

Disability Claims, Guidance Documents, and the Problem of Nonlegislative Rules

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INTRODUCTION

Two similarly situated claimants apply to the Social Security Administration (SSA) for disability benefits. Both receive unfavorable determinations of their claims—first at the initial-determination stage, then on reconsideration, and then again at an administrative law judge (ALJ) hearing. Undaunted, both collect further relevant evidence of their disabilities and request a final round of administrative review by the SSA Appeals Council. Why do they go to this effort? Because they—or their attorneys—have read the SSA’s Hearings, Appeals and Litigation Law manual (HALLEX).¹ And this internal guidance document provides that the Appeals Council should “specifically address”² additional evidence presented in a request for review. Yet, contrary to the guidance articulated in HALLEX, the Appeals Council dismisses the two claims without even a nod to the claimants’ new evidence.³

Next, both claimants take their claims to federal court. One sues in the Ninth Circuit, where the agency’s decision is affirmed. The other goes to the Fifth Circuit, where the agency’s decision is reversed and remanded. These divergent outcomes are emblematic of a broader circuit split over how reviewing courts should respond to cases in which the SSA deviates from HALLEX. A resolution of this split would be beneficial, not only for its impact on numerous disability cases,⁴ but also for its relevance

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¹ Social Security Administration Office of Disability Adjudication and Review, *Hearings, Appeals and Litigation Law Manual* (HALLEX), online at http://www.ssa.gov/OP_Home/hallex (visited Nov 24, 2013).

² *Id.* at I-3-5-1.

³ The hypothetical cases are based on *Newton v Apfel*, 209 F3d 448 (5th Cir 2000).

⁴ One need not look far to find disability claimants alleging violations of HALLEX. For recent examples, see *Estep v Astrue*, 2013 WL 212643, *11 (MD Tenn); *Brown v Astrue*, 2013 WL 159811, *3–4 (D Kan); *Pimentel v Astrue*, 2013 WL 93173, *9 (ND Ill).

to an increasingly pertinent question of administrative law: Are agencies bound to follow their guidance documents?

The term “guidance documents” refers to statements or collections of nonlegislative rules.⁵ Guidance documents are thus agency pronouncements that inform the public of legal interpretations, policies, or procedures without conforming to the rulemaking requirements of § 553 of the Administrative Procedure Act (APA).⁶ Though such documents are increasingly common,⁷ they remain a wellspring of confusion for courts.⁸ As in the hypothetical cases presented above, it is not clear when—if ever—an agency is bound by procedures published in a guidance document. This lack of clarity is compounded by a dictum from the Supreme Court’s opinion in *Morton v Ruiz*,⁹ which states that agencies should follow their own “internal procedures” where “the rights of individuals are affected.”¹⁰

This Comment focuses on the specific question of whether HALLEX binds the SSA. This is a relatively narrow question positioned against the backdrop of a much broader debate over whether any guidance documents bind agencies. Part I attempts to situate HALLEX within this broader debate by surveying the administrative and judicial review of disability claims, as well as the statutory and precedential environment of guidance documents.¹¹ Part II then outlines the two broad camps that have staked out opposing views on whether HALLEX binds the SSA. The first of these, led by the Fifth Circuit and predicated on *Morton*, holds that a violation of HALLEX is reversible error so long as the claimant was prejudiced by it.¹² The second, led by

⁵ See Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 Mo L Rev 695, 698 (2007).

⁶ Pub L No 79-404, 60 Stat 237 (1946), codified in various sections of Title 5.

⁷ See Peter L. Strauss, *The Rulemaking Continuum*, 41 Duke L J 1463, 1468–69 (1992) (noting that agency publications such as staff manuals are produced “in a profusion that overwhelms” formal regulation); Johnson, 72 Mo L Rev at 695 n 1 (cited in note 5) (“In many agencies, more than ninety percent of the ‘rules’ are adopted through policy statements and interpretive rulemaking.”).

⁸ See William Funk, *The Dilemma of Nonlegislative Rules*, Jotwell: The Journal of Things We Like (Lots) (June 3, 2011), online at <http://adlaw.jotwell.com/the-dilemma-of-nonlegislative-rules> (visited Nov 24, 2013).

⁹ 415 US 199 (1974).

¹⁰ *Id.* at 235.

¹¹ A further aim of Part I is to elucidate the form and context of HALLEX, a document on which surprisingly little has been written before.

¹² See *Newton*, 209 F3d at 459.

the Ninth Circuit, maintains that even a prejudicial violation does not, by itself, warrant reversal.¹³

Part III argues that *Morton* has unnecessarily muddied the controversy surrounding HALLEX and proposes an alternative framework for understanding the issue. In brief, this Comment contends that, where an agency deviates from a nonlegislative rule that reasonably invites reliance, the resulting agency action is “arbitrary [and] capricious” under § 706 of the APA and should be reversed.¹⁴ Given HALLEX’s intended audience,¹⁵ designation as “Employee Operating Instructions,”¹⁶ and statement of purpose,¹⁷ claimants cannot reasonably rely on HALLEX, and the manual should, therefore, not bind the SSA. Finally, this Comment concludes by briefly reflecting on why this is a desirable result for both the SSA and claimants.

I. HALLEX AND ITS CONTEXT: PROCEDURES, STATUTES, AND CASES

Answering the question of whether HALLEX binds the SSA requires a working understanding of (1) the administrative and judicial review of disability claims; (2) the statutes, regulations, and rulings pertaining to such claims; (3) HALLEX itself; (4) the informal rulemaking requirements of APA § 553; and (5) Supreme Court precedent on guidance documents. Each is briefly addressed in turn.

A. Administrative and Judicial Review of Disability Claims

The SSA administers two large-scale programs aimed at easing the financial burden of disability: Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI).¹⁸ The former insures individuals who have worked and paid Social Security taxes for a sufficient period of time; the latter distributes

¹³ See *Moore v Apfel*, 216 F3d 864, 868–69 (9th Cir 2000).

¹⁴ See 5 USC § 706 (“The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”).

¹⁵ See note 207 and accompanying text.

¹⁶ See note 45 and accompanying text.

¹⁷ See HALLEX at I-1-0-1 (cited in note 1) (stating that HALLEX is intended to “convey[] guiding principles,” “define[] procedures for carrying out policy,” and “provide[] guidance for processing and adjudicating claims”).

¹⁸ See 42 USC § 901.

disability benefits on the basis of financial need.¹⁹ The SSA and reviewing courts treat the two programs similarly, since both programs use the same criteria to determine disability²⁰ and an application for SSI is automatically an application for SSDI as well.²¹ To avoid redundancy, the overview of SSA procedures presented below focuses on SSDI only.

Title II of the Social Security Act entitles insured individuals suffering from disabilities to benefits.²² In order to receive benefits, a claimant must first file an application with the SSA.²³ Next, a field office processes the claim and makes an “initial determination” of eligibility.²⁴ If the initial determination is unfavorable, up to three tiers of administrative review become available. The first tier, “reconsideration,” provides an opportunity for the claimant to present additional evidence and to have the grounds for the initial determination reexamined.²⁵ The second, an ALJ hearing,²⁶ permits the claimant to appear in person, to be represented by an attorney, to present evidence, and to question and cross-examine witnesses.²⁷ If the ALJ’s decision also proves unfavorable, the claimant may request a third and final tier of administrative review by the SSA’s Appeals Council.²⁸ The Appeals Council will then take one of the following actions: it may deny the request, grant the request but dismiss the case, grant the request and remand the case to an ALJ, or grant the request and issue a decision.²⁹ With the exception of remand,

¹⁹ For a brief overview of the two programs, see SSA, *Benefits for People with Disabilities*, online at <http://www.ssa.gov/disability> (visited Nov 24, 2013).

²⁰ Compare 42 USC § 423(d)(1)(A) (defining “disability” for SSDI) with 42 USC § 1382c(a)(3)(A) (defining “disabled” for SSI).

²¹ See SSA, *Understanding Supplemental Security Income Social Security Entitlement* (2013), online at <http://ssa.gov/ssi/text-entitle-ussi.htm> (visited Nov 24, 2013).

²² See 42 USC § 423(a) (setting forth the requirements for receiving disability insurance). See also 42 USC § 416(l)(1) (defining “retirement age”); 42 USC § 423(d)(1)(A) (defining “disability”); 20 CFR § 404.130 (defining disability-insured status).

²³ 20 CFR § 404.603.

²⁴ 20 CFR § 404.905 (stating that initial determinations are binding unless the claimant requests review within the allotted timeframe or the SSA chooses to revise them).

²⁵ 20 CFR § 404.907. See also 20 CFR § 404.913 (setting forth reconsideration procedures). There are specific circumstances under which a claimant may appeal directly to federal court through an expedited appeals process. See 20 CFR § 404.923.

²⁶ 20 CFR § 404.930 (stating that a claimant may request an ALJ hearing after receiving a reconsidered determination).

²⁷ 20 CFR § 404.944 (setting forth procedures for an ALJ hearing).

²⁸ 20 CFR § 404.967 (stating conditions for Appeals Council review).

²⁹ 20 CFR § 404.967 (describing the Appeals Council process).

any of these actions will constitute the agency's final determination of the claim.³⁰

After a final determination by the SSA, the claimant may seek judicial review by filing an action in federal court.³¹

B. The Social Security Act, Regulations, and Rulings

Courts reviewing final decisions of the SSA look to one or more of the following authorities to determine whether a claimant was improperly denied benefits: (1) the Social Security Act, (2) SSA regulations, (3) SSA rulings, and (4) SSA guidance documents. The first three of these are binding on the agency.³² The fourth is, of course, the topic of this Comment.

The Social Security Act created the SSA to “administer the old-age, survivors, and disability insurance program.”³³ The Act provides some direction for this herculean task: listing requirements for eligibility,³⁴ defining “disability,”³⁵ and so forth. Yet, it necessarily operates at too high a level of generality to answer every question that arises in the day-to-day processing of claims.³⁶ It therefore grants the SSA power to “prescribe such rules and regulations as the Commissioner determines necessary or appropriate to carry out the functions of the Administration.”³⁷ Validly promulgated regulations are undoubtedly binding on the SSA.³⁸

³⁰ 20 CFR § 404.972 (stating that dismissal by the Appeals Council is binding).

³¹ 42 USC § 405(g) (granting federal courts authority to review final decisions of the SSA).

³² The act giving life to the SSA is obviously binding on it. As for regulations, courts have long held that “regulations validly prescribed by a government administrator are binding upon him as well as the citizen.” *Service v Dulles*, 354 US 363, 372 (1957). Rulings are binding pursuant to 20 CFR § 402.35(b). See also note 38.

³³ Social Security Independence and Program Improvement Act of 1994, Pub L No 103-296, 108 Stat 1464, 1465, codified at 42 USC § 901 (charging the SSA with the duty of administering both SSDI and SSI).

³⁴ 42 USC § 423(a).

³⁵ 42 USC § 423(d)(1)(A).

³⁶ The Court recognized this aspect of framework statutes like the Social Security Act in *Morton*, 415 US at 231 (“The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”).

³⁷ 42 USC § 902(a)(5).

³⁸ See *Service*, 354 US at 388–89; *Accardi v Shaughnessy*, 347 US 260, 265–67 (1954); *Wilson v Commissioner of Social Security*, 378 F3d 541, 545 (6th Cir 2004) (“It is an elemental principle of administrative law that agencies are bound to follow their own regulations.”).

Like regulations, SSA rulings continue to flesh out the Social Security Act. These include Social Security Rulings (SSRs) and Acquiescence Rulings (ARs), both of which are published in the Federal Register.³⁹ SSRs are final opinions or statements of policy specially chosen for publication by the SSA,⁴⁰ and ARs are statements of policy detailing how the agency intends to comply with the law of a particular circuit.⁴¹ The SSA has stated *through regulation* that both SSRs and ARs are “binding on all components of the Social Security Administration.”⁴² Suppose, for instance, that a claimant was never apprised of his option to obtain representation (in violation of SSR 79-19).⁴³ Because the SSA has bound itself to its rulings, this would warrant reversal.⁴⁴

C. HALLEX

Even after taking into consideration all regulations, SSRs, and ARs, the staff and ALJs who process the SSA’s colossal caseload still retain a fair amount of discretion. The agency limits this discretion through guidance documents called “Employee Operating Instructions”—of which HALLEX is an example.⁴⁵ As the designation “Employee Operating Instructions” suggests, HALLEX is primarily intended to serve as a “reference source” for SSA employees and adjudicators.⁴⁶ The manual’s self-described purpose is to “convey[] guiding principles,” “define[] procedures for carrying out policy,” and “provide[] guidance for processing and adjudicating claims.”⁴⁷

HALLEX is divided into two volumes. The first covers mostly procedural matters, comprising guidelines on, for example, the conduct of claimants’ representatives,⁴⁸ fee arrangements,⁴⁹

³⁹ 20 CFR § 402.35(b).

⁴⁰ 20 CFR § 402.35(b)(1).

⁴¹ 20 CFR § 404.985(b) (stating that the SSA will issue an AR when it determines that a circuit court’s holding conflicts with its interpretation of a statute or regulation).

⁴² 20 CFR § 402.35(b). See also note 38 and accompanying text (noting the principle that agencies are bound to follow their own regulations).

⁴³ SSA, *SSR 79-19: Titles II, XVI & XVIII: Waiver of Personal Appearance at a Hearing*, online at http://www.socialsecurity.gov/OP_Home/rulings/oasi/33/SSR79-19-oasi-33.html (visited Nov 24, 2013).

⁴⁴ See *Hall v Schweiker*, 660 F2d 116, 119 (5th Cir 1981) (reversing a final determination of the SSA based on the agency’s disregard of SSR 79-19).

⁴⁵ SSA, *Social Security Program Rules*, online at <http://www.socialsecurity.gov/regulations/index.htm#a0=3> (visited Nov 24, 2013).

⁴⁶ HALLEX at I-1-0-3 (cited in note 1) (describing HALLEX’s intended audience).

⁴⁷ *Id.* at I-1-0-1.

⁴⁸ *Id.* at I-1-1-40.

⁴⁹ *Id.* at I-1-2-1.

procedures for ALJ hearings,⁵⁰ ALJ written decisions,⁵¹ and procedures for Appeals Council review.⁵² The second volume primarily consists of Appeals Council Interpretations (ACIs).⁵³ These, as their name suggests, are statements of en banc meetings of the Appeals Council on difficult questions of statutory or regulatory interpretation.⁵⁴ Examples of issues addressed by ACIs include whether claimants will receive an oral hearing after remand from the Appeals Council,⁵⁵ when a claimant with a psychiatric impairment may be excused for failing to follow prescribed treatment,⁵⁶ and whether a claimant's chronological age should be used in a "borderline age situation."⁵⁷

Even if, as this Comment argues, HALLEX does not bind the SSA, the manual still plays an important role. HALLEX fleshes out the Social Security Act and SSA regulations,⁵⁸ constrains undesirable discretion in lower-level SSA employees,⁵⁹ and alerts the public to how the SSA intends to act.⁶⁰ Moreover, the manual is an especially efficient and flexible tool for the SSA because it is exempted from the rigors of informal rulemaking.⁶¹

⁵⁰ HALLEX at I-2-6-1 (cited in note 1).

⁵¹ Id at I-2-8-25.

⁵² See, for example, id at I-3-4-1.

⁵³ See id at I-1-0-2 (describing the organization of HALLEX).

⁵⁴ See HALLEX at I-1-0-1 (cited in note 1). ACIs are intended to: (1) resolve gaps in SSA policy, (2) promote consistency and uniformity in both policy and application, (3) establish precedent, and (4) "[e]nhance service to the public by identifying and resolving conflicts and inconsistencies in adjudicatory policy." Id II-5-0-1.

⁵⁵ Id at II-5-1-3.

⁵⁶ Id at II-5-3-1.

⁵⁷ Id at II-5-3-2. For a brief discussion of borderline-age situations, see notes 214–16 and accompanying text.

⁵⁸ See notes 48–57 and accompanying text.

⁵⁹ This concern is particularly relevant to the SSA. In the past, ALJs have been shown to render radically divergent denial rates, such that the outcome of a claim could very well turn on what ALJ is assigned to it. See Jerry L. Mashaw, Richard A. Merrill, and Peter M. Shane, *Administrative Law: The American Public Law System; Cases and Materials* 456–57 (West 6th ed 2009) ("Variation among ALJs is something like the variance that one would expect from one-person juries applying the 'reasonable person' standard."). See also David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 Yale L J 276, 304 (2010) (noting that the benefits of guidance documents include ensuring administrative uniformity and redirecting resources otherwise spent on rulemaking).

⁶⁰ See Part III.C (distinguishing between types of nonlegislative rules found in HALLEX and describing the function of each).

⁶¹ For an argument that informal rulemaking is neither efficient nor flexible, see Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L J 1385, 1391 (1992) ("To some extent, the fact that the air and waters of the United States are still polluted, workplaces still dangerous, motor vehicles still unsafe, and

D. The Administrative Procedure Act

Section 553 of the APA prescribes informal rulemaking procedures. These require notice of the proposed rulemaking, opportunity for public comment, and publication of the final rule in the Federal Register.⁶² Informal rulemaking is the norm for most agency rules, but § 553 allows some exemptions.⁶³ The exemption most often applied to guidance documents is that for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”⁶⁴ Because rules promulgated pursuant to § 553 are termed “legislative rules,” the rules that fit within this exemption are often referred to collectively as “nonlegislative rules.”⁶⁵

HALLEX is *not* created in accordance with the notice-and-comment requirements of § 553. Instead, it is authored by the SSA’s Office of Appellate Operations and the Office of the Chief Administrative Law Judge.⁶⁶ Nor is HALLEX published in the Federal Register or CFR. Rather, it is made “available for public inspection and copying”⁶⁷ online at the SSA website and in print at SSA field offices.⁶⁸ Because HALLEX fails to meet these requirements of informal rulemaking, it is procedurally valid only insofar as it falls under the exemption for nonlegislative rules. Put another way, HALLEX’s procedural validity turns on the

consumers still being deceived is attributable to the expense and burdensomeness of the informal rulemaking process.”)

⁶² See 5 USC § 553 (requiring notice of proposed rulemaking and a public comment period). See also 5 USC § 552(a)(1)(D) (requiring publication in the Federal Register of “substantive rules of general applicability adopted as authorized by law”).

⁶³ See 5 USC § 553(a), (b)(A)–(B).

⁶⁴ 5 USC § 553(b)(A).

⁶⁵ See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L J 1311, 1324 (1992).

⁶⁶ HALLEX at I-1-0-7 (cited in note 1) (stating that a change or addition to HALLEX is to be effected by either the Office of Appellate Operations or the Office of the Chief Administrative Law Judge, depending on the subject matter at issue).

⁶⁷ 5 USC § 552(a)(2)(C) (requiring that agencies make publicly available all “administrative staff manuals and instructions to staff that affect a member of the public”). For an argument that APA § 552(a) provides a legislative basis for according guidance documents the same minimal degree of binding force as agency adjudicatory precedent, see Strauss, 41 Duke L J at 1472–73 (cited in note 7). For a counterargument on this point, see William Funk, *A Primer on Nonlegislative Rules*, 53 Admin L Rev 1321, 1346 (2001).

⁶⁸ See HALLEX (cited in note 1) (providing access to HALLEX online); 20 CFR § 402.60 (requiring that the SSA make HALLEX available in its field offices).

notoriously murky distinction between legislative rules, which trigger informal rulemaking, and nonlegislative rules, which do not.⁶⁹

The ascendant test for distinguishing legislative and nonlegislative rules is the “legal effect test”⁷⁰ announced by the DC Circuit in *American Mining Congress v Mine Safety & Health Administration*.⁷¹ Under this test, a rule is legislative—and hence subject to informal rulemaking—whenever one of the following conditions obtains: (1) the rule is published in the CFR, (2) the agency has explicitly invoked its legislative authority, (3) the rule effectively overrules a prior legislative rule, or (4) the rule provides the sole adequate legislative basis for the agency action at issue.⁷²

Most or all of HALLEX’s provisions are procedurally valid nonlegislative rules under this test⁷³ and are thus instances of “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.”⁷⁴ It is worth briefly noting here that some provisions of HALLEX are best thought of as interpretive rules,⁷⁵ others as general statements of policy,⁷⁶ and still others as rules of agency organization, procedure, or practice.⁷⁷ The tenuous distinctions between these categories will be discussed in greater detail in Part III.

Even after determining that a provision of HALLEX is *procedurally valid*, there remains the conceptually distinct question of whether that provision *binds the SSA*.⁷⁸ Most courts refuse to hold guidance documents like HALLEX binding on the agencies

⁶⁹ See, for example, *Brock v Cathedral Bluffs Shale Oil Co*, 796 F2d 533, 536–37 (DC Cir 1986) (noting the difficulty in distinguishing what rules require informal rulemaking).

⁷⁰ Franklin, 120 Yale L J at 298–99 (cited in note 59) (quotation marks omitted).

⁷¹ 995 F2d 1106 (DC Cir 1993).

⁷² Id at 1112.

⁷³ Consider *Moore v Apfel*, 216 F3d 864, 868 (9th Cir 2000) (assuming that the provision of HALLEX at issue was procedurally valid); *Newton v Apfel*, 209 F3d 448, 459 (5th Cir 2000) (same). But see *Cordoba v Massanari*, 256 F3d 1044, 1046 (10th Cir 2001) (noting that the district court below invalidated two provisions of HALLEX on the ground that they were legislative rules subject to APA notice-and-comment requirements).

⁷⁴ 5 USC § 553(b)(A).

⁷⁵ See, for example, HALLEX at II-5-3-2 (cited in note 1) (prescribing a sliding scale approach for addressing borderline-age situations).

⁷⁶ See, for example, id at II-5-3-1 (describing the SSA’s policy regarding when a claimant with a psychiatric impairment may be excused for failing to follow prescribed treatment).

⁷⁷ See, for example, id at I-3-5-1 (stating that the Appeals Council should consider additional evidence presented in a request for review).

⁷⁸ For a summary of the debate over the binding force of guidance documents, see Yoav Dotan, *Making Consistency Consistent*, 57 Admin L Rev 995, 1041 & n 163 (2005).

that produce them.⁷⁹ Others rely on the Supreme Court's 1974 opinion in *Morton* to render guidance documents binding wherever "the rights of individuals are affected."⁸⁰

E. The Supreme Court on Guidance Documents

In *Morton*, the Supreme Court considered a guidance document of the Bureau of Indian Affairs (BIA).⁸¹ Ruiz, an American Indian, had applied to the BIA for benefits, but had been told that he was ineligible because he did not live on a reservation.⁸² This benefits-eligibility limitation requiring that a beneficiary live on a reservation originated not in a statute or regulation, but in the BIA Manual.⁸³ While the Court withheld judgment as to whether the BIA could limit its disbursement of benefits,⁸⁴ the Court held it improper for the agency to publish such a limitation in a guidance document.⁸⁵

On the way to reaching this conclusion, the Court noted that the BIA Manual itself required publication of all benefits-eligibility limitations in the Federal Register and CFR.⁸⁶ Stating that the BIA had thus failed to adhere to its own manual, the Court opined: "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required."⁸⁷ In other words, the Court enforced the manual's publication requirement—a nonlegislative rule—to invalidate the benefits-eligibility limitation barring Ruiz from benefits.

While this statement concerning "internal procedures" is frequently cited to support the view that HALLEX binds the SSA,⁸⁸ it was by no means necessary to the Court's holding in

⁷⁹ See, for example, *Vietnam Veterans of America v Secretary of the Navy*, 843 F2d 528, 537 (DC Cir 1988) ("[L]egislative rules bind the courts, while interpretive rules or policy statements do not.").

⁸⁰ *Morton*, 415 US at 235. For a case relying on *Morton* to hold a guidance document binding on its agency, see *Oglala Sioux Tribe of Indians v Andrus*, 603 F2d 707, 717–21 (8th Cir 1979).

⁸¹ *Morton*, 415 US at 235.

⁸² *Id.* at 204.

⁸³ *Id.* at 207.

⁸⁴ *Id.* at 211.

⁸⁵ *Morton*, 415 US at 236.

⁸⁶ *Id.* at 233.

⁸⁷ *Id.* at 235.

⁸⁸ See, for example, *Hall*, 660 F2d at 119 (citing *Morton* for the proposition that agencies must follow their internal procedures).

Morton. The benefits-eligibility limitation was a legislative rule that should have been promulgated using informal rulemaking. It was therefore invalid under the APA, regardless of whether the BIA was bound by the publication requirement in its manual.⁸⁹ The statement concerning internal procedures that has since become central to the debate over HALLEX was a mere dictum. *Morton* is anything but an unconditional affirmation of the binding force of guidance documents, particularly when read in light of subsequent cases.

One of those cases, *Schweiker v Hansen*,⁹⁰ involved yet another SSA guidance document. The agency's Claims Manual provided that SSA field representatives should instruct potential disability claimants to file an application even when uncertain of their eligibility.⁹¹ The claimant in *Hansen* had not been so instructed and therefore had failed to file an application as early as she otherwise could have.⁹² She argued that this violation of the Claims Manual required the SSA to pay her retroactive benefits for the period during which she was eligible for benefits but had not yet filed for them. The Court rejected her argument, reasoning that if even minor breaches of guidance documents sufficed to invalidate agency action, then "every alleged failure by an agent to follow instructions to the last detail" would require remand.⁹³ As glossed by multiple courts, *Hansen* represents a significant retreat from a prior commitment to enforcing agencies' internal procedures.⁹⁴

⁸⁹ See *Morton*, 415 US at 235 (holding that there was "no reason why the requirements of the Administrative Procedure Act could not or should not have been met"). *Morton* is a notoriously opaque decision, and it may be that the best interpretation of it is as a relic from an era when the Court was still working out its APA jurisprudence. See notes 162–63 and accompanying text. Regardless of whether the statement on internal agency procedures is viewed as a dictum unnecessary to the Court's holding or as a principle of administrative law that has since been discarded, the case should not be taken to require that HALLEX binds the SSA. See Part III.A.

⁹⁰ 450 US 785 (1981).

⁹¹ *Id.* at 786.

⁹² *Id.* (posing the question of whether a field officer's neglect of the Claims Manual estopped the SSA from denying retroactive benefits to the claimant).

⁹³ *Id.* at 789–90 (holding that the Claims Manual "has no legal force, and [] does not bind the SSA"), quoting *Hansen v Harris*, 619 F2d 942, 956 (2d Cir 1980) (Friendly dissenting). Unfortunately, only the dissent in *Schweiker v Hansen* observed the tension between the majority's opinion and the *Morton* dictum. See *Hansen*, 450 US at 795 (Marshall dissenting).

⁹⁴ See, for example, *EPI Corp v Chater*, 1996 WL 428409, *4 (6th Cir) ("*Morton* has been limited by [*Hansen*], which held that internal agency procedures do not bind the agency."); *Jackson v Culinary School of Washington, Ltd.*, 27 F3d 573, 584 n 21 (DC Cir

More recently, the Supreme Court has considered guidance documents from a different perspective—as agency interpretations of statutes or regulations analyzable under the *Chevron*⁹⁵ framework. The Court has consistently held that interpretations found in guidance documents do not warrant *Chevron* deference,⁹⁶ but rather the less deferential *Skidmore*⁹⁷ standard.⁹⁸ In other words, agency interpretations in guidance documents should be deferred to only insofar as those interpretations have the “power to persuade.”⁹⁹ For instance, in *Federal Express Corp v Holowecki*,¹⁰⁰ the Supreme Court held that the Equal Employment Opportunity Commission’s Compliance Manual should be accorded *Skidmore* deference, found the manual’s statutory interpretation persuasive, and therefore deferred to it.¹⁰¹ In another case decided the same year, the Court applied *Skidmore* deference to a different provision of the Compliance Manual, did not find it persuasive, and therefore did not defer to it.¹⁰² More recently, the Court granted *Skidmore* deference to the SSA’s Program Operations Manual System (POMS).¹⁰³ Like HALLEX, POMS¹⁰⁴ is a set of employee operating instructions.¹⁰⁵ The Court referred to POMS as comprising “administrative interpretations” that should be deferred to if persuasive.¹⁰⁶ Unlike POMS,

1994) (noting that the Court in *Hansen* retreated from *Morton*’s commitment to holding guidance documents binding), vac’d on other grounds 515 US 1139 (1995).

⁹⁵ *Chevron U.S.A. Inc v Natural Resources Defense Council, Inc*, 467 US 837 (1984).

⁹⁶ See *Christensen v Harris County*, 529 US 576, 587 (2000) (“Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”).

⁹⁷ *Skidmore v Swift & Co*, 323 US 134 (1944).

⁹⁸ See *Christensen*, 529 US at 587.

⁹⁹ *Skidmore*, 323 US at 140. *Skidmore* deference (as opposed to the more robust *Chevron* standard) applies where the agency interpretation at issue does not have the “force of law,” as determined by the formality of the procedure used in creating the interpretation. *United States v Mead Corp*, 533 US 218, 230, 234 (2001).

¹⁰⁰ 552 US 389 (2008).

¹⁰¹ *Id* at 399–402.

¹⁰² See *Kentucky Retirement Systems v Equal Employment Opportunity Commission*, 554 US 135, 150 (2008).

¹⁰³ See *Washington State Department of Social and Health Services v Guardianship Estate of Keffeler*, 537 US 371, 385 (2003) (stating that the Court’s interpretation of a federal statute was confirmed by the SSA’s own interpretation of that statute in POMS).

¹⁰⁴ SSA, *SSA’s Program Operations Manual System*, online at <https://secure.ssa.gov/apps10/poms.nsf/partlist!OpenView> (visited Nov 24, 2013) (“POMS”).

¹⁰⁵ See SSA, *Social Security Program Rules* (cited in note 45). HALLEX and POMS often cross-reference the other. See, for example, POMS DI 42010.021 (cross-referencing HALLEX on the subject of ALJ oral bench decisions).

¹⁰⁶ *Guardianship Estate of Keffeler*, 537 US at 385.

HALLEX has never been discussed at length by the Supreme Court.¹⁰⁷

Viewed together, the cases outlined above suggest that the Supreme Court does not examine guidance documents as such, but rather approaches them as embodying certain types of rules, either invalidating or giving effect to those rules in accordance with their type. It invalidates guidance documents that express legislative rules,¹⁰⁸ upholds those that embody nonlegislative rules, defers to those that represent persuasive interpretive rules (a subset of nonlegislative rules),¹⁰⁹ and enforces those that constitute some indefinite conception of internal agency procedure, the breach of which affects “the rights of individuals.”¹¹⁰

The significance of these cases is discussed further in Part III. But first, Part II examines the debate over HALLEX in the circuit courts.

II. HALLEX AND THE CIRCUIT COURTS OF APPEALS: TWO APPROACHES

There are two competing approaches to addressing cases in which the SSA has deviated from HALLEX. The first holds that the manual is binding on the SSA and that a violation of it constitutes reversible error if prejudicial to the claimant. The Fifth Circuit is currently the only proponent of this prejudicial-error approach, though the First and Tenth Circuits appear poised to adopt it as well. The second approach holds that HALLEX never binds the SSA. This nonbinding approach has been adopted by the Third, Sixth, and Ninth Circuits, and will likely be adopted by the Second, Seventh, Eighth, and DC Circuits as well. It remains unclear how the Fourth and Eleventh Circuits will come out on the issue.

A. The Fifth Circuit and the Prejudicial-Error Approach

The foundation for the Fifth Circuit’s treatment of HALLEX was laid over thirty years ago in *Hall v Schweiker*.¹¹¹ In *Hall*, the court held that the SSA’s failure to abide by an SSR constituted

¹⁰⁷ At most, the Court has briefly cited to HALLEX. See, for example, *Gisbrecht v Barnhart*, 535 US 789, 795 (2002) (citing a provision of HALLEX on fee arrangements).

¹⁰⁸ See *Morton*, 415 US at 236.

¹⁰⁹ See *Christensen*, 529 US at 587.

¹¹⁰ *Morton*, 415 US at 235.

¹¹¹ 660 F2d 116 (5th Cir 1981).

reversible error.¹¹² Paraphrasing *Morton* in part, it stated: “As a general rule, where the rights of individuals are affected, an agency must follow its own procedure Should an agency in its proceedings violate its rules and prejudice result, the proceedings are tainted and any actions resulting from the proceeding cannot stand.”¹¹³

The Fifth Circuit later extended this reasoning to HALLEX in *Newton v Apfel*.¹¹⁴ Newton had requested that the SSA Appeals Council review her claim, but her request had been rejected in a standard-form denial.¹¹⁵ This rejection accorded with the regulation,¹¹⁶ but violated HALLEX’s statement that the Appeals Council should specifically address additional evidence presented in a request for review.¹¹⁷ Quoting *Hall* (and thus paraphrasing *Morton*), the Fifth Circuit held that the SSA was bound to adhere to HALLEX because it must “follow its own procedures, even where the internal procedures are more rigorous than otherwise would be required.”¹¹⁸ But this did not dispose of the matter. Having determined that a violation of HALLEX *could* be reversible error, the court proceeded to inquire whether the violation in the instant case had been *prejudicial*. Since Newton’s additional evidence was not relevant to her claimed disability period,¹¹⁹ the Fifth Circuit determined that she had not been prejudiced and affirmed the SSA’s denial of her claim.¹²⁰

¹¹² Id at 118.

¹¹³ Id at 119.

¹¹⁴ 209 F3d 448 (5th Cir 2000).

¹¹⁵ Id at 459. The facts of *Newton* thus closely resembled those of the hypothetical cases used to introduce this Comment. The only difference is that, in *Newton*, the claimant’s additional evidence was not actually relevant to her claim. See id at 459–60.

¹¹⁶ See 20 CFR § 404.967 (stating that the Appeals Council may either dismiss or deny a request for review).

¹¹⁷ See *Newton*, 209 F3d at 459.

¹¹⁸ Id, quoting *Hall*, 660 F2d at 119.

¹¹⁹ See *Newton*, 209 F3d at 459–60.

¹²⁰ See id. The holding in *Newton* was reaffirmed just one year later in *Shave v Apfel*, 238 F3d 592, 596–97 (5th Cir 2001) (“This Circuit has expressed a strong preference for requiring the social security administration to follow its own internal procedures.”). As in *Newton*, the court in *Shave* acknowledged that HALLEX creates judicially enforceable rights, but then held that the claimant had not been prejudiced by the agency’s deviation from its manual. Id. Given the ultimate outcome of both *Newton* and *Shave*, one might question whether the prejudicial-error approach has any real teeth to it. But this fails to account for the entire picture: district courts have reversed cases involving prejudicial violations of HALLEX, and, moreover, the mere threat of reversal incentivizes the SSA to ensure that its employees and ALJs conform to HALLEX’s instructions. See, for example, *Hines v Barnhart*, 2003 WL 23323615, *5–6 (ND Tex) (reversing and remanding based on an ALJ’s prejudicial failure to follow HALLEX); *Bellard v Astrue*, 2011 WL 13847, *3–5 (WD La) (same).

The Fifth Circuit clearly views *Newton* as a logical extension of *Hall*. This view, however, elides a critical distinction between HALLEX and SSRs. In *Hall*, the Fifth Circuit determined that SSRs bind the SSA by reading two provisions side by side: Congress's grant of authority to the SSA to promulgate regulations and the SSA's regulation binding itself to SSRs.¹²¹ This reasoning worked with regard to SSRs, but cannot extend to HALLEX. The SSA has never expressly bound itself to HALLEX, and so the manual does not bind the SSA in the same way that SSRs do. Unfortunately, *Newton* ignores this distinction, shifting the Fifth Circuit's analysis of SSRs onto HALLEX without taking into account the significant differences between the two.¹²² This, of course, does not prove that the prejudicial-error approach is without merit—only that *Newton* does not adequately defend it.¹²³

Though the Fifth Circuit is currently the only proponent of the prejudicial-error approach, other circuits may adopt it as well.

A district court in the First Circuit has predicted that the circuit will follow *Newton*.¹²⁴ Though the district court's conclusion was based on a questionable interpretation of circuit precedent,¹²⁵ it may nonetheless stand since another district court decision has made a similar prediction.¹²⁶

The Tenth Circuit might adopt the prejudicial-error approach as well. In an unpublished decision, it cited to the Fifth

¹²¹ *Hall*, 660 F2d at 119 n 4 (laying out Congress's grant of statutory authority to the SSA and the SSA's regulation binding itself to SSRs side by side).

¹²² Indeed, *Hall*'s statement regarding agencies' internal procedures was entirely superfluous to that case's holding. Because the SSA was already bound by regulation to follow SSRs, it was irrelevant whether SSRs were also binding by virtue of SSRs being internal procedures affecting the rights of individuals.

¹²³ Moreover, there is room to maintain that, while *Newton* was incorrectly decided, *Hall* was correctly decided—that HALLEX does not bind the SSA, even though SSRs do.

¹²⁴ See *Palmer v Barnhart*, 2004 WL 1529262, *2 (D Me). *Palmer* relies on *Avery v Secretary of Health and Human Services*, 797 F2d 19, 23–24 (1st Cir 1986). In *Avery*, the First Circuit addressed the SSA's other set of employee operating instructions, POMS, and held that the plaintiffs' challenge to a substantively questionable SSR was mooted by the acceptable interpretation given it in that manual. *Id.* (“We [] construe POMS [] as being the latest word on departmental pain policy, committing the Secretary and superceding any inconsistent discussion and examples.”). The district court in *Palmer* contended that, since *Avery* “require[s]” the SSA to comply with POMS, and since other circuits treat POMS and HALLEX alike, *Avery* implies that HALLEX is binding on the SSA. See *Palmer*, 2004 WL 1529262 at *2.

¹²⁵ The argument is suspect because *Avery* did not require the SSA to comply with POMS, but only deferred to its interpretation of an SSR. See *Avery*, 797 F2d at 23–24.

¹²⁶ *Daves v Astrue*, 2012 WL 1098449, *3 (D Me) (“[T]he First Circuit . . . can be expected to hold the commissioner to the terms of the HALLEX.”).

Circuit and stated: “We assume without deciding that we can grant relief for prejudicial violations of [] HALLEX provisions.”¹²⁷ Though the court merely considered the prejudicial-error approach for the sake of argument, its discussion appears to attach more weight to the approach than other circuits have.¹²⁸

B. The Ninth Circuit and the Nonbinding Approach

The Ninth Circuit has held that HALLEX does not bind the SSA. Much as the Fifth Circuit’s prejudicial-error approach derived from *Hall*, the Ninth Circuit’s nonbinding approach also has roots in prior circuit precedent. In fact, one might say that *Hall* is to the Fifth Circuit’s approach in *Newton* as *United States v Fifty-Three (53) Eclectus Parrots*¹²⁹ is to the Ninth Circuit’s stake in the HALLEX debate.

Eclectus Parrots concerned George Allen, a bird trader who had imported at least fifty-three eclectus parrots into the United States.¹³⁰ Unbeknownst to Allen, importation of this rare bird violated Indonesian law—a violation that, in turn, triggered a US statute requiring forfeiture of illegally imported birds or mammals.¹³¹ Allen contested the forfeiture, arguing that the foreign law serving as the predicate offense had not been published by the US Customs Office as required by the agency’s Customs Manual.¹³² The Ninth Circuit rejected his argument and held that the Customs Office was not required to follow its guidance document for two reasons. First, the Customs Manual was not a legislative rule. Second, it was not “promulgated pursuant to a specific statutory grant of authority and in conformance with [] procedural requirements.”¹³³

¹²⁷ *Butterick v Astrue*, 2011 WL 2689053, *2 (10th Cir).

¹²⁸ It should be noted, however, that the court further hedged its position in a footnote. See *id.* at *2 n 3.

¹²⁹ 685 F2d 1131 (9th Cir 1982).

¹³⁰ *Id.* at 1132.

¹³¹ *Id.* at 1132–33.

¹³² *Id.* at 1134–35.

¹³³ *Fifty-Three (53) Eclectus Parrots*, 685 F2d at 1136 (“[N]ot all agency policy pronouncements which find their way to the public can be considered regulations enforceable in federal court.”), quoting *Rank v Nimmo*, 677 F2d 692, 698 (9th Cir 1982). At the end of day, the court held that knowledge of the predicate offense was unnecessary for forfeiture—and Allen lost his fifty-three parrots. *Fifty-Three (53) Eclectus Parrots*, 685 F2d at 1137 (affirming summary judgment against Allen).

Eclectus Parrots set the stage for the Ninth Circuit's decision regarding HALLEX in *Moore v Apfel*.¹³⁴ *Moore* involved a claim for disability benefits that had been remanded by the Appeals Council twice before—both times to the same ALJ.¹³⁵ On appeal to the district court, Moore argued that the SSA committed reversible error in assigning his case to the same ALJ after the second remand because HALLEX required assignation to a new ALJ under such circumstances.¹³⁶ Applying *Eclectus Parrots*, the Ninth Circuit held that HALLEX failed to bind the SSA because it neither prescribed a legislative rule nor conformed to procedural requirements.¹³⁷ Since *Moore*, the Ninth Circuit has repeatedly maintained that HALLEX does not create judicially enforceable rights.¹³⁸

Although this Comment advocates the adoption of the non-binding approach, it is worth noting up front some weaknesses in the Ninth Circuit's brief treatment of the subject. *Moore* applied something like the legal-effect test to resolve the issue of whether HALLEX was procedurally valid, and then made the result of that test dispositive of whether HALLEX bound the SSA. That is, *Moore* essentially tied the binding effect of HALLEX to its categorization as either legislative or nonlegislative. The opinion did not so much as mention *Morton* or other cases holding that guidance documents may sometimes bind agencies.¹³⁹ Moreover, it ignored an objection based on reliance—the contention that the SSA should adhere to HALLEX because it is a publicly available manual upon which claimants may base their conduct and expectations. Even though the Ninth Circuit recognized and rebutted a version of this reliance argument in *Eclectus Parrots*,¹⁴⁰ it failed to address the issue with regard to

¹³⁴ 216 F3d 864 (9th Cir 2000).

¹³⁵ *Id.* at 866.

¹³⁶ *Id.* at 866–67.

¹³⁷ *Id.* at 868–69.

¹³⁸ See *Parra v Astrue*, 481 F3d 742, 749 (9th Cir 2007) (stating that the Ninth Circuit will not review allegations of noncompliance with HALLEX or POMS); *Bunnell v Barnhart*, 336 F3d 1112, 1115 (9th Cir 2003) (holding that HALLEX is without the force and effect of law).

¹³⁹ For an example of a case interpreting *Morton* to require agencies to adhere to their internal procedures, see *Oglala Sioux Tribe of Indians v Andrus*, 603 F2d 707, 717–21 (8th Cir 1979).

¹⁴⁰ See *Fifty-Three (53) Eclectus Parrots*, 685 F2d at 1136 (noting that the Customs Manual was “an internal agency guide for Customs offices . . . not intended for the use of the general public”).

HALLEX in *Moore*. Better arguments are needed on both these fronts if the nonbinding approach is to win out.

Nonetheless, other circuits beside the Ninth Circuit have adopted the nonbinding approach. The Third Circuit has stated in multiple (though unpublished) decisions that both POMS and HALLEX “create no judicially-enforceable rights.”¹⁴¹ And the Sixth Circuit has stated that HALLEX does not create judicially enforceable rights, though it may “bolster[]” the court’s interpretation of SSA regulations.¹⁴²

Other circuits are likely to adopt the nonbinding approach as well. The DC Circuit has a long line of cases that imply it will not hold HALLEX binding on the SSA.¹⁴³ The Second Circuit’s district courts have consistently held that a failure to follow HALLEX does not constitute reversible error.¹⁴⁴ The Seventh Circuit has distinguished HALLEX from SSRs in a manner suggesting that it too will adopt the nonbinding approach.¹⁴⁵ Finally,

¹⁴¹ *Bordes v Commissioner of Social Security*, 2007 WL 1454289, *4 (3d Cir) (holding that POMS and HALLEX do not impose judicially enforceable rights). See also *Chaluisan v Commissioner of Social Security*, 2012 WL 2004983, *3 (3d Cir) (“Internal social security manuals lack the force of law and do not bind the Social Security Administration.”). Though unpublished, *Bordes* has been cited by district courts in the Third Circuit. See, for example, *Snyder v Astrue*, 2010 WL 2403795, *5 (D Del); *Reed v Barnehart*, 2008 WL 2835331, *7 (D NJ) (“While not precedential, the Third Circuit confirmed in its recent decision in *Bordes* that HALLEX creates no ‘judicially-enforceable rights.’”).

¹⁴² *Bowie v Commissioner of Social Security*, 539 F3d 395, 399 (6th Cir 2008). See also *Ferriell v Commissioner of Social Security*, 614 F3d 611, 618 n 4 (6th Cir 2010) (“[W]e note that, though internal manuals like POMS and HALLEX might provide some evidence of the SSA’s interpretations of its regulations, they are properly interpreted in light of remarks promulgated by the SSA as part of the notice-and-comment procedures.”).

¹⁴³ The DC Circuit has observed that, while interpretive rules and policy statements can “affect an agency’s decisionmaking,” the agency nonetheless “remains free . . . to diverge from whatever outcome the policy statement or interpretive rule might suggest.” *Vietnam Veterans of America v Secretary of the Navy*, 843 F2d 528, 537 (DC Cir 1988). See also *Community Nutrition Institute v Young*, 818 F2d 943, 949 (DC Cir 1987); *Brock v Cathedral Bluffs Shale Oil Co*, 796 F2d 533, 539 (DC Cir 1986). The DC Circuit, like the Ninth Circuit in *Lockwood v Commissioner of Social Security*, 616 F3d 1068, 1073 (9th Cir 2010), has stated that it will accord *Skidmore* deference to HALLEX. *Power v Barnhart*, 292 F3d 781, 786 (DC Cir 2002) (noting that both parties to the case agreed that HALLEX and POMS could be accorded, at most, *Skidmore* deference).

¹⁴⁴ See, for example, *Edwards v Astrue*, 2011 WL 3490024, *6 (D Conn). One particularly vexed judge of the Eastern District of New York wrote: “This is now—at least—the third time that Plaintiff’s counsel has made similar arguments regarding the HALLEX. . . . Plaintiff’s counsel should now be on notice that future, frivolous appeals to the HALLEX will not be considered.” *Harper v Commissioner of Social Security*, 2010 WL 5477758, *4 (EDNY).

¹⁴⁵ See *Cromer v Apfel*, 2000 WL 1544778, *2–3 (7th Cir) (rejecting the claimant’s argument that the SSA’s violation of HALLEX was reversible error because the claimant, who bore the burden of demonstrating such a violation, had failed to do so). See also

the Eighth Circuit has leaned toward the nonbinding approach to HALLEX by adopting such an approach with regard to POMS.¹⁴⁶

It is unclear how the remaining circuits will come out on the issue. The Fourth Circuit has yet to address it,¹⁴⁷ and its district courts have reached conflicting results.¹⁴⁸ The same may be said of the Eleventh Circuit.¹⁴⁹

C. A Note on *Skidmore* Deference

An additional wrinkle in the Ninth Circuit's approach to HALLEX has the potential to cause confusion. In *Lockwood v Commissioner Social Security Administration*,¹⁵⁰ the Ninth Circuit held that both HALLEX and POMS do not bind the SSA but do represent agency interpretations of statutes or regulations that are entitled to respect.¹⁵¹ That is, the circuit held that it would accord *Skidmore* deference to both manuals.¹⁵²

Figueroa v Astrue, 848 F Supp 2d 894, 901 n 4 (ND Ill 2012) (“The Seventh Circuit has not determined whether the HALLEX is binding on the Commissioner like a Social Security Ruling is.”); *Plumb v Astrue*, 2011 WL 3610647, *2 n 1 (ND Ind) (observing that district courts in the Seventh Circuit tend to favor the nonbinding approach).

¹⁴⁶ *Shontos v Barnhart*, 328 F3d 418, 424 (8th Cir 2003) (“Although POMS guidelines do not have legal force, and do not bind the Commissioner, this court has instructed that an ALJ should consider the POMS guidelines.”). See also *Ellis v Astrue*, 2008 WL 4449452, *16 (ED Mo) (holding that, in light of *Shontos*, the Eighth Circuit would most likely determine that HALLEX does not bind the SSA). Still, the circuit has not yet squarely addressed the issue. See *Lovett v Astrue*, 2012 WL 3064272, *10 (ED Mo).

¹⁴⁷ See *Faulkenberry v Astrue*, 2012 WL 3000664, *7 n 4 (D SC).

¹⁴⁸ Compare *Melvin v Astrue*, 602 F Supp 2d 694, 704–05 (ED NC 2009) (holding that HALLEX lacks the force of law), with *Way v Astrue*, 789 F Supp 2d 652, 665, 668 (D SC 2011) (adopting the Fifth Circuit's approach explicitly and remanding to the SSA).

¹⁴⁹ The Eleventh Circuit has held that HALLEX may not serve as a basis for remand to consider new evidence. *Carroll v Social Security Administration, Commissioner*, 2011 WL 6152279, *2 (11th Cir); *Ingram v Commissioner of Social Security Administration*, 496 F3d 1253, 1267 (11th Cir 2007). However, it has not yet decided whether HALLEX may ever bind the SSA. See *George v Astrue*, 2009 WL 1950266, *2 (11th Cir) (“Here, even if we assume that § I-2-8-40 of HALLEX carries the force of law—a very big assumption—the ALJ did not violate it.”). Its district courts have reached conflicting results. Compare *Hall v Commissioner of Social Security*, 2007 WL 4981325, *10 (MD Fla) (“HALLEX like all administrative manuals lacks the legal authority to bind the ALJ.”), with *Williams v Astrue*, 2012 WL 2872047, *5 & n 8 (MD Ala) (noting that the Fifth Circuit's decision in *Hall*, the case that was the basis for *Newton*, is binding on the Eleventh Circuit just as it is on the Fifth, and predicting that the Eleventh Circuit will hold HALLEX binding on the SSA).

¹⁵⁰ 616 F3d 1068 (9th Cir 2010).

¹⁵¹ *Id.* at 1073 (according *Skidmore* deference to HALLEX and POMS, but holding that the interpretive rule at issue was not persuasive). See also *Clark v Astrue*, 529 F3d 1211, 1216 (9th Cir 2008) (interpreting the award of reasonable attorney's fees under

In comparing *Skidmore* deference to the question of whether the SSA must comply with HALLEX, it is important to avoid conflating the certainly binding authority of a statute or regulation with any purported binding authority of HALLEX. A court may apply *Skidmore* deference to HALLEX, find HALLEX's interpretation persuasive, require the SSA to follow that interpretation, and still act in a manner perfectly consistent with the nonbinding approach. In such cases, it is the statute or regulation that binds the SSA, not HALLEX. By contrast, the prejudicial-error approach holds that it is HALLEX itself that binds the SSA and that creates judicially enforceable rights for claimants.

This point is illustrated by the Ninth Circuit's decision in *McNatt v Apfel*.¹⁵³ In that case, the SSA had dismissed McNatt's claim because he had failed to appear at his ALJ hearing. However, even though McNatt had been absent from the hearing, his representative had been present. On appeal to federal court, McNatt argued that the SSA's dismissal of his case was improper because HALLEX states that "[i]f an appointed representative appears at the scheduled hearing without the claimant, . . . dismissal is never appropriate."¹⁵⁴ The Ninth Circuit used this provision of HALLEX to interpret the governing regulation, found HALLEX's interpretation of that regulation persuasive, and so agreed with McNatt that dismissal of his case was improper under the regulation.¹⁵⁵ But this in no way contradicted the nonbinding approach because "[i]t was the *Federal Regulation* that had the force and effect of law, not HALLEX."¹⁵⁶

* * *

One might characterize the debate over whether HALLEX binds the SSA as an example of courts talking past each other in place of engaging with each other's arguments. The Fifth Circuit followed *Morton's* assertion that internal agency procedures are judicially enforceable, but did so without discussion of why this

42 USC § 406(b)(1) in accordance with the SSA's persuasive interpretation of that statute in HALLEX).

¹⁵² See note 99.

¹⁵³ 201 F3d 1084 (9th Cir 2000).

¹⁵⁴ HALLEX at I-2-4-25 (cited in note 1).

¹⁵⁵ *McNatt*, 201 F3d at 1088 (reversing and remanding based on HALLEX's interpretation of when an individual's claim should be dismissed for failure to appear at an ALJ hearing).

¹⁵⁶ *Moore*, 216 F3d at 869 (emphasis added) (distinguishing *McNatt* from the instant case).

should apply to HALLEX. Similarly, the Ninth Circuit adhered to the oft-espoused view that guidance documents never bind agencies,¹⁵⁷ but failed to consider *Morton* or respond to other arguments for why this need not be the case.¹⁵⁸

In fact, the Fifth and Ninth Circuits have vacillated on the broader question of whether guidance documents in general (as opposed to HALLEX specifically) may ever bind agencies. Before addressing HALLEX in *Newton*, the Fifth Circuit had considered a different guidance document and opined that “mandatory terms and an impact on substantive rights” are insufficient to render a guidance document binding.¹⁵⁹ Likewise, after *Moore*, the Ninth Circuit suggested that the doctrine according binding status to legislative rules “extends beyond formal regulations,” possibly even to agency “memoranda.”¹⁶⁰

Thus, the Fifth and Ninth Circuits’ split over HALLEX appears to be symptomatic of a broader uncertainty over the proper role of guidance documents and of the nonlegislative rules they contain. Part III attempts to resolve this uncertainty through a more systematic defense of the nonbinding approach than was given it in *Moore*.

III. HALLEX AND THE NONBINDING APPROACH: WHY THE SSA IS NOT BOUND BY ITS GUIDANCE DOCUMENT

Two sources of confusion infect the debate over whether HALLEX binds the SSA. First, repeated and indiscriminate invocation of the *Morton* dictum has muddied the question of whether guidance documents bind agencies. Second, the diversity of rules found in HALLEX makes analyzing that manual difficult.¹⁶¹

¹⁵⁷ See *id.* at 868.

¹⁵⁸ Perhaps, this reluctance to engage with opposing arguments is unsurprising given the complexity of the issue and the continuing controversy over whether guidance documents ever bind agencies. For a survey of the debate among commentators, see Dotan, 57 Admin L Rev at 1041 n 163 (cited in note 78).

¹⁵⁹ *Fano v O’Neill*, 806 F2d 1262, 1264 (5th Cir 1987) (holding that the Immigration and Naturalization Service’s alleged violation of its Operations Instructions could not, by itself, warrant remand). The Fifth Circuit considered *Hansen*, remarking, “[i]f mandatory terms and an impact on substantive rights were sufficient to give an agency rule binding effect, then [*Hansen*] . . . [was] incorrectly decided.” *Id.*

¹⁶⁰ *Alcaraz v INS*, 384 F3d 1150, 1162 (9th Cir 2004) (declining to address whether memoranda issued by the Immigration and Naturalization Service were sufficient to establish a binding policy).

¹⁶¹ Recall from Part I that the Supreme Court generally does not examine guidance documents as such, but rather interprets them as embodying certain types of rules. See notes 108–10 and accompanying text. For examples of the different types of rules found in HALLEX, see notes 75–77.

Part III addresses each of these sources of confusion in turn. It first argues that *Morton* does not obligate lower courts to hold guidance documents binding on agencies. Where guidance documents should be held binding, APA § 706 is a better, clearer means than *Morton* to reaching that result. Part III then elaborates on that argument by developing a framework for considering different types of nonlegislative rules. In applying that framework to HALLEX, this Comment argues that certain features of the manual as a whole categorically exclude it from having binding authority.

A. *Morton* Revisited

Morton has been labeled “one of the most unreliable of [] Supreme Court administrative law decisions” of its time.¹⁶² One might compare use of the case to a child’s game of telephone: *Morton*’s statement regarding internal agency procedures has been restated and reformulated so many times that its interpreters have forgotten that it was a dictum to begin with and that its reach has been narrowed by subsequent cases.¹⁶³

The publication requirement that was the subject of the *Morton* dictum stated the following: “Directives which relate to the public, including Indians, are published in the Federal Register and codified in [the CFR].”¹⁶⁴ At the time *Morton* was decided, the BIA had failed to follow this provision; its benefits-eligibility requirements were in neither the Federal Register nor the CFR.¹⁶⁵ This created a situation in which the requirements for benefits were unclear—a situation that the BIA capitalized on by informing Congress that it required funds to serve Indians living *near* reservations, even though the BIA manual stated that only Indians living *on* reservations were eligible.¹⁶⁶ Aware of this discrepancy, the Supreme Court observed: “Particularly

¹⁶² Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency’s Violation of Its Own Regulations or Other Misconduct*, 44 Admin L Rev 653, 674 (1992).

¹⁶³ For cases expressly or implicitly suggesting narrow interpretations of *Morton*, see *Lincoln v Vigil*, 508 US 182, 199 (1993) (emphasizing that the Supreme Court reached the result that it did in *Morton*, in part, because the denial of benefits would have been inconsistent with the Government’s obligation to a historically oppressed minority); *Hansen*, 450 US at 789–90 (holding that the SSA Claims Manual does not bind the SSA).

¹⁶⁴ *Morton*, 415 US at 233.

¹⁶⁵ *Id* at 234.

¹⁶⁶ *Id* at 236.

here, where the BIA has continually represented to Congress, when seeking funds, that Indians living near reservations are within the service area, it is essential that the legitimate expectation of these needy Indians not be extinguished by . . . an unpublished *ad hoc* determination.”¹⁶⁷ It was in light of this background that the Supreme Court stated: “Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures.”¹⁶⁸ Thus, two policies animated this statement: one was a need to enable better congressional oversight, and another was a desire to protect a historically oppressed minority.¹⁶⁹

Recall from Part I that the Court need not have mentioned internal agency procedures at all in striking down the BIA Manual’s benefits-eligibility requirement, since the requirement was certainly invalid under the APA.¹⁷⁰ Recall as well that the statement regarding internal agency procedures was implicitly narrowed in *Hansen*, where the Court held that the SSA Claims Manual’s instruction to field officers did not bind the SSA.¹⁷¹ Because this language from *Morton* was tailored to meet specific policy aims, was superfluous to the Court’s decision,¹⁷² and has been narrowed by subsequent cases,¹⁷³ it by no means obligates lower courts to enforce the nonlegislative rules found in guidance documents.

B. A Different Reason to Hold Some Nonlegislative Rules Binding on Agencies

This is not to say, however, that nonlegislative rules should never bind agencies. The very persistence of the phrase “[w]here the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures” is a testament to its intuitive

¹⁶⁷ *Id.*

¹⁶⁸ *Morton*, 415 US at 235.

¹⁶⁹ This second policy was later emphasized when the Court clarified that it reached the result it did in *Morton*, in part, because the denial of benefits would have been inconsistent with the government’s obligation to Indians. See *Lincoln*, 508 US at 199.

¹⁷⁰ See note 89 and accompanying text.

¹⁷¹ See notes 90–94 and accompanying text.

¹⁷² See note 89 and accompanying text.

¹⁷³ See notes 90–94 and accompanying text. Consider as well the DC Circuit’s gloss on *Morton* and *Hansen*: “Although *Schweiker* [*v Hansen*] is terse, the decision appears to turn implicitly on the notion that the applicant’s rights were not detrimentally affected by the agency’s breach of its own internal rules.” *Jackson v Culinary School of Washington, Ltd.*, 27 F3d 573, 584 n 21 (DC Cir 1994).

appeal.¹⁷⁴ The intuition responsible for the persistence of the phrase is likely that agencies should not deviate from a guidance document that the public has *relied* upon.

Reliance on guidance documents may sometimes be a legitimate concern. Since guidance documents are always publicly available (as required by the APA),¹⁷⁵ it is indeed possible that individuals will rely on them. And if individuals reasonably rely on an agency's guidance documents, it seems unfair that the agency should then be able to act otherwise with impunity. If an agency deviates from a guidance document that reasonably invites reliance, its action is "arbitrary" and "capricious" within the meaning of § 706 of the APA.¹⁷⁶ This Section provides a better basis than *Morton* for holding some—though not all—guidance documents binding on their agencies.¹⁷⁷

This line of reasoning may be illustrated by *Oglala Sioux Tribe of Indians v Andrus*.¹⁷⁸ There, the court enforced the BIA's "Guidelines for Consultation with Tribal Groups on Personnel Management Within the Bureau of Indian Affairs" against the BIA.¹⁷⁹ The court held that this guidance document was binding on its agency for two reasons. First, the BIA's deviation from its internal procedures failed to accord with what the court took to be required by *Morton*. Second, that same deviation from internal procedures was arbitrary and capricious under APA § 706.¹⁸⁰ The reasoning advanced by this Comment contends that only the second of these was a good reason for enforcing the guidance document at issue. The other—the citation to *Morton*—was

¹⁷⁴ *Morton*, 415 US at 235.

¹⁷⁵ Guidance documents must be made available for copying and inspection pursuant to APA § 552. See note 67.

¹⁷⁶ 5 USC § 706 (stating that a court reviewing agency action "shall . . . hold unlawful and set aside" the action if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

¹⁷⁷ Consider in this light the differences between the BIA Manual's publication requirement and the Claims Manual's provision that SSA field officers advise disability claimants to file for benefits. Disregard of the BIA Manual's publication requirement posed a real danger that individuals entitled to statutory benefits would never be apprised of significant encroachments on their entitlement, *even while expecting to be so advised*. By contrast, disregard of the Claims Manual provision considered in *Hansen* merely entailed the risk that potentially eligible claimants would not be advised to file for benefits. No doubt, the claimant in *Hansen* did not rely on being so advised.

¹⁷⁸ 603 F2d 707 (8th Cir 1979).

¹⁷⁹ *Id* at 717–21.

¹⁸⁰ *Id* at 713–14.

based on an interpretation of that case that this Comment has shown to be inapt.¹⁸¹

This line of reasoning provides a clearer means of addressing the question of whether HALLEX binds the SSA. However, it needs to be fleshed out by considering how it applies to different types of nonlegislative rules.

C. A Framework for Considering Nonlegislative Rules

Guidance documents are only procedurally valid if they are excepted from the APA's informal-rulemaking requirements by the exemption for nonlegislative rules.¹⁸² But, not all nonlegislative rules are alike. Four types of nonlegislative rules may be identified: (1) invalid nonlegislative rules (or, what amounts to the same thing, procedurally deficient legislative rules), (2) interpretive rules, (3) policy statements, and (4) procedural rules.

Some nonlegislative rules promulgated in guidance documents are invalid.¹⁸³ As stated above, the test for determining whether a nonlegislative rule is invalid is the legal-effect test of *American Mining Congress*. Where a nonlegislative rule does not have legal effect and so is not properly exempted from APA § 553,¹⁸⁴ it will be struck down just as the BIA Manual's benefits-eligibility limitation was struck down in *Morton*.

Valid nonlegislative rules, by contrast, are exempted from APA § 553 as "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice."¹⁸⁵ As is implied by the language of the APA, these rules may fall into any one of three subcategories: (1) interpretive rules, (2) policy statements, and (3) procedural rules. While it is debatable whether there are meaningful distinctions between these subcategories,¹⁸⁶ they are nonetheless helpful tools for understanding when nonlegislative rules bind agencies.

¹⁸¹ See Part III.A.

¹⁸² See notes 62–65 and accompanying text.

¹⁸³ Invalid nonlegislative rules are just procedurally deficient legislative rules. They have also been referred to as "spurious rules." Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 Admin L J Am U 1, 7–10 (1994).

¹⁸⁴ See *American Mining Congress*, 995 F2d at 1112. See also notes 70–72 and accompanying text.

¹⁸⁵ 5 USC § 553(b)(A).

¹⁸⁶ For one account of how to distinguish between interpretive rules, policy statements, and procedural rules, see Anthony, 41 Duke L J at 1325 (cited in note 65).

Interpretive rules represent agency interpretations of other authorities¹⁸⁷ and are accorded *Skidmore* deference.¹⁸⁸ They do not bind agencies. Even where a court enforces an agency's interpretation of a regulation or statute against the agency, it is the statute or regulation that binds, not the interpretive rule. Consider once again the Ninth Circuit's decision in *McNatt*. There, the court addressed HALLEX's interpretation of a regulation, found that interpretation persuasive, and remanded McNatt's claim for proceedings consistent with that interpretation of the regulation.¹⁸⁹ But it was the regulation that bound the SSA, not the interpretive rule.

Policy statements are pronouncements on how an agency intends to act.¹⁹⁰ They are, however, only tenuously distinguishable from interpretive rules, since statements of agency intention may be construed as interpretations of that agency's statutory mandate. Insofar as the two categories are distinguishable, it is because policy statements express an intention to act in a way that is consistent with, but not required by, other binding authority.¹⁹¹ Regardless of whether policy statements are properly considered separate from interpretive rules, they are not binding on agencies. If policy statements are coextensive with interpretive rules, then they are not binding because interpretive rules are not binding. If, on the other hand, policy statements represent agency intentions distinct from interpretive rules, they are still not binding because policy statements are, by definition, only tentative.¹⁹² As one court has put it, "[a] binding policy is an

¹⁸⁷ See *id.*

¹⁸⁸ See notes 96–106 and accompanying text.

¹⁸⁹ *McNatt*, 201 F3d at 1088 (reversing and remanding based on HALLEX's interpretation of when an individual's claim should be dismissed for failure to appear at an ALJ hearing).

¹⁹⁰ See, for example, Daniel A. Kracov and Robert P. Brady, *Food and Drug Administration Advisory Opinions and Guidance Documents after Community Nutrition Institute v. Young*, 48 Food & Drug L J 47, 49 (1993).

¹⁹¹ See Anthony, 41 Duke L J at 1326 (cited in note 65) ("If the document goes beyond a fair interpretation of existing legislation, it is not an interpretive rule. [If] it was not promulgated legislatively, it cannot be a legislative rule; it therefore is a policy statement.") (citations omitted).

¹⁹² It is the hallmark of a policy statement to be merely tentative. See, for example, James Hunnicutt, Note, *Another Reason to Reform the Federal Regulatory System: Agencies' Treating Nonlegislative Rules as Binding Law*, 41 BC L Rev 153, 183 (1999) ("If both agency employees and members of the public understand that nonlegislative rules use tentative language and are not legally binding, less confusion will exist."); Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 Duke L J 381, 386 ("[A]n agency may state tentative standards in the form of a nonlegislative rule.").

oxymoron.”¹⁹³ An example of a policy statement is found in *Padulla v Webster*.¹⁹⁴ There, the DC Circuit held that letters the FBI sent to law schools announcing a policy against discrimination on the basis of sexual orientation were not binding on the FBI.¹⁹⁵

Finally, procedural rules have been defined as rules that merely “alter the manner in which the parties present themselves or their viewpoints to the agency.”¹⁹⁶ Procedural rules are distinguishable from interpretive rules and policy statements on the grounds that procedural rules neither interpret other authority nor state broad agency intentions. Rather, they specify how an agency specifically proposes to go about its business. Two examples of procedural rules are the BIA Manual’s publication requirement that was arguably binding in *Morton*¹⁹⁷ and the provision of the Claims Manual that was held nonbinding in *Hansen*.¹⁹⁸ Given the divergent results of these two cases, it is not clear whether procedural rules bind agencies. This analysis of interpretive rules, policy statements, and procedural rules is summarized in Table 1.

¹⁹³ *Vietnam Veterans of America*, 843 F2d at 537.

¹⁹⁴ 822 F2d 97 (DC Cir 1987).

¹⁹⁵ *Id* at 100–01.

¹⁹⁶ *Electronic Privacy Information Center v United States Department of Homeland Security*, 653 F3d 1, 5 (DC Cir 2011), quoting *Chamber of Commerce of the United States v United States Department of Labor*, 174 F3d 206, 211 (DC Cir 1999).

¹⁹⁷ See *Morton*, 415 US at 235.

¹⁹⁸ *Hansen*, 450 US at 789–90.

TABLE 1. A TAXONOMY OF NONLEGISLATIVE RULES

		Procedural Validity	
		Properly Exempted from APA § 553	Not Properly Exempted from APA § 553
Function	Interpretation	Nonbinding interpretive rules, like the provision of HALLEX in <i>McNatt</i> .	Invalid nonlegislative rules/procedurally deficient legislative rules, like the benefits-eligibility limitation in <i>Morton</i> .
	Policy	Nonbinding policy statements, like the FBI's letters in <i>Padula</i> .	
	Procedure	Nonbinding procedural rules, like the Claims Manual in <i>Hansen</i> .	
		Binding procedural rules, like the publication requirement in <i>Morton</i> .	

The preceding analysis suggests the following framework for considering guidance documents. First, the court reviewing an appeal from agency action implicating a guidance document should determine whether the particular provision of the guidance document at issue is exempted from APA § 553. Second, if the provision is exempted, the court should determine whether that provision interprets other authority, states an agency intention, or describes agency procedure. If the provision interprets other authority, then it is an interpretive rule, and *Skidmore* deference should be applied. In this case, the provision will not bind the agency, though the underlying regulation or statute may. If the provision states an agency intention, then it is merely a policy statement, and has no binding effect whatsoever. Finally, if the provision describes agency procedure, then it is a procedural rule, and the court must determine whether it reasonably invites reliance. A provision that does reasonably invite reliance is binding on the agency, and any deviation from it may

be grounds for reversal under APA § 706. By contrast, a provision that does not reasonably invite reliance should not bind the agency.

D. Application to HALLEX

As a preliminary matter, it should be observed that HALLEX comprises both (1) restatements of the Social Security Act, SSA regulations, and SSA rulings¹⁹⁹ and (2) interpretations of, statements of policy on, and procedures with regard to the same.²⁰⁰ The first type of provision is of little interest. As one court has already observed: “To the degree [] HALLEX simply restates an administrative regulation, it is enforceable, of course.”²⁰¹ The latter are more problematic and are the subject of the analysis below.

1. Procedural validity.

Under the legal-effect test, a rule is legislative and subject to APA § 553 whenever one of the following conditions obtains: (1) the rule is published in the CFR, (2) the agency has explicitly invoked its legislative authority, (3) the rule effectively overrules a prior legislative rule, or (4) the rule provides the sole adequate legislative basis for the agency action at issue.²⁰² Of these four conditions, the first two are easily disposed of with regard to HALLEX: the manual is not published in the CFR and does not explicitly invoke legislative authority. The last two are trickier and would require a rule-by-rule examination beyond the scope of this Comment.

That being said, a few observations may be made. First, courts have almost universally treated provisions of HALLEX as valid.²⁰³ Second, the Supreme Court regards at least some provisions of POMS as nonlegislative rules exempt from informal rulemaking²⁰⁴ and would likely interpret similar provisions of

¹⁹⁹ See, for example, HALLEX at I-1-1-40 (cited in note 1) (restating the rules governing the representation of claimants as published in SSA regulations).

²⁰⁰ See, for example, *id.* at II-5-3-2 (stating agency policy on borderline-age issues arising under the Medical-Vocational Guidelines).

²⁰¹ *McCoy v Barnhart*, 309 F Supp 2d 1281, 1284 (D Kan 2004).

²⁰² *American Mining Congress*, 995 F2d at 1112.

²⁰³ See note 73.

²⁰⁴ *Washington State Department of Social and Health Services v Guardianship Estate of Keffeler*, 537 US 371, 385 (2003). See also notes 103–06 and accompanying text.

HALLEX the same way.²⁰⁵ Finally, given HALLEX's propensity to cite to the statutes, regulations, or rulings that it expounds upon,²⁰⁶ it should not prove difficult for courts to find an adequate, alternative legislative basis for agency action taken pursuant to the manual. For these reasons, invalidation of a rule found in HALLEX is likely to be a rare occurrence.

2. Binding effect.

Operating under the assumption that HALLEX is composed of valid nonlegislative rules, the question becomes whether those rules are binding or not. As with the inquiry into procedural validity, this requires a rule-by-rule examination. Here, the purpose of that examination is to determine whether a particular provision of HALLEX is an interpretive rule, a statement of policy, a binding procedural rule, or a nonbinding procedural rule. While a comprehensive study of HALLEX's many provisions is beyond the scope of this Comment, certain features applicable to the manual as a whole categorically exclude HALLEX's provisions from having binding authority.

Any reliance on HALLEX by claimants is misplaced because HALLEX is written for SSA employees and adjudicators, not for claimants. The manual devotes an entire section to describing its audience, first listing the intended audience for the manual as a whole and then noting the primary audience for each division within each volume.²⁰⁷ Nowhere are claimants listed as an intended or primary audience. Moreover, HALLEX's advisory character—evinced by its designation as “Employee Operating Instructions”²⁰⁸ and its statement of purpose²⁰⁹—militates against reliance. To this it may be objected that the affirmative language sometimes used in HALLEX does invite reliance.²¹⁰ However, given that HALLEX's advisory purpose is made clear

²⁰⁵ The SSA's similar treatment of POMS and HALLEX suggests that the Court would treat them alike as well. See SSA, *Social Security Program Rules* (cited in note 45) (referring to both POMS and HALLEX as “Employee Operating Instructions” and listing them alongside each other).

²⁰⁶ See, for example, HALLEX at I-2-8-1 (cited in note 1) (citing the various statutory and regulatory provisions that underlie this provision of HALLEX).

²⁰⁷ *Id.* at I-1-0-3 (describing HALLEX's intended audience).

²⁰⁸ See note 45 and accompanying text.

²⁰⁹ See HALLEX at I-1-0-1 (cited in note 1) (stating that HALLEX is intended to “convey[] guiding principles,” “define[] procedures for carrying out policy,” and “provide[] guidance for processing and adjudicating claims”).

²¹⁰ See, for example, *id.* at I-2-8-25 (“The ALJ *must* write the decision so that the claimant can understand it.”) (emphasis added).

in the manual's introduction, the SSA should not have to hedge each subsequent provision with uncertainty to avoid misinterpretation.²¹¹

Consider once again the provision of HALLEX that was at issue in *Newton*—the provision stating that the SSA Appeals Council should consider additional evidence presented in a request for review.²¹² This provision appears to be clearly within the realm of procedural rules, as it merely “alter[s] the manner in which the parties present themselves or their viewpoints to the agency.”²¹³ What is more, it appears to be clearly within the realm of *nonbinding* procedural rules. Consideration of additional evidence during the third tier of administrative review is not the kind of procedure claimants are likely to rely upon. Where they do, such reliance is misplaced for the reasons given above.

Or, consider an example of an interpretive rule in HALLEX. An ACI in the second volume of HALLEX interprets existing regulation to determine that ALJs should apply a sliding-scale approach to “borderline age situations.”²¹⁴ A borderline-age situation exists when a claimant is on the cusp of moving up in the age categories of the Medical-Vocational Guidelines—a move that will likely affect his disability status. Existing regulation states that ALJs may not “mechanically” decide the question of whether to employ the age category that corresponds to the claimant’s actual age or the age category that corresponds to his soon-to-be age.²¹⁵ HALLEX interprets this regulation to prescribe a sliding-scale approach, in which ALJs are to balance several listed “additional vocational adversities” against the length of time remaining until the claimant’s next birthday.²¹⁶ Because this is an interpretive rule, courts reviewing appeals that invoke this provision of HALLEX should apply *Skidmore* deference to it. If the sliding-scale approach is thought to be a

²¹¹ As one commentator has put it: “If we want to encourage agencies to provide guidance, we should not be too quick to criticize them for stating their views with confidence.” Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 Duke L J 1497, 1499 (1992) (arguing that agencies should not have to “bend over backwards to demonstrate their lack of commitment to the positions they set forth in policy statements”).

²¹² See HALLEX at I-3-5-1 (cited in note 1).

²¹³ *Electronic Privacy Information Center*, 653 F3d at 5, quoting *Chamber of Commerce of the United States v United States Department of Labor*, 174 F3d 206, 211 (DC Cir 1999).

²¹⁴ HALLEX at II-5-3-2 (cited in note 1).

²¹⁵ 20 CFR § 404.1563.

²¹⁶ HALLEX at II-5-3-2 (cited in note 1).

persuasive interpretation of what the regulation requires, then the court may remand the claim for reconsideration in light of that interpretation of the regulation. For the reasons stated above and as these examples illustrate, HALLEX should not be relied upon. It is therefore not arbitrary and capricious for the SSA to deviate from it.

In sum, HALLEX does not bind the SSA. It should be noted, however, that this conclusion has an important corollary. Since HALLEX states only agency intention, it should not be dispositive.²¹⁷ That is, the SSA should not be able to have its cake and eat it too: it should not be able to both escape being bound by HALLEX and argue to claimants that HALLEX mandates a certain result. The SSA may use HALLEX precisely as it has stated it will—to convey guiding principles²¹⁸—but, if a claimant asks the agency to reconsider a policy found in HALLEX, it should do so. If the SSA does treat a provision of HALLEX as dispositive, then there is an argument to be made that the provision should fail the legal-effect test because agency action is being taken for which there is no adequate, alternative legislative basis.

CONCLUSION

Part III concluded that HALLEX does not bind the SSA, but is this a desirable result? It seems so. To make HALLEX binding on the SSA, as the Fifth Circuit has done, would only incentivize the SSA to stop publishing the procedures and policies it intends to implement. Publishing procedures and policies through regulations or SSRs is costly for the SSA: The promulgation of a regulation consumes enormous amounts of time and agency resources.²¹⁹ And, though less expensive along these dimensions, SSRs are also costly, as they provide a means whereby federal courts can remand claims back to the SSA. These costs may preclude the SSA from offering guidance that would otherwise be beneficial, thereby imposing a real loss on its employees and on claimants.²²⁰

²¹⁷ See Levin, 41 Duke L J at 1498 (cited in note 211) (noting that the public is free to dispute nonlegislative rules and that the agency must take these challenges seriously).

²¹⁸ See HALLEX at I-1-0-1 (cited in note 1).

²¹⁹ See McGarity, 41 Duke L J at 1391 (cited in note 61).

²²⁰ Since it is naïve to suppose that agencies will simply do without the constraints for lower-level decision makers found in these documents, the result of disincentivizing their production will likely be less transparency—not more.

Moreover, it is desirable that HALLEX not bind the SSA because holding otherwise precludes the manual from performing an important function. HALLEX represents an intermediate step between the promulgation of rules that bind the SSA and the alternative of offering no guidance at all. Put another way, HALLEX is like an agency adjudication that was not chosen for publication as an SSR; it forms a part of the institutional knowledge that is useful in the SSA's adjudication of claims but does not represent binding authority.²²¹ HALLEX thus represents an efficient and flexible means for the SSA to adapt to changing circumstances or to update procedures in light of accumulated experience.

What this analysis of HALLEX shows is that guidance documents have a place to occupy in administrative law—one that should not be imperiled by rendering them binding on the agencies that produce them.

²²¹ See Strauss, 41 Duke L J at 1467 (cited in note 7) (arguing that guidance documents should be treated like nonbinding adjudicatory precedent).