
Won Kidane
REVISITING THE RULES OF PROCEDURE AND EVIDENCE APPLICABLE IN ADVERSARIAL ADMINISTRATIVE DEPORTATION PROCEEDINGS: LESSONS FROM THE DEPARTMENT OF LABOR RULES OF EVIDENCE

Won Kidane*

I. INTRODUCTION .................................................................................................................. 94
II. ADMINISTRATIVE AGENCIES: MANDATE & RULES OF PROCEDURE AND EVIDENCE .......................................................... 100
   A. Delegation of Authority to Administrative Agencies ........................................... 100
   B. Rules of Procedure and Evidence in Agency Proceedings .................................. 103
III. RULES OF PROCEDURE AND EVIDENCE IN IMMIGRATION PROCEEDINGS: THE CHALLENGES OF GENEROUS ADMISSIBILITY AND MINIMUM REQUIREMENTS OF DUE PROCESS ........................................... 107
   A. Deportation Proceedings in Perspective: Civil, Criminal, or Quasi-Criminal? .................................................................................. 108
   B. Immigration and Nationality Act (INA) Rules of Procedure and Evidence ........... 115
   C. Flexible Standards and Constitutional Limits ......................................................... 118
      1. Due Process in the Immigration Context ............................................................. 119
         (a) Administrative Impartiality: Immigration Judge as a Neutral Adjudicator........ 120
         (b) Appearance and Representation .................................................................. 127
      2. Burden and Standard of Proof ........................................................................... 131
      3. Testimonial Evidence ....................................................................................... 133
         (a) Cross-examination ..................................................................................... 136
         (b) Prior Inconsistent Statements and Other Similar Evidence ......................... 137
      4. Exclusionary Rules ............................................................................................. 141
      5. Hearsay ............................................................................................................. 142
      6. Administrative Notice of Adjudicative Facts ..................................................... 150
IV. LESSONS FROM THE DEPARTMENT OF LABOR RULES OF EVIDENCE .......................................................... 155
   A. DOL Standards ..................................................................................................... 157
   B. Some Specific Rules ............................................................................................. 159
      1. Limited Admissibility and the Rule of Completeness ........................................ 159
      2. Administrative Notice ..................................................................................... 160

* Visiting Assistant Professor of Law, Penn State Dickinson School of Law. I would like to thank Professor Victor Romero for his valuable guidance on this and related projects.
I. INTRODUCTION

The remarkable rise of administrative agencies in the last century is considered to be the most significant legal development in the United States.1 In 1951, Justice Robert Jackson remarked that "perhaps more values today are affected by [the] decisions [of administrative agencies] than by those of all the courts."2 The trend has since continued at an alarming rate.3 Regarding the place that administrative agencies occupy in the general scheme of the American constitutional system, Justice Jackson opined:

Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying “quasi” is implicit with confession that all recognized classifications have broken down, and “quasi” is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.”4

The phenomenon of legislative delegation of policymaking and other functions to administrative agencies has come to be known as “the administrative state” or “the fourth branch of government.”5 The notion of the “administrative state” has evidently eroded the traditional distinction between policy making and execution.6 Merged into one institution, each administrative agency currently undertakes the

---

2. Ruberoid, 343 U.S. at 487 (Jackson, J., dissenting).
3. Today, a substantial part of everyday life is regulated by administrative agencies. See CANN, supra note 1, at 7-8.
5. See CANN, supra note 1, at 8. The term “fourth branch” was first used by Justice Jackson in his Ruberoid dissenting opinion. See Ruberoid, 343 U.S. at 487. It means “bureaucracy as an organization or structure.” CANN, supra note 1, at 8. The “fourth branch” has a broader meaning: “It implies a bureaucracy coequal with the presidency, Congress, and the courts, and it assumes the policy-making aspect of the administrative state.” Id.
6. CANN, supra note 1, at 8. See generally Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573 (1984) (“In the pages following I argue that, for any consideration of the structure law-administration below the very apex of the governmental structure, the rigid separation-of-powers compartmentalization of governmental functions should be abandoned in favor of analysis in terms of separation of functions and checks and balances.”).
functions of policymaking, execution, and adjudication at the same time.\(^7\) In other words, a single administrative agency essentially undertakes three distinctive functions: (1) legislative functions; (2) informal actions; and (3) formal adversarial adjudications.\(^8\) The legislative function involves rulemaking based on delegated authority.\(^9\) Informal actions include processes such as informal application processing, claims settlements, and negotiations.\(^10\) Formal adversarial adjudications are, however, the "functional[...] equivalent to federal civil nonjury trials."\(^11\)

It has become an unavoidable reality of life that neither the legislative nor the executive branch of government could effectively control these diverse functions of administrative agencies.\(^12\) "[A]lmost by default," says Professor Cann, "the job of attempting to control agencies has fallen to the courts, and administrative law is the tool that courts use."\(^13\)

One of the most serious difficulties that the courts face in executing this function of control is the review of decisions made pursuant to the extremely diverse, informal, and relaxed procedural and evidentiary rules of administrative adjudications in light of formal rules of the

---

7. See CANN, supra note 1, at 8.


9. See id.

10. Id.

11. Id.

12. Exemplifying the difficulty associated with the control of the functions of administrative agencies by elected representatives of the people, Professor Cann mentions the following: In 1966 Congress delegated power to the Department of Transportation (DOT) to adopt a public policy to minimize the death and injury caused by automobile accidents. In 1969, the secretary of the DOT adopted a mandatory passive restraint policy. The successor rescinded the policy, but his decision was reversed by the courts following a lengthy legal battle. In a way, the process took twenty-three years to meaningfully effectuate congressional policy. See CANN, supra note 1, at 20-22.

13. Id. at 9. Writing in the British context, Professors Beatson and Matthews suggest: "The constitutional justification for the court's supervisory jurisdiction is to give effect (a) to the intentions of the sovereign Parliament and (b) to the principles of checks and balances inherent in the doctrine of separation of powers and the rule of law." J. BEATSON & M.H. MATTHEWS, ADMINISTRATIVE LAW CASES AND MATERIALS 3 (2d ed. 1989). In theory, administrative agencies are also subject to legislative and executive oversight; the exercise of such oversight is, however, very difficult. For example, in the 1970s, the mechanism of legislative veto was developed. It essentially required the submission of final administrative decisions to Congress for a possible veto. However, in 1983, the Supreme Court struck down this mechanism as a violation of article 1, section 7 of the Constitution. The Court reasoned that the legislative veto amounted to legislation by one house of Congress. See INS v. Chadha, 462 U.S. 919, 956-59 (1983). It is often said that the President's exercise of oversight is limited to the exercise of the Appointments Clause of the Constitution by appointing officials who share his political agenda. See CANN, supra note 1, at 28-29; see also U.S. CONST. art. II., § 2, cl. 2.
judicial process. Perhaps nowhere is such incongruity more evident than in administrative immigration deportation proceedings.

In recent years, the Federal Courts of Appeals have been flooded with ever-increasing appeals from the decisions of the nation's more than 200 immigration judges and the Board of Immigration Appeals (BIA). According to the Administrative Office of Courts of the United States, the number of appeals filed in the Federal Courts of Appeals rose a stunning 515 percent since 2001. The New York Times reported that in the year 2004, "immigration cases, most involving asylum seekers, accounted for about 17 percent of all federal appeals cases." According to this report, "in New York and California, nearly 40 percent of [all] federal appeals involved immigration cases."

According to a congressionally mandated Commission on International Religious Freedom report, the disparity in the approval rates of claims for immigration benefits by individual immigration judges is staggering. One extreme example is the disparity in the rate of approval of immigration cases in a South Florida immigration court. While one judge averaged less than a 2 percent rate of approval of applications for asylum, another judge, sitting on the same court, averaged about a 75 percent approval rate. The Commission further found that in nearly 40 percent of immigration judge decisions where relief was denied, the ground for denial involved evidentiary issues, particularly inconsistencies between the claimant's testimony with his or her prior statements to an immigration inspector or an immigration officer. In nearly one-quarter of denials, the grounds for denial was lack of credibility because of added details.

A research group associated with Syracuse University examined 297,240 immigration cases decided between 1994 and 2005 and found

---

14. See BIA Appeals Remain High in 2nd and 9th Circuits, THIRD BRANCH (Admin. Office of the U.S. Courts, Washington D.C.), Feb. 2005, available at http://www.uscourts.gov/ttb/feb05ttb/bia/index.html. For example, in the Court of Appeals for the Second Circuit, the number of appeals increased by 1,448 percent; in actual figures it rose from 170 to 2,632. Id.


16. Id.

17. See 1 U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, REPORT ON ASYLUM SEEKERS IN EXPEDITED REMOVAL 7 (2005); Kate Jastram & Tala Hartsough, A-File and Record of Proceeding Analysis of Expedited Removal, in 2 U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, supra, at 44, 67-70.


20. Id.
wide disparities in the disposition of immigration cases.\(^{21}\) According to this study, one judge in Miami denied 96.7 percent of asylum cases that came before him. By a stark contrast "a New York judge granted . . . all but 9.8 percent of such cases."\(^{22}\)

Courts of appeals have repeatedly complained about inconsistent, incoherent, and even outright erroneous decisions. For example, the Court of Appeals for the Third Circuit noted "'a disturbing pattern' of misconduct in immigration rulings that sent people back to countries where they had said they would face persecution."\(^{23}\) A notable expression of frustration is Judge Richard Posner's statement in _Pasha v. Gonzales_.\(^{24}\) There, Chief Judge Posner of the Court of Appeals for the Seventh Circuit stated:

At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals and with the defense of the BIA's asylum decisions in this court by the Justice Department's Office of Immigration Litigation. The performance of these federal agencies is too often inadequate. This case presents another depressing example.\(^{25}\)

The central issue in _Pasha_ involved the admissibility of expert testimony.\(^{26}\) The appellant, Pasha, an Albanian national, sought asylum on the basis of past persecution she suffered in Albania because of her political activities.\(^{27}\) She presented nine documentary evidences to prove her allegations of persecution.\(^{28}\) During the hearing before an immigration judge, the Immigration Service presented a forensic documents expert witness, one Gideon Epstein. The witness testified


\(^{22}\) Swarns, _supra_ note 21 (discussing TRANSACTIONAL RECORDS ACCESS CLEARING HOUSE, _supra_ note 21). The study, which examined Justice Department records, also found significant variations in the approval rates of cases presented by different nationalities. For example, while 80 percent of all applicants from Haiti and El Salvador were denied, less than 30 percent of those from Afghanistan or Burma were denied. _Id._ (discussing TRANSACTIONAL RECORDS ACCESS CLEARING HOUSE, _supra_ note 21).

\(^{23}\) See Liptak, _supra_ note 15 (citing Wang v. Attorney Gen., 423 F.3d 260, 267-70 (3d Cir. 2005)).

\(^{24}\) 433 F.3d 530 (7th Cir. 2005).

\(^{25}\) _Id_. at 531 (citation omitted).

\(^{26}\) _Id_. at 535.

\(^{27}\) _Id_. at 531. The appellant testified that she was subjected to arrest and severe physical abuse because of her support for a democratic party in Albania and her political participation. _Id._

\(^{28}\) _Id._
that he examined four of the nine documents and concluded that they were "probably not what they're purported to be." The expert opined that his conclusion is supported by, among other factors, the difference between the handwritten text and the printed text in the form in the Albanian language. Unlike the printed text, the handwritten text did not contain diacritical or accent marks. The expert, however, admitted that he neither spoke Albanian nor compared the documents at issue with other official Albanian documents. He finally conceded that "he could not 'rule out' the possibility" that the documents may have been genuine. Predicated on this testimony alone, the Immigration Court denied Pasha's request for asylum.

On review, the court of appeals held that the expert "should not have been permitted to testify" in the first place. The court stated: "Not knowing Albanian, Epstein was not a proper witness to testify that Albanian is always written with diacritical marks." The court further stated that although the Supreme Court's ruling in Daubert v. Merrell Dow Pharmaceuticals—that expert testimony must rest on a reliable foundation—is not strictly applicable in administrative proceedings, the "spirit" of the holding must guide administrative decisions such as this. As a matter of fact, in the year 2005, the Court of Appeals for the Seventh Circuit reversed 40 percent of the decisions of the Board of Immigration Appeals (BIA). The rate of reversal for non-immigration civil cases within the same period was just 18 percent.

The courts' complaints prompted Attorney General Alberto Gonzales to write: "I have watched with concern the reports of immigration judges

29. Id. at 531-32.
30. Id. The additional reason for the conclusion is the following syllogism: the documents were generated using color laser technology, which makes only one copy at a time. These kinds of devices are not ordinarily used to produce forms as they are expensive. Because Albania is a poor country, such devices could not have been used to produce the forms. Therefore, the documents were probably not genuine. Id. at 531.
31. Id. at 531-32.
32. Id. at 532.
33. Id.
34. Id.
35. Id. at 535.
36. Id.
37. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993) (holding that under the Federal Rules of Evidence, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable").
38. See Pasha, 433 F.3d at 535.
40. Id. ("Federal appeals court judges around the nation have repeatedly excoriated immigration judges this year for what they call a pattern of biased and incoherent decisions in asylum cases."); see also Liptak, supra note 15.
who fail to treat aliens appearing before them with appropriate respect and consideration and who fail to produce the quality of work I expect from employees of the Department of Justice."

In *Djouma v. Gonzales*, Judge Posner remarked that "[u]nfortunately, the Department of Homeland Security and the Justice Department, which share responsibility for processing asylum claims, have, so far as appears, failed to provide the immigration judges and the members of the Board of Immigration Appeals with any systematic guidance." A frustrated Judge Posner further stated in *Benslimane v. Gonzales*, that:

This tension between judicial and administrative adjudicators is not due to judicial hostility to the nation’s immigration policies or to a misconception of the proper standard of judicial review of administrative decisions. It is due to the fact that the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice.

A number of factors are blamed for these shortcomings; however, this Article argues that the utter informality that characterizes immigration court proceedings is one of the most serious problems that has resulted in such profoundly inconsistent, unpredictable, and incoherent adjudication of immigration cases. In particular, this Article discusses the often-disregarded lack of workable and systematic formal rules of procedure and evidence that are compatible with the peculiarities of immigration proceedings. Exclusively focusing on the quasi-judicial or adversarial adjudicative functions of administrative agencies—more particularly, the procedural and evidentiary issues affecting adjudications resulting in the deportation of non-citizens by immigration courts and the BIA—this Article proposes the adoption of uniform formal and strictly enforceable procedural and evidentiary rules modeled after the Department of Labor (DOL) Rules of Evidence that are predicated on the Federal Rules of Evidence (FRE) and selectively modified to fit the peculiarities of adversarial labor proceedings.

44. Some of the factors that are blamed for the shortcomings include such practical issues as lack of resources, high caseload, lack of oversight, and outright misconduct. See, e.g., Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 370, 373, 375-76, 402 (2006).
With this view, this Article is divided into five parts. Following this introduction, Part II provides a theoretical background of the development of the administrative process and the adoption of the Administrative Procedure Act (APA)\(^6\) and its relations with the procedural provisions of the Immigration and Nationality Act.\(^7\) Part III demonstrates the challenges of evidentiary matters involved in deportation proceedings and identifies some important shortcomings needing remedial action. Part IV offers a brief analysis of selected evidentiary rules in light of the DOL approach, and shows the benefits of adopting similar provisions for deportation proceedings. Part V concludes that implementing such rules would restore integrity to the immigration law system.

II. ADMINISTRATIVE AGENCIES: MANDATE & RULES OF PROCEDURE AND EVIDENCE

This Part provides a brief overview of the theoretical underpinnings of the creation of administrative agencies in the context of the constitutional separation of powers, and outlines the rationale behind the emergence of a bifurcated system of adjudication of controversies—i.e., the regular judicial process and the administrative process. It also offers a brief description of the background and distinct features of the rules of procedure and evidence applicable in administrative proceedings.

A. Delegation of Authority to Administrative Agencies

The polity of the United States is said to have been founded on the fundamental principles of "limited government, negative freedom, and laissez-faire economics."\(^8\) Under this theoretical framework, government power was not considered a means of solving society's problems. The underlying assumption was that government interference

\(^7\) Immigration and Nationality Act, 8 U.S.C. §§ 1101-1537 (2000) [hereinafter INA].  
\(^8\) CANN, supra note 1, at 9. Limited government implies that the government's powers must be formally restricted through a constitution with all the guarantees for fundamental freedoms enshrined in the Bill of Rights. See id. The essence of negative freedom suggests the right to be free of government interference. Id. Laissez-faire economics, as articulated by Adam Smith in The Wealth of Nations in 1776, suggests that the free market should determine the economy without government interference. Id. at 9-10. Laissez-faire, is however, not a concept that could easily be defined. The complexities are outlined in a number of scholarly writings. See, e.g., Michael Les Benedict, Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism, 3 LAW & HIST. REV. 293, 293, 297-98 (1985); Calvin Woodward, Reality and Social Reform: The Transition From Laissez-Faire to the Welfare State, 72 YALE L. J. 286, 289-93 & n.9, 300-06, 323 (1962).
with individual initiatives is counterproductive and thus the government should refrain from any interference and limit its power to the protection of life, liberty, and property of the individual.\textsuperscript{49} Increasingly, however, strict adherence to this theoretical framework failed to solve society's problems and became a subject of great controversy.\textsuperscript{50} The challenges to this limited government framework took different forms, such as demands for voting rights for women, child labor regulations, service payment rates regulations (including railway grain elevator rates), labor condition regulations, and antitrust regulations.\textsuperscript{51} Labor and socialist movements around the world also contributed to the advancement of the notion that government involvement could play a positive role in daily life after all.\textsuperscript{52}

Yielding to such increasing demands, the federal government started enacting laws regulating some industries. Foremost among these early actions were the enactment of the antitrust legislation and child labor laws, and the establishment of the Federal Trade Commission (FTC).\textsuperscript{53} These laws were, however, struck down by the Supreme Court as unconstitutional.\textsuperscript{54} Gradually, economic theories that acknowledged the

\textsuperscript{49} See CANN, supra note 1, at 9.
\textsuperscript{50} Id. at 9-10.
\textsuperscript{51} Id.
\textsuperscript{52} See, e.g., id. at 10. For example, in the 1880s, Germany adopted a system of national health care and social security. After about twenty years the British followed the German example. Id. at 11.
\textsuperscript{53} Id. at 10.
\textsuperscript{54} Id. The Supreme Court's involvement in this era was significant. Louis B. Boudin, for example, said that the courts embarked on "a 'great revolution in our political institutions'" by exercising the power to review laws designed to protect the interests of business at the expense of the people. See David M. Gold, The Tradition of Substantive Judicial Review: A Case Study of Continuity in Constitutional Jurisprudence, 52 ME. L. REV. 355, 356 (2000) (quoting Louis B. Boudin, Government by Judiciary, 26 POL. SCI. Q. 238, 270 (1911)). Arthur T. Hadley argued that the Court's interpretation of the Fourteenth Amendment gave corporations "'powers and privileges' . . . beyond popular control." Id. at 356-57 (quoting CHARLES GROVE HAINES, THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY 340 (2d ed. 1932)). Another commentator suggested that the corporations had "'practically appropriated'" the Fourteenth Amendment. Id. at 357 (quoting CHARLES WALLACE COLLINS, THE FOURTEENTH AMENDMENT AND THE STATES 137-38 (1912)). On the opposite spectrum, Professor James Ely suggested that the Court was genuinely devoted to the preservation of individual liberty in a changing society. Unlike modern liberals, the Fuller Court defined freedom largely in economic terms and highly valued individual choice in economic matters. . . . [T]he Fuller Court strengthened private property as a primary personal right immune from government tampering. A preoccupation with economic liberty had more to do with the course of the Fuller Court than any hidden desire to safeguard the interests of business per se.
government's positive role in the economy gained some momentum.\textsuperscript{55} Although both the theory of negative freedom and the theory of "positive government" play a significant role in politics, the steady increase in government activity in every walk of life has persisted.\textsuperscript{56} Administrative agencies and regulations go as far back as the beginning of the United States itself in some rudimentary way.\textsuperscript{57} However, increasing government involvement over the ages brought about increasing administrative regulations and thus the growth of administrative law.\textsuperscript{58}

\textsuperscript{55} See CANN, supra note 1, at 9-10. Prominent among the various theories is the Keynesian economic theory. It essentially suggests that "[m]arkets are far from perfectly competitive, and their operation results in a persistent shortfall in 'effective demand' for consumption, employment, and investment. The result is an endemic underutilization of resources that can be at least partially corrected by government action." Robert Ashford, \textit{Socioeconomics and Professional Responsibilities in Teaching Law-Related Economic Issues}, \textit{41 San Diego L. Rev.} 133, 154 (2004); see also Nancy C. Staudt, \textit{Constitutional Politics and Balanced Budgets}, \textit{1998 U. Ill. L. Rev.} 1105, 1171 n. 342 (citing Martin Feldstein, \textit{The Retreat from Keynesian Economics}, 64 PUB. INT. 92, 93 (1981) (quoting President Nixon as saying, "We are all Keynesians")). See generally, Abba P. Lerner, \textit{Keynesianism: Alive, If Not So Well, at Forty, in FISCAL RESPONSIBILITY IN CONSTITUTIONAL DEMOCRACY} 59 (James M. Buchanan & Richard E. Wagner eds., 1978).

\textsuperscript{56} See CANN, supra note 1, at 10. Professor Cann suggests that "[i]ndeed these two philosophies form the underpinnings of the two major political parties in America today." \textit{Id.}

\textsuperscript{57} See William H. Kuehnle, \textit{Standards of Evidence in Administrative Proceedings}, \textit{49 N.Y.L. Sch. L. Rev.} 829, 836 (2005). For example, a 1941 report by the Attorney General's Committee on Administrative Procedure identifies administrative-type laws enacted by the First Congress of the United States, primarily related to the collections of customs and veteran benefits. \textit{Id.} (citing S. DOC. NO. 77-8 (1941)). By 1941, about 51 administrates agencies were in existence. \textit{Id.} Eleven of them, including the Internal Revenue Bureau and the Patent Office, existed before the Civil War. Six more were created between 1865 and the turn of the twentieth century, including the Immigration and Naturalization Service (INS), now called the United States Citizenship and Immigration Services (USCIS), and the Interstate Commerce Commission (ICC). \textit{Id.}

\textsuperscript{58} See \textit{id.} at 836-37.
B. Rules of Procedure and Evidence in Agency Proceedings

The administrative system is meant to perform the government’s increasingly complex responsibilities in a simpler and more expedient manner than the formal legislative and judicial processes.\(^{59}\) Apparently, to attain the goal of expedited and swift adjudication of administrative matters, the United States Supreme Court began relaxing the rules governing the admissibility of evidence in administrative agency proceedings as early as 1904.\(^{60}\) In *Interstate Commerce Commission v. Baird*, the Court ruled that formal and narrow rules of trials at common law must not hamper the decision making process of administrative agencies, particularly of the Interstate Commerce Commission (ICC).\(^{61}\) The Court distinguished such administrative claims from claims at common law, which require “strict correspondence . . . between allegation and proof.”\(^{62}\)

The debate over the rules of evidence regulating administrative agency proceedings is also as old as the delegation of adjudicatory authority to the administrative agencies.\(^{63}\) In fact, there was immense resistance to the informalities of administrative proceedings from the very beginning. For example, the American Bar Association, in a series of reports from 1934-1938 opposed delegation of adjudicatory authority to administrative agencies, and advocated the establishment of an administrative court.\(^{64}\) The 1934 report went as far as saying: “‘The judicial branch of the federal government is being rapidly and seriously undermined . . . [S]o far as possible, the decision of controversies of a judicial character must be brought back into the judicial system.’”\(^{65}\) Since that had already become almost impossible to do for many reasons (including constitutional issues), the effort instead shifted to attempting to import court-like rules to administrative agency proceedings.\(^{66}\)

---

59. See id. at 831. Jeremy Bentham suggested that formal rules of admissibility of evidence defy common sense because they exclude information that is helpful in reaching a conclusion. Id. (citing JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 6 (Fred B. Rothman & Co. 1995) (1827)). The relaxation of the rules of evidence follow the same common sense observation. See id.


61. Id. at 44.

62. Id.

63. See Graham, *supra* note 8, at 354.

64. 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.4, at 12-13 (4th ed. 2002).

65. Id. § 1.4, at 12 (quoting 59 A.B.A.R. 539, 540 (1934)).

66. See Kuehnle, *supra* note 57, at 843-44 (“The effort later turned from bringing administrative proceedings into a federal court system to bringing court standards into administrative proceedings.”); see also PIERCE, *supra* note 64, §1.4, at 13-15 (explaining
In 1939, Congress passed legislation proposing that the Supreme Court enact uniform rules for adversarial administrative trials, which would have, by and large, duplicated the rules of procedure and evidence applicable in federal court proceedings. It never became law because President Roosevelt vetoed it. On that occasion, he remarked:

"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.

After remaining a source of immense controversy since the Supreme Court's 1904 ruling, evidentiary rules in agency proceedings took their...
current formal shape through the adoption of the Administrative Procedure Act (APA) in 1946.\footnote{71}

The APA was in essence a compromise between the advocacy for the application of strict judicial type rules of procedure and evidence on the one hand, and the advocacy for more relaxed and informal rules on the other. One of the most important provisions of the APA that shows this compromise states:

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.\footnote{72}

According to the APA, therefore, evidence that would otherwise be inadmissible in federal courts, including hearsay, is admissible in proceedings before federal administrative agencies even when the proceedings are adversarial in nature.\footnote{73} Administrative agencies are not only allowed to admit hearsay and other inadmissible evidence, but are required to admit and consider such evidence.\footnote{74} In essence, they have to consider everything for what it is worth excluding only worthless and redundant evidence.

There are several reasons for this fundamental deviation from the rules of evidence applicable in judicial proceedings. One underlying assumption is that formal rules of evidence are designed to assist lay persons making up juries in their determination of facts, which experts adjudicating administrative matters do not to require.\footnote{75} Moreover, broad admissibility rules were deemed to be economically desirable, particularly when large economic matters are involved. A very good example of this proposition is found in \textit{Spiller v. Atchison, Topeka & Santa Fe Ry. Co.}\footnote{76}

In \textit{Spiller}, a group of shippers brought an action before the ICC seeking reparations for alleged overcharge by railroads.\footnote{77} At the hearing,  

\footnote{72. Administrative Procedure Act § 7(c), 5 U.S.C. § 556(d) (2000).}
\footnote{73. \textit{See id.; see, e.g.,} Nat’l Assoc’n of Recycling Indus. v. Fed. Maritime Comm’n, 658 F. 2d 816, 825 (D.C. Cir. 1980).}
\footnote{74. \textit{See, e.g.,} \textit{id.} at 824-25.}
\footnote{75. 2 PIERCE, \textit{supra} note 64, at § 10.1.}
\footnote{76. 253 U.S. 117 (1920).}
\footnote{77. \textit{Id.} at 122.}
the petitioners presented only one witness who based his testimony on his examination of voluminous records of cattle shippers and commission merchants.\textsuperscript{78} The ICC ruled in favor of the petitioners based essentially on that testimony.\textsuperscript{79} Following a series of appeals on evidentiary grounds, the Supreme Court rested the case by holding that hearsay evidence is admissible in administrative proceedings, especially when it is corroborated.\textsuperscript{80}

In this case, if the hearsay testimony were excluded, the ICC would have been required to make a determination based on the examination of the voluminous documentation.\textsuperscript{81} Evidently, economic expediency played a major role in this determination. Such considerations remain at the center of the relaxation of evidentiary rules. Spiller also suggests that relaxation of the rules is favored in complex economic cases where strict rules would be economically burdensome.\textsuperscript{82} The dilemma is, however, that relaxed rules tend to favor one or the other party depending on the circumstances. In Spiller, for instance, stricter rules of the judicial process would have certainly favored the Railroads' defense against claims of overcharging.

Proponents of relaxed procedural and evidentiary rules of administrative proceedings argue that the application of strict rules of evidence, particularly the exclusion of hearsay, would disrupt the administrative process of efficient and expeditious resolution of disputes.\textsuperscript{83} Proponents of stricter rules, on the other hand, argue that the proper regulation of admissibility of evidence brings order to the administrative process and protects individual claimants from indiscretions of powerful agencies.\textsuperscript{84} Professor Glicksman, for example,

\begin{itemize}
\item \textsuperscript{78} Id. at 129-30.
\item \textsuperscript{79} Id. at 130.
\item \textsuperscript{80} Id. at 131.
\item \textsuperscript{81} See id. at 125-26, 129.
\item \textsuperscript{82} See id. at 122-27.
\item \textsuperscript{83} See generally Kenneth Culp Davis, Hearsay in Administrative Hearings, 32 GEO. WASH. L. REV. 689 (1964) (providing that "the distinction between hearsay and non-hearsay is more harmful than it is helpful in the federal administrative process, and that it ought to be obliterated from the law, from the practice, and from the thinking"); Ernest Gellhorn, Rules of Evidence and Official Notice in Formal Administrative Hearings, 1971 DUKE L. J. 1 ("Pressure to abandon, or at least to limit, the application of technical common law rules of evidence has been directed toward administrative agencies from many quarters.");
\item \textsuperscript{84} See generally Elliot B. Glicksman, The Modern Hearsay Rule Should Find Administrative Law Application, 78 NEB. L. REV. 135 (1999) ("The need for judicial rules of evidence, more particularly the application of the hearsay rule, is more urgent in administrative proceedings than it is under general jurisdiction settings."); Joseph J. Migas, Admissibility of Hearsay in Administrative Deportation Hearings: A Due Process Call for Reform, 11 GEO. IMMIGR. L.J. 601 (1997) ("I will argue that the existing system
\end{itemize}
argues that the suggestion that exclusion of hearsay evidence would hamper the finding of the truth is fundamentally flawed because it assumes the only purpose of the American trial is the finding of the truth.\textsuperscript{85} He goes on, stating that more than just finding of the truth is involved: "It is a widely accepted principle of Anglo-American law that not all relevant evidence is admissible. Given that the American trial system is designed to promote both truth and justice, evidentiary rules that exclude potentially relevant evidence should not find rejection."\textsuperscript{86} He further argues that because administrative adjudications today are essentially the same as federal and state nonjury trials, there is no compelling reason to subject them to different evidentiary standards.\textsuperscript{87}

None of the propositions outlined above are without merit. The central difficulty in the divergent positions is the unified treatment of all judicial proceedings on the one hand, and all adversarial administrative proceedings on the other. Given the enormous diversity in the purposes and functions of administrative agencies, and in the nature of interests represented in their adjudications, approaching each administrative agency individually, or a group of similarly situated agencies collectively, would better address the procedural and evidentiary challenges. The following section addresses the peculiarities of immigration proceedings and demonstrates the difficulties associated with the application of the generous procedural and evidentiary rules of the Immigration and Nationality Act (INA).

III. RULES OF PROCEDURE AND EVIDENCE IN IMMIGRATION PROCEEDINGS: THE CHALLENGES OF GENEROUS ADMISSIBILITY AND MINIMUM REQUIREMENTS OF DUE PROCESS

This Part puts the nature of immigration deportation proceedings in context. It provides a detailed discussion of the various aspects of the challenges associated with the rules of procedure and evidence applicable in immigration deportation proceedings, and demonstrates the need for reconsideration of both the fundamental approach as well as some specific rules.

\textsuperscript{85} Glicksman, \textit{supra} note 84, at 137.
\textsuperscript{86} \textit{Id.}
\textsuperscript{87} \textit{Id.} at 139.
A. Deportation Proceedings in Perspective:
Civil, Criminal, or Quasi-Criminal?

More than a century ago, in *Fong Yue Ting v. United States*, the
Supreme Court held that deportation proceedings are civil proceedings.88
In 1984, reaffirming its century old determination, the Court in *INS v. Lopez-Mendoza* noted that immigration proceedings are civil
proceedings because they are essentially designed to determine an
immigrant's eligibility under the immigration laws to stay in the United
States rather than to punish the immigrant for any wrongdoing.89

Regardless of this longstanding rule, however, the similarities between
criminal prosecutions and adversarial deportation proceedings are
evident. Deportation itself not only increasingly looks like a criminal
punishment, but also the proceeding now shares some of the most
fundamental characteristics of a criminal proceeding.90 Today, some
criminal proceedings and convictions have more serious immigration

---

88. 149 U.S. 698, 728-29 (1893); see also Mahler v. Eby, 264 U.S. 32, 39 (1924) ("It is
well settled that deportation, while it may be burdensome and severe for the alien, is not a
punishment.").


90. See Terry Coonan, *Dolphins Caught in Congressional Fishnets—Immigration
Law's New Aggravated Felons*, 12 GEO. IMMIGR. L.J. 589, 590 (1998); Teresa A. Miller,
*Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 GEO.
IMMIGR. L.J. 611, 612-13 (2003). Deportation was traditionally reserved for serious and
violent crimes. The trend has, however, changed drastically over the last two decades. A
comparison of the list of crimes rendering an alien deportable in the old rules with the list
in the current rules demonstrates the changing trend in immigration law relating to crimes.
Compare Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-
(defining "aggravated felony" to include crimes such as murder and "trafficking in any
firearms or destructive devices"), with Immigration Act of 1990, Pub. L. No. 101-649, §
offenses to the aggravated felony category, including money laundering and crimes of
violence), and Immigration and Nationality Technical Corrections Act of 1994, Pub. L.
(adding to the list further, including theft offenses and conspiracy), and Antiterrorism and
(codified as amended at 8 U.S.C. § 1101(a)(43)) (expanding the list significantly by
including crimes such as document fraud and perjury or subornation of perjury), and
Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [hereinafter
IIRIRA], Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627 to 628 (codified as
amended at 8 U.S.C. § 1101(a)(43)) (adding more offenses to the list, but most importantly
lowering the threshold term of imprisonment that satisfies the definition of aggravated
felony for some of the offenses such as theft from five years to one year regardless of
whether the sentence is actually imposed or suspended); see also Coonan, supra, at 592-
605 (providing commentary on the increasing criminalization of the immigration law);
Miller, supra, at 612-14 (same).
consequences than they do criminal penalties. For example, a lawful permanent resident who pleads guilty to shoplifting and receives a suspended sentence of one year may be deported as an aggravated felon. That person will not be eligible for asylum even if she faces persecution in her home country. The immigration system is

91. See generally INA § 237, 8 U.S.C.A. § 1227(a)(2) (West 2005 & Supp. 2007) (listing criminal offenses that result in deportation). A suspended sentence of one year or more for some offenses would simply make a person an aggravated felon. That person does not serve any time but may be deported even if she is a lawful permanent resident. For a definition of aggravated felony, see id. § 101, 8 U.S.C. § 1101(a)(43) (2000 & Supp. IV 2005).

92. See id. § 237(a)(2)(A)(iii) (mandating the deportation of those who have been convicted of an aggravated felony); see also id. § 101(a)(43)(G) (defining the crime of theft as an aggravated felony when the sentence is more than one year). “[T]he fact that [the] sentence [may be] suspended is [considered to be] irrelevant.” S-S-, 21 I. & N. Dec. 900, 902 (1997); see also Pichardon v. INS, 104 F.3d 756, 759 (5th Cir. 1997) (holding that the maximum term of an indeterminate sentence is considered the actual sentence for purposes of defining an aggravated felony). The IIRIRA, which amended the INA, provides that:

Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

IIRIRA, Pub. L. No. 104-208, § 322, 110 Stat. 3009-546, 3009-628 to 629 (1996) (codified at 8 U.S.C. § 1101(a)(48)(B)). Congress made it clear that the new definition of an aggravated felony “clarifies that in cases where immigration consequences attach depending upon the length of a term of sentence, any court-ordered sentence is considered to be ‘actually imposed’ including where the court has suspended the imposition of the sentence.” 142 CONG. REC. H10,899 (daily ed. Sept. 24, 1996) (Joint Explanatory Statement of the Committee of Conference). That is perhaps the worst part of the IIRIRA because plea bargains are often agreed to based on the fact that suspension of the sentence is so attractive and makes it seem as if there is no penalty at all. Unwary immigrants take such bargains routinely. The author of this Article had the opportunity to examine records of an actual case that confirms this concern. The respondent pleaded guilty to shoplifting a sweater on sale for $15 dollars at a Macy’s store in Alexandria, Virginia. She was given a suspended sentence of a year, which meant 365 days under Virginia law. That qualified her as an aggravated felon under INA section 101(a)(43). She was deported as a result. It does not appear that she was advised of the immigration consequences of her plea during the agreement. Even if she was not so advised, she could not have raised ineffective assistance counsel as a defense in most jurisdictions. See United States v. Fry, 322 F.3d 1198, 1200 (9th Cir. 2003); United States v. Banda, 1 F.3d 354, 356 (5th Cir. 1993); Varela v. Kaiser, 976 F.2d 1357, 1358 (10th Cir. 1992); United States v. Del Rosario, 902 F.2d 55, 58-59 (D.C. Cir. 1990); Santos v. Kolb, 880 F.2d 941, 945 (7th Cir. 1989); United States v. Yearwood, 863 F.2d 6, 7-8 (4th Cir. 1988); United States v. Campbell, 778 F.2d 764, 769 (11th Cir. 1985). But see United States v. Couto, 311 F.3d 179, 187-88 (2d Cir. 2002) (holding that affirmative misrepresentation regarding the immigration consequences of a plea agreement is ground for an ineffective assistance claim).

93. See INA § 208, 8 U.S.C. § 1158(b)(2)(A)(ii) (2000). Certain statutory bars apply in asylum cases. By far the most commonly applied bar is the aggravated felony bar. Under the INA, persons convicted of “a particularly serious crime” are barred from
increasingly becoming part of the criminal justice system. The two systems are so closely intertwined as to share some of the same sorts of evidence. For example, immigration courts routinely look at and interpret state and federal criminal statutes to determine an alien's eligibility for some type of relief under the immigration laws. In a case that this author has supervised, an immigration court had to determine whether a Pennsylvania statute defining the crime of possession of stolen property qualified as a crime of moral turpitude for immigration purposes. The immigration court also had to look into the Pennsylvania sentencing statutes, guidelines, and case law to determine what is meant by imposition of a sentence for purposes of INA section 101(a)(43) when the respondent was immediately sentenced to a minimum of six months and a maximum of twenty-three months.

obtaining asylum from persecution. See id. A per se rule considers all persons convicted of an aggravated felony to have been convicted of "a particularly serious crime" barring them from asylum. See id. § 208(b)(2)(B)(i).


95. Cf. Gerald Seipp, Third Circuit's New Role as Activist Court on Immigration Issues, 51 VILL. L. REV. 981, 994 (2006) ("The [INA] penalizes many categories of criminal conduct, and, of course, there are thousands of different federal and state criminal statutes, not to mention criminal statutes from foreign jurisdictions that also penalize criminal conduct. It is often necessary for the courts to juxtapose the immigration statute with the applicable criminal statute and then proceed to analyze the actual findings by the court ... ").

96. Crimes of moral turpitude are a group of crimes that have some serious immigration consequences more like aggravated felonies. Both terms are creations of the immigration law, not of the criminal law, but they now make up a significant part of the criminal justice system. "Crimes of moral turpitude" are not defined under the INA, however, courts have consistently used the following definition: "[A]n act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man." Ng Sui Wing v. United States, 46 F.2d 755, 756 (7th Cir. 1931) (quoting In re Henry, 99 P. 1054, 1055 (Idaho 1909)); see also Coykendall v. Skrmetta, 22 F.2d 120, 120-21 (5th Cir. 1927); Planas v. Landon, 104 F. Supp. 384, 388 (S.D. Cal. 1952); United States ex rel Manzella v. Zimmerman, 71 F. Supp. 534, 537 (E.D. Pa. 1947); United States ex rel Ciarello v. Reimer, 32 F. Supp. 797, 798 (S.D.N.Y. 1940); United States v. Carrollo, 30 F. Supp. 3, 6-7 (W.D. Mo. 1939). Based on this definition, courts have interpreted crimes of moral turpitude to include conduct such as providing false information on a student loan application, Kabongo v. INS, 837 F.2d 753, 754, 758 (6th Cir. 1988), or heterosexual sodomy, Velez-Lonzano v. INS, 463 F.2d 1305, 1307 (D.C. Cir. 1972). For a list of crimes that may or may not be considered crimes of moral turpitude, see generally Stephen H. Legomsky, Immigration and Refugee Law and Policy 547-48 (4th ed. 2005).

97. In this case, our client, a lawful permanent resident for fifteen years, pled guilty to possession of stolen property and was sentenced to a probation of a minimum of six months and a maximum of twenty-three months under Pennsylvania law. See generally 42 PA. CONS. STAT. ANN. § 9756 (West 2007). Inexplicably, however, he served a term of five months and was released from the state penitentiary. Thereafter, he was put in
More than ten years after the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), the interaction between the criminal justice system and the immigration system has become a matter of common knowledge. Whenever an immigrant is subjected to the criminal justice system, the immigration consequences often impact plea agreements and sentencing. At least one circuit court of appeals has held that affirmative misrepresentation of the immigration consequences of a guilty plea amounts to ineffective assistance of counsel and warrants the withdrawal of the guilty plea.

By far, the most important category of offenses that have dramatic immigration consequences are “aggravated felonies” because they immigration detention and the INS commenced deportation proceedings. The Service alleged that he was not eligible for cancellation of removal under INA section 240 because he had committed an aggravated felony within the meaning of INA section 101(a)(43), which makes a theft for which the prison sentence is at least one year an aggravated felony. See INA § 101(a)(43)(G). The issue was whether, under Pennsylvania law, the maximum possible penalty is deemed to have been imposed when the defendant was under the impression that he was getting a probation of twenty-three months at the maximum. Examination of the Pennsylvania criminal statutes and national case law relating to criminal and sentencing statutes was the only way that the immigration judge could determine the outcome. The examination revealed that in many jurisdictions, including Pennsylvania, the maximum penalty is considered the penalty actually imposed in the case of an indeterminate sentence, as long as it is an actual sentence and not probation. See, e.g., Pichardo v. INS, 104 F.3d 756, 759 (5th Cir. 1997) (“For the purposes of exclusion and deportation proceedings, an indeterminate sentence is to be considered a sentence for the maximum term imposed.”); Nguyen v. INS, 53 F.3d 310, 311 (10th Cir. 1995) (“[T]he legal effect [for purposes of INA section 101(a)(43)] of [an] indeterminate sentence of three to eight years [is] the maximum term imposed, eight years.”). Cf. Rogers v. Pa. Bd. of Prob. & Parole, 724 A.2d 319, 321 n.2 (Pa. 1999) (discussing when parole is available to a prisoner, the court notes “if the [parole] Board denies the prisoner’s application, the period of confinement can be the maximum period of incarceration specified by the sentencing court”).


99. United States v. Couto, 311 F.3d 179, 187-88 (2d Cir. 2002) (defendant must also prove he would not have pleaded guilty without the misrepresentation).

100. Although the term “aggravated felony” appears to be a criminal law concept, it is essentially an immigration law term of art, though the criminal justice system is now familiar with this strange class of offenses. Congress introduced the concept of aggravated felony for the first time in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70 (codified as amended at 8 U.S.C. § 1101(a)(43) (2000 & Supp. IV 2005). The concept was then limited to serious crimes such as murder, and drug, firearm, and explosives trafficking. Id. See generally Coonan, supra note 90 (examining “the scope and evolution of the aggravated felon provisions”); see also Miller, supra note 90, at 632 (arguing that a culture of crime control has dominated efforts in the immigration arena). For the current definition and list of offenses that qualify as aggravated felonies see INA § 101(a)(43). “Any alien who is convicted of an aggravated felony at any time after admission is deportable.” INA § 237, 8 U.S.C.A. § 1227(a)(2)(A)(iii) (West 2005 & Supp. 2007).
exclude a non-citizen from virtually all types of relief, with few exceptions. Immigration practitioners commonly say a conviction for an aggravated felony is “the kiss of death to the noncitizen.” The statutory scheme for determining what constitutes an aggravated felony is very difficult.

Except in clear and serious cases, the most common way of determining whether a given respondent is ineligible for cancellation of removal or political asylum by reason of being convicted of an aggravated felony involves examination of state and federal criminal statutes. For example, one of the offenses that is considered an aggravated felony under the INA is: “illicit trafficking in a controlled substance . . . including a drug trafficking crime.” Under this definition, when the conviction is for a drug trafficking offense in either state or federal court, it would clearly be an aggravated felony for purposes of the immigration proceeding. If, however, the respondent is convicted of a non-trafficking offense in state court, the immigration court needs to make a closer examination of not only the immigration laws, but also of criminal statutes and criminal records. Immigration courts often look at the analogous federal statute to determine if the offense could have qualified for federal prosecution had the respondent been subject to federal jurisdiction. Complicated questions usually

101. See INA § 237(a)(2)(A)(iii). Aggravated felons are even excluded from applying for asylum. See id. § 208, 8 U.S.C § 1158(b)(2)(A)(ii) (2000). As indicated above, that is because Congress made a per se rule of considering all aggravated felonies as “particularly serious crimes” within the meaning of the statute. See id. § 208(b)(2)(B)(i) (requiring an actual conviction). For a detailed discussion of what constitutes a conviction, see DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES § 2.17 (2007). Perhaps the only form of relief available for a non-citizen convicted of an aggravated felony is deferral of removal under the Convention Against Torture (CAT). See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, Annex art. 3, ¶ 1, U.N. Doc. A/RES/39/46 (Dec. 10, 1988) [hereinafter Convention Against Torture]; see also Foreign Affairs Reform and Restructuring Act of 1998, P.L. 105-277, § 2242, 112 Stat 2681-761, 2681-822 to 823 (“It shall be the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States.”). CAT relief is difficult to obtain because the respondent must demonstrate that it is more likely than not that he/she will be tortured by a government or its agents or at least by the acquiescence of the government. Convention Against Torture, supra, art. 3.

102. See Ilana Etkin Greenstein, Into the Rabbit's Hole: When a Misdemeanor is a Felony The Davis/Barrett Hypothetical Federal Felony Analysis of Drug Crimes, in IMMIGRATION & NATIONALITY LAW HANDBOOK 137, 137 (Stephanie L. Browning et al. eds., 2006).

103. INA § 101(a)(43)(B).

104. See Greenstein, supra note 102, at 137, 142.

105. Id.
arise when dealing with criminal offenses such as this. It is difficult to
determine if offenses classified as misdemeanors under state law could be
considered aggravated felonies under the federal immigration statute.106
Immigration courts are called upon to make these kinds of
determinations almost on a daily basis.

Furthermore, immigration courts now consider some of the same
evidence presented for criminal proceedings. For example, in a case
where the criminal statute has two or more phases, and a conviction
under one phase qualifies as a crime of moral turpitude or an aggravated
felony but a conviction under the other does not—and when it is not
clear under which one of the two phases the defendant is convicted—the
court may look at the specifics of the criminal conduct, including the
charges.107 Although complicated, this is increasingly becoming necessary
as the criminal justice and immigration enforcement systems become so
closely associated.

There are more reasons to consider deportation proceedings as
criminal proceedings rather than as civil proceedings. Immigration
departure proceedings invariably involve the liberty interest of the
individual just like criminal proceedings. The final result inevitably
involves imprisonment and forced transportation of the individual from a
place where he wants to be to a place where he does not want to be. As
far back as 1922 Justice Brandeis said deportation takes a person from

106. The reverse also raises difficult issues—what if an offense is considered a felony
under state law but could only be prosecuted as a misdemeanor under federal law? There
is no clear answer for all of these questions, but immigration judges need to make such
determinations on a daily basis. Greenstein says:

The Board of Immigration Appeals (BIA) and the nation’s circuit courts of
appeals have taken a deep dive into Alice’s rabbit hole, and have convoluted,
circuitous paths to answering those questions. The result is a body of case law
with more twists and turns than the average roller coaster and with truly bizarre
results.

Id. at 137.

defendant was convicted of burglary in Missouri. The Court had to decide whether the
defendant was a “violent felon” for purposes of sentence enhancement. See id. at 578-80.
The Missouri criminal statute pertaining to burglary provided for multiple types of
burglary, some of which qualified as crimes of violence, but others that did not. See id. at
578 n.1. In such circumstances, the Court held, a court may look at charging documents,
jury instructions, and the actual records to determine “all the elements of [the crime] in
order to convict the defendant.” Id. at 602; see also United States v. Landeros-Gonzales,
262 F.3d 424, 425-26 (5th Cir. 2001) (concluding that where sentence enhancement
requires that the defendant have committed an aggravated felony, “the inherent nature of
the offense” determines whether the requisite elements of the crime have been met);
United States v. Doe, 960 F.2d. 221, 224 (1st Cir. 1992) (“[W]here a single statutory
provision defines several different crimes . . . a court may have to look at the indictment
. . . to see which of the several different statutory crimes . . . was at issue.”).
“all that makes life worth living.” In fact, it was historically considered a criminal punishment. In Seventeenth Century England, deportation was a judicially sanctioned penalty. Scholars suggest that deportation, sometimes called banishment, was deemed an attractive form of criminal penalty for serious offenses because it essentially accomplished what the death penalty was designed to accomplish, albeit in a merciful manner. According to one commentator, “[e]xecution is a simple punishment, quick, effective, economical, but not merciful. Hence perhaps the resort to what seemed to many to be the next best thing—banishment.”

The similarities between immigration deportation proceedings and criminal proceedings are not limited to the involvement of liberty interests and the physical restraint and removal of the individual. The actual proceedings are also quite similar. The government is represented by an attorney and the proceedings are quite adversarial. The respondent, just like a criminal defendant, is often detained and appears in a court room with a prison uniform guarded by a police officer at all times. The respondent answers charges filed against him by attorneys representing the Department of Homeland Security (DHS).

If the respondent is unsuccessful in defending against the charges, he is sent back to wherever it is believed that he came from. The actual deportation involves the physical custody of the deportee before deportation, and the forced physical removal of the individual, often in handcuffs or other forms of body chains. For anyone observing these proceedings and following the consequences thereof, there is nothing civil about them. For all intents and purposes, they are the functional equivalent of criminal proceedings without the constitutional guarantees

110. See id. at 123; see also Wm. Garth Snider, Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment, 24 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 462 (1998) (suggesting that the act was designed to remove criminals from the English society).
111. See A.G.L. SHAW, CONVICTS AND THE COLONIES 21 (Humanities Press 1966); see also WILFRID OLDHAM, BRITAIN'S CONVICTS TO THE COLONIES 11-12 (1990).
113. See id.
114. For example, in 2002, sixty-three Philippines citizens were deported from the United States and arrived at the Manila airport in shackles. Reports indicate that the body chains were kept on them for the entire 16-hour flight. See Michelle Rae Pinzon, Was the Supreme Court Right? A Closer Look at the True Nature of Removal Proceedings in the 21st Century, 16 N.Y. INT'L L. REV. 29, 32 n.20 (2003).
applicable in criminal proceedings.\footnote{115} The following sections discuss the procedural and evidentiary rules that apply in deportation proceedings and demonstrate the shortcomings of these rules in protecting the legitimate liberty interests of the respondents in these proceedings. These sections also demonstrate the infirmities of the rules that result in serious jeopardy to the liberty interests of many and in significant inconsistency and unpredictability.

### B. Immigration and Nationality Act (INA) Rules of Procedure and Evidence

Neither the common law rules of evidence nor the codified Federal Rules of Evidence (FRE) govern the admissibility of evidence in immigration deportation proceedings.\footnote{116} Immigration proceedings are exclusively governed by the INA and the regulations issued in pursuance of it.\footnote{117} Although these rules are somewhat similar to the rules of the APA, the APA rules are also inapplicable in immigration proceedings.\footnote{118}

In 1950, about four years after the enactment of the APA and two years before the enactment of the INA, in \textit{Wong Yang Sung v. McGrath}, the Supreme Court held that the APA applied to immigration proceedings.\footnote{119} Five years later, however, in \textit{Marcello v. Bonds}, the Court revisited its position and held that by adopting the 1952 Immigration

\footnote{115} Fong Yue Ting v. United States, 149 U.S. 698, 740-41 (1893) (Brewer, J., dissenting) (“[I]t needs no citation of authorities to support the proposition that deportation is punishment. Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel. . . . [I]f a banishment of this sort be not a punishment, and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied.” (quoting \textit{4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1778}, at 555 (Jonathan Elliot ed., 2d ed., Philadelphia, J.B. Lippincott & Co. 1881) (quoting President Madison))).

\footnote{116} See INA § 240, 8 U.S.C. § 1229a(a)(3) (2000) (“Unless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or . . . removed . . . .”); see, e.g., Ardestani v. INS, 502 U.S. 129, 133-34 (1991) (stating that the INA is the sole and exclusive source of procedural rules—including rules of evidence—applicable in deportation proceedings); see also Henry v. INS, 74 F.3d 1, 6 (1st Cir. 1996); Felzcerek v. INS, 75 F.3d 112, 116 (2d Cir. 1996); Villegas-Valenzuela v. INS, 103 F.3d 805, 812 (9th Cir. 1996).

\footnote{117} INA § 240(a)(3). See generally 8 C.F.R. pt. 240 (2007) (providing regulations governing immigration proceedings issued pursuant to the INA).

\footnote{118} Ardestani, 502 U.S. at 133-34.

Nationality Act, Congress legislatively superseded *Wong Yang Sung* and provided for special rules applicable in deportation proceedings.\(^\text{120}\) In *Ardestani v. INS*, ten years after the enactment of the Immigration and Nationality Act Amendments of 1981, the Court reaffirmed its *Marcello* decision.\(^\text{121}\)

At issue in *Ardestani* was whether attorney's fees may be awarded under the Equal Access to Justice Act (EAJA)\(^\text{122}\) for a party who prevails in deportation proceedings in an appeal by the government.\(^\text{123}\) The APA provides that "[a]n agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding."\(^\text{124}\) The EAJA defines adversarial adjudication as "an adjudication under section 554 of [Title 5] in which the position of the United States is represented by counsel."\(^\text{125}\) Section 554 of Title 5 in turn provides for the scope of proceedings governed by the APA.\(^\text{126}\) As there was no dispute regarding the representation of the interest of the United States by counsel, the only pertinent issue for the Court was "whether deportation proceeding[s constituted] . . . adversarial adjudication "under section 554" [of the APA] within the meaning of the EAJA."\(^\text{127}\) Applying the *Marcello* precedent, the Court held that "deportation proceeding[s are] not subject to the APA."\(^\text{128}\)

Although the Court's ruling in the *Ardestani* case is focused and specific, it is generally considered to stand for the proposition that deportation proceedings are not governed by the APA but exclusively by the INA. Ironically, however, many of the INA procedural and evidentiary rules are based on the APA.\(^\text{129}\) In fact, the Court acknowledged this in its *Ardestani* opinion when it said: "It is immaterial

---

\(^\text{120}\) *Marcello*, 349 U.S. at 309-10 ("[W]e cannot ignore the background of the 1952 immigration legislation, its laborious adaptation of the Administrative Procedure Act to the deportation process, the specific points at which deviations from the Administrative Procedure Act were made, the recognition in the legislative history of this adaptive technique and of the particular deviations, and the direction in the statute that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings.").

\(^\text{121}\) *Ardestani*, 502 U.S. at 133-34.


\(^\text{123}\) *Ardestani*, 502 U.S. at 131.


\(^\text{125}\) *Id.* § 504(b)(1)(C)(i).


\(^\text{127}\) See *Ardestani*, 502 U.S. at 133.

\(^\text{128}\) *Id.* at 134.

\(^\text{129}\) See DEBORAH E. ANKER, LAW OF ASYLUM IN THE UNITED STATES 91 (3d ed. 1999).
Revisiting the Rules in Deportation Proceedings

that the Attorney General in 1983 promulgated regulations that conform deportation hearings more closely to the procedures required for formal adjudication under the APA.\textsuperscript{130} \textit{Ardestani} simply carved out the possibility of attorney's fees and other cost awards in immigration proceedings.\textsuperscript{131} However, \textit{Ardestani} was given expanded meaning over the years, resulting in a substantially higher degree of flexibility and less procedural guarantees in deportation proceedings governed solely by the INA.\textsuperscript{132}

Consistent with \textit{Ardestani}, lower courts continued the curtailment of some fundamental guarantees that the APA offered individual claimants. For example, in \textit{Kaczmarczyk v. INS}, the Court of Appeals for the Seventh Circuit held that because the APA is not applicable in immigration deportation proceedings, the BIA is not required to afford aliens a chance to rebut the Board's administrative notice of facts.\textsuperscript{133} Therefore, it is safe to conclude that the INA rules of procedure and evidence are more relaxed than even the APA rules. As this Article contends, such informality has resulted in more inconsistency, unpredictability, and at times, outright abuse.

The INA provides that "[u]nless otherwise specified in this chapter, a proceeding under this section shall be the sole and exclusive procedure for determining whether an alien may be admitted to the United States or, if the alien has been so admitted, removed from the United States."\textsuperscript{134} The Act assigns the immigration judge the role of an investigator. It states: "The immigration judge shall administer oaths, receive evidence, and interrogate, examine and cross-examine the alien and any witnesses."\textsuperscript{135}

\begin{thebibliography}{133}
\bibitem{130} \textit{Ardestani}, 502 U.S. at 134 (citing 48 Fed. Reg. 8038-8040 (1983)).
\bibitem{131} See id. at 131.
\bibitem{132} See generally Campos v. INS, 62 F.3d 311 (9th Cir. 1995) (finding that the "law is clear"; immigration proceedings are not controlled by the APA); Hernandez-Avalos v. INS, 50 F.3d 842 (10th Cir. 1995) (noting that "under the exclusivity provision of the [INA]. . . the APA does not govern adjudicatory proceedings"); Howell v. INS, 72 F.3d 288 (2d Cir. 1995) (stating that the APA is inapplicable to deportation proceedings).
\bibitem{133} Kaczmarczyk v. INS, 933 F.2d 588, 595 (7th Cir. 1991). \textit{But see} Castillo-Villagra v. INS, 972 F.2d 1017, 1028-29 (9th Cir. 1991) ([S]ome propositions . . . may require that notice not be taken, or that warning be given, or that rebuttal evidence be allowed.").
\bibitem{135} Id. § 240(b)(1). The judge's role in immigration proceedings is quite different from judges of the judicial system in an adversarial system. It resembles, however, the role of judges in the judicial systems of the civil law, which is essentially inquisitorial. For a discussion of the differences in the adversarial and inquisitorial systems, and the challenges of a mixed system, see generally MIRJAN R. DAMASKA, THE FACES OF JUSTICE AND STATE AUTHORITY (1986); Patrick L. Robinson, \textit{Rough Edges in the Alignment of Legal Systems in the Proceedings at the ICTY}, 3 J. INT'L CRIM. JUST. 1037 (2005).
\end{thebibliography}
With respect to the alien's rights, the INA provides:
the alien shall have a reasonable opportunity to examine the
evidence against the alien, to present evidence on the alien's
own behalf, and to cross-examine witnesses presented by the
Government but these rights shall not entitle the alien to
examine such national security information as the Government
may proffer in opposition to the alien's admission to the United
States or to an application by the alien for discretionary relief
under this chapter.\textsuperscript{136}

Regulations issued pursuant to the INA provide that immigration
courts "shall receive and consider material and relevant evidence."\textsuperscript{137}
Consistent with the APA, there are no restrictions as to the admissibility
of evidence other than materiality, relevancy, and redundancy.\textsuperscript{138}
The extremely flexible evidentiary standards have obviously contributed to
the enormous inconsistency and unpredictability of immigration court
proceedings across the nation. Although courts have tried to impose
some constitutional restrictions on the admissibility of some types of
evidence in deportation proceedings,\textsuperscript{139} the absence of a uniform and
coherent guidance in evidentiary issues is still causing some serious
problems.\textsuperscript{140} The constitutional limitations are discussed in pertinent
parts in the following subsections.

\textbf{C. Flexible Standards and Constitutional Limits}

Constitutional protection of aliens is a complex subject because the
level of protection essentially depends on the level of the ties that an
alien has with the polity of the United States.\textsuperscript{141} Aliens seeking admission
have significantly less protection than aliens in deportation proceedings

\textsuperscript{136} INA § 240(b)(4)(B).
\textsuperscript{137} See 8 C.F.R. § 1240.1(c) (2007).
\textsuperscript{138} See, e.g., Anker, supra note 129, at 91 ("[T]he BIA effectively has adopted the
much broader approach of the Administrative Procedure Act (APA), which states that,
'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.'"
(quoting Administrative Procedure Act, 5 U.S.C. § 556(d) (1998))).
\textsuperscript{139} See, e.g., Cunanan v. INS, 856 F.2d 1373, 1375 (9th Cir. 1988) (holding hearsay
evidence relied on by the government denied the respondent of the opportunity to cross-
examine a witness where the government failed to make reasonable efforts to present the
witness); see also Chavez-Raya v. INS, 519 F.2d 397, 401 (7th Cir. 1975); Barcenas, 19 I. &
\textsuperscript{140} See Acello, supra note 41.
that the Fourth Amendment applies to aliens but that a "significant voluntary" attachment
to the United States is required).
after having been duly admitted.\footnote{142} Constitutional principles of due process, however, apply in almost all immigration cases.\footnote{143} Nonetheless, as indicated above, some of the basic protections of criminal proceedings do not apply in immigration proceedings as they are considered civil proceedings.\footnote{144} This section will demonstrate the shortcomings of some of the “flexible” procedural and evidentiary rules and argues that such rules both undermine the constitutional protections that should otherwise apply and contribute to the inconsistency and unpredictability of immigration deportation proceedings in general.

\section{Due Process in the Immigration Context}

Constitutional due process is perhaps the most fundamental notion that guides any adjudication involving liberty and property interests. As such, it is the appropriate beginning of any inquiry relating to procedural and evidentiary standards. As indicated above, the flexible evidentiary standards under the INA allow the admissibility of all types of evidence with little or no restriction. Perhaps the only meaningful test of reasonableness is due process. A due process check is almost always available.\footnote{145} In \textit{Mathews v. Diaz}, the Supreme Court reaffirmed the
fundamental notion that aliens are entitled to the constitutional protection of due process. It stated:

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.

The following subsections discuss specific INA provisions applicable in deportation proceedings in light of constitutional due process principles, and demonstrate the shortcomings of the corresponding procedural and evidentiary rules.

(a) Administrative Impartiality: Immigration Judge as a Neutral Adjudicator

In Hamdi v. Rumsfeld, the Supreme Court held that due process requires “a meaningful opportunity to contest the factual basis for [deprivation of liberty] before a neutral decisionmaker.” Regarding what constitutes procedural due process in general, the Supreme Court stated: “consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the occupied by noncitizens within the American constitutional community.”). For commentary relating to the plenary power doctrine and consequences, see generally Louis Henkin, The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny, 100 HARV. L. REV. 853 (1987), noting that “[t]he power to regulate immigration is not among the enumerated powers of Congress,” Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation, 100 YALE L.J. 545 (1990), explaining “the advent and persistence of the plenary power doctrine as the dominant principle of constitutional and subconstitutional immigration law,” and Peter H. Schuck, The Transformation of Immigration Law, 84 COLUM. L. REV. 1 (1984), stating that “[t]he signs of incipient changes are abundant and unmistakable,” and “[t]he courts’ almost complete deference to Congress and the immigration authorities, long a keystone of the classical structure, is beginning to give way to a new understanding and rhetoric of judicial role.”

146. Mathews, 426 U.S. at 77-78.
147. Id. at 77 (citations omitted). A number of decisions rendered in the early and mid 1970s held that aliens in the territories of the United States are entitled to the protection of the Fourth Amendment. See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873, 884-86 (1975) (holding that a border patrol stop solely based on the ethnic appearance of the occupant of a vehicle violated the Fourth Amendment); Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973) (holding that border patrol’s warrantless search of a vehicle violated the Fourth Amendment); see also Verdugo-Urquidez, 494 U.S. at 271.
The precise nature of the government function involved as well as of the private interest that has been affected by governmental action."149

Originally, immigration deportation proceedings were non-adversarial in nature and were conducted by Immigration and Naturalization Service (INS or the Service) officials without the government being separately represented by counsel.150 Later on, INS officials called "special inquiry officers" were statutorily assigned to preside over immigration hearings.151 In 1956, the "special inquiry officers" were made to operate independently of the INS.152 Then, in 1973, their title was changed to "Immigration Judge" and the authority to wear robes during hearings in courtrooms was established.153 In 1983, the Executive Office of Immigration Review (EOIR) was created within the Department of Justice. Immigration judges then became part of the EOIR, gaining more independence.154 The creation of the EOIR within the Justice Department was mainly prompted by concerns about the appropriateness of "judges being paid by the same agency that prepared and prosecuted the cases."155

Under the existing structure, while the EOIR remains a part of the Department of Justice,156 the new United States Citizenship and Immigration Services (USCIS) became part of DHS in March 2003.157

151. See id. at 489 (quoting 8 U.S.C. § 1101(b)(4) (Supp. 1992)).
152. See id.; see also James P. Vandello, Perspective of an Immigration Judge, 80 DENVER L. REV. 770, 771 (2003).
153. Vandello, supra note 152, at 771; see also Anker, supra note 150, at 489.
154. See Anker, supra note 150, at 489; see also United States Department of Justice, Executive Office for Immigration Review, Background Information, http://www.usdoj.gov/eoir/background.htm (last visited Nov. 11, 2007) [hereinafter EOIR Background].
155. Vandello, supra note 152, at 771.
156. See EOIR Background, supra note 154. The EOIR was established on January 9, 1983 within the Department of Justice. It combined the BIA and the INS. Now, functions previously performed by the INS are performed by the DHS. The creation of the EOIR within the DOJ separated the enforcement functions of the immigration courts from the enforcement functions of the INS. Id.
The Immigration and Customs Enforcement (ICE) within the USCIS currently performs duties formerly performed by the INS, including investigation, intelligence, detention, removal, and enforcement.\(^{158}\) Today, ICE is responsible for initiating deportation proceedings against aliens and representing the government in deportation proceedings.\(^{159}\) Immigration judges within the EOIR of the Department of Justice make findings of fact and law in each case.\(^{160}\) An immigration judge's decision may be appealed to the BIA within the EOIR.\(^{161}\) Decisions of the BIA may be appealed to the circuit court of appeals with jurisdiction over the matter.\(^{162}\)

Although the structure appears to be formal, immigration proceedings are conducted in an extremely informal environment. Immigration judges face unique responsibilities that are not common in any administrative, civil, or criminal proceedings. Judge James P. Vandello,
who served as an immigration judge for decades, summarized the
uniqueness of his responsibilities as follows:

My duties sometimes vary considerably from those of other
administrative judges and from civil and criminal court judges . . . . I have cases where there are hours of testimony concerning
torture in Algerian prisons. I listen to the testimony of medical
personnel who are torture experts. I have people appear in
front of me with no attorney, all-alone, and they do not speak
English. Not only that, they speak a rare language where there
are no interpreters available in this area, and only one or two in
the United States. I see cases such as that of a young man who
has been in the United States since he was six months old and is
now facing deportation to the Philippines, a country he knows
virtually nothing about. And there is absolutely no possibility
of his remaining in the United States. I have many cases where
the respondent has dealt with an "attorney" for many months
(and at a great cost), only to find out later that the person was a
notary public and not an attorney, and could not represent him
in court.163

This passage demonstrates that the duties of immigration judges are
indeed unique and challenging. The statutory guidance they have to
carry out these difficult responsibilities are not, however, without some
serious shortcomings. Not only are immigration judges required to make
findings of fact and law as neutral adjudicators, but they are also required
to act as examiners.164 Particularly disconcerting is the requirement that
they cross-examine respondents who appear before them.165 Under the
INA, evidentiary matters ought to be resolved in an evidentiary hearing
before an immigration judge.166 The INA also provides that "the
immigration judge shall administer oaths, receive evidence, and
interrogate, examine, and cross-examine the alien and any witnesses."167
The role of immigration judges is thus not limited to performing the
duties of a neutral adjudicator, but it also includes performing duties as
an investigator and examiner. Consistent with this provision, in S-M-J-,
the BIA noted that "the duty to ascertain and evaluate all the relevant
facts is shared between the applicant and the examiner."168 "Examiners"
includes immigration judges.\textsuperscript{169}

Although an inquisitorial\textsuperscript{170} role of a judge in administrative proceedings is not uncommon,\textsuperscript{171} the INA goes too far by involving an

\begin{quote}
\end{quote}

\textsuperscript{169}. \textit{See id.}

\textsuperscript{170}. \textit{See generally} DAMASKA, supra note 135 ("The adversarial mode of proceeding takes its shape from a contest or a dispute: it unfolds as an engagement of two adversaries before a relatively passive decision maker whose principal duty is to reach a verdict. The nonadversarial mode is structured as an official inquiry. Under the first system, the two adversaries take charge of most procedural action; under the second, officials perform most activities."). Regarding the interface between the two systems in the international context, see generally Robinson, supra note 135, which "focuses on four areas in which there is tension between the two legal systems resulting from either the introduction of measures or procedures from the civil law inquisitorial system into the essentially adversarial regime for the collection and presentation of evidence, or the incorporation of common-law procedures without full recognition of their interaction with predominantly civil law features in certain areas of the Tribunal's legal system." The inquisitorial system is prevalent in continental Europe, Latin America, and parts of Asia. In this system, judges presiding over any proceedings are responsible for the introduction of evidence and development of the record. \textit{See} Joachim Herrmann, \textit{Models for the Reform of the Criminal Trial in Eastern Europe: A Comparative Perspective,} 1996 ST. LOUIS-WARSOW TRANSATLANTIC L.J. 127, 128. The judge calls and examines witnesses, including the accused in criminal trials. \textit{Id.} Although the judge's role as an examiner is a common feature of this system, the details vary from country to country. For example, in France, the obligation of judges to discover the truth through their involvement is stated as "the 'honor and conscience' of the judge to find out the truth. \textit{See id.} at 134 (quoting C. PR. PEN. art. 310(1), \textit{reprinted in} 29 AMERICAN SERIES OF FOREIGN PENAL CODES (Gerald Kock & Richard Frase trans., 1988)). In Germany, the duty is stated as: "the court shall, upon its own motion, extend the taking of the evidence to all facts and evidence which are important for the decision." \textit{Id.} (quoting StPO § 244(2), \textit{reprinted in} 10 AMERICAN SERIES OF FOREIGN PENAL CODES (H. Niebler trans., 1965)). Many countries that traditionally adhered to the inquisitorial system have increasingly adopted the Anglo-American adversarial legal system. Examples include Japan, Sweden, and Italy. \textit{Id.} at 137-38.

\textsuperscript{171}. For example, the Social Security Administration adjudicates hundreds of thousands of claims every year—"more cases than all the federal courts combined." Milton M. Carrow, \textit{A Toruous Road to Bureaucratic Fairness: Righting the Social Security Disability Claims Process,} 46 ADMIN. L. REV. 297, 297-98 & n.3 (1994). An administrative judge in these proceedings has the responsibility of developing the record by actively engaging in examining witnesses and seeking more evidence. \textit{See} 20 C.F.R. §§ 404.929, .944 (2007). However, in social security proceedings, the judge is one of the only two lawyers present during the hearing (assuming the claimant is represented) because the government is not represented at all. \textit{See} Jeffrey S. Wolfe & Lisa B. Proszek, \textit{Interaction Dynamics in Federal Administrative Decision Making: The Role of the Inquisitorial Judge and the Adversarial Lawyer,} 33 TULSA L.J. 293, 295 (1997). The administrative judge's active involvement, even in this situation, is a subject of criticism. \textit{Id.} at 298 (noting that courts have described the judge's involvement "as sort of judicial schizophrenia" because they wear the "'dual hats' of investigator \textit{and} adjudicator"). In fact, the adversarial nature of the proceedings is minimized because the judge must fill in for the government's
immigration judge in cross-examination, which is a typical feature of an adversarial system. Cross-examination is traditionally a tool used by an adversary to elicit information that is otherwise not helpful to the party that is subjected to cross-examination. It is used for the purposes of discrediting the witness and undermining testimony. In *Davis v. Alaska*, the Supreme Court characterized the traditional role of cross-examination as follows:

Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, *i.e.*, discredit, the witness. . . . A more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand.

Professor Laurence Tribe also says that cross-examination is “thought to expose any testimonial infirmities.” As such, it necessarily puts the examiner and the examinee in opposite and adversarial positions. The nature of such a relationship necessarily precludes the possibility of one party to act neutrally towards the other and definitely puts them in confrontational positions.

Judge Wolfe of the Social Security Office of Hearings and Appeals asks the following questions relating to the role of the administrative law judge in the social security context. The questions are equally pertinent to the immigration judge.

How does the judge, trained and experienced in the adversarial system of justice, perceive her active role? How does she

---

172. Brenda Danet & Bryna Bogoch, *Fixed Fight or Free-For-All? An Empirical Study of Combativeness in the Adversary System of Justice*, 7 BRIT. J.L. & SOC'Y 36, 37 (1980) ("The purpose of cross-examination is to test the credibility of the other side's witnesses and, if possible, to destroy or reveal inconsistencies and gaps in their testimony presented during direct examination."). *Quoted in Wolfe & Proszek, supra* note 171, at 303.


maintain the requisite jurisprudential distance necessary to independent decision making when required to respond to an adversarial lawyer, unchecked by an opposing party? Is she likely to perceive herself as required to engage in a role which is somehow perceived as less independent than her adversarial colleague, as a means of ensuring fairness—that is, in an attempt to balance the activity of the lawyer?175

Professor Lasso writes: "The inquisitorial model places on judges the potentially conflicting roles of fact finder and decisionmaker. This burden unavoidably allows biases and prejudicial influences to unfairly prejudice results."176 Nowhere is such a concern more pertinent than in immigration proceedings. A party involved in such confrontation would naturally have a different perspective and mind set than a party independently observing what transpires between parties on the opposite side of an argument. Cross-examination of respondents and witnesses is indeed not a suitable task for a judge in an adversarial system.177

A very good example of what might result in adversarial relations between a claimant and a judge is one New York immigration judge’s remark in an asylum case. Liu, a 39-year-old Chinese asylum seeker told the judge that Chinese authorities forcibly sterilized her by "subject[ing] her to painful uterine surgery" after she had her second child.178 After

175. See Wolfe & Proszek, supra note 171, at 346-47.
177. Even in the civil law inquisitorial system where the judge has a significantly more inquisitorial role, judges may conduct questioning, but cross-examination is not common. Judge Patrick Robinson of the International Criminal Tribunal for Yugoslavia (ICTY), writing in the context of the ICTY rules of evidence and procedure, which are essentially a combination of the common law adversarial and civil law inquisitorial systems, suggests that such a combination could lead to unfairness if not cautiously handled. See Robinson, supra note 135, at 1043. He remarks "the essence of that party-driven process [common law adversarial] is cross-examination." Id. He further states that "[i]t is unusual in such a system to invest a Judge with the power to determine whether an accused should cross-examine a prosecution witness who has given evidence which may or may not strengthen the prosecution case against him." Id. This suggests that giving a judge the discretion to allow or disallow cross-examination is not appropriate. Engaging a judge in cross-examining a witness who appears before him would be an extremely drastic deviation from the adversarial system and is not even encouraged in the civil law inquisitorial system. Id. Federal courts have, at times, encouraged the active involvement of the immigration judge, but mainly in situations where the respondent is not represented and not able to present her case properly. See, e.g., Jacinto v. INS, 208 F.3d 725, 733-35 (9th Cir. 2000). As another example, the Department of Labor Rules of Procedure allow the Administrative Law Judge to examine the witness but do not expressly provide for cross-examination. See 29 C.F.R. § 18.29 (2007).
some questioning, the judge remarked: "'You have been lying all day, but if you admit to lying, I will grant your case." The New York Times reported that the asylum seeker said through an interpreter: "'I was very angry, because everything I said was true.'" Her case was denied but she appealed to the BIA and then to the Court of Appeals for the Second Circuit, which remanded the case for further proceedings.

The rules make this kind of confrontation possible. This is a significant shortcoming of the INA rules of procedure and evidence. Revised rules that would significantly curtail confrontations of this nature, avoid any administrative or departmental bias, improve the nature of the relationship between the judge and the respondent, and restore the traditional role of the judge in adversarial proceedings need to be seriously considered.

(b) Appearance and Representation

Factual disputes involved in immigration matters are often resolved in evidentiary hearings before an immigration judge. Generally, evidentiary hearings in deportation proceedings are conducted in the presence of the respondent or in his absence where both parties agree to that effect. The appearance of the respondent through videoconferencing or by telephone may also be sufficient. In case of telephonic appearance, the consent of the respondent is required. The respondent may also be represented by counsel at no cost to the

179. Id.
180. Id.
181. See Liu v. Bd. of Immigration Appeals, 167 Fed. Appx. 871, 874 (2d Cir. 2006); see also Bernstein, supra note 178. In another similar confrontation between an immigration judge and an Afghan immigrant respondent, an anonymous news source reported:

"[The applicant] broke down and wept after yesterday's court hearing before an immigration judge who had smiled, chuckled, shaken his head and rolled his eyes during portions of [the applicant's] testimony . . . . [The judge] suddenly interrupted [the cross-examining government attorney] and, for more than 30 minutes, questioned [the applicant] himself, often yelling, and ask-ing [sic] the same question repeatedly. [The judge] suggested that [the applicant] was being 'evasive' and not 'responsive' to questions designed to determine whether his testimony was believable. During the hearing, [the judge], who . . . serves the U.S. Justice Department, interrupted the proceedings on several occasions to scold either the translator . . . or the attorney representing the Afghans."

Anker, supra note 150, at 498 n.296 (quoting an anonymous newspaper) (alterations in original).
183. See id. § (b)(2)(A)(i)-(ii).
185. See id. § (b)(2)(B) ("An evidentiary hearing on the merits may only be conducted through a telephone conference with the consent of the alien involved after the alien has been advised of the right to proceed in person or through videoconference.").
government.¹⁸⁶ The immigration judge is obligated to inform the respondent that he may be represented by an attorney throughout the proceedings.¹⁸⁷

Although these provisions seem to suggest extremely flexible and accommodating appearance procedures, the consequence of an alien's failure to appear at a scheduled hearing is complete disqualification from the proceedings. In a stark departure from the flexible standards otherwise followed, the INA provides: "Any alien who, after written notice required under paragraph (1) or (2) of section 1229(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia . . . ."¹⁸⁸ The absentia removal order may only be rescinded if the alien files a motion to reopen within 180 days and "demonstrates that the failure to appear was because of exceptional circumstances."¹⁸⁹ Subsection (e)(1) defines exceptional circumstances as "exceptional circumstances . . . beyond the control of the alien."¹⁹⁰ The rule expressly limits these circumstances to "battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien."¹⁹¹ It effectively limits such circumstances to serious illness or death of a close relative by saying exceptional circumstances do not include "less compelling circumstances."¹⁹²

Although this procedural requirement may appear to have an insignificant consequence on the overall immigration adjudication system, the consequences of denying an alien seeking relief from removal (particularly in the form of asylum and withholding of removal) the

---

¹⁸⁶. See id. § (b)(4)(A); 8 C.F.R. §§ 1240.3, 1292.1 (2007); see also Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 554 (9th Cir. 1990); Olvera v. INS, 504 F.2d 1372, 1374 (5th Cir. 1974).

¹⁸⁷. See 8 C.F.R. § 1240.10(a)(1); see also Michel, 21 I. & N. Dec. 1101, 1102 (1998) (holding that failure to inform the respondent of his right to counsel was a reversible error). Because there are currently no government sponsored representation services, most respondents defend the charges pro se. According to a report by the Congressional Commission on Religious Freedom, represented asylum seekers are twelve times more likely to be granted favorable relief than those who are not represented. See 1 U.S. COMM'N ON INT'L RELIGIOUS FREEDOM, supra note 17, at 34. Although strict rules apply, once the respondent is represented, he may raise an ineffective assistance of counsel claim to invalidate any orders that would not have been imposed but for the ineffective assistance under very limited circumstances. See, e.g., Maravilla v. Ashcroft, 381 F.3d 855, 858 (9th Cir. 2004). But see Assad v. Ashcroft, 378 F.3d 471 (5th Cir. 2004).

¹⁸⁸. INA § 240(b)(5)(A).

¹⁸⁹. Id. § (b)(5)(C).


¹⁹¹. Id.

¹⁹². Id.
chance to be heard at a proceeding could be quite dramatic. Often, aliens seeking asylum or other types of relief fail to appear for reasons that may not necessarily fit into the exceptional circumstances rule but could be completely unavoidable for them for several reasons. Evidently, asylum seekers currently get no form of housing and financial assistance from the government. As a result, those who are not detained often share shelters operated by non-profit organizations or apartment units with other immigrants. The possibility of misplacement of mail is quite high. Related to the housing problem, immigrants often move from place to place in pursuit of a place to live. Mailings usually get delayed or lost altogether. By the time the asylum seeker finds out about a scheduled appearance, it maybe too late. This is not an uncommon problem. Because many immigrants do not have representation, all it takes is for one mailing to get lost or misplaced for an immigrant to be disqualified from seeking relief from removal.

Lack of reliable transportation may be another common problem. Immigration courts are often located in business districts of major cities. Newly arriving asylum seekers are usually not properly oriented about their new environment. They usually would not know how much time it would take to get to the court. Most do not get any form of transportation assistance. For example, the author of this Article unsuccessfully attempted to assist an asylum seeker against whom an absentia removal order was entered. In this case, the non-citizen sought asylum as soon as he arrived in the United States. He shared housing with other immigrants in Alexandria, Virginia. The Service referred his case to an immigration court in Baltimore. The court in Baltimore scheduled him for a hearing. On the day of the hearing, a friend of his who offered to drive him to the court simply failed to show up. He had no idea as to how to get to court on his own, so he rented a taxi, and the taxi was delayed because of unusual traffic in Baltimore. He arrived 15 minutes late. Although his attorney was in the court room, the judge exercised the option of entering an absentia order. The BIA upheld the absentia removal order. As of the writing of this Article, the asylum seeker is waiting his removal, having lost at every stage. Eventually, his removal would mean that he would be deported without a single judge

193. See, e.g., Kelly Brewington, Pa. Volunteers Reach Out to Asylum-Seekers, BALT. SUN, Dec. 5, 2005, at 1A.

hearing his case. These types of absentia removal orders are issued routinely.\textsuperscript{195} This is indeed a very rigid procedural rule in a very flexible adjudicatory environment.

This rule exists in stark contrast to the Federal Rules of Civil Procedure default judgment rules, in spite of the fact that deportation proceedings are rhetorically considered to be civil proceedings. The Federal Rules allow the rendering of default judgments whenever the defendant fails to appear or otherwise fails to defend against the action.\textsuperscript{196} However, the rules provide that a default judgment maybe set aside:

On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding for the following reasons: (1) \textit{mistake, inadvertence, surprise, or excusable neglect}; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.\textsuperscript{197}

Under these rules, default judgment is not even mandatory; it is left for the trial court’s discretion.\textsuperscript{198} In fact, it is a highly disfavored form of disposition of cases. Federal courts always prefer the dispensation of cases on their own merits rather than on mere technicalities such as failure to appear.\textsuperscript{199}

In criminal proceedings, the presence of the defendant is a serious matter, as it involves constitutional rights relating to one’s liberty interest. As such, it is zealously guarded. The Federal Rules of Criminal Procedure clearly provide that the presence of the defendant is required

\textsuperscript{195} See generally Damon W. Taaffe, Comment, Tolling the Deadline for Appealing in Abstentia Deportation Orders Due to Ineffective Assistance of Counsel, 68 U. CHI. L. REV. 1065 (2001) (discussing equitable tolling as one solution to the problem of in abstentia orders).

\textsuperscript{196} See FED. R. CIV. P. 55(a).

\textsuperscript{197} FED. R. CIV. P. 60(b) (emphasis added).

\textsuperscript{198} FED. R. CIV. P. 55(a).

at every stage of the proceedings, with few exceptions.\textsuperscript{200} Neither the civil procedure rules nor the criminal procedure rules of appearance resemble the INA rules relating to appearance of respondents in deportation proceedings. The INA rules are exceedingly harsh and unforgiving. A close family member's death or something of that nature must happen for an absentia removal order to be withdrawn.\textsuperscript{201} Life is full of unavoidable but excusable misfortunes that would cause a person to miss an appointment. The Federal Rules of Civil Procedure provision discussed above offers very good guidance with this respect. For a justiciable outcome, the INA rules of appearance must be revised in light of the Federal Rules of Civil Procedure.

2. Burden and Standard of Proof

Before a discussion of some of the most important evidentiary rules applicable in deportation proceedings, it is important to briefly note the burden and standard of proof relating to these proceedings. The level of due process an immigrant receives depends on whether that person has been lawfully admitted or not. "Admission" is a term of art signifying not the mere physical entry or presence of the person but strictly the "lawful entry of the alien into the United States after inspection and authorization by an immigration officer."\textsuperscript{202} Persons who make entry without inspection are deemed inadmissible regardless of their physical presence in the country.\textsuperscript{203} Persons who have been inspected and admitted but overstay their authorized period of time are deemed deportable.\textsuperscript{204} The legal process instituted against persons in either one


\textsuperscript{201} See INA § 240, 8 U.S.C.A. § 1229a(e)(1) (West Supp. 2007).

\textsuperscript{202} Id. § 101, 8 U.S.C. § 1101(a)(13)(A) (2000). This provision, which is a part of the IIRIRA, made a clear distinction between people who have been inspected and admitted and those whose entrance was surreptitious.


\textsuperscript{204} See generally INA § 237(a)(1), 8 U.S.C § 1227(a)(1) (2000). All grounds of inadmissibility are indeed considered grounds of deportability. See id. § 237(a)(1)(A). Other grounds also include violations after admission. See id. § 237(a)(1)(B); see also 8 C.F.R. § 103.12 (defining lawful presence).
of these categories is called a removal proceeding. Some inadmissible persons may be subjected to summary or expedited proceedings. The statute makes a clear distinction between the burden and standard of proof applicable to an alien applying for admission and an admitted alien seeking relief from deportation. Because this Article deals with procedural and evidentiary matters in adversarial deportation or removal proceedings involving persons seeking relief from deportation rather than those seeking admission in different forums, the evidentiary issues involved in the various levels of non-adversarial administrative inquiries of inadmissibility are not discussed. As such, the discussion of the burden and standard of proof is also limited to adversarial deportation proceedings.

A formal removal process is set in motion when the DHS files a charging document called a Notice to Appear (NTA) with the immigration court in the locality where the respondent is known to reside. The NTA charges that a non-citizen is removable for specific violations sanctioned under the INA. Once the NTA is properly served on the respondent, he may answer the charges, and seek relief from deportation. Among the several forms of relief that a respondent may seek, the following are the most common: voluntary departure, cancellation of removal, adjustment of status, asylum/withholding, and relief under the Convention Against Torture. While the DHS bears the burden of proving that the respondent is removable by clear and


207. See id. § 240(c)(2).

208. Applicants for asylum in affirmative asylum cases are interviewed by an immigration officer who seeks to determine their eligibility. This is an informal non-adversarial administrative process. Almost all types of evidence are admitted and considered. See generally 8 C.F.R. § 208.9. These kinds of informal administrative processes are outside the purview of this Article.


210. See INA § 239(a)(1). The NTA contains information such as the nature of the charges, the provisions of the law alleged to have been violated, the legal authority of the proceedings, etc. See id.

211. Id. (providing that proper service requires that the NTA be given to the respondent in person or mailed to him at his, or his counsel's, latest known address); 8 C.F.R. § 1003.13.


convincing evidence,\textsuperscript{214} the burden shifts to the respondent to prove that he is eligible for a particular type of relief.\textsuperscript{215} Accordingly, the respondent must not only demonstrate his statutory eligibility but also that he merits a favorable exercise of discretion.\textsuperscript{216}

Both parties must carry their burden of proof. They are required to present pertinent and credible evidence. As indicated above, under the INA rules of evidence, the only limitation to the admissibility of evidence is essentially redundancy. The following section discusses the shortcomings of the INA rules of evidence with respect to some of the most important forms of evidence used in deportation proceedings.

3. Testimonial Evidence

The respondent's testimony is often the single most important evidence in deportation proceedings, particularly when relief in the form of asylum or withholding of deportation is sought. Theoretically, in asylum proceedings, the applicant's credible testimony may be sufficient to carry the burden of proof even if uncorroborated.\textsuperscript{217} The Court of Appeals for the Seventh Circuit recently elaborated the policy behind this rule as follows:

The policy behind a rule permitting reliance solely on credible testimony is simple. Many asylum applicants flee their home countries under circumstances of great urgency. Some are literally running for their lives and have to abandon their families, friends, jobs, and material possessions without a word of explanation. They often have nothing but the shirts on their backs when they arrive in this country. To expect these...

\textsuperscript{214} Woodby v. INS, 385 U.S. 276, 286 & n.19 (1966) (holding that "no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true"). The Service must show that the respondent is removable either because of immigration violations or disqualifying criminal convictions. \textit{See, e.g.}, \textit{id.}; \textit{see also} INA § 237(a). In some situations, such as marriage and illegal entry, the non-citizen may bear the burden of showing that he is not deportable. It is usually presumed in these cases that a prima facie case of deportability has been made from the outset. \textit{See}, \textit{e.g.}, Patel v. Ashcroft, 104 Fed. Appx. 966, 970 (5th Cir. 2005); \textit{see also} Iran v. INS, 656 F.2d 469, 471 (9th Cir. 1981). \textit{Cf.} Navia-Duran v. INS, 568 F.2d 803, 811 (1st Cir. 1977).


\textsuperscript{216} INA § 240(c)(4)(A). Most forms of relief are discretionary, including cancellation of removal under INA section 240 or Asylum under INA section 208. \textit{See id.; id.} § 208, 8 U.S.C.A. § 1158(b)(1)(A) (West 2005). However, the grant of withholding of removal under the Refugee Act of 1980 and the Convention Against Torture is not discretionary. Precisely because of that reason, the standard of proof is significantly higher. \textit{See} INS v. Cardoza-Fonseca, 480 U.S. 421, 436, 441 (1987).

\textsuperscript{217} \textit{See} 8 C.F.R §§ 208.13(a), 208.16(b), 1208.13(a), 1208.16(b) (2007).
individuals to stop and collect dossiers of paperwork before fleeing is both unrealistic and strikingly insensitive to the harrowing conditions they face.\textsuperscript{218}

Although corroboration is said to be unnecessary when the testimony is credible, the challenge always is to verify the credibility of the testimony. Evidently, corroborative evidence makes testimony more credible.\textsuperscript{219} That means, in practice, applicants with corroborating evidence are more likely to succeed.

In amending the INA, The REAL ID Act of 2005 modified the standard of proof in asylum proceedings. It provides that corroboration is generally not required if the trier of fact is convinced that the testimony is indeed credible.\textsuperscript{220} However, it also provides:

In determining whether the applicant has met [her] burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.\textsuperscript{221}

The REAL ID Act also subjects the determination of credibility to specific standards. It provides that there is no presumption of credibility, and that credibility must be determined based on the totality of the circumstances with due regard to all relevant facts.\textsuperscript{222} These factors include:

demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant’s or witness’s account, the consistency between the applicant’s or witness’s written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of

\textsuperscript{218} Dawoud v. Gonzales, 424 F.3d 608, 612-13 (7th Cir. 2005); see also Yang v. U.S. Attorney Gen., 418 F.3d 1198, 1201 (11th Cir. 2005); Karouni v. Gonzales, 399 F.3d 1163, 1173-74 (9th Cir. 2005); Ahmadshah v. Ashcroft, 396 F.3d 917, 920-21 (8th Cir. 2005); Njuguna v. Ashcroft, 374 F.3d 765, 769-71 (9th Cir. 2004); Secaida-Rosales v. INS, 331 F.3d 297, 311 (2d Cir. 2003).

\textsuperscript{219} See, e.g., Njuguna, 374 F.3d at 771 (concluding that “[g]iven the absence of any contradictory evidence, . . . [a]ny reasonable finder of fact would be compelled to conclude that [the petitioner for asylum] . . . [was] . . . eligible”).


\textsuperscript{221} INA § 208, 8 U.S.C. § 1158(b)(1)(B)(ii).

\textsuperscript{222} Id. § 208 (b)(1)(B)(iii).
State on country conditions) and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor.\textsuperscript{223}

As this provision makes clear, any conceivable form of evidence may be used to contradict the witness's testimony or impeach the witness regardless of the nature of the evidence used for contradiction or impeachment purposes. The adoption of these standards has been the subject of immense criticism;\textsuperscript{224} however, it remains the operative rule. A simple reading of these rules suggests the reason why inconsistency and unpredictability characterize asylum proceedings. It is quite difficult to objectively determine credibility in any legal proceeding.\textsuperscript{225}

Unfortunately, factual findings of the trier of fact in deportation proceedings almost always stand because the BIA can only review determinations of fact when they are "clearly erroneous."\textsuperscript{226} That is an additional reason to get the facts right in the first place as they are not reviewable absent extraordinary circumstances.\textsuperscript{227} As the focus of this Article is on the rules regulating the admissibility of evidence, no comments on the standards themselves are included. In fact, it is the main thrust of this Article that well-conceived evidentiary rules could help bridge the gaps left by the substantive rules. For example, the evidentiary rules could limit the types of evidence used to contradict testimony or impeach the witness.

The existing rules do not in any way limit the government's ability to submit any kind of evidence to contradict the witness's statement or impeach the witness. When the only evidence is the respondent's testimony, the consequences of allowing such unlimited admissibility could be dramatic. As indicated in Part IV below, DOL-type modified rules of evidence that take into account the specific circumstances of deportation proceedings could be very helpful to ensure a consistent, predictable, and justiciable outcome. Some of the most common trial

\textsuperscript{223} Id. (emphasis added).


\textsuperscript{227} See Feto v. Gonzales, 433 F.3d 902, 911 (7th Cir. 2006) (finding that the determination of credibility is a matter of fact and must not be disturbed unless extraordinary circumstances are present).
tools and forms of evidence used by the government to contradict the respondent's testimony, impeach the witness, or otherwise undermine the respondent's case in deportation proceedings are discussed below.

(a) Cross-examination

Both parties have the right to cross-examine or otherwise test the credibility of the witness presented by the other party.228 As with any legal proceeding, cross-examination is one of the most important tools that DHS attorneys use to undermine the credibility of a witness, mainly the respondent herself. The author of this Article has witnessed DHS cross-examination of a respondent that lasted more than 3 hours. There is virtually no limitation as to what questions may be asked regardless of whether they pertain to any disputed issues or not. The Federal Rules of Evidence put a reasonable limit to the scope of cross-examination. Rule 611 provides: "Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."229 The fundamental concerns that necessitated this limitation include: (1) "A party vouches for his own witness but only to the extent of matters elicited on direct;"230 (2) leading questions may not be asked in examination-in-chief as a party may not ask his own witness leading questions;231 and (3) limiting the scope of cross-examination facilitates the orderly conduct of the trial.232

All of these considerations apply in deportation proceedings. In fact, the imposition of some limitation on the scope of cross-examination in deportation proceedings is desirable for even more important reasons. Overzealous DHS attorneys could easily use cross-examination to intimidate or harass respondent's witnesses or the respondent herself. Immigration practitioners routinely complain about this. Thus, an evidentiary rule must specifically state the purpose of cross-examination. A good model is Rule 611(a) of the Federal Rules of Evidence. It provides: "The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment
of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.\textsuperscript{233} The immigration court environment could be very intimidating for a non-citizen who faces government attorneys who are often very experienced and treated with some degree of reverence by defense attorneys and immigration judges alike. Unless properly limited, cross-examination could easily be used not only to harass but also to intimidate the witness to the point where the witness may be afraid of telling the truth. Strict rules with respect to this problem are essential.

Another important reason for limiting the scope of cross-examination is the very real concern for the possibility of self-incrimination. As indicated above, the main witness in deportation proceedings, particularly in asylum and withholding of removal cases, is the respondent herself. Anyone subjected to any kind of legal proceedings, civil or criminal, may invoke the privilege against self-incrimination.\textsuperscript{234} However, almost always—unlike a criminal defendant who does not bear the burden of proving his innocence—a respondent in a deportation proceeding has no choice but to testify on his own behalf because he bears the burden of proving his defenses against deportation.\textsuperscript{235} Failure to take the stand not only leaves the respondent without evidence, but also subjects him to negative inferences that could further undermine his case.\textsuperscript{236}

\textit{(b) Prior Inconsistent Statements and Other Similar Evidence}

As indicated above, there are no meaningful limitations on the admissibility of evidence in deportation proceedings except, of course,

\begin{itemize}
  \item [233.] FED. R. EVID. 611(a) (emphasis added).
  \item [234.] See U.S. CONST. amend. V; Kastigar v. United States, 406 U.S. 441, 444-45 (1972) ("[The Fifth Amendment privilege against self-incrimination] can be asserted in any proceeding, civil or criminal, administrative of judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonable believes could be used in a criminal prosecution or could lead to other evidence that might be so used."); see also Bigby v. INS, 21 F.3d 1059, 1063 (11th Cir. 1994) (providing an example of an effective privilege invocation in a BIA proceeding). \textit{But see} United States v. Balsys, 524 U.S. 666, 700 (1998) (holding that the privilege against self-incrimination does not extend to the possibility of foreign prosecution). It is also important to note that \textit{Miranda} warnings are not applicable in deportation cases. \textit{See} United States v. Solano-Godines, 120 F.3d 957, 960 (9th Cir. 1997). \textit{Cf.} United States v. Kiam, 432 F.3d 524, 529 (3d Cir. 2005) (holding that \textit{Miranda} warnings are not necessary before administrative border inspections).
  \item [235.] See discussion \textit{supra} Part II.C.2.
  \item [236.] See United States \textit{ex rel} Bilokumsky v. Tod, 263 U.S. 149, 153-54 (1923) ("Silence is often evidence of the most persuasive character."); \textit{Solano-Godines}, 120 F.3d at 962 ("In civil proceedings . . . the Fifth Amendment does not forbid fact finders from drawing adverse inferences against a party who refuses to testify.").
\end{itemize}
generally applicable due process considerations.\textsuperscript{237} Immigration regulations provide for the admissibility of "any oral or written statement that is material and relevant to any issue in the case \textit{previously made by the respondent or any other person during any investigation, examination, hearing, or trial}," to contradict the testimony or undermine the respondent's evidence in deportation proceedings.\textsuperscript{238} Apart from serious hearsay problems, which are discussed separately below,\textsuperscript{239} the admission of all these kinds of prior statements and evidence is almost unprecedented in any other type of legal proceeding.

For example, the Federal Rules of Evidence provide: "Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require."\textsuperscript{240} This rule contains some guarantees of reliability even when the extrinsic evidence contains the alleged statements of the witness. The immigration regulations allow the admissibility of extrinsic evidence containing statements made not only by the witness, but also by other persons during any "investigation" or "examination."\textsuperscript{241} The rules provide for no guarantees of reliability or mandatory opportunity for the respondent to challenge the evidence. Immigration courts routinely admit such extrinsic evidence without restriction.

Some very commonly used forms of evidence employed by DHS attorneys to undermine the respondent's case are documents or forms containing the respondent's statements given to a border patrol agent or an immigration officer at an airport, or even the statements of the agents themselves. For example, in \textit{Ramsameachire v. Ashcroft}, the Court of Appeals for the Second Circuit held that airport interview records may be admitted to challenge credibility of the testimony of the respondent in deportation proceedings.\textsuperscript{242} The court developed a four-part test for the determination of the reliability of such prior records: (1) whether the record was verbatim or a summary thereof; (2) whether detailed questions were asked to develop the record; (3) the applicant's reluctance to answer questions because of prior coercive experience; and finally (4) whether there were issues of English translation.\textsuperscript{243}

\textsuperscript{237} \textit{See}, e.g., Hassan v. Gonzales, 403 F.3d 429, 435 (6th Cir. 2005).
\textsuperscript{238} 8 C.F.R. § 1240.7(a) (2007) (emphasis added).
\textsuperscript{239} \textit{See infra} Part III.C.
\textsuperscript{240} \textit{Fed. R. Evid.} 613(b).
\textsuperscript{241} 8 C.F.R. § 1240.7(a).
\textsuperscript{242} Ramsameachire v. Ashcroft, 357 F.3d 169, 175 (2d Cir. 2004).
\textsuperscript{243} \textit{Id.} at 180.
These factors, however, only pertain to the weight of the evidence, not the very issue of admissibility. Regardless of how a piece of evidence performs under the four-part test, it would be put in the record and the judge’s credibility decision would inevitably be negatively influenced by such evidence. The respondent’s statements are usually made immediately upon arrival under very stressful conditions, are not very well thought out, and are often vitiated due to fear of being put on the next flight back where serious consequences may follow. This remains a serious problem. In fact, the most comprehensive report ever mandated by Congress, and undertaken by the Commission on International Religious Freedom, concluded that reliance on prior statements made at ports of entry is a cause for serious concern. The report stated:

The lack of congruence between the observations of our research assistants and the official records prepared by the investigating officers (A-files) suggests that the asylum process itself may be compromised by the use of these documents as official transcripts. We found that when CBP officials failed to ask the relevant fear questions, the official record frequently indicated that these questions had been asked and answered, typically containing just the word “no” in response to fear questions that had not been asked. Likewise, on some occasions the A-files did not indicate that the relevant questions had been asked (i.e., were left blank) when our observers noted that they had been, or contained only a portion of the information that had been disclosed in response to a given question. These discrepancies, however, only reflect the most simplistic level of analysis, since the A-files might have provided incorrect information in many more cases but could not be detected because of our inability to simultaneously observe Secondary Inspection interviews and compare them with A-files. Nevertheless, these data demonstrate that A-files do not necessarily present an accurate record of Secondary Inspection interviews, despite the temptation to assume their accuracy.

The same report indicated that: “Officials may present statements from the Secondary Inspection interview as evidence to impeach an aliens’ [sic] testimony, citing contradictions between their statements and

244. See Ramsameachire, 357 F.3d at 179.
246. Id.
the official records as evidence of a changing story, when the 'evidence' is an erroneous official record.\textsuperscript{247} The report goes on stating:

In addition, aggressive or hostile interview techniques, sarcasm and ridicule of aliens, and verbal threats or accusations, while not common, were not infrequent in our sample. The fact that these behaviors occurred \textit{while observers were present} suggests that such behavior may not even be perceived as problematic by some CBP officers.\textsuperscript{248}

Despite all of these serious concerns, statements contained in these documents are routinely admitted in deportation proceedings. Regulating their admissibility by evidentiary rules is only appropriate.

The immigration regulations go even further and allow the admissibility of records containing prior statements made by persons other than the witness.\textsuperscript{249} Predicated on this rule, courts of appeals have upheld the admissibility of records kept by immigration officers at ports of entry to impeach or otherwise undermine the evidence offered by the respondent.\textsuperscript{250} Immigration courts routinely admit such evidence despite the concerns stated above. Part of the problem with these types of evidence is hearsay. The hearsay aspect of the problem is discussed below.\textsuperscript{251} It is sufficient to state here that as consistently argued throughout this Article, a DOL-type modified rule that takes into account the special conditions of deportation proceedings is not only

\begin{itemize}
\item \textsuperscript{247} \textit{Id.} (citation omitted). The report also stated:
  
  The safeguard against inaccurate A-file records, asking aliens to attest to the accuracy of their statements, also appears inadequate as currently implemented. Roughly one in six cases in which statements were taken by CBP officers and recorded in A-files were not confirmed by aliens, despite the presence of signatures in the required place. When they were asked to confirm their statements, most aliens were neither asked to read the statements, nor had their statements read to them, but were simply told to sign forms. Aliens were often told to sign documents with little or no explanation of what they were signing or what the implications might be, and in most cases these documents were written in a language they were not able to read (English). Failure to confirm statements was more common in cases where the individual was referred for Credible Fear interviews, despite the fact that these statements have the potential to be used in subsequent Asylum Interviews and Hearings.

\textit{Id.}

\item \textsuperscript{248} \textit{Id. at 31.}

\item \textsuperscript{249} \textit{See 8 C.F.R.} § 1240.7(a) (2007).

\item \textsuperscript{250} \textit{See, e.g.,} Prawira v. Gonzales, 405 F.3d 661, 663 (8th Cir. 2005) (holding that the immigration judge properly admitted an immigration officer's notes pertaining to a pending foreign investigation with a bearing on the respondent's documentary evidence); Ramsameachire v. Ashcroft, 357 F.3d 169, 179-80 (2d Cir. 2004) (finding that records kept during ports of entry interviews could be admitted to impeach credibility).

\item \textsuperscript{251} \textit{See infra} Part III.C.5.
\end{itemize}
desirable, but also necessary to alleviate the evidentiary problems associated with the admission of such evidence.

4. Exclusionary Rules

In *INS v. Lopez-Mendoza*, the Supreme Court held that the exclusionary rule of the Fourth Amendment does not apply in deportation proceedings because deportation proceedings are considered civil proceedings. In *Lopez-Mendoza*, federal agents arrested respondents from their workplace without authorization, and used illegally obtained evidence during the respondents' deportation proceedings. The respondents challenged the admissibility of the evidence on Fourth Amendment grounds. The Court held that the social cost of exclusion of illegally obtained evidence in deportation proceedings far outweighs any benefits that exclusion of such evidence might ensure. The four most important reasons that the court noted in support of its conclusion are: (1) illegally obtained evidence often has a marginal role in deportation proceedings as deportability may be proven using other evidence; (2) few, if any, immigrants actually challenge the admissibility of evidence on Fourth Amendment grounds; (3) the INS [now called USCIS] has sufficient institutional deterrence mechanisms; and finally (4) there is always the possibility of sanctions against agents who engage in misconduct.

The Court, however, noted that unlawfully obtained evidence may be excluded if there is reason to believe that the Service is engaged in widespread violations of the Fourth Amendment. The Court also specifically stated that this decision must not be interpreted as a shield for "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." Police stops exclusively

---

253. *Id.* at 1034-35.
254. *Id.* The court applied the balancing test used under *United States v. Janis*, 428 U.S. 433, 454, 459-60 (1976) (holding that illegally obtained evidence may be admissible in IRS tax proceedings, because of the civil nature of the proceedings, where the marginal deterrence benefit gained by applying the exclusionary rule does not outweigh the societal cost of excluding relevant evidence).
256. *Id.* at 1044.
257. *Id.*
258. *Id.* at 1045.
259. *See id.* at 1050.
260. *Id.* at 1050-51.
based on race were, for instance, held to fit the "egregious violations" exception. 261

Obviously, it is very difficult to prove "egregious violations" in each individual case where unlawfully obtained evidence is used. In Lopez-Mendoza, the Court did not consider the values protected by the exclusion of unlawfully obtained evidence to outweigh the interest of expediency in deportation proceedings. 262 Immigration courts now routinely admit illegally obtained evidence and base their deportation orders on such evidence. 263 The effect of this rule is not limited to immigration. The culture of relying on unlawful evidence could indeed have far reaching consequences. The author of this Article has noticed the use of evidence obtained through a violation of the Fourth Amendment. Because challenging such evidence under the "egregious violations" exception could be very difficult and subject to a long process, such violations often remain unchallenged. 264 It is not difficult to imagine the culture that a rule of admitting unlawfully obtained evidence in court could create. It would undoubtedly affect the integrity of the system itself. In fact, it is easy for anyone who observes deportation proceedings to see that there is a subculture of tolerated irregularity. 265 As consistently argued throughout this Article, each deviation from the traditional rules of admissibility of evidence contributes to such undesirable irregularities. The admissibility of illegally obtained evidence is thus one of such matters that need to be revisited with due regard to the peculiarities of deportation proceedings.

5. Hearsay

"Nothing can be more essential than the cross-examining [of] witnesses, and generally before the triers of the facts in question. . . . [W]ritten evidence . . . [is] almost useless; it must be frequently taken ex

261. See Gonzalez-Rivera v. INS, 22 F.3d 1441, 1443 (9th Cir. 1994) (holding that a race-based stop constitutes an "egregious violation"); see also Orhorhaghe v. INS, 38 F.3d 488, 492, 502 (9th Cir. 1994) (holding that evidence obtained through a search that amounted to an "egregious violation" must be suppressed although the violation did not affect the reliability of the evidence). Illegally obtained evidence may sometimes be suppressed under the Fifth Amendment if, for example, a coerced confession is obtained. See, e.g., Navia-Duran v. INS, 568 F.2d 803, 804-05, 808, 811 (1st Cir. 1977).

262. See Lopez-Mendoza, 468 U.S. at 1048-50.

263. See, e.g., Navarro-Chalan v. Ashcroft, 359 F.3d 19 (1st Cir. 2004) (affirming a deportation order in part because the petitioner failed to prove egregious Fourth Amendment violations sufficient to invoke the exclusionary rule).

264. See Lopez-Mendoza, 468 U.S. at 1044; see also Navarro-Chalan, 359 F.3d at 22-23 (finding no "egregious violations").

265. See supra Part I (noting the growing concern regarding this problem).
porte [sic], and but very seldom leads to the proper discovery of truth."

This was Letter IV by the Federal Farmers written on October 15, 1787. The First Congress's response to this message was the inclusion of "the Confrontation Clause in the proposal that latter became the Sixth Amendment."

The Confrontation Clause of the Sixth Amendment provides: "the accused shall enjoy the right . . . to be confronted with the witnesses against him."

The right to confront accusers is a legal tradition that goes as far back as the ancient Roman times. The more direct and immediate precursor of the Sixth Amendment's Confrontation Clause is, however, the English Common Law tradition. Unlike the continental civil law tradition that relies on written statements of out-of-court fact findings, the English Common Law adversarial tradition is based on a preference for live in-court testimony with the opportunity for the adverse party to test the credibility of the testimony.

Linked to the concept of the right to confront accusers, the rule against hearsay is also deeply rooted in the Anglo-American system of justice. Professors Wright and Graham cite to a very interesting incident that occurred in Pennsylvania in 1689. The story is reproduced as follows:

---


267. Crawford, 541 U.S. at 49.

268. U.S. CONST. amend. IV.


270. See id.

271. Id. This tradition was reinforced by the perceived injustices that were caused by the application of the civil law examination in the courts of England. The most frequently referenced political trial with respect to the history of the Confrontation Clause is the trial in 1603 of Sir Walter Raleigh for the crime of treason. During the trial an alleged accomplice, Lord Cobham, implicated Raleigh before an investigation council. Id. at 44. When that evidence was presented in court, the accused said: "'Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour.'" Id. (quoting 1 DAVID JARDINE, CRIMINAL TRIALS 435 (1832)). The accused then asked the court to bring Cobham so that he could testify in front of Raleigh. Id. Raleigh argued: "'[t]he Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face . . . .'" Id. (quoting Raleigh's Case, 2 How. St. Tr. 1, 15-16 (1603)) (alterations in original). Unfortunately, the request was denied, and the accused was convicted and sentenced to death. Id. However, this trial remained a significant part of the history of the right to confrontation for generations. The Supreme Court's reference to it in Crawford in 2004 attests to its importance. See id.

During a controversy over the rights of the colonists, William Bradford printed and distributed copies of the Charter and Frame of Government of the colony. Summoned before the council by an irate governor, Bradford emulated Lilburne in refusing to even admit that he had published the offending pamphlet.

Governor: I desire to know from you, whether you did print the Charter or not, and who set you to work.

Bradford: Governor, it is surely an impracticable thing for any man to accuse himself, thou knows it very well.

When the governor suggested that Bradford might be dealt with more leniently "if you were so ingenuous as to confess", Bradford replied:

Governor, I desire to know my accusers, I think it very hard to be put upon accusing myself. * * * But if anything be laid to my charge let me know my accusers. I am not bound to accuse myself.

Professors Wright and Graham argue that this suggests that even at that time, the connection between the right to confront one's accusers and the privilege against self-incrimination was very well recognized. They also argue that the development of the right to confrontation was significantly impacted by the general hostility against the informants that Imperial authorities used to assist in the enforcement of their laws.

As these historical references suggest, fundamental concerns of due process and justiciability underpin the argument against the admissibility of hearsay evidence. Although these historical references mainly pertain to criminal accusations, as does the Sixth Amendment, the Advisory Committee to the Federal Rules of Evidence expressly rejected any attempt to split the standards of admissibility of evidence between

---

273. Id. § 6344, at 424-25 (quoting LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 360-61 (1968)) (footnotes omitted) (alteration in original).

274. Id. § 6344, at 425. Professors Wright & Graham give another example:

A similar, but richer, set of connections appears in the complaint filed by the Virginia Council against Governor Nicholson in 1702:

II. He encourages all sorts of sychophants, tattlers, and talebearers, takes their stories in writing, and if he can persuade or threaten them to swear to them, without giving the accused person any opportunity of knowing his accusation or accuser.


275. Id. § 6344, at 427-28. "The underlying philosophy was to enlist the busybody in the service of law enforcement by the bait of a share in the penalty, and to make the proceeding as little nuisance as possible." Id. § 6344, at 427 (quoting JULIUS GOEBEL, JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 382 (1944)).
criminal and civil proceedings.\textsuperscript{276} The Federal Rules of Evidence define hearsay as: "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."\textsuperscript{277}

There is no dispute as to the inherent unreliability of out of court statements not made under oath and not tested by cross-examination.\textsuperscript{278} There is also no dispute that some such statements may have some indicia of reliability. The general policy followed over the years to mitigate some of the harsh consequences of the rule against hearsay is the formulation of well-conceived, time tested, and elaborate exceptions. Hearsay statements that fall under the very well recognized classical exceptions are considered reliable and, as such, admissible. Any policy that significantly departs from this rule that is literally centuries in the making is drastic indeed. The consequences may be more serious in some proceedings than in others.

As indicated above, the rule against hearsay contained in the Federal Rules of Evidence does not apply in administrative proceedings. Courts have, however, struggled to set other minimum standards for the admissibility of hearsay in administrative proceedings. This effort was deemed necessary because of the obvious due process issues involved. The end result has often been a circular journey back to the judicial hearsay rule and the exceptions. Hence, the rule allowing the admission of hearsay in administrative proceedings has only added to the confusion on the subject.

This may be exemplified by \textit{Richardson v. Perales}, the leading case that stands for the proposition that hearsay evidence may be admitted and can form the basis of administrative decisions.\textsuperscript{279} The Supreme Court did not find an easy answer to the question, particularly as it pertained to due process. This case involved a proceeding before the Social Security Administration. Perales claimed social security benefits because of a back ailment that was diagnosed and certified by his own physician. However, other physicians who examined his condition found no disability.\textsuperscript{280} The medical records kept by the other physicians who examined him for treatment, as well as for benefit determination, and records kept by an advisor were presented during the hearing before the

\begin{itemize}
\item \textsuperscript{276} \textit{See} \textit{Fed. R. Evid.} art. VIII advisory committee’s introductory note (The Hearsay Problem).
\item \textsuperscript{277} \textit{Fed. R. Evid.} 801(c).
\item \textsuperscript{278} \textit{See} Crawford v. Washington, 541 U.S. 36, 68-69 (2004) ("Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.").
\item \textsuperscript{279} \textit{Richardson v. Perales}, 402 U.S. 389 (1971).
\item \textsuperscript{280} \textit{Id.} at 390-95.
\end{itemize}
Social Security Administration. Perales objected to the admissibility of such evidence on hearsay and lack of cross-examination grounds. The evidence was admitted over his objection and served as the basis for the decision denying the benefits. Perales appealed to the district court, which remanded the case. The Supreme Court agreed with the Social Security Administration. The reasoning of the Court is perhaps more important than the holding. The Court said that consistent with the APA, the Social Security Act provides that hearsay is “admissible up to the point of relevancy.” The Court did not, however, leave it there. It went on analyzing the effect of admitting the specific hearsay on due process grounds. It noted specifically that “procedural 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.’” It properly weighed the reliability of the doctor’s reports in this case and qualified its holding by adding that due process requires that admissible hearsay have the attributes of reliability and probative value such that nothing meaningful would be expected to be added to the veracity through cross-examination. Interestingly, it concluded by saying it all “comes down to the question of the procedure’s integrity and fundamental fairness.”

Ironically, the rule against hearsay purports to attain exactly the same objective, i.e., integrity and fundamental fairness. The BIA has also held that admissibility of evidence must be based on probative value and fundamental fairness. When the classic evidentiary theory followed by all regular courts of law purports to attain the exact same objective, it is difficult to understand the reason behind admitting hearsay in court-like administrative proceedings, and then checking the reliability for due process reasons. Obviously, the due process analysis weighs the probative value of the evidence against the values protected by its exclusion. But that is also what the hearsay rule along with its exceptions essentially does. The question then becomes—who determines the due process issues? Administrative authorities are now vested with the power of adjudication using hearsay evidence; however, their decisions are reviewed for due process. The question remains whether this course is desirable. Which is the better alternative: allowing flexible

281. Id. at 395.
282. Id.
283. Id. 395-98.
284. Id. at 410.
285. Id. at 401 (quoting Hannah v. Larche, 363 U.S. 420, 442 (1960)).
286. See id. at 410.
287. Id.
admissibility standards and revising flawed decisions, or subjecting them to strict rules in the first place and substantially reducing reviewable cases? The effects of the policy choice to allow flexible admissibility are obvious. Those who are not able to rectify shortcomings through the appeals process remain casualties of the policy choice. To the extent the admission of hearsay expedites or facilitates administrative proceedings, the risk of error is disproportionately borne by those who are unable to pursue meaningful appeals. Nowhere is this problem more serious than in immigration deportation proceedings.

The immigration review situation noted in the introduction and repeated throughout this Article is a very good example. Lack of strict and clear evidentiary rules shifts the caseload from administrative authorities (i.e., immigration courts) to appellate courts. Obviously most non-citizens who are ordered deported based on any type of evidence do not have the capability to challenge the decision on appeal. Only a limited percentage of those affected challenge decisions on due process or related grounds. If there is any expediency obtained as a result of admitting the government’s hearsay evidence, it is certainly at the expense of those who are not able to meaningfully challenge the evidence on appeal.

In Goldberg v. Kelly, the Supreme Court noted that what process is due depends on “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.” This holding has two important tests: (1) the nature of the government’s function; and (2) the nature of the private interest affected. Applying these criteria to deportation proceedings would suggest the need for exercising significant care. The government’s function in deportation proceedings is analogous to its functions in criminal proceedings. It purports to have the respondent detained and deported from the United States. The private interest is also clear, preventing a permanent banishment from the United States where there may be significant family and other ties, and deportation to a place where there may be a serious threat of injury to life or liberty. The use of evidence of questionable validity under these circumstances cannot be justified. The Court’s decisions in Richardson v. Perales and Hannah v. Larche are instructive with this respect.


291. See Hannah v. Larche, 363 U.S. 420, 442 (1960) (“[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process.”).
The Service routinely relies on hearsay evidence to cause the deportation of non-citizens. Courts sometimes reverse decisions based on hearsay on substantive due process grounds. For example, in *Alexandrov v. Gonzales*, the Court of Appeals for the Sixth Circuit held that the immigration court's reliance on hearsay memoranda obtained from the U.S. Consulate office in a foreign country to undermine an asylum claim violated due process. Similarly in *Ezeagwuna v. Ashcroft*, the Court of Appeals for the Third Circuit held that reliance on a multiple hearsay letter from a State Department official to undermine the credibility of an asylum claimant violated due process. While a number of other decisions took this same approach to the due process check, others employed a higher standard for the reversal of immigration court decisions on due process grounds. A good example of the latter approach is *Tamenut v. Ashcroft*. In his application for asylum, Tamenut claimed that he was detained and beaten by authorities of his home government a number of times over a four-month period. The Service introduced a faxed letter written by the U.S. Consulate office in that country clearly contradicting the allegation. The claimant objected to the admissibility of evidence on the ground that he was not given the opportunity to rebut it in advance of the trial. The Court of Appeals for the Eighth Circuit held that the admission of this letter did not violate due process where the claimant had the opportunity to rebut it by his testimony during the hearing. A number of other courts adopted an even less demanding due process check with respect to the admissibility of hearsay evidence.

Perhaps, the best articulation of the standards of admissibility of hearsay evidence in deportation proceedings is the Ninth Circuit's 1995 opinion in *Espinoza v. INS*. In this case the court held: "The sole test for admission of evidence is whether the evidence is probative and its

---

294. *See, e.g.*, Olabanji v. INS, 973 F.2d 1232, 1234 (5th Cir. 1992); Cunanan v. INS, 856 F.2d 1373, 1375 (9th Cir. 1988).
295. 361 F.3d 1060 (8th Cir. 2004).
296. *Id.* at 1060-61.
297. *Id.* at 1060.
298. *Id.*
299. *See, e.g.*, Ocasio v. Ashcroft, 375 F.3d 105, 107 (1st Cir. 2004) (admitting wife's affidavit claiming sham marriage without demanding the presence of the wife for cross); Nyama v. Ashcroft, 357 F.3d 812, 815-17 (8th Cir. 2004) (admitting other asylum applications to impeach the credibility of an asylum applicant with similar stories); Bachelier v. INS, 625 F.2d 902, 904 (9th Cir. 1980) (relying on affidavits without requiring an opportunity for cross-examination at the hearing).
300. 45 F.3d 308 (9th Cir. 1995).
admission is fundamentally fair. The court, however, affirmed the immigration judge's admission of an immigration form filled out by in two different handwritings where there was no witness to attest to the contents. It simply held that hearsay is admissible unless it is fundamentally unfair. It did not find such unfairness in this case. In Hernandez-Guadarrama, the same court held that the admission of hearsay evidence is fundamentally unfair when the government is responsible for deporting the declarant thereby making him unavailable for cross-examination.

In Ocasio v. Ashcroft, the Court of Appeals for the First Circuit held that admitting a wife's affidavit claiming sham marriage when the claimant did not object to the evidence at the hearing is not fundamentally unfair. In a similar case, however, the Court of Appeals for the Fifth Circuit reached the opposite result. It held that a wife's affidavit alleging sham marriage is inadmissible hearsay when there is doubt as to its authenticity and the declarant is not available for cross-examination. These differing approaches clearly show that in the absence of clear guidance regarding hearsay, a due process check could be problematic, on top of being limited to only those who are able to challenge the admissibility of evidence on several stages of appeal.

The immigration court's flexible evidentiary standards go even further and allow local rules to provide for basic procedural and evidentiary regulation. For example, in Galicia v. Ashcroft, the Court of Appeals for the First Circuit held that the immigration court's refusal to admit evidence for delay or lack of pre-marking of exhibits pursuant to local rules is not a reversible error. Similarly, in Sulaiman v. Gonzales, the same court held that an immigration judge's refusal to admit evidence submitted one day late is not a reversible error.

Professor Glicksman argues:

All too often proponents of the administrative law process fail to recognize that the hearsay rule is not merely an evidence technicality, but is a fundamental principle that preserves and protects adversarial due process: "The hearsay rule is not a technical rule of evidence, but a basic, vital and fundamental

301. Id. at 310; see also Alexandrov v. Gonzales, 442 F.3d 395, 404-07 (6th Cir. 2006); Rojas-Garcia v. Ashcroft, 339 F.3d 814, 823-24 (9th Cir. 2003).
302. Espinoza, 45 F.3d at 310-11.
303. Id. at 311.
305. Ocasio v. Ashcroft, 375 F.3d 105, 107-08 (1st Cir. 2004).
rule of law which ought to be followed by administrative agencies at those points in their hearings when facts crucial to the issue are sought to be placed upon the record."

He goes on, stating that "[t]he hearsay rule articulates standards of relevance, credibility, and fairness, which the adversarial process demands regardless of the forum."

In view of the above discussion—fundamental fairness being the general rule—attempting to achieve it on an ad hoc basis rather than through the well recognized, classic, and time tested evidentiary rules that purport to attain the exact same objective is not a desirable course. "Courts that have reviewed these issues are convinced that the threshold principles of evidence reliability, as represented by the hearsay rule, constitute the core value of our judicial system." As argued throughout this Article, the result of ad hoc type local rule making by immigration courts across the nation has resulted in serious inconsistency, unpredictability, and perhaps fundamental unfairness, which undermines the integrity of the whole system. It is important that the hearsay rule be applied in deportation proceedings with well-conceived exceptions that take the unique circumstances of deportation into account, along the lines of the DOL rules. Some suggestions with regards to hearsay exceptions are offered in Part IV below.

6. Administrative Notice of Adjudicative Facts

Administrative notice of facts is considered to be the counterpart of judicial notice of facts in administrative proceedings. The Federal Rules of Evidence define a judicially noticed adjudicative fact as "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." When a court takes such notice of facts, it can bypass the regular process of proof and consider such facts as conclusively proven. Because it is a significant departure from the ordinary way of proving facts, this approach is subject to serious

309. Glicksman, supra note 84, at 141-42.
310. Id. at 142 (quoting Bleilevens v. Commonwealth State Civil Serv. Comm’n, 312 A.2d 109, 111 (Pa. Commw. Ct. 1973)).
311. Id. at 141.
312. FED. R. EVID. 201(b) (emphasis added).
313. This is particularly so in civil cases. In criminal cases, such notice may be considered conclusive, but the jury must be instructed that it does not necessarily have to consider it conclusive. FED. R. EVID. 201(g) ("In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.").
restrictions. As the language of the above quoted provision suggests, the accuracy of the sources must be verified beyond a reasonable doubt. Moreover, the party affected by the taking of judicial notice must be given ample opportunity to challenge it. Judicial notice is a rule of convenience designed to eliminate unnecessary expenditure of time and resources to prove commonly known facts.

Although the rule relating to administrative notice is predicated on the same assumptions, it is broader in scope because agencies may take official notice of facts within their expertise or competency. In the immigration context, administrative notice may be taken of: "commonly known facts such as current events or the contents of official documents." The commonly used official documents include the Department of State country condition annual reports, and foreign policy documents containing analysis and opinion. By far the most frequently used document is the State Department's country conditions report. Courts have consistently upheld the administrative notice of the accuracy of facts contained in these State Department reports. For example, the Court of Appeals for the First Circuit, in Negeya v. Gonzales, upheld a decision based on statements contained in a State Department country condition report. A number of other courts of appeals have followed the same approach with respect to State Department reports.

314. See FED. R. EVID. 201(b).
315. See FED. R. EVID. 201(e) ("A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.").
316. See 2 PIERCE, supra note 64, § 10.6, at 743 ("The failure to exercise [judicial notice] tends daily to smother trials with technicality and monstrosely lengthens them out." (quoting James B. Thayer, A Preliminary Treatise on Evidence (1898))); see also Castillo-Villagra v. INS, 972 F.2d 1017, 1026-27 & n.3 (9th Cir. 1991).
317. See, e.g., McLeod v. INS, 802 F.2d 89, 93 n.4 (3d Cir. 1986); Banks v. Schweiker, 654 F.2d 637, 640-41 (9th Cir. 1981).
320. Negeya v. Gonzales, 417 F.3d 78, 84 (1st Cir. 2005) ("Generally, State Department reports are a highly probative source of evidence in cases that turn on the objective reasonableness of an asserted fear of future persecution.").
321. See, e.g., Ambartsoumian v. Ashcroft, 388 F.3d 85, 93 (3d Cir. 2004) (characterizing the State Department country condition report as "objective evidence" to prove absence of past persecution); Kayembe v. Ashcroft, 334 F.3d 231, 235-37 (3d Cir. 2003) (concluding that the State Department country condition report provided "substantial evidence" regarding the practice of a foreign government); Toptchev v. INS, 295 F.3d 714, 722 (7th Cir. 2002) (holding that the State Department country condition report is reliable because of "the Department's expertise in international affairs"); see also Palma-Mazariegos v. Gonzales, 428 F.3d 30, 36 (1st Cir. 2005); Gebrehiwot v. Ashcroft,
A few courts of appeals have taken a different view of state department reports, recognizing the possible difference between the points of view of the State Department and the Departments that adjudicate immigration matters.\textsuperscript{322} Courts of appeals have also questioned the objectivity, specificity, and trustworthiness of such reports.\textsuperscript{323} Regardless of this, however, immigration courts routinely rely on these reports, often taking administrative notice of the facts stated therein. Such reports are most often used as evidence of proving changed country conditions in asylum proceedings. The reports often contain general statements indicating that there has been a change of government in the foreign country and the new government seems to be on the right track towards democracy. Such broad statements are usually considered as evidence of fundamental change of circumstances and often cause the denial of requests for asylum.\textsuperscript{324}

\textit{Rivera-Cruz v. INS} demonstrates the problem with taking administrative notice of facts reported in country condition assessments of the Department of State.\textsuperscript{325} Rivera-Cruz, a native and national of

\textsuperscript{322} See, e.g., Koliada v. INS, 259 F.3d 482, 487-88 (6th Cir. 2001) (noting that the State Department's report in the case was prepared specifically for the INS and stating "[i]t stands to reason that a report produced by one executive department to aid the litigation of another executive department would often support the second department's point of view" regardless of its own view); Gallius v. INS, 147 F.3d 34, 43-47 (1st Cir. 1998) (reversing the denial of an asylum claim that was based heavily on a state department advisory letter and noting that "the advice of the State Department is not binding either on the service or on the courts" (quoting Gramatikov v. INS, 128 F.3d 619, 620 (7th Cir. 1997))).

\textsuperscript{323} See, e.g., Koliada v. Gonzales, 418 F.3d 798, 807-08 (7th Cir. 2005) (finding that such reports lack specificity, are of questionable trustworthiness, and cannot be tested through cross examination); Koliada, 259 F.3d at 487-88 (noting that the State Department report was prepared for the purpose of the INS litigation).

\textsuperscript{324} See, e.g., Mullai v. Ashcroft, 385 F.3d 635, 639 (6th Cir. 2004) (relying on State Department reports "describing the type of general civil disorder and lawlessness" in the foreign country to find "changed country conditions" sufficient to justify denial of asylum); see also infra notes 325-29 and accompanying text.

\textsuperscript{325} Rivera-Cruz v. INS, 948 F.2d 962, 965 (5th Cir. 1991).
Nicaragua, sought political asylum based on past persecution and the well-founded fear of future persecution. He met his burden of proof, and the immigration judge granted his request. The INS appealed the decision mainly on the ground that the political situation in Nicaragua had changed. The BIA took administrative notice of "commonly acknowledged facts" suggesting that the group that was supposed to persecute the claimant was no longer in power. The claimant unsuccessfully challenged these facts alleging that although the group lost political power in some sense they still controlled the coercive powers of the government. The court held that although it is theoretically possible that the board might have taken an administrative notice of facts that are essentially wrong, such taking of notice was not an abuse of discretion under the circumstances.

What changes constitute a fundamental change of government so as to eliminate a supposed threat is a very difficult question. Too often, changes are intermediate, transitory, and negotiated settlements of some kind. Rarely do governments change fundamentally and former elements of danger just disappear. However, State Department reports usually overemphasize changes, particularly when a head of state or government is removed or a peace accord is signed. In Quevedo v. Ashcroft, the Court of Appeals for the First Circuit quoted an asylum seeker who was denied asylum based on a peace accord supposedly ending a thirty-six year civil war in Guatemala as saying: "with a paper and a pencil there is never going to be peace in one country, because there was always violence and now more." The court, however, ruled that the Department of State Report suggesting that the peace accord brought about peace in Guatemala was sufficient evidence to meet the government's burden of proof for the denial of asylum to the applicant.

326. Id. at 965.
327. Id. at 965-67.
328. See id. at 966.
329. Id. at 967 ("Rivera’s attempt to argue officially noticed facts for the first time in this forum is misplaced;" thus the court was "constrained to find that the Board did not abuse its discretion."); see also Castillo-Villagra v. INS, 972 F.2d 1017, 1028 (9th Cir. 1992) (finding that the immigration court’s taking of administrative notice is reviewable only for abuse of discretion).
330. See, e.g., Castillo-Villagra, 972 F.2d at 1027 (analyzing the taking of an administrative notice of changed country conditions in Nicaragua and stating that “[t]he adjudicative fact required both a debatable assumption about the amount of power retained by the Sandinistas, and an assumption about the particular salience of the Castillo-Villagra family as an irritant to Sandinistas who may retain enough power in Jinotega or the university to persecute them").
332. Id. at 42, 45. The use of state department reports of changed country conditions to deny asylum in circumstances where the nature of the change is not clear is not
The temptation of presuming facts contained in country condition reports that on their face purport to be objective is very high. It is also a very convenient source of evidence. The danger of misinterpretation is, however, very serious. Obviously, the reports are diplomatic in nature and are essentially designed to facilitate US foreign policy. The Court of Appeals for the Ninth Circuit has nicely summarized this concern as:

A frank, but official, discussion of the political shortcomings of a friendly nation is not always compatible with the high duty to maintain advantageous diplomatic relations . . . . No hearing officer or court has the means to know the diplomatic necessities of the moment, in the light of which the statements must be weighed.333

Another reason behind the relaxation of the rules for taking administrative notice of adjudicative facts is the supposed expertise of the administrative adjudicators. Although such is true in most administrative agencies that adjudicate routine cases, immigration cases are completely different. No single judge could possibly have expertise in the dynamic political, social, economic, and security conditions of more than one hundred countries from which immigrants come. In fact, immigration judges are not even assigned to specific geographic areas. Cases are often assigned randomly. Particular expertise in any geographic area is not expected. Immigration judges adjudicate cases just like any district court judge based on the record developed before them. There is no justification for a significant departure from the rules of judicial notice in immigration cases. There are few, if any, facts originating in distant places to which none of the litigating parties have practical access that are suitable for administrative notice. Administrative notice is not a helpful tool in deportation proceedings, particularly in cases where the court needs to determine what happened in another country in the past and what is likely to happen in the future. There must not be a convenient334 alternative to proving alleged facts by reliable evidence in a court of law. The DOL Rules of Evidence contain

uncommon. One Canadian case offers a very good example. In Roble v. Canada, the claimant, a national of Somalia, sought asylum on the grounds that he was afraid of the security forces of the then-president of Somalia, Ziad Barre. While the case was still being considered, Ziad Barre was overthrown. Based on the report about this change, the Canadian Federal Court of Appeals approved the denial of asylum. See Roble v. Canada (Minister of Employment and Immigration), 1994 A.C.W.S.J. LEXIS 70543 (Fed. Ct. Can.). As the world came to recognize soon thereafter, the change in Somalia was for the worse making the likelihood of persecution greater, not less.

333. Kasravi v. INS, 400 F.2d 675, 677 n.1 (9th Cir. 1968).
334. See Castillo-Villagra, 972 F.2d at 1027-28 (“[W]e adopt ‘a rule of convenience,’ that ‘the ALJ should take notice of adjudicative facts, whenever, the ALJ at the hearing knows of information that will be useful in making the decision.’” (quoting Banks v. Schweiker, 654 F.2d 637, 640-41 (9th Cir. 1981) (internal quotation marks omitted)).
Revisiting the Rules in Deportation Proceedings

instructive provision in this respect. This alternative is discussed in brief in the following section.

IV. LESSONS FROM THE DEPARTMENT OF LABOR RULES OF EVIDENCE

Professors Beatson and Matthews suggest that one important consideration that needs to be taken into account when considering functions of administrative bodies and judicial oversight is the diversity of administrative bodies themselves. They argue that not all administrative agencies require the same level or kind of check or scrutiny. They say: "Not all bodies are treated in the same way." They contrast the deference accorded to bodies exercising regulatory powers relating to commercial and financial matters with the deference accorded agencies regulating matters involving liberty and related interests. In their own words:

The general theory must, therefore, take account of the relevant statutory and factual context, the fact that different interests will not be seen as needing exactly the same type of protection by the courts and the differing degree to which an issue may be suitable for resolution by the supervisory jurisdiction. They conclude that the central consideration must be "justiciability" under the circumstances.

More than 280 different sets of rules and regulations now govern the admissibility of evidence in administrative agency proceedings. These rules could be grouped into two broad categories: those that are exclusively based on the APA standards, and those that use the FRE "so far as practicable." In an important departure, in the Spring of 1990, the DOL adopted an alternative approach—i.e., a set of rules based on the FRE with some necessary modifications that took the peculiarities of DOL adversarial proceedings into account. The DOL chose this approach because it was believed that neither the open ended APA rules nor the ambiguous "so far as practicable" standard was suitable for adversarial labor proceedings. Although the DOL rules mirror the

335. BEATSON & MATTHEWS, supra note 13, at 5.
336. Id.
337. Id.
338. Id.
339. Id.
341. Id.
342. Id. at 190-91; see also 29 C.F.R. §§ 18.101-1104 (2006).
343. Graham, supra note 340, at 191. Professor Michael H. Graham, who served as a reporter of the DOL Rules of Evidence, wrote:
FRE including such details as parallel numbering, they expand the
categories of evidence that are considered trustworthy enough to be
admitted in DOL proceedings.\textsuperscript{344} One significant instance in this regard
is the introduction of five more exceptions to the hearsay rule.\textsuperscript{345} The
details are discussed in the next section.

Deportation proceedings involve serious liberty interests. As such,
cognizable sets of procedural and evidentiary rules that take this liberty
interest into account are necessary. DOL rules of evidence offer a very
good lesson in devising the rules of evidence that work well under these
unique circumstances. Unlike most other administrative agency rules,
the DOL rules are based on the Federal Rules of Evidence with
exemplary modifications that take into account the significant interest
involved.\textsuperscript{347} There is no disagreement that the rules of evidence
applicable in regular courts of law provide the best assurances of
trustworthiness. Therefore, as there is no easy formula to guarantee
trustworthiness, significant departures from the classic rules of evidence
must be looked at with the utmost care. It is important to reiterate that

\begin{quote}

The DOL approach allows the ALJ and the parties to rely on an understandable
and workable evidence code, while avoiding the inherent ambiguity involved in a
qualified reference to the FRE. To the extent the rules mirror the FRE, their
meaning is supported by fifteen years of judicial interpretation.\ldots

The DOL has approached the question of the admission and exclusion of
evidence in administrative adjudications without resorting to the FRE “so far as
practicable” standard or to the open standard of the APA.
\end{quote}

\textit{Id.}\textsuperscript{344} \textit{Id.}\textsuperscript{345} See 29 C.F.R. § 18.803(a)(26)-(30), cited in Graham, supra note 340.
\textsuperscript{346} Different administrative agencies adopt different rules of procedure and evidence
based essentially on APA rules and the Federal Rules of Evidence. The rules usually take
into account the peculiarities of the adjudicative functions of each agency. For example,
the Surface Transportation Board (STB) rules state:

Any evidence which is sufficiently reliable and probative to support a decision
under the provisions of the Administrative Procedure Act, or which would be
admissible under the general statutes of the United States, or under the rules of
evidence governing proceedings in matters not involving trial by jury in the
courts of the United States, will be admissible in hearings before the Board.

49 C.F.R. § 1114.1 (2006). The Department of Housing and Urban Development (HUD)
rules provide:

Irrelevant, immaterial, privileged, or unduly repetitious evidence shall be
excluded.

Unless otherwise provided for in this part, the Federal Rules of Evidence shall
provide guidance for the conduct of proceedings under this part. Parties may
object to clearly irrelevant material, but technical objections to testimony as used
in a court of law will not be sustained.

the significant departures in agency proceedings are rules of convenience that could compromise the fundamental fairness of any trial.

As consistently argued throughout this Article, there is little justification for a significant deviation from the classical rules of evidence that courts of law and equity have used for years unless warranted by exceptional circumstances. The DOL rules of evidence, by selectively modifying the Federal Rules of Evidence, create a coherent set of rules suitable for resolution of disputes falling within the ambit of the Department of Labor.348

The primary lesson to be drawn from the DOL approach is the very idea of relying on the Federal Rules. The modifications made to some specific rules are also very instructive. The following sections briefly analyze the DOL approach towards specific evidentiary rules and discern the lessons for deportation proceedings.

A. DOL Standards

The general statutory guidance is that proceedings must “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.”349 This rule comes from the Labor Relations Management Act (also called the Taft-Hartley Act) that Congress adopted in 1947 just one year after the adoption of the APA.350 Commenting on the evidentiary standards contained in the National Labor Relations Bill, the House Committee Report stated that the rules require the National Labor Relations Board “to rest its rulings upon facts, not interferences, conjectures, background, imponderables, and presumed expertise [and to] correct abuses under the Act.”351 A supplemental report noted: “The Board’s earlier habit of accepting literally anything into the record was indefensible. . . . [T]he limitation ‘so far as practicable’ gives to the trial examiner considerable discretion as to how closely he will apply the rules of evidence.”352 To clarify the obvious ambiguities in the “so far as practicable” standard, the DOL issued regulations dealing with special evidentiary rules in 1990. The regulations carefully modified the Federal Rules of Evidence to fit the

348. See Graham, supra note 8, at 358-59; see also 29 C.F.R. §§ 18.101-1104.
352. 93 CONG. REC. 7000, 7002 (1947), reprinted in 2 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1622, 1625 (1948), quoted in Graham, supra note 8, at 373.
special concerns of the DOL. These rules provide under the title "Applicability of Federal Rules of Evidence" that "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 immigration system could benefit from this approach because the FRE contain well-conceived rules that courts of law and equity have successfully used for decades. The modifications that the DOL rules make also offer good guidance because the typical labor proceedings are in some ways analogous to deportation proceedings in that there is a heavy reliance on witness credibility and other testimonial evidence in both types of proceedings. The two processes are also structurally similar. In both cases, administrative judges preside over adversarial proceedings relying heavily on testimonial evidence, and make findings of fact and law based on the record. The decisions may be appealed to the respective boards; the Board of Immigration Appeals in the case of immigration, and the National Labor Relations Board in the case of labor disputes. In both cases, the second stage of appeals goes to the federal courts of appeal.

353. See Graham, supra note 8, at 358-59; see also 29 C.F.R. §§ 18.101-1104. The most serious problem was that there were no standards for determining what constituted "so far as practicable." Graham, supra note 8, at 359 n.48.

354. According to the Introductory Note to the DOL Rules of Evidence, "The Rules of Evidence for the United States Department of Labor Modify the Federal Rules of Evidence for application in formal adversarial adjudications conducted by the United States Department of Labor. The civil nonjury nature of the hearings and the broad underlying values and goals of the administrative process are given recognition in these rules." Graham, supra note 8, at n.154 (quoting 29 C.F.R. Part 18, Subpart B app. reporter's introductory note (1990)).

355. See Graham, supra note 8, at 372; see also Martin Sprocket & Gear Co. v. NLRB, 329 F.2d 417, 420 (5th Cir. 1964) ("It is settled that credibility of witnesses and reasonable inferences to be drawn from the evidence are matters for determination by the [NLRB]."); see also discussion supra Part III.C.3.

356. See Graham, supra note 8, at 353-54; supra note 160 and accompanying text.


358. 8 U.S.C. § 1252(b) (2000); 29 U.S.C. § 160(f) (2000). Moreover, the DOL and the Immigration Service have a long tradition of information sharing and collaborative work in relation to immigrant workforce matters. This long-standing relationship should facilitate the Immigration Service's attempt to understand and emulate the DOL rules and precedent, as well as create a closer working relationship. The two departments have traditionally had informal and formal cooperation. The formal cooperation includes the signing of memoranda of understating. The two most notable memoranda were signed in 1992 and 1998. They dealt with complaints issued by the immigrant workforce to the Department of Labor. More specifically, they purported to ensure that exploited workers were not discouraged from filing complaints with the DOL for fear of immigration enforcement. See Memorandum of Understanding Between the Immigration & Naturalization Serv., Dep't of Justice, and the Employment Standards Admin., Dep't of
The following sections briefly discuss the DOL's approach to the most important specific evidentiary rules discussed in Part III.D above, and provide suggestions for the improvement of such rules applicable in deportation proceedings.

B. Some Specific Rules

1. Limited Admissibility and the Rule of Completeness

As discussed at length in Part III.B above, the INA rules of evidence do not provide for any meaningful limitation to the admissibility of evidence in deportation proceedings. Among some fundamental evidentiary principles that could help ensure fundamental fairness in deportation proceedings are the basic principles of limited admissibility and the rule of completeness. The DOL rules rely on these principles to ensure fairness in labor proceedings.

The DOL rule of limited admissibility provides: "When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the judge, upon request, shall restrict the evidence to its proper scope." This rule could be very helpful in screening evidence in deportation proceedings. For example, a Department of State country condition report could contain numerous allegations that may be used to prove the truth of what they assert or to impeach a witness. Some parts of the report might be relevant to some allegations and admissible for one purpose, but other parts may be irrelevant and inadmissible. Looking into the admissibility, relevance, and purpose of each part of the report and determining the use on a case-by-case basis may be an essential step to prevent unwarranted and unconditional reliance on the report in its totality.

This rule of limited admissibility may, however, raise concerns of completeness. The DOL rule of completeness addresses this concern. It provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." The key language here is the reference to fairness. The court must determine that the missing portions "ought in fairness" be considered.

The rule of completeness may also play a significant role with respect to other evidence in deportation proceedings. Sometimes portions of airport interview forms and other documents are presented to the court.
to contradict the claimant's testimony or undermine the case in other ways.\textsuperscript{361} The rule of completeness would mandate the presentation of all documents that "ought in fairness" be considered together.

Another area where the rule of completeness could facilitate fair disposition of deportation cases is the production of criminal records. For example, in the case discussed above that this author supervised, the DHS presented conviction records that apparently showed the respondent's conviction for receiving stolen property and a sentence for six to twenty-three months under Pennsylvania law. Examination of the whole record revealed that the penalty was in fact probation. Parts of the record showed that the probation was actually given on a preprinted regular probation certificate. That meant a difference of life and death for the respondent because a suspended sentence of six to twenty-three months would have excluded him from any kind of reasonable relief under the immigration law.\textsuperscript{362} Probation of twenty-three months, on the other hand, would have had absolutely no serious immigration consequences.\textsuperscript{363} As this example suggests, the rule of completeness used along with the rule of limited admissibility could be a valuable tool to ensure the fairness of deportation proceedings.

2. Administrative Notice

The DOL rules contain a detailed rule regulating the circumstances of relying on administrative notice of adjudicative facts. This rule is entirely compatible with deportation proceedings. It provides:

(b) . . . An officially noticed fact must be one not subject to reasonable dispute in that it is either:

(1) Generally known within the local area,

(2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, or

(3) Derived from a not reasonably questioned scientific, medical or other technical process, technique, principle, or explanatory theory within the administrative agency's specialized field of knowledge.

. . . .

(e) . . . A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official

\textsuperscript{361} See, e.g., Ramsameachire v. Ashcroft, 357 F.3d 169, 175 (2d Cir. 2004).
\textsuperscript{362} See supra notes 91-93 and accompanying text.
\textsuperscript{363} See generally INA § 101, 8 U.S.C.A. § 1101(a)(43) (West 2005) (defining "aggravated felony" as one of a variety of offenses "for which the term of imprisonment [is] at least one year").
notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after official notice has been taken.\textsuperscript{364}

In stark contrast to the INA rules discussed in Part III.D.4 above, this rule relies on the FRE and regulates the details of the circumstances of taking administrative notice of adjudicative facts without proof. It employs a very high threshold of knowledge and verification for administrative notice to be taken. Moreover, it emphasizes the need to provide the adversely affected party with a clear opportunity to challenge the appropriateness of the taking of the administrative notice. These details are essential because they help ensure the reliability of the evidence. This again is a very instructive provision suitable for deportation proceedings.

3. Hearsay

Hearsay is perhaps the most important and also the most controversial of all evidentiary rules. A clear rule on hearsay would undoubtedly improve the justiciability, predictability, and consistency of deportation proceedings. As discussed in Part III.D.5 above, the INA rules of evidence do not impose any limitation on the admissibility of hearsay evidence. That has indeed been a source of serious difficulty. Restricting the admissibility of hearsay and regulating the admissibility of reliable hearsay through exceptions as the Federal Rules do is a proven approach. The DOL approach of expanding the exceptions to accommodate peculiar and legitimate concerns is very useful.

The DOL rules adopt the general FRE rule against the admissibility of hearsay together with all the exceptions.\textsuperscript{365} The DOL rules, however, add five more exceptions to the generally recognized exceptions under the FRE.\textsuperscript{366} These exceptions take the peculiarities of the proceedings before the National Labor Relations Board (NLRB) into account. For example, one exception provides for the admission of expert reports without the availability of the expert to testify in court.\textsuperscript{367} Obviously, this

\textsuperscript{364} 29 C.F.R. § 18.201.

\textsuperscript{365} Id. § 18.802 ("Hearsay is not admissible except as provided by these rules, or by rules or regulations of the administrative agency prescribed pursuant to statutory authority, or pursuant to executive order or Act of Congress."); id. § 18.803 (providing exceptions to the general hearsay rule).

\textsuperscript{366} See id. § 18.803(a)(26)-(30).

\textsuperscript{367} See Graham, supra note 8, at 376-82.

\textsuperscript{368} See 29 C.F.R. § 18.803(a)(28) ("Written reports of an expert witness prepared with a view toward litigation, including but not limited to a diagnostic report of a physician, including inferences and opinions, when on official letterhead, when dated, when including a statement of the expert’s qualifications, when including a summary of experience as an expert witness in litigation, when including the basic facts, data, and
exception weighs the potential trustworthiness of the evidence along with the costs and benefits. It allows the adverse party to call the expert for purposes of testing the testimony through cross-examination. Although the report would still be admissible even if the expert does not appear upon the request of the adverse party, its weight would certainly be affected. The report must be accompanied by the witness's credentials indicating his experience, including trial experience if any, and must state the basis of the testimony. Such evidence may be deemed inadmissible if "the sources of information or the method or circumstances of preparation indicate lack of trustworthiness."

This exception, which is a result of careful drafting, took routine labor litigations into account. This particular exception to the hearsay rule could be a very valuable tool if adopted in deportation proceedings because individuals in deportation proceedings often lack the resources to produce expert witnesses to testify in court. A rule that allows the admissibility of expert reports such as this may be very helpful. The rules that test the trustworthiness must not, however, be overlooked. That is why the details contained in this DOL rule are indeed instructive.

One important piece of evidence often used in deportation proceedings that may be admitted under a similar exception is the Department of State country condition report. As indicated above, allowing its unconditional admission has been a source of great concern. A complete exclusion also would not be wise as it often contains valuable information for both parties that would otherwise be unavailable. A rule may, however, regulate its admissibility and the weight that must be assigned to it. More particularly, a rule should provide that the party adversely affected by the admission of the Report must be given the opportunity to challenge any parts of the Report that the adverse party relies on. A party may even be allowed to challenge any portion of the report by showing that "the sources of information or the method or

---

369. See id.
370. Id.
371. Id.
circumstances of preparation indicate lack of trustworthiness” just like the DOL exception to expert reports.

Another valuable example is the exception relating to written statements of lay witnesses. It provides:

Written statements of a lay witness made under oath or affirmation and subject to the penalty of perjury, so far as admissible under the rules of evidence applied as though the witness was then present and testifying, unless the sources of information or the method or circumstances of preparation indicate lack of trustworthiness provided that (i) a copy of the written statement has been filed and served upon the adverse party sufficiently in advance of the hearing to provide the adverse party with a fair opportunity to prepare to object or meet it, and (ii) if the declarant is reasonably available as a witness, as determined by the judge, no adverse party has sufficiently in advance of the hearing filed and served upon the noticing party a written demand that the declarant be produced in person to testify at the hearing. An adverse party may call the declarant as a witness and examine the witness as if under cross-examination.\(^\text{372}\)

While this exception serves the purposes of cost effective and convenient disposition of cases, the details contained therein are clearly designed to maintain minimum indicia of reliability and trustworthiness. A similar provision for deportation proceedings would have many benefits. It would allow the Service as well as the individuals involved in deportation proceedings to present written testimony while at the same time allowing the party adversely affected by the testimony some practical guarantees. This rule may be modified further to ensure the admissibility of written testimony from overseas, when it is practically impossible to produce the witness, as long as the testimony is given under oath and carries some indicia of reliability. The addition of this exception is particularly valuable for asylum seekers who are otherwise unable to present witnesses who may be in some distant location but can provide written testimony.

V. CONCLUSION

The sheer irregularity and unpredictability of deportation proceedings may call the integrity and sincerity of the system of administration of immigration law itself into question. In his dissenting opinion in *Fong Yue Ting v. United States*, Justice Field remarked:

\(^{372}\) *Id.* § 18.803(a)(29).
If one rule may lawfully be laid aside in his case, another rule may also be laid aside, and all rules may be discarded. In such instances a rule of evidence may be set aside in one case, a rule of pleading in another, the testimony of eye-witnesses may be rejected and hearsay adopted, or no evidence at all may be received . . . . That would be to establish a pure, simple, undisguised despotism and tyranny with respect to foreigners resident in the country by its consent, and such an exercise of power is not permissible under our Constitution.\footnote{373} Justice’s Field’s century old concern is still real. As consistently argued throughout this Article, appropriate rules of procedure and evidence could help mitigate the harsh consequences of the application of substantive law and ensure consistency, credibility, and predictability of deportation proceedings. To this end, the Federal Rules of Evidence that apply in both civil and criminal trials\footnote{374} must offer the basic foundation for any rules of evidence applicable in deportation proceedings. The significant departure from these classic procedural and evidentiary rules in deportation proceedings has been a source of serious anomaly. The Federal Rules of Evidence modified along the lines of the DOL rules would indeed inject badly needed reliability, predictability, and consistency into deportation proceedings and help restore the integrity of the system.

\footnote{373} Fong Yue Ting v. United States, 149 U.S. 698, 754-56 (1893) (Field, J., dissenting).  
\footnote{374} See FED. R. EVID. 1101(b) (“These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.”).