USE OF THE FEDERAL RULES OF EVIDENCE IN FEDERAL AGENCY ADJUDICATIONS

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On June 20, 1986, the Administrative Conference adopted Recommendation 86-2, Use of the Federal Rules of Evidence in Federal Agency Adjudications. The vigorous debate that preceded adoption of the recommendation focused on three primary goals.[1] First, the Conference expects the recommendation to produce greater uniformity among agencies and among presiding officers in their approach to evidentiary decisionmaking. Second, the Conference hopes to discourage Congress from enacting in new statutes or retaining in existing statutes[2] provisions that purport to mandate use of the Federal Rules of Evidence (FRE) in agency adjudications. Most of the exclusionary provisions of the FRE, such as the hearsay rule and its many exceptions,[3] were promulgated to control factfinding by lay jurors;[4] technical

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[1]The goals stated are based on the author's interpretation of the debate that preceded passage of the recommendation. The Conference has not adopted this, or any other, set of goals underlying adoption of the recommendation.

[2]*See, e.g.*, 29 U.S.C. § 160(B) (1982) (purporting to mandate use of the FRE in National Labor Relations Board adjudications "so far as practicable").

[3]FRE 801–805.

[4]*See* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.5 (1980).

application of these rules directly in agency adjudications is unnecessary, inappropriate and counterproductive. Third, the Conference hopes to encourage agencies to assist presiding officers in their evidentiary decisionmaking by conferring clear discretion to exclude evidence the presiding officer considers unreliable, particularly when admission of such unreliable evidence is likely to require an inordinate amount of valuable hearing time. The text of the recommendation and the consultant's report in support of the recommendation[5] follow.

RECOMMENDATION 86-2

1. Congress should not require agencies to apply the FRE, with or without the qualification, "so far as practicable," to limit the discretion of presiding officers to admit evidence in formal adjudications.[6]

2. Agencies should adopt evidentiary regulations applicable to formal adversarial adjudications that clearly confer on presiding officers discretion to exclude unreliable evidence and to use the weighted balancing test in Rule 403 of the FRE, which allows exclusion of evidence the probative value of which is substantially outweighed by other factors, including its potential for undue consumption of time.

3. To facilitate the efficient and fair management of the proceeding, when otherwise appropriate, an agency should announce in advance of a formal adjudication as many of the factual issues as the agency can foresee to be material to the resolution of the adjudication.

REPORT

The purpose of this study is to suggest the extent to which federal agencies should rely upon the FRE in conducting adjudicatory proceedings. At present, 1121 federal Administrative Law Judges (ALJs) apply 280 different sets of evidentiary rules in the process of presiding

[5]The consultant's report has been revised to enhance consistency with the final version of the recommendation and the debate preceding adoption of the recommendation.

[6]The term "formal adjudications" refers to adjudications required by statute to be determined on the record after opportunity for an agency hearing in accordance with the Administrative Procedure Act, 5 U.S.C. §§ 554, 556 and 557, and also includes agency adjudications which by regulation or by agency practice are conducted in conformance with these provisions. The recommendation does not apply to nonadversarial hearings, *e.g.*, many Social Security disability proceedings.

over far more adjudicatory proceedings each year than are resolved in the federal courts. The evidentiary procedures now used in agency adjudications vary substantially along a spectrum from no reference to evidentiary rules at all,[7] to hortatory reference to the FRE as a source of guidance,[8] to mandatory incorporation of the FRE.[9]

During the period from 1940 through 1971, scholars and appellate judges engaged in a lively debate concerning the appropriate role of formal evidentiary rules in agency adjudications. Professor Davis devoted much of his scholarship during this period to developing and supporting his thesis that formal rules of evidence have no place in agency proceedings because of the many differences between agencies and courts.[10] Dean Gellhorn later joined him in this effort by writing what remains today the most complete statement of the case against the application of evidentaiary rules designed to govern jury trials in agency adjudicatory proceedings.[11] Federal appellate courts declined to accept this thesis until the Supreme Court's 1971 opinion in *Richardson v. Perales*,[12] overruling the "legal residuum rule," seemingly invited agencies to admit evidence that would be inadmissible in a court by holding that an agency could predicate a finding of fact entirely on such evidence in some circumstances.

Since 1971 scholars have devoted little attention to the broad question of the evidentiary rules appropriate for use by federal agencies. The relatively little scholarly writing in this important area has been narrowly focused—either on the reaction of the courts of a particular state to the Supreme Court's holding in *Richardson v. Perales*[13] or on the

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[7]A substantial majority of federal agencies merely recite or paraphrase the evidentiary provision in the Administrative Procedure Act, 5 U.S.C. § 556(d). That provision neither establishes nor refers to any rules of evidence. *See* text accompanying notes 18–23.

[8]29 C.F.R. § 18.44 (DOL).

[9]*E.g.*, 29 C.F.R. § 102.39 (NLRB); 43 C.F.R. § 4.122 (Department of Interior Board of Contract Appeals).

[10]Davis, *Hearsay in Administrative Hearings*, 32 GEO. WASH. L. REV. 689 (1964); Davis, *The Residuum Rule in Administrative Law*, 28 ROCKY MTN. L. REV. 1 (1955); Davis, *Evidence Reform: The Administrative Process Leads the Way*, 31 MINN. L. REV. 584 (1950); Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364 (1942).

[11]Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1 (1971).

[12]402 U.S. 389 (1971).

[13]*E.g.*, Stern, *The Substantial Evidence Rule in Administrative Proceedings: Restrictions on the Use of Hearsay Since Richardson v. Perales*, 36 ARK. L. REV. 102 (1983); Note, *Administrative Law—Evidence—Hearsay—Residuum Rule—Unemployment Compensation Board of Review v. Ceja*, 20 DUQ. L. REV. 343 (1982); Note, *Administrative Law—Hearsay Evidence—Uncorroborated Hearsay Evidence Will Not Support a Factual Finding in Unemployment Compensation Proceedings—Ceja*, 87 DICK. L. REV. 193 (1982).

unique issues that arise when an agency is urged to apply a constitutionally based exclusionary rule in an adjudicatory proceeding.[14]

It is important to revisit this significant issue at this time. Agencies are being asked to play an increasingly important role in the legal system, both as policymakers and as administrators of "mass justice."[15] Their evidentiary regimes differ significantly—sometimes as a result of congressional decisions and sometimes as a result of voluntary adoption of rules more stringent than Congress required. Since 1971, Congress and the Court have adopted for the first time a complete set of evidentiary rules applicable to federal courts.[16] ALJs apply agency evidentiary rules in an uneven manner,[17] and reviewing courts experience difficulty in their attempts to review evidentiary rulings made under some of the rules of evidence adopted by agencies or imposed on them by Congress.[18]

The study consists of three parts. Part I is a description of the present state of the law, including the statutory framework in which agencies select evidentiary rules, the evidentiary regulations agencies have adopted, and judicial decisions interpreting and applying those statutes and regulations. Part II reports the results of a survey of ALJs with respect to the extent of their reliance on the FRE and their opinions concerning the relationship between the evidentiary rules they apply and several criteria of the fairness, efficacy, and efficiency of the adjudicatory proceedings over which they preside. Part III of the study includes analysis of the issues presented and recommendations concerning the appropriate role for the FRE in agency proceedings.

I. THE PRESENT STATE OF THE LAW

Statutes

There are two potential sources of statutory constraints on an agency's choice of evidentiary rules—the Administrative Procedure Act

[14]*E.g.*, Note, *The Good Faith Exception to the Exclusionary Rule: Should It Apply to OSHA Enforcement Proceedings?* 9 U. DAYTON L. REV. 95 (1983); Cochell, *The Exclusionary Rule and Its Applicability to OSHA Civil Enforcement Proceedings*, 12 U. BALT. L. REV. 1 (1982).

[15]*See* J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS (1978); Pierce, *The Choice Between Adjudicating and Rulemaking for Formulating and Implementing Energy Policy*, 31 HASTINGS L.J. 1 (1979).

[16]FED. R. EVID., Pub. L. No. 93-595; 88 Stat. 1926 (1975).

[17]Some ALJs "always" rely on the Federal Rules, while other ALJs "never" or "rarely" rely on the Federal Rules. *See* table on page 13.

[18]*E.g.*, NLRB v. Process and Pollution Control Co., 588 F.2d 786 (10th Cir. 1978); Helena Laboratories Corp. v. NLRB, 557 F.2d 1183 (5th Cir. 1977); NLRB v. Addison Shoe Corp., 450 F.2d 115 (8th Cir. 1971). *See also* text at notes 34–36.

(APA) and agency organic acts. The only provision of the APA that relates to evidentiary issues is Section 556(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.[19]

The language and legislative history of this provision leaves no doubt that, while Congress intended to limit agencies' power to base findings of fact on evidence of low quality, it also intended to permit agencies' discretion to decline to apply the rules of evidence that govern judicial trials.[20]

Many agency organic acts do not address evidentiary issues at all, except by incorporating the APA by reference. Of those that do address evidentiary issues, most either recite the APA standard verbatim or paraphrase that standard.[21] In a few statutes, however, Congress purported to limit the agency's discretion to admit evidence that would not be admissible in court. The statutory provision applicable to National Labor Relations Board (NLRB) adjudications illustrates the nature of the constraint most frequently imposed:

> 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.[22]

Agency Regulations

There are 280 regulations that govern evidentiary decisionmaking by federal agencies. Most agencies have a single evidentiary regulation applicable to all adjudications, but some distinguish among proceedings of different types or conducted under different statutes.[23] Agency evidentiary regulations differ considerably in their precise language, but they can be divided initially into two general categories. The

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[19]5 U.S.C. § 556(d) (1982).

[20]*See* S. Doc. No. 248, 79th Cong., 2d Sess. 30, 208, 270 (1946); *Report of the Attorney General's Committee on Administrative Procedure* 70–71 (1941). *See also* K. DAVIS, *supra* note 4, at § 16.4 (1980).

[21]*E.g.*, 42 U.S.C. § 7171(G) (1982) (Federal Energy Regulatory Commission must comply with APA § 556).

[22]29 U.S.C. § 160(B) (1982).

[23]*Compare* 39 C.F.R. § 916.7, *with* 39 C.F.R. § 952.18 (differing rules of Postal Service).

majority—243 of 280—make no reference to the FRE and appear not to impose any constraints on the discretion of ALJs to admit evidence. Often these provisions either parrot the APA or paraphrase it. The other 37 evidentiary regulations make some reference to the FRE.

Of the agency evidentiary regulations that include a reference to the FRE, most require use of the FRE "so far as practicable." In the case of the NLRB,[24] Congress required the agency to adopt such an evidentiary regulation. In other cases, such as the Occupational Safety and Health Review Commission (OSHRC),[25] the U.S. Department of Interior (DOI),[26] Interstate Commerce Commission (ICC),[27] and Federal Communications Commission (FCC),[28] the agency apparently adopted the "so far as practicable" standard voluntarily. In a few cases, an agency's evidentiary regulation refers to the FRE, but only as a source of potentially useful guidance to ALJs. The U.S. Department of Labor's (DOL) evidentiary regulation illustrates this approach.[29] The DOL's unusually long regulation begins with a general provision that describes the role of the FRE in DOL adjudications: "(a) Applicability of Federal Rules of Evidence. Unless otherwise provided by statute or these rules, and where appropriate, the Federal Rules of Evidence may be applied to all proceedings held pursuant to these rules." The contrast between the permissive reference to the FRE in the DOL regulation and the mandatory reference in the "so far as practicable" standard is evident. The DOL regulation goes on to paraphrase several Federal Rules, including Rule 103 (objections and offers of proof), Rule 402 (relevant evidence generally admissible), Rule 403 (exclusion of relevant evidence on grounds of prejudice, confusion, waste of time, or undue delay), and Rule 1006 (summaries admissible). The DOL regulation also expressly authorizes ALJs to limit the number of witnesses who testify on an issue and to limit the amount of cross-examination of witnesses in order to avoid prolonging the hearing or burdening the record—a power implicitly accorded federal judges by FRE 403.[30]

Judicial Interpretation of Statutes and Regulations

If an agency's statutory and regulatory provisions relating to admis-

[24]29 U.S.C. § 160(B).
[25]29 C.F.R. § 2200.72.
[26]43 C.F.R. § 4.122.
[27]49 C.F.R. § 1114.1.
[28]47 C.F.R. § 1.351.
[29]29 C.F.R. § 18.44.
[30]SCM v. Xerox Corp., 77 F.R.D. 10 (D. Conn. 1977) (limiting number of days in which parties could present evidence under FRE 403).

sibility of evidence incorporate only the APA standard, it seems impossible for an agency action to be reversed on the basis that the agency erroneously admitted evidence. Courts routinely decline to reverse agencies on this basis.[31] The converse does not follow, however. An agency action can be reversed solely because it refused to admit evidence that is admissible under the FRE.[32] This combination of holdings is based on the sensible reasoning that, while the special characteristics of agency proceedings justify admission of some evidence that is not deemed sufficiently reliable to be considered by lay jurors, there is no justification for agencies to refuse to consider at all evidence that is deemed sufficiently reliable to be considered even by lay jurors.[33]

Agencies that are bound by statute or regulation to adhere to the FRE "so far as practicable" standard may be subject to some judicially imposed constraints on their discretion to admit evidence that would not be admissible under the FRE. Courts have not interpreted and applied this standard in a consistent manner. Indeed, courts called upon to apply this standard seem troubled and confused in their responses. Their confusion is understandable. What does Congress or an agency mean when it mandates compliance with a detailed set of rules "so far as practicable"? Who is to determine when compliance is practicable—the ALJ, the agency, or a court? By what standards is such a determination to be made? What sanction should a court impose if an agency does not follow the FRE when a court believes that it was "practicable" for the agency to follow the FRE? The results of the cases decided under the "so far as practicable" standard suggest implicitly that courts are resolving these issues in very different ways, but none of the decisions to date contain sufficient analysis of the issues to determine the basis for the court's decision. Courts simply differ in result using broad conclusory language and declining to acknowledge the existence of contrary decisions of other courts.

Three circuit court decisions illustrate the disparate approaches taken in this area. In *NLRB v. Process & Pollution Control Co.*,[34] the Tenth Circuit reversed the agency action in part because the agency admitted hearsay evidence inadmissible under the FRE when the court believed it was practicable for the agency to follow the FRE. In *Helena*

[31]*E.g.*, FTC v. Cement Institute, 333 U.S. 683, 705–06 (1948); Opp Cotton Mills v. Administrator, 312 U.S. 126, 155 (1941); Evosevich v. Consolidation Coal Co., 789 F.2d 1021 (3d Cir. 1986).

[32]*E.g.*, NLRB v. Maywood Do-nut Co., 659 F.2d 108 (9th Cir. 1981); Catholic Medical Center v. NLRB, 589 F.2d 1166 (2d Cir. 1978); NLRB v. Jacob E. Decker & Sons, 569 F.2d 357 (5th Cir. 1978).

[33]*See* Catholic Medical Center v. NLRB, 589 F.2d 1166, 1170.

[34]588 F.2d 786.

Laboratories Corp. v. NLRB,[35] the Fifth Circuit dismissed a similar argument summarily, noting only that the agency was required to follow the FRE only "so far as practicable." The Eighth Circuit completed the circle in *NLRB v. Addison Shoe Corp.*[36] The court reversed the agency in part because it did not admit evidence made inadmissible by the FRE. The court admonished the agency for adhering to the FRE too strictly. Thus, some courts apparently interpret the "so far as practicable" standard to accord near total discretion to agencies. Other courts interpret it as a mandate to comply with the FRE except in unusual circumstances. Still others apparently view the standard as a mandate to admit evidence made inadmissible by the FRE except when unusual circumstances require application of the FRE.

Most disputes concerning agency decisions to admit or exclude evidence that reach the appellate court level involve admission or exclusion of hearsay; a few involve potential application of the "relevance rules" (FRE 404–411) or the "impeachment rules" (FRE 607–610).[37] In all of these evidentiary contexts, the resolution of the dispute by a reviewing court depends in part on whether the agency's evidentiary regulation incorporates the APA standard or the "so far as practicable" standard. In one important context, the standard adopted in the agency's evidentiary regulation is irrelevant to the resolution of the evidentiary dispute. Courts, agencies and commentators seem to be in agreement that all agencies must recognize claims of evidentiary privilege to the same extent that courts must recognize such claims.[38] This rule makes eminently good sense because the reasons for recognizing evidentiary privileges differ fundamentally from the reasons that support adoption of most evidentiary rules. Evidentiary privileges exist not because they further the truth-seeking function, but because forced disclosure of some types of information will cause substantial harm to other social values.[39] Since the harm resulting from forced disclosure of privileged information is identical whether the information is disclosed in a judicial proceeding or an administrative proceeding, the law of privileges should apply equally to both types of proceedings.

It is important to distinguish between judicial constraints on agency

[35]557 F.2d 1183.

[36]450 F.2d 115.

[37]*E.g.*, NLRB v. Jacob E. Decker & Sons, 569 F.2d 357, 362–63 (prior felony convictions are admissible if their probative value exceeds their potential for unfair prejudice).

[38]*E.g.*, CAB v. Air Transport Ass'n, 201 F. Supp. 318 (D.D.C. 1961). *See also* K. DAVIS, *supra* note 4, at § 16.10.

[39]R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 645–651 (2d ed. 1982).

discretion to admit evidence that would not be admissible in a federal court and judicial review of agency findings of fact premised on such evidence. The Supreme Court approved the relaxation of formal rules of evidence in agency proceedings as early as 1904.[40] In 1916, however, the New York Court of Appeals announced the "legal residuum" rule in *Carroll v. Knickerbocker Ice Co.*[41] That rule permitted agencies to continue to admit and to consider evidence that would not be admissible in a jury trial. The Court held impermissible, however, agency reliance exclusively on such inadmissible evidence as the basis for a finding of fact. An agency could base a finding in part on evidence inadmissible in a jury trial if, but only if, it also had a "residuum of legal evidence" in the record to support the finding.[42] Until 1971, federal courts applied the "legal residuum" rule in reviewing agency actions—after 1946 as an integral part of the "substantial evidence" standard made applicable by the APA to agency findings of fact adopted in formal adjudications.[43]

The "legal residuum" rule was the subject of near universal criticism both by evidence scholars and by administrative law scholars.[44] In 1971, the Court finally responded to this criticism by abolishing the rule. In *Richardson v. Perales*,[45] the Court held that an agency can base a finding on hearsay evidence that would be inadmissible in a jury trial, even when that evidence is contradicted by admissible evidence, if the evidence relied upon by the agency is of a type relied upon by a reasonably prudent person in conducting his affairs. Federal courts have applied this standard in reviewing agency findings of fact ever since—independent of whether the agency's evidentiary rule incorporates the APA standard of admissibility or the "so far as practicable" standard. Scholars have reacted to the abolition of the "legal residuum" rule with enthusiastic approval.[46]

II. SURVEY OF ADMINISTRATIVE LAW JUDGES

Since ALJs preside over the majority of federal administrative adjudications, it seemed desirable to find out the extent to which they rely

[40]ICC v. Baird, 194 U.S. 25 (1904).
[41]218 N.Y. 435, 113 N.E. 507 (1916).
[42]*Id.* at 440, 113 N.E. at 509.
[43]5 U.S.C. § 706(2)(E) (1982). *See also* Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
[44]K. DAVIS, *supra* note 4, at § 16.6; C. MCCORMICK, EVIDENCE 126 (1954); J. WIGMORE, EVIDENCE § 4(b) (1940); Gellhorn, *supra* note 11.
[45]402 U.S. 389.
[46]*E.g.*, K. DAVIS, *supra* note 4, at § 16.7.

upon the FRE as a basis for their evidentiary rulings, as well as their opinions concerning the effectiveness of the rules they must apply and the evidentiary rules they would prefer to apply if they could change the rules now in effect at their agencies. To this end, a questionnaire was sent to 603 of the 1121 ALJs. Responses were received from 212 ALJs, for a response rate of 35 percent. The distribution of responses by agency corresponded generally to the aggregate distribution of ALJs.[47]

The questionnaire included questions intended to elicit information in four areas: (1) the ALJ's experiential basis for engaging in comparative evaluation of the evidentiary standard adopted by the agency for which she presides; (2) the ALJ's evaluation of the effectiveness of the evidentiary standard she is required to apply in terms of fairness to the parties, discretion to admit evidence the ALJ considers reliable, discretion to exclude evidence the ALJ considers unreliable, discretion to exclude evidence in the interests of expediting a proceeding, and sufficiency of guidance provided to permit rulings to be made promptly and with confidence in their accuracy; (3) the evidentiary standard the ALJ would prefer to use as the basis for evidentiary rulings; and, (4) the extent to which the ALJ uses the FRE as a source of guidance in making evidentiary rulings.

The questionnaire results were divided into four groups for purposes of evaluating the pattern of responses—(1) ALJs at agencies other than the Social Security Administration (SSA) that have adopted the APA evidentiary standard; (2) ALJs at SSA; (3) ALJs at agencies that have adopted the FRE "so far as practicable" standard; and (4) ALJs at DOL, where the agency's evidentiary regulation refers to the FRE as a permissive source of guidance and incorporates several of the FRE explicitly.[48] ALJs at SSA were evaluated as a separate group to

[47]The selection of a sample of ALJs to receive the questionnaire was not scientific. The Administrative Conference had access to a mailing list that included the addresses of only 603 of the 1121 ALJs. The distribution of responses seems representative, however. The respondents from agencies that incorporate or paraphrase the APA evidentiary standard serve at the following agencies: SSA (113), mine safety (5), EPA (4), SEC (4), FLRA (4), DOA (4), ITC (2), FERC (2), FTC (1), FDA (1), DEA (1), NTSB (1), HUD (1), and NRC (1). The respondents from agencies whose evidentiary standard includes a reference to the FRE serve at the following agencies: NLRB (23), DOL (21), FCC (8), ICC (3), DOI (3), OSHRC (3), Coast Guard (3), USPS (2), export administration (1), FMC (1), and SBA (1).

[48]Most SSA adjudications are not adversarial; neither the claimant nor the government is represented at the hearing. It is difficult to envision how any set of evidentiary rules could be applied in this type of proceeding. Most claimants, with no knowledge of the rules of evidence, could be expected to experience confusion and frustration when told by an ALJ that some of their evidence had been rejected on the basis of some "technical-

avoid potential distortion of the evaluation of the responses of ALJs at other agencies that have adopted the APA evidentiary standard. Arguably, the nature and function of SSA adjudications differ significantly from the nature and function of adjudicatory proceedings at other agencies.[49] Unarguably, ALJs at SSA constitute such a disproportionately large subset of total ALJs that their responses would swamp the evaluation of total responses. Of the 1121 federal ALJs, 760 preside at SSA. Similarly, 113 of the 212 responses received came from SSA ALJs. SSA dominates the group of ALJs who preside at agencies that have adopted the APA evidentiary standard to an even greater extent—113 of the 144 responses from this group came from the SSA.

Before reporting these disaggregated results, it is useful to note one generalization. A majority of ALJs in each of the four groups expressed the opinion that the evidentiary standard adopted by their agencies produced satisfactory results when judged with reference to each of the performance criteria mentioned on the questionnaire, and a majority of ALJs in each group expressed a preference for the evidentiary standard adopted by their agency. This result is ambiguous. It could give rise to an inference that the present disparate pattern of evidentiary regulations yields a near perfect matching of evidentiary regimes with the unique functions of each agency, *e.g.*, FCC and ICC should rely much more heavily on FRE than should the FERC or the FTC (although it is difficult to identify functional distinctions among these agencies that would support this theory). Alternatively, the data could indicate merely that most ALJs, like most people, prefer not to change the rules under which they operate. I prefer the second ex-

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ity" beyond their ken. The few claimants represented by counsel would enjoy a significant advantage, since their evidentiary arguments would be unopposed.

[49]In recognition of the difficulty of applying evidentiary rules to nonadversarial hearings involving pro se litigants, many of the SSA ALJs who expressed a preference to adopt an evidentiary standard that included a reference to the FRE commented that such a change could occur only if SSA also adopted an adversarial system in which both the claimant and the government are represented by counsel. Such a change would increase the cost of administering the Social Security Disability system dramatically with little, if any, improvement in the quality of justice provided by that system. *See* Mathews v. Eldridge, 424 U.S. 319 (1976) (refusing to require counsel at government expense in disability proceedings on the basis that the cost of the added procedural safeguard would exceed its benefits). *See also* J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983) (emphasizing the limited extent to which expensive judicially imposed safeguards can improve the quality of a mass justice system in contrast to the substantial improvements potentially available through implementation of less expensive internal quality control mechanisms). *See generally* R. PIERCE, S. SHAPIRO, & P. VERKUIL, ADMINISTRATIVE LAW AND PROCESS 255–277 (1985).

Because of the unique features of SSA adjudications, the Conference specifically exempted such "nonadversarial" proceedings from the scope of Recommendation 86-2.

planation, in part because of significant differences among the groups in the size of the majority that expressed satisfaction with, and a preference for, the status quo, and in part because of the low level of experience with alternative evidentiary standards in all four groups. Of the 212 respondents, only 16 (7.5 percent) reported that their agency had changed its evidentiary standard during their tenure, and only 53 (25.2 percent) had presided at other agencies with different evidentiary standards.

The results of the survey are shown in Table I.

The survey results support several other important inferences. The evidentiary standard adopted by an agency significantly affects the extent to which ALJs use the FRE as a source of guidance in making evidentiary rulings. Ninety-three and one-tenth's percent of ALJs at agencies with "so far as practicable" standards report that they use the FRE as a source of guidance either "always" or "frequently." This heavy reliance on the FRE contrasts sharply with the sparing reliance of ALJs at SSA—only 23.4 percent report use of the FRE "always" or "frequently." The degree of reliance reported by ALJs at DOL and APA agencies other than the SSA falls between these two extremes, at 73.6 percent and 60.0 percent, respectively.

The results of the survey with respect to the ALJs' satisfaction with the evidentiary standard they are required to apply vary substantially depending on the criteria of satisfaction employed. ALJs in all groups report near unanimous satisfaction with the adequacy of their discretion to admit evidence they consider reliable—the satisfaction rate varied among the groups of ALJs only from 96.4 percent to 100.0 percent. There was slightly greater variation in the rate of satisfaction reported with respect to an ALJ's power to conduct a proceeding that is fair to the parties. As measured by this criterion, the results ranged from 100.0 percent satisfaction reported by the DOL ALJs down to 85.5 percent satisfaction reported by ALJs at APA agencies—a degree of variation that probably is not significant in light of the relatively small number of respondents in the two groups.[50]

The variation in reported satisfaction with respect to other criteria is considerably greater. As measured by adequacy of discretion to exclude evidence an ALJ considers unreliable, the degree of satisfaction reported ranged from 65.5 percent to 100.0 percent. Similarly, the range of responses with respect to adequacy of discretion to exclude evidence in order to expedite a proceeding varied from 70.1 percent to

[50]Twenty-one ALJs at the DOL and 31 ALJs at APA agencies other than the SSA responded to the questionnaire.

TABLE I

SURVEY OF ADMINISTRATIVE LAW JUDGES

	ALJs at APA Agencies Other Than SSA		ALJs at SSA		ALJs at "So Far As Practicable" Agencies		ALJs at DOL	
	Satisfied	Not satisfied	Satisfied	Not satisfied	Satisfied	Not satisfied	Satisfied	Not satisfied
Fairness to parties	87.1%	12.9%	85.5%	14.5%	98.0%	2.0%	100.0%	0.0%
Discretion to admit reliable evidence	96.8	3.2	96.4	3.6	100.0	0.0	100.0	0.0
Discretion to exclude unreliable evidence	83.9	16.1	65.5	34.5	100.0	0.0	95.2	4.8
Discretion to exclude evidence to expedite a proceeding	80.6	19.4	70.1	29.9	98.0	2.0	90.5	9.5
Guidance to permit prompt and confident rulings	86.7	13.3	81.1	18.9	100.0	0.0	100.0	0.0
	PREFERRED RULES							
APA	77.4%		62.7%		4.4%		31.6%	
"So far as practicable"	22.6		33.6		80.0		47.4	
FRE	0		3.6		15.6		21.1	
	FREQUENCY OF USE OF FRE AS GUIDELINE							
Always	20.0%		8.1%		58.6%		36.8%	
Frequently	40.0		15.3		34.5		36.8	
Occasionally	33.3		32.4		3.0		15.9	
Rarely	3.3		26.1		0.0		10.5	
Never	3.3		9.0		3.0		0.0	

98.0 percent, and with respect to adequacy of guidance to make a prompt and confident evidentiary ruling the variation was from 81.1 percent to 100.0 percent. With respect to each criterion, ALJs at the SSA and at other APA agencies reported the lowest rate of satisfaction with the evidentiary standard they are required to apply, while ALJs at the DOL and at agencies with a "so far as practicable" standard reported the highest rate of satisfaction.

It is apparent from the survey results that ALJs prefer the additional guidance and discretion to exclude evidence provided by the "so far as practicable" standard or the DOL standard, both of which refer to the FRE, to the open-ended APA standard. As interpreted and characterized by several of the respondents, the APA standard forces an ALJ to admit any evidence tendered even if the ALJ considers it clearly unreliable. The responses to the question asking ALJs which of three evidentiary standards they would prefer to apply reinforces this conclusion. While a majority of each group expressed a preference to retain the status quo, the size of the majority varied from only 62.7 percent of SSA ALJs who preferred to retain the APA standard adopted by that agency to 80.0 percent of ALJs at "so far as practicable" agencies who preferred to continue to apply that standard. Indeed, that variation understates the preference for the guidance and discretion to exclude provided by a standard that makes reference to the FRE for two reasons. First, of the 20.0 percent of "so far as practicable" ALJs who would prefer to apply a different standard, almost all (15.6 percent) expressed a preference for strict application of the FRE. Second, DOL ALJs were not given the option of expressing a preference to continue to apply the evidentiary standard unique to that agency. Had they been provided that option, it is fair to infer from their extremely high rate of reported satisfaction with the evidentiary standard they now apply (90.5 percent to 100.0 percent satisfaction depending on the criterion used) that they would have expressed near unanimous preference to retain that standard.

The final step in deriving meaning from the survey results is to attempt to infer reasons for ALJs' preference for an evidentiary standard that includes either a mandatory or a permissive reference to the FRE. The satisfaction responses differed significantly with respect to three criteria—adequacy of discretion to exclude evidence considered unreliable, adequacy of discretion to exclude evidence in order to expedite a proceeding, and adequacy of guidance to make prompt and confident rulings. The latter two criteria relate to the managerial role of judges and agencies—how can we resolve tens of thousands of disputes in a timely manner with limited resources? This issue is

critically important to many judges and agency administrators because of its direct relationship to the ability of any agency to perform its mission effectively,[51] but it is too often ignored by theorists.

The first criterion seems initially to reflect a different type of concern entirely—that admission of unreliable evidence will result in injustice through an erroneous finding of fact. Upon analysis, however, the dissatisfaction expressed with respect to this criterion also relates to the managerial side of the administrative justice system. As several respondents noted in their comments, there is no real danger that a finding will be based on evidence an ALJ considers unreliable but feels compelled to admit anyway, since the ALJ will simply decline to rely upon such evidence in making findings. Several ALJs who expressed dissatisfaction with the APA standard with respect to this criterion explained in comments the basis for their dissatisfaction. If an ALJ feels compelled to admit unreliable evidence, she also feels compelled to provide the opponent of the unreliable evidence a complete opportunity to demonstrate the unreliability of the evidence through cross-examination and presentation of rebuttal evidence. Thus, ALJ dissatisfaction with the lack of discretion to exclude unreliable evidence provided by the APA standard seems to be premised on potential undue consumption of time.[52]

III. ANALYSIS AND RECOMMENDATIONS

Three general types of evidentiary standards are now used by federal agencies: (1) the FRE "so far as practicable" standard; (2) the wide-open APA standard; and (3) the DOL standard with its permissive reference to the FRE and selective incorporation of some federal rules. In this section, I will evaluate the strengths and weaknesses of each, argue in support of adoption of a standard of the type used by DOL, and suggest other changes in agency practices that offer the promise of allowing ALJs to make evidentiary rulings in a manner that will improve the quality of administrative justice.

[51] *See* Pierce, *supra* note 15; MASHAW, *supra* note 15.

[52] Some respondents also complain that reviewing courts sometimes require explicit discussion even of clearly unreliable evidence. Under the "adequate consideration" doctrine, an ALJ and an agency risk potential remand if they fail to consider explicitly all arguably relevant evidence. *See* R. PIERCE, S. SHAPIRO, & P. VERKUIL, *supra* note 49, at 380–413. Thus, lack of discretion to exclude unreliable evidence also can force an ALJ to devote scarce opinion-writing time to explaining why she chose not to rely on unreliable evidence she felt compelled to admit.

The "So far as practicable" Standard

The survey of ALJs identified the major advantages of the FRE "so far as practicable" standard. ALJs prefer this standard to the open-ended APA standard because they perceive that it accords them both the guidance and the discretion to exclude low quality evidence. This in turn allows them to manage adjudications more effectively with less need to devote valuable hearing time to evidence they consider unreliable.

Adoption of the "so far as practicable" standard has two major disadvantages, however. First, reviewing courts seem not to know what to make of it.[53] Some interpret it to require reversal of an agency if it admits evidence inadmissible in a jury trial unless the agency meets an apparently heavy burden of establishing that it was not "practicable to" follow the FRE in a particular instance. Others seem to indulge in the entering assumption that it is rarely "practicable" for an agency to follow the FRE. Still others apparently consider it reversible error for an agency to exclude evidence made inadmissible by the FRE without explaining why it adhered to the FRE in the circumstances. It is difficult to recommend a putatively mandatory standard that is subject to such a wide range of judicial interpretation.

Second, if the standard is interpreted in a manner that effectively limits the discretion of agencies and ALJs to admit evidence that is inadmissible in a jury trial, the standard makes little sense. It is difficult for agency ALJs to apply the FRE to resolve close evidentiary disputes. Imposition of mandatory constraints on agency discretion to admit evidence serves no conceivable purpose. Moreover, it is inappropriate to limit expert agency decisionmakers to consideration only of evidence that can be considered by lay jurors.

The FRE are designed to further two goals—to avoid decisions based on unreliable evidence by precluding decisionmakers from being exposed to such evidence and to promote efficiency in the trial process by excluding evidence of such low quality that the cost in the form of trial time required to receive and consider the evidence exceeds substantially the value of the evidence.[54] Thus, for instance, the 33 exceptions

[53] *See* text accompanying notes 29–31. Agencies also experience difficulty attempting to interpret and apply the "so far as practicable" standard. OSHRC has proposed to abandon its use of the standard because it has been unable to define and apply the standard in an acceptable manner. 51 FED. REG. 23,184, 23,190 (June 25, 1986). Unfortunately, OSHRC has proposed to become the first federal agency to adopt the even less appropriate standard of strict application of the FRE. *See* text accompanying notes 54–72.

[54] *See* M. GRAHAM, FEDERAL RULES OF EVIDENCE 82–83 (1981); G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE 3–4 (1978).

to the hearsay rule either instruct a judge to consider the reliability of the evidence directly or to base her ruling on characteristics of the evidence that are believed to function as rough surrogates for reliability.[55] In contrast, FRE 403 provides a basis for excluding evidence that will require more time at trial than its value justifies.[56] In this section, I will discuss only exclusionary rules, like the hearsay rules, that are designed to further the first goal. I will discuss FRE 403 and the second goal in the next section.[57]

As with any other area of law, application of the FRE presents both easy and hard cases. A set of mandatory exclusionary rules is totally unnecessary to permit ALJs to resolve the easy cases. If an item of proffered evidence is clearly unreliable, an ALJ does not have to be told to exclude the evidence because it is inadmissible under the FRE; she needs only the discretion to exclude it because it is unreliable. The many hard cases are, by definition, difficult for federal judges to resolve—particularly in the context of a trial in which a judge may be called upon to promptly resolve scores of difficult evidentiary controversies based on only a few minutes of argument and thought devoted to each.

The risk that a judge will err in some close cases and exclude items of evidence that are sufficiently reliable and probative to warrant consideration is high. The cost of such errors is also high—remand for further hearings or a decision that is not based on all of the reliable evidence. Of course, we require federal judges to take this risk routinely in jury trials, so there are at least some circumstances when we consider it a risk worth taking. The question then must be asked: is an agency adjudication a context in which this risk is justified?

There are three reasons why it makes little sense to take the risk of erroneous exclusion of reliable evidence through application of highly technical exclusionary rules in the context of agency adjudications. First, the cost of such errors is as great in the agency adjudication context as it is in the trial context—if the ALJ erroneously excludes reliable evidence, the agency must either remand for further proceedings or decide the case on the basis of an incomplete record. Second, the risk of errors of exclusion is greater in the agency adjudication context than in the context of a jury trial. Third, there are good reasons to take this risk in the jury trial context that do not exist in the case of agency adjudications.

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[55]R. LEMPERT AND S. SALTZBURG, *supra* note 39, at 498–505.

[56]M. GRAHAM, *supra* note 54, at 82–83.

[57]*See* text accompanying notes 77–85.

Prompt resolution of difficult evidentiary issues under the FRE presents even greater challenges and risks to agency ALJs than to federal trial judges. To resolve close evidentiary questions, a judge must focus specifically and with some care on the issues in the proceeding and on the relationship between a proffered item of evidence and those issues, for most such questions must be answered by reference to the purpose for which the evidence can be considered and its probative value when considered for that purpose.[58] Yet, agency ALJs often have an incomplete understanding of the issues at the time they must rule on the admissibility of evidence. ALJs, unlike federal judges, do not resolve cases subject only to possible appeal. Rather, they issue initial decisions that are, for most purposes, functionally equivalent to recommendations to agency decisionmakers.[59] Since the ALJ is not the final decisionmaker, she often has an imperfect understanding during the hearing of both the issues the agency ultimately will consider important and the probative value the agency will attach to various types of evidence with respect to those issues.

The extent of an ALJ's understanding of the issues at the time of a hearing depends on the degree of specificity with which Congress has identified those issues in the agency's organic act and the extent to which the agency has increased that specificity by promulgating legislative rules. Far too frequently, Congress declines to establish meaningful statutory standards[60] and the agency declines to issue regulations that create standards sufficient to permit ALJs to be confident that they know the issues in a proceeding or the probative value that the agency will attach to various types of evidence that arguably bear on those issues.[61] As a result, agency ALJs frequently have a less complete understanding of the substantive legal principles that should inform their evidentiary rulings than do trial judges.

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[58]Evidence of prior crimes, for instance, can be considered only for some purposes (FRE 404 and 609) and only when its probative value for those purposes exceeds its potential for unfair prejudice or undue expenditure of time. *See* U.S. v. Beechum, 582 F.2d 898 (5th Cir. 1978). More generally, it is impossible to determine whether an item of proffered evidence is hearsay without first determining the purposes for which it may be used by the decisionmaker. *See* Tribe, *Triangulating Hearsay*, 87 HARV. L. REV. 957 (1974).

[59]*See* K. DAVIS, *supra* note 4, at § 17.14.

[60]*See* Pierce, *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 472–481 (1986).

[61]*See* Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 AD. L. REV. 163 (1985). For a discussion of the practical problems posed by an agency's failure to specify the issues in advance of an adjudication *see* Pierce, *supra* note 15, at 34–35. *See also* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 524–25 (1970).

The decision to take the risk of erroneous exclusion of evidence in jury trials is based in part on considerations of necessity that have no analogue in administrative adjudications. In a jury trial, there is little choice but to ask trial judges to resolve close evidentiary disputes through application of complicated and detailed exclusionary rules, and thereby to take the risk of a new trial or of a decision that is not based on all reliable evidence. In Dean Calabresi's words, juries are "irresponsible" decisionmakers.[62] in the sense that they are not required to explain the bases for their decisions, including particularly the evidentiary bases for their findings of fact. Thus, if we want to preclude juries from basing findings on evidence considered unreliable by judges, we can do so only by precluding their exposure to that evidence in the first place.

The considerations are entirely different in agency adjudications.[63] Agencies and ALJs are required to state the bases for their findings of fact.[64] Their findings are then subject to judicial review under the substantial evidence standard.[65] If an agency finding is based on unreliable evidence, the agency's action is reversed. Thus, there is a mechanism available in agency adjudications independent of rulings on the admissibility of evidence to insure that agency findings are based only on reliable evidence.

The independent mechanism available in agency adjudications offers enormous advantages over the instant evidentiary ruling during a trial that provides the only effective means of insuring that juries do not base findings on unreliable evidence. The on-the-spot resolution of close evidentiary issues during a trial undoubtedly results in many erroneous exclusions of reliable evidence because trial judges have little opportunity to reflect on the reliability of an item of proffered evidence before ruling. The need for instant rulings also requires judges to use the many imperfect surrogates for reliability embedded in the FRE because it is easier to apply objective surrogates rapidly than to evaluate reliability directly. Evidentiary rulings in jury trials also must be made in many cases at such an early stage of the proceeding that judges cannot assess accurately some of the factors, such as incremental probative value, that are important to evidentiary decisions.[66]

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[62]G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 57 (1978).

[63]Gellhorn, *supra* note 11, at 17–18.

[64]R. PIERCE, S. SHAPIRO, & P. VERKUIL, *supra* note 49, at § 6.4.3d.

[65]*Id.* at § 7.3.

[66]In recognition of this serious problem, appellate courts frequently encourage trial judges to defer ruling on difficult evidentiary issues until late in a trial. *E.g.*, U.S. v. Beechum, 582 F.2d 898 (5th Cir. 1978).

By contrast, if agency ALJs defer all close decisions concerning the reliability of proffered evidence by admitting all evidence that might be sufficiently reliable to justify consideration, they can make reliability decisions at a time when their decisions are more likely to be accurate. As they read the record and begin to draft their opinion, they can reflect on the entirety of the evidence submitted and base their reliability determinations on each item of evidence as it relates to other evidence and to the issues as they then understand those issues. Equally important, the agency decisionmakers can engage in the same careful process of deciding which evidence is sufficiently reliable to warrant consideration in resolving the issues as they see them. Since a principal role of agencies is to make policy decisions Congress has declined to make,[67] agencies frequently focus on a set of issues and evidence different from the issues and evidence the ALJ believed to be important. Once the agency has completed this process, a reviewing court can perform the important function of insuring that no finding is predicated on unreliable evidence.

Advocates of application of the FRE to agency adjudications seem to ignore completely the major functional differences between the role of the FRE in jury versus nonjury proceedings. While the FRE apply putatively to both types of proceedings, judges do not apply them in the same manner in jury and nonjury cases. Indeed, appellate courts consistently admonish trial judges to resolve all close evidentiary disputes in favor of admission in nonjury cases. The landmark decision on this issue is the Eighth Circuit's oft-cited 1950 opinion in *Builders Steel Co. v. Commissioner*.[68] The reasoning in that opinion applies *a fortiori* to the agency adjudication context:

> In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an affirmative finding which would not otherwise have been made.[69]
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> One who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it after it has been received, and, since he will base

[67]Pierce, *supra* note 60, at 505–508.

[68]179 F.2d 377 (8th Cir. 1950). *Accord* Fields Eng. & Equip., Inc. v. Cargill, Inc., 651 F.2d 589, 594 (8th Cir. 1981); Multi-Medical Convalescent & Nursing Center v. NLRB, 550 F.2d 974, 977 (4th Cir. 1977); Northwestern Nat'l Casualty Co. v. Global Moving & Storage, Inc., 533 F.2d 320, 324 (6th Cir. 1976).

[69]179 F.2d at 379.

> his findings upon the evidence he regards as competent, material and convincing, he cannot be injured by the presence in the record of evidence which he does not consider competent or material.
>
> If the record on review contains not only all evidence which was clearly admissible, but all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided.[70]

It seems anomalous for Congress or an agency to purport to require ALJs to exclude evidence they believe to be inadmissible under the FRE when appellate courts uniformly instruct federal trial judges to resolve all close cases in favor of admission in nonjury cases. Each of the factors that cause appellate courts to give this guidance to trial judges applies with at least equal force to agency ALJs. Indeed, there are powerful additional reasons ALJs should resolve all close cases in favor of admission.

Agencies do not merely perform the decisional review function assigned to appellate courts; they make decisions, frequently on the basis of considerations quite different from those that influenced the ALJ. Thus, it is more important that agencies have access to all evidence that even arguably is sufficiently reliable to warrant consideration than it is for appellate courts to have access to such evidence. In addition, agencies, unlike courts, can base findings on evidence inadmissible under the FRE if a reviewing court concurs in the agency's judgment that the evidence is sufficiently reliable.[71] Thus, it seems foolish to instruct ALJs to exclude evidence based on a set of rules that bars a large class of evidence that the agency could use as a basis for action if the evidence ever reached the agency decisionmaker. Of course, an agency decisionmaker is always free to disregard an item of evidence inadmissible under the FRE if she believes it to be unreliable. Instructing ALJs to exclude all evidence inadmissible under the FRE has the effect, however, only of removing the agency decisionmaker's discretion to consider evidence she and a reviewing court believe to be sufficiently reliable to justify consideration.

It is not only difficult, risky, and unnecessary to instruct ALJs to exclude evidence made inadmissible by the FRE, it is inappropriate to ask them to perform this task because agencies should have the discretion to rely on such evidence if it is reliable. The FRE themselves support this proposition.

Most of the FRE, and in particular the elaborate rules governing the

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[70]*Id.*

[71]Richardson v. Perales, 402 U.S. 389 (1971).

admissibility of hearsay, are predicated on the assumption that the issue is whether an item of evidence is suitable for consideration by a lay decisionmaker.[72] The FRE also have provisions that deal explicitly with the issue of whether an item of evidence is suitable for consideration by an expert. FRE 703 permits an expert to base an admissible opinion on inadmissible evidence if that evidence is "of a type reasonably relied upon by experts in the . . . field. . . ."[73] The courts have interpreted FRE 703 to permit an expert to base an opinion on inadmissible but reliable hearsay.[74] Further, they have held that the scientific community's view of reliability governs, rather than a court's view.[75] Thus, the trial judge's role is to determine through factual investigation whether an item of inadmissible evidence used as the basis for an expert opinion is considered reliable by other experts in the field. The judge is not to decide whether the evidence meets the judge's threshold of reliability or whether it conforms to the surrogates for reliability selected by the drafters of the FRE to determine whether nonexperts can use an item of evidence as the basis for an opinion or conclusion.

Agency decisionmakers are experts, not lay jurors or lay witnesses. As such, the findings and opinions of agency decisionmakers should be governed by the same pragmatic standard used both by the courts and by the drafters of the FRE to determine whether an item of evidence is sufficiently reliable to form the basis for an expert opinion. Once that proposition is accepted—and the Supreme Court accepted it in *Richardson v. Perales*[76]—it makes no sense for Congress or an agency to attempt to restrict an ALJ's discretion to admit evidence solely because that evidence is not admissible in a jury trial.

In summary, the "so far as practicable" standard should be abandoned because: (1) courts do not know what it means or how to enforce it; (2) instructing ALJs to exclude evidence based on the standard forces them to undertake a difficult and hazardous task; (3) excluding evidence on the basis that it is inadmissible in a jury trial is totally unnecessary to insure that agencies take actions based only on reliable evidence; and (4) agencies, like other experts, should be permitted to rely upon classes of evidence broader than those that can be considered by lay jurors.

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[72]K. DAVIS, *supra* note 4, at § 16.3; Gellhorn, *supra* note 11, at 17–22.

[73]FED. R. EVID. 703.

[74]Au Rustproofing Center, Inc. v. Gulf Oil Corp., 755 F.2d 1231 (7th Cir. 1985); Greenwood Util. Comm'n v. Mississippi Power Co., 751 F.2d 1484 (5th Cir. 1985); *In re* Japanese Elec. Prods. Antitrust Litig., 723 F.2d 238 (3d Cir. 1983), *rev'd* on other issues *sub nom.* Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 106 S. Ct. 1348 (1986).

[75]*E.g.*, Indian Coffee Corp. v. Procter & Gamble Co., 752 F.2d 891 (3d Cir. 1985).

[76]402 U.S. 389.

The APA Standard

The advantages of the wide-open APA standard are apparent from the prior description of the disadvantages of the "so far as practicable" standard. The APA standard does not cause confusion among reviewing courts, nor does it require ALJs to undertake a task that is difficult, risky, unnecessary, and counterproductive. The APA standard alone also has difficulties, however, as the survey of ALJs indicates.

ALJs expressed less satisfaction with the APA standard than with a standard that makes reference to the FRE.[77] That relative dissatisfaction was based primarily on frustration that the APA standard does not provide an adequate tool to permit an ALJ to perform her case management role. ALJs perceive that the APA standard provides no basis for excluding evidence even if it is patently unreliable or its probative value is so low that it does not justify the amount of hearing time it would require. This is a serious disadvantage. The delay and high cost of the administrative process poses a severe threat to the quality of justice available in our modern administrative state.[78] Admission and cross-examination of a large volume of low quality evidence contributes significantly to the extraordinary length and attendant high cost of many agency adjudications.

The APA standard alone authorizes an ALJ to exclude an item of evidence only if it is "irrelevant, immaterial or unduly repetitious."[79] Read literally, this standard confers discretion to exclude very little evidence. The modern threshold for determining relevance and materiality is extremely low.[80] The apparently independent basis for excluding evidence as unduly repetitious may be helpful in extreme circumstances, but it seems to provide authority to exclude evidence that meets the low relevancy threshold only if the evidence is virtually identical to other evidence already in the record.

The inadequacy of the APA standard alone as a case management tool becomes apparent when it is compared with the FRE. Independent of the technical exclusionary rules that are designed to insulate lay jurors from arguably unreliable evidence, the FRE provide federal trial judges a powerful tool to permit them to exercise their case management responsibilities in an effective manner. FRE 403 permits exclusion of relevant and material evidence if the probative value of

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[77]*See* table on page 13.

[78]*See Senate Comm. on Governmental Affairs, Study on Federal Regulation Vol. IV, Delay in the Regulatory Process*, S. Doc. No. 95-72, 95th Cong., 1st Sess. (1977). *See also* Pierce, *supra* note 15.

[79]5 U.S.C. § 556(d) (1982).

[80]*See* FED. R. EVID. 401 and Advisory Committee's Note, 56 F.R.D. 183, 215 (1973).

that evidence is substantially outweighed by any of several counterweights, specifically including "considerations of undue delay."[81]

To illustrate the difference between the APA standard alone and an evidentiary standard that incorporates FRE 403, consider a hypothetical situation that recurs frequently in agency adjudications. A party (perhaps a party with a motive for delay) proffers a voluminous exhibit tangentially related to an issue in the case and based entirely on low quality second- and thirdhand hearsay information. The ALJ is confident that neither she nor the agency will rely on the exhibit for any purpose. She also knows, however, that typical conservative counsel for the opposing parties will insist on cross-examining the witness responsible for the exhibit at length and on presenting similar low quality rebuttal exhibits if the ALJ admits the originally proffered exhibit. Thus, admission of the exhibit will lengthen the proceeding significantly.

The ALJ would like to exclude the exhibit, thereby substantially truncating the hearing and hastening the day when the agency ultimately can decide the case. Yet the APA standard alone provides no clear authority to exclude the exhibit, no matter how low its quality or how much it is likely to prolong the proceeding. The exhibit meets the low modern threshold for determining relevance and materiality and it is probably not unduly repetitious unless the ALJ already has admitted a similar exhibit. Under the APA standard alone, the ALJ may feel compelled to admit the exhibit. By contrast, FRE 403 provides the ALJ the additional tool she requires to engage in responsible case management in this frequently recurring situation. Even though the exhibit is relevant, she can exclude it under FRE 403 because its probative value is substantially outweighed by considerations of undue delay.

Since the balancing test in FRE 403 is weighted in favor of admission, the ALJ will continue to resolve close cases by admitting a controversial item of evidence, just as federal trial judges now do in nonjury cases. Hence, exercise of the discretion conferred by FRE 403 raises little risk of an agency or court remand because an ALJ erroneously excluded an item of evidence. Appellate courts accord substantial deterrence to trial judge applications of FRE 403.[82] Agencies and reviewing courts should accord analogous deference to ALJ applications of FRE 403 in recognition of the ALJ's greater familiarity with the situation at trial and the difficulty of the ALJ's task in exercising her case management

[81]*See* FED. R. EVID. 403 and Advisory Committee's Note, 56 F.R.D. 183, 218. *See also* Pierce, *Admissibility of Expert Testimony in Hearsay Form*, 5 AM. J. TRIAL ADV. 277, 279–283 (1981); Slough, *Relevancy Unraveled*, 5 KAN. L. REV. 1 (1956).

[82]*See, e.g.*, Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975).

responsibilities. Because of the combination of ALJ resolution of all close cases in favor of admission and agency and court deference to ALJ evidentiary rulings applying FRE 403, authorizing ALJs to apply FRE 403 does not raise the serious and unnecessary risks inherent in instructing ALJs to apply the myriad complicated and technical provisions of the FRE that are designed to control jury trials.[83]

The DOL Standard

The DOL standard[84] seems to eliminate the disadvantages of both the "so far as practicable" standard and the APA standard. It creates no confusion for reviewing courts because its reference to the FRE is permissive rather than mandatory. For the same reason, it does not impose a difficult, risky, and counterproductive responsibility on ALJs. At the same time, the DOL regulation provides ALJs a basis for managing the cases that come before them. They have a clear basis to exclude evidence whose incremental contribution to the factfinding process does not justify the amount of hearing time its admission would require. The DOL regulation incorporates the most powerful tool available to federal trial judges to expedite proceedings and to keep unreliable evidence from cluttering the record, absorbing valuable trial time, and delaying a decision in the case—FRE 403. Judging from the high rate of satisfaction reported by DOL ALJs,[85] the DOL regulation allows ALJs to perform their case management function far more effectively than does the APA standard alone.

On balance, the approach taken by Congress and the DOL in the process of adopting an evidentiary regulation to govern agency adjudications seems far preferable to the alternatives now in effect at other agencies. Congress should limit its role in the process of establishing agency evidentiary rules to incorporation of the APA standard. If Congress actually wants to attach special limits on the type of evidence that a particular agency can use as the basis for its findings of fact—and it is hard to identify any good reason for this action[86]—it should do so directly by establishing a special, more demanding definition of substantial evidence applicable to that agency, rather than attempting to further this goal indirectly through the awkward process of limiting the evidence an ALJ can admit.

Agencies also should refrain from imposing on ALJs the straightjacket of the FRE. Instead, agencies should provide as much guidance

[83] *See* text accompanying notes 53–76.
[84] 29 C.F.R. § 18.44.
[85] *See* table on page 13.
[86] *See* text accompanying notes 71–76.

as possible, including adoption of the weighted balancing test of FRE 403, to enable ALJs to perform their important case management function. Agencies also can assist ALJs materially by announcing in advance of adjudications—preferably through the rulemaking process—the substantive standards the agency intends to apply in resolving various classes of adjudications.[87] All evidentiary rulings must be based on a good understanding of the substantive issues in dispute.

[87]Agencies vary widely with respect to the extent to which they apprise the ALJ and the parties in advance of the issues they consider important in an adjudicatory proceeding and the types of evidence they consider probative of those issues. At one extreme, NLRB rarely issues rules and frequently changes its policies in adjudicatory disputes with no advance notice. *See* Estreicher, *supra* note 61. *See also* Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970). By contrast, SSA has materially assisted ALJs by resolving some recurring factual issues by rulemaking, identifying with specificity other factual issues through rulemaking, and publishing guidelines concerning the relative reliability of various types of evidence when considered in resolving recurring issues. *See, e.g.*, Heckler v. Campbell, 461 U.S. 458 (1983) (affirming the SSA rule establishing grid system for determining availability of various types of jobs). *See also* 20 C.F.R. §§ 404.708–780 (guidelines describing "preferred evidence" and "other evidence" relevant to a variety of recurring issues).