Report for Recommendation 91-8

Adjudication of Civil Penalties Under the Federal Aviation Act

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Executive Summary

The Federal Aviation Administration (FAA) is operating a demonstration civil penalty program under which the FAA can impose monetary penalties of up to $50,000 for violations of the Federal Aviation Act or its regulations. Under the demonstration program, the FAA prosecutes violations proposing initial civil penalties according to the discretion of the prosecuting FAA official. The persons on whom the penalties would be imposed, usually pilots, airlines, or airport operators, are entitled to an administrative hearing before an administrative law judge (ALJ), followed by the right to an administrative appeal before the administrator of the FAA. Violations of the Federal Aviation Act or the regulations resulting in suspensions or revocations of certificates of pilots, mechanics, or airlines follow a different administrative path. While those "certificate actions" begin with a prosecutorial decision made by an FAA official, the right to a hearing takes the case to the National Transportation Safety Board (NTSB), a separate agency. If the hearing is requested, an NTSB ALJ holds the hearing, and a right to appeal exists before the Board.

Before the demonstration civil penalty program was enacted, the FAA could propose penalties; but such penalties could be imposed only through a civil action brought in a United States District Court.

In 1990 the Administrative Conference of the United States, in Recommendation 90-1, recommended that the civil penalty program be continued, and that the responsibility for adjudication be studied further. In response to the Conference's Recommendation 90-1, the Congress extended the program for an additional 2 years. In that legislation, Pub. L. No. 101-370, Congress expressly asked the Conference to study the issue of "whether the authority to adjudicate administrative complaints under the Federal Aviation Act of 1958 should remain with the Department of Transportation (DOT), should be transferred to the NTSB, or should be otherwise modified." The additional Conference recommendation is due in mid-February 1992.

The Conference held a public hearing on Wednesday, June 19, 1991, to provide interested parties with the opportunity to present their views on these issues.[1]

After release of the draft of this report, the author convened an informal meeting with affected parties to explore the feasibility of a solution to the controversy that accommodates the reasonable needs of all of the affected

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[1] 56 Fed.Reg. 22693 (May 16, 1991) (notice of Conference Committee on Adjudication public hearing).

interests. No overall resolution was agreed to, but all parties expressed a willingness to seek common ground and to explore possible consensual resolution of the controversies over civil penalty adjudication.

There is no evidence of unfairness or mishandling of cases under the present system resulting from commingling of prosecutorial and judging functions. There are, however, strong feelings on the part of representatives of persons potentially subject to civil penalties about the possibility of unfairness. These perceptions should be taken into account in formulating the final form of the civil penalty program.

The FAA administrator, as the delegate of the Secretary of Transportation, is the public official charged with responsibility for making the national aviation system safe. Realization of the goal of aviation safety necessitates giving responsibility and authority to the official to be held accountable. Aviation safety requires tradeoffs among the content of regulations, operational arrangements for the air traffic control system, and enforcement policy. It is useful for the administrator of the FAA to be exposed personally to enforcement cases. Depriving the FAA administrator of enforcement responsibility artificially separates part of an overall matrix and impairs achievement of the safety goal.

It must be recognized that respondents in enforcement proceedings have an economic interest in the establishment or maintenance of the most cumbersome procedural requirements possible. While most of the affected interest representatives recognize the importance of aviation safety objects and accept the need for an efficient system for adjudicating allegations of violations of federal aviation regulations, some arguments against certain civil penalty adjudication configurations are motivated at least in part by a desire to return to a system in which administrative agencies lack civil penalty authority simply because that would mean fewer civil penalties are imposed. Thus, calls for the ultimate in procedural formality must be tempered with recognition of safety needs and efficiency goals.

The Congress already has decided to divide responsibility for aviation safety between the FAA and the NTSB, and the division of responsibility has worked reasonably well. This division of responsibility can support assigning civil penalty adjudication responsibility to either agency.

The existing FAA procedural rules separate prosecuting and judging functions as required by the APA. The existing arrangement potentially encourages forum shopping, although empirical evidence of such forum shopping is lacking.

Joint problem solving, involving the pilot community and the FAA in a spirit of reasonable harmony and trust is desirable. On the other hand, fairness and promotion of safety should not depend on the attitudes of individual incumbents of key positions in either the FAA or the NTSB.

It is useful for the administrator of the FAA and for the NTSB to be exposed personally to enforcement cases.

Use of alternative dispute resolution techniques, including mediation, arbitration, and settlement judges is desirable.[2]

It may be desirable to let the adjudicatory factfinder decide the penalty within valid penalty schedules and guidelines, so for example, an airline pilot could get a large fine instead of a 60-day suspension, which costs her her job.

Parties to enforcement proceedings should have an opportunity to challenge outcome determinative rules, policies, or standards applied in the adjudication, but the ALJ need not be the person who decides such challenges, and the FAA is not obligated to make all rules through notice-and-comment rulemaking.

The FAA should have the right to appeal from an NTSB decision, if the NTSB has decision-making authority.

The report recommends that the two agencies and the affected interests work out an institutional structure that meets their legitimate needs. In the absence of such a consensual resolution, it recommends that responsibility for adjudicating civil penalties and certificate actions against pilots be consolidated at the National Transportation Safety Board. It recommends that responsibility for adjudicating all other civil penalties and certificate action cases be consolidated at the FAA.

The report also recommends changes in procedures for discovery and for determining challenges to rules applied in adjudications, recommends enhancements in opportunities for voluntary resolution of individual cases, and greater use of electronic information technologies in both rulemaking and in handling individual cases.

I. Introduction

The Federal Aviation Administration is operating a demonstration civil penalty program under which the FAA can impose monetary penalties of up to $50,000 for violations of the Federal Aviation Act or its regulations. Under the demonstration program, the FAA prosecutes violations proposing initial civil penalties according to the discretion of the prosecuting FAA official. The persons on whom the penalties would be imposed, usually pilots, airlines, or airport operators, are entitled to an administrative hearing before an administrative law judge, followed by the right to an administrative appeal before the administrator of the FAA. Violations of the Federal Aviation Act or

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[2] See Conference Recommendation 86-3, codified at 1 CFR §305.86-3 (use of alternative dispute resolution in individual case handling); Conference Recommendation 88-5, codified at 1 CFR §305.88-5 (use of settlement judges).

the regulations resulting in suspensions or revocations of certificates of pilots, mechanics, or airlines follow a different administrative path. While those "certificate actions" begin with a prosecutorial decision made by an FAA official, the right to a hearing takes the case to the National Transportation Safety Board, a separate agency. If the hearing is requested, an NTSB ALJ holds the hearing, and a right to appeal exists before the board.

Before the demonstration civil penalty program was enacted, the FAA could propose civil penalties, but such penalties could be imposed only through a civil action brought in a United States District Court.

While the idea of administratively imposed civil penalties has been accepted reasonably well, the procedures under which civil penalties would be adjudicated, and the responsibility for formal hearings and administrative appeals have been controversial.

In 1990, the Administrative Conference of the United States, in Recommendation 90-1, recommended that the civil penalty program be continued, and that the responsibility for adjudication be studied further.

The present controversy, addressed by this report, is really about (1) the authority to decide administrative appeals from initial ALJ decisions and (2) the authority to establish procedural regulations that govern both the initial hearings and the administrative appeals. Less controversial is the question of which agency houses the ALJs who preside over the hearings.

The strongest criticisms of the unitary enforcement model applied to the civil penalty program have been related to separation of prosecutorial and judging functions.

A. Fallon Report and Conference Recommendation 90-1

In June 1990, the Conference adopted Recommendation 90-1[3] regarding "Civil Money Penalties for Federal Aviation Violations." The recommendation asked Congress to make permanent the FAA administrative civil penalty program for violations of aviation safety rules, but recommended some changes to the FAA's procedural rules.

The Conference has long advocated the administrative imposition of civil money penalties as an alternative to reliance on judicial enforcement.[4] The Conference believes that administratively-imposed sanctions are generally

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[3] 55 Fed.Reg. 34209 (Aug. 22, 1990).

[4] *See* Recommendation 72-6, "Civil Money Penalties as a Sanction", 1 CFR §305.72-6; Recommendation 79-3, "Agency Assessment and Mitigation of Civil Money Penalties", 1 CFR §305.79-3.

faster, less expensive, and more effective in enforcing regulatory schemes than is reliance on judicial enforcement.[5]

Consistent with its long-standing position in favor of administrative civil penalties,[6] the Conference recommended that administrative assessment of civil money penalties be made a permanent feature of federal regulation of aviation safety, and that the current cap of $50,000 be eliminated. The Conference noted that many agencies exercise power to impose far heavier monetary penalties than those now authorized in the civil aviation area. The Conference suggested that expanding the scope of money penalties following appropriate administrative hearings would enhance efficient administration without risking loss of fairness.

The Conference also recommended procedural changes, as long as the adjudicatory authority is lodged in the DOT. The FAA had previously interpreted its statutory authority as contemplating a formal finding of a violation (order assessing civil penalty) as a prerequisite to compromising a disputed civil money penalty case. As a result, fewer cases settled than under former agency practice, and a substantial backlog developed. In the ongoing rulemaking proceeding, the FAA reconsidered its position and concluded that it could compromise cases without a finding of a violation. The Conference recommended that Congress explicitly give FAA the discretion to compromise disputed cases without a formal finding of a violation.

The Conference observed that rules of practice governing adjudication of civil money penalty cases should be fair, and that they should appear fair. It found previous FAA regulations adequate for the most part, but found that several provisions led to some misunderstanding and perceptions of unfairness. The Conference recommended that the rules of practice be revised to eliminate existing ambiguities, pursuant to the ongoing notice-and-comment rulemaking. The Conference also noted that the proposed rule at the time of its Recommendation 90-1 substantially incorporated its procedural recommendations.[7]

With respect to location of the civil penalty adjudication responsibility, the Conference said:

> The Conference takes no position at this time on whether the adjudication of civil penalty actions under this program

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[5] Conference Recommendation 86-4, "The Split-Enforcement Model for Agency Adjudication", 1 CFR §305.86-4; Conference Recommendation 90-1, finding that FAA civil penalty program demonstrates the same advantages manifest with other such programs.

[6] *See* Conference Recommendation 72-6, reproduced as an appendix to this report.

[7] At the time Conference Recommendation 90-1 was adopted, June 7, 1990, the comment period on the FAA rule revisions had closed, but a final rule had not been issued.

> should remain a function of the DOT, or whether it should be shifted to the NTSB. There are arguments on both sides.
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> The better choice between the two is not self-evident. Factors that could not be adequately studied in the available time include the relative capacities of DOT and the NTSB to adjudicate cases promptly and fairly, any effect that the location of adjudicative authority might have on aviation safety, and the two agencies' respective capabilities to procure necessary resources. If Congress extends the aviation civil penalty program either permanently or for a substantial period, it is the Conference's intention to study the issue of the more appropriate location for adjudicatory authority.[8]

Recommendation 90-1 was based in part on a report, "Imposing Civil Money [Penalties] for Violations of the Federal Aviation Regulations: Implementing a Fair and Effective System," authored by Richard Fallon, Professor of Law at Harvard Law School. The final Conference recommendations deviated in significant ways from the Fallon recommendations, however. Most important for purposes of this report, Professor Fallon recommended that, "Congress should vest adjudicatory responsibility for civil money penalty cases under the Federal Aviation Act and its implementing safety regulations in the National Transportation Safety Board."[9]

B. Statutory Requirement

In response to the Conference's Recommendation 90-1, the Congress extended the program for an additional 2 years. In that legislation, Pub. L. No. No. 101-370, Congress expressly asked the Conference to study the issue of "whether the authority to adjudicate administrative complaints under the Federal Aviation Act of 1958 should remain with the Department of Transportation, should be transferred to the NTSB, or should be otherwise modified." (Editor's note: Conference Recommendation 91-8 responded to this request.)

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[8] 55 Fed.Reg. 34209 (preamble to Recommendation 90-1).

[9] R. Fallon, Imposing Civil Money for Violations of the Federal Aviation Regulations: Implementing a Fair and Effective System at 52 (appendix of recommendations) (March 1990).

C. Scope of This Study

This report begins where Recommendation 90-1 and Professor Fallon's report ended. It puts the Conference in a position to respond to the mandate in Pub. L. No. No. 101-370, and to fulfill the commitment expressed in the preamble to Recommendation 90-1 to examine further the question of adjudicatory authority for civil penalties.

This report probes in considerable detail the competing arguments in favor of NTSB authority and FAA authority, placing them in a legal and policy context for administrative adjudication. In evaluating these arguments, it gives careful attention to material presented at a public hearing on June 19, 1991.

This study considers not only whether civil penalty adjudication responsibility should be removed from the FAA, but also where civil penalty and certificate suspension/revocation adjudication authority might best be consolidated. It considers a variety of institutional arrangements to avoid an all-or-nothing character to a debate over civil penalty adjudication.[10]

The Conference held a public hearing on Wednesday, June 19, 1991, from 9:15 a.m. to 1 p.m. in Washington, DC. The hearing was intended to "provide interested parties with the opportunity to present their views on the issues raised, which include whether the FAA and Department of Transportation or the NTSB are the better forum adjudicating air safety enforcement cases, and whether responsibility for both certification cases and civil penalty cases should be at the same agency."[11]

After the draft of this report was released, the author convened an informal meeting with affected parties to explore the feasibility of a solution to the controversy that accommodates the reasonable needs of all of the affected interests. Participants in that meeting agreed that informal consultation was desirable and the author met further with representatives of the affected interests to discuss alternatives. While no overall resolution was agreed to, the willingness to seek common ground was enhanced, in the spirit of the recommendations.

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10 *See generally* supplementary statement by Daniel D. Campbell at 2 (noting change in focus of debate to consolidation of civil penalty and certificate authority); *Id.* at 20 (urging Conference consideration of wide variety of institutional arrangements rather than an all-or-nothing focus).

11 56 Fed.Reg. 22693 (May 16, 1991) (notice of Conference Committee on Adjudication public hearing).

D. Acknowledgements

A number of people were helpful in developing the information in this report. The author expresses appreciation to David A. Berg, Senior Attorney of the Air Transport Association; Timothy D. Bradbrooke, Villanova Law School class of 1993; John H. Cassady, III, Deputy Chief Counsel of the FAA; Daniel D. Campbell, General Counsel of the National Transportation Safety Board; David J. Campbell, Villanova Law School Class of 1992; Thomas Devine, Airport Operators Council International; Mary E. Downs, Assistant General Counsel and Secretary of the Air Transport Association; Michael W. Jones, Member of the Pennsylvania Bar; Kevin A. Marks, Villanova Law School Class of 1993; Michael Pangia, Member of the D.C. Bar; Kenneth P. Quinn, Chief Counsel of the FAA; Harry Riggs, Member of the Kentucky Bar; Michael S. Sundermeyer, Williams and Connolly, John Yodice, Counsel to the Aircraft Owners and Pilots Association.

II. Statutory and Regulatory Framework

Civil penalty cases are initiated by the Federal Aviation Administration (FAA), an agency within the Department of Transportation (DOT). The cases are heard by DOT administrative law judges (ALJs), with appeal to the FAA Administrator. Judicial review is available in the federal court of appeals.

FAA certificate actions, if appealed, are adjudicated by the National Transportation Safety Board (NTSB).

The NTSB is an independent agency that has as its primary responsibilities investigating accidents and issuing air safety recommendations, in addition to adjudicating certificate cases.

The actual language of the pertinent statutes is presented in Appendix A.

A. Substantive Statutory Provisions

The FAA has substantive regulatory authority under the Federal Aviation Act. It promulgates regulations to promote aviation safety, conducts investigations to ensure compliance, and brings enforcement actions. It also has responsibility for issuing certificates for most aviation businesses and functions.[12]

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[12] See 49 U.S.C. App. §§1421 (general regulatory authority), 1422 (air crew obligations), 1423 (aircraft requirements), 1424 (air carrier safety requirements), 1432 (airport operations), 1371-1389 (air carrier economic requirements).

In addition, the Hazardous Materials Transportation Act of 1975 authorizes the Secretary of Transportation to designate materials whose transportation may pose safety hazards and to promulgate regulations for the safe transportation of such materials. The Act's chief enforcement provision authorizes the Secretary to impose civil penalties of up to $10,000 per violation for knowing violations of the Act or regulations, after notice and hearing. The statute identifies factors to be considered in determining the appropriate penalty, such as the nature and seriousness of the violation, prior offenses, and ability to pay. The Secretary has delegated this enforcement authority to the units within the Department of Transportation that regulate the various modes of transportation.

B. Civil Penalties

In 1987, Congress enacted a 2-year Civil Penalty Demonstration Program at FAA. For the first time, the program authorized the FAA to impose civil monetary penalties administratively in amounts less than $50,000 for violations of aviation safety rules. Until then, civil monetary penalties could only be imposed through cases brought in the federal courts by the Department of Justice.[13] The demonstration program was originally due to expire December 31, 1989. It was extended for 4 months in anticipation of the completion of a study of the program undertaken by the Administrative Conference of the United States at the request of the Department of Transportation. Congress extended the program an additional 90 days, after receiving a draft of the Conference recommendation from the Conference's Committee on Adjudication.

The civil money penalty program supplements previously available sanctions, which include judicially-imposed civil money penalties and FAA administrative actions to suspend or revoke certificates.

The civil money penalty program has been in operation since September 1988, when the FAA promulgated its procedural regulations as final rules with opportunity for subsequent comment. The FAA procedural rules were invalidated in 1990 in *Air Transport Association v. Department of Transportation*, discussed in §II(C) of this report. Subsequently, the FAA revised its procedural rules after an opportunity for notice and comment.

The FAA's rulemaking occurred in two steps. In early March 1990, the FAA issued a notice of proposed rulemaking on a number of specific issues in

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[13] Civil penalties for violation of hazardous materials statutes and regulations were the only exceptions. Those could be assessed administratively.

the civil penalty procedural rules that had been particularly controversial.[14] In mid-April, the FAA issued a final rule in this rulemaking, with a delayed effective date. At the same time the FAA put out its entire set of procedural rules, incorporating these changes, for notice and comment.[15] Final rules were issued in July 1990.[16]

Under the final rules, a civil penalty case begins with a complaint issued by an agency attorney, providing notice of the violation alleged and the proposed civil penalty.[17] After the complaint is answered[18] a hearing is held before an administrative law judge.[19] The administrative law judge has the usual powers to supervise the hearing, including the power to issue subpoenas, receive evidence, regulate the course of the hearing, hold settlement conferences, resolve motions, and after the hearing makes findings of fact and conclusions of law and issues an initial decision.[20] The rules expressly deny the ALJ the power to issue orders of contempt, to award costs, or to impose any sanction not specified in the rules. If any such sanction is imposed, an interlocutory appeal may be filed of right.[21] Discovery is fairly broad, including depositions on oral examination "of any person," written interrogatories directed to a party, requests for production of documents or tangible items "to any person," and requests for admission by a party. Leave of the ALJ is not required. A party may discover any matter that is not privileged and that is relevant to the subject matter of the proceeding, and may discover information inadmissible at the hearing if it is reasonably calculated to lead to the discovery of admissible evidence.[22] The ALJ may limit discovery that is unduly burdensome or within commercial privileges.[23] The ALJ may impose sanctions for failure to make discovery including striking the responsible parties' pleading, precluding prehearing or discovery motions by that party, or precluding admission of that portion of that parties' evidence.[24] Interlocutory appeals are permitted as of

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[14] 55 Fed.Reg. 7980 (March 6, 1990) (NPRM inviting public comment on policy issues and proposed changes to the rules of practice regarding civil penalty authority).

[15] 55 Fed.Reg. 15110, 15111, 15134, 15135 (April 20, 1990) (final rule adopting changes to the rules of practice, and seeking comment on consolidated body of rules).

[16] 55 Fed.Reg. 27548 (July 3, 1990) (final rule in accordance with a decision of the United States Court of Appeals) (to be codified at 14 CFR Part 13).

[17] 14 CFR §13.208(c).

[18] 14 CFR §13.209.

[19] 14 CFR §13.204.

[20] 14 CFR §13.205.

[21] 14 CFR §13.205(b).

[22] 14 CFR §13.220.

[23] 14 CFR §13.220(f) (power to limit discovery); id. (g) (confidential orders).

[24] 14 CFR §13.220(n).

right over orders barring a person from proceedings, failure to dismiss upon request of the parties, or orders by an ALJ in excess of the limitations on ALJ powers.[25] Other interlocutory appeals may be taken only with approval of the ALJ, which shall be granted when a party shows "that delay of the appeal would be detrimental to the public interest or would result in undue prejudice to any party."[26]

Unless it is appealed, the ALJ's initial decision becomes the final order assessing civil penalties.[27] Any party may appeal the initial decision based, however, only on the following grounds: lack of a preponderance of reliable, probative, and substantial evidence to support each finding of fact, failure of each conclusion of law to be consistent with "applicable law, precedent, and public policy," or commission of prejudicial errors during the hearing."[28] The FAA appellate decisionmaker[29] may raise new issues, as the NTSB may do on appeal of a certificate sanction, but if new issues are raised on appeal, the parties are entitled to develop a record before the ALJ who makes an initial decision on the new issue.[30]

Criteria for the amount of civil penalties are set forth in FAA Order 2150.3A rather than in the regulations.[31] The administrative law judge has authority to modify the proposed civil penalty based on evidence submitted at the hearing. This is a power that many interested parties do not understand exists, based on earlier proposed rules that were modified by the FAA.[32]

A review of the digests of administrator decisions under the civil penalty program[33] reveals the following about patterns of FAA administrator exercise of appellate authority in civil penalty cases:

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[25] 14 CFR §13.219(c).

[26] 14 CFR §13.219(b).

[27] 14 CFR §13.232(d).

[28] 14 CFR §13.233(b).

[29] The decisionmaker is the FAA administrator "acting in the capacity of the decisionmaker on appeal", or any person to whom the administrator has delegated that decision-making authority. 14 CFR §13.202.

[30] 14 CFR §13.233(j); 55 Fed. Reg. 27548, 27568 (July 3, 1990) (preamble to final regulations discussing new issues on appeal).

[31] 55 Fed. Reg. at 27569 (July 3, 1990) (preamble to final regulations, discussing sanction criteria).

[32] 14 CFR §13.232(a) ("in each...decision, the administrative law judge shall include finding of fact and conclusions of law upon...the amount of any civil penalty found appropriate by the administrative law judge...."); 55 Fed. Reg. at 27568 (July 3, 1990) (discussing power to modify civil penalty).

[33] *See* 56 Fed. Reg. 20250 (May 2, 1991); 56 Fed. Reg. 4886 (Feb. 6, 1991); 55 Fed. Reg. 45984 (Oct. 31, 1990).

(1) Relatively few appeals involve pilots

(2) Many appeals are withdrawn or abandoned

(3) Relatively few appeals by persons against whom penalties have been imposed succeed

(4) ALJs exercising discretion with respect to the amount of penalties frequently are reversed.

The separation of prosecutorial and judging functions has been a matter of particular concern to critics of the civil penalty program. This is the separation of functions provision of the final FAA rule:

§13.203 Separation of Functions[34]

(1) Civil penalty proceedings, including hearings, shall be prosecuted by an agency attorney.

(2) An agency employee engaged in the performance of investigative or prosecutorial functions in a civil penalty action shall not, in that case or a factually-related case, participate or give advice in a decision by the administrative law judge or by the FAA decisionmaker on appeal, except as counsel or a witness in the public proceedings.

(3) The Chief Counsel, the Assistant Chief Counsel for Litigation, or attorneys on the staff of the Assistant Chief Counsel for Litigation will advise the FAA decisionmaker regarding an initial decision or any appeal of that civil penalty action to the FAA decisionmaker.

The acting chief administrative law judge of the Department of Transportation told the Conference committee at its June 19, 1991 hearing that FAA ALJs scrupulously enforce FAA separation of functions requirements.[35]

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[34] 55 Fed.Reg. 27548 (July 3, 1990) (to be codified at 14 CFR §13.203).

[35] Yoder statement at 4, (citing NL Industries, FAA Docket 84-29 (H.M.) initial decision, dated March 25, 1987, Appendix A, Order dated February 13, 1986); Western Airlines, Docket 85-108 (H.M.) Orders dated November 3 and 20, December 7 and 18, 1987, reversed in part, decision of the administrator on appeal, December 8, 1988; Omega Silicone Co., FAA Docket 87-152 (H.M.) decision dated May 8, 1991, P. 10, N. 9; American Airlines, FAA Docket CP89EA0019, Orders dated December 12, 1990, and May 31, 1991; Discovery Airways, OST Docket 46760, Orders dated May 16 and 25, 1990; Astro Containers, RSPA file 87-06-DM,

C. *ATA v. Secretary of Transportation* Litigation

In *Department of Transportation. v. Air Transport Ass'n*,[36] the United States Court of Appeals for the District of Columbia Circuit held, inter alia, that the promulgation of the civil penalty rules[37] by the Federal Aviation Administration (FAA) violated the notice-and-comment requirements[38] of the Administrative Procedure Act[39] and that the FAA could not initiate new prosecutions under the rules unless and until they were properly repromulgated.[40] The United States Supreme Court granted a petition for certiorari[41] and vacated the court of appeals decision as moot and remanded[42] the case to the District of Columbia Circuit Court of Appeals, which vacated the case on mootness grounds, because revised FAA regulations had been issued after notice-and-comment.[43]

The *ATA* case concerned the necessity of engaging in notice-and-comment procedures preceding the FAA's promulgation of regulations controlling the adjudication of administrative civil penalty actions.[44] The FAA sought to characterize the civil penalty rules as falling within exceptions to the Administrative Procedure Act's notice-and-comment requirements.[45] The court of appeals found that the civil penalty rules could not properly be characterized as "rules of agency organization, procedure, or practice" because of the

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Administrative Law Judge decision, dated December 23, 1988, modified, decision of the administrator, dated December 19, 1989).

36 900 F.2d 369 (D.C. Cir. 1990), *vacated as moot and remanded*, __ U.S. __, 111 S.Ct. 944 (1991), *vacated as moot*, 933 F.2d 1043 (D.C. Cir. 1991).

37 *See* 53 Fed. Reg. 34,646 (1988) (codified at 14 CFR pt. 13). The Penalty Rules established a schedule of civil penalties for violations of the Federal Aviation Act and Federal Aviation Regulations and "a comprehensive adjudicatory scheme providing for formal notice, settlement procedures, discovery, an adversary hearing before an ALJ and an administrative appeal." 900 F.2d at 373.

38 *See* 5 U.S.C. §553 (1988) (requiring publication of general notice of proposed rulemaking in Federal Register after which interested parties shall have opportunity to participate in rulemaking process through comments).

39 900 F.2d at 375. In reaching its decision, the court of appeals first found that the procedural challenge to the promulgated rules was ripe for adjudication. *Id.* at 374-75. Because the court of appeals found the procedural challenge sufficient, the court did not address the substantive challenge to the penalty rules. *Id.*

40 *Id.* at 380.

41 __ U.S. __, 111 S.Ct. 669 (1991).

42 __ U.S. __, 111 S.Ct. 944 (1991).

43 933 F.2d 1043 (D.C. Cir. 1991).

44 900 F.2d at 371.

45 *Id.* at 371-72.

substantial impact of those rules on a civil penalty defendant's substantive right to an administrative adjudication.[46] Nor could statutory time limits provide "good cause" for eschewing notice-and-comment procedures.[47] Also, the FAA's response to postpromulgation comments could not cure noncompliance with section 553's notice-and-comment requirements.[48]

D. Certificate Actions

Section 609 of the Federal Aviation Act[49] authorizes the Secretary of Transportation (who delegated the authority to the Administrator of the FAA)[50] to amend, modify, suspend, or revoke type certificates, production certificates, airworthiness certificates, airman certificates, air carrier operating certificates, air navigation facility certificates (including airport operating certificates), and air agency certificates. The FAA must, unless it finds that an emergency exists, provide a hearing. A person adversely affected by the FAA decision may appeal the order to the National Transportation Safety Board (NTSB), which may "after notice and hearing, amend, modify, or reverse the [FAA] order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the [FAA] order." The NTSB is not bound by FAA findings of fact. An NTSB appeal stays the effect of an FAA order, unless the FAA declares that an emergency exists and that safety requires the immediate effectiveness of the order. In such emergency cases, the NTSB must decide the appeal within 60 days.

The NTSB publishes digests of its appellate decisions, but not in WESTLAW, LEXIS or the Federal Register.

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[46] *Id.* at 376. Section 553(b)(A) of the Administrative Procedure Act provides that notice prior to promulgation of regulations is not required for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice . . ." 5 U.S.C. §553(b)(A).

[47] *Id.* at 378-79. The FAA argued unsuccessfully that the two year duration of section 1475's demonstration program brought the Penalty Rules within the "good cause" exception to notice-and-comment requirements. *Id.* Section 553(b)(B) of the Administrative Procedure Act provides a second exception from notice requirements "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. §553(b)(B).

[48] *Id.* at 379.

[49] 49 App. U.S.C. §1429.

[50] 14 CFR §1.47 (1991).

E. History of NTSB Authority to Adjudicate Certificate Actions

Regulation of civil aviation by the federal government originated with the Air Commerce Act of 1926,[51] which created an Aeronautics Branch under the authority of the Department of Commerce.[52] The current National Transportation Safety Board evolved nearly 30 years later from the first accident investigation panel created by regulations promulgated by the Secretary of Air Commerce in 1937.[53]

The following year Congress passed the Civil Aeronautics Act of 1938.[54] That act consolidated government regulation of aviation within a newly created Civil Aeronautics Authority that included an independent Air Safety Board charged with investigating accidents and recommending accident prevention measures.[55] In 1940 the Civil Aeronautics Authority was reorganized into two separate agencies, the Civil Aeronautics Administration and the Civil Aeronautics Board (CAB).[56] The Bureau of Safety under the CAB assumed all authority for investigation of civil aviation accidents upon the abolition of the Air Safety Board.[57]

In 1958, Congress passed the Federal Aviation Act[58] that created the Federal Aviation Administration and transferred some of the CAB's responsibilities, including rulemaking and general enforcement duties, to the FAA.[59] Adjudicatory and accident investigatory functions, however, continued to be exercised exclusively by the CAB.[60]

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51 Pub. L. No. No. 69-254, 44 Stat. 568 (1926) (repealed in part, 1938; in full, 1958).

52 Atwood, *Admissibility of National Transportation Safety Board Reports in Civil Air Crash Litigation*, 53 J. Air L. & Com. 469, 470 (1987); Comment, *Judicial Review for the FAA: An Additional Safeguard for Aviation Safety*, 29 Am. U. L. Rev. 713, 723 (1980).

53 Atwood, at 471.

54 Pub. L. No. No. 75-706, 52 Stat. 973 (1938) (repealed 1958).

55 Note, *Aviation: The Rule for Admissibility: Building a Balance Between the Interests of Air Safety and the Interests of Aviation Litigation*, 41 Okla. L. Rev. 265, 268 (1988); Atwood, at 471-72.

56 41 Okla L.Rev. at 268.

57 *Id.*

58 Pub. L. No. No. 85-726, 72 Stat. 731 (current version at 49 U.S.C. §§1301-1542 (1988)).

59 Atwood, at 472; Note, at 269; Comment, at 724.

60 Comment, at 724. All functions, powers, and duties of the Civil Aeronautics Board were terminated or transferred by Pub. L. No. No. 95-504, s 40(a), Oct. 24, 1978, 92 Stat. 1744, effective on or before Jan. 1, 1985.

The legislative history of the 1958 Act[61] shows that the primary Congressional focus was on creating the appropriate institutional framework for safety rulemaking authority, exercised in the context of responsibility of a well-planned aviation system. "An understanding of the system sought to be achieved and a knowledge of the problems faced at the operations level are necessary if the regulations are to accomplish their purpose. Once promulgated, the regulations must be applied and enforced, and, if need be, modified or repealed to meet changing conditions."[62] The arrangement left the Civil Aeronautics Board, "an independent quasi-judicial body," to hear certificate action appeals. In order to "expedite the safety-enforcement process," the Act permitted the FAA to take certificate action before formal proceedings before the CAB were permitted, but preserved the right to "a full hearing complying in all respects with the requirements of the Administrative Procedure Act," before the Board.[63] In all, the House Report discussed the adjudicatory responsibility in three relatively brief paragraphs. The language used, the institutional starting point and the brevity of the analysis all suggest that the Congress gave relatively little attention to the unitary enforcement model, but created a split enforcement model to centralize policy and rulemaking responsibility. The CAB opposed transfer of rulemaking authority to the new FAA, although it did favor a single aviation agency "responsible for the research, development, installation, maintenance, and operation of aviation facilities and services relating to air traffic control."[64] It argued that the quasi-legislative rulemaking function should be retained by an independent agency more subject to congressional control.

Eight years later, Congress created the National Transportation Safety Board with the passage of the Department of Transportation Act of 1966.[65] The NTSB consists of five members appointed by the President, with the advice and consent of the Senate, of which at least three members "have been appointed on the basis of technical qualification, professional standing, and demonstrated knowledge in the fields of accident reconstruction, safety engineering, human factors, transportation safety, or transportation regulation."[66] The original scheme, which placed the NTSB within the Department of Transportation (DOT), gave the NTSB responsibility for

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[61] House Report No. 2360, 95th Cong. 2d Sess., reprinted in 1958 U.S. Code Cong. & Admin. News 3741.

[62] 1958 U.S. Code Cong. & Admin. News at 3747.

[63] 1958 U.S. Code Cong. & Admin. News at 3748.

[64] Letter from Chairman of Civil Aeronautics Board to Chairman of House Commerce Committee, dated July 29, 1958, reprinted in 1958 U.S. Code Cong. & Admin. News at 3763.

[65] Pub. L. No. No. 89-670, 80 Stat. 935 (codified at 49 U.S.C. §§312, 1651-1659 (1988)).

[66] 49 U.S.C. §1902(b)(1) (1988).

investigating all transportation accidents and jurisdiction over all challenges involving certificates or licenses issued by the Secretary of Transportation or the Administrator of the FAA.[67]

The Independent Safety Board Act of 1974[68] removed the NTSB from the Department of Transportation to avoid undue deference to the interests of the DOT by the Board in the performance of its duties.[69] This Act increased the NTSB's investigative authority, set forth standards for responding to safety recommendations, and clarified the separation between the FAA and the NTSB.[70]

The NTSB as a matter of policy defers to FAA interpretations of the FAA rules and the Federal Aviation Act. It does not, however, defer with respect to the standard contained in its own statute for reviewing certificate actions: that the board shall approve an FAA certificate suspension or revocation unless it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the order.

III. Split Enforcement Model

The institutional arrangement for certificate actions under the Federal Aviation Act, and the arrangement preferred by some of the interest groups for civil penalties is known as the "split enforcement model." While this model is not unknown, it is relatively unusual. The most prominent examples of split enforcement outside the transportation context are OSHA/OSHRC and MSHA/MSHRC, dealing with employee health and safety, and OPM/MSPB, dealing with federal employee rights.

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67 Comment, at 729. Although the Board was not specifically given any original investigative authority, in practice the NTSB began to initiate original investigations of accidents, partly due to the migration of many of the former Bureau of Aviation Safety staff into the new NTSB structure. Note, at 269.

68 Pub. L. No. No. 93-633, title III, 88 Stat. 2166 (codified at 49 U.S.C. §§1901-1907 (1988)). For legislative history and purpose of Pub. L. No. No. 93-633 (Independent Safety Board Act), see 1974 U.S.Code Cong. and Admin.News, p. 7669.

69 Comment, at 729-30. As of April 1, 1975, the NTSB has functioned as an independent agency. Atwood, at 485.

70 Note, at 269-70.

A. Occupational Safety and Health Review Commission

The Occupational Safety and Health Act[71] assigns responsibility to two distinct administrative agencies: the Occupational Safety and Health Administration (OSHA) within the Department of Labor, and an independent Occupational Safety and Health Review Commission (OSHRC). OSHA sets and enforces workplace health and safety standards, promulgating regulations[72] and investigating violations, issuing citations, and assessing monetary penalties against noncomplying employers.[73] OSHRC exercises adjudication responsibility.[74] Employers wishing to contest OSHA citations are entitled to hearings before OSHRC administrative law judges, reviewable by the commission itself in its discretion.[75] Judicial review is available to either party,[76] but reviewing courts of appeals must treat commission findings of fact as conclusive so long as they are supported by substantial evidence.[77]

The Supreme Court has referred to this as an "unusual regulatory structure."[78]

The Court noted that the Congress set up this structure to achieve greater separation of functions than exists within traditional unitary agencies under the APA.[79] Senator Javits justified the separation, acknowledging that it went beyond what was required by the APA.[80]

The OSHA split enforcement model has been troublesome. In addition to the deference issue discussed in §III(D) of this report, the Supreme Court was forced to referee another jurisdictional dispute between the Secretary and the Commission. *Cuyahoga Valley Railroad v. United Transportation Union*,[81] arose from the Commission taking the position that it could conduct administrative adjudication even when OSHA moved to vacate a citation. The

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[71] 29 U.S.C. §651-678 (1988).

[72] 29 U.S.C. §665 (1988).

[73] 29 U.S.C. §§658-659, 666 (1988).

[74] 29 U.S.C. §651(b)(3) (1988).

[75] 29 U.S.C. §659(c) (hearing and order); 29 U.S.C. §661(j) (1988) (discretionary review).

[76] 29 U.S.C. §660 (authorizing petitions for judicial review either by affected persons or by secretary) (1988). The Solicitor of Labor is expressly authorized to appear in civil litigation for the secretary, although under the direction and control of the Attorney General. 29 U.S.C. §663 (1988).

[77] 29 U.S.C. §660(a)-(b) (1988).

[78] Martin v. OSHRC, ___ U.S. ___, 111 S. Ct. 1171 (1991).

[79] ___ U.S. at ___.

[80] *Martin*, ___ U.S. at ___ (citing S. Rep. No. 91-1282 at 56, reprinted in Legislative History 195 (individual views of Senator Javits)).

[81] 474 U.S. 3 (1985).

Supreme Court held that the commission lacked that power because necessarily associated with OSHA's enforcement responsibility is the authority to withdraw citations and enter into settlement discussions with employers.[82]

B. Mine Safety and Health Review Commission

The Mine Safety and Health Act[83] authorizes the Secretary of Labor to assess civil penalties up to $10,000 for each violation of mandatory mine health or safety standards or for other violations of the Act.[84] The Act also establishes the Federal Mine Safety and Health Review Commission[85] as an independent agency with five members appointed by the President by and with the advice and consent of the Senate. The Secretary (acting through the Mine Safety and Health Administration) starts the civil penalty process by issuing a notice of proposed civil penalty.[86] If a mine operator, a miner, or a miner representative wishes to contest the proposed penalty, that person is entitled to a hearing before an ALJ assigned to MSHRC.[87] The full commission, or a panel of three members, hears discretionary appeals from ALJ decisions, which become final within 40 days after their issuance otherwise.[88] Petitions for Commission review of ALJ decisions are limited to one of five statutory grounds.[89] Judicial review is available on petition by any person adversely affected or aggrieved by a commission order or by the Secretary of Labor.[90]

C. Merit Systems Protection Board

The Civil Service Reform Act places administrative and operational responsibility for the federal civil service system in the Office of Personnel Management, and places adjudicatory responsibility in the separate Merit

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[82] *Martin*, ___ U.S. at ___ (citing and quoting *Cuyahoga Valley Railroad Company*, 474 U.S. at 6-7).

[83] 30 U.S.C. §§801-962 (1988).

[84] 30 U.S.C. §820 (1988).

[85] 30 U.S.C. §823 (1988).

[86] 30 U.S.C. §815(a)-(b). (1988).

[87] 30 U.S.C. §815(d). (1988).

[88] 30 U.S.C. §823(d). (1988).

[89] 30 U.S.C. §823(d)(2)(ii) (1988).

[90] 30 U.S.C. §816 (1988). The Solicitor of Labor may represent the secretary in civil litigation subject to the direction and control of the Attorney General. 30 U.S.C. §822 (1988).

Systems Protection Board.[91] Federal sector employees adversely affected by an agency decision may appeal to the MSPB, which can hear the appeal directly or through an administrative judge (not an ALJ).[92] Subsequent administrative appeal to the full Board is discretionary.[93] Judicial review is within the jurisdiction of the United States Court of Appeals for the Federal Circuit, exercisable on petition by the employee or by the director of the Office of Personnel Management.[94]

D. To Whom Does a Reviewing Court Defer When Enforcement Authority is Split?

When enforcement responsibility is split between two agencies, courts reviewing administrative decisions sometimes must decide between the two agencies in deferring to administrative discretion.

The Supreme Court was presented with this problem in *Martin v. Occupational Safety and Health Review Commission*.[95] That case involved the allocation of responsibility between the OSHA and the OSHRC, described earlier in §III(A) of this report. OSHA cited a steel manufacturer for leaky respirators. The review commission vacated the citation, interpreting OSHA regulations in a way that did not support the violation asserted by OSHA. On review at the request of OSHA, the court of appeals determined that the regulations were ambiguous and that deference was due the Commission's interpretation. The Supreme Court reversed, inferring from the Occupational Safety and Health Act[96] congressional intent "to invest interpretive power in the administrative actor in the best position to develop [historical familiarity and policymaking expertise]."[97] It concluded that OSHA was more likely than the commission to develop these attributes because OSHA promulgates the standards, and thus is in a better position to reconstruct the purpose of the regulations. Also, "by virtue of the secretary's statutory role as enforcer, the secretary comes into contact with a much greater number of regulatory problems then does the commission, which encounters only those regulatory episodes resulting in contested citations."[98] The court noted that granting

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91 5 U.S.C. §7701 (1988).

92 5 U.S.C. §7701(b) (1988).

93 5 U.S.C. §7701(e) (1988).

94 5 U.S.C. §7703 (1988).

95 ___ U.S. ___, 111 S. Ct. 1171 (1991).

96 29 U.S.C. §§651-678 (1988).

97 ___ U.S. at ___.

98 ___ U.S. at ___.

deference to the commission would reenforce the congressional determination to protect regulated parties from biased decision-making by OSHA, nevertheless concluding that such deference would frustrate congressional intent to make a single administrative actor accountable for overall implementation of the act.[99]

The court emphasized that it took no position on the division of enforcement and interpretive powers within other regulatory schemes conforming to the split enforcement structure. It also emphasized that it was saying nothing about whether particular divisions of enforcement and adjudicative power within a unitary agency comport with section 554(d) of the APA.[100]

Recognizing that the Supreme Court in *Martin v OSHRC* expressed no views on the relationship between the FAA and the NTSB, it nevertheless is useful to apply the factors it used to decide the OSHA review commission case to the FAA/NTSB situation. Because the NTSB, unlike the review commission, investigates accidents, it has comparatively more familiarity with regulatory problems than the review commission did. Thus, the second factor of the Court's formula would permit deference to the NTSB. The first factor, however, presuming sounder interpretation from the agency promulgating regulations in the first place, militates as strongly in favor of deference to the FAA as it did in favor of deference to OSHA. The NTSB, like the review commission, has no responsibility for promulgating regulations. Accountability of a single public official, a third factor mentioned by the *Martin* court, albeit in another part of the opinion rejecting an argument by the respondent steel company, militates in favor of deference to the FAA administrator because that official, more than the NTSB, has overall responsibility for air safety.

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[99] Accord, Conference Recommendation 86-4, 1 CFR §305.86-4 (1991) (recommendation deference to program agency in split enforcement model).

[100] ___ U.S. at ___ (Part III). Section 554(d) of the APA is considered in §V(B) of this report.

IV. Unitary Enforcement Model

A. Most Agencies Follow Unitary Model of Enforcement

As the Supreme Court said within the last year, "under most regulatory schemes, rulemaking, enforcement, and adjudicative powers are combined in a single administrative agency."[101]

In this "unitary" agency model, enforcement and adjudication responsibilities must be divided between separate personnel under §554(d) of the APA, discussed in §V(B) of this report.[102]

The Environmental Protection Agency ("EPA"), in addition to the other agencies identified in the discussion of separation of functions, illustrates the unitary enforcement model applied to civil penalties under several different environmental statutes.[103] Under consolidated rules of practice for these civil penalty programs, the EPA commences a proceeding by issuing a complaint.[104] Certain motions made before a complaint is answered are decided by the regional administrator, and other motions are decided by the assigned ALJ.[105] Hearings are available as a matter of right when requested in the answer.[106] Prehearing conferences are held for the purpose of exploring settlement and simplification of issues.[107] Except for exchange of witness list and documents routinely accomplished at the prehearing conference,[108] discovery is permitted only when the ALJ determines that the discovery sought will not unreasonably delay the proceeding, that the information sought through discovery is not otherwise obtainable, and that the information sought has significant probative value. Depositions on oral questions are permitted

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[101] *Martin*, ___ U.S. at ___ (citing 15 U.S.C. §41 (Federal Trade Commission); 15 U.S.C. §§77s-77u (Securities and Exchange Commission); 47 U.S.C. §151 (Federal Communications Commission)). But see Preamble to Conference Recommendation 86-4, codified at 1 CFR §305.86-4 (1991) (taking no position on whether split enforcement or unitary enforcement model is preferable).

[102] Martin v. OSHRC, ___ U.S. at ___ (citing 5 U.S.C. §554(d) and Johnson, *The Split Enforcement Model: Some Conclusions From the OSHA and MSHA Experiences*, 39 Admin. L. Rev. 315, 317-319 (1987).

[103] See generally 40 CFR Part 22 (1991); 40 CFR §22.01 (scope of procedural rules).

[104] 40 CFR §22.13 (1991).

[105] 40 U.S.C. §22.16 (1991).

[106] 40 CFR §22.15(c) (1991).

[107] 40 CFR §22.19 (1991).

[108] 40 CFR §22.19(b) (1991).

only on a finding that the information sought cannot be obtained by alternative methods or that relevant and probative evidence may not otherwise be preserved for presentation by a witness at the hearing.[109] After the hearing, the ALJ issues an initial decision, which may include a penalty amount different from that recommended in the complaint, but if she does so, must provide specific reasons for any increase or decrease.[110] The initial decision becomes a final order of the administrator unless an appeal is taken to the administrator.[111] Interlocutory appeal ordinarily is available only on certification by the ALJ,[112] or "except when the administrator determines, upon motion of a party and an exceptional circumstances, that to delay review [until review of the initial decision] would be contrary to the public interest."[113] On appeal, the issues are limited to those raised by the parties during the course of the proceeding before the ALJ.[114]

The administrator may delegate all or part of his authority to act in any given proceeding.[115] The person to whom powers are delegated may not be involved in the prosecutorial function.[116]

B. Separation of Functions

Many nonaviation agencies have administrative civil penalty programs, and a number of them have specifically addressed the separation of function questions in their procedural regulations. Other agencies' procedures for assessing civil penalties generally provide for an assessment order, followed by a hearing on the record, resulting in an order, which sometimes is reviewable by the agency.[117]

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[109] 40 CFR §22.19(f) (1991).

[110] 40 CFR §22.27(b) (1991).

[111] 40 CFR §22.27(c) (1991).

[112] 40 CFR §22.29 (1991).

[113] 40 CFR §22.29(c) (1991).

[114] 40 CFR §22.30(c) (1991).

[115] 40 CFR §22.04(b)(3).

[116] 40 CFR §22.04(b)(2) (1991).

[117] *See, e.g.*, 10 CFR §2.205 (NRC); 12 CFR §19.81-.83 (Comptroller of the Currency); 12 CFR §263.22-.29 (Federal Reserve Board); 12 CFR §308.55-.76 (FDIC); 12 CFR §509.34-.38 (Office of Thrift Supervision); 12 CFR §622.52-.60 (Farm Credit Administration); 12 CFR §747.401-.409 (National Credit Union Administration); 15 CFR §904.1, .100-.108 (procedural regulations applicable to NOAA under marine sanctuary regulations) §§935.8 & 936.7 (private remote sensing space systems regulations) pt 960 (deep seabed mining) pt 971.

The Congress relatively recently has had occasion to consider a separation of functions in the unitary enforcement model on a government-wide basis. In 1986, it enacted the Program Fraud statute.[118] While the statute is unusual in the relationships it establishes between responsible agencies and the Justice Department, it does validate the unitary enforcement model with separation of functions protections equivalent to those provided by the FAA in its civil penalty demonstration program. The program fraud regulations of a number of agencies contain standard separation of functions language.[119]

The program fraud statute imposes civil penalties for false claims or statements.[120] It provides for investigations of potentially false claims or statements,[121] followed by presentation of investigative results to a reviewing official.[122] If the reviewing official determines, based on the investigative report, that there is adequate evidence to believe a violation has occurred, that official gives notice to the Attorney General of an intention to refer the allegations to the presiding official of the agency.[123] The presiding official may proceed with the case only if the Attorney General does not object.[124] Civil penalty proceedings before the presiding official begin with notice to the person accused,[125] and thereafter are conducted either under the APA, supplemented by agency procedural regulations meeting the requirements of 31 USC §3803(g)(3) or for agencies not subject to the APA procedures, under agency regulations meeting the requirements of 31 USC §3803(g)(2).

Section 3803(g)(2)(D) has specific separation of functions language, disqualifying the investigating and reviewing officials from participating or advising in the initial decision under §3803(h) or the review of that decision under §3803(i). This disqualification is stated in essentially the same language as the separations of functions language of 5 USC §554(d), except for reference to "related case":

> [procedural regulations shall] ensure that the investigating official and the reviewing official do not participate or advise

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118 31 U.S.C. §3801-3812, 100 Stat. 1874 (1986).

119 *See, e.g.*, 20 CFR §355.14 (Railroad Retirement Board); 13 CFR §142.14 (Small Business Administration); 22 CFR §35.14 (Department of State); 22 CFR §224.14 (Agency for International Development).

120 31 U.S.C. §3802(a).

121 31 U.S.C. §3803(a)(1).

122 31 U.S.C. §3803(a)2).

123 31 U.S.C. §3803(a)(2).

124 31 U.S.C. §3803(b)(2).

125 31 U.S.C. §3803(d)(2).

> in the decision required under subsection (h) of this section or the review of the decision by the authority head . . . .[126]

In his prepared statement for the June 19, 1991 Conference hearing, the chief counsel of the FAA identified the United States Coast Guard,[127] the Office of the Comptroller of the Currency,[128] the Federal Reserve Board,[129] the Federal Deposit Insurance Corporation,[130] the Nuclear Regulatory Commission,[131] the Federal Energy Regulatory Commission,[132] and DOT Aviation Economic Matters[133] as examples of agencies with civil penalty authority in which the prosecutorial and adjudicatory functions are performed by separate organizational components within a chief legal officer's organizational entity.

The EPA procedural rules do not specifically address separation of advisory functions performed by counsel but do require that persons exercising authority delegated by the administrator not perform prosecutorial functions.[134]

V. Legal Requirements for Separating Functions

Separation of functions in the agency context is conceptually related to separation of powers in the Constitutional context, although the requirements are quite different.

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[126] 31 U.S.C. §3803(g)(2)(D).

[127] Separation of functions procedure in 33 CFR §1.07 prohibits chief counsel attorneys giving prosecutorial advice from participating in adjudicatory proceeding.

[128] 12 CFR §19.15 (prosecutorial function exercised by enforcement and compliance division within chief counsel's office; appellate decisionmaker advice comes from legislative and regulatory analysis division within chief counsel's office).

[129] 12 CFR §263.15 (permitting only members of the board staff not engaged in investigative or prosecuting functions to advise and assist the board in considering a case).

[130] 12 CFR §308.44 (only FDIC staff not participating in investigative or prosecutorial functions may advise and assist the board in considering a particular case).

[131] 10 CFR §2.781 (attorneys from licensing and enforcement division within general counsel's office prosecute; attorneys from regulations and adjudication division within general counsel's office advise commissioners on adjudicatory matters).

[132] 8 CFR §385.2202 (no person involved in investigation or trial may participate or advise as to findings, conclusions, or decision except as a witness or counsel in public proceedings).

[133] 14 CFR §300.4 (attorneys reporting to assistant general counsel for aviation enforcement proceedings prosecute enforcement cases; attorneys reporting to assistant general counsel for environmental, civil rights, and general law advise appellate decisionmaker-usually the assistant secretary for Policy and International Affairs).

[134] 40 CFR §22.04(b)(2) (1991).

A. Constitutional Requirements

The principle of separation of powers relates to the apportionment of different governmental functions to distinct and relatively independent governmental bodies.[135] This goal is achieved in the American system of government under the Constitution through separate branches of government consisting of the legislative[136] (making the laws), the executive[137] (effectuating the laws), and the judicial[138] (deciding what the laws mean) branches.[139] Due to the great power of the legislature, that branch is further subdivided bicamerally, to reflect both equality among the states and proportional representation of the people.[140]

In *Mistretta v. United States*,[141] the United States Supreme Court held that separation of powers principles under the Constitution were not violated by the Sentencing Reform Act of 1984, which established the United States

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135 *See generally,* Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers* 72 Cornell L. Rev. 430, 464-68 (1987) (exploring tension inherent in themes of separation and checks and balances); Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions--A Foolish Inconsistency?*, 72 Cornell L. Rev. 488 (1987) (comparing and contrasting formal and functional approaches to separation of powers analysis reflecting, respectively, strict separation of functions and flexible interpretation permitting greater intermingling of powers); Osgood, *Governmental Functions and Constitutional Doctrine: the Historical Constitution*, 72 Cornell L. Rev. 553, (1987) (arguing that historical context plays important part in constitutional decision-making in addition to conventional doctrinal formulations of the law).

136 The Constitution states that: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives." U.S. Constitution, art. I., §1.

137 The Constitution provides that; "The executive Power shall be vested in a President of the United States of America." U.S. Constitution, art. II., §1. Prosecutorial functions are executive functions.

138 The Constitution requires that: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Constitution, art. III., §1.

139 For a discussion of the historical background of separation of powers principles, see Parker, *The Historic Basis of Administrative Law: Separation of Powers and Judicial Supremacy*, 12 Rutgers L. Rev. 449, 451-64 (1958) (tracing historical development of separation of powers doctrine from Aristotle to Locke to Montesquieu); Sharp, *The Classical American Doctrine of "The Separation of Powers"*, 2 U. CHI. L. REV. 385 (1935) (discussing historical evolution of separation of powers concepts from antiquity through early American constitutional theorists such as Adams and Madison).

140 U.S. Constitution, art. I., §1. *See* Sargentich, at 436 (bicameral structure of legislature serves as internal check against excessive legislative accretion of power).

141 488 U.S. 361 (1989).

Sentencing Commission composed of federal judges sharing rulemaking authority with nonjudges and subject to the President's power to appoint or remove for cause.[142] The Court found that the Constitutional mandate requiring the separation of governmental functions among the different branches does not prevent the exercise of some rulemaking authority by an independent agency within the Judicial Branch.[143]

In *Touby v. United States*,[144] the Supreme Court rejected a challenge to commingling rulemaking and prosecutorial functions in the Department of Justice. In doing so, the court flatly rejected separation of powers arguments. "The principle of separation of powers focuses on the distribution of powers *among* the three coequal branches; it does not speak to the manner in which authority is parcelled out within a single branch.[145] Thus, under *Touby* any constitutional constraints on commingling of functions within administrative agencies must be derived from the due process requirement rather than from the separation of powers requirements.

The constitutional cases say two things pertinent to the handling of aviation civil penalties: (1) commingling of functions is not unconstitutional; (2) bias on the part of an adjudicator violates due process regardless of whether it arises because of economic interest or otherwise. Conceptually, functions could be commingled so completely that the decision-making process would be biased in contravention of due process.

1. Due Process and Combination of Functions

Administrative agencies appear at times to exercise all three governmental powers (i.e., legislative, prosecutorial, and adjudicative functions),[146] but the courts and the Congress regularly have approved such commingling of functions. Indeed, the United States Court of Appeals for the Sixth Circuit in

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[142] *Id.* at 412.

[143] *Id.* at 386-87. More generally, the Court has stated that separation of powers doctrine pertains to the distribution of powers *among* the Branches, not *within* a particular Branch. Touby v. United States, 59 U.S.L.W. 4447, 4449 (U.S.. 1991) (citing Mistretta v. United States, 488 U.S. 361, 382 (1989)). For a general discussion of the implications of the *Mistretta* decision, see Buffington, *Comment: Separation of Powers and the Independent Governmental Entity After Mistretta v. United States*, 50 La. L. Rev. 117 (1989).

[144] ___ U.S. ___, 111 S. Ct. 1752 (1991).

[145] ___ U.S. at ___ [citations omitted].

[146] *See* Taintor, *Federal Agency Nonacquiescence: Defining and Enforcing Constitutional Limitations on Bad Faith Agency Adjudications*, 38 Me. L. Rev. 185, 248-50 (1986) (discussing problem of reconciling administrative agencies' dual exercise of prosecutorial and adjudicative functions).

an unpublished opinion rejected the argument that the FAA's separation of functions procedures in civil penalty proceedings violates due process.[147]

In *Winthrow v. Larkin*,[148] the United States Supreme Court reviewed an injunction against a contested Wisconsin administrative hearing on professional misconduct by physicians.[149] The Court recognized that the mere combination of investigative and adjudicative functions within a physicians' State Examining Board was insufficient to violate due process.[150] The simple fact that Board members had viewed evidence during investigative procedures could not overcome the "presumption of honesty and integrity in those serving as adjudicators"[151] and was an inadequate basis for impugning the fairness of the later adversary hearing.[152]

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147 Playter v. FAA, No. 90-3420 (6th Cir. May 16, 1991).

148 421 U.S. 35 (1975).

149 *Id.* at 59.

150 *Id.* at 47. *See also* Richardson v. Perales, 402 U.S. 389, 410 (1971) (upholding agency hearing procedures despite social security hearing examiner's development of facts); Porter County Chapter v. Nuclear Regulatory Comm'n, 606 F.2d 1363, 1371 (D.C. Cir. 1979) (permitting interrelation of functions without violating due process). *But see* Federal Trade Comm'n. v. Atlantic Richfield Co., 567 F.2d 96 (D.C. Cir. 1977) (obligation to keep investigative and adjudicative roles separate to preserve judicial fairness and investigative vigor). In *Atlantic Richfield*, the court sidestepped the issue of how much separation is necessary by remanding the case to the FTC for a determination of the agency's interpretation of its own prosecutorial and adjudicative subpoena processes. 567 F.2d at 106. Subsequently, the FTC decided that complaint counsel could obtain access to documents obtained during the Commission's investigative process without leave of the administrative law judge adjudicating the matter and without notice to the adjudicative respondent. *See also* Appeal of FTC Line of Business Report Litigation, 595 F.2d 685, 707-08 (D.C. Cir. 1978) (unfairness of agency use of its own investigative documentation in adjudicative hearing, leaving unclear the precise limitations, if any, on the commingling of adjudicative and prosecutorial functions in the collection of evidence by agencies).

151 421 U.S. at 47. *See* Federal Trade Comm'n. v. Cement Institute, 333 U.S. 683 (1948) (commission not disqualified from adjudication despite members' prior ex parte investigations); *Porter County Chapter*, 606 F.2d at 1371 (combination of adjudicative with other functions within agency not violative of due process unless sufficient inherent bias); Ash Grove Cement Co. v. Federal Trade Comm'n, 577 F.2d 1368, 1377 (9th Cir. 1978) (cement company unable to overcome presumption of fairness of adjudicative enforcement procedures). *But see*, American Cyanamid Co. v. Federal Trade Comm'n, 363 F.2d 757 (6th Cir. 1966) (vacated FTC holding because of commission chairman's former investigative activities as chief counsel of Senate subcommittee); Trans World Airlines v. Civil Aeronautics Bd., 254 F.2d 90 (D.C. Cir. 1958) (adjudicator disqualified for prior involvement with issue as Postmaster General).

152 *Id.* at 55.

2. Due Process and the Disinterested Adjudicator

Regardless of whether functions are separated or commingled, due process requires that adjudicative decisionmakers be impartial and neutral. During the October Term, 1972, the Supreme Court decided two cases disqualifying adjudicators because of their pecuniary interest in the matters to be decided by them.[153] In *Ward v. Village of Monroeville*,[154] the Court found that a person tried for traffic offenses was denied due process under the Fourteenth Amendment when the decisionmaker was a mayor, responsible for village finances, who provided a substantial portion of village funds from fines levied in his court .[155] The defendant was "entitled to a neutral and detached judge in the first instance,"[156] regardless of the availability of appellate procedures.[157]

Later that term, in *Gibson v. Berryhill*,[158] the Court disqualified a state optometry association from review of professional misconduct charges against optometrists due to the association's direct pecuniary interest in the outcome.[159] The optometry association, composed of private practitioners, sought to bar half the optometrists in the state from practice due to their employment with a corporate competitor.[160] The Court affirmed the district court's finding that the optometry association was "so biased by prejudgment and pecuniary interest" that the hearings pertaining to the revocation of the appellees' licenses were constitutionally infirm.[161]

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153 For a discussion of the necessity for a disinterested adjudicator as part of due process, see Redish and Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L. J. 455, 491-503 (1986) (distinguishing between pecuniary interest, personal bias, and predisposition impediments to adjudicatory fairness and independence).

154 409 U.S. 57 (1972).

155 *Id.* at 61-62. *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927) (judge with direct, personal, substantial bias against defendant violates due process).

156 409 U.S. at 61-62.

157 *See Tumey*, 273 U.S. at 522 (recognizing general rule disqualifying judge with interest in outcome of controversy).

158 411 U.S. 564 (1973).

159 *Id.* at 578.

160 *Id.* at 571.

161 *Id.* at 578. *See also* United Church of the Medical Center v. Medical Center Comm'n, 689 F.2d 693, 699 (7th Cir. 1982) (commission disqualified as adjudicator due to its financial stake in outcome of title reverter proceedings). *But see*, Hammond v. Baldwin, 866 F.2d 172, 177 (6th Cir. 1989) (citing *Ward* and *United Church*, but no due process violation for agency's alleged general bias favoring state interest in outcome).

B. APA Requirements

The formal adjudication provisions of the Administrative Procedure Act implement constitutional due process protections and go beyond minimum constitutional requirements. Accordingly, agency procedures meeting APA requirements also satisfy constitutional requirements.

The Administrative Procedure Act's formal adjudication requirements contained in sections 554-557[162] apply to decisions of an adjudicatory character[163] required by statute to be made on the record after an opportunity for hearing.[164] The procedures for decisions on civil penalties and certificate actions clearly meet these requirements for formal APA adjudication.[165]

The APA formal adjudication provisions contemplate a trial-type hearing before an administrative law judge independent of agency control,[166] followed by an "initial" or "recommended" decision by the ALJ with a subsequent, usually discretionary, administrative appeal to the policy-making authority constituting the agency.[167]

The APA, like the Constitution, recognizes the legitimacy of policy control over agency adjudication. This justifies some compromises with pure neutrality.[168]

Although the Constitution does not directly address the issue of separation of powers within administrative agencies, section 554(d) of the Administrative Procedures Act (APA)[169] prohibits agency employees or agents from engaging in prosecutorial or investigative functions in the same or related case in which

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[162] 5 U.S.C. §§554-558 (1988).

[163] Decisions of an adjudicatory character involve applying preexisting rules to concrete factual situations.

[164] 5 U.S.C. §554(a) (1988).

[165] *See* 49 U.S.C. §§1429(a);1429(c)(3); 1471(a)(1); 1471(a)(3)(D); 1475(d)(1) (1988) (providing for orders only after hearings or hearings on the record).

[166] *See* 5 U.S.C. §5372 (1988) (ALJs compensated independently of agency recommendations or ratings); 5 U.S.C. §7521 (limiting grounds for adverse agency action against ALJs); 5 U.S.C. §3105 (limiting duties of ALJs).

[167] The policymaking authority in the case of a single administrator agency like the FAA is the administrator, and in the case of multimember agency like the National Transportation Safety Board is the board itself. The ultimate authority of an agency can be delegated, just as the Secretary of Transportation who has the statutory authority under the Federal Aviation Act has delegated the authority to the administrator, or, as the EPA administrator does, to judicial officers under 40 CFR §22.04(b)(3). Similarly, a multimember agency can delegate its authority to panels, as the National Labor Relations Board does.

[168] *Accord* Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 Admin.L.Rev. 329, 345-52 (1991) (contrasting agency adjudication with Article III adjudication).

[169] 5 U.S.C. §554(d) (1988).

such employees or agents participate in adjudicatory[170] agency functions.[171] The APA requires that employees performing adjudicative responsibilities may not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency."[172]

When an agency commingles functions to a degree not permitted by §554(d), decisions tainted by the commingling are subject to invalidation by a reviewing court under 5 USC §706(2)(D) (without observance of procedure required by law).

In *Wong Yang Sung v. McGrath*,[173] a *habeas corpus* proceeding involving the deportation proceedings, the United States Supreme Court recognized that one of the fundamental purposes of the APA was "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge."[174] The Court acknowledged that though the APA "did not go so far as to require a complete separation of investigating and prosecuting functions

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[170] Section 554(a) of the APA provides that the section applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,..." 5 U.S.C. §554(a). Several cases have recognized that section 554(d) of the APA applies only to "adjudications", not "rulemaking" activities. Porter County Chapter v. Nuclear Regulatory Comm'n., 606 F.2d 1363, 1367 (D.C. Cir. 1979); Hercules, Inc. v. Environmental Protection Agency, 598 F.2d 91, 117 (D.C. Cir. 1978); Hoffman-La Roche, Inc. v. Kleindienst, 478 F.2d 1, 13 (3d Cir. 1973). *See also*, National Labor Relations Bd. v. Bell Aerospace Co., 416 U.S. 267 (1974) (distinguishing adjudicatory from rulemaking functions); Securities & Exchange Comm'n. v. Chenery Corp., 332 U.S. 194 (1947).

[171] In pertinent part, section 554(d) states that: "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as a witness or counsel in public proceedings." 5 U.S.C. §554(d). *See* Amos Treat & Co. v. Securities and Exchange Comm'n., 306 F.2d 260, 266-67 (D.C. Cir. 1962) (separation of investigatorial and prosecutorial staff from adjudicative function necessary).

[172] 5 U.S.C. §554(d)(2)

[173] 339 U.S. 33 (1950).

[174] *Id.* at 41. The Attorney General's Committee on Administrative Procedure recognized that "when a controversy reaches the stage of hearing and formal adjudication the persons who did the actual work of investigating and building up the case should play no part in the decision." Rep. Atty. Gen. Comm. Ad. Proc. 56 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 56 (1941).

from adjudicating functions,"[175] the Immigration Service's deportation proceedings did not comport with APA requirements proscribing commingling of adjudicatory and prosecutorial and investigative functions.[176]

The limitation on commingling of functions in §554(d) reflects two congressional concerns: acquisition of information ex parte by an adjudicatory decisionmaker, and loss of objectivity and impartiality because of a former or simultaneous role as an advocate.[177] The *Wong Yang Sun* Court embraced the two purposes and urged interpretation of §554(d) consistent with its purpose as well as according to the letter of the statutory language.[178]

The federal courts have strictly applied the language of APA §554(d), to separations within agencies while granting ultimate agency decisionmakers[179] nearly complete flexibility to perform both prosecutorial/investigatory and adjudicatory functions.

In *Blinder, Robison & Co. v. SEC*,[180] the United States Court of Appeals for the D.C. Circuit found no violation of §554(d) when the SEC successfully sought sanctions against a broker dealer in district court and then subsequently heard the case in its administrative adjudicatory capacity. The court discussed the Supreme Court's decision in *Withrow v. Larkin*,[181] sharply distinguishing the commingling of functions before a lower level hearing officer, prohibited by §554(d) and commingling of functions before the administrative agency itself. The *Withrow* court had distinguished administrative agency practice from the situation of a judge performing combined functions. The contrary outcome on the SEC case, in the opinion of the D.C. Circuit would "work a revolution in administrative (not to mention constitutional) law...."[182]

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[175] 339 U.S. at 46. *See also* Twigger v. Schultz, 484 F.2d 856 (3rd Cir. 1973) at 860 n.3 (quoting Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950)). The Attorney General's Committee concluded that complete separation of functions would be overly burdensome and not necessarily the best means of overcoming adjudicatory bias and prejudice. Rep. Atty. Gen. Comm. Ad. Proc. 60 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 60 (1941). *See also*, Rep. Atty. Gen. Comm. Ad. Proc. 207 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 207 (1941) (additional views and recommendations of Messrs. McFarland, Stason, and Vanderbilt) ("It is only the formal adjudication of contested matters--the taking of evidence and the decision of contested cases--that requires separation").

[176] *Id.* at 45. The immigration inspector who presided at the hearing investigated similar cases, was responsible for cross-examination and for presenting evidence on behalf of the INS.

[177] *See* Grolier, Inc. v. FTC, 615 F.2d 1215, 1219-1220 (9th Cir. 1980) (reviewing legislative history and Attorney General's report).

[178] 339 U.S. 33, 41-42 (1950).

[179] Administrators, boards, or commissions.

[180] 837 F.2d 1099 (D.C. Cir. 1988).

[181] 421 U.S. 35 (1975).

[182] 837 F.2d at 1107.

In *Grolier, Inc. v. FTC*,[183] the United States Court of Appeals for the Ninth Circuit held that an ALJ who formerly had been an attorney advisor for the FTC potentially was disqualified from hearing a case as an ALJ on which he had advised a commissioner while he was an attorney advisor. It remanded for a factual determination of whether the ALJ actually had involvement in the same or related case while he was an attorney advisor, imposing the burden of showing such prior acquaintance on the challenger.[184] The *Grolier* decision is as important for its limitations on the 554(d) prohibition as for its holding. It held that the prohibition on commingling of functions would not extend to attorney advisors as long as they are acting as attorney advisors. The FTC has argued that a close relationship between attorney advisors and agency members requires that attorney advisors be treated under §554(d) just as agency members, so that the attorney advisors may advise agency members freely on the full range of their responsibilities. The Ninth Circuit responded, "this argument would be compelling if made on behalf of an attorney-advisor or other FTC employee who must counsel the member at both the investigative and decision-making stages of a cases. But ALJ Von Brand is no longer an attorney advisor...."[185]

The court noted the overwhelming practice in administrative agencies of performing within one organization a number of responsibilities that democratic political theory usually seeks to separate. [186]

In *Pangburn v. CAB*,[187] the United States Court of Appeals for the First Circuit held that involvement by the CAB in a factual determination of accident cause, in its accident investigation role, did not preclude the board from hearing an appeal of a certificate suspension determination by a pilot involved in the accident.[188] The court noted that the board, in hearing the appeal, did not consider itself bound by factual determinations made in the course of an accident investigation. [189] The court based its conclusion on the well-settled proposition, "that a combination of investigative and judicial functions within an agency does not violate due process."[190]

In *Twigger v. Schultz*,[191] the United States Court of Appeals for the Third Circuit invalidated the suspension on a customs broker's license because the

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183 615 F.2d 1215 (9th Cir. 1980).

184 615 F.2d at 1221.

185 615 F.2d at 1220.

186 615 F.2d at 1217.

187 311 F.2d 349 (1st Cir. 1962).

188 311 F.2d at 356.

189 311 F.2d at 356.

190 311 F.2d at 356.

191 484 F.2d 856 (3rd Cir. 1973).

district director of customs presided over an adjudicatory hearing of a complaint that he had recommended to the Commissioner of Customs. The court suggested that commingling an investigatory function with an adjudicatory function is worse than commingling a prosecutorial and adjudicatory function, because the affected person is unable to offer evidence in opposition to that which the investigator received ex parte.[192]

The case law says that it does not violate either the APA or the Constitution for the Administrator of the FAA to make final decisions in cases prosecuted by lower level personnel reporting to the administrator. *Grolier* says that an FAA employee involved as an investigator or prosecutor could not be the hearing officer. *Twigger* says that the investigator could not be the hearing officer or another first level decisionmaker. *Grolier* also says, however, that attorney advisors might both prosecute and advise the administrator. Indeed, the only statutory argument that can be made in favor of a requirement to separate functions further is that the phrase "performing adjudicative responsibilities" in that part of §554(d) prohibiting a unitary reporting relationship includes advising the ultimate decisionmaker. This reading is undercut by *Grolier*, however.

One commentator urged that formality not be carried to the extreme of depriving decisionmakers of informed advice from higher level agency personnel, even if they are in the chain of command of agency prosecutors.[193]

The only conceivable bias argument that seems to have any merit in the aviation civil penalty context is an argument that the FAA administrator's responsibility for the air traffic control system gives the administrator a bias in favor of air traffic control personnel and against pilots or airlines when the two have conflicting interests.[194]

VI. Arguments in Favor of NTSB Authority

The preamble to Conference Recommendation 90-1 introduced the arguments in favor of transferring adjudicatory authority to the NTSB thus:

> "the NTSB currently adjudicates violations of federal aviation law in the context of certificate proceedings, so it already has experience in the substantive area, as well as

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[192] 484 F.2d at 861.

[193] *See* Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 Colum. L. Rev. 759, 800-801 (reviewing APA and Constitutional requirements and recommending that supervisors of agency advocates remain available to advise on decisions, noting that this is the widespread practice).

established and respected adjudicatory procedures. A transfer of these proceedings to the NTSB would place almost all administrative sanctions for aviation safety violations in one forum. Moreover, the independence of the NTSB from the prosecuting agency would promote the appearance of fairness, by formally separating the agency prosecuting the case from the one adjudicating it."[195]

These and other arguments are developed further in the following sections.

A. Separation of Powers Principles

Some proponents of NTSB adjudicatory authority argue that constitutional due process or separation of powers principles, or APA statutory separation of functions principles require that adjudicatory authority be removed from the FAA. As the analysis in part V of this report shows, there is no substance to these arguments legally. It is entirely consistent for the FAA to have adjudicatory authority as long as it meets the requirements of APA §554(d).

The deeply-felt separation of functions argument is better understood as a perceived fairness argument, rather than a legal argument based either on the Constitution or on the APA.

B. Constituencies Trust NTSB More than FAA

Professor Fallon placed greatest emphasis in support of his recommendation for NTSB responsibility on fairness and appearance of fairness, more particularly on trust by affected parties.[196] He concluded that NTSB would be perceived as more fair by constituencies angered by FAA substantive enforcement policies and administration of procedural aspects of the civil penalties demonstration program.[197] He did, however, embrace the

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[194] The administrator's responsibility for air traffic control is discussed in §VI(C) as an argument in favor of transferring adjudicatory authority to the NTSB.

[195] Recommendation 90-1, "Civil Money Penalties for Federal Aviation Violations," 55 Fed.Reg. 34209 (Aug. 22, 1990) (to be codified at 1 CFR §305.90-1.)

[196] Fallon Report at 24-25.

[197] Fallon at 24.

goal of "smooth, simple, unitary system of administrative adjudication, subject to just one main set of procedural rules."[198]

The major part of the separation of functions problem with aviation civil penalties is a perceptions problem.

Most pilot respondents are people of some stature in their communities, do not think of themselves as law breakers, yet are unsophisticated in their knowledge of the structure of federal government agencies. They react strongly to getting hauled before an administrative agency and, when the ultimate trier of fact and law appears to work for the same agency as the prosecutor, the process seems unfair. This problem, of course, cannot be remedied unless all pilot adjudicatory authority is in the NTSB.

The airline community is primarily concerned with enforcing airport security rules and aircraft maintenance rules and is less concerned with pilot enforcement actions. A few carriers do represent their pilots in enforcement proceedings, and those airlines have concerns similar to those expressed by pilot representatives.

Airline industry concerns with civil penalty administration are much increased by the FAA's test object program. The airline community perceives that the FAA engaged in overly militant enforcement of technical airport security requirements for largely political reasons.[199] In the view of some airlines, the launching of the test object program abrogated a negotiated arrangement reached in 1987, thus depriving airline participants of the bargain struck in regulatory negotiation. The test object program subjects persons responsible for airport security screening systems to penalties for failure of the systems to detect all test objects. Test objects are simulated bombs, guns, and other prohibited items.[200]

These concerns about FAA fairness are increased by the perception that some large civil penalties for maintenance violations were announced so as to increase political and public relations fallout rather than to solve real maintenance problems. These concerns may explain, to some degree, the ATA's vigorous opposition to promulgation of procedural rules without notice-and-comment rulemaking.

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198 Fallon at 26.

199 *See* Continental Airlines Statement Appendix (FAA press releases announcing names of airlines and amounts of penalties without mentioning entitlements to hearings and final decisions based on hearing records).

200 *See generally* In the Matter of Continental Airlines, Inc., FAA Order No. 90-18 (August 22, 1990) at 14-15 (describing test object program and finding it not arbitrary and capricious).

Affected constituencies generally perceive that the FAA has been insensitive to adjudicatory procedural protections in the past.[201]

After the public hearing in June, the airline industry significantly increased its opposition to the civil penalty program. Through experience gained primarily in about 2,000 airport security test object cases, the airline industry became convinced that the FAA will not follow its own procedural rules. Therefore, some members of the industry believe solutions to underlying procedural deficiencies must lie in imposing some independent authority over the procedure.

The airline industry believes that the existing procedural rules allow the presentation of affirmative defenses and also allow discovery in support of affirmative defenses. Nevertheless, the FAA has refused to make available for deposition subpoenaed witnesses even in the face of an order from the presiding ALJ.[202] This deprives respondents of the right to make an adequate administrative record. Flouting of the rules is increased, the airline industry believes, by the expectation that almost any position taken by FAA prosecutors will be sustained by the administrator on administrative appeal.

The airline community is more accustomed to an enforcement model in which enforcement responsibility is totally separated from judging and judge advising responsibility. Under the old CAB, the Bureau of Enforcement maintained a virtually total separation from the board's general counsel. The board exercised appellate authority, advised by the general counsel. The Bureau of Enforcement was responsible for the prosecutorial function. The same kind of formal separation is manifest in the DOT economic regulation procedures. A "senior career official" makes the decision, advised by a designated lawyer. Senior career official decisions are subject to discretionary review by the Secretary and Assistance Secretary for Policy and International Affairs. The advising lawyer is insulated from the "public counsel" who

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201 For example, some FAA officials and ALJ Yoder had a running battle over the applicability of Part 300 to hazardous materials violation civil penalty proceedings under 49 U.S.C. §1809(a)(1). See NL Industries, Inc., Docket No. 84-29 HM, Order served Feb. 13, 1986 (In Part 13 matters, Part 300 applies to ex parte contact and separation of functions issues; deleting reference to APA); id. order served Dec. 7, 1989 (accepting assurances of Part 300 compliance; refusing to lift sanctions against FAA attorney for opposing application of Part 300); id., order served Dec. ___, 1988 (FAA Administrator decision on appeal; agency not ALJ determines hearing procedures; Part 300 does not apply to FAA hazardous materials proceedings; ALJ cannot expand procedural requirements beyond those of Part 13; vacating discipline against FAA attorney).

202 See FAA v. American Airlines, Docket Numbers CP89EA0119, EP89GL0121, CP89SW0122, CP89SW0123, CP89So0124, CP89GL0125, CP89GL0126, CP89WP0129, CP89SW0460, CP91SW0142 (letter from FAA regional counsel, October 8, 1991).

commences proceedings. This procedure is followed in route authority cases.[203]

C. The Current Cooperative Spirit at the FAA May Not Last

The D.C. Circuit's decision, and the changes in the FAA procedural rules satisfied some immediate concerns of the airline community. The airline community is very uncomfortable at being at the mercy of a change of regimes or political climate. Certificate actions almost never occur with major trunk airlines and, thus, forum shopping is not an issue. On the other hand, there is great mistrust of the FAA and, thus, opposition to any increase in FAA scope over enforcement proceedings.

While the present administrator of the FAA and chief counsel are oriented toward constructive relationships with regulated groups and to problem solving approaches rather than confrontation, the approach represented by the initial procedural rules for the civil penalty program and by the press releases issued on airline civil penalty complaints is institutionally deep seated and likely to manifest itself again under different leadership. Regulated groups need institutional protection from this inflexibility.

D. The FAA Will be Biased in Favor of its Own Air Traffic Control Personnel

One of the strongest arguments for treating institutional arrangements for aviation safety differently from institutional arrangements for other programs is the fact that the FAA has operational responsibility for the air traffic control system. Making the FAA administrator the ultimate decisionmaker in enforcement actions brought against airlines, airports, pilots, and mechanics gives the administrator a perceived conflict of interest. There are conceivable circumstances in which the administrator may exonerate a pilot only by finding

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[203] 50 Fed. Reg. 2374 (1985) (adding rules of procedure for airline economic regulation functions transferred from CAB, including 14 CFR §302.22a (DOT decisionmaker), and 14 CFR §300.4 (separation of functions). *See* Discovery Airways, Inc. and Mr. Philip Ho, Docket 46760, Order Served May 25, 1990 Slip Op. at 2 n.2 (Assistant Secretary for Policy and International Affairs serves as decisionmaker pursuant to 49 CFR §1.56(i)(1); 14 CFR §302.22a(c), (c)); *Id.*, order served May 16, 1990 (ordering public counsel to file list of ex parte contacts potentially violating 14 CFR §300.2).

fault with one of his own subordinates in the air traffic control system.[204] Similar, though more attenuated, problems exist with respect to other FAA operational functions, such as certification of airmen and aircraft. It is conceivable that a civil penalty proceeding might raise questions about proper performance of certification functions as well as questions about compliance by the person against whom civil penalties are proposed.

Not only is the FAA administrator protective of the FAA air traffic control system as a policy matter; there also are tort liability questions. If a pilot is found liable for violating regulations, the likelihood of a judgment against the government for air traffic control lapses is less. Under the present organizational arrangements the same officials who advise the administrator on administrative appeals of civil penalties also are involved in tort litigation involving the FAA as a defendant. Frequently, exonerating a person against whom civil penalties have been assessed potentially weakens the agency's position in tort litigation.

While there is a weak parallel argument in the other direction, arising from potential conflicts between the NTSB's accident investigation role and its adjudicatory role, the percentage of certificate cases in which an accident is involved is relatively small,[205] while the proportion of civil penalty cases in which air traffic control personnel responsibility is at issue is relatively large.

The FAA is nearly unique in its exercise of operational responsibility, which makes it a co-actor with persons or entities subject to its regulatory jurisdiction. This special characteristic provides plausible justification for treating the FAA differently from other agencies adhering to the unitary enforcement model. Only the Coast Guard has as strong an operational role in

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[204] Continental Airlines contrasts In re Terry and Menn, FAA Order No. 91-12 (May 14, 1991), and Administrator v. Holstein, NTSB Order No. EA-2782 (August 31, 1988) (no pilot sanction when pilot repeats erroneous interpretation of clearance and controller does not correct situation). The FAA only takes such circumstances into account for mitigation purposes. Continental Airlines statement at 3. *See* statement of Michael J. Pangia before the Administrative Conference of the United States, June 19, 1991 at 1 (noting conclusion of aviation safety reporting system that majority of pilot/controller errors are due to miscommunication or misunderstandings between air traffic controllers and pilots, which may leave pilots vulnerable to civil penalties for mistakes by FAA personnel). *See also* supplementary statement by Daniel D. Campbell at 14-15 (citing Administrator v. Ryan, NTSB Order EA-3238 (1990) (involving failure by FAA to produce tapes that might have supported pilot's argument regarding clearance, while producing tapes supporting FAA version of near miss incident).

[205] But see Janka v. DOT, 925 F.2d 1147 (9th Cir. 1991) (NTSB not prohibited from hearing testimony of NTSB investigator in limited circumstances, although Board policy discourages receiving such testimony so as to separate investigation and adjudication functions).

the same regime as those potentially subject to civil penalty authority by the same agency.[206]

E. The FAA Frequently Controls Material Evidence

Related to the conflict of interest argument is an argument that the FAA frequently has the evidence needed to exonerate a person against whom civil penalties are proposed. This is particularly true in the case of airmen who allegedly violated air traffic control regulations. It also conceivably is the case with respect to airport security violations. In one example offered to the author, a pilot was subjected to civil penalties for penetrating a terminal control area without clearance. The pilot claimed that he had been cleared into the TCA. Tapes produced by the FAA after considerable delay omitted the portion of the flight that would have supported the pilot's position.

While production of evidence is under the control of the ALJ, who can impose sanctions for failure to disclose material evidence under the FAA's procedural rules,[207] placing ultimate administrative appellate authority in the FAA administrator raises the risk that the administrator would not uphold ALJ action to compel disclosure of evidence. Placing adjudicatory authority in an independent agency would avoid this risk.

F. The NTSB, Like the FAA, Has Safety Responsibility

One of the factors used by the Supreme Court in *Martin v. OSHRC* for resolving disputes among agencies with potentially overlapping authority for adjudicating civil penalties was the degree to which each agency has overall responsibility for achieving statutory goals. NTSB is different from other potential adjudicatory agencies in split enforcement models in that it does have substantial programmatic responsibility. The NTSB has responsibility for evaluating the safety of the National Aviation System. This gives it a greater measure of expertise and more concern with enforcement actions than it would have if it were a purely adjudicatory agency like OSHRC, MSHRC, and the MSPB. This NTSB responsibility for safety essentially serves to weaken

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206 Hypothetically, a Coast Guard-licensed mariner might be subjected to sanctions for an error that partially resulted from failure by Coast Guard operational personnel to place or maintain a navigational aid properly.

207 14 CFR §13.220(m) (1991) (sanctions for failure to comply with discovery obligations).

arguments in favor of FAA adjudicatory responsibility under the unitary model.

In addition, there is an argument that, at least in pilot cases and maintenance cases, the NTSB can perform its safety oversight function better if it has some involvement in the enforcement process.

The argument in favor of distinguishing pilot and maintenance cases from other enforcement cases is that pilot cases involve safety issues that are similar to those involved in accident investigations. In a sense, involving the NTSB in these cases raises NTSB consciousness of safety matters that otherwise would be visible only after an accident has happened.[208] This argument could justify retaining certificate actions at the NTSB while leaving everything else, including pilot penalty cases, at the FAA. Certificate cases involve the more serious claims of pilot violation and therefore the more serious safety issues.

G. NTSB Adjudication Makes it Easier to Administer Prohibitions On Ex Parte Contact

An argument mobilized by Administrative Law Judge Yoder cuts off potentially productive settlement discussions because of a concern with ex parte contact.[209] The argument is that the administrator and chief counsel may not be involved in discussing settlement of cases pending before ALJs because both of them may become involved in an administrative appeal of an ALJ decision. Class settlements, of course, only can be meaningfully explored at this policy level. This apparent ex parte contact problem would be eliminated if the administrative appeal authority were in another agency.

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208 *See* supplementary statement of Daniel D. Campbell (identifying cases involving sufficiency of clearance readbacks from pilot to tower; potential anomalies and operation of visual approach slope indicators; impact of slipshod or dishonest maintenance practices); statement at 3.

209 American Airlines, FAA Dockets Cp89EA0119, CF89GL0121, CP89SW0122, CP89SW0123, CP89SO0124, CP89GL0125, CP89GL0126, CP89WP0129, CP89SW0460 (civil penalty actions) (ALJ order served June 3, 1991) (ordering disclosure of documents concerning settlement discussions with Deputy Chief Counsel); American Airlines, FAA Dockets Cp89EA0119, CF89GL0121, CP89SW0122, CP89SW0123, CP89SO0124, CP89GL0125, CP89GL0126, CP89WP0129, CP89SW0460 (civil penalty actions) (ALJ order served Dec. 12, 1990) (same).

H. Adjudicatory Responsibility Should not be Bifurcated

Politically, some interested parties argue, it is unlikely that certificate adjudication will be removed from the NTSB, so a decision to keep civil penalty authority in the FAA is tantamount to a decision to bifurcate. The splitting of cases between the NTSB and the FAA leads to forum shopping. This is particularly likely to be evident in situations, like the present one, in which the limitation period is different between the two adjudicatory tribunals. The NTSB has a 6-month "stale complaint" rule.[210] The FAA has a 2-year rule.[211] An FAA attorney bringing a case after the 6-month period has lapsed obviously will bring it as a civil penalty case to get the case heard.

Ultimately, splitting adjudicatory responsibility between civil penalties cases and certificate actions may permit virtually all adjudicatory authority to migrate to the FAA because the FAA, as a matter of policy, could essentially stop pursuing enforcement through certificate actions and substitute civil penalties.

I. The NTSB's Procedural Rules are Better Than the FAA's

Pilot groups believe that NTSB's discovery rules are better than the FAA's. These groups believe that the FAA discovery rule permits too much discovery against persons against whom civil penalties are assessed.[212] Respondent pilots do not need discovery; they take discovery under the Freedom of Information Act. They argue that as individuals, they lack the resources to respond to burdens of discovery requests from the agency. On the other hand, evidence of discovery abuses by the FAA is lacking, and remedial action could be deferred until there is clearer evidence of abuse.

Airlines expressed the view that FAA rules are too rigid with respect to mitigating penalties.[213] These airlines believe that broader NTSB review

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[210] 14 CFR §821.33 (1991).

[211] 14 CFR §13.208(d) (1991) (good cause permits extension).

[212] The point is not that the discovery rules permit more discovery against some parties than against others; the point is that even-handed discovery power impacts some parties more then others.

[213] *See* Comments of Continental Airlines, Inc., Conference hearing, June 19, 1991 (citing FAA chief counsel memorandum suggesting that only mitigating factor is ability to pay; citing In re Northwest Airlines, Inc., FAA Order No. 90-37 (served Nov. 7, 1990) in support of proposition that FAA administrator will enforce penalty guidelines on ALJs; citing In re Dawn

authority permitting amendment, modification, or reversal if the board "finds that safety and air commerce or air transportation and the public interest do not require affirmation of the administrator's order" represents a better approach, noting that flexibility in assessing penalties is the hallmark of virtually all aspects of aviation safety except airport security.[214]

J. The FAA Fails to Permit Appropriate Challenges to its Substantive Rules in the Course of Adjudication

An interested party may challenge an agency rule in two different ways. The person may participate in rulemaking proceedings and seek "preenforcement review", challenging the rule in the abstract.[215] Alternatively, a party to an adjudicatory proceeding may challenge the rule as applied in a particular proceeding.[216] One of the sharpest controversies over the civil penalty adjudication relates to the desire by some airlines to challenge the legitimacy of the test object and zero-tolerance requirements,[217] in the context of defending against civil penalties imposed for violation of those requirements.[218] In addition to the controversy over the deposition of a senior FAA official, resisted on *Morgan v. United States* grounds by the FAA,

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M. Lewis, FAA Order No. 91-3 (Feb. 4, 1991) supporting proposition that ability to pay is only ground for reduction of sanction). Continental Airlines statement at 10-11.

214 Continental Airlines statement at 15 (quoting 49 U.S.C. App. §1429(a); Continental Airlines statement at 11 (contrasting operation of unairworthy aircraft).

215 *Compare* Abbott Laboratories v. Gardner, 387 U.S. 136, 151 (1967) (limits on preenforcement review) *and* Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979) (noting that rule can be challenged when it is applies as well as when it is adopted) *and* Diamond Shamrock, 580 F.2d 670, 673-74 (D.C. Cir. 1978) (allowing effluence regulations to be reviewed only in the context of an enforcement proceeding; rejecting preenforcement review) *with* 42 U.S.C. sec. 7607(b)(2) (1988) (foreclosing challenge to air pollution rule unless made within 60 days of publication in Federal Register) *and* Eagle-Picher Industries v. U.S.E.P.A., 759 F.2d 905 (D.C. Cir. 1985) (applying 42 U.S.C. sec. 9613(a) (1982) requiring that petitions to challenge CERCLA rules be filed within 90-days from publication).

216 The relationship between these two forms of challenges to rules has been debated recently in the context of statutory requirements that challenges to rules be made, if at all, in the preenforcement context.

217 These requirements subject responsible persons to civil penalties for failing to detect all test objects passed through airport security systems.

218 See generally, FAA Motion to Supplement Motion to Quash Subpoena, Federal Aviation Administration v. Alaska Airlines, Inc., CP89AL0295 (88AL720077), CP89NM0296 (88NM710163), CP89NM0299 (88NM710106), CP89NM0307 (88NM710117), CP89NM0470 (89NM710017) (filed August 9, 1991) (reviewing controversy [hereinafter "FAA Motion to Quash"].

agency prosecutors apparently take the position that the airline is not entitled to develop a record in support of its claim that the requirement is arbitrary and capricious.[219] On the other hand, the administrator has considered the arbitrary and capricious argument and has provided enough rationale to permit meaningful judicial review of the legitimacy of the requirements.[220]

VII. Arguments in Favor of Retaining the Authority at FAA

The preamble to Conference Recommendation 90-1 introduced the arguments in favor of retaining civil penalty adjudication authority at the FAA like this:

> "Any transfer of civil penalty adjudicative responsibility to the NTSB would entail legislative consideration of whether and to what degree deference should be given by the Board to FAA policies and whether the FAA Administrator should be entitled to seek judicial review of adverse NTSB decisions. Moreover, retaining the adjudicative function in the FAA would allow for coordinated regulatory and enforcement policy in one agency, a model that is used by most federal agencies. If it is important to have hearings in both certificate and money penalty cases heard in the same forum, theoretically the former function could be transferred to the FAA. Although there has been criticism of the FAA's rules of practice, the agency is about to complete a rulemaking in which it has proposed significant changes in its rules. Finally, aviation safety and related enforcement are the chief missions of the FAA."[221]

These and other arguments are developed more fully in the sections that follow.

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[219] FAA Motion to Quash at 5-6 (arguing that ALJ lacks the authority to consider argument, and that development of a record in support of the argument is impermissible at the ALJ stage).

[220] See In the Matter of Continental Airlines, Inc., FAA Order No. 90-18 (August 22, 1990) at p.15 (quoted in FAA Motion to Quash at 9).

[221] Conference Recommendation 90-1, "Civil Money Penalties for Federal Aviation Violations," 55 Fed.Reg. 34209 (Aug. 22, 1990) (to be codified at 1 CFR §305.90-1.)

A. FAA has Ultimate Responsibility for Safety and is Better Able to Make Safety-Policy Decisions Implicated in Enforcement Adjudications

The FAA administrator, as the delegate of the Secretary of Transportation, is the public official charged with responsibility for making the national aviation system safe. Realization of the goal of aviation safety necessitates giving responsibility and authority to the official to be held accountable. Aviation safety requires tradeoffs among the content of regulations, operational arrangements for the air traffic control system, and enforcement policy. Splitting enforcement responsibility artificially separates part of an overall matrix and impairs achievement of the safety goal.

If adjudicating a pilot case involves the adjudicatory agency in sorting through the details of air traffic control confusion, or questionable operating practices, the adjudicator getting exposure should be the person with safety responsibility, and the power to make changes.

B. Most of the Arguments in Favor of Splitting Enforcement and Adjudication Have Been Rejected in the Context of Administrative Law Generally

Most of the arguments in favor of NTSB adjudicatory authority are arguments that would support separating the adjudication function from the prosecution function in any enforcement agency. These arguments generally have been rejected as the unitary enforcement model has become the norm. The Supreme Court's *Martin v. OSHRC* decision recognizes that split enforcement is a deviation from the norm.

C. FAA has More Resources and Will Minimize Delay

Undeniably, the FAA is a much larger agency than the NTSB. This provides flexibility to reallocate resources, especially ALJ resources, to minimize delay in holding hearings and deciding appeals. The data submitted by the FAA chief counsel in the Conference hearing on June 19 reenforces the conclusion that efficiency would be served and delay minimized by preserving adjudicatory authority in the FAA.

The average time from request for hearing to ALJ decision under the FAA and the NTSB processes is a little longer for the FAA than for the NTSB. The

average time from ALJ decision to appellate decision, however, appears to be significantly longer under the NTSB procedure than under the FAA process. Appellate timeframes under the NTSB procedure range from 15.2 months for opinion-and-order cases to 10 months for all types of appeals, compared with FAA appellate timeframes of 7.9 months (5.3 months when adjusted for cases affected by the 124-day "hiatus" period) for opinion-and-order cases and 5.5 months (3.9 months when adjusted for cases affected by the 124-day "hiatus" period) for all types of appeals.

There are several caveats or counter arguments. One was summarized by attorney Mark T. McDermott, arguing that the FAA has greatly increased its use of emergency case authority.[222] The general counsel of the National Transportation Safety Board, in a supplementary statement submitted at the request of the author of this report during the June 19, 1991 hearing, made several points. First, the statistics offered by the FAA chief counsel do not reflect standard statistical inference methodologies. Second, the statistics for FAA case processing include the earliest cases that moved through a pipeline that was new and uncongested, which may bias the results optimistically. Processing time for more recent FAA cases has increased to almost the same period of time as that offered by the FAA for NTSB appeals.[223]

D. There is no Evidence of Unfairness or Bias in FAA Decisions

Statistics indicate that respondents participating in Administrative Law Judge (ALJ) hearings in the Federal Aviation Administrations (FAA) civil penalty process are more often successful than those appearing before a National Transportation Safety Board (NTSB) ALJ. In FAA ALJ hearings, less than one-third (31 percent or 51 of 166 cases) affirmed the FAA order as compared with over one-half (52 percent or 156 of 299 cases) of NTSB hearings. FAA hearings resulted in reversal or modification of the FAA order, in favor of respondents over two-thirds (69 percent or 115 of 166 cases) of the time while NTSB hearings only resulted in reversal or modification of the FAA order, in respondents' favor, less than one-half (48 percent or 143 of 299

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222 Letter from Mark T. McDermott to Richard J. Leighton, June 25, 1991 (summarizing emergency cases as constituting 5 percent of the total in 1987-88, 6 percent of the total in 1988-89, 15 percent of the total in 1989-1990 and 20 percent of the total for the 8 months of October 1990 to June 1991). Letter at 2.

223 Supplementary statement by Daniel D. Campbell at 6.

cases) of the time.[224] These figures suggest that an ALJ hearing in the FAA's civil penalty process is more favorable to the respondent than a similar hearing before an NTSB ALJ.

Regarding appeals of ALJ decisions, a significantly higher proportion of FAA appeals were dismissed in FAA appellate review (75 percent or 27 of 36 appeals) than in NTSB appellate review (48 percent or 33 of 69 appeals). Similarly, only about 25 percent (10 of 39 appeals) of respondent appeals before FAA appellate review were dismissed as compared to almost 40 percent (39 of 98 appeals) of respondent appeals in NTSB appellate review. Of those FAA appeals which reached decision on the merits, no significant statistical difference was evident between FAA and NTSB appellate forums (FAA prevailed about 75 percent of the time). Respondent appeals, however, were more favorable for respondents in FAA appellate review (31 percent success rate or 9 of 29 decisions) than in NTSB appellate review (mere 8 percent success rate or 5 of 59 decisions). While these figures support the proposition that FAA civil penalty review procedures are more favorable to respondents than the NTSB review process, the relatively small number of statistical events should temper any premature enthusiasm for a particular conclusion based on these data.

E. There are Additional Structural and Procedural Alternatives if Authority is Retained at the FAA

Most of the legitimate objections to FAA adjudicatory authority can be addressed by changing the structure and the procedures for FAA hearings and administrative appeals. The possibilities addressed in §IX of this report can be considered.

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[224] Reversals of FAA orders were less statistically significant between FAA hearings (17 percent or 28 of 166 cases) and NTSB hearings (19 percent or 56 of 299 cases). Modifications of FAA orders, however, were more likely in FAA hearings (52 percent or 87 of 166 cases) than in NTSB hearings (29 percent or 87 of 299 cases).

F. The Ultimate Protection of Procedural Fairness is Judicial Review, Which Operates Regardless of who Has Adjudicatory Authority

Ultimately, the courts protect persons subjected to enforcement actions against procedural unfairness. There is no reason to believe that the federal courts will not be as vigilant in ensuring FAA compliance with constitutional and statutory safeguards as they are with other enforcement programs. If the FAA does not maintain separation of functions, or if the administrator decides administrative appeals based on a bias in favor of air traffic control system personnel, these shortcomings could justify judicial invalidation of the result in particular cases.

G. Split Enforcement Authority is Inefficient, Engenders more Disputes in the Long Run, and can Subvert the Public Interest

There are major risks to acceding to the political concerns by separating the adjudication function. The risks are long term in nature and broader than the particular interests and agencies involved in this particular controversy. The problem is that political forces almost always mobilize in favor of splintering administrative functions. Interest groups potentially affected by enforcement are likely to perceive that independent watchdogs of one kind or another are necessary to ensure that the interests get their due from the program agencies.

Such splintering has three undesirable long-run affects. First, it engenders more interagency disputes that must be resolved by some other institution, presumably the courts, the Congress, or the President. Second, it formalizes matters that many times should be left to an informal problem-solving approach. Administrative law judges or other adjudicators gradually become opposed to the kind of informal contact necessary to work things out rather than aggressively litigating them to a conclusion.

While the allocation of prosecutorial and adjudicatory responsibility to different agencies for certificate actions has not produced great interagency conflict, the experience of other split enforcement arrangements legitimately raises concerns about the split enforcement model in the aviation context. The OSHA/OSHRC arrangement is the oldest split enforcement model and their interagency disputes have reached the Supreme Court in two different and important contexts, the context of judicial deference addressed in the *Martin v.*

OSHRC case,[225] and the unwillingness of OSHRC to permit OSHA to withdraw cases, addressed in the *Cuyahoga Railroad* case.

Third, the beneficiaries of efficient enforcement, the general public, do not mobilize to protect their interests as effectively as pilots and airlines. The political calculus is more likely to undercut safety by hamstringing enforcement than to achieve a neutral balance between efficiency and fairness.

Thus, it is appropriate to be cautious in jumping to the conclusion that because the affected parties want maximum separation of functions it should be done.

VIII. Unifying Civil Penalty Adjudication and Certificate Action Adjudication

The controversy over civil penalty adjudication is not simply a matter of choosing between the unitary and split enforcement model. It is complicated by the fact that both models currently are applied to aviation safety enforcement. The split enforcement model is the status quo for certificate actions, while the unitary model is the status quo for the civil penalty demonstration program. Pure adherence to the split enforcement model necessitates transferring civil penalty adjudication authority to the NTSB. Pure adherence to the unitary enforcement model necessitates transferring certificate-action adjudication authority from the NTSB to the FAA. Maintenance of the status quo, an entirely likely outcome once political factors are taken into account, splits the two types of enforcement cases between two different adjudicatory agencies.

Certificate actions generally have more adverse consequences for the certificate holder than civil penalties. An airline whose certificate is suspended or revoked goes out of business. A pilot or mechanic whose certificate is suspended or revoked loses his or her livelihood. Otherwise, however, there is no principled difference between the two kinds of enforcement cases. The same kind of evidence is involved. The same kinds of violations are involved. The same kind of regulatory interpretation is involved. The same arguments about allocating responsibility between pilots, airlines, airport operators, mechanics, and air traffic control personnel exist in both types of cases.

There is no good reason for separating the two kinds of enforcement cases except maintenance of the status quo, political compromise, and the desire of both agencies to have some responsibility for enforcement adjudication.

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225 The NTSB general counsel told the Conference that NTSB can readily accept the guidance as to deference offered by Martin v. OSHRC and that doing so would not require a noticeable departure from present practice. Supplementary statement by Daniel D. Campbell at 16-17.

There are a number of problems associated with separating the two types of cases, chief among which is the possibility of forum shopping, discussed in §VI(H) and the difficulty in giving ALJs hearing certificate cases the authority to mitigate penalties into civil penalties.

From a purely theoretical standpoint, without regard to political feasibility, any rationalization of aviation enforcement responsibility should ensure that certificate actions and civil penalty actions are adjudicated by the same agency.

IX. Evaluation of Arguments

In Recommendation 90-1, the Conference articulated the criteria for placement of responsibility for civil penalty adjudication as follows:

> "Such a determination should respond to interests of administrative simplicity and efficiency, fairness and the appearance of fairness, and accountability for aviation safety."[226]

A. Application of Formality, Efficiency, and Participation Goals

Recent scholarship and caselaw emphasize three major goals for administrative procedure: formality,[227] efficiency,[228] and participation.[229]

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[226] Recommendation 90-1, "Civil Money Penalties for Federal Aviation Violations," 55 Fed. Reg. 34209 (Aug. 22, 1990) (to be codified at 1 CFR §305.90-1).

[227] Formality, aimed at facilitating judicial reviewability, is the major contribution of the New Deal formalist school. Judicial reviewability is the major artifact of the delegation doctrine and ensures separation of powers. Delegation of legislative authority is constitutional as long as the Congress gives standards to guide exercise of the delegated authority that can be applied as meaningful constraints by the courts. Judicial reviewability ensures maintenance of separation of powers requirements because it reserves to the courts the final decision on matters of law. *See generally* Crowell v. Benson 285 U.S. 22 (1932) (no separation of powers problem in authorizing administrative official to engage in adjudicatory factfinding subject to judicial review); Thomas v. Union Carbide 105 S.Ct. 3325 (1985) (no violation of separation of powers when statute mandated arbitration of disputes over use of proprietary test data in conjunction with pesticide registration).

[228] Efficiency is the Supreme Court's major contribution in Mathews v. Eldridge, 424 U.S. 319, 347-349 (1976); Dixon v. Love, 431 U.S. 105, 114 (1977) (administrative effiency and public interest in safe drivers permit suspending drivers license without prior hearing, citing *Mathews*); Nixon v. Administrator of General Services, 433 U.S. 425, 529 n.23 (1977) (Burger, C. J. dissenting) (*Mathews* goal of administrative efficiency is not the only consideration);

Adjudication requirements are determined largely by efficiency considerations, although the participation goal also is an important justification.[230] Efficiency includes two subgoals: accuracy in factfinding,[231] and cost-effective resource allocation.[232] The *Mathews v. Eldridge* formula evaluates adjudicatory entitlements by the marginal improvement in fact-finding accuracy resulting from each additional procedural ingredient, and weighs this against the cost in agency resources of adding the step, taking into account the magnitude of the individual deprivation resulting from an error in the decisional process.

Critics of this model, which emphasizes formality and efficiency, urge giving greater emphasis to participation. In their view, participation does more than facilitate judicial control.[233] Critical legal studies emphasize a particular aspect of the participation goal: human dignity.[234] While there are dissenters

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Wilkerson v. Sullivan, 904 F.2d 826, 851 (3d Cir. 1990) (citing *Mathews* in support of observation that certain number of errors must be tolerated in large and complex system of claims adjudication).

229 Participation has received increased emphasis through broadened standing, increased use and scrutiny of notice-and-comment rulemaking, and scholarly emphasis on the dignity value in due process.

230 Goldberg v. Kelly, 397 U.S. 254 (1970) (procedures for contesting welfare termination violated procedural due process). Although Goldberg involved Constitutional due process scrutiny of a welfare rights case, more broadly it stands for the need for certain minimal procedures in adjudication. The detailed adjudication requirements under the Administrative Procedure Act (APA) reflect constitutional due process concepts. *Compare* Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267 (1975) (constitutional procedural process) *with* 5 U.S.C. §§554-557 (1988) (statutory adjudication procedures).

231 Accuracy in factfinding is essentially the same goal as rationality.

232 *But see* Verkuil, *The Emerging Concept of Administrative Procedure*, 78 Colum. L. Rev. 258, 280 (1978) (emerging judicial support for a spectrum of procedural alternatives to serve values of fairness, efficiency, and satisfaction). Professor Verkuil's efficiency value considers only deciding cases cheaply and quickly. *Id.* at 280. His satisfaction value is close to the dignity value considered in the text. *Id.* at 280. His fairness value apparently takes into account accuracy. *But see id.* at 284 (quoting Frankfurter as endorsing fairness and satisfaction values, "feeling...that justice has been done").

233 Mashaw, 6 J. L. Econ. & Org. at 286; Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667 (1975) (interest representation model). *See also* Frug, *The Ideology of Bureaucracy in American Law*, 97 Harv. L. Rev. 1276, 1297-1355 (criticizing formalist (delegation), expertise, and judicial review models).

234 Critical legal studies attacks all conventional models on the grounds that they are mechanisms for deception. By legitimating bureaucratic control, they frustrate broad reformation of society. Frug, 97 Harv. L. Rev. at 1379-81. The "crits" argue that any effort to develop models of administrative law is futile. Frug, 97 Harv. L. Rev. at 1381.

from those emphasizing the dignitary value,[235] advancement of dignitary goals is a concern both of political science pluralist models and the critical legal studies movement.[236]

There is wide recognition of a dignity basis for due process, as well as the accuracy basis recognized in *Mathews v. Eldridge*.[237] One of the most cited formulations of a dignity basis is Mashaw's,[238] and one of the most quotable is Tribe's:

> Among the formal procedural safeguards ordinarily held to be required by due process, perhaps the two most striking--the right to be heard and the right to hear why--are ultimately more understandable as inherent in decent treatment than as optimally designed to minimize mistakes. When God asked Adam if he had eaten of the tree of life, the Midrash explains, the point of the exchange was less to minimize the

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235 Magat & Schroeder, *Administrative Process Reform in a Discretional Age: The Role of Social Consequences*, 1984 Duke L. J. 301, 317-18 n.64 & n.65 (1984).

236 *See* Mashaw, *Administrative Due Process: The Search for a Dignitary Theory*, 61 BUL Rev. 885 (1981) (dignitary approach has merit but should place only modest additional demands on procedures necessary to assure rationality in efficiency context).

237 *See* Lister v. Hoover, 706 F.2d 796, 801 (7th Cir. 1983) (due process did not require written reasons for denial of request for in-state tuition) (Swygert, J. dissenting) (Constitution recognizes higher values than speed and efficiency, citing Summers, 60 Cornell L. Rev. 1 (1974), Morgan, *The Constitutional Right to Know Why*, 17 Harv. C.R.-C.L. L. Rev. 297 (1982)); R. Cover, W. Fiss, J. Resnik, Procedure 126-127 (1988) (explaining dignity basis for procedure, but acknowledging that limits of procedural entitlements cannot be defined only in terms of what is satisfactory to claimant).

238 Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. Chi. L. Rev. 28, 50, (1976). Mashaw explains the limits of the *Mathews v. Eldridge* utilitarian approach, and explains how consideration of other values, including individual dignity, equality, and tradition would improve the acceptability of limits on procedural entitlements. He acknowledges that the additional values would not have led to a different outcome in *Eldridge* and that techniques for limiting procedural entitlements under the dignity value have been unsatisfactory. 44 U. Chi. L. Rev. at 58. *See also* Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. Pa. L. Rev. 111, 117, 163 (1978) (importance of personal, and oral participation to serve dignitary value of procedure, not given enough weight by utilitarian approach); LaTour, *Determinants of Participant and Observer Satisfaction with Adversary and Inquisitorial Modes of Adjudication*, 36 J. PERSONALITY & SOC. PSYCHOLOGY 153 (1978) (empirical showing that adversarial procedures are favored because they give disputants more 'process control')[CHECK]; Michelman, *Formal and Associational Aims in Procedural Due Process*, XVIII NOMOS 126, 127-28 (1977) (due process vindicates values of 'participation.'; noting psychological importance of 'participatory opportunity,'

> risk of divine error than to afford Adam a moment to regain his composure.[239]

Fairness--something close to the dignity value--seems to be at the heart of the arguments in favor of NTSB authority. Efficiency is at the heart of the arguments in favor of FAA authority.[240] Perceived fairness is important in law. Legitimacy underlies all political authority in a democratic political system. An agency perceived as being consistently unfair is not likely to retain its legitimacy for long. It may be the FAA has lived too long under a system in which the agency could take a single-minded prosecutorial view of things. It may simply be too difficult to change agency attitudes to an environment in which the FAA administrator is sometimes an enforcement policy officer and sometimes a neutral adjudicator.

Moreover, it may be that efforts to resolve underlying problems with respect to the safety program would be enhanced by removing adjudicatory authority because the administrator would be free to talk to interested groups about enforcement policy and prosecutorial conduct.

The ultimate test for governmental decision-making arrangements in a democratic society is legitimacy. If an arrangement is accepted by all of the affected interests, it should not matter much whether it satisfies *a priori* models of decision-making efficiency or fairness. Conversely, if a decision-making process is not accepted by significant affected interests theoretical support matters little.

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regardless of result); Summers, *Evaluating and Improving Legal Processes--A Plea for 'Process Values,'* 60 Cornell L. Rev.1, 20-21 (1974).

239 L. Tribe, American Constitutional Law §10-15 at 744 (2d ed. 1988). Michelman says it this way:

> (T)he individual may have various reasons for wanting an opportunity to discuss the decision with the agent. Some pertain to external consequences: the individual might succeed in persuading the agent away from the harmful action. But again a participatory opportunity might also be psychologically important to the individual: to have played a part in, to have made one's apt contribution to, decisions which are about oneself may be counted important even if the decision, as it turns out, is the most unfavorable one imaginable and one's efforts have not proved influential.

Michelman, *Formal and Associational Aims of Procedural Due Process*, in Due Process, Nomos XVIII 127-28 (J. Pennock & J. Chapman, eds. 1977).

240 The arguments about the desirability of officials with safety functions needing exposure to enforcement adjudication essentially cancel each other out because both the administrator and the NTSB have safety responsibilities. That leaves the perceived fairness and the other efficiency arguments.

This test of acceptability can be tricky to apply. Properly applied, it asks whether all affected interests are satisfied with the process. Clearly, general aviation (and some airline) pilots have not been satisfied in the past with adjudication of civil penalties by the FAA, and significant parts of the airline community also have been dissatisfied. If the interests of these groups alone are relevant, the legitimacy criterion would strongly militate in favor of placing the adjudication responsibility with the NTSB. There are, however, other interests. The general public has multiple interests. The general public is interested in a safe aviation system. It also is interested in an efficient, modern, convenient system. The Secretary of Transportation and the Administrator of the FAA are charged with furthering these interests. Any arrangement for adjudicating civil penalties that demonstrably undermines these interests is questionable.

The most inflammatory issue for the airlines is the one with the greatest passenger safety implications. Civil penalties are imposed in airport security cases to encourage airlines and airports to have the closest thing possible to a zero defects weapons and explosives screening process. Any intelligent program in pursuit of this objective necessarily uses test objects; it should not wait for an actual weapon or bomb to be carried aboard an aircraft and possibly used. Moreover, any rational programs should not accept a 5 percent error rate. According to this view, imposition of relatively modest monetary penalties for each instance in which a shortfall in airport security is detected is an appropriate economic incentive to improve airport security. The objection of the airlines to civil penalty procedures and structural arrangements really is an objection to the underlying premises of enforcement policy. No relocation of administrative appeals authority to the NTSB can respond to this fundamental objection.

Moreover, it is far from clear that a relatively episodic reaction to changes in enforcement policy by those subject to enforcement ought to preempt other considerations. Otherwise, if deference to such reactions are carried to their extreme, any enforcement program can be limited by the wrong-doers at which it is aimed. This is not to say that heavy-handed, overly formal, enforcement is the best way to pursue the safety objectives of the Federal Aviation Act. The reality is that enforcement agencies are at some level at the mercy of their victims. An agency that is insensitive to the feelings of large segments of respected members of the public risks having its authority curtailed.

In evaluating the arguments favoring placement of adjudicatory authority in the NTSB, one should not forget that multiple guarantees of fairness in the enforcement process exist without creating an independent administrative watchdog. Most fundamental and most independent, is judicial review of agency action. Judicial review is available regardless of how the administrative adjudication function is structured. Second, is the requirement under the APA

that the matters be heard by administrative law judges whose independence from the prosecuting agency is assured by other provisions of the APA. Third, is the APA §554(d) requirement that prosecutorial and judging functions be separated. The principal difficulty with the NTSB alternative is that it is not directly responsive to the underlying problems of enforcement policy and noncompliance with procedural rules.

A completely neat division of responsibility between the FAA and the NTSB is unlikely. Separating the accident investigation function from the rulemaking, prosecutorial, and airspace administration functions is well established. There is little argument in favor of abandoning this much of the split enforcement model as it has been reflected in aviation regulation for several decades.

One can, of course, make a principled distinction between adjudication and investigation and factfinding. The NTSB's accident investigation function does not culminate in an adjudicatory decision. One could conclude that the NTSB should not be involved in any kind of adjudication. Adjudication arguably requires different skills from those required of an effective factfinder and mobilizer of public scrutiny. Also, one could argue that NTSB adjudication is a distraction because it diverts resources that otherwise should be devoted to accident investigation. The Congress should not load the NTSB with so much adjudicatory responsibility that its accident investigation function suffers. This could happen at three levels. First, adjudication responsibility could divert staff resources. Second, adjudication responsibility could divert the attention of the board itself. Third, over the long run, constituency concern with adjudication could influence the selection of board members to the detriment of member orientation toward the accident investigation function.

The opposing argument begins with a proposition that accident investigation and factfinding, like adjudication, should be separated institutionally from the responsibility for running the airspace system. Under this view, the point is not so much separating the judging from the prosecutorial function as it is separating the judging from the administration or operational function. This conceptual approach says that all adjudication ought to placed at the NTSB rather than the FAA. But it also says more than that. If adjudication should not be commingled with administration and operation, neither should prosecution. Leaving the prosecution function at the FAA and placing the judging function elsewhere is not a completely principled resolution. Nevertheless, commingling of the prosecution and operational functions at worst leads to prosecutorial protection of the operational authority and to a more vigorous prosecution of others. Separate NTSB investigatory and factfinding functions ensure that shortcomings in the operational function

will come to light, and that non-FAA personnel subject to prosecution will be protected by NTSB oversight, even though the FAA adjudicates.

There are some other realities, besides political ones, that temper the search for a principled solution. Even if adjudication responsibility is placed with the FAA, it is virtually certain to be exercised in fact by administrative law judges. This forces a considerable institutional separation of the initial judging function, tempering the theoretical advantages of giving it to the institution with the broadest responsibility for aviation policy. It is important to keep in mind, therefore, that the argument is only about the placement of authority to decide the handful of cases in which the ALJ decision is overturned, rather than the vast majority of cases.

Under any proposed system, there are multiple protections against prosecutorial unfairness or inaccuracy. The first level of protection is a hearing before an ALJ, who must make a decision based on the record, and who is assured of independence from the FAA by the APA. Indeed, the acting chief administrative law judge of the Department of Transportation noted in his testimony in the June 19, 1991 the Conference hearing that, "the administrative law judge's 'impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime'."[241] Second is appellate review of the ALJ decision by either the FAA administrator or the NTSB. Third, is judicial review of the final result. Irrationality or bias can be corrected at the judicial review stage.

On balance, this is a very close case, as the Conference recognized in 1990 and as the Congress recognized in mandating further study. Before reaching a conclusion as to the placement of civil penalty adjudication responsibility, leaving other things the same and accepting the arguments as presented, it is appropriate first to identify other organizational alternatives and to articulate specific conclusions.

B. The Role of FAA Policy Decisions or Interpretations of Law in Individual Case Adjudications

Several aspects of the relationship between different FAA functions and between the FAA and the NTSB raise the question of how much force a preexisting FAA rule should have in an adjudication. The term "rule" for the limited purpose of this discussion includes not only formal rules promulgated under the APA but also less formal policy statements, instructions, and

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241 Statement of Ronnie A. Yoder (quoting Marshall v. Jerricho, 446 U.S. 238, 250 (1980) (apparently referring to judges in general)).

guidance to FAA employees and interpretations developed for a particular case. The problem arises when an ALJ or the NTSB is asked to defer to the FAA on the appropriateness of sanctions for particular conduct. It arises in the context of the FAA/airline industry dispute over the legitimacy of the test object program. It arises in discovery disputes over assertions of privilege. Several things are reasonably clear about the relationship between preexisting rules and individual case adjudication.

It is not clear how transferring adjudication authority to the NTSB would improve the ability of an interested party to challenge a rule applied in an adjudication. Indeed, if the FAA retains authority to interpret its own rules, challenging a rule would be even more difficult in an NTSB adjudication than in an FAA adjudication.

This is an efficiency argument in favor of retaining adjudication authority at the FAA.

Any adjudicator--the administrator or the administrator's delegate in hearing an adjudicatory appeal, an ALJ, or the NTSB--is obligated to give effect to a rule promulgated under §553 of the Administrative Procedure Act.

Parties to an adjudication are entitled to challenge the validity of a rule applied in an adjudication on the grounds set forth in §706 of the administrative procedure act.[242] Thus, if a party can show that the rule applied in a particular case is arbitrary and capricious, in excess of agency authority or not established according to procedures required by law, the rule is entitled to no effect in the adjudication even though it formally exists.

Under existing law, the FAA, like other agencies, may establish rules in the course of adjudicating individual cases as well as through notice-and-comment rulemaking.[243] When this is done, however, the FAA must provide support for the rule in the case in which it is developed and that support must satisfy the arbitrary and capricious test of 5 USC §706(2)(A) and be within FAA authority. A rule thus established may be applied in subsequent cases, in which event the support marshaled for the rule in the first case supports its validity in the second case.[244]

However, positions taken by FAA advocates are not entitled to deference simply because the advocate expressed them; they are like any other party position.

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[242] 5 U.S.C. §706 (1988).

[243] See SEC v. Chenery Corp., 318 U.S. 80 (1943); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974); American Hospital Association.

[244] See generally NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

Moreover, propositions articulated in policy statements, press releases, or guidance to FAA employees are not entitled to any particular effect, but they may be used as rules in a particular case as long as they are supported in the case in which they are first applied.

There is no legal reason that procedural rules for adjudications could not reserve the power to determine challenges to a rule to the administrator or someone else other than an ALJ.

X. Alternatives

A number of other alternatives can be considered, besides simply placing adjudicatory responsibility for civil penalties in either the FAA or the NTSB.

A. Bifurcate Hearings and Appeals

DOT ALJs could hold hearings and the NTSB could handle appeals. The problem with this arrangement is that it really does not resolve anything except the resource issue with respect to NTSB authority. The real arguments relate to the exercise of administrative appellate authority. So this approach accepts the arguments in favor of NTSB authority and rejects those favoring FAA authority.

B. Bifurcate Pilot and Airline Cases

The Department of Transportation could retain responsibility for all civil penalties except those frequently associated with certificate actions as alternative sanctions. Under this approach, airline violations would remain the province of the FAA, with or without changes in FAA procedures and the structure for allocating responsibility. To prevent forum shopping and to make it easier for ALJs to mitigate penalties across the full spectrum, pilot violations all would be the responsibility of the NTSB. While it is somewhat artificial to separate different types of civil penalties depending on the identity of the violator, this is a lesser evil than splitting civil penalties from certificate actions with the associated problems of forum shopping and the inability to mitigate penalties.

C. Reform Existing Arrangements

FAA and NTSB procedures for civil penalty and certificate action adjudication could be reformed, especially eliminating differences in limitation periods and other differences that may encourage forum shopping. Under this option, the responsibility for adjudication would remain bifurcated, with the FAA adjudicating civil penalties and the NTSB adjudicating certificate actions.

1. Administrative Appeals Board within the Office of Secretary of Transportation

Administrative appellate authority could be removed from the FAA Administrator and delegated to a new administrative appeals board within the Office of the Secretary of Transportation, modeled on the recommended changes in the social security appeals council within the Department of Health and Human Services.[245] Appeals from ALJ decisions would go directly to this appeals council or would go to the appeals council after an administrator decision.

2. Administrative Appeals Board within the Office of the Administrator

An administrative appeals board could be established within the Office of the FAA Administrator, with authority similar to that exercised by the designated career official under the DOT route authority procedural regulations. The problem with this arrangement is that it removes the overall policy context for deciding civil penalty appeals, which is one of the major arguments in favor of FAA adjudicatory authority.

3. Further Separation of Functions

Further steps could be taken to separate functions within the FAA. For example, a completely separate appellate counsel could be established, independent of the FAA chief counsel, to advise the administrator on civil penalty appeals. This would follow to a greater extent the CAB model, in

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[245] See generally Conference Recommendation 83-3, 1 CFR §305.83-3 (1991) (recommending different structures for administrative appellate review of ALJ decisions depending on nature of caseload); id. Recommendation paragraphs 3(a), (b) (recommending individual decisionmakers delegated authority from statutory authority when caseloads are large and a single skill or discipline, and descriptive facts are involved; recommending review boards when multiple skills, intermediate caseloads, or complex facts are involved); Conference Recommendation 87-7, codified at 1 CFR §87-7 (1991) (recommending further improvements in social security appeals council).

which the Bureau of Enforcement was separated from the general counsel. Alternatively, the prosecutorial function could be removed from the chief counsel and delegated to a new enforcement counsel. Of the two, it may be better to set up a new enforcement counsel responsibility to preserve the chief counsel's policy-making role. On the other hand, making prosecutorial responsibility more independent of policy direction reduces the likelihood of compromise, settlement, and a problem-solving orientation at the early stages of enforcement proceedings.

4. Changes in Discovery Procedure

Specific changes can be made in the FAA's discovery procedure as appropriate to alleviate legitimate concerns about burdens and discovery against individual pilots or other persons unable to bear the cost of discovery.[246]

5. Changes in Limitation Periods

The limitation period for certificate actions or for civil penalty actions or both could be changed to remove any incentives for forum shopping.

6. Authority to Adjust Sanctions

One of the inflexibilities in the present system is that enforcement actions begun as certificate actions cannot be mitigated into civil penalty actions once a hearing is requested. This is undesirable. Moreover, the present regulations limit the authority of an ALJ to change the amount of a civil penalty. The limitations on ALJ authority with respect to civil penalty amounts can be changed by changes in the FAA regulations. Permitting certificate actions to be changed into civil penalty actions probably would necessitate statutory change or interagency agreement between NTSB and the FAA (unless certificate action adjudicatory authority is transferred to the FAA).

7. Tighten Procedural Requirements and Compliance

Many of the airline industry concerns have to do with the perceived failure of FAA advocates to comply with FAA procedural rules. There are a number of ways to address this problem.

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[246] Chief Administrative Law Judge John J. Mathias notes that ALJs have granted discovery against the FAA, and in at least one case have barred the FAA from presenting evidence as a result of a failure to follow pretrial orders to provide certain information. Letter from John J. Mathias to Henry H. Perritt, Jr., Sept. 19, 1991, commenting on draft report, citing Delta Air Lines, Inc., Dkt. CP90WP0099, Tr. of Hearing, Mar. 4, 1991, pp. 24-26, 36-37.

The institutional responsibility for writing procedural rules and for enforcing them, through sanctions if necessary, could be removed from the FAA and placed elsewhere. For example, the office of the Secretary could be responsible for adopting procedural rules and sanctions for noncompliance with procedural rules could be the responsibility of the office of the Secretary, conceivably including personnel sanctions as well as sanctions aimed at the presentation of a particular case.

Procedural deficiencies could be grounds for overturning any civil penalty on judicial review. The airline industry is concerned that judicial deference to FAA interpretation of its own rules would make this a meaningless possibility, and in any event a costly one.

The rules could be rewritten to remove ambiguities and strengthen sanctions for failure to make discovery. The airline industry has given up hope on this option because of its belief that the rule changes won through a combination of litigation and the Conference recommendations in 1990 have proven ineffective because the FAA will not comply with them.

8. Provide for Special Review of Rule Challenges

As §IX(B) explains, persons subject to adverse agency action should not be foreclosed from adjudicating certain issues by the application of preexisting rules that have never been the subject of public scrutiny or adversarial inquiry. The Administrative Conference is working on a comprehensive recommendation on what is entitled to the status of a rule in an adjudication. Pending completion and review of that Administrative Conference effort, it is appropriate to consider procedural alternatives that could ensure an adequate opportunity for affected parties to challenge standards or policies that are functionally equivalent to rules without distorting the allocation of responsibility between policy officials and administrative law judges and without forcing the FAA to adopt policies only through §553 notice-and-comment rulemaking, a requirement not imposed on any other agency. The following proposed procedural rule would do that. There is no legal impediment to allocating responsibility in this way. The formal adjudication requirements of the APA only require that an administrative law judge or the agency preside over the taking of evidence.[247] Challenges to rules do not typically involve evidentiary controversies. If evidence is required to resolve a challenge to a rule, that evidence should be taken before an ALJ. But there is no requirement that an ALJ determine the validity of rules. It is preferable for policy officials to determine rule challenges. Otherwise, rulemaking authority

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[247] 5 U.S.C. §556(d) (1988).

that formally is placed in policy components of an agency actually are exercised by persons insulated from policy control.

There is a possibility that the proposed procedure could be abused. Respondents could make rule challenges in every case for purposes of delay or to increase costs to the agency. If this occurs, consideration can be given to affording an opportunity for the rule challenge only at the end of the factual part of a hearing, in other words eliminating interlocutory rule view and providing for it only after an initial decision has been entered by the ALJ, under 14 CFR §13.233.

The following changes should be made in the FAA procedural regulations, "Subpart G - Rules of Practice in FAA Civil Penalty Actions:" Boldfaced type indicates new language.

§13.202 DEFINITIONS

Senior Reviewing Official **means a career official within the FAA, selected by the Secretary of Transportation acting in the capacity of the decisionmaker on interlocutory appeals to a rule challenge. If the parties agree on a neutral meeting the requirements of 5 USC §583 (Administrative Dispute Resolution Act), that person shall be the senior reviewing official.**

Rule challenge **means a prehearing motion by a respondent to challenge the procedures employed by the FAA in developing a rule or regulation.**

§13.218 MOTIONS

(1) *Rulings on Motions.*

(2) *Prehearing Motions.* The administrative law judge shall resolve all pending motions, **except rule challenges, not later than 7 days before the hearing. Rule challenges are to be resolved pursuant to §13.219(b).** If the administrative law judge issues a ruling or an order verbally, the administrative law judge shall serve a written copy of the ruling or order, within 3 days, on each party. In all other cases, the administrative law judge shall issue rulings and orders in writing and shall serve a copy of the ruling or order on each party.

§13.219 INTERLOCUTORY APPEALS.

(3) *General.* Unless otherwise provided in this subpart, a party may not appeal a ruling or decision of the administrative law judge to the FAA decisionmaker until the initial decision has been entered on the record. A decision or order of the FAA decisionmaker or senior reviewing official on the interlocutory appeal does not constitute a final order of the Administrator for the purposes of judicial appellate review under section 1006 of the Federal Aviation Act of 1958, as amended.

(4) *Interlocutory appeal for rule challenge.* **If a party files a rule challenge with the administrative law judge, the motion is to be considered an interlocutory appeal. When the appeal is filed, the administrative law judge is to stay the proceeding and submit the challenge to the senior reviewing official. The proceedings are stayed until the senior reviewing official issues a decision on the interlocutory appeal.**

(5) *Interlocutory appeal for cause.*

(6) *Interlocutory appeal of right.*

(7) *Procedure.*

(8) *Procedure for interlocutory appeal.*

(9) ***Procedure for rule challenge.*** **A party shall file a notice of rule challenge, with supporting documents, with the senior reviewing official, and shall serve a copy of the notice and supporting documents on each party not later than three (3) days after a rule challenge is filed. A party may file a reply brief not later than 10 days after service of the appeal brief. The reply brief shall be filed with the senior review official and a copy served on each party, . The senior reviewing official shall render a decision on the rule challenge based on an interpretation and application of relevant statutory and regulatory requirements, legal precedents, and policy considerations. The decision of the senior reviewing official is to be applied by the administrative law judge as the controlling**

rule of law in the hearing. If evidence is required to resolve a rule challenge, the senior reviewing official shall remand the case to an ALJ for the limited purpose of taking evidence and reporting findings of fact, within the order of reference to the ALJ.

9. Sunset/Periodic Oversight

The Congress could allow a period of 5 years to pass with the adjudication responsibility split between the FAA and the NTSB along present lines. Eventually it could consolidate adjudication responsibility for both certificate actions and civil penalties, the agency depending on the 5-year experience.

D. Consensual Problem Solving

This controversy is well-suited for resolution through a mediation and problem-solving process.[248] Ultimately, the concerns of the affected pilot and airline communities must be addressed through better relations between those communities and the FAA. The real unfairness arises, not from the placement of responsibility for deciding a relatively minuscule proportion of the cases that are appealed from the initial ALJ decision; it arises from inappropriate or rigid enforcement action. Enforcement responsibility under any realistic scenario will remain with the FAA. The FAA wants to keep civil penalty adjudication responsibility. To keep it, it needs acquiescence by the politically powerful airline and pilot communities. There are a number of possibilities for changing the structure and the procedures for FAA adjudication that could ameliorate the concerns of these communities with respect to FAA responsibility and reduce the force of the arguments in favor of relocating the responsibility to the NTSB.

Accordingly, the best way to work these things out is through a specially constructed mediation process involving the administrator and the chief counsel of the FAA and a limited number of representatives of the airline and pilot communities. This process could result in specific regulatory language to be issued as a proposed rulemaking by the FAA, or specific statutory language to be proposed to the Congress by the FAA and the interest groups jointly. Consultations begun by the author of this report showed promise. All affected interests expressed willingness to consider a variety of alternatives and agreed

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248 Administrative Conference Recommendation 85-5, 1 CFR §305.85-5 (1989) (encouraging agencies to use negotiated rulemaking). See Perritt, *Negotiated Rulemaking before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 Geo.L.J. 1625 (1987).

that a more cooperative relationship between the FAA and its regulatees is desirable. The principal problem the author experienced in the consultation process was that some parts of the airline industry was worried about undermining its position that the civil penalty program must be scrapped, and therefore would not help develop other alternatives. There is nothing impermissible or unseemly in this. These interests like everyone else are entitled to develop their own political strategies.

It may be necessary to provide for a measure of confidentiality in the discussions, recognizing that adequate opportunity for public input occurs during notice-and-comment rulemaking and through the legislative process and the Conference open proceedings on formulation of recommendations.

XI. Conclusions

The Congress already has decided to divide responsibility for aviation safety between the FAA and the NTSB, and the division of responsibility has worked reasonably well.

The division of responsibility between the NTSB and the FAA envisions the FAA in a decision-making capacity and the NTSB in an evaluation and recommendation formulation capacity. This division of responsibility in the context of civil penalties can support assigning civil penalty adjudication responsibility to either agency.

The chief counsel of the FAA controls both the prosecution function and the formulation of advice to the administrator on the adjudication function. The exercise of both responsibilities has been separated under the FAA regulations.

Assuring fairness and promotion of safety should not depend on the attitudes of individual incumbents of key positions in either the FAA or the NTSB.

The existing arrangement potentially encourages forum shopping, although empirical evidence of such forum shopping is lacking.

It is useful for the administrator of the FAA to be exposed personally to enforcement cases.

It is useful for the NTSB to be exposed to enforcement cases.

There is no evidence of unfairness or mishandling of cases under the present system, resulting from commingling of prosecutorial and judging functions.

There is a possibility that the FAA's increased use of its emergency authority has increased the numbers of NTSB appeals, thereby distorting the work load and back log statistics.

Conformity between the procedures of two different agencies with adjudication responsibility is desirable.

Completion of administrative procedures takes too long in both civil penalty and certificate cases.[249]

Use of alternative dispute resolution techniques, including mediation, arbitration, and settlement judges is desirable.[250] The FAA currently offers an informal Conference in every civil penalty case.

It may be desirable to let the factfinder decide the penalty, so for example, an airline pilot could get a large fine instead of a 60-day suspension, which costs her her job.

Parties to enforcement proceedings should have an opportunity to challenge outcome determinative rules, policies, or standards applied in the adjudication, but the ALJ need not be the person who decides such challenges, and the FAA is not obligated to make all rules through notice-and-comment rulemaking.

The FAA should have the right to appeal from an NTSB decision, if the NTSB has decision-making authority. Pilot representatives argued at the June 19, 1991 hearing that any such authority must be circumscribed to avoid inappropriate imposition of costs on pilots by use of the FAA review petition authority. Subsequently, the NTSB general counsel suggested three possible ways for circumscribing such authority: (1) limiting FAA appeals to matters involving interpretation of FAA regulations or policies, (2) limiting appeals to situations where the administrator believes that an NTSB interpretation will necessarily and irremedially impede prospective application of FAA policy, or (3) giving control over FAA appeals to the Department of Justice.[251]

Joint problem solving, involving the pilot community and the FAA in a spirit of reasonable harmony and trust is desirable.

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[249] *Accord* supplementary statement of Daniel D. Campbell at 8 n. 11 (noting elapse of time from potential violation dated May 1988 to final appellate decision in February 1991 in FAA civil penalty case and elapse of time from potential violation date of September 1987 and final appellate decision of September 1990 in NTSB suspension case).

[250] See Conference Recommendation 86-3, codified at 1 CFR §305.86-3 (use of alternative dispute resolution in individual case handling); Conference Recommendation 88-5, codified at 1 CFR §305.88-5 (use of settlement judges).

[251] Supplementary statement of Daniel D. Campbell at 18-19.

XII. Recommendation

A. Explanation

The best resolution of the controversies associated with civil penalty adjudication authority would be a consensual one, satisfying the legitimate concerns of the FAA and the affected interests. Recommendation 1 is intended to operate only in the absence of such a consensual resolution. This recommendation avoids splitting civil penalty and certificate authority, thus eliminating the potential for forum shopping. It eliminates potential conflicts of interest as to that class of cases in which conflict is most likely between FAA employees with operational responsibility and persons subject to civil penalty authority. The FAA is nearly unique in its exercise of operational responsibility, which makes it a co-actor with persons or entities subject to its regulatory jurisdiction. This special characteristic provides plausible justification for treating the FAA differently from other agencies adhering to the unitary enforcement model. Removal of pilot cases from the FAA conflicts the least with comprehensive exercise of FAA safety policy authority because of the individual character of most violations involved in these cases, compared with a more systemic problem frequently manifested in airline, airport security, and hazardous materials cases. The perceptions problem should be largely addressed by this change inasmuch as pilot respondents are the ones least sophisticated about allocation of agency responsibility, and least aware of the legitimacy of the unitary enforcement model in administrative procedure.

Conversely, retention of FAA civil penalty authority for nonpilot cases presents less potential for conflict between respondent interests and the FAA's air traffic control responsibility, and there is greater likelihood that the problems exposed by civil penalty actions are systemic in nature, necessitating some change in FAA oversight of airline aircraft maintenance or airport operator conduct.

The recommendation to transfer certificate authority for airlines from the NTSB to the FAA would affect relatively few cases because certificate actions are unusual except with respect to pilots, and therefore NTSB authority is exercised infrequently. This transfer is necessary to avoid bifurcating responsibility between the FAA and the NTSB in similar classes of cases.

Recommendation 3 proposes reform of the discovery process along the lines recommended in August 1991 for district courts by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United

States. It contains a specific recommendation for dealing with discovery requests that are resisted on the ground of privileges including the deliberative privilege under *Morgan v. United States*.

Recommendation 4 suggests that the FAA take appropriate steps to ensure that adequate opportunities are available for rule challenges. In doing so, the agency should consider the changes to its procedural regulations discussed in §X(C)(8).

Recommendation 5 encourages greater use of a variety of dispute resolution techniques in individual cases. The growing body of alternative dispute resolution literature supports the view that efficiency gains for everyone are available from flexible means of resolving disputes. New procedures for compromising cases are desirable in this regard. Many civil penalty cases now go to informal settlement conferences, but in many cases the prosecutors decline to consider compromises and monetary penalty amounts, apparently on direction from Washington. Some respondents perceive that informal contact with officials at the inspector level can be used to generate incriminating evidence. Further steps should be taken to explore the utility of settlement judge concepts. In addition, there may be advantages in adopting new technologies for certain aspects of adjudication, along the lines suggested in Recommendation H of the Conference Recommendation 88-10.

Recommendation 6 encourages the FAA and the NTSB to build on the DOT's good record in automating administrative procedures and permitted affected persons to communicate with the agencies electronically.

B. Recommendation Text

1. The civil penalty program should be made permanent, in accordance with Recommendation 90-1. There is no objectively correct placement of adjudicatory authority over civil penalties. Accordingly, if the FAA and the affected interests agree on an arrangement for exercise of adjudicatory authority, the Conference does not intend these recommendations to represent a barrier to implementation of such an agreement. In the absence of consensus on the subject:

   A. Authority for adjudicating civil penalties against pilots should be transferred from the FAA to the NTSB, with all other civil penalty adjudication authority remaining at the FAA.

   B. The factfinder should be able to decide the penalty as part of a recommended decision, within validly established schedules, standards or guidelines, so for example, an airline pilot could get a large fine instead of a 60-day suspension, which costs her her job.

C. The FAA should have the right to appeal from an NTSB decision.

2. Responsibility for certificate actions not involving pilots should be transferred from the NTSB to the FAA.

3. Discovery rules in civil penalty cases should be changed to provide as follows:

A. Each party shall, without awaiting a discovery request, provide certain information, including (1) the name, and if known, the address and telephone number of each individual likely to have information that bears significantly on any claim or defense, identifying the subjects of the information; and (2) a copy of, or a description by category and location of, all documents, data compilations, and tangible things in the possession, custody or control of the party that are likely to bear significantly on any claim or defense. Unless the ALJ otherwise directs or the parties stipulate with the ALJ's approval, these disclosures shall be made by the agency within 30 days after service of a request for a hearing in response to a final notice of proposed civil penalty, and by a respondent within 30 days after serving its request for a hearing in response to a final notice of proposed civil penalty.

B. Discovery shall be limited by the ALJ if the ALJ determines that the burden or expense of the proposed discovery outweighs its likely benefit.

C. No more than two depositions, nor any deposition longer than 6 hours shall be taken without leave of the ALJ.

D. No more than 15 interrogatories may be served by one party upon another, without leave of the ALJ.

E. When information is withheld from disclosure or discovery on a claim that its is privileged, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced or disclosed that is sufficient to enable other parties to contest the claim.

F. Controversies over information withheld from discovery on the grounds of privilege shall be subject to interlocutory appeal as a matter of right.

G. The FAA and interested parties should undertake a rule negotiation over these and other aspects of discovery rules for civil penalty adjudications.

4. Before applying a policy made outside notice-and-comment rulemaking, or adopted in an earlier adjudication, the FAA should give affected persons a fair opportunity, either in the adjudication or in a separate proceeding, to challenge the legality or wisdom of the policy and

to suggest alternative policy choices, in a forum that ensures adequate presentation of the affected person's positions and consideration of these positions by persons with authority to take or recommend final action upon them.

5. The primary focus of any changes in the civil penalty program should be on improving trust and developing a problem solving orientation, including the pilot community, the airline community, the FAA and the NTSB. This could occur in a variety of contexts, including the context of a negotiated rule for the procedures for civil penalty adjudication and appeal.

A. Whoever has adjudicatory responsibility for civil penalties and FAA prosecutors should place greater emphasis on alternative dispute resolution in individual cases. The FAA and NTSB, to the extent it retains adjudicatory responsibility, should consider the analysis and conclusions of the September 1990 Conference report on the use of settlement judges and simplified proceedings in agency adjudication, and make greater use of these techniques.

B. For civil penalty adjudication responsibility transferred to the NTSB, the statute should be amended to make it clear that the adjudicating authority has no authority to interfere with informal settlement, or with communications aimed at arriving at such settlements.

C. For civil penalty adjudication responsibility retained by the FAA, the procedural rules should be amended to make it clear that the adjudicating authority has no authority to interfere with informal settlement, or with communications aimed at arriving at such settlements. This can be done by reserving in the agency the authority to discuss settlement.

6. The FAA and the NTSB should consider whether new information technologies can be used to improve the adjudication process, as recommended in the Conference Recommendation 88-10, Paragraph H.

Appendixes

A. Statutory Authority for FAA and NTSB

1. Certificate Action Authority

49 USC App. §1429. Reinspection or reexamination; amendment, suspension, or revocation of certification

(a) Procedure; notification; hearing; appeal to National Transportation Safety Board; judicial review

The Secretary of Transportation may, from time to time, reinspect any civil aircraft, aircraft engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Secretary of Transportation, he determines that safety in air commerce or air transportation and the public interest requires, the Secretary of Transportation may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Secretary of Transportation shall advise the holder thereof as to any charges or other reasons relied upon by the Secretary of Transportation for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Secretary of Transportation under this section may appeal the Secretary of Transportation's order to the National Transportation Safety Board and the National Transportation Safety Board may, after notice and hearing, amend, modify, or reverse the Secretary of Transportation's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Secretary of Transportation's order. In the conduct of its hearings the National Transportation Safety Board shall not be bound by findings of fact of the Secretary of Transportation. The filing of an appeal with the National Transportation Safety Board shall stay the effectiveness of the Secretary of Transportation's order unless the Secretary of Transportation advises the National Transportation Safety Board that an emergency exists and safety in air commerce or air transportation requires the

immediate effectiveness of his order, in which event the order shall remain effective and the National Transportation Safety Board shall finally dispose of the appeal within 60 days after being so advised by the Secretary of Transportation.

The person substantially affected by the National Transportation Safety Board's order may obtain judicial review of said order under the provisions of section 1486 of this title, and the Secretary of Transportation shall be made a party to such proceedings.

(b) Violation of certain laws

The Secretary of Transportation, in his discretion, may issue an order amending, modifying, suspending, or revoking any airman certificate upon conviction of the holder of such certificate of any violation of subsection (a) of section 742j-1 of Title 16, regarding the use or operation of an aircraft.[252]

(c) Transportation, distribution, and other activities relating to controlled substances

(1) The Administrator shall issue an order revoking the airman certificates of any person upon conviction of such person of a crime punishable by death or imprisonment for a term exceeding one year under a State or Federal law relating to a controlled substance (other than a law relating to simple possession of a controlled substance), if the Administrator determines that (A) an aircraft was used in the commission of the offense or to facilitate the commission of the offense, and (B) such person served as an airman, or was on board such aircraft, in connection with the commission of the offense or the facilitation of the commission of the offense. The Administrator shall have no authority under this paragraph to review the issue of whether an airman violated a State or Federal law relating to a controlled substance.

(2) The Administrator shall issue an order revoking the airman certificates of any person if the Administrator determines that (A) such person knowingly engaged in an activity that is punishable by death or imprisonment for a term exceeding 1 year under a State or Federal law relating to a controlled substance (other than any law relating to simple possession of a controlled substance), (B) an aircraft was used to carry out such activity or to facilitate such activity, and (C) such person served as an airman, or was on board such aircraft, in connection with such activity or the facilitation of such activity. The Administrator shall not revoke, and the National Transportation Safety Board on appeal under paragraph (3) shall not affirm the revocation of, a certificate under this paragraph on the basis of any activity if the holder of the certificate

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[252] 16 U.S.C. §742j-1 (1988) prohibits airborne hunting.

is acquitted of all charges contained in an indictment or information that relate to controlled substances and which arise from such activity.

(3) Prior to revoking an airman certificate under this subsection, the Administrator shall advise the holder thereof of the charges or any reasons relied upon by the Administrator for his proposed action and shall provide the holder of such certificate an opportunity to answer any charges and be heard as to why such certificate should not be revoked. Any person whose certificate is revoked by the Administrator under this subsection may appeal the Administrator's order to the National Transportation Safety Board and the Board shall, after notice and a hearing on the record, affirm or reverse the Administrator's order. In the conduct of its hearings, the National Transportation Safety Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the National Transportation Safety Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the Board that safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the Board shall finally dispose of the appeal within 60 days after being so advised by the Administrator. The person substantially affected by the National Transportation Safety Board's order may obtain judicial review of such order under the provisions of section 1486 of this title, and the Administrator shall be made a party to such proceedings.

(4) For purposes of this subsection, the term "controlled substance" has the meaning given such term by section 802(6) of Title 21.

(5) Waiver of revocation requirement.

Upon request of a federal or state law enforcement official, the Administrator may waive the requirements of paragraphs (1) and (2) that an airman certificate of any person be revoked if the Administrator determines that such waiver will facilitate law enforcement efforts.

2. NTSB Authority

49 USC App. §1903. General provisions
(a) Duties of Board

The Board shall--

(1) investigate or cause to be investigated (in such detail as it shall prescribe), and determine the facts, conditions, and circumstances and the cause or probable cause or causes of any--

(A) aircraft accident that is within the scope of the functions, powers, and duties transferred from the Civil Aeronautics Board under section 1655(d) of this title pursuant to title VII of the Federal Aviation Act of 1958, as amended;

(B) highway accident, including any railroad grade crossing accident, that it selects in cooperation with the States;

(C) railroad accident in which there is a fatality, substantial property damage, or which involves a passenger train;

(D) pipeline accident in which there is a fatality or substantial property damage;

(E) major marine casualty, except one involving only public vessels, occurring on the navigable waters or territorial seas of the United States, or involving a vessel of the United States, in accordance with regulations to be prescribed jointly by the Board and the Secretary of the department in which the Coast Guard is operating. Nothing in this subparagraph shall be construed to eliminate or diminish any responsibility under any other Federal statute of the Secretary of the department in which the Coast Guard is operating: Provided, That any marine accident involving a public vessel and any other vessel shall be investigated and the facts, conditions, and circumstances, and the cause or probable cause determined and made available to the public by either the Board or the Secretary of the Department in which the Coast Guard is operating; and

(F) other accident that occurs in connection with the transportation of people or property which, in the judgment of the Board, is catastrophic, involves problems of a recurring character, or would otherwise carry out the policy of this chapter.

Any investigation of an accident conducted by the Board under this paragraph (other than subparagraph (E)) shall have priority over all other investigations of such accident conducted by other federal agencies. The Board shall provide for the appropriate participation by other federal agencies in any such investigation, except that such agencies may not participate in the Board's determination of the probable cause of the accident. Nothing in this section impairs the authority of other federal agencies to conduct investigations of an accident under applicable provisions of law or to obtain information directly from parties involved in, and witnesses to, the transportation accident. The Board and other federal agencies shall assure that appropriate information obtained or developed in the course of their investigations is exchanged in a timely manner. The Board may request the Secretary of Transportation (hereafter in this chapter referred to as the "Secretary") to make investigations

with regard to such accidents and to report to the Board the facts, conditions, and circumstances thereof (except in accidents where misfeasance or nonfeasance by the federal government is alleged), and the Secretary or his designees are authorized to make such investigations. Thereafter, the Board, utilizing such reports, shall make its determination of cause or probable cause under this paragraph;

(2) report in writing on the facts, conditions, and circumstances of each accident investigated pursuant to paragraph (1) of this subsection and cause such reports to be made available to the public at reasonable cost;

(3) issue periodic reports to the Congress, federal, state, and local agencies concerned with transportation safety, and other interested persons recommending and advocating meaningful responses to reduce the likelihood of recurrence of transportation accidents similar to those investigated by the Board and proposing corrective steps to make the transportation of persons as safe and free from risk of injury as is possible, including steps to minimize human injuries from transportation accidents;

(4) initiate and conduct special studies and special investigations on matters pertaining to safety in transportation including human injury avoidance;

(5) assess and reassess techniques and methods of accident investigation and prepare and publish from time to time recommended procedures for accident investigations;

(6) establish by regulation requirements binding on persons reporting (A) accidents and aviation incidents subject to the Board's investigatory jurisdiction under this subsection, and (B) accidents and aviation incidents involving public aircraft other than aircraft of the Armed Forces and the Intelligence Agencies;

(7) evaluate and assess the effectiveness and publish the findings of the Board with respect to the transportation safety consciousness and efficacy in preventing accidents of other government agencies;

(8) evaluate the adequacy of safeguards and procedures concerning the transportation of hazardous materials and the performance of other government agencies charged with ensuring the safe transportation of such materials; and

(9) review on appeal (A) the suspension, amendment, modification, revocation, or denial of any operating certificate or license issued by the

Secretary of Transportation under sections 1422,[253] 1429,[254] or 1431(c)[255] of this title and the revocation of any certificate of registration under section 1401(e)(2) of this title;[256] and (B) the decisions of the Commandant of the Coast Guard, on appeals from the orders of any administrative law judge revoking, suspending, or denying a license, certificate, document, or register in proceedings under section 239 of Title 46;[257] sections 239a[258] and 239b[259] of Title 46; or section 216b of Title 46.[260]

(b) Powers of Board

(1) The Board, or upon the authority of the Board, any member thereof, any administrative law judge employed by or assigned to the Board, or any officer or employee duly designated by the Chairman, may, for the purpose of carrying out this chapter, hold such hearings, sit and act at such times and places, administer such oaths, and require by subpoena or otherwise the attendance and testimony of such witnesses and the production of such evidence as the Board or such officer or employee deems advisable. Subpoenas shall be issued under the signature of the Chairman, or his delegate, and may be served by any person designated by the Chairman. Witnesses summoned to appear before the Board shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Such attendance of witnesses and production of evidence may be required from any place in the United States to any designated place of such hearing in the United States.

(2) Any employee of the Board, upon presenting appropriate credentials and a written notice of inspection authority, is authorized to enter any property wherein a transportation accident has occurred or wreckage from any such accident is located and do all things therein necessary for a proper investigation, including examination or testing of any vessel, vehicle, rolling

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253 49 U.S.C. App. §1422 (1988) (issuance, revocation of airman certificates).

254 49 U.S.C. App. §1429 (1988) (amendment, suspension, revocation of aircraft, air carrier, airport certificates).

255 49 U.S.C. App. §1431(c) (1988) (aircraft noise regulation).

256 49 U.S.C. App. §1401(e)(1) (1988) (aircraft registration certificates).

257 Recodified at 46 U.S.C. §§6301 (investigation of marine accidents) & 7703 (grounds for suspension or revocation of merchant marine certificate).

258 46 U.S.C. §7503(a) (1988) (merchange mariner certificate actions for drug offenses), 7302 (issuance of merchange mariner's certificate).

259 46 U.S.C. §7503(b), 7704(b), (c) (1988) (merchange mariner certificate actions for drug offenses)).

260 46 U.S.C. §6301, 7703 (grounds for suspension or revocation of merchant mariner's certificate in conjunction with accident investigation) (1988).

stock, track, or pipeline component or any part of any such item when such examination or testing is determined to be required for purposes of such investigation. Any examination or testing shall be conducted in such manner so as not to interfere with or obstruct unnecessarily the transportation services provided by the owner or operator of such vessel, vehicle, rolling stock, track, or pipeline component, and shall be conducted in such a manner so as to preserve, to the maximum extent feasible, any evidence relating to the transportation accidents, consistent with the needs of the investigation and with the cooperation of such owner or operator. The employee may inspect, at reasonable times, records, files, papers, processes, controls, and facilities relevant to the investigation of such accident. Each inspection, examination, or test shall be commenced and completed with reasonable promptness and the results of such inspection, examination, or test made available. The Board shall have sole authority to determine the manner in which testing will be carried out under this paragraph and under section 1441(c) of this Appendix including determining the persons who will conduct the test, the type of test which will be conducted, and the persons who will witness the test. Such determinations are committed to the discretion of the Board and shall be made on the basis of the needs of the investigation being conducted by the Board and, where applicable, the provisions of this paragraph.

(3) In case of contumacy or refusal to obey a subpoena, an order, or an inspection notice of the Board, or of any duly designated employee thereof, by any person who resides, is found, or transacts business within the jurisdiction of any district court of the United States, such district court shall, upon the request of the Board, have jurisdiction to issue to such person an order requiring such person to comply forthwith. Failure to obey such an order is punishable by such court as a contempt of court.

(4) The Board is authorized to enter into, without regard to section 5 of Title 41, such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of the functions and the duties of the Board under this chapter, with any government entity or any person.

(5) The Board is authorized to obtain, and shall be furnished, with or without reimbursement, a copy of the report of the autopsy performed by state or local officials on any person who dies as a result of having been involved in a transportation accident within the jurisdiction of the Board and, if necessary, the Board may order the autopsy or seek other tests of such persons as may be necessary to the investigation of the accident: Provided, That to the extent consistent with the need of the accident investigation, provisions of local law protecting religious beliefs with respect to autopsies shall be observed.

(6) The Board is authorized to (A) use, on a reimbursable basis or otherwise, when appropriate, available services, equipment, personnel, and facilities of the Department of Transportation and of other civilian or military agencies and instrumentalities of the federal government; (B) confer with employees and use available services, records, and facilities of state, municipal, or local governments and agencies; (C) employ experts and consultants in accordance with section 3109 of Title 5; (D) appoint one or more advisory committees composed of qualified private citizens or officials of federal, state, or local governments as it deems necessary or appropriate, in accordance with the Federal Advisory Committee Act (5 U.S.C. App. I); (E) accept voluntary and uncompensated services notwithstanding any other provision of law; (F) accept gifts or donations of money or property (real, personal, mixed, tangible, or intangible); (G) enter into contracts with public or private nonprofit entities for the conduct of studies related to any of its functions; and (H) require payment or other appropriate consideration from federal agencies, and state, local, and foreign governments for the reasonable cost of goods and services supplied by the Board and to apply the funds received to the Board's appropriations.

(7) Whenever the Board submits or transmits any budget estimate, budget request, supplemental budget estimate, or other budget information, legislative recommendation, prepared testimony for congressional hearings, or comment on legislation to the President or to the Office of Management and Budget, it shall concurrently transmit a copy thereof to the Congress. No officer or agency of the United States shall have any authority to require the Board to submit its budget requests or estimates, legislative recommendations, prepared testimony for congressional hearings, or comments on legislation to any officer or agency of the United States for approval, comments, or review, prior to the submission of such recommendations, testimony, or comments to the Congress.

(8) The Board is empowered to designate representatives to serve or assist on such committees as the Chairman determines to be necessary or appropriate to maintain effective liaison with other federal agencies, and with state and local government agencies, and with independent standard-setting bodies carrying out programs and activities related to transportation safety.

(9) The Board, or an employee of the Board duly designated by the Chairman, may conduct an inquiry to secure data with respect to any matter pertinent to transportation safety, upon publication of notice of such inquiry in the Federal Register; and may require, by special or general orders, federal, state, and local government agencies and persons engaged in the transportation of people or property in commerce to submit written reports and answers to such

requests and questions as are propounded with respect to any matter pertinent to any function of the Board. Such reports and answers shall be submitted to the Board or to such employee within such reasonable period of time and in such form as the Board may determine. Copies thereof shall be made available for inspection by the public.

(10) The Board may at any time utilize on a reimbursable basis the services of the Transportation Safety Institute of the Department of Transportation (established for the purpose of developing courses and conducting training in safety and security for all modes of transportation) or any successor organization. The Secretary shall continue to make available such Institute or successor organization (A) to the Board for safety training of employees of the Board in the performance of all of their authorized functions, and (B) to such other safety personnel of federal, interstate, state, local, and foreign governments and nongovernmental organizations as the Board may from time to time designate in consultation with the Secretary. Utilization of such training at the Institute or successor organization by any designated nonfederal safety personnel shall be at a reasonable fee to be established periodically by the Board in consultation with the Secretary. Such fee shall be paid directly to the Secretary for the credit of the proper appropriation, subject to the requirements of any annual appropriation, and shall be an offset against any annual reimbursement agreement entered into between the Board and the Secretary to cover all reasonable direct and indirect costs incurred for all such training by the Secretary in the administration and operation of the Institute or successor organization. The Board shall maintain an annual record of all such offsets. In providing such training to federal employees, the Board shall be subject to chapter 41 of Title 5 (relating to training of employees).

(11)(A) Notwithstanding section 503(e) of the Act entitled "An Act making supplemental appropriations for the fiscal year ending September 30, 1987, and for other purposes", approved July 11, 1987 (5 U.S.C. 7301 note), the Board is authorized to obtain from the Secretary of Transportation, by written request, and shall be furnished--

(i) any report of a confirmed positive toxicological test, verified as positive by a medical review officer, which is conducted on an employee of the Department of Transportation, including any of its agencies, pursuant to post-accident, unsafe practice, or reasonable suspicion toxicological testing requirements of the Department, when that employee is reasonably associated with the circumstances of an accident or incident within the investigative jurisdiction of the Board; and

(ii) any laboratory record providing documentation that such test is confirmed positive.

(B) Except as provided in subparagraph (C), the Board shall maintain in confidence and exempt from public disclosure in accordance with section 552(b)(3) Title 5,--

(i) any laboratory record, made available under subparagraph (A), of a confirmed and verified toxicological test that reveals medical use of a drug permitted under applicable regulations; and

(ii) any medical information provided by the tested employee in connection with such test or in connection with a review of such test.

(C) The Board may use such a laboratory record for development of any evidentiary record in an investigation by the Board of an accident or incident if--

(i) the fitness of the employee who is the subject of the toxicological testing is at issue in the investigation; and

(ii) the use of that record is necessary in the development of such evidentiary record.

(12) Establish such rules and regulations as may be necessary to the exercise of its functions.

(c) Use of reports as evidence

No part of any report of the Board, relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports.

(d) Judicial review

Any order, affirmative or negative, issued by the Board under this chapter shall be subject to review by the appropriate court of appeals of the United States or the United States Court of Appeals for the District of Columbia, upon petition filed within 60 days after the entry of such order, by any person disclosing a substantial interest in such order. Such review shall be conducted in accordance with the provisions of chapter 7 of Title 5.

3. FAA Civil Penalty Authority

49 U.S.C.A. App. §1471. Civil penalties; notice and hearing; compromise; liens

(a)(1) Any person who violates (A) any provision of subchapter III,[261] IV,[262] V,[263] VI,[264] VII,[265] or XII[266] of this chapter[267] or of section 1501[268] or 1514,[269] or 1515(e)(2)(B)[270] of this title[271] or any rule, regulation, or order issued thereunder, or under section 1482(i) of this title, or any term, condition, or limitation of any permit or certificate issued under subchapter IV of this chapter, or (B) any rule or regulation issued by the United States Postal Service under this chapter, shall be subject to a civil penalty of not to exceed $1,000 for each such violation, except that a person who operates aircraft for the carriage of persons or property for compensation or hire (other than an airman serving in the capacity of an airman) shall be subject to a civil penalty not to exceed $10,000 for each violation of subchapter III, VI, or XII of this chapter, or any rule, regulation, or order issued thereunder, occurring after December 30, 1987, and except that the amount of such civil penalty shall not exceed $10,000 for each such violation that relates to the transportation of hazardous materials and for each such violation that relates to registration of recordation of an aircraft under subchapter V of this chapter. If such violation is a continuing one, each day of such violation, or each flight with respect to which such violation is committed, if applicable, shall constitute a separate offense. The amount of any such civil penalty which relates to the transportation of hazardous materials shall be assessed by the Secretary, or his delegate, upon written notice upon a finding of violation by the Secretary, after notice and an opportunity for a hearing. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require. The amount of any such civil penalty for any violation of any provision of subchapter IV of this chapter, or any rule, regulation, or order issued thereunder, or under section 1482(i) of

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261 Organization and powers of FAA, Administrator.

262 Air carrier economic regulation.

263 Nationality, ownership of aircraft.

264 Safety regulation of civil aeronautics.

265 Aircraft accident investigation.

266 Aviation security.

267 49 U.S.C. App. ch. 20, 49 U.S.C. App. §§1301-1557 (1988) (Federal Aviation Program).

268 Rules for structures impinging airspace.

269 Presidential suspension of airline operational authority.

270 Notice of foreign airports with substandard security procedures.

271 49 U.S.C. App. (1988).

this title, or any term, condition, or limitation of any permit or certificate issued under subchapter IV of this chapter shall be assessed by the Board only after notice and an opportunity for a hearing and after written notice upon a finding of violation by the Board. Judicial review of any order of the Board assessing such a penalty may be obtained only pursuant to section 1486 of this title. This subsection shall not apply to members of the Armed Forces of the United States, or those civilian employees of the Department of Defense who are subject to the provisions of the Uniform Code of Military Justice, while engaged in the performance of their official duties; and the appropriate military authorities shall be responsible for taking any necessary disciplinary action with respect thereto and for making to the Secretary of Transportation or Board, as appropriate, a timely report of any such action taken.

(2) Any civil penalty may be compromised by the Secretary of Transportation in the case of penalties provided for in subsections (c) and (d) of this section or violations of subchapters III, V, VI, or XII, or of section 1501, 1514, or 1515(e)(2)(B) of this Appendix, of this chapter, or any rule, regulation, or order issued thereunder, or by the National Transportation Safety Board in the case of violations of subchapter VII of this chapter, or any rule, regulation, or order issued thereunder, or by the United States Postal Service in the case of regulations issued by it. The amount of such penalty when finally determined or fixed by order of the Board, or the amount agreed upon in compromise, may be deducted from any sums which the United States owes to the person charged.

(3) Administrative assessment of certain registration and recordation violations

(A) General authority

The Administrator, or his delegate, may assess a civil penalty for a violation of subchapter V of this chapter, or a rule, regulation, or order issued thereunder, that relates to registration or recordation of an aircraft upon written notice and finding of violation by the Administrator.

(B) No reexamination of liability or amount

In the case of a civil penalty assessed by the Administrator under this paragraph, the issue of liability or amount of civil penalty shall not be reexamined in any subsequent suit for collection of such civil penalty.

(C) Continuing jurisdiction of district courts notwithstanding subparagraph (A), the United States district courts shall have exclusive jurisdiction of any civil penalty action initiated by the Administrator--

(i) that involves an amount in controversy in excess of $50,000;

(ii) that is an in rem action or in which an in rem action based on the same violation has been brought;

(iii) regarding which an aircraft subject to lien has been seized by the United States; and

(iv) in which a suit for injunctive relief based on the violation giving rise to the civil penalty has also been brought.

(D) Limitations

(i) Hearing

A civil penalty may be assessed by the Administrator under this paragraph only after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5.

(ii) Violations

This paragraph only applies to civil penalties initiated by the Administrator after November 18, 1988.

(iii) Maximum amount

The maximum amount of a civil penalty that may be assessed by the Administrator under this paragraph in any case may not exceed $50,000. (b) In case an aircraft is involved in such violation and the violation is by the owner or person in command of the aircraft, such aircraft shall be subject to lien for the penalty: Provided, that this subsection shall not apply to a violation of a rule or regulation of the United States Postal Service.

(c) Whoever imparts or conveys or causes to be imparted or conveyed false information, knowing the information to be false and under circumstances in which such information may reasonably be believed, concerning an attempt or alleged attempt being made or to be made, to do any act which would be a crime prohibited by subsection (i), (j), (k), or (l) of section 1472 of this title, shall be subject to a civil penalty of not more than $10,000 which shall be recoverable in a civil action brought in the name of the United States.

(d) Except for law enforcement officers of any municipal or state government or officers or employees of the federal government, who are authorized or required within their official capacities to carry arms, or other persons who may be so authorized under regulations issued by the Administrator, whoever while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate air transportation, has on or about his person or his property a concealed deadly or dangerous weapon, which is, or would be, accessible to such person in flight shall be subject to a civil penalty of not more than $10,000, which shall be recoverable in a civil action brought in the name of the United States.

4. Civil Penalty Assessment Demonstration Program.

49 U.S.C.A. App. §1475 (West 1991)

(a) Civil penalty

The Administrator, or his delegate, may assess a civil penalty for a violation arising under this chapter or a rule, regulation, or order issued thereunder, upon written notice and finding of violation by the Administrator.

(b) No reexamination of liability or amount

In the case of a civil penalty assessed by the Administrator in accordance with this section, the issue of liability or amount of civil penalty shall not be reexamined in any subsequent suit for collection of such civil penalty.

(c) Continuing jurisdiction of district courts

Notwithstanding subsection (a) of this section, the United States district courts shall have exclusive jurisdiction of any civil penalty action initiated by the Administrator (1) that involves an amount in controversy in excess of $50,000; (2) that is an in rem action or in which an in rem action based on the same violation has been brought; (3) regarding which an aircraft subject to lien has been seized by the United States; and (4) in which a suit for injunctive relief based on the violation giving rise to the civil penalty has also been brought.

(d) Limitations

(1) Hearing

A civil penalty may be assessed under this section only after notice and opportunity for a hearing on the record in accordance with section 554 of Title 5.

(2) Violations

This section only applies to civil penalties initiated by the Administrator after December 30, 1987.

(3) Maximum amount

The maximum amount of a civil penalty that may be assessed under this section in any case may not exceed $50,000.

(4) Effective period

The provisions of this section shall only be in effect for the period beginning on December 30, 1987 and ending on August 1, 1992.

5. Procedural Provisions Applicable to FAA and NTSB

49 U.S.C. App. §1482. Complaints to and investigations by Administrator and Board

(a) Filing of complaints; complaints against members of the Armed Forces

Any person may file with the Secretary of Transportation or the Board, as to matters within their respective jurisdictions, a complaint in writing with

respect to anything done or omitted to be done by any person in contravention of any provisions of this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary of Transportation or the Board to investigate the matters complained of. Whenever the Secretary of Transportation or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. In the case of complaints against a member of the Armed Forces of the United States acting in the performance of his official duties, the Secretary of Transportation or the Board, as the case may be, shall refer the complaint to the Secretary of the department concerned for action. The Secretary shall, within 90 days after receiving such a complaint, inform the Secretary of Transportation or the Board of his disposition of the complaint, including a report as to any corrective or disciplinary actions taken.

(b) Investigations on initiative of Secretary or Board

The Secretary of Transportation or Board, with respect to matters within their respective jurisdictions, is empowered at any time to institute an investigation, on their own initiative, in any case and as to any matter or thing within their respective jurisdictions, concerning which complaint is authorized to be made to or before the Secretary of Transportation or Board by any provision of this chapter, or concerning which any question may arise under any of the provisions of this chapter, or relating to the enforcement of any of the provisions of this chapter. The Secretary of Transportation or the Board shall have the same power to proceed with any investigation instituted on their own motion as though it had been appealed to by complaint.

(c) Entry of orders for compliance with chapter

If the Secretary of Transportation or the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with any provision of this chapter or any requirement established pursuant thereto, the Secretary of Transportation or the Board shall, subject to section 1502(a) of this title, issue an appropriate order to compel such person to comply therewith.

(d) Power to prescribe rates and practices of air carriers

(1) Except as provided in paragraph (2) or (4) of this subsection, whenever, after notice and hearing, upon complaint, or upon its own initiative, the Board shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate air.

B. Other Administrative Civil Penalty Authority

7 U.S.C.A. §13a (CFTC assessment of penalties against commodity exchanges)

7 U.S.C.A. §149 (USDA assessment of civil penalties for violation of insect pest vehicle inspection rules)

7 U.S.C.A. §150gg (USDA assessment of civil penalties for violation of plant pest permit and documentation rules)

7 U.S.C.A. §163 (USDA assessment of civil penalties for violation of nursery stock rules)

7 U.S.C.A. §193 (USDA assessment of civil penalties for violation of packers and stockyards rules)

7 U.S.C.A. §228b-2 (USDA assessment of civil penalties for violation of live poultry dealer rules)

7 U.S.C.A. §608c (USDA assessment of civil penalties for violation of handlers of agricultural commodities and agricultural adjustment benefits rules)

7 U.S.C.A. §3805 (USDA assessment of civil penalties for violation of swine health regulations)

Fed. Reserve System Hearing Rules, 12 CFR s 263.28 , 12 U.S.C.A. foll. s 248

15 U.S.C. §78u-2 (SEC civil remedies in administrative proceedings)

15 U.S.C. §2615 (EPA assessment of civil penalties for violation of 15 U.S.C. §2614 regarding toxic substance control)

15 U.S.C. §3414(b) (FERC assessment of civil penalties for violation of Natural Gas Act)

16 U.S.C. §4307 (civil penalties associated with Federal Cave Resources protection)

21 U.S.C. §135a (Animals, meats and dairy products smuggling penalties)

30 U.S.C.§1268 (surface mining control and reclamation penalties)

42 U.S.C. §7524 (motor vehicle emission and fuel standards civil penalties)

42 U.S.C. §9609 (Superfund civil penalties and awards)

43 U.S.C. §1656 (Alaska pipeline civil penalties)

C. Conference Recommendation 90-1

Recommendation 90-1, 55 Fed.Reg. 34209, ___, (to be codified at 5 CFR §305.90-1).

1. Congress should authorize on a permanent basis the administrative imposition of civil money penalties for violations of the Federal Aviation Act (Act) and its implementing safety regulations.

2. Congress should eliminate the current ceiling of $50,000 applicable to administratively-imposed civil money penalties for violations of the Act and its implementing safety regulations.

3. Legislation providing for continued administrative imposition of civil money penalties should make explicit that the Federal Aviation Administration (FAA) has administrative discretion to compromise disputed cases without requiring a formal finding of a violation.

4. As long as adjudicatory responsibility is lodged at the Department of Transportation, the Department should adopt revised rules of practice governing adjudication of civil money penalty cases following notice-and-comment procedures. Such rules should address the following issues:

a. Separation of functions: The regulations should make clear that employees with investigatory or prosecutorial responsibilities in a case in this program will not communicate with the administrative law judge or agency decisionmaker in that case or a factually related case, except as counsel or a witness in the public proceedings.

b. Testimony of FAA employees:

1. The regulations should permit FAA employees to testify as to facts relevant to any disputed issue. Within the scope of this rule, hearsay testimony from FAA employees should be treated the same as other hearsay testimony.

2. FAA employees testifying as experts should be subject to full cross examination.

c. Designation of documents: The regulations should avoid denominating the document used to commence formal civil penalty proceedings as an "order", and should use a term such as "complaint."

d. Use of briefs: The regulations should permit these filing of post-hearing briefs whenever, in the ALJ's view, the interests of justice so require.

e. Explanation of basis for sanctions imposed: The regulations should establish a uniform standard for explanation of sanctions imposed in initial decisions, regardless of whether the ALJ affirms or modifies the proposed sanction.

D. Conference Recommendation 79-3

1 CFR §305.79-3. Agency Assessment and Mitigation of Civil Money Penalties (Recommendation No. 79-3).

(a) The civil money penalty has become one of the most widely used techniques in the enforcement programs of federal administrative agencies. Most regulatory offenses punishable by civil penalties involve adverse social consequences of private business activity. The motivational impact of these penalties depends in large part on the certainty of imposition and uniformity of amount, although some cases may require individualized tailoring to the circumstance of the offender so as to remove the economic benefit of the illegal conduct. Other civil penalties may also serve a secondary function of compensating society for the harm caused by unlawful conduct.

(b) Recommendation 72-6 urged that the advantages of civil money penalties would be best achieved through an "administrative imposition system" in which the agency would be empowered to adjudicate the violation and impose the penalty after a trial-type hearing, subject to "substantial evidence" judicial review. Such a system, it was stated, would avoid the delays, high costs, and jurisdictional fictions inherent in the traditional and most common system of imposing civil money penalties by a court in a civil action initiated on behalf of the agency by the Department of Justice.

(c) Since adoption of that Recommendation in 1972, the use of civil money penalties in general and of administratively imposed civil money penalties in particular has increased significantly, and the constitutionality and desirability of administratively imposed penalties has been widely recognized.

(d) Experience has shown that agencies play a crucial role and exercise broad discretion in the administration of civil penalty programs, whether or not the statute in question authorizes an administrative imposition system. Agencies possessing such authority have found it efficient to try to resolve cases before the formal hearing stage, through settlement and negotiation. Those agencies not possessing administrative imposition authority operate under a wide variety of statutes: some make no express reference to an agency role in the penalty process, while others confer on the agency only a power to "assess" or to "mitigate" penalties, thereby expressly or implicitly reserving to the respondent the right to seek a subsequent de novo fact-finding hearing by the court in a collection proceeding. Agencies typically exercise their statutory authority to "mitigate" in resolving contested penalty assessments prior to the initiation of formal enforcement action. In these recommendations the term "mitigation" refers to any informal process of resolving a contested initial penalty assessment.

(e) Whatever the statutory framework, the enforcing agency typically makes the initial assessment, and provides a process for mitigation of the

penalty. Thus, both where there exists administrative imposition authority and where such authority does not exist, agencies and respondents customarily utilize these initial assessment and mitigation processes to resolve the great majority of civil money penalty cases without reaching the stage of formal administrative adjudication or court collection proceeding.

(f) These informal processes for the initiation and termination of civil penalty proceedings represent an area of previously unstudied and largely discretionary agency action. Appropriate standards and structures for the exercise of such discretion are needed to improve the consistency, efficiency and openness of agency assessment and mitigation processes.

(g) The recommendations that follow focus on: (1) The need for agencies to develop standards for determining penalty amounts, (2) agency procedures for initially assessing penalties, (3) agency mitigation procedures, and (4) the use by agencies of evidentiary hearings to impose civil penalties where such a procedure, though not required by statute, might result in a limited scope of judicial review.

Recommendation

A. Standards for Determination of Penalty Amount

1. Agencies enforcing regulatory statutes, violation of which is punishable by a civil money penalty, should establish standards for determining appropriate penalty amounts for individual cases. In establishing standards, agencies should specify the factors to be considered in determining the appropriate penalty amount in a particular case. To the extent practicable, agencies should specify the relative weights to be attached to individual factors in the penalty calculation, and incorporate such factors into formulas for determining penalty amounts or into fixed schedules of prima facie penalty amounts for the most common types or categories of violation. A penalty intended to deter or influence economic behavior should, at a minimum, be designed to remove the economic benefit of the illegal activity, taking into account the documented benefit and the likelihood of escaping detection. Penalty standards should, in addition, specify whether and to what extent the agency will consider other factors such as compensation for harm caused by the violation or the impact of the penalty on the violator's financial condition. In order to reduce the cost of the penalty calculation process and increase the predictability of the sanction, simplifying assumptions about the benefit realized from or the harm caused by illegal activity should be utilized.

2. Agencies should periodically evaluate the continuing effectiveness of their penalty standards. Such evaluations should be based upon the results of compliance surveys and internal audits of agency assessment and mitigation decisions as well as data on the nature and frequency of violations routinely generated by the agency's enforcement program.

3. Agencies should make such standards known to the public to the greatest extent feasible through rulemaking or publication of policy statements. Such an approach is especially desirable where adjudications that produce written decisions are rare.

4. Agencies should collect and index those written decisions made in response to mitigation requests or after agency assessment hearings, and make such decisions available to the public except to the extent that their disclosure is prohibited by law. Whenever a respondent cites a previous written decision as a precedent for the agency to follow in the respondent's case, the agency should either do so, distinguish the two cases, or explain its reasons for not following the prior decision.

B. Initial Assessment of Penalties.

1. Agencies should give adequate written notice to the respondent of the factual and legal basis for, and amount of, the penalty assessment.

2. Agencies should not mechanically assess variable civil money penalties at the statutory maximum if reliable evidence in their possession indicates the presence of mitigating factors. Nor, if they possess such evidence, should agencies assess at the statutory level fixed penalties which are subject to an express administrative "mitigation" authority.

3. The greater the degree to which an agency decentralizes its penalty assessment authority, the more it should structure the exercise of that authority by the use of highly specific standards. Agencies should not ordinarily delegate discretionary authority to assess civil money penalties to investigative personnel unless the delay inherent in review by an independent assessment official would materially impair the effectiveness of the enforcement process.

Respondents in civil money penalty cases have a right to a trial-type hearing at either the administrative or judicial level. It is nevertheless desirable that agencies establish fair and economical procedures whereby respondents may informally contest the initial assessment of civil penalties without the necessity

of going forward to trial-type hearings. These procedures should be governed by the following principles:

1. Agencies should provide the respondent with a right to reply in writing to a penalty claim.

2. Agency staff should not refuse a reasonable request to discuss a penalty claim orally. But an informal Conference need not be built into the process except in those categories of cases where the use of written communications is likely to prove inadequate because of such factors as the unsophistication of violators or the prevalence of factual disputes.

3. Agencies should consider providing an opportunity for administrative review of a decision denying a request for mitigation.

4. Agency decisions on mitigation requests should be in writing and should be accompanied by a brief indication of the grounds for the decision.

5. In regulatory programs typically involving the imposition of small penalties, agencies may appropriately rely most heavily on readily ascertainable standards of liability, fixed schedules of prima facie penalty amounts for the most common types of categories of violations, and highly objective inspection procedures. Opportunity for mitigation should be narrowly confined and mitigation requests entertained only if in written form.

6. In regulatory programs typically involving the imposition of large penalties, agencies may appropriately provide an opportunity to a respondent to present a request for mitigation, orally or in writing, request an oral Conference thereon, receive a written decision, and submit a written petition for review of such decision or for compromise of such claim at a higher agency level.

D. Evidentiary Hearings

As expressed in Recommendation 72-6, it is desirable that agencies be given express authority to employ the procedures of adjudication on the record pursuant to the APA, 5 U.S.C. 554-557, for the imposition of civil money penalties. Where its statute does not provide for such procedure but confers upon the agency authority to "assess" or to "mitigate" a penalty, particularly if the agency is required to conduct a "hearing", the agency should consider establishing such procedures by regulation, especially where by doing so a de novo proceeding upon judicial review could be avoided. Where such a hearing procedure has in fact been observed by the agency, and the statute does not provide for de novo judicial proceedings, the court should ordinarily utilize a limited scope of review of such agency action imposing civil money penalties.

(44 Fed.Reg. 38824, July 3, 1979)

E. Conference Recommendation 72-6

1 CFR §305.72-6. Civil Money Penalties as a Sanction (Recommendation 72-6).

(a) federal administrative agencies enforce many statutory provisions and administrative regulations for violation of which fixed or variable civil money penalties may be imposed.[272] During Fiscal 1971, seven executive departments and thirteen independent agencies collected well in excess of $10 million, in over 15,000 cases; all evidence points to a doubling or tripling dollar magnitude and substantially increasing caseload within the next few years.

(b) Increased use of civil money penalties is an important and salutary trend. When civil money penalties are not available, agency administrators often voice frustration at having to render harsh "all-or-nothing decisions" (e.g., in license revocation proceedings), sometimes adversely affecting innocent third parties, in cases in which enforcement purposes could better be served by a more precise measurement of culpability and a more flexible response. In many areas of increased concern (e.g., health and safety, the environment, consumer protection) availability of civil money penalties might significantly enhance an agency's ability to achieve its statutory goals.

(c) In developing a range of sanctions adequate to meet enforcement needs, Congress and agencies must often determine whether a "criminal fine" or a "civil money penalty", or both, should be applied to a given regulatory offense. The choice they make has large consequences. Criminal penalties expose an offender to the disgrace and disabilities associated with "convictions"; they require special procedural and other protections; and they can not be imposed administratively. These factors make it appropriate to consider whether criminal sanctions should not be supplemented or replaced by civil money penalties.

(d) Under most money penalty statutes, the penalty cannot be imposed until the agency has succeeded in a de novo adjudication in federal district court, whether or not an administrative proceeding has been held

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[272] For purposes of this recommendation, no distinction has been drawn between sanctions denominated "money penalties" and sanctions denominated "forfeitures" (e.g., in FCC legislation) and "fines" (e.g., in Postal Service legislation) so long as: (i) The sanction is classified as civil and (ii) money is, in fact, subject to collection by an agency or a court. Excluded are situations involving penalties or liquidated damages assessed pursuant to the terms of a government contract or sums withheld or recovered for failure to comply with the terms of a government grant.

previously. The already critical overburdening of the courts argues against flooding them with controversies of this type, which generally have small precedential significance.

(e) Because of such factors as considerations of equity, mitigating circumstances, and the substantial time, effort and expertise such litigation often requires in cases usually involving relatively small sums (an average of less than $1,000 per case), agencies settle well over 90 percent of their cases by means of compromise, remission, or mitigation. Settlements are not wrong per se, but the quality of the settlements under the present system is a matter of concern. Regulatory needs are sometimes sacrificed for what is collectible. On the other hand, those accused sometimes charge that they are being denied procedural protections and an impartial forum and that they are often forced to acquiesce in unfair settlements because of the lack of a prompt and economical procedure for judicial resolution. Moreover, several agency administrators warn that some of the worst offenders, who will not settle and cannot feasibly be brought to trial, are escaping penalties altogether.

This recommendation is intended to meet the problems posed above.

Recommendation

D. Desirability of Civil Money Penalties as a Sanction.

1. Federal administrative agencies should evaluate the benefits which may be derived from the use (or increased use) of civil money penalties as a sanction. Such penalties should not be adopted as a means of supplanting or curtailing other private or public civil remedies.
2. Civil 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.
3. Each federal agency which administers laws that provide for criminal sanctions should review its experience with such sanctions to determine whether authorizing civil money penalties as another or substitute sanction would be in the public interest. Such authority for civil money penalties would be particularly appropriate, and generally should be sought, where offending behavior is not of a type readily recognizable as likely to warrant imprisonment.

B. Adjudication of Civil Money Penalty Cases in an Administrative Imposition System. 1. In some circumstances it is desirable to commit the imposition of

civil money penalties to agencies themselves, without subjecting agency determinations to de novo judicial review. Agencies should consider asking Congress to grant them such authority.[273]

Factors whose presence tends to commend such a course with respect to a particular penalty provision include the following:

(a) A large volume of cases likely to be processed annually;
(b) The availability to the agency of more potent sanctions with the resulting likelihood that civil money penalties will be used to moderate an otherwise too harsh response;
(c) The importance to the enforcement scheme of speedy adjudications;
(d) The need for specialized knowledge and agency expertise in the resolution of disputed issues;
(e) The relative rarity of issues of law (e.g., statutory interpretation) which require judicial resolution;
(f) The importance of greater consistency of outcome (particularly as to the penalties imposed) which could result from agency, as opposed to district court, adjudications; and
(g) The likelihood that an agency (or a group of agencies in combination) will establish an impartial forum in which cases can be efficiently and fairly decided.

Considerations such as those set forth above should be weighed heavily in favor of administrative imposition when the usual monetary penalty for an offense or a related series of offenses would be relatively small, and should normally be decisive when the penalty would be unlikely to exceed $5,000. However, the benefits to be derived from civil money penalties, and the administrative imposition thereof, should also be considered when the penalties may be relatively large.

2. An administrative imposition system should provide:
   (a) For an adjudication on the record pursuant to the Administrative Procedure Act, 5 U.S.C. 554-57 (1970), at the option of the alleged offender or the agency;
   (b) For finality of an agency's decision unless appealed within a specified period of time;
   (c) That, if the person on whom the penalty is imposed appeals, an agency's decision will be reviewed in United States Courts of Appeals

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[273] Due to the special procedures and status of the United States Tax Court, the rationale for administrative imposition may have only limited applicability to civil money penalties administered by the Internal Revenue Service.

under the substantial evidence rule in accordance with the Administrative Procedure Act, 5 U.S.C. 706(e);

(d) That issues made final by reason of (b) above and issues which were raised, or might have been raised, in a proceeding for review under (c) above may not be raised as a defense to a suit by the United States for collection of the penalty. Agencies should adopt rules of practice which will enable just, inexpensive and speedy determinations. They should provide procedures for settlement by means of remission, mitigation or compromise.