STATEMENT OF
THE HONORABLE MARILYN ZAHM
PRESIDENT
ASSOCIATION OF ADMINISTRATIVE LAW JUDGES

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
SUBCOMMITTEE ON REGULATORY AFFAIRS AND FEDERAL MANAGEMENT

UNITED STATES SENATE

MAY 12, 2016

Chairman Lankford, Ranking Member Heitkamp, and Members of the Subcommittee:

Thank you for this opportunity to appear before you to discuss the Social Security Administration's plan to divert two categories of cases from Administrative Law Judges to Attorney Examiners at the Appeals Council.

I am Marilyn Zahm, an Administrative Law Judge assigned to the Buffalo, NY hearing office since 1994. I am also the president of the Association of Administrative Law Judges (AALJ), a group of 1300 Administrative Law Judges (ALJs) employed by the Social Security Administration across the country. The views I express today are those of the Association. I do not speak for the Agency.

The Social Security Administration (SSA) has an unprecedented number of cases pending at the hearings level. There are over 1.1 million people waiting for a hearing and decision. No one is more aware of the seriousness of this problem than the ALJs. Every day we see the toll that waiting up to two years for a hearing can take on a claimant.

The SSA leadership, to its credit, is mobilizing all resources to deal with this caseload.

However, as part of its plan, the Agency has launched an initiative that is inconsistent with the Administrative Procedure Act (APA) and its own regulations and that is not in the best interests of the American public.

The Social Security Administration plans to shift certain categories of cases from ALJs to Attorney Examiners at the Appeals Council. This action violates the Agency's own regulatory process that evidentiary hearings on appeals from adverse Agency determinations are to be presided over by ALJs appointed pursuant to the APA. I have attached a legal analysis from administrative law expert Dean Harold Krent, concluding that this plan is *ultra vires*. (See Appendix A) Not only does SSA's agenda starkly depart from the law and regulations, it is poor public policy, as it strips claimants of their right to an independent, APA adjudicator and, also, their right to an appeal before the Appeals Council.

SSA plans to hire 65 new Attorney Examiners (with the internal organizational title of Administrative Appeals Judges), together with 295 support staff, to augment the current 70 attorney examiners in the Appeals Council. These new appeals council attorneys, according to SSA, will hold hearings and issue decisions on two subsets of cases: non-disability and remanded cases. Non-disability cases are a specialized group of cases involving issues such as overpayments, underpayments, workers' compensation offsets, paternity, fraudulent retirement, selection of representative payee, and matters of income and resources. There are approximately 10,000 non-disability cases appealed to the hearings level annually; and, about 30,000 remands pass through the Appeals Council each year.

Currently, and for decades, evidentiary hearings on appeals made from adverse Agency determinations have been conducted by ALJs. SSA has 1500 ALJs located in 165 hearing offices throughout the country. ALJs are selected by federal agencies through the Office of Personnel Management (OPM) after a rigorous hiring process, the requirements of which include years of trial experience, a full-day written examination, and a structured interview conducted by, among others, sitting ALJs and law professors. The applicants' qualifying experience, together with the results of the test and interview, are scored and the names of the top candidates are sent to any agency seeking to appoint an ALJ.

ALJs are appointed pursuant to the APA, the law passed by Congress after World War II to ensure that federal agencies could not improperly influence their adjudicators. In order to assure judicial independence, ALJs are forbidden by law from having ex-parte communications with certain agency personnel. They cannot receive bonuses or undergo performance appraisals. Suspension and removal for good cause must be accomplished by filing charges at the Merit Systems Protection Board, where an independent judge will preside over the hearing. All of these safeguards are imbedded in the law to protect the American people by ensuring that ALJs can exercise their judicial independence in applying the law.

What SSA plans to do is to divert a subset of cases from ALJs and have them heard by their own handpicked people. Instead of an ALJ presiding over the evidentiary hearing and issuing a decision, an appeals council attorney will be adjudicating the case. SSA argues that having appeals council attorneys hold regulatory evidentiary hearings is not a violation of the claimants' rights as, it contends, appeals council attorneys are equivalent to ALJs. This is simply not true.

These appeals council attorneys are directly selected by the Agency and promoted, demoted and disciplined by their Agency supervisors. They receive bonuses and performance evaluations. In short, the Agency has direct control over these adjudicators who do not have statutorily-protected judicial independence. (See Appendix B for a chart comparing ALJs to appeals council attorneys)

These new appeals council attorneys, who have never held SSA hearings or issued decisions, will have to undergo training to perform this work. Since the learning curve for a new ALJ is nine months, this training will take at least several months even if the individuals involved are familiar with the disability program. Moreover, they will all be located in Baltimore, Maryland and Falls Church, Virginia, and time and travel costs will be required because these appeals council attorneys will be obligated to travel across the country to hold hearings for any claimant who declines a video hearing. SSA has asserted that this new program is a temporary measure and will end in one year. It is not productive or cost effective, however, to spend the time and money to train non-ALJs to hold hearings and issue decisions if they are going to only be assigned to handle this work for one year - unless, of course, SSA intends to continue to transfer more types of cases from ALJs to appeals council attorneys.

What is more, under the Social Security Administration's plan, claimants who appear before these appeals council adjudicators will lose their right to a level of appeal.

Currently, if a claimant is unhappy with the decision of the ALJ, an appeal can be commenced by a simple letter that will trigger the process of a complete review by the Appeals Council of the evidence, the hearing recording, and the ALJ's decision. Decisions of the Appeals Council are then appealable to Federal Court.

Under SSA's new plan, however, a claimant having his case heard and decided by an appeals council attorney will not thereafter be able to appeal to the Appeals Council, but must seek redress directly in Federal Court, a much more expensive and difficult course. Moreover, claimants with non-disability cases, particularly overpayments, are often unrepresented as they do not have sufficient resources to hire an attorney and therefore would be particularly handicapped in filing an appeal.

The regulations relied on by SSA to justify its plan to divert these cases do not provide sufficient legal support for the Agency's position.

Title 20 Code of Federal Regulations, Part 404 §900 vests in all claimants:

- the right to a hearing before an administrative law judge if dissatisfied with the determination of the state agency, and

- the right to a review before the Appeals Council if dissatisfied with the decision of the administrative law judge.

Sections 929 and 930 affirm the right to a hearing before an ALJ. Section 970 also provides that disappointed claimants may seek review of any adverse ALJ decision before the Appeals Council.

The agency cites Part 404.956 for Title 2 cases, and the corresponding Title 16 regulation, 416.1456, for its authority to remove the non-disability caseload from ALJs. However, those regulations, which state that the Appeals Council may assume responsibility for holding a hearing by requesting that the administrative law judge send the hearing request to it, gives the Appeals Council only a limited power to hear particular cases. In fact, this is the manner in which the agency has interpreted these regulations in the past, as only individual cases, such as those involving novel issues, have been escalated from the ALJ level to the Appeals Council level. These regulations have not been used to

subsume whole categories of cases to be heard by the Appeals Council. Any attempt to do so flies in the face of the longstanding regulatory scheme that clearly contemplates that claimants have the right to have ALJs hold their evidentiary hearings. Interpreting these regulations in the way SSA asserts would allow it to replace ALJs with appeals council attorneys in any or all cases.

The agency also argues that Part 404.983 and 416.1483 authorizes the Appeals Council to hold hearings on Federal Court remands. However, those regulations, which state that the Appeals Council may make a decision on the case or remand it to an ALJ to take action and issue a decision, including the holding of a hearing, make plain that the Appeals Council may act if it can make a decision without a further evidentiary hearing.

SSA's initiative to remove the non-disability and remand hearings from ALJs and have the cases heard by appeals council attorneys is a dramatic change that is not contemplated or supported by the law or regulations.

As stated earlier, the AALJ is as concerned as the Agency is about the pending caseload. We applaud SSA for its efforts to find remedies. With this in mind, we welcome the opportunity to offer a solution that meets the goal of reducing the backlog. Our solution, however, will not violate a claimant's right to an independent, APA adjudicator or an internal level of appeal, nor will it contravene longstanding regulatory procedures.

The Association of Administrative Law Judges proposes the following alternatives to SSA's plan.

With regard to handling the non-disability caseload:

- Create a specialty cadre of ALJs throughout the country, approximately three per Region, to handle the non-disability cases in addition to some disability cases. The cadre can be composed of current ALJs or retired Senior ALJs who are re-employed for this purpose.

- Deploy the resources that would have gone to the appeals council attorneys to this ALJ cadre. That is, have an assigned clerical employee gather all of the evidence and prepare the file. Have a well-trained attorney review the file, ensure that the appropriate documents are exhibited, and prepare a legal memorandum for the ALJ, outlining the evidence and the issues to be determined. Once the ALJ has heard the case and made a decision, have the attorney, who is already familiar with the file, draft the decision. The ALJs will be located in the local hearing offices. The attorney and clerical staff can be located in a regional office or a central location. Because non-disability cases have specialized issues, a central location where the support staff can collaborate may make good sense.

- This AALJ solution takes advantage of the fact that ALJs are already trained and are located in the field, therefore reducing travel time and attendant costs.

With regard to remanded cases:

- The AALJ agrees that if the Appeals Council can make a determination on the record before them, it should do so; the existing regulations are clear in this regard.

- If an evidentiary hearing is necessary, it is more cost effective and efficient for the case to be sent back to the ALJ in the local hearing office to hold the hearing and issue a decision. Again, no additional travel costs or time will be required and no additional training is necessary. And, the right to an appeal of the ALJ decision to the Appeals Council would be preserved.

SSA is proposing to hire a total of 350 new employees to implement its initiative; clearly, it has the funds to do so.

Under the AALJ plan outlined above, sixty attorneys and clerical employees will be needed to staff the specialty ALJ cadre; anywhere from ten to thirty retired Senior Judges could be re-appointed. That leaves approximately 260 additional attorneys and clerical staff members who can be available to work directly with the ALJs in the hearing offices with the highest number of backlogged cases. If each ALJ has two attorneys and a clerk to work directly with the Judge - insuring that all evidence is submitted, reviewing case files, writing summaries and drafting decisions - the Judge would be able to hold more hearings and issue more decisions. Moreover, if the existing adjudicatory system were to be modernized by, for instance, enacting rules of practice and closing the record, the ALJs could hear and decide even more cases.

In conclusion**,** it is important for this Committee to understand the implications of SSA's initiative to supplant ALJs with appeals council attorneys. This program is a thinly veiled attempt to eliminate APA protections for the American public in the name of efficiency. Not only is this plan ill advised, it will not make a dent in the backlog of pending cases. More likely, a court challenge will necessitate the rehearing of all of these cases by an ALJ.

Thank you for this opportunity to address this important issue.