

Judges warn public should be ‘concerned’ about executive order to politicize ALJ appointments

By Amelia Brust

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The head of an organization representing about 75 percent of the federal government’s administrative law judges (ALJs) is worried by a recent executive order to change their appointments from competitive to political.

Citing a June verdict by the Supreme Court that ALJs at the Securities and Exchange Commission are subject to the Constitution’s appointments clause, President Donald Trump signed an EO Tuesday to move ALJs into excepted service status. As a result, agencies will be able to forego the competitive hiring process and appoint ALJs directly.

Marilyn Zahm, president of the Association of Administrative Law Judges and an ALJ in the Office of Disability Adjudication and Review in Buffalo, New York, told Federal News Radio why she thought the EO was a bad idea.

“I am very disturbed and concerned and quite frankly, the American people should be as well,” she said on Federal Drive with Tom Temin. “ALJs were created and protected by the administrative procedure act, which was an act passed by Congress after WWII to ensure that the American public would have impartial, independent adjudicators when they had to deal with federal agencies in some sort of a claim situation.”

Currently, to be considered for a position ALJs must submit to a written exam, interviews, a background evaluation and are scored according to their qualifications before being put on a list by the Office of Personnel Management. When agencies wish to hire an ALJ they must do so from the list, Zahm said.

The White House said that the appointment of ALJs has been questioned in “hundreds” of other cases besides the SEC, while the Government Accountability Office recommended OPM reevaluate the ALJ appointment process in 2010.

With the change, she predicted agencies would lower the standard for hiring and appoint judges who are likely to side with the agency in claims disputes.

The Association of Administrative Law Judges represents 1,400 of the Social Security Administration’s nearly 1,600 ALJs, which Zahm said are the bulk of ALJs governmentwide. For the nearly half-million people receiving decisions on claims from SSA administrative law

judges each year, Zahm said they should worry about whether they receive impartial rulings from an excepted service ALJ.

SSA has also struggled to hire enough ALJs to meet demands for claims.

“I would say that in many cases, and certainly look at the Supreme Court dispute, judges who are appointed will do the bidding of whoever appointed them — not necessarily because they’re corrupt but because they’ve been appointed for their particular point of view,” she said.

he Federal Administrative Law Judges Conference echoed her concerns Wednesday.

“Until [Tuesday], federal agencies hired ALJ candidates with seven years of litigation experience,” the statement said. “Candidates were ranked based on their scores on a six-part examination conducted by the Office of Personnel Management. Now, any agency that wants to hire an ALJ needs no approval from OPM and can hire any attorney regardless of skill or experience.”

The conference called for a reconsideration on the part of the White House or Congressional intervention.

Zahm also said the EO failed to explain whether excepted service would still have a probationary period or if their protections under the Merit Systems Protection Board — which states that ALJs can only be removed for just cause — are impacted by this change.

“There are a lot of unanswered questions with this executive order and I would say there is no need for this executive order,” she said.