

REPORT IN SUPPORT OF RECOMMENDATION 72-6

AN EVALUATION OF THE PRESENT AND POTENTIAL
USE OF CIVIL MONEY PENALTIES AS A SANCTION BY
FEDERAL ADMINISTRATIVE AGENCIES

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I. BACKGROUND TO STUDY, STATEMENT OF THE PROBLEMS DISCUSSED,
AND SUMMARY OF CONCLUSIONS

Within what has been described as the "richly varied arsenal of administrative sanctions"⁶ available to federal agencies, an old penalty technique is achieving new prominence today. Congress and federal administrative agencies have apparently concluded that civil money penalties provide a most effective sanction for dealing with many of the regulatory offenses of our day.

Applicable legislative histories, and the lack of uniformity in terminology (terms like "money penalty," "forfeiture" and "fine" are used interchangeably⁷), procedures, and modes of imposition, indicate that the increased use of civil money penalties has resulted from a series of relatively unstudied, *ad hoc* legislative acts. There has been little information available about the nature and scope of the use of civil money penalties by federal administrative agencies.⁸

This report contains the first broad survey of what is being done in the money penalties field.⁹ Information was obtained in a number of

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[Footnotes 1-5 have been deleted.]

⁶McKay, *Sanctions in Motion: The Administrative Process*, 49 Iowa L. Rev. 441, 442 (1964) [hereinafter cited as McKay].

⁷See note 1 of the recommendation annexed to this report.

⁸See e.g., *Hearings on H.R. 755 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., ser. 8, pt. 1, at 158-61, 173-78 (1971).

⁹Professor Walter Gellhorn described some of the uses made of money penalties by federal agencies but, as has been true of all other material published in this area, he relied principally on court cases; there was need of a more comprehensive survey of the field. See Gellhorn, *Administrative Prescription and Imposition of Penalties*, 1970 Wash. U. L. Q. 265 [hereinafter cited as Gellhorn]; Murphy, *Money Penalties—An Administrative Sword of Damocles*, 2 Santa Clara Lawyer 113 (1962); Nelson, *Administrative Blackmail: The Remission of Penalties*, 4 West Pol. Q. 610 (1951).

ways. A questionnaire was distributed to each of the eleven executive departments, two offices of the Executive Office of the President, and twenty-one independent agencies; where necessary, follow-up telephone conferences and interviews were held.¹⁰

In order to evaluate the fairness and effectiveness of the present system, and to appraise the uses which could be made of new (or expanded) money penalty powers, about sixty-five interviews were held.¹¹ In evaluating the present system, case studies were made of the practices of the FAA and FCC. In order to gauge the potential for new or expanded use of civil money penalties—and the advantages of administrative imposition—interviews were conducted with representatives of the CAB, FAA, FCC, FTC, Department of Labor, NTSB and SEC.¹² A case study was also made of the use of civil money penalties by the Department of Insurance of the State of New York; the Department has imposed money penalties for a number of years, by administrative action, under a broad and sophisticated statutory scheme. Additional interviews were held with representatives of the Department of Justice, private members of the aviation bar, and other interested parties.

The material now presented should lessen the confusion that has permeated discussions about this field. It also illuminates a number of significant trends which should be taken into account in formulating national legislative policy. Most notable is a trend towards the increased use of civil money penalties; this is taking place at an accelerating pace. In 1967, for example, five executive departments and six independent agencies collected \$5,857,220 through the imposition of civil money penalties. By 1971, seven executive departments and eight independent agencies collected \$10,463,622 in 15,608 cases. All evidence points to a doubling or tripling dollar magnitude and a substantially increasing caseload within the next few years.¹³

Hunters, farmers, fishermen, coal miners, and many other individuals, as well as railroads, airlines, broadcasters, motor carriers and a diverse assortment of other businesses are now subject to fixed or variable civil money penalties. Numerous separate offenses are involved.

¹⁰ See p. 1 and notes 1-6 in Appendix A.

¹¹ The great majority of interviews were held during the summer of 1971. A number of interviews did, however, occur during the fall of 1971 and the spring of 1972. Notes as to each interview are in the author's file. In accordance with assurances given at the time of each interview (in order to maximize the ease, candor and completeness with which disclosures would be made), the names of those interviewed have not been used in this report.

¹² Abbreviations for the names of agencies have been used throughout this report. The full name of each agency so identified, as well as its executive department affiliation, if any, is set forth in Chart I of Appendix A.

¹³ The figures in text do not include IRS penalty assessments or extraordinary cases. See generally Section II *infra*.

This increased use of civil money penalties constitutes an important and salutary trend. Agency administrators indicate that there is often demonstrable need for a wider range of sanctioning power.¹⁴ Civil money penalties provide an ideally flexible sanctioning tool. In their absence, agency administrators often voice frustration at having to render harsh "all or nothing decisions" (*e.g.*, in license revocation proceedings) when enforcement needs would best be served by a more precise measurement of culpability and a more flexible response.

Part A of the recommendation annexed to this report states that civil money penalties "are often particularly valuable and generally should be sought" in situations in which an agency has a more potent sanction available. In addition to establishing this priority, it focuses upon the advantages of civil money penalties and suggests that agencies evaluate the benefits to be derived from the use (or increased use) of these penalties on a pragmatic, case-by-case basis.¹⁵

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.¹⁶ It is well settled that in most instances both penalties may be imposed for the same offensive behavior,¹⁷ but little else in this area provides a basis for definitive analysis. The typical opinion dealing with classification concludes that a penalty is "remedial" and therefore civil, or "a punishment" and therefore criminal, and contains only the scantiest reasoning to justify what has been done.¹⁸ Justice Frankfurter expressed understandable dismay at the "dialectical subtleties" involved in distinguishing criminal from civil penalties.¹⁹

Nevertheless, the choice made by Congress and agencies has large consequences. Criminal penalties open an offender to the disgrace and other disabilities associated with "conviction," and require that a defendant be afforded the procedural and other protections (*e.g.*, a more stringent burden of proof) surrounding criminal prosecutions. Of great importance is the fact that an administrative imposition scheme could not be implemented for criminal penalties. According to Professor Davis, "[o]ne kind of power of adjudication which clearly cannot be conferred upon an administrative agency is the power to determine guilt or innocence in criminal cases."²⁰

¹⁴ See Section III A *infra*.

¹⁵ *Cf.* Gellhorn 285.

¹⁶ See Section III D *infra*.

¹⁷ *Helvering v. Mitchell*, 303 U.S. 391 (1938); see Gellhorn 285.

¹⁸ See generally cases discussed in Section III C *infra*.

¹⁹ *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (1943) (concurring opinion).

²⁰ 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 2.13 at 133 (1958) [hereinafter cited as DAVIS]; see McKay 443-45.

Therefore, the recommendation asks each federal agency which administers laws providing for criminal sanctions to determine whether supplementation by civil money penalties would be in the public interest.

For the reasons previously stated, the increased use of civil money penalties constitutes a salutary trend, but investigation reveals that federal agencies have not yet devised an imposition system capable of efficiently, effectively and fairly handling penalty cases. Indeed, increased use will undoubtedly place new burdens on a system already overly subject to strain.

The vast majority of agencies must be successful in a *de novo* adjudication in federal district court (whether or not an administrative proceeding has previously occurred) before a civil money penalty may be imposed.²¹ There are probably only four statutory schemes providing for true administrative imposition.²²

Although recognizing that trials *de novo* would be wasteful, to say the least, commentators such as Professor Jaffe defend the present system because,

"it may be possible thus to dispose of the great mass of cases with relative informality if, as is likely, trials *de novo* are seldom sought."²³

Professor Jaffe is correct about trials *de novo* not being sought. Agencies now settle well over 90% of cases by means of a compromise, remission or mitigation device. Settlements are made because civil penalty cases generally involve relatively small amounts of money (an average of less than \$1,000 per case), and most adjudications would require substantial inputs of time and effort, familiarity with specialized vocabularies and other matters of expertise, and meaningful litigation expense.

Settlements are not wrong *per se*. But the quality of the settlements being made under the present money penalties system is of real concern. Those who suggest that it "is probably of little significance" which system is used are surprisingly far from the mark.²⁴ The most significant finding in this report is that settlements reached under the present system are, as a rule, substantially inferior to those that would occur under an administrative imposition scheme.

²¹ For present purposes, no distinction need be drawn between cases in which an agency (or, more likely, the Department of Justice acting for an agency) goes directly to court and those cases in which an agency conducts proceedings which are then subject to *de novo* judicial review.

²² See Chart I in Appendix A.

²³ L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 99 (1965) [hereinafter cited as JAFFE]; see Nelson, *supra* note 9 at 619.

²⁴ JAFFE 114; see ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, FINAL REPORT 174-75 (1941) [hereinafter cited as ATTORNEY GENERAL'S COMMITTEE].

There is evidence that under the present system regulatory needs, at times, are being sacrificed for what is collectable—*i.e.*, agencies are settling for what the traffic will bear. Agency administrators suggest that unwise settlements are being made principally because “the Department of Justice presents an immovable roadblock; we cannot get our cases into court.”²⁵ Manifestly, a knowledgeable defendant may have undue leverage and may ultimately be able to force an unwise settlement (from the standpoint of the public interest) as a result of his situation.

But if the Department of Justice has been an “immovable road block,” it has been so because it has had no other choice. Sound administrative practice requires it to conserve scant resources and to provide a shield for the courts. A balanced sense of priorities, for example, dictates against requiring judges, unfamiliar with aviation, to immerse themselves in the intricacies of flight or airworthiness rules in cases which usually involve penalties of not more than \$1,000. To borrow the words of a colleague “we shall be self-defeatingly quixotic if we try to devise a system of Rolls Royce judicial treatment to deliver perfect justice” in each of our money penalties cases.²⁶

The present system may also be allowing some of the worst offenders (who will not settle and cannot feasibly be brought to trial) to get away. Even when cases are carried forward, serious enforcement problems are often created by excessive delay. The FAA, for example, recently protested to the Department of Justice about cases involving “the question of safety in air transportation,” in which “processing . . . is of great importance,” which were being subjected to “excessive delays.”²⁷

From the standpoint of alleged offenders, the present system is unsatisfactory because, as a practical matter, they are often denied procedural protections and an impartial forum, and may be forced to acquiesce in unfair settlements because of the lack of a prompt and economical procedure for judicial resolution. When, for example, the Bureau of Customs seizes \$1,900 worth of goods can an alleged offender—no matter how much he believes in his case—afford to litigate in federal district court rather than settle for \$1,200?

²⁵ As to the relatively few agencies that may represent themselves in court (as opposed to those required to go through the Department of Justice), see D. SCHWARTZ & S. B. JACOBY, *GOVERNMENT LITIGATION: CASES AND NOTES* 26-27 (1963). Since 1963 other agencies have obtained such power and a number of agencies (*e.g.*, the FAA and FTC) are seeking such power now. The Department of Justice—urging the need for centralization, coordination and the establishment of litigation priorities—has generally opposed giving agencies direct access to the courts.

²⁶ Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 Mich. L. Rev. 797, 799 (1971); see, *e.g.*, Gellhorn 280; Hufstедler, *supra* note 3.

²⁷ Letter from Charles E. Anderson, Acting General Counsel of the FAA, to Richard Kleindienst, July 22, 1971.

Of course, many of the settlements offered by agencies are perfectly fair. But there is every reason to provide an impartial forum and procedural protections for those few who wish to question a proposed imposition. The possibilities for arbitrariness, lack of consistency, and discriminatory exercises of authority are unnecessarily accentuated under the present system.

Especially where relatively small sums are involved, the realistic choice is either (i) to provide that *very small percentage* of alleged offenders who wish to litigate (or the agency itself in an equally small number of instances) an opportunity for speedy and inexpensive adjudications under an administrative imposition scheme, or (ii) to deny (on the basis of the theoretical availability of *de novo* judicial review) both sides an impartial forum altogether. For most money penalty cases,²⁸ the opportunity for a speedy and inexpensive adjudication is basic to a just imposition scheme. Factors whose presence tend to commend the imposition of civil money penalties by agencies themselves are set forth in Part B of the recommendation.

The administrative imposition system proposed would, at the option of either party, provide for an adjudicative proceeding, on the record, pursuant to Sections 5-8 of the Administrative Procedure Act, 5 U.S.C. §§ 554-57 (1970). Agencies are urged to adopt rules of practice which will maximize the possibility of securing just, inexpensive, and speedy adjudications. An agency's decision would be final unless appealed within a stipulated number of days. If an appeal is taken to a United States Court of Appeals, an agency's decision would be sustained if supported by substantial evidence.

An adjudicative proceeding would, of course, prohibit a commingling of adversarial and decisional functions. It is expected that substantial evidence review will be an ultimate, though seldom used, protection against abuse.²⁹ Procedures for settlement by means of remission, mitigation and compromise would, of course, be retained. Administrative imposition is intended to bring fairer, not necessarily fewer, settlements.

Although a few questionable state cases exist,³⁰ the leading commentators³¹ and a number of Supreme Court decisions³² indicate that an administrative imposition system can surmount constitutional barriers. This report concludes that there are no significant constitu-

²⁸ See Charts II and III in Appendix A and Section V *infra*.

²⁹ See note 17 *infra*.

³⁰ See, e.g., *State ex rel. Lanier v. Vines*, 274 N.C. 486, 164 S.E. 2d 161 (1968); *Tite v. State Tax Comm'n.*, 89 Utah 404, 416-18, 57 P. 2d 734, 740-41 (1936).

³¹ 1 DAVIS §§ 2.12-2.13; JAFFE 109-15; Gellhorn 285.

³² See, e.g., *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Lloyd Sabauo Societa v. Elting*, 287 U.S. 329 (1932); *Elting v. North German Lloyd*, 287 U.S. 324 (1932); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

tional impediments to such a system, even though agencies will, at times, be delegated functions traditionally exercised by Congress or the courts.³³

II. THE RESULTS OF A SURVEY OF WHAT IS BEING DONE IN THE MONEY PENALTIES FIELD

A. *The Wide Array of Offenses for Which Civil Money Penalties May Be Imposed*

In 1964, Dean Robert B. McKay, who had recently finished serving as staff director of the Administrative Conference's Committee on Compliance and Enforcement Proceedings, observed:

"Whether on its merits or for reasons of necessity, the administrative process has carried the day. Government by agency regulation is here to stay. Only the methods, including the sanctions used, are subject to change."³⁴

There is obvious wisdom in this observation. Exhibit I to Appendix A sets forth an "illustrative catalogue" of the wide array of offenses for which civil money penalties may be imposed. For the uninitiated, it contains a surprisingly long and diverse list. Some examples should suffice to provide a "feel" for the breadth of coverage of this old sanction which is newly in vogue today.

Farmers are subject to civil money penalties for marketing cotton, sugar, wheat, peanuts and many other commodities in excess of marketing quotas.³⁵ They may be penalized \$25 to \$500 for violation of the Federal Seed Act³⁶ and \$1,000 for showing or exhibiting "any horse which . . . [they have] reason to believe is sore."³⁷ In all, the Department of Agriculture handled more than 1,357 cases and collected more than \$846,550 in the 1970 fiscal year.³⁸ Similarly, fishermen are subject to civil penalties for violations involving "custody, possession or control" of certain species of fish;³⁹ the National Oceanic and Atmospheric Administration (NOAA) handled 14 cases, involving \$804,893, in the 1970 fiscal year.⁴⁰

Hunters are prohibited from killing or capturing various species of wildlife; a \$5,000 civil penalty may be imposed.⁴¹ Coal mines and places of occupation must operate pursuant to health and safety stand-

³³ See generally Section VI *infra*.

³⁴ McKay 441.

³⁵ See, e.g., 7 U.S.C. §§ 1155, 1314(c)(g), 1340, 1346, 1356, 1359 (1970).

³⁶ 7 U.S.C. § 1596(b) (1970).

³⁷ 15 U.S.C. §§ 1823, 1825 (1970).

³⁸ See Appendix A, Charts II and III *infra*.

³⁹ See, e.g., 16 U.S.C. §§ 957 (1970). See generally Exhibit I to Appendix A *infra*.

⁴⁰ See Appendix A, Charts II and III *infra*.

⁴¹ 18 U.S.C. § 43(c)(1) (1970).

ards or their proprietors may be penalized up to \$10,000 per violation.⁴² A coal miner who violates regulations relating to the "carrying of smoking materials, matches or lighters" is subject to a \$250 civil fine.⁴³ Dealing in empty casks of liquor, with the imported-liquor stamp thereon, "for the purpose of placing domestic distilled spirits therein" subjects the offender to a "penalty of \$200 for each such cask"⁴⁴; the master of a licensed vessel must pay \$20 for failure to file a manifest when entering or leaving a port.⁴⁵ Railroads, airlines, broadcasters, motor carriers and many other businesses are subject to civil money penalties for failure to comply with numerous provisions involving safety, service and health.⁴⁶

Of significance is the fact that the list of offenses for which civil money penalties may be imposed has—at an accelerating pace—continued to grow.

B. Trends in Number of Cases and Dollar Magnitude of Monies Collected

1. Dollar Magnitude of Monies Collected as of the 1971 Fiscal Year

In 1967, a total of \$5,857,220 was collected by federal administrative agencies enforcing civil money penalty provisions. The annual figure jumped to \$9,506,568 by the end of the 1970 fiscal year. A substitution of the corresponding 1970 figure for each agency whose 1971 figure was not available produced a \$10,463,622 figure for the adjusted 1971 fiscal year.⁴⁷

Even this last figure significantly underestimates the amount of money actually received. As Chart III in Appendix A indicates, only partial figures were available for the Department of Agriculture and the Bureau of Customs, and no figures were available for the INS, the IRS and the Office of Domestic Gold and Silver Operations

⁴² See 30 U.S.C. § 819(a)(1) (1970) (as to coal mines); 29 U.S.C. § 666 (1970) (as to places of occupation).

⁴³ 30 U.S.C. § 819(a)(3) (1970).

⁴⁴ 19 U.S.C. § 469 (1970).

⁴⁵ 19 U.S.C. § 292 (1970).

⁴⁶ See generally Exhibit I to Appendix A *infra*.

⁴⁷ See Appendix A, Chart III *infra*. Exhibit I to Appendix A indicates that the size and range of penalties available to federal agencies vary a great deal. Indeed, certain provisions enforced by the IRS, Customs and other agencies have no specified upper limits. Section 6653(b) of the Internal Revenue Code, for example, provides:

"If any part of any underpayment . . . of tax required to be shown on a return is due to fraud, there shall be added to the tax an amount equal to 50 percent of the underpayment."

In *Helvering v. Mitchell*, 303 U.S. 391 (1938), the IRS's penalty assessment of \$364,354.92 was upheld. The FPC, on the other hand, has assessed only one penalty for \$1.15 during the past five years. See The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1398 (1970) (providing for civil penalties of up to \$400,000 for a related series of violations).

(ODGSO). Thus, the \$10,463,622 figure includes only monies reported in response to the survey questionnaire; the figure does not take account of monies not reported (or for partially reported) but actually received.⁴⁸

2. *Projection as to the Dollar Magnitude of Monies Expected To Be Collected in the Years Following Fiscal 1971*

Although the period from 1967 through 1971 shows rapid growth, an even more dramatic increase in the dollar magnitude of monies collected is clearly in sight. Over the past few years Congress (often at the request of an interested agency) has placed more and more emphasis on enforcement by means of civil money penalties and the cumulative impact of this is just beginning to show.

The AEC,⁴⁹ the Bureau of Narcotics and Dangerous Drugs (BNDD),⁵⁰ the Department of Labor⁵¹ and the EPA⁵² have important money penalty provisions which have just been put (or are about to be put) into effect. The Department of Labor, for example, reported that it had collected no civil penalties in fiscal 1970 and that no information was available for fiscal 1971. However, the Occupational Safety and Health Act of 1970 became effective on April 28, 1971, and the Department recently indicated that it had assessed \$512,067 (and collected \$155,047), in 7,450 cases, during the first five months of fiscal 1972.⁵³

The trend is also clear as to other agencies. For example, three new divisions of the Department of Transportation (the Federal Highway

⁴⁸ Inferences may be drawn about the extent of the understatement from the following:

(i) although no information was available as to "penalty cases acted upon by district directors [acting] . . . under their local delegated authority", the Bureau of Customs reported collecting \$3,456,211 in 1971 (see Appendix A, Chart III);

(ii) the INS handled 740 cases, involving penalties that ranged from \$10 to \$5,000 in 1971 (see Appendix A, Chart II and Exhibit I);

(iii) the ODGSO imposes penalties under an open-ended provision (i.e., penalties may equal "twice the value of the gold unlawfully acquired") and actually initiated an action against Investors Overseas Services, Ltd., and its former president Bernard Cornfeld for \$74,894,000 and in December, 1971 (see 166 N.Y.L.J. 106 (1971)); and

(iv) the IRS assessed \$3.2 billion of additional taxes and penalties (these could not be separated) in 1970. See TREASURY, ANNUAL REPORT (1970).

⁴⁹ 42 U.S.C. § 2282(a) (1970) (added to Section 234 of the Atomic Energy Act of 1954, on December 24, 1969) provides for a civil penalty of up to \$5,000 for each violation (with a limit of \$25,000 for any one person within a period of thirty consecutive days) of the licensing provisions of the Act.

⁵⁰ Section 402 of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 842(b) (1970) provides for a civil penalty of up to \$25,000 for unlawful distribution of a controlled substance and similar violations of the Act.

⁵¹ The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (1970), is discussed in Section II C *infra*.

⁵² See Exhibit I to Appendix A *infra* as to the three money penalty provisions enforced by the EPA.

⁵³ Telephone conferences held January 27-28, 1972.

Administration, the Federal Railroad Administration, and the National Highway Traffic Safety Administration) collected \$0 in 1967, \$362,225 in 1970, and \$1,663,197 in 1971.⁵⁴ The IRS and the Department of Justice recently brought 70 civil money penalty cases (calling for penalties of up to \$2,500 per violation) in three busy days under Phase II;⁵⁵ a total of about 200 Phase II cases were filed between January and June, 1972.⁵⁶

The Department of Interior, which enforces the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 800 *et seq.* (1970), reported that it had collected \$493,990 from January, 1971 (when safety standards went into effect) through July 12, 1971. *The Wall Street Journal* reported that when all assessments are paid:

“Actual penalties for all types of violations during the period up to March 31, [1971] probably will . . . come to \$4.5 million.”⁵⁷

Moreover, proposed legislation now before Congress would push the dollar magnitude figure even higher. For example, under legislation that has been approved by the Senate and is now before the House, the FTC, under Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1970), will be able to initiate civil actions, in district court, against any person “engaged in an act or practice which is unfair or deceptive to a consumer” and “obtain a civil penalty of not more than \$10,000 for each such violation.”⁵⁸

The FCC has proposed that it be allowed to take “into account the gravity of the conduct [specified by statute] and the financial condition of the licensee,” and “impose a monetary penalty in an amount not to exceed \$250,000.”⁵⁹ The FCC (as was true of a number of agencies responding to the questionnaire) is also requesting a substantial increase in the size of the penalties now available to it.⁶⁰

In summary, federal administrative agencies reported collecting over \$10 million in fiscal 1971;⁶¹ all evidence points to this dollar magnitude doubling or tripling within the next few years.

3. Trends as to Number of Cases

The number of cases (*i.e.*, individual instances in which the power is used) handled annually by federal administrative agencies has only

⁵⁴ See Appendix A, Chart III *infra*.

⁵⁵ See N.Y. Times, Jan. 23, 1972, § 1 at 1, cols. 1-2.

⁵⁶ See N.Y. Times, June 5, 1972, at 29, col. 1.

⁵⁷ Wall Street Journal, July 28, 1971, at 1, col. 4. The article indicated that:

“Though many of the cases [for which the \$4.5 would be collected] date back before January [1971], some as far as the spring of 1970, penalties in most cases weren't assessed until after the guidelines were drawn up.”

⁵⁸ S. 986, 92d Cong., 1st Sess. § 202 (1971).

⁵⁹ See Proposal B by the FCC for the 92d Congress, 1st Session, adopted April 8, 1971.

⁶⁰ See Proposal A by the FCC for the 92d Congress, 1st Session, adopted April 8, 1971.

⁶¹ As indicated, the \$10,463,622 figure for fiscal 1971 probably significantly underestimates the amount of money actually collected. See Section II B 1 *supra*.

partially followed the dollar magnitude trend. In 1967 15,152 cases were processed; by 1971 (excluding the extraordinary jump in Postal Service cases which occurred⁶²) the number had risen to 15,608. But this relatively insignificant increase is in large part explained by a decline in the number of cases handled by the Coast Guard, which processed 3,794 fewer cases in 1971 than in 1967.⁶³ Most federal agencies have had steadily increasing caseloads over the past few years.⁶⁴

The projections discussed above give every reason to believe that the number of civil money penalty cases handled annually by federal agencies will substantially increase in the next few years. By way of comparison, it should be noted that the entire federal judicial system terminates (by decision or settlement) only about 80,000 civil cases a year.⁶⁵

C. Methods Used To Impose Civil Money Penalties

There has been a great deal of confusion about which, if any, federal agencies have the power to adjudicate under a true administrative imposition scheme. The extent of the confusion is illustrated by testimony given at recent Congressional hearings. At issue was an FMC proposal to amend two shipping acts⁶⁶ to convert criminal penalties to civil penalties;⁶⁷ in the conversion, the size of the penalties (\$1,000 and \$5,000) would not be changed. The statement of the FMC in support of the bill explained:

"The Commission believes that *better administration of the Act will be derived . . . [by] empowering the Commission to determine and adjudicate such penalties. . . .* This would eliminate the necessity of a *de novo* district court penalty suit as is presently required and would enable the Commission to relate the amount of the penalty directly to the nature and circumstances of the violation."⁶⁸ (Italic added.)

Chairman Bentley of the FMC testified:

"*H.R. 755 would bring the Commission's practices into line with those of other Federal agencies.* For instance, similar authority to impose civil

⁶² The Postal Service reportedly handled 2,513 cases in 1967 and 52,734 in 1971. See Appendix A, Chart II *infra*.

⁶³ The Coast Guard is one of the agencies which did not have information available for fiscal 1971, and therefore, the figure used in text is actually that for the adjusted as explained earlier) 1971 fiscal year.

⁶⁴ See Appendix A, Chart II *infra*.

⁶⁵ See *Director of the Administrative Office of the United States Courts, ANNUAL REPORT 107, Table 12 (1970)* (70,172 cases were terminated in district courts in 1967; by 1970 the figure had increased to 80,435); Lumbard, *Trial by Jury and Speedy Justice*, 166 N.Y.L.J. 80 at 1, 4 (1971).

⁶⁶ The Shipping Act of 1916, 46 U.S.C. 801 *et seq.* (1970) and the Intercoastal Shipping Act of 1933, 46 U.S.C. § 844 (1970).

⁶⁷ H.R. 755, 92d Cong., 1st Sess. (1971), has been approved by the House and is now before the Senate; the Senate bill is S. 2138, 92d Cong., 1st Sess. (1970).

⁶⁸ *Hearings on H.R. 755 Before the Subcomm. on Merchant Marine and the House Committee on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., ser. 8, at 155 (1971).

penalties for infractions of law is contained in applicable statutes of other Federal agencies such as the Civil Aeronautics Board, U.S. Coast Guard, the Bureau of Customs, and Immigration and Naturalization Service, et cetera."⁶⁹ (*Italic added.*)

In opposing H.R. 755, F. Conger Fawcett, Esq., representing a number of steamship conferences and their member lines, argued against permitting the FMC to impose civil penalties by administrative action:

"There has arisen in connection with this proposed piece of legislation a bedrock point of dispute between our office and the Federal Maritime Commission. . . . That is the question whether the power sought by the Federal Maritime Commission here comports with similar powers already being routinely exercised by other administrative agencies or bodies. The Federal Maritime Commission adamantly says yes; we say, no.

* * * * *

"What emerges as critically important from all of this is the unimpeachable fact that the legislation your Committee is now considering is *not* routine; is *not* in any sense commonplace or comparable to existing agency powers elsewhere; but would, to the contrary, represent a highly unusual, unprecedented and indeed revolutionary development in administrative law."⁷⁰

Administrative imposition would not represent an "unprecedented" or "revolutionary development," but Mr. Fawcett could have correctly asserted that a grant of such power would not be consonant with most existent regulatory law. The vast majority of federal administrative agencies must be successful in a *de novo* adjudication in a district court (whether or not an administrative proceeding has previously occurred) before a civil money penalty may be imposed.⁷¹ True administrative imposition takes place when an agency's decision is subject to only limited judicial review.

Chart I in Appendix A provides a conservative synthesis (*i.e.*, close questions were resolved by assuming that an agency did not have adjudicative power) of the present state of the law. The agencies indicated, *i.e.*, the Department of Labor and the Occupational Safety and Health Review Commission (OSHRC),⁷² the INS, the Postal Service, and the Federal Home Loan Bank Board (FHLBB),⁷³

⁶⁹ *Id.* at 161.

⁷⁰ F. Conger Fawcett, *Statement on S. 2138 before the Merchant Marine Subcommittee of the Senate Committee on Commerce*, 92d Cong., 1st Sess., at 5, 10-11 (1971).

⁷¹ See note 21 *supra*.

⁷² For present purposes, the Department of Labor and the OSHRC, an independent executive agency established under Section 12 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661 (1970), are treated as one agency since they share responsibility for enforcement (with the OSHRC adjudicating Department of Labor assessments and citations contested by employers) under the Act.

⁷³ The power claimed by the FHLBB has never been tested in the courts. See discussion accompanying Chart I, Appendix A *infra*.

have the power to impose administratively civil money penalties. The INS and the Postal Service have exercised this power for many years.⁷⁴

Thus, probably only four statutory schemes provide for true administrative imposition. Chairman Bentley was correct about the INS having the adjudicative power sought by the FMC, but was incorrect about the other three. Decisions of the CAB, Customs and the Coast Guard are subject to *de novo* judicial review.⁷⁵

III. THE ROLES CIVIL MONEY PENALTIES MAY SENSIBLY PLAY

A. *The Role of Civil Money Penalties When an Agency Already Has a More Potent Sanction Available*

Those concerned about agency sanctions, like military planners, have sometimes only belatedly realized that the capacity for "massive retaliation" (*e.g.*, the capacity to render an economic death sentence by license revocation, or by denials of contracts or grants) should be complemented by the ability to render a more precise (in terms of measuring culpability) and flexible response. Agency administrators indicate that there is often demonstrable need for a wider range of sanctioning power.

At the FCC, for example, numerous "typical licensed operator" cases (as to which the FCC's civil money penalties, denominated "forfeitures," do not apply) were cited to demonstrate that the agency is sometimes forced to sanction too harshly and sometimes, when a sanction is warranted, finds itself unable to act at all. The FCC has asked Congress to broaden its authority because.

". . . extending the forfeiture procedures to licensed operators would provide an administrative alternative to the sometimes unduly harsh penalty of license suspension now authorized in section 303(m). License suspension may be unduly harsh if it denies the offender his customary means of livelihood for the suspension period. License suspension may also cost the offender permanent loss of his job, or of his customers if he operates a mobile radio service maintenance business. The proposed extension of the section 303(b) forfeiture provisions to licensed operators would afford the Commission an effective medium for obtaining compliance by operators, but would not cause the secondary detriments which often stem from license suspension."⁷⁶

⁷⁴ As to the INS see, *e.g.*, *Lloyd Sabauda Societa v. Elting*, 287 U.S. 329 (1932); *Elting v. North German Lloyd*, 287 U.S. 324 (1932); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909). As to the Postal Service, see 39 U.S.C. §§ 5206, 5603 (1970); 49 U.S.C. § 1471 (1970); 39 C.F.R. §§ 927.1-2 (1971); *Allman v. United States*, 131 U.S. 31, 35 (1889); *Great North Ry. v. United States*, 236 F. 433, 443-44 (8th Cir. 1916).

⁷⁵ See Appendix A. Chart I *infra*.

⁷⁶ *Explanation to Proposal A by the FCC for the 92d Congress, 1st Session*, adopted April 8, 1971.

An SEC case, presenting the same problem, has twice found its way to the courts. The SEC issued an order suspending a securities salesman for four months because of his willful violation of "antifraud provisions" of applicable acts. The Sixth Circuit reviewed the order and remanded because the SEC had not explained:

"why the public interest necessitates barring petitioner from the securities business for a period of four months at this time. . . ." ⁷⁷

On remand, the SEC explained:

"We imposed the sanction on Beck with a view to adequately impressing upon him, through the impact of the sanction, the necessity of avoiding a repetition of his specific misconduct and the need for scrupulous propriety in all aspects of his securities activities in the future, as well as with a view to discouraging such misconduct by others in the securities industry." ⁷⁸

The case again came before the Sixth Circuit which reversed because,

"the relationship between the remedy adopted and the stated reasons for its adoption is so tenuous that we deem the order a gross abuse of the Commission's remedial authority." ⁷⁹

Here, there was admitted misconduct, but the Sixth Circuit concluded that the SEC had made too harsh a response. The SEC, however, had no choice. It could either suspend the offender or, in effect, let him go scot free. Recognition of the problem recently led the SEC's Advisory Committee on Enforcement Policies and Practices to recommend:

"The Committee recommends that the Commission give consideration to the desirability and practicability of employing money penalties, or fines, as a sanction in broker-dealer proceedings. We are advised that a study of the potential use of money penalties by federal administrative agencies is currently being made by the Administrative Conference of the United States. Fines are a type of sanction currently being employed in broker-dealer proceedings by the self-regulatory organizations. We believe that the availability of money penalties would provide the Commission with substantially greater flexibility in fashioning a suitable remedy in this type of proceeding." ⁸⁰

⁷⁷ *Beck v. SEC*, 413 F. 2d 832, 833 (6th Cir. 1969).

⁷⁸ *Beck v. SEC*, 430 F. 2d 673, 674 (6th Cir. 1970).

⁷⁹ *Id.* at 675.

⁸⁰ ADVISORY COMMITTEE ON ENFORCEMENT POLICIES AND PRACTICES, REPORT 46 (1972). The Committee was appointed by Chairman William J. Casey on January 27, 1972. Its members were John A. Wells (Chairman), Manuel F. Cohen and Ralph H. Demmler; it reported on June 1, 1972.

A similar problem was noted, and the same solution proposed, by the Attorney General's Committee on Administrative Procedure. The Committee commented as follows about the insufficient range of sanctions available to the Bureau of Marine Inspection and Navigation:

"The only sanction provided by statute for punishing offenses of officers and seamen is the suspension or revocation of licenses and certificates. The Committee, however, has doubt concerning the invariable suitability of this sanction. Undoubtedly suspension or revocation is proper in cases involving incompetency. . . . But many relatively petty offenses—use of offensive language, intoxication off duty, and the like—may have only a remote bearing upon competency and safety; nevertheless, a short suspension may result in the offender's being unable to sail on his scheduled voyage,

Similar considerations prompted the Administrative Conference to recommend the following as to grants-in-aid:

"The federal grantor agency should seek to develop an adequate range of sanctions for insuring compliance with federal standards by grantees that apply for or receive federal financial assistance. The sanction of the total denial or cut-off of federal funds should be retained and used where necessary to obtain compliance, but the agency should have available lesser sanctions that do not result in the prevention or discontinuance of beneficial programs and projects.⁸¹

Civil money penalties, which may be fixed or variable depending upon need, provide an ideally flexible sanctioning tool. Therefore, Part A of the recommendation states that civil money penalties "generally should be sought" to supplement those more potent sanctions available to an agency⁸² whose use may prove: (1) unduly harsh for relatively minor offenses or (2) infeasible because, for example, the offender provides services which cannot be disrupted without serious harm to innocent third parties or the public at large.

Agencies that have used money penalties in this way appear more than satisfied with the results. For example, in 1952, the State of New York adopted civil money penalties as a "desirable method of forcing insurance companies to toe the mark" because,

"revoking their licenses to do business was a sanction so disastrous in its consequences that it could not be used except at the risk of injury to the public at large. Yet some means was needed to make insurance companies mindful of the state's rules. . . ."⁸³

Senior officials of the Department of Insurance of the State of New York have recently declared: (i) money penalties are "mitigating penalties" which "set the arm rather than amputate it"; (ii) "actions against charters or licenses are too devastating to permit their effective employment"; (iii) "money penalties are our preferred sanction and the most effective tool we use"; and (iv) "money penalties affect

thus probably depriving him of his livelihood for a considerable length of time. Under these circumstances, the Committee recommends that the statute be amended to permit, as an alternative to revocation or suspension of certificates, the imposition of [civil] fines. . . ."

ATTORNEY GENERAL'S COMMITTEE 145-46; see *Hearings on H.R. 755 Before the Subcomm. on Merchant Marine and the House Committee on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., ser. 8, at 179 (1971).

⁸¹ Administrative Conference, *Enforcement of Standards in Federal Grant-in-Aid Programs*, Recommendation D (1971).

⁸² As to the range of sanctions available to federal administrative agencies, see 3 DAVIS § 23.07 at 318-23; McKay 441-73.

⁸³ Gellhorn 272.

only the wrongdoer involved and cause no unintended negative ramifications.”⁸⁴

As indicated, because of their affirmative experiences, the FCC and FMC are attempting to expand their money penalty powers.⁸⁵ Administrators at the FAA praise the flexibility afforded by civil money penalties and wisely instruct the agency’s staff that such penalties should be used :

“as the normal sanction for less serious violations and violations deemed to be of a nonoperational nature. . . . Where a company is providing a public service which cannot be interrupted, a civil penalty should be utilized in lieu of certificate action, to avoid the termination of such service. It may also be utilized in other cases where a suspension would manifestly be unfair or unjust by reason of its impact upon the individual.”⁸⁶

Conversely, Hearing Examiners of the National Transportation Safety Board (NTSB), who adjudicate “certificate actions” (*i.e.*, for revocation or suspension) brought by the FAA (the FAA’s money penalty actions go directly to district court for *de novo review*), voiced frustration at having to render “all or nothing decisions” in cases “in which money penalties would allow a far more appropriate response.”⁸⁷

B. Other Roles Civil Money Penalties May Sensibly Play

Civil money penalties may, of course, also be used as an agency’s most potent sanction. No licensing power or broad regulatory scheme need be involved. In many areas of increased concern (*e.g.*, health and

⁸⁴ The interviews were conducted on March 10 and 30, 1971. In 1966, Department of Insurance sought to expand the coverage of its money penalty provisions and argued as follows :

“While Section 5 of the Insurance Law provides that all violations of the Insurance Law are misdemeanors unless designated as felonies, the only civil remedies available to penalize the vast majority of violations are liquidation or rehabilitation in the case of a domestic insurer or revocation of license in the case of a foreign insurer. Because of the extreme nature of these remedies they are unrealistic in relation to the offense and rarely exercised. . . .

“For all practical purposes the Superintendent has no *effective* means to penalize an insurer committing any of a large number of statutory violations. . . . It is essential for the protection of the public that the Department have the power authorized by this bill.”

Department of Insurance *Memorandum as to Bill No. 13* (1966) ; the legislation was subsequently enacted. N.Y. INS. Law § 5 (McKinney Supp. 1971).

⁸⁵ See notes 76 and 80 *supra*.

⁸⁶ FAA, HANDBOOK FOR HANDLING LEGAL ASPECTS OF FAA ENFORCEMENT PROGRAM 8-9 (Supp. 1970).

⁸⁷ Of course, as the range of sanctioning power available to an agency expands, the discretion involved in the application of such power also grows. In establishing a money penalties system, care should be taken to provide standards whenever possible and to minimize opportunities for the “leveraging” of sanctioning power by, for example, an administrator threatening to bring a license revocation proceeding if a favorable money penalty settlement is not made. One approach to meeting this problem is to specify, when possible, minor offenses for which only money penalties may be imposed. See discussion of this point Section V *infra*.

safety, the environment, consumer protection) the availability of civil money penalties (especially, if subject to administrative imposition) might significantly enhance an agency's ability to achieve its statutory goals.

Sage commentators, however, assert caveats to be kept in mind. Professor Jaffe, for example, suggests that "when the revocation power is conferred on an agency, it may be advisable to confer a fining power as well," but in other situations he finds it "a close question whether there is sufficient advantage in conferring the power to fine."⁸⁸ Professor Gellhorn believes:

"The use of administrative sanctions is justifiable mainly in respect of matters already or typically committed to administrative supervision and control (e.g., workmen's compensation, taxation, public utility regulation). Even if possibly valid, the power to impose penalties for antisocial behavior not directly related to an extensive regulatory scheme (e.g., disorderly conduct, sedition, counterfeiting) should not be committed to administrative hands."⁸⁹

But broad formulations of principle are of only limited value here. It is doubtful, for example, that Professor Gellhorn would object if the FTC were granted authority to impose a penalty of up to \$10,000 against those engaged in acts or practices which are unfair or deceptive to consumers.⁹⁰ Indeed, he has urged that violators of housing codes,⁹¹ usually prosecuted under the criminal law, be made subject to civil money penalties imposed by administrative action.⁹² Yet, in both instances, an agency would arguably be dealing with "anti-social behavior" which is related to only a limited regulatory scheme.

Part A of the recommendation recognizes that conceptions of "anti-social behavior" and of appropriate matters for agency regulation depend upon the eye of the beholder and are all too subject to change.⁹³ It, of course, suggests that agencies seek civil money penalties where a more potent sanction is already available, but otherwise no all-encompassing recommendation is made. Instead, Part A refers to the advantages of civil money penalties (most notably, the flexibility and precision with which they may be used), and indicates that agencies

⁸⁸ JAFFE 114.

⁸⁹ GELLHORN 285.

⁹⁰ *Cf.* S. 986, 92d Cong., 1st Sess. § 202 (1971) (providing for a court imposed money penalty).

⁹¹ Professor Gellhorn's reference is to housing codes concerned with "proper construction or maintenance of multi-family housing properties." Gellhorn 277.

⁹² *Id.* at 279.

⁹³ The Mayor of New York City, for example, has "urged that crimes, such as housing offenses, gambling, and prostitution be removed from the criminal courts and handled by administrative agencies." Schwartz, *1970 Survey of New York Law: Administrative Law*, 22 *Syracuse L. Rev.* 147 (1971); see PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 97-107 (1967); cf. Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 *Mich. L. Rev.* 797, 809 (1971). Such a step has already been taken as to traffic offenses in New York City. See Section V *infra*.

should evaluate the benefits to be derived from the use (or increased use) of these penalties on a pragmatic, case-by-case basis.

C. *Limits on the Role Civil Money Penalties May Play*

In implementing civil penalty proposals, there is a line beyond which agencies and Congress may not go. Here, we are concerned with the winding, twisting, all too vague boundary between the criminal and civil law. A frequent challenge to civil penalty provisions is a claim that the designation "civil" is a subterfuge and that a defendant should be afforded the constitutionally mandated procedural and other safeguards provided in the criminal law.⁹⁴

Undoubtedly, there is some contradiction in terms. Nevertheless, it is well settled that monetary "penalties," "forfeitures," and "fines" may be characterized as civil, and cases may be adjudicated under the provisions of the civil law.⁹⁵

*Helvering v. Mitchell*⁹⁶ is the leading case in the field. It involved a prominent banker named Charles E. Mitchell who was accused of fraudulently withholding taxes totaling \$728,709.84. The IRS assessed a \$364,354.92 civil penalty under a provision which read:

"Fraud.—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected and paid . . ." ⁹⁷

Mitchell had previously been acquitted of a criminal charge that he had willfully attempted to defraud the Government. He claimed that the "doctrine of double jeopardy" barred the assessment because "the 50 per centum addition of \$364,354.92 is not a tax, but a criminal penalty intended as punishment for allegedly fraudulent acts."⁹⁸

Justice Brandeis, speaking for the Court, focused on whether the penalty provision "imposes a criminal [or civil] sanction,"⁹⁹ and in holding it "remedial" and "civil" pointed to the following for support:

⁹⁴ See, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Lance Roofing Co. v. Hodgson*, F. Supp. (N.D. Ga. 1972).

⁹⁵ See, e.g., *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909); *Hepner v. United States*, 213 U.S. 103 (1909); *JAFFE* 110 ("Is a proceeding to levy a fine as such criminal, and therefore solely within the jurisdiction of the courts? The answer is clearly 'no' . . ."); *Gellhorn* 273-74; *McKay* 444.

⁹⁶ 303 U.S. 391 (1938).

⁹⁷ *Id.* at 395.

⁹⁸ *Id.* at 398.

⁹⁹ The issue of whether the penalty provision "imposes a criminal sanction" was pivotal because,

"Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense." *Id.* at 399.

(i) "Congress . . . clearly [indicated] that it intended a civil, not a criminal sanction";

(ii) "in spite of their comparative severity," similar sanctions "have been recognized as enforceable by civil proceedings since the original revenue law of 1798";

(iii) a legitimate governmental regulatory or revenue purpose was involved; penalties "are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud"; and

(iv) the sanction was "free of the punitive criminal element."¹

Subsequent cases provide little basis for further analysis. The typical opinion dealing with classification concludes that a penalty is "remedial" and therefore civil, or "a punishment" and therefore criminal, and contains only the scantiest reasoning to justify the result.²

Justice Frankfurter expressed understandable dismay at the "dialectical subtleties" involved in distinguishing criminal from civil penalties,³ and Dean McKay perceptively observed:

"it may sometimes seem that the label of civil or criminal is affixed by the Court after first making its determination as to whether a particular monetary levy is an 'appropriate' or 'inappropriate' exercise of administrative power."⁴

What seems clear is that federal agencies and Congress will often have wide discretion in determining whether a criminal or civil penalty, or both, should be applied to a given regulatory offense. Money penalties designated "civil" by Congress should be beyond serious challenge if they:

- (1) are rationally related to a regulatory (or revenue collecting) scheme;
- (2) do not deal with offenses which are *mala in se* (i.e., homicide, rape, robbery and other crimes which are traditionally and widely recognized outrages and threats to common security)⁵;
- (3) may be expected to have a prophylactic or remedial effect.⁶

This last item is important. It emphasizes that money penalty provisions may permissibly be aimed at preventing disapproved conduct—in this sense, at having a deterrent effect. Exclusive use of the "remedial" label creates needless confusion.⁷ Deterrence is not solely

¹ *Id.* at 399-402.

² See, e.g., *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) 1 N.C. WORKING PAPERS 406; McKay 445.

³ *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 554 (concurring opinion).

⁴ McKay 445.

⁵ See NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 403 (1970) [hereinafter cited as N.C. WORKING PAPERS]; JAFFE 112.

⁶ For a discussion of limitations on the power of Congress and agencies, see notes 111-12 *infra* and accompanying text.

⁷ Compare *Pangburn v. CAB*, 311 F. 2d 349, 354 (1st Cir. 1962) (the court upheld the power to revoke a license for deterrence) with *Beck v. SEC*, 430 F. 2d 673 (6th Cir. 1970) (the court questioned, without deciding, whether the SEC could "impose sanctions such as suspensions in order to deter others in the securities industry as a class").

a value of the criminal law, but has long played a role in civil law too (*e.g.*, treble damages in antitrust and punitive damages in tort law).

In analyzing *Helvering v. Mitchell*, Professor Gellhorn noted:

"The explanation that penalties are reimbursement for investigative expenses and losses caused by the taxpayer's fraud, seems far-fetched, since the amount of the penalty is in no way related to the amount of the Government's costs. *More realistically, heavy penalties are imposed so that the fear of loss will deter would-be defrauders of the Public.*"⁸ (Emphasis added.)

The Supreme Court has recognized and approved the use of civil money penalties to deter the conduct of others.⁹ Agencies, in formulating money penalty proposals, may properly keep this purpose in mind.

This result (*i.e.*, the imposition of money penalties, for regulatory offenses, without an alleged offender being afforded to safeguards surrounding criminal prosecutions) may be justified on the following grounds:

(i) only money is at stake;¹⁰

(ii) civil penalties for "malum prohibitum" offenses do not open an alleged offender to the disgrace and other disabilities associated with criminal conviction; and

(iii) at times, the penalty may indeed roughly approximate a proportionate reimbursement for monies lost (or damages suffered) by the Government and/or for the cost of the enforcement system.¹¹

History, precedent, judicial willingness to defer to Congressional judgments, and a judge's pragmatic sense of when the strictures of the criminal law need not be applied, have also been important in shaping past decisions.

It should be noted that under this view Congress and agencies are given broad discretion to fashion effective money penalty provisions, but this does not mean that their powers are *carte blanche*. Long established civil review doctrines such as "abuse of discretion" and "ultra vires," and constitutional guarantees against arbitrary exercises of power under the due process clause, provide courts with more than sufficient authority to invalidate the enactment, or forbid imposition, of monetary sanctions that are clearly more drastic than necessary to ac-

⁸ Gellhorn 273-74 n. 21.

⁹ See, *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 550-51 (1943); *cf. Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 (1972); Carrington, *Civilizing University Discipline*, 69 Mich. L. Rev. 393, 410 (1971).

¹⁰ See MODEL PENAL CODE § 1.04 (Proposed Official Draft) and § 1.05 at 8-9, Comment (Tent. Draft No. 2); *cf. Argersinger v. Hamlin*, 92 S. Ct. 2006, 2012-14 (1972) (counsel must be afforded only "where loss of liberty," as opposed to a fine, is involved).

¹¹ See generally 1N.C. WORKING PAPERS 406; Section VI *infra*.

comply proper regulatory goals.¹² As the Supreme Court put it in *Lloyd Sabaudo Societa v. Elting*, a leading money penalties case :

"It follows that as the fines are not invalid, however imposed, because unreasonable or confiscatory in amount, which is conceded, Congress may choose the administrative rather than the judicial method of imposing them."¹³

The caveat as to "unreasonable or confiscatory in amount" provides a salutary restraint against potential abuse of money penalty power. This approach vitiates what might otherwise be a perceived need to protect against the arbitrariness of an undesirable provision by improperly pigeonholing it under the criminal law.

D. *Supplementation of Criminal Sanctions by Civil Money Penalties*

The decision to select criminal sanctions or civil penalties, or both, is of consequence.¹⁴ Criminal penalties open an offender to the disgrace and other disabilities associated with "conviction." In this regard, the National Commission on Reform of Federal Criminal Laws recently observed :

"The great increase of statutory and administrative regulation commanding affirmative acts or forbidding behavior not condemned by generally recognized ethical standards emphasizes the need for discrimination in the use of the criminal law to enforce such regulation. Use of penal sanctions to enforce regulation involves substantial risk that a person may be subjected to conviction, disgrace, and punishment although he did not know that his conduct was wrongful."¹⁵

Moreover, the increased demands of procedural aspects of due process, the higher standards of proof, the requirements as to appointment of counsel, and other safeguards surrounding criminal prosecutions indicate that agencies assume substantial (often unconsidered) additional burdens when they decide to sanction solely under the criminal law.

Of great importance for present purposes is the fact that an administrative imposition scheme could not be implemented for criminal penalties. As Professor Davis put it, "[o]ne kind of power of adjudication

¹² See, e.g., JAFFE 266-73 and cases cited therein.

¹³ 287 U.S. 329, 335 (1932).

¹⁴ It is well settled that both civil and criminal penalties may be imposed for the same offensive behavior. See, e.g., *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Helvering v. Mitchell*, 303 U.S. 391 (1938).

In this regard, Professor Gellhorn has advised :

"In the present state of the law, confusion will probably be avoided if conduct which is to be subject to administrative penalties is not also denounced as criminal and subject to the sanctions of the criminal law, but no really persuasive reason argues against legislative prescription of a whole arsenal of sanctions, to be used cumulatively or alternatively as the case may be . . ." Gellhorn 285

¹⁵ NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 75 (1971).

which clearly cannot be conferred upon an administrative agency is the power to determine guilt or innocence in criminal cases."¹⁶

Federal administrative agencies should prefer civil sanctions to criminal sanctions as a means of securing compliance with statutory provisions or administrative regulations. The approach suggested is that the criminal law should be used selectively and discriminatingly to deal with only the most serious regulatory offenses or with offenses as to which other sanctions have failed. In almost all other instances, civil sanctions (*e.g.*, license revocations, money penalties, injunctions) should carry the brunt of the regulatory job. This approach was recommended by the National Commission on Reform of Federal Criminal Laws¹⁷ and is in accord with virtually all serious comment on this aspect of the law.¹⁸

A burgeoning number of commentaries have focused on the disadvantages inherent in the overcriminalization of the law.¹⁹ Interviews indicate that many agency administrators now accept the validity of such views. Criminal enforcement of agency regulations has often proven costly and ineffective, created undesirably wide areas of discretion, unnecessarily stigmatized defendants who were in no sense morally reprehensible, and generally, interfered with the operation of the criminal law. In testifying in favor of H.R. 755 (which would convert criminal penalties to civil penalties),²⁰ Chairman Bentley and General Counsel Pimper of the FMC made the following points:

"We feel that if the fine is stiff enough, and if we go after them and we watch them, as we could do under the suggested changes, that this will be a greater deterrent, and they are not going to be prone to proceed to violate the law.

* * * * *

"Although the misdemeanor sections suggest more serious offenses than those sections that are civil, our regulatory efforts are actually more impotent in the former. In criminal proceedings the burden of proof is greater, often causing added delays in correcting a problem that could be handled more promptly and effectively under less stringent civil procedures."²¹

¹⁶ 1 DAVIS § 2.13 at 133 and cases cited therein; McKay 443-45.

¹⁷ NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT 75-76 (1971).

¹⁸ See, *e.g.*, MODEL PENAL CODE § 1.04 (Proposed Official Draft) and § 1.05 at 8-9, Comment (Tent. Draft No. 2); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 97-107 (1967); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 354-63 (1968); Kadish, *The Crisis of Overcriminalization*, 374 ANNALS 157 (1967); Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. Chi. L. Rev. 423 (1963).

¹⁹ *Id.*

²⁰ See notes 68-70 *supra* and accompanying discussion in text.

²¹ *Hearings on H.R. 755 Before the Subcomm. on Merchant Marine and the House Committee on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., ser. 8, at 160, 162 (1971).

"Mr. Pimper. . . . The 1916 act has been on the books since 1916, that is 54 or 55 years. I, frankly, know of no one who has paid anything other than a fine. I know of nobody that has ever—Where anybody has suggested that he be imprisoned."²²

In similar vein, Professor Herbert L. Packer has observed:

"Where economic gain is the motive for the infraction and where the ability to impose significant economic deprivation on the offender exists, it may well be questioned whether the criminal sanction's contribution offers value equivalent to cost. To impose criminal standards of procedure and criminal criteria of proof for the end result of nothing more than a financial exaction may well be to pay a higher social cost than is necessary. Indeed, the conventional monetary fine structure of the criminal sanction may limit the deprivation far beyond what would be possible with a more flexible public or private damage action. . . . The problem may well be to devise sanctions that are not overly severe. Monetary exactions are presumably not too severe. . . ."²³

It is clear that Congress and agencies, in many instances, have not proceeded in an orderly or rational fashion in deciding to enforce statutory provisions or administrative regulations solely by the use of criminal penalties. Unfortunately, this problem has attracted little task force or scholarly attention.²⁴

Part A3 of the recommendation asks each federal agency which administers laws that provide for criminal sanctions to review its experience with such sanctions to determine whether authorizing civil money penalties as another sanction would be in the public interest.²⁵ 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.

Indeed, when a regulatory offense may properly be classified as civil, paper prohibitions which falsely threaten imprisonment make little sense. Such prohibitions should generally be repealed because they tend to create cynicism and indifference in those who are asked to enforce them and in those to whom they are addressed. Discriminatory enforcement becomes a particular danger. Most importantly, where civil money penalties are an available alternative, criminal cases which invariably end in a fine (and not imprisonment) are an expensive and inefficient exercise in futility, and needlessly debase what should be the law's most potent sanctioning tool. As Dean Pound observed many years ago:

²² *Id.* at 167.

²³ H. PACKER, *supra* note 117, at 361-62.

²⁴ See Kadish, *Some Observations on the Use of Criminal Sanctions in Enforcing Economic Regulations*, 30 U. Chi. L. Rev. 423, 424, 449 (1963).

²⁵ The Administrative Conference would, of course, work with interested agencies in making the contemplated review.

"However impressive the state-declared ideal may be to the contemplative observer, the spectacle of statutory precepts with penal sanctions, which are not and perhaps are not intended to be put in force in practice, casts doubts upon the whole penal code and educates in disrespect for law more than the high pronouncement can educate for virtue."²⁶

Of course, agencies—even when thinking in terms of conversion—should retain criminal sanctions in appropriate circumstances. For example, criminal sanctions should be retained where willful violation of a regulatory provision would manifest disregard for the health and safety of others, or where repeated, willful violation occur.²⁷

IV. AN EVALUATION OF THE PRESENT CIVIL MONEY PENALTIES SYSTEM

A. *An Analysis of the Settlement Process*

As previously indicated, the vast majority of federal agencies must be successful in a *de novo* adjudication in federal district court before a civil money penalty may be imposed.²⁸ Although this would appear to create an important role for the courts, in practice the opposite has been true. Agencies now settle well over 90% of cases by means of a compromise, remission or mitigation device.²⁹

The process used at the FAA aptly illustrates how the present system works. Section 901(a)(1) of the Federal Aviation Act³⁰ provides for the imposition of a civil penalty, "not to exceed \$1,000" per violation, against any person who violates certain provisions of the Act or any rule, regulation or order issued pursuant thereto. Section 901(a)(2) provides that "any such civil penalty may be compromised."³¹

Possible violations are investigated by the Flight Standards Service (FSS) of the FAA, which gives an alleged offender a chance to explain a questionable occurrence. If imposition of a sanction is thought desirable, a representative of the FSS and an FAA attorney determine the type and scope of the sanction to be imposed. Should a money

²⁶ R. POUND, CRIMINAL JUSTICE IN AMERICA 67 (1930).

²⁷ See note 113 *supra*.

²⁸ See Section II C *supra*.

²⁹ Many agencies compromise, remit or mitigate the payment of money penalties pursuant to statutory authority granted specifically to them. This is true, for example, of the FAA, the NHTSA, the Department of Labor and the IRS. Other agencies (*e.g.*, the Department of Agriculture, the FMC and ICC) may compromise money penalty claims pursuant to the terms of the Federal Claims Collection Act of 1966, 31 U.S.C. §§ 951-53 (1970). However, compromises under the Act may only cover claims "that do not exceed \$20,000." 31 U.S.C. § 952(b) (1970) See generally Appendix A, Chart I and accompanying text *infra*. For present purposes, no distinction need be drawn as to the uses of the various devices, and the terms "compromise", "remission" and "mitigation" will often by used interchangeably.

³⁰ 49 U.S.C. § 1471(a)(1) (1970).

³¹ 49 U.S.C. § 1471(a)(2) (1970).

penalty be the sanction selected (as opposed, for example, to an action for certificate revocation), a "civil penalty letter" is prepared. The letter advises the aviator (airline or other aviation personnel) of the alleged violation and typically concludes:

"In determining an appropriate sanction, we have taken into consideration the comments submitted in your letter to use . . . as well as information received from. . . . In view of the foregoing, but also considering that safety in air transportation was affected by your violation, we would be willing to accept an offer in compromise of [a dollar figure is inserted] in full settlement of this matter. An explanation of the compromise procedure is enclosed."³²

The explanation indicates that an alleged offender may: (i) "submit the amount suggested," (ii) "submit additional information,"³³ or (iii) have the "matter decided by the United States District Court."³⁴

This process leads to settlements in about 90% of the 750 to 1,000 cases handled by the FAA each year.³⁵ In addition, almost all of the remaining 10% of FAA cases, referred to the Department of Justice, are settled without ever being heard by a court. The Washington Counsel for the Aircraft Owners and Pilots Association estimated that,

"of the thousands of civil penalty cases initiated by the FAA, I would guess that there have been less than half a dozen trials to the Court, and these are usually where the alleged violator is a substantial company engaged in some phase of aeronautics. I can recall no civil penalty case which has gone to trial which involves a general aviation pilot or aircraft owner."³⁶

The FCC uses a process similar to that of the FAA,³⁷ and of the more than 1,000 cases handled by it each year only a handful have ever reached a court.³⁸ This pattern appears to continue across the

³² FAA, HANDBOOK FOR HANDLING LEGAL ASPECTS OF FAA ENFORCEMENT PROGRAM, Appendix 4 at 2 (1968) [hereinafter cited as FAA, HANDBOOK].

³³ The alleged offender is given a choice of submitting the additional information in writing or "in person by requesting an informal conference at the Office of the Area (Regional) Counsel." FAA, HANDBOOK, Appendix 4 at 5.

³⁴ *Id.* at 5.

³⁵ See Appendix A, Chart II *infra*.

³⁶ Address by John S. Yodice, Aircraft Owners and Pilots Association Annual Convention, 1967.

³⁷ Section 503(b) of the Federal Communications Act of 1934, 47 U.S.C. § 503(b) (1970), provides for a "forfeiture" in "a sum not to exceed \$1,000" per violation (or an aggregate of \$10,000) where a broadcast license violates the terms of its license, a provision of the Act, or a regulation promulgated under the Act. Other provisions of the Act call for forfeitures of varying amounts. (See Exhibit I to Appendix A *infra*.) Section 504(b), 47 U.S.C. § 504(b) (1970), provides for settlement by means of a remission or mitigation device. Pursuant to the Act, the FCC sends an alleged violator a "Notice of Apparent Liability" which provides for the following responses: (1) payment, (ii) "a detailed statement of facts and reasons" for cancellation or reduction, and/or (iii) a request for a personal interview with a representative of the Commission. FCC, Form No. 793.

³⁸ According to Professor Gellhorn: "In all the years that the Commission has possessed authority to proceed in court to collect penalties assessed against alleged violators, however, it has had to resort to court enforcement only five times." Gellhorn 283.

board. The CAB, for example, which relies on the same penalty provision as the FAA,³⁹ has settled cases for as much as \$75,000, but has never referred a matter to the Department of Justice or litigated a case in court.⁴⁰

The reasons for this pattern are obvious. Civil penalty cases generally involve relatively small amounts of money (an average of less than \$1,000 per case), and most adjudications would require substantial inputs of time and effort, familiarity with specialized vocabularies and other matters of expertise, and meaningful litigation expense.

Settlements are by no means objectionable *per se*. Indeed, neither our administrative nor our judicial system could function without them.⁴¹ But the quality of the settlements being made under the present system is of real concern.

This conclusion may come as something of a surprise. Professor Jaffe, for example, suggested that:

"Whether the power is to determine liability or, as with the FCC, merely 'apparent liability' [i.e., subject to *de novo* judicial review] is probably of little significance."⁴²

The most significant finding in this report is that settlements reached under the present system are, as a rule, substantially inferior to those that would occur under an administrative imposition system.

B. Critique of the Present System from the Agency Perspective

Interviews with agency administrators indicate that, at times, regulatory needs are being sacrificed for what is collectable—i.e., too often agency administrators are collecting what the traffic will bear.

³⁹ See text accompanying notes 129–30 *supra*.

⁴⁰ The IRS indicates that, "during the last 5 years over 98 per cent of all disputed cases were closed without trial." TREASURY, ANNUAL REPORT 122 (1970).

⁴¹ Of the 80,435 civil cases terminated in federal district courts in the 1970 fiscal year only 9,449 were terminated after a trial. (See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1970 ANNUAL REPORT 107, 127 (1971).) Settlements undoubtedly accounted for a substantial part of the remainder. Of course, of the 15,608 money penalty cases processed by federal agencies in fiscal 1971, well over 90% were settled. If settlements did not occur, there would probably be no way of absorbing the additional cases in a system already "being engulfed by a tidal wave of litigation." Rosenberg, *Devising Procedures that are Civil to Promote Justice that is Civilized*, 69 Mich. L. Rev. 797, 808 (1971); see, e.g., Hufstедler, *New Blocks for Old Pyramids: Reshaping the Judicial System*, 44 S. Cal. L. Rev. 901 (1971); Lumbard, *Trials by Jury and Speedy Justice*, 166 N.Y.L.J. 80 at 1 (1971).

⁴² JAFFE 114; see ATTORNEY GENERAL'S COMMITTEE 146–47, 174–75. As to certain civil aeronautics cases, for example, the Attorney General's committee recommended that civil money penalties be imposed, but "to meet possible constitutional objections," suggested that "provision should be made for review *de novo* of the Board's decisions upon appeal to the Federal district courts." *Id.* at 174–75. Presumably, the Committee foresaw no substantial drawback to *de novo* review.

It should be noted that Professor Jaffe did wisely qualify the statement quoted in text as follows:

"If resort to the judiciary is tried and turns out to be clumsy, inefficient, or ineffective, there is then a good case for administrative penalty powers." JAFFE 114.

At the FCC, for example, four bureaus enforcing money penalty provisions have gone their separate ways. The Common Carrier Bureau and the Broadcasting Bureau serve "Notices of Apparent Liability"⁴³ and, "unless errors or extenuating circumstances are shown," no reductions are made. On the other hand, the Safety and Special Radio Services Bureau and the Field Engineering Bureau invariably reduce an assessment if a request is made. The difference in approach is in large part explained by the fact that the first two bureaus usually have higher penalties at stake, are involved in fewer cases, and have a less diverse constituency which is generally concerned about retaining agency good will. Administrators at the latter two bureaus explain that "we think compliance is best brought about by collecting something, even if a substantially reduced amount."⁴⁴

Professor Dalmas Nelson, after studying the remission of money penalties, concluded: "Apparently the normal mitigated figure, in much of federal administration at least, is low, often very low, compared with the statutory penalty."⁴⁵ Professor Davis has observed:

"In one year the Bureau of Marine Inspection and Navigation (whose power is now exercised by the Coast Guard) imposed 1,140 steamship navigation fines in the aggregate amount of \$493,235, which were mitigated to \$75,621. In a typical month motorboat penalties of \$68,260 were imposed and were mitigated to an aggregate of \$1,201. The FCC has authority to impose for one type of violation a forfeiture of \$500 a day but because of remission or mitigation, no such amounts are collected. The usual CAB penalty of \$1,000 is commonly mitigated to about \$50 and often remitted altogether."⁴⁶

Professor Davis took this as a sign of the magnitude of agency discretion, and optimistically concluded that "maximum penalties are always initially imposed, although Congress could not have intended such penalties to be collected."⁴⁷

Undoubtedly, Professor Davis is correct about many cases. But inter-

⁴³ See generally note 136 *supra*.

⁴⁴ Professor Gellhorn, unaware of these differing approaches to settlement, noted that during 1969 "962 Notices of Apparent Liability were issued; the Commission mitigated the amount of forfeiture originally proposed in 426 of these 932 cases and remitted forfeiture altogether in 220 of the remainder." He understandably concluded:

"These figures show considerable readiness to be attentive to licensees' comments and to weigh additional information that might justify mitigating or remitting liability." Gellhorn 282-83.

Actually, approximately 80% of the FCC's forfeiture cases are handled by the Safety and Special Radio Services Bureau and the Field Engineering Bureau. The remission and mitigation figures reflect not agency "attentiveness", but rather arbitrary reductions based on assumptions as to what the two bureaus thought they could collect.

⁴⁵ Nelson, *Administrative Blackmail: the Remission of Penalties*, 4 West Pol. Q. 610, 614 n. 29 (1951).

⁴⁶ 1 DAVIS § 4.05 at 251-52.

⁴⁷ *Id.* at 252.

views reveal that quite often agencies are accepting settlements that do not comport with enforcement needs because of a belief that they have no other choice. Agency administrators explain that unwise settlements are being made because "the Department of Justice presents an immovable roadblock; we cannot get our cases into court."⁴⁸ There also appears to be a widespread belief that when cases are referred to the Department of Justice the settlements made "are too often counter-productive from the standpoint of an effective enforcement policy."

In short, agencies often feel the need to give ground when obstinate defendants (usually those who understand and can afford to test the system) are involved. The Attorney General's Committee observed:

"One who is content to submit a written application for mitigation or remission is likely to pay a much larger fine than the individual or corporation which sends a representative to Washington to address argument to the officials. It is undeniable that pressures substantially affect the ultimate conclusion."⁴⁹

The advantage of those who can afford to send a representative to Washington (or over whom an agency has little leverage) is greatly enhanced when an agency knows that if settlements are not reached it may not be able to get its cases into court. Federal agencies obviously need an effective process for obtaining binding adjudications under their acts.

An additional reason for creating such a process is the possibility that "some of the worst offenders," as one agency official put it, "who are most likely to refuse to settle, may be getting away."⁵⁰ Even when the Department of Justice acts on cases, serious enforcement problems may be caused by delay. The FAA, for example, recently protested to the Department of Justice that:

"In 1970 about 106 such cases were referred to U.S. Attorneys. Since these cases involve the question of safety in air transportation or in air commerce, and their purpose is the improvement of safety in aviation through the imposition of remedial sanctions, the prompt and efficient processing of these cases is of great importance. . . . We have, however, received reports indicating that in a number of cases it has taken an inordinate amount of time to file complaints and to prosecute cases to their conclusion. . . . [T]he public interest requires that these cases be handled without the excessive delays shown in the enclosed examples."⁵¹

⁴⁸ As to the problems involved in allowing agencies to represent themselves in court, see n. 25 *supra* and Section IV D *infra*.

⁴⁹ ATTORNEY GENERAL'S COMMITTEE 146-47.

⁵⁰ It should be noted that some of the most innocent of those accused are likely to refuse to settle too.

⁵¹ Letter from Charles E. Anderson, Acting General Counsel of the FAA, to Richard Kleindienst, July 22, 1971.

*C. Critique of the Present System From the Alleged
Offender's Perspective*

From the standpoint of the alleged offender, the present system is unsatisfactory because he will be denied (i) procedural protections and (ii) an impartial forum, and if he is unaware of the impediments to agency action, (iii) he may be forced to acquiesce in an unfair settlement because, paradoxically, of the inappropriateness of *his* litigating a case in already overburdened courts.

A review of the FAA's process for handling money penalty cases (described in "A" above) focuses attention on some of the difficulties faced by the unaware or unaggressive defendant. Determinations as to the type and scope of the sanction to be imposed are made by relatively minor officials who are often intimately connected with the investigation and prosecution of the case. Although an informal conference with these officials is available,⁵² an impartial forum is not. Fairness may or may not be a prime consideration; procedural protections are not offered, and the consciences of prosecuting officials are too often assuaged by rationalizations about an alleged offender's right to *de novo* review.⁵³ But as Professor Davis correctly put it, "this justification is usually unreal."⁵⁴

The possibilities for arbitrariness, unnecessary lack of uniformity, and discriminatory exercises of discretion are needlessly accentuated under the present system. By settling an alleged offender forfeits his right to judicial review.⁵⁵ Indeed, there has been virtually no scrutiny of the present system by either impartial agency or judicial review.

John S. Yodice, Washington Counsel to the Aircraft Owners and Pilot Association, summarized the dilemma as follows:

"Let's say in this case [*i.e.*, one involving an airman with a *bona fide* defense] . . . the FAA only charges the airman with one offense. The amount of the suit be \$1,000. The airman must now engage an attorney. In doing so, he has already committed himself beyond the amount for which he could have compromised the civil penalty. Then consider also that he must have his case tried before a judge (or a jury if he wants) who is unfamiliar with aviation and general aviation type operations. The judge and the jury must be educated to the flight rules and to the language of aviation.

⁵² See note 132 *supra*.

⁵³ During interviews, suggestions for additional safeguards or other reforms were, on several occasions, rejected almost out-of-hand, and questionable procedures were justified by references to the availability (certainly, more theoretical than real) of *de novo* judicial review.

⁵⁴ 1 DAVIS § 4.05 at 253.

⁵⁵ See, *e.g.*, Gellhorn 280; McKay 445; Nelson, *supra* note 144, at 610-11. Professor Gellhorn observed:

"Of course, by applying for mitigation or compromise, the vendor will lose his chance to litigate the merits of the commission's charges. The mitigation or compromise device 'thus becomes a kind of administrative blackmail.' "

Consider also that the backlog of civil cases in most Districts is considerable. . . .

"With all those considerations before you, if you were advising this airman, what would you advise him? My guess is you would advise him to accept the compromise. . . . Is this fair?"⁵⁶

Mr. Yodice proposed that "FAA hearing officers be empowered to hear and decide civil penalty cases and to propose appropriate penalties," but he would then subject their decisions to *de novo* review in federal district court. But no reasons are given for perpetuating the duplication waste, and problems of access inherent in such a system.

Concerned about the plight of defendants, the Task Force on Legal Services and Procedure of the Second Hoover Commission recommended:

"Congress should look into the feasibility of transferring to the courts certain judicial functions of administrative agencies, such as the imposition of money penalties, the remission or compromise of money penalties . . . wherever it may be done without harm to the regulatory process."⁵⁷

But do the bulk of money penalty cases belong in district courts? In this regard, Professor Gellhorn has pragmatically warned:

"[A] prudent division of law administration labor precludes having everything done personally by a few hundred lifetime judges instead of by many lesser (possibly even less wise or less sensitive or less scrupulous) officials"⁵⁸

D. *Opening the Road to the Courts Is Not a Viable Alternative*

In his first State of the Judiciary address, Chief Justice Burger noted "our tendency to meet new and legitimate demands with new laws which are passed without adequate consideration of the consequences in terms of caseloads" and urged us to "make a choice of priorities."⁵⁹ Professor Maurice Rosenberg recommends a "comprehensive re-investigation of the question which human disputes belong in the courts" because "our courts are simply and plainly being engulfed by a tidal wave of litigation. . . ."⁶⁰ He counsels:

"Of course, neither . . . administrative agencies, nor arbitration boards, nor any other official substitute for court-made dispositions, will be trouble-free. Still, the effort to de-adversarialize and de-judicialize matters that do not absolutely require the full panoply of court processes must be made, problems or no. . . .

⁵⁶ Address by John S. Yodice, Aircraft Owners and Pilots Association Annual Convention, 1967.

⁵⁷ COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE 85 (1955).

⁵⁸ Gellhorn 282.

⁵⁹ Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 932 (1972).

⁶⁰ Rosenberg, *supra* note 140, at 808.

We have to withdraw from the judicial process some of the disputes that now threaten the administration of justice—quantitatively, qualitatively, and explosively.”⁶¹

The Chief Judge of the United States District Court for the Southern District of New York recently said that the civil backlog:

“is the greatest frustration that I have ever encountered.”⁶²

Similar cries of anguish have come from judges, professors and practitioners in all parts of the country.⁶³ It is in this context that we must evaluate the claim of money penalty cases for transfer to, access to, or priority in, the courts.

Other sections of this report describe the wide variety of regulatory offenses for which civil money penalties may be imposed,⁶⁴ and set forth the number and dollar magnitude of the cases processed annually.⁶⁵ For present purposes, it should suffice to repeat that in 1971 seven executive departments and eight independent agencies collected \$10,463,622 in 15,608 cases; the dollar magnitude figure is expected to double or triple and the caseload figure to increase substantially within the next few years.⁶⁶ Adoption of the Second Hoover Commission’s recommendation (to transfer civil penalty cases to the courts) would obviously create overwhelming problems for federal district courts already staggering under the weight of over 80,000 civil cases and approximately 9,000 civil trials a year.⁶⁷

Moreover, many statutory penalties are \$1,000 or less and few have a maximum as high as \$10,000. In 1971, penalties actually imposed averaged less than \$1,000 per case. In 1970, for example (the last year for which full figures were available), (i) the FCC handled 962 cases and collected \$154,100 (an average of about \$160 per case); (ii) the FAA handled 968 cases and collected \$517,316 (an average of about \$535 per case); (iii) the Department of Agriculture handled 1,357 cases and collected \$846,550 (an average of about \$625 per case); and (iv) the USCG handled 4,368 cases and collected \$260,690 (an average of about \$60 per case).⁶⁸

Sound administrative practice requires the Department of Justice to conserve scant resources and to provide a shield for the courts.

⁶¹ *Id.* at 816.

⁶² 167 N.Y.L.J. 24 at 1 (1972).

⁶³ See, e.g., C. MCGOWAN, THE ORGANIZATION OF JUDICIAL POWER IN THE UNITED STATES (1967); Hufstedler, *supra* note 140; Rosenberg, *supra* note 140; Lumbard, *Trial by Jury and Speedy Justice*, 166 N.Y.L.J. 80, at 1 (1971).

⁶⁴ See Section IIA *supra* and Exhibit I to Appendix A *infra*.

⁶⁵ See Appendix A, Charts II and III *infra*.

⁶⁶ See Section IIB *supra*.

⁶⁷ See DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1970 ANNUAL REPORT 107, 127 (1971).

⁶⁸ See Appendix A, Charts II and III *infra*.

Manifestly, if it has been an "immovable roadblock" to such civil penalty cases, it has been so not because of slothfulness but because other matters clamor for attention. A balanced sense of priorities precludes requiring district judges, unfamiliar with aviation, to immerse themselves in the intricacies of flight or airworthiness rules in cases that involve less than \$1,000.

While agencies should be afforded the opportunity to obtain binding adjudications, and alleged offenders should have the option of obtaining procedural protections and an impartial forum, it would be wholly unrealistic to respond to these needs by providing for the adjudication of money penalty cases in the district courts.

V. RECOMMENDATION AS TO AN ADMINISTRATIVE IMPOSING SYSTEM

A. Rationale for, and Description of, the Proposed System

As previously indicated, in 1952 the Legislature of the State of New York authorized the Superintendent of Insurance to administratively impose a civil money penalty, not to exceed \$1,000, for willful violation of certain provisions of the Insurance Law.⁶⁹ Professor Bernard Schwartz, commenting on this legislation, admonished:

"It is difficult to imagine a statutory provision more repugnant to the basic principles upon which our administrative law is grounded. It violates the fundamental rule that the imposition of a money penalty is, with us, a judicial, not an administrative function. The dangers inherent in allowing administrative authority to extend to the imposition of money penalties seem clear. . . ." ⁷⁰

By 1970, in congratulating the legislature for making "a significant advancement in administrative law by providing for the establishment of an administrative traffic court in New York City," Professor Schwartz had the following to say:

"Too many administrative lawyers continue to think of delegation of power to administrative agencies in terms of the law of a generation ago. To be sure, unlimited delegation of power, without any standards at all, may still present constitutional questions. But the law today recognizes the need for delegations that probably would have presented serious prob-

⁶⁹ See *Old Republic Life Ins. Co. v. Thacher*, 12 N.Y. 2d 48, 186 N.E. 2d 554, 234 N.Y.S. 2d 702 (1962). The Department is concerned about problems similar to those that concern the FAA, FTC and SEC. It has, for example, broad regulatory responsibility for insurance agents and brokers, licensing authority, and even rulemaking power and enforcement responsibilities for "unfair methods of competition" and "unfair or deceptive acts or practices." N.Y. INS. LAW Ch. 26 (McKinney 1966).

⁷⁰ Schwartz, *1952 Survey of New York Law—Administrative Law*, 27 N.Y.U.L. Rev. 928 (1952).

lems in the past. . . . Theoretical objections to the delegation of . . . jurisdiction to an administrative agency must yield to the practical necessities of traffic enforcement in New York City.”⁷¹

On May 10, 1971, Constantine Sidamon-Eristoff, the Transportation Administrator for New York City, reported:

“More and more motorists who in the past systematically broke our parking regulations and then ignored summonses to them are now mailing in their fines [i.e., civil money penalties] or appear for a hearing. . . . [civil penalties collected] should exceed by several million dollars the \$21.4 million collected by the Criminal Court in its last full year of jurisdiction. . . .”⁷²

The Parking Violations Bureau of the City of New York recently reported that the compliance rate, number of dispositions, and collection figures have continued to increase since May, 1971.⁷³

In the federal sphere too, administrative imposition is an idea whose time has come. Administrative imposition would provide the following advantages over the present federal system:

1. Cases which now languish on judicial dockets could be adjudicated quickly, efficiently and at relatively low cost.
2. Unwise settlements (from the standpoint of the public's interest in deterring or remedying violations of regulatory laws) would be avoided by eliminating the inhibitions on agencies created by the unavailability of (or inappropriateness of taking a case to) overburdened courts.⁷⁴ Concomitantly, the availability of a forum should temper administrative inclinations towards arbitrariness.⁷⁵
3. Dual and overlapping efforts by an agency and the Department of Justice would be eliminated.⁷⁶

⁷¹ Schwartz, *1969 Survey of New York Law—Administrative Law*, 21 Syracuse L. Rev. 389-90 (1970).

⁷² N.Y. Times, May 10, 1971, at 35, col. 1.

⁷³ Telephone conference with Miss Phyllis Hirschberg, Parking Violations Bureau, July 21, 1972.

⁷⁴ See Section IV B *supra*.

⁷⁵ Frustrations produced by the present system may well negatively affect—from the standpoint of fairness—agency personnel. Professor Philip G. Schrag, for example, recently commented as follows about his experience as director of the Law Enforcement Division of the New York City Department of Consumer Affairs:

“Those of us who were lawyers were immensely saddened by this perception [i.e., of their greater effectiveness when they did not choose to go to court], on a theoretical level, because a model of law enforcement which we respected did not work—it let swindlers continue to swindle—and on a practical level, because *we could feel the courts driving us out of the normal channels into a kind of street warfare.*

* * * * *

“*We were driven to direct action and to use unpleasant investigative techniques, by sympathy with the victims of consumer fraud and by what we regard as a breakdown in the system of civil justice.*” (Emphasis added.)

Schrag, *On Her Majesty's Secret Service: Protecting the Consumer in New York City*, 80 Yale L.J. 1529, 1597, 1599 (1971).

⁷⁶ At the hearings on the FMC's H.R. 755 (see notes 66-70, *supra*), F. Conger Fawcett, Esq., a representative of various shipping conferences, testified as follows:

“The very intervention of a separate prosecuting Department of Justice . . . which

4. There would no longer be an opportunity for recalcitrant defendants (who now will not settle and cannot easily be brought to trial) to escape the consequences of their improper acts.

5. An alleged offender would, at his or her option, be provided with procedural protections and an impartial forum in which to present a defense. No such forum or protection is available as a practical (as opposed to theoretical) matter now.⁷⁷

6. Fair settlements should be facilitated since neither the agency nor the alleged offender would be able to premise obstinacy on the inability or unwillingness of the other to go to court.

7. Cases which are simply inappropriate (e.g., because of their dollar magnitude and the expertise involved) would be removed from federal district courts at a time when there is general agreement that we "have poured more into the courts than they can digest."⁷⁸ As Judge Hufstедler recently said, "we have tended to treat every case, whatever its genesis and whatever its dimension, as if it warranted meticulous discovery, several bouts of pleading, a pretrial conference, a 12-man jury, full throttle adversary proceedings, and a few reruns. . . . We can no longer indulge ourselves in those luxurious assumptions."⁷⁹

8. Substantial evidence review would be available in the courts of appeals as an ultimate (though presumably seldom used) protection against abuse.⁸⁰

An administrative imposition system would, of course, present some potential for abuse. This led the American Bar Association to resolve in 1956:

"That it is the view of the American Bar Association that legislation authorizing Federal agencies to impose money penalties for alleged violation of law or regulations should not be authorized as a regulatory device except upon a most convincing justification and subject to fair procedural safeguards, including (1) a clear statutory specification of the offense subject to the money penalty sanction, (2) provision for adequate and fair procedures, including notice to the accused and opportunity to answer prior to imposition of the penalty, and (3) other safeguards to avoid an agency

the Commission Chairman decried in her recent testimony before your Committee on H.R. 755, in fact serves a vitally necessary function, in providing a buffer against such arbitrary treatment in the penal phase—Justice often refusing to prosecute . . . where the agency's own ardor has been deeply charged." *Hearing on H.R. 755 Before the Subcomm. on Merchant Marine and the House Committee on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., ser. 8 at 174 (1971).

At issue is whether this type of "buffer," with all of the waste and inefficiency obviously involved, makes sense given the availability in an administrative imposition system, of an impartial forum and circuit court review.

⁷⁷ See Section IV C *supra*.

⁷⁸ Hufstедler, *supra* note 140, at 906.

⁷⁹ *Id.*

⁸⁰ The crisis (in terms of bulging dockets) facing appellate courts is even more serious than that faced by district courts. See Hufstедler, *supra* note 140, at 908-11; 166 N.Y.L.J. 108 (1971) (article entitled "Panel to Study 'Crisis' Facing Appeal Courts"). Given the amount of money usually involved, it is doubtful that many litigants (who avail themselves of an impartial agency proceeding) will appeal to a circuit court. Nevertheless, if such steps proved warranted, equitable disincentives to appeal could be built into the system. Cf. Hufstедler, *supra* note 140, at 914-15; Rosenberg, *supra* note 140, at 817-20.

prejudgment of guilt and the imposition of double penalties for same offense and to afford opportunity for a hearing. . . ."⁸¹

The reasons set forth in Sections III and IV *supra* provide more than "convincing justification" for the administrative imposition of civil money penalties, but without doubt, fair procedural and other safeguards should be devised. The administrative imposition system proposed herein would, at the option of either party, provide for an adjudicative proceeding, on the record, pursuant to Sections 5-8 of the Administrative Procedure Act.⁸² Agencies are urged to adopt rules of practice which will maximize the possibility of securing just, inexpensive, and speedy adjudications.⁸³

An agency's decision would be final unless appealed within a stipulated number of days. Appeals would be taken to a United States Court of Appeals, and an agency's decision would be sustained if supported by substantial evidence.⁸⁴ If necessary, an agency or the Department of Justice would be able to bring a "collection proceeding" (in which the merits of its decision would not be open to challenge) in federal district court; other collection techniques could be made available.⁸⁵

Such an adjudicative proceeding would, of course, provide the usual safeguards against the commingling of adversarial and decisional functions.⁸⁶ Notice, opportunities to answer prior to imposition of a penalty, provisions precluding prejudgment, provisions providing for impartial hearings and for the presence of counsel, and other safeguards, would be provided under the Administrative Procedure Act.

As indicated, substantial evidence review would be an ultimate, though presumably seldom used, protection against abuse.⁸⁷ As Professor Jaffe observed:

"This function may be patently exercised only spasmodically but its availability is a constant reminder to the administrator and a constant source of assurance and security to the citizen."⁸⁸

⁸¹ 81 A.B.A. Rep. 384-85 (1956); see 8 Ad. L. Bull. 9 (1956); 7 Ad. L. Bull. 220-21 (1955); Murphy, *Money Penalties—An Administrative Sword of Damocles*, 2 Santa Clara Lawyer 113, 133 (1962).

⁸² 5 U.S.C. § 554-57 (1970).

⁸³ In this regard, agencies should consider affording alleged offenders the option of choosing "summary proceedings" or other time-saving and expense-saving techniques.

⁸⁴ See Part B2(c) of the recommendation annexed to this report.

⁸⁵ See Section VII *infra*.

⁸⁶ See W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 877-88 (5th ed. 1970).

⁸⁷ See note 179 *supra*.

⁸⁸ JAFFE 325; see McKay 448.

As previously indicated, Congress recently gave the Department of Labor and the OSHRC the power to administratively impose civil money penalties under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (1970). The imposition scheme basically works as follows:

1. The Secretary of Labor promulgates occupational safety and health standards, 29 U.S.C. § 655;
2. persons "adversely affected by a standard" may, in a United States court of appeals,

Whenever possible, clear statutory or administrative specification of offenses should, of course, be provided. This should not be a problem because the offenses for which administrative imposition is being recommended are normally considered in a substantial number of cases (and, therefore, are probably relatively well defined) each year.

Standards should be formulated to guide administrative discretion. Given the amount of recent writing on this subject, there is no need to repeat the many valid arguments for guides to discretion here.⁸⁹ Special efforts should, however, be made to specify offenses for which only civil money penalties, or lesser sanctions, could be applied. This would go far towards preventing agency personnel from forcing inequitable settlements by using the threat of more potent sanctions as an unfair "blackjacking" device.

To the extent that the present system provides for settlements by means of remission, mitigation and compromise devices it should be retained. In the great majority of cases formal adjudication would be a meaningless and needless step.⁹⁰ Of crucial importance, however, is the fact that under an administrative imposition system, fair settlements should be greatly facilitated since neither side would be able to premise obstinacy on the inability or unwillingness of the other to go to court.

All evidence points to settlements or uncontested assessments taking place under an administrative imposition system at about the same rate as they take place at an agency level now. Under the Occupational Safety and Health Act of 1970,⁹¹ for example, 7,450 citations were issued, and \$512,067 assessed, during the first five months of the 1972 fiscal year; fewer than 5% of these citations were contested by a request for a hearing before the OHSRC. Similarly, about 90% of the

seek judicial review; the "determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole," 29 U.S.C. § 655(f);

3. if, after an inspection or investigation, the Secretary believes a violation has occurred, "he shall with reasonable promptness issue a citation to the employer"; in addition, he shall "notify the employer by certified mail of the penalty, if any, proposed to be assessed" (penalties of up to \$10,000 may be assessed), 29 U.S.C. §§ 658-59(a);

4. an employer has 15 working days to contest the "citation or proposed assessment of penalty"; if he fails to do so, "the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency," 29 U.S.C. § 659(a);

5. if an employer contests a citation or proposed assessment, the OSHRC "shall afford an opportunity for a hearing" and "thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directly other appropriate relief;" unless appealed to a court of appeals, the OSHRC's order becomes "final thirty days after its issuance," 29 U.S.C. § 659(c);

6. the findings of the OSHRC "with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive," 29 U.S.C. § 660.

⁸⁹ See, e.g., K. DAVIS, DISCRETIONARY JUSTICE (1969); DAVIS § 2.00-5 (Supp. 1970); A. SOFAER, THE CHANGE-OF-STATUS ADJUDICATION: A CASE STUDY OF THE INFORMAL AGENCY PROCESS 106-50 (1971).

⁹⁰ See Nelson, *supra* note 144, at 619.

⁹¹ See note 187 *supra*.

money penalty cases involving the disciplining of insurance brokers (81 of 92 cases in 1969-70) were settled by the Department of Insurance of the State of New York without a hearing ever being held.⁹² Enforcement officials at the FAA and FCC predict that only a small percentage of penalty cases would require adjudications under their acts.⁹³

Administrative imposition should bring fairer, not fewer, settlements. This should be our main concern.⁹⁴

The initial responses of agency personnel and members of the bar to this proposal have been encouraging.⁹⁵ For example, aside from expressions of fear about "commingling of functions," the administrative imposition idea received unanimous support in six interviews with prominent members of the aviation bar.⁹⁶

B. *Administrative Imposition Under the Evaluative Criterion*

Part B of the recommendation sets forth the following "evaluative criterion," which identifies factors whose presence tends to commend the imposition of civil money penalties by agencies themselves:

- (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;

⁹² This information was obtained during a survey conducted during the spring of 1971.

⁹³ This pattern of settlement (or uncontested payment) is not inconsistent with patterns in other areas of the civil law. Judge J. Edward Lumbard recently noted:

"In civil cases, only about 10 per cent actually go to trial—somewhat more than 10 per cent for accident claims and somewhat less than 10 per cent for commercial disputes."

Lumbard, *Trail by Jury and Speedy Justice*, 166 N.Y.L.J. 80 at 1 (1971); see DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1970 ANNUAL REPORT 107-27 (1971).

⁹⁴ See note 140 *supra*. Of course, limitations may be placed on an agency's ability to settle, or special review procedures may be put into effect, in circumstances which justify insulating an agency from undue pressures.

⁹⁵ Similarly, several interviews with interested members of the bar of the State of New York indicated general satisfaction with the way the Department of Insurance's administrative imposition scheme is working. (See generally note 168 *supra*.) Staff attorneys at the Department of Insurance praised the speed, efficiency and flexibility with which they could work. Agency hearings, for example, were said to make sense because "we all speak the same language and don't have to stop and explain to a layman what an unearned premium reserve is."

⁹⁶ It should be noted that these views were "tentatively" given and, of course, only six interviews were involved.

(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."

Of great importance is the recommendation in Part B that:

"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."

The seven factors set forth will, of course, often raise competing considerations; it will be unusual for each of them to point the same way. No *a priori* weights can be attached to the factors. The importance attached to any one of them must be a product of contextual, not conceptual, analysis.⁹⁷

The \$5,000 referred to in the above-quoted paragraph (half the amount which usually must be in controversy in federal courts⁹⁸) is an essentially conservative figure meant to cover cases which are so small that they clearly do not belong (and under the present system cannot be feasibly tried) in district court. The FAA, FCC, Coast Guard, and probably a majority of agencies now processing a substantial number of money penalty cases, would be affected by this "normally . . . decisive" factor.⁹⁹

Some examples may help to demonstrate the uses to which the evaluative criterion may be put. As previously indicated, the SEC's Advisory Committee on Enforcement Policies and Practices recently suggested that,

"the availability of money penalties would provide the Commission with substantially greater flexibility in fashioning a suitable remedy in . . . [broker-dealer] proceedings."¹

For the reasons stated in Section III A *supra*, there is much to recommend this view.² If the SEC agrees, it would then address

⁹⁷ The evaluative criterion does not, of course, provide an all-inclusive list of relevant factors. It is possible, in any given case, that unmentioned matters will prove of pivotal concern.

⁹⁸ 28 U.S.C. §§ 1331-32 (1970).

⁹⁹ See Appendix A, Charts II and III *infra*.

¹ See note 80 *supra* and accompanying text.

² Indeed, as the SEC's Advisory Committee noted, self-regulatory organizations in the securities industry have been using money penalties for many years. (See note 80 *supra*). In 1970, for example, the National Association of Security Dealers (NASD), handled 440 complaints, imposed 311 penalties, and collected approximately \$500,000. See NASD,

itself to whether such penalties should be administratively imposed.

This is one of those unusual instances in which almost everything points to administrative imposition. Many cases will be processed, and the usual monetary penalty is unlikely to be very substantial.³ The SEC already has the power to suspend or revoke a broker's license, and therefore, money penalties will probably be used to moderate what might otherwise be too harsh an agency response. Speed is important and expertise will undoubtedly be involved. The regulations, in an area of this type, should be relatively clear, and consistency of application (particularly, as to the penalties imposed) is a significant concern. The SEC has long had an efficient and fair process for handling a variety of regulatory cases.

On the other hand, the use of civil money penalties in the SEC's Rule 10b-5⁴ area would be highly desirable, but it is doubtful that administrative imposition should take place. Civil money penalties would be desirable because, in many instances, would-be violators of Rule 10b-5 are not now being deterred. The problem is that an insider who is caught improperly profiting from the use of material information is placed in no worse a position than the honest man who refuses to act.

The landmark *Texas Gulf Sulphur* case⁵ illustrates the point well. Insiders were found to have purchased stock and profited "on the basis of material inside information . . . while such in-

1970 ANNUAL REPORT (1971). The NASD may impose penalties of up to \$5,000 for a single violation. See NASD, MANUAL Paragraph 3011 (1971). The New York Stock Exchange may impose "a \$25,000 fine for individuals and a \$100,000 fine for member firms." 168 N.Y.L.J. 13 at 1 (1972).

³ As note 200 indicates, the NASD alone imposed 311 penalties and collected \$500,000 (an average of about \$1,600) in 1970.

⁴ Rule 10b-5 reads as follows:

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

17 C.F.R. § 240.10b-5 (1970); see Section 10b of the Securities and Exchange Act, 15 U.S.C. § 78(b) 1970.

⁵ *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969); see W. L. CARY, CORPORATIONS 712-98 (4th unabridged ed. 1969); 6 L. LOSS, SECURITIES REGULATION (Supp. 1969); Ruder, *Texas Gulf Sulphur—The Second Round: Privy and State of Mind in Rule 10b-5 Purchase and Sale Cases*, 63 Nw.U.L. Rev. 423 (1968).

formation remained undisclosed.”⁶ At the SEC’s request, the district court required the insiders to disgorge their profits. The payments were to be held in escrow for five years.

“subject to disposition in such manner as the court might direct upon application by the SEC or other interested person, or on the court’s own motion. At the end of the five years any money remaining undisposed of would become the property of TGS. To protect the appellants against double liability, any private judgments against these appellants arising out of the events of this case are to be paid from this fund.”⁷

But only the wrongdoers’ profits are disgorged—hardly a disincentive for those who may cynically (and realistically) hope to avoid being caught.⁸ Although the point is not settled, the Second Circuit has not allowed punitive damages to be imposed under Rule 10b-5.⁹

A penalty equal to 50% or 100% of the recovery, in addition to the restitution of profits, would certainly provide a needed deterrent effect. The IRS has successfully used similar penalties for many years;¹⁰ the SEC should seek authority to adopt this sanctioning approach.

But this does not mean that such penalties should be administratively imposed. The need for substantial monetary penalties, the fact that such a penalty would often be the most potent sanction available to the SEC, the relatively small role to be played by expertise, and the lack of clarity in the substantive law, cut sharply against administrative imposition. Moreover, since private actions will often be filed in district courts, administrative imposition might lead to duplicative or fragmented proceedings.¹¹

In other circumstances, the size of the penalty (*e.g.*, consider the FCC’s proposal to impose a penalty “not to exceed \$250,000”¹²) or the willingness of an agency to establish an impartial forum might be of

⁶ *SEC v. Texas Gulf Sulphur Co.*, 401 F. 2d 833, 839-40 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969).

⁷ *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir. 1971), *cert. denied*, 404 U.S. 1005 (1971).

⁸ The SEC may also bring administrative proceedings against broker-dealers, and seek injunctions and criminal sanctions under Rule 10b-5. *See* W. L. CARY, *supra* note 202, at 790. However, Rule 10b-5 applies to “any person” (not just broker-dealers), injunctions are often ineffective, and in the situation described in text, it is most unlikely that criminal sanctions would be applied.

⁹ *See Green v. Wolf Corp.*, 406 F. 2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); *Globus v. Law Research Service, Inc.*, 418 F. 2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); *deHass v. Empire Petroleum Co.*, 435 F. 2d 1223 (10th Cir. 1970). *But see Hecht v. Harris, Upham & Co.*, 283 F. Supp. 417 (N.D. Cal. 1968) (*dictum*).

¹⁰ *See* notes 47, 98-100 *supra* and accompanying text.

¹¹ *Cf. In the Matter of Investors Management Co.*, Sec. Exch. Act. Rel. No. 9267 (July 29, 1971) (involving censure by the SEC of institutional investors under Rule 10b-5); *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Civil No. 70-3653 (S.D.N.Y. 1972) (same issues as in the SEC’s censure case involved in private damage action).

¹² *See* note 59 *supra* and accompanying text.

particular concern. Again, this is preeminently an area for balanced, pragmatic analysis.

VI. THE CONSTITUTIONAL FRAMEWORK PURSUANT TO WHICH CIVIL MONEY PENALTIES MAY BE ADMINISTRATIVELY IMPOSED

A. *Delegation of Power to Administrative Agencies Which Has Traditionally Been Exercised by Congress or the Courts*

The *de novo* review system appears to have been conceived as a harmless way of "avoiding all constitutional doubts" about administrative imposition.¹³ But, as Section IV *supra* demonstrates, the negative consequences resulting from use of the *de novo* device are too serious to warrant further delay in the implementation of administrative imposition. Certainly, this is true when the "constitutional doubts" are based on vague and no longer plausible suppositions.

The "avoiding all doubts" approach attained prominence through the report of the Attorney General's Committee on Administrative Procedure.¹⁴ Professor Gellhorn noted that the "Committee did not spell out the exact nature of the 'doubts about constitutionality,'" but he found some reasoning in the Committee's monograph concerning the Bureau of Marine Inspection and Navigation,¹⁵ which said:

"Such doubts might arise from the circumstance that money penalties have traditionally been imposed by courts, so that such imposition might be regarded as a 'judicial function' which could not validly be transferred to an administrative agency."¹⁶

Professor Gellhorn commented that this "is an example of what Justice Holmes had in mind when he remarked that sometimes a page of history is worth more than a volume of logic."¹⁷

But the history of what courts do when faced with the issue (as well as a volume of logic) is on the side of administrative imposition. In a variety of settings, over a period of many years, administrative imposition has been consistently upheld in the federal courts.

In 1909, in *Oceanic Steam Navigation Company v. Stranahan*,¹⁸ the Supreme Court reviewed an immigration statute that required ship owners to pay the collector of customs \$100 for each case in which the Secretary of Commerce and Labor determined that an alien has been

¹³ JAFFE 114; see ATTORNEY GENERAL'S COMMITTEE 147.

¹⁴ See ATTORNEY GENERAL'S COMMITTEE 146-47.

¹⁵ Gellhorn 281 n.39.

¹⁶ MONOGRAPH OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, DEPARTMENT OF COMMERCE, BUREAU OF MARINE INSPECTION AND NAVIGATION, S. Doc. No. 186, Part 10, 76th Cong., 3d Sess. 29 n.29 (1940).

¹⁷ Gellhorn 281 n.39.

¹⁸ 214 U.S. 320 (1909).

brought into the United States "afflicted with a loathesome or with a dangerous contagious disease," which might have been detected by a medical examination at the time of embarkation. The statute also provided that "no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid. . . ." ¹⁹ The Court, in upholding the Secretary's exercise of adjudicative power, said :

"In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of involving the judicial power."

". . . [I]f Congress has deemed it necessary to impose particular restrictions on the coming in of aliens, and to sanction such prohibitions by penalties enforceable by administrative authority, it follows that the constitutional right of Congress to enact such legislation is the sole measure by which its validity is to be determined by the courts." ²⁰

In *Lloyd Sabaudo Societa v. Elting*,²¹ where issues similar to those in *Stranahan* were presented (penalties had, however, increased tenfold to \$1,000 per violation in the interim), Justice Stone rejected a steamship company's argument that "imposition of the fines by administrative action is a denial of due process unless opportunity is afforded at some stage to test their validity in court by a trial of the facts *de novo*," and held :

". . . due process of law does not require that the courts, rather than administrative officers, be charged, in any case, with determining the facts upon which the imposition of such a fine depends. It follows that as the fines are not invalid, however, imposed, because unreasonable or confiscatory in amount, which is conceded, Congress may choose the administrative rather than the judicial method of imposing them." ²²

Similarly, in *Elting v. North German Lloyd*,²³ Justice Stone upheld the administrative imposition of a money penalty because the "Secretary gave respondent a hearing and acted on substantial evidence" and, therefore, "we cannot say that the discretion which, under the statute he alone may exercise, was abused."

In other areas, whenever the administrative imposition issue has been raised, federal courts have resolved it the same way. As previ-

¹⁹ *Id.* at 332.

²⁰ *Id.* at 339-40.

²¹ 287 U.S. 329 (1932).

²² *Id.* at 335. Professor Davis has correctly suggested that the immigration cases cannot be distinguished because of language in the opinions as to Congress' "plenary power" in the area because "the Court has said that 'the power of Congress over interstate commerce is plenary.'" 1 DAVIS § 2.13 at 136; see *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942). The interstate commerce clause is, of course, the source from which much of agency power is derived.

²³ 287 U.S. 324, 328 (1932).

ously indicated, in *Helvering v. Mitchell*, Justice Brandeis held that the IRS could impose a \$364,354.92 civil penalty because "the determination of facts upon which liability is based may be by an administrative agency instead of a jury. . . ." ²⁴ Federal courts have upheld the authority of the Postal Service to administratively impose civil money penalties for many years.²⁵

In *N. A. Woodworth Co. v. Kavanagh*²⁶ what was, in effect, a civil money penalty was held a proper method of enforcing economic regulations. Pursuant to the Wage Stabilization Act of 1942, an executive order, and various regulations, the National War Labor Board (NWLB) was empowered to conduct hearings to determine whether improper wages were paid under applicable laws and rules. If so, the NWLB could direct the IRS to disregard the wages paid the employees involved for purposes of calculating the employer's tax deductions. The NWLB could reduce penalties as a result of "extenuating circumstances . . . [and] other pertinent considerations"; its findings were "conclusive upon all executive departments and agencies of the Government."²⁷

The NWLB found "extenuating circumstances" in N.A. Woodworth's case and reduced the civil money penalty it imposed. Plaintiff, N.A. Woodworth Co., paid its tax deficiency under protest and brought suit "for \$80,614.62, the adjusted deficiency" plus interest.²⁸

The district court said that it had "no right to review and redetermine questions of fact considered and lawfully determined by an administrative authority,"²⁹ and held:

"It is well settled that Congress has the power to provide civil sanctions as an aid to effecting its purposes in fields in which it has constitutional power to act . . . and, further, that it can delegate that power to administrative agencies. . . . In view of the broad power to provide civil sanctions resident in Congress, the sanction invoked against plaintiff by the War Labor Board is not violative of the Federal Constitution."³⁰

²⁴ 303 U.S. 391, 402 (1938); see notes 96-100 *supra* and accompanying text.

²⁵ See *Allman v. United States*, 131 U.S. 31, 35 (1889); *Great Northern Ry. v. United States*, 236 F. 2d 433, 443-44 (8th Cir. 1916).

²⁶ 102 F. Supp. 9 (E.D. Mich. 1952), *aff'd*, 202 F. 2d 154 (6th Cir. 1953).

²⁷ *Id.* at 11.

²⁸ *Id.* at 10.

²⁹ *Id.* at 12.

³⁰ *Id.* at 13-14; see Gellhorn 274.

The district court also rejected the applicability of *Crowell v. Benson*, 285 U.S. 22 (1932), a case in which the Supreme Court authorized a trial *de novo* on certain "constitutional" and "jurisdictional" facts, and indicated "Its doctrine is applicable only to cases involving private controversies and not those in which the Government is itself a party." 102 F. Supp. at 12-13. The moribund *Crowell* doctrine has been extensively criticized, limited and disregarded, and should be of no concern to us here. See, e.g., *Estep v. United States*, 327 U.S. 114, 142 (1946) (Justice Frankfurter concurring); *Morrison-Knudson Co. v. D'Leary*, 288 F. 2d 542 (9th Cir.), *cert. denied*, 368 U.S. 817 (1961); 4 DAVIS § 29.08 at 156-160; JAFFE 636-48.

The decision was affirmed by the Sixth Circuit "for the reasons and upon the grounds stated in the opinion of the District Court."³¹

Congress recently reaffirmed its belief in the constitutionality and rationality of administrative imposition when it enacted the Occupational Safety and Health Act of 1970.³² Although a few generally old and unpersuasive state cases exist which question administrative imposition,³³ every case decided by federal courts points the other way. The leading commentators in the field, Professors Davis, Gellhorn and Jaffe agree, as Professor Gellhorn put it, that the "arguments against administrative imposition of money penalties are not very strong."³⁴

Given (i) the problems inherent in the present system,³⁵ (ii) the advantages to be derived from administrative imposition of civil money penalties,³⁶ (iii) the safeguards against arbitrary exercises of power that can be provided,³⁷ and (iv) the fact that agencies often already exercise far greater administrative power (*e.g.* the power to suspend or revoke licenses) over their constituencies, it is hardly conceivable that federal courts would beat a precipitous retreat from their salutary precedents now.

³¹ 202 F. 2d 154 (6th Cir. 1953). Professor Gellhorn commented as follows on the "quantitative significance" of the *N. A. Woodworth Co.* decision:

"During 1944 and 1945, the years here involved, the National War Labor Board's regional office for New York and Northern New Jersey closed 781 enforcement cases involving potential disallowances. The disallowances amounted to \$2,012,729.58. This may be compared with the figure of \$1,249,835.30, which represents the total of fines assessed in all types of criminal cases during 1945 by the very active United States District Court for the Southern District of New York." Gellhorn 274-75.

In *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954), the wage stabilization program, established under the Defense Production Act of 1950 (which was similar to the program in effect in the *N. A. Woodworth* case), was challenged under claims that the Act did not authorize the President to set up the program, and that the Act and proceedings thereunder were unconstitutional because of improper delegation, deprivation of jury trial, and violation of due process. *Id.* at 536-37, 553 n. 22.

The Supreme Court decided that the Act authorized the wage stabilization program, but refused to consider the constitutional claims because of plaintiff's failure to exhaust administrative remedies. *Id.* Professor Davis explains the result as indicating:

"[T]he Court thought it practically desirable to settle the doubts about validity of the wage stabilization program under the statute and that the Court did not feel inclined to bother with the somewhat implausible arguments asserting unconstitutionality." 3 DAVIS § 20.04 at 79 (emphasis added).

Professor Jaffe finds this "a coherent and persuasive reason . . . for the way the case was decided." JAFFE 440.

³² 29 U.S.C. § 651 *et seq.* (1970); see notes 72, 187 *supra* and Appendix A, Chart 1; *cf. Lance Roofing Co. v. Hodgson* F. Supp. (N.D. Ga. 1972) (constitutional challenges to the Act dismissed because of plaintiff's failure to exhaust administrative remedies).

³³ See, *e.g.*, *State ex rel. Lanier v. Vines* 274 N.C. 486, 164 S.E. 2d 161 (1968); *Reid v. Smith*, 375 Ill. 147, 30 N.E. 2d 908 (1940); *Tite v. State Tax Comm'n*, 89 Utah 404, 416-18, 57 P. 2d 734, 740-41 (1936); *Davis v. State*, 190 S.W. 436 (Ark. Sup. Ct. 1916). But see, *e.g.*, *Wycoff Co. v. Public Serv. Comm'n*, 13 Utah 2d 123, 369 P. 2d 283 *cert. denied*, 371 U.S. 819 (1962); *Old Republic Life Ins. Co. v. Thacher*, 12 N.Y. 2d 48, 186 N.E. 2d 554, 234 N.Y.S. 2d 702 (1962). See generally 1 DAVIS §§ 2.12-13 (1970 Supp.); Gellhorn 272-76.

³⁴ Gellhorn 285; see 1 DAVIS §§ 2.12-13; JAFFE 109-14.

³⁵ See Section IV *supra*.

³⁶ See Section V *supra*.

³⁷ See Sections III C and V *supra*.

Other more general arguments about excessive delegations of legislative power (*e.g.*, allowing agencies to prescribe conduct by rulemaking) or judicial power need not long detain us here.³⁸ Professor Gellhorn has observed:

"Legislation authorizing administrators to promulgate rules or to adjudicate specific cases is commonplace. Rarely do contemporary courts hear serious argument that the legislature has improperly transferred its own law-making responsibility. . . . Abstract doctrine about the distribution of governmental powers has been reshaped by practical necessities."³⁹

Judge Harold Leventhal recently upheld the constitutionality of the delegation of authority to the President "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages and salaries" (under the Economic Stabilization Act of 1970) because,

"we cannot say that in the Act before us there is such an absence of standards that it would be impossible to ascertain whether the will of Congress has been obeyed."⁴⁰

In the course of his opinion, Judge Leventhal observed:

"Given a legislative enactment, there have not been any Supreme Court rulings holding statutes unconstitutional for excessive delegation of legislative power since the *Panama Refining and Schechter* cases invalidated provisions of the National Industrial Recovery Act of 1933."

* * * * *

"*Schechter* has fairly been described as a ruling that administered 'the hemlock of excessive delegation' in a case of 'delegation run riot.' We think the extremist pattern then before court cannot fairly be analogized to the anti-inflation statute . . . before us for consideration."⁴¹

Similarly, Professor Davis has noted as to judicial power:

"The Supreme Court of the United States has never held that judicial power has been improperly vested in an agency, although the question has come up in [many] cases. . . ."⁴²

Under modern cases, once the principle of administrative imposition of penalties is accepted, it appears clear that such delegation should not be invalidated because other delegations (*e.g.*, to prescribe conduct by rulemaking) are also involved. Of course, as Section V *supra* indicates, Congress should specify regulatory offenses or provide clear guidelines for agencies, whenever possible; to the extent practical, it should also provide guidance to those who must make decisions about the severity of the penalties to be imposed. The Occupational Safety

³⁸ Excluded from this discussion is the issue of delegations of authority to impose variable money penalties, which is considered in Section VI B *infra*.

³⁹ Gellhorn 265.

⁴⁰ *Amalgamated Meat Cutters v. Connolly*, 337 F. Supp. 737, 745, 747 (D.D.C. 1971).

⁴¹ *Id.* at 762-63.

⁴² 1 Davis § 2.12 at 131.

and Health Act of 1970 provides a good example of how this may be done.⁴³ But these are suggestions for sound policy and not inflexible strictures in the absence of which legislation is bound to fall. As Dean McKay put it, "concern for the welfare of the administrative process" comes today "more from its friends than its foes. Almost gone are the issues of that earlier day having to do with delegation of power and separation of powers, long the refuge of unfriendly critics."⁴⁴

B. Variable Penalties, Jury Trials, and Other Constitutional Issues

Professor Jaffe asked "whether an administrative officer can administer a flexible penalty" and indicated that there "are very few cases dealing with a flexible penalty and one of these [a state case] holds it invalid."⁴⁵ But federal cases, the leading commentators, and good sense

⁴³ See notes 72, 187 *supra*. The Act, for example, provides the following guidance as to the severity of penalties:

"(i) The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

(j) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation." 29 U.S.C. § 666 (i) (j) (1970).

⁴⁴ McKay 442.

⁴⁵ JAFFE 112. Professor Jaffe was referring to *Tite v. State Tax Comm'n*, 89 Utah 404, 57 P. 2d 734 (1936), where the Supreme Court of Utah held unconstitutional a statute authorizing the state tax commission to impose a penalty of not less than \$10 nor more than \$299 for failure to affix revenue stamps on cigarette packages. The court said:

"Giving to the tax commission the power to determine its own judgment the amount of the penalty was a legislative function which could not be delegated. It is not the power to enforce or apply a law, but the power to make a law for each particular case, to determine in its judgment the amount of a penalty. . . . The infirmity . . . of the [statute] lies in the fact that the tax commission can in each case name a different sum. It has not set a standard for all cases which fit the rule, but in each case within its mind at its discretion fixes the amount. Only the courts in imposing a fine as a punishment for a crime have this discretion." *Id.* at 416-18, 57 P. 2d at 740-41.

However, in a more recent case, *Wycoff Co. v. Public Serv. Comm'n*, 13 Utah 2d 123, 369 P. 2d 283, *cert. denied*, 371 U.S. 819 (1962), the Supreme Court of Utah, without citing *Tite*, upheld the administrative imposition of a civil penalty of \$18,500 pursuant to a statute that provided for penalties of "not less than \$500 nor more than \$2,000 for each and every offense." The Court said:

"There is no question but that in performing its multifarious duties in franchising and regulating public utilities the Commission is required to and does perform some functions of a judicial or quasi-judicial nature; nor that it is within the competence of the legislature to confer upon the Commission the power to do so and to enforce the law and its regulations made pursuant thereto by administrative procedures. It is well established that this includes the imposition of a monetary penalty for violation of law or lawful orders or regulations promulgated by the Commission within the scope of its administrative responsibility." *Id.* at 125; 369 P. 2d at 285.

For other state cases dealing with variable money penalties, see 1 DAVIS § 2.13; Gellhorn 268-76.

indicate that Congress' power to authorize variable (as well as fixed) money penalties would be sustained.

Justice Brandeis noted in *Helvering v. Mitchell* that the "payment of fixed or *variable sums of money* are other sanctions which have been recognized as enforceable by civil proceedings since the original revenue law of 1789."⁴⁶ The immigration cases consistently upheld the authority to remit.⁴⁷ In the *N. A. Woodworth* case, the NWLB's right to impose a penalty and reduce it for "extenuating circumstances" was sustained.⁴⁸ Indeed, the whole trend of the law as to delegation (see "A" *supra*), and the power that almost all federal agencies have to remit, mitigate or compromise penalties, indicate that there should be no real problem here.

Again, Professors Davis, Gellhorn and Jaffe concur with this view of the state of the law.⁴⁹ Professor Gellhorn, however, sensibly warns:

"Courts have occasionally been hostile to statutes giving administrative officers large discretion in the severity of the penalty to be imposed, because they fear that inequality in application of the sanction will result; therefore, to the extent practicable, the statutes should contain guides to the considerations that should weigh with the delegate. . . ."⁵⁰

In this regard, agency draftsmen should review the Occupational Safety and Health Act of 1970⁵¹ and the Federal Coal Mine Health and Safety Act of 1969.⁵²

Of course, where appropriate, fixed money penalties should be used because they allow for ease of administration, mandate uniformity, and avoid other problems inherent in the delegation of sanctioning discretion.⁵³ But, in many instances, for all of the reasons set forth in Section III *supra*, federal agencies should be afforded the flexibility,

⁴⁶ 303 U.S. 391, 400 (1938) (emphasis added); see notes 96-100 *supra* and accompanying text.

⁴⁷ See notes 216-21 *supra* and accompanying text.

⁴⁸ See notes 224-29 *supra* and accompanying text.

⁴⁹ See 1 DAVIS § 2.13 at 138; Gellhorn 285; JAFFE 112.

⁵⁰ Gellhorn 285.

⁵¹ See note 241 *supra* and accompanying text.

⁵² 30 U.S.C. § 819(a)(1) (1970).

⁵³ In this regard, Professor Gellhorn observed:

"Possibilities of abusiveness, favoritism, venality, discrimination, absent-mindedness, and sheer silliness do exist when a penalizer has a choice about the severity of the penalty he will utilize. Who can deny this? Must one then conclude that the danger of abuse and the difficulty of correcting it when it does occur are so great that the legislature *must not* confer upon administrators the power to impose variable money penalties, whether they be called fines or something else? Or are these merely factors to be carefully weighed by the legislature before choosing to confer any power of that kind?—to be weighed, one might add, along with such other factors as the danger that inheres in automaticity (as in some of the savage mandatory penalties for narcotics offenses) and the danger that a drastic sanction may not be effective because its side effects on others are too undesirable" Gellhorn 276.

and ability to precisely measure culpability, that variable money penalties provide.⁵⁴

Statutory schemes providing for administrative imposition of civil money penalties should not be vulnerable to claims based upon an alleged offender's right under the Seventh Amendment to jury trial "[i]n [s]uits at common law, where the value in controversy shall exceed twenty dollars."⁵⁵ The statutory transfer of a matter to the bailiwick of agency control has often been said to negate a jury demand because "proceedings before agencies are not suits at common law."⁵⁶ For example, in *NLRB v. Jones & Laughlin Steel Corp.*⁵⁷ the Supreme Court upheld the power of the NLRB to order an employer to pay "wages for time lost" to an employee who had been wrongfully discharged, and rejected the employer's contention "that the requirement is equivalent to a money judgement and hence contravenes the Seventh Amendment with respect to trial by jury." Chief Justice Hughes reasoned:

"The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement."⁵⁸

The shielding of administrative proceedings from Seventh Amendment requirements has been especially consistent when a "public procedure, looking only to public ends" is involved.⁵⁹ Professor Jaffe has summarized the federal law as follows:

"Certain proceedings 'involving public rights' may be adjudicated either by an agency or . . . constitutional courts. Congress may make the choice . . . to use either or both. Furthermore, even a suit involving 'private right,' that is 'the liability of one individual to another,' may also be adjudicated by an agency provided . . . that the matter is not one at 'common law' entitling the parties to a jury trial."⁶⁰

Of course, the administrative imposition of a civil money penalty for a regulatory offense deals with the vindication of a public right, and any sums collected are deposited in the federal treasury.

⁵⁴ As to creative uses of variable money penalties, see proposals for implementation in Section VII *infra*.

⁵⁵ U.S. CONST. amend VII.

⁵⁶ 1 DAVIS § 8.16 at 594; see e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); H. HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 320 (1953).

⁵⁷ 301 U.S. 1 (1937).

⁵⁸ *Id.* at 48-49.

⁵⁹ *Agwilines, Inc. v. NLRB*, 87 F. 2d 146, 150 (5th Cir. 1936); see, e.g., *Virginia Elec. Co. v. NLRB*, 319 U.S. 533, 543 (1943); JAFFE 90-91; 5 J. MOORE, *FEDERAL PRACTICE* § 38.19 [2] (2d ed. 1971).

⁶⁰ JAFFE 91.

Moreover, it is clear that whether the strict historical approach of the majority in *Dimick v. Schiedt*⁶¹ is used, or the more flexible approach of the dissent is adopted, many of the matters for which civil money penalties are imposed would be found to have no analogue at common law, to involve subjects which have always been under the sovereign's control, and would be classified as equity or admiralty for Seventh Amendment purposes.⁶² It is most unlikely that courts would go far out of their ways to break with precedent and require jury trials in penalty cases at a time when there is a growing consensus among commentators and judges that "the question whether we have more trial by jury than we want or need is well worth asking."⁶³

Aside from the problems involved in the classification of "civil" as opposed to "criminal" sanctions (discussed in Section III C & D), the administrative imposition of civil money penalties does not appear to raise any other issues which could result in significant constitutional challenges. Of course, notice, hearings, an impartial forum, and other safeguards should be afforded as explained in Section V.

VII. TECHNIQUES FOR IMPLEMENTATION

A. Collection Techniques

Where necessary, the collection of civil money penalties may be enforced by civil suits in federal district courts; therein, the merits of an agency's decision need not be opened to challenge. Professor Davis has summarized the law in the area as follows:

"In general, a defendant in a civil . . . proceeding brought to enforce an administrative order or regulation may defend on the ground of invalidity of the order or regulation, *in absence of affirmative legislative intent to the contrary.*"⁶⁴ (Emphasis added.)

Part B2 of the recommendation provides for efficient and fair adjudications by agencies and for subsequent judicial review. Legislation providing for the administration imposition of civil money penalties should specify that final agency determinations cannot be

⁶¹ 293 U.S. 474 (1934).

⁶² See, e.g., *Helvering v. Mitchell*, 303 U.S. 391 (1938); *Lloyd Sabauo Societa v. Elting*, 287 U.S. 329 (1932); H. HART & H. WECHSLER, *supra* note 254, at 319-20; J. GOEBEL JR. & T. NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 608-09 (1970); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 920, 927-28, 934-37, 976-81 (1926); James, *Right to a Jury Trial in Civil Actions*, 72 Yale L.J. 655 (1963).

⁶³ Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases*, 85 Harv. L. Rev. 442 (1971); see Lumbard, *Trial by Jury and Speedy Justice*, 166 N.Y.L.J. 80 at 1 (1971); cf. Kaufman, *Harbingers of Jury Reform*, 58 A.B.A.J. 695 (1972). *But cf.* *Ross v. Bernhard*, 396 U.S. 531 (1970).

⁶⁴ 3 DAVIS § 23.07 at 320.

subjected to collateral attack in later "collection proceedings." This is permissible under well settled law.⁶⁵ In *United States v. Sykes*,⁶⁶ for example, where a civil penalty of \$1,962 had been assessed against a farmer for marketing excess wheat, the Fifth Circuit held:

"Appellee claims that he did not follow any of the allowed methods of review because the action of the County Committee was so blatantly wrong that he saw no need for review and that he saw no hope for his cause via those channels. This, of course, is not sufficient reason to avoid the effects of the clear mandate of, and the reasons behind, the statutes and regulations providing for review of the local county committee's determination. Had appellee followed the prescribed remedies he could have urged before the committee the questions he urged before the district court and now urges on appeal. *Neither legal nor factual questions may now be raised, appellee having failed to raise them in the proper manner. The decision thus became final and binding upon appellee and immune from collateral attack.*"⁶⁷ (Emphasis added.)

Undoubtedly, the vast majority of alleged offenders will voluntarily comply with agency decisions and orders;⁶⁸ a "collection proceeding" should be a seldom utilized device. In any event, the Department of Justice, which would proceed by motion for summary judgment,⁶⁹ has indicated that such proceedings "would present no significant difficulty for it."

A variety of other collection techniques could also be used. The INS, for example, easily collects penalties because "no vessel or aircraft shall be granted clearance" while any penalty imposed upon it "remains unpaid."⁷⁰ The Agricultural Adjustment Act of 1938 gives the Department of Agriculture a lien on a farmer's commodities for penalties unpaid.⁷¹ While Professor Gellhorn believes that the "collection of true penalties by summary devices such as distraint will probably be frowned upon, except when supported by a strong tradition such as that encountered in the revenue field," there are enough "strong traditions" to leave considerable room within which to work.⁷² Setoffs

⁶⁵ See, e.g., *United States v. Sykes*, 310 F. 2d 417 (5th Cir. 1962); *Weir v. United States*, 310 F. 2d 149 (8th Cir. 1962); 3 DAVIS § 23.07; Gellhorn 286.

⁶⁶ 310 F. 2d 417 (5th Cir. 1962).

⁶⁷ *Id.* at 420; see *Weir v. United States*, 310 F. 2d 149 (8th Cir. 1962).

⁶⁸ Of course, over 90% of penalty cases are expected to be settled (see Section V *supra*), and those settling are likely to be willing to pay. Other alleged offenders will simply be willing to abide by lawful decisions, or will comply because of concern about continuing relationships and agency good will.

⁶⁹ Motions for summary judgment were, for example, successfully used in the cases cited in note 265 *supra*.

⁷⁰ 8 U.S.C. § 1221(d) (1970); see 8 U.S.C. §§ 1248(a), 1323(b), (d), 1332(c) (1970); note 217 *supra* and accompanying text.

⁷¹ See, *Weir v. United States*, 310 F. 2d 149, 154 (8th Cir. 1962).

⁷² Gellhorn 286; as to the Customs Bureau see Nelson, *supra* note 144, at 613.

against money owed offenders by the Government may be used,⁷³ and the technique of disallowing deductions for tax purposes, used in the *N.A. Woodworth* case, is a most potent device.⁷⁴

In general, however, an agency's compliance rate should be high. The availability of a "collection proceeding" will often be more than ample for enforcement needs.⁷⁵

B. Creative Imposition Techniques

Manifestly, civil money penalties should be used as a behavior influencing, not a revenue raising, device. Since the goal is to secure compliance with statutory provisions or administrative regulations, legislation should be framed with the following postulates in mind:

1. Where improper profits have been made or other pecuniary benefits derived, penalties should deprive the offender of more than his gain if they are to prevent future violations.⁷⁶

2. A civil money penalty which is not high enough to deter may depreciate the significance of an offense and actually imply a license to commit a disapproved act.⁷⁷

3. The deterrent effect of a monetary penalty depends, in large part, upon its likely impact on the financial resources of the potential offender. In determining the severity of a penalty, both the gravity of the offense and the particular status of the offender usually should be considered. If ability to pay is ignored, agencies will often harshly treat the poor and fail to deter those with ample means.⁷⁸

⁷³ See The National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1398(b) ("The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged").

⁷⁴ See notes 224-29 *supra* and accompanying text.

⁷⁵ See note 266 *supra*. Where an indigent is not involved, it is even possible that criminal sanctions could be imposed by a court. See *Tate v. Short*, 401 U.S. 395 (1971); Note, *Fining the Indigent*, 71 Colum. L. Rev. 1281 (1971). In the State of New York, for example, failure to pay a penalty imposed by the Department of Insurance within thirty days is a misdemeanor. N.Y. INS. LAW § 5(2) (Mckinney Supp. 1971). On the federal level, however, it is doubtful that such an extreme (and probably ineffective) approach need ever be used. See Section III D *supra*.

⁷⁶ See notes 201-08 *supra* and accompanying text.

⁷⁷ Although monetary penalties are widely used in both the civil and criminal law, little empirical research has been done as to their impact on those they are intended to deter. Cf. Note, *Fining the Indigent*, 71 Colum. L. Rev. 1281, 1286-87 (1971). Clearly, this subject could be the basis for an important Administrative Conference project.

⁷⁸ See Note, *Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days"*, 57 Calif. L. Rev. 778, 810-16 (1969); Note, *Fining the Indigent*, 71 Colum. L. Rev. 1281, 1284-86 (1971); Note, *Fines and Fining—An Evaluation*, 101 U. Pa. L. Rev. 1013, 1021-26 (1953).

4. Payment of penalties must not become a mere cost of doing business. Insofar as possible, the impact of monetary penalties should not be diffused by permitting indemnification, insurance repayment, tax abatement, or "risk spreading or passing" by any other means.

Sensitivity and creativity should guide the preparation of legislation. New ideas should be tried. For example, one method of taking an offender's wealth into account would be by the so-called "day-fine" technique. Under this approach an offender would first be sanctioned in terms of non-monetary units according to the gravity of his offense (e.g., a pilot buzzing an airport might be fined thirty days). These units would then be converted into the dollar amounts by multiplying them with the daily income of the offender.⁷⁹ Sometimes accumulated wealth, number of dependents, and other similar factors are taken into account.⁸⁰ According to one review of a Swedish statute, for example, "for identical offenses, each meriting the greatest number of units, the fine can vary according to defendant's fortune from \$116.40 to \$6,984.00."⁸¹

Of course, the same kind of monetary impact now occurs when a commercial pilot (or a broker-dealer) is suspended for thirty days, but the "day-fine" has the advantage of retaining the pilot's productive capacity and minimizing the possibility that innocent parties will be hurt. In a less formal sense, statutes could take account of the economic status of an offender by providing, as does the Occupational Safety and Health Act of 1970, that in assessing "all civil penalties" the "size of the business" is to be weighed.⁸²

Informer fees, modern variations of *qui tam* actions,⁸³ combinations of civil money penalties and other sanctions such as publicity,⁸⁴ and similar techniques should be considered and sometimes put into use. The lesson, in short, is not that civil money penalties will be a panacea for all of our regulatory ills, but that they can be far more than a weak palliative, if given a serious try.

⁷⁹ *Id.*

⁸⁰ See Note, *Fines and Fining—An Evaluation*, 101 U. Pa. L. Rev. 1013, 1025 (1953).

⁸¹ *Id.*

⁸² 29 U.S.C. § 666(1).

⁸³ See Note, *Fines and Fining—An Evaluation*, 101 U. Pa. L. Rev. 1013, 1027 (1953).

⁸⁴ See McKay 457-58; Rourke, *Law Enforcement Through Publicity*, 24 U. Chi. L. Rev. 225 (1957). See generally J. CHAMBERLAIN, N. DOWLING & P. HAYS, *THE JUDICIAL FUNCTION IN FEDERAL ADMINISTRATIVE AGENCIES* 111-121 (1942).

APPENDIX A

COMPILATION OF THE RESULTS OF A SURVEY OF THE PRESENT USE OF
CIVIL MONEY PENALTIES BY FEDERAL ADMINISTRATIVE AGENCIES1. *The Nature of the Survey*

This survey was conducted by means of questionnaire (distributed by mail to participating agencies on July 9, 1971); where necessary, follow-up telephone conferences and interviews were held.¹ Each of the eleven executive departments,² two offices of the Executive Office of the President,³ and twenty-one independent agencies⁴ were contacted. Four executive departments (*i.e.*, Commerce, Justice, Transportation, and Treasury) submitted separate information for individual bureaus. Each of the departments, offices and independent agencies responded in July or August, 1971; forty-six responses were received in all.⁵

A number of responses were, for one reason or another, ambiguous, inaccurate or incomplete. In each such instance, further inquiries were made to the agency involved. In general, agency responses were supplemented by independent review of applicable statutes, regulations, cases and secondary sources.

Nevertheless, this survey does not purport to be definitive or wholly complete. A far greater period of time—and more resources and manpower than were available—would be needed for such a job.⁶ Throughout this report, when-

¹ In conducting this survey I have had the invaluable assistance of John Flannery, a student at Columba Law School who served as law clerk to the Administrative Conference during the summer of 1971. Mr. Flannery collected and assembled agency responses, conducted follow-up interviews, collated data, and prepared statistical summaries. I acknowledge my debt to him for the care, diligence and skill with which he carried out each of these tasks.

² Agriculture; Commerce; Defense; Health, Education, and Welfare; Housing and Urban Development; Interior; Justice; Labor; State; Transportation; and Treasury.

³ The Office of Management and Budget, and the Office of Economic Opportunity.

⁴ Atomic Energy Commission; Civil Aeronautics Board; Environmental Protection Agency; Equal Employment Opportunity Commission; Federal Communications Commission; Federal Home Loan Bank Board; Federal Maritime Commission; Federal Power Commission; Federal Reserve System; Federal Trade Commission; General Services Administration; Interstate Commerce Commission; National Aeronautics and Space Administration; National Labor Relations Board; Securities and Exchange Commission; Selective Service System; Small Business Administration; United States Civil Service Commission; United States Commission on Civil Rights; United States Postal Service; and Veterans Administration.

⁵ The response of each agency to the questionnaire is on file at the office of the Administrative Conference. (Copies of responses were distributed to members of the Committee on Compliance and Enforcement Proceedings in October, 1971.)

⁶ Certain information (generally, as to number of cases that occur annually or as to the dollar value of penalties collected) was not available. The IRS, for example, responded to the questionnaire as follows:

"The amount of all penalties received is included within total assessed amounts in our data banks and is not set out as a separate item. Our data processing system has not been programmed to bring out such information."

The Bureau of Customs explained:

"Information is available only with respect to penalty cases acted upon by the Bureau. It is not available with respect to penalty cases acted upon by district directors of Customs under their local delegated authority."

ever unavailable information might have a bearing on a discussion this fact is set forth in a footnote or in the text.

Although it has the above-mentioned limitations, Appendix A constitutes the first significant survey of what is being done in the money penalties field.⁷ Recent Congressional hearings demonstrate that too often misinformation has dominated discussions about this area.⁸ The material presented herein should clear up much of the confusion about the nature and scope of the present use of civil money penalties by federal administrative agencies. More importantly, the survey illuminates a number of significant trends which should be taken into account in formulating national legislative policy. These trends and their implications are discussed in the body of this report. — ↑

2. *Methods Used to Impose Civil Money Penalties* 26 pts.

The first part of the survey questionnaire focused on the methods used to impose civil money penalties. Question A asked :

"Does your agency, in carrying out any administrative or regulatory function, have the power to impose [civil] money penalties (e.g., \$1000 for specified types of misconduct by licensees) through agency rulemaking or adjudication?"

It was assumed that agency adjudications would be subject to limited judicial review under the substantial evidence test.

Although a relatively large number of agencies claimed such adjudicative power, further analysis indicated that it was held by very few.⁹ (See agencies listed in column A in Chart I below.) A number of agencies that claimed adjudicative power are, in fact, given the power to decide cases under applicable statutes. The problem, however, is that their decisions are subject to *de novo* judicial review. Agencies in this category are listed in column B. Another group of agencies, also listed in column B, cannot adjudicate, but instead must seek initial enforcement (either with their own attorneys or, more likely, through the Department of Justice) in the courts. Also set forth in Chart I are the number of civil money penalty provisions (*i.e.*, separate statutory grants) which may be enforced by a given agency; an asterisk in column B indicates that *the agency* has the power to compromise, remit or mitigate the payment of money penalties without obtaining the approval of the Department of Justice or a court. A "+" in column B indicates that the penalty provision in question is infrequently used and that an agency's authority to compromise, remit or mitigate the payment of a money penalty under the provision is unclear.

⁷ See Report note 9 *supra*.

⁸ See, e.g., testimony of Chairman Bentley of the Federal Maritime Commission (FMC) and F. Conger Fawcett, Esq., at *Hearings on H.R. 755 Before the Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess., ser. 8, pt. 1, at 158-61 and 173-78, respectively (1971); Section II, *supra*.

⁹ For purposes of the survey, no distinction was 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 was classified as *civil* and (ii) *money* was in fact subject to collection by an agency or a court. Excluded were 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.

CHART I—*Methods of imposing civil money penalties*

Agency ¹	Number of civil money penalty provisions	A. Administra- tive imposition subject to substantial evidence review	B. Court imposition, or administrative imposition subject to de novo review
EXECUTIVE OFFICE			
1. Office of Management and Budget (OMB)-----	None	-----	-----
2. Office of Economic Opportunity (OEO)-----	None	-----	-----
EXECUTIVE DEPARTMENTS			
3. Agriculture-----	19	-----	× *
4. Commerce:			
a. Foreign Trade Zones Board (FTZB)-----	1	-----	× *
b. Bureau of International Commerce (BIC)-----	1	-----	× *
c. National Oceanic and Atmospheric Administration (NOAA)-----	8	-----	× *
d. Maritime Administration (MA)---	1	-----	× *
5. Defense-----	None	-----	-----
6. Health, Education, and Welfare-----	None	-----	-----
7. Housing and Urban Development----	None	-----	-----
8. Interior-----	4	-----	× * ²
9. Justice:			
a. Bureau of Narcotics and Dangerous Drugs (BNDD)-----	1	-----	×
b. INS-----	13	× ³	-----
10. Labor (with Occupational Safety and Health Review Commission (OSHRC))-----	2	× ⁴	-----
11. State-----	None	-----	-----
12. Transportation:			
a. National Highway Traffic Safety Administration (NHTSA)-----	1	-----	× *
b. Federal Aviation Administration (FAA)-----	1	-----	× *
c. Federal Railroad Administration (FRA)-----	5	-----	× *
d. United States Coast Guard (USCG)-----	87	-----	× *
e. Federal Highway Administration (FHWA)-----	1	-----	× *

See footnotes at end of table.

CHART I—*Methods of imposing civil money penalties*—Continued

Agency ¹	Number of civil money penalty provisions	A. Administra- tive imposition subject to substantial evidence review	B. Court imposition, or administrative imposition subject to de novo review
EXECUTIVE DEPARTMENTS—Continued			
13. Treasury:			
a. Internal Revenue Service (IRS)---	21	-----	× *
b. Customs-----	35	-----	× *
c. Office of Foreign Assets Control (Foreign Assets)-----	1	-----	× *
d. Comptroller of the Currency (Comptroller)-----	3	-----	× †
e. Office of Domestic Gold and Silver Operations (ODGSO)-----	1	-----	× *
INDEPENDENT AGENCIES			
14. Atomic Energy Commission (AEC)---	1	-----	×
15. Civil Aeronautics Board (CAB)-----	2	-----	× *
16. Environmental Protection Agency (EPA)-----	3	-----	× *
17. Equal Employment Opportunity Commission (EEOC)-----	None	-----	-----
18. Federal Communications Commis- sion (FCC)-----	10	-----	× *
19. Federal Home Loan Bank Board (FHLBB)-----	6	× ⁵ -----	-----
20. Federal Maritime Commission (FMC)-----	3	-----	× *
21. Federal Power Commission (FPC)---	2	-----	× †
22. Federal Reserve System (FRS)-----	5	-----	× *
23. Federal Trade Commission (FTC)---	5	-----	×
24. General Services Administration (GSA)-----	None	-----	-----
25. Interstate Commerce Commission (ICC)-----	12	-----	× *
26. National Aeronautics and Space Administration (NASA)-----	None	-----	-----
27. National Labor Relations Board (NLRB)-----	None	-----	-----
28. Securities and Exchange Commission (SEC)-----	1	-----	× †
29. Selective Service System (SSS)-----	None	-----	-----
30. Small Business Administration (SBA)---	1	-----	× *

See footnotes at end of table.

CHART I—*Methods of imposing civil money penalties*—Continued

Agency ¹	Number of civil money penalty provisions	A. Administra- tive imposition subject to substantial evidence review	B. Court imposition, or administrative imposition subject to de novo review
INDEPENDENT AGENCIES—Continued			
31. United States Civil Service Commission (CSC)-----	None	-----	-----
32. United States Commission on Civil Rights-----	None	-----	-----
33. United States Postal Service (Postal Service)-----	3	× ⁶	-----
34. Veterans Administration (VA)-----	None	-----	-----

¹ The abbreviations set forth in Chart I will be used throughout Appendix A.

² This classification of the Department of Interior's power to assess civil money penalties, under the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 800 *et seq.* (1970) is subject to question. In reality, the Department of Interior has a hybrid form.

Section 819(a)(4) of the Act, 30 U.S.C. § 819(a)(4) (1970), the civil penalty provision, provides that a district "court shall consider and determine *de novo* all relevant issues, *except issues of fact* which were or could have been litigated in review proceedings before a court of appeals under section 816 of this title . . ." (emphasis added). Section 816(a) provides:

"Any order or decision issued by the Secretary or the Panel under this chapter, except an order or decision under section 819(a) [*i.e.*, the civil penalty provision] of this title, shall be subject to judicial review by the United States court of appeals for the circuit. . . ."

Section 816(b) provides:

"The court shall hear such petition on the record made before the Secretary or the Panel. The findings of the Secretary or the Panel, if supported by substantial evidence on the record considered as a whole, shall be conclusive."

Since a district court assesses the amount of any money penalty to be paid, and since the interrelation, if any, between fact finding under sections 816 and 819 may vary from case to case, the designation under column B was made. In general, whenever doubt existed as to whether category A or B of Chart I was applicable, such doubt was resolved by classification under B.

³ See, e.g., *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329 (1932); *Elting v. North German Lloyd*, 287 U.S. 324 (1932); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

⁴ 29 U.S.C. § 651 *et seq.* (1970).

⁵ See 12 U.S.C. § 1425a(d) (1970); 12 C.F.R. §§ 523.12-13, 523.32(a) (1971). Counsel for the FHLBB reported that "there has never been a court appeal" but that "review would be limited to considering whether the Board has acted arbitrarily or capriciously."

⁶ 39 U.S.C. §§ 5206, 5603 (1970); 49 U.S.C. § 1471 (1970); 39 C.F.R. §§ 927.1-2 (1971); see, e.g., *Allman v. United States*, 131 U.S. 31, 35 (1889); *Great Northern Ry. v. United States*, 236 F. 433, 443-44 (8th Cir. 1916).

Many agencies able to compromise, remit or mitigate the payment of money penalties act pursuant to statutory authority granted specifically to them. This is true, for example, of the FAA,¹⁰ the NHTSA,¹¹ the Department of Labor¹² and

¹⁰ Section 901(a)(2) of the Federal Aviation Act of 1958, 49 U.S.C. § 1471(a)(2) (1970).

¹¹ National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. § 1398(b) (1970).

¹² Section 6(e) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(e) (1970).

the IRS.¹³ Other agencies (e.g., the Department of Agriculture, FMC and ICC) may compromise money penalty claims pursuant to the terms of the Federal Claims Collection Act of 1966, 31 U.S.C. §§ 951-53 (1970). However, compromises under the Act may only cover claims "that do not exceed \$20,000." 31 U.S.C. § 952(b) (1970).

Agency responses indicate that an overwhelming majority of money penalty cases (somewhere above 90%) are compromised without ever being referred to the Department of Justice or heard by a court.

3. Number of Cases and Dollar Magnitude of Monies Collected

Agencies were asked to:

"indicate the number of cases (*i.e.*, number of individual instances in which the power is used) that occur annually; and . . . set forth the total dollar value of the penalties collected annually."

Charts II and III set forth, in tabular form, the responses to these questions.

CHART II—Number of cases annually¹

Agency	1967	1970	1971
EXECUTIVE DEPARTMENTS			
1. Agriculture ² -----	734	1,357	1,210
2. Commerce:			
a. FTZB-----	0	0	0
b. BIC-----	2	5	3
c. NOAA-----	7	14	³ NA
d. MA-----	1	1	1
3. Interior-----	0	96	2,927
4. Justice:			
a. BNDD-----	0	0	0
b. INS-----	430	691	740
5. Labor and OSHRC-----	0	0	NA
6. Transportation:			
a. NHTSA-----	0	10	10
b. FAA-----	772	968	NA
c. FRA-----	0	25	124
d. USCG-----	8,162	4,368	NA
e. FHWA-----	0	0	128
7. Treasury:			
a. IRS-----	NA	NA	NA
b. Customs ⁴ -----	942	655	664
c. Foreign Assets ⁵ -----			
d. Comptroller-----	0	0	0
e. ODGSO-----	NA	NA	NA

See footnotes at end of table.

¹³ INT. REV. CODE of 1954, § 7122.

CHART II—Number of cases annually ¹—Continued

Agency	1967	1970	1971
INDEPENDENT AGENCIES			
8. AEC-----	0	0	0
9. CAB-----	2	1	NA
10. EPA-----	0	0	0
11. FCC-----	666	962	1, 472
12. FHLBB-----	0	25	27
13. FMC ⁶ -----	4	6	6
14. FPC-----	0	0	0
15. FRS-----	0	0	0
16. FTC-----	8	6	2
17. ICC-----	7 909	670	420
18. SEC-----	0	0	0
19. SBA-----	0	10	NA
20. Postal Service-----	2, 513	53, 107	52, 734
Total-----	⁸ 15, 152	62, 977	60, 468

¹ References in Charts II and III are to an Agency's fiscal year (*i.e.*, ending June 30); in a few instances, estimates were used in converting figures supplied by agencies from a calendar to a fiscal year. Only agencies which have money penalty provisions available for enforcement purposes (see Chart I) are listed on Charts II and III.

² Only partial information was available. Figures for marketing orders and certain research and promotion programs were not available.

³ NA indicates that the requested information was not available.

⁴ Information was available "only with respect to penalty cases acted upon by the Bureau" and not "with respect to penalty cases acted upon by district directors of Customs under their local delegated authority."

⁵ The figures for Foreign Assets are included in those supplied by Customs.

⁶ Only a total figure was available (from January, 1967); this total was apportioned pro rata over the applicable fiscal years.

⁷ This figure for 1967 includes both civil and criminal penalty cases; no further breakdown was available for that year.

⁸ Corresponding figures for 1968 and 1969 were 12,692 and 62,818, respectively.

As indicated, figures for the 1971 fiscal year were not available for several agencies. A substitution of the corresponding 1970 figure for each agency whose 1971 figure was not available produces a total figure of 65,928 cases for the 1971 fiscal year; excluding the extraordinary jump in Postal Service cases which occurred, would produce a figure of 15,608 for the adjusted 1971 fiscal year.

CHART III—Total value of penalties collected

Agency	1967	1970	1971
EXECUTIVE DEPARTMENTS			
1. Agriculture ¹ -----	\$366, 023	\$846, 550	\$660, 986
2. Commerce:			
a. FTZB-----	0	0	0
b. BIC-----	1, 400	41, 841	42, 400
c. NOAA-----	40, 865	804, 893	NA
d. MA-----	800	800	800
3. Interior-----	0	0	493, 990
4. Justice:			
a. BNDD-----	0	0	0
b. INS ² -----	NA	NA	NA
5. Labor and OSHRC-----	0	0	NA
6. Transportation:			
a. NHTSA-----	0	94, 300	165, 250
b. FAA-----	247, 049	517, 316	NA
c. FRA-----	0	267, 925	1, 383, 197
d. USCG-----	118, 793	260, 690	NA
e. FHWA-----	0	0	114, 850
7. Treasury:			
a. IRS-----	NA	NA	NA
b. Customs ³ -----	3, 800, 798	3, 561, 863	3, 456, 211
c. Foreign assets ⁴ -----			
d. Comptroller-----	0	0	0
e. ODGSO-----	NA	NA	NA
INDEPENDENT AGENCIES			
8. AEC-----	0	0	0
9. CAB-----	100, 000	1, 000	NA
10. EPA-----	0	0	0
11. FCC-----	73, 112	154, 100	208, 925
12. FHLBB-----	0	23, 095	23, 095
13. FMC ⁵ -----	32, 755	73, 695	73, 695
14. FPC-----	0	0	0
15. FRS-----	0	0	0
16. FTC-----	68, 100	285, 000	8, 250
17. ICC-----	⁶ 469, 085	1, 902, 330	1, 529, 966

See footnotes at end of table.

CHART III—*Total value of penalties collected*—Continued

Agency	1967	1970	1971
18. SEC.....	0	0	0
19. SBA.....	0	6,744	NA
20. Postal Service.....	538,440	665,426	711,364
Total.....	7 5,857,220	9,506,568	8,872,979

¹ See note 21 *supra*.

² The INS indicated that the requested information was not available and explained:

“When the penalty proceeding has passed through all adjudicative steps and is administratively final, the adjusted amount collected is posted, under Treasury Department instructions, to an account which includes money collected as liquidated damages for breaches of contract, including immigration bonds. Because of this commingling of collections, the requested information cannot be retrieved except by a burdensome task at each of our four regional offices, consisting of tracing each item back until it is identified as either a fine or a contractual obligation.”

³ See note 23 *supra*.

⁴ See note 24 *supra*.

⁵ See note 25 *supra* (i.e., the total dollar figure was also apportioned pro rata).

⁶ See note 26 *supra*.

⁷ Corresponding figures for 1968 and 1969 were \$5,289,285 and \$5,477,856, respectively.

As indicated, figures for the 1971 fiscal year were not available for several agencies. A substitution of the corresponding 1970 figures for each agency whose 1971 figure was not available produces a total dollar figure of \$10,463,622 for the adjusted 1971 fiscal year.

4. *The Wide Array of Offenses for Which Civil Money Penalties May be Imposed*

Exhibit I to Appendix A contains an illustrative catalogue of statutory provisions pursuant to which federal administrative agencies (or the courts) impose civil money penalties. It is not an all-inclusive list. Nevertheless, even a cursory review of Exhibit I should provide the reader with a “feel” for the wide array of matters covered and the varying amounts of money which may be involved. The implications of the above will, of course, be discussed in the body of this report.

EXHIBIT I
to
APPENDIX A

Illustrative Catalogue of Statutory Provisions Pursuant to Which Federal
Administrative Agencies (or the Courts) Impose Civil Money Penalties

Agency-Citation	Purpose	Penalty
<i>Executive Departments—</i>		
<i>Agriculture:</i>		
7 U.S.C. § 1314(a) (1970).	Marketing of tobacco in excess of marketing quota.	75% of average market price of tobacco for preceding year.
7 U.S.C. § 1340(2) (1970).	Marketing of wheat in excess of marketing quota.	65% of parity price per bushel of wheat.
7 U.S.C. § 1346(a) (1970).	Marketing of cotton in excess of marketing quota.	50% of parity price per pound of cotton.
7 U.S.C. § 1356(a) (1970).	Marketing of rice in excess of marketing quota.	65% of parity price per pound of rice.
7 U.S.C. § 1359(a) (1970).	Marketing of peanuts in excess of marketing quota.	75% of the support price for peanuts.
7 U.S.C. § 1155(a) (1970).	Sugar knowingly marketed or imported in excess of sugar quotas.	Three times market value of the sugar.
7 U.S.C. § 1155(b) (1970).	Sugar imported and processed as raw sugar which is determined to be direct-consumption sugar.	\$0.01 per pound in excess of direct-consumption sugar quota.
7 U.S.C. § 1433 (1970).	Misuse of feed intended to relieve distress or preserve foundation herds.	Market value of the feed involved.
7 U.S.C. § 1379i(a) (1970).	Failure to conform to the Secretary's requirements for domestic wheat marketing certificates, export marketing certificates, or other required certificates.	Twice the face value of the marketing certificates.
7 U.S.C. § 610(c) (1970).	Willful disclosure of confidential marketing information.	\$100.

Agency-Citation	Purpose	Penalty
<i>Executive Departments—</i> Continued		
<i>Agriculture—Continued</i>		
7 U.S.C. § 499c(a) (1970).	Failure of broker to obtain license.	Up to \$500 each offense; up to \$25 for each day it continues.
45 U.S.C. §§ 73, 74 (1970).	Failure to properly care for animals in transit.	\$100-\$500.
7 U.S.C. § 1596(b) (1970).	Violation of provisions of Federal Seed Act.	\$25-\$500.
7 U.S.C. § 203 (1970).	Failure to register stockyard.	Up to \$500/each offense, up to \$25 for each day it continues.
7 U.S.C. § 207(g) (1970).	Failure to comply with rate provisions, regulations or orders.	Up to \$500/each offense, up to \$25 for each day it continues.
7 U.S.C. § 215(a) (1970).	Failure to obey Secretary's order concerning rates discrimination or deceptive practices.	\$500/each offense.
7 U.S.C. § 2149(a) (1970).	Animal Welfare Act of 1970.	\$500/each offense.
15 U.S.C. § 1825(a) (1970).	Horse Protection Act of 1970.	\$1000/each offense.
<i>Commerce:</i>		
a. FTZB: 19 U.S.C. § 81S (1970).	Foreign Trade Zones-----	Up to \$1000.
b. BIC: 50 U.S.C. § 2405(c) (1970).	Violation of provisions or regulations concerning import control.	Up to \$1000.
c. NOAA:		
16 U.S.C. § 772f (1970).	Records and reports-----	\$50/each violation.
16 U.S.C. § 957(d) (1970).	Knowingly shipping, transporting, etc., any fish taken or retained in violation of regulations.	(1) Up to \$25,000 for the first violation, (2) up to \$50,000 for subsequent violations.
16 U.S.C. § 957(e) (1970).	Failure to keep statistical records, etc.	(1) up to \$1,000 for the first violation; (2) up to \$5,000 for subsequent violations.
16 U.S.C. § 957(f) (1970).	Importation of certain species of fish contrary to regulation.	Up to \$100,000.

Agency-Citation	Purpose	Penalty
<i>Executive Departments—Continued</i>		
Commerce—Continued		
16 U.S.C. § 989(o) (1970).	Violation of any provision of or regulation under N.W. Atlantic Fisheries Act.	(a) Up to \$500 for the first violation (b) up to \$1000 for subsequent violations.
d. MA: 46 U.S.C. §§ 808, 835 (1970).	Violation of Shipping Act.	Money penalty in lieu of forfeiture from \$500 to \$1000.
Interior:		
18 U.S.C. § 43(c) (1970).	Transportation of wildlife taken in violation of State, national, or foreign laws.	Up to \$5000 for each violation.
30 U.S.C. § 819(a) (1) (1970).	Violations of coal mine health and safety standards.	Up to \$10,000 for each violation.
30 U.S.C. § 819(a) (2) (1970).	Willful violation of standards relating to smoking.	Up to \$250.
Justice:		
a. BNDD: 21 U.S.C. § 842 (1970).	Unlawful distribution of a controlled substance, failure to keep records, unlawful use of seal placed on such substances.	Up to \$25,000.
b. INS:		
8 U.S.C. § 1221(d) (1970).	Failure of manifests for shipments or aircraft to comply with the requirements of this section.	\$10 per person not included in the manifest.
8 U.S.C. § 1223(c) (1970).	Failure to comply with provisions concerning examination upon arrival.	Cost of maintenance including detention expense; \$300 for each violation.
8 U.S.C. § 1227(b) (1970).	Failure to provide immediate deportation of aliens excluded from admission (or entering in violation of law).	Same as above.
8 U.S.C. § 1229 (1970)	Violation of any regulation concerning ports of entry for aliens arriving by aircraft.	\$500.

Agency-Citation	Purpose	Penalty
<i>Executive Departments—</i> Continued		
Justice—Continued		
8 U.S.C. § 1253(c) (1970).	Deportation Proceedings within 5 years after the entry of the alien for causes existing at time of arrival.	Cost of deportation to owner of vessel.
8 U.S.C. § 1281(d) (1970).	Failure to deliver true and accurate list of alien crewmen.	\$10 for each alien not reported.
8 U.S.C. § 1284(a) (1970).	Failure to detain alien crewman until an immi- gration officer has in- spected the crewman.	\$1000 for each failure.
8 U.S.C. § 1285 (1970).	Employment on passenger vessels or aircraft of aliens afflicted with certain disabilities.	\$50 for each alien.
8 U.S.C. § 1286 (1970).	Unlawful discharge in United States of alien crewman.	\$1000 for each viola- tion.
8 U.S.C. § 1321 (1970).	Failure to prevent the un- authorized landing of aliens.	\$1000 for each viola- tion.
8 U.S.C. § 1322(a)(b) (1970).	Bringing in aliens subject to disability or afflicted with certain diseases.	\$1000 or \$250 depend- ing on the alien's condition.
8 U.S.C. § 1323(a)(b) (1970).	Unlawful bringing of aliens into United States.	\$1000 for each viola- tion.
8 U.S.C. § 1287 (1970).	Intent to evade immigra- tion laws or bring alien crewmen into United States with intent to evade immigration laws.	Up to \$5000 each viola- tion.
Labor with OSHRC: 29 U.S.C. § 666 (1970).	Occupational safety and health:	
	(a) willful or repeated violations.	(a) up to \$10,000.
	(b) other violations----	(b) up to \$1,000.
Transportation:		
a. NHTSA: 15 U.S.C. § 1398(a) (1970).	Failure to comply with safety standards.	Up to \$1,000 for each violation and \$400,000 per related series of violations.
b. FAA: 49 U.S.C. § 1471(a) (1) (1970).	Violation of provisions and regulations.	Up to \$1,000 for each violation.

Agency-Citation	Purpose	Penalty
<i>Executive Departments—</i>		
Continued		
Transportation—Con.		
c. FRA:		
45 U.S.C. § 64a(a) (1970).	Hours of service.....	\$500 for each violation.
45 U.S.C. §§ 6, 13 (1970).	Safety appliance.....	\$250 for each violation.
45 U.S.C. § 34 (1970).	Locomotive inspection.....	\$250 for each violation.
49 U.S.C. § 27 (h) (1970).	Signal inspection.....	\$100 for each violation and \$100 for each day violation continues.
45 U.S.C. § 438(b) (1970).	Violation of provisions and regulations.	\$250–\$2,500; each day considered a separate violation.
d. USCG:		
33 U.S.C. § 157a (c) (1970).	Navigating or operating a vessel under bridges in violation of regula- tions.	Up to \$500.
33 U.S.C. § 158 (1970).	Penalty for violations of chapter 3 (navigation rules for harbors, rivers, and inland waters) by pilot, engineer, mate, or master.	Up to \$500.
[The USCG enforces 85 other civil money penalty provisions.]		
e. FHWA: 49 U.S.C. § 322(h) (1970).	Violation of various motor carrier safety regulations by certain motor carriers.	\$500 for each offense and up to \$250 for each additional day.
Treasury:		
a. IRS:		
Internal Re- venue Code § 6651(a).	Failure to file tax return or to pay tax.	0.5%–25%.
Internal Re- venue Code § 6652.	Failure to file certain information returns.	\$1–\$25,000.
Internal Re- venue Code § 6653(a)(b).	Failure to pay tax through:	
	(1) negligence.....	(1) 5% of under- payment.
	(2) fraud.....	(2) 50% of under- payment.

[The IRS enforces 18 other civil money penalty provisions.]

Agency-Citation	Purpose	Penalty
<i>Executive Departments—</i> Continued		
Treasury—Continued		
b. Customs:		
19 U.S.C. § 292 (1970).	Failure to file manifests going to or leaving place where there is no custom house.	\$20 each offense.
19 U.S.C. § 469 (1970).	Dealing in or using empty stamped imported liquor containers.	\$200 for each cask.
[Customers enforces 33 other civil money penalty provisions.]		
c. ODGSO: 31 U.S.C. § 443 (1970).	Acquisition and use of gold in violation of law.	Twice the value of the gold and forfeiture, seizure and condemnation of property.
Independent agencies:		
AEC: 42 U.S.C. § 2282 (1970).	Violations of licensing requirements.	Up to \$5,000 for each violation to a maximum total penalty of \$25,000 within 30 days.
CAB: 49 U.S.C. § 1471(o) (1970).	Violation of provisions and regulations.	Up to \$1000 for each violation.
49 U.S.C. § 1474(a) (1970).	Violations regarding application of existing laws relating to foreign commerce.	\$500/each offense.
FCC:		
47 U.S.C. § 202(c) (1970).	Common carrier—discrimination and preferences.	\$500 each offense and \$25 for each day of continuance of offense.
47 U.S.C. § 214(d) (1970).	Common carrier—extension of lines.	\$100/day.
47 U.S.C. § 503(b) (1970).	Broadcast-stipulated violations.	Up to \$1,000 per violation and total of not more than \$10,000.
47 U.S.C. § 510(a) (1970).	Stipulated violations.....	Up to \$100/violation and a total of not more than \$500.

[The FCC enforces 6 other civil money penalty provisions.]

Agency-Citation	Purpose	Penalty
<i>Executive Departments—</i> Continued		
EPA:		
42 U.S.C. § 1857F-4 (1970).	Violation of provisions or regulations relating to interstate dealings in automobile and engines not meeting exhaust emission standards.	Up to \$10,000.
42 U.S.C. § 1857d(j) (2) (1970).	Failure to submit reports...	\$100 per day.
33 U.S.C. § 1161(f) (2) (1970).	Violation of provisions and regulations of Federal Water Pollution Act.	Up to \$5,000.
FHLBB:		
12 U.S.C. § 1425a(d) (1970).	Deficiency with liquidity requirements under the Federal Home Loan Bank Act.	Up to the highest rate of advances of one year, plus 2% per annum.
12 U.S.C. § 1425b(b) (1970).	Violation of rule.....	Up to \$100/per violation.
[The FHLBB enforces 4 other civil money penalty provisions.]		
FMC: 46 U.S.C. § 801 <i>et seq.</i> (1970).	Violation of statutory provisions.	Up to \$5,000.
FRS:		
12 U.S.C. § 324 (1970).	Failure to make reports of conditions and of payment of dividends to Federal Reserve bank.	\$100/day till submission.
12 U.S.C. § 334 (1970).	Failure to furnish reports from affiliates.	\$100/day till submission.
12 U.S.C. § 374a (1970).	Acting as agent for non-banking borrower in making loans on securities to dealers in stocks, bonds, etc.	Up to \$100 /day.
12 U.S.C. § 377 (1970).	Affiliation with organization dealing in securities.	Up to \$1,000/day.
12 U.S.C. § 1908(a) (1970).	Willful violation of any regulation under chapter 20, credit control.	Up to \$1,000.

Agency-Citation	Purpose	Penalty
Independent agencies— Continued		
FTC:		
15 U.S.C. 45(1) (1970)	Violation of cease and desist order.	Up to \$5,000/each viola- tion; each day a violation.
15 U.S.C. 65 (1970).	Export trade, failure to supply required information.	\$100/each day of failure.
15 U.S.C. 68d(b)(1970).	Wool products labeling, failure to maintain records.	\$100/each day of failure.
15 U.S.C. 69f (1970).	Fur products labeling, failure to maintain records.	\$100/each day of failure.
15 U.S.C. 21(1) (1970)	Violation of order of Commission.	Up to \$5,000/each violation; each day a violation.
ICC:		
49 U.S.C. § 1 (12)(1970).	Failure to prorate.....	\$100/each offense.
49 U.S.C. § 1 (17)(a)(1970).	Failure to comply with order.	\$100-\$500 for each offense and \$50/day.
[The ICC enforces 10 other civil money penalty provisions.]		
SEC: 15 U.S.C. § 78ff(b) (1970).	Failure to file information, documents or reports.	\$100 for each day.
SBA: 15 U.S.C. § 687g (1970).	Violation of any regula- tion or written directive requiring the filing of a report.	Up to \$100/per day for each day of continuance.
Postal Service:		
39 U.S.C. §5206 (1970).	Failure to perform mail transportation services as required.	(a) up to \$500 for each day the carrier refuses (b) an amount the Postal Service deems reasonable, (c) deductions from compensation.
39 U.S.C. § 5603 (1970).	A common carrier by water fails or refuses to trans- port the mail.	Up to \$500 for each day the carrier refuses.
49 U.S.C. § 1471(a) (1970).	Violation of regulations.....	Up to \$1,000 for each such violation.