



## Precedential Decision Making in Agency Adjudication

### Committee on Adjudication

#### Draft Recommendation for Committee | November 4, 2022

1           Agencies use many different mechanisms to formulate policy, enhance efficiency, and  
2 ensure consistency, predictability, and uniformity when adjudicating cases. These include, as  
3 addressed in previous recommendations of the Administrative Conference, appellate review,  
4 quality assurance programs, aggregate decision making, declaratory orders, and legislative and  
5 non-legislative rules.<sup>1</sup>

6           Another way that agencies seek to achieve these objectives is through precedential  
7 decision making incidental to appellate review. A decision is precedential when an agency  
8 adjudicator must follow its holding in subsequent, usually unrelated cases. That is, when the  
9 adjudicator is presented with a question that was already answered in a precedential decision, the  
10 adjudicator must answer it in the same way unless the precedent is distinguishable or until it is  
11 overruled.<sup>2</sup> It is a tenet of our system of justice that like cases be treated alike. The effective use

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<sup>1</sup> 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* (Oct. 17, 2022) (draft report to the Admin. Conf. of the U.S.).



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

12 of precedential decision advances this tenet by promoting values of consistency, predictability,  
13 and uniformity, as well as policymaking, efficiency. Additionally, it can help agencies to better  
14 engage in dialogue with the courts and to provide notice to the public on important developments  
15 in substantive law.

16 With the exception of the Social Security Administration and the Department of Veterans  
17 Affairs, almost every adjudicating agency uses some form of precedential decision making.  
18 Some agencies treat all appellate decisions (other than summary orders) as precedential. Others  
19 treat only some appellate decisions as precedential. In either case, precedential decisions come  
20 from an agency head (or a multi-member commission or board), adjudicators exercising the  
21 agency head's authority to review hearing-level decisions, adjudicators who review hearing-level  
22 decisions but whose decisions are subject to (usually discretionary) agency-head review, or  
23 adjudicators other than the agency head who have statutory authority to issue final decisions.  
24 Rarely, if ever, do hearing-level adjudicators issue precedential decisions.

25 This Recommendation identifies best practices for agencies in considering whether and  
26 how to use precedential decisions in their adjudicative systems. It begins by recommending that  
27 agencies consider whether they issue appellate decisions that lend themselves to use as precedent  
28 and, if they do, whether to treat all or some appellate decisions as precedential. For agencies that  
29 choose to treat only some decisions as precedential, the Recommendation sets forth criteria for  
30 deciding which ones to treat as such, and it identifies procedures for agencies to use or consider  
31 using when designating decisions as precedential, including the solicitation of public input.

32 For all agencies that use some form of precedential decision making, this  
33 Recommendation identifies best practices for designating decisions as precedential and making



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

34 information about such decisions available internally and to the public. These practices build on  
35 the Freedom of Information Act's requirement that agencies post on their websites all final  
36 orders and opinions made in the adjudication of cases, and that agencies generally may rely on,  
37 use, or cite an order or opinion as precedent against a private party only if it has been indexed  
38 and posted online.<sup>3</sup>

39 The Recommendation concludes by urging agencies to address their use of and  
40 procedures for precedential decision making in procedural rules published in the Federal Register  
41 and Code of Regulations (CFR).

### RECOMMENDATION

#### Use of Precedential Decision Making

- 42 1. Agencies should consider whether, and if so when, to treat appellate decisions, other than  
43 summary dispositions unaccompanied by an opinion, as precedential, meaning an agency  
44 adjudicator must follow its holding in subsequent, usually unrelated cases. In determining  
45 whether all, some, or no appellate decisions should be treated as precedential, agencies  
46 should consider:
- 47 a. The extent to which the agency issues decisions that would be useful as precedent  
48 and are written in a form that lends itself to use as precedent;
  - 49 b. The extent to which the agency issues decisions that largely concern only case-  
50 specific factual determinations or the routine application of well-established  
51 policies, rules, and interpretations to case-specific facts; or

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<sup>3</sup> See 5 U.S.C. § 552(a)(2)(A).



- 52           c. The extent to which the agency issues such a large volume of decisions that  
53           adjudicators cannot reasonably be expected to identify which decisions may  
54           appropriately control future ~~determinations~~decisions.
- 55       2. Agencies that choose to treat only some appellate decisions as precedential should  
56       consider treating a decision as precedential if it:
- 57           a. Addresses an issue of first impression;
- 58           b. Clarifies or explains a point of law or policy that has caused confusion among  
59           adjudicators or litigants;
- 60           c. Emphasizes or calls attention to an especially important point of law or policy that  
61           has been overlooked or inconsistently interpreted or applied;
- 62           d. Clarifies a point of law or policy by resolving conflicts among or by harmonizing  
63           or integrating disparate cases on the same subject;
- 64           e. Overrules, modifies, or distinguishes existing precedents;
- 65           f. Accounts for changes in law or policy, whether resulting from a new statute,  
66           agency rule, or court decision;
- 67           g. Addresses an issue that the agency must address on remand from a court; or  
68           h. May otherwise serve as a necessary, significant, or useful guide for adjudicators  
69           or litigants in future cases.
- 70       3. Agencies should not prohibit parties from citing nonprecedential decisions in written or  
71       oral arguments but should determine when and for what purposes a party may cite a  
72       nonprecedential decision and how the agency will consider it.

**Processes and Procedures for ~~Making Issuing~~Designating Precedential**

**Designations~~Decisions~~**

- 73       4. Agencies should streamline any procedures for designating decisions as precedential such  
74       that they are not unduly time consuming or resource intensive. Where streamlining is  
75       impractical, agencies may also consider identifying certain cases as “adopted,”  
76       “informative,” or a similar term that denotes their usefulness to hearing-level or  
77       appellate-level adjudicators, even if not precedential.



78 4.5. Agencies should consider soliciting input— from appellate adjudicators not involved in  
79 deciding the case— prior to designating ~~an~~ appellate decisions as precedential.

80 ~~5.6.~~ Agencies should consider ~~creating a~~ implementing procedures for interlocutory appeal  
81 and the issuance of precedential decisions by the appellate body, at the referral by  
82 hearing-level adjudicators or at the request of parties by which an initial adjudicator can  
83 certify a question to the appellate body to make a precedential decisions.

84 ~~6.7.~~ Agencies should consider soliciting input— from adjudicators, other agency officials, the  
85 parties to the case, and the public— on whether to designate existing appellate decisions  
86 as precedential.

87 ~~7.8.~~ Agencies should assess the value of amici participation or public comment in  
88 precedential decision making and should consider actively soliciting amici participation  
89 or public comments in cases of significance or high interest, for example by publishing a  
90 notice in the *Federal Register* and, on their websites, and by directly alerting those  
91 persons likely to be especially interested in the matter. In determining whether amici  
92 participation or public comments would be valuable, agencies should consider the extent  
93 to which a case addresses broad policy questions whose resolution requires consideration  
94 of general or legislative facts as opposed to simple adjudicative facts particular to the  
95 parties.

96 ~~8.9.~~ When an agency rejects or disavows the holding of a precedential decision, it should  
97 expressly overrule the decision, in whole or in part as the circumstances dictate, and  
98 explain why it is overruling the decision.

#### **Availability of Precedential Decisions**

99 ~~9.10.~~ Agencies that choose to treat only some appellate decisions as precedential should  
100 clearly identify precedential decisions as such. Such agencies should also identify those  
101 precedential decisions in digests and indexes of cases that agencies make publicly  
102 available.

103 ~~10.11.~~ Agencies' websites, digests, and indices should clearly indicate if the agency has  
104 overruled or modified a precedential decision.



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

105 ~~11.12.~~ Agencies should ensure that precedential decisions are effectively communicated  
106 to their adjudicators.

107 ~~12.13.~~ Agencies should update any manuals, bench books, or other explanatory materials  
108 to reflect developments in law or policy effected through precedential decisions.

109 ~~13.14.~~ Agencies should consider posting on their websites brief summaries of  
110 precedential decisions, a digest of precedential decisions, and an index, organized  
111 topically, of precedential decisions.

112 ~~14.15.~~ Agencies should consider tracking, on their own or in coordination with  
113 commercial databases, and make available to agency officials and the public the  
114 subsequent history of precedential opinions, including whether ~~the cases was are~~  
115 remanded, set aside, ~~or~~ modified by a federal court, or superseded by statute or other  
116 agency action, such as a rule.

### Rules on Precedential Decision Making

117 ~~15.16.~~ As part of their rules of practice, published in the *Federal Register* and codified in  
118 the *Code of Federal Regulations*, adjudicative agencies should adopt rules regarding  
119 precedential decision making. These rules should:

120 a. State whether all, some, or none of an agency's appellate decisions are treated as  
121 precedential;

122 b. If the agency considers some but not all of its decisions as precedential, describe  
123 the criteria and process for designating decisions as precedential;

124 c. If the agency considers some but not all of its decisions as precedential, specify  
125 who has authority to designate decisions as precedential (for example, the  
126 adjudicator who decides a case, the entire adjudicative body, etc.);

127 d. Explain the legal effect of precedential decisions in subsequent cases;

128 e. If the agency employs another term such as "adopted" or "informal," to identify  
129 useful decisions even if not formally designated as precedential, describe the  
130 criteria and process for designating these decisions;



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

131 f. Explain when and for what purposes a party may cite a nonprecedential decision,  
132 and how the agency will consider it;

133 ~~e.a. If the agency considers its decisions as precedential, describe any criteria and~~  
134 ~~process for overruling or modifying precedential decisions;~~

135 ~~d.g.~~ If the agency considers its decisions as precedential, describe any opportunities  
136 for amicus or other public participation in precedential decision making; and

137 h. If the agency considers its decisions as precedential, describe any criteria and  
138 process for overruling or modifying precedential decisions; and

139 i. Explain how precedential decisions are clearly identified as precedential, how  
140 they are identified when overturned, and how they are made available to the  
141 public.;

142 ~~e.a. If the agency considers some but not all of its decisions as precedential, specify~~  
143 ~~who has authority to designate decisions as precedential (for example, the~~  
144 ~~adjudicator who decides a case, the entire adjudicative body, etc.)~~

145 ~~f.a. Explain the legal effect of precedential decisions in subsequent cases;~~  
146 ~~and~~

147 ~~g.j. Explain when and for what purposes a party may cite a nonprecedential decision,~~  
148 ~~and how the agency will consider it.~~

149 16.17. Agencies should use clear and consistent terminology in their rules relating to  
150 precedential decisions. Agencies that distinguish between “published” decisions and  
151 “nonpublished” or “unpublished” decisions should identify in their rules of practice the  
152 relationship between these terms and the terms “precedential” and “nonprecedential.”

153 17.18. When adopting procedural regulations or materially amending existing procedural  
154 regulations on the subjects addressed above, agencies should voluntarily use notice-and-  
155 comment procedures or other mechanisms for soliciting public input, notwithstanding the  
156 procedural rules exemption of 5 U.S.C. § 553(b)(A), unless the costs ~~clearly~~ outweigh the  
157 benefits of doing so.