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ADMINISTRATIVE PROCEDURE AND THE CONTROL OF FOREIGN DIRECT INVESTMENT

JAMES O. FREEDMAN †

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† Professor of Law, University of Pennsylvania. A.B. 1957, Harvard University; LL.B. 1962, Yale University. Member, New Hampshire Bar. This article is based upon research I conducted as a consultant to the Office of Foreign Direct Investments, U.S. Department of Commerce. The Office of Foreign Direct Investments has not evaluated or approved this article; the responsibility for its contents is solely mine. The questions considered in Parts II and IV are presently under review by the Office. I am greatly indebted to Henry S. Bryans of the class of 1971 for his devoted and imaginative assistance.

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I. INTRODUCTION

On January 1, 1968, President Johnson created by executive order a federal program of mandatory limits on the amount of foreign investment that United States citizens and businesses would be permitted to make each year.¹ The order, relying upon the power given the President by section 5(b) of the Trading with the Enemy Act,² delegated to the Secretary of Commerce the authority to administer the program toward the objective of "strengthening the balance of payments position of the United States during this national emergency"³—that is, the national emergency declared by President Truman in 1950 and still in effect.⁴ On the same day the Secretary of Commerce announced that he had created the Office of Foreign Direct Investments (OFDI) and had subdelegated to it the authority to administer the Foreign Direct Investment Program.⁵

¹ Exec. Order No. 11,387, 3 C.F.R. 433 (1970), 12 U.S.C. § 95a (Supp. V, 1970).

² Section 5(b) of the Trading with the Enemy Act, originally enacted as the Act of Oct. 6, 1917, ch. 106, § 5(b), 40 Stat. 966, has been amended several times and is now codified at both 12 U.S.C. § 95a (1964) and 50 U.S.C. App. § 5(b) (1964). Hereafter it will be cited as 12 U.S.C. § 95a (1964).

³ Exec. Order No. 11,387, 3 C.F.R. 433 (1970), 12 U.S.C. § 95a (Supp. V, 1970).

⁴ Proclamation No. 2914, Dec. 16, 1950, 3 C.F.R. 99 (Comp. 1949-53), 50 U.S.C. App. § 1 (1964); *Sardino v. Federal Reserve Bank*, 361 F.2d 106 (2d Cir.), cert. denied, 385 U.S. 898 (1966).

⁵ Dep't of Commerce Order 184-A, 33 Fed. Reg. 54 (1968).

The limitations upon foreign direct investment are embodied in the Foreign Direct Investment Regulations,⁶ a complex set of substantive rules that OFDI administers and that it has amended on a number of occasions as experience has recommended and as the nation's balance of payments position has changed.⁷ Questions of the legality and wisdom of the program and the regulations have been raised—by political candidates,⁸ by Congressional committees,⁹ and by commentators¹⁰—but OFDI has yet to be involved in litigation during its first three years of existence.¹¹

The basic scheme of the regulations restricts net transfers of capital¹² between “direct investors”¹³ and their “affiliated foreign nationals”¹⁴ and limits the amount of earnings that a direct investor may authorize an affiliated foreign national to reinvest.¹⁵ The limita-

⁶ 15 C.F.R. §§ 1000.101-1000.1303 (1970).

⁷ See, e.g., 34 Fed. Reg. 9564 (1969); Ellicott, *United States Controls on Foreign Direct Investment: The 1969 Program*, 34 LAW & CONTEMP. PROB. 47, 48 (1969); Lancaster, *The Foreign Direct Investment Regulations: A Look at Ad Hoc Rule-making*, 55 VA. L. REV. 83, 132-33 (1969).

⁸ See Statement of Richard M. Nixon, describing the Foreign Direct Investment Program as “economic isolationism at its worst” and characterizing it as “without Congressional approval” and “based on questionable legal authority.” Wall St. J., Oct. 3, 1968, at 1, col. 3; *id.*, at 4, cols. 3-4.

⁹ See *Hearings on House Concurrent Resolutions 85 and 86 Before the Subcomm. on Foreign Economic Policy of the House Comm. on Foreign Affairs*, 91st Cong., 1st Sess. (1969); H.R. Con. Res. 815, 90th Cong., 2d Sess. (1968), introduced and discussed, 114 CONG. REC. 27199 (1968).

¹⁰ See Adler, *The Framework for Research Into Direct Manufacturing Investment Overseas*, 34 LAW & CONTEMP. PROB. 3 (1969); Behrman, *Assessing the Foreign Investment Controls*, 34 LAW & CONTEMP. PROB. 84 (1969); Furth, *Barriers to Investment Abroad as Tools of Payments Policy*, 34 LAW & CONTEMP. PROB. 64 (1969); Laffer, *The U.S. Balance of Payments—A Financial Center View*, 34 LAW & CONTEMP. PROB. 33 (1970); Note, *The Foreign Direct Investment Controls*, 11 HARV. INT'L L.J. 490 (1970); Note, *The Foreign Direct Investment Program: An Analysis and Critique*, 55 VA. L. REV. 139 (1969).

Other discussions include Asher, *The Foreign Direct Investment Regulations*, 27 N.Y.U. INST. ON FED. TAX. 955 (1969); Baker, *Tax and Related Issues Under the Foreign Direct Investment Regulations*, 21 TAX LAW. 531 (1968); DeVries, *The New Controls on Foreign Investment*, 49 CHI. B. REC. 349 (1968); Frolich & Ettinger, *Current Planning Considerations Under Foreign Direct Investment Controls*, 30 J. TAX. 30 (1969); Goldman, *New Controls on Foreign Investment: What Tax Men Need to Know About E.O. 11387*, 28 J. TAX. 168 (1968); Hynning, *Balance-of-Payments Controls By the United States*, 2 INT'L LAW. 400 (1968); Kingson, *Investment in Western Europe Under the Foreign Direct Investment Regulations: Repatriation, Taxes and Borrowing*, 69 COLUM. L. REV. 1 (1969); Morris, *The New Regulations Governing Direct Foreign Investment—An Early Appraisal*, 23 BUS. LAW. 701 (1968); Scott, *Tax and Other Implications of the Foreign Direct Investment Regulations*, 47 TAXES 32 (1969); Weeks, *The Future of Investment Controls*, 15 MCGILL L.J. 244 (1969); Note, *Governmental Regulation of Foreign Investment*, 47 TEXAS L. REV. 421 (1969).

¹¹ When the Foreign Direct Investment Program was created, the Attorney General gave his opinion that it was “a valid exercise of the authority conferred on the President by section 5(b) [of the Trading with the Enemy Act].” Letter from Attorney General Ramsey Clark to Secretary of Commerce Alexander Trowbridge, Feb. 3, 1968, in CCH BAL. PAYM. REP. ¶ 9031.

¹² 15 C.F.R. § 1000.313 (1970).

¹³ *Id.* § 1000.305.

¹⁴ *Id.* § 1000.304.

¹⁵ *Id.* § 1000.306(b).

tions upon such transfers are expressed in terms of authorized annual maximum amounts, described as "allowables."¹⁶ The regulations provide that a direct investor may apply for a "specific authorization"¹⁷ to permit him to exceed the amount of his annual allowables. If a direct investor exceeds the amount of his annual allowables without having obtained a specific authorization, the regulations permit OFDI to negotiate an informal voluntary settlement¹⁸ or to institute formal administrative proceedings,¹⁹ described as compliance proceedings, that may result in an order requiring the direct investor to take appropriate remedial action.²⁰

This article is concerned with the application of the Administrative Procedure Act²¹ (APA) to the two major administrative processes of OFDI: compliance proceedings and the determination of applications for specific authorizations. The questions that arise in measuring these processes against the requirements of the APA search the nature of fair administrative procedure.

II. WHO IS THE "AGENCY" FOR PURPOSES OF THE ADMINISTRATIVE PROCEDURE ACT?

The APA applies to every "agency" that is a part of the federal government. The question is whether the Secretary of Commerce or the Director of OFDI is the agency for purposes of application of the APA to the Foreign Direct Investment Program. The question is of more than academic significance because only the person who is the agency is permitted under the APA to combine investigative, prosecutorial, and adjudicative functions. If the Director is the agency, he may participate in all phases of OFDI's operations, consistent with due process limitations. But if the Secretary of Commerce is the agency, the Director must circumscribe his participation so that he does not commingle functions.

A. *Applicability of the APA Generally*

One issue may be put to rest at the outset: the authority that administers the Foreign Direct Investment Program—whether it is

¹⁶ *Id.* §§ 1000.503, .504, .506.

¹⁷ *Id.* §§ 1000.316, .801.

¹⁸ *Id.* §§ 1025.211-221.

¹⁹ *Id.* §§ 1030.111-521.

²⁰ *Id.* § 1030.514.

²¹ 5 U.S.C. §§ 551-59, 701-06, 3105, 3344, 5362, 7521 (Supp. V, 1970). The numbering of individual sections of the APA was changed during the process of amendment and codification in 1966 and 1967. Most commentators have continued, however, to refer to the more familiar section numbers that appeared in the original enactment. The references in this article are to those section numbers, even when changes have been made in the statutory language.

finally determined to be the Secretary of Commerce or the Director of OFDI—is not excepted from compliance with the requirements of the APA.

Although section 2 of the APA²² specifically excepts a number of governmental bodies from the Act's reach, none of the exceptions remotely covers the Department of Commerce or OFDI. The APA provides no other express exceptions from its coverage. Conventional rules of statutory construction would dictate that courts create no further exceptions. This result is underscored by section 12 of the APA which provides that even a subsequent statute "may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly."²³ And because, as the Supreme Court said in *Wong Yang Sung v. McGrath*,²⁴ one of the primary purposes of the APA was "to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies" of the federal government, courts are unlikely, for fear of defeating this purpose, to create exceptions beyond those that the APA makes express.

That the Foreign Direct Investment Program may involve foreign policy considerations will not by itself exempt the agency administering it from complying with the APA. The draftsmen of the APA understood that foreign policy considerations might sometimes make application of certain of its provisions difficult or unwise. Section 4 exempts rulemaking from the provisions of the APA "to the extent that there is involved—(1) a military or foreign affairs function of the United States."²⁵ Section 5 exempts adjudications from the provisions of the APA "to the extent that there is involved . . . (4) the conduct of military or foreign affairs functions."²⁶ These carefully drafted exceptions suggest that Congress intended general application of the APA, subject only to individual instances of exemption when foreign affairs functions become implicated in particular proceedings.²⁷ This conclusion is supported by a sentence appearing in the Senate report issued when the APA was passed: "The phrase 'foreign affairs functions,' used here and in some other provisions of the bill, is not to be loosely interpreted to mean any function extending beyond the borders of the United States but only those 'affairs' which so affect relations

²² 5 U.S.C. § 551(1) (Supp. V, 1970).

²³ *Id.* § 559.

²⁴ 339 U.S. 33, 41 (1950).

²⁵ 5 U.S.C. § 553(a) (Supp. V, 1970).

²⁶ *Id.* § 554(a).

²⁷ *Cf.* *United States v. Aarons*, 310 F.2d 341, 347 (2d Cir. 1962); *Timberg, Wanted: Administrative Safeguards for the Protection of the Individual in International Economic Regulation*, 17 *AD. L. REV.* 159 (1965). *But see Note, Foreign Direct Investment Controls*, 11 *HARV. INT'L L.J.* 490, 542-44 (1970).

with other governments that, for example, public rulemaking provisions would clearly provoke definitely undesirable international consequences."²⁸ A substantially identical sentence appears in the House report.²⁹

Prior to 1966, the APA excluded from its reach "functions which by law expire on the termination of present hostilities."³⁰ At one time it may have been arguable that this phrase included functions brought into being by national emergencies, as the Attorney General appears to have argued,³¹ although it should be noted that the Foreign Direct Investment Program is not based upon the national emergency created by World War II (the "present hostilities" intended by the 1946 Congress that passed the APA), but rather upon a national emergency declared in 1950.³² In any event, the revision of the APA in 1966 resulted in the deletion of the phrase "functions which by law expire on the termination of present hostilities." The Reviser's Notes explain that the phrase was omitted "as executed."³³

The APA will apply, then, to the agency that administers the Foreign Direct Investment Program, whether it be the Secretary of Commerce or the Director of OFDI. Parenthetically, this conclusion may provide a possible ground for a court to reject arguments against the substantive legality of the Foreign Direct Investment Program because the procedural safeguards of the APA apply to its administration.

B. *Legislative History of Section 2*

Section 2 of the APA provides that "'agency' means each authority of the Government of the United States, whether or not it is within or subject to review by another agency"³⁴ This definition, as Professor Davis has written, "is not very satisfactory."³⁵ If read literally, it would confer agency status on persons low in the governmental hierarchy who might plausibly claim to be authorities of the United States (for example, passport clerks, meat inspectors, and forest rangers). Congress could not have intended to confer agency status so broadly. The problem is to make functional sense of section

²⁸ S. REP. No. 752, 79th Cong., 1st Sess. 13 (1945).

²⁹ H.R. REP. No. 1980, 79th Cong., 2d Sess. 23 (1946).

³⁰ 5 U.S.C. § 1001(a) (1964), as amended, 5 U.S.C. § 551 (Supp. V, 1970).

³¹ ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 11-12 (1947) [hereinafter cited as ATTORNEY GENERAL'S MANUAL].

³² Proclamation No. 2914, Dec. 16, 1950, 3 C.F.R. 99 (Comp. 1949-53), 50 U.S.C. App. § 1 (1964).

³³ 5 U.S.C. § 551 (Supp. V, 1970).

³⁴ *Id.* § 551(a).

³⁵ 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 1.01, at 1 n.1 (1958) [hereinafter cited as K. DAVIS].

2's use of the term "agency" in a manner consistent with Congress' intention in passing the APA.

Because the statutory language is unclear, the process of interpretation must begin with an examination of the legislative history. The basic legislative history of the APA resides in the reports of the Senate Judiciary Committee and the House Judiciary Committee of the 79th Congress, which passed the Act. These reports are particularly significant because these two committees were the principal draftsmen of the APA.

The Senate Judiciary Committee, in a committee print issued in June 1945, explained why "agency" had been defined by use of the broad word "authority":

It is necessary to define agency as "authority" rather than by name or form, because of the present system of including one agency within another or of authorizing internal boards or "divisions" to have final authority. "Authority" means any officer or board, whether within another agency or not, which by law has authority to take final and binding action with or without appeal to some superior administrative authority. Thus "divisions" of the Interstate Commerce Commission and the so-called Schwellenbach Officer of the Department of Agriculture would be "agencies" within this definition. Any other form of definition would raise serious difficulties in several Federal agencies.³⁶

The final report of the Senate Judiciary Committee, issued in November 1945, also included an analysis of the defining language of the proposed statute:

The word "authority" is advisedly used as meaning whatever persons are vested with powers to act (rather than the mere form of agency organization such as department, commission, board, or bureau) because the real authorities may be some subordinate or semidependent person or persons within such form of organization. In conferring administrative powers, statutes customarily do not refer to formal agencies (such as the Department of Agriculture) but to specified persons (such as the Secretary of Agriculture). Boards or commissions usually possess authority which does not extend to individual members or to their subordinates.³⁷

The report of the House Judiciary Committee, issued in May 1946, included a single paragraph of explanation of the use of the term "agency":

³⁶ STAFF OF SENATE COMM. ON THE JUDICIARY, 79TH CONG., 1ST SESS., REPORT ON THE ADMINISTRATIVE PROCEDURE ACT 13 (Comm. Print 1945).

³⁷ S. REP. NO. 752, 79TH CONG., 1ST SESS. 10 (1945).

Whoever has the authority is an agency, whether within another agency or in combination with other persons. In other words agencies, necessarily, cannot be defined by mere form such as departments, boards, etc. If agencies were defined by form rather than by the criterion of authority, it might result in the unintended inclusion of mere "house-keeping" functions or the exclusion of those who have the real power to act.³⁸

A further source that may be helpful in ascertaining Congress' intention in passing section 2 is the *Attorney General's Manual on the Administrative Procedure Act*, issued in 1947. The *Manual* states:

This definition was adopted in recognition of the fact that the Government is divided not only into departments, commissions, and offices, but that these agencies, in turn, are further subdivided into constituent units which may have all the attributes of an agency insofar as rule making and adjudication are concerned. For example, the Federal Security Agency is composed of many authorities which, while subject to the overall supervision of that agency, are generally independent in the exercise of their functions. Thus, the Social Security Administration within the Federal Security Agency is in complete charge of the Unemployment Compensation provisions of the Social Security Act. By virtue of the definition contained in Section 2(a) of the Administrative Procedure Act, the Social Security Administration is an agency, as is its parent organization, the Federal Security Agency.³⁹

A later Attorney General, who participated in drafting the Freedom of Information Act provisions that became section 3 of the APA,⁴⁰ subsequently issued a memorandum describing the agencies to which the new section—and hence the whole of the APA—applied:

By its first two words ["Every agency"], the introductory clause of the enactment makes it clear at the outset that its requirements are to apply to every department, board, commission, division, or other organizational unit in the executive branch. This results from the definition of the term "agency" in Section 2(a) of the APA as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency"⁴¹

These few paragraphs comprise essentially all of the legislative history specifically directed to the meaning of section 2's defining lan-

³⁸ H.R. REP. No. 1980, 79th Cong., 2d Sess. 19 (1946).

³⁹ ATTORNEY GENERAL'S MANUAL 9-10.

⁴⁰ 5 U.S.C. § 552 (Supp. V, 1970).

⁴¹ ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 4 (1967).

guage. Fragmentary though they are, they suggest, in Justice Frankfurter's helpful phrase, "the known temper of legislative opinion."⁴²

The theme that runs through the legislative history of section 2 is that an administrative agency is a part of government which is "generally independent in the exercise of [its] functions" and which "by law has authority to take final and binding action" affecting the rights and obligations of individuals, particularly by the characteristic procedures of rulemaking and adjudication.

This theme is consistent with the general conclusion of the Attorney General's Committee on Administrative Procedure, which "regarded as the distinguishing feature of an 'administrative' agency the power to determine, either by rule or by decision, private rights and obligations."⁴³ It is consistent with Professor Davis' general conclusion that an "administrative agency is a governmental authority, other than a court and other than a legislative body, which affects the rights of private parties through either adjudication or rulemaking."⁴⁴

If the legislative history on this point can be said to reflect a dominant "temper of legislative opinion," it is a desire to use the term "agency" to identify centers of gravity of the exercise of administrative power. Where a center of gravity lies, where substantial "powers to act" with respect to individuals are vested, there is an administrative agency for purposes of the APA.

The legislative materials indicate an intention to move beyond formal designations and charts of departmental organization to assess the realities of the exercise of administrative power. Thus, the title of the authority in question, whether it be "agency" or "board" or "bureau" or "office" or "department," is irrelevant to assessing the power it exerts. Similarly, the fact that an authority of government is "within" or "subject to the overall supervision of [another] agency" will not necessarily deprive it of the independence associated with agency status. If an authority is in "complete charge" of a program, it is an agency with respect to that program, despite its subordinate position in a larger departmental hierarchy. As the Attorney General's Committee on Administrative Procedure had said, "That term [agency] may appropriately be applied to subdivisions of departments—variously termed 'bureaus,' 'offices,' 'services,' and the like—which have a substantial measure of independence in the departments' internal organiza-

⁴² F. FRANKFURTER, *The Reading of Statutes*, in OF LAW AND MEN 44, 61 (P. Elman ed. 1956).

⁴³ FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 7 (1941) [hereinafter cited as ATTORNEY GENERAL'S FINAL REPORT].

⁴⁴ 1 K. DAVIS § 1.01, at 1.

tion and in the conduct of their adjudicatory or rule-making activities.”⁴⁵

Perhaps more important, the legislative history indicates that the fact that an authority’s actions are subject to appeal to and review by “some superior administrative authority” will not necessarily deprive them of the conclusive character associated with agency status under the APA. Nor will the fact that the authority exercises its power “in combination with other persons” necessarily deprive it of the agency status intended by the APA. The “criterion of authority” by which the APA measures agency status does not require that an agency exercise its power with complete independence, either vertically (in terms of being subject to administrative review) or horizontally (in terms of being required to act in concert with others).

What the legislative history of section 2 seems to teach, then, is that Congress, in using the term “agency,” intended the APA to apply to authorities of government which are the center of gravity for the exercise of substantial power against individuals.

Several caveats are necessary. First, a definition stated thus broadly is not self-applying. It is an abstract proposition that does not neatly decide concrete cases. Its usefulness lies in the fact that it indicates a mood; it does not require a result. Second, particular sentences and phrases appearing in the legislative history cannot be read literally without doing violence to good sense and sound administrative practice. They suggest Congress’ intention that “agency” be given a liberal as opposed to a restricted interpretation, but they are susceptible, if good sense and sound practice are ignored, of application in a manner that would create inappropriate and incongruous results. Third, if statutory interpretation, as Judge Learned Hand said, is “the art of proliferating a purpose,”⁴⁶ it would be shortsighted to draw the purpose of the APA only from the legislative history of section 2. The conclusions suggested by the legislative history of section 2 must be placed in the context of the purposes underlying passage of the APA as a whole.

In *Wong Yang Sung v. McGrath*,⁴⁷ the Supreme Court pointed to two of the several purposes of the APA. The first purpose—“to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies” of the federal government—is not relevant to the present inquiry; the APA will apply to whichever authority is determined to be the agency. But the second

⁴⁵ ATTORNEY GENERAL’S FINAL REPORT 7.

⁴⁶ *Brooklyn Nat’l Corp. v. Commissioner*, 157 F.2d 450, 451 (2d Cir.), cert. denied, 329 U.S. 733 (1946).

⁴⁷ 339 U.S. 33, 41 (1950).

purpose mentioned by the Court—"to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge"—is highly relevant to interpreting the meaning of section 2's use of the term "agency."

Prior to the passage of the APA, a generation of commentators had described the unwholesome consequences that resulted from the combination of investigatory, prosecutorial, and adjudicatory functions in a single person or agency.⁴⁸ The Court in *Wong Yang Sung* devoted a major part of its opinion to reciting the consistent conclusions of those who had studied the problem that it was imperative that Congress "ameliorate the evils [resulting] from the commingling of functions."⁴⁹

Congress' particularized response to what was recognized by 1946 as a pervasive evil is of great significance. Section 5 of the APA provides that "[a]n employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review . . . except as witness or counsel in public proceedings."⁵⁰ As the Court noted in *Wong Yang Sung*, however, "[t]he Administrative Procedure Act did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions."⁵¹ Section 5 goes on to provide that the prohibition against combination of functions "does not apply . . . (C) to the agency or a member or members of the body comprising the agency."⁵²

Thus, although Congress imposed a wide prohibition on the combination of functions, the practical necessity of holding members of an agency responsible for administration of a coordinated program prevented Congress from applying the prohibition against the agency itself. Of all of the members of the federal administrative establishment, only the agency, which had the ultimate responsibility for the effective exercise of administrative power, would be permitted to commingle functions.

These facts suggest the importance that Congress attached to the elimination of the combination of functions generally and the necessity that Congress perceived of creating an exception at the agency level alone. Congress' use of the term "agency" in section 2 must be read,

⁴⁸ See, e.g., ADMINISTRATIVE MANAGEMENT IN THE GOVERNMENT OF THE UNITED STATES, REPORT OF THE PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT 40 (1937); ATTORNEY GENERAL'S FINAL REPORT 56; Nathanson, *Separation of Functions Within Federal Administrative Agencies*, 35 ILL. L. REV. 901 (1941).

⁴⁹ 339 U.S. at 46.

⁵⁰ 5 U.S.C. § 554(d) (Supp. V, 1970).

⁵¹ 339 U.S. at 46.

⁵² 5 U.S.C. § 554(d) (Supp. V, 1970).

then, in the light of the resolution it made in section 5 of the combination of functions problem.

A definition of "agency" turning upon only the exercise of substantial authority would reach a number of second-level employees, such as division chiefs, in any government office. To confer agency status on such employees would be to permit them to commingle functions, a result contrary to Congress' intention to limit the persons who may engage in that practice to those exercising authority at the highest level only. Conversely, a definition of "agency" turning upon only formal retention of supervisory authority would often confer agency status in executive departments upon cabinet members alone. To limit agency status to cabinet members would be to deny the necessary authority to commingle functions to those below cabinet level who are responsible in every real sense for the effective administration of a program.

C. *Judicial Decisions*

The legislative history of section 2 and the purposes of Congress in enacting a general prohibition against the combination of functions acquire a special prominence because of the paucity of judicial decisions on the meaning of "agency." Only two cases appear to have decided in proceedings which contested the point whether a particular authority of government was an agency for purposes of the APA.

In *Larche v. Hannah*,⁵³ the district court held that the Civil Rights Commission was an agency within the meaning of the APA and therefore was required to grant witnesses appearing at its investigative hearings section 5 rights of notice and section 7 rights of cross-examination. The only reasons that court gave for its holding were these:

It performs quasi-judicial functions in its hearings, its fact findings, its studies of "legal developments constituting a denial of equal protection of the laws under the Constitution", and its appraisal of "the laws and policies of the Federal Government" in the same respect. It "adjudicates" by its rulings upon the admissibility of evidence at its hearings and by its determinations of what is or is not the truth in matters before it. Thus we think that the Commission is subject to the provisions of . . . the Administrative Procedure Act⁵⁴

The court based its finding that the Civil Rights Commission was an agency upon the conclusion that it had the authority to adjudicate.

⁵³ 176 F. Supp. 791 (W.D. La, 1959).

⁵⁴ *Id.* at 796-97.

This conclusion was rejected by the Supreme Court, which said, in reversing on other grounds, that the Commission's "function is purely investigative and fact-finding. It does not adjudicate."⁵⁵ The Court therefore held that because "the Civil Rights Commission performs none of the functions [adjudication and rulemaking] specified in" sections 5 and 7, their requirements did not apply to its investigatory hearings.⁵⁶ The Court did not decide whether the Commission was an "agency" within the meaning of section 2.

In *Adams v. Witmer*,⁵⁷ the Court of Appeals for the Ninth Circuit held that the Bureau of Land Management was an agency for purposes of the APA. The difficulty is that the court did not attempt to rationalize its holding or to describe its understanding of what the term "agency" means. Its failure in these respects is surprising because several characteristics of the Bureau would seem to invite discussion: the Director is appointed by the Secretary of the Interior, rather than by the President; the Director reports to an Assistant Secretary of the Interior; and decisions of the Director are subject to appeal to the Secretary. For this reason, the decision is of small value as precedent and as instruction in the meaning of "agency."

No other judicial decisions offer guidance in defining "agency" for APA purposes.⁵⁸

D. Administration of OFDI

By Department Order 184-A, the Secretary of Commerce delegated to the Director of OFDI "the functions, authorities, and responsibilities" with respect to foreign direct investment that he had received by executive order from the President.⁵⁹ The language of the Department Order provided that the delegation was made "subject to such policies, limitations, and directions as the Secretary may prescribe." The Director was authorized to redelegate "subject to such conditions and limitations as the Secretary may deem desirable." The Department Order further provided that the Director "report and be responsible to the Secretary," "[a]dminister the regulations issued by the Secretary," "[p]rovide advice and assistance to the Secretary," and "[p]rovide a basis for policy formulation of the Department [of Commerce] with respect to direct investment abroad and related matters."

⁵⁵ *Hannah v. Larche*, 363 U.S. 420, 441 (1960).

⁵⁶ *Id.* at 453.

⁵⁷ 271 F.2d 29 (9th Cir. 1958).

⁵⁸ See *McEachern v. United States*, 321 F.2d 31, 33 (4th Cir. 1963); *Hurley v. Reed*, 238 F.2d 844, 845 (D.C. Cir. 1961); *Soucie v. DuBridge*, 39 U.S.L.W. 2123 (D.D.C. Sept. 8, 1970); *Pan American Petroleum Corp. v. Udall*, 192 F. Supp. 626, 630 (D.D.C. 1961).

⁵⁹ 33 Fed. Reg. 54 (1968).

The terms of the delegation thus reserve a degree of authority in the Secretary. To ascertain the relevance of that reservation to the determination of who is the agency, it is important to analyze carefully the nature of the authority reserved and to compare it closely with the functional realities of the Foreign Direct Investment Program.

The requirements that the Director of OFDI "report and be responsible to the Secretary" and act "subject to such policies, limitations, and directions as the Secretary may prescribe" are not decisive. First, supervision by a cabinet member is common, if not implicit, in the creation of an office within the executive department which he heads.⁶⁰ Second, the right of the delegator to take back some of his authority is implicit in any delegation. Even absent the explicit reservations appearing in the Department Order, the Secretary would retain the right subsequently to impose limitations upon the Director's exercise of the delegated authority.

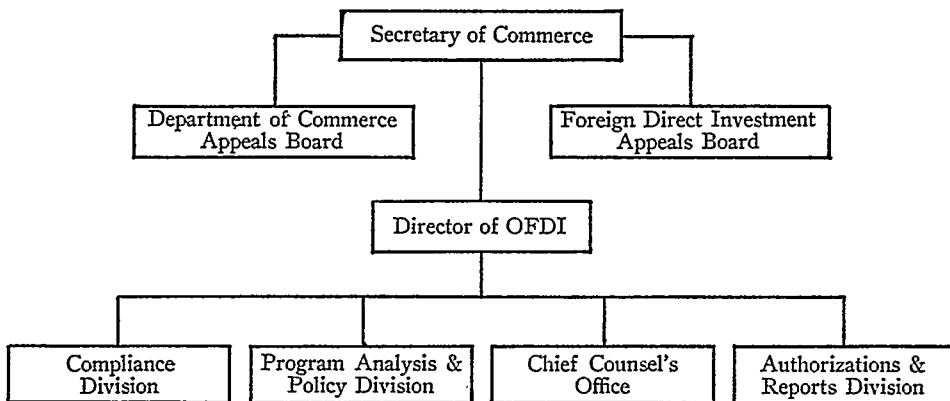
The Secretary's reservation of authority is less important than how he has exercised it. The Secretary has not formally prescribed any substantive policies, limitations, or conditions to govern the Director's administration of the Foreign Direct Investment Program. No regulation requires the Director to consult with the Secretary. In terms of day-to-day operations and of policy formulation, the Director independently exercises "the functions, authorities, and responsibilities" which the Secretary delegated to him. The Director is in charge of the staff and makes almost all of the policy decisions which administration of OFDI requires. It is the Director who decides whether the agency should grant or deny applications for specific authorizations, one of OFDI's most important functions. It is the Director who in practice exercises final responsibility for the content of OFDI's regulations. It is the Director, or a person acting on his behalf, who decides whether to begin an investigation of a direct investor, whether to accept a consent settlement, and whether to bring a compliance proceeding. In these areas, where matters of administration and policy intersect, the Director has made his determinations independent of the Secretary.

In some respects, however, the Director lacks similar independence. First, he does not participate directly in the fundamental decision of the amount of annual allowables, which is made by the Cabinet Committee on Balance of Payments.⁶¹ Because the Secretary is a member

⁶⁰ See, e.g., Dep't of Commerce Order No. 117-A, 31 Fed. Reg. 8087 (1966) (Maritime Administration).

⁶¹ For an illustration of the work of the Cabinet Committee on Balance of Payments, see Letter from Henry H. Fowler, Secretary of the Treasury and Chairman of the Cabinet Committee on Balance of Payments, to Lyndon B. Johnson, Dec. 17, 1968, CCH BAL. PAYM. REP. ¶ 9095.

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of the Cabinet Committee, he plays a greater part in this decision-making process than the Director. Second, the Director's decisions to deny a specific authorization are appealable to the Foreign Direct Investment Appeals Board,⁶² named by the Secretary, and decisions of hearing officers in compliance cases are not appealed to the Director but go directly to the Department of Commerce Appeals Board,⁶³ also named by the Secretary. Because no compliance cases have been brought, no appeals have been taken to the Department of Commerce Appeals Board. Although its power to reverse the decision of a hearing officer is limited,⁶⁴ the Appeals Board does participate in adjudicatory decisions by authority of the Department of Commerce.

The requirements in Department Order 184-A that the Director "[p]rovide advice and assistance to the Secretary" and "[p]rovide a basis for policy formulation of the Department with respect to direct investment abroad and related matters" impose informational duties upon the Director. They give expression to the fact that the Secretary is the head of the executive department in which OFDI is located and that he has wide responsibilities with respect to international commerce. They do not indicate the actual exercise of authority within OFDI.

Finally, the Department Order requires that the Director "[a]dminister the regulations issued by the Secretary." Some of OFDI's regulations have been signed by the Secretary, including, of course, the initial regulations issued simultaneously with the President's Execu-

⁶² 15 C.F.R. § 1000.802(c)(1) (1970).

⁶³ *Id.* § 1035.102(a).

⁶⁴ *Id.* § 1035.108(a).

tive Order and those subsequent regulations thought to enlarge or clarify the powers of the Director. The rest of OFDI's regulations have been signed by the Director. These facts suggest that the Department Order did not mean to limit the authority to issue regulations to the Secretary alone.

E. Analysis and Conclusion

Measured by the "criterion of authority" that the legislative history suggests as the test of agency status, the facts indicate the basis for arguing that the Director is the agency. In terms of operational realities, the Director has been primarily responsible for the actual exercise of authority in the administration of the Foreign Direct Investment Program. He has acted independently in granting and denying applications for specific authorizations, in issuing substantive regulations, in authorizing investigations, and in approving consent settlements. These are actions which seriously affect the rights and obligations of individuals. The Secretary's actual intervention in the Director's exercise of authority has been minimal.

But the argument that the Director is the agency must take account of the following considerations:

First, the Secretary issued OFDI's initial regulations and has issued some subsequent regulations. It was, of course, necessary that the Secretary issue the initial regulations if substantive regulation was to begin at the time that the President announced his intention to control foreign direct investment. The subsequent regulations issued by the Secretary were intended to increase the substantive authority of the Director by enlarging or clarifying the Secretary's original delegation. Although the subsequent regulations may be regarded as announcing rules affecting individuals, the Secretary's intention seems to have been to transfer authority to the Director or to confirm authority that he already possessed. The most recent practice suggests that henceforth OFDI's regulations will be issued by the Director.

Second, the Director's decision to deny an application for a specific authorization may be appealed to the Foreign Direct Investment Appeals Board, whose members are named by the Secretary. Because a time element is important in many applications for specific authorizations, few appeals are likely to be taken. Moreover, the qualifying language of section 2—"whether or not it is within or subject to review by another agency"—suggests that an authority of government may retain sufficient power and independence in the exercise of its functions to be considered an agency despite the availability of reviewing mechanisms implying a subordinate position in a larger depart-

mental hierarchy. The power of the Foreign Direct Investment Appeals Board to reverse the Director's decisions is limited to instances of "unusual hardship" or inconsistency with "the goals and objectives" of the President's Executive Order.⁶⁵ These grounds do not seriously threaten the finality of the Director's decisions.

Finally, the Director does not participate directly in the important determination of the amount of the annual allowables, although the Secretary solicits his views and recommendations. The Secretary does participate to the extent that he is a member of the Cabinet Committee on Balance of Payments, but he too lacks the authority of independent decision which characterizes agency status.

In the respects discussed so far, then, the Director is the center of gravity for the exercise of governmental authority against individuals. Because he meets the criterion of the "power to act" independently, set down as the dominant theme in the legislative history, the argument that he is the agency in these respects is persuasive.

The argument is difficult to sustain, however, with respect to adjudication. Although the Director participates in the negotiation and acceptance of consent settlements, he plays no part in the decision of appeals in compliance proceedings. Under OFDI's regulations the Department of Commerce Appeals Board, not the Director, hears appeals from the decisions of hearing officers in such proceedings. Section 2 provides that an authority of government may be an agency even if it is "subject to review by another agency." If the Director participated in the adjudicatory process to the extent of rendering a decision subject to review, it might be argued that his authority was not inconsistent with agency status for purposes of adjudication: on similar facts, the court so held in *Adams v. Witmer*⁶⁶ with respect to the Bureau of Land Management. The argument is difficult to make when appeals bypass the Director entirely.

The Appeals Board, whose authority derives from the Secretary, is authorized to "consider appeals by persons affected by . . . administrative actions taken pursuant to law and referred to the Board by appropriate authority."⁶⁷ The Department Order provides that decisions by the Appeals Board "shall be final." OFDI's regulations authorize the Appeal Board to make final administrative determinations in respect to adjudicatory appeals and make no provision for appeal to the Secretary from a decision of the Appeals Board.⁶⁸ The Appeals

⁶⁵ *Id.* § 1000.802(c)(1).

⁶⁶ 271 F.2d 29 (9th Cir. 1959).

⁶⁷ 25 Fed. Reg. 2603 (1960).

⁶⁸ 15 C.F.R. § 1035.102(a) (1970).

Board thus has authority "to take final and binding" administrative action in determining the rights of individuals.

The authority of an administrative agency to act by means of adjudication is a powerful sanction for administering its program and for enforcing its substantive regulations. Even if the negotiation and acceptance of consent settlements is regarded as part of the adjudicatory process, the heart of the process is the power to decide appeals. If the "criterion of authority"—which the legislative history of section 2 suggests as the measure of agency status—is to be a meaningful standard in this area, the agency must have the power to decide adjudicatory appeals. Because the Appeals Board rather than the director has the "real power to act," it follows that the Appeals Board is the agency for purposes of adjudication.

The conclusion that the Director is the agency for some purposes and the Appeals Board for others is more plausible than any of the alternate possibilities.⁶⁹ The Director is the center of gravity for the exercise of the Foreign Direct Investment Program's rulemaking authority; the Appeals Board is the center of gravity for the exercise of its final adjudicatory authority.

This bifurcated arrangement—perhaps the result of inadvertence or indirection in the drafting of OFDI's regulations—is not compelled by any general principle of law. The Director could be made the agency for purposes of adjudication as well by amending the regulations to authorize him to hear adjudicatory appeals from decisions of hearing officers in compliance proceedings.

III. APPLICATION OF THE ADMINISTRATIVE PROCEDURE ACT TO COMPLIANCE PROCEEDINGS

Section 5 of the APA applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."⁷⁰ If section 5 is applicable to a proceeding,

⁶⁹ It is not unusual for an agency to possess authority to exercise certain functions but to lack authority to exercise others. Thus, separate agencies participate in the administration of the tax laws, the Treasury Department and the Internal Revenue Service having only rulemaking authority, the Tax Court having only adjudicatory authority. As Professors Gellhorn and Byse have pointed out, in speaking of the wide range of federal administrative agencies,

some of them (like the Federal Trade Commission) have virtually no rulemaking power; others (like the Wage and Hour Division of the Department of Labor) have virtually no adjudicatory power; some (like the workmen's compensation agencies of most states) rarely investigate; others (like the Social Security Administration) do no "prosecuting"; and still others (like the Federal Communications Commission) judge few proceedings they themselves have initiated.

W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW, CASES AND COMMENTS* 1018-19 (4th ed. 1960).

⁷⁰ 5 U.S.C. § 554 (Supp. V, 1970).

sections 7 and 8⁷¹ are also applicable. These sections supply the statutory guidelines for adjudicatory proceedings.

It is clear that the "formal administrative proceedings" contemplated by OFDI's compliance regulations⁷² are "case[s] of adjudication" within the meaning of section 5. Section 2 of the APA defines adjudication as "agency process for the formulation of an order"⁷³ and order as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing."⁷⁴ Compliance proceedings are adjudications because they are designed to result in the formulation of an order rather than a rule.⁷⁵ In addition, unlike rulemaking, they are directed at individual conduct in individual cases and are "characterized by an accusatory flavor and may result in disciplinary action."⁷⁶

A. "Required by Statute"

Section 5 applies only when an adjudication is "required by statute to be determined on the record after opportunity for an agency hearing." For this provision to become operative the asserted statutory requirement of a hearing must be explicit. As the *Attorney General's Manual on the Administrative Procedure Act* states:

The legislative history makes clear that the word "statute" was used deliberately so as to make sections 5, 7, and 8 applicable only where the Congress has otherwise *specifically* required a hearing to be held. . . . Mere statutory authorization to hold hearings (*e.g.*, "such hearings as may be deemed necessary") does not constitute such a requirement.⁷⁷

This reading of the "required by statute" language has been followed consistently by the courts.⁷⁸

It is necessary, then, to determine whether any language in the Trading with the Enemy Act, or in Executive Order 11387, or in Department Order 184-A can fairly be construed as requiring that compliance proceedings be determined on the record after opportunity for a hearing.

⁷¹ *Id.* §§ 556, 557.

⁷² 15 C.F.R. § 1030.111-.521 (1970).

⁷³ 5 U.S.C. § 551(7) (Supp. V, 1970).

⁷⁴ *Id.* § 551(6).

⁷⁵ 15 C.F.R. § 1030.514(b) (1970).

⁷⁶ ATTORNEY GENERAL'S MANUAL 14.

⁷⁷ *Id.* 41 (emphasis in original) (citation omitted).

⁷⁸ See, *e.g.*, *First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 267, 270 (4th Cir. 1965).

Section 5(b) of the Trading with the Enemy Act provides:

(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition[,] holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States⁷⁹

The language of section 5(b) contains no indication, either explicit or ambiguous, of a requirement of a hearing in connection with any functions undertaken by the President pursuant to its authority. In light of the wide and unusual national emergency powers granted to the President, it would be surprising if Congress had placed procedural requirements upon his exercise of them.⁸⁰

Executive Order 11387, by which the President set in motion the procedures that led to the creation of OFDI, provides:

[1.] (b) The Secretary of Commerce is authorized to require, as he determines to be necessary or appropriate to strengthen the balance of payments position of the United States, that [direct investors be made subject to certain restrictions].

. . . .

[3.] The Secretary of Commerce [is] authorized, under authority delegated to [him] under this Order or otherwise available to [him], to carry out the provisions of this Order, and to prescribe such definitions for any terms used herein,

⁷⁹ 12 U.S.C. § 95a (1964).

⁸⁰ Cf. *Pike v. United States*, 340 F.2d 487 (9th Cir. 1965); *Eisner, Administrative Machinery and Steps for the Lawyer*, 11 LAW & CONTEMP. PROB. 61, 64 (1945); *Reeves, The Control of Foreign Funds by the United States Treasury*, 11 LAW & CONTEMP. PROB. 17 (1945).

to issue such rules and regulations, orders, rulings, licenses and instructions, and take such other actions, as [he] determines to be necessary or appropriate to carry out the purposes of this Order. . . .⁸¹

Even if one assumes that the Executive Order has the force of a statute, there is no indication in its language that the President intended to require that hearing be held in connection with the exercise of any of the authority that it delegates.

Finally, Department Order 184-A, whether or not it has the force of a statute, imposes no hearing requirement upon the exercise of any authority or function it delegates to the Director of OFDI.

The absence in the Trading with the Enemy Act, Executive Order 11387, and Department Order 184-A of explicit language requiring a hearing in the determination of compliance proceedings means that those proceedings are not adjudications "required by statute" within the meaning of section 5 of the APA, unless—as the next paragraphs explore—a hearing is constitutionally compelled.

B. *Constitutional Requirement of a Hearing*

Because of the decision of the Supreme Court in *Wong Yang Sung v. McGrath*,⁸² section 5 must be given a broader interpretation than its words might literally suggest.

Wong Yang Sung involved a challenge to a deportation order resulting from a hearing that had not complied with sections 5, 7, and 8 of the APA. The Government sought to justify the noncompliance by arguing that because the Immigration Act contained no express requirement of a hearing, deportation orders were not "required by statute to be determined on the record after opportunity for an agency hearing." The question was whether the Immigration Act was a statute which made section 5 of the APA applicable. After concluding that the "legislative history [of section 5] is more conflicting than the text is ambiguous,"⁸³ the Court held:

But the difficulty with any argument premised on the proposition that the deportation statute does not require a hearing is that, without such hearing, there would be no constitutional authority for deportation. The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body. It

⁸¹ Exec. Order No. 11,387, 3 C.F.R. § 433 (1970), 12 U.S.C. § 95a (Supp. V, 1970).

⁸² 339 U.S. 33 (1950).

⁸³ *Id.* at 49.

was under compulsion of the Constitution that this Court long ago held that an antecedent deportation statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here some time even if illegally. The Court said:

“This is the reasonable construction of the acts of Congress here in question, and they need not be otherwise interpreted. In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution.” *The Japanese Immigrant Case*, 189 U.S. 86, 101.

We think that the limitation to hearings “required by statute” in § 5 of the Administrative Procedure Act exempts from that section’s application only those hearings which administrative agencies may hold by regulation, rule, custom, or special dispensation; not those held by compulsion. We do not think the limiting words render the Administrative Procedure Act inapplicable to hearings, the requirement for which has been read into a statute by the Court in order to save the statute from invalidity. They exempt hearings of less than statutory authority, not those of more than statutory authority. We would hardly attribute to Congress a purpose to be less scrupulous about the fairness of a hearing necessitated by the Constitution than one granted by it as a matter of expediency.⁸⁴

Subsequent decisions of the Supreme Court have made clear that *Wong Yang Sung* states a general statutory construction of section 5, rather than an interpretation which may be limited by the fact that deportation proceedings traditionally have been an area of constitutional solicitude.⁸⁵ The consequence is that an adjudicatory hearing is “required by statute” and sections 5, 7, and 8 of the APA are applicable whenever the Constitution commands that a hearing be provided.

The Supreme Court has most commonly announced a constitutional requirement that a trial-type hearing be held after determining that the case in issue involved adjudicative rather than legislative facts.⁸⁶ “Adjudicative facts,” as Professor Davis has written in summarizing this line of case development, “are the facts about the parties and their activities, businesses, and properties. Adjudicative facts

⁸⁴ *Id.* at 49-50.

⁸⁵ *Cf.* *Marcello v. Bonds*, 349 U.S. 302 (1955); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33 (1952); *Riss & Co. v. United States*, 341 U.S. 907 (1951), *rev’d per curiam* 96 F. Supp. 452 (W.D. Mo. 1950).

⁸⁶ *See, e.g.*, *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886 (1961); *Southern Ry. v. Virginia*, 290 U.S. 190 (1933).

usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.”⁸⁷ Thus, in two early and leading cases, the Supreme Court held that a “relatively small number of persons” were entitled constitutionally to a hearing on the validity of tax assessments levied against them to compensate the municipality for paving the street in front of their homes, because each case turned upon individual grounds,⁸⁸ but that taxpayers had no constitutional right to a hearing when a taxing authority raised the valuation of all taxable property generally, without regard to individual cases.⁸⁹

These principles make clear that a trial-type hearing is constitutionally compelled in compliance proceedings. These proceedings are concerned with individual instances of possible violation of OFDI’s regulations. More important, they require finding of facts on such individualized issues as willfulness and bad faith—adjudicative facts which are “intrinsicly the kind of facts that ordinarily ought not to be determined without giving the parties a chance to know and to meet any evidence that may be unfavorable to them, that is, without providing the parties an opportunity for trial [because] the parties know more about the facts concerning themselves and their activities than anyone else is likely to know, and the parties are therefore in an especially good position to rebut or explain evidence that bears upon adjudicative facts.”⁹⁰

Moreover, the Supreme Court has said that “consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.”⁹¹ Direct investors have important individual interests at stake in compliance proceedings. As OFDI’s regulations make clear, direct investors can be subjected to orders that impose sanctions, whether they be regarded as remedial or disciplinary.⁹² Thus, an order resulting from a compliance proceeding may require a direct investor to repatriate all or part of certain

⁸⁷ 1 K. DAVIS, *supra* note 35, at § 7.02, at 413; *see* H. WADE, *TOWARDS ADMINISTRATIVE JUSTICE* 120 (1963).

⁸⁸ *Londoner v. City of Denver*, 210 U.S. 373 (1908).

⁸⁹ *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915).

⁹⁰ 1 K. DAVIS, *supra* note 35, at § 7.02, at 413.

⁹¹ *Cafeteria Workers Local 473 v. McElroy*, 367 U.S. 886, 895 (1961).

⁹² 15 C.F.R. § 1030.514(c) (1970); *cf.* 5 U.S.C. § 551(10) (Supp. V, 1970).

foreign earnings or balances, or cause affiliated foreign nationals to make transfers of capital to the direct investor.⁹³ Such an order may also "for 1 or more years withdraw all or part of respondent's general authorizations or exemptions" and prohibit certain kinds of foreign direct investment.⁹⁴ Orders including such terms obviously impose restrictions upon a direct investor. They deny him privileges allowed to others under the Foreign Direct Investment Program. These restrictions go beyond merely enjoining one who has violated the law from violating it again, and in this respect are more severe than the sanctions typically imposed by the Federal Trade Commission or the National Labor Relations Board. When consequences similar to the loss of such privileges have been involved, the protections afforded by a trial-type hearing have been held most necessary.⁹⁵

These principles describing the constitutional requirement of a hearing apply in all but a few exceptional cases. An administrative hearing is not required when hearings are inferior as a method of inquiry to inspection, examination, or testing,⁹⁶ or when emergency action of a temporary character is necessary to protect the public interest, as when food is unfit⁹⁷ or drugs are mislabelled,⁹⁸ or when the conduct of a bank's officers is under investigation.⁹⁹ None of these exceptions applies to compliance proceedings against direct investors. A trial-type hearing is the superior method of ascertaining the facts and there is no obvious necessity for administrative action in advance of the time required to conduct a hearing.

C. Foreign Affairs Functions

One final issue must be considered. OFDI exercises authority that derives, ultimately, from the power of Congress and the President in the area of foreign affairs. The power of the President with respect to foreign affairs is obviously great. Its exercise traditionally has been subject to fewer procedural safeguards than almost any other legislative or executive power. The Supreme Court has recognized

⁹³ 15 C.F.R. § 1030.514(c) (1) (1970).

⁹⁴ *Id.* § 1030.514(c) (2).

⁹⁵ *See, e.g.,* Goldberg v. Kelly, 397 U.S. 254 (1970); Jenkins v. McKeithen, 395 U.S. 411 (1969); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963); Goldsmith v. United States Bd. of Tax Appeals, 270 U.S. 117 (1925); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

⁹⁶ *See* 1 K. DAVIS, *supra* note 35, at § 7.09, and cases cited therein. *See also* Miller v. Horton, 152 Mass. 540, 26 N.E. 100 (1891).

⁹⁷ North Am. Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908); Adams v. City of Milwaukee, 228 U.S. 572 (1913).

⁹⁸ Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950).

⁹⁹ Fahey v. Mallonee, 332 U.S. 245 (1947). *See also* Sniadach v. Family Finance Corp., 395 U.S. 337, 339 (1969) (citing cases).

that "within the international field Congress must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved."¹⁰⁰ "We should long hesitate before limiting or embarrassing such powers." ¹⁰¹

The balance of payments crisis which led to the creation of the Foreign Direct Investment Program was clearly in the area of foreign affairs. The purpose of the Program was to reduce the proportions of the crisis in the interest of strengthening the monetary position of the United States vis-à-vis other countries. One of the premises upon which the Program rests is that "[h]ard currency is a weapon in the struggle between the free and the communist worlds."¹⁰² The provision of the Trading with the Enemy Act under which the President acted applies only "[d]uring the time of war or during any other period of national emergency declared by the President."¹⁰³ Executive Order 11387 requires the Secretary of State to advise the Secretary of Commerce "with respect to matters under this Order involving foreign policy."¹⁰⁴ Many of OFDI's substantive regulations—for example, the schedules governing the amount of direct investment permissible in particular countries¹⁰⁵—are related directly to the United States' foreign policy goals in various parts of the world. Certainly the purpose and structure of the Foreign Direct Investment Program rest in considerable part upon foreign policy considerations. The question is whether these facts are sufficient to render section 5 of the APA inapplicable to compliance proceedings.

The decision in *Korematsu v. United States*¹⁰⁶ sustains the exercise of extensive executive authority over individuals but, to the degree that it has not been discredited by the judgment of history,¹⁰⁷ it rests finally upon the existence of a war which threatened the nation's

¹⁰⁰ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936). See *Zemel v. Rusk*, 381 U.S. 1 (1965); cf. *United States v. Travis*, 241 F. Supp. 468 (S.D. Cal. 1963), *aff'd per curiam*, 344 F.2d 506 (9th Cir. 1965), *rev'd on other grounds*, 385 U.S. 491 (1967).

¹⁰¹ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322 (1936) (quoting *Mackenzie v. Hare*, 239 U.S. 299, 311 (1915)) (italics by Court in *Curtiss-Wright* omitted).

¹⁰² *Sardino v. Federal Reserve Bank*, 361 F.2d 106, 112 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966). See also *Teague v. Regional Comm'r of Customs*, 404 F.2d 441 (2d Cir. 1968), *cert. denied*, 394 U.S. 977 (1969).

¹⁰³ 12 U.S.C. § 95a (1964).

¹⁰⁴ Exec. Order No. 11,387, 3 C.F.R. 433 (1970), 12 U.S.C. § 95a (Supp. V, 1970).

¹⁰⁵ 15 C.F.R. § 1000.319 (1970).

¹⁰⁶ 319 U.S. 432 (1943).

¹⁰⁷ See Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945), reprinted in E. ROSTOW, *THE SOVEREIGN PREROGATIVE* 193 (1962).

survival.¹⁰⁸ The national emergency and the balance of payments crisis which resulted in the creation of the Foreign Direct Investment Program cannot be regarded as fair equivalents of World War II.

There is expansive language in *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*¹⁰⁹ sustaining the unreviewability of the President's exercise of discretion in granting his approval, required by statute, of a CAB order which awarded an overseas air route. The Court denied review because "the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions . . . are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil."¹¹⁰ The decision in *Waterman* differs from the present facts in two significant respects. First, the decision which the Court was asked to review had been made by the President himself, rather than by an agency which he had created; the Court's reluctance to undertake such a review is understandable. Second, the decision which the Court was asked to review—whether a new airline route to a foreign country should be established—may well have depended upon foreign policy considerations; such "delicate" and "complex" considerations are hardly likely to be present in most compliance proceedings, in which the issues are the more mundane ones of whether the direct investor exceeded his allowables and, if he did, whether his action was taken in good faith.

The argument that compliance hearings may not have to comply with the otherwise applicable constitutional requirement of a trial-type hearing because OFDI exercises the plenary power of the President and Congress over foreign affairs seems doubtful. It will be difficult to persuade a court that the balance of payments crisis is a national threat of the same order as World War II, or that a decision reached by OFDI's administrative processes is entitled to the same freedom from constitutional and statutory restraints as a decision of the President himself, or that an order entered in a compliance proceeding raises issues of the same foreign policy sensitivity as those implicated in an order granting an overseas air route.

Moreover, Congress has recognized that foreign policy considerations may arise in administrative proceedings and that it may be inappropriate to require full compliance with the APA on such occasions. Section 5 of the APA (and hence sections 7 and 8) does not

¹⁰⁸ See *Bowles v. Willingham*, 321 U.S. 503, 520 (1944); *Yakus v. United States*, 321 U.S. 414 (1944).

¹⁰⁹ 333 U.S. 103 (1948).

¹¹⁰ *Id.* at 111; cf. *Nielsen v. Secretary of the Treasury*, 424 F.2d 833, 845-46 (D.C. Cir. 1970).

apply "to the extent that there is involved . . . (4) the conduct of military or foreign affairs functions."¹¹¹ This language has not been subject to serious judicial interpretation. But a fair reading—particularly in light of the "to the extent that" phrasing—suggests that Congress did not intend totally to exclude an agency from application of the APA merely because it may have been created to meet problems related to the conduct of foreign policy or may have been assigned tasks whose achievement has foreign policy implications.¹¹² Rather, Congress seems to have intended that the APA apply to adjudications such as compliance proceedings conducted by agencies such as OFDI except "to the extent that" a particular proceeding would interfere with the conduct of foreign affairs functions and, as two Congressional committees said, "clearly provoke definitely undesirable international consequences."¹¹³

The decision of most compliance proceedings will not interfere with the conduct of foreign affairs functions and probably will not even implicate foreign policy considerations. Courts are likely to regard such proceedings as presenting routine instances of the administrative necessity to regulate by sanctions and remedies. One can imagine particular cases presenting challenges to OFDI regulations that rest upon foreign policy judgments, and in such cases the exemption in section 5 may become relevant. Similarly, compliance cases may sometimes threaten information which the Government regards as privileged, but there are evidentiary rules to deal with that possibility.¹¹⁴

The fact that Congress has created an exemption for proceedings that would interfere with the conduct of foreign affairs functions indicates its sensitivity to the prerogatives of the President in such matters. Because Congress has supplied a responsible resolution of the competing interests involved, it is unlikely that a court would hold that OFDI's compliance proceedings are entitled to greater immunity from the constitutional requirements of a trial-type hearing than section 5 provides.

D. Conclusion

Because compliance proceedings present issues of adjudicative fact that the Constitution requires be determined at trial-type hearing, they

¹¹¹ 5 U.S.C. § 554(4) (Supp. V, 1970).

¹¹² See *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 375 n.2 (2d Cir. 1968); *Timburg*, *supra* note 27.

¹¹³ S. REP. No. 752, 79th Cong., 1st Sess. 13 (1945); H.R. REP. No. 1980, 79th Cong., 2d Sess. 23 (1946); see text accompanying notes 22-33 *supra*.

¹¹⁴ See *United States v. Reynolds*, 345 U.S. 1 (1953).

are an "adjudication required by statute to be determined on the record after opportunity for an agency hearing" and thus are subject to the procedural requirements of sections 5, 7, and 8 of the APA.

IV. THE ROLE OF THE HEARING EXAMINER IN COMPLIANCE PROCEEDINGS

OFDI's regulations provide that compliance proceedings "shall be presided over by an individual designated by the Director of the Office" and that the individual named "shall not be employed by the Office in any investigative or prosecuting function, and shall not be subject to the supervision of the Director of the Compliance Division in any way."¹¹⁵

A. *Designation of a Presiding Officer*

It has earlier been concluded that compliance proceedings are "case[s] of adjudication required by statute to be determined on the record after opportunity for an agency hearing" within the meaning of section 5 of the APA. When section 5 applies to an administrative proceeding, so does section 7, which provides that only the "agency," or one of its members, or a hearing examiner selected by the Civil Service Commission "shall preside at the taking of evidence" in adjudications.¹¹⁶ OFDI's regulations would permit the designation as hearing officers of individuals who are neither the agency, nor members of the agency, nor hearing examiners selected by the Civil Service Commission.¹¹⁷ In this respect they are inconsistent with section 7 and therefore invalid.

If the Department of Commerce Appeals Board is the agency for purposes of adjudication, as has been concluded earlier, section 7 would permit one of its members to serve as the presiding officer at compliance hearings. Because of the significant responsibilities that members of the Appeals Board already carry, this alternative is impracticable.

If OFDI's regulations are amended to place adjudicatory appeals in the Director so that he becomes the agency for purposes of adjudication, section 7 would permit him to serve as the presiding officer at compliance hearings. Although this alternative may seem valuable in particular cases, its wisdom is doubtful as a regular practice.

Serving as the presiding officer in compliance proceedings may turn out to be a time-consuming job. A presiding officer must par-

¹¹⁵ 15 C.F.R. § 1030.431(a) (1970).

¹¹⁶ 5 U.S.C. § 556(b) (Supp. V, 1970).

¹¹⁷ 15 C.F.R. § 1030.431(a) (1970).

ticipate in the conference stages preceding the hearing, conduct the hearing itself, perhaps over an extended period of time, and prepare a report embodying his findings of fact and conclusions of law. If the volume of adjudications is great, the Director could be required to spend a significant part of his time on compliance hearings. Furthermore, by tradition and necessity, the presiding officer at adjudicatory hearings should be a lawyer, and it is likely that the Director of OFDI will sometimes be a person not trained in law.

Moreover, the person who is the agency usually does not serve as the presiding officer at adjudicatory hearings; the use of independent, impartial hearing examiners, trained by the Civil Service Commission, is overwhelmingly the norm in federal administrative proceedings. For the Director to serve as the presiding officer would create substantial doubts as to the fairness of the proceedings—for example, with respect to his ability to consider objectively challenges to the validity of OFDI regulations. It also might raise the question whether a person regularly engaged in the routine work of presiding at hearings is entitled to be regarded as the agency for purposes of adjudication.

It would therefore seem wise in the generality of cases to designate a hearing examiner selected by the Civil Service Commission as the presiding officer at compliance proceedings. Such a practice need not preclude the possibility of service by the Director in cases of the most unusual nature.

B. *Waiver of a Hearing Examiner*

The question has been raised whether OFDI should amend its regulations to give the Director the authority under some circumstances to designate a senior attorney in the Chief Counsel's office to serve as the presiding officer at compliance hearings in place of an APA section 11 hearing examiner. Two circumstances, for example, in which the regulations might give the Director such authority would be: (1) when the direct investor does not request the designation of a section 11 hearing examiner within a specified period of days, perhaps 20 or 30, after being informed in a notice served with the complaint in the compliance proceeding that failure to do so will result in a waiver of the right; (2) when the direct investor and the Director stipulate to the substitution of an OFDI attorney for a section 11 hearing examiner as the presiding officer.

The possibility that an agency may provide for waiver of a section 11 hearing examiner is raised by the Supreme Court's decision in *United States v. L. A. Tucker Truck Lines, Inc.*¹¹⁸ In that case

¹¹⁸ 344 U.S. 33 (1952).

the ICC had granted a certificate of public convenience and necessity to a trucker, over the objection of competitors, after a hearing conducted by a trial examiner who had not been appointed pursuant to section 11, the ICC taking the position that the hearing was not subject to the formal hearing requirements of the APA. Subsequent to the hearing, in *Riss & Co. v. United States*,¹¹⁹ the Supreme Court held that such hearings were governed by the APA and that failure to appoint a section 11 hearing examiner constituted reversible error. The contention in *Tucker* that the ICC's action was invalid because a hearing examiner had not been appointed pursuant to section 11 was raised for the first time in the district court, no objection having been taken at the hearing.

The Supreme Court dismissed the contention on the ground that no objection had been made in the administrative proceeding. The decision in *Riss & Co.*, it said, "established only that a litigant in such a case as this who does make such demand at the time of hearing is entitled to an examiner chosen as the Act prescribes."¹²⁰ The decision in *Tucker* thus is tied closely to the orthodox rule that a court will not consider objections to the validity of an administrative proceeding if the objections were not raised at the proceeding itself.

The decision is also tied closely to the facts of the case. In considering the competing truck line's failure to object to the status of the hearing officer, the Court noted:

The apparent reason for complacency was that it was not actually prejudiced by the conduct or manner of appointment of the examiner. There is no suggestion that he exhibited bias, favoritism or unfairness. Nor is there ground for assuming it from the relationships in the proceeding. He did not act and was not expected to act both as prosecutor and judge. The Commission, which appointed him, did not institute or become a party in interest to the proceeding. Neither it nor its examiner had any function except to decide justly between contestants in an adversary proceeding.¹²¹

In addition, the ICC's omission of an APA hearing examiner was in the nature of a good faith judgment that happened to be in error. Moreover, the Court noted that "in about five thousand cases commenced after the effective date of the Administrative Procedure Act, orders are for an indefinite period vulnerable to attack if no timely objection during the administrative process is required."¹²² In com-

¹¹⁹ 341 U.S. 907 (1951), *rev'g per curiam* 96 F. Supp. 452 (W.D. Mo. 1950).

¹²⁰ 344 U.S. at 36.

¹²¹ *Id.* at 35-36.

¹²² *Id.* at 37 n.7.

menting upon how closely *Tucker* is tied to its facts, Professor Jaffe has written, "In these licensing cases the ICC plays no prosecutory part. Furthermore, the interest of competitors opposing a new license is a peripheral one. The ICC procedure was of long standing prior to the APA and had evoked little or no objection. The waiver did not involve a significant forfeiture of procedural protection."¹²³

Because of the factual context in which it arose, the decision in *Tucker* cannot be read as authorizing the routine substitution, by intentional design, of agency employees for section 11 hearing examiners. There is no indication that the Court intended any compromise of the view, expressed in *Wong Yang Sung v. McGrath*, that the intention that hearings be conducted by "examiners whose independence and tenure are so guarded by the Act as to give the assurances of neutrality which Congress thought would guarantee the impartiality of the administrative process"¹²⁴ was perhaps the primary motivating impulse behind passage of the APA, a view reaffirmed in *Ramspeck v. Federal Trial Examiners Conference*.¹²⁵

To these concerns must be added the requirement of section 12 of the APA that a "subsequent statute may not be held to supersede or modify [the APA] . . . except to the extent that it does so expressly."¹²⁶ In *Borg-Johnson Electronics, Inc. v. Christenberry*,¹²⁷ the court held invalid an attempt by the Postmaster General to delegate his hearing functions to the Judicial Officer of the Department pursuant to a statutory provision authorizing him to delegate to subordinates "such of his functions as he deems appropriate." "The provisions for the appointment of impartial, independent Hearing Examiners are the very heart and soul of the Administrative Procedure Act," the court said, "and variations therefrom should not be countenanced except where a statute expressly provides for a Hearing Examiner appointed in another manner."¹²⁸ The court found that the statutory language upon which the Postmaster General relied was inadequate to meet the requirement of section 12.¹²⁹

The decision in *Borg-Johnson* has been made subject to at least one qualification. In *Grove Press, Inc. v. Christenberry*,¹³⁰ another

¹²³ L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 457 (1967).

¹²⁴ 339 U.S. 33, 52 (1950).

¹²⁵ 345 U.S. 128, 131-32 (1953); see *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); Note, *The Status of the Trial Examiner in Administrative Agencies*, 66 HARV. L. REV. 1065 (1953).

¹²⁶ 5 U.S.C. § 559 (Supp. V, 1970); cf. *Marcello v. Bonds*, 349 U.S. 302 (1955).

¹²⁷ 169 F. Supp. 746 (S.D.N.Y. 1959).

¹²⁸ *Id.* at 753.

¹²⁹ In 1962, an express statutory provision was enacted authorizing the Judicial Officer to become the agency for purposes of the APA, to the extent that such functions are delegated to him by the Postmaster General. 39 U.S.C. § 308a (1964).

¹³⁰ 175 F. Supp. 488 (S.D.N.Y. 1959).

judge of the same court, writing six months later, said in a footnote, "The Judicial Officer [of the Post Office Department] heard the case pursuant to a stipulation between the parties which had the effect of obviating the requirement that the case be heard by an independent Hearing Examiner. See *Borg-Johnson Electronics, Inc. v. Christenberry* . . ." ¹³¹ In thus apparently approving the use of a stipulation to waive appointment of a section 11 hearing examiner, the court did not mention the "express exception" language of section 12 that had been dispositive in *Borg-Johnson*. It should also be noted that the decision in *Grove Press* is inconsistent with the view—almost certainly held by many courts and argued by Justice Frankfurter in dissent in *Tucker*—that because the requirement that administrative agencies use independent, impartial hearing examiners is designed to assure public confidence in the integrity of the administrative process, it "is not something personal to a party" and "thus not within the dispensing power of any litigant." ¹³²

It is my conclusion that OFDI could not validly provide by regulation that unless a direct investor requests the designation of a section 11 hearing examiner within a specified period of days he will be deemed to have waived the appointment of such an examiner and consented to the use of a senior attorney from OFDI as the presiding officer at the contemplated compliance proceeding. This conclusion will obtain even if the regulation grants the direct investor an adequate period of time in which to request the appointment of a section 11 hearing examiner and even if the notice sent to the direct investor informs him adequately and frankly of the consequences of decision. Several premises, drawn from the materials set out above, underlie this conclusion.

First, the use of independent, impartial hearing examiners is a fundamental aspect of the APA. It is designed to provide individuals against whom an agency proceeds the substance and the appearance of fairness and to assure the public of the integrity of the administrative process. Nothing in the APA—which uses mandatory language in providing that hearing examiners "shall preside at the taking of evidence"—suggests that the right to a section 11 hearing examiner can be waived or made dependent upon the timely request of the party involved. In this respect, the APA's provision for hearing examiners is different from the historical practices governing waiver of jury trial in criminal cases. A regulation which placed the burden of requesting the appointment of a section 11 hearing examiner upon a

¹³¹ *Id.* at 491 n.3 (citation omitted).

¹³² 344 U.S. at 39 (Frankfurter, J., dissenting).

direct investor "could provide the vehicle by which [an agency] might avoid entirely the Hearing Examiner provisions of the Administrative Procedure Act."¹³³

Second, the Director, assuming he is the agency, has the authority to serve as the presiding officer at compliance proceedings. But his right to delegate this authority to a subordinate who is not a section 11 hearing examiner depends upon the existence of statutory language "expressly" indicating an intention of thus modifying the hearing examiner requirement of the APA.¹³⁴ There is no suggestion that the Trading with the Enemy Act, Executive Order 11387, or Department Order 184-A contains such express language.

Third, a regulation providing as a matter of routine procedure that a direct investor bear the burden of formally requesting the appointment of a section 11 hearing examiner too readily suggests that OFDI is attempting to gain an unfair advantage in a proceeding in which it is the direct investor's adversary. It is unrealistic to believe that an employee of OFDI will not be more committed to the achievement of OFDI's substantive goals, and therefore less capable of objective assessment of the direct investor's arguments, than a section 11 hearing examiner. The decision in *Tucker* refused to set aside an administrative proceeding in which an ICC employee improperly presided, but the Court noted that the case involved a dispute between private parties and that the ICC "did not institute or become a party in interest to the proceeding."¹³⁵ Any attempt to formalize the possibility of substituting an OFDI employee for a section 11 hearing examiner will almost certainly strike a court as unfair and inconsistent with the narrow exception tolerated in *Tucker*.

It is perhaps a closer question whether OFDI may by regulation enable the direct investor and the Director to stipulate to the substitution of an OFDI attorney for a section 11 hearing examiner as the presiding officer. Because such a regulation would not impose upon the direct investor the burden of requesting what the APA appears to give him as of right, it avoids some of the difficulties discussed above. In addition, it can be expected that when such a regulation is invoked, it will often result in the designation of a presiding officer with greater competence in the substantive issues presented by compliance proceedings than a section 11 hearing examiner, perhaps newly recruited to the area of international investment, might possess.

¹³³ Borg-Johnson v. Christenberry, 169 F. Supp. 746, 754 (S.D.N.Y. 1959).

¹³⁴ Section 12 of the APA provides that a statute "may not be held to supersede or modify this subchapter . . . except to the extent that it does so expressly." 5 U.S.C. § 559 (Supp. V, 1970).

¹³⁵ 344 U.S. at 35-36.

With the exception of the conclusory footnote sustaining this practice in *Grove Press*,¹³⁶ there is no case authority on the question. Several concerns may arise, however, and they parallel some of the difficulties discussed above:

First, the selection of a presiding officer by stipulation of the parties has the appearance of the selection of an arbitrator. The process may well result in the selection of a presiding officer acceptable to the parties for any number of reasons—for example, because he is available to hear the case at a much earlier date than a section 11 hearing examiner would be. But the process gives no assurance that it will result in the selection of a presiding officer possessing the qualities of independence and impartiality which are of primary concern to the APA.

Second, no statute “expressly” authorizes OFDI to modify the general requirement of the APA that section 11 hearing examiners preside at adjudicatory hearings.

Finally, in most cases it will be OFDI rather than the direct investor that will be interested in stipulating to the substitution of an OFDI employee for a section 11 hearing examiner. The fact that OFDI has such an interest will not escape the notice of direct investors. At the same time, the direct investor, knowing that he must continue to deal with OFDI after the compliance proceeding is completed, will have an interest in remaining on good terms with OFDI. The coincidence of these interests means that a regulation permitting the parties to stipulate to the selection of an OFDI employee as presiding officer may have an inevitably coercive effect in a direct investor’s decision to forego his right to a hearing presided over by a section 11 hearing examiner, no matter how circumspect OFDI may be. Indeed, in view of the possibility that a direct investor might believe that OFDI would refuse to grant applications for specific authorizations from direct investors who have not settled their differences with the Compliance Division (whether or not this is true would be irrelevant for these purposes), the coercive potential of such a regulation is heightened.

This analysis may overstate the subtleties of coercion perhaps at work in a direct investor’s perception of a regulation permitting the parties to stipulate to a hearing officer who is not a section 11 hearing examiner. The fact is that OFDI deals almost exclusively with sophisticated members of the business community who are represented by counsel and are unlikely to be easily coerced into surrendering rights they would prefer to retain.

¹³⁶ See note 131 *supra* & accompanying text.

But even accepting the assumption that the possibility of coercion will be minimal, a regulation of the kind under consideration would nevertheless fail to meet the other objections of omission of a section 11 hearing examiner noted above. Moreover, it may not be enough to persuade a court that in fact the coercive effect of OFDI's regulation upon direct investors will be minimal. A court may well be concerned with the potential for coercive effect that such regulations are likely to have in other administrative contexts. A case-by-case evaluation of a factor so evanescent as coercive effect "may raise questions so subtle that the law can deal with them effectively only by prohibitions not concerned with the fairness of a particular" application.¹³⁷ A court may be disposed to hold that the validity of a regulation permitting parties to stipulate to the omission of APA rights depends as much upon what can happen under such a regulation as upon what has happened in the particular case under review.¹³⁸ For a court to conclude that in many imaginable applications such a regulation would exercise a coercive influence on the surrender of APA rights would not be surprising.

C. Conclusion

It seems clear the OFDI's compliance proceedings must be presided over by a section 11 hearing examiner. A regulation requiring a direct investor to request the designation of a section 11 hearing examiner upon penalty of waiver is inconsistent with the purposes of the APA. A regulation providing that the parties may stipulate to the substitution of an OFDI employee for a section 11 hearing examiner as the presiding officer at compliance proceedings would probably be held invalid, although no decisions speak to this question.

V. SEPARATION OF FUNCTIONS AND DISQUALIFICATION FOR BIAS

Adjudication is a primary function of administrative agencies. The impartiality required for the proper performance of adjudicatory functions is not always wholly consistent with the performance of certain other administrative functions, such as investigating, prosecuting, and negotiating settlements. Section 5(c) of the APA¹³⁹ represents the balance struck by Congress in determining when the combination of inconsistent administrative functions will be permitted

¹³⁷ SEC v. Chenery Corp., 318 U.S. 80, 92 (1943).

¹³⁸ See, e.g., Commonwealth v. Diaz, 326 Mass. 525, 95 N.E. 2d 666 (1950).

¹³⁹ 5 U.S.C. § 554(d) (Supp. V, 1970).

and when they should be separated to protect the judicial function from inappropriate contamination:

Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee [the employee who presides at the reception of evidence] may not—

- (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
- (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

. . . .

- (C) to the agency or a member or members of the body comprising the agency.

These statutory provisions must be read in the light of the case law that has developed with respect to bias on the part of those performing adjudicatory functions. An agency decision rendered in compliance with the APA's strictures on separation of functions may nevertheless be set aside as a denial of due process because the adjudicator was biased. The law in these two areas—separation of functions and bias—is obviously based on related considerations. For purposes of clarity these areas will be considered separately, although any suggestion that such a separation could be rigidly sustained would be artificial.

A. Separation of Functions

Part II of this article analyzed the present administrative structure of OFDI in light of the APA's definition of the term "agency." The conclusions reached were that the Director is the agency for purposes of rulemaking and that the Department of Commerce Appeals Board is the agency for purposes of adjudication. Part IV concluded that the APA requires OFDI to employ a section 11 hearing examiner as the presiding officer at compliance hearings.

These conclusions present no problems with respect to separation of functions. Under OFDI's present administrative structure, appeals

in compliance proceedings go directly from the hearing examiner to the Appeals Board, whose only function is adjudicative; it has no part in the investigating, prosecuting, or negotiating of settlements functions of OFDI. If the present arrangements are retained, OFDI's procedures for deciding adjudicatory appeals would be in compliance with the separation of functions provisions of the APA.

The difficulty is that the present arrangements are highly impractical. They place the power of decision in compliance proceedings entirely in the hands of persons—a section 11 examiner and the members of the Department of Commerce Appeals Board—not subject in any substantive manner to the authority of the Director. Thus the Director, who bears the primary responsibility for administering the Foreign Direct Investment Program, is denied the opportunity to participate in the performance of OFDI's adjudicatory functions. From the standpoint of the development of substantive rules of law by effective and flexible means of administrative action, there is little to recommend an arrangement that deprives a person with the Director's responsibilities of any significant part in the adjudicatory process.

It might be argued that the Director need not be totally excluded from the adjudicatory process under the present administrative structure. The argument would be that the Appeals Board is free to consult the Director during the process of exercising its adjudicatory authority, although nothing in OFDI's regulations suggests that such consultation is contemplated. Even assuming that such an optional consultative role for the Director is better than no role at all, the argument is subject to certain limitations. By the terms of section 5(c), the Appeals Board may consult only agency employees who have not been "engaged in the performance of investigative or prosecuting functions" in the adjudication before it. The Appeals Board's freedom to consult the Director is thus limited to adjudicatory proceedings in which the Director has played no investigatory or prosecutory part. This limitation would almost certainly prove disabling because it would permit the Director a consultative role in the adjudicatory process at the price of denying him any role at all in the investigatory and prosecutory processes. An arrangement precluding the Director from exercising decisive authority over any part of the compliance process is hardly wise.

The impracticality of the present administrative structure of OFDI suggests the wisdom of making the Director the agency for purposes of adjudication. This would necessitate a revision of OFDI's regulations in order to place appeals in compliance proceedings directly in the Director. The Director as the agency would have the authority

—which the APA recognizes as necessary if agencies are to achieve their substantive goals—to combine investigative, prosecuting, negotiating, and adjudicatory functions, subject only to such limitations as section 5(c) imposes. The discussion that follows proceeds on the assumption that the Director has been made the agency for all purposes.

The question is whether separation of functions problems are presented by an administrative structure in which the Director is the agency. It should be made clear at the outset that the law with respect to separation of functions is statutory law, based upon the APA, and not constitutional law. The Supreme Court has held that a combination of functions that would be impermissible were the APA applicable does not constitute a denial of due process.¹⁴⁰ Early in the history of the APA the Court had remarked, in *Wong Yang Sung v. McGrath*,¹⁴¹ that “[i]t might be difficult to justify as measuring up to constitutional standards of impartiality a hearing tribunal for deportation proceedings the like of which has been condemned by Congress as unfair even where less vital matters of property rights are at stake.” But in the subsequent decision of *Marcello v. Bonds*,¹⁴² the Court rejected an argument that the hearing procedures of the Immigration and Naturalization Service, which was not subject to the APA, denied due process because the special inquiry officer was subject to the supervision and control of officials charged with investigative and prosecuting functions.¹⁴³ Professor Davis has concluded that the Court’s remark in *Wong Yang Sung* “has virtually no support in previous law and it seems to be superseded by the deportation cases of *Marcello* and *Accardi*.”¹⁴⁴

The Supreme Court indicated in *Wong Yang Sung* that one of the central purposes behind passage of the APA was “to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge,”¹⁴⁵ and “to ameliorate the evils [resulting] from the commingling of functions.”¹⁴⁶ Section 5(c) represents Congress’ attempt to achieve those goals. But it is important to remember, as the Court noted in *Wong Yang Sung*, that “[t]he Administrative Procedure Act did not go so far as to require a complete separation of investigating and prosecuting functions from adjudicating functions.”¹⁴⁷ Section 5 concludes its prohibition against certain

¹⁴⁰ See *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

¹⁴¹ 339 U.S. 33, 50-51 (1950).

¹⁴² 349 U.S. 302 (1955).

¹⁴³ *Id.* at 311.

¹⁴⁴ 2 K. DAVIS, *supra* note 35, at § 13.02, at 178.

¹⁴⁵ 339 U.S. at 41.

¹⁴⁶ *Id.* at 46.

¹⁴⁷ *Id.*

forms of combination of functions by providing that it "does not apply . . . (C) to the agency or a member or members of the body comprising the agency."¹⁴⁸ By this exception Congress recognized that those who bear ultimate responsibility for the administration of a substantive program must necessarily be involved in all phases of its implementation.

Because section 5(c) does not apply to the agency, the Director is not prohibited from combining functions. He is entitled to participate in every phase of OFDI's administrative procedures—such as investigating, prosecuting, negotiating settlements, and adjudicating—without challenge under section 5(c), "[n]o matter how flagrant may be the combination of inconsistent functions."¹⁴⁹ The clarity of the statutory language may explain the absence of even a single case raising a question about its meaning. (Of course, the nature of the Director's participation in the investigatory or prosecutory stages of a proceeding may compromise his capacity to serve as an impartial adjudicator—an issue to be discussed in terms of bias rather than of separation of functions.)

One provision of section 5(c), however, does apply to the administrative procedures of OFDI and requires an internal separation of functions:

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.¹⁵⁰

Before considering the implications of this provision, two observations may be appropriate.

First, this provision applies only to proceedings governed by section 5 of the APA. The application of section 5 is limited to "case[s] of adjudication required by statute to be determined on the record after opportunity for an agency hearing."¹⁵¹ This means that the prohibitions of this provision apply to compliance proceedings since, as Part III of this article concluded, they are governed by section 5.

Second, this provision very closely parallels section 1050.108 of OFDI's regulations:

(a) In a formal administrative proceeding, no person not employed by the Office and no employee or agent of the

¹⁴⁸ 5 U.S.C. § 554(d) (Supp. V, 1970).

¹⁴⁹ 2 K. DAVIS, *supra* note 35, at § 13.06, at 214.

¹⁵⁰ 5 U.S.C. § 554(d) (Supp. V, 1970).

¹⁵¹ *Id.* § 554(a).

Office who performs any investigative or prosecuting function in connection with the proceeding, shall communicate *ex parte*, directly or indirectly, with any person involved in the decisional process in such proceeding, with respect to the merits of that or a factually related proceeding.

(b) In a formal administrative proceeding, no person involved in the decisional process of such proceeding shall communicate *ex parte*, directly or indirectly, with any person not employed by the Office, or with any employee or agent of the Office who performs any investigative or prosecuting function in connection with the proceedings, with respect to the merits of that or a factually related proceeding.¹⁵²

The reciprocal statement that section 1050.108 gives to the prohibitions laid upon those performing investigative and prosecuting functions and those involved in the decisional process achieves the same substantive breadth as the provision of section 5(c) under present consideration. Thus, an analysis that considers the implications of section 5(c) necessarily states the implications of section 1050.108 as well.

The language of section 5(c) makes clear that any OFDI employee who has "engaged in the performance of investigative or prosecuting functions . . . in a case" may not "participate or advise in the [Director's] decision" of the case. This language—designed to prevent the Director from consulting certain persons in the course of the performance of his adjudicatory functions—presents a number of questions.

1. "Investigative or Prosecuting Functions"

Section 5(c) does not require that the Director be insulated from the advice of every OFDI employee in the performance of his adjudicatory functions. It requires that he be insulated only from the advice of those employees who have engaged in the performance of "investigative" or "prosecuting" functions in the case under consideration. The first question concerns the meaning and reach of "investigative" and "prosecuting."

Read literally, section 5(c) would prohibit the Director from consulting at least the director of the compliance division, since he will typically have been involved in investigating and prosecuting functions in every compliance proceeding, as well as those employees of the compliance division who have participated in investigating, preparing, or presenting the case against the direct investor. Such ac-

¹⁵² 15 C.F.R. § 1050.108 (1970).

tivity—within the division of OFDI directly responsible for prosecuting individuals—is most obviously within the literal meaning of “investigative” and “prosecuting” functions.

The difficulty lies in determining when OFDI employees who are not a part of the compliance division have performed “investigative” or “prosecuting” functions that will disqualify them from participating or advising in the Director’s decision. Three questions may help to expose the difficulty.

First, does section 5(c) prohibit the Director from asking the judgment of the chief counsel (or any other OFDI employee) if the chief counsel has participated in granting an interpretation or determining an application for a specific authorization, particularly if the meaning or validity of one or the other is at issue? Such participation by the chief counsel is plausibly part of neither an “investigative” nor a “prosecuting” function.

Second, does section 5(c) prohibit the Director from asking the judgment of the chief counsel if the chief counsel advised the director of the compliance division that this is an appropriate case for prosecution or urged him to bring the prosecution? We have it on the authority of Professor Davis that “[t]hose who determine that proceedings should be instituted may participate in judging”¹⁵³ because the language of the Act speaks only of “prosecuting” and “says nothing about combination of instituting proceedings with judging. Under the Act the same individual may ‘accuse’ in the sense of deciding that proceedings should be instituted, and may also judge. This is true whether the individual is a head of an agency or a subordinate,”¹⁵⁴ because what a person does in “approving the institution of proceedings is much like what judges do in ruling on demurrers or motions to dismiss.”¹⁵⁵

Third, does section 5(c) prohibit the Director from asking the judgment of the chief counsel if the chief counsel has taken part in unsuccessful attempts to negotiate a settlement? Because the language speaks only of “investigative” and “prosecuting” functions, Professor Davis concludes, “[t]he same individual may attempt to negotiate a settlement and later serve as judge.”¹⁵⁶

However plausible these conclusions may seem in terms of a literal reading of “investigative” and “prosecuting,” they are not wholly satisfying in terms of the purpose of section 5(c). The premise underlying section 5(c) is that the integrity of the adjudicatory process will

¹⁵³ 2 K. DAVIS, *supra* note 35, at § 13.06, at 215.

¹⁵⁴ *Id.* § 13.10, at 237.

¹⁵⁵ *Id.* § 13.11, at 249.

¹⁵⁶ *Id.* § 13.06, at 215.

best be protected by excluding participation by agency employees the nature of whose participation in prior stages of a case suggests that their contribution might not be sufficiently disinterested. The adjudicator should be insulated from one who has performed investigative functions because "an investigator's functions may in part be that of a detective, whose purpose is to ferret out and establish a case. Of course, this may produce a state of mind incompatible with the objective impartiality which must be brought to bear in the process of deciding."¹⁵⁷ The adjudicator should be insulated from one who has performed prosecuting functions because "[a] man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions."¹⁵⁸

Section 5(c) thus represents the language chosen by Congress to insure that the adjudicatory process is not contaminated by the participation of those whose state of mind may be that of the advocate rather than the impartial judge. Once this premise is accepted, it becomes clear that a literal reading of "investigative" and "prosecuting" is inadequate to serve the purposes underlying section 5(c). Such a reading will permit some employees with an advocate's state of mind to participate in adjudicatory functions and will exclude others from participating even though their state of mind is unlikely to be that of an advocate.

For example, it is fairly clear upon a literal reading of section 5(c) that the chief counsel may participate and advise in the Director's decision of a compliance proceeding directly challenging the validity of an interpretation that the chief counsel issued, although one might think that the chief counsel's natural commitment to sustaining the interpretation would make his cast of mind that of an advocate. Similarly, it is fairly clear upon a literal reading of section 5(c) that the chief counsel may participate and advise in the Director's decision of a compliance proceeding after having attempted to negotiate a settlement that failed when the direct investor would not accept terms that the chief counsel regarded as absolute minima in light of the direct investor's conduct and after having urged that a prosecution be brought, although here too one might think that the chief counsel would hold an advocate's "sincere belief in the justice of his cause."¹⁵⁹

Yet the chief counsel may be barred by a literal reading of section 5(c) from participating and advising in the Director's decision in a

¹⁵⁷ ATTORNEY GENERAL'S FINAL REPORT, *supra* note 43, at 56.

¹⁵⁸ *Id.*; see A. BICKEL, THE LEAST DANGEROUS BRANCH 205 (1962).

¹⁵⁹ 2 K. DAVIS, *supra* note 35, at § 13.07, at 218.

compliance case under circumstances in which it is quite unlikely that his prior participation has given him an advocate's cast of mind. For example, it might be argued that the chief counsel had engaged in an "investigative" function by advising the director of the compliance division on the appropriate reach and limits of the subpoena power and on the necessary language that a particular subpoena must contain to be valid, although one might think that the chief counsel would make such routine judgments without especially noticing the merits of the case involved.

Paradoxes of these kinds suggest the necessity of working out a solution that takes account of the literal meaning of the language as well as the underlying premises of section 5(c). The task is difficult because of the dearth of relevant legislative history and of cases on point.¹⁶⁰ Moreover, resolution of the appropriate adjudicatory role of agency employees involves subtleties of human motivation and behavior that are difficult to assess in particular cases and unamenable to generalization beyond them.

Professor Davis—whose views are likely to be relied upon by courts because of the paucity of decided cases—has suggested that "[f]rom the standpoint of accomplishing the basic purpose [of section 5(c)] without undue harm to other interests, the need may be for giving a narrow interpretation to the term 'investigative' and a broad interpretation to the term 'prosecuting'."¹⁶¹ At a later point Professor Davis argues that "[i]f the agencies follow the broad intent as distinguished from the literal words, they will interpret the term 'prosecuting' to cover all advocating, whether or not any accusation is made. Whatever the Act provides or fails to provide, reviewing courts should not allow an advocate to participate in judging."¹⁶² It should be recognized, however, that courts are more likely to accept Professor Davis' contention that a narrow reading be given to "investigative" with respect to a claims agency, such as the Railroad Retirement Board, than to a prosecuting agency, such as OFDI. Perhaps one can be no more precise than to suggest that an agency must insure that the adjudicatory process is not seriously contaminated by the participation of employees whose prior association with a case raises the possibility that their contribution will be shaped by an advocate's state of mind.

¹⁶⁰ See S. REP. No. 752, 79th Cong., 1st Sess. 17-18 (1945); H.R. REP. No. 1980, 79th Cong., 2d Sess. 30-31 (1946). "The courts have strangely refrained from their usual leadership in working out minimal standards of fairness." 2 K. DAVIS, *supra* note 35, at § 13.01, at 172.

¹⁶¹ 2 K. DAVIS, *supra* note 35, at § 13.07, at 216.

¹⁶² *Id.* § 13.11, at 249; see *id.* § 13.10, at 235-36.

2. Investigators and Prosecutors as Supervisors and Subordinates

As the discussion to this point has indicated, section 5(c) excludes from participation in the adjudicatory process agency employees who have "engaged in the performance of investigative or prosecuting functions" in the case under decision. The language does not explicitly exclude the participation of agency employees whose prior activity does not fairly constitute "the performance of investigative or prosecuting functions."

Thus it might be thought that, in the course of performing his adjudicatory functions, the Director could appropriately seek the advice of (1) agency employees who are the subordinates of investigators and prosecutors, so long as they have not themselves performed investigative or prosecuting functions in the case under decision, and (2) agency employees who supervise investigators and prosecutors, again so long as they have not themselves performed investigative or prosecuting functions in the case under decision.

This would mean, for example, that the Director would be permitted to consult employees of the chief counsel's office and of the compliance division on occasions when section 5(c) would prohibit consultation with the chief counsel and the director of the compliance division. It would also mean that the Director would be permitted to consult the chief counsel or the director of the compliance division on occasions when section 5(c) would prohibit consultation with their subordinates.

Although a reading of section 5(c) permitting such results would appear plausible in terms of its language alone, it is not clear that such a reading is correct. Thus, Professor Davis, after quoting the statutory language, writes:

Questions of interpretation of this language are legion. Is a general counsel who supervises investigators or prosecutors disqualified from advising the agency on a question of law? Is such a general counsel disqualified from supervising other attorneys who give such advice? May a general counsel supervise both a section of reviewers and a section of investigators and prosecutors? Does the Act's express provision that presiding officers may not be supervised by an officer engaged in prosecuting or investigating mean, through application of the *expressio unius* principle, that other staff members participating in judging may be so supervised? Questions of this type probably can reasonably be answered either way, and the decision may well depend largely on special circumstances in particular agencies. The major purpose is to prevent contamination of judging with either investigating

or prosecuting. Even a small contamination may defeat that purpose.¹⁶³

Professor Davis' statement implies that there may be prohibitions beyond those stated in the language of section 5(c) upon the persons whom the Director may consult in the course of adjudication, and that these prohibitions, if they exist, would rest upon the purposes underlying the APA's proscription of combination of functions. Unless the implication of this statement is taken seriously, it is possible to read section 5(c) to permit some results that seem questionable in light of the premises underlying the APA.

The separation of functions provisions of the APA are based on the premise that the impartiality of the adjudicatory process will be protected significantly by excluding the participation of those whose contribution is not likely to be sufficiently disinterested. The purpose of section 5(c)—put with only something of an oversimplification—is to prevent the advocate from advising the judge and thereby to preclude a biased input in the adjudicatory process.

The first question, then, is whether agency employees who are the subordinates of investigators or prosecutors may advise and participate in the Director's performance of his adjudicatory functions. Many subordinates—when asked their advice at the adjudicatory stage of a proceeding in which their supervisor played an investigative or prosecuting role that has disqualified him from advising the adjudicator—will at least be inclined to support their superior's position. Subordinates understand the wisdom of justifying the public commitments made by their superiors. To permit a subordinate of the chief counsel to advise the Director in an adjudication in which the chief counsel himself is precluded from doing so because he performed investigative or prosecuting functions is to risk that the subordinate's contribution will be other than dispassionate—precisely a result section 5(c) was designed to prevent.

In a different provision of section 5(c) than that under discussion, Congress recognized the possibilities of personal self-interest inherent in a supervisor-subordinate relationship. It provided that the employee presiding at the reception of evidence may not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency."¹⁶⁴ The use of a section 11 hearing examiner, of course, satisfies this provision. Yet it is curious that, having perceived the risk in this context, Congress did not go further and prohibit any

¹⁶³ *Id.* § 13.07, at 216.

¹⁶⁴ 5 U.S.C. § 554(d)(2) (Supp. V, 1970).

subordinate from participating in an adjudication that almost necessarily will pass upon judgments that his supervisor made as an investigator or prosecutor. Perhaps Congress regarded the risks beyond the one it provided for insufficiently serious to warrant a legislative prohibition.

The second question is whether agency employees supervising investigators and prosecutors may advise and participate in the Director's performance of his adjudicatory functions. This question may be easier than the first. The risk that a supervisor will feel inclined out of professional self-interest to support a position taken by a subordinate, while perhaps not improbable, would seem less than the risk created when the roles are reversed. A supervisor's career (the chief counsel's, for example) depends most directly upon his superior's estimate of the quality of his work; he has small incentive in terms of self-interest to support automatically positions taken by subordinates. Moreover, section 5(c) contains no provision expressing a concern in this area comparable to the concern reflected in its provision that a hearing officer may not be supervised by an investigator or prosecutor. In short, neither the policy nor the language of section 5(c) would seem to preclude the Director from seeking the judgment of those who supervise investigators and prosecutors during the performance of his adjudicatory functions.

In responding to these two questions it would be helpful if one could rely upon judicial decisions as a supplement to an abstract analysis of the premises underlying section 5(c) and hypotheses about the ways in which supervisors and subordinates are likely to behave. Unfortunately, there are not more than a handful of relevant decisions. They do suggest, however, that courts may be prepared to move beyond the literal language of section 5(c) in order to effectuate the spirit of its prohibitions against a combination of functions.

Three decisions involving the Post Office Department are particularly instructive. In *Glanzman v. Schaffer*,¹⁶⁵ an action to enjoin an order of the Post Office Department, the question was whether "the administrative proceedings [that had resulted in the order] were invalid because of . . . lack of proper separation of judicial and prosecutive functions in the administrative forum."¹⁶⁶ The case was heard by an examiner whose initial decision was sustained on appeal by the Solicitor for the Department, to whom, as the court held, the Postmaster General had validly delegated his adjudicatory functions pursuant to a specific statutory authorization. The matter was pre-

¹⁶⁵ 143 F. Supp. 243 (S.D.N.Y. 1956), *aff'd*, 252 F.2d 333 (2d Cir. 1958).

¹⁶⁶ *Id.* at 245.

sent to the hearing examiner by the Assistant Solicitor of the Department. The court set down the following facts as central to its consideration:

The affidavit of [the] Assistant Solicitor for the Post Office Department . . . states that in the handling of these proceedings no officer or employee who presided at the reception of evidence or who made the initial or final agency decisions for the Post Office Department is subject to or responsible to, or subject to the supervision or direction of any officer, employee or agent engaged in the performance of investigative or prosecuting functions for the Post Office Department and that neither [the Assistant Solicitor] nor any other officer, employee or agent engaged in the performance of investigative or prosecuting functions in this case participated or advised in the initial decision by the hearing examiner or the agency decision by . . . the Solicitor for the Post Office Department.¹⁶⁷

On the basis of the affidavit, the court held, without any discussion, that "there has been no violation of the principle of separation of prosecutive and judicial functions in this department. Actually, there has been a separation of such functions as required by the Administrative Procedure Act" ¹⁶⁸

The affidavit upon which the decision in *Glanzman* relies made clear that no employee engaged in the performance of investigative or prosecuting functions in the case had participated or advised in the Solicitor's decision except as counsel in public proceedings; such facts state compliance with section 5(c). The adjudicator, the Solicitor, was the supervisor of the investigator and prosecutor, the Assistant Solicitor, but no language in section 5(c) forbids such a relationship.

The fact that the court could sustain the validity of this relationship without discussion—the court of appeals did not discuss the issue either, because it had been "adequately disposed of in the opinion" below ¹⁶⁹—suggests that it could find no issue raised under the literal language of section 5(c). It seems unlikely that the court considered whether an adjudicator, by virtue of his position as supervisor of an investigator and prosecutor, might have a self-interested inclination, inconsistent with the impartiality expected of judges, to support the position taken by his subordinate. Therefore, one should be circumspect in asserting claims about the necessary implications of the court's decision. The result the court announced, however, appears consistent

¹⁶⁷ *Id.* at 246-47.

¹⁶⁸ *Id.* at 246.

¹⁶⁹ 252 F.2d 333, 334 (2d Cir. 1958).

with the conclusion suggested above that section 5(c) does not seem to preclude participation in the adjudicatory process by supervisors of investigators and prosecutors.

The second decision involving the Post Office Department, *Pinkus v. Reilly*,¹⁷⁰ reversed a postal fraud order in part on the ground that the Department had failed to comply with the requirement in section 3 of the APA that it publish its rules of organization and procedure. But the decision rests as well on the second ground that the administrative procedures of the Department violated the combination of functions provisions of the APA.

The court in *Pinkus* examined the Department's regulations far more carefully than the court had in *Glanzman*. It noted that the regulations in effect when *Glanzman* was decided "vested [the Solicitor] with prosecuting authority generally, including both the supervision of prosecutions, and, as a matter of procedure, the filing of complaints,"¹⁷¹ as well as adjudicating authority. "This," the court said, "indubitably constituted a violation of the above separation of functions provisions of the Administrative Procedure Act, as it was then, and is now, in effect."¹⁷²

By the time that the proceeding in *Pinkus* arose, the Department had changed the title of the Solicitor to General Counsel and of the Assistant Solicitor to Assistant General Counsel. It had also amended its regulations slightly "to vest in the Assistant General Counsel the duty to file complaints similar to that here involved against *Pinkus*."¹⁷³ The court found the amendment wanting. "But the violation continued," it said, "since the General Counsel continued to have the general supervisory power over such prosecutions and over his assistant . . . together with the sole adjudicating authority in such cases" ¹⁷⁴

The court then spoke to the argument made successfully by the Department in *Glanzman*:

Of course, the Department's claim is immaterial that in this case in fact the General Counsel did not tell the Assistant General Counsel what to do in prosecuting *Pinkus*. For the purpose of the Act is not only to see that such commingling of the judicial and prosecuting authority does not occur in fact in a single case, but to see that it can never occur, and that the public should know, by publication, that it can never

¹⁷⁰ 157 F. Supp. 548 (D.N.J. 1957).
¹⁷¹ *Id.* at 550.
¹⁷² *Id.* at 550-51.
¹⁷³ *Id.* at 551.
¹⁷⁴ *Id.*

occur, in order to insure their confidence in the fairness of their government.¹⁷⁵

What explains the difference in result between *Glanzman* and *Pinkus*? The court in *Glanzman* held that the adjudicator was not an employee who had engaged in the performance of investigative or prosecuting functions, even though he possessed investigative and prosecuting authority, because an affidavit indicated that he had not in fact performed such functions in the present case; therefore, read literally, section 5(c) did not prohibit him from participating and advising in the decision. The court in *Pinkus* came to a contrary conclusion on the same procedural facts because it feared the potential for commingling of functions that the Post Office Department's administrative structure appeared to permit; it did not seem to feel constrained by the fact that section 5(c) is limited to circumstances in which the adjudicator has participated in investigative or prosecuting functions in the present case. The prohibition announced in *Pinkus* may be recommended by the purpose of section 5(c) but it cannot be found in its language.

It may be suggested that the court's discussion in *Pinkus* of the separation of functions issue was at most an alternate holding, which the court itself qualified by a subsequent passage:

It is a further interesting question whether the Administrative Procedure Act as adopted prevents all such harmful commingling of the functions of adjudication and prosecution or only certain harmful commingling, leaving certain commingling of prosecuting and adjudicating authority still lawful. This question is raised now by the parties since, as seen above, in this case it is not the prosecuting authority which is alleged to be the superior of the adjudicating authority, which *Wong Yang Sung* holds to be prohibited, but rather it is the adjudicating authority which is alleged to be the superior of the prosecuting authority. . . . [I]t is clear that in either aspect such commingling may have harmful results, and so is contrary to the spirit of the Act itself. Now the Department claims that in fact, according to its plan of "organization," (unpublished as above) its "General Counsel" is not the superior of this particular "Assistant General Counsel," when the latter prosecutes fraud cases, despite these titles, and despite the fact that its General Counsel is the superior of any or all other Assistant General Counsel in charge of all the Department's other legal proceedings—a rather unusual situation. However, assuming this to be correct in fact, it is unnecessary to pursue this point through the

¹⁷⁵ *Id.* at 552.

lengthy legislative history of the statute, in view of the clear invalidity of the present procedure [because it was not published].¹⁷⁶

Judge Learned Hand adopted this suggestion in adverting to *Pinkus* in his opinion in *Columbia Research Corp. v. Schaffer*,¹⁷⁷ the third and most important of the decisions involving combination of functions in the Post Office Department.

Columbia Research involved the same procedural facts as *Pinkus*, except that the Department had by now published regulations that sought to describe its internal organization with respect to hearings: the Assistant General Counsel was the prosecutor and the General Counsel decided appeals from the hearing examiner's decisions. As in *Glansman* and *Pinkus*, the Department submitted an affidavit asserting that "there has been and there is a complete and actual separation of investigative and judicial functions * * * and no officer or employee who presides at the reception of evidence or who makes either initial or final agency decisions * * * is subject to or responsible to or subject to [sic] the supervision or direction of any officer, employee or agent engaged in the performance of prosecuting functions for said Post Office Department."¹⁷⁸

The terms of the affidavit thus presented again the question whether section 5(c) permits an employee who hears administrative appeals, thereby performing an adjudicatory function, to supervise employees who perform investigative or prosecuting functions. The court did not decide that question on the merits because it found the Department's regulations inadequate in their description of the supervisory authority that the General Counsel had over the Assistant General Counsel. But the court did consider whether the relationship between the General Counsel and the Assistant General Counsel could be made consistent with the theory of section 5(c):

[W]e are not satisfied that it is enough that the Assistant General Counsel, on whom § 201.4 of the Regulations imposes the duty of preparing complaints, has in fact no part in the final decision of the General Counsel himself. It would be plainly contrary to the purpose of the section, if the General Counsel prepared the complaint and the Assistant Counsel made the final decision; for the subordinate would then be passing upon the success of what his superior had undertaken. True, the reverse, which is the actual situation, does not present so obvious a fusion of prosecutor and judge;

¹⁷⁶ *Id.*

¹⁷⁷ 256 F.2d 677 (2d Cir. 1958).

¹⁷⁸ *Id.* at 679.

nevertheless, when the subordinate is prosecutor and his superior is judge, it appears to us reasonable to suppose that the prosecutor will be disposed to select such cases as he believes will meet with his superior's approval, and that his discretion may be exercised otherwise than if each was responsible to the Postmaster only by a separate chain of authority. It is of course true that under any possible system of administration in the end there will be the fusion of prosecutor and judge, subject only to the supervision of the courts; but it makes much difference whether it be reserved to the highest level of authority: i.e., to the "agency" itself and it is fairly obvious that Congress had just this in mind when at the end of § 1004(c) it provided that the subsection should not apply to the "agency" or to any of its "members." There alone was the fusion to be permissible.¹⁷⁹

Having spoken at such length to the merits, the court added a further comment during the course of reversing the Department's order because the regulation failed to comply with the APA:

However, if, contrary to what appears to us its very probable purpose, the section does not forbid the powers of the prosecutor and the judge to interpenetrate: that is, if the prosecutor may be subject to the judge in some specifically declared circumstances, nevertheless, we think that § 1002 (a) (1) and (2) require that any such relation, to be valid at all, must be spelled out and published as a regulation¹⁸⁰

Finally, the court noted that neither *Glanzman* nor *Pinkus* could fairly be said to have decided the question whether section 5(c) permits an adjudicator to supervise an investigator or prosecutor. In *Glanzman* the court did not "give any reasons for [its] conclusion" that "an affidavit like that filed in the case at bar was enough to comply with the statute" and "neither in the notice of appeal nor in the briefs on appeal was the question raised or discussed."¹⁸¹ In *Pinkus* the court "reserved the added question, which we have discussed here, whether by a published regulation the 'agency' could make an investigating or prosecuting officer subordinate to the deciding officer."¹⁸² Judge Hand concluded by a further reference to the merits:

As has already appeared we too reserve any final decision as to that, although it seems to us indeed difficult in the situa-

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 680.

¹⁸² *Id.*

tion here presented to forecast how a regulation could be so drafted as to avoid the objection if the Assistant General Counsel remains a subordinate of the General Counsel.¹⁸³

Judge Hand's thoughtful analysis of the purposes of section 5(c) makes *Columbia Research* the most important of the three decisions discussed, even though it does not formally decide the separation of functions question. Several observations may be relevant.

First, the decision in *Columbia Research* is consistent with the conclusion that courts sensitive to the premises underlying the APA's prohibition against the combination of functions will not regard the literal language of section 5(c) as the end of the matter.

The administrative structure created by the Post Office Department was in compliance with section 5(c) in the sense that no explicit language prohibited it, but that was insufficient to persuade Judge Hand that he was estopped from inquiring further. The fact that Judge Hand found justification for looking beyond the literal language—indeed, for strongly suggesting that the Post Office Department's administrative structure was invalid—almost certainly means that other courts will, too.

Second, the decision in *Columbia Research* confirms the suggestion that courts which look beyond the literal language of section 5(c) are likely to focus on the psychological tendencies that may be created by a relationship involving supervisors who adjudicate and subordinates who investigate or prosecute.

Judge Hand was concerned that a prosecutor in such a relationship "will be disposed to select such cases as he believes will meet with his superior's approval, and that his discretion will be exercised otherwise"¹⁸⁴ than if he were independent of the adjudicator's supervision. Assuming that a prosecutor supervised by an adjudicator may be so disposed, Judge Hand does not indicate why this consequence would conflict with the premises underlying section 5(c). Prosecutors generally tend to bring cases they expect an adjudicator to sustain. Although a concern that forum shopping be minimized—perhaps particularly by a prosecutor—finds expression at some points in our law, it does not seem to be a concern of section 5(c). The language Judge Hand chose to make his point suggests that he read section 5(c) as condemning any relationship between the adjudicator and the prosecutor, short of complete separation, that might conceivably appear to open up the psychological possibility of partiality. (Judge Hand does not mention the possibility that an adjudicator who supervises a

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 679.

prosecutor may feel a self-interested inclination to support a position taken by a subordinate.)

Third, the decision in *Columbia Research* may have limited application to OFDI because it rests upon a factual pattern significantly different from the pattern likely to exist at OFDI during the course of adjudication. At the Post Office Department, the General Counsel who exercised final adjudicatory authority was not the agency for purposes of the APA. At OFDI, the Director in whom final adjudicatory authority rests will be the agency. The fact that the APA permits the agency (for example, the Director of OFDI) alone among administrative employees to adjudicate as well as to supervise prosecutors while denying a combination of functions to all other employees (for example, the General Counsel of the Post Office Department) suggests the possibility that *Columbia Research* does not control the present facts.

The difference in the factual patterns may be put still another way. At the Post Office Department, the adjudicator supervised the prosecutor. At OFDI, the adjudicator may seek the advice of employees such as the Chief Counsel who supervises employees who have performed investigative or prosecuting functions, but the Chief Counsel is not the adjudicator and, as it may happen, may not be consulted by the adjudicator at all. The relationship at OFDI between the adjudicator and employees supervising prosecutors is thus more attenuated than the same relationship was at the Post Office Department. Judge Hand's fear that the prosecutor may be disposed to select cases with knowledge of the adjudicator's predilections seems unlikely to result at OFDI merely because the Director may ask the Chief Counsel's advice during the course of adjudications. This conclusion is strengthened by the fact that the authority to bring compliance proceedings formally rests with the chief of the compliance division rather than with the Chief Counsel.¹⁸⁵

Because the Post Office Department responded to Judge Hand's opinion by vesting adjudicatory authority in a Judicial Officer with no supervisory power over employees who prosecuted,¹⁸⁶ and because other agencies have not created relationships in which adjudicators have supervised prosecutors, the theory of *Columbia Research* has not been put to subsequent judicial testing. The paucity of decided cases involving separation of functions issues suggests that violations of section 5(c) either rarely occur or rarely come to light. It was only

¹⁸⁵ 15 C.F.R. § 1030.211(c) (1970).

¹⁸⁶ See *United States Bio-Genics Corp. v. Christenberry*, 173 F. Supp. 645 (S.D.N.Y. 1959); *Greene v. Kern*, 178 F. Supp. 201 (D.N.J.), *aff'd per curiam*, 269 F.2d 344 (3d Cir. 1959).

because the Post Office Department's published rules seemed to raise the possibility on their face that inconsistent functions would not be kept separate that the decisions resulted in *Glanzman, Pinkus*, and *Columbia Research*.

In the absence of published rules obviously presenting such questions on their face, separation of functions issues are unlikely to be raised, if only because members of the public will not typically have an opportunity to learn the identity of agency employees whom agency members may have consulted during the course of any particular adjudication.

This cannot be the end of the matter, however, for an agency conscientiously interested in complying with section 5(c) no matter how small the chances that a violation may be discovered. Some concluding observations may therefore be appropriate.

Despite the evident ambiguities of section 5(c), the Director ought not consult the chief of the compliance division or any of his subordinates during the course of performing his adjudicatory functions. The chief of the compliance division almost certainly will have performed "investigative or prosecuting functions" in every compliance proceeding reaching the Director for decision. Although subordinates of the chief of the compliance division may not have actually performed "investigative or prosecuting functions" in particular cases, the likelihood that they will be motivated by a self-interested inclination to support the position their superior has taken brings them within the interdiction of *Columbia Research*. Moreover, the fact that OFDI is a relatively small administrative agency probably increases the likelihood that a court would be concerned over participation by members of the compliance division, even if literal compliance with section 5(c) might plausibly be argued.

Conversely, the Director may consult members of the authorizations and policy divisions during the course of performing his adjudicatory functions. Neither of these divisions performs "investigative or prosecuting functions." Routine consultation between these divisions and the compliance division—for example, as to the intended meaning or proper construction of the language used in a particular specific authorization—does not implicate them in the performance of "investigative or prosecuting functions" and will not disable the Director from consulting them if he so chooses.

The question whether the Director may consult the Chief Counsel during the course of performing his adjudicatory functions cannot be answered categorically. The answer will depend upon a case-by-case analysis of whether the Chief Counsel's prior participation in the pro-

ceeding—most likely as a consultant to the compliance division—was sufficiently intensive to make his cast of mind that of an advocate. Routine consultation with the compliance division, particularly upon questions of law or agency policy, ought not be regarded as barring the Director from seeking the judgment of the Chief Counsel during the decisionmaking process. Prudence cautions, however, against permitting the compliance division to consult the Chief Counsel about the merits of particular compliance proceedings unless the Director is willing to risk being disabled from consulting the Chief Counsel during the performance of his adjudicatory functions.

The risk does not seem worth running. It is plainly to the Director's advantage to be able to receive legal advice from the man who is the agency's chief legal officer and who may be required to support the Director's decision in court. The chief of the compliance division may, of course, also need access to expert legal advice, but he has lawyers on his own staff to whom he may turn. If the Chief Counsel is held to have engaged in "investigative or prosecuting functions," he cannot present his views to the Director. The chief of the compliance division, on the other hand, can always present his views to the Director "as witness or counsel in the public proceedings, including the filing of briefs."¹⁸⁷ Thus it seems wiser to insure that the Director, rather than the chief of the compliance division, be free to consult with the Chief Counsel when the choice is mutually exclusive.

Even assuming that the Chief Counsel will be able to stay clear of "investigative and prosecuting functions" and will therefore remain available for consultation by the Director during the course of adjudicatory proceedings, it is obvious that the Director will need assistance from a lawyer in the preparation of his written decision. The process of reading an administrative record, considering the arguments and exceptions put forward in the briefs, and preparing an opinion responsive to the record and the briefs, is a time-consuming job. The Director, even when he happens to be a lawyer, cannot fairly be expected to do it alone. Although the Chief Counsel's office conceivably could perform the opinion-writing function, it would be wiser to place it in a full-time legal assistant to the Director. Almost every important federal administrative agency (for example, the Federal Communications Commission, the Securities Exchange Commission) has a separate opinion-writing staff, responsible only to the members of the agency and charged with no other responsibilities for achievement of the agency's substantive goals. This arrangement

¹⁸⁷ ATTORNEY GENERAL'S MANUAL, *supra* note 31, at 57.

insures the appearance of fairness and obviates the possibility that the Chief Counsel will be required or permitted to play a significant role in passing judgment upon the work of the chief of the compliance division, his nominal equivalent in OFDI's organizational structure.

B. *Disqualification for Bias*

Congress made the judgment in enacting section 5(c) that the agency should be permitted to perform both adjudicatory and investigative and prosecuting functions. But the legislative history indicates that Congress understood that the combination of functions authorized by section 5(c) created the possibility of bias. There is also evidence that Congress intended therefore that the combination of functions be permitted only to the extent necessary.¹⁸⁸

In section 7(a) of the APA, Congress made available a procedure by which claims of bias could be passed upon by administrative agencies:¹⁸⁹

On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.¹⁹⁰

Beyond the terms of section 7(a), courts have indicated that a combination of functions that creates the possibility of bias in administrative adjudication gives rise to serious questions of due process. A number of significant cases make clear that an agency decision rendered in compliance with the APA's strictures on separation of functions may nevertheless be set aside as a denial of due process because the adjudicator was biased. Much of the law in this area builds upon recent Supreme Court decisions involving judicial bias.¹⁹¹

Questions of bias will focus primarily upon the Director since he will exercise final adjudicatory authority at OFDI. The possibility that the Director may bring judgments about law or policy—as opposed to judgments about facts—to the adjudication of compliance proceedings is not a serious concern. “Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed

¹⁸⁸ See S. REP. NO. 752, 79th Cong., 1st Sess. 18 (1945); H.R. REP. NO. 1980, 79th Cong., 2d Sess. 31 (1946); ATTORNEY GENERAL'S FINAL REPORT, *supra* note 43, at 57; *Holt v. Raleigh City Bd. of Educ.*, 265 F.2d 95, 98 (4th Cir. 1959); text accompanying notes 47-52 *supra*.

¹⁸⁹ See *Federal Home Loan Bank Bd. v. Long Beach Fed. Sav. & Loan Ass'n*, 295 F.2d 403 (9th Cir. 1961); *National Lawyers Guild v. Brownell*, 225 F.2d 552 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 927 (1956).

¹⁹⁰ 5 U.S.C. § 556(b) (Supp. V, 1970).

¹⁹¹ *Nilva v. United States*, 352 U.S. 385 (1957); *In re Murchison*, 349 U.S. 133 (1955); *Sacher v. United States*, 343 U.S. 1 (1952).

no ground for disqualification.”¹⁹² Indeed, one of the obligations of those who serve as members of an agency is to develop coherent philosophies as to regulatory policy.¹⁹³

In addition, two kinds of bias that have been condemned by courts may be set aside as irrelevant to the present inquiry because they will not result from any particular administrative structure created for the process of adjudication. The first is bias resulting from an adjudicator's personal, usually pecuniary, interest in the outcome of a proceeding.¹⁹⁴ Cases involving bias of this kind in federal administrative agencies have been rare.¹⁹⁵ The second is bias resulting from an adjudicator's personal prejudice, hostility, or favoritism toward a party to a proceeding.¹⁹⁶ Cases involving bias of this kind typically have seen an adjudicator create the appearance that impartial adjudication could not be had by publicly announcing his conclusion, before an administrative proceeding was held, that a person was guilty of agency charges pending against him.¹⁹⁷

Although it is not impossible that bias in either of these two senses might result at OFDI, it would not be the consequence of the selection of any particular administrative structure for the adjudication of compliance proceedings.

OFDI's administrative structure does present a bias question, however, that requires serious analysis. It is obvious that the Director will have gained some knowledge of the facts (and may also have formed some judgments as to the policy issues) in most compliance proceedings before he is required to perform his adjudicatory functions. The Director's knowledge of the facts will derive from his participation in prior stages of the proceedings. The Director may gain such knowledge, for example, when he approves the decision to initiate an investigation or issue a complaint against a direct investor on the basis of a presentation made by the compliance division. He may gain such knowledge when he approves the terms upon which

¹⁹² 2 K. DAVIS, *supra* note 35, at § 12.01, at 131; *see* United States v. Morgan, 313 U.S. 409, 421 (1941).

¹⁹³ FTC v. Cement Institute, 333 U.S. 683 (1948).

¹⁹⁴ Tumey v. Ohio, 273 U.S. 510 (1927).

¹⁹⁵ *Cf.* Air Transport Ass'n v. Hernandez, 264 F. Supp. 227 (D.D.C. 1967).

¹⁹⁶ Compare Price v. Johnston, 125 F.2d 806 (9th Cir.), *cert. denied*, 316 U.S. 677 (1942), and Henry v. Speer, 201 F. 869 (5th Cir. 1913), with NLRB v. Pittsburgh S.S. Co., 337 U.S. 656 (1949).

¹⁹⁷ *See* Cinderella Career & Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970); Texaco, Inc. v. FTC, 336 F.2d 754 (D.C. Cir. 1964), *vacated & remanded on other grounds*, 381 U.S. 739 (1965); *cf.* American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966); Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966); Bufalino v. Kennedy, 322 F.2d 1016 (D.C. Cir. 1963); Gilligan, Will & Co. v. SEC, 267 F.2d 461 (2d Cir.), *cert. denied*, 361 U.S. 896 (1959); Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280 (1955); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954).

OFDI would be prepared to accept a consent settlement as the result of prehearing negotiation with the direct investor. He may gain such knowledge when he determines a direct investor's application for a specific authorization.

Although it is true that "a fair hearing presupposes an impartial trier of fact and that prior official involvement in a case renders impartiality most difficult to maintain,"¹⁹⁸ the cases make clear that some forms of prior official involvement in a case will not disqualify an adjudicator for bias. The leading Supreme Court decision is *NLRB v. Donnelly Garment Co.*¹⁹⁹ The question was whether a hearing examiner who had rejected the proffer of certain evidence as valueless should have been disqualified as biased from hearing the case on remand after a court of appeals had held that exclusion of the evidence had resulted in denial of a fair hearing. Although it could be argued that the examiner had prejudged the value of the proffered evidence—the argument might seem strengthened by the fact that at the second hearing the examiner heard the previously excluded evidence and then made the same findings as he had at the first hearing—the Supreme Court held that he was not disqualified:

The Court [of Appeals, in finding the hearing examiner disqualified by bias,] seemed to be moved by the generous feeling that a party ought not be put to trial before an examiner who, by reason of his prior rulings and findings, may not be capable of exercising impartiality. Certainly it is not the rule of judicial administration that, statutory requirements apart . . . a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing.²⁰⁰

The decision thus seems to stand for the proposition that an adjudicator will not automatically be held disqualified merely because he has prejudged certain issues of fact—that is, "previously announced a position concerning an appraisal of particular facts"²⁰¹—which he is subsequently called upon to decide during the course of an adjudication.

The conclusion that "a hearing examiner is not biased, either in law or in fact, simply because he previously ruled against one of the

¹⁹⁸ *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967).

¹⁹⁹ 330 U.S. 219 (1947).

²⁰⁰ *Id.* at 236-37.

²⁰¹ 2 K. DAVIS, *supra* note 35, at § 12.01, at 139.

parties”²⁰² is reflected in a consistent line of cases.²⁰³ For example, in *MacKay v. McAlexander*²⁰⁴ the court held that a hearing officer who presided at a deportation hearing in which he issued an order that must be read as rejecting appellant’s central factual claim was not disqualified from presiding at a subsequent hearing on appellant’s application for a suspension of deportation. The court stated:

The unfavorable opinion of a party or witness which a hearing officer or a trial judge may entertain as a result of evidence received in a prior and connected hearing involving that individual is not “bias” in the invidious sense. It is in effect a judicially-determined finding which may properly influence such officer or judge in a supplemental proceeding involving the penalty or punishment to be assessed, or the grace to be extended. No unfairness or lack of due process was inherent in the fact that the same hearing officer presided in both proceedings.²⁰⁵

Because of the factual context in which *MacKay* arose, it seems a fair conclusion that the application of *Donnelly Garment* is not limited to circumstances involving remand of an administrative proceeding to an adjudicator; it extends as well to successive proceedings on related matters involving the same adjudicator. It also seems a fair conclusion that the principle of *Donnelly Garment* applies to adjudicators who are members of an agency with at least as much force as it does to hearing examiners; indeed, because of the premises underlying section 5(c), it may apply to members of an agency with greater force.

These two conclusions are supported by the decision in *Pangburn v. CAB*,²⁰⁶ which involved two successive administrative determinations by members of the CAB. In the first proceeding, the Board determined that the probable cause of an accident involving a plane piloted by Pangburn was pilot error; the Board issued its accident report as part of its statutory duty to investigate airplane crashes and make public reports as to their circumstances and probable cause. Shortly thereafter, in the second proceeding, the Board issued an order suspending Pangburn’s pilot license for ninety days; the record

²⁰² *Converse v. Udall*, 262 F. Supp. 583, 590 (D. Ore. 1966), *aff’d*, 399 F.2d 616 (9th Cir. 1968), *cert. denied*, 393 U.S. 1025 (1969).

²⁰³ *Kelly v. Wyman*, 294 F. Supp. 893, 907 (S.D.N.Y. 1968), *aff’d sub nom. Goldberg v. Kelly*, 397 U.S. 254 (1970); 2 K. DAVIS, *supra* note 35, at § 12.06, at 169; Note, *Disqualification of Administrative Officials for Bias*, 13 VAND. L. REV. 712 (1960).

²⁰⁴ 268 F.2d 35 (9th Cir. 1959), *cert. denied*, 362 U.S. 961 (1960).

²⁰⁵ *Id.* at 39.

²⁰⁶ 311 F.2d 349 (1st Cir. 1962).

upon which this order was based did not include the accident report from the first proceeding.

The court rejected Pangburn's contention that the Board should be disqualified by bias from deciding the second proceeding because of the "concrete and specific factual determination"²⁰⁷ it had made in the first. "It is well settled," the court said, "that a combination of investigative and judicial functions within an agency does not violate due process."²⁰⁸ The court noted that the strictures in section 5(c) with respect to combination of functions do not apply to the agency and that *Donnelly Garment* had found no violation of due process when an adjudicator presided at a second hearing after having formed judgments of fact at a first. The court also noted that the Supreme Court had sustained the right of judges to try contempt proceedings that they had initiated, even when the contempt was personal to themselves.²⁰⁹ The court concluded that "we cannot say that the mere fact that a tribunal has had contact with a particular factual complex in a prior hearing, or indeed has taken a public position on the facts, is enough to place that tribunal under a constitutional inhibition to pass upon the facts in a subsequent hearing. We believe that more is required."²¹⁰

The decision in *Pangburn* is not beyond criticism. Because "the CAB had made a public commitment to a finding of pilot error" in the first proceeding, it is not unlikely that "CAB members had a strong incentive [in the second proceeding] to avoid appearing publicly to be inconsistent."²¹¹ It is fair to respond to such criticism by pointing out that the decision in *Pangburn* is supported by the existing case law. In addition, if all the members of the Board had been disqualified the case could not have been decided at all. But the response is incomplete because the thrust of the criticism is that in some circumstances not presently reached by the case law an adjudicator should be disqualified because he has prejudged certain issues of fact. The decision in *Amos Treat & Co. v. SEC*²¹² may suggest that courts will look beyond existing case law in determining when to limit participation by an adjudicator who has formed judgments in prior proceedings about factual issues presented by the proceedings currently before him.

²⁰⁷ *Id.* at 356.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 357 (citing *Nilva v. United States*, 352 U.S. 385 (1957); *Sacher v. United States*, 343 U.S. 1 (1952)).

²¹⁰ 311 F.2d at 358.

²¹¹ 2 K. DAVIS, *supra* note 35, at § 13.02, at 32 (Supp. 1965).

²¹² 306 F.2d 260 (D.C. Cir. 1962).

The court in *Amos Treat* held that Commissioner Cohen was disqualified by bias, under principles of due process, from participating in an adjudicatory proceeding. Before becoming a member of the SEC, Cohen had served as director of the Commission's Division of Corporate Finance. In that capacity he had ordered an informal investigation of a company that had filed a registration statement. He reported the results of that investigation to the full Commission, which ordered the institution of a formal examination and investigation. Within a month after Cohen became a Commissioner, the SEC acted upon the recommendation of the Division of Corporate Finance and instituted administrative proceedings to suspend the effectiveness of the company's registration statement. Relying solely on due process grounds, the court held:

We are unable to accept the view that a member of an investigative or prosecuting staff may initiate an investigation, weigh its results, perhaps then recommend the filing of charges, and thereafter become a member of that commission or agency, participate in adjudicatory proceedings, join in commission or agency rulings and ultimately pass upon the possible amenability of the respondents to the administrative orders of the commission or agency. So to hold, in our view, would be tantamount to that denial of administrative due process against which both the Congress and the courts have inveighed.²¹³

The facts in *Amos Treat* presented a circumstance in which a member of an agency changed his function completely during the course of an adjudicatory proceeding. Commissioner Cohen began the proceeding entirely as a prosecutor; by its conclusion, he had become entirely an adjudicator. The case thus presented a question of a succession—not a combination—of functions.

There is no reason to believe that the provision of section 5(c) exempting members of the agency from the proscription against combining functions was intended to apply to such a situation. First, the facts do not present the necessity for a combination of functions that Congress concluded existed at the agency level alone; in this respect, the case is distinguishable from *Pangburn*. Second, the facts are inconsistent with the hypothesis, implicit in section 5(c), that an adjudicator who is a member of an agency may be expected to exercise his prosecuting function with a self-restraint unnecessary and inappropriate in a person (such as the director of the SEC's Division of Corporate Finance) whose function is to make the case as strong as

²¹³ *Id.* at 266-67.

possible, not to preserve a cast of mind capable of subsequently rendering impartial judgment.

It seems clear, then, that the decision in *Amos Treat* could properly have been rested upon the court's conclusion that section 5(c) "applied to Commissioner Cohen as director of the Division of Corporate Finance. Its prohibitory impact followed him and attended when he became a member of the Commission."²¹⁴ Even when the decision in *Amos Treat* is accepted as resting upon constitutional grounds, the result is still dependent upon the fact that the case presented a question of a succession, rather than a combination, of functions.

The principal authority upon which the court relied, *Trans World Airlines v. CAB*,²¹⁵ closely resembled the facts before the court. The Solicitor of the Post Office Department signed a brief to the Board on behalf of the Postmaster General before becoming a member of the Board and casting the deciding vote in favor of the Postmaster General. The court vacated the Board's order:

It is plain that in this statute Congress contemplated an adjudicatory proceeding and conferred upon the Board in this respect quasi-judicial functions. The fundamental requirements of fairness in the performance of such functions require at least that one who participates in a case on behalf of any party, whether actively or merely formally by being on pleadings or brief, take no part in the decision of that case by any tribunal on which he may thereafter sit.²¹⁶

A similar result was reached in *American Cyanamid Co. v. FTC*,²¹⁷ in which Chairman Dixon was held disqualified by bias from participating in the adjudication of a proceeding involving the same companies and the same facts that had been investigated by a Senate subcommittee of which he had been chief counsel. Chairman Dixon—like Commissioner Cohen in *Amos Treat* and the former Solicitor of the Post Office Department in *Trans World Airlines*—had engaged in a succession, rather than a combination, of functions.²¹⁸

This conclusion—that *Amos Treat* is relevant primarily to circumstances involving a succession of functions—is supported by the court's explanation of the inapplicability of the provision of section 5(c) excluding the agency from the proscription against the combination of functions:

²¹⁴ *Id.* at 266.

²¹⁵ 254 F.2d 90 (D.C. Cir. 1958).

²¹⁶ *Id.* at 91.

²¹⁷ 363 F.2d 757 (6th Cir. 1966).

²¹⁸ See also *Camero v. United States*, 375 F.2d 777 (Ct. Cl. 1967).

It is our view that the exclusionary sentence relied upon was intended to permit one who is a Commissioner to participate in a decision of the Commission that an investigation go forward and even that charges be filed to the end that an adjudicatory proceeding might be initiated. In such circumstances, it was the purpose of Congress as we construe the section, to permit a Commissioner to participate in the ultimate decisional process, and not otherwise.²¹⁹

The court thus makes clear that it did not intend to disturb on constitutional grounds of bias the combination of functions that section 5(c) permits to members of the agency. The decision has been described by one court of appeals as "the exceptional case"²²⁰ and has been considerably limited by another.²²¹ Nevertheless, *Amos Treat* may have implications beyond questions presenting a succession of functions because of the court's willingness to invoke the due process clause to disqualify an agency member when less ultimate means were at hand.

Of what relevance are the principles just discussed to the Director of OFDI? Section 5(c) of the APA permits him to commingle functions because of his status as the agency. Disqualification for bias is a narrow exception to the unusual grant of authority contained in section 5(c). No judicial decision has yet held a member of an agency disqualified by bias when the process of adjudication has been carried out in a regularized setting which complied with the separation of functions requirements of the APA.

This means that in the generality of cases the Director of OFDI may perform routine supervisory functions in the investigative and prosecuting stages of a compliance proceeding to the same degree as do members of other federal administrative agencies—such as the Federal Trade Commission or the Securities Exchange Commission—without running the risk of disqualification for bias. It also means that the Director may become acquainted with the facts in a compliance proceeding during the course of exercising his preadjudicatory responsibilities—indeed, he may even make judgments as to factual issues which are later presented to him for adjudicatory determination—without risking disqualification for bias.

Thus, allegations of bias will probably fail so long as the Director's exposure to the merits of compliance cases is not greater than

²¹⁹ 306 F.2d at 266.

²²⁰ *SEC v. R. A. Holman & Co.*, 323 F.2d 284, 286 (D.C. Cir. 1963), *cert. denied*, 375 U.S. 943 (1964).

²²¹ *R. A. Holman & Co. v. SEC*, 366 F.2d 446 (2d Cir. 1966); see *Law, Disqualification of SEC Commissioners Appointed From the Staff: Amos Treat, R. A. Holman, and the Threat to Expertise*, 49 CORNELL L.Q. 257 (1964).

is necessary to enable him to meet his larger responsibilities of supervising OFDI's operations and personnel, setting the agenda of cases appropriate for investigation, prosecution, and settlement, and protecting direct investors from the excessive zeal or disproportionate severity of staff members. This means that the Director ought not "bury himself in one side of an issue"²²² or take a greater interest in the progress of a particular case than his basic duties require; he ought not, in short, develop a psychological stance or commitment inconsistent with the reality or the appearance of impartial adjudication, however appropriate it might be in a member of the compliance division.

As far as the decision in *Amos Treat* is concerned, the Director would be disqualified from adjudicating a compliance proceeding only if he had participated in the investigatory or prosecuting stages of a case in an agency capacity, most obviously in the compliance division, other than as Director. *Amos Treat* will not govern when the Director has not previously been employed by the agency.

The importance of circumspection by the Director with respect to bias is emphasized by the disabling limitations of the two most obvious alternatives available in the event that the Director is disqualified in a particular case.

The first alternative would be the designation of another employee of OFDI as the adjudicator for cases in which the Director has voluntarily disqualified himself or has been held disqualified by a court. The most appropriate employee would probably be the Deputy Director because, more than any other senior official of OFDI, he would tend to bring an officewide perspective to the decision of adjudicatory proceedings.

The limitations of this alternative are similar to those Judge Hand spoke to in *Columbia Research*. The Deputy Director (or any other OFDI employee designated to substitute for the Director) will be asked to decide a case in which his immediate superior has been disqualified because of bias, a circumstance that in some instances may give rise to an impression in the mind of the Deputy Director as to whom the Director would prefer to see prevail.²²³ *Columbia Research* was precisely concerned with the fairness of an administrative structure in which an adjudicator may be constrained by professional self-interest to make decisions that will please his biased

²²² ATTORNEY GENERAL'S FINAL REPORT, *supra* note 43, at 56.

²²³ This conclusion will not be applicable when the Director disqualifies himself for reasons that do not involve bias but instead reflect a conscientious desire to maintain an appearance of absolute fairness even in the absence of any suggestion of bias.

superior. Although it is not impossible to seek to distinguish *Columbia Research*, the central fact remains that the designation of the Deputy Director will mean that a biased superior is supervising an adjudicator.²²⁴

The second alternative is invocation of the so-called doctrine of necessity, which provides that "[w]here the only tribunal empowered to act in a controversy is allegedly biased the tribunal has jurisdiction since the alternative is nonenforcement of the law."²²⁵ The roots of the doctrine of necessity in this country reach back at least as far as Chancellor Kent.²²⁶ In a famous case testing the constitutionality of taxing the income of federal judges, the Supreme Court made an important statement of the doctrine: "Because of the individual relation of the members of this court to the question, thus broadly stated, we cannot but regret that its solution falls to us The plaintiff was entitled by law to invoke our decision . . . and there was no other appellate tribunal to which under the law he could go In this situation, the only course open to us is to consider and decide the cause,—a conclusion supported by precedents reaching back many years."²²⁷

Cases presenting the question of the appropriate invocation of the doctrine of necessity do not frequently reach the Supreme Court. The most recent decision of significance is *FTC v. Cement Institute*.²²⁸ The issue was whether the entire membership of the Federal Trade Commission should be disqualified for bias. The court of appeals had rejected such a contention on the ground that since the FTC was "the only tribunal clothed with the power and charged with the responsibility of protecting the public against unfair methods of competition and price discrimination," the doctrine of necessity required that it be permitted to hear the case.²²⁹

Although the Supreme Court found that the members of the FTC were not in fact biased, it did affirm the appropriateness of invoking the doctrine:

²²⁴ It may well be, of course, that the designation of the Deputy Director, or any other senior OFDI employee, is impracticable because he will have been involved in most proceedings to at least as great a degree as the Director.

²²⁵ L. JAFFE & N. NATHANSON, *ADMINISTRATIVE LAW, CASES AND MATERIALS* 997 (3d ed. 1968).

²²⁶ See *In re Leffe*, 2 Barb. 39 (N.Y. 1846).

²²⁷ *Evans v. Gore*, 253 U.S. 245, 247-48 (1920). See also *Loughran v. FTC*, 143 F.2d 431 (8th Cir. 1944); *Brinkley v. Hassig*, 83 F.2d 351 (10th Cir. 1936).

²²⁸ 333 U.S. 683 (1948).

²²⁹ *Marquette Cement Mfg. Co. v. FTC*, 147 F.2d 589, 594 (7th Cir. 1945).

Moreover, Marquette's position, if sustained, would to a large extent defeat the congressional purposes which promoted passage of the Trade Commission Act. Had the entire membership of the Commission been disqualified in the proceedings against these respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. Yet if Marquette is right, the Commission . . . [by its alleged bias] completely immunized the practices investigated, even though they are "unfair," from any cease and desist order by the Commission or any other governmental agency.²³⁰

Although the broad outlines of the doctrine of necessity would seem applicable to OFDI, a court would probably not permit the Director to invoke it in the generality of cases. Courts can be expected to be sensitive to the fact that the "easy and seemingly automatic application of the rule of necessity is more dangerous than is [typically] recognized . . . for grave injustice may result from allowing disqualified officers to adjudicate cases."²³¹ Because of this fact, the doctrine of necessity is subject to two important conditions which indicate that OFDI ought not rely on the possibility that the Director can invoke the doctrine.

First, courts will not permit an agency to invoke the doctrine when the agency has failed, in designing its administrative structure, to provide for an impartial tribunal for occasions upon which the adjudicator is disqualified for bias.²³² OFDI is not in the position of the FTC in the *Cement Institute* proceeding; it has the authority to provide that another employee of the agency shall perform the Director's adjudicatory functions when the Director is disqualified. Moreover, a court is unlikely to permit OFDI to invoke the doctrine of necessity if it appears that OFDI did not attempt to insure that the Director's participation in early stages of proceedings kept him free from the possibilities of bias.

Second, courts are likely to review administrative decisions in which the doctrine of necessity has been invoked with greater intensity than they would ordinarily exercise, precisely because the acknowledged

²³⁰ 333 U.S. at 701 (footnote omitted).

²³¹ 2 K. DAVIS, *supra* note 35, at § 12.04, at 164.

²³² Cf. *Tumey v. Ohio*, 273 U.S. 510, 522-23 (1927).

presence of bias presents the due process issue with such clarity.²³³ A court exercising such extraordinary scrutiny may well conclude that there is no overriding necessity to enforce an OFDI order against any particular direct investor—the adverse consequences to the public of nonenforcement will probably appear as less severe than in *Cement Institute*—when the decision underlying the order may have been contaminated by the Director's bias.

VI. PROCEDURES FOR DETERMINING APPLICATIONS FOR SPECIFIC AUTHORIZATIONS

OFDI's regulations provide that applications for specific authorizations will be determined by administrative procedures that do not include a trial-type hearing.²³⁴ The question is whether the APA requires that a trial-type hearing be held.

Sections 5, 7, and 8 of the APA apply "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."²³⁵ These requirements will govern the specific authorizations process only if granting and denying applications for specific authorizations is (1) adjudication, and is either (2) required by statute, or (3) constitutionally required under the rule of *Wong Yang Sung v. McGrath*.²³⁶

A. "Case of Adjudication"

Section 2 of the APA defines "license" as "the whole or part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission,"²³⁷ and "licensing" as "agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license."²³⁸

It is difficult to avoid the conclusion that a specific authorization is a license within the meaning of these definitions. OFDI's regulations provide that: "Transactions subject to the prohibitions contained

²³³ See *Hornsby v. Dohard*, 291 F.2d 483 (5th Cir. 1961); W. GELLHORN & C. BYSE, *supra* note 69, at 947-48. As Professor Davis has commented, "The extraordinary cases which impel courts to resort to the rule of necessity may often deserve extraordinary scrutiny by the reviewing court." 2 K. DAVIS, *supra* note 35, at § 12.04, at 166. This has also been the trend in recent years in state courts. See, e.g., *Board of Educ. v. Shockley*, 52 Del. 277, 156 A.2d 214 (1959); *Borough of Fanwood v. Rocco*, 33 N.J. 404, 165 A.2d 183 (1960).

²³⁴ 15 C.F.R. § 1000.801 (1970).

²³⁵ 5 U.S.C. § 554 (Supp. V, 1970).

²³⁶ 339 U.S. 33 (1950).

²³⁷ 5 U.S.C. § 551(8) (Supp. V, 1970).

²³⁸ *Id.* § 551(9).

in this part which are not generally authorized may be effected only under specific authorization. Persons subject to the requirements of this part may be exempted from complying with any requirement thereof only through a specific exemption."²³⁹ In granting an application for a specific authorization, OFDI gives a direct investor permission to do what otherwise is prohibited. Specific authorizations serve the traditional licensing function of authorizing conduct which is unlawful if done without a license. They are the functional equivalents of certificates of public convenience and necessity issued by the Interstate Commerce Commission and the Federal Power Commission, both of which have been held to be licensing.²⁴⁰

The alternative possibility that granting and denying applications for specific authorizations may be rulemaking is inconsistent with the letter and spirit of the definition of a rule as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy,"²⁴¹ particularly in light of the fact that the words "or particular" mean only that "what is otherwise rulemaking does not become adjudication merely because it applies only to particular parties or a particular situation."²⁴²

Section 2 goes on to define "order" as "the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing,"²⁴³ and "adjudication" as "agency process for the formulation of an order."²⁴⁴ Licensing is thus included within the APA definition of adjudication.

Taken together, this pattern of definitions means that the process of granting and denying applications for specific authorizations is licensing and therefore adjudication within the meaning of the APA.

B. "Required by Statute" or Constitution

Adjudicatory hearings which comply with the APA must be held only when they are "required by statute." The meaning of this provision and its applicability to the basic documents creating OFDI have been discussed earlier in connection with compliance proceedings.²⁴⁵ The conclusions reached there are equally applicable here.

²³⁹ 15 C.F.R. § 1000.801(a) (1970).

²⁴⁰ See *Riss & Co. v. United States*, 341 U.S. 907 (1951), *rev'g per curiam* 96 F. Supp. 452 (W.D. Mo. 1950); *FPC v. Texaco Inc.*, 377 U.S. 33 (1964); 1 K. DAVIS, *supra* note 35, at § 7.01, at 154-55 (Supp. 1965).

²⁴¹ 5 U.S.C. § 551(4) (Supp. V, 1970).

²⁴² 1 K. DAVIS, *supra* note 35, at § 5.02, at 296 (footnote omitted).

²⁴³ 5 U.S.C. § 551(6) (Supp. V, 1970).

²⁴⁴ *Id.* § 551(7).

²⁴⁵ See text accompanying notes 77-81 *supra*.

The absence in the Trading with the Enemy Act, Executive Order 11387, and Department Order 184-A of explicit language requiring a hearing in the determination of applications for specific authorizations means that that process is not an adjudication "required by statute" within the meaning of section 5 of the APA, unless a hearing is constitutionally compelled.

The basic criteria governing the determination of when due process requires a trial-type hearing have been set forth earlier.²⁴⁶ It is clear that under some circumstances these criteria will require a trial-type hearing in licensing proceedings.

When the issuance of the license turns in significant part upon the resolution of disputed issues of adjudicative fact, a trial-type hearing is likely to be required as the vehicle for making that resolution. A trial-type hearing is also likely to be required when the issuance of the license has substantial public consequences, either because it involves an area of significant community impact, such as transportation, or because it confers a particular and perhaps monopolistic privilege upon the applicant to the actual or likely exclusion of others, or because it will have implications over a long period of time. In these circumstances, a trial-type hearing is seen as providing an assurance to the public that the award of the license was made fairly.

Criteria stated in such generality do not decide concrete cases. To these criteria must be added an examination of judicial decisions in areas of licensing similar to the specific authorization process. Two areas are especially significant.

The first involves the determination by the Interstate Commerce Commission of applications by common carriers for certificates of public convenience and necessity. After the Supreme Court's decision in *Wong Yang Sung v. McGrath*,²⁴⁷ it became necessary to ascertain when the APA would apply to licensing proceedings solely because due process required a trial-type hearing. In *Riss & Co. v. United States*,²⁴⁸ the Supreme Court reversed a lower court holding that the APA hearing requirements did not apply to the ICC's determination of a common carrier's application for a certificate of public convenience and necessity to extend its operations over new routes. The Court's per curiam decision consists of a single sentence: "The judgment is reversed. *Wong Yang Sung v. McGrath*, 339 U.S. 33."²⁴⁹

In a case decided the next year, *United States v. L. A. Tucker Truck Lines, Inc.*,²⁵⁰ the Court explained its decision in *Riss & Co.*

²⁴⁶ See text accompanying notes 77-99 *supra*.

²⁴⁷ 339 U.S. 33 (1950).

²⁴⁸ 341 U.S. 907 (1951).

²⁴⁹ *Id.* at 907.

²⁵⁰ 344 U.S. 33 (1952).

by saying, "In *Riss & Co. v. United States* . . . this Court held that officers hearing application for certificates of convenience and necessity under § 207(a) of the Interstate Commerce Act are subject to the provisions of the Administrative Procedure Act."²⁵¹ The decision in *Riss & Co.* is obviously not without ambiguity. But because, as the lower court had carefully demonstrated, the Interstate Commerce Act itself did not require a hearing for the award of certificates of public convenience and necessity of the kind that *Riss & Co.* had applied for,²⁵² it is difficult to avoid the conclusion that the decision, particularly in its reference to *Wong Yang Sung*, was based on the belief that due process required a hearing.

The second area involves the determination by the Comptroller of the Currency of applications by national banks seeking authorization to establish branches and by groups seeking new national bank charters. Although the Supreme Court has not spoken to the issue of whether due process requires a trial-type hearing in such determinations, the law that has been developed is significant because of a number of important court of appeals decisions and because of the influential criticism of Professor Davis.

When application is made for a charter for a new national bank or branch bank, the Comptroller makes his decision to grant or deny the application without holding a formal adversary hearing. As the process was described in a recent case, "the Comptroller caused a field investigation to be made of the applicant and the surrounding circumstances. In accordance with the established practice, the agent-examiners of [the Comptroller] called upon the competitors of the applicant bank, informed them of West Side's application and ascertained their reaction to the application."²⁵³ Competitor banks are typically permitted to file a written protest to the granting of the application and may meet with a high official in the Comptroller's office, often the Deputy Comptroller, but neither they nor the applicant are granted a trial-type hearing.

In *First National Bank of Smithfield v. Saxon*,²⁵⁴ a district court held that the Comptroller was required to hold a hearing conforming to the requirements of the APA before authorizing the establishment of a branch bank. The court found that since the practice of not holding such hearings "raise[s] a serious constitutional question" and "[s]ince an Act should be so construed as to preserve its constitutionality, it becomes imperative, under the view here taken, to hold

²⁵¹ *Id.* at 36 (citation & footnote omitted).

²⁵² 49 U.S.C. § 307(a) (1964).

²⁵³ *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381, 383 (8th Cir. 1966).

²⁵⁴ 232 F. Supp. 725 (E.D.N.C. 1964).

that the Administrative Procedure Act is applicable to the Comptroller of the Currency" in determining applications for new banks and branch banks.²⁵⁵

The court of appeals found that the district court was "mistaken" and reversed, holding that "[p]rocedural due process is not offended by the Comptroller's practice. The absence of a hearing provision in the Banking Act raises no Constitutional question, for the omission was within the power of Congress."²⁵⁶ The court went on to hold that a competitor bank was entitled to a de novo review in the district court of the Comptroller's determination, but only because the absence of an administrative record meant that the court could not perform the reviewing function imposed upon it by the APA unless it could adduce evidence and compile a record. Judge Sobeloff, dissenting, agreed that there was no constitutional compulsion to conduct a trial-type hearing; he would have imposed additional fairness requirements upon the Comptroller's informal procedures.²⁵⁷

Since the decision in *Smithfield*, three other circuits have held that the Comptroller is not constitutionally required to hold a trial-type hearing in determining applications for national bank and branch bank charters.²⁵⁸ In commenting on this line of decisions, Professor Davis has written, "What has happened during the 1960's is that the federal courts have at last gone along with the idea that trial-type hearings on contested applications for charters or branches are not required. Three circuits have so held during 1966, 1967, and 1968, and the Supreme Court has denied certiorari."²⁵⁹

The law in these two areas—the determination by the ICC of applications for certificates of public convenience and necessity and the determination by the Comptroller of the Currency of applications for national bank and branch bank charters—is plainly relevant to OFDI's specific authorizations procedure. What conclusions, then, should be drawn from it?

Notwithstanding the ambiguous brevity of *Riss & Co.*, some observations may be ventured as to why the Court held that a due process hearing was required. First, it was the practice of the ICC when *Riss & Co.* arose to hold hearings before one of its own staff examiners on all applications for certificates of public convenience and

²⁵⁵ *Id.* at 731.

²⁵⁶ 352 F.2d 267, 269 (4th Cir. 1965).

²⁵⁷ *Id.* at 275. See also *National Welfare Rights Org. v. Finch*, 429 F.2d 725, 736-37 (D.C. Cir. 1970).

²⁵⁸ *Warren Bank v. Camp*, 396 F.2d 52 (6th Cir. 1968); *Citizens Bank v. Camp*, 387 F.2d 375 (5th Cir. 1967), *cert. denied*, 391 U.S. 904 (1968); *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381 (8th Cir. 1966). See also *First Citizens Bank & Trust Co. v. Camp*, 409 F.2d 1086 (4th Cir. 1969).

²⁵⁹ K. DAVIS, *DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY* 122 (1969).

necessity, even though there was no statutory requirement that it do so. The case came to the Court upon the applicant's objection that the presiding officer was not a hearing officer appointed pursuant to section 11 of the APA. The Court's decision did not impose the requirement of a hearing where none had previously been held. Rather it required that the hearing be conducted by a section 11 hearing examiner. The fact that the impact of the decision fell within such a narrow margin, given the factual context in which the case arose, may help to explain the brevity of the Court's disposition.

Second, a decision by the ICC to grant a certificate of public convenience and necessity to a common carrier has considerable public significance because it affects the quality of a service required by wide segments of the community. A decision to grant a certificate may also have the result, depending upon the attendant economic circumstances, of foreclosing or limiting the possibility that a certificate will subsequently be granted to prospective competitors.²⁶⁰ There is an obvious legitimate public interest in the fitness of an applicant seeking to perform an important community function and whose selection may imply the grant of an exclusive privilege. The disposition in *Riss & Co.* may reflect the Court's belief that a trial-type hearing is the most effective procedure for assuring the public that decisions of such substantial social significance are made openly and fairly.²⁶¹

Third, applications for certificates of public convenience and necessity typically, although not invariably, are opposed by competitors of the applicant or by other groups in the communities to be affected by the proposed service. Thus, although no one intervened to oppose the application in *Riss & Co.*, twelve parties intervened in opposition to the application in *United States v. L. A. Tucker Truck Lines, Inc.*,²⁶² the decision subsequent to *Riss & Co.* The presence of intervenors usually means that determination of the application will require resolution of disputes involving adjudicative facts such as the quality of the services being performed, the demand for additional or different services, the capacity of the applicant to perform particular services, and the impact of granting the application upon other modes of transportation. The Court's decision in *Riss & Co.* may reflect the premise underlying many earlier decisions that the fairest method for deciding disputed issues of adjudicative fact is a trial-type hearing.²⁶³

²⁶⁰ See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945).

²⁶¹ See *Cates v. Haderlein*, 342 U.S. 804 (1951), *rev'g per curiam* 189 F.2d 369 (7th Cir. 1951) (APA applies to Post Office fraud order); *Door v. Donaldson*, 195 F.2d 764 (D.C. Cir. 1952) (APA applies to Post Office order that films are obscene).

²⁶² 344 U.S. 33 (1952).

²⁶³ See, e.g., *Southern Ry. v. Virginia*, 290 U.S. 190 (1933); *Goldsmith v. United States Bd. of Tax Appeals*, 270 U.S. 117 (1926); *Londoner v. City of Denver*, 210 U.S. 373 (1908).

It may be argued that there is no difference in principle between the determination by the ICC of an application for a certificate of public convenience and necessity and the determination by OFDI of an application for a specific authorization. Both determinations, the argument would run, require an agency to decide whether to grant an applicant permission to do something which would be illegal without such permission. Although this argument may seem plausible in terms of a generalized description, it overlooks significant practical differences between the two determinations.

First, the determination whether a particular direct investor will be permitted to exceed the limits upon foreign direct investment imposed by the substantive regulations is of limited public significance. Second, so long as there is some flexibility in adjusting the aggregate amount permissible for specific authorizations in a given year, a decision to grant any particular application for a specific authorization will rarely, if ever, have the effect of foreclosing the possibility that a subsequent application of comparable merit will be granted. Moreover, a decision to deny an application for a specific authorization has effect for a limited period only, prohibiting the direct investor from undertaking the proposed enterprise for the remainder of the calendar year but leaving him free to do it the following year. It may sometimes be true that the impact of denial will be more severe, at least when the inability to accept a business opportunity now means that the opportunity will be lost forever, but in some cases it will be equally true that the direct investor can take up the opportunity by paying higher interest rates abroad. Third, the determination of applications for specific authorizations will not require the resolution of disputes involving adjudicative facts because OFDI assumes that the statements made in the application are true—converting it, as it were, into a stipulation—and because there are no intervenors to oppose the application or challenge its statements.

Thus, the licensing process of the ICC which the Court spoke to in *Riss & Co.* and the licensing process by which OFDI grants specific authorizations are significantly different. These differences create substantial doubts whether the rationale underlying the decision in *Riss & Co.* would be held applicable to the specific authorizations process.

The conclusion that the federal courts have reached in the second area of present concern—that the Comptroller of the Currency is not required to conduct trial-type hearings on contested applications for national bank and branch bank charters—may seem inconsistent with the principles suggested as helpful in explaining the result in *Riss &*

Co. A decision by the Comptroller to grant or deny an application for a new bank or branch bank charter will almost always have considerable public significance because it affects the quality of an important service required by the community in an area of every day life. Similarly, such a decision will typically have a substantial impact upon the economic position of competitors, perhaps to the point of excluding the grant of future applications.²⁶⁴ And because competitors have standing to contest the application, the Comptroller is usually required to resolve disputed issues of adjudicative fact—for example, the capacity of the community to absorb new banking services, and the impact that the introduction of new banking services may have upon existing banks.

The nature of the determination the Comptroller is required to make, then, would seem within the spirit of the principles usually held to require a trial-type hearing. The fact that the federal courts have held otherwise thus requires explanation. The courts' decisions mean that the principles discussed in connection with *Riss & Co.* are not exclusive and that competing principles are at play and will sometimes prevail. Several observations are relevant.

First, regulation of banking is the federal government's oldest system of economic regulation. The Comptroller's practice of determining applications for national bank and branch bank charters by informal adjudication rather than by a trial-type hearing is part of a tradition begun with the enactment of the National Banking Act in 1864.²⁶⁵ As the court of appeals said in *Smithfield*, "the uniform administrative practice of the Comptroller for a hundred years has sanctioned his present course. True, his own regulations had permitted an adversary hearing, but resort to these rules was entirely at his option."²⁶⁶ Similar informal practices have long existed throughout the area of governmental regulation of banking. Two leading scholars have noted:

The Board of Governors of the Federal Reserve System considers requests for various types of licenses, including membership in the Federal Reserve System, engaging in certain banking activities by member banks, and acquisition of bank stock by bank holding companies. . . . The Federal Deposit Insurance Corporation grants or denies petitions for admission to insurance. For the most part, each of these agencies makes its determinations without hearings at any stage.²⁶⁷

²⁶⁴ See *Federal Home Loan Bank Bd. v. Rowe*, 284 F.2d 274 (D.C. Cir. 1960).

²⁶⁵ 12 U.S.C. §§ 21-215b (1964), as amended, (Supp. V, 1970).

²⁶⁶ 352 F.2d at 270.

²⁶⁷ W. GELLHORN & C. BYSE, *supra* note 69, at 662.

In *Fahey v. Mallonee*,²⁶⁸ the Supreme Court assigned considerable significance to the tradition in banking regulation of determining controversies by methods other than trial-type hearings. The Federal Home Loan Bank Administration, without notice or hearing, had appointed a conservator to enter into possession of a bank. The Court held that the power of summary appointment "is a heavy responsibility to be exercised with disinterestedness and restraint, but in the light of the history and customs of banking we cannot say it is unconstitutional."²⁶⁹ The extensive historical and customary roots of the Comptroller's practice of determining applications for bank charters by informal methods may have influenced the courts whose decisions have sustained its constitutionality.

Second, a substantial body of informed opinion, particularly within the banking community, holds that a trial-type hearing is an inappropriate procedure for making decisions upon applications for new bank and branch bank charters. The procedures by which the Comptroller determines such applications is similar to those used by bankers to make business decisions generally. As long ago as 1940, the Attorney General's Committee on Administrative Procedure wrote:

When a private banker receives a request for a loan from a stranger, the bank will investigate his reputation, his financial condition and the like, and will reject or accept his request accordingly. This is a businessman's way of determining the issue, and it is an expeditious method. Where the investigators are trained and trustworthy, a hearing is nothing but a lawyer's excrescence.²⁷⁰

The fact that the Comptroller makes banking decisions by procedures corresponding to those used by members of the banking community to decide similar questions suggests that these may be the most appropriate means for making such determinations.

In addition, trial-type hearings are often an ineffective vehicle for making certain kinds of administrative determinations. In commenting upon the Comptroller's approach, Professor Davis has written:

A trial is surely a clumsy means of determining how many banks and which banks ought to serve a community, and I think the Federal Communications Commission and the Civil Aeronautics Board might well learn from the banking agencies how they can better handle their comparative application cases. The Comptroller properly, in my opinion,

²⁶⁸ 332 U.S. 245 (1947).

²⁶⁹ *Id.* at 253-54.

²⁷⁰ ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, MONOGRAPH No. 9, FEDERAL RESERVE SYSTEM, S. Doc. No. 186, 76th Cong., 3d Sess. 36 (1940).

avoids proceedings in which each witness presents a mixture of evidence and argument in favor of his view about economic imponderables and each cross-examiner presents arguments on the other side in the guise of questions. Written presentations of economic data, coupled with conferences, seem to me preferable to trials, except on issues of specific fact.²⁷¹

In a related context, Judge Leventhal has observed:

The particular point most controverted by petitioners is the effect of the CAB regulation on their business. The issue involves what Professor Davis calls "legislative" rather than "adjudicative" facts. It is the kind of issue involving expert opinions and forecasts, which cannot be decisively resolved by testimony. It is the kind of issue where a month of experience will be worth a year of hearings.²⁷²

The Supreme Court has approved on several recent occasions the practice of certain federal administrative agencies of dispensing with trial-type hearings in the determination of applications that do not meet the minimal policy requirements set out in a generally formulated rule, even when the agency's governing statute seemed to require a hearing for the determination of such applications.²⁷³ Although these decisions are not directly on point, they suggest that courts are sensitive to the possibility that trial-type hearings may not always be the most effective means of making decisions involving certain issues of policy.

Avoidance of a trial-type hearing may be regarded as necessary for another reason, noted in *Webster Groves Trust Co. v. Saxon*:

[I]f bank applicants were subjected to severe public cross-examination, public presentation of unfavorable evidence and were forced to disclose their future plans and programs to competitors, public confidence in the banking system could be adversely affected.²⁷⁴

Similar concerns led the Supreme Court to observe, in *Fahey v. Mallonee*, that more formal procedures, constitutionally necessary in

²⁷¹ Davis, *Administrative Procedure in the Regulation of Banking*, 31 LAW & CONTEMP. PROB. 713, 715 (1966); see H. WADE, *supra* note 87, at 119.

²⁷² *American Airlines, Inc. v. CAB*, 359 F.2d 624, 633 (D.C. Cir.) (footnotes omitted), *cert. denied*, 385 U.S. 843 (1966).

²⁷³ *FPC v. Texaco Inc.*, 377 U.S. 33 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). See also *Conley Electronics Corp. v. FCC*, 394 F.2d 620 (10th Cir. 1968); *Borden Co. v. Freeman*, 256 F. Supp. 592 (D.N.J.), *aff'd*, 369 F.2d 404 (3d Cir. 1966), *cert. denied*, 386 U.S. 992 (1967); *Air Line Pilots Ass'n v. Quesada*, 276 F.2d 892 (2d Cir. 1960); Fuchs, *Agency Development of Policy Through Rule-Making*, 59 NW.U.L. REV. 781 (1965); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

²⁷⁴ 370 F.2d 381, 385 (8th Cir. 1966).

some situations, may be dispensable in banking cases because of the "delicate nature of the institution and the impossibility of preserving credit during an investigation."²⁷⁵ The Attorney General's Committee on Administrative Procedure expressed similar views:

The Committee recognizes, however, that a major safeguard is careful and conscientious investigation, that in determining whether individuals are suited to engage in the banking business, or whether the community needs a bank, or whether a bank should be insured and similar questions, a congeries of imponderables is involved, calling for almost intuitive special judgments so that hearings are not ordinarily useful, and that the banking business is a delicate one so that the advantages and importance of ready and frank information may outweigh the dangers of accepting confidential information. Accordingly, and in the absence of any substantial evidence that there has been an abuse of power, the Committee is not prepared to recommend that either hearings be held prior to denial or that in all cases the identity of the author of the adverse evidence be disclosed to the applicant.²⁷⁶

The hypothesis that bankers understand the informal decision-making practices adopted by the Comptroller and regard them as appropriate for deciding the questions posed may explain why the constitutionality of these practices went unchallenged in the appellate courts for one hundred years.²⁷⁷ Parenthetically, part of the explanation may also lie in the hypothesis that bankers appreciate the relatively greater speed and expedition by which informal methods can produce a decision. The views of the regulated industry on the inappropriateness of trial-type hearings may have influenced the judicial decisions sustaining the Comptroller's practices.

Third, the results the Comptroller and other federal banking agencies have achieved by use of informal methods of adjudication in regulating the banking community have received unusual praise from commentators and courts. Professor Davis has termed the regulation of national banks "the outstanding example in the federal government of regulation of an entire industry through methods of supervision, and almost entirely without formal adjudication,"²⁷⁸ and suggested that "other regulatory agencies have much to learn from the relatively informal but highly successful methods of the banking agencies."²⁷⁹

²⁷⁵ 332 U.S. at 253. See also *First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 267, 275 (4th Cir. 1965) (Sobeloff, J., dissenting).

²⁷⁶ ATTORNEY GENERAL'S FINAL REPORT, *supra* note 43, at 142-43.

²⁷⁷ See *Webster Groves Trust Co. v. Saxon*, 370 F.2d 381, 384 (8th Cir. 1966).

²⁷⁸ 1 K. DAVIS, *supra* note 35, at § 4.04, at 247.

²⁷⁹ *Id.* § 7.01, at 157 (Supp. 1965). See also Davis, *supra* note 271, at 713, 715; K. DAVIS, DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY 118 (1969).

Similar views have been expressed by the Supreme Court²⁸⁰ and by lower federal courts.²⁸¹

Moreover, the Comptroller has responded affirmatively in recent years to professional criticism that some of his procedures are not as fair as they might be made. For example, in 1968 the rule requiring that all information about an application be kept secret was changed to permit competitors and other interested parties to inspect "all written material submitted by either the applicants or protestants . . . with the exception of personal financial and biographical data submitted in confidence to the Comptroller's Office."²⁸²

The Comptroller's ability over a long period of time to supervise and regulate the banking industry by means of informal adjudication, and his willingness, in response to informed criticism, to modify his practices in the direction of fuller disclosure of the materials underlying the decision, may have further influenced the judicial decisions sustaining the validity of the practices.

Finally, the courts that have sustained the use of informal hearings by the Comptroller may have been concerned over the practical burden that a requirement of a trial-type hearing would impose upon the agency and the applicant. In 1968, the Comptroller received 1,166 applications for branch bank charters and 68 applications for national bank charters;²⁸³ in 1969, he received 1,391 applications for branch bank charters and 104 applications for national bank charters.²⁸⁴ These applications obviously represent a large volume of business. The judicial decisions holding that the Comptroller need not decide these applications by means of a trial-type hearing may reflect a recognition of the potential consequences—particularly the delay in the determination of applications—that a hearing requirement might produce.

The circumstances under which the Comptroller's informal licensing procedures were sustained against constitutional challenge bear significant similarities to those of OFDI's specific authorizations process. The Comptroller of the Currency is a federal administrative agency engaged in the regulation of certain economic activity, in part by the determination of applications made by individual members of

²⁸⁰ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

²⁸¹ *Northwest Bancorporation v. Board of Governors*, 303 F.2d 832, 843 (8th Cir. 1962); *Bridgeport Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Bd.*, 307 F.2d 580, 581-83 (3d Cir. 1962), *cert. denied*, 371 U.S. 950 (1963).

²⁸² K. DAVIS, *DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY* 123 (1969) (quoting from letter from Comptroller's Chief Counsel).

²⁸³ 1968 U.S. COMPTROLLER OF THE CURRENCY ANN. REP. 8, 12.

²⁸⁴ Letter from David C. Motter, Deputy Comptroller of the Currency, Oct. 22, 1970, on file in Biddle Law Library, University of Pennsylvania Law School.

the regulated industry. Trial-type hearings seem inappropriate for determining these applications for several reasons: the applications typically include confidential information to which trial-type hearings would grant exposure, often at the expense of public confidence in the applicant or to the competitive disadvantage of the applicant; the applications typically require the exercise of a policy judgment, often on the basis of economic assessments and forecasts, not well-suited to determination by the cumbersome methods of a trial-type hearing; the applications often require prompt action—"ripeness is all"—if their grant is to be useful and effective. In substantial measure these comments are equally pertinent to applications for specific authorizations.

The differences that remain between the circumstances under which the Comptroller acts in determining applications and those under which OFDI acts tend toward the conclusion that due process would impose even fewer procedural requirements upon OFDI's licensing processes. Determinations by the Comptroller typically will have a considerable impact upon the public and upon the economic position of competitors, perhaps to the point of excluding the grant of future applications. Determinations by OFDI will rarely affect anyone except the applicant. Because there is some flexibility in the aggregate amount for which specific authorizations will be granted annually, determinations by OFDI are also far less likely to prejudice competitors. Moreover, the Banking Act indicates an intention to afford protection to existing banks, particularly state banks, by its provision that national banks may not be granted branch rights beyond those which state law authorizes to state banks.²⁸⁵ None of the basic documents creating OFDI indicates an intention to protect competitors of an applicant for a specific authorization. Determinations by the Comptroller typically will require in some degree the resolution of disputed issues of adjudicative fact. So long as OFDI accepts the application's statements as true for purposes of determining it, there will typically be no necessity to resolve factual disputes or issues of credibility.

Finally, determinations by the Comptroller typically do not require consideration of a foreign affairs component. In determining applications for specific authorizations, the Director of OFDI performs a function that implicates and is at least adjacent to foreign affairs concerns. A central consideration in the determination of an application is the effect that a decision to grant will have upon the nation's balance of payments position. Courts have often been led to conclude that questions bearing such a close relationship to foreign

²⁸⁵ 12 U.S.C. § 36(c) (1964); *see* *First Nat'l Bank v. Dickinson*, 396 U.S. 122 (1969); *First Nat'l Bank v. Walker Bank & Trust Co.*, 385 U.S. 252 (1966); *Davis, The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450, 460-61 (1970).

affairs concerns are hardly well-suited to determination by means of a trial-type hearing.²⁸⁶

In light of these facts, it seems fair to conclude that the decisions holding that due process does not require the Comptroller to grant a trial-type hearing in determining applications are authority for the proposition that OFDI need not grant such a hearing.

C. Conclusion

This analysis suggests that although the determination of applications for specific authorizations is licensing and therefore adjudication within the meaning of section 2 of the APA, the hearing requirements of section 5 do not apply because there is neither a statutory nor a constitutional requirement that such applications be determined by a trial-type hearing.

VI. THE REQUIREMENT THAT GROUNDS FOR DECISION BE STATED IN DETERMINING APPLICATIONS

The question is whether OFDI gives adequate statement of the grounds for decision in granting and denying applications and requests and in imposing conditions upon the grant of such applications and requests. The question arises in the context of proposals for informal voluntary settlements and of applications for specific authorizations.

Two provisions of the APA require agencies to provide a statement of the grounds for decision in certain circumstances. Section 6(d) of the Act provides:

Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.²⁸⁷

The other provision, section 8(b), states:

All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record²⁸⁸

²⁸⁶ Cf. *Schilling v. Rogers*, 363 U.S. 666 (1960); *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); L. JAFFE, *supra* note 123, at 364-65.

²⁸⁷ 5 U.S.C. § 555(e) (Supp. V, 1970).

²⁸⁸ *Id.* § 557(c) (3).

Almost four decades have passed since the Supreme Court suggested, in *Panama Refining Co. v. Ryan*, that "due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends upon determinations of fact, those determinations must be shown."²⁸⁹ There is little authority since that time suggesting that the requirement of administrative findings or reasons is of constitutional dimension; several significant cases are to the contrary.²⁹⁰ Two leading commentators have stated that "[t]he approach of Chief Justice Hughes in the Panama Refining case has had no germinal significance" and "the 'doctrine' of that case may fairly be said to have died in very early infancy."²⁹¹ Professor Davis believes that the "idea that the Constitution requires administrative findings seems clearly untenable"²⁹² and has concluded, after a careful summary of the more recent cases, that "the Supreme Court has seemingly moved away from that view"²⁹³ in the period since *Panama Refining* was decided.

The answers to the questions presented in this section of the article will rest, then, upon the proper application of sections 6(d) and 8(b) of the APA, rather than upon the Constitution.

A. *Proposals for Informal Voluntary Settlements*

Section 5(b) of the APA requires that "[t]he agency shall give all interested parties opportunity for—(1) the submission and consideration of . . . offers of settlement . . . when time, the nature of the proceeding, and the public interest permit . . ."²⁹⁴ Because informal settlements are so widely used, "eliminating the time and expense which are accompaniments of formal hearings,"²⁹⁵ it is not surprising that they should be described as "truly the lifeblood of the administrative process."²⁹⁶

The provisions of section 5(b) apply to "[c]ases of adjudication required by statute to be determined on the record after opportunity for an agency hearing." It was concluded earlier that compliance proceedings came within that definition. The settlement procedures

²⁸⁹ 293 U.S. 388, 432 (1935).

²⁹⁰ *Thompson v. Consolidated Gas Co.*, 300 U.S. 55 (1937); *cf.* *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 (1935).

²⁹¹ W. GELLHORN & C. BYSE, *supra* note 69, at 1139 n.6.

²⁹² 2 K. DAVIS, *supra* note 35, at § 16.04, at 442.

²⁹³ *Id.* § 16.01, at 436.

²⁹⁴ 5 U.S.C. § 554(c) (Supp. V, 1970).

²⁹⁵ W. GELLHORN & C. BYSE, *supra* note 69, at 641.

²⁹⁶ ATTORNEY GENERAL'S FINAL REPORT, *supra* note 43, at 35. *See also* L. JAFFE & N. NATHANSON, *supra* note 225, at 26-28.

described in OFDI's regulations are its response to the requirement of section 5(b).

Two forms of settlement procedure—informal voluntary settlements and consent agreements—are set forth.²⁹⁷ OFDI's general policy is to dispose of compliance matters by informal voluntary settlements whenever possible. As the regulations make clear, the typical practice for concluding an informal voluntary settlement will involve an exchange of letters, the terms of which have been negotiated and agreed upon in advance, between OFDI and the direct investor. The direct investor's letter proposes the agreed-upon terms of the settlement; OFDI's letter accepts the proposal and closes the matter. Settlements by consent agreement, the second form of settlement procedure, have been rare. The question of when grounds for decision must be stated is thus most important with respect to informal voluntary settlements.

It seems a fair conclusion that there is no legal requirement that OFDI state grounds for decision in entering into—that is, in granting proposals made by direct investors for—either informal voluntary settlements or consent agreements.

Section 6(d) is inapplicable because its requirement of "a brief statement" of the grounds for decision goes only to "the denial in whole or in part of a written application, petition, or other request." Section 8(b) is inapplicable because its requirement that "[a]ll decisions, including initial, recommended, and tentative decisions . . . include a statement of—(A) findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented on the record" is limited, as the language indicates, to instances in which there has been a trial-type hearing. Section 8(b) governs only "the procedure subsequent to a hearing and thus applies to substantive decisions on the merits";²⁹⁸ it does not apply to preliminary orders entered prior to an adjudicatory hearing.²⁹⁹

This result is consistent with the language of section 8(b) and with the policy of section 5(b) of encouraging agencies to make use of settlement procedures when formal adjudicatory hearings can properly be avoided. A requirement that grounds for decision be stated would probably inhibit settlement negotiations. The rationale underlying the requirement of section 8(b) that grounds for decision be stated—to advise the parties and any reviewing court of the basis for the agency's judgment—is unnecessary when the direct investor has

²⁹⁷ 15 C.F.R. pt. 1025 (1970).

²⁹⁸ *City of San Antonio v. CAB*, 374 F.2d 326, 331 (D.C. Cir. 1967).

²⁹⁹ *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466 (5th Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

consented to the closing of the matter. Informal voluntary settlements are not intended to be enforceable by court order and the Supreme Court has held that consent agreements, which are intended to be judicially enforceable, need not include findings of fact or grounds for decision.³⁰⁰

Because the regulations contemplate that informal voluntary settlements will be concluded by an exchange of letters the terms of which have been negotiated and agreed upon in advance, there will typically be no occasion for OFDI to reject a proposal for an informal voluntary settlement. Conceivably, however, a direct investor might present a proposal for an informal voluntary settlement without prior negotiation or agreement with OFDI as to the acceptability of its terms. Under present practice, the Director's decision to reject a proposal presented in this fashion is communicated to the direct investor by a staff attorney. The question is whether OFDI must accompany the rejection of an offer for an informal voluntary settlement with a statement of the grounds for decision.

It seems clear for at least two reasons that section 8(b) does not apply. First, a decision to reject a proposal of settlement does not follow a hearing on the merits. Second, a decision to reject a proposal of settlement is not subject to judicial review, either because it is "preliminary, procedural, or intermediate agency action," rather than "final agency action," within the meaning of section 10(c) of the APA,³⁰¹ or because it is "agency action . . . committed to agency discretion by law," within the meaning of section 10.³⁰²

It is less clear that section 6(d) does not apply. The language of the section—in requiring that "the denial in whole or in part of a written application, petition, or other request . . . shall be accompanied by a brief statement of the grounds for denial"—would seem applicable when read literally to proposals for informal voluntary settlements. The literal reading, however, is probably incorrect.

The success of the settlement procedures enjoined upon agencies by section 5(b) depends crucially upon their freedom from formal requirements and restrictions. If settlement procedures are to perform the important function that the APA contemplates—if they are to conclude in settlement agreements and thus obviate the need for litigation—they must be permitted to be informal, flexible, and hospitable to the give-and-take of negotiation that results in the making of

³⁰⁰ NLRB v. Ochoa Fertilizer Corp., 368 U.S. 318 (1961). See also NLRB v. Standard Transformer Co., 202 F.2d 846 (6th Cir. 1953); NLRB v. J. L. Hudson Co., 135 F.2d 380 (6th Cir.), cert. denied, 320 U.S. 740 (1943); National Candy Co. v. FTC, 104 F.2d 999 (7th Cir.), cert. denied, 308 U.S. 610 (1939).

³⁰¹ 5 U.S.C. § 704 (Supp. V, 1970).

³⁰² *Id.* § 701(a); see 4 K. DAVIS, *supra* note 35, at § 28.16.

proposals and counter-proposals. This explains why decisions made during the course of settlement negotiations are not subject to judicial review. It may also explain why the *Attorney General's Manual on the Administrative Procedure Act* stops well short of reading section 6(d) to require that reasons be given for the rejection of a proposed settlement:

If proposals are submitted and they are unsatisfactory, the agency should consider the advisability of informing the parties involved of the conditions, if any, on which the agency is willing to settle the controversy or accept compliance without formal proceedings.³⁰³

An agency seriously engaged in settlement negotiations will doubtless find it useful to explain why it cannot accept particular proposals for settling a case. The incentive to continue the dialogue insures that such explanations will be made for as long as the agency believes settlement appropriate. But this is a far different matter from requiring an agency to supply a written statement of the grounds for decision every time it rejects a proposal for settlement.

The consistent and sensible tradition by which informal settlement procedures have been exempted from judicial supervision and formal restrictions suggests that section 6(d) does not apply to decisions by OFDI to reject a direct investor's proposal for settlement and therefore that OFDI need not state grounds for decision in rejecting such proposals.

B. *Applications for Specific Authorizations*

Section 8(b) applies only to "case[s] of adjudication required by statute to be determined on the record after opportunity for an agency hearing." It was concluded earlier that the determination of applications for specific authorizations is not such an adjudication.³⁰⁴ The consequence of this conclusion is that the requirements stated in section 8(b) do not govern the specific authorizations process and that OFDI is not required to state the grounds for decision when it grants applications for specific authorizations.

However, the requirement stated in section 6(d)—that "denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding . . . be accompanied by a brief statement of the grounds for denial"—would seem applicable to the denial of applications for specific authorizations. It would also seem applicable to specific authoriza-

³⁰³ ATTORNEY GENERAL'S MANUAL, *supra* note 31, at 49.

³⁰⁴ See text accompanying notes 234-86 *supra*.

tions that grant the direct investor less extensive relief than he had requested, including grants that impose limiting conditions: such grants would be "the denial . . . in part of a written application."³⁰⁵

Section 6(d) applies to the denial of applications for specific authorizations although not to the rejection of proposals for informal voluntary settlements because the denial of an application for a specific authorization, unlike the rejection of a proposal for an informal voluntary settlement, is "final agency action" subject to judicial review within the meaning of section 10(c), precisely the most obvious circumstance in which at least "a brief statement of the grounds for denial" is desirable.

In any event, the terms of section 6(d) are applicable to the specific authorizations process because they are tracked by a provision in OFDI's regulations:

Decisions. Written notice of action taken on an application [for a specific authorization] shall be given to the applicant. Whenever an application is denied, such notice shall include a brief statement of the grounds therefor.³⁰⁶

It seems a fair assumption that section 6(d) and the provision just quoted share a common intention and meaning.

Before undertaking to determine the implications of section 6(d) for the denial of applications for specific authorizations, the meaning of "a brief statement of the grounds for denial" must be ascertained. Virtually the only decision explicitly comparing the terms of an administrative order to the requirements of section 6(d) is *City of San Antonio v. CAB*.³⁰⁷ The court there sustained a consolidation order that denied certain applicants an opportunity to participate in a scheduled hearing. After noting that section 8(b) was not applicable, the court said:

The Board's consolidation order more than complied with the requirements of Section [6(d)]. The order made clear that the Board's purpose in consolidation was to avoid unduly complex and protracted proceedings, citing the "high pri-

³⁰⁵ When OFDI provides a direct investor with a "brief statement of the grounds for denial" of an application, it issues an "order" within the meaning of §2(6) of the APA, 5 U.S.C. § 551(6) (Supp. V, 1970), which must be made available for public inspection and copying pursuant to §3(a)(2)(A) of the APA, 5 U.S.C. § 552(a)(2)(A) (Supp. V, 1970). Compare Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 774-75 (1967), with ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE ADMINISTRATIVE PROCEDURE ACT 15 (1967). See also *American Mail Lines, Ltd. v. Gulick*, 411 F.2d 696 (D.C. Cir. 1969); K. DAVIS, DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY 110-11 (1969); Note, *Freedom of Information: The Statute and the Regulations*, 56 GEO. L.J. 18, 22 (1967).

³⁰⁶ 15 C.F.R. § 1000.801(b) (1970).

³⁰⁷ 374 F.2d 326 (D.C. Cir. 1967); see Davis, *Emerging Trends and Problems*, 22 AD. L. REV. 223, 238 (1970).

ority" assigned by the President to speedy conclusion of the proceeding. This was sufficient.³⁰⁸

The order which the court approved as complying with the mandate of section 6(d) thus consisted of little more than a generalized reference to the desirability of avoiding procedural complexity and to the necessity for bringing the proceeding to as speedy a conclusion as practicable.

Because of the paucity of decisions interpreting section 6(d), it will be helpful to consider briefly several important decisions involving the meaning of section 8(b). Whatever the words "a brief statement of the grounds for denial" may mean in section 6(d), it seems clear, if only as a matter of plain meaning, that they state a less stringent, less exacting requirement than the words of section 8(b), which provide that all decisions shall include "a statement of—(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." ³⁰⁹

Perhaps the leading decision in this area is *SEC v. Chenery Corp.*³¹⁰ The Supreme Court there remanded a proceeding to an administrative agency because the grounds upon which the agency had placed its determination were invalid. The Court was aware that the result reached by the agency might be supportable if placed on other grounds, but it made clear that it was the agency which must determine whether to adopt those grounds. The Court emphasized that "the orderly functioning of the process of review requires that the grounds upon which an administrative agency acted be clearly disclosed and adequately sustained" and that "an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."³¹¹ By emphasizing the importance of findings and reasons for the purpose of permitting informed judicial review that gives proper deference to an agency's authority, the Court underscored an earlier remark that it "must know what a decision means before the duty becomes ours to say whether it is right or wrong."³¹²

In a more recent decision, *Burlington Truck Lines, Inc. v. United States*,³¹³ the Court made clear that the rule of *Chenery* concerning the

³⁰⁸ 374 F.2d at 331.

³⁰⁹ See *Transcontinental Bus System, Inc. v. CAB*, 383 F.2d 466, 478 (5th Cir. 1967), cert. denied, 390 U.S. 920 (1968).

³¹⁰ 318 U.S. 80 (1943).

³¹¹ *Id.* at 94, 95.

³¹² *United States v. Chicago, M., St. P., & Pac. R.R. Co.*, 294 U.S. 499, 511 (1935). See also *City of Yonkers v. United States*, 320 U.S. 685, 694-95 (1944) (Frankfurter, J., dissenting); Friendly, *The "Limited Office" of the Chenery Decision*, 21 *Ad. L. Rev.* 1 (1968).

³¹³ 371 U.S. 156 (1962).

necessary preconditions for judicial review was similar to the rationale of section 8(b) of the APA:

There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. See *Siegel Co. v. Federal Trade Comm'n*, 327 U.S. 608, 613-614. Expert discretion is the lifeblood of the administrative process, but "unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion." *New York v. United States*, 342 U.S. 882, 884 (dissenting opinion). "Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body." *Federal Communications Comm'n v. RCA Communications, Inc.*, 346 U.S. 86, 90. The Commission must exercise its discretion under § 207(a) within the bounds expressed by the standard of "public convenience and necessity." Compare *id.*, at 91. And for the courts to determine whether the agency *has* done so, it must "disclose the basis of its order" and "give clear indication that it has exercised the discretion with which Congress has empowered it." *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 197. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. *Interstate Commerce Comm'n v. J-T Transport Co.*, 368 U.S. 81, 93; *United States v. Carolina Carriers Corp.*, 315 U.S. 475, 488-489; *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 511.³¹⁴

As two leading scholars have commented with respect to decisions like *Chenery* and *Burlington Truck Lines*, "[t]he theory is that the requirement of explicitly stated findings and conclusions will promote responsible and carefully deliberated decisions."³¹⁵ An agency's statement of the grounds for decision under section 8(b) must permit a court to understand the reasons underlying an agency's action and their relationship to the agency's governing statute or rules, so that it may properly exercise the function of judicial review.³¹⁶

³¹⁴ *Id.* at 167-68 (emphasis in original).

³¹⁵ L. JAFFE & N. NATHANSON, *supra* note 225, at 1049. See also *NLRB v. Metropolitan Life Ins. Co.*, 380 U.S. 438 (1956); *Secretary of Agriculture v. United States*, 347 U.S. 645 (1954); 2 K. DAVIS, *supra* note 35, at § 16.12; J. LANDIS, *THE ADMINISTRATIVE PROCESS* 75 (1938); Jaffe, *Adventures in Administrative Law*, in FELIX FRANKFURTER: *THE JUDGE* 206, 219-20 (W. Mendelson ed. 1964).

³¹⁶ See *Braniff Airways, Inc. v. CAB*, 306 F.2d 739, 743 (D.C. Cir. 1962); H. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* (1962); Elman, *Notes on Administrative Adjudication*, 74 *YALE L.J.* 652, 655-56 (1965).

The question of how fully elaborated an agency's reasons must be in order to meet this requirement cannot be answered categorically. As one court has soundly stated, "The requirement for findings necessarily varies according to the nature of the proceeding, and the context and effect of the administrative action."³¹⁷ The extent of elaboration required will depend upon the complexity of the issues decided. Professors Gellhorn and Byse have concluded:

While judicial expressions are far from harmonious in this respect, most courts stress simply the need to understand the administrative decision. That is to say, they require not some stylistic organization of the agency's utterance, but, rather, a communication (in whatever form) of precisely what has been decided.³¹⁸

In seeking to apply these conclusions to the denial in whole or part of applications for specific authorizations, it must be recalled that section 6(d) states a less stringent, less exacting requirement in its call for "a brief statement of the grounds for denial" than section 8(b). This margin of difference may be reflected in the tone of the description of section 6(d) given by the *Attorney General's Manual on the Administrative Procedure Act*: "The required statement of grounds for denial, while simple in nature, must be sufficient to advise the party of the general basis of the denial."³¹⁹

It is clear that section 6(d) does not require that an agency reproduce the detailed reasoning that may be contained in its files or internal memoranda. Nor does it require that an agency cast its statement of the grounds for denial in any particular form, so long as it serves the essential functions of describing the general basis for the denial and permitting judicial review. This means that an agency is not restricted to using a narrative, expository, or argumentative form if it prefers to use another.³²⁰

The practice of the Immigration and Naturalization Service in denying applications submitted by aliens is instructive. Professor Davis has described the practice:

The Immigration Service disposes of about 700,000 applications per year, of which some 35,000 are denied. Almost all applications are handled without hearings. Some of the questions involved are of great moment to the particular aliens. When I discovered in 1964 that reasons were stated in support of denials in only a few classes of cases and not in about nine-tenths of them, I proposed to the commissioner

³¹⁷ *Capitol Airways, Inc. v. CAB*, 292 F.2d 755, 758 (D.C. Cir. 1961).

³¹⁸ W. GELLHORN & C. BYSE, *supra* note 69, at 1154.

³¹⁹ ATTORNEY GENERAL'S MANUAL, *supra* note 31, at 70.

³²⁰ *See id.* 86-87.

and other top officers of the Immigration Service that an alien should always be entitled to have a written reason for the denial of any application. The initial response to this proposal was that it might require a doubling of the staff of some seven thousand and that the proposal was totally impractical. But on further study the service found the idea feasible. For each of thirty-six types of applications it prepared printed cards, listing all the usual reasons for denials. The officer was required to check the applicable reason and to give the card to the alien. I think this was a great gain. The alien now knows whether he should take some action to change his circumstances and file another application, whether the denial is based on a mistaken impression of the facts, and whether he should fight the case further by going to a superior officer. Furthermore, if the facts are in the file, a superior officer has the means of checking the officer's judgment. The new system has caused no increase in the size of the staff.³²¹

A check-off system similar to that used by INS would probably prove feasible for OFDI. The system would require OFDI to draw up a list of the most common categories of grounds for denial and to embody it in a standard letter of denial. OFDI would provide a direct investor whose application for a specific authorization is denied with "a brief statement of the grounds for denial" by checking off the appropriate category on the list.

It is true that the system INS has fashioned was motivated by the very substantial volume of applications denied annually. The volume of applications for specific authorizations that OFDI denies annually is hardly comparable. Applications that have little chance of being granted are either discouraged by OFDI in the preliminary stages or restructured upon advice from OFDI to fit into a pattern that will result in a grant. As a result, the burden of stating briefly the grounds for denial is not statistically great. It is true that section 6(d) also requires OFDI to state the grounds for denial when it grants an application for a specific authorization only in part, which will include typically those instances in which conditions are imposed upon a grant, but this burden is not onerous either.

The fact that OFDI denies far fewer applications annually than INS does not undercut the justification for a check-off system, so long as the category of the ground for denial that OFDI checks off is responsive to the factual assertions upon which the direct investor's application relies. When OFDI's decision rests upon extrinsic factors, it must go beyond merely checking off a category of a ground for

³²¹ K. DAVIS, *DISCRETIONARY JUSTICE, A PRELIMINARY INQUIRY* 104-05 (1969).

denial and must include a brief reference to the factual assumption that motivated its decision to deny.

C. Conclusion

Section 6(d) of the APA requires that OFDI provide direct investors with a "brief statement of the grounds for denial" when it denies an application for a specific authorization. There is no requirement that OFDI provide such a statement when it grants an application for a specific authorization. Section 6(d) does not apply to the process by which informal voluntary settlements are concluded.

VIII. POSTSCRIPT: THE ADAPTABILITY OF THE ADMINISTRATIVE PROCEDURE ACT

One of the motivating impulses behind passage of the APA "was to introduce greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other."³²² Given such a purpose, it was necessary that the APA state procedural standards with sufficient precision that agencies might effectively implement them and with sufficient generality that agencies might creatively adapt them to the wide range of their respective regulatory responsibilities. The creation of a new agency like OFDI presents an opportunity for considering the wisdom of the balance Congress struck between precision and generality. The opportunity is particularly useful because of the important differences in origin and function between OFDI and the older agencies that provided the conception upon which the APA was modeled.

Application of the APA to OFDI requires examination of certain questions basic to fair administrative procedure: the definition of the term "agency" with its related consequences for the separation of investigative, prosecuting, and adjudicatory functions; the designation of a presiding officer at administrative hearings; the character of disciplinary and licensing proceedings; the relevance of foreign affairs considerations; and the necessity that grounds for decision be stated in certain circumstances. The process of reasoning toward answers to these questions has been the substance of this article.

The discussion has proceeded primarily in terms of the fundamental principles of administrative fairness embodied in the APA. The conclusions reached are realistic and workable, and ought not inhibit OFDI's performance of its regulatory responsibilities. That questions concerning the application of the APA can be resolved pragmatically in terms of principle demonstrates its capacity to adapt to new challenges in administrative regulation.

³²² Wong Yang Sung v. McGrath, 339 U.S. 33, 41 (1950).