



## Improving Timeliness in Agency Adjudication

### Ad Hoc Committee

#### Proposed Recommendation from Committee | November 9, 2023

1           It is often said that justice delayed is justice denied. Indeed, one rationale underlying the  
2 adjudication of many types of cases by executive branch agencies is that they can often decide  
3 them more quickly through administrative methods than the courts can through judicial methods.

4           Federal agencies adjudicate millions of cases each year, including applications for  
5 benefits and services, applications for licenses and permits, and enforcement actions against  
6 persons suspected of violating the law. Members of the public depend on the timely adjudication  
7 of their cases. Delayed adjudication, especially given the added time of possible judicial review,  
8 can have significant consequences, particularly for members of historically underserved  
9 communities.

10           The time it takes an agency to decide a case depends on, among other variables, the  
11 evidentiary and procedural demands of the case, the volume of cases pending before the agency,  
12 and the resources available to the agency to adjudicate cases. Many factors can affect these  
13 variables, such as the funds appropriated by Congress, which directly impact the resources that  
14 agencies can allocate to adjudication. Other factors include the establishment and expansion of  
15 programs by Congress, economic and demographic changes, trends in federal employment,  
16 disruptions to agency operations such as the COVID-19 pandemic, and agency organizational  
17 structures and procedures.<sup>1</sup> When delays or backlogs increase, agencies frequently face pressure

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<sup>1</sup> Jeremy S. Graboyes & Jennifer L. Selin, Improving Timeliness in Agency Adjudication (Oct. 11, 2023) (draft report to the Admin. Conf. of the U.S.).



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18 from parties, representatives, Congress, the media, and others to process and decide cases more  
19 promptly.

20 Agencies rely on a wide range of procedural, organizational, personnel, technological,  
21 and other initiatives to promote timeliness and to respond to concerns about timeliness when they  
22 arise. The Administrative Conference has adopted many recommendations identifying specific  
23 methods that agencies have used or might use to improve timeliness. One of its earliest  
24 recommendations encourages agencies to collect and analyze case processing data to “develop  
25 improved techniques fitted to [their] particular needs to reduce delays” and measure the  
26 effectiveness of those techniques.<sup>2</sup> Later recommendations address options including:

- 27 • Delegation of final decisional authority subject to discretionary review by the  
28 agency head;<sup>3</sup>
- 29 • Use of precedential decision making by appellate decision makers;<sup>4</sup>
- 30 • Adoption of procedures for summary judgment<sup>5</sup> and prehearing discovery;<sup>6</sup>
- 31 • Use of a broad suite of active case management techniques;<sup>7</sup>
- 32 • Establishment of quality assurance systems;<sup>8</sup>

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<sup>2</sup> Admin. Conf. of the U.S., Recommendation 69-1, *Compilation of Statistics on Administrative Proceedings by Federal Departments and Agencies*, 38 Fed. Reg. 19,784 (July 23, 1973).

<sup>3</sup> 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); *see also* 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 83-3, *Agency Structures for Review of Decisions of Presiding Officers Under the Administrative Procedure Act*, 48 Fed. Reg. 57,461 (Dec. 30, 1983).

<sup>4</sup> Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023).

<sup>5</sup> Admin. Conf. of the U.S., Recommendation 70-3, *Summary Decision in Agency Adjudication*, 38 Fed. Reg. 19,785 (July 23, 1973).

<sup>6</sup> Admin. Conf. of the U.S., Recommendation 70-4, *Discovery in Agency Adjudication*, 38 Fed. Reg. 19,786 (July 23, 1973).

<sup>7</sup> Admin. Conf. of the U.S., Recommendation 86-7, *Case Management as a Tool for Improving Agency Adjudication*, 51 Fed. Reg. 46,989 (Dec. 30, 1986).

<sup>8</sup> Admin. Conf. of the U.S., Recommendation 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or Compensation*, 38 Fed. Reg. 16,840 (June 27, 1973); Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022).



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- 33                   • Development of reasonable time limits or step-by-step time goals for agency  
34                   action;<sup>9</sup>
- 35                   • Use of alternative dispute resolution (ADR) techniques;<sup>10</sup>
- 36                   • Use of simplified or expedited procedures in appropriate cases;<sup>11</sup>
- 37                   • Use of remote hearings;<sup>12</sup>
- 38                   • Aggregation of similar claims;<sup>13</sup>
- 39                   • Use of personnel management devices;<sup>14</sup> and
- 40                   • Implementation of electronic case management and publicly accessible online  
41                   processes.<sup>15</sup>

42                   These recommendations remain valuable resources for policymakers charged with  
43                   promoting and improving timeliness in agency adjudication. As technologies develop,  
44                   policymakers are also increasingly looking to artificial intelligence and other advanced

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<sup>9</sup> Recommendation 86-7, *supra* note 7, ¶ 7; Admin. Conf. of the U.S., Recommendation 78-3, *Time Limits on Agency Actions*, 43 Fed. Reg. 27,509 (June 26, 1978).

<sup>10</sup> Admin. Conf. of the U.S., Recommendation 86-3, *Agencies' Use of Alternative Means of Dispute Resolution*, 51 Fed. Reg. 25,643 (July 16, 1986); *see also* Admin. Conf. of the U.S., Recommendation 88-5, *Agency Use of Settlement Judges*, 53 Fed. Reg. 26,030 (July 11, 1988); Admin. Conf. of the U.S., Recommendation 87-5, *Arbitration in Federal Programs*, 52 Fed. Reg. 23,635 (June 24, 1987).

<sup>11</sup> Admin. Conf. of the U.S., Recommendation 90-6, *Use of Simplified Proceedings in Enforcement Actions Before the Occupational Safety and Health Review Commission*, 55 Fed. Reg. 53,271 (Dec. 28, 1990); Recommendation 86-7, *supra* note 7, ¶ 3.

<sup>12</sup> Admin. Conf. of the U.S., Recommendation 2021-4, *Virtual Hearings in Agency Adjudication*, 86 Fed. Reg. 36,083 (July 8, 2021); Admin. Conf. of the U.S., Recommendation 2014-7, *Best Practices for Using Video Conferencing for Hearings*, 79 Fed. Reg. 75,114 (Dec. 17, 2014); Admin. Conf. of the U.S., Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion*, 76 Fed. Reg. 48,795 (Aug. 9, 2011); Admin. Conf. of the U.S., Recommendation 86-7, *supra* note 7.

<sup>13</sup> Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40,260 (June 21, 2016); Recommendation 86-7, *supra* note 7, ¶ 9.

<sup>14</sup> Recommendation 86-7, *supra* note 7, ¶ 1.

<sup>15</sup> Admin. Conf. of the U.S., Recommendation 2023-4, *Online Processes in Agency Adjudication*, 88 Fed. Reg. 42,681 (July 3, 2023); Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018).



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45 algorithmic tools to streamline or automate time-consuming, error-prone, or resource-intensive  
46 processes.<sup>16</sup>

47 At the same time, no single method will promote timeliness at all agencies in all  
48 circumstances. Each agency has its own mission, serves different communities, adjudicates  
49 according to a distinct set of legal requirements, has different resources available to it, and faces  
50 different operational realities. Moreover, in promoting timely adjudication, agencies must remain  
51 sensitive to other values of administrative adjudication such as decisional quality, procedural  
52 fairness, consistency, transparency, customer service, and equitable treatment. Building on  
53 earlier recommendations, this Recommendation provides a general framework that agencies and  
54 Congress can use to foster an organizational culture of timeliness in agency adjudication in  
55 accord with principles of fairness, accuracy, and efficiency and devise plans to address increased  
56 caseloads, delays, backlogs, and other timeliness concerns when they arise.

### RECOMMENDATION

#### Information Collection

57 1. Agencies should ensure their electronic or other case management systems are collecting  
58 data necessary to accurately monitor and detect changes in case processing times at all  
59 levels of their adjudication systems (e.g., initial level, hearing level, appellate review  
60 level), identify the causes of changes in case processing times, and devise methods to  
61 promote or improve timeliness without adversely affecting decisional quality, procedural  
62 fairness, or other objectives. Agencies should identify the kinds of data or records that  
63 Congress, media representatives, researchers, or other stakeholders frequently request, to  
64 ensure that agency personnel responsible for responding to such requests can do so in an  
65 efficient manner. Agencies should ensure that electronic or other case management  
66 systems track the following information:

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<sup>16</sup> Cf. David Freeman Engstrom et al., *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies* 38, 45 (2020) (report to the Admin. Conf. of the U.S.); Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021); see also Exec. Order No. 14,110, 88 Fed. Reg. 75,191 (Nov. 1, 2023).



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- 67 a. The number of proceedings of each type pending, commenced, and concluded  
68 during a standard reporting period (e.g., week, month, quarter, year) within and  
69 across different levels of their adjudication systems;
- 70 b. The current status of each case pending at every level of their adjudication  
71 systems; and
- 72 c. For each case, the number of days required to meet critical case processing  
73 milestones within and across different levels of their adjudication systems.
- 74 2. To meet organizational goals and clarify stakeholder expectations, agencies should  
75 communicate regularly with internal and external stakeholders. In addition to formal  
76 engagements, agencies should provide ongoing opportunities for interested persons  
77 within and outside the agency to provide feedback and suggestions. Methods for  
78 obtaining information include:
- 79 a. Stakeholder surveys;
- 80 b. Listening sessions and other meetings;
- 81 c. Requests for information published in the *Federal Register*;
- 82 d. Online feedback forms; and
- 83 e. Use of ombuds.

### **Performance Goals and Standards**

- 84 3. Agencies should adopt organizational performance goals that encourage and provide  
85 clear expectations for timeliness. Performance goals may take several forms, including  
86 goals contained in agency strategic plans, rules establishing time limits for concluding  
87 cases, or policies instituting step-by-step time goals. In developing organizational  
88 performance goals for timeliness, agencies should:
- 89 a. Use the information described in Paragraphs 1 and 2 to develop goals that are  
90 reasonable and objective;
- 91 b. Encourage interested persons within and outside the agency to participate in the  
92 development of such goals; and



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- 93                   c. Periodically reevaluate such goals to ensure they (i) continue to be reasonable;  
94                   (ii) encourage and provide clear expectations for timeliness; and (iii) do not  
95                   adversely affect decisional quality or the fairness or integrity of proceedings.
- 96           4. When agencies consider timeliness or productivity in appraising the performance of  
97           employees, as defined in 5 U.S.C. § 4301, and members of the Senior Executive Service,  
98           and in setting timeliness or productivity expectations for administrative law judges, who  
99           are not subject to performance appraisals, they should:
- 100           a. Use the information described in Paragraphs 1 and 2 to develop measures that are  
101           reasonable and objective and provide clear expectations for timeliness;
- 102           b. Encourage interested persons within and outside the agency, including employees  
103           to whom the measures apply, to participate in the development of such measures;
- 104           c. Ensure measures reflect tasks within the control of individual employees;
- 105           d. Ensure measures take into account the range of case types and tasks performed by  
106           individual employees as well as resources (e.g., staff support, technology) at their  
107           disposal;
- 108           e. For employees who decide cases, ensure measures do not inadvertently lead them  
109           to decide cases in a particular way;
- 110           f. For all employees, ensure measures do not inadvertently lead them to take actions  
111           that would adversely affect decisional quality or the fairness or integrity of  
112           proceedings; and
- 113           g. Periodically reevaluate such measures.

### **Organizational, Procedural, Technological, and Case Management Techniques**

114           The Administrative Conference has adopted many recommendations, listed in the Preamble,  
115           that identify organizational, procedural, technological, and case management techniques that  
116           agencies should use, in appropriate circumstances, to promote timeliness in adjudication or  
117           respond to increased caseloads, delays, backlogs, and other timeliness concerns. Agencies  
118           should also implement the following best practices, as appropriate.



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- 119 5. Agencies should narrow disputes and resolve cases at the earliest possible level of their  
120 adjudication systems and, at each level, through the least time- and resource-intensive  
121 processes available and appropriate to the circumstances, such as informal prehearing  
122 procedures, alternative dispute resolution, streamlined procedures, or decision making on  
123 the written record.
- 124 6. As appropriate, agencies should adopt procedures for: (i) resolving multiple cases in a  
125 single proceeding, such as the aggregation of similar claims; or (ii) resolving recurring  
126 legal or factual issues, such as precedential decision making or substantive rulemaking.
- 127 7. Agencies should adopt processes for screening cases at intake to: (i) resolve procedural  
128 issues as early as possible; (ii) identify cases that may be appropriate for less time- and  
129 resource-intensive processes, such as those listed in Paragraphs 5 and 6; (iii) identify  
130 cases that can be resolved quickly because they are legally and factually straightforward;  
131 and (iv) identify cases that should be prioritized or expedited.
- 132 8. Agencies should adopt procedures that standardize the allocation of tasks among  
133 adjudicators, managers, and legal and paralegal support staff.
- 134 9. Agencies should review and update as necessary their Human Capital Operating Plans  
135 (5 C.F.R. pt. 250) to ensure their hiring and position management needs are properly  
136 aligned with their operational goals for adjudication.
- 137 10. Agencies should automate—using artificial intelligence, for example—routine tasks that  
138 do not require a significant exercise of discretion when automation will not adversely  
139 affect quality or program integrity. Such tasks may include receiving filings and  
140 evidence, establishing new case files, associating records with case files, de-duplicating  
141 records, assigning cases to agency personnel for action, screening cases as described in  
142 Paragraph 7, and generating and releasing standardized correspondence.
- 143 11. Agencies should outsource routine tasks that do not require a significant exercise of  
144 discretion—such as transcription, scanning records, or mailing correspondence—when it  
145 would be more efficient and cost-effective for a contractor to perform them.
- 146 12. Agencies should adopt rules and policies that reflect best practices for case management,  
147 including evidentiary development, motions practice, intervention, extensions of time,



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- 148 decision writing, and methods for encouraging prompt action and discouraging undue  
149 delay by parties. At the same time, agencies should ensure that adjudicators, managers,  
150 and support staff have sufficient flexibility to manage individual cases fairly, accurately,  
151 and efficiently, and test alternative case management techniques that may reveal new best  
152 practices. Agencies should periodically reevaluate such rules and policies, using the  
153 information described in Paragraphs 1 and 2, to ensure they continue to reflect best  
154 practices for case management and provide relevant personnel with sufficient flexibility  
155 to manage individual cases and test alternative case management techniques.
- 156 13. Agencies should establish organizational units, supervisory structures, and central and  
157 field operations that reinforce timeliness and facilitate appropriate communication among  
158 agency personnel involved in adjudication at all levels of an adjudication system.
- 159 14. Agencies should update public websites and electronic case management systems so that  
160 they are able to handle the volume of current and future cases efficiently and effectively.

### **Strategic Planning**

- 161 15. Agencies should engage in evidence-based and transparent strategic planning to  
162 anticipate and address concerns about timeliness, including increased caseloads, delays,  
163 and backlogs. In undertaking such strategic planning, agencies should:
- 164 a. Use the information described in Paragraphs 1 and 2 to identify case processing  
165 trends such as geographical or temporal variations in case intake or case  
166 processing times, assess the causes of timeliness concerns, and identify points at  
167 all levels of their adjudication systems that are causing delays;
  - 168 b. Review previous efforts to address timeliness concerns to understand what  
169 initiatives have been attempted and which have been effective;
  - 170 c. Consider a wide range of options for improving timeliness in the adjudication  
171 process without adversely affecting decisional quality, procedural fairness,  
172 program integrity, or other objectives. Options may include organizational,  
173 procedural, technological, case management, and other techniques, including  
174 those identified in previous Conference recommendations and Paragraphs 5–14;





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- 175           d. Engage in candid discussions with adjudicators, managers, and support staff at all  
176           levels of their adjudication systems, as well as interested persons outside the  
177           agency, regarding the benefits, costs, and risks associated with different options  
178           for improving timeliness;
- 179           e. Develop proposed plans for addressing timeliness concerns, and solicit feedback  
180           on the plan from interested persons within and outside of the agency;
- 181           f. Consider pilot studies and demonstration projects before implementing  
182           interventions broadly to test the effectiveness of different interventions and  
183           identify unintended consequences; and
- 184           g. Designate a senior official responsible for coordinating the activities described in  
185           this Paragraph.

### **Communication, Coordination, and Collaboration**

- 186           16. Agencies should enhance communication between components involved in their  
187           adjudication systems and other components that carry out functions necessary for timely  
188           adjudication, such as those that oversee information technology, human resources, budget  
189           planning, office space, and procurement.
- 190           17. Agencies should coordinate with the President, when required, and with Congress by  
191           providing information on recommended legislative changes and appropriations that  
192           would promote timeliness generally or address ongoing timeliness concerns.
- 193           18. Agencies should partner with federal entities such as the Chief Information Officers  
194           Council, the U.S. Digital Service, the General Services Administration, and the Office of  
195           Personnel Management to develop and implement best practices for leveraging  
196           information technology, human capital, and other resources to promote or improve  
197           timeliness.
- 198           19. Agencies should share information with each other about their experiences with and  
199           practices for promoting timeliness generally and addressing ongoing timeliness concerns.  
200           The Office of the Chair of the Administrative Conference should provide for the  
201           interchange of such information, as authorized by 5 U.S.C. § 594(2).



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- 202 20. Agencies should institutionalize partnerships with relevant legal service providers, other  
203 nongovernmental organizations, and state and local government agencies that advocate  
204 for or provide assistance to individuals who participate as parties in agency adjudications.
- 205 21. Agencies should make informational materials available to adjudicators, managers, and  
206 legal and paralegal support staff and conduct regular training sessions for such personnel  
207 on best practices for fair, accurate, and efficient case management.
- 208 22. Agencies should provide parties and representatives with resources to help them navigate  
209 their adjudication systems, understand procedural alternatives that may expedite decision  
210 making in appropriate cases, and learn about best practices for efficient and effective  
211 advocacy before the agency. Such resources may include informational materials (e.g.,  
212 documents written in plain language and available in languages other than English, short  
213 videos, decision trees, and visualizations), navigator programs, and counseling for self-  
214 represented parties.
- 215 23. As early as possible and at key points throughout the adjudication process, agencies  
216 should provide self-represented parties with plain-language materials informing them of:  
217 (i) their right to be represented by an attorney or qualified nonlawyer legal service  
218 provider; (ii) the potential benefits of representation; and (iii) options for obtaining  
219 representation.
- 220 24. Agencies should publicly identify those case management priorities and procedures that  
221 have been adopted to improve timeliness and may result in parties' cases being identified  
222 for aggregation, expedition, or similar alternative techniques.
- 223 25. Agencies should publicly disclose average processing times and aggregate processing  
224 data for claims pending, commenced, and concluded during a standard reporting period;  
225 any deadlines or processing goals for adjudicating cases; and information about the  
226 agency's plans for and progress in addressing timeliness concerns.
- 227 26. When agencies consider timeliness or productivity in appraising the performance of  
228 employees, as defined in 5 U.S.C. § 4301, and members of the Senior Executive Service,  
229 and when they set timeliness or productivity expectations for administrative law judges,  
230 who are not subject to performance appraisals, they should disclose such measures



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231 publicly and explain how they were developed. For employees who are subject to  
232 performance appraisal, agencies should disclose publicly: (i) how they use such measures  
233 to appraise employees, and (ii) whether employees are eligible for incentive awards based  
234 on timeliness or productivity.

### **Consideration for Congress**

235 27. Congress ordinarily should not impose statutory time limits on agency adjudication. If  
236 Congress does consider imposing time limits on adjudication by a particular agency, it  
237 should first seek information from the agency and stakeholders. If Congress does decide  
238 to impose time limits, it should do so only after determining that the benefits of such  
239 limits outweigh the costs. If Congress then decides time limits are necessary or  
240 warranted, it should require agencies to adopt reasonable time limits or, in rare  
241 circumstances, impose such limits itself. In setting any statutory time limits, Congress  
242 should:

- 243 a. Recognize that preexisting statutory or regulatory frameworks or special  
244 circumstances (e.g., a sudden substantial increase in an agency's caseload or the  
245 complexity of the issues in a particular case) may justify an agency's failure to  
246 conclude a case within the proposed statutory time limit;
- 247 b. State expressly what should occur if the agency does not meet its statutory  
248 deadline; and
- 249 c. State expressly whether affected persons may or may not enforce the time limit  
250 through judicial action and, if so, the nature of the relief available for this  
251 purpose.