Appendix C: Table of Federal Cases (1974-2014)

CASE NAME	AGENCIES	NOTABLE FACTS	NOTABLE HOLDINGS
1. Harkonen v. Department of Justice and Office of Management and Budget, 2012 WL 6019571 (N.D. Cal. 2012)	DOJ, OMB	The Justice Department issued a press release announcing Harkonen's conviction for criminal wire fraud (he misrepresented the results of a clinical trial for his company's drug). The press release quoted special agents from both the FBI and the Veterans Administration. For example, the FBI agent was quoted as saying that Harkonen falsified test results, but the government did not allege falsification, only misinterpretation. Harkonen thus argued that the press release should be subject to the Information/Data Quality Act (IQA) and the resulting OMB and Department of Justice guidelines, even though both policies exempt "press releases." DOJ rejected Harkonen's request for correction and retraction under the DOJ and OMB policies because the statements were made in a press release and thus were exempt. Harkonen sued under both the IQA and the Administrative Procedure Act (APA), arguing that excluding press releases from the OMB and DOJ guidelines under the IQA was arbitrary and capricious, an abuse of discretion, and contrary to law.	*Information Quality Act*. Consistent with other cases, the court held that the IQA does not confer a private right of action or "create any legal right to information or its correctness," citing *Salt Institute.* The IQA requires the OMB to establish guidelines; it does not confer a right to correct information. Thus, denying a request under the IQA is not "final" agency action under the APA. *Finality*. The parties agreed that the press release marked the consummation of the agencies' decisionmaking process, but the court found that it did not determine any rights or obligations or otherwise have legal consequences under *Bennett v. Spear*. The only appellate case to reach the merits on the IQA and finality was the D.C. Circuit in *Prime Time*. The court noted that denying a request to correct information does have practical consequences for Harkonen, but not legal ones (the "denial has no direct or immediate effect on his day-to-day activities, nor is he required to take any action because of it"). *Agency discretion*. The court held that decisions to deny requests or to exempt press releases from the IQA are "committed to agency discretion by law" and are thus immune from review under the APA. There is no law or standard by which courts could review such decisions. In dicta, the court found that DOJ did not abuse its discretion or act arbitrarily in denying Harkonen's request, considering the accuracy of the DOJ's statements.

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2. Wilson v. McHugh, 842 F. Supp. 2d 310 (D.D.C. 2012)	U.S. Army	Wilson, a former West Point cadet, sued the Secretary of the U.S. Army for violating the Privacy Act and the APA. A day after West Point charged Wilson with using cocaine, its Public Affairs Office issued a press release, posted on the Internet, stating that Wilson and four others were charged with drug offenses. But the press release clarified that the cadets were "presumed innocent" and explained the process of military court-martials and pretrial investigations. Wilson requested that the press release be taken down under the Privacy Act, which requires the government to "maintain accurate records." Wilson argued that the press release was no longer accurate, procedurally, because he had resigned and did not dispute the charges. After this request (and others) were denied, he sued under the APA.	The court held that the APA does not confer a right of action for Privacy Act violations. Although not pled by Wilson, the court applied APA § 706(2)(A), which allows courts to "hold unlawful or set aside" agency actions that are "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law," or that are "not supported by substantial evidence." The court found that the decision to post the press release and keep it on West Point's web site was supported by substantial evidence and was not arbitrary and capricious. The press release's description was accurate because Wilson was, in fact, charged of a violation. The court found that even though Wilson chose not to proceed through the court-martial process, it did not make the press release inaccurate, as it described the preliminary nature of the charge and the fact that a pretrial investigation would occur. The court did not engage D.C. Circuit precedent on adverse publicity and cited no cases in its analysis of the press release.
3. Barry v. SEC, 2012 WL 760456 (E.D.N.Y. 2012)	SEC	Barry challenged an SEC press release announcing that the agency was bringing a civil enforcement action against him. He argued that the press release included gratuitous and false allegations that his mail order business sold pornography. Barry requested damages for libel and injunctive relief to force the SEC to publicly retract the misstatements via a new press release that would reach the same audience. Barry did not assert claims under the APA, but the court treated his claim for injunctive relief	The court held that the press release was neither "agency action" nor "final." The court noted how the D.C. Circuit had moved away from its holding in *Hearst Radio* (1948) in later opinions such as *Indus. Safety Equip. v. EPA* (1988), *Trudeau* (2006), and *Impro Prods.* (1983) (all included in this chart). Although the D.C. Circuit suggested in *Indus. Safety Equip.* that a false or unauthorized press release might qualify as a "sanction" under the definition of "agency action" in APA § 551(10), the court found that this was not the "compelling" case imagined. The two pornography references were tangential but far less

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		and his allegation that the SEC press release was *ultra vires* as claims under the APA (Barry was a *pro se* plaintiff). Barry also asked to amend his complaint to challenge the "libelous reference" to pornography in the SEC's civil complaint.	damaging than the SEC's other allegations, and the SEC press release "merely echoes" the agency's civil complaint. The court found it "implausible" that the SEC's purpose was to penalize Barry via press release. The court noted that pornography references were "clearly pertinent to civil enforcement litigation since it pertained to the destination of the fraudulently obtained funds." The court also held that the press release was not "final" because it did not determine any "rights or obligations" or impose any legal consequences, citing an unpublished 9th Circuit opinion (*Bonneville Power Admin.*, discussed below).
4. Public Utility Dist. No. 1 v. Bonneville Power Admin., 250 Fed. Appx. 821 (9th Cir. 2007) (unpublished)	Bonneville Power Administration (Department of Energy)	A public utility district in Washington state sued the Bonneville Power Administration (BPA), a federal subagency of the Department of Energy, for issuing a press release. The press release announced the failed settlement talks between BPA and several public utilities, including plaintiffs. The BPA press release announced that because the settlement failed, it would implement the $200 million "litigation penalty" that the parties had previously agreed to, and recoup the costs by charging higher wholesale power rates. The case is governed by the Northwest Power Act, but the court applies principles from the APA.	In an unpublished opinion, the 9th Circuit held that issuing a press release is not "final action" nor the "implementation of final action" under the Northwest Power Act, 16 U.S.C. § 839f(e)(5). Citing *Bennett v. Spear*, the court found the press release was not the culmination of the BPA's decisionmaking process, but merely announced the settlement and that "BPA will continue to implement its existing power contracts." The court also found that "no legal consequences flow from the press release, as BPA deferred the litigation penalty payments before and after the settlement failed and before and after it issued the press release." The court also found that the injury imposed by the $200 million "litigation penalty" flows from the earlier settlement agreement creating it, not this failed settlement talk or the press release. Thus, the court said it lacked jurisdiction under the Northwest Power Act.

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5. Trudeau v. FTC, 456 F.3d 178 (D.C. Cir. 2006); Trudeau v. FTC, 384 F. Supp. 2d 281 (D.D.C. 2005)	FTC	The FTC announced via press release its settlement and Final Order enjoining Trudeau from infomercial marketing. The press release described the terms of the settlement and order. The release also included a quote from the director of FTC's Bureau for Consumer Protection, who implied that Trudeau was a "habitual false advertiser." ABC News interviewed an FTC employee who called Trudeau a "habitual fraud artist." The press release also included a clarification that the Final Order did not constitute an admission that Trudeau violated the law. The FTC web site displaying the press release linked to the full Final Order. The agency refused to remove the press release from its web site, and the press release was the top Google search result for Trudeau. Trudeau challenged the accuracy of press release, the FTC's authority to issue it, and alleged that FTC was retaliating against him for criticizing the agency. He also argued that it violated his First Amendment rights. Trudeau appealed to the D.C. Circuit the District Court's holding that it lacked jurisdiction and that he failed to state a valid cause of action.	*District Court*. The district court denied Trudeau's request for a preliminary injunction and granted the FTC's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim under the APA. The court held that it lacked jurisdiction because the FTC's press release was not "final agency action" under APA § 704. Citing *Bennett v. Spear*, the court said that "were a press release ever to qualify as a final agency action, it would be in a case where one and preferably both of two conditions were present": (i) when the agency was "intent on penalizing" the party, citing *Indus. Safety* and *Invention Submission Corp.*, and (ii) when the press release "was demonstrably or concededly false," citing *Indus. Safety*. The court noted that the "D.C. Circuit has since expressly shied away from a reading of *Hearst Radio* that would preclude a cause of action for all agency publicity." The court emphasized that no court had ever found agency publicity to be reviewable and that press releases rest "at the outer boundaries of the definitions of both 'final' and 'agency action.'" The court found no evidence of intent to punish or retaliate against Trudeau. It also cited the FTC's statutory authority to "make public … information obtained by it … in the public interest." 15 U.S.C. § 46(f). It also quoted the D.C. Circuit in *Bristol-Myers v. FTC* ("The courts may no more enjoin Government departments from issuing statements to the public than they may enjoin a public official from making a speech."). 424 F.2d 935 (D.C. Cir. 1970). Second, the court found no evidence that the press release was false or misleading, addressing Trudeau's concerns about the title of the press release and the impression it might give that an adjudicator found wrongdoing. The court

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			said that "a press release is not obliged to repeat every word or phrase in a settlement," and that "the Court will not assume the role of a scrivener of government publications." The court also noted that "the FTC cannot be blamed because certain media reports inaccurately reported an accurate press release." Finally, the court found that Trudeau failed to "cite any discernible harm that followed from either the press release or the media reports." *D.C. Circuit*. The D.C. Circuit reversed the district court's holding that APA § 704's requirement of "final agency action" precludes the court's *jurisdiction.* APA § 704 creates a cause of action, but does not confer jurisdiction. Thus, court had jurisdiction to consider the APA cause of action, and Trudeau's nonstatutory and First Amendment claims. However, the D.C. Circuit held that none of the three causes of action stated a claim upon which the court could grant relief, because Trudeau presented no evidence that the FTC's press release was false or misleading in describing the underlying Final Order. The court evaluates each of Trudeau's objections to the press release, parsing the language that the FTC used versus the language Trudeau wanted the FTC to use. The court found that "no reasonable reader could misinterpret the press release in the ways that Trudeau suggests" (although, to be fair, media reports did misconstrue it). "In the end, … it comes down to whether Trudeau has the right to take a red pencil to the language of the FTC's press release. He does not."

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6. Invention Submission Corp. v. Rogan, 357 F.3d 452 (4th Cir. 2004); Invention Submission Corp. v. Rogan, 229 F. Supp. 2d 498 (E.D. Va. 2002)	PTO	The Inventors' Rights Act of 1999, 35 U.S.C. § 297(d), authorizes the PTO to publicize *complaints* that it receives against invention promoters. In 2002, the PTO started a media campaign to alert the public to invention promotion scams. The PTO announced the campaign in a press release. Although the press release did not identify any particular invention promoters, it featured one inventor who filed a PTO complaint after losing several thousand dollars. A journalist asked the PTO for the inventor's contact information, then interviewed him. The interview and the resulting news story identified the Invention Submission Corp. as the company against whom the complaint was made. The inventor and the company settled the complaint and the PTO did not post the complaint on its web site. Invention Submission Corp. then sued the PTO under the APA, arguing that the PTO intended to penalize the company and exceeded its authority under the Inventor's Rights Act because it allegedly went beyond merely posting the complaint in a neutral forum without comment or judgment. The company alleged that the PTO's actions were arbitrary, capricious, an abuse of discretion, contrary to constitutional rights, and exceeded the PTO's statutory authority.	The District Court held that the PTO did not take final agency action. On appeal, the company pointed to the D.C. Circuit's language in *Indus. Safety* retreating from *Hearst Radio*. The PTO pointed to the 4th Circuit's ruling in *Flue-Cured Tobacco v. EPA*, holding that an EPA report classifying tobacco smoke as a carcinogen was not final agency action (313 F.3d 852 (4th Cir. 2002). Relying on *Flue-Cured Tobacco*, the 4th Circuit held that agency reports do not create any rights, obligations, or consequences: "We do not think that Congress intended to create private rights of actions to challenge the inevitable objectionable impressions created whenever controversial research by a federal agency is published. Such policy statements are properly challenged through the political process and not the courts." (quoting *Flue-Cured Tobacco*, 313 F.3d at 860). In short, the PTO did not single out any particular invention promoter, and giving a journalist the complainant's phone number was not final agency action because it was not the consummation of the PTO's decisionmaking process and did not determine the company's rights or obligations.
7. Doe v. United	DOJ (U.S.	A U.S. Attorney's Office in Texas posted	The District Court dismissed claims for intentional

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States, 83 F. Supp. 2d 833 (S.D. Tex. 2000)	Attorney's Office), FBI	two "News Releases" falsely announcing that individuals had been charged or indicted with mail fraud and money laundering after an FBI investigation. The anonymous plaintiffs sued for invasion of privacy and intentional infliction of emotional distress.	infliction of emotional distress and invasion of privacy because the Federal Tort Claims Act (FTCA) specifically excludes libel and slander actions or claims "arising out of" those actions. The court cites several cases on the FTCA section that bars claims for libel, slander, and defamation, even where government statements were false or "outrageous."
8. Banfi Products Corp. v. United States, 41 Fed. Cl. 581 (Fed. Cl. 1998); Banfi Products Corp. v. United States, 40 Fed. Cl. 107 (1997)	FDA	*1998 case*. A wine importer sought a private bill from Congress, alleging that the FDA negligently identified its wine as a health hazard, resulting in a recall. The Hearing Officer determined after trial that the company did not have a valid legal or equitable claim against the FDA. Banfi did not bring claims under the APA. *1997 case*. A wine importer voluntarily recalled 1.3 million cases of wine after the Bureau of Alcohol, Tobacco, and Firearms (ATF) requested a recall and issued a press release about the contaminated wine based on the FDA's testing. The press release warned people not to drink certain Austrian wines that might be contaminated with ingredients found in antifreeze. Later press releases identified twelve brands of wines from three countries, and later, 95 brands. The ATF gave the company a chance to review a later press release and request changes, without giving Banfi "editorial rights." Banfi alleged that the determination was negligent.	*1998 case*. The Court of Federal Claims declined to award compensation because Banfi did not have a valid legal or equitable claim against the United States and should not grant a "gratuity" (payment in the absence of a valid claim). *1997 case*. Court found that Banfi had no legal or equitable claim against United States. The ATF's decision to request a recall and issue a press release was protected under the Federal Tort Claims Act's exemptions for discretionary claims and libel and defamation. The court reviewed Banfi's claims against FDA for a cause of action under the APA, finding that the FDA's decision was not arbitrary, capricious, or an abuse of discretion under APA § 706(2)(A). It also reviewed the ATF's actions under the Federal Tort Claims Act, finding them protected as a discretionary function.

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9. FTC v. Freecom Comm., Inc., 966 F. Supp. 1066 (D. Utah 1997)	FTC	The FTC issued several press releases and public statements about companies during an enforcement action. The statements included an interview with *Dun & Bradstreet* and a press release by the FTC's lead counsel in the case, who mentions some of the FTC's allegations against the companies. The companies sought a protective order prohibiting the FTC from making further public statements. The companies argued that the statements exceeded the FTC's authority, were intended to punish, and that the FTC violated its own policies and procedures.	The court denied the protective order for several reasons. First, it found that Congress specifically authorized the FTC to make public statements under 15 U.S.C. § 46(f). Second, it found that the FTC's decision was "discretionary" and "not generally subject to judicial review." Third, it held that the FTC's pretrial statements would not interfere with a fair and equitable trial. Fourth, the court found no evidence that the FTC violated its own policies because the plaintiffs failed to show what those policies were. Fifth, the FTC made truthful statements that the media misinterpreted. Sixth, the court suggested that agencies may have a First Amendment right to speak, but did not specifically rule on this issue. Finally, the court found no likelihood of future irreparable harm that would justify a protective order.
10. Fisher Bros. Sales, Inc. v. United States, 46 F.3d 279 (3d Cir. 1995)	FDA	The FDA issued a press release announcing an import ban on Chilean grapes after an anonymous tip to the Chilean Embassy said that cyanide had been injected into the grapes, and after a local FDA lab erroneously found evidence of cyanide. The press release urged grocers to remove Chilean fruit from their shelves and told consumers to destroy such fruit. The Chilean grape industry sued FDA for $210 million under the Federal Tort Claims Act on the theory that FDA had negligently tested the samples. The industry did not allege violations of the APA.	The Third Circuit upheld the district court's holding that the FDA was not liable under the Federal Tort Claims Act, fearing that massive liability would chill the FDA from protecting public health in similar circumstances. The decision focuses on the scope of the "discretionary function" exception to the FTCA.

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11. Den-Mat Corp. v. United States, 1992 WL 208962 (D. Md. 1992)	FDA	The FDA sent a Warning Letter to Den-Mat, the manufacturer of Rembrandt tooth whitening gel, stating that the gel was a an unapproved new "drug" rather than a "cosmetic." It appears that FDA also sent letters to other manufacturers. The letter to Den-Mat noted that "Until these violations are corrected, Federal agencies will be informed that FDA recommends against the award of contracts for affected products." (Note that FDA no longer uses this language in Warning Letters.) An FDA spokesperson repeated to the press several times the agency's position that these products were being marketed illegally.	The court refused to grant the FDA's motion to dismiss for lack of jurisdiction, holding that the Warning Letter and its publicity could qualify as final agency action under the *Abbott Labs* test. The FDA stated that it *would* recommend to federal agencies against awarding contracts to Den-Mat, not that it *might* do so. The court was "concerned" that "the FDA has utilized the public press to 'enforce' its determination." The court emphasized: "The FDA's statements to the press are not generalized policy statements. Rather, it appears that the FDA may have targeted Den-Mat (perhaps together with ten other manufacturers) for a publicity campaign designed to coerce Den-Mat (and others) into complying with the agency's decision. This Court cannot now say that a focused effort such as this may be is immune from judicial review because the agency says its decision is tentative and open to reconsideration. If the FDA's view is, in fact, so tentative that it is not yet appropriate for judicial review, it may not be appropriate to take actions which directly result in harm to those private parties who dare to disagree with them." The court found this to be a Catch-22 for Den-Mat: risk civil and criminal enforcement or pursue the lengthy new drug approval process. The court thus denied FDA's motion to dismiss and allowed Den-Mat to establish its claim. There is no evidence that Den-Mat later succeeded on these claims.
12. Reliance Electric Co. v. CPSC, 924 F.2d 274 (D.C. Cir. 1991)	CPSC	The CPSC released an unusual press release announcing that its investigation of a circuit breaker manufacturer, Federal Pacific, was inconclusive and did not establish a serious	Federal Pacific objected not to the press release but to the CPSC releasing roughly 500 pages of investigative documents in response to several FOIA requests. The D.C. Circuit remanded to the District Court to require

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		risk to consumers, yet insisted that the agency remained "concerned" and would continue the investigation if it had a bigger budget. The CPSC's press release explained what circuit breakers do and gave both the agency's and manufacturer's positions before issuing a general warning to consumers about how to use circuit breakers properly.	the CPSC to respond to Federal Pacific's objections that some of the documents were not accurate.
13. FTC v. Magui Publishers, Inc., 1990 WL 132719 (C.D. Cal. 1990)	FTC	The FTC obtained an injunction preventing the defendant from representing that various art work was by Salvador Dali or authorized by him. The FTC released a videotaped press conference characterizing defendant as a dealer of counterfeit art work, which generated newspaper articles. Defendant alleged that the FTC violated its own internal procedures (Operating Manual Ch. 17 § 2.5) and ABA Disciplinary Rule 7-107 (superseded by Rule 3.6) regarding pretrial publicity. Defendant argued that the adverse publicity prevented him from earning money to pay for counsel.	The district court denied the defendant's motion to reconsider, rejecting the argument that adverse publicity by the FTC prevented him from paying for legal counsel. The court found that the publicity by the FTC merely restated the terms of the preliminary injunction and that the defendant "cannot be harmed by such publicity … because Marcand was required to make such representations and prohibited from making contrary representations by the preliminary injunction."
14. United States v. 52,823 Children's Dolls, More or Less, 1989 WL 140250 (S.D.N.Y. 1989)	CPSC	The CPSC asked a toy seller to stop selling clown dolls that presented a choking hazard to young children. The letter asked the seller to recall the dolls and issue a joint press release with the CPSC. The seller agreed to temporarily stop selling the dolls but otherwise refused to recall the dolls or issue a joint press release. After the CPSC found	The district court found that the CPSC press release violated the statute (15 U.S.C. § 2055(b)) because the CPSC's allegations were concededly "preliminary and informal." As such, the CPSC had not made a final determination and thus it was not exempt from the confidentiality provisions in the statute (§ 2055(b)(4)). The court relied on *Relco* (below) to note that "the issuance of a press release constitutes final agency

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		that the seller continued to sell the dolls, the CPSC asked the Justice Department to seize the dolls, and issued a unilateral press release identifying the dolls as "banned hazardous toy clowns." Three days later, the seller was served with the complaint and warrant. The seller argued that the CPSC failed to exhaust its own administrative remedies because it did not make a final determination that the dolls were banned hazardous substances. The CPSC conceded that its determination was preliminary and not "final agency action." The seller also requested that the court order the CPSC to retract its press release.	action and thus requires Commission review and approval," finding that there was no such review or approval in this case. However, the court declined to order the CPSC to retract its press release because it included no misstatements and accurately described both the Commission's allegations and the seller's ability to contest the action. The court also noted that a retraction would further "taint" the product and would confuse consumers because no final determination had been made by the court. The court refused to order a retraction of the press release, but allowed discovery on other issues to proceed.
15. Industrial Safety Equipment Ass'n, Inc. v. EPA, 837 F.2d 1115 (D.C. Cir. 1988)	EPA, NIOSH (OSHA)	The EPA and NIOSH (OSHA) published a guide recommending only two of 13 federally certified asbestos protection respirators ("The respirator types numbered 3 through 13 above are *not* recommended by NIOSH or EPA for use against asbestos. However, various existing regulations allow their use. In fact, the existing respirator certification regulations requires NIOSH to certify [these eleven]. However, as a matter of public health policy, NIOSH and EPA do not recommend their use in asbestos environments."). The guide explained that it incorporated the best and most current scientific information on protection from asbestos. An industry group sued for declaratory and injunctive relief, arguing in part that publishing the guide deprived the	The D.C. Circuit held that the guide was not reviewable under the APA because it was not a "sanction" and thus was not final agency action, and because it was not a "rule." The court noted that agency publicity could rise to a sanction and thus be reviewable, citing criticisms of *Hearst Radio*, but there would have to be evidence of the agencies' intent to penalize or evidence that the statements were false. The court found neither here, and noted that adverse impact alone is insufficient. Interestingly, the court cited the legislative history of the APA, noting that a House Report calls the unauthorized use of publicity as a penalty a "troublesome subject." (H.Rep. No. 79-1980, 79th Cong., 2d Sess. (1946) (House of Representatives Report on the APA)). Finally, the court denied the due process argument. Although a certification from NIOSH is a property interest, the guide was not a deprivation, because diminished sales were speculative

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		non-recommended respirator manufacturers of their due process rights.	and the agencies had a statutory duty to alert the public to potentially hazardous work conditions. The guide was designed to advise and had no legally binding effect.
16. California Canners & Growers Ass'n v. United States, 9 Cl. Ct. 774 (1986)	FDA, HEW (now HHS), Surgeon General	An association of fruit growers sought a private bill from Congress to recover losses from statements in 1969 by officials from HEW, FDA, and the Surgeon General that cyclamates in artificial sweeteners were carcinogenic in rats and should not be used in human foods. The Senate passed a private bill and the Hearing Officer recommended $6 million in compensation, both for removing cyclamates from the list of FDA-approved substances (which the Officer found unobjectionable) and publicizing government's concerns (which it found objectionable).	The Court of Federal Claims declined to grant compensation because the manufacturers could not prove a legal or equitable claim against the government. The government's conclusion that cyclamates were risk to public health was reasonable based on data at the time and the decision to publicize was not an abuse of discretion or otherwise in violation of statutory responsibilities. The governments' public statements were not erroneous. The court emphasized deference to discretionary agency decisions like this, noting that the carcinogenicity of cyclamates was still being debated two decades later.
17. Lance Industries Inc. v. United States, 3 Cl. Ct. 762 (1983)	Multiple state and federal law enforcement agencies (National Park Service, U.S. Customs Service, U.S. Army)	The manufacturer of self-defense spray called "Lance" sought a private bill from Congress for compensation allegedly caused by negative publicity surrounding rumors circulating among state and federal enforcement agencies that a street drug called "Lance" caused severe damage when inhaled or tasted. The manufacturer alleged that the government was negligent in not verifying the rumor before circulating it among law enforcement agencies, after which it was disseminated by the media. Various federal agencies, including the U.S.	The Court of Federal Claims declined to award compensation because there was no libel or disparagement and no negligence. The court analyzed the timeliness, form, and dissemination of the agencies' retractions, finding no negligence on their part.

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		Army, the FBI, the Public Health Service, and the Department of Health, Education, and Welfare (HEW), attempted to retract the rumor, clarifying that the commercial "Lance" was distinct from the street drug "Lance."	
18. Impro Products, Inc. v. Block, 722 F.2d 845 (D.C. Cir. 1983)	USDA	A veterinary product manufacturer disputed test results published by USDA scientists in an academic journal, and objected to the USDA's decision to disseminate reprints of the article. The District Court below enjoined the USDA from releasing copies of the article and ordered the agency to attach explanatory information to any other reports discussing the agency's tests of Impro's product. Impro argued that the USDA violated its due process rights, and the USDA argued that neither its testing nor its publication of the test results were reviewable as "agency action."	The D.C. Circuit dismissed Impro's claims as barred by the statute of limitations, but still evaluated whether the USDA's test and publication constituted final agency action under the APA. In dicta, the court "questioned the continued validity of the *Hearst Radio* decision," noting that courts have construed "agency action" to be broader than the court suggested in *Hearst* ("Indeed, we find it troubling that literal adherence to the *Hearst Radio* rule in a case like this one would preclude judicial review under the APA of an agency's dissemination of information that is concededly false and, therefore, completely inconsistent with the statutory purpose of promoting a prosperous agriculture."). The court said that "*Hearst Radio* may no longer be viable precedent." The court did not discuss the due process claim.
19. First Jersey Securities, Inc. v. SEC, 553 F. Supp. 205 (D.N.J. 1982)	SEC	A securities firm asked the court to enjoin the SEC from filing a complaint against it because of the adverse publicity that the complaint would generate, arguing that because the SEC had lost the company's files, the company had a good defense to the SEC enforcement action. The SEC had not issued any publicity yet; the plaintiff was concerned about SEC publicity when the	The District Court refused to enjoin the SEC from filing a complaint due to adverse publicity, calling it part of the "expense and annoyance" of litigation (citing *FTC v. Standard Oil*). The court analogized the situation to adverse publicity surrounding criminal indictments by grand juries. The court also noted that the plaintiffs subjected themselves to adverse publicity, ironically, by filing this action.

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		agency filed a complaint.	
20. Jerry T. O'Brien, Inc. v. SEC, 1982 WL 1566 (E.D. Wash. 1982)	SEC	Securities traders alleged that the SEC leaked confidential information obtained during an investigation to the media or disclosed the information to a third party who then leaked it to the media. The SEC denied the first allegation, but admitted that the second was possible. The traders asked the court to enjoin the SEC from proceeding with various subpoenas.	The district court declined to enjoin the SEC for a past wrong. There was no showing of imminent future harm and plaintiff's bare assertions of harm were inadequate. The court noted that probable cause is not required for agency investigations; agencies can investigate based on suspicions of wrongdoing or even the desire for assurance that there is no wrongdoing. Still, the court allowed the plaintiffs to pursue money damages if they chose.
21. Premo Pharmaceutical Laboratories, Inc. v. U.S., 1980 WL 588226 (S.D.N.Y. 1980)	FDA	A drug manufacturer sought a temporary restraining order and an injunction against the FDA, alleging the agency was "harassing" the company by threatening to recall its drug and issuing press releases.	The court denied Premo's requests, finding that the FDA's actions were not arbitrary and capricious, citing the 1966 *Silver King Mines* case (enjoining the SEC because its publicity campaign was an abuse of discretion). The court noted that "Even a small risk that some individuals might be injured or die as a result of taking the drug in question must outweigh the harm to the plaintiff that might result from the actions" of FDA to publicize a problem with the company's drug.
22. EEOC v. Sears, Roebuck & Co., 504 F. Supp. 241 (N.D. Ill. 1980)	EEOC	Sears alleged that the EEOC violated its due process rights because the agency leaked its decision that it had probable cause to charge Sears with violations of Title VII and "engaged in a media harassment campaign against Sears." Sears alleged that the EEOC "engaged in a stigmatizing publicity campaign against Sears, running afoul of the Due Process and Bill of Attainder Clauses" of the Constitution.	Although Sears claimed that the EEOC's leak and publicity injured its property interest (reputation and goodwill), Sears failed to show "stigma-plus"—a more tangible liberty or property interest, such as a decrease in sales, to sustain a due process challenge. The court noted that *Paul v. Davis* rejected the notion that "every defamation by a governmental body triggers the protections of the Due Process Clause." The court also held that the EEOC's alleged violations of its own confidentiality rules did not deny Sears due process. Finally, the court rejected publicity as a violation of the Bill of Attainder Clause, as Title VII did not empower

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			the EEOC to act legislatively.
23. EEOC v. Sears, Roebuck & Co., 1980 WL 108 (N.D. Ga. 1980)	EEOC	Similar to the case in Illinois, above, Sears alleged that the EEOC "used adverse publicity to harass and embarrass Sears," violating Title VII, its due process rights, and constituting an unconstitutional bill of attainder. Apparently, EEOC employees disclosed confidential information from its investigation to newspapers and the National Organization for Women, and leaked copies of the charge to the public. (Note that Title VII prohibits the EEOC from making public the charges and anything "said or done during and as a part of … informal endeavors" of the EEOC to conciliate charges. 42 U.S.C. § 2000e-5(b)).	The Georgia district court rejected Sears' due process and bill of attainder arguments, under similar reasoning to the Illinois District Court above, citing *Paul v. Davis* for the notion that reputational harm alone, without more tangible interests, does not arise to a constitutional violation. "Sears alleges no decrease in sales or any other tangible harm that directly resulted from the alleged governmentally-generated publicity." Sears also failed to demonstrate that the EEOC "participated in, or even knew about, the leaks." The court also held that even if the EEOC failed to follow its own statutory provisions on confidentiality, it did not rise to the level of a due process violation.
24. Common Cause v. FEC, 83 F.R.D. 410 (D.D.C. 1979)	FEC	The American Medical Association (AMA) Political Action Committee intervened in a FOIA suit by Common Cause, arguing that the confidentiality provision of the Federal Election Campaign Act that prohibits the FEC from publicizing investigations also banned the FEC from releasing documents to Common Cause.	The court held that the statute did not ban the FEC from making narrow FOIA disclosures under seal to associations like Common Cause. (Although this is a "reverse FOIA" case, I include it in the chart because it implicates FECA's prohibition on the FEC publicizing investigations.)
25. Sperling & Schwartz, Inc. v. United States, 218 Cl. Ct. 625 (1978)	FDA	The FDA issued press releases warning consumers about using a company's dishes that allegedly contained lead after receiving information that a child had become ill and test results confirming excess lead in the product. The company claimed that the FDA press releases were erroneous and	The private bill for relief was referred by Congress to the U.S. Court of Federal Claims. The court held that FDA did not cause the alleged libel or damages and had a rational basis for issuing its press release. The press release clarified that FDA was investigating the incident and that test samples exceeded the maximum lead amounts. However, the court also rejected the

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		would constitute libel if uttered by a private party.	FDA's argument that it had absolute privilege for issuing press statements on public health issues under *Barr v. Matteo*, which is inappropriate in a Congressional Reference case.
26. Trans World Accounts, Inc. v. Associated Press, 425 F. Supp. 814 (N.D. Cal. 1977)	FTC	Trans World, a debt collection company, filed a defamation action against wire services and newspaper companies claiming that their stories libeled the company by erroneously reporting that all the charges listed in a FTC press release (announcing its complaint against eight debt collection companies) applied to Trans World. The FTC press release correctly identified the charges that did not apply to Trans World.	Trans World did not sue the government, but the opinion finds that, for purposes of a libel suit against private parties, Trans World was a public figure because of the FTC press release announcing its complaint. The court explained that "The issuance of a proposed complaint [by the FTC] thus draws the named respondent into a particular public controversy." Citing *FTC v. Cinderella Career and Finishing Schools*, the court noted that "Reports by the media of FTC enforcement actions are an integral part of that enforcement effort." The court recognized the FTC's use of publicity to induce compliance.
27. Kaiser Aluminum & Chemical Corp. v. CPSC, 414 F. Supp. 1047 (D. Del. 1976)	CPSC	The CPSC issued a "news release," a press release, a "fact sheet," and a Federal Register notice about problems with aluminum wiring in preparation for rulemaking and standard-setting procedures. None of these documents mentioned Kaiser specifically, but Kaiser requested a retraction from the CPSC. Kaiser argued that the press release misled the public to believe that the agency collected meaningful statistical evidence of the hazard and that a final determination of its safety had been made. After its request was denied, Kaiser sued to enjoin the CPSC and require it to retract certain statements,	The court denied Kaiser's motion for a preliminary restraining order, finding no irreparable injury, but also denied the CPSC's motion to dismiss, finding that Kaiser could state a claim for relief. In so doing, the court found that there was final agency action because the CPSC "disseminated information to the public in violation of Kaiser's rights" and because "Kaiser alleges serious, immediate and continuing injury to its business," citing *Silver King Mines*, *Abbott Labs*, and other cases. Moreover, the court found no adequate administrative remedy that Kaiser would have to exhaust. (That the publicity occurred during rulemaking makes this case somewhat unique. But the lengthy rulemaking process led the court to require no exhaustion of remedies.)

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		claiming the releases decreased sales.	
28. Relco, Inc. v. CPSC, 391 F. Supp. 841 (S.D. Tex. 1975)	CPSC	The CPSC investigated the manufacturer of a welding device for the risk of electric shock, notifying the company of complaints and requesting documents. The CPSC notified the company that it would issue a press release about the "imminent hazard" under its authority in 15 U.S.C. § 2055(a)(1). Relco protested that it had not had an opportunity to respond to the CPSC's findings and that such publicity would be premature. Despite these protests, the agency issued the press release, warning consumers to "immediately cease use of the product." The statute allowed the CPSC to forego 30-day advanced notice if a product presents an imminent hazard.	The court granted the CPSC's motion to dismiss because the press release was not final agency action and because Relco failed to exhaust its administrative remedies before seeking preenforcement review. However, the court emphasized that "Once the government condemns a product as inherently dangerous and unfit, that denouncement may well be tantamount to an economic death knell," for which "the harm is irretractable." The court also noted that retractions may be counterproductive. The court sympathized with Relco that although the public warning "is final in its practical effect," it was not final agency action under the APA.
29. Ajay Nutrition Foods, Inc. v. FDA, 378 F. Supp. 210 (D.N.J. 1974), *aff'd mem.*, 513 F.2d 625 (3d Cir. 1975)	FDA	Health food manufacturers sued to enjoin FDA and sought $500 million in damages for issuing press releases and public announcements expressing skepticism of dietary supplements and health foods, in connection with FDA rulemaking. The manufacturers alleged that the statements were knowingly and maliciously false and sought to discredit their beliefs in violation of their due process rights (alleging that FDA used the words "quacks," "faddists," and "shotgun mixtures").	The court refused to enjoin the FDA and granted the government's motion to dismiss because the government has sovereign immunity and because statements by agency officials are privileged under *Barr v. Matteo*. The FDA demonstrated that its press releases were consistent with the government's investigations and proposed regulations. The court also rejected arguments that the FDA press releases unfairly targeted the entire industry, as opposed to specific parties, distinguishing *Silver King Mines* and other older cases.
30. U.S. v. Abbott Laboratories, 505 F.2d	DOJ, FDA	The FDA and Justice Department issued post-indictment, pretrial press releases after	The Fourth Circuit reversed the district court decision dismissing charges against Abbott because there were

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565 (4th Cir. 1974)		charging Abbott with criminally disseminating adulterated and misbranded intravenous drugs, apparently linked to several deaths and hundreds of injuries. Lawyers for the government also gave interviews to a local reporter. News wires repeated the death and injury numbers in national stories.	ways to preserve fair trial in wake of inflammatory pretrial publicity (like voir dire examination). However, the court called the pretrial publicity "prejudicial and highly inflammatory," condemning the government lawyers for their statements and expressing its "strongest disapproval."