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## Section 558(c) of the Administrative Procedure Act: Is a Formal Hearing to Demonstrate Compliance Required Before License Revocation or Suspension?

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# SECTION 558(c) OF THE ADMINISTRATIVE PROCEDURE ACT: IS A FORMAL HEARING TO DEMONSTRATE COMPLIANCE REQUIRED BEFORE LICENSE REVOCATION OR SUSPENSION?

## INTRODUCTION

The Administrative Procedure Act of 1946 (APA)<sup>1</sup> prescribes procedural standards that administrative agencies must observe when carrying out their rule-making<sup>2</sup> and adjudicatory functions.<sup>3</sup> Section 558(c) of the APA, which deals specifically with licensing procedures, states in part that federal agencies must provide licensees with an "opportunity to demonstrate or achieve compliance" with license qualifications before their licenses are suspended or revoked.<sup>4</sup> Some

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1. Ch. 324, 60 Stat. 237 (1946), *repealed and superseded by* Government Organization and Employees Act, Pub. L. No. 89-554, 80 Stat. 378 (1966) (codified as amended at 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5362, 7521 (1976 & Supp. V 1981)).

2. "Rule making" means any process for formulation, amendment or repeal of any "rule." 5 U.S.C. § 551(5) (1976). "Rule" is defined as "an agency statement of general or particular applicability and future effect" whether interpretative, substantive or procedural. *Id.* § 551(4); *see* Department of Justice, Attorney General's Manual on the Administrative Procedure Act 12-16 (1947 & reprint 1973) (significance of distinction between rule making and adjudication) [herein cited as Attorney General's Manual].

3. Adjudication refers to any process leading to issuance of an agency "order." 5 U.S.C. § 551(7) (1976). "Order" is defined as any "final disposition . . . of an agency in a matter other than rule making but including licensing." *Id.* § 551(6). In *Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964), the court specifically rejected the notion that the decision to grant or deny a particular license application is a legislative function. *Id.* at 608. The court stated that when a "governmental body grants a license it is an adjudication that the applicant has satisfactorily complied with the prescribed standards for the award of that license." *Id.*

4. 5 U.S.C. § 558(c) (1976). This section also requires that the licensee be given notice before the agency begins termination proceedings. *Id.*; *accord* *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1075-76 & n.11 (7th Cir. 1982) (letters warning licensees of potential suspension and which listed instances of failures to file papers timely held sufficient notice); *see* *Blackwell College of Business v. Attorney Gen.*, 454 F.2d 928, 933-34 (D.C. Cir. 1971) (notice insufficient when agency did not indicate which filing failures led to complaint); *Great Lakes Airlines v. CAB*, 294 F.2d 217, 228-29 (D.C. Cir.) (Fahy, J., dissenting) (notice not sufficient when agency in rule-making proceeding relied upon past violation not found willful until the hearing), *cert. denied*, 366 U.S. 965 (1961); *Shuck v. SEC*, 264 F.2d 358, 360 (D.C. Cir. 1958) (service of complaint and temporary restraining order that licensee refrain from further violations of act held sufficient); *Schwebel v. Orrick*, 153 F. Supp. 701, 706 & n.23 (D.D.C. 1957) (notice of impending hearing and a "short simple statement of the matters of fact and law to be considered and determined" sufficient) (quoting Rule III(a) of the SEC), *aff'd on other grounds per curiam*, 251 F.2d 919 (D.C. Cir.), *cert. denied*, 356 U.S. 927 (1958). Agency notification that was factually inaccurate in details but did not mislead the licensee has been held to be sufficient notice prior to license suspension. *Wasson v. SEC*, 558 F.2d 879, 883-84 (8th Cir. 1977). In addition, § 558(c) provides that in cases of emergency or willful misconduct by the licensee, procedural requirements of notice and opportunity to comply are not appli-

courts have interpreted this "opportunity to demonstrate or achieve" language of the second sentence of section 558(c) as requiring that agencies adhere to the procedures that the APA outlines for formal adversarial hearings in all license revocation proceedings.<sup>5</sup> The Seventh Circuit, however, in *Gallagher & Ascher Co. v. Simon*,<sup>6</sup> rejected this interpretation as inconsistent with both the plain meaning and the legislative history of section 558(c).<sup>7</sup> The court stated that the "sole purpose of the second sentence was to provide a licensee threatened with the termination of its license an opportunity to correct its transgressions before actual suspension or revocation of its license resulted."<sup>8</sup> According to this interpretation, the section merely affords the licensee the separate safeguard of an opportunity to comply with license qualifications.<sup>9</sup> If the licensee then fails to demonstrate compliance, termination proceedings are instituted.<sup>10</sup> Other applicable sections of the APA,<sup>11</sup> the statute giving the agency authority over the

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cable. 5 U.S.C. § 558(c) (1976). The willfulness, however, must be "manifest" before an agency may terminate a license without prior notice and some chance for the licensee to respond or comply. H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946) [hereinafter cited as House Report], reprinted in Senate Comm. on the Judiciary, 79th Cong., 2d Sess., Administrative Procedure Act: Legislative History, S. Doc. No. 248, 233, 275 (1946) [hereinafter cited as APA Legislative History]; S. Rep. No. 752, 79th Cong., 1st Sess. 25 (1945) [hereinafter cited as Senate Report], reprinted in APA Legislative History, *supra*, at 185, 211; see *Eastern Produce Co. v. Benson*, 278 F.2d 606, 609 (3d Cir. 1960) (interpreting 5 U.S.C. § 1008(b), recodified at 5 U.S.C. § 558(c) (1976)). "Willfulness" under the APA has been interpreted to include proscribed acts either "intentionally" committed, whether innocently or maliciously motivated, or negligently committed without regard for lawful requirements. *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961); see *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965). Notice requirements have been held to be "superfluous" when the licensee was the "corporate successor" of a willful violator. *Van Wyk v. Bergland*, 570 F.2d 701, 705 (8th Cir. 1978).

5. *Porter County Chapter of Izaak Walton League of Am., Inc. v. Nuclear Regulatory Comm'n*, 606 F.2d 1363, 1368 n.12 (D.C. Cir. 1979); *New York Pathological & X-Ray Labs. v. INS*, 523 F.2d 79, 82 (2d Cir. 1975); see *Bankers Life & Casualty Co. v. Callaway*, 530 F.2d 625, 634-35 (5th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977).

6. 687 F.2d 1067 (7th Cir. 1982).

7. *Id.* at 1074.

8. *Id.*

9. *Id.*; *Blackwell College of Business v. Attorney Gen.*, 454 F.2d 928, 933-34 (D.C. Cir. 1971); see *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 114 (8th Cir. 1972), *rev'd on other grounds sub nom. Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973); *H.P. Lambert Co. v. Secretary of the Treasury*, 354 F.2d 819, 821 n.2 (1st Cir. 1965); *Great Lakes Airlines v. CAB*, 294 F.2d 217, 228-29 (D.C. Cir.) (Fahy, J., dissenting), *cert. denied*, 366 U.S. 965 (1961).

10. See *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1074 (7th Cir. 1982); *Blackwell College of Business v. Attorney Gen.*, 454 F.2d 928, 933-34 (D.C. Cir. 1971).

11. Section 554 states that it applies if another statute requires that an agency's adjudications be "determined on the record after opportunity for an agency hearing." 5 U.S.C. § 554(a) (1976 & Supp. V 1981). See *infra* notes 54-55 and accompa-

licensed activity,<sup>12</sup> and due process,<sup>13</sup> all of which govern agency adjudications, determine the procedures that must be followed in conducting these proceedings.

This Note addresses the issue whether the second sentence of section 558(c) requires a hearing with all the procedural safeguards that the APA outlines for formal adversarial hearings before a license is suspended or revoked. In Part I, this Note examines the language and legislative history of the APA and concludes that rather than requiring a formal hearing, the second sentence of section 558(c) provides the licensee with a "second chance" to comply with license qualifications. It then examines the procedures that must be followed to ensure that the licensee is given that chance. Part II analyzes whether informal compliance proceedings that are consistent with the goals of the APA also satisfy the constitutional due process requirement that an individual not be deprived of property without an opportunity to be heard. After examining the factors that should be considered in formulating procedures that are consistent with due process, this Note concludes that informal compliance proceedings can satisfy that constitutional requirement.

## I. COMPLIANCE PROCEEDINGS UNDER SECTION 558(c)

### A. Licensing

Prior to the enactment of the APA, administrative procedures had been criticized for being conducted "without regard for due process and in violation of cherished ideas of fair play."<sup>14</sup> Licensing proce-

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nying text. If § 554 applies, the procedural safeguards outlined in §§ 556-557 also apply. 5 U.S.C. §§ 556-557 (1976 & Supp. V 1981). See *infra* note 19 and accompanying text. Section 555 applies to both formal and informal agency proceedings. It outlines ancillary procedural safeguards including the right to be represented or advised by counsel, to obtain a transcript of evidence required by the agency, to request the agency to issue subpoenas, and to receive prompt notice with a brief explanation for denial of any application or petition. 5 U.S.C. § 555 (1976).

12. See, e.g., *Colorado v. Veterans Admin.*, 602 F.2d 926, 928 (10th Cir. 1979) (holding that pursuant to 38 U.S.C. § 1785 (1976 & Supp. IV 1980), monetary claims against schools for overpayments to non-eligible students must be determined in court and not by agency proceedings), *cert. denied*, 444 U.S. 1014 (1980); *Ashbaker Radio Corp. v. FCC*, 326 U.S. 327, 328-30 (1945) (holding that pursuant to 47 U.S.C. §§ 307-310 (1976), FCC grants broadcast licenses to qualified applicants after considering public convenience and necessity in comparative hearing).

13. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 332-33, 335-39 (1976) (applying due process to HEW determination of eligibility for disability benefits pursuant to 42 U.S.C. §§ 421(b), 423 (1976 & Supp. IV 1980)); *Richardson v. Perales*, 402 U.S. 389, 399-402 (1971) (same).

14. Woltz, *Preface* to Final Report of the Attorney General's Committee on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. (1941), at vi (1968) [hereinafter cited as Final Report]. By the late 1930's, there was a pervasive feeling that many of the newly established administrative agencies were not treating parties

dures in particular were vulnerable to this criticism because Congress had delegated substantial licensing authority to federal agencies.<sup>15</sup> Rather than divesting agencies of their extensive regulatory authority, which would have interfered with the efficient operation of the licensing process,<sup>16</sup> Congress, attempting to minimize the potential for injustice, enacted section 558(c) of the APA to ensure that licensees had a meaningful opportunity to protect their interest in engaging in the regulated, and often lucrative, activities that require federal licenses.<sup>17</sup>

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whose actions they regulated fairly. *Id.*; House Report, *supra* note 4, at 8, *reprinted in* APA Legislative History at 242; Senate Report, *supra* note 4, at 1, *reprinted in* APA Legislative History at 187; *see* Vanderbilt, *Legislative Background of the Federal Administrative Procedure Act*, in *Federal Administrative Procedure Act and the Administrative Agencies I*, 13 (G. Warren ed. 1947).

15. Years ago, the Supreme Court recognized the need for Congress to delegate regulatory authority to protect the public welfare effectively. In *United States v. Grimaud*, 220 U.S. 506 (1911), the Court stated that "when Congress had legislated and indicated its will, it could give to those who were to act . . . 'power to fill up the details' by the establishment of administrative rules and regulations." *Id.* at 517 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). By specific legislation, Congress has delegated licensing power to numerous agencies that develop expertise in the fields for which licenses are required. *See, e.g.*, Packers and Stockyards Act of 1921, 7 U.S.C. § 203 (1976) (the Agricultural Marketing Service (AMS) licenses registered dealers and agents engaged in buying and selling livestock); Perishable Agricultural Commodities Act, *id.* § 499c(a) (AMS licenses market agents dealing in agricultural commodities); Federal Water Pollution Control Act, 33 U.S.C. §§ 1311-1312 (1976 & Supp. IV 1980) (EPA issues licenses permitting point source discharge of pollutants into navigable waters); Energy Reorganization Act of 1974, 42 U.S.C. § 5841(f) (1976) (the Nuclear Regulatory Commission licenses all aspects of construction and operation of nuclear power plants); Federal Communications Act of 1934, 47 U.S.C. §§ 151-609 (1976 & Supp. IV 1980); Communications Satellite Act of 1962, *id.* §§ 701-757 (the FCC issues licenses for radio and television stations for individuals and corporations offering interstate communications services by wire, radio or microwaves, and others including ham, aviation and marine radio operators); Federal Aviation Act of 1958, 49 U.S.C. § 1371(d) (1976 & Supp. IV 1980) (the Secretary of Transportation issues certificates of public convenience and necessity for air carriers); *id.* § 1424 (operating certificates to air carriers satisfying safety standards); Interstate Commerce Act (as amended), revised by Act of Oct. 17, 1978, 49 U.S.C. § 10,521 (Supp. IV 1980) (the ICC licenses motor carriers providing transportation of persons and property moving interstate or between the states and a foreign nation); *id.* § 10,922 (ICC issues certificates of public convenience for motor carriers).

16. The drafters of the APA were concerned that the Act not unnecessarily interfere with the administrative process. As Senator McCarran, Chairman of the Judiciary Committee, indicated to the full Senate, his Committee had endeavored "to make sure that no operation of the Government is unduly restricted." Senate Report, *supra* note 4, at 5, *reprinted in* APA Legislative History, *supra* note 4, at 191. The Senator was convinced that "no administrative function [was] improperly affected." *Id.*; 92 Cong. Rec. 2150 (1946), *reprinted in* APA Legislative History, *supra* note 4, at 301.

17. *See* *Blackwell College of Business v. Attorney Gen.*, 454 F.2d 928, 936 (D.C. Cir. 1971). The APA defines licenses broadly as any agency "permit, certificate,

Section 558(c) provides licensees with an "opportunity to demonstrate or achieve compliance" with license qualifications before their licenses are suspended or revoked. Licensees threatened with termination of their licenses argue that this "opportunity to demonstrate or achieve" language of section 558(c) is a hearing requirement that triggers the procedural safeguards for formal adversarial hearings described in sections 556 and 557.<sup>18</sup> These procedural safeguards include: 1) an impartial presiding officer; 2) the right to present evidence and to cross-examine; and 3) the right to have the decision based on the record and supported by reliable, probative and substantial evidence.<sup>19</sup> To determine whether these procedural safeguards apply to the "opportunity to demonstrate or achieve compliance," that language must be examined in the context of the statute as a whole,<sup>20</sup> and in light of its legislative history.<sup>21</sup>

## B. Statutory Construction of Section 558(c)

### 1. Express Language

#### a. Section 558(c)

Section 558(c) provides in relevant part:

Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension,

approval . . . exemption or other form of permission." 5 U.S.C. § 551(8) (1976). Thus, licenses such as a certification of medical facilities for performing the laboratory tests required for aliens seeking permanent residency status, *see* New York Pathological & X-Ray Labs. v. INS, 523 F.2d 79, 82 (2d Cir. 1975), a construction or operating permit for a nuclear power plant, *see* Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 526 (1978); Porter County Chapter of Izaak Walton League of Am., Inc. v. Nuclear Regulatory Comm'n, 606 F.2d 1363, 1366 n.4 (D.C. Cir. 1979), and the right to practice before the Securities and Exchange Commission, *see* Schwebel v. Orrick, 153 F. Supp. 701, 704-05 (D.D.C. 1957), *aff'd on other grounds per curiam*, 251 F.2d 919 (D.C. Cir.), *cert. denied*, 356 U.S. 927 (1958), are all covered by the APA. As such, none of these may be suspended or revoked unless the agency has complied with the second sentence of section 558(c).

18. *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1072 (7th Cir. 1982); *Porter County Chapter of Izaak Walton League of Am., Inc. v. Nuclear Regulatory Comm'n*, 606 F.2d 1363, 1367-68 & n.12 (D.C. Cir. 1979); *see* *New York Pathological & X-Ray Labs. v. INS*, 523 F.2d 79, 82 (2d Cir. 1975).

19. 5 U.S.C. §§ 556-557 (1976 & Supp. V 1981). The hearing officer or administrative law judge is authorized to administer oaths, issue subpoenas, receive relevant evidence, take depositions, handle procedural questions, and control the course of the hearing. *Id.* § 556(c) (1976). His decision must be based on the entire record of the hearing. *Id.* § 557(c); *see id.* § 556(e).

20. *See* 92 Cong. Rec. 2146, 2150 (1946), *reprinted in* APA Legislative History, *supra* note 4, at 302. *See generally* 2A C. Sands, Sutherland's Statutes and Statutory Construction § 46.05 (4th ed. 1973).

21. *See* 2A C. Sands, *supra* note 20, § 48.02.

revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

- (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
- (2) opportunity to demonstrate or achieve compliance with all lawful requirements.<sup>22</sup>

The section does not outline the procedure that is necessary to ensure an “opportunity to demonstrate or achieve compliance.”<sup>23</sup> Some courts apply the procedural requirements for hearings outlined in sections 556 and 557 to proceedings conducted pursuant to section 558(c).<sup>24</sup> A literal reading of section 558(c), however, does not suggest that these procedures are necessary.<sup>25</sup> Sections 556 and 557 state that they apply to adjudicatory proceedings when section 554<sup>26</sup> of the APA specifically requires that their procedures be followed.<sup>27</sup> The second sentence of section 558(c) makes no reference to either a hearing or to sections 556 and 557.<sup>28</sup> Because other sections of the APA refer explicitly to “hearings,”<sup>29</sup> Congress’ failure to use the term<sup>30</sup> in section 558(c) suggests that it did not intend to create an independent formal hearing requirement when it enacted the section.<sup>31</sup> Additionally, the

22. 5 U.S.C. § 558(c) (1976).

23. *See id.*

24. Porter County Chapter of Izaak Walton League of Am., Inc. v. Nuclear Regulatory Comm’n, 606 F.2d 1363, 1368 n.12 (D.C. Cir. 1979); New York Pathological & X-Ray Labs. v. INS, 523 F.2d 79, 82 (2d Cir. 1975). In *New York Pathological*, although the court seemed somewhat confused whether the case presented a question of denial of an application or revocation of a license, it relied upon the second sentence of § 558(c) to establish that a formal hearing was required. *Id.* at 82. The plaintiff had engaged in the activity for about 25 years before the agency required that it be licensed. *Id.* at 81.

25. Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1074 (7th Cir. 1982).

26. 5 U.S.C. § 554(c) (1976). Section 554 applies to agency adjudications when another statute requires that such adjudications be determined “on the record after opportunity for an agency hearing.” *Id.* § 554(a) (1976 & Supp. V 1981). *See infra* notes 54-56 and accompanying text.

27. 5 U.S.C. §§ 556-557 (1976 & Supp. V 1981).

28. *See id.* § 558(c) (1976).

29. *Id.* §§ 553(c), 554(a) (1976 & Supp. V 1981). Section 553(c) also requires a formal hearing in certain rule-making situations. Formal proceedings are necessary for agency rule-making whenever the statute provides for a hearing “on the record” in *haec verba* or substantially similar words. *See United States v. Florida E. Coast Ry.*, 410 U.S. 224, 234-38 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 756-57 (1972). *See generally* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. Pa. L. Rev. 485 (1970).

30. A maxim useful for statutory construction is expressed by the phrase *expressio unius est exclusio alterius* (anything not expressly stated is intended to be excluded). *See* 2A C. Sands, *supra* note 20, § 47.23.

31. *Cf. United States v. Wiltberger*, 18 U.S. 76, 104-05, 5 Wheat. 35, 47-48 (1820) (omission of description from one section indicated that descriptive words of

first sentence of the section, which deals with license applications, refers to sections 556 and 557.<sup>32</sup> Congress' failure to repeat this language in the second sentence suggests that it did not intend the procedural safeguards of those sections to apply to proceedings conducted pursuant to that sentence.<sup>33</sup>

b. *Section 558(c) in the Context of the Statute as a Whole*

An examination of both the purpose of the APA<sup>34</sup> and the way that its different sections work together<sup>35</sup> supports this conclusion. The preamble<sup>36</sup> of the APA states that it was designed to "improve the administration of justice by prescribing fair administrative procedure."<sup>37</sup> The fairness of a particular administrative procedure depends not only upon the rights and expectations of licensees, but also upon the public interest and the burdens placed on the administrative agency.<sup>38</sup> Thus, the "opportunity to demonstrate or achieve" language

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another section should not be incorporated into first section); *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (use of specific term in one section indicated that term should not be implied in section where omitted); *Pena-Cabanillas v. United States*, 394 F.2d 785, 789 (9th Cir. 1968) (same); *Pennsylvania Agricultural Coop. Marketing Ass'n v. Ezra Martin Co.*, 495 F. Supp. 565, 570-71 (M.D. Pa. 1980) (same).

32. 5 U.S.C. § 558(c) (1976).

33. Cf. *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) (enumerated exceptions indicated that omission of others was intentional); *Marshall v. Western Union Tel. Co.*, 621 F.2d 1246, 1251 (3d Cir. 1980) (inclusion of standard in one section and exclusion in another indicated that exclusion was intentional).

34. Courts should give effect to the expressed intent of the legislature. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); see *Conoco, Inc. v. Federal Regulatory Comm'n*, 622 F.2d 796, 800 (5th Cir. 1980). If a statute is capable of two constructions, the construction that carries out the manifest object of the statute should be followed. See *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 738 (1979); *Shapiro v. United States*, 335 U.S. 1, 31 (1948).

35. Separate parts of a statute should be interpreted in harmony with one another so that the statute is understood as a unified composition. *United States v. Snider*, 502 F.2d 645, 652 (4th Cir. 1974); *United States v. Firestone Tire & Rubber Co.*, 455 F. Supp. 1072, 1079 (D.D.C. 1978); 2A C. Sands, *supra* note 20, § 46.05. Senator McCarran emphasized that the coherence and interrelatedness of the parts of the bill enacted as the APA must be taken into account when interpreting it. 92 Cong. Rec. 2150 (1946), reprinted in *APA Legislative History*, *supra* note 4, at 302.

36. What the legislature said in the text of the statute is "the best evidence of the legislative intent or will." 2A C. Sands, *supra* note 20, § 46.03. The "preamble expresses in the most satisfactory manner the reason and purpose of the act." *Id.* § 47.02(3).

37. Ch. 324, 60 Stat. 237 (1946), reprinted in *APA Legislative History*, *supra* note 4, at 1.

38. As summarized by the Attorney General in his recommendation of the Act to Congress, the APA was intended to provide the "hopeful prospect of achieving reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical operation of the Government." Letter from Tom Clark, Attorney General, to the Chairman of the Senate



should be construed to maximize the "fairness" to all parties interested in the license termination, and not necessarily to require formal adjudicatory hearings when such hearings would not be in the best interests of the licensee, the public and the administrative agency.<sup>39</sup> In certain circumstances, the interest of fairness<sup>40</sup> may be better served by less formal procedures.<sup>41</sup> For example, whenever the agency's determination of non-compliance is based on a factual occurrence such as the timely filing of documents, it would be unfair to require the government to expend fiscal and administrative resources to provide elaborate procedural safeguards that would not lead to a more accurate determination of compliance or a more equitable resolution of the dispute.<sup>42</sup> A formal hearing, therefore, does not always serve the purpose expressed in the preamble of the APA.

Analysis of other parts of the APA suggests that if the APA is to be read as a unified composition,<sup>43</sup> the "opportunity to demonstrate or achieve compliance" does not create a right to a formal hearing, and that the safeguards of sections 556 and 557 do not apply. The first sentence of section 558(c) requires that an agency conduct "proceedings . . . in accordance with sections 556 and 557 . . . or other proceedings required by law" to determine whether a license should be granted to an applicant.<sup>44</sup> Although referring to sections 556 and

Judiciary Committee (Oct. 19, 1945), *reprinted in* Attorney General's Manual, *supra* note 2, at 123, 124; *see* 92 Cong. Rec. 5645 (1946), *reprinted in* APA Legislative History, *supra* note 4, at 344 (remarks of Rep. Sabath) (President vetoed the earlier Walter-Logan bill because it failed to achieve proper balance among private, public and agency interests).

39. *Cf.* Department of Defense v. Federal Labor Relations Auth., 659 F.2d 1140, 1159-60 (D.C. Cir. 1981) (when Congress intended to create a balance between union and management power, statutory language should not be construed to give the union too much power), *cert. denied*, 455 U.S. 945 (1982); Raven v. Panama Canal Co., 583 F.2d 169, 170-71 (5th Cir. 1978) (when Congress intended to exclude nonresident alien from coverage of statute, word "individual" in statute should be read to exclude nonresident aliens), *cert. denied*, 440 U.S. 980 (1979).

40. As noted by one commentator, "[f]airness seems to dictate a procedural minimum of notice, comment, and reasons before informal adjudication can be legitimated." Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. Chi. L. Rev. 739, 757 (1976).

41. *See* House Report, *supra* note 4, at 17, *reprinted in* APA Legislative History at 251; Senate Report, *supra* note 4, at 8, *reprinted in* APA Legislative History at 194.

42. *See* Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1078 (7th Cir. 1982).

43. *See supra* note 35.

44. 5 U.S.C. § 558(c) (1976). License applicants have argued that the first sentence of § 558(c) entitles them to a formal hearing. Taylor v. District Eng'r, U.S. Army Corps of Eng'rs, 567 F.2d 1332, 1337 (5th Cir. 1978); United States Steel Corp. v. Train, 556 F.2d 822, 833-34 & n.13 (7th Cir. 1977); *see* Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 878 n.11 (1st Cir.) (court disagreeing that § 558(c) independently requires a hearing), *cert. denied*, 439 U.S. 824 (1978); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1260 (9th Cir. 1977) (plaintiff relying upon *United States Steel Corp.*'s interpretation of § 558(c)).

557,<sup>45</sup> the sentence recognizes that these sections do not apply when "other proceedings" are sufficient.<sup>46</sup> When the statute authorizing the agency to grant licenses or due process require that this authority be exercised after a hearing,<sup>47</sup> the first sentence of section 558(c) requires that the hearing conducted meet the specific procedural requirements of sections 556 and 557.<sup>48</sup> In the absence of such a requirement,<sup>49</sup> however, the procedures required by the agency enabling legislation satisfy this sentence of section 558(c).<sup>50</sup> If no procedures are specified in the statute authorizing the agency to grant licenses, the agency is free to devise procedural measures that are consistent with the goals of the enabling legislation, the APA and the Constitution.<sup>51</sup> This sentence, therefore, does not create a statutory right to adjudicatory hearings.<sup>52</sup> Rather, it requires that the proceedings mandated by other statutes or the Constitution be conducted "with due regard for the

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45. 5 U.S.C. § 558(c) (1976).

46. See *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 878 n.11 (1st Cir.), cert. denied, 439 U.S. 824 (1978); *Taylor v. District Eng'r, U.S. Army Corps of Eng'rs*, 567 F.2d 1332, 1337 (5th Cir. 1978).

47. E.g., 12 U.S.C. § 1842(b) (1976 & Supp. V 1981) (Federal Reserve Board, upon disapproval of any application to become a bank holding company, shall hold a hearing and either approve or deny application "on the basis of the record made at such hearing."); 42 U.S.C. § 2239(a) (1976) (Nuclear Regulatory Commission "in any proceeding . . . for the granting . . . of any license . . . shall grant a hearing . . . on each application.").

48. See *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 878 n.11 (1st Cir.), cert. denied, 439 U.S. 824 (1978); *Taylor v. District Eng'r, U.S. Army Corps of Eng'rs*, 567 F.2d 1332, 1337 (5th Cir. 1978); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1260 n.25 (9th Cir. 1977).

49. See, e.g., *Camp v. Pitts*, 411 U.S. 138, 140 (1973) (12 U.S.C. §§ 26-27 (1976 & Supp. V 1981) applications for banks evaluated after investigation into condition "by means of a special commission . . . or otherwise"); *Yong v. Regional Manpower Admin.*, 509 F.2d 243, 245 (9th Cir. 1975) (8 U.S.C. § 1182(a) (14) (1976 & Supp. V 1981) applications for entry by aliens approved after determination of need for skilled workers in alien's field made by state labor commission).

50. See *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 878 n.11 (1st Cir.), cert. denied, 439 U.S. 824 (1978); *Taylor v. District Eng'r, U.S. Army Corps of Eng'rs*, 567 F.2d 1332, 1337 (5th Cir. 1978); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1261 n.25 (9th Cir. 1977).

51. See *Taylor v. District Eng'r, U.S. Army Corps of Eng'rs*, 567 F.2d 1332, 1337 (5th Cir. 1978); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1261 n.25 (9th Cir. 1977). In *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872 (1st Cir.), cert. denied, 439 U.S. 824 (1978), the court remarked that "[t]he most that can be said is that Congress assumed that most licensings would be governed by §§ 556 and 557" formal hearing requirements. *Id.* at 878 n.11.

52. *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 878 n.11 (1st Cir.), cert. denied, 439 U.S. 824 (1978); *Taylor v. District Eng'r, U.S. Army Corps of Eng'rs*, 567 F.2d 1332, 1337 (5th Cir. 1978); *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1261 n.25 (9th Cir. 1977); 2 K. Davis, *Administrative Law Treatise* § 12:10, at 450 (2d ed. 1979); Rolfe, *The Requirement of Formal Adjudication Under the Administrative Procedure Act: When is Section 554(a) Triggered so as to Require Application of Sections 554, 556 and 557?*, 11 *Env'tl. L.* 97, 120-21 (1980).

rights and privileges of all the interested parties . . . and within a reasonable time.”<sup>53</sup>

Similarly, section 554 of the APA does not create a right to a formal adjudicatory hearing. Section 554 states that the procedural safeguards of sections 556 and 557 must be followed when agency enabling legislation requires that adjudications be “determined on the record after opportunity for an agency hearing.”<sup>54</sup> If the enabling statute does not contain this requirement, section 554 does not apply.<sup>55</sup> Accordingly, the requirements of sections 556 and 557 need not be met because those sections apply to adjudicatory hearings only if those hearings are required by section 554.<sup>56</sup> To be consistent with this scheme of safeguarding existing hearing rights, the “opportunity to demonstrate or achieve” language of the second sentence of section 558(c) should not be construed as creating a right to a formal hearing.

## 2. Legislative History

The legislative history also demonstrates that Congress did not intend to create rights to hearings when it enacted the APA.<sup>57</sup> Both the House and Senate Reports state that the APA does not require formal agency hearings unless a hearing is required by another statute.<sup>58</sup>

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53. 5 U.S.C. § 558(c) (1976); *accord* *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1261 n.25 (9th Cir. 1977); Attorney General's Manual, *supra* note 2, at 89.

54. 5 U.S.C. § 554(a), (c) (1976 & Supp. V 1981). When disputes arising under these statutes cannot be settled informally, the agency is required to afford the interested parties notice and a hearing in accord with sections 556 and 557. *Id.* § 554(b)-(c) (1976).

55. *See, e.g.,* *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1072 (7th Cir. 1982) (holding that APA does not by itself require agency to hold a hearing); *Colorado v. Veterans Admin.*, 602 F.2d 926, 928 (10th Cir. 1979) (holding that APA does not create rights to hearings when they do not already exist), *cert. denied*, 444 U.S. 1014 (1980); *New York Pathological & X-Ray Labs. v. INS*, 523 F.2d 79, 84 n.1 (2d Cir. 1975) (Moore, J., dissenting) (arguing that right to formal hearing must be found outside the APA); *Sisselman v. Smith*, 432 F.2d 750, 754 (3d Cir. 1970) (holding that APA requires U.S. Coast Guard to hold adjudicatory hearing only when another statute so requires). *See generally* Rolfe, *supra* note 52, at 115-20; Note, *The Requirement of Formal Adjudication Under Section 5 of the Administrative Procedure Act*, 12 Harv. J. on Legis. 194, 205-15 (1975).

56. *See* 5 U.S.C. §§ 556-557 (1976 & Supp. V 1981).

57. *See* House Report, *supra* note 4, at 10, 14, 17, *reprinted in* APA Legislative History at 244, 248, 251; Senate Report, *supra* note 4, at 6-8, *reprinted in* APA Legislative History at 192-94. A statute should be construed in light of its legislative history. *See* 2A C. Sands, *supra* note 20, § 48.02.

58. House Report, *supra* note 4, at 10, 14, 17, *reprinted in* APA Legislative History at 244, 248, 251; Senate Report, *supra* note 4, at 6-8, *reprinted in* APA Legislative History at 192-94. The Senate Judiciary Committee had earlier explained the operation of the Act stating: “Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine . . . and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from

According to these reports, the APA outlines some of the procedures that must be followed in formal adjudicatory hearings when hearings are required.<sup>59</sup>

Nor does the legislative history demonstrate that Congress intended to eliminate informal proceedings when it enacted the APA.<sup>60</sup> Congress was aware that "informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process."<sup>61</sup> The enactment of sections 556 and 557 describing specific procedural safeguards applicable to agency hearings, therefore, was not an expression of Congress' dissatisfaction with the fairness and effectiveness of informal proceedings.<sup>62</sup> Rather, those sections were designed to ensure "reasonable uniformity and fairness in administrative procedures without . . . interfering unduly with the efficient and economical operation of the Government."<sup>63</sup>

Informal proceedings often may be the best means of achieving the goal of fair, efficient agency action.<sup>64</sup> For example, whether an applicant is qualified to engage in certain areas of banking depends upon "congeries of imponderables . . . calling for almost intuitive special judgments."<sup>65</sup> Under these circumstances, according to the Attorney

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requiring an administrative hearing." Staff of Senate Comm. on the Judiciary, 79th Cong., 1st Sess. 7 (Comm. Print 1945) [hereinafter cited as Committee Print], reprinted in APA Legislative History, *supra* note 4, at 22; accord Attorney General's Manual, *supra* note 2, at 41; Letter from Tom Clark, Attorney General, to the Chairman of the Senate Judiciary Committee (Oct. 19, 1945), reprinted in Attorney General's Manual, *supra* note 2, at 124.

59. House Report, *supra* note 4, at 10, 14, 17, reprinted in APA Legislative History at 244, 248, 251; Senate Report, *supra* note 4, at 6-8, reprinted in APA Legislative History at 192-94.

60. The Congressional reports emphasize the importance of the APA's public notice provisions, which apply broadly to informal and formal agency actions, and state that "some functions and some operations may not lend themselves to formal procedure." House Report, *supra* note 4, at 17, reprinted in APA Legislative History at 251; Senate Report, *supra* note 4, at 8, reprinted in APA Legislative History at 194. Moreover, § 554(c) requires agencies to afford an opportunity for informal settlement of disputes when practicable. 5 U.S.C. § 554(c) (1976). Congress intended agencies to develop whatever informal procedures are appropriate. Committee Print, *supra* note 58, at 9, reprinted in APA Legislative History at 24; see Attorney General's Manual, *supra* note 2, at 48-49. Pursuant to § 552, the agency must publish the means it provides for informal settlement and other informal proceedings. 5 U.S.C. § 552(a)(1)(B) (1976 & Supp. V 1981).

61. Committee Print, *supra* note 58, at 9 (quoting Final Report, *supra* note 14, at 35), reprinted in APA Legislative History at 24; see Final Report, *supra* note 14, at 35-42.

62. See Committee Print, *supra* note 58, at 9, reprinted in APA Legislative History at 24. See *supra* note 60.

63. Letter from Tom Clark, Attorney General, to the Chairman of the Senate Judiciary Committee (Oct. 19, 1945), reprinted in Attorney General's Manual, *supra* note 2, at 124.

64. See *supra* notes 39-42 and accompanying text.

65. Attorney General's Comm. on Admin. Proc., Final Report of the Attorney

General's Report on Administrative Procedure,<sup>66</sup> which Congress relied upon when drafting the APA,<sup>67</sup> careful and conscientious investigation that affords reasonable time to present rebutting evidence and arguments is more useful than formal hearings.<sup>68</sup>

Furthermore, the House and Senate Reports indicate that section 558(c) was designed to prevent agencies from exceeding their statutory authority to impose penalties or sanctions on private parties whose actions they regulated.<sup>69</sup> The second sentence of the section limits this authority by precluding revocation or suspension of licenses if the licensee has not been afforded an opportunity to correct the conduct questioned by the agency.<sup>70</sup> A licensee is thus protected from arbitrary

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General's Comm. on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. 143 (1941).

66. Attorney General's Comm. on Administrative Procedure, Final Report of the Attorney General's Comm. on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. (1941).

67. See House Report, *supra* note 4, at 12, *reprinted in* APA Legislative History at 246 (Congressional documents "indicate the care with which the recommendations of [the Attorney General's Committee] have been studied in framing the present bill."); Senate Report, *supra* note 4, at 4, *reprinted in* APA Legislative History at 190 ("In the framing of the bill [the Senate Judiciary] committee has had the benefit of the factual studies and analyses prepared by the Attorney General's Committee."); *id.* at 6, *reprinted in* APA Legislative History at 192 (The bill finally enacted as the APA "follows generally the views of good administrative practice as expressed by the whole of [the Attorney General's] Committee."). Moreover, the Senate Judiciary Committee, in explaining its proposed bill, published a detailed comparison of its bill complete with references to parts of the Attorney General's Committee's Final Report. See Committee Print, *supra* note 58, *reprinted in* APA Legislative History at 11.

68. Attorney General's Comm. on Admin., Final Report of the Attorney General's Comm. on Administrative Procedure, S. Doc. No. 8, 77th Cong., 1st Sess. 142-43 (1941).

69. House Report, *supra* note 4, at 40, *reprinted in* APA Legislative History at 274; Senate Report, *supra* note 4, at 25, *reprinted in* APA Legislative History at 211; see 92 Cong. Rec. 2158 (1946), *reprinted in* APA Legislative History, *supra* note 4, at 322-23; Attorney General's Manual, *supra* note 2, at 88. As noted by Representative Walter, specific provisions governing agency licensing were needed to "remove the threat of disastrous, arbitrary, and irremediable administrative action." 92 Cong. Rec. 5654 (1946), *reprinted in* APA Legislative History, *supra* note 4, at 368.

70. *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1074 (7th Cir. 1982); see Attorney General's Manual, *supra* note 2, at 90-91. As the court stated in *Blackwell College of Business v. Attorney General*, 454 F.2d 928 (D.C. Cir. 1971), the licensee must be given the chance "to put [his] house in lawful order" before his license can be terminated. *Id.* at 934; *accord* *George Steinberg & Son v. Butz*, 491 F.2d 988, 993-94 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *Glover Livestock Comm'n Co. v. Hardin*, 454 F.2d 109, 114 (8th Cir. 1972), *rev'd on other grounds sub nom.* *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182 (1973); *H.P. Lambert Co. v. Secretary of the Treasury*, 354 F.2d 819, 821 n.2 (1st Cir. 1965); see *Shuck v. SEC*, 264 F.2d 358, 360-61 (D.C. Cir. 1958) (judicial proceedings before administrative action to revoke license afforded an opportunity to show or achieve compliance); *American Fruit Purveyor's, Inc.*, 30 Agric. Dec. 1542, 1577-81, 1581 (1971) (§ 558(c) requires an opportunity for a "second chance" and "cannot be reduced to a mere informal notice requirement.").

terminations by the second chance to "correct its transgressions" and thereby avoid termination altogether.<sup>71</sup>

Neither the APA nor its legislative history indicate that the procedures necessary to give the licensee an opportunity to demonstrate or achieve compliance must meet the specifications of sections 556 and 557.<sup>72</sup> Rather, the second chance is a procedural protection in addition to those that are otherwise required.<sup>73</sup>

### C. Procedural Requirements

Compliance proceedings conducted pursuant to the second sentence of section 558(c) must provide the licensee with a meaningful opportunity to appeal to the discretion of administrative officials.<sup>74</sup> The procedures required to ensure this meaningful opportunity depend upon the relative interests involved. For example, in *Gallagher & Ascher Co. v. Simon*,<sup>75</sup> the Court of Appeals for the Seventh Circuit held that the agency's practice of affording licensees an opportunity to object to warning letters or suspension notices on an informal basis constituted sufficient opportunity to show compliance.<sup>76</sup> In *Blackwell College of Business v. Attorney General*,<sup>77</sup> however, the Court of Appeals for the District of Columbia Circuit held that a similar procedure allowing the licensee an opportunity to respond to warning letters with documented evidence did not satisfy section 558(c).<sup>78</sup>

This apparent inconsistency can be attributed to the difference in the relative importance of the interests involved. The court in *Gallagher* suggested that a customs broker's interest in maintaining the right to receive goods without prepaying fees was not as significant as the government interest in preventing abuse of this licensing privilege.<sup>79</sup> In *Blackwell College*, however, the court noted that in com-

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71. *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1074 (7th Cir. 1982); see *Pan-Atlantic S.S. Corp. v. Atlantic Coast Line R.R.*, 353 U.S. 436, 442-43 (1957) (Burton, J., dissenting) (stating that § 9(b) advances purpose of APA by protecting licensee from summary license revocation).

72. See *supra* notes 22-71 and accompanying text.

73. *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1074 (7th Cir. 1982). See *supra* notes 70-71 and accompanying text. The determination whether a formal hearing is also necessary before revocation depends upon whether the decision is "required by statute to be determined on the record after opportunity for an agency hearing." *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1074 (7th Cir. 1982) (quoting 5 U.S.C. § 554(a) (1976 & Supp. V 1981)).

74. *Blackwell College of Business v. Attorney Gen.*, 454 F.2d 928, 936 (D.C. Cir. 1971).

75. 687 F.2d 1067 (7th Cir. 1982).

76. *Id.* at 1075-76.

77. 454 F.2d 928 (D.C. Cir. 1971).

78. *Id.* at 934-35.

79. 687 F.2d at 1078.

parison to the interest of the licensee in maintaining its approved status as an educational institution for foreign students, the interest of the government was not that substantial.<sup>80</sup> As these rulings illustrate, the procedures that are necessary to ensure that a licensee has a meaningful "opportunity to demonstrate or achieve compliance" require an analysis of the particular interests that the threatened termination affects.

## II. PROCEDURAL DUE PROCESS AND SECTION 558(c)

### A. *Protecting the Property Interest in a License*

Because a licensee has a property interest<sup>81</sup> in a license,<sup>82</sup> the procedures for taking away that license must comply with the due process

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80. 454 F.2d at 935 & n.11.

81. The Supreme Court has held that certain interests are constitutionally protected property rights meriting procedural safeguards of due process. *See, e.g.*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9-12 (1978) (municipal utility service); *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606-08 (1975) (use of bank account); *Fuentes v. Shevin*, 407 U.S. 67, 86-87 (1972) (possession of chattels purchased on installment plan); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (welfare benefits); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 340-42 (1969) (employee's wages). Since the early 1970's, however, lower courts have insisted that the property right be positively substantiated by state or other law. Thus, in *Russell v. Landrieu*, 621 F.2d 1037 (9th Cir. 1980), the Ninth Circuit stated that a protected property interest "results from a legitimate claim of entitlement created and defined by an independent source, such as state or federal law." *Id.* at 1040; *accord* *Golden State Transit Corp. v. City of Los Angeles*, 686 F.2d 758, 760 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 729 (1983); *Ledford v. Delancey*, 612 F.2d 883, 886 (4th Cir. 1980); *Roane v. Callisburg Indep. School Dist.*, 511 F.2d 633, 638 (5th Cir. 1975); *O'Neill v. Town of Nantucket*, 545 F. Supp. 449, 452 (D. Mass. 1982). The Supreme Court has applied similar reasoning to distinguish between mere expectation and entitlement to determine whether due process was applicable. *See, e.g.*, *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 784-85 (1980) (Medicaid provisions not entitling nursing home patients to stay in the home of their choice); *Bishop v. Wood*, 426 U.S. 341, 344-45 (1976) (holding that sufficiency of policeman's claim to hearing before termination depends upon state law). *Compare* *Perry v. Sindermann*, 408 U.S. 593, 602-03 (1972) (recognizing untenured faculty's cognizable interest in future employment when the school's practices created de facto tenure) *with* *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972) (holding that untenured faculty had no protected expectation of future employment). *See generally* L. Tribe, *American Constitutional Law* § 10-7, at 506, §§ 10-9 to 10-10 (1978).

82. *E.g.*, *Barry v. Barchi*, 443 U.S. 55, 64 & n.11 (1979) (state horse trainer's license issued by the Racing and Wagering Bd.); *Mackey v. Montrym*, 443 U.S. 1, 10 n.7 (1979) (state-issued driver's license); *Dixon v. Love*, 431 U.S. 105, 112 (1977) (same); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (license to drive an automobile); *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1077 (7th Cir. 1982) (special term permit issued by U.S. Customs officials); *Herz v. Degnan*, 648 F.2d 201, 208 (3d Cir. 1981) (license from state Board of Psychological Examiners); *Blackwell College of Business v. Attorney Gen.*, 454 F.2d 928, 932 (D.C. Cir. 1971) (school's approved status as an educational facility issued by INS); *Great Lakes Airlines v. CAB*, 294 F.2d 217, 225 (D.C. Cir.) (certificates for nonscheduled air carriers), *cert. denied*,

requirement<sup>83</sup> that an individual not be deprived of property without an opportunity to be heard.<sup>84</sup> Thus, even if the APA does not literally require that a licensee be given a formal hearing in which to demonstrate its compliance, or if the agency enabling legislation does not provide for a formal hearing before a license is revoked, due process may require one.<sup>85</sup>

To determine what procedures are necessary to satisfy the opportunity to be heard requirement of due process, the private interests affected by the threatened governmental action, the likelihood of erroneous deprivation or benefit from additional procedure and the governmental interest in efficient and effective protection of the public must be considered.<sup>86</sup> If it is concluded that due process requires a formal hearing for compliance proceedings, that requirement must be read into the "opportunity to demonstrate" language of section 558(c) to preserve its constitutionality.<sup>87</sup> For example, in *Wong Yang Sung v.*

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366 U.S. 965 (1961); *Page v. Jackson*, 398 F. Supp. 263, 268-69 (N.D. Ga. 1975) (state-issued liquor license).

83. *E.g.*, *Barry v. Barchi*, 443 U.S. 55, 64 (1979); *Mackey v. Montrym*, 443 U.S. 1, 10 (1979); *Dixon v. Love*, 431 U.S. 105, 112 (1977); *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1077 (7th Cir. 1982); *Herz v. Degnan*, 648 F.2d 201, 208 (3d Cir. 1981); *Blackwell College of Business v. Attorney Gen.*, 454 F.2d 928, 932 (D.C. Cir. 1971); *Page v. Jackson*, 398 F. Supp. 263, 268-69 (N.D. Ga. 1975).

84. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Another requirement of due process is notice. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Supreme Court stated that in order to be adequate, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314. The Court remarked that the right to be heard would have "little reality or worth unless one is informed" of matters to be decided. *Id.* As remarked by Justice Frankfurter in *Joint Anti-Fascist Refugee Committee*, "rarely has [Congress] authorized [administrative] agencies to act without those essential safeguards for fair judgment which in the course of centuries have come to be associated with due process." 341 U.S. at 168 (Frankfurter, J., concurring).

85. *See Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1077 (7th Cir. 1982); *Blackwell College of Business v. Attorney Gen.*, 454 F.2d 928, 934-35 (D.C. Cir. 1971).

86. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). For examples of judicial analysis of the process that is due when property rights were at risk, see *Barry v. Barchi*, 443 U.S. 55, 64-66 (1979); *Mackey v. Montrym*, 443 U.S. 1, 11-19 (1979); *Dixon v. Love*, 431 U.S. 105, 112-15 (1977); *Mathews v. Eldridge*, 424 U.S. 319, 340-49 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 262-66 (1970); *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1076-79 (7th Cir. 1982); *Goichman v. Rheuban Motors, Inc.*, 682 F.2d 1320, 1324-25 (9th Cir. 1982); *Justice v. Fabey*, 541 F. Supp. 1019, 1023-24 (E.D. Pa. 1982); *Jones v. Morris*, 541 F. Supp. 11, 15, 19-21 (S.D. Ohio 1981), *aff'd mem.*, 455 U.S. 1009 (1982); *Page v. Jackson*, 398 F. Supp. 263, 269 (N.D. Ga. 1975).

87. As the Supreme Court stated in *The Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U.S. 86 (1903), "[i]n the case of all acts of Congress, such interpretation



*McGrath*,<sup>88</sup> the Supreme Court read a formal hearing requirement into the section of the Immigration Act dealing with deportation, noting that due process requires formal procedures because deportation involves "issues basic to human liberty and happiness and . . . perhaps to life itself."<sup>89</sup> Consequently, the Court held that the APA provisions outlining the requirements of formal hearings must be observed in deportation proceedings.<sup>90</sup> Thus, whether due process requires that section 558(c) proceedings comply with the safeguards outlined in sections 556 and 557, despite the literal language of that section, is determined by balancing the relevant interests.<sup>91</sup> The weight accorded to these competing interests varies depending upon the factual circumstances of each case.

## B. *Balancing Interests in Compliance Proceedings*

### 1. Gravity of Private Interests

Federal administrative agencies have the authority to issue licenses to engage in various commercial and private activities.<sup>92</sup> The gravity of the private interest affected depends upon the type of license threatened with termination. For example, an occupational license authorizes a licensee to pursue a particular means of earning a living.<sup>93</sup> Termination of this license substantially affects the licensee, often depriving him of his chosen source of livelihood, as well as the value of the time and money invested in preparing for and pursuing that livelihood.<sup>94</sup> Congress and various federal agencies, recognizing the

ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution." *Id.* at 101; *accord* Anderson v. Edwards, 505 F. Supp. 1043, 1048 (S.D. Ala. 1981).

88. 339 U.S. 33 (1950).

89. *Id.* at 50.

90. *Id.* at 50-51.

91. *See* Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1077 (7th Cir. 1982); Blackwell College of Business v. Attorney Gen., 454 F.2d 928, 932-33 (D.C. Cir. 1971).

92. *See supra* note 15.

93. *See* Note, *Due Process Limitations on Occupational Licensing*, 59 Va. L. Rev. 1097, 1102-03 (1973) [hereinafter cited as *Due Process Limitations*]; *see, e.g.*, New Banner Inst., Inc. v. Dickerson, 649 F.2d 216, 217 (4th Cir. 1981) (gun salesman), *cert. granted*, 455 U.S. 1015 (1982); Glover Livestock Comm'n Co. v. Hardin, 454 F.2d 109, 111 (8th Cir. 1972) (livestock market agent), *rev'd on other grounds sub nom.* Butz v. Glover Livestock Comm'n Co., 411 U.S. 182 (1973); H. P. Lambert Co. v. Secretary of the Treasury, 354 F.2d 819, 820 (1st Cir. 1965) (customs broker); Dietze v. Siler, 414 F. Supp. 1105, 1106 (E.D. La. 1976) (river pilot); Schwebel v. Orrick, 153 F. Supp. 701, 705 (D.D.C. 1957) (right to practice before the SEC), *aff'd on other grounds per curiam*, 251 F.2d 919 (D.C. Cir.), *cert. denied*, 356 U.S. 927 (1958).

94. *See* Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267, 1297 (1975); *Due Process Limitations*, *supra* note 93, at 1102-03, 1105. Courts more

importance of this interest, often specifically provide by statute or regulation for a formal hearing before termination of an occupational license.<sup>95</sup>

Other licenses, however, such as special permits allowing the licensee to expedite his business<sup>96</sup> or to provide services to selected categories of persons,<sup>97</sup> confer a preferred status. Termination of these licenses does not prevent the licensee from pursuing his trade or business. For example, a customs broker can still function without the special permit that allows him to receive imported goods before he has paid duties on them.<sup>98</sup> Without such a permit, he either can pay the duties before he receives the goods or, if possible, use the permits of his customers.<sup>99</sup> In either case, he is not deprived of his livelihood. Recognizing that an interest in a preferred status is less substantial than an interest in one's livelihood, Congress and agencies have provided for termination of licenses conferring preferred status without specifically

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readily require notice and an opportunity to be heard when occupational licenses are at stake. 1 F. Cooper, *State Administrative Law* 147 (1965).

95. *E.g.*, Department of Agriculture Appropriation Act (as amended), 7 U.S.C. § 204 (1976) (provides for suspension of registered livestock market agents after notice and hearing); Perishable Agricultural Commodities Act, 7 U.S.C. § 499h (1976) (provides for license suspension for brokers or dealers in agricultural goods after hearing); Federal Gun Control Act (as amended), 18 U.S.C. § 923(e) (1976) (provides for a hearing before revocation of a license required for manufacturers and salesmen of firearms); 27 C.F.R. § 178.73 (1982) (regulations of the Bureau of Alcohol, Tobacco & Firearms provide for a hearing before license revocation); *id.* § 178.75(a) (hearing provided after revocation as long as licensee's request for a hearing is "timely"); Customs-House Brokers Act, 19 U.S.C. § 1641(b) (1976 & Supp. V 1981) (requires a hearing before suspension or revocation of a license for a customs broker). Pursuant to its enabling statute, the SEC promulgated Rule II(e), which provides that "[t]he Commission may disqualify, and deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to any person who is found by the Commission after hearing" to be unqualified. *Schwebel v. Orrick*, 153 F. Supp. 701, 703 n.9 (D.D.C. 1957) (quoting Rule II(e)), *aff'd on other grounds per curiam*, 251 F.2d 919 (D.C. Cir.), *cert. denied*, 356 U.S. 927 (1958).

96. Term special permits, issued by the Customs Service, allow brokers to expedite importation of goods by paying duties and filing necessary papers after the goods are released by agency officials. 19 C.F.R. §§ 142.21-.29 (1982); *see Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1069 (7th Cir. 1982).

97. Regulations of the Immigration & Naturalization Service (INS) specify that medical exams required for aliens seeking permanent residency status may be provided only by those facilities approved by the agency. *See* 8 C.F.R. § 245.6 (1982). In *New York Pathological & X-Ray Labs. v. INS*, 523 F.2d 79 (2d Cir. 1975), the court held that such agency approval is a lawfully required license. *Id.* at 82 & n.7. Other INS regulations provide for approval of educational facilities for nonimmigrant aliens. 8 C.F.R. § 214.3 (1982); *see Blackwell College of Business v. Attorney Gen.*, 454 F.2d 928, 932 (D.C. Cir. 1971) (such a status is "a valuable asset in the nature of a license.").

98. *See Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1070 (7th Cir. 1982).

99. *See id.* (discussing use of customer's permits).

requiring a formal hearing.<sup>100</sup> If merely a preferred status is at stake in a compliance proceeding, the balance may weigh in favor of efficiency and the public interest, and thus an informal proceeding will satisfy due process.<sup>101</sup>

## 2. Risk of Wrongful Deprivation

An agency must consider the “[f]acts pertaining to the parties and their businesses and activities”<sup>102</sup> to evaluate a licensee’s compliance with prescribed license qualifications.<sup>103</sup> A formal adversarial hearing is the best forum for adducing these facts.<sup>104</sup> If the risk of erroneous deprivation is minimal<sup>105</sup> or if the decision depends upon objective results of examinations,<sup>106</sup> however, the virtues of formal hearings<sup>107</sup> are often outweighed by their inefficiencies.<sup>108</sup> For example, when the seaworthiness of a vessel is in question, formal proceedings do not

100. *See, e.g.*, 8 C.F.R. § 214.4(b)-(c) (1982) (Although INS regulations afford a school threatened with termination of approved status an opportunity for a hearing, the director is authorized to revoke approved status if the licensee does not respond to agency warnings or request a hearing.); 19 C.F.R. § 142.25(a) (1982) (Customs regulations, without provision for a prior hearing, authorize district director to terminate special permit when licensee repeatedly fails to file papers and make duty payments in timely fashion.). Agency practice, however, must afford the licensee an informal opportunity to show or achieve compliance before termination is appropriate. *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1070 (7th Cir. 1982).

101. *See Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1078 (7th Cir. 1982).

102. 2 K. Davis, *supra* note 52, § 12:3, at 413. Davis distinguishes these “adjudicative” facts from “legislative” facts that aid the decision-maker in determining questions of policy and law but do not specifically concern the disputing parties. *Id.*

103. *See Hornsby v. Allen*, 326 F.2d 605, 608 (5th Cir. 1964). Congress recognized that license revocation is an adjudicatory function. *See* 5 U.S.C. § 551(6)-(7) (1976) (specifically includes licensing in definition of adjudication). Licensing covers any agency process regarding licenses including the “grant, renewal, denial, revocation, suspension, . . . modification, or conditioning of a license.” *Id.* § 551(9).

104. *See* 2 K. Davis, *supra* note 52, § 12:1; 1 K. Davis, *Administrative Law Treatise* § 7.02 (1st ed. 1958). *But see* Friendly, *supra* note 94, at 1268 (approach using adjudicative/legislative fact dichotomy is limited, and other factors should be considered).

105. For instance, when an agency’s decision depends upon verification of a straightforward factual occurrence, such as the timeliness of filing documents and paying fees, and is subject to several levels of administrative review, the risk of erroneous deprivation is at a minimum. *See Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1069, 1078 (7th Cir. 1982).

106. For instance, a student’s eligibility to continue studies at medical school depends upon satisfactory academic performance measured by objective tests and professorial review of clinical performance. *See Board of Curators v. Horowitz*, 435 U.S. 78, 80-81, 86 n.3 (1978).

107. *See supra* note 19 and accompanying text.

108. Final Report, *supra* note 14, at 36-38; *see* 2 K. Davis, *supra* note 52, § 12:12. The Attorney General’s Committee, which extensively studied operations of federal administrative agencies shortly before enactment of the APA, recognized that when

increase the likelihood of a correct resolution of the issue;<sup>109</sup> an inspector can test the vessel by prescribed standards.<sup>110</sup> The results of the test determine whether the vessel's owner has brought the ship into compliance with the qualifications for seaworthiness,<sup>111</sup> and thus whether further termination proceedings should be instituted. Similarly, the Supreme Court has recognized that the procedural safeguards of confrontation and cross-examination do not reduce the risk of erroneous deprivation when a decision must be based on medical records and affidavits submitted by experts.<sup>112</sup> Under these circumstances, the time and expense of formal procedures are not justified because they do not diminish the likelihood of erroneous deprivation.

Furthermore, the fact that the licensee has an opportunity to comply with license qualifications substantially diminishes the likelihood of any deprivation. The licensee not only has an opportunity to challenge the termination proceeding,<sup>113</sup> but he also has the opportunity to correct his wrongful conduct,<sup>114</sup> and thereby avoid the initiation of further termination proceedings.

### 3. Governmental Interests and Administrative Burdens

A federal agency has an interest in efficiently accomplishing the regulatory functions that Congress has assigned to it.<sup>115</sup> When the

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administrative decisions depend upon objective tests, formal procedure, although possible, provides "no added protection" and at times, through delay, endangers the public. Final Report, *supra* note 14, at 37. When Congress enacted the APA, it specifically exempted decisions of this nature from formal hearing requirements. 5 U.S.C. § 554(a)(3) (1976).

109. Final Report, *supra* note 14, at 36-37. As pointed out in the Final Report, greater protection is afforded by agency scrutiny of the skill and integrity of its examiners and the potential for administrative review of agency decisions. *Id.* at 37-38; see 46 U.S.C. § 390(c)(a) (1976 & Supp. IV 1980) (certificates of inspection stating that passenger and freight steamships are in compliance with pertinent safety rules and regulations of the Coast Guard).

110. 46 U.S.C. § 391(d) (1976).

111. *Id.* Congressional reports to the APA excluding such proceedings from formal hearing requirements pointed out that "those methods . . . do not lend themselves to the hearing process." House Report, *supra* note 4, at 27, reprinted in APA Legislative History at 261; Senate Report, *supra* note 4, at 16, reprinted in APA Legislative History at 202.

112. See *Richardson v. Perales*, 402 U.S. 389, 402 (1971).

113. See 5 U.S.C. § 558(c) (1976).

114. *Id.* See *supra* note 70 and accompanying text.

115. For example, the Customs Service has an interest in preventing abuses of the immediate release rights afforded by special term permits, and in the collection of revenue. *Gallagher & Ascher Co. v. Simon*, 687 F.2d 1067, 1078 (7th Cir. 1982). The INS has an interest in enforcing U.S. immigration laws, promoting better relations with foreign nations, and protecting the interests of bona fide nonimmigrant alien students. *Blackwell College of Business v. Attorney Gen.*, 454 F.2d 928, 935 & n.11 (D.C. Cir. 1971).

governmental interest protected by the license requirement is substantial in relation to the private interests affected, the need for efficient agency administration and to conserve limited agency resources justifies procedures that are less burdensome to the agency. For example, in *Gallagher & Ascher Co. v. Simon*,<sup>116</sup> the court held that the government's interest in prompt collection of revenue outweighed the licensee's interest in maintaining a preferred status.<sup>117</sup> Consequently, expenditure of "scarce fiscal and administrative resources" on procedures in addition to the informal hearing already provided was not justified.<sup>118</sup> In *Blackwell College of Business v. Attorney General*,<sup>119</sup> however, the court held that the government's interest in promoting better foreign relations and protecting the interests of bona fide foreign students did not outweigh the licensee's interest in retaining its preferred status license.<sup>120</sup> Because the government's interest could "just as easily be protected by better procedures," better procedures were required.<sup>121</sup>

Depending upon the interests involved, the opportunity to comply may require a full hearing despite the efficiencies of less formal proceedings.<sup>122</sup> If, however, extensive procedures will not reduce the likelihood of wrongful deprivation, informal proceedings may be sufficient.<sup>123</sup> Because due process is a flexible concept<sup>124</sup> and does not require a formal hearing for all compliance proceedings, reading such a requirement into section 558(c) is not necessary to preserve its constitutionality. The procedures that are necessary to ensure that the licensee has an adequate opportunity to be heard in a particular compliance proceeding depend upon the nature of the license and the burden of providing more formal procedures.<sup>125</sup> Formulation of these procedures is best left to the agency that governs the licensed activity.<sup>126</sup> The availability of judicial review is a check upon this agency

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116. 687 F.2d 1067 (7th Cir. 1982).

117. *Id.* at 1078.

118. *Id.*

119. 454 F.2d 928 (D.C. Cir. 1971).

120. *Id.* at 935 & n.11.

121. *Id.* at 935 n.11.

122. See *Due Process Limitations*, *supra* note 93, at 1126-28.

123. See *supra* notes 105-09 and accompanying text.

124. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

125. See *supra* notes 86, 91 and accompanying text.

126. See Attorney General's Manual, *supra* note 2, at 48 ("[The] precise manner in which [informal] opportunities are to be afforded has been deliberately left by Congress to development by the agencies themselves."). This approach was approved years ago by the Supreme Court in *United States v. Grimaud*, 220 U.S. 506 (1911), in which the Court remarked that once "Congress had legislated," as it has in delegating licensing authority to regulatory agencies, "it could give to those who were to act . . . 'power to fill up the details' by the establishment of administrative

authority,<sup>127</sup> ensuring that the procedures provided do in fact satisfy due process.

### CONCLUSION

Section 558(c) of the APA provides federal licensees with a "second chance" to comply with license qualifications before revocation or suspension proceedings are instituted. The section does not address the issue whether a formal adversarial hearing is required if further termination proceedings are necessary. That issue can be resolved by reference to the statute granting regulatory authority to the agency involved, other applicable sections of the APA and the requirements of due process. Because section 558(c) does not describe the procedures that are necessary to ensure that the licensee is properly afforded a second chance, the agency must devise procedures that, consistent with the goals of the APA and due process, provide the licensee with a meaningful opportunity to show its compliance. When properly afforded, this opportunity to rectify the conduct that led to the initiation of agency proceedings, and thereby avoid termination altogether, protects the licensee's interests in a manner that the procedural safeguards outlined in sections 556 and 557, which at best ensure a fair hearing, cannot.

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rules . . . ." *Id.* at 517 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)). When revocation procedures have been specifically provided by statute, the result is often inflexible and inefficient. *See, e.g.*, N.Y. Educ. Law § 6510 (McKinney Supp. 1982-1983); R.I. Gen. Laws tit. 16 (1981 & Supp. 1982). *See generally* Lanzarone, *Professional Discipline: Unfairness and Inefficiency in the Administrative Process*, 51 *Fordham L. Rev.* 818 (1983).

127. The APA provides broadly for judicial review of agency actions stating that "[a] person suffering legal wrong . . . or adversely affected or aggrieved by agency action . . . is entitled to judicial review." 5 U.S.C. § 702 (1976). Two exceptions are also provided when: "1) statutes preclude judicial review; or 2) agency action is committed to agency discretion by law." *Id.* § 701(a)(2). The Supreme Court has narrowly construed these exceptions. Judicial review of the constitutionality of the Veterans' Benefits Act was not barred despite statutory language that the Veterans' agency "decisions . . . on any question of law or fact under any law administered" by the agency be "final and conclusive." *Johnson v. Robison*, 415 U.S. 361, 367 (1974) (emphasis deleted).