ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

June 23, 2025

The Honorable Morgan Luttrell
Chairman
Subcommittee on Disability Assistance and Memorial Affairs
Committee on Veterans' Affairs
United States House of Representatives
Washington, DC 20515

The Honorable Morgan McGarvey
Ranking Member
Subcommittee on Disability Assistance and Memorial Affairs
Committee on Veterans' Affairs
United States House of Representatives
Washington, DC 20515

Dear Chairman Luttrell and Ranking Member McGarvey:

On behalf of the Office of the Chairman of the Administrative Conference of the United States (ACUS), I write to call the Subcommittee's attention to several ACUS recommendations that relate directly to H.R. 3835, the Veterans Appeals Efficiency Act of 2025—and especially its requirement that ACUS be consulted on a study to be commissioned by the Secretary of Veterans Affairs—in advance of the Subcommittee's legislative hearing on June 24, 2025. These recommendations may be useful to the Subcommittee as it considers the bill.

ACUS is an independent agency in the executive branch charged by statute with making recommendations to the President, federal agencies, Congress, and the Judicial Conference to improve adjudication, rulemaking, and other administrative processes (5 U.S.C. § 594). It consists of up to 101 members drawn from federal agencies, the practicing bar, scholars in the field of administrative law or government, and others specially informed by knowledge and experience with respect to federal administrative procedure. The Office of the Chairman supports the work of the membership and undertakes other activities to study and improve federal administrative processes, including providing technical assistance to Congress.

Section 2(g)(1) of H.R. 3835 requires the Secretary of Veterans Affairs to enter into an agreement with a Federally Funded Research and Development Center (FFRDC) to submit to the Secretary a "written assessment" that includes:

- "The determination of the FFRDC" as to "whether modifying the authority of the Board [of Veterans' Appeals] to permit the Board to issue precedential decisions" in cases before the Board is "feasible." § 2(g)(3)(A); see also §2(g)(1)).

- "An assessment of the authority of the Board … to aggregate, for review, more than one appeal . . . that involves common questions of law or fact . . . ." § 2(g)(3)(B).

- "The recommendations of the FFRDC with respect to the rules or principles to which the Board should adhere when aggregating appeals for review . . . ." § 2(g)(3)(C).

In preparing its assessment, the FFRDC must consult with the Chairman of ACUS. ACUS thanks H.R. 3835's sponsors—including Chairman Bost—for including ACUS's Office of the Chairman in the consultative process.

ACUS has issued two recommendations that are concerned exclusively with the general subjects—aggregation and precedential decision making—that the FFRDC must address in its assessment: Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40260 (June 10, 2016); and Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023). A third, Recommendation 2020-3, *Agency Appellate Systems* 86 Fed. Reg. 6618 (Dec. 16, 2020), also addresses precedential decision making. *See* §§ 12, 14, 15–17, 22–23.

Recommendation 2016-2 addresses the specific issues that section 2(g)(3)(C) requires the FFRDC to consider: It identifies the criteria that agencies should consider in deciding whether to aggregate cases, how they should structure an aggregation system, and procedures they should employ.

Recommendation 2016-2, may also be useful in informing the Subcommittee's consideration of section 2(d) of H.R. 3835. That section allows the Chairman of the Board of Veterans' Appeals to aggregate cases and requires the Secretary to submit to the Committee on Veterans' Affairs a report on aggregation within five years after the bill's enactment. Section 2(d) defines aggregation broadly to include "joinder, consolidation, intervention, class actions, and any other multiparty proceeding." Like H.R. 3835, Recommendation 2016-2 and its associated report identifies various procedural forms that aggregation might take.

The above-noted recommendations and summaries of them appear in the Appendix to this letter, accompanied by links to the consultants' reports that informed their development.

In addition to these recommendations, ACUS has issued or sponsored many other recommendations, research reports, and other materials on adjudication that the Subcommittee may find useful as it considers H.R. 3835. They include Recommendation 2023-7, *Improving Timeliness in Agency Adjudication*, 89 Fed. Reg. 1513 (Jan. 10, 2024). Other materials on adjudication appear on ACUS's website at https://www.acus.gov/page/adjudication.

I welcome any questions the Subcommittee may have about these or other ACUS resources on agency adjudication. I encourage your staff to contact Adam Cline, Attorney Advisor (acline@acus.gov), if we can be of assistance on this or any other matter.

Sincerely yours,

Jeremy Graboyes
Research Director

cc: The Honorable Mike Bost
The Honorable Mark Takano

Appendix

Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40260 (June 10, 2016).

> **Summary.** This ACUS Recommendation provides guidance to agencies on the use of aggregation techniques to resolve similar claims in adjudications. It sets forth procedures for determining whether aggregation is appropriate. It also considers what kinds of aggregation techniques should be used in certain cases and offers guidance on how to structure the aggregation proceedings to promote both efficiency and fairness.
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> **Consultant Report.** Michael Sant'Ambrogio & Adam Zimmerman, Aggregate Agency Adjudication (June 9, 2016) (report to the Admin. Conf. of the U.S.).

Recommendation 2020-3, *Agency Appellate Systems* 86 Fed. Reg. 6618 (Dec. 16, 2020).

> **Summary.** This ACUS Recommendation offers agencies best practices to improve administrative review of hearing-level adjudicative decisions with respect to case selection, decision-making process and procedures, management oversight, and public disclosure and transparency. In doing so, it encourages agencies to identify the objectives of such review and structure their appellate systems to serve those objectives.
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> **Consultant Report.** Christopher J. Walker & Matthew Lee Wiener, Agency Appellate Systems (Dec. 14, 2020) (report to the Admin. Conf. of the U.S.).

Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023).

> **Summary.** This ACUS Recommendation identifies best practices on the use of precedential decisions in agency adjudication. It addresses whether agencies should issue precedential decisions and, if so, according to what criteria; what procedures agencies should follow to designate decisions as precedential and overrule previously designated decisions; and how agencies should communicate precedential decisions internally and publicly. It also recommends that agencies codify their procedures for precedential decision making in their rules of practice.
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> **Consultant Report.** 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.).

Administrative Conference Recommendation 2016-2

Aggregation of Similar Claims in Agency Adjudication

Adopted June 10, 2016

Federal agencies in the United States adjudicate hundreds of thousands of cases each year—more than the federal courts. Unlike federal and state courts, federal agencies have generally avoided aggregation tools that could resolve large groups of claims more efficiently. Consequently, in a wide variety of cases, agencies risk wasting resources in repetitive adjudication, reaching inconsistent outcomes for the same kinds of claims, and denying individuals access to the affordable representation that aggregate procedures promise. Now more than ever, adjudication programs, especially high volume adjudications, could benefit from innovative solutions, like aggregation.[1]

The Administrative Procedure Act (APA)[2] does not provide specifically for aggregation in the context of adjudication, though it also does not foreclose the use of aggregation procedures. Federal agencies often enjoy broad discretion, pursuant to their organic statutes, to craft procedures they deem "necessary and appropriate" to adjudicate the cases and claims that come before them.[3] This broad discretion includes the ability to aggregate common cases, both

[1] Other related techniques that can help resolve recurring legal issues in agencies include the use of precedential decisions, declaratory orders as provided in 5 U.S.C. 554(e), and rulemaking. With respect to declaratory orders, see Recommendation 2015-3, *Declaratory Orders*, 80 Fed. Reg. 78,163 (Dec. 16, 2015), *available at* https://www.acus.gov/recommendation/declaratory-orders. The Supreme Court has recognized agency authority to use rulemaking to resolve issues that otherwise might recur and require hearings in adjudications. *See Heckler v. Campbell*, 461 U.S. 458 (1983).

[2] *See* Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559, 701-706 and scattered sections in Title 5).

[3] Broad discretion exists both in "formal adjudication," where the agency's statute requires a "hearing on the record," triggering the APA's trial-type procedures, and in "informal adjudication," where the procedures set forth in APA §§ 554, 556 & 557 are not required, thus allowing less formal procedures (although some "informal adjudications" are nevertheless quite formal).

formally and informally. Formal aggregation involves permitting one party to represent many others in a single proceeding.[4] In informal aggregation, different claimants with very similar claims pursue a separate case with separate counsel, but the agency assigns them to the same adjudicator or to the same docket, in an effort to expedite the cases, conserve resources, and ensure consistent outcomes.[5]

Yet, even as some agencies face large backlogs, few have employed such innovative tools. There are several possible explanations for this phenomenon. The sheer number of claims in aggregate agency adjudications may raise concerns of feasibility, legitimacy, and accuracy because aggregation could (1) create diseconomies of scale by inviting even more claims that further stretch the agency's capacity to adjudicate; (2) negatively affect the perceived legitimacy of the process; and (3) increase the consequence of error.

Notwithstanding these risks, several agencies have identified contexts in which the benefits of aggregation, including producing a pool of information about recurring problems, achieving greater equality in outcomes, and securing the kind of expert assistance high volume adjudication attracts, outweigh the costs.[6] Agencies have also responded to the challenges of aggregation by (1) carefully piloting aggregation procedures to improve output while avoiding creation of new inefficiencies; (2) reducing potential allegations of bias or illegitimacy by relying on panels, rather than single adjudicators, and providing additional opportunities for parties to voluntarily participate in the process; and (3) allowing cases raising scientific or novel

[4] This recommendation does not address formal aggregation of respondents or defendants in proceedings before agencies.

[5] The American Law Institute's *Principles of the Law of Aggregation* defines proceedings that coordinate separate lawsuits in this way as "administrative aggregations," which are distinct from joinder actions (in which multiple parties are joined in the same proceeding) or representative actions (in which a party represents a class in the same proceeding). *See* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.02 (2010) (describing different types of aggregate proceedings).

[6] *See* Michael Sant'Ambrogio & Adam Zimmerman, Aggregate Agency Adjudication 27–65 (June 9, 2016), *available at* https://www.acus.gov/report/aggregate-agency-adjudication-final-report (describing three examples of aggregation in adjudication).

factual questions to "mature"[7]—that is, putting off aggregation until the agency has the benefit of several opinions and conclusions from different adjudicators about how a case may be handled expeditiously.

The Administrative Conference recognizes aggregation as a useful tool to be employed in appropriate circumstances. This recommendation provides guidance and best practices to agencies as they consider whether or how to use or improve their use of aggregation.[8]

RECOMMENDATION

1. Aggregate adjudication where used should be governed by formal or informal aggregation rules of procedure consistent with the APA and due process.

Using Alternative Decisionmaking Techniques

2. Agencies should consider using a variety of techniques to resolve claims with common issues of fact or law, especially in high volume adjudication programs. In addition to the aggregate adjudication procedures discussed in paragraphs 3–10, these techniques might include the designation of individual decisions as "precedential," the use of rulemaking to resolve issues that are appropriate for generalized resolution and would otherwise recur in multiple adjudications, and the use of declaratory orders in individual cases.

Determining Whether to Use Aggregation Procedures

3. Agencies should take steps to identify whether their cases have common claims and issues that might justify adopting rules governing aggregation. Such steps could include:

[7] *Cf.* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995) (defining "maturity" in which both sides' litigation strategies are clear, expected outcomes reach an "equilibrium," and global resolutions or settlements may be sought).

[8] This recommendation covers both adjudications conducted by administrative law judges and adjudications conducted by non-administrative law judges.

a. Developing the information infrastructure, such as public centralized docketing, needed for agencies and parties to identify and track cases with common issues of fact or law;
b. Encouraging adjudicators and parties to identify specific cases or types of cases that are likely to involve common issues of fact or law and therefore prove to be attractive candidates for aggregation; and
c. Piloting programs to test the reliability of an approach to aggregation before implementing the program broadly.

4. Agencies should develop procedures and protocols to assign similar cases to the same adjudicator or panel of adjudicators using a number of factors, including:
    a. Whether coordination would avoid duplication in discovery;
    b. Whether it would prevent inconsistent evidentiary or other pre-hearing rulings;
    c. Whether it would conserve the resources of the parties, their representatives, and the agencies; and
    d. Where appropriate, whether the agencies can accomplish similar goals by using other tools as set forth in paragraph 2.
5. Agencies should develop procedures and protocols for adjudicators to determine whether to formally aggregate similar claims in a single proceeding with consideration of the principles and procedures in Rule 23 of the Federal Rules of Civil Procedure, including:
    a. Whether the number of cases or claims are sufficiently numerous and similar to justify aggregation;
    b. Whether an aggregate proceeding would be manageable and materially advance the resolution of the cases;
    c. Whether the benefits of collective control outweigh the benefits of individual control, including whether adequate counsel is available to represent the parties in an aggregate proceeding;
    d. Whether (or the extent to which) any existing individual adjudication has (or related adjudications have) progressed; and

e. Whether the novelty or complexity of the issues being adjudicated would benefit from the input of different adjudicators.

Structuring the Aggregate Proceeding

6. Agencies that use aggregation should ensure that the parties' and other stakeholders' interests are adequately protected and that the process is understood to be transparent and legitimate by considering the use of mechanisms such as:
    a. Permitting interested stakeholders to file amicus briefs or their equivalent;
    b. Conducting "fairness hearings," in which all interested stakeholders may express their concerns with the proposed relief to adjudicators in person or in writing;
    c. Ensuring that separate interests are adequately represented in order to avoid conflicts of interest;
    d. Permitting parties to opt out in appropriate circumstances;
    e. Permitting parties to challenge the decision to aggregate in the appeals process, including an interlocutory appeal to the agency; and
    f. Allowing oral arguments for amici or amicus briefs in agency appeals.
7. Agencies that use aggregation should develop written and publicly available policies explaining how they initiate, conduct, and terminate aggregation proceedings. The policies should also set forth the factors used to determine whether aggregation is appropriate.
8. Where feasible, agencies should consider assigning a specialized corps of experienced adjudicators who would be trained to handle aggregate proceedings, consistent with APA requirements where administrative law judges are assigned. Agencies should also consider using a panel of adjudicators from the specialized corps to address concerns with having a single adjudicator decide cases that could have a significant impact. Agencies that have few adjudicators may need to "borrow" adjudicators from other agencies for this purpose.

Using Aggregation to Enhance Control of Policymaking

9. Agencies should make all decisions in aggregate proceedings publicly available. In order to obtain the maximum benefit from aggregate proceedings, agencies should also consider designating final agency decisions as precedential if doing so will:
    a. Help other adjudicators handle subsequent cases involving similar issues more expeditiously;
    b. Provide guidance to future parties;
    c. Avoid inconsistent outcomes; or
    d. Increase transparency and openness.
10. Agencies should ensure the outcomes of aggregate adjudication are communicated to policymakers or personnel involved in rulemaking so that they can determine whether a notice-and-comment rulemaking proceeding codifying the outcome might be worthwhile. If agencies are uncertain they want to proceed with a rule, they might issue a notice of inquiry to invite interested parties to comment on whether the agencies should codify the adjudicatory decision (in whole or in part) in a new regulation.

Administrative Conference Recommendation 2020-3

Agency Appellate Systems

Adopted December 16, 2020

In Recommendation 2016-4,[1] the Administrative Conference offered best practices for evidentiary hearings in administrative adjudications. Paragraph 26 recommended that agencies provide for "higher-level review" (or "agency appellate review") of the decisions of hearing-level adjudicators.[2] This Recommendation offers best practices for such review. The Administrative Conference intends this Recommendation to cover appellate review of decisions resulting from (1) hearings governed by the formal hearing provisions of the Administrative Procedure Act (APA) and (2) evidentiary hearings that are not governed by those provisions but are required by statute, regulation, or executive order. Agencies may also decide to apply this Recommendation to appellate review of decisions arising from other hearings, depending on their level of formality.

Appellate review of hearing-level decisions can be structured in numerous ways. Two structures are most common. In the first, litigants appeal directly to the agency head, which may be a multi-member board or commission. In the second, litigants appeal to an appellate adjudicator or group of adjudicators—often styled as a board or council—sitting below the

[1] 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).

[2] Recommendation 2016-4 addressed agency adjudications in which an evidentiary hearing, though not governed by the formal hearing provisions of the Administrative Procedure Act (APA) (5 U.S.C. §§ 554, 556–57), is required by statute, regulation, or executive order. Those adjudications, which are often as formal as APA adjudications in practice, far outnumber so-called APA adjudications. Although Recommendation 2016-4 addresses only non-APA adjudications, most of its best practices are as applicable to APA adjudications as non-APA adjudications. Some such practices, in fact, are modeled on the APA's formal hearing provisions.

agency head. The appellate decision may be the agency's final action or may be subject to further appeal within the agency (usually to the agency head).

The Administrative Conference has twice before addressed agency appellate review. In Recommendations 68-6 and 83-3, it provided guidance to agencies when establishing new, and reviewing existing, organizational structures of appellate review.[3] Both recommendations focused on the selection of "delegates"—individual adjudicators, review boards composed of multiple adjudicators, or panels composed of members of a multi-member agency—to exercise appellate review authority vested in agency heads (including boards and commissions). Recommendation 83-3 also addressed when agencies should consider providing appellate review as a matter of right and when as a matter of discretion, and, in the case of the latter, under what criteria.

With the exception of the appropriate standard for granting review, this Recommendation's focus lies elsewhere. It addresses, and offers best practices with respect to, the following subjects: first, an agency's identification of the purpose or objective served by its appellate review; second, its selection of cases for appellate review, when review is not required by statute; third, its procedures for review; fourth, its appellate decision-making processes; fifth, its management, administration, and bureaucratic oversight of its appellate system; and sixth, its public disclosure of information about its appellate system.[4]

Most importantly, this Recommendation begins by suggesting that agencies identify, and publicly disclose, the purpose(s) or objective(s) of their appellate systems. Appellate systems may have different purposes, and any given appellate system may have multiple purposes. Purposes or objectives can include the correction of errors, inter-decisional consistency of

[3] Admin. Conf. of the U.S., Recommendation 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983); 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). Both recommendations concerned only the review of decisions in proceedings governed by the formal hearing provisions of the APA. Their principles, though, are not so confined.

[4] 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.

decisions, policymaking, political accountability, management of the hearing-level adjudicative system, organizational effectiveness and systemic awareness, and the reduction of litigation in federal courts. The identification of purpose is important both because it dictates (or should dictate) how an agency administers its appellate system—including what cases it hears and under what standards of review it decides them—and provides a standard against which an agency's performance can be evaluated.

This Recommendation proceeds from the recognition that agency appellate systems vary enormously—as to their purposes or objectives, governing substantive law, size, and resources—and that what may be a best practice for one system may not always be the best practice for another. In offering the best practices that follow, moreover, the Administrative Conference recognizes that (1) an agency's procedural choices may sometimes be constrained by statute and (2) available resources and personnel policies may dictate an agency's decision as to whether and how to implement the best practices that follow. The Administrative Conference makes this Recommendation subject to these important qualifications.

RECOMMENDATION

Objectives of Appellate Review

1. Agencies should identify the objective(s) of appellate review; disclose those objectives in procedural regulations; and design rules and processes, especially for scope and standard of review, to serve them.

Procedures for Appellate Review

2. Agencies should promulgate and publish procedural regulations governing agency appellate review in the *Federal Register* and codify them in the *Code of Federal Regulations*. These regulations should cover all significant procedural matters pertaining to agency appellate review, including but not limited to the following:
    a. The objectives of the agency's appellate review system;

b. The timing and procedures for initiating review, including any available interlocutory review;
c. The standards for granting review, if review is discretionary;
d. The standards for permitting participation by interested persons and amici;
e. The standard of review;
f. The allowable and required submissions by litigants and their required form and contents;
g. The procedures and criteria for designating decisions as precedential and the legal effect of such designations;
h. The record on review and the opportunity, if any, to submit new evidence;
i. The availability of oral argument or other form of oral presentation;
j. The standards of and procedures for reconsideration and reopening, if available;
k. Any administrative or issue exhaustion requirements that must be satisfied before seeking agency appellate or judicial review, including whether agency appellate review is a mandatory prerequisite to judicial review;
l. Openness of proceedings to the public and availability of video or audio streaming or recording;
m. In the case of multi-member appellate boards, councils, and similar entities, the authority to assign decision-making authority to fewer than all members (e.g., panels); and
n. Whether seeking agency appellate review automatically stays the effectiveness of the appealed agency action until the appeal is resolved (which may be necessary for appellate review to be mandatory, see 5 U.S.C. § 704), and, if not, how a party seeking agency appellate review may request such a stay and the standards for deciding whether to grant it.

3. Agencies should include in the procedural regulations governing their appellate programs: (a) a brief statement or explanation of each program's review authority, structure, and decision-making components; and (b) for each provision based on a statutory source, an accompanying citation to that source.

4. When revising existing or adopting new appellate rules, agencies should consider the appellate rules (Rules 400–450) in the Administrative Conference's *Model Rules of Agency Adjudication* (rev. 2018).
5. When materially revising existing or adopting new appellate rules, agencies should 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.

Case Selection for Appellate Review

6. Based on the agency-specific objectives of appellate review, agencies should decide whether the granting of review should be mandatory or discretionary (assuming they have statutory authority to decide); if discretionary, the criteria for granting review should track the objectives of the appellate system, and they should be published in the procedural regulations.
7. Agencies should consider implementing procedures for sua sponte appellate review of non-appealed hearing-level decisions, as well as for the referral of cases or issues by hearing-level adjudicators to the appellate entity for interlocutory review.

Appellate Decision-making Processes and Decisions

8. Whenever possible, agencies should consider maintaining electronic case management systems that ensure that hearing records are easily accessible to appellate adjudicators. Such systems may include the capability for electronic filing.
9. Although the randomized assignment of cases to appellate adjudicators is typically an appropriate docketing method for an agency appellate system, agencies should consider the potential benefits of sorting and grouping appeals on the appellate docket, such as reduced case processing times and more efficient use of adjudicators', staff attorneys', and law clerks' skills and time. Criteria for sorting and grouping cases may include the size of a case's record, complexity of a case's issues, subject matter of a case, and similarity of a case's legal issues to those of other pending cases.

10. Consistent with the objectives of the agency's appellate system and in light of the costs of time and resources, agencies should consider adopting an appellate model of judicial review in which the standard of review is not de novo with respect to findings of fact and application of law to facts. For similar reasons, many agencies should consider limiting the introduction of new evidence on appeal that is not already in the administrative record from the hearing-level adjudication.
11. Taking agency resources into account, agencies should emphasize concision, readability, and plain language in their appellate decisions and explore the use of decision templates, summary dispositions, and other quality-improving measures.
12. Agencies should establish clear criteria and processes for identifying and selecting appellate decisions as precedential, especially for appellate systems with objectives of policymaking or inter-decisional consistency.
13. Agencies should assess the value of oral argument and amicus participation in their appellate system based on the agencies' identified objectives for appellate review and should establish rules governing both. Criteria that may favor oral argument and amicus participation include issues of high public interest; issues of concern beyond the parties to the case; specialized or technical matters; and a novel or substantial question of law, policy, or discretion.

Administration, Management, and Bureaucratic Oversight

14. Agency appellate systems should promptly transmit their precedential decisions to all appellate program adjudicators and, directly or through hearing-level programs, to hearing-level adjudicators (as appropriate). Appellate programs should include in their transmittals, when feasible, brief summaries of the decision.
15. Agencies should notify their adjudicators of significant federal court decisions reviewing the agencies' decisions and, when providing notice, explain the significance of those decisions to the program. As appropriate, agencies should notify adjudicators if the agency will not acquiesce in a particular decision of the federal courts of appeals.

16. Agencies in which decision making relies 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.
17. As appropriate, agency appellate systems 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.
18. The Office of the Chairman of the Administrative Conference should provide for, as authorized by 5 U.S.C. § 594(2), the "interchange among administrative agencies of information potentially useful in improving" agency appellate systems. The subjects of interchange might include electronic case management systems, procedural innovations, quality-assurance reviews, and common management problems.

Public Disclosure and Transparency

19. Agencies should disclose on their websites any rules (sometimes styled as "orders"), and statutes authorizing such rules, by which an agency head has delegated review authority to appellate adjudicators.
20. Regardless of whether the Government in the Sunshine Act (5 U.S.C. § 552b) governs their appellate review system, agencies should consider announcing, livestreaming, and maintaining video recordings on their websites of appellate proceedings (including oral argument) that present significant legal and policy issues likely to be of interest to regulated parties and other members of the public. Brief explanations of the issues to be addressed by oral argument may usefully be included in website notices of oral argument.
21. Agencies should include on their websites brief and accessibly written explanations as to how their internal decision-making processes work and, as appropriate, include links to explanatory documents appropriate for public disclosure. Specific subjects that agencies should consider addressing include: the process of assigning cases to adjudicators (when fewer than all of the programs' adjudicators participate in a case), the role of staff, and the order in which cases are decided.

22. When posting decisions on their websites, agencies should distinguish between precedential and non-precedential decisions. Agencies should also include a brief explanation of the difference.
23. When posting decisions on their websites, agencies should consider including, as much as practicable, brief summaries of precedential decisions and, for precedential decisions at least, citations to court decisions reviewing them.
24. Agencies should include on their websites any digests and indexes of decisions they maintain. It may be appropriate to remove material exempt from disclosure under the Freedom of Information Act or other laws.
25. Agencies should affirmatively solicit feedback concerning the functioning of their appellate systems and provide a means for doing so on their websites.

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).

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).

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.

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

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:

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.