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THE BREADTH OF FEDERAL RULE OF EVIDENCE
803(8)(C): BEECH AIRCRAFT CORP. v. RAINNEY

DAVID W. KIRKMAN

ON JULY 13, 1982 Lieutenant Commander Barbara Ann Rainey, a United States Navy flight instructor, and her student, Ensign Donald Bruce Knowlton, flew a training exercise over Middleton Field, Alabama. Ensign Knowlton had successfully piloted the T-34C Turbo-Mentor aircraft through several landings and takeoffs. As the plane took off the fourth time, it appeared to cut off another aircraft in the flight pattern. After radio warnings from other pilots in the area, the T-34C turned sharply to the right. At that point, the plane rapidly lost altitude and crashed in a wooded area southeast of Middleton Field. Lieutenant Commander Rainey and Ensign Knowlton died in the crash. Their spouses, John Charles Rainey and Rondi M. Knowlton, sought money damages under the Florida Wrongful Death Act in the United States District Court for the Northern District of Florida. They alleged negligence and products liability causes of action.

1 Rainey v. Beech Aircraft Corp., 784 F.2d 1523, 1525 (11th Cir.) [hereinafter Rainey I], vacated, 791 F.2d 833 (11th Cir. 1986), reinstated, 827 F.2d 1498 (11th Cir. 1987) (en banc), rev'd, 109 S. Ct. 439 (1988). Rainey and Knowlton were practicing a "touch and go" training exercise in which the student circles the airfield in an oval pattern and then lands the aircraft. After landing, the student accelerates the plane and takes off again. Id. at 1525 n.2.

2 Beech Aircraft Corp. v. Rainey, 109 S. Ct. 439, 443 (1988) [hereinafter Rainey III]; see infra note 8 for citation to Rainey II.

3 Rainey III, 109 S.Ct. at 443.

4 Rainey I, 784 F.2d at 1526. Although Rainey and Knowlton filed individual suits as the personal representatives of their decedent spouse's estates and on behalf of their minor children, the two cases were consolidated for all purposes, including trial. Id. at 1525 n.1.

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against defendants Beech Aircraft Corporation, Pratt and Whitney Canada, Inc., and Beech Aerospace Services, Inc.\(^5\)

The disputed issue at trial was the cause of the fatal crash.\(^6\) Lieutenant Commander William C. Morgan, Jr. conducted an investigation into the circumstances of the crash on order of the squadron’s commanding officer and pursuant to authorization in the Manual of the Judge Advocate General (JAG).\(^7\) Morgan produced a written JAG Report of his investigation that included his findings of fact, opinions, and recommendations concerning the incident.\(^8\) One of Morgan’s opinions was that “[t]he most probable cause of the accident was the pilots [sic] failure to maintain interval.”\(^9\) Plaintiffs Rainey and Knowlton did not agree. Rainey, himself a flight instructor with the United States Navy, had written a letter to Morgan expressing his belief that the crash was the result of a fuel malfunction that caused an in-flight power interruption.\(^10\)

District court Judge Winston Arnow made two crucial evidentiary rulings in the case. First, the trial judge admitted excerpts from the investigative report prepared by Morgan, including his opinions concerning the probable

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\(^5\) *Id.* at 1526. Beech Aircraft manufactured the T-34C Turbo Mentor aircraft; Pratt and Whitney manufactured the engine in the aircraft; Beech Aerospace was under a United States Navy contract for maintenance service on the aircraft. *Id.*

\(^6\) *Rainey III* , 109 S.Ct. at 443 (“Because of the damage to the plane and the lack of any survivors, the cause of the accident could not be determined with certainty.”).

\(^7\) *Id.*

\(^8\) *Rainey v. Beech Aircraft Corp.*, 827 F.2d 1498, 1500 (11th Cir. 1987) [hereinafter *Rainey II*] (en banc), rev’d, 109 S. Ct. 439 (1988). In the concurring opinion in *Rainey II*, Judge Tjoflat included a complete text of Morgan’s written report. *Id.* at 1502 (Tjoflat, J., concurring). The findings of fact portion included such statements as: “At approximately 1020, while turning crosswind without proper interval, 3E955 [the plane] crashed, immediately caught fire and burned.” *Id.* at 1503 (Tjoflat, J., concurring).

\(^9\) *Id.* at 1501 (Tjoflat, J., concurring). The term “interval” refers to the distance between Rainey and Knowlton’s aircraft and another aircraft in the flight pattern. *Id.*

\(^10\) *Rainey I*, 784 F.2d at 1526 (“According to Rainey, this malfunction prompted an inflight ‘power interruption’ or ‘rollback’ making it impossible for Lieutenant Commander Rainey to sustain sufficient power to maintain flight.”).
cause of the crash, into evidence.\textsuperscript{11} Second, although Judge Arnow allowed Beech Aircraft's counsel to question Rainey about portions of his letter to Morgan, he did not allow plaintiff's counsel to question Rainey about his opinions in the same letter concerning the cause of the crash.\textsuperscript{12} The jury concluded that the defendants should not be held responsible and returned a verdict against the plaintiffs.\textsuperscript{13}

On appeal, a panel of the Eleventh Circuit reversed the district court on both evidentiary rulings.\textsuperscript{14} The court determined that Morgan's report must satisfy the hearsay exception for public investigatory records and reports in Federal Rule of Evidence 803(8)(C)[hereinafter the Rule or Rule 803(8)(C)] to be admissible.\textsuperscript{15} The Rule allows the admission of reports of public agencies that set forth factual findings resulting from an investigation made pursuant to authority granted by law. In \textit{Smith v. Ithaca Corp.},\textsuperscript{16} the Fifth Circuit determined that Rule 803(8)(C) excludes opinion and conclusory material contained in

\begin{footnotes}
\item[11] \textit{Id.} At the pretrial conference Judge Arnow ruled that Morgan's report was trustworthy and admissible only with regard to its factual findings. The day before trial, however, the judge reversed in part his prior ruling and decided that the opinions and conclusions contained in the investigative report could also be admitted. \textit{Id.} at 1526 n.5.
\item[12] \textit{Id.} at 1528-29.
\item[13] \textit{Id.} at 1526.
\item[14] \textit{Id.} at 1530.
\item[15] \textit{Id.} at 1528. Federal Rule of Evidence 803(8) provides:
\begin{quote}
\textbf{Rule 803.} Hearsay Exceptions; Availability of Declarant Immaterial
\end{quote}
The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.
\end{footnotes}

\textit{FED. R. EVID. 803(8)}.

\textit{612 F.2d 215} (5th Cir. 1980); see \textit{infra} notes 102-107 and accompanying text for a detailed discussion of \textit{Smith}. 
such reports. The panel in Rainey I recognized that they were constrained by the Smith precedent to hold that Morgan's opinions as to the cause of the incident were not admissible. In considering whether plaintiff's counsel should have been allowed to cross-examine Rainey as to the contents of his letter to Morgan, the panel relied on Federal Rule of Evidence 106. The court determined that Rule 106 allowed Rainey to testify about all relevant portions of the letter for the sake of completeness. The panel held, therefore, that the district court erred in admitting into evidence the opinions contained in Morgan's JAG Report and in limiting Rainey's testimony regarding the letter. Judge Johnson concurred in an opinion that called for the Eleventh Circuit to consider the evidentiary issues relating to Federal Rule of Evidence 803(8)(C) en banc.

The Eleventh Circuit voted to hear the case en banc to reconsider the admissibility of opinions expressed in investigative reports. The en banc court unanimously upheld the panel's conclusion that Rainey should have been allowed to testify about the opinions expressed in his letter to Morgan. However, on the Rule 803(8)(C) eviden-

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17 Rainey I, 784 F.2d at 1528. When the Eleventh Circuit was established October 1, 1981, the judges voluntarily agreed that decisions of the former Fifth Circuit would be binding as precedent. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

18 Rainey I, 784 F.2d at 1529. Federal Rule of Evidence 106 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." FED. R. EVID. 106.

19 Rainey I, 784 F.2d at 1529.

20 Id. at 1530 (Johnson, J., concurring). Judge Johnson stated: Smith is an anomaly among the circuits. The majority view favors broad admissibility under Rule 803(8)(C)'s "factual findings" standard. . . . Broad admissibility releases trial judges from the duty to draw sometimes arbitrary lines between fact and opinion, and focuses the court's inquiry instead on the trustworthiness and relevance of the reports in question.

Id.

21 Rainey II, 827 F.2d at 1498.

22 Id. at 1500. The Supreme Court majority decision affirmed the court of appeals ruling that Rainey should have been permitted to give a more complete
tiary question, the court divided evenly. Six judges wanted to retain the narrow standard enunciated in Smith, and six judges expressed a desire to overrule Smith and to expand the interpretation of Federal Rule of Evidence 803(8)(C). The court recognized that without a majority vote for change, the Smith standard controlled.

The defendants petitioned the Supreme Court for writ of certiorari to hear the case. The Supreme Court granted the writ and handed down its decision on December 12, 1988. The Supreme Court unanimously held that "statements in the form of opinion or conclusions are not by that fact excluded from the scope of Federal Rule of Evidence 803(8)(C)." The Court reversed the judgment of the Court of Appeals, and defined the scope of admissibility under Rule 803(8)(C) in broad terms.

This comment examines the background of Federal Rule of Evidence 803(8)(C) and how the Supreme Court's decision in Beech Aircraft Corp. v. Rainey (Rainey III) will af-

picture of the letter he had written to Morgan. Justice Brennan stated: "We have no doubt that the jury was given a distorted and prejudicial impression of Rainey's letter. The theory of Rainey's case was that the accident was the result of a power failure, and, read in its entirety, his letter to Morgan was fully consistent with that theory." Rainey III, 109 S. Ct. at 450.

In a dissenting opinion, Chief Justice Rehnquist, joined by Justice O'Connor, found that Rainey's attorney had not made a sufficient offer of proof on the completeness question to reverse the trial judge. The Chief Justice explained:

Trial judges do not have the luxury of briefs or research when making a typical evidentiary ruling, and for this reason we have traditionally required the proponent of evidence to defend it against objection by showing why it should be admissible. . . . This Court, far removed from the factual context and on the basis of a cold record, is in no position to say that the trial court's ruling in this situation was an abuse of discretion.

Id. at 454. The balance of this comment does not discuss further the evidentiary issues regarding Rainey's letter to Morgan.

Rainey II, 827 F.2d at 1501 ("Judges Roney, Godbold, Hill, Fay, Vance and Clark would all adhere to Smith. Judges Tjoflat, Kravitch, Johnson, Hatchett, Anderson and Edmonson would follow the reasoning suggested in Judge Johnson's concurring opinion and overrule Smith.").

Id. at 453.


Rainey III, 109 S. Ct. at 439. Defendant Pratt & Whitney settled with the plaintiffs and was dismissed as a party to the case. Id. at 443 n.1.
fect the Rule's implementation in the future. Section I
sets out the common law development of an exception to
the hearsay doctrine for public reports and records.28
Section II looks at the evidentiary attempts to discern fact
from opinion and how the difficulty in making that distinc-
tion arose in public records and reports.29 Section III ex-
amines the creation of the Federal Rules of Evidence,
focusing on the legislative intent behind Rule 803(8)(C).30
Section IV surveys the different approaches that courts
have taken in construing the language of Rule 803(8)(C).
Section IV is organized into three subsections: subsection
A surveys cases that limit the scope of the Rule;31 subsection
B surveys cases that broaden the inclusiveness of the
Rule;32 and subsection C examines the trustworthiness re-
quirement of the Rule.33 Section V analyzes the Supreme
Court's reasoning in Rainey III and the effect the holding
will have on the future interpretation of Rule 803(8)(C).34

I. HISTORICAL DEVELOPMENT OF THE PUBLIC
REPORTS AND RECORDS EXCEPTION TO THE HEARSAY
DOCTRINE

At common law, an exception to the hearsay doctrine35

28 See infra notes 35-53 and accompanying text for a discussion of the develop-
ment of a public records exception.
29 See infra notes 54-76 and accompanying text for discussion of the problematic
fact/opinion distinction.
30 See infra notes 77-95 and accompanying text for a discussion of the legislative
history of Rule 803(8)(C).
31 See infra notes 96-132 and accompanying text for a discussion of the cases
that hold Rule 803(8)(C) admits only the factual portions of public reports.
32 See infra notes 133-162 and accompanying text for a discussion of the cases
that interpret the language of Rule 803(8)(C) to allow admissibility of the opinion
and conclusory portions of a public report.
33 See infra notes 163-186 and accompanying text for a discussion of the use of
the trustworthiness provision in Rule 803(8)(C) to deny admissibility to public
reports.
34 See infra notes 187-238 and accompanying text for a discussion of Rainey III.
35 Hearsay was defined at common law as "that kind of evidence which does not
derive its value solely from the credit to be attached to the witness himself, but
rests, also, in part, on the veracity and competency of some other person." Hopt
v. Utah, 110 U.S. 574 (1884). The Federal Rules currently 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." FED. R.
developed for the written records and reports of government officials. Part of the rationale for admitting these public reports was necessity; demanding live testimony from official sources was inefficient. The public suffers when a government official is removed from the performance of his function. Another justification for the exception is rooted in a public official's performance. There is an assumption that a public official will perform his or her duty properly.

As courts began to allow the admission of governmental and public reports under this hearsay exception, they began to face records that included not only facts, but also opinions and conclusory statements. The common law courts grappled with the decision on which of these evaluative portions of a record should be admissible.

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Evid. 801(C). The hearsay doctrine is the fundamental requirement that such evidence should not be admitted at trial. Beyond reiterating this basic premise, further discussion of the hearsay doctrine is beyond the scope of this comment.


38 Id.; see also E. Cleary, supra note 36, § 315, at 889 ("Not only would [requiring officials to testify] disrupt the administration of public affairs, but it almost certainly would create a class of official witnesses.").

39 See Chesapeake & Del. Canal Co. v. United States, 250 U.S. 123 (1919). The Court found that Treasury Department books' character as public records required by law to be kept, the official character of their contents entered under the sanction of public duty, the obvious necessity for regular contemporaneous entries in them and the reduction to a minimum of motive on the part of public officials and employees to either make false entries or to omit proper ones, all unite to make these books admissible as unusually trustworthy sources of evidence.

Id. at 128-29; 4 D. Louisell & C. Mueller, Federal Evidence § 455, at 735 (1980) ("[I]t is assumed that responsible persons within the agency gathered the information...carefully analyzed it and drew 'factual'...conclusions from it."); Cf. Wong Wing Foo v. McGrath, 196 F.2d 120, 123 (9th Cir. 1952) ("[T]here is a great likelihood that a public official would have no memory at all respecting his action in hundreds of entries that are little more than mechanical.").


41 For decisions favoring admissibility, see United States v. Dumas, 149 U.S. 278, 285 (1893) (in suit against Postmaster an audited statement of account of the delinquent payments by Postmaster admitted in evidence); McCarty v. United States, 185 F.2d 520, 522 (5th Cir. 1950) (in suit by United States to recover for
Indicative of the discrepant approaches courts developed are the different results in *Moran v. Pittsburgh Des Moines Co.* and *Franklin v. Skelly Oil Co.*

*Moran* was an action for an accidental death arising out of the explosion of a gas storage tank. The Third Circuit reversed the district court’s exclusion of a report completed by the Bureau of Mines in the wake of the gas tank explosion. The appeals court admitted the report under a then existing statute excepting business type records from the hearsay doctrine. The court determined that the presence of the expert’s conclusions in the report went to the weight given the evidence, rather than its admissibility. Although the decision relied on a business records exception, it has been described as consistent with the idea that opinions contained in public reports are admissible.

In *Franklin* the reviewing court sustained the exclusion

breach of contract to remove waste from Army camp, Certificate of Settlement of General Accounting Office showing indebtedness admissible as official documents in government files). For decisions denying admissibility, see Yung Jin Teun v. Dulles, 229 F.2d 244, 247 (2d Cir. 1956) (in action by persons of Chinese origin against State Department for denial of passport privileges, “Status Report” of each applicant held inadmissible as official record because it was not prepared from matters within personal knowledge of the record maker); Lomax Transp. Co. v. United States, 183 F.2d 331, 333-34 (9th Cir. 1950) (in suit by United States against Lomax for loss of naval supplies burned in Lomax warehouse, Certificate of Settlement from General Accounting Office claiming monetary losses inadmissible to bind Lomax).

The use of the term evaluative throughout this comment is meant to define reports based on investigation and observation, which, “unlike the usual official statement, contain studied conclusions and opinions as well as facts.” Yates, *supra* note 40, at 112.

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183 F.2d 467 (3d Cir. 1950).

141 F.2d 568 (10th Cir. 1944).

*Moran*, 183 F.2d at 467.

45 Id. at 473 (“The report is no less admissible because it contains conclusions of experts which are based upon hearsay evidence as well as upon observation.”).

46 Id. at 472 (“The offer of the report was based upon the Uniform Business Records as Evidence Act, as adopted by the General Assembly of Pennsylvania, 28 P.S. §§ 91a-91d, and upon the similar federal statute, 28 U.S.C.A. § 1732 (footnote omitted).”).

47 Id. at 473.

48 See 4 D. LOUISELL & C. MUELLER, *supra* note 39, § 455, at 734-35 n.48 (“[T]his remarkably modern pre-Rules decision is plainly consistent with the meaning and spirit of [Federal Rule of Evidence] 803(8)(C).”).
of a report required by state law that allocated the responsibility for an explosion at the plaintiff's house to the defendant's improper installation of a butane system. The Court of Appeals for the Tenth Circuit recognized that elements of reliability, trustworthiness, and authenticity usually justify the public record hearsay exception. The court, however, distinguished the opinion portions of the report from the factual findings. Therefore, despite the court's recognition of a public records exception, it did not admit the opinions and conclusions regarding the butane explosion.

The Tenth Circuit's distinction between fact and opinion within the Fire Marshall's report reflects a common law attempt to separate the two concepts. Although courts struggled through decades of trying to exclude opinion evidence, the Federal Rules now recognize a broad trend towards the admissibility of opinion testimony. This liberal trend regarding live opinion testi-

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49 Franklin, 141 F.2d at 568.
50 Id. at 572. The court held:
   This universally recognized exception to the hearsay rule is based on the reliability, trustworthiness and authenticity which usually attends a public record or report made and kept in the performance of an official function in behalf of the public interest. The exception has been extended to include reports, findings and conclusions of public officials concerning causes and effects when made in pursuance of authority to conduct inquisitions and hearings in the public interest.

Id. (citations omitted).

51 Id. ([E]xpressions of opinion and conclusions on causes and effects based upon factual findings are not always admissible as public records ...).
52 Id.
   Here the written statement of the inspector was offered for the purpose of proving the primary issue of negligence in a private lawsuit. ... The statement is not [admissible] ... because the matter and things contained therein express merely the opinion of one whose official office and duty does not rise to the dignity of an adjudicator of causes and effects.

Id. (citations omitted).

53 See Fed. R. Evid. 701. Rule 701 states:
   [I]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.
mony has not been as easily adopted with regard to opinion portions of government records. Therefore, an analysis of the public records hearsay exception requires a discussion of the attempted distinction between fact and opinion.

II. THE PROBLEM OF DISTINGUISHING FACT FROM OPINION

In the 17th and 18th centuries, the rule developed in English courts to exclude testimony based on any basis other than personal knowledge.\textsuperscript{54} In the 1800's, English writers paraphrased the rule as requiring witnesses to state facts rather than opinions.\textsuperscript{55} United States courts adopted this approach, commonly called the "opinion rule", and attempted to admit only facts while excluding inferences and opinions.\textsuperscript{56} The difficulty in distinguishing between fact and opinion led to what one source called "more than a hundred years of confusion."\textsuperscript{57}

The confusion developed out of the inherent miscon-
ception upon which the fact/opinion dichotomy was based. McCormick calls the assumption that fact and opinion stand in contrast an illusion. Wigmore explains that distinctions between the two are implausible. Both scholars argue that there is no legally definable line between fact and opinion, and, therefore, no independent standard upon which trial judges can reach consistent results. Under recent common law decisions and under the Federal Rules, these considerable criticisms caused the "opinion rule" to be severely disregarded in favor of more liberal admission of opinion testimony. The misconceptions of the "opinion rule", however, persisted in court determinations regarding the admission of public records and reports.

One area in which courts tried to distinguish fact and opinion within government reports is in reports generated to help determine fault in airplane mishaps. When Congress passed the Civil Aeronautics Act of 1938 and

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58 E. Cleary, supra note 36, § 11, at 27. The editors stated:

The difference between the statement, "He was driving on the left-hand side of the road" which would be classed as "fact" under the rule, and "He was driving carelessly" which would be called "opinion" is merely a difference between a more concrete and specific form of descriptive statement and a less specific and concrete form. The difference between so-called "fact," then, and "opinion," is not a difference between opposites or contrasting absolutes, but a mere difference in degree with no recognizable line to mark the boundary.

Id.

59 7 J. Wigmore, supra note 54, § 1919, at 14 (stating that "no such distinction [between fact and opinion] is scientifically possible.").

60 See E. Cleary, supra note 36, § 11, at 28; 7 J. Wigmore, supra note 54, § 1919, at 14-17.

61 See State v. Powell, 237 Iowa 1227, 1242, 24 N.W.2d 769, 772 (1946) ("The distinction between fact and opinion statements sometimes grows thin."); Glaros v. State, 223 Md. 272, 277, 164 A.2d 461, 464 (1960)("The assumption that there is a difference in kind between 'fact' and 'opinion' has been said to be an illusion."); see supra note 53 for a listing of the Federal Rules of Evidence that recognize the admissibility of opinion testimony.

created the Civil Aeronautics Board (CAB) two years later, it gave government agencies substantial responsibility for investigation of airplane accidents.\textsuperscript{63} One of the provisions enacted by Congress limited the general public record hearsay exception by excluding CAB reports from use as evidence.\textsuperscript{64} Many courts, however, ignored the Congressional intent and admitted portions of CAB findings.\textsuperscript{65} Other courts admitted portions of these reports, but attempted to distinguish between the admission of factual observations, and the admission of opinions concerning the cause of an incident.\textsuperscript{66}

Two cases that illustrate different approaches to the fact/opinion material in CAB reports\textsuperscript{67} are \textit{Fidelity and Casualty Co. of New York v. Frank}\textsuperscript{68} and \textit{American Airlines, Inc. v.} 

\textsuperscript{63} See generally Comment, \textit{Admissibility of National Transportation Safety Board Reports in Civil Air Crash Litigation}, 53 J. Air L. & COM. 469, 471-73 (1987) (analysis of the early case law and legislative response of aviation accident investigation that developed into more recent problems in using the results of NTSB investigations as evidence at trial).

\textsuperscript{64} The 1938 Act, supra note 62, at § 701(e). The section states: "No part of any report or reports of the [Civil Aeronautics] Board or the Authority relating to any accident or the investigation thereof, shall be admitted as evidence or used in any suit or action for damages growing out of any matter mentioned in such report or reports". \textit{Id.}

\textsuperscript{65} See \textit{Lobel v. American Airlines, Inc.}, 192 F.2d 217 (2d Cir. 1951) (CAB accident report held admissible because report contained only the investigator’s personal observation about the airplane, and did not contain opinions or conclusions as to the possible causes of the accident); \textit{Tansey v. Transcontinental & W. Air, Inc.}, 97 F. Supp. 458 (D.D.C. 1949) (report prepared by airline employees pursuant to CAB accident investigation held admissible); \textit{Ritts v. American Overseas Airlines, Inc.}, 97 F. Supp. 457 (S.D.N.Y. 1947) (witness questioned by the CAB in the course of an accident investigation permitted to testify).

\textsuperscript{66} See \textit{Berguido v. Eastern Air Lines, Inc.}, 317 F.2d 628 (3d Cir. 1963) (testimony by CAB investigator about the technical observations of a member of the investigatory staff held inadmissible); \textit{Israel v. United States}, 247 F.2d 426 (2d Cir. 1957) (trial court erred in finding fault based on the observations in a CAB report concerning the conditions of a private airstrip that may have contributed to a light plane crash).

\textsuperscript{67} In 1958, Congress created the Federal Aviation Administration (FAA) and extended the CAB’s responsibility over accident investigations. In that legislation, Congress restated the restriction on the use of CAB materials as evidence. Federal Aviation Act of 1958, Pub. L. No. 85-726, § 701(e), 72 Stat. 731 (codified at 49 U.S.C. app. § 1441(e) (1982)).

The Frank case was an action between an insurer and the beneficiary of the insured who died in an airplane crash. The decedent's beneficiary sought to introduce CAB accident reports into evidence. The court admitted both the factual portions and opinion portions of the reports. Within a year, however, the court rendered a second decision in the Frank case that altered the standard of admissibility. The new standard chosen excluded all opinion and conclusory evidence.

In American Airlines, the Court of Appeals for the Fifth Circuit rejected the limited standard enunciated by the Frank court. In a suit over the crash of an American Airlines jet, the district court had admitted government reports that exculpated both the Weather Bureau and the air traffic controller, into evidence. On appeal, the court determined that the analysis of technical information regarding the flight inherently required evaluative opinion. The court, therefore, rejected the Frank approach and found opinions to be generally admissible.

These distinct approaches concerning CAB reports in-

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69 418 F.2d 180 (5th Cir. 1969).
70 Frank, 214 F. Supp. at 805.
71 Id. at 806. The court determined that "conclusions and opinions which are outside the area of the ultimate question may be admitted . . ." Id. at 805.
72 Fidelity & Casualty Co. of New York v. Frank, 227 F. Supp. 948 (D. Conn. 1964). The court found that its previous test "has proven to be more confusing than helpful . . ." Id. at 949.
73 Id. The court stated:
At the time of the former ruling, without the actual investigative group reports and exhibits before it, the court envisaged an area of conclusion and opinion evidence which would be admissible under some rule of evidence and which would not tend to bear upon how the crash occurred. A more workable and better rule is entirely to exclude all evaluation, opinion and conclusion evidence.

74 American Airlines, 418 F.2d at 195-96.
75 Id. at 196. The court stated: "In the context of this case it would perhaps be suitable to say that the attempt to derive information about the altitude, speed, heading, and vertical acceleration of [the flight] was a factual inquiry. However, a very sophisticated evaluation of the data had to be made." Id.
76 Id. The court held that "[b]ecause of the uncertainty which the Frank rule would introduce in sorting fact from opinion, it would be better to exclude opinion testimony only when it embraces the probable cause of the accident or the negligence of the defendant." Id.
dicate the difficulty common law trial judges experienced in resolving the admissibility of public investigatory records. Different courts defined fact and opinion in different degrees. Although the difficulty in making such a distinction plagued the admissibility question, the creation of the Federal Rules of Evidence merely furthered the confusion.

III. RECOGNITION OF THE PUBLIC REPORTS EXCEPTION TO THE HEARSAY DOCTRINE IN THE FEDERAL RULES OF EVIDENCE

In January of 1975, Congress passed legislation to enact the Federal Rules of Evidence for use in the United States federal courts. The Federal Rules redefined and codified the hearsay doctrine and the exceptions to that doctrine. The Advisory Committee on Proposed Rules ("Advisory Committee") drafted Federal Rule of Evidence 803(8) to recognize the common law exception for public records and reports. Three types of official records are recognized in Rule 803(8): subsection A covers the activities of an office or agency; subsection B covers reports completed pursuant to a legal duty to observe; and subsection C covers factual findings from an investi-

78 FED. R. EVID. 801, 802. Rule 801 provides in part: Rule 801. Definitions
The following definitions apply in this article: (a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.
(b) Declarant. A "declarant" is a person who makes a statement.
(c) Hearsay. "Hearsay" is 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.
FED. R. EVID. 801. Rule 802 provides:
Rule 802. Hearsay Rule
Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.
FED. R. EVID. 802.
79 FED. R. EVID. 803, 804.
80 FED. R. EVID. 803(8) advisory committee's note.
igation made pursuant to law. This comment focuses on the appropriate scope of admissibility within the language of subsection C.

Federal Rule of Evidence 803(8)(C) developed from the common law rationale for the admission of certain public reports. The recognition that government officers should not be forced to spend inordinate amounts of time testifying at trial underlies the exception. More importantly, the drafters of the rules assumed that public investigatory reports are completed in a reliable fashion. Because of this focus on the reliability of the record maker, the drafters included a provision requiring that the circumstances and source of information be trustworthy. The inclusion of the trustworthiness safeguard allowed the drafters to assume admissibility unless reliability could not be shown. The Advisory Committee recommended four factors to assist courts in determining the admissibility of evaluative reports: (1) whether the investigation is timely; (2) whether the official conducting the investigation has special skill or experience; (3) whether a hearing was held; and (4) whether motivation problems existed.

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81 See supra note 15 for the text of Rule 803(8).
82 A portion of 803(8)(C) limits the applicability of the section in criminal cases. The hearsay exception in subsection C applies only to use against the government in criminal cases because of the concern for the constitutional confrontation clause rights that must be afforded individuals in criminal proceedings. See supra note 15 for the language of this qualification. This comment does not explore further the material that has developed in interpreting Rule 803(8)(C) in criminal matters.
83 See supra note 37 and accompanying text.
84 Fed. R. Evid. 803(8) advisory committee's note ("Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record.").
85 See supra note 15 and accompanying text for the exact language of the "trustworthiness" clause; see infra notes 163-186 and accompanying text for analysis of decisions defining the clause.
86 Fed. R. Evid. 803(8) advisory committee's note. The Committee explained that the rule "assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present." Id.
87 Fed. R. Evid. 803(8) advisory committee's note. As to the timeliness of the investigation, and the special skill or experience of the official, the Committee referenced Professor McCormick's arguments for admission of evaluative reports:

The most important reason is time. The officer comes on the scene
The Advisory Committee drafting Rule 803(8)(C) left courts with a difficult problem in the implementation of the Rule. The problem relates to the construction of the language "factual findings resulting from an investigation made pursuant to authority granted by law..." The Advisory Committee did not define what the phrase "factual findings" was to include. The Committee acknowledged that the admission of evaluative materials had generated problems for the courts. However, the Advisory Committee recognized that Congress was previously willing to pass federal statutes admitting certain evaluative materials, usually as early as it is feasible to get there. The officer is often able to interview witnesses before they have been pulled one way or the other by the parties. The officer, too, is frequently a specialist—a doctor reporting death, a fire marshal investigating a fire—or at least experienced in like investigations, such as highway patrolman reporting a collision.

McCormick, *Can the Courts Make Wider Use of Reports of Official Investigations?*, 42 Iowa L. Rev. 363, 364-65 (1957). In reference to whether a hearing was held and the level at which it was conducted, the Committee cited Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944). For a discussion of Franklin, see supra notes 49-52 and accompanying text. The Committee's fourth factor was possible motivation problems suggested by Palmer v. Hoffman, 38 U.S. 109 (1943) (upholding the inadmissibility of an accident report offered by the defendant railroad because a locomotive engineer personally involved in the accident prepared the report and would certainly have been affected by a desire to exculpate himself).

Although Rockwell [defendant] argues that the investigation must be required by law, the language of Rule 803(8) suggests otherwise. Section "B" of Rule 803(8), which does require that the underlying investigation be required by law, uses the language "as to which matters there was a duty to report..." to convey this message. By contrast, Section "C" of Rule 803(8) provides that the investigation need only be "made pursuant to authority granted by law." It would seem that the drafters of the rule would have used identical language in both Sections if investigations covered under Section "C" had to be required by law, rather than merely permitted by it.

Fraley, 470 F. Supp. at 1266.

"FED. R. EVID. 803(8)" advisory committee's note ("The more controversial area of public records is that of the so-called 'evaluative' report. The disagreement among the decisions has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle.").
tive reports. That willingness was an indication to the Advisory Committee that Congress supported the admission of evaluative reports within Section C. The Advisory Committee's reading of a consistent Congressional intent proved to be incorrect. The scope of the "factual findings" clause of Rule 803(8)(C) was a subject of controversy in the House and Senate Judiciary Committees. The House of Representatives Judiciary Committee recommended that the rule be strictly read to exclude evaluations or opinions contained in reports. The Senate Judiciary Committee's Report disagreed with the House version, contending that the House did not understand the Advisory Committee's intended operation of the Rule. The Senate Report concluded that the lan-

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1 FED. R. EVID. 803(8) advisory committee's note. The Committee determined:
Various kinds of evaluative reports are admissible under federal statutes: 7 U.S.C. § 210(f), findings of Secretary of Agriculture prima facie evidence in action for damages against stockyard owner; 7 U.S.C. § 292, order by Secretary of Agriculture prima facie evidence in judicial enforcement proceedings against producers association monopoly; 7 U.S.C. § 1622(h), Department of Agriculture inspection certificates of products shipped in interstate commerce prima facie evidence; 8 U.S.C. § 1440(c), separation of alien from military service on conditions other than honorable provable by certificate from department in proceedings to revoke citizenship; 18 U.S.C. § 4245, certificate of Director of Prisons that convicted person has been examined and found probably incompetent at time of trial prima facie evidence in court hearing on competency; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations; 46 U.S.C. § 679, certificate of consul presumptive evidence of refusal of master to transport destitute seamen to United States.

Id.

2 FED. R. EVID. 803(8) advisory committee's note ("[T]he willingness of Congress to recognize a substantial measure of admissibility for evaluative reports is a helpful guide.").

3 H.R. REP. No. 650, 93d Cong., 1st Sess. 14, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7088 ("The committee intends that the phrase 'factual findings' be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.").

4 S. REP. No. 1277, 93d Cong., 2d Sess. 18, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7051, 7064. In reference to the House Judiciary Committee's version the Senate Committee wrote:
The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an under-
guage of the Rule, combined with the Advisory Committee information, provided sufficient guidance on the admissibility of the evaluative reports.\textsuperscript{94} The Joint Conference Committee Report did not resolve the conflict.\textsuperscript{95} The legislative history of Rule 803(8)(C), therefore, provides two contrary interpretations. As a result, courts developed alternative constructions of Rule 803(8)(C).

The version of Rule 803(8)(C) passed by Congress included the basic two-part inquiry envisioned by the Advisory Committee. The first portion of the standard requires courts to determine whether the record in question is a "factual finding resulting from an investigation made pursuant to law." If a court determines the record in question meets this requirement, it then must implement the second inquiry as to whether the record was completed in a trustworthy fashion. The federal courts have taken distinctly different approaches to resolving the first "factual findings" inquiry. Although there is a split of authority on that clause of the Rule, courts have been more consistent in applying the Advisory Committee factors to resolve the trustworthiness inquiry.

IV. IMPLEMENTATION OF RULE 803(8)(C) IN THE FEDERAL COURTS

A. The Strict Construction of "Factual Findings"

Many federal courts interpreted the phrase "factual findings" consistently with the House of Representatives approach to the Rule by interpreting the phrase to have a

\textsuperscript{94} The 1974 U.S. CODE & Admin. NEWS at 7064.

\textsuperscript{95} Id. at 7065.

plain meaning. Courts that adhere to this plain meaning approach persist in the attempt to distinguish fact from opinion. A minority of the circuits adopted this interpretation of Rule 803(8)(C).

One of the early decisions limiting the scope of Rule 803(8)(C) to its plain meaning concerned a suit arising out of a collision between two ships in the New York harbor. In Complaint of American Export Lines Inc., the court excluded the evaluative conclusions and opinions contained in a Coast Guard report as well as the entire contents of a National Transportation Safety Board report regarding the incident. The court was troubled by the conflicting legislative history and found direction in the language of Federal Rule 803(6). The court noted that the business records exception in 803(6) allows admission of "opinions" and "diagnoses," whereas 803(8)(C) specifically omits those terms. The court assumed that because the drafters used different terms in similar contexts, the drafters intended different meanings. The court also recognized that the statute mandating the Coast Guard and NTSB reports stipulated that such reports were not to be used in litigation. The court held this to be

197 Id. at 456.
194 Id. at 457. The pertinent portion of Rule 803(6) states:
Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial
The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.
FED. R. EVID. 803(6).

100 Id. ("Rule 803(8) which is similar in many respects to Rule 803(6), omits ['opinions' and 'diagnoses'] and substitutes 'factual findings.' Since these different terms are used in separate but similar contexts within the same rule, the Court will assume that they have separate and distinct meanings.")
the type of negative factor that weighed against admitting conclusions and opinions stated in the reports.101

In Smith v. Ithaca Corp.,102 the Court of Appeals for the Fifth Circuit adopted the strict analysis employed in American Export. The Smith case represents the basis for the Eleventh Circuit's treatment of the JAG Report in Rainey I.103 In Smith, the spouse of a seaman who died of a heart attack brought suit against the maker of the ship, claiming improper exposure to benzene fumes. After the merchant seaman's death, the ship exploded and the Coast Guard investigated the disaster.104 Although the Coast Guard investigation focused on the explosion, it also included conclusions concerning the benzene contamination aboard ship.105 Relying completely on the comparison to Rule 803(6) set out in American Export,106 the Fifth Circuit held the findings of fact admissible, but excluded the evaluative conclusions and opinions of the Coast Guard investigative board.107

The Fifth Circuit continued to read Rule 803(8)(C) narrowly in McQuaig v. McCoy.108 After being arrested for suspicion of driving while intoxicated, Jacque McQuaig brought suit for false arrest against Louisiana State Police

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101 Id. at 457-59.
102 612 F.2d 215 (5th Cir. 1980).
103 See supra notes 16-17 and accompanying text for a discussion of the Rainey I court's reliance on Smith.
104 Smith, 612 F.2d at 217-20.
105 Id. at 223 n.20. The Coast Guard investigation found:

[T]he crew members on [the ship] were repeatedly exposed to benzene vapors in harmful concentrations. Exposure was caused by fumes emitted from several sources while washing and gas freeing cargo tanks. Exposure also occurred when fumes were emitted from vents and open ullage openings while loading ballast or cargo .... It is concluded that there is a need for an amendment to the tank vessel regulations which would correct this apparent deficiency and which would control this source of noxious fumes.

Id.

106 Id. at 221-22.
107 Id. at 222. The court excluded "opinions as to liability, conclusions as to cause of the [ship's] sinking, or recommendations regarding how to avoid similar disasters in the future." Id.
108 806 F.2d 1298 (5th Cir. 1987).
department officer George McCoy. The Internal Affairs division of the state police issued a report concerning the arrest that contained evaluative opinions and conclusions regarding McCoy's conduct.\textsuperscript{109} The circuit court, expressly relying on \textit{Smith}, upheld the lower court's denial of admission for the conclusory parts of the report.\textsuperscript{110}

Courts have similarly restricted the admission of government evaluative reports in the area of medical research. In \textit{Wetherill v. University of Chicago},\textsuperscript{111} Rachel Wetherill brought suit for injuries allegedly resulting from her mother's ingestion of the drug diethylstilbestrol (DES). Wetherill sought to introduce a 1978 Department of Health, Education and Welfare (HEW) report on the effects of DES into evidence.\textsuperscript{112} The court found that the report was not composed of "factual findings," but rather, consisted of assessments of the literature and of personal opinions of the report's authors.\textsuperscript{113}

A government report concerning medical research was also the focus of a narrow reading of Rule 803(8)(C) by the Court of Appeals for the Second Circuit. In \textit{Lindsay v. Ortho Pharmaceutical Corp.},\textsuperscript{114} the court distinguished facts from medical opinions. The Food and Drug Administra-

\textsuperscript{109} \textit{Id.} at 1300 ("[T]he report concluded with the investigators' opinions of McCoy's actions. In the investigators' view, McCoy was capricious and prejudicial in his arrest of McQuaig, but they could not totally substantiate the allegation of 'false arrest' and therefore did not sustain it.").

\textsuperscript{110} \textit{Id.} at 1302. The Fifth Circuit panel recognized that other circuits decide the admissibility question differently:

Some circuits have followed [the narrow] position, while others have not. Although the McQuaigs argue we should adopt a contrary position to this circuit's present policy, the law in this circuit is settled, and until overruled by this circuit en banc, or by the Supreme Court, we are compelled to follow it. (citations omitted).

\textit{Id.} at 1302 n.4.


\textsuperscript{112} \textit{Id.} at 1388-89. The Secretary of HEW directed the Surgeon General to appoint a task force to study and review the available information on DES and to make specific recommendations regarding further research. \textit{Id.} at 1388.

\textsuperscript{113} \textit{Id.} at 1390. Although the court felt that Rule 803(8)(C) should be given an expansive reading, it determined that "[n]o court has permitted the introduction of a survey of existing data such as contained in the Report." \textit{Id.}

\textsuperscript{114} 637 F.2d 87 (2d Cir. 1980).
tion (FDA) had required certain labeling changes for oral contraceptives. The court held that a record of the FDA's requirement reflected opinions that should not have been admissible in an action for damages allegedly resulting from the use of the pills. In so holding the Second Circuit relied upon Smith and the narrow pre-Federal Rules decision in Franklin v. Skelly Oil Co.

Another case in which the court distinguished fact from opinion in government medical research is Marsee v. United States Tobacco Co. In Marsee, the plaintiff brought suit against a tobacco snuff products manufacturer after contracting oral cancer. The court rejected Marsee's attempts to have certain government research reports regarding the causation of cancer admitted into evidence.

Several courts determined that public reports completed by a congressional oversight committee are inadmissible. In Bright v. Firestone Tire and Rubber Co., the Sixth Circuit heard a suit brought by the representatives of three men killed in a car accident. The Eleventh Circuit heard a similar case in Baker v. Firestone Tire and Rubber Co. In both cases the plaintiffs wanted the results of a House of Representatives Subcommittee investigation of the Firestone 500 tire admitted into evidence. The

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115 Id. at 94.
116 Id.; see supra notes 49-52 and accompanying text for a discussion of Franklin.
118 Id. at 470. The court rejected both the Report of the International Agency for Research on Cancer (IARC) and the Report of the Consensus Development Conference of the National Institute of Health (CDC). The court held "[t]he reports represent little more than opinions and conclusions drawn from existing research literature casting doubt upon the trustworthiness of the reports for the purposes of Rule 803(8)(C)." Id. The court did admit a Report of the Surgeon General's Advisory Committee differentiating it as an "authoritative, exhaustive study by a public agency pursuant to law." Id.
119 756 F.2d 19 (6th Cir. 1984).
120 793 F.2d 1196 (11th Cir. 1986); see infra notes 183-186 and accompanying text for a discussion of the trustworthiness problem associated with Congressional reports.
121 Bright, 756 F.2d at 22. The court also recognized:
The portions of the report read into the record are generally findings and conclusions regarding the safety record of the Firestone 500 drawn from empirical evidence regarding numbers of accidents,
courts denied admission because the report was comprised mostly of the committee's opinions regarding Firestone's culpability.\textsuperscript{122}

The District of Columbia District Court confronted the admissibility question with the reports of both a Congressional committee and a regulatory agency. In \textit{United States v. American Telephone \& Telegraph},\textsuperscript{123} the court considered the admissibility of voluminous materials and documents from the Federal Communications Commission (FCC) in a telephone antitrust action. The court recognized that the records of government rule making proceedings present a complicated problem for analysis under Rule 803(8)(C).\textsuperscript{124} The court admitted the FCC's findings of fact, the FCC's review of American Telephone and Telegraph (AT&T) analysis, and the FCC's summaries of background material.\textsuperscript{125} The court, however, did not admit FCC conclusions on whether AT&T met the burden of proof of compliance with the Communications Act.\textsuperscript{126} The court also did not admit the FCC findings that mixed

\textit{Id.; see also Baker, 793 F.2d at 1199.}
\textsuperscript{122} \textit{Baker, 793 F.2d at 1199} ("The subcommittee report did not contain the factual findings necessary to an objective investigation, but consisted of the rather heated conclusions of a politically motivated hearing."); \textit{Bright, 756 F.2d at 22} ("Much of the proffered evidence comprises the Committee's subjective conclusions regarding Firestone's culpability, rather than factual findings.").
\textsuperscript{124} \textit{Id. at 360}. The court distinguished the findings of a rule making proceeding focused on future conduct which is inadmissible, from the findings of an adjudicatory proceeding regarding past conduct which is admissible. \textit{Id}. However, the court noted:

The difficulty is that with respect to the great bulk of the test case materials it is impossible to draw a hard-and-fast distinction between rule-making and fact-oriented adjudication. The materials typically mix both elements; they involve the prescription of future behavior through order or rule, but at the same time they contain findings of fact made by the Commission (or an administrative law judge) upon which the issuance of rulings for the future is based.
\textit{Id. at 361.}
\textsuperscript{125} \textit{Id. at 361-62.}
\textsuperscript{126} \textit{Id. at 362-63}. The court believed that the FCC conclusions that AT&T had
fact, law and policy.\textsuperscript{127}

The District of Columbia court faced the question of admissibility of a report of the Subcommittee on Crime of the House Judiciary Committee ("Subcommittee") in \textit{Pearce v. E.F. Hutton Group, Inc.}\textsuperscript{128} The plaintiff in \textit{Pearce}, an employee of E.F. Hutton, sought to admit the Subcommittee's report in a libel action against his employer.\textsuperscript{129} The court distinguished the findings of the Subcommittee report from the FCC reports that had been given limited admissibility in \textit{AT&T}.\textsuperscript{130} The court concluded that the Subcommittee's role was more evaluative than investigative.\textsuperscript{131} Because the authority of the Subcommittee de-
derived from its oversight function rather than an investigative function, the Subcommittee's report was inadmissible.\(^{192}\)

This brief survey of different cases advocating a narrow reading of Rule 803(8)(C) indicates the wide range of circumstances in which courts have chosen to draw a fact/opinion line. The difficulty with this approach is that in each instance the trial court has made a determination without any guidelines from either the Rule itself or the Advisory Committee Notes. Thus, there is no uniform standard upon which the federal courts can consistently differentiate opinion from fact. The result is a scope of admissibility based on the personal ideas of individual judges. Although there are many instances in which the difference in fact and opinion may be clear, a vast range of material contained in public records can be interpreted as either fact or opinion. The narrow approach to Rule 803(8)(C) does not resolve the admissibility question for these instances.

B. The Broad Construction of "Factual Findings"

Many courts have not followed the restrictive interpretation that developed out of the House interpretation of Rule 803(8)(C), but rather have read the legislative history to encompass admissibility of evaluative conclusions and opinions. Instead of focusing on the two words "factual findings," these courts have found a broader purpose in the complete phrase, "factual findings resulting from an investigation made pursuant to authority granted by law." This view of broader admissibility under Rule 803(8)(C) stems out of Senate and Advisory Committee scheme perpetrated by Hutton and to thus evaluate the conclusions reached, and actions taken, by the Department." \(^{192}\) Id. at 814. The court explained that "[t]he instant case does not deal with an adjudicatory proceeding nor even with an investigation whose stated purpose was the resolution of some factual dispute." \(^{192}\) Id.; see infra notes 183-186 and accompanying text for a discussion of the trustworthiness problem with Congressional reports.
interpretations and has been adopted in the majority of the circuits.

The Court of Appeals for the Third Circuit initially distinguished fact from opinion in *Lloyd v. American Export Lines, Inc.* In *Lloyd*, the court admitted the Decision and Order of a Coast Guard hearing examiner. The Decision and Order of the hearing examiner set forth the results of his investigation into the circumstances of a fight aboard a ship owned by the defendant. The *Lloyd* court, however, admitted the hearing examiner's summation of the evidence as a factual finding not including opinions.

Soon after the *Lloyd* decision the Third Circuit adopted a broader admissibility reading in *Melville v. American Home Assurance Co.* *Melville* was a suit to collect on an insurance policy for accidental death in an airplane crash. The court held that the Airworthiness Directives issued by the FAA were admissible under Rule 803(8)(C) to show the crash was an accident rather than suicide. The court based its determination on the Advisory Committee's approach which assumes admissibility unless negative factors are present.

The Court of Appeals for the Sixth Circuit rendered

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136 *Id.* at 1182-83. The court determined that the hearing examiner's summation of the evidence and comments on inconsistencies therein did not make the Coast Guard Report inadmissible. *Id.* at 1183.
137 *Id.* ("We reject appellee's contention that the Coast Guard Decision and Order consists in large part of the opinions of the hearing examiner and thus fails to meet the 'factual findings' requirement of the Rule.").
138 584 F.2d 1306 (3d Cir. 1978).
139 *Id.* at 1315-16. The court relied on the Advisory Committee notes emphasizing admissibility in the first instance unless evidence of a lack of trustworthiness is shown. See supra note 15 and accompanying text for the language of the rule; see infra notes 163-186 and accompanying text for a discussion of the trustworthiness provision of Rule 803(8)(C).
140 *Melville*, 584 F.2d at 1316. The Third Circuit found that 
[the district court judge] followed the Advisory Committee's Note in concluding that the Airworthiness Directives were admissible under Rule 803(8)(C) even though they contained evaluative materials. In our opinion the trial judge was correct in this determination since the proviso to Rule 803(8)(C) permits exclusion of such reports if evidence of lack of trustworthiness is introduced (footnote omitted).

*Id.*
one of the broadest readings of Rule 803(8)(C) in Baker v. Elcona Homes Corp. The case involved a personal injury action arising out of a right angle collision between a truck owned by defendants and the plaintiff's automobile. The court upheld admission of a police officer's report of the incident that concluded the plaintiff entered the intersection against the red light, failed to yield the right of way, and was preoccupied. The court based its decision on the trustworthiness factors suggested by the Advisory Committee to the Federal Rules.

The Sixth Circuit also determined that an administrative finding of a lack of negligence may be admitted under Rule 803(8)(C). In Complaint of Paducah Towing Co., the court upheld the admission of the findings of an administrative law judge at a license revocation hearing concerning the reasonableness of the actions of a tow boat captain. The court determined a previous finding that an action is reasonable is an inference drawn from historical facts and is therefore admissible under the Rule 803(8)(C) exception.

Courts have also read the "factual findings" clause

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139 588 F.2d 551 (6th Cir. 1978), cert. denied, 441 U.S. 993 (1979).
140 Id. at 555-56. The Sixth Circuit relied on United States v. School District of Ferndale, Michigan, 577 F.2d 1399 (6th Cir. 1978), a school desegregation suit in which the court held it a reversible error to exclude the findings of an HEW hearing examiner that a school had been established and maintained as a black school for segregative purposes. The court stated: "[c]learly, the HEW proceedings were an 'investigation' into the state of affairs in the Ferndale schools within the plain meaning of that word." Ferndale, 577 F.2d at 1354. After recognizing this precedent, the Elcona Homes court stated that the police officer's determination of whether the light was red or green was more clearly a factual finding under the Rule than was the HEW hearing in Ferndale. Elcona Homes, 588 F.2d at 557.
141 Elcona Homes, 588 F.2d at 558; Cf. Dallas & Mavis Forwarding Co. v. Stegall, 659 F.2d 721 (6th Cir. 1981) (holding that the state trooper's investigation of a car-truck accident was not admissible because it was based on no physical evidence and was derived primarily from the story of a party witness); see supra note 87 and accompanying text for the listing of the Advisory Committee factors.
142 692 F.2d 412 (6th Cir. 1982).
143 Id. at 420. The court recognized that "[a]lthough a finding that actions were reasonable is somewhat conclusory, we do not believe that such a label is controlling. In our view, a finding that amounts to an inference drawn from subsidiary findings is admissible under Rule 803(8)(C)." Id.
144 Id.
broadly with respect to the admissibility of formal decisions of an administrative agency. The District Court for the Eastern District of Pennsylvania made several evidentiary rulings under Rule 803(8)(C) in the complicated antitrust case Zenith Radio Corp. v. Matsushita Electric Industrial Co.\textsuperscript{145} Although the court focused its denial of admissibility on the trustworthiness factors,\textsuperscript{146} the court provided a broad reading of the inclusive nature of the "factual findings" clause.\textsuperscript{147} The court distinguished between situations in which a staff report makes conclusions based on the evidence before it, and situations in which a commission or public agency adopts a staff report and then makes formal findings.\textsuperscript{148} The Second Circuit did not make such a distinction in Litton Systems, Inc. v. American Telephone & Telegraph Co.,\textsuperscript{149} where the court affirmed admission of various FCC formal decisions that described actions with


\textsuperscript{146} Zenith, 505 F. Supp. at 1148; see infra notes 179-182 and accompanying text for an explanation of the court's trustworthiness analysis.

\textsuperscript{147} Zenith, 505 F. Supp. at 1143-46. The court explained that:

The language of 803(8)(C) literally provides for the admission of entire agency reports so long as those reports include, inter alia, factual findings... [Black's Law Dictionary definitions of finding] comport with the common sense meaning of "finding" and support the view that a finding does not include legal conclusions that may have been reached by an investigator and is necessarily something more than a mere recitation of evidence, although we think the term is broad enough to encompass any statement of fact that represents a conclusion on the part of the investigator and that such factual statements need not be formally "findings" in order to come under 803(8)(C).

\textit{Id.} at 1143-44.

\textsuperscript{148} Id. at 1145. The court held:

[W]here a staff report contains factual averments that are not mere recitations of evidence, but rather reflect conclusions made by the staff on the basis of evidence before it, those averments may be admitted as 803(8)(C) "findings." Where, however, the staff report is submitted to a commission or other public agency charged with making formal findings, only those factual statements from the staff reports that are approved and adopted by the agency will qualify as 803(8)(C) "findings."

\textit{Id.}

adjective terms.150

The Fourth and Eighth Circuits have read Rule 803(8)(C) broadly in cases involving the admissibility of factual findings that result from a formal scientific study completed by a governmental agency. In suits brought by administrators of the victims of Toxic Shock Syndrome (TSS) against the manufacturers of tampons, the circuits faced the questions of admissibility of epidemiological studies performed by the Center for Disease Control (CDC) and by state agencies.151 The courts admitted the studies even though they contained tentative conclusions.152 The rationale behind the court’s decisions was the similarity between the scientific studies and other agency reports that courts previously found admissible.153

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150 Id. at 818. The court admitted into evidence FCC formal decisions that described AT&T’s interface tariffs as “unnecessarily restrictive” and an “unjust and unreasonable discrimination.” Id. The court distinguished the findings of the FCC from its own earlier decision in City of New York v. Pullman Inc., 662 F.2d 910, 914 (2d Cir. 1981), cert. denied, 454 U.S. 1164 (1982), in which the interim staff report of a government agency was excluded because it was not the final report or finding of a government agency. Litton, 700 F.2d at 818 n.45.

151 See Ellis v. International Playtex Inc., 745 F.2d 292 (4th Cir. 1984); Kehm v. Proctor & Gamble Mfg. Co., 724 F.2d 613 (8th Cir. 1983). TSS was first discovered in 1978, and the federal government instituted the CDC studies in the spring of 1980. Those studies consisted of tables, graphs and charts summarizing the results of observations of TSS victims. The research confirmed a correlation between the use of tampons, menstruation and TSS. The state health departments of Wisconsin, Minnesota and Iowa also implemented a study dubbed the Tri-State Study at approximately the same time. The research was summarized in a report to the Food and Drug Administration in early 1981. Ellis, 745 F.2d at 297; see also Wolf v. Proctor & Gamble Co., 555 F. Supp. 613, 625 (D.N.J. 1982) (“[S]tudies conducted by the CDC and state health departments come under the public records exception to the hearsay rule as set forth in [Rule]803(8)(C).”).

152 See Ellis, 745 F.2d at 301. The court determined that 803(8)(C) should be interpreted broadly. “Thus, the fact that the CDC and Tri-State studies contained tentative conclusions as well as statistical findings does not affect the applicability of the rule.” Id.; see also Kehm, 724 F.2d at 618.

153 See Ellis, 745 F.2d at 300-01. The court explained:

Most government sponsored investigations employ well accepted methodological means of gathering and analyzing data... We do not believe scientific reports should be treated any differently from other public findings of fact under a Fed. R. Evid. 803(8)(C) analysis. Indeed, in this instance the rationale behind the rule argues strongly for admission of the contested studies. First, both studies were carried out by public offices “pursuant to authority granted by law.” The CDC is a branch of the United States Department of Health and
Another area in which courts have given an expansive reading to Rule 803(8)(C) is Equal Employment Opportunity Commission (EEOC) findings of reasonable cause in Title VII actions. In *Chandler v. Roudebush*, the Supreme Court noted that administrative findings regarding claims of discrimination are generally admissible under Rule 803(8)(C). The Seventh and Eighth Circuits adopted this language in *Tulloss v. Near North Montessori School* and *Johnson v. Yellow Freight System, Inc.* In both cases the EEOC had investigated discrimination claims and issued findings that reasonable cause existed to believe discrimination had taken place. The courts reiterated the general statement of admissibility from *Chandler*, but stressed that the decision remains in the discretion of the trial judge. The importance of this series of cases, however, is in the general holding that EEOC conclusions are admissible under Rule 803(8)(C). This holding is another indication of the circuits' expansive reading of Rule 803(8)(C).

The Tenth Circuit gave a broad interpretation to Rule...
803(8)(C) in admitting conclusory statements in the report of a police review board. In *Perrin v. Anderson*, the administrator of the estate of a shooting victim brought suit against the officers involved. The Oklahoma Department of Public Safety appointed five of its members to investigate the shooting. The court held that even though the Shooting Report contained conclusions concerning the propriety of the officers’ conduct, it was admissible.

The majority of the federal courts of appeal have followed a broad reading of the factual findings phrase. The vastly different circumstances under which courts have admitted opinion and conclusory materials indicate the effectiveness a broad interpretation of Rule 803(8)(C) can provide. The broad approach is effective because it reduces the necessity to engage in an additional fact/opinion analysis. If a court finds the record to be of a government investigation based on factual findings, admissibility is assumed.

C. *The Trustworthiness Clause*

The application of Rule 803(8)(C) involves more than a mere consideration of whether the public records or reports consist of “factual findings.” Even if the court determines that the records of the public office or agency set forth “factual findings,” admissibility under the exception still hinges on whether the sources of information were trustworthy. The Advisory Committee indicated that admissibility should be assumed unless sufficient negative factors are present. The negative factor to be guarded

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160 784 F.2d 1040 (10th Cir. 1986).
161 *Id.* at 1046. The Shooting Review Board interviewed defendants and their superior officers to reach its conclusions. *Id.*
162 *Id.* at 1046-47. The report concluded that: “There was no doubt that [the officers] acted within the guidelines set forth in the Policies and Procedures Manual.” *Id.* at 1046.
163 *Fed. R. Evid* 803(8) advisory committee’s note. The Committee referred to its own earlier explanation of trustworthiness in the note following Rule 803(6), which states that “the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to author-
against is lack of trustworthy, reliable information.

The actual determination of a report's trustworthiness is based on several interrelated factors. One court has noted that trustworthiness is not confirmed by an analysis of the content of records, but rather by an analysis of their source. The consideration of the reliability of that source rests with the trial court judge. District courts are given broad discretion to admit or to exclude reports based on the trustworthiness determination. Because the party offering the public record is counting on its reliability, the burden of proving that the record is untrustworthy lies with the party opposing admission.

The trustworthiness of JAG investigative reports similar to those at issue in the Rainey case has been considered by other courts. Two separate suits arose out of a Navy airplane crash that occurred on December 21, 1975. Each court determined the trustworthiness requirement for two

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164 United States v. American Tel. & Tel., 498 F. Supp. 353, 360 (D.D.C. 1980). The court stated that "the rationale for the admissibility of factual findings contained in public records ... lies in their fundamental trustworthiness. The guarantee of trustworthiness does not necessarily reside in the contents of the records, but the facts or conclusions, but rather in their source." Id. (footnote omitted).

165 See Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944). The court stated "the search is for truth and the trial court is the first and best judge of whether tendered evidence meets that standard of trustworthiness and reliability which will entitle it to stand as evidence of an issuable fact, absent the test of cross-examination." Id. at 572; see supra notes 49-52 and accompanying text for a discussion of Franklin.

166 See, e.g., United States v. Versaint, 849 F.2d 827, 831 (3d Cir. 1988) (holding that "the party objecting to inclusion [must] make an affirmative showing that the proffered evidence is untrustworthy"); Ellis v. International Playtex Inc., 745 F.2d 292, 301 (4th Cir. 1984) ("placing the burden on the opposing party makes considerable practical sense. Most government sponsored investigations employ well accepted methodological means of gathering and analyzing data. It is unfair to put the party seeking admission to the test of 're-inventing the wheel' each time a report is offered"); Complaint of Paducah Towing Co., 692 F.2d 412, 421 (6th Cir. 1982), (holding that "the burden of showing that the sources of information are untrustworthy is on the opponent of the evidence ... "); AT&T, 498 F. Supp. at 364, (stating that "the burden is on the party disputing admissibility to prove the factual finding to be untrustworthy").

reports prepared pursuant to the United States Navy investigation of the crash: a Naval Rework Facility Report and a Judge Advocate General Report. Although both courts admitted the Naval Rework Facility Report, in Fraley the court excluded the JAG Report based on a determination that an inexperienced investigator was not reliable and therefore not trustworthy. In Sage, however, the court determined that inexperience did not affect the admissibility of the evidence, but rather, it affected the weight the evidence should be given.

The courts that have made an assessment of trustworthiness often employ the factors set out by the Advisory Committee in its note to Rule 803(8)(C). The District of Columbia District Court determined that a special government review of witnesses two years after events took place undermined the timeliness factor of the trustworthiness of the government's subsequent report. Many courts have deemed reports untrustworthy based on an analysis of the skill and experience of the record's creator.

1. Fraley, 470 F. Supp. at 1264. The first report issued was prepared by the Judge Advocate General's Office and discussed the general circumstances surrounding the crash. The other report was prepared by the Naval Rework Facility at Alameda, California and contained conclusions about the cause of the crash that were developed from engineering analysis based upon the airplane wreckage. Id.


3. Fraley, 470 F. Supp. at 1267 ("The document was prepared by an inexperienced investigator in a highly complex field of investigation. Thus, this document lacks the reliability to be admitted into evidence.").


5. See supra note 87 and accompanying text for a listing of the four factors.


7. See Jenkins v. Whittaker Corp., 785 F.2d 720 (9th Cir.) (in action brought against manufacturer of atomic simulator which exploded killing soldiers, court excluded as untrustworthy reports investigating the incident where the reports'
admission of a police officer’s conclusory statement on a strict application of all four factors. Although the Sixth Circuit found that the occurrence of a hearing is not always a necessary factor, the Tenth Circuit, in *Denny v. Hutchinson Sales Corp.*, recognized that the lack of formal proceedings in a Civil Rights Commission hearing was sufficient to indicate lack of trustworthiness. The Advisory Committee’s fourth factor of motivation problems has been applied by several courts to deny reports’ admissibility.

The Advisory Committee explicitly stated that other factors could be added to its original list of four. In authors had no competence or experience with atomic simulators). *cert. denied*, 479 U.S. 918 (1986); *Matthews v. Ashland Chem., Inc.*, 770 F.2d 1903 (5th Cir. 1985) (court upheld trial court’s determination that trustworthiness was lacking based on finding that investigator of propane accident did not have special skill and had not fully researched all potential causes of the fire); *Meder v. Everest & Jennings, Inc.*, 637 F.2d 1182 (8th Cir. 1981) (in products liability action against manufacturer of wheelchair, court found lack of trustworthiness where police officer investigating injury could not recall the source of information in the report); *cf. Faries v. Atlas Truck Body Mfg.*, 797 F.2d 619 (8th Cir. 1986) (in suit resulting from accident involving motorcycle and truck, the court found the state trooper that investigated the crash to be inexperienced, but found his report untrustworthy because the investigation was incomplete and lacking in physical measurement data).

Baker v. Elcona Homes Corp., 588 F.2d 551, 558 (6th Cir. 1978). The court determined that (1) the officer arrived minutes after the crash and the investigation was begun immediately; (2) the officer had 28 years experience in the investigation of automobile accidents; (3) a formal hearing was not appropriate to the case and did not appear always to be required; and (4) the officer was completely independent and impartial. *Id.* at 588.

649 F.2d 816 (10th Cir. 1981) (approving exclusion of a housing report in discrimination suit that was based on an ex parte hearing that afforded no opportunity for cross-examination of witnesses).

Id. at 820-22.

See *Miller v. Caterpillar Tractor Co.*, 697 F.2d 141 (6th Cir. 1983) (determining that report of United State Bureau of Mines into the circumstances of an accident that killed plaintiff’s decedent possessed no indicia of trustworthiness since report’s author had no first hand knowledge and no authority to render opinions); *Dallas & Mavis Forwarding Co. v. Stegall*, 659 F.2d 721 (6th Cir. 1981) (finding untrustworthy the report of officer investigating accident where his report was based on a story given to him by employee of plaintiff); *McKimmon v. Skil Corp.*, 638 F.2d 270 (1st Cir. 1981) (excluding reports of Consumer Product Safety Commission concerning prior accidents in suit against manufacturer of electric saw since the bulk of the reports were simply paraphrasing of individual consumer claims).

Fed. R. Evid. 803(8) advisory committee’s note ("Others no doubt could be added.").
Zenith Radio Corp. v. Matsushita Electric Industrial Co. the district court was confronted with an admissibility question concerning a large volume of both U.S. and foreign government documents. The court accepted the Advisory Committee's suggestion and created seven additional criteria to aid in the disposition of the reports. Although the additional criteria have not been widely implemented in other courts, they may serve a valuable purpose in improving the examination of public records.

Courts have taken different approaches to the trustworthiness problem in reports of legislative findings pursuant to Congressional investigation. The Pearce v. E.F. Hutton Group, Inc. and Baker v. Firestone Tire & Rubber Co. courts held that congressional hearing reports were inadmissible not only because they did not contain factual findings, but also because they lacked sufficient trustworthiness. Both decisions denied application of the hearsay exception due to the political motivations that could taint the objectiveness of the particular congressional report.

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181 Id. at 1147. The seven new factors include: (1) the finality of the agency findings, (2) the extent to which the findings rest on inadmissible evidence supplied by interested parties, (3) where hearings are employed, the extent to which appropriate safeguards are applied and observed, (4) the extent to which there is an ascertainable record on which the findings are based, (5) the extent to which the findings express a policy judgment rather than a factual adjudication, (6) the extent to which the findings rest upon findings by other bodies which may be suspect, and (7) where the findings rest upon expert opinion, the extent to which the facts or data on which the opinion is based are reasonably relied on by experts in the field. Id. The Court of Appeals for the Third Circuit declined to endorse the seven criteria listed by the Zenith court, but also rejected the contention that a trial court is limited by the four factors listed by the Advisory Committee. In re Japanese Elec. Prod. Antitrust Litig., 723 F.2d 238, 265 (3d Cir. 1983), rev'd on other grounds, 475 U.S. 574 (1986).


184 Baker, 793 F.2d at 1199 ("We agree with the district court that this report lacks the trustworthiness necessary to bring rule 803(8)(C) into play. . . . The subcommittee report did not contain factual findings necessary to an objective
However, in *De Letelier v. Republic of Chile*, the district court upheld the admissibility of reports presented at a hearing before the House of Representatives based on a failure to show lack of trustworthiness.

The foundation of the hearsay exception for public investigatory reports and records is the reliability of the circumstances surrounding the completion of the report. The trustworthiness provision in Rule 803(8)(C) forces a court to guarantee that the record was made in a reliable fashion. Each factor recommended by the Advisory Committee has been employed in appropriate situations to undermine the trustworthiness of a record. The trustworthiness analysis is Rule 803(8)(C)’s guarantee against the admission of government reports not based on factual findings.

V. SUPREME COURT ANALYSIS OF RULE 803(8)(C): *BEECH AIRCRAFT CORP. V. RAINEY (RAINEY III)*

The Supreme Court settled many of the uncertainties and disagreements over Rule 803(8)(C) when it rendered its decision in *Rainey III*, on December 12, 1988. Mr. Justice Brennan delivered the opinion of the Court, and was joined by a unanimous vote on Parts I and II concerning Rule 803(8)(C). In Part I of the opinion, Justice Brennan recounted the factual record of the crash and investigation, but consisted of the rather heated conclusions of a politically motivated hearing.

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186 *Id.* at 1496-97 (congressional reports and statements by government agencies at hearings of House of Representatives were admissible under Rule 803(8)(C) because there was no substantial showing that the circumstances indicated lack of trustworthiness).


188 *Id.* at 442.

189 *Id.* at 443-45; see *supra* notes 1-3 and accompanying text for a discussion of the facts of the crash.
the procedural history of the case in the lower courts.\textsuperscript{190}

After beginning Part II of the opinion with an inclusion of the text of Rule 803(8)(C),\textsuperscript{191} the court recognized that controversy over the scope of the Rule divided the federal courts of appeal from the beginning.\textsuperscript{192} The Court cited the Smith \textit{v. Ithaca Corp.} case relied on by the Eleventh Circuit as a narrow reading of the scope of the term "factual findings."\textsuperscript{193} The Court reasoned, however, that the broader interpretation employed by the Sixth Circuit in Baker \textit{v. Elcona Homes Corp.}\textsuperscript{194} was more representative of the circuits that had squarely confronted the issue.\textsuperscript{195} Drawing support from the authors of the leading evidence treatises as additional authority,\textsuperscript{196} the Court held that "factually based conclusions or opinions are not on that

\textsuperscript{190} Rainey III, 109 S.Ct. at 445; see supra notes 4-24 and accompanying text for a discussion of the procedural history.

\textsuperscript{191} Rainey III, 109 S. Ct. at 445; see supra note 15 for the text of the Rule.

\textsuperscript{192} Rainey III, 109 S.Ct. at 446.

\textsuperscript{193} Id.

\textsuperscript{194} Id. The court quoted the Sixth Circuit's holding that "factual findings admissible under Rule 803(8)(C) may be those which are made by the preparer of the report from disputed evidence . . . ." Baker \textit{v. Elcona Homes Corp.}, 588 F.2d 551, 557-58 (6th Cir. 1978), cert. denied, 441 U.S. 993 (1979); see supra notes 139-141 and accompanying text for a discussion of the Eleona Homes case.

\textsuperscript{195} Rainey III, 109 S.Ct. at 446. Cases the Court determined had squarely confronted the issue included Jenkins \textit{v. Whittaker Corp.}, 785 F.2d 720 (9th Cir.) cert. denied, 479 U.S. 918 (1986); Perrin \textit{v. Anderson}, 784 F.2d 1040 (10th Cir. 1986); Ellis \textit{v. International Playtex Inc.}, 745 F.2d 292 (4th Cir. 1984); Kehm \textit{v. Proctor & Gamble Mfg.}, 724 F.2d 613 (8th Cir. 1983); Melville \textit{v. American Home Assurance Co.}, 584 F.2d 1306 (3d Cir. 1978). For discussion of these cases, see Jenkins, supra note 174; Perrin, supra notes 160-162 and accompanying text; Ellis and Kehm, supra notes 151-153 and accompanying text; Melville, supra notes 136-138 and accompanying text.

\textsuperscript{196} Rainey III, 109 S. Ct. at 446 n.7. The Court found that several treatises recommended a broad interpretation:

\begin{itemize}
  \item E. Cleary, McCormick on Evidence § 316, at 890, n.7 (3d ed. 1984);
  \item M. Graham, Handbook of Federal Evidence 886 (2d ed. 1986);
  \item R. Lempert & S. Saltzburg, A Modern Approach to Evidence 449-50 (2d ed. 1982);
  \item G. Lilly, An Introduction to the Law of Evidence 275-76 (2d ed. 1987);
  \item D. Louisell & C. Mueller, Federal Evidence § 455, at 740-741 (1980);
  \item J. Weinstein & M. Berger, Weinstein's Evidence § 803(8) [03], at 803-250 to 803-252 (1987).
\end{itemize}

\textit{Id.}
account excluded from the scope of Rule 803(8)(C).”

Once Justice Brennan presented the initial summation of the elements of the Court’s decision, he turned to a specific analysis of the language of Rule 803(8)(C) itself. He reasoned that the narrow interpretation of the term “factual findings” espoused in Smith v. Ithaca Corp. reflected a perceived dichotomy between “fact” and “opinion.” The Fifth Circuit had perceived this distinction from language in Rule 803(6) expressly including “opinions” and “diagnoses” that was not present in Rule 803(8)(C). Justice Brennan rejected the Fifth Circuit’s conclusion that this differing language indicated that “factual findings” meant something other than opinions. He determined that the Advisory Committee’s Note on Rule 803(8)(C) strongly suggested that this Rule had the same scope of admissibility as Rule 803(6).

After rejecting the analysis of Smith v. Ithaca Corp., the Court emphasized that “factual findings” should not be read to mean simply “facts.” The Court cited Black’s Law Dictionary to show that a “finding of fact” is broad

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197 Id. at 446.
198 Id. Justice Brennan cited INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), for the requirement that a legislative enactment be construed through the “traditional tools of statutory construction.” Id.
199 Id.
200 See supra notes 102-107 and accompanying text for a discussion of the Smith decision.
201 Rainey III, 109 S. Ct. at 446. Justice Brennan examined the particular motivation of the Advisory Committee in drafting Rule 803(6):

While opinions were rarely found in traditional “business records,” the expansion of that category to encompass documents such as medical diagnoses and test results brought with it some uncertainty in earlier versions of the Rule as to whether diagnoses and the like were admissible. “In order to make clear its adherence to the [position favoring admissibility],” the Committee stated “the rule specifically includes both diagnoses and opinions in addition to acts, events, and conditions, as proper subjects of admissible entries.” quoting Advisory Committee’s Notes on Fed. Rule Evid. 803(6)) . . .

Since that specific concern was not present in the context of Rule 803(8)(C), the absence of identical language should not be accorded much significance.

Id. at 446-47 n.8.
202 Id.
203 Id. at 447.
enough to include conclusions. At a minimum, the Court found that the language of the Rule did not compel such a narrow reading of the phrase "factual findings." The Court further pointed out that Rule 803(8)(C) does not allow admission of "factual findings", but rather, the Rule assumes admission of "reports . . . setting forth . . . factual findings". This clarification highlighted the Court's finding that the language of Rule 803(8)(C) does not distinguish fact from opinion.

The Court then turned its analysis towards the legislative history of Rule 803(8)(C). The Court explained that unlike some statutory analysis where there is a dearth of legislative comment on the precise question, both Houses of Congress expressed their views on the language of Rule 803(8)(C). However, the Court found that the Houses had not only expressed opposite views on the scope of the Rule, but failed to reconcile their differences. The Court recognized that this conflicting legislative approach caused interpretation problems. The legislative record, therefore, was found to provide no clear answer to the scope of the Rule's language. The Court determined, however, that the Senate Judiciary Committee's broader interpretation was more consistent with both the Rule itself and the comments of the Advisory Committee.

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204 Id. A "finding of fact" is defined as a "conclusion by way of reasonable inference from the evidence." BLACK'S LAW DICTIONARY 569 (5th ed. 1979).
205 Rainey III, 109 S. Ct. at 447.
206 Id.; see supra note 15 for the complete text of Rule 803(8)(C).
207 Rainey III, 109 S. Ct. at 447.
208 Id.; see supra notes 92-93 for the text of the Notes of both the House Judiciary Committee and the Senate Judiciary Committee. Justice Brennan included the transcript of these Notes in the Court's opinion. Rainey III, 109 S.Ct. at 447-48.
209 Rainey III, 109 S.Ct. at 447; see supra notes 92-95 and accompanying text for a discussion of the diametrically opposite stances taken by the House and Senate concerning the interpretation of Rule 803(8)(C).
210 Rainey III, 109 S.Ct. at 447 ("Indeed, in this case the legislative history may well be at the origin of the dispute.").
211 Id. at 447-48. Justice Brennan concluded: "Clearly this legislative history reveals a difference of view between the Senate and the House that affords no definitive guide to the congressional understanding." Id. at 448.
212 Id.
Once Justice Brennan concluded that the legislative history was insufficient to determine the scope of the Rule, he reviewed the Notes of the Advisory Committee for direction.\textsuperscript{213} These comments were particularly important since Congress had not amended the Committee's draft.\textsuperscript{214} The Court recognized that the Advisory Committee cited federal statutes that made evaluative reports admissible and cited cases in which admissibility had been both sustained and denied.\textsuperscript{215} In all the instances, the reports had stated conclusions. The Advisory Committee's discussion and inclusion of such reports was a clear indication to Justice Brennan that its focus was strictly on whether "evaluative reports" should be admissible.\textsuperscript{216} The Advisory Committee comments overall were notable for the lack of any mention of a dichotomy between "facts" and "opinions" or "conclusions".\textsuperscript{217} The Court found no indication that the Advisory Committee even considered admitting factual statements only.\textsuperscript{218} The Court concluded that the Advisory Committee was concerned only with the admissibility of "evaluative reports" without regard to a distinction between facts and conclusions.\textsuperscript{219}

\textsuperscript{213} See supra notes 86-91 and accompanying text for a discussion of the Advisory Committee Notes.

\textsuperscript{214} Rainey III, 109 S. Ct. at 448 n.9. The court found: "As Congress did not amend the Advisory Committee's draft in any way that touches on the question before us, the Committee's commentary is particularly relevant in determining the meaning of the document Congress enacted." \textit{Id.}

\textsuperscript{215} \textit{Id.} at 448; see supra note 90 for a listing of the statutes the Advisory Committee cited; see also supra note 41 and accompanying text for a discussion of the pre-Rules cases the committee had cited.

\textsuperscript{216} Rainey III, 109 S. Ct. at 448. The Court observed: "[W]hat the Committee referred to in the Rule's language as 'reports ... setting forth ... factual findings' is surely nothing more or less than what in its commentary it called 'evaluative reports.'" \textit{Id.}

\textsuperscript{217} \textit{Id.}

\textsuperscript{218} \textit{Id.}

\textsuperscript{219} \textit{Id.} at 448 n.10. Justice Brennan drew additional support for this particular conclusion from the presence of a pre-Rules scholarly debate on the "fact" and "conclusion" distinction.

Indeed, the problem was often phrased as one of whether official reports could be admitted \textit{in view of the fact that they contained the investigator's conclusions}. Thus Professor McCormick, in an influential arti-
The Court then analyzed the Advisory Committee’s solution as to the admissibility of evaluative reports. The Court recognized that the Committee gauged admissibility by two principles: first, the rule assumes admissibility, and second, it provides for escape if negative factors are present. Justice Brennan determined that the “escape provision” referred to by the Committee is embodied in the final trustworthiness clause of the Rule. Therefore, the Court found that the Committee meant for all of the information in evaluative reports to be admissible unless the contents were gathered in an untrustworthy fashion. The Court made it clear that a trial judge has an obligation to exclude facts, conclusions, or an entire report if circumstances indicate a lack of trustworthiness. Other portions of the Federal Rules were cited as additional safeguards available to the trial judge in scrutinizing evaluative reports. Justice Brennan further emphasized that an opponent’s right to contradict or diminish the conclusory portions of reports is his ultimate safeguard.

cle relied upon by the Committee, stated his position as follows: “that evaluative reports of official investigators, though partly based upon statements of others, and though embracing conclusions, are admissible as evidence of the facts reported.”

Id. (quoting McCormick, supra note 87, at 365); see supra note 87 for additional discussion of Professor McCormick’s article.

Rainey III, 109 S. Ct. at 448; see supra notes 85-87.

Rainey III, 109 S. Ct. at 448; see supra notes 169-186 and accompanying text for a discussion of instances where courts implemented the trustworthiness provision.

Rainey III, 109 S. Ct. at 448. Justice Brennan explained that the “trustworthiness inquiry — and not an arbitrary distinction between ‘fact’ and ‘opinion’ — was the Committee’s primary safeguard against the admission of unreliable evidence, and it is important to note that it applies to all elements of the report.” Id.

Id. The Court cited the four factors the Advisory Committee proposed to assist in the trustworthiness inquiry. Id. at 449 n.11; see supra note 87 and accompanying text for a discussion of these four factors. Although no party challenged the district court’s finding that the JAG Report was trustworthy, the Court noted that in Fraley, a JAG Report was found to be untrustworthy. See supra notes 167-170 and accompanying text for a discussion of Fraley.


Rainey III, 109 S. Ct. at 449.
The Court then focused directly on the analytical difficulty of making a distinction between "fact" and "opinion." Justice Brennan consulted several evidence

226 At oral argument, the Court indicated its concern over the difficulty of drawing a line between fact and opinion. The following exchange occurred during the presentation of Mr. Joseph W. Womack, counsel for Beech Aircraft Corporation:

Question: But where do you want us to draw the line between what is factual finding, and what is not a factual finding? . . . Do you think a finding that the pilot was negligent would not be a factual finding?

Mr. Womack: I think that a finding that the pilot was negligent would be too close to a legal conclusion. . . . And to answer the bottom line question of your Honor, I would ask you to consider drawing the line, if the Court chooses to draw a line, just on the other side of probabilities and just this side of legal conclusions and fixation of legal liability.

Oral Transcript at 15-16, Rainey III, (Nos. 87-981 and 87-1028). During the presentation of Mr. Dennis K. Larry, counsel for John Rainey, the following exchange took place:

Chief Justice Rehnquist: Aren't we then just embroiled in the traditional distinction of 50 and 60 years ago, the difference between fact and opinion?

Mr. Larry: Justice Rehnquist, I believe that this Court, I believe that courts, can see a difference, and can distinguish between what an investigator finds as a fact, based upon his evaluation of evidence, and what is pure opinion.

Chief Justice Rehnquist: Surely anyone trained as a lawyer would be able to see things at either end of that spectrum. But the difficulties come in the middle, where very competent trial judges, very competent lawyers may see things differently. And do we want reversals of trials because the trial judge saw it one way, rather than the other, in the middle of the spectrum?

Mr. Larry: Your Honor, what we want is for the trial judge to make a determination as to whether the report qualifies under the rule, and not simply let the entire report in just because in some cases, it may be difficult to distinguish opinion and fact. I think that what we have here is a rule that carefully used words, "findings of fact" and never used the word "opinion" in any of the Advisory Committee notes.

Id. at 26-27. The following questions were asked later in Mr. Larry's presentation:

Question: Suppose . . . it was clear that the weather wasn't affected, [the investigator] simply expressed himself by saying, it is my firm opinion that weather was not a factor. Would that be a factual point?

Mr. Larry: The court could very well determine that although he called it an opinion, he simply made a finding of fact. I don't think we can turn on what the investigator called it.
treatises to show that the difference between fact and opinion is a matter of degree. The Court then cited one of the factual findings contained in the JAG Report and questioned whether the statement couldn’t just as easily have been labeled an opinion. The Court reasoned that this close proximity between fact and opinion will always be present in investigative reports. Therefore, the Court concluded that instead of creating an arbitrary line between fact and opinion, Rule 803(8)(C) requires admission of “reports . . . setting forth . . . factual findings.” The Court then explained the Rule’s inherent limitations. The first limitation is that statements must be based on a factual investigation. The second limitation is that the report be sufficiently trustworthy.

The final source of authority called upon by the Court was the general approach of the Federal Rules to “opinion” testimony. Justice Brennan pointed out that Rules 702-705 permit expert testimony on all range of opinions, Question: I hope not. But I don’t know what we’re turning on, if we’re not turning on that.

Id. at 31-32. These questions asked of the different counsel during oral argument indicate the depth of the Court’s uncertainty in attempting to draw a line between fact and opinion.

227 Rainey III, 109 S. Ct. at 449; see E. CLEARY, supra note 36, § 11, at 27 (“There is no conceivable statement however specific, detailed and ‘factual’ that is not in some measure the product of inference and reflection as well as observation and memory”); R. LEMPERT & S. SALTZBURG, supra note 196, at 449 (“A factual finding, unless it is a simple report of something observed, is an opinion as to what more basic facts imply”).

228 Rainey III, 109 S. Ct. at 449. Justice Brennan stated:

In the present case, the trial court had no difficulty in admitting as a factual finding the statement in the JAG Report that “[a]t the time of impact, the engine of 3E955 was operating but was operating a reduced power.” Surely this “factual finding” could also be characterized as an “opinion”, which the investigator presumably arrived at on the basis of clues contained in the airplane wreckage.

Id.

229 Id.; Fed. R. Evid. 803(8)(C).

230 Rainey III, 109 S. Ct. at 449 (“[T]he requirement that reports contain factual findings bars the admission of statements not based on factual investigation.”).

231 Id. (“[T]he trustworthiness provision requires the court to make a determination as to whether the report, or any portion thereof, is sufficiently trustworthy to be admitted.”).
even those concerning "ultimate issues." Additionally, the Court noted that Rule 701 allows lay witnesses to give opinion testimony. The Court found these Rules to indicate a liberal approach toward the admission of opinion testimony. The Court reasoned that Rule 803(8)(C) should be consistent with that trend.

The Supreme Court held that portions of public investigatory reports are not inadmissible under Rule 803(8)(C) merely because they state a conclusion or opinion. "As long as the conclusion is based on a factual investigation and satisfies the Rule's trustworthiness requirement, it should be admissible along with other portions of the report." The Court determined that because the district court found the JAG Report to be trustworthy, the admission of its opinions into evidence was correct. The Court therefore reversed the judgment of the Eleventh Circuit Court of Appeals.

The Supreme Court's analysis provides a clear and definitive guide to the future implementation of Rule 803(8)(C). It resolves the division of interpretation between the circuit courts. Particularly, in the Fifth and Eleventh Circuits, the Court's rejection of the Smith v. Ithaca Corp. analysis denotes a different admissibility standard. Instead of requiring trial judges to make a distinction between the fact and opinion material included in a report of a public investigation, the Court's holding allows judges to assume that a factually based investigatory report is admissible. The trial judge, however, has an obligation to determine that all portions of a report were completed in a reliable and trustworthy fashion.

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232 Id. at 450; see supra note 53 for the text of the rules cited by Justice Brennan.
233 Rainey III, 109 S. Ct. at 450.
234 Id.
235 Id. ("We see no reason to strain to reach an interpretation of Rule 803(8)(C) that is contrary to the liberal thrust of the Federal Rules.").
236 Id. The Court was careful to note that its holding had no bearing on the distinction between fact and law. The Court stated: "We thus express no opinion on whether legal conclusions contained in an official report are admissible as 'findings of fact' under Rule 803(8)(C)." Id. at 450 n.13.
237 Id. at 450.
Unlike the arbitrary analysis inherent in dividing fact from opinion, the trial judge can apply the trustworthiness factors to gauge the circumstances in which a report is completed.

In federal district court practice, the Supreme Court's analysis of Rule 803(8)(C) will lead to greater admissibility of the conclusion and opinion portions of government investigatory reports. This decision is beneficial because it ultimately means that a trier of fact will have more information upon which to base a decision. One potential negative effect is a greater likelihood that persons completing investigatory records will write the opinion and conclusion portions with an eye towards future litigation. In other words, government officials will have more opportunity to affect the ultimate resolution of certain issues. The trustworthiness analysis, however, will prevent any such biased record completion from being admitted into evidence. The Supreme Court's emphasis on the trustworthiness determination requires trial judges to analyze carefully the circumstances in which a report is completed.

Although innumerable contexts exist in which investigations are conducted pursuant to government authority, the model of analysis set out in the Rainey III decision provides a uniform scheme to gauge potential trial use. The Supreme Court's thorough analysis emphasized that Rule 803(8)(C) does not allow admission of only factual findings, but rather, allows admission of the contents of reports that are based on factual findings. As long as an investigatory record is based on factual findings, and completed pursuant to authority granted by law, it is presumed admissible. The trustworthiness safeguard will vary with each district court judge, but application of the Advisory Committee factors will insure that a public investigatory record will be analyzed consistently throughout the federal district courts.

See supra note 87 and accompanying text for a discussion of motivation as one of the factors which can undermine trustworthiness.
CONCLUSION

The evolution of an exception to the hearsay doctrine for public records and reports has been plagued with uncertainty over the scope of admissibility. Since the common law period, courts recognized the efficiency value in admitting government records. Courts were reluctant, however, to allow the opinion statements of government officials into evidence. A perception existed that an official's opinion statements were distinct from and less reliable than his factual statements.

Congress recognized the public records exception to the hearsay doctrine in Rule 803(8)(C). Unfortunately, Congress did not give the federal courts clear direction as to what the language of the Rule was to include. Because the Rule focused around the phrase "factual findings," many of the circuits continued to recognize the common law distinction between fact and opinion portions of public investigatory reports. This interpretation is no longer valid. In Rainey III the Supreme Court determined that Rule 803(8)(C) does not on its face exclude opinion and conclusory statements. Opinion and conclusory statements contained in government investigatory reports are now admissible unless they are determined to be untrustworthy. The Supreme Court has resolved a longstanding conflict among the federal courts of appeal. The decision provides litigants with a consistent and uniform guide to the proper scope of admission for government investigatory reports under Rule 803(8)(C).