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The Honorable Shaun Donovan
Director
Office of Management and Budget
725 17th Street, NW
Washington, D.C. 20503

The Honorable Beth F. Cobert
Acting Director
U.S. Office of Personnel Management
1900 E Street, NW
Washington, D.C. 20415

Re: Proposal to Authorize the Appointment of Term-Limited Administrative Law Judges

Dear Director Donovan and Acting Director Cobert:

On behalf of the American Bar Association and its over 400,000 members, I am writing to express concern over draft legislation prepared by the Office of Personnel Management (OPM) that was recently brought to our attention.

The attached proposal would authorize agencies to appoint Administrative Law Judges (ALJs) to a term appointment for up to four years, subject to further extension. An agency would have the option of selecting from a list of applicants on the ALJ register prepared by OPM (following the same procedure used for permanent appointments) or from former ALJs eligible for reinstatement. Any ALJ from the register who is term-appointed would remain eligible for consideration under governing regulations for a future permanent appointment.

The ABA has worked actively for almost three decades to protect the adjudicative independence of the administrative judiciary and promote increased efficiency and fairness in the system. We have advocated on a wide range of issues, including efforts to improve the appointment process and reduce the backlog of Social Security disability claims, and we appreciate OPM's focus on assuring that agencies have sufficient ALJs to handle workloads at all times. However, we are concerned that this draft proposal would circumvent and weaken existing statutory and regulatory provisions that protect ALJ decisional independence from agency influence. In addition, we question why a new process, especially one that alters the current relationship between ALJs and their agencies, is needed.

The independent adjudicative function performed by ALJs and the relationship they must maintain with their employing agencies distinguish ALJs from the rest of the federal workforce. The primary mechanism preserving this unique relationship is a coordinated regulatory framework that protects ALJ decisional independence by limiting the authority of an agency to interfere with the job status of its ALJs.

These regulations explicitly prohibit an agency from: (i) rating the performance of its ALJs; (ii) granting a monetary or honorary awards for superior adjudicative performance; (iii) hiring ALJs for a probationary period; and (iv) removing ALJs from office absent good cause established by the Merit System Protection Board on the record after opportunity for a hearing before the Board.

The proposal will give agencies seeking to hire term-limited ALJs the authority to appoint former eligible ALJs and to extend or terminate the appointment of term-limited ALJs in their service. Despite admonitions in the bill, these provisions create significant opportunities for agencies to selectively appoint former ALJs with a history of ruling in favor of the appointing agency, and in effect treat a term-limited appointment as a probationary period and seek extension of only those term-limited ALJs who rule in favor of the agency. At its worst, an agency could make this process its *de facto* method for hiring ALJs. It also is troubling that there is nothing in the proposal that would prevent an agency from requesting early termination of a term-limited ALJ perceived as being too independent.

In addition to these and some lesser concerns, we are perplexed over the absence of information about the need for this proposal. At present, agencies that need assistance with workload surges may use two existing programs administered by OPM -- the ALJ Loan Program, which allows interagency assignment of ALJs, and the Senior ALJ Program, which permits agencies to bring back retired ALJs for up to one year, with ability to reduce or extend such appointments based on changing circumstances. We are not aware of complaints from agencies that these programs have been insufficient to handle "short-term critical hiring needs" and the draft proposal has not explained why another mechanism for responding to short term workload surges may be needed.

A fair and impartial administrative judiciary is indispensable to our system of justice. Vast numbers of Americans are involved in administrative adjudicative proceedings every day, and the decisions rendered by ALJs in these proceedings often affect their lives in profound ways. We can ill-afford to adopt a proposal that could weaken the protections in place to insulate ALJ decision-making from agency control and undermine public trust in the impartiality of the administrative judiciary.

Thank you for the opportunity to express our views on this subject.

Sincerely,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

A BILL

To expand flexibility in appointing administrative law judges, and for other purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE

This Act may be cited as the “Administrative Law Judge Term Appointment Act of 2016.”

SECTION 2. ALLOWING TERM APPOINTMENTS OF ADMINISTRATIVE LAW JUDGES

(a) EXPANDED FLEXIBILITY. – Section 3105 of title 5, United States Code, is amended to read as follows:

“§3105. Appointment of administrative law judges

“(a) Definitions – As used in this section:

- (i) The term “Office” means the U.S. Office of Personnel Management; and
- (ii) The term “Director” means the Director of the U.S. Office of Personnel Management.

(b) An agency shall appoint, in accordance with the provisions of subchapter I of chapter 33 of this title governing appointments in the competitive service, as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Such appointment may be made on a permanent basis, or may be made on a term-limited basis in accordance with subsection (c) of this section. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

“(c) Under regulations of the Office prescribed under section 1305 of this title, the Director may approve an agency’s request to appoint an administrative law judge on a term-limited basis for a period of more than 1 year and not more than 4 years, with the ability for the agency to extend an initial appointment of less than 4 years up to the 4 year limit. At an agency’s request, the Director may approve an initial term beyond the 4-year limit and may approve extension of a term beyond 4 years.

“(1) To obtain approval for term-limited appointments, the agency must demonstrate that such appointments are justified by a short-term critical hiring need and that details under section 3344 or reappointments of annuitants under section 3323(b)(2) of this title would be insufficient to meet the agency’s workload needs.

“(2) An agency may select for a term-limited appointment either from a certificate issued by the Office under section 3317 of this title, or from former administrative law judges eligible for reinstatement. Only an applicant who has affirmatively expressed willingness to serve a term-limited appointment may be referred on such a certificate. Any applicants appointed to a term-limited appointment shall not thereby have their name removed from the register of eligibles for purposes of referral and consideration for future permanent appointment.

“(3) The expiration of an administrative law judge’s term-limited appointment shall not constitute an action under section 7521 of this title.

“(4) In determining whether to extend a term-limited appointment, or in determining whether to request OPM to extend a term appointment beyond 4 years, an agency shall not appraise the administrative law judge’s performance in violation of chapter 43 of this

title or the regulations of the Office, or otherwise violate any laws applicable to administrative law judges.

SECTION 3. EFFECTIVE DATE

(a) EFFECTIVE DATE. The amendments made to this section shall take effect upon the publication of final regulations by the Office of Personnel Management.

SECTION-BY-SECTION ANALYSIS

To accompany a draft bill

“To expand flexibility in appointing administrative law judges, and for other purposes.”

SECTION 1. SHORT TITLE

The first section would provide that the bill may be cited as the “Administrative Law Judge Term Appointment Act of 2016.”

SECTION 2. ALLOWING TERM APPOINTMENTS OF ADMINISTRATIVE LAW JUDGES

Section 2 would amend section 3105 of title 5, United States Code, to allow agencies to appoint Administrative Law Judges (ALJs) to a term appointment for up to four years, in addition to the current permanent hiring authority. The Office of Personnel Management (OPM) is empowered to promulgate regulations detailing how agencies can utilize this new policy. Agencies must obtain OPM approval to appoint term ALJs. This can be achieved by demonstrating a short-term critical hiring need. Once approved to appoint term ALJs, agencies must appoint individuals from the current ALJ register who proactively expressed willingness to be selected for a term appointment, or former ALJs eligible for reinstatement. Individuals selected for a term ALJ appointment are still eligible to be selected for a permanent ALJ position since they are not removed from the ALJ register during their term appointment. Those serving on a term ALJ appointment are not subject to performance evaluations, or any other laws that do not apply to permanent ALJs.

SECTION 3. EFFECTIVE DATE

Section 3 would make the amendments made by the Act effective upon the publication of final regulations by OPM.