



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Precedential Decision Making in Agency Adjudication

### Committee on Adjudication

Proposed Recommendation | December 15, 2022

#### Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

1 ~~It is a tenet of our system of justice that like cases be treated alike. Agencies use many~~  
2 ~~different mechanisms to ensure such consistency, predictability, and uniformity when~~  
3 ~~adjudicating cases, including designating some or all of their appellate decisions as precedential.<sup>1</sup>~~  
4 ~~Agencies can also use precedential decision making to communicate how they interpret legal~~  
5 ~~requirements or intend to exercise discretionary authority, as well as to increase efficiency in~~  
6 ~~their adjudicative systems.<sup>2</sup>Agencies use many different mechanisms to ensure efficiency,~~  
7 ~~consistency, predictability, and uniformity when adjudicating cases, including designating some~~  
8 ~~or all of their appellate decisions as precedential. Agencies can also use precedential decision~~  
9 ~~making to communicate how they interpret legal requirements or intend to exercise discretionary~~  
10 ~~authority.<sup>3</sup>~~

<sup>1</sup> Other mechanisms include appellate review, rulemaking, quality assurance programs, aggregate decision making, and declaratory orders. See, e.g., Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016); Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

<sup>2</sup> See Christopher J. Walker, Melissa Wasserman, and Matthew Lee Wiener, *Precedential Decision Making in Agency Adjudication* (OctDec. 176, 2022) (draft report to the Admin. Conf. of the U.S.).

<sup>3</sup> Other mechanisms include appellate review, rulemaking, quality assurance programs, aggregate decision making, and declaratory orders. See, e.g., Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems*



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11 A decision is precedential when an agency adjudicator must follow the decision's holding  
12 in subsequent cases, unless the precedent is distinguishable or until it is overruled.<sup>4</sup> It is a tenet of  
13 our system of justice that like cases be treated alike. The effective use of precedential decisions  
14 advances this tenet by promoting values of consistency, predictability, and uniformity, as well as  
15 allowing for policymaking and encouraging efficiency. Additionally, effective use of  
16 precedential decisions can help agencies provide notice to the public about developments in  
17 substantive law.

18 An agency's decision is precedential when that same agency's adjudicators must follow  
19 the decision's holding interpreting the agency's authority, unless the precedent is distinguishable  
20 or until it is overruled. Many agencies use some form of precedential decision making. Some  
21 agencies treat all agency appellate decisions as precedential, while others treat only some  
22 appellate decisions as precedential. Additionally, some agencies highlight useful nonprecedential  
23 decisions by labeling them "adopted," "informative," "notable," or a similar term. In any of these  
24 cases, precedential decisions can come from an agency head or heads, adjudicators exercising the  
25 agency's authority to review hearing-level decisions, adjudicators who review hearing-level  
26 decisions but whose decisions are subject to (usually discretionary) agency-head review, or  
27 adjudicators other than the agency head who have statutory authority to issue final decisions.  
28 Rarely do hearing-level adjudicators issue precedential decisions.

29 This Recommendation provides best practices for agencies in considering whether and  
30 how to use precedential decisions in their adjudicative systems. It begins by recommending that  
31 agencies consider determine whether they issue appellate decisions that may lend themselves to  
32 use as precedent and, if they do, whether to treat all or some appellate decisions as precedential.  
33 For agencies that treat only some decisions as precedential, the Recommendation sets forth

*in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016); Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

<sup>4</sup> See Christopher J. Walker, Melissa Wasserman, and Matthew Lee Wiener, *Precedential Decision Making in Agency Adjudication* (Oct/Dec 176, 2022) (draft report to the Admin. Conf. of the U.S.).

Commented [CMA1]: Proposed Amendment from Senior Fellow Alan B. Morrison #1

Commented [CMA2]: Proposed Amendment from Senior Fellow Alan B. Morrison #2

Commented [CA3]: Proposed Amendment from Council #1

Commented [CA4]: Proposed Amendment from Council #2 (see parallel amendment at line 80 below)



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34 criteria for deciding which ones to treat as such, and it identifies procedures for agencies to use  
35 or consider using when designating decisions as precedential, such as the solicitation of public  
36 input.

Commented [CMA5]: Proposed Amendment from Senior Fellow Alan B. Morrison #3

37 For agencies that use some form of precedential decision making, this Recommendation  
38 provides best practices for identifying decisions as which are precedential and making  
39 information about such decisions available internally and to the public. Some of these practices  
40 build on the Freedom of Information Act's requirement that agencies post on their websites all  
41 final orders and opinions and its general prohibition against agencies relying on, using, or citing  
42 an order or opinion as precedent against a private party if it has not been indexed and posted  
43 online.<sup>5</sup>

44 The Recommendation concludes by urging agencies to address their use of, and  
45 procedures for, precedential decision making in procedural rules published in the *Federal*  
46 *Register* and *Code of Federal Regulations*.

### RECOMMENDATION

#### Use of Precedential Decision Making

- 47 1. Agencies should determine whether, and if so when, to treat their appellate decisions as  
48 precedential, meaning that an adjudicator must follow the decision's holding in  
49 subsequent cases, unless the precedent is facts of the decision are distinguishable or until  
50 it the holding is overruled. In determining whether to treat all, some, or no appellate  
51 decisions as precedential, agencies should consider:
- 52 a. The extent to which they issue decisions that would be useful as precedent and are  
53 written in a form that lends itself to use as precedent;

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<sup>5</sup> See 5 U.S.C. § 552(a)(2)(A).



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- 54           b. The extent to which they issue decisions that mainly concern only case-specific  
55           factual determinations or the routine application of well-established policies,  
56           rules, and interpretations to case-specific facts; and  
57           c. The extent to which they issue such a large volume of decisions ~~that from which~~  
58           adjudicators cannot reasonably be expected to identify ~~those~~ which ~~decisions~~  
59           should control future decisions.
- 60       2. Agencies that treat only some appellate decisions as precedential should consider treating  
61       a decision as precedential if it:
- 62           a. Addresses an issue of first impression;
- 63           b. Clarifies or explains a point of law or policy that has caused confusion among  
64           adjudicators or litigants;
- 65           c. Emphasizes or calls attention to an especially important point of law or policy that  
66           has been overlooked or inconsistently interpreted or applied;
- 67           d. Clarifies a point of law or policy by resolving conflicts among, or by harmonizing  
68           or integrating, disparate cases on the same subject;
- 69           e. Overrules, modifies, or distinguishes existing precedents;
- 70           f. Accounts for changes in law or policy, whether resulting from a new statute,  
71           ~~federal court decision, or~~ agency rule, ~~or federal court decision~~;
- 72           g. Addresses an issue that the agency must address on remand from a federal court;  
73           or
- 74           h. May otherwise serve as a necessary, significant, or useful guide for adjudicators  
75           or litigants in future cases.
- 76       3. Agencies should not prohibit parties from citing nonprecedential decisions in written or  
77       oral arguments.
- 78       4. ~~Even if agencies do not treat a decision as precedential, they~~ Agencies should consider  
79       identifying ~~certain cases~~ nonprecedential decisions that may be useful to adjudicators by  
80       ~~designating them~~ as “adopted,” “informative,” “notable,” or a similar term ~~that denotes~~  
81       ~~their usefulness to adjudicators.~~

**Commented [CA6]:** Proposed Amendment from Council #3 (see parallel amendment at line 23 above)



### Processes and Procedures for Designating Precedential Decisions

- 82 5. ~~Agencies' procedures for designating decisions as precedential should not be unduly time~~  
83 ~~consuming or resource intensive.~~
- 84 6-5. Prior to designating an appellate decision as precedential, agencies should consider  
85 soliciting input from appellate adjudicators not involved in deciding the case.
- 86 6. Agencies should consider implementing ~~a~~ procedures by which appellate adjudicators can  
87 ~~issue precedential decisions to resolve that allows for the issuance of precedential~~  
88 ~~decisions to resolve~~ important questions ~~in cases pending before hearing level~~  
89 ~~adjudicators that arise during hearing-level proceedings. Options include procedures by~~  
90 ~~which, on an interlocutory basis or after a hearing-level decision has been issued:~~
- 91 a. ~~Hearing-level adjudicators may certify specific questions in cases or refer entire~~  
92 ~~cases for precedential decision making;~~
- 93 b. ~~Appellate adjudicators on their own motion may review specific questions in~~  
94 ~~cases or entire cases for precedential decision making; and~~
- 95 a-c. ~~Parties may request that appellate adjudicators review specific questions in cases~~  
96 ~~or entire cases for precedential decision making. One such procedure could permit~~  
97 ~~an interlocutory appeal of an otherwise unappealable order or the transfer of an~~  
98 ~~entire case to the appellate adjudicator, whether at the request of a party, upon~~  
99 ~~referral by the hearing-level adjudicator, or on the motion of the appellate~~  
100 ~~adjudicator.~~
- 101 7. Agencies should ~~also consider accepting nominations from~~ establishing a process by  
102 which adjudicators, other agency officials, ~~the~~ parties, and the public ~~can request that a~~  
103 ~~specific on whether any existing~~ nonprecedential appellate decision ~~should be~~ designated  
104 as precedential.
- 105 8. Agencies should ~~assess the value of~~ consider soliciting amicus participation or public  
106 comments in ~~precedential decision making and should consider actively soliciting amicus~~  
107 ~~participation or public comments in cases in which they expect to designate a decision as~~  
108 ~~precedential, particularly in~~ cases of significance or high interest. ~~That could be done,~~ for

Commented [CA7]: Proposed Amendment from Council #4

Commented [CA8]: Proposed Amendment from Council #5

Commented [CMA9]: Comment from Senior Fellow Alan B. Morrison #4: "Instead of 'nominations' which usually refers to an individual, I would use 'suggestions' or 'recommendations'."

Commented [CA10]: Proposed Amendment from Council #6

Commented [CA11]: Proposed Amendment from Council #7



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109 example, by publishing a notice in the *Federal Register* and on their websites and by  
110 directly alerting those persons likely to be especially interested in the matter. In  
111 determining whether amicus participation or public comments would be valuable in a  
112 particular case, agencies should consider the extent to which a-the case addresses broad  
113 policy questions whose resolution requires consideration of general or legislative facts as  
114 opposed to adjudicative facts particular to the parties.

- 115 9. When an agency rejects or disavows the holding of a precedential decision, it should  
116 expressly overrule the decision, in whole or in part as the circumstances dictate, and  
117 explain why it is doing so.

### Availability of Precedential Decisions

- 118 10. Agencies that treat only some appellate decisions as precedential should clearly identify  
119 precedential decisions as such. Such agencies should also identify those precedential  
120 decisions in digests and indexes of cases that agencies make publicly available.
- 121 11. Agencies' websites, as well as their digests, and indices indexes of decisions should  
122 clearly indicate when a precedential decision has been overruled or modified.
- 123 12. Agencies should ensure that precedential decisions are effectively communicated to their  
124 adjudicators.
- 125 13. Agencies should update any manuals, bench books, or other explanatory materials to  
126 reflect developments in law or policy effected through precedential decisions.
- 127 14. Agencies should consider posting on their websites brief summaries of precedential  
128 decisions, a digest of precedential decisions, and an index, organized topically, of  
129 precedential decisions.
- 130 15. Subject to available resources, Agencies-agencies should consider tracking, on their own  
131 or in coordination with commercial databases, and making available to agency officials  
132 and the public the subsequent history of precedential decisions, including whether they  
133 have been remanded, set aside, modified following remand by a federal court, or  
134 superseded by statute or other agency action, such as a rule.

Commented [CA12]: Proposed Amendment from Council #8



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**Rules on Precedential Decision Making**

- 135 16. As part of their rules of practice, published in the *Federal Register* and codified in the  
136 *Code of Federal Regulations*, agencies should adopt rules regarding precedential decision  
137 making. These rules should:
- 138 a. State whether all, some, or none of the agency’s appellate decisions are treated as  
139 precedential;
  - 140 b. Describe the criteria and process for designating decisions as precedential, if the  
141 agency considers some but not all of its decisions as precedential;
  - 142 c. Specify who has authority to designate decisions as precedential, if the agency  
143 considers some but not all of its decisions as precedential;
  - 144 d. Explain the legal effect of precedential decisions in subsequent cases;
  - 145 e. Define any terms the agency uses to identify useful nonprecedential decisions,  
146 such as “adopted,” “informative,” or “notable,” and describe the criteria and  
147 process for designating these decisions;
  - 148 f. Explain for what purposes a party may cite a nonprecedential decision, and how  
149 the agency will consider it;
  - 150 g. Describe any opportunities for amicus or other public participation in precedential  
151 decision making; and
  - 152 h. Explain how precedential decisions are clearly identified as precedential, how  
153 they are identified when overturned, and how they are made available to the  
154 public.
- 155 17. Agencies should use clear and consistent terminology in their rules relating to  
156 precedential decisions. Agencies that distinguish between “published” decisions and  
157 “nonpublished” or “unpublished” decisions (or some other such terminology) should  
158 identify in their rules of practice the relationship between these terms and the terms  
159 “precedential” and “nonprecedential.”
- 160 18. Agencies should consider soliciting public input when when they materially revising  
161 revise existing or adopting new procedural regulations on the subjects addressed above,

**Commented [CMA13]:** Comment from Senior Fellow Alan B. Morrison #5: “Instead of ‘consider’ I would use ‘treat’ or ‘use’.”



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~~agencies should use notice and comment procedures or other mechanisms for soliciting public input, notwithstanding the procedural rules exemption of 5 U.S.C. § 553(b)(A);~~  
unless the costs outweigh the benefits of doing so in a particular instance.

**Commented [CA14]:** Proposed Amendment from Council #9