

Comment on Proposed ACUS Recommendation: Selection of Administrative Law Judges

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With my apologies for submitting this past the deadline, I have one concern about the ALJ Selection recommendation. It seems better to raise it now, rather than at the Plenary, especially since other pre-submitted comments are similar, so the issue is sure to be discussed at the Plenary either way.

Jeff Lubbers has already noted that the recommendation as presently drafted suggests that agencies should be concerned with the *appearance* of impartiality, but not the *actuality* of impartiality. I agree that should be remedied in the final recommendation.

My concern is related. The preamble to the recommendation explains (at page 3) that it is "is built upon the view that there is no 'one-size-fits-all' procedure for appointing ALJs" and takes a strong position (continuing onto page 4) in favor of each agency developing a "system that is best suited to its particular needs."

This is as it should be, except that there is no recognition of other important and potentially countervailing considerations that agencies should also consider as they craft their new, tailored procedures for appointing ALJs. These considerations include the good reasons why OPM was initially given its centralizing role in the process: to protect the independence and promote the impartiality of ALJs. The importance of these considerations was well explained in ACUS Recommendation 92-7.

To address this, I would suggest adding to the preamble a sentence reaffirming Recommendation 92-7's discussion of how important it is that ALJs are selected in such a way as to ensure that they are impartial decisionmakers with sufficient insulation from the investigatory and prosecutorial efforts of their employing agencies.

Ideally, I would have liked to see a separate paragraph in the recommendation urging agencies to consider how best to give these principles effect in their tailored ALJ selection procedures. At this stage, however, I believe my concerns can be adequately addressed through the addition of an extra sentence in the preamble reaffirming 92-7, combined with a tweak to the Paragraph 2 of the recommendation along the lines that Jeff has suggested.