Bill was studied out of existence by the Office of

⁶³ See Hilton Systems, *Age 60 Project, Consolidated Database Experiments, Final Report* (March 1993).

⁶⁴ See H.R. Bill 3498, 101st Session of Congress, 1988.

Technology Assessment, and those leading the fight against age discrimination are now awaiting further congressional leadership in their fight for justice.

With all of the medical and scientific progress that has made in aviation over the years, the industry is still plagued with this almost forty-year-old debate over the mandatory retirement age for pilots.⁶⁵ The idea that a pilot should remove himself or herself from the left seat of commercial aircraft has its roots in the early beginnings of commercial aviation. Tremendous growth occurred in aviation during the First World War and later, when thousands of aircraft became available at very reasonable prices. The aircraft had proved itself as such an invaluable tool during the War that its value to the transportation industry and the opportunity to make a profit enticed governments and individuals to get into the commercial aviation business.⁶⁶

⁶⁵ See *supra* note 37.

⁶⁶ See A.T. Wells, *Air Transportation* (Belmont, CA: Wadsworth Publishing, 1999) at 35-47.

CHAPTER THREE

THE STATES

3.1 State-Sanctioned Discrimination

When the First World War ended, an Aeronautical Commission was established to advise the Peace Conference of Versailles on all air matters and to draft a convention for the general regulation of post-war international aviation. The Paris Convention of 1919⁶⁷ eventually generated the International Commission for Air Navigation (ICON) or, as it is most often referred to, Commission International de Navigation Aeron (CINA). The main task of CINA was to keep the Convention up to date on technical matters affecting aviation. As the results of a Medical Sub-Commission study, it was determined that “a *pilot or navigator* was unfit for commercial airline service after the age of forty-five”.⁶⁸

The resolution adopted as a result of this medical study follows:

RESOLUTION N° 35

The Commission decides to modify as follows paragraphs 1, 2b, 3 and 6 of section V of Annex E of the Convention:

1. Every candidate before obtaining a license as a pilot, navigator, engineer, or member of the operating crew of aircraft engaged in public transport will present himself for examination of specially qualified medical men (flight surgeons), appointed by or acting under the authority of the contracting State.

⁶⁷ See *Convention Relating to the Regulation of Aerial Navigation*, 13 October 1919, 11 L.N.T.S. 173, 1922 U.K.T.S. 2 [hereinafter *Paris Convention*].

⁶⁸ See ICON, *Minimal Standards* (1922), ann. E, art. 13.

2. Medical supervision, both for the selection and the maintenance of efficiency, shall be based upon the following requirements of mental and physical fitness:

a) Good family and personal history, with particular reference to nervous stability. Absence of any mental, moral or physical defect which will interfere with flying efficiency.

b) Pilots and navigators of aircraft engaged in public transport may not enter upon their duties before 19 or *after 45 years of age*.

3. Each Contracting State shall provisionally fix its own methods of examination, until the details and the minimal conditions of the tests shall have been settled by a decision of the International Commission for Air Navigation adopted by the majority provided for in article 34 for modifications of the provisions of the Annexes. Such details and minimal conditions may be modified by the International Commission for Air Navigation by the same majority.

4. ---

5. ---

6. Any aeronaut certificated before the 1st of January 1919, and serving on the 1st of July 1922 in a public transport company, may be retained in the navigating personnel so long as his physical capacities as ascertained at his last medical examination are maintained, unless there be detected a pathological defect capable of causing a sudden accident.

No matter how primitive aircraft used in commercial aviation in the 1920s and 1930s were, setting an absolute age limit of forty-five bordered on a complete lack of understanding of the general operation of commercial aircraft. Indeed, some members on the Sub-Commission Study must have recognized the absurdity of this conclusion because pilots who were already qualified, licensed and flying commercial aircraft and who had passed the age of forty-five were allowed to continue flying.⁶⁹

⁶⁹ See *ibid.*

The danger of aeromedical committees controlled by a government agency, or any other vested interest group with a biased view, is that they can have a very prejudicial effect on the pilot ranks. The recent Robert Hoover Certificate Revocation proceedings are a perfect example of this kind of bureaucratic action.⁷⁰ Robert Hoover, a legendary air performer, had his medical certificate suspended by the FAA for no apparent reason other than his age. The FAA unilaterally suspended Mr. Hoover's second-class medical certificate for more than two years because two FAA officials thought that they observed a deterioration in Mr. Hoover's actions. One of the most peculiar facts involved in this revocation proceeding was that the FAA allowed Hoover to perform 33 additional air show performances before his certificate was suspended.

In an interview by AOPA writer Mark E. Cook, Mr. Hoover was asked what the revocation had cost him. Mr. Hoover responded,

"Well the waking up at night. As we all do, you know. When I would try to go back to sleep, it ran through my mind, how can this happen in this great country of ours? It was impossible for me to comprehend that such an injustice was set up and planned, and then further carried out by the *medical world*, when there was no basis for it. And so it sort of opened my eyes that there are some injustices out there that take place and people can't do anything about them."⁷¹

It took a lawsuit and pressure on the FAA from almost everyone in the aviation community to restore Mr. Hoover's right to fly.

While the FAA denied Mr. Hoover the right to perform at air shows in the United States, other countries allowed his performances to continue. During his more than two years of

⁷⁰ See *Hoover v. FAA*, 43 F.3d 712 (1995).

performing in countries like Australia and Mexico, Mr. Hoover experienced absolutely no flight related medical problems. In October 1995, after a great deal of expense and frustration, the FAA granted Mr. Hoover a restricted second-class medical certificate, allowing him to continue his air show performances in the United States.⁷²

The legacy of this kind of bureaucratic thinking has, in the past, given us such rules as not allowing women or African-Americans to become airline pilots, or doing whatever has been socially and politically correct at the time and offering “expert medical conclusions” as a reason.

3.2 State-Sanctioned Gender Discrimination

The ICON Medical Subcommittee that gave us the age forty-five rule for pilots also found that women were unfit for service as commercial airline pilots.⁷³ The following is the resolution adopted by the Medical Subcommittee:

RESOLUTION No 146

The Commission decides to amend Annex E, Section V, of the Convention by replacing sub-paragraph (c) of paragraph 2 (adopted by Resolution No. 115 at the Fifth Session in Rome, O.B. 5, page 21), by a new paragraph which will become paragraph 2 of Section V of Annex E and will read as follows:

2. The candidate, before undergoing the examination referred to in paragraph one above, must have successfully undergone a preliminary medical examination at which he must have satisfied the following minimal requirements as to physical fitness:

⁷¹ See M.E. Cook, “Justice for Hoover” (1996) 39:1 AOPA Pilot 65-70.

⁷² See FAA News, APA 162-95 (18 October 1995) faa.gov/apa/hisfaa/htm/.

⁷³ See ICON, *Competency of Women for Piloting Aircraft* (1924), ann. 4, s. V.

He must be of *the male sex*, must have complete use of his four limbs, must not be completely deprived of the use of either eye, must be free from any active or latent, acute or chronic, medical or surgical disability or infection. He must be free from injury or wound which might interfere with the safe handling of aircraft at all altitudes and even in cases of prolonged or difficult flight. He must be completely free from hernia, must not suffer from any detectable sensory lesion, and must be free from a history of morbid mental or nervous trouble.

The numbers of the succeeding paragraphs and the letters of the subparagraphs of the paragraph at present numbered 2 will be modified accordingly.

Aviation and legal scholars need to answer the question: Has the psychology and physiology of women changed that much over the years? When answered truthfully, the logical conclusion is that such so-called medical decisions were not based on substantial valid medical research but on what the airline industry and governments at the time perceived was proper. In some instances women still face the discriminatory barriers that prevent them from taking their lawful place in the ranks of aviation. Of the over two hundred airlines operating around the world, less than half have women flight officers.⁷⁴ It took lawsuits to find an airline seat for women in the United States, but these lawsuits have not helped women in countries that hold culturally different ideas about a woman's role in society. Trying to find a woman airline pilot in the Far East, Middle East or the African countries is like looking for the proverbial needle in a haystack. Culture is very difficult to change, even in the modern world of aviation. The double standard used against women in aviation becomes apparent when the safety technique of Crew Resource Management (CRM) is taught in many developing countries. Without attempting to condemn particular parts of the world, the CAA publication *Global Fatal*

⁷⁴ See International Society of Women Airline Pilots, <http://www.iswap.org/> (date accessed: 20 November 1999).

Accident Review 1980-1996 (CAP681) concluded that failure in CRM was the most frequently identified circumstantial factor in fatal accident cases involving African and Asian operators.⁷⁵

The conclusions of the Medical ICON Sub-Commission study were reached with complete disregard for the rights of the individuals they affected. It is likely that, using the same medical conclusions, it could have been determined that African Americans were unfit to command commercial aircraft. There were no African American airline pilots employed by the major airlines in the United States until the mid-1960s.⁷⁶

3.3 The Present

Once again we are facing the age sixty question in commercial aviation. So far, the FAA has failed to address this problem using any common sense. In fact, the FAA has violated its own Age Sixty Rule where foreign airlines are concerned and have therefore created a double standard in the ranks of commercial aviation.⁷⁷ Age sixty waivers for foreign airlines have been granted by the FAA, thus allowing foreign airlines to operate in the territory of the United States with pilots over the age of sixty while at the same time forcing its own airline pilots into mandatory retirement at age sixty.⁷⁸ What kind of credibility does this engender among the ranks of airline pilots in the United States towards the FAA?

⁷⁵ See B. Walters, "HF/CRM Integral or Add-On" (1998) 9:3 Civil Aviation Training 22-26.

⁷⁶ See *Marion D. Green v. Continental Airlines*, 83 Sct. 1022.

⁷⁷ See Letter from K.C. Moore, FAA, Washington, D.C. to Manager Regulatory Affairs, Quantis Airways, Ltd. (14 July 1994).

It has been said many times throughout history that a house divided against itself cannot stand. Or, as Pogo said, "We have met the enemy and they is us".⁷⁹ The Age Sixty Rule and the opposing stand taken by the ALPA in the United States is a perfect example of this statement. The action or inaction of ALPA leadership to the Age Sixty Rule has created a division in the rank and file of ALPA membership. Anyone who is vaguely familiar with the Age Sixty Rule in today's context will tell you that the ALPA is divided on the Age Sixty Rule by the "cockpit throttle quadrant" in the aircraft. In other words, a pilot's opinion on the Age Sixty Rule is determined by whether he or she is a captain, first officer or flight engineer. This is nothing new but it is something that definitely needs to be resolved if the ALPA is to continue its leadership in the brotherhood of the airline profession.⁸⁰

When the Age Sixty Rule was adopted in 1960, junior pilots were able to benefit from the number of senior positions unfilled as older captains were forced to retire. Since the original adoption of the Rule by the FAA, many of these same fortunate pilots have been trying to get the Age Sixty Rule changed to an older age limit, or a limit based not on age but on physical condition. However, most of the pilots who were able to take advantage of the original Rule have long since retired or are serving as flight engineers. The ALPA must have the vision to understand that the Age Sixty Rule has always been unfair and divisive among its rank and file. In fact, it must strive to have this unfair, discriminatory and archaic rule removed from commercial aviation in the United States, as is being done in more and more throughout the world. Without the removal of the Age Sixty Rule as it

⁷⁸ See FAA, Bulletin 92-06 (1992) at 1. B(1).

⁷⁹ See W. Kelly, "Pogo" syndicated daily conic strip character 1949-present.

relates to airline pilots in the United States, the ALPA, with the help of the FAA, is relegating its members to a second-class position in world aviation. With globalization of the airline industry almost certain, the ALPA cannot allow its pilots to negotiate future contracts from a discriminatory position. This means that the ALPA must fight for the rights of American pilots if they are to be treated the same as pilots from other countries.

3.4 The International Scene

The International Civil Aviation Organization (ICAO) adopted the Age Sixty Rule in 1962 during a divisional technical meeting, and the Rule became effective in 1963 as part of the Convention on International Civil Aviation, under Annex One (Personnel Licensing).⁸¹ The adoption of the Age Sixty Rule by ICAO was at the insistence of the US representatives, who received their orders from Washington, DC. Since the United States was by far the largest commercial aviation market in the world, and since the age sixty limitation had been recently adopted as part of FAR 121, the United States was able to put enough pressure on ICAO to force the Organization to change the rule for most of the remaining members. The ICAO membership at that time included over one hundred individual States. It was not the first time or the last that the United States used its leading position and power in the world of aviation to bring about the changes that it felt were necessary.⁸²

⁸⁰ See Steenblik, *supra* note 47.

⁸¹ See ICAO, *Upper Age Limit for Flight Crew Members*, ANC Task No. MED-7101, AN-WP/6538 (1991).

⁸² See *Agreement relating to Liability Limitations of the Warsaw Convention and the Hague Protocol*, 13 May 1966, CAB Order No. 18900, CAB Order E-23680 (docket 17325).

At present, many of the one hundred and eighty-four Contracting States at ICAO no longer find the Age Sixty Rule to their benefit, if in fact it ever was.⁸³ The change in the domestic policy of Contracting States towards the Age Sixty Rule is beginning to put pressure on ICAO to change Annex One of the Convention and remove the age sixty restriction. Bilateral agreements by several contracting States already allow flight crews past the age of sixty to operate aircraft between the two States as well as domestically. Notices of operational differences must be forwarded to ICAO. The United States, acting through the State Department and the FAA, has agreed to waivers of the Age Sixty Rule at least three times with other Contracting States. These include Iceland, Turkey and Corse Air International of France.⁸⁴

Another industry player in the Age Sixty Rule debate is the International Federation of the ALPA. IFALPA, a worldwide federation of national pilots' associations, is structured to provide a democratic forum for developing and promoting a common pilot viewpoint on all matters impacting upon the piloting profession and to provide a system of mutual support for members experiencing difficulties in the social and professional fields.⁸⁵

The Legal Council at IFALPA has rendered an opinion to the organization that reflects the standing of ICAO Annex One governing certification of pilots. In the opinion of IFALPA's Legal Council, the legal system of each and every State is defined within the

⁸³ See ICAO, *Air Navigation Commission*, ANC Task No. MED-7101, NN-WP/7089 (16 January 1996).

⁸⁴ See FAA, Air Transportation Division, *Flight Standards Service* (Washington, DC: FAA, 1994).

⁸⁵ See International Federation of Airline Pilots Associations, admin@ifalpa.org (date accessed: 18 November 1998).

given geographic boundaries of that State.⁸⁶ Filing a difference with ICAO will change the National Aviation Law, but not the International Law. Changing the upper age limit of sixty years from Annex One and operating in the international environment will have the effect of that State being in direct contravention of the Chicago Convention.⁸⁷

The non-adherence by certain States to the Age Sixty Rule as contained in ICAO Annex One will be a direct violation to either ICAO Standards or to another State's national legislation. This can be cause for legal action by either the offended State in terms of its national legislation or by ICAO via the Council of ICAO. As long as the Age Sixty Rule remains in force by ICAO, any State entering international airspace or operating over the high seas will have to adhere to the Annex One standard or possibly be subject to sanctions.

The opinion of IFALPA sums up the position of ICAO and certainly makes the statement that ICAO is in the perfect position to take the lead in changing this archaic rule.

3.5 A Hint of Things to Come

It is difficult to trigger a technical change in the ICAO Standards without the consent of the United States. Until enough pressure is put on the US government to make this change in its own Federal Aviation Rules and Regulations, ICAO will probably continue to apply the age sixty standard, and other contracting States will continue to get around the age sixty provision contained in Annex One. This will happen by the negotiation of

⁸⁶ See Aeronautical Commission of the Paris Conference, 6 March 1919, art. 1.

⁸⁷ See *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S., ICAO Doc. 7300/6.

bilateral or multilateral agreements on a State-by-State basis or through pressure placed on the FAA by the State Department.⁸⁸

In 1991 and again in 1996, the Air Navigation Commission of ICAO performed worldwide studies concerning the position of various member States on the upper age limit for pilots as set out in ICAO Annex One.⁸⁹ These studies were concluded after the Air Navigation Commission was consulted by numerous States questioning the validity of the present upper age limit contained in ICAO Annex One.⁹⁰ The Contracting States wanted to know what other States were doing with older pilots and what changes, if any, had been made to the ICAO Annex One age limit.

The Air Navigation Commission conducted these studies by surveying individual ICAO Member States to determine what their position was in relation to pilots flying past the age of sixty. A questionnaire in the form of a State Letter was sent to Member States, requesting that they submit their position on the age sixty limit contained in ICAO Annex One.⁹¹ The 1991 survey contained four questions for ICAO Member States to answer:

- (1) Is there a need for ICAO to maintain the present specifications concerning the upper age limit contained in Annex One?
- (2) If you think that the upper age limit specifications should be amended, which cutoff age should be set?
- (3) What crew or pilot status should be considered when setting the age limit, pilot-in-command air transport, all crew in transport domestic, all crew air transport international and private pilots?

⁸⁸ See *ibid.*

⁸⁹ See ICAO, *Air Navigation-Working Paper*, C-WP 6538 (5 March 1991) [hereinafter *C-WP 6538*]; ICAO, *Air Navigation Working Paper*, C-WP 7089 (15 January 1996).

⁹⁰ See *Annex One*, *supra* note 81, standard 2.1.10.1.

⁹¹ See ICAO, *State Letter*, AN 5/6-90/72 (17 August 1990).

(4) If a high limit is proposed, or if no age limit is established, should the frequency of medical examinations and flight checks be modified? If so, how often should they be conducted? Age at which the new rule should begin to apply?⁹²

The 1996 survey contained three questions for ICAO Member States to answer:

- (1) According to your national legislation, what upper age limit, if any, is applicable to professional pilots holding an ATP?
- (2) Are pilots older than the limit stated in question (A) allowed to continue their flying career? If you answer yes, list applicable provisions as to special medical and operational requirements, limitations, and conditions.
- (3) Does any final upper age limit apply to these pilots?⁹³

The result of both surveys indicated a split among States on the age sixty issue. The 1991 survey indicated the desire of thirty-one States to change Annex One, whereas twenty-six States were satisfied to let the specifications contained in the Annex remain as they were. The majority of the States indicating a change was in order opted for an age limit of sixty-five. The survey also noted that several States were presently conducting research on the issue of the upper age limit for pilots.⁹⁴ The 1996 survey concluded there is currently a clear trend among Contracting States towards increasing the upper age limit for commercial pilots, as illustrated by the proposed European regulations developed by the JAA. This viewpoint is further emphasized by the fact that many States allow commercial pilots to continue flying beyond the age of sixty years.⁹⁵ It should be interesting to see what changes the United States makes over the next few years in light

⁹² See *C-WP 6538*, *supra* note 89.

⁹³ See *ibid.*

⁹⁴ See *ibid.*, which indicates that Japan, France, the Netherlands and others were conducting research on age limits.

⁹⁵ As related to the author by ICAO Air Navigation Commission, 19 March 1996.

of the fact that over half the States surveyed in 1991 and 1996 were in favor of changing the age sixty limit.

Other States are breaking away from the dictates of the US aviation policies that have become so entrenched since 1947. The Chicago Conference gave the United States an opportunity to become the world leader in commercial aviation and safety.⁹⁶ For the most part, the United States has fulfilled its leadership role over the years, but regardless of the past, change will probably occur in the future. This is more than evident from the lack of adherence to the age limitation set out in Annex One by States finding this archaic rule no longer in their interest.

Just a few of the Member States and other interested parties that wish to change to a higher age limit or remove the age limit completely are:

- (1) Australia: Civil Aviation Order Part 40, ATPL and SCPL no upper age limit but above sixty years may only fly as PIC of an aircraft carrying passengers (in other than private operations) if a copilot who is suitably licensed and endorsed to act as pilot-in-command is carried or if the pilot has passed a flight test within the previous twelve months (six months if over sixty-five).
- (2) Belgium: Considers adopting the upper age limit of sixty-five for one member of a crew comprised of at least two pilots.
- (3) Canada: Licensing of pilots should be based on objective measurements (medical fitness, performance ability) rather than chronological age.

⁹⁶ See M. Milde, "Chicago Convention Fifty Years Later: Are Major Amendments 'Necessary' or 'Desirable' 50 Years Later?" (1994) XIX: I Ann. Air & Sp. L. 401.

- (4) France: Rather than setting a specific age limit, it would be more appropriate to study the problem of medical fitness and to define the biological, functional and clinical examinations necessary after age sixty.
- (5) Germany: The upper age limits may be increased to sixty-five years subject to introducing some safeguards in order to maintain an adequate safety level. Possible safeguards may include operational regulations on crew complement.
- (6) Israel: Copilots are allowed to fly until age sixty-five. Experience has shown that there have been no cases of incapacitation or professional impairments with this group, which has been subject to CAA inspectors observing their training and flight performance.
- (7) Norway: The present upper age limit may be increased to sixty-five years, subject to introduction of certain safeguards.
- (8) Sweden: The present upper age limit may be increased to sixty-five years, subject to introduction of certain safeguards.
- (9) United Kingdom: Filed differences with ICAO to Paragraph 2.1.10 of Annex One. Holders of a United Kingdom professional pilots license are permitted to fly as pilot-in-command of aircraft for the purpose of public transport, regardless of the maximum weight authorized, until their sixty-fifth birthday.
- (10) Japan: Age sixty-five flight tests with older pilots showed no change in safety.
- (11) European Union: The Joint Aviation Requirements for Flight Crew Licensing (JAR-FCL) proposes raising the age restriction for pilots to sixty-five years of age, subject to two-pilot operations where the copilot has not reached his sixtieth birthday and is appropriately qualified on the equipment.

- (12) International Federation Air Line Pilots Associations (IFALPA): IFALPA proposes no age limit, but also proposes specific provisions on whom makes the final decision for a pilot to stop flying.
- (13) Delta Air Lines: Proposes an age sixty-two limit that would not be retroactive.
- (14) Continental Air Lines: The Age Sixty Rule is arbitrary and forces the most experienced pilots into retirement.
- (15) American Air Lines: Keeping the most experienced pilots in American's cockpits would be a step forward in safety.
- (16) Southwest Air Lines Pilot Group: Not in favor of the Rule.

It is obvious from the above declarations that change is definitely taking place in the world of commercial aviation. The United States' insistence on the Age Sixty Rule is placing it further behind other States in the modern way of thinking about age discrimination in the aviation industry. Under the present FARs it would be possible for a US citizen, for example a pilot of an airline in the United States forced to retire by the Age Sixty Rule, to fly for a foreign carrier over the age of sixty and to operate in and out of the United States as a copilot on that carrier. This would be possible because the US is a party of the Chicago Convention and would be required to accept any flight crewmember that is licensed by another Member State. Annex One of ICAO allows copilots and second officers to fly past the age of sixty, only the pilot in command must be under the age of sixty.⁹⁷

The Age Sixty Rule, as envisioned by General Quesada, was for safety reasons. His flying experience in the military with younger pilots and pilots retiring from flying in the military as young as thirty-eight years of age seemed to support his line of thinking on this subject. In the late 1950s and early 1960s new jet aircraft were being introduced, and it was believed by many that the older pilots could not handle these new high performance aircraft. Indeed, there were some pilots who did not make the transition from piston to jet and either left the airline or continued their careers as flight engineers or on piston equipment.⁹⁸ The fear associated with the new jet aircraft transition undoubtedly led to some problems in training. However, the majority of the older pilots going through jet aircraft transition performed their duties quite well and opened up the era of safer commercial jet aviation to the flying community.

IATA addressed the problem of older pilots transitioning to newer aircraft at its Fourteenth Technical Conference in Montreal in 1961.⁹⁹ This study was precipitated by the possibility of many new supersonic transports going into service with the world's international airlines. It found from its research into the subject that the experience and motivation of older pilots was much more important than age in piloting supersonic aircraft.¹⁰⁰ As of 17 June 1995, IATA considered a change in the Age Sixty Rule to a higher age limit to be in the best interests of the international airline industry.¹⁰¹ This change in thinking on the part of IATA was partially motivated by a profit margin, since

⁹⁷ Opinion of Mr. Paul Lamy, Chief personnel Licensing and Training, International Civil Aviation Organization as expressed to Capt. Bary Borell, Vice President, Professional Pilots Association 26 March 1999.

⁹⁸ See IATA, "Symposium on Supersonic Air Transport" (14th Technical Conference, Montreal, 17 April 1961) at 203.

⁹⁹ See *ibid.*

¹⁰⁰ See *ibid.*

savings would be realized in training costs, for example, by keeping pilots past the age of sixty. IATA, to its credit, understands the safety factor involved. Having a more experienced pilot at the controls contributes considerably to the safety of the flight, as has been proven numerous times through accident cause research and reconstruction. There is absolutely no substitution for experience in the cockpit and each time a pilot flies he or she adds to that experience.¹⁰²

3.6 USA Slow to Get the Message

With the rest of the world doing away with the age sixty limitation, why does the United States, through the FAA, continue to adhere to the thinking of the late 1950s? The answer to this question can be found in the FAA's great reluctance to change any rule that could remotely indicate they were remiss in the mandate handed down to them by the US Congress.¹⁰³ That mandate is to promote the aviation industry in the United States and, at the same time, to make sure flying is safe for the general public. At first glance the task assigned to the FAA seems easy enough, but on closer examination there is an obvious conflict of interest created. On several occasions in the past, the FAA has encountered trouble due to its tendency to promote aviation over public safety.¹⁰⁴ The change of the Age Sixty Rule by the FAA would be a no-win situation from their standpoint. Should an aviation disaster happen with an over-sixty pilot at the controls, no doubt some authority would blame the FAA.

¹⁰¹ See IATA, *State Letter*, AN 5/16-95/14 (27 June 1995).

¹⁰² See AOPA Air Safety Foundation, *Flying Light-Twin Engine Airplanes*, No. CO23-109-7/92 (1992) at 191.

¹⁰³ Resulted in the *Federal Aviation Act, 1958*, 72 Stat. 7311, 49 U.S.C. 1301.

Of course, the Courts and Congress face the same problem. Everyone is trying to protect his or her own interests. This same sort of thinking brought random drug and alcohol testing to the airlines at great expense and inconvenience.¹⁰⁵ Interestingly enough, there never has been a scheduled airline crash attributable to either problem.¹⁰⁶ It seems that the FAA must protect its image no matter what the cost and inconvenience to the aviation industry.

There will always be the possibility of a commercial air crash in the foreseeable future, but the likelihood of an experienced older pilot causing the crash for age reasons is negligible. The possibility of an older, more experienced pilot preventing an airline crash is a reality that should be recognized by Congress and the FAA.

For years the FAA has been headed by former career military officers, following in the footsteps of General Elwood R. Quesada, who knew very little about airline flying. When David R. Hinson, a former airline executive and airline builder, was appointed Administrator of the FAA, almost everyone in the airline industry and general aviation community expected enlightened leadership,¹⁰⁷ especially since Mr. Hinson had experience in operating a commercial airline and understood civil aviation and what flying for the airlines entailed. Although Mr. Hinson has accomplished some good work as the Administrator of the FAA, he has not proved to be the visionary the aviation community had hoped for.

¹⁰⁴ See National Transportation Board Accident Reports, DC-10 Certification After Windsor, Ontario Accident (1974).

¹⁰⁵ See G. DiNunno, "Alcohol Testing" (1993) 62:2 Airline Pilot Magazine 28.

¹⁰⁶ See *ibid.*

We now have at least two astronauts flying past the age of sixty.¹⁰⁸ Airline pilots in Great Britain and Australia, as well as several other countries in Europe and Asia, are flying past the age of sixty.¹⁰⁹ In addition, there are test pilots at McDonnell Douglas, Boeing and General Dynamics who are flying past age sixty and doing work more strenuous than an airline captain.¹¹⁰ There is certainly the possibility of an air crash involving these test flights affecting many people, but pilots over age sixty are nevertheless performing the test flights. The stone wall created by Quesada in 1960 is slowly being chipped away even without the leadership of the FAA.

One bright hope for the Age Sixty Rule was the new proposal for "One Standard of Safety".¹¹¹ On 20 December 1995, the new FAR Part 119, Certification: Air Carriers and Commercial Operators, was published in the Federal Register, creating new standards for airplanes seating ten to thirty passengers.¹¹² The FAA, with the help of the ALPA, succeeded in fostering another double standard for pilots in the United States. Basically, FAR Part 119 allows pilots who have reached the age of sixty to continue flying as pilot-in-command for the former FAR Part 135 operator until 19 December 1999. At that time, all operations under FAR Part 121 must be in full compliance with the Age Sixty Rule.¹¹³

¹⁰⁷ Administrator of the Federal Aviation Agency, 1993-1996.

¹⁰⁸ See J.E. Birren & L.M. Fisher, "Rules and Reason in the Forced Retirement of Commercial Airline Pilots at Age 60" (1995) 38:3 *Ergonomics* 518-525.

¹⁰⁹ See *C-WP 6538*, *supra* note 89; ICAO, AN/WP/7089 (15 February 1996), which is a summary of replies to State letter AN 5/16-95/14 with regard to upper age limit for pilots and in particular the experience of States with allowing pilots above age 60 to continue flying.

¹¹⁰ See *EEOC v. Boeing Co.*, 843 F.2d 1213 (1988).

¹¹¹ See Steenblik, *supra* note 47.

¹¹² See FAA, *Rules and Regulations Department of Transportation*, 14 C.F.R. Parts 119, 121 & 135, 26 January 1996, effective 26 February 1996.

¹¹³ See *ibid.*

If it is so unsafe for pilots over age sixty to operate commercial aircraft, then why did the FAA allow this practice to continue until 20 December 1999? The answer to this question is that the Age Sixty Rule is so absurd that, were these older pilots forced to retire, it would draw so much unwanted public attention and criticism to the callous attitude of the FAA that they would have to come up with some realistic scientific basis for the Age Sixty Rule. There is no doubt that several crashes at these 135 operations were caused by inexperience in the cockpit.¹¹⁴ In fact, an older, more experienced pilot would more likely have prevented at least some of these tragic crashes.

Changes in the airline industry are hard to bring about and, for the most part, this is good for safety and everyone involved. In fairness to everyone concerned, the Age Sixty Rule must be changed, as must Annex One. The FAA and ICAO will both lose a tremendous amount of credibility in the world of aviation as long as they force pilots to retire for no reason other than a pilot has reached his chronological sixtieth year.

¹¹⁴ See National Transportation Safety Board, *American Eagle Flight 3379*, DCA95MA006 (13 December 1994).

CHAPTER FOUR

AGE DISCRIMINATION IN THE MILITARY

4.1 Military Pilots, Some Examples

“Blue flight leader, you’ve got a MiG-21, he’s at your six o’clock!” “Look out, he’s firing, break right.” “He missed, he missed.” “Break left lead and he’ll be my bacon” “Missal away, more scrap metal for Hanoi.” Can a forty-five or fifty-year-old person play this game? Should the military allow older pilots to fly such missions?

Piloting a high performance fighter aircraft is one of the most exhausting exercises a person can perform. “After putting your aircraft through every maneuver you can think of to defeat the other pilot and his aircraft, a fighter pilot is completely exhausted and soaking wet with sweat,” says U.S.A.F. Col. Allen C. Ryals. “It is not a game for the old, weak or faint of heart.”¹¹⁵

This is certainly a true observation on the part of Col. Ryals, but be that as it may, the Congress of the United States, as well as other governments worldwide, have enacted laws that protect older people performing this job. How does this affect the military services of the various States? What are the age retirement rules for the military of the various States?

¹¹⁵ Personal Interview with Co. Allen C. Ryals, USAF Fighter Squadron Commander, 1998.

Age limits in the French military are narrowly linked to rank, which is more or less the case in many military organizations throughout the world.¹¹⁶ One of the main differences, however, is whether a person is able to remain in military service at a specific rank. In other words, if a person is not promoted from captain to major, can that person actively serve his or her country?

Pilots in the French military may only continue flying if they earn the rank “that goes with the age.” If they are not promoted, they cannot continue to fly in the French Armed Forces beyond the age indicated below.

Navy Officers:	Age
1. Lieutenant Junior Grade Ensign	52
2. Lieutenant Commander	52
3. Commander	55
4. Captain	56
5. Rear Admiral	58
6. Vice Admiral	60

Air Force Officers	Age
1. Second Lieutenant to Captain	47
2. Major	48
3. Lieutenant Colonel	50
4. Colonel	53

¹¹⁶ Personal Interview with Pascal Ehrlich, Attorney, France, 1998.

5. Brigadier General	55
6. Major General	57
7. Lieutenant General	57
8. General	58

Army Officers	Age
1. NCOs	55
2. Second Lieutenant to Captain	47
3. Major	56
4. Lieutenant Colonel	56
5. Colonel	57
6. General	60

As one can see from the above age limitations, even limits in the French military limits vary regarding when one is forced to retire from flying.

Military service in Great Britain has always afforded a career path that was not for the most part affected by age and promotion. What is wrong with having a fifty-year-old captain as long as he does his work and passes the required physical and mental exams?

German policy towards military personnel is somewhat similar to France as far as age and flying is concerned. If a German aircraft mechanic can perform his job of servicing combat aircraft, he will keep his job.

However, British, German and French military forces are more liberal about allowing older persons to continue in service for their country than are the US Military forces. In the US Military, a person either makes rank or must retire from service.

This seems to be a great waste of manpower on the part of the US Military, which has somewhat of a fast food mentality or instant gratification policy when it comes to personnel. Why must a person retire from the Army, Air Force or Marines just because he or she isn't promoted from Captain to Major within a certain time or by a certain age?

Although the ADEA applies to employees of the US Military, it does not apply to men and women in uniform.¹¹⁷ Congress gave no indication that the ADEA should apply to military personnel, and challenges to age limits set by the military have all been failures.

4.2 Legal Challenges of the US Military

In *Frey v. State of California*, the Court held that the ADEA did not apply to the military department of a state.¹¹⁸ In this particular case, Frey was a uniformed employee of the state of California who had served in the California National Guard for thirty years and had reached the rank of Colonel. In denying Frey's petition, the Court reasoned that "[h]istorically our courts have restricted their review of military decision making out of deference to the special function of the military in our constitutional structure and in the system of national defense".¹¹⁹

¹¹⁷ See *Age Discrimination in Employment Act*, 29 U.S.C. s. 633(a) (1967), and subsequent amendments. (1967), s. 633(a).

¹¹⁸ See *Frey v. State of California*, 982 F.2d 951 (1988).

¹¹⁹ See *ibid.*

When we are dealing with age discrimination in the US Military, we are actually dealing with a separate system of jurisprudence providing for the government and regulation of the military forces.¹²⁰ The Uniform Code of Military Justice is the law that applies to military personnel, but even here there are limits set by the US Constitution.¹²¹ The Supreme Court of the United States has repeatedly emphasized the special status of the military in our judicial system. In *Chappell v. Wallace*, the Court stated, "The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice to some extent parallel: one for civilians and one for military personnel." In 1950, US Congress enacted the Uniform Code of Military Justice, which went into effect in 1951. The Uniform Code of Military Justice superseded the Articles of War and for the first time put the US Military under a single set of laws.

The Military seems perplexed sometimes in how to deal with discriminatory matters and at other times takes the lead in changing things for the better. Nowhere is this more clearly shown than "The Tuskegee Experiment", in which 970 black military aviators were trained to be pilots for the US Army Air Force.¹²²

¹²⁰ See "Military Law" in *Encyclopedia America* (Danbury, CN: Grolier, 1990) at 109-110; *Uniform Code of Military Justice*, 10 U.S.C.A. (1990), s. 801 *et seq.*

¹²¹ See *Chappel v. Wallace*, 462 U.S. 296 (1983).

4.3 Old Soldiers Never Die They Become Astronauts

John Glenn is one soldier who has shown us once again what "The Right Stuff" is made of. In a recent interview, he was quoted as saying, "There were a lot of questions about human capacity in space, doctors even thought that the human eyeball would change shape in weightlessness and you would be unable to see clearly."¹²³ Glenn was a forty-one-year-old Lt. Col. in the US Marine Corps when he was assigned to NASA. During Glenn's 4 hour and 55 minute flight, he answered many of the medical questions being asked at the time about space flight. Glenn became so famous for this flight that the director of the Manned Space Flight Center, Robert Gilruth, refused to let him fly on the Gemini flights.¹²⁴

Glenn says that we now have a chance to answer new questions about space flight. He is 77 years old and is the oldest human ever to be hurled into space aboard a shuttle. According to NASA, one of the main reasons Glenn got the spot on the Shuttle mission is because of his age. In this particular case, being older helped John Glenn realize his dream of flying in space once again.

If NASA can operate shuttle flights into space with crew members in their 60s and 70s, why on earth can't the FAA see the benefit of having older pilots in the cockpit of airliners? With progress being made by older pilots like John Glenn, there will have to be a policy change made very soon at the FAA. Even the casual observer cannot help but

¹²² For more information, contact The Tuskegee Airman Inc., 1 Massachusetts Avenue, NW-Box 15, Washington, DC 20001.

¹²³ See "The Right Stuff Again" [May 1998] Popular Science Magazine 86-88.

¹²⁴ See *ibid.*

notice the age disparity created by the FAA. The Congress of the United States needs to address the age issue that affects older pilots in military service as well as those with the airlines. Other Contracting States at ICAO are in the process of solving many of the age issues affecting their pilots. When will the FAA and the United States catch up? As the Association of Retired Persons (AARP) pointed out to the US Congress, retirement policies based only on chronological age do not take into account individual differences and are discriminatory on their face.¹²⁵

In 1962, for the most part, John Glenn did a superb job of answering questions about space at the age of 41. There is no doubt that this 77-year-old pilot has shown "The Right Stuff" once again and has disproved the skeptic's position against older pilots flying.

It will be interesting to see how the military continues to confront the age issue as the population grows older and a soldier needs to stay in service for financial and other reasons or the military needs certain unique skills possessed by a soldier. There most definitely should be an age limit on the operation of fighter aircraft with the associated stress of a dogfight. Whether or not we should set an age limit in the military for operating cargo and troop transport aircraft is another issue closely associated with mandatory retirement of airline pilots. One would hope that the military services of the world will take the lead here as they did with integrating the military services. As the shortage of military pilots increases, it may become necessary for the military services to keep older pilots on flight status. If indeed this happens, age discrimination in the military may be altered substantially.

¹²⁵ See 138 Cong. Rec. S6, 485 (daily edition 12 May 1992).

CHAPTER FIVE

WOMEN WANT TO FLY TOO

5.1 Sexual Equality and Flight

Why do women want to fly? The truth is that all aviators, whether men or women, black or white, fly because they love it. Amelia Earhart flew for the fun of it; she flew for the joy and beauty of flying above the earth, which excites all aviators, not just men.¹²⁶

Flying is an art form that man was not designed to perform, which is why flying is so exhilarating. Flying beautiful, complex machines in the voids of space above our planet certainly attracts women as much as men. Women have been active in the environment of flight since the inception of the hot-air-balloon and for more than one hundred years before the Wright Brothers invented the airplane. In spite of the many contributions that women have made to aviation, skepticism still remains about their ability to be pilots.¹²⁷

If women have been involved in aviation for such a long period of time, why has society been slow to accept them into the ranks of professional pilots? Both black and white women proved that they could fly aircraft early on in the development of aviation, but this seems to have had an effect opposite of what one would expect. Only very recently have women begun to advance in commercial and military aviation. The answer to the question posed above regarding why women have not been as accepted as men have in aviation is probably more fundamental in nature than we think. If we look at factors

¹²⁶ See A. Earhart, *The Fun of It* (Chicago, IL: Academy Publishers, 1932) at 1-18.

¹²⁷ See E. Thible, *The Aeronauts* (Alexandria, VA: Time-Life Books, 1980) at 49-53.

affecting a male pilot's attitude towards his female counterpart, the most relevant factor is probably rivalry, or competition, for the pilot's seat. Madeleine Sophie Blanchard flew balloons for a decade in Europe, earning her living by performing demonstrations. Yet despite her success, she was never fully accepted by contemporary male pilots.¹²⁸

Since the invention of aircraft, there is no question that female pilots have proven themselves to be skilled, but because of the intense rivalry of flight, they have been forced into a second-class position by their male counterparts. This has almost always been accomplished with the typical male sexist attitude toward women and with the sanction of our society until recently. Although society has not always accepted women pilots to be on par with men pilots throughout aviation history, there have been some women whose flying abilities have forced men to at least sit back and take notice.

There is no doubt that Hanna Reitsch of German Flight Test during World War II could pilot an aircraft as well or better than most men.¹²⁹ In 1937, Reitsch was certified as a test pilot in Germany. During her career in flight testing, she flew virtually every aircraft that Germany developed. In fact, Reitsch was chosen to test the ME 163 rocket plane that had killed so many pilots. At the end of that test flight, during her landing, the aircraft flipped over, resulting in a severe concussion and lacerations to her face and nose. But as a conscientious and professional pilot, she forced herself to remain conscious long enough to write down her findings about the problems she had encountered. Adolph Hitler

¹²⁸ See *ibid.*

¹²⁹ See H.A. Grunwald, ed., *Designer and Test Pilots* (Alexandria, VA: Time-Life Books, 1980) at 60.

rewarded Hannah Reitsch by presenting her with the Iron Cross First Class for her test flight in the ME 163. She was the only woman to ever receive that medal.

On the night of 28 April 1945, as the Third Reich crumbled around them, Hanna Reitch flew General Robert Von Greim, the last commander of the German Air Force, out of Berlin after a secret meeting with Hitler. She had earlier flown Gen. Greim in to meet with Hitler to discuss the final effort of the Luftwaffe. After landing successfully on the rubble-strewn streets of the city, they went to the Fuehrer's bunker to receive last minute instructions. Hitler had given her a cyanide pill to take in case she was captured. When she and Gen. Greim took off in their small aircraft, they were fired at by soldiers bearing rifles and anti-aircraft fire. Due to her flying expertise, she was able to maneuver the small aircraft through the anti-aircraft fire and escape. Captured later, she chose to live and surrendered to the Americans.¹³⁰

After Germany surrendered, Reitsch was stripped of her pilot's license and became a displaced person, like so many other Germans after the war. Her family had been killed during the War and she had very few friends to comfort or help her.¹³¹ Although she later obtained a private pilot's license, she was never able to find a job in flight test. She was a woman and was effectively shut out of flying, while her male contemporaries found work in the airlines or the new German Air Force.¹³² This was true even though Hanna Reitch

¹³⁰ See E. Jablonski, *Air War* (Garden City, NY: Doubleday, 1971) at 117-119.

¹³¹ See D. Piskiewicz, *The Fantastic Flights of Hanna Reitsch* (Westport, CN: Prager Publishers, 1997) at 123.

¹³² See R.F. Toliver & T.J. Constable, *The Blond Knight of Germany* (Garden City, NY: Doubleday Publishing, 1970) at 272.

had flown over twenty different aircraft, from gliders to the ME 163A and 163B Komet rocket planes.¹³³

Hanna Reitch continued to fly after World War II as a private pilot and a member of the German Aero Club, where she flew gliders both domestically and internationally. In addition to her activities in the German Aero Club she accepted a position as aviation aid to Kwame Nkrumah, the first President of the West African Republic of Ghana.¹³⁴ There she set up the National School of Gliding of Ghana 1962 and taught flying. When Nkrumah was deposed by the Ghana Army in 1966, Hanna returned to Germany and continued flying in the German Aero Club until her death from a massive heart attack on 24 August 1978. Had she been a man, there is little doubt that she would have been hired to fly jets for a manufacturer or for an airline following the War.

Another very skilled woman pilot is Jackie Cochran, who proved to be beneficial in organizing and establishing the Women's Auxiliary Service Pilots for the US Military during World War II.¹³⁵ This group of women flew almost every aircraft in the inventory of the US Army Air Force but could not get a job flying after the War ended. In Chuck Yeager's book, *Yeager*, he explains what a great pilot Jackie Cochran was. Going into great detail about the piloting skills of Jackie Cochran, he elaborates on how she set many speed records.¹³⁶

¹³³ See H. Reitch, *The Sky My Kingdom* (London: Greenhill Books, 1955) at 219-222.

¹³⁴ See D. Piszkiwicz, *From Nazi Test Pilot to Hitler's Bunker* (Westport, CN: Prager, 1997) at 125.

¹³⁵ See M. Buchnum Brinley, *Jackie Cochran* (New York, NY: Bantam Books, 1987) at 204.

¹³⁶ See C. Yeager & L. Janos, *Yeager* (New York, NY: Bantam Books, 1985) at 267-288.

After World War II, there were definitely many skilled female pilots available for hire by the commercial aviation industry, but there was also a surplus of male pilots competing for flying jobs. As it turned out, the women pilots of that time were the losers, though not through any fault of their own. The circumstances of the time and the general attitude of most societies were at fault and caused these talented women to miss the great opportunities in flight that were available to their male counterparts after the War.

One interesting note that Jackie Cochran, the famed aviatrix, points out in her book is that women should have been included in the selection of the first astronauts. She felt that if the US government was going to medically test men for space flight, then women should also have been tested. Jackie Cochran always thought that women should be as much a part of aviation as men, and this most certainly would apply to space flight as well.¹³⁷

The US government and NASA chose not to flight test or medically test women for space flight. It would be many more years before the first women astronauts were chosen in the United States. In fact, the Soviet Union was first once again, when Valentina V. Tereshkova was chosen in June 1963.

Jackie Cochran is not the kind of woman to be put off when she believes in something, and she championed women in aviation for many years. Dr. Lovelace, who owned the medical clinic where the male astronauts chosen for upcoming missions were tested, was a personal friend of Cochran's. She contacted Dr. Lovelace and set up a testing program for women that met the requirements for space flight. Ms. Cochran funded much of the

testing of these women out of her own resources, never receiving any help or repayment from her government.

Dr. William Lovelace II, chairman of NASA's Life Science Committee, had the opportunity to attend a scientific symposium in Moscow in October 1960. There, Dr. Lovelace learned that the Russians were not only training men to be cosmonauts but women as well. When Dr. Lovelace returned from the Russian symposium, he was given permission by President Eisenhower to test 24 women as prospective astronauts. Of the 24 women tested in the initial phase of the astronaut physical and mental testing process, 13 passed at levels equal to or above the levels of the all-male Mercury Seven astronauts.¹³⁸

In 1963, two of the women who had passed the Lovelace Clinic Test were called to give evidence to the ongoing congressional hearings into the US space program. Even though they gave an impassioned plea, they were unsuccessful. They quoted from the Lovelace test results and pointed out the flight experience each candidate had, but Congressional thinking towards women in the early 1960s prevailed over reason and none of the women were ever selected. Testifying before Congress that women should not be chosen as astronauts was none other than Lt. Col. John Glynn and Chris Kraft, who later became head of NASA.¹³⁹ With these kinds of odds stacked against the women, there was little chance that any of them would be selected for the space program. Indeed, it would be 25

¹³⁷ See Buchnum Brinley, *supra* note 135.

¹³⁸ See R. Graham, "She Should Have Gone To The Moon" *Sunday Times Magazine* (15 November 1998) 38.

¹³⁹ See *infra* at 46.

years before the first US women ventured into space. Sally K. Ride became the first US female in space aboard Shuttle Columbia in March 1982, thus ending a sad chapter in the history of the US Space Program.

5.2 Long Overdue Changes for Women

The attitude expressed by the US government as well as many other governments toward women in aviation is a sad legacy. This is a direct result of government's discrimination against women based on gender.

When the airlines of various countries finally opened the cockpit to women in the early-1970s, very few were qualified and available, a problem that would not have existed after World War II. This change in attitude by the general public as well as the aviation industry was brought about by political pressure.¹⁴⁰ The women's movement had taken hold in the 1960s and carried with it a political and ideological windfall for women of the 1970s. Yet, obviously this advancement had not come without a price.¹⁴¹

Even now, if we were to examine male dominance in Canada's airline industry, for example, it would not be difficult to find attitudes that still affect women in the cockpit. Change is still taking place in the Canadian airline industry, especially among the male flight crews that comprise ninety-nine percent of commercial airline pilots in Canada.¹⁴²

¹⁴⁰ See *Civil Rights Act, 1964*, title VII.

¹⁴¹ See R.J. Serling, *She'll Never Get Off the Ground* (New York, NY: Doubleday and Co., 1971) at j8-m8.

¹⁴² See S. Render, *No Place for a Lady* (Portage and Main Press, Winnipeg, 1992) at 283.

In Canada, the first woman hired to fly big jets was Rosella Bjornson. Ms. Bjornson was hired by Transair on 16 April 1973 and was the only female airline pilot among 2,800 males for approximately five years. Transair was far-sighted in hiring Ms. Bjornson, who was well-qualified to perform her duties as a flight officer. Five years later, Air Canada hired its first female pilot, after much investigation into the experiences of other airlines around that world that had hired women pilots.¹⁴³

As it turned out, Rosella Bjornson set an exemplary standard as a pilot, but the introduction of women pilots in airlines was not easy. Even though some pilots thought it was about time that women should take their seat up front, male pilots were skeptical about the newly hired women. The male pilots' attitudes were generally divided into general acceptance, conditional acceptance or outright rejection. All women hired by the airlines in Canada faced discrimination in one form or another and were forced to cope with illogical behavior.

Some comments from male pilots indicate that they believed women were different emotionally from men and would cry when things got too tough, or would be thinking of their babies rather than the safety of the passengers and aircraft. Other male pilots wondered about the commitment of women pilots to an airline pilot's career. Were these women taking the seat from a male pilot who would be more committed to the job of flying for the airlines?

¹⁴³ See *ibid.* at 283-285.

The first women pilots for major airlines in the United States faced similar attitudes of resentment from male crewmembers. Roger Rawlings in his book "The Last Airman," points out some of the challenges faced by the first women pilots that flew for major airlines in the United States.¹⁴⁴ These new women pilots were under constant scrutiny by their male counterparts as if the men seemed to think the women would fail in their duty and have to be pushed aside in an emergency. In some cases, men went so far as to try and trip up the women to prove they were inept. In many instances it was not an easy job for the first women commercial airline pilots, no matter what carrier or country they were flying for. Working conditions have improved for women since the 1970s but there is still an attitude, although most of the time well hidden, by male pilots towards their female counterparts.

5.3 Unions Recognize Women

Pilot's Unions over the past 15 to 20 years have come to accept women as equals. Women now hold elected positions with many unions as well as management positions at various airlines. Most unions did not recognize women and minorities without some prodding by the Courts.¹⁴⁵ Unions generally found themselves in trouble with the law because of failure to represent female or minority union members' needs. This was particularly true in the case of women. The one problem that seemed insurmountable was pregnancy.

¹⁴⁴ See R. Rawlings, *The Last Airman* (New York: Harper and Row, 1989) at 92-97.

¹⁴⁵ See *Equal Employment Opportunity Commission v. Delta Airlines*, 578 F.2d 115 (1978); *Trans World Airlines v. Zips*, 582 F.2d 1142 (1978); *INDA v. United Airlines*, 565 F.2d 554; *Harris v. Pan Am*, 649 F.2d 670 (1981).

Neither the airlines nor the unions seemed to understand how to handle pregnancy, especially as far as crew scheduling was concerned. The Canadian airlines did the best they could by handling pregnancy issues using guidelines supplied by other corporations. Many male airline pilots reacted to the pregnancy issue by attacking women pilots for taking a leave of absence to have a baby. They seemed to consider getting pregnant as a form of self-inflicted wound that should not be compensated for. This same attitude condemned women pilots for missing work because of menstruation, marriage, or a sick baby, as well as other uniquely female contours in life.¹⁴⁶

What actually was needed at the time was a working agreement that spelled out exactly what the airline should do when a pilot became pregnant. These contract guidelines are now pretty much in place since women have been flying for the airlines in Canada for over fifteen years. The experience gained from working with the special problems of women is now incorporated into most airline working agreements.¹⁴⁷ At Trans World Airlines, Inc., the guidelines for a pregnant pilot is spelled out in Section 10(e)(1) of the working agreements. That section states:

A flight deck crewmember, upon discovery that she is pregnant, shall promptly notify the Company. Such pregnant flight deck crewmember who continues to meet the standards of Section 16(A)(4) will be permitted, but not required, to continue in the service as an active flight deck crewmember through her twenty-fourth week of pregnancy. A pregnant pilot who elects to continue in active flight status must submit to the Company, prior to her next flight, a written medical release from her physician confirming her medical fitness to perform as an active flight deck crewmember for the following six-week period. Thereafter, she must continue to submit a written medical release from her physician confirming her medical fitness to perform as an active flight deck

¹⁴⁶ See Render, *supra* note 141 at 283-285.

¹⁴⁷ See *Agreement Between Trans World Airlines, Inc. and the Airline Pilots in the Service of Trans World Airlines, Inc.*, 1 September 1998, Maternity Leave, at 114(E).

crewmember for each following six-week period. Should the pilot elect to withdraw from active flight status due to her pregnancy prior to her twenty-fourth week, she shall immediately notify the Company.

A flight deck crewmember who has ceased to perform flight duties pursuant to Paragraph (10, above, shall utilize her accumulated sick leave and, upon exhaustion of their sick leave, be placed on a medical leave of absence for the remaining term of their pregnancy and for a period of up to six weeks following the birth of the child or eight weeks if delivery is by cesarean, while the flight deck crewmember is on paid or unpaid leave, she shall be entitled to the same terms and conditions of employment as would be applicable to any other illness or disability.

A flight deck crewmember covered by this paragraph (E) is expected to return to active flight status within six weeks following the birth of the child or eight weeks if delivery is by cesarean. Unless she is unable to return for reasons due to health, in which case the provisions of the agreement pertaining to the use of sick leave and the granting of extended medical leave shall be applicable. A pilot who makes written application prior to the end of six or eight week period in paragraph (2) above, shall be granted a personal leave of medical leave of absence through the end of the sixth calendar month following the month in which the child was born.

Return to active service in a flight deck operating crew position shall be subject to provisions of Section 18(2) and Section 17(10) governing training and qualifications.

In addition to contracts governing pregnancy of flight crewmembers, provisions have been included in most modern working agreements that now allow a male spouse to take paternity absence from work. This is also extended to pilots who have adopted a child not already living in the home of the crewmember.¹⁴⁸

Even with the discriminatory attitude of many male pilots, the group of women now flying in the Canadian airline industry have proved themselves beyond question. Even though airlines in Canada were somewhat slow in hiring women, they are now trying to

¹⁴⁸ See *ibid.* These agreements are now found in working agreement with all major airlines.

overcome these past discrepancies and when qualified women pilots can be found they are being hired.¹⁴⁹

Women have struggled for equality in the air for as long as we have had flight. As was pointed out in Chapter Two of this thesis, women have been discriminated against in aviation openly by their own governments, as well as international organizations.¹⁵⁰ The Commission Internationale de Navigation Aerienne, created at the Paris Convention of 1919, to study international aviation legal problems, specifically singled out women as being unfit for flight duty. Resolution Number One Hundred Forty Six of the Medical Sub-Commission specifically states that “any candidate under this part must be of the male sex.”¹⁵¹

5.4 Legislation Has Helped

Only in the last fifteen years have women achieved some semblance of equal treatment in aviation. This equal footing with their brother aviators has come at considerable cost and that cost continues until this day.

Over thirty years have passed since the passage of the *Civil Rights Act* of 1964.¹⁵² The original intent of the *Civil Right Act* was to remedy personal injustice, particularly against Negroes, who had been subject to so much prejudice throughout the history of the United States.

¹⁴⁹ See Render, *supra* note 142 at 282.

¹⁵⁰ See ICON, *supra* note 72.

¹⁵¹ See *ibid.*

¹⁵² 18 U.S.C. s. 241 (1988), and subsequent amendments.

In an effort to defeat the civil rights legislation, Representative Howard Smith of Virginia, who was at the time Chairman of the House Rules Committee, introduced sexual discrimination as part of the bill before Congress.¹⁵³ We of course know from history the introduction of sexual discrimination did not defeat the Civil Rights Bill and remains a firm part of society's intent to rid itself of sexual prejudice to this day.

One of the problems that has beseeched Congress and the Courts since the introduction of sexual discrimination in Title VII has been the lack of guidelines about what sexual discrimination is and what it isn't. The plight of women has been basically ignored in this country, at least since the ratification of the Nineteenth Amendment to the Constitution on 18 August 1920, giving women the right to vote. The problem of sexual discrimination has become more apparent in recent years. The addition of more and more women into the workforce of the country, as well as women entering what were formerly all male areas of the Military, has resulted in problems.

The *Civil Rights Act of 1991* has generated renewed interest in civil litigation involving sexual discrimination.¹⁵⁴ Congress has delegated to the Courts the responsibility of interpreting this new legislation as it applies to various civil actions founded in discrimination. From the number of cases being filed, it is apparent that guidelines covering sexual discrimination are developing rapidly. The *Civil Rights Act of 1991* will

¹⁵³ See *History of the Civil Rights Act of 1964*, the Congressional Record daily edition. For subsequent modifications and revisions to the Act, see 42 U.S.C.S. 2000; W.B. Dickinson, Jr., *Congress and the Nation*, vol. 2 1965-1968 (Washington, DC: Congressional Quarterly Service, 1969) at 538 *et. seq.*; F.N. Magill, *Great Events From History II*, vol. 3, 1945-1967 (Salem, NJ: Salem Press, 1994) at 1229-1234.

spawn litigation in two ways. First, plaintiffs and employers will seek to define parameters of the new law and challenge the respective positions. Secondly, and more significantly, suits alleging sexual discrimination will increase dramatically with the prospect of recovering compensatory and punitive damages allowed under the new *Act*.

Litigation under the new Act is moving at a very rapid rate. In the first quarter of fiscal year 1993, more sexual harassment complaints were filed with the Equal Employment Opportunity Commission. (EEOC) than in 1992.¹⁵⁵ The EEOC received a record 19,160 charges during the three months from 1 October 1992, until 1 December 1992.¹⁵⁶

Opponents of the *Civil Rights Act of 1991* were afraid that the *Act* would burden the jury trial system allowed under the *Act*. The opponents' fear was based on the possibility of runaway damage awards, which may in fact be justified if one looks at the number of cases filed with the EEOC. However, what one must not lose sight of is the rights women now have at their disposal to address issues long overdue on their behalf.

If we take a gender cross-section of aviation throughout the world we find that there is still blatant discrimination towards women in aviation. This is particularly true in States where cultural differences place women on the bottom rung of society's ladder. This is particularly true in States that have not granted women equal employment status with men. As I complete this thesis, a young lady in my Airline Management graduate class is

¹⁵⁴ See A. Julano, "Did She Ask for It?" (1992) 77 Cornell L. Rev. 1558-1562.

¹⁵⁵ The EEOC was created by Title VII of the *Civil Rights Act* of 1964, 78 Stat. 241; 42 U.S.C.A. 2000a. The purposes of the Commission are to end discrimination based on race, color, religion, age, sex or

trying to become the first female pilot to be employed by Air Afrique. This female student now meets the qualifications for employment by most airlines throughout the world. It will be interesting to see if Air Afrique breaks its tradition of hiring only male pilots. Air Afrique is owned by eleven African States, the French Development Bank, DHL and the Abidjan Catering Company. Air Afrique was established 28 March 1961 and has never employed a female pilot. This cultural discrimination towards women also flourishes in our more modern and enlightened societies and is not limited to developing States.

5.5 Legacy of Discrimination

Discrimination against women in the United States is continuing. This is true even after a great deal of equal rights legislation and the highly publicized progress that some women have made in the field of aviation. Nowhere is this problem more obviously reflected than in the aviation training institutions throughout the country, including the leading US military academies.

If we take a look at the enrollment demographics of aviation training schools throughout the United States, we will find that less than one in ten students are of the female gender. This is true even though women have been flying in the United States since Blanch Scott first soloed at Hammondsport, New York, on 2 September 1910.¹⁵⁷

national origin in hiring, promotion, firing, wages, testing, training, apprenticeship and all other conditions of employment..

¹⁵⁶ See United States, Department of Justice, Alert No. 5-8 (1992).

¹⁵⁷ See W. Gunston, *Chronicle of Aviation* (London: Chronicle Comm. Ltd., 1992) at 78.

One of the oldest and most prestigious flight training schools in the United States is Embry Riddle Aeronautical University, founded in 1926. It has two campuses, one in Daytona Beach, Florida, and another campus in Prescott, Arizona.¹⁵⁸ Embry Riddle is the largest flight school in the United States with enrollment varying between five and six thousand students. Enrollment at Embry Riddle, which is a private eleemosynary institution, is of great importance to the University. This is so because most university funding comes from student tuition fees.

In an effort to target future students and to track those students enrolling at the University, the Office Institutional Research has tracked gender enrollment for almost ten years.¹⁵⁹ The statistics on women learning to fly at Embry Riddle are quite dismal, indicating that only 10% of students at Embry Riddle are female. This is true even though women and minorities have been targeted for primary consideration as potential university candidates.

Flight Safety International, another leading flight training institution in the United States, trains pilots for airlines in the United States and throughout the world. Statistics on gender enrollment at the Vero Beach, Florida, Flight Academy, parallel the gender statistics at Embry Riddle. Only one in ten student pilots enrolled at the Flight Safety Academy is female.¹⁶⁰ These statistics are quite troubling. Flight Safety International is a

¹⁵⁸ See Embry Riddle Aeronautical University, *Hand Book* (Daytona Beach, FL: Embry Riddle, 1997) at 3.

¹⁵⁹ See Embry Riddle Aeronautical University, *Institutional Research Publications (1989-1999)* (Daytona Beach, FL: Embry Riddle, 1998) at 2 *et. seq.*

¹⁶⁰ See Flight Safety International, *Flight Safety International Racial Ethnicity Breakdowns (1996-1997)* (Vero Beach, FL, Flight safety International publisher, 1996) at 1 *et. seq.*

dynamic organization that pursues flight students throughout the world using every modern advertising technique possible.

One of the newest training schools for pilots in the United States is the Heart of Georgia Technical Institute, located in Eastman, Georgia. The State of Georgia funds this particular school, which is perhaps the only State-funded pilot training school in the United States.¹⁶¹ The Heart of Georgia Technical Institute is one of the most modern state of the art pilot training facilities anywhere. Money from the Georgia State Lottery is earmarked for education, and students do not pay tuition at the Institute. Student enrollment for the almost two years that the pilot training facility has been in existence has had no female pilot trainees.¹⁶²

If we take only a casual look at these statistics, it becomes apparent to those willing to observe the statistics with an open mind that women in the United States are not standing on an equal footing with men, at least as far as aviation training is concerned. Yet, women consistently outperform ninety-five percent of the men in both academic and flight courses. Some women have an initial shyness at the controls of aircraft, but any good flight instructor can eliminate this problem within the first couple of hours of flight instruction. Women have a smooth touch on the flight controls that is sometimes difficult for male students to master. A smooth technique has always been a plus when flying - just watch Bob Hoover perform his Aero Commander Strike routine - but in instrument conditions or with the modern sophisticated aircraft of today it is even more of a plus.

¹⁶¹ Located at Heart of Georgia Technical Institute, 109 Airport Road, Eastman, GA 31023, USA.

¹⁶² As related by HGII Chief Flight Instructor Chris Davis to Author, March 1997.

In addition to looking at the statistics from these three outstanding aviation-training institutions, we also need to take a look at our prestigious US military academies and the Reserve Officer training schools located on university campuses throughout the United States.

The Military has always been a source of pilots for the airlines and corporations. As it turns out, this is a very narrow corridor for women to take in pursuit of a career as a pilot either for the airlines, corporations or the military.¹⁶³

When looking at the US military academies and Reserve Officer Training Core (ROTC) statistics, we must take into account that these schools are not only training the future pilots for our Military but are also training our future line officers for duties other than flying. This makes it a little more difficult to project statistical differences of who will be a pilot upon graduation from the academies and R.O.T.C. programs, but we can look at the number of these graduates entering the military service as pilots. When we project these statistics, we find that they are quite in line with civilian training schools.

5.6 Problems in the Military

Why has it been so difficult for women to take their place in military flying? One rather crude example of why women in the Military face so many barriers can be explained by examining US Congress Representative Nita M. Lowey's letter to the Air Force,

¹⁶³ See A. Laboda, "Kelly Hamilton" [March 1998] AOPA Pilot 136.

outlining their unfair treatment of Pilot First Lieutenant Kelly Flinn.¹⁶⁴ In her letter, Representative Lowey states:

We are here today to call upon the Air Force to drop its charges against Kelly Flinn and allow her to leave the military with dignity. Our message to the Air Force is very clear: Drop the charges against Kelly Flinn and grant her the honorable discharge that she deserves.

Kelly Flinn is not innocent but neither is the Air Force. This case has been bungled from the very beginning. The Air Force should have offered Kelly Flinn counseling, warnings and a transfer. Instead it has thrown the book at her, treating her like a criminal. The Air Force could have saved Kelly Flinn's career instead it has helped to destroy it.

This is a very delicate moment in the history of military gender relations. Tailhook and Aberdeen have seriously tainted the Armed Forces and this case has further cast a further pall on the ability of the Armed Services to successfully integrate women in its ranks. There is no question that the Air Force should put this case behind it and begin a serious re-examination of its fraternization policies and its military justice system.

Kelly Flinn must take responsibility for her actions. Her punishment will be a discharge from the institution she loves. The Air Force must also take responsibility for the way it has mishandled this case by granting Kelly Flinn the discharge she deserves. Justice demands no less.¹⁶⁵

All Lt. Flinn's troubles were brought about by an affair that she had with a married enlisted man. Lt. Flinn, the nation's first female Boeing B-52 pilot, was facing a possible dishonorable discharge and imprisonment for almost ten years if she didn't resign. Had it been a man in uniform instead of a woman, nothing at all would have been made of the affair. It would be difficult to find someone who would believe her indiscretions affected our national security, and it certainly did not hurt the men and women in the Air Force.

¹⁶⁴ See Letter from US Congress Person Nita M. Lowey to US Air Force Chief of Staff, 1997.

¹⁶⁵ See *ibid.*

Had the United States become involved in a serious world conflict where it needed every B-52 pilot, this case would definitely have taken a different turn. Lt. Flinn would be able to do what she was trained for - defend her country as part of her beloved Air Force. What is so ironic about this case is that Lt. Flinn's Commander in Chief, President Bill Clinton, is an admitted adulterer and has been under fire from sexual harassment charges from more than one of his former subordinates!¹⁶⁶

Even though the US Air Force began accepting women for pilot training in 1977, it was not until 1987 that Great Britain began training women pilots. It had been over forty years since a woman flew for the Royal Air Force.¹⁶⁷

Why has it taken Great Britain so long to recognize the ability of women to operate military aircraft? Part of the problem, according to RAF sources, is budgetary restraints on flight training, although this does not really constitute a valid reason for discriminating against women wanting to fly for their country.

European countries have been somewhat slow to come to terms with training women military pilots, but it now appears to have begun. In 1986, the first female NATO fighter pilot completed the NATO fast-jet course in the United States. Once gender barriers are broken by one NATO country, it will not be long before they fall elsewhere. Now European countries are forging ahead and training excellent women pilots. This has taken place even though doubts were raised about a woman's physical ability to operate aircraft

¹⁶⁶ See "House Panel Releases Final Impeachment Report" *Reuters* (16 December 1998).

¹⁶⁷ See W. Mills, "Young Women Who Want To Fly With The Air Force" (1987) 16:2 *Aviation News* 84.

under military conditions. Air Vice-Marshal Peter Howard, as late as 1987, used this medical diagnostic evaluation of women in an attempt to deny women military flight status. "Possible limitations upon the use of women in fast jet aircraft may be caused by their different anthropometry and lesser physical strength", Howard says. He goes on to say, "Female tolerance of environmental distress, the effect upon their reproductive function and the psychological aspects should also be weighed".¹⁶⁸ Most people now realize that flying jet aircraft is not physically incompatible to women. To quote pilot Chuck Yeager, "a person's reproductive organ doesn't determine the quality of pilot they will make. What does determine the quality of pilot is the desire to be a pilot and hard work."¹⁶⁹

One of the major problems facing women in aviation, whether it be in the armed services, or corporate or commercial aviation, is the consequence of there being such a small overall percentage of the pilot group. The direct result is that when one woman pilot makes a mistake, the whole group of women pilots are tarred with the same brush by their detractors. This same problem faces other minority groups throughout society and has deep-seated roots in society's personal prejudices.

The Military has historically treated women unfairly in many ways. Even when women were finally given the right to be a part of the Military, there were still many obstacles to overcome. Executive Order 10240, issued by President Harry Truman on 27 April 1951,

¹⁶⁸ *Ibid.*

¹⁶⁹ See M.B. Brinley, *Jackie Cochran* (New York: Bantam Books, 1987) at 324.

is a good example of just how disenfranchised women were in the US Military until only recently. The *Act* reads as follows:

By virtue of the authority vested in me by the Army-Navy Nurses Act of 1947 and the Women's Army services Act of 1948 and as Commander in Chief of the armed forces of the United States, I hereby prescribe the following regulations governing the separation from the service of certain women serving in the Regular Army, Navy, Marine Corps or Air Force.¹⁷⁰ The commission of any one woman serving in the Regular Army, the commission or warrant of any woman serving in the Regular Navy or the Regular Marine Corps, and the commission, warrant, or enlistment of any woman serving in the Regular Air Force under either of the above-mentioned acts may be terminated, regardless of rank, grade, or length of service, by or at the direction of the Secretary of the Army, the Secretary of the Navy or the Secretary of the Air Force, respectively, (1) under the same circumstances, procedures, and conditions and for the same reason under which a male member of the same armed force and of the same grade, rating or rank, and, and length of service may be totally separated from the service by the administrative action, whether by termination of commission, termination of appointment, revocation of commission, discharge, or otherwise, or (2) whether it is established under appropriate regulations of the Secretary of the department concerned that the woman (a) is the parent, by birth or adoption, of a child under such minimum age as the Secretary concerned shall determine, (b) has personal custody of a child under such minimum age, (c) is the stepparent of a child under such minimum age and the child is within the household of the woman for a period of more than thirty days a year, (d) is pregnant, or enlistment, given birth to a living child; and such woman may be totally separated from the service by administrative action by termination of commission, termination of appointment, revocation of commission, discharge, or otherwise.¹⁷¹

This *Act* itself is completely against women's rights and was apparently written by men having no regard for women in the Military. The *Act* has been changed by more recent legislation and court cases. For example, in *Frontiero v. Richardson*, a servicewoman's application for increased quarters allowances and medical and dental benefits for her husband as a dependant was denied because she failed to demonstrate that her husband

¹⁷⁰ See *Nurses Act 1947*, 61 Stat. 4; *Women's Armed Services Integration Act 1948*, 62 Stat. 356.

¹⁷¹ See Executive Order 10240, 27 April 1951.

was dependant on her for more than one-half of his support, as required by rules governing quarters allowance and medical and dental benefits.

Frontiero instituted an action in the United States District Court for the Middle District of Alabama, contending that the statutes, which allowed a serviceman to claim his wife as a dependent for such benefits without regard to whether she is in fact dependent upon him for any part of her support, unreasonably discriminated on the basis of sex in violation of the due process clause of the Fifth Amendment. The three-judge panel upheld the statute and the appeal was allowed.

The US Supreme Court, eight members sitting, did not agree on an opinion, but did agree that the judgment should be reversed on the ground that the difference in treatment between servicewomen and servicemen under the statutes constituted an unconstitutional discrimination against servicewomen.¹⁷²

Women have been historically thought of as the weaker sex and treated as such by society. Our literature is full of examples of women being weaker. Even our spoken language has numerous examples of placing women socially beneath men (*e.g.*, airhead, wossey, shela, sissy, etc.).

Women are to this day exploited in some of the best selling movies, books and magazines. All one has to do is walk into the local bookstore or convenience store to find

¹⁷² See *Sharon A. Frontiero and Joseph Frontiero, Appellants v. Elliot L. Richardson, Secretary of Defense, et. al.*, 411 US 677, 14 May 1973.

stack after stack of sexually explicit books and magazines, such as *Hustler*, *Playboy*, and other expletive pulp. Every video store has row after row of movies exploiting women. The storyline in all of these movies is basically the same: women are to be sexually violated and treated with little or no respect. Most of these expletive movies, magazines and books are made and printed in the United States, and people around the world learn about America from this trash. It is no wonder that the United States is considered the Great Satan by many. What message does this send to the public, and more importantly, what message do these books and movies send to the children and young adults of the world? If women are allowed to be exploited and treated as objects for sexual use and abuse, their equal status with men will never be fully achieved.

The big issue that women in the United States have faced since President Truman gave them equal military treatment has been with pregnancies. In *Crawford v. Cushman*, a former servicewoman sought declaratory relief and a writ in the nature of mandamus to compel her reinstatement in the Marine Corps after being discharged under an allegedly unconstitutional regulation mandating discharge for pregnancy. The lower court held in favor of the Marine Corps, but on appeal the decision of the lower court was reversed.

On appeal the Circuit Judge held that the Constitutional validity of the regulation was subject to judicial review; that the regulation was invalid on both equal protection and due process grounds; and that the plaintiff's remedy at law for damages appeared wholly adequate relief in respect to her request for an order compelling reinstatement for the

limited purpose of finishing out the approximately 20 months of tenure remaining to serve after her discharge.¹⁷³

Such cases have helped women in the service of their country and have put them on a somewhat equal footing with their brother servicemen. Women now get benefits and are treated openly with equal respect but below the surface there is still a great amount of prejudice towards women in the Military. One area that has been the subject of heated debate recently is the right of women to serve on front line aircraft, ships and in hand-to-hand combat.

5.7 The Gulf War

The Gulf War gave US women their first experience in combat areas with men. Women performed a wide range of tasks throughout the deployment area before, during and after hostilities. Women were stationed in units close to the northern border of Saudi Arabia and served in units that crossed the border into Iraq and Kuwait during the air and ground wars.

Women filled a variety of jobs, ranging from medical positions to aircraft weapons assembly and loaders. Along with men, women performed generic deployment-related tasks and handled the work well. These tasks included building bunkers, putting up and tearing down tents as well as burning human waste. There was some concern about whether or not the women would be strong enough to handle these tasks because of

¹⁷³ See *Stephanie Crawford v. Robert E. Cushman, Jr. Commandant, United States Marine Corps*, 531 Fed. Rep., 2d 1114.

strength limitations. Women chose to overcome heavy tasks using teamwork, and physical strength was never an issue.

This was also the first war that women from the United States flew aircraft in combat. Their performances here proved to be just as good as the men, and restrictions on women flying in combat for the Army, Navy and Air Force are now being lifted.

One new hope for women in aviation is the new Administrator of the Federal Aviation Agency, Jane Garvey. Vice President Al Gore and Transportation Secretary Rodney Slater swore in Jane F. Garvey as the 14th Administrator of the Federal Aviation Administration. Garvey will be the first female administrator of the agency and the first to serve a five-year term. Garvey has served as Director of the Logan International Airport in Boston, Massachusetts, and as Administrator of the Federal Highway Administration. It will be very interesting to see what new enlightened ideas Ms. Garvey brings to the men and women in aviation in the United States and elsewhere.¹⁷⁴

It is only recently that Congress and the legislatures of the many States began to give women equal standing before the law with men. Prior to this, women were given a special standing that in actuality turned out to be quite unequal to that of their brothers. These new changes, at least in the letter of the law, are obvious from the more recent law text. All one has to do is pick up a recent edition of a law book for example, one covering divorce, alimony and child support, to see these changes.¹⁷⁵

¹⁷⁴ See Federal Air Surgeon's Medical Bulletin, 97-3 [Fall 1997].

¹⁷⁵ See D.E. McConaughy, *Divorce, Alimony and Child Custody* (Atlanta, GA: Harrison Co., 1998).

Amelia Earhart once said, “men might, rather vacate the arena altogether than share it with a woman.”¹⁷⁶ When we take time to look at all of the problems and barriers women have had to endure to stay aloft, you wonder why there are any women pilots at all.

¹⁷⁶ See T.H. Stiehm, *Bring Me Men and Women: Mandate for Change at the United States Air Force Academy* (Berkley, CA: Univ. Calif. Press, 1981) at 9.

CHAPTER SIX

RACIAL DISCRIMINATION IN AVIATION

6.1 The Early Years

Since the Wright Brothers' first flight, African American men and women have dreamed alongside their white brothers and sisters about the thrill of flight. In the racially segregated United States of the first part of this century as well as many other places around the world, becoming pilots proved to be a very difficult task for blacks.

The United States is not the only country where minorities have had a difficult time learning to fly. In the former Soviet Union, minorities were treated with disrespect while the Slavs received the best that society could offer. In their book *Ethnic Minorities in the Red Army*, Alexiv and Wimbush point out that racism is as prevalent in a socialist society as it is elsewhere. The book's surveys and interviews from people who either migrated or escaped from the former Soviet Union show that discrimination against Soviet Muslim peoples, Georgians and Armenians was common. For instance, Slavs refer to their darker skinned brothers and sisters as *churkas*. In the Soviet Military the *churkas* were given the most menial tasks, such as latrine duty, were the last to eat in the dining room and were always given the worst billets. During the Cold War, the US Central Intelligence Agency was very interested in the racial disharmony in the Soviet Union. They wondered whether in the event of war the minorities in the Soviet Union would support the country. The

surveys actually found that minorities were treated worse by lower class soldiers than by officers, especially when working in a highly technical field.¹⁷⁵

Most European countries embraced the new science of flight to a much larger degree than did the United States. Progress by the United States in aviation lagged behind Europe from the time of the of the hot air balloon until World War II.

France was not only a leader in the development of aviation, but the country also took a somewhat color blind or liberal approach to allowing people of other races to join their society. This was especially true during World War I when France needed all the help she could get in her struggle against Germany and others. The French Foreign Legion as well as other branches of the French military is a good example of France's attitude about using soldiers from other countries throughout the world.

Eugene J. Bullard, a young black man from Columbus, Georgia, was one such man that fought for France in World War I.¹⁷⁶ Bullard grew up in the segregated southern part of the United States where lynching and beatings of blacks were common. Bullard's own father had been taken from his home during one of the many Negro purges. This so frightened Bullard that even though his father was released unharmed, he decided to leave the United States and move to France, which he eventually did.

¹⁷⁵ See A.R. Alexiev & S.E. Wimbush, *Ethnic Minorities in the Red Army* (Boulder, CO: Western Press, 1988) at 181-183.

¹⁷⁶ See P.J. Carisella & J.W. Ryan, *Black Swallow of Death* (New York: Marborough House, Inc., 1978) at 153-160.

Bullard developed a love for France and when war broke out in Europe, he volunteered to fight in the trenches. He was wounded twice fighting for his beloved France and was awarded the Croix de Guerre.

When Bullard recovered from his wounds, he transferred to the French Air Service and in 1916 became a pilot assigned to Escadrille Lafayette Space 93 of Group Brocard. Bullard continued to fly for France but when the United States entered the fray, there was a rumor that every American pilot flying for France would be offered a transfer to the American Flying Service.

Bullard applied for a transfer to the American Air Service from the Lafayette Flying Corps, along with other Americans who had been flying for France. Unfortunately for Bullard, the United States had no Negro officers and didn't intend to allow him to be the first.¹⁷⁷

How could the United States admit all of the white American pilots flying for France, but not one black American flyer? The answer is that the US Military used the medical profession to exclude Bullard. Bullard was given a flight physical and was found unfit to operate US aircraft. The physical he was given was almost comical in nature and although he was told that he had passed the physical, he never received a call to pilot status, but watched dejectedly as all his white American comrades got their orders to report. It should be obvious even to the least astute among us that Negroes were

¹⁷⁷ See *ibid.* at 182-183.

systematically excluded from being hired as flyers by the US Army in 1917, using among other things the medical exam excuse, “unfit for medical service.”

The US Military used the medical profession to cover up their racist policy towards blacks. Eugene Bullard’s case would not be the last time that bogus medical requirements were used to keep not only black men from flying for the military but also to keep women as well as older pilots from flying. The medical profession has prostituted itself over the years for unworthy reasons and in many cases has completely disregarded the Hippocratic Oath.

6.2 Between the Wars

After World War I, blacks in the United States continued to encounter problems learning to fly and working in aviation. Bessie Coleman, born to a sharecropper’s family on 26 January 1893, in Atlanta, Texas, was the world’s first black female pilot and the first woman to receive an international pilot’s license.¹⁷⁸

Due to the fact that she was black, Coleman could not get admitted to a flying school in the United States. She loved flying and had read all the accounts of her hero pilot, Eugene Jacques Bullard, who had flown for the French in World War I. Finally giving up on learning to fly in the United States, Coleman made the decision to go to France, a country that she believed treated people of color fairly. She took flying lessons from French pilots and earned a pilot’s license from the Federation Aeronautique Internationale in 1921.

Bessie Coleman returned to the United States in 1922 and started the process of opening a flying school where blacks could train to become pilots. Had Bessie Coleman's life not ended tragically while performing a flight exhibition in Jacksonville, Florida on 30 April 1926, she certainly would have succeeded; Ms. Coleman was attempting to earn money to support her flying school.

Blacks continued to fight prejudice both in and out of aviation during the years before World War II. Segregation was as prevalent in the US Military as it was in civilian life.

William J. Powell, author of the book *Black Wings*, published in 1934, tells of the difficulty he had in learning to fly. Any white person with money could learn to fly almost anywhere in the United States in the 1920s or 1930s, but a black person could not.¹⁷⁹

Powell, a middle-class American, went to Los Angeles, California, to learn to fly. California has always been a State ahead of its time, and in 1928 the Warren College of Aeronautics accepted Powell as a student.

James H. Bonnig, the first black pilot to fly an aircraft coast to coast in the United States, experienced the same prejudice that Powell had encountered when he tried to obtain flight instruction. Bonnig, born in Canton, Oklahoma, in 1900, studied engineering for two years at Iowa State College before becoming interested in aviation. Flight schools in

¹⁷⁸ See B. Coleman, *Soaring Above Eagles* (Washington, DC: Smithsonian Institution Press, 1996) at xix.

¹⁷⁹ See W.J. Powell, *Black Wings* (Washington, DC: Smithsonian Institution, 1994).

Chicago, Minneapolis, Kansas City and St. Louis rejected him. Through persistence and persuasion, Bonnig was able to talk Raymond Fisher of Des Moines into giving him flying lessons. Bonnig continued to fly, even though he felt the pressures of segregation and the Jim Crow attitude almost everywhere he went.¹⁸⁰ When in 1926, the Department of Commerce began licensing pilots, Bonnig found out about the licensing process and became the first licensed black pilot in the United States.

One of the ironies of prejudice toward black pilots in the United States is that other nationalities and races were freely admitted. Japanese, Chinese, Indians and others learned to fly in the United States. In some cases, this skill learned in the United States was later used against it, especially in the case of the Japanese.

In 1932, there were approximately 15 black pilots licensed and flying in the United States. Jim Crow was still very evident in the aviation community during that time. Only world events could change this attitude towards black airmen. By 1941, due to the efforts of such people as Bessie Coleman and Charles A. Anderson, there were over one hundred licensed black pilots and almost two hundred black student solo pilots.

6.3 World War II

World War II had a different effect on the population of the United States than the First World War. US citizens were afraid for the first time since the War Between the States. People in the United States and elsewhere believed that the Axis powers were capable of

controlling the entire world. Everyone who could man a weapon was trained, and the United States was on the alert. The bombing of Pearl Harbor in the Hawaiian Islands was the wake-up call.

As the United States emerged from the Great Depression, black people felt that the time had come for them to be treated with more equality. In fact, blacks were becoming more prosperous by moving to the northern part of the United States. With the outbreak of war in Europe, the Depression in the United States came to an end. More factory workers were needed to make the raw materials needed for the War, which caused a migration of blacks from the South to the factories of the North. There they found jobs in the automobile, steel and other heavy industry areas and for the first time were earning wages equivalent in some cases to white people. With their newfound wealth, they began to have the political power necessary to make some changes in the segregated portions of society. When World War II began, the United States became known as the “arsenal of Democracy”. It had not yet entered the war, but it was supplying much-needed arms, food and supplies to many of the combatants.

Blacks believed that if they did not seek more freedoms at this time, especially as the United States entered the war, they would be unable to obtain those freedoms later.¹⁸⁰ Almost all civil rights groups, Negro churches and influential black businessmen felt that

¹⁸⁰ Jim Crow is a term used to describe segregation laws begun in 1880s. See P.W. Goetz, *Encyclopaedia Britannica*, vol. 6, 15th ed. (Chicago, University of Chicago, 1989) at 552.

¹⁸¹ See Records of the Committee on Fair Employment Practices, *Negro Organizations and the War Effort* (Washington, DC, US Government Publishing, 1942).

this was a time to show what they could do for their country. In return, they believed the United States government's attitude about segregation could be changed.

The effort of black people to better their circumstances by finding better jobs and housing did not come without a price. War stimulated increased violence between the races, and the summer of 1943 saw many acts of violence. For instance, in New York City, the Italians felt that blacks were taking their jobs. This same sentiment existed in Detroit between blacks and Poles and resulted in many deaths, arsons and lootings.¹⁸² Detroit, Michigan, forced to accommodate over 500,000 new white people and 50,000 black people rushing into the city to find war jobs, became a powder keg of racial strife that erupted, killing thirty-four and injuring 700.¹⁸³

Less than two months later riots broke out in New York City. The black people there were protesting against discrimination and segregation, unemployment and restricted housing, police brutality, mistreatment of black soldiers, and the white-owned, rat-infested black ghettos they were forced to live in. When the rioting was over five Negroes had been killed and over 500 people had been injured.¹⁸⁴

The democratic expressions of blacks between 1940 and 1943 caught the attention of the Roosevelt Administration and Roosevelt's opponent Wendell Willkie. Wendell Willkie's

¹⁸² See Thurgood Marshall's report to the NAACP concerning the Detroit Riots of 21 & 22 June 1943 "Mayor's Papers" (Burlington Historical Collection, Detroit Public Library).

¹⁸³ *Ibid.*

¹⁸⁴ See H. Sitkoff, "Racial Militancy and Interracial Violence in the Second World War" (1971) *J. Amer. History* 661-681.

presidential platform proposed many new changes and opportunities for blacks, but Roosevelt, whose campaign was supported by the southern Democrats, defeated him.

Nevertheless, Roosevelt knew that changes were needed for blacks in the United States, and since a world war was in progress, where better to start than the military services.¹⁸⁵ In an effort to increase the number of fighting men, blacks were for the first time drafted into the US Military to do things other than cooking and cleaning. At first many black men were not very keen about the draft. Why should they fight for a country that gave them so little freedom and treated them with so little respect? A popular saying of young black draftees was “there lies a black man killed fighting a yellow man for the glory of a white man.”¹⁸⁶

In the beginning all black men served in an all black military organization in the US Army. In the US Navy, blacks were not allowed at the start of the War but were later used as stewards and cooks.

As we look at the plight of the Negro in the US Military during the early 1940s, it is hard for some of us to understand the thinking of people and the government of that time. However, the racial views of society were reflected in the service schools of the 1940s as they are reflected today.¹⁸⁷ Racism has taken a back seat to sexism in today’s Military,

¹⁸⁵ See W. White to F.D. Roosevelt, PPF 1336, Franklin D. Roosevelt Papers (Hyde Park, NY, 4 November 1940).

¹⁸⁶ See Sitkoff, *supra* note 178 at 666.

¹⁸⁷ See I.A. Newby, *Jim Crow's Defense: Anti-Negro Thought In America, 1900-1930* (Baton Rouge, LA, 1965) at X-XI & 16-66.

yet the same prejudices are still there, usually supported by some obscure medical reasoning.

6.4 The Tuskegee Pilots

On 22 March 1941, the 99th Pursuit Squadron was activated on the Tuskegee College Campus in Alabama. A new unit of black aviators was created through the so-called “Tuskegee Experiment”. Approximately 970 black airmen were trained to be pilots near the town of Tuskegee, Alabama.¹⁸⁸ Over four hundred black fighter pilots were able to defend their country in the skies over Germany and Italy as a result of this experiment. The most well known group of black flyers was the 99 Pursuit Squadron and the 332nd Fighter Group. Benjamin O. Davis, Jr., who later became the first black American General, commanded these troops into the history of aerial warfare.

This group of black fighter pilots completed 1,578 missions with the 12th Tactical US Army Air Force and the 15th Strategic US Army Air Force. The Germans called this group of black pilots the “Schwartzte Voelmenschen”; Because the tail of the P51 aircraft that the black airmen flew were painted red, the men of the US bomber squadrons that were protected by these black fighter pilots called them the “Black Red-tailed Angels.” These bomber crews were glad to have the company of their black brothers in the unfriendly skies over Germany, and the Red-tailed Fighters earned a reputation of staying with the bombers.

¹⁸⁸ For more information, contact Tuskegee Airmen, Inc., One Massachusetts Avenue, NW-Box 15, Washington, DC 20001, USA.

The Black US Army Air Core pilots came home with 150 Distinguished Flying Crosses, Legions of Merit and the Red Star of Yugoslavia. These men had shown that they could fly and fight. They certainly demonstrated their ability to pilot aircraft using the same piloting skills as their white brother pilots had demonstrated. Even with this gallant chapter behind them, they were not accepted into the integrated ranks of the Army Air Force (AAF) for several more years.¹⁸⁹

There is no question that progress was made towards integrating the AAF, and the Tuskegee Airmen were the foundation of that progress. In 1942, the AAF was required to meet racial quotas of 10.6 percent.¹⁹⁰ As the AAF attempted to meet these quotas, new developments began to take place.

The AAF was segregated during World War II, and the influx of many new black soldiers brought about problems in housing, as well as in training. Government policy at the time was separate but equal, and this created tremendous logistical problems for the AAF. Separate but equal policy may have looked good on paper but it proved impossible to accomplish in a modern army. For example, the AAF had squadrons of black soldiers stationed worldwide. The discriminatory policies of the US Military did not sit well with countries that had been US allies during World War II; France, for example.

¹⁸⁹ See Presidential Orders of the United States, H.S. Truman (1948).

¹⁹⁰ See S. Sandler, *Segregated Skies* (Washington, DC: Smithsonian Institution Press, 1992) at 133.

Something had to be done to bring this discriminatory policy in the Military to a close. The Department of Defense proposed setting up a select board to study the race problem and came up with an answer.¹⁹¹ The Gillem Board was created and was composed of four generals who reached the conclusion that blacks should be afforded more opportunity in the Military but that a segregated system should still be maintained.

The policy of the Gillem Board was completely unacceptable to the black community of the United States, and pressure was placed on the War Department as well as Congress. There was a feeling in Washington, DC that changes were necessary since blacks in the military had earned their right to equality.

On 26 July 1948, President Harry S. Truman signed Executive Orders 9980 and 9981, which helped bring segregation to an end in the military.¹⁹² The faith that the black community put in the Democratic Party finally paid off in the form of integration into the armed services.

Executive Order 9981 paved the way for blacks to achieve equal footing in the Military, but integration of the armed services of the United States did not take place overnight. In an attempt to further integration within the Military, the Fahy Committee was established.¹⁹³ The Fahy Committee was a watchdog committee that monitored the

¹⁹¹ See *ibid.*

¹⁹² Executive Order 9980 dealt with federal employees and 9981 dealt with the military. See Executive Order, Pres. H.S. Truman, 26 July 1948.

¹⁹³ See A.M. Osur, *Blacks in the Army Air Forces During World War II: The Problem of Race Relations* (Washington, DC: Office of the Airforce History, 1980) at 134.

progress of the three services and generally held them accountable to follow Executive Order 9981.

It is sometimes easier to make legislation than to follow the law and enforce rules. Even though Executive Order 9981 was in place, as was the Fahy Committee, the Korean War served as a proving ground for the new integrated US Services.

By 1948, there were 26,000 blacks serving in the US Air Force and this included 249 black officers. Although it was not the 10.6% that was called for, it was certainly a step in the right direction. By 1971 the 10.6% quota had been surpassed, with 78,000 blacks in the US Air Force. This figure is somewhat misleading because only 1.7% of the total US Air Force population of officers at that time was black.

The results of a recent survey by the United States Defense Manpower Data Center sheds much insight into race relations in the US Military.¹⁹⁴ The objective of the Defense Department survey was to determine just how much progress had been made toward stable race relations in the Military during the last fifty years. The survey asked service members about the number of racial-ethnic interactions that had occurred in the twelve-month period prior to completing the survey. The survey also contained questions about the outcome of complaints properly registered with higher authority relating to racial-ethnic discrimination.

¹⁹⁴ See Armed Forces Equal Opportunity Survey, Defense Manpower Data Center Survey and Program Evaluation Division, 1600 Wilson Blvd., Suite 100, Arlington, VA 22209-2593.

This equal opportunity survey was the first of its kind to be conducted since the total integration of the US armed services. The survey, which was conducted from September 1996 through February 1997. The survey was sixteen pages long and contained eighty-one questions with multiple parts, was addressed to all military personnel from the private soldier up to the rank of full colonel.

The results of the survey indicated that there is a major difference in the perceptions of service members of different racial-ethnic groups regarding equal opportunity for success in the Military. The survey did find positive overall results in racial harmony in the Military as compared to civilian life. Even though a large percentage of each racial-ethnic group indicated experiencing offensive encounters based on their race-ethnicity, they felt they were treated much better in the Military than they would be treated in civilian life.

The survey included Whites, Blacks, Hispanics, Asians, Pacific Islanders and Native Americans. Eighty-five to ninety-three percent of those surveyed indicated that they had close personal friends of a different race-ethnicity. The survey also indicated that there was low hate crime in the Military, compared with civilian life, and that opportunities for advancement were much better in the Military than in civilian life.

As positive overall as the survey is, it also indicates the Military has a long way to go in establishing fair and equal opportunity. Three-quarters of minority service members say they have experienced racial discrimination and half expressed doubt that their

complaints are thoroughly investigated. Edwin Doran, former Under Secretary of Defense, who commissioned the study, indicated that he was disappointed with the results. His comment was, "If people in an institution that has moved so far in equal opportunity continue to report these unpleasant experiences, think what must be happening on the average factory floor."¹⁹⁵

6.5 Discrimination in the Airlines

Although black pilots had begun to make progress in military aviation, commercial aviation was a different story. It was not until the landmark 1963 US Supreme Court case of *Green v. Continental Airlines* that African Americans were allowed to fly for airlines in the United States.¹⁹⁶

Marline Greene was a trained military aviator with a good record. When he applied for a job at Continental Airlines in Denver, Colorado, he was turned down while white pilots with less flying credentials were hired by the airline. Greene filed a complaint against Continental Airlines under the Colorado Statute that prohibited discrimination in hiring based on race.¹⁹⁷ The *Act* provides, among other things, that "it is an unfair employment practice for an employer to refuse to hire, to discharge, to promote or demote, or to discriminate in matters of compensation against, any person otherwise qualified, because of race, creed, color, national origin or ancestry."¹⁹⁸

¹⁹⁵ See W. Raspberry, "Other Opinions" *The Times-Picayune* (29 November 1999) B-5.

¹⁹⁶ See *Green v. Continental Airlines*, 83 s. 1022 (1963).

¹⁹⁷ See *Colorado Anti-Discrimination Act of 1957*, Col. Rev. Stat. 80-24-6.

¹⁹⁸ *Ibid.*

Continental defended the case by stating that Colorado law did not apply to an interstate carrier like Continental. The case was removed from the State Tribunal and tried in the US District Court of Colorado, where the judge held that the state law governed. On appeal, the US Court of Appeals overturned the lower court decision, and black pilots were finally allowed to assume their rightful place in commercial aviation.

Much like women in commercial aviation, black pilots have formed an organization known as the "Organization of Black Airline Pilots, Inc." This organization has proven to be a forum for the black aviators in many different ways. Benjamin Thomas, a black airline pilot with Eastern Airlines, founded the OBAP 1976, and the first meeting was held in Chicago, Illinois in September of that year.¹⁹⁹

The OBAP creates many opportunities for the black child who wants to become a commercial pilot as well as for black pilots now flying for the airlines. Some of the programs sponsored by the OBAP are:

- (1) The Professional Pilot Development Program;
- (2) The Airline Type Rating Scholarship Program;
- (3) The FAA Aviation Career Enhancement Program;
- (4) The Willa Brown Project; and
- (5) Pilots in the School.

¹⁹⁹ See Organization of Black Airline Pilots, e-mail webmaster@obap.org , or write to OBAP, 2740 Greenbriar Parkway, Suit A1328, Atlanta, GA 30331, Ph. (800) jet-obap.

All of these programs are targeted at helping increase the number of minority pilots in the cockpit of our modern jet age airlines. In 1976, there were approximately 80 black pilots in the airline industry of the United States, but by 1986 the number had increased to 400. Today, this number continues to grow through the work of organizations like the OABP.

Even with organizations like the OABP helping black pilots to find jobs, there are still many hurdles facing a black person who wants to become an airline pilot. When World War II ended in 1945, none of the over 900 Tuskegee Airmen could get a job in commercial aviation. Today, less than one percent of the approximately 80,000 airline pilots are African Americans.

Court-ordered affirmative action and litigation has made some inroads available to the African American population seeking employment within the aviation industry. For example, United Airlines, the largest airline in the world, originally fell short of a court decree ordering them to hire more minorities.²⁰⁰ With prodding from the Equal Opportunity Commission, United has made up for this shortfall. United now has approximately nine percent minority staffing in the pilot ranks.²⁰¹

Probably the main barrier to blacks that want to become airline pilots is the cost of getting the necessary education. With costs running over \$100,000 to obtain the necessary education and pilot's license, there are few minority students who can afford this.

²⁰⁰ See *Equal Employment Opportunity Commission v. United Airlines*, 560 F.2d 224 (1977).

²⁰¹ See M. Hornblower, "The Still Unfriendly Skies" (1995) 146:9 Time Magazine 1 & 2.

With airlines salaries approaching \$200,000 and airline benefits being something most people would like, being hired by an airline is very difficult. If one looks at the statistics of job applications for law school, medical school and airline pilot positions, it is obvious that getting an airline job is quite competitive. In fact, it is much easier to get admitted to most law schools and medical schools than to land a pilot's job with a major airline like United or American. Minority applicants applying for flight officer positions with the airlines are competing with the top ninety-five percent of educated people in the United States and elsewhere around the world.

The Hispanic Coalition for Aviation Education (HCAE) is one organization trying to help minorities train for airline jobs.²⁰² The relationship between cross-cultural competence and economic competitiveness lies at the heart of the HCAE. The belief is that too many Hispanic and other minority students who could make the United States more competitive in the global marketplace are left marginalized by the education processes and essentially untrained for what are increasingly technical jobs. The coalition is dedicated to establishing an economic pipeline for these students, a pipeline that runs from the local high schools to the community colleges absorbing their graduates and then to universities serving minority students. Inter American University of Puerto Rico's School of Aeronautics is the type of institution that targets these students. Inter American University is the only Hispanic-serving institution in the United States offering a Bachelor's degree in Aviation.

²⁰² For more information, contact Equity Research Corp., Five Thomas Circle, NW, Washington, DC 20005, USA.

It is the purpose of HCAE to help Hispanics and other minority undergraduates supplement their academic training with cooperative programs and summer internships at the FAA and other relevant federal agencies and departments, as well as in the private sector. These programs benefit not only the minority student but also the work force of this country and the college or university the student attends. The co-op-returning student will represent a growing body of undergraduates with workplace training, increased intellectual focus and a clear understanding of what is expected upon graduation.

CHAPTER SEVEN

OTHER AREAS OF DISCRIMINATION

7.1 Looking Back

Differences are difficult for people set in their ways and beliefs to deal with. Changing people's attitudes towards what they perceive as normal can be a painful and frustrating experience not only for the person who has to make the change but also for the person who is the focus of the new change. Nowhere is this more pronounced than in the military services of various States throughout the world.

As was pointed out earlier in this thesis, the US Military had difficulty accepting women and African Americans into the ranks of the services. For example, there were only eighteen African American women nurses accepted into the US Army Nurses Corps during World War I.²⁰³ The jobs these nurses were given were usually isolated from the rest of the Army's medical personnel, and little recognition was ever given for their services. It was not until World War II that African American women began to advance in US Military careers.

Most African American women who served in the military during World War II joined the US Army because the other services refused to admit them. The US Navy, for example, did not begin employing African American women until almost three years after WAVES (Women Accepted for Volunteer Emergency Service) came into existence.

²⁰³ See B.L. Moore, *To Serve My Country, To Serve My Race* (New York: University Press, 1996) at 2.

The US Marine Corps did not enlist African American women until after the War, in September 1949. Of all the African American women that served during World War II, only the 6888th Central Postal Directory Battalion served overseas.²⁰⁴

7.2 Homosexuals in the Military

These difficult changes in society's attitude towards African American women are somewhat mirrored in the changes the military and society is now experiencing with gays and lesbians. In 1989, a major airline employed a male pilot who expressed that he felt like a woman trapped in a man's body. To overcome the agony of this situation had a sex change and shortly thereafter returned to his work as a line pilot. The crewmembers assigned to fly with this pilot resented having to be in the same cockpit with him. The airline and the union representing the group of pilots were sure of one thing - they could not discriminate against this pilot. He had passed all of his flight checks as well as the FAA flight physical and was entitled to his place on the seniority list. Management at the airline surmised that problems encountered in the cockpit were not the fault of the pilot who had the sex change but the perception of the rest of the flight crew toward the sex-changed pilot.²⁰⁵ This airline is not alone in having to deal with pilots who resent having to fly with gay pilots, but for the most part, airlines and unions have treated these individuals in accordance with the law.

²⁰⁴ See *ibid.*

²⁰⁵ Personal conversations with management pilots of XYZ Airlines, Inc. (1993).

The homosexual issue in the airline industry is pale in comparison with the problems that military services throughout the world have had to confront.²⁰⁶ Homosexuals have always been a part of the military. In recent years gays have “come out of the closet” in almost all areas of society, except in the military. But in the Military of the United States and other States around the world, homosexuals still face discriminatory barriers.²⁰⁷

The overwhelming belief by many military leaders is that an acknowledged homosexual in a combat unit would adversely interfere with combat effectiveness and unit cohesion. This belief underlies the current policy of the US Military that homosexuality is incompatible with military service.

To date, the Courts in the United States have upheld the Uniform Code of Military Justice (UCMJ) and the philosophy of the Courts seems to be that any changes to the UCMJ should be brought about by legislation. The military is bound by customs, rules and regulations that are not always subject to a Constitutional test. Article 133 of the UCMJ deals with conduct unbecoming of an officer and a gentleman. Article 134, the General Article, makes punishable “all disorders and neglects to the prejudice of good order and discipline in the Armed Forces.” Both of these examples would fail the Constitutional test for vagueness in regular civilian life.²⁰⁸ A person could wear a peace symbol or arm band expressing his beliefs in civilian life without fear of prosecution. However, in the military this would most certainly detract from unit cohesiveness and would not be

²⁰⁶ See *Doe v. City of New York*, 825 F. Sup. 36 at 37 (S.D.N.Y. 1993).

²⁰⁷ See W. Scott & C. Stanley, *Gays and Lesbians in the Military* (New York: Aldine De Gruyter, 1994) at xvii.

permitted. This analogy may also be compared with lifestyle differences that may or may not be acceptable under military standards.

A policy study of other States' attitudes and laws about homosexuality and the role of gays in those States' military organizations is helpful when looking at the changes to policy of the US Military.

Canada, whose military has had a history of excluding homosexuals, is in the process of change.²⁰⁹ In 1992, the Defense Ministry instituted new changes after the Canadian Charter of Rights and Freedoms came into effect.²¹⁰ The Canadian Military now places the same rules of conduct on both heterosexual and homosexual personnel.

In Israel the Defense Forces removed all restrictions on military service by homosexuals in 1993. Israel has a policy of universal conscription for national service and takes the position that almost everyone in the Israel is of a common religion and has a common interest in defending the country.

Great Britain has historically excluded homosexuals from military service and, until 1967, justified its position based on the *Sexual Offences Act*. This Act criminalizes relations between men but not between women. The British continue a military policy of

²⁰⁸ See Enforcement of the UMCJ, *Parker v. Levy*, 417 U.S. 733 (1974), off base behavior, *Solorio v. Levy*, 483 U.S. 435 (1987).

²⁰⁹ See B.D. Rostker & S.A. Harris, *Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment*, National Defense Research Institute Study, 323-OSD (Santa Monica, CA: RAND, 1993) at 420-422, ann. D.

²¹⁰ See *ibid.*

exclusion based on military necessity and both men and women may be dismissed for homosexual feelings or homosexual acts.

The policies of Denmark, France, Belgium, Italy and Finland specifically state that individuals whose homosexuality interferes with their ability to effectively perform required duties may be discharged. In most cases individuals are discharged only after medical diagnoses have been provided and medical decisions of fitness have been rendered by a physician.²¹¹

On 30 November 1993, the *Defense Authorization Act* was signed into law by President Clinton.²¹² The new law retains many of the old policies of the military towards homosexuals and views homosexuals as an unacceptable risk to moral, good order and discipline. It also sets forth the grounds for discharge from the military:

- (1) A person has engaged in, attempted to engage in or solicited another to engage in homosexual acts
- (2) A person states that he or she is a homosexual or bisexual
- (3) A person has married or attempted to marry someone of the same sex.²¹³

In 1993, President Clinton announced the “Don’t Ask, Don’t Tell, Don’t Pursue” policy.²¹⁴ The United States Court of Appeals on several occasions upheld this legislation, ruling that “the military has a legitimate interest in discharging service

²¹¹ See *DOD Policy on Homosexuality*, GAO/NSIAD-92-98 (Washington, DC: General Accounting Office, 1998) at 40 & 41.

²¹² See Public Law 103-160, 30 November 1993.

²¹³ *Ibid.*

²¹⁴ *Ibid.*

members on account of homosexual conduct in order to maintain an effective armed forces".²¹⁵

Many people advocate changes to this law. In a recent article in the National Gay Pilots Association Magazine it was pointed out how one-sided this law is. In that article, a gay US Navy pilot is dispatched to the Gulf War to fly combat missions. Wives of his fellow pilots are allowed to come and see their husbands off to war but the partner of the gay pilot is unable to bid his friend good-bye as it would be grounds for discharge from the service to admit that you are a gay pilot. This is true even if you are an excellent pilot and a decorated soldier.

There is a similar story in another branch of the flying service. A gay pilot is assigned to fly combat missions in the Gulf War. Just before he is to be sent on a dangerous mission he receives a Dear John letter from his domestic partner. Had the Dear John letter come from a girlfriend or wife that pilot could have told his commanding officer about the situation and been relieved from his flight duties. In this case, since the Dear John letter came from another man, the gay pilot could not tell anyone or he would be discharged from the service.²¹⁶

With lifestyles evolving around the world, the military of each nation will likely be forced to make policy changes to accommodate new circumstances. Does it make any difference who pulls the trigger to force an adversary down, to deliver a bomb load on

²¹⁵ See *US v. Watson*, 893 F.2d 970.

target or to lead a flight of aircraft? Does a person's sexual preference make that individual less loyal to his or her nation or branch of the military service? There are those among us who would argue both sides of this issue but it certainly appears from the changes taking place in today's world that the sexual orientation of an individual should not bear on his or her ability to perform the job.

The National Gay Pilots Association, whose membership is composed of pilots from all branches of aviation, has as its mission to provide an affirming social and professional network for gay and lesbian pilots, to encourage gays and lesbians to begin piloting careers, to foster equal treatment of gay and lesbian pilots and to promote aviation safety. Membership in the NGPA is growing rapidly throughout the aviation community and is being accepted by airlines and the unions representing pilots.²¹⁷ Every year the NGPA takes part in national and international aviation programs. They sponsor a variety of pilot-related activities and events and offer a variety of pilot-related scholarships to deserving young persons.

While commercial airlines and the general aviation community seems to be accepting pilots with different lifestyles, the US Military and the military organizations in other countries seem to have trouble accepting gays and lesbians into the uniform of the military services. The US Military policy has made some changes over the last fifty years but it appears that more change are in store.

²¹⁶ See "Of Fighter Pilots, Bombing Missions and Goodbye" (1999) 8:3 National Gay Pilots Ass. Mag. News 15 to 17.

²¹⁷ For more information, contact National Gay Pilots Association, P.O. Box 27542, Washington, DC 20038-7542, BoardChair@NGPA.org.

The “Don’t Ask Don’t Tell, Don’t Pursue” policy of the US Military is continually coming under attack and will probably be changed in the near future. In addition to a continuous attack by such organizations as the American Civil Liberties Union, the Human Rights Campaign, the Partners Task Force for Gay and Lesbian Couples, other more widely accepted organizations are fighting for changes to the policy of the US Military. One good example is the Portland School District ban on military recruitment from schools because of the Military’s policy against lesbians and gays. This is a rather grass roots movement and probably mirrors the thinking of many educational institutions throughout the United States, and elsewhere. Should this philosophy spread throughout the nation, there is no doubt that the military services of the United States will change its policy regarding gays and lesbians.

7.3 Same Sex Couples and Domestic Partners

While military organizations throughout the world struggle with the gay and lesbian issue, the worldwide aviation industry is also facing similar challenges.²¹⁸

The City of San Francisco, California, had for many years expressed the view that people with different lifestyles should not be discriminated against in the workplace. The city required contractors doing business with it to make a pledge that they would not discriminate against their employees on the basis of sexual orientation. The City decided in 1996 to make this philosophy a part of the City Ordinances. To achieve the desired

²¹⁸ See *Air Transport Association of America v. City and County of San Francisco*, 992 F. Supp. 1149 (1999).

changes, the City incorporated the following wording as part of Chapter 12B of the San Francisco Administrative Code.²¹⁹

PURPOSE

To articulate guidelines for implementing the provisions of Chapter 12B of the San Francisco Administrative Code prohibiting City Contractors from discriminating in the provision of benefits to employees with spouses and employees with domestic partners and to the spouses and domestic partners of employees. To create a flexible implementation plan designed to provide guidance to entities seeking to comply with the law.

I. DEFINITIONS

Benefits means any plan, program or policy provided by a City Contractor to its employees as a part of the employer's total compensation package.

This includes, but is not limited to, the following types of benefits:

Retirement plans; medical, dental and vision plans; bereavement, family medical, parental and other leave policies; disability and life insurance plans; employee assistance programs; discounts; access to facilities, services and events; travel and relocation expenses; incentive, stock option, and profit sharing plans and other compensation programs.

C. City Contractor

City Contractor means any person or persons, firm, partnership, corporation, or combination thereof, who submits a bid and/or enters into a contract with department heads and officers empowered by law to enter into contracts on the part of the City and County for public works or improvements to be performed or for a franchise, concession or lease of the City property, for goods, services or supplies to be purchased, at the expense of the City and County or to be paid out of moneys deposited in the treasury or out of trust moneys under the control or collected by the City and County.

In *Air Transportation Association of America v. City and County of San Francisco*,²²⁰ the question before the United States District Court was whether or not the City Ordinance reached beyond the limits of city and county authority. The Plaintiffs moved for

²¹⁹ See *Rules of Procedure for the Nondiscrimination in Contracts: Equal Benefits Provisions of Chapter 12B of the San Francisco Administrative Code*, Revised: 13 August 1998.

²²⁰ See *Air Transportation Association of America v. City and County of San Francisco*, 992 F. Supp. 1149 (1999).

summary judgment based on the fact that the Ordinance violates the US Constitution because it impermissibly regulates out-of-state conduct not related to the purpose of a contract with the City, that the Ordinance is preempted by the *Employee Retirement Income Security Act* insofar as it effects ERISA plans providing ERISA-covered benefits and insofar as the Ordinance is applied to Airport contracts, and that the Ordinance violated the *Airline Deregulation Act* and the *Railway Labor Act*.²²¹

The Court concluded that the Ordinance was unconstitutional as applied to out-of-state conduct unrelated to the purpose of a City contract. It was federally preempted as applied to airport contracts insofar as it affected ERISA plans providing ERISA-covered benefits. With respect to other benefits, the Ordinance was also federally preempted *if the burden of complying with the otherwise-valid portions of the Ordinance practically forces air carriers to stop using the Airport*.

The airlines won the fight in this lawsuit but lost the war. United Airlines, American Airlines, US Airways Airline, and many other airlines around the world have agreed to allow their employees the very benefits outlined in the San Francisco City and County Ordinance.²²² In addition to the airline industry, over two thousand State, Federal and City laws in the United States, Canada and elsewhere now allow benefits to same sex couples.²²³ This list includes companies and cities as diverse as Atlanta, Georgia and

²²¹ See *Rules of Procedure for the Nondiscrimination in Contracts: Equal Benefits Provisions of Chapter 12B of the San Francisco Administrative Code*, rev'd 13 August 1998. **Note these sites are in the printed thesis that I mailed up to you. RR: Please find it and fill it in.**

²²² Partners Task Force for Gay and Lesbian Couples, *Private Employment Benefits* (1999) at 1, www.buddybuddy.com; H. Chang, *San Francisco Chronicle* (6 August 1999) at 1, American Civil Liberties Union News, www.aclu.org/news/1999 (date accessed: 28 November 1999).

²²³ See *ibid*.

New York City, the Bank of Montreal and Spar Aerospace of Canada. These employers offer benefits that include medical, dental, life insurance, pension benefits, bereavement, family medical leave and other benefits.

Companies, organizations and governments are striving to achieve an environment that is free from racial, age and sexual harassment. The United States FAA has issued a policy statement concerning harassment in the workplace.²²⁴ In September 1997, Jane F. Garvey, Administrator of the FAA issued the following policy statement:

The Federal Aviation Administration is committed to a comprehensive approach of managing diversity, practicing equal employment opportunity, and engaging in affirmative efforts to create and maintain an environment that supports and encourages the contribution of all employees and is free of inappropriate and unlawful behavior. In recognizing the importance of different viewpoints, perspectives, and overall effectiveness, we pledge to have a productive and hospitable environment with a work force reflective of the Nation's diversity.

We must not discriminate on the basis of political affiliation, race, color, religion, national origin, *sexual* orientation, marital status, age, disability, or any other characteristic not bearing on the job performance.

Other departments in the US Federal Government are issuing similar kinds of policy statements. It is interesting to compare those statements coming from the US Government in 1999, and those issued under the Eisenhower Administration of the 1950s.

**1. Dwight D. Eisenhower, President, Executive Order 10450, 1953.
Security Requirements for Government Employment
Sec. 8. (a)**

The investigations conducted pursuant to this order shall be designed to develop information as to whether the employment or retention in

²²⁴ See U.S. Department of Transportation, Federal Aviation Administration, *Administrator's Policy Statement on Model Work Environment*, 20 January 1998, www.faa.gov/act/mwepoljg.htm.

employment in the Federal service of the person being investigated is clearly consistent with the interest of national security. Such information shall relate, but shall not be limited, to the following:

1. Depending on the relation of the Government employment to national security:

(iii) Any criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct, habitual use of intoxicants to excess, drug addiction, *sexual perversion*.

One must remember that these were the years of the Cold War and security was on the mind of many people in high government positions. It had also recently come to light that Great Britain was reeling from a major spy problem. Sexual perversion had contributed to this major security leak.²²⁵ Heavy drinking, drugs, sex and homosexuality had all figured largely in the spy scandal breaking in England. Harold "Kim" Philby, Guy Burgess and Donald Maclean were in the process of defecting to the U.S.S.R. These three men had been recruited by a Junior Professor at Cambridge University and formed themselves into a society known as the "Apostles." The professor that recruited them was none other than Anthony Blunt, who was later knighted "Sir Anthony Blunt" by the Queen of England. Kim Philby had been assigned to the British Embassy in Washington, DC where he was privy to many of the top secrets of the United States Security Agencies. All of these men proved to be quite an asset for the Soviet Union, and much of the West security interest was compromised directly through their clandestine operations.

Executive Order 10450 was repealed by Executive order 12107. This Executive Order was known as Reorganization Plan No. 2 of 1978 (43 FR 36037). The plan created the

²²⁵ See J. Ranelagh, *The Agency, The Rise and Decline of the CIA* (New York: Simon and Schuster, 1986) at 149-159; W. Fowler, *The Secret World of the Spy* (Philadelphia: Brompton Books, 1994) at 28-31.

Merit Systems Protection Board, which gave more protection and security to federal employees.

2. William J. Clinton, President, Executive Order 13087, May 28, 1998

By the authority vested in me as president by the Constitution and the laws of the United States, and in order to provide for a uniform policy for the Federal Government to prohibit discrimination based on sexual orientation, it is hereby ordered that Executive Order 11478, as amended, is further amended as follows:

Section 1. The first sentence of section 1 is amended by substituting "age, or sexual orientation" for "or age."

Section 2. The second sentence of section 1 is amended by striking the period and adding at the end of the sentence, "to the extent permitted by law."

3. Federico Pena, Secretary of Transportation, May 27, 1993

As secretary, let me affirm that it is the policy of the Department that no one be denied opportunities because of his or her race, color, religion, sex, age, disability or sexual orientation.

4. Canada August 6, 1992

The Federal Government has determined to explicitly recognize sexual orientation as a prohibited basis for discrimination.

7.4 Who Are These People?

As a group, homosexuals include gay men, lesbians, bisexuals and transgenders (cross dressers and sex change operations), in other words, those people whom, in general, are sexually attracted to those of the same sex. It is estimated that ten percent of the population is gay, which in the United States equates to nearly thirty million people. Of this group, fifty percent of gay men and seventy percent of gay women are in long-term relationships with a single partner. To understand the status of gays in aviation and gays in the military we first need to identify what the gay movement as a whole is trying to

accomplish and how these issues relate to problems faced by gay people working in the field of aviation and serving in the military.²²⁶

The gay population is composed of people who want and need the same quality of life that is experienced by everyone else. They ask for the same Constitutional protection that is enjoyed by the general population. The Gay movement is about stopping discrimination, including State sanctioned discrimination towards gay and lesbian people.

The gay community sums up what their demands are as follows:

- a. The passage of a Lesbian, Gay, Bisexual and Transgender Civil Rights Bill and repeal of all sodomy laws and other laws that criminalize private sexual expression between consenting adults.
- b. Passage of legislation to prevent discrimination against LGBT people in the areas of family diversity, custody, adoption and foster care. Recognition that a family includes full structural diversity.
- c. Full and equal inclusion of LGBT people in the educational system and LGBT studies included in multicultural curricula.
- d. Legalization of multiple partner and LGBT unions.

Recognition of same sex marriages would allow gay persons to enjoy all the employee benefits that heterosexual unions enjoy today. Marriage would allow Social Security benefits as well as assets from a deceased spouse to pass freely to the survivor.

On 24 June 1999, the *Employment Non-Discrimination Act* was reintroduced to Congress.²²⁷ Bill S. 1276 failed to pass Senate approval by one vote; it still would have faced tough opposition in the House. It would have provided gay and lesbian workers

²²⁶ See M. Nava & R. Dawidoff, *Created Equal* (New York: St. Martin's Press, 1994) at 1-29.

²²⁷ See United States Senate Bill S1276, 1999.

freedom from job discrimination in all fifty States. The gay community believes the passage of this Act would provide employment protection for the gay community and afford gays equal footing with the rest of the workforce.

An alternative approach to Senate Bill 1276 would be for the Courts to determine that gays and lesbians are a protected class, similar to a racial minority, and are subject to equal protection under the law. If the gay population could be recognized as a protected class, basically all laws adversely affecting them would become unconstitutional. If homosexual sodomy is considered a right of privacy for this group of people, then state laws making sodomy a crime, for example, would most likely be considered unconstitutional.

To meet the Constitutional test and to be provided with equal protection statutes, gays as a protected class must prove to the Courts the following test in the affirmative:

1. Strict scrutiny must be applied to the classification such as race. Any regulation of a suspect class must serve a compelling state interest and be narrowly tailored to meet that interest.
2. Intermediate or heightened scrutiny will be applied to classifications, such as gender, that are usually invalid but for which some justification can be presented. Under heightened scrutiny, any regulation must be substantially related to an important governmental interest.
3. Where no suspect class is determined, the regulation will be reviewed on a rational basis test. This test presumes the validity of governmental regulation as long as it serves any reasonable state interest.

Thus far, the federal courts have treated homosexuals as a suspect class for equal protection. Some individual state constitutions have, on the other hand, afforded protection to a limited extent.²²⁸ How far this line of development will eventually reach in achieving equal protection for gays is open to debate. Probably most constitutional scholars could agree that there needs to be some protection for the gay population, and this seems to be the thinking in the US Federal Government as well as most Western democracies.

Representative Barney Frank, Democrat Massachusetts, points out how difficult it is for some people to admit that they are gay. He says, "The single most important thing gay and lesbian people can do is come out, and one of the obstacles to coming out is the fear of losing your job."

Examples of policy statements expressed by government leaders like Jane Garvey, FAA Administrator, seem to be ending the fear of losing one's job because of sexual preference.²²⁹ It will be interesting to see if this policy is followed by other government entities within the United States, and abroad.

Gays and lesbians seem to be enjoying relative acceptance in the air carrier and general aviation industry.²³⁰ A casual search of the Internet discloses many gay aviation organizations. The FAA Globe is an organization dedicated to the interests of gays in the FAA. The National Gay Pilots Association, set up to provide an affirming social and

²²⁸ See *Baehr v. Director of the Department of Health*, Supreme Court of Hawaii, No. 911394 (1993).

²²⁹ See "Administrator's Policy Statement", *supra* note 215.

professional network for gay aviation enthusiasts, encourages gays to begin piloting careers, fosters equal treatment of gay aviators and promotes safety. Some air carriers have their own gay and lesbian organizations. GLEAM is the gay and lesbian organization at American Airlines. The purpose of GLEAM is to further the interest of gays and lesbians at American. United Pride represents gay employees at United Airlines. Today, it is not at all uncommon to have a gay or lesbian pilot at the controls of an airliner operated by one of the major airlines. As accepted as gays are in the airline industry, gay cockpit crewmembers as well as other gay crewmembers are still subject to harassment.²³¹

²³⁰ See <http://www.FAA-Globe.org/>; <http://www.UnitedPride.org> (date accessed: 13 December 1999).

²³¹ Embry Riddle Aeronautical University, fall meeting GALBA, Capt. ABC, Delta Airlines, "Problems Faced by Gay Flight Crewmembers," October 1999, <http://www.db.erau/campus/student/clubs/galba/officers.html>.

CONCLUSION

Aviation is a dynamic enterprise, whether military or civilian. In fact, aviation has been one of the most important technologies that the human mind has conceived. It has only been exceeded by changes in the electronic data industry, which has also changed aviation.

While many changes in aviation have been directed sought out and embraced by almost everyone, other have been slow in coming. This thesis has discussed how difficult it has been for women to be accepted by their brother aviators. The struggle for equal footing by women in aviation has made a lot of progress but is not over yet. Recent studies by such leading institutions as Georgia Institute of Technology clearly indicate women are as effective in the cockpit as men.²³² In the survey conducted by Georgia Institute of Technology it was found that women make their commands in a slightly different manner than men, but to some degree they are more informative in nature. The survey also found that there were cultural differences in communication, and for safety reasons it is important to understand these subtle differences in the flight crew makeup. Gender and cultural differences need to be stressed in crew resource management training. The study clearly indicates the capability of women to perform in a modern airline cockpit.

We need to see more women taking their seat in both the military and commercial sectors of aviation. This can only be accomplished by organizations such as the International

²³² See W. Siuru, "Gender, Cultural Differences Affect Crew Communications" (1999) 51:4 Flyer Magazine 38.

Society of Women Airline Pilots, the International Airline Pilots Association and other interested parties ensuring women pilot applicants are treated fairly. There are still a very small percentage of women pilots in both the military and commercial sectors of aviation worldwide. This would certainly be fertile ground for organizations like the ICAO, the FAA and the JAA to take the lead and set an example for others to follow.

As we have seen, black men and women have made progress in aviation. So much has been overcome and so many peoples' attitudes towards blacks have been changed since Eugene Bullard received his French Pilots license in 1917. Without the strong backing of black society these changes would never have taken place. Organizations such as the NAACP and the Urban League helped tremendously. What helped the most, however, were people of the white race finally realizing just how regrettable and wrong it is to discriminate against a person because of his or her color. Without the help of their white brothers and sisters Jim Crow would never have been killed.

Although many changes for the better have taken place in aviation, there is still much change that needs to take place. This is especially true in both the airline industry and military when people are discriminated against because of their age. What is most troubling about age discrimination in aviation is that government sanctions it. This government sanction is based on the age-old medical reason that has no basis. Throughout the history of aviation, we have seen aviation medical committees, with the support of governments, denying people the right to operate or to earn a living flying aircraft. Women were found unfit to fly, blacks were found too slow mentally to fly and

perfectly healthy sixty-year-old pilots have been arbitrarily denied the right to fly as captain of a modern airliner. As this paper points out, prejudiced and ignorant people manipulating the medical community have fostered these misplaced ideas upon our society.

What will be necessary to stop the age discrimination? The most important ingredient will be enlightened and fair-minded leadership from ICAO as well as from the United States Federal Aviation Administration and other licensing agencies throughout the world. We have seen some enlightened movement already by the JAA in Europe as well as aviation authorities in Japan, Australia and others States.

One interesting item that has taken place in the United States recently is the flight of Senator John Glenn aboard the NASA Space Shuttle. Perhaps this is a glimmer of change in the thinking of the US government towards older pilots. We all certainly hope so and are delighted to see Glenn returning to space.

Not everyone is in favor of Glenn's flight but regardless of whether a person is in favor of the flight or not it was a history making event that will enhance the scientific communities knowledge of older people in space.²³³

While Glenn has returned to space, older people are making advances in aviation. Sixty-four-year old fighter pilots are testing high performance aircraft on the deserts of the United States.²³⁴

Dick Lawyer, 64, is chief test pilot for Tracor, Inc. of Austin, Texas. Tracor is heavily involved in aviation research and development. Tracor Flight Systems, Inc. (TFSI), is a subsidiary of Tracor, Inc. Tracor's flight test facility is located at Edwards Air Force Base, Mojave, California.

Dick Lawyer and test pilot Bob Miller, also in his sixties, test some of the hottest aircraft that have ever come off the assembly line. These include F86, F-4, F-100 and F-105s, among others. These men love what they are doing and as long as they can pass a flight check and physical they will be flying century series aircraft.

Not to be outdone by grandfather fighter test pilots, a group of pilots known as the "United Flying Octogenarians" continue to fly well past their eighties.²³⁵ Capt. John M. Miller is president of this proud organization. Capt. Miller began flying in the 1920s and continued his flying until he retired from Eastern Airlines in the 1950s. Capt. Miller tells me that there are approximately two hundred other pilots belonging to the United Flying Octogenarians.²³⁶ In order to belong, one must have an active pilot's license and continue to fly. Capt. Miller is now well into his nineties and continues to fly on a regular basis. He informs me that aside from his hearing, his blood pressure, weight and heart rate are the same as they were when he was in his twenties.

²³³ See "The Right Stuff Again", *supra* note 122.

²³⁴ More information can be obtained from Tracor Corp., 6500 Tracor Lane, Auston, TX 78725, @tracor.com.

Another active octogenarian flying is the somewhat famous Edmund E. Ball. Mr. Ball was the CEO of the Ball Corporation, the company that produces the home canning jars that bear the same name. Ball soloed in 1929, in an OX-5 powered Travel Air. Ball's flying experiences include a tour in the Moroccan Desert where he earned his wings with the US Army Air Force. Ball has continued his active piloting skills through the years, flying a large number of different aircraft and touring widely with his wife Virginia. At the age of 93, Ball is the fourth oldest active pilot in the United States.²³⁷ With men and women like Edmund Ball and John Miller flying near the age of one century the United States must see that restricting older pilots from flying is highly unfair.

Retired TWA Pilot Ralph Charles started flying for the Wright Brothers early in this century and plans to continuing flying into the 21st century. Charles is 99 years old and was recently checked out in the Lockheed L1011 simulator at TWA's Training Center at Charles Lindbergh Field St. Louis, Missouri. Captain Charles also recently obtained his third class medical so that he can act as pilot in command of general aviation aircraft. Charles said he hadn't flown in a while because he had promised his wife that he wouldn't but now that she has passed away, he intends to spend time with his second love, flying. Capt. Charles flew the L1011 simulator like he had never missed a day of flying and is looking forward to getting back into the cockpit.²³⁸

²³⁵ More information can be obtained from United Flying Octogenarians, 41 Kingwood Park, Poughkeepsie, NY 12601, USA.

²³⁶ See Letter from Capt. John M. Miller, President United Flying Octogenarians, 9 April 1998.

²³⁷ See "Edmund F. Ball" [April 1998] AOPA Magazine 164.

²³⁸ See J. Andrews, "Former TAT/TWA Pilot Certifies for L1011 Aircraft" (1999) 65:1 TWA Skyliner 1 & 2.

With older people in Congress and older people in the cockpit, perhaps we are making some headway against the barriers facing aviation. With help on the international front from ICAO and the effort of organizations like the Professional Pilots Federation, we will beat age discrimination in the cockpit. With the support from individual groups like the powerful American Association of Retired Persons (AARP), changes will be made.

With leadership from the Organization of Black Airline Pilots, the International Society of Women Airline Pilots, the National Gay Pilots Association and other right minded people, the yoke of discrimination will be lifted from the shoulders of all pilots whether they be white, black, female or gay. More and more people throughout the aviation industry appear to be getting the word. Times are changing and the day will come when discrimination is no longer tolerated. This is true in the Government, the airlines, in general aviation and in the various military forces throughout the world.

BIBLIOGRAPHY

Articles:

Advisory Group for Aerospace Research and Development (AHARD), Conference Proceedings No. 491, Aerospace Medical Panel Symposium, Tours, France, "Recruitment Selection, Training and Military Operations of Female Aircrew," 4-5 April 1990.

Ables, M.E., "Former TAT/TWA Pilot Certifies for L1011 Aircraft" (January 1999) 65:1 TWA Skyliner 1.

"Edmund F. Ball" [April 1998] AOPA Magazine 164.

AOPA Air Safety Foundation, "Flying Light-Twin Engine Aircraft," Document No. CO23-109-7 (1992) 19.

Ables, M. E., "Former TAT/TWA Pilot Certifies for L1011 Aircraft" (1999) 65:1 TWA Skyliner 1.

Barlow, B.K., "Rethinking The Age Sixty Mandatory Retirement Rule" (1994) 60 J. Air L. & Comm. 334.

Birren, J.E. and Fisher, L.M., "Rules and Reason in the Forced Retirement of Commercial Airline Pilots at Age 60" (1995) 38:3 Ergonomics 518-525.

Birtles, P.J., "The South Carolina Air National Guard" (1993) 21:20 Aviation News 947.

Cook, M.C., "Justice For Hoover" (1996) 39:1 AOPA Pilot Magazine 65-70.

Di Nunno, G., "Alcohol Testing" [February 1993] 62:2 Air Line Pilot Magazine 28.

Duncan, P.A., "Garvey Sworn In As New Administrator" (1997) 36:7 FAA Aviation News 32.

Federal Air Surgeon's Medical Bulletin, 97-3, Fall 1997.

GAO Publication, "Women in the Military, Attrition and Retention," GAO MSIAD-90-87BR, July, 1990.

Gebicke, M.E., "Women in the Military, Deployment in the Persian Gulf," report for GAO/NSIAD-93-93 (Washington, DC: GAO, 1993) 3 & 21.

Graham, B., "She Should Have Gone to the Moon" [15 November 1998] Sunday Times Magazine 38-47.

- Guttman, J., "Pakistan's Sabre Ace" [September 1998] *Aviation History* 30.
- Freeman, J.W., "First Ladies of the Air" (1988) 16:21 *Aviation News* 965-966.
- Hannant, H.D., "Gunsmoke 89" (1989) 16:16 *Aviation News* 752-753.
- Hornblower, M., "The Still Unfriendly Skies" (1995) 146:9 *Time Magazine* 1-2.
- Laboda, A., "Kelly Hamilton" [March 1998] *AOPA Pilot Magazine* 136.
- Milde, M., "Chicago Convention Fifty Years Later: Are Major Amendments Necessary or Desirable 50 Years Later?" (1994) XIX:I *Ann. Air & Sp. L.* 401.
- Mills, W., "Young Women Who Want To Fly With The Air Force" [June 1987] 62:2 *Aviation News* 82-84.
- Mohler, S.P., "FAA Discretionary Issuance Permit Medical Certification of Many Pilots Despite Disabilities" (April 1999) *FAA Aviation News* 9-14.
- Morgan, L., "It's Better Now" (1992) 119:9 *Flying Magazine* 113.
- Orr, W.S., "The Presidential Commission on the Assignment of Women in the Armed Forces," Superintendent of Documents, Washington, DC, Nov. 15, 1992.
- Rasberry, W., "Other Opinions" *The Times-Picayune* (29 November 1999) B-5.
- Reuters, "House Panel Releases Impeachment Report," 16 December 1998.
- Sellers, G., "FAA: Born With The Jet Age" (August 1978) *FAA World Magazine* 4 & 5.
- Siuru, W., "Gender, Cultural Differences Affect Crew Communications" (1999) 51:4 *Flyer Magazine* 38.
- Schefter, J., "The Right Stuff Again" [May 1998] *Popular Science Magazine* 86-88.
- Schiff, B., "Sentimental Journey" (1998) 41:8 *AOPA Pilot Magazine* 81.
- Sitkoff, H., "Racial Militancy and Interracial Violence in the Second World War" [December 1971] *J. Amer. History* 661-681.
- Steenblik, J.W., "A Banner Day for Aviation Safety" [February 1996] *Air Line Pilot Magazine* 24 & 25.
- Valentine, B.L., "Jane Garvy New FAA Administrator," *Federal Air Surgeon's Medical Bulletin*, 97-3 (Fall 1997) 1 & 3.

Walters, B., "HF/CRM Integral or Add-On" (1998) 9:3 Civil Aviation Training 22.

Wayda, M., "Medical Stuff" *FAA Aviation News* (April 1998) 15.

"Did She Ask For It" (1992) Cornell L. Rev. 1558-1562.

"Of Fighter Pilots, Bombing Missions and Goodbye" (1999) 8:3 National Gay Pilots Association Magazine News 15-17.

Books:

Alexiev, A.R. and Wimbush, S.E. *Ethnic Minorities in the Red Army*, Bolder, CO, Western Press, 1988.

Binkin, M. and Eithelberg, M.J., *Blacks and the Military*, Washington, DC, Brookings Institute, 1982.

Brinley-Buchnum, M., *Jackie Cochran*, New York, NY, Bantom Books, 1987.

Burkhardt, R., *The Federal Aviation Administration*, New York, F.A. Praeger Publishers, 1967.

Carisella, P.T. and Ryan, J.W., *The Black Swallow of Death*, New York, NY, Marlborough House, Inc., 1978.

Coleman, A., *Soaring Above Eagles*, Washington, DC, Smithsonian Institute Press, 1996.

Craven, W.F. and Cates, J.L., *The Army Air Force In WW II*, vol. 3, Chicago, University of Chicago Press, 1951.

---, *B.O. Davis, Jr.*, Washington, DC, Smithsonian Institute Press, 1991.

Dempsey, P.S., Hardaway, R.M. and Thomas, W.E., *Aviation Law and Regulation*, St. Paul, MN, Butterworth Legal Publishers, 1993.

Devore, P.W., *Introduction to Transportation*, Worcester, MA, Davis Publications, 1983.

Donaldson, G., *The History of African Americans in the Military*, Malabar, FL, Kreiger Publishing, 1991.

Eddy, P., *Destination Disaster: From Tri-Motor to the DC-10: The Risk of Flying*, New York, Quadrangle Press, 1976.

Ferguson, W.C., *Black Flyers In World War II*, Chicago, IL, W.C. Ferguson, private publication copy obtained by Embry Riddle Aeronautical University Library, 1987.

- Flowers, S.H., *Women in Aviation and Space* (Ozark, AL: Alabama Aviation and Technical College, not dated).
- Francis, C.E., *The Tuskegee Airmen*, Boston, Brandon Publishing, 1993.
- Frisbee, J.L., *History of the USAF*, Washington, DC, United States Air Force Publishing, 1987.
- Fowler, W., *The Secret World of The Spy* (Philadelphia, PA, Brompton Books, 1994) at 28-31.
- Groenewege, A.D., *Compendium of International Civil Aviation*, Montreal, PQ, International Aviation Development, Corp., 1997.
- Grunwald, H.A., *Designers and Test Pilots* Alexander, VA, Time-Life Books, 1983.
- Gunston, W., *Chronicle of Aviation*, London, Chronicle Communications, Ltd., 1992.
- Hopkins, G., *Flying the Line: The History of the Air Line Pilots Association*, Chicago, University of Illinois Press, 1982.
- Jablonski, E., *Ladybirds, Women in Aviation*, New York, NY, Hartorne Books, 1968.
- Jaros, C., *Heroes Without Legacy*, Niwot, CO, University Press of Colorado, 1993.
- Kane, R.A. and Vose, A.D., *Air Transportation*, Dubuke, Iowa, Kendall Hunt Publishing, 1979.
- Killen, J., *A History of the Luftwaffe*, New York, Berkley Medallion Books, 1967.
- Komons, N.A., *Bonfires to Beacons*, Washington, DC, U.S. Government Printing Office, 1978.
- Longyard, W.H., *Who's Who In Aviation History: 500 Biographies*, Shrewsbury, England, WBC, Bridgen, 1994.
- Lovell, S., *The Sound of Wings*, New York, NY, St. Martin Press, 1989.
- Miller, M., *Ike The Soldier*, New York, NY, G. P. Putnam's Sons, 1987.
- McConaughy, D.E., *Divorce, Alimony and Child Support*, Atlanta, GA, Harrison Company, 1998.
- Moore, B.L., *To Serve My Country To Serve My Race*, New York, NY University Press, 1996, at 2.

- Nava, M. and Davidoff, R., *Created Equal*, New York, St. Martin's Press, 1994.
- Newby, I.A., *Jim Crow's Defense: Anti-Negro Thought In America, 1900-1930*, Baton Rouge, LA, 1965.
- Osur, A.M., *Blacks In the Army Air Force During World War II: The Problem of Race Relations*, Washington, DC, Office of Air Force History, 1980.
- Piszkiewicz, D., *From Nazi Test Pilot To Hitler's Bunker*, Westport, CN, Prager, 1997.
- Peters, R.E. and Arnold, C.M., *Black Americans In Aviation*, Chicago, IL, New World Aviation Academy, Inc., 1975.
- Rawlins, R., *The Last Airman*, New York, Harpers and Row, 1989.
- Reitch, H., *The Sky My Kingdom*, London, Greenhill Books, 1955.
- Ranelagh, J., *The Agency, The Rise and Decline of the CIA*, New York, Simon and Schuster, 1986.
- Reed, P. and Witlieb, B.L., *The Book of Women's First*, New York, NY, Random House, 1992.
- Render, S., *No Place for A Lady*, Winnipeg, Manitoba, Portage and Main, 1992.
- Sandler, S., *Segregated Skies All Black Combat Squadron of World War II*, Washington, DC, Smithsonian Institute Press, 1992.
- Shore, N., *Amelia Earhart*, Broomall, PA, Chelsea House, 1987.
- Scott, W. and Stanley, C., *Gays and Lesbians In The Military*, New York, Aldine De Gruyter, 1994.
- Stahl, P.W., *KG 200 The True Story*, London, Janes Publishing, 1981.
- Stiehm, J.H., *Bring Me Men and Women: Mandated Change at the U.S. Air Force Academy*, Berkley, CA, Berkley University Press, 1981.
- Stovall, T., *Paris Noir, African Americans in Aviation*, Boston, MS, Houghton Mifflin, Co., 1998.
- Thible, E., *The Aeronauts*, Alexander, VA, Time-Life Books, 1980.
- Toliver, R.F. and Constable, T.J., *The Blond Knight of Germany*, Garden City, NY, Doubleday Publishing, 1970.

Weigly, R.F., *Eisenhower's Lieutenants*, Bloomington, IN, University Press, 1981.

Weitzel, T.R., *The Laissez Faire 1990s: Policies and Constancy of Purpose in Reshaping the U.S. Major Airlines*, Daytona Beach, FL: Embry Riddle Thesis Publication, 1991.

Wells, A.T., *Air Transportation*, Belmont, CA, Wadsworth Publishing, 1999.

Whyte, E.G. and Cooper, A.L., *Rising Above It*, New York, NY, Orion Books, 1991.

Yeager, C. and Janus, L., *Yeager*, New York, NY, Bantam Books, 1985.

Cases:

Air Line Pilots Association v. Quesada, 182 F. Supp. 595 (1960).

Air Transportation Association of America v. City and County of San Francisco, 992 F. Supp. 1149 (1999).

Aman v. FAA, 856 F.2d 964 (1988).

Baehr v. Director of the Department of Health, Supreme Court of Hawaii, No. 911394, (1993).

Baker v. FAA, 917 F.2d 318 (1990) 499 U.S. 936 (1991)).

Chappel v. Wallace, 462 U.S. 296 (1983).

Chew v. Quesada, 182 F. Supp. 231 (1960).

Costner v. Oklahoma Army National Guard, 833 F.2d 905 (1987).

Crawford v. Cushman, 531 Fed. Rep., 2d 114 (1976).

Doe v. City of New York, 825 F. Supp. 37 (1993).

EEOC v. Boeing Co., 843 F.2d 1213 (1988).

EEOC v. Delta Airlines, 578 Fd.2d 115 (1978).

EEOC v. United Airlines, 560 Fd.2d 224 (1997).

Frey v. State of California, 982 F.2d 951 (1988).

- Frontiero v. Richardson*, 411 U.S. 677 (1973).
- Green v. Continental Airlines*, 82 Sct. 1022 (1963).
- Harris v. Pan Am*, 649 Fd.2d 670 (1981).
- Helm v. State of California*, 722 F.2d 507 (1983).
- Holmes v. Helms*, 705 F.2d 343 (1983).
- Hoover v. FAA*, 43 F.3d 712 (1995).
- Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408 (1986).
- INDA v. United Airlines*, 565 Fd.2d 554 (1986).
- O'Donnell v. Shafer*, 491 F. Supp. 59 (1974).
- Parker v. Levy*, 427 U.S. 733 (1974).
- Solorio v. Levy*, 483 U.S. 435 (1987).
- Stephanie Crawford v. Robert E. Cushman, Jr. Commandant, United States Marine Corps*, 531 Fed. Rep., 2d 1114.
- Trans World Airlines v. Thurston*, 105 S.Ct. 613 (1985).
- Trans World Airlines v. Zips*, 582 Fd.2d 1142 (1978).
- U.S. v. Watson*, 893 Fed. 2d 970 (1990).
- Western Air Lines v. Criswell*, 514 F. Supp. 384 (1981), 427 U.S. 423 (1985).

Government Documents:

Age Discrimination and Employment Act s. 633(a). 1967.

Armed Forces Equal Opportunity Survey, Defense Manpower Data Center Survey and Program Evaluation Division, 600 Wilson Blvd., Suit 100, Arlington, VA 22209-2593, 1999.

Civil Rights Act of 1964, title VII and subsequent amendments.

U.S. Congressional Record S6, 485(daily edition 12 May 1992).

Colorado Anti-Discrimination Act of 1957, Col. Rev. Stat. 80-24-6.

Defense Authorization Act, 30 November 1993, Public Law 103-160.

GAO/NSIAD-92-98, DOD Policy on Homosexuality, 40 & 41.

Nurses Act 1947, 61 Stat. 4; Women's Armed services Integration Act 1948, 62 Stat. 356.

Records of the Committee on Fair Employment Practices, "Negro Organizations and the War Effort," U.S. Government Publishing, 28 April 1942.

Marshal, T., Report to the NAACP Concerning Detroit Riots of June 21 and 22, 1943, Mayor's Papers, Burlington Historical Collection, Detroit Public Liabry.

National Defense Research Institute Study, "Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment," 323-OSD, RAND Santa Monica, CA 1993, Annex D, p. 420 to 422.

Nurses Act 1947, 61 Stat. 4; Women's Armed services Integration Act 1948, 62 Stat. 356.

President Franklin D. Roosevelt Papers, Hyde Park, NY, W. White to Franklin D. Roosevelt, 4 November 1940, PPF 1336.

San Francisco Administrative Code, Revised: August 13, 1998, Rules of Procedure for the Nondiscrimination in Contracts: Equal Benefits provisions of Chapter 12B.

Harry S.Truman, Presidential Executive Order 10240, 27 April 1951.

Harry S. Truman, Presidential Executive Order 9980 and 9981, 26 July 1948.

U.S. Department of Transportation, Federal Aviation Administration, "Administrator's Policy statement on Model Work Environment," 20 January 1988, www.faa.gov/act/mwepoljg.htm, December 1999.

OTHER DOCUMENTS AND SOURCES:

- Agreement Between British airways and British Airline Pilots Association 1973.
- American Civil Liberties Union News, www.aclu.org/news/1999.
- Association of Black Air Line Pilots, web sight, webmaster@obap.org.
- Equity Research Corp., Five Thomas Circle, NW, Washington, DC 20005, USA.
- Embry Riddle Aeronautical University, Daytona Beach, FL, "Admission Studies," 1988-1998.
- European Joint Aviation Authorities, "Aging of Flight Crew Studies," 1995.
- FAA, Air Transportation Division, Flight Standards Services, Washington, DC, 1994.
- FAA, Age Sixty Rule, December 1, 1959.
- FAA, Rules and Regulations, Department of Transportation, 14 CFE Part 119, 121, and 135.
- FAA News, APA 152-95, Oct. 18, 1995.
- FAA Web Sight, faa.gov/apa/hisfaa/html.
- FAA, Hilton Systems, Age 60 Project, 1993.
- FAA Globe, <http://www.FAA-GLOBE.org/>, December 1999.
- Flight Safety International Academy, Vero Beach, FL, "Racial Ethnicity Breakdowns," 1995-1997.
- GAO, Aviation Safety, Washington, D.C. 1989.
- ICAO, Annex One, 1962.
- ICAO, Upper Age Limit for Flight Crewmembers, ANC Task No. MED-7, 1994.
- ICAO, Air Navigation Commission Surveys, AN-WP/7089, Feb. 1996.
- ICAO, Air Navigation Working Paper, NO. 6538, Appendix A, 1990.
- ICAO, Air Navigation Commission, ANC Task. No. MED-7101, Jan. 15, 1996.
- ICON, Competency of Women for Piloting Aircraft, Annex 4, 1924.
- ICON, Minimal standards for Flight Crew, Annex E, 1922.

IATA, State Letter, AN 5/16-95/14, June 27, 1995.

IATA, Symposium on Supersonic Transport, 1961.

IFALPA, web sight, admin@ifalpa, Nov. 1998.

Independent Pilots Association of Great Briton, ipapilots@iname.com, November 1999.

International Society of Women Airline Pilots, web sight, gmcutter@coastside.net.

National Gay Pilots Association, P.O. Box 27542, Washington, DC 20038-7542.

NTSB, Report on American Eagle Flight 3379, Dec. 13, 1994.

NTSB, Report on DC-10 Incident at Windsor, Ontario, 1974.

NTSB, web Sight, ntsb.gov/aviation/aviation.htm.

Organization of Black Airline Pilots, 2740 Greenbriar Parkway, Suit A1328, Atlanta GA, 30331, Ph. (800) jet-obap.

Partners Task Force for Gay and Lesbian Couples, "Private Employment Benefits," 1999, p. 1, www.buddybuddy.com, December 1999.

Professional Pilots Federation, web sight, www.ppf.org, 1999. Reuters, "House Panel

Reuters, "House Panel Reaches Final Impeachment Report," Dec. 16. 1998.

Trans World Airlines Flight Operations Policy Manuel, 1989.

Trans World Airlines, Agreement Between Trans World Airlines, Inc. and the Airline Pilots in the Service of Trans World Airlines, Inc., Sept. 1998, at 114(E).

Tracor Corp., 6500 Traco Lane, Austin, TX 78725, @tracor.com, November 1999.

Tuskegee Airman, Inc., One Massachusetts Ave, N.W., Washington, D.C.

United Airlines, Inc., United Pride.org, December 1999.

United Flying Octogenarians, 41 Kingwood Park, Poughkeepsie, NY 12601, USA.

U.S. Department of Justice, Alert No. 5-8, 1992.

U.S. House of Representatives, Bill H.R. 3498, 1988.

PERSONAL INTERVIEWS AND CORRESPONDENCE:

Babbett, Capt. J. Randolph, President Airline Pilots Association, letters august 10, 1998 and September 1, 1998.

Brown, Col. James R., Wing Commander United States Air Force, retired, Jacksonville, FL.

Cobbs, N.H., Attorney At Law, Washington, D.C.

Corde, Luis, Aviacion Civil, Coordinacion de Recursos de Aviacion.

Davis, C., Chief Pilot, Heart of Georgia Technical Institute, Eastman, GA.

DelFarro, Col. Ivo, Air Attache Italian Embassy, Washington, D.C.

Ehrlich, Prof. P., Age classification and restrictions of the military in France, Germany and England.

Faulk, J. E., Senior Judge NTSB, retired, Melbourne, FL.

Lamy, P., Chief Personnel Licensing and Training Section, ICAO, Montreal, PQ.

Montonati, Capt. Alessio, Alitalia Airlines

Moor, Robert, Dallas Voice.

Ryals, Col. Allen C., Fighter Squadron Commander United States Air Force, retired, Seaside Beach, SC.

Weitzel, Dr. Thomas R., Embry Riddle Aeronautical University, Daytona Beach, FL.