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Raiding the OPM Den: The New Method of ALJ Hiring, by Kent Barnett

by [Guest Blogger](#) – Wednesday, July 11, 2018

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As [Andy Hessick has blogged](#) here, President Trump yesterday issued an [executive order](#) (EO) that alters how federal administrative law judges (ALJs) are appointed. Although I am not an expert on the interworking of the federal civil service, my initial impression is that the altered hiring model has benefits, but also potentially serious drawbacks.

Under the [former model](#), in brief, agencies hired ALJs from the “list of three” that the Office of Personnel Management (OPM), an independent agency, prepared. This list had the three-highest scoring candidates after a written examination, interviews, a Veteran’s preference, etc. OPM had not permitted “selective certification” for ALJ hiring—that is, hiring a candidate lower on the list, usually because of subject-matter expertise—since 1984. The former model provided some separation between the agency and its adjudicators by having an intermediary winnow the ALJ candidates under a competitive process, providing some actual and apparent impartiality for these adjudicators who apply agency policy in proceedings in which the agency may be a party. (After their appointment, ALJs cannot receive performance appraisals or bonuses from their agencies or be removed except for cause, as established by the Merit Systems Protection Board.)

The new hiring model would, from what I can tell, allow agencies to set their own hiring criteria and hire directly without going through OPM’s hiring process. Agencies, under different administrations, have criticized the OPM process as being too difficult and slow. Although they have from time to time sought selective certification or accounting for subject-matter expertise, agencies have also indicated that they are pleased with the quality of ALJs whom they hire. Moreover, their pleas to Congress for selective certification have not been successful. (To my surprise, in my co-authored [research](#) into hiring qualifications for *non-*

ALJ adjudicators (often called “Administrative Judges” and confused with administrative *law* judges), over whom agencies have some discretion to set hiring criteria, agencies do not usually look for subject-matter expertise, suggesting that their pleas for expertise for ALJs may be somewhat feigned.)

The EO may prove beneficial in certain respects:

1. Because the EO largely removes OPM from the hiring process, the EO makes it easier for agencies to decide when they need ALJs, as opposed to having to procure OPM’s agreement as to when the agency needs ALJs. As Emily Bremer’s [work for ACUS](#) has indicated, OPM has taken the position that it is the final arbiter of when agencies need ALJs. The [relevant statute](#), however, says that “[e]ach agency shall appoint as many administrative law judges as are necessary,” suggesting that the appointing agencies can determine necessity. Moreover, the agency will not need to wait on OPM to begin and complete the hiring and scoring process. Having the President force changes in an agency that has been resistant to modification for decades has its advantages.
2. The EO does away with the [written-examination requirement](#), which I’ve never been sure is necessary or even that useful in deciding who’s a good judge. Reviewing past work product may be a better, more efficient inquiry.
3. The EO also allows agencies to consider subject-matter expertise. Because ALJs have never functioned as generalists (despite perhaps moving from one agency to another over the course of their careers or occasionally being loaned out to another agency), it’s never made sense to me that agencies can’t account for whether a candidate has expertise in the agency’s subject matter. (ALJs frequently disagree with me about this.)
4. By rendering the hiring of ALJs more attractive, the EO may encourage agencies to use ALJs and turn away from their growing and troubling reliance on non-ALJ adjudicators. These non-ALJs usually lack the same or similar indicia of impartiality that ALJs have.
5. Contrary to Andy’s [view](#), I don’t think that the EO has any effect, at least directly, on ALJ oversight or protection from at-will removal, the more important considerations for protecting ALJs from the risk of partiality. Matters of pay, oversight, and removal are largely set by [statute](#) (with a significant regulatory overlay). Notably, these protections from agency influence were the ones that the Administration sought to weaken in *Lucia v. SEC*, but it did not find a receptive Court.
6. Appointing agencies’ increased control over hiring may render challenges to ALJs’ removal provisions (based on their [double for-cause protections](#)) much less appealing to the Court. Increased control and accountability on the front end may mean that the Court sees less need for control on the backend, given the competing impartiality concerns. If the Court does, nonetheless, limit or strike down the removal provisions, then the risk of partiality (and potential due process problem) for ALJs becomes much more significant, as I have discussed [elsewhere](#).

But the EO should also raise hackles:

1. The EO allows the current administration (and then perhaps later administrations) to pack the agency’s ALJ corps with those whom it thinks are sympathetic to the current administration’s positions. This will matter mostly on matters related to credibility, as has occurred with certain immigration judges (who are not ALJs). This packing could lead to a

one-sided culture within the ALJ corps and eventually criticism – similar to that in the 1930s before the Administrative Procedure Act – that agency adjudicators are unprofessional and biased in favor of the agency. At the end of it all, it will help those who do not like a robust administrative state to sigh and say, “See, we just can’t rely on agency adjudication.” Perhaps I’m being overly dramatic on this point, but my informal interactions with those who represent large companies or are sympathetic to their interests lead me to think that they will complain about agency adjudicators who are too impartial (“We must have accountability!”). And, in the face of proposed changes to provide more oversight, they will claim that the adjudicators are in the agency’s pocket (“We need impartial adjudicators!”). I’m skeptical that they really seek a compromise or resolution. The current model was part of a hard-fought compromise (reached after many years and debates) to accommodate the competing interests of impartiality and accountability. I would be cautious is throwing it away after approximately 70 years (with its various modifications).

2. The EO provides no guidance on appropriate hiring criteria. All that is required is a bar license; agencies have discretion to add additional criteria. Considering how important the preamble says that these judges are, it’s surprising that the EO wouldn’t provide agencies more direction on how to hire. (My co-authored [research](#) on non-ALJs suggests that agencies’ hiring qualifications are extremely varied.)
3. The rationale for the change – that giving the agency more discretion will head off Appointments Clause challenges – seems unconvincing. Is there really any serious Appointments Clause argument on the executive branch (via OPM) itself setting criteria for appointments? Considering that dicta from *Myers v. United States* makes it clear that Congress can set qualifications for officers, I don’t see how the problem increases in gravity when the executive branch itself – with [delegated authority from Congress to OPM](#) – does so. The problem that the courts identified with the appointment of the SEC’s ALJs in *Lucia v. SEC* was that the Commissioners themselves had not appointed the ALJs; they instead had delegated the hiring authority to others within the agency. That constitutional violation did not implicate the OPM-led process. Because I’m unaware of any party challenging the OPM process, I am, once again contrary to Andy, surprised at the wholesale changes to ALJ hiring. The Administration cut out OPM from the ALJ-hiring process entirely (or nearly so), instead of providing surgical improvements that would actually improve ALJ hiring – while accounting for notions of impartiality – and receive widespread praise.
4. Because the stated justification for the change does not appear convincing, because the change permits packing, and because the change is not as surgical as it could have been to improve the hiring process, the EO looks like an attempt to undermine ALJ impartiality in fact and certainly appearance, not improve the hiring process itself. That said, because the ALJs continue to have protections from agency oversight and removal, the concerns over agencies packing their corps is not as great as it was before the APA’s bestowal of protections on ALJs.
5. This may be just the first (and canny, I must say) move by the Administration to limit ALJs’ impartiality. To no avail, the Administration first attempted in *Lucia* to limit ALJs’ protection from at-will removal. That protection from removal is granted [by statute](#), giving the Administration less room to maneuver. The Administration appears to have turned, instead, to an area where it has much more authority – ALJ hiring – to obtain more control over ALJs. Unlike removal matters, Congress has, as best I can tell, [delegated](#) the hiring of ALJs to OPM. OPM has indicated in a memo that accompanied the EO that it will comply with the President’s directive (preventing any turf war between an independent agency and the White House). The effect is that the Administration has altered the hiring process largely by executive action alone.

But will there be further attacks on ALJ impartiality? Will the Administration consider methods of overseeing ALJ performance? Seek to limit ALJs' protection from at-will removal?

We'll have to wait until the smoke clears.

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One thought on “Raiding the OPM Den: The New Method of ALJ Hiring, by Kent Barnett”



Andrew S. Pearlstein

July 12, 2018 at 6:57 pm

The amazing thing is that the EO says nothing about remedying the actual issue in Lucia – the constitutional status of incumbent ALJs under the Appointments Clause. DOJ is supposed to come up with some guidance on that, so we'll see. Will ratification or “re-appointment” be sufficient? If current ALJs receive new “appointments” would they (we) then be in the excepted rather than competitive service? Is the current administration (or agency heads) free to appoint or ratify current ALJs or not? Also, as a practical matter, all agencies that hire ALJs other than Social Security (and perhaps OMHA) already can and do practice selective hiring without regard to OPM's rule of three, since they hire from the vast pool of SSA ALJs.