DRAFT REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

# PRECEDENTIAL DECISION MAKING IN AGENCY ADJUDICATION

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*This report was prepared for the consideration of the Administrative Conference of the United States. It does not necessarily reflect the views of the Conference (including its Council, committees, or members).*

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**Recommended Citation**

Christopher J. Walker, Melissa Wasserman & 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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Christopher J. Walker,* Melissa Wasserman** & Matthew Lee Wiener***

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† This is an early working draft of the Report, so comments are particularly welcome. Note that this draft is still subject to more extensive fact- and cite-checking, such that some of the details of each adjudication will be corrected in the final version. The final version will be published near the end of 2022.

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## LIST OF ACRONYMS

Each acronym is written out the first time it appears in the Report. For convenient reference, we have prepared the following list.

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| ACUS | Administrative Conference of the United States |
| ALJ | Administrative Law Judge |
| APA | Administrative Procedure Act |
| BALCA | Board of Alien Labor Certification Appeals |
| BIA | Board of Immigration Appeals |
| BVA | Board of Veterans' Appeals |
| CFR | Code of Federal Regulations |
| DOJ | Department of Justice |
| DOL | Department of Labor |
| DOT | Department of Transportation |
| DHS | Department of Homeland Security |
| EAB | Environmental Appeals Board (Environmental Protection Agency) |
| EEOC | Equal Employment Opportunity Commission |
| EOIR | Executive Office of Immigration Review |
| EPA | Environmental Protection Agency |
| FAA | Federal Aviation Administration |
| HHS | Department of Health and Human Services |
| IBLA | Interior Board of Land Appeals |
| MSPB | Merit Systems Protection Board |
| NLRB | National Labor Relations Board |
| OMHA | Office of Medicare Hearings and Appeals (Department of Health and Human Services) |
| PTAB | Patent Trial and Appeal Board |
| PTO | Patent and Trademark Office |
| USCIS | U.S. Citizenship and Immigration Services |
| SEC | Securities and Exchange Commission |
| SSA | Social Security Administration |
| VA | Veterans Administration |

## INTRODUCTION

Over fifty years ago, the Judicial Conference of the United States recommended that the federal courts of appeals respond to their expanding caseload by "publish[ing]" only decisions "which are of general precedential value."[1] The federal judiciary has since established a clear, stable, and likely perdurable set of rules governing the distinction between precedential (sometimes called "published") and non-precedential (sometimes called "unpublished") decisions in the courts of appeals.

After an intense debate accompanied by significant academic commentary,[2] the judiciary amended the *Federal Rules of Appellate Procedure* in 2006 to address the precedential/non-precedential distinction.[3] Its amendment requires the courts to permit the citation of non-precedential, non-published, and similarly designated decisions but otherwise leaves each circuit to decide (1) whether to issue non-precedential decisions, (2) under what circumstances and with what procedures they should do so, and (3) what legal effect they should give them.[4] Every circuit's rules address at least the first question. Most also address the second and third. Circuit decisions explicate the rules.[5] The precedential/non-precedential distinction, in short, is now well-entrenched in litigation before the federal courts of appeals.

The federal administrative judiciary, by contrast, has failed to reckon with many issues surrounding the distinction between precedential and non-precedential decisions. Most agencies lack formal procedural rules that address the subject. That is true even of agencies that explicitly distinguish between the binding effect of precedential and non-precedential decisions. Some agencies appear to have given the issue scant, if any, consideration. Academic attention to the subject has been still more limited, despite the recent resurgence of scholarship on agency adjudication.[6]

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[1] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL CONFERENCE REPORTS (1962-64) 11 (1964).

[2] *See, e.g.*, Symposium, *Have We Ceased To Be a Common Law Country? A Conversation on Unpublished, Depublished, Withdrawn and Per Curiam Opinions*, 62 WASH. & LEE L. REV. 1429 (2005).

[3] FED. R. APP. P. 32.1.

[4] FED. R. APP. P. 32.1 advisory committee notes to 2006 amendment.

[5] *See* Part I.A & App. A *infra*.

[6] *See, e.g.*, Michael R. Asimow, *Best Practices for Evidentiary Hearings Outside the Administrative Procedure Act*, 26 GEO. MASON L. REV. 923 (2019); Kent Barnett & Russell Wheeler, *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal*, 53 GA. L. REV. 1 (2019); Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377 (2021); Robert L. Glicksman & Richard E. Levy, *Restoring ALJ Independence*, 105 MINN. L. REV. 39 (2020); Catherine Y. Kim & Amy Semet, *An Empirical Study of Political Control Over Immigration Adjudication*, 108 GEO. L.J. 579 (2020); Christopher J.

Last year, the Administrative Conference of the United States (ACUS) responded to this situation by initiating a new project entitled *Precedential Decision Making in Agency Adjudication*. The project "seeks to identify best practices on the use of precedential decisions in agency adjudication" by addressing such questions as "when agencies should issue precedential decisions," "according to what criteria," and by what procedures; how they designate precedential decisions; and how they should communicate them, both internally and to the public.[7]

ACUS commissioned this Report to address these and related questions. It builds on a report that two of us wrote for ACUS entitled *Agency Appellate Systems*,[8] which underlies a late 2020 ACUS recommendation issued under the same title.[9] That recommendation addresses certain aspects of precedential decision making, but for the most part does not address the issues in this Report, and certainly none to the same extent. That prior recommendation had a broader and different focus.

To address the issues ACUS has identified, we reviewed the rules, policies, and practices of the dozen-plus systems addressed in *Agency Appellate Systems*, plus several additional ones, bringing the total number of systems studied to twenty. They include the federal government's highest volume adjudication systems. Our review of these systems was informed by, among things, careful consideration of the various objectives of agency appellate review, the approaches of the federal courts of appeals to precedential decision making, foundational principles of administrative law, and ACUS's recommendations on adjudication. We then conducted interviews with various agency officials at each adjudication system.

Here, in brief, are the two main conclusions to which our study has led us. The first is that ACUS cannot offer any definitive answer to the question "when" any given agency should use precedential decision making. There are too many disparate considerations to say for sure, especially in the high-volume adjudication programs. But ACUS can and should identify for agencies the (sometimes competing) objectives that a system of precedential decision making can serve. Attention to these objectives may well guide agencies in deciding whether to use precedential decisions and, if they do, how.

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Walker & Melissa Feeney Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141 (2019).

[7] *Precedential Decision Making in Agency Adjudication*, ADMIN. CONF. OF THE U.S., https://www.https://www.acus.gov/research-projects/precedential-decision-making-agency-adjudicationacus.gov/research-projects/precedential-decision-making-agency-adjudication.

[8] Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-report-agency-appellate-systems.

[9] Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618, 6618–20 (Jan. 22, 2021).

Our second main conclusion is that ACUS should recommend that agencies with precedential decision-making systems follow certain best—and, in a few cases, obligatory—practices to comport with administrative law's norms of regularity, consistency, and transparency.[10] They include promulgating publicly available rules of procedure (preferably appearing in the *Code of Federal Regulations*) that specify the criteria for designating decisions as precedential and the procedures by which agencies make these designations. Whereas the federal courts have generally done that, most agencies have not. Other best practices include identifying techniques to improve the dissemination of decisions internally (to other adjudicators, policymakers, enforcement staff, and others) and externally (to regulatory beneficiaries, regulated firms, and the public more generally).

An important note about the scope of this Report is necessary: Just as we do not provide a determinative answer to the question whether agencies should use precedential decision making, we do not answer the perennial question in administrative law whether agencies should make policy—which we understand broadly to include interpreting the statutes and regulations they administer—by rule or adjudicative decision (or order in APA parlance).[11] We only briefly discuss the subject to illustrate what functions precedential decision making can serve. That said, it will become readily apparent that any meaningful agency policymaking through adjudication invariably requires the use of precedential decision making.[12] Agencies that choose to make policy through adjudication should find many of our proposed recommendations useful in carrying out that choice. A well-functioning system of precedential decision making, moreover, may help agencies identify recurring issues that are best addressed by rulemaking.[13]

This Report proceeds as follows. Part I provides necessary background for our findings. In Part I.A, we explain what, exactly, precedential decision making is and the role (or roles) it plays in an adjudication system. We draw on, among

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[10] *See generally* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2021).

[11] *See generally* RICHARD J. PIERCE & KRISTIN E. HICKMAN, ADMINISTRATIVE LAW TREATISE § 4.9 (6th ed. 2020). *But cf.* Matthew C. Stephenson, *Embedded Rules*, 39 YALE J. ON REGUL. BULL. 59 (2021) (arguing that, contrary to the conventional understanding, adjudicative orders/decisions often embody rules, whether substantive legislative rules, interpretive rules, or policy statements). A rule, of course, need not be legislative. It could take the form of, among other things, a policy statement or interpretive rule (together often known as a "guidance document"). *See, e.g.*, John Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004). For a brief discussion of non-legislative rules as a surrogate for precedential decision making, see Part III.A.2 *infra*.

[12] *Cf.* Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40260, 40260 (identifying precedential decision making, along with rulemaking, as a mechanism to "resolve recurring legal issues").

[13] Two ACUS recommendations make that point. *See* Part II.B. *infra*. *See generally* Heckler v. Campbell, 461 U.S. 458 (1983).

other things, the practices and academic literature surrounding the federal appellate courts—given the dearth of literature in the adjudication context. Part I.B then provides a brief review of prior ACUS recommendations and studies related to our subject. In Part II.C, we identify the various institutional structures from which precedential decision making can arise. That includes identifying the adjudicators within an agency who can issue precedential decisions. Then, in Part II.D, we identify the objectives that precedential decisions might serve in an agency's appellate system. Any informed decision about whether to use precedential decision making—and, if so, when and how—requires careful consideration of those objectives.

After explaining the study methodology in Part II, we turn in Part III to our findings. In Part III.A, we address the prevalence of precedential decision making in agency adjudication and the sources of law that governs its use. In Part III.B, we review the standards and practices these agencies use to decide whether to designate a decision as precedential and the sources of law in which the standards reside (if any). In Part III.C, we offer some generalizations about the process for drafting prudential decisions as well as the form and structure of precedential decisions—including how agencies identify the precedential status of decisions—across the studied agencies. Finally, in Parts III.C and D, we address two related questions. First, how do agencies make precedential decisions publicly available, and how do they educate the public on the important policies and interpretations often embodied in agency precedential decisions (Part III.C)? And second, how do agencies disseminate precedential decisions internally—to other appellate adjudicators, to hearing-level adjudicators, enforcement staff, and agency policymakers (Part III.D)? Part III.F explores some findings as to judicial review and inter-decisional consistency.

In Part IV, we offer recommendations for ACUS's consideration. Each recommendation is grounded in Part III's findings.

# I. BACKGROUND

## A. Understanding Precedential Decision Making

Stare decisis is the legal doctrine that obligates judges to apply rules or principles laid down in previous decisions to the instant case.[14] Prior decisions or rulings that bind adjudicators are referred to as precedent. Precedent can be vertical or horizontal and derives its authority from its existence rather than its content or the persuasiveness of its reasoning. Vertical stare decisis is the practice of judges' adhering to the decision of a tribunal with supervisory

[14] *See, e.g.*, Or. Natural Desert Ass'n v. U.S. Forest Serv., 550 F.3d 778, 785 (9th Cir. 2008) ("As every first-year law student knows, the doctrine of stare decisis is often the determining factor in deciding cases brought before any court."); *see also* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 956 (2005) (noting the significance of stare decisis and concluding that "scholarly attention is thus warranted" on the subject).

jurisdiction, a tribunal that can overrules the judges' decision.[15] Horizontal stare decisis is the practice of a tribunal adhering to its own decisions.[16]

Given that federal courts have relied upon some form of precedent since the nation's founding,[17] it is unsurprising that precedent in the federal courts has been the subject of extensive study. While scholars have identified a number of benefits of stare decisis, four common themes emerge: appearance of justice, predictability, fairness, and efficiency.[18]

First, the most common justification for judicial precedent is that precedent advances the appearance of justice or promotes rule of law values.[19] The Supreme Court has recognized that precedent serves as "an essential feature of a democratic society governed by the rule of law."[20] Stare decisis allows for the public to presume that judicial decisions are governed by the law rather than the proclivities of individuals.

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[15] In the federal judiciary, federal district courts are obligated to follow the decisions of the courts of appeals in their circuit, and the court of appeals are similarly obliged to follow the decisions of the Supreme Court of the United States. *See, e.g.*, Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam) ("But unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.").; *see generally* BRYAN GARNER ET AL., LAW OF JUDICIAL PRECEDENT 27-34 (2016) (describing the law of vertical precedent in treatise format with contributions from a dozen federal court of appeals judges).

[16] For example, in the federal judiciary, every circuit court has chosen to adopt "law of the circuit," where a prior reported three-judge panel of the respective court of appeals is binding on subsequent panels of that court. *See, e.g.*, Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 794–95 (2012).

[17] *See generally* Thomas R. Lee, *Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court*, 52 VAND. L. REV. 647 (1999); *see also* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1897 (2009) ("The doctrine is so central to Anglo-American jurisprudence that it scarcely needs be mentioned, let alone discussed at length." (emphasis omitted) (quoting BENJAMIN N. CARDOZO, THE NATURE OF JUDICIAL PROCESS 20 (Yale Univ. Press 1964) (1921))); Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570, 582 (2001).

[18] *See, e.g.*, Hohn v. United States, 524 U.S. 236 (1998) ("Stare decisis is 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" (internal quotation marks omitted)); James C. Rehnquist, Note, *The Power That Shall Be Vested in a Precedent: Stare Decisis, The Constitution and the Supreme Court*, 66 B.U. L. REV. 345, 347 (1986).

[19] *See, e.g.*, Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1 (2012).

[20] Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent,* 91 TEX. L. REV. 1843, 1857 (2013) (collecting cases); *see, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.").

Second, precedent promotes predictability in the law. Changes in the law disrupt the groundwork for numerous human interactions. Precedent provides the "moorings so that [people] can trade and arrange their affairs with confidence."[21] In that say, precedent both promotes predictability in future court decisions and reliance on past decisions.

Third, precedent also promotes fairness. Adherence to precedent ensures that similarly situated litigants are subject to the same legal consequences.[22]

Finally, adhering to precedent increases the efficiency of the judiciary. As Justice Cardozo noted, "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case."[23]

Weighing against these enumerated virtues of precedent are the costs associated with stare decisis. Scholars have argued that stare decisis gives more interpretive power to past judges than to present judges, enabling the dead hand of the past to control outcomes in the present. In other words, stare decisis can ossify the law, causing old law to linger despite society's advancements.[24] Still others have argued that consciously entrenching erroneous decisions can impair the legitimacy of the legal regime, undermining the rule of law rather than promoting it.[25]

Beyond examining the values and costs of precedent, there is a substantial literature devoted to delineating when it is proper for a court to follow stare decisis and what factors are sufficient for a court deviate from precedent.[26] Scholars have attempted to empirically examine the factors that make it more likely for precedent to be overruled.[27] There is also a robust literature examining

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[21] William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 735–36 (1949).

[22] *Id.* at 736.

[23] Rehnquist, *supra* note 18, at 348 (quoting CARDOZO, *supra* note 17, at 149); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it.").

[24] Amy E. Sloan, *A Government of Laws and Note Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711, 733 (2004).

[25] Kozel, *supra* note 20, at 1857; Randy J. Kozel, *The Rule of Law and the Perils of Precedent*, 111 MICH. L. REV. FIRST IMPRESSIONS 37, 40–41 (2013).

[26] *See, e.g.*, Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as it Sounds*, 22 Const. Comment. 257 (2005); David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929 (2008); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1427 (2007); Davis A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996); Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2005).

[27] *See, e.g.*, Lee Epstein, *The Decision to Depart (or Not) from Constitutional Precedent: An Empirical Study of the Roberts Court*, 90 N.Y.U. L. REV. 1115 (2015); Michael H. Lerroy, *Overruling Precedent: "A Derelict in the Stream of Law"*, 66 SMU L. REV. 711 (2013); Youngsik Lim, *An Empirical Analysis of the Supreme Court Justices' Decision Making* 29 J. LEGAL STUD. 721 (2000); Frank B. Cross, *Chief Justice Roberts and Precedent: A Preliminary Study*, 86 N.C. L. REV. 1251 (2008).

the relationship between precedent and statutory interpretation, including interpretative methodology.[28] To date, scholarship on precedent has largely focused on the U.S. Supreme Court, although there is a growing scholarship on precedent in the federal courts of appeals.[29]

In contrast to the courts, precedent in agency adjudication has received scant scholarly attention. Scholars have just begun to explore the concept of precedent in administrative agency adjudication and to delineate the ways in which the use of precedent in administrative agencies differs from that of the federal judiciary.[30] There are important distinctions between precedent in federal courts and agency adjudication. As several scholars have noted and the findings in this Report further detail, agencies can more easily alter well-settled precedent than courts, as the doctrine of stare decisis is not generally or fully applicable to agency adjudication.[31]

Nevertheless, precedent in agency adjudication holds great promise. As detailed in Part I.D, the values precedent fulfills in the federal judiciary are also important to administrative agencies.[32] The administrative state, for example, has long been concerned with inconsistent decision making and sought ways to bring more homogeneity to agency outcomes.[33] Two of the authors of this Report have argued that high volume adjudicators, like the Patent & Trademark Office, could increase consistency in agency adjudicatory outcomes by increasing their reliance on precedential decision making.[34] Given the potential benefits

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[28] *See, e.g.*, RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT (2017); Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317 (2005); Randy J. Kozel, *Stare Decisis in the Second-Best World*, 5 CALIF. L. REV. 1139 (2015); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009).

[29] *See, e.g.*, Barrett, *supra* note 28, at 317; Mead, *supra* note 16, at 787.

[30] *See, e.g.*, Charles H. Koch, *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 703–13 (2015); Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOKLYN L. REV. 1241, 1288–89 (2015). There are a few notable exceptions. *See, e.g.*, Ray J. Davis, *The Doctrine of Precedent as Applied to Administrative Decisions*, 59 W. VA. L. REV. 111, 125–28 (1957).

[31] Koch, *supra* note 30, at 703–04; Holper, *supra* note 30, at 1288–89; E.H. Schopler, *Annotation, Comment Note: Applicability of Stare Decisis Doctrine to Decisions of Administrative Agencies*, 79 A.L.R.2D. 1126, 1131–32 (1961); James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191, 1199–20 (2006). This does not mean that agency adjudicators do not routinely consider or follow past decisions for their persuasive authority. *See* Davis, *supra* note 30, at 125–28. Nevertheless, unlike appellate court federal judges, appellate level agency adjudicators are not necessarily bound by their colleagues' decisions. Moreover, even when an agency adjudicator decision is subject to higher level review, that higher level decision does not necessarily bind agency adjudicators in future cases.

[32] Davis, *supra* note 30, at 128–36.

[33] JERRY MASHAW, BUREAUCRATIC JUSTICE 73 (1983).

[34] Walker & Wasserman, *supra* note 6, at 191–93.

associated with precedent, it is not surprisingly that many agencies have adopted some form of precedential decision making in agency adjudication.

### B. Prior ACUS Recommendations on Precedential Decisions

Not only has there been little scholarly attention paid to precedential decision making in agency adjudication; ACUS too has not studied it closely. As far as we can ascertain, ACUS first addressed the use of precedential decisions on a cross-agency basis[35] in a footnote to a 1989 recommendation concerning public indexing of "significant" adjudicative decisions. ACUS "urge[d]" agencies whose policies deny precedential effect to all decisions to "re-examine the feasibility of creating a system that accords certain decisions precedential value to provide guidance about the factors that influence their decisions and to ensure better development of agency policy and standards."[36]

ACUS's first sustained attention to the issue came thirty years later in Recommendation 2020-3, *Agency Appellate Systems*.[37] Its disclosure and related provisions aside for a moment, *Agency Appellate Systems* included two specific recommendations relevant to this Report:

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[35] Several recommendations have addressed possible uses of precedential decisions and related techniques by the SSA's Appeals Council (one of the case studies for this Report). The first was Recommendation 87-7, *A New Role for the Social Security Appeals Council*, 52 Fed. Reg. 49,143 (Dec. 30, 1987), which recommended that the Appeals Council provide "guidance to agency adjudicators" by, among other things, "articulating the proper handling of specific issues in case review opinions [consistent with the Commissioner's Social Security Rulings"] to be given precedential significance." *Id.* at 49,143; *see also* Recommendation 90-4, *Social Security Disability Programs Appeal Process: Supplementary Recommendations*, 55 Fed. Reg. 34,213, 34,213 (Aug. 22, 1990) (characterizing Recommendation 87-7 as "suggest[ing]" that the Appeals Council's caseload could be "significantly limited" by "focus[ing] on important issues on which it could issue precedential decisions"). (In 87-7, ACUS also recommended that the Appeals Council "enhance its" internal and external visibility by "seeking publication of precedent by a recognized reporters service." 52 Fed. Reg. at 49,143.) ACUS returned to the subject in Recommendation 2013-1, *Improving Consistency in Social Security Disability Adjudication*, 78 Fed. Reg. 41,352 (July 10, 2013), when it recommended that the Appeals Council issue "Appeals Council Interpretations" (discussed below) with "greater frequency" and "establish precedents upon which claimants and their representatives may rely." *Id.* at 41,345. ACUS also recommended in 2013-1 that the Appeals Council publish "selected ALJ or Appeals Council decisions to serve as model decisions" (with personally identifiable information redacted). *Id.* Model decisions of the sort recommended in 2013-1, though not precedential in the sense they do not purport to bind agency officials, might serve some of the same objectives as precedential decisions. *See* Part I.D *infra*.

[36] Admin. Conf. of the U.S., Recommendation 89-8, *Agency Practices and Procedures for the Indexing and Public Availability of Adjudicatory Decisions*, 54 Fed. Reg. 53,495 (Dec. 29, 1989).

[37] Admin. Conf. of the U.S., Recommendation 2020-3, Agency Appellate Systems, 86 Fed. Reg. 6618 (Jan. 22, 2021). Citations of specific recommendations therein, identified by their section numbers, appear parenthetically in the main text. It bears mentioning that ACUS's MODEL ADJUDICATION RULES (rev. 2018), https://www.acus.gov/research-projects/model-adjudication-rules-2018-revisions, which are highlighted in Recommendation 2020-3, do not offer any model rules governing, or otherwise addressing, precedential decision making.

- Agencies should promulgate, publish in the *Federal Register*, and codify in the *Code of Federal Regulations* (CFR) procedural rules that address, among other "significant procedural matters pertaining to agency appellate review, the "procedures and criteria for designating decisions as precedential and the legal effect of such designations . . ." (§ 2).
- "Agencies should establish clear criteria and processes for identifying and selecting appellate decisions as precedential, especially for appellate systems" whose objectives include "policymaking or inter-decisional consistency" (§ 12).

Section 12 accords with a 2016 recommendation on evidentiary hearings in which ACUS recommended that, when providing for post-hearing administrative review of hearing-level adjudicative decisions in their procedural rules, agencies should "allow and encourage" the designation of decisions as "precedential in order to improve decisional consistency."[38]

A third recommendation, which concerns aggregate agency proceedings such as class actions, bears mentioning.[39] It identifies precedential decision making as among the "techniques," along with rulemaking and declaratory judgments, by which agencies can "resolve claims with common issues of fact or law, especially in high-volume adjudication programs."[40] It recommends that decisions in aggregate proceedings be designated as precedential, with the objective of enhancing policy making control, when doing so will "[h]elp other adjudicators handle subsequent cases involving similar issues more expeditiously," "[p]rovide guidance to future parties," "[a]void inconsistent outcomes," or "[i]ncrease transparency and openness."[41] These are among the objectives of precedential decision making that we address in this Report.

*Agency Appellate Systems*, building on other ACUS recommendations,[42] also addresses two closely related issues to which we return here: public disclosure and internal dissemination of precedential decisions. It recommended that:

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[38] Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act* (§ 27).

[39] Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260, 40,260.

[40] *Id.* at 40,260; *see also id.* at 40,260 n.1 (identifying precedential decision making, declaratory orders, and rulemaking as "among the related techniques that can help resolve recurring legal issues").

[41] *Id.* at 40,261.

[42] *See* Admin. Conf. of the U.S., Recommendation 89-8, *Agency Practices and Procedures for the Indexing of Publicly Available Adjudicatory Decisions*, 54 Fed. Reg. 53,495 (Dec. 29, 1989), which recommended that agencies "compile a subject-matter index" of all "significant adjudicative decisions, whether or not the decisions are designated as precedential." *Id.* ACUS took the position even some non-precedential decisions could be significant because they "establish a principle to govern recurring cases with similar facts, develop agency policy and exceptions to the public in areas where the law is unsettled, deal with important emerging

- Agencies should transmit precedential decisions to all appellate adjudicators and, "directly or indirectly through hearing-level programs, to hearing-level adjudicators," accompanied by, "when feasible, brief summaries of the decisions" (§ 14).
- Agencies that "rely[] extensively on their own precedential decisions" should consider "preparing or having prepared indexes and digests—with annotations and comments, as appropriate—to identify those decisions and their significance" (§ 16).
- When posting decisions on their websites, agencies should "distinguish between precedential and non-precedential decisions" and "brief[ly] explain[] the difference" (§ 22); and "should consider including, as much as practicable, brief summaries of precedential decisions and, for precedential decisions at least, citations to court decisions reviewing them" (§ 23).[43]

A related recommendation in *Agency Appellate Systems* provides that, "as appropriate," agency appellate adjudicators should communicate with agency rule-writers and other agency policymakers—and institutionalize communication mechanisms—to address whether recurring issues in their decisions should be addressed by rule rather than precedential case-by-case adjudication" (§ 17).[44] We also return to these recommendations in this Report.

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trends, or provide examples of the appropriate resolution of major types of cases not otherwise indexed. *Id.* ACUS did so against the background of the Attorney General's (and presumably some agencies') interpretation of the Freedom of Information Act's requirement that agencies affirmatively or proactively disclose final adjudicative opinions (i.e., without awaiting a FOIA request), *see* 5 U.S.C. § 552(a)(2)(A), to cover only precedential decisions. *See* 54 Fed. Reg. at 53,495. As ACUS noted in the recommendation, some courts had read the provision more broadly. *See id.* The courts have yet to reach a consensus as to what, exactly, "final opinions" means under § 552(a)(2)(A) and whether, most importantly, it covers only precedential decisions (and if so, what exactly "precedential" means). *See, e.g.*, New York Legal Assistance Group v. Bd. of Immigration Appeals, 987 F.3d 207, 211 & n.10 (2d Cir. 2021); *see also* DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT 2–3 n.8, https://www.justice.gov/oip/doj-guide-freedom-information-act-0. In 2017, ACUS noted that the "prevailing interpretation" of § 502(a)(2)(A) "limits its ambit to 'precedential' decisions." Admin. Conf. of the U.S., Recommendation 2017-1, *Adjudication Materials on Agency Websites*, 82 Fed. Reg. 31,039, 31,039 (citing DOJ GUIDE). Presumably ACUS was referring to agencies'—or just the DOJ's—interpretation rather than the courts' interpretation.

[43] See also Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Materials*, 84 Fed. Reg. 2139, 2139 (Feb. 6, 2019) ("Agencies should consider providing access on their websites to explanatory materials aimed at providing an overview of relevant agency precedents that apply the rules of procedure.").

[44] Cf. Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. at 40260. (recommending that agencies communicate the "outcomes of aggregate litigation . . . to policymakers or personnel involved in rulemaking so that they can determine whether" to begin a notice-and-comment rulemaking "codifying the outcome"); Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161, 78,161 (Dec. 16, 2015) (noting that declaratory orders issued under 5 U.S.C. § 554(e)

## C. Agency Structures for Precedential Decision Making

It is important to consider not only what precedential decisions are, as we do in Parts I.A and III.A, but also from where within the agency's adjudicative decision-making structure they might emanate. Or, put another way, which agency adjudicators might issue precedential decisions? The short answer is that decisions that might have precedential status are generally made on appellate review of decisions by hearing-level adjudicators (whether ALJs or non-ALJ adjudicators).[45] Some qualifications will be necessary.

Structures of agency appellate review vary from agency to agency.[46] Most agency appellate structures, though, can comfortably be placed within one of the four broad categories set forth below, allowing for minor qualifications.[47] After identifying the attributes of each structure, we identify from where within the structure a precedential decision might emanate. The answer is usually an appellate tribunal within the agency or the agency head.

1. *Direct Review of Hearing-Level Adjudicator's Decision by Agency Head.*

The agency head directly reviews the decision of a hearing-level adjudicator. No agency-head delegatee or intermediate review body is interposed between

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may form a "body of agency precedent [that] will not only be useful to regulated and other interested parties, but may also prove invaluable to the agency when it later decides to conduct a rulemaking or other proceeding for formulating policy on a broader scale").

[45] Some ACUS recommendations divide adjudications into three categories: (1) those subject to formal hearing provisions of the APA (or APA adjudications); (2) those in which a statute, regulation, or executive order requires an APA-like exclusive-record evidentiary hearing, but are not subject to those provisions; and (3) those in which no such evidentiary hearing is legally required. *See, e.g.*, Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016). In a study for ACUS, Professor Asimow calls these adjudications Type A, Type B, and Type C. *See* Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act* (Report for the Admin. Conf. of the U.S.) (Nov. 10, 2016) [hereinafter *Evidentiary Hearings*], https://www.acus.gov/report/evidentiary-hearings-outside-administrativeprocedure-act-final-report; *see also* Michael Asimow, *Best Practices for Evidentiary Hearings Outside the Administrative Procedure Act*, 26 GEO MASON L. REV. 923 (2019). For an expanded discussion, see MICHAEL ASIMOW, ADMIN. CONF. OF THE U.S., FEDERAL ADMINISTRATIVE ADJUDICATIONS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 15–24 (2019) [hereinafter ADJUDICATION SOURCEBOOK]. Most of the appellate schemes with which are concerned review decisions arising from hearings in Type A and Type B adjudications, but not all. Some schemes that review Type C decisions are functionally and structurally similar enough to be covered by this report. *See* Walker & Wiener, *Agency Appellate Systems*, *supra* note 8 at 30 n.7.

[46] The structure of an appellate program can be the result of statutory law or an agency rule, or a combination of both. Most agencies' programs are administratively established by rule as far as their particulars are concerned, but there are notable exceptions, among them the PTO (for patent cases) and the VA (for veterans benefit cases). Whatever the legal basis of an appellate program's structure, though, the precedential status of its decisions will almost always be dictated agency (not statutory) law, policy, or practice. *See* Part III.A *infra*.

[47] As our classification system reflects, an important question in evaluating an appellate-review program is whether it provides for some form of agency-head review. *See generally* Walker & Wasserman, *supra* note 6, at 174–75.

the adjudicator and the agency head. Review is usually either as of right at the request of a party (mandatory review) or at the discretion of the agency head (either on the application of a party or, less commonly, its own initiative). Even when review is discretionary, a statute or, more commonly, a procedural rule often sets forth a standard or criteria to guide or circumscribe the discretion. Many of the agencies with discretionary review are multi-member independent boards and commissions. They include, among the studied agencies here, the NLRB, the SEC, and the MSPB. The formal hearing provisions of the APA will often govern their adjudications. (The MSPB is an exception.)

In this structure, precedential decisions come only from the agency head.

2. *Review by an Agency-Head Delegatee—Often a Multi-Member Appellate Body—Resulting in a Final Decision Unreviewable by the Agency Head.*

The agency head voluntarily delegates her authority to review the hearing-level adjudicator's decision to a subordinate official(s), often a multi-member appellate body, who issues a final decision on the agency head's behalf.[48] (The delegation is usually made without explicit statutory authorization. The delegation is almost always on a standing, class-wide basis rather than a one-time, individual-case basis, and it is done by rule (though the directive may be labeled an "order.") Review can be as of right or discretionary. The delegation does not provide for agency-head review; it is often silent on the question. Notable appellate bodies in this second category include SSA's Appeals Council, and, with allowances for minor qualifications, the EAB at the EPA.[49]

In this structure, appellate decisions come from the appellate adjudicator exercising delegated authority.

3. *Review by a Statutorily Authorized Appellate Decisionmaker—Often a Multi-Member Body—Resulting in a Final Decision Unreviewable by the Agency Head.*

Unlike in the previous category, in which the agency creates an appellate body, this category involves a statutorily created appellate body with authority to make final decisions on behalf of the agency. Review by the appellate body is often mandatory, but there are exceptions. The decision is unreviewable by the agency head. There may be an additional level of appellate review interposed between the agency and an Article III court in the form of an Article I court.

Examples among the studied agencies include the VA's Board of Veterans' Appeals (BVA) and the Department of Labor's Benefits Review Board. PTAB

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[48] An agency's authority to create, and assign adjudicative responsibilities to, an appellate tribunal will arise under 5 U.S.C. § 301, the agency's organic statute, or both. *See* Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 686–87 (2020).

[49] Some of these structures may raise Appointments Clause issue, since the final agency decision is not subject to review by a principal officer. *See* Arthrex v. United States, 141 S. Ct. 1970 (2021).

falls into this category,[50] although the Supreme Court recently severed the statutory provision precluding agency-head review after finding that it violated the Appointments Clause because it vested final decision making authority in PTAB judges who were not presidentially appointed and Senate confirmed.[51] Now PTAB decisions are subject to agency-head review, so PTO might best be put in the next category.

In this structure, precedential decisions come from the statutorily designated appellate review body.

4. *Review by an Intermediate Appellate Adjudicator—Often a Multi-Member Appellate Body—Resulting in a Decision Subject to Agency Head Review.*

A statute or agency rule assigns appellate review to an intermediate adjudicator, often a multi-member appellate body. (If the assignment is made by a rule, the review will be by an agency-head delegate.) That adjudicator's decision will be subject to (usually discretionary) review by the agency head. The agency head, however, will usually exercise review authority in only a few cases, and agency rules may say little or nothing about the procedures by which a party may seek agency-head review.[52] The most notable example is DOJ's immigration adjudication program, under which the Board of Immigration Appeals' decisions are subject to discretionary review by the Attorney General. Other examples include the Department of Labor's Administrative Review Board and the Department of Agriculture's Judicial Officer.

In this structure, precedential decisions come either from the intermediate appellate adjudicator or the agency head. The vast majority come from the former. The agency head often reviews few cases and then only on a sporadic basis.

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In short, precedential decisions, when they are issued, come from appellate adjudicators within an agency—in most cases, an administratively or (less commonly) statutorily established tribunal or the agency head—rather than hearing-level adjudicators. In this respect, the agency decision-making structure is analogous to the federal-court decision-making structure, in which trial-court decisions do not have precedential effect. They do not, that is, bind district courts in other, unrelated cases, even in cases within the same district.[53]

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[50] *See generally* Walker & Wasserman, *supra* note 6.

[51] *See* Arthrex v. United States, 141 S. Ct. 1970 (2021).

[52] *See, e.g.*, Fleming v. U.S. Dep't of Agric., 987 F.3d 1093, 1103 (D.C. Cir. 2021) (noting, in the case of appellate review by USDA's Judicial officer, "the Secretary may, at his election, step in and act as final appeals officer in any case" (citing 7 C.F.R. § 2.12)).

[53] *See, e.g.*, Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) (" 'A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.' " (quoting 18 J. MOORE ET AL., MOORE'S FEDERAL PRACTICE §134.02[1][d], p. 134–26 (3d ed. 2011)).

We are not aware of any adjudication systems in which hearing-level adjudicator's decisions have precedential effect.

This generalization, though, requires some qualification. In agency adjudication, the distinction between a hearing- or trial-level adjudication and an appellate-level adjudication is not quite as easily drawn as in the court system.

Some adjudication programs decide what they call "appeals," but they do not undertake what is normally considered an appellate function. While these programs provide for review of an initial adjudicative decision—usually rendered after an informal proceeding—they do so through a de novo proceeding that results in a "new" decision, which itself is then subject to high-level agency review. The proceedings are trial-like, not appellate, in nature. Examples include the "appeals" decided by the ALJs in HHS's Office of Medicare Hearings and Appeals (OMHA) and the judges at the MSPB. We do not classify these cases as appellate.

At the same time, the term "appellate review" cannot be reserved exclusively for agency programs that review adjudicative decisions resulting from a full evidentiary hearing on basis of a closed and exclusive record of documentary evidence, transcripts, and dockets of the sort familiar in federal courts. One reason is that any number of adjudicative offices that otherwise performs traditional appellate functions sometimes hear at least some new evidence on appeal in a way unknown to federal-court appellate practice. SSA's Appeals Council is a prominent example. The BVA also falls into this category.

Another reason that the trial/appellate distinction can be problematic in the agency context is that some adjudicative offices that perform mostly trial-like functions also perform appellate functions. The trial and appellate functions can even be commingled. A notable example (though an outlier, to be sure) is offered by the PTO's PTAB. It has both hearing-level, review of patent grants, and appellate jurisdiction, review of patent denials. Even its original-jurisdiction adjudications have an appellate character. Its judges sit in three-member panels and issue final agency decisions. The director may designate panel decision as precedential and hence binding on the system's several-hundred judges in all future cases. Other adjudicative agencies likewise defy easy categorization. Among them is the BVA.

Notwithstanding these qualifications, the term "appellate review" can be reliably used here to denote the final review a party can request the agency to provide (Categories [1]-[3] above) or, at agencies with an appellate body or officer whose decisions are subject to discretionary and usually infrequently exercised agency-head review, the next-to-final intra-agency review a party can request (Category [4] above).[54] Such intra-agency review is, if not the only possible locus

[54] Note the phrase "a party can request" here. A final agency decision may arise before a case gets to the appellate level of decision addressed in this report. That most commonly happens

of precedential decision making, the locus of such decision making at every agency at which it appears to be used. It is certainly the locus at all of our studied agencies.

### D. Objectives for Precedential Decisions in Agency Adjudication

Although "[m]odern administrative law is built on the appellate review model of the relationship between reviewing courts and agencies,"[55] it would be a mistake to equate the objectives of agency appellate review with those of federal court appellate review. That is particularly true when it comes to precedential decision making. After all, in many circumstances Congress created the agency adjudication system to expressly advance objectives that the federal court system could not, or should not, carry out effectively.[56]

For example, in his 1983 ACUS report on agency appellate review of hearing-level decisions, Ronald Cass summarized the competing models for agency decision making in the literature: the "judicial model," in which "a neutral arbiter weighs evidence and ascertains facts"; and the "political model," in which "decisions do not turn on descriptive facts but on the identity of interested parties, the intensity of their interests, and on assumptions about the impact of particular decisions on future events."[57] Professor Cass ultimately concluded that, in the agency adjudication context, these models merge. The hearing-level adjudicators should embrace the judicial model, but the appellate review function within the agency can incorporate the political model, at least in some circumstances.[58]

Professor Cass's categorization is similar to James Freeman's 1969 approach for agency appellate review. There is both a "judicial model," which consists of error correction and the application of law to fact without engaging in policymaking, as well as an "administrative model," which includes "deciding

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when a party chooses to forego agency appellate review of an initial or recommended decision by a hearing-level adjudicator. (Whether a party must seek such review before seeking judicial review depends on what the agency's rules (or, less commonly, its governing statute) says about exhaustion of administrative remedies.) *See* Walker & Wiener, *supra* note 8, at 19.) We are not aware of any agencies that accord any precedential effect to a decision that becomes final because it is not appealed, and the case for doing so would be weak.

[55] Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 940 (2011).

[56] *See, e.g.*, Walker & Wasserman, *supra* note 6, at 158 (noting that Congress created new patent adjudication procedures at the U.S. Patent and Trademark Office "to create a cheaper, faster alternative to district court patent litigation").

[57] Ronald Cass, Agency Review of Administrative Law Judges' Decisions 117 (1983) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/project-report-recommendation-83-3.

[58] *See id.* at 121–24.

appeals in adjudication cases as well as formulating policy."[59] In other words, unlike appellate review in federal courts, appellate review in agency adjudication often has an explicit policymaking and/or political accountability function.

That said, a key finding from the Walker-Wiener ACUS report on agency appellate systems is worth repeating here:

> In surveying agency appellate programs and interviewing their leaders across the federal regulatory state, it becomes immediately apparent that the judicial model of appellate review is not the predominant one within agencies, although it does play an important role in many programs. Neither is there—nor should there be—one unifying model. Agencies operate appellate review programs for distinct purposes. Sometimes the agency does so because Congress has commanded a certain objective or multiple objectives in appellate review. Other times, the agency itself has exercised its discretion to focus appellate review on certain objectives, which hopefully advance the statutory purposes of the agency adjudication program as a whole.[60]

In our interviews with agency leaders and our review of publicly available sources conducted for this Report, this theme of diversity in models and objectives again predominated. This should come as no surprise, as the structures, objectives, and procedures in agency adjudication vary considerably across the federal regulatory state. Our study of twenty agency adjudication systems revealed at least seven objectives for precedential decision making. Each one merits some elaboration here. Before doing so, however, four preliminary observations from our study are worth making to contextualize the objectives we identified for precedential decision making.

First, similar to a core finding from the Walker-Wiener report on appellate systems, at many agencies the objectives for precedential decision making are not widely known or perceivable. Not only are they not publicly available, but the agencies themselves have not systematically considered what factors do, or should, dictate whether to designate a decision as precedential. It was only through asking follow-up questions during our semi-structured interviews that we were able to get a better sense of the potential reasons for designating decisions as precedential. We return to this finding in Part III.A.

Second, although the Walker-Wiener report concluded that the judicial model is not the predominant one when it comes to agency appellate systems,

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[59] James O. Freedman, *Review Boards in the Administrative Process*, 117 U. PA. L. REV. 546, 558–59 (1969). This article served as the report for Admin. Conf. of the U.S., Recommendation 68-6, *Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency*, 38 Fed. Reg. 19,783 (July 23, 1973).

[60] Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems 11 (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-report-agency-appellate-systems.

the objectives of the judicial model seem to have a lot of resonance at many agencies when it comes to approaches to precedential decision making. This is particularly true at agencies that treat all—or nearly all—decisions as precedential. For those agencies, the reasons decisions should be precedential echoed rule of law values as well as the need for predictability, consistency, and efficiency in agency adjudication. We return to these objectives below. Perhaps unsurprisingly, those agencies that designate all decisions as precedential tend to be lower-volume adjudication systems.

Third and similarly, one overriding theme from the interviews is that many agencies do not view "policymaking" as a core reason for designating a decision as precedential. Interviewees resisted the idea that decisions are made precedential just to achieve some particular policy or political aim of the current administration or political leadership at the agency. This was certainly not true at all agencies, but the view was more widespread than we had anticipated based on the scholarly literature. As we discuss further below, "policymaking" could also just mean setting one policy as to novel or recurring issues in the agency's adjudication system—as opposed to more political or substantive policy-oriented decisions—and the agency officials interviewed largely agree that sort of policymaking is a core reason for designating a decision as precedential.

Finally, there appears to be no theory of stare decisis in agency adjudication. In other words, neither the scholarly literature nor the agencies themselves seem to have given much thought to when, and under what circumstances, a prior precedential decision should be overruled. The one major exception, which we view as different in kind, is that agencies have thought extensively about the need to revisit agency precedent in light of intervening statutory, regulatory (i.e., rulemaking), or judicial developments.

As detailed in Part I.A, this subject has received extensive attention in the literature and by judges in the context of federal courts. To be sure, the theory of stare decisis for agency adjudication would no doubt differ from that of Article III federal courts. Federal agencies, after all, are more politically accountable than Article III courts, with the agency head nominated by the President and confirmed by the Senate as well as removable (usually at will, sometimes for cause) by the President. But that does not mean stare decisis should have no pull in agency adjudication. For instance, one could imagine that an agency head may consider the reliance interests engendered by the prior precedent as a reason not to overturn it—or to overturn it more narrowly. Or perhaps an agency head may consider congressional acquiescence an important factor when overturning a longstanding agency precedent against which Congress has legislated. We take no position in this Report on what the theory should be, but merely flag this finding for future scholarly inquiry.

With those preliminary observations made, we turn to the reasons for precedential decisions in agency adjudication, based on a review of the literature

and our study conducted for this Report. These objectives are presented in no particular order.

1. *Policymaking*

In the judicial context, the "creation and refinement of law" is often proffered as a core rationale for appellate review.[61] In the agency adjudication context, the literature and judicial precedent focus extensively on the somewhat analogous function of regulatory policymaking. Ever since the Supreme Court announced in *SEC v. Chenery* (*Chenery II*) that an agency has the discretion to make policy through rulemaking or adjudication[62] there has been a long history of agency heads—as well as intermediate review bodies—using precedential decisions to establish or further develop policy for the agency as a whole. Scholars have long questioned the wisdom of *Chenery II*, especially when it comes to retroactive policymaking.[63] Yet others have defended it, emphasizing that "developing policy through case-by-case adjudications—akin to courts' development of the common law—can offer significant benefits over informal rulemaking, both to agency policymakers and the public."[64]

The policymaking objective of precedential decisions may be framed in terms of political accountability, in that the political leadership of the agency should be able to set the policy that binds the entire agency via adjudication (and not just rulemaking).[65] In that sense, it reflects Professor Cass's "political model" for administrative action.[66] But as noted above, the agency leaders surveyed for this study added important nuance to the role of agency precedent as policy. For many of them, the use of precedential decisions is not usually about implementing the presidential administration's policy preferences in a *Chenery*

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[61] Chad M. Oldfather, *Error Correction*, 85 IND. L.J. 49, 49 (2010) ("Most depictions of appellate courts suggest that they serve two core functions: the creation and refinement of law and the correction of error.").

[62] Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 203 (1947) ("There is thus a very definite place for the case-by-case evolution of statutory standards. And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.").

[63] *See, e.g.*, Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 940 (2021) (arguing that in some circumstances agency policies made via adjudication should not receive *Chevron* deference); Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against* Chevron *Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1202–03 (2021) (arguing that major immigration policy is better made through rulemaking than adjudication). There is ample scholarship supportive and critical of agency policymaking by adjudication. *See, e.g.*, M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1396–97 (2004); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 922 (1965).

[64] Todd Phillips, *A Change of Policy: Promoting Agency Policymaking by Adjudication*, 73 ADMIN. L. REV. 495, 498–99 (2021).

[65] *See* Walker & Wiener, *supra* note 8, at 13 (discussing the political accountability rationale for agency appellate systems).

[66] *See* Cass, *supra* note 57.

*II* lawmaking fashion. Instead, it is a most modest form of policymaking: gap filling in the interstices of the statutes and regulations to address novel and recurring issues in administration. This type of policymaking addresses a critical problem with administrative action: "the failure to develop standards sufficiently definite to permit decisions to be fairly predictable and the reasons for them to be understood."[67]

2. *Consistency*

This naturally leads to a second objective for precedential decisions: inter-decisional consistency. This fairness concern of ensuring similarly situated individuals are treated the same is one of the core rationales for precedent in the federal courts, as discussed in Part I.A. And it was one of the main objectives mentioned by the agency leaders interviewed for the study. This is, of course, not a new objective in agency adjudication. For instance, Jerry Mashaw's work in the 1980s focused on the related concept of "bureaucratic rationality," which aims "to minimize the sum of error costs and administrative costs."[68] This model facilitates "[g]reater control and consistency" by placing the "overriding value" on "accurate, efficient and consistent implementation of centrally-formulated policies."[69] Much of the agency adjudication scholarship in recent years has focused on the importance of inter-decisional consistency in agency adjudications and how such consistency affects other values, such as public confidence and accuracy.[70] And precedential decision making is one way to help bring more consistency to the adjudication system—both on the hearing and appellate levels.

3. *Predictability*

Although similar to consistency, predictability is perhaps a broader objective for precedential decision making in agency adjudication—just as it is viewed in the federal courts context.[71] It encompasses the fairness concerns about

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[67] HENRY FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS 5–6 (1962).

[68] Jerry L. Mashaw, *Conflict and Compromise Among Models of Administrative Justice*, 1981 DUKE L.J. 181, 185 (1981). *See generally* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 25–26 (1983); Jerry L. Mashaw, *The Management Side of Due Process*, 59 CORNELL L. REV. 772 (1974).

[69] Robert A. Kagan, *Inside Administrative Law*, 84 COLUM. L. REV. 816, 820 (1984).

[70] *See, e.g.*, Michael D. Frakes & Melissa F. Wasserman, *Patent Trial and Appeal Board's Consistency-Enhancing Function*, 104 IOWA L. REV. 2417, 2421–23 (2019) (arguing that argued that inter-decisional inconsistency can be evidence of hearing-level adjudicators committing routine errors and can erode public confidence that the adjudication system is fair and nonarbitrary); David Hausman, *The Failure of Immigration Appeals*, 164 U. PA. L. REV. 1177, 1181 (2016) ("Uniformity is both a goal of appeals processes and an indication that they are functioning properly."); Richard J. Pierce, Jr., *Political Control Versus Impermissible Bias in Agency Decisionmaking: Lessons from* Chevron *and* Mistretta, 58 U. CHI. L. REV. 481, 510 (1990) (arguing that consistency can serve as a proxy for accuracy, apart from whatever due-process norms the former serves).

[71] *See* Part I.A *supra*.

similarly situated individuals, and about regulated individuals ability to rely on prior decisions. It also concerns providing an expedient intra-agency binding answer to novel legal and policy issues, such that regulated individuals can order their affairs around that precedent. Another way to frame this predictability rationale is in terms of "error prevention"—"inducing trial court judges to make fewer errors because of their fear of reversal."[72] The threat of further review may well encourage the hearing-level adjudicators to avoid errors in the first place. Designating an appellate decision as published could send a louder and more public message to hearing-level adjudicators.

4. *Efficiency*

Efficiency, a fourth rationale for precedent in the federal courts context, is also implicated by precedential decision making in agency adjudication. To be sure, Justice Cardozo's efficiency argument—that "the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case"[73]—may not be as compelling in the agency context. After all, as noted above, agencies do not seem to have developed a theory of stare decisis, such that agency leadership may feel far less pressure to preserve a prior administration's precedent with which she disagrees. But agency precedential decisions still lead to more efficient administration. They bind the hearing-level adjudicators to one particular approach, and they bind the appellate adjudicators to the same absent their discussion to override prior precedent. Especially in a high-volume adjudication system, the efficiency gains at the hearing level from binding precedent can be enormous.

5. *Rule of Law*

In addition to consistency, predictability, and efficiency, the fifth main reason in the literature for precedent in the federal courts is the appearance of justice, in that adjudication decisions are governed by the rule of law and not just the personal policy preferences of the particular adjudicators.[74] Again, these rule-of-law values may be different in the agency adjudication context than in the federal court context, in light of the fact that new agency leadership may depart from prior precedent due to a change in presidential administration. But the agency interviews conducted for this study underscored the importance of precedential decisions for rule of law values. This includes sending a message to the public, and the regulated individuals in particular, that they will be treated the same as those in the published decisions—that the agency will be bound by those decisions and the reasons articulated in them.

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[72] Steven Shavell, *The Appeals Process as a Means of Error Correction*, 24 J. LEGAL STUD. 379, 425–26 (1995).

[73] Rehnquist, *supra* note 18, at 348 (quoting CARDOZO, *supra* note 17, at 149); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 854 (1992) ("With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it.").

[74] *See* Part I.A *supra.*

5. *Management of Hearing-Level Adjudicators*

By statutory and regulatory design, hearing-level adjudicators usually enjoy a substantial level of decisional independence from political leadership and other high-level policymakers within the agency. This is a critical feature of agency adjudication. Yet the agency as a whole must ensure that the other values of agency adjudication are advanced, including the values of policymaking, consistency, predictability, efficiency, and rule of law already discussed. Precedential decisions help the agency manage the hearing-level adjudication program, by expeditiously intervening to provide binding rules for hearing-level proceedings. Indeed, this management function was one of the most common objectives offered by the agency leaders during our interviews.

6. *Judicial Deference and Dialogue*

Judicial review also shapes why agencies publish precedential decisions. The obvious reason is that in many adjudicative contexts the formality of a precedential decision results in more deferential judicial review.[75] Hearing-level adjudicative decisions do not receive *Chevron* deference for agency statutory interpretations, and the Supreme Court has increasingly signaled the importance of agency-head final decision making authority to receive deference for agency statutory and regulatory interpretations.[76] Judicial deference was a recurring theme in the interviews conducted for this Report.

But the agency officials broadened the judicial review rationale for precedential decisions in adjudication beyond just deference. Similar to the findings in the Walker-Wiener ACUS report on agency appellate systems,[77] the agency interviewees underscored that their agency is in a continuing dialogue with federal courts. When decisions are remanded to the agency, they deliberate internally on next steps, including how the agency should respond in that particular case and whether the agency should acquiesce to that judicial decision in other circuits where the judicial decision is not binding. Designating agency decisions on remand as precedential, the interviewees noted, helps facilitate a dialogue between the agency and courts on the issue. And more generally, the interviewees underscored that a precedential decision is often a useful tool to educate the courts more generally on the agency's position on a matter of importance to its regulatory scheme.

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[75] *See generally* Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833 (2001).

[76] *See, e.g.*, Kisor v. Wilkie, 139 S. Ct. 2400, 2416 (2019) ("To begin with, the regulatory interpretation must be one actually made by the agency. In other words, it must be the agency's 'authoritative' or 'official position,' rather than any more ad hoc statement not reflecting the agency's views.").

[77] Walker & Wiener, *supra* note 8, at 39–40.

7. *Public Education*

When it comes to the educational aim of precedential decisions, many agency officials interviewed—especially those working in high-volume adjudication systems—also mentioned the importance of publishing decisions for the public and, in particular, for regulated parties.[78] This public education objective is particularly important in high-volume adjudication systems, where thousands of decisions are issued each year and many individuals navigate the adjudication process without legal representation. Designating a select number of decisions as precedential helps educate those individuals about the agency's most important rulings.

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Some of these objectives are overlapping, and yet these seven objectives are likely also not exhaustive. But they struck us as the main objectives for precedential decision making based on our review of the literature and our interviews with agency officials.

## II. STUDY METHODOLOGY

We began by reviewing the research materials underling the report for *Agency Appellate Systems*, including the ACUS database on adjudication maintained by Stanford Law School.[79] We then reviewed the limited academic literature on precedential decision making, rules of practice governing the federal courts' use of precedential decision making and the associated literature, and every ACUS recommendation that mentions precedential decision making. (The relevant recommendations are discussed in Part I.D.)

Based on this research, we selected as case studies the dozen appellate systems used in *Agency Appellate Systems*, plus several others we thought would make the Report still more representative. A system may cover all the cases a particular agency may adjudicate or a subset of them. (At a few agencies, we studied more than one appellate system.) The twenty adjudication systems we studied are:

- Department of Agriculture: Office of the Judicial Officer
- Environmental Protection Agency (EPA): Environmental Appeals Board
- Equal Employment Opportunity Commission (EEOC): Federal Sector

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[78] *Cf.* 8 C.F.R. § 1003.1(g)(vi) (BIA) (identifying as among the criteria for designating a decision as a precedential its "general public interest").

[79] *See* STANFORD LAW SCHOOL, ADJUDICATION RESEARCH, http://acus.law.stanford.edu. Of particular relevance are two of the twelve tables (which the database calls "reports") on the homepage: "Types and Hearings and Appeals" and "Ability to Appeal."

- Federal Energy Regulatory Commission
- Department of Health and Human Services (HHS): Medicare Appeals Council & Departmental Appeals Board
- Department of Homeland Security (DHS), U.S. Citizen and Immigration Services (USCIS): Administrative Appeals Office
- Department of the Interior: Interior Board of Indian Appeals and Interior Board of Land Appeals
- Department of Justice (DOJ), Executive Office of Immigration Review (EOIR): Board of Immigration Appeals (BIA) (and Attorney General Review)
- Department of Labor (DOL): Administrative Review Board, Benefits Review Board, and Board of Alien Labor Certification Appeals
- Merit Systems Protection Board (MSPB)
- National Labor Relations Board (NLRB)
- Patent & Trademark Office (PTO): Patent Trial and Appeal Board (PTAB)
- Securities and Exchange Commission (SEC)
- Social Security Administration (SSA): Appeals Council
- Department of Transportation (DOT): Federal Aviation Administration (FAA)
- Department of Veterans Affairs (VA): Board of Veterans' Appeals (BVA)

In compiling this list, we sought to include well-known appellate systems representative of the predominate structures of appellate review identified in Part II.B, both systems within executive departments and those within independent (or freestanding) agencies, both regulatory and benefits-conferring adjudication systems, and so forth.[80] We placed particular emphasis on case volume in our selections. The selected systems, for the most part, adjudicate a relatively large number of cases, and several of them (the SSA Appeals Council, Board of Veterans' Appeals, and Board of Immigration Review) are the government's highest volume adjudication systems. Each of the government's so-called "mass adjudication systems" is represented here.

For each system, we prepared a written overview that begins by briefly describing the cases it adjudicates and how its appellate process works. The overview then addresses whether the system uses precedential decision making

[80] Our list overlaps considerably with the list of twelve agencies/programs Professor Asimow singled out for detailed review in his adjudication studies for ACUS. *See* Asimow, *Evidentiary Hearings*, supra note 6; *see also* ASIMOW, ADJUDICATION SOURCEBOOK, *supra* note 45, at 107–82.

and, if it does, asks the following questions: In what respect does it use precedential decision making? By what procedures and processes? And under what legal authority? The overview also addresses the form precedential opinions take, where and how they are published or posted on agency websites, and techniques agencies use (including indexes, digests, summaries, and the like) to communicate them internally and externally.

It is important to emphasize that the overviews are based primarily on publicly available sources (statutes, regulations, posted decisions, and explanatory materials on agency websites, and so forth), as the citations in the overviews reflect. We did supplement and modify the overviews after conducting the interviews noted below. This was mostly to correct errors and account for features of the system that were not explicit in or obvious from publicly available sources but are known to practitioners in the system. None of the overviews contains confidential information.

The system overviews appear in Appendices A–Q (in the same order in which they are listed above). They are posted on ACUS's website. We usually cite to the overviews in this Report rather than the original sources unless the latter requires emphasis.

To better understand how these appellate systems operate in practice, we conducted semi-structured interviews with at least one high-ranking official at each agency—in most cases the head of the system.[81] In total, we interviewed more than two dozen agency officials. The interviews were conducted remotely.

To prepare for the interviews, we constructed a standard script that accounted for the topics and structure of Part III of this Report (Findings). We used the script during the interviews, but we also asked numerous follow-up questions tailored to the particular system and the issues we identified when we prepared a draft of the overview for the system. Many of those questions centered around why the subject agency does or does not use precedential decision making and, for agencies that treat some decisions as precedential and others as non-precedential, what criteria drive the choice.

We told interviewees that their specific responses would not be attributed to them or their agency. That allowed for the candid responses on which this Report is partly based. The exception would be for responses that identified what interviewees considered best practices for consideration by other agencies. Our findings (Part III) and recommendations (Part IV) are written accordingly. That means readers will find some unattributed comments in the Report.

It should go without saying that there are necessarily significant methodological limitations in our study, as there are with any study of this sort. As noted above, our findings and recommendations are based largely on the existing literature, publicly available sources, and interviews with high-ranking

[81] We were not able to schedule an interview with DOJs Board of Immigration Appeals, but two of us previously explored the agency's use of precedential decision making for our ACUS report on agency appellate systems. *See* Walker & Wiener, *supra* note 8, at 20–21.

officials in each adjudication program. Publicly available sources often do not reflect the realities of administrative practice. Interviews of high-ranking agency officials can shed important light on those realities. But interviews are necessarily limited by the questions asked, the perspectives and knowledge of the interviewees, the amount of time officials can allot to interviews, and other explicit and implicit factors that influence information gathering via semi-structured interviews. Finally, while this Report is based on a relatively large number of case studies that is as representative as possible, we caution readers about extending our generalizations to adjudication systems not reviewed here. Variation and anomalies abound throughout the administrative state, especially when it comes to agency adjudication systems.

## III. FINDINGS

Based on our interviews with agency officials and review of publicly available sources on the twenty agency appellate review programs detailed in Part II, we organize our findings in five main subparts. We first detail the use of precedential decision making across agencies (Part III.A), followed by the standards and practices for designating opinions as precedential (Part III.B) and the process of drafting and the format and structure of precedential decisions (Part III.C). We then focus on how precedential decisions are made publicly available (Part III.D) as well as disseminated and implemented internally (Part III.E). Part III concludes with some observations on judicial review and consistency (Part III.F). Following Part III, we detail our recommendations in Part IV.

### A. The Use of Precedential Decision Making Across Agencies

This subpart addresses (1) how agencies define "precedent"; (2) the prevalence of precedential decision making among the appellate systems we studied; (3) the sources of law governing the use of precedential decision making. This subpart concludes with a summary table.

1. *Defining Precedential Decision Making*

A definition of "precedent" will be useful at the outset. The word can be used in different ways. By *precedential decisions*, we mean agency appellate decisions that announce or establish rules of decisions that, unless and until overruled with an adequate explanation,[82] bind a system's own appellate adjudicators,

[82] For a slightly different characterization of precedent that accords with ours in substance, see KRISTIN HICKMAN & RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE 436–37 (6th ed. 2013) ("[W]henever an agency generalizes in an opinion, it formulates what it is often described as a rule. Yet that kind of legal rule may be freely overruled . . . . So legal rules based on an agency's adjudicative precedents are not usually binding on the agency, for the agency, like a court, may overrule its precedents and apply a new legal rule . . . to the facts of the overruling case, so long as the agency provides an adequate explanation for its decision." (citing Atchison, Topeka & Santa Fe R.R. Co. v. Wichita Bd. of Trade, 412 U.S. 800 (1973))).

lower-level adjudicators, or other agency officials when they address the same issues in subsequent, unrelated cases.[83] They may also in some cases bind officials at other agencies that share some coordinated or related regulatory responsibility, as DOJ and DHS do in the immigration context.[84]

Of course, precedents may also be said to be binding on parties who are not involved in an adjudication. That is, they may establish or announce rules of conduct—in short, law—to which regulated parties must conform their conduct or risk an enforcement action, just as a statute or substantive legislative rule might do. But there is an important difference between an adjudicative precedent and a legislative rule. When an agency seeks to apply a rule embodied in an adjudicative precedent to a party in an unrelated case, the agency must afford the party a meaningful opportunity to argue that the precedent does not apply or should be overruled. The agency need not do so in the case of a legislative rule.[85]

The few agency procedural rules that define precedent or precedential do so in ways make bindingness their critical feature. The MSPB's rules, which are among the most explicit, provide a good example. They define precedential decisions by contrasting them with non-precedential "orders" (which usually take the form of opinions, not summary orders). Such orders "are not binding on the Board or its administrative judges in any future" unrelated cases. Neither the Board nor the judges are "required to follow or distinguish them in future decisions."[86] Another example is provided by the Department of the Interior's Board of Land Appeals, whose website page says that the Board need not "follow" or "distinguish" non-precedential decisions (called "dispositive orders").[87]

As suggested above, "precedent" can be used in ways that do not denote bindingness. A few agencies designate some decisions as important or noteworthy but not as precedential in the way used in this Report—that is, as binding. This might be thought of as an intermediate designation. The best example is PTAB. It designates some decisions as non-precedential,

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[83] *Cf.* Cal. Government Code § 11425.60.

[84] *See* App. G (DHS–USCIS); App. I (DOJ–BIA). *See generally* Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 28 HARV. L. REV. 805 (2015).

[85] *See, e.g.*, PETER L. STRAUSS ET AL, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 263–264 (12th ed. 2018). [Case citations forthcoming.] On an agency's obligation to afford a party the opportunity to urge reconsideration an agency position set forth in a non-legislative rule, see Admin. Conf. of the U.S., Recommendation 2017-5, *Agency Guidance Through Policy Statements*, 82 Fed. Reg. 61,734 (Dec. 29, 2017); *see also* Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38927 (Aug. 8, 2019). [Parentheticals and pin citations forthcoming.]

[86] 5 C.F.R. § 1201.117(c)(2). *See also, e.g.*, Patent Trial & Appeal Bd., Standard Operating Procedure 2 (Revision 10) 3 (2018) (non-precedential decisions are "non-binding authority"), https://www.uspto.gov/patents/ptab/procedures/revisions-standard-operating.

[87] Dept. of Interior, *IBLA Facts*, https://www.doi.gov/oha/organization/ibla/faqs.

"informative," or "precedential."[88] PTAB rules provide that "informative" designation may be appropriate when, among other criteria, a decision sets forth "norms on recurring issues" or provides "guidance on issues of first impression, procedures and practices," or on "issues that may develop through analysis of recurring issues in many cases."[89] Informative decisions, the rules provide, "should be followed in most cases, absent justification," but they are not binding.[90]

USCIS is another example. The process to designate a decision as precedential at USCIS is cumbersome and lengthy, including approval by both the USCIS Director at DHS and the Attorney General at the Justice Department.[91] But USCIS has created a middle-ground approach—called "adopted decisions"—between non-precedential and presidential. Adopted decisions must be approved by the USCIS Director after a more expedited review process within the agency and sometimes informal feedback from other agencies and components at DHS (outside of USCIS). Especially in high-volume adjudication systems where the precedential decision-making process is too resource-intensive to use regularly, a middle-ground designation is an effective way to educate the public (and the regulated community) about which agency decisions are most important.

2. *Prevalence of Use Among Studied Agencies*

Nearly all the appellate systems we reviewed treat some or all of their decisions as precedential. There are two prominent examples among the appellate systems we studied that do not accord any precedential status to any decisions: the VA's Board of Veterans' Appeals and SSA's Appeals Council. All decisions of the Board and Appeals Council are non-precedential—in the case of the Board, by explicit VA rule; in the case of the Appeals Council, by longstanding practice.[92] (Board decisions are posted on the Board's website (with certain redactions); Appeals Council decisions are not posted on its website or otherwise made publicly available.[93]) It is significant that these systems constitute two of the government's three highest volume appellate systems. The

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[88] *See* App. M (PTO–PTAB).

[89] Patent Trial & Appeal Bd., Standard Operating Procedure 2 (Revision 10) 9 (2018), https://www.uspto.gov/patents/ptab/procedures/revisions-standard-operating.

[90] *Id.* at 11.

[91] *See* App. G (DHS–USCIS)

[92] *See* App. Q (VA–BVA); App. O (SSA). The VA regulation ("Non-precedential nature of Board decisions") provides: "Although the Board strives for consistency in issuing its decisions, previously issued Board decisions will be considered binding only with regard to the specific case decided. Prior decisions in other appeals may be considered in a case to the extent that they reasonably relate to the case, but each case presented to the Board will be decided on the basis of the individual facts of the case in light of applicable procedure and substantive law." 38 C.F.R. § 20.1303. Under VA regulations, the VA's general counsel may issue "precedential decisions," but these are a form of rules, not adjudicative decisions.

[93] *See* App. Q (VA–BVA); App. O (SSA).

third highest volume appellate system, DOJ's Board of Immigration Appeals (BIA), does use precedential decision making.[94] Its regulations are noted below.

Both the Board of Veterans' Appeals and Appeals Council rely on rules rather than adjudicative decisions to direct and guide appellate and lower-level adjudicators in furtherance the objectives that underlay precedential decisions (including consistency across decisions). The Appeals Council is especially noteworthy in this regard. Although SSA regulations provide for the issuance of precedential decisions,[95] the Appeals Council has not issued any such decisions at least for several decades. The Appeals Council relies instead on non-legislative rules (i.e., policy statements and interpretive rules) and various bureaucratic mechanisms (e.g., training) to serve the objectives of precedential decision making, including inter-decisional consistency and compliance with agency policy.[96]

The Appeals Council is especially notable and somewhat unique in this regard. A comment on its practice will help illuminate the relationship between rules (especially non-legislative rules, often known just as guidance documents) and precedential decisions—in particular, how appellate *adjudicators* might use rules as surrogates for precedential decisions, and vice versa. We emphasize "adjudicators" here because the rules in question are promulgated by the appellate system itself rather than the agency more generally.

The Appeals Council relies heavily on non-legislative rules when reviewing decisions of, and providing direction to, SSA's many ALJs.[97] These rules include the *Hearings, Appeals, and Litigation Law Manual* (HALLEX), which include

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[94] *See* App. I (DOJ–BIA).

[95] *See* 20 C.F.R. § 402.35(4).

[96] These rules include the Hearings, Appeals, and Litigation Law Manual (HALLEX), Social Security Rulings, and Appeals Council Interpretations. Appeals Council Interpretations, for instance, "[r]esolve conflicts and inconsistencies in adjudicatory policy," and "[e]stablish precedents at the hearings and appeals levels of adjudication upon which claimants and their representatives may rely." HALLEX § II-5-0-1 (Introduction to Appeals Council Interpretations), https://www.ssa.gov/OP_Home/hallex/II-05/II-5-0-1.html. The Interpretations thus serve much the same function precedential decisions, and in fact may offer a more concise and simple way to establish and communicate authoritative interpretations and policies than through precedential decisions in a. high-volume system in which adjudicators may not have time to extract holdings from long and complicated decisions. One important way these non-legislative rules differ from precedential decisions or legislative rules is that, though they are considered binding on SSA adjudicators, they do not have the force of law and so (according to SSA) are not enforceable on judicial review. *See* SSA, Social Security and Acquiescence Rulings, https://www.ssa.gov/OP_Home/rulings/rulings-pref.html ("Although Social Security Rulings do not have the force and effect of the law or regulations, they are binding on all components of . . . SSA, . . . and are to be relied upon as precedents in adjudicating other cases."); *see also* Note, Frederick W. Watson, *Disability Claims, Guidance Documents, and the Problem of Non-Legislative Rules*, 80 U. CHI. L. REV. 2037 (2013). Precedential decisions would normally be characterized as binding agency law, although that characterization elides some complicated issues.

[97] *See* App. O (SSA).

what are known as Appeals Council Interpretations. They begin by identifying discrete interpretative questions that have arisen in disability adjudications—precisely the sort of question a precedential decision might address—and then provide a concise answer and the legal basis for it. Most are just a page or so. As SSA explains, the Interpretations "[p]romote consistency and uniformity," "[r]esolve conflicts and inconsistencies in adjudicatory policy," and "[e]stablish precedents at the hearings and appeals levels of adjudication upon which claimants and their representatives may rely."[98] Appeals Council Interpretations thus serve much the same function as a precedential decision, and in fact may offer a more concise and simple way to establish and communicate authoritative interpretations than through adjudicative decisions. This might be useful in a high-volume system in which adjudicators may not have time to extract holdings from long and complicated decisions.

One important way Appeals Council Interpretations differ from a precedential adjudicative decision or a legislative rule is that, though they are considered binding on SSA adjudicators, they do not have the force of law (at least according to SSA). That means they may not be enforceable on judicial review.[99] Precedential decisions would normally be characterized as binding agency law, although that characterization elides some complicated issues.[100]

3. *Sources of Law Governing Precedential Decision Making*

While Congress presumably has the authority to dictate whether and how agencies use precedential decision making, we are not aware of any agencies at which it has done so. It certainly has not done so with any of the studied agencies. Instead, the agency head relies on the adjudicatory and implementation authority delegated to the agency head in the agency's governing statute to derive a broad statutory authority to issue precedential decisions. The use of precedential decision making at agencies is governed by, if it is governed by any public legal authority at all, agency rules of varying level of formality.

Many of the studied agencies have no rules—not at least publicly available rules—that address precedential decision making in any respect. That includes,

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[98] HALLEX § II-5-0-1 ("Introduction to Appeals Council Interpretations"), https://www.ssa.gov/OP_Home/hallex/II-05/II-5-0-1.html.

[99] SSA makes that point explicitly with respect to Social Security Rulings. *See* Soc. Sec. Admin., *Social Security and Acquiescence Rulings*, https://www.ssa.gov/OP_Home/rulings/rulings-pref.html ("Although Social Security Rulings do not have the force and effect of the law or regulations, they are binding on all components of . . . SSA, . . . and are to be relied upon as precedents in adjudicating other cases.") The question of HALLEX's legal status—in particular, whether it confers judicial enforceable rights on the public, despite SSA's disclaimer—has occasioned debate on judicial review of SSA's decisions. *See, e.g.*, Note, Frederick W. Watson, *Disability Claims, Guidance Documents, and the Problem of Non-Legislative Rules*, 80 U. CHI. L. REV. 2037 (2013).

[100] *Cf.* Matthew C. Stephenson, *Embedded Rules*, 39 YALE J. ON REGULATION BULLETIN 59 (2021).

most fundamentally, whether the agency even treats all or some of its decisions as precedential. Of the agencies that treat all (or nearly all) their decisions as precedential, none reflects that in their publicly available rules. Interviews confirmed that these agencies have no undisclosed rules on the subject.

Of the eight appellate systems among the studied agencies that use a two-tier approach, five have a rule that addresses some aspect of precedential decision making. Only two of them, the PTAB and the Board of Immigration Appeals, identify their criteria for designations. PTAB and the BIA are also alone among the systems reviewed in identifying their processes for making designations.[101]

Much agency practice, in short, is not reflected in agency rules, let alone C.F.R.-codified procedural rules. The role of precedent in an agency system at many agencies becomes largely a matter of customary and historical practice.

The only necessary qualification here is that the issue of precedent may be addressed in agency decisions, which can of course be an important source of law. This can happen in one of three ways: First, as noted below, an agency might consistently label non-precedential decision as such on their face. Second, an agency might explicitly disclose in some decisions how it addresses precedent. An agency might say in decision, for instance, that its conclusion follows from another decisions that it explicitly characterizes as binding precedent. Or an agency might have a (usually small) body of decisions that explain how it treats precedent.[102] And third, the use of precedential decision making may be implicit in agency decisions. A decision that says "case X" supplies the rule of decision would fall into this third category.[103]

## B. Standards and Practices for Designating Opinions as Precedential

This subpart addresses the standards and practices for designating opinions as precedential, including: (1) the choice between treating all decisions as precedential or some as a precedential and others non-precedential; (2) the criteria agencies use to decide when to issues precedential decisions (3) the citation of non-precedential decisions; and (4) the process for overruling a prior agency precedent. This subpart concludes with a table, which summarizes the key findings from Parts III.A and III.B.

### 1. *Two Approaches to Precedential Decision Making*

Appellate systems that use precedential decision should be divided into two categories: those that treat all (or nearly all) their decisions as precedential—invariably without an explicit designation—and those that, usually by explicit designation, treat only selected decisions as precedential. The latter systems

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[101] *See* App. M (USPTO–PTAB); App. I (DOJ–BIA).

[102] *See, e.g.,* App. B (USDA); App. J (DOL: Administrative Review Board).

[103] *See, e.g.*, App. L (NLRB).

generally use the "precedential"/"non-precedential" terminology, but some use other terminology—for instance, "published"/"non-published."[104] ("Published"/"non-published" can usually be used synonymously with "precedential"/"non-precedential," as in most courts of appeals, but there are some exceptions.[105] "Precedential"/"non-precedential" is the better generic term, especially since "published" is often a holdover from a pre-website era in which printed reporters were more commonly used.) Whatever terminology is used, systems that designate some decisions as precedential and others as non-precedential can be called two-tier systems. About half of the appellate systems we studied fall into the two-tier category.

Of the agencies that treat all (or nearly all) of their decisions as precedential, a few distinguish between types of precedential decisions based on one factor or another. An example is the EPA's Environmental Appeals Board, which treats all its decisions as precedential, but only designates some as "published," based on the uniqueness or significance of the issues the decisions address. (Here is an example of "published" and "precedential" not being synonymous.) Another example is the EEO's Federal Sector Office. Most decisions are decided, under an administrative delegation of final decision-making authority from the full Commission, by the Office's Director; a small number are decided by the Commission, usually when an emerging issue has arisen. Only the name of the signatory at the bottom of decisions indicates which is which. Although no rule distinguishes between the two types of decisions, the Office appears to accord Commission decisions some unspecified degree of greater weight when deciding unrelated cases.[106]

When it comes to categorizing agency appellate systems, a caveat is necessary: Even a system that can be said to treat all its decisions as precedential may treat some discrete classes of decisions as non-precedential. Examples include summary orders—approving a settlement, making final an un-appealed hearing level decision, addressing non-merits procedural matters, declining to grant discretionary (or certiorari-like) review, and so forth—unaccompanied by an opinion or more than a brief explanation.[107] It is difficult to imagine in many cases how a summary order could even be put to precedential use, since it supplies no or little explanation for its basis. We generally do not characterize systems that use summary orders as two-tier.

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[104] *See, e.g.*, App. J (DOL: Benefits Review Board).

[105] See App. L (NLRB) (noting that in a discrete category of cases, a decision can be published in the NLRB's official report, but not, under NLRB decisional law, have any precedential effect).

[106] The situation at the EEOC should be distinguished from that of systems in which precedential decisions may emanate from an intermediate appellate body or, following additional intra-agency review, the agency head. The latter's decision will generally supersede the former as agency precedent.

[107] *See, e.g.*, App. L (NLRB).

2. *Reasons for Use of Precedential Decisions and Criteria for Designation*

Few agencies have publicly available rules or guidelines that disclose the criteria they use to decide whether to designate decisions as precedential. One notable exception is PTAB.[108] Moreover, during our interviews, a recurring theme is that many agencies did not have a clear set of criteria for designation. Instead, when the agencies did have reasons or criteria, they were based more on intuitions and institutional history and, as discussed below, seemed to align with the judicial model—i.e., the criteria developed in the federal courts of appeals.

Interviewees at agencies that treat all decisions as precedential generally did not articulate a reason for doing so. In most cases, the practice developed many years ago—usually when the agency first began deciding cases. Current adjudicators just inherited a long-standing practice. A common response to the question, "why do you treat all decisions as precedential?" was, "we've always done it that way." When they did provide reasons, those reasons resonated in rule-of-law values, such as the need for inter-decisional consistency, binding nature of legal decisions, and reasoned decision making.

According to interviewees at agencies with two-tier systems, the main reason for treating decisions as precedential was largely the same: to ensure consistency or uniformity among decisions—both decisions of the appellate adjudicators and those of hearing level-decision makers they review, as well in some cases other agency officials (often front-line enforcement officials)—and thereby enhance the fairness, integrity, and rule-of-law characteristics of the adjudicative system. As further detailed in Part I.D, other reasons agency officials provided include to judicial review (both in terms of judicial deference and agency–court dialogue) and to help educate the public—and the regulated in particular—about which agency decisions matter the most.

The inter-decisional consistency objective, in turn, largely informs the criteria (in a few cases, as noted below, embodied in a rule) that agencies use when designating decisions as precedential or non-precedential. Those criteria are fairly uniform across agencies, even if some agencies formulate them a bit differently or put greater emphasis on some rather than others. These criteria include the need to address novel questions of law and issues of first impression; clarify points of law that have become sources of confusion among adjudicators

[108] PTAB Standard Operating Procedure 2 (Rev. 10) II.A. ("The Precedential Opinion Panel generally will be used to establish binding agency authority concerning major policy or procedural issues, or other issues of exceptional importance in the limited situations where it is appropriate to create such binding agency authority through adjudication before the Board. For example, and among other things, the Precedential Opinion Panel may be used to address constitutional questions; important issues regarding statutes, rules, and regulations; important issues regarding binding or precedential case law; or issues of broad applicability to the Board. The Precedential Opinion Panel also may be used to resolve conflicts between Board decisions, to promote certainty and consistency, or to rehear any case it determines warrants the Panel's attention."), https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf. *See also* 8 C.F.R. § 1003.1(g) (identifying criteria for BIA's designation of precedential decisions).

and parties; resolve conflicts among decisions or otherwise harmonize disparate decisions dealing with the same issues; overrule or modify prior precedential decisions; account for changes in the law, whether arising from new rules, new statutes, or new judicial decisions; and provide guidance to adjudicators and other agency officials. One agency's rules, the BIA's, adds another criterion that does not appear to be employed at other agencies: whether a case "warrants" precedential designation "in light of other factors that give it general public interest."[109]

3. *Citation of and Reckoning with Non-Precedential Decisions*

As noted in the Introduction, the *Federal Rules of Appellate Procedure* permit the citation of non-precedential decisions. Circuit rules may not provide otherwise.[110] We only identified one agency—the MSPB—whose rules address the subject. MSPB's rules provide that parties may cite non-precedential decisions, but that neither the board nor its administrative judges must "distinguish" them.[111] The other studied agencies' practices all appear to be in accord with the MSPB rule.[112]

It is common, at the studied agencies, for at least private parties to cite non-published decisions, including at the BVA, whose rules designate all decisions as non-precedential. When a party cites a non-precedential decision in a brief, some agencies will address it in their decisions. The most common way to do so, as interviewees confirmed, is to distinguish the decisions on its facts.

A few agencies treat non-precedential decisions as "persuasive" even if they are not binding. Terminology varies. An example is DOL's Board of Alien Labor Certification Appeals (BALCA). On the model of the courts of appeals, BALCA sits in panels of three members (each an ALJ). Cases may also be heard en banc. While only en banc panel decisions are precedential, BALCA considers non-precedential panel decisions to be persuasive. A BALCA panel decision will generally take note of an earlier panel decision on the same subject. When a panel decides not to follow another panel's decision, it will often note that explicitly and explain its disagreement with the decision.

4. *Process of Overruling a Precedential Decision*

As noted in Part I.D, neither the publicly available sources reviewed nor the information gathered during the interviews revealed any sort of theory of stare decisis, in terms of what criteria agencies use when deciding whether to overturn prior agency precedent. At virtually all studied agencies, the answer was that the agency precedent is binding until the agency overrules it.

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[109] 8 C.F.R. § 1003.1(g)(vi).

[110] *See* Fed. R. App. P. 32.1.

[111] 5 U.S.C. § 1201.117(c)(2).

[112] *But cf.* Dep't of the Interior, *IBLA Facts* (implying that only precedential decisions may be cited), https://www.doi.gov/oha/organization/ibla/faqs.

To be sure, agencies have thought extensively about the need to revisit agency precedent in light of intervening statutory, regulatory (i.e., rulemaking), or judicial developments. And one agency—PTAB—has published a rule for de-designating precedential decisions that provides for de-designation when, "for example because it has been rendered obsolete by subsequent binding authority, is inconsistent with current policy, or is no longer relevant to Board jurisprudence."[113]

But none of the agencies, to our knowledge, have developed criteria similar to the U.S. Supreme Court—one that looks to the administrability of the precedent, the reliance interests implicated, etc.

* * *

The following table summarizes the key findings above, including which agencies use precedential decision making, which ones distinguish between precedential and non-precedential decisions (as opposed to issues all substantive decisions precedential), whether the agency has issued a rule addressing precedential decisions, and whether the agency has published criteria for deciding whether to designate a decision as precedential.

**Summary Table**[114]

| Agency Adjudication System | Uses Precedential Decision Making | Distinguishes Between Precedential and Non-Precedential Decisions | Rule Addressing Precedent | Published Criteria for Precedential Designations |
|---|---|---|---|---|
| Department of Agriculture Judicial Officer | Yes | No | No | No |
| U.S. Citizenship and Immigration Services: Administrative Appeals Office | Yes | Yes; also intermediate "adopted decision" | Yes: C.F.R.-codified rule | No |
| DOJ: Board of Immigration Appeals (and Attorney General Review of Board Decisions) | Yes | Yes | Yes: C.F.R.-codified rule | Yes |
| EEOC | Yes | Yes | No | No |

[113] PTAB Standard Operating Procedure 2 (Rev. 10) IV, https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf.

[114] The information set forth below is drawn from the online Appendixes B–Q except where otherwise noted.

| | | | | |
|---|---|---|---|---|
| EPA: Environmental Appeals Board | Yes | No | No | No |
| Federal Energy Regulatory Commission | Yes | [No] | [No] | [No] |
| Department of Health & Human Services: Department Appeals Board | Yes | No | N/A | N/A |
| Department of Health & Human Services: Medicare Appeals Council | Yes | Yes | [No] | No |
| Department of the Interior: Interior Board of Indian Appeals | Yes | No | No | No |
| Department of the Interior: Interior Board of Land Appeals | Yes | Yes | No | No |
| DOL: Administrative Review Board[115] | Yes | No | No | No |
| DOL: Benefits Review Board | Yes | Yes | No | No |
| DOL: Board of Alien Labor Certification Appeals (Permanent Certification Cases)[116] | Yes | Yes | No | No |
| MSPB | Yes | Yes | Yes: C.F.R.-codified rule | No[117] |

[115] We have not accounted for here discretionary review by the Secretary of Labor provided for in a recent DOL rule, which makes the Secretary's decision "binding precedent" in all cases involving the "same issue." Order 01-2020, Delegation of Authority to the Administrative Review Board, 45 Fed. Reg. 13,186, 13,187 (Mar. 6, 2020).

[116] As in the case of DOL's Administrative Review Board, we have not accounted for here discretionary review by the Secretary provided for in a recent rule that tracks the above-cited rule governing the Board. *See* 29 C.F.R. § 18.95(c)(2)(iii).

[117] Except to provide that a "nonprecedential Order is one that the Board has determined not add significantly to the body of MSPB case law." 5 C.F.R. § 1201.117(c)(2).

| | | | | |
|---|---|---|---|---|
| NLRB | Yes | Yes, at least for certain representation (as opposed to unfair-labor practice cases) in which discretionary review is denied | No[118] | N/A |
| U.S. Patent and Trademark Office: Patent Trial & Appeals Board | Yes | Yes; also intermediate "informative" decisions | Yes ("Standard Operating Procedures" not codified in C.F.R.) | Yes |
| SEC | Yes | No | None | N/A |
| Social Security Administration: Appeals Council | No | N/A | N/A | N/A |
| Department of Transportation | Yes | No | No | No |
| VA: Board of Veterans' Appeals | No | N/A | Yes: C.F.R.-codified rule | N/A |

## C. Process, Format, and Structure of Precedential Decisions

This subpart addresses (1) the process of deciding whether to designate a decision as precedential; (2) the process of drafting precedential opinions and (2) the format and structure of precedential opinions.

1. *Process of Deciding to Designate a Decision as Precedential*

In those adjudication systems where there is discretion whether to issue a precedential or non-precedential appellate decision, the process for deciding whether to designate the decision as precedent varies considerably. At most agencies, as noted in Part III.A.2, the agencies have not published any criteria for designating a decision as precedential. The same is even more true with respect to publishing the process for designating decisions as precedential.

Agency approaches to deciding whether to designate a decision as precedential can be grouped into two large buckets, based on timing. At some agencies, the adjudicators who decide particular cases have the authority to designate decisions as precedential, which they exercise incidental to deciding

[118] An explainer on the NLRB's website does note that the decisions listed as unpublished are non-precedential "except with respect to the parties in the specific case." NLRB, *Unpublished Board Decisions*, https://www.nlrb.gov/cases-decisions/decisions/unpublished-board-decisions.

the case, much like a panel of a federal court of appeals. This practice is most common when the decision-maker is a board or commission.[119]

At other agencies, by contrast, the decision whether to designate an opinion as precedential is made after its issuance by an official other than the issuing adjudicator(s) or the issuing adjudicator(s) joined by other adjudicators in the same office (as when a tribunal sits en banc). For example, USCIS seldom issues precedential decisions because the process is lengthy and resource intensive, requiring signoffs from the DHS General Counsel, the Justice Department's Office of Legal Counsel, and the Attorney General, and then publication by the BIA.[120] Because that is a lengthy and resource-intensive process, USCIS has created a middle-ground opinion category—called "adopted decisions"—that are not precedential decisions binding on agencies or others outside of the USCIS, but do bind the USCIS adjudicators in other cases. These decisions go through an internal review process, with USCIS Director signoff. Other DHS components sometimes also provide informal feedback on draft adopted decisions.

Similarly, in immigration adjudication at the Justice Department, the vast majority of BIA decisions are nonprecedential and unpublished. But the BIA can and does go through an en banc process to select decisions to publish as precedential.[121] At the BIA, a majority of the full Board (or at the direction of the Attorney General) must vote in favor of designating decisions as precedential.[122] Immigration adjudication decisions by the Attorney General are also precedential. During the Trump Administration, the BIA and the Attorney General issued around one-hundred precedential decisions.[123]

Other agencies have adopted similar post-decisional procedures regarding precedential status. At the Medicare Appeals Council, a panel decision is designated as precedential by the chair.[124] At the BVA, when the appellate body wants to make policy, it works with the VA's Office of General Counsel to bring consistency to adjudications.[125]

Perhaps most notably, at PTAB, a panel decision is designated as a precedential either by a special panel selected and convened by the PTO's director or by PTO director with consultation of an advisory committee.[126] PTAB's process is probably the most formalized and elaborate. As two of us have

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[119] *See* Merit Sys. Protection Bd., 5 C.F.R. § 1201.117(c).

[120] App. G (DHS–USCIS).

[121] App. I (DOJ–BIA). Compare DOL's Board of Alien Labor Certification Appeals, where precedential decisions can only be issued when the Board sits en banc. *See* App. J (DOL: BALCA).

[122] *See* 8 C.F.R. § 1003.1(g)(3).

[123] Wadhia & Walker, *supra* note 63, at Part II.B.

[124] App. F (HHS: Medicare Appeals Council).

[125] App. Q (VA–BVA).

[126] App. M (USPTO–PTAB).

detailed elsewhere, PTAB had a very difficult process for designating decisions as precedential.[127] In 2018, however, PTAB adopted new procedures which established a Precedential Opinion Panel and set forth procedures to identify cases for this new panel to consider designating decisions as precedential and created an advisory committee to provide recommendations to the Director on precedential status of decisions.[128]

It is worth noting that several appellate programs have adopted processes under which they solicit suggestions—from other adjudicators, agency officials, litigants, and the public—for precedential designations.[129] PTAB does so through an online-form,[130] and the Medicare Appeals Counsel provides on its website an email address to which to submit recommendations.[131] The agency officials interviewed underscored how helpful is it to get feedback from within the agency—and something from outside of it—on whether to designate decisions as precedential.

2. *Process of Drafting Precedential Opinions*

Given the great variation in how agencies designate opinions as precedential, it is unsurprising that there is also variety in the method of writing such opinions. At some agencies, precedential opinions receive extensive input from agency staff—that is, agency employees who are not agency adjudicators. The office of general counsel or some office within the agency may make recommendations on how matters should be resolved as well as draft precedential opinions to support the adjudicator. This practice is most common when the decision-maker is a multi-member commission or single-director agency head. The Security Exchange Commission's Office of General Counsel is of this model in that provides substantial support to the Commission in writing precedential opinions.[132]

At other agencies, by contrast, the input from the agency staff may be more mixed during the writing process. For instance, in some agencies precedential opinions are authored by an appellate body comprised of ALJs or AJs, rather than an agency head or commission, and the decision is not given precedential effect until after it has issued, and it may receive less agency staff input.

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[127] *See* Walker & Wasserman, *supra* note 6, at 188–96.

[128] App. M (USPTO–PTAB).

[129] *See, e.g.*, *id.*; App. F (HHS) (Medicare Appeals Council).

[130] Precedential Opinion Panel (POP) Amicus Form, https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/precedential-opinion-panel-pop-amicus.

[131] Appeals to the Medicare Appeals Council (Council), https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-council/index.html.

[132] U.S. Securities & Exchange Comm'n, Office of Gen. Counsel, https://www.sec.gov/ogc (""[The Office of the GC] . . . assists in preparing Commission opinions in adjudications set for a hearing before the Commission and on appeal from administrative law judges, stock exchanges, FINRA, and the Public Company Accounting Oversight Board."). Enforcement and prosecution authority of the SEC is not housed within the Office of the General Counsel.

There is also variation on whether appellate adjudicators solicit feedback on draft precedential opinions from other appellate adjudicators who did not hear the case. Some agencies do so informally, in regular meetings with adjudicators where policy issues are discussed. Fewer agencies appear to formally solicit feedback on precedential opinions from non-decision-making adjudicators. An example of the latter includes the PTO, which circulates all precedential opinions to all APJs for comment for ten days before the precedential decision issues.[133] Mimicking the practice of the U.S. Court of Appeals for the Federal Circuit,[134] the PTO's 10-day circulation period was adopted to promote consistency and clear and transparent decision-making at PTAB.

Beyond receiving input internally from agency officials, many agencies that issue precedential decisions accept amicus briefs and hence ensure it is possible for views outside of the parties to be considered before a case is decided. Agencies that accept amicus briefs vary on the procedures associated for amici participation. The SEC, for instance, has promulgated rules delineating the conditions for amici participation.[135] The PTO historically has treated amicus briefs as any other motion, requiring PTAB approval.[136] Although recently the PTO has added an online form for POP Panel amicus requests.[137] Similarly, whether to allow amicus briefs in immigration adjudication is at the sole discretion of the BIA. In contrast, amicus briefs are only allowed at the USCIS if they are solicited by the party or the USCIS.

Some agencies not only allow amici participation but actively solicit it. This is most likely to occur in cases that involve important or novel policy issues. For example, the NLRB regularly invites the public to file amicus briefs in cases of significance or high interest and includes a list of such cases on its website.[138] The PTO has also solicited amici participation but much less frequently than the NLRB.[139]

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[133] Patent Trial and Appeal Board, Internal Operating Procedures

[134] U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT, Internal Operating Procedures #10, Precedential/Nonprecedential Opinions and Orders, 5, https://cafc.uscourts.gov/wp-content/uploads/RulesProceduresAndForms/InternalOperatingProcedures/IOPs-03012022.pdf.

[135] 210(d) SEC Rules of Practice.

[136] 37 C.F.R. §42.20(b).

[137] Precedential Opinion Panel (POP) Amicus Form, https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/precedential-opinion-panel-pop-amicus (last visited Dec. 1, 2020).

[138] https://www.nlrb.gov/cases-decisions/filing/invitations-to-file-briefs.

[139] The PTO appears to have solicited amicus briefs filings for the first time in 2017 in regard to *OpenSky Industries, LLC v. VLSI Technology LLC*, IPR2021-01064 (PTAB July 7, 2022), and *Patent Quality Assurance, LLC v. VLSI Technology LLC*, IPR2021-01229 (PTAB July 7, 2022). See USPTO, Director Vidal Sets Schedule and Calls for Amicus Briefing in Director Review Cases (July 7, 2022), https://www.uspto.gov/subscription-center/2022/director-vidal-sets-schedule-and-calls-amicus-briefing-director-review.

3. *Substance and Structure of Precedential Decisions*

Most agencies' precedential opinions mimic the features of judicial decisions. Virtually all precedential decisions state the reasons for the action taken and address the serious arguments of the parties. Most have headings to ease their readability, such as statement of the case, summary of the facts, and analysis. The analysis section mimics that of judicial decisions, summarizing the governing case law or guidelines, applying the law to the facts, and addressing counterarguments. Precedential decisions may engage with prior agency decisions, especially if parties argue such decisions are binding on the decisionmaker or are persuasive.

The length of precedential opinions varies substantially across agencies and may also vary on the complexity of the issue being adjudicated. PTAB precedential decisions are on average approximately twenty pages in length[140] but some are longer than seventy five pages.[141] In contrast, SEC opinions are on average shorter. The majority of SEC opinions, which involve the revocation of security registrations, are on average seven pages in length.[142] SEC decisions that address fraud tend to be longer but average under twenty pages.[143] Similar to the SEC, the length of FAA decisions also vary on the issue decided.

Agencies also differ in how they identify opinions as precedential. PTAB decisions include a heading on the first page indicating the decision is precedential, although whether the precedential marking is on its own page or part of the first page of the decision has evolved over time.[144] DOL Benefits Review Board's decisions' precedential status is indicated by a stamp on the decision. IBLA decisions are identified as precedential by a footnote at the bottom of the order. Some agencies do not include any indication that a decision is precedential on the opinions itself but instead do so by a notation on the website. One such example is BIA decisions, wherein the precedential nature of the BIA opinions is indicated on the DOJ website.[145] Moreover, agencies generally do not mark opinions as precedential if all decisions are precedential.

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[140] *See, e.g.*, PTAB, Ex Parte Mewherter, Appeal 2012-007692, https://www.uspto.gov/sites/default/files/ip/boards/bpai/decisions/prec/fd2012_007692_precedential.pdf.

[141] PTAB, Lectrosonics v. Zaxcom https://www.uspto.gov/sites/default/files/documents/Lectrosonics%2C%20Inc.%20v.%20Zaxcom%2C%20Inc.%2C%20IPR2018-01129%20%28Paper%2033%29.pdf.

[142] Security Exchange Comm'n, https://www.sec.gov/litigation/opinions/2022/34-95534.pdf.

[143] Security Exchange Comm'n, https://www.sec.gov/litigation/opinions/2022/34-95141.pdf.

[144] *Compare* PTAB *Ex parte McAward*, Appeal 2015-006416 https://www.uspto.gov/sites/default/files/documents/ex-parte-mcaward-2017_08.pdf, *with* PTAB Lectronsonics v. Zaxcom, https://www.uspto.gov/sites/default/files/documents/Lectrosonics%2C%20Inc.%20v.%20Zaxcom%2C%20Inc.%2C%20IPR2018-01129%20%28Paper%2033%29.pdf

[145] Department of Justice, Agency Decisions, https://www.justice.gov/eoir/ag-bia-decisions.

## D. Public Availability of Precedential Decisions

Agencies publish their precedential decisions in a variety of formats. The publishing of precedential opinions not only enables practicing attorneys to follow the development of agency law but likely increases public trust by increasing the transparency of agency's processes. A handful of agencies publish their precedential decisions in Reporters, wherein cases are published in chronological order in print volumes. These print volumes are typically available for sale to the public. Even though most cases are now available online, precedential opinions are still organized and cited according to the print reporter system. Reporters are published by the government or private third parties and frequently have multiple series. Examples include the NLRB, whose decisions are published in its own reporter; and DOL's Benefits Review Board, whose decisions are published in one of two private reporters (Juris Publishing's *Black Lung Reporter* and Matthew Bender's *Benefits Review Board Service Longshore Reporter*).[146]

Agency precedential decisions can be also found online in subscription legal databases such as Lexis and Westlaw. Although the breadth of coverage varies among databases, both Lexis and Westlaw contain robust administrative material databases that includes agency precedential decisions for most agencies, including PTO, SEC, MSPB, and the NLRB. These databases typically categorize the opinion by type, enabling the user to search for precedential opinions only. For instance, Lexis administrative materials database delineate between PTAB that are designated as precedential, informative, or routine and allows users to search for a subcategory of opinions.

Although subscription databases contain precedential agency decisions, they generally do not provide robust tracking of the subsequent history of agency precedential adjudicatory decisions, including remand by a federal court or overruling by the agency. Tracking subsequent precedential agency decisions would provide valuable information to public and agency officials, enabling users to quickly focus on pertinent sources and access information that might otherwise be missed. This could be achieved by using similar signals that illustrate the validity of federal or state cases, such as red flag to suggest negative treatment, green flag to suggest positive treatment, or an overruling flag to suggest the precedential agency decision is no longer good law. Agencies may need to coordinate with private databases on tracking of precedential decisions and thus the feasibility of such tracking should be subject to agency's available resources.

Agency precedential decisions can also be accessed electronically without access to a subscription database. The Freedom of Information Act (FOIA) has been interpreted to require agencies to disclose certain adjudicatory material.[147]

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[146] The NLRB's reporter, which is akin to the U.S. Reports, can be accessed on the NLRB's website. Online access to the Benefits Review Board's reporters requires a paid subscription.

[147] 5 U.S.C. § 552.

Under 5 U.S.C. § 552(a)(2), final agency decisions must be made available "by electronic means"—i.e., online.[148] There has been debate around which types of adjudicatory decisions are included in this affirmative disclosure obligation. The Attorney General has interpreted this disclosure requirement as only applying to precedential decisions, partly due to the impracticability of maintaining copies of all decisions in the era before electronic access to decisions.[149] Whether or not this interpretation is correct, it is well accepted that precedential decisions fall within § 552(a)(2)'s disclosure requirement.[150] As a result, virtually all agencies publish their precedential decisions on their websites.

Agency websites almost all contain a section or sections dedicated to adjudication. Most also include a search engine for accessing agency precedential decisions, which contain options for filtering results by, for example, date or topic, in conjunction with name docket party or some other category. If the number of precedential decisions the adjudicatory body issues a year is small enough, agencies may also list all precedential opinions on a single webpage. For example, in addition to containing a search engine for PTAB decisions, the PTO's website also indexes all PTAB precedential opinions by issue on a single webpage.[151]

Finally, some agencies publish digest or summary of their precedential opinions to make the decision more accessible to nonexperts.[152] This facilitates necessary research and is especially important in adjudication programs in which decisional law (as opposed to statutory or rule-based law) plays an important role in deciding even routine cases. Some agencies post short-form versions of digests and indexes on their website so that both adjudicators and the public can benefit from them.

### E. Internal Implementation of Precedential Decisions

It does not appear that many agencies engage in extensive practices to encourage internal implementation of precedential decisions—within the appellate review system, the hearing-level system, or elsewhere such as with their policy or enforcement components. To be sure, some agencies actively notify both appellate and, to a much lesser extent, their hearing-level

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[148] *Id.*

[149] U.S. Dep't of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act, at 15 (Aug. 17, 1967).

[150] *See* note 42 *supra*.

[151] U.S. Pat. Trademark Off., Precedential and informative decisions, https://www.uspto.gov/patents/ptab/precedential-informative-decisions.

[152] *See, e.g.*, Nat'l Labor Relations Bd., Cases and Decisions—Notable Board Decisions (listing especially significant decisions with accompanying brief summaries prepared by agency staff), https://www.nlrb.gov/cases-decisions/decisions/notable-board-decisions; U.S. Dep't of Justice (Exec. Office for Immigration Review) (including with each precedential decision in its bound volumes a one-sentence summary of the decision's principal holdings—somewhat akin to the syllabus accompanying U.S. Supreme Court decisions), Agency Decisions, https://www.justice.gov/eoir/ag-bia-decisions

adjudicators of precedential decisions. But most agencies, like federal courts, let the published words speak for themselves, and rely on their adjudicators to independently review precedential decisions from the program's website or otherwise, sometimes with the aid of digests, indexes, and summaries (as noted above). What decisions a program notifies agency adjudicators of and how it does so vary considerably.

Direct notification of precedential decisions by appellate adjudicators to hearing-level adjudicators, moreover, appears uncommon. Agencies usually leave notification to hearing-level administrators, and interviews with hearing-level administrators exceeded the scope of this Report. As noted in the Walker-Wiener ACUS Report:

> Notification is especially important—and, in a high-volume program, often appropriately reserved for—precedential and other important decisions of which adjudicators must be aware when deciding future cases. (Notification would be impracticable and often not very useful in high-volume programs where decisions involve routine application of well-established law and policy—procedural and substantive—to case-specific facts.) No generalization can be made about the optimal format and means of delivery. Some agencies find that sending memoranda suffices. Agencies often find it useful, not surprisingly, to provide summaries and commentary about the decisions. . . . This is one context in which any number of agencies could improve dialogue, and at least some modest coordination, between appellate-level offices and hearing-level offices.[153]

Our interviews with agency officials did not reveal any other mechanisms that the agencies use precedential decisions to encourage improvements to agency adjudication systems. We would be surprised if agencies have not innovated on this front, and further exploration and study of this subject would be warranted.

## F. Judicial Review and Consistency

Some early critics of circuit-court rules that render nonpublished (or similarly designated) decisions non-precedential complained that it leaves courts of appeals free to decide, without explanation, which decisions they must follow and which they may disregard. One especially prominent critic, Judge Richard Arnold, argued that all circuit decisions, however designated, should be considered precedential—that is, binding on judges within the same circuit confronting the same issue—unless and until properly overruled. Judge Arnold even suggested that Article III of the Constitution may compel this result.[154]

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[153] Walker & Wiener, *supra* note 8, at 43–44 (paragraph break omitted).

[154] *See* Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PRACTICE 291, 226 (1990). Judge Arnold was addressing an Eighth Circuit that rendered non-published

A rough analogue exists in the administrative context: Agencies may not depart from a rule announced in a previous decision (more often a line of decisions) without an adequate explanation. (Of course, the case before the agency may be distinguishable from the prior case; the prior case's rule would not then govern.) An inadequately explained departure may condemn a decision on judicial review under the arbitrary-and-capricious standard.[155]

We have identified only a few cases in which a party has challenged an agency's failure to follow its non-precedential decisions. Each rejected the suggestion that, as far as arbitrary-and-capricious review is concerned, non-precedential decisions stand on any different footing than precedential decisions.[156] Departure from a non-precedential decision, under these cases, thus demands the same justification as from a precedential decision. The result is that, even if an agency's rules provide otherwise (as some do), the agency is

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non-precedential and discouraged their citation. The first part of the rule remains in the Eighth Circuit's current rule; the second part was eliminated as a result of Rule 32.1 of the Federal Rules of Appellate Procedure, which prohibit citation restrictions. *See* 8th Cir. 32.1A, reproduced in App. A.

[155] *See, e.g.*, Achison v. Wichita Board of Trade, 412 U.S. 800, 802–809 (1973); Louisiana Pub. Serv. Comm'n v. Fed. Energy Reg. Comm'n, 184 F.3d 892, 897 (D.C. Cir. 1999) Apache Corp. v. Fed. Energy Reg. Comm'n, 627 F.3d 1220, 1228 (D.C. Cir. 2010). Cf. *Allentown Mack v. NLRB*, 522 U.S. 359 (1998). As the D.C. Circuit pointedly noted in one case, "[f]or the agency to reverse its position in the face of a precedent it has not persuasively distinguished is quintessentially arbitrary and capricious." *Louisiana Pub. Serv. Comm'n*, 184 F.3d at 897.

[156] The cases we have identified so far all arose, not surprisingly, in the context of immigration. *See* Sang Goo Park v. AG of U.S., 846 F.3d 645, 654 (3d Cir. 2017) ("The government argues that to the extent BIA decisions can establish a policy, practice, or settled course of adjudication, only published, precedential BIA decisions should be considered. It is true that we assigned diminished weight to the legal reasoning in and the deference owed to unpublished BIA decisions. But otherwise, on review, we treat the published and unpublished dispositions of the agency in the same way. . . . There is no apparent administrative-law principle that removes unpublished, nonprecedential agency decisions from the reach of review for arbitrariness.); *Davila-Bardales v. INS*, 27 F.3d 1, 5–6 (1st Cir. 1994) ("[T]he prospect of a government agency treating virtually identical legal issues differently in different cases, without any semblance of a plausible explanation, raises precisely the kinds of concerns about arbitrary agency action that the consistency doctrine addresses (at least where the earlier decisions were not summary in nature, but, rather, contained fully reasoned explications of why a certain view of the law is correct). Put bluntly, we see no earthly reason why the mere fact of nonpublication should permit an agency to take a view of the law in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases, without explaining why it is doing so. Hence, we do not believe that the BIA, in the circumstances at hand, can take refuge behind the determination not to publish [the decisions in question]."); Guam Contractor's Ass'n v. Sessions, No. 16-00075, 2018 WL 525697 (D. Guam Jan. 24, 2008) (holding that doctrine agency's "duty" to explain departure from "general policy" established "by a settled course of adjudication" also "applies for patterns of non-precedential adjudication.") One decision of the Article I Court of Appeals for Veterans Claims suggested that, with respect to a particular issue, BVA decisions were inconsistent. *See* Johnson v. Shulkin, 2017 U.S. App. Vet Claims LEXIS 313, at *18–19 (Mar. 3, 2017). By regulation, all BVA decisions are non-precedential. *See* App. Q (VA–BVA).

still bound in some sense by its non-precedential decisions, and it may not simply ignore them if a party cites them.

With this background in mind, we asked interviewees at agencies that designate some decisions as non-precedential whether reviewing courts have identified unexplained departures from those decisions in particular as problematic. None of the interviewees identified any such instances. Some interviewees explained that, as their decision-writing practices reflect, adjudicators do address non-precedential decisions—usually to distinguish them—when a party cites them. One reason is to assure parties that they are being treated fairly under the principle that like case be treated alike. Another is to avoid unnecessary scrutiny on judicial review.

No doubt the issue of decisional consistency across large numbers of cases in (especially) mass adjudication systems warrants study.[157] Any serious study, of course, would require a time-consuming and methodologically challenging empirical investigation of particular adjudication systems' pattern of decisions. It may be that the relative absence of such studies explains in part why litigation involving agency fidelity to non-precedential decisions is rare. (Few if any litigants before a mass adjudication program would have the resources or incentive, even in an aggregate proceeding, to identify significant patterns of decisional inconsistency.)

For now, we simply reiterate that, as explained elsewhere in this Report, some high-volume adjudication programs may find that precedential decision making may serve as an important mechanism to enhance decisional consistency over time. It could, of course, be used to this end in conjunction with, among things, such as interpretative rules, policy statements, and quality-assurance systems.[158]

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[157] *See generally* David Ames, Cassandra Handan-Nader, Daniel E. Ho, & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1 (2020)

[158] Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022) (identifying inter-decisional consistency as an objective quality assurance systems). The associated report notes that "an "agency may consider using consistency among decision-makers, or whether adjudicators with similar dockets generate significantly different results, as a quality measure. . . . Adjudicator independence and the discretion that fact-intensive adjudication requires make variation an irreducible reality. But significant disparities could indicate a cohort of adjudicators with fundamentally mistaken understandings of agency policy, or they could indicate policy ambiguity causing widespread confusion." Daniel E. Ho, David Marcus, & Gerald K. Ray, Quality Assurance Systems in Agency Adjudication (Nov. 30, 2021) (report to the Admin. Conf. of the U.S.).

# IV. RECOMMENDATIONS

Our recommendations are draw from our findings (Part III), though not all our findings resulted in a recommendation. We have been judicious in making recommendations given the heterogeneity of agency appellate programs. The recommendations under each category are followed by a brief comment that explains their inclusion.

In considering whether to implement some of our recommendations, agencies should of course weigh the costs and benefits of implementation and take into account the unique features of their adjudication system. We have marked off those recommendations by preceding the statement of the recommended action with "should consider." Recommended actions not so qualified are, we think, generally obligatory, but we realize that exceptions may need to be made for some systems based on their unique features.

A prefatory definition will be useful. When we refer to "decisions" in the recommendations that follow, we include only decisions accompanied by an opinion, however brief. We do not include summary dispositions, such an order making final an un-appealed hearing-level adjudicator's decision. Summary dispositions are common even at agencies that treat all their decisions as precedential.

## A. Use of Precedential Decision Making

1. Agencies should consider publicly identifying the objectives for precedential decision making in their adjudication systems and then structuring the substantive criteria and procedural mechanisms for their use of precedential decisions to advance those objectives. Realizing that objectives may vary by agency, agencies should consider among the possible objectives of precedential decision making might serve: (1) policymaking; (2) inter-decisional consistency; (3) predictability; (4) efficiency; (5) appearance of justice or similar rule-of-law values; (6) management of hearing-level adjudicators; (7) judicial deference and dialogue; and (8) public education.

2. Agencies should consider whether to treat all decisions, other than summary dispositions (that is, decisions unaccompanied by an opinion), as precedential. The most important factor bearing on this determination should often be whether the agency regularly writes decisions that would be useful as precedent in future cases and are written in a form that lends itself to use as precedent in future cases. When many or most of an agency's decisions largely concern only case-specific factual determinations or the routine application of well-established policies rules, and interpretations to case-specific facts, the agency may wish to treat most of its decisions as non-precedential (no matter their length). Doing so may be

especially advisable—or even necessary—in high-volume (or mass) adjudication system in which adjudicators cannot reasonably be expected to sift through a voluminous body of decisions to identify the few decisions requiring their attention.

3. When agencies choose to distinguish between precedential and non-precedential decisions, they should consider designating as precedential decisions that:

    a. Address issues of first impression, whether involving policy or the interpretation of statutes, agency regulations, other precedential decisions, or court decisions.

    b. Clarify or explain points of law that have caused confusion among adjudicators or litigants.

    c. Emphasize or call attention to especially important points of law or policy on which adjudicators or parties to which adjudicators or parties have been insufficiently attentive.

    d. Resolve conflicts among or otherwise harmonize, integrate, or clarify disparate cases on the same subject, so that the agencies' decisional law is clear, coherent, and uniform on a particular point of law or policy.

    e. Overrule or modify existing precedents.

    f. Account for changes in the law, whether resulting from new statutes, agency regulations, or court decisions.

    g. Address an issue that the agency must address on remand from a court.

    h. May otherwise serve as a necessary, significant, or useful guide for adjudicators or litigants in future cases.

4. Agencies should also consider whether certain issues that might be addressed through precedential decisions might be best addressed through interpretive rules and policy statements directed to hearing-level and appellate-level adjudicators. Doing so might be especially appropriate in high-volume adjudication programs in which (especially hearing-level) hearing-level adjudicators cannot, because of their workloads and other circumstances, reasonably be expected to identify key rules and polices from a large body of decisions.

5. Agencies should consider whether, even if they do not designate a decision as precedential, they should identify it as "adopted," "informative," or the like because it may be useful to hearing-level or appellate adjudicators. A decision might be useful because, among other things, it illustrates how law is applied to a commonly occurring fact pattern; identifies important statutes, regulations,

or decisions in an accessible way; or might serve as an exemplar for decision writers. Moreover, the use of "adopted" or "informative" decisions may be of particular use on high-volume adjudication systems, especially those where the process to designate a decision as precedential is time consuming or resource intensive.

6. Agencies should consider whether to adopt standard and uniform practices as to when, if ever, adjudicators should address non-precedential decisions when a party cites them, even if their rules provide that the agency need not distinguish or otherwise address them.

7. Consistent with Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022), agencies should consider implementing quality assurance programs to enhance inter-decisional consistency, especially among decisions designated as non-precedential to which agencies do not deem themselves bound in future cases.

**COMMENT**:

These recommendations draw on the findings explored in Parts III.A and III.B.

The first recommendation responds to our findings that many agencies have not systematically considered the reasons for their use of precedential decisions, much less publicly announced those objectives. Tailoring the substance and process for precedential decision making based on the agency's unique objectives will address current challenges and assess effectiveness of current practices.

The second recommendation recognizes that not all agencies will choose to designate some decisions as precedential and others as non-precedential, but instead treat all decisions as precedential. (It does not address the few appellate systems—including the SSA Appeals Council and BVA—that do not treat any decisions as precedential.) As the recommendation contemplates, an important consideration here will be the volume of cases a system handles. Marking out only some decisions as precedential may be especially appropriate—indeed necessary—in high-volume adjudication programs.

The third recommendation sets forth a non-exclusive list of criteria that two-tier systems may wish to use when designating decisions as precedential. Our list is drawn from the actual practices of agencies—in a few cases as embodied in rules—and the circuit court rules appearing in Appendix A.

As for the other recommendations, the four recognizes that adjudication systems may want to use non-decisional techniques in lieu of or to supplement precedential decision making to serve the same objectives as precedential decisions. The model here, as our findings note, is SSA's Appeals Council. Even agencies not situated or inclined to follow SSA's approach in full, may find it useful at least in limited respects. The fifth recommendation is suggested by the

practices of a few agencies noted in our findings. The use of "adopted" or "informational" decisions in addition to precedential decisions may be particularly helpful for agencies with high volumes and/or agencies whose processes to designate decisions as precedential are too time consuming or resource intensive.

The sixth and seventh recommendations, which deal with inter-decisional consistency, are largely cautionary: While agencies may not consider themselves bound by non-precedential decisions (as a few agency rules explicitly provide), the reasoned decision-making requirement of administrative law, and general norms of fairness to parties, requires that like cases be treated alike. There is no recognized exception, as a few courts have noted, for non-precedential cases. Agencies that decide non-precedential cases inconsistently risk possible scrutiny from the courts under the arbitrary-and-capricious standard. We have offered two possible recommendations this potential concern.

## B. Designation of Decisions as Precedential

*Agencies at Which All Decisions Are Precedential*

1. Agencies at which all decisions are precedential should so state in a publicly available rule. The rule should appear in the agency's rules of procedure (often called "rules of practice") published in the Federal Register and codified in the *Code of Federal Regulations* (C.F.R.).

*Agencies at Which Selected Decisions Are Precedential*

2. If an agency designates some of its decisions as precedential and others as non-precedential, it should so provide in a publicly available rule. The rule should appear in the agency's rules of procedure (often called "rules of practice") published in the Federal Register and codified in the Code of Federal Regulations (C.F.R.).
3. Every agency that designates some decisions as precedential and others as non-procedural should state, in its C.F.R.-codified rules procedural rules, the following:
    a. the criteria for designating decisions as precedential;
    b. the legal effect of both precedential and non-precedential decisions, such as whether only precedential decisions are binding on the agency or the public;
    c. whether and under what circumstances a party may cite a non-precedential decision.
4. Agencies should use clear and consistent terminology in their rules relating to precedential decisions. Agencies that distinguish between "published" and "non-published" (or "unpublished") decisions should identify the relationship between these terms and

the terms "precedential" and "non-precedential." The same is true of agencies that have intermediate designations, such as "adopted" or "informative" decisions.

5. In promulgating their rules on the above subjects, agencies may wish to consult Rule 32.1 of the *Federal Rules of Appellate Procedure*, which prohibits courts from restricting "the citation of federal judicial opinions, orders, judgments, or other written dispositions" "designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like"; and circuit rules of the United States courts of appeals, many of which identify the criteria for non-precedential designations and explain the legal effect of such designations.

**COMMENT**:

These recommendations draw on the findings explored in Part III.B.

None of the appellate systems we studied that treat all their decisions as precedential note that in their procedural rules, and most do not do so in explanatory website materials. Of appellate systems that designate some decisions as precedential and others (usually the majority) of decisions as non-precedential, some do not address the distinction in their procedural rules. Still fewer of them address the criteria they use in making designations, the legal effect of the designation, and the permissibility of citing non-precedential decisions. In this respect, agency practice often stands in marked contrast to the practice of the federal courts of appeals. The courts' rules may be a good starting point for some agencies.

In Recommendation 2020-3, *Agency Appellate Systems*,[159] ACUS recommended that agencies "promulgate and publish procedural regulations governing agency appellate review in the Federal Register and codify them in the Code of Federal Regulations." Such regulations, the Recommendation continued, "should cover all significant matters pertaining to appellate review."[160] The Recommendation includes a list of matters that regulations should address, including the "procedures and criteria for designating decisions as precedential and the legal effect of such designations."[161] The above recommendation, and several below, restate or build upon 2020-3's list. We leave to ACUS to decide whether any recommendation that results from this Report should reference companion recommendations in Recommendation 2020-3.

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[159] 86 Fed. Reg. 6612 (Jan. 22, 2021).

[160] *Id.* at 6619 (§ 2). This recommendation extends ACUS's recommendation that hearing-level adjudication programs include "a complete statement of important procedures" in "procedural regulations," Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016), to appellate programs.

[161] 86 Fed. Reg. 6619 (§2(g)).

Codifying important procedures and related substantive criteria serves several objectives, not least the rule-of-law objective of laying down in explicit terms the procedures to which both the agency and litigants must follow in both agency proceedings and the federal courts. We think codification is especially important here because, in many appellate systems, only lawyers who practice regularly before them will know how the systems treat precedential decisions, and even those lawyers may not know the particulars of an agency's practice.

## C. Procedures for Making Precedential Designations

1. Agencies should consider ways to streamline the decision-making process for designating decisions as precedential, including the review and approval process by the agency head and by related agencies. This streamlining may be particularly important in high-volume adjudication systems, where precedential decisions play a vital role in promoting inter-decisional consistency, managing hearing-level adjudicators, and educating the public and those navigating the adjudication system often without legal representation.

2. For agencies that have a time-consuming process for designating precedential decisions, they should consider experimenting with alternative designations, such as "adopted" or "informative." These designations may advance the values of inter-decisional constituency, management of hearing-level adjudicators, and public education.

3. Agencies should consider whether (a) adjudicators who decide a case should be given authority to designate their decision as precedential at the time it is issued, or instead (b) such authority should be given to or shared with other adjudicators to be exercised after the decision is issued.

4. Agencies should also consider whether to solicit suggestions—from adjudicators, other agency officials, the parties to the case, and the public—on whether to designate a decision as precedential, especially when the designation is made after a decision is issued. This could include allowing hearing- or appellate-level agency adjudicators to certify specific questions in cases (or refer entire cases) for precedential decision making—either on an interlocutory basis or after the adjudicator has issued an opinion.

5. Agencies should assess the value of formally circulating at least some subset of precedential opinions to all non-decision-making appellate adjudicators (e.g., judges on an appellate body but not on the deciding panel) for input before the opinion issue. Such circulation could promote consistency and transparent decision making.

6. Agencies should assess the value of amicus participation in their appellate decision making, especially in cases that may result in a precedential decision. Such participation may be especially important in cases that address broad policy questions whose resolution requires consideration of general or legislative facts as opposed to simple adjudicative facts particular to the parties. If an agency does allow amicus participation, it should establish clear rules for such participation. Agencies should consider not only adopting a general rule governing the circumstances under which amicus participation is permitted, but also, when they decide that amicus participation will improve the quality of decisions in a particular case, invite public participation by notice in the *Federal Register*, press release, listservs, or otherwise.

7. If an agency does adopt any of the above formal procedures for designating decisions as precedential, it should do so in a publicly available rule. The rule should appear in the agency's rules of procedure (often called "rules of practice") published in the Federal Register and codified in the *Code of Federal Regulations* (C.F.R.).

**COMMENT**:

These recommendations draw on the findings explored in Part III.C.

The first two recommendations address the inefficiencies and delays identified during our interviews with agency officials when it comes to designating a decision as precedential. Not surprisingly, precedential decisions are much less common when the process is too time consuming. In those circumstances, the agencies should consider streamlining their decision-making processes or experimenting with other forms of decision designations that are short of precedential yet still advance the objectives of precedential decision making.

The third and fourth recommendations encourage agencies to explore adopting certain best practices used at various agencies when it comes to seeking input on designate whether to designate decisions as precedential. This includes whether to allow appellate adjudicators to designate their own decisions as precedential or to set up some more elaborate process at the agency. It also includes whether to allow the parties or the lower-level agency adjudicators to recommend that certain decisions or questions be addressed in a precedential decision.

The fourth and fifth recommendations aim at improving the quality of precedential opinions as well as the transparency of decision making by enlarging the inputs into process of drafting precedential opinions. The third recommendation contemplates enabling input from non-decision-making

appellate adjudicators whereas the fourth recommendation contemplates allowing input from the public via amici participation to precedential decisions.

The final recommendation reinforces that these procedures should be set forth in publicly available rules.

### D. Public Availability of Precedential Decisions.

1. Agencies should clearly identify the precedential status of cases on both the face of the opinion and the agency's website. Agencies should also provide a brief explanation of the difference between precedential and non-precedential opinions on their websites, and should consider doing the same on the first page of each decision.

2. When posting precedential decisions on their websites, agencies should consider including brief summaries.

3. When posting decisions on their websites, agencies should consider highlighting any decisions that are of particular importance to the agency or the public—whether they be precedential, non-precedential, "informative," "adopted," or otherwise.

4. Agencies should include on their websites any digests and indexes of precedential decisions they maintain.

5. Agencies should track the subsequent history of precedential opinions—that is, track whether decisions have been overruled, modified, superseded, distinguished, or the like in subsequent agency decisions, or denied enforcement, remanded, or otherwise disapproved on judicial review. Agencies should make available to the public the subsequent histories of precedential decisions, whether on the face of the decisions or in separate documents available on their websites. In tracking and making available to the public subsequent histories, agencies should consider the feasibility of partnering or coordinating with private reporters and online legal research providers.

**COMMENT**:

These recommendations draw on the findings explored in Parts III.C and III.D.

The first recommendation addresses a problem identified in some adjudication systems that it is difficult to discern from the face of the agency decision whether it is precedential, non-precedential, or something else—and what that designation means as a legal matter. It is critical for the public to know and understand the status of agency decisions.

All second, third, and fourth recommendations address ways to increase the accessibility and salience of precedential opinions to the public, highlighting best practices uncovered at the studied agencies.

The final recommendation may be more aspirational at this point, as we recognize that agencies face resource constraints and other agency activities will no doubt take priority. But tracking the subsequent history of precedential decisions would provide valuable information to the public and agency officials, enabling users to quickly focus on pertinent sources and access information that might otherwise be missed. Perhaps private legal services, such as Westlaw or Lexis, should explore innovating on this front, in partnership with the agencies.

### E. Overruling Precedential Decisions

1. Agencies should decide what general criteria will inform their consideration of whether and when to overrule a precedential decision.

1. If an agency identifies such criteria, it should disclose them to the public, either in rules of practice or in explanatory materials on their websites.

2. Agencies should consider using the same or similar processes when overruling a precedential decision as when they decide whether to designate a decision as precedential. This may include, among other things, the solicitation of public views through amicus participation.

3. When an agency rejects or disavows the holding of a precedential decision, it should consider expressly overruling the decision, in whole or in part as the circumstances dictate, to avoid confusion, ambiguity, and wasted time in future cases. As noted in Recommendation D(5) above, any overruling of a precedential decision should be reflected in the subsequent history decision.

**COMMENT:**

As noted in Parts I (Background) and III (Findings), the issue of stare decisions has received little attention in discussions of agency adjudication. Few if any agencies have articulated criteria for when a precedential decision should be overruled or given any systematic consideration to the issue. We think that ACUS should encourage agencies to do so, along the lines of the first recommendation, even if criteria cannot be described in precise or rule-like form. The remainder of the recommendations in this subpart align with the best practices we suggest for precedential decision in the preceding subparts.

### F. Solicitation of Public Input on Procedural Rules

1. When adopting new or materially amending existing procedural regulations on the subjects addressed above, agencies should

voluntarily 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 clearly outweigh the benefits of doing so.

**COMMENT**:

We include this recommendation for ACUS's consideration since it is consistent with other ACUS recommendations, new and old, relating to procedural rules exempt from the notice-and-comment process.[162]

## CONCLUSION

Relying on case studies and interviews of agency officials at twenty agency adjudication systems, this Report documents how and why federal agencies use precedential decisions in their appellate review systems. Based on those findings, we have made a number of recommendations for how agencies can improve their use of precedential decisions—in terms of deciding when to designate decisions as precedential, designing the process for drafting such decisions, and communicating these decisions to the public and within the agency. A recurring theme is that agencies should more systematically explore the objectives for precedential decision making in their particular adjudication systems, and then to design the processes and substance of their precedential decision making to advance those objectives.

When it comes to precedential decision making in agency adjudication, topics for further scholarly and empirical attention abound. Much more work needs to be done to understand the differences between the use of precedent in federal courts and at federal agencies. Policymaking is often suggested as a reason for precedential decision making in agency adjudication. Yet the agency officials interviewed suggested a substantial gap between scholarly and judicial conceptions of agency policymaking (i.e., major lawmaking) and the realities of policymaking in agency adjudication (i.e., interstitial gap filling). Based on our study, it appears that agencies have not extensively explored how to ensure that their precedential decisions have a systemic effect on their adjudication system and the agency's regulatory activities more generally. Nor have agencies paid sufficient attention to approaches to stare decisis, including the factors that should influence whether and when federal agencies should overturn prior adjudication precedents. These are just a few illustrations of the many important questions this Report has raised for future investigation.

The stakes here are high. The vast majority of federal adjudications today take place not in federal courthouses but in agency hearing rooms. More than 12,000 agency adjudicators across the federal administrative judiciary collectively issue millions of decisions per year on subjects ranging from Social Security and veterans benefits to immigration and patent rights. The effective

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[162] *See, e.g.*, __.

use of precedential decisions in these adjudication systems can advance the core aims of agency adjudication, such as policymaking, consistency, predictability, efficiency, and the appearance of justice. We hope the findings and recommendations in this Report encourage that further scholarly and real-world attention.

# APPENDIX A:
# RULES OF THE U.S. COURTS OF APPEALS GOVERNING PRECEDENTIAL DECISIONS

**NOTE**: This table excludes circuit rules governing summary dispositions (often called "disposition by summary order")—that is, dispositions in which no opinion is issued. (But note that some circuit rules on the citation of non-precedential decisions—reproduced in the far right-hand column—do address the citation of summary dispositions.) We have excluded rules governing summary dispositions because this Report's recommendations exclude summary dispositions. The recommendations address only the precedential status of decisions that include an opinion.

| Circuit | Rule | Precedential Decisions | Non-Precedential Decisions | Citation to Non-Precedential Decisions |
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| 1 | Loc.R. 32.1.0 | | | An unpublished judicial opinion, order, judgment or other written disposition of this court may be cited regardless of the date of issuance. The court will consider such dispositions for their persuasive value but not as binding precedent. A party must note in its brief or other filing that the disposition is unpublished. The term "unpublished" as used in this subsection and Local Rule 36.0(c) refers to a disposition that has not been selected for publication in the West Federal Reporter series, e.g., F., F.2d, and F.3d. |

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| 1 | Loc.R. 36.0 | An opinion is used when the decision calls for more than summary explanation. … In general, the court thinks it desirable that opinions be published and thus be available for citation. The policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants. ... When a panel decides a case with a dissent, or with more than one opinion, the opinion or opinions shall be published unless all the participating judges decide against publication. In any case decided by the court en banc the opinion or opinions shall be published. | However, in the interests both of expedition in the particular case, and of saving time and effort in research on the part of future litigants, some opinions are rendered in unpublished form; that is, the opinions are directed to the parties but are not published in West's Federal Reporter. As indicated in Local Rule 36.0(b), the court's policy, when opinions are used, is to prefer that they be published; but in limited situations, described in Local Rule 36.0(b), where opinions are likely not to break new legal ground or contribute otherwise to legal development, they are issued in unpublished form. | While an unpublished opinion of this court may be cited to this court in accordance with Fed. R. App. P. 32.1 and Local Rule 32.1.0, a panel's decision to issue an unpublished opinion means that the panel sees no precedential value in that opinion. |

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| 2 | Local R 32.1.1 | | Rulings by summary order do not have precedential effect. | In a document filed with this court, a party may cite a summary order issued on or after January 1, 2007. … In a document filed with this court, a party may not cite a summary order of this court issued prior to January 1, 2007, except: (A) in a subsequent stage of a case in which the summary order has been entered, in a related case, or in any case for purposes of estoppel or res judicata; or (B) when a party cites the summary order as subsequent history for another opinion that it appropriately cites. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel. |

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| 3 | L.A.R. 28.0 | | | In the argument section of the brief required by FRAP 28(a)(9), citations to federal opinions that have been reported must be to the United States Reports, the Federal Reporter, the Federal Supplement or the Federal Rules Decisions, and must identify the judicial circuit or district, and year of decision. Citations to the United States Supreme Court opinions that have not yet appeared in the official reports may be to the Supreme Court Reporter, the Lawyer's Edition or United States Law Week in that order of preference. Citations to United States Law Week must include the month, day and year of the decision. Citations to federal decisions that have not been formally reported must identify the court, docket number and date, and refer to the electronically transmitted decision. |
| 3 | L.A.R. 36.0 | All written opinions of the court and of the panels thereof will be filed with and preserved by the clerk. All opinions will be posted on the court's internet web site under the supervision of the clerk. | | |

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| 4 | Local Rule 32.1 | | | Citation of this Court's unpublished dispositions issued prior to January 1, 2007, in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case. If a party believes, nevertheless, that an unpublished disposition of this Court issued prior to January 1, 2007, has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such disposition may be cited if the requirements of FRAP 32.1(b) are met. |

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| 4 | Local Rule 36(a) | Opinions delivered by the Court will be published only if the opinion satisfies one or more of the standards for publication: i. It establishes, alters, modifies, clarifies, or explains a rule of law within this Circuit; or ii. It involves a legal issue of continuing public interest; or iii. It criticizes existing law; or iv. It contains a historical review of a legal rule that is not duplicative; or v. It resolves a conflict between panels of this Court, or creates a conflict with a decision in another circuit. The Court will publish opinions only in cases that have been fully briefed and presented at oral argument. Opinions in such cases will be published if the author or a majority of the joining judges believes the opinion satisfies one or more of the standards for publication, and all members of the Court have acknowledged in writing their receipt of the proposed opinion. A judge may file a published opinion without obtaining all acknowledgments only if the opinion has been in circulation for ten days and an inquiry to the non- | | |

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| | | acknowledging judge's chambers has confirmed that the opinion was received. | | |
| 4 | Local Rule 36(b) | | Unpublished opinions give counsel, the parties, and the lower court or agency a statement of the reasons for the decision. They may not recite all of the facts or background of the case and may simply adopt the reasoning of the lower court. | |
| 6 | Cir. R. 32.1 | Published panel opinions are binding on later panels. A published opinion is overruled only by the court en banc. | | The court permits citation of any unpublished opinion, order, judgment, or other written disposition. The limitations of Fed. R. App. P. 32.1(a) do not apply. If a party cites such an item that is not available in a publicly accessible electronic database, the party must file and serve a copy as an addendum to the brief or other paper in which it is cited. |
| 7 | Circuit Rule 32.1 | Opinions, which may be signed or per curiam, are released in printed form, are published in the Federal Reporter, and constitute the law of the circuit. | Orders, which are unsigned, are released in photocopied form, are not published in the Federal Reporter, and are not treated as precedents. Every order bears the legend: "Nonprecedential disposition. To be cited only in accordance with Fed. R. App. P. 32.1." | No order of this court issued before January 1, 2007, may be cited except to support a claim of preclusion (res judicata or collateral estoppel) or to establish the law of the case from an earlier appeal in the same proceeding. |

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| 8 | Rule 32.1A | | Unpublished opinions are decisions a court designates for unpublished status. They are not precedent. | Unpublished opinions issued on or after January 1, 2007, may be cited in accordance with FRAP 32.1. Unpublished opinions issued before January 1, 2007, generally should not be cited. When relevant to establishing the doctrines of res judicata, collateral estoppel, or the law of the case, however, the parties may cite an unpublished opinion. Parties may also cite an unpublished opinion of this court if the opinion has persuasive value on a material issue and no published opinion of this court or another court would serve as well. A party citing an unpublished opinion in a document or for the first time at oral argument which is not available in a publicly accessible electronic database must attach a copy thereof to the document or to the supplemental authority letter required by FRAP 28(j). When citing an unpublished opinion, a party must indicate the opinion's unpublished status. |

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| 8 | Rule 47B | | A judgment or order appealed may be affirmed or enforced without opinion if the court determines an opinion would have no precedential value and any of the following circumstances disposes of the matter submitted to the court for decision: (1) a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) the evidence in support of a jury verdict is not insufficient; (3) the order of an administrative agency is supported by substantial evidence on the record as a whole; or (4) no error of law appears. The court in its discretion, with or without further explanation, may enter either of the following orders: "AFFIRMED. See 8th Cir. R. 47B"; or "ENFORCED. See 8th Cir. R. 47B." | |

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| 9 | Circuit Rule 36-1 | Each written disposition of a matter before this Court shall bear under the number in the caption the designation OPINION, or MEMORANDUM, or ORDER. A written, reasoned disposition of a case or motion which is designated as an opinion under Circuit Rule 36-2 is an OPINION of the Court. It may be an authored opinion or a per curiam opinion. ... All opinions are published | A written, reasoned disposition of a case or a motion which is not intended for publication under Circuit Rule 36-2 is a MEMORANDUM. Any other disposition of a matter before the Court is an ORDER. A memorandum or order shall not identify its author, nor shall it be designated "Per Curiam." ... orders are not published except by order of the court. | |

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| 9 | Circuit Rule 36-2 | A written, reasoned disposition shall be designated as an OPINION if it: (a) Establishes, alters, modifies or clarifies a rule of federal law, or (b) Calls attention to a rule of law which appears to have been generally overlooked, or (c) Criticizes existing law, or (d) Involves a legal or factual issue of unique interest or substantial public importance, or (e) Is a disposition of a case in which there is a published opinion by a lower court or administrative agency, unless the panel determines that publication is unnecessary for clarifying the panel's disposition of the case, or (f) Is a disposition of a case following a reversal or remand by the United States Supreme Court, or (g) Is accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression. | | |

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| 9 | Circuit Rule 36-3 | | Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion. | Unpublished dispositions and orders of this Court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with Fed. R. App. P. 32.1. ... Unpublished dispositions and orders of this Court issued before January 1, 2007 may not be cited to the courts of this circuit, except in the following circumstances. (i) They may be cited to this Court or to or by any other court in this circuit when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion. (ii) They may be cited to this Court or by any other court in this circuit for factual purposes, such as to show double jeopardy, sanctionable conduct, notice, entitlement to attorneys' fees, or the existence of a related case. (iii) They may be cited to this Court in a request to publish a disposition or order made pursuant to Circuit Rule 36-4, or in a petition for panel rehearing or rehearing en banc, in order to demonstrate the existence of a conflict among opinions, dispositions, or orders. |

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| 9 | Circuit Rule 36-5 | | An order may be specially designated for publication by a majority of the judges acting and when so published may be used for any purpose for which an opinion may be used. Such a designation should be indicated when filed with the Clerk by the addition of the words "FOR PUBLICATION" on a separate line. | |
| 10 | Cir. R. 32.1 | Citation to published authority is preferred | | While citation to published authority is preferred, citation of unpublished decisions is permitted as authorized in Federal Rule of Appellate Procedure 32.1. Unpublished decisions are not precedential, but may be cited for their persuasive value. They may also be cited under the doctrines of law of the case, claim preclusion, and issue preclusion. Citation to unpublished opinions for which a Federal Appendix cite is unavailable must include an "unpublished" parenthetical. E.g., United States v. Wilson, No. 13-2047, 2015 WL 3072766 (10th Cir. Oct. 31, 2016) (unpublished). If an unpublished decision cited in a brief or other pleading is not available in a publicly accessible electronic database, a copy must be attached to the document when it is filed and must be provided to all other counsel and pro se parties. Where possible, references to unpublished dispositions should include the appropriate electronic citation |

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| 10 | Cir. R. 36.1 | | The court may dispose of an appeal or petition without written opinion. Disposition without opinion does not mean that the case is unimportant. It means that the case does not require application of new points of law that would make the decision a valuable precedent. | |
| 11 | Cir. R. 36-2 | An opinion shall be unpublished unless a majority of the panel decides to publish it. | | Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority. If the text of an unpublished opinion is not available on the internet, a copy of the unpublished opinion must be attached to or incorporated within the brief, petition, motion or response in which such citation is made. But see I.O.P. 7, Citation to Unpublished Opinions by the Court, following this rule. |

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| DC | Cir. R. 32.1 | Citations to decisions of this court must be to the Federal Reporter. Dual or parallel citation of cases is not required. | | Unpublished orders or judgments of this court, including explanatory memoranda and sealed dispositions, entered before January 1, 2002, are not to be cited as precedent. All unpublished orders or judgments of this court, including explanatory memoranda (but not including sealed dispositions), entered on or after January 1, 2002, may be cited as precedent. Counsel should review the criteria governing published and unpublished opinions in Circuit Rule 36, in connection with reliance upon unpublished dispositions of this court. ... A copy of each unpublished disposition cited in a brief that is not available in a publicly accessible electronic database must be included in an appropriately labeled addendum to the brief. The addendum may be bound together with the brief, but separated from the body of the brief (and from any other addendum) by a distinctly colored separation page. Any addendum exceeding 40 pages must be bound separately from the brief. If the addendum is bound separately, it must be filed and served concurrently with, and in the same number of copies as, the brief itself. [Provision on retroactive effect of provision deleted.] |

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| DC | Cir. R. 36 | An opinion, memorandum, or other statement explaining the basis for the court's action in issuing an order or judgment will be published if it meets one or more of the following criteria: (A) with regard to a substantial issue it resolves, it is a case of first impression or the first case to present the issue in this court; (B) it alters, modifies, or significantly clarifies a rule of law previously announced by the court; (C) it calls attention to an existing rule of law that appears to have been generally overlooked; (D) it criticizes or questions existing law; (E) it resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit; (F) it reverses a published agency or district court decision, or affirms a decision of the district court upon grounds different from those set forth in the district court's published opinion; (G) it warrants publication in light of other factors that give it general public interest. | An opinion, memorandum, or other statement explaining the basis for this court's action in issuing an order or judgment under subsection (b) above, which does not satisfy any of the criteria for publication set out in subsection (a) above, will nonetheless be circulated to all judges on the court prior to issuance. A copy of each such unpublished opinion, memorandum, or statement will be retained as part of the case file in the clerk's office and be publicly available there on the same basis as any published opinion. | |

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| Fed | Rule 32.1 | A precedential disposition will bear no legend. | | Parties are not prohibited or restricted from citing nonprecedential dispositions. The court may refer to a nonprecedential or unpublished disposition in an opinion or order and may look to a nonprecedential or unpublished disposition for guidance or persuasive reasoning, but will not give one of its own nonprecedential dispositions the effect of binding precedent. The court will not consider nonprecedential or unpublished dispositions of another court as binding precedent of that court unless the rules of that court so provide. |

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| Fed | Rule 36 | The court may enter a judgment of affirmance without opinion, citing this rule, when it determines that any of the following conditions exist and an opinion would have no precedential value: (1) the judgment, decision, or order of the trial court appealed from is based on findings that are not clearly erroneous; (2) the evidence supporting the jury's verdict is sufficient; (3) the record supports summary judgment, directed verdict, or judgment on the pleadings; (4) the decision of an administrative agency warrants affirmance under the standard of review in the statute authorizing the petition for review; or (5) a judgment or decision has been entered without an error of law. The clerk of court will not prepare a separate judgment when a case is disposed of by order without opinion. The order of the court serves as the judgment when entered. | A nonprecedential disposition must bear a legend designating it as nonprecedential. An opinion or order which is designated as nonprecedential is one determined by the panel issuing it as not adding significantly to the body of law. | |

## INDEX OF ONLINE APPENDICES B–Q: AGENCY-SPECIFIC OVERVIEWS

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| **Appendix P** | Department of Transportation (DOT): Federal Aviation Administration (FAA) |
| **Appendix Q** | Department of Veterans (VA) Affairs: Board of Veterans' Appeals (BVA) |