

Comment from Public Member Jack M. Beermann on *Precedential Decision Making in Agency Adjudication*
October 19, 2022

I have a few issues I would like to share regarding the recommendations. Please feel free to share these with the consultants and the committee.

These are an excellent set of recommendations. Here are some suggested edits and some questions or issues I flagged. (I have not yet had a chance to read the report, so please forgive me if my issues are explained there.)

In a and b under number 1, I'm not sure about "regularly." Even if they regularly don't (number 1) or do (number 2) if they sometimes don't and do, I would think that it's still important to openly designate the important ones as precedential if they are. These seem more like factors about whether a particular decision should be precedential.

Line 2, why not add ", and if so when," after whether? It reflects the entire recommendation. Lines 7 and 8, I think the phrase "in future cases" can be deleted as redundant. Like 13. I don't like the sound of "sift through." Maybe something like "digest" or maybe add "such" after "issues" in line 12 and then delete "sift through."

Number 2—these are good indications that a particular decision ought to be designated as precedential, and I think the sentence should be re-written to reflect that. Also, I don't understand why this would turn on whether an agency treats some as precedential and some as not. Maybe something like "Indications that an appellate decision ought to be treated as precedential include whether the decision:"

Number 4. I'm not sure why only appellate adjudicators not involved in the decision should be solicited for input on this. It seems like the particular adjudicators would be in the best position to say so, and the other people listed in number 5 might also provide valuable input. Perhaps all precedential decisions could be issued along with an invitation to provide input on the merits of the designation.

Number 6, line 42, maybe consider after "Federal Register" adding ", on their websites, and by directly altering those persons likely to be especially interested in the matter. Also, the last sentence of number 6 is preamble language—it does not contain a recommendation. Maybe turn it into the language of a recommendation like "In determining whether amici participation or public comments would be valuable, agencies should consider the extent to which a cases addresses broad policy questions whose resolution requires consideration of general or legislative facts as opposed to simple adjudicative facts particular to the parties."

Number 7—I think that this recommendation is required by caselaw, particularly the Allentown Mack and Fox Television decisions. An unexplained departure from a precedential decision would be arbitrary and capricious. They have to distinguish it or expressly disavow it.

Number 9, line 54, consider changing “upon whom they are binding” to “required to apply them.” Or “required to follow them.”

Number 12, the last sentence, starting on line 63, is preamble language, there’s no recommendation. Maybe delete the sentence but add to the beginning of the first sentence of number 12 “To enable parties and others to quickly focus on pertinent sources and access information that might otherwise be missed, agencies should . . .”

Number 13—I don’t understand why c and d depend on some but not all decisions being precedential. Unless I am missing an important factor, I would delete that clause from each of those. Also, in line 74, I think you want “modifying” not “modified.” In F of number 13, don’t you mean “precedential decisions” not “appellate decisions”? G seems redundant of part of c. Maybe add the words “criteria for” to C, and delete G.

Jack Beermann