



Selection of Administrative Law Judges

Commented [ATW1]: The Committee on Adjudication and the Committee on Administration and Management voted to change the title of this Recommendation to "Agency Recruitment and Selection of Administrative Law Judges"

Ad Hoc Committee of the Committee on Adjudication and the Committee on Administration and Management

Proposed Recommendation | April 26, 2019

1 The Administrative Procedure Act (APA) requires that hearings conducted under its main
2 adjudication provisions¹ (sometimes known as "formal" hearings) be presided over by the
3 agency itself, by "one or more members of the body which comprises the agency," or by "one or
4 more administrative law judges [(ALJs)] appointed under" 5 U.S.C. § 3105.² Section 3105, in
5 turn, authorizes "[e]ach agency" to "appoint as many [ALJs] as are necessary for proceedings
6 required to be conducted in accordance" with those provisions.³

7 The process for appointing ALJs recently changed as a result of Executive Order (EO)
8 13,843.⁴ Until that order was issued, agencies could hire a new ALJ only from a certificate of
9 qualified applicants (that is, a list of applicants eligible for hire) prepared by the Office of
10 Personnel Management (OPM).⁵ Each certificate generally had three applicants selected from a
11 much larger register of applicants OPM deemed "qualified." The "list of three," as it was known,
12 consisted of the three highest-scoring applicants based upon, among other things, an OPM-

¹ 5 U.S.C. §§ 554, 556–57.

² 5 U.S.C. § 556(b).

³ *Id.* §§ 3105.

⁴ Exec. Order 13,843, 83 Fed. Reg. 32,755 (July 13, 2018) (issued July 10, 2018); *see also* Memorandum from Jeff T.H. Pon, Director, Office of Personnel Mgmt., to Heads of Exec. Dep'ts and Agencies, Executive Order – Excepting Administrative Law Judges from the Competitive Service (July 10, 2018) (noting that "OPM's regulations continue to govern some aspects of ALJ employment"), <https://chcoc.gov/print/9282>.

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.



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13 administered and -developed examination and panel interview process, as well as veterans'
14 status.⁶

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

28 EO 13,843 requires only that ALJs be licensed attorneys. In addition, it identifies
29 desirable qualities for ALJs, such as appropriate temperament, legal acumen, impartiality, and
30 the ability to communicate their decisions, explicitly leaving it, however, to each agency to
31 determine its own selection criteria. This Recommendation does not address the substantive

⁶ See Admin. Conf. of the U.S., Recommendation 92-7, *The Federal Administrative Judiciary 5* (Dec. 10, 1992). Qualified veterans received extra points that “had an extremely large impact, given 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 Senior Executive Service.” 5 U.S.C. § 2103.

⁸ 138 S. Ct. 2044 (2018).

⁹ See Exec. Order 13,843, *supra* note 5, § 1.

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.

¹² Exec. Order 13,843, *supra* note 5, § 1.



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32 hiring criteria that agencies should employ in selecting among ALJ candidates, though it does
33 recommend that agencies publish the minimum qualifications and selection criteria for their ALJ
34 positions. The selection criteria that an agency adopts might include, for example, litigation
35 experience, experience as an adjudicator, experience in dispute resolution, experience with the
36 subject-matter that comprises the agency's caseload, specialized technical skills, experience with
37 case management systems, demonstrated legal research and legal writing skills, a dedicated work
38 ethic, and strong leadership and communications skills.¹³

39 Each agency must decide not only which selection criteria will apply, but also which will
40 be mandatory and which are only desirable or preferred. Of course, agencies must also ensure
41 compliance with generally applicable legal requirements, including those relating to equal
42 employment opportunity and veterans' preference.¹⁴

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

47 This Recommendation is built upon the view that there is no "one size fits all" procedure
48 for appointing ALJs and is designed to assist agencies that are in the initial stages of thinking
49 through new procedures for appointing ALJs under the EO.¹⁵ Each agency will have to construct a
50 system that is best suited to its particular needs. Doing so will require consideration of, among
51 other things, the nature of its proceedings, the size of the agency's caseload, and the substance of
52 the relevant statutes and the procedural rules involved in an agency's proceedings.

¹³ See generally Jack M. Beermann and Jennifer L. Mascott, *Federal Agency ALJ Hiring After Lucia* and Executive Order 13843 (Mar. 28, 2019) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/draft-research-report-federal-agency-alj-hiring-after-lucia-and-executive-order-13843>. This report is based in part upon interviews with officials at a number of agencies, including those employing the vast majority of ALJs.

¹⁴ The Executive Order provides that "each agency shall follow the principle of veteran preference as far as administratively feasible." Exec. Order 13,843, *supra* note 5, § 3.

¹⁵ Some agencies have already publicly disseminated guidance. See Secretary's Order 07-2018, *Procedures for Appointments of Administrative Law Judges for the Department of Labor*, 83 Fed. Reg. 44,307 (Aug. 30, 2018); U.S. Department of Health and Human Services, *Administrative Law Judge Appointment Process Under the Excepted Service* (Nov. 29, 2018), <https://www.hhs.gov/sites/default/files/alj-appointment-process.pdf>.



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RECOMMENDATION

- 53 1. To ensure the widest possible awareness of their ALJ vacancies and a broad pool of
54 applicants, agencies should announce their ALJ vacancies on USAJOBS, their own
55 websites, and/or other websites that might reach potential ALJ applicants. Agencies that
56 desire or require subject-matter, adjudicative, or litigation experience should also reach
57 out to lawyers who practice in the field or those with prior experience as an adjudicator.
58 Each agency should keep the application period open for a reasonable period of time to
59 achieve an optimal pool of applicants.
60
- 61 2. Agencies should formulate and publish minimum qualifications and selection criteria for
62 ALJ hiring. Those qualifications and criteria should include the factors specified in
63 Executive Order 13,843 and the qualifications the agency deems important for service as
64 an ALJ in the particular agency. The notice should distinguish between mandatory and
65 desirable criteria. When constructing guidelines and processes for the hiring of ALJs,
66 agencies should be mindful of the importance of the appearance of impartiality and the
67 independence and neutrality of ALJs.
68
- 69 3. Agencies should develop policies to review and assess ALJ applications. These policies
70 might include the development of screening panels to select which applicants to
71 interview, interview panels to select which applicants to recommend for appointment, or
72 both kinds of panels. Such panels could include internal reviewers only or both internal
73 and external reviewers, and could include overlapping members among the two types of
74 panels or could include entirely different members. These policies might include
75 procedures to evaluate applicants' writing samples. Such writing samples could be
76 submitted with the applicants' initial applications, as part of a second round of
77 submissions for applicants who meet the agencies' qualifications expectations, or as part
78 of a proctored writing assignment in connection with an interview.
79