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Accusers as Adjudicators in Agency Enforcement Proceedings

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ACCUSERS AS ADJUDICATORS IN AGENCY ENFORCEMENT PROCEEDINGS

Andrew N. Vollmer*

ABSTRACT

Largely because of the Supreme Court's 1975 decision in Withrow v. Larkin, the accepted view for decades has been that a federal administrative agency does not violate the Due Process Clause by combining the functions of investigating, charging, and then resolving allegations that a person violated the law. Many federal agencies have this structure, such as the Securities and Exchange Commission (SEC) and the Federal Trade Commission.

In 2016, the Supreme Court decided Williams v. Pennsylvania, a judicial disqualification case that, without addressing administrative agencies, nonetheless raises a substantial question about one aspect of the combination of functions at agencies. The Court held that due process prevented a judge from sitting in a case in which he had participated as district attorney years earlier. The operative principle for the decision was that "the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."

This Article concludes that the reasoning of Williams should supersede Withrow on the need to disqualify a specific commissioner or agency head from participating in a particular adjudication if the agency official played a meaningful role, such as voting to approve enforcement charges, in the process leading to the agency's initiation of proceedings against the defendant. Voting to approve enforcement charges would be a meaningful role. The due process cases do not permit a compromise on the high standards of impartiality demanded of a final agency decision maker in an adjudication to determine whether a private party committed a violation of law.

That reading of Williams threatens to unsettle standard practices at various agencies, but a closer look at the procedures of the SEC shows that it would be able to accommodate the rule in Williams yet retain the combination of charging and adjudicating at the Commission level. Because of turnover of Commissioners and quorum rules, the SEC could continue to have the agency leaders bring enforcement cases and review nearly all administrative law judge decisions while disqualifying individual Commissioners under Williams when necessary.

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INTRODUCTION

The standard practice at the Securities and Exchange Commission (SEC or Commission) is for the Commissioners both to charge a person with a violation of law and then sit as judges to decide whether the defendant committed the violation.¹ Often, one or more SEC Commissioners at the time of the initial charge are still Commissioners later when the Commission reviews an initial decision from an administrative law judge in the same case. When that occurs, the Commissioners who participated in the decision to initiate an enforcement proceeding also participate in the agency's final decision on disposition of the charge. Other federal agencies,

1. See *infra* text accompanying notes 169–76; Russell G. Ryan, *The SEC as Prosecutor and Judge*, WALL ST. J. (Aug. 4, 2014, 7:36 PM), <http://www.wsj.com/articles/russell-g-ryan-the-sec-as-prosecutor-and-judge-1407195362>.

such as the Federal Trade Commission and the Federal Communications Commission, follow similar procedures.²

This combination of roles and powers might surprise some, but constitutional and administrative law has long accepted that the leaders of a federal agency may investigate and charge a person with a violation of law and then later act in a judicial capacity in the same case. The primary sources of that understanding are a section of the Administrative Procedure Act³ and *Withrow v. Larkin*. In that 1975 decision, the Supreme Court held that a state medical examining board would not violate the Due Process Clause of the Constitution by investigating and charging potential misconduct by a doctor and then determining that the doctor should be temporarily suspended because of the misconduct.⁴ Lower federal courts later extended the rule of *Withrow* to federal administrative agencies.⁵

2. See *infra* text accompanying notes 164–68.

3. 5 U.S.C. § 554(d) (2012) provides that an “employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review [of an initial decision], except as witness or counsel in public proceedings.” The restriction does not apply “to the agency or a member or members of the body comprising the agency.” *Id.*

4. *Withrow v. Larkin*, 421 U.S. 35 (1975).

5. See, e.g., *NEC Corp. v. United States*, 151 F.3d 1361, 1371–73 (Fed. Cir. 1998) (using *Withrow* to deny a due process challenge to the role of the Department of Commerce in an anti-dumping determination and noting that “the blend of investigative and adjudicative functions sometimes found in modern administrative agencies requires that a pragmatic approach be taken to what qualifies as an ‘impartial’ decision maker”); *Keating v. OTS*, 45 F.3d 322 (9th Cir. 1995) (rejecting the contention that the first director of OTS exercised an impermissible combination of investigatory, prosecutorial, and adjudicatory functions at least in part because the second OTS director issued a final decision); *In re Seidman*, 37 F.3d 911 (3d Cir. 1994) (using *Withrow* to reject a due process challenge to the combination of investigation, prosecution, and adjudication functions in the OTS director); *Simpson v. OTS*, 29 F.3d 1418 (9th Cir. 1994) (using *Withrow* and the minimal involvement of the OTS director in the commencement and prosecution of the case to reject a due process challenge based on the combination of prosecution and adjudication); *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099 (D.C. Cir. 1988) (using *Withrow*, 5 U.S.C. § 554, and the core value of flexibility in modern administrative process to reject a due process challenge to an SEC administrative proceeding); *NLRB v. Aaron Bros. Corp.*, 563 F.2d 409, 413 (9th Cir. 1977) (using *Withrow* and 5 U.S.C. § 554 to reject a due process challenge when the Regional Director of the NLRB “exercised both investigative and adjudicative responsibilities in connection with the issuance and resolution of [an] unfair labor practice complaint”); see also *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 79 (10th Cir. 1972) (“[T]he Federal Trade Commission combines the functions of investigator, prosecutor and judge and . . . Congress designed it in that manner. Thus Kennecott’s complaint goes to the nature of the law itself. As to this, the courts have uniformly held that this feature does not make out an infringement of the due process clause of the Fifth Amendment.”); *FTC v. Cinderella Career & Finishing Sch.*, 404 F.2d 1308, 1315 (D.C. Cir. 1968) (using precedent and 5 U.S.C. § 554 to conclude that Congress had approved the combination of an agency’s power to act in an accusatory capacity and to determine the merits of the charges, concluding that a combination of investigative and judicial functions within an agency did not violate due process, and rejecting the

Notwithstanding its application by the courts, *Withrow* is one of the Supreme Court decisions at the heart of a long-running debate about the extent to which the Constitution permits or forbids a federal administrative agency from exercising legislative functions, judicial functions, or a combination of them in one agency with executive duties. The debate provokes arguments about the separation of powers, separation of functions, checks and balances, due process, pragmatism and efficiency. It spans a range of theories from the formalist view of separated powers to a functionalist approach supporting workable government.⁶

The debate now has new material to digest. In 2016, the Supreme Court decided *Williams v. Pennsylvania*,⁷ which put the established understanding of *Withrow* in doubt, at least in part. *Williams* held that the Due Process Clause required a state supreme court justice to disqualify himself from reviewing a collateral challenge to a defendant's conviction and death sentence because, years earlier, the judge had participated in the criminal prosecution of the defendant as district attorney. The operative principle for the decision was that "the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case."⁸

The reasoning of *Williams* naturally raises the question whether it applies to federal administrative agencies, such as the SEC, whose heads both charge and adjudicate. Does *Williams* create a new due process imperative that federal agencies must meet, or was there something about the law or facts in *Williams* that prevents the outcome from extending to agencies and qualifying *Withrow*?

argument that an agency's issuance of a press release about the charges in a complaint created an unacceptable appearance of prejudgment because agency members were then "under a very real pressure to vindicate themselves and justify the charges").

6. See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981); Kent Barnett, *Why Bias Challenges to Administrative Adjudication Should Succeed*, 81 MO. L. REV. 1023 (2016); Rebecca Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513 (1991); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915 (1988); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1839 (2011); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984); Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L. J. 384 (2012); see also Martin H. Redish & Kristin McCall, *Due Process, Free Expression, and the Administrative State*, Nw U. Pritzker Sch. L. Pub. L. & Legal Theory Series No. 18-03 (2018), <https://ssrn.com/abstract=3122697>.

7. *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016).

8. *Id.* at 1905.

Perhaps *Williams* did not implicate *Withrow* at all. *Williams* was different from *Withrow* in several obvious ways: *Williams* involved a judge, a criminal case for the death penalty, and collateral relief in state court. *Withrow* was a proceeding by an administrative agency to suspend a medical license, and the Court has often acknowledged that the demands of the Due Process Clause vary with the circumstances.

This Article will discuss whether *Williams* affects our understanding of *Withrow* and the established position that a federal agency may charge and adjudicate the same case. It concludes that *Williams* should supersede *Withrow* and require the disqualification of a specific commissioner or agency head from participation in an adjudication if the agency official played a meaningful role in the process leading to the agency's initiation of proceedings against the defendant. The Article will discuss whether voting to approve enforcement charges qualifies as a meaningful role. The due process cases on disqualification do not permit a compromise on the high standards of impartiality demanded of a final agency decision maker in an adjudication to determine whether a private party committed a violation of law.

Applying *Williams* to federal agencies does not necessarily mean a complete renunciation of *Withrow* or of the combination of charging and adjudicating functions within a single agency. *Williams* dealt with the specific circumstances of an individual accuser turned adjudicator. It was not about whether an entire agency carries an inherent bias from the combination of functions or whether the Constitution's structure of separated powers prevents Congress from authorizing a single agency to charge a violation of law and then adjudicate the charge.

Part I of this Article will review and comment on the two key Supreme Court decisions, *Withrow* and *Williams*. Reconciling the reasoning of the two decisions is difficult, but the two cases illustrate the difference between a narrow claim that an individual decision maker should be disqualified because specific circumstances create a strong risk of bias or partiality and the broader argument that the Due Process Clause or the Constitution's separation of powers does not permit an enforcement agency to adjudicate claims it brought. The discussion in this Article is limited to the narrower, individual due process claim and does not address whether the combination of enforcement and adjudication in one agency violates the Constitution.

Part II then considers whether *Williams* applies to federal administrative agencies. This Part considers possible ways to distinguish the two decisions but concludes that *Williams* reflects an evolving concern with the likelihood of partiality that grows out of service as an advocate. The principles in *Williams* and other due process cases on the need for impartial decision makers apply to administrative agencies, at least when an agency such as the SEC commences an enforcement claim through an internal administrative process that culminates in final agency review by the most senior agency officials. This discussion also reports data from several studies that support the Supreme Court's concern that an accuser lacks the necessary neutrality to determine the merits of an initial charging decision.

Part II concludes by examining the needs of the modern administrative state and the pragmatic considerations favoring the combination of charging and adjudicating functions in an agency. It asserts that practical considerations should and can give way to the application of *Williams*. It also explains that some agencies, such as the SEC, would be able to accommodate the rule in *Williams* and continue to have agency leaders bring enforcement cases and review nearly all decisions of administrative law judges (ALJs).

Finally, Part III assumes that *Williams* extends to federal agencies. It addresses the ways in which the *Williams* rule would apply to the SEC and the adjustments the SEC could make to its procedures to comply. If the rule in *Williams* applies to federal agencies, it would apply to the SEC whose Commissioners act as both accuser and adjudicator. Then, this Part considers the way *Williams* would have affected three specific SEC administrative proceedings. Because of turnover on the Commission and the SEC's quorum rules, applying *Williams* would rarely disable the agency from issuing a final adjudication on the merits of an administrative proceeding.

The procedures administrative agencies use is a large topic, and this Article does not set out to discuss the full range of potential issues. Three factors limit the scope of this discussion.

First, the Article addresses only those situations in which the agency head or the individuals constituting the leadership of the agency participate in both a decision to initiate an enforcement claim against a third party and then participate in an adjudication proceeding to determine liability or the appropriate sanction. At the SEC, agency leadership means the Commissioners, who are

appointed by the President and confirmed by the Senate.⁹ This Article does not address the position of agency personnel or adjudicators subordinate to the top officials of an agency. For example, at the SEC and many agencies, an ALJ renders an initial decision in an administrative enforcement proceeding, and the Commissioners may review that initial decision.¹⁰ This Article does not address lower level employees because section 554(d) of the Administrative Procedure Act prohibits agency personnel who perform investigating or prosecuting functions in a case from participating in or advising on an adjudication decision in the same case or a factually related case, but the prohibition does not apply to the agency or agency heads.¹¹

Second, this Article addresses government enforcement cases brought as administrative proceedings. These are situations in which a government agency charges a specific person with a violation of law because of particular past conduct, litigates the case within the agency, and renders a decision on whether a violation occurred and what sanction or relief to impose. SEC administrative enforcement cases can lead to severe forms of coercive sanctions and resemble criminal prosecutions in many ways. Many agency enforcement cases brought as administrative proceedings, such as the ones at the SEC, involve a hearing on the record and are adjudications under the APA;¹² they are not license hearings, rule-makings, or rulings on government benefits.

Third, the reasoning and analysis in this Article apply only to federal agencies with two characteristics: (1) those that use administrative proceedings to resolve meaningful enforcement allegations and (2) those whose top-level officials vote to initiate enforcement proceedings and make the final agency determination on a potential violation. The SEC is a leading example of such an agency, and the details of its operations are used to illustrate the implications of applying *Williams* to an agency's procedures. Other

9. 15 U.S.C. § 78d(a) (2012); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510–13 (2010).

10. Other works devote attention to the position of administrative law judges, administrative judges, or agency staff. See Asimow, *supra* note 6 (addressing primarily the separation of staff from decision making); Kent Barnett, *Against Administrative Judges*, 49 U.C. DAVIS L. REV. 1643 (2016); Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797 (2013); Michael Asimow, *Evidentiary Hearings Outside the Administrative Procedure Act*, ADMIN. CONFERENCE U.S. (Nov. 10, 2016), https://www.acus.gov/sites/default/files/documents/adjudication-outside-the-administrative-procedure-act-final-report_0.pdf.

11. 5 U.S.C. § 554(d); see discussion *supra* note 3.

12. See 5 U.S.C. §§ 551(7), 554(a) (2012); 15 U.S.C. §§ 77u, 78u-2(a), 78u-3(a), 78v (2012).

agencies appear to have a similar structure and to operate in a similar manner. Part III of this Article describes some of the relevant procedures of several other agencies, including the Federal Communications Commission and the Commodity Futures Trading Commission, but the particular processes of those agencies would need to be considered to reach a fully informed conclusion about whether and how *Williams* would apply.

I. THE SUPREME COURT DECISIONS IN *WITHROW* AND *WILLIAMS*

This first Part describes *Withrow* and *Williams*. This review prompts several observations that bear on the later, essential question of whether the holding in *Williams* should apply to federal administrative agencies.

A. *Withrow v. Larkin*

In *Withrow v. Larkin*, a doctor challenged the procedures used by the Wisconsin Medical Examining Board to enforce state statutes against various types of professional misconduct.¹³ The doctor's objection was that the Board had the authority to investigate possible prohibited acts, issue charges, and then reach a conclusion on reprimanding him or temporarily suspending his medical license.¹⁴

The Board held an investigative hearing to determine if the doctor had engaged in prohibited acts in the course of his work. It then proposed to hold a "contested hearing" on charges resulting from the investigation and decide whether to suspend the doctor's license temporarily.¹⁵ The doctor sought relief from a federal district court, which stopped the Board from imposing a temporary suspension because the Board was not "an independent, neutral and detached decision maker."¹⁶ The district court concluded that a Board decision to suspend the doctor's medical license "at its own contested hearing on charges evolving from its own investiga-

13. 421 U.S. 35 (1975).

14. *Id.* at 41.

15. *Id.* at 40-41; *Larkin v. Withrow*, 368 F. Supp. 796, 797 (E.D. Wis. 1973); Brief for Appellee at 14, *Withrow v. Larkin*, 421 U.S. 35 (1975) (No. 73-1573), 1974 WL 186368, at *14 ("The issues involved in the contested hearing were identical to the issues which had been investigated by the Board.").

16. *Withrow*, 368 F. Supp. at 797; *Withrow*, 421 U.S. at 41-42.

tion would constitute a denial to him of his rights to procedural due process.”¹⁷

After the district court enjoined the temporary suspension proceedings, the Board held another investigative session and then issued findings of fact, conclusions of law, and a decision that the doctor had engaged in specified misconduct. The Board also determined that it had probable cause for an action to revoke the doctor’s medical license and filed its decision with the local district attorney to initiate appropriate revocation or criminal proceedings.¹⁸ Permanent license revocation or a criminal conviction needed a court action prosecuted by the district attorney.

The Board appealed the district court’s judgment to the Supreme Court, and the Court rejected the due process argument in a unanimous opinion by Justice White. The Court began by acknowledging that administrative adjudications must be fair and must have an unbiased decision maker.¹⁹ The Court identified previous situations “in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”²⁰ The earlier situations occurred when an adjudicator had a pecuniary interest in the outcome²¹ and when the adjudicator had been the target of personal abuse or criticism from a party.²²

The combination in an administrative agency of the authority to investigate, commence proceedings, and adjudicate was different. Unlike the situations previously identified, the Court did not believe it created an unconstitutional risk of bias.

The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers

17. *Withrow*, 368 F. Supp. at 797; *Withrow*, 421 U.S. at 42.

18. *Withrow*, 421 U.S. at 41–42.

19. *Id.* at 46–47.

20. *Id.* at 47.

21. The Court cited *Gibson v. Berryhill*, 411 U.S. 564 (1973), and *Tumey v. Ohio*, 273 U.S. 510 (1927), among other cases. *Withrow*, 421 U.S. at 47 n.14.

22. The Court cited *Taylor v. Hayes*, 418 U.S. 488 (1974), and *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971), among other cases. *Withrow*, 421 U.S. at 47 n.15.

on the same individuals poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.²³

The Court conceded that the argument against allowing the combination of functions had merit. “The issue is substantial,”²⁴ but, when the question concerned the operations of administrative agencies, legislators needed freedom to choose from complete separation of functions or virtually none at all. The “growth, variety, and complexity of the administrative processes have made any one solution highly unlikely.”²⁵ At the federal level, Congress had passed section 554(d) of the Administrative Procedure Act, which explicitly permitted the members of a federal agency to investigate or prosecute and participate or advise in adjudication.²⁶

The doctor relied on the Supreme Court’s 1955 decision in *Murchison*,²⁷ where the Court held that the Due Process Clause prohibited a state court judge acting as a one-person grand jury from hearing witnesses, charging witnesses with perjury or contempt, and then trying the charges against the witnesses. The Court responded by saying that *Murchison* did not stand for a broad rule against the combination of functions at an administrative agency, did not question the APA or an earlier Court decision permitting agency members from having some knowledge of facts relevant to an adjudication,²⁸ and involved different procedures. It concluded the Board in *Withrow* used procedures that did not contain an unacceptable risk of bias.

The Court appeared to demand proof that members of the Board held an actual personal bias or prejudice against the doctor or had prejudged the outcome of the doctor’s case based on the information from the investigation.²⁹ The mere exposure to evi-

23. *Withrow*, 421 U.S. at 47.

24. *Id.* at 51.

25. *Id.* at 51–52.

26. *Id.* at 52. The Court also relied on the approval of the combination of functions by the leading commentator on the administrative process at the time, Kenneth Culp Davis. The Court cited the Davis treatise several times. *Id.* at 52 nn.17–18, 57 n.24 (citing 2 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE (1958 & Supp. 1970)).

27. *Withrow*, 421 U.S. at 53; *In re Murchison*, 349 U.S. 133 (1955).

28. *Withrow*, 421 U.S. at 53 (discussing *FTC v. Cement Inst.*, 333 U.S. 683 (1948)).

29. *Id.* at 54–55 (“When the Board instituted its investigative procedures, it stated only that it would investigate . . . Later, . . . it would determine if violations had been committed . . . Without doubt, the Board then anticipated . . . an adjudication of the issue; but there was no more evidence of bias . . . than inhered in the very fact that the Board had investigated and would now adjudicate.”).

dence presented in a non-adversary investigation was not sufficient to impugn the fairness of the Board members at a later adversary hearing. The Board members and other administrators should be assumed to be conscientious and intellectually disciplined.³⁰

The Court then rejected the argument that the Board's filing of probable cause conclusions with the district attorney demonstrated prejudice and prejudgment. Different stages of a proceeding, such as initial charges and ultimate adjudication, have different bases and purposes and could legitimately lead to different results from "a more complete view of the evidence afforded by an adversary hearing."³¹ The risk of bias or prejudgment in deciding whether a violation occurred after having filed a complaint "has not been considered to be intolerably high or to raise a sufficiently great possibility that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position."³²

In summary, *Withrow* was a rousing defense of the administrative state and Congress's ability to authorize an agency to investigate, charge, and resolve allegations of misconduct. The Court elevated legal formalities over the psychological tendencies and human weaknesses of individuals, praised the honesty and intellectual discipline of agency adjudicators, and diminished due process precedents.

B. *Williams v. Pennsylvania*

In *Williams v. Pennsylvania*,³³ the Supreme Court held that the Due Process Clause of the Constitution forbids a person from being both an accuser and adjudicator in the same case. The case concerned a local district attorney who approved a decision to seek the death penalty against a criminal defendant and then, many years later, participated as a judge in a court decision that refused to grant the defendant post-conviction relief.

Pennsylvania charged the defendant with a 1984 murder. The trial prosecutor wrote a memorandum to her supervisors requesting permission to seek the death penalty. The district attorney

30. *Id.* at 55.

31. *Id.* at 57–58.

32. *Id.* at 57.

33. *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016).

wrote a note at the bottom of the memorandum approving the request. The defendant was convicted and sentenced to death in 1986.³⁴ The district attorney did not participate in the litigation other than to approve the request to seek the death penalty.³⁵

For over twenty-five years, the defendant challenged his conviction and sentence. In 2012, he filed a petition for post-conviction relief claiming newly discovered evidence. The state trial court found misconduct by the trial prosecutor and ordered a new sentencing hearing. The case went to the Supreme Court of Pennsylvania where the district attorney who had approved seeking the death penalty was now chief justice. The defendant asked the chief justice to disqualify himself. He refused and voted with the other five members of the state supreme court to reinstate the death penalty.³⁶

The U.S. Supreme Court, in a five-to-three decision written by Justice Kennedy, held that the Due Process Clause required the disqualification of the state chief justice. A judge must be free of bias. That determination required an objective standard: Would an average judge likely be neutral or have an unconstitutional potential for bias from a financial or other interest in the outcome of a case.³⁷

The *Murchison* precedent, which *Withrow* had distinguished, played an important role in *Williams*.³⁸ In *Williams*, the Court said *Murchison* “determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.”³⁹

The *Williams* majority, using language from *Withrow* and *Murchison*, gave weight to an advocate’s psychological investment and personal knowledge:

When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome. There is, furthermore, a risk that the judge

34. Brief for Petitioner at 7, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) (No. 15-5040), 2015 WL 10356400.

35. Brief for Respondent at 17, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016) (No. 15-5040), 2016 WL 355062.

36. *Williams*, 136 S. Ct. at 1904–05.

37. *Id.* at 1905–06.

38. *Id.* at 1905–07; *In re Murchison*, 349 U.S. 133 (1955).

39. *Williams*, 136 S. Ct. at 1905.

“would be so psychologically wedded” to his or her previous position as a prosecutor that the judge “would consciously or unconsciously avoid the appearance of having erred or changed position.” In addition, the judge’s “own personal knowledge and impression” of the case, acquired through his or her role in the prosecution, may carry far more weight with the judge than the parties’ arguments to the court.⁴⁰

The Court cited no empirical research or studies to bolster these conclusions, although supporting data exists, as discussed below.⁴¹

The *Williams* Court recognized that the state chief justice was just one of several prosecutors who worked on the case, played only a limited role, and ended his involvement decades earlier. Nonetheless, “the constitutional principles” were fully applicable when “a judge had a direct, personal role in the defendant’s prosecution.”⁴² What mattered was whether the adjudicator participated in a “critical” or “major adversary decision.”⁴³ “A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call.”⁴⁴ Brief, administrative or ministerial acts do not qualify.⁴⁵ When a serious risk exists that a person would be influenced by a motive, even inadvertent, to validate prior involvement, the person has a “duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion.”⁴⁶ An individual is not able to set aside personal interest in an outcome when he or she has served as an advocate in the very case being adjudicated.⁴⁷

The Court concluded that the chief justice’s authorization to seek the death penalty amounted to significant and personal involvement in a critical trial decision and gave rise to an unacceptable risk of actual bias. His participation in the proceedings as a justice on the state supreme court violated due process.⁴⁸

40. *Id.* at 1906 (citations omitted).

41. *See infra* Part II.C.

42. *Williams*, 136 S. Ct. at 1906.

43. *Id.*

44. *Id.* at 1907.

45. *See id.*

46. *Id.*

47. *Id.* at 1906.

48. *Id.* at 1908–09.

The violation was not harmless error even though six state supreme court justices decided the case and the chief justice's vote was not decisive.⁴⁹ The existence of harm did not depend on whether the chief justice influenced the other justices during the decision-making process or whether the disqualified judge's vote was necessary to the disposition of the case. The decision of a body with several members reflects a collective process of exchanging ideas and arguments with each person playing a part in shaping the ultimate disposition. "Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself."⁵⁰

Chief Justice Roberts, together with Justice Alito, dissented and would not have found a due process violation because the state chief justice did not have any previous knowledge of the facts contested in the specific issue that the state supreme court reviewed and had not made any previous decision on that issue.⁵¹ Justice Thomas also dissented because the post-conviction proceedings were different from the original criminal case, the state chief justice did not participate as a prosecutor in the post-conviction proceeding, and the Due Process Clause required disqualification only when a judge had a direct and substantial pecuniary interest or had served as a lawyer in the same case.⁵²

C. *Comments on Withrow and Williams*

Through the lens of *Williams*, a large part of *Withrow* appears to be wounded. The reasoning in the two opinions is hard to reconcile, as four aspects of the opinions illustrate. The fifth comment below observes that comparing *Withrow* and *Williams* accentuates the difference between a due process disqualification of an individual decision maker for partiality in particular circumstances and a broader separation of powers or due process challenge to an agency's combined authority to investigate, commence proceedings, and adjudicate.

First, *Withrow* and *Williams* had similar basic fact patterns and stated the same legal standards for disqualification but reached entirely different outcomes. *Withrow* said that due process required

49. *Id.* at 1909.

50. *Id.*

51. *Id.* at 1910–11 (Roberts, C.J., dissenting).

52. *Id.* at 1920 (Thomas, J., dissenting).

disqualification when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”⁵³ *Williams* began with the same general due process principle and quoted *Withrow*.⁵⁴

Withrow professed to make “a realistic appraisal of psychological tendencies and human weakness” but concluded that the sequence of functions of investigating, charging, and deciding did not create an intolerably high risk “that the adjudicators would be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position.”⁵⁵ *Williams* considered the human tendency to be psychologically wedded to a position and reached the opposite conclusion. Serving as a judge after having been an advocate in the same case created an unacceptable “risk that the judge ‘would be so psychologically wedded’ to his or her previous position as a prosecutor that the judge ‘would consciously or unconsciously avoid the appearance of having erred or changed position.’”⁵⁶ The *Williams* opinion cited concepts and language from *Withrow*, but reached different conclusions.

The *Williams* majority did not follow other parts of *Withrow*’s reasoning. It did not refer to or rebut *Withrow*’s “presumption of honesty and integrity in those serving as adjudicators” or *Withrow*’s assumption that adjudicators would act with conscience, intellectual discipline, and fairness.⁵⁷ In fact, one of the most interesting things about the use of *Withrow* as a precedent is that the Supreme Court has adopted the standard of impartiality from *Withrow* in other cases but has jettisoned key reasons for allowing a person both to charge and adjudicate.⁵⁸

53. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

54. *Williams*, 136 S. Ct. at 1903 (citing *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975))).

55. *Withrow*, 421 U.S. at 47, 57.

56. *Williams*, 136 S. Ct. at 1906 (quoting *Withrow*, 421 U.S. at 57).

57. *Withrow*, 421 U.S. at 47, 55. The *Withrow* Court showed its faith in the board members at several points. It referred to the fairness of the members, *id.* at 55, and to their objectivity in adjudicating after making a charging decision. The board could decide not to suspend the doctor without implicitly admitting error because the decision would probably “reflect the benefit of a more complete view of the evidence afforded by an adversary hearing.” *Id.* at 57–58.

58. See, e.g., *Williams*, 136 S. Ct. at 1903; *Caperton*, 556 U.S. at 872. The dissents in *Caperton* and *Williams* quoted the *Withrow* presumption of honesty and integrity in adjudicators. *Caperton*, 556 U.S. at 891 (Roberts, C.J., dissenting); *Williams*, 136 S. Ct. at 1910 (Roberts, C.J., dissenting).

Second, both opinions featured discussions of *Murchison*,⁵⁹ but they derived considerably different lessons. In *Murchison*, a state judge heard testimony about potential crimes, charged witnesses with perjury or contempt, and then tried and convicted them. It was important precedent in both *Withrow* and *Williams* because *Murchison* required disqualification for a decision maker's earlier participation in a case rather than for the traditional reason of the adjudicator's financial interest. *Withrow* emphasized the part of *Murchison* that found that the judge likely relied on his own personal knowledge and impression of what the witnesses said in the grand jury room, an impression that could not be tested by adequate cross-examination. *Murchison* did not "stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications."⁶⁰

Withrow referred to *FTC v. Cement Institute*⁶¹ and other examples of a decision maker exposed to the same facts for different purposes.⁶² It stated that *Murchison* did not purport to question *Cement Institute*⁶³ and concluded that "mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing."⁶⁴

To the *Williams* Court, *Murchison* laid down a broader rule. The Court had overturned the convictions in *Murchison* because "the judge's dual position as accuser and decisionmaker in the contempt trials violated due process: 'Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.'"⁶⁵ The *Williams* Court also drew on *Murchison*'s concern with exposure to factual information, as discussed below, but the

59. *Caperton* also included an extended discussion of *In re Murchison*, 349 U.S. 133 (1955). 556 U.S. at 880–81.

60. *Withrow*, 421 U.S. at 53.

61. *FTC v. Cement Inst.*, 333 U.S. 683 (1948).

62. *Withrow*, 421 U.S. at 47–49.

63. *Id.* at 53.

64. *Id.* at 55. A year after *Withrow*, the Supreme Court used similar reasoning to reject a due process challenge to a school board decision to fire striking teachers when the board was the bargaining agent for the school district and engaged in negotiations with representatives of the striking teachers. The Court said that mere familiarity with the facts of a case gained by an agency in performance of its statutory role does not disqualify a decision maker. *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 493–94 (1976).

65. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906 (2016) (alteration in original) (quoting *In re Murchison*, 349 U.S. 133, 137 (1955)).

chief lesson the Court drew from *Murchison* was an objection to an adjudicator's participation in the accusatory process.

The *Williams* Court had the better reading of *Murchison*. The first reason *Murchison* gave for faulting trial by the judge-grand jury was the judge's role in the accusatory process:

It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. . . . A single "judge-grand jury" is even more a part of the accusatory process than an ordinary lay grand juror. Having been a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal.⁶⁶

The *Williams* Court then expanded the part of *Murchison* that relied on the judge's personal knowledge of the events to be tried rather than the evidence presented at the contempt trial. The *Murchison* concern had been narrow and limited to what took place before the judge in the secret grand jury sessions. For the *Murchison* Court, the judge was to be impartial and weigh only the evidence presented at the contempt trial but would not be able to disregard the events at the grand jury stage and would not be subject to cross-examination on those impressions. *Williams* enlarged this concern about access to facts and opined that a judge's personal knowledge and impression of a case acquired through participation in a prosecution could carry more weight with the judge than the parties' arguments to the court.⁶⁷ This was an expansion of the point in *Murchison* because *Williams* reasoned that a prosecutor would ascribe undue weight to all information learned while working on a case. The broader concern in *Williams* about information acquired while working on a case as a prosecutor contrasts with the statement in *Withrow* that "exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of [adjudicators] at a later adversary hearing."⁶⁸

Third, the two opinions differed in assessing the significance of a decision maker's actions before the adjudication stage. *Withrow*

66. *Murchison*, 349 U.S. at 137.

67. *Williams*, 136 S. Ct. at 1906.

68. *Withrow*, 421 U.S. at 55.

gave credence to the different legal standards applicable to different stages of a matter and the ability of a decision maker to remain analytically pure in applying those standards. “When the Board instituted its investigative procedures, it stated only that it would investigate whether proscribed conduct had occurred. Later in noticing the adversary hearing, it asserted only that it would determine if violations had been committed which would warrant suspension of appellee’s license.”⁶⁹ In another part of the opinion, the Court observed that judges usually participate in different stages of a proceeding, such as approving an arrest warrant and later presiding over the criminal trial or resolving a preliminary injunction application and later presiding over permanent injunction proceedings.⁷⁰ The Court remarked that, “just as there is no logical inconsistency between a finding of probable cause and an acquittal in a criminal proceeding, there is no incompatibility between the agency filing a complaint based on probable cause and a subsequent decision, when all the evidence is in, that there has been no violation of the statute.”⁷¹

The problem with all of the Court’s analogies in *Withrow* was that none of them included a judge in the role of advocate or prosecutor with a will to win. In each example, the judge acted as a referee who tested whether one party, as advocate, satisfied a legal standard used in an early part of a case and then applied a different legal standard to the evidence and legal arguments of the parties at a later stage of the case. The judge was not an accuser, movant, or proponent for an outcome.⁷² A later part of this Article discusses whether a member of a charging administrative agency takes on the mantle of an accuser and advocate.⁷³

Williams on the other hand worried more about the reality of human behavior when an adjudicator, as an advocate, had played an important role in a “critical” or “major adversary decision.”⁷⁴ Significant, personal involvement in any critical prosecutorial decision was not eradicable and was sufficient to call for the protec-

69. *Id.* at 54.

70. *Id.* at 56–57.

71. *Id.* at 57.

72. The Federal Circuit relied on this difference in finding that no due process problem existed with the same panel of the Patent Trials and Appeals Board first deciding to institute *inter partes* review and then later deciding the merits of the *inter partes* review. *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1029–30 (Fed. Cir. 2016).

73. *See infra* Part III.B.

74. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906 (2016).

tions of the Due Process Clause against a decision maker's bias and prejudgment. The Court explained:

Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process.⁷⁵

The *Williams* Court took a broad view of major adversary decisions: "A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call."⁷⁶ Brief administrative or ministerial acts do not qualify.⁷⁷

Williams did not draw nice differences between legal standards or stages of a proceeding, although it could have. Using the reasoning of *Withrow*, the *Williams* Court could have argued that the state chief justice's actions as district attorney did not amount to adopting the view that the defendant had committed an offense worthy of the death penalty. Instead, it could have determined that the district attorney did nothing more than conclude that the state, in the particular circumstances and based on the information at the time, had sufficient grounds and evidence to seek to persuade the final decision maker, the jury, to impose the death penalty. The *Williams* Court also could have relied on the difference between a decision to seek the death penalty at the original trial and the standards for granting post-conviction relief. It did not rely on these differences.

The *Withrow* decision does not hold up under the *Williams* standard. The Board in *Withrow* had significant personal involvement in key prosecutorial decisions. It conducted an investigation and then proposed to hold a contested hearing to determine whether to suspend the doctor's medical license. The Board later confirmed its commitment to the view that the doctor engaged in misconduct when it issued a decision that it had probable cause for an action to revoke the doctor's medical license and filed its decision with the local district attorney. The Board decided whether to

75. *Id.* at 1907.

76. *Id.*

77. *Id.*

bring charges and what charges to bring. Before transferring responsibility to the district attorney, the Board was the proponent and movant against the doctor. It was not a referee intermediating between two other adversarial parties.

A fourth comparison between *Withrow* and *Williams* involves the relevance of a decision-making body with several members. *Withrow* did not comment on the number of members of the Board because it was not relevant. The doctor's complaint applied to the Board as a whole and did not turn on any distinction between one member and another. All we know from *Withrow* is that the Board had more than one member.⁷⁸ As far as we can tell, every member of the Board participated in every stage of the proceeding against the doctor. By contrast, the issue of a group decision maker was present in *Williams* because the state chief justice was the only member of the court who had participated earlier in the case and his vote in the state supreme court had not been decisive. As described above,⁷⁹ the Court held that an unconstitutional failure to recuse is a structural error even if the judge in question did not cast a deciding vote. The chief justice's participation in the state supreme court decision was an error that affected the "whole adjudicatory framework below."⁸⁰

Fifth, *Williams* and *Withrow* together highlight the difference between a due process disqualification of an individual decision maker for partiality or bias on particular facts and a broader separation of powers or due process challenge to the combination of functions within a single administrative agency. That is an important distinction to keep in mind.

The larger separation of powers or due process question was not at stake in *Williams*. *Williams* was about the propriety of one decision maker's participation in one particular case because the individual had participated in the prosecution of the same case before becoming a judge. *Williams* did not say that no district attorney could become a judge. Other due process cases on partiality or bias were also aimed at a single individual and the specific circumstances of that individual's participation in a case or in a recurring

78. The Court referred to the "practicing physicians" on the Board and the "individual members" of the Board. *Withrow v. Larkin*, 421 U.S. 35, 37–38 (1975). Section 15.405(7) of the 1973 Wisconsin statutory code provided for eight members at the time of the doctor's hearings in mid-1973. See 1973 Assembly Bill 300, ch. 90, § 18, 1973 Wis. Sess. Laws 200.

79. See *supra* text accompanying notes 42–50.

80. *Williams*, 136 S. Ct. at 1910.

category of cases. *Caperton*, *Murchison*, and *Mayberry v. Pennsylvania*⁸¹ are examples.

A separation of functions challenge to an agency's structure would argue that the design of the Constitution, which separated executive, judicial, and legislative powers, prohibited an Executive Branch agency from exercising both executive and judicial functions and therefore prohibited an agency from charging and adjudicating. That would be a constitutional challenge to the powers Congress conferred on the agency rather than a fact-specific claim that an agency decision maker had a financial interest in an outcome or prejudice against a party. A structural due process argument of bias would rest on some of the reasons for separating executive and judicial functions. A defendant could argue that an agency head had a bias in favor of his or her own agency and was partial to upholding charges brought by the agency even if the agency head did not participate in the charging decision. The Supreme Court saw a due process defect in a similar situation, when a village mayor sat as a judge in traffic cases and the village received a portion of the fine income from the mayor's court even though the mayor did not personally receive a share of the fines.⁸²

Withrow blended consideration of individualized due process arguments and separation of functions issues. The doctor in *Withrow* asserted a due process claim, and the Supreme Court treated the case as a due process case, but the reasoning of the opinion mixed due process issues such as impartiality, bias, and prejudice with a defense of the combination of functions in agencies. The Court discussed bias cases and decisions considering an agency's exposure to facts that later were the subject of an adjudication but concluded that those cases did not "stand for the broad rule that the members of an administrative agency may not investigate the facts, institute proceedings, and then make the necessary adjudications."⁸³ A pragmatic factor was that legislatures needed to be able to combine functions within a single agency because of the complexity of the structure of government.

Lower courts and commentators have generally treated *Withrow* as authority to reject separation of powers and due process attacks on the combination of functions in federal agencies. For example,

81. *Mayberry v. Pennsylvania*, 400 U.S. 455, 466 (1971) (holding that a defendant in criminal contempt proceedings should be tried by "a judge other than the one reviled by the contemnor").

82. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

83. *Withrow*, 421 U.S. at 53.

the District of Columbia Circuit reviewed an SEC enforcement case in which the defendant attacked the SEC's combination of charging and prosecution powers with the power to adjudicate and impose sanctions. The court cited *Withrow* as settling the question: The defendant "failed to heed *Withrow's* message that a due process challenge directed broadly to combinations of purposes or functions in the modern administrative state 'assumes too much.'"⁸⁴ A leading casebook also viewed *Withrow* as protecting administrative agencies from separation of functions challenges: "No one doubts . . . that a broad-based separation-of-powers challenge to the modern combination of functions in federal agencies would meet the same fate as the broad-based due process challenge in *Withrow*."⁸⁵

The Supreme Court has not decided whether the combination of charging and adjudicating authority within a federal agency contravenes separation of powers requirements, probably because *Withrow* is viewed as resolving it, but separation of powers concerns with agencies occasionally surface at the Court.⁸⁶ Rumbblings from various justices signal that they might be ready to consider whether particular combinations of functions at administrative agencies exceed separation of powers limitations.⁸⁷

84. *Blinder, Robinson & Co. v. SEC*, 837 F.2d 1099, 1104-07 (D.C. Cir. 1988). Another example was *Ethicon Endo-Surgery, Inc. v. Covidien LP*, which involved a due process challenge to the use of one panel of the Patent Trials and Appeals Board to institute a type of review of claims and then make final decisions. 812 F.3d 1023, 1029-31 (Fed. Cir. 2016). The court did not accept the due process contention largely because of *Withrow*. *Id.* at 1029 ("The leading case involving due process and the combination of functions is the Supreme Court's decision in *Withrow*.").

85. GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 298 (7th ed. 2016); see also STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 762 (7th ed. 2011) (In *Withrow*, "the Supreme Court made clear that at the agency-head level the combination of adjudicative and investigative functions does not in itself violate due process.").

86. See *Oil States Energy Servs., LLC v. Greene's Energy Grp.*, 138 S. Ct. 1365 (2018) (holding that the *inter partes* review process at the Patent and Trademark Office does not violate Article III of the Constitution); *Stern v. Marshall*, 564 U.S. 462, 503 (2011) (holding that bankruptcy court exercised judicial power reserved to Article III courts and stating that the Court could not "compromise the integrity of the system of separated powers" even if the compromise would be minor).

87. See, e.g., *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1237-38 (2015) (Alito, J., concurring) (discussing separation of powers issues raised by Amtrak statute); *id.* at 1240-42, 1246, 1250-52 (Thomas, J., concurring) (discussing the same); *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210 (2015), (Alito, J., concurring in part and in the judgment) (expressing concern about the power of administrative agencies when issuing interpretations of regulations and concern about transfer of judicial power to an executive agency); *id.* at 1215-20 (Thomas, J., concurring in the judgment) (expressing similar concerns); *Michigan v. EPA*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877-79 (2013) (Roberts, C.J., dissenting) (discussing agencies and the separation of powers and stating "the danger posed by the growing power of the admin-

II. *WILLIAMS* APPLIES TO FEDERAL AGENCY ENFORCEMENT ADJUDICATIONS

Williams and *Withrow* addressed similar concerns, started their opinions with similar legal standards, but then reached different outcomes. As the foregoing comments explained, the reasoning of *Williams* repudiated substantial segments of *Withrow*. Would the *Williams* Court have decided *Withrow* differently, or does a principled, legal distinction exist between the *Williams* decision and administrative agency adjudications? Does *Williams* likely apply to administrative agencies? Does it require agency heads who participate in accusatory functions, such as commencing proceedings asserting violations of law, to disqualify themselves when the case returns to them for final adjudications on the merits?

The factual contexts of *Withrow* and *Williams* were different, and an important body of law cautions that due process for a court is different from due process for an administrative agency. This Part considers the possible ways to distinguish the two decisions. It concludes that *Williams* reflects an evolving concern with the likelihood of partiality that grows out of service as an advocate, that the principles in *Williams* and other due process cases that address the need for impartial decision makers apply to administrative agencies, and that pragmatic considerations favoring the combination of charging and adjudicating functions in an agency should and can give way to the application of *Williams*. This Part also reviews empirical research that supports the Supreme Court's concerns in *Williams*.

A. *Factual Differences Between Withrow and Williams*

First, consider some of the obvious factual differences between *Withrow* and *Williams*: *Williams* was about a judge in a criminal case addressing the death penalty and collateral relief in state court. *Withrow* was a proceeding by a state administrative agency to sus-

istrative state cannot be dismissed"); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) (discussing Supreme Court decisions that “permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design”).

pend a medical license.⁸⁸ These differences are not sufficient to lessen the legal weight *Williams* should carry in the agency process.

The reasoning of *Williams* did not depend on any of these factual distinctions. The rationale of the decision was sweeping and was not limited to judges, criminal cases, or death penalty cases. The Court could have reasoned that death penalty cases are different and require special procedural protections. The defendant had made that argument,⁸⁹ but the Court did not adopt it. A decision to seek the death penalty is consequential and was certainly a critical decision in the defendant's case,⁹⁰ but the Court cited many other litigation decisions as significant. The Court expanded the category of accusatory acts that would disqualify an advocate turned decision maker to include "what charges to bring, whether to extend a plea bargain, and which witnesses to call."⁹¹ Helping to decide what charges to bring or which witnesses to call is a part of civil cases and non-capital criminal cases.

The Court could have stated that criminal cases call for more restrictive judicial disqualification standards than civil or administrative cases, but the Court did not draw that distinction. To the contrary, it extracted and applied "constitutional principles" from its "due process precedents" and reasoned that "the principles on which these precedents rest dictate the rule that must control" when a judge had prior involvement in a case as a prosecutor.⁹² The main principle from its precedents extended well beyond criminal cases, judges, and prosecutors: "Of particular relevance to the instant case, the Court has determined that an unconstitution-

88. The state-federal distinction has not been significant for purposes of determining the procedures that must be used in agency adjudications. *Carroll v. Greenwich Ins. Co.*, 199 U.S. 401, 410 (1905) ("While we need not affirm that in no instance could a distinction be taken, ordinarily if an Act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth."). The Court has interpreted the procedural due process clauses of the Fifth and Fourteenth Amendments to provide similar protections in administrative adjudications, subject to exceptions, such as the debate about the incorporation of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment or the application of the Due Process Clause to certain issues in state criminal cases (but not to questions about the impartiality of a judge). *See, e.g., Medina v. California*, 505 U.S. 437, 442–46 (1992); *Duncan v. Louisiana*, 391 U.S. 145 (1968). *See also* PETER L. STRAUSS ET AL., *GELLHORN AND BYSE'S ADMINISTRATIVE LAW* 545–46 (12th ed. 2018); LAWSON, *supra* note 85, at 845.

89. Brief for Petitioner at 20–21, 25, 30, *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016), (No. 15-5040), 2015 WL 10356400.

90. *Williams*, 136 S. Ct. at 1907 ("[W]hether to ask a jury to end the defendant's life is one of the most serious discretionary decisions a prosecutor can be called upon to make.").

91. *Id.*

92. *Id.* at 1905–06.

al potential for bias exists when the same person serves as both accuser and adjudicator in a case.”⁹³

The impartiality principle applied to the larger, less specific categories of accusers and adjudicators. The *Williams* Court often referred to the role of a judge, jurist, or prosecutor,⁹⁴ because those were the facts of the case, but also broadened the analysis to “advocate,” “accuser and decisionmaker,” “fair adjudication,” and “accusatory process.”⁹⁵

The *Williams* rationale cannot be limited to criminal cases or judicial disqualification cases. Although criminal sanctions are severe, many agency law enforcement proceedings are nearly as severe as criminal cases, as discussed below.⁹⁶ Moreover, the function of an agency decision maker in an enforcement adjudication is the same as a judge’s function in a civil or criminal case. No principled ground exists for distinguishing agency enforcement proceedings from criminal or judicial proceedings on the issue of impartiality. The concern is with bias, the partiality of the decision maker, and the potential effect on the accuracy, legitimacy, and fairness of a judicial-like decision. The need for neutrality and the appearance of neutrality reaches many different types of proceedings:

An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.⁹⁷

Second, the rule in *Williams* might not apply to administrative agencies because the Court did not suggest that possibility. *Williams* was not a case about the combination of functions by the head of an administrative agency. The briefs of the parties did not identify the possibility of applying a principle of impartiality to heads of administrative agencies,⁹⁸ and none of the majority or dissenting

93. *Id.* at 1905.

94. *Id.* (referring in the holding to a judge and prosecutor); *id.* at 1906–10.

95. *Id.* at 1906, 1909.

96. *See infra* text accompanying notes 126–35.

97. *Williams*, 136 S. Ct. at 1909.

98. The brief for the defendant *Williams* cited cases involving the SEC, Federal Trade Commission (FTC), and the National Labor Relations Board (NLRB) on the question of the effect of the bias of one member of a tribunal with several members. Brief for Petitioner at 42, *Williams*, 136 S. Ct. 1899 (2016) (No. 15-5040), 2015 WL 10356400.

opinions remarked about the possibility of extending the result in *Williams* to agencies. The Court did not address the effect on federal agencies or attempt to reconcile its principle with *Withrow* as a longstanding precedent on the combination of executive and judicial roles at an agency. Surely, the Court would have said something if it meant to overturn forty years of settled practice at federal agencies.

These arguments have force but in the end are not sufficient to protect administrative agency members acting as adjudicators from the due process standard of impartiality developed in *Williams*. Much of the language in *Williams* naturally was directed at a prosecutor who became a judge, because that was the situation in the case, but the reasoning of the majority opinion was not confined to judicial disqualifications or criminal cases and was expressed as a constitutional due process principle. As discussed at greater length in a moment, the Supreme Court has applied the same due process standard of impartiality to adjudicators in executive agencies as it has to judges and criminal cases, with the exception of *Withrow*. The impartiality rule in *Williams* also is likely to extend to administrative agency adjudications.

Finally, the *Williams* Court was certainly aware of the chance that its conclusion would be read to apply to administrative agencies. *Withrow* is the standard authority for the proposition that an administrative agency may investigate, charge, and adjudicate; the majority opinion in *Williams* cited *Withrow* three times, and the Chief Justice's dissent cited *Withrow* once.⁹⁹ None of the writers cautioned that the *Williams* outcome did not apply to agencies.

B. *Due Process, Administrative Agencies, and Impartiality in Agency Adjudications*

This section of the Article considers the different strands of due process authorities. One important line of Supreme Court decisions supports the view that administrative agencies are different from courts for purposes of the Due Process Clause, and those cases might be used to reason that *Williams* does not apply to administrative agencies. The more relevant due process authorities are the decisions on the impartiality of an adjudicator, and those cases do

99. *Williams*, 136 S. Ct. at 1903, 1906, 1909 (Kennedy, J.); *id.* at 1910 (Roberts, C.J., dissenting).

not distinguish between court and agency decision makers or administrative enforcement and criminal prosecutions.

Well-known cases, such as *Goldberg v. Kelly*¹⁰⁰ and *Mathews v. Eldridge*,¹⁰¹ considered whether an evidentiary hearing was required before or after an agency deprived a person of some type of liberty or property interest and whether the hearing needed to approximate a judicial trial.¹⁰² The Court stressed that due process was not a technical conception with a fixed content unrelated to time, place, and circumstance and, instead, was flexible and dependent on the demands of the particular situation.¹⁰³ It developed the now famous and frequently invoked three-factor balancing test.¹⁰⁴ “Under the *Mathews* balancing test, a court evaluates (A) the private interest affected; (B) the risk of erroneous deprivation of that interest through the procedures used; and (C) the governmental interest at stake.”¹⁰⁵ In many situations, the test does not call for all the protections of court litigation.¹⁰⁶

The due process precedents more relevant to the question of an agency head who participates in authorizing an enforcement proceeding and later participates in resolving the merits of the claim are those addressing the neutrality and impartiality of the decision maker in an adjudication. *Williams*, *Withrow*, *Murchison*, and other decisions fall into this subcategory.

The remainder of this section demonstrates that the due process cases on impartiality apply equally to administrative agency adjudicators and judges and favor application of *Williams* to agency enforcement proceedings. The differences between courts and agencies, as well as the differences among civil, criminal, and administrative proceedings, have not mattered when considering the standards for the neutrality or impartiality of the decision maker, and the demands of the modern administrative state have

100. 397 U.S. 254 (1970).

101. 424 U.S. 319 (1976).

102. *Id.* at 333–34.

103. *Id.* at 334.

104. *Id.* at 335. The Court applies the test in a variety of situations, especially to determine the process due in administrative cases. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 528–29 (2004); PETER L. STRAUSS ET AL., *GELLHORN AND BYSE’S ADMINISTRATIVE LAW* 580–629 (12th ed. 2018).

105. *Nelson v. Colorado*, 137 S. Ct. 1249, 1255 (2017).

106. *See, e.g., Mathews*, 424 U.S. at 348 (“The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness [D]ifferences in the origin and function of administrative agencies ‘preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts.’”) (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940)).

not diluted those standards. This uniform application reflects the high level of due process protection accorded to the impartiality of adjudicatory decision makers. That high value deserves to be protected in agency enforcement cases because agency adjudicators perform the same function as a judge and the stakes for the defendant can be very high.

The Supreme Court has applied its decisions on the impartiality of judges and agency officials interchangeably. It has cited judicial disqualification decisions in cases about agency officials and vice versa. The legal standard did not vary depending on whether the decision maker was a judge or an agency official, and the reasoning was not moderated with balancing factors or cost-benefit tests. In *Schweiker v. McClure*, the Court considered the impartiality of Medicare hearing officers appointed by private insurance carriers and cited *Murchison*, a decision about judges, as one of the cases establishing the relevant standards.¹⁰⁷ In *Gibson v. Berryhill*, which concerned an administrative board of optometrists, the Court noted the “prevailing view that ‘[m]ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.’”¹⁰⁸

The Court also has applied impartiality principles from administrative situations to judicial disqualification cases. *Williams* itself is an example. It was a judicial disqualification case, but it extracted key principles for its analysis from *Withrow* and discussed *Tumey v. Ohio*, which was a case about an executive official acting in a judicial capacity.¹⁰⁹ *Caperton*, another judicial disqualification case, cited *Withrow* for the constitutional standard for recusal (recusal is necessary when “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable”) and reviewed the main due process cases requiring recusal, including several that involved executive officials: *Tumey*, *Gibson*, and *Ward v. Village of Monroeville*,¹¹⁰ another case about a mayor’s court.¹¹¹

*Marshall v. Jerrico, Inc.*¹¹² explained that the cases on neutrality and impartiality apply to a person serving in an adjudicatory role, whether in a court or an agency, and do not apply to agency offi-

107. *Schweiker v. McClure*, 456 U.S. 188, 196 (1982).

108. *Gibson v. Berryhill*, 411 U.S. 564, 578–79 (1973) (quoting KENNETH CULP DAVIS, ADMINISTRATIVE LAW TEXT [sic] § 12.04, at 250 (1972) (concerning bias by prejudgment and pecuniary interest)).

109. *Tumey v. Ohio*, 273 U.S. 510 (1927).

110. 409 U.S. 57 (1972).

111. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876–79 (2009).

112. 446 U.S. 238 (1980).

cial not acting in a judicial role. The case was a due process challenge to an administrator's actions within an area of the Department of Labor that determined certain violations and assessed penalties. Penalty payments were paid to the administrator's area of the Department, creating, in the view of the challenging party, an impermissible risk that the administrator would be biased to make more and larger penalty assessments.¹¹³ The Court discussed the due process requirement of neutrality from *Tumey* and *Ward*, observing that it had "employed the same principle in a variety of settings, demonstrating the powerful and independent constitutional interest in fair adjudicative procedure" and citing a mix of judge, justice of the peace, and agency cases.¹¹⁴ In the end, the Court decided that the impartiality rules did not apply because the administrator was not acting in a judicial capacity. "The rigid requirements of *Tumey* and *Ward*, designed for officials performing judicial or quasi-judicial functions, are not applicable to those acting in a prosecutorial or plaintiff-like capacity."¹¹⁵

Similar examination of Supreme Court precedents demonstrates the Court applies the impartiality principles uniformly to criminal, civil, and administrative cases. The Court has not developed a special, stricter impartiality rule for criminal cases. The Court's 2009 *Caperton* decision is illustrative. *Caperton* concerned judicial disqualification in a civil tort case for compensatory and punitive damages, but the Court invoked due process impartiality principles from several criminal cases, including *Murchison*, *Tumey*, *Ward*, and *Mayberry*.¹¹⁶ The Court applied all or some of those same criminal precedents in cases about the impartiality of administrative actors, such as *Marshall* and *Gibson*. The reasoning of *Williams* is therefore apt to extend to administrative enforcement adjudications even though *Williams* was a criminal case.

Applying the standards of judicial neutrality to an agency official engaged in a judicial function is consistent with the high level of due process importance assigned to the impartiality of an adjudicator, whether in an agency or a federal court. Without evident disagreement or qualification, legal authorities view an impartial decision maker as a fundamental attribute of due process. In *Goldberg v. Kelly*, the Court found that the government must provide some procedural protections before terminating a person's welfare ben-

113. *Id.* at 241.

114. *Id.* at 242–43, 243 n.2.

115. *Id.* at 248.

116. *Caperton*, 556 U.S. at 872, 876–78, 880–81.

efits.¹¹⁷ A pre-termination hearing did not need to take the form of a judicial or quasi-judicial trial, but it had to provide “minimum procedural safeguards” and meet “rudimentary due process.”¹¹⁸ The Court concluded its list of necessary procedures with this: “And, of course, an impartial decision maker is essential.”¹¹⁹ An impartial decision maker was a minimum procedural safeguard of rudimentary due process.

Commentators agree. One treatise writer said: “Due process requires a neutral, or unbiased, adjudicatory decisionmaker. Scholars and judges consistently characterize provision of a neutral decisionmaker as one of the three or four core requirements of a system of fair adjudicatory decisionmaking.”¹²⁰ Another scholar concluded that an agency decision maker “should not be biased for or against any party. An impartial decisionmaker is an essential element of an evidentiary hearing. Impartiality is required both by the APA and by due process.”¹²¹ In a widely cited article, Judge Henry Friendly put “an unbiased tribunal” at the top of his list of the elements of a fair hearing.¹²²

Even *Withrow* accepted the need for a fair tribunal in an administrative adjudication, although the result did not fulfill the promise of the principle. *Withrow* conceded (that was the word the Court used) that a basic requirement of due process was a fair trial in a fair tribunal and then immediately said: “This applies to administrative agencies which adjudicate as well as to courts.”¹²³

Certainly the purpose of requiring an impartial decision maker is the same in both courts and administrative proceedings. The judge and the agency adjudicator perform the same function in the type of administrative law enforcement proceeding addressed here. They take or review evidence about specific historical facts involving a particular person, receive arguments about the proper legal standard of behavior, apply the law to the facts to determine whether the person committed a violation of law, and then impose a sanction or relief for a violation. The reason to have a neutral

117. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

118. *Id.* at 265–67.

119. *Id.* at 271 (citing *In re Murchison*, 349 U.S. 133 (1955)).

120. 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 9.8 (5th ed. 2010).

121. Asimow, *Evidentiary Hearings*, *supra* note 10, at 23 (footnotes omitted).

122. Henry J. Friendly, “Some Kind of Hearing”, 123 U. PA. L. REV. 1267, 1279 (1975); *see also* Redish & McCall, *supra* note 6, at 2, 8, 12, 19 (“Of all the procedural requirements dictated by the demands of fair procedure, far and away the most important is the requirement of an independent, neutral adjudicator.”).

123. *Withrow v. Larkin*, 421 U.S. 35, 46–47 (1975).

decision maker is to maximize the chance of a result on the merits of the relevant facts and law and to minimize the chance that external influences distort an objective determination of the facts and application of the law.¹²⁴ A famous passage in *Tumey* described the impartiality standard this way:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.¹²⁵

The same demands for accuracy and legitimacy in the eyes of the defendant and the public are present whether a judge or an agency head decides that a defendant did or did not break the law.

A further consideration in assessing whether to apply the standards of judicial neutrality to an agency adjudicator, at least in government enforcement cases, is that just as much or more is at stake in an administrative enforcement proceeding as a case in federal court and nearly as much is at stake as in a criminal case. Different agencies have different powers, but many agency enforcement cas-

124. The Court gave these reasons for the neutrality requirement:

This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. . . . The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. . . . At the same time, it preserves both the appearance and reality of fairness, “generating the feeling, so important to a popular government, that justice has been done,” *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (citations omitted); *see also Williams v. Pennsylvania*, 136 S. Ct. 1899, 1907, 1909 (2016) (“Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself.”); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 883 (2009) (“If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case.”); *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (“[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases.”).

125. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

es resemble criminal prosecutions. SEC enforcement cases do, and they do so whether they are brought as administrative proceedings or district court actions. Violations carry moral opprobrium and social stigma¹²⁶ and can result in a wide array of severe sanctions and forms of relief. In an administrative proceeding, the SEC may levy a fine,¹²⁷ order disgorgement of large amounts of money plus prejudgment interest,¹²⁸ issue a cease and desist order,¹²⁹ and prohibit a person from being an officer or director of a publicly reporting company.¹³⁰ The SEC may suspend or revoke the registration of a regulated person such as a broker-dealer or investment adviser.¹³¹ It may deny a lawyer or accountant the ability to practice and represent clients before the SEC.¹³² The main forms of relief in an SEC enforcement case in federal court are the same, with the exception of the SEC's power over regulated persons and professionals practicing before the SEC.¹³³ A defendant in an SEC enforcement case does not face jail or the death penalty, but otherwise faces serious consequences. The SEC has the power and uses that power to ruin reputations, livelihoods, and businesses.¹³⁴ The

126. See *Gabelli v. SEC*, 568 U.S. 442, 451–52 (2013) (stating that monetary penalties in SEC enforcement cases are intended to punish and label defendants as wrongdoers); *SEC v. Bartek*, 484 F. App'x 949, 957 (5th Cir. 2012) (injunction and director and officer bar “would have a stigmatizing effect and long-lasting repercussions”); *Securities Law Enforcement in the Current Financial Crisis Before the U.S. H.R. Comm. on Fin. Servs.*, 111th Cong. (2009) (testimony by Elisse B. Walter, Comm’r, SEC), <https://www.sec.gov/news/testimony/2009/ts032009ebw.htm> (bar on appearing or practicing before the SEC “carries a serious reputational stigma”); Thomas O. Gorman, *The SEC, Insider Trading and Prosecutorial Obligations*, SEC ACTIONS (Apr. 23, 2017), <http://www.secactions.com/the-sec-insider-trading-and-prosecutorial-obligations/> (“Charging someone with violations of the law carries a stigma which last [sic] long after the case is dismissed; prosecuting that case through trial only increases that harm, grinding the stain and injury into the reputational fabric of the person prosecuted.”).

127. 15 U.S.C. § 78u-2(a) (2012).

128. 15 U.S.C. §§ 78u-2(e), 78u-3(e) (2012); 17 C.F.R. § 201.600(a) (2018).

129. 15 U.S.C. § 78u-3(a) (2012).

130. 15 U.S.C. § 78u-3(f) (2012).

131. 15 U.S.C. §§ 78o(b)(4), (b)(6), 80b-3(e)–(f). License revocation proceedings ranked high on Judge Friendly’s list of most serious government actions against a person. See Friendly, *supra* note 122, at 1297.

132. See 15 U.S.C. § 78d-3 (2012); 17 C.F.R. § 201.102(e) (2018).

133. In federal court, the SEC may seek and the court may order an injunction, a civil monetary penalty, disgorgement with pre-judgment interest, and other equitable relief. See 15 U.S.C. § 78u(d)(1)–(3), (5) (2012). In *Kokesh v. SEC*, the Court did not express an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings. 137 S. Ct. 1635, 1642 n.3 (2017).

134. KIRKPATRICK & LOCKHART LLP, THE SECURITIES ENFORCEMENT MANUAL 5, 135 (1997) (noting that “the publicity that frequently accompanies enforcement actions can be devastating to those who depend on investor confidence for their business” and an administrative order “may have a business or career-ending impact on firms or persons in the securities business”).

severity of the results of government enforcement cases brought as administrative proceedings rebuts the idea that, because less is at stake in administrative cases than in criminal cases, the due process protections may be relaxed.¹³⁵

The Supreme Court's decisions on the due process requirement of impartiality apply equally to judicial or administrative decision makers and to criminal and agency enforcement proceedings. The standard is a high one, and, aside from *Withrow*, has not been watered down with considerations of costs, burdens, or the need for procedural flexibility in agency cases. An agency head deciding the merits of an enforcement case performs the same function as a judge, and a defendant has much at stake in an administrative enforcement case. The grounds for relaxing the standard of impartiality for an agency adjudicator in an enforcement case are extremely weak. The next section of the Article reviews research showing that the *Williams* Court was correct to be concerned about the likelihood that an accuser maintains a bias against the accused.

C. Data Supporting Bias in Accusers

Several sources support the *Williams* Court view that a charging official likely develops a will to win or a stake in sustaining the charges. Three are empirical studies, and one reports the personal experience of an SEC Commissioner. None is definitive, but they are consistent with the position that an accuser lacks the necessary neutrality to determine the merits of the initial charging decision.

The first set of data reports results of SEC adjudications that reviewed ALJ decisions in cases where the Commission charged one or more violations of the securities laws. The Commission reviewed ALJ decisions covering sixty-four defendants in administrative enforcement proceedings that the Commission began in fiscal years 2007 through 2015. For sixty of the sixty-four defendants, over ninety-three percent, the Commission found one or more violations and ordered a sanction. The Commissioners dismissed all charges against four of the sixty-four defendants. For seven of the sixty defendants found liable, nearly twelve percent, the ALJ had dismissed all charges, but the Commission disagreed with the ALJ

135. Contrary to this last statement, one commentator reasoned that the combination of prosecution and adjudication in one agency does not need to comply with the stringent requirements of the criminal model because an agency does not have the power to order incarceration. See 2 PIERCE, *supra* note 120, § 9.9, at 884.

and found violations.¹³⁶ Thus, when the SEC judged cases in which it had brought charges, it won against over ninety-three percent of defendants. In contested cases in federal court, the SEC's success rate was much worse; it prevailed eighty percent of the time.¹³⁷ Achieving a more favorable outcome for the SEC in thirteen percent of cases appears to be meaningful in a system in which the SEC staff conducts lengthy one-sided investigations and the Commissioners have complete discretion in charging decisions.

A different research project looked at potential bias at the Federal Trade Commission (FTC) in merger challenges decided between 1956 and 1992.¹³⁸ The charging process at the FTC is similar to the one at the SEC. The Commissioners vote on administrative complaints, send the matter to an ALJ for an initial decision, and then review ALJ decisions. An "FTC commissioner can act as both the prosecutor and the judge on a particular case."¹³⁹ The authors found that FTC "commissioners are more likely to vote for administrative complaints if they were members of the commission that chose to prosecute those cases. Thus, it appears to matter if commissioners act as both prosecutors and judges."¹⁴⁰ The "ability of commissioners to act as both prosecutor and judge in a particular matter can significantly increase the likelihood of a merger order."¹⁴¹ An analysis of the combination of prosecution and adjudication functions at the FTC and NLRB by Richard Posner published in 1972 differed, concluding that the results, "although hardly definitive," suggested that the combination did not bias an agency's adjudication.¹⁴²

136. An SEC fiscal year runs from October 1 through September 30; for example, fiscal year 2015 ended on September 30, 2015.

I am grateful to Urska Velikonja for these details from data she compiled. For a description of her data on SEC enforcement cases, see Urska Velikonja, *Are the SEC's Administrative Law Judges Biased? An Empirical Investigation*, 92 WASH. L. REV. 315 (2017).

The figures in the text about Commission review of ALJ initial decisions cover cases in which the Commission issued an opinion by June 30, 2017. The enforcement cases were primary enforcement actions, not follow-on proceedings, as Professor Velikonja defines them. A primary enforcement action is one to establish a violation of the securities laws and obtain relief. A follow-on case is an administrative proceeding for additional regulatory or disciplinary relief based on success in a preceding primary action. *Id.* at 338–39.

137. *Id.* at 349, 352 (explaining inclusion of some voluntary dismissals).

138. Malcolm B. Coate & Andrew N. Kleit, *Does it Matter that the Prosecutor Is also the Judge? The Administrative Complaint Process at the Federal Trade Commission*, 19 MANAGERIAL & DECISION ECON. 1, 3 (1998).

139. *Id.* at 2.

140. *Id.* at 7.

141. *Id.* at 9.

142. Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305, 343 (1972); see BREYER, *supra* note 85, at 764–65.

A third study concerned lawyers rather than agencies and considered whether lawyers tend to view the merits of their clients' cases too favorably. This research is relevant to agency adjudications because the head of an agency, when deciding that the agency should charge a person with a violation of law, is in a position resembling a lawyer agreeing to represent a client in litigation. Furthermore, in many cases, the agency head is a lawyer.¹⁴³ This particular study sought to avoid flaws in earlier research on lawyer optimism bias by questioning law students about the merits of the position they took in moot court competitions.¹⁴⁴ One of the two questions used to assess a person's perceived confidence in the merits of a legal position was: "If you were the judge, how likely would you be to rule in favor" of your opponent?¹⁴⁵ The data from the study showed that "students overwhelmingly perceive that the legal merits favor the side that they were randomly assigned to represent"¹⁴⁶ and that "[p]articipation in advocacy is causally associated with increased confidence in the merits of the side that the lawyer is advocating."¹⁴⁷

The final source of support for the bias of agency heads who charge and judge comes from the reflections of a former SEC Commissioner.¹⁴⁸ A few months after he finished six years in office, the former Commissioner recounted the "tri-functional" responsibilities of the SEC—to formulate general policies of regulation, to prosecute violations, and to pass on the rights and liabilities of individuals accused of violations¹⁴⁹—and concluded that the commissioners of such an agency needed to act with the "cold neutrality of an impartial judge" when they acted in a judicial capacity.¹⁵⁰ Unfortunately, that was not his experience. When an SEC adjudication concerned policies of the Commission's own making, the SEC had a vested interest in reaching a particular result and protecting and

143. All the SEC Commissioners appointed since the Clinton Administration have been lawyers, except for Chairman Donaldson and Commissioners Glassman and Piwowar. For the available biographical information about each Commissioner, see *SEC Historical Summary of Chairmen and Commissioners*, SEC. EXCH. COMM'N, <https://www.sec.gov/about/sechistoricalsummary.htm> (last visited Aug. 30, 2018).

144. Zev J. Eigen & Yair Listokin, *Do Lawyers Really Believe Their Own Hype and Should They? A Natural Experiment*, 41 J. LEGAL STUD. 239 (2012).

145. *Id.* at 249.

146. *Id.* at 239.

147. *Id.* at 263–64.

148. Edward H. Fleischman, *Toward Neutral Principles: The SEC's Discharge of Its Tri-Functional Administrative Responsibilities*, 42 CATH. U. L. REV. 251 (1993).

149. *Id.* at 252.

150. *Id.* at 260 (quoting Bernard Schwartz, *Administrative Justice and its Place in the Legal Order*, 30 N.Y.U. L. REV. 1390, 1409 (1955)).

advancing the particular policies. The other functions of the Commission detracted from the impartiality of the judicial work. “[I]t is fairness and the appearance of fairness that are left behind when the SEC bends its adjudicatory responsibilities to the services of its policymaking function.”¹⁵¹

D. *Impartiality, Separation of Functions, and the Practical Needs of the Administrative State*

This Article has shown that the due process standard of impartiality has a high value and applies equally to agency adjudicators and judges, who perform the same functions and have the ability to impose similar sanctions when deciding enforcement cases. It has also reviewed empirical support for the Supreme Court’s concerns about an accuser’s bias. Those factors weigh in favor of applying the strictures in *Williams* to administrative adjudications.

An additional topic to examine is the practical consideration whether some federal agencies should allow their leaders to combine the functions of charging and adjudicating to take advantage of expertise and operate efficiently within the modern administrative state. This section examines the practical concerns, argues that they do not outweigh due process values, and concludes that applying *Williams* to agency enforcement adjudications does not need to sacrifice expertise and efficiency.

Authorities give practical reasons for combining functions within a single agency. Agencies are essential tools in modern government, and agency heads have an informed and experienced understanding of the statutes, rules, and policies in their areas that give them a comparative advantage when evaluating the types of conduct that should be subject to an enforcement charge and that should be found to be a violation. Vesting final decision-making power in agency heads allows them to retain control over the policy direction of the agency, promote consistency in legal interpretations and adjudicatory results, and monitor the functioning of the regulatory area.¹⁵²

151. *Id.* at 261.

152. See Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. (forthcoming 2019) (manuscript at 3, 34–37), <https://ssrn.com/abstract=3129560>; George Robert Johnson, Jr., *The Split Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 ADMIN. L. REV. 315 (1987).

The *Withrow* Court reasoned that prohibiting an agency from charging and deciding “would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity.”¹⁵³ The growth, variety, and complexity of administrative processes gave legislators latitude to determine when different administrative functions should be performed by the same persons.¹⁵⁴ “The incredible variety of administrative mechanisms in this country will not yield to any single organizing principle.”¹⁵⁵ *Withrow* was loath to constrain Congress’s discretion to tailor the design of an administrative agency for the needs of modern government.

Commentators attributed *Withrow* and other Supreme Court decisions on the combination of functions in an agency to similar pragmatic factors rather than legal ones. One said the main ground for the decisions “has been that the combination of functions is necessary to secure expert administrative decisionmaking in a complex society.” Impartiality comes at too great a price given the tradeoff with informed expertise in the administrative state.¹⁵⁶ Another writer cited the inefficiency, burden, and expense of requiring a separation of functions: Congress’s decision to allow an agency head to investigate, charge, and adjudicate “represents a tradeoff between the goal of minimizing the risk of potential conflicts of interest attributable to an agency head’s multiple roles and the goal of creating an efficient decisionmaking structure. The Supreme Court has consistently acquiesced in the balance Congress struck in the APA.”¹⁵⁷

The response to these pragmatic considerations has several parts. First, the practical factors supporting the need for combined functions in an agency are aimed more at mollifying separation of powers and institutional due process concerns than at denying an impartial decision maker to a defendant in an agency enforcement case. The expertise, efficiency, and cost arguments in favor of combining functions within a single agency relate more to the

153. *Withrow v. Larkin*, 421 U.S. 35, 49–50 (1975) (internal quotation marks omitted) (quoting *Richardson v. Perales*, 402 U.S. 389, 410 (1971)).

154. *Id.* at 51.

155. *Id.* at 52.

156. Vermeule, *supra* note 6, at 405.

157. 2 PIERCE, *supra* note 120, at 889; *see also* Asimow, *supra* note 6, at 787–88 (“Clearly combinations arising because a legislature gives investigating, negotiating, prosecuting, and adjudicating tasks to a single agency, so that agency heads are ultimately responsible for all functions, do not violate due process. A contrary holding would violate the principle of necessity and sow uncertainty and disruption in all levels of government.”).

overall institution and the expertise and efficiency gains of permitting different staff areas to work together than to advantages that occur from allowing the senior people in an agency to charge violations and then make final agency decisions on those charges. The staff who regulate a particular market and write rules for it are valuable advisers to the staff who investigate potential misconduct and recommend enforcement cases, and the experiences of the enforcement staff aid the regulatory areas. For example, when the SEC proposed new regulations to govern broker-dealer recommendations about securities to retail customers, the proposal drew heavily from the history of enforcement cases against broker-dealers.¹⁵⁸ Some expertise, policy, and consistency benefits accrue from consolidating rulemaking, enforcement, and adjudication responsibilities in the top persons in an agency, but the bulk of the advantage is found in the overall operation of the agency. To the extent the benefits occur at the agency-head level, they should not be enough to defeat a due process objection based on *Williams* for the additional reasons discussed below; whether the practical benefits from the combination of functions within a single agency would be enough to defeat a separation of powers challenge is not clear and, in any event, is beyond the scope of this article.

Second, applying the due process rule of *Williams* to a federal agency would not impose a blanket prohibition on agency heads from both charging and adjudicating. The rule from *Williams* would operate on individual agency heads in a particular set of circumstances—when they participated in a significant charging decision—and not as a constitutional barrier prohibiting the combination of functions within an agency. This distinction was discussed above.¹⁵⁹ The main legacy of *Withrow* could continue. Agency heads could continue to vote to bring an enforcement case and then later vote on its final disposition as long as the same individual did not do both. *Withrow* would need to be read compatibly with *Williams*, but it would not need to be entirely overruled.

Third, interests in administrative expertise and efficiency should not outweigh the due process values in a neutral and impartial decision maker. The due process requirement for a fair and impartial decision maker has constitutional status, and it serves, to a large

158. Regulation Best Interest, 83 Fed. Reg. 21,574, 21,576–77 nn. 9–18 (proposed May 9, 2018) (to be codified at 17 C.F.R. pt. 240).

159. See *supra* text accompanying notes 80–83.

extent, to protect the individual from the powers of government.¹⁶⁰ The need to use agencies to operate modern government is an interest with weight, but the combination of functions in a single agency does not have explicit constitutional recognition, and, as already discussed, an impartial adjudicator is at the top of the due process hierarchy.¹⁶¹ As described below, an agency can likely develop reasonable alternative approaches that would allow it to provide a neutral decision maker to a person accused of a violation of law and preserve most of the benefits of the combined functions of charging and adjudicating.

Fourth, *Williams* only has bite at the agency-head level and not at lower echelons. Section 554(d) of the APA already prohibits the combination of prosecution and adjudication in all parts of a federal agency except for “a member or members of the body comprising the agency.” Consequently, the effect of *Williams* is limited to the top officials at an agency, such as the SEC’s Commissioners. Except for final action by agency heads to decide a contested administrative enforcement case, an agency could continue to function as it does now with no changes in staffing or procedures at levels beneath its leaders.

Fifth, if *Williams* applied, agencies would have several ways they could continue to combine enforcement and adjudication functions. As discussed below,¹⁶² applying the *Williams* rule at the SEC would not create unmanageable problems. The length of time from the commencement of a case to the time the Commission reaches a decision in a review of an ALJ decision is several years, and changes in the composition of the Commission would mean an untainted quorum would usually be available.¹⁶³ If a quorum was not available, the agency could wait until a quorum was available or accept an ALJ’s initial decision as final.

Therefore, for the series of reasons discussed above, *Williams* should apply to administrative agencies. First, a neutral or impartial adjudicator is highly valued in the due process hierarchy. It is

160. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (“[T]he Due Process Clause . . . ‘was intended to secure the individual from the arbitrary exercise of the powers of government’”) (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)).

161. See *supra* text accompanying notes 117–23.

162. See *infra* Part III.C–D.

163. See *infra* text accompanying notes 190–93; see also Asimow, *supra* note 6, at 785–88 (“[A] court might conclude that a single commissioner of a multimember agency who has previously functioned as an adversary . . . can be disqualified without undue cost and disruption [T]he costs of disqualifying a single member of a multi-member agency . . . would generally . . . be minor.”).

one of the three or four core requirements of a fair adjudicatory system. Second, since *Withrow*, the Supreme Court has applied its due process principles of impartiality without distinguishing between judicial and agency adjudicators or administrative and criminal cases. The decisions on the impartiality of judges apply with full force to agency officials acting in a judicial capacity. The due process standard of impartiality and neutrality for an adjudicator has not been lower for an agency decision maker than for a judge. Third, the purpose of the neutrality requirement applies to the function of an agency adjudicator in enforcement cases. Fourth, research supports the fear that an accuser builds a lasting will to win against an accused. Fifth, the alarm that a federal agency could not operate efficiently if due process disqualified an agency head from sitting as an adjudicator when he or she participated in launching the enforcement case is overstated and, in any event, does not supersede the importance of preserving impartiality in adjudications decided by agency heads. These reasons strongly suggest that *Williams* applies to federal agency adjudications and prohibits individuals who head agencies from participating in a decision to charge a violation of law and then in a final agency conclusion on the charge.

III. THE APPLICATION OF *WILLIAMS* TO SEC ADMINISTRATIVE ENFORCEMENT CASES

If the rule in *Williams* applies to federal agencies, it would apply to the procedures that the SEC follows. At the SEC, Commissioners act as both accuser and adjudicator. In this Part, we look at the SEC's procedures, the reasons those procedures would violate the rule in *Williams*, and the way *Williams* would have affected three proceedings. Because of turnover at the SEC and the SEC's quorum rules, applying *Williams* would rarely disable the agency from issuing a final adjudication on the merits of an administrative proceeding.

A. *The Role of SEC Commissioners in Initiating and Resolving Administrative Enforcement Proceedings*

This section reviews the procedures the SEC follows in enforcement cases. SEC Commissioners both charge a person with a violation of law and then sit as judges to decide whether the defendant

committed the violation. Other agencies also involve commissioners or top officials in both the commencement and resolution of enforcement cases. Examples of such agencies are the Federal Trade Commission,¹⁶⁴ the Federal Communications Commission,¹⁶⁵ the Commodity Futures Trading Commission,¹⁶⁶ the Federal Energy Regulatory Commission,¹⁶⁷ and the Consumer Financial Protection Bureau.¹⁶⁸

A majority of SEC Commissioners must vote to authorize an enforcement case.¹⁶⁹ The staff of the Division of Enforcement conducts investigations and makes charging recommendations in a detailed action memorandum that reviews significant portions of the information from the record of the investigation. The Commissioners jointly discuss and then vote on the staff's recommendations at a closed Commission meeting.¹⁷⁰ A majority of Commis-

164. LAWSON, *supra* note 85, at 290–91 (describing the enforcement process at FTC).

165. A person is liable for a forfeiture penalty if the FCC determines the person committed a violation of certain communications laws. 47 U.S.C. § 503(b)(1) (2012). The Commission must issue a notice of apparent liability in writing to impose a forfeiture penalty on a person. *Id.* § 503(b)(4)(A). The Commission then has the power to determine the forfeiture penalty in an adjudication. *Id.* § 503(b)(2)(E), 503(b)(3)(A). A staff member has delegated authority to issue the notice of apparent liability and to determine the penalty amount when the amount does not exceed certain levels. 47 C.F.R. § 0.311(a)(4) (2018).

166. See Dan M. Berkovitz, *The Resurrection of CFTC Administrative Enforcement Proceedings: Efficient Justice or a Biased Forum?*, 35 FUTURES & DERIVATIVES L. REP. 2, 3–6 (2015), <https://www.wilmerhale.com/-/media/ed79ca97e7f74c8ca2d205044e081332.pdf>; Gideon Mark, *SEC and CFTC Administrative Proceedings*, 19 U. PA. J. CONST. L. 45, 71–72 (2016).

167. FED. ENERGY REG. COMM'N, REVISED POLICY STATEMENT ON ENFORCEMENT, 123 FERC ¶ 61,156 at ¶¶ 35–41, Pt. III.B.3. (2008), <https://www.ferc.gov/whats-new/comm-meet/2008/051508/M-1.pdf>.

168. See 12 U.S.C. § 5563(b)(1)(A), (D); PHH Corp. v. CFPB, 881 F.3d 75, 137–38, 154 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting); *id.* at 165, 171 (Kavanaugh, J., dissenting); CFPB, ENFORCEMENT POLICIES AND PROCEDURES MANUAL, 2-6, 2-8, https://www.venable.com/files/upload/CFPB_Enforcement_Policies_and_Procedures_Manual.pdf (last visited Oct. 17, 2018).

169. The main securities acts require the Commission to initiate an enforcement case. The Exchange Act says that “the Commission” may issue a notice instituting an administrative proceeding for a cease-and-desist order and that “the Commission . . . may in its discretion bring an action in the proper district court.” 15 U.S.C. §§ 78u(d)(1), 78u-3(a)–(b); see also *id.* §§ 77h-1(a)–(b), 77t(b), 80a-9(f), 80a-41(d), 80b-3(k)(1), 80b-9(d). The Commission has the authority to delegate its statutory power to commence an enforcement case, *id.* at § 78d-1(a), but has not exercised that power. *Cf.* 17 C.F.R. § 200.30-4 (indicating delegations that *have* been made to the Director of Division of Enforcement); *cf.* SEC DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL 2.5.1–2.5.2 (Oct. 28, 2016), <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf> (referencing requirement of Commission approval to bring suit).

170. For a description of the submission of an action memorandum to the Commissioners for approval to bring an enforcement case and of Commission deliberations on proposed enforcement cases at a closed meeting, see SEC DIVISION OF ENFORCEMENT, ENFORCEMENT MANUAL 2.5 (Nov. 28, 2017), <https://www.sec.gov/divisions/enforce/enforcementmanual.pdf>; Christopher Cox, Chairman, Sec. Exch. Comm'n, Opening Re-

sioners must agree on the important decision to sue, the charges to be asserted, and the forms of relief to be sought. For example, the Commissioners make the final choices about whether to assert a fraud claim and whether to seek a financial penalty or an order to prohibit a person from being an officer or director of a public company. Discussion among the Commissioners can lead to tougher or more lenient claims or requested relief.¹⁷¹

The Commission also decides whether to bring the case in federal district court or in the internal SEC administrative process.¹⁷² An administrative case goes first to an administrative law judge for an initial decision on whether a violation occurred and whether sanctions are appropriate. The ALJ conducts pre-trial and trial proceedings with adversarial parties that brief and argue legal issues, take discovery, present witnesses, and introduce evidence. The ALJ holds an on-the-record, trial-type hearing,¹⁷³ compiles a record, and then releases a long written decision with findings of fact and conclusions of law.¹⁷⁴

ALJ decisions are then subject to review by the full Commission, which has complete authority to affirm, reverse, modify, or remand the ALJ's decision or make findings or conclusions based on the record.¹⁷⁵ In these adjudications, the Commission acts as a court. The Commissioners receive legal briefs from the parties, hear oral argument,¹⁷⁶ jointly deliberate about the case at a closed meeting, and issue a written opinion that reviews evidence of the conduct of the defendant, applies the law to determine whether a violation occurred, and imposes sanctions. A majority of participating Commissioners determines the disposition of the merits of the case.¹⁷⁷

marks to the Practising Law Institute's SEC Speaks Series (Feb. 9, 2007), <https://www.sec.gov/news/speech/2007/spch020907cc.htm>.

171. Cf. Luis A. Aguilar, *Dissenting Statement In the Matter of Lynn R. Blodgett and Kevin R. Kyser, CPA, Respondents* (Aug. 28, 2014) (criticizing the case for failing to include fraud charges or a bar on appearing before the SEC as an accountant), www.sec.gov/News/PublicStmnt/Detail/PublicStmnt/1370542787855.

172. See 17 C.F.R. § 202.5(b) (2018).

173. See *id.* §§ 201.300–201.360 (2018). The SEC's Rules of Practice govern administrative proceedings. *Id.* §§ 201.100–201.900.

174. 17 C.F.R. §§ 201.350–60 (2018).

175. See 5 U.S.C. § 557(b) (2012); 17 C.F.R. § 201.411(a) (2018); see also *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *pet. for review denied by equally divided en banc court*, 868 F.3d 1021 (D.C. Cir. 2017), *rev'd*, 138 S. Ct. 2044 (2018); *Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016).

176. See 17 C.F.R. §§ 201.450–201.451 (2018).

177. 17 C.F.R. § 201.411(f) (2018).

B. SEC Commissioners as Accusers

The next question is whether this SEC process has features that create an unconstitutional potential for bias faulted in the Supreme Court's *Williams* decision. The better conclusion is that it does. Commissioners have a direct, personal role in critical decisions of initiating enforcement cases by the agency they head. They are accusers who have a desire to prevail, and they later act as judges to decide whether the defendant committed the charged misconduct.

The decisions that SEC Commissioners make when they vote to approve the specific charges and the specific requested relief against a defendant fit within the category of critical or major adversary decisions defined in *Williams*. The examples in *Williams* were decisions about which charges to bring or witnesses to call.¹⁷⁸ A Commissioner votes to authorize a case, the specific charges, the proposed sanctions, and the forum. These are among the most consequential decisions a law enforcement agency can make. After an initial ALJ decision, a Commissioner resolves all liability and sanctions issues from the ALJ opinion raised by the defendant or the Division of Enforcement. According to *Williams*, a person with responsibility for a major adversary decision is likely to continue to be influenced by a motive to validate that decision.

An SEC Commissioner might seek to avoid this criticism by claiming that he or she applies one legal standard when deciding whether to charge a person (such as sufficient evidence to raise a substantial question or probable cause to believe that the defendant committed the violation) and a stricter legal standard when voting as an adjudicator on final liability issues (such as preponderance of the evidence on each aspect of the violation).¹⁷⁹ The Commissioner could say that the Commission is a neutral umpire between the advocacy of the Enforcement staff and the arguments of the defendant and that it therefore acts in the nature of a judge or magistrate when deciding to bring a case. The argument would be that the application of a higher legal standard for purposes of determining final liability removes any taint of advocacy from participation at the charging stage. Recall that *Withrow* took different

178. See *supra* text accompanying notes 44–45, 76–77.

179. See *Steadman v. SEC*, 450 U.S. 91 (1981) (holding that the standard of proof in an SEC enforcement adjudication, including one for fraud, is preponderance of the evidence).

legal standards into account, while *Williams* did not mention that factor.¹⁸⁰

The possible use of different legal standards at different phases of an SEC case is not a persuasive basis for insulating an SEC Commissioner from *Williams*. The question, according to *Williams*, is not whether an accuser uses a different legal standard from the one used to judge¹⁸¹ but whether a person becomes an accuser, advocate, or adversary with an unacceptable risk of being psychologically wedded to the position that the defendant engaged in misconduct. *Williams* could have drawn lines based on different legal tests or standards but did not.¹⁸² To the *Williams* Court, a person did not need much involvement in the earlier stages of an enforcement proceeding to qualify the person as an accuser or advocate. Selecting charges or witnesses was sufficient. Ancillary involvement decades earlier was sufficient. The test set a low threshold, and, as just discussed, the role of an SEC Commissioner easily meets it.

Even if a Commissioner employed one legal standard for a vote to charge and a different legal standard to hold a defendant liable, a vote to authorize an enforcement case makes the Commissioner an accuser. The Commissioners are the leaders of the Agency that will be named as the complaining party. The Enforcement staff does not bring a case; the Agency does, and the Agency may not do so unless a majority of the Commissioners votes to commence the case. This kind of role carried weight in *Williams*. The Court cited the need for the express authorization of the district attorney, who later became a state supreme court justice, before Pennsylvania could pursue the death penalty against *Williams*.¹⁸³

180. See *supra* text accompanying notes 69–77.

181. The statutory authority for SEC administrative cease-and-desist proceedings specifies no standard for commencing a case or resolving it. The provision states that the Commission may enter a cease-and-desist order if it “finds” that a person is violating, has violated, or is about to violate any of the federal securities laws. 15 U.S.C. §§ 77h-1(a), 78u-3(a) (2012). An SEC Commissioner is free to apply no standard or a personally selected standard when commencing an enforcement case. Presumably, most Commissioners would employ a lower legal standard to charge a violation than to determine ultimate liability. An appropriate charging standard is that the Commissioners should not authorize a proceeding unless they believe that (1) a reasonable person would conclude that the SEC is more likely than not to prevail on the facts and the law and (2) that a proceeding would serve broad and legitimate enforcement goals of deterrence or prevention. See Andrew N. Vollmer, *Four Ways To Improve SEC Enforcement*, 43 SEC. REG. L.J. 333, 341–42 (2015).

182. See *supra* text accompanying notes 77–78.

183. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1907 (2016).

The language in *Williams* describes an accuser as an advocate and adversary with a desire to prevail.¹⁸⁴ SEC Commissioners know that charging a person with a violation of law is a serious matter and do not want to be wrong. A vote to charge would not be responsible if a Commissioner did not conclude that the defendant should be the subject of an enforcement proceeding and that the agency should win. The Commissioners know that the SEC's enforcement record matters for deterrence, compliance in the securities markets, the SEC's reputation, and success in obtaining congressional appropriations.¹⁸⁵ Losing too many enforcement cases would harm the mission of the Agency the Commissioners are responsible for leading.

The notion that the Commissioners are passive observers, neutral intermediaries, or referees between the Enforcement staff and the potential defendant is not sustainable. A decision to charge is not just a comparison of information from an investigation to a legal standard. It is a policy judgment that the person deserves to be held accountable for the conduct and that the resources of the Agency should be used against this person rather than another person. In a great number of cases at the charging phase, Commissioners undoubtedly conclude that the defendant committed the violation. Whether they apply different legal standards to charge and adjudicate, SEC Commissioners, like the judge in *Murchison*, become the accuser and an advocate for the position that the defendant committed the violation.¹⁸⁶

The information provided to a Commissioner at the time of voting to begin an enforcement case creates the further risk, identified in *Williams*, that the adjudicator's personal knowledge and impressions of the case could carry more weight than the parties' arguments at the final adjudication.¹⁸⁷ An SEC Commissioner receives a material amount of information about the staff's investigation of the facts in the action memorandum before a decision to

184. *Id.* at 1906 (referring to an "advocate," "adversary decision," "interest in the outcome," and desire to avoid appearing to change position).

185. See Urska Velikonja, *Reporting Agency Performance: Behind the SEC's Enforcement Statistics*, 101 CORNELL L. REV. 901, 906–12, 918, 920–21 (2016).

186. See Redish & McCall, *supra* note 6, at 25, 27 ("[T]he commissioners' position as heads of their agency automatically places them in a partisan role inconsistent with the impartiality by which they are constitutionally bound"; as in *Murchison*, "the commissioners may be predisposed to believe the parties charged are guilty because they initially viewed the evidence through a prosecutorial or adversarial lens.").

187. See *Williams*, 136 S. Ct. at 1906.

charge. This information will not necessarily become part of the record before the Commission at the time of a final disposition.¹⁸⁸

Under the Supreme Court's rationale in *Williams*, due process forbids an SEC Commissioner who votes on commencing a particular enforcement case from participating in final agency action in that case to determine a defendant's liability or an appropriate sanction. Such a vote is significant, personal involvement in the originating accusation. As the research data discussed above support,¹⁸⁹ a Commissioner's participation in the charging decision creates "an unacceptable risk of actual bias." It creates a serious risk that the Commissioner will be psychologically wedded to the Agency's claim and, if later called on to sit in the case as an adjudicator, would be "influenced by an improper, if inadvertent, motive to validate and preserve" a result upholding the original charged violation.¹⁹⁰

C. Limited Effect of Applying *Williams* at the SEC

The remedy for applying *Williams* at the SEC is for a Commissioner to disqualify himself or herself from any adjudication for which the Commissioner voted on the decision to authorize, whether the vote was to commence or not to commence an enforcement proceeding. For several reasons discussed in this section, implementing that remedy would be feasible and would not paralyze the SEC's enforcement or adjudication function.

Williams would not require disqualifying every SEC Commissioner in every adjudication. It would apply only when a particular Commissioner voted on the decision to commence the enforcement case. Usually, several years pass between a decision to initiate an administrative enforcement case and Commission review of the ALJ's decision, as the examples discussed below illustrate. The practice at the SEC is not for the Commissioners to hear and decide an enforcement case immediately after issuing charges, which was the situation in *Withrow*. There can be turnover on the Commission between the time a case is commenced and the time it comes before the Commission again after an ALJ decision. Some Commissioners are likely to have left. New Commissioners face no *Williams* disqualification issue because they did not participate in

188. See 17 C.F.R. §§ 201.350, 201.460 (2018).

189. See *supra* Part II.C.

190. *Williams*, 136 S. Ct. at 1907, 1908.

authorizing the enforcement case. A Commissioner in office when a case was initiated might not have participated in that decision.¹⁹¹ The disqualification would apply only to a Commissioner who voted at the time of case initiation, was still in office at the time the Commission reviewed the ALJ initial decision, and would have participated in the review of the ALJ decision absent the disqualification.

If the *Williams* rule applied and the Commission still had a quorum, a majority would determine the outcome.¹⁹² The Commission typically can satisfy the quorum requirement even if several Commissioners must disqualify themselves.¹⁹³ A quorum can be as small as two Commissioners when disqualifications occur. If the Commission had a quorum for a final adjudication and divided evenly over the disposition, it would dismiss the proceeding instituted against the defendant.¹⁹⁴ As a result, if applying *Williams* re-

191. See discussion *infra* Part III.D.

192. 17 C.F.R. § 201.411 (f) (2018).

193. The quorum rule is complicated and depends on the number of Commissioners in office and the number of Commissioners disqualified from a particular matter. Section 200.41 of the SEC's Rules states:

A quorum of the Commission shall consist of three members; provided, however, that if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office; and provided further that on any matter of business as to which the number of members in office, minus the number of members who either have disqualified themselves from consideration of such matter . . . or are otherwise disqualified from such consideration, is two, two members shall constitute a quorum for purposes of such matter.

194. See, e.g., Ruggieri, Securities Act Release No. 10389, 2017 WL 2984863 (July 13, 2017), <https://www.sec.gov/litigation/opinions/2017/33-10389.pdf>; Urban, Exchange Act Release No. 66259, 2012 WL 1024025, at *2 n.5 (Jan. 26, 2012), <https://www.sec.gov/litigation/admin/2012/34-66259.pdf> (alteration in original):

Commission Rule of Practice 411(f), 17 C.F.R. § 201.411(f) (“In the event a majority of participating Commissioners do not agree to a disposition on the merits, the initial decision shall be of no effect, and an order will be issued in accordance with this result.”); *Steinberg*, 58 S.E.C. 670 (2005) (dismissing proceeding where the “Commission [was] evenly divided as to whether the allegations . . . [were] established”).

It is not clear why the Commission wrote a regulation choosing to dismiss an enforcement case entirely rather than allowing the ALJ's initial decision to become final when a majority of Commissioners did not agree on an outcome. The statutes do not require that result, and, in fact, the APA and the Exchange Act contemplate treating an ALJ decision as final agency action in some circumstances. 5 U.S.C. § 557(b) (2012) (“When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule.”); 15 U.S.C. § 78d-1(c) (same); see also *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277, 286 (D.C. Cir. 2016) (“[T]he Commission *could* have chosen to adopt regulations whereby an ALJ's initial decision would be deemed a final decision of the Commission upon the expiration of a review period, without any additional Commission action.”) (emphasis in original), *aff'd by an equally divided en banc court*, 868 F.3d 1021 (D.C. Cir. 2017), *rev'd*, 138 S. Ct. 2044 (2018). The Supreme Court affirms a decision of a court of ap-

quired some Commissioners to disqualify themselves from reviewing an ALJ's initial decision, the Commission would operate in the normal fashion as long as the Commission had a quorum. The rule from *Williams* would not prevent an agency from tapping the expertise and efficiency that some see as benefits from the combination of functions at the top level of the agency.

If the Commission did not have a quorum to review the particular case, two courses would be open. One would be to wait until the Commission was able to form a quorum to review the case. The other would be to adopt a regulation deeming an ALJ's initial decision as the final decision of the Commission. The Commission would need to amend its rules of practice to permit this second approach.¹⁹⁵

The solution is not for the Commission to delegate to the staff the power to authorize administrative enforcement cases. That would not be effective because a defendant has a legal right to seek the Commission's consideration of a delegated decision and needs to persuade only a single Commissioner to call for Commission review.¹⁹⁶ Furthermore, delegating the decision to initiate enforcement proceedings would allow Commissioners to shirk responsibility and accountability for one of the fundamental functions for which the President nominated and the Senate confirmed them.

D. *Examples of Applying Williams at the SEC*

How the *Williams* rule would affect SEC administrative enforcement cases would depend on the specific circumstances of each case. This section provides three examples by applying the *Williams* rule to actual cases on which the Commission ruled. In one, the *Williams* rule would have resulted in dismissal of all charges against

peals when, after granting review, the justices are equally divided. *See, e.g.,* United States v. Texas, 136 S. Ct. 2271 (2016).

195. According to the District of Columbia Circuit, the SEC's current regulations require that for every case decided by an ALJ, the Commission must either review the decision or issue a finality order under Rule 360(d)(2), *Lucia*, 832 F.3d at 286, a conclusion the Supreme Court's reversal did not appear to disturb, *see Lucia v. SEC*, 138 S. Ct. 2044, 2054 (2018). The Commission may not take such an action without a quorum, and it is unclear what would happen if the Commission did not have a quorum to decide the case, issue the finality order, or review a decision by the Office of the General Counsel to issue a finality order pursuant to delegated authority. 17 C.F.R. § 200.30-14(g)(1)(iii) (2018). In principle, it seems acceptable to solve this issue with a regulation deeming the ALJ decision as final when a quorum is absent. *See supra* note 194.

196. *See* 15 U.S.C. § 78d-1(b) (2012); 17 C.F.R. § 201.430 (2018).

the defendant, which also had been the ALJ's initial decision. The rule would not have affected the result in the second case and, in the third case, would have left the Commission without a quorum, at least temporarily. The examples show that the Commission would be able to retain its power to charge and to perform its adjudication function, although it would need to make some adjustment for occasions when it could not muster a quorum.¹⁹⁷

In *Flannery*, the Commissioners authorized fraud charges against two defendants on September 30, 2010.¹⁹⁸ The five Commissioners in office in September 2010 were Chairman Schapiro and Commissioners Casey, Walter, Aguilar, and Paredes, but Commissioners Casey and Walter did not participate in the vote to bring the case.¹⁹⁹ The case went to an administrative law judge, who rejected all charges and found in favor of the defendants. The staff appealed to the full Commission, then comprising Chair White and Commissioners Aguilar, Gallagher, Piowar, and Stein. At the end of 2014, three of the five Commissioners, Chair White and Commissioners Aguilar and Stein, disagreed with the ALJ and found that each defendant had committed a violation. Commissioners Gallagher and Piowar dissented.²⁰⁰ One of the Commissioners

197. More research could be done to estimate the number of adjudications that would likely be affected by applying the *Williams* rule at the SEC and other agencies. The research could consider how often Commissioners depart and new Commissioners arrive, how much time usually elapses between a charging decision and a final Commission vote on an appeal from an ALJ decision, how often Commissioners who voted on a decision to commence an enforcement case were still Commissioners at the time of an adjudication vote, and how often a quorum of Commissioners would have existed.

198. *Flannery*, Securities Act Release No. 9147, 2010 WL 3826277 (Sept. 30, 2010), <https://www.sec.gov/litigation/admin/2010/33-9147.pdf>.

199. The SEC website has information about Commissioner votes on instituting enforcement charges and other matters. See *Final Commissioner Votes (April 2006 - December 2015)*, SEC, <https://www.sec.gov/foia/foia-votes.shtml> (last updated Feb. 19, 2016). The copy of the order instituting proceedings in *Flannery* in this material shows that Commissioners Casey and Walter did not participate. See *Final Commissioner Votes (September 2010)*, SEC, <https://www.sec.gov/foia/docs/votes/2010-09.pdf> (last updated Feb. 19, 2016) (listed in hyperlink as document number 80 of 82, and showing a handwritten note on a photocopy of the original order that indicates these two commissioners did not participate). SEC records also indicate when a Commissioner disapproved of an action. See, e.g., Linton, Exchange Act Release No. 67912, 104 SEC Docket 2663, 2012 WL 4320219, at *1 (Sept. 21, 2012), <https://www.sec.gov/foia/docs/votes/2012-09.pdf> (listed in hyperlink as document number 50 of 75, and showing a handwritten note on a photocopy of the original order that indicates two commissioners did not participate, while another participated but disapproved of the action ultimately taken by the Commission).

200. *Flannery*, Securities Act Release No. 9689, Exchange Act Release No. 73840, Investment Company Act Release No. 31374, 110 SEC Docket 2463, 2014 WL 7145625 (Dec. 15, 2014). Chair White and Commissioners Aguilar and Stein were in the majority. Commissioners Gallagher and Piowar dissented without a separate opinion. *Id.* at *41. The defendants appealed to a court of appeals, which found for the defendants and vacated the SEC decision. *Flannery v. SEC*, 810 F.3d 1 (1st Cir. 2015).

who participated in the SEC's review of the ALJ decision, Commissioner Aguilar, had participated in authorizing the case in 2010. He was in the three-two majority of Commissioners disagreeing with the ALJ's initial decision. If he had been disqualified from the review of the ALJ initial decision, the Commission vote probably would have been two-two, making the Commission evenly divided on whether the allegations in the charging document had been established and leading the Commission to dismiss the charges.²⁰¹

In *Lucia*, the Commission authorized charges in September 2012.²⁰² The Commission consisted of Chairman Schapiro and Commissioners Aguilar, Paredes, Walter, and Gallagher, although Commissioner Aguilar did not participate.²⁰³ An ALJ issued an initial decision finding liability based on misrepresentations and imposing sanctions, including a lifetime industry bar of Raymond Lucia.²⁰⁴ Both the staff and the defendants appealed to the Commission, then consisting of Chair White and Commissioners Aguilar, Stein, Gallagher, and Piwowar. With a three-two vote in 2015, the Commission found that the defendants had committed fraud violations, added a violation that the ALJ rejected, and imposed the same sanctions that the ALJ had.²⁰⁵ Chair White and Commissioners Aguilar and Stein were in the majority, while Commissioners Gallagher and Piwowar dissented.²⁰⁶ Only Commissioner Gallagher participated in both the charging decision and the final adjudication. If Commissioner Gallagher had been disqualified, the vote would have been three-one, and the outcome would have been the same.

201. If a majority of the Commissioners does not agree to the disposition on the merits of an ALJ's initial decision, the Commission dismisses the proceeding instituted against the defendant. *See supra* note 194 and accompanying text.

202. Raymond J. Lucia Cos., Exchange Act Release No. 3456, Investment Company Act Release No. 67781, 104 SEC Docket 2130, 2012 WL 3838150, at *1 (Sept. 5, 2012), <https://www.sec.gov/foia/docs/votes/2012-09.pdf> (showing a photocopy of the original order with a handwritten note indicating that Commissioner Aguilar did not participate in the proceeding).

203. *Id.*

204. Raymond J. Lucia Cos., Exchange Act Release No. 540, 107 SEC Docket 4365, 2013 WL 6384274 (ALJ Dec. 6, 2013), modifying Raymond J. Lucia Cos., Exchange Act Release No. 495, 106 SEC Docket 3613, 2013 WL 3379719 (ALJ July 8, 2013).

205. Raymond J. Lucia Cos., Exchange Act Release No. 4190, Investment Company Act Release No. 75837, 112 SEC Docket 1754, 2015 WL 5172953 (Sept. 3, 2015). The defendants appealed to the D.C. Circuit and sought review in the Supreme Court on a constitutional question. *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *aff'd by an equally divided en banc court*, 868 F.3d 1021 (D.C. Cir. 2017), *rev'd*, 138 S. Ct. 2044 (2018).

206. Raymond J. Lucia Cos., Exchange Act Release No. 4190, Investment Company Act Release No. 75837, 112 SEC Docket 1754, 2015 WL 5172953, at *28 (Sept. 3, 2015).

In September 2014, Chair White plus Commissioners Aguilar and Piwowar voted to charge an investment adviser with fraud and to seek financial and other sanctions in an SEC administrative proceeding. Commissioner Stein and one other Commissioner did not participate.²⁰⁷ An administrative law judge tried the case and dismissed all of the charges.²⁰⁸ The SEC staff appealed to the Commission. When the Commission decided the appeal in 2016, only three Commissioners were in office: Chair White and Commissioners Stein and Piwowar. The three Commissioners decided that the ALJ had been wrong and that some of the original charges should be upheld. They found violations by the investment adviser, imposed a civil money penalty, and issued a cease and desist order.²⁰⁹ If the *Williams* rule had been in effect, Chair White and Commissioner Piwowar would have disqualified themselves, leaving only Commissioner Stein to vote on the case. She had not participated in the vote to initiate the proceeding. In those circumstances, one Commissioner does not make a quorum,²¹⁰ and the Commission would have had no power to act. The case would have remained pending until another Commissioner created a quorum.

The three examples show a range of possible outcomes from applying *Williams* at the SEC. The due process protection would have mattered in two of the three cases. In the first case, one Commissioner who had voted to charge also participated in the final adjudication. He again voted against the defendants. If he had been excluded, the charges against the defendants would have failed. In the second case, only one Commissioner participated in both the initiation and adjudication of the case. He voted in favor of bringing the case but then changed his mind at the adjudication stage. He rose above the potential bias, but a majority of the Commissioners still found the defendants liable. In the third case, only three Commissioners were in office at the time of the adjudication and two of them had voted to charge the defendant. They then both voted in favor of the defendant's liability. The Commis-

207. See Robare Group, Ltd., Securities Act Release No. 3907, Investment Company Act Release No. 72950, 109 SEC Docket, 4294, 2014 WL 4296690, at *1 (Sept. 2, 2014), <https://www.sec.gov/foia/docs/votes/2014-09.pdf> (including a photocopy of the original Order Instituting Administrative Cease and Desist Proceedings, which bears a handwritten notation indicating that Commissioners Gallagher and Stein did not participate).

208. Robare Group, Ltd., Exchange Act Release No. 806, 111 SEC Docket 3765, 2015 WL 3507108 (ALJ June 4, 2015) (Initial Decision).

209. Robare Group, Ltd., Exchange Act Release No. 4566, 115 SEC Docket 2796, 2016 WL 6596009 (Nov. 7, 2016). Commissioner Piwowar, who, along with Chair White, had initially voted to charge the adviser, ultimately disagreed with imposing a penalty.

210. See *supra* note 193 and accompanying text.

sion would not have had a quorum if those two Commissioners had been disqualified. The result of Commission review by an untainted quorum is unknown.

CONCLUSION

For decades, constitutional and administrative law has depended on *Withrow v. Larkin* for the principle that the Due Process Clause does not forbid federal agencies from combining the ability to conduct investigations into potential misconduct, commence proceedings alleging violations of law, and make final agency decisions that find a violation and impose sanctions. That position might still be valid if the question is broadly whether an administrative agency, as an institution, may combine those functions without offending due process or separation of powers concepts, but *Williams v. Pennsylvania* appears to require a partial step back from that broad position. *Williams* held that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case.

The facts of *Williams* concerned a state court judge who, years earlier, had approved a decision to seek the death penalty in a criminal case, but the reasoning of the Court's decision was not so confined. The reasoning expressed constitutional doubt about the ability of an advocate to maintain the necessary neutrality to decide the merits of a case fairly and was consistent with other Court decisions requiring impartial adjudicators when the decision maker was a judge or an executive official acting in a judicial capacity. Given the importance and high value of impartiality in adjudicatory settings, the rule in *Williams* likely applies to federal administrative agencies.

If courts agree that *Williams* applies to federal agencies, an agency head, such as a commissioner, will not be able to vote to initiate an administrative enforcement proceeding and then later sit as a judge reviewing an initial ALJ decision in that case. Combining those roles is the standard procedure at many federal agencies, such as the SEC, FTC, and FCC, and it would need to change. The change, on its face, would be dramatic. It would be at odds with the common understanding established by *Withrow* and section 554(d) of the APA and with the views of those who see pragmatic value in the combination of charging and adjudicating functions. In reality, applying *Williams* to federal agencies would have a limited effect if the example of the SEC is a reliable guide. Because of

the availability of new or different agency heads in most if not all cases, an agency would be able to review an ALJ's initial decision with a quorum of commissioners or agency heads who had not participated in the original decision to charge the defendant. If, for some reason, a quorum was not available within a reasonable time, an agency could allow the ALJ's decision to become the final position of the agency.