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# United States Senate

COMMITTEE ON  
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

KEITH B. ASHDOWN, STAFF DIRECTOR  
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April 5, 2016

The Honorable Carolyn W. Colvin  
Acting Commissioner  
Social Security Administration  
6401 Security Blvd., West High Rise  
Baltimore, MD 21235

Dear Ms. Colvin:

There is growing apprehension regarding the independence and increased usage of the more than 3,000 executive agency administrative judges utilized across the federal government.<sup>1</sup> In this light, I write to express my concern regarding the recent proposal from the Social Security Administration to remove two classes of hearings from SSA's Administrative Law Judges (ALJs) to the purview of the Administrative Appeals Judges (AAJs) and Attorney Examiners within SSA's Appeals Council.

SSA's regulatory framework places de novo evidentiary hearings for disputed SSA actions before Office of Personnel Management appointed ALJs per the Administrative Procedure Act (APA).<sup>2</sup> However, it is my understanding that SSA has proposed that potentially tens of thousands of cases be removed from the jurisdiction of SSA ALJs. These cases arise from two broad classes of hearings:

- Non-Disability Cases (404.956 and 416.1456); and
- Supplemental Hearings in Cases the Council Would Otherwise Remand (404.983 and 416.1483).

These proposed changes break with decades of practice, run contrary to well established interpretation of the Social Security Act, and depart from SSA's own regulations. Without a recent change in existing statutes, the possibility that this action is to address statutory ambiguity per *Chevron*<sup>3</sup> seems unlikely, and the requisite agency discretion lacking. Further, on its face serious concerns arise about the need for SSA claimants to receive due process through APA hearings before an independent arbitrator. The possibility that such actions could invite large-scale, costly, and protracted litigation from affected claimants is very troubling.

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<sup>1</sup> Barnett, Kent, *Due Process vs. Administrative Law*, The Wall Street Journal, (Nov. 15, 2015).

<sup>2</sup> 5 U.S.C. §§ 551 et seq.

<sup>3</sup> *Chevron, U.S.A., Inc. v NRDC*, 467 U.S. 837 (1984).

The Honorable Carolyn W. Colvin

April 5, 2016

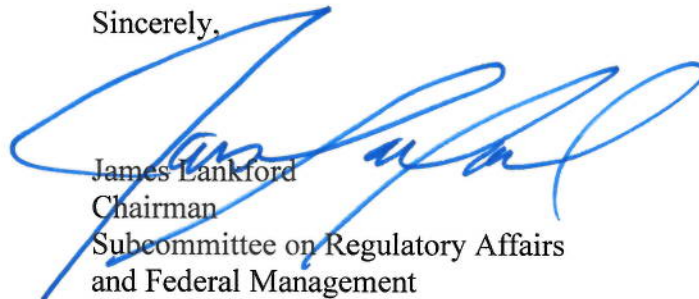
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Therefore, I request your assistance in understanding more about these proposed changes and SSA's views on how they can be justified. Specifically I would ask that you provide the subcommittee with documents and answers no later than 5:00 PM EDT on April 26, 2016, regarding the following:

1. Please provide copies of all drafts and final SSA's proposals regarding the transfer of cases to AAJs within the Appeals Council as described above.
2. Has the Office of the General Council for SSA furnished a legal memorandum or opinion outlining the authority which supports the AAJ proposal(s)? If so, please provide the memorandums including all drafts and final.
3. Did SSA consult with OPM regarding these proposals? If so, please provide all documents regarding OPM's consultation.
4. What alternative solutions did SSA consider to these proposals?
5. If the intention of these proposals was to lighten the caseloads of ALJs, as an alternative option, did SSA consider hiring ALJs instead of creating AAJs? Please explain.

If you have any questions about this correspondence, please contact Nate Kaczmarek with the Senate Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management at (202) 224-6662. The Subcommittee prefers to receive all documents in electronic format. Thank you for your prompt attention to this important matter.

Sincerely,



James Lankford  
Chairman  
Subcommittee on Regulatory Affairs  
and Federal Management

cc: The Honorable Heidi Heitkamp  
Ranking Member  
Subcommittee on Regulatory Affairs  
and Federal Management