



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

## Administrative Judges

### Committee on Adjudication

Proposed Recommendation | June 14, 2018

#### Proposed Amendments

**This document displays manager's amendments (with no marginal notes) and additional amendments from Council members and Conference members (with sources shown in the margin).**

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

---

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

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

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



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

6 “administrative judges”<sup>4</sup> (although they often go by any number of other names).<sup>5</sup> For purposes  
7 of this Recommendation, all adjudicators who are neither ALJs nor agency heads are referred to  
8 as “administrative judges.”

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

Commented [CA1]: Proposed amendment from Council

19 In contrast to hearings over which ALJs preside, which are regulated by the adjudication  
20 provisions of the APA, hearings over which administrative judges preside do not share a uniform  
21 statutory framework. Instead, they are governed by procedures, norms, and practices specific to

<sup>4</sup> Administrative judges far outnumber the approximately 2,000 ALJs in federal service. See Kent Barnett, Logan Cornett, Malia Reddick & Russell Wheeler, Non-ALJ Adjudicators in Federal Agencies: Status, Selection, Oversight, and Removal 47-18 (Feb. 14-May 11, 2018) (draft report to the Admin. Conf. of the U.S.), <https://www.acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal-0> <https://acus.gov/report/non-alj-adjudicators-federal-agencies-status-selection-oversight-and-removal> [hereinafter Barnett et al.] (accounting for 10,831 administrative judges among fifty-three agencies and components of agencies).

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

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



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

22 each administrative judge’s employing agency and relevant governing statutes.<sup>7</sup> Administrative  
23 judges oversee enforcement, benefits, licensing, and other classes of hearings situated within a  
24 wide variety of substantive areas. Hearings may be adversarial or inquisitorial, and may involve  
25 disputes between private parties or between private parties and the federal government. Hearings  
26 outside the APA also contrast widely in their procedural complexity, ranging from those that are  
27 similar in formality and procedure to APA hearings to those that are procedurally minimal and  
28 informal.<sup>8</sup>

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

41 In contrast, the policies and procedures pertaining to the selection, oversight, evaluation,  
42 discipline, and removal of ALJs are prescribed by the APA. These policies and procedures are

---

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

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

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

<sup>10</sup> *See id.* § 302.101(c).

<sup>11</sup> *See* 5 U.S.C. § 7511.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

43 largely designed to promote ALJ independence. Among other things, they establish a merit-  
44 based system for selecting ALJs, prohibit ALJs from engaging in investigation or prosecution or  
45 from reporting to officials with such duties, limit the ability of ALJs to engage in ex parte  
46 communications, and exempt ALJs from performance appraisals and bonus eligibility.<sup>12</sup> In  
47 addition, ALJs may only be removed or disciplined “for good cause established and determined  
48 by the Merit Systems Protection Board.”<sup>13</sup>

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

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

<sup>13</sup> 5 U.S.C. § 7521(a).

<sup>14</sup> See, e.g., 28 U.S.C. § 455(b) (prescribing the conditions for which justices and judges of the United States must disqualify themselves); *id.* § 631(b)(5) (directing the Judicial Conference of the United States to promulgate regulations that provide for the establishment of merit selection panels to advise in the selection of federal magistrate judges); JUD. CONF. OF THE U.S., REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES FOR THE SELECTION, APPOINTMENT, AND REAPPOINTMENT OF UNITED STATES BANKRUPTCY JUDGES ch. 3 (1984) (authorizing the use of merit selection panels to advise in the selection of bankruptcy judges); see also Barnett et al., *supra* note 4, at 61–62–63 (remarking on the use of state and federal merit selection panels and commissions to advise in the selection of some state judges and federal bankruptcy and magistrate judges).

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

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

<sup>17</sup> 18 U.S.C. §§ 201–209.



59 independence<sup>18</sup> appropriate for a system in which decision-making and policy-making authority  
60 ultimately lies in the agency head; and (2) clarity and transparency with respect to the policies  
61 and practices governing the selection, oversight, evaluation, discipline, and removal of  
62 administrative judges.

**RECOMMENDATION**

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

**Commented [CA2]:** Proposed amendment from Council

**Selection**

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

**Commented [CMA3]:** Proposed amendment from Carol Ann Siciliano 1

**Explanation:** The preamble does not explain why the current “excepted service” model fails to achieve the Recommendation’s goals of “competence, integrity, impartiality, and degree of independence.” Changing the civil service hiring process would introduce unjustified hiring complications.

**Commented [CMA4]:** Proposed amendment from Carol Ann Siciliano 2

**Explanation:** Deleting the suggestion that panels/commissions make “final selection decisions” will allow the Recommendation to remain clear and viable, irrespective of the Court’s ruling in *Lucia*.

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



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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

**Commented [CMA5]:** Proposed amendment from Carol Ann Siciliano 3

**Explanation:** Inviting representatives of experienced parties to help select AJs may create the appearance of bias or indebtedness.

**Commented [CMA6]:** Proposed amendment from Carol Ann Siciliano 1

**Note:** This portion of the amendment would delete "merit selection" in the first line of this paragraph. This portion of the amendment is dependent on resolution of Siciliano 2, which would delete the entire paragraph.

**Commented [CMA7]:** Proposed amendment from Carol Ann Siciliano 2

**Note:** This portion of the amendment would also delete the footnote.

**Commented [CMA8]:** Proposed amendment from Carol Ann Siciliano 2

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



**Assignment of Adjudicative Functions**

102 5. To the extent feasible, agencies should consider assigning all adjudicative functions to  
103 employees who serve exclusively as administrative judges, rather than to administrative  
104 judges who also have significant non-adjudicative duties. When exclusive assignment of  
105 adjudicative functions is not feasible, agencies should consider appointing alternate  
106 administrative judges to adjudicate matters when the designated administrative judge may  
107 have a conflict. Occasional cross-over of duties may be appropriate to meet agency  
108 objectives, including professional development.

109 5. To the extent feasible, agencies should consider assigning all adjudicative functions to  
110 administrative judges who exclusively perform adjudicative duties and directly-related  
111 duties (such as hearing office management), rather than to administrative judges who also  
112 have significant unrelated duties. Occasional cross-over of duties may be appropriate to  
113 meet agency objectives, including professional development.

**Commented [CMA9]:** Proposed amendment from Carol Ann Siciliano 4

**Explanation:** It is infeasible to designate some employees to serve exclusively as AJs. The workload of some agencies' AJs is often light and other demands for their services are often high. EPA prevents the appearance of impartiality by ensuring its Regional Judicial Officers work on matters not amenable to adjudication. Agencies also use recusal when necessary. The current second sentence strongly leans in favor of exclusive assignments. It should be replaced with a sentence suggesting a structure to accommodate recusals.

**Physical Separation**

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

**Commented [CMA10]:** Proposed amendment from Robert Girouard

**Note:** This entails changing the first sentence of unamended ¶ 5, but not the second. (Siciliano 4, above, would replace the second sentence of ¶ 5 with a new sentence, but would not alter the first sentence.)

**Explanation:** The Attorney General has ruled that administrative and management duties related to an agency's hearing program are not inconsistent with ALJs' duties and responsibilities where those duties require an experienced ALJ and where the ALJ continues to adjudicate cases to the extent his or her duties permit. 42 Op. A.G. 289 (1963). This is a sensible rule. There should not be a different, more restrictive rule for AJs.

**Ethics and Disqualification**

119 7. Agencies should consider providing guidance and educational resources to administrative  
120 judges on the applicable requirements of the criminal conflict-of-interest laws, contained  
121 in 18 U.S.C. §§ 201–209, and the Office of Government Ethics's (OGE) standards  
122 governing the disqualification of federal employees from participating in particular



## ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

- 123 matters due to the appearance of loss of impartiality, contained in 5 C.F.R. §§ 2635.501–  
124 2635.503.
- 125 8. Agencies should consider developing procedures for assigning cases to administrative  
126 judges that are aimed at preventing them from presiding over hearings in which they have  
127 conflicts of interest.
- 128 9. When appropriate, agencies should consider exercising their authority under Executive  
129 Order 12,674 (as amended by Executive Order 12,731) and 5 C.F.R. § 2635.105 to adopt,  
130 subject to OGE’s approval, supplemental regulations pertaining to the disqualification of  
131 administrative judges from particular hearings. **Such regulations should that** augment  
132 OGE’s standards in 5 C.F.R. §§ 2635.501–2635.503, which govern the disqualification of  
133 federal employees from participating in particular matters due to the appearance of loss  
134 of impartiality. Any supplemental regulations adopted should be tailored to the particular  
135 needs of the adopting agency’s adjudication program.
- 136 10. Agencies should establish procedures that explain when and how parties may seek an  
137 administrative judge’s disqualification and how agencies and administrative judges  
138 should resolve such claims.

### **Performance**

- 139 11. Evaluations of administrative judges’ performance and potential eligibility for bonuses  
140 should be based on the following factors derived, in part, from Recommendation 92-7:  
141 case processing guidelines; appropriate case volume goals and requirements; adjudicative  
142 comportment and demeanor; adherence to governing ethical requirements; adherence to  
143 properly articulated and disseminated rules, procedures, precedents, and other agency  
144 policy; and all other relevant considerations. Agencies should not consider the outcomes  
145 of particular cases when evaluating administrative judges’ performance of adjudicative  
146 functions.





ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

**Transparency**

- 147 12. Agencies should, to the extent appropriate and practicable, make available to the public  
148 generally applicable policies and procedures governing the selection, oversight,  
149 evaluation, discipline, and removal of administrative judges.