



Administrative Conference Recommendation 2022-4

Precedential Decision Making in Agency Adjudication

Adopted December 15, 2022

It is a tenet of our system of justice that like cases be treated alike. Agencies use many different mechanisms to ensure such consistency, predictability, and uniformity when adjudicating cases, including designating some or all of their appellate decisions as precedential.¹ Agencies can also use precedential decision making to communicate how they interpret legal requirements or intend to exercise discretionary authority, as well as to increase efficiency in their adjudicative systems.²

An agency's decision is precedential when an agency's adjudicators must follow the decision's holding unless the precedent is distinguishable or until it is overruled. Many agencies use some form of precedential decision making. Some agencies treat all agency appellate decisions as precedential, while others treat only some appellate decisions as precedential. Additionally, some agencies highlight nonprecedential decisions that may be useful to adjudicators by labeling them "informative," "notable," or a similar term.³ In any of these cases, precedential decisions can come from an agency head or heads, adjudicators exercising the agency's authority to review hearing-level decisions, adjudicators who review hearing-level

¹ Other mechanisms include rulemaking, quality assurance programs, appellate review, aggregate decision making, and declaratory orders. *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022); Admin. Conf. of the U.S., Recommendation 2020-3, *Agency Appellate Systems*, 86 Fed. Reg. 6618 (Jan. 22, 2021); Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016); Admin. Conf. of the U.S., Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,161 (Dec. 16, 2015).

² *See* Christopher J. Walker, Melissa Wasserman & Matthew Lee Wiener, *Precedential Decision Making in Agency Adjudication* (Dec. 6, 2022) (report to the Admin. Conf. of the U.S.).

³ *See id.* at 28, 37 & app. G (discussing the use of "adopted decisions" at the U.S. Citizenship and Immigration Services).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

decisions but whose decisions are subject to (usually discretionary) agency-head review, or adjudicators other than the agency head who have statutory authority to issue final decisions. Rarely do hearing-level adjudicators issue precedential decisions.

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

For agencies that use some form of precedential decision making, this Recommendation provides best practices for identifying decisions which are precedential and making information about such decisions available internally and to the public. Some of these practices build on the Freedom of Information Act's requirement that agencies post on their websites all final orders and opinions and its general prohibition against agencies relying on, using, or citing an order or opinion as precedent against a private party if it has not been indexed and posted online.⁴

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

RECOMMENDATION

Use of Precedential Decision Making

1. Agencies should determine whether, and if so when, to treat their appellate decisions as precedential, meaning that an adjudicator must follow the decision's holding in subsequent cases, unless the facts of the decision are distinguishable or until the holding

⁴ See 5 U.S.C. § 552(a)(2)(A).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

is overruled. In determining whether to treat all, some, or no appellate decisions as precedential, agencies should consider:

- a. The extent to which they issue decisions that would be useful as precedent and are written in a form that lends itself to use as precedent;
 - b. The extent to which they issue decisions that mainly concern only case-specific factual determinations or the routine application of well-established policies, rules, and interpretations to case-specific facts; and
 - c. The extent to which they issue such a large volume of decisions that adjudicators cannot reasonably be expected to identify those which should control future decisions.
2. Agencies that treat only some appellate decisions as precedential should consider treating a decision as precedential if it:
- a. Addresses an issue of first impression;
 - b. Clarifies or explains a point of law or policy that has caused confusion among adjudicators or litigants;
 - c. Emphasizes or calls attention to an especially important point of law or policy that has been overlooked or inconsistently interpreted or applied;
 - d. Clarifies a point of law or policy by resolving conflicts among, or by harmonizing or integrating, disparate decisions on the same subject;
 - e. Overrules, modifies, or distinguishes existing precedential decisions;
 - f. Accounts for changes in law or policy, whether resulting from a new statute, federal court decision, or agency rule;
 - g. Addresses an issue that the agency must address on remand from a federal court;
or
 - h. May otherwise serve as a necessary, significant, or useful guide for adjudicators or litigants in future cases.
3. Agencies should not prohibit parties from citing nonprecedential decisions in written or oral arguments.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

4. Agencies should consider identifying nonprecedential decisions that may be useful to adjudicators by designating them “informative,” “notable,” or a similar term.

Processes and Procedures for Designating Precedential Decisions

5. Agencies’ procedures for designating decisions as precedential should not be unduly time consuming or resource intensive.
6. Prior to designating an appellate decision as precedential, agencies should consider soliciting input from appellate adjudicators not involved in deciding the case.
7. Agencies should consider implementing procedures by which appellate adjudicators can issue precedential decisions to resolve important questions that arise during hearing-level proceedings. Options include procedures by which, on an interlocutory basis or after a hearing-level decision has been issued:
 - a. Hearing-level adjudicators may certify specific questions in cases or refer entire cases for precedential decision making;
 - b. Appellate adjudicators on their own motion may review specific questions in cases or entire cases for precedential decision making; and
 - c. Parties may request that appellate adjudicators review specific questions in cases or entire cases for precedential decision making.
8. Agencies should consider establishing a process by which adjudicators, other agency officials, parties, and the public can request that a specific nonprecedential appellate decision be designated as precedential.
9. Agencies should consider soliciting amicus participation or public comments in cases in which they expect to designate a decision as precedential, particularly in cases of significance or high interest. That could be done, for example, by publishing a notice in the *Federal Register* and on their websites, and by directly notifying those persons likely to be especially interested in the matter. In determining whether amicus participation or public comments would be valuable in a particular case, agencies should consider the extent to which the case addresses broad policy questions whose resolution requires



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

consideration of general or legislative facts as opposed to adjudicative facts particular to the parties.

10. When an agency rejects or disavows the holding of a precedential decision, it should expressly overrule the decision, in whole or in part as the circumstances dictate, and explain why it is doing so.

Availability of Precedential Decisions

11. Agencies that treat only some appellate decisions as precedential should clearly identify precedential decisions as such. Such agencies should also identify those precedential decisions in digests and indexes that agencies make publicly available.
12. Agency websites, as well as any agency digests and indexes of decisions, should clearly indicate when a precedential decision has been overruled or modified.
13. Agencies should ensure that precedential decisions are effectively communicated to their adjudicators.
14. Agencies should update any manuals, bench books, or other explanatory materials to reflect developments in law or policy effected through precedential decisions.
15. Agencies should consider posting on their websites brief summaries of precedential decisions, a digest of precedential decisions, and an index, organized topically, of precedential decisions.
16. Subject to available resources, agencies should consider tracking, on their own or in coordination with commercial databases, and making available to agency officials and the public the subsequent history of precedential decisions, including whether they have been remanded, set aside, modified following remand by a federal court, or superseded by statute or other agency action, such as a rule.

Rules on Precedential Decision Making

17. As part of their rules of practice, published in the *Federal Register* and codified in the *Code of Federal Regulations*, agencies should adopt rules regarding precedential decision making. These rules should:



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- a. State whether all, some, or none of the agency's appellate decisions are treated as precedential;
 - b. Describe the criteria and process for designating decisions as precedential, if the agency considers some but not all of its decisions as precedential;
 - c. Specify who has authority to designate decisions as precedential, if the agency considers some but not all of its decisions as precedential;
 - d. Explain the legal effect of precedential decisions in subsequent cases;
 - e. Define any terms the agency uses to identify useful nonprecedential decisions, such as "informative" or "notable," and describe the criteria and process for designating these decisions;
 - f. Explain for what purposes a party may cite a nonprecedential decision, and how the agency will treat it;
 - g. Describe any opportunities for amicus or other public participation in precedential decision making; and
 - h. Explain how precedential decisions are clearly identified as precedential, how they are identified when overturned, and how they are made available to the public.
18. Agencies should use clear and consistent terminology in their rules relating to precedential decisions. Agencies that distinguish between "published" decisions and "nonpublished" or "unpublished" decisions (or some other such terminology) should identify in their rules of practice the relationship between these terms and the terms "precedential" and "nonprecedential."
19. Agencies should consider soliciting public input when they materially revise existing or adopt new procedural regulations on the subjects addressed above, unless the costs outweigh the benefits of doing so in a particular instance.