Section 558(c) of the Administrative Procedure Act: Provision for Informal Agency Hearings Prior to License Revocation or Suspension

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Section 558(c) of the federal Administrative Procedure Act (APA)\(^1\) prescribes procedures federal agencies must follow in all phases of the licensing process, including license application, license revocation or suspension, and continuation of a license pending a renewal decision. It provides that, prior to suspension or revocation\(^2\) of a federal license,\(^3\) an agency must give a licensee written notice and an “opportunity to demonstrate or achieve compliance with all lawful requirements.”\(^4\)

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2. The exact wording of the Act is “withdrawal, suspension, revocation, or annulment.” 5 U.S.C. § 558(c) (1982). For the purposes of this Note, these actions will be referred to as “revocation and suspension.”
3. The APA broadly defines the term “license” to include agency permits, certificates, approvals, registrations, charters, memberships, statutory exemptions, and other forms of permission. 5 U.S.C. § 551(8) (1982). A wide range of “licenses” are subject to the procedural requirements of § 558(c). See, e.g., Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1072 n.5 (7th Cir. 1982) (customs broker’s special entry permit); Porter County Chapter of the Izaak Walton League of America, Inc. v. Nuclear Regulatory Comm’n, 606 F.2d 1363, 1368 & n.12 (D.C. Cir. 1979) (nuclear power plant construction permit); New York Pathological & X-Ray Laboratories, Inc. v. INS, 523 F.2d 79 (2d Cir. 1975) (approval of laboratory for medical testing of aliens seeking residency); Blackwell College of Business v. Attorney General, 454 F.2d 928, 933-34 (D.C. Cir. 1971) (approval of school for attendance by nonimmigrant alien students).
4. Section 558(c) states in full:
   (c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest or safety requires otherwise, the withdrawal, suspension, 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.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.
It is unclear whether this provision requires an agency to conduct a hearing prior to suspension or revocation. Three circuits have suggested that section 558(c) requires an agency to conduct hearings before revoking or suspending a license. In contrast, the Seventh Circuit recently held that hearings are not necessary. Uncertainty also exists regarding the type of hearing, if any, imposed by section 558(c). Only two courts imposing a hearing requirement reached the issue of what procedural formality is required. Both concluded that formal hearings, consistent with the requirements of sections 556 and 557 of the APA, are always necessary.

This Note argues that section 558(c) should be interpreted to require an agency to provide a hearing prior to license suspension or revocation. Part I argues that all courts that have adjudicated whether


6. Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1074-76 (7th Cir. 1982); see also Note, Section 558(c) of the Administrative Procedure Act: Is a Formal Hearing to Demonstrate Compliance Required Before License Revocation or Suspension?, 51 FORDHAM L. REV. 1436, 1440-48 (1983) (concluding that § 558(c) cannot be interpreted to require a hearing).

7. The term "hearing" is flexible. At one extreme, it includes an oral process, a trial-type adjudication with cross-examination and the chance to present rebuttal witnesses. At the other extreme, the opportunity to be "heard" may merely require the consideration of written comments submitted in an informal adjudicatory process. Cf. United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 756-57 (1972) (holding that the due process right to be heard in a rulemaking proceeding did not require a trial-type adjudication). As used in this Note, "hearing" is intended to describe a procedure providing, at a minimum, an opportunity for the licensee to obtain access to the evidence supporting the revocation or suspension decision and to present its own rebuttal evidence. In Part II, further consideration is given to the elements of a hearing necessary to satisfy the requirements of § 558. See infra notes 94-101 and accompanying text.


9. As developed in Part II, this Note contends that, depending on the circumstances of a particular case, § 558(c) may require anything from the submission of written responses to the agency's evidence to a full blown trial-type hearing. The only type of hearing not available under § 558(c) is a formal hearing meeting all the requirements of §§ 556-557 of the APA. See infra notes 27-32 and accompanying text.

10. The Supreme Court's holding in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, 435 U.S. 519 (1978), does not preclude this interpretation of § 558(c). In that case, the Supreme Court held that the lower courts may not, in the rulemaking context, require the agencies to adopt procedures more stringent than those required by the APA. The Court specifically stated that there was "little doubt that Congress intended that the discretion of the agencies and not that of the courts was to be exercised in determining when extra procedural devices should be employed." Id. at 546. There are two reasons why this restrictive language does not apply in the context of license revocation. First, the Court's admonishment in Vermont Yankee was directed toward judicial activism in the area of informal rule-making; the Court was not faced with an issue involving informal adjudication, the type of agency procedure at issue in the interpretation of § 558(c). Rulemaking and adjudication are distinct types of decision making under the APA. Compare 5 U.S.C. §§ 551(5), 553 (1982) (rulemaking) with 5 U.S.C. §§ 551(7), 554 (1982) (adjudication). The APA provides for both formal and informal rulemaking, compare 5 U.S.C. §§ 553(a), 556, 557 (1982)
section 558(c) requires a hearing have misconstrued the statute by failing to consider the general policies served by the APA. Part II examines section 558(c) in light of the major policies of the APA, uniformity and fairness in administrative procedure. It argues that these policies are best served by an interpretation that requires a hearing prior to suspension or revocation of any federal license. It does, however, recognize exceptions consistent with those policies. Finally, Part II argues that the policies of fairness and uniformity suggest that the procedural formalities necessary to comply with the hearing requirement vary with the circumstances of each case.

I. THE DISPUTED HEARING REQUIREMENT OF SECTION 558(c)

A. Judicial Interpretations

Section 558(c) establishes the minimal procedures that must be followed before an agency may suspend or revoke a federal license. 11 (formal) with 5 U.S.C. § 553(c), (b), (d), (e) (1982) (informal), but it establishes procedures for only formal adjudication, 5 U.S.C. §§ 554, 556, 557 (1982). Although the APA includes protections that apply generally (§§ 552, 555, 702), no provision of the APA besides § 558 specifies procedures to be followed in the case of informal adjudication. Rolfe, The Requirement of Formal Adjudication Under the APA: When is Section 554(a) Triggered so as to Require Application of Sections 554, 556 and 557?, 11 ENVTL. L. REV. 97, 98 (1980). Without explicit provisions for informal adjudication, it can be argued that the courts remain free to establish federal common law procedures in the area of informal adjudication under § 558(c). Cf. Milwaukee v. Illinois, 451 U.S. 304, 314 (1980) (federal courts may develop common law when compelled to consider federal questions that federal statutes cannot answer); Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 SUP. CT. REV. 345, 385, 391-92, 395; Westen & Lehman, Is There Life For Erie After the Death of Diversity?, 78 MICH. L. REV. 311, 331-41 (1980). An alternative explanation for the failure of Congress to provide for informal adjudication within the APA is that it intended informal adjudications to be governed solely by the provisions of the organic statutes. But see Scalia, supra, at 391, 394 (rejecting this argument).

Second, even if this common law prerogative does not exist with respect to all types of informal adjudication, it should at least exist in the license revocation context. Here, Congress not only gave very little procedural guidance but, at the same time, indicated the need to prevent the agencies from acting arbitrarily. See infra note 45 and accompanying text.

It has also been suggested that the result of Vermont Yankee was, to a large degree, a function of the clear mandate of Congress, in the Atomic Energy Act, to develop nuclear power. Without such a strong mandate, a court may find it necessary to impose additional procedural protections. Casenote, Administrative Law — Reviewing Courts Restricted from Imposing Procedures for Informal Rulemaking Beyond Those Specified in Section 553 of the Administrative Procedure Act or Other Relevant Statutes — Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), 28 CATH. U.L. REV. 411, 424 (1979); see also S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 77-78 (Supp. 1982).

11. The Senate Committee Report on the Act asserted that, "[b]y enacting this bill, the Congress — expressing the will of the people — will be laying down for the guidance of all branches of the Government and all private interests in the country a policy respecting the minimum requirements of fair administrative procedure." S. REP. No. 752, 79th Cong., 1st Sess. 31 (1945) [hereinafter cited as S. REP.], reprinted in SENATE COMM. ON THE JUDICIARY, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY, S. DOC. No. 248, 79th Cong., 2d Sess. 217 (1946) [hereinafter cited as LEGIS. HISTORY].
The agency must provide written notice of the facts or conduct warranting the action, and it must provide an opportunity for the licensee to "demonstrate or achieve compliance with all lawful requirements." The APA does not specify what procedures are necessary to comply with the latter provision.

The issue arises in cases of agency suspension or revocation where the agency is not required by law, other than the APA, to hold a pretermination hearing. Such external hearing requirements do exist in a great number of cases. If a property interest is involved, the due process


13. Although the requirement is expressed in the disjunctive, "demonstrate" or "achieve," the courts do not often make clear which part of the disjunctive they are applying. See, e.g., Shuck v. SEC, 264 F.2d 358, 360 (D.C. Cir. 1958) (conversations between parties and agency officials prior to agency action sufficient to establish "notice and opportunity to comply"). When they have made the distinction, the majority of courts have focused on the word "achieve." They have required that a licensee be given a "second chance" to achieve compliance, an opportunity to "put its house in lawful order before more formal agency proceedings are undertaken." George Steinberg & Son, Inc. v. Butz, 491 F.2d 988, 993 (2d Cir.), cert. denied, 419 U.S. 830 (1974); Twigger v. Schultz, 484 F.2d 856, 858 (3d Cir. 1973); Blackwell College of Business v. Attorney General, 454 F.2d 928, 934 (D.C. Cir. 1971); see also Butz v. Glover Livestock Comm'n Co., 411 U.S. 182, 185 (1973); American Fruit Purveyors, Inc. v. United States, 630 F.2d 370, 374 (5th Cir. 1980); 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).

Even when courts appear to have considered the impact of the word "demonstrate," their choice of language reveals their uncertainty. Although only one court has rested its holding on the flat assertion that § 558(c) requires a full adjudicatory hearing, New York Pathological & X-Ray Laboratories, Inc. v. INS, 523 F.2d 79, 82 (2d Cir. 1975), several courts have indicated their confusion by loosely referring to the provision as one requiring an opportunity to be heard, Bankers Life & Casualty Co. v. Callaway, 530 F.2d 625, 634 (5th Cir. 1976) ("notice and hearing procedure"), cert. denied, 429 U.S. 1073 (1977); Gallagher & Ascher Co. v. Simon, No. 76-C-3499 (N.D. Ill. June 29, 1981) (available Nov. 12, 1983, on LEXIS, Genfed library, Dist. file) ("notice and hearing requirements"), aff'd, 687 F.2d 1067 (7th Cir. 1982).

Arguably, the phrase "opportunity to demonstrate or achieve compliance" could be read as a whole to mean nothing more than a second chance to measure up to whatever criteria an agency uses to monitor compliance. Use of the disjunctive, however, normally indicates alternatives and requires that each word be treated separately. George Hyman Constr. Co. v. Occupational Safety & Health Review Comm'n, 582 F.2d 834, 840 n.10 (4th Cir. 1978); Azure v. Morton, 514 F.2d 897, 900 (9th Cir. 1975). 2A J. SUTHERLAND, STATUTES & STATUTORY CONSTRUCTION § 46.06, at 63 (C. Sands 4th ed. 1973).

Two different circumstances can be envisioned where a licensee would assert the right to an opportunity to "demonstrate" compliance. In the first, the licensee admits to initial noncompliance but desires to demonstrate that it has used its "second chance" to come back into compliance. In the second, the licensee asserts that it was never out of compliance; thus, it does not intend to achieve, but merely to "demonstrate," compliance. Although the legislative history speaks extensively to the former situation, it does not address the latter. See, e.g., STAFF OF SENATE COMM. ON THE JUDICIARY, 79TH CONG., 1ST SESS., SENATE JUDICIARY COMMITTEE PRINT, JUNE 1945 (Comm. Print 1945), reprinted in LEGIS. HISTORY, supra note 11, at 35 ("The second sentence is designed to preclude the withdrawal of licenses, except in cases of willfulness or the stated cases of urgency, without affording the licensee an opportunity for the correction of the conduct questioned by the agency."). This void in the legislative history allows the courts even greater leeway to interpret "demonstrate" broadly in circumstances where a licensee challenges the agency's initial determination of noncompliance.
clause of the Constitution may require a hearing. Many statutes governing federal licenses incorporate provisions for hearings prior to revocation or suspension. Even when the governing statute does not require one, a number of agency regulations provide an opportunity for a hearing. Absent an external hearing requirement, however, the minimal requirements of section 558(c) govern.

In such cases, courts must consider two different questions. First, does section 558(c) require a hearing prior to revocation or suspension? Second, if a hearing is required, what type of hearing does the agency "have to provide?"

On the first question, the courts have reached conflicting results. Three federal circuit courts have concluded that section 558(c) always requires a hearing. The Seventh Circuit recently disagreed and held

14. See infra notes 49, 50 & 55 and accompanying text.

When the governing statute provides for a hearing "on the record," minimal standards for the hearing are established by §§ 556-557 of the APA. See, e.g., Ligon Specialized Hauler, Inc. v. ICC, 587 F.2d 304, 315 (6th Cir. 1978); Twigger v. Schultz, 484 F.2d 856 (3d Cir. 1973); Jaffee & Co. v. SEC, 446 F.2d 387, 393 (2d Cir. 1971).

Formal adjudication in these cases is triggered by § 554(a), not by § 558(c). In the adjudicatory context, the formal standards of §§ 556-557 are triggered by § 554(a) "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing..." Thus, if a governing statute does not require that a hearing be conducted, §§ 556-557 do not come into play. Cf. Wong Yang Sung v. McGrath, 339 U.S. 33, 48-51 (1950) (broadening the triggering function of § 554(a) by interpreting "required by statute" to mean required by statute or by the due process clause of the Constitution). See generally Rolfe, supra note 10, at 97-131; Note, The Requirement of Formal Adjudication Under Section 5 of the Administrative Procedure Act, 12 HARV. J. ON LEGIS. 194, 205-43 (1975).

If the statute requires a "hearing," but does not use the "on the record" language, courts often look to congressional intent to determine whether §§ 556-557 nevertheless apply. See, e.g., United States Lines v. Federal Maritime Comm'n, 584 F.2d 519, 536 (D.C. Cir. 1978); Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir.), cert. denied, 439 U.S. 824 (1978); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1263 (9th Cir. 1977).

16. See, e.g., 9 C.F.R. § 78.25(c) (1983) (hearing prior to withdrawal of approval of stockyard under animal quarantine laws); 9 C.F.R. § 162 (1976) ("informal conference" required prior to revocation or suspension of veterinary accreditation).

Under the interpretation proposed by this Note, these regulations would be subject to judicial review on the question whether the procedural formalities provided by the regulations were sufficient to satisfy the purpose of § 558(c). See infra notes 94-101 and accompanying text.

17. Porter County Chapter of the Izaak Walton League of America, Inc. v. Nuclear Regulatory Comm'n, 606 F.2d 1363, 1368 & n.12 (D.C. Cir. 1979); Bankers Life & Casualty Co. v. Callaway, 530 F.2d 625, 635 (5th Cir. 1976), cert. denied, 429 U.S. 1073 (1977); New York Pathological & X-Ray Laboratories, Inc. v. INS, 523 F.2d 79, 82 (2d Cir. 1975).

The District of Columbia Circuit concluded in Porter County that § 558(c) required a hearing
that section 558(c) never requires a hearing.18

Of the courts finding a hearing requirement, only two reached the second question. Both of these courts determined that section 558(c) requires a formal hearing consistent with sections 556 and 557 of the APA.19 Those sections provide for an impartial presiding officer, a hearing of record with an opportunity to present a defense and conduct cross-examination, and a standard of judicial review requiring that the decision be supported by substantial evidence of record.20

B. Inadequacies of the Judicial Interpretations

The courts that have adjudicated whether section 558(c) requires a hearing have ignored the complexities of that section. Courts holding that 558(c) always requires a hearing have ignored certain language in the statute. In contrast, courts holding that 558(c) never requires a hearing have given insufficient weight to the general purposes of the APA.

I. Courts holding a hearing is always required—Two different rationales appear to have governed the decisions concluding that section 558(c) always requires a hearing. Two courts noted that the language of the first sentence of section 558(c) provides, in the license application setting, for proceedings consistent with sections 556 and 557 of the APA.21 These courts apparently concluded that the formal hearing requirements of those sections applied in the revocation context as well.

meeting the standards of §§ 556-557 prior to revocation or suspension of a permit to construct a nuclear power plant. 606 F.2d at 1368 & n.12. Section 186(b) of the Atomic Energy Act provides that § 558(c) of the APA applies to any revocation proceeding under the Act. 42 U.S.C. § 2236(b) (1976).

The plaintiff in Bankers asserted a right to a hearing before revocation of its dredge-and-fill permit granted under the Rivers and Harbors Act. The Fifth Circuit concluded that the permit had become null and void of its own terms and was, therefore, not revoked and not subject to § 558(c). 530 F.2d at 634-35.

In New York Pathological, the Second Circuit held that § 558(c) required the INS to conduct hearings prior to the revocation of a laboratory's certification to perform the medical examinations necessary for aliens entering the United States. 523 F.2d at 82. The precedential value of New York Pathological is limited by its procedural context. Because the licensee sought a preliminary injunction, the court only had to find a likelihood of success on the merits. See also id. at 84 (Moore, J., dissenting) (arguing that the case should have been treated as a license application, rather than a license revocation).

18. In Gallagher & Ascher Co. v. Simon, 687 F.2d 1067 (7th Cir. 1982), the Customs Service had suspended the plaintiff's special entry customs permit. The Seventh Circuit held that § 558(c) provided no independent basis for requiring a hearing prior to that suspension. 687 F.2d at 1073-76.


Another court reasoned that the language in section 558(c) requiring “notice . . . and opportunity to demonstrate or achieve compliance” also mandated a hearing. 22 Both rationales appear incorrect.

A close analysis of the structure of section 558(c) dispels the first theory. Each sentence of that section refers to a distinct phase of the licensing process. The first sentence refers to license application, the second to revocation or suspension, and the third to continuation of a license during the pendency of an agency’s renewal decision. 23 Each must be read independently of the others. 24 Thus, the reference in the first sentence to the formal hearing requirements of sections 556 and 557 is not relevant in the revocation or suspension context. 25

The second rationale is contradicted by the express language and the legislative history. It must be assumed that Congress’s choice of the phrase “opportunity to demonstrate . . . compliance” was purposeful. If it intended to require a hearing in all cases, it could simply have used the phrase “opportunity for a hearing.” Moreover, the reports of the House and Senate Judiciary Committees clearly indicate that

23. See supra note 4.
25. Moreover, the legislative history supports the view that, even in the license application context, no independent right to a hearing was created. The House Judiciary Committee clearly specified that the first sentence “does not provide for a hearing where other statutes do not do so.” H.R. Rep. No. 1980, 79th Cong., 2d Sess. 41 (1946) [hereinafter cited as H.R. Rep.], reprinted in Legislative History, supra note 11, at 275.

After some initial confusion, the courts have firmly rejected the argument that, in the license application setting, a hearing is independently required by § 558(c). In City of West Chicago v. United States Nuclear Regulatory Comm’n, 701 F.2d 632, 644 (7th Cir. 1983), the Seventh Circuit overruled its previous holding, in United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977), that the APA required a formal hearing in this context. The fact that the early precedent was still in force explains some of the contorted logic of the Gallagher & Ascher opinion, where the court admits that “[o]ur interpretation of section 558(c) in U.S. Steel may bear reexamination . . . .” Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1075 (7th Cir. 1982). See Rolfe, supra note 10, at 120-21 (“[T]he Seventh Circuit committed a cardinal sin of statutory construction.”); see also 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’rs, U.S. Army Corps. of Eng’rs, 567 F.2d 1332, 1337 (5th Cir. 1978); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1260-61 n.25 (9th Cir. 1977); Lincoln Transit Co. v. United States, 256 F. Supp. 990, 994 (S.D.N.Y. 1966) (three-judge panel); 2 K. Davis, Administrative Law Treatise § 12.10, at 447, 450 (2d ed. 1979). If the first sentence of § 558(c) does not require a full adjudicatory proceeding for license applications, that same language cannot be found to support by implication such a requirement in the revocation setting.
Congress did not anticipate that hearings would be held in every case of revocation or suspension. 26

2. *Courts holding a hearing is never required*—The Seventh Circuit based its holding that section 558(c) never requires a hearing on the legislative history of that section. 27 It quoted the House Judiciary Committee's statement that section 558(c) "does not provide for a hearing where other statutes do not do so," 28 and concluded that Congress did not intend for section 558(c) to provide an independent basis for a hearing. 29

The language of the committee report, however, is more ambiguous than the Seventh Circuit recognized. The committee reference to a "hearing" might be taken to refer only to the formal adjudicatory proceedings required by sections 556 and 557, rather than to more informal agency hearings. The historical context of the passage of the APA supports this narrow reading of the committee's reference to a "hearing." In 1946, when a case was contested before an agency, the standard procedure was to conduct a full adjudicatory hearing. 30 By pointing out that section 558 did not provide for a hearing, the committee may have been clarifying its intent that this section not impose a formal hearing requirement. 31 Thus, the reference to "hearings" in the report does not foreclose the possibility that informal hearings might, under some circumstances, be required to demonstrate compliance. 32

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27. Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1072-76 (7th Cir. 1982).
29. Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1074 (7th Cir. 1982).
30. The 1947 Attorney General's Manual noted that, even if a controlling statute did not specify that a hearing was to be conducted "on the record," it was generally assumed that a full evidentiary hearing meeting the requirements of §§ 556-557 was contemplated in the critical license revocation context. A.G. MANUAL, supra note 24, at 42; see also Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 878 n.11 (1st Cir.) (noting that Congress probably "assumed that most licensing would be governed by §§ 556 and 557"), cert. denied, 439 U.S. 824 (1978); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.2, at 5 (Supp. 1982); Scalia, supra note 10, at 381.
31. All references in the Act itself to "hearings" are to the formal hearings of §§ 556 and 557. See, e.g., 5 U.S.C. §§ 553(c), 554(a)-(b), 556 (1982).
32. Even if Congress did not intend for the procedures available under § 558(c) to include any sort of hearing, such an intent has been rendered meaningless by the drastic changes in administrative law that have occurred over the past 40 years. During that time, both agency practice and court-made law have developed in ways that severely limit the ability of a reviewing court to take evidence beyond the existing administrative record, no matter how meager that record.

In 1946, the understanding of Congress was that "the established law permits a trial de novo of the facts in all cases of adjudications where statutes do not require an administrative hearing." STAFF OF THE SENATE COMM. ON THE JUDICIARY, 79TH CONG., 1ST SESS., SENATE JUDICIARY COMMITTEE PRINT, JUNE 1945 (Comm. Print 1945), reprinted in LEGIS. HISTORY, supra note 11, at 22; see also S. Rep., supra note 11, at 6, reprinted in LEGIS. HISTORY, supra note 11, at 192; Lichter v. United States, 334 U.S. 742, 791-92 (1948); Nickey v. Mississippi, 292 U.S. 393, 396 (1934); Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 708, 711-12 (1884).

That is no longer the case. Now, when a licensee is not granted a hearing at the agency level,
Further, the Seventh Circuit failed to consider that its decision never to require a hearing undercut the purpose of section 558(c). That section exists to limit the discretion of government agencies in their licensing decisions. Congress intended to impose procedural requirements that would prevent an agency from summarily revoking or suspending a license without an adequate basis. If the section is to serve as a limitation, some procedure, such as a hearing, that requires an agency to consider a licensee's evidence prior to revocation or suspension may be required. The result is that there is no opportunity to cross-examine or provide evidence of factual issues that may be outcome determinative. See, e.g., Camp v. Pitts, 411 U.S. 138, 142 (1973) (holding that the authority of courts to conduct de novo evidentiary hearings is strictly limited); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 413-16 (1971) (courts engage in de novo review only in limited circumstances); Scalia, supra note 10, at 377 (noting that agencies have responded to the rigorous requirements of APA §§ 556-557 by switching from formal adjudicatory proceedings to informal rulemaking and informal adjudication); Pedersen, Formal Records and Informal Rulemaking, 85 Yale L.J. 38, 42 (1975) (noting that "...during the past decade, the courts have used the latitude left them ... to pare down any right to an adjudicatory hearing in complicated regulatory programs"). See generally Nathanson, Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review under the Administrative Procedure Act and Other Federal Statutes, 75 Colum. L. Rev. 721 (1975).

If the legislators had been aware of the extreme deference now given by courts to agency decisions or the limitations on the ability of a court to conduct a de novo review, they may have thought twice before foregoing a hearing requirement. One commentator has concluded that, in light of the drastically new setting, courts have a "positive obligation to 'reinterpret'" portions of the APA in order to prevent the courts' own actions from subverting the Act's basic intent. Scalia, supra note 10, at 382, 395.

33. Section 558(a) states that the section applies to "the exercise of a power or authority." Both § 558(b) and (c) serve to limit that power. 5 U.S.C. § 558 (1982).

One limitation imposed is that an agency may not revoke a license before giving sufficient notice and an opportunity to comply. 5 U.S.C. § 558(c); see George Steinberg & Son, Inc. v. Butz, 491 F.2d 988, 993-94 (2d Cir.), cert. denied, 419 U.S. 830 (1974). Another limitation imposed by the same section is the provision that, if a licensee has made a timely application for a renewal or a new license, a license governing an activity of a continuing nature does not expire until the application has been finally determined by the agency. 5 U.S.C. § 558(c) (1982).

34. See S. Rep., supra note 11, at 26, reprinted in Legis. History, supra note 11, at 212 (the exceptions of § 558(c) do not "confer upon agencies an arbitrary discretion to ignore the requirement of notice and an opportunity to demonstrate compliance").

The legislative history confirms the inference, drawn from the express language, that § 558 was intended to serve as a limitation on agency power. The report of the House Judiciary Committee states that the Act provides "some general limitations upon administrative powers and sanctions, particularly in the rigorous field of licensing." H.R. Rep., supra note 25, at 12, reprinted in Legis. History, supra note 11, at 246; see also 92 Cong. Rec. 5654 (1946), reprinted in Legis. History, supra note 11, at 368 (comments of Rep. Walter, chairman of the subcommittee that reported out the House version of the bill). See generally J. SUTHERLAND, supra note 13, § 48.13, at 216 (explanatory statements by a member of the standing committee in charge of presentation of a bill entitled to weight).

Although most of the Act reflected the recommendations of the Attorney General's Committee on Administrative Procedure, § 558(c)’s treatment of licensing was one area where the advisory committee's report had not been stringent enough. Thus, after congressional hearings, the limitations in § 558 were added. H.R. Rep., supra note 25, at 12, reprinted in Legis. History, supra note 11, at 246; see also S. Rep., supra note 11, at 7, reprinted in Legis. History, supra note 11, at 192-93; S. Rep., supra note 11, at 7, reprinted in Legis. History, supra note 11, at 194 (describing § 558 as a section providing for "limitations upon sanctions and powers").
be implicitly required. The court did not consider whether its decision left intact such a check on the agency.

Only an examination of the policies of the APA as a whole can resolve the issue of whether section 558(c) requires a hearing prior to license revocation or suspension. The express language, when properly construed, does not address the issue in the revocation and suspension context. The legislative history is ambiguous. Thus, consideration must be given to the overall goals served by the APA. The courts failed to do this.

II. The Proposed Interpretation of Section 558(c)

The major policies of the APA, fairness and uniformity, are decisive in the interpretation of section 558(c). As a general rule, these goals are best served if that section is read to require a hearing. The policies of fairness and uniformity also relate to the nature of the hearing required. Contrary to the courts requiring formal hearings in all cases, this Note concludes that the type of hearing prescribed by section 558(c) varies with the circumstances of a given case.

A. The Hearing Requirement

1. Justification for the hearing requirement—The major goals of the APA are uniformity and fairness in administrative procedure. The APA was enacted in 1946, in part, because of the concern that administrative agencies were developing into an unchecked fourth branch of government. Congress recognized that the agencies had great power to make decisions affecting individuals. Thus, the establishment of

35. When an agency revocation decision is appealed to the courts, the standard of review is that described in 5 U.S.C. § 706(2)(A): the court may hold the action unlawful only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." As a practical matter, it is rare for a court to overturn an agency action based on this standard of review. See, e.g., Butz v. Glover Livestock Comm'n Co., 411 U.S. 182 (1973) (reversing a court of appeals decision holding that a 20-day suspension was invalid because it was more severe than sanctions given to others for similar violations of the Packers and Stockyards Act).

36. According to Senator McCarran, the APA "is a coherent whole; no section or paragraph of the bill is completely independent; all parts of it are closely interrelated. The bill must be read and considered as a whole, and in this case the whole is considerably more than the sum of its parts." 92 Cong. Rec. 2150 (1946), reprinted in LEGIS. HISTORY, supra note 11, at 302; see also J. SUTHERLAND, supra note 13, § 46.05, at 48.

37. See infra notes 40-42.


39. The concern for fairness in the licensing context was expressed by Representative Walter, chairman of the House subcommittee designated to review the bill:

[Section 558 is] necessary because of the very severe consequences of the conferring of licensing authority upon administrative agencies. The burden is upon private parties to apply for licenses or renewals. If agencies are dilatory in either kind of application, parties are subjected to irreparable injuries unless safeguards are provided. The pur-
minimal standards of fair procedure was of primary concern to the drafters of the APA. The drafters also intended to promote uniformity. They sought to facilitate predictability, both at the agency level and upon judicial review, by creating uniform rules of practice and procedure. Thus, whether section 558(c) requires a hearing must be resolved by considering whether a hearing requirement would advance or detract from the policies of uniformity and fairness.

a. The policy of uniformity— Concerns about uniformity may focus on uniformity within an agency or uniformity between agencies. The focus of the drafters of the APA appears to have been on interagency uniformity. Their goal of providing a predictable, judicially reviewable
set of rules, however, applies to differences among distinct agencies and to those within different branches or offices of the same agency.

Interagency uniformity is unaffected by the presence or absence of a hearing requirement. If section 558(c) did not so require, the agency would conduct a hearing only when mandated by statute or regulation or when the agency chose to grant one.\(^{43}\) Thus, the discretion to require a hearing would rest with Congress or the agencies. If the alternative proposed by this Note were adopted, a hearing would be required unless the case fell within a judicially defined exception. Thus, the discretionary power to require a hearing would be shifted from Congress and the agencies to the courts. The difference concerns who decides the uniformity issue; presumably, the amount of interagency uniformity would not change because of a different decision maker.

Intraagency uniformity, however, would be increased by an interpretation of section 558(c) that required a hearing. Without a hearing requirement, each office of an agency can utilize whatever procedures it deems sufficient. Under that interpretation, the practice of one regional office is likely to be different from that of another regional office.\(^{44}\) If, instead, section 558(c) were read to require a hearing, once a court decided that a hearing was necessary in one case, each regional office would be obliged to provide the same procedural protections.

b. The policy of fairness—The legislative history reveals that the APA drafters sought to achieve fairness by balancing the interests of the licensees and agencies. The committee reports and statements of sponsors reveal Congress’s concern that the rights of licensees be protected.\(^{45}\) Yet, the drafters were also mindful of the need to minimize administrative costs.\(^{46}\) Congress envisioned that, at some point, the administrative burden could become so excessive that additional pro-

\(^{43}\) See supra notes 15-16 and accompanying text; see also Note, supra note 6, at 1444.

\(^{44}\) For example, in Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1070 (7th Cir. 1982), the Chicago office of the Customs Service adopted guidelines specifying that more than five late entries justified institution of suspension proceedings. In a different entry city, the informal guidelines might have specified that ten late entries triggered suspension. Cf. Gerhart, Judicial Review of Customs Service Actions, 9 LAW & POLICY IN INT’L BUS. 1101, 1120 (1977) (noting that “[c]ustoms apparently has no workable formal procedures for systematically reviewing the treatment given to imports at the various ports”).

\(^{45}\) See supra note 39. As noted by one court, “[t]he wide latitude and discretion inevitably given to executive officials and administrative agencies in regard to enforcement policy puts upon them a corresponding obligation to institute and abide by procedures that give affected persons a meaningful opportunity, before adverse decisions are crystallized, to make an appeal to their discretion.” Blackwell College of Business v. Attorney General, 454 F.2d 928, 932 (D.C. Cir. 1971).

\(^{46}\) See S. REP., supra note 11, at 5, reprinted in LEGIS. HISTORY, supra note 11, at 191 (“the committee has attempted to make sure that no operation of the Government is unduly restricted”); H.R. REP., supra note 25, at 16, reprinted in LEGIS. HISTORY, supra note 11, at 250 (“the bill does not unduly encroach upon the needs of any legitimate governemt operation”).
cedural protections would not be feasible.\textsuperscript{47} Thus, fairness under the APA should be determined by balancing the potential for wrongful deprivation of the licensee against the administrative costs of providing increased procedural protections.

One implication of using a balancing approach to determine fairness is that, in some cases, it will be fair to grant licenses greater procedural protections than in other cases. For example, a securities broker facing a ten-day suspension of its license deserves some procedural protections to assure that the rationale for the suspension is valid. Because the suspension is for a short duration, however, it may be desirable only to provide the broker with notice, full disclosure of the evidence against it, and an opportunity to respond to that evidence. On the other hand, if the penalty were a permanent revocation of the license, it would make sense to require that an adjudicatory hearing be held to substantiate the basis for the revocation.\textsuperscript{48}

The doctrine developed by the courts in the administrative due process area provides a useful analogy. In that context, the courts are applying a concept of fairness that requires a balancing of interests.\textsuperscript{49} As a result of the balancing approach, courts exhibit great flexibility in their choice of procedural remedies. If a private interest rises to the level of "property" protected by the due process clause, the remedy is not automatically a full trial-type hearing. Rather, the extent of the procedural remedy is a function of the balance of the potential for wrongful deprivation against the value of the government interest in not providing a hearing.\textsuperscript{50}

\textsuperscript{47} The drafters used conclusory labels to describe this critical point. The Senate Judiciary Committee Report indicates that the Act was intended to protect private parties, even at the risk of "some incidental or possible inconvenience to or change in present administrative operations." S. REP., supra note 11, at 5, reprinted in LEGIS. HISTORY, supra note 11, at 191 (emphasis added). Similarly, the House Report described the Act as an effort to protect licensees "without unduly interfering with necessary governmental operations." H.R. REP., supra note 25, at 8, reprinted in LEGIS. HISTORY, supra note 11, at 242 (emphasis added). In his discussion of the general structure of the APA, Congressman Walter commented that "[t]o require hearings in all cases would add unnecessary burdens in the business of government and would at the same time deprive the citizen of the need for speed where quick action is desirable." CONG. REC. 5648 (1946), reprinted in LEGIS. HISTORY, supra note 11, at 352.

\textsuperscript{48} Through the combined effect of the governing statute and the SEC regulations, this result is reached in the securities regulation context. See 15 U.S.C. § 78o(b)(4) (1982); 17 C.F.R. §§ 240.15b7-1, 201.11, 201.11.1, 201.14 (1983).

\textsuperscript{49} The Supreme Court, in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), held that the scope of the process due to an individual threatened with deprivation of a protectible property interest depends on: (1) the nature of the private interest affected by the agency action; (2) the value of additional procedural safeguards; and (3) the government's interest, including its interest in minimizing the administrative burdens imposed by additional procedural requirements.

\textsuperscript{50} For example, in Blackwell College of Business v. Attorney General, 454 F.2d 928, 936 n.15 (D.C. Cir. 1971), the court reversed an INS decision to withdraw the college's status as a school approved for attendance by nonimmigrant aliens. The court remanded to the agency, suggesting that due process in that context required a hearing before an impartial agency official,
An interpretation of section 558(c) that never requires a hearing would fail to provide such flexibility. Instead, when faced with a case of inadequate pretermination procedures, a court would be required to choose one of two discrete remedies. If a law external to the APA required a hearing on the record under section 554, the agency would have to provide a hearing with the full panoply of procedural rights set forth in sections 556 and 557. If, however, no external law existed and section 558(c) governed, the most that a court could require would be some form of written notice and an opportunity to petition the agency informally. Courts could avoid this harsh result by stretching their interpretations of the governing statutes to find a requirement of a hearing on the record. Absent such willingness to construe the governing statute in this way, however, even a licensee facing a potentially harmful deprivation where the cost of an administrative hearing is low would be limited to receiving notice and an opportunity to petition the agency informally.

An interpretation of section 558(c) that requires a hearing, by pro-

an opportunity to cross-examine persons who supplied evidence, and participation by counsel in those proceedings.

In National Rifle Ass'n v. United States Postal Service, 407 F. Supp. 88, 95 (D.D.C. 1976), the postal service revoked special mailing privileges held by the NRA, a nonprofit organization. Remanding the case, the court noted that "due process can be satisfied by allowing the applicant ... to fully present any evidence ... by means such as submission of documents and informal meetings. ... Further, if the Postal Service has uncovered any information that would disqualify the party concerned, [it] must present this evidence to the party for rebuttal." Id. at 95.

In Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1076-78 (7th Cir. 1982), the court considered the government's administrative costs in determining the scope of the process due, holding that warning letters and informal meetings provided sufficient protection of plaintiff's due process rights.

51. See supra notes 15-16 and accompanying text.
52. See, e.g., Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1079 (7th Cir. 1982).
53. See supra note 15. Courts have consistently held, when considering whether a particular statute requires a hearing on the record, that entirely different presumptions govern in cases of rulemaking and adjudication. In the rulemaking context, a statute must almost specifically require that the hearing be held "on the record" before a court would so hold. In contrast, there is less emphasis placed on express language of the statute in the adjudicatory context. Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 877 (1st Cir. 1978); Marathon Oil v. EPA, 564 F.2d 1253, 1262 n.30 (9th Cir. 1977). These cases relied on the guidance of the Attorney General's Manual, which states that:

a statutory provision that rules be issued after a hearing, without more, should not be construed as requiring agency action "on the record," but rather as merely requiring an opportunity for the expression of views. ... No such rationale applies to administrative adjudication. In fact, it is assumed that where a statute specifically provides for administrative adjudication ... after opportunity for a hearing, such specific requirement for a hearing ordinarily implies the further requirement of a decision in accordance with evidence adduced at the hearing.

A.G. Manual, supra note 24, at 42-43; see also United States v. Florida East Coast Ry., 410 U.S. 224, 239 (1973) (The meaning of the term "hearing" will vary, "depending on whether it is used in the context of a rulemaking-type proceeding or in the context of a proceeding devoted to the adjudication of particular disputed facts.")
providing flexible procedural safeguards, furthers the goal of fairness in a way that the opposite interpretation could not. The concept of a "hearing" covers a broad range of procedures. In some contexts, courts might interpret section 558(c) to require a trial-type hearing with the opportunity to cross-examine adverse witnesses. In other contexts, a hearing may be more limited. Thus, by interpreting section 558(c) to require a hearing, a court gains the flexibility to provide a remedy roughly proportional to the outcome of its fairness balance.

c. Objections to a hearing requirement—Two arguments can be made to suggest that a hearing requirement is not appropriate in the context of section 558(c). First, because a licensee is already protected by the due process clause, there may be no need to provide another set of flexible remedies. Second, section 558(c) may have already struck the balance, concluding that the cost of providing hearings is always so great as to preclude their use.

In practice, the due process clause affords only limited protection to licensees facing suspension or revocation. Most often, in cases where the due process clause would require a hearing, the governing statute already does so. When the governing statute or regulations do not require a hearing, courts rarely find that the due process clause does.

Section 558(c) should be read to provide licensees with protection greater than that afforded by the due process clause. Although the Constitution protects property and liberty interests generally, section 558(c) protects federal license interests specifically. The drafters of the APA sought to codify the kind of fairness embodied in constitutional due process analysis.

54. See supra note 7.
55. See Note, supra note 6, at 1449-56. The analysis that a court would apply to determine whether the due process clause requires that a hearing be held is, to some extent, parallel to the analysis under § 558(c). Under the APA, the court would first consider whether a federal license was involved; under the due process clause, the question is whether the license is an interest subject to fifth amendment protection. Goldberg v. Kelly, 397 U.S. 254 (1970). The second question under the APA is what procedural requirements are imposed by § 558(c). Under the due process clause, the court must similarly ask: "What process is due?"
57. See, e.g., Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1078 (7th Cir. 1982); Taylor v. District Eng'rs, 567 F.2d 1332, 1337-38 (5th Cir. 1978); Marathon Oil Co. v. EPA, 564 F.2d 1253, 1265 (9th Cir. 1977); New York Pathological & X-Ray Laboratories, Inc. v. INS, 523 F.2d 79, 84-85 (2d Cir. 1975) (Moore, J., dissenting); Lincoln Transit Co. v. United States, 256 F. Supp. 990, 993-94 (S.D.N.Y. 1966) (three-judge panel). But see Blackwell College of Business v. Attorney General, 454 F.2d 928, 935 (D.C. Cir. 1971).
58. Before both the House and the Senate, sponsors referred to the bill as one designed to provide guarantees of "due process" in administrative procedure. 92 Cong. Rec. 5656 (1946),
however, suggests that it intended to provide federal licensees with something more than the minimal constitutional protections. An interpretation of section 558(c) that provides for hearings in cases where the due process clause does not is consistent with that intent.

The second argument, that section 558(c) already strikes the balance, is consistent with the premise that Congress intended the APA to provide fairness. Yet it suggests that Congress concluded that the costs of providing an agency hearing in section 558(c) contexts always outweighs any potential for wrongful deprivation of a licensee. Thus, the argument is made that the balance always tips against providing a hearing. A close analysis of the marginal cost of a hearing requirement, however, dispels this theory.

To analyze the validity of the premise that section 558(c) hearings are always too expensive, the burdens introduced by a hearing requirement must be identified. This can be done by considering whether, and to what extent, such a requirement would affect the litigation strategies of licensees. For purposes of this analysis, licensees can be subdivided into three types: indifferent licensees, cost-conscious licensees, and litigious licensees. The total cost of the proposed interpretation would then be the marginal increase in costs to agencies as a result of the actions of each type of licensee, multiplied by the number of licensees of each type.

The indifferent licensees, even if given the chance, would not avail themselves of the opportunity for agency hearings. In the absence of a right to an agency hearing, these same licensees would not pursue their cases in court. Thus, in this situation, the marginal cost of the hearing requirement would be zero.

An examination of the analogous case of license issuance indicates that the category of indifferent licensees would probably be large. Environmental Protection Agency (EPA) regulations provide that any person may petition for a hearing to contest the terms of a water pollution discharge permit. The regulations require that any industry claiming the effluent limitations set by the EPA are too stringent may raise its objections at such a hearing. The EPA must grant a hearing if the

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reprinted in LEGIS. HISTORY, supra note 11, at 373 (comments of Rep. Gwynne, member of the House Committee on the Judiciary); 92 Cong. Rec. 2149 (1946), reprinted in LEGIS. HISTORY, supra note 11, at 298 (Sen. McCarran's comments). It is unlikely that the sponsors sought to do no more than codify a protection that was already provided by the Constitution. More likely, the drafters meant to incorporate, in the APA, a due process-like model of fairness.

59. Marginal cost, rather than total cost, is the appropriate criterion because the concern is with the difference between an interpretation of § 558(c) that does require hearings and an interpretation that does not.

60. See infra note 63 and accompanying text.

party raises substantial issues of fact. By 1977, after four years of the program's existence, over 40,000 dischargers had applied for permits. Of those, only about 200, or five percent, had requested adjudicatory hearings. Thus, ninety-five percent of the holders of this federal license were indifferent licensees. This suggests that a licensee subject to revocation or suspension is likely either to accept the agency decision or to resolve any differences with the agency prior to the final determination.

Agency hearings requested by the cost-conscious licensees will place an administrative burden on the agencies. These licensees would carefully weigh the cost of litigation before taking any action. To the extent that an agency hearing is less costly than a court proceeding, there would be more requests for agency hearings than there would be for judicial hearings, if the latter were the only option.

The magnitude of the burden placed on the agencies by the cost-conscious licensees depends on two factors. One factor is how many licensees would request agency hearings. The other factor is the cost of those hearings. Because of the great range of agency programs that fall within the scope of section 558(c), it is difficult to predict this cost. There is, however, evidence that the cost is manageable.

The decisions of a number of federal and state agencies to provide hearings before revocation or suspension of licenses suggest that the cost of providing hearings is not excessive. Many federal agencies, not compelled to do so by statute, have promulgated regulations making hearings available prior to license suspension or revocation. A number of state administrative codes also provide for trial-type hearings prior to revocation or suspension of licenses administered by state agencies.

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64. Even if the licensee expects to lose its case, there is one occasion where it might seek an agency hearing — when delay would be of benefit. See Gardner, The Informal Actions of the Federal Government, 26 AM. U.L. REV. 799, 813-14 (1977). For the most part, however, a licensee seeking delay would be willing either to request an agency hearing or to go to court. Thus, the choice of interpretation of § 558(c) will not result in increased marginal cost from frivolous requests for hearings.
65. See supra note 63 and accompanying text.
66. See supra note 16.
Thus, agencies and legislators who have apparently considered the same issues of relative cost and benefit have decided that the burden of providing hearings is not an impracticable one.

This increase in marginal costs must be balanced with the decrease in marginal costs that would occur in the case of litigious licensees. These licensees, either because they were convinced of the merits of their cases or because they would be so aggrieved by the loss of their licenses, would challenge the suspension or revocation in whatever forum was available. In the absence of a provision for an agency hearing, these licensees would go into court for temporary restraining orders and, later, for injunctive relief.68

In most cases, the agency will be the low cost dispute-resolver.69 It possesses expertise in the particular area of licensing in dispute. Unlike the court, it does not have to be educated in the matters before it. The agency is likely to have an ongoing relationship with the particular licensee. It may have dealt with very similar factual and legal issues in the past. Given its understanding of the issues, the agency is better able to limit the scope of the hearing to relevant matters.

To the extent that disputes can be finally resolved at the agency level, there would be a cost savings by virtue of the efficiency of the agency proceeding. Yet, even in cases where the licensee appealed the agency decision, cost savings are likely to result. If the licensee is required first to petition the agency for a hearing, the courts are saved the burden of deciding whether or not to issue a temporary restraining order. More importantly, the case would arrive in the court with some record10 of the agency proceedings and with the issues clearly focused by the parties.71


69. An agency hearing will often be less rigorous and, therefore, less costly than the trial-type hearing that a court would provide. See infra notes 95-101 and accompanying text; see also 2 K. DAVIS, supra note 25, § 13:6, at 491, § 13:15, at 520. Although a trial court may summarily deny injunctive relief on a motion for summary judgment or a motion to dismiss, similar cost saving summary procedures are available to the agency decision maker. See infra notes 77-93 and accompanying text; see also 3 K. DAVIS, supra note 25, § 14:7, at 31-34.

70. Under the interpretation proposed by this Note, a transcript of the agency hearing may not be required. If it is not, the record might simply contain the order of the agency, any affidavits submitted by parties, and any written records prepared by the agency on the case. See generally Pedersen, supra note 32.

71. The marginal cost may be increased if the agencies overreact to court holdings. For instance, a court may remand a case to a particular agency, noting that, because factual issues are in dispute, an opportunity to cross-examine and rebut the agency’s evidence is required. The agency might overreact in two ways. It might provide for hearings even when the licensee would not be able to show that factual issues are in dispute. It might also provide for a full adjudicatory hearing when a “paper hearing” would have been sufficient. This danger is avoidable if the agencies realize that a spectrum of procedural tools are available, and that they may pick the
Thus, neither of the objections to the contention that hearings are vital to flexibility, and thereby to fairness under the APA, is persuasive. The APA should be interpreted to provide greater protection to licensees than the due process clause. Further, the costs imposed on agencies by a hearing requirement are not so excessive as to preclude an interpretation of section 558(c) that imposes a hearing requirement.

2. Exceptions to the hearing requirement—Although, as a general rule, the policies of the APA are best served by an interpretation of section 558(c) that requires a hearing, several exceptions to the general rule are necessary. Section 558(c) and its legislative history mandate three exceptions, and the policies of fairness and uniformity provide two more.

a. Explicit exceptions—There are two instances when the language of section 558(c) expressly exempts an agency from the hearing requirement. The first is the case where noncompliance with the terms of the license is clearly "willful." A second exists in cases of emergency, when "public health, interest, or safety" requires immediate action. The legislative history cautions that both of these exceptions must be narrowly construed in favor of the licensee.

The committee reports establish a third exception for temporary licenses. With some qualifications, the courts have consistently treated licenses granted on an interim or emergency basis as exempted from the requirements of section 558(c).
b. Implicit exceptions— There may be cases where the cost of providing a hearing would be so great and the potential for wrongful deprivation of a licensee so small that no hearing will be required under section 558(c). This exception to the hearing requirement should be rarely invoked. Because the hearing requirement is so flexible, an agency, or court on review, should make the fairness balance a factor in deciding what type of hearing to grant, rather than considering it in its initial decision whether to grant a hearing at all.

The fairness policy also implicitly sanctions an exception for those cases when nothing that the licensee is prepared to prove at the hearing is relevant to the agency decision. If it can be accurately determined, prior to hearing, that the licensee's evidence would not result in a reversal of the revocation or suspension decision, the licensee is not wrongfully deprived.

An agency decision to deny a hearing on this ground is similar to granting a motion to dismiss or summary judgment in judicial proceedings. As in those cases, the agency and the courts must have a standard upon which to judge the sufficiency of the facts alleged.

It is therefore suggested that a hearing should be granted by an agency when the licensee demonstrates that factual disputes exist with respect to issues of consequence to the agency decision. This requirement has two components: (1) the issue must be one of fact; and (2) it must be relevant to the agency decision to revoke or suspend. For the purposes of this proposed standard, a factual issue is one that presents a question that can be answered with a descriptive statement, rather than with a prescriptive judgment.

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77. See Fed. R. Civ. P. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief can be granted); Fed. R. Civ. P. 12(c) (motion for judgment on the pleadings). If the agency bases its decision on offers of proof in addition to the licensee's petition for a hearing, the analogous judicial procedure is summary judgment. See Fed. R. Civ. P. 56(c) (offer of proof may include pleadings, depositions, answers to interrogatories, and affidavits).

78. The test applied in ruling on a motion to dismiss is whether it appears beyond doubt that the plaintiff can prove no set of facts that would entitle him to relief. 5 C. Wright & A. Miller, Federal Practice and Procedure § 1357, at 600-02 (1969). A motion for judgment on the pleadings is granted if the moving party clearly establishes that no material issue of fact remains and that he is entitled to judgment as a matter of law. Id. § 1368, at 690. In the case of summary judgment, the standard is whether there is a genuine issue of material fact. Fed. R. Civ. P. 56.

79. The procedural juncture for making this threshold determination would be an agency's ruling on a petition for a hearing. An agency decision not to grant a licensee's hearing request should include reasons for the denial. See, e.g., 40 C.F.R. § 124.75(b) (1983). The denial could then be appealed to the courts. See 5 U.S.C. § 702 (1982).

For an example of a commendable effort by the FDA to define those circumstances when it will grant a hearing, see 21 C.F.R. § 12.24(b) (1983); see also 3 K. Davis, supra note 69, § 14.2, at 7-10.

80. Factual issues raise "is" questions. Is the licensee engaging in (or did the licensee engage in) X behavior? Is the agency responding (or did the agency respond) with Y behavior? Prescrip-
In order to succeed in its petition for a hearing, a licensee should be required to show that there is a factual dispute and that it is prepared to submit evidence relevant to that dispute. A hearing should not be granted to debate prescriptive rules that have been settled by the courts, by the legislature, or by the agency.

A licensee will most likely always be able to find evidence relevant to some factual dispute. Thus, the second requirement — that the factual dispute be of consequence to the agency decision — is likely to be a deciding factor in determining whether to hold a hearing. A factual issue, on the other hand, are those that require "ought" judgments. Ought the licensee's conduct be punished with suspension or revocation?

Efforts, in the due process context, to define "fact" by drawing distinctions between fact and law, and fact and policy, have proven confusing to the courts. S. Breyer & R. Stewart, supra note 61, at 674 n.81; Cooper, Goldberg's Forgotten Footnote: Is There a Due Process Right to a Hearing Prior to the Termination of Welfare Benefits When the Only Issue Raised is a Question of Law?, 65 MINN. L. REV. 1107, 1125-26 (1980). Rather than merely answering the first question, whether an issue is factual, these distinctions tend to embody a determination of relevance as well. Professor Davis has attempted to refine the distinction between law and fact by distinguishing "adjudicative facts," facts specific to the activities of the parties, from "legislative facts," facts relevant generally to discretionary policy choices of the agency. According to Davis, a trial should only be granted to develop "adjudicative facts." 3 K. Davis, supra note 25, §§ 14:3-14:4, at 10-242; 2 K. Davis, supra note 25, §§ 12:1-12:3, at 406-15. But see Friendly, Some Kind of Hearing, 123 U. Pa. L. REV. 1267, 1268 (1975). Application of the test urged by this Note will result in some type of hearing for all issues of "adjudicative fact" and some issues of "legislative fact." See Rolfe, supra note 10, at 129-30 (suggesting that there are times when legislative facts should be "ventilated" in an agency hearing); see also Clagett, Informal Action-Adjudication-Rulemaking: Some Recent Developments in Federal Administrative Law, 1971 DUKE L.J. 51, 78-79.

Besides the danger of using the adjudicative and legislative labels in a conclusory manner (i.e., concluding that, because an issue should be raised at a hearing, it is "adjudicative"), this distinction creates the danger of shifting the focus from resolution of the factual issue to a dispute over the agency's policy choice itself. Cf. Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 876 (1st Cir. 1978) (in the analogous license issuance setting); Marathon Oil v. EPA, 564 F.2d 1253, 1262-63 (9th Cir. 1977) (in the license issuance setting); see also A.G. Manual, supra note 24, at 14-15 (setting forth a similarly conclusive distinction between issues of adjudication and rulemaking, a distinction rightfully criticized by Professor Davis). Instead, by first requiring the licensee to specifically challenge descriptive issues, the agency should be able to focus the hearing on resolution of those issues, rather than opening the hearing to a general attack on its policy choice.

The hearing process is a time honored means of developing such issues. See generally 3 K. Davis, supra note 25, § 14:3, at 11; 2 K. Davis, supra note 25, § 12:1, at 406-09.

A governing statute or regulation may say that a license should be revoked if the licensee engages in X behavior, or that it should not be revoked if the agency misled the licensee through Y behavior. If all parties admit that behaviors X and Y occurred, a hearing need not be granted to answer the question of whether revocation or suspension should result. See Bankers Life & Casualty Co. v. Callaway, 530 F.2d 625, 632 n.9 (5th Cir. 1976), cert. denied, 429 U.S. 1073 (1977).

See Bonfield, The Definition of Formal Agency Adjudication Under the Iowa Administrative Procedure Act, 63 IOWA L. REV. 285, 321 (1977) (suggesting that, even when a state statute, on its face, requires a formal hearing prior to all revocations or suspensions, it should not be read to require a hearing in instances when there is no factual dispute between the agency and the affected party); see also Costle v. Pacific Legal Found., 445 U.S. 198, 214 (1980); S. Breyer & R. Stewart, supra note 61, at 525 n.88; Rolfe, supra note 10, at 127-28.

"Of consequence" is the language used to define relevance in the Federal Rules of Evidence.
dispute is clearly of consequence to the agency decision if it was necessary to that decision in a "but for" sense. A factual dispute, however, is not at issue if its only relevance is to the wisdom of an existing law or regulation. A licensee should not be permitted to challenge in a revocation or suspension context a factual antecedent of general agency policy.

Whether an issue is of consequence to an agency decision is difficult to determine in the typical case that calls for the resolution of factual issues and the development of prescriptive judgments. In the license revocation or suspension context, there will often be questions of interpretation regarding the governing statute. The agency must answer descriptive questions and make prescriptive judgments as it interprets the law in the context of a specific revocation or suspension decision.

The potential complexities of the typical case may be illustrated by a variation of the facts in Porter County Chapter of the Izaak Walton League of America, Inc. v. Nuclear Regulatory Commission. In that case, the court upheld the Nuclear Regulatory Commission's (NRC) decision not to initiate a proceeding to revoke the construction permit of a nuclear power plant. The NRC is authorized to institute revoca-


84. See Clagett, supra note 80, at 72-73 (stating the corollary: if the facts disputed by the licensee, even if resolved in the licensee's favor, would not change the agency decision, a hearing need not be granted).

For example, Customs Service regulations in Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1069 (7th Cir. 1982), prescribed that "timely" meant entry within ten days. The plaintiff alleged that dates stamped on entry documents were not always accurate and that personnel shortages and a newly installed computer caused delays in processing that caused timely entries to be treated as untimely. Whether or not the entries were made within ten days was an issue of fact. If these delays were the sole reason for the license suspension, they were of consequence to the agency decision. To ensure fairness, as required by § 558(c), a hearing should have been granted.

85. In the previous example, see supra note 84, the customs broker would not be entitled to a hearing to present factual evidence that, based on statistics of collection data, the ten-day limit was arbitrary. Although the licensee might have factual evidence to submit, such as data on the number of brokers who filed ten days late and later became uncollectible or evidence on the feasibility of filing within ten days given present technology, those issues are not of consequence to the immediate suspension decision.

86. Such claims are more efficiently resolved in the agency's initial rulemaking proceeding. See 5 U.S.C. § 553(c) (1982). They may also be raised by directly appealing to the courts, seeking a ruling that the regulation is not in accord with the governing statute.

87. For example, in Gallagher & Ascher Co. v. Simon, 687 F.2d 1067, 1069 (7th Cir. 1982), the governing regulation stated that the District Director was empowered to discontinue or suspend the special permits of brokers that had "repeatedly failed to make timely entry without sufficient justification." The regulations prescribed that "timely" meant within ten days but did not define what was meant by "repeatedly" or "sufficient justification." Whether the plaintiff was out of compliance required an interpretation because no previously established rule of law determined whether the plaintiff's conduct fell within this statutory language.

88. 606 F.2d 1363 (D.C. Cir. 1979).
tion proceedings whenever evidence not available when the construction permit was issued casts serious doubt on the safety of the reactor design. 89 The court suggested that, had revocation proceedings been instituted, section 558(c) would have required a hearing. 90 If that hearing had been granted, the issue to be resolved would have been whether the new evidence demonstrated that the reactor design was unsafe.

The agency, in considering whether to grant a hearing, would face both types of issues. Whether or not the reactor was unsafe, within the meaning of the governing statute, would be a prescriptive issue. Whether or not the new evidence was correct would be a descriptive question. The power plant licensee would likely be eager to present its own experts and to have the opportunity to cross-examine the experts that developed the new evidence.

It can be argued that it is unnecessary and wasteful to require a hearing in cases where the factual dispute is relevant only to a generally applicable agency policy, rather than to the circumstances of the revocation or suspension. If the agency has the power to make policy choices in its interpretation of the statute, and if it can consider whatever evidence is available, it may simply hear and disregard the evidence submitted by the licensee. 91

The policy of uniformity, however, suggests that when the licensee can make a showing that a factual issue (in this case the accuracy of the new evidence) is of consequence to the agency's prescriptive judgment (here the safety determination) a hearing should be required. The systemic consequences of such a rule would promote uniformity. An agency faced with a rule requiring a hearing in this situation would have two options. It could continue to grant hearings whenever facts of consequence to the agency decision were disputed. Alternatively, it could promulgate rules prescribing what it considered to be "safe." 92 Each time such a rule was promulgated, the agency would resolve interpretation problems and obviate the need to hold future hearings on the issue. More importantly, the rulemaking process would further the goal of uniformity by setting standards by which licensees could predict the consequences of their acts. 93

89. Id. at 1365.
90. Id. at 1368.
92. For example, it could specify that a certain alloy was suitable for certain components. It could incorporate specifications established by trade groups into its regulations. See Rolfe, supra note 10, at 124-25; see also SEC v. Chenery, 332 U.S. 194, 202 (1947) (agencies have the choice between setting policy by adjudication or by rulemaking).
93. Goals external to the APA are also served by holding a hearing even when the factual dispute is relevant only to a generally applicable agency policy. The very act of proceeding through a hearing process serves to promote reasoned decision making. See Marathon Oil v. EPA, 564 F.2d 1253, 1261-62 (9th Cir. 1977) (interpreting the Clean Water Act to require hearings in the
B. Application of the Hearing Requirement

The policies of fairness and uniformity also provide guidance to the agencies and courts in their determinations of the scope of the requisite hearing. A variety of hearing procedures are available to meet the requirements of section 558(c). The scope of the procedure used should depend on the type of license and the nature of the facts at issue.

Because the hearing requirement of section 558(c) is based on a fairness balance, the courts must require procedural protections consistent with the outcome of that balance. Thus, to some extent, the procedural protections required are a function of the type of license involved. If the potential harm resulting from a wrongful revocation or suspension of a particular license is great, section 558(c) requires more protections than if that potential harm is small.

The scope of the procedure also depends on the nature of the facts at issue. For instance, when the credibility or perception of a critical witness is likely to be questioned, fairness may require that an opportunity be granted to cross-examine that witness before the agency decision maker. When the technical advice of an expert is likely to have served as the basis of an agency decision, fairness similarly may require an opportunity to cross-examine.

License application context in order to promote "reasoned decisionmaking"); Rabin, supra note 71, at 302-03; Rolfe, supra note 10, at 107 n.66; Thibaut, Walker, LaTour & Houlden, Procedural Justice as Fairness, 26 Stan. L. Rev. 1271, 1287-88 (1974). It also serves a "dignitary" function, giving the licensee the satisfaction of having its case heard. See Cramton, A Comment on Trial-Type Hearings in Nuclear Plant Siting, 58 U. Va. L. Rev. 585, 591-93 (1972); Mashaw, Administrative Due Process as Social-Cost Accounting, 9 Hofstra L. Rev. 1423, 1423 (1981); Mashaw, Administrative Due Process: The Quest for a Dignitary Theory, 61 B.U.L. Rev. 885 (1981); Rabin, supra note 71, at 303; Thibaut, Walker, LaTour, & Houlden, supra; see also Gardner, supra note 64, at 812-13 ("[i]t seems plain enough that generally there should be a great deal more rulemaking"); Verkuil, A Study of Informal Adjudication Procedures, 43 U. Chi. L. Rev. 739, 755-56 (1976).

94. See infra notes 99-101 and accompanying text.

95. When judging the fairness balance, a court could consider the licensee's interests in one of two ways. It could look to the licensee's subjective valuation of its license. Alternatively, it could consider the objective interests of holders of that particular type of license. The policy of uniformity suggests that the latter approach is appropriate. If the courts based their decisions solely on the equities of the parties present in court, there would be no predictable means for the agencies to determine what procedures are required. Only by using an objective approach will the courts be able to provide guidance to agencies. If a court holds that a certain agency procedure is inadequate, the agency would then have incentive to adopt a uniformly applicable procedure meeting the court's requirements.

96. See generally Friendly, supra note 80, at 1282-87; Gardner, supra note 64, at 822-24; Verkuil, supra note 93, at 757.


Although the legislative history specifically provides that section 558(c) does not require a hearing consistent with sections 556 and 557 of the APA, several less burdensome alternatives might be imposed. A court might require a "paper hearing," a hearing involving only written submissions, providing some opportunity to cross-examine and present rebuttal evidence. It might prescribe an oral hearing from which the decision maker would preserve his or her findings of fact and conclusions of law for review. In sum, a wide range of hearing alternatives is available. A court, after considering the type of license and the nature of the dispute, must require a hearing that will adequately protect the licensee's interests.

CONCLUSION

Loss of a federal license can have disastrous consequences. Individuals or organizations facing license revocation may look to the APA for relief from what they consider incorrect agency action. Several courts have studied the question of whether a hearing must precede revocation or suspension and have reached contradictory results. Using the language of section 558(c) and a portion of the legislative history, they have held that a hearing is always required, or that a hearing is never required.

The general policies of the APA, fairness and uniformity, are best served by a general rule requiring hearings. Because the interests in fairness and uniformity vary in different settings, hearings should not be required in every case, and the strength of the interests should determine the scope of the hearing. This system will provide a necessary check on arbitrary or unsupported agency license revocation or suspension without creating undue costs for agencies or affected parties.

—Joan P. Snyder

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99. See supra note 31 and accompanying text.
100. See Friendly, supra note 80, at 1270; see also 2 K. Davis, supra note 25, § 12.5, at 423; cf. National Rifle Ass'n v. United States Postal Service, 407 F. Supp. 88, 95 (D.D.C. 1976) (use of written submission to comply with due process right); 5 U.S.C. § 556(d) (1982) (providing, even in the formal adjudication context, for the submission of all or part of the evidence in written form).
101. S. Breyer & R. Stewart, supra note 61, at 526; Friendly, supra note 80, at 1292; Gardner, supra note 64, at 824.