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BY THE COMPTROLLER GENERAL

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# Report To The Congress

OF THE UNITED STATES

## ICC's Enforcement Program Can Be More Effective In Halting Violations And Preventing Their Recurrence

Civil penalty settlements and court actions are the two most common methods used by the Interstate Commerce Commission to enforce compliance with interstate transportation regulations. Yet their effectiveness is limited by nonapplicability in cases involving many tariff- and service-related violations, small and untimely settlements, problems with U.S. attorneys' handling of referred cases, and lack of followup investigations.

While proposals for regulatory reform may eliminate enforcement of certain regulations, the need to deter violations of other regulations will remain. Thus, actions to strengthen ICC's enforcement program will be important.

Congressional and agency actions are needed.



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COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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To the President of the Senate and the  
Speaker of the House of Representatives

This report describes how the Interstate Commerce <sup>72</sup>  
Commission can make its enforcement program more effective.  
The report discusses the sanctions available to the Commis-  
sion for carrying out its regulatory functions and evaluates  
how effectively these sanctions are being used to deter vio-  
lations of the Interstate Commerce Act. We are making a  
number of recommendations to the Chairman, Interstate Com-  
merce Commission; the Attorney General; and the Congress  
for improving the effectiveness of the Commission's enforce-  
ment program.

We are sending copies of this report to the Director,  
Office of Management and Budget; the Attorney General; and  
the Chairman, Interstate Commerce Commission.

A handwritten signature in black ink, reading "Elmer B. Staats".

Comptroller General  
of the United States



D I G E S T

The Interstate Commerce Commission's (ICC's) enforcement program has encountered problems in deterring violations of interstate commerce legislation through use of its most common enforcement tools--civil penalty settlements and court actions.

GAO realizes that ICC's regulatory mandate is currently under scrutiny and that proposals before the Congress, if implemented, would eliminate the need for enforcement of some existing motor carrier licensing and rate regulations. However, ICC would continue to have enforcement responsibilities. Therefore, GAO believes that ICC will continue to need a sound enforcement program and made its review to determine how effective ICC has been in halting violations and preventing their recurrence.

EFFECTIVENESS OF CIVIL  
PENALTIES IS LIMITED

ICC uses civil penalties more often than any other enforcement tool, yet they

- cannot be used for some major violations,
- are not obtained in a timely manner, and
- result in small settlements.

Under existing laws, civil penalties cannot be used in cases involving many tariff- and service-related violations to which ICC has given highest priority for enforcement action. For example, ICC has been unable to use civil penalties when carriers have illegally retained duplicate payments mistakenly made by shippers, and when carriers have failed to pay independent truckers moneys owed them for rising fuel costs.  
(See p. 8.)

Civil penalty settlements are not obtained in a timely manner. ICC attorneys require an average of 11 months to negotiate a case to completion. Cases handled first by ICC and then referred to U.S. attorneys for collection require an average of 30 months for completion.

While it is possible to assess the relative effectiveness of penalties when violators' revenue gains are measurable, many violations result in benefits which are difficult or impossible to measure, such as retaining a shipper's goodwill and continuing business. The most common violations where revenues can be measured and compared to penalty settlements involve motor carriers hauling commodities without ICC authority.

Civil penalty settlements in cases involving measurable illegal revenue to violators have historically been small--too small to be an effective deterrent. Such settlements have become even more insignificant in relation to illegal revenues. In 1972 the average out-of-court settlement was \$114 per violation, 38 percent of the average gross illegal revenue of \$404 for each documented violation. For the 1977 and 1978 cases GAO reviewed, the average settlement was \$138 per violation, only 26 percent of the average revenue of \$524. (See p. 10.)

#### SEVERAL FACTORS CONTRIBUTE TO UNTIMELY AND SMALL SETTLEMENTS

Some ICC attorneys fail to follow Federal claim collection standards, which call for timely and aggressive action. Sometimes several months elapse before collection is attempted. Also, timeliness is affected because ICC regions have not established and/or consistently followed policies for terminating settlement negotiations. ICC could improve the timeliness of civil penalty settlements by making sure that its attorneys follow Federal claim collection standards and by establishing and implementing policies for terminating negotiations. (See p. 14.)

Motor carriers are aware that civil penalty settlements have historically been small. Carriers negotiate knowing that there is no minimum penalty and that the maximum penalty of \$500 is outdated. Establishing a minimum penalty and a higher maximum based on current economic conditions should give ICC attorneys more leverage in their negotiations. (See p. 15.)

ICC procedures for documenting and using violations also influence the size of some settlements. An average of only about 16 percent of the violations identified by ICC are documented and used in making civil penalty claims. This percentage seems too low to assure settlements large enough to deter future violations. (See p. 16.)

ICC lacks authority to file civil court actions to collect penalties. Some ICC attorneys are reluctant to press for higher amounts knowing that if the violator resists, the case must be referred to the U.S. attorney for collection. A referral may result in additional negotiations between the U.S. attorney and the violator or the filing of a civil court action by the U.S. attorney, or both. Referrals which are accepted by U.S. attorneys result in only slightly larger average penalties. Also, ICC attorneys believe referral to a U.S. attorney substantially delays completion of the case. (See p. 18.)

#### RECOMMENDATIONS

To make ICC's enforcement more effective, the Congress should amend interstate commerce legislation to:

- Make civil penalties applicable to all types of motor carrier violations as well as to shippers and others that aid and abet these violations.
- Establish a minimum civil penalty for motor carrier violations and increase the maximum penalty. (See p. 22.)

Appendix I of this report contains proposed draft legislation to implement these recommendations. (See p. 41.)

The Chairman, ICC, should

- uniformly follow Federal claim collection standards,
- establish and adhere to specific criteria for terminating settlement negotiations and initiating court collections in a timely manner, and
- document and use as many identified violations as are feasible to support civil penalty claims. (See p. 22.)

Further, the Chairman, Interstate Commerce Commission, and the Attorney General, Department of Justice, should reach an agreement authorizing ICC attorneys to handle civil penalty collections when their out-of-court negotiations are exhausted. (See p. 22.)

COURT ACTIONS ARE OFTEN DECLINED,  
DELAYED, AND LACK FOLLOWUP

Court actions--both civil and criminal--are essential to stimulate compliance in cases where civil penalties may not provide a strong enough deterrent to violations. However, ICC's problems with U.S. attorneys' handling of criminal court actions and ICC's lack of a followup investigation program for court actions are limiting their use and effectiveness.

Overall, in the four ICC regions GAO visited, U.S. attorneys declined to handle 42 percent of ICC criminal cases during 1977 and 1978. U.S. attorneys required an average of 12 months to decide to accept or decline these cases. Many of these declinations and delayed decisions are the result of U.S. attorneys' heavy workloads and related priority systems for deciding which cases to prosecute with available resources. (See p. 25.)

ICC regions no longer have a program for timely reinvestigations following successful



court actions. Lack of a followup program to monitor compliance may jeopardize the deterrent value of court actions. (See p. 30.)

#### RECOMMENDATIONS

The Chairman, Interstate Commerce Commission, and the Attorney General, Department of Justice, should enter into an agreement which would ensure more timely and effective judicial handling of criminal actions. The agreement should:

- Designate, where possible, a senior ICC attorney as a standing special assistant U.S. attorney in each region with authority to prosecute ICC criminal court actions whenever U.S. attorneys' workloads or other factors prevent timely handling.
- Develop a procedure for bringing unresolved problems between U.S. attorneys' offices and ICC field offices promptly to the attention of the Attorney General and the Chairman, ICC, for disposition.

The Chairman, ICC, should establish a followup investigation system in each region to timely monitor compliance of those who have received civil injunctions, contempt actions, or criminal fines whenever it appears that violations may continue or be resumed. (See p. 32.)

#### AGENCY COMMENTS AND OUR EVALUATION

ICC generally agreed with the report findings and recommendations. However, with regard to handling court actions for collection of civil penalties, ICC prefers to seek statutory authority for civil litigation in lieu of an agreement with the Department of Justice delegating such authority. GAO believes that the recommended agreement is appropriate because it could be developed rapidly and could eliminate the need for statutory changes.

The Department of Justice agreed that the present statutory maximum civil penalty should be raised and a minimum established. Justice does not believe it is necessary

to authorize ICC attorneys to handle civil penalty court collection actions or to facilitate conduct of criminal litigation by designating selected ICC attorneys as standing special assistant U.S. attorneys. Justice does not believe there is a problem with delays or declinations of ICC cases by U.S. attorneys' offices. With regard to this latter point, the statistics presented in Justice's own comments indicate a problem exists. The data shows that over 50 percent of ICC cases currently on hand at Justice have been there for a year or more.

Justice believes that authorizing ICC attorneys to handle ICC civil and criminal cases in court would be unsound and would result in a diminution of the Department's ability to perform its basic and traditional function of coordinating Government litigation. Justice also notes that authority for litigating civil and criminal cases as recommended by GAO cannot be delegated under existing statutes.

GAO disagrees. For civil penalty collection cases, Justice could require that ICC attorneys (1) seek the advice of U.S. attorneys whenever a civil penalty collection action involves issues of construction or constitutionality of Federal statutes, or of Government-wide significance, (2) provide U.S. attorneys with copies of pleadings, motions, and other key legal documents, and (3) take any other coordinating actions deemed necessary by the Department. Justice has already employed requirements similar to these as part of a memorandum of understanding between it and the Veterans Administration.

For criminal litigation GAO anticipates that Justice could fulfill its coordination responsibilities by requiring close consultation between the U.S. attorney and the ICC special assistant at the time a decision is reached to prosecute a case. The Department could also require the special assistant to take other coordinative actions during the course of the litigation, such as those mentioned above for civil cases. (See p. 34.)

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ABBREVIATIONS

GAO	General Accounting Office
ICC	Interstate Commerce Commission
VA	Veterans Administration

## CHAPTER 1

### INTRODUCTION

The Interstate Commerce Commission (ICC) is responsible for ensuring that the United States has an adequate and efficient transportation system under private ownership. ICC regulation directly affects every mode of transportation except air carriers. Although regulatory laws and regulations vary with the mode of transportation, they generally involve (1) licensing of carriers to provide interstate transportation, (2) settling controversies over rates and charges, (3) prescribing accounting rules, and (4) ruling on applications for mergers or sale of carriers. When carriers, shippers, and others fail to voluntarily comply with these laws and regulations, ICC relies on its enforcement program to bring about compliance and deter violations. Its Bureau of Investigations and Enforcement is charged with enforcing the civil and penal provisions of the Interstate Commerce Act and related laws (49 U.S.C. 10101 et seq. (1978)). The Bureau also takes part in specific ICC proceedings to assist in developing facts and issues on behalf of consumers and the general public.

In October 1976 ICC issued a policy statement which established eight regulatory priorities. First priority would be given to

"\* \* \* those violations having a significant adverse impact on consumers, on particular markets, on the viability of the national transportation system, and those seriously affecting national energy and environmental goals."

ICC also gave its six regional offices complete authority to handle all enforcement cases except those which have national significance, transcend regional boundaries, or involve precedent-setting enforcement actions. ICC headquarters handles these cases. The restructuring of its program was intended, among other things, to respond to past ICC internal studies which found that ICC's compliance and enforcement actions overemphasized relatively insignificant violations by smaller carriers.

Growing congressional and public interest and concern over proposals for regulatory reform in the motor carrier industry raise questions about the future role of ICC's enforcement program. Under the reform proposals advanced by the Ford and Carter administrations, ICC's role in

licensing, among other things, would be reduced, thereby eliminating the need for enforcement of some current regulations. Under such proposals ICC would continue to have responsibility for protecting shippers, consumers, and carriers from abuses in such areas as rates, service levels, and insurance coverage. The need for effective deterrents to violations will remain, and actions to strengthen ICC's current enforcement program will be important to the success of any regulatory reforms undertaken. In addition, continued ICC regulation of other interstate transportation modes, such as rail and water, calls for a sound enforcement program.

#### TYPES OF VIOLATIONS

Most violations generally relate either to adequacy of service rendered, tariff provisions, or carrier authorizations.

Common carriers are required to provide safe and adequate service upon reasonable request of shippers and passengers. Service violations occur when carriers refuse to provide the required service. Examples of inadequate service include not picking up and/or delivering shipments during the time period agreed to and not handling loss and damage claims in a timely manner.

Tariffs are carrier publications which specify the carriers' various services and rates. In general, a tariff violation occurs when transportation services are provided at a rate other than the one published. Tariff violations cover a variety of situations, including undercharging and kickback schemes designed to attract and/or hold shippers' business, as well as various situations in which shippers are charged higher-than-tariff rates or not given the service they paid for.

ICC grants authority to haul commodities or carry passengers only when a carrier demonstrates that a need exists for its proposed service. Grants of authority designate geographic service areas or routes to be followed and/or the commodities which may be carried. Violations occur when carriers without any ICC authority provide services for which authority is required or when authorized carriers exceed the scope of their authority. Most authority violations involve motor carriers. We recognize that the need for the regulations governing some of these violations is currently being debated. Our analysis of ICC's effectiveness in enforcing these regulations should not be interpreted as supporting either side of the regulatory reform issue.

## SANCTIONS AVAILABLE TO ICC FOR CARRYING OUT REGULATORY FUNCTIONS

To halt violations and prevent their recurrence, the Interstate Commerce Act provides for civil penalties, 1/ civil injunctions, and criminal penalties, all of which may be enforced by court action. In addition, ICC has administrative remedies, such as cease and desist orders, suspension or revocation of authority, and denial of applications for authority.

### Civil penalties

ICC uses civil penalties more frequently than any other sanction. In the railroad area, the Interstate Commerce Act provides for a variety of civil penalties for violating the act or ICC regulations or orders. The penalties range from \$100 for denying ICC access to inspect railroad facilities (49 U.S.C. 11901(f)(2)) to \$5,000 for knowingly violating an ICC order (49 U.S.C. 11901(a)).

The Interstate Commerce Act provides for only one civil penalty for motor carrier violations (49 U.S.C. 11901(g)). This provision, by far ICC's most common civil penalty, covers failure to (1) make required reports to ICC, (2) specifically, truthfully, and completely answer questions required by ICC, (3) make, prepare, or preserve transportation records in the form and manner prescribed by ICC, and (4) operate within the limitations of authority granted by ICC. Under this provision, the violator is liable for a civil penalty of not more than \$500 for each violation and not more than \$250 for each additional day the violation continues. No minimum penalty is specified.

ICC civil penalty procedures involve making a claim against a violator based on "documented" violations--that is, those which were reported by an ICC investigator, together with sufficient evidence to prove them in court. An ICC attorney may use all or any part of the documented violations to assert a civil penalty claim. After notifying the violator that he or she is subject to a penalty up to a specified amount for each violation, the ICC field attorney may negotiate a compromise settlement of the claim as

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1/Before revision of the Interstate Commerce Act and related laws on Oct. 17, 1978, the term "forfeiture" was used in the act rather than "penalty." We will use the current civil penalty terminology throughout this report.

provided for under the Federal Claims Collection Act of 1966 (31 U.S.C. 951 et seq.). If a negotiated settlement cannot be agreed upon, the attorney may refer the claim to the U.S. attorney in the appropriate Federal judicial district for collection. The U.S. attorney may conduct further settlement negotiations and/or file a civil court action to force payment of the penalty.

### Civil injunctions

ICC may bring actions seeking civil court injunctions to enjoin carriers and those participating with them from violating provisions of the Interstate Commerce Act and related laws or ICC regulations and orders (49 U.S.C. 11702). If a civil court injunction is granted, ICC may bring any subsequent violation of the injunction as a civil contempt action. In such an action, the court may reaffirm its injunction and take any of several actions such as (1) establishing a penalty amount for future violations of the injunction, (2) requiring periodic reports to demonstrate compliance with the injunction, or (3) granting ICC access to specific records for monitoring future compliance.

### Criminal penalties

The Interstate Commerce Act and related laws prescribe criminal penalties for carriers and shippers who knowingly and/or willfully violate provisions of the acts or regulations, orders, and operating authorities issued under them (49 U.S.C. 11903-11914). In addition, criminal contempt actions may be brought for willful violations of civil injunctions.

In the area of rate violations, some of the criminal provisions call for a fine of at least \$1,000 and up to \$20,000, imprisonment for up to 2 years, or both (49 U.S.C. 11903(a) and (b)). Most types of rate violations, as well as recordkeeping and reporting violations, carry a maximum fine of \$5,000, and some also provide for imprisonment for up to 2 years. For other types of violations where specific criminal penalties are lacking, a general criminal provision designates fines of up to \$5,000 for each rail-related violation, at least \$100--but no more than \$500--for each motor carrier violation, and up to \$500 for each water carrier violation (49 U.S.C. 11914).

All criminal penalties must be obtained in criminal actions prosecuted by U.S. attorneys. ICC refers criminal cases to U.S. attorneys for filing in court; and if the U.S. attorney accepts the case, the ICC field attorney often provides technical assistance in prosecuting it. In some



instances ICC field attorneys may be appointed as special assistant U.S. attorneys, allowing them to appear in court and handle all aspects of the case under the U.S. attorney's supervision.

### Administrative remedies

ICC has several administrative remedies for carrying out its regulatory functions. Available remedies include cease and desist orders, suspension or revocation of authority, and denial of applications for authority.

Although administrative remedies are important to ICC in carrying out its regulatory functions, this report deals only with the more frequently used court-enforced remedies and evaluates how effectively these remedies are being used to halt identified carrier and shipper violations and deter future violations.

### SCOPE OF REVIEW

We reviewed 415 completed case files involving civil penalty claims and civil and criminal court actions in four of ICC's six regions--Boston, Atlanta, Chicago, and San Francisco. Our review covered about 64 percent of all cases completed in these regions during 1977 and 1978. Our purpose in reviewing these files was to determine how effective ICC's enforcement program has been in stimulating compliance with the Interstate Commerce Act and ICC's requirements, regulations, and orders, and in deterring violations.

We discussed the results of our case file reviews with ICC field attorneys and also discussed ICC enforcement policies and procedures with ICC headquarters officials and with field attorneys, investigators, and other regional officials. We reviewed other documents at ICC headquarters and at the four regional offices visited and examined applicable laws and regulations dealing with the ICC enforcement program.

We also contacted Department of Justice headquarters officials responsible for civil and criminal litigation to obtain their views on litigating ICC regulatory cases. We contacted U.S. attorneys' offices and discussed their handling of ICC cases.

Our case file reviews highlighted factors which are limiting the effectiveness of ICC's enforcement program. The factors dealing with civil penalties are discussed in chapter 2, and those dealing with court actions, in chapter 3.

We realize that ICC's regulatory mandate is currently under scrutiny and that proposals before the Congress, if implemented, would eliminate the need for enforcement of some existing motor carrier licensing and rate regulations. Our analysis of ICC's effectiveness in enforcing these regulations should not be interpreted as supporting either side of the regulatory reform issue. ICC would continue to have responsibilities requiring enforcement. Therefore, we believe ICC will continue to need a sound enforcement program and made our review to determine how effective its program has been in halting violations and preventing their recurrence.

## CHAPTER 2

### CIVIL PENALTIES HAVE QUESTIONABLE

#### ENFORCEMENT VALUE

In its October 1976 enforcement policy statement, ICC said that civil penalties would be sought not only to bring about compliance but also to deprive wrongdoers of illegally obtained profits and revenues as a deterrent to violations. We question whether civil penalties are meeting these objectives because they

--cannot be used for some major violations or against some violators,

--are not obtained in a timely manner, and

--result in small settlements.

ICC has been concerned about strengthening its enforcement program for several years. A number of interrelated actions could be taken to make civil penalties a more effective enforcement tool. First, the Congress needs to (1) broaden the civil penalty provisions to include violations which ICC now considers to be its highest priorities and (2) strengthen the monetary penalties. Also, ICC needs to give more emphasis to developing procedures to ensure effective and timely negotiation and collection in civil penalty cases. Finally, ICC and the Department of Justice need to develop procedures to allow ICC attorneys to file civil penalty collection actions when their out-of-court negotiations are exhausted.

#### CIVIL PENALTIES--ICC's CHIEF ENFORCEMENT TOOL

ICC uses civil penalties more often than any other enforcement tool. Even so, several internal ICC compliance studies questioned the effectiveness of civil penalties as a deterrent to unlawful activity.

One internal ICC study, using 1972 data, found that civil penalty settlements collected only a small percentage of illegally obtained revenues. A 1975 compliance study showed that ICC field personnel generally agree that carriers view civil penalty payments largely as a cost of doing business rather than a serious deterrent to unlawful activity. A compliance study conducted in 1976 reported another common staff complaint that

"\* \* \* crime does pay in areas of the Commission's jurisdiction since fines and penalties imposed against violators of our regulations do not cover the gain received from the illegal operation."

This ICC study also observed that "\* \* \* when we do move against a violator we do so in such a mild way that it amounts to little more than a slapping of the wrist."

One of these studies recommended, among other things, an evaluation of the effectiveness of civil penalties as a deterrent. Another of the studies recommended the development and implementation of a revised national compliance policy.

In October 1976 ICC announced a revitalized program which redirected its enforcement approach and established eight priorities for allocating its limited resources to various types of violations. The program was designed to reduce current violations and prevent them from recurring. It increased emphasis on matters of significant economic impact or national importance. Civil penalties were viewed as an important part of the program although their limited effectiveness as an enforcement tool was acknowledged. ICC further noted that legislation might be needed to strengthen the effectiveness of civil penalties.

In February 1978 ICC submitted to the Congress 36 specific recommendations for changes which would have updated the Interstate Commerce Act and brought into accord the regulation of the several modes of transportation it governs. One recommendation would have provided for uniform civil penalties for violations of the Interstate Commerce Act or of orders issued, regulations prescribed, or certificates issued under the act. Also, penalties would have been increased to reflect current economic conditions. The Congress did not act on any of the recommendations.

In November 1979 ICC submitted a legislative package on enforcement and compliance issues to the Chairman, Senate Committee on Commerce, Science, and Transportation. One proposal provides for uniform civil and criminal penalties and is similar to the recommendation submitted in February 1978. As of January 1980 no action had been taken on this proposal.

#### CIVIL PENALTY CANNOT BE USED IN SOME CASES

The overall effectiveness of civil penalties as an enforcement tool is limited by the fact that they often

cannot be used against the types of violations which ICC considers to be its highest enforcement priorities.

For motor carriers, the civil penalty provisions of the Interstate Commerce Act do not specifically cover violations relating to adequacy of carrier service and observance of published rates--two areas to which ICC gave top priority in its October 1976 policy statement. In addition, their applicability to some other types of violations and violators is in doubt as a result of court decisions. ICC attorneys are sometimes unable to use the civil penalty deterrent against carriers and/or shippers because of these problems.

--In one region, ICC found that two large motor carriers had illegally kept an estimated \$3.4 million and \$1.4 million, respectively, in duplicate payments by shippers. ICC officials said that the carriers kept the duplicate payments intentionally and should have been penalized. Although an ICC attorney obtained court injunctions requiring the carriers to cease retaining duplicate payments and, where possible, to return illegally held payments, he said he could not bring civil penalty claims against the carriers because of limited statutory coverage.

--On referral from ICC, a U.S. attorney filed a civil penalty case in U.S. district court involving a motor carrier's violation of an ICC order. ICC charged the carrier with keeping fuel surcharge moneys it had collected from shippers as permitted by an ICC order. The order required the carrier to pass the moneys to the owner-operators 1/ who actually bore the increased fuel costs during the 1973-74 energy crisis. The court ruled that the civil penalty section of the Interstate Commerce Act applicable to motor carriers cannot be used to exact civil penalties for violating ICC orders, such as the surcharge order. Using ICC data, we estimated that the carrier had kept \$73,000 in funds belonging to one group of owner-operators and an unknown portion of more than \$500,000 belonging to a second group of owner-operators.

--In part of another region, ICC cannot use the civil penalty deterrent against shippers who continually

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1/Owner-operators, independent businessmen, are major providers of drivers and equipment to the trucking industry.

aid and abet violating carriers. ICC attorneys in the region said that in many cases these shippers are using the services of carriers who operate without proper insurance coverage and/or routinely violate safety regulations in order to haul at reduced rates. In a precedent-setting case, the U.S. Court of Appeals for the Ninth District ruled that the civil penalty provision does not apply to shippers.

Several ICC attorneys said the Interstate Commerce Act's civil penalty provisions should be broadened and clarified to ensure their applicability to all types of violations by motor carriers and parties aiding and abetting them. Broader authority could give ICC a more effective enforcement tool against violations, particularly for high priority areas of tariff- and service-related violations.

#### SETTLEMENTS NOT OBTAINED IN A TIMELY MANNER

A factor limiting the deterrent value of civil penalty settlements is the time necessary to obtain them. Our review of closed civil penalty cases showed that for those handled entirely by ICC attorneys, an average of 11 months passed between the date the investigator submitted a report until the attorney obtained a settlement or terminated collection efforts. For cases handled first by ICC, then referred to U.S. attorneys for collection, the average processing time was 30 months. For these cases, ICC attorneys' processing lasted an average of 17 months, and subsequent U.S. attorneys' collection efforts took an average of 13 additional months.

Some ICC attorneys told us that settlement delays reduce the deterrent value of civil penalties. Carriers can continue their violations during the lengthy settlement process, further reducing the effect the civil penalty will have on their future compliance. Carriers may also drop out of sight during the delays and avoid paying a civil penalty, or they may start up business in another locale.

#### MANY SETTLEMENTS ARE SMALL

Overall data indicating whether the size of civil penalty settlements is adequate to deter violations is unavailable. Many violations involve benefits which are difficult or impossible to measure, such as retaining a shipper's goodwill and continuing business or temporarily using funds belonging to shippers or independent owner-operators. In such cases the adequacy of the settlement in relation to the benefits derived or harm caused cannot be assessed. Such

assessments can be made only when violations involve measurable revenue gain to the violator. The vast majority of violations producing measurable revenue involve motor carriers hauling commodities without proper ICC authority.

Since we could use only those cases involving measurable revenue to assess the relative size and deterrent value of civil penalty settlements, the results of our assessment presented below should not be considered as representing all ICC civil penalty cases. In particular, cases involving adequacy of service and tariff violations, which ICC now considers to be its highest priority, are not represented. Also, the examples below are intended only to demonstrate a general problem of small settlements in many cases and should not be considered as support either for or against retention of the authority regulations involved.

Civil penalty settlements in cases involving measurable revenue have historically been small. Since 1972 such settlements have become even smaller in relation to illegal revenues.

ICC's only study of civil penalty settlements found that in 1972 the average out-of-court settlement negotiated by ICC attorneys was \$114 per violation, or 38 percent of the average illegal revenue of \$303 for each violation. For the 1977 and 1978 enforcement cases we examined, the average out-of-court settlement was \$138 per violation, or only 26 percent of the average illegal revenue of \$524 for each violation documented.

These average revenue figures are based on the number of violations documented by the investigator, which is often less than the number discovered during the investigations. The average settlement figures are based on the number of violations the ICC attorney actually used in negotiating a civil penalty settlement, which is often less than the number documented. As a result, the actual disparity between total revenue and total out-of-court penalty may be much larger than the above figures indicate.

For example, in several cases the settlement amount was less than 5 percent of the projected revenue 1/ from the violations discovered by the ICC investigator.

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1/We used the revenue recorded by the ICC investigator for documented violations to project the total revenue from the violations discovered.

- A motor carrier was discovered hauling commodities outside the territorial boundaries specified in its ICC operating authority on over 100 occasions. The carrier's projected revenue was over \$108,000. Of the 100 violations, ICC documented 52 and used 24 to negotiate a penalty settlement of \$2,400, only 2 percent of the projected revenue.
- A motor carrier and its parent company were operating beyond the scope of their authority in more than 500 instances over a 13-month period. The projected revenue for the 500 violations was \$68,895. ICC documented 77 of the violations but used only 19 of them in negotiating civil penalty settlements. The companies paid a total penalty of \$2,500, less than 4 percent of the projected revenue from the 500 violations.
- Another motor carrier was found to be hauling beyond the scope of its authority in 106 cases. The violations, occurring over a 13-month period, generated projected revenue of about \$28,000. Although ICC documented 50 of the violations, it used only 10 to negotiate a \$500 civil penalty settlement. This penalty represented less than 2 percent of the projected revenue from the 106 violations.
- A motor carrier was cited for over 400 instances of hauling without proper ICC authority during a 14-month period. The projected revenue from the 400 violations was \$225,500. The carrier's gross annual revenue for the period during which most of the violations occurred was about \$500,000. Only 44 violations were documented and used in negotiating a settlement of \$8,000. While this settlement is larger than most others in the regions we visited, it is less than 4 percent of the projected revenue from the 400 violations.

Several ICC attorneys told us that in most cases civil penalty settlements are too low to be an effective deterrent. They told us that motor carriers in particular often view civil penalties as a cost of doing business. We found cases where carriers continued to violate the regulations after paying a civil penalty and either paid subsequent civil penalties for the same types of violations or were the subject of subsequent court actions for refusing to comply. For example:

- A motor carrier paid a civil penalty of \$4,500, about 4 percent of its illegal revenue of \$105,000.



About 17 months later the carrier paid \$4,000 in settlement of penalty claims arising from identical violations discovered through an ICC followup investigation. Again, the settlement was about 4 percent of \$103,000 in illegal revenue.

- A motor carrier paid five penalties over a 12-year period for unauthorized hauling under illegal lease arrangements with another carrier. The penalties increased progressively from \$500 to \$5,000 without any deterrent effect. Concurrently with the fifth penalty, ICC obtained a court order enjoining further unauthorized operations by the carrier. An investigation of the carrier's activities during the year following the court injunction showed that it was again hauling illegally under the same type of arrangement with the carrier involved in the earlier violations, as well as with a second carrier. An ICC field attorney chose not to start criminal contempt actions because he believed a court action might not lead to an adequate fine. He based his belief on the carrier's claim that it had acted on the advice of a former ICC employee who said that the lease arrangements were acceptable. Instead, the attorney made a sixth penalty claim against the carrier, which eventually led to a \$3,500 settlement.

#### FACTORS CONTRIBUTING TO UNTIMELY AND SMALL SETTLEMENTS

Several interrelated factors contribute to untimely and small civil penalty settlements:

- ICC regions do not uniformly follow Federal claim collection standards and have not established adequate policies for terminating negotiations, both of which affect timeliness of settlements.
- Inadequate penalty provisions result in carriers anticipating small settlements.
- ICC procedures for documenting and using violations in settlement negotiations influence the size of settlements.
- ICC's lack of authority to handle civil court actions to collect civil penalties affects both settlement size and timeliness.

Collection standards not followed and  
termination policies not established

ICC field attorneys do not uniformly follow Federal collection standards issued under the Federal Claims Collection Act of 1966 (31 U.S.C. 951 *et seq.*). The standards direct that an agency take aggressive, timely action, with effective followup, to collect all claims for moneys and property due the United States (4 C.F.R. 102.1). They further direct that three written demands at 30-day intervals will normally be made unless a response to the first or second demand indicates that further demand will be futile (4 C.F.R. 102.2). Several collection cases we reviewed did not conform to the above standards. For example:

- After making an initial claim against a carrier, ICC took 1 year to negotiate a compromise settlement. ICC sent an agreement-of-settlement form for the carrier's signature and awaited receipt of payment. After 3 months, ICC sent a followup letter requesting payment. This letter also went unanswered, and another 5 months elapsed before ICC sent a second request, warning that the case would be referred to the U.S. attorney if payment was not received. Payment was made a month later, but over 21 months had passed since the initial claim against the carrier.
- In another case, ICC delivered a first claim letter to a carrier, then waited 4-1/2 months without reply before sending a warning letter. About another 5 months passed without any response before ICC made telephone contact with the carrier and sent a third letter requesting an offer of settlement. After 4 more months had elapsed, ICC sent a fourth letter giving the carrier 20 days to respond or the case would be turned over to the U.S. attorney. This letter also went unanswered, but 5-1/2 more months passed before the case was referred to the U.S. attorney.
- In one case, an ICC attorney sent an initial demand letter to a carrier, then waited 4 months without a response before sending a second letter. The second letter warned the carrier that timely response was needed or the case would be taken to the U.S. district court. It urged him to contact the ICC office within 10 days. The file contained evidence of only one additional contact with the carrier 2 months later. After another 2 months had elapsed, the case was finally referred to the U.S. attorney for collection.

--In another case, ICC negotiated with a carrier during a 3-month period for settlement of civil penalty claims, ending with a warning that the case would be referred to the U.S. attorney if the carrier did not cooperate by providing financial information. The requested data was never submitted, and ICC field staff were able to obtain only limited information on equipment owned by the carrier. When the case was 11 months old, the ICC attorney took preliminary steps to refer the case to the U.S. attorney but proceeded no further. The case remained dormant for another 20 months until a second ICC attorney wrote the carrier, reviving ICC's claims. Shortly thereafter, the carrier agreed to a settlement, but by then over 3 years had passed since ICC had discovered the violations.

We found considerable variance among ICC attorneys regarding their timeliness in negotiating civil penalties and their susceptibility to being stalled by violators. These factors may help explain why ICC's average processing time for civil penalty cases in the four regions we visited varied from 8 to 16 months.

While some ICC regions have established an informal policy to either settle most civil penalty claims within 6 months or refer them to U.S. attorneys, this policy was not consistently used to terminate unproductive negotiations. Attorneys in some regions said that, rather than refer a case to the U.S. attorney, they continue negotiating, regardless of the time involved, until the negotiation process completely breaks down.

The overall timeliness of civil penalty settlements could be improved if ICC ensures that its attorneys uniformly comply with Federal claim collection standards. Further, establishing and implementing policies for terminating settlement negotiations and initiating court collection actions could also improve timeliness.

#### Inadequate penalty provisions

Some ICC attorneys said that motor carriers are aware that negotiated settlements have a history of being low and that the general civil penalty provision of the Interstate Commerce Act sets a maximum penalty of \$500 per violation but no minimum. Therefore, motor carriers often expect to negotiate small penalty settlements. If, on the other hand, ICC tries to obtain larger penalties, the carrier may refuse to negotiate, believing that subsequent court action will result in a smaller penalty.

Our review of cases settled by ICC attorneys showed that, where measurable, illegal revenues average \$524 per documented violation and that the vast majority of such violations involve motor carriers. We noted that many motor carrier violations generate revenues of \$1,000 to \$2,000 or more. In contrast, the average settlement was only \$138 per prosecuted violation for cases involving measurable revenue gain.

Our file reviews indicated that the current maximum penalty limits ICC attorneys' ability to negotiate effective settlements in cases involving sizable revenues. This is particularly true since most carriers resist paying the maximum, and ICC attorneys usually ask for a lesser amount to avoid frequent court actions. With a higher maximum, ICC attorneys could request larger settlements while still demonstrating a willingness to compromise at amounts below the maximum.

ICC believes that the maximum civil penalty for motor carriers should be raised to bring it more in line with the current level of illegal revenues and other potential benefits resulting from violations. Some ICC attorneys noted that the maximum penalty of \$500 per violation may have been satisfactory in 1935 when motor carriers first came under regulation but is inappropriate in today's economy.

ICC also believes that a minimum civil penalty should be established for motor carrier violations. Some ICC attorneys told us that a minimum amount would help eliminate the imposition of negligible penalties in court suits. The minimum could assist ICC attorneys in negotiating settlements because violators would expect a court penalty of at least that minimum amount for each violation. This factor, together with potential court costs, could make carriers willing to settle at more reasonable levels.

Having both a higher maximum and a suitable minimum would give ICC attorneys more leverage in negotiating with violators and ensure that negotiated settlements stay within a more reasonable range. Furthermore, it would help ensure that more suitable penalty amounts are obtained if negotiations break down and court collection actions are initiated.

#### ICC procedures for documenting and using violations

ICC investigators document only a fraction of the violations discovered, and ICC attorneys do not use all the documented violations to negotiate penalty settlements. The net result is that an average of only 16 percent of the

discovered violations are used in negotiating civil penalty settlements.

ICC found that in 1972 its investigators documented only 20 percent of the discovered violations. Similarly, for civil penalty cases we reviewed for 1977 and 1978, ICC investigators documented only 19 percent of the discovered violations.

ICC officials in one region told us that heavy workloads generally limit the time available to investigators for copying freight bills, canceled checks, and other items needed to document a discovered violation. They said this problem is compounded when dealing with complex cases which require substantial time to demonstrate each violation, or with carriers who refuse to give the investigator access to their records. However, our file reviews showed that relatively few cases involve complex violations or access to records problems. In most cases, complete carrier files are available to the investigator, and documentation of substantially more violations apparently would require only a few additional hours.

Once violations have been documented, ICC attorneys are responsible for using them to assess civil penalty claims against the violator. The violations used by the attorney become the basis for settlement negotiations.

For the cases we reviewed, ICC attorneys used an average of 83 percent of the available documented violations in making civil penalty claims. The average varied from 98 percent in one region to 66 percent in another region. In some cases, documented violations were not used because they were not clearly violations or because they were very similar to other documented violations (for example, two instances of illegal hauls on the same day for the same shipper, but to different destinations). In other instances, however, there were no justifications in ICC enforcement files for not using documented violations which otherwise appeared to be usable.

One ICC attorney told us that the specific number of documented violations used in making a civil penalty claim is not important as long as there are enough to negotiate a "target" settlement amount--one which an ICC attorney believes will deter further violations. Such target settlement amounts are based on a number of factors, including the number and seriousness of the violations, the size and financial position of the carrier, and the carrier's compliance record. In some cases the use of additional violations may be unnecessary since ICC attorneys are able to

obtain the target settlement amounts using fewer violations. However, in many cases ICC attorneys are unable to obtain target amounts, as evidenced by their comments that settlements obtained are, on the average, too small to be effective deterrents.

Documenting and using more discovered violations could give ICC a greater advantage in some civil penalty negotiations and help increase the size of settlements obtained.

#### ICC authority to bring court collection actions

ICC's lack of authority to apply directly to civil courts for penalty claim collection is a factor in both the small size of civil penalty settlements and the length of time needed to obtain them. ICC must refer such proposed collections to U.S. attorneys, and not all cases referred are accepted. An ICC attorney said it sometimes becomes a matter of "selling" the cases and "shopping" for the most receptive U.S. attorneys. Also, according to some ICC attorneys, when a U.S. attorney accepts a case, the settlement is often substantially delayed.

Some ICC attorneys said that they settle for lower civil penalty amounts than they would if their negotiations were backed with the authority to handle their own court collection actions. They said that rather than being able to take violators to court as soon as negotiations reach an impasse, they must rely on U.S. attorneys, which usually means a lengthy delay in filing such actions. ICC attorneys are reluctant to follow this procedure because of the additional delay and because they believe U.S. attorneys are unlikely to collect more than they could themselves. Our review showed that U.S. attorneys obtained an average of \$155 per prosecuted violation, only \$17 more than the settlement average of ICC attorneys.

As noted earlier, referring a case to a U.S. attorney means an average additional delay of 13 months in obtaining a settlement. In several instances, we found that U.S. attorneys were too busy or for other reasons did not give ICC cases attention to assure their timely filing and progress through the court system. We also noted that U.S. attorneys often resume further negotiations with violators in hopes of avoiding filing a court action, even though ICC negotiations were at an impasse when the case was referred. The following are examples of enforcement problems involving U.S. attorneys.

- Combined ICC and U.S. attorneys' efforts required 3-1/2 years to obtain a court default judgment for \$7,500 against a carrier. About 5 months after the investigation report was submitted, ICC made a claim against the carrier, initiating the negotiation phase which extended for 20 months before the case was referred to the U.S. attorney. The assistant U.S. attorney involved said he was busy and, as a result, did not complete his review of the case for about 9 months. He then took another 6 months to file the case in court. The court awarded a default judgment 2-1/2 months later, and the latest document in ICC's file indicated that the assistant U.S. attorney was trying to collect the judgment.
  
- Another case was referred to the U.S. attorney after ICC negotiations over an 8-month period were unproductive. Repeated ICC efforts to prompt the U.S. attorney to get the case to court were unsuccessful. The case was finally dismissed 2 years after referral because of the age of the violations and the fact that the carrier's whereabouts were unknown.
  
- One U.S. attorney sent claim letters and negotiated unsuccessfully with a carrier for 14 months after referral from ICC before filing a court action. These negotiations duplicated ICC's earlier efforts, which had lasted 18 months, and resulted in an additional delay.

A December 1977 Senate Committee on Governmental Affairs report <sup>1/</sup> noted that the Department of Energy Organization Act (Public Law 95-91 (1977)) gives the Federal Energy Regulatory Commission independent litigating authority for all civil court actions except those before the Supreme Court. The report recommended that all independent regulatory commissions, including ICC, be given such authority.

During the 95th Congress, two bills were introduced which would have given ICC some litigating authority. Senate bill 1534 would have given ICC attorneys the authority to commence, defend, or supervise civil litigation if the Attorney General was notified in advance and did not take the requested action. This bill passed the Senate, but no action was taken by the House. Another bill, S. 3240, would have

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<sup>1/</sup>"Study on Federal Regulation," Committee on Governmental Affairs, U.S. Senate, Vol. V, Regulatory Organization, Dec. 1977.

given ICC and other regulatory agencies authority to initiate and conduct litigation in connection with any of their functions carried out pursuant to law. No hearings were held on the bill.

In November 1979 ICC sent a legislative proposal to the Chairman, Senate Committee on Commerce, Science, and Transportation, requesting independent civil litigating authority against all carriers, brokers, and persons who violate the Interstate Commerce Act or orders issued, regulations prescribed, or certificates issued thereunder. No action had been taken on this proposal as of January 1980.

It appears that having the authority to bring its own civil court actions could help ICC increase both the size and timeliness of penalty settlements. This authority could be established through an agreement between ICC and the Department of Justice.

### CONCLUSIONS

ICC has been concerned about improving the effectiveness of its enforcement program. Over the years, internal ICC studies have questioned the effectiveness of civil penalties as a deterrent to future violations and recommended a review of civil penalties and the development and implementation of a revised, comprehensive national compliance policy. In October 1976 ICC adopted a policy which made the pursuit of civil penalties an integral part of its enforcement activities. While ICC uses civil penalties more than any other enforcement tool, we question whether their use is meeting the agency's enforcement objectives because (1) the civil penalty criteria of the Interstate Commerce Act do not cover some types of violations, (2) settlements are often not obtained in a timely manner, and (3) settlement amounts are often small. These factors are interrelated, and a number of joint actions will have to be taken to make civil penalties the effective deterrent they were designed to be.

The overall deterrent value of civil penalties is limited by their lack of applicability to many tariff- and service-related violations, which are ICC's highest enforcement priorities. In addition, court decisions in two regions have further interpreted that civil penalty provisions do not apply to some other types of violations. One of these decisions has prevented ICC from seeking civil penalties against shippers in that jurisdiction. ICC's enforcement program could be improved by (1) broadening the civil penalty provisions applicable to motor carriers to include all violations of the Interstate Commerce Act or of regulations and orders issued pursuant to it and (2) clarifying the provisions



to ensure they apply to shippers and others that aid and abet motor carrier violators.

The value of civil penalties as a deterrent is often reduced because they are not obtained in a timely manner. One factor in delayed settlements is that some ICC attorneys do not consistently follow Federal claim collection standards, which call for timely and aggressive collection efforts. Another reason for delayed settlements is that ICC regions have not established and/or consistently followed policies for terminating settlement negotiations. Some attorneys will continue negotiations indefinitely, often to avoid referring a case to the U.S. attorney for collection.

The major factor contributing to small civil penalty settlements is the existing penalty provisions specified in the Interstate Commerce Act. Carriers are aware that under the present penalty provisions, civil penalty settlements historically have been small; violators therefore tend to resist substantial increases in settlement amounts. They negotiate on the basis that for motor carrier violations the Interstate Commerce Act specifies no minimum penalty and an outdated maximum of \$500. We believe that a minimum penalty of at least \$200 per violation and a maximum of at least \$1,000 are needed to give ICC attorneys more leverage in negotiating with violators. Increasing the maximum penalty would bring it more in line with current economic conditions.

Only a small percentage of violations discovered by an ICC investigator are actually documented and used in negotiating a civil penalty settlement. In many cases, however, additional violations could be documented without substantially increasing the time spent by the investigator. ICC could increase the size of settlements in some cases by directing investigators to routinely document as many discovered violations as possible within time constraints and by directing its attorneys to use as many of the violations as feasible in making penalty claims.

A factor in both the size and timeliness of civil penalty settlements is the reluctance of ICC attorneys to refer cases to U.S. attorneys for collection, because such referrals have met with limited success. U.S. attorneys decline to handle some of these cases and often substantially delay the completion of referred cases. Both the size and timeliness of civil penalty settlements apparently could be improved if ICC attorneys were authorized to handle court actions when their efforts to settle out-of-court are exhausted. This authority could be established through an agreement between ICC and the Department of Justice.

## RECOMMENDATION TO THE CONGRESS

We recommend that the Congress amend the Interstate Commerce legislation by

- making civil penalties applicable to all types of motor carrier violations and clarifying the provisions to ensure that civil penalties apply to shippers and others that aid and abet these violations and
- establishing a minimum civil penalty for motor carrier violations of at least \$200 per violation and increasing the maximum to at least \$1,000 per violation.

Appendix I of this report contains proposed draft legislation to implement this recommendation.

## RECOMMENDATIONS TO THE CHAIRMAN, ICC

To assure that more effective and timely measures are taken to deter violations, we recommend that the Chairman, ICC, direct that:

- ICC attorneys uniformly follow the collection standards issued in accordance with the Federal Claims Collection Act with regard to timely claim letters and aggressive settlement negotiations.
- ICC regions establish and adhere to specific criteria for terminating settlement negotiations and initiating court collection actions after a reasonable time period, except in unusual circumstances.
- ICC investigators document as many of the violations discovered during investigations leading to civil penalty claims as are feasible within the time available.
- ICC attorneys use as many of the documented violations as are feasible in negotiating settlements of civil penalty claims and, where documented violations are not used, provide rationales in the case files for omitting them.

## RECOMMENDATION TO THE CHAIRMAN, ICC, AND THE ATTORNEY GENERAL

To further assure more timely and effective handling of ICC civil penalty collection actions, we recommend that the Chairman, ICC, and the Attorney General develop an

agreement permitting ICC attorneys to file civil collection actions when their out-of-court negotiations are exhausted.

### CHAPTER 3

#### PROBLEMS IN USING COURT ACTIONS

##### TO DETER VIOLATIONS

ICC's October 1976 policy statement said that the use of court actions was essential to provide stronger deterrents where civil penalties had not stimulated compliance. In attempting to use court actions, ICC has encountered problems with the Department of Justice's handling of such actions and with its own lack of procedures for following up on court actions. Those problems have reduced the use and effectiveness of court actions in deterring violations.

Under existing law, ICC must rely on the Department of Justice to bring criminal court actions. This arrangement has created some problems, particularly where local U.S. attorneys have heavy workloads. U.S. attorneys in some jurisdictions have frequently declined to handle criminal cases referred by ICC and/or delayed reaching decisions on whether to file such cases. ICC and Justice need to cooperate in developing measures for more effective handling of court actions.

A major part of the deterrent value of a court action lies in the stronger sanctions the court may impose if violations continue. Therefore, timely followup on court actions to determine compliance is important to ensure their deterrent value. ICC lacks procedures for following up on court actions to ensure that violators have come into compliance. This problem jeopardizes the effectiveness of all court actions, both civil and criminal. ICC needs to establish a program of timely followup investigations to monitor violators' compliance after completion of court actions against them.

##### PROBLEMS WITH U.S. ATTORNEYS' HANDLING OF CRIMINAL COURT ACTIONS

In general, when ICC refers enforcement actions to U.S. attorneys, it often encounters problems with cases being delayed and/or declined. These problems were briefly discussed in chapter 2 concerning civil penalty collections and are discussed in more detail in this chapter concerning criminal actions.

ICC must request U.S. attorneys to bring court actions for violations of the criminal provisions of the Interstate Commerce Act and related laws. While ICC officials indicated that they received good response to such requests in

many of the 95 U.S. attorney jurisdictions, they often encounter problems in some of the jurisdictions. Overall, we found that U.S. attorneys decline to handle a large percentage of ICC-referred court actions and often fail to reach timely decisions on declining or prosecuting such cases. These difficulties have hampered ICC's enforcement program in some regions. They have also caused some ICC field attorneys to avoid referring cases to U.S. attorneys whenever possible.

Criminal actions declined and decisions delayed

Our review showed that U.S. attorneys declined to prosecute many criminal court actions referred by ICC. In the four ICC regions visited, we identified 120 criminal cases active during 1977 and 1978 which had been referred to U.S. attorneys. At the time of our review, U.S. attorneys had reached decisions to either accept or decline 86 of these cases. Overall, 42 percent of these cases were declined, as indicated below.

Referrals to U.S. Attorneys

<u>Region</u>	<u>Total cases referred</u>	<u>Cases where decision reached to accept or decline</u>	<u>Cases declined</u>	<u>Percent declined</u>
1	31	a/18	a/11	61
3	20	15	5	33
4	31	25	8	32
6	<u>38</u>	<u>28</u>	<u>12</u>	43
Total	<u>120</u>	<u>86</u>	<u>36</u>	42

a/Included three cases which ICC said were, in effect, declined by U.S. attorney inaction. The cases had been pending with one U.S. attorney for 20, 35, and 44 months, respectively, and ICC withdrew them, concluding that no action would ever be taken.

Whether U.S. attorneys accept or decline ICC criminal cases, the decisions often take a long time. We found that an average of 12 months elapsed before U.S. attorneys

reached a decision on whether or not to prosecute a case. 1/ In addition, a number of cases referred by ICC had yet to be accepted or declined by U.S. attorneys although they had been pending for an average of 13 months.

#### Causes of declinations and delayed decisions

While several interrelated factors appear to account for cases being declined or delayed, the major factor seems to be the heavy workloads of some U.S. attorneys and the priority system used to evaluate referred cases.

In an earlier report we noted that U.S. attorneys receive more criminal complaints than they can prosecute and have developed priority systems for deciding which cases to handle with available resources. 2/ The report also mentioned that ICC and other Federal enforcement and regulatory agencies have problems obtaining needed prosecutorial support from U.S. attorneys in some districts.

Many ICC attorneys said that U.S. attorneys' priority systems work against acceptance and timely handling of their cases, particularly in jurisdictions with heavy workloads. According to one ICC regional counsel, U.S. attorneys in the region have priority systems which give little weight to ICC cases. ICC attorneys in another region complained that one busy U.S. attorney's office generally considers ICC cases unimportant.

Attorneys whom we talked with at both the Department of Justice headquarters and in U.S. attorneys' offices agreed that priority systems necessitated by heavy workloads often do not favor most ICC cases. Assistant U.S. attorneys in two jurisdictions told us that cases involving such things as narcotics violations, major fraud, and official corruption must take priority. ICC regulatory violations, in which people are usually less directly harmed, get a lower priority.

Our file reviews identified several instances when U.S. attorneys' workloads and priority systems apparently led to declinations and/or delayed decisions on ICC-referred cases. For example:

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1/Based on 70 of the 86 decided cases included in the table on p. 25 for which we could obtain dates.

2/"U.S. Attorneys Do Not Prosecute Many Suspected Violators of Federal Laws" (GGD-77-86, Feb. 27, 1978).

--ICC referred a proposed criminal contempt action to the U.S. attorney, stressing that the case was extremely important, since it involved illegal hauling in violation of a prior restraining order. The ICC attorney noted that the carrier's operations were "considerable in scope" and "well known to the trucking industry." He stated that this particular type of illegal hauling posed the region's biggest problem in enforcing the Interstate Commerce Act.

About 10 months after referral, the assistant U.S. attorney involved said he had not yet had time to consider the case but would review it and reach a decision within 2 weeks. Another 14 months elapsed before the case was eventually reviewed by a second assistant U.S. attorney to whom it was assigned. Several times during this 2-year period, ICC regional and headquarters officials urged the U.S. attorney to proceed with the case.

When the case was finally reviewed, the documented violations were 3 or more years old, and the assistant U.S. attorney asked ICC to reinvestigate to determine whether there were more recent violations. The reinvestigation did not establish that substantial violations were continuing, but ICC urged the assistant U.S. attorney to prosecute on the basis of the earlier violations. Four months later the case was declined.

The assistant U.S. attorneys who handled this case were no longer with the U.S. attorney's office. The chief of the office's criminal division told us that delays in handling the case were due to heavy workloads of major fraud cases and other higher priority cases which the assistant U.S. attorneys were handling at the time.

--A case in another ICC region was referred to a U.S. attorney's office with a heavy workload. The case involved a motor carrier that unlawfully extended credit on payment of freight bills to a particular group of shippers in preference over other shippers. The acting U.S. attorney initially declined the case, but shortly thereafter ICC asked the newly appointed U.S. attorney to reconsider it. The U.S. attorney told ICC that the case would be accepted for prosecution, but no action was taken.

In a meeting with an assistant U.S. attorney and in repeated correspondence, ICC urged that action be taken on the case. At various times the U.S. attorney's office did not reply to ICC inquiries about

the status of the case. At one point an ICC attorney wrote the U.S. attorney that "it is only fair that your office act on referrals or advise us why not." Finally, more than 3-1/2 years after its referral for reconsideration, ICC withdrew the case and closed it, concluding that the U.S. attorney would never take action.

--In the same region, ICC referred a criminal complaint against a motor carrier for unauthorized hauling violations and against a second motor carrier and a shipper for aiding and abetting the violations. About 3 years earlier the violating carrier had been found in criminal contempt of court for similar violations while under a court injunction.

The U.S. attorney took no action on the case until 17 months after its referral. At that time he asked ICC to redraft the complaint, deleting the aiding and abetting parties. ICC complied with the request, but more than 14 months passed before the U.S. attorney filed the case. Although shortly thereafter the carrier pleaded guilty and was fined \$2,500, nearly 4 years had elapsed since the violations occurred.

The assistant U.S. attorney involved in the case told us that it was delayed because he was handling higher priority cases during the period. He said these cases included narcotics violations, illegal possession of firearms or explosives, and other cases involving active investigations and arrests.

--Finally, in a third region, a case was referred to a U.S. attorney in what an ICC attorney said was a busy jurisdiction. The case involved a motor carrier who did not collect from shippers and did not pass on to owner-operators a fuel surcharge published in its tariffs. The surcharge, which was permitted under an ICC order, was intended to compensate truck operators for increased fuel costs.

The U.S. attorney took no action on the case until about 27 months had passed. At that point he declined prosecution and noted that ICC had alternative measures it could take against the carrier. Following the declination, ICC sought and obtained a civil penalty from the carrier, but the ICC attorney involved told us that taking more than 2 years to decline the case was "ridiculous."



In addition to problems of low priority of ICC cases in U.S. attorneys' offices, several ICC attorneys said that their cases are often complex and require considerable time to prepare and prosecute. They said that these difficulties further decrease the desirability of busy U.S. attorneys handling ICC cases.

#### ICC's enforcement program hampered

ICC regional counsels in three of the four regions we visited told us that problems with U.S. attorneys' handling of criminal actions have hampered their enforcement efforts. They said that when U.S. attorneys decline cases, ICC is sometimes left with no suitable alternative to effectively deter the violator. ICC attorneys said that even when the U.S. attorney accepts a case, the delay in reaching the decision is a major problem. They said such delays may (1) give a violator extra months or years to continue the violations, (2) weaken the case against the violator, since some of the violations originally referred for prosecution become too old to use, and (3) use ICC investigators' time unnecessarily to reinvestigate and update the case.

ICC attorneys from one region said that one U.S. attorney's declinations and delayed decisions have nearly stymied their efforts against criminal violations in that jurisdiction. As a result, they told us, ICC is having particular difficulty with illegal agricultural cooperatives, 1/ which are the foremost enforcement problem in the region. One attorney in the region said that, of seven criminal actions against such cooperatives referred to the U.S. attorney over a 3-1/2-year period, only one had been filed in Federal court. He stated that the U.S. attorney had declined two of the cases and taken no action to either file or decline the other four cases.

Assistant U.S. attorneys involved in handling them told us that these cases had been given higher priority. They said that, at the request of ICC headquarters officials, they were moving ahead on what they believed to be the strongest of the cases.

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1/These entities are interstate motor carriers operating without authority but claiming status as bona fide agricultural cooperatives to disguise their illegal activities. Bona fide agricultural cooperatives provide trucking services primarily for their farmer members and are partially exempt from ICC regulation.

We noted that limited efforts have been made to overcome problems with U.S. attorneys' handling of ICC cases. ICC attorneys said that in a few cases U.S. attorneys have agreed to appoint them as special assistants to help prosecute criminal court actions. As special assistants, ICC attorneys have provided technical expertise on complex transportation aspects of cases and handled all normal prosecutorial functions, including conduct of grand jury and court proceedings.

ICC attorneys said the special assistant approach has worked well in the few instances that it has been used. However, an ICC regional attorney noted that one U.S. attorney's office had not acted on ICC's offers to serve as special assistants to expedite cases that had been pending for long periods of time.

ICC attorneys believe the ICC enforcement program would benefit if the Department of Justice were to appoint a senior ICC attorney as a standing special assistant in each region. In our opinion such an arrangement, if properly implemented, would allow ICC to handle major criminal cases of vital importance to its enforcement program whenever U.S. attorneys' workloads or other factors prevent them from handling such cases in a timely manner.

#### COURT ACTIONS NOT FOLLOWED UP

A major part of the deterrent value of a civil or criminal court action lies in the stronger sanctions the court may impose if violations continue. For example, if a carrier violates a civil injunction, ICC may bring a civil contempt action or request the U.S. attorney to bring a criminal contempt action against the carrier. If the court finds the carrier in contempt, it may take any of several actions, including imposing fines or jail sentences. Likewise, if carriers are found repeating violations for which they previously were put on probation, they could be sent to jail. Therefore, timely followup on court actions to determine compliance is important to assure the deterrent value of such actions.

ICC procedures require Bureau of Operations field staff to conduct a followup compliance check within at least 8 months after completion of a court action. However, two ICC regional counsels told us that responsibility for followup has not been clearly assigned to either the Bureau of Operations or the new Bureau of Investigations and Enforcement since ICC reorganized in early 1977. As a result, the ICC

regions we visited have no established procedures to ensure timely followup on court actions.

Court actions in ICC regions may be followed up when the carrier involved happens to be the subject of one of the routine compliance surveys which ICC's Bureau of Operations conducts periodically. However, current ICC policy calls for only a limited number of indepth compliance surveys each year, primarily of large carriers. This policy reduces the probability of timely followup on court actions involving other carriers. ICC attorneys said that followup may also be scheduled when tips are received from the transportation community, but obviously ICC has no control over the timeliness or reliability of such information. In one region, the regional counsel designates certain cases for followup. However, no time frame has been established for completing such followups. In the words of an ICC attorney in another region, "Followup is falling through the cracks."

ICC officials told us that followup investigations are important and should be performed in a timely manner whenever there is any question of noncompliance after court action. We agree and believe that all ICC regions need a system to ensure that timely followup investigations are made, thereby increasing the deterrent value of court actions.

#### CONCLUSIONS

Civil and criminal court actions are intended to play a major role in ensuring the success of ICC's enforcement program. These stronger deterrents are essential to stimulate compliance where civil penalties are unsuccessful. However, problems with U.S. attorneys' handling of criminal court actions and ICC's lack of a followup investigation program are limiting the use and effectiveness of court actions.

ICC is not using criminal court actions as frequently or effectively as it could because of problems with U.S. attorneys either declining or delaying decisions on such cases. In some regions, U.S. attorneys decline a large percentage of criminal cases referred by ICC. Many of these declinations apparently result from U.S. attorneys' heavy workloads and their related priority systems for deciding which cases to prosecute with available resources.

U.S. attorneys often require excessively long time periods in deciding to accept or decline criminal cases referred by ICC. These delays are particularly apparent in jurisdictions with heavy workloads. For those cases which are eventually accepted, such delays can reduce the deterrent

value of subsequent penalties. They can also result in unnecessary use of ICC investigators' time in reinvestigating delayed cases.

Declinations and delayed decisions by U.S. attorneys have hindered enforcement programs in some ICC regions and have nearly stymied enforcement efforts against a major group of violators--illegal agricultural cooperatives--in one region.

ICC officials believe, and we agree, that enforcement could be improved if the Department of Justice appointed a senior ICC attorney as a standing special assistant U.S. attorney in each ICC region and/or developed other measures for handling ICC criminal cases where U.S. attorneys' workloads prevent timely and effective action.

None of the ICC regions we visited had established procedures to ensure that timely followup investigations are made after successful court actions. The deterrent value of court actions depends largely on the threat that noncompliance may result in stronger deterrents, such as larger fines or jail sentences. Lack of a followup program is limiting the deterrent value of court actions in ICC regions. ICC therefore needs to institute a program of timely followup investigations to monitor compliance of violators who receive civil injunctions or criminal fines, or are held in contempt of court.

#### RECOMMENDATIONS

We recommend that the Chairman, Interstate Commerce Commission, and the Attorney General enter into an agreement aimed at more timely and effective handling of ICC violations through the judicial system. The agreement should:

- Designate, where possible, a senior ICC attorney as a standing special assistant U.S. attorney in each region with authority to prosecute ICC criminal court actions whenever U.S. attorneys' workloads or other factors prevent timely handling.
- Develop a procedure for bringing unresolved problems between U.S. attorneys' offices and ICC field offices promptly to the attention of the Attorney General and the Chairman, ICC, for disposition.

In order to ensure effective use and greater deterrent value of civil and criminal court actions, we recommend that the Chairman, ICC, establish a followup investigation system

in each region to timely monitor compliance of those who have received civil injunctions, contempt actions, or criminal fines whenever a potential exists that violations may be continued or resumed.

## CHAPTER 4

### AGENCY COMMENTS AND OUR EVALUATION

#### INTERSTATE COMMERCE COMMISSION

In a February 27, 1980, letter commenting on our report (see app. II), the Interstate Commerce Commission agreed with the report's findings and conclusions and generally supported its recommendations. However, ICC viewed one recommendation--that the agency and the Department of Justice agree to allow ICC attorneys to handle court actions for collection of civil penalties--as only an alternative to a statutory change giving ICC independent litigating authority for all civil cases. ICC requested such a statutory change as part of a legislative package submitted to the Chairman, Senate Committee on Commerce, Science, and Transportation, in November 1979.

While ICC would prefer a statutory change to secure necessary litigating authority for civil penalties, we believe such authority could be delegated through a cooperative agreement between the agency and the Department of Justice. Such an agreement, if pursued by both agencies in a true spirit of cooperation, could be developed rapidly and could eliminate the need for statutory revisions.

ICC has the following actions underway or planned which relate to its handling of civil penalty negotiations:

- Reviewing selected cases to assess the timeliness of enforcement efforts and their deterrent impact.
- Training ICC attorneys in penalty negotiating techniques and practices.
- Experimenting with statistical sampling to project violations--rather than individually documenting them--for use in pursuing civil penalty claims.
- Evaluating various aspects of the enforcement program using a computerized case tracking system. According to ICC, a program analyst position has been requested in its fiscal year 1981 budget to make greater use of this computer capability.
- Exploring the development of an automatic reminder system to notify attorneys when responses to demand letters are due in accordance with the 30-day response periods specified in Federal collection standards.

We recognize that ICC has long been concerned about its enforcement program and commend the agency for the above actions to improve the effectiveness of civil penalties. However, we do not believe that these actions by themselves, even if carried out fully, will remove the causes of problems noted in our review. Additional specific actions, as outlined in the recommendations to ICC, are needed to increase the deterrent value of civil penalties. (See p. 22.)

With regard to followup on court actions, ICC said that it has encouraged all regional offices to establish a program similar to that in one region where certain cases are selected for followup investigations. We view this as a positive step, but systems established must be uniform and provide for timely followup. As mentioned in our report, the procedures used in the region which ICC has asked other regions to emulate do not include a specified time frame for completing the followup. (See p. 30.)

#### DEPARTMENT OF JUSTICE

The Department of Justice, in a March 11, 1980, letter commenting on our report (see app. III), agreed that the present statutory maximum penalty per violation must be raised and that a statutory minimum penalty must be established. The Department disagreed with the findings related to U.S. attorneys' handling of civil and criminal cases referred by ICC. The Department does not believe any significant problem exists with either handling or declining cases in a timely manner. The Department also disagreed with the recommendations aimed at developing mechanisms for ICC to assume some litigating responsibilities, arguing that such measures are unneeded, undesirable, and unauthorized by existing statutes.

The Department supported its contention that problems with U.S. attorneys' handling of ICC cases are negligible by (1) presenting its own statistics on referred cases, (2) noting that ICC headquarters officials have not advised a liaison group in the Department's Criminal Division of any problems, and (3) alleging that our report states that the problem appears to exist in only a few U.S. attorneys' offices.

First, the Department's statistics show neither the numbers nor percentages of cases referred by ICC which are accepted or declined by U.S. attorneys. Thus, the data fails to offer any indication of the extent of the problem faced by ICC attorneys in convincing U.S. attorneys to accept cases which ICC believes should be filed in court. Although the statistics include some information on length of time

ICC cases have been pending with U.S. attorneys, the data is severely limited and fails to give any clear picture of the extent of delays. In fact, it could be construed to verify a potentially large problem, with 96 of 169 civil cases (57 percent) and 35 of 62 criminal complaints (56 percent) pending for a year or more. Also, for criminal cases, the problem we noted was one of U.S. attorneys' delays in reaching decisions to either accept or decline a case. We did not question the additional amount of time required to complete court action on those cases which are accepted. The Department's data on active cases does not indicate how many are awaiting U.S. attorneys' decisions to either accept or decline or how long such decisions have been pending.

The Department properly notes that ICC has not advised it, through a liaison group under its Criminal Division, of any problems with delays by U.S. attorneys. Our recommendation that the two agencies develop a procedure for bringing such problems on criminal cases to the attention of top agency officials was aimed at this lack of communication. However, we disagree with the Department's view that this lack of communication demonstrates lack of a problem with delays.

In some instances ICC headquarters officials have brought problems with handling of criminal cases by U.S. attorneys' offices directly to the attention of the U.S. attorneys involved, with varying degrees of success. However, this action has apparently been taken only for longstanding or extreme problems with a particular U.S. attorney's office, as in the example mentioned on page 29 of the report involving illegal agricultural cooperatives. More typical problems, such as a U.S. attorney's office delaying for a year or more a decision on whether or not to accept a particular criminal case, have not usually received such attention.

We found no indication that problems with declinations or delays on individual cases referred for civil penalty collection are ever brought to the attention of Justice's higher level management. If problems with a particular U.S. attorney's office are frequent, ICC attorneys may try to refer civil penalty cases to other, more receptive ones, or may become reluctant to refer cases at all. (See p. 18.)

As final support for its contention that problems with U.S. attorneys' handling of ICC cases are insignificant, the Department alleges that our report states that apparently only a few U.S. attorneys' offices are involved. However, nowhere in the report is the word "few," or any synonym for it, used in describing how many offices are involved. Delays on civil penalty referrals are common, as indicated by



the average of 13 months required by U.S. attorneys to complete collection after ICC has already exhausted all negotiation alternatives for each case. For criminal cases, we noted that ICC officials cited good handling by many U.S. attorneys' offices but said they often encounter problems with others. The overall declination rate of 42 percent and the average of 12 months required to render decisions on whether cases will be accepted indicated that problems with U.S. attorneys' handling of criminal cases are substantial in the ICC regions visited. (See pp. 18 and 24.)

The Department disagreed with the recommendations to develop mechanisms which would allow ICC attorneys to carry out some litigating responsibilities. The agency cited a number of reasons why it believed such mechanisms were unneeded, undesirable, and unauthorized by existing statutes.

The Department said that mechanisms for ICC litigation are unneeded because of the small number of cases referred by ICC. While the number of cases may be small in comparison to the thousands of actions handled by U.S. attorneys' offices each year, the cases are a significant portion of ICC's workload and some are of major importance to its enforcement program. Also, as noted in the report, problems with U.S. attorneys' handling of cases have caused some ICC attorneys to avoid referring cases which they otherwise would have referred. Thus, more cases might be handled under the proposed ICC litigating responsibility than under the present system.

The Department believes the recommended mechanisms to allow ICC litigation of civil and criminal cases are undesirable because they would (1) diminish the Department's ability to function in its traditional role of coordinating Government litigation, (2) create ethical problems in some criminal cases, (3) set up "freewheeling" special assistant U.S. attorneys who would lack adequate backgrounds to use resources wisely and would have increased incentive to file unworthy cases, and (4) compound existing problems, since ICC has difficulty with its own internal case handling.

The Department notes that the Government must speak with one voice on common issues of law and policy arising under diverse statutes and that Government litigation must be coordinated even when it concerns only one agency. We do not believe that either the recommended agreement between the Department and ICC for handling civil cases or the standing special assistant attorney approach for handling some criminal cases would preclude the Department from exercising its traditional coordinating role. In the former alternative, the Department could require that ICC attorneys

(1) seek the advice of U.S. attorneys whenever a civil penalty collection action involves issues of construction or constitutionality of Federal statutes, or of Government-wide significance, (2) provide U.S. attorneys with copies of pleadings, motions, and other key legal documents, and (3) take any other coordinating actions deemed necessary by the Department. The Department has already employed requirements similar to these as part of a memorandum of understanding between it and the Veterans Administration, as discussed below.

With regard to the standing special assistant approach for handling those criminal cases which U.S. attorneys cannot prosecute in a timely manner, we anticipate that the Department could fulfill its coordination responsibilities by requiring close consultation between the U.S. attorney and the ICC special assistant at the time a decision is made to prosecute a case. The Department could also require the special assistant to take other coordinative actions during the course of the litigation, such as those mentioned above for civil cases.

The Department provided a lengthy analysis of ethical problems which could arise if regulatory agency attorneys with civil responsibilities are given primary litigating authority in related criminal cases. We believe that these ethical constraints could be evaluated at the outset to assure that only cases which do not involve grand jury proceedings and/or potential for related civil actions are initiated under the special assistant approach. Many criminal cases referred to U.S. attorneys' offices by ICC field attorneys do not involve grand juries or related civil actions.

The Department noted that potentially "freewheeling" special assistant U.S. attorneys would not have sufficient litigation experience or the breadth of prosecutorial background needed to determine whether a case is prosecutable and worthy of the expenditure of attorney and judicial resources required for trial. Also, the Department said that the agency would have too great an incentive to file an excessive number of criminal cases, not all of which would be worthy of prosecution. First, "freewheeling" does not accurately describe the operation of the standing special assistant as we envisioned it. The six special assistants--one in each ICC region--would be senior attorneys with extensive litigation backgrounds. Most likely they would be ICC regional counsels or assistant regional counsels who either have handled many civil injunction cases in Federal courts under ICC's authority to file such cases or have served as special assistants to U.S. attorneys on prior

criminal cases. In addition, questions of prosecutorial merit and proper use of resources could be raised by U.S. attorneys during initial joint evaluation of proposed litigation. This review process, together with the fact that a single standing special assistant in each ICC region would necessarily be limited in the number of criminal cases he or she could litigate during a given time, should alleviate the Department's concern that ICC might tend to file an excessive number of unworthy criminal actions.

The Department believes that mechanisms to provide ICC with litigating authority are also undesirable because they would compound existing problems. These problems involve the length of time ICC staff requires to process civil penalty cases and the fact that they do not document and use as many violations as feasible in negotiating civil penalty settlements. The Department notes that, in light of these difficulties, ICC attorneys could not be expected to solve additional problems arising from civil and criminal litigation.

In our opinion, the Department's conclusions about the ability of ICC attorneys to handle civil and criminal litigation are not sound. First, the Department implies that the additional problems of litigation would be entirely new to ICC attorneys. Actually, ICC attorneys already handle numerous Federal court cases each year involving civil injunctions and contempt actions against carriers. Also, a major cause of untimely civil penalty settlements is that some ICC attorneys prefer to extend negotiations indefinitely rather than refer cases to U.S. attorneys for collection. With the ability to threaten court collection actions and, if necessary, immediately file such actions themselves, ICC attorneys could terminate unproductive negotiations much sooner. Finally, the Department has misinterpreted our findings by stating that many violations are not adequately documented by ICC investigators. We found that in many cases investigators do not document as many of the discovered violations as they could but found no problem with the adequacy of documentation for those violations which are selected and used by ICC.

The Department's final major objection to the recommendations to allow ICC attorneys to litigate civil penalty and criminal cases was that such authority cannot be delegated under existing statutes. The Department noted that any delegation must be accomplished through appointment of ICC attorneys as special assistant U.S. attorneys pursuant to 28 U.S.C. §543, and would require supervision of their functions by the Department pursuant to 28 U.S.C. §519.

However, the Department, in November 1979, entered into a memorandum of understanding with the Veterans Administration (VA) for the conduct of a test program that includes litigating authority for VA attorneys without such appointments. The memorandum of understanding is carefully drawn to preserve the overall litigation responsibility of the U.S. attorneys and the Department and includes supervision by them pursuant to 28 U.S.C. section 519. It provides for a 1-year test program at specified VA regional offices, subject to the concurrence of the local U.S. attorneys, designed to collect educational assistance overpayments where the amounts owed the United States are less than \$600. We based our conclusion that an agreement could be used to authorize ICC litigation of civil penalty claims largely on the existence of this memorandum. We envision a similar agreement, possibly including a test program, between the Department and ICC, although its specific provisions could be tailored to ICC needs for civil penalty litigation. Department supervision of such litigation could be accomplished through provisions such as those contained in the Veterans Administration agreement.

For criminal cases, we recommended appointment of special assistant U.S. attorneys on a standing basis rather than on an infrequent case-by-case basis. The Department apparently assumed we were recommending completely independent litigating authority with no supervision by U.S. attorneys. However, we anticipate that necessary supervision could be achieved through close communication between U.S. attorneys and the standing special assistants during joint evaluation of a case before initiating court action, and during litigation as needed. The U.S. attorney would retain final authority over decisions to commence litigation, and if agreed, the special assistant could proceed whenever the U.S. attorney's staff is unable to take timely action. We also anticipate that litigation by standing special assistants would be used only for criminal cases which ICC regions consider vital to their enforcement programs and for which U.S. attorneys' offices lack resources to prosecute in a timely manner, considering caseloads and priorities.

DRAFT AMENDMENTS TO  
THE INTERSTATE COMMERCE ACT AND RELATED LAWS

(49 U.S.C. 10101 et seq. (1978))

Amend Chapter 119 of Title 49 of the U.S. Code to read as follows:

Chapter 119 - Civil and Criminal Penalties

§11901. General Civil Penalties.

When another civil penalty is not provided under this chapter, a carrier, a broker, or any other person who fails or refuses to comply with this subtitle, or a regulation or order of the Commission, or a certificate, permit, or license issued under this subtitle, is liable to the United States Government for a civil penalty of at least \$200, but not more than \$1,000, for each violation; and in the case of a continuing violation, not more than \$500 for each day the violation continues. In a subsequent civil action for the same violation, the civil penalty increases to at least \$400, but not more than \$2,000, for each violation, and in the case of a continuing violation, not more than \$1,000 for each day the violation continues.

§11902. Evasion of Regulation of Motor Carriers and Brokers.

A person, or an officer, employee, or agent of that person, that by any means knowingly and willfully tries to evade regulation provided under this subtitle for motor carriers or brokers shall be fined at least \$200, but not more than \$500, for the first violation and at least \$250, but not more than \$2,000, for a subsequent violation.

§11903. Civil Penalty for Recordkeeping and Reporting Violations.

A person required to make a report to the Commission, or make, prepare, or preserve a record under this subtitle, or an officer, agent, or employee of that person, that knowingly falsifies, destroys, mutilates, or changes that report or record, or knowingly makes a false or incomplete entry in the record about a fact or transaction required under this subtitle, or any person who aids and abets such violation is liable to the United States Government for a civil penalty of not more than \$5,000 for each violation.

§11904. Civil Penalty for a Violation of Provisions on Consolidation, Merger, and Acquisition of Control by a Person Not a Carrier.

A person, other than a carrier, that violates section 11343, 11344, 11345, 11346, or 11347 or this title is liable to the United States Government for a civil penalty of not more than \$5,000 for each violation.

§11905. Civil Penalty for Transportation of Passengers without Charge.

A carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subtitle that provides transportation of passengers without charge, except as provided in sections 10721(b), 10722(c) and (d) (if the transportation is for its employees on sleeping and express cars or linemen of telegraph and telephone companies), 10723 (a)(1) (other than paragraph (1)(A) of that subsection when transportation is arranged by a municipal government), or 10724(a) of this title, is liable to the United States Government for a civil penalty of at least \$100, but not more than \$2,000, for each violation. An individual who uses a free ticket for, or accepts transportation subject to the jurisdiction of the Commission under this subtitle, except as provided in those sections, is liable to the United States Government for a civil penalty of at least \$100, but not more than \$2,000, for each violation.

§11906. Civil Penalty for Unlawful Rail Abandonments

A carrier or other person that discontinues or abandons rail service contrary to the provisions of section 10903 of this title is liable to the United States Government for a civil penalty of not more than \$5,000.

§11907. Civil Penalty for Abandonment of Service by Freight Forwarder.

A freight forwarder controlled by or under common control with a carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subtitle, or a director, officer, receiver, operating trustee, lessee, agent, or employee of that freight forwarder or common carrier, that knowingly authorizes or permits a violation of section 10933 of this title is liable to the United States Government for a civil penalty of not more than \$5,000.

§11908. Civil Penalty for Accepting and Offering Rebates.

(a) A person (1) delivering property to a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission for transportation under this subtitle or from whom that carrier will transport the property as consignor or consignee for that person from a State, territory, or possession of the United States to another State, possession, or territory, or to a foreign country, and (2) knowingly accepting or receiving by any means or device a rebate against the rate for transportation for, or service of, that property contained in a tariff filed with the Commission is liable to the United States Government for a civil penalty in an amount equal to 3 times the amount of money that person accepted or received as a rebate and 3 times the value of other consideration accepted or received as a rebate. In a civil action under this section, all money or other consideration received by the person during a period of 6 years before an action is brought under this section may be included in determining the amount of the penalty, and if that total amount is included, the penalty shall be 3 times that total amount.

(b) A carrier that offers, grants, gives, or solicits a rebate as set forth in subsection (a) of this section is liable to the United States Government for a civil penalty of not more than \$2,000 for each violation.

(c) For purposes of this chapter, "rebate" means a rebate, concession, offset, or any other practice that would result in a deviation from the lawfully published tariff.

§11909. Criminal Penalty for Rate and Tariff Violations.

(a) A carrier, broker, or other person that knowingly offers, grants, gives, solicits, accepts, or receives by any means transportation or service provided for property by a carrier subject to the jurisdiction of the Interstate Commerce Commission under this subtitle at less than the rate in effect, or assists or permits a person to receive transportation or service at less than the rate in effect, shall be fined at least \$1,000, but not more than \$20,000, imprisoned for not more than 2 years, or both.

(b) A carrier providing transportation or service subject to the jurisdiction of the Commission under this

subtitle, or an officer, director, receiver, trustee, lessee, agent, or employee of a corporation that is subject to the jurisdiction of the Commission under this subtitle, that knowingly does not file and publish its rates or tariffs as required or does not observe those tariffs until changed under law, shall be fined at least \$1,000, but not more than \$20,000, imprisoned for not more than 2 years, or both.

(c) When acting in the scope of their employment, the actions and omissions of persons acting for or employed by a carrier, broker, or shipper that is subject to subsections (a) or (b) of this section are considered to be the actions and omissions of that carrier, broker, or shipper, as well as of that person.

#### §11910. Conclusiveness of Rates in Certain Proceedings.

When a carrier files with the Interstate Commerce Commission or publishes a particular rate or participates in one of those rates, the published or filed rate is conclusive proof against that carrier, its officers and agents, that it is the legal rate for that transportation or service in a proceeding begun under sections 11908 and 11909 of this title. A departure, or offer to depart, from that rate is a violation of those sections.

#### §11911. Criminal Penalty for Interference with Railroad Car Supply.

(a) A person that offers or gives anything of value to another person acting for or employed by a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subtitle intending to influence an action of that other person related to supply, distribution, or movement of cars, vehicles, or vessels used in the transportation of property, or because of the action of that other person, shall be fined not more than \$1,000, imprisoned for not more than 2 years, or both.

(b) A person acting for or employed by a rail carrier providing transportation subject to the jurisdiction of the Commission under this subtitle that solicits, accepts, or receives anything of value (1) intending to be influenced by it in an action of that person related to supply, distribution, or movement of cars, vehicles, or vessels used in the transportation of property or (2) because of the action of that person, shall be fined not more than \$1,000, imprisoned for not more than 2 years, or both.



§11912. Criminal Penalty for Unlawful Disclosure of Information.

(a) A carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under this subtitle, or an officer, agent, or employee of that carrier, or another person authorized to receive information from that carrier, that knowingly discloses to another person, except the shipper or consignee, or a person who solicits or knowingly receives information about the nature, kind, quantity, destination, consignee, or routing of property tendered or delivered to that carrier for transportation provided under this subtitle without the consent of the shipper or consignee, shall be fined not more than \$1,000.

(b) This section does not prevent a carrier or broker providing transportation subject to the jurisdiction of the Commission under this subtitle from giving information

(1) in response to legal process issued under authority of a court of the United States or a State;

(2) to an officer, employee, or agent of the United States Government, a State, or a territory or possession of the United States; or

(3) to another carrier or its agent to adjust mutual traffic accounts in the ordinary course of business.

(c) An employee of the Commission delegated to make an inspection or examination under section 11144 of this title who knowingly discloses information acquired during that inspection or examination, except as directed by the Commission, a court, or a judge of that court, shall be fined not more than \$500, imprisoned for not more than 6 months, or both.

§11913. Criminal Penalty: Issuance of Securities, Disposition of Funds, Restriction on Ownership.

(a) A director, officer, attorney, or agent of a carrier defined in section 11301(a)(1) of this title or of a person to which that section is made applicable by section 11302(a) of this title that knowingly agrees to or concurs in (1) an issue of securities or assumption of obligations

or liability in violation of section 11301 of this title, (2) a disposition of securities in violation of an order of the Interstate Commerce Commission, or (3) an application not authorized by the Commission of the funds derived by the carrier through a disposition of securities shall be fined not more than \$20,000, imprisoned for not more than 3 years, or both.

(b) A person that violates section 11322 of this title shall be fined not more than \$20,000, imprisoned not more than 3 years, or both.

§11914. Criminal Penalty for Disobeying Subpenas.

A person not obeying a subpoena or requirement of the Interstate Commerce Commission to appear and testify or produce records shall be fined not more than \$5,000, imprisoned for not more than 1 year, or both.

§11915. General Criminal Penalty When Specific Penalty Not Provided.

When another criminal penalty is not provided under this chapter, a person that knowingly and willfully violates this subtitle, or a regulation or order prescribed under this subtitle, or a condition of a certificate, permit, or license issued under this subtitle, shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both.

§11916. Punishment of Corporation for Violations Committed by Certain Individuals.

An act or omission that would be a violation of this subtitle if committed by a director, officer, receiver, trustee, lessee, agent, or employee of a common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under this subtitle that is a corporation is also a violation of this subtitle by that corporation. The penalties of this chapter apply to that violation. When acting in the scope of their employment, the actions and omissions of individuals acting for or employed by that carrier are considered to be the actions and omissions of that carrier as well as that individual.

**Interstate Commerce Commission**  
**Washington, D.C. 20423**

BUREAU OF INVESTIGATIONS AND ENFORCEMENT

February 27, 1980

Mr. Henry Eschwege  
Director  
Community and Economic  
Development Division  
U. S. General Accounting  
Office  
Washington, D. C. 20548

Dear Mr. Eschwege:

Thank you for your January 24, 1980, letter transmitting copies of the draft GAO report entitled EFFECTIVENESS OF ICC'S ENFORCEMENT PROGRAM WEAKENED BY NARROW SCOPE, DELAYS, AND LOW PENALTIES. I have been asked by the Chairman to respond.

Our reactions and responses to the draft report's recommendations are generally positive. While we note that the data evaluated by GAO involved certain investigations which predated the revitalization of the Commission's compliance and enforcement program in 1976-1977, it is clear that the effectiveness of civil forfeitures in our enforcement program is dependent on two principal factors. The first relates to internal processes in case handling by Commission staff, and the second--and most important--factor relates to external variables including statutory requirements regarding forfeiture levels and applicability and the requirements of litigating cases through the Department of Justice. While we believe the draft report properly addresses these factors, the following comments are designed to highlight certain findings and recommendations and perhaps to offer additional information where appropriate:

Mr. Henry Eschwege

INTERNAL COMMISSION PROCESSES RELATING TO CASE  
HANDLING.

The timely settlement of forfeiture actions, negotiating for low amounts, and inadequate follow-up procedures once settlements are obtained have been and will continue to be of concern to the Commission. In fact, prior to receiving the draft report, we began looking into several aspects of the civil forfeiture program. As a result of an earlier study by the Administrative Conference of the United States (which, after a review of one regional office's handling of civil forfeitures, questioned the deterrent impact and criteria for settling civil penalty cases generally), the headquarters staff of the Bureau of Investigations and Enforcement has been working with Commission statisticians to undertake a review of selected enforcement actions to assess their deterrent impact. In another instance, we are reviewing the timeliness of forfeiture settlement efforts, among other things, relating to a group of over 85 settled civil forfeiture cases involving violations of the Commission's recently promulgated detention regulations.

Although not addressed by the draft GAO report, we believe that an attorney's ability to negotiate settlements is another factor to consider in evaluating the level of penalties assessed. In an effort to provide uniform training to enforcement attorneys, a seminar on negotiating practice was held for the benefit of all Regional Counsel and certain top headquarters staff in September of 1979. In March 1980, the Bureau of Investigations and Enforcement will devote a significant portion of its Transportation Law Seminar to specific training of all BIE attorneys in negotiating techniques and practices.

With regard to negotiating settlements on the basis of documented counts, the draft report suggests that

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investigators document larger numbers of violations and that attorneys negotiate on the basis of increased counts. Strides have been made to demand and negotiate civil forfeitures based on a large number of documented violations. For example, significant monetary claims were made against 45 household goods carriers for violating the Commission's household goods regulations (49 C.F.R. §§ 1056, et seq.) in December of 1978. While certain of these cases have settled, most have been referred to the Department of Justice for formal litigation. The total penalty demanded from the carriers as a result of our initial claims letters amounted to \$4.5 million.

A factor affecting additional documentation of unlawful behavior is found in the stated positions of many judicial districts which oppose the filing of complaints seeking forfeitures for numerous violations. Although this situation may be dealt with by changes in existing statutes whereby penalty levels would be increased, we are also exploring the use of statistical sampling as a possible technique in pursuing civil cases based on a projected rather than an absolutely documented number of instances of violation. It remains to be seen whether statistical sampling can be useful in other than injunctive type actions.

With regard to follow-up procedures to determine whether respondents are complying with court decrees, we agree that a more formal internal system should be developed to insure that follow-up occurs. We have had recent successes in an effort to seek criminal contempt for violations of prior court orders, including a number of cases from our Region 6 area. In three cases one defendant was fined \$100,000 and sentenced to a jail term, another was fined \$20,000, and a fine of \$40,000 was assessed against another person for violating a prior court order. We have encouraged all regions to

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establish a contempt follow-up program similar to the Region 6 program.

One other comment should be made about case management and internal procedures. In October 1978 the Bureau of Investigations and Enforcement instituted a computerized case tracking system whereby all investigations and cases are monitored through the updating of a data base. After an initial period of educating attorneys and investigators on the uses and procedures of the system and after the system had been enhanced by redesigning certain programs and adding others, the Case Tracking System has now become the major information tool in evaluating aspects of the enforcement program. Through various retrieval programs, elements of numerous cases can be retrieved to permit program analysis. For example, the level of civil forfeitures in a category of cases can be evaluated, and the length of time required to investigate and negotiate settlements in cases can be easily retrieved through the computer system. It should be noted that a program analyst position has been authorized by the Commission for the Bureau of Investigations and Enforcement in FY 81. With the filling of this position, additional data analysis can be undertaken to address many of the internal procedural questions raised by the GAO report.

In addition to data analysis, the Bureau of Investigations and Enforcement staff will be exploring the development of an automatic reminder system whereby the 30-day incremental periods set forth in the Federal Claims Collection Act of 1966 (31 U.S.C. § 951) can be met by each attorney in every forfeiture action. In other words, the computer will be programmed to remind the negotiating attorney every 30 days that a response to an initial or subsequent demand letter is required from the respondent. This kind of program would not be unique, considering the fact that existing case tracking programs already contain reminder features.

Mr. Henry Eschwege

EXTERNAL FACTORS AFFECTING CIVIL PENALTIES.

We wholeheartedly agree with the findings of the draft GAO report to the effect that the use of civil forfeitures in the enforcement program is adversely affected by the narrow scope of present statutory authority and by the lack of independent litigating authority.

With regard to legislative initiatives, the draft report correctly points out that the Commission has twice formally sought legislative amendments which would, among other things, increase the level of civil forfeitures and permit Commission attorneys to litigate cases in the name of the Commission without the need to refer matters to the Department of Justice. Our latest submission to Congress was in November 1979.

With regard to declinations by the Department of Justice, we should point out that while certain United States Attorneys' Offices continue to decline to prosecute ICC referrals, we have had successes in instances where ICC attorneys and investigators worked either as Special Assistant U. S. Attorneys or as agents of the grand jury or have worked closely with the Department of Justice attorneys in handling given cases. For example, two major southeastern railroads were recently fined \$1.9 million and \$1.2 million for engaging in criminal concessionary practices. One case was prosecuted entirely by ICC attorneys and investigators, while the other was handled as a joint matter with the Department of Justice staff. In another instance, a civil judgment of over \$3.5 million was assessed in January 1980 against a major steel

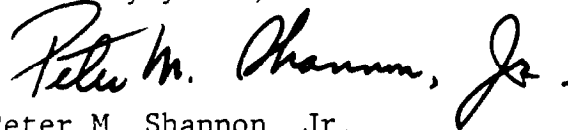
Mr. Henry Eschwege

producer for receiving rate concessions on shipments of coal. An ICC attorney devoted considerable time and effort to this civil litigation. Based on these and other examples, we believe it is proper to advocate, as we have done, for independent litigating authority. Absent such statutory changes, we agree with your recommendations that ICC attorneys be specifically designated as Special Assistant United States Attorneys to litigate ICC cases.

My personal intervention has been required in some instances to progress referred cases through certain United States Attorneys' Offices. While such intervention has generally proved successful, it does not substitute for independent litigation authority.

We appreciate the opportunity to comment upon the draft report. As noted earlier, we view the report as generally favorable to our efforts to increase the effectiveness of the Commission's enforcement program. In this regard, we request a revision of the draft report's title, which now contains a pejorative sense-- a theme which is not followed in the body of the report. While additional efforts will be made with regard to internal procedures and processes, we have anticipated many of the issues noted in your report and have already made strides to correct deficiencies where they exist.

Sincerely yours,



Peter M. Shannon, Jr.  
Director

cc: Chairman Gaskins





## UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the  
Division Indicated  
and Refer to Initials and Number

MAR 11 1980

Mr. Allen R. Voss  
Director  
General Government Division  
United States General Accounting Office  
Washington, D.C. 20548

Dear Mr. Voss:

This is in response to your request to the Attorney General for the comments of the Department of Justice (Department) on your draft report entitled "Effectiveness of ICC'S Enforcement Program Weakened By Narrow Scope, Delays, and Low Penalties."

The major portion of the GAO draft report concerns matters which are largely programmatic in nature. We do not express any opinion as to these concerns. However, the report discusses three subjects which affect litigation handled by the Civil Division: (1) changing the amount of the statutory civil penalty and the discretion of the judge in assessing the civil penalty, (2) the conclusion that civil penalty settlements are too small, and (3) the recommendation that Interstate Commerce Commission (ICC) attorneys should conduct civil penalty litigation under a formal agreement with the Attorney General.

The draft report recommends that the maximum \$500 statutory civil penalty per violation for motor carriers established in 1935 should be raised to at least \$1,000. The recommendation is intended to make the penalty exposure of a carrier approximate the revenue generated by a violation. The report concludes that the increased maximum exposure will encourage speedier and more realistic settlements of civil penalty claims. The report also recommends that a minimum penalty amount be statutorily set at a figure of no less than \$200. The minimum penalty figure is intended to reduce the discretion now vested in the court in assessing a penalty once a violation has been proved. The statutory minimum is also intended to benefit the settlement process. We favor raising the present statutory maximum penalty per violation and statutorily setting a minimum penalty that must be assessed.

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We concur in the report's recommendation that raising the penalty amount will aid in the settlements of these claims. A higher maximum penalty exposure will offset the litigation cost factor which often exceeds the amount of penalty available under the existing statute. Under the existing statute, the amount of the penalty assessed is within the discretion of the court up to a maximum of \$500 per violation. Many of the civil penalty suits do not possess demonstrable harm to an individual or the public. The courts recognize that the statute does not contain a minimum penalty and often assess a low penalty after trial. Therefore, the U.S. attorneys' offices are reluctant to pursue substantial settlements. Raising the maximum amount and providing a statutory minimum should substantially meet GAO's recommended objective and raise the settlement averages for future cases.

The draft report concludes that settlements of civil penalty claims were too low and that U.S. attorneys obtained an average of \$155 per prosecuted violation or only \$17 more than the settlement average of ICC attorneys. The draft report does not consider individual factors such as litigation costs, etc., which are relevant to a determination of whether settlements of contested civil penalty suits are adequate. More importantly, perhaps, the draft report does not recognize that the ICC often specifies a settlement level for civil penalty suits at a certain percentage of the claim which would be acceptable.

The Department disagrees with the premise stated in the draft report that there is a problem of delays by U.S. attorneys' offices in filing civil actions and initiating prosecutions of ICC violations, and that there has been an inordinately large number of declinations of cases referred by ICC. In order to ascertain whether the conditions of delay and declinations of large numbers of ICC cases actually exist, the Executive Office for U.S. Attorneys (EOUSA) has generated a complete statistical report of all ICC matters referred to each U.S. attorney for the last 2 fiscal years. The report, which is summarized below, indicates separately the status and dates of all civil and all criminal matters, and cases pending, terminated, and appealed. This study provides the only comprehensive and valid documentation of whether there is a problem of any magnitude nationally and pinpoints any pending cases needing action by any particular U.S. attorneys' offices. This statistical report shows that nationally there are only 99 criminal ICC records now pending, which involve 53 multiple defendants, so that the total of actual pending criminal complaints is only 62. Of

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these, since referral by the ICC, 15 criminal complaints are less than 4 months old and 27 are less than 1 year old. In addition, during fiscal year 1980 alone, there have been 45 criminal ICC cases and matters terminated. In the civil area, there are currently only 169 civil ICC cases and matters pending nationally, of which 24 are less than 4 months old and 73 are less than 1 year old since referral by the ICC. During fiscal year 1980, there have already been 40 civil ICC cases and matters terminated by U.S. Attorneys. The number of criminal cases and matters already terminated by U.S. attorneys in the first 4 months of fiscal year 1980 reflects over 28 percent of the total criminal ICC matters available to U.S. attorneys. The number of civil ICC matters and cases already terminated by U.S. attorneys in the first 4 months of fiscal year 1980 amounts to over 21 percent of the total number of civil ICC matters in the U.S. attorneys' offices. In addition, it should be noted that of the total of 99 criminal ICC records and 169 civil ICC cases and matters currently pending, 23 criminal records and 8 civil cases and matters are in a pending status only because the U.S. attorneys' offices are awaiting completion and receipt of an investigation or report or advice from the referring agency.

The total number of referred matters from the ICC is relatively small compared to the total national caseload handled by all U.S. attorneys, which for fiscal year 1979 amounted to approximately 230,000 criminal cases and matters and approximately 270,000 civil cases and matters. Nonetheless, the U.S. attorneys' offices have made impressive progress in evaluating and, where appropriate, commencing litigation in the ICC matters referred to them by the ICC. Thus, the relative size of the caseload is small and is being handled more than adequately by U.S. attorneys at this time.

The draft report implies that referral of civil penalty cases to the U.S. attorneys results in additional delays which presumably would be eliminated if the ICC attorneys, by agreement with the Attorney General, were able to prosecute the civil penalty cases through the court system. We believe that GAO's conclusion that ICC attorneys be given such independent litigation authority is unsupported by the findings in the report and, furthermore, is contrary to proper law enforcement policy.

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In our view, authorizing ICC attorneys to handle ICC civil and criminal cases in court would be unsound and would result in a diminution of the Department's ability to perform its basic and traditional function of coordinating Government litigation.

The Government must speak with one voice on common issues of law and policy arising under diverse statutes. Because court determinations frequently affect more than one agency, the Government should exercise selectivity in the filing and presentation of cases in order to maximize the likelihood of a successful result. The traditional policy of Attorney General control of Government litigation encourages a sensible division of responsibility under which agency lawyers concentrate on the intricacies of administrative activities, while Department attorneys concentrate on the area of their familiarity and expertise--Federal court litigation. Experience has shown that Government litigation against local defendants in local Federal courts is best conducted by local attorneys from the United States attorneys' offices.

The Government has a wide range of punitive and remedial responses to persons or corporations who violate agency statutes or regulations. However, the possible target of agency action need not necessarily await agency action. He may seek a tactical advantage by proceeding under the Declaratory Judgment Act, the Freedom of Information Act, or any number of statutes which would make the agency a defendant. The point is that Government litigation, even when it concerns only one agency and one litigant, must be coordinated, and such coordination has traditionally been the responsibility of the Attorney General.

New programs are already in operation in U.S. attorneys' offices which have been specifically designed to further the effectiveness and the coordination of civil and criminal enforcement of violations of regulatory matters, such as those matters presented by the ICC where both civil and criminal remedies may be appropriate in the same or related matters.

The U.S. Attorney for the District of New Jersey has initiated a Civil Remedies Program whereby civil dispositions of criminal matters are to be pursued as alternatives to criminal prosecution and adjective civil remedies are to be

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used as a complement to criminal prosecution. The Civil Remedies Program, as described in a lengthy memorandum which was distributed to U.S. attorneys at their most recent conference, includes specific procedures to identify criminal cases with civil ramifications, to review criminal cases in order to ensure prompt institution of civil remedies, and to monitor the progress of all such civil and criminal cases.

The recommendation to the Attorney General regarding the enforcement of civil penalties, contained in Chapter 2 of the draft report, suggests that the Attorney General and the Chairman of the ICC develop agreements permitting ICC attorneys to file civil collection actions when their out-of-court negotiations for settlement are exhausted. The draft report also recommends that the Chairman, ICC, direct that ICC regions initiate court collection actions after making reasonable efforts in settlement negotiations. There is no statutory authority for ICC attorneys to initiate such civil actions. Civil collection actions may be filed only by authority of the U.S. attorneys, assistant U.S. attorneys, or special assistant U.S. attorneys, and by attorneys of the Civil Division of the Department. The Attorney General has exclusive litigating authority on behalf of the United States. Such court collection actions as recommended in the draft report cannot be initiated by ICC attorneys.

However, the Department, on the recommendation of the EOUSA has appointed ICC attorneys as special assistant U.S. attorneys in many cases at the request of the local U.S. attorney and the ICC.

It is not true, as stated on page 20 and pages 22-23 of the draft report, that agreements between the ICC and the Department could allow ICC to bring its own civil court actions. If ICC attorneys were to be allowed to initiate the filing of civil penalty collection actions, statutory authority for their actions could be derived only from the appointment of these ICC attorneys as special assistant U.S. attorneys pursuant to 28 U.S.C. §543 and would require the direct supervision of their functions by the Department, as required by 28 U.S.C. §519. Such supervision would necessarily be similar to the close and personal supervision employed in the selected cases in which ICC attorneys are appointed as special assistant U.S. attorneys for criminal cases and "second-chair" the criminal case under the assistant U.S. attorney. However, independent litigating authority cannot be given to ICC attorneys under existing statutes.

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Congress has considered and declined to adopt several proposals to enact legislation giving limited civil litigation authority to the ICC, as described fully on page 20 of the draft report. The Department is in agreement with Congress' decisions not to provide such limited civil litigation authority to the ICC.

The Department agrees with the third recommendation in Chapter 3 of the draft report, which suggests that the ICC establish a follow-up investigation system for monitoring compliance in cases involving civil injunctions, contempt citations, and criminal fines.

The other recommendations in Chapter 3 of the draft report directed to the Attorney General and the Chairman of the ICC regarding enforcement of criminal provisions of ICC statutes state that they are aimed at more timely and effective handling of ICC violations through the judicial system. However, as discussed above, the Department disagrees that a problem exists with either the timely handling of these criminal cases or the proper declination of nonprosecutable cases by U.S. attorneys' offices. The Department also disagrees that standing special assistant U.S. attorneys are either necessary to handle the present caseload or statutorily authorized to litigate ICC criminal cases.

The recommendations that the Attorney General and the Chairman of the ICC enter into an agreement for the appointment of ICC attorneys as "standing special assistant U.S. attorneys" in each region is an unnecessary measure based on the existing small caseload. It would create ethical problems for regulatory agency attorneys, and interfere with the application of valid judgment and prosecutorial discretion by experienced criminal prosecutors. It would be statutorily unauthorized as discussed in our comments on civil enforcement actions above.

The Department agrees with the objective of the second recommendation in Chapter 3 of the draft report, which suggests that the ICC bring unresolved problems between ICC and U.S. attorneys' offices to the attention of the Attorney General and the Chairman of the ICC for disposition. The Department encourages and welcomes the ICC's regional offices and the ICC General Counsel's Office bringing any specific

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unresolved matters or problems to the attention of the local U.S. attorney, the respective heads of the Commercial Litigation Branch of the Department's Civil Division, the General Litigation and Legal Advice Section of the Department's Criminal Division, or the Acting Director of the Executive Office for United States Attorneys, as appropriate.

The Criminal Division already has this complete capability and serves the functions of receiving reports of criminal regulatory cases needing special attention, resolving any problem cases between the ICC and U.S. attorneys' offices, and providing additional litigation assistance where necessary.

The Department has already designated the General Litigation and Legal Advice Section of the Criminal Division with responsibility to monitor and provide assistance with litigation of criminal regulatory cases. There are 31 attorneys and another five to eight attorneys will be added soon. The number of cases referred by the ICC to this Section for litigation has been extremely small, totaling only five cases since August 1979. Action has been taken on all of these cases in the U.S. attorneys' offices, including trials in two major ICC regulatory and tariff cases and the provision of Department attorney assistance to a U.S. attorney's office for a trial.

In an effort to increase the Department's proactive approach to ICC regulatory violations and increase the quality of ICC investigations and cases referred to the Department by the ICC, the General Litigation and Legal Advice Section has conferred with the ICC and has instituted an Informal Referral System to provide for Department and U.S. Attorney's office participation at the early stages of ICC investigations where there is potential criminal liability.

The Department disagrees with the statements in the draft report that there has been a significant problem with delays of cases referred to the Department and to U.S. Attorneys by the ICC. The timeliness of the Department's and U.S. Attorneys' offices actions on referred ICC cases has not been raised as a problem by the General Counsel of the ICC, despite opportunities to do so through the liaison created by the General Litigation and Legal Advice Section of the Criminal Division. The condition of delays, if indeed it exists on a large scale, has not been presented to the Department so that the Department's Criminal Division could

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stimulate prosecutive action. The General Litigation and Legal Advice Section has initiated and established a proactive type of liaison and supervision of caseloads with other regulatory agencies, including the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA), and is in the process of establishing the same with the Environmental Protection Agency and the Nuclear Regulatory Agency. In addition, some other regulatory agencies, e.g., OSHA, have made available to the Department all agency facilities, including investigators and clerical personnel. The ICC, however, has not yet done so.

Seminars for regulatory agency personnel and investigators have been sponsored by the General Litigation and Legal Advice Section for the MSHA in West Virginia and one will be held again soon for the MSHA in Denver. The Department will also soon hold a seminar for the OSHA investigators and will give the OSHA General Counsel's Office guidelines on how to investigate regulatory violations. Similar assistance is available for the ICC, but the ICC has not requested such assistance. One of the common problems encountered by the Department with ICC criminal cases has been that some ICC investigations reveal different facts rendering the cases unprosecutable. One recent case which was investigated by the ICC investigators and referred to the Department as a major criminal violation case had to be declined by the Department after further Department investigation revealed the case was not prosecutable because there had been no violation of law. The Department will continue to seek ways in which to improve the quality of its litigation of regulatory cases and of the type of cases referred to it for litigation.

As with all regulatory agencies, the Department and the offices of the U.S. attorneys encourage the participation of agency attorneys in investigations, and sometimes use agency attorneys who are duly appointed as special assistant U.S. attorneys for a specific case as "second chair" attorneys at trial. Such agency attorney participation, however, must be and always is under the direct supervision of the U.S. attorney or assistant U.S. attorney. It would be improper to consider appointments of ICC attorneys as free-wheeling special assistant U.S. attorneys because they do not have sufficient litigation experience and the breadth of prosecutorial discretion needed to exercise selectivity and prosecutorial discretion in deciding whether a case is prosecutable and worthy of the great expenditure of attorney and judicial resources required for a trial. In addition, there would be too great an incentive on the part of regulatory



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agency attorneys to file an excessive number of this one class of case, not all of which would be worthy of prosecution.

Two of the most compelling reasons why regulatory agency attorneys with civil responsibilities cannot be appointed to primary criminal authority in related cases are the inherent ethical conflict and the prohibition of Rule 6(e), Federal Rules of Criminal Procedure, against disclosure and misuse of grand jury process and grand jury materials for civil or administrative purposes without a court order.

In certain cases, it might be appropriate for an agency attorney to assist the U.S. attorney, but the entrusting of the entire presentation of the case to a staff attorney from an agency responsible for investigating the offense raises serious conflict of interest questions. These questions are explored at some length in United States v. Gold, 470 F. Supp. 1336 (N.D. Ill., 1979).

On October 1, 1977, certain amendments to the Federal Rules of Criminal Procedure took effect, among them an amendment to Rule 6(e). The amendment was proposed to Congress by the Supreme Court "to facilitate an increasing need, on the part of the government attorneys, to make use of outside expertise in complex litigation." This was to be accomplished by a definition of "attorneys for the government" which "includes such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties," such as agency attorneys who are appointed as special assistant U.S. attorneys for specific cases.

Congress noted the views of the Supreme Court and the Advisory Committee (See 18 U.S.C.A. Fed. R. Cr. P. 6. Notes of Advisory Committee, Supp. No. 3, Nov. 1977) and agreed that there should be no barrier of secrecy between the facets of the criminal justice system. However, Congress then redrafted the proposed Rule to eliminate the definition of attorney for the Government and substituted a specific exception to the general secrecy requirement by providing for disclosure to:

"(i) an attorney for the government for use in the performance of such attorney's duty:" and

"(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce Federal criminal law."

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The report of the Senate Judiciary Committee which made this change explained that "The Rule as redrafted is designed to accommodate the belief on the one hand that the Federal prosecutor should be able . . . to facilitate the performance of their duties relating to criminal law enforcement. On the other hand, the Rule seeks to allay the concerns of those who fear that such prosecutorial power will lead to misuse of the grand jury to enforce non-criminal Federal laws by (1) providing a clear prohibition subject to the penalty of contempt and (2) requiring that a court order under paragraph (C) be obtained to authorize such disclosure."

While some questions have arisen under the new Rule regarding the ambiguity over definitions, one thing clear is that disclosure may not be made for the purpose of enforcing civil or administrative provisions. (This was actually clear before the clarifying amendment, for example, see In re Grand Jury Proceeding, 109 F.2d 440.)

The Rule imposes upon the prosecutor an affirmative duty of reporting to the court. Paragraph (2)(B) of Rule 6(e) states in pertinent part that:

"An attorney for the government shall promptly provide the district court, . . . with the names of the persons to whom such disclosure has been made."

The above-quoted change reflects a major congressional concern. That very legitimate concern was the potential for misuse of grand jury material for civil purposes in the absence of court supervised disclosure. The approval and reporting requirements of the amendment are for the purpose of creating a system of accountability for disclosure similar to Privacy Act requirements, so that responsibility for an improper disclosure can be fixed.

The grave concern about civil misuse that motivated Congress in amending the Rule can be seen in another practice now followed by the U.S. attorneys. Federal prosecutors (who are ultimately responsible to the court in this regard) now routinely advise agents (i.e., an ICC criminal investigative agent) that disclosure to them needs to be reported to the court, and, that grand jury information disclosed is covered by Rule 6(e) and cannot be used for any purpose other than "assisting" the assistant U.S. attorney in the enforcement of Federal criminal laws. This "advice" to agents is generally given by a written directive confirming the limitations of disclosure. Copies of certain forms used to emphasize limitations to the agent have been distributed to all U.S. attorneys.

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U.S. attorneys are knowingly and properly carrying out the clear intent of Congress to prevent misuse of grand jury material (i.e., civil or administrative use without a court order). The continued, active interest of Congress in the area of alleged grand jury abuse has prompted an even greater caution by the Department in this and other areas of grand jury procedures. U.S. attorneys have no desire to generate ill will in Congress or elsewhere by the careless or questionable use of grand jury material in civil cases. Clearly the Department's reputation and continued effectiveness, which are assets far more important in the long run than increased collections, rest upon a strict adherence to the restrictions of the new Rule 6(e).

In addition to the above, U.S. attorneys noted the following:

(a) Maintaining the secrecy of ongoing criminal cases mitigates against disclosure. This relates not only to the propensity of well-informed targets to destroy evidence or files but the issue of pretrial publicity.

(b) Material turned over to civil attorneys for civil action becomes subject to civil discovery. Civil discovery is far broader than criminal discovery and a criminal defendant could easily gain information through civil discovery denied him in the criminal case. Such disclosure could endanger more than the success of the Government's case. It could endanger witnesses.

(c) Assistant U.S. attorneys are personally accountable for their actions or any conduct considered unethical. Clearly no assistant U.S. attorney desires to, and the Department advises them not to, ever create the appearance of unethical conduct. Thus, any action tending to appear as an effort to coerce payment of a civil claim must be avoided. The best way to avoid any such appearance is to save the civil action until the criminal case is resolved, and not to allow regulatory agency attorneys with civil responsibility in regulatory cases personally to present related matters to the grand jury or to have access simultaneously to protect grand jury materials while involved in civil actions in the same or related matters.

The findings in the GAO report do not justify a departure from this practice. GAO's conclusions and recommendations appear to be based largely upon interviews with ICC attorneys, although apparently a few U.S. attorneys were interviewed also. The report does state that many U.S. attorneys process these cases in an appropriate manner and that the problem appears to be with only a few offices. This being the case, it would not appear that the granting of a

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general authority to the ICC to handle its own litigation is justified. Indeed, much of the data in the report tends to support a conclusion that vesting litigative responsibility in the ICC would only compound the problems that already exist. The report states that it takes an average of 17 months for the ICC to process a case before referral to a U.S. attorney and an average of 13 months from the time an investigator submits a report until the ICC settles a civil case. Moreover, many violations are not adequately documented by investigators, and frequently not all documented violations are used by ICC attorneys in settling cases. The fact that the ICC is experiencing considerable difficulty in handling its current responsibilities in a timely fashion demonstrates rather clearly that agency attorneys could not be expected to solve the additional problems that would arise in connection with civil and criminal litigation.

As the report notes, U.S. attorneys' manpower and other resources are limited, and prosecutive priorities must be established in each U.S. attorney's office. This is so because U.S. attorneys are responsible for civil and criminal litigation under literally thousands of Federal statutes as well as for defending cases brought against the Government. Nevertheless, other factors pointed out in the GAO report undoubtedly influence U.S. attorneys' decisions to file cases. Many of the cases are stale by the time they are referred to a U.S. attorney as a result of the delays in administrative handling referred to above. The penalties sought in many of the cases are minimal and would not appear to justify the expenses involved in litigation. Finally, many of the cases are complex and require lengthy analysis by the U.S. attorney before a decision whether or not to litigate can be made.

In summary, we do not believe there is any justification for lodging litigative authority in the ICC. As noted above, the report indicates that the problem of delay appears to exist in only a few U.S. attorneys' offices. Had the ICC brought these problems to the attention of the Criminal Division in the past, perhaps some of the difficulties could have been resolved. Should GAO nevertheless wish to pursue this alternative, a much more detailed study of the rates of declination and pattern of handling these cases in the U.S. attorneys' offices should be done, and this data should be compared with rates of declination and processing patterns for other types of cases. We note that the declination rates in two of the four regions visited were only 32 percent and 33 percent. Obviously, if cases are being declined because

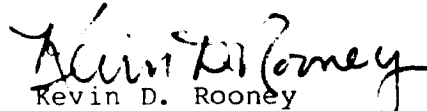
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of lack of merit, the appointment of ICC attorneys to handle these case would not improve the situation.

We certainly share the concern of GAO and the ICC that ICC cases should be dealt with in a proper fashion, and we are prepared to explore with the ICC appropriate means of dealing with particular cases or with delay problems in particular U.S. attorney's offices. However, the conclusion that ICC attorneys should be generally authorized to handle all litigation in these cases is not supported by the findings in the GAO report, and more significantly, such independent litigating authority cannot be given to ICC attorneys under existing statutes.

We appreciate the opportunity to comment on the report. Should you desire any additional information, please feel free to contact us.

Sincerely



Kevin D. Rooney  
Assistant Attorney General  
for Administration

(347440)





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