



Recusal Rules for Administrative Adjudicators

Committee on Adjudication

Proposed Recommendation | December 13, 2018

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

12 In Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative*
13 *Procedure Act*, the Conference recommended that agencies require adjudicator recusal in the
14 case of actual bias.³ This recommendation builds upon Recommendation 2016-4 by addressing
15 the need for agency-specific recusal rules that consider the full range of actual and apparent bias.
16 It focuses on a variety of agency adjudications, including those governed by the adjudication

¹ Louis J. Virelli, III, Recusal Rules for Administrative Adjudicators (October 29, 2018) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/second-draft-report-recusal-rules-administrative-adjudicators>.

² See 28 U.S.C. § 455(a); 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 judges where 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).

17 provisions of the Administrative Procedure Act (APA), as well as adjudications not governed by
18 the APA but nonetheless consisting of evidentiary hearings required by statute, regulation, or
19 executive order.⁴ It also covers appeals from those adjudications. This Recommendation does
20 not, however, necessarily apply to adjudications conducted by agency heads, as there are
21 additional considerations associated with their role as chief policy makers for their agencies.

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

31 Recusal rules also provide a process for parties to petition their adjudicator to recuse in
32 the event he or she does not elect to do so sua sponte. This right of petition promotes more
33 informed and accountable recusal decisions. Recusal rules can further provide for appeal of
34 those decisions within the agency. Such appeals are typically performed by other agency
35 adjudicators acting in an appellate capacity but may also include the official responsible for the
36 adjudicator’s work assignments. This right of appeal increases the reliability and accuracy of
37 recusal determinations and helps ensure the consistency and effectiveness of the work
38 assignment process. Consistent with the APA, adjudicators, including appellate reviewers, must
39 provide parties with a written explanation of their recusal decisions.⁵ Finally, agencies could

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 includes 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* (November 10, 2016) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

⁵ 5 U.S.C. § 555(e).

40 provide for the publication of recusal determinations. Both written explanations and publication
41 of recusal decisions increase transparency and thus the appearance of impartiality.

42 It is important to distinguish agency-specific recusal rules from the ethics rules
43 promulgated by the Office of Government Ethics (OGE).⁶ As an initial matter, the two are not
44 mutually exclusive. Even where ethical and recusal rules overlap, it is entirely possible and
45 coherent to enforce both. This is due, at least in part, to the differences in scope, form, and
46 enforcement mechanisms between the two. Ethics rules focus on preventing conflicts of interest
47 among all executive branch employees. Recusal rules focus on ensuring the integrity and
48 perceived integrity of adjudicative proceedings. Recusal rules are thus broader in focus and
49 narrower in application than ethics rules. In this light, ethics rules tend to be very precise, as
50 agency employees need clear guidance to ensure that they behave ethically. Recusal rules, by
51 contrast, tend to be much more open-ended and standard-like. They are focused on maintaining
52 both actual impartiality and the appearance of impartiality of adjudicative proceedings, which
53 may be compromised by conduct that would not constitute a breach of any ethics rule, such as
54 advocating a particular policy in a speech before a professional association. The enforcement
55 mechanism is also different. A potential ethics issue is reviewed privately inside the agency,
56 whereas the recusal process is public and can be initiated by a party to the adjudication if an
57 adjudicator does not recuse him or herself sua sponte.

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

⁶ The Ethics in Government Act of 1978 (P.L. 95-521) 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.

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

RECOMMENDATION

- 63 1. Agencies should adopt rules for recusing adjudicators who preside over adjudications
64 governed by the adjudication sections of the Administrative Procedure Act (APA) as well
65 as those not governed by the APA but administered by federal agencies through
66 evidentiary hearings required by statute, regulation, or executive order. The recusal rules
67 should also apply to adjudicators who conduct internal agency appellate review of
68 decisions from those hearings, but not necessarily to agency heads. When adopting such
69 rules, agencies should consider the actual and perceived integrity of agency adjudications
70 and the effectiveness and efficiency of adjudicative proceedings.
- 71 2. Agency rules should, consistent with ACUS Recommendation 2016-4, provide for the
72 recusal of adjudicators in cases of actual adjudicator partiality, referred to as bias in
73 ACUS Recommendation 2016-4, including:
- 74 a. Improper financial or other personal interest in the decision;
 - 75 b. Personal animus against a party or group to which that party belongs; or
 - 76 c. Prejudgment of the adjudicative facts at issue in the proceeding.
- 77 3. Agency recusal rules should preserve the appearance of impartiality among its
78 adjudicators. Such rules should be tailored to accommodate the specific features of an
79 agency's adjudicative proceedings and its institutional needs, including consideration of
80 the following factors:
- 81 a. The regularity of the agency's appearance as a party in proceedings before the
82 adjudicator (the more frequently an adjudicator must decide issues in which his or
83 her employing agency is a party, the more attentive the agency should be in
84 ensuring that its adjudicators appear impartial);
 - 85 b. Whether or not the hearing is part of enforcement proceedings (an agency's
86 interest in the outcome of enforcement proceedings could raise public skepticism
87 about adjudicators' ability to remain impartial and thus require stronger
88 appearance-based recusal standards);
 - 89 c. The agency's adjudicative caseload volume and capacity, including the number of
90 other adjudicators readily available to replace a recused adjudicator (if recusal
91 could realistically infringe upon an agency's ability to adjudicate by depriving it

92 of necessary adjudicators, then more flexible appearance-based recusal standards
93 may be necessary);

94 d. Whether a single adjudicator renders a decision in proceedings, or whether
95 multiple adjudicators render a decision as a whole (concerns about quorum, the
96 administrative complications of tied votes, and preserving the deliberative nature
97 of multi-member bodies may counsel in favor of more flexible appearance-based
98 recusal standards); and

99 e. Whether the adjudicator acts in a reviewing/appellate capacity (limitations on
100 appellate standards of review could reduce the need for strict appearance-based
101 recusal standards, but the greater authority of the reviewer could warrant stronger
102 appearance-based recusal standards).

103 4. Agency recusal rules should also include procedural provisions for agencies to follow in
104 determining when recusal is appropriate. At a minimum, those provisions should include
105 the right of petition for parties seeking recusal, initial determination by the presiding
106 adjudicator, and internal agency appeal.

107 5. In response to a recusal petition, adjudicators and appellate reviewers of recusal decisions
108 should provide written explanations of their recusal decisions. In addition, agencies
109 should publish their recusal decisions to the extent practicable and consistent with
110 appropriate safeguards to protect relevant privacy interests implicated by the disclosure
111 of information related to adjudications.