



Administrative Conference Recommendation 2018-4

Recusal Rules for Administrative Adjudicators

Adopted December 13, 2018

Recusal, the voluntary or involuntary withdrawal of an adjudicator from a particular proceeding, is an important tool for maintaining the integrity of adjudication. Recusal serves two important purposes. First, it helps ensure that parties to an adjudicative proceeding have their claims resolved by an impartial decisionmaker. This aspect of recusal is reflected in the Due Process Clause, as well as statutory, regulatory, and other sources of recusal standards. Second, the recusal of adjudicators who may appear partial helps inspire public confidence in adjudication in ways that a narrow focus on actual bias against the parties themselves cannot.¹ Appearance-based recusal standards are in general not constitutionally required, but have been codified in judicial recusal statutes as well as model codes.² Unlike with federal judicial recusal, there is no uniformity regarding how agencies approach appearance-based recusal in the context of administrative adjudication.

In Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, the Conference recommended that agencies require adjudicator recusal in the case of actual bias.³ This Recommendation builds upon Recommendation 2016-4 by addressing the need for agency-specific recusal rules that consider the full range of actual and apparent bias.

¹ Louis J. Virelli, III, *Recusal Rules for Administrative Adjudicators* (Nov. 30, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/final-report-recusal-rules-administrative-adjudicators>.

² See 28 U.S.C. § 455(a) (2012); MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES Canon 3(C) (AM. BAR ASS'N 1989), available at <http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1521&context=naalj>. Both require recusal by federal adjudicators when their “impartiality might reasonably be questioned.”

³ 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).



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It focuses on a variety of agency adjudications, including those governed by the adjudication provisions of the Administrative Procedure Act (APA), as well as adjudications not governed by the APA but nonetheless consisting of evidentiary hearings required by statute, regulation, or executive order.⁴ It also covers appeals from those adjudications. Although this Recommendation does not apply to adjudications conducted by agency heads, agencies could take into account many of the provisions in the Recommendation when determining rules for the recusal of agency heads.

Recusal rules addressing actual and apparent bias can protect parties and promote public confidence in agency adjudication without compromising the agency's ability to fulfill its mission effectively and efficiently. This necessarily lends itself to standards that are designed in accord with the specific needs and structure of each agency and that allow for fact-specific determinations regarding the appearance of adjudicator impartiality. This contextualized nature of administrative recusal standards is reflected in the list of relevant factors in Paragraph 3 for agencies to consider in fashioning their own recusal rules. The parenthetical explanations accompanying these factors show how different features of an agency's administrative scheme may affect the stringency of those rules.

Recusal rules also provide a process for parties to petition their adjudicator to recuse in the event he or she does not elect to do so sua sponte. This right of petition promotes more informed and accountable recusal decisions. Recusal rules can further provide for appeal of those decisions within the agency. Such appeals are typically conducted by other agency adjudicators acting in an appellate capacity but may also include the official responsible for the adjudicator's work assignments. This right of appeal increases the reliability and accuracy of recusal

⁴ In the context of Recommendation 2016-4 and the associated consultant report, adjudications with evidentiary hearings governed by the APA adjudication sections (5 U.S.C. §§ 554, 556, and 557) and adjudications that are not so governed but that otherwise involve a legally required hearing have been named, respectively, "Type A" and "Type B" adjudications. This Recommendation addresses both Type A and Type B adjudications but does not apply to adjudications that do not involve a legally required evidentiary hearing (known as "Type C" adjudications). See 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); Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act 2* (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.



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determinations and helps ensure the consistency and effectiveness of the work assignment process. Consistent with the APA, adjudicators, including appellate reviewers, must provide parties with a written explanation of their recusal decisions.⁵ Finally, agencies could provide for the publication of recusal decisions. Both written explanations and publication of recusal decisions increase transparency and thus the appearance of impartiality.

It is important to distinguish adjudicative recusal rules and procedures from the ethics rules promulgated by the Office of Government Ethics (OGE).⁶ As an initial matter, the two are not mutually exclusive. Even where ethical and recusal rules overlap, it is entirely possible and coherent to enforce both. This is due, at least in part, to the differences in scope, form, and enforcement mechanisms between the two. Ethics rules prohibit employees from participating in certain matters when they have a conflict of interest or an appearance of a conflict. Adjudicative recusal rules focus on how an agency, acting through its adjudicators and appeal authorities, decides who will hear certain cases in a manner that ensures the integrity and perceived integrity of adjudicative proceedings. Adjudicative recusal rules are thus broader in focus and narrower in application than ethics rules. In this light, ethics rules tend to be very precise, as agency employees need to have clear guidance as to what they may or may not do. Adjudicative recusal rules, by contrast, tend to be much more open-ended and standard-like. They are focused on maintaining both actual impartiality and the appearance of impartiality of adjudicative proceedings, which may be compromised by conduct that would not constitute a breach of any ethics rule, such as advocating a particular policy in a speech before a professional association.

The enforcement mechanism is also different. If an adjudicator, like other employees, participates in a matter in violation of an ethics rule, the adjudicator can be subject to discipline. In contrast, if an adjudicator decides not to recuse him or herself in a case where he or she should have been recused, even if the adjudicator would not be subject to discipline, the decision not to

⁵ 5 U.S.C. § 555(e) (2012).

⁶ The Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824 (codified at 5 U.S.C. App.) established the Office of Government Ethics to provide “overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency.” OGE’s *Standards of Ethical Conduct for Employees of the Executive Branch* are available at 5 C.F.R. Part 2635.



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recuse could be appealed under whatever process the agency has established. In addition, the recusal process can be initiated by a party to the adjudication if an adjudicator does not recuse him or herself sua sponte.

Under current law, an agency that wishes to supplement its ethics rules must, of course, do so through the OGE supplemental process.⁷ Under that process, agencies, with the concurrence of OGE, may promulgate ethics rules that supplement existing OGE rules. This Recommendation, in contrast, focuses exclusively on a set of recusal rules an agency may wish to adopt to preserve the integrity and perceived integrity of its adjudicative proceedings.

RECOMMENDATION

1. Agencies should adopt rules for recusal of adjudicators who preside over adjudications governed by the adjudication sections of the Administrative Procedure Act (APA), as well as those not governed by the APA but administered by federal agencies through evidentiary hearings required by statute, regulation, or executive order. The recusal rules should also apply to adjudicators who conduct internal agency appellate review of decisions from those hearings, but not to agency heads. When adopting such rules, agencies should consider the actual and perceived integrity of agency adjudications and the effectiveness and efficiency of adjudicative proceedings.
2. Agency rules should, consistent with ACUS Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*,⁸ provide for the recusal of adjudicators in cases of actual adjudicator partiality, referred to as bias in ACUS Recommendation 2016-4, including:
 - a. Improper financial or other personal interest in the decision;
 - b. Personal animus against a party or group to which that party belongs; or
 - c. Prejudgment of the adjudicative facts at issue in the proceeding.

⁷ See Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.105.

⁸ 81 Fed. Reg. 94,314 (Dec. 23, 2016).



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3. Agency recusal rules should preserve the appearance of impartiality among its adjudicators. Such rules should be tailored to accommodate the specific features of an agency's adjudicative proceedings and its institutional needs, including consideration of the following factors:
 - a. The regularity of the agency's appearance as a party in proceedings before the adjudicator (the more frequently an adjudicator must decide issues in which his or her employing agency is a party, the more attentive the agency should be in ensuring that its adjudicators appear impartial);
 - b. Whether the hearing is part of enforcement proceedings (an agency's interest in the outcome of enforcement proceedings could raise public skepticism about adjudicators' ability to remain impartial and thus require stronger appearance-based recusal standards);
 - c. The agency's adjudicative caseload volume and capacity, including the number of other adjudicators readily available to replace a recused adjudicator (if recusal could realistically infringe upon an agency's ability to adjudicate by depriving it of necessary adjudicators, then more flexible appearance-based recusal standards may be necessary);
 - d. Whether a single adjudicator renders a decision in proceedings, or whether multiple adjudicators render a decision as a whole (concerns about quorum, the administrative complications of tied votes, and preserving the deliberative nature of multi-member bodies may counsel in favor of more flexible appearance-based recusal standards); and
 - e. Whether the adjudicator acts in a reviewing/appellate capacity (limitations on appellate standards of review could reduce the need for strict appearance-based recusal standards, but the greater authority of the reviewer could warrant stronger appearance-based recusal standards).
4. Agency rules should include provisions identifying considerations that do not, on their own, warrant recusal and specifying situations in which recusal is not required or is presumptively not required.



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5. Agency recusal rules should also include procedural provisions for agencies to follow in determining when recusal is appropriate. At a minimum, those provisions should include the right of petition for parties seeking recusal, initial determination by the presiding adjudicator, and internal agency appeal.
6. In response to a recusal petition, adjudicators and appellate reviewers of recusal decisions must provide written explanations of their recusal decisions. In addition, agencies should publish their recusal decisions to the extent practicable and consistent with appropriate safeguards to protect relevant privacy interests implicated by the disclosure of information related to adjudications and adjudicative personnel.
7. Although this Recommendation does not apply to adjudications conducted by agency heads, agencies could take into account many of the provisions in the Recommendation when establishing rules addressing the recusal of agency heads.



Separate Statement of Public Member Richard Klingler¹

Filed January 4, 2019

This statement briefly summarizes the reasons for my vote against adopting Administrative Conference Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators* (Dec. 13, 2018). I appreciate the fine and careful work by committee members and others leading to this Recommendation, and in particular Prof. Virelli's thorough and helpful report to the Conference. However, I believe the Recommendation is in considerable tension with basic separation of powers principles and will lead to associated distortions in Executive Branch decisionmaking and accountability. To avoid these results, agencies might (a) carefully consider whether any recusal rules should apply at all to more senior agency officials, including those reviewing initial adjudicatory decisions and (b) clarify that their recusal rules do not apply to statements or positions regarding policy or the interpretation of statutes or regulations. I especially urge agencies not to extend the Recommendation's provisions to agency heads.

The Recommendation focuses on “the *appearance* of adjudicator impartiality” to force “the recusal of adjudicators who may *appear* partial.” Rec. at 1, 2 (emphases added). It acknowledges that the resulting recusal rules will “tend to be much more open-ended and standard-like” than the extensive ethics rules already applicable to these and other officials and will be akin to rules “codified in judicial recusal statutes as well as model codes.” *Id.* at 1, 3. Most troubling for my purposes, the Recommendation states that “[t]he recusal rules should also apply to adjudicators who conduct internal agency review of decisions from [initial] hearings” and that “agencies could take into account many of the provisions in the Recommendation when establishing rules addressing the recusal of agency heads.” *Id.* at 4, 6.

Appearance of impartiality standards, especially those modeled on judicial standards, tend and often seek to foster the public perception that agency adjudicators act independently of

¹ Partner, Sidley Austin LLP. This statement is made solely in my capacity as an ACUS Public Member.



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policy determinations or the directions of more senior officials. Those standards also tend to foster agency cultures and official actions consistent with those views. But that independence does not reflect reality, nor should it. These “adjudicators” are Executive Branch officials. They are not Article III or even Article I judges, and should not be treated as such. They should be and inevitably are “partial” in the sense of implementing and developing distinct Executive Branch policies through their decisions, and many of those policies are set forth prior to deciding individual cases. Ideally, those policy choices and associated legal interpretations would be expressly acknowledged and would reflect the views of senior officials, including the President. This is especially so for officials reviewing initial hearing decisions and for agency heads, who must even more clearly execute the law through the exercise of discretion informed by distinct views of law and policy.

The Recommendation’s conflation of these judicial and executive roles will likely undermine the formulation and implementation of Executive Branch legal policy. This is so because large segments of the public and many adjudicators themselves are prone to view the advocacy and implementation of distinct policies in the course of or prior to executing the law as reflecting inappropriate bias and lack of independence. That is, they view what should be the proper discharge of office as reflecting the “appearance of adjudicator impartiality.” The resulting rules and the likely frequent resort to recusal motions will reinforce those views and impede the articulation of legal policy and the implementation of senior officials’ judgments of how the law should be executed. Indeed, the Recommendation seeks to bar activities “such as advocating a particular policy in a speech before a professional association” and suggests that “the greater authority of the reviewer could warrant stronger appearance-based recusal standards.” Rec. at 3 & 5. Especially as applied to officials who review initial adjudications and even more so for agency heads, this type of constraint is beyond unwarranted: it is undesirable as inconsistent with those officials’ core responsibilities as Executive Branch officials and inconsistent with the powers vested in them and their superior officers.

The Recommendation also will tend to insulate administrative adjudicators further from the President, principal officers, other political appointees, and other officials who formulate



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policy and direct the execution of laws. That may be the intended effect. But that insulation does not only produce decisions that reflect uncoordinated policy choices and legal interpretations, masked as neutral decisionmaking. It also undermines the ultimate public accountability that the separation of powers is designed to ensure. The adjudicators subject to the recommended rules will be at least “inferior Officers,” and those reviewing or ultimately issuing the adjudicatory orders may well be principal officers. For both, the Appointments Clause is designed to “maintain clear lines of accountability—encouraging good appointments and giving the public someone to blame for poor ones,” *Lucia v. SEC*, 585 U.S. ___, slip op. 2 (2018) (Thomas, J., concurring), and those clear lines of accountability are also necessary to enable the President to “take Care that the Laws be faithfully executed.” U.S. Const. Art. II, § 3.

The Recommendation and resulting rules also have the unintended effect of inserting the Conference and agencies into highly contested legal debates regarding the proper scope of Presidential appointment and removal powers. Like other limitations on or counterweights to those powers, the recommended rules will have the practical effect of submerging the role that discretionary policy and legal determinations play in adjudications, and of insulating agency adjudicators from the direct and indirect influence of officials accountable to the President. The Recommendation was adopted soon after the President expanded his control over appointing certain adjudicators, *see* EO 13843, *Excepting Administrative Law Judges from the Competitive Service* (July 10, 2018), and as the courts appear poised to address broader challenges to limits on the President’s ability to direct agency decisionmaking, including adjudications, by appointing and removing officers. *See, e.g., Lucia v. SEC, supra; Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010). The Conference and agencies should, if anything, seek instead to foster a more unified and coordinated exercise of Executive Branch action within our scheme of separated powers.