



## 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.<sup>1</sup>  
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.<sup>2</sup> 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.<sup>3</sup> 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.

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<sup>1</sup> 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>.

<sup>2</sup> 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 judges when their “impartiality might reasonably be questioned.”

<sup>3</sup> 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).

16 It focuses on a variety of agency adjudications, including those governed by the adjudication  
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.<sup>4</sup> 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 those  
34 decisions within the agency. Such appeals are typically performed by other agency adjudicators  
35 acting in an appellate capacity but may also include the official responsible for the adjudicator’s  
36 work assignments. This right of appeal increases the reliability and accuracy of recusal  
37 determinations and helps ensure the consistency and effectiveness of the work assignment  
38 process. Consistent with the APA, adjudicators, including appellate reviewers, must provide

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<sup>4</sup> 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 (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>.

39 parties with a written explanation of their recusal decisions.<sup>5</sup> Finally, agencies could provide for  
40 the publication of recusal determinations. Both written explanations and publication of recusal  
41 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).<sup>6</sup> 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.<sup>7</sup> 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  
62 to adopt to preserve the integrity and perceived integrity of its adjudicative proceedings.

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<sup>5</sup> 5 U.S.C. § 555(e) (2012).

<sup>6</sup> The Ethics in Government Act of 1978, Pub. L. No. 95-521 (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.

<sup>7</sup> 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.