FAIR AND BALANCED? THE STATUS OF PAY AND BENEFITS FOR NON-ARTICLE III JUDGES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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FAIR AND BALANCED? THE STATUS OF PAY AND BENEFITS FOR NON-ARTICLE III JUDGES

TUESDAY, MAY 16, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FEDERAL WORKFORCE AND AGENCY ORGANIZATION,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m., in room 2247, Rayburn House Office Building, Hon. Jon C. Porter (chairman of the subcommittee) presiding.

Present: Representatives Porter, Davis, Issa and Cummings.

Staff present: Ron Martinson, staff director; Chad Bungard, deputy staff director; Shannon Meade, professional staff member; Patrick Jennings, senior counsel; Alex Cooper, legislative assistant; Mark Stephenson, minority professional staff member; and Teresa Coufal, minority assistant clerk.

Mr. PORTER. Good afternoon, everyone. I would like to bring the meeting to order. Can you hear me OK?

I would like to bring the meeting to order, and I would like to thank you all for joining us today.

The role that judges play in holding our society together is extremely important and often underestimated. Today's hearing is: Fair and Balanced? The Status of Pay and Benefits for Non-Article III Judges. We rely on judges serving in courts of law or administrative tribunals to peacefully resolve our disputes in an independent manner and according to the rule of law.

When most people think of a Federal judge, the first thing that probably comes to their mind is the type of judge in a court of law under Article III of the Constitution. However, what many people fail to realize is that there is another group of Federal judges serving critical functions in the courts created outside of Article III and outside of the judicial branch. Today, we will be examining the recruitment and retention of judges in the executive branch. These judges decide the cases which affect the functioning of the government and the everyday lives of people across the country, handling such cases involving interpretation of complex regulatory issues, Social Security disability appeals, and deportation and immigration cases. Nothing could be more important to the litigants before these tribunals than the right to due process and a fair hearing. The role of a judge in the executive branch is not easy. That is why it is important to not only recruit the best and the brightest lawyers to execute these judicial duties, but to retain them.

I look forward to delving into the issues pertaining to the recruitment and retention of these judges, including pay compression, the utility of adjusting judicial pay based on performance, the Office of Personnel Management's management of the Administrative Law Judge [ALJ] Program and retirement benefits provided to the ALJs.

There are over 1,400 ALJs across the government responsible for hearing disputes over their agencies' decisions. Most of them work at the Social Security Administration, where they make judgments on citizen appeals. There are also a number of Administrative Judges [AJs], serving as immigration judges and Board of Contract Appeals judges. We will hear from their representative associations today.

I would like to thank our witnesses for being here, and I look forward to the discussion.

Now we are going to move right into procedural matters. It is customary to have all witnesses take the oath before their testimony. So please stand.

Honorable Bill Cowan, please, are you here?

Judge COWAN. Here.

Mr. PORTER. Honorable Bernoski.

Judge BERNOSKI. Mr. Chairman, yes, sir.

Mr. PORTER. Anthony McCann.

Judge MCCANN. Here.

Mr. PORTER. And Denise Slavin.

Judge SLAVIN. Here.

Mr. PORTER. And, of course, Nancy is with us today.

Thank you very much. If you would please all raise your right hands.

[witnesses sworn.]

Mr. PORTER. Let the record reflect the witnesses have answered in the affirmative. Please be seated.

I ask that each of you remember your testimony will be approximately 5 minutes, and any further statements you wish to make will be included in the record. We will have Members that will be coming today, actually, coming and going. There is a funeral that is happening in Mississippi, so we are not going to have our normal Members here. But, just so you know, Members may come and go. So understand that is how the process works.

Also note that Mr. Issa is here, and we now have a quorum.

[The prepared statement of Hon. Jon C. Porter follows:]

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Opening Statement of Chairman Jon Porter

Hearing of the House Government Reform
Subcommittee on Federal Workforce and Agency Organization

"Fair and Balanced? The Status of Pay and Benefits for Non-Article III Judges"

May 16, 2006

Thank you all for joining us today. Judge Roy Bean, the self-proclaimed "Law West of the Pecos" during the late 1880's once said, "You'll get a fair trial followed by a first class hanging." While people may have been forced to endure such a judge in the Wild West, no one today wants to have their case decided by an arbitrary judge. The role that judges play in holding our society together is often underestimated. We rely on judges serving in courts of law or in administrative tribunals to peacefully resolve our disputes according to the rule of law.

When most people think of a federal judge the first thing that probably comes to their mind is the type of judge in a court of law under Article III of the Constitution. However, what many people fail to realize is that there is another group of federal judges serving in courts created outside of Article III. Congress has created special legislative courts under Article I of the Constitution, staffed by federal judges, and various administrative boards, staffed by Administrative Law Judges (ALJs).

These judges decide the cases which affect the functioning of the Government and the everyday lives of people across the country. These judges decide cases involving interpretation of complex regulatory issues, social security disability appeals, and deportation and immigration cases. Nothing could be more important to the litigants before these tribunals than the right to due process and a fair hearing. That is why it is important for us to examine how these non-Article III judges are recruited, retained, and paid. It is important that only the best and brightest resolve our disputes.

Today, this Subcommittee will explore issues pertaining to the recruitment and retention of these judges, including pay compression, the utility of implementing an ALJ pay-for-performance, OPM's management of the ALJ program, and the retirement benefits provided to ALJs. There are over 1,400 ALJs across the government responsible for hearing disputes over their agency's decisions. Most of them work at the Social Security Administration, where they make judgments on citizen appeals. Non-Article III judges and ALJs have indicated to me that pay compression is an especially important issue. Pay compression describes the condition

where judges a reach the statutory cap and are paid in a narrow range, at or near the pay cap. This problem can affect the ability to hire and retain an appropriate number of judges. Today we will examine this and other issues to clarify the issues and discuss possible solutions.

I thank our witnesses for being here, and I look forward to the discussion.

#####

Mr. PORTER. We will begin, Nancy Kichak, with your presentation. You are the Associate Director for the Division for Strategic Human Resources Policy for the Office of Personnel Management. Thank you for being here.

STATEMENT OF NANCY KICHAK, ASSOCIATE DIRECTOR, DIVISION FOR STRATEGIC HUMAN RESOURCES POLICY, OFFICE OF PERSONNEL MANAGEMENT

Ms. KICHAK. You're welcome.

Mr. Chairman, members of the subcommittee, thank you for this opportunity to discuss human resources management of Federal administrative law judges and to respond to calls for changes in their pay and retirement benefits. For the past 60 years, ALJs have provided a vital service in the administration of Federal programs. We are committed to ensuring the agencies can continue to recruit and retain a high caliber of personnel while respecting ALJ independence.

The Administrative Procedure Act created the position of ALJ, originally called hearing examiner, to ensure due process in Federal agency rulemaking and provide aggrieved parties an opportunity for a formal hearing on the record before an impartial hearing officer. It also provides for a merit system of selection administered by the Office of Personnel Management and the statutory protection of the ALJ's decisional independence from undue agency influence.

In order to assure the requirements for a merit selection system is met, OPM administers the ALJ examination and maintains a register of qualified candidates. Currently, the exam is closed while OPM is working to update the exam to include abilities identified by ALJs as necessary to perform their work.

Recently, we have filled 140 positions with qualified candidates from the existing register, demonstrating there is no recruitment problem for this profession. When the new exam is completed, applicants will use state-of-the-art technology to apply online.

Until recently, members of the SES and ALJs have had access to the same pay cap. However, Congress enacted legislation in late 2003 that gave SES access to higher pay, provided they are covered by performance appraisal systems that are certified by OPM and OMB. Understandably, ALJs would like access to the increased level of pay. However, they fail to credit the additional requirements placed on members of the SES.

At this time pay levels of ALJs are not creating a retention problem. A total of only 12 ALJs have resigned over the last 4 years.

There is no similarity in responsibilities or qualifications of ALJs and SES indicating their pay should be directly linked. A more appropriate comparison is to employees in like positions with similar duties and responsibilities.

For example, judges of the Supreme Court, U.S. Court of Appeals and U.S. District Court indeed have higher pay than for ALJs. However, bankruptcy judges and magistrates earn less than the cap salary of ALJs.

This administration believes that higher pay levels must be justified by the scope of duties and coverage by a performance manage-

ment system that is designed to maintain the independence of the administrative judiciary.

Groups representing ALJs have suggested that OPM establish a special office to deal with ALJ issues. Director Springer is personally committed to seeing that ALJ issues are appropriately addressed. OPM's General Counsel has been serving as the initial contact for ALJ issues, with support from additional OPM staff. If at any time the Director determines this arrangement is not effective, she will make other arrangements.

The Administrative Law Judges Retirement Act of 2005, introduced by Representative Wynn, liberalizes eligibility requirements for retirement while increasing the annuity computations. Other special retirement programs with enhanced benefits such as for law enforcement officers and firefighters are based upon the human capital management issues resulting from the physical demands of the specific position.

ALJs retire on average at age 70 with 32 years of service, demonstrating an ability to work a full career. Thus, we believe that the existing retirement provisions applicable to ALJs are appropriate.

We are committed to ensuring the Federal Government can continue to recruit and retain the high caliber of personnel it has come to expect in ALJ positions. We are improving the recruitment process. But we believe current pay and retirement provisions are enabling the Federal Government to recruit and retain a high quality ALJ work force.

This concludes my statement. I would be glad to take any questions.

Mr. PORTER. Thank you very much. We appreciate the testimony.

[The prepared statement of Ms. Kichak follows:]

STATEMENT OF NANCY H. KICHAK
ASSOCIATE DIRECTOR
STRATEGIC HUMAN RESOURCES POLICY DIVISION
OFFICE OF PERSONNEL MANAGEMENT

before the

SUBCOMMITTEE ON THE FEDERAL WORKFORCE
AND AGENCY ORGANIZATION
COMMITTEE ON GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

on

ADMINISTRATIVE LAW JUDGE PAY AND RETIREMENT

MAY 16, 2006

Mr. Chairman and Members of the Subcommittee:

Thank you for this opportunity to discuss human resources management of Federal administrative law judges (ALJs) and to respond to calls for changes in their pay and retirement benefits. For the past 60 years, ALJs have provided a vital service in the administration of Federal programs. We are committed to ensuring they can continue to recruit and retain a high caliber of personnel while respecting their independence of operation.

Background

The position of ALJ, originally called hearing examiner, was created by the Administrative Procedure Act (APA) of 1946, Public Law 79-404. The APA ensures fairness and due process in Federal agency rulemaking and adjudication proceedings and provides

aggrieved parties an opportunity for a formal hearing on the record before an impartial hearing officer. It also provides for a merit system of selection administered by the Office of Personnel Management (OPM) and statutory protection of the ALJ's decisional independence from undue agency influence.

As of last December, the Federal Government was served by 1,428 ALJs in 26 Departments and agencies. Of these, the vast majority (1,176, or 82 percent) were employed by the Social Security Administration. Other organizations with a significant number of ALJs include the DHHS Office of Medicare Hearing and Appeals (53), the National Labor Relations Board (50), and the Department of Labor (40).

On average, ALJs are age 61.2 with 21.0 years of service, both higher than the Government-wide averages for all employees of age 46.4 with 15.2 years of service. ALJs remain in their positions longer than most Federal employees. Over the last 4 years (FYs 2002-2005), ALJs retired on average at age 69.6 with 31.7 years of service, compared with age 58.7 with 27.7 years of service for employees generally. ALJs may be removed only for cause and almost never resign from their positions; a total of only 12 have done so over the last 4 years.

RECRUITING IMPROVEMENTS ARE UNDER WAY

The Office of Personnel Management is actively engaged in improving the system of human resources management for ALJs. We are doing this by developing regulations to update their personnel system, modifying the ALJ entrance examination to make it more reflective of actual work experience, and establishing an independent ALJ qualifications standard, as is the case for other occupations, rather than incorporating the standards only as a part of the vacancy

announcement.

In order to assure the requirement for a merit selection system is met, OPM (and its predecessor agency, the Civil Service Commission) has administered an ALJ examination and maintained a list (or register) of qualified ALJ candidates. To maintain the relevance and validity of the examinations, OPM has periodically conducted studies to revise and update elements of the exam. In 1999, the exam and register were suspended pending the outcome of litigation in *Azdell/Fishman.* In that case, non-preference eligibles challenged the 1996 scoring formula used in the examination because, they alleged, that the revised formula gave too much weight to veterans' preference. The Merit Systems Protection Board ruled that the scoring system was an unlawful employment practice and imposed various stays. OPM challenged the Board's ruling before the Federal Circuit, which ruled in OPM's favor and vacated the Board's orders. After the Federal Circuit mandate issued in July 2003, OPM reactivated the suspended register. Still, OPM opted to close the exam (except for 10-point veterans), because (1) work was already underway to develop a new exam, and (2) the present register contained sufficient numbers of high-quality candidates to meet projected agency needs.

We have been able to respond to agency requirements for qualified ALJ candidates, and will be able to continue to do so. Currently, the existing register contains 1,197 qualified candidates for ALJ positions. Although the register has been closed to all but 10-point veterans since 1999, we have verified that those candidates are still actively interested in an ALJ position, and have invited them to provide updated information. From January 1, 2005, through the 8th of this month, over 140 selections were made from certificates issued from the register. This is 10

percent of the ALJ workforce, and clearly demonstrates our continuing ability to fill ALJ positions.

OPM is presently completing work on the new ALJ exam. Although the opening date will depend entirely upon the issuance of newly proposed ALJ regulations, OPM is committed to rolling out the new exam expeditiously once the revised regulations become effective. When a new register is generated from the new exam, the current register will be terminated. When the new exam comes out, OPM also plans to take advantage of our state-of-the-art examining technology, USA Staffing, which allows applicants to apply on-line.

We are making great progress in developing the revised regulations referenced above. In December 2005, OPM posted a proposed rule to revise the ALJ program. The proposed rule removed redundant procedures and outdated information, clarified bar membership requirements, and provided for the ALJ examination process to be established in a manner similar to other OPM examinations. The proposed rule was open for public comment for 60 days. In conjunction with publishing these proposed regulations, OPM also posted a new ALJ qualification standard on its Web site. The ALJ qualification standard was also open for public comment for a 60-day period. At this time, OPM is carefully considering the comments submitted on both the proposed rule and ALJ qualification standard

PAY

Let me begin a discussion of pay issues affecting ALJs today by briefly reviewing the history of pay for these officials. From the start, the APA excluded ALJs from performance or

"efficiency" ratings in order to protect their independence. This exclusion is now codified in chapter 43 of title 5, U.S. Code, at section 4301(2)(D). Until 1991, ALJs were classified and paid as General Schedule employees. As required by the Federal Employees Pay Comparability Act of 1990, a new pay system was established for ALJs in 1991. At that time, most ALJs were classified and paid at grade GS-15 of the General Schedule, though some ALJs—especially those in higher level managerial positions—were classified at grades GS-16, 17, and 18.

As in the case for members of the Senior Executive Service (SES), members of Boards of Contract Appeals, and employees in other senior-level positions, the maximum rate of pay for ALJs is linked to the Executive Schedule. The law caps total pay (including locality pay) for ALJs at the rate for Executive Level III—currently $152,000. While it is true that about 43 percent of all ALJs currently are paid at the capped rate, we have seen no evidence that this phenomenon has resulted in significant recruitment or retention problems.

Groups representing ALJs have taken note of the fact that the pay cap for SES members was increased from level III to level II of the Executive Schedule under legislation enacted by Congress in late 2003. In 2006, the rate for level II is $165,200. However, the 2003 legislation did not authorize automatic pay increases for SES members. Indeed, the higher SES pay cap applies only to SES members covered by performance appraisal systems that are certified by OPM, with the concurrence of the Office of Management and Budget, as making meaningful distinctions based on relative performance. And SES members also lost their entitlement to locality payments under the 2003 legislation.

The question as to whether ALJ pay levels should be adjusted upward to match the pay levels of SES members who now have access to higher rates involves two separate

determinations. First, we must evaluate the level of duties and responsibilities assigned to ALJs to determine whether they are comparable to those of SES members or employees in other similar positions. At this time, it is not clear whether that is the case. However, a comparison of pay levels for judges across Federal, State, and local governments may be instructive.

The Bureau of Labor Statistics' Occupational Outlook Handbook, 2006-07 Edition, reflects judicial pay as of 2004, when ALJs had a top salary of $145,600. The Handbook indicates that judges, magistrate judges, and magistrates had median annual earnings of $93,070 in May of 2004. The middle 50 percent earned between $54,140 and $124,400. The top 10 percent earned more than $141,750, while the bottom 10 percent earned less than $29,920. Median annual earnings of judges, magistrate judges, and magistrates were $111,810 in State government and $65,800 in local government. Administrative law judges, adjudicators, and hearing officers earned a median of $68,930.

The Handbook also includes the results of a 2004 survey by the National Center for State Courts showing that salaries of chief justices of State high courts averaged $130,461 and ranged from $95,000 to $191,483, salaries of State intermediate appellate court judges averaged $122,682 and ranged from $94,212 to $164,604, while salaries of State judges of general jurisdiction trial courts averaged $113,504 and ranged from $88,164 to $158,100.

In the Federal court system currently, the Chief Justice of the U.S. Supreme Court earns $212,100, and the Associate Justices earn $203,000. Federal court of appeals judges earn $175,100 a year, while district court judges have salaries of $165,200 (equal to the rate for Executive Level II), as do judges in the Court of Federal Claims. Federal judges with limited

jurisdiction, such as magistrates and bankruptcy court judges, have salaries of $151,984, which is slightly less than the top rate for ALJs ($152,000).

Second, this Administration believes that higher pay levels, if otherwise justified, must be accompanied by the development of robust performance management systems. OPM believes that care must be taken to ensure that we maintain the integrity and independence of the administrative judiciary. However, we also believe that this can be accomplished at the same time as the goal of ensuring that differences in pay levels are driven by performance factors.

One performance management option that bears consideration is a system of peer review within the ALJ community that maintains strict separation from influence by officials of the employing agency whose policies and decisions are subject to adjudication. Such a system could be designed to make meaningful distinctions in performance and pay based on such factors as case management or the thoroughness of any legal research conducted in connection with reaching a decision—without regard to the substance or outcome of the decision. We have previously offered to work with the ALJ community to develop robust performance appraisal systems that are consistent with preserving the integrity and independence of the administrative judiciary.

We already have substantial experience with performance appraisals in organizations that have responsibility for independent review of agency actions. Furthermore, we have been able to create structures for such review without harm to the independence of the organizations employing the individuals being evaluated. In particular, these actions have been accomplished in a number of Offices of Inspectors General (IGs). As with IGs, we are not suggesting that the

review be accomplished by parts of the organization whose work is being reviewed, or by other outside entities. Instead, these reviews are being accomplished within the IG offices internally.

Most ALJs are employed in organizations of significant size, in which an internal review of work can be performed without outside interference. We do understand that such processes may not be universally applicable and that different situations may require different methodologies. However, we believe that robust performance appraisal systems are essential and more than worth the effort to get right.

ADMINISTRATION

Your invitation also asks us to address OPM's management of the ALJ program. Groups representing ALJs have suggested that we establish a special office within OPM to deal with ALJ issues. Director Linda M. Springer is personally committed to seeing that all ALJ issues are appropriately addressed. However, other groups are making the same request for dedicated personnel to address their issues, and the Director needs to be able to appropriately balance those interests across multiple areas as we work to fulfill our mission statement. The Director will respond to all demonstrated needs, but it is important for her to have the flexibility to determine how best to do that. OPM's General Counsel has been serving as the initial contact for ALJ issues with support from a working group of staff drawn from the various offices within OPM with responsibility for issues affecting ALJs. If at any time the Director determines that this arrangement is not effective, she will make other arrangements

RETIREMENT

As indicated earlier, on average, ALJs are older with more service than most Federal employees at retirement. In our view, their retirement benefits are appropriately proportionate with their careers.

In preparation for today's hearing, your staff asked us to review H.R. 1864, the "Administrative Law Judges Retirement Act of 2005" introduced last year by Representative Albert Wynn of Maryland. Taking into account both eligibility and computation, we believe H.R. 1864 would give ALJs a more liberal retirement benefit structure than available to any other retirement-covered group, including law enforcement officers, firefighters, and Members of Congress. The ongoing costs of providing this enhanced benefit would be costly, and providing these benefits to current ALJ's would create a substantial unfunded liability. Further, in its present form, it contains significant technical drafting issues.

If H.R. 1864 was enacted, then, under the Civil Service Retirement System (CSRS) and the Federal Employees' Retirement System (FERS), ALJs would be able to voluntarily retire with an unreduced annuity at age 55 with 10 years of service, and with a reduced annuity at any age with 10 years of service. If there was a Voluntary Early Retirement Authority, or an ALJ was involuntarily separated, he or she could retire at any age with only 5 years of service. In the annuity calculation, a retiring ALJ would receive 2.5 percent credit per year under CSRS, and 1.7 percent credit per year under FERS, for all ALJ service, plus up to 5 years of military service, while law enforcement officers and firefighters are limited to 20 years of civilian service at those rates.

To create such a generous structure for this group would greatly complicate the situation *vis-a-vis* other groups who have or want special retirement benefits. Other special retirement programs applicable in the executive branch, such as for law enforcement officers and firefighters, are based upon the human capital management issues resulting from the physical demands of the specific position and prematurely terminated careers requiring mandatory retirement at a relatively early age. On the other hand, ALJs are permitted to continue to work without age limit, with approximately a quarter of active ALJs being at least 65.

The only explanation we have heard in support of these liberalizations is that ALJs come to their Federal careers later than other employees. It would appear (from average age and years of service statistics) that ALJs do enter Government service at about age 40, compared with age 31 for Federal employees generally. However, to the extent that ALJs do not earn a full retirement benefit, it is because they have entered Federal service after a professional legal career in the private sector or state or local government during which they had the opportunity to make provision for their retirement. We see no recruitment or retention reasons to enhance the pension formula to effectively compensate ALJs for deferring entry into Federal jobs. Thus, we believe that the existing retirement provisions applicable to ALJs are appropriate, and that no need has been demonstrated for modifications at this time.

CONCLUSION

We have made much progress on the issues relating to competitive recruitment and believe matters are close to being finalized. There is no retention problem. In the area of pay,

while further evaluation of the level of duties and responsibilities assigned to ALJs is necessary, any access to higher pay levels must be accompanied by the development of robust performance management systems. In our view, no justification for changing the current, competitive retirement structure for ALJs has been demonstrated.

In short, the overwhelming objective evidence is that we currently have no difficulty in either recruiting or retaining a capable ALJ workforce.

This concludes my statement. I will be glad to answer any questions you may have.

Mr. PORTER. Chairman Davis.

Mr. DAVIS. Thank you, Mr. Chairman.

Thank you for your testimony.

Unfortunately, I have to get over to the floor where I have to manage a couple of bills on behalf of the committee, but I want to take the opportunity to wish Chairman Porter a happy birthday.

Mr. PORTER. Twenty-one.

Mr. DAVIS. Times a factor.

But I am not going to say how old he is, but I will say that I think the Las Vegas climate is preserving him well, and I appreciate his leadership on this subcommittee and his friendship.

I want to thank OPM and the representatives and the judges for appearing here today. How we recruit, we retain and pay non-Article III judges and ALJs is an important issue that deserves careful, careful consideration.

These judges decide disputes that cross a range of subjects from Social Security disability cases to cases involving complex questions about regulatory tax and immigration law. All of these are, generally speaking, administrative cases which are not as visible as the headline court cases. Decisions of the judges involved are of critical importance to the litigants, the individuals seeking disability benefits or the person who is in a tax dispute with the IRS; and because of the critical importance of these cases it is important that the government provides a competitive salary and a competitive benefits package to recruit and to retain the judges that decide them.

The structure of pay and benefits for non-Article III judges and, more specifically, ALJs is very different from what it once was. But, as the 20th century philosopher Yogi Berra once said, "the future ain't what it used to be." Today's ALJs are increasingly facing pay compression. This means that many ALJs are being paid in a narrow range at or near the pay cap for their occupation.

This seems to be a persistent issue. I am looking forward to learning more about the issue and trying to resolve it. Once again, I want to thank you for coming today to help us understand the issues facing the non-Article III judges; and I appreciate it very much.

I know the committee staff has a lot of questions, Mr. Chairman. I will move through you, but I want to just be here, show my support for what you're doing and hope we can move to some kind of a resolution.

Mr. PORTER. Thank you, Mr. Chairman. I appreciate your being here and your questions and your comments.

I do have a couple of questions regarding OPM. Does OPM agree that a very large number of judges are at or near the total pay cap?

Ms. KICHAK. Yes, we do.

Mr. PORTER. And if that is the case, does OPM consider that to be a problem?

Ms. KICHAK. OPM does not consider that to be a problem. Pay caps—whenever there is a pay cap, folks cluster at that pay cap. That's true when you set the pay caps for SES. When you have a pay cap for ALJs, they cluster there. In our general schedule, folks cluster at the step 10. In other words, particularly with ALJs that work long careers, eventually they work through the ALJ pay

range and they get to the top; and whatever that cap is, that is where they are.

Mr. PORTER. Does the compression cause a recruitment or retention problem?

Ms. KICHAK. It does not. We have been able to fill every position that has been presented to us from the existing register.

We are getting ready to introduce a new exam fairly soon. We have had a lot of interest exhibited through calls and comments in that exam.

We think that the newest register will offer the wealth of candidates that the existing register does.

Mr. PORTER. In your opening comment, you mentioned there is approximately 1,400 or so ALJs, right——

Ms. KICHAK. Right.

Mr. PORTER [continuing]. In 26 departments and agencies. But there has only been 12 that have retired in 4 years, is that correct?

Ms. KICHAK. Twelve who have resigned. There have been more retirements.

Mr. PORTER. And it may have been in your testimony or in your backup, but do you recall why the 12 have resigned?

Ms. KICHAK. No, our records don't show that.

Mr. PORTER. The specific reason?

Ms. KICHAK. The 12 resignations out of 1,400 folks is not a huge number.

Mr. PORTER. What would you say the average is for resignations in the Federal employee?

Ms. KICHAK. I think we have what we call a turnover rate of around 6 percent in the Federal Government. So 6 percent of 1,400 would be more than——

Mr. PORTER. Six percent a year.

Ms. KICHAK. That's right; and the number I quoted you was 12 over 4 years, or 4 per year—3 per year.

Mr. PORTER. As far as your testimony, you stated that higher pay levels for ALJs must be accompanied by the development of robust performance management systems; and you cite the Office of Inspector General as an example of OPM having substantial experience with performance appraisals and organizations that have responsibility for independent review of agency actions. Let's face it. Judicial functions are much different from that of the IG, is that correct?

Ms. KICHAK. Right.

Mr. PORTER. What experience does OPM have with performance appraisals for executive branch judges or hearing examiners?

Ms. KICHAK. We do not have experience with that. This is a new area for us. But we think our experience with Inspector Generals is important. Yes, their actual jobs are different, but Inspector Generals pride themselves on their independence also. And yet, in their structure, which is like the ALJ structure where you have offices with senior Inspector Generals and then you have staff, they have been able to develop performance appraisal systems where they are—their performance is evaluated by independent folks, not by the agency head.

We think that opportunity exists in the ALJ community, because most ALJs are in offices where the ALJ is not the sole—is not by

themselves. They are in a management structure in which there can be performance oversight by other ALJs and maintain the independence.

Mr. PORTER. The OPM's position is that ALJs should receive no pay compression relief unless such a pay increase was accompanied by a robust performance management system. Is that correct?

Ms. KICHAK. We think the robust performance management system is critical, yes.

Mr. PORTER. And what are OPM's special plans to revitalize the ALJ register?

Ms. KICHAK. We have proposed regulations and we have proposed new qualification standards. Those proposals were open for 60 days of public comment. We are in the process of reviewing those comments now, and we are in the process of modernizing the exam and taking account of things we have learned from the ALJ community that—about things that are important to examine candidates on.

So as soon as we are done reviewing and commenting—reviewing those comments, we will announce the final—the regulations and procedures, we will open a new exam and develop a new register.

Mr. PORTER. I think that is it for today. There will be additional written questions for followup, and we appreciate your testimony.

Ms. KICHAK. Thank you. We will be glad to answer them. Thank you so much.

Mr. PORTER. Also note that all Members will have 5 legislative days to submit written statements and questions for the hearing record. Answers to written questions provided by the witnesses also will be included in the record.

I also acknowledge all other materials referred to by Members and the witnesses may be included in the hearing record. All Members will be permitted to revise and extend their remarks.

I would like now to welcome our second panel. We will hear from the Honorable William Cowan, the Honorable Ronald Bernoski, the Honorable Anthony McCann and the Honorable Denise Slavin.

Let's begin with Judge Cowan, who is the Deputy Chief Administrative Law Judge with the Federal Energy Regulatory Commission and is vice president for the Federal Administrative Law Judges Conference. Welcome, Judge.

STATEMENTS OF WILLIAM COWAN, DEPUTY CHIEF ADMINISTRATIVE LAW JUDGE, FEDERAL ENERGY REGULATORY COMMISSION, AND VICE PRESIDENT, FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE; RONALD G. BERNOSKI, ADMINISTRATIVE LAW JUDGE, SOCIAL SECURITY ADMINISTRATION, AND PRESIDENT, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES; R. ANTHONY McCANN, PRESIDENT OF THE BOARD OF CONTRACT APPEALS JUDGES ASSOCIATION; AND DENISE N. SLAVIN, PRESIDENT, NATIONAL ASSOCIATION OF IMMIGRATION JUDGES

STATEMENT OF WILLIAM COWAN

Judge COWAN. Thank you very much, Mr. Chairman and honorable members of the committee, members of the staff. On behalf of the Federal Administrative Law Judge community, I thank you for

this opportunity to discuss a very significant issue for us and that is compression of the pay schedule for the corps of administrative law judges.

I have been a U.S. Administrative Law Judge for a little over 9 years, and I live in northern Virginia.

Sixty years ago, the Congress enacted the Administrative Procedure Act, which provided for the independent adjudication of agency administrative hearings by presiding officers who later became known as Administrative Law Judges. To serve in this function well, the ALJs must be chosen from the best legal minds the Federal Government and the private bar have to offer. The Federal Government and the American people have a great stake in the process.

Unfortunately, over the past few years, ALJ compensation has not kept pace with traditional milestones, resulting in compression of the pay schedule that actually threatens to weaken the administrative adjudicatory process.

Pay compression, as has been discussed previously today, results from a statutory limitation of the pay grade. Last year, as a result of this compression, most ALJs received only a 1.9 percent increase, while most of the Federal work force received a 3.44 percent increase, including locality pay.

Most ALJs at level AL–3F, AL–2 and AL–1 now receive exactly the same rate of pay, so there is no recognition through compensation for greater experience, length of service, management responsibilities. Nor is there any financial incentive for a judge to take on the administrative responsibilities of a Chief Judge or Deputy Chief Judge.

While this is unfair to sitting ALJs, we are also very concerned that continuing pay compression will dilute the quality of ALJ applicants and make the position unattractive to senior agency counsel or SES attorneys that historically formed the natural candidate base for ALJ positions. They are no longer interested. A GS–15 step 10 senior attorney, for example, already makes 25 percent more than a starting ALJ.

There was a lot of talk earlier today about everybody being at a relatively healthy level of pay. The missing ingredient there was the $95,000 starting salary for ALJs. It is simply not competitive in this day and age.

Agencies deserve to have the best and the brightest ALJs to adjudicate the important cases that they get from their agencies. Pay dilution will beget quality dilution. You get what you pay for. If this problem continues, the ALJ program will end up bottom feeding from a pool of marginal perspective candidates instead of attracting the best and brightest individuals.

I know the chairman of my agency wrote to the President a number of years ago complaining about the quality of the applicant pool. The situation has gotten even worse since then.

Now OPM recognizes the problem but has linked consideration of a remedy to establishment of a pay-for-performance regime. However, the APA itself and OPM's own regulations prohibit grading of the performance of ALJs and with good reason. ALJ's need judicial independence to protect the integrity and the legitimacy of

the agency hearing process and the rights of claimants and litigants in agency cases.

OPM seems not to understand the very fundamental principle that an agency rating and rewards system for ALJs would be inconsistent with a preservation of an independent administrative judiciary and, more important, even the perception of objectivity and fairness that is so important to claimants and litigants. OPM has not suggested to us to date how its policy preferences can be reconciled with the need to maintain judicial independence, which is the hallmark of a fair and balanced process.

We have communicated our thoughts to OPM as to some concepts and existing programs that might help bridge this gap. At bottom, however, we don't believe that relief from the very important pay compression issue needs to be delayed until a way can be found to satisfy OPM's performance policy objectives. Pay compression is a problem that needs attention now.

Thank you for this opportunity. That concludes my prepared remarks.

Mr. PORTER. Thank you, Judge.

[The prepared statement of Judge Cowan follows:]

STATEMENT

OF

WILLIAM J. COWAN

FIRST VICE PRESIDENT

FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

Before the

SUBCOMMITTEE ON FEDERAL WORKFORCE AND AGENCY ORGANIZATION

COMMITTEE ON GOVERNMENT REFORM UNITED STATES HOUSE OF REPRESENTATIVES

Regarding the Hearing on

Fair and Balanced? The Status of Pay and Benefits For Non-Article III Judges

May 16, 2006

Mr. Chairman, Honorable members of this subcommittee and members of the staff. On behalf of the Federal Administrative Law Judge community, I thank you for this opportunity to discuss a very significant issue, compression of the pay schedule for the corps of Federal Administrative Law Judges. I am William J. Cowan, Deputy Chief Administrative Law Judge with the Federal Energy Regulatory Commission, and First Vice-President of the Federal Administrative Law Judges Conference. I have been a U.S. Administrative Law Judge for over 9 years, and I am a resident of Northern Virginia.

The Pay Compression Problem and its Implications

Sixty years ago, the Congress enacted the Administrative Procedure Act, which provided for the independent adjudication of administrative proceedings by presiding officers who later were designated as Administrative Law Judges. The Congress specifically intended that hearings before ALJs serve as the principal appellate forum within administrative agencies prior to judicial review. The judicial function performed by ALJs is known to the legal world as a key element of the process of review of agency actions, and a necessary step in the exhaustion of administrative process before judicial review. It has worked well and become a model for the fifty states, the territories, and the international legal community.

To function well, this administrative judicial function must be staffed with an ALJ corps that is chosen from among the best legal minds that the federal government and the private bar have to offer. The federal government and the American people have a great stake in this process and in a competently staffed corps of Administrative Law Judges.

My testimony will deal specifically with the issue of compensation for Administrative Law Judges, and in particular, about the problems caused by compression

of the ALJ pay schedule. As you may know, many ALJs did not receive the full increase that other federal employees received this year because the ALJ base plus locality pay rate is limited by statute to the rate for Level III of the Executive Schedule (5 U.S.C. § 5304(g)(2)). Most ALJs in the Washington region received only a 1.9% pay increase, whereas most of the federal workforce in this area received a 3.44% increase (locality pay included).

Even more troubling is the effect of compression. The ALJ pay schedule set by statute has three levels: AL-1 (for Chief ALJs), AL-2 (for Deputy or Regional Chiefs) , and AL-3 (for line ALJs). The AL-3 pay level contains six steps (AL-3A through AL-3F) to reflect increases gained from experience. The vast majority of the approximately 1,400 ALJs are paid at one of the six AL-3 steps.

Currently, due to pay compression, many Judges at level AL-3E, most Judges at level AL-3F, and all Judges in levels AL-2 and AL-1 earn exactly the same rate of pay. This effectively eliminates any recognition through compensation for greater experience, length of service, or supervisory responsibilities. In addition, it provides no incentive for senior judges to take on the administrative tasks of a Chief or Deputy Chief Judge.

Not only is this unfair to those currently serving as ALJs, this continuing and unchecked pay compression negatively affects ALJ recruitment and the retention of the best candidates available. This problem will dilute the quality of applicants for ALJ positions, so that those eventually retained at lower relative pay levels may be unable to handle the complex and difficult cases which ALJs are currently entrusted to resolve. This problem will further negatively affect the agencies as they begin to realize that they are no longer able to rely upon ALJs to handle these types of cases. This "death spiral" could eventually lead to a weakening and the eventual demise of the ALJ program. This would represent a significant disservice to claimants and litigants in agency proceedings.

OPM has unfortunately addressed this concern in the past by noting no shortage of applicants for ALJ positions. While it is true that there is a register of applicants maintained by OPM with many names on it, it is also true that one can always expect applicants for judicial positions that have a starting salary in the current range. However, unless pay compression is addressed, that pay will continue to decline, relative to historic comparisons, making the position less and less attractive to the best and the brightest experienced attorneys who typically have been interested in ALJ positions.

Already, there is an ever widening gap between current ALJ pay and the pay of career agency staff officials who are responsible for selecting cases for ALJ assignment and reviewing their decisions. For example, the pay of a GS-15 at step 10 is $118,957, whereas the starting pay for an ALJ is $95,500.[1] A similar gap exists between ALJ and Senior Executive Service positions of comparable responsibility, and that gap continues to increase in light of compensation incentives available to many SES managers.[2] We cannot hope to attract the senior agency staff and SES attorneys who are the natural candidates for prospective ALJ positions as this pay inequity continues and the disparity increases. Nor can we hope to attract candidates from the pool of private practitioners who practice before our agencies. While we can never expect to match the kind of salaries offered by top national law firms, the present entry level pay for ALJs is so low as to virtually assure that the ALJ program will be bottom feeding from the private bar, attracting only those whose practices are unsuccessful or worse.

[1] Even the pay of a Washington-based *GS-14* at step 10 ($112,734) exceeds that of a newly hired Washington-based ALJ ($112,213). Note: both of these salaries include locality pay for Washington, D.C.

[2] The minimum SES salary is $109,808, and the cap, exclusive of awards and benefits is $165,200. The current ALJ pay range is $95,500 to $143,000 (locality pay not included). For a Washington based ALJ, the salary range, including locality pay, is $112,213 to $152,000.

Our agencies and the American public deserve better. If they do not get high quality ALJs, the viability of administrative adjudication will be severely compromised. This is a very real concern. The Chairman of my agency expressed his dismay in 2001 over an inability to attract and retain the high quality of ALJs needed to handle FERC's challenging caseload. The situation today is even graver than it was in 2001.

Catch 22-- OPM's Insistence on a Pay for Performance Concession

While OPM recognizes that this pay compression problem requires redress, it has made its support for pay compression relief contingent upon agreement of the ALJ community to adoption of a pay for performance system. However, such a system would violate the provisions of the Administrative Procedure Act and is inconsistent with the very principles upon which that statute is based, particularly if individual performance of ALJs is evaluated.

A brief review of the nature of our work would be helpful to understand the dilemma which OPM's insistence on a pay for performance regime presents for us. The adjudication provisions of the APA were enacted to ensure full, fair and impartial hearings in administrative agencies. Confidence in the independence of adjudicators is an absolutely critical element to claimants and litigants coming before administrative agencies. In order for the administrative hearing process to work as intended by Congress, these litigants and the American public must be assured that the agency cannot influence decisions in administrative hearings Critical to the success of this objective is a delicate balance in the relationship of ALJ adjudicators and their employing agencies. To help achieve this careful balance, the APA exempted ALJs from agency performance ratings. 5 U.S.C. §4301(2)(D). Also barred was the grant of performance awards to ALJs. Further, prohibitions were enacted against *ex parte* communications with ALJs. All of these protections were designed to ensure that ALJs decided cases independently of agency influence or pressure. Performance ratings of ALJs by the agency could

constitute a direct or subtle attempt to influence ALJ decision-making, or be perceived as doing so, and could affect the legitimacy of the process and the outcome of a case. The imposition of such a system would threaten the integrity of the administrative judicial process.

Representatives of the ALJ community have maintained a so far unsuccessful dialogue on the pay compression issue with OPM, which is charged with the responsibility and authority to administer the ALJ program. OPM seems unwilling to acknowledge that judicial independence and the above statutory protections form an inherent construct that cannot be compromised without doing severe damage to the will of Congress, as enacted in the APA. The basic demand of OPM for its support for legislative pay compression relief is an agreement that the ALJs support a system of performance evaluation with "consequences." It is critical that OPM and the Congress understand how any direct or subtle attempt to influence ALJ decision-making, such as by agency ratings of ALJs, would be potentially dangerous to the integrity of the APA's administrative judicial process. Indeed, it would destroy the very reason for the existence of the administrative adjudicatory function. It is very distressing to us that OPM would insist upon a performance program that threatens the validity and legitimacy of ALJ adjudications.

While OPM has acknowledged the importance of ALJ independence and objectivity, it has not provided any specific proposals or any real guidance as to how its desires for a performance program can be reconciled with the requirement that ALJ independence and objectivity be maintained. OPM has, however, suggested that it would be willing to explore with the ALJ community "surrogates" for the performance regime that it favors for federal employees.[3] Our community itself has been engaged in such an

[3] Our ALJ Coordinating Council recently advised OPM's Director Springer about existing programs in place in many agencies and suggested other possible ways that might help achieve OPM's policy goals in the context of the ALJ program. (Letter to

exercise, in the hope that some middle ground can be found that reconciles OPM's policy preferences with the statutory construct of ALJ independence. Reconciliation in a manner that preserves that necessary independence is worthy of study and careful consideration. It may be difficult to achieve, as some of our organizations well know after spending hours upon hours debating how that might occur. In that event, we see no reason why independence and the legitimacy of the administrative adjudication process need to be sacrificed in order to obtain relief from the pay compression dilemma that now confronts us.

Conclusion

The need is great for recognition of the pay compression problem that exists in the ALJ program and for the development of a remedy. Moreover, reformation of the pay schedule to address the pay compression issue need not and should not be linked to the adoption of a pay for performance scheme that threatens to destroy the legitimacy of the administrative adjudication process conceived and enacted by Congress sixty years ago. The door remains open to consider alternative approaches or surrogates that might maintain ALJ independence from agency influence while satisfying OPM's policy objectives. We in the ALJ community are willing to explore these ideas with OPM.

OPM Director Linda M. Springer, dated April 11, 2006)

Mr. PORTER. Next, we have Judge Bernoski, Administrative Law Judge, from the Social Security Administration, and president of the Association of Administrative Law Judges. Welcome.

STATEMENT OF RONALD G. BERNOSKI

Judge BERNOSKI. Thank you. Thank you, Mr. Chairman, and thank you for inviting us to testify here today.

I have been an Administrative Law Judge with the Social Security Administration for over 25 years. But, as you indicate, I appear here as a witness as president of the Association of Administrative Law Judges. We represent about 1,100 Administrative Law Judges in the Social Security Administration and in the Department of Health and Human Services.

As indicated previously, there are about 1,400 Administrative Law Judges in the Federal Government. However, I make the statement today on behalf of all Federal Administrative Law Judges. We appear in support of the Administrative Law Judges Retirement Act of 2005, which is pending before this committee as H.R. 1864. This legislation addresses the present inequity for Administrative Law Judges and provides a retirement benefit similar to other judicial officers in both the State and Federal Governments. This legislation is not complex, and it is patterned after existing Federal pension law.

All Administrative Law Judges will receive the same pension enhancement as currently received by Federal law enforcement officers, congressional staff, and some Article I judicial groups. The pension annuity for Civil Service Retirement System pension beneficiaries will be enhanced from the current 2 percent to 2.5 percent, and the Federal Employees Retirement System [FERS] beneficiaries annuitants will be enhanced from the current 1 percent to 1.7 percent. In exchange, Administrative Law Judges will pay an additional 1 percent individual contribution for this pension benefit.

The enhanced pension only applies to the years that the individual serves as an Administrative Law Judge in the Federal Government.

This is low-cost legislation; and, on a similar bill, in 2003, the Congressional Budget Office estimated a 10-year direct cost of $14 million, or an average of $1.4 million per year.

The legislation will also provide a short-term reduction in the budgets of some agencies. This savings will occur because older judges who are paid at a higher rate will retire and be replaced by judges who are entering the system at the lower pay scales, thereby resulting in a cost savings for the agencies.

This legislation is needed because Administrative Law Judges enter the government later in their professional career. This is particularly common for Administrative Law Judges who enter the Federal Government from the private practice of law. It is not uncommon for an attorney to become an Administrative Law Judge at age 50 or older. Because of the qualifying requirement of trial practice or legal experience which enables an Administrative Law Judge to start hearing cases completely, there is no extensive training period. For example, in the last class at Social Security, the average age of the judges was 56 years. This means that these judges

must work until age 80 years or older to earn a Federal pension based on the governmentwide average of 30 years of service.

Now, many States have recognized that judicial officers should have enhanced pensions. For example, in the State of Nevada, the State provides a pension at age 60 at 75 percent of the last year's judicial salary; and the State of Illinois provides a pension for 85 percent of salary after 20 years at age 60.

Administrative Law Judges should receive a fair pension for the same reason that other judicial employees receive a fair pension, and that is to attract highly qualified attorneys to the position of Federal Administrative Law Judge.

In closing, Mr. Chairman, the Federal Administrative Law Judges Retirement Act of 2005 provides this remedy. It will permit Administrative Law Judges to retire before they reach mid-80's and create a younger, more efficient corps of Administrative Law Judges.

As indicated previously, this bill is low cost and will result in short-term savings for some agencies. Therefore, Mr. Chairman, we ask for your support for this legislation.

Thank you.

Mr. PORTER. Thank you, Judge.

I appreciate two of your comments, one, that you brought up Nevada, which is always a good thing, and the 50 and older, so I fit into that group.

I do appreciate your testimony.

Judge BERNOSKI. On behalf of all Administrative Law Judges, we wish you happy birthday.

Mr. PORTER. Thank you, and we should be celebrating in Las Vegas right now.

Judge BERNOSKI. That is exactly correct.

[The prepared statement of Judge Bernoski follows:]

STATEMENT ON BEHALF OF THE

ASSOCIATION OF ADMINISTRATIVE LAW JUDGES

By

RONALD G. BERNOSKI, PRESIDENT

Before the

SUBCOMMITTEE ON FEDERAL WORKFORCE and AGENCY ORGANIZATION

COMMITTEE ON GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

Regarding the Hearing on

Fair and Balanced?
The Status of Pay and Benefits
For Non-Article III Judges

May 16, 2006

Mr. Chairman and Members of the Subcommittee:

I. INTRODUCTION

Thank you for the opportunity to testify before you today. My name is Ronald G. Bernoski. I am an Administrative Law Judge ("ALJ") who has been hearing Social Security disability cases at the Office of Hearings and Appeals ("OHA") of the Social Security Administration ("SSA") in Milwaukee, Wisconsin, for over 25 years.

I am the President of the Association of Administrative Law Judges ("AALJ"). Our organization represents the administrative law judges employed in the Social Security Administration and the Department of Health and Human Services ("DHHS"). One of the stated purposes of the AALJ is to promote and preserve full due process hearings in compliance with the Administrative Procedure Act for those individuals who seek adjudication of program entitlement disputes within the SSA. The AALJ represents about 1100 of the approximate 1400 administrative law judges in the Federal government. Administrative law judges handle cases that go to the heart of the economic and social structure of our nation. Typically, these cases present complex legal and factual issue involving laws and regulations related to agriculture, banking, energy, labor, transportation, new medications, Medicare and social security

II. STATEMENT

I am appearing and testifying here today on behalf of all administrative law judges in support of the *Administrative Law Judges Retirement Act of 2005 (H. R. 1864)*. This legislation addresses the present inequity in the pensions of Federal administrative law judges. The proposed system provides retirement benefits at the same level as that now received by members of Congress, Congressional staff, law enforcement officers and some Article I judicial groups. The bill will allow for a Civil Service Retirement System (CSRS) and Federal Employees Retirement System (FERS) annuity enhancement to the amounts of 2.5% and 1.7% respectively. Notably, Administrative law judges will individually pay an increased contribution for this pension benefit.

This change is needed because most administrative law judges enter government service late in their professional careers. The lack of an adequate pension is causing a large and increasing number of administrative law judges to work until advanced age to achieve a Federal pension based on the government-wide average of 30 years of service. This is particularly true for administrative law judges who enter government service from the private practice of the law without an existing adequately funded retirement program. This legislation addresses this problem. The proposed pension benefit will allow more administrative law judges to retire at a dignified age and not require them to work into old age. Without this correction, many administrative law judges from the private practice of law will be required to work until the age of mid-80 to obtain a pension based on 30 years of government service. This is because many of these judges enter government service for the first time after age 45. For example, the last class of Social

Security Administration new judges had an average age of 56.7 years. One result of this legislation will be to create a younger more efficient administrative law judge corps with judges who will be more accustomed to working in the emerging "electronic" environment of the modern governmental workplace.

Administrative law judges should receive a fair pension for the same reasons they are provided to other judges, judicial officers and select Federal employees: to attract highly qualified candidates, retain highly experienced adjudicators, and assure the public of the independence and integrity of their adjudicators' decision-making. Administrative law judge pensions should be sufficiently adequate to attract superior attorneys to the position. Administrative law judges not only provide due process adjudications to the American people, but are the first and only experience for a large segment of the public in formal governmental proceedings. Administrative law judges provide the only "day in court" for millions of Americans in a hearing room. Therefore, it is important that administrative law judges be competent and highly qualified to attract outstanding candidates. The administrative law judge position must provide for a just pension and must have the same safeguards of judicial independence as other members of the judiciary. In the administrative procedure Act, the Congress established this independence and in doing so, recognized its importance to the America people.

An inadequate pension was not intended when Congress enacted FERS. The small size of the pension for FERS employees, compared to the CSRS pension, was justified when enacted by Congress on the grounds that the Social Security retirement benefits ("RSI") and proceeds from the Thrift Savings Plan ("TSP") would make up for the large difference in CSRS and FERS pensions. Congress expected that RSI alone would replace 34% to 37% of the average Federal employees' annual earnings. This expectation has proven erroneous for retired administrative law judges and other federal employees with high salaries. RSI does not, as Congress intended, make up for the reduction of the pension benefit in FERS compared to CSRS. The reason for the shortfall in RSI is an administrative law judge has earnings that exceed the maximum earnings level that is subject to the Social Security tax. The RSI component of an administrative law judge's retirement under FERS is therefore capped. This means that the same maximum RSI benefit that is worth 24% of salary at the maximum benefit threshold is worth only about 15% of salary to an administrative law judge because of the cap on earnings subject to taxation. The proposed FERS pension enhancement in this legislation will help to close most of the RSI gap to ensure a retirement for administrative law judges at a standard of living commensurate with their salaries, and as intended by Congress when it created FERS.

The *Administrative Law Judges Retirement Act of 2005 (H.R. 1864)* is a very low cost bill. The September 2003 Congressional Budget Office Cost Estimate for the bill projects a 2004-2013 ten year net direct cost for the pension bill of only $14 million, or an average of $1.4 million per year. Under the Congressional "pay as you go" budget rules, which Congress allowed to expire in 2003, the net impact of a bill upon the Federal budget is determined by offsetting the bill's "revenues" against the "direct cost." This method is considered to be the most accurate

representation of a bill's cost. The CBO found the low net direct cost based upon a 2004-2013 ten year direct cost to the Federal government of $34 million for increased CSRS and FERS retirement benefits to administrative law judges that will be paid out of the Office of Personnel Management's Civil Service Retirement and Disability Fund ("the Fund") offset by 2004-2013 ten year revenues of $20 million from the additional individual contributions from administrative law judges to the pension plans that are provided for in the bill.

The CBO report for the pension bill separately projects a 2004-2013 ten year increase of $56 million in the Federal agencies' spending that is subject to appropriation to cover the agencies' increased FERS contributions to the Fund to pay for the enhanced FERS retirement benefits for administrative law judges in their employ, since FERS is a fully-funded pension system. There is no increase in the Federal agencies' spending that is subject to appropriation for the agencies' CSRS contributions, since there is no statutory mechanism that mandates that any increase in the CSRS unfunded liability be paid into the Fund. This result demonstrates a very low cost to the agencies that employ administrative law judges to cover the increased cost of FERS. The cost of the bill is minimal for all administrative law judge employing agencies, except for the Social Security Administration, which employs over 80 percent of the administrative law judges. (The increase in spending for FERS that is subject to appropriation impacts the agencies' budgets because the spending is a mandated expenditure that must come out of the agencies' discretionary budgets, regardless of whether Congress increases the agencies' budget to cover it. If Congress does not increase the agencies' budgets, no actual increase in overall government spending by the agencies occurs. If Congress does increase the agencies' budgets, there is an increase in overall government spending by the agencies.)

The retirement age of Federal administrative law judges is, on average, 10 years greater than other Federal employees. The age of many of our current administrative law judges is between 70 to 80 years. As noted earlier, delayed retirement is often not a voluntary decision for administrative law judges. Rather, they are forced to work into their 70's and 80's as an earlier retirement with only a partial retirement benefit would result in financial hardship. That is, an administrative law judge appointed at age 60 who retires at age 75 would have a substantially reduced pension. For this individual, the need for a full retirement benefit may well require this judge to work until age 90. The minimal cost associated with the administrative law judge pension reform bill would serve as an incentive to administrative law judges with significant Federal service to retire sooner. However, this minimal cost is, to a degree offset by payroll savings from newly appointed judges whose pay would begin at the first level of a seven tier pay schedule established by the Office of Personnel Management. Thus, once an administrative law judge retires, the Federal agencies no longer are paying the administrative law judge's compensation; rather, it is paid from the CSRS and FERS Retirement Fund that is administered by the Office of Personnel Management.

An unintended consequence of a fair and equitable pension benefit would be the appointment of younger administrative law judges who will likely have much greater

experience with the use of technology in an adjudication setting. As the Federal government transitions to expansive use of new technology to accommodate its goal of progressing to a paperless work environment, judges more experienced with these technological changes may well be more efficient and effective with its use. Obviously, this experience would benefit the American people.

Virtually all Federal judges, Federal judicial officers, and state judges have retirement pension benefits substantially greater than the pensions provided to administrative law judges. Four groups of Article I Federal judicial officers that have enhanced CSRS pensions identical to that which the administrative law judges now seek are: (1) U.S. Bankruptcy Judges, (2) U.S. Magistrates, (3) U.S. Court of Federal Claims Judges, and (4) U.S. Court of Appeals for the Armed Forces Judges. These Federal judicial officers do not have enhanced FERS pension benefits because they have had separate 80-100% of salary pension plans since the 1980s. Members of Congress, Congressional staffers, and many federal law enforcement employees also have the same enhanced CSRS and FERS pensions that the administrative law judges now seek, but they do not also have separate pension plans such as those in force for the Article I Federal judicial officers.

The *Administrative Law Judges Retirement Act of 2005 (H. R. 1864)* would increase the annual pension benefit accrual rate for the administrative law judges enrolled in CSRS to 2.5% and administrative law judges enrolled in FERS to 1.7% of the administrative law judges' average pay (high three consecutive years) for all years of administrative law judge service, including all past administrative law judge service, and up to five years of countable military service. All of the employee groups who have received a CSRS and FERS annuity enhancement receive the same enhanced annual pension benefit accrual rate as the Members of Congress and Congressional staffers (2.5% in CSRS and 1.7% in FERS), including four groups of Federal judicial officers and many Federal law enforcement employees.

The bill would provide administrative law judges with three new immediate annuity options in CSRS and FERS: (1) a full annuity after becoming 55 years of age and completing 10 years of administrative law judge service, (2) a reduced annuity upon voluntary early retirement before age 55 and after completing 10 years of administrative law judge service, and (3) a full annuity at any age after completing 5 years of civilian service upon involuntary separation or an "early out" voluntary early retirement. This is low cost legislation that meets the public's need for good efficient government.

III. SUMMARY

On behalf of the Federal administrative law judiciary, I respectfully ask for your support of this important legislation. The *Administrative Law Judges Retirement Act of 2005* (H. R. 1864) will permit administrative law judges to retire in early old age, after 30 years of government service with a dignified pension. This improvement will allow a "turn over" of administrative law judges and it will provide for a younger Corps of administrative law judges who are better suited to work in the modern work environment. The bill is

low cost and according to the CBO it will cost about $1.4 million per year. The legislation will also result in a short term reduction in administrative law judge salary costs for the agencies, especially the Social Security Administration.

Respectfully submitted,

Ronald G. Bernoski
President, AALJ

Mr. PORTER. Judge McCann is president of the Board of Contract Appeals Judges Association. Judge.

STATEMENT OF R. ANTHONY McCANN

Judge MCCANN. Thank you. Thank you, Mr. Chairman. Good afternoon and thank you very much for this opportunity to appear before you.

Mr. PORTER. Excuse me, Judge. We won't hold Bill against you, because I see he is here today.

Bill Bransford—we won't hold Bill against you.

Judge MCCANN. We appreciate that very much. We try to keep him under control.

I am president of the Board of Contract Appeals Judges Association; and one of the purposes of the Board of Contract Appeals Judges Association is to provide appropriate means of communication between BCA judges and Congress, the judiciary, bar associations, etc.

I am familiar with the concerns of my Federal judges, and I know that I speak for most of them.

The Boards of Contract Appeals are independent quasi-judicial tribunals authorized by Congress and established by agencies to issue binding decisions resolving contract disputes. Congress provided that the Boards of Contract Appeals judges would not be subject to direction or control by procuring agencies. Our decisions are final agency decisions not reviewable by the agency and appealable only to the Court of Appeals for the Federal Circuit, much as the decisions of the Court of Federal Claims are.

In this respect, we are quite different from Administrative Law Judges. Our primary responsibility is to issue fair and independent decisions. It is from this perspective that I approach the issue of the pay-for-performance issue.

Pay for performance provides compensation based on individual performance or contribution to agency performance. Pay for performance would necessarily affect the process of arriving at, the quality of, the timeliness of, or the outcome of decisions. It would, in fact, diminish or possibly eliminate a judge's independence and his impartiality. Certainly it would create doubt in the government contract community as to judges' impartiality and independence. Contractors may well hesitate before they bring appeals to the Boards of Contract Appeals. This could have a significant impact on Boards of Contract Appeals and could even impact on a court of claims.

Pay for performance is simply inconsistent with the judge's primary responsibility to issue fair and independent decisions, and my attachment goes into this issue in more detail.

With regard to pay, the Contract Disputes Act of 1978 established BCA judges pay at grade levels of GS–16, 17 and 18, the so-called super grade levels, the precursors to the Senior Executive Service. The Federal Employees Comparability Act of 1990, again, Congress set Boards of Contract Appeal judges pay at levels comparable to that of the SES.

BCA judges perform work at levels comparable to the Court of Federal Claims. Contractors can appeal their cases either to the Boards of Contract Appeals or to the Court of Federal Claims, and

the relief granted by each of these tribunals is exactly the same. The Court of Federal Claims judges are paid at Executive Level 2, the pay cap for the SES. We believe that BCA judges should be restored to the pay levels comparable to the SES and Court of Federal Claims judges.

BCAs need to be fully competitive when filling vacancies. If the SES is paid more, candidates are more likely to opt for the SES. The SES already has a competitive advantage. They can receive bonuses, where BCA judges may not receive bonuses for the very reason that they must remain independent.

To keep the rates relatively comparable to the SES, BCA pay rates we feel should be set at a percentage of Executive Level 3, instead of Executive Level 4; and the locality pay cap should be set at executive pay level 2 instead of level 3. BCAs have separate significant pay compression over the past 15 years in relation to the general schedule. After the Pay Comparability Act of 1990, GS–15 step 10 received 74 percent of the pay of the BCA judge. Today, they receive 92 percent of the pay of the BCA judge. Soon there may be little, if any, monetary reason for a GS–15 to aspire to become a BCA judge.

If the trend continues, the only way a GS–16 could increase his pay is to move to the SES. The relative diminution of pay is inappropriate, we feel, and should be rectified.

Thank you for the opportunity to appear before you.

Mr. PORTER. Thank you very much, Judge. We appreciate your testimony.

[The prepared statement of Judge McCann follows:]

TESTIMONY

of

JUDGE R. ANTHONY McCANN

President

BOARD OF CONTRACT APPEALS JUDGES ASSOCIATION

Before the

HOUSE GOVERNMENT REFORM COMMITTEE,
SUBCOMMITTEE ON THE FEDERAL WORKFORCE AND AGENCY ORGANIZATION

May 16, 2005

Good Afternoon Mr. Chairman and Members of the Subcommittee:

My name is R. Anthony McCann. I am an Administrative Judge on the Board of Contract Appeals for the Department of Energy. I testify today as President of the Board of Contract Appeals Judges Association or BCAJA. BCAJA's purpose is to maintain a professional association of board of contract appeals ("BCA") judges, to conduct educational seminars, to promote procedural due process and impartiality of proceedings, and to provide an appropriate means of communication between the BCAJA and legislative committees, bar associations, and the judiciary, as to matters relating to Government contract law. In view of my role, I am familiar with the concerns of my fellow judges and know I speak for most of them.

I am also a member of the Senior Executives Association's Board of Contract Appeals Judges Chapter. SEA represents the interests of BCA judges and I have included an SEA paper on performance standards and pay as an attachment to my testimony.

I appreciate the opportunity to appear before the Subcommittee to discuss pay for performance and judicial independence.

The boards of contract appeals are independent quasi-judicial tribunals authorized by Congress, and established by government agencies, to issue binding decisions, resolving contract disputes between government agencies and contractors. Congress provided that "in conducting proceedings and deciding cases they (judges) would not be subject to direction or control by procuring agency management authorities." (S. Report No. 95-1118, pg. 24). The decisions of the judges of the boards of contract appeals are final, except that either the Government or the contractor may appeal to the U.S. Court of Appeals for the Federal Circuit. We are thus different from Administrative Law Judges.

Our primary responsibility as judges is to issue fair and independent decisions on the disputes presented to us. It is from the perspective of maintaining our independence that I approach the question of pay for performance.

Pay for performance provides compensation based on "individual performance" or "contribution to the agency's performance." (See the statutory standard for the Senior Executive Service at 5 U.S.C. § 5382.) At the very least, pay adjustments for board judges that are based on individual performance would be intended to affect the process of arriving at, the quality of, the timeliness of, or the outcome of, a judge's decision. Such pay adjustments would diminish or eliminate the judge's independence in each of those aspects of performance. Because the agency is always one party to any dispute, pay for performance would at the very least create doubt about the independence and impartiality of BCA judges. Under such circumstances contractors may hesitate to appeal their cases to the BCAs. The affect on the BCAs and the Court of Federal claims could be significant.

Pay for performance is thus inconsistent with the performance of a judge's primary responsibility – the issuance of fair and independent decisions. A judge must always fully perform the primary function of issuing fair and independent decisions – no more and no less. The attachment to my statement deals with these issues in greater detail.

A judge should receive an appropriate pay – not more or less.

We think Congress understood our situation when it initially established the pay system under which we are currently compensated. The pay for BCA judges was set by Congress in the Contract Disputes Act of 1978 at the three highest rates payable in the civil service—the so-called super grades: GS-18, GS-17, and GS-16. These super grades were the precursors to the SES. Subsequently, the Federal Employees Comparability Act of 1990 established pay levels for BCA judges higher than or comparable to the three highest levels of the Senior Executive Service.

BCA judges perform work at a level comparable to that of the judges of the U.S. Court of Federal Claims. Board judges are authorized to grant the same contract relief that would be available from a judge of the U.S. Court of Federal Claims. U.S. Court of Federal Claims judges are paid at Executive Level II which is the current pay cap for the SES.

It is important for the BCAs to be fully competitive when filling judge vacancies. If the SES receives pay that is substantially higher than that of the BCAs, the best candidates are likely to opt for the SES instead of the BCAs. The SES already enjoys a competitive advantage over the BCAs in that members are eligible for bonuses, something not available to BCA judges by statutory design because of the need for judges to remain impartial. In order to ensure that high caliber lawyers with the requisite five years of procurement experience (required by the Contract Disputes Act) accept positions as BCA judges, it is essential that the pay of BCA judges remain comparable to the highest levels of the SES.

To keep the rates of compensation relatively comparable to the highest levels of the SES, while ensuring the judges' independence, the rates of pay in 5 U.S.C. § 5372a(b) should be set as a percentage of Executive level III, rather than level IV; and, the comparability cap in 5 U.S.C. § 5304(g)(2), which is currently set at Executive level III, should be set at Executive level II.

With regard to the issue of pay compression, BCA judges pay has steadily decreased over the past 15 years in relation to General Schedule employees. After passage of the Federal Employees Comparability Act of 1990, a GS-15, step 10, received 74 per cent of the pay of a BCA judge. Today a GS-15, step 10, receives 92 per cent of the pay of a BCA judge. Such relative diminution in pay is inappropriate and should be rectified. Soon there may be little, if any, monetary reason for a GS-15 employee to aspire to become a BCA judge. If this trend continues a move to the SES will be the only way for a GS-15 to increase his/her salary.

Thank you for the opportunity to appear before you.

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ATTACHMENT

PAY RATES for ADMINISTRATIVE JUDGES of the BOARDS OF CONTRACT APPEALS

SHOULD A JUDGE'S PAY BE ADJUSTED BASED ON PERFORMANCE?

A statement by the Senior Executives Association
on behalf of
The Administrative Judges of the Boards of Contract Appeals
May 11, 2006

Introduction

Board judges believe that adjusting the pay of board judges based on specific performance standards is counter intuitive. However, board judges recognize that there are some who think that executive branch judges, like other members of the executive branch, should be paid based on whether judges individually meet specific performance standards. We offer our reasons for rejecting pay adjustments for performance for Board of Contract Appeals Judges.

What are the Boards of Contract Appeals

The Boards of Contract Appeals have a long history of resolving contract disputes between the government and its contractors. Originally, the boards were creatures of the Dispute Clause contained in government contracts. Board members were appointed by and reported to the Secretaries of the Departments. By the time the Contract Disputes Act of 1978 was passed, "the boards ha[d] evolved into trial courts, as the result of *S & E Contractors, Inc. v. United States*, (400 U.S. 1 (1972))." *See* S. Rep. No. 95-1118, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News, 5237-38.

The Contract Disputes Act gave statutory recognition to the trial court nature of the boards of contract appeals. In considering the Contract Disputes Act, Congress stated,

> The agency boards of contract appeals as they exist today, and as they would be strengthened by this bill, function as quasi-judicial bodies. Their members serve as administrative judges in an adversary-type proceeding, make findings of fact, and interpret the law. Their decisions set the bulk of legal precedents in

> Government contract law, and often involve substantial sums of money. In performing this function they do not act as a representative of the agency, since the agency is contesting the contractor's entitlement to relief.

See S. Rep. No. 95-1118, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News, 5260.

The legislative history in the U. S. House of Representatives was to the same effect.

> The provisions outlined above concerning appeal from a decision of an agency board of contract appeals by the Government involves a basic change in the law and practice relating to contracts. It is consistent with the statutory basis in the bill for agency boards of contract appeals and their recognition as independent boards before which the Government and contractor can receive an impartial determination on the basis of an evidentiary hearing on the record.

See H.R. Rep. No. 95-1556, 95th Cong., 2d Sess., at 20.

The Contract Disputes Act changed the contract appeals process from a right provided by contract and subject to the discretion of the Secretary, to a right granted and governed by federal statute. While the agencies continue, under the Contract Disputes Act, to have the authority to establish the boards of contract appeals, they have no authority to approve, disapprove, or even review the decisions of the boards once they have been established. In this regard the board judges do not act under the Administrative Procedure Act (5 U.S.C. § 554) to implement an agency program. As the Federal Circuit Court of Appeals has noted, "In enacting the CDA, Congress explicitly stated that a board of contract appeals proceeding is not subject to the adjudicative procedure of 5 U.S.C. § 554." *Fidelity Construction Co. v. United States,* 700 F.2d 1379, 1316 (Fed. Cir. 1983).

Under the Contract Disputes Act the decisions of the boards of contract appeals may only be reviewed by an Article III court. All appeals go directly to the Federal Circuit Court of Appeals, except that maritime cases are appealed to district courts. (41 U.S.C. §§ 603, 607(g)) Once created, the boards perform their functions independently of the agency that has created them. Today, in 2006, there are ten agency boards of contract appeals. On January 6, 2007, eight civilian boards will be consolidated into the Civilian Board of Contract Appeals.

The structure of the various boards generally provides that the chairman has administrative responsibility for the operation of the board, including the assignment of cases. However, each judge acts independently in performing the quasi-judicial duty of deciding disputes between the government and the contractor. Each judge is a peer. There is no superior-subordinate relationship. This is similar to the relationship among the judges of an Article III court.

Who are the Board Judges

Board judges are lawyers licensed to practice law who have significant experience in government procurement law. They are required by the Contract Disputes Act to have at least five years of such public contract law experience. (41 U.S.C. § 607(b)(1)).

Today, in 2006, there are approximately 49 board judges. Twenty-two of them are serving on the Armed Services Board of Contract Appeals. The remaining judges are serving on the Postal Service Board or will be serving on the new Civilian Board.

Technically, board judges are members of the Executive Branch. However, board judges have no responsibility for implementing programs or policies of the Executive Branch. In performing this function they do not act as a representative of any agency. *See* S. Rep. No. 95-1118, 95th Cong., 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News, 5260.

What do Board Judges Do

Their responsibility is to render independent decisions on contract disputes between the government agency and the government's contractor. The Contract Disputes Act provides that board judges may be assigned other duties, but only if those duties are not inconsistent with their contract disputes act responsibilities. (41 U.S.C. § 607(a)(1)).

For example, the Agriculture Board of Contract Appeals also decides disputes arising out of standard reinsurance agreements between the Federal Crop Insurance Corporation and large insurance companies; the General Services Board of Contract Appeals also used to decided bid protest cases and currently also decide claims of federal civilian employees for travel and relocation expenses; and the Housing and Urban Development Board of Contract Appeals also decides the Department's Debt Collection actions (including tax offsets and administrative wage garnishments) and reviews of administrative sanctions (including debarments and suspensions). The Department of Interior Board of Contract Appeals is also required by statute (25 U.S.C. § 450m-1(d)) to decide disputes arising from Indian self-determination contracts (25 U.S.C. § 450f)) of the Department of Interior and the Department of Heath and Human Services (25 U.S.C. § 450m-1(e)). The Armed Services Board of Contract Appeals also decides Non-appropriated Fund disputes that are not subject to the Contract Disputes Act, as well as certain NATO and Iraq Coalition Provisional Authority disputes.

How do Board Judges Perform their Functions

Board judges are generally responsible for managing their dockets within the limits of the resources made available to them. Preparatory to issuing a decision, board judges resolve discovery disputes and other pre-hearing motions. If the contractor elects to have an appeal for a claim up to $50,000 placed on the expedited docket, an individual judge is solely responsible for issuing the decision. (*E.g., Wayne T. Palmer v. General Services Administration*, GSBCA No. 14063, 97-2 BCA ¶ 28,988 (May 12, 1997); *Wayne T. Palmer v. Barram*, 184 F.3d 1373 (Fed. Cir. 1999) (appeal dismissed).

Generally, these decisions are issued by panels of three judges. In rendering a decision each individual judge is required to explain the rationale for the decision and to set forth the facts on which the decision is based. In performing this function each judge is subject to the judgment of the other judges on the panel and appellate review by the judges of the Federal Circuit Court of Appeals. Notwithstanding this peer review, each judge is still required to render an independent judgment. This independence is protected by the guarantee that a judge's pay is not affected by the performance of this duty to render an independent judgment.

In addition, board judges are available to resolve disputes under voluntary alternative disputes resolution procedures. Sometimes the parties choose to waive their appeal rights and to have a single judge issue a binding decision; sometimes they choose to have a judge act as a mediator. It is a testament to the independence, fairness, and impartiality of the board judges that both parties are willing to have judges in those roles.

Performance Standards – Public Scrutiny – Conflicts of Interest

The Contract Disputes Act contains performance standards for the boards of contract appeals. The judges are to act as quasi-judicial officers and are to issue fair and independent decisions on contract disputes between government agencies and contractors. Moreover, the boards are to "provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes" and are to issue decisions in writing. 41 U.S.C. § 607(e). With respect to accelerated (up to $100,000) and expedited (up to $50,000) appeals, the statute provides 180 and 120 day time limits for resolution, whenever possible. 41 U.S.C.§§ 607(f) and 608.

Unlike most jobs in the executive branch, these standards of performance are publicly known. Moreover, accomplishment of those objectives is subject to public scrutiny. The parties to a contract dispute, the government and the contractor, are aware of the manner in which disputes are resolved and have the opportunity to have a say as to which procedures are used. Moreover, decisions by board judges are subject to peer review by other judges, to motions for reconsideration by the parties, to appellate review by the Federal Circuit, and to public critique by members of the procurement community. This scrutiny goes to the quality of the judge's performance, but does not tread on the judge's independence. This public scrutiny is a procedure, which has two prongs. First, it guarantees that each party to the dispute will receive a fair and independent hearing; and second, it encourages achievement of the appropriate standard of performance.

Board judges are also subject to conflict of interest laws, rules, and regulations. For example, judges are prohibited from accepting gifts from parties that appear before them, must recuse themselves if they have a personal conflict of interest – such as a personal friendship with a party, must not express any more than an academic interest in a decision that they have issued (*Gulf & Western Industries, Inc. v. United States,* 230 Ct. Cl. 1 (1982)); and, must recuse themselves from cases in which they have a financial interest – such as employment or stock ownership.

Should there be Specific Performance Standards that Govern Pay Increases

There is no reason for pay adjustments to be connected to the achievement of specific performance standards, other than to affect the performance of an individual judge. In addressing this issue it becomes necessary to ask what specific standards would be applied, who would establish the specific standards, who would determine if the individual judge has met the specific standards, what affect would the successful achievement of the specific standards have on an individual judge's pay, and why should a judge's performance be affected? We think that the answers to these questions reveal a classic conundrum.

What Specific Performance Standards Would Apply

Ordinarily, specific performance standards are set with program objectives, goals, and resources all taken into consideration. If there are changes in program objectives, goals, or resources, performance standards can be adjusted. How would this process work in setting performance standards for judges? We see more questions than answers. The answers we find are not good ones.

Would the specific standards be related to quality of the decisions? If so, would quality be related to outcome? Would a good outcome be one that favored the government or one that favored the contractor? Would quality be related to writing style or length of a judge's opinion? How would these standards be applied to panel opinions, as opposed to those written by a single judge?

Would the standards be related to timeliness? If so, would timeliness be more or less important than quality? Would timeliness be related to resources available to a particular judge? Would timeliness be related to the difficulty of a case, the number of issues in a case, the number of days a hearing takes, the number of witnesses in a case, the number of documents in a case, whether travel was required, or whether the parties filed few or many pretrial motions?

Would a judge be penalized if many issues were discovered or discussed in a case, or would the judge be given credit for discussing and deciding many issues? Would a judge be penalized if the issues seemed relatively easy to decide, or would the judge be given credit if the issues seemed to be very difficult to decide? Would there be a catalogue of cases for which each was given a relative ranking of difficulty?

Would a judge be penalized for allowing many witnesses to testify, or would a judge be given credit if a large number of witnesses testified? Would a judge be penalized if a hearing lasted more days, or given credit because a hearing required many days of testimony?

Would a judge be penalized for allowing many documents into the record, or given credit for allowing the parties to submit all the documents they desired in order to make the record complete as required for appeal to the Federal Circuit?

Would the judge be penalized for allowing the parties to file many pretrial motions, or would the judge be given credit for having many motions to resolve? Would it make a

difference if the motions were oral or in writing? Would each motion be of equal weight for determining a judge's performance? Would one long complex motion be equal to many smaller succinct motions?

Who would decide what the Specific Performance Standards Would Be

Would one of the parties to the contract dispute decide what the specific performance standards would be? Would the contractor decide? Would the government agency decide? Which party would the judge be required to please? Would the government be willing to have its disputes decided by a judge whose pay was being determined by specific performance standards imposed by the contractor? Would a contractor be willing to have its disputes decided by a judge whose pay was being determined by specific performance standards imposed by the government? What does this do to fairness and impartiality?

May OPM set the Specific Performance Standards

OPM is a procuring agency whose contracts are subject to the Contract Disputes Act and whose disputes are decided by board judges. OPM is thus an interested party appearing before board judges. *E.g.*, see the following cases where OPM was a party: *Blue Cross and Blue Shield Association*, ASBCA No. 53632, 2004-1 BCA (CCH) ¶ 32,413; *Humana, Inc.*, ASBCA No. 49951, 2000-2 BCA (CCH) ¶ 31,142; *PCA Health Plans of Texas, Inc.*, 1998-2 BCA (CCH) ¶ 29,900. OPM can also be an interested third party in a contract dispute, as it was in a Government Printing Office contract dispute over the delivery of materials to OPM. *McDonald & Eudy Printers, Inc.*, GPO BCA 2-85, 1986 GPOBCA Lexis 40 (1986).

No Party that has an interest in the Board Proceeding May Establish the Specific Performance Standards

The legislative history of the Contract Disputes Act makes it clear that "in conducting proceedings and deciding cases [board judges] would not be subject to direction or control by procuring agency management authorities." (Senate Report No 95-1118, pg 24) Could it be realistically expected that the losing party in a dispute will believe that a judge issued an independent decision, if the judge rules in favor of the party that decides whether or not that judge will receive a pay raise?

May the Board Chairman or the other Judges on a Panel Determine whether a Judge should be given a Pay Raise?

Putting aside the obvious question of who would decide on the pay of the Chairman, since each judge has only one vote on a decision, and since most decisions are issued by panels including the chairman, would an individual judge ever issue a decision contrary to a decision by a chairman if the chairman was in the position of deciding whether or not the individual judge received a pay raise? Could the individual judge's decision ever be viewed as independent under those circumstances? In order to prove independence, wouldn't a judge have to disagree with the chairman?

Pay Increases for Performance Creates a Conflict of Interest

The judges' responsibility is to issue independent and fair decisions. In performing this function the judges do not have any superiors within the executive branch of government. The judges do not advocate, advance, or accomplish any particular agency program. Since the judges do not advocate, advance, or accomplish any particular agency program, it is not possible to give judges a performance award for achievement. They can only be paid for doing their job – which is to render independent decisions. Decisions are either independent or they are not. A judge thus does the job or does not. The job is not performed in degrees of independence. A board judge should be paid the judge's compensation or not – just as an Article I or and Article III judge is paid.

If a judge is to be personally compensated based on the judgment of another person as to whether or not the judge has satisfied specific performance standards, then the judges' personal interest in satisfying the judgment of that other person – in order to secure a favorable pay adjustment - will always be seen to be in conflict with the judge's duty to render a fair and impartial decision on a dispute between the government agency and the contractor. This would create an inherent conflict of interest between the judge's personal interest and his duty. An impossible situation!

Conclusion

The SEA Board of Contract Appeals Judges Chapter opposes any pay adjustment that is tied to individual achievement of specific performance standards.

Mr. PORTER. Finally, we have Judge Slavin, who is the president of the National Association of Immigration Judges.

STATEMENT OF DENISE N. SLAVIN

Judge SLAVIN. Good afternoon and happy birthday, Mr. Chairman; good afternoon to the committee members. Thank you for inviting the National Association of Immigration Judges to testify today.

The National Association of Immigration Judges is an association of immigration judges in the certified collective bargaining unit for these judges Nationwide. There is about 200 of us Nationwide. We have been reaching out to lawmakers grappling with this topic for the last few years. Pay compression has been an increasing problem in the ranks of the Immigration Judge Corps for some time.

The unique position of immigration judges frequently has been overlooked because we comprise a relatively small body of specialized administrative judges within the Department of Justice. Immigration Court proceedings are a strange hybrid of administrative civil and criminal law. While we are technically an administrative tribunal, we are not governed by the Administrative Procedures Act. However, we comprise one of the bigger groups of administrative judges within the Federal bureaucracy.

Unlike ALJs, we generally render final agency decisions, not mere recommendations. The vast number of our cases are not appealed. The subject matter we address daily can have life-or-death impact on the parties before us, whether it is in the context of asylum claims in the United States or whether someone's removal would cause exceptional and extremely unusual hardship to a U.S. citizen's relative.

More recently, cases have raised significant national security issues and assertions of connections to international terrorism or persecution of others. Further, the increased spotlight on immigration issues and IJ decisions has been brought on by streamlining, a process where the Board of Immigration Appeals adopts IJ decisions as the final agency decisions, and this highlights the need for a seasoned and stable corps of immigration judges.

We have similar problems to ALJs because of pay compression. These include the serious problems of attrition in the ranks and salaries disproportionate to those of the attorneys and parties who appear before us. Our ranks have been more directly affected by pay compression in recent years because, increasingly, the department has not been able to fill positions as IJs leave, creating a burden on the system and sitting IJs. The increased focus on immigration issues in the press only highlights the need to recruit and retain a high caliber of candidate for the system.

The immigration judge pay schedule is based on four levels of pay, based on increasing years of experience. However, in the third of the cities in which the immigration judges sit, the pay levels for the two highest positions are the same due to pay compression. At present, over 100 judges, about half of our corps, are paid identical salaries because of the pay cap provisions which limit the amount of locality augmentation that we can receive.

One thing that someone hasn't mentioned is that pay compression is aggravated by the fact that, for the same reason we are ex-

empted from performance reviews, we cannot receive other types of Federal compensation, such as bonuses or awards. These types of compensations usually are used to augment the salaries of high-level SES or executive schedule employees. Historically, immigration judges have been exempted from the general Federal Employment Performance Review System by OPM in recognition of the quasi-judicial nature of the job and the need for both real and perceived decisional independence.

The NAIJ would be happy to work with the subcommittee to change the pay scale, but we cannot envision a system that would link pay to performance and still preserve public confidence. A new pay system cannot include a pay for performance model. Judicial independence is paramount to ensure that we maintain public confidence and neutrality and fairness of our tribunal, and the mere appearance that quantity based measures are applied are worse yet. Financially rewarding would severely undermine that confidence.

Indeed, many immigration judges believe that the isolated incidences of immigration judge intemperance that have been occasionally criticized by the press have been brought on by the Department of Justice's position of case performance goals. These goals have dictated rigid guidelines for the immigration judges for the timeframe of completion of cases based on the type or age of the case. With added emphasis in the last years on these goals, we do not have the time in court to exchange pleasantries or allow an applicant to take all the time they desire for their day in court, and this sometimes makes us appear abrupt or curt in order to move cases along.

It is not difficult to see how this pressure to expeditiously move cases through the system might be misconstrued and misinterpreted as a lack of courtesy by the parties. Yet it is the same press of cases which highlights the need for expert and experienced IJs and serves to underscore the crucial importance of maintaining a top-quality corps of seasoned IJs by addressing pay compression and inequities relative to private sector employment.

The important independent goal of IJs in post September 11th times and the pay compression from which we suffer demands that all positions be addressed in a manner similar to any proposal for ALJs or non-Article III judges. The statutory language must be clear to ensure the pay scale for IJs is appropriately modernized, the compression is alleviated, and it would be clearly protected from any link to performance based criteria.

Thank you very much for the opportunity to speak today.

Mr. PORTER. Thank you, Judge. We appreciate your testimony.

[The prepared statement of Judge Slavin follows:]

Testimony of Denise Noonan Slavin, President
National Association of Immigration Judges
Before the Subcommittee on the Federal Workforce and Agency Organization
Committee on Government Reform
"Fair and Balanced? The Status of Pay and Benefits for Non-Article III Judges"
May 16, 2006

Good afternoon Mr. Chairman and Committee Members. Thank you for inviting the National Association of Immigration Judges to testify. Pay compression has been an increasing problem in the ranks of the Immigration Judge Corps for some time, and we welcome the opportunity to explain how it affects our ranks and how important it is to address it.

Before I begin, I need to make clear that my testimony today is in my capacity as President of the National Association of Immigration Judges, and not as a representative of the United States Department of Justice. The NAIJ is a professional association of Immigration Judges, and the certified collective bargaining unit for Immigration Judges nation-wide. The NAIJ has been reaching out to lawmakers grappling with this topic for the last few years.

The unique position of Immigration Judges frequently has been overlooked because they comprise a relatively small body of specialized administrative judges with the Department of Justice. Immigration Court proceedings are a strange hybrid of administrative, civil, and criminal law. Although we are technically an administrative tribunal, we are not governed by the Administrative Procedures Act. However, we comprise perhaps one of the largest groups of "administrative judges" within the federal bureaucracy. Unlike ALJs, we generally render final agency decisions, not mere recommendations. The vast number of our decisions is not appealed. The subject matter we address daily can have life-or-death impact on the parties before us, either in the context of asylum claims or claims involving assertions that removal will cause exceptional and extremely unusual hardship to United States citizen relatives. More often recently, cases have raised significant national security issues and assertions of connections to international terrorism or persecution of others abroad. Further, the increased spotlight on immigration issues and IJ decisions brought on by 'streamlining" –the process of the Board of Immigration Appeals adopting IJ decisions as the final agency decision – has highlighted the need for a seasoned and stable corps of IJs.

I understand the Committee's emphasis has been on Administrative Law Judges (ALJs), but Immigration Judges (IJs) have similar problems because of pay compression. These include the serious problems of attrition in the ranks and salaries disproportionate to those of the attorneys and parties who appear before them. Our ranks have been more directly affected by pay compression in recent years. Increasingly, the Department has not been able to fill positions as IJs leave, creating a burden on the system and sitting IJs. The increased focus on immigration issues in the press only highlights the need to recruit and retain a high caliber candidate for IJ positions.

The current IJ pay scale is governed by Public Law 104-208, Section 371(c), as amended by Section 1125(c)(4) of the National Defense Authorization Act for Fiscal Year 2004. This scale set

up a schedule of four levels of pay, based on increasing years of experience. However, in over one third of the cities which IJs sit, the pay levels for the two highest positions are the same due to pay compression. At present, over100 Immigration Judges, about half of the corps, are paid identical salaries because of the pay cap provisions which limit the amount of locality augmentation they can receive. The ubiquity of this compression is exacerbated for IJs in high locality pay areas such as New York, Los Angeles, and San Francisco, as they must forgo part of their locality pay adjustment (losing actual salary to which they would otherwise be entitled) in order to comply with the overall salary cap applicable under our present pay structure.

This pay compression has occurred because the IJ pay scale has been linked to another pay scale. IJs initially were paid on the attorney-scale at the Department of Justice, but Congress recognized the need to set up a different scale for IJs in 1996. The new IJ pay scale was initially linked to the SES level II, because of the precedent of highly paid government workers being promoted to the SES pay scale after working their way through the GS system, and because of the fact that the actual dollar amount of pay was appropriate for experienced attorneys in our positions of responsibility. The "pay marker" was changed to the Executive Level II salary by the National Defense Authorization Act for Fiscal Year 2004, to safeguard IJ pay from being impacted by the implementation of performance evaluations for SES employees in that same act. Of course, pay compression is aggravated by the fact that, for the same reason they are exempt from performance reviews, IJs cannot receive other types of federal compensations, such as bonuses that any agencies annually award their SES members. Similarly those employees who are paid through the Executive Schedule frequently benefit from additional financial or non-financial perks which IJs do not qualify to receive.

Historically, IJs have been specifically exempted from the general federal employment performance review system by OPM in recognition of the quasi-judicial nature of the job and the need for both real and perceived decisional independence. The NAIJ would be happy to work with the Subcommittee to change the pay scale, but NAIJ cannot envision a system that would link pay to performance and still preserve public confidence. We would suggest that, in the best of all worlds, non-Article III Judge pay be linked, although at a reduced percentage, to the salaries of Bankruptcy Judges or Magistrate Judges, which are more comparable positions.

In any event, any new pay system cannot include a "pay for performance" model. Judicial independence is paramount to assure that we maintain public confidence in the neutrality and fairness of our tribunal, and the mere appearance that quantity-based measures are applied or, worse yet, financially rewarded, would severely undermine that confidence. Indeed, many IJs believe that the isolated incidents of IJ intemperance occasionally criticized in the press, has been brought on by the Department of Justice's impositions of "case performance goals" on IJs. These "goals" have dictated rigid guidelines to IJs for the time frame of completion of cases based on the case "type"and/or age. Immigration Judges routinely have four full hearings scheduled each day to determine the merits of a claim for relief from deportation, such as asylum, and are expected to render oral decisions from the bench on each case, with little time for reflection. We are charged with applying a complicated and frequently amended governing statute which has repeatedly been

acknowledged as second only to the tax code in its legal complexity. With added emphasis in the last few years on case completion goals with do not have the time in court to exchange pleasantries or allow an applicant to take all the time they desire for their "day in court." We cannot always rely on the attorneys who appear before us to keep the case on track, for relevant information, and thus sometimes appear abrupt or curt in order to move cases along. It is not difficult to see how this pressure to expeditiously move cases through the system might be misconstrued and misinterpreted as a lack of courtesy by the party. Yet it is the same press of cases which highlights the need for expert and experienced IJs and serves to underscore the crucial importance of maintaining a top quality corps of seasoned IJs by addressing pay compression and inequities relative to private sector employment.

The public deserves an Immigration Judges corps of the most knowledgeable and professional people in the field. However, it is vital that the public perceive Immigration Judges as a neutral check-and balance in a system which provides due process to the parties. This requires both decisional independence and the continuity of an experienced corps of professionals.

The important, independent role of IJs in post 9/11 times, and the pay compression from which we suffer, demand that our positions be addressed in a manner similar to any proposal for ALJs or other non-Article III Judges. The statutory language must be clear to ensure the pay scale for IJs is appropriately modernized, that compression be alleviated, and that it be clearly protected from any link to performance-based criteria. It has been recognized that IJs need to operate in an impartial manner, and to assure the public that this is so, an objective and fair salary is essential. More and more, we are vulnera ble to losing our seasoned judges as professional salaries outside the government sector rise and ours remain stagnant due to the pay cap to which we are subject. We fear that in the future, the lack of a competitive salary with appropriate opportunities for augmentation and meaningful locality adjustments will inhibit the ability of the Immigration Court to attract and keep the best and the brightest. Therefore, we strongly urge that you take action to treat IJ salaries comparably to that of ALJs and other non-Article III judges and that the adverse affects of pay compression and pay caps be ameliorated.

Thank you again for this opportunity.

Mr. PORTER. I guess we will start with you, with a couple of questions.

In light of the President's new proposal, at least concepts, yesterday, do you see your workload increasing substantially with some of the proposals that have been brought forward?

Judge SLAVIN. I see our workload increasing in two ways. One of the ways it makes our workload more difficult is immigration law is constantly changing so it is very difficult to keep up with those changes and to apply the new complexities. Just as case law develops on statutes that are passed, new statutes are passed or they are amended; and this makes these novel issues basically appear in court almost all the time. It is hard to determine whether this would be an initial increase in cases before the Immigration Court, and especially until some actual language comes out of any compromise that would be developed it would be difficult to determine.

Mr. PORTER. Before I continue with questions, I would like to ask my colleague, Mr. Cummings, if he would like to make any comments or an opening statement.

Mr. CUMMINGS. No, you can proceed Mr. Chairman.

Mr. PORTER. Thank you.

You had mentioned also, Judge, that the pay of immigration judges should be linked to the salaries of bankruptcy judges or magistrate judges. How are these judges paid, and why is that the best comparison?

Judge SLAVIN. Well, it is interesting I did agree with Ms. Kichak on this issue. They are paid on a percentage of the pay of the Federal court judges. I think her comparison to State court judges is totally inappropriate. It is like comparing apples and oranges. If you compared, for example, the salaries of Federal attorneys to State attorneys, you would see a similar discrepancy. But I think we should be paid comparably to magistrate judges and bankruptcy judges.

I would note, however, that those judges and the Federal court judges are also pressing for an increase in pay and feel that their current system is out of date.

When I looked at this issue last year, the Senate bill that was proposed would have proposed a maximum of $166,000 for the magistrate or bankruptcy judges; and if you linked, for example, the immigration judge pay at 95 percent of that, it would have brought our pay up to $157,000. So I think that the type of work we do is more similar to that than the work done by management employees or senior level management employees.

Mr. PORTER. It is becoming more and more obvious that we have a lot of our senior government officials in different areas where—their pay benefits and retirement situations—we need to be reviewing a lot of folks that are in the senior level, and possibly by an independent commission at some point.

But, again, I appreciate your comments in answering my questions.

Judge McCann, in your view, are there any pay-for-performance principles that will be applied to preserve your independence and improve the quality of timeliness?

Judge MCCANN. Mr. Chairman, I don't see any way to have a performance pay or any standards that can be used that would in fact preserve our independence or our impartiality. We thought about this long and hard and actually tried to but have not been able to come up with something that would preserve our impartiality.

Mr. PORTER. And, Judge Bernoski, how many ALJs retire each year and how many separate without retiring? Do you do any exit polling discussion with these folks?

Judge BERNOSKI. Off the top of my head, Mr. Chairman, I cannot give you an answer to that. I can supplement my testimony and try to provide that information to you.

But I think that probably in the Social Security Administration—this is probably a guess—we probably would have about—we have 1,100 judges, probably around 30 retire a year. I think that is a good ballpark estimate, about 30 a year.

Mr. PORTER. And if you could check that for us, I would appreciate it.

Judge BERNOSKI. Yes, sir I will.

Mr. PORTER. Judge Bernoski, do you see a significant loss of experienced and talented judges in the near midterm if we don't address these pay concerns; and, if so, what will happen.

Judge COWAN. Do we anticipate a loss of judges because of the pay problem? I think it is a complicated question. The fact is that the existing corps of judges came in late in their careers, typically, to Administrative Law Judge positions. They typically need to stay in largely because they can't afford to retire, and I think that links into Judge Bernoski's testimony about the need for retirement programs. So you are not going to see a lot of midterm people going in and out. There are some, but not a lot.

Mr. PORTER. And you need to help me because I don't know the answer to this question. You take a—like a State employee judge in the State of Nevada, who may well be a part of the public employees retirement system in Nevada, and what you are saying is they may be there for 10, 15 years and then, at later in life, with that experience, then they become a Federal judge. And they are not able to combine their benefits. So they have to stay longer to make sure that they can maximize the retirement benefits.

Judge COWAN. That is exactly right. I am an example of that. I am a retiree in the State of New York. That pension plus the Federal pension is not nearly as good as a typical long-term Federal pension.

So that is why people in ALJ positions stay in them. They need to stay in them to continue to get the number of years to boost up the FERS benefit, basically.

Mr. PORTER. So where is it that they start in salary, approximately?

Judge BERNOSKI. $95,500 I believe is the existing starting pay for ALJs.

Mr. PORTER. To start, you have to have experience for a number of years. It is not like they are coming in fresh from college in their first job?

Judge COWAN. No. OPM has an examination. Last examination required 7 years of trial experience or similar experience and a

number of other qualifications that you wouldn't get right out of law school, for example. So you are dealing with a seasoned corps of people. Typically the kind of people that came into ALJ positions were senior-level government employees at the GS–15 level that my colleague was talking about earlier and I mentioned as well. We are not getting those transfers anymore because it is just not lucrative for them. They can make more money staying where they are. That is what our concern is.

There is always going to be applicants for a job that pays $95,000 a year. The question is, are you getting the right kind of people? And we think that these programs need the best and the brightest people.

Mr. PORTER. Thank you. That actually concludes my questions.

Mr. Cummings, anything you would like to ask?

Mr. CUMMINGS. Yes. What is the retirement age for judges—I guess it is different—on different levels it is different retirement ages. In the State of Maryland, you have to retire by 70. But when do you all have to? Do you have a time that you have to retire?

Judge BERNOSKI. No, there is no mandatory retirement age, Mr. Cummings, in the Federal Government.

Most judges, Administrative Law Judges, that is, retire between after 20 years of service and then usually around 30 or more, depending on what their age is at that time. We have—I was over in Oklahoma City a couple of weeks ago and in that office there in the Oklahoma City hearing office of about 13 judges I think there were 3 that are over 80 years old. One was 85 or 86 years old. So these people are working well into older age and probably, quite frankly, beyond the scope of productivity.

Mr. CUMMINGS. The reason why I ask that question is because there was some mention of judges having to work longer because of certain circumstances with regard to pay, I guess, and pensions. So I assume that part of the reason why some may work a little longer than, say, the average is because of pay, is that it, or the retirement packages?

Judge BERNOSKI. Well, the typical reason why judges work older is because, well, first of all, as Judge Cowan indicated, their FERS system is really inadequate for the salary level of Administrative Law Judges the way the pension is structured, but second is because they enter Federal service at much later age. Like, for instance, the last class of Social Security judges of about a year ago, the average age of those judges was a little over 56 years.

So if you are going to take a governmentwide pension of 30 years on top of 56, you have 85 years of age before they would receive their 30 years of Federal service. And that is typically what happens. Our people enter into government service probably closer—OPM statement said age 40, but I think that is a little bit young. I would say our judges are a little bit closer to 50 years old when they enter. We have some younger people, but most of them are on the older side, 50 years or more.

Mr. CUMMINGS. Judge McCann, you had said that—in answering one of the chairman's questions about pay for performance, you said that—you mentioned that it might be harmful to impartiality. Is that what you said?

Judge MCCANN. Yes, I did.

Mr. CUMMINGS. Can you explain that to me? I am sorry I missed you all earlier.

Judge MCCANN. Absolutely, Congressman Cummings.

If you have pay for performance, you would have to have certain standards for pay for performance. And that would—if you have standards for pay for performance that are at all subjective, that would be opening up that performance review to political pressure or pressure by the agency to come to some conclusion. It would not be impartial.

If you had absolutely objective standards, you could have pay for performance. But we know of no objective standards that would possibly apply. So any type of—we come to the conclusion that any type of pay for performance necessarily destroys impartiality.

Mr. CUMMINGS. So when it comes to—and then when it comes to pay compression, I guess it becomes very—I am sort of moving to another subject—kind of difficult to hold on to folks and even to get them in the process.

I know you can get somebody for $95,000. I got that. But as far as attracting the better people, that is your major concern, is that right, Judge Cowan?

Judge COWAN. Yes. Absolutely.

Mr. CUMMINGS. So you just got somebody that comes in at $95,000 who is an outstanding jurist or whatever they might be doing, could probably make a lot more money doing something else——

Judge COWAN. Yes.

Mr. CUMMINGS [continuing]. At that point in their career.

Judge COWAN. What you are going to get are a bunch of people with failed law practices or people who just couldn't cut it in private industry, that have the requisite number of years to qualify for experience. They will submit applications. Now, hopefully, OPM will design an examination that will weed a lot of those people out. But we are really worried about the fact that this compression is going to have a real quality effect on the corps of ALJs.

Mr. CUMMINGS. And have you seen evidence of that? How do you all—I am trying to say this in a way where you don't have to talk about your colleagues. I mean, do you all have any kind of evaluation system short of somebody complaining? Are you following me?

Judge BERNOSKI. No, we don't. There isn't any evaluation system for Administrative Law Judges. It is precluded by the Administrative Procedure Act and by Federal statute.

But, Mr. Cummings, with relation to the OPM statement, since the register has been closed, since 1999, OPM has not had empirical data as to the quality of applicants that they will receive under this current pay cap, quite frankly, because they haven't been putting any applicants on the register; they haven't been receiving any applicants or administering the examination. So it is at best on their part an educated guess; and we do not, I think, concur with their conclusion.

Judge COWAN. If I might supplement upon that, I referred earlier in my remarks that the chairman of my agency wrote to the President a number of years ago, 3 years ago, complaining about the quality of the applicants we were seeing in the OPM register. I am with the Federal Energy Regulatory Commission. We have very

technical, very complex cases. You really need to have the right kind of skills to do those kinds of cases. And he just wasn't seeing—when we would bring applicants that OPM would certify up to the chairman's office and he would say, we don't think they can do the job. So it was a real concern. It hasn't gotten any better. It's gotten worse, because the pay compression is even worse now than it was then.

Mr. CUMMINGS. Who did you say you work for?

Judge COWAN. The Federal Energy Regulatory Commission.

Mr. CUMMINGS. So when it comes to judges in your area, they have to have expertise with regard to energy?

Judge COWAN. They don't necessarily, no. We don't have that as a requirement. As far as OPM examination is concerned, all judges are equal. A judge in Social Security could conceivably be transferred and do our work. In fact, they have done that; and some of them work out fine. But others may not work out so good. We are really concerned about the general problem.

Mr. CUMMINGS. I understand that. But you are also concerned about, yeah, quality.

But what I was thinking about is, in Maryland, they just had a—there was an article in the Baltimore Sun the other day about one of our circuit court judges and how he had to—I think they said he spent a whole summer just trying to figure out how the Public Service Commission works and with regard to energy problems in Maryland, just so that he could be knowledgeable of even dealing with a hearing. And I can imagine that would get—that could get very, very complicated.

So if you have someone who is mediocre at best and who may not be too quick on the draw with regard to learning the subject matter, it is kind of hard, I guess, to have a truly fair hearing. Because it takes about, I assume, a certain base of knowledge just to be able to even fully appreciate and understand the arguments that may be presented. Is that a fair statement?

Judge COWAN. I would agree with that.

Mr. CUMMINGS. So if whoever is in charge of the judges, say like in your agency, ends up with a judge who is clearly not qualified to hear those kinds of cases, there is not too much you can do it about it, huh?

Judge COWAN. No, we are required basically to assign cases on a rotational basis. So as they come in they get assigned to the next available judge to the extent practicable.

Mr. CUMMINGS. What is your solution to this problem of compression? What do you see as a solution?

Judge COWAN. The solution would be—I would like to see a fresh look at the whole structure, but the immediate solution would be to establish a cap at a higher level. That is a stopgap measure.

But I think the American public deserves a fresh look at compensation for judges across the board, non-Article III judges, which is what this committee is looking at. I think it is a wonderful idea to do that, and we are appreciative of it.

Mr. CUMMINGS. Let me say one last thing. I agree with you. I am a lawyer. I practiced for 20-plus years, and for the life of me, I could not, I never could, understand why judges were not paid better. I mean, most of the judges I knew were very strong people in

the legal profession. They could go out and make more money than what they were making on the bench. And then people would scream and holler if any mention was made of them making a decent salary.

It seems to me we have to protect all branches of our government, and I think the judicial branch plays as significant a role as the legislative and executive. Hopefully we can take a look at this.

I agree with you on quality. To have justice, in order to make decent decisions, you have to start with a base of knowledge. If you don't have that base, you have a problem. I don't consider that justice.

Thank you all very much.

Mr. PORTER. Thank you. I just have one additional question.

Entry level approximately $95,000, is that based upon what is being paid, or is that where it begins? I would assume that a lot of folks come in from other agencies and may be above the $95,000. If they come in at $110,000, they start at $110,000?

Judge COWAN. If there is an intergovernmental transfer, they transfer laterally at their highest level.

But there are other people that come from other jurisdictions or the private sector, and they start at the lowest level.

Mr. PORTER. Your points are well taken. I concur with Mr. Cummings that this is an important hearing, and we appreciate hearing your perspectives.

As I said earlier, I think there are some other executive levels in the government, senior government officials, that we need to take a look at also.

Thank you very much for your testimony. We appreciate you being here today. And with that, we will adjourn the meeting.

[Whereupon, at 3:03 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

STATEMENT OF
ASSOCIATION OF ADMINISTRATIVE LAW JUDGES
FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE
JUDICIARY DIVISION OF THE FEDERAL BAR ASSOCIATION
FORUM OF UNITED STATES ADMINISTRATIVE LAW JUDGES

BEFORE THE
HOUSE COMMITTEE ON GOVERNMENT REFORM
SUBCOMMITTEE ON FEDERAL WORKFORCE
AND AGENCY ORGANIZATION

MAY 16, 2006

These comments are submitted on behalf of the Association of Administrative Law Judges, the Federal Administrative Law Judges Conference, the Judiciary Division of the Federal Bar Association, and the FORUM of United States Administrative Law Judges. They address the subjects of judicial independence and the need for improved communication between the ALJ stakeholders and the Office of Personnel Management (OPM).[1]

Maintaining Decisional Independence of the Administrative Law Judiciary and Adjudicative Fairness and Impartiality

The administrative law judiciary was clothed by the Administrative Procedure Act of 1946, 5 U.S.C. § 551, et. seq. (APA), with decisional independence and unique statutory protections to ensure fair and impartial adjudication across the spectrum of national interest. That decisional independence cannot and should not be abrogated in the name of pay for performance. Testimony presented today explains why ALJ compensation needs to be enhanced and made competitive to attract well qualified senior professionals and to retain experienced ALJs. It also is imperative that OPM re-establish

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[1] Under the provisions of the Administrative Procedure Act of 1946, 5 U.S.C. § 551, et seq., OPM was given the authority to administer the appointment of ALJs by other agencies and was designated, implicitly, as the guardian of the ALJ program. *See* 5 U.S.C. § 1305 which provides, in pertinent part, that OPM, for the purposes of 5 U.S.C. §§ 3105 (governing appointment of ALJs), 3344 (the loaning of ALJs between agencies), and 5372 (ALJ pay) "may investigate, require reports by agencies, issue reports, including an annual report to Congress, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees as established for the courts of the United States."

an office which exclusively addresses ALJ stakeholder issues and consults with the ALJ stakeholder community.

The adjudicative function performed by ALJs and the delicately balanced relationship that ALJs must maintain with their employing agencies distinguish ALJs from the remainder of the agency's workforce. Their adjudicative independence, established in the APA, enables ALJs to make fair and impartial decisions without fear of undue agency pressure or agency reprisal.

The seminal requirement of the APA is that hearings be conducted by merit-appointed ALJs. 5 U.S.C. § 3105. ALJs are appointed from a register maintained by OPM. Under current OPM regulations, to get on the register, an ALJ candidate is required to demonstrate competence and judicial temperament by establishing a minimum of 7 years of administrative law or other qualifying experience and obtain a satisfactory score on an all-day written examination. Further, an ALJ candidate is evaluated by a panel comprised of an OPM representative, an ALJ, and a representative of the American Bar Association. A successful candidate is rated and ranked by OPM, consistent with veterans preference requirements, and placed on the register in accordance with his/her score. When an agency seeks to appoint an ALJ, a list of candidates, based upon their ranking and geographical preference, is certified to it by OPM. At the moment, OPM is in the process of developing a new examination scoring formula which will be used to construct a new ALJ register and a pending rulemaking proceeding proposes to modify these qualification and appointment standards in ways that the ALJ community, in comments to OPM, has suggested are inappropriate.[2] We would be happy to provide the Committee with copies of our comments at its request.

The APA requires agencies to assign cases to each ALJ on a rotational basis "to the maximum extent practical." Hearings are required to be on the record and *ex parte* communications are prohibited. 5 U.S.C. §§ 556, 557. The APA exempts ALJs from the establishment of performance standards for federal agency employees. 5 U.S.C. § 4301(2)(D). OPM regulations expressly prohibit an agency from rating the performance of an administrative law judge. 5 C.F.R. § 930.211, "Performance Rating." Also, OPM regulations bar the granting of performance awards to ALJs. 5 C.F.R. § 930.210(b). These APA protections were designed to ensure that ALJs decide cases independent of agency influence or pressure.

Agency rating or evaluation of the performance of an individual ALJ could constitute a direct or subtle attempt to interfere with his or her decision-making process

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[2] While, in the past, many qualified attorneys, both from the public and private sector, have sought appointment as an ALJ, we submit that the attraction of the position is greatly diminished as ALJ pay fails to keep up with that of senior federal attorneys, without even addressing its failure to maintain its position vis-à-vis the private sector.

and, thus, to affect the outcome of a case. Moreover, while ALJs can be disciplined and removed from office, to ensure ALJ decisional independence, the APA requires that a complaining agency demonstrate good cause for the removal or other discipline of an ALJ in an APA hearing on the record before the Merit System Protections Board. 5 U.S.C. § 7521. OPM regulations mirror these statutory requirements. 5 C.F.R. ¶ 930.210(b).

The unique, independent role of the ALJ in the administrative process is reflected by section 11 of the APA as discussed in the Attorney General's Manual on the Administrative Procedure Act (1947). The Act required and the Attorney General recognized that it is necessary to ensure that Hearing Examiners [now ALJs] possessed superior qualifications." Attorney General's Manual at 121 ("there shall be appointed as many qualified and competent examiners as may be necessary...who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners.")

More than 1300 ALJs serve at thirty different Cabinet-level and independent agencies, from the Department of Agriculture to the United States Postal Service. ALJs adjudicate controversies that involve energy law, including interstate and retail pricing of electricity, oil, and natural gas utilities, antitrust, banking practices, commodity futures, education grants, environmental degradation, food and drug safety, housing violations, immigration law, international trade, labor, mine safety, occupational workplace conditions, postal rates, telecommunications licensing, unfair labor practices, Medicare and social security old age and disability benefits, to name but a few.

Congress further recognized that the duties performed by ALJs are not analogous to the duties performed by other members of the Executive Branch workforce when it created a separate ALJ pay category in 1990. ALJ compensation was modeled on Senior Executive Service (SES) compensation and was then subject to the same Executive Level ceiling for total compensation, exclusive of the bonuses and awards to which the SES were eligible and which the APA prohibited for ALJs. This ALJ compensation system was made more equitable in 1999 by enactment of P.L. 106-97. In that amendment to 5 U.S.C. § 5372, Congress gave the President the discretionary authority to grant ALJs the same basic pay raise authorized for the General Schedule and to adjust ALJ basic pay within a range of a minimum of 65% of EL-IV basic pay and a maximum of 100% of EL-IV basic pay. This authority has been exercised only sparingly.[3]

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[3] In 2002, as a first step towards remedying ALJ pay erosion relative to General Schedule pay, the President exercised this authority by granting ALJs a 5.4 percent basic pay increase for ALJs at levels 2 and 3. This included the same national pay raise authorized for the General Schedule and a supplemental adjustment within the EL-IV cap. The President's Pay Agent also extended locality adjustments to ALJs in 2002-2006. These actions were undertaken as part of a graduated effort to close the gap

Integrity of the Administrative Law Judiciary and the Need for OPM to Promptly Reestablish the Longstanding Office of Administrative Law Judges

To ensure the integrity of the federal administrative law judiciary, it is imperative that OPM re-establish an office that exclusively addresses ALJ concerns, is headed by a senior manager with a direct line to the Director, and which meets on a regular and periodic basis with ALJ stakeholders.

An essential element of the Civil Service Commission's reform of its procedures for the recruitment, examination and appointment of hearing examiners (now ALJs), during the 1960s, was the establishment of an Office of Hearing Examiners which reported directly to the Executive Director of the Commission. Subsequently renamed the Office of Administrative Law Judges, the Office was abolished by OPM in 2003 and the performance of its statutory obligation as to ALJs assigned to different sections of the agency. The Office of Administrative Law Judges provided the principle vehicle through which the ALJ community and the bar were able to keep abreast of developments involving ALJ candidates, and to express concerns about the ALJ program administered by OPM under the APA.

In order to perform its statutory responsibilities with regard to ALJs in an exemplary manner, OPM should promptly re-establish the Office of Administrative Law Judges with sufficient stature, leadership and resources to: (1) administer effectively the ALJ application process in a fair, efficient, open and continuous manner; (2) guarantee the expedited scoring of ALJ candidates in the future in support of an open register with the caliber of candidates that are appropriate to the position of ALJ, that is, a job calling for superior, rather than average or ordinary talents; and (3) provide advice within the government and to the interested public as to ALJ matters. The re-establishment of this office would be a significant stride toward restoring cooperative communications between OPM and the bench and the bar, and public confidence in the ALJ selection process.

CONCLUSION

The administrative law judiciary was clothed by the APA with decisional independence and unique statutory protections to ensure that fair and impartial adjudication across the spectrum of national interest. That decisional independence

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between ALJ pay levels relative to where they were in 1991, vis-à-vis the General Schedule. A further step was taken in 2004 when the President supplemented ALJ compensation with a modest increase above that authorized for the General Schedule.

cannot and should not be abrogated in the name of pay for performance. The APA prohibits ALJ performance evaluations and precludes performance bonuses and awards to ensure that decisions are made on the record and not exclusive of the record. OPM is responsible for administering the merit-based examination and appointment of ALJs and, in its role as a member of the President's Pay Agent, may recommend that ALJ national compensation be supplemented above that authorized by the Congress for the General Schedule, subject to the statutory cap. Testimony presented today explains why ALJ compensation should be enhanced and made competitive to attract well qualified senior professionals and retain experienced ALJs. It also is imperative that OPM re-establish an office which exclusively addresses ALJ stakeholder issues and consults with the ALJ stakeholder community.

ENERGY
BAR ASSOCIATION®

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David T. Doot
185 Asylum Street
Hartford, CT 06103

PRESIDENT-ELECT
Michael J. Manning
801 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

VICE PRESIDENT
Donna M. Attanasio
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

SECRETARY
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Baltimore, MD 21201

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1150 18th Street, N.W.
Washington, D.C. 20036

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Washington, D.C. 20036

ENERGY LAW JOURNAL

EDITOR-IN-CHIEF
Robert S. Fleishman
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

1020 -19th Street, NW
Suite 525
Washington, DC 20036

Phone: 202-223-5625
Fax: 202-833-5596

May 12, 2006

HAND DELIVERED

The Honorable Tom Davis
Chairman
Committee on Government Reform
U.S. House of Representatives
2348 Rayburn House Office Building
Washington, D.C. 20515-6143

Re: May 16, 2006 Subcommittee on Federal Workforce and Agency Organization Hearing on Compensation to Administrative Law Judges

Dear Chairman Davis:

On behalf of the Board of Directors of the Energy Bar Association ("EBA"), I am writing to express the EBA's views on Administrative Law Judge ("ALJ") matters to be considered in a hearing before the Subcommittee on Federal Workforce and Agency Organization, scheduled for May 16, 2006.

The EBA is a non-profit organization consisting of more than 2,300 attorneys and non-attorney energy professionals. The EBA is dedicated to enhancing the professional competence of those who practice and administer energy law. Many of our members practice before ALJs at various federal agencies, particularly the Federal Energy Regulatory Commission ("FERC"), and our members include some FERC ALJs.

The EBA strongly supports measures that promote a highly qualified and independent corps of ALJs. For that reason, we urge that the administration and human resource functions of the Office of Personnel Management ("OPM") be structured and performed in a manner to attract and retain the best qualified individuals for the federal administrative law judiciary. In particular, the EBA requests that the pay compression issue ALJs face be addressed, but not by imposing a performance-based compensation change that could threaten the decision-making independence of the ALJ corps.

As the OPM itself has recognized and proposes to remedy, the ALJ corps is experiencing narrowing pay differentials, *i.e.*, pay compression. An example of a problem this pay compression creates is that Chief Judges and

supervisory judges with executive and managerial duties in addition to their adjudicatory responsibilities receive no greater compensation for assuming these extra duties. Diligence and excellence in the performance of these duties are crucial to the sound and efficient administration of proceedings before ALJs, and compensation policies should encourage experienced ALJs to take on these executive and managerial duties. Pay compression impedes this outcome. More generally, the EBA believes that the elimination of pay compression is crucial to the attraction and retention of highly qualified individuals to serve as ALJs.

The EBA opposes, however, proposals like OPM's that would condition the elimination of ALJ pay compression on the establishment of a performance-based compensation adjustment mechanism that could compromise the independence of ALJs in their decision making. It is essential that ALJs remain fair and impartial.

Central to the Administrative Procedure Act ("APA") is the right to a full, fair, and impartial hearing. This objective is met through the requirement for on-the-record evidentiary hearings before ALJs appointed based on merit, and through certain unique statutory protections. Under the APA, ALJs are expressly (and, we believe, properly) exempt from performance appraisals. 5 U.S.C. § 4301(2)(D). They are also insulated from supervision by any person performing an investigative or prosecuting function for the agency, *ex parte* communications are prohibited, and ALJs can be removed or disciplined only upon an agency filing of a complaint before the Merit System Protections Board ("MSPB") and a showing of good cause through an on-the-record hearing. Current OPM regulations incorporate these APA requirements and specifically prohibit performance bonuses and awards for ALJs.

A compensation structure that conditions increases in ALJ compensation upon performance certifications could directly or subtly interfere with the independent ALJ decision-making process. For example, an ALJ decision in an on-the-record evidentiary hearing could be susceptible to political pressures or other outside influences if the ALJ's compensation is tied to the ALJ's performance. The public interest compels preservation of all of the decisional independence protections required by the APA, including prohibitions against performance-based compensation adjustments that could, in perception or reality, jeopardize that independence.

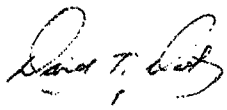
There are undoubtedly reasonable alternatives to OPM's pay for performance review proposal that would not compromise the actual or perceived independence of the ALJs. The FORUM of the United States Administrative Law Judges and the Federal Administrative Law Judges

Conference are particularly mindful of these independence and impartiality concerns and the EBA urges favorable consideration of their views.

The EBA also urges reconsideration of the OPM's elimination of the Office of Administrative Law Judges ("OALJ"). The maintenance of a highly qualified and independent ALJ corps depends on effective communications between OPM and the ALJ community. OALJ has provided that necessary function historically, and the immediate reconstitution of the OALJ, or something similar, should be thoroughly reviewed.

Thank you for your consideration of the EBA's views. Please include this letter in the record of the May 16 hearing and contact me (860-275-0102; dtdoot@dbh.com) if you have any questions.

Respectfully yours,



David T. Doot
President

Administrative Law Judge Coordinating Council
A Consortium of National Organizations Representing U. S. Administrative Law Judges

c/o Federal Bar Association Judiciary Division
2215 M Street, N.W.
Washington, DC 20037

April 11, 2006

Honorable Linda M. Springer
Director
Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415-8200

RE: March 3, 2006 Meeting

Dear Director Springer:

Thank you for meeting with the representatives of the Administrative Law Judge organizations on March 3, 2006. This letter responds to several matters raised at that meeting. The joint signatories to this letter represent virtually all the major professional organizations of Administrative Law Judges. All of us share the same goal of preserving the integrity of the Administrative Procedure Act and the administrative law judiciary.

At the March 3 meeting, you requested a summary of "surrogates" previously discussed with OPM officials as a potential avenue to provide relief for ALJ pay compression. The primary surrogate suggested is the Model Code of Judicial Conduct for Federal Administrative Law Judges. We previously provided a copy of the Code to OPM staff, and have included a copy herewith. It represents a straightforward template for ALJs to assure that their conduct and performance conforms to public and traditional expectations. The Code was endorsed in 1989 by what is now called the National Conference of the Administrative Law Judiciary of the Judicial Division of the American Bar Association (ABA) and enjoys the support of all ALJ organizations. We reiterate that a "pay for performance" regime is antithetical to the independence of the administrative law judiciary. However, the ALJ organizations have informally suggested that the Model Code be codified in law or regulation as a standard of satisfactory conduct and performance for ALJs. This would provide both the ALJs and OPM with specific rules by which ALJs must abide.

In addition to the Model Code for Judicial Conduct of Federal Administrative Law Judges, MSPB and OPM have recognized the applicability of the ABA's Code of Judicial Conduct (1972) to federal administrative law judges. *See, e.g., In Re Chocallo,* 1 MSPBR 612 (1978) and the Administrative Law Judge OPM Program Handbook (May 1989), Ch. 13, F. Misconduct as Basis for Action, which notes that, "The code of Judicial Conduct, adopted by the House of Delegates of the American Bar Association (ABA) in 1972 and updated in 1984, although not *ipso facto* binding on Administrative Law Judges, has been cited by the former U. S. Civil Service Commission and the U.S. Merit Systems Protection Board as an appropriate guide in evaluating the type of conduct of an Administrative Law Judge in certain cases.

Moreover, some agencies have adopted certain provisions of the Code in their own regulations concerning conduct of Administrative Law Judges and/or other agencies."

The closest recognized analogy to the role of an administrative law judge is other federal trial judges. Our job duties have been recognized by the Supreme Court as functionally equivalent to those performed by federal trial judges. *Federal Maritime Com'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002); *Butz v. Economou*, 438 U. S. 478 (1978); *see also, Rhode Island Dept. of Environmental Management v. United States*, 304 F.3d 31(1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges).

Most of us hear cases where our own agencies are parties before us. We should not be subjected to evaluation by parties who appear before us, or by people who can be seen by the public to be influenced by agency management.

Nearly all ALJ decisions are subject to review by someone in the agency where they serve. All ALJs are subject to discipline by their agencies upon a finding of good cause by MSPB. Congress requires that the ALJs from some departments and agencies (for example, HUD and FERC) file annual reports concerning case processing times and dispositions. Additionally, some departments and agencies have adopted rules and practices to address complaints about the ALJs. *See* Procedures for Internal Handling of Complaints of Misconduct or Disability, 46 Fed. Reg. 28050 (1981), as amended, 48 Fed. Reg. 30843 (1983) and 52 Fed. Reg. 32973 (1987) ["Peer Review"]. Thus, there are already ample measures to assess the performance of ALJs; and there has not been any showing that performance evaluations are needed. Implementation of performance evaluations would be an administrative nightmare, costly in time, money and morale.

The matter of pay compression is critical to recruitment and retention of quality lawyers to serve as ALJs, and attract quality ALJs to serve as supervisory judges, such as chief judges. Already, the pay of AL-1, AL-2, and the majority of AL-3F judges is identical and at the total pay cap allowed by law ($152,000). Some AL-3E judges are at the total pay cap with the remaining AL-3E judges close to the cap. These four categories encompass the vast majority of ALJs. Chief judges and supervisory judges earn nothing additional for their executive and managerial duties. The numbers of applicants for these critical positions have declined and numerous vacancies go unfilled, as judges see no incentive to take on the additional burdens and responsibilities of management. In this respect, it is essential that the compensation of the administrative law judiciary is competitive with the level of total compensation, including incentives, applicable to more than half of the General Schedule. Without reference to the incentive compensation that is being extended to the General Schedule, the starting pay for AL-3A judges is only $93,500, far less than the pay of a GS-15 at Step 10 ($118,987) and the minimum SES starting salary of $109,808. In fact, a newly hired ALJ in Washington DC is paid $112,213, less than an experienced GS-14 government lawyer at Step 8, earning $112,734. The quality of ALJ applicants will certainly decline as the level of ALJ pay declines relative to competitive positions in the federal government. These are the traditional recruiting grounds for quality federal lawyers. Without some pay compression relief, ALJ pay will fall further behind.

This will negatively affect the quality of adjudication and the actual and perceived legitimacy of the administrative hearing process.

Another issue that was discussed was the need to establish a stronger working relationship with OPM. While OPM feels that its reorganization effectively serves the needs of ALJs, we respectfully suggest that communications could be improved to the benefit of ALJs and OPM. While you suggest that every stakeholder group wants its own office within OPM, we respectfully point out that Congress has not tasked OPM with the responsibility to manage any other program and protect any other class of employees the way it did with ALJs under the Administrative Procedure Act. If OPM is not willing to reestablish an Office of Administrative Law Judges to undertake those congressionally mandated responsibilities that it has abandoned in recent years, it should support the transfer of those responsibilities to an Administrative Law Judge Conference of the United States, as proposed by the ALJ community.[1] In the interim, we hope that you will identify the appropriate person or persons, with responsibility for the most pertinent and pressing issues, such as the finalization of the register and examination process, as well as the pay compression issue, which we addressed above. We need the names and telephone numbers of specific contacts because those of us who have attempted to contact the Acting General Counsel with ALJ issues have been shuffled from person to person without receiving any real assistance.

Thank you for the time you took to meet with us. We look forward to working with you and your agency to meet the challenges outlined at our meeting and in this letter. We would like to schedule another meeting with you in the very near future to discuss these issues.

Sincerely,

Arthur A. Liberty
Arthur A. Liberty
Chair, Judiciary Division
Federal Bar Association

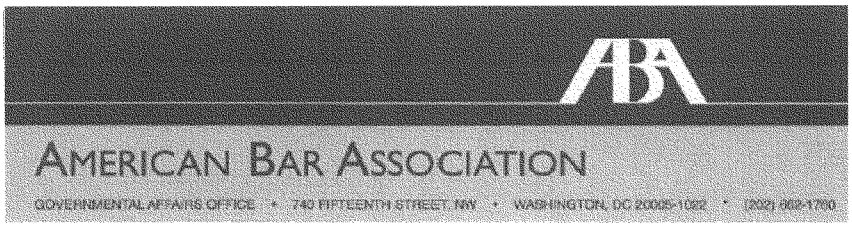
Pamela Wood
Pamela Wood
President
Federal Administrative Law Judges Conference

David F. Barbour
David F. Barbour
President
FORUM of Administrative Law Judges

Diane Townsend-Anderson
Diane Townsend-Anderson
President
Association of Hearing Office Chief Judges

Ronald Bernoski
Ronald Bernoski
President
Association of Administrative Law Judges

[1] The establishment of an Administrative Law Judge Conference of the United States was proposed in H.R. 5177, introduced in the 106th Congress. The purpose of the proposed ALJCUS was to centralize administration, management, training and assignment of federal ALJs. The proposed law also would have codified the Model Code of Judicial Conduct for Federal Administrative Law Judges as the standard of conduct applicable to federal ALJs.



STATEMENT

of the

AMERICAN BAR ASSOCIATION

submitted to the

SUBCOMMITTEE ON FEDERAL WORKFORCE AND AGENCY ORGANIZATION

COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

on the subject of

"Fair and Balanced? The Status of Pay and Benefits for Non-Article III Judges"

May 16, 2006

The American Bar Association is pleased to submit this statement to the Subcommittee on the Federal Workforce and Agency Organization for the record of the May 16, 2006, hearing on the status of pay and benefits for Non-Article III judges. We thank the Committee for demonstrating its concern for unique function of the administrative judiciary within the federal workforce by holding this focused hearing. This statement summarizes the ABA's positions regarding the adequacy of, and problems with, current administrative law judge (ALJ) pay; the incompatibility of the concept of adjudicative independence with a pay-for-performance salary scheme; the need for ALJ retirement enhancements; and our concerns over the relationship between the Office of Personnel Management (OPM) and the ALJ community.

ALJ Compensation and Pay Compression

The ABA has long advocated that the compensation of ALJs needs to be appropriate to their judicial status and functions. Unfortunately, we are farther from achieving this goal today than we were in 1990, when Congress enacted a separate pay scale for ALJs, which was supposed to improve compensation: in the intervening years, entry-level ALJ salaries have declined significantly in relative value, and increasing numbers of experienced ALJs have been prevented from collecting cost-of-living adjustments and/or locality pay adjustments due to pay compression. Long-term solutions are needed to fix these problems, which threaten to impair the quality of the federal administrative judiciary.

ALJ compensation used to fall under the General Schedule but is now controlled by a separate pay scale that is linked to the Executive Schedule. Enacted by Congress in 1990 to improve ALJ pay, the revised pay schedule has backfired: rather than improving ALJ pay over the years, it has not even succeeded in maintaining the parity that previously existed with the compensation paid to other senior-level government attorneys. This deterioration in ALJ basic pay is the result of ALJs not receiving many of the cost-of-

living adjustments (COLAs) that were granted under the General Schedule during the past thirteen years. In 1991, ALJ entry level basic pay was comparable to the pay at GS-15, steps 5 and 6; today, ALJ basic pay has slipped to a rate comparable to the pay at GS-14, steps 7 and 8.

Needless to say, over the last decade, entry-level ALJ salaries have not kept pace with salaries for the most senior government attorneys under the General Schedule or in the Senior Executive Service (SES), or for experienced attorneys in the private sector. And the gap keeps widening. This is creating an anomaly in comparative pay-ranking that is inequitable to ALJs and adverse to the goal of attracting and retaining the best and the brightest to serve as ALJs: in some agencies, the pay of career staff officials who are responsible for selecting cases for ALJ assignment are making more money than the ALJs. As William J. Cowan, Deputy Chief Administrative Law Judge with the Federal Energy Regulatory Commission pointed out in his testimony before this subcommittee, "We cannot hope to attract the senior agency staff and SES attorneys who are the natural candidates for prospective ALJ positions as this pay inequity continues and the disparity increases. Nor can we hope to attract candidates from the pool of private practitioners who practice before our agencies. While we can never expect to match the kind of salaries offered by top national law firms, the present entry level pay for ALJs is so low as to virtually assure that the ALJ program will be bottom feeding from the private bar, attracting only those whose practices are unsuccessful or worse."

In 1999, Congress attempted to rectify these problems by enacting legislation (Pub. L. No. 106-97) granting the President authority to authorize the same annual COLA for ALJs that is authorized for the General Schedule and to adjust ALJ basic pay within the statutorily mandated range of 65% to 100% of Executive Level IV. Since then, ALJs have received a yearly COLA and in 2002 also received a small supplemental adjustment. Unfortunately, recent COLA authorizations do nothing to recoup the cumulative loss of wages resulting from COLAs that were denied in the past, and the modest supplemental adjustment, while greatly appreciated, nevertheless was insufficient to restore ALJ pay to a rate comparable to where it was in 1991, vis-a-vis the General Schedule.

In addition to the incremental erosion of pay since 1991, the adequacy of ALJ pay has been undermined by the spiraling problem of pay compression. Pay compression results from both the statutory cap on basic salary for each level of ALJ pay and the statutory cap on locality pay. The statutorily-set ALJ pay schedule is divided into three levels: AL-1 (for Chief ALJs), AL-2 (for Deputy or Regional Chiefs), and AL-3 (for line ALJs). The AL-3 pay level contains six steps (AL-3A through AL-3F) to reflect increases gained from experience. The vast majority of the approximately 1,400 ALJs are paid at the AL-3F level -- a reflection of the fact that the members of the current administrative judiciary, according to OPM, have served, on average, as ALJs for 21 years.

The Federal Administrative Law Judges Conference has pointed out that due to pay compression, many ALJs at level AL-3E, the vast majority of ALJs at level AL-3F, and all ALJs at levels AL-2 and AL-1 earn exactly the same rate of pay. Furthermore, assuming the status quo, these ALJs, unlike the vast majority of the Federal workforce, will not receive any locality- or base-pay increases next year or the year after and on into the future. Their salaries will not keep pace with inflation, and the longer they work, the more they can "look forward" to their salaries continuing to decrease in relative value. This has created an inequitable and demoralizing pay system that effectively penalizes those ALJs who have the most experience, length of service, or supervisory responsibilities. In addition, it provides no incentive for senior judges to take on the administrative tasks of a Chief or Deputy Chief Judge.

While we do not know for certain, we suspect that pay compression adversely affects the salaries of close to 2/3 of the Administrative Judiciary. Even though Nancy H. Kichak, Associate Director of the Strategic Human Resources Policy Division of OPM, reported to this subcommittee last week that about 43 per cent of ALJs currently are paid at capped rates, we are hesitant to rely on that lower assessment in light of the fact that last year , in his written statement to this subcommittee, the OPM Associate Director minimized the effect of pay compression, dismissing it as only affecting ALJs at the top two tiers (AL-1 and AL-2) of the salary scale.

OPM has not been responsive to the ALJ community's concerns over pay parity issues, stating that they see no evidence that pay is inadequate or that pay compression has resulted in significant retention or recruitment problems. We have three concerns with OPM's assessment. First, we question whether OPM is using the right subsets of public employees for pay–level comparison purposes. Second, OPM has ignored the effect of the growing pay disparity between entering ALJs and both senior agency staff and SES attorneys, which we believe is highly significant because these latter groups comprise the most natural pool candidates for prospective ALJ positions. Finally, the number of ALJs who are resigning is not a good measure of the inadequacy of ALJ pay or the severity of the problem of pay compression. That the current rate of resignations is not alarming may be due to multiple other external factors, such as a bulge in the number of ALJs who are approaching retirement age, or a sluggish economy. Even absent other causes, an analysis based on resignation rates would be short-sighted and side-steps the fact that it is inequitable to deny a majority of ALJs cost-of-living adjustments simply because they have reached the statutory cap.

Inadequate or stagnant salaries steadily undermine morale, diminish the importance of retaining experienced jurists, and reduce the value we, as a society, place on the work performed by the administrative judiciary. We should address these problems now, not after we do lose experienced and able ALJs.

During the 108th Congress, the ABA supported H.R. 3737 (Jo Ann Davis, R-VA) because it would have provided a solution to pay compression and established a statutory framework for addressing pay adequacy issues that respected the unique function of the administrative judiciary within the Executive Branch. While similar legislation has not been introduced this Congress, we recommend that this Subcommittee give consideration to the bill's provisions as a possible blueprint for much needed remedial action in this area.

ALJ Pension Enhancement

Congressional review of ALJ compensation would not be complete without an examination of the current ALJ pension system. The ABA urges Congressional establishment of a retirement plan for federal administrative law judges that is appropriate to their judicial status and functions and that is separate from retirement plans of other career civil servants. The ABA supports enactment of H.R. 1864 (Wynn, D-MD), the Administrative Law Judges Retirement Act of 2005, providing enhanced ALJ retirement benefits, modeled after the Congressional retirement plan. *See* the Federal Employees' Retirement System Act of 1986 (P.L. 99-335).

As Administrative Law Judge Ronald Bernoski, on behalf of the Association of Administrative Law Judges, pointed out in testimony before this subcommittee last week, "Virtually all Federal judges, Federal judicial officers, and state judges have retirement pension benefits substantially greater than the pensions provided to administrative law judges. Four groups of Article I Federal judicial officers that have enhanced CSRS pensions identical to that which the administrative law judges now seek are: (1) U.S. Bankruptcy Judges, (2) U.S. Magistrates, (3) U.S. Court of Federal Claims Judges, and (4) U.S. Court of Appeals for the Armed Forces Judges....Members of Congress, Congressional staffers, and many federal law enforcement employees also have the same enhanced CSRS and FERS pensions that the administrative law judges now seek...." The ABA's policy and accompanying explanatory report (which is not adopted as policy) are attached to this statement as Appendix A and will provide you with a more detailed analysis of this issue.

ALJ Adjudicative Independence Precludes Imposition of a Pay-for-Performance Salary System

The adjudicative function performed by ALJs and the delicately balanced relationship that ALJs must maintain with their employing agencies distinguish ALJs from the rest of an agency's workforce. The Administrative Procedure Act established the adjudicative independence of the administrative judiciary to enable ALJs to make fair, impartial decisions without fear of undue agency pressure or agency reprisal. To preserve ALJ independence, federal regulations explicitly prohibit an agency from rating the performance of an administrative law judge or granting a monetary or honorary award for superior adjudicative performance. 5 C.F.R. §930.211 and §930.215(b).

Congress recognized that the duties performed by ALJs are not analogous the duties performed by other members of the Executive Branch workforce when it created a separate ALJ pay category in 1990. The U.S. Supreme Court, likewise, affirmed the unique status of ALJs within the Executive Branch in 1978, affirming that ALJs are functionally equivalent to federal trial judges *Butz v. Economou*, 438 U.S. 478 (1978); *Federal Maritime Com'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002); see also, *Rhode Island Dept. of Environmental Management v. United States*, 304 F.3d 31(1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges.)

Even though OPM officials acknowledge that ALJs are different from other federal workforce employees and that ALJ independence is essential, they refuse to acknowledge the inherent incompatibility of a pay-for performance salary system with the preservation of ALJ adjudicatory independence and have expressed certainty that a pay-for-performance salary system can be constructed in a way that will not diminish or chill the decisional independence of ALJs.

We reiterate our opposition to the concept of pay-for performance salary structure for the administrative judiciary. Any proposal to improve ALJ pay that directly or indirectly links pay to performance clearly would violate existing statutes and regulations and jeopardize the decisional independence of ALJs and the integrity of the administrative hearing process. Accordingly,

attempts to find a surrogate mechanism for awarding merit increases to individual ALJs based on some measure of performance are equally suspect.

This does not mean that there should not be checks on ALJ performance. Indeed, many checks currently exist. The manner in which an ALJ carries out his or her duties may be evaluated through a system of peer review without violating judicial independence principles if the purpose is to measure and improve performance. Some departments and agencies have adopted rules and practices to address complaints of misconduct and disability of administrative law judges. *See* Procedures for Internal Handling of complaints of Misconduct or Disability, 46 Fed. Reg. 28050 (1981), as amended 48 Fed Reg. 3085 (1983) and 52 Fed Reg. 32973 (1987). Further, ALJs who fail to carry out the duties assigned to them are subject to remedial action by their chief judge and, in serious cases, disciplinary action before the Merit System Protection Board. (Current procedures require that a complaining agency demonstrate good cause for discipline of an ALJ in an APA hearing on the record before the Merit System Protections Board. 5 U.S.C. § 7521; 5 C.F.R. ¶ 930.210(b). In addition, Congress requires that ALJs from some departments and agencies file annual reports disclosing case processing times and dispositions.

It is important to be absolutely clear that our opposition is specifically limited to the imposition of any system that directly or indirectly links pay for performance. We support efforts to improve the performance and professional capabilities of administrative law judges, and we believe that administrative law judges should be subject to, and accountable under, appropriate ethical standards adapted from the ABA Model Code of Judicial Conduct (1990). Such efforts are fully compatible with the objectives of the APA and will protect the public interest in independent, impartial, and responsible decision-making in the administrative adjudication process. In an effort to be reconcile OPM's insistence on establishing a performance management system with the need to preserve the core tenets of ALJ independence, w the ABA and other organizations representing the ALJ community suggested to OPM officials that an appropriate Model Code of Judicial Conduct be codified in law or regulation as a standard of satisfactory conduct or performance for ALJs. Many organizations specifically recommended codification of the Model Code of Judicial Conduct for Federal Administrative Law Judges, which was adapted from the ABA Model Code of Judicial Conduct. It was endorsed in 1989 by

the National Conference of the Administrative Law Judiciary of the ABA, but never presented to the ABA's policy-making body for Association–wide approval. Nevertheless, it enjoys extensive support in the ALJ community. Unfortunately, OPM has not indicated a willingness to consider this proposed compromise.

Reinstate the OPM Office of Administrative Law Judges or Establish an Administrative Law Judge Conference of the United States

Finally, we would like to make a few observations about the relationship between OPM and the Administrative Judiciary. Over 1400 ALJs perform judicial services throughout the government, serving approximately 30 different Cabinet-level and independent agencies. By design, ALJs are insulated from the entities for which they work. While this is necessary to protect adjudicatory independence, the downside is that ALJs do not have employers who represent their interests, coordinate their activities, provide policy guidance, etc.. As result, the APA tasked OPM with managing the ALJ program, including serving as their ombudsman. It undermined its ability to fulfill this latter role when it eliminated the Office of Administrative Law Judges during its reorganization in 2003. Since then, the ALJ community has had no dedicated point of contact at OPM through which information can be obtained and shared, efforts coordinated and concerns expressed. We therefore urge OPM to immediately reestablish the Office of Administrative Law Judges. If OPM is unwilling to do that, we urge Members of Congress and OPM to support transferring OPM's Congressionally-mandated ALJ functions to an Administrative Law Judge Conference of the United States, as contemplated by H.R. 5177 (106th Congress, 2000) and H.R. 3961 (105th Congress, 1998). The ABA adopted policy in support of the creation of an Administrative Law Judge Conference in 2004. A copy of our policy and explanatory report is attached as Appendix B for your ready reference.

Thank you for this opportunity to present the views of the Association. We stand ready to assist you in whatever way we can. Please contact Denise Cardman, Deputy Director of Governmental Affairs at: **cardmand@staff.abanet.org** or by phone at: 202/662-1761.

APPENDIX A

AMERICAN BAR ASSOCIATION

Retirement Plan for Federal Administrative Law Judges
Adopted on February 9, 2004

RESOLVED, That the American Bar Association encourages Congress to establish a retirement plan for federal administrative law judges that is appropriate to their judicial status and functions and that is separate from retirement plans of other career civil servants.

REPORT

Federal administrative law judges have been members of the American Bar Association, Judicial Division, National Conference of the Administrative Law Judiciary, since 1971; this resolution renews and extends existing American Bar Association policy.1

The American Bar Association has previously endorsed enhancements of compensation for federal administrative law judges, by supporting establishment of a pay schedule for administrative law judges separate from other career civil servants.2

Retirement benefits are a substantial part of the compensation benefits that are made available to federal administrative law judges but present retirement systems are not adequate or consistent with the recruitment needs or status of administrative law judges.

Federal administrative law judges are appointed under 5 U.S.C. § 3105.3 Their powers emanate from the Administrative Procedure Act.4 Extensive prior legal

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[1] The American Bar Association has adopted policy supporting the independence and integrity of the administrative judiciary in 1983, 1989, 1998, 2000 and 2001. Indeed, the Association's commitment to the independence of the administrative judiciary is reflected in the jurisdictional authority of the Standing Committee on Judicial Independence, which is authorized to promote this value.

[2] Policy to this effect was adopted 20 years ago, in 1983.

[3] See also, 5 U.S.C. sec. 5372 (a) ("For the purposes of this section, the term 'administrative law judge' means an administrative law judge appointed under section 3105.")

[4] See, A Guide to Federal Agency Adjudication, Michael Asimow, ed., 164 (American Bar Association Administrative Law Section 2003). For example, subject to published rules of the agency, administrative law judges are empowered to administer oaths, issue subpoenas, receive relevant evidence, take depositions, and regulate the course of the hearing. These fundamental powers arise from the Administrative Procedures Act "without the necessity of express agency delegation" and "an agency is without the power to withhold such powers" from its administrative law judges. Id. The Administrative Procedures Act seeks to affirm and protect the role of the administrative law judge, whose "impartiality," in the words of the Supreme Court in Marshall v. Jerrico, 446 U.S. 238, 250 (1980), "serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime."
In order to accomplish this goal, Congress requires Office of Personnel Management to maintain a register of qualified applicants, and to test and evaluate prospective applicants. Office of Personnel Management has been recognized for doing an excellent job. In fact, in 1992, the principal investigator for the Administrative Conference of the United States (ACUS) wrote:

experience is necessary for the position because it provides maturity, a reliable record, experience with problems likely to be encountered as an administrative law judge, and first-hand knowledge of rules of the operation of the courts.[5]

The Supreme Court has declared that federal administrative law judges are functionally just like other federal trial judges.[6] Although federal administrative law judges are judicial officers, they do not have a judicial retirement system.[7]

It is important to ensure that the federal government can attract highly qualified candidates for the administrative law judge position. Maintaining appropriate pay and pension reform will assure that the American people have highly qualified administrative law judges to adjudicate their administrative claims.

It is important that the demographic pool of administrative law judges does not become stagnant. Recent studies show that, as a body, administrative law judges retire on the average of eight to ten years later than the average federal civilian employee.8 Regenerating the pool will also enable greater diversity in the corps of judges.

Administrative law judges are the oldest discernable group of federal employees.[9] As a result, more administrative law judges die on the job proportionally than in any other civilian federal occupation.[10]

> Administrative Law Judges as a group are among the most diversely talented, well-trained, and deeply entrenched adjudicators in our system, even when they are compared with the federal district and state judiciary. Paul Verkuil, "Reflections upon the Federal Administrative Judiciary," 39 UCLA L. Rev. 1341 (1992).

[5] Amiel T. Sharon and Craig B. Pettibone, "Merit Selection of Federal Administrative Law Judges," 70 Judicature 216, 218 (1987).

[6] See, Butz v. Economou, 438 U.S. 478 (1978); Federal Maritime Com'n v. South Carolina State Ports Authority, 535 U.S. 743 (2002); see also, Rhode Island Dept. of Environmental Management v. United States, 304 F.3d 31(1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges).

[7] Four groups of Article I federal judicial officers have enhanced pensions: (1) U.S. Bankruptcy Judges, (2) U.S. Magistrate Judges, (3) U.S. Court of Federal Claims Judges, and (4) U.S. Court of Appeals for the Armed Forces Judges. Members of Congress, Congressional staffers, and many federal law enforcement employees also have the same enhanced pensions that may be appropriate for administrative law judges, but they do not also have separate pension plans such as those in force for the Article I federal judicial officers. The American Bar Association adopted policy in favor of enhanced state Administrative Law Judge compensation and retirement in 1998.

[8] "The Administrative Law Judges Retirement Act of 2003: a Proposal to Enhance the Retirement Annuity for Administrative Law Judges," Association of Administrative Law Judges' Retirement Committee (2001, revised 2003), http://www.aalj.org/pension.html#report, p. 12, citing OPM Administrative Law Judge Report, Table 8 (1999).

[9] See, Office of Personnel Management, Cognos PowerPlay Web Explorer, http://www.fedscope.opm.gov/index.htm, Table 10, The Fact Book, Office of Personnel Management, Federal Civilian Workforce Statistics, http://www.opm.gov/feddata/01factbk.pdf (2001 Edition) and data compiled by Association of Administrative Law Judges. Administrative law judges are currently part of the Civil Service Retirement System (CSRS) and the Federal Employee Retirement System (FERS). Under the CSRS, at age fifty-five, after thirty (30) years of participation, retirees can receive fifty-three per cent (53%) of their highest three years of government earnings. The most a federal retiree may earn in this plan is eighty per cent (80%) of the highest three years of earnings. This can be achieved with forty-one years and ten months' service. This is a traditional defined benefit plan, but it only applies to ALJs whose federal service began before 1984, when the retirement plan was changed to FERS. Under FERS, participants

Most (ALJs) are appointed later in life than other federal employees and therefore must work until age 75, 80 or older in order to attain a decent pension under the current federal program based on 30 years of service that was designed for career employees entering federal service in their 20's or 30's with a reasonable expectation of retiring at age 55-65. As a result, more ALJs die in office, proportionally, than any other federal civilian occupation.

Given the current retirement structure, there is little incentive for administrative law judges to retire. The Congressional Budget Office has reviewed the administrative law judge retirement dilemma and has determined that using proposed H.R.2316, "The Administrative Law Judges Retirement Act of 2003," pension reform can be accomplished at a very low cost.[11] Under these circumstances, the American Bar Association should recommend that federal administrative law judges should be provided retirement plans appropriate to their status.

Respectfully submitted,

Richard N. Bien

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receive one per cent (1%) for each year of service at retirement. Enrollees also contribute to Social Security and may participate in the Thrift Savings Plan. Up to five per cent (5%) of Thrift Savings contribution is matched under this plan. There is a ceiling on contributions, however, so that administrative law judges may not contribute as much proportionally as the general federal workforce population. *See*, Office of Personnel Management Retirement Information, http://www.opm.gov/retire/html/faqs/faq11.html and Association of Administrative Law Judges' Retirement Committee Report, *supra* (2001, revised 2003). Association of Administrative Law Judges' Retirement Committee Report, supra (2001, revised 2003). Under the existing CSRS and FERS retirement system for federal employees, an adequate pension can be earned only after a full and long career in government service of about thirty (30) years. Id. The lack of an adequate pension is causing a large and increasing number of administrative law judges to work into old age to achieve a federal pension based on the government-wide average length of service of thirty (30) years. Id. Consequently, the percentage of administrative law judges who will have to work at or beyond age seventy-five (75) to achieve a thirty (30) year pension will nearly double in ensuing years to about twenty-three per cent (23%) of the current administrative law judge workforce. Id. At least another sixteen per cent (16%) of administrative law judges will have to work at or beyond ages seventy (70) through seventy-four (74) to achieve thirty (30) years of federal service. Id. In other areas of the federal workforce, employees at or over the age of seventy (70) are unusual. Id.

[10]At the Social Security Administration alone, in Fiscal Year (FY) 2002, six (6) administrative law judges died while in service; in FY 2001, three (3) deaths occurred; in FY 2000, eight (8) deaths were recorded; and in FY 1999, four (4) deaths occurred to administrative law judges. See, Office of Personnel Management, Cognos PowerPlay Web Explorer, http://www.fedscope.opm.gov/index.htm. It is also reasonable to assume that because of advanced age, the need for more medical leave is requested by administrative law judges than any other body, but these statistics are not maintained.

[11] See, Congressional Budget Office Report dated September 9, 2003. The Congressional Budget Office found the low net direct cost based upon (1) a 2004-2013 ten-year direct cost to the federal government of $34 million for increased Civil Service Retirement System and the Federal Employee Retirement System retirement benefits to administrative law judges that will be paid out of the Office of Personnel Management's Civil Service Retirement and Disability Fund, and (2) 2004-2013 ten-year revenues of $20 million from the administrative law judge's additional contributions to the pension plans that are provided for in the bill.

APPENDIX B

AMERICAN BAR ASSOCIATION

Administrative Law Judge Conference of the United States
Adopted on August 9, 2005

RECOMMENDATION

RESOLVED, that the American Bar Association encourages Congress to establish The Administrative Law Judge Conference of the United States as an independent agency to assume the responsibility of the United States Office of Personnel Management with respect to Administrative Law Judges including their testing, selection, and appointment.

REPORT

Federal administrative law judges ("ALJ") have been members of the American Bar Association, Judicial Division, National Conference of the Administrative Law Judiciary, since 1971; this resolution renews and extends existing American Bar Association policy.[1]

The Office of Personnel Management ("OPM") is mandated to administer the ALJ program and to maintain a register of qualified applicants and test and evaluate prospective applicants.[2]. However, OPM recently closed its Office of Administrative Law Judges and has otherwise failed to adequately service the agencies and the judges under its mandate. In 2003, the functions were dispersed to other OPM divisions, without notice to the agencies or to ALJs regarding the terms of transfer. Thus, there is no central administrative office to administer the administrative law judge program at OPM, and there is no agency that provides suggestions to Congress to improve the administrative adjudication process.

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[1] The American Bar Association has adopted policy supporting the independence and integrity of the administrative judiciary in 1983, 1989, 1998, 2000 and 2001. Indeed, the Association's commitment to the independence of the administrative judiciary is reflected in the jurisdictional authority of the Standing Committee on Judicial Independence, which is authorized to promote this value.

[2] The classification of "administrative law judge" is reserved by OPM for the specific class of appointments made under 5 U.S.C. § 3105 and applies to all agencies:

> "The title 'administrative law judge' is the official class title for an administrative law judge position. Each agency will use only this official class title for personnel, budget, and fiscal purposes." 5 C.F.R. § 930.203b.

5 C.F.R. § 930.201 requires OPM to conduct competitive examinations for administrative law judge positions and defines an ALJ position as one in which any portion of the duties includes those which require the appointment of an administrative law judge under 5 U.S.C. 3105. ALJs can only be appointed after certification by OPM:

> An agency may make an appointment to an administrative law judge position only with the prior approval of OPM, except when it makes its appointment from a certificate of eligibles furnished by OPM. 5 C.F.R. § 930.203a. Id. § 930.203a; see also 5 U.S.C. § 5372 (2000) (providing for pay for administrative law judges, also subject to OPM approval).

The Administrative Law Judge Conference of the United States will perform those functions and enhance the independence of decision-making and the quality of adjudications of administrative law judge hearings under the Administrative Procedure Act ("APA"). The Administrative Law Judge Conference of the United States would be similar to the Judicial Conference of the United States, which provides administrative functions for Federal Article III judges, but its creation would effect no change in the current relationship between ALJs and the agencies where they serve. Rather the new Conference would assume the current responsibilities of OPM with respect to administrative law judges, including their testing, selection, and appointment.

Federal administrative law judges are appointed under 5 U.S.C.§ 3105.[3] Their powers emanate from the Administrative Procedure Act.[4] Extensive legal experience is necessary for the position, because experience provides maturity, expertise in compiling a reliable record, first-hand knowledge with problems likely to be encountered as an administrative law judge, and intimacy with rules of evidence and procedure similar to those used in administrative hearings.[5] After reviewing the duties of the office, the Supreme Court has declared that federal administrative law judges are like other federal trial judges for tenure and compensation[6] and that ALJs are functionally equivalent to other Federal trial judges:[7]

Cases heard and decided by ALJs involve billions of dollars and have considerable impact on the national economy. In fact, a single ALJ may handle a single case that may affect millions of people and involve billions of dollars. ALJs adjudicate cases involving a wide range of regulatory matters...

The Office of Personnel Management

The need for a separate agency to manage the ALJ program is prompted by longstanding problems with OPM's administration of the program. The APA contemplated that the Civil Service Commission (now OPM)[8] would oversee merit selection and appointment of ALJs and would also act as an ombudsman for the ALJ program but OPM has essentially abandoned that role. Section 1305 provides that for the purpose of sections 3105 (appointment), §3344 (loans), and §5372 (pay) OPM "may.. investigate, require reports by agencies, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpoena witnesses and records, and pay witness fees." Although the OPM

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[3] See also, 5 U.S.C. sec. 5372 (a) ("For the purposes of this section, the term 'administrative law judge' means an administrative law judge appointed under section 3105.")

[4] See, A Guide to Federal Agency Adjudication, Michael Asimow, ed., 164 (***American Bar Association Administrative Law Section***, 2003). For example, subject to published rules of the agency, administrative law judges are empowered to administer oaths, issue subpoenas, receive relevant evidence, take depositions, and regulate the course of the hearing. These fundamental powers arise from the Administrative Procedures Act "without the necessity of express agency delegation" and "an agency is without the power to withhold such powers" from its administrative law judges. Id. The Administrative Procedure Act seeks to affirm and protect the role of the administrative law judge, whose "impartiality," in the words of the Supreme Court in ***Marshall v. Jerrico***, 446 U.S. 238, 250 (1980), "serves as the ultimate guarantee of fair and meaningful proceedings in our constitutional regime."

[5] Amiel T. Sharon and Craig B. Pettibone, "Merit Selection of Federal Administrative Law Judges," 70 ***Judicature*** 216, 218 (1987).

[6] ***Butz v. Economou***, 438 U.S. 478 (1978).

[7] ***Federal Maritime Com'n v. South Carolina State Ports Authority***, 535 U.S. 743 (2002); see also, ***Rhode Island Dept. of Environmental Management v. United States***, 304 F.3d 31(1st Cir. 2002) (finding that Department of Labor administrative law judges are functionally equivalent to Federal District Judges).

[8] Administration of the ALJ program was originally placed in the Civil Service Commission and was subsequently bifurcated to OPM and the Merit Systems Protection Board ("MSPB").

Program Handbook, p. 4, affirms those responsibilities, OPM has seldom exercised them, except for regulations, including sometimes less-than-benign changes in selection and RIF regulations.[9]

On May 21, 1991, the National Conference of Administrative Law Judges (NCALJ)[10], in the Judicial Division of the American Bar Association, wrote to OPM, pointing out that:

> OPM has not taken a leadership role in the education of either ALJs or the agencies as to the nature of their relationship or the judge's function, or in the supervision or investigation of problems related to that relationship and function. OPM has not conducted or sponsored orientation programs for ALJs or their administrators, has not monitored the appointment of sufficient numbers of ALJs by agencies (although traditionally it has carefully monitored appointments to prevent the appointment of too many), has not adopted or proposed uniform rules for conduct, procedure, robes, support staff, office or hearing space, and has not investigated or made recommendations on any of these questions, or the long-standing strife between the SSA and its ALJs, or, most recently, the apparent due process breakdown at MSPB in connection with projected furlough of ALJs in fiscal 1991.

That letter suggested 10 items that OPM should undertake to improve relationships between ALJs and their agencies and the lot of ALJs generally, including education for ALJs and their reviewing authorities, administrative leave for education, guidelines for offices, staff support, robes and perks, model procedural rules, standards of conduct, appointment of sufficient judges by agencies, a mini-corps, and an investigation of the SSA and furlough situations and pay issues. In June 1991 OPM forwarded that letter to the Administrative Conference of the United States (ACUS) for consideration in connection with its study of the federal administrative judiciary. That study was completed in 1992 and recognized the importance of continuing and improving the position of ALJs and the ALJ program.[11] However, OPM neither referenced nor dealt with any of the NCALJ concerns, and OPM undertook no action on the report even though it sponsored it.

In August 1994 NCALJ again sought a response to its letter and was told by OPM in a September 8, 1994, letter that "several of your concerns appear to be more appropriately identified as agency matters" and that "other concerns appear to involve matters which conflict with this agency's evolving policy of returning greater responsibility for personnel management to the agencies." The letter did not address the fact that such a policy might conflict with OPM's responsibilities under the APA. In short, while OPM has responsibility to study and report to Congress concerning the ALJ program, it has not done so and has proclaimed an interest in returning its function to the agencies.

From 1998 to 2004, agencies were generally unable to hire new judges from the OPM register. While ***Azdell*** [12]was pending, OPM suspended the examination process for administrative law judges (ALJ). Therefore, the ALJ register became dated. With one exception,[13] agencies could not hire judges from the ALJ Register during this period. In ***Bush v. Office of Personnel Management***, 315 F.3d 1358 (Fed. Cir. 2003), after an applicant was rejected in his request to he be given part of the ALJ examination,

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[9] See Appointment, Pay, and Removals of Administrative Law Judges, 63 Fed. Reg. 8,874 (proposed Feb.23, 1998).

[10] Now the National Conference of the Administrative Judiciary.

[11] 1 C.F.R. § 305.92-7. [57 FR 61760, Dec. 29, 1992].

[12] ***Meeker v. Merit Systems Protection Board***, 319 F.3d 1368 (Fed. Cir. 2003).

[13] In August, SSA was granted a waiver by OPM to hire 126 judges who would have qualified under any scoring formula. See ***Hearing Before the Subcommittee on Social Security Of the Committee on Ways and Means House of Representatives***, One Hundred Seventh Congress, Second Session (MAY 2, 2002).

the Federal Circuit determined that the suspension of testing was a reviewable employment practice.[14] On February 27, 2004, the United States Supreme Court finally dismissed the requests for certiorari.

OPM has also failed to follow its own regulations concerning priority placement from the ALJ priority referral list (PRL),[15] resulting in irreparable harm to an ALJ on the PRL and a preliminary injunction against its continued improper administration of the PRL.[16]

Various other questions have arisen concerning the appropriate administration of the ALJ program, including the adoption of a Code of Judicial Conduct for ALJs, which OPM has refused to consider as part of its responsibility under present law. While OPM has met periodically with ALJ representatives, it has refused requests to establish an advisory committee or to meet with ALJ representatives on a regular basis to discuss these and other problems concerning the ALJ program.[17]

Administration of the ALJ program by OPM has been inadequate, and OPM has repeatedly indicated by words and deeds that it does not want to continue responsibility for the administration of operational programs such as the ALJ program. Indeed, until 1998 the OPM long-range plan did not recognize the ALJ program as one of its responsibilities. From 1994-95 the Office of Administrative Law Judges was upgraded by placing an administrative law judge in charge of the office, but since that time the office director has been a personnel specialist rather than a judge and the office has been subordinated under other testing functions. For many years OPM refused to maintain a continuously open examination for ALJ applicants, and when it finally opened the register continuously, it applied illegal criteria, as noted above, in examining and scoring applicants. As a result of OPM inaction, agencies have not been able to address hiring needs.

Maximize Administrative Efficiency

The Administrative Law Judge Conference of the United States will assume all duties with respect to administrative law judges currently mandated to OPM. The budget currently dedicated to administration of an administrative law judges' program by OPM will be transferred to the Administrative Law Judge Conference. Agencies will continue to select ALJs but the selection process and ALJ register will be managed by the Administrative Law Judge Conference of the United States.

It is also anticipated that the office of the Chief Judge will have the capacity to review rules of procedure, rules of evidence, peer review, and where appropriate, make suggestions ~~for~~ ***to*** promote administrative uniformity.

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[14] Sunsetting American Bar Association policy establishes that with respect to the recruitment and selection of administrative law judges (ALJs) employed by federal agencies, OPM, and Congress, where necessary, are to develop strategies to increase the percentages of women and minority candidates, eliminate veterans' preferences from this process, allow selection by agencies from a broader range of candidates for ALJ positions, and enhance OPM's Office of Administrative Law Judges. Although OPM facially adhered to these requests, it failed to administer the system during the period when it was involved in the ***Azdell*** litigation.

[15] Under 5 CFR §930.215, an ALJ who is separated from service because of a reduction in force (RIF) is entitled to priority referral for any AL.J vacancy ahead of others on the ALl register of eligibles maintained by OPM.

[16] ***Rutberg v. United States***, No. 98-10752-JUT, Order dated December 10, 1998, 1998 U.S. Dist, LEXIS 19832 (D. Mass., 1998).

[17] In 1998 and 1999, OPM advised ALJs that they are required to maintain active bar status to retain their status as ALJs, although there is no provision in the OPM regulations granting authority to do so. Unlike attorneys, ALJs are barred from the practice of law by the Code of Judicial Conduct (Canon 5F)(ABA, 1990), which has been applied to ALJs by the Merit Systems Protection Board (***In re Chocallo***, 1 MSPBR 612, 651 (1978) and by some agency regulations. In some states, Federal ALJs like other judges, cannot be members of the state bar. E.g. Alabama.

Ensure High Standards

The Administrative Law Judge Conference of the United States will assure high standards for Federal Administrative Law Judges. It will permit the chief judge to adopt and issue rules of judicial conduct for administrative law judges. This is consistent with ABA policy, which states in part, that members of the administrative judiciary should be held accountable under appropriate ethical standards adapted from the ABA Model Code of Judicial Conduct in light of the unique characteristics of particular positions in the administrative judiciary.[18]

Promote Professionalism

The Conference can be used as a resource for continuing judicial education, consistent with ABA policy.[19]ABA policy also encourages governmental entities at all levels to permit government lawyers, including those in judicial administrative positions, to serve in leadership capacities within professional associations and societies.[20]

Promote Public Confidence

Establishment of the Administrative Law Judge Conference of the United States will significantly increase public trust and confidence in the integrity and independence of decision making by administrative law judges throughout the Federal Government.

Congressional Oversight

Congress needs a new organization to assure independent review of agency compliance with the APA and reporting to Congress on these important public safeguards for fundamental due process and the fair hearing process before administrative agencies. The Administrative Law Judge Conference of the United States will provide regular reports to the Congress on agency compliance with the APA and the provisions relating to ALJ utilization, management and compensation. This process will assist the Congress in its oversight of agency compliance with the APA. This reform permits Congress to maintain oversight on constitutional safeguards such as the right to an impartial and independent decision maker, notice and opportunity to appear at a hearing, a written explanation for the decision and the issuance of a timely hearing decision. This is consistent with ABA policy that Congress provide a practical process for agency matters.[21]

Respectfully Submitted,

Louraine Arkfeld, Chair, Judicial Division
August, 2005

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[18] Policy 101B, 2001, ***ABA Policy/procedures Handbook***, 193 (2004).

[19] Standards for the Education of the Administrative Judiciary. Policy 99 A101, ***ABA Policy/procedures Handbook***, 268 (2004).

[20] Policy 99-A-112. It also encourages governmental entities to adopt standards that would authorize government lawyers, including those in judicial administrative positions, to (1) make reasonable use of government law office and library resources and facilities for certain activities sponsored or conducted by bar associations and similar legal organizations, and (2) utilize reasonable amounts of official time for participation in such activities.

[21] See ABA Policy, August, 1997, ***ABA Policy/procedures Handbook: Policy on Legislative and National Issues, 233 (2004).***

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