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June 1, 2016

The Honorable James Lankford
Chair, Subcommittee on Regulatory Affairs
and Federal Management
Committee on Homeland Security and
Governmental Affairs
United States Senate
340 Senate Dirksen Office Building
Washington, DC 20510

The Honorable Heidi Heitkamp
Ranking Member, Subcommittee on
Regulatory Affairs and Federal Management
Committee on Homeland Security and
Governmental Affairs
United States Senate
340 Senate Dirksen Office Building
Washington, DC 20510

Dear Senator Lankford and Senator Heitkamp:

On behalf of the American Bar Association, with nearly 400,000 members, I write to commend you for your hearing examining due process in administrative hearings on May 12. We share your concerns regarding a new proposal by the Social Security Administration's Office of Disability Adjudication and Review to hold hearings without Administrative Law Judges (ALJs) in certain categories of cases.

The ABA has worked actively for over two decades to protect the adjudicative independence of the administrative judiciary and promote increased efficiency and fairness in the system. We have been able to draw upon the considerable expertise of our diverse membership – ALJs, claimant representatives, academicians, and agency staff – to develop a wide-ranging body of recommendations.

The ABA's Section of Administrative Law and Regulatory Practice, Commission on Disability Rights, Judicial Division, Commission on Law and Aging, and the National Conference of Administrative Law Judiciary of the Judicial Division have worked to develop our recommendations, the goals of which are to improve the quality of decision-making; increase fairness and efficiency for claimants; help alleviate the backload of cases; encourage clarity in communications with claimants; promote procedural due process protections; and seek the application of appropriate, consistent legal standards at all stages of the adjudication process.

Long-standing ABA policy calls for due process, on-the-record hearings presided over by ALJs appointed pursuant to the Administrative Procedure Act (APA) (5 U.S.C. § 3105) and applying standards consistent with the law and with published regulations. The ABA has long supported an informal and non-adversarial hearing before an ALJ that allows the ALJ to function as an independent fact-finder who has a duty to develop the record, and we believe this role should continue.

We support your recognition that the APA applies to applications for disability and that, for all other evidentiary hearings under the Social Security Act, the ALJ adjudication process should also remain the preferred type of adjudication for evidentiary proceedings, consistent with the APA.

The adjudicative function performed by ALJs and the relationship they must maintain with their employing agencies distinguish them from the rest of the federal workforce. Congress recognized their unique function when it passed the APA, which established the adjudicative independence of the administrative judiciary. Federal regulations protect ALJ independence by explicitly prohibiting an agency from rating the performance of its administrative law judges or granting a monetary or honorary award for superior adjudicative performance. 5 C.F.R. §§ 930.211 and 930.215(b).

To increase efficiency, we encourage efforts to improve the ability of ALJs to issue a correct decision as early as possible in the process. If we can improve the quality of intake and development of evidence early, there will be fewer appeals and fewer cases awaiting adjudication. We support the concept of a quick disability determination process to identify, expedite, and resolve the claims of those who clearly are disabled.

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. As the U.S. Supreme Court has stated on several occasions, ALJs are the “functional equivalent of district court judges”; they, too, should be held to the highest ethical standards of conduct in their professional and personal lives.

Additionally, the ABA believes that an excellent way to promote fairness and public trust in administrative adjudication is to make ALJs subject to, and accountable under, appropriate standards for ethical conduct adapted from the ABA Model Code of Judicial Conduct. The Model Code establishes standards for the ethical conduct of judges that promote the independence, integrity, and impartiality of the federal judiciary. It is comprised of four canons – overarching principles of judicial conduct – followed by enforceable black letter rules and comments that provide aspirational statements and guidance in interpreting and applying the rules. Requiring adherence to a rigorous code of conduct based on the ABA’s Model Code is fully compatible with, and advances the objectives of, the APA.

Allowing the Social Security Administration to decide which portions of the Social Security Act (SSA) and APA it wishes to follow is contrary to the rule of law. Allowing the Social Security Administration to ignore the use of due process hearings conducted by Administrative Law Judges is contrary to both the SSA and to the APA and is unfair to the citizens that the Agency was created to serve and the public in general.

Due to our concern about the Social Security Administration’s continued preference of expediency over its mission and the law (SSA and APA), evidenced by its alteration of the position description of the Administrative Law Judge, we encourage you to consider legislation to establish The Administrative Law Judge Conference of the United States as an

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independent agency to assume the responsibility of the United States Office of Personnel Management with respect to ALJs, including their testing, selection, and appointment.

Thank you and your staff for your consideration of these comments. The ABA stands ready to be of assistance as you continue to look into these important issues surrounding the role of the Administrative Law Judge and the due process hearings to which citizens are entitled.

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