



## Selection of Administrative Law Judges

### Committee on Adjudication

### Committee on Administration and Management

#### Proposed Recommendation for Committee | April 5, 2019

*Note for Joint Ad Hoc Committee:* As you will see below, this document includes separate sets of proposed recommendations from both Professors Beermann and Mascott. The text of the proposed recommendations is drawn directly from the consultants' report without alteration, but the recommendations have been reordered and grouped by subject matter.

For each recommendation, the Joint Ad Hoc Committee is free to select Professor Beermann's language, Professor Mascott's language, some combination of the two, or neither one. It may also adopt its own recommendations on any topic—whether or not covered below—within the scope of the project. Indeed, we have circulated recent pronouncements of the Department of Labor and the Department of Health and Human Services for the committee's consideration, as those documents may identify additional topics that could be addressed in this recommendation. And we encourage committee members to share experiences from the agencies with which they are familiar and to consider whether additional recommendations are warranted.

Prior to the next committee meeting, the Conference staff will circulate a revised recommendation that includes both the recommendation language upon which the Joint Ad Hoc Committee has settled during the first meeting and a Preamble.

#### RECOMMENDATION

##### ALJ Recruitment

###### *Beermann Recommendation*

1. Agencies should announce their ALJ vacancies on a widely-available platform such as USAJOBS and also reach out to lawyers who practice in the field and to incumbent ALJs in other agencies. For those agencies that desire or require prior experience as an ALJ, the agency should take steps to inform existing ALJs of the vacancy. Each agency should determine how long to keep the application period open based on its experience with the volume of applications.



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### *Mascott Recommendation*

- 8
- 9 2. As some agencies have already done, one potential way for agencies to ensure the widest
- 10 possible awareness of their ALJ vacancies is announcement of the vacancies on
- 11 USAJOBS or other websites that might reach potential ALJ applicants. Announcement
- 12 through USAJOBS is not required by law as ALJs are no longer in the competitive
- 13 service, but USAJOBS is a well-known information source, and many prospective ALJ
- 14 candidates may first think to check this site for openings. Agencies interested in further
- 15 extending awareness of ALJ openings might also consider communicating with lawyers
- 16 who practice in the field and incumbent ALJs in other agencies. For agencies with a
- 17 particular interest in ALJ candidates who have litigation or formal hearing experience, it
- 18 might be particularly beneficial for the agency to take steps to inform all existing ALJs of
- 19 the vacancy, especially SSA ALJs who have historically viewed their positions as an
- 20 entry point to ALJ spots in agencies that conduct adversarial hearings. Each agency
- 21 should evaluate how long to keep open the ALJ application period based on their prior
- 22 experience with achieving an optimal volume of applications.

### **Formulation and Public Announcement of Hiring Criteria**

#### *Beermann Recommendations*

- 23 3. In addition to those factors specified in Executive Order 13843, including impartiality,
- 24 commitment to the rule of law, “appropriate temperament, legal acumen, impartiality, . . .
- 25 .sound judgment” and the ability to “clearly communicate their decisions,”<sup>1</sup> agencies
- 26 should formulate and publish minimum qualifications and selection criteria for ALJ
- 27 hiring that include the qualifications the agency deems important for service as an ALJ in
- 28 the particular agency. These agency-specific criteria may include such factors as
- 29 experience with the subject matter of the issues that come before agency ALJs, litigation
- 30 experience, prior experience as an adjudicator, experience with case management
- 31 systems, demonstrated legal research and writing skills, and more specialized skills such

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<sup>1</sup> See Executive Order 13843, § 1, para. 1.



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32 as mathematics or familiarity with economic analysis or medical diagnostics. Guidelines  
33 may also include integrity and proper temperament. When constructing guidelines and  
34 processes for the hiring of ALJs, agencies should be mindful of the importance of the  
35 appearance of impartiality and the independence and neutrality of ALJs.

36 4. Agencies should consider formulating guidelines for the consideration of veterans'  
37 preference and diversity in their hiring processes. Any such guidelines created should be  
38 communicated to all officials involved in the hiring process.

### 39 *Mascott Recommendations*

40 5. Agencies also may find it helpful to formulate and publish minimum qualifications and  
41 selection criteria for ALJ hiring that include the qualifications the agency deems  
42 important for service as an ALJ. From interviews of agency officials and the new hiring  
43 plans already put in place by some agencies, it appears that relevant hiring criteria might  
44 range from litigation experience, experience as an adjudicator, experience with the  
45 subject-matter that comprises the agency's caseload, specialized technical skills,  
46 experience with case management systems, demonstrated legal research and legal writing  
47 skills, a dedicated work ethic, and strong leadership and communication skills.

48 6. When constructing guidelines and processes for the hiring of ALJs, agencies should also  
49 consider the executive order's emphasis on selection of ALJs "who are impartial and  
50 committed to the rule of law." Agencies might want to consider whether it would be  
51 beneficial to maintain diversity in their consideration of candidates from outside  
52 government in addition to candidates with prior government experience.

53 7. Agencies might also consider establishing relevant criteria that encompass characteristics  
54 highlighted in Executive Order 13843 such as a commitment to displaying an  
55 "appropriate temperament, legal acumen, impartiality, and sound judgment." As stated in  
56 Executive Order 13843, agencies should also think through how they will "follow the  
57 principle of veteran preference as far as administratively feasible."



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- 58 8. Agencies might consider whether it would be beneficial to enhance transparency by  
59 publicly posting details of the procedures they will use to evaluate ALJ candidates,  
60 similar to the public announcements of the Labor and HHS departments.

### 61 **Selection Panels and Writing Samples**

#### 62 *Beermann Recommendation*

- 63 9. Agencies that determine that they would like to use their flexibility under EO 13843 to  
64 continue some kind of writing-based evaluation of ALJ candidates might consider  
65 incorporating an evaluation of writing samples from ALJ candidates that is similar to the  
66 process the Department of Health and Human Services has implemented under EO 13843  
67 or even contracting with OPM to formulate and administer an examination that the  
68 agency might take into account in making ALJ appointments.

#### 69 *Mascott Recommendation*

- 70 10. Agencies might want to consider establishing policies about whether they will use both a  
71 screening panel and a separate interview panel to evaluate ALJ candidates and which  
72 officials might participate on such panels. Regarding the written examination as formerly  
73 administered by OPM, OPM has discontinued this competitive service written exam for  
74 ALJ candidates. Agencies that determine they would like to use their flexibility under EO  
75 13843 to continue some kind of writing-based evaluation of ALJ candidates might  
76 consider incorporating an evaluation of writing samples from ALJ candidates that is  
77 similar to the process that the Department of Health and Human Services (HHS) has  
78 implemented under EO 13843.

### **Compliance with the Appointments Clause**

#### *Beermann Recommendations*

11. Agencies employing ALJs should seek legal advice concerning whether *Lucia* raises  
questions about whether their ALJs have been appointed in a manner consistent with the  
Appointments Clause of the Constitution. If an agency concludes that its ALJs are  
Officers of the United States, the agency should ensure that its ALJs are appointed by the



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official or officials who are considered the head or heads of their Department for Appointments Clause purposes. For agencies within a traditional Department, this means the Secretary of the Department, or in the case of the Department of Justice, the Attorney General. For agencies not within a cabinet department, this means the agency head or heads. To the extent consistent with applicable law,<sup>2</sup> agencies with ALJs who were not appointed by the head or heads of their Department, should considering having the appointments of their existing ALJs ratified by the official or officials who are considered the head or heads of their Department for Appointments Clause purposes.

79 12. In light of *Lucia*, in any case in which proceedings have been conducted by an ALJ  
80 whose appointment may not have been in compliance with the Appointments Clause, the  
81 agency should consider, if feasible, transferring the case to a different ALJ who has been  
82 properly appointed even if the original ALJ was subsequently appointed in a process that  
83 complies with the Appointments Clause.

84 *Mascott Recommendation*

85 13. All of the interviewed agency officials appear to take as a given the idea that the most  
86 cautious approach in light of *Lucia* is for their agency's Article II department head to  
87 serve as the appointing official for the agency's administrative law judges (ALJs).  
88 Executive Order 13843 provides significant flexibility that agencies and their department  
89 heads should consider using to develop the criteria and procedures that the department  
90 head concludes will lead to selection of the most well-suited ALJ candidates for  
91 appointment.

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<sup>2</sup> Congressional action may be required in those cases in which a statute assigns the appointment of ALJs to an official other than one that would be considered a Department Head for Appointments Clause purposes.