

# ARTICLES

## ENFORCING AVIATION SAFETY REGULATIONS: THE CASE FOR A SPLIT-ENFORCEMENT MODEL OF AGENCY ADJUDICATION

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## INTRODUCTION

The scheme of administrative adjudication that is employed in aviation safety cases currently occupies the center of a well-founded controversy. The focus of this dispute is the Civil Penalty Assessment Demonstration Program (Demonstration Program)<sup>1</sup>—a temporary grant of authority to the Federal Aviation Administration (FAA), in conjunction with its parent agency, the Department of Transportation (DOT), to impose civil money penalties for violations of the safety provisions of the Federal Aviation Act<sup>2</sup> and its implementing regulations.<sup>3</sup> Although long ensconced in other areas of administrative law,<sup>4</sup> the administrative imposition of civil money penalties is both novel and controversial in the context of aviation safety regulation.<sup>5</sup> The future of the Demonstration

1. Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223, tit. II, § 204(g), 101 Stat. 1486, 1520 (codified at 49 U.S.C. app. § 1475 (1988)).

2. 49 U.S.C. app. §§ 1301-1541 (1988) [hereinafter Federal Aviation Act].

3. 14 C.F.R. §§ 1-1265 (1990).

4. See Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1438 (1979) (stating 348 statutory civil penalties are enforced by 27 federal departments and independent agencies).

5. Prior to 1987, the Federal Aviation Administration had authority to impose civil money penalties administratively for safety violations only in cases involving violations

tion Program is at risk.

Prior to the initiation of the Demonstration Program in 1987, the FAA either had to settle its civil money penalty cases or refer them to United States attorneys, who frequently were reluctant to sue in federal district court for the relatively small sums that often were involved.<sup>6</sup> Proceeding gingerly along the path of reform, Congress initially provided the Demonstration Program with a two-year term, due to expire on December 30, 1989.<sup>7</sup> With the program mired in controversy as the demonstration period drew to a close, Congress enacted a four-month extension,<sup>8</sup> followed by a three-month extension.<sup>9</sup> The most recent legislation extends the program for two years, until July 31, 1992.<sup>10</sup>

The Demonstration Program has engendered controversy for many reasons, some of which are quite misguided. Criticisms to the contrary notwithstanding, powerful arguments support the administrative imposition of civil money penalties for aviation safety violations. It would be highly regrettable to return to the prior scheme. The administrative imposition of civil money penalties has worked well in other contexts, and it also makes sense in the area of aviation safety regulation.

The scheme of administrative adjudication that is used under the Demonstration Program deserves to be controversial, however, and ought to be thoroughly reformed, for another reason. The current pro-

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of the Hazardous Materials Transportation Act, 49 U.S.C. app. §§ 1801-1812 (1988), or any rule, regulations, or order issued thereunder. 49 U.S.C. app. §§ 1471(a)(1), 1809 (1988). Since 1978, administratively imposed civil money penalties have been used to enforce various types of economic regulations that are imposed by the Federal Aviation Act, 49 U.S.C. app. §§ 1371-1389 (1988), and the Act's implementing rules and regulations. 14 C.F.R. §§ 1-1265 (1990). See *infra* note 19 for the history of federal regulation and the various modes of enforcement used for different types of regulations at different times.

This Article, however, is concerned exclusively with aviation safety regulations and their enforcement. Subsequent references to the Federal Aviation Act and its implementing regulations therefore should be understood as referring solely to those provisions of the Federal Aviation Act and its implementing regulations that pertain to aviation safety.

6. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 896, 919-23, 1 C.F.R. § 305.72-6 (1972); EXTENSION OF CIVIL PENALTY ASSESSMENT DEMONSTRATION PROGRAM, H.R. REP. NO. 602, 101st Cong., 2d Sess. 3 (1990).

7. Airport and Airway Safety and Capacity Expansion Act of 1987, Pub. L. No. 100-223, tit. II, § 204(g), 101 Stat. 1486, 1520 (codified at 49 U.S.C. app. § 1475 (1988)).

8. Miscellaneous Aviation Amendments, Pub. L. No. 101-236, 103 Stat. 2060 (1990).

9. Extension of the Civil Penalty Demonstration Program, Pub. L. No. 101-281, 104 Stat. 164 (1990).

10. Pub. L. No. 101-370, — Stat. — (1990) (LEXIS Genfed library, PubLaw file).

cedure for adjudicating violations of federal aviation safety rules is needlessly duplicative and confusing. Although there is one set of aviation safety standards, two federal administrative agencies share the accompanying adjudicatory responsibilities: the Department of Transportation, which includes the FAA, and the independent National Transportation Safety Board (NTSB). Which agency adjudicates a particular claim depends on the specific penalty that the FAA, as the prosecuting agency, elects to seek. If the FAA pursues a civil money penalty, the dispute is litigated before an administrative law judge (ALJ) in DOT, subject to administrative review by the FAA Administrator.<sup>11</sup> If the prosecutor instead determines to seek a revocation of the alleged violator's aviation license, litigation occurs before the NTSB.<sup>12</sup> This ungainly arrangement generates needless confusion, invites forum-shopping, and risks creating conflicting administrative interpretations of the same aviation safety regulations.

In this Article, I argue that virtually all responsibilities for administrative adjudication in aviation safety cases should be vested in the independent NTSB. The reasons supporting this conclusion largely depend on factors peculiar to the context of aviation safety regulation. The situation is intricate, involving a mixture of practical, political, and legal concerns, and I hope to sort these matters out as clearly as possible.

Although I shall focus on the area of aviation safety regulation, the proposal that I offer opens a window on a more general set of administrative law issues involving what is sometimes called the "split-enforcement model"<sup>13</sup> of administrative adjudication. In what might be viewed as the traditional model, a single agency both prosecutes and adjudicates alleged violations.<sup>14</sup> Under the "split-enforcement model," by contrast, one agency promulgates rules and exercises prosecutorial responsibilities, while another agency acts as an independent adjudicator. Most legal commentators agree that the "split-enforcement model" gives rise to hard issues of practical administration, due to the difficulty of working out a precise division of responsibilities between the participating agencies.<sup>15</sup> A particularly nettlesome problem involves the defer-

11. 49 U.S.C. app. § 1475(a) (1988).

12. *Id.* §§ 1422(b), 1429(a).

13. Johnson, *The Split-Enforcement Model: Some Conclusions From the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987).

14. See REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE 7 (1941) (stating "[t]he Committee has regarded as the distinguishing feature of an 'administrative' agency the power to determine, either by rule or by decision, private rights and obligations").

15. Johnson, *supra* note 13.

ence, if any, that the adjudicating agency should accord the prosecutorial and rulemaking agency's interpretations of pertinent statutes and regulations.<sup>16</sup> I hope that my discussion of this issue will possess an interest that reaches beyond the domain of aviation safety regulation.

Part I of this Article describes the statutory framework in which the Demonstration Program is located. It outlines the respective roles of the FAA and the NTSB, the main types of civil penalties for violations of statutes and regulations relating to aviation safety, and the procedural structures through which those penalties are assessed. Part II discusses the operation of the Demonstration Program itself, reviews available statistics, and examines why the Program has proved so controversial. Part III argues that a properly designed system of administrative assessment of civil money penalties would serve the interests of aviation safety and administrative rationality, and that it would also benefit the aviation community by furnishing fair but inexpensive adjudication. Turning to questions of design and implementation, Part IV concludes that the NTSB is the preferable administrative forum for administrative adjudication. It also furnishes recommendations concerning the appropriate relationship between the FAA and the NTSB.

## I. THE STATUTORY FRAMEWORK FOR THE IMPOSITION OF CIVIL PENALTIES

Current issues regarding the administrative imposition of civil money penalties for violations of aviation safety regulations—whether fines should be imposed by an agency rather than a court, and, if so, by which agency—arise within a statutory scheme that has emerged more through historical accident than conscious design. Beginning with the Air Commerce Act of 1926,<sup>17</sup> Congress has vested responsibilities for aviation safety regulation in a succession of federal agencies.<sup>18</sup> Since

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16. The Supreme Court recently granted certiorari in a case that raises the closely analogous issue of whether a reviewing court should accord deference to the interpretation of a regulation by an adjudicating agency, or to the conflicting interpretation of the agency that promulgated the regulation and is charged with prosecuting violations, when the agencies have reached differing interpretations of the same regulation. *Dole v. Occupational Safety and Health Review Comm'n*, 891 F.2d 1495 (10th Cir. 1989), cert. granted, \_\_\_ U.S. \_\_\_, 110 S. Ct. 3235 (1990).

17. Air Commerce Act of 1926, ch. 344, 44 Stat. 568 (repealed by Federal Aviation Act of 1958), Pub. L. No. 85-726, 72 Stat. 731 (1958) (codified at 49 U.S.C. app. §§ 1303-1541 (1988)).

18. These include the Department of Commerce, the Civil Aeronautics Authority, the Civil Aeronautics Board, the Civil Aeronautics Administration, the Federal Aviation Administration, and the National Transportation Safety Board. For a general overview of the history, see Hamilton, *Appellate Practice in Air Safety Proceedings*, 10

1940, however, no agency has had a monopoly of administrative authority over aviation regulation and adjudication.<sup>19</sup> Today two administrative agencies share primary responsibility for aviation safety: the Federal Aviation Administration<sup>20</sup> and the National Transportation

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SW. U.L. REV. 247, 247-49 (1978).

19. Under the Air Commerce Act of 1926 (1926 Act), ch. 344, 44 Stat. 568 (1926) (*repealed by* Federal Aviation Act of 1958), and the Civil Aeronautics Act of 1938 (1938 Act), Pub. L. No. 706, ch. 601, 52 Stat. 973 (1938) (codified at 49 U.S.C. app. §§ 1301-1542 (1988)), both enforcement authority and hearing authority were situated entirely within one agency: the Department of Commerce and the independent Civil Aeronautics Agency under the 1938 Act. Shortly thereafter, Reorganization Plans III and IV of 1940, § 7, 54 Stat. 1231, 1234 (1940), divided authority between the newly created Civil Aeronautics Authority and Civil Aeronautics Board (CAB).

The Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (codified at 49 U.S.C. app. §§ 1301-1541 (1988)), continued the pattern of division between enforcement and hearing authority. The Federal Aviation Act of 1958 created the Federal Aviation Agency (FAA) with regulating and enforcing functions, while retaining the CAB as an autonomous entity responsible for economic regulation, accident investigation, and appellate review of FAA actions to suspend or revoke certificates of existing licenses. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, 754-96 (1958) (codified at 49 U.S.C. § 1429 (1988)). Under this bifurcated structure, the FAA had authority to compromise civil money penalties for violations of any of the provisions of the Federal Aviation Act of 1958 or the Act's implementing regulations that the FAA was responsible for administering, while the CAB had authority to compromise civil money penalties only for violations of provisions and rules that involved accident investigations. Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731, 783-84 (1958) (codified at 49 U.S.C. app. § 1471(a) (1988)).

The Act of July 10, 1962, amended the Federal Aviation Act of 1958 to end the disparity between the FAA's and the CAB's civil penalty powers by authorizing the CAB to compromise civil money penalties for violations of provisions and rules that involved economic regulations. Act of July 10, 1962, Pub. L. No. 87-528, 76 Stat. 143, 149 (codified at 49 U.S.C. § 1471(a) (1988)). Four years later, the Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (1966) (codified at 49 U.S.C. app. §§ 1651-1659 (1988)), added the FAA (now renamed Federal Aviation Administration) to the newly created Department of Transportation (DOT). The CAB retained its economic regulatory functions, as well as its power to compromise penalties for violations of economic provisions and rules. The CAB's accident-investigation and appellate responsibilities, however, as well as its power to compromise penalties for violations of accident-investigation provisions and rules, were vested in the National Transportation Safety Board (NTSB), which was intended to be functionally independent from the outset, and was given formally independent status by the Independent Safety Board Act of 1974, Pub. L. No. 93-633, tit. III, 88 Stat. 2166 (1975) (codified at 49 U.S.C. §§ 1901-1907 (1988)).

The Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 (1978) (codified in scattered sections of 49 U.S.C.), which restructured the CAB and provided for its gradual extinction, gave the CAB and its successor agency for this purpose, DOT, the power to impose civil money penalties for violations of economic regulations. 49 U.S.C. app. § 1471(a) (1988). Consistent with Congress's patchwork treatment of the regulating agencies, however, the FAA's powers involving civil money penalties for violations of aviation safety regulations were not similarly enhanced at this time. Currently, the FAA and the NTSB are the two entities that retain continuing authority in the area of aviation safety.

20. See *infra* text accompanying notes 28-37.

Safety Board.<sup>21</sup> Although more will be said about each agency in due course, it is important to outline their general responsibilities at the outset.

At the risk of some oversimplification, the FAA, which is located within the DOT, is the agency vested with both substantive regulatory authority and enforcement responsibility under the Federal Aviation Act. The FAA promulgates regulations to promote aviation safety,<sup>22</sup> conducts investigations to ensure compliance and discover noncompliance,<sup>23</sup> and brings enforcement actions to penalize regulatory violations.<sup>24</sup>

In contrast with the FAA's general mandate, the NTSB, which is an independent agency,<sup>25</sup> has two relatively discrete functions in the area of aviation safety: investigating accidents and issuing air safety recommendations.<sup>26</sup> In addition, and much more significant for purposes of this Article, the NTSB has adjudicative responsibilities in an important category of cases involving alleged violations of the Federal Aviation Act and the implementing regulations issued by the FAA.<sup>27</sup>

### A. *The General Structure of Aviation Regulation and Enforcement*

#### 1. *The FAA*

Under the Federal Aviation Act, the FAA has the responsibility to promulgate air traffic rules;<sup>28</sup> set minimum standards governing aircraft design, construction, and maintenance;<sup>29</sup> dictate maximum periods of service for pilots and crews;<sup>30</sup> impose various record-keeping requirements;<sup>31</sup> and generally provide for safety in air commerce. To ensure compliance with applicable regulations, FAA personnel conduct inspections and, as will be discussed shortly,<sup>32</sup> initiate enforcement ac-

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21. See *infra* text accompanying notes 25-27.

22. 49 U.S.C. app. §§ 1348, 1421 (1988).

23. *Id.* §§ 1425, 1429.

24. *Id.* §§ 1471, 1475.

25. *Id.* §§ 1901-1902.

26. *Id.* § 1441(a).

27. See 49 U.S.C. app. §§ 1422(b), 1429(a), 1903(a) (1988) (providing NTSB authority to review decisions to suspend, modify, and revoke aviation certificates).

28. *Id.* § 1348.

29. *Id.* § 1421(a)(1).

30. *Id.* § 1421(a)(5).

31. *Id.* §§ 1421, 1421(a)(3).

32. See *infra* notes 38-74 and accompanying text.

tions.<sup>33</sup> In addition, the FAA has licensing powers and responsibilities<sup>34</sup> with respect to “almost every conceivable form of aviation business” and function.<sup>35</sup>

Unlike many administrative agencies, however, the FAA has historically lacked the authority to impose civil sanctions for violations of the statute and regulations that it administers. The Federal Aviation Act provides two main forms of civil sanction: (i) suspensions or revocations of existing licenses (so-called “certificate actions”)<sup>36</sup> and (ii) civil money penalties.<sup>37</sup> In the past, the FAA’s power lay with seeking, rather than imposing, these sanctions. A curious feature of the Federal Aviation Act is that it has provided, and indeed continues to provide, starkly different adjudicatory structures in certificate actions, on the one hand, and actions for civil money penalties, on the other.

## 2. Penalties

### a. Certificate suspensions and revocations

According to FAA policy, certificate actions are the “primary” enforcement tool in cases involving certificate holders other than airline companies—pilots, flight personnel, and mechanics, for example.<sup>38</sup> In order to ensure compliance with safety regulations, the Agency reasons that, “[i]f a certificate holder improperly exercises the privileges of that certificate, the natural consequence . . . is to lose the privileges for a

33. 49 U.S.C. app. §§ 1425, 1429, 1471, 1475 (1988).

34. *Id.* §§ 1421-1429.

35. According to Hamilton, *supra* note 18, at 616-17, the FAA has the authority: to certify almost every conceivable form of aviation business, including domestic, flag, and supplemental air carriers and commercial operators of large aircraft, air travel clubs using large airplanes, scheduled air carriers using helicopters, foreign air carriers operating within the United States, operators of helicopters hoisting loads externally, air taxi and commercial operators of small aircraft, agricultural aircraft operators, airports serving certificated air carriers, pilot training schools, aircraft repair stations, aviation maintenance technician schools, and parachute lofts, along with both ground and flight instructors. In addition to obtaining an operating certificate, each flight crew member and air traffic controller must obtain an aviation medical certificate from the FAA.

36. 49 U.S.C. app. § 1429 (1988). Certificate actions are often referred to as “section 609 cases,” in reference to section 609 of the Civil Aeronautics Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958) (codified as amended at 49 U.S.C. §§ 1301-1557 (1988)).

37. 49 U.S.C. app. § 1471 (1988). Suits for civil money penalties are often referred to as “section 901 cases,” in reference to section 901 of the Civil Aeronautics Act of 1938, Pub. L. No. 706, ch. 601, 52 Stat. 973 (1938).

38. FEDERAL AVIATION ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, COMPLIANCE AND ENFORCEMENT PROGRAM, ORDER NO. 2150.3A, para. 206 (1988) [hereinafter FAA Enforcement Handbook].



period of time commensurate with the violation.”<sup>39</sup> There are four main exceptions to the Agency’s preference for certificate action as the most appropriate form of sanction. One deals with persons who are not certificate holders—for example, passengers.<sup>40</sup> Another involves relatively minor violations, “where the adverse consequences of a certificate action would be clearly disproportionate to the violation.”<sup>41</sup> A third exception, with a different rationale, applies to air carriers, and especially to airlines providing scheduled passenger service, in whose cases a certificate action might have “a substantial adverse impact on the public from disrupted service.”<sup>42</sup> Finally, the Agency sometimes seeks civil money penalties in cases in which a certificate action would be untimely under applicable procedural rules.<sup>43</sup>

The FAA Administrator<sup>44</sup> has long had power to amend, modify, suspend, or revoke existing certificates,<sup>45</sup> but this power, as a practical matter, requires the concurrence of the NTSB. If the Administrator issues an order affecting a certificate, the certificate holder has a right of appeal to the NTSB,<sup>46</sup> which is directed by statute to conduct an independent review.<sup>47</sup> Under NTSB rules, the initial decision is made

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. The NTSB, which adjudicates certificate actions, has a “stale complaint rule” under which the Board regards any penalty action not initiated within six months of the alleged violation as untimely. 49 C.F.R. § 821.33 (1990). The FAA has recently adopted a two year statute of limitations applicable in civil money penalty cases adjudicated by the FAA and its parent, DOT. 55 Fed. Reg. 27,553 (1990).

44. Within the current statutory framework, the Administrator possesses suspension and revocation powers on behalf of the Secretary of Transportation. 49 U.S.C. § 106(g) (1988).

45. 49 U.S.C. app. § 1429 (1988). The FAA’s authority to suspend and revoke certificates for punitive purposes has been challenged repeatedly by former FAA attorney Lawrence Smith. See Smith, *FAA Punitive Certificate Sanctions: The Emperor Wears No Clothes*, 14 TRANSP. L.J. 59 (1985). The essence of Smith’s argument is that the FAA began to assert the power to use certificate actions for punitive purposes under the 1926 Air Commerce Act, but that Congress did not intend to grant this authority in 1926, and that the FAA’s initial arrogation of unlawful power remains illegitimate. This argument has been rejected repeatedly by the courts. See, e.g., *Komjathy v. NTSB*, 832 F.2d 1294 (D.C. Cir. 1987); *Go Leasing, Inc. v. NTSB*, 800 F.2d 1514 (9th Cir. 1986). Moreover, even if Smith were correct about the 1926 Act, it seems clear that Congress, in subsequent Acts, has intended to ratify the use of certificate actions for punitive purposes. Congress’ intent on the use of certificate actions for punitive purposes is legally controlling. See *Lorillard v. Pons*, 434 U.S. 575, 581-82 (1978) (stating Congress is presumed to be aware of administrative or judicial interpretation of statute and to adopt that interpretation when it re-enacts that statute or incorporates relevant parts in a new law).

46. 49 U.S.C. app. § 1429(a) (1988).

47. See *id.* This provision states that:

[t]he National Transportation Safety Board may, after notice and hearing,

by an ALJ, and a further appeal may be taken to the Board itself.<sup>48</sup> If the Board's decision is adverse to the certificate holder, the certificate holder may obtain judicial review in the federal courts of appeals.<sup>49</sup> The NTSB thus retains ultimate adjudicatory authority in certificate actions.

In the context of general administrative practice, two features of the process for certificate actions stand out. First, imposition of this form of sanction follows the "split-enforcement model."<sup>50</sup> The FAA promulgates rules and brings actions to enforce them, but the NTSB, in every disputed case, exercises independent adjudicatory authority.<sup>51</sup> Second, certificate suspensions and revocations are nevertheless imposed administratively, without requirement of prosecution by a United States attorney or trial by jury.<sup>52</sup> Review in the courts of appeals occurs on the administrative record, subject to substantial evidence review.<sup>53</sup>

## b. Civil money penalties

### (i) Pre-1987 scheme

Civil money penalties have long been available for violations of aviation safety regulations, and, as noted above,<sup>54</sup> are the FAA's preferred form of sanction against persons who do not hold certificates, against

amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of hearings the National Transportation Safety Board shall not be bound by the findings of fact of the Administrator.

48. 49 C.F.R. § 821.47 (1990); 49 U.S.C. app. § 1429(a) (1988). A case that is appealed to the full Board is routinely transferred to the Office of the General Counsel, where it is assigned to a staff attorney. Telephone interview with Ronald Battocchi, NTSB staff attorney (Jan. 31, 1990). The staff attorney then prepares a draft decision, which is circulated to all five Board members with the relevant briefs attached. Also attached is a voting sheet, on which members record their votes. Roughly 90% of the Board's cases are decided through this voting process. *Id.* At the request of any member, however, a case will be "calendared for discussion" at a closed meeting of the Board, at which only members and staff are present. *Id.* This type of deliberation occurs in perhaps 10% of all decided cases. *Id.* Although the Board's rules permit oral argument at the discretion of the Board, requests for oral argument are almost never granted. *Id.*

49. 49 U.S.C. app. § 1429(a) (1988). In cases of NTSB decisions that are adverse to the FAA, the agency has no right of appeal. *Id.*; *Id.* § 1486.

50. See Johnson, *supra* note 13 (using the term "split-enforcement model" to apply to administrative structures in which one agency has responsibility for rulemaking and enforcement while another has responsibility for adjudication).

51. See *supra* notes 46-47 and accompanying text.

52. 49 U.S.C. app. § 1429(a) (1988).

53. *Id.* § 1486(e).

54. See *supra* notes 40-43 and accompanying text.

air carriers, and against violators for whom a certificate suspension or revocation would be excessive. Prior to the authorization of the Demonstration Program, the relevant statutes generally made no provision for the administrative assessment of civil money penalties.<sup>55</sup> Under the procedures then in place, the Agency would conduct an investigation, issue a letter proposing a civil penalty, and afford an opportunity for an informal conference, presided over by an FAA attorney.<sup>56</sup> After concluding that a violation had occurred, the Administrator had legal authority only to "compromise" a penalty.<sup>57</sup> If the party charged with a violation declined either to pay the proposed penalty or to enter a compromise that the FAA deemed acceptable, the FAA was forced to refer the action to a United States attorney for enforcement action in a federal district court, where the defendant enjoyed a right to trial by jury.<sup>58</sup> There was no provision for administrative adjudication by the NTSB or any other agency. The maximum available civil penalty was \$1,000.<sup>59</sup>

(ii) *Pressures for change*

By 1987, the statutory provisions for civil money penalties had emerged as a subject of controversy and a source of frustration. Appealing to the ultimate concern for aviation safety, the FAA argued that allowing the imposition of civil money penalties only after a suit had been brought in federal district court by a United States attorney effectively undermined the deterrent purpose of the sanctions. According to the Agency, the enforcement process operated too slowly to drive home the message that violations would lead to punitive consequences.<sup>60</sup> Moreover, the FAA argued, the reluctance of United States attorneys to prosecute cases for relatively small fines placed undue pressure on the Agency to compromise civil penalty assessments, thus

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55. There was, however, an exception for cases involving violations of the Hazardous Materials Transportation Act, 49 U.S.C. app. §§ 1801-1813 (1988). In Hazardous Materials cases, the Administrator, for the Secretary, has been able to "assess" a civil money penalty "after notice and opportunity for hearing" with no provision for review by the NTSB. *Id.* § 1809. The Administrator's decision may be appealed to the courts of appeals. *Id.* § 1486(a). As with decisions made by the NTSB, the Administrator's decision is subject to "substantial evidence review." *Id.* § 1486(e).

56. See Pangia, *Handling FAA Enforcement Proceedings: A View from the Inside*, 46 J. AIR L. & COM. 573, 593-94 (1981) (describing FAA's previous process for determining whether to bring civil penalty actions).

57. 49 U.S.C. app. § 1471(a)(2) (1988).

58. *Id.* § 1487(b).

59. *Id.* § 1471(a)(1).

60. See Goldschmid, *supra* note 6, at 923 (restating and endorsing similar argument made by FAA in 1971).

further diminishing the deterrent effect of civil money penalties.<sup>61</sup> In a closely related complaint, the FAA argued that the maximum civil penalty of \$1,000, which had remained unchanged since 1938, was too low. According to the FAA, such a limited penalty “provided little economic disincentive to any commercial operator capable of viewing the penalty as merely a cost of doing business.”<sup>62</sup>

Viewing the matter from a different perspective, at least some private aviation lawyers expressed concern that the overall structure for imposition of sanctions was perverse and dysfunctional.<sup>63</sup> It was administratively easier for the FAA to pursue certificate actions, with their potentially draconian penalties, than to seek modest civil fines. In addition, the disparate enforcement tracks—with civil penalty cases in the federal district courts and certificate actions ultimately adjudicated administratively before the NTSB—invited forum-shopping.

(iii) *Current provisions: the Demonstration Program*

The Airport and Airway Safety and Capacity Expansion Act of 1987<sup>64</sup> (1987 Act) significantly altered the prior scheme of imposing civil money penalties, though only on a provisional basis. Specifically, the 1987 Act—which has essentially been extended in all relevant respects through 1992<sup>65</sup>—authorized a two-year Civil Penalty Assessment Demonstration Program, under which the FAA Administrator may assess civil money penalties with a cumulative total of up to \$50,000.<sup>66</sup> Before a disputed penalty can be imposed, the statute contemplates a formal administrative hearing before an ALJ within DOT, the FAA’s parent agency, and administrative review by the FAA Administrator.<sup>67</sup> Civil penalty defendants also have an additional right of judicial review in the courts of appeals.<sup>68</sup> In addition to providing for administrative adjudication, the 1987 Act increased the maximum civil penalty for any single violation from \$1,000 to \$10,000 for any person

61. See *id.* at 919-23 (offering survey and argument reaching same general conclusion that slowness of enforcement process diminished deterrent effect of sanctions).

62. FEDERAL AVIATION ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, REPORT TO CONGRESS ON THE \$10,000 MAXIMUM CIVIL PENALTY ASSESSMENT PROGRAM 3 (July 1989).

63. See generally, Smith, *supra* note 45, at 63-5 (arguing two-track enforcement model lacks “logic and common sense”).

64. 49 U.S.C. §§ 1471-1472, 1475 (1988).

65. Pub. L. No. 101-370, § 1, \_\_\_ Stat. \_\_\_ (1990) (LEXIS, Genfed library, PubLaw file).

66. 49 U.S.C. app. § 1475 (1988).

67. *Id.*

68. *Id.* § 1486(a); 14 C.F.R. § 13.235 (1990).

who operates an aircraft for compensation or hire in violation of applicable federal statutes or regulations.<sup>69</sup>

c. Other forms of sanctions

Besides certificate actions and suits for civil money penalties in the federal district courts, the statutory scheme that has existed since 1987 includes sundry provisions for other, but practically less important, civil remedies for violations of statutes and regulations relating to aviation safety. In emergency cases, the statutes generally allow summary action by the FAA Administrator, with a subsequent right of both administrative and judicial review.<sup>70</sup> Injunctive remedies require judicial action.<sup>71</sup> And in one relatively small but not insignificant category of cases, arising under the Hazardous Materials Act, the statutes permit the administrative imposition of civil money penalties without a requirement of review by the independent NTSB.<sup>72</sup> Following a notice of proposed penalty, respondents are entitled to a formal hearing before an ALJ within the FAA's parent agency, DOT, with a right to administrative review by the FAA Administrator,<sup>73</sup> and to judicial review in the courts of appeals.<sup>74</sup>

B. *Significance of the Demonstration Program*

The significance of the legislation creating and extending the Demonstration Program can be measured in part by its effect on the pre-existing structure for the assessment of civil penalties for violations of air safety regulations. Most importantly, the statutes have freed the FAA from reliance on the unwieldy process of referring civil money penalty cases to United States attorneys. The legislation also has authorized fines large enough to function as effective deterrents.

At the same time, the 1987 Act and successor enactments that have extended the Demonstration Program have made no attempt to impose overall coherence on the structure of available remedies for violations of air safety legislation and regulations. By 1987, that scheme had become a complex patchwork involving partial reliance on a variety of adjudicative mechanisms and diverse bodies of procedural rules.<sup>75</sup> In

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69. 49 U.S.C. app. § 1471(a) (1988).

70. *See id.* §§ 1429(a), 1485(a) (providing for summary action by FAA if Administrator determines emergency exists).

71. *Id.* § 1487(a).

72. *Id.* §§ 1471(a)(1), 1809(a).

73. 14 C.F.R. § 13.233 (1990).

74. 49 U.S.C. app. § 1486(a) (1988); 14 C.F.R. § 13.235 (1990).

75. *See generally* Tello, *Do We Need So Many Enforcement Structures and Rules*

reforming just one segment of the crazy-quilt, the 1987 legislation contemplated that the principal forms of sanction for violations of air safety regulations—certificate actions and suits for civil money penalties—would continue to follow sharply distinct procedural tracks. Under the Demonstration Program, adjudicatory responsibility in certificate cases remains with the NTSB, while adjudication in civil money actions is assigned to officials of the FAA and its parent, DOT.

## II. THE DEMONSTRATIVE PROGRAM IN OPERATION

Controversy has abounded throughout the Demonstration Program's short and still precarious life. At the most fundamental level, questions continue to be raised about whether civil money penalties should be imposed administratively at all in the area of aviation safety.<sup>76</sup> Although the administrative imposition of civil penalties is now a familiar practice in other contexts,<sup>77</sup> some members of the aviation community continue to view the right to a jury trial in an article III court as fundamental to fairness.<sup>78</sup>

Debate also has focused on the allocation of adjudicative responsibility to the agencies having prosecutorial responsibilities, rather than to the independent National Transportation Safety Board, which continues to adjudicate certificate actions.<sup>79</sup> To an extent, the arguments have concerned the relatively abstract merits of independent adjudication by the NTSB, which would arguably enhance fairness or at least the appearance of fairness, and of the traditional agency model in which a single agency both prosecutes and adjudicates alleged violations. However, context-specific concerns and interests have strongly influenced the discussions.

First, although it is common practice in other areas for a single agency to possess both prosecutorial and adjudicative responsibilities, the aviation community had grown accustomed to "independent" adju-

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*for Aviation Enforcement?*, TRANSLAW 1 (Winter 1989) (asserting that multiple layers of federal aviation legislation, enacted to serve specialized purposes, lack "cohesive structure").

76. See Smith, *No Basis In Law*, September 1987 AVIATION DIGEST 26; Smith, *FAA Punitive Sanctions: The Emperor Wears No Clothes; Or How Do You Punish A Propeller?*, 14 TRANS. L.J. 59 (1985) (questioning the appropriateness of FAA's use of civil penalties and suspensions to punish for violations of air-safety regulations).

77. Diver, *supra* note 4 (discussing increased use of civil money penalties by federal regulators).

78. See Smith, *No Basis in Law*, *supra* note 76, at 31.

79. Congress has called on the Administrative Conference of the United States to study this issue and report its recommendations by February 1992. Pub. L. No. 101-370, § 3, \_\_\_ Stat. \_\_\_ (1990) (LEXIS, Genfed library, PubLaw file).

dication of alleged safety violations—either by the federal district courts in suits for civil money penalties or by the NTSB and its predecessor agencies in certificate actions.<sup>80</sup> The result may have been a natural assumption among members of the aviation community that adjudicative fairness requires complete adjudicative independence<sup>81</sup>—something that the Demonstration Program, which involves administrative adjudication by ALJs in the FAA's parent agency, DOT, and administrative review by the FAA Administrator, does not provide.

In addition, during most of the period of the Demonstration Program, the FAA has pursued controversial and aggressive substantive enforcement policies that have produced a large percentage of the civil penalty cases subject to administrative adjudication.<sup>82</sup> Most easily documented is the FAA's aggressive testing of air carriers' capacity to detect simulated weapons at pre-boarding passenger screening points.<sup>83</sup> The major carriers fiercely resent this simulated weapons program, which has produced adverse publicity, and which they claim is politically motivated and substantively unfair. Although substantive enforcement priorities are analytically distinct from questions involving appropriate adjudicative structures, emotional responses generated in one area of dispute may tend to color viewpoints in other areas. There also

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80. One or another variant of a "split-enforcement model," in which one agency adjudicates cases brought by another agency, has been followed in certificate actions since 1940. *See supra* note 19.

81. Some hint of this concern emerges in the comments received by the FAA in response to recent notice of proposed rulemaking. *See* 55 Fed. Reg. 27,548, 27,571 (1990) (discussing comments arguing for full transfer of adjudicative responsibilities from FAA and DOT to NTSB).

82. *See infra* note 83 and accompanying text.

83. The Air Transport Association of America (ATA), which represents the major commercial airlines that are subject to FAA regulation, has complained bitterly that the FAA has "devoted two-thirds of its civil penalty resources to litigation about sneaking fake guns through domestic airports;" that it has done so "to try to raise money and to generate headlines for the agency and political appointees;" that "there is no indication [that] security has been enhanced" as a result, since there was no substantial threat of hijackings even at the outset; and that the agency, as a result of its excessive activity with respect to simulated weapons tests, has failed to deploy its resources to deal with greater safety problems, such as unlawful shipments of hazardous materials. *The Civil Penalty Assessment Demonstration Program of the Federal Aviation Administration: Hearings Before the Subcomm. on Aviation, Public Works & Transportation of the House Comm. on Public Works and Transportation*, 101st Cong., 1st Sess. 160 (1989) (statements of James E. Londrey, Senior Vice-President, Air Transport Association of America) [hereinafter ATA Comments]. The FAA, of course, defends its simulated weapons tests as important to ensure safety. *See* FEDERAL AVIATION ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION, REPORT TO CONGRESS ON THE \$10,000 MAXIMUM CIVIL PENALTY AND THE CIVIL PENALTY ASSESSMENT PROGRAM 6-8 (July 1989) (stating simulated weapons tests are necessary to determine if airlines have implemented safety regulations promulgated by FAA) [hereinafter FAA Report to Congress].

seems to be a sense in the general aviation community, going far beyond the major carriers, that the FAA in recent years has adopted a "get-tough" enforcement stance, and that its enforcement personnel have sometimes adopted unreasonably harsh attitudes.<sup>84</sup> The resulting resentment also seems to have manifested itself in opposition to the location of adjudicative responsibilities in the FAA and DOT.

The actual administration of the Demonstration Program by the FAA and DOT has also come under attack. A brief sketch of the program's administrative history, and of the numbers and types of cases that have arisen within it, will help to define the context in which future decisions must be taken.

### *A. Implementation of the Demonstration Program*

Although the Demonstration Program was initially authorized for a period of only two years, from December 30, 1987 until December 30, 1989, the FAA needed to promulgate rules of practice before administrative adjudication of civil money penalty cases could begin. Despite the time pressure, it took the FAA over eight months to draft a set of procedural rules. With the demonstration period fleeting, the FAA, at the end of its drafting process, opted to issue a final rule, on August 31, 1988, without providing prior notice or opportunity for comment.<sup>85</sup> The Agency invited comment at that time. After comments had been received, the FAA published a response on March 22, 1989, in which it defended each of the challenged procedural provisions and rejected all suggestions for amendment.<sup>86</sup>

The FAA's initial rules of practice sparked a firestorm of criticism. With respect to content, those rules afforded fewer procedural safeguards to civil penalty defendants than do what one administrative law judge, in private conversation, has called the "tried and true" system of NTSB rules. Adverse comments came not only from the regulated aviation community, but from the Section of Administrative Law and Regulatory Practice of the American Bar Association.<sup>87</sup> When the

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84. See Lewis, *FAA Enforcement: An Agency Under Fire*, 63 *BUS. AND COMM. AVIATION* (Dec. 1988) (discussing complaints that FAA has taken increasingly adversarial enforcement attitude and has acted especially harshly toward "little guys" who lack resources to defend themselves effectively in litigation).

85. 53 *Fed. Reg.* 34,646 (1988).

86. Federal Aviation Administration, *Disposition of Comments on Rules of Practice for FAA Civil Penalty Cases*, 54 *Fed. Reg.* 11,914, 11,916 (1989) [hereinafter *FAA Disposition of Comments*].

87. Letter from Sally Katzen, Chairperson, Section of Administrative Law and Regulatory Practice of the American Bar Association to the Federal Aviation Administration, Office of Chief Counsel (December 2, 1988) [hereinafter *Katzen letter*].



FAA asked the Administrative Conference of the United States to conduct a study of the Demonstration Program, the Conference's Committee on Adjudication,<sup>88</sup> and later the Conference itself,<sup>89</sup> also recommended a number of changes.<sup>90</sup>

The FAA's rules also came under attack for being issued without prior notice and opportunity for comment. The Agency had a plausible legal argument that its rules of practice were "rules of agency organization, procedure, or practice" and thus specifically exempted from the notice-and-comment requirements of the Administrative Procedure Act.<sup>91</sup> But this argument did little to placate industry critics, who took the Agency's stance as further evidence of its insensitivity to perspectives other than its own. A coalition of aviation organizations, headed by the Air Transport Association of America,<sup>92</sup> brought suit in the United States Court of Appeals for the District of Columbia Circuit to enjoin the rules' application on the ground, among others, that the rules were unlawfully promulgated. By a two-to-one vote, the court agreed.<sup>93</sup> In a decision handed down on April 13, 1990, the court enjoined the FAA from applying its procedural rules to any future cases until the Agency had complied with the notice-and-comment strictures of section 553 of the APA.<sup>94</sup>

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88. COMMITTEE ON ADJUDICATION OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, PROPOSED RECOMMENDATION: CIVIL MONEY PENALTIES FOR FEDERAL AVIATION VIOLATIONS (adopted March 15, 1990).

89. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACUS RECOMMENDATION 90-1, IMPOSING CIVIL MONEY PENALTY VIOLATIONS OF THE FEDERAL AVIATION REGULATIONS: IMPLEMENTING A FAIR AND EFFECTIVE SYSTEM, 1 C.F.R. § 90-1 (1990).

90. *Id.* Perhaps the most important of these called for observance of more stringent separation-of-functions rules by the FAA. ACUS also recommended changes to permit full and fair examination and cross-examination of witnesses and, where the interests of justice so require, a right to submit post-hearing briefs.

91. APA section 553 (b)(3)(A) exempts "rules of agency organization, procedure, or practice" from the otherwise applicable notice requirements of section 553, 5 U.S.C. § 553 (b)(3)(a) (1988). The Supreme Court has recently granted the government's petition for certiorari to review the court of appeals' resolution of this issue. *See* 59 U.S.L.W. 3451 (Jan. 8, 1991).

92. Intervenor included the National Air Carrier Association, the Airline Pilots Association, and the Aircraft Owners and Pilots Association.

93. *Air Transp. Ass'n of America v. Department of Transp.*, 900 F.2d 369 (D.C. Cir. 1990), *cert. granted*, 59 U.S.L.W. 3451 (Jan. 8, 1991). The court did not rule on the merits or the ripeness of the ATA's substantive challenges to the FAA's rules of practice. *Air Transp. Ass'n*, 900 F.2d at 374 n.5.

94. *Id.* The court also ordered the FAA "not to initiate further prosecutions until the agency has engaged in further rulemaking in accord with section 553." *Id.* at 381. In the exercise of its "equitable remedial powers," the court stated that "the FAA is free to hold *pending* cases in abeyance while it engages in further rulemaking. If and when the FAA promulgates a final rule for adjudication of administrative penalty actions, it may then resume prosecution of these cases." *Id.* at 380.

By the time that the court of appeals rendered its decision in April of 1990, the FAA had already commenced a rulemaking that would soon lead to a number of important changes in its rules of practice.<sup>95</sup> The notice-and-comment rulemaking that the Agency conducted in response to the court's mandate produced still further revisions, which became effective on August 2, 1990.<sup>96</sup> In both tone and substance, the FAA's posture in the 1990 rulemakings presented a sharp contrast to the stance that the Agency had adopted in rebuffing criticism of its initially promulgated set of rules in its March, 1989, *Disposition of Comments*.<sup>97</sup> The final rule that became effective in August incorporated a number of suggested changes in the proposed rules published in April, and the Agency was sympathetic in its discussion even of the proposed changes that it rejected.<sup>98</sup> Nonetheless, a substantial residue of suspicion of the FAA lingers in the aviation community.

A changed political climate offers the easiest explanation for the FAA's newly accommodating demeanor. When the original term of the Demonstration Program expired on December 30, 1989, the FAA had hoped to receive legislative authorization to continue the program on a permanent basis. But the aviation community mounted a strong effort in opposition. The most public debate in the legislative forum occurred on November 15, 1989, in a hearing before the Subcommittee on Aviation of the House Public Works and Transportation Committee.<sup>99</sup> Representatives of virtually all segments of the aviation community at-

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The FAA published a new final rule for adjudication of civil penalty cases on July 3, 1990, with an effective date of August 2, 1990. 55 Fed. Reg. 27,548 (1990).

95. In the face of mounting criticism, the FAA drafted a number of proposed revisions, published on February 28, 1990, and requested public comment. 55 Fed. Reg. 7,980 (1990). A final rule, which substantially accepted all of the revisions proposed by the Administrative Conference's Committee on Adjudication, then issued on April 20, 1990. 55 Fed. Reg. 15,110 (1990). The revisions could not take effect until August 2, however, due to the ruling of the United States Court of Appeals in the suit brought by the Air Transport Association. The court, as noted above, *see supra* notes 93 and 94 and accompanying text, held the FAA's entire set of procedural rules—including even those that had not attracted controversy—subject to the APA's notice-and-comment requirement. It accordingly enjoined the FAA from conducting any further adjudications until the completion of the required rulemaking. *Air Transp. Ass'n of America v. Department of Transp.*, 900 F.2d 369, 380 (D.C. Cir. 1990).

96. 55 Fed. Reg. 27,548 (1990).

97. FAA *Disposition of Comments*, *supra* note 86.

98. 55 Fed. Reg. 27,548, 27,548-27,585 (1990). Among other things, the agency responded to comments by altering rules relating to service of documents, prehearing procedures, location of hearings, discovery, intervention, and submission of written arguments. *Id.*

99. *The Civil Penalty Assessment Demonstration Program of the Federal Aviation Administration: Hearings Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 101st Cong., 1st Sess. 233 (1989) [hereinafter *Hearings*].

tacked the rules of practice promulgated by the FAA and opposed continuation of the Demonstration Program as implemented by the FAA and its parent agency, DOT. Obviously troubled by the widespread perception in the aviation community that the FAA and DOT had mishandled their mandate, Congress first voted a stopgap, four-month extension of the Demonstration Program and its system of administrative adjudication until April 30, 1990.<sup>100</sup> When that date pressed close, a 90-day extension was enacted.<sup>101</sup> It was during these two extension periods, under palpable congressional pressure, that the FAA comprehensively revised its procedural rules.

Congress, however, remained unwilling to put the Demonstration Program on a permanent footing. In its most recent action, Congress authorized continuation of the program in its current state for another two years, until July 31, 1992.<sup>102</sup> Apparently eager for advice, Congress also has commissioned an additional study by the Administrative Conference of the United States.<sup>103</sup> The main question for the Administrative Conference is whether adjudicatory responsibilities in civil money penalty cases should be vested in the FAA and its parent, DOT, or in the independent NTSB.

### *B. Numbers and Types of Cases Affected by the Demonstration Program*

Although Congress authorized the Demonstration Program nearly three years ago, many of the data that would be most relevant to an assessment are not yet available. It took more than eight months to get the program started. Scarcely a year and a half later, a court decision brought the program to a four-month halt.<sup>104</sup> Nonetheless a few generalizations—based mostly on data yielded by the program's first fourteen months of actual operation—are possible.<sup>105</sup>

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100. Miscellaneous Aviation Amendments, Pub. L. No. 101-236, 103 Stat. 2060 (1990).

101. Extension of the Civil Penalty Demonstration Program, Pub. L. No. 101-281, 104 Stat. 165 (1990).

102. Pub. L. No. 101-370, § 1, \_\_\_ Stat. \_\_\_ (1990) (LEXIS. Genfed library, PubLaw file).

103. *Id.*

104. *Air Transp. Ass'n of America v. Department of Transp.* 900 F.2d 369 (D.C. Cir. 1990), *cert. granted*, 59 U.S.L.W. 3451 (Jan. 8, 1991).

105. Most of the statistical information that follows was provided to me by the FAA during the time that I worked as a consultant to the Administrative Conference of the United States. This information came in various installments; earlier sets of figures were later updated. The most comprehensive and up-to-date information was sent to me by Mary Walsh, Staff Attorney, FAA Enforcement Policy Branch, Regulations and Enforcement Division. Letter from Mary Walsh, FAA Enforcement Policy

First, the total number of civil money penalty cases initiated under the program is quite large. During the first fourteen months of the program's operation, the FAA issued 4,379 notices of proposed civil penalty in cases subject to administrative adjudication, an average of more than 300 per month.<sup>106</sup>

Second, the vast preponderance of Demonstration Program cases falls within three identifiable categories. More than sixty-five percent of the cases (2,871) involve security violations.<sup>107</sup> These arise overwhelmingly, if not exclusively, out of the operation of screening processes aimed at detecting illegal weapons.<sup>108</sup> The security cases divide into two types: cases against passengers who unlawfully attempt to introduce guns or other weapons onto aircraft, and cases against air carriers that fail to detect simulated weapons in tests conducted by the FAA. About fifteen percent of the Demonstration Program cases (649 in total) have involved flight operations violations.<sup>109</sup> These include violations of aircraft operational rules, such as those that forbid dispatching an aircraft without required equipment on board, and those that regulate behavior by passengers. Finally, roughly ten percent of notices of proposed civil penalty (456) allege violations of regulations that prescribe maintenance standards and procedures.<sup>110</sup>

Third, the vast majority of Demonstration Program cases have been brought against either airline companies or against individuals who are

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Branch, "Requested Statistics" (October 31, 1989) [hereinafter Demonstration Program Statistics of October 31, 1989]. This set of statistics and computer print-outs most importantly reflects the number and status of Demonstration Program cases as of October 31, 1989, at which time the Demonstration Program already had been in operation for 14 months.

106. Demonstration Program Statistics of Oct. 31, 1989, *supra* note 105. The data supplied to me by the FAA do not indicate the total dollar amount sought in the 4,379 Demonstration Program cases. It may be possible to get a very rough measure, however, by taking the average penalty in cases in which orders assessing civil penalty have issued, which is \$1,936, Demonstration Program Statistics of October 31, 1989, *supra* note 105, and projecting it over 4,379 cases. This crude method of estimation suggests that the FAA sought on the order of \$8.5 million in civil money penalties in Demonstration Program cases during the Program's first 14 months. By comparison, in the 53 cases involving requests for civil penalties in excess of \$50,000 that were initiated during the same period, the FAA sought penalties totaling roughly \$16 million. *Id.* When the figures are combined, they suggest that the Demonstration Program cases constituted nearly 99% of the FAA's total number of civil money penalty actions, but that more than 60% of the total fines that the FAA sought to collect during the period were sought outside the program's ambit.

107. ATA Comments, *supra* note 83, at 175-80.

108. Interview with John Cassidy, Deputy Chief Counsel of the FAA (Jan. 11, 1990).

109. Demonstration Program Statistics of October 31, 1989, *supra* note 105.

110. *Id.* The FAA also reports 97 records and reporting violations, 55 medical violations, and 53 "crewmember interference" violations. *Id.*

not certificate holders.<sup>111</sup> This is partly the result of the FAA's substantive enforcement priorities, which have put a heavy emphasis on security violations, and especially on test-object screening.<sup>112</sup> But the pattern is also a result of the FAA's longstanding criteria for the selection of sanctions, which make certificate actions the preferred remedial choice against individual certificate holders.<sup>113</sup> Air carriers are more often the targets of fines, because a suspension of their certificates could severely inconvenience the traveling public. The major air carriers, much more than any other identifiable group, have also tended to receive large fines. Out of roughly the first 600 cases in which the FAA sought the new maximum \$10,000 penalty for a single violation of applicable rules, 483 involved a major carrier's failure to detect a simulated weapon.<sup>114</sup>

Fourth, during the first fourteen months of the demonstration period, the adjudicative structure operated with reasonable expedition—once a case had emerged from the administrative process to a point of readiness for adjudication. Of the 368 Demonstration Program cases in which formal administrative hearings had been scheduled or held as of October 31, 1989, there was an average elapsed time of 183 days between a request for a hearing and the scheduling of a hearing.<sup>115</sup> Most of the hearings ended with a dispositive oral decision.

Nevertheless, within the first fourteen months of the Demonstration Program's operations, a disappointingly large backlog of cases had developed at the pre-adjudicative stages of the enforcement process. Out of the nearly 4,400 cases initiated during that period, only 368 formal hearings had been requested as of October 31, 1989, and only 1,224 cases had proceeded to an "order assessing civil penalty"—an administrative finding of liability—as a result of formal hearings, settlements, or defaults.<sup>116</sup> There were roughly 2,800 "open" cases in which notices

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111. The statistics that directly support this conclusion come from the admittedly restricted sample of 368 cases in which formal hearings had been requested as of October 31, 1989. Of the 286 security cases included in this sample, 132 involved air carriers and 148 were "gun cases" against individuals. Demonstration Program Statistics of October 31, 1989, *supra* note 105. The 54 "operations cases" included 29 against "carriers, air taxi operators, airports, or other entities" and 25 against "passengers or other individuals." *Id.* Only within the category of "maintenance cases," where there were nine "cases against carriers or other entities" and "16 cases against individuals (e.g., mechanics)," *id.*, is there any significant representation of actions against certificate holders.

112. ATA Comments, *supra* note 83, at 175-80.

113. See *supra* notes 38-43 and accompanying text.

114. FAA Report to Congress, *supra* note 83, at 6.

115. Demonstration Program Statistics of October 31, 1989, *supra* note 105.

116. *Id.*

of civil penalty had issued, but in which hearings had not been requested and orders assessing civil penalty had not been entered.<sup>117</sup> The Agency had no firm indication of the speed at which these cases would proceed through the administrative system, or of how many cases would ultimately require formal hearings before an ALJ.

This backlog of cases resulted, in part, from FAA policy. During the early part of the Demonstration Program, the FAA assumed that it lacked the authority to settle civil money penalty cases without making a formal "finding of violation."<sup>118</sup> This position, which rested on the Agency's interpretation of the statute authorizing the Demonstration Program,<sup>119</sup> reflected a sharp departure from practice prior to the program's implementation.<sup>120</sup> From the perspective of those subject to fines for violations of the federal aviation regulations, the change in compromise policy appears to have been significant, given the repercussions that may accompany a formal finding. Air carriers may suffer a damaging loss of reputation among the public; in the relatively unusual cases in which the FAA seeks a civil money penalty from an individual pilot or other individual certificate holder, the affected individuals may find it harder to get and retain aviation-related jobs.<sup>121</sup>

Recognizing that its refusal to enter settlements without making formal findings of violation deterred the speedy resolution of cases and increased the demand for formal adjudication, the FAA recently re-examined and abandoned its earlier view that it lacked settlement au-

117. Telephone interview with John Cassady, Deputy Chief Counsel of the FAA (Dec. 18, 1989) (corroborating conclusion, reached through examination of Demonstration Program statistics, that there is large backlog of civil penalty cases).

118. FAA Disposition of Comments, *supra* note 86, at 11,916.

119. The FAA is authorized to "assess" civil penalties not to exceed \$50,000 "upon written notice and finding of violation." 49 U.S.C. app. §§ 1475(a)(1988). The FAA initially construed this language as forbidding it to accept compromise payments without a "finding of a violation." FAA Disposition of Comments, *supra* note 86, at 11,916.

120. Prior to the Demonstration Program, the FAA was under heavy pressure to settle its civil money penalty cases because it lacked statutory authority to assess civil money penalties, *see supra* notes 58-63 and accompanying text, and because United States attorneys were also often reluctant to prosecute civil penalty cases, due to the relatively small amounts of money that were usually involved, because of the then-existing statutory maximum of a \$1,000 fine per violation. Approximately 90% of the cases closed through the receipt of civil money penalties between 1984 and 1988 were closed as a result of compromises. Letter from Gregory S. Walden, FAA Chief Counsel (March 7, 1990) [hereinafter Walden letter]. Furthermore, of the 6,157 cases in which the FAA collected civil money penalties (including 104 hazardous materials cases) from 1984 to 1988, only 615 were closed following reference to a United States attorney. *Id.* The remainder, except for the 104 hazardous materials cases that were resolved under a separate grant of statutory authority, were all closed through a compromise procedure. *Id.*

121. Brief of Intervenor, at 10, *Air Transp. Ass'n of America v. Dep't of Transp.*, (D.C. Cir. 1990) [hereinafter Intervenor's Brief].

thority.<sup>122</sup> In connection with a rule published on April 23, 1990, the FAA pronounced itself both competent and willing to compromise civil money penalty cases without making any formal finding that a violation had occurred.<sup>123</sup> Since this change in policy makes settlement more attractive to alleged violators, at least some reduction in the backlog of cases requiring administrative adjudication can surely be anticipated.

### III. THE DESIRABILITY OF ADMINISTRATIVE IMPOSITION OF CIVIL MONEY PENALTIES

Although administrative assessment of certain kinds of penalties has long been accepted, administrative imposition of civil money penalties has sometimes been regarded as peculiarly problematic. This section begins with an analysis of the constitutionality of the administrative assessment of civil money penalties for violations of the Federal Aviation Act and its implementing safety regulations. It then discusses considerations of administrative policy.

#### A. Constitutional Issues

Perhaps because money fines are familiar as a criminal sanction, courts once were reluctant to acknowledge that agencies could impose this form of penalty.<sup>124</sup> Constitutional questions have continued to linger, despite an overwhelming pattern of administrative practice: as long ago as 1979, over forty percent of the 348 federal statutes prescribing civil money penalties also provided for administrative assessment.<sup>125</sup> Today, there is little doubt about the constitutionality of administrative assessment of civil money penalties for violations of the Federal Aviation Act and its implementing regulations.<sup>126</sup>

Doubts about the constitutionality of administrative imposition of civil money penalties derive from two constitutional provisions: article

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122. 55 Fed. Reg. 15,110, 15,124 (1990).

123. *Id.* The Agency's revised interpretation finds stronger support in the statute than did its initial reading. The provision of the Federal Aviation Act under which the FAA exercised its compromise authority prior to the institution of the Demonstration Program, 49 U.S.C. app. § 1471 (1988), remains applicable unless its grant of compromise authority was partially repealed by the legislation establishing the Civil Penalty Demonstration Program; and it is a settled principle of statutory interpretation that repeals by implication should not be inferred lightly. 2A C. SANDS, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 23.10 at 346 (N. Singer rev. 4th ed. 1984).

124. *See* *Lipke v. Lederer*, 259 U.S. 557, 562 (1922) (stating that penalties for crime should not be enforced through "secret findings and summary actions of executive officers").

125. *Diver*, *supra* note 4, at 1441.

126. 49 U.S.C. app. §§ 1371-1389 (1988); 14 C.F.R. §§ 1-1265 (1990).

III, which prescribes that "the judicial Power of the United States shall be vested" in courts whose judges enjoy life tenure,<sup>127</sup> and the seventh amendment, which states that, "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved."<sup>128</sup> There are two interpretive problems under article III. First, which categories of cases must, if they are to be adjudicated in any federal tribunal at all, be assigned to an article III court staffed by life-tenured judges?<sup>129</sup> Second, when is appellate review or supervisory responsibility by an article III tribunal sufficient to support initial decisionmaking by an adjunct, master, or administrative agency?<sup>130</sup> The seventh amendment issue is largely one about which statutory causes of action, if any, should trigger the right to trial by jury that is prescribed for "suits at common law."<sup>131</sup>

The Supreme Court's decisions, under both provisions, reflect an uncertain compass. The Court's recent decision in *Granfinanciera v. Nordberg*,<sup>132</sup> however, makes it clear that a central analytical concept, under both article III and the seventh amendment, is that of a "public right."<sup>133</sup> The Court has never settled on an adequate definition of the "public right" concept,<sup>134</sup> and there is serious question whether it ever could; the concept is a murky one, especially at its fringes. But, the

127. U.S. CONST., art. III, § 1.

128. U.S. CONST., amend. VII.

129. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847-58 (1986) (discussing constitutionality of congressional delegation of adjudicative functions); *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 586-93 (1985) (discussing concept of "public right" as important criterion for determining permissibility of administrative adjudication).

130. See, e.g., *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 76-87 (1982) (discussing "adjunct" role of bankruptcy court to district court); *Crowell v. Benson*, 285 U.S. 22, 50-57 (1932) (finding that provision for administrative fact finding subject to judicial review did not impermissibly remove essential attributes of judicial function from article III court); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988) (arguing that judicial review should be deemed both necessary and sufficient to legitimate administrative adjudication under article III).

131. See *Tull v. United States*, 481 U.S. 412, 417-25 (1987) (holding that seventh amendment guarantees right to jury trial to determine liability under Clean Water Act because nature of civil penalties and injunctive relief under Act resembles relief available in "[s]uits at common law"); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442 (1977) (holding seventh amendment does not bar administrative factfinding instead of trial by jury in case involving "public right").

132. \_\_\_ U.S. \_\_\_, 109 S. Ct. 2782 (1989).

133. See *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 450-61 (1977) (discussing cases involving litigation of "public rights" that do not trigger right to jury trial under seventh amendment).

134. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 69 (1982) (plurality opinion) (stating "[t]he distinction between public rights and private rights has not been definitively explained in [Court's] precedents").



existence of a public rights category reflects the traditional assumption that there are certain categories of cases—including those in which the government is a defendant, as well as disputes in which the government is enforcing a constitutional scheme of federal regulations<sup>136</sup>—to which the ordinary principles governing rights of access to judicial tribunals, for reasons of sovereign necessity and convenience, do not apply.<sup>136</sup>

Whatever the difficulties of categorization, the “public rights” label has a dispositive effect in certain cases. If a controversy involves a “public right,” the Court has held that article III establishes no impediment to administrative adjudication.<sup>137</sup> Public rights cases, apparently, are not among those to which article III necessarily applies. Moreover, “[i]f a claim . . . asserts a ‘public right,’ . . . then the seventh amendment does not entitle the parties to a jury trial if Congress assigns its adjudication to an administrative agency. . . .”<sup>138</sup>

In light of the Supreme Court’s recent pronouncements, virtually all of the difficult issues under both article III and the seventh amendment can, for present purposes, simply be put to one side. If civil enforcement actions under the Federal Aviation Act and its accompanying regulations are “public rights” cases, there is no article III obstacle to administrative adjudication; and, if an administrative tribunal is used, there is no seventh amendment bar to administrative imposition of civil money penalties since the public rights requirement is met. Despite the blurriness of the public rights category, actions to enforce the Federal

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135. *Atlas Roofing Co.*, 430 U.S. at 450.

136. See Young, *Public Rights and the Federal Judicial Power: From Murray's Lessee Through Crowell to Schor*, 35 BUFFALO L. REV. 765 (1986) (recounting history of concept of “public rights”).

137. See *Granfinanciera v. Nordberg*, — U.S. —, 109 S. Ct. at 2795-97 (holding article III does not bar Congress from assigning resolution of statutory claims to non-article III tribunals in cases involving “public rights”).

138. *Id.* at 2790 n.4; see *id.* at 2796 (stating “[i]f Congress may assign the adjudication of a statutory cause of action to a non-article III tribunal [as it can in “public rights” cases], then the seventh amendment poses no independent bar to the adjudication of that action by a nonjury factfinder” such as an administrative agency). *Granfinanciera*, in this respect, builds on the foundation laid by a footnote in *Tull v. United States*, 481 U.S. 412, 418 n.4 (1987). *Tull* held the seventh amendment applicable to a suit by the United States in federal district court to impose a civil money penalty under the Clean Water Act. But the Court, in holding the seventh amendment applicable to that action, distinguished *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 442, 454 (1977), on the ground that the government’s suit in that case, to collect civil money penalties under the Occupational Safety and Health Act, had been brought in an administrative tribunal. *Tull*, 481 U.S. at 418 n.4. According to the *Tull* footnote, “[t]he Court has . . . considered the practical limitations of a jury trial” and its functional incompatibility with administrative adjudication “in holding that the seventh amendment is not applicable to administrative proceedings.” *Id.*

Aviation Act and its implementing regulations<sup>139</sup> fall within one of the paradigms that is most clearly recognized by Supreme Court precedent: that of a civil suit by the government to protect the public's interest in compliance with a constitutionally valid federal regulatory program.<sup>140</sup>

The conclusion that administrative adjudication in the FAA's civil penalty cases is constitutionally legitimate also accords with the thrust of recent academic commentary. Skeptical of whether the concept of a public right is analytically adequate to bear the weight that the Supreme Court has assigned it, scholars have increasingly argued that judicial review, which is amply provided under the Demonstration Program,<sup>141</sup> should be both necessary and sufficient to support administrative adjudication under article III.<sup>142</sup> There is also strong support for the view that the seventh amendment should be held inapplicable to civil actions brought by the government in administrative tribunals to enforce valid schemes of federal regulation.<sup>143</sup>

### B. Policy Considerations

Considerations of public policy strongly support the administrative imposition of civil money penalties as a sanction for the violation of both regulatory statutes and their implementing regulations.<sup>144</sup> Civil

139. 49 U.S.C. app. §§ 1371-1389 (1988); 14 C.F.R. §§ 1-1265 (1990).

140. See *Granfinanciera*, \_\_\_ U.S. \_\_\_, 109 S. Ct. at 2795 (citing *Atlas Roofing Co.*, 430 U.S. at 458 as establishing that public rights category applies to situations "where the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable . . . rights").

141. See *supra* note 68 and accompanying text (describing judicial review provisions).

142. See Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233 (1990); Fallon, *supra* note 130 (arguing judicial review renders adjudication by legislative or administrative tribunal consistent with article III).

143. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 8.11, at 450-51 (3d ed. 1985) (stating there is no right to jury trial in civil actions brought before administrative tribunal to enforce statutory scheme of federal regulation because actions are based on statute, and, thus, are not "[s]uits at common law"); J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE § 11.6, at 500 (1985) (stating Congress has wide latitude in creating administrative and specialized judicial mechanisms for adjudicating statutory rights before administrative tribunals).

144. *Administrative Conference of the United States, ACUS Recommendation 72-6, Civil Money Penalties as a Sanction, 2 Recommendations and Reports of the Administrative Conference of the United States* 67-70, 1 C.F.R. § 305.72-6 (1990) [hereinafter ACUS 1972 Recommendation]. The Administrative Conference reaffirmed its recommendation in 1979. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACUS RECOMMENDATION 79-3, AGENCY ASSESSMENT AND MITIGATION OF CIVIL MONEY PENALTIES, RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1 C.F.R. § 305.79-3 (1990).

money penalties are a valuable complement to certificate suspensions and revocations, which may be excessively harsh for relatively minor offenses, and might in some cases disrupt airline service on which there is substantial public reliance.<sup>145</sup> Moreover, once the desirability of money penalties is acknowledged, a variety of factors calls for administrative imposition in the first instance, subject to judicial review in an article III court. Perhaps most telling are the lessons of experience: prior to the initiation of the Demonstration Program, requiring suits for civil money penalties to be brought by United States attorneys resulted in undue delay and, arguably at least, diminished in the sanction's deterrent effect.<sup>146</sup>

Even if speedier prosecution could be obtained, however, it is most likely that the costs of judicial decisionmaking in all civil money penalty cases would exceed the potential benefits. There would be an enormous drain on judicial resources. Within the most recent six months of the Demonstration Program for which I have figures, requests for formal hearings averaged 44 per month<sup>147</sup>—a rate that would produce 528 requests for hearing per year. Moreover, this sample comes from a period during which more than 2,800 cases for which the FAA had issued a notice of proposed civil penalty were clogged in the pipeline, and in which hearing requests could still be lodged.<sup>148</sup> Although prediction is hazardous, the available data suggest that an annual rate of 1,000 or more hearing requests might well be anticipated<sup>149</sup>—and there is no

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145. See ACUS 1972 Recommendation, *supra* note 144 (Recommendation A (2)): [c]ivil money penalties are often particularly valuable, and generally should be sought, to supplement those more potent sanctions already available to an agency—such as license suspension or revocation—whose use may prove (a) unduly harsh for relatively minor offenses, or (b) infeasible because, for example, the offender provides services which cannot be disrupted without serious harm to the public.

146. See *supra* notes 58-63 and accompanying text.

147. Interview with John Cassady, Deputy Chief Counsel of the FAA (Dec. 18, 1989).

148. See *supra* note 101 and accompanying text.

149. Of the roughly 1,560 Demonstration Program cases that had come closest to the end of the adjudicative process as of October 31, 1989, about 1,200 orders assessing civil penalty (which are formal administrative findings of guilt) had issued without a request for formal hearing, while requests for formal hearings had been entered in 368 cases, a rate of 24%. Demonstration Program Statistics of October 31, 1989, *supra* note 105. If that pattern is projected onto the approximately 4,000 civil penalty cases that will be initiated on an annual basis if present trends continue, the anticipated volume of annual requests for hearing would be about 1,000.

This projection gains some corroboration from recent experience in the somewhat parallel case of certificate actions. The FAA issued more than 4,000 notices of proposed certificate action in 1987 and again in 1988. *Id.* In each year there were more than 1,000 requests for adjudication before the NTSB. Because of time lags, no precise figures on the ratio of notices of proposed certificate action to requests for ALJ hear-

reason to believe that this number would change markedly if litigation occurred in a federal district court rather than an administrative tribunal. It is no small thing to add a thousand cases per year to the dockets of the federal district courts. Yet the benefits would appear small. The district courts presumably have most to contribute in cases involving disputed questions of law.<sup>150</sup> Yet such issues appear to be relatively rare in actions to enforce the federal aviation regulations—most of which turn on disputes concerning material facts. There are also advantages to be realized from administrative adjudication. An expert, specialized bench should be uniquely qualified to understand the contexts in which factual questions arise. Finally, as long as the tribunal is fair, the general aviation community benefits from relatively cheap and informal administrative adjudication. In these circumstances, the values supporting decisionmaking by an article III court are more than amply protected by judicial review.<sup>151</sup>

At least one member of the aviation community has characterized the right to a jury trial before an article III court as fundamental to fairness.<sup>152</sup> But this argument is simply out of touch with prevailing norms of the modern administrative state, in which administrative adjudication—conducted according to fair procedures and subject to judicial review—is commonplace.<sup>153</sup> Others, notably the Air Transport Association (ATA), have questioned whether administrative adjudication achieves the promised benefit of swifter dispute resolution. According to the ATA, “there is no indication that litigation in the District Courts would be any less expeditious than FAA administrative hearings.”<sup>154</sup> Although the data that are currently available are less than wholly conclusive, they support a different conclusion. Even though a

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ings are available. But if, extrapolating from these figures, we assume roughly 4,000 notices of proposed certificate action generated roughly 1,000 requests for hearing on an annual basis, the rate would again be in the vicinity of 25%; and if that were the rate of requests for hearing in civil penalty cases, roughly 1,000 per year would again have to be anticipated. This basis for projection must, of course, be used with extreme caution since the rate of requests for hearing is likely to vary enormously with the nature and severity of the penalty involved and with the character and financial circumstances of the defendants.

150. Cf. Fallon, *supra* note 130, at 986-89 (arguing that, although article III requires independent judicial review of agency decisions of law, it requires less stringent judicial oversight of fact-finding).

151. See generally *id.* (arguing that judicial review should be regarded as both necessary and sufficient to protect article III values).

152. See Smith, *No Basis In Law*, *supra* note 76, at 31 (stating “[r]ight to jury trial is sacred”).

153. See Diver, *supra* note 4, at 1441 (stating 141 of 348 statutes providing for civil penalties grant administrative agencies authority to “assess” civil penalties).

154. ATA Comments, *supra* note 83, at 183.

troublingly large backlog of cases has developed under the Demonstration Program,<sup>155</sup> virtually all of that backlog occurs prior to the point at which a case is ready to proceed to a formal hearing, whether administrative or judicial.<sup>156</sup> Once a case is ready for formal hearing, administrative decisionmaking proceeds much more quickly than does adjudication in a federal court.<sup>157</sup>

In sum, the stronger policy arguments all support administrative adjudication in cases in which the FAA seeks relatively modest civil money penalties. Although important questions of structure remain to be addressed, the imposition of civil money penalties for violations of the Federal Aviation Act and its implementing regulations ought to be retained.

#### IV. STRUCTURING A SYSTEM FOR THE ADMINISTRATIVE IMPOSITION OF CIVIL MONEY PENALTIES

If it is agreed that civil money penalties should be imposed administratively, the next question involves the appropriate forum. In what administrative forum should actions for civil money penalties be prosecuted? Part A of this section argues that the NTSB is the better forum for adjudication of suits for civil money penalties. Part B discusses statutory changes and administrative arrangements that would be necessary for the NTSB to perform this function in a way that promotes all of the relevant policy values.

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155. See *supra* notes 116-17 and accompanying text.

156. See *supra* note 115 and accompanying text.

157. Of 368 Demonstration Program cases in which formal administrative hearings had been scheduled or held as of October 31, 1989, there was an average elapsed time of 183 days between the time a hearing was requested and the date on which it was actually scheduled. Demonstration Program Statistics of October 31, 1989, *supra* note 105. Moreover, the FAA's rules of practice contemplate an oral decision immediately after a hearing's conclusion except in cases in which the administrative law judge requests written briefs or determines that a written decision is appropriate. 55 Fed. Reg. 27,584 (1990) (amending 14 C.F.R. § 13.231(c) (1990)). It therefore seems reasonable to anticipate that resolution should come, on average, within perhaps 200 days of the request for a hearing. Although there is no precisely analogous figure in cases referred to United States attorneys under the prior sanctioning regime, of the 1,223 cases referred to United States attorneys between September 7, 1984 and September 6, 1988, those that had been resolved as of July 1989 had taken an average of 306 days following the reference to be resolved; and in the 336 cases that had still not been resolved as of July 1989, an average of 714 days had elapsed since the reference to the United States attorney. FAA Report to Congress, *supra* note 83, at 23-25.

*A. The Appropriate Administrative Forum: the NTSB*

The choice of a forum for adjudicating civil money penalty cases should be guided by three main values. The paramount concern is aviation safety. Also important are the values of fairness and the appearance of fairness. The tribunal should enjoy and merit trust, both from a public that is concerned about aviation safety and from the aviation community. Finally, there is a closely related set of interests in administrative simplicity, efficiency, and rationality. All of these values support, or at least are consistent with, the choice of the NTSB as the more appropriate adjudicator for civil money penalty cases. For reasons of expository convenience, I shall discuss the value of administrative simplicity and rationality first, followed by fairness and its appearance, and then aviation safety.

*1. Administrative efficiency and rationality*

The current pattern of sharply differentiated enforcement tracks in certificate actions and suits for civil money penalties, with each track possessing its own set of procedural rules, is needlessly complicated and confusing. It would be preferable to have both types of action adjudicated within a single forum under a single set of procedural rules. Adjudication of certificate actions before the NTSB and civil money penalty actions within DOT poses a risk of conflicting administrative interpretations of the same substantive statutes and regulations. This arrangement also creates at least a theoretical possibility of forum-shopping by the FAA, engenders confusion about the applicable procedural rules, and squanders an opportunity for the consolidation of expertise in one set of ALJs.

As a theoretical matter, the advantages of consolidating certificate actions and suits for money penalties within a single procedural framework could be obtained in either of the available forums; either the FAA or the NTSB could be given adjudicatory responsibility in both categories of cases. As a practical matter, however, there is broad agreement that, at least in the short term, it is politically infeasible to transfer certificate actions from the NTSB to DOT.<sup>158</sup> If the benefits of a substantially unified system of administrative adjudication are to be

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158. It is indicative of the political realities that, in the recently enacted legislation extending the Demonstration Program, Congress asked the Administrative Conference to study whether civil money penalty cases should be shifted from the DOT to the NTSB, but not whether adjudicatory authority in certificate actions should be moved from the NTSB to the DOT. Pub. L. No. 101-370, § 3, — Stat. — (1990) (LEXIS, Genfed library, PubLaw file).

achieved in the foreseeable future, civil penalty actions must be assigned to the NTSB.

Although reflecting concerns of political practicability, this conclusion does not represent a grudging acceptance of second-best. The NTSB generally has won the trust of those who litigate before it in certificate actions as a fair and efficient tribunal whose effective discharge of its responsibilities ought not to be disrupted.<sup>159</sup>

## 2. *Fairness and the appearance of fairness*

The goals of achieving fairness and the appearance of fairness also furnish strong arguments to rely on the NTSB as an independent adjudicator. The so-called "split-enforcement model," in which rulemaking and enforcement responsibility are vested in one agency and adjudicatory power in another, has won acceptance in other contexts as a means of achieving enhanced administrative fairness.<sup>160</sup> That model is especially attractive in the context of aviation safety regulation. On one side, the NTSB, functioning as an adjudicatory body, has acquired a reputation for fairness. On the other, substantial segments of the aviation community are distrustful of the FAA's capacity to adjudicate fairly, partly as a result of the Agency's substantive enforcement policies and partly as a result of anger at the FAA's administration of the procedural aspects of the Demonstration Program.<sup>161</sup> However misplaced their distrust might be, appearances matter. Moreover, it is no

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159. This explains why as the House Committee on Public Works and Transportation recently recognized, "[c]onsiderable interest has been expressed in the aviation community in having all aviation civil penalty cases heard by the National Transportation Safety Board." H.R. REP. No. 602, 101st Cong., 2d. Sess. 4 (1990).

160. See generally Johnson, *supra* note 13. Outside the aviation area, there are at least three prominent examples of "split-enforcement models." Under the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1988), Occupational Safety and Health Administration, an agency in the Department of Labor (DOL), sets and enforces safety standards, while challenges are adjudicated by the independent Occupational Safety and Health Review Commission. The Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. §§ 801-962 (1988), similarly assigns the task of developing and enforcing standards to the Mine Safety and Health Administration, located in DOL, but provides for adjudication by the independent Federal Mine Safety and Health Review Commission. A third example grows out of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111 (1978) (codified as amended in scattered sections of 5 U.S.C.), which abolished the Civil Service Commission. The Commission has been replaced by the Office of Personnel Management, which exercises management and administrative functions with respect to the federal civil service, and the independent Merit Systems Protection Board, which exercises judicial authority in disputed personnel cases. 5 U.S.C. § 1205 (1988).

161. See 55 Fed. Reg. 27,551 (July 3, 1990) (FAA summaries of and response to criticisms of its proposed rules of practice, explicitly or implicitly questioning Agency's fairness).

disparagement of the FAA to recognize the respect that has been earned by the NTSB.

Although arguments of fairness and the appearance of fairness thus support reliance on the NTSB, one drawback of that course deserves mention. Among its functions, the NTSB investigates all aircraft accidents and, where possible, determines their probable cause.<sup>162</sup> Frequently, an accident may trigger an enforcement action by the FAA as well as an investigation by the NTSB. In such cases, assignment of adjudicatory responsibilities to the NTSB would require the Board to perform the dual function of investigator and impartial adjudicator. As a purely legal matter, the combination of investigative and adjudicative functions in the same officials "does not, without more, constitute a due process violation."<sup>163</sup> Nor, in the case of the NTSB, does it violate the APA.<sup>164</sup> Nonetheless, the possible temptation to pre-judgment that might arise from the NTSB's non-adjudicatory responsibilities furnishes a cause for concern.

When this concern is looked at in context, however, it weighs less heavily than the fairness and appearance of fairness arguments in favor of adjudication by the NTSB. Among the factors supporting this conclusion, similar mixture-of-function concerns would of course arise if the alternative course were chosen and the FAA were asked to combine investigative, prosecutorial, and adjudicative responsibilities in suits for civil money penalties.

### 3. *Aviation safety*

The NTSB, fully as much as the FAA, has a mission of promoting aviation safety,<sup>165</sup> and the Board has compiled a record of adjudicatory decisionmaking that is in no way inconsistent with its mandate. Virtually no one argues that promotion of aviation safety requires removal of certificate actions—the FAA's preferred form of sanction in cases in-

162. 49 U.S.C. app. § 1441 (1988).

163. *Withrow v. Larkin*, 421 U.S. 35, 58 (1975). For due process to be offended, "the special facts and circumstances present in the case. . . [must indicate] that the risk of unfairness is intolerably high." *Id.* In the ordinary case in which the NTSB both investigates and subsequently adjudicates, there is no reason to believe that this threshold is crossed. *Pangburn v. Civil Aeronautics Bd.*, 311 F.2d 349 (1st Cir. 1962), held specifically that no rights were offended when the Civil Aeronautics Board, which then performed the functions now assigned to the NTSB, adjudicated a certificate appeal growing out of the same set of facts that it had investigated in preparing an accident report.

164. The section of the APA that deals explicitly with separation-of-functions requirements, 5 U.S.C. §§ 554(d)(2)(c) (1988), does not apply to "members of the body comprising the agency."

165. 49 U.S.C. app. §§ 1901, 1903-06 (1988).



volving the most serious violations<sup>166</sup>—from the NTSB's traditional jurisdiction. From a safety perspective, if the NTSB is the appropriate adjudicative structure for the generally more serious certificate actions, it could hardly be less so for civil money penalty cases.

The strongest argument that safety considerations call for adjudication by the FAA and its parent agency, DOT, would probably appeal to the traditional and still most prevalent model of administrative practice, under which a single agency performs a mix of investigative, enforcement, and adjudicatory functions.<sup>167</sup> Among its advantages, the traditional model permits policy development through a coordinated blend of regulatory efforts, including both rulemaking and adjudication.<sup>168</sup> This model allows agencies to interpret their rules and governing statutes in a way that reflects expert understanding. The traditional model also permits a purposive tailoring of sanctions to the administrator's sense of what is necessary and appropriate in particular cases in order to achieve a regulatory statute's policy goals.<sup>169</sup> Appealing to the assumptions that underlie most regimes of administrative adjudication, an argument for adjudication by the FAA could hardly lack surface appeal.<sup>170</sup>

In the context of FAA practice, however, the benefits of the traditional model should not be overstated. Some are not relevant at all. Of those benefits that are relevant, most can be attained through the development of appropriate principles of adjudicative deference.

Departing from the assumptions that underlie what I have called the traditional model of an administrative agency, the FAA, according to its Chief Counsel, does not generally utilize adjudication as an instrument of policy development.<sup>171</sup> In common with an increasingly large

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166. See *supra* notes 38-43 and accompanying text.

167. See REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PRACTICE 7 (1941)(stating "[t]he Committee has regarded the distinguishing feature of an 'administrative' agency the power to determine, either by rule or by decision, private rights and obligations").

168. See Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149 (1986) (discussing relative advantages of rulemaking and adjudication as policy-making tools within traditional model of administrative practice).

169. See *Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 185-86 (1973) (explaining how regulatory sanction is tailored toward fulfillment of statute's policy goal).

170. Address by Gregory S. Walden, FAA Chief Counsel, before Transportation Law Section of the Federal Bar Association (Feb. 20, 1990) [hereinafter Walden Address].

171. Interview with Gregory S. Walden, Chief Counsel, FAA (Oct. 12, 1989) [hereinafter Walden Interview].

number of other administrative agencies,<sup>172</sup> the FAA establishes policy principally through rulemaking, and it should be encouraged to do so.<sup>173</sup> In addition, adjudication by the NTSB does not preclude the FAA from using adjudication to develop substantive policy when circumstances require; for some years the FAA has litigated certificate actions before the NTSB, with NTSB adjudications occasionally resulting in rule-like formulations of substantive duties.<sup>174</sup> Finally, to the extent that adjudication may have an irreducible policy component, conferral of adjudicatory authority on the NTSB need not deprive the FAA of any discretionary authority that is necessary to effective interpretation and enforcement of the Federal Aviation Act and its implementing regulations.<sup>175</sup> As I shall discuss below, the FAA's proper prerogatives can, and should, be protected through principles of adjudicative deference.<sup>176</sup>

#### 4. The balance

When policy arguments are weighed, those in favor of assigning civil money penalty cases to the NTSB are more compelling. Although I have not specifically studied the FAA's adjudication of Hazardous Materials cases,<sup>177</sup> the same arguments would appear to favor transferring those cases to the NTSB as well.<sup>178</sup> This allocation would represent a significant step in the direction of a smooth, simple, unitary system of administrative adjudication, subject to just one main set of procedural rules.

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172. See Breger, *The APA: An Administrative Conference Perspective*, 72 VA. L. REV. 337, 349-53 (1986) (discussing relative decline of adjudication as means of developing rule-like prescriptions and corresponding arguments in favor of independent adjudication and sharper separations of functions).

173. Among its advantages, rulemaking allows participation by all interested and affected parties, and it avoids the element of unfair surprise that sometimes inevitably attends the use of adjudication to shape and implement agency policies of general applicability. See generally Berg, *supra* note 168 (discussing comparative benefits of rulemaking and adjudication).

174. See *Tearney v. NTSB*, 868 F.2d 1451 (5th Cir. 1989), *cert. denied*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 333 (1989) (upholding use of adjudication, in certificate action before the NTSB, to establish what was effectively a "rule").

175. 49 U.S.C. app. §§ 1371-1389 (1988); 14 C.F.R. §§ 1-1265 (1990).

176. See *infra* notes 180-204 and accompanying text.

177. See *supra* notes 5 and 55.

178. Demonstration Program Statistics of October 31, 1989, *supra* note 105. The number of cases that would be involved is relatively small. Only 68 notices of proposed civil penalties were issued in hazardous materials cases during the first 14 months of the Demonstration Period's operation. *Id.*

### *B. Implementing a Transfer of Authority to the NTSB*

For adjudication by the NTSB to advance the values of aviation safety, fairness, and efficiency, more would be required than a simple reallocation of adjudicative responsibility. The precise contours of the division of power and responsibility between the FAA and the NTSB would need to be established.<sup>179</sup>

#### *1. Deference by the NTSB to the FAA*

If adjudicatory responsibility in civil money penalty cases is assigned to the NTSB, the FAA worries that its capacity to implement substantive policy will be undermined.<sup>180</sup> How much (if at all) the FAA suffers will depend on the degree of deference that the NTSB gives or is required to give to the FAA. Questions need to be considered concerning how much deference, if any, the NTSB should give to: (i) FAA interpretations of the Federal Aviation Act and its implementing regulations and (ii) the FAA's determinations as to appropriate sanctions. I shall discuss these matters in turn.

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179. In addition, the NTSB would need to be given adequate resources to assume the added duties. NTSB adjudication occurs at two levels. First, ALJs hold formal evidentiary hearings and render decisions. Second, the full NTSB entertains administrative appeals. In gauging the additional personnel needs that adjudicating FAA civil money penalty cases would impose, the Board estimates that it would require one ALJ and one staff attorney for each 200 added cases. *The Civil Penalty Assessment Demonstration Program of the Federal Aviation Administration: Hearings Before the Subcomm. on Aviation, Public Works and Transportation of the House Comm. on Transportation and Public Works*, 101st Cong., 1st Sess. 261, 263 (1989) (statement of James L. Kolstad, Acting Chairman of the NTSB) [hereinafter Kolstad Testimony]. If this calculation is correct, the crucial question involves the number of civil money penalty cases likely to require formal hearings. This is a difficult question. Over the six-month period from May to October, 1989, there were an average of 44 requests for formal hearing per month—a rate that, if projected over a 12-month period, would produce 528 requests per year. See *supra* notes 147-48 and accompanying text. But these figures come from a period in which the flow of cases was bottle-necked, and there are other bases that would support an estimate of closer to 1,000 per year. See *supra* note 149 and accompanying text. If this estimate were accepted, and if the NTSB is correct that each 200 additional cases requires one additional ALJ and one additional attorney in the General Counsel's office, then the NTSB would need four or five new ALJs and four or five more full-time attorneys to absorb the civil money penalty cases now assigned to the FAA and its parent DOT; and this is beyond those staff increases that are necessary to handle the NTSB's currently backlogged caseload. The possibility that the necessary ALJs could be reassigned or borrowed from other agencies, including DOT, should be explored. Although not optimal, a borrowing arrangement might suffice as a stopgap measure.

180. Walden Interview, *supra* note 171.

## a. Questions of interpretation

In adjudicating disputed enforcement cases, the NTSB would function much as a court. It would provide the benefits of independent and impartial adjudication and should not, any more than a court, interfere with the FAA's performance of its congressionally delegated policymaking functions. I therefore agree with the conclusion reached by the Administrative Conference of the United States in its general study of the so-called "split-enforcement model":

Generally speaking, . . . the adjudicatory agency must accept the rulemaking agency's interpretation of the standard unless it can be shown that the rulemaking agency's interpretation is arbitrary, capricious, or otherwise not in accordance with law.<sup>181</sup>

This approach to deference questions, which calls for a statutory directive to the NTSB to give very substantial deference to the FAA in all covered cases, is both controversial and costly. The NTSB possesses expertise of its own in aviation matters, and requiring it to defer to the FAA may undermine, at least in part, the value of independent adjudication that the NTSB is expected to serve.<sup>182</sup> Nevertheless, the arguments that underlie the quoted recommendation of the Administrative Conference apply fully in the aviation context. The FAA, not the NTSB, is the agency responsible for promulgating and enforcing substantive regulations adequate to protect the public safety. Judgments about how the federal aviation regulations should be interpreted in order to fulfill their purposes can therefore be viewed as falling within the presumptive domain of the FAA's responsibility and its expertise.

Although the principle is well-founded that the adjudicatory agency owes deference to the policymaking agency,<sup>183</sup> the conditions of its ap-

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181. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ADMINISTRATIVE CONFERENCE RECOMMENDATION 86-4, 1 C.F.R. § 305.86-4 (1986) [hereinafter 1986 ACUS RECOMMENDATION].

182. It may also be relevant that the NTSB currently does not, in adjudicating certificate actions, consider itself bound to defer to the FAA's interpretation of the Federal Aviation Regulations. A Lexis search of published NTSB decisions failed to reveal any express invocation of deference principles by the Board in construing the Federal Aviation Act and its implementing regulations, and some decisions clearly seem to involve the exercise of independent judgment by the NTSB. *E.g.*, Administrator v. Thomas, 3 NTSB 3203 (1981); Administrator v. Conley, 3 NTSB 2236 (1980). A non-deferential stance seems to be wholly consistent with, and possibly called for by, the Board's current statutory mandate in certificate actions. *See supra* note 47 and accompanying text. It would invite confusion for the NTSB to follow one set of deference principles in civil penalty cases and another in certificate actions. If the NTSB is required to give deference in civil penalty cases, it should therefore be required to do so in certificate cases as well.

183. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S.

propriate application are far from clear.<sup>184</sup> The difficult problem is in identifying those interpretations deserving of deference. As Professor Anthony has persuasively argued, deference is most problematic in cases in which the administrative interpretation is first adopted as a litigating position in an enforcement action.<sup>185</sup> An agency's claim to "expertness" may be compromised nearly as much as its claim to "impartiality" when it insists on deference to a position that may be influenced, if not determined, by its desire to win a lawsuit.<sup>186</sup> Moreover, concerns about fairness and the appearance of fairness grow even larger when deference is sought to an agency interpretation that was developed, not through a process designed to include top-level policy-makers, but possibly by a relatively low-level prosecutorial employee as an aspect of the decision to file a complaint.

The choice of which agency interpretations deserve deference is therefore not obvious. Two stark possibilities stand out. First, FAA interpretations might command deference only when they emerge from rulemakings or other formal processes. Second, all agency interpretations, even those developed by agency prosecutors, might command equal deference. I believe, however, that a third, compromise position would achieve a better balance of the competing concerns and values. Within a scheme familiar in other areas of administrative law,<sup>187</sup> the NTSB should be directed to accord some deference to FAA interpretations that are developed for the first time in the context of a prosecution, but the deference should be of a kind calibrated not to assess the formal authority of those interpretations, but to reflect their "power to

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837 (1984).

184. See Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 *YALE J. ON REG.* 1, 1-63, 51-52 (1990) (noting uncertainty in existing case law whether decisions by low-level agency employees should qualify for judicial deference).

185. See *id.* at 60-61.

186. Cf. Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 *DUKE L.J.* 511, 519-20 (1989) (rehearsing, although neither endorsing nor rejecting, the view that, because authoritative "choice among the various interpretive options . . . should not be based upon the desire to win a particular lawsuit," deference should be accorded only to "agency determinations made (with sufficient formality) in the regular course of the agency's business, and not in litigation").

187. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). In this case, the Court stated that:

[w]e consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such judgments in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade.

persuade."<sup>188</sup> This, obviously, is a much weaker defense than is accorded, for example, to agency interpretations developed through rulemaking. If, however, the FAA Administrator seeks judicial review of an adverse NTSB decision on the ground that it incorrectly resolves a question of significant public interest,<sup>189</sup> then the reviewing court should be instructed to give deference to the interpretation of the FAA's Administrator, rather than to the judgment of the NTSB, under the formula prescribed by the Administrative Conference's 1986 recommendation quoted above.<sup>190</sup>

Among its attractions, this compromise position would ensure that the FAA interpretations to which strong deference is required are ones that reflect the considered judgment of the FAA Administrator—not merely the view of lower-level prosecutorial employees who might be influenced excessively by zeal to prevail in a particular case. This compromise proposal would also have the virtue of promoting fairness by giving alleged violators the benefit of independent judgment by the NTSB in all cases that are not of large public consequence, while accommodating the FAA's overriding interest in the promotion of public safety in cases of sufficiently general importance that the Administrator thinks it necessary or appropriate to appeal an adverse decision of the NTSB.<sup>191</sup> Indeed, this proposal would accord the FAA more deference in the interpretive process than it currently appears to receive in certificate actions—the FAA's preferred form of sanction in cases involving the most serious safety violations. Under current law, the NTSB accords no special deference to FAA interpretations,<sup>192</sup> and the FAA has no authority to appeal adverse decisions by the Board.<sup>193</sup>

#### b. Appropriate sanctions

A related set of deference issues involves appropriate penalties: How much deference, if any, should be accorded to the FAA's recommendations with regard to sanctions? This question arises in a complicated historical and institutional setting. In carrying out its existing adjudicative authority in certificate actions, the NTSB has prescribed a sub-

188. *Id.*

189. For a recommendation that the FAA should be able to appeal adverse NTSB decisions only if this standard is satisfied, *see infra* notes 205-10 and accompanying text.

190. *See supra* note 181 and accompanying text.

191. On the FAA's right to appeal adverse decisions, *see infra* notes 205-10 and accompanying text.

192. *See supra* note 182 and accompanying text.

193. 49 U.S.C. app. §§ 1429(a), 1486 (1988).

stantially deferential standard, first articulated in *Muzquiz v. NTSB*:<sup>194</sup> “In those cases in which all of the violations [found by the FAA] are affirmed,” an ALJ and then the Board itself should accept the FAA’s sanction recommendations unless “clear and compelling reasons” mandate a reduction. The NTSB’s reasons for adopting this standard stem partly from practical experience. In the absence of required deference to the Administrator’s recommended sanction, the Board concluded in *Muzquiz*, the decisions of ALJ’s too often had the “appearance of an effort to try to satisfy both parties—the FAA by affirming all violations and the airman by reducing the sanction.”<sup>195</sup>

Although the Board continues to cite *Muzquiz* as controlling authority,<sup>196</sup> adherence to its standard is inconsistent at best.<sup>197</sup> It is also not surprising that tension and controversy would surround a requirement that administrative law judges and the NTSB accord deference to the sanctioning recommendations of agency prosecutors. On the one hand, “the relation of remedy to policy is peculiarly a matter of the administrative competence”<sup>198</sup> of the agency with primary enforcement responsibilities, in this case the FAA. On the other hand, the facts of a case may look different after an adjudicatory hearing than they did to the FAA official who determined to pursue a particular sanction based on a less formal, and presumably less reliable, investigation. Moreover, recommendations as to sanctions constitute a quasi-prosecutorial judgment, which may even have a partly tactical purpose in anticipation of possible settlement negotiations. Viewed in this light, agency decisions of this kind may have a less compelling claim to deference than those developed through the carefully structured procedures of a formal ad-

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194. 2 NTSB 1474 (1975).

195. *Id.* at 1477. The NTSB has given other supporting reasons as well. According to *Pearson v. NTSB*, 3 NTSB 3837, 3838 (1981):

The *Muzquiz* standard reflects the belief that where the Administrator has proved all of the charges underlying an order suspending an airman certificate, his judgment on the proper term of suspension should be accepted, since it presumably rests on a determination that a sanction of a specific duration is warranted to vindicate the various enforcement interests the individual charges collectively implicate. The deference thus accorded the Administrator, in safety, should be observed, under the standard, unless clear and compelling reasons, cognizable within the Board’s review authority, justify a different sanction.

196. *See Administrator v. Fallon*, Order EA-2728 (1988) (citing *Muzquiz*, 2 NTSB 1474 (1975), for proposition that Board must accept ALJ’s choice of sanction if Board finds ALJ’s choice has an adequate basis in law).

197. *See Walden Address*, *supra* note 170; *see also Tello*, *supra* note 75, at 5 n.34 (asserting that adherence to *Muzquiz* standard “has arguably eroded in recent years”).

198. *Butz v. Glover Livestock Comm’n Co., Inc.*, 411 U.S. 182, 185-86 (1973) (quoting *American Power Co. v. SEC*, 329 U.S. 90, 112 (1946)).

judication or a rulemaking.<sup>199</sup>

If confronted with an all-or-nothing choice between a regime of deference and one of no deference, I would opt for deference. As the Supreme Court has recognized in considering the deference owed by courts to a traditionally structured agency's choice of sanctions, the question of an appropriate remedy is too closely connected with other aspects of enforcement policy to be removed from the agency with primary enforcement responsibility.<sup>200</sup> Thus, in "those cases in which all of the violations [alleged by the FAA] are [found to have occurred],"<sup>201</sup> I would conclude that the NTSB should accept the FAA's recommended sanction unless the Agency's recommendation is arbitrary, capricious, or otherwise not in accordance with law.<sup>202</sup> In cases in which the facts as proved fail to support one or more of the violations alleged, such deference would obviously be inappropriate, and the NTSB would have to exercise a broader discretion.

In the existing context of aviation safety regulation, however, a better alternative may be available. The FAA's Enforcement Handbook currently specifies the range of sanctions that its enforcement personnel may pursue for various types of violations.<sup>203</sup> This catalogue of appropriate penalty ranges provides a benchmark against which arbitrariness and caprice can be measured. If promulgated as a rule through notice-and-comment rulemaking, the penalty guidelines would become legally enforceable standards binding on the NTSB and its ALJs; upon finding a particular violation, an ALJ would have no lawful choice but to select from among the range of penalties specified by the FAA as appropriate to the offense. The FAA should be encouraged, and possibly required, to take this rulemaking step.<sup>204</sup> The promulgation of penalty standards would protect the FAA's control over penalties as a necessary incident of its enforcement function, yet avoid binding the adjudicating authority to accept the prosecutor's precise recommendation in cases in which, for example, the facts establish a violation but also suggest mitigating circumstances.

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199. See generally Anthony, *supra* note 184.

200. See *Butz v. Glover Livestock Comm'n Co., Inc.*, 411 U.S. 182, 185-86 (1973) (quoting *American Power Co. v. SEC*, 329 U.S. 90, 112 (1946)).

201. *Muzquiz v. NTSB*, 2 NTSB 1474 (1975).

202. Cf. *supra* note 181 and accompanying text (quoting ACUS recommendation concerning deference appropriately accorded promulgating agency's interpretation of its standards).

203. FAA Handbook, *supra* note 38, at ch. 2, and app. 4.

204. For discussion of some of the relevant issues and difficulties, see Diver, *supra* note 4, at 1472-78.



## 2. Appeals by the FAA

Under current law, the FAA has no authority to appeal adverse NTSB decisions in certificate actions to the courts of appeals.<sup>205</sup> This structure may create a risk of underexplained decisionmaking by an NTSB that knows that decisions that are adverse to the FAA will not be subject to judicial review. In addition, if the NTSB is given adjudicatory responsibility in civil penalty cases, there inevitably will be uncertainty about the exact boundary between its power and discretion and that of the FAA.<sup>206</sup> This situation calls for a disinterested policing of the bounds by an independent judiciary.<sup>207</sup> The FAA should therefore be authorized to seek judicial review of adverse NTSB decisions in both certificate actions and civil penalty cases that raise questions of significant public interest.

In cases in which the FAA Administrator seeks judicial review of an NTSB decision, the prevailing party should be named as the respondent. The NTSB is not a party in interest and should not be named as such; the Board's function, analogous to that of a court, is that of an independent adjudicator.<sup>208</sup> It might be objected that allowing the FAA

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205. 49 U.S.C. app. §§ 1429(a), 1486 (1988). The FAA, however, may appeal adverse ALJ decisions to the full Board.

206. See Johnson, *supra* note 13 (discussing uncertainties that have sometimes attended "split-enforcement models").

207. In other situations involving a "split-enforcement model," the Secretary of Labor can appeal adverse decisions by independent Occupational Safety & Health Review Commission, see 29 U.S.C. § 601(b) (1988), and the Mine Safety and Health Administration can appeal decisions of independent Mine Safety and Health Review Board, see 30 U.S.C. § 816(b) (1988). The Director of the Office of Personnel Management is authorized to appeal decisions of the Merit Systems Protection Board in cases that she believes "will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. § 7703(d) (1988).

208. Cf. *Oil, Chemical & Atomic Workers Int'l Union v. Occupational Safety & Health Review Comm'n*, 671 F.2d 643, 652 (D.C. Cir. 1982) (reasoning that OSHRC, as "purely adjudicative entity," holds position like that of district court and "has no duty or interest in defending its position on appeal," and distinguishing Federal Communications Commission, National Labor Relations Board, and Federal Energy Regulatory Commission, in whose cases concrete adverseness exists). There is, however, a division among the courts of appeals with respect to whether the OSHRC is a proper party to an OSHA appeal. See *id.* at 651 (noting Sixth Circuit, *Marshall v. Occupational Safety & Health Review Comm'n*, 634 F.2d 544, 549-52 (6th Cir. 1980), Third Circuit, *Marshall v. Sun Petroleum*, 622 F.2d 1176, 1184-86 (3d Cir. 1980), and Ninth Circuit, *Dale Madden Constr., Inc. v. Hadgson*, 502 F.2d 278 (9th Cir. 1974) have held that commission is not proper party, while Fourth Circuit, *Brennan v. Giles & Caltig, Inc.*, 504 F.2d 1255, 1267 (4th Cir. 1974), and Fifth Circuit, *Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 648 n.8 (5th Cir. 1976), have held commission is proper party to an OSHA appeal). Cf. 5 U.S.C. § 7703(d) (1988) (authorizing Merit Systems Protection Board to "appear" in proceedings in which Director of Office of Personnel Management seeks judicial review of its judgments). This recommended party structure on appeal also avoids the justiciability

to seek judicial review would unduly burden private parties who have prevailed in the NTSB, especially in cases involving relatively minor civil penalties. For them, the costs of appellate litigation may be excessive; some may simply default. In light of this concern, the FAA's authority to seek judicial review should be limited to cases in which, in the judgment of the Administrator, the adverse decision of the NTSB is one that involves a question of significant public interest.<sup>209</sup> But a more general prohibition against appeals by the FAA would unduly threaten the public interest in a properly administered enforcement system and in aviation safety.<sup>210</sup>

### CONCLUSION

Controversy surrounding the Demonstration Program should not obscure the larger issues. A properly designed system of administrative adjudication would assist the FAA in carrying out its statutory responsibilities. It would afford the aviation community the benefits of swift, accurate, and relatively inexpensive dispute resolution. And it would, above all, advance the paramount public interest in achieving aviation safety under a fair administrative system. Neither article III nor the seventh amendment poses a constitutional impediment. The question is not whether administrative adjudication should be retained, but which agency should provide it.

The preferable forum is the National Transportation Safety Board. The Board already has adjudicative responsibilities when the FAA seeks to suspend or revoke an aviation certificate. Moreover, the NTSB has discharged its responsibilities effectively and has earned the respect of the aviation community. Consolidating certificate actions and suits for money penalties in this single administrative forum would enhance administrative rationality and the appearance of fairness, and it would vest the adjudicative function in an agency with an assuring track rec-

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issue that might be presented were one federal agency, the FAA, seeking to litigate a dispute with another federal agency, the NTSB. In that circumstance it would at least be arguable—although not persuasively so, in my view—that the nominal parties' dispute is essentially intra-governmental, and that it lacks the concrete adverseness necessary to a constitutional case under article III.

209. Cf. 5 U.S.C. § 7703(d) (1988) (authorizing Director of Office of Personnel Management to petition for judicial review of decisions of Merit Systems Protection Board only "if the Director determines, in his discretion, that . . . the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive").

210. In conformity with familiar practice in cases involving federal executive agencies, responsibility for the appellate litigation of FAA civil penalty cases in the courts of appeals might reasonably be vested in the Department of Justice.

ord in promoting aviation safety.

Implementing a "split-enforcement model," in which the FAA has rulemaking and prosecutorial responsibilities while the independent NTSB performs the function of administrative adjudication, requires a careful definition of the two agencies' respective responsibilities. A variety of perplexities admittedly attends the design of a proper relationship between a rulemaking and prosecuting agency on the one hand and an adjudicatory agency on the other, whether in the domain of aviation safety regulation or elsewhere. In this Article, I have argued that the adjudicatory agency should accord substantial deference to the rulemaking and prosecuting agency's interpretation of the relevant standards, but only in those cases in which the latter develops its position prior to the initiation of litigation. The requirement of this much deference is necessary to enable the FAA to perform its mission effectively; the limitation is necessary to ensure adjudicative fairness. On appeal, however, the federal courts of appeals should regard the FAA as the agency entitled to deference on the meaning of controverted standards. In imposing sanctions for safety violations, the NTSB should stay within the guidelines promulgated by the FAA, the agency with rulemaking and enforcement responsibilities. Again, however, fairness dictates that deference principles should not be simplistic, and I have tried to map some of the relevant concerns.

However my answers are viewed, I hope this Article will at least have succeeded in clarifying some of the questions—especially those involving the deference owed by one agency to another—that attend the implementation of a "split-enforcement model." If the "split-enforcement model" has any useful place in our administrative structure, these questions need thoughtful attention. And that attention should come soon—in a congressional revision of the scheme of administrative adjudication that is employed in aviation safety cases.

