



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Council Amendment (lines 10-18, 63-68)

### **Administrative Judges**

#### **Committee on Adjudication**

#### **Proposed Recommendation | June 15, 2018**

1           In Recommendation 2016-4,<sup>1</sup> the Administrative Conference offered best practices for  
2 structuring the increasing number of legally required evidentiary hearings in administrative  
3 adjudications not subject to the adjudication provisions of the Administrative Procedure Act  
4 (APA).<sup>2</sup> Those hearings are usually not presided over by administrative law judges (ALJs)  
5 appointed under 5 U.S.C. § 3105,<sup>3</sup> but instead by agency employees often known as  
6 “administrative judges”<sup>4</sup> (although they often go by any number of other names).<sup>5</sup> For purposes

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<sup>1</sup> Admin. Conf. of the U.S., Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*, 81 Fed. Reg. 94,314 (Dec. 23, 2016).

<sup>2</sup> See 5 U.S.C. §§ 554, 556–557.

<sup>3</sup> If an agency’s authorizing statute requires an adjudication “on the record after opportunity for an agency hearing,” the formal adjudication provisions of the APA apply. *Id.* § 554(a). The presiding official in an APA hearing must be an ALJ (or “the agency” or “one or more members of the body which comprises the agency”). *Id.* § 556(b). “In the absence of a statute requiring formal APA adjudication, agencies have broad discretion to fashion their own adjudicatory procedures.” Matthew Lee Wiener et al., Office of the Chairman, Admin. Conf. of the U.S., Equal Employment Opportunity Commission: Evaluating the Status and Placement of Adjudicators in the Federal Sector Hearing Program 6 (March 31, 2014), <https://acus.gov/report/equal-employment-opportunity-commission-evaluating-status-and-placement-adjudicators-federal>. Agencies generally use their discretion to appoint administrative judges to preside over non-APA hearings, rather than ALJs. *Id.* On the circumstances under which Congress may consider converting certain administrative judge positions to ALJ positions, see Admin. Conf. of the U.S., Recommendation 92-7, *The Federal Administrative Judiciary*, ¶ I.A, 57 Fed. Reg. 61,760, 61,763–764 (Dec. 29, 1992).

<sup>4</sup> Administrative judges far outnumber the approximately 2,000 ALJs in federal service. See Kent Barnett, Logan Cornett, Malia Reddick & Russell Wheeler, Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 17 (Feb. 14, 2018) (draft report to the Admin. Conf. of the U.S.), <https://acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal> [hereinafter Barnett et al.] (accounting for 10,831 administrative judges among fifty-three agencies and components of agencies).

<sup>5</sup> Titles used by agencies that employ administrative judges include “Hearing Officer,” “Immigration Judge,” “Veterans Law Judge,” “Administrative Patent Judge,” and “Administrative Appeals Judge.” “Administrative Judge” is also an official title held by some non-ALJ adjudicators.



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7 of this Recommendation, all adjudicators who are neither ALJs nor agency heads are referred to  
8 as “administrative judges.”

9 This Recommendation addresses an important subject not addressed by Recommendation 2016-  
10 4: the selection, oversight, evaluation, discipline, and removal of administrative judges. In  
11 addressing these matters, the recommendation is intended to apply to those administrative judges  
12 who are responsible for making factual findings or applying established law or agency policy to  
13 facts as opposed to making policy decisions on behalf of the agency.<sup>6</sup> Adjudicators who review  
14 the decisions of hearing-level adjudicators are especially likely to undertake such a policymaking  
15 function, though there may be circumstances under which hearing-level adjudicators also  
16 permissibly do so under certain adjudicative schemes. In addition, much of the recommendation  
17 is intended to apply to employees who serve exclusively or nearly so as adjudicators, rather than  
18 those who also perform significant non-adjudicative duties.

19 In contrast to hearings over which ALJs preside, which are regulated by the adjudication  
20 provisions of the APA, hearings over which administrative judges preside do not share a uniform  
21 statutory framework. Instead, they are governed by procedures, norms, and practices specific to  
22 each administrative judge’s employing agency and relevant governing statutes.<sup>7</sup> Administrative  
23 judges oversee enforcement, benefits, licensing, and other classes of hearings situated within a  
24 wide variety of substantive areas. Hearings may be adversarial or inquisitorial, and may involve  
25 disputes between private parties or between private parties and the federal government. Hearings  
26 outside the APA also contrast widely in their procedural complexity, ranging from those that are

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<sup>6</sup> As the Conference stated in a prior recommendation, “the APA model of agency decision making is based on the use of independent ALJs to find facts and to apply agency policy to those facts . . . . Where an agency has made its policies known in an appropriate fashion, ALJs and AJs are bound to apply them in individual cases. Policymaking is the realm of the agency, and the ALJs (or AJ’s) role is to apply such policies to the facts the judge finds in an individual case.” Admin. Conf. of the U.S., Recommendation 92-7, *The Federal Administrative Judiciary*, 57 Fed. Reg. 61,760, 61,763 (Dec. 1992).

<sup>7</sup> All adjudication proceedings are also subject to baseline requirements imposed by the APA at 5 U.S.C. §§ 555 (addressing “ancillary matters”) and 558 (relating to licensing) and constitutional due process.



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27 similar in formality and procedure to APA hearings to those that are procedurally minimal and  
28 informal.<sup>8</sup>

29 As with the nature and procedural complexity of hearings outside the APA, the policies  
30 and procedures pertaining to the selection, oversight, evaluation, discipline, and removal of  
31 administrative judges are necessarily diverse and not governed by a specific framework. In  
32 regard to hiring in particular, administrative judges are typically attorneys in “schedule A” of the  
33 excepted service, which means they are hired under agency-specific procedures without a  
34 competitive civil service examination and their qualifications are set by their hiring  
35 agencies.<sup>9</sup> Further, attorney hiring is not subject to Office of Personnel Management rules on  
36 rating applicants for excepted service positions, and veterans preference is required only as far as  
37 administratively feasible.<sup>10</sup> Once hired, attorneys are generally subject to a longer trial period  
38 before they acquire statutory rights in removal proceedings.<sup>11</sup> However, they are subject to  
39 generally-applicable civil service laws, rules, and regulations, such as those related to  
40 background investigations, job classification, compensation, and performance management.

41 In contrast, the policies and procedures pertaining to the selection, oversight, evaluation,  
42 discipline, and removal of ALJs are prescribed by the APA. These policies and procedures are  
43 largely designed to promote ALJ independence. Among other things, they establish a merit-  
44 based system for selecting ALJs, prohibit ALJs from engaging in investigation or prosecution or  
45 from reporting to officials with such duties, limit the ability of ALJs to engage in *ex parte*  
46 communications, and exempt ALJs from performance appraisals and bonus eligibility.<sup>12</sup> In

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<sup>8</sup> Recommendation 2016-4, *supra* note 1; *see also* Michael Asimow, Evidentiary Hearings Outside the Administrative Procedure Act 7–9 (Nov. 10, 2016) (report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/evidentiary-hearings-outside-administrative-procedure-act-final-report>.

<sup>9</sup> *See* 5 C.F.R. §§ 6.2, 6.3(b), 213.3101.

<sup>10</sup> *See id.* § 302.101(c).

<sup>11</sup> *See* 5 U.S.C. § 7511.

<sup>12</sup> *See id.* §§ 554(d), 556(b), 557(d)(1); 5 C.F.R. §§ 930.206(a)–(b).



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47 addition, ALJs may only be removed or disciplined “for good cause established and determined  
48 by the Merit Systems Protection Board.”<sup>13</sup>

49 While the Administrative Conference does not believe it is possible or desirable to  
50 recommend uniform policies or practices governing the selection, oversight, evaluation,  
51 discipline, and removal of administrative judges, it does believe that agencies should consider  
52 the policies and practices employed by other agencies, federal and state judicial systems,<sup>14</sup> and  
53 the ALJ system with respect to these and related matters when designing or evaluating  
54 adjudication programs. The Administrative Conference also believes that agencies should  
55 consider the ethical standards of the Office of Government Ethics (OGE),<sup>15</sup> which agencies may  
56 supplement pursuant to executive order and OGE regulation,<sup>16</sup> and governing conflict-of-interest  
57 laws<sup>17</sup> that are applicable to administrative judges. This Recommendation identifies practices  
58 that may promote (1) the objectives of competence, integrity, impartiality, and the degree of  
59 independence<sup>18</sup> appropriate for a system in which decision-making and policy-making authority  
60 ultimately lies in the agency head; and (2) clarity and transparency with respect to the policies  
61 and practices governing the selection, oversight, evaluation, discipline, and removal of  
62 administrative judges.

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<sup>13</sup> 5 U.S.C. § 7521(a).

<sup>14</sup> See, e.g., 28 U.S.C. § 455(b) (prescribing the conditions for which justices and judges of the United States must disqualify themselves); *id.* § 631(b)(5) (directing the Judicial Conference of the United States to promulgate regulations that provide for the establishment of merit selection panels to advise in the selection of federal magistrate judges); JUD. CONF. OF THE U.S., REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES FOR THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES BANKRUPTCY JUDGES ch. 3 (1984) (authorizing the use of merit selection panels to advise in the selection of bankruptcy judges); see also Barnett et al., *supra* note 4, at 61–62 (remarking on the use of state and federal merit selection panels and commissions to advise in the selection of some state judges and federal bankruptcy and magistrate judges).

<sup>15</sup> 5 C.F.R. pt. 2635.

<sup>16</sup> Exec. Order 12,674, § 301, 54 Fed. Reg. 15,159, 15,160 (April 14, 1989), *amended by* Exec. Order 12,731, 55 Fed. Reg. 42,547 (Oct. 17, 1990); 5 C.F.R. § 2635.105.

<sup>17</sup> 18 U.S.C. §§ 201–209.

<sup>18</sup> “Impartiality” relates to the adjudicator’s ability to issue fair, neutral decisions. See Barnett et al., *supra* note 4, at 1–2 n.3.



## RECOMMENDATION

63           The recommendations that follow are intended to apply only to those administrative  
64 judges who are responsible for making factual determinations or applying established law to  
65 facts as opposed to making policy decisions on behalf of the agency. With the exception of  
66 recommendations 5, 7–10, and 12, the recommendations are also intended to apply only to  
67 employees who serve exclusively or nearly exclusively as adjudicators, rather than those who  
68 also perform significant non-adjudicative duties.

### Selection

- 69           1. When practicable and permitted by law, agencies should consider using merit selection  
70 panels or commissions to select or recommend administrative judges for positions whose  
71 principal duties are adjudicative. Models for the use of such panels or commissions could  
72 include those used by some state governments to advise those who select judges and by  
73 the federal courts to advise in the selection of United States bankruptcy and magistrate  
74 judges.
- 75           2. Agencies that use such panels or commissions should establish rules and requirements for  
76 membership on them and identify categories of individuals who are eligible to serve on  
77 them. Membership could consist of one or more of the following categories of  
78 individuals:
- 79           a. current or former administrative judges from within or outside the agency;
  - 80           b. other federal employees with relevant expertise from within or outside the  
81           agency; and
  - 82           c. if legally permissible, representatives of parties with experience in the agency's  
83           adjudication proceedings.



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- 84 3. Agencies should identify the duties and responsibilities of merit selection panels or  
85 commissions and determine whether they will offer recommendations to an appointing  
86 authority or make final selection decisions.<sup>19</sup>
- 87 4. Recommendations and selections should be based on criteria set by the agency that take  
88 into account the specific responsibilities for each administrative judge position. Such  
89 criteria could include factors used in the selection of United States bankruptcy and  
90 magistrate judges, as well as other relevant factors, such as:
- 91 a. professional credentials, including experience and education;
  - 92 b. diversity of background and experience;
  - 93 c. subject-matter expertise;
  - 94 d. litigation or adjudication experience;
  - 95 e. professional reputation, as ascertained by references;
  - 96 f. organizational and time-management skills;
  - 97 g. case-management abilities;
  - 98 h. temperament;
  - 99 i. decisiveness;
  - 100 j. ethics and integrity; and
  - 101 k. analytical and writing ability.

### **Assignment of Adjudicative Functions**

- 102 5. To the extent feasible, agencies should consider assigning all adjudicative functions to  
103 employees who serve exclusively as administrative judges, rather than to administrative

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<sup>19</sup> A merit selection panel's authority to select administrative judges may be contingent on the outcome in *Raymond J. Lucia Cos. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *petition for en banc rev. denied*, 868 F.3d 1021 (D.C. Cir. 2017), *cert. granted*, 138 S. Ct. 736 (Jan. 12, 2018) (concerning whether ALJs of the Securities and Exchange Commission are "officers of the United States" within the meaning of the Constitution's Appointments Clause). If the Supreme Court in *Lucia* determines that ALJs are "inferior officers" under the Appointments Clause, ALJs will be required to be appointed by the "heads of departments." U.S. CONST. art. II, § 2, cl. 2. If such a holding is applied to administrative judges who perform duties that are sufficiently analogous to those performed by ALJs, merit selection panels could make recommendations but would be prohibited from making final selection decisions regarding such positions.



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104 judges who also have significant non-adjudicative duties. Occasional cross-over of duties  
105 may be appropriate to meet agency objectives, including professional development.

### **Physical Separation**

106 6. To the extent feasible, agencies should physically separate administrative judges and their  
107 support staff from other agency personnel to maintain appropriate levels of independence  
108 and impartiality. Physical separation occurs when administrative judges' offices and  
109 other agency employees' offices, respectively, are located in different physical spaces,  
110 even if such spaces are located in the same building or premises.

### **Ethics and Disqualification**

111 7. Agencies should consider providing guidance and educational resources to administrative  
112 judges on the applicable requirements of the criminal conflict-of-interest laws, contained  
113 in 18 U.S.C. §§ 201–209, and the Office of Government Ethics's (OGE) standards  
114 governing the disqualification of federal employees from participating in particular  
115 matters due to the appearance of loss of impartiality, contained in 5 C.F.R. §§ 2635.501–  
116 2635.503.

117 8. Agencies should consider developing procedures for assigning cases to administrative  
118 judges that are aimed at preventing them from presiding over hearings in which they have  
119 conflicts of interest.

120 9. When appropriate, agencies should consider exercising their authority under Executive  
121 Order 12,674 (as amended by Executive Order 12,731) and 5 C.F.R. § 2635.105 to adopt,  
122 subject to OGE's approval, supplemental regulations pertaining to the disqualification of  
123 administrative judges from particular hearings that augment OGE's standards in 5 C.F.R.  
124 §§ 2635.501–2635.503, which govern the disqualification of federal employees from  
125 participating in particular matters due to the appearance of loss of impartiality. Any  
126 supplemental regulations adopted should be tailored to the particular needs of the  
127 adopting agency's adjudication program.



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128 10. Agencies should establish procedures that explain when and how parties may seek an  
129 administrative judge's disqualification and how agencies and administrative judges  
130 should resolve such claims.

### **Performance**

131 11. Evaluations of administrative judges' performance and potential eligibility for bonuses  
132 should be based on the following factors derived, in part, from Recommendation 92-7:  
133 case processing guidelines; appropriate case volume goals and requirements; adjudicative  
134 comportment and demeanor; adherence to governing ethical requirements; adherence to  
135 properly articulated and disseminated rules, procedures, precedents, and other agency  
136 policy; and all other relevant considerations. Agencies should not consider the outcomes  
137 of particular cases when evaluating administrative judges' performance of adjudicative  
138 functions.

### **Transparency**

139 12. Agencies should, to the extent appropriate and practicable, make available to the public  
140 generally applicable policies and procedures governing the selection, oversight,  
141 evaluation, discipline, and removal of administrative judges.