



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Recusal Rules for Administrative Adjudicators

Committee on Adjudication

Proposed Recommendation | December 13, 2018

Proposed Amendments

This document displays amendments from the Council and Conference members (with sources shown in the margin).

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

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 judges when their “impartiality might reasonably be questioned.”

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
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, ~~because as there are~~
21 ~~additional considerations are~~ associated with their roles, ~~as chief policy makers for their agencies~~
22 ~~but many of the provisions in the Recommendation should be taken into account when~~
23 ~~determining rules for the recusal of agency heads.~~

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

33 Recusal rules also provide a process for parties to petition their adjudicator to recuse in
34 the event he or she does not elect to do so sua sponte. This right of petition promotes more
35 informed and accountable recusal decisions. Recusal rules can further provide for appeal of those

Commented [CMA1]: Proposed amendment from Andrew N. Vollmer
(see also line 78 for conforming amendment)

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).

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* (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>.

36 decisions within the agency. Such appeals are typically performed by other agency adjudicators
37 acting in an appellate capacity but may also include the official responsible for the adjudicator’s
38 work assignments. This right of appeal increases the reliability and accuracy of recusal
39 determinations and helps ensure the consistency and effectiveness of the work assignment
40 process. Consistent with the APA, adjudicators, including appellate reviewers, must provide
41 parties with a written explanation of their recusal decisions.⁵ Finally, agencies could provide for
42 the publication of recusal determinations. Both written explanations and publication of recusal
43 decisions increase transparency and thus the appearance of impartiality.

44 It is important to distinguish agency-specific adjudicatory recusal rules and procedures
45 from the ethics rules promulgated by the Office of Government Ethics (OGE).⁶ As an initial
46 matter, the two are not mutually exclusive. Even where ethical and recusal rules overlap, it is
47 entirely possible and coherent to enforce both. This is due, at least in part, to the differences in
48 scope, form, and enforcement mechanisms between the two. Ethics rules focus on
49 preventing prohibit employees from participating in certain matters where they have a conflicts of
50 interest or an appearance of a conflict among all executive branch employees. Adjudicatory
51 Recusal rules focus on how an agency, acting through its adjudicators and appeal authorities,
52 decides who will hear certain cases in a manner that ensures the integrity and perceived
53 integrity of adjudicative proceedings. Adjudicatory Recusal rules are thus broader in focus and
54 narrower in application than ethics rules. In this light, ethics rules tend to be very precise, as
55 agency employees need to have clear guidance as to what they may or may not do to ensure that
56 they behave ethically. Adjudicatory Recusal rules, by contrast, tend to be much more open-
57 ended and standard-like. They are focused on maintaining both actual impartiality and the
58 appearance of impartiality of adjudicative proceedings, which may be compromised by conduct
59 that would not constitute a breach of any ethics rule, such as advocating a particular policy in a
60 speech before a professional association. The enforcement mechanism is also different. If an
61 employee, including an adjudicator, participates in a matter in violation of an ethics rule, the

⁵ 5 U.S.C. § 555(e) (2012).

⁶ 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.

62 employee can be subject to discipline. In contrast, if an adjudicator decides not to recuse him or
63 herself in a case where he or she should have been recused, the adjudicator would not be subject
64 to discipline, but the decision not to recuse could be appealed under whatever process the agency
65 has established. In addition, a potential ethics issue is reviewed privately inside the agency,
66 whereas the recusal process is public and can be initiated by a party to the adjudication if an
67 adjudicator does not recuse him or herself sua sponte.

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

RECOMMENDATION

- 73 1. Agencies should adopt rules for recusing adjudicators who preside over adjudications
74 governed by the adjudication sections of the Administrative Procedure Act (APA) as well
75 as those not governed by the APA but administered by federal agencies through
76 evidentiary hearings required by statute, regulation, or executive order. The recusal rules
77 should also apply to adjudicators who conduct internal agency appellate review of
78 decisions from those hearings, but not necessarily to agency heads. When adopting such
79 rules, agencies should consider the actual and perceived integrity of agency adjudications
80 and the effectiveness and efficiency of adjudicative proceedings.
- 81 2. Agency rules should, consistent with ACUS Recommendation 2016-4, provide for the
82 recusal of adjudicators in cases of actual adjudicator partiality, referred to as bias in
83 ACUS Recommendation 2016-4, including:
- 84 a. Improper financial or other personal interest in the decision;
 - 85 b. Personal animus against a party or group to which that party belongs; or
 - 86 c. Prejudgment of the adjudicative facts at issue in the proceeding.
- 87 3. Agency recusal rules should preserve the appearance of impartiality among its
88 adjudicators. Such rules should be tailored to accommodate the specific features of an

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

Commented [CMA2]: Proposed amendment from David J. Apol

Explanation: The proposed changes at lines 44 through 65 are intended to clarify the differences between the adjudicatory recusal rules and procedures contemplated by this Recommendation and the ethics rules promulgated by the Office of Government Ethics. Please see comment from David J. Apol for more information.

A proposed amendment from Carol Ann Siciliano to this paragraph does not appear here and is found in her comment.

Commented [CMA3]: Proposed amendment from Andrew N. Vollmer

(conforming amendment to Andrew N. Vollmer amendment at lines 20 – 23)

A proposed amendment from Carol Ann Siciliano to this sentence and the following sentence does not appear here and is found in her comment.

89 agency's adjudicative proceedings and its institutional needs, including consideration of
90 the following factors:

- 91 a. The regularity of the agency's appearance as a party in proceedings before the
92 adjudicator (the more frequently an adjudicator must decide issues in which his or
93 her employing agency is a party, the more attentive the agency should be in
94 ensuring that its adjudicators appear impartial);
- 95 b. Whether or not the hearing is part of enforcement proceedings (an agency's
96 interest in the outcome of enforcement proceedings could raise public skepticism
97 about adjudicators' ability to remain impartial and thus require stronger
98 appearance-based recusal standards);
- 99 c. The agency's adjudicative caseload volume and capacity, including the number of
100 other adjudicators readily available to replace a recused adjudicator (if recusal
101 could realistically infringe upon an agency's ability to adjudicate by depriving it
102 of necessary adjudicators, then more flexible appearance-based recusal standards
103 may be necessary);
- 104 d. Whether a single adjudicator renders a decision in proceedings, or whether
105 multiple adjudicators render a decision as a whole (concerns about quorum, the
106 administrative complications of tied votes, and preserving the deliberative nature
107 of multi-member bodies may counsel in favor of more flexible appearance-based
108 recusal standards); and
- 109 e. Whether the adjudicator acts in a reviewing/appellate capacity (limitations on
110 appellate standards of review could reduce the need for strict appearance-based
111 recusal standards, but the greater authority of the reviewer could warrant stronger
112 appearance-based recusal standards).

113 4. Agency recusal rules should also include procedural provisions for agencies to follow in
114 determining when recusal is appropriate. At a minimum, those provisions should include:

- 115 a. ~~the right of petition for parties seeking recusal;~~
- 116 b. referral (for decision by an agency ethics official) of allegations of improper
117 financial interest or impartiality arising under the Standards of Ethical Conduct
118 for Employees of the Executive Branch;
- 119 c. initial determination by the presiding adjudicator in appropriate cases; ~~and~~

120 ~~f.d.~~ internal agency appeal.
121 4.5. In response to a recusal petition, adjudicators and appellate reviewers of recusal decisions
122 should provide written explanations of their recusal decisions. In addition, agencies
123 should publish their recusal decisions to the extent practicable and consistent with
124 appropriate safeguards to protect relevant privacy interests implicated by the disclosure
125 of information related to adjudications and adjudicatory personnel.

Commented [CMA4]: Proposed amendment from Carol Ann Siciliano

Explanation: Financial conflicts of interest and impartiality determinations must be made by an Agency ethics official. Silence might imply that someone other than an Agency ethics official would make those decisions.

Commented [CA5]: Proposed amendment from Council