



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Aggregate Agency Adjudication

Committee on Adjudication

Proposed Recommendation for Committee | February 29, 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 long avoided aggregation tools to efficiently resolve large groups of claims. Consequently, in a
4 wide variety of cases, agencies risk wasting resources in repetitive adjudication, reaching
5 inconsistent outcomes for the same kinds of claims, and denying individuals access to the
6 affordable representation that aggregate procedures promise. Now more than ever, adjudication
7 programs, especially mass adjudications, could benefit from creative solutions, like aggregation.¹

8 To some extent, the widespread unavailability of aggregation procedures derives from the
9 failure to provide for these mechanisms in the Administrative Procedure Act (APA).²
10 Specifically, the APA divides agency policymaking into two broad categories (rulemaking and
11 adjudication), and it contemplates the use of individualized administrative hearings in the case of
12 adjudication.³ Few rules in the APA exist for adjudicators to resolve large cases that fall in

¹ Over the past several years, problems in many different administrative courts have been described as “a crisis.” See Anthony Brino, *Medicare Claims Crisis Pits Hospitals Against Feds, Auditors*, HEALTHCARE FINANCE (May 27, 2014) (describing Medicare appeals system as in “crisis”), available at <http://www.healthcarefinancenews.com/news/growing-claims-appeal-crisis>; Veterans for Common Sense v. Shinseki, 644 F.3d 845, 877–78 (9th Cir. 2011) (finding veteran benefits administration in “crisis”); *Improving Efficiency and Ensuring Justice in the Immigration Court System: Hearing Before the S. Comm. On the Judiciary*, 112th Cong. 1 (2011) (statement of Karen T. Grisez, Chair of the American Bar Association Comm’n on Immigration) (arguing immigration system is in “crisis”).

² See Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 551–559).

³ See George B. Shepard, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1680–81 (1996).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

13 between the formal categories of rulemaking and adjudication—such as when agency
14 proceedings systematically affect groups of people in the same way.

15 Despite this gap, federal agencies often enjoy broad discretion to craft procedures they
16 deem “necessary and appropriate” to adjudicate the cases and claims that come before them.⁴
17 This broad discretion includes the ability to aggregate common cases, both formally and
18 informally. Formal aggregation involves permitting one party to represent many others in an
19 adjudication. In informal aggregation, different claimants with very similar claims each retain
20 separate counsel and advance a separate case, but in front of the same adjudicator or on the same
21 docket, in an effort to expedite the cases, conserve resources, and ensure consistent outcomes.⁵

22 Yet, even with the present caseload crisis and the discretion to wield creative tools to
23 address their backlogs, few agencies have employed such tools, like aggregation. There are
24 several explanations for this phenomenon. The sheer number of claims in aggregate agency
25 adjudication may: (1) create diseconomies of scale—inviting even more claims that further
26 stretch the agency’s capacity to adjudicate; (2) negatively affect the perceived legitimacy of the
27 process; and (3) increase the consequence of error. In other words, aggregate adjudication
28 struggles to deal with the concerns of feasibility, legitimacy, and accuracy.

29 Notwithstanding these risks, several agencies have identified contexts in which the
30 benefits of aggregation, including pooling information about recurring problems, achieving
31 greater equality in outcomes, and securing the kind of expert assistance mass adjudication
32 attracts, outweigh the costs.⁶ Agencies have also responded to the challenges of aggregation by
33 (1) slowly piloting aggregate procedures to improve output while avoiding creation of new

⁴ This discretion exists in both adjudication that is governed by the APA—commonly referred to as “formal adjudication”—and adjudication that is governed by other sources of law, including statutes, regulations, and executive orders—commonly referred to as “informal adjudication.”

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 27-66* (Feb. 19, 2016), available at <https://www.acus.gov/report/aggregate-agency-adjudication-draft-report> (describing three examples of aggregate agency adjudication).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

34 inefficiencies; (2) relying on panels of adjudicators to reduce allegations of bias or illegitimacy
35 and providing additional opportunities for parties to voluntarily participate in the process; and (3)
36 allowing cases raising scientific or novel factual questions to “mature”⁷—that is, putting off
37 aggregation until the agency has the benefit of several opinions and conclusions from different
38 adjudicators about how a case may be handled expeditiously.

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

RECOMMENDATION

Determining Whether to Use Aggregation Procedures

- 42 1. Congress should continue to grant agencies broad discretion to develop procedures
43 tailored to the cases and claims they adjudicate.
- 44 2. Agencies should determine whether they have the authority to implement formal and/or
45 informal aggregation procedures.
- 46 3. Agencies should develop means to identify whether sufficient common claims and issues
47 generally justify aggregation by:
 - 48 a. Asking parties to identify related claims with common issues of fact or law;
 - 49 b. Developing infrastructure to identify and track cases with common issues of fact
50 or law; and
 - 51 c. Piloting programs to test the reliability of an approach to aggregation before
52 implementing the program broadly.
- 53 4. Agencies should consider using a centralized panel to determine whether aggregation
54 proceedings are warranted based on several factors, including:
 - 55 a. Whether coordination would avoid duplication in discovery;

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).



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 56 b. Whether it would prevent inconsistent evidentiary or other pre-hearing rulings;
57 and
58 c. Whether it would conserve the resources of the parties, their representatives, and
59 the agency.
- 60 5. Agencies should develop procedures and protocols using a number of factors for
61 adjudicators to determine whether formal or informal aggregation is superior to
62 individual adjudication in any given case, including:
- 63 a. The comparative benefits of individual or collective control;
64 b. The extent to which any existing individual adjudication has progressed;
65 c. The maturity of the complex or novel issues being adjudicated;
66 d. Whether the aggregate proceeding is manageable and materially advances the
67 resolution of those cases;
68 e. Whether a superior forum exists in federal court to aggregate claims; and
69 f. Whether the agency can accomplish similar goals through rulemaking.

Structuring the Aggregation Proceeding

- 70 6. Agencies that use aggregation should have written and publicly available procedures
71 explaining how the agency initiates, conducts, and terminates aggregation proceedings.
72 An agency should also communicate in a written and publicly available way how it
73 decides whether claims or issues are ripe for aggregation.
- 74 7. Agencies should develop provisions permitting interested parties to file amicus briefs, or
75 their equivalent, in the aggregation proceeding.
- 76 8. Agencies should ensure, to the extent possible, that parties' interests are adequately
77 represented by considering the use of mechanisms, such as:
- 78 a. Permitting opt-outs in appropriate circumstances;
79 b. Providing separate representation for different interests; and/or
80 c. Conducting fairness hearings.
- 81 9. Agencies should train a specialized corps of experienced adjudicators to handle complex
82 aggregate proceedings and assign such adjudicators in rotation to these cases.

Commented [A1]: For the Committee's consideration:
This has to do with whether claims can be aggregated in
federal court instead of adjudicated within the agency.

For example, the Federal Communications Commission and
the Commodity Futures Trading Commission have declined
to implement aggregate procedures in part because the
claims can be aggregated later in federal court.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

83 10. Agencies should consider using multiple adjudicators from the specialized corps to
84 address concerns with having a single adjudicator decide large numbers of claims.
85 Agencies that have few adjudicators may need to “borrow” adjudicators from other
86 agencies.

Using Aggregation to Enhance Control of Policymaking

- 87 11. In order to obtain the maximum benefit from the additional resources devoted to
88 aggregate proceedings, agencies should consider publishing opinions in such proceedings
89 as precedential decisions if doing so will:
- 90 a. Help other adjudicators handle subsequent cases involving similar issues more
91 expeditiously;
 - 92 b. Avoid inconsistent outcomes; and
 - 93 c. Increase transparency and openness.
- 94 12. Agencies should ensure the outcomes of aggregate adjudication are communicated with
95 policymakers or personnel involved in rulemaking so that they can determine whether
96 future rulemaking is worthwhile. Such communication could include publishing an
97 Advance Notice of Proposed Rulemaking or similar device inviting interested parties to
98 comment on whether the agency should codify the adjudicatory decision (in whole or in
99 part) in a new regulation.
- 100 13. Agencies should encourage communication between agency personnel involved in
101 rulemaking and adjudicators whenever agencies are undertaking a rulemaking involving
102 recently adjudicated issues, while maintaining the appropriate boundary between
103 rulemaking and adjudication.

Commented [A2]: For the Committee’s consideration:
What other considerations bear upon whether a decision
should be precedential?

Commented [A3]: For the Committee’s consideration:
How should this be communicated? What specifically is the
recommendation suggesting the agencies do? How should
the outcomes be shared?