



## Federal Bar Association

Veterans & Military Law Section

June 24, 2014

Hon. Bernie Sanders  
Chairman  
Committee on Veterans' Affairs  
United States Senate  
Washington, D, C. 20510

Hon. Jeff Miller  
Chairman  
Committee on Veterans' Affairs  
U.S. House of Representatives  
Washington, D.C. 20515

### **Re: Due Process Protections for VA Senior Executives**

Dear Senator Sanders and Representative Miller:

I write on behalf of the Veterans and Military Law Section of the Federal Bar Association to express concern over provisions in the House and Senate-passed veteran bills, set for conference discussion, that could lead to the politicization of the senior career ranks of the Department of Veterans Affairs and make it increasingly harder for the Department to attract and retain highly qualified talent to its ranks.

These comments express the views of the Veterans and Military Law Section of the Federal Bar Association, and do not necessarily represent the official position of the national Federal Bar Association. The Veterans and Military Law Section includes a substantial number of attorneys who actively work with our veteran community. They and others are concerned about proposals that would authorize the speedy termination or demotion of Senior Executive Service appointees in the VA, with only modest regard, at best, for due process.

At the outset, we note that we have been deeply troubled by allegations of mismanagement at VA facilities and their harmful impact upon the health of veterans. We believe that the underlying health care problems deserve prompt attention and resolution, including the impartial investigation by the VA Inspector General and the Department of Justice of actions suggesting mismanagement and potentially criminal activity.

These endeavors do not warrant a rush to judgment by Congress, however, through changes in law that permit the VA Secretary to indiscriminately fire VA employees, especially in the career ranks of the Senior Executive Service. Such a response will not necessarily fix the

VA's problems and may ultimately weaken the VA's management ranks and degrade the expertise to fix the VA.

While the Senate bill (the Senate-amended version of HR 3230) is superior to the House bill (HR 3230) in moderating these risks, a truncated Merit Systems Protection Board hearing, as proposed by the Senate bill, is unlikely to provide the firm assurance of due process for SES members, as available for decades under federal civil service law. Current procedures already assure the VA authority and discretion to act in a prompt and appropriate fashion when faced by arguably poor performance by a career SES appointee.

Section 409 of the Senate-passed bill requires the Merit Systems Protection Board to issue a decision on the appeal of removal of a VA-employed SES appointee within 21 days of the filing of an appeal. An appellant is unlikely to have had sufficient time to review the agency's charges, prepare his defense, and participate in a hearing within such a compact time frame. Moreover, the 21-day requirement places tremendous pressure upon the capacity of MSPB to exercise rational consideration of the issues raised within such a short time period. The elimination of the appellant's right of appeal of an adverse decision by the MSPB to the Federal Circuit Court of Appeals also raises issues of concern.

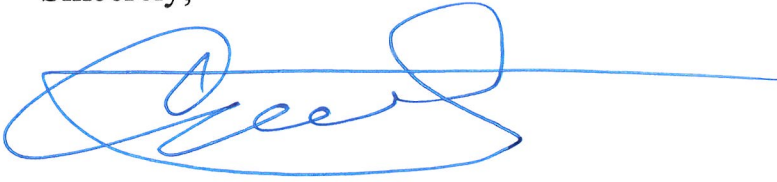
Alternatively, the relatively more extreme proposal, as contained in the House-passed bill, would consider Senior Executive Service employees as serving at the pleasure of the Secretary of the Department. This would, in effect, return the DVA to a time where the spoils system controlled such employment. Talent and experience would be of no moment in the removal of employees, and constant personnel turbulence will interfere with the Department's ability to carry out its mission.

We are concerned that both bills will substantially interfere with the ability of the VA to attract and retain a highly-qualified work force. The types of changes proposed by the House and Senate bills are likely to discourage talented individuals from seeking senior positions within the VA. In addition, certain employees of the Department occupy jobs, e.g., the claims officers and members of the Board of Veteran's Appeals, that warrant insulation from political pressure to insure they execute the duties of their offices without fear of political retaliation.

For the foregoing reasons, we urge the conferees to refrain from including in the final version of the legislation, as agreed to by the conferees, provisions that disparately penalize members of the Senior Executive Service within the VA by abbreviated forms of due process. We remain supportive of proposals that will effectively promote the efficiency of the civil service and the Department of Veterans' Affairs. Our veterans deserve no less than competent loyal support from their government.

June 24, 2014

Sincerely,

A handwritten signature in blue ink, appearing to read 'Carol W. Scott', with a long horizontal line extending to the right.

Carol W. Scott  
Chair, Veterans and Military Law Section