

May 12, 2016

Opening Statement of Senator James Lankford

**Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs
and Federal Management Hearing titled:**

“Examining Due Process in Administrative Hearings”

Good morning and welcome to today’s Subcommittee hearing. Today we will look into several issues surrounding administrative law judges, their independence and the importance of due process as provided by the Administrative Procedure Act. The APA validates due process principles through the guarantee of an administrative hearing before an independent decision-maker. These independent and impartial decision-makers are most often administrative law judges, or ALJs.

The office of the ALJ is unique in our federal government. Although they are like federal judges in the sense that we expect them to preside over formal administrative adjudications independently, ALJs are in fact executive branch employees selected by the Office of Personnel Management to oversee adjudications as required by law. Though ALJs are spread throughout the executive branch, our focus today will center on ALJs from the Social Security Administration, as they employ the largest number of federal ALJs. ALJs are hired through the Office of Personnel Management. OPM is tasked with reviewing all ALJ’s qualifications. OPM has made strides in providing qualified ALJs to the Social Security Administration and elsewhere across the executive branch.

At the same time, over the last 4 years, Congress has appropriated significant resources so that the Social Security Administration could hire more ALJs to address its backlog of disability claims. Yet, the agency has been unable to hire sufficient numbers of approved ALJs to tackle the rising backlog of cases—a backlog which topped one million last year. But instead of hiring more ALJs, in a misguided effort to expedite the adjudications process, SSA is in the process of moving tens of thousands of pending cases from ALJs to non-APA attorney examiners, who are regular employees of the agency and lack the requisite decisional independence. In March, SSA posted close to 30 non-APA “Attorney Examiners” job openings, to support this initiative. This SSA proposal raises important questions about whether cases heard by non-APA attorneys constitutes a violation of the Administrative Procedure Act. Further, Social Security regulation makes repeated reference to a claimant’s right to an independent decision from an ALJ.

SSA's newfound policy also raises procedural issues—given the magnitude and potential economic effect of SSA's proposed reinterpretation of its own rule here, it appears that the rule should also have been submitted by SSA to the Office of Information and Regulatory Affairs. Economics aside, the proposal creates an inequity where some claimants will receive the independent decision guaranteed to them by the APA and others will not. Furthermore, for non-disability cases the loss of due process is compounded by the fact that a majority of these individuals are unlikely to have access to attorney representation due to a lack of financial incentive. But once a sizable number of claimants have been denied a hearing before an ALJ, there is the potential that SSA's proposal to move cases away from ALJs to non APA attorneys could result in a large, class action lawsuit.

While we all share the goal of eliminating the hearing backlog, our concern isn't just about meeting desired results; we must also focus on how we get there. Accordingly, there are three main points I would like to address today: First, I would like to focus on the how attorney examiners, drawn from the SSA's own ranks, can be said to appear impartial, especially to the extent that they review cases *de novo*. Second, I would like to know more about SSA's policy pivot, which in the past allowed for certain transfers on a case-by-case basis, to permit large-scale transfers of entire classes of cases. Third, I believe we need to carefully consider alternative proposals to SSA's untested and legally ambiguous policy, such as using retired ALJs from local offices to hear these cases. If SSA believes that there aren't enough qualified ALJs to meet the current demand, shouldn't they and OPM instead be focused on new recruitment efforts to increase the supply of worthy applicants?

We are happy to have with us today Deputy Commissioner Theresa Gruber from SSA, Associate Director for HR Solutions Joseph Kennedy from the Office of Personnel Management, and Marilyn Zahm, an ALJ from the Social Security Administration to help us navigate these important issues. We are grateful for your testimony and I look forward to the issues discussed at this hearing. With that, I will recognize Ranking Member Heitkamp for her opening remarks.