

STATEMENT OF KENNETH P. QUINN, CHIEF COUNSEL OF THE FEDERAL AVIATION ADMINISTRATION, BEFORE THE HOUSE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION, SUBCOMMITTEE ON AVIATION, CONCERNING THE CIVIL PENALTY ASSESSMENT PROGRAM. MARCH 26, 1992.

Mr. Chairman and Members of the Subcommittee:

I am Kenneth Quinn, Chief Counsel of the Federal Aviation Administration. With me today is John H. Cassady, the FAA's Deputy Chief Counsel. We are pleased to appear before the Subcommittee today to discuss the FAA's civil penalty assessment program.

As you know, Mr. Chairman, the FAA has made great strides in the past three years in compliance and enforcement. We initiated our "Compliance in the 90's" initiative to provide remedial training to general aviation airmen for many types of violations. Over 700 airmen have availed themselves of this program. In the air carrier area, we have instituted a voluntary self-disclosure program. Under this program, air carriers are encouraged to audit, report and correct potential safety problems, thereby avoiding imposition of civil penalties.

Still, there are areas where enforcement remains a necessary resort--records falsification, reckless flying, weapons in airport secure areas and explosives aboard aircraft--to name a few. And when we do bring an enforcement case, we need to know that it can

be brought and adjudicated in an efficient manner that preserves the prerogatives of the FAA Administrator's preeminent safety and security policies.

That's why Congress enacted the civil penalty assessment program in 1987--to provide administrative resolution of civil penalty cases without having to resort to the overburdened Federal District Court system. Processing these cases through the court system can waste scarce judicial resources, and can force U.S. Attorneys to make priority choices between bringing to trial significant criminal cases and oftentimes relatively small civil penalty cases. In general, administrative hearings are far more efficient and less costly than resort to the district court--a fact as important to regulated entities as it is to the regulator. Our civil penalty assessment authority was modeled after programs that have been in effect at agencies throughout the Federal Government. Initially enacted for a two-year demonstration period, the program has since has been reenacted by the Congress for limited periods three additional times.

Now I am well aware that the FAA's civil penalty program has not been without controversy. In fact, in my former capacity as Counselor to the Secretary of Transportation, I worked hard with the FAA to revamp its rules of practice for this program. For example, we changed the program to permit parties to settle cases without a finding of violation, and instituted stricter separation

of functions between prosecutor and adjudicator--far more than other Executive Branch agencies. Since I became Chief Counsel last year, I have worked equally as hard to ensure fairness to all parties in an enforcement case. I have worked cooperatively with members of the aviation bar and industry groups to achieve our compliance and enforcement goals--goals that I know they share--to maximize the safety and security of the finest aviation system in the world.

Much has been said and written about this program from its early days. But the simple and unrefuted facts are these: the FAA's unitary form of administrative adjudication for civil penalties is (1) the norm throughout government, with over 200 statutes on the books authorizing similar programs; (2) legally sound, with over ten U.S. Supreme Court cases upholding the Constitutionality of various components of unitary adjudication and one United States Court of Appeals decision expressly rejecting a due process challenge to the FAA's civil penalty program; (3) procedurally fair, with no interest group challenging our rules of practice and a United States Supreme Court decision directing a lower court to vacate its earlier opinion on this subject; and (4) administratively superior in terms of efficiency as compared to the NTSB, with less than one-quarter the amount of time it takes to go from an administrative law judge decision to final administrative decision at the FAA versus the NTSB. Now, as a result of an exhaustive review of the entire civil penalty program

by the Administrative Conference of the United States (ACUS), we have an express finding of "no evidence of actual unfairness or mishandling of cases resulting from commingling prosecutorial and judging functions under the present system." As a result, although we will continue to work with regulated parties to address concerns over "perceptions," we see no convincing evidence or rationale for proposing any transfer of cases to the NTSB.

At bottom, no system of enforcement will be popular with regulated entities. As Professor Perritt of Villanova Law School noted in his report to ACUS: "It must be recognized that respondents in enforcement proceedings have an economic interest in the establishment or maintenance of the most cumbersome procedural requirements possible." Each individual or entity subject to an enforcement action has a vested interest in finding alternative forums for review, especially when added delays will result. But I would encourage this Subcommittee to examine closely any remaining concerns. Satisfy yourself that you are not just hearing complaints about existing enforcement policy, or anecdotes from cases that are neither civil penalties nor fully adjudicated. The FAA's civil penalty program has been placed under a microscope and been proven to be normal, legal, fair and efficient--no justifiable reasons exist to transfer any of the Administrator's important safety and security responsibilities, Perceptions are important, and can be changed. I only ask that

the Congress judge the FAA's civil penalty program on the facts and the law, not on its popularity.

When the program was last extended, the Congress called upon ACUS to consider whether cases brought under the civil penalty program should be heard by the National Transportation Safety Board rather than the FAA. That report has, of course, now been completed and provided to the Subcommittee. Since representatives of ACUS will appear before you today, I will not go into detail concerning their process or findings. Their recommendations do, however, provide the general framework for the Administration's proposal for change to the current civil penalty process, which is contained in the FAA reauthorization proposal transmitted to the Congress on March 4.

Our proposed legislation, in keeping with the ACUS' recommendations, makes several key changes in the current program. First, it would make the program a permanent program. Second, it would provide for an FAA right of appeal to the courts of appeal for adverse decisions of the NTSB in certificate cases; private appellants already have that right. Third, it calls for deference by the courts of appeal and the NTSB to the FAA's interpretations of its regulations and the statutes it administers. And, fourth, it would remove the present cap of \$50,000 for civil penalty cases which can be heard administratively.

The one ACUS recommendation with which we disagree, and have not proposed, concerns the transfer of FAA's authority to hear civil penalty cases for pilots and flight engineers to the NTSB.

Whereas the other ACUS recommendations were adopted unanimously by ACUS, this aspect of the report was more controversial, and was adopted on a split vote.

The genesis of the proposal for transfer of the relatively small number of civil penalty cases involving pilots and flight engineers to the NTSB was the initial report to ACUS prepared by Professor Perritt. As a corollary to this limited transfer of cases, however, Professor Perritt also proposed that the authority to hear all other certificate cases (e.g., air carriers) be, in turn, statutorily transferred to the FAA. This proposed transfer of certificate cases to the FAA, which would have avoided so-called "forum-shopping" between FAA's two-year limitations period and NTSB's six-month stale complaint rule, was not proposed in the final ACUS report.

Instead, the ACUS Committee on Adjudications rejected this aspect of Professor Perritt's work and accepted only recommendations for the transfer of pilot/flight engineer civil penalty cases to the NTSB. The Council of ACUS, however, unanimously rejected the pilot transfer, citing no justifiable basis for making an exception to the unitary form of administrative adjudication. Finally, by a vote of 22 to 12, the

ACUS plenary session voted to reinstate the recommendation for pilot/flight engineer transfer.

Our experience to date in administering the present civil penalty assessment program shows that it works well. We have demonstrated efficiency in hearing a large number of cases. On average, the time it has taken for civil penalty cases to go from an administrative law judge decision to final appeal decision at the FAA has been 172 days, compared to 756 days for certificate cases before the NTSB. (I have attached as an appendix to my prepared statement general statistical data on the civil penalty program for your review.) The efficacy of our civil penalty program, combined with an enforcement approach intended to force airlines to pay greater attention to finding weapons and explosives, has been demonstrated in weapons detection tests we have conducted of airlines over a four-year period. Before the initiation of an initial enforcement effort in this area in 1987, and a subsequent strengthened enforcement policy in 1988, airlines were failing to find our simulated weapons and explosives in 21% of our probes; most recently, for calendar year 1991, the failure rate had dropped dramatically to about 5%.

Certainly, much of this improvement can be attributed to a more aggressive, tailored enforcement posture in this area; at the same time, though, the fact that a process was in place to adjudicate these cases administratively without the recognized difficulties

of using the Federal courts had an impact on the airlines' compliance attitude as well. It's hard to argue that our air transportation system is not well served by thwarting the carriage of weapons or explosives aboard aircraft. The success of this particular enforcement effort demonstrates, perhaps more clearly than any other example we could cite, how the safety enforcement tools Congress has given us can have a direct effect on promoting the safety of the traveling public.

There were two bases cited by ACUS for recommending the transfer of pilot/flight engineer cases to the NTSB. The first was that there were perceptions that the FAA's process may be unfair. The second is that there may be a potential conflict in pilot/flight engineer cases given the FAA's operation of the air traffic control system. Let me respond briefly to each of these points.

I believe we have demonstrated that our process is a fair one. When the question of fairness or perceptions of fairness was raised by outside lawyers, we looked at the results in cases on appeal before the FAA compared to cases heard before the NTSB. The results show that respondents have prevailed in a higher number of cases in their appeals to the Administrator than they have before the NTSB, which is in sharp contrast to the stated perceptions of the fairness of the FAA's program.

I would also stress that the FAA's program is the norm throughout the Federal Government. In fact, aviation lawyers practicing in

the economic arena have long been involved with a similar adjudication process at the Civil Aeronautics Board and its successor the Office of the Secretary of Transportation. As I mentioned a moment ago, our analysis shows that appellants have been more likely to win before the FAA than the NTSB. And, perhaps most importantly, the distinguished professor retained by ACUS to do its report listened to the anecdotes about bias by outside lawyers, conducted an exhaustive review, and specifically found that there was no evidence of unfairness or bias in the FAA's adjudication process.

We also cannot accept the theory that there might be a conflict in FAA's adjudication of pilot/flight engineer cases because of the FAA's operation of the air traffic control system. Most pilot cases that arise do not have involvement with the air traffic control system. In fact, FAA data shows that, of all the pilot cases heard by administrative law judges so far, fewer than 15% have had any air traffic involvement. Even in cases involving air traffic control contact with an aircraft, the potential for bias simply does not exist as a practical matter because air traffic control tapes, cockpit voice recorders, or radar track data, available to both parties, tends to show objectively what transpired. In any event, the courts remain the final arbiter in these matters to assure that FAA and all other agencies provide fair, unbiased treatment.

In brief, the Administration does not support the transfer of pilot/flight engineer civil penalty cases to the NTSB since there has been no documented basis to do so. Perceptions of alleged safety violators may be important, but in the absence of a demonstrated basis for those perceptions, they should not be controlling--particularly when the process in which they participate is the predominant form of civil penalty adjudication throughout the Federal Government. There has been no evidence of abuse; indeed, all existing evidence reveals a system that is working in a timely, fair, effective manner.

I would also add that the opportunity and responsibility to review in detail cases on appeal gives the Administrator a unique and invaluable perspective into the effectiveness and fairness of enforcement during the day-to-day operation of our air transportation system. This insight has proven extremely valuable to the Administrator in helping to shape his approaches to system safety, and offers him an important perspective that helps him fulfill his safety responsibilities.

In closing, Mr. Chairman, I would urge that the Administration's proposal for changes to the civil penalty assessment program be adopted, and that legislation be enacted promptly. Without legislative action, the authority to hear safety cases administratively will expire on August 1. Our ability to process safety violations found by our aviation safety and security inspectors will be substantially impaired if that occurs. My

staff and I stand ready to assist you in your efforts, and to provide whatever additional information you may find useful.

That completes my prepared statement, Mr. Chairman. We would be pleased to respond to any questions you may have at this time.