Office of the Attorney General
Washington, D. C. 20530

May 31, 2016

The Honorable Paul Ryan
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *Helman* v. *Department of Veterans Affairs*,
No. 15-3086 (Fed. Cir.)

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to you concerning the above-referenced case, which involves a constitutional challenge to a statutory provision added by Section 707 of the Veterans Access, Choice, and Accountability Act of 2014, Pub. L. 113-146, 128 Stat. 1754 (codified at 38 U.S.C. 713(e)(2)).

Section 707 authorizes the Secretary of Veterans Affairs to remove a senior executive at the Department of Veterans Affairs (DVA) under streamlined procedures "if the Secretary determines that the performance or misconduct of the individual warrants removal." 38 U.S.C. 713(a)(1). The statute provides that an individual removed under that section may appeal her removal "to the Merit Systems Protection Board under section 7701 of title 5." 38 U.S.C. 713(d)(2)(A). Section 707 specifies, however, that the Merit Systems Protection Board "shall refer such appeal to an administrative judge," 38 U.S.C. 713(e)(1), and that the decision of the administrative judge "shall be final and shall not be subject to any further appeal." 38 U.S.C. 713(e)(2).

In this case, pursuant to Section 707, the Secretary removed petitioner Sharon Helman from her senior executive position as Director of the Phoenix Veterans Administration Health Care System in Phoenix, Arizona. Helman appealed to the Merit Systems Protection Board, which referred her appeal to an administrative judge, as Section 707 requires. The administrative judge sustained two of the three charges against Helman and upheld her removal. The Merit Systems Protection Board refused to entertain Helman's appeal of that decision, explaining that Section 707 renders the administrative judge's decision final and unappealable. Helman then filed a petition for review in the United States Court of Appeals for the Federal Circuit, contending that Section 707 violates the Constitution in several respects. As relevant here, Helman contends that Section 707 violates the Appointments Clause (U.S. Const. art. II, § 2, cl. 2) insofar as it vests an administrative judge with unreviewable discretion to decide whether her removal violated federal law.

I write to advise you that the Department of Justice has decided not to defend 38 U.S.C. 713(e)(2) against the Appointments Clause challenge in this case. The Constitution requires that

"Officers of the United States" be appointed in the manner prescribed by that Clause. The Supreme Court has held that "officers" under the Constitution are officials who "exercis[e] significant authority pursuant to the laws of the United States." *Buckley* v. *Valeo*, 424 U.S. 1, 125-126 (1976). Section 707 requires the Merit Systems Protection Board to refer to an administrative judge an appeal by a DVA senior executive who has been removed by the Secretary; resolution of the appeal is committed to that judge's final and unreviewable discretion. 38 U.S.C. 713(e)(1), (2). Administrative judges are not appointed as officers of the United States, but rather are "employee[s] of the Board designated by the Board [to] administer oaths, examine witnesses, take depositions, and receive evidence." 5 U.S.C. 1204; see 5 C.F.R. 1201.4(a). Section 707 thus vests a federal employee with the final authority—unreviewable by any politically accountable officer of the Executive Branch—to determine whether to uphold the removal of a DVA senior executive, which includes the power to overrule the decision of a Cabinet-level officer. That scheme, which impairs the President's ability to supervise the execution of the federal civil service laws, is inconsistent with the Appointments Clause. See *The Attorney General's Duty to Defend the Constitutionality of Statutes*, 5 Op. O.L.C 25, 25 (1981) (explaining that the Department appropriately declines to defend the constitutionality of an Act of Congress when it "infringes on the constitutional power of the Executive"). Accordingly, the Justice Department will not defend 38 U.S.C. 713(e)(2) against the Appointments Clause challenge in this case.

I note that the scope of this decision is narrow. Although the Department of Justice has decided not to defend 38 U.S.C. 713(e)(2) against the Appointments Clause challenge in this case, the Department will continue to defend the vast bulk of the statute. Thus, the Department will recommend to the court of appeals that it hold invalid and sever only 38 U.S.C. 713(e)(2) and those provisions of 38 U.S.C. 713 that are inextricably intertwined with that provision. The Department will urge that the remainder of the statute remain intact, and the Department will defend the remainder of the statute against the other constitutional arguments that Helman has raised.

The government's brief is due to be filed in the Federal Circuit on June 1, 2016. Please note as well that Congress is currently considering legislation that is designed to address the constitutional infirmity identified in this letter, including a bill that has been drafted in consultation with DVA.

Please do not hesitate to contact this office if we can be of further assistance in this matter.

Sincerely,

Loretta E. Lynch

Loretta E. Lynch
Attorney General