



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Aggregation of Similar Claims in Agency Adjudication

Committee on Adjudication

Proposed Recommendation | June 10, 2016

Proposed Amendments

This document displays manager's amendments (with no marginal notes) and additional amendments from Conference members (with sources shown in the margin).

1 Federal agencies in the United States adjudicate hundreds of thousands of cases each
2 year—more than the federal courts. 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. Federal agencies often enjoy broad discretion to craft procedures they deem

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).



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12 “necessary and appropriate” to adjudicate the cases and claims that come before them.³ This
13 broad discretion includes the ability to aggregate common cases, both formally and informally.
14 Formal aggregation involves permitting one party to represent many others in a single
15 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—by 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

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).

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 27–65* (Apr. 29, 2016), available at <https://www.acus.gov/report/aggregate-agency-adjudication-final-report> (describing three examples of aggregation in agency adjudication).



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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.

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.⁷

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 individual decisions as “precedential,” the use of
46 rulemaking to resolve legal issues that are appropriate for generalized resolution and
47 would otherwise recur in multiple adjudications, and the use of declaratory orders in
48 individual cases.

Conference Member Amendment: Siegel
Amendment: The use of rulemaking to resolve generalized issues that would recur in multiple adjudications need not be limited to “legal” issues. I would not call the issues resolved by rule in the classic cases of *Heckler v. Campbell* or *US v. Storer Broadcasting* “legal”; indeed, the Supreme v. *Campbell* referred to the issue resolved by rule as a “general factual issue.” 461 U.S. at 468. The key consideration is not whether an issue is legal but whether the issue can appropriately be resolved on a generalized basis without the need for consideration of the circumstances of individual cases.

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).

⁷ This recommendation covers both adjudications conducted by administrative law judges and adjudications conducted by non-administrative law judges.



Determining Whether to Use Aggregation Procedures

- 49 3. Agencies should take steps to identify whether their cases have common claims and
50 issues that might justify adopting rules governing aggregation. Such steps 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 specific cases or types of cases
54 that are likely to involve common issues of fact or law and therefore prove to be
55 attractive candidates for aggregation; and
 - 56 c. Piloting programs to test the reliability of an approach to aggregation before
57 implementing the program broadly.
- 58 4. Agencies should develop procedures and protocols to assign similar cases to the same
59 adjudicator or panel of adjudicators 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 c. Whether it would conserve the resources of the parties, their representatives, and
63 the agencies; and
 - 64 d. Where appropriate, whether the agencies can accomplish similar goals by using
65 other tools as set forth in paragraph 2.
- 66 5. Agencies should develop procedures and protocols for adjudicators to determine whether
67 to formally aggregate similar cases in a single proceeding based on the following factors:
- 68 a. Whether the number of cases or claims are sufficiently numerous and similar to
69 justify aggregation;
 - 70 b. Whether an aggregate proceeding would be manageable and materially advance
71 the resolution of the cases;
 - 72 c. Whether the benefits of collective control outweigh the benefits of individual
73 control, including whether adequate counsel is available to represent the parties in
74 an aggregate proceeding;



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- 75 d. Whether (or the extent to which) any existing individual adjudication has (or
76 related adjudications have) progressed; and
77 e. Whether the novelty or complexity of the issues being adjudicated would benefit
78 from the input of different adjudicators.

Structuring the Aggregate Proceeding

- 79 6. Agencies that use aggregation should ensure, to the extent possible, that the parties' and
80 other stakeholders' interests are adequately protected and that the process is **perceived**
81 **as understood to be** transparent and legitimate by considering the use of mechanisms such
82 as:
- 83 a. Permitting interested stakeholders to file amicus briefs or their equivalent;
 - 84 b. Conducting "fairness hearings," in which all interested stakeholders may express
85 their concerns with the proposed relief to adjudicators in person or in writing;
 - 86 c. Ensuring that separate interests are adequately represented in order to avoid
87 conflicts of interest;
 - 88 d. Permitting parties to opt-out in appropriate circumstances; and
 - 89 e. Allowing amicus briefs or oral arguments in agency appeals.
- 90 7. Agencies that use aggregation should develop written and publicly available policies
91 explaining how they initiate, conduct, and terminate aggregation proceedings. The
92 policies should also set forth the factors used to determine whether aggregation is
93 appropriate.
- 94 8. Where feasible, agencies should consider assigning a specialized corps of experienced
95 adjudicators who would be trained to handle aggregate proceedings, consistent with the
96 APA requirement that administrative law judges be assigned in rotation. Agencies
97 should also consider using a panel of adjudicators from the specialized corps to address
98 concerns with having a single adjudicator decide cases that could have a significant
99 impact. Agencies that have few adjudicators may need to "borrow" adjudicators from
100 other agencies for this purpose.



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Using Aggregation to Enhance Control of Policymaking

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