The Administrative Procedure Act (APA) requires that hearings conducted under its main adjudication provisions (sometimes known as “formal” hearings) be presided over by the agency itself, by “one or more members of the body which comprises the agency,” or by “one or more administrative law judges [(ALJs)] appointed under” 5 U.S.C. § 3105. Section 3105, in turn, authorizes “[e]ach agency” to “appoint as many [ALJs] as are necessary for proceedings required to be conducted in accordance” with those provisions.

The process for appointing ALJs recently changed as a result of Executive Order (EO) 13,843. Until that order was issued, agencies could hire a new ALJ only from a certificate of qualified applicants (that is, a list of applicants eligible for hire) prepared by the Office of Personnel Management (OPM). Each certificate generally had, for each opening, three

2 Id.
3 Id. § 3105.
5 This was the process for hiring new ALJs. Many agencies hired incumbent ALJs from other agencies under a process known as “interagency transfer.” This process no longer exists, but agencies are still free to hire ALJs from other agencies using their own process.
applicants selected from a much larger register of applicants OPM deemed “qualified.” The “list
of three,” as it was known, consisted of the three highest-scoring applicants based upon, among
other things, an OPM-administered and -developed examination and panel interview process, as
well as veterans’ status.6

Under EO 13,843, newly appointed ALJs were removed from the are no longer in the
“competitive service,” and were instead placed in what is known as the “excepted
service.”7 As a result, agencies now hire new ALJs directly—that is, without OPM’s
involvement—generally using whatever selection criteria and procedures they deem appropriate.
EO 13,843 was premised on two primary bases. The first was the need to “mitigate” the concern
that, after the Supreme Court’s 2018 decision in Lucia v. Securities and Exchange Commission,8
the OPM-administered process might unduly circumscribe an agency head’s discretionary hiring
authority under the Constitution’s Appointments Clause.9 Lucia held that the Securities and
Exchange Commission’s (SEC) ALJs were officers under the Appointments Clause, with the
result being that—assuming that the SEC’s ALJs are inferior rather than principal officers10—
they must be appointed directly by the Commission itself as the head of a department rather than,
as was being done, by SEC staff.11 The second basis was the need to give “agencies greater
ability and discretion to assess critical qualities in ALJ candidates . . . and [such candidates’]
ability to meet the particular needs of the agency.”12

the small range in unadjusted scores.” Id. As the Administrative Conference noted in 1992, “application of the
veterans’ preference has almost always been determinative in the ALJ selection system.” Id.
7 “[T]he ‘excepted service’ consists of those civil service positions which are not in the competitive service or the
10 The Lucia majority expressly refrained from deciding whether the SEC’s ALJs are principal or inferior officers,
but did note that “[b]oth the Government and Lucia view the SEC’s ALJs as inferior officers and acknowledge that
the Commission, as a head of department, can constitutionally appoint them.” Lucia, 138 S. Ct. at 2051 n.3.
11 See id. This Recommendation takes no position on constitutional questions.
EO 13,843 requires only that ALJs be licensed attorneys. In addition, it identifies desirable qualities for ALJs, such as appropriate temperament, legal acumen, impartiality, and the ability to communicate their decisions, explicitly leaving it, however, to each agency to determine its own selection criteria. This Recommendation does not address the substantive hiring criteria that agencies should employ in selecting among ALJ candidates, though it does recommend that agencies publish the minimum qualifications and selection criteria for their ALJ positions. The selection criteria that an agency adopts might include, for example, litigation experience, experience as an adjudicator, experience in dispute resolution, experience with the subject-matter that comprises the agency’s caseload, specialized technical skills, experience with case management systems, demonstrated legal research and legal writing skills, a dedicated work ethic, and strong leadership and communications skills.\(^\text{13}\)

Each agency must decide not only which selection criteria will apply, but also which are mandatory and which are only desirable or preferred. Of course, agencies must also ensure compliance with generally applicable legal requirements, including those relating to equal employment opportunity such as are embodied in Executive Order 13,583 regarding government-wide initiatives to promote diversity and inclusion in the federal workforce\(^\text{14}\) and veterans’ preference.\(^\text{15}\)

Because the EO allows each agency to design its own selection procedures, each agency must now decide which of its officials will be involved in the selection process, how the process will be structured, how vacancies will be announced and otherwise communicated to potential applicants, and whether the agency will require writing samples or use some other evaluation method.

\(^{13}\) See generally Jack M. Beermann and Jennifer L. Mascott, Federal Agency ALJ Hiring After Lucia and Executive Order 13843 (May 29, 2019) (report to the Admin. Conf. of the U.S.), https://www.acus.gov/report/final-research-report-federal-agency-alj-hiring-after-lucia-and-eo-13843. This report is based in part upon interviews with officials at a number of agencies, including those employing the vast majority of ALJs.


\(^{15}\) The Executive Order provides that “each agency shall follow the principle of veteran preference as far as administratively feasible.” Exec. Order No. 13,843, § 3, 83 Fed. Reg. at 32,755.
This Recommendation is built upon the view that there is no “one-size-fits-all” procedure for appointing ALJs and is designed to assist agencies that are in the initial stages of thinking through new procedures for appointing ALJs under the EO. Each agency will have to construct a system that is best suited to its particular needs. Doing so will require consideration of, among other things, the nature of its proceedings, the size of the agency’s caseload, and the substance of the relevant statutes and the procedural rules involved in an agency’s proceedings.

RECOMMENDATION

1. To ensure the widest possible awareness of their Administrative Law Judge (ALJ) vacancies and an optimal and broad pool of applicants, agencies should announce their
ALJ vacancies on the Office of Personnel Management’s website USAJOBS (currently operated by the Office of Personnel Management) and/or other websites that might reach a diverse range of potential ALJ applicants. Agencies that desire or require subject-matter, adjudicative, or litigation experience should also reach out to lawyers who practice in the field or those with prior experience as an adjudicator, as well as the relevant bar associations. Each agency should keep the application period open for a sufficient reasonable period of time to achieve an optimal and broad pool of applicants.

2. Agencies should formulate and publish minimum qualifications and selection criteria for ALJ hiring. Those qualifications and criteria should include the factors specified in Executive Order 13,843 and the qualifications the agency deems important for service as an ALJ in the particular agency. The notice should distinguish between mandatory and desirable criteria. When constructing guidelines and processes for the hiring of ALJs, agencies should be mindful of the importance of the appearance of impartiality and the independence and neutrality of ALJs.

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3. Agencies should develop policies to review and assess ALJ applications. These policies might include the development of screening panels to select which applicants to interview, interview panels to select which applicants to recommend for appointment, or both kinds of panels. Such panels could include internal reviewers only or both internal and external reviewers, and could include overlapping members among the two types of panels or could include entirely different members. These policies might include procedures to evaluate applicants’ writing samples. Such writing samples could be submitted with the applicants’ initial applications, as part of a second round of submissions for applicants who meet the agencies’ qualifications expectations, or as part of a proctored writing assignment in connection with an interview.

3.4 The guidelines and procedures for the hiring of ALJs should be designed and administered to ensure the hiring of ALJs who will carry out the functions of the office with impartiality and maintain the appearance of impartiality.