

RULES OF EVIDENCE AND OFFICIAL NOTICE IN FORMAL ADMINISTRATIVE HEARINGS†

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Twenty years have passed since Kenneth Culp Davis reviewed how agency ingenuity reconciled fairness with efficiency in developing flexible rules of evidence for administrative hearings,¹ and thirty years have transpired since Walter Gellhorn proposed the concept of official notice to expand upon the judicial practice and make use of administrative knowledge and experience.² In the meantime agencies have multiplied as the role of government expands into almost every segment of the economy and life in general. Benefits once considered privileges to be dispensed or withdrawn at an administrator's unreviewable whim are now matters of right deserving procedural protection.³ A record of experience under the Administrative Procedure Act,⁴ the statute which governs most federal agency adjudications and provides a practical model for state hearings, now fills the open contours of that act. Continuous review of federal administrative procedures and recommendations for improvement are now institutionalized through the permanent Administrative

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1. Davis, *Evidence Reform: The Administrative Process Leads the Way*, 34 MINN. L. REV. 581 (1950); see Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942).

2. W. Gellhorn, *Official Notice in Administrative Adjudication*, 20 TEXAS L. REV. 131 (1941).

3. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970). See generally Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

4. 5 U.S.C. §§ 551-59, 701-06, 3105, 3344, 5362, 7521 (Supp. V, 1970).

Conference.⁵ While this brief discussion obviously does not exhaust the list of significant changes affecting administrative procedures since the forties and fifties, it establishes my basic point: it is time to restate and review the rules of evidence applied in administrative adjudications, and, where appropriate, to reconsider their validity. This article seeks to accomplish these immodest goals in terms understandable to the beginning student yet challenging to the expert teacher, practitioner, and administrator. Some compromises are inevitable.⁶

AN INTRODUCTION TO ADMINISTRATIVE ADJUDICATION⁷

Most administrative enforcement has relied upon informal methods including advisory letters, administrative warnings, or settlement stipulations. Like their judicial counterparts, however, agencies have also relied upon trial-type proceedings for deciding disputed questions of fact and for ordering compliance with specific laws and regulations.

Although the assembly of comparative figures is still inexact, the conclusion is indisputable that administrative trials far exceed the number of judicial trials. For example, in fiscal 1963—the most recent figures available⁸—almost 70,000 administrative trials involving oral testimony and verbatim transcripts were heard by the more than 100 agencies of the federal government.⁹ In comparison the federal district

5. *Id.* §§ 571-76; see 1969 ANN. REP. ADMIN. CONF. OF THE UNITED STATES (1970).

6. The next section, for example, need not detain those familiar with administrative hearings.

7. See generally 1 F. COOPER, STATE ADMINISTRATIVE LAW chs. 1-3 (1965) [hereinafter cited as COOPER]; 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE ch. 1 (Supp. 1965) [hereinafter cited as DAVIS].

8. Reliable data on administrative adjudications are still unavailable despite repeated recommendations that agencies collect usable statistics. See, e.g., *Recommendation Nos. 1, 17 & 27, FINAL REPORT ADMIN. CONF. OF THE UNITED STATES 1961-62, reprinted in part in SELECTED REPORTS OF THE ADMIN. CONF. OF THE UNITED STATES 1961-62, S. DOC. NO. 24, 88th Cong., 1st Sess. 12-13 (1963); Recommendation No. 14, 1969 ANN. REP. ADMIN. CONF. OF THE UNITED STATES 43-44 (1970).* Consequently, so-called problem areas are identified only because of individual grievances, the volume or importance of the complainant, or because, when the failure is egregious, a systematic failure of an agency to perform its assigned task generates substantial public dissatisfaction. In other words, despite the general sophistication of administrative procedure, the basic tools for measuring the effectiveness or ineffectiveness of such techniques are still undeveloped. Cf. Posner, *A Statistical Study of Anti-trust Enforcement*, 13 J. LAW & ECON. 365 (1970). Yet one should acknowledge, of course, that quantitative statistics are not the only tool for measuring agency performance.

9. These figures consist of the following agency hearings reported in SUBCOMM. ON ADMINISTRATIVE PRACTICE AND PROCEDURE, SENATE COMM. ON THE JUDICIARY, 88TH

courts heard fewer than 11,000 civil and criminal cases that year, and not even 6,000 of these were jury trials.¹⁰ As these figures suggest, the importance of jury trial rules of evidence has been overemphasized in the law schools and the literature. Indeed, the subject matter and significance of administrative hearings equal those facing the courts. Their range extends from relatively insubstantial workmen's compensation claims to precedent setting antitrust merger rulings involving millions of dollars and affecting thousands of employees.

At first glance many, and perhaps most, administrative adjudications appear to be merely carbon copies of judicial trials. Usually open to the public, the majority are conducted in an orderly and dignified manner, although not necessarily with the formality of a judicial trial. Typically, the proceeding is initiated by the agency's filing of a complaint in a manner similar to the procedures followed in a civil action. Following the respondent's answer, discovery and prehearing conferences may be held. At the prehearing conference, presided over by a trial examiner who conducts the hearing and rules on all motions, the agency is represented by counsel who presents evidence in either written or oral question-and-answer form in support of the complaint. The respondent then presents his case in the same fashion. Witnesses may be cross-examined, objections may be raised, and rulings issued. The parties usually submit briefs and proposed findings to the examiner and may also make oral argument. Shortly after the hearing is closed, the examiner renders a decision, usually supported by findings, and written opinion. If neither agency counsel nor respondent objects, the recommended order is customarily

CONG., 2D SESS., STATISTICAL DATA RELATED TO ADMINISTRATIVE PROCEEDINGS 82 (Comm. Print 1964) (Part II of the "Statistical Greenbook"):

—Closed by agency decision on merits after hearing and preliminary decision	17,573
—Closed by agency final decision on merits without preliminary decision	17,195
—Closed by prelim. decis. on merits which became final without review by agency	16,310
—Other final disposition	<u>11,488</u>
TOTAL	<u>69,566</u>

Professor Davis has inflated this total to 81,469 by including as complete agency hearings cases in two additional categories: (1) "withdrawal, consent, settlement, or other agreement without final decision on merits"; and (2) "dismissed on procedural grounds without consent of the parties." See 1 DAVIS § 1.02 (Supp. 1965).

10. *Annual Report of the Director of the Administrative Office of the United States Courts 1969*, in REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 134 (1970).

adopted by the agency; if there are exceptions, the agency will hear the matter in the manner of an appellate court through the submission of briefs and oral argument by both parties. In general, therefore, a lawyer experienced in litigating cases in state or federal courts will not find an administrative hearing strange or unfamiliar. The parties are represented by counsel; the examiner is treated with deference; and the evidence is received in the usual question and answer form.

This does not mean that variations from this general pattern are either uncommon or insignificant. Many adjudicatory hearings are conducted informally, without the presence of attorneys, by hearing officers without legal training. In some cases actions may be initiated by a private party rather than by the agency, as in a case involving the grant of a license or the approval of a rate rather than a finding of compliance or violation of a statute or regulation. These differences often affect the manner and kind of evidence which will be received.¹¹

Another and more significant distinction between judicial and administrative adjudications, however, is that agency hearings tend to produce evidence of general conditions as distinguished from facts relating solely to the respondent. This difference can be traced back to one of the original justifications for administrative agencies, namely the development of policy. Administrative agencies more consciously formulate policy by adjudicating—as well as by rulemaking—than do courts. Consequently, administrative hearings require that the hearing officer consider the impact of his decision upon the public interest as well as upon the particular respondent. Testimonial evidence and

11. See R. BENJAMIN, *ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK* 174-75 (1942) [hereinafter cited as BENJAMIN] (footnotes omitted):

The law of evidence as it now exists, however useful it may be in practical operation in the courts, is unsystematized, difficult to understand in detail, and difficult to apply. Its successful application requires trained and experienced judges . . . Its successful application requires also trained and experienced counsel. The law of evidence as applied in judicial proceedings is not self-executing . . .

It is a frequent characteristic of [state] quasi-judicial proceedings that the hearing officer is not a trained lawyer; nor would more legal training of hearing officers assure expertness in the field of evidence. It is another frequent characteristic of quasi-judicial proceedings that the parties are not represented by counsel. The essential conditions of the successful application of the rules of evidence are therefore lacking, in many instances. For those instances at least, administrative adjudication must be able (as in my judgment it is) to operate satisfactorily without a legal requirement that the exclusionary rules of evidence be applied.

Since the time of the "Benjamin Report" many states have improved the status and stature of their hearing examiners. See 1 COOPER 331-38; W. GELLHORN & C. BYSE, *ADMINISTRATIVE LAW* 885 n.4 (5th ed. 1970) [hereinafter cited as W. GELLHORN & C. BYSE].

cross-examination therefore play less important roles in many administrative hearings.¹²

A closer examination of administrative adjudication discloses significant institutional distinctions between agencies and courts. These distinctions alter, for application in administrative hearings, the rules of evidence applied in jury trials presided over by a judge. Foremost among them is the fact that an administrative hearing is tried to the *trial examiner* and never to a *jury*. Since many of the rules governing the admission of proof in judicial trials are designed to protect the jury from unreliable and possibly confusing evidence,¹³ the rules need not be applied with the same vigor in proceedings solely before a judge or trial examiner.¹⁴ The trial examiner decides both the facts and the law to be applied. Usually a lawyer, he is often an expert on the very question he must decide. Consequently, the technical common law rules barring the *admissibility* of evidence have generally been abandoned by administrative agencies.

Courts accept whatever cases the parties present; their familiarity with the subject matter is accidental. Agencies, on the other hand, usually select their cases; trial examiners and agency chiefs are either experts or have at least a substantial familiarity with the subject matter since their jurisdictions tend to be restricted. In addition, an agency usually is staffed by experts whose reports, commonly relating to matters adjudicated before the agency, are made available to examiners and commissioners alike. While this development of agency experience and expertise is commonly offered as a justification for administrative agencies,¹⁵ it also creates a basic

12. For some penetrating insights on whether such evidence should be dispensed with in deciding questions of "policy," see Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 521-22 (1970).

13. [The law of evidence is] a piece of illogical, but by no means irrational, patchwork; not at all to be admired, nor easily to be found intelligible, except as a product of the jury system . . . where ordinary untrained citizens are acting as judges of fact. J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 509 (1898).

14. Most commentators agree, for example, that the hearsay and best evidence rules are products of the jury system, see 2 DAVIS § 14.03 (1958) (collecting authorities), and that neither rule is applied with the same strictness in cases tried to the judge and not the jury. C. MCCORMICK, EVIDENCE 137 (1954).

15. The significance of such experience and expertness has also been questioned. See, e.g., W. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 28 (1941); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 25 (1965); Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436, 471-75 (1954).

conflict between assuring fairness to the respondent on the one hand and promoting efficient use of reliable information on the other. The respondent, for example, wants an opportunity to rebut or explain all the "evidence" which the examiner or agency relies upon in making its decision. Yet the agency wishes to avoid the burden of having to prove once again previously established "facts." As a result the agencies developed the doctrine of "official notice" in administrative hearings, a concept which expands on the concept of judicial notice¹⁶ long applied in judicial proceedings. Briefly, this concept requires that an agency give the respondent prior notice and an opportunity to rebut any material facts which the agency would otherwise presume to exist.¹⁷

Pressure to abandon, or at least to limit, the application of technical common law rules of evidence has been directed toward administrative agencies from many quarters. In some cases the legislative direction is clear. One major reason for the creation of workmen's compensation commissions was to avoid the costly and often impossible burden of the hearsay rule. Others, especially the licensing bureaus and claims agencies, were created to provide speedy, cheap, and efficient justice. Their cases seldom involve issues of credibility and demeanor evidence¹⁸—the cornerstone of the hearsay rule. The question-answer format and strict rules of admissibility have little application to judgments involved in granting airline route applications or setting utility rates.¹⁹ Consequently, many agencies have formulated procedures for receiving opinion and written evidence with only limited opportunity for cross-examination. This is not to say that administrative agencies have undertaken a general departure from the basic principles of evidence. Rather it is in agency hearings that many of the hard questions of evidence are probed.

THE LAW GOVERNING ADMINISTRATIVE EVIDENCE

The legal framework governing the conduct of administrative adjudications is not complex and can probably be best understood by first examining the law which determines the kind of proof an agency can receive into evidence.

16. See C. McCORMICK, *supra* note 14, ch. 37.

17. For the APA's treatment of the doctrine of official notice, see APA § 7(d), 5 U.S.C. § 556(e) (Supp. V, 1970).

18. See W. GELLHORN & C. BYSE 711-12.

19. See Robinson, *supra* note 12, at 519-24.

Federal Law. Until the passage of the Administrative Procedure Act in 1946,²⁰ the receipt of evidence into federal administrative proceedings was limited only by general constitutional requirements of fairness and privilege together with the vague directions implicit in the standard for judicial review developed by appellate courts or written into agency enabling acts.²¹ The requirement of fairness generally means only that the respondent

shall have an opportunity to be heard and cross examine the witnesses against him and shall have time and opportunity at a convenient place, after the evidence against him is produced and known to him, to produce evidence and witnesses to refute the charges²²

The test for judicial review typically provides that “[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.”²³ Either standard could be read as a command that administrative agencies must rely upon common law rules of evidence barring hearsay and other secondary evidence, since the respondent could neither confront nor cross-examine such evidence or since the evidence was not competent and therefore not substantial. Neither the agencies nor the courts have accepted these contentions.²⁴ The exclusionary rules of evidence were originally designed to assure that evidence admitted would be relevant and reliable. But the opportunity for confrontation and cross-examination is not the sole measure of reliability. As early as the turn of the century, the Supreme Court ruled that the Interstate Commerce Commission—the first regulatory agency to conduct formal adjudicatory hearings—was not bound by the exclusionary rules:

The [ICC’s] inquiry should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law²⁵

20. Administrative Procedure Act, 60 Stat. 237 (1946). 5 U.S.C. §§ 551-59, 701-06, 3105, 3344, 5362, 751 (Supp. V, 1970).

21. Only a few special statutes articulate procedures for individual agency hearings. *See, e.g.,* Federal Aviation Act §§ 1001, 1004, 49 U.S.C. §§ 1481, 1484 (1964); Federal Communications Act § 409, 47 U.S.C. § 409 (1964).

22. *NLRB v. Prettyman*, 117 F.2d 786, 790 (6th Cir. 1941). *See also* *Morgan v. United States*, 304 U.S. 1, 18-19 (1938); *Hornsby v. Allen*, 326 F.2d 705, 708 (5th Cir. 1964).

23. *Developments in the Law—Remedies Against the United States and Its Officials*, 70 HARV. L. REV 827, 904-05 (1957) (a distillation of the most typical provisions of the statutes providing for judicial review).

24. *See* K. DAVIS, ADMINISTRATIVE LAW 245-48 (1959).

25. *ICC v. Baird*, 194 U.S. 5, 44 (1904). In response to a challenge to an ICC order based partly on hearsay, the Court observed that “[e]ven in a court of law, if evidence of this kind is

Occasionally federal authority has held that the mere admission of legally incompetent evidence is reversible error. But such decisions are exceptional and erroneous unless other grounds can be established for rejecting such evidence.²⁶ Thus, by 1941 the Supreme Court could confidently note that "it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that such rules are to be observed."²⁷

With the adoption of the APA, Congress codified this case law by providing that "[a]ny oral or documentary evidence may be received" in an administrative hearing.²⁸ Specific statutes may, however, override the application of the APA to agency hearings. In a few instances Congress has either exempted an agency's hearings from the APA or has specified that other procedures shall govern certain administrative hearings.²⁹ Sometimes the congressional objective is not clear. For example, the Taft-Hartley Act amended the National Labor Relations Act to provide that the Board's adjudications "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States"³⁰ Although it seems doubtful that this amendment had the intention of imposing jury trial rules on NLRB hearings, at least one court has held that "hearsay evidence must [now] be excluded from consideration by the Board and by [the reviewing court]."³¹ Fortunately, however, most reviewing courts have taken the sensible

admitted without objection, it is to be considered, and accorded its natural probative effect" *Spiller v. Atchison, Topeka & S.F. Ry.*, 253 U.S. 117, 130 (1920).

26. Compare *Tri-State Broadcasting Co. v. FCC*, 96 F.2d 564 (D.C. Cir. 1938), with *FTC v. Cement Institute*, 333 U.S. 683, 705-06 (1948). In response to the *Tri-State* ruling that the admission of all hearsay is improper since it deprives the respondent of its right to cross-examine, Dean Wigmore commented acidly: "No wonder the administrative agencies chafe under such unpractical control." 1 J. WIGMORE, EVIDENCE 34 (3d ed. 1940).

27. *Opp Cotton Mills, Inc. v. Administrator, Dep't of Labor*, 312 U.S. 126, 155 (1941).

28. Administrative Procedure Act § 7(c), 5 U.S.C. § 556(d) (Supp. V, 1970).

29. See S. Doc. No. 248, 79th Cong., 2d Sess. 216 (1946); cf. 8 U.S.C. § 1252(b) (1964), applied in *Marcello v. Bonds*, 349 U.S. 302 (1955).

30. Labor-Management Relations Act § 10(b), 61 Stat. 147 (1947), 29 U.S.C. § 160(b) (1964). Section 10(b) of the 1935 Act, which Taft-Hartley modified, provided that "rules of evidence prevailing in courts of law or equity shall not be controlling." National Labor Relations Act § 10(b), 49 Stat. 453 (1935).

31. *NLRB v. Amalgamated Meat Cutters*, 202 F.2d 671, 673 (9th Cir. 1953); accord, 1 COOPER 384. But see *NLRB v. International Union of Oper. Engr's, Local 12*, 413 F.2d 705, 707 (9th Cir. 1969).

stand that the mere admission of hearsay is not within the purview of the Taft-Hartley amendment.³² Despite this almost universal judicial interpretation, NLRB examiners invariably apply the strictest common law rules of evidence and refuse to admit hearsay testimony unless it is within one of the recognized exceptions.³³ Several explanations can be offered: (1) hearsay evidence is generally unreliable in labor cases which commonly involve hotly-contested questions of credibility and demeanor evidence is best tested under the common law rules; (2) following the common law rules is the path of least resistance, and a trial examiner who rejects hearsay evidence need not fear Board reversal; or (3) most examiners "grew up" on the common law rules and have been unable to shed comfortable habits. None seems particularly convincing. Whatever the reason, the point worth noting is that the reality of agency hearing practice does not always reflect the rhetoric of judicial supervision. In Labor Board hearings the difference is regrettable. It seems ripe for investigation by the Administrative Conference.

Of more concern is a recent decision which holds that the general provisions of an agency's enabling act override the APA's hearing provisions. In *Cohen v. Perales*³⁴ the Fifth Circuit ruled that since the Social Security Act permits the Secretary of Health, Education and Welfare to adopt rules of evidence, procedures established under this power are not subject to the restrictions of the APA. The impact of

32. *E.g.*, *NLRB v. Carpet, Linoleum & Resilient Tile Layers Local 419*, 213 F.2d 49, 53 (10th Cir. 1954); *NLRB v. Philadelphia Iron Works, Inc.*, 211 F.2d 937, 942-43 (3d Cir. 1954).

33. This conclusion is supported by comments from NLRB hearing examiners, staff attorneys, and labor practitioners to the author. *See also Archer, Query: Should Administrative Agencies Tailor Exclusionary Evidence Rules Specifically for Their Own Proceedings? An Illustrative Study of the NLRB*, 3 IND. LEG. F. 339 (1970).

34. 412 F.2d 44, *rehearing denied*, 416 F.2d 1250 (5th Cir. 1969), *cert. granted sub nom. Richardson v. Perales*, 397 U.S. 1035 (1970), *noted* 1970 DUKE L.J. 146. The statutory provisions which, when implemented, were held to override the APA provided:

(a) The Secretary shall have full power and authority to . . . adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same [to receive benefits].

(b) . . . Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure.

(g) . . . The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive . . . 42 U.S.C. §§ 405(a), (b), (g) (1964).

The Secretary's hearing regulations did not in fact alter the APA standards. The regulations required that "[t]he hearing examiner . . . shall receive in evidence . . . any documents which are relevant and material to such matters" and that "[e]vidence may be received at the hearing even though inadmissible under rules of evidence applicable to court procedure." 20 C.F.R. §§ 404.927-928 (1970). *See also* 5 U.S.C. § 556(d) (Supp. V, 1970).

this particular ruling—that hearsay evidence was admissible—seems of minimal consequence since a similar result would have been appropriate under the APA.³⁵ Nevertheless, it is disturbing that the court disregarded prior cases which assumed that the APA hearing provisions applied to social security adjudications,³⁶ ignored direct rulings by other courts that similar Food and Drug Act provisions should be read *in pari materia* with the APA provisions,³⁷ and seemed oblivious to the absence of any indication that this interpretation of the Social Security Act would in any way serve a congressional purpose. If upheld by the Supreme Court, *Perales* may encourage other agencies to follow the NLRB's return to unnecessarily strict rules of evidence in administrative hearings.³⁸ An alternative and preferred interpretation of the Social Security Act would allow the Secretary to promulgate rules and procedures consistent with the APA. Whether the *Perales* decision is a harbinger of similar rulings that the APA does not govern hearing procedures in other agencies—a distinct possibility since the language relied upon in this instance by the court is common to that in other agency enabling acts³⁹—should be settled during the current term of the Supreme

35. *E.g.*, *Carter-Wallace, Inc. v. Gardner*, 417 F.2d 1086 (4th Cir. 1969), *cert. denied*, 398 U.S. 938 (1970); *see* S. Doc. No. 248, 79th Cong., 2d Sess. 31, 271 (1946).

36. *See, e.g.*, *McDaniel v. Celebrezze*, 331 F.2d 426 (4th Cir. 1964); *Vanderpool v. Celebrezze*, 240 F. Supp. 801 (D. Ore. 1965); *cf.* *Cappadora v. Celebrezze*, 356 F.2d 1 (2d Cir. 1966); *Couch v. Udall*, 265 F. Supp. 848 (W.D. Okla. 1967), *aff'd*, 404 F.2d 97 (10th Cir. 1968).

37. *E.g.*, *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 686 (9th Cir. 1949).

38. *See Project, Federal Administrative Law Developments—1969*, 1970 DUKE L.J. 67, 151-52;

Such a construction erodes the authority of the APA and will allow divergent procedures to be established for each agency, contrary to congressional intent that there be uniformity of procedures among the agencies. If Social Security hearings are not to be subject to the restrictions of the APA, the large body of case law developed by other agencies under the APA will not be applicable, with a resulting loss in judicial efficiency and increase in the uncertainty of individual litigation. The court's statement may also have the deleterious effect of providing precedent for eliminating the APA's coverage of all hearings provided for by statute. . . . [A]pplication of the Social Security Act rather than the APA could create differences. For example, the Secretary could modify the Social Security procedures so that a person could not be represented by counsel . . . while the APA provides a statutory right of counsel to parties. Even greater differences would result if the exemption is applied to the entire APA, not merely the hearing provisions. This may have the effect of lessening the reviewability of Social Security determinations and narrowing the scope of review for those subject to judicial scrutiny. *Id.*

39. *See, e.g.*, *Railway Labor Act* § 3(u), 45 U.S.C. § 153(u) (1965) ("The Adjustment Board shall . . . adopt such rules as it deems necessary in carrying on its proceedings"); *Federal Power Act*, 16 U.S.C. § 825g(b) (1965) ("All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied.").

Court.*

State Law. The constitutional limitations applied to federal agencies also impose restraints upon state hearings. The states in turn have freed their administrative agencies from the "rules of evidence," but not always for the same reasons. Most state agencies were created as political-administrative bodies rather than as quasi-judicial commissions.

Fifty years ago, the typical state agencies would include, perhaps, rural township supervisors who as members of local boards of assessors would estimate the value of their neighbors' farms, and statehouse politicians who as a railroad commission would bargain with railroad attorneys concerning the granting of franchises and the fixing of rates, and insurance commissioners who would watch with a wary eye the premiums charged by fire insurance companies . . . and—in the more progressive states—"committees of arbitration" who would informally arbitrate compensation claims of workers injured in industrial accidents under the newfangled workmen's compensation laws.⁴⁰

Neither these state agencies nor the parties appearing before them could have followed judicial rules of evidence. As the agencies became more sophisticated, and their hearings more formal, the presentation of evidence was formalized. Now, as with federal agencies, their hearings are often indistinguishable from nonjury civil trials. Nevertheless, the original approach that state agencies are not restricted by common law rules in the admission of evidence has continued.⁴¹ One leading observer has contended that this liberal approach has outrun its reasons.⁴² Attributing its continuance to legislative lethargy, to arbitrary agency desire to operate with a free hand, and to the judicial trend toward relaxation of exclusionary rules

*The Supreme Court reversed the Fifth Circuit, ruling that written reports of examining physicians may constitute substantial evidence, and that, since the evidentiary standard relied upon by the Secretary did not deviate from the APA, the Court did not have to decide which prevailed. *Richardson v. Perales*, 39 U.S.L.W. 4497 (U.S. May 3, 1971).

40. 1 COOPER 379 (footnotes omitted).

41. Many state statutes explicitly provide that the common law rules of evidence applicable to jury trials shall not govern agency hearings. *E.g.*, ANN. CALIF. LABOR CODE § 5709 (West 1955); MASS. ANN. LAWS ch. 30A, § 11(2) (1966). Several practical reasons have been offered for not following rigid common law rules of evidence in state hearings: agency hearings are often held at one or a few central locations distant from the scene of events, making it difficult for eyewitness participants to testify; hearings may be held shortly after the complaint is filed, making the advance preparation and the marshalling of the best witnesses and documentary evidence difficult; and the heavy case-load volume, much of which is routine and involves only matters of small consequence, renders formal requirements of proof inappropriate. *See* BENJAMIN 175-76.

42. 1 COOPER 380-81.

in court cases, he decries this laxity concerning the application of the common law rules and suggests that state agencies should be "required to follow the rules of evidence to about the same extent and in about the same way as judges do when trying cases without juries."⁴³ His argument fails to recognize, however, that this standard is meaningless, since no such rules exist. As Dean Wigmore noted over a generation ago: "On this question, there is a singular dearth of authority."⁴⁴ Nor has the gap been filled in the intervening years.⁴⁵ The Revised Model State Act furthers this erroneous suggestion by proposing that the rules of evidence applicable in nonjury civil cases should be followed in state agency adjudication.⁴⁶ Happily, with the exception of six states which have adopted this provision,⁴⁷ state legislators have ignored this advice.

Thus, the trend in state agencies, both by statute and court rule, continues to be away from—rather than toward—the technical rules of admissibility.

THE ADMISSIBILITY OF EVIDENCE

As I have already indicated, administrative agencies generally are not restricted in the kind of evidence they can admit. The mere admission of proof that would be excluded as irrelevant, immaterial, incompetent, or redundant under the rules of evidence adopted in a jury trial will not restrict enforcement of an agency's decision.⁴⁸ The

43. *Id.*

44. 1 J. WIGMORE, *supra* note 26, at 171; *see id.* 201.

45. 2 DAVIS § 14.04 (1958).

46. Revised Model State Administrative Procedure Act §10(1) (1961), *criticized in* K. DAVIS, *ADMINISTRATIVE LAW* 584 (1965).

47. The three state statutes following the 1961 Revised Model Act are: GA. CODE ANN. § 3A-101 *et seq.* (1970); R.I. GEN. LAWS ANN. § 42-35-1 *et seq.* (1969); W. VA. CODE ANN. § 29A-1-1 *et seq.* (1969). Three other states have similar provisions: COLO. REV. STAT. ANN. § 3-16-4(7) (1969); MICH. STAT. ANN. § 3.560(175) (1970); N.D. CENT. CODE § 28-32-06 (1969). While continuing this meaningless suggestion, the 1970 version of the state APA makes the helpful addition that "[w]hen necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is the type commonly relied upon by prudent men in the conduct of their affairs." Revised Model State Administrative Procedure Act § 10(1) (1970). *See also* note 75 *infra* and accompanying text.

48. *Opp Cotton Mills, Inc. v. Administrator, Dep't. of Labor*, 312 U.S. 126, 155 (1941). On the other hand, several states have followed the lead of the Revised Model Act that "[i]rrelevant, immaterial, or unduly repetitious evidence shall be excluded." ALAS. STAT. § 44.62.460(d) (1967); ANN. CALIF. GOV'T CODE § 11513(c) (West 1967); GA. CODE ANN. § 3A116(a) (1969); MO. REV. STAT. § 536.070(8) (1970); R.I. GEN. LAWS ANN. § 42-35-10(a) (1969); W. VA. CODE ANN. § 29A-5-2(a) (1966); WIS. STAT. ANN. § 227.10(1) (1967). There is, however, a paucity of case authority interpreting and applying these statutes,

APA confirms this practice in section 7(c) by providing that “[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.”⁴⁹ Note, the APA opens the door to *any* evidence which the examiner admits and only *suggests* that insignificant and redundant evidence should be rejected, giving the agencies broad discretion. Moreover, the APA pointedly omits hearsay or other “incompetent” evidence from the list of evidence which should not be received.⁵⁰ Thus the exclusion of otherwise legally inadmissible evidence from an administrative hearing may be error.⁵¹ Furthermore, it is clear that the exclusion of relevant, material, and competent evidence by a trial examiner will be grounds for reversal if that refusal is prejudicial.⁵²

The courts have pressed the agencies to abide by the spirit of these rules. The leading example of such pressure is found in *Samuel H. Moss, Inc. v. FTC*,⁵³ where a distinguished panel of the Second Circuit admonished a hearing examiner for rigidly following the rules of evidence:

although courts have occasionally expressed their disapproval of the admission of such evidence. See *Bunting Bristol Transfer, Inc. v. Pennsylvania Pub. Util. Comm'n*, 418 Pa. 286, 292, 210 A.2d 281, 284 (1965); *D.F. Bast, Inc. v. Pennsylvania Pub. Util. Comm'n*, 397 Pa. 246, 251, 154 A.2d 505, 508 (1959). Several state courts have been critical of agency receipt of hearsay evidence, essentially on grounds that the particular evidence lacked probative force. See, e.g., *Gomez v. Industrial Comm'n*, 72 Ariz. 265, 233 P.2d 827 (1951); *Zawisza v. Quality Name Plate, Inc.*, 149 Conn. 115, 176 A.2d 578 (1961). But only occasional—and usually earlier—state decisions have reversed agency rulings merely on the grounds of the receipt of hearsay evidence. See, e.g., *In re Trustees of Village of Westminster*, 108 Vt. 352, 187 A. 519 (1936).

49. 5 U.S.C. § 556(d) (Supp. V, 1970). Not only the Act's words but also the legislative history make clear that the exclusionary rules do not govern the admissibility of evidence in administrative hearings and that the provision for exclusion applies only to “irrelevant, immaterial, or unduly repetitious evidence” and not to legally incompetent evidence. *United States ex rel. Dong Wing Ott v. Shaughnessy*, 116 F. Supp. 745, 750 (S.D.N.Y. 1953), *aff'd on other grounds*, 220 F.2d 537 (2d Cir.), *cert. denied*, 350 U.S. 847 (1955); see 2 DAVIS § 14.05 (1958).

50. See the authorities cited in note 49 *supra*. In this context, the definition of hearsay is second-hand information which would not come within any of the exceptions to the “hearsay rule.”

51. See, e.g., *Brotherhood of R.R. Trainmen v. Illinois Cent. R.R.*, 26 Ad. L.2d 216 (E.D. Ill. 1969); 2 DAVIS § 14.09 (1958).

52. *NLRB v. Burns*, 207 F.2d 434 (8th Cir. 1953); *Prince v. Industrial Comm'n*, 89 Ariz. 314, 361 P.2d 929 (1961); *People ex rel. Hirschberg v. Board of Supervisors*, 251 N.Y. 156, 167 N.E. 204 (1929); see 1 COOPER 367-71 (collecting authorities). But see notes 32-33 *supra* and accompanying text.

53. 148 F.2d 378 (2d Cir.) (per curiam decision by Clark, A. Hand & L. Hand, J.J.), *cert. denied*, 326 U.S. 734 (1945).

[I]f the case was to be tried with strictness, the examiner was right . . . Why either he or the [Federal Trade] Commission's attorney should have thought it desirable to be so formal about the admission of evidence, we cannot understand. Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude, evidence and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence. In the case at bar it chanced that no injustice was done, but we take this occasion to point out the danger always involved in conducting such a proceeding in such a spirit, and the absence of any advantage in depriving either the Commission or ourselves of *all evidence which can conceivably throw any light upon the controversy*.⁵⁴

Many reasons support the admission of hearsay and other legally incompetent evidence in administrative hearings.⁵⁵ Foremost among them is the fact that these exclusionary rules do not determine the probative value of the proffered evidence. Professor Davis, the leading proponent that hearing officers should make no distinction between hearsay and non-hearsay evidence, makes the point this way:

[T]he reliability of hearsay ranges from the least to the most reliable. The reliability of non-hearsay also ranges from the least to the most reliable. Therefore the guide should be a judgment about the reliability of a particular evidence in a particular record in particular circumstances, not the technical hearsay rule with all its complex exceptions.⁵⁶

To require that a trial examiner refuse to admit hearsay makes no sense where there is no jury to protect and the trier of fact is equally exposed to the evidence whether he admits or excludes it.⁵⁷ Admission without a ruling—as long as the evidence has some element of reliability — does no harm and can prove more efficient than the requiring of a ruling which may later be held erroneous. Discarding

54. *Id.* at 380 (emphasis added).

55. See Patterson, *Hearsay and the Substantial Evidence Rule in the Federal Administrative Process*, 13 *MERCER L. REV.* 294, 304-06 (1962); cf. *Builders Steel Co. v. Commissioner*, 179 F.2d 377, 379 (8th Cir. 1950); Davis, *Hearsay in Nonjury Cases*, 83 *HARV. L. REV.* 1362, 1366 (1970).

56. Davis, *Hearsay in Administrative Hearings*, 32 *GEO. WASH. L. REV.* 689 (1964). One commentator has asserted that nine-tenths of the problems involved in applying the exclusionary rules in administrative hearings—or, at least, those problems that come to reviewing courts—involve hearsay. Note, *Exclusionary Rules of Evidence in Nonjury Proceedings*, 46 *ILL. L. REV.* 915, 919 n.23 (1952). While this unsubstantiated statement probably overstates the problem, a quick perusal of the advance sheets supports the conclusion that many of the administrative evidence questions raised in courts of review do indeed involve hearsay.

57. *Donnelly Garment Co. v. NLRB*, 123 F.2d 215, 224 (8th Cir. 1942). *But cf.* Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?*, 79 *HARV. L. REV.* 407, 409-11 (1965).

the exclusionary rules eliminates the need for the parties to interpose protective objections—the objections being preserved by their briefs to the examiner or agency—and relieves the examiner of making difficult rulings before all the evidence is available. It assures a complete, yet not necessarily unduly long, record and might well avoid the need to reopen the hearing. Hearsay, of course, is not subject to current, in-court cross-examination, but that limitation affects the weight such evidence carries, not its admissibility.⁵⁸

The fact that administrative hearings need not follow the exclusionary rules and the fact that the admission of remote or repetitious evidence is not reversible error do not suggest that “anything goes” or that all proffered evidence, whatever its relevance or trustworthiness, should be admitted. Wholesale admission would only add to delay and further expand records which often are already too long.⁵⁹ Nor can an efficient adjudicatory system decide anew each time the question is presented whether some particular type of evidence should be admitted. Such procedures would not only be time consuming but also unsatisfactory to the parties involved and would provide no basis for preparing for the hearing. Regrettably, most agencies have not fully developed regulations governing the extent to which the exclusionary rules should not be applied.⁶⁰ In general, the admissibility of evidence in administrative hearings depends upon the *importance* of the evidence in relation to the ultimate issues rather than to the legal standards of relevance and materiality. The basic point made earlier should not be ignored—namely, that administrative hearings generally follow the time-tested judicial pattern of receiving evidence.⁶¹

However, several significant and useful deviations from the judicial pattern appear in administrative hearings. The first, of course, involves the relatively free receipt of hearsay evidence which appears reliable. Equally important is the manner in which oral testimony is

58. See *Peters v. United States*, 408 F.2d 719, 724 (Ct. Cl. 1969); W. GELLHORN & C. BYSE 713-14, 772.

59. See, e.g., *National Airlines, Inc. v. CAB*, 321 F.2d 380 (D.C. Cir. 1963). For a graphic portrait of the endless transcript of one Federal Power Commission gas case, see W. GELLHORN & C. BYSE 940.

60. 2 DAVIS § 14.07 (1958).

61. Cf. W. GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS* 75-82 (1941). It is also clear that agencies have not adequately explored methods to streamline the process of obtaining reliable evidence. See *SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES* 1961-62, S. DOC. NO. 24, 88th Cong., 1st Sess. 90-91 (1963).

received. Witnesses in agency hearings are frequently permitted to testify in a simple, natural, and direct fashion, without unnecessary interruptions from either the attorney who is directing the questioning or his adversary.⁶² Only when the witness strays far afield or the question is remote will an objection be sustained. A third departure permitted from judicial practice occurs when the examiner is uncertain whether to exclude the evidence on the grounds of incompetency, irrelevancy, or immateriality. In administrative hearings the tendency is to admit the evidence since the need for a complete record and the desirability of avoiding reversal outweigh the disadvantages of a slightly longer record and the delay involved in receiving the evidence. Other techniques, principally the use of written presentations and shortened hearings are discussed below.⁶³

Since administrative hearings differ so widely in scope and significance, it is impossible to suggest a single standard to govern the admission of all evidence. It is probably still true, however, as one keen observer noted almost thirty years ago, that the more closely administrative proceedings approach judicial proceedings in formality and in the nature of the issues to be tried, the greater the degree to which the exclusionary rules will be applied.⁶⁴ Nor has improvement been made to the standard suggested by the Attorney General's Committee on Administrative Procedure in 1941: "The ultimate test of admissibility must be whether the proffered evidence is reliable, probative and relevant. The question in each case must be whether the probability of error justifies the burden of stricter methods of proof."⁶⁵

In observing agency hearings, it is depressing to note that the rules of evidence supposedly governing agency hearings are honored in the breach more often than in practice. If this meant that examiners were developing new and flexible responses to an ever-increasing and more complex caseload, I would only be concerned with recording these developments and sharing their wisdom. My observations, however, are rather that the strictest judicial rules are frequently applied in

62. See W. Gellhorn & Lauer, *Administration of the New York Workmen's Compensation Law II*, 37 N.Y.U.L. REV. 204, 209 (1962). For a discussion of the use of narrative testimony in jury trials, see 3 J. WIGMORE, EVIDENCE §§ 766-88 (3d ed. 1940).

63. See notes 163-84 *infra* and accompanying text.

64. BENJAMIN 178; see Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 386-90 (1942).

65. FINAL REPORT OF ATTORNEY GENERAL'S COMM. ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 71 (1941).

agency hearings, even though no jury is present and demeanor evidence is not in issue.⁶⁶ Several parties share the blame. Trial examiners are too timid, preferring the safety of ancient rules to the efficiency of modern practice. Agencies have abdicated their responsibilities by failing to supervise trial procedures,⁶⁷ by writing rules which do little more than sluggishly repeat the APA's broad authority,⁶⁸ and by acting only when the cries of protest can no longer be safely ignored—and even then the response is limited to the necessary minimum to satisfy particular demands.⁶⁹ Courts and agencies have been intimidated by the length of hearing records. The judiciary is also aware of the broad legislative mandate given most agencies to solve the delegated problem in any reasonable manner and that agencies therefore need considerable freedom of action. Nor have counsel participating in administrative hearings contributed to improvement; naturally enough they have concentrated on substantive results rather than procedural niceties. While these observations do not necessarily imply that agencies should grant more interlocutory appeals on evidentiary objections, they do suggest that the occasional hortatory passages in agency opinions which affirm initial decisions have not had the desired impact. If the agencies believe that liberalized rules of evidence should apply, as I do, then they must develop pressures which assure that these rules are observed. What is needed first, perhaps, is a series of in-depth studies to test this thesis. The Administrative Conference would seem ideally suited for this task. If my observations are correct, that body should develop and authoritatively recommend effective institutional responses.

THE EVALUATION OF EVIDENCE

In contrast to the effect of a trial court's decision to receive hearsay evidence in a jury trial, a hearing officer's decision to receive such evidence in an administrative adjudication is only the first step in

66. Professor Posner's observation that FTC hearing examiners hew to traditional rules of evidence largely disregarded in almost identical federal antitrust trials, Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 52-53 & n.23 (1969), need not be confined to that agency.

67. Initial decisions by hearing officers are seldom reversed because of overly restrictive evidentiary rulings. Nor have agencies provided much direction to their examiners.

68. See Davis, *supra* note 56, at 695.

69. Cf. Firestone Tire & Rubber Co., 3 TRADE REG. REP. ¶ 19,373 (FTC 1970); Campbell Soup Co., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,261 (FTC 1970); Campbell Soup Co., *id.* ¶ 19,006 (FTC 1969).

determining its impact upon the tribunal's decision. The admission of evidence in a jury trial is often considered the last effective legal control because of the assumption that the jury will rely upon or be swayed by such evidence regardless of whether or not its reliability has been established. In an administrative hearing, on the other hand, as in the case of nonjury trials, it is assumed that the trial examiner will not rely upon untrustworthy evidence in reaching his decision. Thus if there is "competent" or trustworthy evidence to support the decision, the reviewing court presumes that the examiner or trial judge relied on that evidence—and not the "tainted" hearsay—in reaching his decision.⁷⁰

Nevertheless, the more difficult—and often crucial—question for the hearing officer is the determination of whether he should rely upon hearsay evidence in reaching his decision. The examiner's concern is with the reliability or probative worth of the evidence.⁷¹ Jury trial rules of evidence exclude hearsay on the theory that more often than not it may prove untrustworthy.⁷² The party against whom the evidence is admitted can neither confront nor cross-examine its original proponent to test its probative worth. But on the other side of the ledger is the fact that each of us constantly relies upon hearsay evidence in making important decisions. Without hearsay, commerce would stop, government would cease to function, and education would be reduced to each teacher's personal experience (and even the latter would often be based on hearsay). It is not surprising, then, that no legal system outside the Anglo-American realm has adopted so restrictive a rule of evidence. Scholars have consistently rejected its across-the-board application and the courts are increasingly rejecting its application, even in jury cases.⁷³

On the other hand, the fact that some hearsay may prove reliable is no guarantee that all hearsay is reliable. Nor is it responsive to observe that the rules of evidence already admit much that is worthless. Why, it could be asked, should more that is worthless be admitted in order to find some that is trustworthy, particularly when there is no assurance that the factfinder will rely on the latter and

70. See generally, Note, *Improper Evidence in Nonjury Trials: Basis for Reversal?*, 79 HARV. L. REV. 407 (1965).

71. The same weighing process is often involved in the examiner's decision whether to receive the evidence. If it is unlikely to be probative, he will not receive it regardless of the inapplicability of the hearsay rule.

72. C. McCORMICK, *supra* note 14, § 224.

73. See, e.g., Weinstein, *Probative Force of Hearsay*, 46 IOWA L. REV. 331 (1961).

disregard the former? It could also be contended that unless probative evidence could be distilled or some alternative protection devised, the admission of hearsay would not promote justice. The administrative regulations governing the receipt and evaluation of evidence indicate that the agencies themselves have not adequately wrestled with this issue.⁷⁴ The courts have indirectly provided only scant guidance in upholding administrative reliance on some hearsay evidence. Judge Learned Hand has offered the classic formulation:

[The examiner] did indeed admit much that would have been excluded at common law, but the act specifically so provides . . . [N]o doubt, that does not mean mere rumor will serve to "support" a finding, but hearsay may do so, at least if more is not conveniently available, and if in the end the finding is supported by *the kind of evidence on which responsible persons are accustomed to rely in serious affairs.*⁷⁵

Hearing officers and agencies have adhered to this common sense standard instinctively.⁷⁶ At the same time, several criteria applied in evaluating the reliability of hearsay can be discerned.⁷⁷ The following are the most significant:

(a) What is the "nature" of the hearsay evidence? If the hearsay is likely to be reliable, it usually becomes an exception to the hearsay rule. Moreover, if the evidence is intrinsically trustworthy, agencies have taken the next logical step and relied, if necessary, upon this evidence in deciding cases, even though it technically constitutes hearsay and does not fall within any of the recognized exceptions. One example of intrinsically reliable hearsay, intra- and inter-corporate documents not shown to be within the business records exception, was the subject of a celebrated opinion by Judge Wyzanski in a nonjury

74. See 2 DAVIS § 14.07 (1958).

75. *NLRB v. Remington Rand*, 94 F.2d 862, 873 (2d Cir.), *cert. denied*, 304 U.S. 567 (1938), *rev'd on other grounds*, 110 F.2d 148 (2d Cir. 1940) (emphasis added). See also *International Ass'n v. NLRB*, 110 F.2d 29, 35 (D.C. Cir.), *aff'd*, 311 U.S. 72 (1939); *John Bene & Sons, Inc. v. FTC*, 299 F. 468, 471 (2d Cir. 1924). Several states—both by judicial decree and by statute—have adopted this test to permit agency departures from the exclusionary rules where compliance is impracticable and where the evidence is "of a type commonly relied upon by reasonably prudent men in the conduct of their affairs." See, e.g., *Ring v. Smith*, 5 Cal. App. 3d 197, 204, 85 Cal. Rptr. 227, 232 (1970); GA. CODE ANN. § 3A-116(a) (1969); MICH. STAT. ANN. § 3.560(175) (1970); N.D. CENT. CODE § 28-32-06 (1969); R.I. GEN. LAWS § 42-35-10 (1969); W. VA. CODE § 29A-5-2(a) (1964).

76. Sigmon, *Rules of Evidence Before the I.C.C.*, 31 GEO. WASH. L. REV. 258 (1962); Note, *Evidence Problems in NLRB Hearings and the Applicability of the Proposed Code of Evidence*, 55 HARV. L. REV. 820, 827-33 (1942).

77. 2 DAVIS § 14.10, at 296-303 (1958).

trial not dissimilar to an administrative hearing.⁷⁸ An even clearer example of hearsay satisfying the reliability criteria is newspaper reports.⁷⁹ Stories of significant news events are likely to be reliable, and newspapers normally do not report accidents which did not occur. On the other hand, newspaper summaries of public comments are commonly inaccurate—at least if one may believe those who claim to be misquoted—because of the difficulty of hearing and then summarizing another's views. Even so-called verbatim transcripts commonly suffer from significant errors as a result of the pressure of time deadlines. Note that the hearsay quality of each report is identical. Yet the accident report will be treated as solid support for an administrative decision and the speech summary, unless corroborated, will not.⁸⁰

(b) Is better evidence available? The necessary substantiation for the reliability of hearsay evidence may arise from the failure of respondent to controvert the hearsay when the proof is readily available to him, even though there is no testimonial or documentary evidence of such available "support." The leading example of this position is *United States ex rel. Vajtauer v. Commissioner*,⁸¹ where the Supreme Court upheld a deportation order based on a finding that the alien had advocated the overthrow of the government by force. The alien gave his name as Emanuel Vajtauer, a "Doctor of Psychology" and editor of the "Spravedlvost." In making his finding the director relied upon two items of hearsay: a pamphlet bearing the name of Dr. E.M. Vajtauer as author; and a newspaper report of a speech by a Dr. Vajtauer, editor of the "Spravedlvost," supporting revolution. Both items became convincing evidence when "the appellant, confronted by this record, stood mute. . . . His silence without explanation other than that he would not testify until the entire evidence was presented, was in itself evidence that he was the author."⁸² Workmen's compensation cases furnish a further illustration. In one typical case, the testimony revealed that the

78. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 349, 355-56 (D. Mass. 1950), noted in 60 *YALE L.J.* 363 (1951).

79. See Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 *HARV. L. REV.* 364, 390 (1942); cf. *Dallas County v. Commercial Union Assur. Co.*, 286 F.2d 388 (5th Cir. 1961).

80. See *United States ex rel. Vajtauer v. Commissioner*, 273 U.S. 103 (1927); *Montana Power Co. v. FPC*, 185 F.2d 491, 498 (D.C. Cir. 1950), cert. denied, 340 U.S. 47 (1951).

81. 273 U.S. 103 (1927).

82. *Id.* at 111. But cf. *Griffin v. California*, 380 U.S. 609 (1965).

workman went home, told his wife that he had been injured while at work, repeated the same story to a doctor, and died. No one saw the accident; no better evidence was available. Placing special reliance on the statute's remedial purpose, the agency relied upon this hearsay evidence even though it fell outside the spontaneous exclamation exception.⁸³ On the other hand, if credible first-hand witnesses had told another story—for example, that the accident happened elsewhere—the hearing officer would likely have rejected the hearsay testimony, especially if the witnesses' testimony was corroborated by convincing circumstantial evidence.⁸⁴

(c) How important is the subject matter in relation to the cost of acquiring "better" evidence? Many examples are available. If the out-of-hearing declarant is readily available and the question involves the respondent's livelihood or security—as is often the case in loyalty and deportation matters—hearsay by itself carries little weight.⁸⁵ If, however, the matter is but one of thousands of compensation claims—as in social security and workmen's compensation cases—and the declarant's appearance would be relatively costly or time-consuming, hearsay alternatives such as letters or other written evidence might prove decisive.⁸⁶ It has likewise been held that, in the granting of a license, an agency may rely upon evidence which would not be adequate in revoking the same license.⁸⁷

(d) How precise does the agency's factfinding need to be? The ICC's reliance on "typical evidence" and the FTC's use of survey

83. *Greenfarb v. Arre*, 62 N.J. Super. 420, 163 A.2d 173 (1960); see *John W. McGrath Corp. v. Hughes*, 264 F.2d 314 (2d Cir. 1959); *Associated Gen. Contractors of America, Inc. v. Cardillo*, 106 F.2d 327, 329 (D.C. Cir. 1939); cf. *G. & C. Merriam Co. v. Syndicate Publ. Co.*, 207 F. 515, 518 (2d Cir. 1913) (quoting trial court opinion by L. Hand, J.). See generally 3 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 79 (1952); 2 *id.* (Supp. 1970).

84. *Jacobowitz v. United States*, 424 F.2d 555 (Ct. Cl. 1970); *In re Rath Packing Co.*, 14 N.L.R.B. 805, 817 (1939); see *Glaros v. Immigration & Naturalization Serv.*, 416 F.2d 441 (5th Cir. 1969) (hearsay corroborated by other evidence); *NLRB v. Operating Engineers, Local 12*, 25 Ad. L.2d 832 (9th Cir. 1969) (no objection raised to admission of hearsay).

85. E.g., *Young v. Board of Pharmacy*, 81 N.M. 5, 462 P.2d 139 (1969); *Outagamie County v. Town of Brooklyn*, 18 Wis. 2d 303, 118 N.W.2d 201 (1962); see *Reilly v. Pinkus*, 338 U.S. 269 (1949). *Contra Peters v. United States*, 408 F.2d 719 (Ct. Cl. 1969), criticized in *Note, Hearsay and the Right of Confrontation in Administrative Hearings*, 48 N.C.L. REV. 608 (1970).

86. *Richardson v. Perales*, 39 U.S.L.W. 4497 (U.S. May 3, 1971); *Marmon v. Railroad Retirement Bd.*, 218 F.2d 716 (3d Cir. 1955); *Ellers v. Railroad Retirement Bd.*, 132 F.2d 636 (2d Cir. 1943). For an interesting reverse application of this principle, see *Staskel v. Gardner*, 274 F. Supp. 861, 863 (E.D. Pa. 1967) (hearsay not sufficient evidence to deny claim); *Rios v. Hackney*, 294 F. Supp. 885 (N.D. Tex. 1967).

87. *Davis, Hearsay in Administrative Hearings*, 32 GEO. WASH. L. REV. 689, 699 (1964); see *FTC v. Cement Institute*, 333 U.S. 683, 705-06 (1948).

evidence are examples of agency dependence on statistical averages to determine facts in particular cases where legal or policy decisions are not dependent upon exact determinations. For instance, survey evidence indicating that from 9 to 100 percent of the public were misled by respondent's advertising will support a finding that it constitutes an unfair or deceptive act.⁸⁸ Still another example is the fixing of a rate for commodities transported by one carrier on the basis of costs incurred by similarly situated carriers.⁸⁹

(e) What is the administrative policy behind the statute being enforced? The range of necessary reliability is affected by the type of policy which the administrative hearing is designed to promote. For example, the social security and workmen's compensation programs are intended to provide benefits quickly at low cost. The refusal to rely upon affidavit facts in such hearings would run counter to the purposes for which the statutes are designed.⁹⁰

When focusing on these criteria, it is essential to consider the central point that evaluation of hearsay and other technically incompetent evidence cannot be accomplished in the abstract; the evidence must be examined in the light of the particular record. This includes, at a minimum, an examination of the quality and quantity of the evidence on each side, as well as the circumstantial setting of the case.⁹¹

SUBSTANTIAL EVIDENCE

Once the agency has determined that legally incompetent evidence can be admitted and relied upon in making an administrative decision, it might appear that the subject of hearsay evidence in administrative hearings has been exhausted. While the agency's

88. *E.g.*, *Arrow Metal Prods. Corp.*, 53 F.T.C. 721, 727, 733-34, *aff'd per curiam*, 249 F.2d 83 (3d Cir. 1957); *Rhodes Pharmacal Co.*, 49 F.T.C. 263 (1952), *aff'd*, 208 F.2d 382, 386-87 (7th Cir. 1953), *rev'd on other grounds*, 348 U.S. 940 (1955).

89. *New England Divisions Case*, 261 U.S. 184, 197-98 (1923); *Atchison, T. & S.F. R.R. v. United States*, 225 F. Supp. 584 (D. Colo. 1964); *see* 2 I. SHARFMAN, *THE INTERSTATE COMMERCE COMMISSION* 376-80 (1931). *See also* *Skelly Oil Co. v. FPC*, 375 F.2d 6 (10th Cir. 1967), *modified sub nom.*, *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

90. Several states have also adopted specific statutes governing the use of copies of documentary evidence. *See* GA. CODE ANN. § 3A-116(b) (Supp. 1970); HAWAII REV. STAT. ANN. § 91-10(1)-(2) (1968); MD. ANN. CODE art. 41, § 252(b) (1965); MASS. ANN. LAWS ch. 30A, § 11(4) (1966); MICH. STAT. ANN. § 3.560(176) (Supp. 1970); MINN. STAT. ANN. § 15.0419(2) (1967); NEB. REV. STAT. § 84-914(3) (1966); OKLA. STAT. ANN. tit. 75, § 310(2) (1965); ORE. REV. STAT. § 183.450(1) (1964); R.I. GEN. LAWS ANN. § 42-35-10(b) (1969); WASH. REV. CODE ANN. § 34.04.100(2) (1965).

91. For a review of the cases, *see* *Jacobowitz v. United States*, 424 F.2d 555 (Ct. Cl. 1970).

admission and use of legally incompetent evidence is subject to judicial review, this review of administrative determinations of fact should be confined to determining whether the decision is supported by the evidence in the record. Judicial review of administrative evidence has not been so limited, however. As a substitute for rules of admissibility, courts apply the so-called "substantial evidence" rule to judicial review of agency action in seeking to assure fairness to the parties.

As applied to administrative findings, the substantial evidence rule possesses two branches, one of which is sound, and the other unsound. The first consists of an overall standard of review of the findings of fact. In essence, it does not differ materially from the "sufficiency" standard applied in judicial review of jury verdicts.⁹² In this sense, substantial evidence is that evidence

affording a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.⁹³

This standard measures both the *quantitative* and *qualitative* sufficiency of the evidence.⁹⁴ Its proper application takes into account the rationale of the exclusionary rules of evidence, the reliability of the hearsay evidence—including the opportunity for cross-examination, the availability of better evidence, and the appearance of corroborating evidence—and the needs of administrative economy. According to the leading opinion of *Universal Camera Corp. v. NLRB*,⁹⁵ this judicially evolved standard of review of administrative fact-finding is incorporated into the Administrative Procedure Act, except that the Act broadens judicial review to assure that the reviewing court takes "into account whatever in the record fairly detracts from its weight."⁹⁶ In other words, the reviewing court should

92. *E.g.*, *Wilkerson v. McCarthy*, 336 U.S. 53, 57 (1949); *C. McCORMICK*, *supra* note 14, at 317-19.

93. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 299-300 (1939); *see* *Consolo v. FMC*, 383 U.S. 607, 618-21 (1966). The substantial evidence test applied to jury verdicts and administrative findings is in contrast to appellate review of a court's fact determinations in a nonjury case where such findings are measured by the "clearly erroneous" test. *See* *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *NLRB v. Southland Mfg. Co.*, 201 F.2d 244, 246 (4th Cir. 1952); *C. WRIGHT*, *FEDERAL COURTS* 429-32 (1969).

94. *See* BENJAMIN 192; I COOPER 404-05.

95. 340 U.S. 474 (1951).

96. *Id.* at 488.

review the whole record to determine whether it contains a rational basis for the findings of fact supporting the agency's decision.⁹⁷

In reviewing administrative decisions, some appellate courts—primarily state—added a second branch to the substantial evidence test, warping the test into a rigid rule for denying credibility to uncorroborated hearsay evidence. Known as the “legal residuum rule” because it requires that an administrative finding of fact be supported by some evidence admissible in a jury trial—that is, by a residuum of legal evidence—it has been severely criticized by scholars, and its application has strained judicial reasoning.⁹⁸

The earliest case applying this rule illustrates its weakness. In *Carroll v. Knickerbocker Ice Co.*,⁹⁹ the New York Court of Appeals reversed a workmen's compensation award in a death case where the commission's finding of accidental injury was based wholly on hearsay testimony of statements by the deceased workman. The workman, who developed delirium tremens and died within six days, had told his wife, a neighbor, and his family and hospital physicians that a 300-pound cake of ice had fallen upon his abdomen. Each party related this story to the commission. However, the case record also contained substantial contradictory evidence. The workman's helper on the ice truck, along with two cooks working in the saloon where the ice was delivered, testified that they were present at the time and place where the accident presumably occurred but they neither saw nor heard the incident. In addition, the hospital physicians found no bruises, discolorations, or abrasions on the workman's body. In light of the lack of testimonial or physical corroboration of the workman's story which probably would have been available if the hearsay statement had been trustworthy, the obvious self-interest in the deceased's statement, and the possibility of the workman's being inebriated when he made his statement, the court reasonably could have ruled that credulity could not be placed in the supporting hearsay evidence and that such evidence did not, therefore, constitute substantial evidence. Instead, after noting that the commission could “accept any evidence that is offered” under the New York Workmen's Compensation Act, the court laid down the rule that

97. The intricacies and problems which arise in applying this standard are not within our concern here. See generally 4 DAVIS ch. 29 (1958). For a review of state authority which also is extremely critical of the substantial evidence standard, see 2 COOPER 722-55.

98. BENJAMIN 189-92; 2 DAVIS § 14.10 (Supp. 1965); 1 J. WIGMORE, EVIDENCE 39 (3d ed. 1940). But see 1 COOPER 410-12.

99. 218 N.Y. 435, 113 N.E. 507 (1916).

“still in the end there must be a residuum of legal evidence to support the claim before an award can be made.”¹⁰⁰ It therefore held that when substantial evidence is required, “hearsay testimony is not evidence.”¹⁰¹

The residuum rule is both logically unsound and administratively impractical. In a trial before a lay jury hearsay admitted without objection is given its natural, probative effect and may be the sole support for a verdict. But under the residuum rule hearsay cannot support a decision by an expert administrator. The rule ignores the reliability of technically incompetent evidence, rendering all such evidence ineffective unless corroborated. However, if corroborated, regardless of how slight the legal evidence, the same hearsay evidence will provide the substantial evidence needed to support the administrative finding.

This rule may also become a trap for the unwary, particularly where the hearing officer is not expert in the rules of evidence or where the parties are not represented by counsel. In fact it encourages trial examiners to apply the hearsay rule and exclude probative evidence in order to avoid possible error. In its instinctive protection of fairness in administrative hearings, through assuring that the decision is supported by evidence subject to confrontation and cross-examination, the residuum rule seems unassailable. What it fails to consider, however, is that much “legal” evidence within the hearsay exceptions is equally untested. Yet the latter is accepted even in jury trials because of its probable reliability. Consequently the residuum rule’s mechanical prohibition against uncorroborated hearsay is unsound. Its sound objectives can be secured through the sensitivity of hearing officers and the wise application of the substantial evidence test which measures the quantity and quality of the supporting evidence regardless of its category or label.

As others have recounted at substantial length, the residuum rule is not accepted by most federal courts.¹⁰² The states are still divided

100. *Id.* at 441, 113 N.E. at 509.

101. *Id.*

102. 2 DAVIS § 14.11 (Supp. 1965). Compare *Cohen v. Perales*, 416 F.2d 1250 (5th Cir. 1969), with *Peters v. United States*, 408 F.2d 719 (Ct. Cl. 1969), noted in 1970 DUKE L.J. 153-56. But see *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 230 (1938) (dictum) (“[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence”); *Weaver v. Finch*, 306 F. Supp. 1185 (W.D. Mo. 1969).

over its validity.¹⁰³

OPINION EVIDENCE AND EXPERT TESTIMONY¹⁰⁴

The presentation of expert and non-expert opinions is increasingly common in administrative hearings. Medical issues arising in workmen's compensation claims are often complex, technical, and beyond the knowledge of either the hearing officer or the agency. An administrative decision to license a hydroelectric plant, to locate a public housing project, to discontinue a bus line, or to grant a liquor license frequently evokes strong community concern.¹⁰⁵ The public views advanced are likely to be expressed in terms of opinion and to include reference to the views of others. To deny the public an opportunity to testify is to invite public rejection of the agency decision.

The general admissibility of expert and non-expert testimony in administrative hearings is no longer open to question, but doubt still exists regarding the weight an expert's views should be given.¹⁰⁶ For a time agencies and reviewing courts followed early judicial reasoning and refused to hear expert testimony on the very question that the agency was created to decide.¹⁰⁷ Other courts took the position that it would be unfair for an agency to rely on its own expertise or the expert testimony of its staff when their opinions were contradicted by outside experts.¹⁰⁸ In rejecting these contradictory appeals to ignorance, courts now recognize legislative intention to establish expert agencies.

103. See *Tauber v. County Bd. of Appeals*, 262 A.2d 513, 518 (Md. Ct. App. 1970); *Neuman v. City of Baltimore*, 251 Md. 92, 246 A.2d 583 (1968); 1 COOPER 406-10; 2 DAVIS § 14.12 (Supp. 1965).

104. See generally 2 DAVIS § 14.13 (Supp. 1965).

105. Cf. *Citizens for Allegan County, Inc. v. FPC*, 414 F.2d 1125 (D.C. Cir. 1969); *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

106. See *Keller v. FTC*, 132 F.2d 59, 61 (7th Cir. 1942); *Gloyd v. Commissioner*, 63 F.2d 649, 650 (8th Cir.), *cert. denied*, 290 U.S. 633 (1933); *Davis & Randall, Inc. v. United States*, 219 F. Supp. 673, 679 (W.D.N.Y. 1963).

107. Cf. *Corn v. State Bar*, 68 Cal. 2d 461, 67 Cal. Rptr. 401, 439 P.2d 313 (1968); C. McCORMICK, *supra* note 14, § 12. The courts have generally discarded the former view that agency opinions need supporting expert testimony and agencies are now free to use their own judgment. Compare, e.g., *Boggs & Bahl v. Commissioner*, 34 F.2d 859 (3d Cir. 1929), with *Kline v. Commissioner*, 130 F.2d 742 (3d Cir. 1942), *cert. denied*, 317 U.S. 697 (1943).

108. E.g., *Brenan v. State Bd. of Med. Examiners*, 101 Cal. App. 2d 193, 225 P.2d 11 (1950).

Therefore, agency decisions which rely on the agency's own expertise are upheld when the respondent offers no contrary expert testimony or when expert testimony offered by staff members and outside experts conflicts.¹⁰⁹ Some courts have gone even further and given excessive deference to the knowledge of the administrative agency by upholding its decisions in the face of uncontradicted expert testimony to the contrary.¹¹⁰ However, the demands of fairness are now generally accepted, and an agency seeking to rely on its expertise must present expert testimony subject to cross-examination on the record or give the respondent fair notification that official notice will be taken of such "facts."¹¹¹

Perhaps because of this very limited judicial supervision, agency reliance on opinion and expert testimony often is at best vacillating and at worst irresponsible. Again the Federal Trade Commission's false advertising hearings are revealing and illustrative.¹¹² To prove

109. *E.g.*, *Contractors v. Pillsbury*, 150 F.2d 310, 313 (9th Cir. 1945); *Pacific Power & Light Co. v. FPC*, 141 F.2d 602 (9th Cir. 1944); *see* *McCarthy v. Sawyer-Goodman Co.*, 194 Wis. 198, 215 N.W. 824 (1927).

This is an exceedingly brief summary of what can be a complex issue. For an excellent analysis and attempt to balance the right of respondent to a decision based on "record" evidence with the administrative need to avoid unproductive hearings, *see* *Davis & Randall, Inc. v. United States*, 219 F. Supp. 673 (W.D.N.Y. 1963), where Judge Friendly applied the following test:

Without wishing to be held to the letter, we suggest that a rejection of unopposed testimony by a qualified and disinterested expert on a matter susceptible of reasonably precise measurement, without the agency's developing its objections at a hearing, ought to be upheld only when the agency's uncommunicated criticisms appear to the reviewing court to be both so compelling and so deeply held that the court can be fairly sure the agency would not have been affected by anything the witness could have said had he known of them, *and* the court would have been bound to affirm, despite the expert's hypothetical rebuttal, out of deference for the agency's judgment on so technical a matter. *Id.* at 679.

110. *See, e.g.*, *Arc Realty Co. v. Commissioner*, 295 F.2d 98, 103 (8th Cir. 1961); *Gaddy v. State Bd. of Registration for Healing Arts*, 397 S.W.2d 347, 355 (Mo. 1965). *But cf.* L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 608-10 (1965). Judicial approval of agency reliance upon its own expertise is inappropriate, of course, where the expert opinion is patently fallacious or "intrinsically nonpersuasive." *See* *Davis & Randall, Inc. v. United States*, 219 F. Supp. 673, 678 (W.D.N.Y. 1963); *Sternberger v. United States*, 401 F.2d 1012, 1016 (Cl. Ct. 1968). Approval is equally inappropriate where the opinion is based on inferences from facts in the record. *Interstate Power Co. v. FPC*, 236 F.2d 372, 385 (8th Cir. 1956), *cert. denied*, 352 U.S. 967 (1957); *see* *Market St. Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 559-60 (1945).

111. *E.g.*, *Moschogianis v. Concrete Material & Mfg. Co.*, 179 Minn. 177, 228 N.W. 607 (1930); *see* notes 188-209 *infra* and accompanying text.

112. For a more complete description of FTC reliance on opinion and expert testimony, *see* E. Gellhorn, *Proof of Consumer Deception Before the Federal Trade Commission*, 17 U. KANS. L.J. 559 (1969).

that an advertisement is false or deceptive, government counsel must show that the advertisement made a promise which respondent's product or service failed to meet. In other words, the agency must show what the consuming public understood from the advertisement. The obvious method of proof would seem to be a scientific survey exploring the reactions of those who either relied upon the advertisement or were within the target area and could have been affected by it. Such surveys are rarely relied upon in Commission hearings; even when used, they are usually questionable samplings prepared at the behest of one partisan. Instead, the parties rely on a number of less significant factors: the Commission's experience and expertise, thereby adopting what is more accurately described as the "hunch" or "intuitive" approach; dictionary definitions which tell only the possible or preferred interpretation of words used in an advertisement, not how they are actually understood; trade understandings which are hardly reflective of consumer perception; or the opinions of a parade of consumer witnesses, testimony which needlessly prolongs the hearing and demonstrates only that somewhere, somehow, inventive counsel may find someone who will interpret an ad as counsel desires. Despite academic criticism of these sloppy practices, little change is discernible. On the other hand, if agencies were required to try cases quickly and to enforce their decisions meaningfully—developments which public pressures will, I think, soon demand—the agencies would be forced to make expert opinion readily available to all parties and to develop routine procedures for validating expert views.¹¹³ A fair analysis of administrative hearings in recent decades must conclude that agencies have increasingly opened their doors to expert opinion without contemporaneously assuring that these opinions should be relied upon.

EXCLUSION OF PRIVILEGED TESTIMONY

Witnesses in administrative hearings have the same general duty to give testimony which is incumbent on all citizens in judicial trials; "the public has a right to every man's testimony."¹¹⁴ Because the demand comes from the community as a whole, rather than from the

113. The problem is not unique to administrative law. See, e.g., Note, *The Doctor in Court: Impartial Medical Testimony*, 40 S. CAL. L. REV. 728 (1967).

114. 12 D. COBBETT'S PARLIAMENTARY HISTORY 675, 693 (1812), quoted in 4 J. WIGMORE, EVIDENCE 2965-66 (1st ed. 1905).

parties, and because the obligation is essential to any search for justice, "all privileges of exemption from this duty are exceptional."¹¹⁵ Read literally, the APA's provision in section 7(c) that "[a]ny oral or documentary evidence may be received"¹¹⁶ authorizes the receipt of privileged evidence in administrative hearings.¹¹⁷ Nevertheless, administrative hearings have generally followed the judicial lead in recognizing numerous exceptions to this obligation to testify. Such exceptions are of two kinds. A few, such as the exclusion of illegally obtained evidence and the assertion of the right against self-incrimination, are based upon constitutional commands. Others, such as the privileges protecting attorney-client and marital communications, are founded upon the need to protect interests without constitutional dimension yet these relationships have sufficient social importance to warrant the sacrifice of full factual disclosure.

Even though administrative agencies do not as a rule impose criminal penalties, their adjudicative procedures are not exempt from constitutional limitations. In *Camara v. Municipal Court*¹¹⁸ and *See v. Seattle*¹¹⁹ the Supreme Court applied the fourth amendment's strictures against unreasonable search and seizure of property to administrative health and fire inspections.¹²⁰ While these cases involved direct challenges to administrative inspections, it is also clear that the constitutional objection is available at the hearing even though no objection is asserted at the time the inspection is made.¹²¹

115. 8 J. WIGMORE, EVIDENCE 73 (McNaughton rev. ed. 1961).

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

117. Professor Davis has made the provocative suggestion that section 7(c) authorizes agency rejection of unsound or questionable privileges. 2 DAVIS § 14.08, at 287 (1958). It seems doubtful, however, that this provision can reasonably be interpreted as addressing itself to the question of testimonial privilege; rather, the legislative history suggests that its purpose is to avoid binding administrative agencies to technical rules of evidence. 92 CONG. REC. 2157, 5653 (1946); see ATTORNEY GENERAL'S MANUAL ON ADMINISTRATIVE PROCEDURE ACT 76 (1947). Legislative omission, moreover, is seldom convincing support for deviation from common law practices. See *CAB v. Air Transp. Ass'n*, 201 F. Supp. 318 (D.D.C. 1961).

118. 387 U.S. 523 (1967).

119. 387 U.S. 541 (1967).

120. See generally Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801 (1965); Note, *The Fourth Amendment and Housing Inspections*, 77 YALE L.J. 521 (1968).

121. See *Finn's Liquor Shop, Inc. v. State Liquor Auth.*, 24 N.Y.2d 647, 249 N.E.2d 440, 301 N.Y.S.2d 584, cert. denied, 396 U.S. 840 (1969); *Leogrande v. State Liquor Auth.*, 25 App. Div. 2d 225, 268 N.Y.S.2d 433 (1966), rev'd on other grounds, 19 N.Y.2d 418, 227 N.E.2d 302, 280 N.Y.S.2d 381 (1967); *Pennsylvania Liquor Control Bd. v. Leonardziak*, 210 Pa. Super. 511, 233 A.2d 606 (1967); cf. *Parrish v. Civil Service Comm'n*, 66 Cal. 2d 260, 57 Cal. Rptr. 623, 425

For example, in *Knoll Associates, Inc. v. FTC*,¹²² the Seventh Circuit set aside an FTC order on the ground that the Commission's acceptance and use of corporate documents, known to be stolen on behalf of the government, violated the fourth amendment. This constitutional protection extends beyond purloined documents. Many cases uphold the fifth amendment privilege against self-incrimination in administrative proceedings.¹²³ However, the self-incrimination privilege has been limited. First, it applies only to natural persons and therefore does not protect corporations and other legal entities.¹²⁴ Second, it can be circumvented by the grant of immunity from criminal prosecution.¹²⁵ Federal agencies commonly have been authorized to grant such immunity and then compel a witness to testify even if the evidence implicates him.¹²⁶ Third, the privilege against self-incrimination is also avoided if the information is sought

P.2d 223 (1967). *Compare* *Elder v. Board of Medical Examiners*, 241 Cal. App. 2d 246, 50 Cal. Rptr. 304 (1966) (dictum), with *Pierce v. Board of Nursing Educ. & Nurse Reg.*, 255 Cal. App. 2d 463, 63 Cal. Rptr. 107 (1967) (dictum). *Contra* *NLRB v. South Bay Daily Breeze*, 415 F.2d 360, 364 (9th Cir. 1969) (alternative holding), *cert. denied*, 397 U.S. 915 (1970); *Solomon v. Liquor Control Comm'n*, 4 Ohio St. 2d 31, 212 N.E.2d 595, *cert. denied*, 384 U.S. 928 (1966) (relying on the discredited "privilege" rationale).

122. 397 F.2d 530 (7th Cir. 1968).

123. *E.g.*, *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964); *Smith v. United States*, 337 U.S. 137 (1949). In this situation, the respondent fears the potential administrative order less than the subsequent use of his testimony in a criminal proceeding.

124. *United States v. White*, 322 U.S. 694 (1944); *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906).

125. *See* Compulsory Testimony Act of 1893, 49 U.S.C. § 46 (1964):

No person shall be excused from . . . testifying . . . on the ground . . . that the testimony of evidence . . . may tend to criminate him But no person shall be prosecuted or subjected to any penalty of forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena

See also *Ullmann v. United States*, 350 U.S. 422 (1956); *Brown v. Walker*, 161 U.S. 591 (1896); Note, *The Federal Witness Immunity Acts in Theory and Practice: Treading the Constitutional Tightrope*, 72 YALE L.J. 1568 (1963) (noting 44 federal witness immunity acts). Most of these statutes were repealed and incorporated with substantial modification into the Organized Crime Control Act of 1970, § 6004, 84 Stat. 922. Immunity may still be granted to witnesses appearing before administrative agencies, but approval of the Attorney General is first required. For an example concerning the continuing controversy surrounding the grant of immunity, see *Piccirillo v. New York*, 400 U.S. 548.

126. *See* *Shapiro v. United States*, 335 U.S. 1, 6 (1948) (citing 26 federal statutes). Similar state statutes are common. *E.g.*, ILL. REV. STAT. ch. 120 § 453.10a (1967); *see* *Halpin v. Scotti*, 415 Ill. 104, 112 N.E.2d 91 (1953). However, application of the immunity provision does not preclude an agency from issuing an order against persons so testifying, even though the order is based upon such testimony. *Drath v. FTC*, 239 F.2d 452 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 917 (1957).

from records "required to be kept."¹²⁷ However, this avoidance of the self-incrimination exception has been narrowed and possibly eliminated as a practical matter by recent Supreme Court rulings.¹²⁸ The courts have also given some exploratory consideration of the application of other fifth and sixth amendment exclusionary rules to administrative proceedings, but few definitive determinations have been issued. Some agencies have taken action to protect constitutional rights, at least where criminal sanctions are possible. For example, Internal Revenue Service agents must now provide *Miranda*¹²⁹ warnings that an accused has a right to remain silent and seek counsel in order to protect the admissibility of a taxpayer's statements or of evidence discovered as a result of the investigation.¹³⁰ Agency adjudications have in general only skirted these issues, and a host of unanswered questions remain.¹³¹

127. *Shapiro v. United States*, 335 U.S. 1 (1948); see Meltzer, *Required Records, The McCarran Act, And The Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687 (1951).

128. In *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), the Court upheld assertion of the privilege against self-incrimination as a defense to criminal prosecutions for violations of both the registration and taxing provisions of the federal wagering tax statutes. The obligation to pay taxes could not be separated from the information and incriminatory purposes of the statutes. The required records exception set forth in *Shapiro* was not applicable, the Court concluded, because the three premises of that doctrine had not been met. They are:

First, the purposes of the United States' inquiry must be essentially regulatory; second, information is to be obtained by requiring the preservation of records of a kind which the regulated party has customarily kept; and third, the records themselves must have assumed "public aspects" which render them at least analogous to public documents. 390 U.S. at 67-68.

Accord, *Leary v. United States*, 395 U.S. 6 (1969); *Haynes v. United States*, 390 U.S. 85 (1968) (invalidating registration provisions of the National Firearms Act). *But see* *United States v. Knox*, 396 U.S. 77 (1969).

129. *Miranda v. Arizona*, 384 U.S. 436 (1966).

130. *Mathis v. United States*, 391 U.S. 1 (1969); *United States v. Dickerson*, 413 F.2d 1111, 1117 & n.13 (7th Cir. 1969). See generally Andrews, *The Right to Counsel in Criminal Tax Investigations Under Escobedo and Miranda: The "Critical Stage,"* 53 IOWA L. REV. 1074 (1968). On the other hand, *Miranda* warnings have not generally been extended to other administrative investigations because they are not criminal in nature and do not involve the "custodial" feature so critical to *Miranda*. See, e.g., *Harris v. Smith*, 418 F.2d 899 (2d Cir. 1969); *F.J. Buckner Corp. v. NLRB*, 401 F.2d 910 (9th Cir. 1968), cert. denied, 393 U.S. 1084 (1969); *Wilber J. Allingham*, 164 N.L.R.B. 30 (1967); *In re A_____*, 19 AD. L.2d 372 (Bd. Imm. App. 1966); *Mumford v. Department of Alcoholic Bve. Cont.*, 258 Cal. App. 2d 49, 65 Cal. Rptr. 495 (4th Dist. 1968). See generally Note, *Extending Miranda to Administrative Investigations*, 56 VA. L. REV. 690 (1970). *But see* *United States v. Casias*, 306 F. Supp. 167 (D. Colo. 1969) (draft board).

131. For example, attempts to secure the appointment of counsel for an indigent respondent in administrative proceedings have met with only minimal success. Compare *American Chinchilla Corp.*, 26 AD. L.2d 284 (FTC Dec. 23, 1969), noted in 1970 DUKE L.J. 112; 84

On the federal level, neither the Congress nor the agencies have focused on whether administrative agencies must recognize testimonial privileges not constitutionally required. In a leading case concerning the enforcement of an SEC subpoena, Judge Learned Hand expressly assumed that agency proceedings are "subject to the same testimonial privileges as judicial proceedings."¹³² Except for the Ninth Circuit, other federal courts have either made the same assumption or considered the matter a question of federal law.¹³³ At any rate, agencies have generally accorded privileged treatment to communications between attorney and client, physician and patient, and husband and wife.¹³⁴ But they have not been anxious to extend such privileges. For example, the accountant-client privilege recognized by a few states has not been accepted by federal agencies.¹³⁵ Business secrets have been protected grudgingly, although agencies have become more sophisticated in recent years in protecting both the witness and the adjudicative process by *in camera* receipt of sensitive data.¹³⁶

The government secrets privilege is particularly important in administrative hearings. Any attempt to probe the government's case by discovery, subpoena of agency witnesses, or cross-examination is quickly met by claims that the information sought is privileged.

HARV. L. REV. 1066 (1971), with *Nees v. SEC*, 414 F.2d 211, 221 (9th Cir. 1969), and *Boruski v. SEC*, 340 F.2d 991, 992 (2d Cir.), cert. denied, 381 U.S. 943 (1965).

132. *McMann v. SEC*, 87 F.2d 377, 378 (2d Cir.), cert. denied, 301 U.S. 684 (1937).

133. See, e.g., *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); *Falsone v. United States*, 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S. 864 (1953); *United States v. Threlkeld*, 251 F. Supp. 324 (W.D. Tenn. 1965); *In re Kearney*, 227 F. Supp. 174 (S.D.N.Y. 1964). *Contra Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960); *In re Breto*, 231 F. Supp. 529, 531 (D. Minn. 1964) (*Baird* applied pursuant to stipulation of the parties). For a perceptive student comment questioning the accuracy of this assessment of the choice of law problem, see Comment, *Privileged Communications Before Federal Administrative Agencies: The Law Applied in the District Courts*, 31 U. CHI. L. REV. 395 (1964).

134. See, e.g., (1) attorney-client: *Colton v. United States*, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963); *CAB v. Air Transp. Ass'n of America*, 201 F. Supp. 318 (D.D.C. 1961); *Viviano Macaroni Co.*, [1965-67 Transfer Binder] TRADE REG. REP. ¶ 17,467 (FTC 1966); cf. *Schoeps v. Carmichael*, 177 F.2d 391 (9th Cir. 1949), cert. denied, 339 U.S. 914 (1950); *John A. Iseli*, 1 C.A.A. 715 (1940); (2) husband-wife; *Cahan v. Carr*, 47 F.2d 604 (9th Cir. 1931); *Gilles v. Del Guercio*, 150 F. Supp. 804 (S.D. Cal. 1957); Peterson, *Attorney-Client Privileges in Internal Revenue Service Investigations*, 54 MINN. L. REV. 67 (1967). *Contra Air Transp. Ass'n* [1960-64 Transfer Binder] AV. L. REP. ¶ 21,355 (1963).

135. See e.g., *FTC v. St. Regis Paper Co.*, 304 F.2d 731 (7th Cir. 1962); *Falsone v. United State*, 205 F.2d 734 (5th Cir.), cert. denied, 346 U.S. 864 (1953).

136. See generally E. Gellhorn, *Business Secrets in Administrative Agency Adjudication*, 22 AD. L. REV. 515 (1970).

Actually, the government secrets privilege is an umbrella for three types of information: state secrets involving military or diplomatic information; requests that executive officers testify; and official government information which may range from the identity of informers and internal management materials to staff studies unrelated to any litigation.¹³⁷ Only the third omnibus exception has special significance for administrative adjudications; the judicial rules applicable to state secrets and executive testimony are routinely followed in agency hearings. An exploration of all the twists and turns given agency applications of the omnibus exception is beyond the scope of this paper.¹³⁸ A fair summary of agency practice, however, is that exculpatory information in an agency's possession or file data which may aid respondent's preparation or presentation of his case must be disclosed by the agency.¹³⁹ The agency's alternative is to drop the prosecution against the respondent.¹⁴⁰ Anything less would violate the commands of procedural due process which every adjudication must observe.¹⁴¹ But beyond this simple generalization which no one seriously disputes,¹⁴² neither cases nor commentaries have attempted to suggest precisely what the duty to disclose includes.¹⁴³ When does

137. See 8 J. WIGMORE, EVIDENCE §§ 2374, 2378 (McNaughton rev. ed. 1961); Hardin, *Executive Privilege in the Federal Courts*, 71 YALE L.J. 879 (1962); Zagel, *The State Secrets Privilege*, 50 MINN. L. REV. 875 (1966).

138. For an explanation of one agency's approach, see E. Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: The Hearing*, 116 U. PA. L. REV. 401, 423-27 (1968); E. Gellhorn, *The Treatment of Confidential Information by the Federal Trade Commission: Pretrial Practices*, 36 U. CHI. L. REV. 113, 157-77 (1968); cf. Moore-McCormack Lines, Inc., v. United States, 413 F.2d 568 (Ct. Cl. 1969). The Freedom of Information Act of 1966, 80 Stat. 250, as amended, section 3 of the APA, 5 U.S.C. § 552 (Supp. V, 1970), has served to ease access to some agency files for the public, but it has had little effect on agency adjudication.

139. E.g., *Sperandeo v. Dairy Employees Local 537*, 334 F.2d 381 (10th Cir. 1964); *NLRB v. Capital Fish Co.*, 294 F.2d 868 (5th Cir. 1961); *Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136 (S.D.N.Y. 1966); *Union Bag-Camp Paper Corp. v. FTC*, 233 F. Supp. 660, 666 (S.D.N.Y. 1964); cf. *Miller v. Pate*, 386 U.S. 1 (1967); *Giles v. Maryland*, 386 U.S. 66 (1967); *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); *United States v. Bryant*, 39 U.S.L.W. 2455 (D.C. Cir. Feb. 23, 1971).

140. See *Sperandeo v. Dairy Employees Local 537*, 334 F.2d 381, 385 (10th Cir. 1964); cf. *United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944); Berger & Krash, *Government Immunity from Discovery*, 59 YALE L.J. 1451, 1453 (1950).

141. See, e.g., *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143-44 (1940).

142. E.g., BNA ANTITRUST & TRADE REG. REP. No. 375, at A-8 (1968); cf. Note, *The Duty of the Prosecutor to Disclose Exculpatory Evidence*, 60 COLUM. L. REV. 858 (1960); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964).

143. For a useful discussion in another context, see Weinstein, *Judicial Notice and the Duty to Disclose Adverse Information*, 51 IOWA L. REV. 807 (1966).

information become exculpatory? Can criteria be developed, or is this subject akin to obscenity and seemingly beyond anything but the vaguest definition? Is the duty limited to government counsel or does a corresponding duty apply to nonparties, especially when the latter are the unseen de facto charging parties? Should a respondent have a correlative obligation to disclose incriminating data since the proceedings are civil and, at least as to corporate respondents, there is no right against self-incrimination? Even if these questions can be answered satisfactorily, what procedures should be adopted to assure that exculpatory data is revealed? Again, this is an area ripe for further analysis and discussion by an appropriate vehicle such as the Administrative Conference.¹⁴⁴ Although the cases still reflect only a glimmer of concern for such disclosure, as agencies further develop summary techniques or impose upon respondent the burden of proving its innocence—as I suspect demands for a cleaner environment and for fairer business-consumer relations will require—these questions should receive increasing attention.

Almost half the states provide that rules of privilege applicable in court proceedings must apply in administrative hearings.¹⁴⁵ Courts and agencies in other states have reached the same position as a matter of policy.¹⁴⁶ The scope of the statutory recognition of privileged communications in the states tends to exceed the testimonial exception recognized by federal courts.¹⁴⁷ Where agency proceedings are excepted or where no statutory mandate exists, state agencies have relaxed or avoided testimonial privileges where the rationale for the privilege is weak or not particularly appropriate. For example, several states have held that the physician-patient privilege cannot bar a workmen's compensation commission's search for the truth.¹⁴⁸

144. The initial consultant's report on discovery to a committee of the Administrative Conference attempted to formulate standards for disclosure of exculpatory data, but both the standard and the discussion were deleted from the final recommendation and report. Compare Tomlinson, *Discovery in Agency Adjudication*, Consultant's Report to the Committee on Compliance and Enforcement Proceedings, Administrative Conference of the United States 76-89 (January 1969), with *id.* (March 1970) and *Recommendation No. 21—Discovery in Agency Adjudication* (adopted June 3, 1970).

145. 1 COOPER 396-97 (collecting statutory authorities).

146. *E.g.*, *New York City Council v. Goldwater*, 284 N.Y. 296, 31 N.E.2d 31 (1940); BENJAMIN 171.

147. *E.g.*, OKLA. STAT. ANN. tit. 75, § 310(1) (1970).

148. *See, e.g.*, *Danussi v. Easy Wash, Inc.*, 270 Minn. 465, 134 N.W.2d 138 (1965); *Cooper's, Inc. v. Long*, 224 So. 2d 866 (Miss. 1969).

In summary, the trend appears to be toward narrowing testimonial privileges in administrative hearings and, where practical, toward resort to alternative protections against unnecessary public disclosure.

PRESENTATION OF CASE: BURDEN OF PROOF AND PRESUMPTIONS

The customary common law rule that the moving party has the burden of proof—including not only the burden of going forward but also the burden of persuasion—is generally observed in administrative hearings. Section 7(c) of the APA, for example, provides: “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”¹⁴⁹ State courts have reached the same result in connection with state administrative proceedings.¹⁵⁰ In most hearings the burden of persuasion is met by the usual civil case standard of “a preponderance of the evidence.” However, where grave issues of personal security are at stake in an administrative hearing as in a deportation proceeding, the Supreme Court has imposed the equity standard that the government establish its allegations by “clear, unequivocal, and convincing evidence.”¹⁵¹

Increasingly, the courts are also employing the substantial evidence standard to impose a special burden of proof on administrative agencies distributing compensation benefits. A series of cases involving social security and workmen’s compensation proceedings have required that the agency accept the claimant’s uncontroverted evidence even though the claimant has the burden of proof.¹⁵² Nor can these cases be explained away on the grounds of

149. 5 U.S.C. § 556(d) (Supp. V, 1970).

150. *E.g.*, *International Minerals & Chem. Corp. v. New Mexico Pub. Serv. Comm’n*, 81 N.M. 280, 466 P.2d 557 (1970); *Crossroads Recreation, Inc. v. Broz*, 4 N.Y.2d 39, 172 N.Y.S.2d 129, 149 N.E.2d 65 (1958); *State ex rel. Util. Comm’n v. Carolina Power & Light Co.*, 250 N.C. 421, 109 S.E.2d 253 (1959); *Pennsylvania Labor Relations Bd. v. Sansom House Enterprises, Inc.*, 378 Pa. 385, 106 A.2d 404 (1954).

151. *Woodby v. Immigration & Naturalization Service*, 385 U.S. 276 (1966); *see Jaffe, Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914 (1966).

152. *E.g.*, *Young & Co. v. Shea*, 397 F.2d 185 (5th Cir. 1968), *rehearing en banc denied*, 404 F.2d 1059, *cert. denied*, 395 U.S. 920 (1969); *Kerner v. Flemming*, 283 F.2d 916 (2d Cir. 1960); *Stanley v. Moan*, 71 Ariz. 359, 227 P.2d 389 (1951); *Dole v. Industrial Comm’n*, 115 Utah 311, 204 P.2d 462 (1949). The recent social security cases from just one federal circuit, the sixth, include: *York v. Gardner*, 397 F.2d 209 (6th Cir. 1968); *Nelms v. Gardner*, 386 F.2d 971 (6th Cir. 1967); *Colwell v. Gardner*, 386 F.2d 56 (6th Cir. 1967); *Branham v. Gardner*, 383 F.2d 614 (6th Cir. 1967); *Sayers v. Gardner*, 380 F.2d 940, 942-43 (6th Cir. 1967) (noting “the repeated necessity of reversing the Secretary [of HEW] in these cases”); *Erickson v. Ribicoff*, 305 F.2d 638 (6th Cir. 1962); *Hall v. Flemming*, 289 F.2d 290 (6th Cir. 1961); *King v. Flemming*, 289 F.2d 808 (6th Cir. 1961). *See generally* L. JAFFE, *supra* note 110, at 608.

judicial acceptance of uncontradicted medical testimony in support of the claim, since the agencies are also dealing with malingering and false claims. On the other hand, reviewing courts are more concerned with the remedial (insurance?) purposes of the statutes and the comparative inability of the claimant to present additional proof.¹⁵³ Similar tendencies occasionally appear in such diverse areas as police suspension matters¹⁵⁴ and draft exemption cases¹⁵⁵ where the courts have given increasing scrutiny to the overall fairness of administrative adjudications. It would seem safe to predict the spread of this tendency to less formalized adjudications¹⁵⁶ where the agency deals with an individual's liberties or claims.

These cases can also be viewed as establishing a presumption in certain administrative adjudications since they affect the burden of proof. The history of workmen's compensation illustrates this alternative analysis. Although many state acts have created a presumption in favor of the claimant, several state courts formerly gave these acts no such effect.¹⁵⁷ In interpreting a federal compensation act in *Del Vecchio v. Bowers*,¹⁵⁸ the Supreme Court has held that this "benefit" presumption was sufficient to carry claimant's burden of persuasion in the absence of opposing evidence. However, once rebuttal evidence is introduced, the statutory presumption is overcome, and the agency must decide the case solely on the evidence in the record.¹⁵⁹ Similar analysis supports the presumption of the correctness of official administrative action.¹⁶⁰

On the other hand, precisely the opposite trend is beginning to surface in administrative adjudications where the activities of business respondents are tested. For example, an advertiser now has the burden

153. However, where the evidence is likely to be available only to respondent, either the burden of persuasion or of going forward may be required of respondent. *See, e.g., Day v. National Transp. Safety Bd.*, 414 F.2d 950 (5th Cir. 1969); *Smyth v. United States Civil Serv. Comm'n*, 291 F. Supp. 568, 573 (E.D. Wis. 1968).

154. *E.g., Kelly v. Murphy*, 20 N.Y.2d 205, 229 N.E.2d 40 (1967).

155. *Dickinson v. United States*, 346 U.S. 389, 396 (1953); *cf. Mulloy v. United States*, 398 U.S. 410 (1970). *But see Dickinson v. United States*, 346 U.S. at 399 (dissenting opinion).

156. *See generally* K. DAVIS, *DISCRETIONARY JUSTICE* (1969).

157. *E.g., Joseph v. United Kimono Co.*, 194 App. Div. 568, 185 N.Y.S. 700 (1921).

158. 296 U.S. 280 (1935).

159. *Id.* at 286. This view now prevails in the state courts. *E.g., Cellurale's Case*, 333 Mass. 37, 127 N.E.2d 787 (1955); 2 A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* § 80.33 (1952). This also illustrates that problems of burden of proof are, in essence, often questions of substantive law. 2 DAVIS § 14.14, at 328 (1958); *see Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); 2 DAVIS § 15.04, at 372-73 (1958).

160. *E.g., Goldfarb v. Department of Revenue*, 411 Ill. 573, 104 N.E.2d 606 (1952); *Cupples Hesse Corp. v. State Tax Comm'n*, 329 S.W.2d 696 (Mo. 1959).

of establishing any advertising claim, and if it is the type of claim whose truth can be determined only by scientific tests—for example, a claim that respondent's tires will stop a car 25 percent quicker than other tires—the advertiser's fully-documented proof must *antedate* the representation; the prosecuting agency need only show that the claim was made.¹⁶¹ As increasing weight is given to the public interest in fair dealing and in a healthier environment, we can expect further developments either imposing strict liability on certain business activities¹⁶² or requiring that the business establish by substantial evidence that its practices should not be prohibited.

PRESENTATION OF CASE: WRITTEN EVIDENCE AND CROSS-EXAMINATION

Perhaps the most distinctive feature of many administrative hearings, particularly in contrast to nonjury trials, is the substitution of written evidence for oral testimony. This written evidence takes several forms. In its simplest and least productive aspect, some witnesses appear, if at all, simply for cross-examination, with the written questions and answers read into the record in lieu of the usual oral question-answer format. This "canned dialogue" has been savagely and justly criticized as an abomination leading to the withholding of the true facts from the hearing examiner and assuring that the case will be decided on grounds other than the evidence in the record.¹⁶³ But if applied more sensitively, written evidence can expedite

161. The Federal Trade Commission's theory in recent complaints is that an advertiser making performance claims without substantiating proof in hand shows a reckless disregard for the rights of the public. The conduct is therefore illegal whether or not the claim is ultimately established. *See, e.g.*, Firestone Tire & Rubber Co., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,209 (FTC 1970); *id.* 3 TRADE REG. REP. ¶ 19,370 (FTC 1970); *id.* (Initial Decision, May 5, 1971) (dismissing complaint). The theory is supported by Heinz W. Kirchner, 63 F.T.C. 1282, 1294-95 (1963).

162. *Cf.* 18 C.F.R. § 250.43 (1970) (Department of Interior regulations imposing strict liability on off-shore oil well lessees for pollution damage).

163. As one leading administrative practitioner describes the impact of canned testimony: I don't believe that I am wholly unique in being put immediately to sleep when it is read. That tedium is eliminated when the written testimony is used, without reading, as direct examination subject to oral cross. I have not, however, yet seen an examiner who has really mastered the unspoken direct testimony. The 25% that is really strong won't be touched in cross-examination and cannot easily be brought out in redirect, so in most cases the examiner proceeds until briefing time, at the best, and forever at the worst, in amiable ignorance of the heart of the testimony. The few hours of direct examination that are saved by written direct testimony come at too high a price. Gardner, *Shrinking the Big Case*, 16 AD. L. REV. 5, 12-13 (1963).

and simplify formal administrative proceedings through reducing the controversy to verified written statements which are then exchanged by the parties for the purpose of rebuttal.¹⁶⁴ Federal administrative agencies have frequently relied upon this technique; the ICC has done so for almost half a century.¹⁶⁵ With the cooperation of the parties, this procedure can result in greater precision than where the facts are presented orally.

The ICC's written procedures are probably more sophisticated than those of any other agency.¹⁶⁶ Early in the 1920's, this commission abbreviated the usual oral hearing before a commissioner or examiner through the use of a "shortened" procedure. Upon consent of the parties, oral testimony was dispensed with, and decision was rendered upon stipulated, sworn statements of fact. Despite encomiums from administrative law experts, this procedure did not prove particularly successful, since the parties could avoid the shortened procedure at any time by requesting a formal hearing. Consequently, in 1942 the ICC substituted a "modified" procedure whereby each party submitted his case in writing for the purpose of obtaining agreement on as many facts as possible. The parties then confined their oral testimony to the remaining points in dispute. While more successful than the "shortened" procedure, this modified procedure did not eliminate a formal hearing when the parties could not agree on the facts. In time, the modified procedure was streamlined into an extraordinary administrative version of summary judgment. Under rule 45 of the ICC's current procedure, any party may request use of the modified procedure by filing a verified statement setting forth the facts, arguments, and exhibits on which he relies.¹⁶⁷ The opposing party must either admit or deny each material allegation, explaining

164. See W. GELLHORN, *FEDERAL ADMINISTRATIVE PROCEEDINGS 100-15* (1941); *SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 1961-62*, S. DOC. NO. 24, 88th Cong., 1st Sess. 92 (1963); P. WOLL, *ADMINISTRATIVE LAW 37-48* (1963); *FINAL REPORT OF ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE*, S. DOC. NO. 8, 77th Cong., 1st Sess. 69-70 (1941); Brown, *Public Service Commission Procedure—A Problem and a Suggestion*, 87 U. PA. L. REV. 139 (1938).

165. State agencies have also made extensive use of written evidence. See 38 J. AM. JUDIC. SOC. 61 (1954).

166. See Hosmer, *Some Notes on a Perennial Procedural Problem*, 5 I.C.C. PRAC. J. 275 (1938); Mohundro, *Improvements in Procedure Before the Commission*, 20 I.C.C. PRAC. J. 75, 79-81 (1952); Woll, *The Development of Shortened Procedure in American Administrative Law*, 45 CORNELL L.Q. 56, 62-66 (1959); *Three Letters on Procedure Before the I.C.C.*, 20 I.C.C. PRAC. J. 196 (1952).

167. 49 C.F.R. § 1100-45 (1970); see *id.* §§ 100.49-.50, .53.

each exception he takes to the facts and argument of his adversary. Unless there are material facts in dispute or the objecting party explains why he cannot properly present his case by affidavits, a decision will then be rendered on the written case. Note that this rule exceeds the concept of summary judgment currently applied under rule 56 of the Federal Rules of Civil Procedure¹⁶⁸ by placing the burden on the parties to prove that an oral hearing is necessary.¹⁶⁹ An oral hearing is not presumed to be the proper method for hearing a case.

Written evidence has been relied upon most successfully in rate or price control proceedings, where economic and expert analysis rather than sensorily-perceived phenomena provide the bulk of the evidence.¹⁷⁰ Credibility based upon conflicting stories relating what each witness observed is seldom involved. Often the advance preparation of written evidence is limited to the contentions of the party having the burden of proof; in others the opposing party's evidence is included. The elimination of surprise cannot be objected to since surprise has no proper place in the hearing when credibility is not in issue. Cross-examination is not used to establish a party's case. Its major purpose here is "not to reduce . . . [the expert] witness to a shattered hulk by the admission of error, but to explore all of the considerations entering into what must remain a matter of judgment."¹⁷¹

As explained by the Second Interim Administrative Conference, the benefits of written evidence are manifold:

- (1) [the] exchange of written evidence facilitates settlement techniques in situations in which there is staff participation;
- (2) the hearing examiner, after studying the direct evidence of the parties prior to hearing, can participate in the case in an intelligent fashion, leading to more effective use of conference techniques and more informed rulings at the hearing;
- (3) in a substantial number of cases, particularly those of less moment, the parties may be satisfied with their written presentations, and an oral hearing becomes unnecessary; and
- (4) the efforts of the parties at the oral hearing, if one is necessary, are confined to clarifying the major issues through informed cross-examination. Properly handled, written procedures should result in a more adequate record being produced in a shorter space of time.¹⁷²

168. FED. R. CIV. P. 56.

169. See E. Gellhorn & Robinson, *Summary Judgment in Administrative Adjudication*, 84 HARV. L. REV. 612 (1971). The ICC's procedure has withstood attacks upon due process grounds. *E.g.*, *Allied Van Lines Co. v. United States*, 303 F. Supp. 742 (C.D. Calif. 1969).

170. See SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 1961-62, S. DOC. NO. 24, 88th Cong., 1st Sess. 92 (1963).

171. *Id.*

172. *Id.* at 93.

Section 7(c) of the APA recognizes the propriety of written presentations with only limited cross-examination: "In rule making or determining claims for money or benefits or applications for initial licenses any agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form."¹⁷³ While denying the broad application of their recommendation to all adjudications, some commentators have suggested the use of written presentations by any agency in a type of proceeding where the interest of any party is not prejudiced.¹⁷⁴ Existing case authority on the point supports this conclusion.¹⁷⁵

Where cross-examination is necessary for protection against untrustworthy evidence, it cannot be avoided. Section 7(c) of the APA specifically preserves the right of cross-examination in agency adjudications: "A party is entitled . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts."¹⁷⁶ State law is identical.¹⁷⁷ Through this provision the APA recognizes one of the fundamentals of a fair hearing—namely, a reasonable opportunity to test and controvert adverse evidence whether or not such evidence is a statement of opinion, observation, or consideration of the witness. Cross-examination has several potential uses: to bring out matters left untouched by direct examination; to test the accuracy of a witness' perception as well as his ability to observe; to probe his truthfulness; to question his memory and narration; and to expose the basis of any opinions he has expressed. In other words, "cross-examination is a means of getting at the truth; it is not truth itself."¹⁷⁸ Unless credibility is directly in issue—and then only on occasion—cross-examination invariably does no more than demonstrate forensic talent or score trial points irrelevant to the final decision.¹⁷⁹ As an experienced agency practitioner, now an eminent federal judge, has observed: "Only rarely . . . can you accomplish something devastating on cross-examining an expert. More often it is love's labor lost."¹⁸⁰

173. 5 U.S.C. § 556(d) (Supp. V, 1970).

174. See 2 DAVIS § 14.16 (1958); ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 77-78 (1947).

175. See *Yakus v. United States*, 321 U.S. 414 (1944). See also 2 DAVIS § 14.16 (1958).

176. 5 U.S.C. § 556(d) (Supp. V, 1970).

177. See *Hyson v. Montgomery County Council*, 242 Md. 55, 67-68 & n.1, 217 A.2d 578, 585-86 & n.1 (1966); 1 COOPER 371-79 (collecting cases).

178. W. GELLHORN & C. BYSE 713.

179. C. MCCORMICK, EVIDENCE § 30 (1954).

180. Leventhal, *Cues and Compasses for Administrative Lawyers*, 20 AD. L. REV. 237, 246 (1968); accord, Prettyman, *Trying an Administrative Dispute*, 45 VA. L. REV. 179, 190-91 (1959).

Perception of this point is the key to a reconciliation of the right of cross-examination with the seemingly inconsistent administrative practice of relying on hearsay testimony and written evidence whether or not the declarant is unavailable. The legislative history of the APA clearly indicates that Congress was seeking to draw a line between an unlimited right of unnecessary cross-examination and a reasonable opportunity to test opposing evidence.¹⁸¹ The test, stated abstractly, is that cross-examination must be allowed when it is required for determining the truth. If witness veracity and demeanor are not critical, there is no requirement for cross-examination so long as sufficient opportunity for rebuttal exists; if credibility is a key factor, and the objecting party can show that the absence of cross-examination of the witness may have prejudiced his case, the denial of cross-examination could be fatal to an agency decision.¹⁸² Statistical compilations and surveys are admissible only if the person responsible for—and having full knowledge of the preparation of—the exhibit is available. In addition, the raw data upon which the exhibit is based should be available to the opposing party.¹⁸³ One far-thinking administrative lawyer has proposed that the right of the witness to cross-examine be reduced to a privilege “to be granted only in the virtually unlimited discretion of the hearing officer” as part of a restructuring of the administrative hearing into a conference proceeding where almost all the evidence would be submitted in written form.¹⁸⁴ This proposal may prove to be the path of the future in resolving economic disputes and sophisticated problems arising in industry regulation.

Finally, administrative agencies are required to apply the “Jencks rule”—namely, that after a government witness has testified, the

181. S. Doc. No. 248, 79th Cong., 2d Sess. 208-09, 271 (1946); ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 77-78 (1947).

182. *E.g.*, *In re Chapman Radio & Television Co.*, 6 F.C.C.2d 768 (1967); *accord*, *Richardson v. Perales*, 39 U.S.L.W. 4497 (U.S. May 3, 1971); *see Peters v. United States*, 408 F.2d 719 (Ct. Cl. 1969); *Brown v. Macy*, 222 F. Supp. 639 (E.D. La. 1963), *aff'd*, 340 F.2d 115 (5th Cir. 1965).

183. *Wirtz v. Baldor Elec. Co.*, 377 F.2d 518 (D.C. Cir. 1964); *see Carter-Wallace, Inc. v. Gardner*, 417 F.2d 1086, 1095-96 (4th Cir. 1969) (party not entitled to cross-examination if alternative method of investigating accuracy available); *Zeisel, The Uniqueness of Survey Evidence*, 45 CORNELL L.Q. 322, 345-46 (1960).

184. *Westwood, Administrative Proceedings: Techniques of Presiding*, 50 A.B.A.J. 659, 660 (1964). *See also Recommendation No. 19*, SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 1961-62, S. Doc. No. 24, 88th Cong., 1st Sess. 51, 96-97 (1963); *Cramton, Some Modest Suggestions for Improving Public Utility Rate Proceedings*, 51 IOWA L. REV. 267, 276-78 (1966).

prosecution must disclose prior statements by the witness relating to his testimony.¹⁸⁵ Application of this rule in agency hearings has been riddled with controversy.¹⁸⁶ The Administrative Conference has offered this sensible solution—that prior statements be made available to the respondent at the prehearing conference. If this view is adopted, the question will no longer be one of evidence but of discovery.¹⁸⁷

OFFICIAL NOTICE¹⁸⁸

Official notice, like its judicial notice counterpart, involves reliance by the presiding officer—in this case, the hearing examiner—on extra-record information. That is, the examiner in making a decision relies upon facts and opinions not supported by evidence “on the record.” Official notice, however, is distinguishable from judicial notice in several respects. First, a specific procedure has been established to receive extra-record facts, with the parties receiving notice and an opportunity to rebut the “noticed” facts.¹⁸⁹ Second, extra-record facts usually have first been developed by the agency’s expert staff or accumulated from previous agency decisions. But official notice is not limited to information in agency files. In

185. *Jencks v. United States*, 353 U.S. 657 (1957). The “Jencks rule” was initially applied to administrative agencies in *NLRB v. Adhesive Prods. Corp.*, 258 F.2d 403 (2d Cir. 1958), and *Communist Party of the United States v. Subversive Activities Cont. Bd.*, 254 F.2d 314 (D.C. Cir. 1958); see SELECTED REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 1961-62, S. DOC. NO. 24, 88th Cong., 1st Sess. 132 (1963).

186. For a survey of the conflict of FTC proceedings, see *Papercraft Corp.*, 25 AD. L.2D 1063 (FTC 1969); *Allied Chemical Corp.*, 24 AD. L.2D 112 (FTC 1969); *Star Office Supply Co.*, 24 AD. L.2D 472 (FTC 1968), *enforced by order*, [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,228 (FTC 1970); *Inter-State Builders, Inc.*, 19 AD. L.2D 7 (FTC 1966), 21 AD. L.2D 1078 (FTC 1967); *L.G. Balfour Co.*, 19 AD. L.2D 35 (FTC 1966); *Viviano Macaroni Co.*, 19 AD. L.2D 69 (FTC 1966); E. Gellhorn, *supra* note 138, at 428-33. Similar difficulties experienced by the NLRB are discussed in Alleyne, *The “Jencks Rule” in NLRB Proceedings*, 9 B.C. IND. & COMM. L. REV. 891 (1968); see *NLRB v. Borden Co.*, 392 F.2d 412 (5th Cir. 1968). Finally, for a discussion of the application of the rule by the Department of Labor, see *Wirtz v. Rosenthal*, 388 F.2d 290 (9th Cir. 1967); *Wirtz v. B.A.C. Steel Prod., Inc.*, 312 F.2d 14 (4th Cir. 1962); *Mitchell v. Roma*, 265 F.2d 633 (3d Cir. 1959).

187. *Recommendation No. 21—Discovery in Agency Adjudication* (adopted June 3, 1970); see Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89, 149.

188. See generally FINAL REPORT OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 8, 77th Cong., 1st Sess. 71-73 (1941); BENJAMIN 206-21; 1 COOPER 412-20; 2 DAVIS ch. 15 at 383-434 (1958); W. GELLHORN, FEDERAL ADMINISTRATIVE PROCEEDINGS 82-99 (1941); W. Gellhorn, *Official Notice in Administrative Adjudication*, 20 TEXAS L. REV. 131 (1941); Jaffe, *Administrative Procedure Re-examined: The Benjamin Report*, 56 HARV. L. REV. 704, 717-19 (1943).

189. APA § 7(d), 5 U.S.C. § 556(d) (Supp. V, 1970).

fact, it is often taken at the initiative of one of the parties. Third, agency recognition of extra-record facts is clearly not limited to either "indisputable" or "disputable" facts. Rather, official notice may extend to almost any information useful in deciding the adjudication as long as elemental fairness is observed.¹⁹⁰

On the other hand, in administrative adjudication, official notice is frequently confused with the process of decision-making. In reaching a conclusion, the examiner or agency may rely on its special skills, whether they include particular expertise in engineering, economics, medicine, or electricity, just as a judge may freely use his legal skills in reading statutes and applying decided cases in the preparation of his opinion. But such evaluations are not within the concept of official notice. Official notice is concerned with the *process of proof*, not with the *evaluation of evidence*. The difference between an administrative tribunal's use of non-record information included in its expert knowledge, as a substitute for evidence or notice, and its application of its background in evaluating and drawing conclusions from the evidence that is in the record, is primarily a difference of degree rather than of kind. In principle, reliance upon the examiner's knowledge in the process of proof is permissible only within the confines of official notice, whereas the examiner's use of his experience in evaluating "proof" that has been offered is not only unavoidable but, indeed, desirable.¹⁹¹ The troublesome problem, as with most questions of law, is that a fine line cannot be drawn with precision. Benjamin illustrates the point:

When the State Liquor Authority concludes, from evidence in the record as to the size of food bills and gas bills paid (in relation to the volume of liquor business), that the holder of a restaurant liquor license is not conducting a *bona fide* restaurant, is the Authority using its experience and knowledge to evaluate

190. In contrast, judicial notice: involves no special procedure and seldom offers the parties either notice or an opportunity to show contrary facts; usually applies to facts developed by non-judicial sources and is often relied upon at the court's initiative; and is limited to facts not likely to be disputed by the parties. *See, e.g.*, C. MCCORMICK, EVIDENCE ch. 37 (1954); Davis, *Official Notice*, 62 HARV. L. REV. 537 (1949). "The customary assumption that official notice is merely the administrative counterpart of judicial notice . . . is fundamentally unsound. . . ." *Id.* At least one observer has suggested that agencies should apply the doctrine of judicial notice to broad, general facts of common knowledge which are of an undisputed nature, thus avoiding the notice and rebuttal requirements of official notice, and limit official notice—with its procedural requirements—to disputable facts. Muir, *The Utilization of Both Judicial and Official Notice by Administrative Agencies*, 16 AD. L. REV. 333 (1964); *see* 2 DAVIS § 15.09 (Supp. 1965). The agencies, however, have not explicitly adopted this suggestion.

191. *See, e.g.*, ICC v. Louisville & Nashville R.R., 227 U.S. 88, 98 (1913); *Feinstein v. N.Y. Cent. R.R.*, 159 F. Supp. 460, 464 (S.D.N.Y. 1958) (L. Hand, J.).

and draw conclusions from the evidence, or is it using its experience and knowledge as a substitute for further evidence as to the normal relation of the size of food and gas bills to the volume of food business? . . . My own view is that . . . the procedure described is permissible [evaluation]; but until the courts have decided specific questions of this character, it is impossible to anticipate with any certainty what their decision would be.¹⁹²

Beyond this or other examples, little guidance can be offered.

The primary thrust behind official notice is to simplify or ease the process of proof. Where facts are known or can be safely assumed, the process of proving what is already known is both time consuming and unduly formal. When facts have been proven before, further proof becomes tiresome, redundant, and lacking in common sense. At times even the obvious could be difficult or time-consuming to prove without affecting the final result which was never in doubt. Moreover, administrative agencies were often created to become repositories of knowledge and experience. It would defeat their existence to require adherence to traditional methods of proof when alternative and equally fair methods are readily available. On the other hand, in developing an alternative method it is necessary to safeguard the elements of a fair trial preserved by the traditional forms of proof. The Attorney General's Committee accurately summarized the need:

The parties, then, are entitled to be apprised of the data upon which the agency is acting. They are entitled not only to refute but, what in this situation is usually more important, to supplement, explain, and give different perspective to the facts upon which the agency relies. In addition, upon judicial review, the court must be informed of what facts the agency has utilized in order that the existence of supporting evidence may be ascertained.¹⁹³

Congress sought to recognize and reconcile these concerns by a single sentence in section 7(d) of the APA: "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary."¹⁹⁴

The procedure is simple. Official notice is a means by which an agency can avoid hearing further evidence on a material fact in the case if it notifies the parties that unless they prove to the contrary the agency's findings will include that particular fact and allows the parties an opportunity to present contrary evidence. Federal Trade

192. BENJAMIN 212.

193. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 188, at 72; see *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292, 303-04 (1937).

194. 5 U.S.C. § 556(e) (Supp. V, 1970).

Commission cases illustrate the practice. After hearing dozens of cases indicating that consumers preferred American to foreign-made goods—and holding, therefore, that a failure to disclose the foreign origin of these goods was a false and deceptive act¹⁹⁵—the Commission advised respondents in *Manco Watch Strap Co.*¹⁹⁶ that it would not hear evidence on this issue in the future. Then, in subsequent cases where the FTC took official notice and the respondents could not prove that American consumers preferred either foreign goods or that the consumers had no particular preference, the Commission upheld orders barring sales of goods not bearing the requisite disclosures.¹⁹⁷ On the other hand, if respondents could show that consumers preferred French over American perfumes, for example, the “noticed finding” would not apply.¹⁹⁸

Practically, then, the primary effect of taking official notice is to transfer the burden of proof on that material fact—usually from the agency to the respondent. The significance of this tactic varies in proportion to the difficulty of the proponent in establishing that fact originally and the cost and effort of the opponent in disproving it. In most instances where agencies have taken official notice, the former costs have been slight since the result has seemed obvious. Where the fact is less obvious, however, these costs could prove substantial.¹⁹⁹

195. *E.g.*, *Oxwall Tool Co.*, 59 F.T.C. 1408 (1961) (hand tools); *Utica Cutlery Co.*, 56 F.T.C. 1186 (1960) (stainless steel hardware); *William Adams, Inc.*, 53 F.T.C. 1164 (1957) (cutlery handles); *Royal Sewing Mach. Corp.*, 49 F.T.C. 1351 (1953) (sewing machine parts); *Rene D. Lyon Co.*, 48 F.T.C. 313, 317 (1951) (watch bands); *Atomic Prods., Inc.*, 48 F.T.C. 289 (1951) (mechanical pencils); *L. Heller & Son, Inc.*, 47 F.T.C. 34 (1950), *aff'd*, 191 F.2d 954 (7th Cir. 1951) (imitation pearls); *The Bolta Co.*, 44 F.T.C. 17 (1947) (sunglass lenses); *Vulcan Lamp Works, Inc.*, 32 F.T.C. 7 (1940) (flashlight bulbs); *American Merchandise Co.*, 28 F.T.C. 1465 (1939) (gloves and thumbtacks). This listing is also further testimony to the FTC's historic concentration on trivia.

196. 60 F.T.C. 495 (1962).

197. *E.g.*, *Brite Mfg. Co.*, 65 F.T.C. 1067 (1964), *aff'd*, 347 F.2d 477 (D.C. Cir. 1965) (watch bands); *Savoy Watch Co.*, 63 F.T.C. 473 (1963) (watchcases); *Baldwin Bracelet Corp.*, 61 F.T.C. 1345 (1962), *aff'd*, 325 F.2d 1012 (D.C. Cir. 1963) (watch bands).

198. In its pursuit of the Grail, the FTC has in fact held that consumers prefer French perfumes and that it therefore is deceptive not to disclose the domestic origin of perfume. *See, e.g.*, *Harsam Distrib., Inc.* 54 F.T.C. 1212 (1958), *aff'd*, 263 F.2d 396 (2d Cir. 1959); *Etalissements Rigaud, Inc.*, 29 F.T.C. 1032 (1939), *modified*, 125 F.2d 590 (2d Cir. 1942); *Fioret Sales Co.*, 26 F.T.C. 806, *aff'd*, 100 F.2d 358 (2d Cir. 1938).

199. In the unusual event that the evidence is split with the moving party having the burden of establishing that material fact by a preponderance of the evidence, official notice may be the difference between winning and losing the case. In assessing the proper place of official notice, one should also take into account (a) the cost of establishing a general negative—which is, in part, the reason for assigning the burden of proof to the moving party, *cf.* C. McCORMICK, EVIDENCE 675 (1954); (b) the desirability of cross-examination; and (c) the impact of denying

The academic controversy over official notice has centered upon sterile attempts to categorize the types of facts which can be officially noticed. The APA's guidance is slender; it merely sets forth the procedure which must be followed for taking notice of "material facts." By omission it appears to suggest that facts which are not material can be noticed in the manner of a judge at a judicial trial, but it does not tell how to determine which facts are material and can therefore be noticed.

The Attorney General's Committee on Administrative Procedure suggested a distinction between "litigation" and "non-litigation" facts:

If information has come to an agency's attention in the course of investigation of the pending case, it should be adduced only by the ordinary process. . . . But if the information has been developed in the usual course of business of the agency, if it has emerged from numerous cases, if it has become part of the factual equipment of the administrators, it seems undesirable for the agencies to remain oblivious of their own experience [and, they should take notice of such facts].²⁰⁰

Professor Davis, on the other hand, rejects the notion that significance could be attached to the time when the factual data was collected. His criticism of the Committee's distinction stems from his conclusion that it would "encourage guesswork" and "discourage extra-record research of the kind that is especially needed for creation of law or policy. It would mean . . . [for example, that] an agency could notice only those statutes that it has previously encountered!"²⁰¹ This criticism seems somewhat unfair since the Committee's basic point defining reliable facts—those previously established by the agency—is sound. Davis is right, however, when he points out that the Committee rule is too narrow. As an alternative to the Committee rule, he offers a different standard for deciding whether an administrator may use extra-record facts:

When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—[it] is performing an adjudicative function, and the facts are conveniently called adjudicative facts. When a court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are

confrontation—all of which are intimately connected with the decision whether official notice is appropriate.

200. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *supra* note 188, at 72.

201. 2 DAVIS 363-64 n.43 (1958).

called legislative facts . . . Legislative facts are ordinarily general and do not concern the immediate parties.²⁰²

On this basis, he asserts that legislative facts usually need not be brought into the record by official notice; where critical, a party should be able to challenge them by brief and argument. He contends that adjudicative facts, on the other hand, must be brought into the record—unless they are indisputable—either through direct proof or by official notice. Nothing less will meet the cardinal principles of a fair hearing—notice and an opportunity to test and rebut opposing evidence. Whether such adjudicative facts can be officially noticed or must be established by direct proof depends, he says, on three variables: how close the facts are to the center of the controversy; the extent to which the facts are adjudicative or legislative; and the degree to which the facts are certain. As the adjudicative facts move closer to the basic issues of the hearing, relate to the parties, and are disputed, the usual methods of proof must be observed; as they move in the opposite direction, official notice is permissible.²⁰³

Professor Jaffe has entered the fray briefly to point out that, in his opinion, Professor Davis has succumbed to the lure of labels.

[W]here the facts bear closely and crucially on the issue, and are prima facie debatable, they should be developed in evidentiary fashion—by which is meant simply that they should be referred to in such a manner as to enable the opponent to offer rebuttal. Such facts will not necessarily be “adjudicative”

. . . .²⁰⁴

As Davis readily concedes, the categories he defines do not in themselves resolve which facts can be noticed in particular cases. He is certainly correct when he points out that the central problem is to reconcile procedural fairness with convenience and the use of agency knowledge. The difficulty with his analysis lies not in his categories, which are original and helpful, but rather that many cases fall outside his definitions. A sampling of cases illustrates this point. The existence of the Great Depression is a “legislative” fact which an agency can include in its findings without notice to the parties, but a specific price trend, also a general legislative fact, cannot be used to

202. *Id.* § 15.03 at 353.

203. *Id.* § 15.10.

204. Jaffe, *Administrative Procedure Re-Examined: The Benjamin Report*, 56 HARV. L. REV. 704, 719 (1943); cf. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1295-96 (1952). The Davis labels of “adjudicative” and “legislative” facts are commonly recited by agencies and courts to justify official notice decisions. See, e.g., *Communist Party v. Subversive Activities Cont. Bd.*, 367 U.S. 1, 110 (1961); *State v. Weinstein*, 322 S.W.2d 778 (Mo. 1959).

update the figures in the record without notice to the parties.²⁰⁵ Since a specific price trend can be readily verified, taking notice is appropriate; the burden of proving any substantial error is not likely to be significant. Similarly, the courts have upheld agencies' official notice of scientific data, technical facts, and articles in academic journals,²⁰⁶ although many courts contend that this places too great a burden on the opponent to refute the "noticed evidence."²⁰⁷

Of greater consequence is the fact that reliance upon Davis' categories distracts from the central question of fairness—that is, is it fair in the particular hearing to take official notice and *transfer the burden of proof* to the opposing party? Two cases involving the use of the record of a related hearing, each of which reaches an opposite result, are perhaps the clearest examples of this suggested "fairness of the transfer of the burden of proof" analysis. In *United States v. Pierce Auto Freight Lines, Inc.*,²⁰⁸ the ICC held two separate hearings on competing applications for truck service between San Francisco and Portland. Each applicant intervened in the other hearing, but the cases were not consolidated. In reaching its decision, the Commission relied on evidence appearing in only one record. This procedure was upheld because both applicants were parties to both proceedings and both had ample opportunity to present evidence, to cross-examine witnesses, and otherwise to protect their interests.

In the second case, *Dayco Corp. v. FTC*,²⁰⁹ the FTC sought to take official notice of the distribution system and practices used by the respondent, a manufacturer of auto replacement parts, since the system had been the subject of a prior proceeding. That prior

205. *Ohio Bell Tel. Co. v. Public Util. Comm'n*, 301 U.S. 292 (1937); *West Ohio Gas Co. v. Public Util. Comm'n*, 294 U.S. 63, 68 (1935); *cf. United States v. Baltimore & Ohio S.W.R.R.*, 226 U.S. 14, 20 (1912).

206. *E.g.*, *Alabama-Tennessee Natural Gas Co. v. FPC*, 359 F.2d 318 (5th Cir.), *cert. denied*, 385 U.S. 847 (1966); *McDaniel v. Celebrezze*, 331 F.2d 426 (4th Cir. 1964); *see* 46 C.F.R. § 502.226 (1970). The CAB's rules note 43 separate reports and other resource materials of which it automatically takes official notice in economic proceedings. 14 C.F.R. § 302.24(m) (1) (1970).

207. *See, e.g.*, *Sayers v. Gardner*, 380 F.2d 940, 952-55 (6th Cir. 1967); *Ross v. Gardner*, 365 F.2d 554, 558-59 (6th Cir. 1966); *Sosna v. Celebrezze*, 234 F. Supp. 289 (E.D. Pa. 1964); *Cook v. Celebrezze*, 217 F. Supp. 366 (W.D. Mo. 1963).

208. 327 U.S. 515 (1947); *see Safeway Stores, Inc. v. FTC*, 366 F.2d 795, 803 (9th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967); *cf. Zimmerman v. Board of Regents*, 31 App. Div.2d 560, 294 N.Y.S.2d 435 (3d Dep't 1968).

209. 362 F.2d 180 (6th Cir. 1966). The judicial reception of official notice is more hospitable where the fact being noticed is of less a personal (i.e., adjudicative) nature. *See, e.g.*, *Dombrovskis v. Esperdy*, 321 F.2d 463, 467 (2d Cir. 1963).

proceeding, in which respondent was only a witness, was brought against his customers. The court ruled that the FTC's attempt to take official notice of these "adjudicative" facts from the first proceeding was improper because the manufacturer was not a party, but only a witness, to the prior proceeding. To allow official notice in this circumstance, the court reasoned, would have eliminated the Commission's entire burden of proof. The agency had asserted that its reliance on prior knowledge merely shifted the burden of going forward to respondent and this burden (of correcting any FTC errors in describing respondent's distribution system) was minimal when compared with the cost of proving these same facts again. The FTC's argument is not persuasive. If the agency merely sought to shift the burden of going forward, it could have introduced the prior record as reliable hearsay evidence subject to rebuttal or as written evidence with an offer to make the witnesses available for cross-examination. If handled in this manner—rather than under the official notice rubric—the fact trier would still have to determine whether the prior record accurately portrayed respondent's distribution system. The court may also have perceived that there was no compelling need to approve the Commission's proposal since the FTC could (and should) have avoided the burden of re-proof by joining the respondent as a party in the first proceeding. Official notice, in other words, is not properly a procedural device to avoid the requirement of section 7(c) of the APA that the moving party has the burden of proof. If that burden is to be placed on respondent as a condition of doing business, it should be accomplished openly through a shift in substantive policy rather than covertly by manipulation of procedural devices.

When the issue of official notice is viewed in this manner, the Davis criteria and the Attorney General's distinctions are helpful, but not dispositive.

CONCLUSION

The rules of administrative evidence and official notice probably will continue to be buffeted by two forces seemingly pulling in opposite directions—namely, the desire for fairness and the need for efficiency. Current trends suggest that the command of fairness will control where personal security or dignity is at stake and that efficiency will weigh heavily where private economic positions compete with public interests. On the one hand, concern for personal rights and dignity will require that an individual claiming benefits or

seeking to avoid serious sanctions such as revocation of parole is entitled to a full hearing with notice before the applicant is disadvantaged, to the right to know and confront all evidence considered by the tribunal, and to effective assistance in preparing and presenting his case. In addition, it seems likely that in deciding these issues agencies increasingly will have the burden of presenting the evidence, of demonstrating its reliability, of proving that a benefit should be withheld, and of showing that all exculpatory information has been disclosed. On the other hand, where the public's demand for a safe environment is imperiled or its interest in fair dealing is threatened, especially by private economic interests, agencies will have to find ways to shorten administrative adjudications if formal hearings are to continue. The near future will probably see agencies developing summary techniques designed to acquire reliable evidence, to make it available to all parties, to open the record for commentary by interested parties whose testimony will not create substantial interference with the proceedings, and to enable the rendering of final decisions while meaningful, effective action is still possible.

The ultimate test is whether the agencies can develop fair procedures which are efficient—and vice versa. But the tougher and more immediate problem arises where compromises must be made. Here the questions will continue to be: Is the determination that fairness or efficiency must be given first priority correct? Is no better alternative available?