



Precedential Decision Making in Agency Adjudication

Committee on Adjudication

Proposed Recommendation from Committee | November 4, 2022

1 Agencies use many different mechanisms to ensure efficiency, consistency,
2 predictability, and uniformity when adjudicating cases, including designating some or all of their
3 appellate decisions as precedential. Agencies can also use precedential decision making to
4 communicate how they interpret legal requirements or intend to exercise discretionary authority.¹

5 A decision is precedential when an agency adjudicator must follow the decision’s holding
6 in subsequent cases, unless the precedent is distinguishable or until it is overruled.² It is a tenet
7 of our system of justice that like cases be treated alike. The effective use of precedential
8 decisions advances this tenet by promoting values of consistency, predictability, and uniformity,
9 as well as allowing for policymaking and encouraging efficiency. Additionally, effective use of
10 precedential decisions can help agencies provide notice to the public about developments in
11 substantive law.

¹ 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).

² 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.).



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12 Many agencies use some form of precedential decision making. Some agencies treat all
13 appellate decisions as precedential, while others treat only some appellate decisions as
14 precedential. Additionally, some agencies highlight useful nonprecedential decisions by labeling
15 them “adopted,” “informative,” “notable,” or a similar term. In any of these cases, precedential
16 decisions can come from an agency head or heads, adjudicators exercising the agency’s authority
17 to review hearing-level decisions, adjudicators who review hearing-level decisions but whose
18 decisions are subject to (usually discretionary) agency-head review, or adjudicators other than
19 the agency head who have statutory authority to issue final decisions. Rarely do hearing-level
20 adjudicators issue precedential decisions.

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

28 For agencies that use some form of precedential decision making, this Recommendation
29 provides best practices for identifying decisions as precedential and making information about
30 such decisions available internally and to the public. Some of these practices build on the
31 Freedom of Information Act’s requirement that agencies post on their websites all final orders



32 and opinions and its general prohibition against agencies relying on, using, or citing an order or
33 opinion as precedent against a private party if it has not been indexed and posted online.³

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

RECOMMENDATION

Use of Precedential Decision Making

- 37 1. Agencies should determine whether, and if so when, to treat appellate decisions as
38 precedential, meaning that an adjudicator must follow the decision's holding in
39 subsequent cases, unless the precedent is distinguishable or until it is overruled. In
40 determining whether to treat all, some, or no appellate decisions as precedential, agencies
41 should consider:
- 42 a. The extent to which they issue decisions that would be useful as precedent and are
43 written in a form that lends itself to use as precedent;
 - 44 b. The extent to which they issue decisions that mainly concern only case-specific
45 factual determinations or the routine application of well-established policies,
46 rules, and interpretations to case-specific facts; and
 - 47 c. The extent to which they issue such a large volume of decisions that adjudicators
48 cannot reasonably be expected to identify which decisions should control future
49 decisions.
- 50 2. Agencies that treat only some appellate decisions as precedential should consider treating
51 a decision as precedential if it:
- 52 a. Addresses an issue of first impression;

³ See 5 U.S.C. § 552(a)(2)(A).



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- 53 b. Clarifies or explains a point of law or policy that has caused confusion among
54 adjudicators or litigants;
- 55 c. Emphasizes or calls attention to an especially important point of law or policy that
56 has been overlooked or inconsistently interpreted or applied;
- 57 d. Clarifies a point of law or policy by resolving conflicts among, or by harmonizing
58 or integrating, disparate cases on the same subject;
- 59 e. Overrules, modifies, or distinguishes existing precedents;
- 60 f. Accounts for changes in law or policy, whether resulting from a new statute,
61 agency rule, or federal court decision;
- 62 g. Addresses an issue that the agency must address on remand from a federal court;
63 or
- 64 h. May otherwise serve as a necessary, significant, or useful guide for adjudicators
65 or litigants in future cases.
- 66 3. Agencies should not prohibit parties from citing nonprecedential decisions in written or
67 oral arguments.
- 68 4. Even if agencies do not treat a decision as precedential, they should consider identifying
69 certain cases as “adopted,” “informative,” “notable,” or a similar term that denotes their
70 usefulness to adjudicators.

Processes and Procedures for Designating Precedential Decisions

- 71 5. Agencies’ procedures for designating decisions as precedential should not be unduly time
72 consuming or resource intensive.
- 73 6. Prior to designating an appellate decision as precedential, agencies should consider
74 soliciting input from appellate adjudicators not involved in deciding the case.
- 75 7. Agencies should consider implementing a procedure that allows for the issuance of
76 precedential decisions to resolve important questions in cases pending before hearing-
77 level adjudicators. One such procedure could permit an interlocutory appeal of an
78 otherwise unappealable order or the transfer of an entire case to the appellate adjudicator,



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- 79 whether at the request of a party, upon referral by the hearing-level adjudicator, or on the
80 motion of the appellate adjudicator.
- 81 8. Agencies should also consider accepting nominations from adjudicators, other agency
82 officials, the parties, and the public on whether any existing nonprecedential appellate
83 decision should be designated as precedential.
- 84 9. Agencies should assess the value of amicus participation or public comment in
85 precedential decision making and should consider actively soliciting amicus participation
86 or public comments in cases of significance or high interest, for example by publishing a
87 notice in the *Federal Register* and on their websites and by directly alerting those persons
88 likely to be especially interested in the matter. In determining whether amicus
89 participation or public comments would be valuable, agencies should consider the extent
90 to which a case addresses broad policy questions whose resolution requires consideration
91 of general or legislative facts as opposed to adjudicative facts particular to the parties.
- 92 10. When an agency rejects or disavows the holding of a precedential decision, it should
93 expressly overrule the decision, in whole or in part as the circumstances dictate, and
94 explain why it is doing so.

Availability of Precedential Decisions

- 95 11. Agencies that treat only some appellate decisions as precedential should clearly identify
96 precedential decisions as such. Such agencies should also identify those precedential
97 decisions in digests and indexes of cases that agencies make publicly available.
- 98 12. Agencies' websites, digests, and indices should clearly indicate when a precedential
99 decision has been overruled or modified.
- 100 13. Agencies should ensure that precedential decisions are effectively communicated to their
101 adjudicators.
- 102 14. Agencies should update any manuals, bench books, or other explanatory materials to
103 reflect developments in law or policy effected through precedential decisions.



- 104 15. Agencies should consider posting on their websites brief summaries of precedential
105 decisions, a digest of precedential decisions, and an index, organized topically, of
106 precedential decisions.
- 107 16. Agencies should consider tracking, on their own or in coordination with commercial
108 databases, and make available to agency officials and the public the subsequent history of
109 precedential decisions, including whether they have been remanded, set aside, modified
110 following remand by a federal court, or superseded by statute or other agency action,
111 such as a rule.

Rules on Precedential Decision Making

- 112 17. As part of their rules of practice, published in the *Federal Register* and codified in the
113 *Code of Federal Regulations*, agencies should adopt rules regarding precedential decision
114 making. These rules should:
- 115 a. State whether all, some, or none of the agency's appellate decisions are treated as
116 precedential;
 - 117 b. Describe the criteria and process for designating decisions as precedential, if the
118 agency considers some but not all of its decisions as precedential;
 - 119 c. Specify who has authority to designate decisions as precedential, if the agency
120 considers some but not all of its decisions as precedential;
 - 121 d. Explain the legal effect of precedential decisions in subsequent cases;
 - 122 e. Define any terms the agency uses to identify useful nonprecedential decisions,
123 such as "adopted," "informative," or "notable," and describe the criteria and
124 process for designating these decisions;
 - 125 f. Explain for what purposes a party may cite a nonprecedential decision, and how
126 the agency will consider it;
 - 127 g. Describe any opportunities for amicus or other public participation in precedential
128 decision making; and



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- 129 h. Explain how precedential decisions are clearly identified as precedential, how
130 they are identified when overturned, and how they are made available to the
131 public.
- 132 18. Agencies should use clear and consistent terminology in their rules relating to
133 precedential decisions. Agencies that distinguish between “published” decisions and
134 “nonpublished” or “unpublished” decisions (or some other such terminology) should
135 identify in their rules of practice the relationship between these terms and the terms
136 “precedential” and “nonprecedential.”
- 137 19. When materially revising existing or adopting new procedural regulations on the subjects
138 addressed above, agencies should use notice-and-comment procedures or other
139 mechanisms for soliciting public input, notwithstanding the procedural rules exemption
140 of 5 U.S.C. § 553(b)(A), unless the costs outweigh the benefits of doing so.