

Research Report on Federal Agency ALJ Hiring after *Lucia* and Executive Order 13843

Jack M. Beermann* and Jennifer L. Mascott**

Revised Version May 29, 2019

I. Introduction

The Administrative Procedure Act (APA) requires that formal adjudicative hearings conducted under its provisions be presided over either by the agency itself, by “one or more members of the body which comprises the agency” or by “administrative law judges (ALJs) appointed under” 5 U.S.C. § 3105.¹ 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 the Act’s formal adjudication procedures.² Beyond providing that ALJs are to be appointed by “[e]ach agency,”³ no provision of the APA itself specifies the precise procedure for appointing ALJs. However, because ALJs at the time were part of the competitive service, agencies by law were required to hire *new* ALJs from lists of eligible candidates provided by the Office of Personnel Management through a rating process it administered.

Historically, most ALJs, as members of what is known as the “competitive service,” have been appointed pursuant to a selection process administered by the Office of Personnel

* Professor of Law and Harry Elwood Warren Scholar, Boston University School of Law

** Assistant Professor of Law (on leave), Antonin Scalia Law School, George Mason University. Prof. Mascott joins this report except for several paragraphs as noted in more detail below. Professor Mascott participated in the research and drafting of the first draft of this report, dated March 28, 2019 (available at <https://www.acus.gov/report/draft-research-report-federal-agency-alj-hiring-after-lucia-and-executive-order-13843>), that was presented to the Committee on Administration and Management and the Committee on Adjudication. Subsequent revisions were made by Professor Beermann alone due to Professor Mascott’s withdrawal from the project after her appointment as Deputy Assistant Attorney General in the United States Department of Justice’s Office of Legal Counsel.

¹ 5 U.S.C. § 556.

² 5 U.S.C. § 3105.

³ *See id.*

Management (OPM) that included a written examination and a rating process conducted by OPM.⁴ After taking an examination and going through an evaluation process that included a structured interview and an evaluation by a panel, candidates would receive a score of up to 100. As many as five to ten veterans' preference points were added to this score. Agencies were then provided with a list of the three highest-ranking applicants for each position. Many agencies, however, finding that the one-size-fits-all OPM ranking system was not producing candidates that met their requirements were able to hire ALJs already working for another agency and thus already part of the competitive service.

Almost all agencies other than the Social Security Administration (SSA) used the interagency transfer model for all or nearly all of their ALJ hiring, allowing them to fine-tune the qualifications of candidates to suit the agencies' particular needs. They typically hired their ALJs from SSA, which employs the great majority of ALJs.⁵ Although SSA hearings lack certain features of a typical adversarial trial, many ALJs have viewed SSA as a kind of training ground for an ALJ position at an agency where ALJs preside over adversarial, trial-like proceedings, such as the Department of Labor (DOL) or the Environmental Protection Agency (EPA). Now that ALJs have been excepted from centralized competitive service requirements, all agencies, including SSA, have the ability to tailor their ALJ hiring procedures to fit their particularized hiring needs.

⁴ Most administrative law judge (ALJ) hiring was done pursuant to this process for the simple reason that the vast majority of federal ALJs are employed by the Social Security Administration (SSA), which used this process. See *Administrative Law Judges: ALJs by Agency*, Office of Personnel Management (OPM) [hereinafter "ALJs by Agency, OPM"], <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency>. See also *infra* note 14 and accompanying text (listing the numbers of ALJs within each agency). Other agencies often opted instead to use an interagency transfer process that permitted agencies, with Office of Personnel Management (OPM) approval, to hire ALJs already working in other agencies who had previously been certified as eligible ranked candidates through the OPM competitive service process.

⁵ See *ALJs by Agency*, OPM, *supra* note 4.

Significantly, prior to the recent litigation in *Lucia v. Securities and Exchange Commission*,⁶ there had always been variation among agencies on who actually made ALJ appointments. In some agencies, agency heads themselves made the appointments, normally on the recommendation of agency officials assigned the task of ALJ selection, while in other agencies appointments were made by lower-level officials. This latter appointment method had been challenged in court more than once, due to uncertainty over whether ALJs are “Officers of the United States,”⁷ who must be appointed in a process consistent with the Constitution’s Appointments Clause, which allows appointment of Officers of the United States by lower-level agency officials.⁸ In 2018, in *Lucia v. SEC*,⁹ the Supreme Court held that ALJs within the Securities and Exchange Commission are Officers of the United States whose appointments must conform to the Appointments Clause. This holding meant that the appointment of SEC ALJs by lower-level agency officials was unconstitutional.

Soon after the Court issued its decision in *Lucia*, the President, exercising statutory authority,¹⁰ issued Executive Order 13843 (“EO 13843”),¹¹ placing ALJs in what is known as the “excepted service” and thereby eliminating the centralized OPM examination and ratings

⁶ 138 S. Ct. 2044 (2018).

⁷ Compare *Freytag v. Commissioner*, 501 U.S. 868 (1991) (Tax Court “special trial judges” are inferior officers whose appointment must conform to the Appointments Clause), with *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000) (Federal Deposit Insurance Corporation ALJs are “employees” whose appointments are not subject to the Appointments Clause).

⁸ U.S. CONST. art. II, § 2, cl. 2 (“The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.”).

⁹ 138 S. Ct. 2044 (2018)

¹⁰ 5 U.S.C. § 3301 (“The President may (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service . . .”; *id.* § 3302 (“The President may prescribe rules governing the competitive service. The rules shall provide, as nearly as conditions of good administration warrant, for (1) necessary exceptions of positions from the competitive service . . .”).

¹¹ Executive Order 13843, 83 Fed. Reg. 32755 (July 13, 2018).

requirements for ALJ candidates.¹² Agencies have now commenced working on altering their ALJ hiring procedures to conform to both the *Lucia* decision and the executive order. This study explores and analyzes the hiring procedures for ALJs that have emerged and are likely to emerge after *Lucia* and under EO 13843.

Agencies' implementation of the discretion left by *Lucia* and the executive order is currently under development. One purpose of this report is to study agency practices and analyze the potential mechanisms for evaluation of ALJ candidates that agencies might consider as they establish ALJ hiring procedures tailored to meet the agency's particular needs.

The process of preparing this report included interviews with officials in numerous agencies about their ALJ hiring practices, focused mainly on their plans regarding implementation of EO 13843. Interviews were conducted with the following agencies that employ ALJs: the Social Security Administration, the Office of Medicare Hearings and Appeals (OMHA) of the Department of Health and Human Services (HHS), the National Labor Relations Board (NLRB), the Federal Mine Safety and Health Review Commission (FMSHRC), the Federal Energy Regulatory Commission (FERC), the Occupational Safety and Health Review Commission (OSHRC), the United States Coast Guard of the Department of Homeland Security, the Departmental Appeals Board (DAB) of the Department of Health and Human Services, the EPA, the Office of Hearings and Appeals in the Department of Education (DoEd), the Federal Labor Relations Authority (FLRA), the Office of Financial Institution Adjudication, and the United States Postal Service. In addition, we made brief contact with the Department of the Interior. We also spoke to two additional entities involved in ALJ hiring, the Office of Personnel

¹² See 5 C.F.R., part 302.

Management and the Office of Management and Budget. Of 28 agencies employing ALJs, we conducted interviews with 13 (about half). However, those agencies account for 1,851 (96%) of the then-total of 1,931 ALJ. SSA accounts for 86 percent of that total. Most of the agencies that did not respond to our request for an interview employ three or fewer ALJs.

II. ALJs and Federal Agency Adjudication

As noted, the APA requires that either the agency itself, members of the agency itself, or “one or more” administrative law judges (ALJs) preside at hearings required to be conducted under the APA’s formal adjudication procedures.¹³ As a result, agencies across the federal government employ approximately 1,931 ALJs, the majority of whom are employed by SSA. According to the March 2017 tally on the OPM website, the number of ALJs employed by federal agencies was as follows, sorted by the number of ALJs in each agency:¹⁴

<u>Number of ALJs reported</u>	<u>Agencies reporting</u>
1,655	Social Security Administration
101	Department of Health and Human Services/Office of Medicare Hearings and Appeals
41	Labor Department
34	Nat’l Labor Relations Board
15	Federal Mine Safety and Health Review Commission Federal Energy Regulatory Commission
12	Occupational Safety and Health Review Commission
9	Interior Department
6	U.S. Coast Guard (Homeland Security Department) International Trade Commission
5	Department of Health and Human Services/Departmental Appeals Board Securities and Exchange Commission

¹³ 5 U.S.C. § 556(b). Many other agency proceedings are presided over by officials who are not ALJs. This report does not address the hiring of these officials, which have been referred to in another ACUS report as “non-ALJs.” See Kent Barnett et. al., *Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal* (Feb. 14, 2018), available at https://www.acus.gov/sites/default/files/documents/Non-ALJ%20Draft%20Report_2.pdf.

¹⁴ See ALJs by Agency, OPM, *supra* note 4. Our interviews with agency officials indicate that the number of ALJs in each agency is not likely to have changed significantly in the interim, although small differences in the number of ALJs currently employed were revealed.

- 3 Agriculture Department
Transportation Department (Office of the Secretary)
Environmental Protection Agency
National Transportation Safety Board
- 2 Education Department
Housing and Urban Development Department
Department of Justice (Drug Enforcement Administration)
Federal Labor Relations Authority
Federal Maritime Commission
Office of Financial Institution Adjudication
- 1 Consumer Financial Protection Bureau
Department of Justice (Executive Office for Immigration Review)
Federal Communications Commission
Federal Trade Commission
United States Postal Service
- 0 Commodity Futures Trading Commission¹⁵

A. Federal Administrative Hearings Conducted by ALJs

ALJs preside over three general categories of hearings, all of which are subject to the formal hearing provisions of sections 556 and 557 of the APA.¹⁶ The first category involves adversarial *on-the-record formal adjudication* subject to APA section 554.¹⁷ Such hearings are most similar to the adversarial trial proceedings of a typical judicial court and involve duties most similar to those of the Securities and Exchange Commission ALJs, whom the Supreme

¹⁵ At one time, the Commodity Futures Trading Commission (CFTC) employed two ALJs who presided over hearings involving claims for “reparations” brought by customers against commodities brokers who allegedly violated the Commodities Exchange Act. *See* 7 U.S.C. § 18. Currently, these hearings are presided over by a “Judgment Officer” (JO), not an ALJ, although CFTC rules allow ALJs to perform the functions of the JO. 17 C.F.R. § 12.2; 12 C.F.R. § 12.26(C); 12 C.F.R. § 12.201. CFTC rules relating to “Formal Decisional Proceedings” continue to refer to ALJs as the presiding officer. *See* 17 C.F.R. part 300, subpart E. Out of concern for the possible applicability of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), to the appointment of the CFTC’s JO, on April 9, 2018, the full CFTC issued an order ratifying the appointment of its existing JO and ordered the JO to reconsider the record in all pending cases. *See In re: Pending Administrative Hearings, Ratification and Reconsideration Order* (April 9, 2018), *available at* <https://www.cftc.gov/sites/default/files/2018-04/ogcorder040918.pdf>.

¹⁶ Previous Administrative Conference of the United States (ACUS) reports describe these hearings as the most formal “Type A” hearings. There are many more categories of more informal “Type B” and “Type C” hearings presided over by administrative judges and other adjudicators, who are outside the scope of this report.

¹⁷ “There shall preside at the taking of evidence—(1) the agency; (2) one or more members of the body which comprises the agency; or (3) one or more administrative law judges appointed under section 3105 of this title.” 5 U.S.C. § 556(b).

Court categorized as Article II “Officers of the United States” in *Lucia*.¹⁸ The second category constitutes *on-the-record formal rulemaking* proceedings that section 553 of the APA similarly subjects to section 556 and 557 formal hearing requirements. The Department of Agriculture is one of the very few agencies whose ALJs conduct these formal hearings within the rulemaking context. The third category involves the largest group of ALJs, those who work in the Social Security Administration. These SSA ALJs preside over *non-adversarial proceedings*, generally of a different level of complexity than the adversarial formal hearings used in most other administrative agencies.¹⁹ Although adjudicators who preside over SSA benefits determinations also bear the title of ALJ, they preside over hearings very different in form from the more adversarial enforcement proceedings conducted by ALJs in agencies like the SEC. Thus, the responsibilities of SSA ALJs look very different from the duties of ALJs in the more formal adversarial proceedings.

Section 554 of the APA²⁰ provides that agencies must hold formal hearings when a statute requires the agency to conduct adjudication “on the record after opportunity for an agency hearing,” subject to certain subject matter-related exceptions.²¹ The ALJ who presides over the

¹⁸ *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018).

¹⁹ After years of doubt over whether SSA adjudicators were ALJs, Congress resolved the question by providing, in section 371 of the Social Security Amendments of 1977, that SSA adjudicators “shall be deemed appointed . . . under and in accordance with section 3105 of title 5.” See Pub. L. No. 95-216, tit. III, § 371, 91 Stat. 1559. Although the language of this statute applies only to previously appointed SSA ALJs, it is our understanding that all SSA ALJs subsequently appointed have been considered appointed pursuant to 5 U.S.C. § 3105 and thus are within the scope of this report. This would also make their hiring subject to Executive Order 13843 since that order on its face appears to apply to all ALJs hired by the federal government.

²⁰ To be precise, section 554 delineates the place where this provision appears within Title V of the United States Code. The Administrative Procedure Act (APA) itself, as enacted, included distinct section numbering. But this section 554 reference, like the other section references in this report, have come to be known colloquially as the relevant APA section numbers.

²¹ See 5 U.S.C. § 554(a)(1)-(6) (excluding from the Section 554, 556, and 557 procedural requirements any adjudicative matters that involve: “(1) a matter subject to a subsequent trial of the law and the facts de novo in a court; (2) the selection or tenure of an employee, except [an] administrative law judge appointed under section 3105 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; or (6) the certification of worker representatives”). Hearings are to proceed, subject to the procedural requirements of sections

hearing is to make the initial or recommended adjudicative decision for the agency.²² The presiding ALJ in section 554 adjudications is subject to certain separation-of-functions limitations barring the ALJ from involvement in agency investigations and limiting ex parte communication on factual issues related to the case.²³ For example, agency investigative or prosecuting officials may not direct or supervise ALJs who preside over formal adjudicative hearings.²⁴ And an agency official who participates in prosecuting or investigating a particular case is barred from participating as an adjudicator in that case other than as a witness or counsel in the case.²⁵ Agency heads are not subject to these separation-of-function limitations when they, rather than an ALJ, preside over adjudicative proceedings.²⁶

In addition to formal adjudicative proceedings, ALJs (or agencies or their members) must preside over the hearings associated with formal rulemaking proceedings.²⁷ Such proceedings, subject to the same APA section 556 and 557 requirements as formal adjudication, must comply with significantly more APA procedural mandates than the informal notice-and-comment rulemaking requirements of APA Section 553, which lack any mandated in-person hearing opportunity. That said, in light of the Supreme Court's 1973 decision in *United States v. Florida East Coast Railway*²⁸ (*FECR*) and 1972 decision in *United States v. Allegheny-Ludlum Steel*

556 and 557 of the APA, when parties to the adjudication are unable to reach an agreement by consent. *Id.* § 554(c)(2).

²² This requirement is subject to the ALJ's continued availability to the agency. *See id.* § 554(d).

²³ *Id.* § 554(d), (d)(1) ("Except to the extent required for the disposition of ex parte matters as authorized by law," the presiding ALJ "may not . . . consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate.").

²⁴ *Id.* § 554(d)(2).

²⁵ *See id.* § 554(d)(2).

²⁶ The separation-of-functions protections also do not apply to matters involving initial license applications or public utility rates. *See id.* § 554(d).

²⁷ *See id.* § 553(c) (subjecting rulemakings required to be "on the record after opportunity for an agency hearing" to comply with sections 556 and 557 of the APA).

²⁸ 410 U.S. 224 (1973).

Corp.,²⁹ very few agencies are considered subject to formal rulemaking requirements. The Court in *FECR* incorporated the earlier case's interpretation that administrative rulemaking must comply with section 556 and 557 hearing requirements "only where the agency statute, in addition to providing a hearing, prescribes explicitly that it be 'on the record.'"³⁰ Therefore, agencies rarely engage in formal rulemaking and consequently rarely use ALJs in the promulgation of rules, instead favoring the more informal Section 553(c) notice-and-comment rulemaking procedures³¹ or hybrid rulemaking statutory requirements that do not rise to the level of a full formal hearing.³² By contrast, many more agencies engage in formal adjudication, in part because the Supreme Court has not applied *FECR*'s constricted interpretation of formal hearing triggering requirements beyond the rulemaking context.³³ One notable exception in current practice is the U.S. Department of Agriculture (USDA), which conducts formal

²⁹ 406 U.S. 742 (1972).

³⁰ See GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 324 & n.15 (7th ed. 2016) (internal quotation omitted) (analyzing and recapping the two cases). The Court in *Allegheny-Ludlum* clarified that a statute did not need to include "the precise words 'on the record'" to trigger a formal rulemaking requirement. See *id.* But since the Court handed down the 1973 opinion in *Florida East Coast Railway*, only statutes containing the precise phrase "on the record" have been interpreted to mandate formal rulemaking proceedings. See *id.* at 332.

³¹ 5 U.S.C. § 553(c) (requiring agencies to incorporate a statement of basis and purpose into published substantive rules and to "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments" but not necessarily provide any "opportunity for oral presentation").

³² See, e.g., "A Brief Overview of Rulemaking and Judicial Review," Todd Garvey, Congressional Research Service, at 4 (2017).

³³ See, e.g., *City of Taunton, Massachusetts v. EPA*, 895 F.3d 120, 129 (1st Cir. 2018) (explaining that the First Circuit has afforded *Chevron* deference to agency interpretations of whether ambiguous statutory public hearing requirements trigger compliance with the APA's formal adjudication requirements); *Chemical Waste Management v. EPA*, 873 F.2d 1477, 1480-83 (D.C. Cir. 1989) (allocating *Chevron* deference to agency interpretations of whether their statutory hearing requirements trigger mandatory compliance with the APA's formal adjudication procedures). See also "Equal Employment Opportunity Commission: Evaluating the Status and Placement of Adjudicators in the Federal Sector Hearing Program," ACUS, at 23-24 (Mar. 31, 2014), available at <https://www.acus.gov/sites/default/files/documents/FINAL%20EEOC%20Final%20Report%20%5B3-31-14%5D.pdf> (describing the deference given to agencies for their interpretations of whether statutes require them to engage in formal rather than informal adjudication); LAWSON, *supra* note 30, at 341, 350-51.

rulemaking proceedings under the APA³⁴ that must comply with the formal hearing requirements of APA sections 556 and 557.³⁵

B. The APA’s Specification of ALJ Duties in Formal Hearings

The formal hearing provisions in APA sections 556 and 557 vest extensive powers and duties in ALJs who preside over formal rulemaking or adjudication proceedings, including the authority to administer oaths, issue subpoenas, rule on admission of evidence, take depositions, hold settlement conferences, and make initial or recommended decisions on behalf of the agency, among other responsibilities.³⁶

The APA makes clear that ALJ impartiality is important. Section 556 mandates that adjudicators presiding over formal hearings conduct themselves “in an impartial manner.”³⁷ ALJs must have the judgment to know when to recuse themselves from agency proceedings. ALJs may at any time deem themselves to be disqualified from presiding over formal hearing proceedings; if a party files an affidavit claiming that an ALJ has personal bias or suffers from

³⁴ *See, e.g.*, Rules of Practice and Procedure Governing Formal Rulemaking Proceedings Instituted by the Secretary, 7 C.F.R. Part 1, 82 Fed. Reg. 51,149, 51,149-51,154 (2017) (adopting a final rule that specified procedural requirements for “formal rulemaking proceedings instituted by the Secretary”). *Cf.* Aaron L. Nielson, *In Defense of Formal Rulemaking*, 75 OHIO STATE L.J. 237, 273 (2014) (describing the Marine Mammal Protection Act as also including formal rulemaking requirements).

³⁵ Agencies conducting formal hearings for rulemaking or adjudication may provide more, but not fewer, procedural safeguards than the section 556 and 557 requirements. Section 559 of Title V specifies that the formal hearing and other procedural APA requirements “do not limit or repeal *additional* requirements imposed by statute or otherwise recognized by law.” 5 U.S.C. § 559 (emphasis added). But statutes enacted subsequent to the APA may not supersede or modify its requirements unless they expressly do so. *Id.* Those requirements include the specification that agencies required to conduct on-the-record hearings must comply with section 556 and 557 procedures. *See id.* §§ 553(c), 554(a), 556(a), 557(a). *See also id.* § 556(a) (“This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute.”).

³⁶ *See* 5 U.S.C. § 556(c)(1)-(11) (listing these and other authorities, subject to the agency’s published rules and limits on the agency’s general authority); *id.* § 557(b).

³⁷ 5 U.S.C. § 556(b).

another disqualifying conflict, the agency is to resolve all such claims on the record.³⁸ ALJs also must comply with the limitations on ex parte communications specified in section 557(d), which includes a ban on such communications and a requirement that a summary of any such communications that occur in violation of the ban be placed in the public record and that a party who knowingly makes such communications may be required “to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.”³⁹

III. ALJ Hiring Practices Prior to *Lucia* and EO 13843

A. Pre-*Lucia* and EO Practices

Before the issuance of the EO, the primary system for hiring administrative law judges was administered by the Office of Personnel Management.⁴⁰ This process included a competitive examination and rating system. ALJ applicants were required to be licensed attorneys under state law or other United States jurisdiction and have at least seven years of litigation experience at the federal, state or local level. Applicants meeting these requirements, including passing the OPM examination, were assigned a numerical score on a 100-point scale, taking into account their qualifications, including up to 60 points based on the value of their previous experience, and up to 40 points based on other professional qualifications. In addition,

³⁸ *See id.* In December 2018, ACUS issued recommendations further addressing recusal considerations and procedures, in formal as well as informal agency adjudication. *See* Recusal Rules for Administrative Adjudicators, Administrative Conference Recommendation 2018-4 (Dec. 13, 2018).

³⁹ *See* 5 U.S.C. § 557(d)(2).

⁴⁰ Background on pre-*Lucia* ALJ hiring is drawn from multiple sources including the statutes and regulations governing competitive service hiring, *see, e.g.*, 5 U.S.C. §§ 3301-3302, 5 U.S.C. § 3105, 5 C.F.R. Part 2, 5 C.F.R. Part 302, and 5 C.F.R. Part 930, Subpart B; agency interviews; VANESSA K. BURROWS, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW (Congressional Research Service Report, April 13, 2010); and Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on our Invisible Judiciary*, 33 ADMIN. L. REV. 109 (1981).

by statute and rule, veterans received either five or ten veterans' preference points.⁴¹ These points were added to the competitive service point scoring system; certain veteran applicants, therefore, could receive a top score of 110.⁴² The score might also be adjusted based on the applicant's structured interview and writing sample, although information gathered from our interviews with agency officials suggests that in practice such adjustments were relatively minor.

Upon the conclusion of the scoring process, the top three-scoring applicants were placed on a list of eligible candidates. Agencies seeking to hire candidates who were not currently working as ALJs⁴³ could only hire from that list.⁴⁴ OPM would take into account geographical requirements in constructing the list of the top three applicants. According to the interviews we conducted, application of the veterans' preference points was often outcome-determinative in achieving placement on the OPM's eligible candidates list.

At one time, some agencies made special arrangements with OPM, known as "selective certification," to hire ALJs lower on the list but with subject-matter expertise. For example, the Federal Communications Commission used this process to hire ALJs with experience either litigating or deciding cases in the field of communications law.⁴⁵ In practice, this allowed agencies to appoint their former staff members as ALJs. This process was controversial,

⁴¹ See 5 U.S.C. § 3309 (providing for the awarding of an extra 10 or 5 points to "preference eligible" veteran applicants who "receive[] a passing grade in an examination for entrance into the competitive service"); 5 U.S.C. § 2108 (defining "veteran" and "disabled veteran" for purposes of this process); 5 U.S.C. § 2108a (regulating the preference awarded to veterans in competitive service application processes); 5 C.F.R. at § 930.203(e).

⁴² See Veterans Services, OPM, <https://www.opm.gov/policy-data-oversight/veterans-services/vet-guide-for-hr-professionals/>.

⁴³ As this report further discusses below, many agencies with more adversarial adjudicative proceedings had instead been utilizing an alternative competitive service procedure to hire ALJs by which agencies could acquire OPM approval to hire an ALJ already working for another agency through a competitive service mechanism known as the interagency transfer process. Although this process required OPM approval, it did not require the OPM ranking and screening processes that was mandatory to become eligible for the competitive service system in the first place.

⁴⁴ See 5 U.S.C. § 3317.

⁴⁵ See Lubbers, *supra* note 40, at 117.

including opposition from the American Bar Association Section on Administrative Law and Regulatory Practice, and it was discontinued by OPM in 1984.⁴⁶ Some agencies continued to press OPM to allow them to hire ALJs based on factors that were not captured in the OPM scoring system, such as litigation experience—but OPM declined to alter the default competitive-service requirements for ALJ hiring.⁴⁷

The OPM competitive service hiring process for ALJs was used almost exclusively to fill ALJ openings at the Social Security Administration, where adjudicators preside over benefits distribution proceedings rather than the more trial-like adversarial proceedings used for enforcement matters and other formal APA adjudications. As the interviews conducted for this study show, agencies engaged in adversarial hearings subject to the formal hearing requirements of APA sections 556 and 557 rarely used the OPM hiring process. Such agencies conducting adversarial adjudication instead selected ALJs through an interagency transfer process in which agencies could hire individuals already working as ALJs. This transfer process was subject to no competitive service criteria at all. Of course, all incumbent ALJs had previously been hired pursuant to the OPM process and thus had at one point qualified to become an ALJ within the competitive service. Agencies hiring ALJs away from other agencies found it easier to hire based on qualifications they found important, such as subject-matter expertise and adversarial litigation experience. It was apparently common for individuals to become SSA ALJs knowing that in a few years they might be hired by an agency where they were previously employed or before which they had practiced.

⁴⁶ See Burrows, *supra* note 40, at 6; Kent Barnett, *Resolving the ALJ Quandary*, 66 VAND. L. REV. 797, 805-06 (discussing “OPM’s rejection of selective certification” followed by a report by an association of ALJs to President-elect Obama in 2008 expressing general opposition to OPM’s role in the ALJ hiring process).

⁴⁷ See Barnett, *supra* note 46, at 805-06.

B. Description of the *Lucia* Decision

In 2018, the U.S. Supreme Court held, in *Lucia v. Securities and Exchange Commission* that administrative law judges in the SEC are “Officers of the United States” subject to the Appointments Clause requirements of Article II of the U.S. Constitution.⁴⁸ The Appointments Clause specifies that any such officer must be appointed by the President of the United States with Senate consent, except that Congress may, by law, provide for the appointment of “inferior Officers” by the president alone, a head of a department, or a court of law.⁴⁹ The Court held that the SEC’s ALJs are Article II “officers” and thus their appointment by an SEC staff member—the agency’s chief ALJ—was unconstitutional.

The Court based its holding on precedent finding that government officials who exercise “significant authority” in a “continuing position” are “officers of the United States” for Appointments Clause purposes.⁵⁰ Specifically, in 1991, in *Freytag v. Commissioner*,⁵¹ the Supreme Court had held that special trial judges (STJs) for the U.S. Tax Court were Article II “officers,” and the Court in *Lucia* found the SEC ALJs to be “near-carbon copies” of those officials.⁵² Even though the “significant authority” standard is “framed in general terms,” making it susceptible to debates over its precise meaning, the Court found it did not need to clarify the standard in *Lucia* because the SEC ALJs have duties very similar to duties that the Court previously found to constitute “significant authority.”⁵³

⁴⁸ *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

⁴⁹ U.S. CONST. art. II, § 2, cl. 2.

⁵⁰ *Lucia*, 138 S. Ct. at 2051 (internal quotation omitted).

⁵¹ 501 U.S. 868 (1991).

⁵² *Lucia*, 138 S. Ct. at 2052.

⁵³ *Id.* at 2051-52.

Duties of the SEC ALJs that the Court found relevant to their Article II “officer” status included the fact that they held “a continuing office established by law.”⁵⁴ In addition, the Court observed that SEC ALJs “exercise the same ‘significant discretion’ when carrying out the same ‘important functions’ as STJs do.”⁵⁵ In the Court’s estimation, both categories of adjudicative officials had the complete authority “needed to ensure fair and orderly adversarial hearings—indeed, nearly all the tools of federal trial judges.”⁵⁶

The Court then broke down the ALJ and STJ powers into four overlapping categories. Both categories of officers: (1) take testimony, receive evidence, examine witnesses, and take pre-hearing depositions; (2) conduct trials, which includes the administration of oaths and regulation of the conduct the counsel and parties; (3) rule on evidence admissibility, thereby critically shaping the administrative record; and (4) maintain authority to enforce discovery orders, including through punishment of contemptuous conduct.⁵⁷ Thus, as the Court relied on factors drawn “point for point—straight from *Freytag*’s list—the Commission’s ALJs have equivalent duties and powers as STJs in conducting adversarial inquiries.”⁵⁸

The *Lucia* Court then noted that the SEC ALJs’ role in issuing decisions was even more powerful than the decision-issuing role of the “officer” STJs. Whereas the STJs’ proposed

⁵⁴ *Id.* at 2053.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* The Court found it irrelevant to Article II “officer” status that the ALJs’ discovery-related enforcement authority encompassed less severe sanctions than the enforcement power held by the special trial judges (STJs). *See id.* at 2054. The Court observed that in describing the STJs’ “officer”-level powers the *Freytag* opinion “referenced only the general power to enforce compliance with discovery orders, not any particular method of doing so.” *Id.* (internal quotation omitted). The Securities and Exchange Commission (SEC) ALJs’ power to exclude violators of discovery orders from the adjudicative proceedings or summarily suspend a wayward attorney from representing his client counted as having enforcement compliance power. *See id.* The Court also specified that the Article II analysis was not impacted in any way by the purportedly lesser deference given to ALJ factfinding determinations than to STJ findings of fact. *See id.* Indeed, the Court in *Lucia* observed that “[t]he *Freytag* Court never suggested that the deference given to STJs’ factual findings mattered to its Appointments Clause analysis,” and, “anyway, the Commission often accords a similar deference to its ALJs” as STJ factual conclusions receive. *Id.*

⁵⁸ *Id.* at 2053.

findings and opinions in major cases always must be reviewed by a higher-level Tax Court judge, “the SEC can decide against reviewing an ALJ decision at all.”⁵⁹ When the SEC declines to review an ALJ decision and a party fails to file a petition for review, the ALJ opinion becomes the final action of the SEC upon the Commission’s issuance of “an order that the decision has become final as to that party.”⁶⁰ The *Lucia* Court expressly stated that the question whether an official has final decisionmaking authority is nondispositive for determination of Article II “officer” status. But the Court also noted that the ALJs’ power to issue decisions with “potentially more independent effect” than those of STJs meant that the ALJs’ “officer” status followed *a fortiori* from *Freytag*’s holding based on the other characteristics that the STJs and SEC ALJs share.⁶¹

The Court left unanswered several questions related to the constitutional status of ALJs. For example, the Court refused to decide whether the complete set of duties shared by ALJs and STJs is essential for an adjudicative official to merit Article II “officer” status.⁶² The four listed categories of ALJ duties were sufficient, but perhaps not necessary, to constitute “significant authority.” Leaving this issue as an open question is an apparent corrective to past lower court opinions that have analyzed Article II “officer” status based on whether the challenged official has each and every one of the duties discussed in Supreme Court precedent analyzing the Appointments Clause status of a similar position.⁶³ Under *Lucia*, an administrative adjudicator

⁵⁹ *Id.* at 2053-54.

⁶⁰ 17 C.F.R. § 201.360(d)(2). *See also* 15 U.S.C. § 78d-1(b)-(c) (providing that decisions by the Commission and the affected parties not to initiate review of an ALJ’s action have the legal effect of causing that action to “be deemed the action of the Commission”).

⁶¹ *See Lucia*, 138 S. Ct. at 2053-54.

⁶² *Id.* at 2054 (clarifying the opinion’s discussion of discovery compliance powers by explaining, “(even supposing, which we do not decide, that each of those items is necessary for someone conducting adversarial hearings to count as an officer”).

⁶³ *See, e.g., Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277, 284-85 (D.C. Cir. 2016) (judgment vacated, Feb. 16, 2017) (reasoning that SEC ALJs were not Article II “officers” because they did not hold all of the duties

is not necessarily off the hook for Appointments Clause compliance simply because that adjudicator lacks one or some of the duties held by the Commission’s ALJs.

Further, the Court also technically did not specify whether all ALJs or other categories of agency adjudicators—even all ALJs presiding over adversarial hearings at other agencies—are Article II “officers.” In the Court’s description of its holding, it specified that “*the Commission’s* ALJs are ‘Officers of the United States,’ subject to the Appointments Clause.”⁶⁴ As a practical matter, any ALJ presiding over an Administrative Procedure Act (APA)-style formal hearing performs duties that are broadly similar to those determined by *Lucia* is likely to pass the bar for Article II “officer” status⁶⁵ But the *Lucia* Court wrote its opinion in very narrow terms, expressly deciding only the specific controversy over SEC ALJs that was before it.

The *Lucia* Court further declined to address precisely what was required to effectuate constitutional Article II appointments for the Commission’s ALJs. At a minimum, moving forward, the SEC ALJs must be appointed by an authorized actor under the Appointments Clause.⁶⁶ The Appointments Clause’s default rule requires “Officers of the United States” to be appointed by the President with Senate consent.⁶⁷ However, for “inferior Officers,” the Clause allows Congress to specify, by law, that the appointments may be made by the President alone, a

held by the STJs of *Freytag* and noting that this conclusion directly followed from D.C. Circuit precedent in *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000)).

⁶⁴ See *Lucia*, 138 S. Ct. at 2055 (emphasis added).

⁶⁵ Cf., e.g., *Jones Brothers, Inc. v. Secretary of Labor*, 898 F.3d 669 (6th Cir. 2018) (evaluating, among other issues, whether ALJs in the Federal Mine Safety Health Review Commission (FMSHRC) are Article II “officers” and finding that these ALJs’ Article II status follows directly from *Lucia* in light of the similarity of the duties of FMSHRC ALJs and SEC ALJs).

⁶⁶ See *Lucia*, 138 S. Ct. at 2055 (holding that the Article II “officer” status of the SEC’s ALJs subjects them to Appointments Clause requirements).

⁶⁷ U.S. CONST. art. II, § 2, cl. 2 (“[H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .”).

department head, or a court of law.⁶⁸ Under the text of Article II, if Congress does not affirmatively establish one of these alternative mechanisms, the default requirement of presidential nomination subject to Senate consent applies, even to “inferior Officers.”⁶⁹

According to the *Lucia* Court, “[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.”⁷⁰ In its 2010 opinion in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court described inferior officers as “‘officers whose work is directed and supervised at some level’ by other officers appointed by the President with the Senate’s consent.”⁷¹ No party in *Lucia* challenged the SEC ALJs’ inclusion in this category.⁷²

There are two derivative questions that arise with respect to the appointment of ALJs as inferior officers by the heads of their department. First, what entity qualifies as the “head” of an ALJ’s respective agency or department? Second, which federal entities qualify as “departments”?

Both of these questions were easily answered by the *Lucia* Court with respect to the ALJs of the Securities and Exchange Commission. In *Free Enterprise Fund*, the Court had specified that the SEC itself (composed of multiple commissioners) qualifies as a “Head[] of

⁶⁸ See *id.* (“[B]ut the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.”).

⁶⁹ See *id.* (permitting Congress to vest “by law” the appointment of inferior officers in something other than the President with Senate consent).

⁷⁰ See *Lucia*, 138 S. Ct. at 2051 n.3.

⁷¹ See *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010) (quoting *Edmond v. United States*, 520 U.S. 651, 662-63 (1997)). (“[I]nferior officers are officers whose work is directed and supervised at some level by other officers appointed by the President with the Senate’s consent.” (internal quotation omitted)).

⁷² Cf. *Free Enter. Fund*, 561 U.S. at 510 (describing principal officers and observing that one “powerful” indicator of inferior officer status is the ability to remove an officer “at will and without cause,” leading to the Court’s conclusion in that case that without tenure protections, Public Company Accounting Oversight Board board members did not qualify as principal officers (internal quotation omitted)).

Department[]” under the Appointments Clause.⁷³ The Court defined a “department” within the meaning of the Appointments Clause to be “a freestanding component of the Executive Branch, not subordinate to or contained within any other such component.”⁷⁴ This definition means that in addition to the traditional executive departments, each independent agency not situated within any other agency is likely to be considered a “department” for Appointments Clause purposes. Because Congress, in 5 U.S.C. § 3105, established that “each agency” has the authority to appoint its ALJs, the SEC had the legal authority to make the appointments.⁷⁵ *Free Enterprise Fund* further found that the full Commission could constitute the department’s “Head” because, by statute, SEC powers “are generally vested in the Commissioners jointly, not the Chairman alone” and “[t]he Commissioners do not report to the Chairman, who exercises administrative and executive functions subject to the full Commission’s policies.”⁷⁶

This does not necessarily mean that every agency that arguably has the statutory authority to appoint ALJs is considered a “Department[]” for Appointments Clause purposes. As mentioned above, under 5 U.S.C. § 3105, agencies have the statutory authority to appoint their ALJs. Under the APA, at least for the purposes of certain procedural requirements such as the Section 556 and 557 formal hearing requirements, the general definition of “agency” includes

⁷³ *Lucia*, 138 S. Ct. at 2050 (citing *Free Enter. Fund*, 561 U.S. at 510-11).

⁷⁴ *Free Enter. Fund*, 561 U.S. at 511 (describing a department alternatively as “a free-standing, self-contained entity in the Executive Branch” (internal quotation omitted)).

⁷⁵ 5 U.S.C. § 3105 (“Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.”).

⁷⁶ *Free Enter. Fund*, 561 U.S. at 512 & n.13. The *Free Enterprise Fund* Court did not clarify in which circumstances a chairman as opposed to the entire multi-member administrative board or commission would qualify as the department head for purposes of the Appointments Clause. Nor did *Free Enterprise Fund* address whether a chairman and full commission could simultaneously constitute a department’s “Head.” *But cf. id.* at 513 (citing the Classification Act of 1923’s statutory definition of “the head of the department,” which included both “the officer or group of officers . . . who are not subordinate or responsible to any other officer of the department” (internal quotation omitted) (emphasis in *Free Enterprise Fund* opinion)). That said, the Reorganization Act provisions cited by the Court indicated that, as a statutory matter, an agency head could be either “an individual or a commission or board with more than one member” as long as the people serving in those positions had been appointed by the President with Senate consent. *See* 5 U.S.C. § 904, *cited in Free. Enter. Fund*, 561 U.S. at 512.

“each authority of the Government of the United States, whether or not it is within or subject to review by another agency.”⁷⁷ As Professor Kent Barnett has noted in his extensive scholarship on agency adjudicators, not all of these agencies would qualify as department heads under *Free Enterprise Fund*.⁷⁸ In particular, under Supreme Court precedent, an agency is not a department for Appointments Clause purposes if it is not “a freestanding component of the Executive Branch” and instead is “subordinate to or contained within any other such component.”⁷⁹ Thus, in light of *Lucia*, the implication from the Court’s department head definition in *Free Enterprise Fund* and Professor Barnett’s scholarship is that some ALJs might need appointment, not by the head of their specific agency, but instead by the head of the larger department or commission over their agency.⁸⁰

It is unclear whether Section 3105 alone grants all Appointments Clause department heads the legal power to appoint ALJs for their subordinate agencies.⁸¹ *Lucia* does not address this complication since in that case the SEC clearly had the statutory authority to make the appointments. If the phrase “[e]ach agency” in Section 3105 is interpreted to grant appointment power only to the subordinate agency employing an ALJ, an agency would need to consider whether there is an alternative source of statutory authority for its department head to appoint its ALJs. Alternatively, APA section 551 generally defines “agency” to include “each authority of

⁷⁷ The definition of “agency” excludes Congress, federal courts, U.S. territories, the District of Columbia, military tribunals, and “agencies composed of representatives of the parties . . . to the disputes determined by them.” See 5 U.S.C. § 551(1)(A)-(H). Section 551 applies this definition to the surrounding subchapter, which includes sections 551 through 559 of Title V.

⁷⁸ Barnett, *supra* note 46, at 810 & n.77 (listing “the Food and Drug Administration, the Federal Energy Regulatory Commission, and the Drug Enforcement Administration,” as examples of agencies under the APA that do not qualify as departments under Article II).

⁷⁹ See *Free Enter. Fund*, 561 U.S. at 511.

⁸⁰ See *id.* Cf. Kent Barnett, *The Consumer Financial Protection Bureau’s Appointment with Trouble*, 60 AM. U. L. REV. 1459, 1460-62, 1478-81 (2011) (noting that the Consumer Financial Protection Bureau’s relationship with the Federal Reserve Board might place it outside the constitutional definition of Article II “departments”);

⁸¹ See Barnett, *supra* note 46, at 811 n.77.

the Government of the United States,” which arguably would include both the ALJ’s directly supervisory agency as well as the larger department that encompasses the subordinate agency.

C. Agency Action to Address Pre-*Lucia* ALJ Hiring by a Non-Department Head

Even though the Court clearly indicated that the Securities and Exchange Commission was a valid appointing authority for inferior officers under the Appointments Clause, the Court declined to specify precisely what actions the SEC needed to take to properly appoint the administrative law judges who had originally been hired by staff. The Court noted that, prior to its *Lucia* decision, the SEC had acted to ratify the appointments of its ALJs, but the Court explained that the adequacy of this ratification was not before the Court.⁸² (The Court had granted review only of the question whether SEC ALJs are “Officers of the United States.”)

Some courts and agencies have concluded that the most cautious approach is for agencies to take two steps to comply with *Lucia*. First, department heads have been ratifying the appointment of any ALJs not previously appointed by a department head.⁸³ Second, some entities have concluded that it is preferable for agencies to reassign pending cases that had been before an improperly appointed ALJ to another ALJ even if the first ALJ’s appointment has been ratified by a department head.⁸⁴ The Supreme Court took this step in *Lucia* “[t]o cure the

⁸² See *Lucia*, 138 S. Ct. at 2055.

⁸³ The Sixth Circuit approved of ratification in *Jones Brothers, Inc. v. Secretary of Labor*, 898 F.3d 669, 679 (6th Cir. 2018).

⁸⁴ That said, the Court in *Lucia* explicitly declined to conclude that this step was constitutionally required in any case other than the *Lucia* litigation itself. In fact, the Court indicated that there might be cases where it was permissible for the same adjudicator to rehear the case on remand after correction of the earlier Article II violation. See *Lucia*, 138 S. Ct. at 2055 & nn. 5-6.

constitutional error”⁸⁵ as did the Court of Appeals for the Sixth Circuit in its decision applying *Lucia* to another agency’s ALJs.⁸⁶

D. Executive Order 13843 Abolishing the Centralized OPM ALJ Hiring Process

On July 10, 2018, the President issued Executive Order 13843, exempting administrative law judges from competitive service hiring procedures and placing them in a new category of excepted service.⁸⁷ Section 1 of the executive order reiterates the importance of “a professional cadre of administrative law judges” who “are impartial and committed to the rule of law.” Because ALJs “exercise significant discretion” and “interact with the public on issues of significance,” it is important that they “display appropriate temperament, legal acumen, impartiality, and sound judgment.” In addition, they must “clearly communicate their decisions to the parties who appear before them, the agencies that oversee them, and the public that entrusts them with authority.”⁸⁸

The EO observes that because ALJs’ responsibilities have increased and “ALJ decisions have, with increasing frequency, become the final word of the agencies they serve,” the Supreme Court in *Lucia* concluded that “at least some—and perhaps all—ALJs are ‘Officers of the United States’” subject to the Appointments Clause.⁸⁹ The executive order further notes that the ALJs’

⁸⁵ 138 S. Ct. at 2055.

⁸⁶ See *Jones Brothers, Inc.*, 898 F.3d at 679.

⁸⁷ Executive Order 13843 relies on the President’s statutory authority under 5 U.S.C. §§ 3301-3302. Section 3301 authorizes the President to “prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service” and to “ascertain the fitness of applicants as to age, health, character, knowledge, and ability for the employment sought.” 5 U.S.C. §§ 3301(1)-(2). Section 3302 authorizes the President also to prescribe rules providing for “necessary exceptions of positions from the competitive service.” 5 U.S.C. § 3302(2). For thoughtful discussion of the executive order from a policy perspective, see *Examining Changes to Social Security’s Disability Appeals Process: Hearing Before the H. Comm. on Ways & Means*, 115th Cong. (July 25, 2018) (statement of Hon. Ronald A. Cass, President, Cass & Associates), available at <https://docs.house.gov/meetings/WM/WM01/20180725/108602/HHRG-115-WM01-TTF-CassR-20180725.pdf>.

⁸⁸ See Executive Order 13843, § 1, para. 1.

⁸⁹ See *id.* § 1, para. 2.

Article II officer status may raise questions about “whether competitive examination and competitive service selection procedures are compatible with the discretion an agency head must possess under the Appointments Clause in selecting ALJs.”⁹⁰ Irrespective of the constitutional dimensions of these issues, the executive order as a matter of policy excepts from the competitive service all ALJs who preside over any type of hearing.⁹¹

Pursuant to presidential authority to provide “necessary exceptions of positions from the competitive service” as warranted by “conditions of good administration,”⁹² the executive order excepts ALJs from “competitive hiring rules and examinations” to give agency heads additional flexibility in assessing prospective appointees.⁹³ In exercising that flexibility, the executive order calls on agencies to look for “critical qualities in ALJ candidates, such as work ethic, judgment, and ability to meet the particular needs of the agency.”⁹⁴ The executive order predicts that these changes will enable agencies to assess ALJ candidates without proceeding through complicated hiring procedures that may not necessarily reflect the agency’s specific needs and will promote more confidence in agency adjudications.⁹⁵

Section 2 of the executive order mandates that ALJs be appointed under a new Schedule E of the excepted service that section 3 of the order creates. Section 3 of the order amends Civil Service Rule VI to require the Office of Personnel Management (OPM) to “list the position of

⁹⁰ *Id.* § 1, para. 3. *See also* Civil-Service Commission, 13 Op. Atty’ Gen. 516, 516 (1871) (concluding that “[t]he right of Congress to prescribe qualifications for office is limited by the necessity of leaving scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment,” so an examining board cannot bind the appointing authority to its selection of the fittest candidate even though the board’s examination can inform the selection and Congress can prescribe mandatory qualifications for a class of persons to fill an office); Jennifer L. Mascott, *Who are “Officers of the United States”?*, 70 STAN. L. REV. 443, 551-56 (2018) (addressing potential constitutional issues related to the civil service selection of Article II officers).

⁹¹ *See id.* § 1, para. 3.

⁹² 5 U.S.C. § 3302(1).

⁹³ Executive Order 13843, § 1, para. 4.

⁹⁴ *Id.*

⁹⁵ *See id.*

administrative law judge in Schedule E.”⁹⁶ Under the order, the new Schedule E places ALJs in the excepted service and provides “that appointment to this position not be subject to the requirements of 5 C.F.R., part 302, including examination and rating requirements, though each agency shall follow the principle of veteran preference as far as administratively feasible.”⁹⁷

Officials who are exempt from excepted service requirements, like ALJs under the new Schedule E, generally are subject to veterans’ preferences only “as far as administratively feasible.”⁹⁸ Such positions include, for example, government attorneys.⁹⁹ A 2018 OPM study of hiring policies for the excepted service highlighted the DOJ’s attorney hiring policy as “a noteworthy example of applying the ‘administratively feasible’ provision.”¹⁰⁰ The policy requires documentation of the consideration of veterans during the relevant hiring process and provides that “when all relevant considerations for the position are deemed equal, the selecting official must offer the position to a preference eligible candidate as opposed to an equally well-qualified, non-preference eligible candidate.”¹⁰¹ This policy is not mandated by OPM but rather represents DOJ’s own action to comply with the feasibility instruction. According to OPM, only 36 percent of the agencies that agreed to participate in the OPM study have policies in place that address the “administratively feasible” veterans provision.¹⁰²

Section 3(ii) of the order then amends 5 C.F.R. § 6.3(b) to permit “appointments and position changes in the excepted service” to be “made in accordance with such regulations and

⁹⁶ *Id.* § 3(i) (amending 5 C.F.R. § 6.2, which specifies the “[s]chedules of excepted positions”).

⁹⁷ *Id.*

⁹⁸ *See* 5 C.F.R. § 302.101(c).

⁹⁹ *See* 5 C.F.R. § 302.101(c)(8).

¹⁰⁰ *Excepted Service Hiring Authorities: Their Use and Effectiveness in the Executive Branch*, U.S. Office of Personnel Management, at 28 (July 2018), available at <https://www.chcoc.gov/content/opm-special-study-%E2%80%93-93-excepted-service-hiring-authorities-their-use-and-effectiveness>).

¹⁰¹ *Id.*

¹⁰² *Id.*

practices as the head of the agency concerned finds necessary.”¹⁰³ The core difference between the new ALJ hiring process under the executive order and the previous competitive service requirements is that ALJ hiring evaluations are now to be managed internally within each agency subject to that agency’s particularized needs rather than by the centralized authority of OPM.

The executive order calls for merit-based hiring of a highly qualified, impartial ALJ corps but through agency-specific criteria as implemented by the agency or department head. The executive order’s only explicit minimum requirement for new ALJ hires is that the appointee possess an active law license, have judicial status in “States that prohibit sitting judges from maintaining ‘active’ status to practice law,” or be in “good standing” in “States where the licensing authority considers ‘good standing’ as having a current license to practice law.”¹⁰⁴ By providing that ALJ appointments “may be subject to additional agency requirements where appropriate,”¹⁰⁵ the EO leaves it to each agency to determine its own selection criteria beyond the EO’s minimum requirements.

Incumbent ALJs as of July 10, 2018, “shall remain in the competitive service as long as they remain in their current positions.”¹⁰⁶ But any incumbent ALJ accepting a new appointment

¹⁰³ The order stipulates that this authority must be exercised only “[t]o the extent permitted by law and the provisions of this part,” which refers to Part 6 of 5 C.F.R. Subchapter A that encompasses 5 C.F.R. §§ 6.1-6.8.) See Executive Order 13843 § 3(ii). The agency head’s regulations for hiring excepted service ALJs also are “subject to the suitability and fitness requirements of the applicable Civil Service Rules and Regulations.” Executive Order 13843 § 3(ii). Some of these requirements include the stipulations that “[l]ike other excepted service appointments, ALJ appointments are generally subject to investigation, a determination of fitness, a determination of eligibility for logical and physical access to agency systems and facilities, and, where applicable, a determination of national security eligibility.” See Dr. Jeff T.H. Pon, Director, Memorandum, “Executive Order—Excepting Administrative Law Judges from the Competitive Service,” U.S. Office of Personnel Management (July 10, 2018), *available at* <https://www.chcoc.gov/content/executive-order-%E2%80%93-excepting-administrative-law-judges-competitive-service> [hereinafter “Pon Memo”]. In contrast, the order specified that “[e]xcept as required by statute, the Civil Service Rules and Regulations shall not apply to removals from positions listed in Schedules A, C, D, or E” Executive Order 13843 § 3(iii).

¹⁰⁴ *Id.* § 3(ii).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* § 3(iv).

after the issuance of Executive Order 13843 moves into the excepted service.¹⁰⁷ This means that if an ALJ seeks a position in a different agency, the ALJ's application procedure will be governed by the hiring agency's new Schedule E procedures. Prior competitive service mechanisms permitting incumbent ALJs to seek transfers to a different agency or to seek reinstatement after retirement no longer exist in the new excepted service regime.¹⁰⁸ (The competitive service inter-agency transfer process had been the primary mechanism by which agencies conducting adversarial hearings had selected ALJs prior to the issuance of the executive order, rather than relying on OPM's competitive service examination process.)¹⁰⁹ Currently serving ALJs who seek positions in a different agency must be hired by that agency in accordance with Executive Order 13843.¹¹⁰ That said, an OPM memo addressing implementation of the order suggested that incumbent ALJs in the competitive service could continue to receive *intra*-agency promotions subject to OPM approval under 5 C.F.R. 930.204(e).¹¹¹

IV. Post-*Lucia* and EO ALJ Hiring Practices

Lucia and EO 13843 have made it necessary for agencies to construct new practices for administrative law judge (ALJ) hiring. *Lucia* makes it clear that many if not all ALJs must be appointed by department heads, and the EO makes it clear that appointments of ALJs shall “not be subject to the requirements of 5 CFR, part 302, including examination and rating requirements”¹¹² that had previously been administered by OPM. Rather, the EO leaves it up to

¹⁰⁷ See Pon Memo, *supra* note 103.

¹⁰⁸ *Id.*

¹⁰⁹ See *infra* Part V (describing interviews with agency officials).

¹¹⁰ See Pon Memo, *supra* note 103.

¹¹¹ See *id.*; 5 C.F.R. § 930.204(e) (requiring agencies to seek OPM permission to approve a higher-level classification of an ALJ).

¹¹² Executive Order 13843.

each agency to create its own process “to assess critical qualities in ALJ candidates, such as work ethic, judgment, and ability to meet the particular needs of the agency.”¹¹³ The OPM itself has recognized that agencies are now free to hire ALJs without OPM approval or involvement.¹¹⁴ Each agency must decide for itself how to hire ALJs. As discussed below, some agencies have finalized plans for ALJ hiring going forward while others are in the process of formulating new processes.

A. OPM

As part of the ALJ hiring process that existed prior to the issuance of Executive Order 13843, OPM was responsible for crafting and updating the ALJ competitive service exam. OPM also administered the process by which ALJs were interviewed by panels for prospective ALJ positions. The interview panels asked a series of predetermined standardized interview questions that were identical for each applicant. The panels consisted of a mixture of individuals, some of whom did not work for OPM. At times ALJs from other agencies participated as interviewers on the panels.

Announcements of ALJ vacancies were posted on the centralized government website, USAJOBS.gov, like other competitive service positions. (Openings for non-competitive service positions may also be advertised on USAJOBS.gov.¹¹⁵) Applicants for the ALJ positions

¹¹³ *Id.*

¹¹⁴ See Memorandum from Dr. 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), <https://chcoc.gov/print/9282>.

¹¹⁵ According to OPM’s website, most excepted service positions do not need to be advertised on USAJOBS.gov, so prospective applicants for such positions should also check an individual agency’s website for potential openings. Hiring Information: Excepted Service, U.S. OPM, <https://www.opm.gov/policy-data-oversight/hiring-information/excepted-service/>. That said, as a practical matter, agencies sometimes voluntarily advertise non-competitive service positions on USAJOBS.gov because the public is accustomed to searching the site for openings and a critical mass of applicants is more likely to learn of the opening via that centralized site.

advertised on the government site were evaluated based on their written examination and in-person interview performance. Under that competitive service system, applicants received scores on their tests and interviews.

Even prior to the steps taken by the first administrative law judge hiring agencies to implement the executive order, OPM took several key steps in carrying out the executive order, which directed the office to revise its regulations if necessary to comply with the order. According to a memorandum issued by then-OPM Director Jeffrey Pon on July 10, 2018, agencies had authority to immediately make Schedule E appointments under the order, without any OPM role in the approval process. The director also concluded that the order “eliminates the need for OPM to conduct additional ALJ competitive examinations.” That said, the director also observed that “OPM’s regulations continue to govern some aspects of ALJ employment, including those related to reassignments (5 C.F.R. § 930.204(f)), intra-agency details (5 C.F.R. § 930.207),¹¹⁶ interagency loans (5 C.F.R. § 930.208),¹¹⁷ senior ALJs (5 C.F.R. § 930.209), and reductions in force (5 C.F.R. § 930.210).”¹¹⁸ Except as specified in those regulations, agencies no longer need OPM approval to hire an ALJ, according to then-Director Pon’s memo.¹¹⁹

The pre-existing OPM regulations carved out in then-Director Pon’s July 2018 memo as still applicable, however, continue to give OPM some role in agency hiring of ALJs. For example, 5 C.F.R. § 930.209 charges OPM with approval of agency requests to temporarily

¹¹⁶ 5 C.F.R. § 930.207 (regulating the detailing of an ALJ from one ALJ spot to another within the same agency and restricting the assignment of non-ALJ duties to ALJs).

¹¹⁷ 5 C.F.R. § 930.208 (addressing an ALJ Loan Program administered by OPM that authorizes agencies to ask OPM for permission to temporarily borrow or loan out ALJs to address temporary formal adjudication workflow needs). To acquire such permission, the borrowing agency must demonstrate to OPM that it has no ALJ available to hear the relevant case, identify the cases for which it needs an extra ALJ, and “[s]pecify the legal authority for which the use of an administrative law judge is required.” *Id.* § 930.208(b).

¹¹⁸ 5 C.F.R. § 930.210 (regulating the placement of ALJs on an OPM ALJ “priority referral list” when an ALJ has been displaced due to a reduction in the workforce).

¹¹⁹ See Pon Memo, *supra* note 103.

reemploy senior ALJs to help meet irregular workflow needs. And 5 C.F.R. § 930.204(f) indicates that agencies “must provide a bona fide management reason” prior to acquiring OPM approval for reassignment of an ALJ.¹²⁰ In contrast, section 3105 of Title 5 instructs *agencies* to “appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.” Perhaps OPM will revisit some of the above-discussed regulations as it works to conform its regulations to Executive Order 13843.

On October 4, 2018, the OPM announced that the competitive service register of qualified top-scoring ALJ candidates had been terminated.¹²¹ Applicants who had already been placed “on the register, or who would have received an eligible rating,” were given the opportunity to consent by October 1, 2018, to OPM’s providing their names and information to ALJ hiring agencies.¹²² OPM sent along numerous names, and agencies such as the Social Security Administration have incorporated this information into their consideration of applicants for current openings. Otherwise, OPM “has terminated the ALJ register for any purpose and discontinued the competitive ALJ examination.”¹²³ Any eligible ALJ candidate not appointed as of July 10, 2018, must now be appointed under Schedule E.¹²⁴ According to the OPM’s website, confidentiality agreements signed in relation to the OPM’s former competitive examination

¹²⁰ Further, even though then-Director Pon’s memo suggests that only the OPM pre-approval requirements of 204(f) remain active, the entire 5 C.F.R. § 930.204 appears to remain on the books as of spring 2019. That section generally requires agencies to receive prior approval from OPM before appointing ALJs (unless the agency hires from the OPM list of eligible candidates, which was terminated in 2018). See 5 C.F.R. § 930.204(a) (requiring pre-approval for agency ALJ appointments, except when agencies select “from the list of eligibles provided by OPM”—a list that no longer exists in light of Executive Order 13843, see *infra* note 121 and accompanying text).

¹²¹ See Administrative Law Judges: E.O. 13843 Guidance, OPM, <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=EO-13843-Guidance> [hereinafter “E.O. 13843 Guidance, OPM”].

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See Pon Memo, *supra* note 103.

process “remain in effect for all individuals (applicants, examiners, and subject matter experts) who participated in any part of the Administrative Law Judge Examination.”¹²⁵

B. The Departments of Labor and Health and Human Services

As of early March 2019, two of the agencies with large numbers of ALJs, the Departments of Labor and Health and Human Services, have implemented Executive Order 13843 through the adoption of new ALJ hiring procedures. Although their approaches have differed somewhat from each other, the agencies have both chosen what appear formally to be merit-based ALJ hiring systems, tailored to their agencies’ individual needs and accountable to the leadership and selection authority of the relevant department head.

1. Department of Labor

The Department of Labor was the first out of the gate with a new administrative law judge hiring process, outlined in an order issued by the Secretary of Labor on August 16, 2018, effective immediately upon issuance.¹²⁶ It employed a version of a number of the merit-based, multi-member decisionmaker components of the competitive service hiring system under the Office of Personnel Management, but without an examination. The process is housed within the agency itself, gives the head of the department the accountability in decisionmaking, and incorporates qualifications requirements that are more flexible and tailored to meet the formal hearing needs of the department.

¹²⁵ See E.O. 13843, Guidance, *supra* note 121.

¹²⁶ See Secretary’s Order 07-2018, Procedures for Appointments of Administrative Law Judges for the Department of Labor, 83 Fed. Reg. 44307 (Aug. 30, 2018). Although the order was published on August 30, 2018, it was issued on August 16 of that year.

a. Purpose and Notice

The Secretary's Order¹²⁷ defines its purpose as providing "for transparent and consistent processes by which the Secretary of Labor shall select and appoint individuals" to be Department of Labor administrative law judges. The process first requires a "notice of vacancy and solicitation of applications" to be "posted in the Federal Register and/or on the ALJ website or other appropriate location for public notice." The vacancy is to be held open for at least 30 days. The notice must include information such as the minimum criteria for selection and the required documentation to submit along with one's application.

b. Initial Screening

Applications will be provided to "the Office of Executive Resources within the Office of the Assistant Secretary for Administration and Management." That office will screen applications to ensure that each applicant possesses the minimum required qualifications and has included all necessary documentation.

c. Interview Panels

Screened applications that meet all minimal requirements will be forwarded to an interview panel. That panel is to consist of several officials holding different positions, representing both policymaking and adjudicative officials. In particular, the panel is to include "the Department's Chief Administrative Law Judge, Chief Human Capital Officer, the Assistant Secretary for Policy, and a Member of the Employees' Compensation Appeals Board." If there are vacancies in any of those positions, the Secretary will select a substitute panelist from the

¹²⁷ All quoted text concerning this order are drawn from Procedures for Appointment of Administrative Law Judges for the Department of Labor, 83 Fed. Reg. 44307 (Aug. 30, 2018).

Department's Senior Executive Service. In addition to the panel members themselves, the "Director for the Office of Executive Resources, or designee," will attend each panel meeting.

The panel will "rank the qualified applications taking into account needs of the agency" and then "interview the top-ranked candidates." The panel will forward "its recommended candidates to the Deputy Secretary."

d. The Secretary of Labor's Appointing Role

In "consultation with a career ethics attorney from the Office of the Solicitor," the Deputy Secretary will give the Secretary of Labor the list of recommended candidates along with the "resumes of the other top-ranked candidates interviewed but not recommended."¹²⁸ This step gives the Secretary more flexibility than the hard-and-fast competitive service rule of three, which permitted the agency hiring authority to look only at the top three candidates as ranked by the Office of Personnel Management-supervised competitive service ranking panel.¹²⁹ The Secretary is to either make the final appointment from that group of applications or "order another candidate search be completed."

e. Qualifications Requirements Building on the Executive Order 13843

Threshold Requirements

Under the policy, each administrative law judge vacancy announcement may contain additional mandatory qualifications but at a minimum must impose the following qualifications requirements: active bar status or membership in good standing "for at least ten years total in at least one jurisdiction in which the applicant is admitted," "seven years of relevant litigation or

¹²⁸ The order explicitly authorizes all of the authorities that it delegates to be re-delegated "in order to serve the purposes of this order."

administrative law experience,” and knowledge of the statutes that the Department of Labor enforces with several possible examples listed. The order defines relevant litigation experience to include trial-related work in federal, state, or local litigation, participation in plea negotiations or settlements, opinion preparation, and arbitration and mediation efforts. The order defines relevant administrative law experience to include “litigation experience in cases initiated before a governmental administrative body.”

In sum, the Department of Labor procedures build on the minimal threshold of ALJ qualifications established by the executive order, imposing additional qualifications tailored to Labor Department needs. The key features of this new Labor ALJ hiring structure include (i) notice and transparency regarding the process of the new hiring system, (ii) a publication and notice requirement for new ALJ openings, (iii) an initial screening function, (iv) merit-based interview panels made up of a diverse group of agency positions, and (v) recommended lists of potential hires that are submitted to the Secretary for final selection.

2. The Department of Health and Human Services

The Department of Health and Human Services announced a new process for hiring ALJs dated November 29, 2018, and posted a description of the process on the department’s website.¹³⁰ In an accompanying posting to an HHS blog, the chief administrative law judge and appeals board chair within the department stated that there are 126 ALJs “and other comparable officials” at HHS.¹³¹ These officials hear “disputes involving Medicare and Medicaid eligibility,

¹³⁰ See U.S. Department of Health and Human Services, “Administrative Law Judge Appointment Process: Departmental Appeals Board, Office of Medicare Hearings and Appeals,” <https://www.hhs.gov/sites/default/files/alj-appointment-process.pdf>.

¹³¹ See Nancy J. Griswold & Constance B. Tobias, Establishing a New Merit-Based Process for Appointing Administrative Law Judges at HHS, Jan. 8, 2019, <https://www.hhs.gov/blog/2019/01/08/new-merit-based-process-for-appointing-administrative-law-judges.html>. These 126 adjudicators include 101 ALJs within the Office of Medicare Hearings and Appeals, 13 ALJs associated with the Departmental Appeals Board (DAB), seven

claims, fraud and abuse; penalties for health information privacy and security violations; research misconduct;” and other issues. The blog post reports that ALJs within HHS had been improperly appointed in light of *Lucia* because the HHS Secretary had not been making the appointments. Executive Order 13843 has since “remove[d] uncertainty about ALJ appointments,” enabling agency heads to “directly appoint the best candidates through a process that would ensure the merit-based appointment of individuals with the specific experience and expertise needed by the selecting agencies.”

The blog post describes the new process as “similar to the one used to hire attorneys throughout the executive branch.”¹³² Summarizing the new process, the blog post reports that career officials will make merit-based hiring recommendations to the HHS Secretary. The selection and appointment process will “focus[] on identifying and appointing ALJs who will faithfully apply the law,” and “HHS will not seek consultation with or concurrence from outside officials” as part of that process.¹³³

The new process, as described in the memorandum explaining it¹³⁴ includes the following features:

a. Announcement/Application Submission

All HHS ALJ openings will be announced on USAJOBS.gov. Agencies within HHS also may post that announcement on their own websites or provide links to it via external sources.

administrative appeals judges within the DAB, and five DAB members. The newly unveiled HHS ALJ hiring procedures will apply to all of these positions. *Id.*

¹³² *Id.*

¹³³ *See id.*

¹³⁴ U.S. Department of Health and Human Services, “Administrative Law Judge Appointment Process: Departmental Appeals Board, Office of Medicare Hearings and Appeals,” <https://www.hhs.gov/sites/default/files/alj-appointment-process.pdf>.

Applicants must apply through USAJOBS.gov, and submit materials including “proof of bar membership, a statement of interest and writing samples,”¹³⁵ as well as responses “to a limited number of questions regarding qualifying and desired experience, skills, and qualifications.”

b. Mandatory Qualifications

Like the Department of Labor’s list of mandatory qualifications, HHS ALJ applicants must be licensed attorneys who have had seven years of qualifying litigation or administrative law experience. The HHS announcement clarifies that in addition to meeting the minimal mandatory threshold qualifications, “applicants will be required to address, and provide evidence of, desired skills and experience as a means to allow recommending officials to identify top candidates.” The description of qualifying litigation and administrative law experience is similar to the description included in the Department of Labor’s announcement. One distinction is that the HHS memo explicitly spells out that qualifying administrative law experience must involve formal hearings “on the record under procedures at least as formal as those prescribed by the Administrative Procedure Act, 5 U.S.C. §§ 553 through 559.”

c. Desired Skills and Experience

The announcement then separately enumerates the desired skills for each of the two adjudicative bodies within HHS. For the HHS Departmental Appeals Board (DAB) ALJs, the desired skills include experience in multi-day litigation proceedings, legal writing on complex issues, team-building and mentorship skills, and a “[f]amiliarity with various technology solutions for case management,” among several others. Desired skills listed for HHS Office of

¹³⁵ All quoted material in this description of the process is drawn from the document describing the process, “Administrative Law Judge Appointment Process: Departmental Appeals Board, Office of Medicare Hearings and Appeals,” U.S. Department of Health and Human Services, <https://www.hhs.gov/sites/default/files/alj-appointment-process.pdf>.

Medicare Hearings and Appeals (OMHA) ALJs include the distinct elements of a “[d]emonstrated ability to adjudicate a high volume of cases . . . in a timely manner,” strong oral communication skills, and a “[d]emonstrated ability to lead and supervise staff.” Both job descriptions list knowledge of healthcare law as a desired qualification.

d. “Issuance of the Certificate of Applicants”

In a screening function similar to that employed by the Department of Labor, HHS’s “servicing human resources center” will issue a “certificate via USA Staffing to the recommending official” that lists the “applicants that meet the mandatory qualification requirements.” Although applicants who also possess “desired qualifications” in addition to the mandatory qualifications “will be listed at the top of the certificate,” the recommending official will receive “the names of all applicants who provided required documentation and meet the basic qualification requirements.”

e. Selection Process: Writing Sample Review, Screening Panel, and Interview Panel

The subsequent selection process includes at least three separate elements. Writing samples “are reviewed by a writing instructor and/or a designated ALJ” who provides a written assessment of the writing samples to the screening panel. Next the screening panel reviews this assessment along with the applicants’ packages of materials and “identifies and prepares a list of the best qualified candidates to interview.” The screening panel is to be selected by DAB/OMHA leadership and “may include reviewers internal and external to DAB/OMHA.” (This contrasts with the Department of Labor process, which includes only individuals internal to the department.) After the screening process, the interview panel, “which may be different from

the screening panel and may consist of internal and external interviewers,” conducts “structured interviews with related but unstructured follow-up questions, and rates each candidate’s performance during the interview.” Members of the interview panel are identified by DAB/OMHA leadership. Interviewed candidates “may be required to participate in a proctored writing assignment,” and “[a] second interview may be required at the discretion of the recommending official.”

Like the Department of Labor process, this model of using panels to screen and interview candidates based on merit-related qualifications is similar to the objective merit-based process used by the Office of Personnel Management under the competitive service, albeit without the scored written examination. One key distinction is the flexibility and tailoring of the HHS procedures. Interview panels within HHS are not limited to structured questions, and additional writing and interview assessments may be included in the process if helpful.

f. Recommending Official and Secretary

In addition to the screening and interview processes, criminal background and reference checks will be conducted. A candidate’s entire folder “is reviewed by the interview panel and/or other designated official.” Qualifications are “rated” and then “sent to the recommending official for review and selection and appointment recommendation.” After reviewing all rated candidates, the official “makes a selection/appointment recommendation to the Secretary based upon the desirable skills/qualifications ratings, and experience of each candidate.” To make the appointment decision, the Secretary receives a package that includes “the names of recommended selections/appointments, the certificate (list of candidates), copies of resumes for recommended selections/appointments, and an ALJ Appointment Affidavit.”

g. Employment Offer

Before receiving any final employment offer, all applicants “must receive favorable personnel security adjudication.” They must also “submit an [Office of Government Ethics] OGE form 278, Public Financial Disclosure, and receive clearance from the HHS [Office of General Counsel] OGC Ethics Division.”

C. Additional Agencies

The administrative law judge (ALJ) hiring plans of additional agencies can be described more succinctly, either because they are less detailed than those discussed above or because they are still in the preliminary planning stage.

The Occupational Safety and Health Review Commission (OSHRC), an independent agency, has constructed a new position announcement and posted it on USAJOBS.¹³⁶ Apparently, the agency was in the midst of an ALJ hiring process when the EO was issued and it found it necessary to put the process on hold to ensure compliance with the EO. OSHRC focused on both procedure—what screening committee and interview panel process would work best—and substance—what are the best qualifications for ALJs within the agency. The statute governing OSHRC appointment of ALJs assigns that power to the agency’s chairman.¹³⁷ The published position description requires that applicants possess a law degree and have been a member of a jurisdiction’s bar in good standing for a minimum of ten years. Further, the description requires at least seven years of litigation experience “preferably demonstrating

¹³⁶ See <https://www.usajobs.gov/GetJob/ViewDetails/524786200>. Information concerning ALJ hiring at the Occupational Safety and Health Review Commission is drawn from an interview an agency official conducted on January 24, 2019, as well as the job announcement and statutes cited in this report.

¹³⁷ See 29 U.S.C. § 661(e).

knowledge of occupational health and safety law or other labor and employment laws.” The description details specific types of litigation experience that are required.

The Office of Financial Institution Adjudication (OFIA) within the Federal Deposit Insurance Corporation (FDIC), which is an independent government corporation, is planning to hire a new ALJ in the near future.¹³⁸ OFIA was created by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 as a pool of ALJs for the Federal Reserve Board, the FDIC, the Comptroller of the Currency, and the National Credit Union Administration, and currently employs two ALJs, up from one before the 2008 financial crisis.¹³⁹ The new hire will fill one of these two currently existing ALJ positions. In advertising this opening, the agency has used the same position description as when it advertised for ALJs under the competitive service with one modification: In keeping with the EO and the agency’s own considerations, specialized experience in law relating to financial institutions and accounting principles has been added to the position description as a desired qualification. The agency is also looking for litigation experience, which has always been a qualification. The new process involves a screening committee made up of representatives from the four agencies whose cases are heard by OFIA ALJs. OFIA considers its department head to be the Federal Reserve Board, and the Board will serve as the appointing authority for OFIA ALJs based on the recommendation of the four-member screening committee.

¹³⁸ Information concerning ALJ hiring at the Office of Financial Institution Adjudication (OFIA) is drawn largely from an interview with an FDIC official conducted on January 17, 2019.

¹³⁹ The appointment of OFIA ALJs was challenged as unconstitutional, and the Court of Appeals for the Fifth Circuit stayed proceedings on the case in anticipation of the *Lucia* decision. *See Burgess v. Federal Deposit Insurance Corporation*, 871 F.3d 297 (5th Cir. 2017). Since that time, the procedure for appointing OFIA ALJs has been changed to include appointment by the Federal Reserve Board.

Other agencies have not finalized their plans for ALJ processes in light of *Lucia* and the EO. The Social Security Administration,¹⁴⁰ an independent agency, which employs the largest number of ALJs, plans to begin by working from the list of qualified candidates previously compiled by OPM and then applying a merit-based system that takes into account numerous factors that SSA believes indicate an attorney will succeed as an ALJ. Notice of open positions will be provided through USAJOBS. SSA plans to put together its own application package with questions about applicants' legal experience and abilities. SSA also plans to conduct interviews and perform background checks and ultimately consider the totality of the evidence concerning an applicant when making a hiring decision. The ultimate hiring decision will be made by the Commissioner of SSA, on the recommendation of a panel of agency ALJs. The agency's preliminary inclination is to present the Commissioner with recommended hires, not a list of applicants from which the Commissioner would choose.

Similarly, the Office of Hearings and Appeals within the Department of Education (DoEd),¹⁴¹ an executive branch agency, is in the process of formulating a new procedure for hiring ALJs. The agency intends to formulate a process under which the Director of the Office of Hearings and Appeals conducts a merit-selection process and recommends individual appointments to be made by the Secretary of Education. There is no plan to provide a list from which the Secretary would be required to select ALJs for appointment. Currently, the DoEd has only one ALJ, and it may hire two more. Given this small number, the DoEd may not formalize a process but rather will arrive at one informally through consultations with officials in the chain

¹⁴⁰ The information concerning ALJ hiring plans at the SSA comes largely from an interview with an SSA official conducted on January 9, 2019.

¹⁴¹ The information concerning ALJ hiring plans at the Department of Education (DoEd) comes largely from an interview with an official of the Department conducted on January 9, 2019.

of command. In reaction to *Lucia*, the Secretary of Education has ratified the appointment of the Department's ALJ.

The National Labor Relations Board), an independent agency, is also formulating a plan for hiring future ALJs.¹⁴² The NLRB plans to use a merit-based process that takes into account applicants' experience, references and writing samples. As currently conceived, the process would be conducted by a panel of three agency ALJs who would make recommendations to the Chief ALJ who would in turn make hiring recommendations to the full NLRB for actual appointment. The process will not include an examination. As in the past, experience in labor law will be an important criterion. Vacancy announcements are likely to be made through USAJOBS and through a notice directed at existing ALJs (mostly at SSA), which has been effective in the past. However, the NLRB has not decided whether to advertise on USAJOBS or whether to limit applicants to existing ALJs with NLRB experience.

The Federal Energy Regulatory Commission (FERC), another independent agency, is also in the process of evaluating its plan for future ALJ hiring, although it may simply maintain its prior practice with any adjustments required by *Lucia* and the EO.¹⁴³ The current process is for the Chief ALJ to screen resumes and conduct interviews, sometimes with the assistance of other ALJs, and then present recommendations for individual hires to the chairman. FERC will post vacancies through USAJOBS. By statute, FERC ALJs are appointed by the agency's chairman without any requirement that the remaining commissioners participate.¹⁴⁴

¹⁴² The information concerning ALJ hiring plans at the National Labor Relations Board (NLRB) comes largely from an interview with an agency official conducted on January 10, 2019.

¹⁴³ The information concerning ALJ hiring plans at Federal Energy Regulatory Commission comes largely from an interview with an agency official conducted on January 29, 2019.

¹⁴⁴ See 42 U.S.C. § 7171(c).

Assuming that FERC ALJs are Officers of the United States, the appointment process for FERC ALJs raises possible constitutional concerns.* While the Supreme Court has held that a multi-member commission can be considered a department head capable of appointing officers,¹⁴⁵ it has not opined on whether the chairman of a multi-member commission can also be considered a department head for such purposes. Thus, it is unclear whether appointment of ALJs by the chairman of FERC complies with *Lucia*, assuming that FERC ALJs are Officers of the United States. Further, even if out of an abundance of caution the agency were to have the full commission ratify the chairman's appointments, the Court in *Lucia* did not opine on whether ratification is sufficient,¹⁴⁶ and even more uncertainty arises from the statutory allocation of appointment power to the chairman. It is thus unclear whether ratification would have legal effect.

ALJ hiring at the Environmental Protection Agency is on hold pending decisions on how to proceed in light of *Lucia* and the EO.¹⁴⁷ The agency is studying the new processes announced by the Department of Labor, the Department of Health and Human Services and the Social Security Administration. It is unclear what the agency will do going forward. Even if the agency hires an additional ALJ, the EPA has not yet begun crafting a post-EO hiring process, mainly because the agency is waiting to see how other agencies with a higher number of ALJs implement the EO. In the past, EPA had more success hiring existing ALJs from other agencies than hiring from the OPM list. EPA prefers to hire experienced ALJs with litigation experience because EPA cases can be very complex and the statutes and regulations applicable to EPA

* Prof. Mascott does not join this paragraph of the report.

¹⁴⁵ PCAOB, 577 U.S. at 512-13 (“As a constitutional matter, we see no reason why a multimember body may not be the “Hea[d]” of a “Departmen[t]” that it governs.)

¹⁴⁶ 138 U.S. at 2055, n. 6.

¹⁴⁷ Information concerning ALJ hiring plans at the Environmental Protection Agency (EPA) is drawn largely from an interview with an EPA official conducted on January 14, 2019.

hearings are voluminous and complicated. EPA ALJs have to travel a great deal, so willingness and ability to travel is also an important criterion. The EPA is sensitive to the impression that their ALJs appear biased in favor of the agency and thus tries to hire ALJs that have not previously worked for EPA to dispel that appearance.

The FMSHRC is a five-member independent agency that reports employing 13 ALJs who adjudicate cases arising under the Federal Mine Safety and Health Act of 1977.¹⁴⁸ FMSHRC ALJs are appointed by the commission as a whole.¹⁴⁹ Cases are brought to the FMSHRC by enforcement officials from the Mine Safety and Health Administration, a unit of the Department of Labor. ALJ decisions are appealable to the commission,¹⁵⁰ and the commission's decisions are subject to judicial review. The FMSHRC has not formulated plans for future ALJ hiring since it is not likely to be doing any such hiring in the near future.

The United States Coast Guard is a branch of the military, but it is also a unit of the Department of Homeland Security. The Coast Guard reported six ALJs in March 2017, and is in the process of finalizing its plans for future ALJ hiring because it has to fill at least one vacancy.¹⁵¹ In reaction to *Lucia*, the Coast Guard submitted paperwork to the Secretary of Homeland Security to ratify the appointment of its ALJs, which she did. For the future, the Coast Guard will use a process similar to that used for the hiring of all officials in the Senior Executive Service. The opening will be posted on USAJOBS and all applications will be reviewed by an initial screening panel. The screening process would narrow the pool to no more

¹⁴⁸ 30 U.S.C. § 823. Information concerning ALJ hiring plans at the Federal Mine Safety & Health Review Commission is drawn largely from an interview of agency officials conducted on February 5, 2019.

¹⁴⁹ 30 U.S.C. § 823(b)(2).

¹⁵⁰ 30 U.S.C. § 823(c)(2)(A). The commission currently lacks a quorum of presidentially appointed and Senate-confirmed members and thus is unable to take substantive action in any cases.

¹⁵¹ Information concerning ALJ hiring at the U.S. Coast Guard is drawn largely from an interview with a Coast Guard official conducted on February 13, 2019.

than ten applicants to be interviewed. Although nothing has been finalized, important qualifications are likely to include experience as a lawyer in areas that are relevant to the Coast Guard's caseload; the candidate's reputation in the community; and the candidate's temperament, leadership and management experience, honesty and integrity, and writing ability. The Coast Guard's Chief ALJ will select the recommended candidate to present to the Secretary of Homeland Security for possible appointment.

The FLRA is not currently looking to hire any new ALJs.¹⁵² The FLRA has no cases at present and is looking to loan its ALJs to other agencies with active caseloads. Similarly, the U.S. Postal Service also has no current plans to hire new ALJs.¹⁵³ Based on their experiences with ALJ hiring processes in the past, the officials interviewed from these agencies suggested that agencies should consider the preservation of impartiality and non-agency bias when hiring ALJs. In particular, one of the officials suggested that agencies consider not hiring ALJs exclusively from within the agency so as to help protect against any pro-agency preference, inadvertent or otherwise.

The Federal Communications Commission announced the hiring of a new ALJ on December 18, 2018, replacing its previous ALJ who had retired after many years at the agency.¹⁵⁴ (This is the FCC's only ALJ.) This was the first ALJ appointment made by the FCC in decades. There was no publicly announced process and no vacancy announcement was made. It may be inferred that the FCC placed importance on subject-matter experience: According to

¹⁵² Information concerning ALJ hiring at the Federal Labor Relations Authority is drawn largely from an interview with an agency official conducted on February 4, 2019.

¹⁵³ Information concerning ALJ hiring at the United States Postal Service is drawn largely from an interview with an agency official conducted on January 15, 2019.

¹⁵⁴ See <https://www.fcc.gov/document/jane-hinckley-halprin-will-serve-fccs-administrative-law-judge>. Further information concerning ALJ hiring at the FCC is drawn from an interview with an agency official conducted on May 29, 2019.

the press release announcing the appointment, the new ALJ had been employed in various capacities at the FCC since 1987, including service for the past 14 years “in the Office of General Counsel as an Ethics Counsel and for the past year has led the agency’s ethics team as Assistant General Counsel for Ethics.”¹⁵⁵ Because ethics matters do not come before the agency’s ALJ, it was apparently advantageous to hire an ALJ who had worked on such matters because there would be no cases in which the new ALJ would be recused for previous involvement in the case. Although the press release does not specify who made the appointment, the appointment was made by the entire commission, reportedly unanimously.¹⁵⁶ The person who was appointed had previously been placed on the OPM register of ALJ candidates, having taken and passed the OPM examination in 2015, but in light of the executive order, the OPM was not involved in the selection or appointment of the FCC’s new ALJ.

In sum, interviews with officials from agencies that have already finalized their post-EO ALJ hiring plans indicated that these agencies will advertise their ALJ openings on USAJOBS, will assign initial screening of applicants to an official or small group of officials, and will often have higher level officials (sometimes a panel of ALJs) conduct interviews and check references. Agencies had a variety of views on how long the position should remain open on USAJOBS, based mainly on the volume of applications that earlier announcements had generated. Only the Department of Labor currently intends to present the appointing official with a list of qualified candidates from which to choose.

V. Discussion and Analysis of Agency ALJ Hiring Plans

¹⁵⁵ *Id.*

¹⁵⁶ <https://www.fcclawblog.com/2018/07/articles/fcc/aljs-fcc-adjudications/>.

All agencies interviewed were aware that under *Lucia*, their ALJs may have to be appointed by the official or officials who would be considered their department head for Appointments Clause purposes. Section 3105 of Title 5 provides statutory authority for agencies to appoint their ALJs.¹⁵⁷

1. Threshold Constitutional Issues*

Under the Appointments Clause, any ALJ who would be considered a principal officer would have to be appointed by the President with the advice and consent of the Senate.¹⁵⁸ Whether an ALJ would be considered a principal officer would depend on factors such as whether they were subject to the supervision of other agency officials, whether they had discretion to make policy for the agency, and whether their decisions were reviewable at another level within the agency.¹⁵⁹

Statutes governing two agencies—FERC and OSHRC—assign the appointment of ALJs to the agency Chairman, and it is unclear whether the Supreme Court would consider the Chairman a Department Head for Appointments Clause purposes or whether 5 U.S.C. § 3105 would allow the entire commission to ratify the agency’s appointments in the face of the more specific statutory provision for appointment by the Chairman.

¹⁵⁷ 5 U.S.C. § 3105 (“Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.”).

* Prof. Mascott does not join this section of the report.

¹⁵⁸ U.S. Const. Art. II, § 2, cl. 2.

¹⁵⁹ *Edmond v. United States*, 521 U.S. 651 (1997). See also Jack M. Beermann, Administrative Adjudication and Adjudicators, forthcoming *George Mason Law Review* (2019). Professor Gary Lawson has argued that members of the Patent Trial and Appeal Board (PTAB), an adjudicative body within the Department of Commerce’s Patent and Trademark Office are principal officers because their decisions are not subject to review within the Executive Branch. See Gary Lawson, *Appointments and Illegal Adjudication: The AIA through a Constitutional Lens*, *GEO. MASON L. REV.* 1, 4 (forthcoming 2019). The title held by members of PTAB is “Administrative Patent Judge” not ALJ, but their functions are analogous to the functions of ALJs. PTAB’s Administrative Patent Judges are appointed by the Secretary of Commerce.

Further, the Supreme Court explicitly declined to address whether ratification was sufficient to render a previously defective appointment constitutional.¹⁶⁰ The Court did order the SEC, on remand, to reassign the case to a properly appointed ALJ other than the one who had originally heard the case,¹⁶¹ but it did not opine on whether ratification was sufficient to cure the constitutional defect in the appointment of the SEC's ALJs. Thus, it is unclear whether ratification of the appointments of existing ALJs by those officials who are considered Heads of Departments under the Appointments Clause is sufficient to cure a constitutionally defective initial appointment.¹⁶²

2. Agency Procedures Under EO 13843

All of the agencies are aware that under the EO, agencies are to “follow the principle of veteran preference as far as administratively feasible.” With a more flexible system replacing the point system, veteran status may be one factor considered among many during the hiring process. Agency officials that we interviewed suggested that the ALJ hiring process might evaluate veteran status analogously to how it is weighed during the hiring of certain executive branch attorneys, another process that requires the consideration of veteran status “as far as administratively feasible.”¹⁶³ One potential approach for applying this standard that has been used previously is relying on veteran status as a tie-breaker between two equally qualified candidates. In addition to expressing a commitment to considering the veterans preference, all agencies expressed an interest in continuing to consider diversity in ALJ hiring. Some agency

¹⁶⁰ 138 U.S. at 2055, n. 6 (While this case was on judicial review, the SEC issued an order “ratif[y]ing” the prior appointments of its ALJs. Order (Nov. 30, 2017) . . . *Lucia* argues that the order is invalid. See Brief for Petitioners 50–56. We see no reason to address that issue.”)

¹⁶¹ *Lucia*, 138 S. Ct. at 2055; *Jones Brothers, Inc.*, 898 F.3d at 679.

¹⁶² The Sixth Circuit approved of ratification in *Jones Brothers, Inc.*, see 898 F.3d at 679.

¹⁶³ See *supra* notes 98-102 and accompanying text.

officials provided examples to illustrate the importance of diversity in their ALJ hiring. Like the veterans' preference, diversity is likely to be one factor among many in the ALJ selection process moving forward.

It is clear from our interviews that the considerations used in evaluating ALJ candidates at most agencies other than the Social Security Administration will not necessarily change a great deal because most agencies already had been hiring incumbent ALJs from other agencies (mainly SSA) rather than from the OPM-generated list of qualified candidates. According to the interviews, the tendency of agencies to hire ALJs away from other agencies is mainly the result of three factors: the inability of agencies under the prior system to fine-tune the qualifications of new ALJs to their specific needs, the ability to take advantage of the training and experience that SSA provides to its new ALJs, and the inflexibility of the veterans' preference requirement as applied under the prior point system. For these agencies, the EO makes it easier for them to hire in the way they believe will be most effective because it allows them to apply the same process and criteria to the hiring of new ALJs that previously could be applied only to the hiring of ALJs away from other agencies.

In light of EO 13843 excepting ALJs from the competitive service, the interagency transfer process by which agencies requested OPM permission to hire ALJs from SSA is no longer in place. This does not mean that agencies can no longer hire ALJs away from other agencies, but rather that any such hire would be considered a new appointment pursuant to the excepted service, rather than a competitive service inter-agency transfer. Thus, based on our interviews, it appears that some agencies are likely to continue to prefer to hire incumbent ALJs who have been working for other agencies (which as a practical matter means mainly ALJs from SSA), while others may focus on candidates who are not incumbent ALJs. Some agencies with

very few ALJs value the training that SSA provides to the dozens of ALJs that they hire each year. Other agencies see greater value in the flexibility they now have to appoint ALJs with qualifications and experience that more closely meet their particular needs who are not necessarily incumbent ALJs. Exactly how this will develop remains to be seen.

Interviews with agency officials revealed that agencies have disparate views on the criteria that ought to be applied to ALJ hiring, and that the new process will increase their ability to apply criteria that best meet their agencies' needs. These views may sometimes be idiosyncratic to the particular official interviewed, but they often appeared to reflect the different needs of the agencies involved, especially the particular skills necessary to resolve the matters ALJs will encounter at the agency. Several interviewees found judicial or administrative adjudicative experience valuable, whether as an SSA ALJ or on a state court or agency. Several agencies reported that specialized substantive experience related to their agency's caseload was important and could not be captured in the prior process. One agency—FERC—stated that due to the nature of its caseload, its ALJs need good math skills. Many agencies reported that their agencies need more and better litigation experience than the prior process would often provide.

Additional qualifications that the interviewed agency officials feel they can now screen for include strong writing skills, extensive litigation experience, appropriate temperament and demeanor, and management and leadership experience. In fact, some agency officials expressed more concern with general qualifications than subject matter knowledge because in their experience competent lawyers can get up to speed on particular subject areas relatively quickly. Several interviewees were most anxious to hire competent attorneys who would be fair to all parties appearing before them and not view their cases from the agency's perspective. These

qualifications were applied by agencies when they recruited ALJs away from other agencies, and now they are free to apply them to the hiring of new ALJs.

SSA's experience as the highest volume employer of ALJs is somewhat different.¹⁶⁴ SSA was on the record as being dissatisfied with the OPM process because it was difficult for SSA to tailor its hiring to its needs. In particular, SSA wanted to be able to make subject matter expertise a more important factor and also count administrative expertise, which in practice may mean that SSA wants to make it easier to hire its own attorneys as ALJs. In recent years, SSA ALJs have been hired with more subject-matter expertise than in the past, although given the high volume of SSA ALJ hiring, it is unlikely to be possible for SSA to require all new ALJs to have significant subject-matter knowledge. There were also instances in which SSA found none of the top three candidates suitable when it was hiring for a particular geographical location, which meant that ALJ positions went unfilled.

While all agencies appear to welcome the flexibility provided by the EO concerning their ALJ hiring, some interviewees expressed the concern that ALJ hiring might become more politicized. However, numerous interviewees expressed confidence that ALJ hiring in their agencies would continue to be merit-based and that the new system would provide a better ability to select ALJs based on their agency's needs.

VI. Recommendations from Professor Beermann *

¹⁶⁴ The information concerning ALJ hiring plans at the SSA in this paragraph is derived from an interview with an SSA official conducted on January 9, 2019.

* Prof. Mascott's proposed alternative formulation of several of these recommendations follows at the end of this report. In light of the executive order's goal of providing administrative agencies with maximum flexibility subject to presidential control, Prof. Mascott would frame the ACUS recommendations more as informative factors that agencies might consider. Actual recommendations by ACUS are determined by ACUS in its normal processes.

1. 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 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,¹⁶⁵ agencies with ALJs who were not appointed by the head or heads of their Department, should consider 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.

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

3. 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

¹⁶⁵ 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.

long to keep the application period open based on their experience with the volume of applications.

4. In addition to those factors specified in Executive Order 13843, including impartiality, commitment to the rule of law, “appropriate temperament, legal acumen, impartiality, . . . sound judgment” and the ability to “clearly communicate their decisions,”¹⁶⁶ agencies should formulate and publish minimum qualifications and selection criteria for ALJ hiring that include the qualifications the agency deems important for service as an ALJ in the particular agency. These agency-specific criteria may include such factors as experience with the subject matter of the issues that come before agency ALJs, litigation experience, prior experience as an adjudicator, experience with case management systems, demonstrated legal research and writing skills, and more specialized skills such as mathematics or familiarity with economic analysis or medical diagnostics. Guidelines may also include integrity and proper temperament. 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.

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

¹⁶⁶ See Executive Order 13843, § 1, para. 1.

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

VII. Alternative Formulation of Recommendations by Professor Mascott

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

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

3. Agencies also may find it helpful to formulate and publish minimum qualifications and selection criteria for ALJ hiring that include the qualifications the agency deems important for service as an ALJ. From interviews of agency officials and the new hiring plans already put in place by some agencies, it appears that relevant hiring criteria might range from litigation experience, experience as an adjudicator, 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 communication skills.

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

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

6. Agencies might want to consider establishing policies about whether they will use both a screening panel and a separate interview panel to evaluate ALJ candidates and which officials might participate on such panels. Regarding the written examination as formerly administered by OPM, OPM has discontinued this competitive service written exam for ALJ candidates. Agencies that determine they would like to use their flexibility under EO 13843 to continue

some kind of writing-based evaluation of ALJ candidates might consider incorporating an evaluation of writing samples from ALJ candidates that is similar to the process that the Department of Health and Human Services (HHS) has implemented under EO 13843.

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