REPORT FOR THE
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

PRECEDENTIAL DECISION MAKING IN AGENCY ADJUDICATION

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Recommended Citation

Christopher J. Walker, Melissa Wasserman & Matthew Lee Wiener, Precedential Decision Making in Agency Adjudication (Dec. 6, 2022) (report to the Admin. Conf. of the U.S.)

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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.

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
DHS	Department of Homeland Security
EAB	Environmental Appeals Board
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
USPTO	U.S. 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and likely perdurable set of rules governing the distinction between precedential (sometimes called "published") and non-precedential (sometimes called "unpublished") decisions in the courts of appeals.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commentary,[2] the judiciary amended the *Federal Rules of Appellate Procedure* in 2006 to address the precedential/non-precedential distinction.[3] Its amendment requires the courts to permit the citation of non-precedential, non-published, and similarly designated decisions but otherwise leaves each circuit to decide (1) whether to issue non-precedential decisions, (2) under what circumstances and with what procedures they should do so, and (3) what legal effect they should give them.[4] Every circuit's rules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's notes to 2006 amendment.

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

[6] *See, e.g.*, Michael 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.

Walker & Melissa F. 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* (C.F.R.)) 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 of 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 Administrative Procedure Act (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] Three ACUS recommendations make that point. *See* Part I.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 I.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 I.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.D and E, 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? And second, how do agencies disseminate precedential decisions internally—to other appellate adjudicators, to hearing-level adjudicators, enforcement staff, and agency policymakers? 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 findings addressed in Part III.

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. Nat. 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 overrule the judge's 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 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 courts 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 court of appeals ("circuit court") has chosen to adopt the "law of the circuit," under which 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 way, 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 to 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 Not 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. LeRoy, *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 how 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 adjudication systems, 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 associated with precedent, it is not surprising that many

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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 BROOK. 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.

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, but ACUS also 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] In addition to its disclosure and related provisions, *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* (C.F.R.) 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 orders, 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, "[a]s 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.*, N.Y. Legal Assistance Grp. v. Bd. of Immigr. 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 administrative law judges (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

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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 this Report is 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 U.S. Patent and Trademark Office (for patent cases) and the Veterans Administration (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 by 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* Arthrex v. United States, 141 S. Ct. 1970, 1984 (2021) ("And 'higher-level agency reconsideration' by the agency head is the standard way to maintain political accountability and effective oversight for adjudication that takes place outside the confines of § 557(b)."); *see generally* Walker & Wasserman, *supra* note 6, at 174–75 (exploring this standard model in greater detail). This question is of constitutional significance following *Arthrex*, which held unconstitutional a statute that assigned final agency decision-making authority to administrative patent judges

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 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 National Labor Relations Board (NLRB),[48] the Securities and Exchange Commission (SEC),[49] and the Merit Systems Protection Board (MSPB).[50] 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.[51] (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

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(APJs) who have statutory removal protections and are not appointed as principal officers (that is, by the President with the advice and consent of the Senate) under the Appointments Clause. *See Arthrex*, 141 S. Ct. at 1985 ("We hold that the unreviewable authority wielded by APJs during inter partes review is incompatible with their appointment by the Secretary to an inferior office."). *Arthrex* might render unconstitutional other appellate systems in which adjudicators similarly exercise final agency decision-making authority but who are not appointed as principal officers. The constitutionality of such systems may depend on whether final decision-making authority is vested in such officers by statute, as in *Arthrex*, or instead by agency rule. We express no opinion as to whether any particular appellate system, including any studied here, may violate the Appointments Clause.

[48] *See* App. L (NLRB). Throughout this Report, we cite to the case studies on the agency adjudication systems included in our study, which are appended to the end of the Report.

[49] *See* App. N (SEC).

[50] *See* App. K (MSPB).

[51] 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).

does not provide for agency-head review; it is often silent on the question.[52] Notable appellate bodies in this second category include the Social Security Administration's (SSA) Appeals Council,[53] and, with some qualification, the Environmental Appeals Board (EAB) at the Environmental Protection Agency (EPA).[54]

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 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 Veterans Administration's (VA) Board of Veterans' Appeals (BVA)[55] and the Department of Labor's (DOL) Benefits Review Board.[56] The Patent Trial and Appeal Board (PTAB) falls into this category,[57] 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.[58] Now PTAB decisions are subject to agency-head review, so the U.S. Patent and Trademark Office (USPTO) 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

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[52] In this appellate review structure, an agency head still likely retains the authority to review decisions. The agency head might exercise this authority by, among other things, rescinding or modifying the rule delegating final decision-making authority or by making a case-specific exception.

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

[54] *See* App. N (EPA–EAB).

[55] *See* App. Q (VA–BVA).

[56] *See* App. J (DOL–BRB).

[57] *See* App. M (USPTO–PTAB); *see generally* Walker & Wasserman, *supra* note 6.

[58] *See Arthrex*, 141 S. Ct. at 1987–88.

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.[59] The most notable example is the Department of Justice's (DOJ) immigration adjudication program at the Executive Office of Immigration Review (EOIR), under which the Board of Immigration Appeals' (BIA) decisions are subject to discretionary review by the Attorney General.[60] Other examples include the DOL's Administrative Review Board[61] and the Department of Agriculture's Judicial Officer.[62]

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.[63] We are not aware of any adjudication systems in which conventional 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

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[59] *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)).

[60] *See* App. I (DOJ–EOIR).

[61] *See* App. K (DOL–ARB).

[62] *See* App. B (USDA).

[63] *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)).

include the "appeals" decided by the ALJs in the Department of Health and Human Services' (HHS) Office of Medicare Hearings and Appeals (OMHA),[64] and the judges at the MSPB.[65] 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 perform 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.[66] The BVA also falls into this category.[67]

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 USPTO's PTAB.[68] 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 decisions 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 are the BVA[69] and HHS's Departmental Appeals Board.[70]

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).[71] Such intra-agency review is, if not the only possible locus

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[64] *See* App. F (HHS).

[65] *See* App. K (MSPB).

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

[67] *See* App. Q (VA–BVA).

[68] *See* App. M (USPTO–PTAB).

[69] *See* App. Q (VA–BVA).

[70] *See* App. F (HHS).

[71] 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 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—say 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. *See* Ronald M. Levin,

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,"[72] 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.[73]

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."[74] 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.[75]

Professor Cass's categorization is similar to James Freedman'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 appeals in adjudication cases as well as formulating policy."[76] In other words, unlike appellate review in federal courts, appellate review in agency

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Administrative Judges and Agency Policy Development: The Koch Way, 22 WM. & MARY BILL OF RIGHTS J. 407, 411 & n.24 (2013).

[72] 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).

[73] *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").

[74] Ronald Cass, Agency Review of Administrative Law Judges' Decisions 117 (1983) (report to the Admin. Conf. of the U.S.).

[75] *See id.* at 121–24.

[76] 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).

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.[77]

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 eight 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, 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

[77] Walker & Wiener, *supra* note 8, at 11.

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 overrule it—or to overrule it more narrowly. Or perhaps an agency head may consider congressional acquiescence an important factor when overruling 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 eight reasons for precedential decisions in agency adjudication, based on a review of the literature as well as the publicly available information and interviews conducted at the studied twenty agency adjudication systems 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.[78] 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[79] 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.[80] Scholars have long questioned the wisdom of *Chenery II*, especially when it comes to retroactive policymaking.[81] 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."[82]

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).[83] In that sense, it reflects Professor Cass's "political model" for administrative action.[84] But as noted above, the agency leaders surveyed for this

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[78] 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.").

[79] SEC 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.").

[80] *See generally* JEFFREY S. LUBBERS, A GUIDE TO FEDERAL RULEMAKING 129–47 (6th ed. 2018); Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 28 ADMIN. L. REV. 149 (1986).

[81] *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); *see also* Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 389 (2007) (recommending that Congress eliminate *Chevron* deference in immigration 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).

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

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

[84] *See* Cass, *supra* note 74.

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 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."[85]

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."[86] This model facilitates "[g]reater control and consistency" by placing the "overriding value" on "accurate, efficient and consistent implementation of centrally-formulated policies."[87] 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.[88] And precedential decision making is one way to help bring more consistency to the adjudication system—both on the hearing and appellate levels.

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

[86] 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).

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

[88] *See, e.g.*, Daniel Ho, David Marcus & Gerald Ray, Quality Assurance Systems in Agency Adjudication (Dec. 1, 2021) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/quality-assurance-systems-agency-adjudication-final-report; 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).

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.[89] It encompasses the fairness concerns about similarly situated individuals, and about the ability of regulated individuals to rely on prior decisions. It also concerns the agency's ability to expeditiously provide an 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."[90] The threat of further review may well encourage hearing-level adjudicators to avoid errors in the first place. Designating an appellate decision as precedential could send a louder and more public message to hearing-level adjudicators.

4. *Efficiency*

Efficiency, a fourth objective for precedent in the federal courts context, is also present 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"[91]—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 hearing-level adjudicators to one particular approach, and they bind appellate adjudicators to the same absent their discretion to overrule 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 policymaking, consistency, predictability, and efficiency, the fifth main objective 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 particular adjudicators.[92] 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

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

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

[91] 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.").

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

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 regulated individuals in particular, that they will be treated the same as those in precedential decisions—that the agency will be bound by those decisions and the reasons articulated in them.

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.[93] 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 to be applied in the 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.[94] Hearing-level adjudicative decisions do not receive *Chevron* deference for agency statutory interpretations; and to receive deference for agency statutory and regulatory interpretations, the Supreme Court has increasingly signaled the importance of agency-head final decision-making authority.[95] Judicial deference was a recurring theme in the interviews conducted for this Report.

7. *Judicial Dialogue*

The agency officials, however, 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,[96] the agency interviewees underscored that their agencies are 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

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[93] *See generally* Levy & Glicksman, *supra* note 6, at 45–52.

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

[95] *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.").

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

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.

8. *Public Education*

When it comes to the educational aim of precedential decisions, many agency officials interviewed also mentioned the importance of publishing decisions for the public and, in particular, for regulated parties.[97] 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 underlying the report for *Agency Appellate Systems*, including the ACUS database on adjudication maintained by Stanford Law School.[98] 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.B.)

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:

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[97] *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").

[98] *See* STAN. L. SCH., 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."

- Department of Agriculture (USDA): Office of the Judicial Officer
- Environmental Protection Agency (EPA): Environmental Appeals Board
- Equal Employment Opportunity Commission (EEOC): Federal Sector
- Federal Energy Regulatory Commission (FERC)
- 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 (IBIA) and Interior Board of Land Appeals (IBLA)
- 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 (ARB), Benefits Review Board (BRB), and Board of Alien Labor Certification Appeals (BALCA)
- Merit Systems Protection Board (MSPB)
- National Labor Relations Board (NLRB)
- U.S. Patent & Trademark Office (USPTO): 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 predominant structures of appellate review identified in Part I.C, both systems within executive departments and those within independent (or freestanding) agencies, both regulatory and benefits-conferring adjudication systems, and so forth.[99] We placed particular emphasis on case volume in our selections. The selected systems, for the most part, adjudicate a

[99] 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.

relatively large number of cases, and several of them (the SSA Appeals Council,[100] BVA,[101] and EOIR[102]) are among 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 briefly describes the cases it adjudicates and how its appellate process works. The overview then addresses whether the system uses precedential decision making 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, explanatory materials on agency websites, and so forth), as the citations in the overviews reflect. We supplemented and modified 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 B–Q (in the same order in which they are listed above) at the end of this Report. 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.[103] 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

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[100] *See* App. N (SSA).

[101] *See* App. O (VA–BVA).

[102] *See* App. I (DOJ–EOIR).

[103] We were not able to schedule an interview with DOJ's 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.

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 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 are 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 into 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; and (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.[104] By *precedential decisions*, we mean agency appellate decisions that announce or establish rules of decisions that, unless and until overruled with an adequate explanation,[105] bind a system's own appellate adjudicators, lower-level adjudicators, or other agency officials when they address the same issues in subsequent, unrelated cases.[106] 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.[107]

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.[108]

The few agency procedural rules that define precedent or precedential do so in ways that make bindingness their critical feature. The MSPB's rules, which

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[104] *See, e.g.*, Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

[105] 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))). On an agency's need to explain adequately its change of precedent to withstand arbitrary-and-capricious review, see, for example, FCC v. Fox Television Stations, Inc., 556 U.S. 502 (2008).

[106] *Cf.* CAL. GOV'T CODE § 11425.60 (West) (seemingly using a broader definition).

[107] *See* App. G (DHS–USCIS); App. I (DOJ–EOIR). *See generally* Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 (2015).

[108] *See, e.g.*, PETER L. STRAUSS ET AL, GELLHORN AND BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 263–264 (12th ed. 2018); John F. Manning, *Non-Legislative Rules*, 72 GEO. WASH. L. REV. 893, 934–935 (2003) (noting that "agency adjudications enjoy precedential force by virtue of the consistency norms imposed by the arbitrary and capricious test"). Compare Admin. Conf. of the U.S., Recommendation 2017-5, Agency Guidance Through Policy Statements, 82 Fed. Reg. 61,734, 61,736 (Dec. 29, 2017), which urges agencies to afford the public an opportunity to suggest that an agency modify or rescind a policy statement. *See also* Admin. Conf. of the U.S., Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*, 84 Fed. Reg. 38927 (Aug. 8, 2019).

are among the most explicit, provide a good example.[109] 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 any future decisions."[110] Another example is provided by IBLA, whose website page says that the Board need not "follow" or "distinguish" non-precedential decisions (called "dispositive orders").[111]

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, "informative," or "precedential."[112] 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."[113] Informative decisions, the rules provide, "should be followed in most cases, absent justification," but they are not binding.[114]

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.[115] 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.

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[109] *See* App. K (MSPB).

[110] 5 C.F.R. § 1201.117(c)(2) (2022). *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.

[111] *IBLA Facts*, Dep't of Interior, https://www.doi.gov/oha/organization/ibla/faqs; *see* App. H (Interior).

[112] *See* App. M (USPTO–PTAB).

[113] Patent Trial & Appeal Bd., *supra* note 110.

[114] *Id.* at 11.

[115] *See* App. G (DHS–USCIS); *see also* 8 C.F.R. § 103.3(c) (2022).

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.[116] (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.[117]) It is significant that these systems constitute two of the government's three highest volume appellate systems. The third highest volume appellate system, DOJ's EOIR, does use precedential decision making.[118] 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 of the objectives that underlie 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,[119] 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.[120]

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[116] *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.

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

[118] *See* App. I (DOJ–EOIR).

[119] *See* 20 C.F.R. § 402.35(4) (2022).

[120] 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 as 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

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 for which it has done so. 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 levels 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, 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 distinguish between precedential and non-precedential decisions, 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 EOIR are also alone among the systems reviewed in identifying their processes for making designations.[121]

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 decisions as such on their face. Second, an agency might explicitly disclose in some decisions how it addresses precedent. An agency might say in a decision, for instance, that its conclusion follows from other decisions that it explicitly characterizes as binding precedent. Or an agency might have a (usually small) body of decisions that explain how it

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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 by claimants. *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 Nonlegislative 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.

[121] *See* App. M (USPTO–PTAB); App. I (DOJ–EOIR).

treats precedent.[122] 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.[123]

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 precedential and others non-precedential; (2) the criteria agencies use to decide when to issue 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 decisions should be divided into two categories: those that treat all (or nearly all) of 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 generally use the "precedential"/"non-precedential" terminology, but some use other terminology—for instance, "published"/"non-published."[124] ("Published"/"non-published" can usually be used synonymously with "precedential"/"non-precedential," as in most courts of appeals, but there are some exceptions.[125] "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 EAB, 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.[126] (Here is an example of "published" and "precedential" not being synonymous.) Another example is the EEOC's Federal Sector Office.[127] Most decisions are decided, under an administrative delegation of final decision-making authority from the full

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[122] *See, e.g.,* App. B (USDA); App. J (DOL–ARB).

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

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

[125] 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).

[126] *See*, *e.g.*, App. B (EPA–EAB).

[127] *See*, *e.g.*, App. D (EEOC).

Commission, by the Office's Director; a small number are decided by the Commission, usually when an emerging issue has arisen.[128] Only the name of the signatory at the bottom of a decision indicates which is which.[129] 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.[130]

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.[131] 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.

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.[132] 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.

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[128] *Id.*

[129] *Id.*

[130] 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.

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

[132] 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) (2022((identifying criteria for BIA's designation of precedential decisions).

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 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 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 EOIR'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."[133]

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.[134] 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

[133] 8 C.F.R. § 1003.1(g)(vi) (2022); *see* App. I (DOJ–EOIR).

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

"distinguish" them.[135] The other studied agencies' practices all appear to be in accord with the MSPB rule.[136]

It is common, at the studied agencies, for at least private parties to cite non-published decisions, including at the BVA,[137] 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 their facts.

A few agencies treat non-precedential decisions as "persuasive" even if they are not binding. Terminology varies. An example is DOL's BALCA.[138] 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. Moreover, PTAB labels certain non-precedential decisions as "informative," and the USCIS designates some non-precedential decisions as "adopted."[139]

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 overrule prior agency precedent. At virtually all studied agencies, the answer was that the agency precedent is binding until the agency overrules it.

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 that provides for de-designation of precedential decisions 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."[140]

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, and so forth.

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[135] 5 U.S.C. § 1201.117(c)(2); *see* App. K (MSPB).

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

[137] *See* App. Q (VA–BVA).

[138] *See* App. J (DOL–BALCA).

[139] *See* App. M (USPTO–PTAB).

[140] PTAB Standard Operating Procedure 2 (Rev. 10) IV, https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf; *see* App. M (USPTO–PTAB).

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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[141]

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, except for PACA cases	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: Executive Office of Immigration Review	Yes	Yes	Yes: C.F.R.-codified rule	Yes
EEOC	Yes	Yes	No	No
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	No	No
Department of Health & Human Services: Medicare Appeals Council	Yes	Yes	Yes	Yes
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

[141] Except where otherwise noted, the information set forth below is drawn from Appendixes B–Q included at the end of this Report.

Agency Adjudication System	Uses Precedential Decision Making	Distinguishes Between Precedential and Non-Precedential Decisions	Rule Addressing Precedent	Published Criteria for Precedential Designations
DOL: Administrative Review Board[142]	Yes	No	No	No
DOL: Benefits Review Board	Yes	Yes	No	No
DOL: Board of Alien Labor Certification Appeals (Permanent Certification Cases)[143]	Yes	Yes	No	No
MSPB	Yes	Yes	Yes: C.F.R.-codified rule	No[144]
NLRB	Yes	Yes	No	No
USPTO: Patent Trial & Appeals Board	Yes	Yes; also intermediate "informative" decisions	Yes ("Standard Operating Procedures" not codified in C.F.R.)	Yes
SEC	Yes	No	No	No
SSA: Appeals Council	No	No	No	No
Department of Transportation	Yes	No	No	No
VA: Board of Veterans' Appeals	No	No	Yes: C.F.R.-codified rule	No

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 decisions and (3) the format and structure of precedential decisions.

1. Process of Deciding to Designate a Decision as Precedential

In those adjudication systems where there is discretion as to whether to issue a precedential or non-precedential appellate decision, the process for deciding whether to designate the decision as precedential varies considerably. At most

[142] 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).

[143] 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) (2022).

[144] Except to provide that a "nonprecedential Order is one that the Board has determined does not add significantly to the body of MSPB case law." 5 C.F.R. § 1201.117(c)(2) (2022).

agencies, as noted in Part III.B.2, the agencies have not published any criteria for designating a decision as precedential. The same is even truer 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 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.[145]

At other agencies, by contrast, the decision whether to designate an opinion as precedential is made 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 requires signoffs from the DHS General Counsel, the Justice Department's Office of Legal Counsel, and the Attorney General, and then publication by the BIA.[146] In part because that is a lengthy and resource-intensive process, USCIS seldom issues precedential decisions and has instead created a middle-ground opinion category—called "adopted decisions"—that are not binding on agencies or others outside of the USCIS but do bind 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.[147]

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.[148] 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.[149] 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.[150]

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.[151] At the BVA, when the appellate body

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[145] *See* MSPB, 5 C.F.R. § 1201.117(c) (2022).

[146] App. G (DHS–USCIS).

[147] *Id.*

[148] App. I (DOJ–EOIR). 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).

[149] *See* 8 C.F.R. § 1003.1(g)(3) (2022).

[150] Wadhia & Walker, *supra* note 81, at 1229 n.179.

[151] App. F (HHS–Medicare Appeals Council).

wants to make policy, it works with the VA's Office of General Counsel to bring consistency to adjudications.[152]

Perhaps most notably, at PTAB, a panel decision is designated as a precedential either by a special panel selected and convened by the USPTO's director or by the USPTO director in consultation with an advisory committee.[153] PTAB's process is probably the most formalized and elaborate. As two of us have detailed elsewhere, PTAB had a very difficult process for designating decisions as precedential.[154] 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.[155]

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.[156] PTAB does so through an online-form,[157] and the Medicare Appeals Counsel provides on its website an email address to which to submit recommendations.[158] The agency officials interviewed underscored how helpful is it to get feedback from within the agency—and sometimes 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 SEC's Office of the General Counsel is of this model in that it

[152] App. Q (VA–BVA).

[153] App. M (USPTO–PTAB).

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

[155] App. M (USPTO–PTAB).

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

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

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

provides substantial support to the Commission in writing precedential opinions.[159]

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 been issued, and it may receive less agency staff input.

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 USPTO, which circulates all precedential opinions to all administrative patent judges for comment for ten days before the precedential decision issues.[160] Mimicking the practice of the U.S. Court of Appeals for the Federal Circuit,[161] the USPTO'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 views outside of the parties can be considered before a case is decided. Agencies that accept amicus briefs vary on the procedures associated with amici participation. The SEC, for instance, has promulgated rules delineating the conditions for amici participation.[162] The USPTO historically has treated amicus briefs as any other motion, requiring PTAB approval.[163] Although recently the USPTO has added an online form for Precedential Opinion Panel amicus requests.[164] Similarly, whether to allow amicus briefs in immigration adjudication is at the

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[159] 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. *See* App. N (SEC).

[160] App. M (USPTO–PTAB).

[161] 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.

[162] SEC Rules of Practice 210(d); *see* App. N (SEC).

[163] 37 C.F.R. §42.20(b) (2022); *see* App. M (USPTO–PTAB).

[164] 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).

sole discretion of the BIA.[165] In contrast, amicus briefs are only allowed at the USCIS if they are solicited by the party or the USCIS.[166]

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.[167] The USPTO has also solicited amici participation but much less frequently than the NLRB.[168]

3. *Substance and Structure of Precedential Decisions*

Most agencies' precedential opinions mirror 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 is similar to 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,[169] but some are longer than seventy-five pages.[170] 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.[171] SEC decisions

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[165] App. I (DOJ–EOIR).

[166] App. G (DHS–USCIS).

[167] *See* App. L (NLRB); https://www.nlrb.gov/cases-decisions/filing/invitations-to-file-briefs.

[168] *See* App. M (USPTO–PTAB); The USPTO appears to have solicited amicus briefs filings for the first time in 2017, in *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.

[169] *See* App. M (USPTO–PTAB); *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.

[170] 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.

[171] *See* App. N (SEC); *FreeSeas Inc.*, Exchange Act Release No. 95534, 2022 WL 3575915 (Aug. 18, 2022).

that address fraud tend to be longer but average under twenty pages.[172] Similar to the SEC, the lengths of FAA decisions also vary on the issue decided.[173]

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.[174] The DOL Benefits Review Board's decisions' precedential status is indicated by a stamp on the decision.[175] IBLA decisions are identified as precedential by a footnote at the bottom of the order.[176] Some agencies do not include any indication that a decision is precedential on the opinions themselves 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.[177] Moreover, agencies generally do not mark opinions as precedential if all decisions are precedential.[178]

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 processes. A handful of agencies publish their precedential decisions in Reporters, wherein cases are published in chronological order in print volumes, that 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;[179] and DOL's Benefits Review Board, whose decisions are published in one of two private reporters (Juris Publishing's *Black Lung*

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[172] *The Application of Louis Ottimo for Rev. of Disciplinary Action Taken by Finra*, Exchange Act Release No. 95141, 2022 WL 2239146 (June 22, 2022).

[173] *See* App. P (DOT–FAA).

[174] *Compare Ex parte McAward,* Appeal No. 2015-006416, 2017 WL 3669566 (P.T.A.B. Aug. 25, 2017), *with* Lectrosonics, Inc. v. Zaxcom, Inc., No. IPR2018-01130, 2020 WL 407146 (P.T.A.B. Jan. 24, 2020).

[175] App. J (DOL–BRB).

[176] App. J (DOL–IBLA).

[177] *See* App. I (DOJ–EOIR); *see also* Department of Justice, *Agency Decisions*, https://www.justice.gov/eoir/ag-bia-decisions.

[178] *See, e.g.*, App. A (USDA); App. E (FERC); App. F (HHS–DAB); App. H (Interior); App. N (SEC).

[179] *See* App. L (NLRB). 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.

Reporter and Matthew Bender's *Benefits Review Board Service Longshore Reporter*).[180]

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 include agency precedential decisions for most agencies, including USPTO, SEC, MSPB, and the NLRB.[181] These databases typically categorize the opinion by type, enabling the user to search for precedential opinions only. For instance, Lexis administrative materials database delineates between PTAB decisions that are designated as precedential, informative, or routine and allows users to search for a subcategory of opinions.[182]

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 the 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 a red flag to suggest negative treatment, a 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 the 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 materials.[183] Under 5 U.S.C. § 552(a)(2), final agency decisions must be made available "by electronic means"—i.e., online.[184] 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 impracticality of maintaining copies of all decisions in the era before electronic publication.[185] Whether or not this interpretation is correct, it is well accepted that precedential

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[180] *See* App. J (DOL–BRB).

[181] *See, e.g.*, App. K (MSPB); App. L (NLRB); App. M (USPTO–PTAB); App. N (SEC).

[182] App. M (USPTO–PTAB).

[183] 5 U.S.C. § 552.

[184] *Id.*

[185] 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).

decisions fall within § 552(a)(2)'s disclosure requirement.[186] 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 contains 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 USPTO's website also indexes all PTAB precedential opinions by issue on a single webpage.[187]

Finally, some agencies publish digest or summary of their precedential decisions to make them more accessible to non-experts.[188] 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 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.

Moreover, even direct notification of precedential decisions by appellate adjudicators to hearing-level adjudicators appears uncommon. Agencies usually leave notification to hearing-level administrators, and interviews with hearing-

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

[187] *Precedential and informative decisions*, U.S. Pat. Trademark Off., https://www.uspto.gov/patents/ptab/precedential-informative-decisions; *see* App. M (USPTO–PTAB).

[188] *See, e.g.*, *Cases and Decisions—Notable Board Decisions*, Nat'l Labor Relations Bd., https://www.nlrb.gov/cases-decisions/decisions/notable-board-decisions (listing especially significant decisions with accompanying brief summaries prepared by agency staff); *Agency Decisions*, Exec. Office for Immigration Review, https://www.justice.gov/eoir/ag-bia-decisions (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).

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.[189]

Our interviews with agency officials did not reveal any other mechanisms by which 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.[190]

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

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

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

not then govern.) An inadequately explained departure may condemn a decision on judicial review under the arbitrary-and-capricious standard.[191]

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.[192] 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 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

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[191] *See, e.g.*, Achison v. Wichita Board of Trade, 412 U.S. 800, 802–09 (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); United Auto. Workers v. NLRB, 802 F.2d 969 (7th Cir. 1986). *Cf.* Allentown Mack v. NLRB, 522 U.S. 359 (1998) (emphasizing also that an agency must follow the decisional rule as specifically phrased in its precedential decisions, however consistent its decisions may be). 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.

[192] Nearly all of the cases we have identified arose 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.") We have identified one decision of the Article I Court of Appeals for Veterans Claims suggesting 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).

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 cases 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.[193] Any serious study, of course, would require a time-consuming and methodologically challenging empirical investigation of particular adjudication systems' patterns 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.[194]

IV. RECOMMENDATIONS

Our recommendations are drawn from our findings (Part III), though not all of our findings resulted in recommendations. 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

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[193] *See generally* JAYA RAMJI-NOGALES, ANDREW I. SCHOENHOLTZ & PHILIP G. SCHRAG, REFUGEE ROULETTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM (2011); David Ames, Cassandra Handan-Nader, Daniel E. Ho, & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1 (2020)

[194] 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 for 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.).

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 unappealed 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 a 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 policies 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 in 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 the 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.[195]) 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 fourth 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.[196] 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.

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[195] App. O (SSA); App. Q (VA–BVA).

[196] App. O (SSA).

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 for 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 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*,[197] 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."[198] 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."[199] The above recommendation, and several below, restate or build upon 2020-3's list. We leave it to ACUS to decide whether any recommendation that results from this Report should reference companion recommendations in Recommendation 2020-3.

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 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

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[197] 86 Fed. Reg. 6612 (Jan. 22, 2021).

[198] *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.

[199] 86 Fed. Reg. 6619 (§2(g)).

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 consistency, 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 issuing the opinions. Such circulation would promote consistency.

6. Agencies should assess the value of amicus participation in their appellate decision making, especially in cases that may result in precedential decisions. 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 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 the 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 decisions on both the faces of the decision 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 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.

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

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: 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.

The 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 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.

2. 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.

3. 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.

4. 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 decisis 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 decisions 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.[200]

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 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 overrule 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 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 in this Report encourage further scholarly and real-world attention.

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[200] *See, e.g.*, Admin. Conf. of the U.S., Agency Appellate Systems, 86 Fed. Reg. 6618, 6619 (Jan. 22, 2021).

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
1st Circuit	Cir. 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.

1st Circuit	Cir. 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.

2nd Circuit	Cir. 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.

3rd Circuit	Cir. R. 28.3			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.
3rd Circuit	Cir. R. 36.1	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.		

4th Circuit	Civ. R. 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.

4th Circuit	Cir. R. 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-		

		acknowledging judge's chambers has confirmed that the opinion was received.		
4th Circuit	Cir. R. 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.	
5th Circuit	Cir. R. 47.5.3			Unpublished opinions issued before January 1, 1996*, are precedent. Although every opinion believed to have precedential value is published, an unpublished opinion may be cited pursuant to FED. R. APP. P. 32.1(a). The party citing to an unpublished judicial disposition must provide a citation to the disposition in a publicly accessible electronic database. If the disposition is not available in an electronic database, a copy of any unpublished opinion cited in any document being submitted to the court, must be attached to each copy of the document, as required by FED. R. APP. P. 32.1(b).

5th Circuit	Cir. R. 47.5.4			Unpublished opinions Issued on or after January 1, 1996*, are not precedent, except under the doctrine of res judicata, collateral estoppel or law of the case (or similarly to show double jeopardy, notice, sanctionable conduct, entitlement to attorney's fees, or the like). An unpublished opinion may be cited pursuant to FED. R. APP. P. 32.1(a). The party citing to an unpublished judicial disposition should provide a citation to the disposition in a publicly accessible electronic database. If the disposition is not available in an electronic database, a copy of any unpublished opinion cited in any document being submitted to the court must be attached to each copy of the document, as required by FED. R. APP. P. 32.1(b). The first page of each unpublished opinion bears the following legend: Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

5th Circuit	Cir. R. 47.5.1	The publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. However, opinions that may in any way interest persons other than the parties to a case should be published. Therefore, an opinion is published if it: (a) Establishes a new rule of law, alters, or modifies an existing rule of law, or calls attention to an existing rule of law that appears to have been generally overlooked; (b) Applies an established rule of law to facts significantly different from those in previous published opinions applying the rule; (c) Explains, criticizes, or reviews the history of existing decisional or enacted law; (d) Creates or resolves a conflict of authority either within the circuit or between this circuit and another; (e) Concerns or discusses a factual or legal issue of significant public interest; or		

		(f) Is rendered in a case that has been reviewed previously and its merits addressed by an opinion of the United States Supreme Court. An opinion may also be published if it: Is accompanied by a concurring or dissenting opinion; or reverses the decision below or affirms it upon different grounds.		
6th Circuit	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.
7th Circuit	Cir. R. 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.

8th Circuit	Cir. R. 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.

8th Circuit	Cir. R. 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."	

9th Circuit	Cir. R. 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.	

9th Circuit	Cir. R. 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.		

9th Circuit	Cir. R. 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.

10th Circuit	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
10th Circuit	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.	

11th Circuit	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.

D.C. Circuit	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.]

D.C. Circuit	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 (d) above, which does not satisfy any of the criteria for publication set out in subsection (c) 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.	

Federal Circuit	Cir. R. 32.1	A precedential disposition will bear no legend.	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.	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.

Federal Circuit	Cir. R. 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.		

APPENDIX B:
DEPARTMENT OF AGRICULTURE (USDA):
OFFICE OF THE JUDICIAL OFFICER

I. Overview of Agency Adjudication System

At the U.S. Department of Agriculture (USDA), initial decisions from administrative law judges (ALJs) can be appealed to the USDA Judicial Officer,[1] who has been delegated final decision-making authority from the Secretary of Agriculture.[2] USDA adjudicates cases under around forty statutes, including the Agricultural Marketing Agreements Act,[3] the Animal Welfare Act,[4] the Commodity Promotion, Research, and Information Act,[5] the Equal Access to Justice Act,[6] the Federal Meat Inspection Act,[7] the Horse Protection Act,[8] the Organic Foods Production Act,[9] and the Perishable Agricultural Commodities Act (PACA).[10] USDA also issues reparation orders for monetary damages under the Packers and Stockyards Act[11] and PACA.[12]

The Judicial Officer issues final decisions from any appeals from those matters, as well as any appeals from initial decisions of the Commissioner of the Plant Variety Protection Office under the Plant Variety Protection Act.[13] The Judicial Officer also rules on any questions submitted by ALJs or procedural

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[1] *See* Schwellenbach Act of 1940, c. 75, § 3, 54 Stat. 82 (1940) (creating the USDA Judicial Officer). For an overview of the USDA's adjudication system, see MICHAEL A. ASIMOW, ADMIN. CONF. OF U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 109–113 (2019).

[2] *See* 7 U.S.C. §§ 2204-2, 2204-3 (granting authority to Secretary of Agriculture to subdelegate regulatory functions); *see also Office of the Judicial Officer (OJO)*, USDA, https://www.usda.gov/oha/ojo (lasted visited Dec. 1, 2022) ("The Judicial Officer is delegated authority by the Secretary of Agriculture to act as final deciding officer in United States Department of Agriculture (USDA) adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 and other proceedings listed in 7 C.F.R. § 2.35.").

[3] Pub. L. No. 75-137, 50 Stat. 246.

[4] 7 U.S.C. § 2131 *et seq*.

[5] *Id.* § 7411 *et seq*.

[6] 5 U.S.C. § 504; 28 U.S.C. § 2412.

[7] 21 U.S.C. § 601 *et seq*.

[8] 15 U.S.C. §§ 1821–31.

[9] 7 U.S.C. ch. 94; 7 U.S.C. § 6501 *et seq*.

[10] 7 U.S.C. ch. 20A.

[11] *Id.* §§ 181–229b.

[12] 7 U.S.C. ch. 20A.

[13] *See* 7 C.F.R. § 1.145 (2022). We use the term "appeals" here, which technically also include reparation orders under PACA and the Packers and Stockyard Act. PACA Rules of Practice are found at 7 C.F.R. pt 47 and Packers and Stockyards Act Rules of Practice are at 9 C.F.R. § 202.101 *et seq*.

motions brought by parties.[14] The regulations allow for appeals, a briefing schedule, transmittal of the record, and a final decision by the Judicial Officer that is appealed in federal court.[15] USDA cannot appeal a Judicial Officer's decision, but aggrieved parties can file appeals in Article III courts, usually in the U.S. Courts of Appeals though sometimes in the U.S. District Courts. The Judicial Officer receives 300-500 appeals per year and decides roughly that many. Historically, the median decision time for an appeal to the Judicial Officer is less than one week, with the longest decision taking less than a year.[16]

II. Use of Precedential Decisions

Although not set forth by statute, regulation, or rules of practice, decisions by the Judicial Officer that review ALJ rulings are all precedential.[17] When it comes to review of the less-formal adjudicative decisions in the PACA context—which involves resolving disputes between private participants in the fresh or frozen fruit and vegetable markets—the Judicial Officer has discretion whether to designate the decision as precedential. There are no published criteria for how the Judicial Officer decides whether to issue a precedential decision, but the decisions selected as precedential are published in the USDA's Agricultural Decisions reporter.[18]

III. Process for Writing and Form and Structure of Precedential Decisions

There is no publicly available information on how the Judicial Officer drafts precedential decisions, including whether staff attorneys assist, when it comes to appeals from ALJ decisions. Regulations do shed some light on the use of staff

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[14] *Id.* § 1.143(e).

[15] *See id.* § 1.145(i) ("As soon as practicable after the receipt of the record from the Hearing Clerk, or, in case oral argument was had, as soon as practicable thereafter, the Judicial Officer, upon the basis of and after due consideration of the record and any matter of which official notice is taken, shall rule on the appeal. If the Judicial Officer decides that no change or modification of the Judge's decision is warranted, the Judicial Officer may adopt the Judge's decision as the final order in the proceeding, preserving any right of the party bringing the appeal to seek judicial review of such decision in the proper forum. A final order issued by the Judicial Officer shall be filed with the Hearing Clerk. Such order may be regarded by the respondent as final for purposes of judicial review without filing a petition for rehearing, reargument, or reconsideration of the decision of the Judicial Officer.").

[16] This overview relies on USDA, ANNUAL REPORT OF THE JUDICIAL OFFICER: FISCAL YEAR 2015, https://www.dm.usda.gov/ojo/docs/reports/Annual%20Report%20of%20the%20Judicial%20Officer%20FYear%202015.pdf (last visited Dec. 1, 2022).

[17] *See, e.g.*, In Re: David Harris., 50 Agric. Dec. 683, 684 (U.S.D.A. 1991) ("The decisions of the Judicial Officer are binding on an ALJ irrespective of whether the ALJ regards the decisions as correct, and irrespective of whether the Judicial Officer ignores cases deemed relevant by the ALJ.").

[18] *See Agriculture Decisions Publication*, USDA, https://www.usda.gov/oha/services/agriculture-decisions-publications (last visited Dec. 1, 2022).

assistance in drafting opinions with respect to reparation orders.[19] Neither regulations or nor practice rules contain provisions for participation by outside parties as amicus.

Judicial Officer precedential opinions read very much like published judicial decisions. They state the reasons for the action taken and address the arguments of the parties. They include a summary of the dispute and findings at the outset, and then they have headings to ease their readability, such as procedural history, statutory framework, and analysis. Judicial Officer opinions do not have any markings that indicate their precedential status, and the length of opinions vary from fewer than ten pages to much longer.[20]

IV. Public Availability of Precedential Decisions

The Judicial Officer's precedential decisions and rulings are all published in the USDA's Agricultural Decisions reporter, which is available in subscription legal databases such as Lexis and Westlaw as well as on the USDA Office of Administrative Law Judges' website.[21] From 1971 through 2011, the Judicial Officer published an annual summary of major decisions,[22] but that practice has been discontinued. Each volume of the USDA's Agricultural Decisions reporter includes an index, and the published decisions typically include a brief summary of the case and ruling at the outset.

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[19] *See* 7 C.F.R. § 47.19(e) (2022) ("The examiner, with the assistance and collaboration of such employees of the Department as may be assigned for the purpose, . . . shall prepare, upon the basis of the evidence received at the hearing and with due consideration of submissions of the parties filed pursuant to this section, his or her report."); 7 C.F.R. § 47.20(k) (same); 9 C.F.R. § 202.115(a) (similar)

[20] *Compare* In Re: Jonathan Dyer, Drew Johnson a/k/a Drew R. Johnson, & Michael S. Rawlings, 79 Agric. Dec. 312 (U.S.D.A. 2020) (9 pages), *with* In Re: Quinter Livestock Mkt. & Clint Kvasnicka, 79 Agric. Dec. 288 (U.S.D.A. 2020) (22 pages).

[21] *Agriculture Decisions Publication*, USDA, https://www.usda.gov/oha/services/agriculture-decisions-publications (last visited Dec. 1, 2022). Volumes 55–78 are available on the University of Arkansas's National Agricultural Law Center website: https://nationalaglawcenter.org/aglaw-reporter/usdadecisions/ (last visited Dec. 1, 2022).

[22] *Summary of Decisions*, USDA, https://www.dm.usda.gov/ojo/decisions.htm (last visited Dec. 1, 2022).

APPENDIX C:
ENVIRONMENTAL PROTECTION AGENCY (EPA):
ENVIRONMENTAL APPEALS BOARD (EAB)

I. Overview of Agency Adjudication System

The Environmental Protection Agency (EPA) administers all or part of more than two dozen laws, including the Clean Air Act (CAA); Clean Water Act (CWA); Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); Solid Waste Disposal Act (SDWA); Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); Safe Drinking Water Act (SDWA); and Toxic Substances Control Act (TSCA).[1] Adjudications under those statutes include, among other matters, permit and enforcement decisions. A Director (typically a Regional Administrator) issues the "final" permit decision in permit cases, which can then be appealed.[2] A Presiding Officer—either an administrative law judge (ALJ) or Regional Judicial Officer (RJO)—issues the initial decision in enforcement proceedings.[3]

Before 1992, the EPA Administrator was responsible for deciding appeals from permit and initial enforcement decisions. Through an internal manual, the Administrator had delegated most appellate responsibility to two Judicial Officers at the main headquarters, while formally retaining the authority to decide certain appeals.[4] To respond to a growing appellate caseload, among other reasons, the EPA issued a rule in 1992 that established a three-member Environmental Appeals Board (EAB) as a "permanent body with continuing functions."[5] The rule eliminated the position of Judicial Officer at EPA headquarters. For both pragmatic and separation-of-functions reasons, the rule largely divested the EPA Administrator of any explicit adjudicative function, delegating nearly all final appellate decision-making authority to the EAB.[6] Today, the regulations retain the EAB's independence from the Administrator to issue final decisions as delegated by the Administrator, with the one exception

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[1] *Laws and Executive Orders*, EPA, https://www.epa.gov/laws-regulations/laws-and-executive-orders (last visited Nov. 11, 2022).

[2] 40 C.F.R. §§ 124.15(a), 124.19(a)(1); *see also* Modernizing the Administrative Exhaustion Requirement for Decisions and Streamlining Procedures for Permit Appeals, 84 Fed. Reg. 66,084, 66,087 (Dec. 3, 2019).

[3] *See* 40 C.F.R. § 22.4(b).

[4] Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5320, 5320 (Feb. 13, 1992).

[5] *Id*. at 5322; *see also* Anna L. Wolgast, Kathie A. Stein & Timothy R. Epp, *The United States' Environmental Adjudication Tribunal*, 3 J. CT. INNOVATION 185, 186 (2010); Edward E. Reich, *EPA's New Environmental Appeals Board*, NAT. RESOURCES & ENVT. 39, 39 (Spring 1994). For an overview of the EAB, see MICHAEL A. ASIMOW, ADMIN. CONF. OF U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 143–149 (2019).

[6] Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. at 5322.

of the Administrator preserving the right to break a tie if the EAB deadlocks in a specific case.[7]

The EAB originally consisted of three members, called Environmental Appeals Judges, designated by the Administrator.[8] Due to a "significant increase" in the EAB's caseload in the 1990s and changes in the Board's jurisdiction, that number later grew to "no more than four."[9] The Environmental Appeals Judges serve as "co-equals" without a Chief Judge.[10] Today, the bulk of the EAB's workload remains appeals from enforcement, especially civil penalty, decisions issued (mostly) by ALJs, and permits issued (mostly) by Regional Administrators.[11]

In its initial years, the EAB faced a significant backlog of cases awaiting decision. During its first full fiscal year (FY), it took final action on 156 matters and received 126 new matters.[12] In its first four years, the EAB "handled more than 500 matters and . . . issued more than 140 formal opinions."[13] In 2016, Michael Asimow reported the EAB had considered roughly 600 appeals during the previous 10 years, about two-thirds of them involving permit appeals and

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[7] *See* 40 C.F.R. § 1.25(e)(1) ("In the case of a tie vote, the matter shall be referred to the Administrator to break the tie."). During the Trump Administration, the EPA issued a rule reaffirming the EPA Administrator's "existing authority (derived from his or her statutory authority to issue the permits in the first instance) to review or change any EAB decision" and introduced an explicit mechanism by which the Administrator, through the General Counsel, can "issue a dispositive legal interpretation in any matter pending before the EAB or an any issue addressed by the EAB." Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,651 (Aug. 21, 2020). During the Biden Administration, the EPA rescinded that rule. *See* Revisions to the Permit Appeals Process To Restore the Organization and Function of the Environmental Appeals Board, 86 Fed. Reg. 31,172 (June 11, 2021). The EPA explained that it was rescinding the Trump-era rule allowing for the Administrator to de-designate a published EAB decision because that rule "interfere[d] with the independence and function of the EAB to issue final decisions as delegated by the Administrator, which again is fundamental to inspiring confidence in the fairness of the Agency's appellate adjudication process." *Id.* at 31,176. Although outside the scope of this Report, we note that the Administrator likely still has, as a technical matter, the authority to review decisions by, for example, rescinding the relevant rule subdelegating final decision-making authority or by making a case-specific exception.

[8] Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. at 5320; Wolgast et al., *supra* note 5, at 186.

[9] Changes to Regulations Concerning Membership of EPA's Environmental Appeals Board, 63 Fed. Reg. 67,779 (Dec. 9, 1998).

[10] EPA, THE ENVIRONMENTAL APPEALS BOARD PRACTICE MANUAL 5 (Aug. 2013) [hereinafter EAB PRACTICE MANUAL], https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Practice+Manual (last visited Nov. 11, 2022); *see also* 40 C.F.R. § 22.31.

[11] The EAB also processes other types of cases, including Equal Access to Justice Act fee petitions and program fraud civil remedy cases, which are beyond the scope of this study. EAB PRACTICE MANUAL, *supra* note 10, at 38–39, 60; *see also* 40 C.F.R. § 124.19(*l*).

[12] Reich, *supra* note 5, at 65.

[13] Nancy Firestone & Elizabeth Brown, *Ensuring the Fairness of Agency Adjudications: The Environmental Appeals Board's First Four Years*, 2 ENVTL. LAW. 291, 293 (1996).

the remainder involving enforcement actions.[14] A recent study found "EAB actions are 1.5 times more likely to come from permit appeals than penalty appeals."[15]

II. Use of Precedential Decisions

The EAB issues both "published" and "unpublished" decisions, with the process of publishing a decision being much more elaborate and the published opinions being much more detailed. The regulations and practice manual do not address the criteria the EAB uses to decide whether to publish a decision. In reviewing the decisions, however, it becomes quite clear that the EAB publishes decisions that are of significant value to the regulated community.

That said, nothing in the regulations, standing orders, or practice manual suggests that the precedential value of an EAB decision is different based on whether the decision is selected for publication. Indeed, the practice manual states that "[a]ll final EAB decisions and final EAB orders may be cited in EAB proceedings at any time after issuance, using the forms of citation set forth below."[16] Moreover, the EPA recently reaffirmed in a final rule that all decisions should be considered precedential:

> Whether a decision is categorized as "published" versus "unpublished" is also not determinative of whether a party will rely on a case or cite a case to the Board. Consistent with the foundational legal principle of *stare decisis*, the Board generally follows its own prior applications of law where the same factual and legal principles are presented. The use of a system of precedential decisions makes the decisional process more transparent and consistent for all, including the public.[17]

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[14] ASIMOW, *supra* note 5, at 147–48 (citing correspondence between EAB Judge Kathie Stein and Michael Asimow).

[15] Kelly Tzoumis & Emma Shibilski, *Environmental Decision-Making Through Adjudicatory Appeals in the United States*, 5 PEOPLE: INT'L J. SOC. SCI. 846, 856 (2019).

[16] EAB PRACTICE MANUAL, *supra* note 10, at 7.

[17] Revisions to the Permit Appeals Process To Restore the Organization and Function of the Environmental Appeals Board, 86 Fed. Reg. 31,172, 31,175 (June 11, 2021). During the Trump Administration, the EPA had issued a rule that would make only "published" decisions precedential and that would allow the EPA Administrator to review any published decision before it became effective in order to de-designate it. *See* Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,653 (Aug. 21, 2020) ("The publication of any decision designated for publication by the EAB is delayed for 15 days. During this period, the Administrator may review the decision and change the designation to an unpublished final order. Moving forward, it is the express policy of the Agency that only published decisions of the EAB represent EPA's official, authoritative position with regard to the issues addressed in such decisions."). During the Biden Administration, the EPA rescinded that rule. Revisions to the Permit Appeals Process To Restore the Organization and Function of the Environmental Appeals Board, 86 Fed. Reg. at 31,175.

The EPA explained that the precedential status of both published and unpublished EAB decision promotes "the transparency and consistency of EAB decisionmaking."[18]

III. Process for Writing and Form and Structure of Precedential Decisions

The practice manual and regulations provide little detail on the decision-making process, opinion structure, or substance of published decisions.[19] But the EAB published decisions read very much like published judicial decisions. They state the reasons for the action taken and address the arguments of the parties. They include a lengthy syllabus at the outset, and then they have headings to ease their readability, such as statement of the case, issues on appeal, statutory and regulatory framework, and analysis. The opinions do not have any markings that indicate their precedential status. The length of published opinions varies greatly, from single-digit pages to more than a hundred pages.[20]

IV. Public Availability of Precedential Decisions

All EAB decisions can be found on EAB's website.[21] Published decisions are initially issued as slip opinions, and then are published in the EPA's reporter Environmental Administrative Decisions (EAD). The EAD volume generally includes a subject index and reference tables, and the EAD is available in subscription legal databases such as Lexis and Westlaw.[22] Published decisions are organized on the website by statute and type of case, and they can also be sorted alphabetically, chronologically, by appeal number, or by citation.[23] Further, the EAB's website has a robust search function so the public can search for cases of interest.

EAB does not post any indices, digests, or summaries of its decisions on its website, but as noted above, published decisions include a formal syllabus at the outset and the EAD volume generally includes an index and reference tables. Finally, EAB's website includes comprehensive lists of EAB decisions reviewed by federal courts (and the outcome) and EAB decisions where federal court

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[18] Revisions to the Permit Appeals Process To Restore the Organization and Function of the Environmental Appeals Board, 86 Fed. Reg. at 31,175.

[19] *See* 40 C.F.R. § 1.25(e) (setting forth how the EAB makes decisions generally on three-judge panels by majority vote, with the Administrator casting the deciding vote in the event there is a tie).

[20] *Compare* Mesabi Nugget Delaware, LLC, 15 E.A.D. 812 (Mar. 19, 2013) (5 pages), *with* General Electric Co., 17 E.A.D. 434 (Jan. 26, 2018) (152 pages).

[21] *EAB Decisions*, EPA, https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Board+Decisions (last visited Nov. 11, 2022).

[22] EAB PRACTICE MANUAL, *supra* note 10, at 7–8.

[23] *Published Decisions List of Statutes*, EPA, https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Statutes (last visited Nov. 11, 2022).

review is pending.[24] Those lists include links to the federal court decisions and dockets, respectively.

To provide some perspective, the EAB website includes 462 published decisions (dating back to March 1992)[25] and 658 unpublished final orders (dating back to January 1997 but noting that unpublished final orders prior to November 1996 may not be listed and can be obtained from the agency).[26]

[24] *EAB Decisions Reviewed by the Federal Courts*, EPA, https://yosemite.epa.gov/oa/eab_web_docket.nsf/EAB+Decisions+Reviewed+by+the+Federal+Courts (last visited Nov. 11, 2022).

[25] *Published Decisions List of Statutes*, EPA, https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Statutes (last visited Nov. 11, 2022).

[26] *Unpublished Final Orders*, EPA, https://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Unpublished~Final~Orders (last visited Nov. 11, 2022).

APPENDIX D:
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION:
OFFICE OF FEDERAL OPERATIONS
(FEDERAL SECTOR CASES)

I. Overview of Agency Adjudication System

The Equal Employment Opportunity Commission's (EEOC's) federal sector program adjudicates claims by current and former federal employees (and applicants for federal employment) alleging discrimination by federal agencies.[1] Appellate cases come before the EEOC when, among other things, an agency appeals an EEOC administrative judge's (AJ's) adverse decision or a complainant appeals an agency's final decision (which itself can be based on an EEOC AJ's decision).[2]

Most appeals are decided by the EEOC's Office of Federal Operations (OFO), as provided for by rule, "on behalf of the Commission."[3] OFO is staffed by thirty or so appellate attorneys who work under a Director. All OFO decisions bear the Director's signature.

A small number of appeals are decided by the EEOC Commissioners themselves.[4] These appeals generally involve novel legal or policy issues. Commissioner decisions bear the signature of the EEOC's Executive Secretariat.

Just over 100,000 appellate decisions appear on the EEOC's website for the period July 2000 through the present.[5] That represents an average of about 4,500 cases per year.

If a complainant or defendant agency disagrees with an appellate decision, the complainant or agency may ask for reconsideration.[6] A request for reconsideration will only be granted if a party can show that the decision relied

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[1] For background, see MICHAEL ASIMOW, ADMIN. CONF. OF U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 139–142 (2019); MATTHEW LEE WIENER, GRETCHEN JACOBS, AND EMILY S. BREMER, ADMIN. CONF. OF U.S., EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: EVALUATING THE STATUS AND PLACEMENT OF ADJUDICATORS IN THE FEDERAL SECTOR HEARING PROGRAM 8–10 (2014).

[2] *See* 29 C.F.R. § 1614.401 (2022); *see also Federal EEO Complaint Processing Procedures*, EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/publications/federal-eeo-complaint-processing-procedures (last visited Nov. 12, 2022); ASIMOW, *supra* note 1, at 141.

[3] 29 C.F.R. §§ 1614.404 & 405 (2022).

[4] *Commission Votes: Glossary*, EEOC, ("Federal Sector Appellate Decisions"), https://www.eeoc.gov/commission-votes-glossary ("Only certain federal sector appellate decisions are voted on by the Commission.") (last visited Nov. 12, 2022). No rule addresses the distinction.

[5] *See Federal Sector Appellate Decisions*, EEOC, https://www.eeoc.gov/federal-sector/appellate-decisions (last visited Nov. 12, 2022).

[6] *See* 29 C.F.R. § 1614.407(c) (2022).

on a clearly erroneous interpretation of material fact or law or that it will have a substantial impact on the policies, practices, or operations of the defendant agency.[7] Once the EEOC has made a decision on a request for reconsideration, the decision is final. A dissatisfied complainant may file an action for de novo review in a federal district court.[8] A dissatisfied agency may not seek review.[9]

II. Use of Precedential Decisions

By long-standing practice, the EEOC treats all decisions as precedential, whether they are decided by OFO or the Commissioners themselves. No rule reflects this practice.

While the EEOC occasionally overrules decisions, it more commonly distinguishes the earlier decision. Sometimes the EEOC will note that a decision has been superseded by a statutory, regulatory, or judicial development.

III. Process for Writing and Form and Structure of Precedential Decisions

Decisions are drafted, in the first instance, by one of OFO's appellate attorneys. No dissenting or concurring opinions are issued in Commissioner-decided cases.

Decisions are judicial-like in their form and structure. Most decisions follow a consistent organization: they begin by summarizing the EEOC's disposition of the appeal and identifying the issues presented, and then provide the procedural and factual background of the case, summarize the parties' contentions, and set forth the EEOC's analysis, findings, and final disposition. Decisions conclude with an order, when applicable, awarding relief to the complainant.[10]

IV. Public Availability of Precedential Decisions

EEOC precedential decisions can be found online in subscription legal databases such as Lexis and Westlaw. The EEOC posts on its website all federal-sector appellate decisions since mid-July 2000.[11] (Complainant's names and other sensitive information are redacted. Respondent agency names are retained.) The EEOC publishes digests and articles of recent Commission decisions of interest, as well as relevant federal court cases.[12]

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[7] *Id*.

[8] *See, e.g.*, 29 C.F.R. §§1614.407, 1614.408.

[9] *See* ASIMOW, *supra* note 1, at 141–42; WIENER, *supra* note 1, at 13–16.

[10] *See, e.g.*, *Barbara S.*, EEOC Appeal No. 2020002285 (Apr. 14, 2021); Rick G., EEOC Appeal No. 0720180009 (Apr. 26, 2019).

[11] *Federal Sector Appellate Decisions*, EEOC, https://www.eeoc.gov/federal-sector/appellate-decisions (last visited Nov. 12, 2022).

[12] *Digests and Articles of Equal Employment Opportunity Law*, EEOC, https://www.eeoc.gov/digest (last visited Nov. 12, 2022).

Selected decisions that OFO deems to be especially "noteworthy" are highlighted separately, organized by topic (e.g., "attorney's fees," "timeliness," "determination on the merits [in cases under Title VII]"), accompanied by concise and helpful summaries of their key holdings.[13] About 100 decisions (the earliest from 2017) appear on the significant-decisions list.

OFO identifies noteworthy decisions not only for the benefit of adjudicators and the public, but also for the benefit of federal agencies subject to EEO laws. OFO uses "many" such decisions as "part of the Commission's outreach and training efforts."[14]

[13] *See Selected Noteworthy Federal Sector Appellate Decisions*, EEOC, https://www.eeoc.gov/federal-sector/selected-noteworthy-federal-sector-appellate-decisions (last visited Nov. 12, 2022).

[14] *Id.*

APPENDIX E:
FEDERAL ENERGY REGULATORY COMMISSION (FERC)

I. Overview of Agency Adjudication System

The Federal Energy Regulatory Commission (FERC) is a multi-member commission that regulates, among other things, the rates and services for electric transmission in interstate commerce and electric wholesale power sales in interstate commerce, the rates and services for natural gas and oil pipeline transportation in interstate commerce, and the licensing of hydroelectric dams and certification of natural gas pipeline facilities.[1] The Commission also protects the reliability of the high-voltage interstate transmission system through reliability standards and monitors and investigates energy markets.[2] The Commission adjudicates a number of contested matters as part of its regulatory activities, including rate and infrastructure proposals and remedial orders.[3]

When the Commission establishes hearing procedures to adjudicate matters pending before it, initial decisions are made by a presiding officer (typically an administrative law judge),[4] and there are four mechanisms for Commission review and decision. First, the conventional route is for a party to appeal (file "a brief on exceptions") the initial decision made by a presiding officer.[5] Second, if a party does not appeal, the Commission may—ten days after expiration of the appeal period—stay the initial decision and review the decision sua sponte, with discretion whether to require additional briefing and oral argument.[6] Third, a presiding officer may certify "any question arising from the proceeding, including any question of law, policy, or procedure" for Commission review.[7] The Commission has discretion whether to act on the certified question, and it can also sua sponte order that a presiding officer certify a question.[8] Finally, a party may seek interlocutory appeal of an issue if the presiding officer or the "motions Commissioner" "finds extraordinary circumstances which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person."[9] If the Commission does

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[1] *See What FERC Does*, FERC, https://www.ferc.gov/what-ferc-does (last visited Nov. 12, 2022).

[2] *See id.*

[3] *Id.*

[4] 18 C.F.R. § 385.708 (2022).

[5] *Id.* § 385.711.

[6] *Id.* § 385.712.

[7] *Id.* § 385.714.

[8] *Id.* If the Commission does not act on the certified question within 30 days, the question is returned to the presiding officer.

[9] 18 C.F.R. § 385.715 (2022).

not act on the interlocutory appeal within 15 days, it will review the issue after there is a complete initial decision.[10]

Based on a review of FERC's eLibrary,[11] the Commission has issued around ten orders on initial decision and another 150 orders on offers of settlement over the last two years.

II. Use of Precedential Decisions

Although not detailed by statute or regulation, all Commission-level FERC decisions are precedential. Precedential decisions are binding on the public, on the hearing-level ALJs, and on the agency as a whole until and unless the Commission decides to overturn the precedent.

III. Process for Writing and Form and Structure of Precedential Decisions

FERC's various program offices, including the Office of Energy Market Regulation, the Office of Energy Policy and Innovation, the Office of Energy Projects, the Office of Electric Reliability, and the Office of the General Counsel play an important role in drafting the Commission's precedential decision.[12] The staff in the Commission's program offices work with the Commissioners and their staff to finalize the decisions. When it comes to outside participation, FERC's rules of procedure allow any interested person to file a motion to intervene in a proceeding.[13] And the Commission's regulations do not require any person to intervene in order to submit comments in a proceeding.[14]

FERC precedential opinions read very much like published judicial decisions. They state the reasons for the action taken and address the arguments of the parties. They have headings to ease their readability, such as background, procedural history, and analysis. FERC opinions do not have any markings that indicate their precedential status, and the length of Commission opinions vary from fewer than ten pages to much longer.[15]

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[10] *Id.*

[11] *eLibrary*, FERC, https://www.ferc.gov/ferc-online/elibrary (last visited Nov. 12, 2022).

[12] *See Office of the General Counsel*, FERC, https://www.ferc.gov/office-general-counsel-ogc (last visited Nov. 12, 2022).

[13] *See* 18 C.F.R. § 385.214 (2022).

[14] *See, e.g.*, Cal. Dep't of Water Resources & City of Los Angeles, 120 FERC ¶ 61,248, at 13 (2007) (noting that "one need not intervene in order to comment and have one's comments fully considered"), *pet'n denied*, Cal. Trout v. FERC, 572 F.3d 1003 (9th Cir. 2009).

[15] *See, e.g.*, Modesto Irrigation Dist. & Turlock Irrigation Dist., 181 FERC ¶ 61,107, 2022 WL 16726228 (Nov. 4, 2022).

IV. Public Availability of Precedential Decisions

FERC opinions can be found online in subscription legal databases such as Lexis and Westlaw. The FERC eLibrary also contains all opinions, orders, and decisions (as well as most underlying filings) issued by FERC since 1981.[16] FERC does not post any indices, digests, or summaries of its decisions.

[16] *eLibrary*, FERC, https://elibrary.ferc.gov/eLibrary/search (last visited Nov. 12, 2022).

APPENDIX F:
DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS): DEPARTMENTAL APPEALS BOARD (DAB) AND MEDICARE APPEALS COUNCIL (MAC)

I. Overview of Agency Adjudication System

There are two inter-related appellate adjudication bodies at the Department of Health and Human Services: the Departmental Appeals Board (DAB) and the Medicare Appeals Council (MAC).[1]

The DAB hears appeals from written decisions by administrative judges (AJs) at various offices within HHS, mostly concerning grant programs, as well as appeals from decisions of HHS administrative law judges (ALJs) under various statutes administered by HHS regarding civil money penalties and Medicare enrollment, revocations, and exclusions.[2] The Board currently consists of seven members appointed by the HHS Secretary,[3] and they decide appeals on three-judge panels.[4] All decisions are precedential, and they all appear to be unanimous decisions with no dissenting views. The DAB issues roughly fifty to seventy decisions per year.[5] There is no higher-level review within the agency, but the parties can seek judicial review.[6]

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[1] *See generally* 42 U.S.C. §§ 1395 *et seq.*; 42 C.F.R. §§ 400 *et seq.* (2022). The agency generally uses "DAB" to refer to the entire adjudication agency—both the Departmental Appeals Board and the Medicare Appeals Commission—and "Commission" to refer to the Medicare Appeals Commission. To avoid confusion with other agencies in this Report, we refer to DAB and MAC for the separate components of this HHS adjudication agency.

[2] For an overview of the Departmental Appeals Board adjudication system, see MICHAEL A. ASIMOW, ADMIN. CONF. OF U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 135–137 (2019).

[3] *Who Are the Board Members and Judges?*, HHS DAB, https://www.hhs.gov/about/agencies/dab/about-dab/who-are-the-board-members-and-judges/index.html (last visited Nov. 11, 2022).

[4] The online practice manual provides additional details on the process, including citations to the relevant regulations. *Appellate Division Practice Manual*, HHS, https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/practice-manual/index.html (last visited Nov. 11, 2022).

[5] *See* ASIMOW, *supra* note 2, at 136 ("In 2016, according to its website, DAB handed down 95 decisions. In 2015, it delivered 57 decisions; 2014, 58 decisions; 2013, 61 decisions. Some 2015 cases were delayed by an office move which partly accounts for the large number of 2016 decisions. One-quarter to one-third of these decisions concern grant disputes (the rest are appeals of ALJ decisions that do not involve grant disputes). Most grant cases involve accounting disputes such as disallowance of outlays by the grantee. A few involve termination of grants because of grantee misconduct.")

[6] *See* ASIMOW, *supra* note 2, at 137 ("Board decisions are precedential, and these precedential decisions cover many recurring issues. . . . DAB decisions cannot be appealed to any higher authority within HHS.").

The MAC hears appeals of decisions by ALJs at the Office of Medicare Hearings and Appeals on Medicare coverage and payment claims.[7] The MAC currently consists of twenty-two members: the seven DAB members and fifteen administrative appeals judges.[8] They decide appeals on two-judge panels. The MAC is a higher-volume appellate review system than the DAB. For instance, HHS reported that in fiscal year 2015, the MAC had the capacity to decide 2,300 cases per year, received a year's worth of appeals every *eleven* weeks, and had a backlog of more than 14,000 appeals to process.[9]

II. Use of Precedential Decisions

All DAB decisions are precedential, but that is not the case with respect to MAC decisions. Since 2017, the DAB Chair has had power by regulation to designate as precedential a final decision issued by the MAC.[10] Precedential effect means that the MAC's:

> (1) legal analysis and interpretation of a Medicare authority or provision is binding and must be followed in future determinations and appeals in which the same authority or provision applies and is still in effect; and
>
> (2) factual findings are binding and must be applied to future determinations and appeals involving the same parties if the relevant facts are the same and evidence is presented that the underlying factual circumstances have not changed since the issuance of the precedential final decision.[11]

Precedential decisions have precedential effect from the date they are made available to the public.[12] Implementing regulations provide some guidance on when the agency should designate a decision as precedential: "In determining which decisions should be designated as precedential, the DAB Chair may take into consideration decisions that address, resolve, or clarify recurring legal

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[7] *Appeals to the Medicare Appeals Council*, HHS DAB, https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-council/index.html (last visited Nov. 11, 2022).

[8] *Who Are the Board Members and Judges?*, HHS DAB, https://www.hhs.gov/about/agencies/dab/about-dab/who-are-the-board-members-and-judges/index.html (last visited Nov. 11, 2022).

[9] *HHS Primer: The Medicare Appeals Process*, at 7, https://www.hhs.gov/sites/default/files/dab/medicare-appeals-backlog.pdf (last visited Nov. 11, 2022). The backlogs in Medicare appeals processing at the hearing level have been subject to ongoing litigation. *See, e.g.*, Am. Hosp. Ass'n v. Price, 867 F.3d 160, 170 (D.C. Cir. 2017) ("vacat[ing] the mandamus order and the order denying reconsideration, and remand[ing] to the District Court to evaluate the merits of the Secretary's claim that lawful compliance would be impossible"); Am. Hosp. Ass'n v. Azar, 2018 WL 5723141, at *1 (D.D.C. Nov. 1, 2018) (granting mandamus relief on remand because "the Government agrees that recent funding has made compliance possible within four years").

[10] 42 C.F.R. § 401.109(a) (2022).

[11] *Id.* § 401.109(d).

[12] *Id.* § 401.109(b).

issues, rules or policies, or that may have broad application or impact, or involve issues of public interest."[13]

The agency's website notifies the public that it can suggest MAC decisions to be designated as precedential by emailing the agency.[14] To date, the DAB Chair has not exercised her authority to designate any MAC decisions as precedential.

III. Process for Writing and Form and Structure of Precedential Decisions

The online practice manual, regulations, and website provide little detail on the decision-making process, opinion structure, or substance of precedential decisions. As noted above, however, the website does seek public input on which MAC decisions the DAB Chair should designate as precedential.

As there are no published MAC decisions to date, we do not have a sense of the structure or format. Since 2003, however, the MAC has identified and uploaded to an online decisions database on its website "certain significant decisions and actions" that "involve the adjudication of issues that may be of interest to various stakeholders in the Medicare appeals process."[15] There are around 200 such MAC decisions included in the online database, which is searchable and also indexed by topic.

The DAB decisions, however, read very much like published judicial decisions. They state the reasons for the action taken and address the arguments of the parties. They include a summary of the ALJ decision under review and the DAB's conclusion, and then they have headings to ease their readability, such as legal background, case background, ALJ proceedings and decision, and analysis. The opinions do not have any markings that indicate their precedential status, and the length of opinions vary from single-digit pages to more than thirty pages.[16]

IV. Public Availability of Precedential Decisions

The DAB maintains a database on its website that contains all of its precedential DAB decisions.[17] The database is searchable based on key words but does not offer more sophisticated search capabilities, such as field searches.

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[13] *Id.* § 401.109(a).

[14] *Appeals to the Medicare Appeals Council*, HHS DAB ("The DAB Chair is authorized to designate Council decisions as precedential, and welcomes suggestions from stakeholders, interested parties, and the general public. Suggestions for precedential decisions may be emailed to: DABStakeholders@hhs.gov."), https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-council/index.html (last visited Nov. 11, 2022).

[15] *Medicare Appeals Council (Council) Decisions*, HHS DAB, https://www.hhs.gov/about/agencies/dab/decisions/council-decisions/index.html (last visited Nov. 11, 2022).

[16] *Compare* Res. Health Care, Inc., DAB No. 3063 (2022) (H.H.S. May 16, 2022) (7 pages), *with* Dr. Timothy Baxter, DAB No. 3074 (2022) (H.H.S. Sept. 30, 2022) (33 pages).

[17] *Board Decisions*, HHS DAB, https://www.hhs.gov/about/agencies/dab/decisions/board-decisions/index.html (last visited Nov. 11, 2022).

The website also displays links to Board decisions issued during each calendar year starting with the most recent decision. There are more than 3,200 DAB decisions in its online database. DAB decisions are also available in subscription legal databases such as Lexis and Westlaw.

By regulation, precedential MAC decisions (once there are any) must be "made available to the public, with personally identifiable information of the beneficiary removed, and have precedential effect from the date they are made available to the public. Notice of precedential decisions is published in the Federal Register."[18] Some nonprecedential MAC decisions are included in Westlaw and Lexis databases, and as noted above, some 200 MAC "significant decisions and actions" are posted on the agency's website, searchable and also indexed by topic.

[18] 42 C.F.R. § 401.109(b).

APPENDIX G:
DEPARTMENT OF HOMELAND SECURITY (DHS):
U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS)

I. Overview of Agency Adjudication System

The Administrative Appeals Office (AAO), under the Immigration and Nationality Act[1] and Title 8 of the Code of Federal Regulations,[2] conducts administrative review of roughly fifty types of immigration cases filed with U.S. Citizen and Immigration Services (USCIS).[3] There are several different ways a case can reach the AAO, whether it be from an appellant's appeal or by certification. Once a case reaches the AAO there are multiple directions in which the case can go, be it a remand back to an immigration officer, a dismissal by the AAO, or a sustain. Due to the various pathways cases can take, the AAO's adjudication system is complex. Judicial review is also available.[4]

There are three types of adjudications that AAO deals with: appeals, motions, and certifications. Appeals are when the AAO conducts appellate review of an immigration benefit request decision.[5] A motion to reopen must state new facts and be supported by documentary evidence; this review, unlike appeals, is conducted by the AAO over an AAO decision.[6] A motion to reconsider "must establish that AAO based its decision on an incorrect application of law or policy, and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision."[7] Lastly, certifications occur when a USCIS official asks the AAO to review an initial decision that involves a complex or novel question of law or fact.[8]

In addition to the three types of adjudications, there are three types of decisions that AAO produces. These are nonprecedential, precedential, and

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[1] 8 U.S.C. §§ 1101–1178.

[2] 8 C.F.R. § 103.3 (2022); *see also* Powers and Duties of Service Officers; Availability of Service Records, 48 Fed. Reg. 43160 (Sept. 22, 1983).

[3] AAO also reviews some types of cases from DHS Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP). However, not every immigration benefit is appealable and some are under the jurisdiction of the Board of Immigration Appeal (Board) jurisdiction. *See generally The Administrative Appeals Office*, USCIS, https://www.uscis.gov/about-us/organization/directorates-and-program-offices/the-administrative-appeals-office-aao (last visited Nov. 22, 2022).

[4] *See, e.g.*, *Amin v. Mayorkas*, 24 F.4th 383, 389–90 (5th Cir. 2022) (noting USCIS regulations do not require exhaustion of administrative remedies).

[5] *See* 8 C.F.R. § 103.3 (2022); *see also* USCIS, AAO PRACTICE MANUAL, § 1.4(a) [hereinafter AAO PRACTICE MANUAL], https://www.uscis.gov/administrative-appeals/aao-practice-manual (last visited Nov. 22, 2022).

[6] *See* 8 C.F.R. § 103.5(a)(2) (2022); AAO PRACTICE MANUAL, *supra* note 5, § 4.1.

[7] AAO PRACTICE MANUAL, *supra* note 5, § 4.3.

[8] *See* 8 C.F.R. § 103.4(a)(1) (2022).

adopted. The most frequently utilized type of decision is nonprecedential. Nonprecedential decisions are only binding on the case at hand; they "do not create or modify USCIS policy or practice."[9] The second type is adopted decisions. These decisions "[p]rovide policy guidance to USCIS employees in making determinations on applications and petitions for immigration benefits."[10] Adopted decisions are only binding on USCIS internally. Lastly, in terms of precedential decisions, the DHS Secretary, with the approval of the Attorney General, may "designate AAO decisions to serve as precedents in all future proceedings."[11] The decisions "announce a new legal interpretation or agency policy, or may reinforce an existing law or policy by demonstrating how it applies to a unique set of facts."[12]

II. Use of Precedential Decisions

When it comes to precedential decisions, publication requires interagency coordination between DHS and the Department of Justice. The regulation at 8 C.F.R. § 103.3(c) sets forth the process:

> The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause such decisions to be published in the same manner as decisions of the Board and the Attorney General. In addition to Attorney General and Board decisions referred to in § 1003.1(g) of chapter V, designated Service decisions are to serve as precedents in all proceedings involving the same issue(s). Except as these decisions may be modified or overruled by later precedent decisions, they are binding on all Service employees in the administration of the Act. Precedent decisions must be published and made available to the public as described in 8 CFR 103.10(e).[13]

Section 3.15 of USCIS AAO's Practice Manual provides additional details, including the introduction of a third category of cases—adopted decisions—that fall between precedential and nonprecedential: "USCIS occasionally 'adopts' an AAO nonprecedential decision to provide policy guidance to USCIS employees in making determinations on applications and petitions for immigration benefits. Unlike precedential decisions, adopted decisions do not establish policy

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[9] AAO PRACTICE MANUAL, *supra* note 5, § 1.5.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *See also* 8 C.F.R. § 1003.1(i) (2022) (providing for the same process in the regulations governing the Executive Office for Immigration Review and the Board).

that must be followed by personnel outside of USCIS."[14] Adopted decisions are available on the USCIS website.[15] The Practice Manual provides no details on the internal process to designate adopted decisions.

When it comes to precedential decisions, the Practice Manual explains that precedential decisions "announce new legal interpretations or policy, or reinforce existing law or policy by demonstrating its application to the facts of a specific case."[16] When describing nonprecedential decisions, the Practice Manual provides some additional contrasting definitions:

> Non-precedent decisions apply existing law and policy to the facts of an individual case. The decision is binding on the parties to the case, but does not create or modify agency guidance or practice. The AAO does not announce new constructions of law or establish agency policy through non-precedent decisions. As a result, non-precedent decisions do not provide a basis for applying new or alternative interpretations of law or policy.[17]

The publicly available documents do not appear to articulate any objectives or criteria for precedential decision making beyond these statements.[18] Although the internal processes for making a precedential decision are not detailed in the Practice Manual, both the Practice Manual and the implementing regulations indicate that both the Attorney General and the DHS Secretary must agree to designate a decision as precedential, which suggests an involved and lengthy process.

The Practice Manual, moreover, provides that parties may request that a nonprecedential decision be designated as precedential and/or adopted:

> The AAO will consider written requests from the public to reissue a non-precedent decision as an adopted or precedent decision. No specific form is required. The request should explain why the non-precedent decision warrants adoption or designation as a precedent decision. The request should include a copy of the non-precedent decision, or reference the decision by its A-Number or Receipt Number, and the date of the

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[14] AAO PRACTICE MANUAL, *supra* note 5, § 3.15(b).

[15] *Adopted AAO Decisions*, USCIS, https://www.uscis.gov/about-us/organization/directorates-and-program-offices/administrative-appeals-office-aao/adopted-aao-decisions (last visited Nov. 22, 2022).

[16] AAO PRACTICE MANUAL, *supra* note 5, § 3.15(c).

[17] *Id.* § 3.15(a) (footnotes omitted).

[18] In 2013, USCIS issued a policy memorandum to amend the Adjudicator's Field Manual to reflect these distinctions between precedential and nonprecedential decisions. USCIS Policy Memorandum PM-602-0086.1, Precedent and Non-Precedent Decisions of the Administrative Appeals Office (AAO) (Nov. 18, 2013), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0086-1_AAO_Precedent_and_Non-Precedent_Decisions_Final_Memo.pdf.

decision. See Chapter 6.1 for how to send a written correspondence to the AAO.[19]

III. Process for Writing and Form and Structure of Precedential Decisions

The Practice Manual and regulations similarly provide little detail on the decision-making process, opinion structure, or substance of precedential decisions. Nor does the Practice Manual detail if there is supplemental briefing allowed, or if amicus briefs can be filed at the precedential decision-making stage—though amicus participation and supplemental briefing seem to be generously allowed throughout the appeals process.[20]

Since 2010, DHS has issued eight precedential decisions.[21] Along with the decisions of the Board, DHS precedential decisions are collected and published by the Department of Justice in the bound volumes of the *Administrative Decisions Under Immigration and Nationality Laws of the United States*.[22] The decisions may be recognized as precedent by their unique citation format and interim decision number.[23] These opinions read very much like published judicial decisions. They state the reasons for the action taken and address the arguments of the parties. They include a summary of the holdings at the outset, and then they have headings to ease their readability, such as factual background, legal and historical background, and legal analysis. Other than the citation format, the opinions do not have any markings that indicate their precedential status, and the length of opinions vary from five to twenty-five pages.[24]

When it comes to adopted decisions, USCIS has issued twenty-four total over the years. Only seventeen of those are currently enforceable, as the other several

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[19] AAO PRACTICE MANUAL, *supra* note 5, § 3.15(d).

[20] *See id*. § 3.8; *see, e.g.*, Matter of H-G-G-, 27 I.&N. Dec. 617, 617 n.2 (2019) ("We appreciate the thoughtful brief submitted by the American Immigration Council in this case.").

[21] *See DHS/AAO/INS Decisions*, U.S. DEP'T OF JUSTICE, EXECUTIVE OFFICE OF IMMIGR. REV., https://www.justice.gov/eoir/dhs-aao-ins-decisions (last visited Nov. 11, 2022).

[22] 8 C.F.R. § 1003.1(i).

[23] "Precedent decisions are recognizable by their citation format. Precedent decisions are generally designated using the phrase 'Matter of,' followed by the name of the party. Next are the volume and page number where the print version of the decision is published. Citations conclude with a parenthetical statement containing the office that authored the decision and the year of publication." AAO PRACTICE MANUAL, *supra* note 5, § 3.15(d).

[24] Matter of H-G-G-, 27 I.&N. Dec. 617 (AAO 2019) (25 pages); Matter of Dhansar, 26 I.&N. Dec. 884 (AAO 2016) (11 pages); Matter of Simeio Solutions, LLC, 26 I.&N. Dec. 542 (AAO 2015) (8 pages); Matter of Christo's, INC., 26 I.&N. Dec. 537 (AAO 2015) (5 pages); Matter of Leaching Int'l, Inc., 26 I.&N. Dec. 532 (AAO 2015) (5 pages); Matter of Skirball Cultural Center, 25 I.&N. Dec. 799 (AAO 2012) (8 pages); Matter of Chawathe, 25 I.&N. Dec. 369 (AAO 2010) (9 pages); Matter of Al Wazzan, 25 I.&N. Dec. 359 (AAO 2010) (10 pages).

have been superseded by a precedential decision or other policy.[25] The decisions themselves are of the same format and style as precedential decisions. An adopted decision is identified by a unique citation format and includes a policy memorandum at the front that helpfully explains what the adopted decision does. That policy memorandum also makes clear that the decision is an "adopted decision" and explains the legal effect of the "adopted decision." Consider, for example:

> This policy memorandum (PM) designates the attached decision of the Administrative Appeals Office (AAO) in *Matter of Z-R-Z-C-* as an Adopted Decision. Accordingly, this Adopted Decision shall be used to guide determinations by all U.S. Citizenship and Immigration Services (USCIS) employees. USCIS personnel are directed to follow the reasoning in this decision in similar cases.
>
> . . .
>
> This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.[26]

To put these numbers of precedential and adopted decisions in perspective, the AAO has issued more than 15,000 nonprecedential decisions since 2015.[27]

IV. Public Availability of Precedential Decisions

All AAO decisions can be found on the USCIS website.[28] Precedential decisions, moreover, are published by the Department of Justice in both the bound volumes of immigration precedent and on its website in a "Virtual Law Library." They are also available in subscription legal databases such as Lexis and Westlaw. Additionally, the Department of Justice includes DHS and former

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[25] *See AAO Decisions*, USCIS (listing and providing PDF links to all adopted decisions), https://www.uscis.gov/administrative-appeals/aao-decisions (last visited Nov. 11, 2022).

[26] Policy Memorandum, PM-602-0179, SUBJECT: *Matter of Z-R-Z-C-*, Adopted Decision 2020-02 (AAO Aug. 20, 2020), https://www.uscis.gov/sites/default/files/document/aao-decisions/Matter-of-Z-R-Z-C-Adopted-AAO-Decision.pdf, *rescinded by* Policy Memorandum, PM-602-0188, *Rescission of Matter of Z-R-Z-C- as an Adopted Decision* (July 1, 2022), https://www.uscis.gov/sites/default/files/document/memos/PM-602-0188-RescissionofMatterofZ-R-Z-C-.pdf.

[27] *AAO Non-Precedent Decisions*, USCIS (as of Nov. 9, 2022, listing 15,6786 nonprecedential decisions since 2015), https://www.uscis.gov/administrative-appeals/aao-decisions/aao-non-precedent-decisions (last visited Nov. 9, 2022).

[28] *See AAO Decisions*, USCIS, https://www.uscis.gov/administrative-appeals/aao-decisions (last visited Nov. 11, 2022). Nonprecedential decisions are available on the website dating back to 2005, adopted decisions back to 2010 (when they were first introduced), and precedential decisions back to the 1950s (when the AAO had not been established and such decisions were made by Assistant Commissioners).

INS precedent decisions in a cumulative index to agency immigration decisions.[29] Other than a link to the Department of Justice's Virtual Law Library, USCIS does not post any indices, digests, or summaries of its decisions, but each adopted and precedential decision has a short summary of the holding at the start of the decision.

[29] *See, e.g.*, Dep't of Justice, Index to Precedent Decisions, Interim Decisions 2526 to 3765, https://www.justice.gov/sites/default/files/eoir/legacy/2014/05/29/Topical%20Index.pdf (listing Matter of Skirball Cultural Center, 25 I.&N. Dec. 799 (AAO 2012), by its interim decision number under the topic "entertainer, culturally unique").

APPENDIX H:
DEPARTMENT OF THE INTERIOR:
INTERIOR BOARD OF INDIAN APPEALS (IBIA) & INTERIOR BOARD OF LAND APPEALS (IBLA)

I. Overview of Agency Adjudication System

The Department of the Interior's Office of Hearings and Appeals (OHA) exercises delegated authority from the Interior Secretary to hold hearings and decide appeals arising from Department bureaus and offices.[1] OHA houses two standing administrative appeals boards: the Interior Board of Land Appeals (IBLA) and the Interior Board of Indian Appeals (IBIA). The Secretary appoints the members (administrative judges) of both the IBLA and the IBIA. Each board has a chief judge.[2] OHA's Director is an ex officio member of both boards.[3]

Both boards issue final agency decisions. The IBLA hears appeals of decisions of Department bureaus and OHA administrative law judges relating to, among other things, "the use and disposition of public lands and their resources."[4] The IBIA hears appeals from the Bureau of Indian Affairs, other Department bureaus, and OHA ALJs involving a range of "Indian matters."[5]

As provided for in OHA's rules of procedure, both appeals boards work in much the same way. The chief judge of each board "may direct" that any appeal be decided by a panel of two administrative judges.[6] Most appeals are decided by two judges. (As an ex officio member of both boards, the director may also participate in deciding an appeal.[7]) If the two judges on a panel cannot agree on a decision, the chief judge may assign one or more additional judges to decide the appeal, in which case a board decision may then be issued by majority vote.[8] As a review of the boards' decisions reflects, the boards' practice is in accord in

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[1] *Office of Hearings and Appeals*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/oha (last visited Nov. 16, 2022).

[2] *See* 43 C.F.R. § 4.2; *About the Interior Board of Land Appeals*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/oha/about-interior-board-land-appeals (last visited Nov. 16, 2022); *About the Interior Board of Indian Appeals*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/oha/organization/ibia (last visited Nov. 16, 2022).

[3] *See* 43 C.F.R. § 4.2(b) (2022).

[4] 43 C.F.R. § 4.1(b)(2) (2022); *see also About the Interior Board of Land Appeals*, *supra* note 2.

[5] 43 C.F.R. § 4.1(b)(1) (2022); *see also About Board of Indian Appeals, supra* note 2.

[6] 43 C.F.R. § 4.3(a) (2022).

[7] *See id.* § 4.3(b).

[8] *See id.* § 4.3(a).

with these rules. Most decisions are issued under the signature of one of the panel's two judges; the second judge "concurs."[9]

In addition, the OHA Director may appoint an ad hoc board to consider appeals to the Secretary that do not lie within the appellate jurisdiction of the IBIA or IBLA. With limited exceptions, both the Interior Secretary and the OHA Director may assume jurisdiction of a case at any stage of an appeal.[10] It appears that the director seldom exercises jurisdiction. The Secretary's exercise of jurisdiction is still rarer.

In 2021, the IBIA decided 58 appeals,[11] and the IBLA decided 183.[12] Both boards' decisions are reviewable in federal district courts.[13]

II. Use of Precedential Decisions

OHA's C.F.R.-codified rules of practice do not address the precedential status of decisions for either the IBLA or the IBIA. By long-standing practice, the IBIA treats all its opinions as precedential, though they are not designated as such on their face. The IBLA, by contrast, divides its decision into two categories: "dispositive orders," which are not precedential, and "decisions," which are precedential. OHA's website explains:

> The Board may issue a dispositive order or a decision to resolve an appeal. Dispositive orders are binding on the parties; however, orders are not precedential, and the Board is not obligated to follow or distinguish them in future orders or decisions issued in other appeals. Decisions are precedential. This means that they may be cited or relied upon in future appeals.[14]

No publicly available authority identifies the criteria for designating some decisions as precedential and others not. A selective review of IBLA decisions, though, reveals that non-precedential "dispositive orders" are used in routine

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[9] *See, e.g.*, California State Controller, 166 IBLA 5 (2005); Estate of Henry Little Coyote, 4 IBIA 145 (1975).

[10] *See* 43 C.F.R. § 4.5 (2022).

[11] *Cases Decided in Calendar Year 2021*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/oha/organization/ibia/cumulative-chronological-index-of-cases/cases-decided-in-calendar-year-2021 (last visited Nov. 16, 2022).

[12] In 2021, there were 28 precedential IBLA decisions. *Chronological Index of Decisions Issued in Calendar Year 2021*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/oha/organization/ibla/Finding-IBLA-Decisions/Chronological-Index-of-Decisions/calendar-year-2021 (last visited Nov. 16, 2022). That same year, there were 155 dispositive orders, *Chronological Index of Dispositive Orders Issued in Calendar Year 2021*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/oha/organization/ibla/IBLA-Dispositive-Orders/Chronological-Index-of-Dispositive-Orders/dispositive-order-2021 (last visited Nov. 16, 2022).

[13] *See Board of Land Appeals, supra* note 2; *About Board of Indian Appeals*, *supra* note 2.

[14] *IBLA FAQs*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/oha/organization/ibla/faqs (last visited Nov. 16, 2022); *see also Office of Hearings and Appeals*, U.S. DEP'T OF INTERIOR, https://www.oha.doi.gov:8080/index.html (last visited Nov. 16, 2022).

cases that involve settled law and can often be disposed of summarily.[15] In calendar year 2021, about fifteen percent of the IBLA's decisions were precedential.[16] That percentage is slightly higher than in many previous years.

IBLA's practice manual notes that the "Board may consider an appeal ahead of when it would normally be adjudicated if the Board's ruling would impact other pending appeals or establish a precedent that would be helpful . . . ."[17]

III. Process for Writing and Form and Structure of Precedential Decisions

IBLA's and IBIA's rules permit the filing of amicus curiae briefs at the Board's discretion.[18] IBLA's current practice is to include a footnote at the bottom of dispositive orders that reads: "This Order is binding on the parties but does not constitute Board precedent."[19] There is no corresponding label on the IBLA's precedential decisions. IBIA decisions do not include any notation about their precedential status.

Both IBIA decisions and precedential IBLA decisions resemble judicial decisions in length and structure.[20] They include a summary and background at the beginning of the decision. They also include an extensive analysis—examining the burden of proof and standard of review and citing other IBLA or IBIA decisions as precedent. The length of published opinions generally falls in the single or low-double digit page range but can exceed a hundred pages.[21] Many IBLA dispositive orders are just a page or two in length.[22]

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[15] *See* Chris Onstad, 189 IBLA 194, 198 (2017) ("Our approach comports with our precedent, in which we have repeatedly recognized that unpublished orders are not precedent, but have considered the analysis contained in such orders for purposes of reaching a decision."); *see, e.g.*, Bd. of Cnty. Comm'rs of Pitkin Cnty., 186 IBLA 288, 304 n.17 (2015); J.R. Simplot Co., 173 IBLA 129, 135 n.4 (2007); S. Utah Wilderness All., 163 IBLA 142, 158 n.12 (2004).

[16] *See* note 12 *supra*.

[17] INTERIOR BD. OF LAND APPEALS, PROCEDURES AND PRACTICES MANUAL 6 (Nov. 2021), https://www.doi.gov/sites/doi.gov/files/ibla-procedures-and-practices-manual-nov.-2021.pdf.

[18] 43 C.F.R. §§ 4.313, 4.406(d) (2022).

[19] That appears on each decision issued in calendar year 2022. See the decisions appearing at *Chronological Index of Dispositive Orders Issued in Calendar Year 2022*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/oha/organization/ibla/IBLA-Dispositive-Orders/Chronological-Index-of-Dispositive-Orders/dispositive-order-2022 (last visited Nov. 16, 2022).

[20] *See e.g.*, XTO Energy, Inc., IBLA 2017-194 (May 31, 2022); Off. of Just. Servs. v. Designated Representative of the Sec'y, 51 IBIA 81 (2010).

[21] *See e.g.*, WPX Energy Williston, LLC, IBLA 2022-121 (Oct. 7, 2022) (1 page); Off. of Just. Servs. v. Designated Representative of the Sec'y, 51 IBIA 81 (2010) (8 pages); XTO Energy, Inc., IBLA 2017-194 (May 31, 2022) (18 pages); Moon Mining Co., 128 IBLA 266 (1994) (34 pages); United States v. James Collord, 128 IBLA 266 (1994) (103 pages).

[22] *See, e.g.*, WPX Energy Williston, LLC, IBLA 2022-121 (Oct. 7, 2022).

IV. Public Availability of Precedential Decisions

All decisions of both boards (including the IBLA's dispositive orders) appear on OHA's website.[23] They appear chronologically (grouped by year) and in several databases that can be effectively searched using term and natural-language tools. Selected IBLA and IBIA decisions have been published in the *Index-Digest of the Department of the Interior*.[24] Aside from these, neither board posts any other indices, digests, or summaries of its decisions on its website. Both boards' decisions are also available in subscription legal databases such as Westlaw and Lexis.

[23] *Id.*

[24] *U.S. Department of the Interior Administrative Decisions and Policies*, U.S. DEP'T OF INTERIOR, https://www.doi.gov/library/collections/law/decisions (last visited Nov. 16, 2022).

APPENDIX I:
DEPARTMENT OF JUSTICE (DOJ):
EXECUTIVE OFFICE OF IMMIGRATION REVIEW (EOIR):
BOARD OF IMMIGRATION APPEALS (BIA)

I. Overview of Agency Adjudication System

Under the immigration laws, the Attorney General has appellate authority over immigration judge (IJ) decisions as well as immigration-related decisions of the Department of Homeland Security (DHS).[1] An IJ decides whether the noncitizen is subject to removal proceedings, and whether relief from removal is warranted. The Attorney General, acting as the appellate authority, can review such lower body decisions to determine if the IJ applied immigration law correctly. Under the Immigration and Nationality Act (INA) the Attorney General has the ability to delegate that appellate authority.[2] Under that delegated authority, the Board of Immigration Appeals (BIA) currently has twenty-three members, consisting of immigration lawyers that the Attorney General appoints.[3] The BIA acts in place of the Attorney General and determines whether IJ decisions applied immigration law correctly. The BIA and IJs are housed in the Justice Department's Executive Office for Immigration Review (EOIR).[4]

The BIA is purely a creature of regulation, and the Attorney General has made significant regulatory changes to the structure of the BIA. In 2002, for example, the Attorney General reorganized the BIA to allow members, by themselves, to affirm lower body decisions or dismiss appeals.[5] When affirming a decision, a single member issues an "affirmance without opinion."[6] When dismissing an appeal, the BIA regulations specify the grounds that permit the

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[1] 8 U.S.C. §1103(g)(2). For an overview of DOJ's immigration adjudication system, see MICHAEL A. ASIMOW, ADMIN. CONF. OF U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 151–158 (2019).

[2] 8 U.S.C. §1103(g)(2).

[3] Expanding the Size of the Board of Immigration Appeals, 85 Fed. Reg. 18,105 (Apr. 1, 2020). *See generally* Immigration and Naturalization Service: Regulations Governing Departmental Organization and Authority, 5 Fed. Reg. 3,502 (Sept. 4, 1940).

[4] *See About the Office*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., https://www.justice.gov/eoir/about-office (last visited Nov. 12, 2022).

[5] Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878 (Aug. 26, 2002).

[6] *Id.*

member to act.[7] Single-member BIA decisions are the most common form of BIA decision making.[8]

The BIA does not act as a factfinder. Instead, the BIA reviews IJ findings of fact or questions of law.[9] The BIA can issue binding "precedential" decisions which clarify existing requirements under immigration law. The Attorney General, if he or she desires, can refer any case for the Attorney General to decide directly.[10] Once the BIA rules on a case, like an appellate court would, it can remand the case to the IJ or make a ruling clarifying existing requirements under immigration law. Petitioners, but not the government, can seek judicial review of an adverse BIA decision.

The BIA is a high-volume appellate adjudication system. Roughly 20,000 to 50,000 appeals are filed each year (29,506 in fiscal year 2022), and the BIA completes roughly 20,000 appeals each year (21,657 in fiscal year 2022).[11] In each of the last three fiscal years, the backlog of pending cases at the end of the year has surpassed 80,000—with nearly 90,000 at the end of fiscal year 2022.[12]

II. Use of Precedential Decisions

The vast majority of BIA decisions are issued by a single BIA member and, by definition, cannot be precedential.[13] The default for decisions by a three-member or en banc BIA is also nonprecedential. BIA three-member and en banc decisions are designated as precedential in one of two ways: at the direction of the Attorney General or his or her designee, or by a majority vote of the permanent members of the BIA.[14] The Attorney General can also designate decisions as precedential that the Attorney General issues per his or her referral authority.[15]

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[7] 8 C.F.R. § 1003(e)(6) (2022). *See generally* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., BOARD OF IMMIGRATION APPEALS PRACTICE MANUAL (rev. Nov. 14, 2022) [hereinafter BIA PRACTICE MANUAL], https://www.justice.gov/eoir/book/file/1528926/download (last visited Nov. 12, 2022).

[8] ASIMOW, *supra* note 1, at 157.

[9] 8 C.F.R. § 1003.1(d)(3) (2022).

[10] *Id.* § 1003.1(h).

[11] U.S. DEP'T OF JUST., EXECUTIVE OFFICE FOR IMMIGRATION REVIEW ADJUDICATION STATISTICS (generated Oct. 13, 2022), https://www.justice.gov/eoir/page/file/1248501/download.

[12] *Id.*

[13] 8 C.F.R. § 1003.1(e)(6)(ii), (g)(3); *see also* BIA PRACTICE MANUAL, *supra* note 7, § 1.3(a)(1); *see id.* (noting that a three-judge panel is required "to establish a precedent construing the meaning of laws, regulations, or procedures").

[14] 8 C.F.R. § 1003.1(g)(3) (2022).

[15] *See id.* § 1003.1(h). *See generally* Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841 (2016).

The regulations set forth a list of illustrative criteria that the BIA may take into account when deciding whether to designate a decision as precedential:

> (i) Whether the case involves a substantial issue of first impression;
>
> (ii) Whether the case involves a legal, factual, procedural, or discretionary issue that can be expected to arise frequently in immigration cases;
>
> (iii) Whether the issuance of a precedent decision is needed because the decision announces a new rule of law, or modifies, clarifies, or distinguishes a rule of law or prior precedent;
>
> (iv) Whether the case involves a conflict in decisions by immigration judges, the Board, or the federal courts;
>
> (v) Whether there is a need to achieve, maintain, or restore national uniformity of interpretation of issues under the immigration laws or regulations; and
>
> (vi) Whether the case warrants publication in light of other factors that give it general public interest.[16]

As a point of clarification, the BIA uses the term "published" synonymously with "precedential."[17] As the practice manual explains, "Published decisions are binding on the parties to the decision. Published decisions also constitute precedent that binds the Board, the Immigration Courts, and DHS."[18] Precedential decisions are rare. For example, in 2021, the Attorney General and BIA issued fewer than thirty precedential decisions (out of the roughly 20,000 appeals the BIA completed that year).[19]

III. Process for Writing and Form and Structure of Precedential Decisions

The practice manual and regulations provide little detail on the decision-making process, opinion structure, or substance of precedential decisions. But the precedential decisions of the Attorney General and BIA read very much like published judicial decisions. They state the reasons for the action taken and

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[16] 8 C.F.R. § 1003.1(g)(3) (2022); *see also* BIA PRACTICE MANUAL, *supra* note 7, § 1.4(d)(1)(A) ("Decisions selected for publication meet one or more of several criteria, including but not limited to: the resolution of an issue of first impression; alteration, modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law; resolution of a conflict of authority; and discussion of an issue of significant public interest.").

[17] *See, e.g.*, 8 C.F.R. § 1003.1(g)(3) (2022) ("By majority vote of the permanent Board members, or as directed by the Attorney General or his designee, selected decisions of the Board issued by a three-member panel or by the Board en banc may be designated to be published and to serve as precedents in all proceedings involving the same issue or issues.").

[18] BIA PRACTICE MANUAL, *supra* note 7, § 1.4(d)(1).

[19] *See Volume 28*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., *Administrative Decisions Under Immigration and Nationality Laws of the United States* ("I.&N. Decisions"), https://www.justice.gov/eoir/volume-28 (last visited Nov. 12, 2022).

address the arguments of the parties. They include a summary of the holdings at the outset, and then use headings to ease readability, such as factual background, legal and historical background, and legal analysis. The length of opinions varies from five to twenty-five pages.[20]

The opinions do not have any markings that indicate their precedential status. But the practice manual contains instructions on how the agency formats a BIA decision when published as precedential:

> When a decision is selected for publication, it is prepared for release to the public. Headnotes are added, and an I&N Decision citation is assigned. Where appropriate, the parties' names are abbreviated, and alien registration numbers ("A numbers") are redacted. The decision is then served on the parties in the same manner as an unpublished decision.[21]

IV. Public Availability of Precedential Decisions

Each precedential decision has a short summary of the holding at the start of the decision. All Attorney General and BIA precedential decisions can be found on EOIR's website.[22] This website also includes cumulative indices to agency decisions.[23] Precedential decisions are also published in the Justice Department's reporter *Administrative Decisions Under Immigration and Nationality Laws of the United States* ("I.&N. Decisions"), which is available on EOIR's website and in subscription legal databases such as Lexis and Westlaw. These reporters include brief summaries of the precedential decisions.[24] Moreover, EOIR has a subscription service for the public to receive email notifications of new Attorney General and BIA precedential decisions.[25]

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[20] *See, e.g.*, In re Fernandes, 28 I.&N. Dec. 605 (BIA 2022) (25 pages); In re Ortega-Quezada, 28 I.&N. Dec. 598 (BIA 2022) (7 pages); In re B-Z-R-, 28 I.&N. Dec. 563 (A.G. 2022) (5 pages).

[21] BIA PRACTICE MANUAL, *supra* note 7, § 1.4(d)(1)(B).

[22] *See Agency Decisions*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., https://www.justice.gov/eoir/ag-bia-decisions (last visited Nov. 12, 2022).

[23] *See id.*

[24] *See, e.g.*, *Volume 28*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., https://www.justice.gov/eoir/volume-28 (last visited Nov. 16, 2022).

[25] *See id.*

APPENDIX J:
DEPARTMENT OF LABOR (DOL):
ADMINISTRATIVE REVIEW BOARD, BENEFITS REVIEW BOARD, AND BOARD OF ALIEN LABOR CERTIFICATION APPEALS

This Appendix addresses three of the four appellate review boards at the Department of Labor's (DOL's): the Administrative Review Board (ARB), the Benefits Review Board (BRB), and the Board of Alien Labor Certifications Appeals (BALCA). The fourth one not included in this study is the Employees' Compensation Appeals Board.

I. Overview of Agency Adjudication System

The Administrative Review Board

The Secretary of Labor established the ARB to decides appeals on the Secretary's behalf arising from hearing-level decisions (most by DOL ALJs) involving numerous employee-protection laws.[1] The ARB consists of up to five members who serve terms of up to four years. The Secretary designates one member as the chair and may designate another as the vice chair.[2]

ARB review is discretionary upon the filing of a petition for review. A petition may be granted by a single ARB member or at the direction of the Secretary.[3] With limited exceptions, cases are heard by panels of two or three members, as assigned by the chair, unless the chair directs that they be heard by the full ARB.[4]

As a result of a 2020 rule, the Secretary may exercise discretionary review of any ARB decision within specified time limits. There are two paths for the Secretary to exercise this review: cases can be "referred" to the Secretary if a majority of the ARB, in response to a party's petition, determines that the case "presents a question of law that is of exceptional importance and warrants review by the Secretary"; or the Secretary may, "in his or her sole discretion, require the ARB to refer" a decision for review.[5] So far the Secretary has only reviewed three cases.

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[1] *See* Secretary's Order 01-2020—Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. 13,186 (Mar. 6, 2020); 29 C.F.R. § 26.1(b) (2022); *see also Establishment and Mission of the Board*, DEP'T OF LAB., https://www.dol.gov/agencies/arb/about (last visited Nov. 19, 2022). The Secretary's order lists nearly seventy statutes under which ARB cases can arise.

[2] *See* Secretary's Order 01–2020 Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. at 13,186.

[3] *See id.* at 13,188.

[4] *See id.*

[5] *See id.*

ARB decisions are reviewed in district courts or the courts of appeals depending on the statutes under which they arise.[6]

The Benefits Review Board

The BRB was established by statute to review ALJ decisions involving claims for workers' compensation benefits under, among other statutes, the Black Lung Benefits Act and the Longshore and Harbor Workers' Compensation Act (and its extensions).[7] By statute, the BRB is vested with final decision-making authority.[8]

The BRB consists of five permanent members appointed by the Secretary.[9] One member is designated as the chairman and chief administrative appeals judge.[10]

As authorized by statute and rule, the BRB usually sits in panels of three judges. A party may, when seeking reconsideration of a panel decision, suggest en banc review. If no party does so, any Board member may petition for en banc review.[11] En banc review is granted upon majority vote of the BRB's permanent members.[12]

Cases are grouped into one of two BRB-designated categories: Black Lung and Longshore. The BRB issued, on average, 460 Black Lung decisions in each of the last five years. It designated as published four in 2022, none in 2021, one in 2020, two in 2019, and one in 2018. The BRB issued, on average, 123 Longshore decisions in each of the past five years. It designated five as published in 2022, seven in 2020, eight in 2019, and fifteen in 2018.[13] As noted in Part II, all published decisions in both Black Lung and Longshore are precedential.

Generally, BRB decisions are reviewable in the U.S. courts of appeals for the circuit in which the claimant's injury arose.[14] Some decisions are reviewable in district courts.[15]

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[6] *Establishment and Mission of the Board*, DEP'T OF LAB., https://www.dol.gov/agencies/arb/about (last visited Nov. 19, 2022).

[7] *See* 33 U.S.C. § 921. Secretary's Order 03–2006 Delegation of Authority and Assignment of Responsibility to the Benefits Review Board, 71 Fed. Reg. 4220 (Jan. 25, 2006); *Benefits Review Board: Mission Statement*, DEP'T OF LAB., https://www.dol.gov/agencies/brb/mission (last visited Nov. 19, 2022). The BRB also hears certain direct appeals from decisions by district directors in DOL's Office of Workers' Compensation.

[8] 33 U.S.C. § 921.

[9] See 29 C.F.R. §§ 801.101–.102 (2022).

[10] *See id.* § 801.201.

[11] *See id.* § 802.407(b).

[12] *See id.* § 802.407(d).

[13] *Benefits Review Board: Decisions*, DEP'T OF LAB., https://www.dol.gov/agencies/brb/mission (last visited Nov. 19, 2022).

[14] *See* 33 U.S.C. § 921.

[15] *See id.*

Board of Alien Labor Certification Appeals

BALCA mainly hears private-sector employers' appeals of decisions of DOL's Employment and Training Administration (ETA) denying their applications to certify non-U.S. citizens to work in the U.S. A successful application requires the employer to establish, in an informal adjudicative proceeding before the ETA, that employment of non-citizens will not adversely affect U.S. workers.[16]

Until 1987, appeals of denials of applications to employ a non-U.S. citizen on a permanent basis were heard by individual DOL ALJs.[17] The Secretary established BALCA in that year, by rule, to "enhance the uniformity and consistency of decisions."[18] BALCA issues final DOL decisions "in the name of the Secretary."[19]

BALCA is housed within DOL's Office of Administrative Law Judges. It consists of the chief ALJ, who serves as its chair,[20] and other DOL ALJs appointed by the chief ALJ.[21] There are now three such appointees, plus two alternates.[22] All members sit in Washington, DC.

Appeals are normally heard by three-judge panels.[23] Before issuing a decision, a BALCA panel may sua sponte "call" for en banc consideration of an appeal if two of the ALJs on the panel agree that it is "necessary to secure or maintain uniformity of . . . [BALCA's] decisions; [or] the proceeding involves a question of exceptional importance."[24] After a panel has issued a decision, a party may file a petition for en banc rehearing on the same grounds.[25] Such calls

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[16] *See Information for Aliens and Employers on Immigration Cases*, DEP'T OF LAB., https://www.dol.gov/appeals/aliens.htm (last visited Nov. 19, 2022).

[17] Appeals of denials of application to employ non-U.S. citizens on a temporary basis, which must be decided quickly, continue to be decided by individual ALJs designated to serve on BALCA to decide such appeals. Those appeals are not addressed here.

[18] Labor Certification for the Permanent Employment of Aliens in the United States; Establishment of Board of Alien Labor Certification Appeals, 52 Fed. Reg. 11,217, 12,217 (Apr. 8, 1987).

[19] Rules Concerning Discretionary Review by the Secretary, 5 Fed. Reg. 30,608, 30,609 (May 20, 2020).

[20] *See* 20 C.F.R. § 656.3 (2022).

[21] *See* Labor Certification for the Permanent Employment of Aliens in the United States; Establishment of Board of Alien Labor Certification Appeals, 52 Fed. Reg. at 11,217.

[22] *See* Mem. from Stephen R. Henley, Chief Administrative Law Judge, Dep't of Lab., Designation of United States Department of Labor Administrative Law Judges to the Board of Alien Labor Certification Appeals (May 20, 2022) [hereinafter 2022 Henley Mem.], https://www.dol.gov/agencies/oalj/topics/libraries/LIBINA (last visited Nov. 19, 2022).

[23] DOL regulations authorize, but do not require, BALCA to sit in three-judge panels. *See* 20 C.F.R. § 656.27.

[24] Mem. from Stephen R. Henley, Chief ALJ, DOL, and Chair, BALCA, In re BALCA En Banc Procedure (Jan. 24, 2020) [hereinafter Mem. of Jan. 24, 2020], https://www.dol.gov/agencies/oalj/topics/libraries/LIBINA (last visited Nov. 19, 2022).

[25] *See id.* at 1.

and petitions are decided by the chief ALJ and the ALJs designated to sit on BALCA.[26] That includes, under the extant designation order, the two alternates.[27] A case will be heard en banc upon majority vote.[28]

BALCA issues on average 200–300 decisions per year. Since 2005, BALCA has issued sixteen en banc decisions.[29] Its last en banc decision was in 2020. BALCA issued nearly 250 en banc decisions during the period 1988–2006.[30] The decline appears to be attributable to a 2005 rule change that simplified ETA's administration of applications.

By rule, the Secretary may "assume jurisdiction" over a BALCA case at any point between the time BALCA receives a request for review and thirty business days after BALCA issues its decision.[31] Secretarial review is rare.

II. Use of Precedential Decisions

Administrative Review Board

No rule addresses the precedential status of ARB decisions other than to provide that the ARB must decide cases according to "[a]pplicable rules of decision and precedent."[32] In practice, the ARB treats all its decisions as precedential. A review of decisions reveals that the ARB sometimes distinguishes a prior decision or distinguishes between its holdings and its dicta. Occasionally the ARB will expressly overrule a decision.

By rule, the Secretary's decision in an ARB case "shall serve as binding precedent on all Department [of Labor] employees and in all Department proceedings involving the same issues or issues."[33]

Benefits Review Board

No rule addresses the precedential status of BRB decisions. By long-standing practice, the BRB designates some decisions as "published" (i.e., precedential) and others as "non-published" (i.e., non-precedential). Their publication status

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[26] *See id.* at 2.

[27] *See* 2022 Henley Mem, *supra* note 22, at 1.

[28] *See* Mem. of Jan. 24, 2020, *supra* note 28, at 2.

[29] *DOL, En Banc Decisions* [2006–present], OFF. OF ADMIN. L. JUDGES, DEP'T OF LAB., https://www.dol.gov/agencies/oalj/PUBLIC/INA/REFERENCES/CASELISTS/BALCA_DECISIONS_PERM (last visited Nov. 19, 2022).

[30] *DOL, En Banc Decisions* [1988–2006], OFF. OF ADMIN. L. JUDGES, DEP'T OF LAB., https://www.dol.gov/agencies/oalj/PUBLIC/INA/REFERENCES/CASELISTS/BALCA_DECISIONS (last visited Nov. 19, 2022).

[31] 29 C.F.R. § 18.95(c)(1) (2022).

[32] Secretary's Order 01-2020—Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. 13,186, 13,187 (Mar. 6, 2020).

[33] See *id.* at 188.

is indicated by whether they are listed on the Board's website page under the heading "published" or "unpublished."[34]

Most published decisions appear to be designated as such by the Board contemporaneously with the issuance of the decision. Sometimes the Board designated a decision as published after the fact upon the motion of a party.

Board of Alien Labor Certifications

BALCA's rules do not address the precedential status of opinions. As reflected in its decisional law, BALCA treats en banc decisions as precedential and panel decisions as non-precedential but "persuasive." Occasionally a panel will "decline to follow" an earlier panel decision. When the Secretary issues a decision, it "shall serve as binding precedent on all Department employees and in all Department proceedings involve the same issue or issues."[35]

III. Process for Writing and Form and Structure of Precedential Decisions

With respect to amicus briefs, the ARB follows Rule 29 of the Federal Rules of Appellate Procedure,[36] which provides that an amicus curiae (other than the government) may file a brief "by leave of court or if the brief states that all parties have consented to its filing."[37] If the Secretary decides to hear a case, amicus briefs may be filed only with the Secretary's permission.[38] Neither the BRB's rules nor BALCA's rules address amicus briefs.

The decisions of all three review boards resemble judicial opinions in their length and structure. That is true of both BRB published and unpublished decisions, and both BALCA panel decisions and en banc decisions. Concurring and dissenting opinions appear in the decisions of all three boards.

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[34] *Board Decisions,* DEP'T OF LAB.*,* https://www.dol.gov/agencies/brb/decisions (last visited Nov. 19, 2022). Moreover, DOL rules provided that the Board may, in "appropriate cases," issue summary decisions. Such cases include those in which "the issues raised on appeal have been thoroughly discussed and disposed of in prior cases by the Board or courts." *See* 29 C.F.R. § 802.404(b) (2022).

[35] 20 C.F.R. § 18.95(c)(2)(iii) (2022).

[36] *See Rules of Practice and Procedure Before the Administrative Review Board*, DEP'T OF LAB., https://www.dol.gov/agencies/arb/resources/rules (last visited Nov. 19, 2022).

[37] Fed. R. App. P. 29.

[38] *See* Secretary's Order 01–2020 Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. at 13,187.

IV. Public Availability of Precedential Decisions

Administrative Review Board

ARB decisions are published on DOL's website.[39] They are listed both by name (in alphabetical order) and date (broken down by month).[40] The list includes, for each decision, a "case note" that provides a summary of the decision.[41]

Benefits Review Board

All BRB decisions, both published and unpublished, appear on the Board's webpage.[42] Decisions appear on one of four pages, listed chronologically on each page: "Published Black Lung Decisions," "Unpublished Black Lung Decisions," "Published Longshore Decisions," and "Unpublished Long Shore Decisions."[43] Decisions also appear in two private reporters—the Black Lung Reporter, published by Juris Publishing, and the Benefits Review Board Service Longshore Reporter, published by Matthew Bender (LexisNexis)—and on both Lexis and Westlaw. Both private reporters were developed with BRB's cooperation and compiled in coordination with the BRB.[44]

Board of Alien Labor Certifications

DOL posts all BALCA decisions on its website.[45] DOL maintains on its website summaries of en banc decisions from 1987 through October 2020 (when BALCA issued its last en banc decisions).

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[39] *See Board Decisions, Orders, and Briefs*, ADMIN. REV. BD., DEP'T OF LAB., https://www.dol.gov/agencies/arb/decisions (last visited Nov. 19, 2022).

[40] *See id.*

[41] *See Administrative Review Board Decisions*, OFF. OF ADMIN. L. JUDGES, DEP'T OF LAB., https://www.oalj.dol.gov/PUBLIC/ARB/REFERENCES/CASELISTS/04_2020.HTM (last visited Nov. 19, 2022).

[42] *See Board Decisions*, DEP'T OF LAB., https://www.dol.gov/agencies/brb/decisions (last visited Nov. 19, 2022).

[43] *See id.*

[44] *See Black Lung Reporter*, JURIS PUBLI'G, http://www.jurispub.com/BLACK-LUNG-REPORTER_3.html (last visited Nov. 19, 2022).

[45] *See Office of Administrative Law Judges*, DEP'T OF LAB., https://www.dol.gov/agencies/oalj (last visited Nov. 19, 2022).

APPENDIX K:
MERIT SYSTEMS PROTECTION BOARD (MSPB)

I. Overview of Agency Adjudication System

The Merit Systems Protection Board ("MSPB")[1] is an adjudicatory agency[2] vested by statute with both original jurisdiction[3] and appellate jurisdiction[4] over claims challenging federal agencies' personnel actions. The vast majority of its cases arise under its so-called "appellate jurisdiction."[5] This overview is limited accordingly.

The Board proper is, by statute, MSPB's final decision-making authority, although decisions of MSPB administrative judges will become the final decision of the MSPB if neither party files an administrative petition for review with the Board and if the Board does not decide to hear the case sua sponte.[6] The Board consists of three presidentially appointed and Senate-confirmed members.[7] Unless recused, all sitting Board members hear each case in which an administrative petition for review is filed; the Board historically has not sat in panels.

The MSPB's "appellate" jurisdiction covers multiple different categories of cases.[8] They include, most notably, cases in which an agency terminates—or takes some other qualifying adverse action against—a federal employee in alleged violation of the civil service laws.[9] They also include "mixed cases" in which an employee alleges that a qualifying adverse action violated a federal statute prohibiting discrimination on the basis of some protected characteristic.[10]

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[1] "Board" is used to refer to the three-member board that sits atop the Merit Systems Protection Board and serves as its final adjudicative decision-maker. "MSPB" is used here to refer to the agency as a whole, including the Board, administrative judges appointed to carry out the initial adjudication functions of the MSPB, and administrative law judges from other agencies under contract to assist the MSPB to carry out initial adjudication functions not performed by MSPB administrative judges.

[2] *See* 5 U.S.C. § 1204(a); 5 C.F.R. § 1200.1 (2022).

[3] *See* 5 U.S.C. § 1204(a).

[4] *See* 5 U.S.C. § 7701(b).

[5] *See* JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RES. SERV., MERIT SYSTEMS PROTECTION BOARD (MSPB): A LEGAL OVERVIEW 1 (2019). For an overview of MSPB's adjudication system, see MICHAEL A. ASIMOW, ADMIN. CONF. OF U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 159–162 (2019).

[6] *See* 5 U.S.C. § 1204(a), (g).

[7] *See* 5 U.S.C. § 1201; 5 C.F.R. § 1200.2 (2022).

[8] *See* 5 U.S.C. § 7701; 5 C.F.R. § 1201.3 (2022).

[9] *See* 5 U.S.C § 7512; 5 C.F.R. § 1201.3(a) (2022); *see also* Kloeckner v. Solis, 568 U.S. 41, 44 (2012).

[10] *See* 5 U.S.C § 7702; *see also Kloeckner*, 568 U.S. at 44.

An "appellate" case begins with an employee filing an "appeal" of their agency's adverse decision, either directly from the decision or after first exhausting other prescribed administrative process.[11] After administrative proceedings before an administrative judge (AJ), which may include a trial-like evidentiary hearing, , the AJ issues an "initial decision."[12] That decision becomes the Board's final decision within 35 days of issuance unless a petition for review is filed with the Board.[13] The Board may deny or grant the petition (or a cross-petition from the other party); in either case, with rare exceptions,[14] it will issue a final decision itself.[15] (Although Board review is usually the result of a petition, the Board can hear an appeal on its own initiative.[16]) The Board determines in each case on review whether to issue a precedential or non-precedential decision.[17]

When the Board issues a final decision itself, it does so under the names of all sitting members. Members may file dissenting or concurring opinions; they may also recuse themselves from hearing a particular case.

In non-mixed cases, an employee may seek judicial review of a final MSPB decision (whether issued by an AJ or the Board) in the Federal Circuit (or, in a whistleblower case, another circuit of "competent jurisdiction").[18] In mixed cases, the claimant may seek review of the discrimination claims before the Equal Employment Opportunity Commission (EEOC).[19] If the claimant does not seek EEOC review or the EEOC declines review, the claimant may file a de novo action on the discrimination claims in a district court, which will also hear the non-discrimination claims under an abuse of discretion standard.[20]

Since the Board regained a quorum in early March 2022 after being without one for more than five years, it has issued 581 decisions.[21] Thirty-six of them are precedential.[22] These figures may not be representative of the Board's output in

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[11] *See* 5 C.F.R. § 1201.21–22 (2022).

[12] *Id.* § 1201.111.

[13] *See id.* § 1201.113. The Board's review is discretionary, although parties have a right to request it. A rule provides a non-exhaustive list of grounds for review. *See id.* § 1201.115.

[14] *See id.* § 1200.3(b) (providing that under certain circumstances, if only two Board members hear a case and cannot agree on a disposition, the initial decision may become the final Board decision).

[15] *See id.*

[16] *See* 5 U.S.C. § 7701(e)(1).

[17] *See* 5 C.F.R. § 1201.117(c) (2002).

[18] 5 U.S.C. § 7703(a), (b)(1)(A), (b)(1)(B).

[19] *See* 5 U.S.C. § 7702(b)(1); 5 C.F.R. § 1201.161 (2022).

[20] *See* 5 U.S.C. § 7703(b)(2); 5 C.F.R. § 1201.161–162 (2022).

[21] *Nonprecedential Decisions*, MSPB, https://www.mspb.gov/decisions/nonprecdec.htm (last visited Nov. 12, 2022); *Precedential Decisions*, MSPB, https://www.mspb.gov/decisions/precdec.htm (last visited Nov. 12, 2022).

[22] *Precedential Decisions*, MSPB, https://www.mspb.gov/decisions/precdec.htm (last visited Nov. 12, 2022).

the future as the Board is presumably working through a large inventory that arose while it lacked a quorum.

II. Use of Precedential Decisions

As provided for in the MSPB's rules of practice, the Board designates each of its decisions as either precedential, in which case the decision takes the form of an "Opinion and Order"; or non-precedential, in which case the decision takes the form of an "Order."[23] A precedential decision is one that "has been identified by the Board as significantly contributing to the Board's case law."[24] It may be "appropriately cited or referred to by any party."[25] A non-precedential decision

> is one that the Board has determined does not add significantly to the body of MSPB case law. The Board may, in its discretion, include in nonprecedential Orders a discussion of the issue(s) to assist the parties in understanding the reason(s) for the Board's disposition in a particular appeal. Nonprecedential Orders are not binding on the Board or its administrative judges in any future appeals except when it is determined they have a preclusive effect on parties under the doctrines of res judicata (claim preclusion), collateral estoppel (issue preclusion), judicial estoppel, or law of the case. Parties may cite nonprecedential Orders, but such orders have no precedential value; the Board and its administrative judges are not required to follow or distinguish them in any future decisions.[26]

Neither the MSPB's rules nor its website addresses any other aspect of precedential decision making, although the website groups precedential and nonprecedential orders separately. The website also provides a link to MSPB's Case Reports, which summarize the Board's precedential decisions and circuit court decisions on appeals from MSPB cases.

III. Process for Writing and Form and Structure of Precedential Decisions

MSPB rules provide for the filing of amicus briefs with the Board's permission. They also authorize the Board to "solicit amicus briefs on" its "own motion."[27]

Nonprecedential decisions include a prominent notation on the first page of the decision that reads: "This final order is nonprecedential."[28] A footnote on the first page reproduces the above-cited rule about nonprecedential decisions.

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[23] 5 C.F.R. § 1201.117(c) (2022).

[24] *Id.* § 1201.117(c)(2).

[25] *Id.*

[26] *Id.* § 1201.117(c)(2).

[27] *Id.* § 1201.34(e).

[28] See cases listed at MSPB, *Nonprecedential Decisions*, https://www.mspb.gov/decisions/nonprecdec.htm (last visited Nov.12, 2022).

Precedential decisions are not so labelled.[29] As noted below, however, precedential and non-precedential decisions are posted separately on the MSPB's website under headings that identify their status.

There appear to be no differences in form or structure between precedential and non-precedential decisions, except that precedential decisions have a special citation format. The precedential and non-precedential decisions are sometimes of similar length, although generally precedential decisions tend to be longer. Board decisions resemble federal-court appellate decisions in their form of presentation.

IV. Public Availability of Precedential Decisions

MSPB precedential and non-precedential decisions can be found online in subscription legal databases such as Lexis and Westlaw. Westlaw also provides a separate database of AJ decisions (which are also non-precedential). All precedential Board decisions are posted on the MSPB's website, while nonprecedential Board decisions are available from 2010 onward. Precedential decisions and non-precedential decisions appear on separate pages of the website and have unique search engines to allow the public to search each body of case law. The page for the latter includes a notation, drawn from the above-cited rule, explaining what non-precedential means.[30]

Every week, MSPB staff prepares and posts on the MSPB website a weekly "case report." They summarize precedential Board decisions, and all federal circuit court decisions issued in cases appealed from MSPB decisions.[31] The MSPB also publishes a yearly report of summaries of precedential cases decided by the Board and precedential or otherwise significant decisions by the federal circuit courts in appeals of MSPB cases. The yearly report includes statistics about cases processed in regional and field offices.[32]

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[29] See cases listed at *Nonprecedential Decisions*, MSPB, https://www.mspb.gov/decisions/nonprecdec.htm (last visited Nov. 12, 2022).

[29] See cases listed at *Precedential Decisions*, MSPB, https://www.mspb.gov/decisions/precdec.htm (last visited Nov. 12, 2022).

[30] *See Nonprecedential Decisions*, MSPB, https://www.mspb.gov/decisions/nonprecdec.htm (last visited Nov. 12, 2022).

[31] *Case Reports*, MSPB, https://www.mspb.gov/decisions/casereports.htm (last visited Nov. 12, 2022).

[32] *See, e.g.*, MSPB, ANNUAL REPORT OF FY 2021, https://www.mspb.gov/about/annual_reports/MSPB_FY_2021_Annual_Report_1900943.pdf.

APPENDIX L:
NATIONAL LABOR RELATIONS BOARD (NLRB)

I. Overview of Agency Adjudication System

The National Labor Relations Board proper[1] consists of five members. One is designated by the President to serve as its chair.[2] Three members constitute a quorum, unless the Board delegates its authority to a three-member "group" (usually called a panel), as it frequently does, in which case two members constitute a quorum.[3]

An important feature of the Board is that it has always made policy mostly by adjudication. With a few exceptions, the Board has not issued substantive legislative rules,[4] although it does have statutory authority to do so.[5] (Most rules are procedural.) As a result, Board decisions rely heavily on adjudicative precedent. Employers and unions regulated by the NLRB rely on Board decisions to apprehend their rights and obligations. The Board does not issue policy statements or interpretive rules on substantive matters.

Under the National Labor Relations Act (NLRA), the Board adjudicates two types of cases: representation cases and unfair labor practice cases. The former involve such matters as whether an NLRB regional director should conduct a union election; if so, among which employees in the appropriate "bargaining unit"; and whether the ensuing election results should be certified in the face of objections to the conduct of an election. The latter involve allegations made by the NLRB's General Counsel (acting through regional directors) that an employer or union violated the NLRA (say, by discriminating against an employee based on NLRA-protected activities).[6]

Representation cases come to the Board from non-APA/informal adjudicative decisions of regional directors. Unfair labor practices come to the Board from

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[1] "NLRB" is used here when referring to the agency as a whole. "Board" is used here to refer only to the five-member board within the agency that has final adjudicative (and other) authority. The NLRB operates under the National Labor Relations Act, as amended, codified at 29 U.S.C. §§ 151–169. Both the applicable sections of the session laws and the accompanying sections of the U.S. Code appear in all citations below.

[2] *See* NLRA § 3(a), 29 U.S.C. § 153.

[3] *See id.* An important qualification: If the Board delegates its authority to a three-member group, all three members of the group must remain on the Board for the delegation to remain valid. If, for example, the Board delegates its authority to a three-member group and one departs the Board, the two remaining members may not act on behalf of the Board. *See* New Process Steel, L.P. v. NLRB, 560 U.S. 674 (2010).

[4] *See Decisions*, NLRB, https://www.nlrb.gov/news-outreach/graphs-data/decisions (lasted visited Nov. 21, 2022).

[5] *See* NLRA § 6, 29 U.S.C. § 156.

[6] *See generally About NLRB: What We Do*, NLRB, https://www.nlrb.gov/about-nlrb/what-we-do (lasted visited Nov. 21, 2022).

APA/formal adjudicative decisions of administrative law judges (ALJs). Certain representation matters may sometimes be addressed by an ALJ decision when they are associated with unfair labor practice allegations.

Board review differs in each of the two types of cases. In unfair labor practice cases, the ALJ issues an initial decision to which a party may file "exceptions" (that is, appeal) as of right. The Board's review of the ALJ's decision is de novo with respect both to questions of law and (with a limited exception for demeanor-based credibility determinations) to questions of fact.[7] In a representation case, an NLRB regional director issues a decision subject to discretionary Board review on the filing of a request for review. The Board will hear the appeal only "where compelling reasons exist," as when a party raises a "substantial question of law or policy . . . because of [t]he absence of . . . or departure from Board precedent" or establishes that factual findings were "clearly erroneous" and prejudicial.[8]

In recent years, the Board has issued approximately 125 published decisions per year and about 250 unpublished decisions per year.[9]

As for judicial review, it is necessary to distinguish between Board decisions in unfair labor practice cases and representation cases. Decisions in representation cases are not subject to direct judicial review.[10] Decisions in unfair labor practice cases are subject to judicial review in the U.S. courts of appeals.[11] As a result of statutory venue rules, the U.S. Court of Appeals for the D.C. Circuit hears many of these appeals.[12]

II. Use of Precedential Decisions

Board decisions take one of two forms: published, which appear in the NLRB's official reporter, and unpublished. A distinction must be drawn between decisions in representation and unfair labor practice cases.

By longstanding practice, all decisions in unfair labor practice cases involving review of an ALJ's initial decision disposing of a case on the merits are

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[7] 29 C.F.R. § 101.12 (2022); *see also* NLRA § 9, 29 U.S.C. § 159.

[8] 29 C.F.R. § 102.67 (2022); *see also* NLRA § 10, 29 U.S.C. § 160.

[9] These numbers are based on a review of decisions available on the agency's website. *See Board Decisions*, NLRB, https://www.nlrb.gov/cases-decisions/decisions/board-decisions (lasted visited Nov. 21, 2022); *Unpublished Board Decisions*, NLRB, https://www.nlrb.gov/cases-decisions/decisions/unpublished-board-decisions (lasted visited Nov. 21, 2022). *See* Part II *infra* on the distinction between published and unpublished decisions.

[10] Note that, as a practical matter, some such decisions may be reviewable when they underlie a reviewable bargaining order in an unfair labor practice case.

[11] *See* NLRA § 10(e)–(f), 29 U.S.C. § 160(e)–(f); 29 C.F.R. § 101.14 (2022).

[12] *See generally* John G. Roberts Jr., *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 389 (2006).

published.[13] Unpublished decisions in unfair labor practice cases are reserved for summary decisions (styled as orders) involving such matters as interlocutory appeals (often on procedural matters), motions to approve settlements, and requests for reconsideration.[14] The Board also issues unpublished orders adopting ALJ decisions in unfair labor practice cases when no party has filed exceptions.

In representation cases, decisions may be published or unpublished. Most are unpublished and, given the limited grounds for review noted above, often are summary in their disposition of the issues.[15]

As for the precedential status of decisions, no NLRB rule addresses the subject.[16] In practice, all unpublished decisions are non-precedential. The NLRB's website explains that unpublished decisions are "not intended or appropriate for publication and are not binding precedent, except with respect to the parties in the specific case."[17] Most, but not all, published Board decisions are precedential. The exception are some decisions in representation cases denying review of a regional director's decision in which a Board member dissents from or concurs in the denial of review. These decisions are akin to Supreme Court opinions dissenting from or concurring in denials of certiorari.

III. Process for Writing and Form and Structure of Precedential Decisions

In a representation case, the Board writes its own, standalone decision, whether the decision is published or unpublished. The regional director's decision is not appended to the Board's decision.[18]

In unfair labor cases, the form and structure of the Board's decision depends on whether it is unpublished or published. If it is unpublished, the Board writes its own—usually very short, summary—decision.[19] The ALJ's decision is not appended to the Board's decision. It is important to note that, as explained

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[13] *See Board Decisions*, NLRB, https://www.nlrb.gov/cases-decisions/decisions/board-decisions (lasted visited Nov. 21, 2022).

[14] *See, e.g., 21st Century Valet Parking, LLC d/b/a Star Garden* (31-RC-301557) (Oct. 28 2022) (interlocutory appeal); *Bridgestone Americas Tire Operations, LLC* (10-CA-230142) (Oct. 7, 2020) (approving settlement); *American Federation for Children, Inc.* (28-CA-246878 & 28-CA-262471) (Jan. 6, 2022) (request for reconsideration).

[15] *See, e.g., 21st Century Valet Parking, LLC d/b/a Star Garden* (31-RC-301557) (Oct. 28 2022) (the body of the order is one sentence, though there are more substantial footnotes); *American Federation for Children, Inc.* (28-CA-246878 & 28-CA-262471) (Jan. 6, 2022) (one paragraph with little analysis).

[16] *But cf.* 29 C.F.R. § 102.67 (2022) (referring to a regional director's departure from "precedent" as one ground for hearing an appeal in a representation case).

[17] *Cases and Decisions: Unpublished Board Decisions*, NLRB, https://www.nlrb.gov/cases-decisions/decisions/unpublished-board-decisions (lasted visited Nov. 21, 2022).

[18] *See, e.g., Window to The World Commc'ns, Inc.,* (13-RC-289039 (Nov. 15, 2022).

[19] *See, e.g., NP Red Rock LLC,* (28-RD-292426) (Nov. 07, 2022).

above, unpublished decisions in unfair labor practice cases are used only to address certain limited matters. They are not used when reviewing a final recommended, case dispositive decision.

If the Board's decision in an unfair labor practice case is published, the ALJ's decision is appended to it.[20] The Board's own decision often relies on the ALJ's decision for the recitation of the procedural history of the case, findings of facts, conclusions of law, and the recommended remedy. When it adopts (or affirms), modifies, or rejects the ALJ's decision (in whole or part) on review, the Board's decision often bears little resemblance to a judicial decision. It is often very short, and much of its case-specific content appears in footnotes.[21] In complex cases or important cases, the Board's decision will sometimes more closely resemble a judicial decision in terms of its structure, though it is usually shorter.[22] Even then, it is often necessary to read the ALJ's decision alongside the Board's decision to understand the case in full.

Board decisions are issued under the names of all members in the majority. Individual members may, and often do, write concurring or dissenting opinions, although in most cases the Board's decision is unanimous. In deciding cases, the Board is sometimes aided by the participation of amici. Interested organizations or individuals may file a motion requesting permission to file an amicus brief.[23] The Board "occasionally invites the public to file amicus briefs in cases of significance or high interest."[24] When the Board does so, its website invitation is usually accompanied by an official "notice" that summarizes the case and identifies the issues on which the Board seeks amicus participation.[25]

IV. Public Availability of Precedential Decisions

Published decisions are first issued in slip-opinion form (much like Supreme Court opinions) and are subject to correction before publication.[26] They are later published in bound, printed volumes. All Board decisions appear on the NLRB's website—first in their slip-opinion form.[27] The citation for each decision begins

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[20] *See, e.g., T-Mobile USA, Inc.,* 13 (14-CA-170226) (Nov. 18, 2022).

[21] For judicial commentary, see UAW v. NLRB, 802 F.2d 969, 972 (7th Cir. 1986) (Posner, J.).

[22] *See, e.g., T-Mobile USA, Inc.,* 13 (14-CA-170226) (Nov. 18, 2022) (13 pages including dissent).

[23] *See* 29 C.F.R. § 102.46(i) (2022).

[24] *Invitation to File Briefs*, NLRB, https://www.nlrb.gov/cases-decisions/filing/invitations-to-file-briefs (lasted visited Nov. 21, 2022).

[25] *See id.*

[26] *See, e.g., T-Mobile USA, Inc.,* 1 (14-CA-170226) (Nov. 18, 2022) ("This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions.").

[27] *Board Decisions*, NLRB, https://www.nlrb.gov/cases-decisions/decisions/board-decisions (lasted visited Nov. 21, 2022).

with a volume number. There is no notation on or statement in published opinions addressing their precedential status.

Unpublished decisions appear on a separate page of the NLRB's website that clearly identifies them as unpublished. They do not share the same formatting as published opinions. There is no notation on unpublished opinions designating them as non-precedential.[28]

The NLRB's website includes a weekly digest of decisions that includes short summaries of the facts and holding of each listed decision.[29] The website also includes a list of "notable decisions" accompanied by a summary of each.[30] Members of the public can subscribe to receive Board decisions once they are posted. Another feature of the NLRB's website is that, for each case, it identifies and includes links to all administrative decisions and subsequent court decisions.[31]

[28] *Unpublished Board Decisions*, NLRB, https://www.nlrb.gov/cases-decisions/decisions/unpublished-board-decisions (lasted visited Nov. 21, 2022).

[29] *Weekly Summary*, NLRB, https://www.nlrb.gov/cases-decisions/decisions/weekly-summaries-decisions (lasted visited Nov. 21, 2022).

[30] *Notable Decisions*, NLRB, https://www.nlrb.gov/cases-decisions/decisions/notable-board-decisions (lasted visited Nov. 21, 2022) ("The Office of the Executive Secretary has identified the following Notable Board Decisions that may be of special interest to the labor-management community. These decision summaries are provided for informational purposes only and are not intended to substitute for the opinions of the National Labor Relations Board.").

[31] *Case Search*, NLRB, https://www.nlrb.gov/search/case (lasted visited Nov. 21, 2022).

APPENDIX M:
U.S. PATENT AND TRADEMARK OFFICE (USPTO): PATENT TRIAL AND APPEAL BOARD (PTAB)

I. Overview of Agency Adjudication System

Under the Leahy–Smith America Invents Act (AIA or Act), the Board of Patent Appeals and Interferences (BPAI) was redubbed the Patent Trial and Appeal Board (PTAB).[1] Situated within the U.S. Patent and Trademark Office (USPTO),[2] the PTAB "decides appeals from the decisions of patent examiners, and adjudicates the patentability of issued patents challenged by third parties in post-grant proceedings."[3] In addition to retaining jurisdiction over reexaminations and patent interferences, the AIA gave the PTAB authority over four new types of proceedings to review patent grants: Post-Grant Review (PGR), Inter Partes Review (IPR), Covered Business Method Review (CBMR), and derivation.[4] These new adjudicatory channels were "designed to create a cheaper, faster alternative to district court patent litigation."[5]

While these post-grant proceedings are presided over by panels of three administrative patent judges (APJs),[6] the PTAB also consists of certain statutory members, namely the Director of the USPTO, the Deputy Director of the USPTO, the Commissioner for Patents, and the Commissioner for Trademarks.[7] However, unlike certain other agency adjudicatory processes, the USPTO Director lacked unilateral direct review authority over PTAB determinations.[8] This changed in 2021 when the Supreme Court decided *United States v. Arthrex, Inc.*[9] In *Arthrex*, the Court held that the appointment of APJs

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[1] 35 U.S.C. § 6(a). For an overview of the USPTO's adjudication system, see MICHAEL A. ASIMOW, ADMIN. CONF. OF U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 163–171 (2019).

[2] "USPTO" is used here when referring to the agency as a whole; "PTAB" is used here when referring to the more discrete adjudicatory body consisting of the Director of the USPTO, the Deputy Director of the USPTO, the Commissioner for Patents, the Commissioner for Trademarks, and the stable of APJs.

[3] Janet Gongola, *The Patent Trial and Appeal Board: Who Are They and What Do They Do?*, U.S. PAT. & TRADEMARK OFF., https://www.uspto.gov/learning-and-resources/newsletter/inventors-eye/patent-trial-and-appeal-board-who-are-they-and-what (last visited Nov. 11, 2022).

[4] 35 U.S.C. § 6(b).

[5] Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141, 158 (2019).

[6] 35 U.S.C. § 6(c).

[7] 35 U.S.C. § 6(a).

[8] Walker & Wasserman, *supra* note 5, at 160 (noting that, although the USPTO "Director does not have final decision-making authority," the Director "has the authority to designate panel members that she hopes share her views in an effort to influence PTAB determinations").

[9] 141 S. Ct. 1970 (2021).

violated the Appointments Clause and remedied this constitutional violation by holding that the Director of the USPTO must have final decision-making authority over PTAB final decisions in AIA proceedings.[10] Specifically, as it relates to 35 U.S.C. § 6(c), the Court's remedy provides that the Director "may review final PTAB decisions and, upon review, may issue decisions himself [or herself] on behalf of the Board."[11]

While these post-grant proceedings have differing eligibility and time-bar requirements,[12] each must occur in an adversarial, court-like hearing in which parties are entitled to request oral argument and additional discovery.[13] The APJs—"persons of competent legal knowledge and scientific ability who are appointed by the Secretary [of Commerce], in consultation with the [Patent Office] Director"[14]—render decisions based on the evidentiary record.[15] Parties wishing to appeal final decisions in post-grant proceedings rendered by the PTAB may request a rehearing[16] or may appeal directly to the U.S. Court of Appeals for the Federal Circuit.[17]

II. Use of Precedential Decisions

A precedential PTAB decision establishes binding authority, typically concerning major policy or procedural issues, or other issues of exceptional importance, including constitutional questions, important issues regarding statutes, rules, and regulations, important issues regarding case law, or issues of broad applicability to the Board.[18] The precedential designation may be used to resolve conflicts between Board decisions, to promote certainty and consistency among Board decisions, and to ensure PTAB compliance with judicial precedent, statutes, regulations, and the Constitution.[19] An "informative" PTAB decision provides Board norms on recurring issues, guidance on issues of first impression to the Board, guidance on Board rules and practices, and guidance on issues that may develop through analysis of recurring issues in many cases.[20] A precedential decision is binding Board

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[10] *Id.* at 1988.

[11] *Id.* at 1987.

[12] *See, e.g.*, 37 C.F.R. §§ 42.102, 42.202 (2018) (setting forth timing requirements for institution of IPR, PRG, respectively)

[13] *Id.* §§ 42.51(b)(2), 42.62, 42.70.

[14] 35 U.S.C. § 6(a).

[15] *See* Walker & Wasserman, *supra* note 5, at 164 (PTAB decision is "[p]robably" limited to bases included in hearing record, given the requirement that "[a]ll evidence must be filed in the form of an exhibit" (quoting 37 C.F.R. § 42.63(a) (2018))).

[16] 35 U.S.C. § 6(c).

[17] 35 U.S.C. § 141.

[18] Pat. Trial & Appeal Board, SOP 2, at 2–3, 11.

[19] *Id.* at 9.

[20] *Id.*

authority in subsequent matters involving similar facts or issues.[21] Informative decisions set forth Board norms that should be followed in most cases, absent justification, although an informative decision is not binding authority on the Board.[22]

There are four different avenues in which PTAB decisions may be designated as precedential or informative, all of which require the Director's approval. First, the Director may decide sua sponte that a PTAB decision should be precedential or informative and designated a decision as such without any additional process.

Second, a PTAB decision may be designated as precedential or informative after issuance by the Precedential Opinion Panel (POP) comprising the Director, the Commissioner for Patents, and the Chief Administrative Patent Judge.[23] The POP is intended to "establish binding agency authority concerning major policy or procedural issues . . . in the limited situations where it is appropriate to create such binding agency authority through adjudication before the Board."[24] The Director herself may decide sua sponte a PTAB decision should be subject to POP review.[25] Alternatively a party to the decision or an APJ may request POP review when the PTAB decision in question: (1) is contrary to Supreme Court, Federal Circuit, or precedential board opinion; (2) is contrary to Constitution, statute, or regulation; or (3) addresses one or more precedent setting questions of exceptional importance.[26] A screening committee made of POP members or designees will review a request for POP review by party or member of PTAB and will forward their recommendations to the Director.[27] The Director then decides whether to convene the POP to decide on granting the rehearing.[28] Although the POP review process generally is used to establish binding agency authority, no decision may be designated as precedential without the Director's approval.[29]

Third, anyone, including USPTO officials or members of the public, may nominate a routine decision to be designated as precedential or informative.[30] A screening committee reviews the nomination and then recommends which cases should be subject to further review for designation as precedential or

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[21] *Id.* at 3.

[22] *Id.*

[23] *Id.* at 4 (giving the Director wide latitude to select the members of the POP and to impanel more members than the default). This may allow the Director to ensure the POP renders a decision in line with the Director's view.

[24] *Id.* at 3.

[25] *Id.* at 8.

[26] *Id.* at 5–6.

[27] *Id.* at 6–7.

[28] *Id.* at 8.

[29] *Id.* at 3, 8.

[30] *Id.* at 9.

informative.[31] This further review occurs by the Executive Judges Committee (EJC), which consists of five members, and includes the Chief Judge, the Deputy Chief Judge, and the Operational Vice Chief Judges.[32] The EJC provides the recommendation to the Director as to whether the opinion or a portion of the opinion should be designated as precedential or informative.[33] The Director may consult with others, including members of the POP or the Office of the General Counsel in making the decision as to whether a PTAB decision nominated to be precedential or informative should in fact be designated as such.[34]

Fourth, PATB decisions may be designated as precedential or informative after Director review. In response to *Arthrex*, the USPTO implemented an interim process for Director review of PTAB decisions.[35] Under the current process, the Director may choose to issue Director review decisions as precedential, informative, or routine. Decisions made on Director review are routine by default, but may be made precedential on designation by the Director, e.g., immediately upon issuance or at a later time via the nomination process discussed above.[36]

The USPTO also has procedures as to how to de-designate precedential or informative decisions that should no longer be designated as such because it has been rendered obsolete by subsequent binding authority, is inconsistent with current policy, or is no longer relevant to Board jurisprudence.[37] Any person—including Board members, other USPTO employees, and members of the public—may nominate opinions that should be de-designated by submitting an email to PTAB_Decision_Nomination@uspto.gov. If the Director determines that the particular Board decision should no longer be designated as such, the subject Board decision will be de-designated. The Chief Judge will notify the Board that the decision has been de-designated. The decision will be removed from the Board's Precedential and Informative Decisions webpage, and the public will be notified that the decision has been de-designated.

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[31] *Id.*

[32] *Id.* at 10.

[33] *See id.*

[34] *Id.* at 10–11.

[35] *See Interim Process for Director Review*, USPTO, https://www.uspto.gov/patents/patent-trial-and-appeal-board/interim-process-director-review (last visited Nov. 28, 2022); *see also* Request for Comments on Director Review, Precedential Opinion Panel Review, and Internal Circulation and Review of Patent Trial and Appeal Board Decisions, 87 Fed. Reg. 43249 (July 20, 2022).

[36] *See Interim Process for Director Review*, USPTO, https://www.uspto.gov/patents/patent-trial-and-appeal-board/interim-process-director-review (last visited Nov. 28, 2022).

[37] Pat. Trial & Appeal Board, SOP 2, at 12.

III. Process for Writing and Form and Structure of Precedential Decisions

The nominating process for designating PTAB decisions as precedential involves potential input from agency staff, including non-adjudicating APJs, and the public. With respect to routine decisions that are nominated for precedential designation, the USPTO generally circulates all nominated decisions to all APJs for comment for five days before the determining whether to recommend the decision for precedential or informative designation to the Director.[38] The POP and Director review processes may also allow for amici participation.[39]

PTAB precedential opinions mirror the features of judicial decisions. They state the reasons for the action taken and address arguments of the parties. They have headings to ease their readability, such as statement of the case, summary of the facts, and analysis. PTAB precedential decisions are on average approximately twenty pages in length,[40] but some are longer than seventy-five pages.[41] 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.[42]

IV. Public Availability of Precedential Decisions

PTAB precedential and informative decisions can be found online in subscription legal databases such as Lexis and Westlaw and are posted on the USPTO website.[43] The USPTO posts an index of its precedential and informative decisions by subject matter with a description of the topic of each decision and/or a short summary of its holding. The USPTO also provides an alphabetical listing of these decisions.

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[38] *Id.* at 10.

[39] *See Precedential Opinion Panel*, PTAB, https://www.uspto.gov/patents/ptab/decisions/precedential-opinion-panel (last visited Nov. 28, 2022).

[40] *See, e.g.*, Mewherter, Appeal 2012-007692 (Pat. Trial & Appeal Bd. Mar. 1, 2016), https://www.uspto.gov/sites/default/files/ip/boards/bpai/decisions/prec/fd2012_007692_precedential.pdf.

[41] Lectrosonics v. Zaxcom, IPR2018-01129 (Pat. Trial & Appeal Bd. Jan. 24, 2020), https://www.uspto.gov/sites/default/files/documents/Lectrosonics%2C%20Inc.%20v.%20Zaxcom%2C%20Inc.%2C%20IPR2018-01129%20%28Paper%2033%29.pdf.

[42] *Compare McAward*, IPR2015-006416 (Pat. Trial & Appeal Bd. Aug. 25, 2017), https://www.uspto.gov/sites/default/files/documents/ex-parte-mcaward-2017_08.pdf, *with* Lectronsonics v. Zaxcom, Appeal 2018-01129 (Pat. Trial & Appeal Bd. Jan. 24, 2020), https://www.uspto.gov/sites/default/files/documents/Lectrosonics%2C%20Inc.%20v.%20Zaxcom%2C%20Inc.%2C%20IPR2018-01129%20%28Paper%2033%29.pdf

[43] *Precedential and Informative Decisions*, PTAB, https://www.uspto.gov/patents/ptab/precedential-informative-decisions (last visited Nov. 11, 2022).

APPENDIX N:
SECURITIES AND EXCHANGE COMMISSION (SEC)

I. Overview of Agency Adjudication System

The Securities and Exchange Commission (SEC) administers federal securities laws in order to further its three-part mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation.[1] The SEC's oversight includes securities exchanges, securities brokers and dealers, investment advisors, and mutual funds, and it brings both administrative and civil enforcement actions for violations of securities laws, including insider trading, accounting fraud, and the provision of false or misleading information about securities.

Established by the Securities Exchange Act of 1934 (Act),[2] the SEC assumes a primary role in regulating securities markets, which are governed by the Act as well as a series of laws, from the Securities Act of 1933[3] and Investment Company Act of 1940[4] to, more recently, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.[5] The SEC's rulemaking, investigations, and adjudicatory authorities also derive from these laws.

As the agency head, the Commission is composed of five commissioners appointed for five-year staggered terms by the President with the advice and consent of the Senate.[6] No more than three commissioners may be of the same political party, and executive and administrative functions of the Commission are carried out by the Chairman, who is so designated by the President.[7]

The Commission may delegate many of its functions to an individual commissioner, administrative law judges (ALJs), or employees, and it retains the authority to review any action pursuant to such a delegation, either on its own initiative or upon petition of a party.[8] Hearings in administrative actions may be held before either the Commission or an ALJ.[9] The Commission has issued a standing delegation to ALJs to issue initial decisions in any proceeding

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[1] *Our Goals*, SEC, https://www.sec.gov/our-goals (last visited Nov. 12, 2022).

[2] 15 U.S.C. § 78a *et seq*.

[3] *Id.* § 77a *et seq*.

[4] *Id.* §§ 80a-1–80a-64.

[5] Pub. L. 111–203, 124 Stat. 1376–2223. Additional laws governing the securities industry include: the Trust Indenture Act of 1939; the Investment Advisers Act of 1940; the Securities Investor Protection Act of 1970; the Foreign Corrupt Practices Act of 1977; the Public Company Accounting Reform and Corporate Responsibility Act of 2002 (Sarbanes-Oxley Act of 2002); and the Jumpstart Our Business Startups (JOBS) Act (enacted in 2012).

[6] 15 U.S.C. § 78d(a).

[7] *Id.* §§ 78d(a), 78d-2.

[8] *Id.* § 78d-1(a), (b).

[9] 17 C.F.R. § 201.110 (2022).

at which they preside.[10] The Chief Administrative Law Judge of the Commission designates the ALJ to preside in a particular case.[11]

Even prior to the commencement of proceedings, the Commission holds significant decision-making authority regarding the agency's investigations to determine whether a violation has occurred. This includes decisions to commence a formal investigation with the use of process it deems necessary, issue an order instituting administrative proceedings before the agency, initiate civil proceedings in the courts, and refer criminal matters to the Department of Justice for prosecution where there has been a willful violation.[12]

Initial decisions by ALJs, if not appealed to the Commission (or selected by the Commission for review) are deemed the final action of the Commission.[13] While statutes and regulations have specified that parties have a right of review by the Commission for certain enumerated actions (with discretionary review for all others), as a matter of practice, the Commission grants all appeals of initial decisions.[14] While no definitive or binding statement provides explanation for this practice, a comment included with a prior version of the Rules of Practice states that the custom of granting all appeals was "the product of a consensus over many years" that "represents a Commission determination that there is benefit to joint deliberation by the Commission when exception is taken to an initial decision."[15]

The Commission also sits as an appellate body for several entities outside the SEC. For example, the Commission hears appeals from determinations made by self-regulatory organizations, and—like initial decisions by the SEC's ALJs—the Commission may select unappealed determinations by the self-regulatory organizations for review as well.[16] Self-regulatory organizations include the national securities exchanges (such as the New York Stock Exchange) as well as the Financial Industry Regulatory Authority (FINRA).[17] The Commission may also review (on appeal or its own initiative)

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[10] *Id.* § 200.30-9.

[11] *Id.* § 201.110.

[12] 15 U.S.C. §§ 77s, 78u; 17 C.F.R. § 202.5 (2022); *see also How Investigations Work*, SEC, https://www.sec.gov/enforce/how-investigations-work.html (last visited Nov. 11, 2022); *Enforcement Manual*, SEC DIV. OF ENF'T, https://www.sec.gov/divisions/enforce/enforcement manual.pdf (last visited Nov. 12, 2022); *Office of Administrative Law Judges*, SEC, https://www.sec.gov/page/aljsectionlanding (last visited Nov. 12, 2022).

[13] 15 U.S.C. § 78d–1(b) and (c); 17 C.F.R. § 201.360(d)(2) (2022).

[14] 15 U.S.C. § 78d–1(b); 17 C.F.R. § 201.411(b)(1) and (2) (2022).

[15] *Rules of Practice (July 2003): Rule 410 Comment (a)-(b), (d)*, SEC, https://www.sec.gov/about/rulesprac072003.htm (last visited Nov. 12, 2022). Subsequent versions of the Rules of Practice, including the current version, do not include comments on the rules.

[16] 17 C.F.R. §§ 201.420, 201.421 (2022).

[17] A list of self-regulatory organizations is available at *Self-Regulatory Organization Rulemaking*, SEC, https://www.sec.gov/rules/sro.shtml (last visited Nov. 11, 2022).

determinations by the Public Company Accounting Oversight Board.[18] Additionally, while perhaps not always considered to be the review of a prior adjudication, the Commission may review (on appeal and on its own initiative) the actions taken by the directors of the SEC's divisions pursuant to the Commission's delegated authority.[19]

Generally, final orders by the Commission may be reviewed by the U.S. Court of Appeals for the District of Columbia or the U.S. Court of Appeals where the aggrieved person resides or has their principal place of business.[20]

II. Use of Precedential Decisions

All Commission opinions are precedential and binding on ALJs. The Commission, which issues approximately 200 opinions per year, is not bound by its prior opinions although it is rare for the Commission to overturn a previous decision.

III. Process for Writing and Form and Structure of Precedential Decisions

The SEC's Office of the General Counsel provides substantial support to the Commission in writing precedential opinions.[21] The SEC also allows for amicus participation. SEC precedential opinions mirror the features of judicial decisions. They state the reasons for the action taken and address the serious arguments of the parties. They have headings to ease their readability, such as statement of the case, summary of the facts, and analysis. SEC opinions do not have any markings that indicate their precedential status, and the length of Commission opinions vary.[22]

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[18] 17 C.F.R. §§ 201.440, 201.441 (2022).

[19] 17 C.F.R. §§ 201.430, 201.431 (2022). Authorities delegated to the various division directors are at 17 C.F.R. §§ 200.30–11 through 200.30–18 (2022).

[20] Judicial review provisions for the respective securities laws administered by the SEC include: 15 U.S.C. § 77i; 15 U.S.C. § 78y; 15 U.S.C. § 77vvv; 15 U.S.C. § 80a–42; and 15 U.S.C. § 80b–13.

[21] *Office of the General Counsel*, SEC, https://www.sec.gov/ogc (last visited Nov. 12, 2022) (""[The Office of the General Counsel] . . . 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. The Office of the General Counsel does litigate administrative disciplinary proceedings against attorneys under Rule of Practice 102(e); in those proceedings the Office of the General Counsel does not assist the Commission in writing the opinions resolving the proceedings.

[22] The majority of SEC opinions, which involve the revocation of security registrations, are on average seven pages in length. *See, e.g.*, Freeseas Inc., Exchange Act Release No. 95534, 2022 WL 3575915 (Aug. 18, 2022). SEC decisions that address fraud tend to be longer but average under twenty pages. *See, e.g.,* In the Matter of the Application of Louis Ottimo for Review of Disciplinary Action Taken by FINRA, Exchange Act Release No. 95141, 2022 WL 2239146 (June 22, 2022).

IV. Public Availability of Precedential Decisions

Commission opinions can be found online in subscription legal databases such as Lexis and Westlaw and are posted electronically on the SEC website.[23] The SEC used to publish a daily digest of enforcement actions, but this has not been updated since 2013.[24] Aside from an RSS Feed,[25] the SEC does not currently post any indices, digests, or summaries of its decisions.

[23] *Commission Opinions and Adjudicatory Orders*, SEC, https://www.sec.gov/litigation/opinions.htm (last visited Nov. 12, 2022).

[24] *The SEC News Digest Archives*, SEC, https://www.sec.gov/news/digest.shtml (last visited Nov. 12, 2022).

[25] *RSS Feeds*, SEC, https://www.sec.gov/about/secrss (last visited Nov. 12, 2022).

APPENDIX O:
SOCIAL SECURITY ADMINISTRATION (SSA):
APPEALS COUNCIL

I. Overview of Agency Adjudication System

The Social Security Administration (SSA) administers a variety of benefit programs under the Social Security Act (Act), including Old-Age, Survivors, and Disability Insurance benefits under Title II of the Act and Supplemental Security Income under Title XVI of the Act.[1]

The Act authorizes the Commissioner to delegate to "any member, officer, or employee of the Social Security Administration designated by him" the responsibility to hold hearings.[2] The Act also authorizes the Commissioner to "make rules and regulations" and "establish procedures" and to "adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits."[3]

The regulations establish an administrative review process by which SSA determines individuals' rights under Titles II and XVI of the Act.[4] First, SSA or a state agency makes an initial determination.[5] If an individual is dissatisfied with an initial determination, she may request reconsideration.[6] If an individual is dissatisfied with a reconsideration determination, she may request an evidentiary hearing before an administrative law judge (ALJ).[7] If an individual is dissatisfied with an ALJ's decision, she may request that the Appeals Council review the decision.[8] The Appeals Council's decision, or the ALJ's decision if the Appeals Council denies an individual's request for review, becomes the final decision of the Commissioner.[9] If an individual is dissatisfied with the agency's final decision, she may request judicial review by filing an action in federal district court.[10]

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[1] SSA also administers Special Benefits for Certain World War II Veterans under Title VIII of the Act. For more information, see 20 C.F.R. pt. 408.

[2] *See* 42 U.S.C. § 405(l); *see also id.* § 902(a)(7).

[3] *Id.* § 405(a); *see also* §§ 902(a)(5), § 1383b(d)(1).

[4] 20 C.F.R. §§ 404.900(a), 416.1400(a).

[5] *Id.* §§ 404.900(a)(1), 416.1400(a)(1).

[6] *Id.* §§ 404.900(a)(2), 416.1400(a)(2).

[7] *See id.* §§ 404.900(a)(3), 416.1400(a)(3).

[8] *Id.* §§ 404.900(a)(4), 416.1400(a)(4).

[9] *Id.* §§ 404.981, 416.1481.

[10] 42 U.S.C. § 405(g); 20 C.F.R. §§ 404.900(a)(5), 416.1400(a)(5); Smith v. Berryhill, 139 S. Ct. 1765 (2019).

If an individual is dissatisfied with an ALJ's decision following a court remand, she may submit written exceptions to the Appeals Council.[11] The Appeals Council will either decline jurisdiction or assume jurisdiction, in order to remand the case to an ALJ or issue a decision.[12] The Appeals Council may also assume jurisdiction on its own motion.[13] If the Appeals Council issues its own decision, that decision becomes the final decision of the Commissioner.[14] If the Appeals Council does not assume jurisdiction, the ALJ's decision becomes the final decision of the Commissioner subject to judicial review.[15] The Appeals Council processed over 191,000 cases in fiscal year 2020.[16]

Administrative appeals judges (AAJ) comprise the Appeals Council's membership.[17] The regulations authorize individual AAJs to dismiss requests for review, deny requests for review, and deny reopening requests.[18] The regulations authorize panels of two or three AAJs to grant requests for review and review ALJ actions on the Appeals Council's own motion.[19] The regulations also authorize appeals officers to deny certain requests for review.[20] Appeals officers are "[o]rganizationally . . . a part of the Appeals Council."[21] While SSA regulations permit the Appeals Council to decide cases en banc,[22] it rarely does so. Separate, adversarial procedures apply in cases in which SSA's Office of the General Counsel initiates a proceeding against an attorney or non-attorney representative to suspend or disqualify that an individual from acting in a representational capacity before SSA.[23] This case study does not examine the procedures that ALJs and the Appeals Council follow in representative sanction cases.

II. Use of Precedential Decisions

The SSA does not treat any Appeals Council decisions as precedential.

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[11] 42 U.S.C. §§ 404.984(b), 416.1484(b).

[12] *Id*. §§ 404.984(b), 416.1484(b).

[13] *Id*. §§ 404.984(c), 416.1484(c).

[14] *Id*. §§ 404.984(b)(3) and (c), 416.1484(b)(3) and (c).

[15] *See id*. §§ 404.984(d), 416.1484(d).

[16] *Appeals Council Requests for Review FY 2022*, SSA, https://www.ssa.gov/appeals/DataSets/07_AC_Requests_For_Review.html (last visited Nov. 11, 2022).

[17] *See* 20 C.F.R. § 422.205; *see also* Final Rule, Organization and Procedures; Procedures of the Office of Hearings and Appeals; Authority of Appeals Officers To Deny a Request for Appeals Council Review, 60 Fed. Reg. 7117, 7118 (Feb. 7, 1995).

[18] *See* 20 C.F.R. § 422.205(c).

[19] 20 C.F.R. § 422.205(d).

[20] 20 C.F.R. § 422.205(c).

[21] 60 Fed. Reg. at 7118; *see also* Hearings, Appeals, and Litigation Law Manual (HALLEX) § I-3-0-1 B.

[22] 20 C.F.R. § 422.205(e)

[23] *Id*. §§ 404.1700 et seq., 416.1500 et seq.

III. Process for Writing and Form and Structure of Precedential Decisions

Not applicable.

IV. Public Availability of Precedential Decisions

Not applicable.

APPENDIX P:
DEPARTMENT OF TRANSPORTATION (DOT):
FEDERAL AVIATION ADMINISTRATION (FAA)

I. Overview of Agency Adjudication System

The Office of Adjudication within the Federal Aviation Administration (FAA) adjudicates (1) acquisitions (protests, disputes, and pre-disputes),[1] (2) certain aviation matters,[2] and (3) civil penalty appeals.[3] The Office of Dispute Resolution for Acquisition (ODRA), located within the Office of Adjudication, adjudicates certain assigned FAA matters. The FAA also delegates authority to the DOT's administrative law judges (ALJs) in the DOT's Office of Hearings for formal adjudication of FAA civil penalty enforcement cases. The FAA then serves as the first appellate tribunal on any appeal from the DOT ALJ's orders or decisions. Each will be addressed briefly in turn.

A. AMS Bid Protests and Contract Disputes

With respect to acquisition matters, ODRA adjudicates all Acquisition Management System (AMS) bid protests and contract disputes.[4] Consistent with its statutory mandate, the ODRA uses a variety of dispute avoidance and alternative dispute resolution (ADR) techniques. For those matters that cannot be resolved by ADR, an ODRA dispute resolution officer holding an appointment as an administrative judge (AJ) presides over the adjudication proceeding.[5] While AJs issue "Findings and Recommendations" in a typical case, only the ODRA Director and the Administrator issue final orders.[6] Appeals from final agency orders resulting from ODRA adjudications may be brought in either the U.S. Court of Appeals for the District of Columbia or the Court of Appeals where the appellant resides.[7]

B. Informal Aviation Hearings

With respect to aviation matters, AJs from the Office of Adjudication provide informal hearings for the FAA when the law does not require a formal hearing.[8] These hearings relate to orders of compliance, cease and desist orders, orders of

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[1] 14 C.F.R. pt. 17 (2022).

[2] 13 C.F.R. §§ 13.31–.69 (2022).

[3] *Id.* §§ 13.201–.236 (2022).

[4] 49 U.S.C. § 40110(d)(4); 14 C.F.R. pt. 17 (2022); *Designation of Administrative Judges and Delegation of Authority*, 76 Fed. Reg. 70529 (Nov. 14, 2011).

[5] 49 U.S.C. § 40110(d)(4); 14 C.F.R. §§ 17.21, 17.33 (2022).

[6] 14 C.F.R. § 17.41 (2022); *see also* Delegation of Authority, 79 Fed. Reg. 21832 (Apr. 17, 2014).

[7] 49 U.S.C. § 46110.

[8] An interested party subject to these types of orders must initiate the hearing process by filing a request for hearing. 14 C.F.R. §13.35 (2022).

denial, and some orders suspending or revoking a certificate of registration.[9] AJ decisions can be appealed to the Administrator of the FAA.[10] Aggrieved parties can then appeal the Administrator's decision to either the U.S. Court of Appeals for the District of Columbia or the U.S. Court of Appeals where the appellant resides.[11]

D. Formal Civil Penalty Enforcement Adjudication

By FAA delegated authority, DOT ALJs provide formal, independent administrative adjudications over a wide variety of FAA civil penalty enforcement matters (e.g., safety issues involving air carriers, aircraft maintenance or repair, hazmat shipping, unmanned aircraft systems, passenger misconduct, etc.) when a charged respondent (business or individual) requests a formal hearing. Pursuant to FAA regulations, the FAA Administrator (and/or delegated FAA decisionmaker[12]) is legally separated from the DOT ALJ's formal evidentiary adjudication proceedings,[13] so that the FAA Administrator (or other FAA decisionmaker) may act as an impartial appellate tribunal on any appeal from that adjudication. Once the DOT's ALJ fully resolves the civil penalty administrative proceeding by issuing a formal Order or Initial Decision, such formal Order or Initial Decision—if not appealed—is automatically final for civil penalty assessment, but non-precedential.[14] The DOT ALJ orders and decisions can be found online in subscription legal databases such as Lexis and Westlaw and are posted electronically on the FAA website.

E. Appeals from DOT ALJ Orders and Decisions

If either party files a timely appeal from the DOT ALJ's formal Order or Initial Decision, such appeal is filed with the FAA's Hearing Docket Clerk and directed to the FAA decisionmaker.[15] The FAA's Office of Adjudication administers the Civil Penalty Appeals Program to review initial decisions and

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[9] 4 C.F.R. §§ 13.20, 13.75 (2022)

[10] Memorandum from Principal Deputy Chief Counsel, FAA, to Director, Office of Adjudication, FAA (Mar. 30, 2016) (delegating authority under Part 13, Subpart D), https://www.faa.gov/sites/faa.gov/files/about/office_org/headquarters_offices/agc/Subpart_D__AGC-2_to_AGC-70_3-30-2016.pdf (last visited Nov. 12, 2022).

[11] 49 U.S.C. §§ 5127, 46110.

[12] Per regulations, the title "FAA Decisionmaker" identifies the FAA Administrator, "acting in the capacity of the decisionmaker on appeal, or any person to whom the Administrator has delegated the Administrator's decisionmaking authority in a civil penalty action" 14 C.F.R. § 13.202 (2022); *see also* Organizations, Functions, and Authority Delegations: Chief Counsel and Assistant Chief Counsel for Litigation, Notice of Delegation of Authority, 57 Fed. Reg. 58,280 (Dec. 9, 1992).

[13] 14 C.F.R. § 13. 203 (2022) ("Separation of Functions").

[14] *Id.* § 13.202 ("Order assessing civil penalty"); *see also id.* § 13.218(f)(5) ("Motion for Decision"); *id.* § 13.232 ("Initial Decision"); *id.* § 233 (j)(3) ("[A]ny issue, finding or conclusion, order, ruling, or initial decision of an administrative law judge that has not been appealed to the FAA decisionmaker is not precedent in any other civil penalty action.")

[15] *Id.* § 13.233 ("Appeal from initial decision").

orders of DOT ALJs.[16] These appeals arise from the FAA's authority to impose monetary penalties for violations of the Federal Aviation Act or related regulations.[17] The FAA prosecutes violations, proposing initial civil money penalties according to published sanction guidance. Pursuant to regulation, the Office of Adjudication "advises the FAA decisionmaker" on the appeal.[18] Any Office of Adjudication mediator who has participated in the underlying proceeding (i.e., prior to referral of the case to the DOT ALJ) may not participate in advising the FAA decisionmaker in the civil penalty enforcement adjudication appeal.[19] The Director of the Office of Adjudication has delegated authority to grant or deny motions to dismiss,[20] but often appeals result in a "Decision and Order" signed by the FAA Administrator.[21] These are final agency orders that respondents may appeal to either the U.S. Court of Appeals for the District of Columbia or the Court of Appeals where the appellant resides.[22]

II. Use of Precedential Decisions

Dispositive decisions in acquisition and civil penalty appeals issued by either the Administrator or the Director are precedential decisions.[23] In contrast, decisions from informal hearings are not precedential.[24]

III. Process for Writing and Form and Structure of Precedential Decisions

The writing process of FAA precedential opinions involves potential input from agency staff and the public, and the FAA allows for amici participation.

FAA opinions mirror the features of judicial decisions. They state the reasons for the action taken and address the serious arguments of the parties. They often have headings to ease their readability, such as statement of the case, summary

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[16] *Delegation of Authority*, 81 Fed. Reg. 24686, 24686 (Apr. 26, 2016). The Office of Adjudication was delegated authority from the FAA Administrator to review appeals from the decisions of the Department of Transportation administrative law judges in civil penalty cases. *See* 49 U.S.C. § 322(b); 14 C.F.R. §§ 13.201 *et seq*. (2022).

[17] 14 C.F.R. § 13.16 (2022).

[18] *Id.* § 13.202 ("FAA decisionmaker" and "Office of Adjudication"); *id.* §§ 13.219, 13.233.

[19] *Id.* § 13.236 ("Alternate Dispute Resolution").

[20] *Id.*

[21] *Id.* § 13.202 ("FAA decisionmaker means the Administrator of the Federal Aviation Administration, acting in the capacity of the decisionmaker on appeal, or any person to whom the Administrator has delegated the Administrator's decisionmaking authority in a civil penalty action.").

[22] 49 U.S.C. § 46110.

[23] *See, e.g., Protest of Alutiiq Pacific, LLC,* 12-ODRA-00627 (Findings and Recommendation, at 37, incorporated into FAA Order No. ODRA-13-664 (May 15, 2013); 14 C.F.R. § 13.233(j)(3) (2022).

[24] *Informal Hearings Under Part 13, Subpart D*, FAA, https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/informal_hearings (last visited Nov. 12, 2022).

of the facts, and analysis. FAA decisions are not marked precedential, given that all FAA decisions addressing acquisitions and civil penalties are precedential.[25]

IV. Public Availability of Precedential Decisions

FAA precedential decisions can be found online in subscription legal databases such as Lexis and Westlaw. The Office of Adjudication publishes its decisions online, supported by subject matter indices and tools that support searching by text, docket numbers, order numbers, and party name.[26] Moreover, hard copy publications of FAA decisions in civil penalty cases can be found in Federal Aviation Decisions, which is published by Thomson Reuters.[27]

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[25] *Civil Penalty Appeals*, FAA, https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/civil_penalty (last visited Nov. 12, 2022); *see Consolidated Decision on Request for Suspension*, 22-ODRA-00902, *et seq.* (Decision on Suspension, May 9, 2022) *(*citing *Protest of A3 Technology, Inc.*, 21-ODRA-00882 (Decision on Suspension, Oct. 9, 1998) as precedent); *In the Matter of: Presidential Aviation, Inc.*, FAA Order 2020-7 (Nov. 3, 2020) (describing *Schuman Aviation Co., Ltd.*, FAA Order 2015-2 (Aug. 24, 2016) as binding precedent).

[26] *See Adjudication*, FAA, www.faa.gov/go/adjudication (last visited Nov. 12, 2022).

[27] *Publications*, FAA, https://www.faa.gov/about/office_org/headquarters_offices/agc/practice_areas/adjudication/civil_penalty/pubs (last visited Nov. 12, 2022).

APPENDIX Q:
DEPARTMENT OF VETERANS AFFAIRS (VA):
BOARD OF VETERANS' APPEALS (BVA)

I. Overview of Agency Adjudication System

The Board of Veterans' Appeals (Board) was created by Executive Order in 1933 and recognized in statute in Congress's 1958 recodification of what are now the Department of Veterans Affairs (VA) governing statutes.[1] The Board's purpose is to adjudicate appeals from decisions made by one of the VA Agencies of Original Jurisdiction (AOJ): the Veterans Benefits Administration, the Veterans Health Administration, the National Cemetery Administration, or the Office of General Counsel. Until 1988, the Board was the last resort for veterans' appeals; Congress has since allowed for judicial review of Board decisions on veterans' claims in the U.S. Court of Appeals for Veterans Claims under the Veterans Judicial Review Act.[2]

Adjudication proceedings begin when a veteran or other claimant submits a claim for VA benefits. If the veteran is denied or unsatisfied with the AOJ decision, she can file a Notice of Disagreement (NOD) to appeal the decision. The two most common reasons for appealing a benefits decision are denial of benefits for a disability believed to be related to service or believing a disability is more severe than rated by the VA.[3] At the veteran's option, a hearing may then be held in front of a Veterans Law Judge (VLJ). The Board will then mail the veteran its decision either granting, remanding, or denying the issue.

If the veteran is still unsatisfied once the Board has made its decision, she has several options. The veteran may ask the Board to reconsider, file a supplemental claim with the AOJ with new and relevant evidence, or file an

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[1] Act of Sept. 2, 1958, Pub. L. No. 85-857, 72 Stat. 1105. The Board was originally established under Executive Order 6230 in 1933. *See* James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958*, 5 VETERANS L. REV. 5, 39 (2013). As with much of what is now the Department of Veterans Affairs, the history of the agency is a complicated combination of different programs designed to provide benefits to veterans and their survivors. *See* James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 253 (2010) ("During this 200-year period, various offices within the Departments of War, the Interior, and the Treasury made decisions on veterans benefits before VA was created in 1921 . . . ."). It was not until 1988, through the Department of Veterans Affairs Act, that the agency received its modern Cabinet status, going from the "Veterans Administration" to the "Department of Veterans Affairs." Department of Veterans Affairs Act, Pub. L. No. 100–527, 102 Stat 2635 (1988).

[2] Veterans' Judicial Review Act, Pub. L. 100–687, 102 Stat 4105 (1988). For an overview of VA's adjudication system, see MICHAEL A. ASIMOW, ADMIN. CONF. OF U.S., FEDERAL ADMINISTRATIVE ADJUDICATION OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT, 177–182 (2019).

[3] *How Do I Appeal?*, DEP'T OF VETERANS AFF. at 3, https://www.bva.va.gov/docs/Pamphlets/How-Do-I-Appeal-Booklet--508Compliance.pdf (last visited Nov. 11, 2022).

appeal to the U.S. Court of Appeals for Veterans Claims,[4] an Article I court.[5] Only the veteran may appeal Board decisions; the Secretary of Veterans Affairs (Secretary) is prohibited from doing so.[6] Final Board decisions usually consist of a "decision and order" that either grants, remands, or denies the issue. A Board order is then implemented by the AOJ, if necessary.

The Board decides around 100,000 cases a year.[7]

II. Use of Precedential Decisions

Board decisions do not have precedential value before the Board, beyond the law of the case.[8] Nevertheless, prior Board decisions "may be considered in a case to the extent that they reasonably relate to the case" even though "each case presented to [Board] will be decided on the basis of the individual facts of the case in light of the applicable procedure and substantive law."[9]

III. Process for Writing and Form and Structure of Precedential Decisions

Not applicable.

IV. Public Availability of Precedential Decisions

Not applicable.

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[4] *Id.* at 12. While the appeal from the Board to the U.S. Court of Appeals for Veterans Claims concludes the appeals process within the VA, decisions made by the U.S. Court of Appeals for Veterans Claims may then be appealed to the U.S. Court of Appeals for the Federal Circuit. 38 U.S.C. § 7292(b)(1). And finally, decisions made by the U.S. Court of Appeals for the Federal Circuit can be reviewed by the U.S. Supreme Court. 28 U.S.C. § 1254.

[5] 38 U.S.C. § 7251.

[6] *Id.* § 7252.

[7] *Decision Wait Times*, DEP'T OF VETERANS AFF, https://www.bva.va.gov/decision-wait-times.asp (last visited Nov. 11, 2022).

[8] 38 C.F.R. § 20.1303 (2022) ("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."); *see, e.g.*, Hillyard v. Derwinski, 1 Vet. App. 349, 351 (1991) ("Since each claim is fact specific, and since, as a practical matter, BVA decisions are not indexed by topic, the only value of the reasons or bases for BVA decisions in other cases is as argument in support of appellant's claim.").

[9] 38 C.F.R. § 20.1303 (2022).