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An Ethical Gap in Agency Adjudication

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An Ethical Gap in Agency Adjudication

LOUIS J. VIRELLI III[†]

ABSTRACT

There is an ongoing crisis of confidence in American government. Accusations of incompetence and political self-dealing dominate news cycles as public institutions seek to combat—with varying degrees of success—the public health and economic consequences of a global pandemic. Highlighted in this struggle is the larger issue of the importance of integrity to 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

[†]Professor of Law, Stetson University College of Law. This Article originated as a report to the Administrative Conference of the United States (ACUS or “the Conference”). LOUIS J. VIRELLI III, RECUSAL RULES FOR ADMINISTRATIVE ADJUDICATORS (2018), <https://www.acus.gov/sites/default/files/documents/Recusal%20Rules%20for%20Administrative%20Adjudicators%20-%20Final%20Report%2011.30.2018.pdf>. I am grateful to the staff at ACUS, in particular the members of ACUS’s Committee on Adjudication, for their helpful feedback on that report. This Article further develops the ideas and conclusions in that report and offers some additional normative assessments. As with the initial report, the opinions, views, and recommendations expressed herein are those of the author and do not necessarily reflect those of the members of the Conference or its committees, except where formal recommendations of the Conference are cited.

integrity of all manner of quasi-judicial activity, including agency adjudication. Yet the existing landscape of agency recusal standards exhibits gaps in coverage that potentially threaten the efficacy of, and public confidence in, that adjudication. This Article, which is based on a report for the Administrative Conference of the United States, is the first to identify the full range of recusal standards that impact agency adjudicators and to evaluate their effectiveness in light of recusal's dual purposes of promoting fairness to litigants and public confidence in the integrity of the proceedings. It concludes that the best way to fill the ethical gap in agency adjudication is through agency-specific recusal regulations that seek to preserve both the reliability and effectiveness of agency adjudication.

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INTRODUCTION

The administrative state, and administrative adjudication in particular, are under siege. Public confidence in government institutions is at historic lows, and evidence from popular political discourse suggests that public institutions—and administrative agencies specifically—are viewed skeptically by both sides of the political aisle.¹

For proponents of active, independent agency adjudication, agencies are becoming too beholden to the White House or otherwise constrained in their substantive authority.² During the last year of the Trump Administration, the White House Office of Management and Budget published a request for information related to ideas for “[p]rotecting Americans against the unjust or arbitrary exercise of government power” through agency adjudication;³ and the Department of Justice (DOJ) began strongly advocating for the courts to require “at will” removal of agency adjudicators, thereby limiting those adjudicators’ independence from political, that is presidential, influence.⁴ The Supreme Court accepted DOJ’s invitation, holding the structure of two independent agencies unconstitutional

1. AMY E. LERMAN, GOOD ENOUGH FOR GOVERNMENT WORK: THE PUBLIC REPUTATION CRISIS IN AMERICA (AND WHAT WE CAN DO TO FIX IT) 4 (2019) (“[T]he tendency of Americans to associate ‘public’ with ineffective, inefficient, and low-quality services . . . is a central feature of our modern political culture.”).

2. See Peter Shane, *Trump’s Quiet Power Grab*, THE ATLANTIC (Feb. 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/trumps-quiet-power-grab/607087> (“The Trump administration has launched an obscure but dangerous effort to undermine this system, and to dictate both the appropriate circumstances for commencing adjudication and the rules that govern how disputes with agencies are resolved.”).

3. Improving and Reforming Regulatory Enforcement and Adjudication, 85 Fed. Reg. 5483, 5483 (Jan. 30, 2020).

4. See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2195 (2020); *Lucia v. SEC*, 138 S. Ct. 2044, 2050 n.1 (2018) (neglecting to decide the issue, put forth by the government for the first time on appeal to the Supreme Court, whether removal protections for administrative law judges unconstitutionally infringe on the President’s removal power under Article II of the Constitution).

because they were headed by single directors who were protected from removal by the president,⁵ and another because agency adjudicators' decisions were not automatically reviewable by a politically accountable actor.⁶

For advocates of smaller or less active government, agencies are bureaucratic behemoths, out to preserve their own longevity and significance as much as pursue the public good.⁷ A 2017 report by the Pew Research Center found that “the overall level of trust in government remains near historic lows; just 20% say they trust the government to do what’s right always or most of the time,” and a similar survey in 2021 revealed that “[o]nly about one-quarter of Americans today say they can trust the government in Washington to do what is right ‘just about always’ (2%) or ‘most of the time’ (22%).”⁸ The recent controversy over whether the Chair of

5. See *Seila Law*, 140 S. Ct. at 2192 (holding that statutory for cause removal protection for the Director of the independent Consumer Financial Protection Bureau is incompatible with Article II’s grant of removal authority to the President); *Collins v. Yellen*, 141 S. Ct. 1761, 1783–84 (2021) (relying on *Seila Law* in holding that the structure of the Federal Housing Finance Agency, which includes a single director removable only for cause, was unconstitutional because it “lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control”).

6. See *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987–88 (2021) (holding the appointment of administrative patent judges (APJs) unconstitutional because they are principal officers appointed by the Secretary of Commerce, and remedying the constitutional infirmity by invalidating the statutory provision prohibiting review of APJ decisions by the director of the Patent and Trademark Appeals Board, who is appointed by the President with the advice and consent of the Senate).

7. See PHILIP WALLACH, BROOKINGS INST., *THE ADMINISTRATIVE STATE’S LEGITIMACY CRISIS 1* (Elizabeth Sablich ed., 2016), https://www.brookings.edu/wp-content/uploads/2016/07/Administrative-state-legitimacy-crisis_FINAL.pdf (“People begin to doubt not only the recent performance of their governments, but their basic legitimacy: their claim to be uniquely representative institutions working on the public’s behalf.”); *id.* at 5 (“[A] kind of institutionalized anti-institutionalism now looms larger in American politics than at any time in living memory The administrative state—generically referred to as ‘the bureaucracy’ . . . often takes on a focal role in discussions of the American government’s legitimacy.”).

8. PEW RSCH. CTR., *PUBLIC TRUST IN GOVERNMENT REMAINS NEAR HISTORIC*

the Federal Trade Commission, Lina Khan, should recuse herself from antitrust cases involving Amazon and Facebook reflects this cynicism about the motives and impartiality of administrators.⁹

Despite any controversy over their contributions, the work of administrative agencies remains prevalent and critically important to achieving the Nation's policy goals. This is most apparent during national crises—like the attacks of 9/11 and the COVID-19 pandemic—but is also true in more ordinary times, as issues like food and workplace safety, unemployment insurance, and healthcare coverage have become part and parcel of our political culture. In such an environment—where skepticism abounds yet our reliance on agencies persists—the integrity of agency action is essential to the efficacy and legitimacy of administrative government. Agency credibility alleviates skepticism about the process while producing results that encourage acceptance and compliance.

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. From enforcement proceedings to benefits determinations and grant awards, agency adjudicators make myriad decisions that have profound and personal impacts on our

LOWS AS PARTISAN ATTITUDES SHIFT 1 (2017), <https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2017/05/05-03-17-Trust-release.pdf>; *Public Trust in Government: 1958-2021*, PEW RSCH. CTR. (May 17, 2021), <https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021>.

9. See, e.g., Letter from Four Members of Congress to Mark Zuckerberg, Chief Exec. Officer, Facebook, Inc., and Andy Jassy, Chief Exec. Officer, Amazon Services, Inc. (Aug. 4, 2021), [https://www.warren.senate.gov/imo/media/doc/Letter%20to%20Amazon%20and%20Facebook%20re%20Petitions%20for%20Khan%20Recusal%20\(8.4.21\).pdf](https://www.warren.senate.gov/imo/media/doc/Letter%20to%20Amazon%20and%20Facebook%20re%20Petitions%20for%20Khan%20Recusal%20(8.4.21).pdf); Marcy Gordon, *Facebook Asks Recusal of FTC Head in Antitrust Case Decision*, AP NEWS (July 14, 2021), <https://apnews.com/article/technology-joe-biden-business-government-and-politics-be2dc68dac93003a6df23aaec1614d06> (reporting on Facebook and Amazon's attempts to have Chair Khan recused from ongoing antitrust cases against the companies).

daily lives. Yet those same adjudicators are neither politically accountable for their choices,¹⁰ nor effectively insulated from the political branches like Article III courts.¹¹ As a result, basic notions of administrative legitimacy¹² and due process make the independence and integrity of agency adjudicators critically important to both the effectiveness of, and public confidence in, administrative government. Among the forces that influence the independence and integrity of agency adjudicators,¹³ recusal—the process by which an adjudicator is removed, voluntarily or involuntarily, from a specific proceeding—has the strongest historical pedigree.¹⁴

10. Removal provisions governing adjudicators may make adjudicators more or less accountable to the President or another executive branch official who is in turn accountable to the President. But because adjudicators are not directly elected, they are not directly accountable to the electorate in the same way as members of Congress and the President. Many of them, especially ALJs, also enjoy statutory or regulatory salary and tenure protections that further insulate them from influence by the political branches. *See* 5 U.S.C. § 5372 (setting ALJ salary protections for ALJs); 5 U.S.C. § 7521 (setting ALJ removal protections). *But see* KENT BARNETT, MALIA REDDICK, LOGAN CORNETT & RUSSELL WHEELER, *NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL* 39-59 (2017) (“Barnett et al. Study”) (noting that non-ALJ adjudicators often do not enjoy the same statutory protections as ALJs, and describing some of the protections that do exist for non-ALJs, including separation of functions requirements and prohibitions on ex parte communications).

11. *See* U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”).

12. *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.”).

13. Appointment and removal, congressional oversight, and limits on ex parte contacts all help constrain adjudicators and preserve the integrity of the adjudicative process. Although prohibitions on ex parte contacts may sometimes rely on recusal as a remedy, the two are conceptually distinct. *See* discussion *infra* Part II.

14. 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*

In the judicial context, recusal is as old as courts themselves; 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 the 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.¹⁵

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.¹⁶ Agency recusal is currently governed by government ethics rules, various statutory provisions, and the Due Process Clause. Taken together, this amorphous collection of recusal standards leaves potentially important features of agency integrity unprotected.

The current reality of administrative recusal thus begs several questions. First, would more targeted, agency-specific recusal rules bring more clarity, consistency, and

DISQUALIFICATION OF JUDGES 4 (Banks & Jordan 2d ed. 2007) (“In fact, in modern practice ‘disqualification’ and ‘recusal’ are 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.

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

16. *See generally* 28 U.S.C. § 455 (federal judicial recusal statute).

integrity to administrative adjudication? If so, to what sources of law should agencies look before fashioning 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 Article 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.

This Article concludes that the best way to fill the existing gaps in recusal standards for administrative adjudication 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 inside and outside 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.

Part I outlines the scope of the current project. Part II describes the legal provisions impacting (however indirectly) administrative recusal. Part III analyzes the benefits of agency-specific recusal standards in light of the importance

of administrative legitimacy in adjudication and the twin goals of recusal. Part IV considers how procedural regimes fit into the larger recusal picture, and Part V concludes with some thoughts on best practices for administrative recusal.

I. 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 by Professor Michael Asimow 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).¹⁷ 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).¹⁸ Finally, the largest (and most widely varied) category of agency adjudication is that which does not

17. Type A adjudication is defined in Professor Asimow’s 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”).

18. 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”). *Id.* at 2, 20. 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. BARNETT ET AL., *supra* note 10, at 13. 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 et al. Studies are not directly relevant to the present discussion.

require—yet may permit—an evidentiary hearing.¹⁹

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.²⁰ In connection with the *Evidentiary Hearings Outside the Administrative Procedure Act* project, Administrative Conference attorneys, working with Professor Asimow (the project consultant), created a database containing “information about all of the schemes of Type A and Type B federal agency adjudication” (“Asimow Study”).²¹ Professor Asimow then relied on this information and conducted additional research to “formulate . . . best practices for Type B adjudication.”²² Drawing on the Asimow Study, the ACUS Assembly adopted Recommendation 2016-4, which recommended that agencies promulgate regulations addressing three distinct categories of adjudicator bias: bias resulting from “a. Improper financial or other personal interest in the decision; b. Personal animus against [a party

19. This category is described in the Asimow Study as “Type C” adjudication. ASIMOW, *supra* note 17, at 2.

20. 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 (“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 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 (“Verkuil et al. Study”). PAUL R. VERKUIL ET AL., *THE FEDERAL ADMINISTRATIVE JUDICIARY* (1992). The Verkuil et al. 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, OFF. OF ADMIN. L. JUDGES, *THE FEDERAL ADMINISTRATIVE JUDICIARY THEN AND NOW—A DECADE OF CHANGE 1992–2002*, at 2 (1992).

21. ASIMOW, *supra* note 17, at 2.

22. *Id.* at 4.

or agency attorney]; or c. Prejudgment of the adjudicative facts at issue in the proceeding.”²³ These three instances of bias were included as grounds for recusal of Type B adjudicators.²⁴

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 and suggested best practices for Type B adjudication.²⁵ Of particular interest to this project is the study’s treatment of “non-ALJ . . . oversight, and independence,” which included recusal standards.²⁶ Like the Asimow Study, 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.²⁷ 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 Government Ethics’s] standards . . . govern[ing] the disqualification of federal employees from participating in particular matters due to

23. Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314, 94,315 (Dec. 23, 2016).

24. *See id.*

25. *See* BARNETT ET AL., *supra* note 10, at 11–13. 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. *See supra* note 18 and accompanying text.

26. *Id.* at 2.

27. *Id.* at 67.

the appearance of loss of impartiality.”²⁸

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 clarify and sharpen its scope, this study 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.²⁹ In

28. Admin. Conf. of the U.S., *Administrative Judges Committee on Adjudication Proposed Recommendation* 6–7 (June 14, 2018), https://www.acus.gov/sites/default/files/documents/Proposed%20Recommendation%20for%20Plenary_0.pdf.

29. As the Barnett et al. Study revealed, “we are not aware of any [oral] hearings that the agencies identified that lack an exclusive-record

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 identifying 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 Article 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 Part is to explore the existing landscape of legal and other sources that could potentially affect administrative recusal. Many of those provisions are not targeted at agencies or adjudication, and, 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 Part, there does appear to be a range of adjudicator conduct that could merit recusal yet is not currently regulated—a potential “ethical gap” in agency adjudication.

limitation” BARNETT ET AL., *supra* note 10, at 14.

II. THE “LAW” OF RECUSAL FOR ADMINISTRATIVE ADJUDICATORS

A. *Due Process*

Due process is the lifeblood of adjudication. Although not always easy to define, it is the legitimizing principle for government resolution of disputes between specific parties.³⁰ In that capacity, 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.³¹ 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.³² 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.³³ This includes a range of requirements relating to an adjudicator’s impartiality, from “an absence of actual bias”³⁴ against the parties to the admonitions that “no man

30. See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting) (“Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society.”).

31. See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

32. *Id.* at 334–35.

33. See *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (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))).

34. *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (quoting *Murchison*, 349

can be a judge in his own case”³⁵ 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.³⁶

Just like judicial proceedings, administrative adjudication must satisfy all of these criteria to pass constitutional muster.³⁷ 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, repeatedly invoking the idea that most recusal issues will be the product of legislative discretion.³⁸

In one of its earliest cases directly addressing recusal under the Due Process Clause, the Court in *Tumey v. Ohio* explained that “in determining what due process of law is, under the Fifth or Fourteenth Amendment, the Court must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors.”³⁹ The common law standard at the Founding only mandated recusal in cases of pecuniary interest, and that approach is reflected in the Court’s earliest

U.S. at 136).

35. *Murchison*, 349 U.S. at 136; see also *Caperton*, 556 U.S. at 886 (“[N]o man is allowed to be a judge in his own cause . . .”).

36. *Murchison*, 349 U.S. at 136 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

37. See *Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 385–86 (1908). Due process of course applies to all forms of adjudication, including adjudicative decisions that do not involve evidentiary hearings.

38. See *Caperton*, 556 U.S. at 876 (noting that “most matters relating to judicial disqualification [do] not rise to a constitutional level” (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948))); see also *Tumey*, 273 U.S. at 523 (“All questions of judicial qualification may not involve constitutional validity. Thus, matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion.”).

39. 273 U.S. at 523.

approach to due process recusal.⁴⁰ In *Tumey v. Ohio*, the Court found a due process violation where a mayor tried and convicted a defendant despite the fact that a portion of the defendant's fine remitted to the mayor personally.⁴¹ Some fifty years later, the Court expanded the pecuniary interest prohibition in *Ward v. Village of Monroeville* to include an adjudicator's indirect financial interest.⁴² Like *Tumey*, *Ward* involved a mayor-as-adjudicator in Ohio. But rather than the mayor receiving a portion of the fine for himself, as in *Tumey*, the fine issued by the mayor in *Ward* only benefitted the municipality.⁴³ In the Court's view, a due process violation "may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court."⁴⁴

In addition to financial interest, the Court has applied the Due Process Clause in cases where the adjudicator is facing some other conflict. Roughly thirty years after *Tumey*, the Court returned to due process and recusal in *In re Murchison*.⁴⁵ Under Michigan law, judges could serve as a "one-man grand jury."⁴⁶ In *Murchison*, a Michigan judge serving as a one-person grand jury commanded two witnesses to testify as part of the grand jury proceeding. Suspecting each of the witnesses of perjuring themselves, the judge charged, tried, convicted, and sentenced them both for

40. LOUIS J. VIRELLI III, *DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION* 5 (2016) ("[T]he law of judicial recusal in America around the time of the Founding looked very much like Blackstone's version. The American colonial courts adopted the pecuniary interest standard, which persisted through the ratification of the Constitution and the creation of the lower federal courts.").

41. 273 U.S. at 523.

42. 409 U.S. 57, 60 (1972).

43. *Id.* at 58 ("A major part of village income is derived from the fines, forfeitures, costs, and fees imposed by him in his mayor's court.").

44. *Id.* at 60.

45. *See* 349 U.S. 133 (1955).

46. *Id.* at 133.

contempt. The witnesses objected on due process grounds, claiming that the judge who suspected and charged them of perjury could not also try and convict them of the same charge. Despite the fact that the judge in *Murchison* did not have any pecuniary interest in the outcome, the Court held that it was indeed a violation of the defendants' due process rights to have the same judge charge, try, and convict them.⁴⁷ It explained that due process "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way [justice must satisfy the appearance of justice]."⁴⁸

The Court further developed its conflict-of-interest rationale in *Mayberry v. Pennsylvania*,⁴⁹ another contempt case in which a pro se criminal defendant, Mr. Mayberry, repeatedly "vilified" the presiding judge in open court.⁵⁰ When the same judge charged and found Mr. Mayberry guilty of contempt, Mr. Mayberry objected on due process grounds. The Court held due process required the judge's recusal, mirroring its language in *Murchison* that "justice must satisfy the appearance of justice."⁵¹ *Murchison* and *Mayberry* are important due process cases because they represent a departure from the traditional focus on a judge's pecuniary interest toward a potentially wider range of disqualifying conduct, including conduct that threatens a judge's appearance of impartiality. It is equally important to note, however, that the conflicts experienced by the judges in both cases were rather direct and personal; the Court in *Mayberry* noted that the defendant's "[i]nsults [were] apt to

47. *Id.* at 139.

48. *Id.* at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).

49. 400 U.S. 455, 455-58 (1971).

50. *Id.* at 456, 458 (noting that the defendant called the judge a "hatchet man for the State," "a dirty sonofabitch," and a "stumbling dog," told him to "go to Hell," and asked him, "What are you working for? The prison authorities, you bum?").

51. *Id.* at 465 (quoting *Offutt*, 348 U.S. at 14).

strike ‘at the most vulnerable and human qualities of a judge’s temperament,’” resulting in the judge becoming so “personally embroiled” in the confrontation as to give the appearance of injustice.⁵²

The Court took a similar approach in a case involving an alleged financial interest by a state supreme court justice. In *Aetna Life Insurance Co. v. Lavoie*,⁵³ the Court considered whether the members of the Alabama Supreme Court should be recused from deciding issues of state insurance law that could impact two suits in which the justices were parties. One of the suits was an individual suit by Justice Embry. The other was a class action on behalf of all Alabama state employees insured under a particular insurance plan, which happened to include every member of the Alabama Supreme Court. Aetna moved to recuse Justice Embry on the basis of his involvement in these related lawsuits, and to recuse the entire Alabama Supreme Court based on their potential inclusion in the class action suit.⁵⁴

The Supreme Court concluded that Justice Embry’s participation violated the Due Process Clause, but that the participation of the remainder of his colleagues on the Alabama Supreme Court did not. In the process, the U.S. Supreme Court clarified the scope of its “appearance of justice” standard from *Ward* and *Murchison* when it held that a “general hostility toward insurance companies” was not enough of an interest in the case to require Justice Embry’s recusal, but that because his opinion had the “clear and immediate effect of enhancing both the legal status and the settlement value of his own case,” his interest was sufficiently “direct, personal, substantial, [and] pecuniary” to

52. *Id.* at 465–66.

53. 475 U.S. 813 (1986).

54. *Id.* at 817. Two of the Alabama Supreme Court justices affirmatively removed themselves from the pending class action suit once they became aware of it. *Id.* at 818.

merit recusal on those grounds.⁵⁵ By contrast, the remaining members of the Alabama Supreme Court in Justice Embry's class action suit did not need to recuse on due process grounds, because their potential interest was not as direct and personal.⁵⁶

The Court's two most recent recusal cases applying the Due Process Clause clarify the boundaries of the constitutional doctrine. *Caperton v. A.T. Massey Coal Co.*,⁵⁷ involved an appeal from a \$50 million West Virginia jury verdict against Massey. Soon after, Massey's President and CEO Don Blankenship contributed \$3 million—more than all other contributions combined—to Brent Benjamin's campaign for state supreme court justice in West Virginia. Mr. Benjamin narrowly won the election but was asked to recuse himself from Massey's appeal of its case against Caperton to the state supreme court. Justice Benjamin denied the motion to recuse, and the court reversed the jury verdict against Massey by a vote of 3–2. It denied Caperton's request for rehearing by the same margin. Justice Benjamin was in the majority for both decisions.⁵⁸

The U.S. Supreme Court held that Justice Benjamin's failure to recuse himself violated the Due Process Clause. Writing for the Court, Justice Kennedy restated the Court's consistent refrain that most recusal cases do not rise to the level of a constitutional issue.⁵⁹ He then explained that the facts of the case were “extreme by any measure” creating “circumstances ‘in which . . . the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’”⁶⁰

55. *Id.* at 824.

56. *Id.* at 824–25.

57. 556 U.S. 868 (2009).

58. *Id.* at 872–74.

59. *Id.* at 876.

60. *Id.* at 877, 887 (citations omitted).

Similarly dramatic facts led the Court to find a probability of actual bias in its most recent due process recusal case, *Williams v. Pennsylvania*.⁶¹ *Williams* asked whether a state supreme court justice violated due process by declining to recuse himself from a case involving the revocation of a death sentence that the justice himself had personally approved while serving as the district attorney responsible for overseeing the prosecution. The U.S. Supreme Court, applying the “probability of actual bias” test from *Caperton*, held that Chief Justice Castille’s involvement in *Williams*’s conviction and sentence created a significant enough risk of actual bias that due process required his recusal from the case. The Court explained that the Chief Justice’s involvement created “a risk that the judge ‘would be so psychologically wedded’ to his or her previous position” that recusal was necessary.⁶²

Caperton and *Williams* represent the current state of the Court’s recusal jurisprudence under the Due Process Clause. Notwithstanding the Court’s appeals to the “appearance of justice,” its holdings and other statements 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.⁶³ For one, the Court has limited its recusal decisions only to cases described in *Caperton* as “extreme by any measure,”⁶⁴ and in *Mayberry* as instances where judges are so “personally embroiled” in the case that the likelihood of bias is intolerably high.⁶⁵

Perhaps more importantly, the Court has consistently

61. 136 S. Ct. 1899 (2016).

62. *Id.* at 1906.

63. *See* 28 U.S.C. § 455(a).

64. *Caperton*, 556 U.S. at 887 (“Our decision today addresses an extraordinary situation where the Constitution requires recusal. . . . The facts now before us are extreme by any measure.”).

65. *Mayberry v. Pennsylvania*, 400 U.S. 455, 465–66 (1971).

reaffirmed its position that most recusal cases do not implicate the Due Process Clause. In discussing a case in which a Federal Trade Commissioner's public comments about a legal issue did not require his recusal from a case involving that issue, the Court made clear that, citing some of its oldest recusal precedents, "most matters relating to judicial disqualification [do] not rise to a constitutional level,"⁶⁶ and "matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion."⁶⁷ This qualification is a consistent theme in the Court's recusal jurisprudence, and it 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 the broader universe of situations that could raise concerns about the impartiality and legitimacy of an adjudicator's decision.⁶⁸

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). It represents the culmination of two centuries of legislative

66. *Caperton*, 556 U.S. at 876 (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948)).

67. *Id.* (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

68. The lower courts have applied due process principles to administrative recusal, most notably in *Cinderella Career & Finishing Schools, Inc. v. FTC*, where the court held that prejudgment of adjudicative facts by an agency head violated the Due Process Clause. 425 F.2d 583, 589–91 (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.'" *Id.* 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 expressed in statutory and other standards. *See* 5 U.S.C. § 556.

development, always toward a more exacting set of recusal rules for federal judges.

Congress passed the first judicial recusal statute in 1792.⁶⁹ It applied only to lower federal courts and included the familiar requirement that judges who were “concerned in interest” in the case must recuse themselves. It also added a prohibition for any judge who “has been counsel for either party” in the case.⁷⁰ From 1792 through 1948, Congress revised the recusal standards for federal judges on several occasions, “enlarging the enumerated grounds for seeking disqualification almost every time.”⁷¹

Congress’s first post-1792 revision occurred in 1821. It added the requirement that judges recuse when a judge’s relative appears before the judge as a party.⁷² The 1891 amendment prohibited a judge from hearing an appeal of a case the judge tried in the court below.⁷³ Twenty years later, the 1911 Act precluded judges from hearing cases in which they were a material witness.⁷⁴ Roughly one hundred and twenty years since drafting its first recusal statute, Congress had identified five scenarios in which recusal was statutorily required—when a judge has a pecuniary interest in the proceeding, when the judge served as counsel for either party in the same case, when a judge’s relative appears before the judge as a party, when the judge is asked to decide an appeal from a case they presided over below, or when the judge was a material witness in the case before her.

Despite these seemingly clear standards, litigants still

69. Act of May 8, 1792, ch. 25, § 11, 1 Stat. 275, 278–79.

70. *Id.*

71. FLAMM, *supra* note 14, at 670.

72. Act of Mar. 3, 1821, Pub. L. No. 16-52, 3 Stat. 643, 643.

73. Act of Mar. 3, 1891, Pub. L. No. 51-517, § 3, 26 Stat. 826, 827. This 1891 statute has since been codified as amended and reads, in pertinent part, “no judge shall hear or determine an appeal from the decision of a case or issue tried by him.” 28 U.S.C. § 47.

74. Act of Mar. 3, 1911, Pub. L. No. 61-475, § 20, 36 Stat. 1087, 1090.

faced significant obstacles in seeking to recuse a judge. The statute required litigants to initiate the recusal process,⁷⁵ yet did not provide any procedural mechanisms for initiating recusal proceedings. The statute also left recusal decisions to the challenged judge's own discretion, requiring recusal only if the situation would "render it improper, in [the judge's] opinion," to preside over the case.⁷⁶ This wide latitude continued on appeal; a judge's decision not to recuse was reviewable only for an abuse of discretion.⁷⁷

Section 21 of the 1911 Act, currently codified at 28 U.S.C. § 144, offered some potential clarity. It allowed a party to remove a district judge by simply filing an affidavit stating that the judge has "a personal bias or prejudice" against the affiant.⁷⁸ Section 21 was the first federal statute to offer any procedural guidelines for seeking recusal. It was also the first to provide for recusal on a peremptory basis and to use personal bias as grounds for recusal.

The courts, however, quickly limited its scope. In *Berger v. United States*,⁷⁹ multiple defendants of German descent sought to recuse the trial judge, Kenesaw Mountain Landis, under § 21 due to his alleged bias against Germans. The issue was whether an affidavit alone would be sufficient to trigger recusal under the new statute. The Court held that judges could not question the veracity of the affidavit, but that they may determine for themselves whether the allegations, taken as true, support a finding of actual bias or prejudice on their part.⁸⁰ Courts applying *Berger* construed the phrase "bias and prejudice" narrowly, severely limiting

75. This is referred to as a "challenge-for-cause" statute. FLAMM, *supra* note 14, at 670.

76. John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 627 (1947).

77. See FLAMM, *supra* note 14, at 988.

78. Frank, *supra* note 76, at 628.

79. 255 U.S. 22 (1921).

80. *Id.* at 36.

§ 21's effectiveness.⁸¹

The federal recusal statute remained unchanged until 1948, when Congress amended § 20 to cover the entire federal judiciary, including the Supreme Court. The amended version of § 20, recodified at 28 U.S.C. § 455, has become the “principal” federal recusal statute.⁸² In fact, it is often (wrongly) referred to as the only federal recusal statute, largely because its primary competitors, § 144 and § 47, deal exclusively with trial courts and address only a narrow subset of the accepted grounds for recusal.⁸³ The 1948 amendments to § 455 expanded the statute's scope to include Supreme Court Justices and required recusal where a judge or justice had been a material witness, had been of counsel, or was related to an attorney or party in the case.⁸⁴ Most importantly, Congress modified the personal interest standard to apply only in cases where a judge or justice had a *substantial* interest in the case. The amendments did not, however, limit judicial discretion in making recusal decisions, or tighten the standard of review for those

81. Frank, *supra* note 76, at 629. Section 21 of the 1911 Act was recodified in 1948 in almost precisely the same form. 28 U.S.C. § 144. Section 144's definition of “bias and prejudice” continues to be narrowly construed by the courts and applies only to federal district judges.

82. In terms of its impact on current recusal law, § 455 “has frequently been referred to as the ‘principal’ or ‘comprehensive’ federal judicial disqualification statute In fact, some courts have issued decisions which appear to reflect the belief that § 455 is the *only* federal disqualification statute.” FLAMM, *supra* note 14, at 678.

83. As discussed above, courts have construed § 144 extremely narrowly, making it effectively useless for litigants seeking to recuse an otherwise unwilling judge. *See supra* notes 78–81 and accompanying text. Section 47 prohibits judges from serving as appellate judges in cases where they also served as the trial judge. 28 U.S.C. § 47. While there is no evidence that the courts have sought to unduly limit the application of § 47, the fact that it is explicitly limited to cases where judges are hearing appeals from their own cases is both narrowing in its own right as well as potentially redundant with the reasonableness standard of § 455: “[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455.

84. 28 U.S.C. § 455 (1948).

decisions on appeal. Recusal was still required only when it would be “improper, in [the judge’s] opinion” for the judge to sit in the case, and a judge’s recusal decision could still only be reversed on appeal when it represented an abuse of discretion.⁸⁵ Section 455 also did not offer any procedural guidance for litigants seeking recusal. Unlike § 144’s detailed procedural framework for how and when a party may go about disqualifying a judge, § 455 operated in purely substantive terms, and more narrowly than before, as it only required recusal when the judge’s “substantial” financial interests were implicated.⁸⁶

The next, and last, amendment to § 455 was in 1974. The “substantial” financial interest standard from 1948 changed to “ownership of a legal or equitable interest, however small,” in the subject matter of the case at hand.⁸⁷ It also required that a judge or justice recuse themselves in instances of personal bias, previous involvement in (or knowledge of) the case at hand, familial and other personal relationships, and in any case where a judge’s “impartiality might reasonably be questioned” (the “reasonable appearance standard”).⁸⁸ This standard is a popular and relatively new development in American recusal law.⁸⁹ The reasonable appearance standard was designed to promote public confidence in the judiciary by ensuring that cases are decided by individuals

85. *Id.*

86. *Id.*

87. 28 U.S.C. § 455(b)(4), (d)(4) (1974).

88. 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, American recusal law had generally operated consistently with Blackstone’s maxim that “the law will not suppose a possibility of bias or favour in a judge.” 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 361 (Univ. of Chi. Press 1979) (1768).

89. See FLAMM, *supra* note 14, 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.”).

who are not only impartial in fact, but who appear so to the people affected by, and expected to comply with, their decisions.⁹⁰

The historical development of the current federal recusal statute is important because it reveals how the American concept of judicial recusal has evolved over the last two centuries. Far from the pecuniary interest standard that reigned at the Founding, current recusal law addresses a range of conduct and situations far beyond the Due Process Clause's probability of actual bias standard. Also, unlike the Due Process Clause, which applies to all government adjudicators, the federal recusal statute applies only 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.⁹¹ 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 ABA's Model Canons of Judicial Ethics (Model Canons) first appeared in

90. VIRELLI, *supra* note 40, at xii ("By guarding against the mere appearance of impropriety, recusal advances public confidence in the integrity and legitimacy of an otherwise unaccountable judiciary.").

91. See *Greenberg v. Bd. of Governors of the Fed. Rsrv. Sys.*, 968 F.2d 164, 167 (2d Cir. 1992). This perspective on administrative recusal also reinforces the notion that the federal recusal statute is broader than the Due Process Clause. It is indisputable that due process governs agency adjudicators, but it is also commonly understood that the reasonable appearance standard of § 455 is too broad to cover administrative actors. These two things are only possible if the statutory standard covers activity not prohibited by due process.

1924 in response to Judge Kenesaw Mountain Landis's appointment as commissioner of Major League Baseball after the Chicago Black Sox cheating scandal in 1919. Although not technically illegal,⁹² controversy around Judge Landis simultaneously serving as a federal judge and baseball commissioner inspired talk of impeachment and the development of the Model Canons.⁹³ The ABA was concerned with the appearance of impropriety created by a federal judge receiving compensation from another employer. As a result, the newly adopted Canon 4 stated that "[a] judge's conduct should be free from impropriety and the appearance of impropriety."⁹⁴

Although the 1924 Canons expanded the bounds of recusal at the time by incorporating concerns about the appearance of impropriety among judges, their impact should not be overstated. For one thing, they were not legally enforceable.⁹⁵ They also did not contain any procedural guidelines for how recusal matters should be decided and did

92. Attorney General A. Mitchell Palmer explained that "[t]here seems to be nothing as a matter of general law which would prohibit a district judge from receiving additional compensation for other than strictly judicial service, such as acting as arbitrator or commissioner." DAVID PIETRUSZA, *JUDGE AND JURY: THE LIFE AND TIMES OF JUDGE KENESAW MOUNTAIN LANDIS* 197 (1998).

93. The ABA voted to censure Judge Landis on September 1, 1924 for maintaining dual employment while a member of the federal bench. AM. BAR ASS'N, *TRANSACTIONS OF THE FORTY-FOURTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION*, 61–67 (1921). The ABA's censure of Judge Landis was reprinted in the *New York Times*. *Bar Meeting Votes Censure of Landis*, N.Y. TIMES, Sept. 2, 1921, at 1. On February 2, 1921, a resolution was introduced in the House of Representatives calling for Judge Landis's impeachment. *Id.* The bill was defeated in the Senate by a tie vote. *Bill Aimed at Landis Fails*, N.Y. TIMES, July 19, 1921, at 13.

94. CANONS OF JUDICIAL ETHICS r. 4 (AM. BAR ASS'N 1924), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/1924_canons.pdf. The other Canons that are relevant to judicial recusal were far less revolutionary. For example, Canon 13 explained that "[a] judge should not act in a controversy where a near relative is a party," and Canon 29 explained that a judge should avoid presiding over cases "in which his personal interests are involved." *Id.* at r. 13, 29.

95. See Debra Lyn Bassett, *Judicial Disqualification in the Federal Appellate Courts*, 87 IOWA L. REV. 1213, 1229–30 (2002).

not use mandatory language. Canon 4 states that “a judge’s conduct *should* be free from the appearance of impropriety,” implying that there are some instances in which an appearance of impropriety may be acceptable.⁹⁶

The next four decades saw little change in the Model Canons. By the end of the 1960s, the development within the federal judiciary of the “duty to sit”—a presumption against recusal in close cases⁹⁷—and some high-profile ethical controversies involving sitting and prospective Supreme Court justices sparked a renewed focus on recusal standards.⁹⁸ In August 1969, the ABA convened a Special

96. CANONS OF JUDICIAL ETHICS r. 4 (AM. BAR ASS’N 1924), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/pic_migrated/1924_canons.pdf.

97. In *Edwards v. United States*, a three-judge panel of the Fifth Circuit reversed defendants’ convictions for failing to pay a federal gambling tax. 334 F.2d 360, 362 (1964). The case was granted rehearing en banc, but two members of the original panel were unable to participate in that hearing. *See id.* at 362 n.2. Judge Hays, who wrote the majority opinion for the panel, had been sitting by designation from another circuit and was thus statutorily precluded from participating in the en banc hearing. *Id.* Judge Cameron, who concurred with Judge Hays to form the panel majority, died before the en banc argument. *Id.* In light of these unusual circumstances, the dissenting judge from the panel, Judge Revis, considered disqualifying himself to avoid the appearance of unfairness, but declined after consulting with his colleagues. *Id.* Finding no statutory prohibition on his participation, Judge Revis concluded that “[i]t is a judge’s duty to refuse to sit when he is disqualified but it is equally his duty to sit when there is no valid reason for recusal.” *Id.* In addition to operating as a presumption against recusal in traditional cases, the duty to sit also had potential consequences for appellate review of recusal decisions, as appellate courts that recognized the duty to sit (which was all of them as of 1972) would find it even more difficult to conclude that a judge had abused their discretion by failing to recuse. *See Laird v. Tatum*, 409 U.S. 824, 837 (1972).

98. Justice Abe Fortas was forced to resign from his position on the Court under public pressure resulting from his personal and financial relationship with Louis E. Wolfson, a businessman who had been convicted of illegal stock manipulations. HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS* 10, 219 (1999). Recusal had a direct impact on President Nixon’s scuttled appointment of Judge Clement Haynsworth to the Supreme Court. During his confirmation process, “it came to light that [Judge Haynsworth] had failed to recuse himself from several cases in which he held stock in one of the parties.” VIRELLI, *supra* note 40, at 11. “[T]he backlash over his perceived lack of judgment and the resultant appearance of impropriety played a significant role in his failing to be confirmed by the Senate.” *Id.*

Committee on Standards of Judicial Conduct to revise the existing ABA Canons.⁹⁹ The result was a Model Code of Judicial Conduct (Model Code). Canon 3C closely resembled the 1948 version of the federal recusal statute. The most prominent changes from the statute were the elimination of the “substantial” qualifier from the requirement that a judge recuse when they have a “financial interest in the subject matter” before the court, and requirements that a judge recuse from “a proceeding in which his impartiality might reasonably be questioned, including but not limited to” cases of actual bias or personal interest in the case, or cases in which the judge had served as a lawyer in the case or was related to the parties or their lawyers.¹⁰⁰ Despite all of its reformative qualities, the 1972 revisions to the ABA’s Model Code were just that—revisions to a model code that did not carry the force of law.

In 1973, at least in part due to a highly unusual memorandum from then-Justice Rehnquist explaining his decision not to recuse from a high-profile case,¹⁰¹ the Judicial

99. Irving R. Kaufmann, *Lions or Jackals: The Function of a Code of Judicial Ethics*, 35 LAW & CONTEMP. PROBS. 3, 3 & n.4 (1970).

100. MODEL CODE OF JUD. CONDUCT Canon 3C (AM. BAR ASS’N 1972), reprinted in Note, *Disqualification of Judges and Justices in the Federal Courts*, 86 HARV. L. REV. 736, 743–44 (1973). The Code also mandated recusal where: a judge was personally biased; had served as a lawyer in the controversy; had a financial interest in the outcome of the case; or was within the third degree of relationship with a party, lawyer, interested person, or material witness in the case. *Id.*

101. At least one reason for the codification was then-Justice Rehnquist’s memorandum explaining his refusal to recuse in *Laird v Tatum*, 409 U.S. 824 (1972) (Rehnquist, J., mem.), a case involving a government program that Justice Rehnquist had worked on and testified publicly about while a lawyer at the Justice Department. *Laird v Tatum*, 408 U.S. 1 (1972) (merits opinion). Although the Model Code was in effect at the time, Rehnquist’s memorandum focused heavily on the more lenient recusal standards in the applicable (1948) version of § 455. Although Rehnquist stated that he was aware of the new ABA Model Code, he declined to address it formally in his memorandum. *Laird*, 409 U.S. at 825 (“Respondents also cite various draft provisions of [the Model Code] . . . Since I do not read these particular provisions as being materially different from the standards enunciated in the congressional statute [from 1948], there is no occasion for me to give them separate consideration.”). He did not address whether his prior involvement with the program could lead to his impartiality

Conference of the United States adopted the ABA Model Code as its Code of Conduct for United States Judges (Code of Conduct).¹⁰² The Judicial Conference is presided over by the Chief Justice of the United States,¹⁰³ and its Code of Conduct serves a similar function to the ABA's Model Code. Like the Model Code, it does not have the force of law, yet it remains an influential source of ethical guidance for the federal bench, especially since it was voluntarily adopted by the federal judiciary to govern its own conduct.¹⁰⁴

Neither the Model Code nor the Code of Conduct apply, by their own terms, to agency adjudicators. They are nonetheless important to administrative recusal, because they serve as a template for ethical guidelines in administrative adjudication.

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, especially with regard to recusal. Canon 3(C) of the Model ALJ Code adopted the objective test from the Model Code, which was also codified in the federal recusal statute, by requiring recusal whenever an ALJ's "impartiality might reasonably be questioned."¹⁰⁵

being questioned within the meaning of Canon 3 of the 1972 Model Code, because he did not read Canon 3 as adding anything "materially different" from § 455. *Id.*

102. ADMIN. OFF. OF THE U.S. CTS., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES APRIL 5–6, 1973, at 10 (1973), <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1973-04.pdf>.

103. 28 U.S.C. § 331.

104. Importantly, the expansion of federal recusal standards embodied in the Model Code and Code of Conduct were codified in the 1974 amendments to § 455. See discussion *supra* Section II.B (describing the history and scope of the primary federal recusal statute, 28 U.S.C. § 455).

105. 28 U.S.C. § 455(a); MODEL CODE OF JUD. CONDUCT FOR FED. ADMIN. L. JUDGES Canon 3(C) (AM. BAR ASS'N 1989).

But like its judicial analogs, 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.¹⁰⁶ It has also not shown the staying power of the Model Code. The Model Code has been updated several times since 1989, while the Model ALJ Code has not. In 2007, the Model Code was expanded to explicitly include ALJs,¹⁰⁷ but only to the extent that individual jurisdictions deemed it desirable.¹⁰⁸ At least some jurisdictions have resisted. The Ninth Circuit, for example, has held that the Model 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.”¹⁰⁹

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.¹¹⁰ Despite being aligned with federal judicial

106. See MODEL CODE OF JUD. CONDUCT FOR FED. ADMIN. L. JUDGES Preface (AM. BAR ASS'N 1989) (“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, 340 (2012).

107. MODEL CODE OF JUD. CONDUCT Application § I(B) (AM. BAR ASS'N 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.”).

108. 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.”).

109. *Lowry v. Barnhart*, 329 F.3d 1019, 1023–24 (9th Cir. 2003).

110. REVISED MODEL STATE ADMIN. PROC. ACT § 402(c)–(d) (NAT'L CONF. ON COMM'RS OF UNIF. STATE L. 2010), <https://www.uniformlaws.org/HigherLogic>

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 ALJ Code). Like the Model State APA, although the Model State ALJ 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."¹¹¹

ACUS recently published revised Model Adjudication Rules (ACUS Model Rules).¹¹² The ACUS Model Rules require that an agency adjudicator "conduct her/his functions in an impartial manner."¹¹³ They also require recusal on the grounds of "personal bias" or "basis for other disqualification."¹¹⁴ 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.¹¹⁵ 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. In light of the number of other model codes that have expressly adopted the reasonable appearance language, there are good reasons not to read the ACUS Model Code's reference to the "basis for other disqualification" as including the reasonable appearance

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111. MODEL CODE OF JUD. CONDUCT FOR STATE ADMIN. L. JUDGES Canon 2, r. 2.11(A) (AM. BAR ASS'N 2018), https://www.americanbar.org/content/dam/aba/publications/judicial_division/2018-model-code-statealj.pdf.

112. MODEL ADJUDICATION RULES (ADMIN. CONF. OF THE U.S. 2018), https://www.acus.gov/sites/default/files/documents/Model%20Adjudication%20Rules%209.13.18%20ACUS_0.pdf.

113. *Id.* r. 112(A).

114. *Id.* r. 112(B)(2)(a).

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

standard.

Taken together, the model codes and rules offer some important insight into modern thinking about the best way to effectuate recusal of judges as well as agency adjudicators. In terms of scope, model recusal requirements have, as they did in the federal statute between 1792 and 1948, consistently “enlarg[ed] the enumerated grounds for seeking disqualification,”¹¹⁶ such that 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, that is 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.¹¹⁷

There are, however, some obvious limitations to relying solely on the codes and rules as a template for adopting agency-specific recusal standards. Even those codes that purport to apply to agency adjudicators are only applicable to ALJs, as opposed to adjudicators presiding over Type B adjudications or appellate-style review hearings, and none of the model codes and rules are directly enforceable as a matter of law. Moreover, despite the invitation to adopt the Model Judicial Code and the ACUS Model Rules, most

116. FLAMM, *supra* note 14, at 670.

117. See, e.g., MODEL CODE OF JUD. CONDUCT FOR STATE ADMIN. L. JUDGES r. 1.2 (AM. BAR ASS’N 2018), https://www.americanbar.org/content/dam/aba/publications/judicial_division/2018-model-code-statealj.pdf; MODEL CODE OF JUD. CONDUCT r. 1.2 (AM. BAR ASS’N 2007); MODEL CODE OF JUD. CONDUCT FOR FED. ADMIN. L. JUDGES Canon 2.A (AM. BAR ASS’N 1989).

agencies have declined to do so.¹¹⁸ 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.

D. *Government Ethics Provisions*

Recusal is largely (although not exclusively) an ethical issue, and agency adjudicators are part of the executive branch.¹¹⁹ As a result, the legal infrastructure for dealing with ethical issues within the executive branch workforce are potentially instructive for agency recusal standards. In addition to statutory requirements, the Office of Government Ethics (OGE) has responsibility for interpreting and promulgating ethical standards. OGE is an executive agency headed by a director who is appointed by the president with the advice and consent of the Senate.¹²⁰ OGE may promulgate “rules and regulations . . . pertaining to conflicts of interest and ethics in the executive branch,” including those “pertaining to the identification and resolution of conflicts of interest.”¹²¹

118. See LOUIS J. VIRELLI III, ADMINISTRATIVE RECUSAL RULES: A TAXONOMY AND STUDY OF EXISTING RECUSAL STANDARDS FOR AGENCY ADJUDICATORS 22 (2020) (noting that “a small group of agency rules include all of the[] features [of judicial recusal],” by “referring to model codes or canons of judicial ethics”), <https://www.acus.gov/sites/default/files/documents/Virelli%20ACUS%20Part%20II%20FINAL%20-%20June%2023%20%282nd%20release%2C%20cover%20sheet%29.pdf>.

119. Recusal’s role in promoting public confidence in the integrity of agency adjudication is more of an institutional, rather than an ethical, benefit.

120. 5 U.S.C. app. 4 § 401(a)–(b).

121. 5 U.S.C. app. 4 § 402(b)(1)–(2). OGE has a somewhat unique enforcement structure. According to the agency website, OGE oversees the executive branch ethics program, but the program is a shared responsibility. *Mission, Authority, & Key Players*, U.S. OFF. OF GOV’T ETHICS https://www.oge.gov/web/oge.nsf/ethicsofficials_mission (last visited Dec. 21, 2021). In its supervisory capacity, OGE “sets policy for the entire executive branch ethics program.” *Id.* The head of each agency is statutorily responsible for leading the program in their agency. *Id.* The agency head is also responsible for selecting a Designated Agency Ethics

1. Ethics Statutes

The primary criminal statute relating to the recusal of agency adjudicators is 18 U.S.C. § 208.¹²² The statute prohibits government employees from “participat[ing] personally and substantially . . . in a judicial or other proceeding . . . in which, to his knowledge, he [or certain family or business associates] . . . has a financial interest.”¹²³ Although only enforceable by the Department of Justice because it is a criminal statute, OGE has authority under the Act to “issue uniform regulations for the issuance of waivers and exemptions under [the Act] which shall . . . provide guidance with respect to the types of interests that are not so substantial as to be deemed likely to affect the integrity of the services the Government may expect from the employee.”¹²⁴ OGE has also issued—at Congress’s request—a report to the president and Congress on “conflict of interest laws relating to executive branch employment,” including § 208.¹²⁵

In that report, OGE described § 208 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

Official, the employee with primary responsibility for directing the daily activities of an agency’s ethics program and coordinating with OGE. *Id.* For a more detailed discussion of how OGE enforcement mechanisms relate to recusal, see *infra* Section II.D.4.

122. 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. OFF. OF GOV’T ETHICS, REPORT TO THE PRESIDENT AND TO CONGRESSIONAL COMMITTEES ON THE CONFLICT OF INTEREST LAWS RELATING TO EXECUTIVE BRANCH EMPLOYMENT 2 (2006) [hereinafter OGE REPORT], [https://www.oge.gov/web/OGE.nsf/0/F3127FD1FD0A2415852585B6005A126D/\\$FILE/fb1bb9d5af124e6ca85c3cab2db6ac582.pdf](https://www.oge.gov/web/OGE.nsf/0/F3127FD1FD0A2415852585B6005A126D/$FILE/fb1bb9d5af124e6ca85c3cab2db6ac582.pdf).

123. 18 U.S.C. § 208(a).

124. 18 U.S.C. § 208(d)(2).

125. OGE REPORT, *supra* note 122, at 1.

in which certain others with whom he is associated [spouse, minor child, general partner, etc.] have a financial interest.”¹²⁶ OGE has made clear that § 208 requires disqualification from “any ‘judicial or other proceeding’ . . . even if that financial interest is insubstantial.”¹²⁷ 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.¹²⁸ Since this standard is consistent with the longstanding requirement—at common law, under the Due Process Clause, and in every federal recusal statute and ethics code since the Founding—that judges may not preside over cases in which they have a direct financial interest, § 208 adds little if anything to the present consideration of administrative recusal.¹²⁹

2. Ethics Regulations

OGE has also issued specific ethics regulations that apply to members of the executive branch, including, but not limited to, agency adjudicators. The OGE regulation that most directly applies to recusal of administrative

126. *Id.* at 28.

127. *Id.* at 29.

128. 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)).

129. That is not to say that the statute is not a valuable contribution to government ethics more broadly. Recall that the statute applies to all government employees, not just the categories of agency adjudicators discussed here. A comparison to judicial recusal standards is only relevant in cases where executive employees perform tasks closely analogous to those of traditional judges. The fact that § 208 may be redundant when applied to that group of adjudicators does not in any way denigrate its contributions with regard to the remaining (and, incidentally, the vast majority of) federal employees covered by the statute.

adjudicators can be found at 5 C.F.R. § 2635.502 (§ 502).¹³⁰ 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 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.”¹³¹

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

130. Section 502 was the culmination of a long process that included the development of OGE’s Standards of Ethical Conduct for Employees of the Executive Branch (Standards of Ethical Conduct) and of fourteen ethical principles for government employees. *See* 5 C.F.R. § 2635.101 (2021). In 1989, President Bush signed Executive Order 12,674, 54 Fed. Reg. 15,159, 15,159–62 (Apr. 12, 1989), which put into action a recommendation by the President’s Commission on Federal Ethics Law Reform to replace individual agency standards with “a single set of regulations” applicable to all employees of the executive branch. THE PRESIDENT’S COMM’N ON FED. ETHICS L. REFORM, TO SERVE WITH HONOR: REPORT AND RECOMMENDATIONS TO THE PRESIDENT 11 (1989) (“The Commission recommends that the Office of Government Ethics be directed by executive order to consolidate all executive branch standards of conduct regulations into a single set of regulations.”). Executive Order 12,674, as modified the following year by Executive Order 12,731, set out fourteen ethical principles for executive branch employees and tasked OGE with creating a “single, comprehensive, and clear set of executive branch standards of ethical conduct.” Exec. Order No. 12,731, 55 Fed. Reg. 42,547, 42,547–50 (Oct. 17, 1990). Two years later, on August 7, 1992, OGE published its Standards of Ethical Conduct, which were eventually codified in 5 C.F.R. Part 2635, where section 502 currently resides. 5 C.F.R. § 2635.502 (2021); *see also Our History*, U.S. OFF. OF GOVERNMENTAL ETHICS, https://oge.gov/web/oge.nsf/about_our-history (last visited Nov. 26, 2021) (“In 1992, at the direction of President George H.W. Bush, OGE established the Standards of Ethical Conduct for Employees of the Executive Branch.”).

131. 5 C.F.R. § 2635.502(a) (2021).

relationships.¹³² Section 502(a) is further limited by its suggestive (“should not participate”), rather than mandatory, language.¹³³

Finally, § 502(a)(2) allows for an employee to seek advice on whether they should participate in a given matter if “circumstances other than those specifically described in this section would raise a question regarding his impartiality.”¹³⁴ 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 “necessary and appropriate . . . to fulfill the purposes” of the existing OGE regulations.¹³⁵ Supplemental regulations could be a useful vehicle for adopting agency-specific recusal standards, but a review of the current list of supplemental regulations did not reveal any supplemental regulations pertaining specifically to agency adjudicators, let alone to administrative recusal.¹³⁶

132. *See id.* The scope of covered relationships that could trigger disqualification is limited largely to financial/employment and familial relationships. 5 C.F.R. § 2635.502(b)(1)(i)–(v) (2021).

133. 5 C.F.R. § 2635.502(a), (a)(2) (2021).

134. 5 C.F.R. § 2635.502(a)(2) (2021).

135. *See* 5 C.F.R. § 2635.105 (2021).

136. For a more detailed discussion of the reasons for and against using OGE regulations to address agency-specific recusal questions, see *infra* Parts III and IV.

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.”¹³⁷ 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.”¹³⁸

Principle fourteen 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 fourteen, 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*.”¹³⁹ 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.

4. Enforcement

It is not only the substantive standards that distinguish federal ethics laws and regulations from more traditional judicial recusal standards. Ethical violations carry a wider range of consequences than recusal. Recusal is a remedy unto itself—it describes a situation wherein an adjudicator is not fit to participate in a proceeding and then removes the adjudicator from that proceeding. It is not at all punitive, nor is it meant to be. This is reflected in the centuries-old, unbroken history of judges making their own recusal

137. *14 General Principles*, OFF. OF GOV'T ETHICS (May 7, 2009), [https://www.oge.gov/web/OGE.nsf/0/CF823CA93BF7562A85258711006D29E4/\\$FILE/14%20General%20Principles.pdf](https://www.oge.gov/web/OGE.nsf/0/CF823CA93BF7562A85258711006D29E4/$FILE/14%20General%20Principles.pdf).

138. *Id.*

139. *Id.* (emphasis added).

decisions in the first instance.¹⁴⁰ Maintaining recusal as a judicial decision permits judges to police themselves, which in turn not only promotes public confidence in the judiciary—an express goal of recusal doctrine—but also preserves judicial independence by insulating judges from outsiders using recusal as a tool for forum shopping or a source of undue influence on judicial conduct in general.¹⁴¹

By contrast, violations of OGE’s Standards of Conduct, which include § 502,¹⁴² “may be cause for . . . corrective or disciplinary action” against an employee by the agency.¹⁴³ In addition to recusal, disciplinary action for violating OGE regulations can include “reprimand, suspension, demotion, and removal.”¹⁴⁴ Although there is little evidence of recusal inquiries resulting in such disciplinary actions, the fact that both are resolved by the affected agency’s Designated Agency Ethics Official, rather than the adjudicators themselves, and that there is the possibility of disciplinary action, rather than merely recusal and replacement of the adjudicator, provides yet another reason why OGE’s ethics regime is not an adequate substitute for administrative recusal.

140. See Louis J. Virelli III, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1195 (“In pre-Revolutionary England and America, recusal decisions were the product of judge-made common law; the standards for establishing whether a judge could participate in a case were developed and applied within the judicial branch.”).

141. As a reminder, because recusal decisions are reviewable on appeal, the threat of judges abusing their authority to make their own recusal decisions is contained. As I have discussed in detail elsewhere, this is not true for courts of last resort, but that is beyond the scope of the current discussion. See generally VIRELLI, *supra* note 40 (arguing that separation of powers principles forbid Congress from establishing binding recusal standards for the Supreme Court). Administrative recusal is more like recusal in the lower courts, even as it applies to agency heads, because it is still eligible (much like other final agency action) for judicial review. See *infra* Part IV (discussing judicial review of agency recusal decisions).

142. See *supra* note 130 (describing the history of § 502’s enactment).

143. 5 C.F.R. § 2635.106(a) (2021).

144. 5 C.F.R. § 2635.102(g) (2021) (defining “disciplinary action” for purposes of Part 2635).

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 are 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.¹⁴⁵ 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.¹⁴⁶

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 a minority of the adjudicators included in this study.¹⁴⁷ Second, it does not address appearances of bias or partiality that could affect

145. ASIMOW, *supra* note 17, at 23.

146. Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314, 94,315 (Dec. 23, 2016).

147. Kent H. Barnett, *Some Kind of Hearing Officer*, 94 WASH. L. REV. 515, 522 (2019) (“Non-ALJs outnumber . . . ALJs by more than 5:1.”). 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. Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314, 94, 315 (Dec. 23, 2016).

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.

The salience of public confidence in agency adjudication is reflected in the increased attention paid to adjudicator independence in recent scholarship. Professors Richard Levy and Robert Glicksman recently outlined a growing and dynamic set of threats to ALJ independence and suggested bold structural changes to protect ALJs,¹⁴⁸ and Professor Kent Barnett recently argued for a disclosure regime for non-ALJ adjudicators that is designed to inform Congress, agencies, and administrative litigants of potential threats to adjudicator impartiality.¹⁴⁹ Both of these approaches address important issues of adjudicator independence akin to the actual bias standard in § 556(b) of the APA. But like § 556(b), they do not focus on how gaps in adjudicator independence may impact the general public's perception of that adjudication's legitimacy. While certainly related, concerns about public perception raise theoretically and practically distinct concerns about the integrity of agency action that the APA itself does not address.¹⁵⁰

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

148. Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 45 (2020).

149. Barnett, *supra* note 147, at 563–81.

150. For a more detailed discussion of how agency recusal rules can promote public confidence in agency adjudication, see *infra* Section III.B.

some agencies believe that their adjudicators' recusal practices are not definitively governed by external sources of law or policy, that is there was 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.

A taxonomy and tabulation of the specific recusal standards adopted by individual agencies is the topic of a separate project.¹⁵¹ For present purposes, it is enough to note that agency recusal rules occupy a broad spectrum. On one end are agencies with either no written standards or highly discretionary standards that require recusal only when adjudicators "deem it necessary."¹⁵² On the other end of the spectrum are standards that approximate the judicial recusal statute, often by requiring recusal for violations of the Code of Judicial Conduct.¹⁵³ The middle portion of the

151. See generally Louis J. Virelli III, *Recusal in Administrative Adjudication*, 64 ARIZ. L. REV. (forthcoming 2022) (relying substantially on another ACUS report by the author titled *Administrative Recusal Rules: A Taxonomy and Study of Existing Recusal Standards for Agency Adjudicators*, cited *supra* note 118).

152. See, e.g., 16 C.F.R. § 3.42(g)(1) (2021) ("When an Administrative Law Judge deems himself disqualified to preside in a particular proceeding, he shall withdraw therefrom by notice on the record and shall notify the Director of Administrative Law Judges of such withdrawal."); BARNETT ET AL., *supra* note 10, at 50 (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).

153. See 43 C.F.R. § 4.1122 (2021) ("Administrative law judges shall adhere to the 'Code of Judicial Conduct.'"); MODEL CODE OF JUD. CONDUCT Canon 2, r 2.11 (AM. BAR ASS'N 2011) (echoing the language of the federal judicial recusal statute, 28 U.S.C. § 455). The Merit Systems Protection Board (MSPB) and Social Security Administration (SSA) represent hybrid structures with similar effects. The MSPB promulgated a regulation requiring recusal "on the basis of personal bias or other disqualification," 5 C.F.R. § 1201.42(b) (2021), but referred to the federal recusal statute's reasonable appearance standard when reviewing an adjudicator's denial of a party's motion to recuse. See *Shoaf v. Dep't of Agric.*, 97 M.S.P.R. 68, 73 (2004).

The SSA has among the most developed set of recusal standards. It has adopted

spectrum is populated with recusal standards that are more targeted to specific indications of partiality, such as an adjudicator's financial interest or personal relationship with a party¹⁵⁴ or their prior involvement with the case.¹⁵⁵

While the details of existing agency regulations are beyond the scope of this Article, it is worth noting that neither the existence of recusal regulations, nor their content, demonstrate any 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 demonstrates that additional guidance regarding agency-specific recusal standards could prove useful. Parts III and IV that follow are thus 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.

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." 20 C.F.R. §§ 404.940, 416.1440 (2021). 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." Program Operations Manual System (POMS) DI 33015.045A, SOC. SEC. ADMIN. (Sept. 5, 2019), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0433015045>. 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.

154. See 40 C.F.R. § 164.40(a) (2021) (EPA); 7 C.F.R. § 47.11(a) (2021) (Agriculture).

155. See 37 C.F.R. § 11.39(b)(3) (2021) (stating that PTO hearing officers "shall not be an individual who has participated in any manner in the decision to initiate the proceedings and shall not have been employed under the immediate supervision of the [subject of the disciplinary proceeding]").

III. 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.¹⁵⁶ Publication also makes it easier for parties to enforce the recusal standards,¹⁵⁷ which further serves the goals of protecting the parties and promoting public confidence in the proceedings.

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.¹⁵⁸ As the Asimow Study suggests, agencies should continue to be vigilant, however, in promulgating rules to protect parties from biased adjudicators.¹⁵⁹ The Supreme Court has made clear that “most matters relating to judicial disqualification [do] not rise to a constitutional level,”¹⁶⁰ and the APA’s impartiality requirement does not apply to the

156. See also Admin. Conf. of the U.S., Recommendation 2018-5, *Public Availability of Adjudication Rules*, 84 Fed. Reg. 2,139, 2,142 (Feb. 6, 2019) (recommending publication on agency websites).

157. See *infra* Part IV (discussing private causes of action under agency-specific recusal regulations).

158. See discussion *supra* Sections II.A, B, D.

159. See ASIMOW, *supra* note 17, at 23.

160. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948)).

multitude of adjudicators who fall outside the statute.¹⁶¹ 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. While some existing recusal rules do address actual bias, they do not cover all agency adjudicators.¹⁶² Additional attention to agency-specific rules could help ensure that all of the forms of bias targeted by both the APA and OGE are addressed for non-APA adjudicators.¹⁶³

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.

Trans-agency legal restrictions on agency adjudication do not require that appearances be taken into account when deciding recusal questions. Due process is focused on the

161. See Barnett, *supra* note 147, at 521–22.

162. See VIRELLI, *supra* note 118, at 19–21 (cataloging agency recusal standards based on actual or personal bias).

163. OGE 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. For a more detailed development of the reason for favoring a private cause of action in recusal, see *infra* Part IV.

probability of actual bias in a reasonable judge.¹⁶⁴ 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 neither self-enforcing nor have they been adopted by most agencies.¹⁶⁵ Even when they do mention appearances, government ethics provisions are narrowly tailored to financial and relational conflicts,¹⁶⁶ and the APA is limited to ALJ bias.¹⁶⁷

1. Reasons for Agency-Specific Appearance Rules

There is thus a gap in the recusal safety net when it comes to public perception of agency adjudication, which is most easily filled by agency-specific recusal rules. 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, in the absence of publicly articulated standards, they often adopt internal, unpublicized measures to project the appearance of impartiality.¹⁶⁸ Recusal regulations would be more visible, 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, in which concerns about the integrity and independence of agency adjudication continue to grow in prominence,¹⁶⁹ public statements like regulations in support of impartiality—and the appearance thereof—can

164. See discussion *supra* Section II.A.

165. See discussion *supra* Sections II.B, C.

166. See discussion *supra* Section II.D.

167. See discussion *supra* Section II.E.1.

168. BARNETT ET AL., *supra* note 10, at 50–51 (explaining that, based on a survey of agencies with non-ALJ adjudicators, “more than a third (11 of 31) of the non-ALJ types’ [recusal obligations] arise, at least in part, from custom”).

169. See, e.g., WALLACH, *supra* note 7, at 1, 5.

be a powerful countermeasure to increasing cynicism about, and suspicion of, our public institutions. It further stands to reason that the more prominent and authoritative those statements—such as published, judicially enforceable regulations versus other forms of agency guidance or advice—the more profound the perceived commitment of the agency to promoting impartiality and the greater the public response.

Third, promulgating recusal regulations can help preempt concerns about integrity before they arise. Rather than seeming reactionary to questions about decisional independence and impartiality, preemptive recusal rules send a message that the agency is acting on principle, free from political pressure. As mentioned above with regard to transparency, preemptive action may be even more critical in the current environment of public skepticism and perceived dissatisfaction with administrative government.

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.¹⁷⁰ On two separate occasions, the ABA has taken steps to apply traditional judicial recusal standards to ALJs. In 1989, it adopted the Model Code for Administrative Law Judges, which mirrors the recusal standards for federal judges adopted in the ABA Model Code of Judicial Conduct and the federal recusal statute, 28 U.S.C. § 455.¹⁷¹ In 2007, the ABA amended its Model Code of Judicial Conduct to expressly include ALJs, albeit with some contextual limitations.¹⁷² Although neither of these codes are legally enforceable, they are evidence of

170. See, e.g., MODEL CODE OF JUD. CONDUCT Application § I(B) (AM. BAR ASS'N 2020).

171. See MODEL CODE OF JUD. CONDUCT FOR FED. ADMIN. L. JUDGES Canon 3(C) (AM. BAR ASS'N 1989).

172. MODEL CODE OF JUD. CONDUCT r. I(B) (AM. BAR ASS'N 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.”).

the legal profession's views regarding administrative recusal.

2. Additional Factors to Consider

While there is value to agencies promulgating recusal regulations that seek to promote public confidence in their adjudicative systems, the regulatory process will not be identical for every agency. Each agency will need to consider carefully how to promote recusal's values 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.¹⁷³ Each agency should thus evaluate its own adjudicative system and design a system of 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, there are some variables that may be useful guideposts for agencies in designing recusal standards aimed at preserving their appearance of impartiality. First is the degree of adjudicator independence. ALJs are often more insulated from agency influence than other adjudicators;¹⁷⁴ does the presence of a non-ALJ create a stronger appearance of partiality or bias? If so, recusal standards for non-ALJs may need to be more stringent than

173. 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.").

174. See, e.g., Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1345 (1992) (noting that non-ALJs "do similar work [to ALJs] but . . . are neither comparably protected in their independence nor compensated at similar levels").

for similarly situated ALJs. Imagine a recusal requirement based on an adjudicator's prior involvement in, or familiarity with, a case while working within the agency in another capacity.¹⁷⁵ The more insulated an adjudicator is from agency influence, the less important it may be (or appear to be) to remove them from cases they have previously encountered.¹⁷⁶

This of course begs the question of how independence is measured. Issues like adjudicator appointment, removal, compensation, discipline, and assignment may all impact an adjudicator's freedom from agency control. Finally, agency structure is relevant. The potential for the appearance of impartiality is necessarily less in cases where an agency adjudicator's decision is subject to highly deferential review than when it is conducted by an entirely separate agency, such as in the relationship between the Occupational Safety and Health Administration and the Occupational Safety and Health Review Commission.¹⁷⁷

175. This is distinct from the APA's limitation on ALJs presiding over cases in which a prior combination of functions has inspired in them a preexisting "will to win" on behalf of the agency. *See Grolier, Inc. v. FTC*, 615 F.2d 1215, 1220 (9th Cir. 1980) ("Congress intended to preclude from decisionmaking in a particular case . . . all persons who . . . had developed, by prior involvement with the case, a 'will to win.'").

176. Of course, the opposite may also be true; if an adjudicator is insulated from agency influence, they may be more willing and able to bring forward their pre-established bias regarding the case. Assuming the prior involvement came through working within the agency in another (non-adjudicative capacity), it is likely that whatever personal commitment to the outcome the adjudicator developed will persist regardless of agency influence. A lack of adjudicator independence is thus compounded—and in turn more detrimental to the overall impartiality of the proceeding—if the agency retains influence over the adjudicator. The APA addresses this concern, at least in part, through its prohibition on combination of functions. *See* 5 U.S.C. § 554(d)(2) ("The employee who presides at the reception of evidence . . . may not . . . be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.").

177. The Occupational Safety and Health Administration (OSHA) was created by the Occupational Safety and Health Act of 1970 and is part of the Department of Labor. OSHA's mission is to set and enforce protective workplace safety and health standards. *About OSHA*, OCCUPATIONAL SAFETY & HEALTH

A second factor in determining whether and how to develop appearance-based recusal standards is the regularity with which the agency appears as a party before the adjudicator. This of course is most likely where an agency has enforcement responsibilities. In enforcement proceedings, the fact that the agency is bringing its authority to bear against a private party arguably magnifies the importance of the adjudicator not only being impartial, but also appearing so. Benefits determinations in which the agency is a party (like those conducted by SSA) may present less of an appearance problem for the agency because they are not punitive, yet they are still vulnerable to charges of discriminatory or unfair treatment of vulnerable individuals, and thus depend on an appearance of impartiality to preserve their legitimacy. That said, a reasonable appearance standard cannot require recusal simply due to the agency appearing as a party in the adjudication. Agencies who regularly appear in evidentiary hearings before their own adjudicators must balance that fact against their interest in promoting a reasonable appearance of impartiality.

Third, the proportion of an agency's adjudicative staff to its caseload can also inform the appropriate recusal standard. Agencies with large adjudicative staffs and manageable caseloads 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. Concerns about adjudicator availability can be solved in other ways—by encouraging alternative dispute resolution or allowing adjudicators from other offices or agencies to sit by

designation¹⁷⁸—but that does not change the fact that recusal policies necessarily have consequences for adjudicator availability. Any decision to adopt a reasonable appearance standard must be cognizant of how an increased recusal rate could affect the agency’s ability to fulfill its adjudicatory mission.

A fourth factor is the agency’s public profile. Agencies that 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. Compare, for example, an individual benefits determination with an SEC enforcement action against an international bank. There is no question that both adjudications deserve and require impartial adjudicators, so the need for actual bias protections are the same in both cases.¹⁷⁹ When it comes to the appearance of impartiality, however, it may be that the magnitude of public awareness is directly proportionate to the increase in public confidence created by the appearance of impartiality. If that is true, then agencies that are more frequently in the public eye or the subject of press or other public scrutiny may benefit more from an appearance-based recusal standard.

Whereas recusal of a single adjudicator presents problems if replacements are not readily available, recusal of one of several members of an adjudicative body raises alarms

178. See, e.g., 5 C.F.R. § 930.208 (2021) (outlining OMB’s Administrative Law Judge Loan Program, under which OPM “coordinates the loan/detail of an administrative law judge from one agency to another”).

179. It is important to reiterate 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.

about the resulting makeup of that body. Concerns about the body's ability to achieve a 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.¹⁸⁰ Agencies should be aware of that potential consequence when setting appearance-based recusal standards.

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 (or should be) 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. These varied and potentially conflicting considerations do not outline a clear path for agency recusal rules generally, but they should be taken into account by each individual agency seeking to adopt its own recusal standards in order to balance the need for effective and efficient adjudication against concerns about the integrity of its adjudications.

180. At least two of these issues are readily apparent in modern administrative law. In terms of problems achieving quorum, ongoing vacancies on the Merit Systems Protection Board have rendered it entirely unoccupied since 2019 and unable to perform its statutory duties since 2017. See Juliegrace Brufke, *Administration Pushes for Senate to Move on MSPB Chair Nomination*, THE HILL (July 2, 2020, 5:42 PM), <https://thehill.com/homenews/administration/505719-administrations-mspb-chair-pick-calls-for-senate-to-move-on-his>. Tie votes have long been a problem for multi-member agencies with an even number of leaders, such as the Federal Election Commission. See, e.g., Daniel P. Tokaji, *Beyond Repair: FEC Reform and Deadlock Deference*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA (Eugene D. Mazo & Timothy K. Kuhner eds., 2018) (noting the problem of deadlock at the agency and proposing a new approach to judicial review of those deadlocks). If not monitored, recusal could create similar problems in individual cases by altering the agency's makeup in an individual proceeding in a way that threatens the agency's ability to perform its duties.

IV. 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. As explained in the Asimow Study, 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.¹⁸¹

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 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

181. ASIMOW, *supra* note 17, at 23.

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 to initially decide their own recusal issues.¹⁸² 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 remedy them by removing 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 it 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.¹⁸³

Agencies must determine if there should be an intermediate appellate forum for recusal decisions or if they

182. *See supra* Section II.B (discussing the development of the federal judicial recusal statute).

183. 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 . . .”).

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's decisions are only reviewable by the head of an agency, an intermediate review body could be formed from among the adjudicator's peers for recusal issues (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.

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 likely be required to defer to agency adjudicators' recusal decisions.¹⁸⁴ 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

184. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019) (elaborating on the Court's existing deference doctrine for agency interpretations of their own regulations articulated in *Auer v. Robbins*, 519 U.S. 452, 462 (1992)). The Court in *Kisor* expanded the longstanding *Auer* deference doctrine to include a series of considerations for courts to undertake before deciding whether to defer to an agency's interpretation of its own regulation. In order to merit judicial deference, the regulation must be genuinely ambiguous when subjected to the "traditional tools" of construction, and the agency interpretation must be reasonable. Reasonableness, according to the Court, depends on factors such as whether the agency's reading of the rule represents an agency's "authoritative" or "official," rather than merely ad hoc, position on the matter. A reasonable interpretation must also reflect the agency's expertise and its fair and considered judgment, meaning it cannot be part of a "'convenient litigating position' or '*post hoc* rationalizatio[n] advanced' to 'defend past agency action against attack.'" *Id.* at 2417 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)). In the recusal context, a generally applicable regulation adopted either through the APA's notice-and-comment procedures or its exception for procedural rules, see 5 U.S.C. § 553(b)(A), will almost certainly constitute an authoritative statement by the agency that is dependent on its own expertise regarding administrative adjudication and reflects its fair and considered judgment. While ambiguity will depend on the specific language of the rule and the facts surrounding each recusal issue, questions about the appearance of impartiality will likely be ambiguous enough to invite judicial deference in many—if not most—cases.

errors. If agencies do not provide for internal appeal of an adjudicator's recusal determination—or the recusal decision was made by an agency head and thus not subject to review within the agency—then agencies should consider permitting reviewing judges to consider those decisions *de novo*.

CONCLUSION

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

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.