NOTES

MANUAL OVERRIDE? *ACCARDI*, *SKIDMORE*, AND THE LEGAL EFFECT OF THE SOCIAL SECURITY ADMINISTRATION'S HALLEX MANUAL

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The Social Security Administration's Disability Insurance program encompasses a mammoth adjudicatory and appellate process, rivaling in size the entire federal judiciary. The SSDI is principally governed by validly promulgated regulations, but the SSA also uses an internal manual—"HALLEX"—to provide more detailed rules and guidance to its adjudicators and staff. The circuits have split over whether HALLEX is enforceable—whether it can bind the SSA such that violations of its provisions can be grounds for district court reversal. The Ninth and Third Circuits hold HALLEX to be per se unenforceable, with the Ninth categorically refusing to examine alleged violations. The Fifth Circuit, by contrast, will review alleged violations of HALLEX for prejudice and will remand to the SSA if prejudice is present.

*The circuit split results from unclear, decades-old Supreme Court precedent on what kinds of rules under what circumstances courts can enforce to bind agencies. This Note aims to reframe the "enforceability" debate by examining more recent doctrine on internal agency guidance and by outlining how it might interact with the "*Accardi *principle" underlying that earlier precedent. Specifically, it suggests that typically one-way, agency-invoked doctrines like* Auer *and* Skidmore *should be understood more broadly with respect to HALLEX and similar internal guidance, where the public is often the beneficiary of gratuitous protections. This approach provides the Fifth Circuit's approach with more certain doctrinal footing; it also preserves the Fifth Circuit's prejudice test, derived from the* Accardi *principle, as an essential guiding inquiry. Ultimately, it would promote effective administration and fair agency adjudication.*

INTRODUCTION

In 1988, Winston Moore severely injured his right knee and leg.[1] Claiming inability to perform gainful work because of his impairments and subsequent psychiatric debilities, he sought Disability Insurance

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1. Moore v. Apfel, 216 F.3d 864, 866 (9th Cir. 2000).

under the Social Security Act.[2] Following a protracted series of denials, appeals, and remands within the Social Security Administration (SSA), Moore's application for disability landed in the hands of Administrative Law Judge (ALJ) David Gandy, who had reviewed Moore's case twice before[3]—a violation of Social Security Administration policy prescribed by that agency's internal appeals manual, "HALLEX."[4] For the third time, ALJ Gandy denied Moore's claim.

Moore challenged this determination in court, arguing that the violation of HALLEX constituted reversible error and entitled him to a new hearing before a different ALJ.[5] The Ninth Circuit, however, held that HALLEX, as an internal agency manual, "does not have the force and effect of law . . . [and] is not binding on the [agency]," and declined to review any allegations of noncompliance with the manual.[6] Twelve years after his claim was first filed, Moore's case thus concluded. The dispute over HALLEX's legal effect, however, endures.

This Note addresses whether HALLEX creates enforceable rights—whether it can, in fact, bind the Social Security Commissioner and judges of the SSA. While the issue implicates the legal status of internal agency manuals generally, the authority of HALLEX in particular has created a decade-long circuit split that district courts across the country are confronting in a steadily swelling number of Disability Insurance (DI) claims. The Ninth and Third Circuits expressly hold that HALLEX's provisions are per se unenforceable against the SSA.[7] The Fifth Circuit, while acknowledging that HALLEX lacks the conventionally conceived "force of law," holds that district courts *may* review SSA noncompliance with HALLEX and that violations causing prejudice to claimants during administrative adjudications constitute reversible error.[8]

This Note argues that the Fifth Circuit's approach—under which courts should consider HALLEX violations reversible error to the extent they appear prejudicial—is preferable for reasons of both law and policy. But it does so on different grounds than the Fifth Circuit, and demon-

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2. Appellant's Opening Brief at 5, *Moore*, 216 F.3d 864 (No. 98-56318), 1998 WL 34078406, at *4.

3. Id. at 5–6.

4. Soc. Sec. Admin., Hearings, Appeals, and Litigation Law Manual [hereinafter HALLEX], available at http://ssa.gov/OP_Home/hallex/hallex.html (cited provisions on file with the *Columbia Law Review*) (last visited Mar. 28, 2014). "HALLEX" is a stylized abbreviation of "Hearings, Appeals, and Litigation Law Manual." The relevant provision reads, "[Appeals Council] remands, including those generated by the courts, are assigned to the same ALJ who issued the decision or dismissal unless . . . the case was previously assigned to that ALJ on a prior remand from the [Appeals Council] and the ALJ's decision or dismissal after remand is the subject of the new [Appeals Council] remand." Id. § I-2-1-55(11) (last updated Jan. 31, 2014).

5. Appellant's Opening Brief, supra note 2, at 16–20.

6. *Moore*, 216 F.3d at 869.

7. See infra Part II.B (discussing Ninth and Third Circuits' position).

8. See infra Part II.A (discussing Fifth Circuit's standard).

strates that the "split" as currently understood is more of a mutual misunderstanding.[9] No circuit holds that HALLEX carries the force of law or that it is per se enforceable; rather, the disagreement among the circuits is about the extent to which courts will hold agencies to their rules, and recent Supreme Court doctrine can help resolve that disagreement. Specifically, this Note contends that arguments from doctrines allowing agencies to authoritatively interpret their regulations should also be invoked by private parties when agencies fail to follow those rules. Part I describes the Social Security Disability Insurance (SSDI) program and HALLEX's role in its internal appellate process. It then turns to the Supreme Court's agency-manual jurisprudence and the legal effect that has been accorded to other agency manuals. Part II examines the split between the Fifth Circuit and the Ninth and Third Circuits and analyzes their justifications for holding HALLEX reviewable for prejudice and per se unreviewable, respectively. Part III argues that the Fifth Circuit's position is both more consonant with Supreme Court precedent on agency manuals and more desirable for policy reasons.

I. SSDI, HALLEX, AND AGENCY MANUALS' JURISPRUDENCE OF DOUBT

Agencies' internal procedural manuals are of unsettled legal status. Despite early indications to the contrary, a series of signal Supreme Court decisions in the 1970s and 1980s refused to enforce them against either the public or the agency, and this apparent rule became embedded in the general legal consciousness. But more recent decisions reviving the concept of *Skidmore* deference have raised the prospect of investing "lesser" guidance—including that which, like manuals, is not subject to prepublication or the notice-and-comment rulemaking

9. As this Note was in publication, a student-written comment addressing the HALLEX split was published elsewhere. Frederick W. Watson, Comment, Disability Claims, Guidance Documents, and the Problem of Nonlegislative Rules, 80 U. Chi. L. Rev. 2037 (2013). That comment reaches a different conclusion on different grounds. Watson concludes that HALLEX is unenforceable per se, relying on a proposed system of classifications for manual provisions under the APA to determine which rules should receive scrutiny as potentially valid and enforceable ones. Id. at 2064–68. This Note, in contrast, aims to reframe the "enforceability" debate. While the existing circuit split results from unclear, decades-old Supreme Court precedent on what rules can "bind" agencies, this Note envisions the more recent *Skidmore/Mead* or *Auer* doctrines as the essential site where that unclear precedent might in principle survive. See infra Part III.A (outlining relationship of *Accardi*, *Auer*, and *Skidmore*). In so doing, it suggests that these typically one-way, agency-invoked doctrines must be understood more capaciously when applied to HALLEX and similar internal guidance, where members of the public are often the beneficiaries of gratuitous agency protections. See infra notes 147–151 and accompanying text (suggesting increased invocation of *Auer* and *Skidmore* on behalf of private parties). This Note's argument thus provides the Fifth Circuit's approach with a more certain doctrinal footing and suggests that the "prejudicial effect" test, derived ultimately from the *Accardi* principle, can remain a guiding inquiry when applying *Skidmore* to *claimants'* allegations of agency violations. See infra Part III.B.2 (demonstrating applicability of *Auer* and *Skidmore* and proposing role for prejudice inquiry).

process—with some legal authority. Part I.A introduces HALLEX by describing the SSDI program that it governs, the history of the manual, and the circumstances under which the present circuit split arose and now steadily deepens. Part I.B reviews the source of law for agency rules and the Supreme Court's evolving approach to informal internal guidance, and shows that an apparently once-clear line against such guidance's legal effect has blurred.

A. *SSDI, the Appeals Process, and HALLEX*

Because they provide low-level employee instruction and cabin bureaucratic discretion, manuals like HALLEX are essential tools of administration—all the more so in mammoth administrative bureaucracies like the SSA. Part I.A.1 reviews the size and scope of the SSDI program, as well as persistent problems in administering it, while Part I.A.2 examines the nature, origin, and role of HALLEX in that program.

1. *SSDI.* — Over the course of more than fifty years, the SSDI program has seen a dramatic, largely unabated increase in claimants and outlays.[10] The number of DI recipients has increased sixfold since 1970,[11] and, because of an aging baby-boomer population, a continually expanding workforce, and an ongoing economic recession, the number of disability applications and claimants "continues to rise at an unprecedented rate . . . test[ing] the agency's resources and personnel."[12] In 2008, there were a record 2.8 million new SSDI benefits applications and a preexisting backlog of 752,000 cases awaiting ALJ review.[13]

As Winston Moore's saga attests,[14] the DI claims process, comprising initial determinations and a three-stage internal appellate procedure,[15] is

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10. In fiscal year 2014, the SSA "will pay about $145 billion in DI benefits to approximately eleven million disabled workers and their family members." Soc. Sec. Admin., FY 2014 Budget Overview 3 (2013), available at http://ssa.gov/budget/FY14Files/2014BO.pdf (on file with the *Columbia Law Review*).

11. Cong. Budget Office, Policy Options for the Social Security Disability Insurance Program 2–5 (July 2012), available at http://cbo.gov/sites/default/files/cbofiles/attachments/43421-DisabilityInsurance_print.pdf (on file with the *Columbia Law Review*).

12. Minority Staff of S. Permanent Subcomm. on Investigations, 112th Cong., Social Security Disability Programs: Improving the Quality of Benefit Award Decisions 1 (Comm. Print 2012).

13. Richard J. Pierce, Jr., What Should We Do About Social Security Disability Appeals?, Regulation, Fall 2011, at 34, 34, available at http://object.cato.org/sites/cato.org/files/serials/files/regulation/2011/9/regv34n3-3.pdf (on file with the *Columbia Law Review*).

14. See supra notes 1–6 and accompanying text (describing plaintiff Winston Moore's bureaucratic struggles).

15. If an initial claim for disability benefits is denied, the claimant may request reconsideration of that claim (or, under certain circumstances, expedited review by an ALJ). See 42 U.S.C. § 421(d) (2006) (providing "dissatisfied" disability claimants right to review); 20 C.F.R. §§ 404.907–.922 (2013) (providing procedures for reconsideration of initial benefits decision). A claimant may then seek a hearing before and determination of an ALJ. Id. §§ 404.929–.961 (governing adjudication before ALJ and hearing procedures).

frequently byzantine, opaque, and lumbering.[16] The current caseload of the SSA's Office of Disability Adjudication and Review (ODAR)—responsible for holding hearings and issuing decisions as part of the SSA's process for determining whether or not a person may receive benefits[17]—makes it "one of the largest administrative judicial systems in the world . . . issu[ing] more than half a million hearing and appeal dispositions each year"[18] and employing a correspondingly sizeable ALJ workforce.[19] The SSA's internal Appeals Council—its comparatively diminutive final appellate review board[20]—resolves tens of thousands of cases per year, and the volume of cases it processes[21] ensures that it cannot practically rely on published precedents to standardize SSA appellate jurisprudence or to compel outcomes in factually similar cases.[22] Indeed,

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Finally, claimants may seek review by the Appeals Council, the last administrative decisional level, which may uphold the determination, reverse and remand, or deny or dismiss the request for review. Id. §§ 404.966–.982 (providing procedure for Appeals Council review). Claimants dissatisfied with the disposition of their case within the SSA may then appeal to the district court for judicial review. See 42 U.S.C. § 405(g) (establishing right to judicial review of SSA determinations).

16. See Jerry Mashaw, Bureaucratic Justice 139 (1983) ("Major features of the . . . process combine to divest claimants of control over or participation . . . in their claims. The basic criteria for judgment are opaque. The critical medical evidence is . . . often incomprehensible . . . [and] [t]he state agency as decisionmaker is a faceless, formless, and presumably inaccessible bureaucracy."); see also Mathews v. Eldridge, 424 U.S. 319, 342 (1976) (noting "torpidity" of SSDI "administrative review process").

17. See Information About SSA's Office of Disability Administration and Review, Soc. Sec. Admin., http://ssa.gov/appeals/about_odar.html (on file with the *Columbia Law Review*) (last visited Mar. 28, 2014) (providing overview of ODAR responsibilities and structure).

18. Information About Social Security's Hearings and Appeals Process, Soc. Sec. Admin., http://ssa.gov/appeals/ (on file with the *Columbia Law Review*) (last visited Mar. 28, 2014); see also Mashaw, supra note 16, at 18 ("SSA operates the largest system of administrative adjudication in the Western world.").

19. See Hearing Office Locator: Office of Disability Adjudication and Review, Soc. Sec. Admin., http://ssa.gov/appeals/ho_locator.html (on file with the *Columbia Law Review*) (last modified Feb. 2014) (placing number of ALJs at 1,500 across 169 hearing offices as of Sept. 2012).

20. The Appeals Council comprises about seventy-two Appeals Judges, forty-three Appeals Officers, and hundreds of support staff. Brief History and Current Information About the Appeals Council, Soc. Sec. Admin., http://ssa.gov/appeals/about_ac.html (on file with the *Columbia Law Review*) (last visited Mar. 28, 2014).

21. In Fiscal Year 2012, for example, the Appeals Council received 173,849 new requests for review, processed 166,020 requests for review, and ended the year with 161,070 still pending. Information About Requesting Review of an Administrative Law Judge's Hearing Decision, Soc. Sec. Admin., http://ssa.gov/appeals/appeals_process.html (on file with the *Columbia Law Review*) (last visited Mar. 28, 2014).

22. See Jerry L. Mashaw et al., Administrative Law: The American Public Law System 457 (6th ed. 2009) (describing obstacles to precedent-based SSA jurisprudence). According to many scholars, "the fact-based, highly contextual decision making involved in the disability program simply cannot be structured through precedent." Id.; see also Charles H. Koch, Jr. & David A. Koplow, The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council, 17 Fla. St.

the SSA's yearly appeals docket is larger than that of all Article III federal courts,[23] and there is widespread concern, within government and without, over delays and inefficiencies arising from the massive, and mounting, backlog of cases.[24] Moreover, controversy persists over alleged systemic prejudices in, and waste and abuse of, the disability system, which many attribute to SSA ALJs' discretion and lack of adequate centralized oversight.[25] In response to these and other criticisms, the SSA

U. L. Rev. 199, 234 (1990) ("The SSA does not accord precedential value to its previous decisions in disability cases . . . ."). Yet the Appeals Council does use a quasi-precedential system, issuing authoritative interpretations that synthesize its rulings. See infra note 32 (discussing role of Appeals Council in SSA adjudications). Indeed, the Administrative Conference of the United States has recently recommended that the Council take steps to make its decisions more closely resemble reliable "precedent." See Admin. Conference of the U.S., Administrative Conference Recommendation 2013-1: Improving Consistency in Social Security Disability Adjudications 7–8 (2013) [hereinafter Admin. Conference Recommendation], available at http://acus.gov/sites/default/files/documents/Recommendation%202013-1%20%28SSA%20Adjudication%29.pdf (on file with the *Columbia Law Review*) (recommending "issuing Appeals Council Interpretations (ACIs), with greater frequency" and "publishing selected ALJ or Appeals Council decisions to serve as model decisions . . . or to provide needed policy clarifications").

23. See Pierce, supra note 13, at 34 (noting 2.8 million new SSDI benefits applications and preexisting backlog of 752,000 claims in 2008); Judicial Caseload Indicators, U.S. Courts, http://uscourts.gov/Statistics/JudicialBusiness/2012/judicial-caseload-indicators.aspx (on file with the *Columbia Law Review*) (last visited Mar. 28, 2014) (reporting total of approximately 850,000 new and pending federal district and circuit court cases in fiscal year 2012).

24. See U.S. Gov't Accountability Office, Social Security Disability: Additional Performance Measures and Better Cost Estimates Could Help Improve SSA's Efforts to Eliminate Its Hearings Backlog 1–2 (Sept. 2009), available at http://gao.gov/new.items/d09398.pdf (on file with the *Columbia Law Review*) (noting number of backlogged claims "more than doubled" from 1997 to 2006 and overburdened SSDI system led to designation of federal disability programs as "high risk"); see also Jeffrey S. Wolfe, The Times They Are a Changin': A New Jurisprudence for Social Security, 29 J. Nat'l Ass'n Admin. L. Judiciary 515, 518 (2009) ("[T]he present SSA appeals system is . . . plagued with significant systemic delay resulting in widespread public dissatisfaction."); id. at 524 (noting backlog is "endemic"). This "crisis" is not unique: "[T]he elusive promise of individual hearings for deserving claimants has pushed caseloads to the breaking point, producing significant backlogs, disparate decisions, and new barriers to justice in many different agencies." Michael D. Sant'Ambrogio & Adam S. Zimmerman, The Agency Class Action, 112 Colum. L. Rev. 1992, 1994, 2023 (2012).

25. While the Administrative Conference of the United States observes that decisional "[c]onsistency and accuracy . . . suffer[] under the strain of administering such a sprawling program," see Admin. Conference Recommendation, supra note 22, at 4, broader-bore critiques explore the system's unresolved tension between administrative efficiency and procedural justice. See Mashaw, supra note 16, at 41–44 (observing ALJ independence and hearing process "fit[] uneasily into the bureaucratic scheme" and pro forma hearings applying "objective criteria" "[have] little of the legitimating symbolism of the proverbial day in court," but erring in opposite direction threatens loss of SSA "control of the program"). Other, more specific critiques report systemic prejudice against minorities and rampant disregard for rules in the ALJ hearing process; still others decry ALJs' role in driving up benefits awards by reversing initial determinations. See Linda G. Mills, A Penchant for Prejudice: Unraveling Bias in Judicial Decision Making 148 (1999) (summarizing study of SSDI denials finding "systematic pattern of prejudice" and

has recently moved to impose more discipline and control on ALJs, which has resulted in a "'40-year historic low'" in favorable decisions and increasing difficulties for many claimants.[26]

2. *HALLEX*. — One function of agency manuals is to cabin such discretion. To instruct its ALJs, support staff, and other relevant employees on proper adjudicative and internal appellate procedure, SSA maintains a two-volume "Hearings, Appeals, and Litigation Law Manual," known as "HALLEX."[27] HALLEX "defines procedures for carrying out policy and provides guidance for processing and adjudicating claims at the hearing, Appeals Council, and civil action levels,"[28] and it provides detailed instructions on everything from claimant-representative fee authorization[29] to comprehensive ALJ and Appeals Council procedural guidelines.[30] HALLEX also "includes policy statements resulting from Appeals Council *en banc* meetings,"[31] which synthesize and communicate the Council's judgments on proper policy and procedure as formulated in its otherwise unpublished appellate decisions.[32] Whether HALLEX has any legal effect when appellate proceedings leave the SSA for district

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judges who "frequently ignore mandated rules"); Pierce, supra note 13, at 34–36 (arguing ALJs' subjectivity and unchecked discretion lead to undeserved benefits awards).

26. Damian Paletta, Government Pulls in Reins on Disability Judges, Wall St. J. (Dec. 26, 2013, 8:14 PM), http://online.wsj.com/news/articles/SB10001424052702304753504579282293690041708 (on file with the *Columbia Law Review*) (quoting Glenn Sklar, SSA Deputy Commissioner).

27. HALLEX was introduced in 1990 and replaced the Administration's ALJ Handbook, while incorporating numerous other, disparate ODAR manuals and handbooks. See Frank Bloch, Bloch on Social Security § 4:2 (2014), Westlaw BLOCHSS ("[HALLEX] serves the same function as POMS for administrative law judges, the Appeals Council, and the Office of Civil Actions."). HALLEX actually consolidated the manuals of the Office of Hearings and Appeals (OHA), which was later redubbed ODAR. Id.

28. HALLEX, supra note 4, § I-1-0-1 (last updated Mar. 3, 2011).

29. Id. §§ I-1-2-1 to -91 (last updated Jan. 28, 2003). Moreover, it includes extensive examples and document templates for this and other purposes. See id. §§ I-1-2-101 to -121 (last updated Sept. 9, 2004).

30. Id. §§ I-2-0-1 to -3-9-60 (last updated Sept. 8, 2005).

31. Id. § I-1-0-1 (last updated Mar. 3, 2011).

32. Compare Sant'Ambrogio & Zimmerman, supra note 24, at 2023 ("Administrative appellate bodies . . . are poorly positioned to issue well-reasoned, precedential decisions."), with HALLEX, supra note 4, § II-5-0-1(I) (last updated Sept. 1, 2005) ("'The Appeals Council is admirably well-suited and well-situated to serve a major role in promoting policy integrity. The Appeals Council is the only unit in SSA which regularly receives and adjudicates a broad run of ordinary and extraordinary cases.'" (quoting independent study)). By synthesizing statements from its collective case law, HALLEX provides the Appeals Council a bureaucratically feasible alternative to full or selective publication of precedent—thus representing a repository for the received wisdom of the tens of thousands of cases it resolves. See id. § II-5-0-1(II) (last updated Sept. 1, 2005) ("ACIs are designed to . . . [e]stablish precedents at the hearings and appeals levels of adjudication upon which claimants and their representatives may rely . . . ."); see also Mashaw et al., supra note 22, at 457 (noting "inaccessibility or irrelevance of precedent as a corrective leaves the SSA with . . . managerial supervision" as standardizing technique); infra note 230 (explaining Appeals Council policy statements may merit *Skidmore* weight).

court is a question that has split the circuits[33]—in no small part because the Supreme Court's jurisprudence on internal agency documents is unclear.

B. *Agency Manuals: Law and Doctrine*

Agencies effectively create binding law when they exercise congressionally delegated authority to make rules. Because of the constitutional delicacy of nonlegislative bodies "making law," agency rulemaking procedures are strictly governed by statutory instructions—the Administrative Procedure Act (APA)—and subject to judicial review. But the growth of agency authority, the proliferation of agency action, and the inherent time- and resource-intensive nature of conventional forms of agency rulemaking[34] have fostered an environment in which so-called nonlegislative rules—informal guidance documents like manuals—have become a large and indeed indispensable component of agency action.[35] This section addresses the statutory authority for such materials and the relevant Supreme Court doctrine that has developed around them. Part I.B.1 describes the statutory framework for agency action, the APA, and the place of manuals within that framework. Part I.B.2 traces the development of the *Accardi* principle, which holds that agencies are bound by their own rules—even, in some cases, those prescribed by manuals. Part I.B.3 examines the status of manuals under the *Skidmore* weight doctrine developed by the Court in recent decades. Part I.B.4 explores the implications of the related concept of *Auer* deference.

1. *Agency Manuals as APA Rules.* — Executive and independent federal agencies, including the SSA, must issue rules in accordance with the APA.[36] The APA provides several ways in which an agency may issue rules, but the default position is notice-and-comment rulemaking.[37] This procedure requires the agency to give (i) advance notice that it is considering a rule, (ii) an "opportunity to participate" for "interested persons," and

33. HALLEX's ambiguously binding status has caused scholarly as well as judicial confusion: According to one scholar, although "not binding on [administrative law] judges," HALLEX's "significance should not be underestimated" because "[w]hen SSA developed its data collection form to test ALJ compliance with the rules, *Hallex* figured prominently in its hearings review process." Mills, supra note 25, at 165 n.1. Perhaps reflecting the uncertain authority of HALLEX, however, elsewhere in her study Mills observes that it "*requires* judges to introduce themselves to claimants," and that judges "*must*" comply with numerous other provisions. Id. at 34–36 (emphasis added).

34. See Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 Duke L.J. 1385, 1396–411 (1992) (describing burdensome requirements of notice-and-comment rulemaking).

35. See Peter L. Strauss, The Rulemaking Continuum, 41 Duke L.J. 1463, 1477 (1992) [hereinafter Strauss, Continuum] ("[Nonlegislative] rules outnumber informal rules, which in turn dwarf statutes, which in turn dwarf constitutional provisions.").

36. 5 U.S.C. § 553 (2012).

37. John F. Manning, Nonlegislative Rules, 72 Geo. Wash. L. Rev. 893, 893 (2004) [hereinafter Manning, Rules].

(iii) upon a rule's issuance, a "concise general statement of [the rule's] basis and purpose."[38] A crucial distinction embodied by the APA is that between "legislative" and "nonlegislative" rules. Rules promulgated by notice-and-comment are considered legislative because they impose binding obligations, with legal authority tantamount to that of statutes.[39] These rules are "substantive,"[40] a term not defined by the APA but generally contradistinguished from "interpretive" rules,[41] as discussed below.

Nonlegislative rules, including "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice," are exempt from the APA's notice-and-comment requirement.[42] Another provision of the APA, however, requires that statements of "the general course and method" of the agency's "functions," "rules of procedure," "substantive rules of general applicability," and "statements of general policy or interpretations of general applicability" be published in the Federal Register.[43] This provision, added to the APA by the Freedom of Information Act in 1967,[44] also requires that agencies make all such materials "available for public inspection and copying" and specifically includes "administrative staff manuals and instructions to staff that affect a member of the public."[45] The House Committee that reported this language to the floor noted that this category of material, "embodied in thousands of orders, opinions, statements, and instructions issued by hundreds of agencies," is the "end product of Federal administration"

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38. 5 U.S.C. § 553(b)–(c).

39. See Manning, Rules, supra note 37, at 893 (observing notice-and-comment rules "are called 'legislative rules' because they are capable of binding with the force of statutes"); Mark Seidenfeld, Substituting Substantive for Procedural Review of Guidance Documents, 90 Tex. L. Rev. 331, 335–36 (2011) (describing notice-and-comment procedure and observing that the "canonical mode by which agencies . . . establish policy is legislative rulemaking").

40. 5 U.S.C. § 553(d) (discussing "required publication or service of a substantive rule" but exempting "interpretive rules and statements of policy").

41. See Chrysler Corp. v. Brown, 441 U.S. 281, 301–02 (1979) ("'[S]ubstantive rule' is not defined in the APA, and other authoritative sources essentially offer definitions by negative inference.").

42. 5 U.S.C. § 553(b)(A); see also id. § 553(d)(2) (exempting "interpretative rules and statements of policy" from thirty-day advance-publication requirement).

43. Id. § 552(a)(1). Moreover, "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." Id. Professor Strauss has termed this category of materials "publication rules," noting that they "are generally adopted at staff levels within an agency to guide both staff conduct and public knowledge" and that publication "permit[s] agencies to rely upon them in their dealings with the public." Peter L. Strauss, Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element, 53 Admin. L. Rev. 803, 804 (2001) [hereinafter Strauss, Publication Rules].

44. Pub. L. No. 90-23, sec. 1, § 552(a), 81 Stat. 54, 54–55 (1967) (codified as amended at 5 U.S.C. § 552(a)).

45. 5 U.S.C. § 552(a)(2); see also Strauss, Continuum, supra note 35, at 1467 (observing § 552(a) explicitly includes "administrative staff manuals . . . that affect a member of the public" (internal quotation marks omitted)).

and "*has the force and effect of law in most cases.*"[46] The Supreme Court, however, has suggested otherwise: A "substantive rule," it has held, is a "legislative-type rule," but whether the rule affects individual rights and obligations "is an important touchstone for distinguishing those rules that may be 'binding' or have the 'force of law.'"[47]

Nonlegislative rules, also known as guidance documents,[48] vastly outnumber legislative rules,[49] and concerns have long been raised about agencies' abuse of this form of "nonrulemaking rulemaking" to bypass the more transparent, deliberative mechanisms mandated by the APA.[50] These concerns are typically raised in the context of guidance intended for private parties—companies, industries, or individuals whose behavior the "rule" purports to guide.[51] Agency manuals like HALLEX, however, are typically nonlegislative rules intended for *internal* guidance. They are nonetheless subject to the publication rules of the APA and, although principally tailored to and intended for agency employees,[52] can have

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46. Comm. on Gov't Operations, Clarifying and Protecting the Right of the Public to Information, H.R. Rep. No. 89-1497, at 7–8 (1966) (emphasis added), reprinted in 1966 U.S.C.C.A.N. 2418, 2424–25. Additional evidence in § 552(a)'s legislative history, as well as the text of that provision, "strongly suggests that even if [formal procedures] are not taken, such materials may be relied on, used, or cited as precedent *against the agency* although they do not serve to bind the public." Strauss, Continuum, supra note 35, at 1467–68 & n.17 (internal quotation marks omitted).

47. Chrysler Corp. v. Brown, 441 U.S. 281, 302 (1979) (quoting Morton v. Ruiz, 415 U.S. 199, 232, 236 (1974)).

48. See Jessica Mantel, Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State, 61 Admin. L. Rev. 343, 351 (2009) ("Nonlegislative rules often are announced through agency manuals, advisory notices, internal guidance to agency field inspectors, and letters from government officials . . . collectively referred to . . . as 'agency guidance' or 'guidance materials.'").

49. See Connor N. Raso & William N. Eskridge, Jr., *Chevron* as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases, 110 Colum. L. Rev. 1727, 1730 (2010) ("The bulk of our federal law now derives from agency rules, guidances, opinion letters, manuals, and websites."); Strauss, Publication Rules, supra note 43, at 805 (observing guidance documents "are common and generally salutary forms of informal agency action . . . [whose] volume greatly exceeds that of notice-and-comment regulation").

50. See Manning, Rules, supra note 37, at 915 ("[B]ecause agencies often adopt nonlegislative rules that look and feel very much like legislative rules, the APA's procedural exception for such rules risks allowing agencies to circumvent the notice-and-comment process.").

51. See, e.g., 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, 1317–18 (1992) (suggesting guidance documents lend themselves to agency abuse); Seidenfeld, supra note 39, at 342–44 (discussing potential agency abuse of guidance documents as pertain to regulated entities).

52. See Michael Asimow, Public Participation in the Adoption of Interpretive Rules and Policy Statements, 75 Mich. L. Rev. 520, 529 (1977) ("Agencies cannot perform effectively unless they clarify the law through interpretative rules and channel their discretion through policy statements."); Nina A. Mendelson, Regulatory Beneficiaries and Informal Agency Policymaking, 92 Cornell L. Rev. 397, 409 (2007) (observing "[a]gencies

spillover effects on those who are subject to the agency's authority.[53] The Supreme Court has vacillated in its willingness to enforce these guidance documents against agencies.

2. *The* Accardi *Principle*.[54] — A federal agency must obey its own rules.[55] This principle—known as the *Accardi* principle, after the Supreme Court case enunciating it[56]—applies to regulations[57] validly promulgated by an agency pursuant to statutory authority. In *Accardi*, the Court held agency action procedurally invalid when it failed to comply with the agency's own "[r]egulations with the force and effect of law."[58] In *Service v. Dulles*, the Court extended the *Accardi* principle to regulations that *exceed* statutory requirements and concluded that, while an agency is not obligated to self-impose such requirements, once an agency does so, it must abide by them.[59] The Court later clarified that *Accardi* did

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rely on handbooks, directives, and other similar guidance documents to ensure that lower-level employees complete forms correctly and make consistent (and thus more predictable) decisions" in cheaper manner than promulgating legislative rules); Strauss, Continuum, supra note 35, at 1482 ("Staff instructions, manuals, and other forms of publication rules are essential tools of bureaucratic management, by which the expertise of an agency is shared throughout its structure, and staff operatives are kept under the discipline necessary to the efficient accomplishment of agency mission.").

53. See Robert L. Glicksman & Richard E. Levy, Administrative Law: Agency Action in Legal Context 784–86 (2010) (detailing statutory publication requirements and discussing manuals' potential indirect effects on public).

54. As one scholar notes, "What [this] principle is called may depend on what administrative law casebook one learned or teaches from." Elizabeth Magill, Agency Self-Regulation, 77 Geo. Wash. L. Rev. 859, 873 n.44 (2009). Like Professor Magill, this Note follows Professor Merrill's terminology—the *Accardi* principle—as denominated and exhaustively explored in a 2006 article. Thomas W. Merrill, The *Accardi* Principle, 74 Geo. Wash. L. Rev. 569 (2006).

55. See 32 Charles Alan Wright & Charles A. Koch, Jr., Federal Practice and Procedure: Judicial Review of Agency Action § 8165 (1st ed. 2012) ("One of the most firmly established principles in administrative law is that an agency must obey its own rules.").

56. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

57. The term "regulation" may refer both to rules adopted by notice-and-comment procedure, which are codified in the Code of Federal Regulations, and rules otherwise adopted. Because of the ambiguity surrounding the term in numerous cases, this Note uses the term "rulemaking" to distinguish formal "regulations."

58. *Accardi*, 347 U.S. at 265, 268; see also Service v. Dulles, 354 U.S. 363, 372 (1957) (affirming "regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature" as holding of *Accardi*); Peter Raven-Hansen, Regulatory Estoppel: When Agencies Break Their Own "Laws," 64 Tex. L. Rev. 1, 6–7 (1985) ("[T]he Court held that the . . . regulations required [the agency] to exercise independent discretion and that Accardi was entitled to prove that [it] had violated those regulations and, therefore, rendered an unlawful decision.").

59. 354 U.S. at 387–88. The Court addressed in *Service* the binding effect of self-imposed legislative regulations prescribed by a State Department manual; it concluded that, while the Department "was not obligated to impose upon [itself] . . . more rigorous substantive and procedural standards, . . . [it] could not, so long as the Regulations remained unchanged, proceed without regard to them." Id. at 388.

not apply to agency rules "not intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion"[60]—that it did not apply, in other words, to "'procedural rules adopted for the orderly transaction of business . . . except upon a showing of substantial prejudice to the complaining party.'"[61] And in *Morton v. Ruiz*, the Court extended *Accardi* to *nonlegislative* manuals of internal agency use, stating that an agency was required to comply with its own manual's provisions: "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."[62]

Notably, *Ruiz*, unlike previous instantiations of the *Accardi* principle, explicitly couched its analysis in APA terms.[63] Previously, the source of the *Accardi* principle was unclear—neither *Accardi* nor *Dulles* referred to the APA, instead invoking basic due process concerns. Indeed, the legal authority undergirding the principle remains uncertain.[64] Nonetheless, *Ruiz*'s holding that "more rigorous" procedures should be followed regardless of statutory mandate has been regarded as a signal—albeit an ambiguous one—that federal courts may review agencies' noncompliance with nonlegislative internal manuals.[65] The Court revisited, but

60. Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 538 (1970).

61. Id. at 539 (quoting NLRB v. Monsanto Chem. Co., 205 F.2d 763, 764 (8th Cir. 1953)).

62. 415 U.S. 199, 235 (1974). The provision was contained in "an internal-operations brochure intended to cover policies that do not relate to the public"; the Court concluded that "[b]efore the [agency] may extinguish . . . entitlement[s] of . . . otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures." Id. (internal quotation marks omitted).

63. Id. at 232–33. The manual in question expressly required compliance with the APA, which mandates Federal Register publication of "substantive rules of general applicability . . . and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D) (2012).

64. See Raven-Hansen, supra note 58, at 10–13 (reviewing scholarly speculation surrounding source of *Accardi* principle, including "primal due process" and text of APA).

65. See Merrill, supra note 54, at 584 ("In *Ruiz* . . . the *Accardi* principle arguably takes on broader significance as a general duty to conform to agency-created guidance documents, whether legally binding or not."); see also Peter L. Strauss et al., Gellhorn and Byse's Administrative Law: Cases and Comments 132 (11th ed. 2011) ("The [*Accardi*] principle applies to agency rules intended to be binding, but that can include procedural rules adopted under the exception in § 553(b)(A)." (citing *Ruiz*, 415 U.S. at 235; Viet. Veterans of Am. v. Sec'y of the Navy, 843 F.2d 528, 536–38 (D.C. Cir. 1988))). Disagreement persists about whether the Court was saying what it appeared quite clearly to be saying, as does dispute about the implications of its words: "This passage is troublesome because the 'internal procedures' the agency was faulted for violating were contained in an unpublished regulation. Because this passage was not necessary to the result in *Ruiz*, it has therefore been dismissed by some as arrant (and errant) dictum." 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, 675 (1992) (footnotes omitted). But see Lincoln v. Vigil, 508 U.S. 182, 199 (1993) (describing violation of internal procedures invalidating agency action as holding of *Ruiz*). The

obscured, its ruling in *Ruiz* five years later in *Chrysler Corp. v. Brown*, positing that the two starting places for determining whether a rule carries the force of law are the APA's fundamental distinction between "substantive" and "interpretive" rules and compliance with the APA's prescribed rulemaking procedures.[66] Yet the Court cited *Ruiz* for the proposition that a more fundamental test for "substantiveness," and thus presumptive legal effect, is whether the rule "affect[s] individual rights and obligations"[67]—which, in *Ruiz*, the *nonlegislative* manual provision did.

In the years after *Ruiz*, however, the Supreme Court departed from—but did not repudiate or overrule—that case's apparent extension of the *Accardi* principle, ruling in a variety of contexts that nonlegislative internal regulations and manuals were binding on neither the public nor the agency. The Court held in *United States v. Caceres* that the Internal Revenue Service's violation of its nonlegislative manual could not compel courts to exclude evidence obtained by such violation.[68] Two years later the Court held in *Schweiker v. Hansen* that the SSA Claims Manual—a "13-volume handbook" for internal use by SSA employees—was "not a regulation," had "no legal force, and d[id] not bind the SSA."[69]

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immediate confusion caused by the decision was no less severe. See Kenneth Culp Davis, Administrative Law Surprises in the *Ruiz* Case, 75 Colum. L. Rev. 823, 843 (1975) ("Administrative law would benefit if part V of the *Ruiz* opinion could be erased from the reports.").

66. 441 U.S. 281, 301 (1979) ("In order for a regulation to have the force and effect of law, it must have certain substantive characteristics and be the product of certain procedural requisites." (internal quotation marks omitted)).

67. Id. at 302 (quoting *Ruiz*, 415 U.S. at 232) (internal quotation marks omitted).

68. 440 U.S. 741, 755–57 (1979). Justices Marshall and Brennan dissented, pointing to *Ruiz* to argue that "where internal regulations do not merely facilitate internal agency housekeeping but rather afford significant procedural protections, we have insisted on compliance." Id. at 759–60 (Marshall, J., dissenting) (citation omitted). For "[w]here individual interests are implicated, the Due Process Clause requires that an executive agency adhere to the standards by which it professes its action to be judged." Id. at 758 (citing Vitarelli v. Seaton, 359 U.S. 535, 547 (1959) (Frankfurter, J., concurring in part and dissenting in part)).

69. 450 U.S. 785, 789 (1981) (per curiam). *Hansen* is properly considered part of the Court's equitable estoppel jurisprudence, which concerns when and whether agencies may be *sued* to enforce or preserve rights. See Schwartz, supra note 65, at 660–63 (defining equitable estoppel claims in government context and discussing agencies' presumptive immunity from them). Although "most cases in which the *Accardi* doctrine is invoked do not directly implicate the immunity of federal agencies from equitable estoppel," id. at 656 (emphasis omitted), the doctrines are sufficiently analogous that the Court's curt dismissal of the Claims Manual as a source of enforceable duties is, for present purposes, telling. Indeed, many district courts continue to cite *Hansen* when deciding HALLEX cases, even though HALLEX was not actually at issue there and the circuit split suggests *Hansen* does not obviously control. See, e.g., Neely v. Colvin, No. 2:12-cv-88-RJC-DSC, 2013 WL 5536791, at *10 (W.D.N.C. Oct. 7, 2013) ("Indeed, as the Supreme Court has observed, HALLEX is not binding on the Agency itself." (citing *Hansen*, 450 U.S. at 789)); Green v. Astrue, No. 11-11711-PBS, 2013 WL 636962, at *10 n.5 (D. Mass. Feb. 20, 2013) ("[I]t is well established that '[HALLEX] is not a regulation. It has no legal force, and it

Motivated by concern for administrative and judicial efficiency, the Court noted the consequences of allowing a "minor breach of such a manual [to] suffice[] to" bind the agency:

> [T]he Government is put "at risk that every alleged failure by an agent to follow instructions to the last detail in one of a thousand cases will deprive it of the benefit of [policies] which experience has taught to be essential to the honest and effective administration of the Social Security Laws."[70]

Some have concluded from *Caceres* and especially *Hansen* that the *Accardi* doctrine is presumptively limited to legislative rules.[71] Nonlegislative rules, on this account, are outside the scope of *Accardi* because they lack the "force and effect of law"—the very language used in the original *Accardi* decision.[72] Yet as recently as 1993 the Supreme Court reaffirmed *Morton v. Ruiz*'s holding that an agency's "failure to abide by its own procedures" in its manual could render agency action invalid.[73] So, although "a court is likely to review the agency's actions to see if the agency complies with" self-limiting rules it adopts,[74] the nature of the rule required to trigger *Accardi* remains hotly disputed. Despite this conspicuous lack of clarity, the Supreme Court has provided no guidance in recent years: The *Accardi* principle has lain largely dormant since *Hansen*,[75] and the nation's premier circuit court for administrative law

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does not bind the SSA. Rather, it is a 13-volume handbook for internal use by thousands of SSA employees . . . .'" (second alteration in original) (quoting *Hansen*, 450 U.S. at 789)).

70. *Hansen*, 450 U.S. at 789–90 (quoting Hansen v. Harris, 619 F.2d 942, 956 (2d Cir. 1980) (Friendly, J., dissenting), rev'd sub nom. Schweiker v. Hansen, 450 U.S. 785). Justice Marshall, joined by Justice Brennan, again dissented, arguing that "in an analogous situation [in *Ruiz*], we concluded that before an agency 'may extinguish the entitlement of . . . otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures.'" Id. at 795 (Marshall, J., dissenting) (quoting *Ruiz*, 415 U.S. at 235).

71. See, e.g., Merrill, supra note 54, at 612 ("The principle that agencies must comply with their own regulations applies only to agency legislative rules."); Schwartz, supra note 65, at 702 ("*Hansen* can quite plausibly be read to suggest that if the *Claims Manual* had been a published regulation its violation would have been a proper basis for [relief].").

72. United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 265 (1954); see also Merrill, supra note 54, at 586–87 ("*Hansen* is obviously in tension with *Ruiz* and *Caceres*, insofar as those decisions hold or imply that courts can direct agencies to comply with instructions set forth in agency manuals that do not have the force of legislative regulations.").

73. Lincoln v. Vigil, 508 U.S. 182, 199 (1993).

74. Magill, supra note 54, at 880. As Professor Magill eloquently puts it, "The *Accardi* doctrine . . . can transform unreviewable action into reviewable action." Id.

75. Professor Merrill notes:

> The modern era . . . is notable for only one thing: the Court has said nothing of significance about the *Accardi* principle. The doctrine has occasionally come up. But there has been no discussion that would bear, one way or another, on either its underlying rationale or its scope. There is no suggestion that the Court has disavowed the *Accardi* doctrine. It has simply had no occasion to enforce it, and hence has provided no additional guidance about its basis or its dimensions.

review has applied it in ways suggesting no consensus about what, if anything, it still stands for.[76]

3. Chevron *and* Skidmore. — If *Caceres* and *Hansen*, in their decisive departure from *Ruiz*, intimated a new hard-and-fast rule against binding agencies with their nonlegislative internal manuals, then the Court's overhaul of agency-deference doctrine beginning with *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[77] may have opened a backdoor to their "enforceability"—certainly against the public, and potentially against the agency. Although the two-step *Chevron* test[78] pertains to agency interpretations of *statutes*, several cases in which agency interpretations were held ineligible for *Chevron* deference appeared to allow for some flexibility on the legal status of manuals.[79] In *Christensen v. Harris County*, the Court held that manuals per se belong to a lesser category of guidance materials that "lack the force of law" and that "do not warrant *Chevron*-style deference."[80] Nevertheless, the Court conceded that this category of materials may be "entitled to respect" under *Skidmore v. Swift & Co.*'s[81] earlier, more flexible formulation of agency influence, "but only to the extent that those interpretations have the 'power to per-

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Merrill, supra note 54, at 584 (footnotes omitted); see also id. at 613 ("The Supreme Court has largely forgotten the case and the principle for which it stands.").

76. Professor Merrill analyzed the D.C. Circuit's *Accardi* doctrine from 1954 to 2005 and found it "fairly manipulable": "When the court is eager to apply the *Accardi* principle, all sorts of agency statements have been regarded as binding," including guidance documents, but the court has stopped short of according internal agency manuals binding effect. Id. at 592–93. Moreover, paralleling the Fifth Circuit's position on HALLEX, the D.C. Circuit "occasionally avoid[ed] the *Accardi* principle by holding that violations . . . have caused no prejudice to claimants." Id. at 606. As Professor Magill explains, "There is no self-evident answer to what counts as 'binding,' and there is frustrating ambiguity about which measures a court will deem 'binding.'" Magill, supra note 54, at 878. More generally, in the federal courts there remains "no agreement on . . . what counts as a 'rule' that an agency has an obligation to follow." Id. at 877.

77. 467 U.S. 837 (1984).

78. *Chevron* memorably held that, in evaluating agency interpretations of their authorizing (or "organic") statutes, courts should first determine "whether Congress has directly spoken to the precise question at issue . . . [and] [i]f the intent of Congress is clear, that is the end of the matter." Id. at 842. If, however, "the statute is silent or ambiguous . . . the question for the court is whether the agency's answer is based on a permissible construction of the statute"; if it is permissible, courts should defer to the agency's construction. Id. at 842–43. For a recent review of *Chevron*'s antecedents, reasoning, and ramifications, see generally Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "*Chevron* Space" and "*Skidmore* Weight," 112 Colum. L. Rev. 1143, 1161–63 (2012) [hereinafter Strauss, Weight].

79. See, e.g., Reno v. Koray, 515 U.S. 50, 61 (1995) (finding "internal agency guideline[s]" entitled to "some deference"); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157 (1991) (holding "informal interpretations" in internal guidelines not entitled to "same deference as norms that derive from the exercise of . . . delegated lawmaking powers" such as notice-and-comment rulemaking, but "still entitled to some weight on judicial review").

80. 529 U.S. 576, 587 (2000).

81. 323 U.S. 134 (1944).

suade.'"[82] According to *Skidmore*, factors bearing on an interpretation's "persuasiveness" are an agency's prior decisions and experience, "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."[83]

The Court confirmed its revival of the *Skidmore* "power to persuade" standard a year later in *United States v. Mead Corp.*, explicitly holding that certain agency guidance materials could have legal effect, even if ineligible for *Chevron* deference.[84] Although *Mead* reiterated that "'interpretations contained in . . . agency manuals . . .' [a]re beyond the *Chevron* pale,"[85] it also established that "the want of" notice-and-comment rulemaking "does not decide the case" on whether deference is due;[86] the Court thus confirmed that the less deferential standard articulated in *Skidmore* provides the proper analytical framework.[87] *Mead*'s meaning was soon obscured, however, in *Barnhart v. Walton*, when the Court suggested some criteria by which classic *Chevron* deference—not *Skidmore* weight—might be warranted for informal agency interpretations after all.[88]

Since *Mead*, however, *Skidmore* has been more routinely invoked in reference to manuals. In *Washington State Department of Social & Health*

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82. *Christensen*, 529 U.S. at 587 (citing *Skidmore*, 323 U.S. at 140); see also Strauss, Publication Rules, supra note 43, at 825 (explaining *Christensen*'s holding that a "reviewing court may find it appropriate to give [agency interpretations] some weight but should not say that it was 'bound' by the agency's view").

83. 323 U.S at 140.

84. 533 U.S. 218, 234–35 (2001).

85. Id. at 234 (quoting *Christensen*, 529 U.S. at 587); see also Manning, Rules, supra note 37, at 925 (observing *Mead* made "*Chevron* framework . . . presumptively inapplicable to nonlegislative rules").

86. *Mead*, 533 U.S. at 230–31.

87. Reviewing its pre-*Chevron* deference doctrine, the Court observed in *Mead* that "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." Id. at 228 (footnotes omitted) (citing *Skidmore*, 323 U.S. at 139–40). Moreover, "*Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency, and given the value of uniformity in its administrative and judicial understandings of what a national law requires." Id. at 234 (citation omitted) (internal quotation marks omitted). Soon after *Mead*, Professor Strauss summarized the thrust of the *Christensen-Mead* duo: "Publication rules may be binding within an agency hierarchy, as precedents are binding on the lower tribunals of a judicial system; but 'influence' seems the better account to give of their permitted force over others. *Skidmore* weight . . . is the right model for judges to deploy." Strauss, Publication Rules, supra note 43, at 833.

88. 535 U.S. 212, 222 (2002). These criteria included "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." Id. In *Barnhart*, the Court held that, despite its nonlegislative status, an SSA construction of statutory language governing SSDI benefit eligibility *was* entitled to *Chevron* deference in part because of its consistency with its "own longstanding interpretation." Id. at 219–20.

Services v. Guardianship Estate of Keffeler, the Court, citing *Skidmore* and *Mead*, found provisions of the SSA's Program Operations Manual System (POMS) to "warrant respect."[89] It addressed the subject at length in *Federal Express Corp. v. Holowecki*, holding that an "agency's policy statements, embodied in its compliance manual and internal directives, interpret[ed] not only the regulations but also the statute itself . . . [and] reflect[ed] a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[90] Therefore, "they are entitled to a measure of respect" under *Skidmore*.[91] Lower courts have been driven to inconsistency by the simultaneous potential applicability of *Skidmore* and *Chevron* to informal interpretations, and this confusion is no more pronounced than in the area of agency manuals.[92]

4. Auer *Deference*. — Complementing (and complicating) the Court's statutory-deference doctrine is a parallel regulatory-deference doctrine that originated in *Bowles v. Seminole Rock & Sand Co.*[93] and was explicitly rearticulated and reaffirmed in *Auer v. Robbins*.[94] The so-called *Auer* doctrine[95] holds that an agency's constructions of its regulations are "controlling unless '"plainly erroneous or inconsistent with the regulation,"'"[96] a standard widely regarded as more deferential than *Chevron*'s and one that the Supreme Court and lower courts have applied—as in

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89. 537 U.S. 371, 385 (2003) (citing *Mead*, 533 U.S. at 228, 234–35; *Skidmore*, 323 U.S. at 139–40).

90. 552 U.S. 389, 399 (2008) (quoting Bragdon v. Abbott, 524 U.S. 624, 642 (1998)) (internal quotation marks omitted).

91. Id. (internal quotation marks omitted) (citing Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487–88 (2004); *Mead*, 533 U.S. at 227–29). The Court went on to scold the EEOC for its unclear guidance, taking the opportunity to opine on the nature of guidance documents and stressing above all the agency's responsibility to deal fairly with the public:

> The Federal Government interacts with individual citizens through all but countless forms, schedules, manuals, and worksheets. . . . An assumption underlying the . . . judicial rule of deference to the agency's determinations[] is that the agency will take all efforts to ensure that affected parties will receive the full benefits and protections of the law.

Id. at 406–07.

92. See Lisa Schultz Bressman, How *Mead* Has Muddled Judicial Review of Agency Action, 58 Vand. L. Rev. 1443, 1459, 1466 (2005) (observing lower courts are split between "those that consider *Mead*-inspired factors and those that consider *Barnhart*-inspired factors," and "[a]fter *Mead*, courts are uncertain whether interpretations contained in formats like . . . manual[s] are entitled to *Chevron* deference or even which analytical framework applies").

93. 325 U.S. 410 (1945).

94. 519 U.S. 452 (1997).

95. Kevin M. Stack, Interpreting Regulations, 111 Mich. L. Rev. 355, 359 n.11 (2012) ("This doctrine was traditionally associated with *Seminole Rock*, but since 1997 the Supreme Court and other courts have frequently attributed it to *Auer* . . . .").

96. *Auer*, 519 U.S. at 461 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989) (quoting *Seminole Rock*, 325 U.S. at 414)).

Auer itself[97]—even when the interpretations are first advanced during litigation.[98] Because agency manuals typically consist of regulatory interpretations and implementations, *Auer* deference is a logical doctrinal source for according manuals' interpretations controlling weight. But *Auer* deference and *Skidmore* weight are not mutually exclusive: Indeed, in *Keffeler*, the Court both explicitly deferred under *Auer* and affirmed *Skidmore*'s applicability to an internal SSA agency manual.[99]

Auer, however, appears to be an increasingly vulnerable precedent. It has been subject to severe scholarly criticism,[100] especially in light of the *Mead* revival of *Skidmore* weight as a guiding principle.[101] And the Court's trend since *Auer* has been to restrict the scope of this "super-deference"[102]: *Christensen*—the case that held that lesser guidance materials, like manuals, lack the force of law and do not merit *Chevron* deference—also held that *Auer* applies only "when the language of the regulation is ambiguous . . . [because] [t]o defer to the agency's position would be to permit the agency . . . to create *de facto* a new regulation."[103] *Auer* is likewise inapplicable when "the underlying regulation does little more than restate the terms of the statute itself."[104]

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97. See id. at 462 ("[T]he Secretary's interpretation comes to us in the form of a legal brief; but that does not . . . make it unworthy of deference.").

98. See Fed. Express Corp. v. Holowecki, 552 U.S. 389, 397 (2008) ("Just as we defer to an agency's reasonable interpretations of the statute when it issues regulations . . . the agency is entitled to further deference when it adopts a reasonable interpretation of regulations it has put in force." (citing *Auer*, 519 U.S. at 452)); Stephen M. Johnson, Bringing Deference Back (But for How Long?): Justice Alito, *Chevron*, *Auer*, and *Chenery* in the Supreme Court's 2006 Term, 57 Cath. U. L. Rev. 1, 31 (2007) (observing *Auer* deference is "even more deferential than *Chevron* deference" and "[c]ourts have accorded deference to agency interpretations of their own regulations under *Auer* even when the agencies have initially advanced those interpretations in the course of litigation").

99. Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385–88 (2003) (citing United States v. Mead Corp., 533 U.S. 218, 228, 234–35 (2001); *Auer*, 519 U.S. at 461; Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)) (finding SSA's POMS manual eligible for *Skidmore* weight and that interpretations therein were "eminently sensible and should have been given deference under *Auer*").

100. See John F. Manning, Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules, 96 Colum. L. Rev. 612, 680–90 (1996) [hereinafter Manning, Structure] (arguing *Seminole Rock*'s latitudinarian approach to agency action should be replaced with aggressive judicial "check").

101. See Johnson, supra note 98, at 31 ("[A]cademic criticism of *Auer* deference rose dramatically after the Court's decision in *United States v. Mead*."); Manning, Rules, supra note 37, at 943–44 ("[T]he continued availability of this second—and, if anything, stronger—form of binding deference allows an end run around the boundaries drawn by *Mead*.").

102. J. Lyn Entrikin Goering, Tailoring Deference to Variety with a Wink and a Nod to *Chevron*: The Roberts Court and the Amorphous Doctrine of Judicial Review of Agency Interpretations of Law, 36 J. Legis. 18, 48 (2010).

103. Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000).

104. Gonzales v. Oregon, 546 U.S. 243, 257 (2006). "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and

Furthermore, the Court has scaled back its willingness to accept agency interpretations advanced defensively or for the first time in litigation if they "undermine the principle that agencies should provide regulated parties 'fair warning of the conduct [a regulation] prohibits or requires.'"[105] The Court has held that the appropriate standard in such situations is not *Auer* deference but *Skidmore* weight.[106] Justice Scalia in particular has thundered against *Auer*'s permissive approach to agency policymaking, arguing recently that it should be strictly curtailed,[107] while other Justices have signaled a willingness to revisit and potentially curb the *Auer/Seminole Rock* precedents.[108]

In summary, after the high-water mark of *Ruiz*, which held that an agency would be held to the letter of its internal manual, the Court began to suggest categorical exclusion of nonlegislative agency-manual provisions from legal effect. But the interpretive latitude of *Auer* and *Skidmore* may have provided manuals, under certain circumstances, limited legally authoritative status. Indeed, the Supreme Court has expressly granted POMS, an SSA manual similar to HALLEX,[109] both *Auer* defer-

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experience to formulate a regulation, it has elected merely to paraphrase the statutory language." Id.

105. Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2167 (2012) (alteration in original) (quoting Gates & Fox Co. v. Occupational Safety & Health Review Comm'n, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.)).

106. Id. at 2168–69; see also Elbert Lin & Brendan J. Morrissey, No Notice, No Deference: Agency Deference After *Christopher v. SmithKline Beecham Corp.*, Bloomberg Law, http://about.bloomberglaw.com/practitioner-contributions/no-notice-no-deference-agency-deference-after-christopher-v-smithkline-beecham-corp-by-elbert-lin-and-brendan-j-morrissey-wiley-rein-llp/ (on file with the *Columbia Law Review*) (last visited Mar. 5, 2014) ("After years of expressing discomfort with the significant deference afforded to agency interpretations of their own ambiguous regulations, the Supreme Court has adopted a clear and potentially far-reaching limitation on *Seminole Rock* deference.").

107. See Decker v. Nw. Envtl. Def. Ctr., 133 S. Ct. 1326, 1339–40 (2013) (Scalia, J., concurring in part and dissenting in part) ("Enough is enough. For decades, and for no good reason, we have been giving agencies the authority to say what their rules mean, under the harmless-sounding banner of 'defer[ring] to an agency's interpretation of its own regulations.' . . . Our cases have not put forward a persuasive justification for *Auer* deference." (quoting Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254, 2265 (2011) (Scalia, J., concurring))).

108. See id. at 1339 (Roberts, C.J., concurring) ("The bar is now aware that there is some interest in reconsidering [*Auer* and *Seminole Rock*], and has available to it a concise statement of the arguments on one side of the issue. I would await a case in which the issue is properly raised and argued.").

109. POMS is "a primary source of information used by Social Security employees to process claims for Social Security benefits." SSA's Program Operations Manual System Home, Soc. Sec. Admin., https://secure.ssa.gov/apps10/poms.nsf/Home?readform (on file with the *Columbia Law Review*) (last visited Mar. 5, 2014). POMS is "essentially a set of detailed guidelines relating to interpretations and procedures to be followed by the staff of the SSA. It is at least a clear indication of the agency's intended application of the governing law and its views on what that law means." 1 Social Security Law & Practice § 1:27 (2013), Westlaw SSLP. Unlike HALLEX, until mid-2013, POMS included a detailed disclaimer: "The POMS states only internal SSA guidance. It is not intended to, does not,

ence and *Skidmore* weight,[110] and lower courts have since held that nonlegislative rules conveyed purely by internal manuals—including POMS and HALLEX—can have sufficient legal effect under *Skidmore* to be effectively binding on the public.[111] Central to the dispute over HALLEX, however, is whether the *agency* should be held to interpretations in its manuals, even if persuasive under *Skidmore*; the answer is as yet uncertain.[112]

II. THE CIRCUIT SPLIT OVER HALLEX

The jurisprudence of agency manuals is complicated. It is little wonder, then, that lower courts have disagreed on the legal status of such manuals. So it was with HALLEX: In 2000, within two months of each other, the Fifth and Ninth Circuits arrived at different conclusions about the legal effect of HALLEX violations. Although this split has existed for over a decade, it is in recent years, with the increasing influx of disability determination appeals, that other courts have begun confronting, commenting on, and taking sides in the split. Part II.A analyzes the Fifth Circuit's relevant decision and reasoning, and subsequent development of that circuit's doctrine in the district courts. Part II.B does the same for the Ninth and Third Circuits' HALLEX doctrine. Part II.C examines the uncertain legal authority of HALLEX in other circuits and in district courts. Examining this "split" demonstrates that it is more of a mutual misunderstanding: No circuit holds HALLEX to have the force of law.

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and may not be relied upon to create any rights enforceable at law by any party in a civil or criminal action." Compare Soc. Sec. Admin., SSA's Program Operations Manual System Home, https://web.archive.org/web/20130512053235/https://secure.ssa.gov/apps10/ (last updated May 12, 2013) (on file with the *Columbia Law Review*) (accessed by searching Internet Archive for https://secure.ssa.gov/apps10/) (containing disclaimer), with Soc. Sec. Admin., POMS Home, https://web.archive.org/web/20130724091427/https://secure.ssa.gov/apps10/ (last updated July 24, 2013) (on file with the *Columbia Law Review*) (accessed by searching Internet Archive for https://secure.ssa.gov/apps10/) (containing no disclaimer). Its removal may suggest an acknowledgement that POMS *is* often relied upon.

110. The Supreme Court has acknowledged that interpretations in POMS may be entitled to *Auer* deference and that "[w]hile . . . administrative interpretations [in POMS] are not products of formal rulemaking, they nevertheless warrant respect [under *Skidmore*]" for purposes of interpreting the underlying statute. Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385–86 (2003) (citing United States v. Mead Corp., 533 U.S. 218, 228, 234–35 (2001); Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944)).

111. See, e.g., infra notes 149–150 and accompanying text (discussing Ninth Circuit application of *Skidmore* to HALLEX).

112. See Strauss, Continuum, supra note 35, at 1464 (noting cases binding agency, but not public, to its rules are "historically . . . not numerous in litigation, but nonetheless central to one's sense of what it means to have a government of laws"); id. at 1473 ("Cases like these arise when citizens try to hold the government to what it has apparently promised, rather than when they try to undercut a declared policy by suggesting that improper procedures have been followed."); infra notes 238–240 and accompanying text (discussing desirability of applying *Skidmore* standard against agency where warranted).

They differ, rather, in how they interpret pre-*Chevron* case law and now vary in the extent to which they incorporate post-*Chevron* guidance document doctrine.

A. *The Fifth Circuit: Prejudicial Violations "Cannot Stand"*

In *Newton v. Apfel*, the Fifth Circuit, while acknowledging that HALLEX lacks the per se force of law, established that, when warranted, it would nonetheless hold the SSA to its stated adjudicative procedures.[113] In 1992, appellant Gloria Newton applied for Social Security disability benefits, alleging that her medical condition had rendered her unable to work.[114] An ALJ denied Newton's claim because her impairment was not sufficiently "severe" and because during the relevant period she retained "the residual functional capacity to perform the exertional requirements of a full range of sedentary work."[115] Newton sought review from the SSA's Appeals Council, which rejected her appeal—but in doing so, the Council failed to "specifically address additional evidence or legal arguments or contentions submitted in connection with the request for review," as required by HALLEX.[116] Newton raised this issue on appeal, contending that her case was prejudiced by this failure because she was "required to pursue her action in federal court, as opposed to having her arguments specifically considered by the Appeals Council," and by "the resulting delay therefrom."[117]

The Fifth Circuit agreed that the ALJ made numerous errors warranting reversal and remand. The court rejected Newton's argument, however, that the Appeals Council's failure to follow HALLEX prejudiced her, "because her new medical evidence . . . [was] not relevant," as it did not pertain to the time period for which she sought benefits and consequently "did not cause [her] need to seek relief from the federal courts."[118] Nevertheless, the opinion asserted a right to police violations of HALLEX:

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113. 209 F.3d 448, 459 (5th Cir. 2000).

114. Id. at 451.

115. Id. at 454.

116. Id. at 459 (citing then-current version of HALLEX, supra note 4, § I-3-5-1 (last updated Sept. 8, 2005)).

117. Brief of Appellant at 45, *Newton*, 209 F.3d 448 (No. 98-11172), 1998 WL 34082295, at *45. Newton also advanced an argument from public policy:

> [T]he Appeals Council's failure to consider the claimants' arguments results in unnecessary cluttering of the federal courts with cases that should have been reversed and/or remanded by the Appeals Council. It also emasculates the entire purpose behind requiring the exhaustion of administrative remedies, which is to provide the government with an opportunity to remedy deficiencies without resort to costly and lengthy litigation.

Id. at 43–44.

118. *Newton*, 209 F.3d at 459–60.

> While HALLEX does not carry the authority of law, this court has held that "where the rights of individuals are affected, an agency must follow its own procedures [sic], even where the internal procedures are more rigorous than otherwise would be required." If prejudice results from a violation, the result cannot stand.[119]

In contrast to the tangle of precedent surrounding the Ninth Circuit's later *Moore v. Apfel* decision,[120] the source of the *Newton* rule was straightforward: a 1981 case, *Hall v. Schweiker*, in which the Fifth Circuit cited the preeminent Supreme Court case on scrupulous internal rule observance, *Morton v. Ruiz*.[121] *Hall* also drew upon *Alamo Express, Inc. v. United States*, which contains the Circuit's explicit endorsement of the *Accardi* principle as applied to nonlegislative, informal guidance materials.[122] *Accardi*, extended by *Ruiz*, was thus the source of the Fifth Circuit's position.

Although *Newton* found no prejudicial violation in the Appeals Council's noncompliance with HALLEX, later district court cases in the Fifth Circuit applied the *Newton* standard to reverse for precisely that reason. In *Ortega v. Apfel*, for example, the claimant was initially denied benefits by the ALJ and on appeal provided the Council with the results of an I.Q. test and his elementary school transcripts.[123] Although HALLEX requires that the Appeals Council "specifically address additional evidence or legal arguments or contentions submitted in connection with the request for review,"[124] in Ortega's case "the Appeals Council only issued a standard denial form in rejecting [his] request."[125] Citing *Newton*'s conclusion that "'[i]f prejudice results from a violation [by an administrative agency of its own procedures], the result cannot stand,'"[126] the district court held that the I.Q. test and transcripts constituted "new and material evidence" that the Council "clearly did not

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119. Id. at 459 (citation omitted) (quoting Hall v. Schweiker, 660 F.2d 116, 119 (5th Cir. Unit A Sept. 1981) (per curiam)) (misquotation).

120. See infra notes 135–144 and accompanying text (describing source of *Moore* principles).

121. *Hall*, 660 F.2d at 119 (citing Morton v. Ruiz, 415 U.S. 199, 235 (1974)).

122. See Alamo Express, Inc. v. United States, 613 F.2d 96, 98 (5th Cir. 1980) (observing that when agency action causes "substantial[] prejudice[]," a "series of Supreme Court cases which stretch back as far as" *Accardi* make agency "bound to observe [its] procedure").

123. Ortega v. Apfel, No. P-99-CA-050, 2001 WL 681723, at *4 (W.D. Tex. Mar. 28, 2001).

124. HALLEX, supra note 4, § I-3-5-1 (last updated Sept. 8, 2005).

125. *Ortega*, 2001 WL 681723, at *4.

126. Id. (alterations in original) (quoting Newton v. Apfel, 209 F.3d 448, 459 (5th Cir. 2000)).

adequately consider," with prejudicial result; thus, "remand of [the] case for consideration of that evidence [was] appropriate."[127]

B. *The Ninth and Third Circuits: HALLEX Violations Are Unreviewable*

The Fifth Circuit's qualified review of HALLEX noncompliance contrasts with the approach of the Ninth and Third Circuits. Part II.B.1 explicates the Ninth Circuit's nonreviewability standard, while Part II.B.2 does the same for the Third Circuit's similar approach.

1. *The Ninth Circuit.* — The Ninth Circuit refuses to entertain claimant allegations that HALLEX was violated, a position it first enunciated in *Moore v. Apfel*.[128] Moore argued that his case was prejudiced, as it was assigned three times to the same ALJ in direct violation of HALLEX policy.[129] The Ninth Circuit reasoned that, "for HALLEX to have the force and effect of law, it must . . . '[p]rescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice and . . . conform to certain procedural requirements.'"[130] In light of the manual's statement of purpose, the court stated:

> HALLEX is strictly an internal guidance tool, providing policy and procedural guidelines to ALJs and other staff members. As such, it does not prescribe substantive rules and therefore does not carry the force and effect of law. . . . [T]he specific provision at issue in the instant case . . . creates no substantive rights; it merely provides OHA [Office of Hearings and Appeals] staff

127. Id. *Bellard v. Astrue* provides a similar example: In that case, the claimant was denied benefits before an ALJ because her physical and mental impairments—cervical degenerative disc disease, lumbar degenerative disc disease, obesity, depression, and agoraphobia with mania—were not, either severally or in combination, disabling and because she could "perform the jobs of general office clerk, administrative support worker, and shipping and receiving clerk return." No. 09-1603, 2011 WL 13847, at *1 (W.D. La. Jan. 3, 2011). On appeal, Bellard supplied the Council with additional evidence to corroborate her claims that her mental impairments were disabling; as in *Ortega*, her appeal was denied by form letter. The district court reversed, concluding that "the Appeals Council violated its internal procedures by failing to specifically address the additional evidence," and that "[p]rejudice resulted from this course, because the additional evidence appears to support Ms. Bellard's claims for benefits." Id. at *5.

128. 216 F.3d 864 (9th Cir. 2000); see supra notes 1–6 and accompanying text (describing facts of *Moore*).

129. *Moore*, 216 F.3d at 866–67. HALLEX § I-2-1-55(D)(11) provides that "[Appeals Council] remands, including those generated by the courts, are assigned to the same ALJ who issued the decision or dismissal unless . . . the case was previously assigned to that ALJ on a prior remand from the [Appeals Council] and the ALJ's decision or dismissal after remand is the subject of the new [Appeals Council] remand." HALLEX, supra note 4, § I-2-1-55(D)(11) (last updated Dec. 11, 2013).

130. *Moore*, 216 F.3d at 868 (quoting United States v. Fifty-Three Eclectus Parrots, 685 F.2d 1131, 1136 (9th Cir. 1982)).

> with internal procedures for assigning cases to ALJs after a remand.[131]

Distinguishing an earlier case in which "the HALLEX provision found to have been violated . . . was the Commissioner's official interpretation of [a] binding regulation,"[132] the court concluded that, "[a]s HALLEX does not have the force and effect of law, it is not binding on the Commissioner and we will not review allegations of noncompliance with the manual."[133] The Ninth Circuit has maintained this strict nonreviewability position since.[134]

The court in *Moore* relied principally upon two cases for its ruling. The first was *United States v. Fifty-Three Eclectus Parrots*, which articulated a "substantive rules" test for whether an agency's action carries the "force of law."[135] Importantly, *Eclectus Parrots* acknowledged that "an agency can create a duty to the public which no statute has expressly created," but cited an earlier ruling for the proposition that "'[n]ot all agency policy pronouncements which find their way to the public can be considered regulations enforceable in federal court.'"[136] *Moore* also relied upon *United States v. Alameda Gateway Ltd.*, which provided an explicitly textualist test for whether an agency rule is "substantive" or "interpretive."[137] Here, the Ninth Circuit's references to controlling law became circular: *Alameda Gateway* relied upon *Eclectus Parrots* as well as *James v. U.S. Parole Commission*,[138] which itself cites to *Eclectus Parrots*—and, parenthetically,

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131. Id. at 868–69.

132. Id. at 869 (citing McNatt v. Apfel, 201 F.3d 1084, 1088 (9th Cir. 2000)). For discussion of *McNatt*'s uncertain relevance post-*Moore* and post-*Mead*, see infra note 197.

133. *Moore*, 216 F.3d at 869.

134. See, e.g., Roberts v. Comm'r of the Soc. Sec. Admin., 644 F.3d 931, 933 (9th Cir. 2011) (per curiam) (rejecting appellant's claims ALJ failed to substantively advise him of right to representation because "we do not 'review allegations of noncompliance with [HALLEX's] provisions'" (quoting Parra v. Astrue, 481 F.3d 742, 749 (9th Cir. 2007))). The Ninth Circuit has, however, noted in a different context—limiting attorney's fees awards to claimants—that "as an Agency manual, HALLEX is 'entitled to respect' under [*Skidmore*] to the extent that it has the 'power to persuade.'" Clark v. Astrue, 529 F.3d 1211, 1216 (9th Cir. 2008) (citations omitted).

135. 685 F.2d at 1136.

136. Id. at 1135–36 (quoting Rank v. Nimmo, 677 F.2d 692, 698 (9th Cir. 1982)). Importantly, *Eclectus Parrots* also distinguished Morton v. Ruiz, 415 U.S. 199 (1974), the Supreme Court's strongest statement of internal-manual enforceability: Unlike *Ruiz*, the manual provision at issue in *Eclectus Parrots* was "not a rule eliminating, narrowing or redefining Appellant's statutory rights . . . [but] merely a method for providing customs agents with information pertinent to their law enforcement duties." *Eclectus Parrots*, 685 F.2d at 1136; see also supra notes 62–65 and accompanying text (discussing *Ruiz* and its discontents). The court's suggestion was, presumably, that *had* the provision redefined or materially affected Appellant's statutory rights, *Ruiz* would probably control.

137. *Moore*, 216 F.3d at 868 (quoting United States v. Alameda Gateway Ltd., 213 F.3d 1161, 1168 (9th Cir. 2000)).

138. *Alameda Gateway*, 213 F.3d at 1168 (citing James v. U.S. Parole Comm'n, 159 F.3d 1200, 1206 (9th Cir. 1998); *Eclectus Parrots*, 685 F.2d at 1136).

to the case *Eclectus Parrots* quoted for its essential holding,[139] *Rank v. Nimmo*,[140] where all these roads lead.

The Ninth Circuit's reasoning in *Moore*, then, rests upon the result in *Nimmo*. In that case, the Circuit ruled that a Veterans Administration (VA) handbook contained "general statements of policy and procedure," which historical circumstances and policy considerations indicated were "not intended to have the force and effect of law."[141] The court cited *Chrysler Corp. v. Brown* as "requir[ing] that . . . rules be legislative in nature, affecting individual rights and obligations" to have legal effect.[142] In further support of its conclusion, the *Nimmo* court cited a litany of cases from other circuits that had "held agency handbooks . . . of [that] type unenforceable."[143] Administrability considerations weighed heavily in the *Nimmo* court's reasoning: "To hold [these documents] binding on the VA would hamper seriously the ability of departmental administrators to communicate freely and flexibly with the employees of their departments by means of written directives."[144] But *Chrysler Corp.*, the ultimate source of the circuit's HALLEX standard, approvingly cites *Ruiz*, the preeminent case for manual enforceability.[145] (Indeed, this is doctrine that the Fifth Circuit read to compel a quite different result.[146])

The Ninth Circuit's standard, holding allegations of HALLEX noncompliance to be per se unreviewable,[147] is in tension with subsequent Ninth Circuit authority recognizing that the *Accardi* principle—as restated in *Ruiz*—may, in fact, suffice to hold agencies bound by

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139. *James*, 159 F.3d at 1206.

140. 677 F.2d 692.

141. Id. at 698 (explaining disputed circular was issued "in response to the economic recession of 1974–75").

142. Id. (citing Chrysler Corp. v. Brown, 411 U.S. 281, 301–02 (1979)). Note that *Chrysler Corp.* itself drew upon *Ruiz*, which held that a provision contained only in an agency manual *could* be grounds for invalidating agency action; moreover, later Supreme Court decisions never clarified this apparent discrepancy and as recently as 1993 maintained that *Ruiz*'s holding on agency manual provisions was good law. See Lincoln v. Vigil, 508 U.S. 182, 199 (1993) (restating with approval *Ruiz*'s finding that agency manual violation rendered action invalid).

143. *Nimmo*, 677 F.2d at 698.

144. Id. (internal quotation marks omitted). *Nimmo* repeatedly conflates two documents at issue in the case, an internal handbook and a public circular, which clouds the substance of its holding. Nonetheless, its practical concerns echo the Supreme Court's in *Hansen*, see supra notes 69–70 (citing administrability to support nonbinding nature of manual provisions), but are inapplicable to the HALLEX review standard advocated here. See infra notes 246–250 and accompanying text (discussing Fifth Circuit's prejudice standard as limiting principle).

145. See infra notes 183–190 and accompanying text (examining Ninth Circuit's reliance on *Chrysler Corp.* and role of *Ruiz*).

146. See supra notes 120–122 and accompanying text (describing Fifth Circuit interpretation of *Ruiz* and related precedent).

147. See Moore v. Apfel, 216 F.3d 864, 869 (9th Cir. 2000) ("[W]e will not review allegations of noncompliance with [HALLEX].").

operations manuals and even "internal memoranda."[148] More generally, it seems to ignore the vast space between enforceable per se and unenforceable per se, i.e., the spectrum of legal effect represented by *Skidmore* and *Auer*. But in a few cases, the Ninth Circuit *has* in fact already accorded certain HALLEX provisions *Skidmore* influence, even while acknowledging that the Ninth Circuit "previously held that HALLEX is strictly an internal Agency manual, with no binding legal effect on the Administration or this court."[149] In the context of limiting awards of attorneys' fees to claimants—in other words, adopting HALLEX interpretations to bind *private parties*, not the agency—the Court has invoked *Skidmore* and *Christensen* to find HALLEX persuasive.[150] This sits uneasily with the Ninth Circuit's otherwise uncompromising standard. If HALLEX interpretations do carry legal weight, then in the Ninth Circuit only *claimant*-side arguments that such interpretations were not properly followed are precluded.[151] In other words, the standard allows the SSA to informally "bind" claimants with HALLEX, but immunizes the SSA against claims that provisions favoring claimants deserve *Skidmore* weight, too.

2. *The Third Circuit.* — In the 2007 case *Bordes v. Commissioner of Social Security*, the Third Circuit joined the Ninth in holding that HALLEX, as an internal agency manual, creates no enforceable rights.[152] Pauline Bordes's initial claim for disability benefits was denied, and she pursued the ordinary course of appeal, during which Bordes's attorney submitted letters to the SSA requesting reconsideration and review—some letters signed, some not. After being denied benefits, in Bordes's appeal to the Third Circuit, she alleged for the first time that the Appeals Council violated HALLEX by initiating an appeal on an unsigned request.[153]

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148. See, e.g., Alcaraz v. INS, 384 F.3d 1150, 1162 (9th Cir. 2004) (noting "agencies may be required to abide by certain internal policies" and finding Ninth Circuit "courts have recognized that the so-called *Accardi* doctrine extends beyond formal regulations," but declining "to address whether the various memoranda issued by the agency [were] sufficient to establish" binding policy).

149. E.g., Clark v. Astrue, 529 F.3d 1211, 1216 (9th Cir. 2008).

150. Id. (citing Christensen v. Harris Cnty., 529 U.S. 576, 587 (2000); Skidmore v. Swift & Co., 323 U.S. 124, 134 (1944)).

151. See infra text accompanying notes 237–239 (discussing discrepancy between "enforcement" against private parties and "enforcement" against SSA).

152. 235 F. App'x 853, 859 (3d Cir. 2007). Although unpublished in the Federal Reporter, the Third Circuit's opinions on HALLEX can be regarded as reasonably authoritative statements of its position. See Nash v. Astrue, No. 09-342-RGA-MPT, 2012 WL 3238226, at *15 (D. Del. Aug. 7, 2012) ("Although the Third Circuit opinion in *Bordes* is not precedential, it is the best guidance and only source cited that directly addresses whether HALLEX materials require judicial enforcement.").

153. *Bordes*, 235 F. App'x at 859.

Drawing upon its previous holding that another SSA manual's "regulations do not have the force of law"[154] and a Ninth Circuit decision applying *Moore*, the Third Circuit concluded that "HALLEX provisions . . . lack the force of law and create no judicially-enforceable rights."[155] Apparently reluctant to summarily quash Bordes's claim of procedural unfairness, however, it went on to review the Fifth Circuit's rationale for finding enforceable rights in HALLEX and concluded that Bordes's claim "would fail even under the Fifth Circuit's approach, because she has not shown she was prejudiced by the Appeals Council's review of her claim based on the unsigned request for review."[156] Unsurprisingly, the *Bordes* court drew heavily upon *Schweiker v. Hansen*, which explicitly held that a Social Security Claims Manual did not bind the SSA.[157]

C. *HALLEX in Other Circuits*

Four other circuits have addressed HALLEX's legal status without definitive resolution.[158] The Tenth Circuit "assume[d] without deciding that [it] c[ould] grant relief for prejudicial violations of . . . HALLEX provisions"; the court did not reach the issue because, "giving [the plaintiff] the benefit of the Fifth Circuit's approach," it found no such prejudicial violations in the record.[159] And, although the Eleventh Circuit has not squarely decided the issue,[160] it has hinted that its approach might

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154. Edelman v. Comm'r of Soc. Sec., 83 F.3d 68, 71 n.2 (3d Cir. 1996) (citing Schweiker v. Hansen, 450 U.S. 785, 789 (1981)).

155. *Bordes*, 235 F. App'x at 859. The court quotes Lowry v. Barnhart, 329 F.3d 1019, 1023 (9th Cir. 2003), as holding "neither [POMS nor HALLEX] imposes judicially enforceable duties." *Bordes*, 235 F. App'x at 859.

156. *Bordes*, 235 F. App'x at 859.

157. Id. (citing *Hansen*, 450 U.S. at 789). *Hansen*, however, concerned a different manual and a different provision—albeit one quite similar in the granularity and specificity of the provision allegedly violated in *Bordes*. See supra notes 69–70 and accompanying text (describing facts and holding of *Hansen*); see also Chaluisan v. Comm'r Soc. Sec., 481 F. App'x 788, 791 (3d Cir. 2012) ("Internal social security manuals lack the force of law and do not bind the Social Security Administration." (citing *Hansen*, 450 U.S. at 789)).

158. District courts (and magistrate judges) tend to vary in their tally of confirmed Fifth versus Ninth Circuit adherents. See, e.g., DiRosa v. Astrue, No. 10 C 7243, 2012 WL 2885112, at *5 (N.D. Ill. July 13, 2012) (counting Ninth, Sixth, Second, and D.C. Circuits as those holding "HALLEX is merely a non-binding, internal administrative guide"). This Note counts only the Third, Fifth, and Ninth Circuits as having squarely ruled on whether HALLEX is binding on the SSA. While the Sixth Circuit has held HALLEX not to bind *courts*, see Bowie v. Comm'r of Soc. Sec., 539 F.3d 395, 399 (6th Cir. 2008), it has not ruled on whether it binds the *agency*, leading to ongoing disagreement in that circuit's district courts. See infra note 167 (describing decisions).

159. Butterick v. Astrue, 430 F. App'x 665, 668 (10th Cir. 2011).

160. See Childs v. Astrue, No. 2:07CV945-SRW, 2009 WL 902614, at *6 (M.D. Ala. Mar. 31, 2009) ("The Eleventh Circuit has not addressed whether an ALJ's violation of the guidance set forth in the HALLEX is grounds for remand.").

align with the Ninth and Third Circuits'. According to the Eleventh Circuit, to assume that HALLEX carries the force of law would be "a very big assumption."[161] But districts in the Eleventh Circuit remain divided as to the legal effect of HALLEX.[162] When presented with an opportunity, the Seventh Circuit specifically avoided ruling on the enforceability of HALLEX, only deciding in the negative the narrower question of whether HALLEX creates freestanding due process rights.[163] District courts in that circuit are likewise split.[164] Like the Seventh, the Sixth Circuit has narrowly held on a related question—whether HALLEX's interpretation of a federal court decision trumps a court's own interpretation of that precedent—and concluded that for such purposes,

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161. George v. Astrue, 338 F. App'x 803, 805 (11th Cir. 2009) (per curiam). But see Mullis v. Astrue, No. 1:07-CV-1986-AJB, 2008 WL 4452343, at *11 n.13 (N.D. Ga. Sept. 30, 2008) (observing Eleventh Circuit considers certain Fifth Circuit opinions prior to 1981 binding and because Fifth Circuit "relied on [a] former Fifth Circuit opinion" in its original HALLEX ruling, "Eleventh Circuit might follow the Fifth Circuit standard").

162. Numerous decisions adopt the Fifth Circuit's approach, reviewing HALLEX violations for prejudice. See, e.g., Maiben v. Astrue, No. CA 09-0408-C, 2010 WL 761334, at *5 (S.D. Ala. Mar. 4, 2010) (citing Fifth Circuit's "prejudice" standard and concluding "plaintiff was not prejudiced by the ALJ's failure" to provide him with medical report post-hearing); Howard v. Astrue, 505 F. Supp. 2d 1298, 1302 (S.D. Ala. 2007) (following Fifth Circuit standard to find "plaintiff was prejudiced by the ALJ's failure to order a supplemental hearing as required by the HALLEX"). Many cite to Eleventh Circuit doctrine that accords with the Fifth's. See Carroll v. Soc. Sec. Admin., Comm'r, 453 F. App'x 889, 892 (11th Cir. 2011) (per curiam) (citing Hall v. Schweiker, 660 F.2d 116, 119 (5th Cir. Unit A Sept. 1981) (per curiam)) ("[W]e have held that an agency's violation of its own governing rules must result in prejudice before we will remand to the agency for compliance."); see also Ostos v. Astrue, No. 11-23559-CIV, 2012 WL 6182886, at *10 (S.D. Fla. Nov. 20, 2012) (citing *Carroll* and finding "no evidence that any alleged violation of the procedures resulted in prejudice to the Plaintiff"), adopted by No. 11-23559-CIV, 2012 WL 6182447 (S.D. Fla. Dec. 11, 2012). Others premise remand on fundamental due process concerns. See Hartman v. Comm'r of Soc. Sec., No. 2:12-CV-13-FtM-99SPC, 2012 WL 6089483, at *8 (M.D. Fla. Sept. 10, 2012) (finding plaintiff's attorney had no opportunity to review vocational expert interrogatories before hearing and remanding for HALLEX violation "in deference to Plaintiff's due process rights"), adopted by No. 2:12-CV-13-FtM-UA-SPC, 2012 WL 6090029 (M.D. Fla. Dec. 7, 2012). Yet just as many side with the Ninth Circuit and refuse to entertain the question. See, e.g., *Childs*, 2009 WL 902614, at *6 ("The court concludes that violation of HALLEX provisions do not provide an independent basis for relief against the Commissioner."). In the absence of a definitive ruling, uncertainty is the rule. See Tarver v. Astrue, No. CA 10-0247-C, 2011 WL 206217, at *3 (S.D. Ala. Jan. 21, 2011) ("There is uncertainty . . . between the District Courts in the Eleventh Circuit . . . as to whether or not . . . HALLEX creates judicially-enforceable rights.").

163. Davenport v. Astrue, 417 F. App'x 544, 547–48 (7th Cir. 2011) ("[N]o circuit has held that the HALLEX creates *constitutional* rights because, of course, only the Constitution, not an agency's rules or procedures, is the source of such rights.").

164. "[T]he Seventh Circuit has not decided whether the Appeals Council's failure to follow a provision of HALLEX is reversible error. . . . [Some] district courts . . . have held ALJs to the procedural requirements in HALLEX. The circumstances have varied, but, most often, the concerns were over the development of the record." DiRosa v. Astrue, No. 10 C 7243, 2012 WL 2885112, at *5–*7 (N.D. Ill. July 13, 2012) (citations omitted) (citing numerous Seventh Circuit district court opinions).

HALLEX is "not binding" on the courts.[165] And while it has indicated that "internal manuals like . . . HALLEX might [only] provide some evidence of the SSA's interpretations of its regulations,"[166] the precise question of whether noncompliance can constitute reversible error awaits a "definitive ruling from the Sixth Circuit"[167]—although at least one Sixth Circuit district court has apparently assumed that the Circuit's holdings amount to an adoption of the Ninth Circuit rule.[168]

Uncertainty also obtains among the circuits that have yet to address the question, and some circuits are more divided than others. Although "[t]he Fourth Circuit has not ruled on the issue,"[169] some district courts in that circuit have followed the Fifth Circuit in considering prejudicial HALLEX violations grounds for remand[170]—and have even raised the issue sua sponte[171]—while others have avoided the question[172] or have

165. Bowie v. Comm'r of Soc. Sec., 539 F.3d 395, 399 (6th Cir. 2008). One district court has interpreted this to mean that "HALLEX procedures *are* binding on the Social Security Administration," although this is precisely the question the circuits have split over. Dukes v. Comm'r of Soc. Sec., No. 1:10-CV-436, 2011 WL 4374557, at *9 (W.D. Mich. Sept. 19, 2011) (emphasis added) (citing *Bowie*, 539 F.3d at 399).

166. Ferriell v. Comm'r of Soc. Sec., 614 F.3d 611, 618 n.4 (6th Cir. 2010).

167. Caudill v. Astrue, No. 09-70-GWU, 2010 WL 148806, at *4 (E.D. Ky. Jan. 14, 2010). Absent one, some courts in the Sixth Circuit have "[f]ollowed those [circuits] that have concluded that failure to follow the HALLEX does not require reversal absent a convincing showing of prejudice to the plaintiff," Boschert v. Astrue, No. 10-82-GWU, 2011 WL 741373, at *6 (E.D. Ky. Feb. 23, 2011) (citing *Caudill*, 2010 WL 148806, at *4), while others reject review of SSA decisions for consistency with HALLEX. See, e.g., Alilovic v. Astrue, No. 1:12CV323, 2012 WL 5611077, at *7 (N.D. Ohio Nov. 15, 2012) ("HALLEX is an internal guidance tool for use by ALJs and other staff members, is not published in either the Federal Register or the Code of [Federal] Regulations, and does not have the force of law." (internal quotation marks omitted)); Hedden v. Comm'r of Soc. Sec., No. 1:10-CV-534, 2011 WL 7440949, at *10 (W.D. Mich. Sept. 6, 2011) ("[T]he Court is aware of no controlling authority holding that the HALLEX regulations carry the force of law such that failure to act in conformity therewith is a sufficient basis for relief."); Kendall v. Astrue, No. 09-239-GWU, 2010 WL 1994912, at *4 (E.D. Ky. May 19, 2010) ("HALLEX does not create a procedural due process issue as do the Commissioner's regulations in the Code of Federal Regulations.").

168. See Hull-Kitchen v. Astrue, No. 3:11CV00423, 2013 WL 423278, at *12 (S.D. Ohio Feb. 1, 2013) ("Because HALLEX is not binding in the Sixth Circuit . . . the ALJ's failure . . . does not constitute an abuse of discretion or reversible error."), adopted by Hull-Kitchen v. Colvin, No. 3:11-CV-423, 2013 WL 792920 (S.D. Ohio Mar. 4, 2013).

169. Faulkenberry v. Astrue, No. 1:11-594-JMC-SVH, 2012 WL 3000664, at *7 n.4 (D.S.C. June 28, 2012), adopted by No. 1:11-594-MGL, 2012 WL 3000659 (D.S.C. July 23, 2012); Chapman v. Astrue, No. 1:10-3052-DCN-SVH, 2011 WL 4965493, at *11 n.8 (D.S.C. Sept. 26, 2011); see also Thorne v. Astrue, No. 3:11-cv-720-HEH, 2012 WL 4801840, at *16 (E.D. Va. Sept. 20, 2012) (noting "Fourth Circuit has yet to rule on this issue" and reviewing internal Fourth Circuit split), adopted by No. 3:11cv720-HEH, 2012 WL 4801839 (E.D. Va. Oct. 9, 2012).

170. See, e.g., Way v. Astrue, 789 F. Supp. 2d 652, 665 (D.S.C. 2011) (reviewing split and concluding "[u]nder the circumstances of this case . . . the Fifth Circuit's approach is appropriate").

171. *Chapman*, 2011 WL 4965493, at *10–*12 (noting HALLEX violations were not raised before court, but still ordering Commissioner to follow HALLEX provisions on

opted to follow the Ninth and Third Circuits' nonreviewability standard.[173] In the Second Circuit, some consensus appears to be emerging among district courts that HALLEX is per se unenforceable,[174] although one court has drawn a distinction between HALLEX guidelines that govern procedures specifically prescribed by regulation—which may be enforced against the agency even if stricter than required—and those that "authorize procedures not addressed in the regulations or statute," which may not be so enforced.[175] Furthermore, the Second Circuit appears to assume that HALLEX is eligible for *Skidmore* deference[176] and generously holds that the SSA's POMS "sub-regulations" are "entitled to 'substantial deference, and will not be disturbed as long as they are reasonable and consistent with the statute.'"[177] District courts in the Eighth Circuit have consistently found that "[i]n the absence of a ruling from the . . . Court of Appeals, coupled with the weight of authority that HALLEX does not create judicially-enforceable rights . . . an ALJ's failure to follow HALLEX is [not] reversible error."[178] Finally, while it has not

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remand). The *Chapman* court further noted that "HALLEX does not *automatically* have the force of law, so . . . failure to follow [a provision] does not automatically require reversal or remand." Id. (emphasis added).

172. See Calhoun v. Astrue, No. 7:08cv00619, 2010 WL 297823, at *3–*4 (W.D. Va. Jan. 15, 2010) (observing "Fourth Circuit has not addressed the meaning and effect of HALLEX, and circuits are split with respect to whether the agency must follow" it, but declining to rule on issue and remanding on other grounds). But see Neely v. Colvin, No. 2:12-cv-88-RJC-DSC, 2013 WL 5536791, at *10 (W.D.N.C. Oct. 7, 2013) (noting, with inapposite citation to footnote about Social Security Rulings (SSRs) rather than HALLEX, that "Fourth Circuit has held[] HALLEX does 'not have the force of law'" (quoting Pass v. Chater, 65 F.3d 1200, 1204 n.3 (4th Cir. 1995))).

173. See Melvin v. Astrue, 602 F. Supp. 2d 694, 704 (E.D.N.C. 2009) ("As an internal guidance tool, HALLEX lacks the force of law. . . . Thus, the court rejects claimant's reliance on the ALJ's alleged failure to comply with HALLEX . . . ." (citations omitted)). The *Melvin* court nonetheless felt the need to explain that "even if HALLEX were binding and a source of a remedy, plaintiff has failed to show prejudice." Id.

174. See Valet v. Astrue, No. 10-cv-3282 KAM, 2012 WL 194970, at *12 n.21 (E.D.N.Y. Jan. 23, 2012) ("Courts in the Eastern District of New York have held that 'a failure to follow procedures outlined in HALLEX does not constitute legal error.'" (citing Grosse v. Comm'r of Soc. Sec., No. 08-CV-4137, 2011 WL 128565, at *5 (E.D.N.Y. Jan. 14, 2011))).

175. Edwards v. Astrue, No. 3:10CV1017 MRK, 2011 WL 3490024, at *6 (D. Conn. Aug. 10, 2011). Although noting that "other circuits and Second Circuit district courts have found that HALLEX polices [sic] are not regulations and therefore not deserving of controlling weight," the judge cited the Fifth Circuit's contrary holding in Newton v. Apfel, 209 F.3d 448 (5th Cir. 2000), to assert that "[a]n administrative agency is required to follow its own internal policies when they accord with or are more demanding than the statute or its regulations." *Edwards*, 2011 WL 3490024, at *6.

176. See Cage v. Comm'r of Soc. Sec., 692 F.3d 118, 125 n.2 (2d Cir. 2012) ("declin[ing] to defer" to HALLEX under *Skidmore*), cert. denied, 133 S. Ct. 2881 (2013).

177. Lopes v. Dep't of Soc. Servs., 696 F.3d 180, 186 (2d Cir. 2012) (quoting Bubnis v. Apfel, 150 F.3d 177, 181 (2d. Cir. 1998)).

178. Heitz v. Astrue, No. 09-CV-2019-LRR, 2010 WL 1521306, at *17 (N.D. Iowa Apr. 15, 2010); see also Ericson v. Astrue, No. 8:11CV432, 2012 WL 5286762, at *10 (D. Neb. Oct. 24, 2012) (reviewing Eighth Circuit HALLEX decisions); cf. Hartfield v. Barnhart,

weighed in on the circuit split, the D.C. Circuit has, like the Second, recognized that HALLEX is eligible for *Skidmore* deference,[179] as the Ninth Circuit now holds.

III. THE NINTH CIRCUIT'S STANDARD IS PROBLEMATIC WHILE THE FIFTH'S IS BETTER SUPPORTED BY LAW AND POLICY

The ongoing, decade-long circuit split over the legal effect of HALLEX has concrete consequences: a national SSDI regime with patchwork procedural protections. Some claimants—those in the Fifth Circuit and districts following its lead—enjoy an additional institutional safeguard against potentially prejudicial error by an ALJ or the Appeals Council. Others—those in the Ninth Circuit and the circuits and districts following its lead—do not. The result is to summarily exclude some potentially prejudicial ALJ and Appeals Council errors from judicial review, and thus potentially to deny claimants disability benefits based on administrative carelessness or disregard for internal rules.

This Part argues, following the Fifth Circuit, that district courts should review HALLEX violations for prejudice to the claimant during hearings and appeals. This approach is preferable on grounds of law and policy. Part III.A demonstrates that the difference between the circuits' approaches reflects the uncertain survival of the *Accardi* principle and its interaction with *Skidmore* and *Auer*. It further argues that *Accardi* remains a vital component of judicial review of nonlegislative guidance and contends that HALLEX's provisions governing appellate procedures would warrant either *Auer* deference or *Skidmore* weight and should thus be eligible for application of the *Accardi* principle—in other words, that claimants should be able to invoke an agency's authoritative interpretations *against the agency*. Part III.B explains that the dispute between the Fifth Circuit and the Ninth and Third Circuits implicates significant public policy concerns and argues that the Fifth Circuit's approach is more desirable on this ground.

A. Accardi, Auer, *and* Skidmore*: Merging Complementary Doctrines*

The Ninth Circuit's HALLEX doctrine is distinctly two faced. While it recognizes HALLEX's provisions are often agency interpretations, and thus may be "persuasive authority," it refuses to review allegations of noncompliance with those interpretations.[180] The court will, in other

384 F.3d 986, 988 (8th Cir. 2004) (noting while POMS provisions "do not have legal force and do not bind the Commissioner, courts should consider them in their findings").

179. See Power v. Barnhart, 292 F.3d 781, 786 (D.C. Cir. 2002) (holding HALLEX and other interpretive documents would not merit *Chevron* deference, but might "qualify for the more limited form of deference accorded under [*Skidmore*]").

180. See, e.g., Lor v. Colvin, No. 2:12-CV-0434 AC, 2013 WL 5519999, at *4 (E.D. Cal. Oct. 3, 2013) (noting Ninth Circuit applies *Skidmore* analysis to HALLEX but "will not review allegations of noncompliance").

words, "enforce" the agency's views, if persuasive, to bind private parties, but will not even consider potential SSDI recipients' claims that the agency *failed* to follow its interpretations of governing regulatory and statutory provisions. The Fifth Circuit's approach adopts a more pragmatic position: acknowledging the uncertain legal status of HALLEX—it, too, holds that HALLEX does not have the "force of law," as the phrase is conventionally understood—but providing redress where the error may have denied a claimant the opportunity to present the best case possible or to receive a fair and impartial hearing.[181] Both circuits rely on the same cluster of Supreme Court cases for support, but their interpretations and conclusions differ. Part III.A.1 demonstrates that the Ninth Circuit's categorical approach to reviewing noncompliance with HALLEX is not justified by the precedent it cites and neglects *Auer* deference and *Skidmore* weight as potential sources of legal authority. Part III.A.2 discusses these precedents in the HALLEX context, illustrating that HALLEX merits *Auer* deference or *Skidmore* weight and, thus, that the Ninth Circuit's refusal to review allegations of HALLEX violations is unjustified, even in the context of its own case law.

1. *Establishing* Accardi*'s Applicability.* — The Ninth Circuit's HALLEX-nonreviewability principle, articulated in *Moore v. Apfel*,[182] can be traced to *Chrysler Corp. v. Brown*.[183] But because *Chrysler* drew its principal propositions directly from *Morton v. Ruiz*—which arguably held that nonlegislative, internal agency manuals *may* be enforced against agencies[184]—*Moore* stands on shaky ground. (Recall that in *Ruiz*, the Supreme Court sanctioned review of agency compliance with rules "affecting individual rights" even if such rules are contained in nonlegislative guidance documents and are "more rigorous than otherwise would be required."[185]) *Moore* and its sequels' steadfast refusal to review alleged HALLEX violations is untenable if for no other reason than that *Ruiz* has not been overruled, nor has its strong statement of the *Accardi* principle as applied to rights-affecting nonlegislative rules been repudiated. More fundamentally, doctrine both pre- and post-*Chevron* continues to hold that the *Accardi* principle requires federal agencies to follow their own rules, even "gratuitous procedural rules,"[186] that may be

181. Both the Code of Federal Regulations and HALLEX provide that claimants will receive a "fair and impartial" hearing. 20 C.F.R. § 405.1(a) (2013); HALLEX, supra note 4, § I-2-6-1 (last updated Sept. 2, 2005).

182. See supra notes 128–134 and accompanying text (discussing *Moore*'s rule and reasoning).

183. See supra notes 135–144 and accompanying text (discussing *Moore*'s reliance on *Nimmo*, which channeled *Chrysler Corp.* into Ninth Circuit).

184. See supra Part I.B (discussing enforceability of nonlegislative rules, including *Ruiz* and its implications).

185. Morton v. Ruiz, 415 U.S. 199, 235 (1974).

186. Steenholdt v. FAA, 314 F.3d 633, 639 (D.C. Cir. 2003).

purely internal to the agency.[187] Indeed, *Accardi* retains its vitality in the Ninth Circuit in cases involving regulations,[188] published policy statements,[189] and even internally promulgated policy statements.[190] In the Ninth Circuit, agencies have also been held to interpretive rules where parties have reasonably relied upon them.[191] Although this precedent only holds under a different doctrine—that of equitable estoppel—courts, as noted above, routinely cross-apply rules governing guidance documents.[192]

But *Accardi*, *Ruiz*, and the tangle of circuit precedent surrounding *Moore* coexist with post-*Chevron* administrative law, which tends to occupy the field. There is little disagreement among the circuits on one fundamental point: HALLEX is an internal guidance manual and does not "carry the force and effect of law" as conventionally understood.[193] But, as *Skidmore* and *Auer* illustrate, this phrase is at best ambiguous; courts and scholars agree that agency action falls along a *spectrum* of legal authority, from formal rulemaking on one end to individualized opinion letters and advice on the other.[194] Some provisions of HALLEX must have *some* legal effect if it can be regarded as the SSA's authoritative

187. Doe v. U.S. Dep't of Justice, 753 F.2d 1092, 1098 (D.C. Cir. 1985) (observing, in employment context, courts "have long required agencies to abide by internal, procedural regulations").

188. See, e.g., Sagaydak v. Gonzales, 405 F.3d 1035, 1040 (9th Cir. 2005) ("[I]t has long been held that the BIA's 'failure to exercise its own discretion, contrary to existing regulations' is reversible error." (quoting United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 268 (1954))).

189. See Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 852 (9th Cir. 2003) ("Having chosen to promulgate [a policy], the [Fish and Wildlife Service] must follow that policy." (citing *Steenholdt*, 314 F.3d at 639)).

190. Church of Scientology of Cal. v. United States, 920 F.2d 1481, 1487 (9th Cir. 1990) ("Pursuant to the *Accardi* doctrine, an administrative agency is required to adhere to its own internal operating procedures.").

191. See United States v. Am. Prod. Indus., Inc., 58 F.3d 404, 408 (9th Cir. 1995) ("There is a single exception to [the] general rule [that interpretive rules do not create a private cause of action][:] Where a contracting party reasonably relies on an authorizing regulation, the Government may be estopped from voiding the contract.").

192. See supra note 69 (describing cases where Supreme Court estoppel rule is used to hold HALLEX nonbinding).

193. See, e.g., Bordes v. Comm'r of Soc. Sec., 235 F. App'x 853, 859 (3d Cir. 2007) ("HALLEX provisions . . . lack the force of law."); Moore v. Apfel, 216 F.3d 864, 868 (9th Cir. 2000) (finding HALLEX "does not carry the force and effect of law"); Newton v. Apfel, 209 F.3d 448, 459 (5th Cir. 2000) ("HALLEX does not carry the authority of law.").

194. See, e.g., Jamison E. Colburn, Agency Interpretations, 82 Temp. L. Rev. 657, 661 n.28 (2009) ("The standard account has long been that 'force of law' in the administrative state comprises a more or less hierarchical pyramid beginning with a base of circulars, manuals, and the like, building upward to the Constitution at its most forceful apex."); Strauss, Publication Rules, supra note 43, at 804 (illustrating texts' degrees of "binding" authority as tiers of pyramid).

interpretation of regulation and statute, as it repeatedly—and rightly[195]—has been. Pre-*Chevron*, this effect might have been an emanation from the "poorly theorized" *Accardi* principle.[196] Post-*Chevron*, the most obvious source of such effect is either *Auer* deference or *Skidmore* weight.

Several circuits have discussed the new jurisprudence of nonlegislative rules and administrative guidance in their HALLEX decisions. Indeed, the Ninth Circuit itself has held that the *Skidmore* "power to persuade" standard applies to HALLEX, but did so in the context of bolstering the SSA's case *against a claimant*.[197] One possible reason the *Moore* standard is so severe—and so seemingly inconsistent with other Ninth Circuit case law—is that *Moore* was decided in 2000, before the Supreme Court's *Skidmore* renaissance.[198] As discussed above, the Ninth Circuit interpreted pre-*Chevron* doctrine to forbid claims grounded in documents that did not carry the force of law.[199] The Fifth Circuit interpreted that precedent differently, making an exception for an agency's prejudicial failure to follow internal rules.[200] (In implicit acknowledgement of the potential for prejudice, the Ninth Circuit made clear it saw

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195. The APA provides support for agencies' *unilateral* invocation of manual provisions against private parties. See 5 U.S.C. § 552(a)(2) (2012) ("A . . . staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency . . . if . . . it has been indexed and either made available or published.").

196. See Merrill, supra note 54, at 569 ("To say that the *Accardi* principle is poorly theorized would be an understatement. . . . The Court has variously suggested that it is inherent in the nature of delegated 'legislative power'; that it is required by due process; and that it is a principle of administrative common law.").

197. Clark v. Astrue, 529 F.3d 1211, 1216 (9th Cir. 2008); see supra note 134 (discussing *Clark*). An earlier, pre-*Mead* and pre-*Moore* case—*McNatt v. Apfel*—*had* agreed with a claimant's reading of a HALLEX provision, understood there as an "interpretation" of an underlying regulation, and ultimately sided with the claimant's reading against the SSA. 201 F.3d 1084, 1088 (2000). Whatever influence *McNatt* may have enjoyed, however, has been significantly limited by the *Moore* standard's ubiquitous invocation in Ninth Circuit HALLEX cases and the adoption, in *Clark*, of the *Skidmore* standard. *Clark*, 529 F.3d at 1216. *McNatt* is now cited predominantly for jurisdictional holdings; where it is cited in relevant ways, it is for the cases involving the specific HALLEX provision and regulation at issue in that case—and where it *is* cited for this reason, it is typically accompanied by the *Moore* rule. See, e.g., Morales v. Astrue, No. EDCV 10-13 AGR, 2011 WL 1671953, at *2 (C.D. Cal. May 4, 2011) (noting plaintiff's argument from HALLEX and *McNatt*, but adding that "'HALLEX does not impose judicially enforceable duties on either the ALJ or this court'" (quoting Lockwood v. Comm'r Soc. Sec. Admin., 616 F.3d 1068, 1072 (9th Cir. 2010))), aff'd, 504 F. App'x 592 (9th Cir. 2013).

198. The Ninth Circuit did cite *Christensen v. Harris County*, a precursor to the *Skidmore* revival, but only for the proposition that "[i]nterpretations . . . contained in agency manuals lack the force of law and are not entitled to *Chevron* deference by a reviewing court." *Moore*, 216 F.3d at 869 n.2 (citing 529 U.S. 576, 586–88 (2000)).

199. Supra Part II.B.1.

200. Supra Part II.A.

none in the ALJ's failure to follow HALLEX in Winston Moore's case, even as it enunciated its nonreviewability standard.[201])

Circuit courts are thus asking the wrong question: It is not whether HALLEX has the force of law and can, accordingly, be enforced; indeed, the Fifth Circuit has never held that HALLEX is per se "enforceable."[202] Instead, the question is whether the *Accardi* principle still has force—either of its own accord,[203] as the Fifth Circuit indirectly holds, or, as this Note argues, through application of *Auer* or *Skidmore* on claimants' behalf. The next section argues that *Skidmore* deference should not be presumptively reserved for agencies' reliance on their own interpretations and that in many cases it should be given to SSA interpretations that claimants allege are violated.

2. *HALLEX's Character, Design, and Incorporation of Agency "Precedent" Suggest Claimant-Directed Provisions Deserve* Auer *Deference or* Skidmore *Weight.* — *Accardi* remains a guiding principle, even as post-*Chevron* doctrine has largely eclipsed the case law through which it was developed. This section reviews whether that doctrine should in fact apply to HALLEX. *Auer* deference, the super-strong cousin of *Chevron* deference, accords agencies significant authority to interpret their own regulations—with binding force—so long as those interpretations are not "plainly erroneous or inconsistent with the regulation."[204] Indeed, the

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201. See *Moore*, 216 F.3d at 870–71 ("ALJ Ganly . . . did exactly what the caselaw and SSR 83-12 direct him to do . . . [and] [his] finding that Moore was not disabled because substantial gainful work exists in the national economy was supported by substantial evidence.").

202. No opinion in the Fifth Circuit, either by the circuit court or district courts, uses the term "enforce" or "enforceable," and indeed only two have used the term "binding." See Bellard v. Astrue, No. 09-1603, 2011 WL 13847, at *3 (W.D. La. Jan. 3, 2011) ("HALLEX is binding to the extent that violations can be grounds for granting relief . . . ."); Pullam v. Astrue, No. 06-CV-1771, 2008 WL 4000538, at *2 (W.D. La. July 1, 2008) ("The Commissioner's HALLEX is binding upon the ALJ."). Precise terminology, of course, is irrelevant if the *effect* is "enforcement" by way of remand, as other circuits have understood the standard. But many Fifth Circuit courts' choice of language suggests a potential point of convergence with *Skidmore*: Some courts hold that "the *authoritativeness* of the provisions of HALLEX" is at issue, see James v. Astrue, No. 08-4480, 2013 WL 870360, at *4 (E.D. La. Feb. 20, 2013), adopted by No. 08-4480, 2013 WL 870367 (E.D. La. Mar. 7, 2013), and in one court's opinion, "[T]he Fifth Circuit expressly held in *Newton* that HALLEX provisions are entitled to *considerable weight*." Speights v. Barnhart, No. Civ.A.04-003-D-M3, 2004 WL 3331910, at *7 (M.D. La. Nov. 30, 2004) (emphasis added), adopted by No. Civ.A.04-003-D-M3, 2004 WL 3354861 (M.D. La. Dec. 27, 2004); cf. Strauss, Weight, supra note 78, at 1145–46 (characterizing *Skidmore* deference as "weight" of agency views).

203. Professor Merrill notes one potential intellectual obstacle to applying *Accardi*: "[I]t is possible that the *Accardi* principle has become identified in the judicial mind with niggling enforcement of agency procedural regulations, a project which has largely fallen out of favor." Merrill, supra note 54, at 613 n.267.

204. Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

Supreme Court has previously granted POMS *Auer* deference.[205] This would seem the more logical standard to apply; but *Mead*'s rehabilitation of *Skidmore* and the subsequent erosion of *Auer*,[206] along with the composite character of HALLEX,[207] suggest that *Skidmore* weight is the applicable standard, as several circuits have held[208] or suggested in dicta.[209] Part III.A.2.a applies *Auer* deference doctrine to HALLEX; Part III.A.2.b examines HALLEX in terms of *Skidmore*.

a. Auer *Deference*. — Analysis under *Auer* deference doctrine could simply and straightforwardly provide HALLEX provisions with sufficient legal authority to warrant reversal for SSA failure to observe them. *Auer* asks whether an agency's construction of its own regulation is "plainly erroneous or inconsistent with the regulation"; if not, that construction is controlling.[210] In *Keffeler*, the Supreme Court examined a series of SSA manual provisions interpreting statutory and regulatory language, ultimately concluding that "the Commissioner's interpretation of her own regulations [was] eminently sensible and should have been given deference under" *Auer*.[211] *Keffeler* involved interpreting POMS provisions that substantially defined potentially ambiguous statutory and regulatory terms.[212] Many HALLEX provisions are likewise matters of regulatory interpretation—construing or unpacking ambiguous or underdefined terms in regulations.[213] But other HALLEX provisions do not resolve

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205. See supra notes 98–99 and accompanying text (discussing *Auer* doctrine applied to POMS).

206. See, e.g., Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168–69 (2012) (limiting scope of *Auer* deference in favor of *Skidmore* analysis); see also supra notes 100–108 (discussing waning influence of *Auer*).

207. See supra notes 28–32 and accompanying text (detailing HALLEX's diverse assemblage of provisions and requirements).

208. See, e.g., Clark v. Astrue, 529 F.3d 1211, 1216 (9th Cir. 2008) ("HALLEX is entitled to respect under [*Skidmore*]." (internal quotation marks omitted)).

209. See, e.g., Power v. Barnhart, 292 F.3d 781, 786 (D.C. Cir. 2002) (noting HALLEX would "at best" qualify for *Skidmore* deference).

210. Auer v. Robbins, 519 U.S. 452, 461 (1997) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

211. Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 387–88 (2003).

212. Professor Stack observes that while "[n]either *Seminole Rock* nor *Auer* includes ambiguity as a preliminary doctrinal inquiry," the Court has since "articulated the *Auer* inquiry in terms of ambiguity." See Stack, supra note 95, at 371 n.74.

213. See, e.g., HALLEX, supra note 4, § I-3-5-1 (last updated Sept. 8, 2005) (providing, when issuing denial-of-review notices, "the Appeals Council will specifically address additional evidence or legal arguments or contentions submitted in connection with the request for review"). The cited regulatory authorities for that provision, 20 C.F.R. §§ 404.967, 404.981 (2013), provide only for the right to appeal and its binding nature, respectively—but a regulation not cited there, id. § 404.976, indicates that upon denial "the Appeals Council will return the additional evidence to you with an *explanation* as to why it did not accept the additional evidence." Id. (emphasis added). Thus, under *Auer*, HALLEX § I-3-5-1 would represent a relatively straightforward interpretation of the term "explanation" to entail *specific*, fact-based explanations and easily qualifies for deference.

regulatory ambiguity, such as those providing additional procedural protections, or otherwise elaborating upon relatively *unambiguous* internal appellate procedures already prescribed by regulation.[214] The Supreme Court has suggested, but not explicitly held, that regulatory ambiguity is not *essential* to according *Auer* deference; rather, the lack of ambiguity sheds light on whether an interpretation is "plainly erroneous."[215] HALLEX provisions that appear to depart from the regulatory text might properly be understood as "interpretations-plus"—interpretations carrying procedural corollaries not specified in the necessarily limited language of the Code of Federal Regulations—and as such would presumptively be not erroneous.[216] Unless those implementing interpretations[217] are *inconsistent* with the regulation—which, by elaborating upon and emending existing language, they prima facie are not—*Auer* deference is appropriate.

There are, however, reasons to suspect *Auer* deference may not apply. First, like *Skidmore*, it has not traditionally been a tool of private parties—it is, rather, an agency's default defense mechanism *against* challenges to enforcement by private parties, a doctrine that *reinforces* agency authority.[218] Invoking *Auer* to hold the SSA to its own interpretive rules

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Violating this provision has served as grounds for remand in the Fifth Circuit, albeit without invocation of *Auer*. See, e.g., Bellard v. Astrue, No. 09-1603, 2011 WL 13847, at *1, *3–*5 (W.D. La. Jan. 3, 2011) (finding "Appeals Council violated its internal procedures [in HALLEX] by failing to specifically address the additional evidence" and that "[p]rejudice resulted from this course").

214. See, e.g., HALLEX, supra note 4, § I-2-0-60 (last updated Feb. 7, 2014) (providing "good cause" for failure to make timely filings may include circumstances where "claimant relied on a representative to timely file a request, and the representative failed to do so," where regulations do not mention proxy failure); id. § I-2-5-69 (last updated Aug. 30, 2013) (establishing elaborate Internet-use policy for ALJ and staff, informed but not mandated by existing regulations, that generally forbids research on claimants).

215. See Chase Bank U.S.A., N.A. v. McCoy, 131 S. Ct. 871, 882 (2011) ("[I]f the text of a regulation is unambiguous, a *conflicting* agency interpretation . . . will necessarily be plainly erroneous or inconsistent with the regulation in question." (emphasis added) (internal quotation marks omitted)).

216. Consider HALLEX's interpretation of 20 C.F.R. §§ 404.944, 405.1, and 416.1444, which require that ALJs "look[] fully into the issues" at "fair and impartial" hearings. HALLEX § I-2-6-1 restates this language, adding that ALJs must "ensure that the claimant understands how the hearing will be conducted, and the general and specific issues on which findings will be made." HALLEX, supra note 4, § I-2-6-1 (last updated Sept. 2, 2005). HALLEX is not erroneous here; nor is it inconsistent with the regulation—it is, rather, the SSA's studied decision, an implementing interpretation.

217. The SSA has itself characterized HALLEX provisions in similar terms when its provisions have gone beyond bare regulatory language to provide detailed procedure. See, e.g., Brief for Respondent in Opposition at 13 n.6, Parra v. Astrue, 552 U.S. 1141 (2008) (No. 07-408), 2007 WL 4404235, at *13 n.6 ("[T]he internal agency documents at issue . . . reflect the agency's reasonable implementation of the Commissioner's . . . regulations . . . .").

218. *Auer* places in an agency's hands both the task of writing *and* authoritatively interpreting regulations and renders presumptively valid those interpretations. As the

would turn the weapon on its customary wielder, testing the limits of that "deference." Second, many of HALLEX's provisions are not firmly grounded in, or at least fail to cite, specific regulations,[219] and whether ambiguous phraseology is essential to a successful appeal to *Auer* remains unclear. Finally, recent Supreme Court opinions suggest that a broadly conceived *Skidmore* weight may ultimately supersede *Auer* deference.[220] Analysis under that less doctrinaire test[221] is, therefore, more availing in HALLEX's case.

b. Skidmore *Deference*. — Eligibility for *Skidmore* weight—or, under *Walton*, possibly even a derivative form of *Chevron* deference[222]—requires that an agency's reasoning be persuasive, which can be shown through its prior decisions and experience, "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements."[223] In application, *Skidmore* has generally represented a "sliding scale" of judicial deference, informed by the factors enumerated in the case.[224] The Supreme Court has indicated that policy statements in "manual[s] and internal directives" are "'a body of experience and informed judgment to which courts and litigants may properly resort for guidance[,]' . . . [and are thus] entitled to a 'measure of resp-

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Supreme Court recently disapprovingly observed, this may encourage agencies to "announce[] . . . interpretations for the first time in an enforcement proceeding and demand[] deference." Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168 (2012).

219. See, e.g., HALLEX, supra note 4, § I-2-1-55(D)(11) (last updated Dec. 11, 2013), (requiring claimant cases to not be assigned to same ALJ on second remand); see also supra notes 128–134 (discussing Ninth Circuit's disposition of HALLEX claims in *Moore*). Despite its seeming lack of regulatory authority—no regulation is explicitly cited, which the *Moore* court took to be dispositive—this provision can be read to follow from 20 C.F.R. §§ 404.944 and 416.1444's requirement that ALJs "look[] fully into the issues," which the SSA has interpreted to require an unjaundiced perspective on second remand.

220. See supra notes 100–108 (describing *Auer*'s potentially waning influence).

221. See, e.g., *SmithKline Beecham*, 132 S. Ct. at 2168–69 (rejecting *Auer* analysis of agency's interpretation of regulation in favor of evaluation by *Skidmore* factors).

222. See Barnhart v. Walton, 535 U.S. 212, 219–20 (2002) (finding SSA informal interpretation of statutory text entitled to *Chevron* deference because of longstanding consistency); supra note 88 and accompanying text (discussing substance of *Walton*).

223. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944); see also United States v. Mead Corp., 533 U.S. 218, 228 (2001) (citing *Skidmore* and explicating factors); Manning, Rules, supra note 37, at 938 ("[A] reviewing court applying *Skidmore* . . . will exercise its authority with sensitivity to the deeper agency perspective on the technical, policy, and political contexts of legislation with which the agency must live on a day-to-day basis."); Strauss, Weight, supra note 78, at 1156 (listing "matters indispensible for [a court] to consider" when interpreting under *Skidmore* as "meanings attributed to it by prior (administrative) interpreters, their stability, and the possibly superior body of information and more embracive responsibilities that underlay them").

224. See Kristin E. Hickman & Matthew D. Krueger, In Search of the Modern *Skidmore* Standard, 107 Colum. L. Rev. 1235, 1281–91 (2007) (noting courts of appeals "overwhelmingly" apply "sliding-scale" model of *Skidmore* but vary in weight they assign each factor).

ect' under the . . . *Skidmore* standard,"[225] and has held that POMS, a similar SSA internal procedural manual, warrants *Skidmore* weight.[226] Like POMS, HALLEX is a compendious multivolume resource generated and relied upon by SSA employees; it stands to reason—as, again, the Ninth Circuit and others have held[227]—that the same *Skidmore* standard would apply.

Most *Skidmore* factors weigh in HALLEX's favor. The "thoroughness evident in its consideration"[228]—among the circuits' most-invoked *Skidmore* factors[229]—is demonstrated by the coordinative, supervised, and deliberative character of the manual.[230] "Whether the agency has applied

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225. Fed. Express Corp. v. Holowecki, 552 U.S. 389, 399 (2008) (quoting Alaska Dep't of Envtl. Conservation v. EPA, 540 U.S. 461, 487–88 (2004); Bragdon v. Abbott, 524 U.S. 624, 642 (1998)). *Federal Express* concerned an Equal Employment Opportunity Commission manual's elaborate definition of a statutorily and regulatorily defined term ("charge") and so may plausibly be distinguished on that basis. Id. at 395. Nevertheless, many if not most of HALLEX's rules can be characterized as interpretations. See supra note 197 (discussing Ninth Circuit case finding HALLEX provision authoritative interpretation); supra notes 212–216 and accompanying text (reviewing this issue in *Auer* context).

226. Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler, 537 U.S. 371, 385 (2003). The Court's holding in *Keffeler* has been construed twice in this context—once suggesting broader applicability and once suggesting exceedingly narrow applicability. Compare Lang v. Barnhart, No. Civ. A. 05-1497, 2006 WL 3858579, at *5 n.12 (W.D. Pa. Dec. 6, 2006) (citing *Keffeler* to counter Third Circuit ruling that POMS lacks "force of law"), with Nash v. Astrue, No. 09-342-RGA-MPT, 2012 WL 3238226, at *15 (D. Del. Aug. 7, 2012) ("[T]he Supreme Court did not hold administrative interpretations, like those found in HALLEX, should always be followed by a reviewing district court . . . but may be helpful when interpreting statutory terms.").

227. See, e.g., Clark v. Astrue, 529 F.3d 1211, 1216 (9th Cir. 2008) ("[A]s an agency manual, HALLEX is entitled to respect under *Skidmore* . . . ." (internal quotation marks omitted)); Power v. Barnhart, 292 F.3d 781, 786 (D.C. Cir. 2002) (observing HALLEX "lack[s] the administrative formality or other attributes that would justify substantial judicial deference under *Chevron*" but might "qualify for the more limited form of deference accorded under *Skidmore*").

228. *Skidmore*, 323 U.S. at 140.

229. Hickman & Krueger, supra note 224, at 1281 ("[T]he 'thoroughness' of the agency's consideration of an issue was one of the most cited in the sliding-scale applications of the *Skidmore* standard.").

230. First, it is the product of distributed agency expertise: Authorship is divided between the Office of the Chief Administrative Law Judge (OCALJ) and the Office of Appellate Operations (OAO), both of which, through HALLEX, "develop and update HALLEX to reflect the procedures they require to implement policy and process their workloads." HALLEX, supra note 4, § I-1-0-5 (last updated Mar. 3, 2011). Numerous other departments collaborate in prioritizing revisions and additions to the manual. Id. Furthermore, its composition and revision are carefully supervised to ensure "accurate, current, and complete procedures" that are in "conformity and consiste[nt] with established standards, policies and procedures." Id.

Second, HALLEX incorporates the text and reasoning of SSRs. See, e.g., HALLEX, supra note 4, § I-2-4-40(E) (last updated Mar. 8, 2013) (incorporating core reasoning of SSR 91-5p and citing it for elaboration of "good cause" standard). SSRs "represent precedent final opinions and orders and statements of policy and interpretations that [the

its position with consistency," a *Skidmore* factor the Supreme Court recently considered convincing in judging an internal agency manual worthy of deference,[231] also supports granting HALLEX authoritative weight. In *Federal Express*, the Court held that a manual "[that] ha[d] been binding on . . . staff for at least five years" was adequately consistent for *Skidmore* purposes, even though "the agency's implementation of [the] policy ha[d] been uneven."[232] Many, if not most, HALLEX rules easily meet this standard of consistency, having been in effect for

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SSA] ha[s] adopted," 20 C.F.R. § 402.35(b)(1) (2013), and are by law "binding on all components of the Social Security Administration," including ALJs. Id. § 402.35(b)(1); see also Bray v. Comm'r of Soc. Sec. Admin., 554 F.3d 1219, 1224 (9th Cir. 2009) ("SSRs do not carry the 'force of law,' but they are binding on ALJs nonetheless." (citing Quang Van Han v. Bowen, 882 F.2d 1453, 1457 & n.6 (9th Cir. 1989))). Moreover—as even the Ninth Circuit recognizes—SSRs are due judicial deference. See, e.g., Avenetti v. Barnhart, 456 F.3d 1122, 1124 (9th Cir. 2006) ("SSRs reflect the official interpretation of the SSA and are entitled to 'some deference as long as they are consistent with the Social Security Act and regulations.'" (quoting Ukolov v. Barnhart, 420 F.3d 1002, 1005 n.2 (9th Cir. 2005) (internal quotation marks omitted))); see also Jon C. Dubin, Overcoming Gridlock: *Campbell* After a Quarter-Century and Bureaucratically Rational Gap-Filling in Mass Justice Adjudication in the Social Security Administration's Disability Programs, 62 Admin. L. Rev. 937, 997 n.229 (2010) ("[A]t a minimum, SSRs must be accorded *Skidmore* respect and sometimes usually more decisive *Auer/Chevron* deference.").

Third, many of its appellate rules have a quasi-common law character. HALLEX governs internal appellate procedure and as such incorporates regulatory interpretations and policy statements produced by the Appeals Council—the accumulated, reasoned wisdom and judgment of expert, experienced SSA adjudicators. See HALLEX, supra note 4, § I-1-0-1 (last updated Mar. 3, 2011) (noting HALLEX "includes policy statements resulting from Appeals Council *en banc* meetings under the authority of the Appeals Council Chair"). Policy statements are printed in their own section of HALLEX, id. §§ II-5-0-1 to -3-4, but are also interwoven through relevant provisions in other sections. Compare id. § II-5-1-2 (last updated Oct. 4, 1989) (examining Appeals Council authority to vacate ALJ rulings and providing exception), with id. § I-3-7-1 (last updated Sept. 8, 2005) (incorporating exception). As Professor Mashaw has noted, selective publication in the SSDI internal-appellate context suggests a "precedent system" that would "of necessity take on certain characteristics of rulemaking activity." Mashaw, supra note 16, at 105–06. He adds that choosing precedents for publication requires "decisions concerning the importance and stability of the policies announced by the cases—that is, concerning the degree to which a policy is worth stating and the likelihood that it is well considered." Id. at 106. Thus, "enunciation" by "publication choice[] . . . represent[s] the point at which the real policy decisions for the system are made." Id. His argument applies just as well to the Council's policy statements, which represent the SSA's practical, but no less effective, alternative to selective publication. See supra notes 20–22 and accompanying text (explaining SSA's present inability to rely upon full or selective publication of precedent).

231. Fed. Express Corp. v. Holowecki, 552 U.S. 389, 399 (2008) (citing United States v. Mead Corp., 533 U.S. 218, 228 (2001); Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 417 (1993)).

232. Id. The Court further observed that "undoubted deficiencies in the agency's administration of the statute and its regulatory scheme are not enough . . . to deprive the agency of all judicial deference. Some degree of inconsistent treatment is unavoidable when the agency processes over 175,000 inquiries a year." Id. at 400.

considerably longer than five years;[233] those that do not may only have had text revised or expanded, with core "interpretations" remaining stable.[234] The SSA's expertise in internal appellate procedures—another *Skidmore* factor, albeit one not enumerated by the *Skidmore* Court[235]—seems self-evident. The SSA's long history of and considered judgment in setting, supervising, and internally enforcing adjudicatory standards and practices suggest its HALLEX rules embody a carefully considered balance between administrative efficiency and fair, impartial, individualized factfinding.[236]

All of this is not to argue that HALLEX should *always* be deferred to under *Skidmore*. That would amount to de facto automatic "enforceability," which is plainly impermissible under either the Fifth or Ninth Circuit's standards. Rather, it is to cast doubt on the Ninth Circuit's peremptory and steadfast refusal to review alleged ALJ and Appeals Council HALLEX violations—and other courts' adoption of that standard—by showing that there are valid grounds to accord many of HALLEX's

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233. The Ninth Circuit made much of a supposed "inconsistency" between POMS and HALLEX provisions in *Lockwood v. Comm'r Soc. Sec. Admin.* and found HALLEX provisions unpersuasive for that reason. 616 F.3d 1068, 1073 n.6 (9th Cir. 2010). But the "inconsistency" consisted of a (very new) provision's presence in POMS but absence from HALLEX—surely a discrepancy, but scarcely a conflict or otherwise affirmative inconsistency.

234. Admittedly, HALLEX is an evolving resource, as evidenced by its frequent updates by ODAR "transmittal." See Soc. Sec. Admin., HALLEX: Hearings, Appeals, and Litigation Law Manual, http://ssa.gov/OP_Home/hallex/ (on file with the *Columbia Law Review*) (last visited Mar. 29, 2014) (listing transmittals). Yet this should not suggest, let alone establish, inconsistency: Evaluation of HALLEX provisions must necessarily be case-by-case, both to determine the degree of *Skidmore* weight warranted and to evaluate claims of prejudicial violation in individual instances. Updates to language or addition of provisions to existing sections should not decide the case, as underlying *policies* are at issue, not language. Thus, even recently adopted HALLEX provisions—one week before a claimant's hearing, say—should be *Skidmore* eligible if they are of a piece with previous policy and the claimant actually knew of and expected them to apply.

235. See Hickman & Krueger, supra note 224, at 1288 ("While the *Skidmore* Court did not include agency expertise in its oft-cited list of factors, the 'expertise' factor nevertheless played a prominent role in that opinion and appeared explicitly in *Mead*'s compilation of factors.").

236. This factor, however, may cut both ways: If the SSA is acknowledged to be sufficiently expert to promulgate internal policies that allow justice—as understood there—best to be done, would not its decision to defend violations of those policies reflect that same expertise? Cf. Mathews v. Eldridge, 424 U.S. 319, 349 (1976) ("[S]ubstantial weight must be given to the good-faith judgments of [social welfare agencies] that the procedures they have provided assure fair consideration of the entitlement claims of individuals."). The answer is twofold: First, a litigation argument that HALLEX is not binding does not constitute an interpretation of a statute or regulation, as the HALLEX provision itself might. Second, the point of internal rules is to follow them internally, and defending violations by asserting that those rules are not binding undermines their purpose. Thus, in the final analysis, agency expertise bolsters HALLEX but not ad hoc arguments that it represents inconsequential SSA dicta.

claimant-protection provisions "persuasive" authority,[237] just as that circuit has been willing to recognize such authority in some of HALLEX's other provisions.[238] The fundamental jurisprudential obstacle in all of these cases, it seems, is that determining legal effect is only a preliminary step, because the provisions will be enforced, by way of reversal or remand, *against the agency*. But it is in the realm of rights-based individual adjudication, governed by readily available internal[239] procedural rules, that the *Accardi* principle should remain most vital.[240] Informed by *Accardi*, and with *Skidmore* or *Auer* providing bases for legal authority, courts may accord HALLEX's claimant-focused protections the "persuasiveness" sufficient to warrant remand or reversal.[241] Compelling reasons of public policy suggest that they should.

B. *Public Policy Requires Review of HALLEX Violations for Prejudice to Claimants*

While the legal grounds for judicial review independently suffice to warrant adopting the Fifth Circuit's approach to HALLEX noncompli-

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237. In many cases the grounds are not merely valid, but compelling: those concerning evidence and development of the record, for example, which implicate broader due process considerations. Indeed, the Fifth Circuit's standard seems almost tailor-made to catch otherwise irremediable, but manifestly unfair, procedural violations; most courts that do find prejudice find it in the form of a "deni[al] [of] a procedural right at the hearing itself or a defect resulting from some evidence that was or was not considered at the hearing." Melvin v. Astrue, 602 F. Supp. 2d 694, 704 (E.D.N.C. 2009).

238. Clark v. Astrue, 529 F.3d 1211, 1216 (9th Cir. 2008) ("[W]e are persuaded by the interpretation of § 406(b) put forth in HALLEX—i.e., that an award of attorney's fees under § 406(b) is separate from, and in addition to, any fees awarded by the Administration under § 406(a)."); see also Scharlatt v. Astrue, No. C 04-4724 PJH, 2008 WL 5000531, at *2 n.2 (N.D. Cal. Nov. 21, 2008) ("HALLEX has been deemed by the Ninth Circuit to be persuasive authority." (citing *Clark*, 529 F.3d at 1211)).

239. The advent and now ubiquity of the Internet and the internal-manual availability requirements of the Freedom of Information Act, Pub. L. No. 90-23, sec. 1, § 552(a), 81 Stat. 54, 54–55 (1967) (codified as amended at 5 U.S.C. § 552(a) (2012)), combine to make "internal guidance" an increasingly inapt appellation.

240. See Strauss, Continuum, supra note 35, at 1464 (observing agency compliance with internal rules is "central to one's sense of what it means to have a government of laws"). Professor Merrill sees the fundamental question animating judicial review of agency action as whether courts will serve as agencies' ex post error correctors or ex ante incentive structurers, associating existing *Accardi* doctrine with the former and *Chevron* deference with the latter. Merrill, supra note 54, at 612–15. He also offers an insightful restatement of *Accardi* that would fashion it as an "ex ante system of incentives." Id. at 613. This Note argues that the *Accardi* doctrine's historical ex post function may yet be useful, as it is in the Fifth Circuit's position on HALLEX, and that a broader understanding of *Auer* or *Skidmore* as doctrines that readily cut both ways—against private parties *and* agencies—is a suitable vehicle for applying it.

241. See Administrative Law—Second Circuit Suggests that Statutory Interpretations in Agency Manuals Are Ineligible for *Chevron* Deference.—Estate of Landers v. Leavitt, 545 F.3d 98 (2d Cir. 2008)., 122 Harv. L. Rev. 1549, 1556 (2009) ("[C]ircuit judges could formulate rules . . . specifying exactly how 'force of law' should be defined in the various contexts in which agencies make interpretations.").

ance—albeit newly grounded in *Skidmore*—policy considerations bolster the case. Part III.B.1 addresses the potential counterargument that judicial review of HALLEX will contribute to backlog and inefficiency by arguing that the opposite is true. Part III.B.2 argues that justice and fairness demand SSA internal compliance with its own rules of appellate procedure and require that such compliance be monitored by meaningful judicial review.

1. *Review of HALLEX Will Encourage SSA Hearing and Appellate Efficiency.* — One argument frequently raised in opposition to judicial review of manual violations is that it would be inefficient and unadministrable, posing a "'risk that every alleged failure by an agent to follow instructions to the last detail in one of a thousand cases will deprive it of the benefit of'" essential policies.[242] A presumption that courts will review alleged HALLEX violations for reversible error may result in additional challenges by claimants *properly* denied benefits seeking a more favorable outcome on reconsideration.[243] This is a serious concern: SSA ALJs are already overburdened and will remain so as the number of claimants continues to rise.[244] Where administrative due process is concerned, the Supreme Court has observed that higher financial cost alone is not "a controlling weight," but diminishing returns may discourage imposing additional safeguards.[245]

Such a presumption of reviewability, however, may not in fact be costly in the long term. Indeed, it may actually *reduce* court challenges by incentivizing ALJs, the Appeals Council, and agency staff to observe HALLEX's due-process-directed procedural requirements more scrupulously. Upon judicial review, it will not, of course, mean that *all* errors are reversible, or even that they will warrant exacting oversight—that was precisely the result the Fifth Circuit avoided by adopting the prejudicial

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242. Schweiker v. Hansen, 450 U.S. 785, 789–90 (1981) (per curiam) (quoting Hansen v. Harris, 619 F.2d 942, 956 (2d Cir. 1980) (Friendly, J., dissenting), rev'd sub nom. Schweiker v. Hansen, 450 U.S. 785).

243. See Strauss, Publication Rules, supra note 43, at 845 (noting concern that "[h]olding the government bound by the errors of its functionaries . . . would open too wide the doors of chicanery and adventitious dispute"); Strauss, Continuum, supra note 35, at 1474 (reviewing argument that "judicial as distinct from executive enforcement of [internal] requirements threatens more harm (adventitious lawsuits, distraction of government efforts, discouragement to the announcement of policy) than good").

244. See supra notes 12–13, 18–24 and accompanying text (describing increasing SSDI caseload).

245. In *Mathews v. Eldridge*, the Court noted:

> Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But . . . [a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.

424 U.S. 319, 348 (1976).

error test from the *Accardi* line of precedent, including *Ruiz*.[246] It will simply provide a judicial check on what is, in fact, the Appeals Council's own standard for reviewing HALLEX violations: reversal for potential prejudice.[247] Under this standard, minor, or even major, violations of HALLEX that cause harmless error are not grounds for relief and thus, by themselves, are hardly worth pursuing on appeal. Adopting the "prejudice" standard among the circuits would be a move with solid foundation in existing *Accardi* doctrine,[248] and moreover, those cases from the Fifth Circuit and districts following its lead where prejudice *has* been found are relatively consistent, providing a ready-made template.[249] Finally, as a practical matter, sudden hordes of denied claimants grasping at minor violations to seek fruitless review seem unlikely, especially given attorneys' ethical and legal restrictions on making frivolous claims.[250]

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246. See Steenholdt v. FAA, 314 F.3d 633, 640 (D.C. Cir. 2003) ("Because Petitioner has not been prejudiced by the [agency's] alleged departure from its gratuitous procedures, the *Accardi* doctrine . . . does not give Petitioner a basis for review.").

247. The Appeals Council's statement of jurisdiction provides that it reviews cases for "error[s] of law," 20 C.F.R. § 404.970(a)(2) (2013), including "[m]isinterpretation" or "[m]isapplication of the law, regulations, or [SSRs] to the facts," as well as "procedural error[s] (more than technical) which affect[] due process." HALLEX, supra note 4, § I-3-3-3 (last updated Sept. 8, 2005). The Appeals Council does not publish its dispositions, but these statements suggest and available summaries of case dispositions demonstrate that it will reverse for prejudicial HALLEX violations. See, e.g., Catherine M. Callery & Louise M. Tarantino, Insensitivity Requires Different ALJ on Remand, Empire Justice Ctr. (Jan. 1, 2008), http://www.empirejustice.org/issue-areas/disability-benefits/litigation-legal-updates/administrative-decisions/insensitivity-requires.html (on file with the *Columbia Law Review*) (citing case remanding for "inappropriate judicial demeanor" contrary to HALLEX § I-2-8-35); Nat'l Org. of Soc. Sec. Claimants' Representatives, List of Available Materials: Item Number 1597–1830: January 2007–December 2010, at 1, available at http://nosscr.org/sites/default/files/LAM%20index%202007%20-%202010.pdf (on file with the *Columbia Law Review*) (last visited Mar. 1, 2014) (remanding because ALJ's action violated HALLEX provision permitting claimant testimony at supplemental hearing); id. (remanding because hearing notice did not include expert witness names per HALLEX § I-2-3-15C); id. at 15 (remanding for violation of HALLEX § I-2-7-30H, requiring ALJ to grant request for supplemental hearing if claimant requests additional answers from vocational expert); see also Eric Schnaufer, Advocacy Before the Appeals Council 3 (June 12, 2008), available at http://schnaufer.com/ACAdvocacyJune2008.pdf (on file with the *Columbia Law Review*) ("[T]he Appeals Council routinely—but not always—enforces the HALLEX." (emphasis omitted)).

248. See Am. Farm Lines v. Black Ball Freight Serv., 397 U.S. 532, 537–38 (1970) (suggesting presence or absence of procedural violations' prejudicial effect determines *Accardi* eligibility); see also Merrill, supra note 54, at 606 ("[Some Supreme Court] cases, most prominently *American Farm Lines*, imply that courts will enforce agency rules only when the rule violation has caused harm or prejudice.").

249. See supra note 237 (noting relative consistency in HALLEX-violation prejudice findings).

250. See Fed. R. Civ. P. 11(b)(2) (requiring "nonfrivolous argument[s]" under penalty of sanction); Model Rules of Prof'l Conduct R. 3.1 (2013) ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous . . . .").

Conscientious observance and enhanced oversight of HALLEX compliance may also have beneficial collateral effects. The SSDI program has been subject to sharp congressional criticism for waste and unnecessary awards due to ALJs' poor hearing practices, use of insufficient and contradictory medical evidence, and overall low-quality decisions, which in many cases were attributable directly to HALLEX violations.[251] In light of the SSA's tight budget and undiminished workload, judicial review for prejudicial noncompliance will conduce to more efficient, just observance of HALLEX's interpretative procedural protections.

2. *Review of HALLEX Will Help Guarantee Procedural Fairness While Contributing to Consistency.* — Clearly, fundamental fairness—the "primal due process" that was thought to undergird the early *Accardi* doctrine[252]—is an interest worthy of protection, even if *Accardi* is properly understood as a "judicially evolved rule of administrative law."[253] Equally worthy of protection is claimants' perception that they are receiving their mandated fair hearing. "[P]rocedural due process is applicable to the [SSDI] adjudicative administrative proceeding,"[254] and there is "a basic obligation on the ALJ in these nonadversarial proceedings to develop a full and fair record."[255] However, detailed studies of ALJ behavior during SSDI hearings have concluded that "rules promulgated to ensure impartiality and fairness are systematically disregarded" by ALJs.[256] Internal disciplinary measures, while helpful, may not be as effective as the shadow of judicial review;[257] the reportedly rampant un- or under-

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251. Minority Staff of S. Permanent Subcomm. on Investigations, supra note 12, at 3–4, 22–24. ALJs and the SSA have also been faulted for "variation in . . . decisionmaking patterns" that has "increased significantly since the 1970s": In the first half of 2011, the average ALJ benefit award rate was 60%, "but 100 ALJs awarded benefits in over 90 percent of cases while 27 ALJs awarded benefits in over 95 percent of cases," a "dramatic difference . . . inherently inconsistent with an accurate decisionmaking process." Pierce, supra note 13, at 36.

252. See Raoul Berger, Do Regulations Really Bind Regulators?, 62 Nw. U. L. Rev. 137, 150 (1967) (describing government compliance with regulation with "force of law" as "required by due process in its primal sense"); see also Raven-Hansen, supra note 58, at 10–13 (reviewing scholarly speculation surrounding source of *Accardi* principle, including "primal due process").

253. Vitarelli v. Seaton, 359 U.S. 535, 547 (1959) (Frankfurter, J., concurring in part and dissenting in part).

254. Richardson v. Perales, 402 U.S. 389, 401 (1971).

255. Heckler v. Campbell, 461 U.S. 458, 471 (1983) (Brennan, J., concurring) (quoting Broz v. Schweiker, 677 F.2d 1351, 1364 (11th Cir. 1982), rev'd sub nom. Heckler v. Broz, 461 U.S. 952 (1983)) (internal quotation marks omitted). This duty "derives from claimants' basic statutory and constitutional right to due process in the adjudication of their claims." Id. at 471 n.1.

256. Mills, supra note 25, at 148; see also id. at 100 (noting ALJs "consistently neglect uniformity in a number of areas," including "making introductions," "providing assistance to unrepresented claimants," and "gathering of evidence").

257. Dissenting in *Caceres*, Justice Marshall pointedly critiqued the majority's reliance on internal disciplinary procedures to enforce agency manual compliance: "[T]he Court does not assert that the sanctions which exist in theory are effectively employed in

observance of SSA policy suggests supervisory discipline by itself cannot curb the problem.

The Administrative Conference of the United States,[258] citing the "improper application of agency policy" in wrongly denying claimants benefits, recently completed a comprehensive review of the SSDI program in general, and the role of the Appeals Council in particular, with the aim of better balancing consistency and justice.[259] Its recommendations—the first on the Social Security disability benefits system in over twenty years[260]—were formally adopted in June 2013.[261] Most are aimed squarely at "promot[ing] greater decisional consistency and streamlin[ing] the adjudication process," including specific prescriptions for ALJs and the Appeals Council.[262] Moreover, the SSA is independently seeking to cabin excessive ALJ discretion—one byproduct of which is increased potential for erroneous denials of benefits.[263]

District court review of HALLEX violations for prejudice would nicely complement the Conference's recommendations that the Appeals Council issue more frequent authoritative interpretive guidance and publish precedent-like decisions[264] by providing more effective judicial error-correction when such interpretations are, as the Conference concedes, "precedents upon which claimants and their representatives may rely."[265] The prospect of not only Appeals Council review, but consistent *judicial* review of HALLEX violations, would help guard against ALJ non-

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practice. While '[s]elf-scrutiny is a lofty ideal,' nothing in the record before us indicates why . . . disciplinary procedures should enjoy the Court's special confidence." United States v. Caceres, 440 U.S. 741, 767 (1979) (Marshall, J., dissenting) (alteration in original) (citation omitted) (quoting Wolf v. Colorado, 338 U.S. 25, 42 (1949) (Murphy, J., dissenting)).

258. The Administrative Conference of the United States is "an independent federal agency dedicated to improving the administrative process through consensus-driven applied research, providing nonpartisan expert advice and recommendations for improvement of federal agency procedures." About the Administrative Conference of the United States (ACUS), Admin. Conference of the U.S., http://acus.gov/about-administrative-conference-united-states-acus (on file with the *Columbia Law Review*) (last visited Mar. 29, 2014).

259. Social Security Disability Adjudication, Admin. Conference of the U.S., http://acus.gov/research-projects/social-security-disability-adjudication (on file with the *Columbia Law Review*) (last visited Mar. 29, 2014) (noting concerns of ensuring "consistent and accurate application of regulations and policies at all levels of adjudication," controlling program costs, and "unequal application of justice for claimants who should be awarded benefits but are not because of improper application of agency policy").

260. Admin. Conference Recommendation, supra note 22, at 1 (observing Conference "last issued a recommendation . . . over twenty years ago").

261. See Adoption of Recommendations, 78 Fed. Reg. 41,352, 41,352 (July 10, 2013) (noting Conference formally adopted recommendations).

262. Admin. Conference Recommendation, supra note 22, at 6–9.

263. See Palletta, supra note 26 (discussing SSA efforts to cabin ALJ discretion, which has caused difficulty for some claimants).

264. Admin. Conference Recommendation, supra note 22, at 7–8.

265. Id. at 7.

compliance, thereby promoting the Conference's goal of "decisional consistency."[266] More broadly, it would minimize the risk of real injustice and guard against systematic subversion of SSA procedure,[267] and it would lend the claims process a vital "legitimizing symbol"[268]: the assurance that the SSA's failure to follow its own rules, adopted to ensure procedural fairness and impartiality, will be fairly and impartially reviewed.[269]

CONCLUSION

The SSDI program is among the United States'—and the world's—largest government benefits programs, and, barring drastic changes, it will continue to grow unabated. Unsurprisingly, its internal hearings and appeals processes constitute the largest administrative adjudicatory system in the world; just as unsurprisingly, given the caseload and limited staff, the SSDI suffers from systemic error and inefficiencies. These include ALJ and Appeals Council violations of their own rules, and circuits have split over whether such violations may be grounds for remand. This Note has argued in support of the Fifth Circuit, which draws upon the *Accardi* principle to hold the SSA to HALLEX's provisions when failure to comply with them causes a claimant prejudice. As the Ninth and other circuits recognize, HALLEX may merit sufficient deference under current guidance document doctrine to constitute authoritative interpretations of governing statutes and regulations. But that circuit steadfastly refuses to review allegations of noncompliance with those interpretations, an easy-to-apply, hard-and-fast standard that the Third Circuit and many district courts in other circuits have adopted. Reading *Skidmore* or *Auer* in light of the *Accardi* principle—using deference to hold the *agency* to its own interpretations—provides a sound basis for the approach of the Fifth Circuit, whose prejudice standard is a built-in limiting principle. By establishing a firm standard, it incentivizes the agency to observe its own rules more scrupulously, which may help curb costly inefficiencies. But more fundamentally, it ensures that

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266. Id. at 6; see also Mashaw, supra note 16, at 21–46 (discussing features and virtues of "bureaucratic rationality").

267. See Brown v. Astrue, No. 11-2580-CM, 2013 WL 159811, at *3–*4 (D. Kan. Jan. 10, 2013) (remanding for HALLEX violation because "it would undermine the claims review process if [such violations] routinely occurred").

268. Mashaw, supra note 16, at 142–44. There is a "symbolic power of [a] judge or [a] legal hearing to promote acceptance of the legitimacy of a disappointing judgment," id. at 143, which is inevitably diminished by both the nonobservance of rules and the toleration of such failures by the agency.

269. See Manning, Structure, supra note 100, at 683 (noting more searching judicial review of agency lawmaking "giv[es] agency lawmakers greater incentives both to adopt clear regulations and to apply them faithfully"); id. at 696 ("If such . . . rules bound the agency (and its staff) but not the public, their deployment would go a long way toward meeting the need for certainty . . . ." (footnote omitted)); Strauss, Continuum, supra note 35, at 1464 (noting cases where government is bound by its rules are "central to one's sense of what it means to have a government of laws").

claimants whose cases were demonstrably disserved by HALLEX violations—otherwise abstracted away as "inefficiencies"—have a fair opportunity to have their case properly heard.