

January 2004

Standards of Evidence in Administrative Proceedings

William H. Kuenhle
Securities and Exchange Commission

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review

 Part of the [Civil Law Commons](#), [Criminal Law Commons](#), [Evidence Commons](#), [Legal Profession Commons](#), [Legal Writing and Research Commons](#), and the [Litigation Commons](#)

Recommended Citation

William H. Kuenhle, *Standards of Evidence in Administrative Proceedings*, 49 N.Y.L. SCH. L. REV. 829 (2004-2005).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

STANDARDS OF EVIDENCE IN ADMINISTRATIVE PROCEEDINGS

WILLIAM H. KUEHNLE*

TABLE OF CONTENTS

I. INTRODUCTION 831 R
II. EARLY EVIDENCE DEVELOPMENTS AND THE ADMINISTRATIVE PROCEDURE ACT 836 R
A. Agency Proceeding Origins 836 R
B. Pre-APA Judicial Development of Administrative Evidence Standards 837 R
C. The Administrative Procedure Act 842 R
1. Early Legislative Reaction to Broad Standards of Evidence 842 R
2. Bar Efforts on Procedure and Government Response 844 R
3. Final Compromise on Bifurcated Evidence Standards in Agency Proceedings 846 R
4. Judicial Review Evidence Standard 850 R
III. THE APPLICATION OF EVIDENCE STANDARDS 854 R
A. The Role of Constitutional Considerations 854 R
1. Richardson v. Perales 854 R
2. Factors in Varying Due Process Requirements Generally 859 R
3. Varying Due Process Requirements, Cross-Examination, and Hearsay 868 R
a. Cross-examination requirements generally 869 R

* Assistant Chief Litigation Counsel, Division of Enforcement, Securities and Exchange Commission; LL.M., Georgetown University, 1978; J.D. University of Pennsylvania, 1967; M.A. George Washington University, 1973; B.A. Yale University, 1964. The Securities and Exchange Commission, as a matter of policy, disclaims responsibility for any private publication or statement by any of its employees. The views expressed herein are those of the author and do not necessarily reflect the views of the Commission or of the author's colleagues upon the staff of the Commission.

b.	Issue of whether there is a constitutional need for cross-examination where evidence comes in through hearsay: reliability and probativeness	873	R
c.	Influence of Availability or Unavailability of Witness	876	R
d.	Burden on Opponent of Admission to Raise Meaningful Issue of Need for Cross-examination on Hearsay.	882	R
B.	<i>APA Standards</i>	884	R
1.	APA Factors	885	R
2.	Sequence of Application of Evidence Standards.....	889	R
a.	The legislative sequence	890	R
b.	The sequence with constitutional considerations	893	R
C.	<i>Role of the Federal Rules of Evidence</i>	898	R
1.	Role of the Federal Rules of Evidence Generally	898	R
2.	Federal Rules of Evidence Admission Tests ..	906	R
a.	Authentication.....	906	R
b.	Hearsay.....	909	R
i.	<i>Non-hearsay: prior statements of party opponents; prior inconsistent statement of a witness</i>	909	R
ii.	<i>Hearsay exceptions even when declarant is available</i>	910	R
iii.	<i>Hearsay exceptions when declarant is unavailable</i>	911	R
IV.	SUMMARY AND CONCLUSION.....	912	R

It appeared to me that no private family, composed of half a dozen members, could subsist a twelvemonth under the governance of such [judicial] rules [of evidence]: and that were the principles from which they flow to receive their full effect, the utmost extravagance of Jacobinism would not be more surely fatal to the existence of society than the sort of dealing, which, in these seats of elaborate wisdom, calls itself by the name of justice.¹

I. INTRODUCTION

Jeremy Bentham (1748-1832), the renowned thinker and reformer, made the observation above in criticizing the restrictive judicial rules of evidence that defied common sense by excluding information that could be useful in reaching a decision. As discussed below, the statutory law governing evidence in administrative proceedings was designed to ease the admission and use of relevant evidence from the type of restrictions applied in court proceedings while still retaining a standard of integrity. This relaxed standard, however, is more amorphous than the particularized judicial rules of evidence and presents continuing problems of application.²

1. JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 6 (Fred B. Rothman & Co. 1995) (1827).

2. Commentators have taken differing views on how to address some of the difficulties of the absence of identifiable evidence rules in administrative proceedings. Some have advocated essentially adopting the Federal Rules of Evidence ("FRE") or similar rules either to bring more order or to make it more difficult for government agencies to prevail. See, e.g., Elliot B. Glicksman, *The Modern Hearsay Rule Should Find Administrative Law Application*, 78 NEB. L. REV. 135 (1999) (arguing that administrative proceedings are like non-jury trials, to which the FRE apply, and the application of the FRE would add integrity and structure to administrative proceedings); Joseph J. Migas, *Admissibility of Hearsay in Administrative Deportation Hearings: a Due Process Call for Reform*, 11 GEO. IMMIGR. L.J. 601 (1997) (arguing that applying FRE hearsay exclusion rules to deportation hearings would increase protections for deportable aliens); James L. Rose, *Hearsay in Administrative Agency Adjudications*, 6 ADMIN. L. J. AM. U. 459 (1992) (arguing that hearsay should be rejected in administrative proceedings if it does not meet requirements of the FRE); Michael H. Graham, *Application of the Rules of Evidence in Administrative Agency Formal Adversarial Adjudications: A New Approach*, 1991 U. ILL. L. REV. 353 (1991) (arguing for the adoption of modified FRE to provide more structure and consistency; author was the Reporter for the Department of Labor Rules of Evidence, which are a modified version of the FRE).

At first glance, the statutory law governing evidence, the Administrative Procedure Act (“APA”), seems to provide a straightforward standard of admissibility. The APA provides that “[a]ny oral or documentary evidence may be received[.]”³ The only restriction is that an “agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.”⁴ In other words, only useless evidence is excluded. Many agencies have supplemented evidence admission requirements through regulation.⁵ Some regulations simply echo the APA.⁶ Some regulations

On the other hand, some commentators have staunchly defended the greatest admissibility of evidence without the interference of judicial rules of evidence. *See, e.g.*, KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE §§ 10.1-10.3, at 117-29 (3d ed. 1994) (distinguishing evidence rules in court proceedings from those in administrative proceedings); Kenneth Culp Davis, *Hearsay in Administrative Hearings*, 32 GEO. WASH. L. REV. 689 (1964) (arguing in an address before hearing examiners (the former title of administrative law judges (“ALJs”)) that judicial rules of evidence should not be applied in administrative proceedings because “simple observation” shows that “technically incompetent evidence is so often more reliable than technically competent evidence;” the guide should be “the probative effect of the evidence”); Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, (1941) (arguing that because administrative proceedings have many varying purposes, degrees of formality, and procedural necessity requirements, judicial rules of evidence are too rigid to work); Ernest Gelhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 12-22 (opining that deviation from strict judicial rules of evidence is helpful in some circumstances in administrative proceedings).

Commentators have generally approached the subject of evidentiary standards from a fixed point as to whether broad admissibility or the more restrictive judicial rules of evidence are best. This article attempts a more fundamental exploration of the origins and operation of evidence standards in administrative proceedings. It explores the history of the struggle between broader admissibility on one hand and tighter and more structured admission standards on the other and then examines the default standards that apply constitutionally on broader admission. It looks at the FRE from the standpoint of how the FRE complement those standards and could be used in a way that would help add structure without constraining needed broad admission in many types of proceedings.

3. 5 U.S.C. § 556(d) (2004). The APA standards in 5 U.S.C. § 556(d) apply only to adjudications “required by statute to be determined on the record after opportunity for an agency hearing.” 5 U.S.C. § 554 (2004). Such statutory requirements are common, though they do not apply to all administrative proceedings.

4. 5 U.S.C. § 556(d).

5. Professor Pierce, in the middle 1980s when he was a consultant to the Administrative Conference (no longer in existence), found that there were 280 regulations that governed evidence in agency proceedings. Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 5 (1987). Because there are so many individual agency proceeding variations, the analysis here focuses on

add exclusionary provisions that are APA decisional or reviewing court standards, discussed below.⁷ Some regulations add other standards, such as what a reasonable person would rely on.⁸ Many regulations make references to the Federal Rules of Evidence (“FRE”). Usually such regulations expressly exclude the restrictive application of the FRE.⁹ Others make some use of the FRE or provide that if evidence complies with the FRE it shall be admitted.¹⁰

decisions of reviewing courts, which have more general application and deal with fundamental issues common to all agency proceedings.

6. *See, e.g.*, 17 C.F.R. § 201.320 (rules for Securities and Exchange Commission proceedings): “The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.”

7. *See, e.g.*, 17 C.F.R. § 10.67 (rules for Commodity Futures Trading Commission proceedings): “Relevant, material and reliable evidence shall be admitted. Irrelevant, immaterial, unreliable and unduly repetitious evidence shall be excluded.” *See infra* notes 83-109 and accompanying text for discussion of the administrative decision and review standards.

8. *See, e.g.*, 18 C.F.R. § 385.509 (rules for Federal Energy Regulatory Commission proceedings): “The presiding officer should exclude from evidence any irrelevant, immaterial, or unduly repetitious material. The presiding officer may also exclude from evidence any other material which the presiding officer determines is not of the kind which would affect reasonable and fair-minded persons in the conduct of their daily affairs.” *See also* 18 C.F.R. § 401.84 (rules for Delaware River Basin Commission proceedings): “The Hearing Officer shall: . . . exclude irrelevant, immaterial or unduly repetitious evidence, but the interested parties shall not be bound by technical rules of evidence and all relevant evidence of reasonably probative value may be received.” Some regulations add requirements that are not only not in the APA, but are contrary to the APA, perhaps without awareness, such as referring to “competency,” a term usually associated with judicial rules of evidence and excluded from the APA during its drafting. *See, e.g.*, 21 C.F.R. § 1316.59 (rules for controlled substances proceedings, Drug Enforcement Administration, Department of Justice): “The presiding officer shall admit only evidence that is competent, relevant, material and not unduly repetitious.” *See infra* notes 94-97 and accompanying text for legislative rejection of court standards of competency.

9. *See, e.g.*, 22 C.F.R. § 1423.17 (rules for Unfair Labor Practice proceedings, Foreign Service Labor Relations Board): “The parties shall not be bound by the rules of evidence, whether statutory, common law, or adopted by court. Any evidence may be received, except that an Administration Law Judge may exclude any evidence which is immaterial, irrelevant, unduly repetitious or customarily privileged.”

10. Some regulations provide that evidence shall not be excluded because of failure to comply with the FRE, but the FRE may be used to argue as to admissibility. *See, e.g.*, 24 C.F.R. § 1724.425 (rules for sales registration proceedings, Housing and Urban Development Department):

The administrative law judge shall receive relevant and material evidence, rule upon offers of proof and exclude all irrelevant, immaterial or unduly repetitious evidence. . . . Evidence shall not be excluded merely by application of technical rules governing its admissibility, competency, weight or

In some cases, the FRE have been adopted as the evidence standard.¹¹

The APA evidence admission rules are accompanied by related, express APA standards setting forth the evidence required to support a final decision after the hearing. On that point, the APA provides: "A sanction may not be imposed or rule or order issued

foundation in the record; but evidence lacking any significant probative value, or substantially tending merely to confuse or extend the record, shall be excluded. The administrative law judge may allow arguments on the admissibility of evidence by analogy to the Federal Rules of Evidence currently applicable in the United States District Courts of the United States. Some regulations utilize specific provisions of the FRE. *See, e.g.*, 16 C.F.R. § 3.43 (rules for Federal Trade Commission proceedings):

Relevant, material, and reliable evidence shall be admitted. Irrelevant, immaterial, and unreliable evidence shall be excluded. Evidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The second sentence is taken from Rule 403 of the FRE.

Some regulations provide expressly that evidence that meets the requirements of the FRE is admissible, but that inadmissibility under the FRE does not exclude admissibility in the proceedings. *See, e.g.*, 12 C.F.R. § 308.36 (rules for Federal Deposit Insurance Corporation proceedings):

Admissibility. (1) Except as is otherwise set forth in this section, relevant, material, and reliable evidence that is not unduly repetitive is admissible to the fullest extent authorized by the Administrative Procedure Act and other applicable law.

(2) Evidence that would be admissible under the Federal Rules of Evidence is admissible in a proceeding conducted pursuant to this subpart.

(3) Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this subpart if such evidence is relevant, material, reliable and not unduly repetitive.

11. The Department of Labor has enacted a complete set of rules of evidence based on the FRE, with modifications of some provisions. *See* 29 C.F.R. part 18, subpart B. In a variation, Congress specifically required the NLRB to apply the judicial rules of evidence to NLRB proceedings to the extent practicable. *See* 29 U.S.C. § 160(b) ("Any such proceeding 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, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28."); implemented in 29 C.F.R. § 102.39 ("Any such proceeding 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, adopted by the Supreme Court of the United States pursuant to the act of June 19, 1934, (U.S.C., title 28, §§ 723-B, 723-C).").

except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.”¹² This obviously raises some questions on admissibility because if evidence cannot be used for a decision there would seem to be no purpose to admitting it. The standards are not the same because often it is not possible to make a final determination about whether evidence will meet decisional standards at the moment it is offered into evidence.¹³ Thus the evidence standard for making a decision is not the same as the standard for admissibility, although there is some relationship. There also is a judicial review standard that agency decisions must be supported by “substantial evidence,” discussed below, that necessarily relates to the admission and agency decision evidentiary standards.¹⁴

Another overarching factor is the constitutional standard. Because the purpose of the relaxed evidence standard in administrative proceedings is to encourage broad admission of evidence,

12. 5 U.S.C. § 556(d).

13. For example, a single piece of evidence is unlikely to meet the “substantial” evidence requirement. Rather, “substantial” evidence is likely to be formed from an aggregation of individual pieces of evidence. Thus, a piece of evidence is not inadmissible because it is not “substantial” evidence in terms of the decisional standard (although an individual piece of evidence may be so inherently trifling that it is not “material”). Similarly, the “reliability” or “probativeness” of a piece of evidence may be established in part from other pieces of evidence. A record of a telephone call might, by itself, not appear probative, but when ultimately combined with testimony and other documents, it helps form a body of evidence sufficient to support a decision. Even as to reliability, a piece of evidence of apparent questionable reliability may ultimately be corroborated by other evidence and form evidence sufficient to support a decision. Oral testimony is received without determination as to reliability or probativeness; that determination is made at the time of a decision. Thus a witness’s blatantly false or improbable testimony is received, but it could not constitute evidence to support a decision.

14. The standard for judicial review with respect to evidence is:

The reviewing court shall . . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be . . .

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute . . .

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706 (1966).

including hearsay, there frequently can be situations where a respondent's ability to test the evidence, particularly hearsay, may be lessened so much that he or she is denied due process. Indeed, reviewing courts frequently determine specific evidence issues on constitutional requirements rather than statutory or regulatory requirements.

This article examines all the factors that apply to the standards for admission and use of evidence in administrative proceedings. It also discusses how the FRE relate to the process. It explores the interworkings of the factors and advances a methodology for their application.

II. EARLY EVIDENCE DEVELOPMENTS AND THE ADMINISTRATIVE PROCEDURE ACT

A. *Origins of Agency Proceedings*

The roots of administrative agencies go back to the beginning of the United States.¹⁵ The Final Report of the Attorney General's Committee on Administrative Procedure, prepared during the debates in the early 1940s leading up to the enactment of the APA, identifies laws enacted in the first session of the First Congress that conferred administrative powers for customs collections and veterans benefits.¹⁶

At the time of the Final Report in 1941, fifty-one administrative agencies or offices existed.¹⁷ Eleven of the agencies had beginnings in statutes enacted before the close of the Civil War, including the Patent Office and, in 1862, the Bureau of Internal Revenue.¹⁸ Six others came into existence from 1865 to the turn of the twentieth century, including the Interstate Commerce Commission ("ICC") and the Immigration and Naturalization Service ("INS").¹⁹ Nine others came into existence by the end of World War I, including the Food and Drug Administration, the Federal Reserve System,

15. The APA defines "agency" as "an authority of the Government of the United States." 5 U.S.C. § 701 (1966). "Agency" is therefore used here generally to refer to any federal administrative body even if it is part of an executive department.

16. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE S. DOC. NO. 77-8 (1ST SESS. 1941).

17. *Id.* at 7-8.

18. *Id.* at 8-9.

19. *Id.* at 9.

and the Federal Trade Commission.²⁰ The period from 1918 to 1929 saw the beginning of nine new agencies, including the Federal Power Commission and the predecessor of the Federal Communications Commission.²¹ Seventeen more came into being in the 1930's, including Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the Social Security Board, the National Labor Relations Board, and the Commodity Exchange Commission.²²

Administrative powers have changed significantly over time. Early administrative powers dealt with basic, relatively straightforward functions, such as taxes, patents, and veterans' benefits. After the Civil War, as the industrial revolution blossomed, the powers delegated to administrative agencies began to include regulation of the economics of business, starting with the ICC in 1887. Perhaps because the administrative powers were beginning to affect business, with extensive financial impact and complicated economic issues, the question of evidentiary standards became significant.

B. Pre-APA Judicial Development of Administrative Evidence Standards

It is not surprising that the seminal Supreme Court case on evidentiary standards in administrative proceedings involved a case before the first economic regulation agency, the ICC. In *Interstate Commerce Commission v. Baird*,²³ a shipper complained of discriminatory rates on certain rail lines in shipments from Pennsylvania to the Atlantic Ocean and sought an order from the ICC prohibiting the discriminatory rates.²⁴ The ICC held hearings on the complaint.²⁵ One of the issues was whether contracts entered into between the railroads and coal producing companies they essentially owned showed lower imbedded shipping costs than the complainant could get.²⁶ Witnesses from the coal producing companies receiving the favored rates appeared when summoned but refused to

20. *Id.*

21. *Id.* at 10.

22. See *supra* REPORT, *supra* note 16, at 10-11.

23. 194 U.S. 25 (1904).

24. *Id.* at 26-28.

25. *Id.* at 28.

26. *Id.* at 41.

produce their contracts with the railroad companies or to testify about them.²⁷ The United States circuit court rejected the ICC's request for an order requiring production of the documents and the giving of testimony.²⁸ The Supreme Court reversed,²⁹ holding that broad concepts apply to the admission of evidence in such administrative hearings:

The inquiry of a board of the character of the Interstate Commerce Commission 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 law, where a strict correspondence is required between allegation and proof.³⁰

In this early Supreme Court foray into evidentiary standards in administrative proceedings, the Court was willing to view administrative proceedings as having looser evidence standards than courts.

Later, the Supreme Court confronted the issue of what standard of judicial review applies to ICC decisions and again commented on evidentiary standards. In *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*,³¹ the ICC argued that its order that rates on particular rail lines be rolled back to earlier rates must be accepted without regard to whether the unfairness of the rates was formally established at a hearing; that is, the conclusions must be accepted pretty much as legislative determinations must be accepted.³² The Court noted, however, that the law provided that rates may be ordered changed only after a hearing and that a hearing implies basic rights as to evidence.³³ The Court noted that there is greater liberality in the admission of evidence in administrative proceedings, but that such liberality is still constrained to meet basic evidentiary requirements:

27. *Id.* at 28.

28. *Id.* at 26.

29. *Interstate Commerce Comm'n*, 194 U.S. at 42-44.

30. *Id.* at 44.

31. 227 U.S. 88 (1913).

32. *Id.* at 92-93.

33. *Id.* at 93.

The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. *Interstate Commerce Comm'n v. Baird*, 194 U.S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.³⁴

Having noted that it would not review the Commission's conclusions "by passing upon the credibility of witnesses or conflicts in the testimony,"³⁵ the Court proceeded to review the record to determine if there was "substantial evidence to support the order."³⁶ The Court found that the order was sustained by "substantial, though conflicting evidence," and since "courts cannot settle the conflict, nor put their judgments against that of the rate-making body," upheld the order.³⁷

In *Spiller v. Atchison, Topeka & Santa Fe Ry. Co.*³⁸ the Court reached the issue of the standard for the underlying quality of evidence admitted. Shippers petitioned the ICC for a reparations order for overcharges by railroads.³⁹ The ICC held a hearing, characterized by the Court as "informal," in which the only witness was a shipper's representative who, having prepared the claims, having gathered data on the claims from commission agents and shippers, and having examined the books and records of commission merchants, testified as to the information and the practices of cattle shippers and commission merchants.⁴⁰ Voluminous documentary evidence was received on the claims themselves, and records were

34. *Id.*

35. *Id.* at 92.

36. *Id.* at 94.

37. *Interstate Commerce Comm'n*, 227 U.S. at 100.

38. 253 U.S. 117 (1920).

39. *Id.* at 122-24.

40. *Id.* at 129-30.

submitted during the hearing for review by the accounting offices of the railroads, with the Court noting that "points in real controversy were few."⁴¹ On this record, the ICC determined that reparations should be paid.⁴² The statute provided that enforcement of the order was by suit in a United States District Court. The shippers brought such suit and prevailed.⁴³ The defendants then appealed to the court of appeals, arguing that the record in the ICC hearing was not adequate to support an order by a court.⁴⁴ The Court of Appeals agreed, characterizing the evidence as hearsay.⁴⁵ Thus the issue was essentially whether the evidence used for the ICC hearing had to meet court evidentiary requirements or whether the ICC evidentiary record and order were sufficient.

Upon appeal, the Supreme Court noted that the Court of Appeals had criticized the evidence as being hearsay and agreed that much of it was.⁴⁶ The Court noted that the defendants had failed to object to the hearsay nature of the evidence at the ICC hearing and thus had lost standing to object at the court level.⁴⁷ The Court also noted that the hearsay evidence was corroborated.⁴⁸ The Court stated that the use of hearsay evidence was acceptable:

We are not here called upon to consider whether the Commission may receive and act upon hearsay evidence seasonably objected to as hearsay: but we do hold that in this case, where such evidence was introduced without objection and was substantially corroborated by original evidence clearly admissible against the parties to be affected, the Commission is not to be regarded as having acted arbitrarily, nor may its findings and order be rejected as wanting in support, simply because the hearsay evidence was considered with the rest.⁴⁹

41. *Id.* at 127-28.

42. *Id.* at 122.

43. *Id.* at 120.

44. *Spiller*, 253 U.S. at 122.

45. *Id.* at 122, 129.

46. *Id.* at 129-30.

47. *Id.* at 130.

48. *Id.* at 131-32.

49. *Id.* at 131.

The Court cited *Interstate Commerce Commission v. Baird*⁵⁰ and *Interstate Commerce Commission v. Louisville & Nashville. R. R. Co.*⁵¹ discussed above, for the proposition that admissibility of evidence in administrative proceedings is not limited to the strict rules of evidence in court trials.⁵² Thus, the Court first reached the issue of whether particular evidence that did not meet court rules of evidence could be admitted and held that it could, at least in the circumstances presented. The Court also held that the underlying standard for the conduct of administrative proceedings is that the hearing be fair and any order be supported by substantial evidence, stating:

These provisions [authorizing the ICC hearings] allow a large degree of latitude in the investigation of claims for reparation, and the resulting findings and order of the commission may not be rejected as evidence because of any errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence.⁵³

Finally, in the last major opinion on evidence standards prior to the enactment of the APA, *Consolidated Edison Co. v. NLRB*,⁵⁴ the Court addressed the evidentiary review standard. In this case, a court of appeals had upheld an administrative order on the basis that the administrative hearing was not “wholly barren of evidence” supporting the order.⁵⁵ The appellants argued that this was insufficient and also argued that the hearing received “remote hearsay” and “mere rumor.”⁵⁶ The statute provided that the factual findings of the Labor Board shall be conclusive if “supported by evidence.”⁵⁷ The Court agreed with the appellants that this meant the findings must be supported by “substantial evidence.”⁵⁸ The Court defined substantial evidence as being: “more than a scintilla. It means such

50. 194 U.S. 25 (1904).

51. 227 U.S. 88 (1913).

52. *Spiller*, 253 U.S. at 131.

53. *Id.* at 126.

54. 305 U.S. 197 (1938).

55. *Id.* at 229.

56. *Id.*

57. *Id.*

58. *Id.*

relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁵⁹ The Court found that the court of appeals was referring to substantial evidence as supporting the order, and thus upheld the court of appeals ruling.⁶⁰

As to the admissibility of evidence, the Court in *Consolidated Edison Co.* noted that the authorizing statute provided that “the rules of evidence prevailing in courts of law and equity shall not be controlling.”⁶¹ The Court noted that the purpose was to relax the standard for the admissibility of evidence: “The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order.”⁶² The Court, however, stated that the relaxed standard does not extend to permitting decisions to be based on remote and flimsy evidence: “But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence.”⁶³ Thus, broad admissibility is permissible, but the evidence on which a decision is rendered must have “rational probative force.” In this case, the Court found that the evidence met the test and rejected the appellants’ argument.

C. *The Administrative Procedure Act*

1. Early Legislative Reaction to Broad Standards of Evidence

As reflected in the pre-APA court decisions on administrative evidence, agencies wanted, indeed needed, broad admissibility. Particularly on large economic matters, hearsay and other non-admissible forms of evidence had to be considered. Courts recog-

59. *Id.*

60. *Consol. Edison Co.*, 305 U.S. at 229.

61. *Id.*

62. *Id.* at 229-30, citing to, among other cases, *Interstate Commerce Comm’n v. Baird*, 194 U.S. 25, 44 (1904); *Interstate Commerce Comm’n v. Louisville & Nashville R. R. Co.*, 227 U.S. 88, 93 (1913), discussed above.

63. *Consol. Edison Co.*, 305 U.S. at 230.

nized this, as in *Spiller*,⁶⁴ where establishing rates charged to shippers would be difficult at best under court evidence rules of the time. Of course, the respondents felt they were economically affected by evidentiary standards lower than those required in court. Certainly, applying court rules of evidence in administrative proceedings would make defense much easier. These competing interests also were reflected in the legislative arena.

The defense bar resisted the informality of the expanding administrative processes, in part by seeking “increasingly elaborate, expensive, and time-consuming procedural formalities to govern agency decision making.”⁶⁵ In both the United States and England, some lawyers decried what they saw as a movement to socialism through administrative proceedings.⁶⁶ The establishment of new agencies during the New Deal created additional bar concerns. In 1933, the American Bar Association established a special committee on administrative law.⁶⁷ In the first of a series of reports, the committee in 1934 advocated more court-like procedures, stating:

The judicial branch of the federal government is being rapidly and seriously undermined. . . . The committee naturally concludes that, so far as possible, the decision of controversies of a judicial character must be brought back into the judicial system.⁶⁸

During this time, the initial legislative movement under these influences was directed toward creating a federal administrative court.⁶⁹ It was noted, however, that the establishment of a federal administrative court would be inconsistent with the existence of general courts that were provided for in the Constitution and with which the population was familiar.⁷⁰

64. 253 U.S. 117 (1920)

65. KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.4, at 10 (3d. ed. 1994).

66. *Id.* at 10.

67. *Id.* at 11.

68. *Id.* (quoting 59 A.B.A.R. 539, 549 (1934)).

69. See H.R. REP. NO. 79-1980, at 7-16 (1946) (providing a detailed history of legislative developments).

70. *Id.* at 8.

2. Bar Efforts on Procedure and Government Response

The effort later turned from bringing administrative proceedings into a federal court system to bringing court standards into administrative proceedings. The first of the bills addressed to standards of administrative proceedings was S. 915, introduced in 1939, in the first session of the 76th Congress. An identical bill, H.R. 4236 was introduced in the House. These bills recognized that it was too late to try to force the adjudicatory process into the federal court system.⁷¹ The bills sought to bring judicial proceeding requirements into the administrative forum by imposing procedures for appeals within agencies and providing for external imposition of rules of trial practice and procedure:

Section 6 is complementary to these two sections [4 and 5, on internal appeals process] in the authorization and request that the Supreme Court of the United States issue uniform rules of trial practice and procedure for the exercise of the adjudicatory process in the administrative agencies and for the appellate review. It is assumed that in complying with such request the Supreme Court of the United States will duplicate the procedure followed in formulating uniform rules for the trial courts and appoint an able committee, consisting of representatives of the administrative agencies, members of the bar in private practice, and others to make the necessary studies and prepare the rules of trial practice and procedure.⁷²

71. S. REP. NO. 76-442, at 12 (1939). The Senate report on the legislation stated: If there ever was a time when the investigational, prosecutorial, and judicial function exercised by administrative agencies in the administration of statutes could be segregated, that time has long since passed. The complexities of modern-day governments necessitate the combination of such functions in the administrative process, and this is entirely aside from the fact that the administrative agencies determine many times more controversies within a given period than do the traditional courts. Even if the courts were otherwise qualified to exercise de novo the judicial process as to all such controversies, the number thereof would swamp any judicial system which we have had in America.

Id.

72. *Id.* at 13.

This legislation passed in Congress,⁷³ but the bill was prevented from becoming law by a veto by President Roosevelt on December 17, 1940.

The President vetoed the bill largely on the ground that the bill would effectively impose the constraints and costs of court proceedings in an area where broader reception of evidence at less cost was essential:

It is impossible to subject the daily routine of fact finding in many of our agencies to court procedure. Litigation has become costly beyond the ability of the average person to bear. Its technical rules of procedure are often traps for the unwary and *technical rules of evidence often prevent common-sense determinations on information which would be regarded as adequate for any business decision.* . . .

* * *

The administrative tribunal or agency has been evolved in order to handle controversies arising under particular statutes. It is characteristic of these tribunals that simple and nontechnical hearings take the place of court trials and informal proceedings supersede rigid and formal pleadings and processes. *A common-sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence*, and an informed and expert tribunal renders its decisions with an eye that looks forward to results rather than backward to precedent and to the leading case.⁷⁴

The President's veto also was based in part upon his desire to await a report from a committee appointed by the Attorney General to study administrative procedure. This Committee, known as The Attorney General's Committee on Administrative Procedure, had been appointed on February 24, 1939, at the time of the introduction of the bill that was vetoed. It was composed of practitioners,

73. The bill was passed in the Senate on May 17, 1939, but became subject to a motion to reconsider. A substantially identical House bill, H.R. 6324, was passed in the House on April 21, 1940. It was reported in the Senate and passed with technical amendments on November 26, 1940. The amendments were agreed to by the House on November 26, 1940.

74. *Message from the President of the United States*, H.R. Doc. 76-986 (Dec. 18, 1940) (emphasis added).

judges, and professors under the leadership of Walter Gelhorn.⁷⁵ The Committee staff investigated the procedures at many agencies, wrote monographs, held public hearings and issued a detailed report.⁷⁶ The Final Report of the Attorney General's Committee on Administrative Procedure, submitted on January 24, 1941,⁷⁷ echoed the sentiments in the President's veto as it applied to evidence.⁷⁸ The report also began the process of trying to formulate a standard for evidence to be applied in the absence of the rejected limitations of the common law rules of evidence.⁷⁹ The succeeding legislative history reflects the further exploration of the issue of how to establish standards for evidence after the abandonment of the restrictions of court rules of evidence. In the meantime, the more urgent matter of the Second World War brought a three year hiatus to these developments.

3. Final Compromise on Bifurcated Evidence Standards in Agency Proceedings

In 1944, work on administrative procedure legislation resumed. Bills reflecting the ABA positions requiring court rules of evidence were introduced.⁸⁰ Although the bills supported by the ABA were not passed in 1944, they were reintroduced with revisions in 1945.⁸¹ Hearings were held in June 1945 and comments were received from administrative agencies.⁸² By October 1945, the language of the Senate bill had been changed to provide for broad

75. See DAVIS & PIERCE, *supra* note 65, at 13.

76. *Id.*

77. FINAL REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, S. DOC. NO. 77-8 (1st Sess. 1941).

78. *Id.* at 70.

79. *Id.* at 71.

80. H.R. 4314, 78th Cong. (1944) was introduced on March 2, 1944. S. 2030, 78th Cong. (1944) and H.R. 5081, 78th Cong. (1944) were then introduced in the second session. H.R. 5237, 78th Cong. (1944) was also introduced in this session to carry out recommendations of the Select Committee to Investigate Executive Agencies contained in H.R. REP. NO. 78-1797, 2d Session.

81. They were reintroduced in the first session of the 79th Congress as S. 7 and H.R. 1203.

82. A committee print correlating the bill, revisions, references to the Attorney General's Committee report and a summary of views and proposals was issued in June 1945. COMM. ON THE JUDICIARY, 79TH CONG., REPORT ON S. 7 (Comm. Print 1945).

admission of evidence, but with restrictions on the use of evidence in decisions:

Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any evidence, oral or documentary, may be received, but every agency shall as a matter of policy provide for the exclusion of immaterial and unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except as supported by relevant, reliable, and probative evidence.⁸³

Thus, Congress dealt with the evidence issue by bifurcating the evidence requirement. To accommodate the need for free admission of information, unfettered by the restrictions of the court rules of evidence, all evidence was admissible, limited only by restraints against useless or redundant information. To accommodate those concerned that this open gate standard would allow use of dubious evidence that otherwise would have been screened out by court rules of evidence, the bill provided that in the end, the agency was required to cite only reliable evidence to support its decision. Congress was trying to get to what a normal person would rely on in responsible matters in their lives:

There are no real rules of probity and reliability even in courts of law, but there are certain standards and principles – usually applied tacitly and resting mainly upon common sense – which people engaged in the conduct of responsible affairs instinctively understand and act upon. They may vary with the circumstances and kind of case, but they exist and must be rationally applied. These principles, under this subsection, are to govern in administrative proceedings.⁸⁴

The fact that the structure splits the standard of admissibility of evidence from the standard necessary to support a final decision is made plain in the Senate debate on the bill. In the debate, the sponsor of the bill, Senator McCarran, was asked whether the Committee intentionally chose the phrase “except as supported by rele-

83. *Id.*

84. *Id.*

vant, reliable, and probative evidence.”⁸⁵ Senator McCarran responded by explaining the origin of the bifurcation solution on evidence:

[R]ather than curtail the agencies, we sought an intermediate ground which we thought would be protective of the rights of individuals, and at the same time would not handicap the agencies. So we said to the (representatives of agencies) “You may go outside and get what would be secondary evidence, or hearsay; you may perhaps even go into the realm of conjecture; but when you write your decision it must be based upon probative evidence and nothing else. If in the formation of your decision you consider other than probative evidence, your decision will be subject to being set aside by a court of review.” In other words, we did not wish to destroy the administrative agencies or prescribe the methods under which they have been operating. . . . Then we laid down the rule that the administrative agencies must not make a finding which impinges upon an individual unless there is behind such finding probative evidence to sustain it. That is what we have worked out in this bill.⁸⁶

85. 92 CONG. REC. 2,157 (1946).

86. *Id.* In the House debate, Congressman Walter (chairman of the subcommittee reviewing the bill) stated that the standard of evidence for decisions is different from admissibility, making clear that the reason is the fear that agencies might use free admissibility to render decisions on insubstantial evidence:

The requirement that agencies may act only upon relevant, probative, and substantial evidence means that the accepted standards of proof, as distinguished from the mere admissibility of evidence, are to govern in administrative proceedings as they do in courts of law and equity. The same provision contains two other limitations – first, that the agency must examine and consider the whole of the evidence relevant to any issue and, secondly, that it must decide in accordance with the evidence. Under these provisions the function of an administrative agency is clearly not to decide arbitrarily or to act contrary to the evidence or upon surmise or suspicion or untenable inference. Mere uncorroborated hearsay or rumor does not constitute substantial evidence – see *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 230 (1938). Under this provision agencies are not authorized to decide in accordance with preconceived ideas or merely to sustain or vindicate prior administrative action, but they must enter upon a bona fide consideration of the record with a view to reaching a just decision upon the whole of it.

92 CONG. REC., H. 5753 (May 24, 1946).

As reported out of the House Committee on May 3, 1946, adjustments were made to the decisional standard in the bill to delete the word “relevant” because it had been added to the admission standard, and to add to the decisional standard the word “substantial” and a requirement of consideration of the “whole record” to conform to the judicial review standard.⁸⁷ It was in this form that the Administrative Procedure Act was passed without a dissenting vote in either house.⁸⁸ It was signed into law by President Truman on June 11, 1946.⁸⁹

87. The language of the bill was modified to make reference to giving consideration to the “whole record” and the sanction being “supported by and in accordance with” the requisite standard of evidence, which was now slightly changed to delete the reference to “relevant” in the trilogy and adding a reference to “substantial:”

Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative and substantial evidence.

S. 7, 79th CONG. 2D SESS. 33 (May 3, 1946).

The House Report explains that the word “relevant” was stricken from the trilogy of what is needed to support a decision because the provision was simultaneously changed to require the exclusion of “irrelevant” evidence from admission. H.R. REP. NO. 79-1980, at 53 n.16. The reference to the “whole record” was inserted to conform to the standard of the appeal court review elsewhere in the legislation. *Id.* at 53 n.17. The word “substantial” was added to the standard of evidence for the same reasons as the “whole record” requirement: to conform to the standard of review. *Id.* at 53 n.18.

88. ATTORNEY GENERAL’S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT (1947), at 6, available at <http://www.oalj.dol.gov/public/apa/refrnc/agintro.htm>.

89. *Id.* The provision governing hearings and decisions now reads:

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

* * *

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any 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. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or

4. Judicial Review Evidence Standard

The evidentiary judicial review standard established through pre-APA judicial decisions was whether the agency hearing decision was supported by “substantial evidence.”⁹⁰ The legislative contest was on whether review should be tightened. One early bill, for example, appeared to seek to make certain, even though it may be inferred from judicial decisions, that “probative value” was required by providing for setting aside “findings of facts, inferences, or conclusions of facts unsupported, upon the whole record, by substantial evidence having probative value”⁹¹

When work resumed on administrative procedure legislation in 1944, an American Bar Association drafted bill provided for even further restrictions. It provided that the reviewing court shall hold unlawful any agency action to the extent it is “unsupported by competent, material, and substantial evidence, upon the whole record as reviewed by the court”⁹² The term “competent” is usually associated with admissibility of evidence in court proceedings.⁹³ When legislation was reintroduced as S. 7 in early 1945, it also con-

defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an 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.

90. See *supra* notes 54-63 and accompanying text.

91. S. 918, 77th Cong. § 805 (1941). Judicial review also had always encompassed aspects beyond evidence. *E.g.*, *Interstate Commerce Comm’n v. Illinois Cent. R. Co.*, 215 U.S. 452, 470 (1910) and *Interstate Commerce Comm’n v. Union Pac. R. Co.*, 222 U.S. 541, 547 (1912). Early bills included a number of items under the scope of judicial review. For example, bill S. 918 in the 77th Congress provided for review of questions of:

Constitutional right, power, privilege, or immunity; (2) the statutory authority and jurisdiction of the agency; (3) the lawfulness and adequacy of the procedure followed by the agency in the particular case; (4) findings of facts, inference, or conclusions of facts unsupported, upon the whole record, by substantial evidence having probative value; and (5) administrative action otherwise arbitrary, capricious, or involving abuse of discretion.

S. 918, 77th Cong. § 805 (1941). The various elements of judicial review are now in 5 U.S.C. § 706 (2004). This article focuses only on evidentiary review.

92. S. 2030, 78th Cong. 2d Sess. (1944).

93. *E.g.*, BALLENTINE LAW DICTIONARY 233 (3d ed. 1969) (“Competency of evidence. The admissibility of evidence under the established rules of evidence.” (citation omitted)).

tained the “competent” requirement.⁹⁴ Subsequently, a Committee Print setting forth revisions after receipt of varying views deleted the “competent” evidence requirement and changed the language to:

“(5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8.”⁹⁵

The late 1945 Senate report on S. 7 stayed with the substantial evidence language in the Committee Print and included a whole record requirement:

“Substantial evidence” means evidence which on the whole record is clearly substantial, sufficient to support a finding or conclusion under section 7(c), and material to the issues.

* * *

The requirement of review upon “the whole record” means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case.⁹⁶

A report of the Attorney General on S. 7, which the Senate report called a “favorable report on the bill,” was contained in an appendix to the Senate Report.⁹⁷ On the evidence scope the Attorney General’s report went back to the judiciary standard, stating:

Clause (5) is intended to embody the law as declared, for example, in *Consol. Edison Co. v. NLRB*. There the Chief Justice said: ‘Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’⁹⁸

As passed, the law provided the reviewing court:

Hold unlawful and set aside agency action, findings and conclusions found to be . . . (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of

94. S. 7, 79th Cong. § 10(e) (1945).

95. S. Comm. Print on § 7, 79th Cong. § 10(e) (1945).

96. S. REP. NO. 79-752, at 28 (1945).

97. *Id.* at 37-45.

98. *Id.* at 44 (citations omitted).

an agency hearing provided by statute. . . . In making the foregoing determinations [under each of the various powers of review] the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.⁹⁹

The Attorney General's Manual, published in 1947, in reference to the evidentiary judicial review standard, returned to the judicial precedent, stating:

It is clear that nothing in section 7(c) is intended to change the standard or scope of judicial review; section 10(e)(5) specifically restates the "substantial evidence rule", as developed by the Congress and the courts, under which the reviewing court ascertains whether the agency's findings of fact are supported by substantial evidence.¹⁰⁰

Further word on the somewhat amorphous struggle of Congress to heighten review and of the administration to leave the more lenient review of Supreme Court precedent in place was spoken by the Supreme Court in 1951, when the issue of the evidentiary standard of review under the APA first came to it. An opinion written by Justice Frankfurter approached the issue of the review standard in a way consistent with pre-APA Supreme Court precedent, but acknowledging the Congressional concerns.¹⁰¹ The opinion noted that prior to the APA, the Court had interpreted the standard that National Labor Relations Board decisions be upheld if "supported by evidence" to mean "substantial evidence."¹⁰² It noted that the Court had subsequently described substantial evidence as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹⁰³

The Court noted that the legislative history showed some desire for closer judicial review, including consideration of the "whole

99. Pub. L. No. 79-404 § 10(e) (1946).

100. See ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, *supra* note 88, at 77.

101. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

102. *Id.* at 477 (citing *Wash., Va. & Md. Coach Co. v. NLRB*, 301 U.S. 142 (1937)).

103. *Id.* (citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

record.”¹⁰⁴ Taking these factors into account the Court concluded that the APA changed review standards in two ways.¹⁰⁵ First the adoption of the “whole record” standard meant that decisions could not be tested only on whether some part of the record would support the agency decisions without taking into account contradictory portions of the record.¹⁰⁶ Secondly, in a more subtle interpretation, the Court noted that while the terminology of “substantial evidence” was not changed in the statute, the mood of Congress suggested it was meant to be taken as a somewhat broader scope of review than previously followed by some courts.¹⁰⁷ The Court saw this as being a difficult to define aspect of judicial function, but one within traditional roles.¹⁰⁸

104. The Court stated that pre-APA formulations led in time to an interpretation that if even an isolated portion of the record could meet this standard, the agency action would be upheld and that this led to criticism that agencies were basing their decisions on flimsy evidence. *Id.* at 477-79. The Court noted that these criticisms led to the early administrative procedure legislation, which was vetoed by President Roosevelt. *Id.* at 479. The opinion noted that, subsequently, the Final Report of the Attorney General’s Committee endorsed continuing the “substantial evidence” standard of review. *Id.* at 480. The Court observed, however, that a minority report complained that courts would uphold agency actions if any portion of the record could support it, even if there was a preponderance of countervailing evidence. *Id.* at 481-82. The Court stated that the minority used, for the first time, the expression that the evidence should be considered “on the whole record.” *Id.* at 481, 482 and nn. 14-15. The Court also observed that while the term “substantial evidence” was carried forward from current practice, the legislative history showed considerable unhappiness over the failure of courts to rein in agency actions which legislative reports described as based on “suspicion, surmise, implications, or plainly incredible evidence.” *Id.* at 483-84 and notes thereto.

105. *Id.* at 487-91. The Court had before it consideration of both the APA and the Taft-Harley Act, but found a similarity of legislative history and an “identity” between the two on the proof needed to support a decision.

106. *Id.* at 487-88. The Court stated:

Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitively precludes such a theory or review and bars its practice.

107. 340 U.S. at 489-91.

108. *Id.* at 490. The Court stated:

Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the re-

III. THE APPLICATION OF EVIDENCE STANDARDS

A. *The Role of Constitutional Considerations*

The appropriate starting point in analyzing the application of evidence standards after the APA is the Constitution. This may seem a little surprising given the concentration in the legislative history on working out a specific structure to be applied. However, there are sound reasons for first considering constitutional issues. Because the whole purpose of more relaxed evidence standards in administrative proceedings is to allow in pretty much all relevant evidence, a point will be reached, particularly with attenuated forms of hearsay, that will test the minimums required by due process under the Fifth Amendment to the Constitution.¹⁰⁹ This contrasts with court rules of evidence, which generally exclude hearsay or allow exceptions that meet constitutional requirements. Constitutional standards are also relevant because, as discussed below, they involve a balancing of considerations in determining the extent of the use of evidence in administrative proceedings. Prominent in the balancing process are factors such as reliability and probativeness, which also constitute evidence standards under the statutory scheme.

1. *Richardson v. Perales*

The leading case on evidence in administrative proceedings is *Richardson v. Perales*.¹¹⁰ It is most often cited for the holding that not only is hearsay admissible in administrative proceedings, but it can form a valid basis for a decision by itself.¹¹¹ Less observed is the

quirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals.

109. See *Niam v. Ashcroft*, 354 F.3d 652, 659-60 (7th Cir. 2004) (citing *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1088 (7th Cir. 1994); *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003); *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 406 (3d Cir. 2003); *Felzcerek v. INS*, 75 F.3d 112, 116 (2d Cir. 1996); *Bustos-Torres v. INS*, 898 F.2d 1053, 1056 (5th Cir. 1990)). The Court's opinion stated: "[A]dministrative agencies are not bound by the hearsay rule or any other of the conventional rules of evidence, but only by the looser standard of due process of law."

110. 402 U.S. 389 (1971).

111. See, e.g., *Echostar Communications Corp. v. FCC*, 292 F.3d 749, 753 (D.C. Cir. 2002).

fact that the Court's decision was based on constitutional requirements.

In *Perales*, a claimant for Social Security disability benefits went through a series of examinations by physicians during treatment and the claims process.¹¹² He claimed disability because of back problems, but the physicians, other than his own physician, found no serious disability, and some reported apparent faking by the applicant.¹¹³ At the Social Security Administration hearing, held after agency denials of disability benefits, the claimant appeared with his own treating physician and both testified in support of a finding of disability. His lawyer objected to the admission of the written reports of several of the physicians that had seen him as part of his treatment or for evaluation for benefits.¹¹⁴ The lawyer objected on several grounds, including hearsay and absence of an opportunity for cross-examination.¹¹⁵ The Social Security Act and regulations provided that a claimant could request the issuance of subpoenas, but the claimant here had not made a request for subpoenas for the testimony of the physicians who provided the written reports.¹¹⁶ The objections were overruled and the physician reports and records were received.¹¹⁷ The hearing examiner also called another physician as an independent medical adviser. He provided testimony and an opinion based on his review of the medical evidence. The claimant objected to this testimony and cross-examined this expert.¹¹⁸ Based on all the evidence, including the physician reports and the testimony of the independent medical advisor, the hearing examiner found that the claimant had not met his burden of proof and was not entitled to disability benefits.¹¹⁹

The claimant appealed to the district court.¹²⁰ The district court held that the evidence on which the decision was based was hearsay and declined to accept the physician opinions in the writ-

112. *Perales*, 402 U.S. at 390-95.

113. *Id.* at 392-95.

114. *Id.* at 395.

115. *Id.*

116. *Id.* at 397.

117. *Id.*

118. *Perales*, 402 U.S. at 396.

119. *Id.* at 396-97.

120. *Id.* at 397-98. At that time, appeals were initially made to District Courts. Now, appeals are made only to Circuit Courts of Appeals.

ten reports as substantial evidence without cross-examination.¹²¹ It remanded the case for a new hearing.¹²² The Court of Appeals held that hearsay was admissible under the Social Security Act and that the written physician reports specifically were admissible.¹²³ It also held that because the claimant did not seek subpoenas, he was not in a position to complain of lack of confrontation or cross-examination.¹²⁴ Nevertheless, the court found that the reports and the testimony of the adviser did not constitute sufficient evidence when it was objected to and was contradicted by the only live fact witnesses.¹²⁵

The Supreme Court noted that the Social Security Act provides: "Evidence may be received at any hearing before the Secretary even though inadmissible under rules of evidence applicable to court procedure."¹²⁶ From this and the overall indications of informality for procedure, the Court concluded that the proceedings generally are to be conducted more informally than formally and that "strict rules of evidence, applicable in the courtroom, are not to operate at social security hearings so as to bar the admission of evidence otherwise pertinent."¹²⁷ The Court stated that the APA is consistent with the Social Security Act, and indeed is derived from it, and that "[h]earsay, under either Act, is thus admissible up to the point of relevancy."¹²⁸

In considering the appeal, the Court used the "substantial evidence" standard for review set forth in *Consolidated Edison Co. v. NLRB*,¹²⁹ that held that such evidence is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹³⁰ The Court in *Perales* concluded that a written report by a qualified physician who has examined a claimant may be received as evidence and despite its hearsay character, the absence of cross-examination, and the pres-

121. *Id.* at 397-98.

122. *Id.* at 398.

123. *Id.*

124. *Perales* 402 U.S. at 398.

125. *Id.*

126. *Id.* at 400 (quoting § 205(a) of the Social Security Act, 42 U.S.C. § 405(a)).

127. *Id.* at 400.

128. *Id.* at 400-01.

129. 305 U.S. 197.

130. *Perales*, 402 U.S. at 401 (quoting *Consol. Edison Co.*, 305 U.S. at 229).

ence of opposing live medical testimony, can constitute substantial evidence when the claimant did not seek subpoena power with respect to the physicians who created the reports.¹³¹ A necessary part of this conclusion is a holding that at least in some circumstances not only is hearsay admissible, but hearsay alone can be sufficient to constitute substantial evidence.¹³²

Most important for determining the actual standard to be applied to evidence, however, is the analysis by which the Court got to its conclusion. The Court had to address the claimant's assertion that the use of the hearsay reports without cross-examination violated constitutional rights to due process.¹³³ The fundamental issue of due process has recurring importance to all hearsay evidence because hearsay inherently involves lack of cross-examination.

The Court noted at the outset that it accepted that due process rights apply to administrative proceedings, but that the requirements of due process vary.¹³⁴ The Court quoted *Hannah v. Larche*:¹³⁵ “[P]rocedural due process is applicable to the adjudicative administrative proceeding involving ‘the differing rules of fair play, which through the years, have become associated with differing types of proceedings. . . .’”¹³⁶

The Court also quoted *Goldberg v. Kelly* on the variation in the requirements of due process:¹³⁷

[The] extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be ‘condemned to suffer grievous loss’ Accordingly . . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private

131. *Id.* at 402.

132. This removes from federal administrative proceedings application of the “residuum rule” for administrative proceedings, which holds that even if evidence that would be excluded in a court proceeding is admitted in an administrative proceedings, it can never itself constitute sufficient evidence to support a decision in the absence of sufficient court admissible evidence that would.

133. *Perales*, 402 U.S. at 401-02, 406-07.

134. *Id.* 401-02.

135. 363 U.S. 420 (1960).

136. *Perales*, 402 U.S. at 401 (quoting *Hannah*, 363 U.S. at 442).

137. 397 U.S. 254, 262 (1970).

interest that has been affected by governmental action.”¹³⁸

The Court stated the constitutional issue as: “The question, then, is as to what procedural due process requires with respect to examining physicians’ reports in a social security disability claim hearing.”¹³⁹ This was the context when the Court went on to state that the written reports could be used to support the decision. The Court was prompted to this conclusion by a “number of factors” that “assure underlying reliability and probative value.”¹⁴⁰

The Court in *Perales* did not elaborate on how these factors satisfy due process, but the reference to the varying requirements of due process in *Hannah* and *Goldberg* shows, as discussed more fully below, that the test is whether further procedures are reasonably needed to test the truthfulness of the evidence.¹⁴¹ The Court essentially held that the use of hearsay, even hearsay alone, as the basis of a decision meets due process requirements if the hearsay has attrib-

138. *Perales*, 402 U.S. 401-02 (quoting *Goldberg*, 397 U.S. at 262-63).

139. *Id.* at 402.

140. *Id.* The Court cited a number of factors that supported its conclusion in this particular case of the reliability and probative value of the evidence and, by implication, the lack of need for further testing to produce a fair result:

- There was no apparent bias by those creating the hearsay since they were disinterested professional physicians. *Id.* at 402-03.
- The hearsay was created by a system, the social security system, that is directed toward reliability and impartiality. *Id.* at 403.
- The hearsay is from a process, producing medical reports, based on detail and routine practice. *Perales*, 402 U.S. at 402.
- The hearsay represents a range of examinations by different types of specialists. *Id.* at 404.
- The hearsay was consistent among the reports. *Id.* at 404.
- The claimant did not take advantage of an opportunity to request subpoenas for the physicians. *Id.* at 404-05.
- Under court rules of evidence written medical reports have been received as exceptions to the hearsay rule. *Id.* at 405-06.

Based on these factors, the Court concluded that despite the due process objections, the hearsay was not only admissible, but it properly provided the basis for the decision. *Id.* at 402.

141. *Perales*, 402 U.S. at 402. The Court’s reference to a test of “reliability and probative value” was not addressed to the requirement in the APA that an agency’s decision must be based “on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.” 5 U.S.C. 556(d). The reference comes in the context of the analysis of constitutional requirements, and there are no accompanying statutory or regulatory cites to the reference.

utes of reliability and probative value such that little would be added by further testing. This is consistent with the Court's reference that the Social Security Act and the APA both permit hearsay and that "[t]he matter comes down to the question of the procedure's integrity and fundamental fairness."¹⁴² This has importance in establishing a minimum standard for the use of hearsay evidence in administrative proceedings.

2. Factors in Varying Due Process Requirements Generally

As reflected in the references to *Hannah* and *Goldberg* in *Perales*, the process that is due under the Constitution is dependant on the circumstances. This involves a balancing of factors. One of the factors used, even though not explicitly articulated in *Perales*, is the extent of the need for testing evidence. For example, in *Gilbert v. Homar*,¹⁴³ where the Court was determining whether a campus policeman at a state university was entitled to a pre-suspension administrative hearing, the court recited the standard for balancing factors in determining the constitutional process that is due, based on the circumstances:

To determine what process is constitutionally due, we have generally balanced three distinct factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest."¹⁴⁴

Although *Homar* dealt with whether a party is entitled to a hearing, a fundamental issue that encompasses evidence is what the value of additional procedural safeguards would be.¹⁴⁵ As discussed below, in the evidence context that translates into what would be

142. *Perales*, 402 U.S. at 410.

143. 520 U.S. 924 (1997).

144. *Id.* at 931-32 (quoting *Mathews v. Eldridge*, 424 U.S. 319 (1976)) (emphasis added).

145. The Court was determining whether a campus policeman at a state university who was put on unpaid leave after a drug felony arrest was entitled to a pre-suspension hearing. The Court held that no hearing was required under the due process standard because little in the way of due process could be added by a hearing. The Court had

the value to truth-determining in requiring live testimony instead of hearsay, or, on the other end of the question, is the hearsay sufficiently reliable such that live testimony is not needed.¹⁴⁶ The interests of respondents and costs to the government are the other two issues that must be placed in the balance.

The concept that due process is not a set standard has a long history, and the extension of due process rights in administrative proceedings may be said to have reached a high point in *Goldberg v. Kelly*,¹⁴⁷ cited in *Perales*. Although *Goldberg* dealt with whether there was a right to a hearing, it contained a reference to a right to cross-examination that is often cited by opponents of the use of hearsay evidence in particular cases, as in *Perales*.¹⁴⁸ Because this is an oft-cited case that can be misunderstood in the context of the use of hearsay and cross-examination, it is appropriate to examine it closely.

noted that due process is a flexible concept that is dependent on circumstances. The Court stated:

It is by now well established that “‘due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886 (1961). “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Id. at 930. The Court found, as the most important determinant, that little would be served by the procedure of a hearing because dismissal under the regulations was based on the arrest and there was no dispute about the arrest. In other words, there must be a material fact in dispute that the proposed due process procedure would affect in order for the denial of the procedure to be a violation of due process rights. For discussion on the hearing elements required by due process generally in administrative proceedings, see, e.g., KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE, §§ 9.1–9.12, at 1-116 (3d ed., 1994); Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1282-87 (1975).

146. See *infra* notes 200-210 and accompanying text.

147. 397 U.S. 254 (1970).

148. The Court in *Perales* separately addressed the claimant’s reliance on holdings and statements in *Goldberg* “that due process requires notice ‘and an effective opportunity to defend by confronting any adverse witnesses’” *Perales*, 402 U.S. at 406-07 (quoting *Goldberg*, 397 U.S. at 267-68). *Perales* distinguished *Goldberg* on the differing circumstances, all of which have relevance to due process requirements, as shown in the discussion below. *Goldberg*, 397 U.S. at 406. The Court noted that in the case before it, it was not dealing with termination of disability benefits once granted; nor was there a change in status without notice; the physician reports were available for inspection; the authors were known and subject to subpoenaing; and, significantly, credibility and veracity was not at issue. *Id.* at 407.

Goldberg involved the termination of benefits to a recipient of public welfare. The applicable regulations provided for a post-termination hearing at which the recipient could appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing.¹⁴⁹ Prior to termination, however, the regulations provided only for notification to the subject of the intended termination, a right to request within seven days that a higher official review the record, and a right to submit a written statement in support of the request for review.¹⁵⁰ If the review was unfavorable to the recipient, aid was stopped immediately and the recipient was notified by letter of the reasons.¹⁵¹ The Court found these procedures inadequate under the Due Process Clause of the Constitution because rights to a hearing should have been accorded before the termination.¹⁵² The Court recognized that the particular due process hearing rights that must be provided vary depending upon the circumstances.¹⁵³

The Court held that the exigencies in this situation, where an eligible welfare recipient might be deprived of the very means to live, outweigh the benefits of summary adjudication, and thus hearing rights must be provided before termination.¹⁵⁴ The Court held

149. *Goldberg*, 397 U.S. at 259-60.

150. *Id.* at 258-59.

151. *Id.* at 259.

152. *Id.* at 264.

153. The Court stated:

The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be "condemned to suffer grievous loss," *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in *Cafeteria & Rest. Workers Union, etc. v. McElroy*, 367 U.S. 886, 895 (1961), "consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." *See also* *Hannah v. Larche*, 363 U.S. 420, 440, 442 (1960).

Goldberg, 397 U.S. at 262-63 (emphasis added).

154. *Id.* at 264-66. The factual situation was seen by the Court as extreme, and the opinion has generally been distinguished on that ground. *See, e.g.*, *Crook v. Baker*, 813 F.2d 88, 98-99 (6th Cir. 1987):

The district court was aware of and discussed the opinion of this court in *Frumkin v. Bd. of Trustees*, 626 F.2d 19 (6th Cir., 1980), which held that a tenured college professor, who was discharged for stated reasons that ad-

that although a full evidentiary hearing is not required before termination, basic procedures must be employed.¹⁵⁵ The Court noted that the fundamental requisite of due process is “an opportunity to be heard,” and the hearing must be “at a meaningful time and in a meaningful manner.”¹⁵⁶ It held that in this context, that means timely notice of the reasons for the proposed termination and “an effective opportunity to defend by confronting any adverse witnesses and by presenting his own argument and evidence orally.”¹⁵⁷ With respect to confrontation of witnesses, in the statement that is often cited by opponents of hearsay in administrative hearings, the court stated: “In almost every setting where important decisions turn on question of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”¹⁵⁸ The Court also cited *Greene v. McElroy*,¹⁵⁹ for the proposition that cross-examination is an important protection “where evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.”¹⁶⁰ The Court concluded that welfare recipients must be “given an opportunity to confront and cross-examine the witnesses relied on by the department.”¹⁶¹

There are several factors to be considered in the use of the “confront and cross-examine” statement in *Goldberg* that illuminate its use, or limitations in its use, on evidence matters such as hearsay.

versely reflected upon him, was not entitled to have his counsel examine and cross-examine witnesses at the hearing that resulted in such findings. In reaching this result, this court discussed *Goldberg v. Kelly*, (*see supra* note 138) and stated:

We cannot, however, accept appellant’s contention that we should rule in his favor on the basis of an analogy between the problems which beset an unrepresented welfare recipient confronted with an administrative court and the position of a professional academic who, under the direction of his attorney, presents his case to a panel of fellow faculty members.

Crook, 813 F.2d at 98-99 (citation omitted).

155. *Goldberg*, 397 U.S. at 266-67.

156. *Id.* at 267 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965), respectively.)

157. *Id.* at 267-68.

158. *Id.* at 269.

159. 360 U.S. 474 (1959).

160. *Goldberg*, 397 U.S. at 270 (quoting *Greene*, 360 U.S. at 496-97).

161. *Id.* at 270.

First, *Goldberg* was dealing in the abstract. That is, there was no specific evidence, or even witness, before it. Since there had been no hearing, the Court was speaking conceptually of what it thought should be required generally in a hearing to be held.¹⁶² Further, the Court apparently believed that there were factual disputes and issues of credibility and veracity that needed to be brought out in the open so that the facts could be tested.¹⁶³ This is relevant because this involves a confrontation/know-one's-accusers right, not applicable to hearsay in the traditional form where the declarant is known and where the evidence may be of routine nature and even allowed under the FRE. The Court's assertion in *Goldberg* of the need to confront witnesses is seen in the cases cited by the Court. The principal case cited is *Greene v. McElroy*.¹⁶⁴

In *Greene*, during the cold war communist scare period an executive in a company supplying the military had his security clearance revoked on the grounds of association with communists. In the hearing before a board he was given a chance to provide evidence, which he did by his own testimony and that of co-workers and others, but the board stated that the transcript of the hearing would not disclose all the material in the file of the case, specifically excluding from disclosure the FBI report of investigation and the identity of confidential informants.¹⁶⁵ The Court ultimately side-stepped the issue of whether this process violated the Constitution, ruling instead that the process used did not have necessary Congressional or Presidential authorization.¹⁶⁶ Before doing so, however, it made statements on constitutional due process principles, later cited and quoted in *Goldberg* and in many other opinions on administrative proceedings, including:

Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be

162. *Id.* at 267-72 (enumerating the several elements of a hearing).

163. *Id.* at 268-69 (noting that challenges on incorrect factual bases and credibility and veracity were at issue).

164. *Greene*, 360 U.S. 474 (cited in *Goldberg*, 397 U.S. at 270).

165. *Id.* at 485-89.

166. *Id.* at 499-508.

disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals *whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy*. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right "to be confronted with the witnesses against him." This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, e.g., but also in all types of cases where administrative and regulatory actions were under scrutiny.¹⁶⁷

167. *Id.* at 496-97 (emphasis added) (citations omitted).

One of the other two cases cited by *Goldberg* similarly involved unidentified accusers. In *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-04 (1963) the petitioner had been denied bar admission by a review committee without identification of negative sources or opportunity to confront those sources. The other case, *Interstate Commerce Commission v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 93-94 (1913) involved an attempt by the ICC to avoid *any* hearing rights, with the Court stating:

The government further insists that the commerce act (26 Stat. at L. 743, chap. 128, U.S. Comp. Stat. 1901, p. 3163) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created; and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing,—*for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute. . . .* The Commission is an administrative body and, even where it acts in a quasi judicial capacity, *is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties*. *Interstate Commerce Comm'n v. Baird*, 194 U.S. 25. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. *In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal.* In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the the-

These statements in *Greene* are criticizing the use in a politically inflamed situation of unidentified sources that are being relied on effectively as witnesses at trial, with the defendant being kept blind and helpless. This is far from normal hearsay, such as used in *Perales* where identified, unbiased doctors rendered reports on medical conditions.¹⁶⁸

Mathews v. Eldridge,¹⁶⁹ subsequent to the *Greene*, *Goldberg* and *Perales* decisions, marked a turning point. The Court revisited the due process requirements in a way that narrowed *Goldberg* and put the cross-examination/hearsay issue more in the *Perales* mode, although the issue in the case was, again, the right to a hearing. In *Mathews*, a person receiving social security disability payments received a questionnaire from the state agency monitoring his medical condition.¹⁷⁰ The recipient completed the questionnaire saying that his condition had not improved and identifying physicians from whom he was receiving treatment.¹⁷¹ The agency obtained reports from his physicians and a psychiatric consultant.¹⁷² After considering these reports and other information in the recipient's file the agency informed him that it had made a tentative determination that his disability had ended, stated the reasons for the proposed termination, and advised him that he could request more time to submit additional information.¹⁷³ In a written response, the recipient disputed only the characterization of his condition.¹⁷⁴ The agency then made a determination that he had ceased to be

ory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding.

Id. at 93-94 (citation omitted) (emphasis added).

168. In a law review article, Judge Henry J. Friendly, of the Second Circuit Court of Appeals, noted that while the reference in *Greene* to the need for cross-examination was "wholly appropriate to the witch hunts of the McCarthy era," he questioned its sweeping application to the masses of administrative proceedings where such broad use is not needed, is impractical, and can even be counterproductive to truth-testing. Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1282-87 (1975). *Mathews v. Eldridge*, 424 U.S. 319 (1976), discussed next and adopting the Friendly approach, was decided by the Supreme Court a year after the Friendly article.

169. 424 U.S. 319 (1976).

170. *Id.* at 323.

171. *Id.* at 323-24.

172. *Id.* at 324.

173. *Id.*

174. *Id.*

disabled, and the Social Security Administration cut off his benefits.¹⁷⁵ The recipient had a right to seek reconsideration, and if the reconsideration was denied, he had a right to an evidentiary hearing before a Social Security Administration ALJ.¹⁷⁶

Instead of seeking reconsideration, the plaintiff in *Mathews* brought an action in Federal district court challenging the constitutionality of the procedures used to terminate his benefits.¹⁷⁷ He claimed that he was entitled to a pre-termination evidentiary hearing consistent with the Court's ruling in *Goldberg*. The District Court agreed that the termination of disability rights was like the termination of welfare payments in *Goldberg* and that a similar evidentiary hearing with similar procedural rights was required.¹⁷⁸ The court of appeals affirmed the district court.¹⁷⁹ When *Mathews* reached the Supreme Court, the Court recognized that Fifth Amendment due process rights apply to termination of Social Security benefits.¹⁸⁰ The issue was what "process is due" prior to initial termination of benefits, pending review.¹⁸¹ The Court noted that of the increasing number of cases coming before the Court on the issue of the extent that due process requires an evidentiary hearing prior to the termination of property interests, only in *Goldberg*¹⁸² did the Court hold that a hearing approximating a judicial trial was necessary.¹⁸³ After making reference to opinions holding that only rudimentary procedures were required, the Court pointed out that this reflects the fact that due process is flexible and depends on consideration of three factors:

First, the private interest that will be affected by the official action; *second*, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that

175. *Mathews*, 424 U.S. at 324.

176. *Id.* at 319.

177. *Id.* at 324-25.

178. *Id.* at 326.

179. *Id.*

180. *Id.* at 332.

181. *Mathews*, 424 U.S. at 333.

182. *Goldberg*, 397 U.S. at 266-71.

183. *Mathews*, 424 U.S. at 333.

the additional or substitute procedural requirement would entail.¹⁸⁴

In weighing the balance of factors, the Court stated that in *Goldberg* the Court had emphasized that the recipient was living on the “very margin of existence,” which not need be the case for disability benefits, which are not based on financial need.¹⁸⁵ On the portion of the balancing test relevant to the evidence issues here, the Court looked to what benefits additional hearing rights would bring in these circumstances:

In order to remain eligible for benefits the disabled worker must demonstrate by means of “medically acceptable clinical and laboratory diagnostic techniques,” 42 U.S.C. § 423(d)(3), that he is unable “to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment” In short, a medical assessment of the worker’s physical or mental condition is required. This is a more sharply focused and easily documented decision than the typical determination of welfare entitlement. In the latter case, a wide variety of information may be deemed relevant, and issues of witness credibility and veracity often are critical to the decisionmaking process. *Goldberg* noted that in such circumstances “written submissions are a wholly unsatisfactory basis for decision.”¹⁸⁶

The Court contrasted the *Goldberg* situation with the *Perales* situation where the factual issues can reasonably be resolved by hearsay evidence that have indicia of reliability and probative value:

By contrast, the decision whether to discontinue disability benefits will turn, in most cases, upon “routine, standard, and unbiased medical reports by physician specialists,” *Richardson v. Perales*, concerning a subject whom they have personally examined. In *Richardson* the Court recognized the “reliability and probative worth of written medical reports,” emphasizing that while there may be “professional disagreement with the medical conclusions” the “specter

184. *Id.* at 334-35 (emphasis added).

185. *Id.* at 340-41.

186. *Id.* at 343 (citations omitted).

of questionable credibility and veracity is not present.” To be sure, credibility and veracity may be a factor in the ultimate disability assessment in some cases. But procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions. The potential value of an evidentiary hearing, or even oral presentation to the decisionmaker, is substantially less in this context than in *Goldberg*.¹⁸⁷

Thus, balancing is required to determine what due process is to be afforded, and one of the considerations is what level of procedural testing of truth is needed to arrive at a correct outcome. This is the “question of the procedure’s integrity and fundamental fairness” referred to in *Perales*.¹⁸⁸ It takes into account circumstances ranging from *Greene* and *Goldberg* with faceless, secret, probably biased witnesses providing the evidence supporting the decision without any challenge, to *Perales* where the witnesses are known, the bases of their information are disclosed and largely objective, and there may even be a potential for challenging by subpoenas if the opposing party can show a need for a subpoena. Thus, the Court’s evaluation of the “reliability and probativeness” of the evidence in *Perales* goes, constitutionally in terms of due process, to whether there is a need in terms of truth testing to have the evidence tested by a requirement that the evidence can only come in through live testimony. The interplay of these considerations is explored further below as to the constitutional considerations and their relation to evidence, particularly hearsay.

3. Varying Due Process Requirements, Cross-Examination, and Hearsay

The constitutional requirements discussed above apply to cross-examination, both on witnesses at a hearing and as it may be necessary to test hearsay. Since both cross-examination of witnesses and hearsay are central evidence vehicles, the impact of the constitutional considerations are discussed here.

187. *Id.* at 344 (citations omitted).

188. *Perales*, 402 U.S. at 410.

a. Cross-examination requirements generally

There are three principal circumstances with respect to witnesses where a due process right to cross-examination could come up. First, there is the circumstance of witnesses who appear and testify. There are limits to the extent of constitutional cross-examination even in the circumstance of a witness testifying. The fact that cross-examination is not required under the Constitution in all situations in administrative proceedings is illustrated in *Central Freight Lines v. United States*.¹⁸⁹ In *Central Freight Lines*, in an administrative hearing proceeding on applications of interstate motor carriers to operate in a new market, the ALJ established a procedure to hear a certain percentage of witnesses live and to receive verified written statements from the rest. Live testimony subject to cross-examination was taken from 127 witnesses, and written statements from approximately 1,600 witnesses were received. Those opposing the applications claimed that their due process rights were violated by the limitation on cross-examination of the 1,600 witnesses. The court rejected the argument. It noted that the APA “mandates only ‘such cross-examination as may be needed for a full and true disclosure of the facts.’”¹⁹⁰ Further, as to due process, the court noted that the procedural requirement of due process depends on the circumstances, and that here the protection afforded by the cross-examination of a large number of witnesses versus the burden of taking live testimony from a huge additional number of witnesses provided adequate due process.¹⁹¹ The court stated:

The cross-examination allowed here was sufficient. Under *Mathews v. Eldridge*, the process that is due depends on three factors: first, the private interest affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value of additional procedures; and third, the government’s interest, including the function involved and the fiscal and administrative burden that the additional procedures would entail. In this case, the private interest lies in the appellants’ economic stake in business that may

189. 669 F.2d 1063 (5th Cir. 1982).

190. *Id.* at 1068 (quoting 5 U.S.C. § 556(d) (2004)).

191. *Id.*

possibly be lost to competition from the applicants' proposed services. While this threatened loss is undoubtedly important to appellants, the hardship does not compare with the personal economic losses imposed without a full evidentiary hearing in other cases. Further, the procedures employed here adequately protected the appellants' interests. The cross-examination of 127 public witnesses rendered minimal the risk of erroneously depriving the appellants' interests. Additional cross-examination would have made little difference. And the burden of cross-examining the remaining 1,600 witnesses would have been tremendous; in fact, it would have multiplied manifold a hearing that was already one of the longest service extension cases on record. Likewise, the administrative and fiscal cost of cross-examining 1,600 witnesses would have been great. Full cross-examination, in other words, would have imposed a burden not justified by any significant improvements in the protection of appellants' interests or in the accuracy of the hearing procedure.¹⁹²

This limitation on cross-examination is consistent with the statutory limitations in the APA on cross-examination. The APA grants a right "to conduct such cross-examination *as may be required for a full and true disclosure of the facts.*"¹⁹³ This provision does not grant an absolute right to cross-examination, but only as needed to develop the truth.¹⁹⁴ The burden for establishing the need for cross-

192. *Id.* (citation omitted). See also *Boykins v. Fairfield Bd. of Ed.*, 492 F.2d 697, 701-02 (5th Cir. 1974) (footnotes omitted), *cert. denied*, 420 U.S. 962 (1975):

They contend, however, that we should read the Supreme Court's *Goldberg* [*Goldberg v. Kelly*, 397 U.S. 254 (1970)] and *Morrissey* [*Morrissey v. Brewer*, 408 U.S. 471 (1972)] decisions as expanding the requirements of *Dixon* [*Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961)] to add to them universal confrontation and cross-examination of witnesses, especially where severe punishments are meted out on disputed facts. We decline to do so. . . . The requirements of due process are sufficiently flexible to accommodate themselves to various persons, interests and tribunals without reduction to a stereotype and hence to absurdity.

193. 5 U.S.C. § 556(d) (citation omitted) (emphasis added).

194. *Natural Res. Def. Council, Inc. v. United States Env'tl. Prot. Agency*, 859 F.2d 156, 193 (D.C. Cir. 1988); *Cent. Freight Lines v. United States*, 669 F.2d 1063, 1068 (5th Cir. 1982) (APA "mandates only such cross-examination as may be required for full and true disclosure of the facts."); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 880 (1st Cir. 1978). See *American Public Gas Ass'n v. Federal Power Comm'n*, 498 F.2d

examination is on the proponent of cross-examination.¹⁹⁵ A complaint of a lack of cross-examination is not sufficient unless the party complaining has exhausted alternatives.¹⁹⁶ To establish a due process right to cross-examination, there must be disputed facts and the cross must go to the veracity of the witness, not just the weight to be accorded to the evidence.¹⁹⁷ All these elements are

718, 723 (D.C. Cir. 1975) (“even in formal adjudicatory hearing under the APA, cross-examination is not always a right”).

Taking testimony by telephone also does not violate due process. *Gibbs v. SEC*, 25 F.3d 1056 (10th Cir. 1994).

195. *Cellular Mobile Systems of Pa., Inc. v. FCC*, 782 F.2d 182, 198 (D.C. Cir. 1985) (“Cross-examination is therefore not an automatic right conferred by the APA; instead, its necessity must be established under specific circumstances by the party seeking it.”); *Seacoast Anti-Pollution League v. Costle*, 572 F.2d 872, 880 (1st Cir. 1978):

The APA commits the decision whether to allow cross-examination to the discretion of the person presiding at the hearing. 5 U.S.C. § 556(c)(5), (c)(7), and (d). The party seeking to cross-examine bears the burden of showing that cross-examination is in fact necessary. *See American Public Gas Ass’n v. FPC*, 162 U.S.App.D.C. 176, 498 F.2d 718, 723 (1974). Petitioners would place the burden of establishing the need for cross-examination on the same party bearing the burden of proof as to the substantive standards set by § 316 of the FWPCA. There is no merit in that argument, however. In this instance petitioners are the proponent of a procedural order and will properly bear the burden. *Cf.* 5 U.S.C. § 556(d).

Id. at 880 n.16.

196. *Ashworth Transfer, Inc. v. United States*, 315 F. Supp. 199, 202-03 (D. Utah 1970). In *Ashworth*, the ICC applied a procedure in a proceeding for a grant of authority for truck service in which evidence would be received by verified statements and an oral hearing would be denied unless there is a showing by controverting affidavit that material facts are in dispute. The losing parties opposing the authority challenged the order granting the authority because of the denial of a request for oral hearing and cross-examination. The court rejected the challenge because the challenging parties did not controvert the basic facts and had not availed themselves of discovery opportunities to challenge the facts. The court held that “a party cannot simply fail to controvert the veracity of sworn statements and then succeed in a demand for a right of cross-examination.” *Id.* at 203. This would appear to go to 1) the discretion of the agency; 2) who has the burden of showing a need for cross-examination; and 3) the fact that due process requires cross-examination only where it would have a function of affecting the facts, that is, unless material facts are in dispute.

See also Williams v. United States Dep’t of Transp., 781 F.2d 1573, 1578 n.9 (11th Cir. 1986) (no due process denial where respondent did not request hearing officer’s assistance in obtaining presence of any person and declined a continuance that would allow him to contact witnesses).

197. *Nat’l Trailer Convoy, Inc. v. United States*, 293 F. Supp. 634, 636 (N.D. OK. 1968). In *Nat’l Trailer*, the ICC employed a procedure of accepting only written evidence in a proceeding about an application for a common carrier certificate. Parties opposing the application requested a hearing at which they could cross-examine. The

consistent with the due process standards, discussed above, under which the test is whether there are risks of having no cross-examination and to what extent cross-examination improve truth-finding. Moreover, the restriction in the statute does not violate the Sixth Amendment right to confront a witness against the defendant, since that provision expressly applies only to criminal proceedings.¹⁹⁸

A second circumstance with respect to a due process right to cross-examine witnesses is where available witnesses are not called to testify by the party bringing the action. Where there is no hearsay issue, i.e., there is no attempt to get evidence in from the un-called witness, there is no right to demand that the plaintiff party call all witnesses who may have information, at least as long as the party making the demand has subpoena power.¹⁹⁹

request was denied and the ICC granted a common carrier certificate to the applicant. The court held that the fundamental right to a hearing encompasses an opportunity to challenge the claims of the opposing party and that confrontation and cross-examination are implicit in this right. The court held that “[i]n all adjudicative proceedings cross-examination and confrontation are the handmaidens of trustworthiness in the fact of factual dispute.” *Id.* at 636. The court stated, however, that “unless material facts are in dispute there is no right to cross-examination and confrontation.” *Id.* (citations omitted). The court reviewed the asserted areas of dispute and found that there was no material dispute; that the issue did not turn on the veracity of the affiants, but, instead the claim of need for cross-examination went only to the weight of the evidence and this was not enough to establish a due process right of confrontation and cross-examination.

198. The Sixth Amendment applies only in criminal cases. *See* U.S. CONST. Amend. VI; *Bennett v. Nat’l Transp. Safety Bd.*, 66 F.3d 1130 (10th Cir. 1995): Of course, “Bennett’s invocation of the Sixth Amendment is misplaced, for the Confrontation Clause speaks only of ‘all criminal prosecutions.’ That constitutional right does not apply to civil administrative matters generally (*Hannah v. Larche*, 363 U.S. 420, 440 n. 16 (1960)). . . .”

199. In *Pavlik v. United States*, 951 F.2d 220 (9th Cir. 1991), fishermen were charged administratively for having illegal possession of a certain type of fish. The evidence consisted of the eyewitness testimony of two crewmembers on a fishing boat that accidentally caught the fish in its nets and gave the fish to the respondents. After the ALJ found against the respondents, they appealed on the grounds that the agency’s (National Oceanic and Atmospheric Administration) failure to put its investigating agent on the stand violated their due process rights because they could not effectively confront their accuser. *Id.* at 224. They posited that they could have cross-examined the agent to reveal that the crewman allegedly selected by the agent were not credible. *Id.* The court held that even under an assumption that due process requires respondents to be able confront witnesses against them in the proceedings (citing *Goldberg v. Kelly*, 397 U. S. 254 (1970)), the respondents exercised that right here in cross-examining the witnesses at trial against them, the two crewmen. *Id.* The court noted that even in

The third circumstance is the right to cross-examine the maker of a hearsay statement that is offered as evidence. The issues in this circumstance are very broad. It is therefore discussed separately next.

- b. Issue of whether there is a constitutional need for cross-examination where evidence comes in through hearsay: reliability and probativeness

As to the situation where the missing witness is the provider of hearsay that is admitted, a due process standard generally applies. As discussed above, a key question in this analysis is: what is the need for cross-examination? If the reliability of the hearsay would likely be undermined by cross-examination, due process rights would likely be violated if the hearsay is admitted and used. If the reliability of the hearsay is not likely to be substantially undercut by cross-examination, however, it may be received and used without cross-examination of the maker of the statement.

The role of reliability as it relates to due process rights to confront or cross-examine is illustrated in *Felczerek v. Immigration & Naturalization Service*,²⁰⁰ where an alien was admitted to the United States as a nonimmigration visitor for a limited period. The alien overstayed the period and applied for a driver's license using a forged INS letter that purported to allow him to stay in the United States for a longer period. He was arrested at the Department of Motor Vehicles. In a subsequent deportation hearing the immigration judge allowed into the record, over the objection of the alien, 1) the forged INS letter, 2) the alien's Department of Motor Vehicle ("DMV") application containing a DMV official's handwritten notation that the alien had submitted an "Immigration and Natu-

criminal trials, there is no right to confront a "witness" who does not testify at trial, and that the government is not required to call all of the witnesses to a crime. *Id.* Finally, even if the right of confrontation applied, and even if it could be said to apply to witnesses not called by the agency, here the respondents had subpoena power to call the agent and even under criminal law this satisfies the confrontation right. *Id.* See also *Nat'l Ass'n of Psychiatric Treatment Ctrs. For Children v. Mendez*, 857 F. Supp. 85, 94-95 (D.C. Cir. 1994) (stating that agency does not have to produce witnesses for the purpose of allowing defendant to cross-examine); *Rochester Pure Waters Dist. v. United States Envtl. Protec. Agency*, 848 F. Supp. 1031, 1036 (D.C. Cir. 1994).

200. 75 F.3d 112 (2d Cir. 1996).

ralization Letter” as proof of identification, and 3) a standard INS form filled out by the arresting INS agent describing the circumstances of the arrest. The form contained the INS agent’s statement that the alien had presented the INS letter to the DMV and that the alien claimed that he received the letter in the mail but would not provide any further information about it. After the alien was ordered deported, he appealed on the basis that it was a denial of due process for the immigration judge to admit the INS letter, DMV application, and the INS form without giving him an opportunity to cross-examine the authors of the relevant statements. The court noted that while due process applies in deportation hearings, they are civil and the heightened Sixth Amendment confrontation protections of a criminal trial are not constitutionally required.²⁰¹ The court stated that the due process test for admissibility of evidence in a deportation hearing is whether the evidence is probative and whether its use is fundamentally fair.²⁰² The court stated that “[I]n the evidentiary context, fairness is closely related to the reliability and trustworthiness of the evidence.”²⁰³ The court held that the INS form itself was not hearsay since it was not admitted for the truth of its contents, and that while the DMV application and INS form contained hearsay notations, they fell within the long-recognized public records exception to hearsay exclusion under the FRE, which carries with it strong support that the admission of evidence under such exception complies with due process.²⁰⁴ The court also noted that other courts had allowed the admissibility of the INS forms unless the subject of the proceedings raised legitimate issues of the reliability of the particular form.²⁰⁵ The court stated:

201. *Id.* at 115.

202. *Id.*

203. *Id.*

204. *Id.* at 115-16.

205. *Felzerek*, 75 F.3d at 117. The court stated:

Other courts have agreed that a Form I-213 is presumptively reliable and can be admitted in deportation proceedings without giving the alien the opportunity to cross-examine the document’s author, at least when the alien has put forth no evidence to contradict or impeach the statements in the report. *See Espinoza*, 45 F.3d at 310-11; *Bustos-Torres*, 898 F.2d at 1056. *See also* *Immigration & Naturalization Serv., v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (noting that officer who completes a Form I-213 “rarely must attend the hearing”). This is not a case where the reliability of the form is somehow undermined. *See* *Murphy v. Immigration & Naturalization Serv.*,

“Under these circumstances, we agree with the Fifth and Ninth Circuits that ‘[a]liens in deportation proceedings ‘may not assert a cross-examination right to prevent the government from establishing uncontested facts.’” The Court held that the admission of the application and form did not deprive the aliens of due process.²⁰⁶

In a similar vein, in *Bustos-Torres v. Immigration & Naturalization Service*,²⁰⁷ the immigration judge in a deportation hearing admitted a standard form filled out by an INS officer that was based on statements made to the officer by the alien, presumably at the time of apprehension. The alien objected to the admission of the form as hearsay and demanded that the officer be presented for cross-examination. The hearing was adjourned to allow the appearance of the officer, but the officer did not appear at the continued hearing because he was at an office in another city. The INS produced an affidavit from the officer attesting that he filled out the form based on an interview with the alien. The affidavit was received over the alien’s objection. No other evidence was presented and the alien was found deportable. After noting that the court rules of evidence do not apply to bar evidence in administrative proceedings, but that due process does apply, the court stated that the test for admissibility is “whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law.”²⁰⁸ The court stated that the contents of the form were essen-

54 F.3d 605, 610-11 (9th Cir. 1995) (vacating B.I.A. determination based in part upon inaccurate I-213 for which information was provided by biased INS informant); *Cunanan v. Immigration & Naturalization Serv.*, 856 F.2d 1373, 1374-75 (9th Cir. 1988) (vacating B.I.A. determination premised upon uncorroborated affidavit of absent witness and Form I-213 reporting substance of interview of the witness by an INS officer); *see also* FRE 803(8) (public records admissible “unless the sources of information or other circumstances indicate lack of trustworthiness”).

206. *Id.* at 117.

207. 898 F.2d 1053 (5th Cir. 1990).

208. *Id.* at 1055. The court stated:

Bustos alleges that the Form I-213 amounts to hearsay, and is not properly admissible without the testimony of the officer who filled out the form, so that he may be available for cross examination. First we note that the rules of evidence applicable in the courts are not applicable in deportation proceedings. *Soto-Hernandez v. Immigration & Naturalization Serv.*, 726 F.2d 1070 (5th Cir. 1984). Nonetheless, due process standards of fundamental fairness extend to the conduct of deportation proceedings. *Bridges v. Wixon*, 326 U.S. 135 (1945). The test for admissibility of evidence in a de-

tially a recorded recollection of a conversation with the alien and that the alien did not contest that the form reflected the officer's examination and did not attempt to impeach the information in the form.²⁰⁹ The court upheld the admission of the form.²¹⁰ Thus cross-examination on hearsay is not constitutionally required where it would not likely affect the credibility of the evidence.

c. Influence of Availability or Unavailability of Witness

The admission of hearsay evidence under constitutional requirements may also be affected by whether a witness is available and the circumstances of the non-appearance of the witness. A first circumstance is where the witness who created the hearsay is available live, but simply is not called by the proponent of the hearsay. If the hearsay is reliable in itself, there may be no need to call the witness, as in *Felzcerek*, discussed above.²¹¹ There is no due process denial because calling the witness live would not improve the truth testing. FRE Rule 803 likewise provides that certain forms of hearsay may come in even if a live witness is available. The rule provides, however, that in some applications the hearsay exception is not available where reliability is undercut, such as in the provision that the exception for records of regularly conducted activity is not available if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness."²¹²

On the other hand, if the hearsay witness is available and having the witness live would be important for determining reliability, the admission of hearsay of an available declarant may be im-

portation proceeding is whether the evidence is probative and whether its use is fundamentally fair so as not to deprive the alien of due process of law. *See, e.g.,* Calderon-Ontiveros v. Immigration & Naturalization Serv., 809 F.2d 1050 (5th Cir.1986); Baliza v. Immigration & Naturalization Serv., 709 F.2d 1231 (9th Cir.1983); Tashnizi v. Immigration & Naturalization Serv., 585 F.2d 781 (5th Cir.1978); Trias-Hernandez v. Immigration & Naturalization Serv., 528 F.2d 366 (9th Cir. 1975).

Id. at 1055. Although the court speaks in terms of an admissibility test, it is significant that the court stated the constitutional test is "whether its *use* is fundamentally fair." *Id.* at 1055 (emphasis added).

209. *Id.* at 1055-56.

210. *Id.* at 1056.

211. *See infra* notes 248-254 and accompanying text.

212. FED. R. EVID. 803(6).

proper.²¹³ In *Olabanji v. Immigration & Naturalization Service*,²¹⁴ a Nigerian citizen married an American citizen and began the process of getting permanent resident status under the particular process required where marriage is critical to immigration status. At a meeting between the married couple with an INS agent, as part of the process, the agent talked to the wife separately. She told the agent that her name had been forged onto a necessary document and that the marriage did not meet the immigration statute requirements in other ways. The agent got an affidavit from the wife. A handwriting expert wrote a letter stating that the signature on the necessary document was not the wife's. These were offered and admitted at the hearing, and the immigrant testified to the contrary. The immigration judge entered a deportation order. The court of appeals noted that the relevant statute provides that in deportation hearings persons "shall have a reasonable opportunity . . . to cross-examine witnesses presented by the Government" and noted that cross-examination is also subject to a constitutional right of due process.²¹⁵ It cited a judicially established standard that affidavits cannot be used where the INS has not established that despite the use of reasonable efforts the presence of the witness could not be obtained.²¹⁶ The court also recognized that this does not apply

213. See, e.g., *Galvin v. New York Racing Ass'n*, 70 F. Supp. 2d 163, 177-80 (E.D.N.Y. 1998) (finding state board admission of brief, written investigative notes when there was a lack of effort to produce witnesses live was a violation of due process, particularly when only short notice of hearing was given).

214. 973 F.2d 1232 (5th Cir. 1992).

215. *Id.* at 1234 (citations omitted).

216. *Id.* at 1234-35 (citing *Hernandez-Garza v. INS*, 882 F.2d 945, 948 (5th Cir. 1989); *Cunanan v. INS*, 856 F.2d 1373, 1375 (9th Cir. 1988); *Dallo v. INS*, 765 F.2d 581, 586 (6th Cir. 1985); *Baliza v. INS*, 709 F.2d 1231, 1234 (9th Cir. 1983)).

In *Bustos-Torres*, 898 F.2d at 1056 n.2, the court noted that in a case where the alien contradicted the statements in an affidavit and the government made no effort to produce the witness, another circuit found this to be a violation of the statute's right of cross-examination because it would leave the government's choice about whether to produce a witness wholly unfettered. *Id.* at 1056 n.2. The court found that the form in *Bustos-Torres*, however, was uncontested as to the validity of the alien's statement in the form, and since it was "clearly relevant and material and is not repetitious," it was properly admitted. *Id.* at 1056. The central conclusion of *Bustos* reflects the balancing described above: where there is no real challenge to the reliability of the hearsay, a denial of cross-examination is not a violation of due process since little could be accomplished in terms of truth-finding; and on the other side, requiring live witnesses in such situations would be an unreasonable burdening of an essential government function. But if there are suspicious circumstances to the non-appearance of the witness when the sub-

where the facts are not reasonably contested.²¹⁷ Thus, affidavits can be used where the deportee cannot raise a reasonable challenge to the contents of the affidavit, but where the deportee asserts a reasonable challenge, the affidavit may be excluded where the proponent does not establish the reasonable efforts that had been made to obtain the presence of the witness. Here the witness took the stand and testified that his wife signed the document and that the contents of the affidavit were false, presenting a direct challenge to the truthfulness of the hearsay evidence. Because the INS did not show why the handwriting expert could not be produced or what efforts were made to try to produce the wife, the deportation order was reversed.²¹⁸ These distinctions are consistent with the due process balancing of factors. Given the first factor that an important individual right is at issue, the question is what is the need for cross-examination to test for truthfulness and what is the feasibility of the proposed procedure in light of the needs of the operation of the government function.

A related consideration on the availability of witnesses is whether the party opposing the admission has subpoena power to summon the hearsay declarant but has failed to exercise that power. In *Perales*, the fact that the claimant had not requested a subpoena was a factor in finding that due process was not denied.²¹⁹ A larger issue is whether hearsay evidence, particularly in the form of substituting a written statement of a witness in place of live testimony, can be used if the opponent does not have subpoena power.

Some courts have held that if no credible challenge to the reliability of the hearsay is raised, there may not be a requirement that the party opposing the use of the evidence to be able to subpoena the declarant. In *Butera v. Apfel*,²²⁰ the court held that even where subpoena power to test hearsay was available but a request for its use was denied, a decision could be based on the hearsay. In practi-

ject matter of the action puts the truth to be provided by the witness in contention, a court could conclude that due process is being denied.

217. *Olabanji*, 973 F.2d at 1234, n.1 (citing *Bustos-Torres* 898 F.2d 1053) and *Calderon-Ontiveros v. INS*, 809 F.2d at 1053).

218. *Id.* at 1034-36.

219. 402 U.S. 389, 402 (1971).

220. 173 F.3d 1049 (7th Cir. 1999).

cal effect, this is *Perales* with the subpoena issue removed. In *Butera*, a claimant sought Social Security disability benefits. The state agency denied benefits because two agency physicians reviewing the reports of three examining physicians found an ability to do work. The claimant appealed the decision to the Department of Health and Human Services. At the resulting hearing, the ALJ had reports from the three examining physicians and the two reviewing physicians. None of the physicians testified. The ALJ denied a request of the claimant for subpoenas for the non-examining physicians and upheld the denial of the disability claim. On appeal, the claimant objected to the denial of the subpoenas. The court noted that the regulations for allowing cross-examination in social security administrative proceedings is “[w]hen it is reasonably necessary for the full presentation of the case,” which it found consistent with the APA provision that entitles a party to “such cross-examination as may be required for a full and true disclosure of the facts.”²²¹ The court noted that the Court in *Perales*, in upholding a decision based only on written reports, had cited the impartiality of the workings of the social security process, the impartiality and routine nature of medical reports, and the practical consideration of providing live medical testimony.²²² Although the Supreme Court in *Perales* had referenced the fact that the claimant had not sought the issuance of a subpoena, the court of appeals cited a case that held that the issuance of a subpoena is not an absolute right and which assumed if the claimant in *Perales* had not been able to demonstrate the need for cross-examination, the outcome would not have been different.²²³ Placing the burden on the claimant here, the court found that the arguments advanced—“that [the physicians] had not examined him . . . and that their opinions were based on an incomplete record”—went only to weight, not to the necessity of cross-examination.²²⁴ The court noted that the ALJ had stated that only minor weight would be given these reports. The court held that the

221. *Id.* at 1057 (citations omitted).

222. *Id.* at 1057-58.

223. *Id.* at 1058 (citing *Calvin v. Chater*, 73 F.3d 87, 92 (6th Cir. 1996)). The court distinguished two cases, *Lonzollo v. Weinberger*, 534 F.2d 712, 714 (7th Cir. 1976) and *Wallace v. Bowen*, 869 F.2d 187 (3rd Cir. 1989), that required the issuance of subpoenas, on the basis that they involved the introduction of reports post-hearing. *Id.* at 1058-59.

224. *Id.* at 1058.

ALJ had not erred in denying the subpoenas.²²⁵ Thus, the issuance of subpoenas is subject to a showing of need for truth-testing and the party demanding the subpoenas bears the burden.

If the objector to the hearsay had an opportunity to use subpoena power to call or depose the declarant but failed to take it, due process is not violated, at least where the hearsay appears to be reliable. In *Bennett v. National Transportation Safety Board*,²²⁶ the subject of disciplinary action over a near mid-air collision was told during the week before the hearing that the principal witnesses, who were flying the plane that was almost struck, would be unavailable at the hearing because of vacation plans and that testimony in the form of declarations would be submitted. The court held that due process was not denied by the admission of the hearsay declarations at the hearing because the subject of the action did not use available rules to subpoena attendance, seek depositions, or seek a continuance.²²⁷ In some cases, prehearing depositions themselves are subject to a determination of the need for testing truth and a weighing of the burden the depositions would impose.²²⁸

225. *Id.*

226. 66 F.3d 1130 (10th Cir. 1995).

227. *Id.* at 1137. In *Bennett*, there was corroborating evidence, including air traffic controller tapes containing exclamations of the witnesses at the time of the event, that was consistent with their declarations. See also *Valkering, U.S.A., Inc. v. United States Dep't of Agric.*, 48 F.3d 305, 308 (8th Cir. 1995) (no deprivation of right of cross-examination through admission of affidavits where affidavits were provided in advance and objecting party could have requested order for deposition under regulations.).

228. The extent to which a party is constitutionally entitled to pre-hearing discovery is also subject to the balancing tests. In *Kropat v. Federal Aviation Administration*, 162 F.3d 129 (1998), an FAA employee was suspended without pay and demanded and received an arbitration hearing. He objected, however that he was denied pre-hearing discovery in the form of deposing or interviewing the agency witnesses. The court applied the balancing test:

In order to determine whether due process is satisfied in a particular case, we employ the familiar *Mathews* [*Mathews v. Eldridge*, 424 U.S. 319 (1976)] test, in which we balance "the nature of the benefit or status of which the individual is being deprived; the need for the government to act efficiently and expeditiously in terminating this type of benefit or status; and the extent to which the decisionmaking process would be aided by the presence of the procedural safeguard that the individual seeks."

Id. at 132-33.

The court focused on the last of the factors, and noted that the employee had been unable to explain how he had been realistically prejudiced by the denial of discovery, particularly since he had been given the witnesses' statements. *Id.* at 133. Moreover, the

If the party objecting to the hearsay asks to have the hearsay declarant subpoenaed *and* there are reliability issues, it probably would be error to refuse the subpoena if the cross-examination would be critical to evaluating the evidence. In a variation on *Perales*,²²⁹ in *Solis v. Schweiker*,²³⁰ there was a difference in the opinions of physicians in a hearing on a disability claim. Three opinions were for temporary work disability and the claimant's treating physician's opinion was for permanent work disability. The ALJ then sought a fifth opinion, based on the medical records and examination. The fifth opinion was for no work disability. The ALJ denied the claimant's request to cross-examine the testimony of the fifth physician, allowing the claimant only to submit written interrogatories.²³¹ The ALJ denied the disability claim.²³² The court of appeals reversed. The court recognized that cross-examination is limited to that "required for a full and true disclosure of the facts" and that the ALJ has discretion to determine when cross-examination is warranted.²³³ The court, however, rejected the argument that the ALJ did not abuse his discretion, which had been made on the grounds that *Perales* allows the use of an adverse written report even in the absence of cross-examination.²³⁴ The court noted that the Court in *Perales* had emphasized that the claimant had not sought cross-examination. The court also noted that here the report on which cross-examination was sought was crucial to the ALJ's decision. The court held that "where the physician is a crucial witness whose findings substantially contradict the other medical testimony, the claimant has been denied procedural due process if his request to subpoena the physician is not granted."²³⁵

court noted that formal discovery can be burdensome and does not necessarily contribute to the accuracy of the final determination in the case. *Id.* at 133-34.

229. 402 U.S. 389.

230. 719 F.2d 301 (9th Cir. 1983).

231. *Id.* at 302.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.* at 301.

d. Burden on opponent of admission to raise meaningful issue of need for cross-examination on hearsay

The burden is on the opponent of hearsay evidence to show that there are credible issues about the reliability of the evidence in order to compel cross-examination, just as it is on the party demanding cross-examination of a witness at the hearing.²³⁶ This is consistent with the posture of the opponent of admission being the proponent of the argument that due process is violated. In *Veg-Mix, Inc. v. United States Department of Agriculture*,²³⁷ the respondent argued that invoices admitted in the hearing against it did not meet the requirement of the business records hearsay exception of FRE Rule 803(6) in that the records were not supported by the testimony of a custodian. The court not only held that standards are more lax for administrative proceedings, but that the burden is on the opponent of admission of hearsay to raise a valid challenge to the accuracy of the documents:

Veg-Mix stresses the agency's purported technical error, rather than the truthfulness of the invoices. . . . In the absence of a serious, nonspeculative argument that the records were something other than they appeared to be, the practical standards applicable to administrative proceedings are not offended.²³⁸

Hearsay documents are admissible even if a witness does not testify subject to cross-examination as to authenticity, at least where there is no reasonable challenge to the authenticity of the docu-

236. *See supra* notes 195-197 and accompanying text. The opponent must show that the particular relevant part of the evidence affecting him or her is deficient; it is not sufficient to show that non-relevant parts of a piece of evidence may not be accurate. *Anderson v. United States Dep't of Transp., F.A.A.*, 827 F.2d 1564, 1571-72 (Fed. Cir. 1987) (general attack on attendance logs not sufficient if no successful attack on the particular relevant entries).

237. 832 F.2d 601 (D.C. Cir. 1987).

238. *Id.* at 606 (internal reference omitted). *See also Anderson v. United States Dep't of Transp., F.A.A.*, 827 F.2d 1564, 1576 (Fed. Cir. 1987) (placing burden on opponent of entries in attendance log to show that entries applying to the particular respondent were inaccurate: "If the FAA had erroneously 'updated' an individual petitioner's T & A record, that person had the burden of bringing such error to the attention of the FAA during its removal proceedings or at least to the attention of the presiding official at the board hearings.").

ment, and in such circumstances, admission does not violate the basic constitutional requirement that the use be “fundamentally fair.” In *Bustos-Torres*,²³⁹ discussed above, where an INS officer who filled out a form was in another city, the court found an affidavit by the officer about the form was sufficient for authenticity because the validity of the contents was not challenged.²⁴⁰

The requirement that the opponent of admission of hearsay raise a credible argument that it is unreliable avoids having a party needlessly obstruct a fact finding hearing merely by raising an objection. In *Fairfield Scientific Corp. v. United States*,²⁴¹ a contractor had his contract with the Navy terminated because of failure to deliver cartridges. As part of showing that the fault was in the control of the contractor, the government introduced a copy of a letter from a supplier to the contractor setting out terms he had to meet with the supplier, which he failed to meet, to enable him to satisfy the Navy contract. The contractor objected to the admission of the letter because no witness testified to its authenticity. The court upheld the admission of the letter, noting that the rules governing the hearing provided that the hearing shall be informal and that evidence not ordinarily admissible under the rules of evidence may be admitted.²⁴² The court stated: “Furthermore, it is settled generally that an administrative tribunal is not required to exclude hearsay evidence in the form of a document *if its authenticity is sufficiently*

239. 898 F.2d 1053.

240. *Id.* at 1056. The court stated:

The affidavit of the examining officer shows that the information in the Form I-213 is based upon statements of the petitioner, and the petitioner does not contest their validity. In *Tejeda-Mata v. INS*, 626 F.2d 721, 724 (9th Cir. 1980), the court held that the authenticity of a Form I-213 was sufficiently established by the testimony of the examining officer, who identified it as the form prepared by him when he questioned the alien. Here there was no such testimony by the examining officer, but his affidavit to that effect was introduced into evidence. Because the rules of evidence do not apply in deportation hearings, the admission of this affidavit was not error, for *it is probative, and not fundamentally unfair.*

Id. (emphasis added).

241. 611 F.2d 854 (Ct. Cl. 1979).

242. *Id.* at 858-59.

convincing to a reasonable mind and if it carries sufficient assurance as to its truthfulness."²⁴³

The court noted that the contents of the letter were corroborated by events that followed the letter and that no motive was suggested as to why the supplier would falsify such a document.²⁴⁴ The court concluded that "there was a reasonable basis for the board to be assured of its genuineness so as to warrant its admission in evidence."²⁴⁵ Thus, a mere objection to admission is not sufficient; the opponent must demonstrate that there are substantive grounds for rejecting the evidence.²⁴⁶

B. APA Standards

Although the constitutional requirements have a broader role in evidence standards in administrative proceedings than the APA requirements in that they are more frequently referred to by review courts under the "probative and fundamentally fair" test,²⁴⁷ the requirements work together. There are common concepts that make for a largely coordinated whole. Constitutional requirements on use of hearsay include, as part of the due process balancing test, evaluation of the "reliability and probative value" of the hearsay.²⁴⁸ Under the APA, decisions must be based on evidence that is reliable and probative. The standard on judicial review of "substantial

243. *Id.* at 859 (citing *Richardson v. Perales*, 402 U.S. 389, (1971); *Pascal v. United States*, 543 F.2d 1284, 1289 (Ct. Cl. 1976); *Reil v. United States*, 456 F.2d 777, 780 (Ct. Cl. 1972); *N. Fiorito Co. v. United States*, 416 F.2d 1284, 1295 (Ct. Cl. 1969); *J. D. Hedin Construction Co. v. United States*, 408 F.2d 424, 427-28 (Ct. Cl. 1969)) (emphasis added).

244. *Id.*

245. *Id.*

246. In *Gallagher v. NTSB*, 953 F.2d 1214 (10th Cir. 1992), the court rejected arguments that because a blood sample vial was not sealed in a particular regular way, it could not be authenticated. The court cited testimony that it was sealed and shipped in apparently good order. There was no suggestion or evidence that the sample had been tampered with. The court concluded that one would have to make an assumption without any evidentiary basis to reject the evidence that the vial had been tampered with without any reason. The court rejected the objection. This can be looked on as the proper use of common sense in receiving evidence unless the opponent can develop evidence of an irregularity. It can also be looked at as saying that speculation about defects in otherwise apparently reliable evidence is not a sound ground to decide about evidence. *Id.* at 1218-19.

247. See *supra* notes 140-42.

248. *Perales*, 402 U.S. at 402.

evidence” is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²⁴⁹ A reasonable mind would accept reliable and probative evidence.

1. APA Factors

The application of the statutory requirements basically follows the intent in the legislative history. On admissibility the APA provides that “[a]ny oral or documentary evidence may be received.”²⁵⁰ It precludes, for purposes of not overburdening the record, only “irrelevant, immaterial, or unduly repetitious evidence.”²⁵¹ The essential test for admissibility under the APA, then, is relevance and materiality.²⁵² Hearsay is admissible, like other evidence, if it meets the relevance test.²⁵³ Some discretion as to admission of evidence is reposed in the ALJ and the agency.²⁵⁴ Denying admission of evidence which would constitute probative evidence can be a denial of the moving party’s rights.²⁵⁵ Making timely objections to the admission of evidence is very important. Generally, a failure to object to the admission of evidence at the hearing precludes raising the ob-

249. *Id.* at 401 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

250. 5 U.S.C. § 556(d).

251. *See, e.g.*, *Bennett v. NTSB*, 66 F.3d 1130, 1137 (10th Cir. 1995); *Gallagher v. NTSB*, 953 F.2d 1214, 1218 (10th Cir. 1992); *Sorenson v. NTSB*, 684 F.2d 683, 686 (10th Cir. 1982).

252. *See, e.g.*, *Evosevich v. Consol. Coal Co.*, 789 F. 2d 1021, 1025 (3d Cir. 1986) (holding that admissible evidence is “constrained only by its relevancy”); *Sorenson v. NTSB*, 684 F.2d 683, 686 (10th Cir. 1982) (“Under the Administrative Procedures Act an agency need only exclude ‘irrelevant, immaterial or unduly repetitious evidence.’ 5 U.S.C. § 556(d). Otherwise, any documentary or oral evidence may be received.”).

253. *Bobo v. United States Dep’t of Agric.*, 52 F.3d 1406, 1414 (6th Cir. 1995); *Hoska v. United States Dep’t of the Army*, 677 F.2d 131, 138 (D.C. Cir. 1982) (“Provided it is relevant and material, hearsay is admissible in administrative proceedings generally and in adverse action proceedings in particular.”)

254. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 950 (4th Cir. 1997) (“Accordingly, we recognize that the APA grants ALJ’s broad discretion to exclude excessive evidence which lacks significant probative value and, by implication, to limit examinations, evaluations, and consultations by experts when such events will, in the ALJ’s judgment, merely give rise to evidence so unduly repetitious as to be lacking in probative value.”); *Yaffe Iron & Metal Co., Inc. v. EPA*, 774 F.2d 1008, 1016 (10th Cir. 1985) (“[T]he EPA rules of procedure for administrative hearings give latitude to the presiding officer in determining whether to exclude or admit evidence.”).

255. *Nat’l Ass’n of Recycling Indus., Inc. v. Fed. Mar. Comm’n*, 658 F.2d 816, 825 (D.C. Cir. 1980) (finding agency’s disregarding of probative hearsay evidence to be arbitrary and capricious).

jection on appeal.²⁵⁶ The exclusionary rule, by which unlawfully obtained evidence is excluded from trial, is generally not applicable to administrative proceedings.²⁵⁷

The standard for agency decisions is “reliable, probative and substantial” evidence.²⁵⁸ Courts tend not to address this standard in APA terms. The explanation for this seems two-fold. First, the process of evaluating and weighing by a trier of fact to arrive at a decision is somewhat subjective.²⁵⁹ Second, elements of “reliable, probative, and substantial” tend to get discussed by reviewing courts, accurately or inaccurately, in terms of constitutional due process considerations or in terms of the “substantial evidence” judicial review standard.²⁶⁰

The standard of judicial review on evidence is well settled.²⁶¹ Consistent with the legislative history and the determination in *Uni-*

256. See, e.g., *NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1343 (5th Cir. 1993) (“To begin with, as the NLRB observes, Cal-Maine did not object to the two employees’ testimony on hearsay grounds at the administrative hearing. Thus, their hearsay objection is waived.”).

257. The Supreme Court has long held that unconstitutionally obtained evidence must be excluded in criminal cases to deter law enforcement officers from engaging in the unconstitutional conduct. Generally, this is not so in administrative proceedings. In *Pennsylvania Board of Probation & Parole v. Scott*, 524 U.S. 357 (1998) the Supreme Court held that “the exclusionary rule is . . . a judicially created means of deterring illegal searches and seizures.” *Id.* at 363. The Court stated that it “applies only in contexts ‘where its remedial objectives are thought most efficaciously served,’ *United States v. Calandra*, 414 U.S. 338, 348 (1974); see also *United States v. Janis*, 428 U.S. 433, 454 (1976).” *Id.* As a result, the Supreme Court concluded that the exclusionary rule is “applicable only where its deterrence benefits outweigh its ‘substantial social costs.’ *United States v. Leon*, 468 U.S., at 907 . . . Recognizing these costs, we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials. *Id.*, at 909; *United States v. Janis*, *supra*, at 447.” *Id.*

258. 5 U.S.C. § 556(d) (2004).

259. Even where there is occasional reference to agency determination of the requisite quality of the evidence, it is usually oblique. See, e.g., *Anderson v. Dep’t of Transp., FAA*, 827 F.2d 1564, 1570 (Fed. Cir. 1987) (holding that hearsay may be treated as substantial evidence if the “circumstances lend it credence”).

260. See *supra* notes 91-107 and 109-235 and accompanying text; *infra* notes 262-75 and accompanying text.

261. A decision can be reviewed on other grounds, including whether the decision is arbitrary, capricious, an abuse of discretion, or contrary to law. 5 U.S.C. § 706(2)(a) (2004). See, e.g., *R. P. Carbone Constr. Co. v. OSHRC*, 166 F.3d 815, 818 (6th Cir. 1998) (holding that the ALJ’s determination may be set aside if arbitrary, capricious, an abuse of discretion, or contrary to law. Under this standard, the court must consider whether there has been a clear error in judgment. As to facts: “The ALJ’s factual determinations must be affirmed if they are supported by substantial evidence on the record as a

versal Camera Corp. v. NLRB,²⁶² discussed above, the standard of review for factual findings is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”²⁶³ This is evidence that would be enough to sustain a jury verdict.²⁶⁴ In making these determinations, the reviewing court must consider the whole record, including that part that detracts from the conclusion below.²⁶⁵ Speculation does not constitute substantial evidence.²⁶⁶

whole.”) (citation omitted). This article is focused on the substantial evidence standard of 5 U.S.C. § 706(2)(E).

262. 340 U.S. 474 (1951). See *supra* notes 101-108 and accompanying text.

263. *Id.* at 477 (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). See also *Dickenson v. Zurko*, 527 U.S. 150, 162-63 (1999) (quoting *Universal Camera* and analyzing the court/agency review and court/court review); *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966); *Valkering, U.S.A., Inc. v. United States Dep’t of Agric.*, 48 F.3d 305, 307 (8th Cir. 1995) (“substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion’”) (citations omitted). The Court in *Universal Camera* did find that the APA required the consideration of the whole record and the need, as found in the legislative history, to avoid merely rubber stamping agency decisions. See *supra* notes 101-108 and accompanying text. See also *Dickenson v. Zurko*, 527 U.S. 162 (1999).

This standard differs from the admissibility standards. See *Gallagher v. NTSB*, 953 F.2d 1214, 1219 (10th Cir. 1992); *Mikels v. United States Dep’t of Labor*, 870 F. 2d 1407, 1409 (8th Cir. 1989); *Williams v. United States Dep’t of Transp.*, 781 F.2d 1573, 1579 (11th Cir. 1986); *Yaffe Iron and Metal Company, Inc.*, 774 F.2d 1008, 1010 (10th Cir. 1985).

264. *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966); *Illinois Cent. R.R. Co. v. Norfolk & W. Ry. Co.*, 385 U.S. 57, 66 (1966); *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) (evidence 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”) (citations omitted); *NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1339 (5th Cir. 1993); *Gallagher v. NTSB*, 953 F.2d 1214, 1219-20 (10th Cir. 1992); *Diamond Ring Ranch, Inc. v. Morton*, 531 F.2d 1397, 1404 (10th Cir. 1976).

265. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-88 (1951); *Gray v. United States Dep’t of Agric.*, 39 F.3d 670, 675 (6th Cir. 1994) (holding that the “‘substantiality of the evidence must be based upon the record taken as a whole’”) (citation omitted); *NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1339 (5th Cir. 1993) (“A reviewing court must consider the totality of evidence in the record, including ‘that which fairly detracts from the [agency’s] decision.’” (quoting *Universal Camera*, 340 U.S. at 488)); *Mikels v. United States Dep’t of Labor*, 870 F. 2d 1407, 1409 (8th Cir. 1989); *Garcia v. Califano*, 463 F. Supp. 1098, 1105 (E.D. Ill. 1979).

266. *White v. Apfel*, 167 F.3d 369 (7th Cir. 1999) (Where parent presented evidence that a state court would not release a court-supervised fund in favor of disabled minor in seeking social security disability benefits for the minor, it was speculation for the agency to conclude that a different request to the state court would get the funds released, and “[s]peculation is, of course, no substitute for evidence, and a decision based on speculation is not supported by substantial evidence.” *Id.* at 375); *Garcia v. Califano*, 463 F. Supp. 1098, 1103 (E.D. Ill. 1979).

R

R

Corroboration, however, is helpful in determining whether hearsay testimony is substantial evidence.²⁶⁷

The reviewing court must defer to the agency in significant ways and not substitute itself for the agency.²⁶⁸ Thus, the reviewing court must normally defer to the agency where credibility is the issue.²⁶⁹ Credibility determinations will be upheld unless they are

267. R.P. Carbone Constr. Co., 166 F.3d at 815 (the statements of two workers and a safety manager to inspector, set forth in hearsay testimony of inspector, corroborated each other). In *Evosevich v. Consol. Coal Co.*, 789 F.2d 1021 (3d Cir. 1986) the claimant for black lung benefits asserted that the ALJ's reliance on a written report of a physician who had not examined him did not meet the factors in *Perales*. The court held that the ALJ used the report as corroboration for another report of an examining physician and that because the report was otherwise by a competent physician, involved reasoned interpretations, and was consistent with other reports, it was permissible to make limited use of the report. *Id.* at 1027-28. In *NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336 (5th Cir. 1993), an employer claimed that only local eggs were processed at a plant, using testimony of supervisors and records of shipping. The ALJ, however, relied on a number of isolated bits of evidence, much of it hearsay, to rule against the employer. The court of appeals upheld the ruling stating, "The agency's decision was based on numerous pieces of evidence that, *in the aggregate*, undoubtedly support its finding." *Id.* at 1343 (emphasis added). Even where corroborating evidence is ultimately not sufficient, its particular role in a "substantial evidence" evaluation supports its admission. The admission of hearsay by an ALJ allows the agency and reviewing court to assess the evidence. See *Crawford v. United States Dep't of Agric.*, 50 F.3d 46, 48-50 (D.C. Cir. 1995) (ALJ allowed in veterinarian's written reports as "probative hearsay," but found that absent corroboration they were insufficient to support case; the department reversed and court upheld reversal because no credible challenge was made to the truthfulness of the reports).

268. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. at 618-21 (1966) (holding that the review of fact finding in an agency decision is more like reviewing the actions of another branch of the government and thus is more deferential than the review of the fact finding of a lower court based on a "clearly erroneous" standard).

269. *Butera v. Apfel*, 173 F.3d 1049, 1055-56 (7th Cir. 1999) (accepting ALJ's detailed reasons for disbelieving claimant, including that claimant (1) was vague and evasive in answering questions, (2) was hesitant and indefinite in describing his pain, and (3) forced the ALJ to bring out claimant's criminal past by questions). The court stated in *Butera*:

The ALJ's credibility determination of Butera, based on these three factors, is precisely the sort of determination that this Court has recognized is entitled to particular deference as it "involve[s] intangible and unarticulable elements which impress the ALJ, that unfortunately leave 'no trace that can be discerned in this or any other transcript.'" *Edwards v. Sullivan*, 985 F.2d 334, 338 (7th Cir. 1993) (quoting *Kelly v. Sullivan*, 890 F.2d 961, 964 (7th Cir. 1989)).

Id. at 1055. See also *NLRB v. Cal-Maine Farms, Inc.*, 998 F.2d 1336, 1339-40 (5th Cir. 1993) ("However, in determining whether the NLRB's factual findings are warranted by the record, this court will not 'pass on the credibility of witnesses or reweigh the evi-

inherently incredible or patently unreasonable.²⁷⁰ If there is a difference between the hearing officer's findings and those of the agency, the hearing officer's findings are considered part of the record and given "such probative force as [they] intrinsically command" in determining whether the agency decision is supported by substantial evidence.²⁷¹ Also, the reviewing court is not to reevaluate the weight of the evidence to come to its own conclusion, but to accept the findings if they are supported by substantial evidence in the record as a whole.²⁷² Indeed, the fact that two inconsistent conclusions can be drawn from the same evidence does not cause a rejection of the agency decision.²⁷³ The purpose of this restraint on courts is to avoid having courts simply replicate the agency's fact finding role and displace the expertise that agencies bring to the subject.²⁷⁴

2. Sequence of Application of Evidence Standards

Although the basic APA law is not complex, the sequence of the application of standards appears to present a continuing challenge. The sequence of the application of constitutional requirements is also a challenge.

dence.' Indeed, where a case turns on witness credibility, this court will accord special deference to the NLRB's credibility findings and will overturn them 'only in the most unusual or circumstances.'" (citations omitted); *Gallagher v. NTSB*, 953 F.2d 1214, 1217 (10th Cir. 1992); *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980).

270. *Marick v. CFTC*, 1993 U.S. App. LEXIS 27535 (Table), (9th Cir. 1993).

271. *Universal Camera*, 340 U.S. at 495-97.

272. *Illinois Cent. R.R.*, 385 U.S. at 57, 69 ("It is not for the court to strike down conclusions that are reasonably drawn from the evidence and findings in the case."); *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620-22 (1966); *Butera v. Apfel*, 173 F.3d 1049, 1055 (7th Cir. 1999); *Woolsey v. NTSB*, 993 F.2d 516, 521, n.16 (5th Cir. 1993); *Nadiak v. Civil Aeronautics Bd.*, 305 F.2d 588, 592 (5th Cir.1962) ("The function of a reviewing Court is to accept the findings of fact made by the administrative body if there is substantial evidence in the record as a whole to support those findings"); *Gallagher v. NTSB*, 953 F.2d 1214, 1217, 1220 (10th Cir. 1992); *Yaffe Iron & Metal Co. v. EPA*, 774 F.2d 1008, 1014 (10th Cir. 1985).

273. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. at 620; *Gallagher v. NTSB*, 953 F.2d at 1220; *Mikels v. United States Dep't of Labor*, 870 F.2d at 1409 ("Under this standard, if the ALJ's decision is consistent with the law and is supported by substantial evidence, 'the ALJ's determination is conclusive and it is immaterial that the facts permit the drawing of diverse inferences.'" (citations omitted); *Williams v. United States Dep't of Transp.*, 781 F.2d 173, 1579 (11th Cir. 1986); *Yaffe Iron & Metal Co., Inc.*, 774 F.2d at 1010.

274. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. at 620-21.

a. The legislative sequence

An initial consideration is the sequence of evidentiary requirements contained in the APA. The sequence has been described in *United States Steel Mining Co., Inc. v. Director, Office of Workers' Compensation Programs, United States Department of Labor*.²⁷⁵ In that case, a widow seeking black lung benefits obtained a letter from a doctor who opined, based on a review of the deceased husband's medical file, that it was "possible" that a condition qualifying for benefits was a cause of death.²⁷⁶ Relying solely on that evidence, which was the only medical evidence presented by the claimant, the ALJ and the agency granted the benefits.²⁷⁷

On review, the court of appeals noted that a concept of broad admissibility applies: "the Administrative Procedure Act provides that in an administrative hearing, 'the agency as a matter of policy shall provide for the exclusion [, only] . . . irrelevant, immaterial, or unduly repetitious evidence.' 5 U.S.C. § 556(d). We have concluded that this provision empowers the ALJ to admit and consider 'all relevant evidence, erring on the side of inclusion.'"²⁷⁸ The court of appeals reasoned that an ALJ has the competence to properly interpret and weigh evidence, such that strict exclusionary rules are unnecessary. As such, the court of appeals limited the use of exclusionary rules to issues of relevance. Broad admissibility does not end the evidence process under the APA. As the court noted, at the time of the decision the ALJ or the agency must rely only on reliable, probative and substantial evidence:

But even though the more stringent exclusionary rules of evidence, which are generally applicable to jury trials, are not justified in agency proceedings, the agency process nonetheless requires that the ALJ perform a gate keeping function *while assessing evidence to decide the merits of a claim*. To assure both a fairness in the process and an outcome consistent with the underlying statutory scheme, the ALJ has, under § 556(d) of the Administrative Procedure Act, the affirmative duty to qualify evidence as "reliable, pro-

275. 187 F.3d 384 (4th Cir. 1999).

276. *Id.* at 387.

277. *Id.* 387-88.

278. *Id.* at 388 (citation omitted).

bative, and substantial” before relying upon it to grant or deny a claim. 5 U.S.C. § 556(d).²⁷⁹

More specifically, on the sequence of admission and evaluation of evidence, the court stated that:

in an agency proceeding[,] the gate keeping function to evaluate evidence occurs when the evidence is considered in decision making rather than when the evidence is admitted. Even though it arises later in the administrative process than it does in jury trials, the ALJ’s duty to screen evidence for reliability, probativeness, and substantiality . . . ensures that final agency decisions will be based on evidence of requisite quality and quantity” regardless of the admission of evidence.²⁸⁰

The court did not take issue with the admissibility of the doctor’s opinion, but did find that the opinion was not “reliable, probative, and substantial” evidence because it was speculation that could not establish by the preponderance of the evidence the required fact.²⁸¹ Since there was no other evidence, the agency determination was reversed.²⁸²

Such clarity of sequence is rare, and most opinions mix concepts.²⁸³ Some reviewing courts “speak” in terms of admissibility when they are really addressing whether the evidence meets the substantial evidence review standard.²⁸⁴ Some courts have rolled

279. *Id.* at 388-89 (emphasis added).

280. *Id.* at 389.

281. *United Steel Mining Co.*, 187 F.3d at 390-91.

282. *Id.* at 391.

283. In some cases, the correct sequence is applied, even if not expressly articulated. *See, e.g.*, *Crawford v. United States Dep’t of Agric.*, 50 F.3d 46 (D.C. Cir. 1995); *Hoska v. United States Dep’t of the Army*, 677 F.2d 131 (D.C. Cir. 1982).

284. The court in *Evosevich* noted the incorrect mixing of admission and review standards:

The Supreme Court in *Perales* and this court in *Republic Steel* conflated the questions whether medical reports were admissible and whether they could constitute substantial evidence. Neither case doubts, however, that hearsay evidence is freely admissible in administrative proceedings. *See* 402 U.S. at 400, 91 S. Ct. at 1426, 635 F.2d at 208. In fact, hearsay reports of non-testifying doctors constituted all the medical evidence submitted to the ALJ in this case, by both the claimant and the Company. The ALJ did not err in admitting Dr. Kress’ report over *Evosevich*’s objection.

789 F.2d at 1025.

admission, decision, and judicial review standards into one mixed standard.²⁸⁵ The confusion is somewhat understandable. The APA is a result of legislative deconstruction and reconstruction of evidence concepts, resulting in a somewhat unusual evidentiary creature. But the express intent is to allow in all relevant evidence and then screen it later. This is in contrast to the FRE, which screens restrictively what is admitted and then leaves the jury free to come to a conclusion without further standards, other than a possible finding by the judge that no reasonable jury could have come to that conclusion.²⁸⁶

Another aspect of the different APA tests for admission, decision, and judicial review is that they share a reliance on what a reasonable person would do at the different stages. But because the standard of what a reasonable person would do at the most demanding stage tends to be intuitively applied across all stages, conflation occurs. Thus, if evidence does not meet the statutory decisional standard of being “reliable” and “probative,” why should it be admitted in the first place? The argument supporting separate consideration is that whether a particular piece of evidence is “reliable” and “probative” may depend largely on corroboration of other evidence.²⁸⁷ This determination can best be made when the evidence can be analyzed together — at the decisional level and then at the judicial review level. The “substantiality” of the evidence standard for decision and judicial review, of course, is almost always a matter of aggregating pieces of evidence and is not determinable at the admission stage.

The exception to separate analysis at the admission stage and the decisional stage occurs when a piece of evidence is offered but is incapable of ever meeting the “reliable” or “probative” or “sub-

285. See, e.g., *Gray v. United States Dep't of Agric.*, 39 F.3d 670, 675-76 (6th Cir. 1994) (discussing admissibility, decisional, and review standard without distinguishing them as different standards).

286. See FED. R. CIV. P. 50; 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2524 at 249-66 (Civ. 2d 1995).

287. *United States v. Int'l Bhd. of Teamsters*, 19 F.3d 816, 823 (2d Cir. 1994) (“Thus hearsay is admissible, provided it is reliable. Hearsay statements may gain reliability by corroborating one another or by including specific details.”) (citations omitted); *R. P. Carbone Construction Co.*, 166 F.3d at 819 (the statements of two workers and a safety manager to inspector, set forth in hearsay testimony of inspector, corroborated each other).

stantial” decisional standard, either under statutory or due process analysis. In such clear cases, it may be appropriate to speak of the evidence as being inadmissible. This is because the evidence is so inherently deficient that it can only be “irrelevant,” or “immaterial” and therefore cannot meet the admission standards.²⁸⁸ Such treatment should be rendered, however, only when the proponent can make no reasonable argument about how the evidence can be considered reliable, probative, or substantial in connection with other evidence.

b. The sequence with constitutional considerations

The analysis of the APA standard sequence has to be coordinated with the due process constitutional considerations of whether evidence, particularly hearsay evidence, requires cross-examination. Cross-examination necessarily takes place during the hearing. Since the cross-examination issue is determined in large part by whether the evidence is sufficiently reliable that further testing is not required, it tends to pull forward discussion of reliability and probativeness to the admission period. But contravailingly, the constitutional evaluation is also influenced by corroboration and the overall context, and these are best weighed at a later stage. Thus, if it is clear that the evidence either can or cannot be admitted without cross-examination, the decision should be made at the time the evidence is offered. When the proponent reasonably argues that corroboration and context will support admission without cross-examination, the evidence should be admitted and evaluated later by the ALJ, agency, and reviewing court for both statutory and constitutional compliance.

The sequence of applying the constitutional standards is frequently confused. *Calhoun v. Bailar*²⁸⁹ is sometimes cited as a standard for admissibility of hearsay evidence. A closer examination reveals that the analysis in *Calhoun* mixes admissibility, due process,

288. *Woolsey v. NTSB*, 993 F.2d 516, 519-20 (5th Cir. 1993) (noting that authenticity is needed to avoid evidence being irrelevant or immaterial, but finding that the proof met even the FRE standard and so was properly admitted); *Gallagher v. NTSB*, 953 F.2d 1214, 1218 (10th Cir. 1992) (although allowing admission, acknowledged that a “lower evidentiary standard does not completely obviate the necessity of proving by competent evidence that real evidence is what it purports to be”).

289. 626 F.2d 145 (9th Cir. 1980).

and judicial review standards. In *Calhoun*, a supervisor at a Post Office facility was charged with falsification of mail volume records and directing his subordinates to falsify records.²⁹⁰ The charges were based on affidavits of several of his subordinates. At the administrative hearing on his dismissal the officer who took the affidavits testified that each of the affiants was advised of his or her constitutional rights and was given an opportunity to review and revise his or her affidavit before swearing to it. The affidavits were received into evidence. The supervisor did not object to the admission and did not later move to strike the affidavits, arguing only as to the weight to be given to them. The affiants who averred that they had falsified records at the respondent's direction testified at the hearing, apparently as the supervisor's witnesses. Each renounced his or her affidavit in whole or in part at the hearing. Some or all of the affiants refused to answer any questions on cross-examination, apparently on self-incrimination grounds. The only other witness was an inspector who testified that he detected falsification in records and provided statistical evidence in support of a finding of falsification. The inspector also testified that one of the affiants who renounced his affidavit at the hearing had admitted to him that he had reweighed mail at the supervisor's request. The officer presiding at the administrative hearing found that the statements made in the affidavits were more credible than the live testimony of the affiants because of the witnesses' refusal to testify on cross-examination and because parts of the affidavits were corroborated by other evidence.²⁹¹

On appeal, the supervisor argued that hearsay statements that are contradicted by the declarant can never constitute substantial evidence. The court then engaged in an analysis that mixed concepts of admissibility with concepts of constitutional due process use of evidence. The court noted that court rules of evidence do not apply to restrict the receipt of evidence in administrative proceedings, particularly hearsay evidence.²⁹² The court then stated a test for hearsay evidence that has been frequently cited, often in the admissibility context:

290. *Id.* at 147.

291. *Id.* at 148.

292. *Id.*

Not only is there no administrative rule of automatic exclusion for hearsay evidence, but the only limit to the *admissibility* of hearsay evidence is that it bear satisfactory indicia of reliability. We have stated the test of admissibility as requiring that the hearsay be probative and its use fundamentally fair.

Thus, it is not the hearsay nature per se of the proffered evidence that is significant, it is its probative value, reliability and the fairness of its *use* that are determinative.²⁹³

The court used *Perales*,²⁹⁴ which allowed the use of hearsay reports even when there was an objection and the only live testimony was contrary to the reports, as an illustration of this analysis.²⁹⁵ The court stated, “The Court rejected a rigid rule and held that the proffered hearsay evidence could constitute substantial evidence. In doing so, the Court explained that there could be no blanket rejection of administrative reliance on hearsay evidence irrespective of reliability and probative value.”²⁹⁶

The court in *Calhoun* did not discuss the meaning of “fundamentally fair” or “fairness of use.” Nor did it discuss the relationship of “probative value” or “reliability” to the fairness concept. Although the court did not discuss the source of those requirements, they only make sense in terms of the balancing test for meeting due process requirements, described above.²⁹⁷ The court’s reference to *Perales*, which dealt with those arguments in constitutional terms, confirms that meaning.²⁹⁸ A due process analysis, in turn, explains the use of “probative value” and “reliability,” because, as described above, part of the due process balancing process includes an assessment of whether further truth-testing by cross-examination is necessary.²⁹⁹ Hearsay evidence that has “probative value” and is “reliable” in its own terms or in light of other, corroborating, evidence does not require the additional step of further truth-test-

293. *Id.* (citations omitted) (emphasis added).

294. 402 U.S. at 390.

295. *Calhoun*, 626 F.2d at 149.

296. *Id.* (citing *Perales*, 402 U.S. at 407-08).

297. *See supra* notes 109-142 and accompanying text.

298. *See supra* notes 110-142 and accompanying text.

299. *See supra* notes 143-208 and accompanying text.

ing by cross-examination. Indeed, the *Calhoun* court cited a number of factors, as in *Perales*, that may be helpful in establishing probative value and reliability, which tend to establish whether further truth-testing is necessary.³⁰⁰

Another aspect of *Calhoun* that echoes confusion elsewhere is when and how the tests of reliability and probative value are applied. *Calhoun* started its discussion by noting that the supervisor's objection on appeal was that hearsay contradicted by its maker cannot constitute "substantial evidence."³⁰¹ This is the judicial review standard. The court proceeded from there to discuss admissibility standards, noting that they are broader than court rules of evidence, leading up to the reference to an assessment of the probative value, reliability and fairness of use.³⁰² The court then moved to speaking about the analysis in *Perales* on the use of hearsay as "substantial evidence," the judicial review standard again.³⁰³ The court then began mixing admissibility and substantial evidence concepts.³⁰⁴ Finally, the court directly discussed the procedural process of applying the tests for probative value and reliability as an admissibility issue.³⁰⁵ At the same time, the court clearly recognized and discussed that judging the reliability, probative value, and

300. *Calhoun*, 626 F.2d at 149. For the factors referred to in *Perales*, see *supra* note 140.

301. *Calhoun*, 626 F.2d at 148.

302. *Id.* The court also referred to the fact that a sanction cannot be imposed except in accordance with "reliable, probative, and substantial evidence." *Id.* This is the statutory agency decisional standard. The court did not refer to this requirement further in the opinion.

303. *Id.* at 148-49.

304. *Id.* at 149 ("We too reject any per se rule that holds that hearsay can never be substantial evidence. To constitute substantial evidence, hearsay declarations, like any other evidence, must meet minimum criteria for admissibility — it must have probative value and bear indicia of reliability.").

305. *Id.* "There remains only the question of the appropriate vehicle of application of these factors. As noted, hearsay evidence, once admitted, may be relied upon by the agency in many circumstances." The court here ignores the requirement that regardless of what is admitted, a decision can be rendered only when "supported by and in accordance with the reliable, probative, and substantial evidence," 5 U.S.C. § 556(d), even though this provision was earlier referred to in the opinion. 626 F.2d at 148.

The issue of how the tests should be applied was also somewhat complicated by the fact that the supervisor did not object to the admission of the affidavits. During the discussion, the court stated the well-recognized precept that, "[s]uch a rule would also comport with the general rule that hearsay admitted without objection is ordinarily given its normal probative effect. See K. Davis, *Administrative Law Treatise* § 14.05 at

fairness of use is to a large extent dependent on the other evidence, which might not be available to the trier of fact at the time the evidence is offered.³⁰⁶ The court suggested that in light of this fact, a motion to strike at the close of the evidence is the desirable way to handle the admissibility issue.³⁰⁷

All of this analysis is somewhat tangled and does not provide practical guidance. If an admissibility ruling at the close of evidence allows for a proper determination, as the court in *Calhoun* suggested, is the party objecting to the admissible evidence required or permitted to wait until the close of evidence to voice objection? If an objection is made at the time the evidence is offered, as required in court, is the ALJ required to defer rulings to the close of evidence? If hearsay evidence is excluded either when introduced or at the close of evidence, does this make it more difficult for an agency or reviewing court to determine whether the evidence is sufficiently probative and reliable to meet decisional and review standards when they take up deliberation? All of these questions go to the issue of the difference between admission and use of evidence. Although due process can be addressed at admission, its fundamental significance pertains to use. That is, constitutional rights are not offended by mere admission in a non-jury setting; they are offended when an action is taken against an objector based on evidence that the objector has not had a reasonable opportunity to test. The reasonable approach would seem to be to apply the due process test at the time of admission to exclude only evidence that is so constitutionally deficient that there is no reasonable way it can be made to meet due process. Where evidence might meet due process when considered in relation to other evidence, the determination on admissibility can be delayed to the close of evidence and be struck there if it clearly fails at that point.³⁰⁸ Finally, if the evidence is not clearly excludable at the

275 n. 8; Cf. *Hayden v. Chalfant Press, Inc.* (9th Cir. 1960) 281 F.2d 543, 548. See generally 79 A.L.R.2d 890." *Id.* at 150.

306. *Id.*

307. *Id.*

308. The party objecting to the evidence should make an objection when the evidence is offered, however. It would be unfair to the opposing party to allow an objection to be delayed until the close of the hearing because if evidence is offered and admitted, that fact will influence the course of the rest of the hearing. The objecting party should make the objection when the evidence is offered and the ALJ can defer

close of evidence, it should be left in the record for further determination at the time of decision. Thus, the terminology in *Calhoun* of “reliable,” “probative,” and “fundamentally fair” is consistent with constitutional considerations applicable to hearsay, but the timing of their application should vary depending on how clear the issue is to any particular piece of evidence.

C. *Role of the Federal Rules of Evidence*

1. Role of the Federal Rules of Evidence Generally

Although the evidentiary exclusions of court rules of evidence were deliberately abandoned in the formulation of the APA, there are strong reasons to make use of the modern Federal Rules of Evidence to assist in affirmatively determining what evidence should be *admitted*. First, the standards for the admission and use of evidence under the APA and the Constitution have proven to be amorphous, particularly with respect to hearsay. To the extent that the FRE can establish at least what definitely should be admitted, it can provide some certainty to, and rational support for, the admission. Second, the court rules of evidence at the federal level were codified in 1975.³⁰⁹ This has made the rules easier to use and has promoted uniformity.³¹⁰ The codification of the rules generally has been found to have been successful.³¹¹

It is universally recognized that the FRE do not restrict the admission of evidence in administrative proceedings.³¹² Thus, failure

ruling to the close of evidence where appropriate. Although this can create a hardship for the opposing party, at least the opposing party is alert to the risk of losing the evidence. The exception to this sequence is where the basis for the objection only becomes apparent later, such as through the other party's witnesses.

309. For a concise history of the codification of the rules of evidence, see STEPHEN A. SALTZBURG ET AL., 1 FEDERAL RULES OF EVIDENCE MANUAL 2 (7th ed. 1997).

310. *Id.* at 5.

311. *Id.*

312. *See, e.g.,* Bennett v. NTSB, 66 F.3d 1130, 1137 (10th Cir. 1995) (“To begin with, agencies are not bound by the strict rules of evidence governing jury trials . . . [r]ather the Administrative Procedure Act (5 U.S.C. § 556(d)) renders admissible any ‘oral or documentary evidence’ except ‘irrelevant, immaterial, or unduly repetitious evidence’”); Veg-Mix, Inc. v. United States Dep’t of Agric., 832 F.2d 601, 606 (D.C. Cir. 1987) (“Laxer standards of admissibility [than the FRE], however, apply to administrative tribunals.”); Sorenson v. NTSB, 684 F.2d 683, 686 (10th Cir. 1982) (“However, agencies are not bound by the strict rules of evidence governing jury trials.”) (citations omitted); Donovan v. Sarasota Concrete Co., 693 F.2d 1061, 1066 (11th Cir. 1982) (“In

to comply with the FRE is not a basis for excluding evidence.³¹³ The most challenging problem in administering this broader admission standard under the APA standards is hearsay evidence. Here, the FRE can provide valuable help. The rules providing exceptions to the exclusion of hearsay represent development and reflection over a long period of time.³¹⁴ More importantly, the basis of the exceptions is the reliability of the hearsay.³¹⁵ Reliability, in turn, is the center of the due process analysis for the use of hearsay in administrative proceedings, as described above.³¹⁶

Thus, compliance with the FRE should satisfy due process requirements in administrative proceedings.³¹⁷ It would almost certainly be reversible error to exclude evidence that meets FRE standards if the excluded evidence would have been material to the decision.³¹⁸ Constitutional case law is consistent with the FRE satis-

the interest of maintaining their autonomy, administrative agencies are not restricted to rigid rules of evidence.”); *Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir. 1974) (“Hearsay is admissible in administrative proceedings, which need not strictly follow conventional evidence rules.”); *Marlow v. INS*, 457 F.2d 1314, 1315 (9th Cir. 1972) (“The strict rules of evidence governing the admissibility of hearsay in judicial proceedings are not applicable to administrative hearings.”); 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.5 (1980).

This observation does not apply in those relatively rare situations where there are statutory or regulatory requirements that the FRE be followed. *See, e.g.*, 29 U.S.C. § 160(b) (NLRB proceedings “shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States. . .”).

313. *See Anderson v. United States Dep’t of Transp., FAA*, 827 F.2d 1564, 1571-72 (Fed. Cir. 1987).

314. *Ohio v. Roberts*, 448 U.S. 56, 62 (1980) (referring to “exceptions developed over three centuries”); *Ferrier v. Duckworth*, 902 F.2d 545, 547 (7th Cir. 1990) (Posner, J.) (noting hearsay rule and exceptions are “the product of careful elaboration and critique”).

315. *See, e.g.*, FED. R. EVID. 803 advisory committee’s notes (“The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person even though he may be available.”); *Ezeagwuna v. Ashcroft*, 325 F.3d 396, 406 (3d Cir. 2003) (stating “[a]lthough the Federal Rules [of Evidence] do not apply in this [administrative] case, exceptions set forth in the Rules focus on trustworthiness . . .”) (citing as examples Rules 803(6)-(8), 804(b)(3) and 807).

316. *See supra* notes 109-209 and accompanying text.

317. *See infra* notes 319-350 and accompanying text. Some agencies have implemented regulations that provide expressly that evidence that meets the requirements of the FRE is admissible. *See, e.g.*, Rules for Federal Deposit Insurance Corporation proceedings, 12 C.F.R. § 308.36.

318. Richard J. Pierce, Jr., *Use of the Federal Rules of Evidence in Federal Agency Adjudications*, 39 ADMIN. L. REV. 1, 7 (1987) (stating that based on “sensible reasoning” and

R

fyng constitutional evidence considerations. Significantly, in civil case law, there are virtually no cases raising questions of constitutional due process denial when the FRE are applied to a permit admission of evidence in civil judicial proceedings.³¹⁹ This indicates that in civil actions, compliance with the FRE essentially precludes constitutional challenge on due process grounds. In criminal law, however, the relationship of the FRE to constitutional requirements is a major recurring issue.³²⁰ The abundance of analysis in criminal cases is principally because the Confrontation Clause of the Sixth Amendment mandates confrontation of witnesses against the accused in criminal proceedings.³²¹ Significantly,

the propriety of evidence that meets FRE standards, it is right that an agency action should be reversed for failing to admit such proper evidence) (citations omitted); *Nat'l Ass'n of Recycling Indus., Inc. v. Fed. Mar. Comm'n*, 658 F.2d 816, 825 (D.C. Cir. 1980) (finding agency's disregard of probative hearsay evidence to be arbitrary and capricious); *See Director Office of Workers' Compensation Programs, United States Dep't of Labor v. Mangifest*, 826 F.2d 1318, 1331 (3d Cir. 1987) (agency decisions can be reversed for improperly excluding evidence).

319. Even in the rare instance when FRE issues that sound in constitutional terms come up, constitutional requirements are not discussed as such. In *Melville v. American Home Assurance Co.*, the defendant objected to the admission of an FAA Airworthiness Directive under FRE Rule 803(8) (public records and reports) because the report should be considered an expert opinion and the defendant was denied a chance to cross-examine under Rules 702 and 705. *See Melville v. Am. Home Assurance Co.*, 443 F. Supp. 1064, 1110-15 (E.D. Pa. 1977), *reversed on other grounds*, 584 F.2d 1306 (3d Cir. 1978). In denying the objection, the court commented on the relation of hearsay to cross-examination:

Obviously, the hearsay and inability to cross-examine objections are closely related, for one of the primary purposes for excluding hearsay evidence is the inability to cross-examine the declarant. Under limited and carefully controlled circumstances, however, some evidence that would otherwise be inadmissible as hearsay is expressly made admissible by the Federal Rules of Evidence because of the inherent reliability of such evidence. *See Advisory Committee Notes to Rule 803* ("The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person even though he may be available.")

Id. at 1111 n.70. The court, however, did not reference constitutional requirements in resolving the issue, but addressed the issue as being solely a matter of reconciliation between competing FRE rules.

320. *See, e.g., Ohio v. Roberts*, 448 U.S. 56, 66 n.9 (1980) (listing extensive commentary).

321. This express requirement does not apply to civil proceedings, including administrative proceedings. *See supra* note 197 and accompanying text.

even with the heightened requirements in the criminal context, the FRE hearsay exceptions usually pass constitutional muster.

For example, in *Ohio v. Roberts*,³²² the Court addressed the use at a criminal trial, under a state rule of evidence similar to FRE Rule 804(b)(1)) (testimony at prior hearing of now unavailable witness), of a transcript of the testimony of a now unavailable witness given at the preliminary hearing in the case. The Court held that the admission of such hearsay against an accused does not violate the Confrontation Clause.³²³ The Court noted that hearsay can be admitted despite the Confrontation Clause only when it has such trustworthiness that there is no departure from the reason for a confrontation right.³²⁴ The Court observed that it had previously held that hearsay must have “indicia of reliability” to overcome the Confrontation Clause.³²⁵ The Court summarized that hearsay is admissible “only if it bears adequate ‘indicia of reliability.’ Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.”³²⁶ The court found that the hearsay was properly admitted because the prior testimony had “indicia of reliability” under the hearsay exception for testimony taken in a prior hearing.³²⁷ The Court did not have to resort to a determination of “particularized guarantees of trustworthiness” of the particular testimony.³²⁸

322. 448 U.S. 56 (1980).

323. *Id.* at 66.

324. *Id.* at 65.

325. *Id.* at 65-66. The Court went on to say “[we have] applied this ‘indicia of reliability’ requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the “substance of the constitutional protection.” This reflects the truism that “hearsay rules and the Confrontation Clause are generally designed to protect similar values.” *Id.* at 66 (citations and footnote omitted).

326. *Id.* at 66.

327. *Id.* at 67-73.

328. *Id.* at 66, 72-73. The state law at issue permitted the use of criminal preliminary hearing testimony when the declarant was unavailable at trial. *Id.* at 59. The similar provision in FED. R. EVID. 804(b)(1), imposes certain conditions on the use of prior testimony, including an opportunity for cross-examination.

Subsequently, in *United States v. Inadi*,³²⁹ the Court accepted the co-conspirator exceptions from hearsay exclusion as providing a basis for admission.³³⁰ The Court has held that other FRE hearsay exceptions satisfy the Confrontation Clause in criminal cases. For example, in *Idaho v. Wright*³³¹ the Court noted that the “excited utterance,” “dying declaration,” and “medical treatment” exceptions to hearsay evidence exclusion satisfied the Confrontation Clause requirements.³³²

In the most recent case on the subject, *Crawford v. Washington*,³³³ the Court revisited the requirements to satisfy the Confrontation Clause in criminal cases in a ruling that tends to reduce the use of hearsay in criminal trials in the specific form of pre-trial *ex parte* testimonial statements. These statements do not qualify as FRE hearsay exceptions. In *Crawford*, the defendant was convicted of stabbing a man who allegedly tried to rape his wife.³³⁴ The defendant’s wife had been present at the stabbing, but she was not available to testify at trial because of the state’s marital privilege, which bars a spouse from testifying without the other spouse’s consent.³³⁵ The trial court in *Crawford* admitted a taped police interview with the defendant’s wife in which she described events at the time of the stabbing.³³⁶ The court admitted the interview on the grounds that it bore “particularized guarantees of trustworthiness” under *Ohio v. Roberts*, not under a court evidence hearsay exception.³³⁷ The interview would not meet the FRE exclusion exception for prior testimony under Rule 804(b)(1) because prior testimony is admissible only if it is sworn and the defendant had an opportunity and similar motive to conduct cross-examination. After the defendants’ conviction, the intermediate court of appeals reversed, finding that the statement did not bear “particularized guarantees of

329. 475 U.S. 387 (1986).

330. *Id.* at 395-96. See FED. R. EVID. 801(d)(2)(E) (This is technically an exclusion from the definition of hearsay and not an exception to the application of the exclusion rule).

331. 497 U.S. 805, 820 (1990).

332. See FED. R. EVID. 803(2), 804(b)(2), and Rule 803(4), respectively.

333. 541 U.S. 36 (2004).

334. *Id.* at 38.

335. *Id.*

336. *Id.* at 40-41.

337. *Id.* at 40.

trustworthiness.”³³⁸ The state supreme court reversed the intermediate court, finding that the statement did bear “guarantees of trustworthiness.”³³⁹

The Supreme Court noted that factual situations of the admission of hearsay in most Supreme Court precedent, including *Ohio v. Roberts*, satisfied the Confrontation Clause requirements of cross-examination.³⁴⁰ The Court, however, rejected the generalized formulation of a “reliability” exception for a particular category of hearsay: “*ex parte* testimony,” *i.e.*, statements made essentially as trial witness testimony but outside of the trial cross-examination process.³⁴¹ The Court noted that various descriptions of these “testimonial” statements exist, including “‘*ex parte* in-court testimony, or its functional equivalent – that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.’”³⁴²

Significantly, the Court excludes from the confrontation requirement in criminal trials most situations that would qualify as hearsay exceptions in the FRE. Thus, the Court held that even “testimonial” statements are admissible where the defendant had an opportunity for cross-examination and the witness is unavailable at trial, which is consistent with the prior testimony exception in the FRE.³⁴³ The Court also permits the free use of prior testimonial statements of a witness who appears at trial, presumably including the admission of such hearsay as prior inconsistent statements of a witness, as permitted under the FRE.³⁴⁴ It appears the Court also apparently accepts such FRE prior statement exceptions as “dying

338. *Id.* at 41.

339. *Id.*

340. *Id.* at 56-59. The Court noted that in *Ohio v. Roberts* there had been prior cross-examination. *Id.* at 58. The evidence rule used in *Roberts* as the basis for admission required opportunity for cross-examination. *Id.* at 58. *See also supra* note 328.

341. *Crawford*, 541 U.S. at 60.

342. *Id.* at 51.

343. *Id.* at 52-57, 59 n.9. The Court also noted that the evidence outcome in *Roberts* was consistent with this exception. *Id.* at 58. *See also* FED. R. EVID. 804(b)(1).

344. *Crawford*, 541 U.S. at 59 n.9 (“Finally, we reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements.”). *See* FED. R. EVID. 801(d)(1).

declarations” and probably “spontaneous declarations.”³⁴⁵ The Court also permits common hearsay exceptions that it noted are not “testimonial,” including statements in furtherance of a conspiracy and business records.³⁴⁶ Indeed, the Court seems willing to allow further hearsay exceptions development except for “testimonial” statements where there was no prior opportunity for cross-examination.³⁴⁷ What is excludible are *ex parte* hearsay trial-type statements being used as a substitute for witnesses at a criminal trial where there has been no opportunity for confrontation. These are statements not usually admissible under the FRE. Thus, even when the stringencies of the Confrontation Clause in its most restrictive interpretation are applied, hearsay that meets most of the common exceptions in the FRE can be admitted even in criminal actions.

Since exceptions to hearsay exclusion in the FRE generally satisfy even the expressly more stringent constitutional requirements applicable to criminal prosecutions, they satisfy the constitutional requirements in administrative proceedings.³⁴⁸ That is, the admis-

345. *Crawford*, 541 U.S. at 56 n.6, 58 n.8. See also FED. R. EVID. 804(b)(2), 803(1), (2).

346. *Crawford*, 541 U.S. at 55 (“Most of the hearsay exceptions [at the time of the Sixth Amendment] covered statements that by their nature were not testimonial – for example, business records or statements in furtherance of a conspiracy.”). See also FED. R. EVID. 803(6), 801(d)(2).

347. *Crawford*, 541 U.S. at 68 (“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.”).

348. The relationship of constitutional compliance of the FRE to the propriety of admitting evidence in administrative proceedings is illustrated in *Felczerek v. Immigration and Naturalization Service*, 75 F.3d 112, discussed above. See *supra* notes 199-205. In *Felczerek*, where the court was dealing with documents that were public records under Rule 803(8) or records of regularly conducted activity under Rule 803(6), the court was confronted with the claim by an alien that he was denied due process in a deportation hearing because of the admission of the records. The records included a forged INS letter, a DMV application by the alien with a DMV official’s handwritten notation that the alien had submitted an “Immigration and Naturalization Letter” as proof of identification, and a standard INS form filled out by the arresting INS agent describing the circumstances of the alien’s arrest, including a statement that the alien had presented an INS letter and claimed he received it in the mail. The court recognized that the DMV application with the official’s notations and the INS form were hearsay. *Id.* at 115. The court had to determine whether, in light of the alien’s claim that his due process rights were violated by not having the opportunity to cross-examine the authors of the

sion of evidence in criminal trials that is in compliance with the FRE is also “fundamentally fair” in administrative proceedings.³⁴⁹

The use of the FRE to determine what can be admitted has valuable practical advantages. It can help resolve issues in the most difficult areas, hearsay and due process. Its codified modern form makes access and reference to it relatively easy. The rules also provide accessible guidance in the form of accompanying comments by the drafters that often explains the reasoning behind the rules. Further, extensive case law interpretation is readily available through linkage to a specifically identified rule. All this makes it easier to utilize the rules and to get more consistent and correct determinations. There is also a practical advantage to those preparing cases. Reference to the FRE cannot tell those preparing to try a proceeding *all* the evidence that will be admitted, because there is evidence that is likely to be admitted even if it does not comply with the FRE. One preparing for a hearing, however, by reference to the FRE, should be able to determine whether particular evidence *will be* admitted. This is of significant practical value to parties shaping a case to be tried. It also presents a structure around which arguments on admission and reliance can be framed, as opposed to a more amorphous standard that can cause misdirected argument and ultimately cause determinations on admissibility to drift into error or confusion.³⁵⁰ The FRE provide an established framework to admit reliable evidence, to permit efficient trial preparation, and

documents, whether the use of the documents was “fundamentally fair” where “[i]n the evidentiary context, fairness is closely related to the reliability and trustworthiness of the evidence.” *Id.* at 115 (citations omitted). The court stated that the Federal Rules of Evidence “recognize the reliability and probative worth of public records by allowing into evidence as exceptions to the hearsay rule” such records under Rule 803(8). *Id.* at 116. The court also cited Rule 803(6) (records of regularly conducted activity) as an exception to hearsay exclusion that also might apply to the DMV application. *Id.* at 116 n.3. Over objections of lack of due process through lack of cross-examination, the court recognized that evidence that meets FRE standards probably meets due process standards.

349. Some agencies expressly make compliance with the FRE a ground for admission. The rules of practice for hearings of the Office of the Comptroller expressly provide that evidence that complies with the FRE is admissible even though evidence that does not meet the FRE may still be admissible. *See* 12 C.F.R. § 19.36(a) (2005). The rules for the Federal Reserve and the Federal Deposit Insurance Corporations are the same. *See* 12 C.F.R. § 263.36 (2005) & 12 C.F.R. § 308.36 (2005).

350. 5 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 1101.02(6) (8th ed. 2004) (Federal Rules of Evidence do not apply to administrative

to take some of the vagaries out of determinations of what should be admitted.

2. Federal Rules of Evidence Admission Tests

The FRE are helpful in several very common situations in administrative proceedings, given the statutory scheme for broad admissibility and the widespread use of reports, records, and prior statements. FRE standards on authenticity and hearsay are most relevant. The FRE not only establish what qualifies for admission because that evidence almost always will satisfy any due process requirements, but they also serve as guidance for what traits to look for in evidence situations that may not actually meet the FRE, but where the evidence has qualities that meet due process requirements.

a. Authentication

Authentication of documents and other materials, i.e., that they are what the proponent asserts they are, is required under Rule 901 of the FRE.³⁵¹ Certain methods of establishing authenticity are set out in Rule 901.³⁵² These standards can be helpful in deciding what to look at to determine if a document has the proper indicia of reliability. Further, Rule 902 provides that certain documents do not have to be authenticated by extrinsic evidence.³⁵³ These include business records, if they meet certain conditions. The authentication standards indicate what may properly be considered as authenticated without violation of due process.³⁵⁴

Even though the authenticity standard can be lower in administrative proceedings, the FRE standards are recognized as helpful in determining the authenticity of documents for admission and

proceedings, but are often used as “a helpful guide to proper hearing practices” (quoting *Yanopoulos v. United States Dep’t of the Navy*, 796 F.2d 468 (Fed. Cir. 1986)).

351. See FED. R. EVID. 901 (Requirement of Authentication or Identification).

352. See FED. R. EVID. 901(b)(1)-(10) (citing examples of ways to authenticate or identify). For some administrative proceedings, rules on authenticity specify procedures to expedite admission of documents. See, e.g., rules for controlled substances proceedings, Drug Enforcement Administration, Dep’t of Justice, 21 C.F.R. § 1316.59(c) (2005).

353. See FED. R. EVID. 902(1)-(12) (citing documents and evidence which are self-authenticating).

354. FED. R. EVID. 902(11).

use in administrative proceedings. In *Woolsey v. National Transportation Safety Board*,³⁵⁵ the central issue was whether the respondent pilot was engaged in common carrier operations, for which he did not have the appropriate licenses. The government introduced, through the testimony of investigators, advertisements in publications and written information received by customers of the pilot tending to show that he was engaged in common carrier operations. The materials were received into evidence. The respondent argued that the documents were not authenticated by witnesses with personal knowledge and that he was thus denied a right to confront and cross-examine witnesses against him. The court noted that the FRE did not apply to administrative proceedings and that the standards for authentication are “somewhat lower” than under the FRE. The court held, however, that there must be some showing that the documents are what they are purported to be, otherwise they would not be relevant or material and hence would be excluded.³⁵⁶ The court rejected the respondent’s argument that the authors of the materials had to be produced. The court found that the documents met even the FRE standards for authenticity.³⁵⁷ The court held that the advertisements in publications were self-authenticating under Rule 902.³⁵⁸ It also held that the material received from customers by investigators was authenticated by testimony of the investigators of how they sought and received the evidence, and that, consistent with the Advisory Notes to Rule 901, that was sufficient knowledge of the authenticity of the documents.³⁵⁹ The court also rejected the claim that not having the customers testify deprived him of confrontation and cross-examination rights.³⁶⁰ The court noted that all but one of the cases cited by respondent were criminal cases, which the court found inapposite in this civil proceeding.³⁶¹ The sole exception was *Greene v. McElroy*,³⁶² discussed above,³⁶³ which the court distinguished as invol-

355. 993 F.2d 516 (5th Cir. 1993).

356. *Id.* at 519-20.

357. *Id.* at 520.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Woolsey*, 993 F.2d at 521.

362. 360 U.S. 474 (1959).

363. *See supra* notes 164-167 and accompanying text.

ing a hearing where the administrative board was relying on secret reports that were kept from the respondent, whereas here, the government presented open evidence and the pilot could confront the investigators over the source of the documents.³⁶⁴

Failure to meet the FRE authenticity standard does not preclude admission in an administrative proceeding if the authenticity is not reasonably put in dispute by the opponent. In *Gallagher v. NTSB*,³⁶⁵ a vial of blood used for blood alcohol testing of a pilot was not sealed by the normal security method before shipment to a testing lab. The respondent argued that because of this the government could not establish authenticity under FRE Rule 901 and that the sample could not constitute substantial evidence. The court rejected the argument that evidence must be authenticated with the precision of the FRE, although there must be enough shown about the evidence to make it relevant and material for admission purposes.³⁶⁶ The court observed that there was testimony about how the vial was marked after the sample was drawn and how it was packed and sealed for shipment to the laboratory.³⁶⁷ Since this treatment was protective of the sample, the only way it could have been corrupted was by deliberate tampering, and since there was no suggestion or evidence of tampering, the court would not reject the evidence on unreasonable mere speculation.³⁶⁸ Under this approach, consistent with the Benthamite common sense approach to evidence in administrative proceedings, if affirmative evidence shows a basis for a reasonable person to believe that a document or real evidence is what it is purported to be, the party opposing the admission must introduce some specific showing that challenges that conclusion – and mere speculation will not be sufficient.³⁶⁹

364. *Greene*, 360 U.S. at 521.

365. 953 F.2d 1214 (10th Cir. 1992).

366. *Id.* at 1218.

367. *Id.* at 1218-19.

368. *Id.*

369. *Anderson v. United States Dep't of Transp., FAA*, 827 F.2d 1564, 1570-71 (Fed. Cir. 1987) (holding that even as to imperfect documents, "generalized charges" of tampering not sufficient to prevent admission and use).

b. Hearsay

- i. *Non-hearsay: prior statements of party opponents;
prior inconsistent statement of a witness*

The FRE do not exclude as hearsay prior statements of a party opponent and prior inconsistent statements of any live witness.³⁷⁰ These forms of evidence may have the technical form of hearsay in that they are out-of-court statements, but they are not defined as hearsay in the FRE because the basic problem with hearsay, the unfairness of an inability to cross-examine the maker of the statement is absent. In both cases the maker is in the courtroom and available to be cross-examined. In the case of a prior inconsistent statement of a witness, by definition the witness is on the stand at the hearing and a party can attack the prior statement through examination of the person who made it.³⁷¹ In the case of prior statements of a party opponent or his agents, if the statements were unreliable when made, it is fair to let the party take the consequences and to come forward and explain the statements.³⁷² No due process issues can be raised by an opponent of such statements, and they would come in an administrative proceeding regardless of the FRE, assum-

370. See FED. R. EVID. 801(d)(1)-(2). It is important to note that the prior inconsistent statement comes into evidence without restriction as to the parties to which it applies. That is, if a plaintiff moves for the admission of a prior inconsistent statement and it is admitted in a multi-defendant proceedings, it can be used against all defendants. The prior statement of an opposing party, in contrast, comes in only against the party who made the prior statement (“[t]he statement is offered against a party . . .”). Thus, if a plaintiff moves for the admission of a prior statement of a particular party in a multi-defendant proceeding, the statement cannot be used against the other parties.

371. 4 STEPHEN A SALZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL § 801.02(3)(a) (8th Ed. 2001). See FED. R. EVID. 801 advisory committee’s note; 5 JACK B. WEINSTEIN & MARGARET BERGER, WEINSTEIN’S FEDERAL EVIDENCE 801 App.01[2] (2d ed. 2002).

372. 8 SALZBURG, *supra* note 371, at § 801.02 [2][b]; WEINSTEIN & BERGER, *supra* note 371, at § 801.30[1][a]. See FED. R. EVID. 801 advisory committee’s note.

Where the party opponent is an entity, the FRE provides that statements of employees of the entity are admissible only under certain circumstances. NLRB v. Cal-Maine Farms, Inc., 998 F.2d 1336, 1343 (5th Cir. 1993) (employees testified that their supervisor made certain admissions during the course of their work; court cited FED. R. EVID. 801(d)(2)(D) (admission of employer’s “agent or servant concerning a matter within the scope of the agency or employment” in upholding admission in NLRB proceeding where FRE applies to the extent practicable).

ing the statements are not otherwise irrelevant, immaterial, or unduly repetitious.³⁷³

ii. *Hearsay exceptions even when declarant is available*

The FRE provide for admission of some hearsay even if the declarant is available to be called as a witness.³⁷⁴ The basis of these exceptions is that the evidence is so inherently reliable there is no need to call the person who originated the information, although a party may need to call a person who can vouch for the method of the recording of the information. Thus public records (FRE Rule 803(8)) were admissible in *Felzcerek*,³⁷⁵ discussed above, and present sense impressions and excited utterances (FRE Rule 803(1), (2)) were admissible in *Bennett*.³⁷⁶

Although compliance with the FRE provides for admission, failure to comply does not necessarily exclude hearsay evidence in administrative proceedings even if a live witness is available. In *Veg-Mix, Inc.*,³⁷⁷ discussed above, the respondent objected to the use of a batch of invoices because no custodian had testified as to the invoices as required for the business records hearsay exception of FRE Rule 803(6) at that time.³⁷⁸ The court held that such techni-

373. As part of its exposition, the Court in *Lilly v. Virginia*, 527 U.S. 116 (1999) held that if a statement against penal interest is used against the defendant who made it, it would "unquestionably" be admissible under longstanding principles. *Id.* at 127. The Court was presumably referring to the exemption from hearsay exclusion for admissions by a party-opponent. *Lilly* was a state prosecution; the federal rule is FED. R. EVID. 801(d)(2). See also *Sorenson v. NTSB*, 684 F.2d 683, 686 (10th Cir. 1982); *Marlowe v. INS*, 457 F.2d 1314, 1315 (9th Cir. 1972) (upholding admission and use in deportation hearing of alien registration form filled out by petitioner and a report of investigation containing petitioner's registration as a prostitute in Nevada was probative and use was not fundamentally unfair so as to deprive petitioner of due process). The items in *Marlowe* would probably be admissible under Rule 801(d)(2) as an admission of a party-opponent — i.e., technically defined as non-hearsay for purposes of the exclusion of hearsay in Rule 802.

374. See FED. R. EVID. 803(1)-(23) (citing hearsay exceptions even though declarant is available as a witness).

375. 75 F.3d 112.

376. 66 F.3d 1130.

377. 832 F.2d 601.

378. Rule 803(6) now permits admission by certification under certain conditions that are set forth in Rules 902(11) and 902(12).

calities are not required, but rather the issue is relevance for admission, and then a question of weighing.³⁷⁹

Admissibility does not determine that the hearsay must be accepted as true or be given decisive weight in administrative proceedings. In *NLRB v. Cal-Maine Farms, Inc.*,³⁸⁰ the ALJ admitted voluminous records of shipments of eggs, but they were accorded little weight because they contained discrepancies and they were records of the party offering them.³⁸¹ In giving little weight to such records, the court noted that the comments to FRE Rule 803(6) discuss potential problems with business records and that it is permissible for the trier of fact to decide what weight should be given to them.³⁸²

iii. *Hearsay exceptions when declarant is unavailable*

Some hearsay is admitted only when a declarant is unavailable.³⁸³ The exceptions for such hearsay are made because there is no other way to get the information, and the indicia of reliability, while not as strong as for the exceptions when the declarant is available, are sufficient to meet due process standards. The court in *Ortiz v. Eichler*,³⁸⁴ without expressly referring to the FRE, held that despite a regulatory requirement that claimants have an opportunity to confront and cross-examine witnesses, testimony from a prior court proceeding to which the claimant was a party and had an opportunity to cross-examination was admissible.³⁸⁵ This is consistent with FRE Rule 804(b)(1).³⁸⁶ In a somewhat looser situation,

379. 832 F.2d at 606.

380. 998 F.2d 1336 (5th Cir. 1993).

381. *Id.* at 1342-43.

382. *Id.* at 1343.

383. *See* FED. R. EVID. 804(b)(1)-(6) (citing hearsay exceptions when witness is unavailable).

384. 794 F.2d 889 (3d Cir. 1986).

385. *Id.* at 895-96.

386. FED. R. EVID. 804(b)(1) (“*Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.”).

in *Martin-Mendoza v. Immigration & Naturalization Service*,³⁸⁷ an alien appealing an order of deportation objected to the admission at his deportation hearing of the statements given to an INS agent by another alien in his group.³⁸⁸ The alien who made the statements fled before the hearing and could not be found.³⁸⁹ The court found the admission to be acceptable because of its probative value and the fundamental fairness of its use. The court noted that the statement was sworn and verified and the declarant was unavailable.³⁹⁰ The court also noted that the statement would probably be admissible in court under the FRE as they apply to unavailable declarants.³⁹¹

IV. SUMMARY AND CONCLUSION

Evidence standards in administrative proceedings are affected by some basic conflicting considerations. One is the conflict on the scope of evidence that should be available: the advantage, as Jeremy Bentham saw it, of allowing consideration of any information that an ordinary person would want to have available when making a decision about daily matters versus the disadvantage of allowing evidence that may adversely affect persons without providing them a full opportunity to test and prevent the use of some information. A second conflicting consideration is the cost of procedures: costly, highly formal proceedings that provide the maximum protection to respondents versus less formal proceedings that save costs and meet practicality needs. A third conflict is the discipline of determining evidence matters: a broad, unspecified standard that provides greater information but makes determination on evidence issues less certain versus established judicial evidence standards that provide more structure but may exclude some useful evidence and require more formal technical knowledge.

387. 499 F.2d 918 (9th Cir. 1974).

388. *Id.* at 921.

389. *Id.*

390. *Id.*

391. *Id.* ("Under Rule 804(a)(5) and (b)(4) of the Proposed Rules of Evidence for the United States Courts and Magistrates, it would probably be admissible in a trial in court." Rule 804(b)(4) currently excepts statements of personal or family history from hearsay exclusion).

The drafters of the APA attempted to address some of these conflicts by providing for very broad admission of evidence followed by restrictions on the use of evidence in making decisions. Reviewing courts tend to analyze evidence issues, principally as to hearsay evidence, in constitutional terms. This also involves conflicting considerations. The constitutional test is based on an assessment the need for cross-examination balanced with consideration of the rights of the individual and needs of the government program. This is the “fundamental fairness” of the process test.

The application of these various tests produces uncertainty. There are, however, some steps that can be followed to minimize the uncertainty, particularly as to hearsay. First, the initial review on the admission of evidence should be based on whether the FRE would allow admission. That is, if the evidence meets the FRE requirements and would be admissible in a civil judicial action, it satisfies the constitutional standard of “fundamental fairness” in *Perales* and elsewhere. It should be admitted unless it is “irrelevant” or “immaterial” under the APA admission standard. To be used subsequently as a basis for a decision, it must be determined to be “reliable, probative, and substantial” under APA standards.

If the proffered evidence does not meet the FRE standards for admissibility, then a constitutional test must be applied directly. The evidentiary core of the test is an evaluation of whether further testing would meaningfully add to the determination of trustworthiness, i.e., an assessment of the “reliability and probative value” of the evidence. If further testing is not needed, due process is not offended by its admission and use even if it does not satisfy the FRE. Where a basis for inclusion or exclusion is not clear, a determination should be delayed to the end of the hearing or to a decision because corroboration by other evidence can be important and neither the APA nor the Constitution is offended by mere admission. A further consideration is the availability or unavailability of the maker of the hearsay. If hearsay evidence is in the form of a witness statement and the witness is freely available, the hearsay may be declined. If the witness of apparently reliable hearsay is not available in a practical sense or the truth of the hearsay is not meaningfully challenged, it can be admitted and used. Also, the party advancing a constitutional challenge to the admission or use of the

proffered evidence bears the burden of raising a meaningful challenge that the evidence fails to meet the constitutional test if the exclusion is not obvious. This is because the constitutional objection is not premised on form, as with a FRE objection in court; it is premised on the substantive issue of whether due process would be denied by admission and use. Thus, a simple objection by the opponent of admission that the evidence does not meet FRE requirements or that he or she has not been able to cross-examine the creator of the hearsay is not sufficient in itself to stop admission. Finally, in close cases the evidence should be admitted because the evidence will undergo a further evaluation of whether it is "reliable, probative, and substantial evidence" before it can be used to support a decision.

In the end, the central issue is that administrative proceeding evidence standards must be practical while also protecting basic rights. An understanding of the mechanisms, legislative and constitutional, that help reconcile the different interests is essential. Applying the FRE initially and then specific steps within the broader constitutional test makes the task more manageable.