RECUSAL IN ADMINISTRATIVE ADJUDICATION

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The challenges facing agency adjudication are a microcosm of those facing modern American government. Limited resources, shifting priorities, and overt politicization all contribute to perhaps the gravest threat to the longevity of our public institutions—diminished confidence in the integrity of agency action.

Recusal—the removal of an adjudicator from a particular case—is a time-honored way of safeguarding the integrity of adjudicative proceedings, from traditional judicial proceedings to agency adjudications. Yet unlike judicial proceedings, there is no set standard for determining when an agency adjudicator must recuse. Agencies have been left to design their own recusal regimes for the dual purpose of promoting fairness to litigants and, just as importantly, public confidence in their proceedings. Until now, the nature and scope of agency recusal practices were largely a mystery. This Article, which is derived substantially from a recent report for the Administrative Conference of the United States, is the first to develop a comprehensive accounting and taxonomy of agency recusal standards. As such, it is also the first to offer a normative analysis of administrative recusal across all federal agencies. The result is a series of recommendations for how agencies can

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best develop their recusal practices to combat the ongoing cynicism and suspicion that threatens the efficacy of American government.

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INTRODUCTION

Judicial recusal—the process of removing a judge from a case—is as old as the law itself. Judges since Justinian's time have evaluated whether they are able to fairly resolve disputes between opposing parties and, when they decide that they cannot, used recusal to give way to another, more impartial, adjudicator. As legal systems have evolved, so too has the law of recusal. Yet while the specific standards for when recusal is or should be required have fluctuated, recusal's primary purposes and goals have not.

Since its inception, recusal has sought to achieve two primary objectives: to promote fairness to the parties by ensuring an impartial arbiter for their dispute and to project the appearance of judicial impartiality for society at large. The first

goal implicates due process principles and has obvious benefits for a system designed to achieve the peaceful and orderly resolution of disputes and enforcement of the laws. If the arbiter is not in fact impartial, the parties themselves are less likely to seek the arbiter's assistance or abide by their decision. The second goal is institutional. By creating the outward appearance of fairness and impartiality, recusal encourages public confidence in the judicial system. This increased confidence is critical to safeguarding the democratic legitimacy of our otherwise independent and politically unaccountable courts.[1]

The importance of judicial recusal to the legitimacy of our judicial system is evidenced by how quickly the first Congress adopted recusal standards for federal judges. The Judiciary Act of 1789 included a provision codifying the English common law of recusal at the time, and there has been a federal recusal statute continually in existence ever since.[2] Model codes of judicial ethics have also existed since the Founding.[3] These codes either added context to the law of recusal or, in some instances, inspired legislative developments.[4] The attention paid to judicial recusal has not, however, translated to other forms of adjudication, particularly federal administrative adjudication. This is especially curious given that the goals of judicial recusal are no less important to agency adjudicators than to federal judges and in some instances may be even more so.

Administrative adjudication is a critical aspect of administrative government. Adjudications ranging from benefits determinations to licensing decisions and enforcement actions represent the full panoply of agency authority and touch on nearly every aspect of modern society. What's more, when agencies adjudicate, they directly affect the rights and liberties of individuals. The sheer scope and public impact of administrative adjudication are therefore enough on their own to highlight the significance of promoting integrity and confidence in agency adjudications. Questions of agency ethics and trustworthiness are even more important as government bureaucracy in general and administrative agencies in particular increasingly become targets—fairly or not—of public critique and skepticism.[5] Seemingly unaccountable agency actors are perceived as pulling the strings of power in furtherance of their own bureaucratic ends, independent of the

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1. As Justice O'Connor explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, "the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." 505 U.S. 833, 865–66 (1992).

2. LOUIS J. VIRELLI III, DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION 1–5 (2016) (outlining the history of recusal from the Roman Empire to the Founding).

3. *See id.* at 5–16.

4. 28 U.S.C. § 455.

5. 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.").

public good or purpose their agencies were designed to promote.[6] At the same time, concerns have been raised about increased political interference in adjudicator independence.[7] All of these factors—the reach of agency adjudication, its profound impact on individual members of the public, and a growing concern about agency motivations and transparency—create a strong incentive for agencies to protect both the actual and perceived integrity of their proceedings.

One way to promote the integrity of our government institutions is through a stable and transparent system of administrative recusal—a process and set of standards by which administrative adjudicators may withdraw or be removed from cases that raise questions about the assigned adjudicator's actual (or even apparent) impartiality.[8] Yet the law of recusal in federal agencies is often difficult to pinpoint

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6. Philip Wallach, *The Administrative State's Legitimacy Crisis* 1, BROOKINGS INST. (Apr. 2016), https://www.brookings.edu/wp-content/uploads/2016/07/Administrative-state-legitimacy-crisis_FINAL.pdf [https://perma.cc/W8FS-7J9V] ("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."). 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." PEW RSCH. CTR., PUBLIC TRUST IN GOVERNMENT REMAINS NEAR HISTORIC LOWS AS PARTISAN ATTITUDES SHIFT: DEMOCRATS' CONFIDENCE IN COUNTRY'S FUTURE DECLINES SHARPLY 1 (2017), https://www.people-press.org/2017/05/03/public-trust-in-government-remains-near-historic-lows-as-partisan-attitudes-shift/ [https://perma.cc/H864-C4Q2]. A similar survey in 2019 revealed that "[o]nly 17% of Americans today say they can trust the government in Washington to do what is right 'just about always' (3%) or 'most of the time' (14%)." *Public Trust in Government: 1958-2019*, PEW RSCH. CTR. (Apr. 11, 2019), https://web.archive.org/web/20190801035530/https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/ [https://perma.cc/7RN3-SM9R]. Public confidence improved slightly by 2021, but still only showed about a quarter of the population having trust in their government. *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/ [https://perma.cc/YW9U-DHPP] ("Public trust in government remains low. Only about one-quarter of Americans say they can trust the government in Washington to do what is right 'just about always' (2%) or 'most of the time' (22%).").

7. *See, e.g.*, Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 43 (2020) ("Recent Supreme Court decisions and executive actions raise concerns about the neutrality and independence of ALJs."); Bijal Shah, *Expanding Presidential Influence on Agency Adjudication*, REGUL. REV. (July 23, 2021), https://www.theregreview.org/2021/07/23/shah-agency-adjudication/ [https://perma.cc/5W93-65CB] ("Administrative adjudication is susceptible to contamination because it has a 'due process dimension that does not burden other government officials.' An expanded appointments power, the elimination of for-cause removal protections, and other modes of ensuring that adjudicators consider political interests may impede procedural fairness and negatively impact decisional independence.").

8. 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

and, once uncovered, largely underdeveloped. That is not to say that agency adjudicators are not using recusal frequently enough or appropriately *in practice*. The problem is that many agencies with statutory adjudication authority have either no written recusal standards or standards that provide little guidance to the adjudicators themselves, let alone the observing public. The result is possible confusion among parties about how to protect themselves from potentially partial adjudicators, and among the public about whether and to what degree the agency prioritizes the integrity of its proceedings.

Why is this so? For starters, judicial recusal standards do not apply to agency adjudicators. There are two commonly stated reasons for this phenomenon. First is that agency adjudication is so varied that it would be too difficult—if not impossible—for judicial recusal standards to accommodate all of its permutations.[9] Second is that agency adjudicators ought not be judged by the same standards as their judicial counterparts because of the multiple roles played by administrative agencies.[10] While the principle of judicial independence seeks to ensure that judges are immune from issues of policy and from the influence of designated policymakers, agency adjudicators typically have a policymaking function that necessarily combines their adjudicative responsibilities with an obligation to the agency's political mission. This policymaking feature complicates questions about which real or perceived conflicts can reasonably be avoided by agency adjudicators whose proceedings regularly involve, as a party, the very agency that employs them and whose decisions are often reviewed by executive-branch officials, including political appointees.

There is also no generalized legal standard for the recusal of agency adjudicators. This could be for the same reason that judicial recusal standards do not include agencies—the variety and dual function of agency adjudication. It could also be due to a perception that generalized provisions in the Administrative Procedure Act ("APA") or government ethics rules address the issue, or that model codes and ethical canons offer sufficient guidance to empower adjudicators to make recusal decisions that are tailored to their agency's needs and conduct. A closer

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disqualification. In modern practice, the two terms are used interchangeably. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES § 1.1, at 4 (Banks & Jordan eds., 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.

9. *See, e.g.*, Withrow v. Larkin, 421 U.S. 35, 52 (1975) (noting that "[t]he incredible variety of administrative mechanisms in this country will not yield to any single organizing principle" in the context of determining that the combination of adjudicative and enforcement functions within agencies does not per se violate due process).

10. *See id.*; 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 (2003) ("Despite intermittent expressions of caution—even of doubt and denial—we still turn to ALJs to identify and articulate the nuances of agency policy."); Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 49, 49–53 (2005) (examining the policymaking role of administrative adjudicators).

examination, however, reveals that none of these sources are sufficient to achieve the goals of recusal for administrative adjudicators.

The initial step in this project (the "Initial Report") for the Administrative Conference of the United States ("ACUS" or "the Conference") outlined the existing sources of agency recusal law and showed how, taken together, these sources failed to capture the full benefits of recusal.[11] The Initial Report concluded that, in order to fully realize the benefits of recusal, agencies should adopt recusal standards specific to their mission and responsibilities.[12]

This study furthers the work of the Initial Report by collecting and analyzing a "comprehensive" set of agency-specific recusal standards.[13] It seeks to highlight some of the strengths and weaknesses of those standards and to identify features of agency adjudication—such as whether an adjudicator exercises original or appellate jurisdiction—that may affect an agency's approach to recusal. Finally, the present study endeavors to make at least some preliminary recommendations as

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11. LOUIS J. VIRELLI III, RECUSAL RULES FOR ADMINISTRATIVE ADJUDICATORS (2018), https://www.acus.gov/report/final-report-recusal-rules-administrative-adjudicators [https://perma.cc/6RY8-32CB] [hereinafter INITIAL REPORT].

12. *Id.* at 23.

13. The goal of the study was to identify every recusal standard, including regulations and published guidance documents, adopted by agencies in connection with what Michael Asimow described in his recent ACUS study as "Type A" and "Type B" adjudication. Asimow defined Type A adjudication 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), https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-final-report_0.pdf [https://perma.cc/KZ8B-FMGV] [hereinafter ASIMOW STUDY]. He 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.* A more recent ACUS study focused only on Type B proceedings that required oral, as opposed to purely written, evidentiary hearings, but did not require that those proceedings include the "exclusive-record limitation" used in the Asimow Study. KENT BARNETT, MALIA REDDICK, LOGAN CORNETT & RUSSELL WHEELER, NON-ALJ ADJUDICATORS IN FEDERAL AGENCIES: STATUS, SELECTION, OVERSIGHT, AND REMOVAL 13 (2017), https://www.acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal [https://perma.cc/N8RF-N95U] [hereinafter BARNETT ET AL. STUDY]. Because this project considers a wider range of evidentiary hearings by agency adjudicators, the relatively slight distinctions between the types of hearings examined in the Asimow and Barnett Studies are not directly relevant to the present discussion.

The methodology used here to locate agency recusal standards for Type A and Type B adjudication is outlined in Part II, *infra*. Although the research methodology aspired to identify a comprehensive set of relevant recusal standards and employed several redundancies in an attempt to be as thorough as possible, there remains the inherent difficulty of isolating a truly definitive list of relevant regulations and guidance documents across the full universe of administrative agencies. Notwithstanding the significant research challenge, the sheer number and breadth of standards identified herein represents at minimum a useful and informative dataset from which to evaluate the current state of, and normative issues facing, administrative recusal.

to how agencies can use recusal standards to improve the results of, and the public's confidence in, their adjudications.

I. THE PROJECT

This study is designed to offer a set of choices for agencies seeking to adopt or amend their administrative recusal standards. It builds on the Initial Report by developing a taxonomy of existing approaches to administrative recusal and providing some analysis of the relative strengths and weaknesses of each approach. The Initial Report outlined the universe of generally applicable standards that could affect administrative recusal and concluded that, although those standards were somewhat well-suited to prevent actual adjudicator bias, they did not adequately address the appearance of impartiality. More specifically, the Report explained:

> A combination of due process protections, APA impartiality requirements, and [Office of Government Ethics] OGE ethical protections are relatively effective at checking actual adjudicator bias and, in many cases, at preventing a reasonable probability of such bias . . . . [A]gencies should continue to be vigilant, however, in promulgating rules to protect parties from biased adjudicators. The Supreme Court has made clear that "most matters relating to judicial disqualification [do] not rise to a constitutional level," and the APA's impartiality requirement does not apply to the multitude of adjudicators who fall outside the statute. Moreover, although OGE's ethical rules apply to non-ALJ adjudicators, they focus primarily on financial and relational conflicts of interest; they do not directly address issues such as personal animus or prejudgment.
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> Current legal restrictions on agency adjudication do not require that appearances be taken into account when deciding recusal questions. Due process is focused on the probability of actual bias in a reasonable judge. The federal recusal statute and model codes offer a broad reasonable appearance standard, but the statute does not apply to administrative adjudicators and the codes are not self-enforcing and have not been adopted by most agencies. Even when they do mention appearances, government ethics provisions are narrowly tailored to financial and relational conflicts . . . .[14]

Based on these gaps in the law of recusal for agencies, the Initial Report suggested that "[a]gency-specific recusal rules could be helpful in ensuring that all of the forms of bias targeted by both the APA and OGE are addressed for non-APA adjudicators" and in filling "a gap in the recusal safety net when it comes to public perception of agency adjudication."[15] It noted that "some agencies have . . . taken it upon themselves to establish their own recusal standards"[16] and acknowledged that

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14. INITIAL REPORT, *supra* note 11, at 17 (citations omitted).
15. *Id.* at 17, 18.
16. *Id.* at 15.

"[t]here is still more work to do to accurately map the landscape of agency recusal regulations."[17] ACUS Recommendation 2018-4 incorporated many of the suggestions in the Initial Report, recommending that "[w]hen adopting [recusal] rules, agencies should consider the actual and perceived integrity of agency adjudications and the effectiveness and efficiency of adjudicative proceedings" and that those "rules should . . . provide for the recusal of adjudicators in cases of actual adjudicator partiality."[18]

But the search for agency-specific recusal standards necessarily raises the question: Which agencies and which proceedings? The overarching goal of this trending inquiry into administrative recusal is to consider how traditional concepts of judicial recusal can be used to promote fairer and more legitimate agency adjudication. This in turn suggests a focus on agency adjudications that more closely approximate judicial proceedings. Because agency adjudication includes such a wide range of agency conduct, and because executive branch recusal standards include people with no adjudicative responsibilities whatsoever, it is important to be specific about which agency recusal standards are of interest here. The relevant agency adjudications are the same as those in the Initial Report: adjudications in which evidentiary hearings are required by statute, regulation, or executive order (whether presided over by administrative law judges ("ALJs"), referred to as Type A,[19] or non-ALJs, referred to as Type B,[20] and appeals arising from those hearings (including appeals to agency heads).[21] This definition is likely to be inclusive of all (or the vast majority of) agency proceedings for which judicial recusal concepts could be useful. It is also—and perhaps most importantly so—simpler and easier to describe when collecting information about agencies' recusal standards and practices.

Defining the category of adjudication that is of interest does not, however, identify which agencies to include in the search for agency-specific recusal standards. The universe of relevant agencies was drawn from a combination of sources that, taken together, provide a holistic (if not exhaustive) list of relevant

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17. *Id.* at 16.

18. Admin. Conf. of the U.S., Recommendation 2018-4, Recusal Rules for Administrative Adjudicators, 84 Fed. Reg. 2139, 2140 (Feb. 6, 2019).

19. Type A adjudication is defined by Michael Asimow in his recent ACUS study as "adjudicatory systems governed by the adjudicatory sections [§§ 554, 556, and 557] of the APA . . . [and] presided over by administrative law judges (ALJs)." ASIMOW STUDY, *supra* note 13.

20. *See* ASIMOW STUDY, *supra* note 13 (discussing the definition of Type B adjudication).

21. In sum, the scope of adjudicators considered in this study is the same as that in the Report but somewhat broader than the Barnett et al. Study and at least as broad as the Asimow Study. It 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. As the Barnett et al. Study revealed, "we are not aware of any [oral] hearings that the agencies identified that lack an exclusive-record limitation." BARNETT ET AL. STUDY, *supra* note 13, at 13.

agencies and their subunits. Those sources included the Asimow and Barnett et al. studies for ACUS,[22] the Stanford-ACUS adjudication database,[23] the Conference's *Sourcebook of United States Executive Agencies*, which includes a table of "Agencies with Statutory Adjudicative Authority,"[24] the Office of Personnel Management's (OPM's) list of agencies employing ALJs, and a contact list of agencies developed through previous ACUS research projects.[25] The goal of combining and cross-checking these lists against one another was to include all of the relevant Type A (ALJ) and Type B adjudicators.[26]

For each agency or subunit identified from these sources, research was done into: whether evidentiary hearings of the type described above are in fact held; the adjudicator's classification (ALJ, administrative judge ("AJ"), hearing officer, etc.); whether the proceeding involves an initial hearing or appellate-style review of an initial hearing; whether it is presided over by a single adjudicator or a multi-member body; the form in which recusal standards are promulgated (regulation, guidance document, practice manual, etc.); the content of the recusal standard, including whether it contained any procedural guidelines, such as whether parties to an adjudication can move for recusal; and whether an adjudicator's recusal decision is reviewable within the agency.

In addition to conducting research into published recusal standards, a survey was developed to gather whatever information remained from the relevant agencies. Ninety-two agencies (including subunits) were sent surveys. The recipient

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22. *See generally supra* note 13.

23. *See generally Adjudication Research: Joint Project of ACUS and Stanford Law School*, STANFORD UNIV., http://acus.law.stanford.edu/ [https://perma.cc/P3FT-R7KE] [hereinafter Stanford-ACUS Database] (last visited Feb. 17, 2022).

24. JENNIFER L. SELIN & DAVID E. LEWIS, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 116–18 (2d ed. 2018) ("Table 18: Agencies with Statutory Adjudicatory Authority"), https://www.acus.gov/sites/default/files/documents/ACUS%20Sourcebook%20of%20Executive%20Agenices%202d%20ed.%20508%20Compliant.pdf [https://perma.cc/N4J8-SLR6] [hereinafter SOURCEBOOK].

25. U.S. OFF. OF PERS. MGMT., ADMINISTRATIVE LAW JUDGES: ALJS BY AGENCY, https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency [https://perma.cc/XWR5-YBZ6] [hereinafter OPM List] (last visited Feb. 17, 2022). In addition to the *Sourcebook*'s list of adjudicating agencies, Table 18 provides information as to which of those agencies employ ALJs. SOURCEBOOK, *supra* note 24, at 116–18. The OPM list was current as of June 10, 2018. The *Sourcebook* also included a list of agencies that employ ALJs, but it was based on OPM data from 2017. In the interest of thoroughness, both the *Sourcebook* and OPM lists of ALJs were used to ensure that all agencies that fit within the parameters of the study were included in the recusal research. The ACUS contact list included, among others, the eleven agencies with the largest adjudication dockets: the Board of Veterans Appeals, Department of Health and Human Services, Department of Homeland Security, Department of Justice Executive Office for Immigration Review, Department of Labor, Environmental Protection Agency, Equal Employment Opportunity Commission, Federal Mine Safety and Health Review Commission, Internal Revenue Service, National Labor Relations Board, and Social Security Administration. *See* Stanford-ACUS Database, *supra* note 23.

26. The final list included 47 agencies and 35 "subunits," according to the *Sourcebook*. *See* SOURCEBOOK, *supra* note 24, at 125–32 (Appendix A-1: List of Agencies and Subunits—By Agency Name).

list was based on an ACUS contact list developed in connection with previous adjudication research. The ACUS contact list was used because it combined a thorough (if not wholly comprehensive) list of relevant agencies with the names of contact people to whom a survey could be directed. The primary purpose was to continue identifying agency recusal rules or standards within the different agencies and learn as much as possible about agency enforcement practices. The survey asked the following three questions of each agency:

> (1) Has your agency put in place an agency-specific policy or rule (whether substantive or procedural) applicable to any adjudicators governing their recusal or disqualification? Such a policy/rule may be contained in a C.F.R. regulation, guidance document, or otherwise.
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> (2) Does any statute—apart from the Administrative Procedure Act, see 5 U.S.C. § 556(b)—govern adjudicators' recusal or disqualification?
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> (3) If you have any such policies, rules, or statutes referred to in (1) and (2) above, please provide a citation(s) or, if no citation is available for a policy, a copy of or website link to the policy. Finally, we would welcome any other information you wish to provide on your agency's authorities and procedures for enforcing either its own recusal policies or rules, or the OGE's Standards of Ethical Conduct for Employees of the Executive Branch. Any information you can offer would be helpful.

Written responses were submitted on behalf of eighteen of the subunits surveyed. In addition to the survey responses, phone interviews were requested from twenty-one of the relevant subunits. Three interviews, covering two different agencies, were ultimately granted and conducted.[27] Interviews were designed to collect information about the actual role of recusal standards in agency adjudication, in particular how adjudicators view their recusal obligations and what resources they use to inform their decisions. The following Part summarizes and categorizes some of the results of the study in an attempt to better understand the strengths and weaknesses of agency recusal practice and thus draw better-informed conclusions about how recusal can most benefit agency adjudication.

II. ADMINISTRATIVE RECUSAL STANDARDS

The results of the study have been organized into five broad categories. The first focuses on the content of the recusal standards. It creates a taxonomy of agency recusal standards and evaluates the efficacy of each approach to administrative recusal. The second category looks at which agencies have adopted recusal procedures and considers the normative value of the different procedural regimes.

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27. Interviews were done with the General Counsel and Designated Agency Ethics Officer of the Occupational Safety and Health Review Commission ("OSHRC"), the Chief Administrative Law Judge ("ALJ") for OSHRC, and the Chief ALJ and Chief Advisor and Deputy Ethics Counselor for the Department of Health and Human Services Office of Medicare Hearings and Appeals ("OMHA").

The third category focuses on standards for different adjudicators, especially ALJs versus other adjudicators. It looks at how, if at all, standards differ among classes of adjudicators and whether those differences can be justified either legally or normatively. The fourth category considers the form of recusal standards, in particular whether they are promulgated in legally binding regulations, public-guidance documents, etc. The final category examines agency recusal standards along institutional lines. It compares standards used in different institutional contexts—such as initial hearings versus appellate-style review and single adjudicators versus multi-member bodies—and considers the relative value of those choices.

A. Taxonomy of Substantive Recusal Standards

It should come as no surprise that, in a universe as varied as agency adjudication, the range of recusal standards impacting those proceedings is equally varied. There are, however, some common themes that provide structure to the administrative-recusal landscape.

1. No Substantive Recusal Standards

The Asimow and Barnett et al. studies concluded that many agencies have no published recusal standards for their adjudicators, and this study confirms that conclusion.[28] Some agencies reported that they rely on internal custom or some other unwritten set of principles to guide adjudicative judgments about recusal.[29] A lack of written recusal standards raises challenges beyond the actual fairness of the proceedings. It is certainly possible that agency adjudicators are principled and diligent enough to avoid presiding over cases in which they either could not remain impartial or would appear unable to do so to a reasonable observer. Yet by failing to articulate recusal standards for those adjudicators, agencies leave the parties and the public unclear as to how adjudicators are likely to proceed. Paired with a lack of explicit procedures for seeking recusal, agencies hamstring the parties' ability to use recusal to benefit themselves and the adjudicator, and risk giving the impression that the agency is unaware of recusal's benefits for agency adjudication.

Other agencies have issued rules ensuring some general proposition like an impartial hearing without specific reference to recusal or § 556(b), which has been generally interpreted to address recusal for personal bias.[30] Impartiality is certainly related to recusal, but, without specific mention of recusal as a remedy, a requirement to be impartial, without more, is not a substitute for recusal.

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28. *See, e.g.*, ASIMOW STUDY, *supra* note 13, at 23 ("Some Part B procedural regulations and manuals do not contain explicit provisions concerning bias or explain how and when bias claims should be raised."); BARNETT ET AL. STUDY, *supra* note 13, at 49–50 (noting that "no disqualification requirement exists" for 6 of the 31 types of non-ALJs identified in the study). A list of adjudicatory agencies, subunits, and offices that do not have explicit recusal standards can be found *infra* in Table 1.

29. *See* BARNETT ET AL. STUDY, *supra* note 13, at 48 ("[M]ore than a third (11 of 31) of the non-ALJ types' [recusal obligations] arise, at least in part, from custom.").

30. *See* ASIMOW STUDY, *supra* note 13, at 23 (explaining how the APA's requirement of impartiality has been interpreted to apply to proceedings governed by §§ 556 and 557).

Regardless of whether a lack of recusal standards exposes litigants to more adjudicator bias, the damage is done. Parties either have no mechanism to challenge an adjudicator's participation (if no procedural rules exist) or no incentive to because they have no substantive rule on which to base a recusal argument. In extreme cases this may be less of a problem. The cost of proceeding with the current adjudicator could be so high as to leave the party with no choice but to challenge their participation, and non-agency-specific sources like the Due Process Clause and the APA could provide a basis for a party's recusal argument. This still presupposes that the party is aware of these non-agency-specific standards, and that the case presents such a severe bias issue that due process or the APA would be relevant.

But even if severe cases would be addressed without an agency enacting its own recusal rules, the appearance of either indifference or of a permissive approach to recusal threatens the integrity of agency adjudications. A rule incorporating by reference another source of recusal standards solves many of these problems and should be easy enough for an agency to adopt. When weighed against the cost of being silent about recusal and its effects on agency reputation, having some official statement regarding recusal—even if only to borrow standards from elsewhere—is a net benefit to the agency.

Finally, at least three agencies—the Commodity Futures Trading Commission ("CFTC"), Occupational Safety and Health Review Commission ("OSHRC"), and the Securities and Exchange Commission ("SEC")—set recusal standards for their lower-level adjudicators but do not offer similar standards for their commissioners when the commissioners preside over adjudicative proceedings.[31] This raises the interesting question of whether, and if so how, recusal should apply to agency heads. ACUS Recommendation 2018-4, which supports agency-specific recusal regulations, expressly states that "[a]lthough this Recommendation does not apply to adjudications conducted by agency heads, agencies could take into account many of the provisions in the Recommendation when establishing rules addressing the recusal of agency heads."[32] Agency heads' status as final policymakers complicates features of recusal like prior involvement, conflicts of interest, and the appearance of impartiality. Because it is an important aspect of agency heads' job to take public positions on the issues within their agency's purview, many of the traditional grounds of recusal must be balanced against considerations that do not apply to other agency adjudicators. For example, an ALJ may be expected to avoid interacting with agency rulemakers during their formulation of new regulatory proposals both for fear of the effect of the ALJ's prior involvement on the integrity of a later decision applying the rule and of the public's perception of that involvement. The same cannot and should not be true, however, for agency heads, who are expected to advance every aspect of the agency's mission,

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31. *See* CFTC, 17 C.F.R. § 10.10 (providing "scope of review" for Commission proceedings without mention of recusal, in contrast to § 10.8, which mentions recusal with respect to CFTC ALJs); OSHRC, 29 C.F.R. § 2200.92 (describing review by the Commission without mentioning recusal, whereas § 2200.68 sets recusal requirements for ALJs); 17 C.F.R. § 201.112 (setting recusal requirements for "hearing officers," which are contrasted with commissioners in § 201.110).

32. Admin. Conf. of the U.S., Recommendation 2018-4, Recusal Rules for Administrative Adjudicators, 84 Fed. Reg. 2139, 2140 (Feb. 6, 2019).

including rulemaking and adjudication. When judging agencies' recusal standards, it is important to distinguish between those that omit standards altogether and those that exclude only agency heads, because the latter may represent a strength, rather than a weakness, in the agency's approach to recusal.

2. Impartiality and Discretionary Recusal

Two very common themes—of admittedly limited value in thinking normatively about recusal—are instructions to adjudicators to conduct "impartial"[33] hearings or to make purely discretionary recusal decisions.[34] These approaches to recusal are inadequate from a normative perspective because, as in the case of the impartiality requirement, they are redundant and overbroad. An impartiality requirement is redundant because it overlaps directly with the Due Process Clause's requirement that *all* adjudication be conducted without a "probability of actual bias."[35] At its core, the concept of impartiality requires a lack of actual (as opposed to apparent) adjudicator bias, so the narrowest reading of an impartiality requirement is indistinguishable from due process. In the case of ALJs, an impartiality standard is also redundant with § 556(b) of the APA, which requires that the "functions of [ALJs] . . . be conducted in an impartial manner."[36]

In its broadest form, an impartiality standard is unhelpful for understanding the normative benefits of recusal because it threatens to subsume recusal altogether. If impartiality is read to be synonymous with general ideas of fairness, then it could include issues like an adjudicator's political preferences, hobbies, and casual friends, let alone the fact that agency adjudicators frequently hear disputes in which their agency employer is a party. While it is not wholly unreasonable to take a broad view of administrative recusal, the analysis is too complex and involves too many factors to be accurately characterized with a simple reference to impartiality.

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33. *See* Department of Commerce, 15 C.F.R. § 766.13; FDIC, 12 C.F.R. § 308.5(b)(9); IRS Appeals Functions, 26 C.F.R. § 6001.106(a); Office of Comptroller of Currency, 12 C.F.R. § 109.5(b)(9); USPS, 39 C.F.R. § 958.9; USITC, 19 C.F.R. § 210.36(d); DEP'T OF DEF. DIRECTIVE NO. 5220.6, DEFENSE INDUSTRIAL PERSONNEL SECURITY CLEARANCE REVIEW PROGRAM 4, 6 (1992), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/522006p.pdf [https://perma.cc/M3DE-LSSJ] (requiring that "[a]ll proceedings provided for by this Directive shall be conducted in a fair and impartial manner," and that "Administrative Judges and Appeal Board members have the requisite independence to render fair and impartial decisions"); OFF. OF GEN. COUNS., NAT'L LAB. RELS. BD., GUIDE FOR HEARING OFFICERS IN NLRB REPRESENTATION AND SECTION 10(K) PROCEEDINGS 1, 141 (2003), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/hearing_officers_guide.pdf [https://perma.cc/3GH2-72XM]. These impartiality provisions are presented in tabular form in Table 2, *infra*.

34. These discretionary standards use language granting adjudicators authority to recuse themselves whenever they "deem it necessary," or "in [the adjudicator's] opinion it is improper for him/her to preside," etc. *See, e.g.*, FDA, 21 C.F.R. § 12.75 (2021); FTC, 16 C.F.R. § 3.42(g) (2021); 24 C.F.R. §§ 26.5, 26.35 (2021); HUD, 24 C.F.R. § 180.210; DHS IJs, 8 C.F.R. § 246.4; National Highway Transportation Authority (NHTSA), 49 C.F.R. § 511.42(e) (2021). A full account of these discretionary recusal provisions is included in Table 3, *infra*.

35. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 877 (2009) (citing Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

36. 5 U.S.C. § 556(b).

Effectiveness aside, it is also possible that a generalized standard like impartiality is useful not for substantive purposes but as a messaging tool to notify the public that the agency and its adjudicators are committed to principles of fairness and equal treatment in their adjudications. However, messaging at this level may do more harm than good, particularly if the results under the standard do not match public expectations.

Discretionary standards—provisions empowering adjudicators to recuse whenever they "deem it necessary"—are similarly unhelpful because they serve only as a recognition of adjudicators' power, rather than a guiding principle that can protect litigants and promote public confidence. Although such purely discretionary standards obviously cannot displace constitutional, statutory, or other regulatory recusal standards, they offer little to no additional guidance for adjudicators as to when they should recuse, and in fact may prove confusing to adjudicators seeking to reconcile their obligations under discretionary regulatory standards and other recusal obligations.

In some cases, discretionary standards are accompanied by provisions permitting parties to file a motion to recuse on more concrete grounds, such as personal bias,[37] or by guidance documents that provide more detailed

37. The most recent example is from the Federal Aviation Administration ("FAA"). In a final rule promulgated on October 1, 2021, the FAA updated its recusal provisions based in part on ACUS Recommendation 2018-4. *See* Update to Investigative and Enforcement Procedures, 86 Fed. Reg. 54,514, 54,521 (Oct. 1, 2021) (relying in part on the "recommendations on Recusal Rules for Agency Adjudicators cited in ACUS's comment"). For civil-penalty actions, recusal of ALJs is discretionary, but a party may file a recusal motion based on allegations of "financial or other personal interest[,] . . . personal animus[,] . . . prejudgment[,] . . . or any other prohibited conflict of interest." 14 C.F.R. § 13.218(f)(6). For more informal evidentiary hearings, FAA hearing officers face similar choices. A hearing officer "may disqualify himself or herself at any time," but a party may file a motion to recuse on the same grounds articulated in § 13.218(f)(6). 14 C.F.R. §§13.39 (a), (d).

The FAA is only the most recent of many examples of agencies adopting discretionary standards while adopting more detailed grounds for recusal by motion. *See* Architectural and Transportation Barriers Compliance Board, 36 C.F.R. § 1150.53; CFTC, 17 C.F.R. § 10.8(b); CPSC, 16 C.F.R. § 1025.42(e); FCC, 47 C.F.R. § 1.245; FERC, 18 C.F.R. § 385.504 (explaining motion to Commission on review); FMC, 46 C.F.R. § 502.25(g); FMSHRC, 29 C.F.R. § 2700.81; GAO, 4 C.F.R. § 28.23; DOL, 29 C.F.R. §§ 18.16, 22.16 (ALJs and ARB); DOI, 43 C.F.R. § 4.1016 (concerning acknowledgment of American Indian Tribes); DOJ-EOIR, 28 C.F.R. § 68.30 (concerning immigration employment claims); NEA Program Fraud Civil Remedies Act, 45 C.F.R. § 1149.31; NLRB Unfair Labor Practice Proceedings, 29 C.F.R. §§ 101.10, 102.36; NTSB Air Safety Proceedings, 49 C.F.R. §§ 821.15, 821.35; Postal Regulatory Commission, 39 C.F.R. § 3001.23; SEC, 17 C.F.R. § 201.112; DOT Aviation Proceedings, 14 C.F.R. § 302.17(b); DOT Maritime Administration, 46 C.F.R. § 201.89; Alcohol and Tobacco Tax and Trade Bureau, 27 C.F.R. § 71.96.

A full list of agencies, subunits, and offices that employ discretionary and/or bias standards are available *infra* at Tables 3 and 5, respectively. If a single provision contains both a discretionary standard and a bias standard, those standards are tabulated separately in the corresponding table, such that a single provision can be included in multiple tables, along

suggestions.[38] One view of these provisions is that they simply mirror the APA standard, which states that an adjudicator "may at any time disqualify himself," but that "[o]n the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of [an adjudicator], the agency shall determine the matter as a part of the record and decision in the case."[39]

While it may be understandable for agencies to mirror the APA in their own recusal rules, there are at least two reasons why this answer is not sufficient. First is that the phrase "deems it necessary" connotes greater discretion for adjudicators facing a recusal issue than a statement that an adjudicator "may" recuse themselves "at any time." The former suggests a discretionary, threshold determination of necessity before an adjudicator should recuse. Setting a threshold of necessity for recusal shifts the adjudicator's perspective toward remaining in the

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with the language of the relevant standard for that table. For example, 17 C.F.R. § 10.8 (CFTC) is included in Tables 3 and 5 because it contains a discretionary standard and a separate bias standard.

38. For an example of the importance of guidance documents to agency recusal, consider the *National Labor Relations Board Division of Judges Bench Book* ("NLRB Bench Book"), which supplements the regulatory requirement that an ALJ "may withdraw . . . because of personal bias or for some other disqualifying reasons." 29 C.F.R. § 102.36. In doing so, it cites previous Board decisions requiring that "even the appearance of a partial tribunal" must be avoided and with statements that judges should recuse where they had some previous involvement with the proceeding or made statements that reveal an opinion about the case that "derives from an extrajudicial source" and "reveals a high degree of favoritism and antagonism." DIV. OF JUDGES, NAT'L LAB. RELS. BD., BENCH BOOK: AN NLRB TRIAL MANUAL § 2-410 (2019), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/alj_bench_book_2019.pdf [https://perma.cc/RN2Q-V86L]. The Atomic Safety and Licensing Board ("ASLB") of the Nuclear Regulatory Commission is also subject to a highly discretionary regulatory standard and a far more detailed and nuanced guidance document. *See* 10 C.F.R. § 2.313(b) (allowing for discretionary recusal to be achieved sua sponte or on motion from a party in ASLB proceedings); U.S. NUCLEAR REGUL. COMM'N, UNITED STATES NUCLEAR REGULATORY COMMISSION STAFF PRACTICE AND PROCEDURE DIGEST: COMMISSION, APPEAL BOARD AND LICENSING DECISIONS §§ 2.9, 3.1.4, 5.13 (2011), https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr0386/d16/sr0386d16.pdf [https://perma.cc/9GE4-XGHX] (suggesting standards similar to those applied to federal judicial recusal for ASLB proceedings). The Merit Systems Protection Board is in a similar situation. *Compare* 5 C.F.R. § 1201.42 (allowing for recusal "if a judge considers himself or herself disqualified" or if a party submits a motion alleging "personal bias or other disqualification"), *with* U.S. MERIT SYS. PROT. BD., JUDGES HANDBOOK 13 (2017), https://www.mspb.gov/mspbsearch/viewdocs.aspx?docnumber=241913&version=242182&application=ACROBAT [https://perma.cc/RFZ2-MBJR] [hereinafter MSPB Judges Handbook] (describing as bases for disqualification a close personal or familial relationship between the judge and a "party, witness or representative" in the case or the judge's "personal bias or prejudice"). As are immigration judges. *Compare* 8 C.F.R. § 1240.1(b) ("The immigration judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified."), *with* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., OPERATING POLICIES AND PROCEDURES MEMORANDUM 05-02: PROCEDURES FOR ISSUING RECUSAL ORDERS IN IMMIGRATION PROCEEDINGS (2005), https://www.justice.gov/sites/default/files/eoir/legacy/2005/03/22/05-02.pdf [https://perma.cc/2PWF-M2YX] (outlining detailed recusal standards).

39. 5 U.S.C. § 556(b).

case absent a determination that to remain would be untenable. Read this way, an adjudicator facing traditional grounds for recusal could still decide not to recuse based on their determination that doing so is not necessary for whatever reason. By contrast, the APA language is permissive. Rather than creating a threshold for recusal, it can be read to offer adjudicators the opportunity to recuse precisely when it may *not* be necessary. Consider a situation where an adjudicator may be personally familiar with one of the parties to a proceeding and is concerned about the perception of partiality that their participation in the adjudication might create publicly. While this may not require recusal under common law or other statutory standards, the adjudicator may feel that, for whatever reason, the balance of considerations—such as public perception, institutional considerations, and fairness to the parties—may weigh in favor of recusal. Under the APA's "may [recuse] . . . at any time" standard, an adjudicator would feel empowered to recuse out of prudence, even if they did not feel it was absolutely necessary.

There is also a way to read the "deems it necessary" standard and the APA language more harmoniously.[40] Yet even if the APA standard is effectively indistinguishable from the discretionary provisions cited above, it suffers from similar challenges. Conditioning mandatory recusal standards on the parties' decision to file a motion does not require the adjudicator to recuse on their own accord, even in the most obvious cases. It instead relies on the parties to initiate a recusal analysis. This is an important tool for parties in administrative adjudications but is a weak constraint on adjudicators who are not already inclined to recuse. It requires parties to take an adversarial position against the adjudicator who is presiding over their cases with full knowledge that the adjudicator has already declined to recuse on their own. While still an important check on recalcitrant adjudicators—especially those subject to intra-agency review of their recusal decision—it places a significant burden on the parties. Something as fundamental as the adjudicator's personal bias should be mandatory grounds for recusal regardless of whether the parties are aware of it or raise it in a motion.[41]

In terms of its messaging, a purely discretionary standard could create the sense that recusal is *never* objectively necessary. When recusal is left wholly to the adjudicator's discretion, it portrays recusal as a prudential, rather than legal, decision. Prudential considerations may be necessary in the most-difficult recusal cases but are not, and have historically not been treated as, relevant in clear cases like those involving personal bias, even though some instances of bias are not

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40. For example, the APA's grant of permission to adjudicators to recuse themselves "at any time" could be read to include an implicit limitation on recusal only in cases where it is warranted, or "necessary" (at least colloquially so) in the eyes of the adjudicator. This would be consistent with the common law "duty to sit"—the notion that judges have a responsibility to decide cases unless their participation would be unwarranted. Edwards v. United States, 334 F.2d 360, 362 n.2 (5th Cir. 1964) ("It 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 recusa[l].").

41. *See supra* note 37 (collecting citations). Presumably, a mandatory bias requirement would be enforceable on review of the adjudicator's final decision, whereas a bias standard that is only triggered by a party's motion to the adjudicator in question could be waived on review.

covered by constitutional or statutory recusal standards.[42] Most importantly, discretionary recusal standards encourage public skepticism about the integrity of agency adjudicators because they appear to allow for seemingly arbitrary recusals. This is not to suggest that adjudicators themselves are incapable of understanding or applying those standards in a principled, consistent way; concerns about perception surrounding recusal are important regardless of whether individual adjudicators are making sound recusal decisions. Such concerns could be controlled in part by allowing for appellate-style review of recusal, but not all agencies have such a system, and depending on appellate review to address the problem could be costly and inefficient. Moreover, review of recusal decisions traditionally includes only decisions not to recuse, leaving agencies with the choice to review all recusal determinations (a far more significant administrative commitment) or to leave open the possibility of arbitrary decisions to recuse under a discretionary standard.[43]

Discretionary standards are of course far less problematic when they are part of a larger recusal standard that includes mandatory requirements and relies on the discretionary recusal clause as a catch-all in case something unforeseen should occur that merits recusal. While using discretionary standards as a catch-all does have intuitive appeal and could be helpful in focusing adjudicators on the contextual nature of recusal decisions, the same pitfalls attach. Discretionary standards still empower adjudicators without guiding them, creating the potential for actual and perceived arbitrariness. For recusal standards that include both mandatory and discretionary provisions, the threat of arbitrariness or the perception thereof in recusals under a discretionary standard is inversely proportional to the depth and clarity of the mandatory standards. When mandatory standards are clear and comprehensive, the likelihood of relying on a discretionary provision decreases, and the problems created by a discretionary provision are curtailed. Public accountability for a discretionary recusal decision is in turn magnified because the choice to rely on a discretionary provision necessarily indicates that the mandatory grounds for recusal did not apply, thereby offering insight into the basis for the

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42. Due process addresses extreme financial and personal conflicts, but the Supreme Court has made clear that "most matters relating to judicial disqualification [do] not rise to a constitutional level" and that "'matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion." Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 876 (2009). The Office of Government Ethics ("OGE") standards govern some financial and personal conflicts, but only in specific situations, and the APA applies only to ALJs. *See* APA, 5 U.S.C. § 556(b); OGE, 5 C.F.R. § 2635.502. One important caveat about the relevance of prudential considerations pertains to courts of last resort, such as the U.S. Supreme Court, that do not allow for replacement judges or justices in instances of recusal. *See* Louis J. Virelli III, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1184–85 (2011) (arguing that institutional concerns about the number of Justices participating in a case must be part of the recusal analysis at the Supreme Court, and arguing that recusal standards that limit those considerations by the justices are unconstitutional). Since the overwhelming majority of adjudicators covered by the recusal standards in this study are not adjudicators of last resort and are replaceable when recused, the issues raised by Supreme Court recusal are not significant here.

43. For further discussion of whether decisions to recuse should be reviewable, see *infra* Subsection II.B.4.

exercise of discretion regardless of whether the adjudicator chooses (or is required) to publicly explain their decision.

3. Financial and Other Conflicts of Interest (Family and Professional Relationships)

The situation most closely associated with recusal is the conflict of interest. From Justinian to Blackstone, legal systems sought to protect litigants from judges who are financially invested in the outcome of their case or who have a personal relationship with one of the principles—a party, witness, or lawyer—in the proceeding. The Office of Government Ethics ("OGE") takes a similar approach to regulating the conduct of all government employees, including agency adjudicators.[44] It comes as little surprise, then, that several agencies follow the same approach in their recusal standards. The Patent Trial and Appeal Board's ("PTAB") Standard Operating Procedures[45] defines prohibited "conflicts of interest" for its adjudicators by reference to the Patent and Trademark Office Summary of Ethics Rules, which in turn relies on the OGE rules for all government employees.[46]

Among agencies with their own conflicts-based recusal standards, some of the clearest examples come from the Department of Agriculture. Although specific subunits within the Department have slightly varying standards, taken together they show a clear theme of conflicts-based recusal regulation.[47] For example, the Department of Agriculture regulation covering enforcement by the Secretary of 38 different statutes forbids assignment of an ALJ to any case where the ALJ "(1) has any pecuniary interest in any matter or business involved in the proceeding, (2) is related within the third degree by blood or marriage to any party to the proceeding, or (3) has any conflict of interest which might impair the Judge's objectivity in the proceeding."[48] The Agricultural Marketing Service regulation covering proceedings

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44. *See* 18 U.S.C. § 208; 5 C.F.R. § 2635.502 (2021).

45. PAT. TRIAL & APPEAL BD., U.S. PAT. & TRADEMARK OFF., STANDARD OPERATING PROCEDURE 1 (REVISION 15): ASSIGNMENT OF JUDGES TO PANELS 3–4 (2018), https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf [https://perma.cc/RH5E-UDFC].

46. *See* U.S. PAT. & TRADEMARK OFF., SUMMARY OF ETHICS RULES 3–4 (2019), https://ogc.commerce.gov/sites/default/files/pto-summary_of_ethics_rules-2021a.pdf [https://perma.cc/Q5CF-RGA2].

47. *Compare* 7 C.F.R. § 1.144 (2021) (precluding ALJs in the Department of Agriculture from participating in cases where they have a pecuniary interest, are related to any party, or have any other conflict), *with* 7 C.F.R. § 47.11 (2021) (precluding participation of potential examiners in proceedings of the Agricultural Marketing Service if they have a pecuniary interest in the proceeding or are related to any person involved in that proceeding). Like the Department of Agriculture, HHS also has relatively consistent conflicts standards across different agency adjudicators. *See* 42 C.F.R. §§ 423.1026, 423.2026 (2021) (disqualifying ALJs from participating in initial hearings or appeals related to the voluntary Medicare-prescription-drug benefit for personal bias or conflicts of interest); 42 C.F.R. § 405.1817 (2021) (same for contract hearing officers presiding over provider-reimbursement determinations).

48. 7 C.F.R. § 1.144 (2021). This regulatory language articulates the grounds on which an ALJ may not be assigned, rather than when recusal is required. The recusal provision of the rule instead focuses on procedure and includes the "for any reason deemed by the Judge

under the Perishable Agricultural Commodities Act[49] states that "[n]o person who (1) has any pecuniary interest in any matter of business involved in the proceeding, or (2) is related within the third degree by blood or marriage to any of the persons involved in the proceeding shall serve as examiner in such proceeding."[50]

Other agencies or subunits use conflicts standards in similar ways,[51] and still others combine conflict-of-interest standards with other provisions, most commonly prohibitions against personal bias.[52] Although personal bias and conflicts are sometimes used interchangeably, they are conceptually distinct for recusal purposes. Conflicts of interest do not connote any specific feelings or point of view about the parties or participants in the suit, whereas personal bias is based on those

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to be disqualifying" catch-all. There are at least two explanations for why some of the conflicts-based rules describe the standard as an *ex ante* assignment rule and others as an *ex post* recusal standard. The first is a matter of style. There is little practical difference in terms of the protections offered to litigants and the message sent to the regulated public by a standard that prohibits assignment versus one that requires recusal, especially if the regulation focusing on assignment includes a mechanism for seeking recusal when an inappropriate assignment has been made. The second is that the OGE rules governing federal employees address virtually identical conflict-of-interest situations as the recusal provisions, but the OGE rules' contemplated remedies include assignment and discipline; they do not mention recusal. *See, e.g.*, 5 C.F.R. § 2635.502 (2021) (stating 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"). To the extent a recusal rule drafter is looking to the OGE standards as a reference for a recusal regulation, it is understandable why they may choose to describe the prohibition on conflicts of interest as the OGE rules do—as an *ex ante* assignment constraint, rather than an *ex post* recusal requirement. Regardless of the precise reason, the difference between assignment and recusal provisions is largely irrelevant for present purposes. As mentioned above, the normative issues surrounding prohibitions on conflicts of interest for agency adjudicators are effectively identical whether they are framed as questions of assignment or recusal.

49. 7 U.S.C. § 499m(c) (2012).

50. 7 C.F.R. § 47.11(a) (2021).

51. *See, e.g.*, Department of Labor, 20 C.F.R. § 725.352 (2021) ("No adjudication officer shall conduct any proceedings in a claim in which he or she is prejudiced or partial, or where he or she has any interest in the matter pending for decision."); Railroad Retirement Board, 20 C.F.R. § 260.3(e) (2021) ("The [hearing] shall be conducted by a person who shall not have any interest in the parties or in the outcome of the proceedings, shall not have directly participated in the initial decision which has been requested to be reconsidered and shall not have any other interest in the matter which might prevent a fair and impartial decision."). A complete accounting of recusal provisions based on conflicts of interest is provided in Table 4, *infra*.

52. *See, e.g.*, SBA, 13 C.F.R. § 134.218(c) (2021) ("[A] Judge will promptly recuse himself or herself from further participation in a case whenever disqualification is appropriate due to conflict of interest, bias, or some other significant reason."); MSPB Judges Handbook, *supra* note 38, at 14 (describing as a basis for disqualification of an administrative judge (AJ) the situation where "(a) A party, witness, or representative is a friend or relative of, or has had a close professional relationship with the AJ; or (b) Personal bias or prejudice of the AJ"). A collection of recusal provisions based on personal bias or prejudice is provided in Table 5, *infra*.

same feelings or points of view. For example, an adjudicator could be presiding over a case in which she has a longstanding feud with one of the parties but has a financial interest in that party prevailing. Both issues have ramifications for the fairness and public perception of the proceeding, but they do not perfectly overlap. It therefore makes sense for agencies to include both factors in a recusal regulation and for a normative analysis of that regulation to treat each factor separately.

Conflicts-based provisions are certainly useful recusal measures. They go directly to the issue of fairness for litigants because they protect against adjudicators being tempted to make decisions on a basis other than the appropriate sources: the facts, law, and policy decisions relevant to the parties and the agency. They also meet the public's expectations for impartial adjudicators—objective, even-handed, and (ideally) independent—which promotes confidence in agency adjudication. Conflicts provisions additionally tend to be clear and easy to apply. A financial conflict should be a simple matter of fact that is easily discoverable by requiring annual financial disclosures (as many government entities do), which could also include information about business relationships and employment arrangements.

Familial and personal conflicts may be harder to discover, and they create drafting challenges as to how close a relationship is permissible between an adjudicator and a participant in the proceeding. The challenge of learning about an adjudicator's relationships can be alleviated somewhat by clear line-drawing regarding which relationships are acceptable. If acceptable levels of sanguinity are included in the provision—as many of the agencies with conflicts-based recusal standards have done[53]—then requiring adjudicators to disclose their family tree to that level of relation could preempt any confusion in a specific proceeding. The Selective Service System, for instance, prohibits adjudicators from participating "in the case of a registrant who is the [adjudicator's] first cousin or closer relation either by blood, marriage, or adoption."[54] This is a relatively straightforward and objective test that sends a clear signal about the agency's interest in protecting against adjudicators who could have difficulty remaining impartial. Nonfamilial relationships are harder to characterize and identify, but that may just counsel in favor of a conservative approach to "friendship" recusal. Historically we have not required judges to recuse based on close friendships with participants in a case (although some judges choose to do so anyway out of an abundance of caution). To the extent administrative-recusal regulations only address recusal in the closest of relationships, they remain in line with judicial standards while remaining less intrusive and easier to administer.

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53. *See, e.g.*, 9 C.F.R. § 202.118(d) (2021) (USDA Agricultural Marketing Service Rule requiring recusal of a "presiding officer" who "is related within the third degree, by blood or marriage, to any party in the proceeding"); 32 C.F.R. §§ 1605.6, 1605.25, 1605.55 (2021) (Selective Service rules requiring recusal of official "who is the member's first cousin or closer relation either by blood, marriage, or adoption"); U.S. EQUAL EMP. OPPORTUNITY COMM'N, HANDBOOK FOR ADMINISTRATIVE JUDGES (2002), https://permanent.access.gpo.gov/LPS105796/LPS105796/archive.eeoc.gov/federal/ajhandbook.html [https://perma.cc/X2YB-9KC9] (requiring recusal of administrative judge when "a party is a member of his/her household, [or] a close relative").

54. 32 C.F.R. §§ 1605.25(a), 1605.55(a), 1605.6(e) (2021).

The most significant problem with conflicts-based recusal provisions is that they are underinclusive. As mentioned above, conflicts and personal bias are distinct concepts, so an agency that stops at a conflicts standard is necessarily leaving itself vulnerable to both biased proceedings and, more likely and perhaps more troubling, to the perception that the agency has not sought to protect its litigants against biased adjudicators. This perception problem is particularly important for an agency that is under close public scrutiny.

Conflicts-based recusal standards are often closely aligned with the OGE rules for government employees.[55] This is not inherently problematic because recusal rules focus on a remedy—removal of an adjudicator from a specific case—that OGE rules may not offer. Recusal rules offer the benefit of being applied and interpreted with adjudication in mind, whereas OGE rules apply to all federal employees and thus may be interpreted and applied in ways that would not be best suited to fostering fair and legitimate agency adjudication. The difficulty arises when agencies simply cross-reference or incorporate OGE rules into recusal standards, as in the PTAB's Standard Operating Procedures.[56] If done conscientiously, agencies can use cross-references and incorporation for drafting convenience and still preserve the distinct features of administrative recusal. They should be vigilant, however, about avoiding conflation and public confusion.

4. Prior Involvement with the Case or Subject Matter

Concerns about adjudicators with a prior involvement in the case before them are generally reserved for activity performed within the agency prior to becoming an adjudicator, or as an attorney practicing before the agency. Hearing officers presiding over investigations and disciplinary proceedings for the PTO "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]."[57] The Department of Health and Human Services ("HHS") and the Railroad Retirement Board ("RRB") have similar provisions prohibiting an initial adjudicator from participating in the review of a contract reimbursement in which he or she directly participated (HHS) and in the review of an initial determination of benefits under the Railroad Retirement Act for which he or she had any direct responsibility (RRB).[58] These examples, however, are relatively few and far between: they do not reflect a widespread commitment among recusal regulators to protect against prior involvement in a case. It is certainly possible, given the nature of agency adjudication, that most agency adjudicators did not have any previous involvement

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55. *See* PBGC, 29 C.F.R. § 4003.2 (2021).

56. PAT. TRIAL & APPEAL BD., U.S. PAT. & TRADEMARK OFF., *supra* note 45.

57. 37 C.F.R. § 11.39(b)(3) (2021).

58. RRB, 20 C.F.R. § 260.3(e) (2021) ("The reconsideration of the initial [benefits determination] shall be conducted by a person who shall not have . . . directly participated in the initial decision which has been requested to be reconsidered . . . ."); CMS, 42 C.F.R. § 405.1817 (2021) ("The hearing officer or officers shall not have had any direct responsibility for the program reimbursement determination with respect to which a request for hearing is filed . . . ."). Recusal standards incorporating the prior-involvement approach are included in Table 4, *infra*.

in a case before them. While this is a rational basis for not including a provision addressing prior involvement in a recusal regulation, it overlooks two issues.

First, prior-involvement clauses are not difficult to draft (see the above examples) and are easy to understand and apply. To the extent they prove to be a solution without a problem, little is lost from the perspective of agency time and resources. To the extent a prior-involvement issue arises, a recusal provision designed to address the problem could be extremely valuable because it would put both the presiding adjudicator and any potential reviewers of the adjudicator's recusal decision on notice that the agency takes such situations seriously and expects the adjudicator to address them. The fact that OGE rules contemplate prior involvement can help mitigate the potential downside of leaving the provision out of a recusal rule, but OGE rules do not, in and of themselves, remedy the problem. Even if government employees, including agency adjudicators, are prohibited from participating in cases in which they have some prior involvement, the lack of a recusal remedy leaves adjudicators in the awkward position of being disciplined for something that could have been easily remedied via recusal.

Second, prior-involvement provisions not only benefit litigants, who are protected from adjudicators who have an extrajudicial perspective on their case, but also serve recusal's public-perception goal. Including a prior-involvement provision in a recusal rule strengthens the public perception that agencies are expressly seeking to preempt concerns about agency adjudicators with prior exposure to, or involvement in, the case. This approach could be particularly valuable in the administrative (as opposed to judicial) recusal context because much of the skepticism around agency adjudication is based on the relationship between the agency and its adjudicator employee,[59] and the existence and applicability of OGE rules is not likely to be as readily apparent to the general public.

5. Personal Bias

Personal bias is a core feature of modern recusal doctrine.[60] The APA addresses recusal in adjudications covered by §§ 554, 556, and 557 of the Act by requiring recusal "[o]n the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification."[61] It is thus no surprise that bias is a recurring feature in a large percentage of agency recusal rules.[62] As with discretionary recusal

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59. *See, e.g.*, Greenberg v. Bd. of Governors of Fed. Rsrv. Sys., 968 F.2d 164, 167 (2d Cir. 1992) (explaining that recusal cannot be applied in the same way to federal judges and ALJs due at least in part to ALJ's employment relationship with the agency); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1248 (1994) (describing the close relationship between agency adjudicators and agency heads).

60. For centuries of English common law, judicial recusal was only required in cases of financial interest. *See* FLAMM, *supra* note 8, at 7 ("Under early English law a judge could be disqualified from presiding over a matter only when he could be shown to possess a disqualifying pecuniary interest . . . ." (citing John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947)).

61. 5 U.S.C. § 556(b).

62. 42 C.F.R. §§ 405.1817, 405.1847, 405.1026, 423.1026, 498.45 (2021) (HHS—CMS, DBA, PRB, OMHA); SBA, 13 C.F.R. § 134.218 (2021); U.S. COAST GUARD,

provisions, issues of bias appear most often in situations where bias is the basis for a party's recusal motion or affidavit; the adjudicator is often not bound to recuse themselves based on their own, known biases.[63] That raises some potential challenges in terms of both efficacy and perception. The cost of linking personal bias and mandatory recusal is small, but the benefits could be significant. Even if we do not trust adjudicators to recuse themselves on bias grounds,[64] setting mandatory recusal standards based on personal bias would give parties more traction on review to have biased adjudicators removed and fairness restored to their proceeding.

The obvious importance of protecting against personal bias in adjudication gives rise to at least two arguments against including bias-based recusal provisions in agency rules. One is that the Due Process Clause already addresses actual bias and that any attempt to regulate in the same area would be at best meaningless and at worst potentially confusing. It is true that due process guarantees a degree of impartiality in agency adjudication, but it does not go nearly as far as courts and agencies have and should to properly protect litigants. The Supreme Court has consistently held that "most matters relating to judicial disqualification [do] not rise to a constitutional level"[65] and that "'matters of kinship, personal bias, state policy, [and] remoteness of interest, would seem generally to be matters merely of legislative discretion.'"[66] This serves as a reminder that constitutional protection in recusal standards operates as a floor, leaving to lawmakers the broader universe of situations that could raise concerns about the impartiality and legitimacy of an adjudicator's decision.

The other argument relies on the fact that Congress has already dealt with the issue of personal bias in agency adjudication through the APA's impartiality requirement.[67] There are two responses to this point, beyond acknowledging that it is of course correct. The first is that many of the proceedings that fit within this study's definition of legally required evidentiary hearings are not presided over by ALJs and thus are not covered by the APA's impartiality language. For that reason

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ADMINISTRATIVE LAW JUDGE INTERNAL PRACTICES AND PROCEDURES 16722.21, at 2 (2010), https://www.uscg.mil/Portals/0/Headquarters/Administrative%20Law%20Judges/Guidance%20Documents/ALJIPP_16722.21_ALJ_Process_Guides.pdf [https://perma.cc/SD25-WWSY]; MSPB Judges Handbook, *supra* note 38, at 13.

63. *See supra* note 37 (collecting citations).

64. There is an ongoing debate over whether bias is a problem that is overlooked because individuals have difficulty finding bias in themselves or whether judges are simply good at overlooking potential bias in their decisions. It is worth clarifying that enthusiasm for bias-based recusal provisions should not be construed as concern that agency adjudicators struggle with impartiality. There is currently no evidence of an impartiality crisis in agency proceedings. That is why issues of perception are so critical to the analysis. We cannot confuse what we know and take for granted about the integrity of our adjudicators with public confidence in the system. That is where agency recusal is likely to make the greatest contribution at minimal cost to agency efficacy and efficiency.

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

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

67. 5 U.S.C. § 556(b).

alone, agencies should adopt bias provisions for agency adjudicators not covered by the APA.

The second response is that public perception benefits less from the implicit incorporation of the APA into ALJ proceedings than it would from the express prohibition of biased adjudicators via an agency rule. At worst, a bias-based recusal provision could be seen as redundant and thus ineffective. At best, however, a bias provision portrays the agency as concerned with one of the core drivers of our principle of due process—an impartial decision-maker. The upside of including a bias provision thus likely outweighs the potential downside of being viewed as redundant.

6. Protecting the Appearance of Impartiality

Some agencies have come close to adopting judicial recusal standards without actually doing so.[68] The Equal Employment Opportunity Commission's ("EEOC") *Handbook for Administrative Judges* states that the "Administrative Judge should recuse himself/herself from both real and perceived conflicts of interest" but goes on to say that recusal is not required where "no reasonable person knowing all the facts would question [the AJ's] impartiality."[69] The Provider Reimbursement Review Board ("PRRB"), a subunit of the Center for Medicare and Medicaid Services ("CMS"), requires recusal of a board member who "is prejudiced or partial with respect to any party or . . . has any interest in the matter pending for decision," and Rule 45 of the PRRB Rules explains that a "Board member may recuse him or herself if there are reasons that might give the appearance of an inability to render a fair and impartial decision."[70] As discussed in greater detail above, this focus on appearances is an important part of recusal theory, but it is somewhat fraught in the agency context due to adjudicators' policymaking obligations and the inevitable interconnectedness between those adjudicators and the agency that not only employs them but also regularly appears before them as a party. Still, with thoughtful implementation, the agency should be able to maintain the necessary balance between public perception and administrative efficacy and efficiency. Regulating the appearance of impartiality must be done explicitly in

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68. *See, e.g.*, HALLEX I-3-1-40 (SSA) ("An administrative appeals judge (AAJ) or appeals officer (AO) must disqualify or recuse himself or herself from adjudicating a case and request reassignment if . . . [t]he AAJ or AO believes his or her participation in the case would create an appearance of impropriety . . . ."); PAROLE COMM'N, U.S. DEP'T OF JUST., RULES AND PROCEDURES MANUAL, at M-03 (2010), https://www.justice.gov/sites/default/files/uspc/legacy/2010/08/27/uspc-manual111507.pdf [https://perma.cc/3WUC-UC3N] ("A hearing examiner or Commissioner shall disqualify himself when it reasonably appears that he may have a conflict of interest or that his participation in the hearing might place the Commission in an adverse situation."). For efficiency purposes, recusal provisions incorporating appearance standards have been included alongside truly quasi-judicial standards in Table 6, *infra*.

69. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 53, at III.A.1.

70. CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., PROVIDER REIMBURSEMENT REVIEW BOARD RULES 58 (2018), https://www.cms.gov/Regulations-and-Guidance/Review-Boards/PRRBReview/Downloads/PRRB-Rules-August-29-2018.pdf [https://perma.cc/M7DP-S6P4] [hereinafter PRRB RULES].

order to gain the public-perception benefits, but it cannot be done to the detriment of the agency's ability to fully and finally adjudicate.

It is also worth noting that the appearance standards adopted by the EEOC and PRRB both occurred in guidance documents, rather than regulations.[71] This may be a coincidence, but it may also reflect the difficult problem of balancing public perception with functionality; even if appearance standards appear only in guidance documents, they can still send the desired message that the agency values impartial adjudication while also allowing for some flexibility among adjudicators to weigh the appearance of their participation against the realities of staffing concerns and policymaking. A shortcoming of the EEOC model is that the *Handbook* only addresses personal conflicts and the appearance of partiality that can accompany them. It does not explicitly mention any of the other grounds for recusal—personal bias, financial conflicts, and prior involvement—that can be harmful to litigants and weaken the public's confidence in administrative adjudication. The PRRB standard includes conflicts and bias, but it still does not cover the full panoply of reasons to recuse. Recusal rules that are concerned with public perception do promote public confidence in administrative adjudication but must be careful not to do so at the expense of fairness to litigants.

7. (Quasi-) Judicial Recusal

The most comprehensive agency recusal standards are those that approximate judicial standards, whether by incorporating the federal-judicial-recusal statute directly, referring to model codes or canons of judicial ethics, or explicitly including all the features of judicial recusal.[72] The common features of modern judicial recusal are those already discussed above—conflicts of interest, prior involvement, personal bias, and the appearance of impartiality. A small group of agency rules include all of these features, almost exclusively by incorporating judicial recusal sources into their administrative recusal standards. One clear example is the Department of the Interior, which has two separate regulations requiring adjudicators to recuse themselves "from a case if circumstances exist that would disqualify a judge in such circumstances under the recognized canons of judicial ethics."[73] Another is a recently adopted regulation from the Occupational Safety and Health Review Commission ("OSHRC"), which states that "[a] Judge shall recuse himself or herself under circumstances that would require disqualification of a federal judge under Canon 3(C) of the Code of Conduct for United States Judges."[74] Canon 3(C) is virtually indistinguishable from the federal

71. The PRRB's conflicts and bias provisions are in a recusal rule, but the appearance standard is not. *Compare* 42 C.F.R. § 405.1847 (2021), *with* PRRB RULES, *supra* note 70, at 58.

72. For list of quasi-judicial standards, see Table 7, *infra*.

73. 43 C.F.R. § 4.27(c) (2021); Fish and Wildlife Service, 50 C.F.R. § 18.76 (2021).

74. 29 C.F.R. § 2200.68 (2021). Canon 3(C) reads, in pertinent part, as follows:

(C) *Disqualification.*

recusal statute.[75] Others have followed suit to varying degrees of specificity, but agencies with recusal rules that mirror federal judicial standards are a distinct and small minority. They do include, however, by far the most active agency adjudicator in the study, the Social Security Administration ("SSA"), as well as the DOJ's Executive Office of Immigration Review ("DOJ EOIR") and the Nuclear Regulatory Commission ("NRC").[76] None of the three have adopted binding regulations governing recusal, but all have issued guidance documents that explicitly include features like protections against conflicts, prior involvement, personal bias, and the appearance of impartiality.[77] A 2005 DOJ EOIR memorandum from the Chief Immigration Judge stated that the federal recusal statute, while it "does not specifically mention immigration judges . . . offers strong guidance on the recusal issue,"[78] and the NRC's Staff Practice and Procedure Guide specifically refers to the

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> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
> (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;
> (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:
> (i) a party to the proceeding, or an officer, director, or trustee of a party;
> (ii) acting as a lawyer in the proceeding;
> (iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or
> (iv) to the judge's knowledge likely to be a material witness in the proceeding;
> (e) the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

OFF. OF GEN. COUNS., ADMIN. OFF. OF U.S. CTS., CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3(C) (2019), https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges [https://perma.cc/N7QK-FE66].

75. 28 U.S.C. § 455.

76. As of July 10, 2018, SSA employed over 85 percent of all federal ALJs (1655 out of 1931). OPM List, *supra* note 25.

77. *See, e.g.*, HALLEX I-2-1-60 (SSA) ("ALJ may withdraw from the case if . . . [t]he ALJ believes his or her participation in the case would give an appearance of impropriety.").

78. EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., *supra* note 38, at 2 n.2.

federal statute in describing its desired approach to recusal.[79] Explicitly incorporating judicial standards, including protection for the appearance of impartiality, comes closer to fulfilling the dual promises of recusal theory than any other administrative recusal standards.

The remaining issues are whether smaller organizations with specific policy missions are able to apply broad judicial recusal standards without infringing on the agency's ability to fulfill its mission, both with regard to the parties in its adjudications and its broader constituents. The following categorizations of agency recusal regulations will take a closer look at those issues.

B. Recusal Procedures

Among agencies that have set their own substantive recusal standards, most have also adopted some procedural regime to facilitate enforcement of those substantive standards.[80] Setting procedural standards for recusal is important because it increases the likelihood that recusal will be utilized. Procedural standards establish consistent mechanisms for resolving recusal issues, which ideally will make the process better informed, easier to administer, and more transparent, benefitting the parties and the observing public. The following represents some of the features of recusal procedure adopted by adjudicating agencies. Although each feature represents a positive contribution to the overall recusal process, they may work best in combination.

1. Recusal Motions

The majority of agency recusal regimes allow for parties to file motions requesting their adjudicator's recusal. In practice, the existence of agency-specific procedural rules generally does not depend on the level of sophistication of the substantive standards the procedural standards seek to facilitate. Some agencies allow for parties to file a recusal motion despite not setting any substantive standards at all. The Federal Housing Finance Agency ("FHFA"), for example, allows an adjudicator to "[r]ecuse himself upon his own motion or upon motion made by a party," without any explicit guidance about the factors an adjudicator should consider in deciding whether that motion should be granted.[81] Other agencies set vague, highly discretionary standards for adjudicators yet allow for recusal motions

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79. U.S. NUCLEAR REGUL. COMM'N, *supra* note 38, at 3.1.4.2 ("Although the disqualification standard for federal judges in 28 U.S.C. § 455 does not by its terms apply to administrative judges, the Commission and its adjudicatory boards have applied it in dispositioning motions for disqualification under 10 C.F.R. § 2.313."). The Merit Systems Protection Board has been less explicit. Neither its Judges Handbook nor the regulation it adopted incorporate the federal recusal standard. 5 C.F.R. § 1201.42; MSPB Judges Handbook, *supra* note 38, at 14. Yet in its published decisions, the Board has indicated that the federal judicial recusal standard may still be instructive. *See, e.g.*, Washington v. Dep't of the Interior, 81 M.S.P.R. 101, 104 (1999) ("There is no requirement that the Board be bound by the federal judicial rule . . . but . . . we see no reason not to look to the rule and case law arising from 28 U.S.C. § 455, where relevant . . . .").

80. Of the total of approximately 100 agencies, subunits, and offices that have adopted some type of recusal standard, over half (approximately 63) have adopted some form of recusal procedure.

81. 12 C.F.R. § 1209.11(b)(13) (2021).

only on more concrete grounds, like personal bias.[82] The Federal Communications Commission ("FCC") not only allows an adjudicator to recuse whenever he "deems himself disqualified" but also allows parties to file motions to recuse "based upon personal bias or other grounds."[83]

The overwhelming majority of procedural standards leaves the initial recusal determination to the adjudicator whose participation is being questioned and empowers parties to the adjudication to file a motion requesting the adjudicator to recuse themselves.[84] This approach is legitimizing for administrative recusal both because it tracks well-known and accepted judicial recusal procedures and because it adds to the integrity of the recusal decision by allowing parties to offer grounds for recusal that the presiding adjudicator either was unaware of or refused to acknowledge. The parties' ability to seek recusal decreases the likelihood that genuine reasons to recuse will go unnoticed and incentivizes adjudicators to come forward early with information that may lead to their recusal, which creates a more efficient and transparent process.

Adjudicators deciding their own recusal status also discourages parties from using recusal as a means of judge shopping to avoid unsympathetic adjudicators. Despite taking recusal seriously, agencies also encourage adjudicators not to recuse without sufficient grounds.[85] Maintaining as a default position that adjudicators will resolve the cases assigned to them discourages adjudicators from

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82. *See supra* note 37 (collecting citations).

83. 47 C.F.R. § 1.245 (2021).

84. One exception to this practice of adjudicators making their own initial recusal decisions is in Department of Agriculture ("USDA") proceedings under the Packers and Stockyards Act. Rule 18 of the USDA Rules of Practice for those proceedings allows a party to file a motion with the "judicial officer" seeking recusal of the "presiding officer." 9 C.F.R. § 202.118(b) (2021). The "presiding officer" is "any attorney who is employed in the Office of the General Counsel of the [USDA] and is assigned so to act in a reparation proceeding." 9 C.F.R. § 202.102 (2021). The "judicial officer" is the "final deciding officer in adjudicatory proceedings subject to 5 U.S.C. 556 and 557." 9 C.F.R. §§ 202.102, 2.35 (2021). In this instance, the judicial officer reviews decisions of the presiding officer yet is also the person responsible for the initial resolution of motions to recuse the presiding officer.

Several other agencies have similar provisions placing the initial recusal decision in an official other than the adjudicator being challenged. *See, e.g.*, 18 C.F.R. § 385.504(c)(2) (2021) (listing FERC rule allowing for motion to Commission to request "removal of any presiding officer from a proceeding"); 45 C.F.R. § 16.5 (2021) (listing HHS Departmental Board of Appeals rule stating that the "Chair will assure that no Board or staff member will participate in a case where his or her impartiality could reasonably be questioned"); 49 C.F.R. § 511.42 (2021) (listing NHTSA rule allowing for parties to request disqualification of "the presiding Officer" by "fil[ing] with the Chief Administrative Law Judge a motion to disqualify"); 49 C.F.R. § 821.15 (2021) (listing NTSB rule requiring recusal motions pertaining to an individual Board Member be filed with "the Board"); POMS DI 33015.045 (stating that the decision to disqualify a SSA Disability Hearing Officer must be made by the SHO (Supervisory Hearing Officer)).

85. *See, e.g.*, EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., *supra* note 38, at 3 ("Recusal is not a tool which parties and judges can arbitrarily invoke to rid themselves of unpleasant or difficult cases. Rather, recusal is mandated only in certain clearly delineated instances. Indeed, judges have *an obligation not to recuse themselves* in certain circumstances.").

succumbing to judge shopping in its most blatant form. It also provides cover for adjudicators to deny recusal motions attacking their competency without appearing defensive or obstinate; an initial adjudicator may be reluctant to deny an overly aggressive recusal motion, especially if it contains allegations that directly implicate the adjudicator's integrity. Internal agency review of recusal decisions is helpful in this regard—it protects the parties from misguided denials of recusal motions and protects adjudicators from appearing to be self-serving when denying overly aggressive recusal requests.

2. Affidavits

Several of the provisions permitting recusal motions also require an affidavit from the movant asserting the factual grounds for recusal. The adjudicator is then tasked with evaluating the affidavit to determine if recusal is warranted.[86] Like allowing the adjudicator to resolve their own recusal issues in the first instance, affidavits have been part of federal judicial recusal for over a century. The value of affidavits to the recusal process has, however, been a bit controversial. As early as 1911, affidavits were used as grounds for peremptory recusals of federal judges; if a party filed an affidavit asserting facts that met the recusal standard, the judge was required to recuse as a matter of law.[87] Only ten years later, the Supreme Court severely limited the scope of peremptory recusals under the statute.[88] In *Berger v. United States*, the Court held that, in the face of a peremptory recusal under § 144, a judge must accept the veracity of the facts alleged in the affidavit but could determine for him or herself whether those facts met the prevailing recusal standard.[89] This empowered judges to prevent parties from judge shopping through unfounded recusal motions yet still held the judge responsible for applying the *party's* account of the facts to the governing legal standard. Although the Court's holding only applies to § 144, which is directed solely at district court judges, the *Berger* Court's application of § 144 is instructive as to the use of affidavits in administrative recusal.

The use of an affidavit strengthens the recusal process in several ways. Most importantly, it prevents the adjudicator from being both the source of factual information and the ultimate fact finder for their own recusal. Judges have a long

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86. *See, e.g.*, DOT, 14 C.F.R. § 302.7 (2021) ("If . . . there is filed with the administrative law judge . . . an affidavit of . . . disqualification . . . the DOT decisionmaker shall determine the matter . . . as a part of the record . . . in the case."); 29 C.F.R. § 2700.81(b) (2021) (FMSHRC) ("A party may request a Commissioner or a Judge to withdraw . . . by promptly filing an affidavit setting forth in detail the matters alleged to constitute . . . grounds for disqualification."); DoEd, 34 C.F.R. § 81.5(d)(2) (2021) ("A party may file a motion to disqualify an ALJ under the standards in paragraph (c) of this section. A motion to disqualify must be accompanied by an affidavit that meets the requirements of 5 U.S.C. § 556(b). Upon the filing of such a motion and affidavit, the ALJ decides the disqualification matter before proceeding further with the case.").

87. Act of Mar. 2, 1911, 36 Stat. 1090 (codified as amended at 28 U.S.C. § 144).

88. Berger v. United States, 255 U.S. 22, 35 (1921).

89. *See id.* at 36.

history of being their own fact finders in recusal decisions,[90] and that fact has generated significant public skepticism about the integrity of the process. Providing for a party's affidavit is an improvement to a purely judge-driven process because it incentivizes parties to file recusal motions by protecting them against self-interested adjudicators. It also protects against baseless recusal motions by both constraining movants and empowering adjudicators. The use of affidavits constrains movants by requiring them to make their factual assertions under oath. Affidavits empower adjudicators by giving them freedom to deny recusal requests that are unsupported by the facts, especially in cases where an adjudicator is not required to recuse themselves under the applicable standard yet is wary about *appearing* self-serving by denying a motion for their own recusal. If the party's version of the relevant facts does not justify recusal, it is hard to perceive the adjudicator's denial of a recusal motion as self-serving.

The potential drawback of allowing affidavits, of course, is the risk of a fact-finder's reliance on unsupported, selective, or exaggerated facts. A clever party should have little trouble fashioning an account of the grounds for recusal that meets the standard and is not facially untenable.[91] The danger of affidavits leading to unwarranted recusals can be limited on review of the initial recusal decision, but that adds administrative costs and resources that could have been avoided with a more robust fact-finding process at the outset. Other methods of discouraging over-zealous use of affidavits would be to allow the opposing party to file an affidavit in opposition to the motion, or to adjust the initial adjudicator's standard of review from peremptory recusal to a rebuttable presumption in favor of recusal. The presumption could be rebutted by the adjudicator on the record, thereby deterring parties from unduly elaborating in their affidavit and providing a reviewing entity additional information upon which to evaluate the propriety of the initial decision. The difficulty with such an approach is the inherent tradeoff between the benefits of adjudicators policing parties' assertions and the costs of potentially chilling the candor of those assertions.

In general, affidavits seem to be a sound way to communicate facts relevant to administrative recusal. As with many issues in the recusal process, the challenge lies in maintaining a workable, efficient process that does not overwhelm the agency's adjudication system while protecting against real and perceived self-dealing by either the parties or the adjudicator.

3. Adjudicator Reporting Requirements

A potentially crucial feature of recusal procedure—as with all administrative procedure—is the adjudicator's explanation of their recusal decision. A few agencies require that adjudicators explain their recusal decisions on the

90. *See* Virelli, *supra* note 42, at 1195 ("In fact, at English common law and throughout the history of American federal recusal law, judges have been empowered to make the initial (and in the case of United States Supreme Court Justices, the final) ruling as to their own recusal.").

91. This risk may be less in the context of a sworn affidavit than in a recusal motion but is still quite real; an affiant can attest to certain facts that they know to be true and exclude others without necessarily violating their oath.

record, but the large majority are silent on the matter.[92] The APA states that for adjudications governed by §§ 554, 556, and 557, "the agency shall determine [whether to recuse an adjudicator] as a part of the record and decision in the case."[93] Yet it is not typical in practice for adjudicators—even those subject by rule to the APA's substantive standard for recusal based on an "affidavit of personal or other disqualification"—to be required to provide a written explanation of their recusal decisions.[94] This alone supports establishing agency regulations that require ALJs to explain their recusal decisions, both as a matter of compliance with the statute and to avoid the appearance of impropriety created by a failure to comply.

It may be that more generalized rules regarding motions practice at the agency address the issue, but that only highlights the value of an explicit cross-reference in the recusal standards.[95] Busy adjudicators have lots of valid reasons not to employ precious time and resources explaining (at least in detail) their recusal decisions. Especially in cases where the substantive recusal standard is highly discretionary or flexible, a stringent reporting requirement could deter sua sponte recusals. Reporting requirements are not meant to disparage adjudicators' good faith in the recusal process, but rather to highlight the importance of including specific reporting requirements that serve the dual purpose of signaling the agency's commitment to public dialogue about recusal and considering the resource challenges that additional requirements inevitably create.

There are several specific benefits that may result from adjudicators publicly explaining their recusal decisions. First is that the increased transparency encourages adjudicators to be more thoughtful about their reasons for recusal, including their reasons for withdrawing from a particular case. Because the adjudicator is often the primary source of the relevant facts regarding their recusal as well as the official finder of fact for the initial recusal decision, increased transparency encourages adjudicators to develop a complete record in support of their decision rather than merely relying on their own knowledge of the

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92. *See, e.g.*, HUD, 24 C.F.R. § 26.5 (2021) ("If the hearing officer does not withdraw, a written statement of his or her reasons shall be incorporated in the record . . . ."); FCC, 47 C.F.R. § 1.245 (2021) ("(1) The person seeking disqualification shall file with the presiding officer an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification . . . . (6) The affidavit, response, testimony or argument thereon, and the Commission's decision shall be part of the record in the case."); DOI, 50 C.F.R. § 18.76 (2021) ("If there is filed by a party in good faith a timely and sufficient affidavit alleging [grounds for disqualification], the hearing shall recess. The Director of the Office of Hearings and Appeals shall immediately determine the matter as a part of the record and decision in the proceeding . . . .").

93. 5 U.S.C. § 556(b).

94. In fact, in at least one instance in which an agency utilizes ALJs for its adjudication under § 556(b) of the APA, it explicitly states that the "judge . . . is not required to state the[ir] reason for recusal." 43 C.F.R. § 30.130 (stating that a judge presiding over Indian probate hearings for the Department of the Interior "must immediately file a certificate of recusal in the case and notify the Chief ALJ . . . [but] is not required to state the reason for recusal").

95. The present study did not include a broader review of generalized adjudication procedures that could affect recusal—it is limited to regulations and agency guidance directly addressing recusal.

circumstances without articulating which facts are most relevant and why. Increased transparency also operates as a check against unnecessary recusals. The decision to leave can appear to be the "safer" position, especially in cases where reassignment is relatively easy for the agency and its adjudicators. But too much risk aversion in recusal can be damaging to an agency as well. If adjudicators are encouraged, or take it upon themselves, to recuse in every case where a motion is filed, for instance, just to be abundantly certain that no appearance of impropriety is attached to the case, then the value of substantive recusal standards is diminished, and parties may feel emboldened to use recusal to engage in judge shopping. Requiring adjudicators to explain their recusal decisions publicly makes it more difficult for them to exercise caution for caution's sake. It also pushes adjudicators to develop norms and interpretive approaches to recusal that can help refine the standards and send a clearer message to the affected public as to when and how recusal will be used by adjudicators in that agency. Adjudicators' explanations can also serve as guidelines for their colleagues to use in future cases, thereby making recusal practices within the agency more uniform and easier to apply and evaluate for effectiveness going forward.[96]

A second reason for requiring explanations of recusal decisions is to facilitate more insightful review of those decisions. As mentioned in the next Subsection, many agencies with recusal procedures include intra-agency review of those decisions. A written record of why a recusal decision was made, although perhaps not limiting the scope of the reviewers' inquiry,[97] can both inform and guide the reviewers' understanding of the issue. This is especially important in light of the fact that initial adjudicators, who decide only their own recusal motions, may not be as experienced in recusal matters as their reviewers, who will have access to recusal issues from a wider body of initial adjudicators. Providing reviewers with an

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96. The Justices of the Supreme Court have rejected this argument for requiring them to explain their own recusal decisions. Justice Kennedy testified before Congress that the Justices' recusal decisions "should never be discussed," even with one another, because "[t]hat's almost like lobbying." House Appropriations Committee, *Hearing: The Supreme Court of the United States FY 2016 Budget*, YOUTUBE (Mar. 23, 2015), https://youtu.be/spLCISTFF9k?t=3715 [https://perma.cc/37MW-DDJZ] [hereinafter Hearing on the Supreme Court Budget]. Although Justice Kennedy's position may appear transferrable to agency adjudicators, it is in fact easily distinguishable. The Court's reluctance to engage in public discourse about recusal turns, at least in part, on the fact that a Justice's recusal decision is unreviewable and because a recused Justice cannot be replaced in a given case. *See* Ruth Bader Ginsburg, *An Open Discussion with Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1039 (2004) ("[T]here's no substitute for a Supreme Court Justice."). Recusal at the Court thus impacts the composition of the Court in a way that recusal in other adjudicative contexts does not. *See* CHIEF JUSTICE JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 8–9 (2011), http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf [https://perma.cc/R397-6P3Q] (explaining that the Justices' recusal decisions are materially different from those of lower-court judges). The institutional impact is not present in agency adjudication, at least outside of agency heads, because recused administrative adjudicators are by-and-large replaceable and reviewable. Moreover, the fact that administrative recusal decisions are reviewable supports record-building.

97. *See* 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" in adjudications covered by APA §§ 554, 556, and 557).

explanation of an adjudicator's reasoning allows reviewers to reach more informed outcomes in individual cases, create a more coherent recusal regime for the agency, and educate less-experienced initial reviewers about recusal. This coherent view of recusal also helps maintain consistency within an agency in the face of initial adjudicators being transferred from other agencies. An experienced SSA ALJ, for example, may have a different, SSA-specific view of recusal than the agency that they have been transferred to. A system of written recusal decisions allows for coordination both horizontally (among initial adjudicators) and vertically (between initial adjudicators and reviewers) that can make the entire recusal regime more effective by making it clearer and easier to use as well as rendering it more accessible to prospective parties and the public at large.

A third reason is that written recusal decisions comport with our general understanding of administrative law in adjudications. Courts review agency decisions for rationality, based both on whether reasons were provided and the adequacy of those reasons.[98] This rationality requirement promotes the legitimacy of agency action; we feel more confident in the power of agencies to impact our lives when we know they are being made to act rationally. Providing written recusal explanations comports with this legitimizing expectation that agencies will provide reasons for their choices.

Finally, agency reporting requirements allow for the collection of recusal data that can better inform agency policy and can provide the public with a better understanding of how recusal is functioning to ensure that parties are interacting with impartial adjudicators. It is possible to collect such data without the adjudicator's rationale for their decision, but the presence of a written rationale draws additional attention to the decision, making it easier for the agency to account for it. It also makes it easier for outside observers to follow agency recusal practices, increasing transparency and further promoting public confidence in the process.

Reporting requirements are not, however, without costs. As mentioned above, the administrative burden of explaining recusal decisions could be a deterrent to an adjudicator withdrawing from a proceeding. Moreover, as discussed in Recommendation 2018-4, there are potential privacy concerns implicated by offering reasons for recusal.[99] The details of an adjudicator's relationship with a party to the proceeding, a party's financial or professional information, or facts pertaining to agency conduct that may create a real or apparent conflict with the adjudicator could all be worth protecting from disclosure on privacy or other grounds unrelated to recusal. It will be important for adjudicators to have the flexibility to determine how best to explain their decision to recuse while taking into account the broader impact of that explanation.

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98. *See, e.g.*, Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721 (2014) (arguing in favor of distinctions between "first order" (i.e., procedural), and "second order" (i.e., substantive) arbitrariness review).

99. *See* Admin. Conf. of the U.S., Recommendation 2018-4, Recusal Rules for Administrative Adjudicators, 84 Fed. Reg. 2139, 2141 (Feb. 6, 2019) ("In addition, agencies should publish their recusal decisions to the extent practicable and consistent with appropriate safeguards to protect relevant privacy interests implicated by the disclosure of information related to adjudications and adjudicative personnel.").

The APA appears to require some degree of explanation when a party asks an adjudicator to recuse themselves.[100] Although this set of circumstances does not include the full range of agency adjudication considered by this study, it is emblematic of how the basic premise in administrative law that agencies must justify their decisions also applies to administrative recusal. Agencies should consider using explanation requirements to promote the efficacy and public perception of recusal decisions, while seeking to minimize administrative and privacy burdens that could steer adjudicators away from recusal.

4. Intra-Agency Review

Procedural recusal standards can also allow for intra-agency review of an adjudicator's decision not to recuse.[101] The benefits of this approach are obvious, in that it both protects against adjudicators' unwillingness to accept that they should be removed from the case and creates the perception that the recusal decision has been fully vetted. The use of an affidavit to set the factual record has similar benefits at this stage as at the initial determination. Deference to an adjudicator's fact finding about their own recusal status could perpetuate an already-tainted outcome, such that allowing the party requesting recusal to set the factual record protects against adjudicator self-dealing. For adjudications governed by § 557 of the APA, the question arises whether any deference to the facts in the affidavit is required.[102] In cases where the factual record is derived directly, if not solely, from the affidavit, even a de novo review of the factual record should adhere relatively closely to the affidavit, absent some glaring inconsistencies or fabrications.

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100. 5 U.S.C. § 556(b) (explaining that an agency's decision to recuse an adjudicator "shall" be made "as a part of the record . . . in the case").

101. *See, e.g.*, CFPB, 12 C.F.R. § 1081.105(c)(2) (2021) ("If the hearing officer does not disqualify himself or herself within ten days, he or she shall certify the motion to the Director . . . ."); FTC, 16 C.F.R. § 3.42(g)(2) (2021) ("If the Administrative Law Judge does not disqualify himself . . . , he shall certify the motion to the Commission . . . . The Commission shall promptly determine the validity of the grounds alleged . . . ."); FDA, 21 C.F.R. § 12.75(a) (2021) ("The ruling on any [presiding officer recusal] request may be appealed in accordance with § 12.97(b)."); TTB, 27 C.F.R. § 71.96 (2021) ("[T]he Administrator shall upon appeal as provided in § 71.115, if the administrative law judge fails to disqualify himself, determine the matter as a part of the record and decision in the proceeding."); EPA, 40 C.F.R. § 22.4(d)(1) ("If such a motion to disqualify the Regional Administrator, Regional Judicial Officer or Administrative Law Judge is denied, a party may appeal that ruling to the Environmental Appeals Board. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator."); NEA, 45 C.F.R. § 1149.31(c) ("[I]f the ALJ denies a motion to disqualify, the matter will be determined by the authority head only during his/her review of the initial decision on appeal."); FCC, 47 C.F.R. § 1.245(b)(3) ("The person seeking disqualification may appeal a ruling of disqualification, and, in that event, shall do so at the time the ruling is made.").

102. *But see* HALLEX 1-3-2-25 (SSA), at 1 ("If, in conjunction with a request for review, the [SSA] Appeals Council (AC) receives an allegation of unfairness, prejudice, partiality, bias, misconduct, discrimination, or its equivalent (allegations) about an [SSA] ALJ, the AC reviews the allegation under the abuse of discretion standard in [HALLEX] I-3-3-2.").

The costs of intra-agency review fall mostly on the agency itself, rather than the parties. Intra-agency review of a recusal decision is not dispositive of the adjudication such that resources spent deciding recusal questions, especially on appeal, may seem better directed toward the merits of the parties' claims. This problem is amplified in cases of interlocutory review because interlocutory review slows down the proceeding on the merits without any possibility of resolving it.[103] In addition to cost, the additional time spent to review a recusal decision creates potentially perverse incentives for parties in adversarial proceedings. Recusal motions eligible for interlocutory review could be a delaying tool for parties with deeper pockets than their opponents or who stand to benefit from the status quo.

Intra-agency review of recusal decisions could also encourage reviewers to use recusal as a political tool, particularly when the reviewers are agency heads. This is mostly a concern in cases where agency heads have strong feelings about the issue being adjudicated but for whatever reasons do not want to be accountable for their position. If they are willing to be accountable, they can simply use their significant review authority to achieve the desired result through a ruling on the merits. If they would prefer not to be associated with the desired outcome, however, they could use recusal to maneuver the adjudication to an official who is sympathetic to their view. Assuming the sympathetic adjudicator issued a ruling consistent with the agency heads' preference, the agency heads could then deny review and preserve the ruling without having to take a public position themselves. By contrast, if the agency heads could not review an adjudicator's recusal decision, they would be forced to address the issue on the merits, thus making them more fully accountable. This accountability issue is admittedly not as prominent in recusal decisions as questions of cost and delay, but it is nonetheless another factor in understanding which procedures stand to improve agency recusal.

Recusal of a member of a multi-person board or commission raises slightly different issues.[104] If the multi-person entity is the head of the agency, then any intra-agency review of one member's decision would have to be performed by the other members of the entity. Time and resource allocation may be slightly less burdensome when review can be performed by one's peers rather than an entirely different segment of the agency. For one, the other members of the entity are likely to be familiar with the details of the proceeding. In addition, peer review is likely to be more efficient when recusal practice is viewed over time. To the extent recusal is about the relationships and experiences of a board member or commissioner, that member's peers may develop a more thorough understanding of the member's experiences and relationships than a relative stranger elsewhere in the agency. This of course depends on the length of time the members serve together and the level of

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103. In cases where a denial of a recusal motion is overturned, the added expense of interlocutory review is unquestionably worth it because it prevents the possibility of having to completely redo an otherwise final adjudication. There is no reason to believe and no quantitative data to confirm or deny, however, that interlocutory appeals are likely to result in reversals even half of the time, let alone often enough to make the process efficient.

104. As evident from Table 7, *infra*, many multi-member agencies—such as the CFTC, Consumer Products Safety Commission ("CPSC"), EEOC, FCC, Federal Deposit Insurance Corporation ("FDIC"), FMSHRC, FTC, MSPB, NLRB, NRC, and SEC—have promulgated recusal standards.

familiarity they develop with one another, but it still represents an opportunity for efficiencies in the recusal process. More frequent recusal motions could also create greater familiarity.

Problems also arise when some of the agency's leaders review a recusal decision by one of their own.[105] Members may be reluctant to second-guess a colleague for reasons of collegiality or simply to avoid creating a precedent they themselves may have to follow.[106] Second, members may be reluctant to vote to force a colleague to recuse because of the message it sends about the ethics of the group's decision. This is true for any number of votes to force recusal short of a majority; if one or more reviewing members vote in favor of their peer's recusal but do not carry the vote, they have succeeded only in tainting the public's perception of the outcome. This fact could create a sense of risk aversion among members and lead them to vote against recusal as a bloc for fear of the costs of a split vote on recusal of an agency head.

In addition, the structure and function of a multi-member body can be changed drastically through recusal, such that members of that body will not want to be seen as having ulterior motives when reviewing their peers' recusal decisions. A vote for recusal of an adjudicator who holds opposing views projects a concern with the outcome, not just the ethics, of the adjudication. This of course is not always true, but the perception could be quite costly. Furthermore, most multi-member bodies consist of an odd number of members.[107] Review of a peer's recusal decision by the remaining members could thus create the possibility of a tie vote. Even if the members decide in advance what result will accompany a tie vote, a group that is evenly split on recusal creates concern about the legitimacy and integrity of that body's decision in the case.

Lastly, discussion of intra-agency review of recusal decisions should not limit itself to review of an adjudicator's refusal to recuse themselves. Focusing on refusals to recuse makes sense because the fairness to the parties and the public confidence in the process is generally advanced by removing an unfit (or apparently unfit) adjudicator from a case. But it is not true that fairness and public confidence can only be advanced by reviewing recusal denials. Overly conservative decisions

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105. Chief Justice Roberts explained that the Supreme Court would not undertake review of its members' recusal decisions because "[a]s in the case of the lower courts, the Supreme Court does not sit in judgment of one of its own Members' decision whether to recuse in the course of deciding a case. Indeed, if the Supreme Court reviewed those decisions, it would create an undesirable situation in which the Court could affect the outcome of a case by selecting who among its Members may participate." ROBERTS, *supra* note 96, at 9.

106. Both of these concerns have been expressed by Justice Kennedy when asked about the prospect of intra-Court review of a Justice's recusal decision. *See* Hearing on the Supreme Court Budget, *supra* note 96, at 14.

107. A notable exception is the Federal Election Commission, which consists of six members. *See* 52 U.S.C. § 30106. Many multi-member bodies do not operate at full capacity, and therefore may in fact have an even number of members at a given time, notwithstanding the statutory design. For purposes of understanding how recusal should be viewed in a multi-member body, it is most important to note that recusal changes the numerical makeup of the body, resulting in potentially unforeseen challenges such as tie votes or a lack of quorum.

to recuse could harm the parties as well by subjecting them to a less qualified, or less fair, decision-maker. Moreover, all of the benefits of prudent recusal apply equally to decisions for and against recusal. The fairness and public-perception benefits that attend review of recusal denials are just as prevalent in grants. So are the costs. Limited resources and the corrupting effects of political motivations could influence reviews of recusals just as they could denials. Perhaps even more so in the sense that the most efficient and logical remedy for review of a decision to recuse is reinstatement. Unlike ruling that a failure to recuse is incorrect and must be remedied by recusal, the remedy for wrongfully recusing oneself in the first place is to be put back in charge of the proceeding. This means review of decisions to recuse come with greater certainty as to who will be in power after the recusal issue is settled, especially if the recused adjudicator's replacement is known at the time of review. By contrast, review of a failure to recuse leads only to forced recusal, with less certainty as to who will preside over the adjudication going forward. This uncertainty could deter reviewers seeking to manipulate the assignment process for their own advantage.

Procedural guidelines for administrative recusal can be significant factors in the perceived and actual success of an agency's recusal regime. Empowering parties to be part of the solution by filing recusal motions and offering affidavits promotes more thorough investigation of an adjudicator's impartiality and, in turn, the public's perception of that impartiality. The same is true of public records of recusal decisions and internal review of those decisions. While many agencies employ one or more of these techniques, the current study did not identify any that employed them all, via regulation or otherwise. At minimum, casting procedural recusal rules as tools for promoting more consistent, transparent, and reliable recusal practices reveals their legitimizing potential for administrative adjudication.

C. ALJs Versus Other Adjudicators

In addition to focusing on the content of agency recusal regulations, it may be informative to consider how the status of the adjudicator affects recusal decisions. The primary distinction among agency adjudicators who preside over required evidentiary hearings is the distinction between ALJs and non-ALJs. This is because ALJ practice and procedure is addressed (in part) by the APA, and ALJ hiring and removal is at least somewhat consistent across agencies.[108] Not so for non-ALJ adjudicators. Wide variation and a relative lack of understanding about how non-ALJ adjudication operates prompted the recent Asimow and Barnett et al. studies.[109] Both studies looked holistically at non-ALJ adjudication and touched on recusal

108. The longstanding process for ALJ hiring was recently modified significantly by Executive Order 13,843, which was ostensibly promulgated in response to the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018), that ALJs are "inferior officers" subject to the Appointments Clause of the Constitution. U.S. CONST. art. II, § 2, cl. 2. The Executive Order moved the position of ALJ from the competitive service to the excepted service, meaning the civil service exam is no longer required for appointment. ALJ appointments may be made directly by, and at the discretion of, agency heads. The limiting feature of the Order is that ALJ candidates must either already be a judge or have a current license to practice law in the United States or one of its territories. Exec. Order No. 13,843, at § 3(a)(ii), 83 Fed. Reg. 32,755 (July 10, 2018).

109. For further details about these studies, *see supra* note 13.

issues, but neither undertook a comprehensive treatment of agency recusal standards or practice. This project's combining of ALJ and non-ALJ recusal standards offers an opportunity to see if and how agencies treat the two types of adjudicators differently.

As a theoretical matter, there are at least two reasons why treating ALJs and non-ALJs differently makes sense with regard to recusal. The first is that ALJs are statutorily required by § 556(b) of the APA to act impartially, which Recommendation 2016-4 explained means requiring ALJs to recuse themselves from proceedings in which they have a financial interest, personal animus, or prejudged adjudicative facts.[110] To the extent the APA prohibits conflicts and bias for ALJs, it stands to reason that agency recusal regulations that cover ALJs would either exclude these terms or expressly incorporate § 556(b) by reference.[111]

A second distinction between ALJs and non-ALJs that could be influential for recusal rules is adjudicator independence. ALJs are statutorily protected from undue influence by their employing agency; they can only be removed for cause as determined by a neutral third-party arbiter, the Merit Systems Protection Board

110. *See* Admin. Conf. of the U.S., Recommendation 2016-4, Evidentiary Hearings Not Required by the Administrative Procedure Act, 81 Fed. Reg. 94,314 (Dec. 23, 2016), https://www.acus.gov/recommendation/evidentiary-hearings-not-required-administrative-procedure-act [https://perma.cc/C4CB-HT2R]. Recommendation 2016-4 adopted the Asimow Study's suggestion. *See* ASIMOW STUDY, *supra* note 13, at 23.

111. In reality, however, a review of existing recusal regulations shows that the presence of an ALJ does not make it less likely that a recusal rule will explicitly mention conflicts of interest or personal bias. This does not mean that agency regulators are indifferent to the APA standard, only that the present evidence does not suggest that the applicability of the APA's impartiality requirement directly impacts the content of agency recusal rules. It could, however, indicate that the agencies are not focusing on the APA standard when thinking about recusal and therefore that the distinction between ALJs and non-ALJs is not an agency priority.

("MSPB").[112] Non-ALJs often do not enjoy the same protections.[113] ALJs' greater independence could counsel against including appearance standards in ALJ recusal provisions because their independence necessarily creates an appearance of impartiality, at least with regard to conflicts of interest. This may be true, but the few examples of agencies adopting recusal rules do not corroborate the theory. The PRRB and EEOC, both of which include an appearance standard in guidance documents, do not use ALJs, but most of the agencies that incorporate an appearance standard do. The DOJ EOIR, EEOC, OSHRC, and SSA have all adopted quasi-judicial or, at minimum, appearance-based recusal standards despite relying on ALJs for their adjudication.[114] The NRC is the only agency with a quasi-judicial approach to recusal that does not employ ALJs.[115] This suggests that ALJ independence is not viewed by agencies as a substitute for appearance-based recusal rules.

In short, the theoretical reasons to treat ALJ recusal differently from non-ALJ recusal are not reflected in the applicable standards. Shifting from the theoretical to the descriptive, however, reveals that the one area in which ALJs seem to be treated differently is discretionary recusal standards.[116] The overwhelming majority of adjudicators given the regulatory power to recuse whenever they "deem it necessary" or something similar are ALJs. The interesting question is why. There are a few possibilities worth mentioning. The most obvious is the language of the

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112. 5 U.S.C. § 7521(a) ("An action may be taken against an administrative law judge . . . by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board."). "For cause" removal is currently constitutionally permissible for ALJs. But as some commentators have observed, the Supreme Court's recent decision in *Lucia v. SEC* that ALJs are inferior officers under Article II, coupled with its earlier decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), that "double-for-cause" removal is unconstitutional, may draw the constitutionality of ALJ removal protections into question. *See* Jeffrey S. Lubbers, *SG's Brief in Lucia Could Portend the End of the ALJ Program as We Have Known It*, YALE J. REG. NOTICE & COMMENT (Apr. 10, 2018), https://www.yalejreg.com/nc/if-the-supreme-court-agrees-the-sgs-brief-in-lucia-could-portend-the-end-of-the-alj-program-as-we-have-known-it-by-jeffrey-s-lubbers/ [https://perma.cc/Z48R-45FJ]; Gillian Metzger, *Symposium: Minimalism with Radical Potential*, SCOTUSBLOG (June 22, 2018, 9:34 AM), https://www.scotusblog.com/2018/06/symposium-minimalism-with-radical-potential/ [https://perma.cc/VZB7-NZQL] ("[N]ow that ALJs are deemed inferior officers, the strong removal protection enjoyed by ALJs at independent agencies becomes ripe for challenge as a form of the double-for-cause removal protection held unconstitutional in *Free Enterprise Fund v. PCAOB*.").

113. *See* BARNETT ET AL. STUDY, *supra* note 13, at 60 ("Of the 36 non-ALJ types for which we received responses, only three have reported protections from at-will removal . . . ."). Some federal employees or officials with adjudicative responsibilities—such as independent agency heads, for instance—also have protections against undue influence, but in general, non-ALJ adjudicators with responsibilities similar to those of their ALJ counterparts do not.

114. For details about each provision, see *infra* Table 6.

115. For details about each provision, see *infra* Table 6.

116. For a more detailed discussion of discretionary standards, *see supra* Subsection II.A.2.

APA, which states that an ALJ may "at any time disqualify himself."[117] This explanation is not entirely satisfactory for the reasons given in the above discussion of discretionary standards. Allowing recusal whenever an adjudicator "deems it necessary" is substantively different from permitting the adjudicator to recuse themselves "at any time." The former relies on the subjective determination of the adjudicator. The latter reads most clearly as a timing or other procedural provision instructing ALJs that they need not wait for the parties to effectuate their recusal, but not suggesting that the decision is entirely up to their personal view of when their own recusal is "necessary." Reliance on the APA language also falls short in light of the fact that the other APA recusal provision, the impartiality requirement, does not appear to disproportionately influence recusal rules in agencies that employ ALJs. Therefore, while it may not be purely coincidental that agencies employing ALJs rely more heavily on discretionary recusal standards, there is no evidence that this phenomenon can be explained by reference to the APA alone.

Agencies may be inclined to use discretionary provisions as a catch-all in case an ALJ believes recusal is prudent but not necessarily required. Another reason could be a nod to ALJ independence. Granting additional discretion within mandatory agency recusal rules makes the ALJ one step further removed from agency control, and therefore enhances their independence and the appearance thereof. There is also the possibility that agencies used existing recusal rules to design their own, and the discretionary provision became part of an industry standard without much history or explanation.

Finally, at the time most of the existing recusal rules were adopted,[118] the way in which ALJs were hired may have allowed agencies to feel more comfortable empowering ALJs to make discretionary recusal decisions. Because ALJs were hired in a more structured, transparent vetting process than non-ALJs,[119] ALJs may have benefitted from greater agency confidence in their judicial skills and

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117. 5 U.S.C. § 556(b).

118. After Exec. Order No. 13,843, 83 Fed. Reg. 32,755 (July 10, 2018), https://www.federalregister.gov/documents/2018/07/13/2018-15202/excepting-administrative-law-judges-from-the-competitive-service [https://perma.cc/EC5Y-RT8X], which removed many of the distinguishing features of ALJ hiring, this descriptive claim may not be accurate. Because the overwhelming majority of recusal rules and standards predate the Executive Order, however, distinctions between hiring practices for ALJs and non-ALJs still have descriptive force with respect to those provisions. OSHRC promulgated a new recusal rule after Executive Order 13,843, but the OSHRC rule explicitly tracks Canon 3(C) of the Code of Conduct for United States Judges, which does not include the type of discretionary recusal provision currently under discussion. *See* 29 C.F.R. § 2200.68 (effective date June 10, 2019).

119. *See* Jack M. Beermann & Jennifer L. Mascott, *Research Report on Federal Agency ALJ Hiring after* Lucia *and EO 13843*, at 1 (May 31, 2019) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/Submitted%20final%20draft%20JB.pdf [https://perma.cc/A8XY-VXTK] ("Beyond providing that ALJs are to be appointed by '[e]ach agency,' [as stated in 5 U.S.C. § 1305,] no provision of the APA itself specifies the precise procedure for appointing ALJs. However, because ALJs at the time were part of the competitive service, agencies by law were required to hire new ALJs from lists of eligible candidates provided by the Office of Personnel Management through a rating process it administered.").

temperament, thereby making it easier to grant them discretion over a quintessentially judicial issue like recusal. It remains to be seen how new approaches to ALJ hiring under Executive Order 13,843 will compare to those for non-ALJs. If agencies tend to adopt higher minimum hiring standards for ALJs, due to concerns about ALJ independence for instance, distinctions in hiring practices may continue to explain the greater prevalence of discretionary standards for ALJs versus non-ALJs.

On the other hand, it may be reading too much into discretionary provisions to suggest that they are connected to some grand theory of administrative recusal that intentionally entrusts ALJs with more recusal discretion than non-ALJs. After all, the existence of a recusal provision in one agency's regulations does not necessarily mean that the lack of that same provision in a different agency's regulatory portfolio indicates a difference of opinion between the two agencies; silence does not have to indicate a rejection. In reality, a non-ALJ without the benefit of a discretionary recusal rule may find it just as easy to recuse for his or her own reasons than an ALJ citing a discretionary provision. For present purposes, it is enough to acknowledge that discretionary recusal provisions do appear to be used more often in connection with ALJs than with non-ALJs and to keep in mind some ideas as to why that may be case. The analysis at minimum shines light on some of the relevant variables in administrative recusal and how focusing on the differences between agency adjudicators may impact those variables.

D. Regulations or Guidance Documents

An agency's chosen vehicle for establishing recusal standards also has consequences for the standards' effectiveness. Although the majority of administrative recusal standards take the form of regulations, at least five agencies rely exclusively on guidance documents for their recusal standards,[120] and another five use a combination of regulations and guidance documents.[121]

Moreover, many of the more complex recusal regimes are developed in guidance documents. The SSA, for example, is the largest agency adjudicator and has promulgated a set of recusal standards that closely approximate federal judicial recusal. It has chosen to do so, however, in guidance documents.[122] The same is true

120. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 53; PAT. TRIAL & APPEAL BD., U.S. PAT. & TRADEMARK OFF., *supra* note 45; PAROLE COMM'N, U.S. DEP'T OF JUST., *supra* note 68; PEACE CORPS, IPS 1-12 PROCEDURES FOR HANDLING COMPLAINTS OF VOLUNTEER/TRAINEE SEXUAL MISCONDUCT (2013), https://files.peacecorps.gov/documents/IPS-1-12-Interim-Procedures.pdf [https://perma.cc/LLA9-DAM2]; HALLEX I-2-1-60; I-3-1-40; I-3-2-25 (SSA).

121. *See* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., *supra* note 38; U.S. NUCLEAR REGUL. COMM'N, *supra* note 38; CTR. FOR MEDICARE & MEDICAID SERV., PROVIDER REIMBURSEMENT REVIEW BOARD RULES (2018) (Rule 45), https://www.cms.gov/Regulations-and-Guidance/Review-Boards/PRRBReview/Downloads/PRRB-Rules-August-29-2018.pdf [https://perma.cc/EB7X-WXA3]; *see also* U.S. COAST GUARD, COMMANDANT INSTRUCTION 16200.5B (2013), https://media.defense.gov/2017/Mar/15/2001717001/-1/-1/0/CI_16200_5B.PDF [https://perma.cc/X6PN-GKCY]; U.S. MERIT SYS. PROT. BD., JUDGES HANDBOOK (2017), https://www.mspb.gov/appeals/files/ALJHandbook.pdf [https://perma.cc/GZ6T-BJ8C]; OFF. OF GEN. COUNS., NAT'L LAB. REL. BD., *supra* note 33.

122. *See, e.g.*, HALLEX I-2-1-60; I-3-2-25 (SSA).

of the EEOC.[123] Other agencies with complex recusal standards have used a combination of regulations and guidance documents. DOJ EOIR, NRC, and PRRB all address recusal at least superficially via regulation, but add much of the substantive content and nuance of their recusal regimes in related, publicly available memoranda, manuals, handbooks, letters, and directives.[124]

How should we interpret an agency's decision to rely on guidance documents to set recusal parameters? One potential benefit is that guidance documents are more efficient: agencies can promulgate guidance documents without complying with the APA's rulemaking requirements.[125] There are two reasons, however, why this benefit does not necessarily attach to recusal standards. First is that recusal standards may meet the procedural-rule exception to notice and comment under APA § 553(b).[126] If recusal rules are indeed statutorily exempt from the notice-and-comment process, there is little if any efficiency benefit to characterizing a recusal standard as agency guidance or as a procedural rule. Second is that many agencies that publish guidance documents, and in particular those that offer detailed instructions about, and insight into, agency conduct, collect public

123. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *supra* note 53.

124. *See supra* note 121 (citing relevant agencies' guidance documents).

125. 5 U.S.C. § 553(b) ("Except when notice and hearing is required by statute, this subsection does not apply—(A) to interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice . . . .").

126. There is a good argument that recusal rules do not reflect the type of "substantive value judgment" that courts have used to distinguish procedural from substantive rules under the APA. *See* Pub. Citizen v. Dep't of State, 276 F.3d 634 (D.C. Cir. 2002); Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1047 (D.C. Cir. 1978) (describing the procedural-rule exception to notice and comment as "cover[ing] agency actions that do not themselves alter the rights or interests of parties, although [they] may alter the manner in which parties present themselves or their viewpoints to the agency"). Recusal rules, especially those that may be focused on promoting the appearance of impartiality, seem a good fit with the court's description of procedural rules in *Bowen*. Recusal based on the appearance of impartiality affects the identity of the adjudicator but is not being used to prevent any harm to the actual parties. Even in cases where recusal is based on personal bias, the recusal standard itself does not express any preference for the subject matter of the parties' claims; it simply precludes an adjudicator from resolving those claims based on the adjudicator's relationship with either the party or the circumstances surrounding their claims. Recusal for actual bias is prohibited, in other words, without consideration of the relevant party's position in the proceeding, and therefore does not reflect an *ex ante* value judgement by the agency.

One response might be that recusal rules contain a substantive value judgment because they depend for their application on the specific facts and circumstances of the proceeding. That alone, however, is not enough to trigger the APA's notice-and-comment requirement. *See* JEM Broad. Co. v. FCC, 22 F.3d 320, 327 (D.C. Cir. 1994) (holding that FCC hard-look rules for licenses fit within APA's exception for procedural rules despite the fact that they depended on the content of specific applications). It may be enough, however, when we think of recusal as protecting rights to a fair and impartial hearing. To the extent recusal rules adjust the scope of that right, they could be seen as substantive rules requiring notice and comment under § 553. For present purposes, the point is that a viable argument exists for excepting recusal rules from notice and comment, and to the extent that argument prevails it will significantly reduce any efficiency benefits for agencies deciding between recusal guidance and recusal regulations.

feedback about their position before publication.[127] If agencies seek public comments about their recusal standards anyway, the efficiency argument for guidance documents is diminished. There are still advantages to avoiding the full slate of requirements accompanying notice-and-comment rulemaking under § 553(c)—such as requirements to respond to material issues raised in the comments and to submit to review by the Office of Information and Regulatory Affairs[128]—but it stands to reason that a request for public input would also include review of that input and an attempt to at least consider it in forming the agency's guidance. This additional investment of time and resources at minimum narrows the efficiency gap between guidance documents and legislative rules under the APA.

A subtler advantage of recusal guidance arises from the fact that legislative rules are more likely to be issued by the agency head, whereas agency adjudicative bodies or other lower-level officials may have authority to issue their own guidance documents. Recusal guidance can thus avoid competing with other agency regulatory priorities for resources and from being delayed by lengthy internal and external rulemaking processes. In some cases, guidance may be the only realistic vehicle for the agency to express publicly its views on administrative recusal. Finally, due to its promulgation by individuals more immediately involved in the adjudicative process than the agency head, recusal guidance may also be more responsive to the agency's specific needs.

Guidance documents are also beneficial because they can generally be applied more flexibly and amended more easily than legislative rules.[129] Flexibility

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127. OSHRC's recently adopted recusal rules went through the full notice-and-comment process. *See* 29 C.F.R. § 2200.68. To the extent agencies choose to promulgate recusal standards as guidance, relying neither on notice and comment nor the APA exemption for "rules of agency organization, procedure, or practice," a recent Executive Order suggests that public participation may still be necessary. On October 9, 2019, President Trump issued an Executive Order requiring "a period of public notice and comment of at least 30 days before issuance of a final guidance document" among other procedural requirements for issuance of agency guidance documents. Exec. Order No. 13,891, 84 Fed. Reg. 55,235, 55,237 (Oct. 15, 2019); *see also* Admin. Conf. of the U.S., Recommendation 2019-1, Agency Guidance Through Interpretive Rules, 84 Fed. Reg. 38,927 (Aug. 8, 2019) ("An agency should afford members of the public a fair opportunity to argue for modification, rescission, or waiver of an interpretive rule. In determining whether to modify, rescind, or waive an interpretive rule, an agency should give due regard to any reasonable reliance interests.").

128. *See* 5 U.S.C. § 553(c) (requiring agencies to provide a "concise general statement of . . . basis and purpose" in support of notice-and-comment regulations); Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (requiring review of "significant regulatory actions" by the White House Office of Management and Budget's Office of Information and Regulatory Affairs).

129. This appeared to be less true for future guidance documents after President Trump's Executive Order regarding White House review of guidance documents. Exec. Order No. 13,891, 84 Fed. Reg. 55,235, 55,237 (Oct. 9, 2019), https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents [https://perma.cc/YC9Q-4L2V]. Executive Order 13,891 was revoked by President Biden, however, almost immediately after taking office. Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021), https://www.federalregister.gov/documents/2021/01/25/

is a benefit due to the contextual nature of recusal decisions and the corresponding advantages of more generalized standards—especially when it comes to protecting the appearance of impartiality. Amendment is similarly advantageous, both in terms of maintaining optimal standards for the agency and in demonstrating to the public that recusal is an ongoing priority to agency decision-makers. These benefits only magnify when the recusal standards—like those mentioned above—are complicated. As the agency's recusal standards become more inclusive and far-reaching, the advantages of flexible application and easy amendment increase.

A potential drawback to reliance on guidance documents is the greater potential for guidance documents to lack transparency. Although guidance documents published in the Federal Register are effectively as "public" as binding regulations, not all guidance documents are made so publicly available.[130] As long as agencies are aware that transparency is important for empowering parties to use recusal standards and for generating public confidence in the integrity of agency proceedings, however, agencies should be able to make their guidance documents sufficiently public to eliminate any transparency costs.[131]

Another potential drawback could be the public-relations aspect of guidance documents over regulations. If the public perceives guidance documents as less impactful (as they technically are), or as representing less of a commitment by the agency to the cause of recusal, the recusal standards' ability to promote public confidence in agency adjudication could be diminished. That is not to say that guidance documents will necessarily have less of a positive impact than regulations, only that they could create that impression. Several agency-specific factors could contribute to this phenomenon. The frequency with which the agency relies on guidance for important announcements and positions could be directly proportional to the public confidence inspired by recusal standards issued as guidance. The more common it is for an agency to use guidance, the more likely the regulated public will view that guidance as a serious commitment by the agency. A related but slightly different factor is how comfortable the public is with the agency's use of guidance documents. This is not just a point about frequency but about the agency's past success in using guidance documents to effect change and to communicate with the

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2021-01767/revocation-of-certain-executive-orders-concerning-federal-regulation [https://perma.cc/9JFP-ZZXU]. For a more thorough discussion of whether recusal rules meet the APA exception to notice and comment for procedural rules, see *supra* note 126.

130. *See, e.g.*, Louis J. Virelli III & Ellen S. Podgor, *Secret Policies*, 2019 U. ILL. L. REV. 463 (offering several examples of, and outlining incentives for, agencies to keep certain policy documents confidential).

131. *See* Admin. Conf. of the U.S., Recommendation 2019-3, Public Availability of Agency Guidance Documents, 84 Fed. Reg. 38,927 (Aug. 8, 2019) (urging agencies "to develop and disseminate internal policies for publishing, tracking, and obtaining input on guidance documents; post guidance documents online in a manner that facilitates public access; and undertake affirmative outreach to notify members of the public of new or updated guidance documents"); Admin. Conf. of the U.S., Recommendation 2018-5, Public Availability of Adjudication Rules, 84 Fed. Reg. 2139 (Feb. 6, 2019) (encouraging agencies "to make procedural rules for adjudications and related guidance documents available on their websites and to organize those materials in a way that allows both parties appearing before the agencies and members of the public to easily access the documents and understand their legal significance").

public about that change. The agency's successful use of guidance documents could thus depend on the process by which the documents are formed—i.e., the level of participation by interested parties outside the agency—their clarity, and the success of their implementation within the agency; how quickly and thoroughly were the standards employed?

The most important point about the use of guidance documents is that it is a multi-variable calculus. Agencies have pro-guidance incentives and pro-regulation incentives. This is true as a theoretical matter and is supported by agencies' use of guidance documents in some situations and their apparent preference for regulations in others. One feature that emerges rather clearly is that guidance documents (like regulations) are more likely to be effective when they are public. If recusal standards are publicly accessible, guidance documents can provide efficiency and flexibility without sacrificing much in the way of promoting public confidence. Agencies can then consider for themselves how using guidance documents to set recusal standards is likely to affect the efficacy of those standards and the public's perception of them, and to factor that information into the agency's ultimate decision.

E. Institutional Effects

Another dimension within which to consider agency recusal standards is their institutional features—circumstances that are driven by institutional structure rather than the standards' substance, procedure, or legal form.

1. Agency Heads

Perhaps the most obvious institutional feature is the possibility that reviewers could also be agency heads. As mentioned above, the applicability of recusal standards to agency heads has intuitive appeal when they are reviewing specific adjudications, for the same reasons that recusal is appropriate for traditional judges. Unlike judges, however, agency heads also function as chief policymakers for the agency.[132] Their policymaking role makes recusal of agency heads more complex than recusal of more-easily-replaceable, less-powerful initial adjudicators. Policymaking is an inherently value-laden enterprise; it requires policymakers to employ their own normative viewpoints in a way that traditional adjudication—especially in the courts—seeks to avoid.[133] Conversely, the higher public profile of agency heads makes the substantive and procedural recusal standards discussed earlier potentially more important to their conduct than that of less visible intermediate or initial adjudicators. Because agency heads' decisions are more likely to be publicly scrutinized than those of individual adjudicators, the public

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132. For additional discussion of how recusal considerations apply to agency heads, see *supra* Subsections II.A.1 and II.B.4.

133. A famous, although certainly not the only or even the most compelling, account of judges' relationship with, and necessary distance from, policymaking was made by Chief Justice Roberts in his opening statement at his Supreme Court confirmation hearing before the Senate Judiciary Committee. *See* Chris Cillizza, *John Roberts, Umpire.*, WASH. POST (June 28, 2012), https://www.washingtonpost.com/blogs/the-fix/post/john-roberts-umpire/2012/06/28/gJQAx5ZM9V_blog.html [https://perma.cc/B3WZ-7Q9U] ("Judges are like umpires. Umpires don't make the rules; they apply them.").

confidence engendered by clear and transparent recusal standards may be even more valuable at the top of the agency hierarchy.

This complexity of designing a recusal regime for agency heads is reflected in agencies' varied approaches to it. Some agencies have decided to exclude agency heads from the agency's recusal standards altogether. The SEC and OSHRC, for instance, both have recusal standards for ALJs but none for their appointed commissioners.[134] Other agencies apply the same recusal standards to initial adjudicators and final agency decision-makers. The EPA applies the same recusal standard to members of the Environmental Appeals Board ("EAB"), its final decision-maker on administrative appeals, and the ALJs who render the decisions that the EAB reviews.[135] The Federal Mine Safety and Health Review Commission ("FMSHRC"), the Federal Trade Commission ("FTC"), and the MSPB likewise apply the same recusal standard to their ALJs and commissioners.[136] These examples reflect the individual agencies' perspectives on the differences between initial adjudicators and agency heads, and reinforce the need to be thoughtful about how recusal should apply to both.

One important feature to note is that agencies' different views regarding recusal of agency heads cannot be explained by focusing on whether the agency is solely an adjudicative agency, like OSHRC and FMSHRC, or whether it also has regulatory responsibilities, like the SEC and FTC. It would be easier to understand why an agency that is solely adjudicatory would be more likely to adopt quasi-judicial recusal standards all the way to the top of its organizational chart, but that is not categorically the case. Conversely, it may be easy to posit that dual-function agencies would treat their heads less like traditional judges and have less stringent recusal requirements. That is also not true. Without insight into each agency's specific motivations for adopting its recusal standards, one general conclusion is that recusal standards for agency heads are not simply a function of whether those agency heads are part of a separate, wholly adjudicative entity. So how should we think of the recusal of agency heads along institutional lines?

One fault line could be internal agency culture and history. Another could be the fact that some agency heads (presidential, Senate-confirmed appointees) are already more accountable than other adjudicators, both politically and under the OGE ethics rules.[137] Seemingly the most significant factor, however, is how much the agency thinks its recusal standards would constrain the agency heads' ability to

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134. *See, e.g.*, 17 C.F.R. § 201.112 (SEC ALJs); 29 C.F.R. § 2200.68 (OSHRC ALJs).

135. EAB, 40 C.F.R. § 22.4(d)(1).

136. MSPB, 5 C.F.R. § 1201.42; FTC, 16 C.F.R. § 3.42(g) (2021); FMSHRC, 29 C.F.R. § 2700.81.

137. Senate-confirmed presidential appointees take an ethics pledge and have their own additional financial disclosure obligations. *See* Exec. Order No. 13,770, at § 1, 82 Fed. Reg. 9333 (Jan. 28, 2017), https://www.govinfo.gov/content/pkg/FR-2017-02-03/pdf/2017-02450.pdf [https://perma.cc/PAA8-JYP8]; U.S. OFF. OF GOV'T ETHICS, OGE FORM 201: REQUEST TO INSPECT OR RECEIVE COPIES OF OGE FORM 278S OR OTHER COVERED RECORDS (2014), https://www.oge.gov/Web/OGE.nsf/Resources/OGE+Form+201:+Request+to+Inspect+or+Receive+Copies+of+OGE+Form+278,+SF+278s+or+Other+Covered+Records [https://perma.cc/T3H7-XB6W].

fulfill their organizational mission, whether that be solely adjudication or some combination of administrative functions. This "duty to mission" is most vulnerable at the top of the agency structure. Unlike initial adjudicators, who are generally replaceable either by in-house personnel or through "borrowing" adjudicators from another agency, agency heads cannot be replaced as easily or at all once recused. Recusal thus threatens to change the nature of adjudication among agency heads by changing the number and, potentially, the collective ideology of the decision-makers. Changing the number could cause the agency to lose a quorum (thereby rendering it totally ineffective), to deadlock over a vote, or to be deprived of an adjudicator who may have been an influential part of the agency's ultimate decision. That does not mean that recusal of agency heads should be avoided for those reasons, but rather that those deciding whether to include agency heads in recusal provisions should consider the stakes involved in removing an agency head from the process. This is clearly not enough to sway some agencies to treat initial and final adjudicators differently but is theoretically important as a framework for evaluating what is the best way for each agency to balance its duty to fulfill its institutional obligations with its commitment to impartiality and promoting public confidence in its conduct.

2. Appellate-Style Adjudicators

A related institutional effect is the application of recusal standards to an initial, as opposed to an appellate-style, adjudicator.[138] In general, the same concerns about fairness to litigants and public perception apply to both groups: it is just as important to protect parties from biased decision-makers in their initial presentation of evidence as it is on review of that decision. A closer look, however, suggests that there may be some notable differences between the two.

For one, appellate-style adjudicators are subject to less-searching review than initial adjudicators. Agency heads and adjudicators that have been delegated final decision-making authority by the agency head are the clearest example of this; they are likely to be entirely free from intra-agency review and subject only to (often deferential) judicial review of their final determinations for the agency.[139] More interesting cases are those in which an appellate-style administrative body that

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138. The use of the term "appellate-style" adjudicator is designed to acknowledge the inherent differences between intra-agency review and traditional judicial appellate review. For present purposes, however, any such differences are immaterial; the current relationship of interest is between initial-hearing adjudicators and those presiding over proceedings designed to review those initial hearings. ACUS recently published a report and corresponding recommendation on agency appellate systems. *See* Admin. Conf. of the U.S., Recommendation 2020-3, Agency Appellate Systems, 86 Fed. Reg. 6618 (Jan. 22, 2021); CHRISTOPHER J. WALKER & MATTHEW LEE WEINER, AGENCY APPELLATE SYSTEMS (Dec. 20, 2020) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/sites/default/files/documents/Walker%20Wiener%20Agency%20Appellate%20Systems%20Report%20-%2012.14.2020.pdf [https://perma.cc/LEF3-NRMX].

139. Not only will courts defer to the agency heads and delegated final decision-makers on the merits of their conclusions, but they will also likely owe *Kisor* (or at least *Skidmore*) deference to those adjudicator's recusal decisions. *See infra* notes 155–59 and accompanying text (discussing the interplay of judicial deference doctrines and administrative recusal).

consists neither of agency heads nor adjudicators with delegated final decision-making authority serves in an intermediate position between an initial adjudicator and an agency head. Despite the fact that these intermediate adjudicators are not expressly identified as final decision-makers for the agency, with all of the scrutiny and public accountability that attaches to that status, review of these intermediate policymakers by the agency head is very often discretionary and, for practical reasons, rare. This may suggest that more stringent recusal standards are necessary to ensure that intermediate reviewers remain (and appear) unbiased in the absence of intra-agency review.

On the other hand, to the extent appellate-style reviewers are effectively final decision-makers for the agency, their influence on agency policy may, as with agency heads, support subjecting them to less probing recusal standards than initial adjudicators due to the political, as well as adjudicative, qualities of their decisions.[140] Moreover, if appellate-style reviewers' discretion is constrained by standards of review that require deference to the initial adjudicator's decision, those constraints can mitigate recusal-related concerns and further support more forgiving recusal requirements.

Consider as a case study the many variables that influence recusal of appellate-style administrative adjudicators at the DOJ's Board of Immigration Appeals ("BIA"). BIA decisions are reviewable by the Attorney General at his or her discretion,[141] suggesting that the BIA does not exercise the policymaking responsibilities of an agency head. In reality, however, the sheer number of BIA decisions makes the Board's full body of work unreviewable by the AG as a practical matter, meaning that the overwhelming majority of its decisions go unreviewed and therefore that its work has significant policy implications.[142] The scope of its policymaking authority is tempered, however, by the fact that BIA review of immigration judges ("IJs"), the initial adjudicators, is limited by regulatory standards of review. The BIA may review legal determinations by IJs de novo but may only review IJ factual determinations for clear error.[143] Taken as a whole, the BIA's example stresses the importance of considering recusal standards in context. The policy impact of the Board's decisions suggests a more relaxed standard in recognition of its extra-adjudicative function, yet the facts that a politically accountable actor like the AG may review its decisions on command and that it owes deference to the IJ's factual determinations make it look more like a

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140. A more through discussion of how policymaking responsibilities affect recusal norms is included *supra* at Subsection II.E.1, *infra* at notes and accompanying text.

141. *See* 8 C.F.R. § 1003.1(h)(1)(i) ("The Board shall refer to the Attorney General for review of its decision all cases that: (i) The Attorney General directs the Board to refer to him.").

142. Hon. Alberto R. Gonzales & Patrick Glen, *Advancing Executive Branch Immigration Policy Through the Attorney General's Review Authority*, 101 IOWA L. REV. 841, (2016) ("[T]he exercise of the [AG's] referral authority . . . is used less frequently at present than at any other time in the past . . . .").

143. *See* 8 C.F.R. § 1003.1(d)(3)(i)–(ii) ("Facts determined by the immigration judge . . . shall be reviewed only to determine whether the findings . . . are clearly erroneous . . . . The Board may review questions of law, discretion, and judgment and all other issues in appeals . . . de novo.").

traditional appellate court, suggesting that more stringent, quasi-judicial recusal standards may be most appropriate.

The reality is somewhere in between and is reflected in the recusal standards applicable to both the Board and the IJs it is responsible for reviewing. The Board follows the OGE Guidelines for recusal, which are limited to financial and personal conflicts of interest, whereas IJs have been instructed by the DOJ EOIR to follow the federal-judicial-recusal statute.[144] Although perhaps not the only factor explaining this difference, institutional distinctions between appellate-style reviewers and initial adjudicators are undoubtedly relevant to the development of recusal standards for both groups.

3. Single or Multiple Adjudicators

Another institutional fault line in adjudicator recusal is the distinction between single adjudicators and multi-member bodies. Because the agency heads in the examples immediately above are all multi-member bodies, many of the idiosyncrasies surrounding recusal within a multi-member adjudicative body have already been discussed.[145] It is important to remember, though, that not all multi-member bodies are necessarily agency heads, and vice-versa. The SSA Appeals Council, for instance, generally sits in two- or three-member panels to review ALJ decisions. Although Council decisions represent the agency's final determination, that authority comes by a delegation from the SSA Commissioner: Council members are not agency heads.[146] The differences between recusal of an individual and a group member therefore could be relevant independent of whether the group is also the agency head.

Recusal of a single adjudicator more often leads to uncertainty regarding who will be left to adjudicate the case. That is because the remedy for recusal of a single adjudicator is to replace the recused adjudicator, whereas the remedy for recusal of a group member is often (especially in the case of multi-member agency heads) to leave the group short-handed. In addition to problems already discussed

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144. *Compare* U.S. DEP'T OF JUST., ETHICS AND PROFESSIONALISM GUIDE FOR MEMBERS OF THE BOARD OF IMMIGRATION APPEALS (2011), https://www.justice.gov/eoir/page/file/992726/download [https://perma.cc/9P75-YXKW], *with* EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., *supra* note 38.

145. *See supra* Subsection II.E.1.

146. *See* HALLEX I-3-0-1 B (SSA) ("Under a direct delegation of authority from the Commissioner of the Social Security Administration, the [Appeals Council] is the final level of administrative review for claims filed under titles II and XVI of the Social Security Act."). The Patent and Trademark Appeals Board ("PTAB") is similarly situated. It conducts proceedings in panels of three or more adjudicators but is not the agency head and it describes itself as a "tribunal within the United States Patent and Trademark Office." U.S. PAT. & TRADEMARK OFF., NEW TO PTAB ARCHIVED: WHAT IS PTAB?, https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/ptab-inventors [https://perma.cc/5KNC-P7TT] (last visited Dec. 29, 2021). Like with the SSA Appeals Council, a PTAB decision represents the final agency determination on the matter. The PTAB's finality is granted by a statutory provision that also distinguishes between the PTAB and the agency head, the Patent and Trademark Office. *See, e.g.*, 35 U.S.C. § 135(d) ("The final decision of the Patent Trial and Appeal Board, if adverse to claims in an application for patent, shall constitute the final refusal *by the Office* on those claims." (emphasis added)).

like tie votes and failure to achieve a quorum, the benefit of recusing one group member is that the remaining decision-makers are still familiar to the parties. This reduces the possibility of multiple rounds of recusal and allows the parties to work more confidently on their merits presentations during the recusal process.

Somewhere in between are multi-member bodies that conduct hearings using a subset of the total membership of that body—think again of the BIA.[147] The BIA's three-member panels represent a small fraction of the Board's full membership, such that recusal of a Board member will reflect features of both individual-adjudicator recusal and recusal within a multi-member body.[148] Like individual-adjudicator recusals, a recused panel member can be replaced by another member of the Board that is not already assigned to that panel.[149] Replacement of the recused panel member will create uncertainty as to one-third of the adjudicators presiding over the case, and could certainly impact the substantive position of the panel, but this degree of uncertainty is still likely to be less disruptive to the parties than replacing a lone adjudicator. Assuming only one recusal, a majority of the original panel remains; the situation more closely resembles recusal of a multi-member adjudicator with a fixed membership. Although replacing one of three adjudicators is of course different from not replacing them, overall concerns about continuity and predictability of the body are still less than for recusal of an individual adjudicator. As more panelists are recused—especially if a majority of original adjudicators are replaced—the impact grows and could ultimately be indistinguishable from recusal of an individual. In short, recusal of members from a replaceable multi-member body represents a spectrum of uncertainty for the parties. Recusal of one or a minority of the members is closer to the relatively minor effects

147. The BIA consists of twenty-one members. Although the majority of its cases are presided over by a single Board Member, there are six categories of cases that must be decided by three-member panels. They are cases involving the need to (1) "settle inconsistencies among the rulings of different immigration judges;" (2) "establish a precedent construing the meaning of laws, regulations, or procedures;" (3) "review a decision by an Immigration Judge or DHS that is not in conformity with the law or with applicable precedents;" (4) "resolve a case or controversy of major national import;" (5) "review a clearly erroneous factual determination by an Immigration Judge;" and (6) "reverse the decision of an Immigration Judge or DHS in a final order, other than nondiscretionary dispositions." BD. OF IMMIGR. APPEALS, U.S. DEP'T OF JUST., PRACTICE MANUAL § 1.3 (2020), https://www.justice.gov/eoir/page/file/1250701/download [https://perma.cc/7Y5M-S92P] [hereinafter BIA Practice Manual].

148. The BIA will occasionally sit en banc, which by regulation requires a "majority of the permanent Board members" to constitute a quorum. 8 C.F.R. § 1003.1(a)(5). If an en banc proceeding involved all of the permanent Board members, recusal could result in the Board being short-handed in that case, like in other multi-member bodies that do not sit in subsets of their full membership. En banc hearings for BIA are, however, "not favored" by rule. *Id.*

149. "A vacancy, absence, or unavailability of a Board Member does not impair the right of the remaining members to exercise all the powers of the Board . . . . [IJs], retired Board Members, retired [IJs], [ALJs], and senior EOIR attorneys . . . may be designated as Temporary Board Members." BIA Practice Manual, *supra* note 147, at § 1.3(c) (citing 8 C.F.R. § 1003.1(a)(4)).

of recusing an irreplaceable member of a fixed multi-member body, while recusal of a majority or all of the deciders approximates recusal of an individual.

Recusal of one member of a multi-member adjudicative body creates the potential for pressure from other members of the group about the recusal decision. In addition to the base (and I think largely nonexistent) issue of members using recusal to affect the composition of the group and advance their own view of the case, there could be pressure to remain in the case in order to address issues that the group feels merit consideration by all of its members. This phenomenon occurs at the Supreme Court[150] and could just as easily be present in any entity with final decision-making authority. Although agency adjudicators are never as final as the Supreme Court, their role as the agency's final word in a case is significant in terms of fulfilling the agency's duty.

The notion of pressure to participate in important cases is less prominent for a replaceable individual adjudicator, but it could still be present in cases where the likely replacement for a recused hearing officer would be from another agency, and thus not as experienced in adjudicating cases within the relevant program.[151] Concerns about agency expertise and consistent administration of its programs could council against recusal in those circumstances, even where the prevailing recusal standards were clearly met for the lone adjudicator. For multi-member bodies with available replacements for recused members, any pressure to participate for institutional reasons should be no more, and often less, than for individual adjudicators. Even if replacement adjudicators came from another agency, they would still likely comprise only a minority of the presiding panel, thereby minimizing any concerns about their participation. In the unlikely event a majority of the panel needed replacement due to recusal, the disruption would be no more than for an individual adjudicator.

Finally, recusal of a single adjudicator may be distinct from recusal of a group member in that an individual adjudicator's recusal could be more easily decided by a fellow adjudicator.[152] Judicial recusals have historically been decided in the first instance by the judge facing recusal, and the same is true for administrative recusal. Despite its pedigree, this process of self-evaluation by adjudicators facing recusal is controversial.[153] For those concerned about the integrity of adjudicators deciding their own recusal status, the difference between recusal of an individual adjudicator and a member of a group is significant. Put

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150. *See* VIRELLI, *supra* note 2 (discussing generally how institutional concerns can impact Supreme Court Justices' recusal decisions).

151. *See* 5 C.F.R. § 930.208 (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").

152. The concept of adjudicators reviewing one another's recusal decisions is also discussed in the context of intra-agency review *supra,* Subsection II.B.4.

153. *See, e.g.*, MATTHEW MENENDEZ & DOROTHY SAMUELS, JUDICIAL RECUSAL REFORM: TOWARD INDEPENDENT CONSIDERATION OF DISQUALIFICATION 4 (Brennan Center for Justice 2016) ("[A]nother judge personally removed from the situation is in a better position to more accurately assess whether a request for another judge's recusal is warranted.").

simply, it is easier and more effective to have one adjudicator review the recusal decision of another if they are not members of the same group.[154]

Multi-member bodies face a litany of conflicts of interest in reviewing a member's recusal decision. If the review consists of one member of the body reviewing the recusal decision of another member, both the reviewing member and the member facing recusal have an interest in the case. If the two interests align, the incentive will be for the reviewer to deny recusal. If the two adjudicators have opposing views, the reviewer's incentive would be to recuse and eliminate an opposing vote. A similar conflict exists in terms of recusal's effect on the number of adjudicators available to participate. If recusal could affect the group's ability to reach a quorum, or makes a tie vote more likely, then a conflict arises over not just the outcome of the proceeding but the group's ability to reach a resolution at all.

These conflicts are the same or greater when the review is performed collectively by all the other members of the body. The other members may be influenced by the effect of recusal on the ideological and numerical balance of the body. Moreover, when working together to review a fellow member's recusal, the entire group becomes actively involved in every recusal decision the group faces. Although different groups could react differently to this responsibility, at least one plausible approach would be to effectively refuse to opine on a fellow group member's recusal decision by affirming in every instance. This is the position taken by members of the U.S. Supreme Court when asked whether they would consider reviewing one another's recusal decisions—decisions which are otherwise entirely unreviewable and final.[155]

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154. The FTC has adopted a recusal rule that allows for one ALJ to review the recusal decision of another. *See* 16 C.F.R. § 3.42(g) (2021) ("The Commission shall promptly determine the validity of the grounds alleged [for recusal of the presiding ALJ], either directly or on the report of another Administrative Law Judge appointed to conduct a hearing for that purpose."). There is of course another possible configuration in this analysis—the recusal status of a group member could be reviewed by a single adjudicator outside of the group. This would alleviate many of the conflicts inherent in group members reviewing one another's recusal status. It would also be effectively indistinguishable from the situation of a single adjudicator reviewing another single adjudicator's recusal decision, which is discussed above.

155. The Supreme Court is a multi-member adjudicative body that faces similar ideological and numerical challenges in recusal as a multi-member administrative body. Justice Kennedy explained that the Justices were loath to get involved in one another's recusal decisions because they would not want to appear to be "lobbying" for their colleague's participation or withdrawal or to be creating precedents that the other members of the Court would have to reckon with in future recusal decisions. *See* Hearing on the Supreme Court Budget, *supra* note 96, at 14; Steven Lubet & Clare Diegel, *Stonewalling, Leaks, and Counter-Leaks: SCOTUS Ethics in the Wake of* NFIB v. Sebelius, 47 VAL. U. L. REV. 883, 893 (2013). Supreme Court recusal is somewhat distinct from other forms of judicial and adjudicative recusal because the Court is both final and unreviewable, making its recusal decisions fraught with potentially greater and more lasting consequences than those of adjudicative entities whose recused members can be replaced or that are subject to higher-level review. *See* VIRELLI, *supra* note 2, at 78–85. Nevertheless, the core challenges faced by reviewing a fellow group member's recusal decision are effectively the same for multi-member administrative entities as for multi-member courts.

The recusal calculus is a bit different when the multi-member body sits in smaller groups, i.e., when the full membership does not participate in a single proceeding. The impact of having members of the body review their peers' recusal decisions depends on whether the reviewer is participating in the same proceeding as the adjudicator facing recusal. If the reviewer is part of the same proceeding, the same conflicts arise as those mentioned above in regard to multi-member bodies. If not, those conflicts can largely be avoided.

For the most part, employing reviewers from outside of the relevant proceeding is similar to the situation (discussed below) of individual adjudicators reviewing one another's recusal decisions. One additional consideration, however, is that reviewers from the same multi-member adjudicative body may be more invested in that body's overall decision-making—especially if those decisions have precedential authority—than reviewers whose own decisions are not directly influenced by the recusal. Put another way, members of a multi-member adjudicative body may care more about one another's recusal decisions than an individual adjudicator would about that of another individual adjudicator. The reason is the collective interest in the multi-member body's policymaking mission and the possibility that a decision in one proceeding could influence the reviewer's ability to decide a similar case in the future. Individual adjudicators from the same agency may feel a similar connection when reviewing one another's recusal decisions, but there is at least a conceptual distinction when the reviewer and the adjudicator facing recusal are members of a single adjudicative body, rather than simply members of the same agency.

Conflicts are minimized when an individual adjudicator reviews another individual adjudicator's recusal determination. A single ALJ, for instance, does not have the same ability to affect the outcome of the case or to set precedent for herself or her peers by reviewing a recusal decision of another ALJ. A reviewer could of course be influenced by their own view of the proceeding and whether their view aligns with the adjudicator facing recusal. But because the reviewer is not an active participant in the proceeding (like a fellow group member performing a recusal review could be) and therefore has far less occasion or motivation to advance his or her own position on the merits, an individual adjudicator is less likely to be influenced by the substantive impacts of a recusal decision than a reviewer who is participating in the case as a member of the same body as the adjudicator facing recusal.

Recusal review of an individual adjudicator by another individual adjudicator is attractive because it opens up the possibility of an individual adjudicator's decision to recuse being reviewed in the first instance by a peer, rather than a superior. This is important because review by an ALJ's superior may mean review by an agency head, which is almost certainly not the most effective use of agency resources. The same benefit of peer review rather than superior review holds for review of one member of a multi-member body's recusal decision by the rest of the group, only with the added costs of the attendant conflicts of interest.

Concerns about adjudicators deciding their own recusal status, coupled with the efficiency of peers, rather than supervisors, reviewing initial recusal decisions, suggest that peer-to-peer recusal review may be advantageous, provided

steps are taken to ameliorate the potential conflicts created by recusal reviews of fellow group members.

III. SOME THOUGHTS AND PRESCRIPTIONS

The results of this study shed some interesting light on the present and future of administrative recusal. What they do not show—or even suggest—is the presence of any ethical issues in agency adjudication. The purpose of this study is to better understand how agencies currently approach recusal and, most importantly, how their approach helps them to achieve recusal's dual purposes of ensuring fairness to litigants and promoting public confidence in the administrative process. In terms of fairness, it is difficult to project the actual effect of explicit recusal standards on adjudicators' recusal decisions. Anecdotal evidence indicates that adjudicators take their recusal obligations seriously and that they consider roughly the same factors traditionally associated with judicial recusal in doing so. It is nevertheless fair to assume, especially in agencies where they are currently lacking, that clear and easily discernible recusal standards, including procedural standards, would encourage an even more robust and thorough investigation of recusal issues. Initial adjudicators and those tasked with reviewing them will have more guidance for their recusal decisions, which in turn will contribute to a more consistent and accessible body of law to guide future conduct and empower parties to protect themselves against potential bias. The result is a system of adjudication that is fairer for litigants.

Explicit, effective recusal standards' greatest contribution, however, is in promoting public confidence in agency adjudication. Regardless of whether adjudicators are relying on defensible standards to make consistent, principled recusal decisions, doing so without any public-facing statement by the agency of when those decisions must or should be made does little to convince the public of the integrity of those decisions. Yet this is precisely what is happening across much of the administrative state. The taxonomy of substantive standards shows a significant number of adjudicating agencies with no express recusal standards at all and another group with a highly discretionary approach. Even those regulations that mirror the APA's personal-bias language do little to explain what that means and how it should be applied, and those that address more granular factors like conflicts of interest and prior involvement often neglect the appearance of partiality.

Procedural requirements present a similar, albeit less striking, problem. Many, but not all, agencies allow for parties to request their assigned adjudicator's recusal and for intra-agency appeal of the adjudicator's decision. Very few, however, require adjudicators to explain or record their decisions, and some expressly do not require such explanations. Though established mechanisms for seeking and processing recusal decisions should promote public faith in the adjudication's integrity, the absence of any requirement that adjudicators explain and document their decisions can have the opposite effect; it not only is inconsistent with American norms of public adjudication but also creates the impression that adjudicators are unwilling or unable to justify their decision. When one of the parties has sought the adjudicator's recusal, a decision without any explanation promotes skepticism, rather than confidence, in that decision.

An agency's choice to promulgate recusal standards in guidance documents, rather than legislative rules, sends a mixed message to the observing public. Guidance documents may be as good or better than regulations in communicating expectations to adjudicators and other agency actors responsible for recusal decisions. But in terms of their communicative value to the public, they may suggest less of a commitment to recusal standards than regulations and are often harder to find, and less likely to be understood, by interested third parties. Taken together, all of these factors make guidance documents potentially less effective in promoting public confidence.

Judicial review of agency recusal decisions is also served by the promulgation of agency recusal rules. Although not part of agency recusal standards themselves, review of administrative recusal decisions by Article III courts will be part of the recusal process. Because the term "recusal" is generally not included in agency enabling acts, recusal decisions will be based on regulations, guidance documents, or for those agencies without written recusal standards, agency custom and tradition. Adjudicators' application of agency recusal regulations will be entitled to *Auer* deference, as recently updated by the Court in *Kisor v. Wilkie*.[156] Although it is still unclear precisely how *Kisor* will impact judicial review of agency regulatory interpretations, one plausible reading is that recusal rules are more likely to exhibit the "character and context" necessary to merit *Auer* deference than standards published in guidance documents or derived from agency custom or tradition.[157] Under this reading, agencies looking to take control of their recusal standards would be better off promulgating regulations that receive greater deference from reviewing courts.[158] This is especially true because recusal regulations likely fall within the procedural-rule exception to the APA's notice-and-comment provision, which would allow them—even where the agency voluntarily sought public input for the rule—to be issued more efficiently and cheaply than traditional notice-and-comment rules.[159]

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156. *Auer* deference is a doctrine that derives from the Supreme Court's decisions in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 418 (1945), and *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The doctrine was updated by the Court's recent decision in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019).

157. *See Kisor*, 139 S. Ct. at 2416 ("We have recognized in applying *Auer* that a court must make an independent inquiry [to determine the appropriate level of deference] into whether the character and context of the agency interpretation entitles it to controlling weight. *See Christopher*, 567 U.S. at 155, 132 S. Ct. 2156; *see also Mead*, 533 U.S. at 229–231 . . . (requiring an analogous though not identical inquiry for *Chevron* deference)."); Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

158. A different reading, in which the form of the agency's recusal standards is less important (or even irrelevant) to determining the level of judicial deference they receive, is also plausible. That approach leaves recusal rules and guidance documents in equipoise. It does not counsel against recusal regulations, except on efficiency grounds, which are diluted by the prospect of recusal rules satisfying the APA's procedural exception to notice and comment. *See infra*. No reading of *Kisor* suggests, however, that a recusal rule could receive less deference than a guidance document, assuming similar content.

159. 5 U.S.C. § 553(b)(A) ("Except when notice or hearing is required by statute, this subsection does not apply — (A) to interpretative rules, general statements of policy, or rules of agency . . . procedure . . . .").

Based on these findings, it seems that most agencies would be served by adopting more specific substantive and procedural recusal regulations. At minimum, a public commitment to establishing a clear and consistent approach to recusal will have a legitimizing effect on agency adjudication by communicating clearly to the public how the agency views its recusal obligations. This study, by providing a taxonomy of existing substantive and procedural approaches to administrative recusal, gives agencies a chance to consider which of these approaches may best serve their specific institutional needs and helps them understand and consider the attendant consequences of each choice.

From an internal agency perspective, recusal regulations offer agencies an opportunity to reflect what their adjudicators are in large part already doing and can help clarify for those adjudicators how they are expected to balance their obligation to the agency's adjudicative mission with the need to protect the integrity of agency proceedings.

The problem of tailoring agency recusal standards to the specific needs of the agency can be addressed by the other issues considered in the study—the nature and role of the adjudicators themselves and the institutional features of the adjudicative regime. Issues like adjudicator independence, the degree of decisional authority, and whether adjudicators act alone or as part of a deliberative body can all help flesh out precisely when and how recusal can best suit the parties before the agency and the agency's standing in the community.

CONCLUSION

Recusal is but one part of a complex and highly varied system of administrative adjudication. It is by no means a panacea, but it does offer concrete benefits that are currently, as this study reveals, underdeveloped by agencies. The judicial model of recusal seeks to protect litigants from biased judges and to give the public confidence that judicial decisions will be based on a neutral, objective application of the law. The same aspirations attach to administrative recusal. Agencies adopting public-facing recusal standards, as well as procedures outlining how those standards are to be implemented, can protect litigants from potentially partial adjudicators while assuring the regulated public that their administrative government takes issues of fairness seriously.

TABLES

Table 1. Adjudicatory Agencies (and Subunits) With No Written Recusal Standards

Agency	Subunit	Adjudicator Title / Position
Department of the Air Force	Board for Correction of Military Records	Board Members
	Discharge Review Board	Board Members
Department of the Army	Board for Correction of Military Records	Board Members
Department of Commerce (Patent and Trademark Office)	Trademark Trial and Appeal Board	Administrative Trademark Judges
	Office of Enrollment and Discipline	Hearing Officers
		Patent Examiners
Department of Defense	Armed Services Board of Contract Appeals	Board of Contract Appeals Judges
	Defense Office of Hearings and Appeals	Administrative Judges
		Appeal Board Members
		Claims Division
Department of Energy	Office of Hearings and Appeals	Administrative Judges
Department of the Navy	Board of the Correction of Naval Records	Board Members
Environmental Protection Agency	Office of Mission Support, Office of Grants and Debarment	Attorney-Examiners
Equal Employment Opportunity Commission	Office of Field Operations (OFO)	Appellate Attorneys for OFO
Farm Credit Administration		Board Members
Federal Election Commission		Commissioners
Federal Maritime Commission	Bureau of Consumer Complaints and Licensing	Hearing Officers

General Services Administration	Civilian Board of Contract Appeals	Board Members
Department of Labor	Employee Compensation Appeals Board	Board Members
Library of Congress	Copyright Royalty Board	Copyright Royalty Judges
National Aeronautics and Space Administration	Contracts Adjustment Board	Board Members
National Credit Union Administration	Office of Financial Institution Adjudication	Board Members and ALJs
National Labor Relations Board	Regional Offices	Hearing Officers (10(k) post-election hearings)
Department of the Navy	Board for Correction of Military Records	Board Members
Postal Service		ALJs and Judicial Officers
Securities and Exchange Commission		Commissioners
Surface Transportation Board		Hearing Officers, Board Members

Table 2. Impartiality Requirements

Agency	Department of Commerce	Department of Defense	Department of Justice	Federal Deposit Insurance Corporation
Subunit	Bureau of Industry and Security Export Administration	Office of Hearings and Appeals	Drug Enforcement Administration	
Citation	15 C.F.R. § 766.13	Department of Defense Directive No. 5220.6, Defense Industrial Personnel Security Clearance Review Program (Jan. 2, 1992)	21 C.F.R. § 1316.52	12 C.F.R. § 308.5(b)(9)
Recusal Provision	"Hearings will be conducted in a fair and impartial manner by the administrative law judge . . . ."	"All proceedings provided for by this Directive shall be conducted in a fair and impartial manner . . . [and] Administrative Judges and Appeal Board members have the requisite independence to render fair and impartial decisions."	"The presiding officer shall have the duty to conduct a fair hearing . . . ."	"The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner . . . including . . . [t]o recuse . . . ."

Agency	Federal Housing Finance Agency	Federal Labor Relations Authority	Federal Reserve	International Trade Commission
Subunit		Office of the General Counsel		
Citation	12 C.F.R. § 1209.11(a)	5 C.F.R. § 2423.31(a)	12 C.F.R. § 263.5	19 C.F.R. § 210.36(d)
Recusal Provision	"The presiding officer shall . . . conduct a fair and impartial hearing . . . ."	"The Administrative Law Judge shall conduct the hearing in a fair, impartial, and judicial manner . . . ."	"The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner . . . including . . . [t]o recuse . . . ."	"Every hearing under this section shall be conducted in accordance with the Administrative Procedure Act (i.e., 5 U.S.C. §§ 554 through 556). Hence, every party shall have . . . all other rights essential to a fair hearing."

Agency	National Labor Relations Board	Postal Service	Selective Service System	Department of State
Subunit			National Appeal Board	Foreign Service Grievance Board
Citation	Office of General Counsel, National Labor Relations Board, Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings (2003)[160]	39 C.F.R. § 958.9	32 C.F.R. § 1605.6(e)	3 FAM 4441(c), Establishment and Composition
Recusal Provision	"The hearing officer is not an advocate of any position and must be impartial in his/her rulings and in conduct both on and off the record."	"The Presiding Officer shall conduct a fair and impartial hearing . . . ."	"A member of the National Appeal Board must disqualify himself in any matter in which we would be restricted for any reason in making an impartial decision."	"All members of the Board shall act in an impartial manner in considering grievances."

160. OFF. OF GEN. COUNS., NAT'L LAB. REL. BD., GUIDE FOR HEARING OFFICERS IN NLRB REPRESENTATION AND SECTION 10(K) PROCEEDINGS (2003), https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1727/hearing_officers_guide.pdf [https://perma.cc/MKT2-9C9B].

Agency	Department of Treasury	
Subunit	Internal Revenue Service	Office of Comptroller of Currency
Citation	26 C.F.R. § 6001.106(a)	12 C.F.R. § 109.5(b)(9)
Recusal Provision	"It shall be [the Appeals representative's] duty to determine the correct amount of the tax, with strict impartiality . . . ."	"The administrative law judge shall have all powers necessary to conduct a proceeding in a fair and impartial manner . . . including . . . [t]o recuse . . . ."

Table 3. Discretionary Recusal Standards

Agency	Access Board	Commodity Futures Trading Commission	Consumer Product Safety Commission
Subunit	Architectural and Transportation Barriers Compliance Board		
Adjudicators / Subject Matter			
Citation	36 C.F.R. § 1150.53(a)	17 C.F.R. § 10.8(b)	16 C.F.R. § 1025.42(e)
Recusal Provision	"A judge shall disqualify himself/herself whenever in his/her opinion it is improper for him/her to preside at the proceedings."	"An Administrative Law Judge may withdraw from any proceeding when he considers himself to be disqualified."	"When a Presiding Officer considers himself/herself disqualified to preside in any adjudicative proceedings, he/she shall withdraw by notice on the record . . . ."

Agency	Department of Energy	Environmental Protection Agency	Federal Communications Commission
Subunit	Federal Energy Regulatory Commission		
Adjudicators / Subject Matter		Pesticide program (FIFRA)	
Citation	18 C.F.R. § 385.504(c)(1)	40 C.F.R. § 164.40	47 C.F.R. § 1.245(a)
Recusal Provision	"A presiding officer may withdraw from a proceeding, if that officer believes himself or herself disqualified."	"The Administrative Law Judge may at any time withdraw from any proceedings in which he deems himself disqualified for any reason."	"In the event that a presiding officer deems himself disqualified and desires to withdraw from the case, he shall notify the Commission of his withdrawal at least 7 days prior to the date set for hearing."

Agency	Federal Trade Commission		Federal Maritime Commission
Subunit			
Adjudicators / Subject Matter			
Citation	16 C.F.R. § 3.42(g)	16 C.F.R. § 4.17	46 C.F.R. § 502.25(g)
Recusal Provision	"When an Administrative Law Judge deems himself disqualified to preside in a particular proceeding, he shall withdraw therefrom by notice on the record . . . ."	Explaining that in adjudicatory proceedings involving FTC commissioners (which include appeals from ALJ rulings governed by 16 C.F.R. § 3.42(g), above), disqualification of commissioners will occur "in accordance with legal standards applicable to the proceeding in which such motion is filed."	"Any presiding or participating officer may at any time withdraw if he or she deems himself or herself disqualified . . . ."

Agency	Federal Mine Safety and Health Review Commission	Government Accountability Office	Department of Health and Human Services	Department of Homeland Security
Subunit			Food and Drug Administration	U.S. Citizenship and Immigration Services
Adjudicators / Subject Matter				
Citation	29 C.F.R. § 2700.81(a)	4 C.F.R. § 28.23(a)	21 C.F.R. § 12.75	8 C.F.R. § 246.4
Recusal Provision	"A Commissioner or a Judge may recuse himself from a proceeding whenever he deems such action appropriate."	"In the event that an administrative judge considers himself or herself disqualified, he or she shall withdraw from the case . . . ."	"A presiding officer who is aware of grounds for disqualification shall withdraw from the proceeding."	"The immigration judge assigned to conduct a hearing shall, at any time, withdraw if he or she deems himself or herself disqualified."

Agency		Department of Housing and Urban Development		
Subunit	Coast Guard			Office of Assistant Secretary for Equal Opportunity
Adjudicators / Subject Matter		Hearing officers	APA hearings	Civil rights matters
Citation	33 C.F.R. § 20.204(a)	24 C.F.R. §§ 26.5, 26.35, 180.210	24 C.F.R. § 26.35	24 C.F.R. § 180.210
Recusal Provision	"An ALJ may disqualify herself or himself at any time."	"When a hearing officer believes there is a basis for disqualification in a particular proceeding, the hearing officer shall withdraw by notice on the record . . . ."	"An ALJ in a particular case may disqualify himself or herself."	"If an ALJ finds that there is a basis for his/her disqualification in a proceeding, the ALJ shall withdraw from the proceeding."

Agency	Department of the Interior	Department of Justice	
Subunit		Executive Office for Immigration Review	
Adjudicators / Subject Matter	Acknowledgement of Indian Tribes	Employment	Removal proceedings
Citation	43 C.F.R. § 4.1016(a)	28 C.F.R. § 68.30(a)	8 C.F.R. § 1240.1(b)
Recusal Provision	"The ALJ may withdraw from a case at any time the ALJ deems himself or herself disqualified."	"When an Administrative Law Judge deems himself or herself disqualified to preside in a particular proceeding, such judge shall withdraw therefrom . . . ."	"The immigration judge assigned to conduct the hearing shall at any time withdraw if he or she deems himself or herself disqualified."

Agency		Department of Labor		National Endowment for the Arts
Subunit			Administrative Review Board	
Adjudicators / Subject Matter	Board of Immigration Appeals	Administrative Law Judges	Program Fraud Civil Remedies Act	Program Fraud Civil Remedies Act
Citation	Board of Immigration Appeals Practice Manual § 1.3(c)[161]	29 C.F.R. § 18.16	29 C.F.R. § 22.16	45 C.F.R. § 1149.31(a)
Recusal Provision	"Board Members may recuse themselves under any circumstances considered sufficient to require such action."	"A judge must withdraw from a proceeding whenever he or she considers himself or herself disqualified."	"A reviewing official or ALJ in a particular case may disqualify himself or herself at any time."	"A reviewing official or an ALJ may disqualify himself or herself at any time."

161. Bd. of Immigr. Appeals, U.S. Dep't of Just., Practice Manual (2020), https://www.justice.gov/eoir/page/file/1250701/download [https://perma.cc/7Y5M-S92P].

Agency	National Labor Relations Board		Nuclear Regulatory Commission
Subunit			Atomic Safety and Licensing Board
Adjudicators / Subject Matter			
Citation	29 C.F.R. § 101.10	29 C.F.R. § 102.36	10 C.F.R. § 2.313(b)
Recusal Provision	"[A]ny such administrative law judge, agent, or employee may at any time withdraw if he or she deems himself or herself disqualified because of bias or prejudice."	"An Administrative Law Judge may withdraw from a proceeding because of a personal bias or for other disqualifying reasons."	"If a designated presiding officer or a designated member of an Atomic Safety and Licensing Board believes that he or she is disqualified to preside or to participate as a board member in the hearing, he or she shall withdraw by notice on the record . . . ."

Agency	Postal Service	Securities and Exchange Commission	Department of Transportation
Subunit	Postal Regulatory Commission		
Adjudicators / Subject Matter			
Citation	39 C.F.R. § 3001.23	17 C.F.R. § 201.112(a)	14 C.F.R. § 302.17(b)
Recusal Provision	"A presiding officer may withdraw from a proceeding when he/she deems himself disqualified . . . ."	"At any time a hearing officer believes himself or herself to be disqualified from considering a matter, the hearing officer shall issue a notice stating that he or she is withdrawing from the matter . . . ."	"An administrative law judge shall withdraw from the case if at any time he or she deems himself or herself disqualified."

Agency			
Subunit	Federal Aviation Administration		National Highway Traffic Safety Administration
Adjudicators / Subject Matter	Office of Adjudication	Civil Penalty Actions	
Citation	14 C.F.R. § 13.39(d)	14 C.F.R. § 13.205(c)	49 C.F.R. § 511.42(e)
Recusal Provision	"A hearing officer may disqualify himself or herself at any time."	"The administrative law judge may disqualify himself or herself at any time."	"When a Presiding Officer deems himself or herself disqualified to preside in a particular proceeding, he or she shall withdraw by notice on the record . . . ."

Agency			Department of Treasury
Subunit	National Transportation Safety Board	Maritime Administration	Alcohol and Tobacco Tax and Trade Bureau
Adjudicators / Subject Matter			
Citation	49 C.F.R. § 821.35	46 C.F.R. § 201.89	27 C.F.R. § 71.96
Recusal Provision	"A law judge shall withdraw from a proceeding if, at any time, he or she deems himself or herself disqualified."	"Any presiding officer may at any time withdraw if he deems himself disqualified . . . ."	"An administrative law judge shall, at any time, withdraw from any proceeding if he deems himself disqualified . . . ."

Table 4. Conflict of Interest Standards (including prior involvement and OGE)

Agency	Department of Agriculture	
Subunit	Office of Secretary	Agricultural Marketing Service
Adjudicators / Subject Matter	Judges	Perishable Agricultural Commodities Act
Citation	7 C.F.R. § 1.144(a)	7 C.F.R. § 47.11(a)
Recusal Provision	"No Judge shall be assigned to serve in any proceeding who (1) has any pecuniary interest in any matter or business involved in the proceeding, (2) is related within the third degree by blood or marriage to any party to the proceeding, or (3) has any conflict of interest which might impair the Judge's objectivity in the proceeding."	"No person who (1) has any pecuniary interest in any matter of business involved in the proceeding, or (2) is related within the third degree by blood or marriage to any of the persons involved in the proceeding shall serve as examiner in such proceeding."

Agency			
Subunit	Agricultural Marketing Service	Agricultural Marketing Service	Agricultural Marketing Service
Adjudicators / Subject Matter	Marketing agreements & orders	Grain inspection	Packers and Stockyards Administration
Citation	7 C.F.R. §§ 900.6, 1200.7 (identical provisions)	7 C.F.R. § 1.144(a)	9 C.F.R. § 202.118(d)
Recusal Provision	"No judge who has any pecuniary interest in the outcome of a proceeding shall serve as judge in such proceeding."	(Same as above)	"No person shall be assigned to act as a presiding officer in any proceeding who (1) has any material pecuniary interest in any matter or business involved in the proceeding; (2) is related within the third degree by blood or marriage to any party to the proceeding; or (3) has any conflict of interest which might impair such person's objectivity in the proceeding."

Agency	Department of Commerce		Department of Education
Subunit	Patent and Trademark Office	Patent Trial and Appeal Board	Office of Hearings and Appeals
Adjudicators / Subject Matter	Disciplinary hearings	Judges	ALJs
Citation	37 C.F.R. § 11.39(b)(3)	PTAB, Standard Operating Procedures 1: Assignment of Judges to Panels, 13 (Sept. 20, 2018)[162]	34 C.F.R. § 81.5(c)
Recusal Provision	"A hearing officer . . . 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 practitioner."	"Judges shall recuse themselves upon becoming aware of an existing or later arising conflict, as defined in [OGE regulations]."	"An ALJ is disqualified in any case in which the ALJ has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or the party's attorney as to make it improper for the ALJ to be assigned to the case."

162. PAT. TRIAL & APPEAL BD., U.S. PAT. & TRADEMARK OFF., STANDARD OPERATING PROCEDURE 1 (REVISION 15): ASSIGNMENT OF JUDGES TO PANELS (2018), https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf [https://perma.cc/3RKR-M9FK].

Agency	Environmental Protection Agency		
Subunit			
Adjudicators / Subject Matter	Assessment of civil penalties	Pesticide programs	CERCLA
Citation	40 C.F.R. § 22.4(d)	40 C.F.R. § 179.75(a)	40 C.F.R. § 305.4(d)(1)
Recusal Provision	"The [presiding adjudicators] may not perform functions provided for in these Consolidated Rules of Practice regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act."	"A deciding official in a hearing under this part . . . shall not decide any matter in connection with which he or she has a financial interest in any of the parties, or a relationship that would make it otherwise inappropriate for him or her to act."	"Neither the Review Officer nor the Presiding Officer may perform functions provided for in this part regarding any matter in which he: has a financial interest; or has any relationship with a party or with the subject matter that would make it inappropriate for him to act."

Agency		Equal Employment Opportunity Commission
Subunit	Environmental Appeals Board	Office of Field Programs
Adjudicators / Subject Matter		ALJs
Citation	40 C.F.R. § 22.4(d)	U.S. Equal Employment Opportunity Commission Handbook for Administrative Judges 14 (July 1, 2002)[163]
Recusal Provision	(Same as above)	"The Administrative Judge should recuse himself/herself from both real and perceived conflicts of interest. The Administrative Judge generally should not participate in a hearing where a party is a member of his/her household, a close relative, the employer of his/her spouse, parent or dependent child, someone with whom he/she has a business relationship, or a former employer (within the past year). If, however, the Administrative Judge determines that no reasonable person knowing all the facts would question his/her impartiality, the Administrative Judge may proceed with the hearing after disclosing the relationship and explaining the reasons why he/she does not believe there is a conflict."

163. On file with author.

Agency	Department of Health & Human Services		
Subunit	Departmental Appeals Board (DAB)	Departmental Appeals Board (DAB)	
Adjudicators / Subject Matter	Board Member	ALJ – civil monetary penalty hearings	
Citation	HHA Appeals Manual[164]	42 C.F.R. § 423.1026(a)	42 C.F.R. § 498.45
Recusal Provision	"The evaluator's opinions can serve as the basis for further settlement discussions. On occasion, a Board Member who is knowledgeable about the subject matter area may serve as the evaluator. If the case is not settled, the Board Member will be recused from further Board proceedings in that case."	"An ALJ may not conduct a hearing in a case in which he or she is prejudiced or partial to the affected party or has any interest in the matter pending for decision."	(Same as above)

164. U.S. DEP'T OF HEALTH & HUM. SERVS., APPELLATE DIVISION PRACTICE MANUAL, https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-board/practice-manual/index.html#41 [https://perma.cc/46UX-7D45] (last visited Feb. 17, 2022).

Agency				
Subunit	Medical Appeals Council	Office of Medicare Hearings and Appeals		Center for Medicare Services
Adjudicators / Subject Matter	ALJ/Attorney Adjudicator	Administrative Law Judge/Attorney Adjudicator	Qualified Independent Contractor	Contract Hearing Officer
Citation	42 C.F.R. § 423.2026	42 C.F.R. § 405.1026	42 C.F.R. § 405.968(d)	42 C.F.R. § 405.1817
Recusal Provision	"An ALJ or attorney adjudicator may not adjudicate an appeal if he or she is prejudiced or partial to the enrollee or has any interest in the matter pending for decision."	"An ALJ or attorney adjudicator may not adjudicate an appeal if he or she is prejudiced or partial to the enrollee or has any interest in the matter pending for decision."	"No physician or health care professional employed by or otherwise working for a QIC may review determinations."	"The hearing officer or officers shall not have had any direct responsibility for the program reimbursement determination with respect to which a request for hearing is filed; no hearing officer (or officers) shall conduct a hearing in a case in which he is prejudiced or partial with respect to any party, or where he has any interest in the matter pending for determination before him."

Agency		Department of Homeland Security	Department of Labor
Subunit	Provider Reimbursement Review Board	Coast Guard	Benefits Review Board
Adjudicators / Subject Matter	Board Member	Hearings for Civil and Criminal Penalties	Board Members
Citation	42 C.F.R. § 405.1847	U.S. Coast Guard, Commandant Instruction 6200.5B, at 8.l. (Sept. 23, 2013).[165]	20 C.F.R. § 801.203
Recusal Provision	"No Board member shall join in the conduct of a hearing in a case in which he is prejudiced or partial with respect to any party or in which he has any interest in the matter pending for decision before him."	"A Hearing Officer shall recuse him or herself from further participation in a civil penalty case if he or she determines that he or she should be disqualified because of actual bias, prejudice, or personal interest in a matter . . . ."	"Disqualification of Board Members . . . they shall be subject to the Department's regulations governing ethics and conduct set forth at [5 C.F.R. part 2635, the OGE ethics rules]."

165. U.S. Coast Guard, Commandant Instruction 16200.5B (2013), https://media.defense.gov/2017/Mar/15/2001717001/-1/-1/0/CI_16200_5B.PDF [https://perma.cc/5EH8-Q7PA].

Agency		Merit Systems Protection Board	Peace Corps
Subunit	Office of Workers Compensation Programs		Office of the General Counsel
Adjudicators / Subject Matter	Federal Coal Mine Health and Safety Act of 1969	AJs	Hearing Panelist
Citation	20 C.F.R. § 725.352	U.S. Merit Systems Protection Board Judges Handbook 14 (Mar. 2017)[166]	IPS 1-12 Procedures for Handling Complaints of Volunteer/Trainee Sexual Misconduct at 5.1(a) (July 1, 2013)[167]
Recusal Provision	"No adjudication officer shall conduct any proceedings in a claim in which he or she is prejudiced or partial, or where he or she has any interest in the matter pending for decision."	"Bases for the disqualification of an AJ include: (a) A party, witness, or representative is a friend or relative of, or has had a close professional relationship with the AJ . . . ."	"Either party may . . . object to any member of the Hearing Panel on the basis of a conflict of interest or other good cause."

166. U.S. MERIT SYS. PROT. BD., JUDGES HANDBOOK (2017), https://www.mspb.gov/appeals/files/ALJHandbook.pdf [https://perma.cc/JFL8-UH7H].

167. PEACE CORPS, IPS 1-12 PROCEDURES FOR HANDLING COMPLAINTS OF VOLUNTEER/TRAINEE SEXUAL MISCONDUCT (2013), https://files.peacecorps.gov/documents/IPS-1-12-Interim-Procedures.pdf [https://perma.cc/94NR-8K3K].

Agency	Pension Benefit Guaranty Corporation	Railroad Retirement Board	Selective Service System
Subunit	Appeals Board		Selective Service Local Board
Adjudicators / Subject Matter	Board Member	Board Member, Director, Hearings Officer	Board Member
Citation	29 C.F.R. 4002.6	20 C.F.R. §§ 260.3(e), 260.4(e), 260.5(e)	32 C.F.R. § 1605.55(a)
Recusal Provision	A Board Member and the Director must notify the Board members of disqualification in any decision or activity based on a conflict of interest under [OGE provisions 18 U.S.C. § 208 and 5 C.F.R. § 2635.502].	"The [hearing] shall be conducted by a person who shall not have any interest in the parties or in the outcome of the proceedings, shall not have directly participated in the initial decision which has been requested to be reconsidered and shall not have any other interest in the matter which might prevent a fair and impartial decision." § 260.3(e).	"No member of a local board shall act on the case of a registrant who is the member's first cousin or closer relation, either by blood, marriage, or adoption, or who is the member's employer, employee, or fellow employee, or stands in the relationship of superior or subordinate of the member in connection with any employment, or is a partner or close business associate of the member, or a fellow member or employee of the area office."

Agency	Selective Service System (cont.)	
Subunit	Selective Service District Appeal Board	National Appeal Board
Adjudicators / Subject Matter	Board Member	Board Member
Citation	32 C.F.R. § 1605.25(a)	32 C.F.R. § 1605.6(e)
Recusal Provision	"No member of a district appeal board shall act on the case of a registrant who is the member's first cousin or closer relation, either by blood, marriage, or adoption, or who is the member's employer, employee, or fellow employee, or stands in the relationship of superior or subordinate of the member in connection with any employment, or is a partner or close business associate of the member, or is a fellow member or employee of the board."	"No member of the National Appeal Board shall act on the case of a registrant who is the member's first cousin or closer relation either by blood, marriage, or adoption, or who is the member's employer, employee or fellow employee or stands in the relationship of superior or subordinate of the member in connection with any employment, or is a partner or close business associate of the member, or is a fellow member or employee of the National Appeal Board."

Agency	Small Business Administration	Department of Transportation	
Subunit	Office of Hearings and Appeals	Federal Aviation Administration	
Adjudicators / Subject Matter	ALJs	Office of Adjudication	Civil Penalty Actions
Citation	13 C.F.R. § 134.218(c)	14 C.F.R. § 13.39(a)	14 C.F.R. § 13.218(f)(6)
Recusal Provision	"[A] Judge will promptly recuse himself or herself from further participation in a case whenever disqualification is appropriate due to conflict of interest, bias, or some other significant reason."	"A party must state the grounds for disqualification [in a motion], including, but not limited to, a financial or other personal interest . . . or any other prohibited conflict of interest."	"A party must state the grounds for disqualification in a motion for disqualification, including, but not limited to, a financial or other personal interest . . . or any other prohibited conflict of interest."

Agency	Department of Treasury	Department of Veterans Affairs
Subunit	Alcohol and Tobacco Tax and Trade Bureau	Board of Veterans Appeals
Adjudicators / Subject Matter	Administrator	Board Member (including Chairman and Veterans Law Judges)
Citation	27 C.F.R. § 71.116	38 C.F.R. § 20.107
Recusal Provision	"Appeals and petitions for review shall not be decided by the Administrator in any proceeding in which he has engaged in investigation or prosecution, and in such event he shall so state his disqualification in writing and refer the record to the Under Secretary for appropriate action."	"A Member of the Board will disqualify himself or herself in a hearing or decision on an appeal if that appeal involves a determination in which he or she participated or had supervisory responsibility in the agency of original jurisdiction prior to his or her appointment as a Member of the Board, or where there are other circumstances which might give the impression of bias either for or against the appellant."

Table 5. Personal Bias Standards

Agency	Access Board	Commodity Futures Trading Commission	Federal Communications Commission
Subunit	Architectural and Transportation Barriers Compliance Board		
Adjudicators / Subject Matter			
Citation	36 C.F.R. § 1150.53(b)	17 C.F.R. § 10.8(b)	47 C.F.R. § 1.245(b)
Recusal Provision	"At any time following appointment of the judge and before the filing of the decision, any party may request the judge to withdraw on grounds of personal bias or prejudice either against it or in favor of any adverse party, by promptly filing with him/her an affidavit setting forth in detail the alleged grounds for disqualification."	"Any party or person who has been granted leave to be heard pursuant to these rules may request an Administrative Law Judge to disqualify himself on the grounds of personal bias, conflict or similar bases."	"Any party may request the presiding officer to withdraw on the grounds of personal bias or other disqualification."

Agency	Federal Maritime Commission	Federal Mine Safety and Health Review Commission	Government Accountability Office
Subunit			Personnel Appeals Board
Adjudicators / Subject Matter			AJ
Citation	46 C.F.R. § 502.25(g)	29 C.F.R. § 2700.81(b)	4 C.F.R. § 28.23
Recusal Provision	"If a party to a proceeding, or its representative, files a timely and sufficient affidavit of personal bias or disqualification of a presiding or participating officer, the Commission will determine the matter as a part of the record and decision in the case."	"A party may request a Commissioner or a Judge to withdraw on grounds of personal bias or other disqualification."	"Any party may file a motion requesting the administrative judge to withdraw on the basis of personal bias or other disqualification and specifically setting forth the reasons for the request."

Agency	Department of Health & Human Services			
Subunit	Departmental Appeals Board (DAB)		Medical Appeals Council	Office of Medicare Hearings and Appeals
Adjudicators / Subject Matter	ALJ – civil monetary penalty hearings		ALJ/Attorney Adjudicator	Administrative Law Judge/Attorney Adjudicator
Citation	42 C.F.R. § 423.1026(a)	42 C.F.R. § 498.45	42 C.F.R. § 423.2026	42 C.F.R. § 405.1026
Recusal Provision	"An ALJ may not conduct a hearing in a case in which he or she is prejudiced or partial to the affected party or has any interest in the matter pending for decision."	(Same as above)	"An ALJ or attorney adjudicator may not adjudicate an appeal if he or she is prejudiced or partial to the enrollee or has any interest in the matter pending for decision."	"An ALJ or attorney adjudicator may not adjudicate an appeal if he or she is prejudiced or partial to the enrollee or has any interest in the matter pending for decision."

Agency	Department of Health & Human Services (cont.)		Department of Homeland Security
Subunit	Center for Medicare Services	Provider Reimbursement Review Board	Coast Guard
Adjudicators / Subject Matter	Contract Hearing Officer	Board Member	Hearings for Civil and Criminal Penalties
Citation	42 C.F.R. § 405.1817	42 C.F.R. § 405.1847	U.S. Coast Guard, Commandant Instruction 6200.5B, at 8.l. (Sept. 23, 2013).[168]
Recusal Provision	"[N]o hearing officer (or officers) shall conduct a hearing in a case in which he is prejudiced or partial with respect to any party, or where he has any interest in the matter pending for determination before him."	"No Board member shall join in the conduct of a hearing in a case in which he is prejudiced or partial with respect to any party or in which he has any interest in the matter pending for decision before him."	"A Hearing Officer shall recuse him or herself from further participation in a civil penalty case if he or she determines that he or she should be disqualified because of actual bias, prejudice, or personal interest in a matter . . . ."

168. U.S. COAST GUARD, COMMANDANT INSTRUCTION 16200.5B (2013), https://media.defense.gov/2017/Mar/15/2001717001/-1/-1/0/CI_16200_5B.PDF [https://perma.cc/AJ6F-AM2P].

Agency	Department of the Interior	Department of Justice	Department of Labor
Subunit		Executive Office for Immigration Review	
Adjudicators / Subject Matter	Acknowledgement of Indian Tribes	Immigration Judge	Program Fraud Civil Remedies Act
Citation	43 C.F.R. § 4.1016	Office of the Chief Immigration Judge, Operating Policies and Procedures Memorandum 05-02[169]	29 C.F.R. § 22.16(b)
Recusal Provision	"[A]ny party may move that the ALJ disqualify himself or herself for personal bias or other valid cause."	"[I]n *Matter of Exame*, 18 I&N Dec. 303 (BIA 1982) . . . , the BIA recognized . . . recusal: . . . (2) when the immigration judge has a personal bias . . . ."	"A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification."

169. EXEC. OFF. FOR IMMIGR. REV., U.S. DEP'T OF JUST., OPERATING POLICIES AND PROCEDURES MEMORANDUM 05-02: PROCEDURES FOR ISSUING RECUSAL ORDERS IN IMMIGRATION PROCEEDINGS (2005), https://www.justice.gov/sites/default/files/eoir/legacy/2005/03/22/05-02.pdf [https://perma.cc/2PWF-M2YX].

Agency	Merit Systems Protection Board	National Endowment for the Arts	National Labor Relations Board	Postal Service
Subunit			Division of Judges	Postal Regulatory Commission
Adjudicators / Subject Matter	AJs	Program Fraud Civil Remedies Act	Section 10(a)-(i) of Unfair Labor Practices Act	
Citation	U.S. Merit Systems Protection Board Judges Handbook 14 (Mar. 2017)[170]	45 C.F.R. § 1149.31(b)	29 C.F.R. § 102.36(a)	39 C.F.R. § 3001.23(d)
Recusal Provision	"Bases for the disqualification of an AJ include: . . . (b) Personal bias or prejudice of the AJ."	"The motion [for disqualification] must be supported by an affidavit . . . establish ing that personal bias or other reason for disqualification exists . . . ."	"An Administrative Law Judge may withdraw from a proceeding because of a personal bias or for other disqualifying reasons."	"A presiding officer may withdraw from a proceeding when he/she deems himself disqualified, or may be withdrawn by the Commission for good cause found after timely affidavits alleging personal bias or other disqualifications have been filed."

170. U.S. MERIT SYS. PROT. BD., JUDGES HANDBOOK (2017), https://www.mspb.gov/appeals/files/ALJHandbook.pdf [https://perma.cc/JFL8-UH7H].

Agency	Small Business Administration	Securities and Exchange Commission	Department of Transportation
Subunit	Office of Hearings and Appeals		
Adjudicators / Subject Matter	ALJs		Aviation Proceedings
Citation	13 C.F.R. § 134.218(c)	17 C.F.R. § 201.112(b)	14 C.F.R. § 302.17(b)
Recusal Provision	"A Judge will promptly recuse himself or herself from further participation in a case whenever disqualification is appropriate due to conflict of interest, bias, or some other significant reason."	"Any party who has a reasonable, good faith basis to believe that a hearing officer has a personal bias, or is otherwise disqualified from hearing a case, may make a motion to the hearing officer that the hearing officer withdraw."	"If . . . there is filed with the administrative law judge, in good faith, an affidavit of personal bias or disqualification with substantiating facts and the administrative law judge does not withdraw, the DOT decisionmaker shall determine the matter."

Agency	Department of Transportation (cont.)		
Subunit	Federal Aviation Administration		Maritime Administration
Adjudicators / Subject Matter	Office of Adjudication	Civil Penalty Actions	
Citation	14 C.F.R. § 13.39	14 C.F.R. § 13.218(f)(6)	46 C.F.R. § 201.89
Recusal Provision	"A party must state the grounds for disqualification, including, but not limited to, . . . personal animus against a party to the action or against a group to which a party belongs [and] prejudgment of the adjudicative facts at issue in the proceeding . . . ."	"A party must state the grounds for disqualification in a motion for disqualification, including, but not limited to . . . personal animus against a party to the action or against a group to which a party belongs [and] prejudgment of the adjudicative facts at issue in the proceeding . . . ."	"If a party to a proceeding, or his representative, files in good faith a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the Administration will determine the matter as a part of the record and decision in the case."

Agency	Department of the Treasury
Subunit	Alcohol and Tobacco Tax and Trade Bureau
Adjudicators / Subject Matter	
Citation	27 C.F.R. § 71.96
Recusal Provision	"[U]pon the filing in good faith . . . of a timely and sufficient affidavit of facts showing personal bias or otherwise warranting the disqualification of any administrative law judge, the Administrator shall . . . determine the matter as a part of the record and decision in the proceeding."

Table 6. Quasi-Judicial Standards (including appearance standards)

Agency	Subunit	Adjudicators / Subject Matter	Citation	Recusal Provision
Equal Employment Opportunity Commission	Office of Field Programs	Administrative Judges	U.S. Equal Employment Opportunity Commission Handbook for Administrative Judges 14 (July 1, 2002)[171]	"(a) The Administrative Judge should recuse himself/herself from both real and perceived conflicts of interest . . . . (b) The Administrative Judge should not participate in any conduct during the hearing that presents the appearance of or demonstrates actual bias in favor of or against one of the parties."
Department of Health and Human Services	Provider Reimbursement Review Board	Board Member	Provider Reimbursement Review Board Rules (Aug. 29, 2018) (Rule 45)[172]	"A Board member may recuse him or herself if there are reasons that might give the appearance of an inability to render a fair and impartial decision."

171. On file with author.

172. CTRS. FOR MEDICARE & MEDICAID SERVS., U.S. DEP'T OF HEALTH & HUM. SERVS., PROVIDER REIMBURSEMENT REVIEW BOARD RULES (2018), https://www.cms.gov/Regulations-and-Guidance/Review-Boards/PRRBReview/Downloads/PRRB-Rules-August-29-2018.pdf [https://perma.cc/QM25-DRYQ].

Agency	Department of Interior	
Subunit	Office of Hearings and Appeals	Fish & Wildlife Service
Adjudicators / Subject Matter	Hearing Divisions, Board of Land Appeals, Board of Indian Appeals	Presiding Officer
Citation	43 C.F.R. § 4.27(c)(1)	50 C.F.R. § 18.76(e)
Recusal Provision	"[A]n Office of Hearings and Appeals deciding official must withdraw from a case if circumstances exist that would disqualify a judge in such circumstances under the recognized canons of judicial ethics."	"The presiding officer shall withdraw . . . if he deems himself disqualified under recognized canons of judicial ethics . . . . If there is filed . . . a timely and sufficient affidavit alleging the presiding officer's personal bias, malice, conflict of interest or other basis which might result in prejudice to a party, the hearing shall recess."

Agency	Department of Justice	Department of Justice (cont.)
Subunit	Executive Office for Immigration Review	United States Parole Commission
Adjudicators / Subject Matter	Immigration Judge	
Citation	Office of the Chief Immigration Judge, Operating Policies and Procedures Memorandum 05-02	U.S. Parole Commission Rules and Procedures Manual, at M-03 (June 30, 2010)[173]
Recusal Provision	"[A] judge should recuse him or herself when it would appear to a reasonable person, knowing all the relevant facts, that a judge's impartiality might reasonably be questioned."	"A hearing examiner or Commissioner shall disqualify himself when it reasonably appears that he may have a conflict of interest or that his participation in the hearing might place the Commission in an adverse situation."

173. PAROLE COMM'N, U.S. DEP'T OF JUST., RULES AND PROCEDURES MANUAL (2010), https://www.justice.gov/sites/default/files/uspc/legacy/2010/08/27/uspc-manual111507.pdf [https://perma.cc/6FXU-DZQG].

Agency	Nuclear Regulatory Commission		Occupational Safety and Health Review Commission
Subunit	Commission, Appeal Board, Atomic Safety and Licensing Board		
Adjudicators / Subject Matter			ALJs
Citation	U.S. Nuclear Regulatory Commission Staff Practice and Procedure Digest 3.1.4.1 (June 2011)[174]	U.S. Nuclear Regulatory Commission Staff Practice and Procedure Digest 2.9.1 (June 2011)[175]	29 C.F.R. § 2200.68(b)
Recusal Provision	"The rules governing motions for disqualification or recusal are generally the same for the [NRC] as for the judicial branch itself."	"10 C.F.R. § 2.313(b) is meant to ensure both the integrity and appearance of integrity of the Commission's formal hearing process."	"A Judge shall recuse himself or herself under circumstances that would require disqualification of a federal judge under Canon 3(C) of the Code of Conduct for United States Judges, except that the required recusal may be set aside under the conditions specified by Canon 3(D)."

174. U.S. NUCLEAR REGUL. COMM'N, UNITED STATES NUCLEAR REGULATORY COMMISSION STAFF PRACTICE AND PROCEDURE DIGEST: COMMISSION, APPEAL BOARD AND LICENSING DECISIONS (2011), https://www.nrc.gov/reading-rm/doc-collections/nuregs/staff/sr0386/d16/sr0386d16.pdf [https://perma.cc/47RB-C38V].

175. *Id.*

Agency	Social Security Administration	
Subunit	Office of Analytics, Review, and Oversight	Office of Hearings Operations
Adjudicators / Subject Matter	AAJ, AO	ALJs
Citation	HALLEX I-3-1-40	HALLEX I-2-1-60
Recusal Provision	"An administrative appeals judge (AAJ) or appeals officer (AO) must disqualify or recuse himself or herself from adjudicating a case and request reassignment if . . . The AAJ or AO believes his or her participation in the case would create an appearance of impropriety . . . ."	"ALJ may withdraw from the case if . . . [t]he ALJ believes his or her participation in the case would give an appearance of impropriety."

Table 7. Taxonomy by Agency[176]

Agency	Categories of Recusal Standard
Civilian Board of Contract Appeals	None
Department of Agriculture	Discretionary, Conflicts
Department of the Air Force	None
Architectural and Transportation Barriers Compliance Board (Access Board)	Discretionary
Department of the Army	None
Chemical Safety and Hazard Investigation Board	N/A
Commission on Civil Rights	N/A
Department of Commerce - US Patent and Trademark Office	Impartiality, Conflicts
Department of Commerce	Impartiality
Commodity Futures Trading Commission	Discretionary
Consumer Financial Protection Bureau	Discretionary
Consumer Product Safety Commission	Discretionary
Department of Defense	Impartiality
Department of Education	Conflicts
Department of Energy	None
Environmental Protection Agency	Discretionary, Conflicts

176. In Table 7, recusal standards based on the appearance of impartiality are noted separately from quasi-judicial standards, even though the two categories are treated as one in the body of the Article. Quasi-judicial for purposes of the table includes incorporation into agency recusal rules of existing judicial recusal standards, such as the Canons of Judicial Ethics or the federal-judicial-recusal statute, 28 U.S.C. § 455.

Agency	Categories of Recusal Standard
Equal Employment Opportunity Commission	Conflicts, Appearance
Farm Credit Administration	None
Federal Communications Commission	Discretionary
Federal Deposit Insurance Corporation	Impartiality
Federal Election Commission	N/A
Federal Energy Regulatory Commission	Discretionary
Federal Housing Finance Agency	Impartiality
Federal Labor Relations Authority	Impartiality
Federal Maritime Commission	Discretionary
Federal Mediation & Conciliation Service	N/A
Federal Mine Safety & Health Review Commission	Discretionary
Federal Reserve Board of Governors	Impartiality
Federal Trade Commission	Discretionary
Government Accountability Office	Discretionary
Department of Health & Human Services	Conflicts, Bias, Appearance
Department of Homeland Security	Discretionary, Conflicts, Bias
Department of Housing & Urban Development	Discretionary
Department of Interior	Discretionary, Quasi-Judicial
International Trade Commissions	Impartiality

Agency	Categories of Recusal Standard
Department of Justice - Executive Office for Immigration Review	Impartiality, Discretionary, Quasi-Judicial
Department of Justice	Appearance
Department of Labor	Impartiality, Discretionary, Conflicts, Bias
Library of Congress	None
Merit System Protection Board	Discretionary, Conflicts, Bias
National Aeronautics and Space Administration	None
National Endowment for the Arts	Discretionary
National Credit Union Administration	None
National Labor Relations Board	Impartiality, Bias
National Transportation Safety Board	Discretionary
Department of the Navy	None
Nuclear Regulatory Commission	Discretionary, Conflicts, Appearance, Quasi-Judicial
Occupational Safety & Health Review Commission	Quasi-Judicial
Peace Corps	Conflicts
Pension Benefit Guaranty Corporation	Conflicts
Postal Regulatory Commission	Discretionary
Postal Service	Impartiality
Railroad Retirement Board	Conflicts
Securities and Exchange Commission	Discretionary
Selective Service System	Impartiality, Conflicts
Small Business Administration	Conflicts, Bias

Agency	Categories of Recusal Standard
Social Security Administration	Conflicts, Bias, Appearance
Department of State	Impartiality
Surface Transportation Board	None
Department of Transportation	Discretionary
Department of the Treasury	Impartiality, Discretionary, Conflicts
Department of Veterans Affairs	Conflicts, Appearance