



Aggregate Agency Adjudication

Committee on Adjudication

Proposed Recommendation for Committee | March 28, 2016

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

9 The Administrative Procedure Act (APA)² does not provide specifically for aggregation
10 in the context of adjudication, though it also does not foreclose the use of aggregation
11 procedures. Despite this gap, federal agencies often enjoy broad discretion to craft procedures
12 they deem “necessary and appropriate” to adjudicate the cases and claims that come before
13 them.³ This broad discretion includes the ability to aggregate common cases, both formally and
14 informally. Formal aggregation involves permitting one party to represent many others in a

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 This 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).

Commented [A1]: For the Committee’s consideration:
Two alternative titles have been proposed:

(1) Aggregate Procedures in Agency Adjudication

(2) Procedures Used in Agency Adjudication to Resolve Similar Claims



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

15 single proceeding. In informal aggregation, different claimants with very similar claims pursue a
16 separate case with separate counsel, but the agency assigns them to the same adjudicator or to the
17 same docket, in an effort to expedite the cases, conserve resources, and ensure consistent
18 outcomes.⁴

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

25 Notwithstanding these risks, several agencies have identified contexts in which the
26 benefits of aggregation, including producing a pool of information about recurring problems,
27 achieving greater equality in outcomes, and securing the kind of expert assistance high volume
28 adjudication attracts, outweigh the costs.⁵ Agencies have also responded to the challenges of
29 aggregation by (1) carefully piloting aggregation procedures to improve output while avoiding
30 creation of new inefficiencies; (2) reducing potential allegations of bias or illegitimacy by
31 relying on panels, rather than single adjudicators, and providing additional opportunities for
32 parties to voluntarily participate in the process; and (3) allowing cases raising scientific or novel
33 factual questions to “mature”⁶—that is, putting off aggregation until the agency has the benefit of
34 several opinions and conclusions from different adjudicators about how a case may be handled
35 expeditiously.

⁴ 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).

⁵ See Michael Sant’Ambrogio & Adam Zimmerman, *Aggregate Agency Adjudication* 27-66 (Feb. 19, 2016), available at <https://www.acus.gov/report/aggregate-agency-adjudication-draft-report> (describing three examples of aggregate agency adjudication).

⁶ 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).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

RECOMMENDATION

39 1. Congress should continue to allow agencies broad discretion and in some circumstances
40 encourage them to develop formal or informal aggregation rules of procedure consistent
41 with past practice, the APA, and due process.

Using Alternative Decisionmaking Techniques

42 2. Agencies should consider using a variety of techniques to resolve claims with common
43 issues of fact or law, especially in high volume adjudication programs. In addition to the
44 aggregate adjudication procedures discussed in recommendations 3–10, these techniques
45 might include the designation of selected decisions as “precedential,” the use of
46 rulemaking to resolve legal issues that would otherwise recur in multiple adjudications,
47 and the use of declaratory orders.

Determining Whether to Use Aggregation Procedures

48 3. Agencies should take steps to identify whether their cases potentially have common
49 claims and issues that might justify adopting rules governing aggregation. Such steps
50 could include:
51 a. Developing the information infrastructure, such as centralized docketing, needed
52 to identify and track cases with common issues of fact or law;
53 b. Encouraging adjudicators and parties to identify the types of cases that are likely
54 to involve common issues of fact or law and therefore prove to be attractive
55 candidates for aggregation;
56 c. Piloting programs to test the reliability of an approach to aggregation before
57 implementing the program broadly.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 58 4. Agencies should develop procedures and protocols to assign similar cases to the same
59 adjudicator using a number of factors, including:
- 60 a. Whether coordination would avoid duplication in discovery;
 - 61 b. Whether it would prevent inconsistent evidentiary or other pre-hearing rulings;
 - 62 and
 - 63 c. Whether it would conserve the resources of the parties, their representatives, and
64 the agency.
- 65 5. Agencies should develop procedures and protocols for adjudicators to determine whether
66 to formally aggregate similar cases in a single proceeding based on the following factors:
- 67 a. Whether the number of cases or claims are sufficiently numerous and similar to
68 justify aggregation;
 - 69 b. Whether an aggregate proceeding would be manageable and materially advance
70 the resolution of the cases;
 - 71 c. The comparative benefits of individual or collective control, including whether
72 adequate counsel is available to represent the parties in an aggregate proceeding;
 - 73 d. The extent to which any existing individual adjudication has (or related
74 adjudications have) progressed;
 - 75 e. Whether the novelty or complexity of the issues being adjudicated would benefit
76 from the input of different adjudicators;
 - 77 f. Whether the agency is the only available forum to aggregate the claims involved
78 in the case or cases; and
 - 79 g. Whether the agency can accomplish similar goals by using other tools as set forth
80 in paragraph 2.

Commented [A2]: For the Committee's consideration: Is this a factor agencies should consider?



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Structuring the Aggregate Proceeding

- 81 6. Agencies that use aggregation should ensure, to the extent possible, that the parties' and
82 other stakeholders' interests are adequately protected and that the process is perceived as
83 transparent and legitimate by considering the use of mechanisms such as:
- 84 a. Permitting interested parties to file amicus briefs, or their equivalent;
 - 85 b. Permitting parties to opt-out in appropriate circumstances;
 - 86 c. Providing separate representation for different interests;
 - 87 d. Conducting "fairness hearings," where all interested stakeholders may express
88 their concerns with the proposed relief to adjudicators in person or in writing;
89 and/or
 - 90 e. **Allowing amicus briefs or oral arguments in appeals to the agency head.**
- 91 7. Agencies that use aggregation should develop written and publicly available policies
92 explaining how the agency initiates, conducts, and terminates aggregation proceedings.
93 The policies should also explain how it decides whether claims or issues are ripe for
94 aggregation.
- 95 8. Where feasible, agencies should consider assigning a specialized corps of experienced
96 adjudicators who would be trained to handle aggregate proceedings, consistent with the
97 APA requirement to assign such adjudicators in rotation. Agencies should also consider
98 using a panel of adjudicators from the specialized corps to address concerns with having
99 a single adjudicator decide large numbers of claims. Agencies that have few adjudicators
100 may need to "borrow" adjudicators from other agencies for this purpose.

Commented [A3]: For the Committee's consideration: (e) refers to appeals, whereas (a) refers to the initial hearing. Should this be made clearer?

Using Aggregation to Enhance Control of Policymaking

- 101 9. **In order to obtain the maximum benefit from the additional resources devoted to**
102 **aggregate proceedings, agencies should make clear that decisions in such cases are**
103 **precedential if doing so will:**
- 104 a. **Help other adjudicators handle subsequent cases involving similar issues more**
105 **expeditiously;**



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 106 b. Avoid inconsistent outcomes; or
107 c. Increase transparency and openness.
- 108 10. Agencies should ensure the outcomes of aggregate adjudication are communicated with
109 policymakers or personnel involved in rulemaking so that they can determine whether a
110 rulemaking proceeding codifying the outcome might be worthwhile. Any such
111 rulemaking should involve publication of an advanced notice of proposed rulemaking
112 inviting interested parties to comment on whether the agency should codify the
113 adjudicatory decision (in whole or in part) in a new regulation.

Commented [A4]: For the Committee's consideration: As written, there is a strong presumption that these decisions are precedential, especially given the use of the disjunctive instead of the conjunctive in (b).