# THE AVAILABILITY OF DECISIONS AND PRECEDENTS IN AGENCY ADJUDICATIONS: THE IMPACT OF THE FREEDOM OF INFORMATION ACT PUBLICATION REQUIREMENTS

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## INTRODUCTION

It is no revelation that in common law systems the doctrine of *stare decisis*[1] has had a central role in the development of judge-made law. In many formal agency adjudications, subject to the hearing requirements of the Administrative Procedure Act (APA),[2] agencies publish their decisions, and these are available for use as precedents. Not all agencies publish their decisions, however, nor do they make them available as a body of decisions or regard them as precedential. These practices may more often arise in informal agency adjudications, but the practice is not confined to them.[3]

This Article examines the obligation of agencies to make their decisions available to the public and to recognize precedents in both types of proceedings. An inquiry into the role of precedents in agency proceedings is particularly pertinent in light of the recent opinion in *Allison v. Block*,[4] in which the Eighth Circuit found the Farmers Home Administration's (FmHA) failure to give "some precedential effect" to its informal decisions an indication of a lack of reasoned decision-making.[5] The court in *Allison* required the FmHA to develop its criteria for

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1. The influence of the *stare decisis* doctrine was evidenced in some of the very first published opinions of American Courts. In *Ex Parte Bollman*, Justice Marshall commented that the principle is particularly important in popular governments where the "influence of passions is strong, the struggles for power are violent, the fluctuations of party are frequent and the desire of suppressing opposition, or of gratifying revenge under the forms of law and by the agency of the courts, is constant and active." *Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 89 (1807).

2. 5 U.S.C. §§ 551-559, 701-706 (1982 & Supp. IV 1986).

3. The decisions of the Social Security Administration in disability proceedings are rarely published even though they are formal proceedings. *Infra* note 153-54 and accompanying text.

4. 723 F.2d 631 (8th Cir. 1983).

5. 723 F.2d at 637.

a loan deferral program through rulemaking, rather than through *ad hoc* and informal adjudications that considered each fact pattern in isolation in each case.[6]

To explore the need for publicly available decisions and precedents, Part I of this Article examines the traditional features of a system based on precedent, in order to identify factors that may affect the appropriateness of a precedent system in agency proceedings. In Part II, the Freedom of Information Act (FOIA) is explored. The FOIA is relevant, because it governs the affirmative obligation of agencies to index and make available prior decisions. The availability of decisions is a precondition to their having precedential effect. Part III of this Article discusses the attempt by the Eighth Circuit in *Allison v. Block* to require precedential effect for the decisions of the FmHA. Part IV makes a limited survey of the practices utilized by some federal agencies in making their prior decisions publicly available and in using prior agency decisions as precedents. The procedures examined are those of the FmHA,[7] the Food and Drug Administration,[8] the Department of Defense,[9] and the Social Security Administration.[10] Finally, Part V summarizes the findings of Part IV, analyzing the policies supporting, and difficulties associated with, the use of precedents in agency determinations. Part V concludes that a re-examination of the scope of FOIA's affirmative disclosure requirements is warranted. The statutory provision is intended to help those affected by agency action know how to deal effectively with an agency. A test for disclosure that looks to the needs of participants for guidance better serves the statutory aim than a test that looks solely at the precedential reliance planned by the agency.

## I. A Precedent System

### *A. Reasoned Individual Decisions*

For a system to follow precedents, there first must exist explained decisions in cases. The long tradition of providing reasons for judicial opinions has been an important part of the influence of the court system.[11] The APA statutorily requires administrative agencies that con-

6. Freedom of Information Act, 5 U.S.C. § 552 (1982 & Supp. IV 1986).
7. *Infra* notes 61-103 and accompanying text.
8. *Infra* notes 104-27 and accompanying text.
9. *Infra* notes 128-52 and accompanying text.
10. *Infra* notes 153-84 and accompanying text.
11. Sprecher, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 31 A.B.A. J. 501 (1945) (discussing importance and value of adhering to precedent in judicial decision making).

duct formal proceedings to explain the reasons and bases for their decisions.[12] Informal agency adjudications have increasingly been decided on the basis of an administrative record that includes a contemporaneous statement of the basis for a decision. When the agency provides a contemporaneous explanation, judicial review of an agency's decision is based upon this record made by the agency during the administrative process and not a new record created in court.[13] Thus, the incentive created by judicial review has meant that informal agency adjudications produce explained decisions, one of the elements needed for a precedential system.

### *B. Precedential Effect and Changes in Policy*

Courts not only issue reasons for their decisions, they follow the principles of prior cases in similar cases.[14] Although adherence to precedent may reduce a court's ability to deal with the case at hand, other values are promoted, including predictability and notice to those affected; consideration of the lessons of experience; consistency and equality of treatment; restraint on capriciousness by the decisionmaker; and enhancement of the legitimacy of judicial institutions.[15] Courts are not inflexibly bound by precedent. They may distinguish earlier cases and, thereby, reach an alternative result in a particular case by finding that the precedent dealt with a significantly different situation than the case at hand. Courts also can overrule prior precedents of the same tribunal in subsequent decisions by explaining the reasons warranting a change.[16]

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12. Administrative Procedure Act, 5 U.S.C. § 557 (1982).

13. *See* Camp v. Pitts, 411 U.S. 138 (1973) (deciding that inadequately explained agency decisions are to be vacated and remanded to agency); Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) (finding that judicial review of agency fact-finding in informal adjudications is to be based on administrative record); Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. CHI. L. REV. 739 (1976) (surveying administrative procedures used in informal adjudications).

14. *See* Rumsez v. New York & New Eng. Ry., 183 N.Y. 79, 30 N.E. 654 (1892); *see also Ex Parte* Bollman, 8 U.S. (4 Cranch) 75, 89 (1807) (noting that if law is not settled by repeated decisions, justices are "afloat on the troubled ocean of opinion, of feeling, and of prejudice")

15. *See* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); Sprecher, *supra* note 11, at 507-09 (discussing pros and cons of adherence to precedent); Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) (describing theoretically the haphazard development of law without precedents); Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 2-4 (1983) (discussing value of *stare decisis* to judges *and* its ability to enhance work product); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949) (arguing that *stare decisis* takes capricious element out of law and provides social stability).

16. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (overruling *League of Cities* and finding application of federal minimum wage and maxi-

In formal proceedings, administrative agencies also adhere to precedent. A study at the time of the enactment of the APA found that agencies already followed their own earlier decisions out of a concern for internal consistency.[17] They generally gave "as much weight to their prior decisions as the highest court of a state."[18]

Agencies should not be dissuaded from having decisions available as precedents out of a concern that they will be unduly bound. Like the courts, the agencies can distinguish or overrule their precedents.[19] Indeed, the agencies are not as constrained as courts in terms of overruling their precedents. To overrule their own decisions, courts must justify the change in terms that reflect the court's authority to declare and apply the law.[20] Agencies, by contrast, are expected to take a significant role in developing the law and creating policy. Often, they are delegated discretion by legislative bodies to determine policy given only very general standards.[21] Consequently, agencies have more freedom to justify changes based upon policy factors.

Nevertheless, some restraints on an agency's abilities to change its policy do exist. A presumption in favor of the continuation of a settled rule, for example, requires the agency to offer more justification for changing an established policy than would be required, if the agency were to formulate rules where previously none existed.[22] The agency

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mum hour provisions to employees public authority constitutional), *rev'g*, National League of Cities v. Usery, 426 U.S. 833 (1976); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226 (1975) (substituting comparative negligence doctrine for contributory negligence doctrine in California); Stevens, *supra* note 15, at 4-7 (listing legitimate reasons for court to overrule or decline to follow prior precedent);

17. ADMINISTRATIVE PROCEDURE IN GOV'T AGENCIES, S. Doc. No. 8, 77th Cong., 1st Sess. 466-74 (1941). For an analysis of the early use of precedents by administrative agencies, see generally Pittman, *The Doctrine of Precedents and the Interstate Commerce Commission*, 5 GEO. WASH. L. REV. 543 (1937) [hereinafter Pittman, *ICC*] (applying theoretical concepts of precedent to Interstate Commerce Commission decisions); Pittman, *The Doctrine of Precedents and Public Service Commissions*, 11 Mo. L. REV. 31 (1946) [hereinafter Pittman, *Public Service*] (concluding Public Service Commission's regulatory control of utilities is highly respectful of common law precedents).

18. 2 Op. Att'y. Gen., 464, 466 (1941).

19. *See, e.g.*, Tax Analysts v. IRS, 362 F. Supp. 1298, 1306 (D.D.C. 1973) (holding that although letter rulings and technical advice memoranda by Internal Revenue Service are precedent, they will not necessarily be blindly followed; precedent is only persuasive and can be overruled), *aff'd on other grounds*, 505 F.2d 350 (D.C. Cir. 1974).

20. *See supra* notes 1, 14 and accompanying text (discussing situations in which overruling is acceptable).

21. It was the purpose of administrative agencies to develop particularized expertise useful in the formation of public policy. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

22. Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29 (1983).

needs to, at a minimum, acknowledge and provide rational support for changes in policy.[23]

### C. *Decisionmaking Structure*

In the traditional judicial setting, the decisions of the appellate courts bind the lower courts. Judges below must generally observe the precedent unless and until a higher appellate court overrules it.[24] Decisions made by courts at the same appellate level, however, are given "most respectful consideration."[25]

In traditional formal proceedings, federal agencies generally follow a hierarchical arrangement. The agency head serves as the "final decisionmaker" or appellate tribunal on adjudicatory matters, and the decision binds lower level adjudicators.[26] The agency head also establishes the policy adopted by the agency through means other than adjudication. In administrative agencies, policy typically can be established on a prospective basis through rulemaking and other measures, as well as through a more reactive process of adjudication. The combination of the policymaking and adjudicatory functions in the agency head facilitates the coordinated development of policy.[27]

In other types of agency proceedings, policy-making officials also may have an adjudicatory responsibility.[28] In others, the agency may choose to delegate the decision-making responsibility to lower-level ad-

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23. *See, e.g.*, Atchison, T. & S.F.R.R. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (holding that agency departure from prior norms must be explained so that reviewing court may judge relevance); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir.), *cert. denied*, 403 U.S. 923 (1970) (holding agency has right to change its policy course in deciding what is in public interest, but must provide court with reasoning so that court can enforce rule of law in administrative process); *see also* 2 K.C. Davis, Administrative Law Treatise, § 8.9, at 198-99 (2d ed. 1979) (discussing *Atchison* and *Greater Television* and noting that "the dominant law clearly is that an agency must either follow its precedents or explain why it departs from them"); *cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29 (1983) (holding agency failed to provide requisite analysis for revoking rule).

24. *See* Sprecher, *supra* note 11, at 503 (describing American doctrine of *stare decisis*).

25. Colby v. J.C. Penney Co., Inc., 811 F.2d 1119, 1123-24 (7th Cir. 1987).

26. Administrative Procedure Act, 5 U.S.C. § 557 (1982).

27. *See* Strauss, *Rules, Adjudications, and Other Sources of Law in an Executive Department; Reflections on The Interior Department's Administration of the Mining Law*, 74 Colum. L. Rev. 1231, 1256-60 (1974) (noting that Secretarial control over board decisions assured coherence and intelligence in Department's mining law interpretations); *see also* Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 Harv. L. Rev. 921 (1965) (discussing agency willingness to utilize rulemaking in administrative process).

28. *Infra* notes 104-07 and accompanying text.

judicators who do not have other policymaking responsibilities.[29] In this setting, problems of coordination can arise.[30] The separation of the adjudicatory functions from policymaking may even lead to a reluctance to give decisions a precedential effect. To do so gives the decisions a greater policy significance, even though the policy is established by adjudicators without review by the agency's highest policymakers.

### *D. Public Availability of Decisions*

#### *1. Court and Formal Agency Proceedings*

In general, court decisions are publicly available and often are published in the case of the highest appellate tribunals. The availability of decisions makes possible the precedential effect of decisions, and the failure to record and disseminate decisions precludes such an effect.[31] The availability of decisions aids a practicing attorney. Citation to prior cases serves to indicate to the court the attorney's view of the "guiding criteria" to be applied to the case.[32] The practicing bar effectively provides the operating force that gives precedents their effect through repeated citation.

However, some court decisions are specifically stated to be without precedential effect and are not cited.[33] The reason for the non-precedential status of these decisions relates to their being merely a repetitive application of settled law.[34] These non-precedential decisions exist

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29. *See* Administrative Conference Recommendation No. 87-7, A New Role for the Social Security Appeals Council, 1 C.F.R. § 305.87-7 (1988) [hereinafter ACUS Recommendation No. 87-7] (stating that SSA's Appeals Council has come under criticism for failing to consider policy factors in its decisions and commenting that due to increasing caseload, previous policy-relevant role of Appeals Council has been eliminated).

30. *See* Strauss, *supra* note 27, at 1258 (proposing that when policy choices are allocated between two authorities, different procedures ultimately result).

31. Pittman, *Public Service*, *supra* note 17, at 45 n.53 (noting that in earliest days of English Chancery Court, Chancellor decided cases without reference to past decisions and failure to record decisions indicated their lack of precedential value).

32. *See* Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951) (discussing factors that led to evolution of tort law through judicial process over time).

33. *See* 2 K.C. DAVIS, *supra* note 23, § 8.9, at 199 (noting that only small portion of district court decisions are published).

34. *See* Note, *Unreported Decisions in United States Court of Appeals*, 63 CORNELL L. REV. 128 (1977-78) (critiquing non-publication or citation of unreported decisions); Render, *On Unpublished Opinions*, 73 KY. L.J. 145 (1984-85) (discussing options available to eliminate precedent problem with unreported opinions); Andreani, *Independent Panels to Choose Publishable Opinions: A Solution to California's Selective Publication System*, 12 PAC. L.J. 727 (1981) (advocating use of independent panels to select opinions for publication).

within a body of judge-made law elaborated in a great number of printed appellate decisions.

In formal agency adjudications, agencies often publish the decisions of the highest agency tribunal, typically the collegial body that heads the agency. Publication of decisions by agencies such as the National Labor Relations Board, the Interstate Commerce Commission, and the Federal Communications Commission allows for citation by the practicing bar in the same way as court-made precedents. The publication helps attorneys determine the criteria that govern later decisions by the same agency. Also, because these decisions are accessible nationwide, all attorneys, including those who practice outside of the Washington metropolitan area, can adequately advise clients.[35]

Agencies do not publish all decisions reached in formal adjudications.[36] Informal agency adjudications also vary considerably. In those surveyed below, decisions are not published in printed form, are not disseminated publicly, and are not covered by private reporting services.[37]

## II. Statutory Publication Requirement: The Freedom of Information Act

The Freedom of Information Act (FOIA) requires every agency to make publicly available unpublished opinions and orders.[38] Addition-

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35. Strauss, *supra* note 27, at 1243.

36. *See* ACUS Recommendation No. 87-7, *supra* note 29, § 305.87-7(1)(a)(2), (1)(f) (1988) (recommending that SSA's Appeals Council institute "publication of precedent by a recognized reporter service").

37. FDA matters are reported in Commerce Clearing House (CCH) Food & Drug Decisions, but the decisions on matters subject to regulatory hearings are not reported.

38. The FOIA statute provides, in pertinent part, the following:

(2) Each Agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases . . .

unless the materials are promptly published and copies offered for sale. . . . Each agency shall also maintain and make available for public inspection and copying current indexes providing identifying information for the public . . . required by this paragraph to be made available or published. . . . Each agency shall promptly publish, . . . and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request. . . . A final . . . opinion . . . 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 only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

ally, FOIA requires that each agency maintain an index of its unpublished materials to aid the public in identifying decisions.[39] These affirmative disclosure obligations extend beyond formal APA adjudications[40] but do not extend to every matter within the broad APA definition of adjudications.[41] Instead, based upon the history and purposes of FOIA, the Attorney General's FOIA Manual (Manual) applies disclosure provisions to "structured, relatively formal proceedings, "in which the agency is functioning in a quasi-judicial capacity, and in which its decision is rendered" upon a consideration of statutory or administratively defined standards."[42]

All proceedings surveyed in this Article would seem to be within the category of structured decisions discussed in the Manual.[43] Indeed, even informal adjudications decided on a written record, without an oral hearing, seem to have the characteristics described in the Manual. The evolution in the basis for reviewing informal adjudications based on a record has given more of these proceedings the attributes identified in the Manual as bringing the proceedings within the reach of the FOIA provisions.

The appropriate test to be used in determining which types of decisions are covered by the affirmative disclosure obligation has generated some debate. The Attorney General initially found that the statute "seems" to require indexing only those materials cited by or relied

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5 U.S.C. § 552(a) (1982). Affirmative disclosure requirements also apply to agency manuals and statements of policy not adopted by rule.

39. *Id*; *see generally* CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, S. REP. NO. 1219, 88th Cong., 2d Sess. 12 (1964) [hereinafter SENATE REPORT NO. 1219]; CLARIFYING AND PROTECTING THE RIGHT OF THE PUBLIC TO INFORMATION, AND FOR OTHER PURPOSES, S. REP. NO. 813, 89th Cong., 1st Sess. 7 (1965) [hereinafter SENATE REPORT NO. 813]; U.S. Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act at 14 (U.S. Dept. of Justice, 1967) [hereinafter Att'y Gen.'s Memorandum on Public Information Section]; U.S. Attorney General's Memorandum on the 1974 Amendment to the Freedom of Information Act (U.S. Dept. of Justice, 1975) [hereinafter Att'y Gen.'s Memorandum on 1974 Amendment] (identifying primary purpose as to compel disclosure of the agency's "secret law"); Davis, *The Information Act: A Preliminary Analysis*, 34 U. CHI. L. REV. 761, 707 (1967) (finding that memorandum giving instructions for evaluating complaint's merits is final opinion and not exempt from disclosure on basis of inter-agency memorandum exception); 5 U.S.C. § 553(a)(2) (1982) (prohibiting decisions to be used as precedent against members of public if not indexed and made available, unless timely notice is otherwise given).

40. Att'y Gen.'s Memorandum on 1974 Amendment, *supra* note 39, at 20.

41. *Id.* (noting that to do so would encompass matters not intended, such as Park Police tickets and IRS refunds).

42. *Id.*

43. *See id.* (claiming provision applies to agency proceedings in which agency is acting quasi-judicially).

upon as precedent.[44] This limitation was derived from both the enforcement provision in the statute, precluding the agency from giving precedential effect to matters not indexed, and the legislative history of the statute,[45] which indicates that the disclosure requirement makes available documents "having precedential significance."[46]

The Attorney General also was influenced by the impracticality and futility of indexing all decisions.[47] Others have also suggested that it may be better to have agencies rely solely on published decisions.[48] The public can ignore the unpublished decisions without fear that the agencies will use them as precedent.

On the other hand, the limitation of the requirement solely to precedential decisions has been criticized because it would provide agencies with too much discretion to select decisions to be given precedential effect.[49] Instead, private parties affected by agency action should be able to determine which decisions have precedential value.[50] Accordingly, all decisions should be made available and be indexed.

Further, the legislative history indicates that the underlying aim of the FOIA indexing requirements was "to afford the private citizen the essential information to deal effectively and knowledgeably with the [f]ederal agencies."[51] The purpose was also to guard against "secret law."[52] The few court cases dealing with the disclosure requirement

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44. Att'y Gen.'s Memorandum on the Public Information Section, *supra* note 39, at 15.

45. *See* SENATE REPORT NO. 813, *supra* note 39, at 7 (discussing prohibition on agencies from giving precedential effect to decisions not properly indexed).

46. *See* HOUSE COMM. ON GOVERNMENT OPERATIONS, GOVERNMENT INFORMATION.—PUBLIC ACCESS, H. REP. NO. 1497, 89th Cong., 2d. Sess. 7 (1966), *reprinted in* 1966 U.S. CODE CONG. & ADMIN. NEWS 2418 (claiming APA once allowed wide withholding of information but now new legislation is "disclosure" statue); SENATE REPORT NO. 813, *supra* note 39, at 6 (finding that requirement precluding agencies from relying on unpublished material as precedents gives agencies "added incentive" to make available required material).

47. *See* Att'y Gen.'s Memorandum on the Public Information Section, *supra* note 39, at 15 (arguing that sanction limits indexing to orders with precedential effect that result from final dispositions of adjudicative proceedings).

48. *See* Strauss, *supra* note 27, at 1243 (suggesting that reliance on indexed but unprinted material should be avoided because of their relative inaccessibility).

49. *See* 1 K.C. DAVIS, *supra* note 23, § 5.7, at 324-28; Comment, *The Freedom of Information Act: Access to Law*, 36 FORDHAM L. REV. 765 (1968) (discussing problems resulting from agencies using FOIA and their discretion to justify withholding information); *see also* Davis, *supra* note 39, at 782 (discussing records that should be subject to index provisions).

50. *See* Davis, *supra* note 39, at 779 (claiming portions of staff guidelines used in determining and adjudicating cases should be available to public for use in argument).

51. SENATE REPORT NO. 1219, *supra* note 39, at 12.

52. *See* Att'y Gen.'s Memorandum on 1974 Amendment, *supra* note 39, at 28.

generally have given the precedential test an expansive reading.[53] In these cases, the obligation to disclose applies not only to decisions that an agency considers to be binding in the future but to all decisions an agency retains for general reference and research. An agency's use of decisions in developing future guidelines sufficiently subjects the decisions to disclosure.[54]

As an alternative grounds, the courts have explicitly rejected limiting the FOIA disclosure requirement solely to precedential decisions.[55] The "enforcement" provision is viewed as a means to secure compliance by the agency and does not limit the scope of the broader language of the statutory text which requires agencies to index "final decisions," a term that taken literally could cover all decisions.[56] The decisions in these cases have dealt with situations where indexing and availability were required under the expansive version of the precedential test.[57] Thus, they do not fully test whether courts will impose an affirmative obligation when the agencies have not retained any decisions. The rationale of these court decisions would lead to an obligation for the indexing and disclosure of all agency decisions, but such an obligation is burdensome and may serve little purpose.

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53. Irons v. Gottschalk, 548 F.2d 992 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 965 (1977); Tax Analysts v. IRS, 362 F. Supp. 1298, 1306 (D.D.C. 1973), *aff'd on other grounds*, 505 F.2d 350 (D.C. Cir. 1974).

54. National Prison Project v. Sigler, 390 F. Supp. 789 (D.D.C. 1975). The expansiveness of the reading in the latter instance may be attributable to the experimental nature of the particular proceedings at issue. For example, where an agency has established a pilot program of providing reasons for parole determinations each decision may be reviewed by the agency for its potential value in developing and revising guidelines. *Id.* at 794. In this context, individual decisions may be especially important to those inside the agency in formulating an emerging policy. *See* Pickus v. United States Bd. of Parole, 507 F.2d 1107, 1114 (D.C. Cir. 1974) (holding that because guidelines concerning parole hearings impact upon parole determinations, they must adhere to APA rulemaking requirements).

55. National Prison Project v. Sigler, 390 F. Supp. at 793; *cf.* Tax Analysts v. IRS, 362 F. Supp. at 1303 (requiring that under FOIA agency interpretations with general applicability be published in *Federal Register* with those not of general applicability be made available to public), *aff'd on other grounds*, 505 F.2d 350 (D.C. Cir. 1974); *See* U.S. GEN. ACCT. OFF., FREEDOM OF INFORMATION ACT: NONCOMPLIANCE WITH AFFIRMATIVE DISCLOSURE PROVISIONS, 27 (1986) [hereinafter GENERAL ACCT. OFF.] (noting that 15 out of 25 federal agencies evaluated were not in full compliance with various aspects of FOIA (a)(2) disclosure requirements).

56. National Prison Project v. Sigler, 390 F. Supp. at 793; Tax Analysts v. IRS, 362 F. Supp. at 1306. *See* 26 U.S.C. §§ 6103, 6110 (1982 & Supp. IV 1986) (governing FOIA-like disclosure and indexing obligations of IRS).

57. *See* National Prison Project v. Sigler, 390 F. Supp. at 789 (concluding that materials determined to be agency orders must be made available to public); Tax Analysts v. IRS, 362 F. Supp. 1298 (D.D.C. 1973) (affirming holding that FOIA mandated public disclosure when agency statements of policy or interpretations are made), *aff'd on other grounds*, 505 F.2d 350 (D.C. Cir. 1974).

In *NLRB v. Sears, Roebuck & Co.*,[58] the Supreme Court gave the related FOIA affirmative disclosure requirements governing agency memoranda an expansive reading. The memoranda sought by the plaintiff were explanations of the agency's reasons for declining to initiate complaints, effectively final dispositions of matters. The memoranda were the type of agency decision in which "the public is so vitally interested and which Congress sought to prevent the agency from keeping secret."[59] Though the precedential test was not at issue, the Court noted that final opinions provide "guides for decisions of similar and analogous cases" as well as explanations for the decision reached.[60] This recognition of the guidance value of decisions suggests a test for the disclosure of final decisions that focuses less on the binding nature of the precedent and more on the value decisions can have to inform and guide the public.

## III. The Judicial Effort to Require Precedential Decisions: *Allison v. Block* and the Farmer's Home Administration

### *A.* Allison v. Block

*Allison v. Block* was one of a series of cases that criticized the Farmer's Home Administration's (FmHA) denial of loan repayment deferrals to farmers.[61] Under the FmHA program considered in *Allison*, "underprivileged" farmers received loans secured by the farm.[62] If a farmer defaulted under the program, the agency might accelerate the loan and pursue foreclosure.[63] In addition to default measures, the agency could allow the farmer to defer payment, if he became temporarily unable to pay.[64]

After the Allisons defaulted on their loan because of poor farm yields due to inclement weather conditions, the agency accelerated the

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58. 421 U.S. 132 (1975).
59. *Id.* at 156.
60. *Id.* at 153 n.5.
61. *See, e.g.*, Shick v. FmHA, 748 F.2d 35 (1st Cir. 1984) (requiring FmHA give notice to borrower of his ability to defer loan payments); Matzke v. Block, 732 F.2d 799 (10th Cir. 1984) (ordering Secretary to provide notice of deferral procedures); Curry v. Block, 738 F.2d 1556 (11th Cir. 1984) (holding Secretary of Agriculture has duty to implement loan deferral programs).
62. Curry v. Block, 541 F. Supp. 506, 513-14 (S.D. Ga. 1982) (imposing duty on Secretary of Agriculture to implement loans), *aff'd*, 738 F.2d 1556 (11th Cir. 1984); *See* H.R. Rep. No. 986, 95th Cong., 2d Sess. 22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 1106, 1127 (1978) (outlining purpose for and noting implementation of loan program).
63. 7 U.S.C. §§ 1927, 1981(e) (1982 & Supp. IV 1986).
64. 7 U.S.C. §§ 1981(d) (1982 & Supp. IV 1986).

debt. While an administrative appeal was pending on the decision to accelerate, the Allisons requested a deferral under the deferral provision.[65] A program assistant denied the deferral request, because the Allisons' "past performance show[ed] that they did not have the potential to generate sufficient income to repay . . . expenses plus debt service even if a deferral had been granted."[66]

The Eighth Circuit Court of Appeals found the denial invalid, enjoining acceleration of the underlying loan. The court interpreted the statute to require explicit notice of the deferral program and the establishment of new procedures to consider applications and denials.[67] The court also found that the agency had misinterpreted the statute in a way that led to "no substantive measure of relief."[68] The court believed that few, if any, borrowers would qualify for deferrals if the agency took a literal and stringent approach to the requirement of "temporary" repayment difficulties. The court additionally stipulated that appropriate eligibility standards would have to be developed through rulemaking to ensure that the scale of relief sought by Congress would be reflected by substantive criteria.[69] Adjudication could be used to develop criteria only if the adjudication would have precedential effect, would be consistent with nationwide requests, and would not be made in isolation.[70] The court termed the FmHA decision a conclusory abuse of discretion.[71]

Other courts have enjoined FmHA foreclosures using one or more of the defects identified by the *Allison* court, including the failure to use rulemaking to establish criteria as a basis for the decision.[72] The *Allison* decision, however, was unusual because it identified an absence of precedent as a factor in determining that rulemaking, rather than adju-

65. Allison v. Block, 723 F.2d 631, 633 (8th Cir. 1983).

66. *Id.* at 633.

67. *Id.* at 634; *see* Matzke v. Block, 732 F.2d 799, 802 (10th Cir. 1984) (ordering Secretary provide notice of deferral provisions). *But see* United States v. Markgraf, 736 F.2d 1179, 1186 (7th Cir. 1984) (holding that Secretary of Agriculture was not required to give notice of § 1981(a) deferral provisions). *See generally* Note, *"You Mean I Could've Saved the Farm?"- An Examination of the Notice Requirements, of Lack Thereof, of 7 U.S.C. § 1981(a)*, 1985 B.Y.U. L. REV. 159 (noting resolution of circuit court conflict by adoption of requirement for notification to further statute's purpose).

68. Allison v. Block, 723 F.2d at 637.

69. *Id.* at 637-38.

70. *Id.* at 638.

71. *Id.* at 638 n.3.

72. *See* Curry v. Block, 738 F.2d 1556 (1st Cir. 1984) (obligating Secretary of Agriculture to utilize rulemaking procedure and not adjudicatory process); Jacoby v. Schuman, 568 F. Supp. 843 (D. Mo. 1983) (enjoining FmHA from foreclosing on borrowers farms until implementation of regulations farm loan deferrals).

dication, was necessary.[73]

### *B. Case Analysis*

The impact of *Allison* is limited because of the alternative grounds for decision, including the statutory error by the agency. The case also illustrates, again, the difficulties of mandatory rulemaking as an alternative to adjudications.

Although rulemaking has the advantage of involving the public in making policy, the Supreme Court has ordinarily left the choice between rulemaking and adjudication to the "informed discretion" of the agency.[74] The agency's choice of adjudication is often presumed reasonable, because the agency can best assess the variability of the situation, the novelty of the issue, the inappropriateness of a fixed rule, and the need for further experience.[75] However, rulemaking may be required where the use of adjudication amounts to an abuse of discretion, a determination most readily made if past conduct by an individual is penalized by the agency on the basis of some new standard.[76]

In *Morton v. Ruiz*, the Supreme Court found rulemaking to be mandatory in order to preclude *ad hoc* decisionmaking.[77] The significance of the *Ruiz* decision, like the *Allison* case, has been problematical. Other errors in the agency action made it unnecessary to reach the issue of the need for rulemaking.[78] Like *Allison*, the *Ruiz* decision also failed to specify why an *ad hoc* decision should be invalid when the decision was rational on its own terms.

Moreover, when the court is concerned about the lack of clear criteria for the agency decision on eligibility or other matters, mandatory rulemaking may not necessarily produce dispositive standards. A rule may make so many factors relevant, that the ultimate decision is nevertheless subject to considerable discretion. A stricter rule with clearer standards may not necessarily be rational or a suitable way to deal with the matter.[79]

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73. Allison v Block, 723 F.2d at 636

74. *See* SEC v. Chenery Corp., 332 U.S. 194, 203 (1947) (finding case-by-case evolution of standards as an alternative to rulemaking); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974) (upholding agency choice of adjudication to develop policy absent abuse of discretion).

75. SEC v. Chenery Corp., 332 U.S. at 204.

76. NLRB v. Bell Aerospace Co., 416 U.S. at 294.

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

78. *See* 2 K.C. DAVIS, *supra* note 23, § 7:27, at 140-50 (critiquing *Morton* decision as overly broad).

79. *See* Heckler v. Campbell, 461 U.S. 458 (1983); WNCN Listeners Guild v. FCC, 450 U.S. 582 (1982) (upholding rule as rational without any waiver procedure);

The lack of a reporting system also may be a factor that explains the judicial concern.[80] The FOIA availability requirements are pertinent to this concern because they represent a congressionally-mandated reporting system. The availability of agency decisions makes it possible for affected parties to cite earlier cases and, thus, to test whether prior cases are of precedential value and need to be considered or distinguished in making a rational decision. The scope of the FOIA requirement is uncertain, however. To the extent the requirement only applies when agencies retain and rely on decisions as precedents, the result may be that no decisions will be available. A broader test for the agencies' obligation that looks to the guidance value of decisions and the needs of participants should lead to the availability of decisions that can be examined by participants both for guidance and potential precedential significance. Thus, the concern of the *Allison* court, that decisions not be *ad hoc*, may be more appropriately directed not at mandating rulemaking but at examining the extent to which agencies should act affirmatively to make their prior decisions available to the public under the FOIA.

### *C. Agency Response and Legislative Developments*

After the *Allison* court criticized the FmHA adjudicatory process for failing to give precedential effect to prior decisions,[81] a number of other courts invalidated the FmHA determinations due to inadequate notice of the deferral procedures and a lack of rules.[82] The FmHA reacted by adopting substantive rules through notice and comment procedures, which assured more notice about the deferral program and other farmer loan programs and specified the eligibility criteria in more detail.[83] The agency action did not reflect any steps that would make the process more precedential.

Under the new rules, the need for the deferral must be due to condi-

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Diver, *The Optional Precision of Administrative Rules*, 93 YALE L.J. 65 (1983) (discussing standard to evaluate degree of precision appropriate in administrative rules).

80. *See* W. GELLHORN, C. BYSE, P. STRAUSS, T. RAKOFF & R. SCHOTLAND, ADMINISTRATIVE LAW 312-14 (8th ed. 1987); *see generaliy* Verkuil, *supra* note 13, at 789; *see also* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921), *cited in* Sprecher, *supra* note 11, at 507-09; Schauer, *supra* note 15, at 571 (explaining deficiencies in *ad hoc* decisionmaking).

81. Allison v. Block, 723 F.2d 631 (8th Cir. 1983).

82. Matzke v. Block, 732 F.2d 799, 802 (10th Cir. 1984); *see* Curry v. Block, 738 F.2d 1556 (1st Cir. 1984) (obligating Secretary to utilize rulemaking procedure and not adjudicatory process); Jacoby v. Schuman, 568 F. Supp. 843 (D.M. 1983) (enjoining FmHA from foreclosing on borrowers farms until implementation of regulations farm loan deferrals); *see generally* Note, *supra* note 67, at 159.

83. 7 C.F.R. § 1951.44 (1988).

tions beyond the borrower's control, a category that includes, but is not limited to, widespread economic conditions. Furthermore, the rules require the agency to provide specific reasons for any denial.[84] The borrower still must demonstrate that the need for deferral is temporary, and the debt can be repaid at the end of the deferral period.[85] The borrower has the burden of proving repayment ability,[86] and the history of the borrower's previous loans from the agency are part of the record. That record may provide the agency the means to document concerns about repayment ability.[87]

Under the statute, the agency is specifically required to conduct informal hearings for deferrals.[88] Under the procedures, a deferral request is decided by the local county supervisor, an official of FmHA.[89] If denied, the borrower also may request an informal hearing with an FmHA district director to review the denial and the decision to accelerate.[90] Then, the borrower may request a written determination from the FmHA state director, or an unbiased designee, not significantly involved in the case.[91] No national review of this type was provided for in the agency's initial rules.[92] Appeals of deferrals are not compiled or indexed nationally and exist, if at all, at the state level FmHA offices.[93] In recent years, there have been relatively few deferral requests due to the pendency of court injunctions and rule revisions.[94]

Separate from the adjudicatory system, a national office seeks to ensure the consistency of lower level determinations through the regular use of audit teams[95] which selectively review loan decisions made at the

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84. *Id.* § 1951.44(j)(3).
85. *Id.* § 1951.44(b)(2), (c)(4).
86. *Id.* § 1951.44(d).
87. *Id.* § 1951.44(b)(i).
88. 7 U.S.C. § 1981(b) (1982).
89. 7 C.F.R. § 1951.44(h) (1988). Hearings procedures are specified at 7 C.F.R. § 1900.51 (1988).
90. 7 C.F.R. § 1900.56, Pt. 1900, Subpt. B, Exhibit D (1988).
91. 7 C.F.R. § 1900.58, Exhibit D (1988).
92. *Id.*
93. Letter from FmHA FOIA Officer V. Cunningham to Margaret Gilhooley (Dec. 31, 1987) [hereinafter Cunningham Letter].
94. *See* U.S. DEP'T OF AGRICULTURE, A STUDY OF THE APPEALS PROCEDURE IN FMHA FARMER PROGRAMS, 7-8 (July 1986) [hereinafter FMHA STUDY OF APPEALS PROCEDURE]. The Study was done during a time period in which foreclosure actions involving deferral request were deferred pending revisions in the rules necessitated by the court litigation.
95. Audit review is relevant to this article as an example of a management measure to ensure consistency. It is also a process with procedural implications. For example, were a particular decision changed as a result of an audit review, any administrative appeal by the borrower might warrant review by higher level officials not ordinarily subject to the type of supervisory review represented by an audit.

lower level.[96] Training programs for the auditees are used to deal with the problems found.[97]

These types of decentralized arrangements may seem at odds with *Allison*'s emphasis on precedent and consistency. Nonetheless, the *Allison* court viewed rulemaking as an alternative to adjudications with precedential effect.[98] If the rules have sufficiently established the criteria, there may no longer be a need for precedential determinations under that court decision.[99]

Recent legislative developments have altered the decentralized proceedings. Congress, in 1988, changed FmHA deferral procedures,[100] establishing a national review office to consider appeals of state FmHA decisions.[101] This review office and its director are concerned solely with hearing issues, a provision that separates the reviewers from program responsibilities and which seems intended to enhance the independence of the review.[102] The existence of a national office for review has the potential for the development of decisions that can serve as precedent that apply nationwide.

The absence of precedents in the FmHA program may be explained in large part by the specific factual nature of FmHA decisions. The bulk of the decisions made by FmHA are undoubtably mere factual applications of the rules. Nonetheless, wider issues may sometimes arise. An FmHA survey found that one of the reasons for delays in farmer loan appeals was the "complexity of regulations and policies which differ substantially for different programs,"[103] suggesting that cases can present difficulties in interpreting and applying the rules. There may be a need for authoritative decision interpreting the rules and illustrating their application in order to provide guidance to those inside and outside the agency.

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96. Evaluation Reviews FmHA Instruction 2006-M; Evaluation Review Questionnaire District Form FmHA 2006-1; Evaluation Review Questionnaire County Form FmHA 2006-2.

97. Evaluation Reviews FmHA Instruction 2006-M, § 2006.615.

98. Allison v. Block, 723 F.2d 631, 636 (8th Cir. 1983).

99. Some aspects of the agency's revised rules were upheld and some rejected in an initial court test in which the precedential effect of the agency decisions was not issue. Coleman v. Block, 632 F. Supp. 997 (D.N.D. 1986).

100. Agricultural Credit Act of 1987, Pub. L. No. 101-233, 101 Stat. 1568 (1988) (codified as amended at 12 U.S.C. § 2001 (1986)).

101. *Id.*

102. *Id.*

103. *See* FmHA Study of the Appeals Procedure, *supra* note 94, at 34.

## IV. Practices in Other Agencies

### *A. Food and Drug Administrative Regulatory Hearings*

#### *1. Description*

##### *a) Program Background*

The structure of regulatory hearings at the Food and Drug Administration (FDA) stand in contrast to other programs surveyed. The sheer size of caseloads exists as a distinctive feature of the Social Security Administration (SSA) programs; the FDA regulatory hearings are by contrast few in number. Final decisions at FDA are made by officials with policy-making responsibilities; FDA proceedings are followed by a specialized bar. Although FDA proceedings have not produced "precedents" recognized as such in an agency index, in practice all FDA decisions are made available indirectly and when a FOIA request is made. The agency is also taking steps to establish a general index for these proceedings.

The FDA established a procedure for resolving a number of disputed matters on the basis of an informal "regulatory hearing."[104] The procedure provides for an oral hearing before a presiding officer who has not participated in the investigation or action and who is not subordinate to any involved official other than the agency head.[105] Once the hearing is complete, the presiding officer makes a report and, if time permits, provides the parties with an opportunity to review and comment on the report.[106] A Commissioner, or delegate, then issues a final decision based on this record,[107] giving the reasons for the action taken and the basis in the record.[108]

FDA regulatory hearings are available for a number of matters,[109] including the withdrawal of approval of investigational medical devices and the denial of permission to investigate new drugs.[110] Hearings most frequently have involved the disqualification of clinical investigators who have repeatedly or deliberately violated the FDA's requirements for conducting clinical studies.[111] Investigators can be disqualified if

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104. 21 C.F.R. § 16.1 (1988).
105. 21 C.F.R. § 16.42 (1988).
106. 21 C.F.R. § 16.60(e) (1988).
107. 21 C.F.R. § 16.95(b)(2) (1988).
108. *Id.*
109. *See* 21 C.F.R. § 16.1(b)(1)-(2) (1988) (listing 10 statutory provisions and 27 regulatory provisions under which regulatory hearings are available).
110. 21 C.F.R. § 16.1 (1988).
111. This estimate is based on the author's own examination of the collection of hearings in the FDA Office of General Counsel.

they ship, in interstate commerce, drugs that will be used for investigational new drug (IND) testing on human subjects.[112] As a condition of approval, the drug company must agree to have clinical investigators consent to compliance with FDA regulations governing the manner of the research.[113]

If the agency initiates a disqualification, the investigator is entitled to request a regulatory hearing[114] with a final decision made by an FDA Associate Commissioner.[115] Increasingly, however, a settlement is reached after proceedings are initiated but before hearings occur. Investigators may agree to conduct investigations according to monitoring arrangements.[116]

*b) Indexing and Availability of Decisions*

The FDA's quarterly activity report, an internal agency publication available to the public upon request, summarizes decisions involving investigators. Although the agency's regulations do not compel the existence of any index or the availability of the decisions,[117] the prior decisions are provided after a FOIA request is made. These decisions are also retained by the General Counsel's office, which is in the process of developing a general index.[118] The FDA Public Dockets Office also maintains lists of recent regulatory hearings. The Clinical Investigations Program Office maintains a list of investigators disqualified or restricted from research through either settlement or hearing.[119] Through FOIA requests, attorneys can obtain previous settlement agreements for use in representing clients.[120]

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112. 21 U.S.C. § 355(i) (1982 & Supp. IV 1986).

113. *Id.*; 21 C.F.R. § 312.60-.68 (1988); FOOD & DRUG ADMIN., COMPLIANCE PROGRAM GUIDANCE MANUAL [hereinafter FDA MANUAL] (describing FDA program in detail). Drug sponsors often obtain and send this manual to clinical investigators to inform them as to what to expect in an FDA inspection.

114. 21 C.F.R. § 312.70(a) (1988).

115. 21 C.F.R. § 312.70 (1988).

116. Telephone Interview with Dr. Alan Liscook, Chief, Clinical Investigations Branch of FDA (Oct. 1987) [hereinafter Liscook interview].

117. 21 C.F.R. § 20.26 (1988).

118. Interview with Linda Horton, Deputy Chief Counsel for Regulations and Hearings, FDA Office of Chief Counsel (Oct. 1987) [hereinafter Horton interview]. Agency practice of keeping decisions for reference brings them within the scope of the FOIA requirements. *See* Irons v. Gottschalk, 548 F.2d 992 (D.C. Cir. 1976) (holding manuscript decisions of U.S. Patent Office subject to FOIA disclosure requirements), *cert. denied*, 434 U.S. 965 (1977).

119. Liscook interview, *supra* note 116.

120. *Id.*

*2. Discussion*

Some reasons weigh against the need to index decision for this program. The few FDA decisions focus on the individual facts of the case. Also, the FDA quarterly activity report and list of disqualified investigators indirectly provide the knowledgeable public access to decisions resulting in unfavorable treatment. Finally, as only a small number of decision-makers are involved, an institutional memory promotes consistency.[121]

There still remain reasons in favor of compilation and indexing of these decisions. Regulatory decisions can involve issues that transcend a particular case.[122] Some decisions have stated general criteria in order to resolve the issues involved.[123] Highlighting such decisions by indexing better ensures accessibility of the principles for the public.

The importance of indexing can be illustrated. In one particular regulatory hearing, the FDA enumerated general criteria that limit the circumstances for terminating approval for IND testing by a drug sponsor. In this instance, lower level program officials refused to permit any further testing of an investigational drug, because the tests to that point had not shown effectiveness, and the drug's method of action was improbable. After a decision, made by the head of the Bureau of Drugs, further testing of the drug, a purported hemorrhoid cure administered via the patient's navel, was permitted. The final decision allowed further research, because research should be terminated only "to protect the health and safety of the public" and not because the likelihood of success was improbable.[124] The agency decision recognized the importance of ensuring the opportunity to pursue research when safety concerns are not present.[125]

This decision illustrates the limitations of a narrow sanction-based precedential test for FOIA indexing and affirmative disclosure requirements. Because the decision relaxed the restrictions on drug sponsors, it

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121. Horton interview, *supra* note 118.

122. *See* Letter from Deputy Commissioner Novitch to James R. Phelps, Esq. (Oct. 5, 1984) [hereinafter Novitch Letter] (discussing asserted problem of inconsistent treatment of clinical investigators in determining eligibility for IND testing). The agency later revised its rules to eliminate the adequate assurance procedure that had given rise to the dispute. *See* 52 Fed. Reg. 8831 (1987).

123. Novitch Letter, *supra* note 122.

124. Memorandum Decision of J. Richard Crout, M.D., Director Bureau of Drugs on Regulatory Hearing on Termination of IND 9421. The author was an adviser in the preparation of the final decision in this matter.

125. 21 C.F.R. § 312.44 (1988); *see* 52 Fed. Reg. 8,798, 8,821-22 (1987) (stating that narrow focus on safety at initial stage of investigation reflects desire to remove impediments to innovation at early stages of discovery).

is unlikely that the agency would rely on it in future proceedings which seek to impose restrictions. Thus, disclosure of the decision would not be mandatory under the precedential test that precludes agency reliance on decisions not included in the index. Making the decision available, however, ensures that the agency will acknowledge and justify any later changes in position.[126] Additionally, the affirmative disclosure provides some guidance about the agency's regulatory philosophy.[127]

### *B. Department of Defense Industrial Personnel Security Clearance Review Program*

#### *1. Description*

The Department of Defense (DOD) procedures for reviewing denials and withdrawals of security clearances from employees of industrial contractors provide a contrasting example of agency practice with respect to the indexing and availability of decisions. The DOD program makes about 150 full hearings and decisions annually,[128] with the DOD Directive for the program considerably limiting discretion of the adjudicators.[129] Cases primarily involve application of law and the DOD Directive to the facts of the case. A comprehensive annual index groups all cases according to the grounds for clearance denial.[130]

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126. *See, e.g.*, Atchison, T. & S.F.R.R. v. Wichita Bd. of Trade, 412 U.S. 800, 808 (1973) (noting presumption that agency "policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms" ); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (declaring that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standing are being deliberately changed . . . . [I]f an agency glosses over or swerves from prior precedent without discussion, it may cross the line from tolerably terse to intolerably mute"). *See generally* 2 K.C. DAVIS, *supra* note 23, § 8.9, at 199 (noting that "[t]he dominant law clearly is that an agency must either follow its precedents or explain why it departs from them."); *cf.* Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co., 463 U.S. 29, 42 (1983) (holding agency failed to provide requisite analysis for revoking rule procedures).

127. *See* Atchison, T. & S.F.R.P. v. Wichita Bd. of Trade, 412 U.S. at 807 (stating that adjudicated cases serve as guide for future agency action).

128. U.S. DEP'T OF DEFENSE, INDEX TO CASES UNDER THE INDUSTRIAL PERSONNEL SECURITY CLEARANCE REVIEW PROGRAM, Vol. V (Jan. 1, 1986-Dec. 31, 1986) [hereinafter DOD INDEX].

129. U.S. Dep't of Defense, Directive 5220.6, Defense Industrial Personnel Security Clearance Review Program, 32 C.F.R. §§ 155.1-.8 (1987) [hereinafter DOD Directive].

130. *See* DOD INDEX; 32 C.F.R. § 286.11 (1987) (authorizing maintenance of index).

*a) Program background*

The DOD clearance program is authorized by a Presidential Executive Order which provides for the issuance of agency regulations.[131] A security clearance is granted when such issuance is "clearly consistent with the national interest."[132] An employee whose clearance is denied or withdrawn, under DOD regulations, receives a statement of reasons for the action and is entitled to an oral hearing.[133] Appeal of this hearing officer's written decision, if taken, proceeds to an Appeals Board, which bases its written[134] and final decision upon the record.[135]

*b) Indexing and Availability of Decisions*

The final Appeals Board and hearing examiner's decisions are summarized in the agency's prepared index. A letter symbol indicating the principal ground or grounds relied on for withdrawing the security clearance, *e.g.*, financial irresponsibility, unauthorized disclosures, and criminal or dishonest conduct, is a means to research the decision. Summary statements are taken from each decision.[136] These listings include the case file numbers to facilitate FOIA requests, but in order to protect privacy, the listings do not indicate the name of party involved.

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131. Exec. Order No. 10,865, 3 C.F.R. § 398 (1959-1963), *reprinted in* 5 U.S.C. § 504 (1982 & Supp. IV 1986). A clearance can be denied or withdrawn for several reasons, including treason, "sympathetic association" with a spy, unauthorized disclosure of classified information, criminal or dishonest conduct, acts of sexual perversion, excessive indebtedness, alcohol abuse, and illegal or improper use of narcotics or cannabis. 32 C.F.R. § 155.6(e) (1987).

132. Exec. Order No. 10,865, 3 C.F.R. § 398 (1959-1963), *reprinted in* 5 U.S.C. § 504 (1982 & Supp. IV 1986); *see* 32 C.F.R. § 155.4 (1987) (stating that any determination authorizing security clearance for access to classified information shall be based only upon finding that to do so is clearly consistent with national interests); *see also* 32 C.F.R. § 155.6(e) (1987) (noting that clearance can be denied for treason, association with a spy, disclosure of classified information, criminal conduct, illegal or excessive use of alcohol or narcotics, or sexual perversion).

133. Exec. Order No. 10,865, 3 C.F.R. § 398 (1959-1963), *reprinted in* 5 U.S.C. § 504 (1982 & Supp. IV 1986); 32 C.F.R. § 155.7 (1987). This hearing does provide procedural safeguards. Both DOD and the employee are represented by counsel and cross examination is available, unless otherwise harmful to national interests. Exec. Order. No. 10,865, 3 C.F.R. § 398 (1959-1963), *reprinted in* 5 U.S.C. § 504 (1982 & Supp. IV 1986); 32 C.F.R. § 155.6(i)-(k) (1987); *cf.* Greene v. McElroy, 360 U.S. 474 (1959) (holding that in absence of explicit authorization from either President or Congress, respondents not empowered to deprive petitioner of his job through proceeding which does not afford safeguards of confrontation and cross examination).

134. 32 C.F.R. § 155.7(r)-(u) (1987).

135. 32 C.F.R. § 155.7(u) (1987); *see, e.g.*, Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969) (reviewing lower court's grant of summary judgment for Secretary of Defense in action by homosexual seeking declaration and injunctive relief for denial of security clearance).

136. DOD INDEX, *supra* note 128.

Redacted opinions delete any personal identifying details.

*2. Discussion*

*a) Indexing Practices*

Though DOD is unusual in providing as much indexing as it does, limitations on DOD's practices affect the utility of its disclosure and index. The existence of the index is not identified in the specific regulations governing the program, and DOD's general regulations governing FOIA indexing do not indicate which programs have indexed decisions.[137] Parties unaware of the index's existence would benefit if DOD regulations made a specific reference to it. This identification may particularly benefit those employees who retain counsel[138] located outside of Washington.

All cases are reported in the index, without regard to their significance or precedential value. As a result, counsel themselves can review prior cases to determine relevance. Nevertheless, a grouping of the unusual cases separate from the routine ones would be desirable to enhance the index's utility.

*b) Directives and Adjudicatory Discretion*

The current procedure of indexing cases on a comprehensive, rather than a selective precedential basis, appears attributable to the restricted adjudicatory role. The function of the examiners and the Board is centered on factual determinations and applications of the governing standards set out in the agency's rules and directives. Consequently, decisions by both the examiners and the Appeals Board do not typically cite as authority prior agency decisions but instead refer generally to the DOD Directive as the basis for resolving any questions that arise.[139]

The DOD Directive establishes an "Adjudication Policy," which attempts to detail specific factors considered in determining an employee's eligibility for a security clearance and other "mitigating factors" considered relevant.[140] A history of bad debts or of writing

137. 32 C.F.R. § 155.1-.8, § 286.11 (1987); 5 U.S.C. § 552(a)(2) (1982).

138. Interviews with program staff, Defense Industrial Personnel Security Clearance Review Program (Oct. 1987) [hereinafter program staff interviews].

139. *See* Determination of Examiner William R. Kearney, D.I.S.C.R. OSD No. 85-0403, at 5 (Sept. 3, 1986) (referring to cases under DOD Directive 5220.6 as placing burden on government to establish prima facie case that applicant does not possess requisite qualifications for security clearance); *see also* Program staff interviews, *supra* note 138.

140. 32 C.F.R. §§ 155.6(f), 155.8 (1987).

insufficient funds checks, for example, may be considered in determining whether an individual is financially irresponsible. However, the decision-maker may consider systematic efforts by the individual to satisfy creditors as a mitigating factor and, thereby, grant[141] the clearance.

The DOD Directive illustrates the limited discretion of the adjudicators and the difficulty in applying fixed tests. The adjudication policy is stated in the DOD Directive to be "binding" on determinations of clearance eligibility.[142] The text of the policy appears, in some respects, to leave no discretion. For instance, it might seem that discontinuance of alcohol use for less than two years could not be considered a mitigating factor.[143] Nonetheless, other parts of the DOD Directive mandate that the decision be "a fair and impartial, overall common sense decision based upon a consideration of all available information, both favorable and unfavorable."[144] Based upon this provision, the Appeals Board has found an examiner's "rigid and uncompromising application" of the factors in the adjudication policy arbitrary and inconsistent with the context of the rest of the DOD Directive.[145] Although the adjudication policy is "binding" under the DOD Directive, it cannot be applied to dictate "formula adjudication."[146] Instead, each case must be decided on its own facts.[147]

Board decisions interpreting the effect of the DOD Directive are likely to affect examiners regularly reviewed by that Board and are particularly significant. Within the area of discretion left to the adjudicators by the Directive, the decisions of the Board also can provide guidance in applying the criteria. For this reason, the indexing and publication practices of an agency should highlight decisions that deal with larger questions or provide important guidance. At present, the DOD index does not highlight decisions for their significance, and that determination is left for those who read through all the topical summaries in the annual indices.[148]

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141. 32 C.F.R. § 155.8(a)(2)(iv) (1987).
142. 32 C.F.R. § 155.6(f) (1987).
143. *See* DOD Directive, *supra* note 129, at 3-7.
144. 32 C.F.R. § 155.6(c) (1987).
145. Order for Remand, D.I.S.C.R. OSD No. 85-0005 (May 27, 1986).
146. *Id.*
147. *Id.* As each case is decided on its own facts, board decisions reflect an individualized approach. *See* Smith v. Schlesinger, 513 F.2d 462 (D.C. Cir. 1975) (allowing *in camera* inspection of file compiled for initial decision to deny security clearance); Gayer v. Schlesinger, 490 F.2d 740 (D.C. Cir.) (finding that DOD did not apply *per se* rule of withdrawing security clearance to homosexual without consideration of plaintiffs individual case), *as amended*, 494 F.2d 1135 (D.C. Cir. 1973).
148. DOD INDEX, *supra* note 128, at Criteria M and 1.

*c) Relationship Between Policy and Adjudicatory Responsibilities*

The relationship between the policy and adjudicatory functions for the DOD program should be noted. Basic hearing procedures for the programs were established after notice and comment rulemaking, but the adjudication policy, with its quasi-binding effect, was adopted without comment, based upon reliance on the statutory exceptions to rulemaking procedures.[149]

Lastly, the role of the adjudicators in the industrial security program is primarily to make factual determinations. That responsibility affects the future work of the individual employee, as well as the national interest. Therefore, the adjudicatory process must be fair, and due process must be afforded.[150] The examiners, the Appeals Board, and the departmental attorneys who bring cases all share the same offices and use the same library. More importantly, the same director has the responsibility to "manage" the program, involving both the attorneys who bring the cases and the adjudicators.[151] Hearing examiners and Appeals Board members are attorneys designated by the General Counsel of DOD to serve on the program, with the General Counsel administering the program.[152] Some re-examination of program management responsibility, therefore, seems appropriate. At a minimum, the scope of the management responsibility should be specified along with the safeguards to protect the adjudicator's role.

### *C. Social Security Administration Disability Determinations*

#### *1. Availability of Decisions and Precedent Practices*

Social Security Administration (SSA) disability and benefit determinations are subject to the formal adjudication requirement under the APA.[153] Nevertheless, the decisions have only rarely been published al-

149. 32 C.F.R. §§ 155.1-.8 (1987). The adjudication policy in 32 C.F.R. § 155.6(f) and § 155.8 was adopted as a final rule in reliance on the exemptions in 5 U.S.C. § 553(a) (1982).

150. *See* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) (holding that government must respect due process of law when restricting a private interest and acknowledging that due process is not inflexible procedure); Greene v. McElroy, 360 U.S. 474 (1959) (recognizing due process rights of employees in cases of revocation of security clearance); 32 C.F.R. §§ 155.4, 155.6(c) (1987) (declaring that DOD proceedings shall be conducted in fair and impartial manner and in compliance with due process of law).

151. 32 C.F.R. § 155.5 (c)(1) (1987).

152. 32 C.F.R. § 155.5 (b) (1987).

153. 42 U.S.C. § 405 (a) (1982); *see* Richardson v. Perales, 402 U.S. 389 (1971) (upholding procedures notwithstanding responsibility of Administrative Law Judge to gather evidence).

though this practice may change.[154]

*a) Program Background and Administrative Structure*

Claims by permanently disabled workers[155] are processed by the SSA at the state level. Reconsideration is available in case of denials.[156] When a claimant disputes a denial, a federal Administrative Law Judge (ALJ) makes a written decision.[157] An ALJ's decision may be reviewed by the SSA's Appeals Council on its own motion, or at the request of a claimant, where there appears to be an abuse of discretion, an error of law, a lack of substantial evidence, or a "broad policy or procedural issue which may affect the general public interest."[158] Any final denial of a claim made by the Appeals Council or by an ALJ, in a decision not reviewed by the Council, is subject to judicial review in federal district court.[159]

*b) Governing Law and Precedents*

The SSA has not regarded ALJ or Appeals Council decisions as having precedential effect.[160] Instead, the agency had viewed both the adjudicators and the initial claims examiners as bound only by statute,

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154. An extensive study of SSA procedures has been conducted. *See* Koch & Koplow, The Fourth Bite of the Apple: A Study of the Operation & Utility of the Social Security Administration's Appeals Council, 1987 ADMIN. CONF. U.S. 625 (discussing operation of the SSA's Appeals Council and advocating improvements); ACUS Recommendation No. 87-7, *supra* note 36, § 305.87-7(1)(a)(2), (f) (adopting recommendations of Koch and Koplow); J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL, & M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS (outlining study on behalf of the National Center for Administrative Justice, 1978) [hereinafter SOCIAL SECURITY HEARINGS AND APPEALS].

155. 42 U.S.C. §§ 423(d)(1)(A), 1382(c)(a)(3)(A) (1982); *see* 20 C.F.R. §§ 404.1001-.1096 (1988) (explaining financial eligibility requirements); 20 C.F.R. §§ 416.1100-.1182 (1988) (defining income for purposes of welfare program).

156. *See* 20 C.F.R. §§ 404.907-.913 (1988) (outlining procedure for reconsideration); SOCIAL SECURITY HEARINGS AND APPEALS, *supra* note 154, at 60 (examining ability of reconsideration process to aid claimant in preparing for denial hearings).

157. 42 U.S.C. § 405 (1982). Appeals of ALJ hearings have been as numerous as 300,000 annually, with 180,000 of these involving disability matters. *See* 11 OHA L. REP. 26 30 (SSA Publication No. 70-032, 1984). A recent moratorium has however led to a decline of cases: A 1987 estimate noted 287,000 cases heard by ALJs, of which 118,000 were disability related. Koch and Koplow, *supra* note 154, at 673-74 n.134.

158. 20 C.F.R. § 404.970 (1988); *see* Koch and Koplow, *supra* note 154, at 704 n.220 (noting that Appeals Council caseload has risen from 50,000 cases in 1986 to approximatley 80,000 in 1988).

159. 42 U.S.C. § 405(g) (1982); 21 C.F.R. § 404.955 (1988).

160. *See, e.g.*, 11 OHA L. REP. (SSA Publication No. 70-002, 1987) (containing SSA Appeals Council and ALJ decisions). This reporter's introduction states: "It should be noted that this service is not to be considered an authority which can be cited, but rather an informative aid which may lead to individual research."

the substantive rules of the agency, and prior Social Security Rulings (SSA Rulings).[161] These SSA Rulings are determinations by the Commissioner of SSA and are published in bound volumes, and they may reject or adopt the decision of an ALJ or the Appeals Council. The SSA Rulings have binding effect in future cases and, thus, can serve as precedent.[162] However, in practice, the SSA Rulings rarely deal with Appeals Council or ALJ decisions.

The ALJs and the Appeals Council are not obliged to base their decisions on the agency's manuals[163] or other SSA policies not formally adopted by rule or in the Rulings. Nevertheless, manuals and other policies do affect the initial decisions and reconsideration requests made by claims examiners.[164] The differences in approach to the treatment of the manual could contribute to different outcomes and to the reversal rate.[165]

*c) Availability of Decisions*

Since 1975 however, the Appeals Council has published an Office of Hearings and Appeals Law Reporter (OHA) quarterly, together with a cumulative annual index.[166] This guide contains excerpts from some Appeals Council and ALJ decisions.[167] The Reporter is not intended however to have precedential effect. Rather, it is to be used only as an "information aid which may lead to individual research."[168]

The mere existence of the OHA Reporter creates the potential for a precedent-like effect to be accorded to reported decisions despite the disclaimer. This potential effect was realized in an Appeals Council decision affecting the Medicare program.[169] There, an ALJ relied on a

161. 20 C.F.R. § 442.208 (1988); Koch and Koplow, *supra* note 154, at 688-91.

162. 20 C.F.R. § 422.408 (1988); *see* Pacific States Gas & Elec. Co. v. FPC, 506 F.2d 33 (D.C. Cir. 1974) (emphasizing that substantive rulemaking binds adjudicators).

163. The Social Security Administration's Program Operations Manual System (POMS) is comprised of standard SSA policies and operating standards.

164. SOCIAL SECURITY HEARINGS AND APPEALS, *supra* note 154, at 107; telephone interview with Richard Ross, Attorney Adviser, SSA Office of Hearings and Appeals (Nov. 1987) [hereinafter Ross interview]; *see* Koch and Koplaw, *supra* note 154, at 688 n.180 (noting that many ALJs "do not consider [SSA] rulings binding upon them, since [the rulings] are not promulgated via APA notice-and-comment rulemaking procedures"); *see also id.* at 689 (stating that by its own terms POMS manual is not directly applicable to ALJ or Appeals Council).

165. SOCIAL SECURITY HEARINGS AND APPEALS, *supra* note 154, at 107.

166. *See, e.g.*, 11 OHA L. REP. (SSA Publication No. 70-002, 1987) (reporting decisions and pertinent activity with respect to SSA).

167. Ross interview, *supra* note 164.

168. 11 OHA L. REP. introductory statement (SSA Publication No. 70-002, 1987)

169. *See* Appeals Council Decision (March, 1987—Texas case), 11 OHA L. REP.

reported Appeals Council decision to support his own decision that post-conviction behavior was to be considered a mitigating circumstance in a Medicare provider's suspension proceeding. On appeal, representatives of the Medicare program successfully persuaded the Appeals Council to overturn the ALJ decision and to alter the Council's earlier view. Although continuing to disclaim any precedential effect for its prior decision, the Appeals Council stated that its decisions reflect "the general policy of the Appeals Council."[170] Apart from this Reporter, the SSA does no other indexing of Appeals Council or ALJ decisions.[171] Most individual decisions are kept in the claimant's file.

SSA maintains that the FOIA indexing and availability requirements apply only to decisions with precedential value and not to all of its ALJ and Appeals Council decisions.[172] SSA argues that to make available all decisions would be unduly costly and estimates that if all the decisions were made available, the cost would exceed ten million dollars annually.[173] Nevertheless, the General Accounting Office disputed the SSA's restrictive policy as inconsistent with judicial decisions.[174]

### 2. *Other Studies of SSA Practices*

The Administrative Conference of the United States (ACUS) recently recommended a change in the role of the Appeals Council.[175] Under this recommendation, the SSA Appeals Council would take a policy-oriented role when deciding cases and not serve merely to correct errors. To facilitate this change, the Council could exercise greater dis-

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at 9 (noting that ALJ specifically referred to a previous Appeals Council decision to support his decision).

170. Appeals Council Decision (March 1987—Texas case), 11 OHA L. REP. at 9-10 n.1. Regulations to revise and incorporate a similar policy had been proposed at 51 Fed. Reg. 24,857, 24,868 (1986).

171. Ross interview, *supra* note 164; Letter from Timothy D. Roberson to Margaret Gilhooley (Mar. 17, 1988); Letter to Ms. Sally Hart Wilson from John Percy (Nov. 27, 1984).

172. *See* GENERAL ACCT. OFF., *supra* note 55, at 27-28 (noting Office of Hearings and Appeals position that "these [non-precedential] opinions are relevant only to the individual appeals out of which they arise and should not be relied upon or consulted in deciding subsequent cases"); 20 C.F.R. § 422.408 (beginning by stating "[p]recedent final opinions or orders").

173. *See* GENERAL ACCT. OFF., *supra* note 55.

174. GENERAL ACCT. OFF., *supra* note 55, at 27. GAO contends that FOIA requires all final opinions to be made available, regardless of precedential effect. The report also found SSA's position to be inconsistent with the decision in *National Prison Project v. Sigler*. National Prison Project v. Sigler, 390 F. Supp. 789 (D.D.C. 1975).

175. ACUS Recommendation No. 87-7, *supra* note 36, § 305.87-7, *based on* Koch and Koplow, *supra* note 154.

cretion in deciding which cases to review.

This change would impact upon the precedential value of the Appeals Council decisions. Policy decisions would be distributed throughout the SSA system and made publicly available, possibly through a recognized reporting service.[176] Moreover, these policy decisions would be expected to influence the ALJs' decisions in other similar matters.[177] Lastly, should the new role of the Appeals Council fail to improve policy development and case handling performance, the value of having the Appeals Council would be in question.[178]

The ACUS study illustrates the relationship between the policy-making role of an appellate adjudicatory body and the precedential value of its decisions. Where decisions are not publicly available, the adjudicatory body serves largely in a case review capacity. An adjudicatory body that is to help in formulating policy to govern similar cases must perceive its role in policy-oriented terms. Decisions also have to be available in order to influence other decisionmakers and to be a source of guidance available to the parties involved in the proceedings.

Recognition of the precedential value of the Appeals Council decisions will eliminate the awkward characterization presently made of Appeals Council decisions. The Council currently states that its reported decisions are unofficial and not available for citation.[179] The Appeals Council cannot appropriately ignore inconsistencies in prior decisions when resolving similar issues in subsequent cases. Thus, the availability of prior decisions inevitably gives some precedential quality for the decisions.

Other SSA disability proceeding studies have analyzed the appropriateness of making prior decisions available as precedents. Disability determinations often involve judgmental questions in applying law to fact. The more "abstract terms" in the rules cannot convey a sense of how that judgment is to be used. Instead, "concrete examples" in the form of case-based precedents are "essential" and should be available as guidance.[180] The designation by SSA of well-written decisions as "models" can provide more specific guidance on matters not appropriately governed by rigid rules. In the absence of precedential materials, the process can seem "opaque" or "arbitrary" to the affected public, contributing to a poor selection of cases for appeal by attorneys. Lastly,

176. ACUS Recommendation No. 87-7, *supra* note 36, § 305.87-7 (1)(a)(2), (1)(f).
177. *Id.* § 305.87-7 (1)(a)(2).
178. *Id.* § 305.87-7 (2).
179. *See* 11 OHA L. REP. at 1 (discussing disclaimer in preface of Reporter).
180. SOCIAL SECURITY HEARINGS AND APPEALS, *supra* note 154, at 109.

court decisions reviewing SSA matters have found general questions which need a unified agency position.[181] The existence of these judicial findings suggests that cases are not the exclusively factual, individual determinations of unique issues suggested by the SSA.

Giving Appeals Council decisions a wider precedential effect has repercussions. If all decisions are accorded precedential effect, the sheer number of decisions could create "cognitive overload."[182] Because selection of precedents would be necessary, the process is judgmental and would make the Appeals Council a policy institution.[183] The availability of judicial review in federal district courts nationwide would make it difficult to maintain a unified value to the Appeals Council precedents.[184]

## V. Summary and Analysis

### *A. Summary of Precedent Practices*

This survey of agency programs indicates that the use of precedents has been limited. Only the SSA has a clearly articulated policy with respect to the precedential effect of its decisions, and that policy presently disclaims any precedential effects for the decisions of the SSA's highest appellate tribunal.[185]

The lack of precedential significance of decisions is reflected in the agencies' approaches to the indexing of the decisions. FmHA deferral decisions have not been nationally indexed or compiled in an accessible way.[186] SSA disability decisions also have not been made generally available, although a few cases are found in the OHA Law Reporter.[187] At FDA, decisions involving regulatory hearings are available if an individual makes a general FOIA request, and a general index of all the decisions is currently in production.[188] Although DOD does compile

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181. *Id.*

182. *Id.*; J. Mashaw, Bureaucratic Justice 201 (1983).

183. *Id.*

184. *Id.*; *see* Strauss, *Only Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 Colum. L. Rev. 1093, 1112 n.84 (1987) (summarizing procedure adopted by Department of Health and Human Services (HHS) requiring state officials to follow uniform national standards).

185. *See supra* note 168 and accompanying text (discussing disclaimer in OHA Law Reporters).

186. *See* Cunningham Letter, *supra* note 93 (stating that FmHA does not maintain a national index of its decisions).

187. *See* Ross interview, *supra* note 164 and accompanying text (reiterating that editorial board selects cases to be published in OHA Reporter).

188. Horton interview, *supra* note 118 and accompanying text.

and index, the index is simply descriptive of each case and is not organized cumulatively by subject matter; cases are not highlighted for special significance. The DOD index reflects the view that the decisions are not the source of governing standards. Each decision is explained in terms of the governing DOD Directive, obscuring any influence a prior decision may have.[189]

To decide whether the restricted availability of decisions and limited use of precedents is proper, consideration is needed of the value of precedents in an administrative program. Analysis of the factors that may have contributed to the lack of the availability of decisions is also necessary.

### *B. Policies Supporting the Use of Precedents*

#### *1. Development of Standards*

Adherence to precedents helps develop agency standards. These agency standards, in turn, serve to guide agencies in making decisions in a rational and principled manner.[190] The rationale for the acceptance of the delegation of power to administrative agencies rests in part on the expectation that the agencies will develop standards as the administration of a program continues.[191] Self-generated standards also provide a context for judging the reasonableness of agency action. Administrative precedents can serve a function similar to that of judicial precedents. They act as a constraint on the discretion of the decisionmaker and help legitimize the process.

In order for adjudications to help develop agency standards, the agency must record decisions which can be used as precedents. The availability of previous decisions can provide a framework for the further identification of standards, as well as reminding the agency of the need to make coherent sense of its decisionmaking. To facilitate this purpose, a test is needed which measures the agency's obligation to disclose and index decisions on a basis that is broader than the "preceden-

189. *See supra* note 139 and accompanying text.

190. H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR A BETTER DEFINITION OF STANDARDS 74 (1962); Frankfurter, *The Task of Administrative Law*, 75 U. PENN. L. REV. 614 (1927) (describing difference between rules and agency discretion); *see* Pittman, *ICC*, *supra* note 17 (noting that *stare decisis* might be too restrictive for agency required to give individual application, yet some control in form of standards based upon experience is needed). An absence of agency standards can lead to individual decisions based on bargaining. *See* T. LOWI, THE END OF LIBERALISM (1979).

191. *See* Amalgamated Meat Cutters v. Connelly, 437 F. Supp. 737 (D.D.C. 1971).

tial" test traditionally associated with the FOIA's requirements. The precedential test focuses too narrowly on the question of the agency's reliance on the decisions as precedents and the agency's use of the decisions for reference and guidance.[192] If the agency makes no use of the decision, the agency need not retain or index any of the decisions. Such a test does not seem to require an agency index decisions that restrict the agency's power. The agency should have to justify decisions, however, that change its past policies. Those outside the agency should have access to the agency's past decisions to raise issues about a change in policy.

*2. Notice and Guidance to the Affected Public*

Precedents can aid those outside the agency in understanding the agency's policies and in providing notice of these policies.[193] Those outside the agency can also benefit by having access to examples of decisions identified by the agency as leading or model cases. Examples of typical cases can help in case preparation and in selecting cases for appeal.[194] Those in the agency have a continuing exposure to its processes and its decisions. Those outside do not have the same familiarity with the cases. Thus, examples of decisions can put the outsiders on a more equal footing with those inside an agency.

*3. Value to the Agency*

An agency's use of precedents, together with an appropriate indexing system, can be part of an agency's effort to develop policy. Adjudications may involve novel issues not resolved by the statute or rules. Policy issues can arise that are not susceptible to a fixed rule. A model decision can provide guidance for lower-level adjudicators about handling the interrelated variables that can arise. If adjudications are to serve this policy role, the agency adjudicators, however, must recognize the policy dimensions of an issue. An ACUS recommendation recognized the need for the SSA to develop a policy formulation function of the Appeals Council.[195] Other agencies also should consider encourag-

192. *See supra* notes 53-54 and accompanying text.

193. The Supreme Court has recognized the guidance value of prior decisions to similar and analogous cases. *See* NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) (holding that NLRB advice and appeals memoranda, which conclude that complaints should not be filed, are discoverable by public).

194. *Supra* note 180 and accompanying text.

195. SOCIAL SECURITY HEARINGS AND APPEALS, *supra* note 154, at 109; Koch and Koplow, *supra* note 154, at 748-54, 798-820; *see* ACUS Recommendation No. 87-7, *supra* note 36, § 305.87-7(1) (recommending that SSA restructure Appeals Council

ing their adjudicatory appellate tribunals to formulate policy on emerging issues.

The use of precedents and indexes by agencies also reflects a judgment that with experience comes knowledge. Agency expertise comes from familiarity in dealing with issues and represents an institutionalized experience. Preservation of this experience in the context of adjudications requires keeping decisions accessible. Agencies cannot rely on fragile institutional and personal memory to record decisions. Personnel retire or leave with a change of administration; oral communications can be misunderstood or forgotten with time. Particularly in large programs, some written system of precedents may be needed simply to communicate to those involved. Also, because the federal record disposal laws lead to the warehousing and destruction of records unless a reason for preserving them is identified,[196] the agency itself should organize and preserve any lessons learned during adjudications.

### *C. Difficulties in Expanding the Use of Precedents*

#### *1. Lack of General Significance*

Consideration is needed of the complicating factors that weigh against any general requirement that agencies index their decisions and regard them as precedents. Although these factors are important, a selective availability of more decisions on balance seems warranted. Decisions are not compiled and indexed because, some contend, the decisions concern only a particular fact pattern and, therefore, lack general significance. The case is only a routine application of law to facts.[197] Furthermore, the agency's rules may establish specific standards, which narrow the range of discretion in adjudications.[198]

Although many cases are undoubtedly routine and predominantly factual, it is unlikely that there are no cases of wider significance. Some cases may raise general policy issues or unexpected situations. Furthermore, although each case does have individual facts, there may

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and redirect institution's goals and operations away from merely processing cases towards improved organizational effectiveness).

196. 44 U.S.C. § 3301 (1982); *see* FOOD & DRUG ADMIN., STAFF MANUAL GUIDE 2460.8 (Nov. 10, 1983) (stating that records are usually retained for five years).

197. *See* Dixon, *The Welfare State and Mass Justice: A Warning from the Social Security Disability Program*, 1972 DUKE L.J. 681, 699 n.87 (1972) (referring to decisions by Appeals Council and stating that "[m]ost decisions, based upon a Council reaction to the totality of the often conflicting evidence in the record and its application of the uncertain congressional standards, are a borderline type not readily transferable to new fact situations").

198. *See*, 32 C.F.R. §§ 155.6(f), 155.8 (1987) (detailing adjudication policy adhered to by DOD.

be recurrent patterns. The extent to which an agency views its cases as individual determinations is affected by the agency's willingness to recognize a resemblance among the issues presented and to resolve issues on the basis of a general principle. Thus, when agencies utilize precedents sparingly in their adjudications, there may be a need to examine the extent to which the agency exercises a policy role in the adjudicatory process. Finally, as mentioned earlier, examples of routine, model, and leading cases can provide guidance to agency the public.

### 2. *Overload and Burdens*

The availability and indexing of prior agency decisions may seem undesirable because to do so would be burdensome.[199] In large programs, the sheer number of decisions makes it impracticable to treat all decisions as precedents. Even in smaller programs, indexing of all decisions may make it difficult for users to distinguish routine decisions from ones of wider significance.[200]

This overload problem is serious; to deal with it effectively, a selective availability and indexing of decisions is necessary. Indexing should highlight the more significant cases. Selectivity, however, has its own difficulties. A question of judgment is involved in selecting which decisions will be made available and indexed. In making these determinations, the adjudicators may be able to play an important role in identifying decisions that are more than routine.[201]

Agencies will also be concerned about the costs and staffing burdens of expanded indexing and disclosure obligations. SSA estimated a ten million dollar annual cost; an estimate presumably based on an availability of all decisions.[202] Selective availability may increase the cost because of the greater professional judgment involved in selecting cases. Nonetheless, increasing the fairness of the process and developing a cohesive policy weigh in favor of these added costs.

### 3. *Dealing with Inconsistency*

Concern can arise that as decisions become available additional disputes will arise as to inconsistencies between the current matter and the prior resolution in other cases. Where a decision represents a policy

199. SOCIAL SECURITY HEARINGS AND APPEALS, *supra* note 154, at 107.
200. *See supra* note 138 and accompanying text.
201. *See supra* notes 137-48 and accompanying text.
202. *See* GENERAL ACCT. OFF., *supra* note 55, at 28 (elaborating that over 250,000 decisions are issued annually and to report them, OHA would have to delete personally identifying information and index issues included in each decision).

change, the opening up of the issue through the availability of prior decisions produces a desirable result. The agency always needs to consider and address issues of inconsistency in policy and to have a rational justification for differences in treatment.[203] More problematical is the potential for disputes about inconsistency in handling claims with similar fact patterns. The resolution of such disputes involves having to consider and resolve specific factual questions, a particularly great burden in the large mass welfare programs.[204] When such issues arise, the focus of judicial review is ordinarily on the correctness of the decision at hand rather than the handling of other cases, at least absent a showing of abuse.[205]

The selective availability of more decisions is not likely to provide a great number of cases that could potentially be raised as inconsistencies. The assurance of consistency in decisionmaking in large programs may need to be provided through management measures that examine the quality and consistency of decisions.[206] Still, the possibility that inconsistent decisions will not be considered, because of the burden of resolving them, remains an unsettling fact. The difficulty in obtaining copies of prior decisions may help to preclude a litigant from raising the issue and demonstrating an abuse.[207] Some balance between testing the inconsistency of decisions while at the same time reducing the burdens of handling large numbers of cases is needed. A random selection of routine cases should be included in the agency's index and made available to the public. In smaller programs, the program should make available and index a complete list of the routine cases, in addition to cases identified as significant. These measures would allow those outside the agency some possibility of detecting inconsistencies in the application of standards. An individual justice model may still justify precluding disputes about such discrepancies in results. The acceptability of that result should be tested in a setting that presents the hard

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203. *See supra* notes 22-23 and accompanying text.

204. *See* Koch and Koplow, *supra* note 154, at 128-32 (describing reason why it is difficult to define and measure accuracy in SSA disability).

205. *See* Davis v. Commissioner, 59 T.C. 716 (1978) (denying discovery of material relating to other taxpayers when "too nebulous" showing made a relationship to specific issues); Davis v. Commissioner 65 T.C. 1014, 1022-23 (1976) (finding treatment of other taxpayers by IRS to be generally irrelevant); *see* Gifford, *Need Like Cases Be Decided Alike? Mashaw's Bureaucratic Justice*, 4 AM. B. FOUND. RES. J. 985 (1983) (criticizing Mashaw's view of SSA decisional inconsistencies).

206. Mashaw, *Management Side of Due Process*, 59 CORNELL L. REV. 772 (1974).

207. Davis v. Commissioner, 65 T.C. 1014, 1022-23 (1976); *see* Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982) (stating that inconsistencies in decisions make it difficult for litigant to raise same issue).

case.[208]

*4. Administrative Structure*

A precedential and policy-oriented system has implications for the administrative structure of the adjudicatory process. In some programs, the agency may delegate final decisionmaking responsibilities to full-time adjudicators who do not have significant policy responsibilities.

The separation of the adjudication function from policy-making enhances fairness and integrity in adjudication. The separation does, however, complicate the development of agency policy on a coordinated basis.[209] The adjudicators, due to their limited policy-making role, also may be reluctant to reach the broader policy aspects of the issues arising in cases.

The agencies need to encourage adjudicators to deal with policy issues as they emerge. In addition, consideration is needed of the means to involve policy-making officials when adjudications raise major issues of policy which may serve as important precedents for future cases. One means of providing this input would be a discretionary review of important cases by the agency's head or a delegate with policy-making responsibility.[210] Such a review would focus on the policy aspects, rather than the factual issues but would serve as the final decision in the matter. Such a review would not be warranted in all cases. If the issues are merely factual and routine, or raise narrow policy questions, there is no need for this discretionary review. But, the procedure should be available on the occasions when significant policy questions do arise.

An additional reason for coordinating policy-making and adjudicatory responsibilities is that agencies sometimes establish policies through the issuance of manuals and statements of policies. However, when these policy statements are not issued through substantive rulemaking, they do not have the legal effect of a rule and, thus, do not have the same binding effect that a rule does.[211] Support for the policy and its applicability to the case needs to be considered when policy

208. *See* Gifford, *supra* note 205, at 990 (pointing out that inconsistent results do not appear unfair to participants if they are unaware of differences in treatment).

209. *See* Strauss, *supra* note 27, at 1256 (noting that top agency officials have wide range of decisionmaking power).

210. *See Id.* at 1259-60, 1271 (maintaining that major issues should be decided by top agency officials); Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546 (1969) (analyzing impact of review boards on administrative decisionmaking); *see also* Cass, *Allocation of Authority within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U.L. REV. (1986).

211. Pacific States Gas & Elec. Co. v. FPC, 506 F.2d 33 (D.C. Cir 1974).

issues arise in adjudicatory proceedings. If the adjudicator finds the agency policy inappropriate for the facts of a particular case, the policy may remain effective for other situations. Questions about the appropriateness of a manual policy and the circumstances in which the policy is inapplicable can raise important questions for which discretionary review by the agency's policy official may be particularly important.

Due to the importance of decisions concerning the applicability of agency manuals, the index should take particular note of such decisions, whether or not they are reviewed by the agency head. For example, if a decision finds that an agency manual is not applicable to the facts of a particular case, other members of the public should be aware of the decision because of its value in understanding factors that limit the application of the agency's policy manual.[212]

## V. Need for a Framework for Precedents: The FOIA Requirements

### *A. The Relevance of the FOIA Affirmative Disclosure Requirements*

The FOIA affirmative disclosure requirements warrant re-examination in light of the reasons supporting the greater availability of agency decisions and precedents. At present, the FOIA requirements have not always led agencies to take affirmative steps to make available and index decisions. The agency practices surveyed above reflect different approaches to FOIA's requirements. None of these approaches is fully satisfactory. The statutory text could be read literally to require the indexing of all decisions and has support in the legislative history.[213] Requiring the indexing and availability of all decisions can be impracticable and without utility, particularly in large programs the size of the SSA program. The Attorney General's Manual provides support for not requiring the availability of all decisions when it is futile and without purpose.[214]

However, limiting the requirement solely to precedential decisions has drawbacks and has been criticized in court decisions.[215] A test that

212. *See supra* notes 161-62 and accompanying text (stating that Rulings are precedential and are used to announce whether agency will adhere to federal court decisions).

213. 5 U.S.C. § 552 (a) (1982); see Senate Report No. 813, *supra* note 39, at 6 (noting that apart from exemptions, agencies must make available "all final opinions").

214. *Supra* note 47 and accompanying text.

215. *See, e.g.*, National Prison Project v. Sigler, 390 F. Supp. 789 (D.D.C. 1975) (rejecting contentions that only orders and opinions having precedential effect are subject to disclosure requirements).

is dependent upon the precedential status of a case can lead to overrestrictive disclosure practices. Moreover, the precedential test is susceptible to several intrepretations. Agencies may define precedential decisions as only those decisions recognized by the agency as establishing definitive policy. Under the statute, an agency cannot rely on decisions as precedents unless they are indexed or notice is given.[216] The indexing obligation should not be confined to decisions within the ambit of this sanction. To do so limits the requirement to decisions that bind the public without reaching decisions that impose a standard or restriction on the agency.[217] The precedential test also has the objectionable feature of providing justification for completely failing to index and make decisions available. An agency does not have an indexing obligation if it regards all of its decisions as based on the facts of the case and does not retain any of the cases for reference in an accessible way. This result seems inconsistent with Congress' expectations in establishing the disclosure requirements. Congress seems to have assumed that the agency would have some precedents to guide its decisions and that such guidance would be afforded to those affected by agency action. The agency retention test can also discourage agencies from keeping decisions for future reference and, potentially, from developing policy on the basis of them.

If a precedential test is to be used, the test should encompass decisions of precedential significance that may be used by those opposing agency action as well as by the agency itself.[218] Determining the precedential significance of cases is not an easy matter though. It calls for anticipating the potential use by others in the future. The significance of the decisions relates to their use in similar and analogous cases and not simply identical ones. The precedential value of cases is not a static quality and can emerge and change with circumstances. The participant needs test suggested below as an alternative test may be easier to apply because it looks at significant differences between decided cases. Compliance with that test should also serve to identify decisions of precedential significance in its broader sense.

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216. SENATE REPORT NO. 813, *supra* note 39, at 7 (noting that subsection (b) contains its own sanction regarding improperly indexed orders and opinions).

217. National Prison Project v. Sigler, 390 F. Supp. at 793.

218. H. REP. NO. 1497, *supra* note 46, at 2425, states:

> [s]ubsection (b) would help bring order out of the confusion of agency orders, opinions, policy statements, interpretations, manuals, and instructions by requiring each agency to maintain for public inspection an index of all the documents *having precedential significance* which would be made available or published under the law.

(emphasis added).

### *3. "Participant Needs" Test for Availability*

The FOIA requirement should be read in light of the statutory text and the purpose of the indexing requirement identified by Congress in the legislative history, to afford the private citizen "the essential information to enable him to deal effectively and knowledgeably with the [f]ederal agencies."[219] The provision should not be read as requiring the indexing of all decisions when they are simply repetitive resolutions of the same issue. That type of indexing does not help participants in proceedings. Rather, the agency should selectively index cases that help participants in understanding how to participate effectively. In furtherance of this legislative aim, the "agency-recognized precedential" test should be supplemented by a "participant needs" test to determine which decisions are subject to the indexing requirements of FOIA and its related affirmative disclosure requirements.

In order to deal with the agencies effectively, the affected participant must have access, not merely to decisions that the agency intends to rely on as binding precedent, but also to model decisions, which provide guidance on how cases are typically decided and that can assist in the preparation of cases and appeals.[220] In order to provide this assistance, the agency should always include some decisions in its index. Therefore, the index should include decisions resolving any discrete type of issue, unless a subsequent case provides better guidance and becomes the "leading" case.

It is no answer that the decisions do not provide guidance because they do not influence other decisionmakers. Decisions always have value by providing an example of how decisions can be made. Where there is no typical pattern to the decisions, a greater selection may even be necessary in order to illustrate the variability in outcome. Adjudicators in the agency have the examples provided by their own prior decisions. Thus, in order to be on an equal footing, the affected public should have some access to prior decisions as well.

Additionally, the index should include current, routine decisions which are designated as such. This relates to meeting a "participant-needs" needs test. Routine cases provide examples of ordinary decisionmaking and give potential litigants guidance on what to expect. Fur-

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219. SENATE REPORT NO. 1219, *supra* note 39, at 12; SENATE REPORT NO. 813, *supra* note 39, at 7.

220. *See* SOCIAL SECURITY HEARINGS AND APPEALS, *supra* note 154, at 107, 109 (discussing SSA precedent practices); Koch and Koplow, *supra* note 154, at 776-77 (suggesting that selective publication of significant decisions would promote consistency and policy integrity).

thermore, availability of routine decisions may detect inconsistency in decisions. As discussed above, there are limits on the ability of any adjudicatory system to deal with inconsistencies. Nonetheless, some opportunity should be available to detect clear abuses, even if it is a limited opportunity. Moreover, FOIA is concerned with the detection of any "secret law."[221] The availability of routine decisions helps safeguard this aim. Availability of routine decisions also refutes arguments that the agency's index of significant decisions was too selective.

A "participant needs" test for indexing has implications for the manner in which the index is prepared and made available. An index that highlights significant decisions is more useful than one that indexes all decisions without sorting out the routine from the more significant.[222] Thus, the index should highlight leading cases and indicate their substantive content. The index should also be "current" and cumulatively cover decisions of continuing significance.

Ordinarily the index should focus on the final decisions of the highest appellate level, because these decisions are the ones expected to be influential. If, however, many decisions become final without review, or the precedential value of the appellate decisions is weak, examples of initial decisions should also be disclosed. Likewise, lower level decisions should be included if they are the only decision dealing with an issue or if they serve as a model decision.

### *C. Conclusion and Recommendation*

The use of a participant needs test seems appropriate under the FOIA to achieve its underlying aims.[223] If the existing statute did not encompass such an obligation, a legislative change would be warranted. In addition, on policy grounds, the availability of decisions and the indexing obligation should be governed by a test that looks at the needs of the public for guidance and not solely at the precedential signifi-

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221. *See* SENATE REPORT NO. 813, *supra* note 39, at 7; HOUSE REPORT NO. 1497, *supra* note 46, at 2424 (outlining purpose of index as preventing "a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which is not available to the citizen simply because he had no way in which to discover it"). The concept of "secret law" can be viewed as limited solely to undisclosed law that potentially binds or adversely affects the public. It is also possible to give it a broader meaning that encompasses an undisclosed policy. The Supreme Court left the question open in NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 156 n.22 (1975).

222. *See* 5 U.S.C § 552(a)(2) (1982) (stating that each agency shall make rules available for public inspection); 32 C.F.R. §§ 155.1-.8, 286.11 (1987) (describing DOD's duties to publish and index materials and supplements).

223. 5 U.S.C. § 552(a)(2) (1982).

cance of the decisions. The agencies on their own initiative should provide for this broader measure of disclosure.

Additionally, there may be indirect incentives for an agency to undertake a reasonable effort to index and make available decisions. As *Allison v. Block* indicates, courts, on occasion, may consider the lack of precedents as a factor when issues arise concerning the agency's choice between rulemaking and adjudication. In situations such as these, courts also should consider the adequacy of the agency's compliance with FOIA's requirements, because these requirements provide a congressionally-recognized means for agencies to report their unpublished decisions.[224] The agency also should be expected to make available and index its future decisions concerning the pertinent issue, if it is an important one. The availability and indexing of the decisions permits the parties to make their own determination, whether prior decisions have a precedential value that should be considered in reaching a rational decision in a particular case.

## Recommendations

Set out below are recommendations which suggest the scope of the indexing and disclosure requirements that agencies should meet. Disclosure is keyed to the need for information that enhances participants' ability to knowledgeably participate in agency proceedings. The test effectuates the aims underlying the affirmative disclosure provisions of FOIA and should lead to a considerable expansion in the availability of decisions.

1. Agencies should index their decisions subject to the affirmative disclosure requirements of FOIA so as to assist development of agency standards and policies in respect to general issues and recurring questions. The test for determining the indexing and affirmative disclosure requirements of the FOIA should be the need for guidance on the part of the affected participants, not simply the precedential value of decisions relied on by the agency.

2. To promote this objective, agencies resolving disputes in adjudications on a limited record should maintain a current index of final decisions, which should include:

(a) decisions of recognized precedential value that bind other adjudicators unless overruled;

(b) decisions consulted for reference or research or their persuasive merit by those in the agency involved in deciding cases or in bringing

224. 5 U.S.C. § 552 (a)(c) (1982).

them or in developing guidelines to reflect the decisions;

(c) decisions establishing standards and criteria for handling similar cases or establishing limits and restrictions on the agency;

(d) the initial or leading cases dealing with any identifiable issue that is not frivolous;

(e) the principal cases dealing with recurrent cases and illustrating the factors affecting decisions;

(f) the principal cases identifying exceptions to the general pattern of resolving recurrent cases;

(g) the principal cases resolving purported inconsistencies in policies and prior decisions or overruling prior decisions;

(h) the principal cases interpreting or clarifying the agency regulations;

(i) the cases resolving questions about the scope or validity of an agency policy not adopted by rule and representative cases finding such a policy not applicable to the facts of a particular case; and

(j) the principal cases resolving questions of general principle or otherwise regarded as significant.

3. The index should also include all, or a random selection, of routine cases, identified as such, with a general indication of subject matter.

4. The index should be made of the decisions of the highest appellate body ordinarily deciding cases. The decisions of the initial level decisionmaker should be indexed in accordance with paragraphs two and three, if a large number of initial decisions are not subject to appellate review or if the initial decision provides the only guidance on a matter covered by paragraph two.

5. The existence of the index for unpublished decisions should be indicated in both the agency's FOIA regulations and procedural or substantive regulations governing the specific program. The agency should endeavor to make the index known and readily available to those affected by agency decisions.