THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

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August 25, 2016

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

Re: Draft Legislation to Change APA to Allow Temporary Appointments Would Waste OPM Resources and Adversely Affect Recruitment and Independence of Administrative Law Judges

The Federal Administrative Law Judge Conference (FALJC) is the largest organization that represents and serves all administrative law judges throughout the Federal government. Our mission is to further the public interest by improving the administrative process; advance the professional standing, education and welfare of the ALJs employed by the U.S. government; and encourage cordial relations among the members of the organization and with the judiciary, government agencies, and public and private organizations concerned with the administrative law process.

We have recently become aware of a proposal entitled the "Administrative Law Judge Term Appointment Act of 2016." This proposal from the Office of Personnel Management (OPM) seeks to amend the Administrative Procedure Act and would substantially change the law regarding the appointment of administrative law judges. This proposal would waste OPM resources that should be devoted to hiring sufficient numbers of highly qualified judges to meet agency needs. As summarized below the OPM proposal is not supported by any identified need that would benefit the public interest in fair hearings, it would eviscerate the protection for independence of administrative law judges and would create a disincentive for highly qualified attorneys from the private sector to apply to be an administrative law judge. To assess the impact of this proposal we offer the following critical considerations:

(1) OPM already has existing authority to allow agencies to use retired annuitants when needed and to provide for loan of Judges from other agencies when assistance is needed. The agencies with ALJs are required to pay OPM each year for management of the examination and hiring process. There is no explanation of why OPM believes the retired annuitant and loan programs are inadequate. Furthermore OPM would have to divert current resources for management of the ALJ loan and annuitant programs to administer this proposed program.
(2) To address the lack of sufficient OPM hiring of ALJs for the Social Security Administration Congress provided additional authority in the Bipartisan Budget Act of 2015 to allow for expedited hiring of administrative law judges. OPM has not explained why this authority is not sufficient.
(3) A limited time appointment with individuals looking for a permanent employment status adversely impacts the independence of adjudication. This would essentially allow an Agency to keep ALJs on one year appointments subject to renewal if they issued decisions favoring the agency or non-renewal if they do not. Additionally, highly qualified applicants who are on the

ALJ register would be reluctant to leave permanent appointments and move to a remote location for a one-year appointment.

(4) OPM policies have not supported maintaining the historic equivalence of Administrative Law Judge positions with Senior Executive Service positions because the APA prohibits pay for performance systems for judges and prohibits bonuses. Making administrative law judge appointments temporary makes the appointment less attractive to highly qualified attorneys who may seek employment as SES instead.

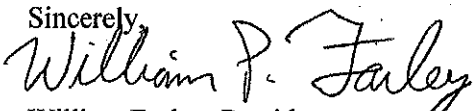
(5) Congress created the independent administrative law judge position for the benefit of the public that they would receive a fair hearing and due process before an agency. Changing the law to make these appointments temporary may subject decisions made by temporary ALJs to legal challenge by unsuccessful litigants.

(6) Internal hiring practices for such a program developed by OPM may also be subject to legal challenge if there is a question of validity or if the process is used to favor or disfavor certain types of applicants. E.g. Meeker v. MSPB, 319 F.3d 1368 (Fed. Cir. 2003).

Before any significant change is made to the APA regarding the appointment of administrative law judges it should be thoroughly studied and reviewed and an opportunity for public comment provided so that changes are fully understood and considered and unintended consequences may avoided.

As administrative law judges, we are in a unique position to offer information regarding the current administrative system and potential efforts to improve administrative law, while preserving the independence of the administrative judiciary for the benefit of the public. FALJC is able to provide information and extensive experience in administrative litigation and would be able to provide suggestions to promote efficient adjudication and professionalism within the administrative judiciary. We are prepared to meet with your staff to discuss these matters.

Sincerely,



William Farley, President
Federal Administrative Law Judges Conference

Cc: Honorable Beth F. Cobert, Director Office of Personnel Management
Encl: Section 846 Bipartisan Budget Act of 2015, 129 Stat. 620