Administrative Conference of the United States

RECUSAL RULES FOR ADMINISTRATIVE ADJUDICATORS

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EXECUTIVE SUMMARY

The integrity of agency action is critically important for the efficacy and legitimacy of administrative government. This is especially true for agency adjudication, as it is the form of agency action that most directly impacts individuals. Recusal—the process by which an adjudicator is removed, voluntarily or involuntarily, from a specific proceeding—is a time-honored way of protecting the integrity of all manner of quasi-judicial activity, including agency adjudication. The current landscape of agency recusal standards, which consists of government ethics rules, constitutional protections, statutory and regulatory requirements, and model codes, exhibits gaps in coverage that are best filled by agency-specific recusal regulations. This report discusses the need for such regulations and best practices for their promulgation and implementation. One of the principal issues it will address is whether agencies should adopt recusal rules that are distinct from ethics rules that apply to all federal employees.

Adjudication is a broad and amorphous category of agency action. Studying adjudication, therefore, requires some difficult choices. This project focuses on a subset of agency adjudication—administrative proceedings in which evidentiary hearings are legally required—for two reasons. First is that the category is easy to define. It has few required features that are relatively simple to identify. Second is that this category of agency adjudication is at least comparable to traditional judicial proceedings, so we can use what we know about the integrity of judicial decisions as a starting point for examining the integrity of agency adjudication.

With respect to this type of adjudication, there are several tools that agencies can use to protect the integrity of their proceedings. Among the oldest and most well-known is recusal. Recusal serves two important purposes. The first is that it protects litigants from partial or biased decision makers. The second is that it promotes public confidence in the fairness and reliability of government adjudication.

Unlike courts, which can rely on a long tradition of recusal law, agencies' recusal requirements are less clear. This project addresses the question of whether agencies should enact their own, agency-specific recusal regulations and, if so, what sources of law and procedural requirements they should consider in doing so.

The existing legal framework for administrative recusal consists of several parts, each of which exhibits strengths and weaknesses for promoting the integrity of agency adjudications. The Due Process Clause of the Constitution protects litigants against adjudicators who present a probability of actual bias against a party, but does far less to promote public confidence in the adjudicative system because it does not directly address the outward appearance of agency bias. The federal recusal statute is an example of how to achieve both of recusal's ultimate goals, but it applies only to courts, not agencies, and may in any event be too broad for agency adjudicators

that must decide cases in which their employer, the agency itself, is a party. The American Bar Association model codes are also useful examples of how to use recusal aggressively to achieve both of its goals, but they are not legally binding and may be too broad for the same reasons as the federal recusal statute. Government ethics rules seem like a natural source of recusal standards for agency adjudicators, but they are designed for a much wider range of actors (all executive branch employees, rather than just adjudicators), and are limited to financial and relationship-based conflicts of interest, which do not protect against all forms of actual or apparent bias. The Administrative Procedure Act (APA) and existing agency recusal regulations are useful, but the APA applies to a smaller set of adjudicators than this study seeks to capture and is limited to specific instances of actual or potential (as opposed to apparent) bias. Agency regulations vary widely, but they generally do not focus on problems of public perception and appearance. When they do, they are often limited in other areas. Taken together, the existing recusal framework for agency adjudicators leaves gaps that must be filled in order for agencies to protect fully the integrity of their adjudications.

This study concludes that the best way to fill those gaps is for agencies to promulgate regulations governing recusal for their own adjudicators. Agencies should consider the specific nature and demands of their own adjudicative system to design a set of recusal standards that will protect parties against actual bias as well as project the appearance of impartiality to a watchful public. In addition to recusal standards, agencies' regulations should also include procedures for resolving recusal questions, including a way for parties to bring recusal issues to the presiding adjudicator and a process to appeal the initial recusal decision both in and outside of the agency. In sum, agencies must consider the nature of their proceedings and of their adjudicators, as well as institutional needs and limitations in order to promulgate regulations that best balance adjudicative integrity with the agency's need for timely and effective adjudications.

I. PROJECT DESCRIPTION

Administrative adjudication is a powerful and wide-ranging tool for implementing agencies' statutory missions. Adjudication's more specific, individualized determinations implicate litigants' rights to fair and impartial treatment more directly than other agency conduct, like rulemaking. As a result, basic notions of administrative legitimacy[1] and due process make the independence and integrity of agency adjudicators critically important to both the effectiveness of, and public confidence in, administrative government. Recusal[2]—the process by

[1] *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 462 (2003) ("From the birth of the administrative state, we have struggled to describe our regulatory government as the legitimate child of a constitutional democracy.").

[2] Historically, the process by which judges removed themselves from a case was called recusal, and the process by which they were forced to withdraw was called disqualification. In modern practice, the two terms are used interchangeably. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1, at 4 (Banks & Jordan 2d ed. 2007) ("In fact, in modern practice 'disqualification' and 'recusal' are

which an adjudicator is removed, voluntarily or involuntarily, from a specific proceeding—is a powerful tool in protecting the integrity of agency adjudicators. Agency recusal is currently governed by government ethics rules, various statutory provisions, and the Due Process Clause. Taken together, these sources of recusal standards leave potentially important features of agency integrity unprotected. This project seeks to identify areas left unaccounted for by existing sources of agency recusal standards, and proposes that agencies adopt agency-specific recusal regulations to fill those gaps in the current landscape of administrative recusal.

There are several issues that influence the independence and integrity of agency adjudicators. For example, appointment and removal, congressional oversight, *ex parte* contacts,[3] and adjudicator compensation all affect adjudicators' independence and, in turn, the integrity of the proceedings they preside over. The same is true for recusal.

In the judicial context, recusal is as old as courts themselves. Since Justinian's time, judges have either removed themselves or been forced to withdraw from cases for a variety of (mostly ethical) reasons. Recusal fulfills two primary purposes. First, it protects individual litigants against biased or conflicted adjudicators to ensure a fair and objective resolution of their claims. Second, it protects the integrity of the adjudicatory system by promoting public confidence in the impartiality and fairness of the adjudicative process. In modern American jurisprudence, federal judicial recusal is governed by at least two sources of law; the Due Process Clause and wider-reaching recusal statutes.[4]

Recusal has a role in administrative adjudication that is at least analogous to its role in judicial proceedings. Administrative adjudicators remove themselves—either voluntarily or pursuant to some mandatory legal standard—from proceedings over which they would otherwise preside in order to protect both the rights of the parties to an impartial hearing and the public's confidence in the adjudicative system. Unlike with judicial recusal, however, administrative adjudicators do not have the benefit of a generally applicable recusal statute to help guide their decisions.[5] The law of administrative recusal comes from multiple sources, many of which are either not binding on agency adjudicators or were not specifically designed for agency actors responsible for presiding over evidentiary hearings.

The current reality of administrative recusal thus begs several questions. First, would more targeted, agency-specific recusal rules bring more clarity, consistency, and integrity to administrative adjudication? If so, to what sources of law should agencies look before fashioning

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frequently viewed as synonymous, and employed interchangeably."). For consistency's sake, recusal will be used here to refer to both situations—voluntary and involuntary withdrawal of an agency adjudicator.

[3] Although prohibitions on *ex parte* contacts may sometimes rely on recusal as a remedy, they are conceptually distinct; at minimum, recusal is much broader in scope and applicability and is more explicitly concerned with bias.

[4] U.S. CONST. amend. V; 28 U.S.C. § 455 (federal judicial recusal statute).

[5] 28 U.S.C. § 455.

such rules and how should those rules be promulgated? Finally, what procedures should agencies employ to enforce recusal rules, and should those rules treat different adjudicators within an agency—hearing officers versus appellate adjudicators, for instance—differently? This project seeks to address these questions by building on two recent Administrative Conference of the United States (ACUS) studies of administrative adjudication to examine the various laws and standards affecting recusal for a defined subset of agency adjudicators and to evaluate whether more tailored recusal regulations would further the goals of impartiality and public confidence that are necessary to good government.

II. SCOPE OF THE PROJECT

The term adjudication covers a vast array of agency conduct. The difficulty in accurately defining and organizing all of the agency conduct that fits under the umbrella of agency adjudication requires some line drawing. In general, one distinct category of adjudication—referred to generally here as "Type A" adjudication—consists of evidentiary hearings prescribed by certain provisions of the Administrative Procedure Act (APA) and presided over by administrative law judges (ALJs).[6] A second category is comprised of evidentiary hearings that are required by law but are not governed by the same APA sections and do not involve ALJs (in general, "Type B" adjudication).[7] Finally, the largest (and most widely varied) category of agency adjudication is that which does not require—yet may permit—an evidentiary hearing.[8]

Two recent ACUS studies have focused on the second category of adjudication described above: legally required evidentiary hearings that are not presided over by ALJs. Both studies built on a collection of previous ACUS studies that examined various aspects of non-ALJ agency adjudication.[9]

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[6] Type A adjudication is defined by Michael Asimow in his recent ACUS study as "adjudicatory systems governed by the adjudicatory sections [§§ 554, 556, and 557] of the APA . . . [and] presided over by administrative law judges (ALJs)." MICHAEL ASIMOW, EVIDENTIARY HEARINGS OUTSIDE THE ADMINISTRATIVE PROCEDURE ACT 2 (2016) ("Asimow Study").

[7] Although referring to this category of adjudication as Type B adjudication is useful and adequate for present purposes, it is not completely accurate. The Asimow Study defined Type B adjudication as "evidentiary hearings required by statute, regulation, or executive orders, that are not governed by the adjudication provisions [§§ 554, 556, 557] of the APA" and that are decided exclusively on the record developed during the proceeding (the "exclusive-record limitation"). *See id.* at 2. A more recent ACUS study focused only on Type B proceedings that required oral, as opposed to purely written, evidentiary hearings, but did not require that those proceedings include the "exclusive-record limitation" used in the Asimow Study. KENT BARNETT, MALIA REDDICK, LOGAN CORNETT, & RUSSELL WHEELER, NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL 13 (2017) ("Barnett et al. Study"). Because this project considers a wider range of evidentiary hearings by agency adjudicators, the relatively slight distinctions between the types of hearings examined in the Asimow and Barnett Studies is not directly relevant to the present discussion.

[8] This category is described in the Asimow Study as "Type C" adjudication. *See* Asimow Study, *supra* note 6, at 2.

[9] The first study of non-ALJ adjudication was a 1989 ACUS-sponsored survey by John Frye, who had served as both an ALJ and a non-ALJ ("the Frye Study"). The Frye Study cataloged the use of non-ALJs in oral evidentiary hearings, and the results were published in a 1992 law review article. *See* John H. Frye III, *Survey of Non-ALJ*

In connection with the *Evidentiary Hearings Outside the Administrative Procedure Act* project, Administrative Conference attorneys, working with Professor Michael Asimow (the project consultant), created a database containing "information about all of the schemes of Type A and Type B federal agency adjudication."[10] Professor Asimow then relied on this information and conducted additional research to "formulate . . . best practices for Type B adjudication" ("the Asimow Study").[11] Drawing on Professor Asimow's work, the ACUS Assembly adopted Recommendation 2016-4, which recommended that agencies promulgate regulations addressing three distinct categories of adjudicator bias: bias resulting from "(i) a financial or other personal interest in the decision; (ii) personal animus against [a party or agency attorney]; [or] (iii) prejudgment of the adjudicative facts at issue in the proceeding."[12] These three instances of bias were included as grounds for recusal of Type B adjudicators in Administrative Conference Recommendation 2016-4.[13]

In 2018, Kent Barnett, Malia Reddick, Logan Cornett, and Russell Wheeler submitted *Non-ALJ Adjudicators and Federal Agencies: Status, Selection, Oversight, and Removal* ("the Barnett et al. Study"). The Barnett et al. Study addressed issues related to selection, oversight, evaluation, discipline, and removal of non-ALJ adjudicators. It also supplemented and updated information from prior ACUS studies, as well as suggesting best practices for Type B adjudication.[14] Of particular interest to this project is the study's treatment of "non-ALJ . . . oversight, and independence," which included recusal standards.[15] Like Asimow, the Barnett et al. Study suggested that agencies promulgate standards for non-ALJs that "clearly state the grounds for disqualification" and that outline procedures for enforcing and reviewing the application of those standards.[16] The proposed recommendation associated with the Barnett et al. Study suggested that agencies consider pursuing "supplemental regulations pertaining to the disqualification of administrative judges from particular hearings that augment [the Office of

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Hearing Programs in the Federal Government, 44 ADMIN. L. REV. 261 (1992). Next was a comprehensive 1992 study by Paul Verkuil, Daniel Gifford, Charles Koch, Richard Pierce, and Jeffrey Lubbers ("the 1992 Study"). PAUL R. VERKUIL ET AL., THE FEDERAL ADMINISTRATIVE JUDICIARY (1992). The 1992 Study built on the Frye Study and included information on the history and variety of administrative adjudications; the attitudes, selection, and independence of agency adjudicators; the effect of adjudicators' decisions; and standards for when agencies should rely on ALJs for their adjudications. *See id.* The third study was a survey by Raymond Limon, who primarily updated the Frye Study's data on non-ALJs. RAYMOND LIMON, OFFICE OF ADMIN. L. JUDGES, THE FEDERAL ADMINISTRATIVE JUDICIARY THEN AND NOW—A DECADE OF CHANGE 1992–2002, at 2 (1992).

[10] *See* Asimow Study, *supra* note 6, at 2.

[11] *Id.* at 4.

[12] *See* Recommendation 2016-4, at ¶ 5, adopted Dec. 13, 2016, https://www.acus.gov/sites/default/files/documents/informal-agency-adjudication-recommendation-final.pdf.

[13] *See id.*

[14] *See* Barnett et al. Study, *supra* note 7, at 11-12. As mentioned *supra* in note 7, the category of adjudication considered in the Barnett et al. Study was not precisely the same as what the Asimow Study defined as Type B adjudication, but the differences between the two remain immaterial for present purposes.

[15] *Id.* at 2.

[16] *Id.* at 64.

Government Ethics's (OGE's)] standards . . . govern[ing] the disqualification of federal employees from participating in particular matters due to the appearance of loss of impartiality."[17]

This project approaches the issue of administrative recusal from the foundation laid by Asimow and Barnett et al. It takes a broader and more detailed look at the relevant legal and other sources of administrative recusal standards, and asks whether there is a need within this landscape for agency-specific recusal regulations.

The answer depends on the category of agency adjudication being examined. In order to make the focus of this study as clear as possible, it focused on the recusal of Type A and B adjudicators (rather than simply all government employees). It therefore includes ALJs, which were part of the adjudication database created by Administrative Conference attorneys and Professor Asimow in connection with *Evidentiary Hearings Outside the Administrative Procedure Act*, but were not included in either the Asimow Study or the Barnett et al. Study. The current study also includes Type B adjudicators, but defines the relevant universe of these non-ALJ adjudicators differently than previous studies. The Type B adjudicators included here are those who preside over evidentiary hearings required by statute, regulation, or executive order, and who decide appeals of decisions arising from those hearings. This definition is broader than that used in the Barnett et al. Study in that it—like the Asimow Study—includes non-ALJ adjudicators who preside over legally required written and oral (as opposed to just oral) hearings. It is also technically broader than the Asimow Study's definition because it is not limited to hearings decided exclusively on the record developed during the proceeding, although that may in fact be, at least with regard to required written hearings, a distinction without a difference.[18] In sum, the scope of adjudicators considered in this study is broader than the Barnett et al. Study and at least as broad as the Asimow Study. It is also—and perhaps most importantly so—simpler and easier to describe when requesting information about agencies' recusal standards and practices. This combination of breadth and simplicity is designed to maximize the range and depth of information obtained about recusal in agency adjudications.

Due to the wide range of adjudicators targeted by this study, this report examines a similarly broad scope of recusal-related sources to identify any gaps in existing standards and practices that may indicate a need for agency-specific recusal regulations. It is important to note that references to the substantive limitations of certain legal or ethical frameworks with regard to recusal are not intended as criticisms of those provisions. The purpose of the following section is to explore the existing landscape of legal and other provisions that could potentially affect administrative recusal. Many of those provisions are not targeted at agencies or adjudication, and

[17] Proposed Recommendation, ADMINISTRATIVE JUDGES, June 14, 2018, at 6-7, https://www.acus.gov/sites/default/files/documents/Proposed%20Recommendation%20for%20Plenary_0.pdf.
[18] As the Barnett et al. Study revealed, "we are not aware of any [oral] hearings that the agencies identified that lack an exclusive-record limitation." Barnett et al. Study, *supra* note 7, at 13.

as such should not be expected to provide comprehensive recusal standards. It is nevertheless necessary to examine the full range of potentially relevant sources in order to evaluate the potential utility of agency-specific recusal rules.

As seen in the following section, there does appear to be a range of adjudicator conduct that could merit recusal yet is not currently regulated.

III. The "Law" of Recusal for Administrative Adjudicators

A. Due Process

Due process has two related, but conceptually distinct, applications. First, due process ensures that parties will receive adequate notice and an opportunity to be heard in connection with the resolution of their claims or defenses before an impartial adjudicator.[19] The scope of the required notice and hearing depends at least in part on the parties' level of personal interest in the outcome of the proceeding.[20] Proceedings with more formalized, rigorous procedures can be understood to recognize a greater personal interest in the outcome of those proceedings.

A litigant's opportunity to be heard depends, in turn, on both the literal availability of a forum to hear their claims and the ability of that forum to resolve them fairly. The fairness of the resolution is premised on the notion that all parties to an adjudication are entitled to a neutral, unbiased arbiter.[21] This includes a range of requirements relating to an adjudicator's impartiality, from "an absence of actual bias"[22] against the parties to the admonitions that "no man shall be a judge in his own case"[23] and that the "possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the [parties] denies [them] due process of law."[24]

Just like judicial proceedings, administrative adjudication must satisfy all of these criteria to pass constitutional muster.[25] Recusal can be a powerful tool to remedy due process violations, especially in cases where the adjudicator exhibits actual or probable bias against a party or has a personal conflict of interest. The Supreme Court has confirmed recusal's role in these cases, but has been reluctant to apply due process protections too broadly. The Court has applied the Due Process Clause most readily in cases where the adjudicator had a financial interest in the

[19] Mathews v. Eldridge, 424 U.S. 319 (1976).
[20] *Id.* at 334-35.
[21] Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 877 (2009) ("It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" (quoting In re Murchison, 349 U.S. 133, 136 (1955))).
[22] Williams v. Pennsylvania, 136 S. Ct. 1899, 1905 (2016) (quoting *Murchison*, 349 U.S. at 136).
[23] Caperton, 556 U.S. at 886 ("[N]o man is allowed to be a judge in his own cause . . . .").
[24] *Murchison*, 349 U.S. at 136 (quoting Tumey v. State of Ohio, 273 U.S. 510, 532 (1927)).
[25] *See* Londoner v. City and County of Denver, 210 U.S. 373 (1908). Due process of course applies to all forms of adjudication, including adjudicative decisions that do not involve evidentiary hearings.

outcome of a case or where some other conflict of interest exists, such as when a judge that charged a party with contempt presided over that party's contempt hearing.[26] The Court's two most recent cases on the issue both involved state supreme court justices. The Court found due process violations in those cases where a justice participated in a case in which his largest judicial campaign donor was a party, and where a justice took part in the review of a defendant's death sentence that the justice had personally approved while serving as the district attorney responsible for the case.[27] In each instance, the Court cited the "probability of actual bias" on the judge's part as grounds for recusal. This is the Court's current standard for recusal under the Due Process Clause.[28]

Despite its willingness to find due process violations in these cases, the Supreme Court has consistently reaffirmed that most recusal cases do not implicate the Due Process Clause. In the process of ruling that a Federal Trade Commissioner's previous public comments about a legal issue did not require his recusal from a case involving that issue, that Court made clear that "most matters relating to judicial disqualification [do] not rise to a constitutional level,"[29] and that "'matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion.'"[30] This qualification is a consistent theme in the Court's recusal jurisprudence, and serves as a demarcation of the boundary between the narrow range of due process recusals—recusals based on whether a reasonable judge would likely be biased in a given case and that often involve what Justice Kennedy called "extreme facts"[31]—and the broader universe of situations that could raise concerns about the impartiality and legitimacy of an adjudicator's decision.

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[26] *See, e.g.*, *Tumey*, 273 U.S. at 310 (financial interest); *Murchison*, 349 U.S. at 133 (contempt).
[27] *Caperton*, 556 U.S. at 868 (campaign donation); Williams v. Pennsylvania, 136 S. Ct. 1899 (2018) (district attorney).
[28] The Court has noted that "justice must satisfy the appearance of justice" under the Due Process Clause, Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1986) (quoting Murchison, 349 U.S. at 136), but its holdings and other statements about the limits of due process recusal make clear that this statement is not meant to conflate constitutional recusal requirements with the broader "impartiality might reasonably be questioned" standard in the federal recusal statute, 28 U.S.C. § 455. The lower courts have also applied due process principles to administrative recusal, most notably in *Cinderella Career & Finishing Schools, Inc. v. FTC*, in which the court held that prejudgment of adjudicative facts by an agency head violated the Due Process Clause. 425 F.2d 583 (D.C. Cir. 1970). The court in *Cinderella* explained that "[t]he test for disqualification has been succinctly stated as being whether 'a disinterested observer may conclude that (the agency) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it.'" 425 F.2d at 591 (quoting Gilligan, Will & Co. v. SEC, 267 F.2d 461, 469 (2d Cir. 1959)). The prejudgment standard applied in *Cinderella* is analogous to the impartiality requirement for ALJs under § 556 of the APA, and is often used interchangeably. In any event, it, like the Supreme Court's probability of actual bias test, represents a narrower view of recusal than those expressed in statutory and other standards.
[29] *Caperton*, 556 U.S. at 876 (quoting FTC v. Cement Inst., 333 U.S. 683, 702 (1948)).
[30] *Id.* (quoting *Tumey*, 273 U.S. at 523).
[31] *Id.* at 887 ("Our decision today addresses an extraordinary situation where the Constitution requires recusal. . . . The facts now before us are extreme by any measure.").

B. Federal Recusal Statute

The federal judicial recusal statute, 28 U.S.C. § 455, represents the broadest recusal standard applicable to federal adjudicators (specifically, federal judges). In addition to requiring recusal in instances of personal bias, previous involvement in (or knowledge of) the case at hand, financial interest, and familial and other personal relationships, § 455 requires recusal in any case where a judge's "impartiality might reasonably be questioned" (the "reasonable appearance standard").[32] This standard is a popular and relatively new development in American recusal law.[33] The reasonable appearance standard was designed to promote public confidence in the judiciary by ensuring that cases are decided by individuals who are not only impartial in fact, but who appear so to the people affected by, and expected to comply with, their decisions.[34]

Unlike the Due Process Clause, which applies to all government adjudicators, the federal recusal statute applies to "[a]ny justice, judge, or magistrate judge of the United States." It does not apply to administrative adjudicators. Federal courts have interpreted the reasonable appearance standard as too broad for adjudicators who are employed by the very agencies that could appear before them.[35] For that reason alone, § 455 cannot be understood to govern administrative recusal. It does, however, represent a potentially useful example of why agencies may desire to take public perception into account when seeking to protect the integrity of their adjudications.

C. Model Codes of Conduct

Model codes of conduct are a valuable source of insight into the legal profession's views on recusal. The American Bar Association's (ABA's) National Conference of Administrative Law Judges (NCALJ) adopted its own set of ethical guidelines for ALJs in 1989, which included recusal standards. The *Model Code of Judicial Conduct for Federal Administrative Law Judges* (Model ALJ Code) was patterned after the ABA's *Model Code of Judicial Conduct* (Model Judicial Code), especially with regard to recusal. Canon 3(C) of the Model ALJ Code adopted

[32] 28 U.S.C. § 455(a). The reasonable appearance standard was added to the statute in 1974 and represented a significant departure from traditional Anglo-American recusal law. In fact, prior to the addition of the "reasonable appearance" standard to § 455 in 1974, America recusal law had generally operated consistent with Blackstone's maxim that "the law will not suppose a possibility of bias or favour in a judge." 3 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361.

[33] FLAMM, *supra* note 2, at § 1.4 at 9 ("[B]ecause of the importance of assuring both litigants and the public at large that judges are impartial . . . virtually every commentator who has critically analyzed the subject of judicial disqualification has applauded its expansion.").

[34] LOUIS J. VIRELLI III, DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION xii (2016) ("By guarding against the mere appearance of impropriety, recusal advances public confidence in the integrity and legitimacy of an otherwise unaccountable judiciary.").

[35] *See* Greenberg v. Board of Governors of the Federal Reserve, 968 F.2d 164, 167 (2d Cir. 1992).

the objective test from the Model Judicial Code, which also is codified in the federal recusal statute, by requiring recusal whenever an ALJ's "impartiality might reasonably be questioned."[36]

But the Model ALJ Code is only suggestive. It is not legally binding on ALJs by its own terms and has not been codified by Congress.[37] It has also not shown the staying power of the Model Judicial Code. The Model Judicial Code has been updated several times since 1989, while the Model ALJ Code has not. In 2007, the Model Judicial Code was expanded to explicitly include ALJs,[38] but only to the extent that individual jurisdictions deemed it desirable.[39] At least some jurisdictions have resisted. The Ninth Circuit, for example, has held that the Model Judicial Code did not apply to ALJs from the Social Security Administration (SSA), the agency that employs by far the largest number of ALJs, because the SSA itself had not adopted the Code and none of the ABA Model Codes "create[] legally enforceable duties."[40]

In 2010, the National Conference of Commissioners on Uniform State Laws adopted the *Revised Model State Administrative Procedure Act* (Model State APA). The Model State APA requires "disqualification for bias, prejudice, financial interest, ex parte communications . . . or any other factor that would cause a reasonable person to question the impartiality" of the adjudicator and allows parties to "petition for the disqualification of a presiding officer" in their own case.[41] Despite being aligned with federal judicial recusal standards, the Model State APA is not itself legally binding and is applicable only to state actors, including state agency adjudicators. In 2018, the NCALJ adopted the *Model Code of Judicial Conduct for State Administrative Law Judges* (Model State Code). Like the Model State APA, although the Model State Code does not apply to federal adjudicators, it advocates for essentially the same recusal standards as the other codes, including for recusal where a state ALJ's "impartiality might reasonably be questioned."[42]

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[36] 28 U.S.C. § 455(a); AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES Canon 3(C) (1989) ("Model ALJ Code"), http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1521&context=naalj.

[37] *See* Model ALJ Code, *supra*, at 132 ("Adaption and endorsement of the Model Code for Administrative Law Judge[s] by NCALJ does not make that Code applicable to any administrative law judge . . . ."); Steven A. Glazer, *Toward a Model Code of Judicial Conduct for Federal Administrative Law Judges*, 64 ADMIN. L. REV. 337 (2012).

[38] AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT I(B) (2007) ("A judge, within the meaning of this Code, is anyone who is authorized to perform judicial functions, including . . . [a] member of the administrative law judiciary."), http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf.

[39] *See id.* at n.1 ("Each jurisdiction should consider the characteristics of particular positions within the administrative law judiciary in adopting, adapting, applying, and enforcing the Code for the administrative law judiciary.").

[40] Lowry v. Barnhart, 329 F.3d 1019, 1024 (9th Cir. 2003).

[41] NATIONAL CONFERENCE ON COMMISSIONERS OF UNIFORM STATE LAWS, REVISED MODEL STATE ADMINISTRATIVE PROCEDURE ACT §§ 402(c), (d) (2010), http://www.uniformlaws.org/shared/docs/state%20administrative%20procedure/msapa_final_10.pdf.

[42] AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES Canon 2, Rule 2.11(A) (2018),

ACUS recently published revised Model Adjudication Rules ("ACUS Model Rules").[43] The ACUS Model Rules require that an agency adjudicator "conduct her/his functions in an impartial manner."[44] They also require recusal on the grounds of "personal bias" or "basis for other disqualification."[45] Like the model codes described above, however, the ACUS Model Rules are only suggestive; they recommend that agencies adopt them, but provide no other legal obligations or remedies on their own.[46] They are also likely narrower than the Model ALJ Code. The "basis for other disqualification" standard could include the reasonable appearance standard, but is less explicit than the model codes on that point.

The model codes and rules support recusal in many more cases than due process requires. This is important because it supports the conclusion that agency adjudicators are concerned about more than the negative effect of a partial adjudicator on the parties to that hearing. The fact that all three model codes require recusal where an adjudicator's impartiality might reasonably be questioned, *i.e.* regardless of whether actual bias or even a probability of actual bias would exist in the mind of a reasonable judge, confirms that the public's perception of the integrity of the proceeding is important to agency adjudicators and other members of the profession. This is further corroborated by specific canons in each model code explicitly requiring judges to promote public confidence in their conduct.[47]

There are, however, some obvious limitations to relying solely on the codes and rules as a template for adopting agency-specific recusal standards. The codes are only applicable to ALJs, as opposed to adjudicators presiding over Type B adjudications or appellate-style review hearings, and the model codes and rules are not directly enforceable as a matter of law. Moreover, despite the invitation to adopt the Model Judicial Code and the ACUS Model Rules, most agencies have declined to do so. This indicates that, although the benefits of broader recusal standards are real, a generalized, one-size-fits-all approach to administrative recusal is not the optimal approach to addressing recusal concerns in agency evidentiary hearings.

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https://www.americanbar.org/content/dam/aba/administrative/administrative_law_judiciary/2018-model-code-statealj.authcheckdam.pdf.

[43] ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, MODEL ADJUDICATION RULES 8 (Rule 112) (rev. 2018).

[44] *Id.* at 8 (Rule 112(A)).

[45] *Id.* at 8 (Rule 112(B)(2)(a)).

[46] *See id.* at vi (Preface) ("[T]he Working Group encourages agencies to adopt the revised [Model Adjudication Rules] in toto . . . .")

[47] See, e.g., AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT FOR STATE ADMINISTRATIVE LAW JUDGES Canon 1, Rule 1.2 (2018), https://www.americanbar.org/content/dam/aba/administrative/administrative_law_judiciary/2018-model-code-statealj.authcheckdam.pdf; AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT Canon 1, Rule 1.2 (2007), http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf; AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT FOR FEDERAL ADMINISTRATIVE LAW JUDGES Canon 2.A (1989), http://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1521&context=naalj.

D. Government Ethics Provisions

Recusal is largely (although not exclusively) an ethical issue, and agency adjudicators are executive branch employees.[48] As a result, the statutes administered, and the regulations promulgated, by the Office of Government Ethics (OGE) governing executive branch employees' ethical conduct are an important source for agency recusal standards.

1. Ethics Statutes

The primary criminal statute relating to the recusal of agency adjudicators is 18 U.S.C. § 208,[49] which has been described by OGE as "the cornerstone of the executive branch ethics program. It prohibits an employee from participating personally and substantially in any particular matter in which he has a financial interest, or in which certain others with whom he is associated [spouse, minor child, general partner, etc.] have a financial interest."[50] OGE has made clear that § 208 requires disqualification from "any 'judicial or other proceeding' . . . even if that financial interest is insubstantial."[51] Although it also contains some limiting provisions, the relevant feature of the statute is that it requires disqualification of agency adjudicators in a relatively narrow, and well-covered, set of circumstances—a direct financial interest in the adjudication by the adjudicator or a small group of people close to the adjudicator.[52]

2. Ethics Regulations

OGE has also issued specific ethics regulations that apply to executive branch employees, including but not limited to agency adjudicators. The OGE regulation that most directly applies to recusal of administrative adjudicators can be found at 5 C.F.R. § 2635.502 ("section 502" or "§ 502"). Section 502(a) states that an employee "should not participate" in a matter where the employee knows *either* that they have a direct financial interest in the matter *or* that a person

[48] Recusal's role in promoting public confidence in the integrity of agency adjudication is more of an institutional, rather than an ethical, benefit.

[49] Sections 203 and 205 of Title 18 also outline conflicts of interest that could lead to disqualification or recusal, but the subject matter of those sections—prohibiting "Federal employees from representing private interests before the Government"—are less likely to affect adjudicators, who are generally in a deciding, rather than a representational role, in agency adjudications. OFFICE OF GOVERNMENT ETHICS, REPORT TO THE PRESIDENT AND TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 2 (2006) (OGE Report), https://www.oge.gov/web/oge.nsf/Legal%20Interpretation/2992B018CA57C5B985257E96006A91E8/$FILE/Report%20to%20the%20President%20and%20Congress%20on%20Ethics.pdf.

[50] *Id.* at 28.

[51] *Id.* at 29.

[52] The statute requires that the employee have knowledge of the disqualifying financial interest. It also permits employees to seek waivers from the official who appointed them, and allows OGE to promulgate regulatory exemptions for classes of financial interest deemed too remote or inconsequential to merit disqualification. *Id.* (discussing 18 U.S.C. §208(a), (b)).

with whom the employee "has a covered relationship is or represents a party" *and* the "circumstances would cause a reasonable person . . . to question his impartiality in the matter."

Section 502(a)'s standard is not designed specifically for adjudicators presiding over evidentiary hearings, and as such does not take into account the full range of issues that can arise in that quasi-judicial setting. The objective nature of the test in § 502(a) is analogous to the broad appearance standard in the federal recusal statute and the model codes mentioned above, but it is substantively limited to appearances resulting from financial interests and covered relationships.[53] Section 502(a) is further limited by its suggestive ("should not participate"), rather than mandatory, language.

Finally, § 502(a)(2) allows for an employee to seek advice on whether he should participate in a given matter if "circumstances other than those specifically described in this section would raise a question regarding his impartiality." This language could certainly be used to trigger recusals in a wider range of cases than the language in § 502(a), but it could only do so at the behest of the recused employee, and even then is only suggestive. The purely voluntary nature of § 502(a)(2) makes it an inadequate substitute for mandatory, agency-specific recusal standards because relying on an employee's judgment to bring about his own recusal does not instill the same measure of public confidence in the integrity of the proceeding.

In addition to § 502, OGE can work with agencies to promulgate any supplementary regulations that the agency deems are "necessary and appropriate . . . to fulfill the purposes" of the existing OGE regulations.[54] Supplemental regulations could be a useful vehicle for adopting agency-specific recusal standards, but an ACUS review of the current list of supplemental regulations did not reveal any supplemental regulations pertaining specifically to agency adjudicators, let alone to administrative recusal.[55]

3. General Principles

OGE has also promulgated a list of "14 General Principles" that, it explains, "apply to every employee and may form the basis for the standards contained in this part."[56] It goes on to explain that where a situation is not covered by a specific ethical standard, "employees shall apply the principles . . . in determining whether their conduct is proper."[57]

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[53] The scope of covered relationships that could trigger disqualification is limited largely to financial/employment and familial relationships. 5 C.F.R. § 2630.502(b)(1)(i)-(v).
[54] *See* 5 C.F.R. § 2635.05.
[55] For a more detailed discussion of the reasons for and against using OGE regulations to address agency-specific recusal questions, see Part V, *infra*.
[56] OFFICE OF GOVERNMENT ETHICS, 14 GENERAL PRINCIPLES, https://www.oge.gov/web/oge.nsf/0/73636c89fb0928db8525804b005605a5/$file/14%20general%20priniciples.pdf.
[57] *Id.*

Principle 14 refers to employees creating an appearance of impropriety, and on that basis could be seen as supporting a broader approach to agency recusal than that articulated in § 502. The text of Principle 14, however, stops short of opening the door to a wide-ranging appearance standard by being both aspirational and tethered to existing law. It states that "employees shall *endeavor* to avoid . . . creating the appearance that they are violating the law or ethical standards *set forth in this part*."[58] Although the principle's focus on appearances may be a bit broader than § 502, it is tethered too closely to the substantive provision of that section to meaningfully expand recusal requirements for agency adjudicators.

E. Administrative Recusal Statutes and Regulations

Unlike the federal recusal statute and OGE regulations, there are statutory and regulatory standards that are specifically directed at agency adjudicators.

1. The APA

Section 556(b) of the Administrative Procedure Act (APA) requires that evidentiary hearings under the APA (what is traditionally referred to as "formal adjudication") "shall be conducted in an impartial manner." The Asimow Study identifies the various forms of bias that § 556(b) is designed to prevent—financial interests, personal animus, and prejudgment of adjudicative facts—and makes a persuasive case for why agencies should consider promulgating recusal regulations to prevent these types of bias from affecting their adjudications.[59] ACUS recommendation 2016-4 adopts the Asimow Study's suggestion that the three types of bias targeted by § 556(b) should be prohibited in agency-specific procedural regulations.[60]

There are two reasons why § 556(b)'s bias standard does not occupy the entire field of administrative recusal. First, it by definition only applies to adjudicators governed by §§ 556 and 557 of the APA, which represent only one portion of the adjudicators included in this study.[61] Second, it does not address appearances of bias or partiality that could affect public perception, even if those appearances do not in fact skew the outcome of the adjudication. While the reasonable appearance standard may not be as readily applied to agency adjudication as to federal courts, some consideration of the impact of adjudicators' conduct on public confidence in administrative adjudication may be not only appropriate, but also beneficial.

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[58] *Id*. at Principle 14 (emphasis added).
[59] *See* Asimow Study, *supra* note 6, at 23.
[60] *See* Recommendation 2016-4, adopted Dec. 13, 2016, https://www.acus.gov/sites/default/files/documents/informal-agency-adjudication-recommendation-final.pdf.
[61] It is true that recommendation 2016-4 states that those same bias standards should be applied to non-ALJ adjudication, but this does not amount to a statutory standard for purposes of outlining the existing landscape of administrative recusal.

2. Agency-Specific Regulations

Notwithstanding the effects of due process, the federal recusal statute, model codes, various ethics provisions, and the APA, some agencies have still taken it upon themselves to establish their own recusal standards. The very existence of such standards makes two important points. First, at least some agencies believe that their adjudicators' recusal practices are not definitively governed by external sources of law or policy, *i.e.* there is a gap in administrative recusal law that needed filling. Second, the choice by some agencies to include the reasonable appearance standard in their recusal regulations shows that public confidence in the integrity of their adjudications is important to the agency and worth protecting through recusal.

In terms of the specific recusal standards adopted by individual agencies, the available evidence at this point is largely anecdotal. The Merit Systems Protection Board has promulgated a regulation requiring recusal "on the basis of personal bias or other disqualification,"[62] but has also referred to the federal recusal statute's reasonable appearance standard when reviewing an adjudicator's denial of a party's motion to recuse.[63] Other agencies have limited recusal standards to situations involving an adjudicator's financial interest or personal relationship with a party;[64] findings of actual or apparent adjudicator bias;[65] generic determinations like an adjudicator "should be disqualified";[66] and violations of the "Code of Judicial Conduct," which includes the reasonable appearance standard.[67]

The Social Security Administration (SSA) has among the most developed set of recusal standards. It has adopted different standards for different adjudicators, some of which are regulatory and some of which are contained in sub-regulatory guidance documents. The SSA's recusal practices for ALJs are governed by regulation. Recusal is required when an ALJ "is prejudiced or partial with respect to any party or has any interest in the matter pending for decision."[68] Its Program Operations Manual System (POMS) contains agency guidance requiring recusal of Disability Hearing Officers (DHOs). The POMS requires DHOs to recuse when they have sufficient familiarity with the participants in the proceedings that a reasonable observer "would perceive a substantial likelihood that the DHO cannot make an impartial decision."[69] According to the agency, it is currently developing guidance on recusal of appellate-level officers that will be at least procedurally different from its other recusal standards.

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[62] 5 C.F.R. § 1201.42(a).
[63] *See* Shoaf v. Department of Agriculture, 97 M.S.P.R. 68, 73 (2004).
[64] *See* 40 C.F.R. § 164.40(a) (EPA); 7 C.F.R. 47.11 (Agriculture).
[65] *See* Asimow Study, *supra* note 6, at 53 (citing 29 C.F.R. § 1610(h) and EEOC Handbook for Administrative Judges, Ch. 7H).
[66] 10 C.F.R. § 2.313 (Nuclear Regulatory Commission).
[67] *See* 43 C.F.R. § 4.1122 (Interior); ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 2, Rule 2.11 (2011), https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/model_code_of_judicial_conduct_canon_2/rule2_11disqualification.html.
[68] 20 CFR §§ 404.940, 416.1440.
[69] SOCIAL SECURITY ADMINISTRATION, PROGRAM OPERATIONS MANUAL SYSTEM (POMS) DI 33015.045A.

This snapshot of existing agency regulations represents only a small portion of the agencies that employ the category of adjudicators targeted by this study. Based on the Asimow Study and the Barnett et al. Study, both of which investigated a subset of the adjudicators included here, it is clear that many of the agency adjudicators considered for this report either do not require recusal at all or do not rely on regulatory standards to do so.[70] There is still more work to do to accurately map the landscape of agency recusal regulations,[71] but suffice to say that neither the existence of recusal regulations, nor their content, demonstrate consistency of thought or approach to the issue across different agencies.

Despite at least some agencies' apparent interest in treating recusal independently from other ethics provisions, and even in employing the reasonable appearance standard, their approach is far from uniform and demonstrates that additional guidance regarding agency-specific recusal standards could prove useful.

The remaining portions of the report are dedicated to exploring the potential benefits of specific recusal rules, the procedures by which those rules should be adopted and enforced, and some of the structural features that could affect an individual agency's choices about its own approach to recusal.

IV. The Value of Agency-Specific Recusal Standards

The legal provisions and agency practice regarding recusal indicate that well-developed, agency-specific recusal rules could benefit agency adjudication, both by protecting litigants from biased decision makers and by advancing public confidence in the integrity of the adjudicative process. Those rules should be published in the Federal Register and Code of Federal Regulations to provide notice to the parties and the general public that the agency is concerned with proceedings that are fair and impartial and that appear so to the reasonable observer.[72] Publication also makes it easier for parties to enforce the recusal standards,[73] which further serves the goals of protecting the parties and promoting public confidence in the proceedings.

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[70] *See, e.g.*, Barnett et al. Study, *supra* note 7, at 49 (finding that less than half of the non-ALJ types identified in that study were subject to recusal regulations, according to their agencies, and that more than a third of the non-ALJs that were required to recuse based their recusal decisions on agency custom.)

[71] The ongoing study seeks, among other things, to catalog the existing landscape of adjudicative recusal standards for use in a follow-up report regarding best practices in developing agency-specific recusal standards.

[72] ACUS has an ongoing project on the Public Availability of Adjudication Rules, see https://www.acus.gov/research-projects/public-availability-adjudication-rules, and has published a memorandum describing the project. *See* Memorandum from Todd Phillips, Attorney Advisor, Administrative Conference of the United States, to Ad Hoc Committee of the Committee on Administration and Management and the Committee on Adjudication, at 4-5 (Sept. 28, 2018) (discussing publication of adjudication rules), https://www.acus.gov/sites/default/files/documents/Memorandum%20-%20Public%20Availability%20of%20Adjudication%20Rules.pdf.

[73] *See infra* Part V. for a discussion of private causes of action under agency-specific recusal regulations.

A. Dealing with Actual or Probable Bias

A combination of due process protections, APA impartiality requirements, and OGE ethical protections are relatively effective at checking actual adjudicator bias and, in many cases, at preventing a reasonable probability of such bias. As the Asimow Study suggested, agencies should continue to be vigilant, however, in promulgating rules to protect parties from biased adjudicators.[74] The Supreme Court has made clear that "most matters relating to judicial disqualification [do] not rise to a constitutional level,"[75] and the APA's impartiality requirement does not apply to the multitude of adjudicators who fall outside the statute. Moreover, although OGE's ethical rules apply to non-ALJ adjudicators, they focus primarily on financial and relational conflicts of interest; they do not directly address issues such as personal animus or prejudgment. Agency-specific recusal rules could be helpful in ensuring that all of the forms of bias targeted by both the APA and OGE are addressed for non-APA adjudicators.[76]

B. The Appearance of Impartiality

Agency-specific recusal regulations stand to benefit agency adjudication most clearly through their role in promoting public confidence in the integrity of adjudicative proceedings. There is good reason to believe that agencies already take the appearance of impartiality very seriously when conducting adjudications, and there is likewise good reason to believe that agency adjudication is being conducted in a fair and impartial manner. Appearances to the contrary could jeopardize the agency's reputation and effectiveness by conveying inaccurate negative information about adjudication.

Current legal restrictions on agency adjudication do not require that appearances be taken into account when deciding recusal questions. Due process is focused on the probability of actual bias in a reasonable judge. The federal recusal statute and model codes offer a broad reasonable appearance standard, but the statute does not apply to administrative adjudicators and the codes are not self-enforcing and have not been adopted by most agencies. Even when they do mention appearances, government ethics provisions are narrowly tailored to financial and relational conflicts, and the APA is limited to ALJ bias.

[74] *See* Asimow Study, *supra* note 6, at 23.
[75] *Caperton*, 556 U.S. at 876 (quoting FTC v. Cement Inst., 333 U.S. 683, 702 (1948)).
[76] OGE's rules also do not provide for a private cause of action; enforcement is dependent on an agency's ethics official being notified of the potential problem and taking action. This is notably different from traditional recusal enforcement—and ostensibly from enforcement of agency-specific recusal regulations—and thus should be taken into account by agencies when formulating their own policies. The reason for favoring a private cause of action in recusal is developed in more detail in Part V., *infra*.

There is thus a gap in the recusal safety net when it comes to public perception of agency adjudication. Agencies have good reasons to try to fill that gap with agency-specific regulations designed to minimize situations in which an adjudicator's impartiality might reasonably be questioned. First, agencies are already concerned about how their adjudications are perceived, and often take internal, unpublicized measures to project the appearance of impartiality. Recusal regulations would be more permanent and enforceable expressions of that concern. Second, and related, is the idea that transparency and clarity amplify and broaden the message. In an increasingly polarized political environment, public statements like regulations in support of impartiality—and the appearance thereof—can be a powerful countervailing force to increasing cynicism about, and suspicion of, our public institutions. Third, promulgating recusal regulations can help preempt concerns about integrity before they arise. Finally, a broader, appearance-focused approach to recusal would be consistent with the prevailing view of the legal profession that its recusal canons should apply to agency adjudicators, including ALJs.

1. Additional Factors to Consider

While there is value to agencies promulgating recusal regulations that seek to promote public confidence in their adjudicative systems, each agency will need to consider carefully how to do so without unduly compromising agency effectiveness. It is likely unreasonable, for example, to apply wholesale the federal recusal statute's reasonable appearance standard to agencies. Unlike federal judges, agency adjudicators by definition have a relationship with a party (the agency) that frequently appears before them. They also have—particularly in the context of agency appellate bodies and agency heads—a policymaking function that requires adjudicators to make value judgments that a federal judge would not be asked to make.[77] Each agency should thus evaluate its own adjudicative system and design a regulation that balances the importance of reassuring the public about the integrity of its proceedings against the need for effective and efficient adjudication.

Toward that end, the following variables are useful guideposts for agencies designing recusal standards aimed at preserving their appearance of impartiality:

- The degree of adjudicator independence. ALJs are often more carefully insulated from agency influence than other adjudicators; does the presence of a non-ALJ create a stronger appearance of partiality or bias? By contrast, the potential for an appearance of impartiality is necessarily less in cases where an agency's adjudications are presided over by a separate agency, such as in the relationship between OSHA and the Occupational Safety and Health Review Commission.

[77] *See, e.g.*, Phyllis E. Bernard, *The Administrative Law Judge As A Bridge Between Law And Culture*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 1, 13 ("Despite intermittent expressions of caution--even of doubt and denial--we still turn to ALJs to identify and articulate the nuances of agency policy.").

Consideration of these factors may better inform an agency as to precisely how to design an appearance-based recusal standard.

- The regularity of the agency appearing as a party. Agencies cannot adopt reasonable appearance standards that require recusal solely due to the agency appearing as a party in the adjudication, but agencies who regularly appear in evidentiary hearings before their own adjudicators should balance that fact against their interest in promoting a reasonable appearance of impartiality.

- Nature of the adjudicative body or proceeding. Is the evidentiary hearing part of an enforcement proceeding? Enforcement proceedings are inherently problematic from an appearance standpoint because the agency has a clear interest in the outcome and is appearing before one of its employees. On the other hand, a broad appearance standard could prevent basically *any* agency adjudicator from presiding over an enforcement proceeding, making it difficult to pursue enforcement at all. Agencies with a high percentage of enforcement hearings may thus be forced to balance the reasonable appearance issue differently than other agencies.

- The agency's adjudicative caseload and capacity. Agencies with large caseloads and adjudicative staffs may find it easier to impose stricter recusal standards—like a version of the reasonable appearance standard—due to the relative ease of replacing a recused adjudicator. Smaller agencies or those with fewer adjudicators run the risk of strict recusal standards hindering the agency's ability to issue decisions due to a lack of available adjudicators in a given case.

- The agency's public profile. Agencies who administer controversial or widely popular programs may face greater public scrutiny over their activities and, in turn, find greater cause for appearance-based recusal than less visible agencies.

  (It is important to remember that this factor does not address actual bias or partiality. Actual bias or partiality are unacceptable regardless of whether they are evident to a reasonable, outside observer. An adjudicator who is biased against a particular religious group, for instance, may not reveal that bias publicly and thus could be recused for actual bias, but not the appearance thereof. The opposite is also true, say for a member of a segregated club who is not personally biased; they could be recused for the appearance of racial bias, but not for actual bias. When considering recusal based on an *appearance* of partiality, the degree of public interest in the agency's activity—whether anyone is watching—could be relevant, whereas it cannot (and should not) be part of recusal based on actual bias.)

- The adjudicator is part of a multi-member body. Recusal of a single adjudicator presents problems if replacements are not readily available, but recusal of one of several members of an adjudicative body raises concerns about the resulting makeup of that body. Concerns about quorum, the administrative complications of tied votes, and preserving the deliberative nature of multi-member bodies may thus counsel in favor of more flexible recusal standards. Agencies should be aware of that potential consequence when setting appearance-based recusal standards.

- The adjudication is an appellate proceeding or an initial determination. Appellate proceedings may raise different public perception concerns for several reasons. First, they are likely to be of greater public interest as the proceeding rises through the agency decision-making hierarchy. Second, and by contrast, an appellate tribunal may be limited in terms of its standard of review or the factual record presented to it, such that public expectations are different than they would be of an initial decision maker. Finally, where the appellate reviewer is also the agency head, appearances may be of greater concern due to the heightened scrutiny and responsibility of agency leaders.

V. RECUSAL PROCEDURES

Agency-specific recusal statutes should also contain procedural requirements that meet the agency's particular needs and advance its goals of preventing bias and promoting public confidence in its adjudications.

As mentioned above, agency-specific recusal regulations should be published in the Code of Federal Regulations and the Federal Register. This will increase public awareness of the prevailing standards and, with regard to public perception, help develop public confidence in an agency's integrity before the public has any reason to question it.

Agency recusal standards should include a right for parties to the adjudication to petition for recusal . The Asimow Study argued that peremptory challenges to adjudicators (requiring recusal without any substantive demonstration of bias or some other disqualifying feature) "could be difficult and costly for agencies to implement" and therefore should not be part of adjudicatory best practices.[78] I agree.

A party's petition for recusal is different from a peremptory challenge in that it would still require a showing that the adjudicator had met the regulatory standard for recusal. It is also different from current procedures under federal ethics regulations because it does not require a third-party ethics official to initiate the recusal proceeding. A petition process under a recusal regulation would not preclude the agency from pursuing an ethics complaint (and thus

[78] Asimow Study, *supra* note 6, at 23.

maintaining control over the conduct of its employees), but would allow a party who is concerned about the adjudicator's fitness to file a petition to recuse the adjudicator in the proceeding. Since the parties and the adjudicator are most likely to be familiar with the details of their own adjudications, allowing a right to petition for recusal streamlines the process and puts parties in more immediate control of their fate in instances where they are concerned about the integrity of the proceeding.

Recusal petitions (unlike ethics complaints) should be heard in the first instance by the adjudicator who is being asked to recuse. This would bring administrative recusal procedurally in line with judicial recusal, which requires presiding judges initially to decide their own recusal issues. The benefit of such an approach is that the judge or adjudicator in question is very often in the best position to know the facts of the situation and to be able to remedy them by removing him or herself from the case. Having adjudicators decide their own recusal petitions also creates a sense of checks and balances between parties and the bench—it discourages parties from filing frivolous or strategic recusal motions, and pressures adjudicators to demonstrate their own commitment to the integrity of the proceedings by resolving the issue thoroughly and impartially.

Recusal decisions should be subject to appeal within the agency and then to judicial review. Parties should have a right to appeal an initial decision not to recuse. The possibility of appeal generally will require the adjudicator facing recusal to build a record in support of his or her decision. The presence of a record promotes transparency and accountability, and provides a check against self-serving recusal decisions by the presiding adjudicator. Appeal within the agency is faster and more efficient than judicial review, and can be more searching as well, if agencies chose to permit the same *de novo* review of factual and legal conclusions in recusal decisions as the APA does for an ALJ's initial decision.[79]

Agencies must determine if there should be an intermediate appellate forum for recusal decisions or if they should be appealed directly to agency heads. Due to the potentially large number of recusal issues in some agencies, requiring agency heads to review each recusal issue arising anywhere within the agency's adjudicative system would be too burdensome. Appeal to an intermediate body is preferable, with a possibility of discretionary review of the intermediate appellate body by agency heads. If the initial adjudicator is only reviewable by the head of an agency, an intermediate review body could be formed from among the adjudicator's peers (a panel of fellow ALJs for an ALJ recusal issue, for example). For recusal issues arising for one member of a multi-member adjudicative body, initial review of the adjudicator's decision should be performed by the remaining members of the body, especially if the multi-member body either is the agency itself or is directly responsible to the agency head.

[79] 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision.").

Adjudicators should provide, and agencies should publish, written explanations of adjudicators' recusal decisions. Similarly, appellate reviewers of adjudicators' recusal decisions should provide, and agencies should publish, written explanations of the appellate reviewers' decisions. Agencies should also seek to include the agency official responsible for assigning adjudicators in any intermediate appellate review of recusal matters. This would allow agencies to retain the right to assign adjudicators to individual cases and would ensure that the reviewing authority would understand the institutional consequences of recusal and reassignment in a given proceeding.

Agencies will be faced with a determination as to whether recusal issues will be appealable on an interlocutory basis. The issues raised in the recusal context are the same for any interlocutory review issue—the cost of delaying the adjudication on the merits in order to resolve a recusal question versus the benefit of avoiding redundant proceedings where recusal is found to be necessary after the initial adjudication is completed. Agencies with large adjudicatory dockets may be less inclined to permit interlocutory review for fear of overwhelming appellate reviewers and delaying large numbers of active adjudications. Agencies with smaller dockets will likely have fewer recusal issues to review and therefore whether they are available on an interlocutory basis may have less of an overall impact on agency effectiveness.

Judicial review is important as a check against the appearance of self-serving behavior on the part of the agency. For reasons of efficiency and expertise, some measure of judicial deference to agency decisions would be advisable. If agencies promulgate specific recusal regulations, then absent an explicit prescription in the regulation itself requiring a different standard of review, judges would apply *Auer* deference to agency recusal decisions.[80] If agencies provide for internal agency appeals of recusal decisions, then judicial deference to those appellate decisions promotes a proper balance of efficiency and respect for agency expertise with judges' power to correct errors. If an agency does not provide for internal appeal of an adjudicator's recusal determination, then agencies should consider permitting reviewing judges to consider those decisions *de novo*.

VI. Recommended Best Practices

Recusal of agency adjudicators that preside over legally required evidentiary hearings serves two important purposes. It protects litigants from biased decision makers and it promotes public confidence in the administrative process by demonstrating to outside observers that the agency values impartiality.

[80] *See* Auer v. Robbins, 519 U.S. 452, 461 (1992) (finding the Secretary of Labor's interpretation of his own regulation "controlling unless 'plainly erroneous or inconsistent with the regulation'").

The current legal framework around recusal of agency adjudicators is a collection of sources—only some of which are legally binding—that either do not fully address both of recusal's goals or do so only for a subset of agency adjudicators.

Agencies should fill the gap in the existing framework by promulgating agency-specific recusal regulations. Those regulations should be tailored to best accommodate the specific features of the agency's adjudicative proceedings and its institutional needs, particularly as they pertain to both promoting the actual and perceived integrity of agency adjudications and maximizing the effectiveness and efficiency of those proceedings.

Common features of agency-specific recusal regulations should include:

1. A provision requiring recusal in instances of bias, as defined in paragraph 5 of ACUS Recommendation 2016-4 and the Asimow Study;

2. A provision requiring recusal in at least some instances where the adjudicator's impartiality might reasonably be questioned; and

3. Provisions outlining the procedures by which recusal issues will be resolved, including a right of the parties to petition for recusal, an initial determination by the presiding adjudicator, intra-agency appeal, and judicial review.