the imposition of criminal sanctions,"[36] and has held that due process requires the use of at least some of the same protections that the citizen would have in a criminal trial.[37] However, the extension of this line of authority might prove too inflexible. There will be circumstances where the agency is justified in holding closed hearings. Perhaps the optimum resolution of the problem would be to couple a presumption in favor of open hearings with the extension of the *Goldberg* balancing test utilized by the *Fitzgerald* court. The presumption would recognize the policy arguments favoring open hearings by shifting the burden to the Government to show a legitimate governmental interest for restricting access, and the balancing test would permit the court to weigh, on a case by case basis, the competing interests.[38]

C. USE OF HEARSAY EVIDENCE AND THE "SUBSTANTIAL EVIDENCE" STANDARD

Richardson v. Perales[1] and its attendant trilogy of lower court opinions[2] reflect the constant friction in administrative law generated by a mounting case load and a conscious effort to insure justice in each individual proceeding. The final decision established that uncorroborated hearsay can constitute "substantial evidence" sufficient to support an administrative ruling.

36. Williams v. Zuckert, 371 U.S. 531, 533-34 (1962) (Douglas, J., dissenting), *vacated and remanded*, 372 U.S. 765 (1963).

37. *See* Greene v. McElroy, 360 U.S. 474 (1958) (granting right to hearing where accusers could be confronted and cross-examined); Peters v. Hobby, 349 U.S. 331 (1955) (granting right to appeal from unfavorable agency ruling).

38. It is entirely possible that the court of appeals will not reach the issue of an open hearing on the appeal of the *Fitzgerald* decision. The doctrine that a litigant must exhaust his administrative remedies before judicial appeal, enunciated in Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1937), applies to employment-discharge cases. *E.g.*, American Fed'n of Gov't Employees v. Resor, 442 F.2d 993 (3d Cir. 1971); Hills v. Eisenhart, 256 F.2d 609 (9th Cir. 1958); Green v. Baughman, 214 F.2d 878 (D.C. Cir. 1954). The district court held that *Fitzgerald* represented one of the exceptions to the exhaustion principle—that established avenues for review may be bypassed where an adequate remedy for the issue in question would not exist after the agency action. *See* Jewel Cos. v. FTC, 432 F.2d 1155 (7th Cir. 1970). The court felt that the "probability of unfairness" presented by non-public proceedings would not lend itself to later judicial review. ___ F. Supp. at ___ The court of appeals may reverse on the exhaustion issue and remand this case to the Civil Service Commission for completion of hearings.

1. 402 U.S. 389 (1971), *noted in The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 326 (1971).

2. Cohen v. Perales, 412 F.2d 44 (5th Cir.), *rehearing denied*, 416 F.2d 1250 (1969), *noted in* 1970 *Duke Project* 153; Perales v. Secretary, 288 F. Supp. 313 (W.D. Tex. 1968).

In 1966 Perales filed for social security benefits which he alleged were due him because a lumbar injury he had suffered made it impossible for him to engage in "any gainful activity."[3] When notified that the claim had been disapproved by the state agency, Perales requested an administrative hearing before an examiner of the Bureau of Hearings and Appeals of the Social Security Administration. Two hearings ensued at which the only evidence adverse to Perales consisted of medical reports and evaluations submitted by physicians who had treated and/or examined Perales and the findings of a "medical examiner" who collated and interpreted these reports for the examiner. All of this material was hearsay which was objected to as a denial of the right to confront and cross-examine witnesses as guaranteed by the Administrative Procedure Act (APA).[4] Perales testified in his own behalf and introduced the oral testimony of another physician who had treated him. The hearing examiner denied the claim and this decision was later affirmed by the Appeals Council.

An appeal was subsequently lodged with a federal district court which asserted its reluctance to accept as "substantial evidence" the opinions of medical experts in the form of unsworn written reports and dismissed the opinion of the medical examiner as of little probative value,[5] particularly when opposed by the testimony of an appearing witness. The district court concluded that the administrative proceedings amounted to "pyramiding hearsay upon hearsay" and remanded the case for a new hearing.[6]

The Court of Appeals for the Fifth Circuit affirmed the lower court holding that uncorroborated hearsay evidence is not sufficient to meet the "substantial evidence" standard.[7] Recognizing that hearsay evidence is clearly admissible in administrative proceedings before the Social Security Administration,[8] the court reasoned that such admission did *not* deny a claimant's right of cross-examination inasmuch as the hearing examiner has the power to subpoena witnesses

3. Social Security Act, 42 U.S.C. § 423(d)(1)(B) (1970).

4. A party is entitled to present his case or defense by oral or documentary evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Administrative Procedure Act, 5 U.S.C. § 556(d) (1970).

5. 288 F. Supp. at 314. The court did indicate that hearsay evidence could be accepted as substantial evidence "in unusual circumstances" but it did not indicate what these circumstances would be. *Id.*

6. *Id.*

7. 412 F.2d 44 (5th Cir. 1969).

8. 42 U.S.C. § 405(b) (1970); 20 C.F.R. § 404.927 (1971).

sua sponte or upon the request of a party.[9] If such a request is not made, however, a party may not later object to admission of the hearsay evidence. In regard to the "substantial evidence" standard, the court cited the definition enunciated by the Supreme Court in *NLRB v. Columbian Enameling & Stamping Co.*[10]

> [F]indings by administrative bodies means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. . . . [a]nd it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. . . .[11]

Focusing upon the application of this standard to hearsay, the court relied upon the pronouncement in *Consolidated Edison Co. v. NLRB*[12] to the effect that "[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence."[13] The court disparaged the use of a medical examiner to interpret the reports of examining physicians and dismissed the probative value of the testimony of such an expert because "[m]ultiple hearsay is no more competent than single hearsay."[14] Substantial evidence was deemed lacking, and the lower court opinion was affirmed. Denying a rehearing of the *Perales* case, the Fifth Circuit in a per curiam opinion[15] clarified its stand on uncorroborated hearsay by stating that evidence of this nature may provide a basis for an adverse administrative ruling but not where standing alone and opposed by objection and oral testimony as in *Perales*.[16]

In the final appellate proceeding,[17] the Supreme Court affirmed the lower court as to the admissibility of hearsay in administrative hearings[18] but reversed as to the "substantial evidence" issue, holding

9. 412 F.2d at 51.

10. 306 U.S. 292 (1939).

11. *Id.* at 299-300.

12. 305 U.S. 197 (1938).

13. *Id.* at 230. The statement has been echoed in a number of subsequent decisions. *E.g.*, Camero v. United States, 345 F.2d 798, 800 (Ct. Cl. 1965); NLRB v. Amalgamated Meat Cutters, 202 F.2d 671, 673 (9th Cir. 1953); Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 691 (9th Cir.), *cert. denied*, 338 U.S. 860 (1949); United States v. Krumsiek, 111 F.2d 74, 78 (1st Cir. 1940); Hill v. Fleming, 169 F. Supp. 240, 245 (W.D. Pa. 1958).

14. 412 F.2d at 53.

15. 416 F.2d 1250 (5th Cir. 1969).

16. *Id.* at 1251.

17. Richardson v. Perales, 402 U.S. 389 (1971).

18. The consensus as to the admissibility of hearsay in administrative hearings shown in the *Perales* decisions, including the Supreme Court dissent, reflects both congressional intent

that hearsay medical reports may indeed constitute "substantial evidence" within the ambit of section 205(g) of the Social Security Act.[19] In support of the latter determination, the majority was impressed both by the wide range of medical examinations, most at government expense, to which claimant had been subjected and by the fact that the evidence was derived from unbiased physicians who had personally examined the claimant. The majority thus concluded that the resulting detailed reports were based on accepted medical procedures and were of value to an adjudicative body. The Court felt that the circumstances indicated a careful and patient endeavor by the agency and examiner to ascertain the truth and the Court was impressed by the consistent results of the independent and specialized examinations. Further, in concurring with the Fifth Circuit on the availability of cross-examination through the examiner's subpoena power, the majority pointed out that claimant had failed to utilize this power despite ample opportunity to examine the documentary evidence on file. From this it followed that he could not later complain of inability to cross-examine witnesses. Noting the burden on administrative funds

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and the growing dissatisfaction with exclusionary evidentiary rules in all types of judicial and administrative proceedings. In addition to the Social Security Act, see note 8 *supra*, the APA similarly allows *any* documentary evidence to be received unless irrelevant, immaterial and unduly repetitious. 5 U.S.C. § 556(d) (1970). The courts have adopted a similar position even when there are no specific agency regulations applicable to the issue. For example, the Supreme Court early determined that because of its investigative duties the Interstate Commerce Commission was not bound by the exclusionary rules. ICC v. Baird, 194 U.S. 25 (1904). The trend of recent decisions is reflected in that portion of *Morelli v. United States* holding that "the hearsay rule is not applicable to administrative hearings so long as the evidenee upon which a decision is ultimately based is both substantial and has probative value." 177 Ct. Cl. 848, 853-54 (1966).

The legislative provisions and judicial rulings complement growing criticism of the exclusionary rules, particularly the hearsay restrictions, even in jury trials. *See generally* C. McCORMICK, EVIDENCE 634 (1954); 1 J. WIGMORE, EVIDENCE § 8c (3d ed. 1940). Unfortunately, the new proposed federal rules do not recognize this approach, Preliminary Draft of Proposed Rules of Evidenee for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969), but the Fifth Circuit has admitted a newspaper account to establish the damaging of a courthouse by fire, declaring that this evidence was not being received as an exception to the hearsay rule but "because it [was] necessary and trustworthy, relevant and material, and its admission [was] within the trial judge's exercise of discretion in holding the hearing within reasonable bounds." Dallas County v. Commercial Union Assur. Co., 286 F.2d 388, 397-98 (5th Cir. 1961). The same may be said of much evidence presented in administrative hearings, particularly medical reports. McCormick correctly notes that the exclusionary rules "are absurdly inappropriate to any tribunal or proceeding where there is no jury." 5 ENCYCL. SOC. SCI. 637, 644 (1931). Certainly, such jury-protecting exclusionary rules need not be adopted or encouraged in administrative proceedings. 2 DAVIS 264.

19. 42 U.S.C. § 405(g) (1970).

of producing live testimony, the Court pointed out prior instances where the reliability and probative worth of written medical reports in formal trials had been recognized and the reports admitted as an exception to the hearsay rule.[20] More importantly, a number of decisions were cited in which courts, reviewing administrative rulings, had upheld adverse decisions despite the fact that the sole supporting evidence consisted of reports of the variety in question, occasionally, but not always, buttressed by testimony of a medical adviser as in the *Perales* situation. Such cases indicated the acceptability of medical reports as a basis for social security determinations.[21] In view of these precedents, the Court stated that the lower court had read too much into the *Consolidated Edison* definition of "substantial evidence."[22] The majority also took issue with the Fifth Circuit on the use of medical advisers and recognized their value as interpreters of complex medical evidence for a lay examiner.

The dissenting opinion cited with approval the holding of *Consolidated Edison* that "[u]ncorroborated hearsay . . . does not by itself constitute 'substantial evidence' "[23] and emphasized that cross-examination of the reporting physicians was "essential to a full and fair disclosure of the facts."[24] The dissent went on to characterize the use of medical advisers in such proceedings as "beneath the dignity of a great nation."[25]

The Demise of the Legal Residuum Rule

Since the creation of the administrative process in the United States in 1789,[26] a standard has been sought by which to judicially gauge the soundness of an administrative determination. The prevalent standards include the legal residuum rule and the requirement of

20. White v. Zutell, 263 F.2d 613 (2d Cir. 1959); Long v. United States, 59 F.2d 602 (4th Cir. 1932).

21. *E.g.*, Breaux v. Finch, 421 F.2d 687 (5th Cir. 1970); Flake v. Gardner, 399 F.2d 532 (9th Cir. 1968); Pierce v. Gardner, 388 F.2d 846 (7th Cir.), *cert. denied*, 393 U.S. 885 (1967); McMillin v. Gardner, 384 F.2d 596 (10th Cir. 1967); Justice v. Gardner, 360 F.2d 998 (6th Cir. 1966); Brasher v. Celebrezze, 340 F.2d 413 (8th Cir. 1965); Ber v. Celebrezze, 332 F.2d 293 (2d Cir. 1964); Cuthrell v. Celebrezze, 330 F.2d 48 (4th Cir. 1964); Stancavage v. Celebrezze, 323 F.2d 373 (3d Cir. 1963).

22. 402 U.S. at 407.

23. *Id.* at 413. *See also* Ginsburg v. Richardson, 436 F.2d 1146 (3d Cir. 1971).

24. 402 U.S. at 412 (Justices Douglas, Black and Brennan dissenting).

25. *Id.* at 413.

26. The first administrative agency was established by the Act of July 31, 1789, 1 Stat. 29, to estimate duties on imports.

substantial evidence.[27] The origin of the former standard is found in *Carroll v. Knickerbocker Ice Co.*[28] wherein the New York Court of Appeals, in interpreting a state statute on administrative hearings, ruled that while a commission could "accept any evidence that is offered, still in the end there must be a residuum of legal evidence to support the claim before an award can be made."[29] Basically, the rule requires a reviewing court to set aside an administrative finding unless such finding is supported by evidence which would be admissible in a jury trial—no matter how reliable the evidence introduced, no matter what the circumstances and no matter what opposing evidence was presented.[30] The premise of the rule appears to be that a strict requirement to set aside decisions based on evidence which would be inadmissible in a jury trial is superior to a separate evaluation of the probative weight of such evidence in each particular case. This assumption has been severely criticized for several reasons.[31] As Professor Davis points out, the rule denies hearsay in an administrative hearing its probative value, which could be as great as that attached to incompetent evidence admitted without objection in a jury trial.[32] The restriction also precludes experts who are members of the tribunal from drawing conclusions from evidence that could be utilized for drawing conclusions by an expert witness testifying before a jury.[33] More importantly, however, the evidence is often reliable and its value should be assessed in the light of attendant circumstances rather than being summarily excluded by an inflexible rule.[34] In addi-

27. Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings*, 1971 DUKE L.J. 1, 23.

28. 218 N.Y. 435, 113 N.E. 507 (1916).

29. *Id.* at 440, 113 N.E. at 509.

30. 2 DAVIS 292.

31. *See* R. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK 189-92 (1942); 2 DAVIS 293; 1 J. WIGMORE, EVIDENCE 39 (3d ed. 1940). *But see* 1 F. COOPER, STATE ADMINISTRATIVE LAW 411 (1965). *See generally* United States v. Costello, 221 F.2d 668, 688 (2d Cir. 1955); C. MCCORMICK, EVIDENCE 626-27 (1954); J. WIGMORE, *supra*, § 4b.

32. 2 DAVIS 293. *See also, e.g.*, Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126 (1941); Diaz v. United States, 223 U.S. 442 (1912).

33. 2 DAVIS 293. *See also, e.g.*, National Bank of Commerce v. New Bedford, 175 Mass. 257, 56 N.E. 288 (1900).

34. 2 DAVIS 293-94. Professor Davis suggests that the circumstances to be evaluated include: the alternative to relying on the incompetent evidence; the state of the supporting and opposing evidence; the program policy being administered and the effects of the decision; the relative importance of the subject matter and government economy; and the efficacy or lack thereof of cross-examination in regard to given hearsay evidence. *Id.*

tion to being criticized, the legal residuum rule has been weakened by developments in regard to the sufficiency and acceptance of hearsay in the trial field.[35]

Although the majority of federal jurisdictions reject the legal residuum rule,[36] several recent cases[37] approving it in broad generalizations have prompted the observation that "the federal case law does not support an unqualified statement that the residuum rule is uniformly rejected."[38] Prior to *Perales*, the only Supreme Court pronouncement on the subject appears to be the dictum of Justice Brandeis in *Tisi v. Tod*[39] to the effect that an administrative finding need not be based on evidence legally sufficient in a court of law. The *Perales* decision, by sustaining a ruling based solely upon hearsay medical reports, should remove all doubt as to the applicability of the residuum rule to judicial review of federal administrative proceedings. This decision provides a welcome answer to the controversy and insures a greater uniformity in review procedures among the federal courts.

The "Substantial Evidence" Standard

The first version of the "substantial evidence" standard of judicial review is attributed to the Federal Trade Commission Act of 1914;[40] since that date, at least eighteen other federal statutes have incorporated it.[41] The substantial evidence rule is not a rule of evidence,[42] but instead requires that the evidence furnished provide "a substantial

35. For example, hearsay has been held in special circumstances to be of such probative value as to support a criminal conviction, United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968), and to justify dismissal of a federal employee, Jenkins v. Macy, 357 F.2d 62 (8th Cir. 1966). Also, probable cause for an arrest may be premised *entirely* on hearsay. Draper v. United States, 358 U.S. 307 (1959).

36. *E.g.*, Marmon v. Railroad Retirement Bd., 218 F.2d 716, 717 (3d Cir. 1955); American Rubber Products Corp. v. NLRB, 214 F.2d 47, 51 (7th Cir. 1954); Ellers v. Railroad Retirement Bd., 132 F.2d 636, 639-40 (2d Cir. 1943); and cases cited in note 20 *supra*. *See also* 2 DAVIS (Supp. 1970) 309-10.

37. *E.g.*, Boyle's Famous Corned Beef Co. v. NLRB, 400 F.2d 154, 169-70 (8th Cir. 1968); NLRB v. Yutana Barge Lines, 315 F.2d 524 (9th Cir. 1963); NLRB v. Englander Co., 260 F.2d 67, 71 (9th Cir. 1958); Hill v. Fleming, 169 F. Supp. 240, 245 (W.D. Pa. 1958).

38. 2 DAVIS 303.

39. 264 U.S. 131 (1924).

40. Act of Sept. 26, 1914, ch. 311, § 5, 38 Stat. 720, *as amended* 15 U.S.C. § 45(c) (1970).

41. Stason, *"Substantial Evidence" in Administrative Law*, 89 U. PA. L. REV. 1026, 1027 (1941).

42. Patterson, *Hearsay and the Substantial Evidence Rule in the Federal Administrative Process*, 13 MERCER L. REV. 294, 307 (1962).

basis of fact from which the fact in issue can reasonably be inferred."[43] The substantial evidence proviso adopted in the Administrative Procedure Act of 1946 largely codified the definition of the rule developed in case law.[44] Unfortunately, some decisions had incorporated the residuum rule into the concept of "substantial evidence," and this rule continued to exert an influence even after the enactment of the APA.[45] In regard to the exclusionary rules, particularly hearsay, it appears that different criteria are still applied by reviewing courts depending upon whether private rights, such as alien claims, or the activity of a regulatory agency, whose purpose is promotion of general public welfare, are in issue.[46] The "substantial evidence" standard has also been colored to some degree by the tendency of courts to rely, at least in cases where private rights are involved, on common law rules of evidence.[47]

By expunging the residuum restriction from the concept of "substantial evidence," *Perales* indicates that hearsay may constitute substantial evidence depending upon its reliability and probative value.[48] Though the court does not attempt to delineate the parameters of hearsay which would constitute substantial evidence, it notes with approval that *Consolidated Edison*,[49] a case upon which the lower court opinions and the Supreme Court dissent relied so heavily, held that material "without a basis in evidence having rational probative force" did not constitute "substantial evidence."[50] *Perales* indicates what hearsay evidence will not constitute substantial evidence, but provides little guidance as to the degree of reliability and probative value required to meet the substantial evidence standard.[51] In any event the existence of the examiner's subpoena power insures the

43. Appalachian Elec. Power Co. v. NLRB, 93 F.2d 985, 989 (4th Cir. 1938).

44. *See* Western Paper Makers' Chem. Co. v. United States, 271 U.S. 268 (1926); United States v. Abilene & S. Ry., 265 U.S. 274 (1924); Spiller v. Atchinson, T. & S.F. Ry., 253 U.S. 117 (1920); ICC v. Louisville & N.R.R., 227 U.S. 88 (1913); ICC v. Baird, 194 U.S. 25 (1904); Pennsylvania R.R. v. United States, 40 F.2d 921 (W.D. Pa. 1930); Beaumont, S.L. & W. Ry. v. United States, 36 F.2d 789 (W.D. Mo. 1929), *aff'd*, 282 U.S. 74 (1930); Montrose Oil Ref. Co. v. St. Louis-San Francisco Ry., 25 F.2d 750 (N.D. Tex.), *aff'd*, 25 F.2d 755 (5th Cir. 1927), *cert. denied*, 277 U.S. 598 (1928). *See also* Patterson, note 42 *supra*, at 306-15.

45. *See* note 13 *supra*.

46. *See* Patterson, note 42 *supra*, at 315.

47. *E.g.*, Bullock v. Chicago, B. & Q.R.R., 19 F. Supp. 862 (W.D. Minn. 1937).

48. For an analysis of this approach, *see* Patterson, note 42 *supra*, at 343.

49. 305 U.S. 197 (1938).

50. *Id.* at 230.

51. See the circumstances suggested for evaluation by Professor Davis, note 34 *supra*.

opportunity to cross-examine as long as adverse evidence to be presented is available for inspection. This access to cross-examination is adequate because "the requirement . . . is not that the witness be cross-examined, but only that the opponent have opportunity to cross-examine."[52] Thus, the *Perales* decision represents a sound liberalization of administrative procedure by a realistic appraisal of the probative worth of hearsay in view of the attendant circumstances. The ruling should increase the efficiency of the administrative process while preserving procedural safeguards.

D. RIGHT TO A COMPARATIVE HEARING

In *Citizens Communications Center v. FCC*[1] the Court of Appeals for the District of Columbia Circuit held that an FCC policy statement[2] which denied full comparative hearings[3] to mutually exclusive[4]

52. Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 380 (1942). *See generally The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 328 (1971).

1. 447 F.2d 1201 (D.C. Cir. 1971), *noted in* Comment, *Implications of Citizens Communications Center v. FCC*, 71 COLUM. L. REV. 1500 (1971). The Citizens Communications Center (CCC) and Black Efforts for Soul in Television (BEST), a co-petitioner, are non-profit citizens' groups organized for the purpose of representing the public interest in proceedings before the FCC. After the Commission had denied their request to reconsider its 1970 Policy Statement, discussed at notes 7-11 *infra* and accompanying text, see Memorandum Opinion and Order, 24 F.C.C.2d 383, 19 P & F RADIO REG. 2D 1902 (1970), CCC and BEST petitioned the court of appeals for review of the statement and related opinions and orders of the Commission. 447 F.2d at 1202 n.2; Memorandum Opinion and Order, 21 F.C.C.2d 355, 18 P & F RADIO REG. 2D 1523 (1970). The court consolidated this petition with petitions to review the 1970 statement filed by Hampton Roads Television Corp. and Community Broadcasting of Boston, Inc., two applicants for television channels who had filed in competition with renewal applicants. In a third consolidated case, dismissed for laek of jurisdietion at the district court level, CCC and BEST sought to enjoin the FCC from making any change in the standards applicable to comparative broadcast license renewal hearings without first giving all interested parties notice and an opportunity to be heard pursuant to § 4 of the Administrative Procedure Act. 5 U.S.C. § 553 (1970). In light of the decision discussed herein, the court held that this case was moot. Two intervenors, RKO General, Inc. and WTAR Radio TV Corp., filed briefs defending the policy statement and subsequent FCC actions.

2. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants [1970 Policy Statement], 22 F.C.C.2d 424, 18 P & F RADIO REG. 2D 1901 (1970).

3. A comparative hearing involves a determination of the relative qualifications of two or more applicants. All parties participating in such a comparative determination have the right to support their allegations by argument and by proof, if necessary. Londoner v. Denver, 210 U.S. 373, 386 (1908).

4. Applications are mutually exclusive "if the grant of one effectively precludes the other." Ashbacker Radio Corp. v. FCC, 326 U.S. 327, 330 (1945). This situation arises most commonly