



## Recusal Rules for Administrative Adjudicators

### Committee on Adjudication

#### Proposed Recommendation for Committee | November 6, 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 agency adjudication. Recusal  
3 serves two important purposes. First, it ensures that parties to an adjudicative proceeding have  
4 their 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 recusal promotes the legitimacy of the adjudicative system as a whole by creating the appearance  
7 of impartiality; the recusal of adjudicators who may appear partial inspires public confidence in  
8 administrative adjudication in ways that a focus on actual bias against the parties themselves  
9 cannot.<sup>1</sup> Appearance-based recusal standards are in general not constitutionally required, but  
10 have been codified in judicial recusal statutes as well as model codes.<sup>2</sup> Unlike with judicial  
11 recusal, there is no uniformity regarding how agencies approach appearance-based recusal in the  
12 context of adjudication.

13           In Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative*  
14 *Procedure Act*, the Conference recommended that agencies require adjudicator recusal in the  
15 case of actual bias.<sup>3</sup> This recommendation builds upon Recommendation 2016-4 by addressing  
16 the need for agency-specific recusal regulations that consider the full range of actual and

---

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

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

<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).

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

23 A comprehensive set of recusal rules addresses instances of actual and apparent bias  
24 within the covered adjudications. Recusal rules can be used to protect litigants and promote  
25 public 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 but that also 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  
30 below. These factors are for agencies to consider in fashioning their own recusal regulations, and  
31 the parenthetical explanations accompanying them show how different features of an agency’s  
32 administrative scheme may affect the stringency of those regulations.

33 Recusal rules also permit the parties to petition their adjudicator to recuse in the event he  
34 or she does not elect to do so in the initial instance. This right of petition promotes more  
35 informed and accountable recusal decisions. Recusal rules can further provide for intra-agency  
36 appeal of those decisions. 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 intra-agency appeal increases the reliability and accuracy of  
39 recusal determinations and could help ensure the consistency and effectiveness of the work  
40 assignment process. Finally, recusal rules could provide for the publication of recusal

---

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

41 determinations, which increases transparency and thus the appearance of impartiality in recusal  
42 decisions themselves.

43 It is important to distinguish agency-specific recusal rules from the ethics rules  
44 promulgated by the Office of Government Ethics (OGE).<sup>5</sup> As an initial matter, the two are not  
45 mutually exclusive. Even where ethical and recusal regulations overlap, it is entirely possible and  
46 coherent to enforce both. This is due, at least in part, to the differences in scope, form, and  
47 enforcement mechanisms between the two. Ethics rules focus on preventing conflicts of interest  
48 among executive branch employees. Recusal rules focus on ensuring the integrity and perceived  
49 integrity of adjudicative proceedings. Recusal rules are thus broader in focus and narrower in  
50 application than ethics rules. In this light, ethics rules tend to be very precise, as agency  
51 employees need clear guidance to ensure that they behave ethically. Recusal rules, by contrast,  
52 tend to be much more open-ended and standard-like, since they are focused on maintaining both  
53 actual impartiality and the *appearance of* impartiality of adjudicative proceedings, which may be  
54 compromised by conduct that would not constitute a breach of any ethics rule, such as  
55 advocating a particular policy in a speech before a professional association. The enforcement  
56 mechanism is also different. A potential ethics issue is investigated privately inside the agency,  
57 whereas the recusal process is public and can be initiated by a party to the adjudication if an  
58 adjudicator does not recuse him or herself in the first instance.

59 An agency that wishes to supplement its ethics rules should, of course, work through the  
60 OGE supplemental process.<sup>6</sup> Under that process, agencies, with the concurrence of OGE, may  
61 enact ethics rules that supplement existing OGE rules. This recommendation focuses exclusively  
62 on the separate body of recusal rules an agency may wish to adopt to preserve the appearance of  
63 impartiality in its adjudicative proceedings.

---

<sup>5</sup> The Ethics in Government Act of 1978 (P.L. 95-521) established the Office of Government Ethics to provide “overall direction of executive branch policies related to preventing conflicts of interest on the part of officers and employees of any executive agency.” OGE’s *Standards of Ethical Conduct for Employees of the Executive Branch* are available at 5 C.F.R. Part 2635.

<sup>6</sup> See *Standards of Ethical Conduct for Employees of the Executive Branch*, 5 C.F.R. § 2635.105.

## RECOMMENDATION

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

- 93 of necessary adjudicators, then more flexible appearance-based recusal standards  
94 may be necessary);
- 95 d. Whether a single adjudicator renders a decision in proceedings, or whether  
96 multiple adjudicators render a decision as a whole (concerns about quorum, the  
97 administrative complications of tied votes, and preserving the deliberative nature  
98 of multi-member bodies may counsel in favor of more flexible appearance-based  
99 recusal standards); and
- 100 e. Whether the adjudicator acts in a reviewing/appellate capacity (limitations on  
101 appellate standards of review could reduce the need for strict appearance-based  
102 recusal standards, but the greater authority of the reviewer could warrant stronger  
103 appearance-based recusal standards).
- 104 4. Agency recusal rules should also include procedural provisions for agencies to follow in  
105 determining when recusal is appropriate. At a minimum, those provisions should include  
106 the right of petition for parties seeking recusal, initial determination by the presiding  
107 adjudicator, and intra-agency appeal.

108 *Note: The following paragraphs are intended for consideration by the Committee as additions to*  
109 *Paragraph 4 above. They were not part of the Recommendations which were approved by the*  
110 *Committee at its meeting on October 24, 2018:*

111 **Adjudicators should provide, and agencies should publish, written explanations of**  
112 **adjudicators' recusal decisions. Similarly, appellate reviewers of adjudicators' recusal**  
113 **decisions should provide, and agencies should publish, written explanations of the**  
114 **appellate reviewers' decisions.**

115

116 **In cases where an initial recusal decision involves an adjudicator whose decisions are**  
117 **only reviewable by an agency head, agencies should permit appellate review of that**  
118 **adjudicator's recusal decision by other agency adjudicators with the same level of**  
119 **authority within the agency's adjudication structure.**