STATEMENT OF PROFESSOR ABRAHAM A. DASH¹

My name is Abraham A. Dash. I am an Emeritus Professor of Law at the University of Maryland School of Law where I have taught Administrative Law for over 30 years. Prior to teaching at the Law School, I was Deputy Chief Counsel and Director of Litigation for the Comptroller of the Currency (Administrator of National Banks) where I was involved in adjudications not covered by the Federal APA, but was required to comply with Due Process under the Fifth Amendment as interpreted by the U.S. Supreme Court. Prior to this position, I was a Trial Attorney with the Criminal Division of the U.S. Department of Justice.

It is my understanding that I have been invited to attend this hearing; as I <u>may</u> be of some assistance to the Committee regarding issues of Due Process that may exist in adjudications conducted by the United States Coast Guard.

Procedure Due Process is defined in two related areas of law — The Federal Administrative Procedure Act (5 USC 551 et. seq.) and the Fifth and Fourteenth Amendments (Due Process Clauses), of the United States Constitution. A multitude of Supreme Court cases deal with Due Process in state administrative adjudications under the Fourteenth Amendment (i.e., *Goldberg v Kelly*, 397 U.S. 254 (1970).

A further line of cases deal with Federal adjudications (not under the APA) where Due Process under the Fifth Amendment will apply — (<u>i.e.</u>, *Wong Yang Sung v McGrath*, 339 U.S. 33, (1950) and *Ins v Doherty*, 502 U.S. 314, (1992).

¹ "This statement has used the following sources: Administrative Law – Schwartz and Corradu; Understanding Administrative Law – William F. Fox, Jr.; and Administrative Law – Gellhorn and Byse."

The Federal Administrative Procedure Act was enacted shortly after the World War in 1946. This statute was an attempt to correct Due Process problems that arose from the growth of new regulatory agencies during the new deal. There were no standard procedures for rule making or adjudications; each agency had its own way of operating regarding rule making and adjudication. Today, with some limited exceptions, all Federal agencies are under the APA.

Sections 554-559 of the APA regulate adjudications and more than satisfy the Due Process requirements of the Fifth Amendment. <u>However</u>, this section only applies when the statute of the agency requires that its adjudications be determined by a "hearing" on the record. It is my understanding that the adjudications of the United States Coast Guard are under Section 551 et. seq. of the APA.

It is apparent that the three areas of procedural Due Process of the APA more relevant to this hearing are as follows:

- 1. Independence and impartiality of the fact finder (<u>i.e.</u>, Administrative Law judges).
- 2. Ex parte contacts with the fact finder (<u>i.e.</u>, Administrative Law judges).
- 3. Discovery for respondents in Coast Guard adjudications.
- **1.** <u>Independence and Impartiality</u>

Congressional intent to insure the independence and impartiality of fact finders under the

APA is clearly expressed when Congress changed the name of "Hearing Examiners" to

"Administrative Law Judges."

"In 1978, Congress confirmed the change in title by a statute providing that "hearing examiners" in the relevant APA sections should be changed to "administrative law judge." This change has elevated the status of hearing officers more than any other step could have done. And the judicial apotheosis has been achieved at no cost –simply by a change of name that was as painless as it was beneficial. See *Butz v Economou*, 438 U.S. 478 (1978)."

2. <u>Ex parte Contacts with the ALJ</u>

"The drafters of the APA took this issue quite seriously. The Act contains a number of express provisions on ex parte. First, § 554(d) prohibits an ALJ from consulting "a person or party on a fact in issue, unless on notice and opportunity for all parties to participate" Second, § 557(d)(1) sets out ex parte contact rules applicable to all agency employees who participate in the decision.

Ex parte contacts go both ways: parties are prohibited from contacting the agency deciders, and the agency deciders are prohibited from contacting the parties."

The Federal Courts are, of course, equally concerned with ex parte contacts and have often expressed their disapproval when it comes up in a case. (<u>i.e.</u>, *See Home Box Office Inc. v F.C.C.*, 434 U.S. 829 (1977), and *Wong Yang Sung v McGrath*, 389 U.S. 33, (1950).

3. <u>Discovery</u>

The APA says very little about discovery in agency proceedings. Agencies, under Section 555 (d), are authorized to issue subpoenas to parties on request. Section 556 (c) authorizes ALJs to take depositions or have depositions taken. The Attorney General's manual on the APA, 67 (1947) states that parties should be given the same access to discovery as the agency's staff.

However, agencies differ in the types of discovery permitted. Despite the fact that the administrative conference in 1981 (recommendation 70-4, 1 CSR Section 305. 70-4) strongly recommended that agencies spell out a comprehensive discovery system; few have done so.

There is, of course, some discretion with the ALJ to authorize discovery in a given case, but the regulations and policy of the agency will control. There is a Due Process requirement for basic information that respondents would need to defend themselves, (See *Hess and Clark v* *FDA*, 495 F2 975 (D.C. Cir. 1974). But, other than that, discovery is discretionary with the agencies.

Conclusion

It is clear that any attempt by agency personnel to make ex parte contacts with an administrative law judge, on a pending case, is a violation of the Administrative Procedure Act and the Fifth Amendment to the United States Constitution.

It is clear that any attempt to pressure an administrative law judge by a superior or the agency to rule favorably for the agency is a violation of the Administrative Procedure Act and the Fifth Amendment.

It is also clear that if discovery by a respondent in an APA adjudication is so limited that it inhibits the ability of the respondents to present their case that would violate the Fifth Amendment of the United State Constitution. This would probably violate the intent of the adjudication sections of the Administrative Procedure Act.

I will be happy to answer any question the committee may have.