ESPRIT DE CORPS: RECRUITING AND RETAINING AMERICA'S BEST FOR THE FEDERAL CIVIL SERVICE, H.R. 1601, S. 129, AND H.R. 3737

HEARING

BEFORE THE

SUBCOMMITTEE ON CIVIL SERVICE
AND AGENCY ORGANIZATION

OF THE

COMMITTEE ON GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

SECOND SESSION

ON

H.R. 1601 AND S. 129

TO PROVIDE FOR REFORM RELATING TO FEDERAL EMPLOYMENT, AND FOR OTHER PURPOSES

AND ON

H.R. 3737

TO INCREASE THE MINIMUM AND MAXIMUM RATES OF BASIC PAY PAYABLE TO ADMINISTRATIVE LAW JUDGES, AND FOR OTHER PURPOSES

FEBRUARY 11, 2004

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WEDNESDAY, FEBRUARY 11, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY ORGANIZATION,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 1:03 p.m., in room 2154, Rayburn House Office Building, Hon. Jo Ann Davis of Virginia (chairman of the subcommittee) presiding.

Present: Representatives Jo Ann Davis of Virginia, Norton, Danny K. Davis of Illinois, and Van Hollen.

Staff present: Ron Martinson, staff director; B. Chad Bungard, deputy staff director and chief counsel; Chris Barkley, professional staff member; John Landers, detailee; Reid Voss, clerk; Shannon Meade, legal intern; Michelle Ash, minority senior legislative counsel; Tania Shand, minority professional staff Member; and Teresa Coufal, minority assistant clerk.

Ms. DAVIS OF VIRGINIA. The subcommittee on Civil Service and Agency Organization will come to order.

Again I want to thank you all for joining us here today. We began the second term of the 108th Congress in much the same way that we did the first—with an exploration of what steps we can take to attract, motivate, and train the best qualified workers for the Federal Government. Last year this subcommittee's hearing focused on the broad subject of compensation reform. Today we will be looking at two specific legislative proposals. These legislative proposals, if enacted into law, would enhance management flexibilities to attract and retain the best and the brightest across the government and would alleviate the problem of pay compression for administrative law judges.

Taken together, these two initiatives represent the major point of our recruitment and retention strategy—to address the very real pay, benefit, and personnel issues that keep potential employees from joining the Civil Service and sometimes drive our best employees and managers away.

The first piece of legislation is H.R. 1601, the Federal Workforce Flexibility Act, which I introduced last year. This bill would do many things to improve the effectiveness of the Federal Government, including expanding agencies' abilities to offer recruitment,

retention, and relocation bonuses, allowing agencies to offer enhanced annual leave benefits to new mid-career hires, emphasizing training, streamlining, critical pay authority, and making it easier for agencies to establish personnel demonstration projects.

A companion bill, Senate bill 129, has made its way through the Senate Governmental Affairs Committee with some changes.

The second bill is H.R. 3737, the Administrative Law Judges Pay Reform Act, which I introduced earlier this year. This legislation addresses the large problem of pay compression among administrative law judges. The 1,400 ALJs across the government are responsible for hearing disputes over their agencies' decisions. Most of them work at the Social Security Administration, where they make judgments on citizens' appeals. They play a crucial role. Pay compression caused by a statutory cap on ALJ salaries is especially worrisome in high-cost areas such as Boston, Chicago, Los Angeles, New York, and San Francisco. This problem threatens the ability to hire and retain an appropriate number of administrative law judges. Until recently, members of the Senior Executive Service were subject to the same cap, but that problem was remedied for the SES last year. That legislation, however, failed to address the ALJ situation.

I want to again thank our witnesses for being here today, and I look forward to hearing your thoughts on these pieces of legislation.

I'm going to give my ranking minority member here a chance to get his breath, and then I am going to recognize him to see if he has any comments.

[The prepared statement of Hon. Jo Ann Davis, and the texts of H.R. 1601, H.R. 3737, and S. 129 follow:]

CHAIRWOMAN JO ANN DAVIS
OPENING STATEMENT
FEBRUARY 11, 2004
"*ESPRIT DE CORPS*: RECRUITING AND RETAINING AMERICA'S BEST FOR THE FEDERAL CIVIL SERVICE"
LEGISLATIVE HEARING ON H.R. 3737, H.R. 1601, AND S. 129

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I

108TH CONGRESS
1ST SESSION

H. R. 1601

To provide for reform relating to Federal employment, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 3, 2003

Mrs. JO ANN DAVIS of Virginia introduced the following bill; which was referred to the Committee on Government Reform

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A BILL

To provide for reform relating to Federal employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Workforce Flexibility Act of 2003".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

TITLE I—FEDERAL HUMAN RESOURCES MANAGEMENT INNOVATIONS

SEC. 101. STREAMLINED PERSONNEL MANAGEMENT DEMONSTRATION PROJECTS.

Chapter 47 of title 5, United States Code, is amended—

(1) in section 4701—

(A) in subsection (a)—

(i) by striking "(a)";

(ii) by striking paragraph (1) and inserting the following:

"(1) 'agency' means an Executive agency and any entity that is subject to any provision of this title that could be waived under section 4703, but does not include—

"(A) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and

Mapping Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof which is designated by the President and which has as its principal function the conduct of foreign intelligence or counterintelligence activities; or

"(B) the General Accounting Office;";

(iii) in paragraph (4), by striking "and" at the end;

(iv) by redesignating paragraph (5) as paragraph (6); and

(v) by inserting after paragraph (4) the following:

"(5) 'modification' means a significant change in 1 or more of the elements of a demonstration project plan as described in section 4703(b)(1); and"; and

(B) by striking subsection (b); and

(2) in section 4703—

(A) in subsection (a)—

(i) by striking "conduct and evaluate demonstration projects" and inserting "conduct, modify, and evaluate demonstration projects";

(ii) by striking ", including any law or regulation relating to—" and all that follows and inserting a period; and

(iii) by adding at the end the following: "The decision to initiate or modify a project under this section shall be made by the Office.";

(B) by striking subsection (b) and inserting the following:

"(b) Before conducting or entering into any agreement or contract to conduct a demonstration project, the Office shall ensure—

"(1) that each project has a plan which describes—

"(A) its purpose;

"(B) the employees to be covered;

"(C) its anticipated outcomes and resource implications, including how the project relates to carrying out the agency's strategic plan, including meeting performance goals and objectives, and accomplishing its mission;

"(D) the personnel policies and procedures the project will use that differ from those otherwise available and applicable, including a specific citation of any provisions of law, rule, or

regulation to be waived and a specific description of any contemplated action for which there is a lack of specific authority;

"(E) the method of evaluating the project; and

"(F) the agency's system for ensuring that the project is implemented in a manner consistent with merit system principles;

"(2) notification of the proposed project to employees who are likely to be affected by the project;

"(3) an appropriate comment period;

"(4) publication of the final plan in the Federal Register;

"(5) notification of the final project at least 90 days in advance of the date any project proposed under this section is to take effect to employees who are likely to be affected by the project;

"(6) publication of any subsequent modification in the Federal Register; and

"(7) notification of any subsequent modification to employees who are included in the project.";

(C) in subsection (e)—

(i) by striking paragraph (1) and inserting the following:

"(1) any provision of chapter 63 or subpart G of part III of this title;";

(ii) by redesignating paragraphs (4) and (5) as paragraphs (6) and (7), respectively;

(iii) by inserting after paragraph (3) the following:

"(4) section 7342, 7351, or 7353;

"(5) the Ethics in Government Act of 1978 (5 U.S.C. App.);"; and

(iv) in paragraph (6) as redesignated, by striking "paragraph (1), (2), or (3) of this subsection; or" and inserting "paragraphs (1) through (5);";

(D) by striking subsections (d) and (e) and inserting the following:

"(d)(1) Unless terminated at an earlier date in accordance with this section, each demonstration project shall terminate at the end of the 10-year period beginning on the date on which the project takes effect.

"(2) On or before the end of the 7-year period beginning on the date on which a demonstration project takes effect, the Office shall submit a recommendation to Congress on whether Congress should enact legislation to make that project permanent.

"(e) The Office may terminate a demonstration project under this chapter if the Office determines that the project—

"(1) is not consistent with merit system principles set forth in section 2301, veterans' preference principles, or the provisions of this chapter; or

"(2) otherwise imposes a substantial hardship on, or is not in the best interests of, the public, the Government, employees, or eligibles."; and

(E) by striking subsections (h) and (i) and inserting the following:

"(h) Notwithstanding section 2302(e)(1), for purposes of applying section 2302(b)(11) in a demonstration project under this chapter, the term 'veterans' preference requirement' means any of the specific provisions of the demonstration project plan that are designed to ensure that the project is consistent with veterans' preference principles.

"(i) The Office shall ensure that each demonstration project is evaluated. Each evaluation shall assess—

"(1) the project's compliance with the plan developed under subsection (b)(1); and

"(2) the project's impact on improving public management.

"(j) Upon request of the Director of the Office of Personnel Management, agencies shall cooperate with and assist the Office in any evaluation undertaken under subsection (i) and provide the Office with requested information and reports relating to the conducting of demonstration projects in their respective agencies.".

SEC. 102. EFFECTIVE DATE.

This title shall take effect 180 days after the date of enactment of this Act.

TITLE II—REFORMS RELATING TO FEDERAL HUMAN CAPITAL MANAGEMENT

SEC. 201. RECRUITMENT, RELOCATION, AND RETENTION BONUSES.

(a) BONUSES.—

(1) IN GENERAL.—Chapter 57 of title 5, United States Code, is amended by striking sections 5753 and 5754 and inserting the following:

"§ 5753. Recruitment and relocation bonuses

"(a) In this section, the term 'employee' has the meaning given that term under section 2105, except that such term also includes an employee described under subsection (c) of that section.

"(b)(1) The Office of Personnel Management may authorize the head of an agency to pay a bonus to an indi-

vidual appointed or moved to a position that is likely to be difficult to fill in the absence of such a bonus, if the individual—

"(A)(i) is newly appointed as an employee of the Federal Government; or

"(ii) is currently employed by the Federal Government and moves to a new position in the same geographic area under circumstances described in regulations of the Office; or

"(B) is currently employed by the Federal Government and must relocate to accept a position stationed in a different geographic area.

"(2) Except as provided by subsection (h), a bonus may be paid under this section only to an employee covered by the General Schedule pay system established under subchapter III of chapter 53.

"(c)(1) Payment of a bonus under this section shall be contingent upon the employee entering into a written service agreement to complete a period of employment with the agency, not to exceed 4 years. The Office may, by regulation, prescribe a minimum service.

"(2)(A) The agreement shall include—

"(i) the length of the required service period;

"(ii) the amount of the bonus;

"(iii) the method of payment; and

"(iv) other terms and conditions under which the bonus is payable, subject to subsections (d) and (e) and regulations of the Office.

"(B) The terms and conditions for paying a bonus, as specified in the service agreement, shall include—

"(i) the conditions under which the agreement may be terminated before the agreed-upon service period has been completed; and

"(ii) the effect of the termination.

"(3) The agreement shall be made effective upon employment with the agency or movement to a new position or geographic area, as applicable, except that a service agreement with respect to a recruitment bonus may be made effective at a later date under circumstances described in regulations of the Office, such as when there is an initial period of formal basic training.

"(d)(1) Except as provided in subsection (e), a bonus under this section shall not exceed 25 percent of the annual rate of basic pay of the employee at the beginning of the service period multiplied by the number of years (or fractions thereof) in the service period, not to exceed 4 years.

"(2) A bonus under this section may be paid as an initial lump sum, in installments, as a final lump sum

upon the completion of the full service period, or in a combination of these forms of payment.

"(3) A bonus under this section is not part of the basic pay of an employee for any purpose.

"(4) Under regulations of the Office, a recruitment bonus under this section may be paid to an eligible individual before that individual enters on duty.

"(e) The Office may authorize the head of an agency to waive the limitation under subsection (d)(1) based on a critical agency need, subject to regulations prescribed by the Office. Under such a waiver, the amount of the bonus may be up to 50 percent of the employee's annual rate of basic pay at the beginning of the service period multiplied by the number of years (or fractions thereof) in the service period, not to exceed 100 percent of the employee's annual rate of basic pay at the beginning of the service period.

"(f) The Office shall require that, before paying a bonus under this section, an agency shall establish a plan for paying recruitment bonuses and a plan for paying relocation bonuses, subject to regulations prescribed by the Office.

"(g) The Office may prescribe regulations to carry out this section, including regulations relating to the repayment of a recruitment or relocation bonus in appro-

priate circumstances when the agreed-upon service period has not been completed.

"(h)(1) At the request of the head of an Executive agency, the Office may extend coverage under this section to categories of employees within the agency who otherwise would not be covered by this section.

"(2) The Office shall not extend coverage to the head of an Executive agency, including an Executive agency headed by a board or other collegial body composed of 2 or more individual members.

"§ 5754. Retention bonuses

"(a) In this section, the term 'employee' has the meaning given that term under section 2105, except that such term also includes an employee described in subsection (c) of that section.

"(b) The Office of Personnel Management may authorize the head of an agency to pay a retention bonus to an employee, subject to regulations prescribed by the Office, if—

"(1) the unusually high or unique qualifications of the employee or a special need of the agency for the employee's services makes it essential to retain the employee; and

"(2) the agency determines that, in the absence of a retention bonus, the employee would be likely to leave—

"(A) the Federal service; or

"(B) for a different position in the Federal service under conditions described in regulations of the Office.

"(c) The Office may authorize the head of an agency to pay retention bonuses to a group of employees in 1 or more categories of positions in 1 or more geographic areas, subject to the requirements of subsection (b)(1) and regulations prescribed by the Office, if there is a high risk that a significant portion of employees in the group would be likely to leave in the absence of retention bonuses.

"(d) Except as provided in subsection (j), a bonus may be paid only to an employee covered by the General Schedule pay system established under subchapter III of chapter 53.

"(e)(1) Payment of a retention bonus is contingent upon the employee entering into a written service agreement with the agency to complete a period of employment with the agency.

"(2)(A) The agreement shall include—

"(i) the length of the required service period;

"(ii) the amount of the bonus;

"(iii) the method of payment; and

"(iv) other terms and conditions under which the bonus is payable, subject to subsections (f) and (g) and regulations of the Office.

"(B) The terms and conditions for paying a bonus, as specified in the service agreement, shall include—

"(i) the conditions under which the agreement may be terminated before the agreed-upon service period has been completed; and

"(ii) the effect of the termination.

"(3)(A) Notwithstanding paragraph (1), a written service agreement is not required if the agency pays a retention bonus in biweekly installments and sets the installment payment at the full bonus percentage rate established for the employee with no portion of the bonus deferred.

"(B) If an agency pays a retention bonus in accordance with subparagraph (A) and makes a determination to terminate the payments, the agency shall provide written notice to the employee of that determination. Except as provided in regulations of the Office, the employee shall continue to be paid the retention bonus through the end of the pay period in which such written notice is provided.

"(4) A retention bonus for an employee may not be based on any period of such service which is the basis for a recruitment or relocation bonus under section 5753.

"(f)(1) Except as provided in subsection (g), a retention bonus, which shall be stated as a percentage of the employee's basic pay for the service period associated with the bonus, may not exceed—

"(A) 25 percent of the employee's basic pay if paid under subsection (b); or

"(B) 10 percent of an employee's basic pay if paid under subsection (c).

"(2) A retention bonus may be paid to an employee in installments after completion of specified periods of service or in a single lump sum at the end of the full period of service required by the agreement. An installment payment may not exceed the product derived from multiplying the amount of basic pay earned in the installment period by a percentage not to exceed the bonus percentage rate established for the employee. If the installment payment percentage is less than the bonus percentage rate, the accrued but unpaid portion of the bonus is payable as part of the final installment payment to the employee after completion of the full service period under the terms of the service agreement.

"(3) A retention bonus is not part of the basic pay of an employee for any purpose.

"(g) Upon the request of the head of an agency, the Office may waive the limit established under subsection (f)(1) and permit the agency head to pay an otherwise eligible employee or category of employees retention bonuses of up to 50 percent of basic pay, based on a critical agency need.

"(h) The Office shall require that, before paying a bonus under this section, an agency shall establish a plan for paying retention bonuses, subject to regulations prescribed by the Office.

"(i) The Office may prescribe regulations to carry out this section.

"(j)(1) At the request of the head of an Executive agency, the Office may extend coverage under this section to categories of employees within the agency who otherwise would not be covered by this section.

"(2) The Office shall not extend coverage under this section to the head of an Executive agency, including an Executive agency headed by a board or other collegial body composed of 2 or more individual members.".

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 57 of title 5, United States Code, is amended by striking the

item relating to section 5754 and inserting the following:

"5754. Retention bonuses.".

(b) RELOCATION PAYMENTS.—Section 407 of the Federal Employees Pay Comparability Act of 1990 (5 U.S.C. 5305 note; 104 Stat. 1467) is repealed.

(c) EFFECTIVE DATE AND APPLICATION.—

(1) EFFECTIVE DATE.—Except as provided under paragraphs (2) and (3), this section shall take effect on the first day of the first applicable pay period beginning on or after 180 days after the date of enactment of this Act.

(2) APPLICATION TO AGREEMENTS.—A recruitment or relocation bonus service agreement that was authorized under section 5753 of title 5, United States Code, before the effective date under paragraph (1) shall continue, until its expiration, to be subject to section 5753 as in effect on the day before such effective date.

(3) APPLICATION TO ALLOWANCES.—Payment of a retention allowance that was authorized under section 5754 of title 5, United States Code, before the effective date under paragraph (1) shall continue, subject to section 5754 as in effect on the day before such effective date, until the retention allow-

ance is reauthorized or terminated (but no longer than 1 year after such effective date).

SEC. 202. STREAMLINED CRITICAL PAY AUTHORITY.

Section 5377 of title 5, United States Code, is amended—

(1) by striking subsection (c) and inserting the following:

"(c) The Office of Personnel Management, in consultation with the Office of Management and Budget, may, upon the request of the head of an agency, grant authority to fix the rate of basic pay for 1 or more positions in such agency in accordance with this section.";

(2) in subsection (e)(1), by striking "Office of Management and Budget" and inserting "Office of Personnel Management";

(3) by striking subsections (f) and (g) and inserting the following:

"(f) The Office of Personnel Management may not authorize the exercise of authority under this section with respect to more than 800 positions at any 1 time, of which not more than 30 may, at any such time, be positions the rate of basic pay for which would otherwise be determined under subchapter II.

"(g) The Office of Personnel Management shall consult with the Office of Management and Budget before

making any decision to grant or terminate any authority under this section."; and

(4) in subsection (h), by striking "The Office of Management and Budget shall report to the Committee on Post Office and Civil Service" and inserting "The Office of Personnel Management shall report to the Committee on Government Reform.".

SEC. 203. CIVIL SERVICE RETIREMENT SYSTEM COMPUTATION FOR PART-TIME SERVICE.

Section 8339(p) of title 5, United States Code, is amended by adding at the end the following:

"(3) In the administration of paragraph (1)—

"(A) subparagraph (A) of such paragraph shall apply to any service performed before, on, or after April 7, 1986;

"(B) subparagraph (B) of such paragraph shall apply to all service performed on a part-time or full-time basis on or after April 7, 1986; and

"(C) any service performed on a part-time basis before April 7, 1986, shall be credited as service performed on a full-time basis.".

SEC. 204. CORRECTIONS RELATING TO PAY ADMINISTRATION.

(a) IN GENERAL.—Chapter 53 of title 5, United States Code, is amended—

(1) in section 5302, by striking paragraph (8) and inserting the following:

"(8) the term 'rates of pay under the General Schedule', 'rates of pay for the General Schedule', or 'scheduled rates of basic pay' means the unadjusted rates of basic pay in the General Schedule as established by section 5332, excluding additional pay of any kind; and";

(2) in section 5305—

(A) by striking subsection (a) and inserting the following:

"(a)(1) Whenever the Office of Personnel Management finds that the Government's recruitment or retention efforts with respect to 1 or more occupations in 1 or more areas or locations are, or are likely to become, significantly handicapped due to any of the circumstances described in subsection (b), the Office may establish for the areas or locations involved, with respect to individuals in positions paid under any of the pay systems referred to in subsection (c), higher minimum rates of pay for 1 or more grades or levels, occupational groups, series, classes, or subdivisions thereof, and may make corresponding in-

creases in all rates of pay range for each such grade or level. However, a minimum rate so established may not exceed the maximum rate of basic pay (excluding any locality-based comparability payment under section 5304 or similar provision of law) for the grade or level by more than 30 percent, and no rate may be established under this section in excess of the rate of basic pay payable for level IV of the Executive Schedule. In the case of individuals not subject to the provisions of this title governing appointment in the competitive service, the President may designate another agency to authorize special rates under this section.

"(2) The head of an agency may determine that a category of employees of the agency will not be covered by a special rate authorization established under this section. The head of an agency shall provide written notice to the Office of Personnel Management (or other agency designated by the President to authorize special rates) which identifies the specific category or categories of employees that will not be covered by special rates authorized under this section. If the head of an agency removes a category of employees from coverage under a special rate authorization after that authorization takes effect, the loss of coverage will take effect on the first day of the first pay period after the date of the notice.";

(B) in subsection (b), by striking paragraph (4) and inserting the following:

"(4) any other circumstances which the Office of Personnel Management (or such agency as the President may designate) considers appropriate.";

(C) in subsection (d)—

(i) by striking "President" and inserting "Office of Personnel Management"; and

(ii) by striking "he" and inserting "the President";

(D) in subsection (e), by striking "basic pay" and inserting "pay";

(E) by striking subsection (f) and inserting the following:

"(f) When a schedule of special rates established under this section is adjusted under subsection (d), a covered employee's special rate will be adjusted in accordance with conversion rules prescribed by the Office of Personnel Management or by such agency as the President may designate.";

(F) in subsection (g)(1)—

(i) by striking "basic pay" and inserting "pay"; and

(ii) by striking "President (or his designated agency)" and inserting "Office of Personnel Management (or such agency as the President may designate)";

(G) by striking subsection (h) and inserting the following:

"(h) An employee's entitlement to a rate of pay established under this section terminates when the employee is entitled to a higher rate of pay (including basic pay as adjusted to include any locality-based comparability payment under section 5304 or similar provision of law).";

and

(H) by adding at the end the following:

"(i) When an employee who is receiving a rate of pay established under this section moves to a new official duty station at which different pay schedules apply, the employee shall be entitled to the rates of pay applicable in the new pay area based on the employee's position, grade, and step (or relative position in the rate range) before the movement, as determined under regulations prescribed by the Office of Personnel Management or other agency designated by the President under subsection (a). Such pay conversion upon geographic movement shall be effected before processing any other simultaneous pay action (other than a general pay adjustment).

"(j) A rate established under this section shall be considered to be part of basic pay for purposes of subchapter III of chapter 83, chapter 84, chapter 87, subchapter V of chapter 55, section 5941, and for such other purposes as may be expressly provided for by law or as the Office of Personnel Management may by regulation prescribe.";

(3) in section 5334—

(A) in subsection (b), by adding at the end the following:

"If an employee's rate after promotion or transfer is greater than the maximum rate of basic pay for the employee's grade, that rate shall be treated as a retained rate under section 5363. The Office of Personnel Management shall prescribe by regulation the circumstances under which and the extent to which special rates under section 5305 (or similar provision of law) or locality-adjusted rates under section 5304 (or similar provision of law) are considered to be basic pay in applying this subsection."; and

(B) by adding at the end the following:

"(g) When an employee moves to a new official duty station at which different pay schedules apply, the employee shall be entitled to the rates of pay applicable in the new pay area based on the employee's position, grade, and step (or relative position in the rate range) before the

movement. Such pay conversion upon geographic movement shall be effected before processing any other simultaneous pay action (other than a general pay adjustment).";

(4) in section 5361—

(A) by striking paragraphs (3) and (4) and redesignating paragraphs (5) through (7) as paragraphs (3) through (5), respectively;

(B) in paragraph (4), as redesignated, by striking "and" at the end;

(C) in paragraph (5), as redesignated, by striking the period and inserting a semicolon; and

(D) by adding at the end the following:

"(6) 'rate of basic pay' means—

"(A) the rate of pay prescribed by law (including regulations) for the position held by an employee before any deductions or additions of any kind, but including—

"(i) any applicable locality-based payment under section 5304 or similar provision of law;

"(ii) any applicable special salary rate under section 5305 or similar provision of law; and

"(iii) any applicable existing retained rate of pay established under section 5363 or similar provision of law; and

"(B) in the case of a prevailing rate employee, the scheduled rate of pay determined under section 5343;

"(7) 'former highest applicable rate of basic pay' means the highest applicable rate of basic pay payable to the employee immediately before the action that triggers pay retention under section 5363; and

"(8) 'highest applicable basic pay rate range' means the range of rates of basic pay for the grade or level of the employee's current position with the highest maximum rate, except as otherwise provided in regulations prescribed by the Office of Personnel Management in cases where another rate range provides higher rates only in the lower portion of the range.";

(5) in section 5363—

(A) in subsection (a), by amending the matter following paragraph (4) to read as follows:

"is entitled to pay retention under the conditions set forth in this section. Notwithstanding any other provision of

law, this section may not be applied to employees whose rate of basic pay is reduced solely because of the recomputation of pay upon movement to a new official duty station at which different pay schedules apply. When a geographic move is accompanied by a simultaneous pay action that reduces the employee's rate of basic pay after the employee's pay has been recomputed to reflect the geographic move, this section shall be applied, if otherwise applicable."; and

(B) by striking subsections (b) and (c) and inserting the following:

"(b)(1) If an employee is entitled to pay retention under subsection (a), paragraphs (2) and (3) shall apply in determining the employee's rate of pay:

"(2) If the employee's former highest applicable rate of basic pay is less than or equal to the maximum rate of the highest applicable basic pay rate range for the employee's current position, the employee is entitled to the lowest payable rate of basic pay in that rate range that equals or exceeds the former rate, and pay retention ceases to apply.

"(3) If the employee's former highest applicable rate of basic pay exceeds the maximum rate of the highest applicable basic pay rate range for the employee's current

position, the employee is entitled to a retained rate equal to the lesser of—

"(A) the employee's former highest applicable rate of basic pay; or

"(B) 150 percent of the maximum rate of the highest applicable basic pay rate range for the employee's position.

"(c) An employee's retained rate shall be increased at the time of any increase in the maximum rate of the highest applicable basic pay rate range for the employee's position by 50 percent of the dollar increase in that maximum rate.

"(d) The rate of pay for an employee who is receiving a retained rate under this section and who is moved to a new official duty station at which different pay schedules apply shall be determined under regulations prescribed by the Office of Personnel Management consistent with the purposes of this section.

"(e) A retained rate shall be considered part of basic pay for purposes of this subchapter and for purposes of subchapter III of chapter 83, chapters 84 and 87, subchapter V of chapter 55, section 5941, and for such other purposes as may be expressly provided for by law or as the law or as the Office of Personnel Management may by regulation prescribe. For other purposes, the Office

shall prescribe by regulation what constitutes basic pay for employees receiving a retained rate.

"(f) Subsections (a) through (e) do not apply (or shall cease to apply) to an employee who—

"(1) has a break in service of 1 workday or more;

"(2) is entitled by operation of this subchapter or chapter 51 or 53 to a rate of basic pay which is equal to or higher than, or declines a reasonable offer of a position the rate of basic pay for which is equal to or higher than, the rate to which the employee is entitled under this section; or

"(3) is demoted for personal cause or at the employee's request."; and

(6) in section 5365(b) by inserting after "provisions of this subchapter" the following: "(subject to any conditions or limitations the Office may establish)".

(b) SPECIAL RATES FOR LAW ENFORCEMENT OFFICERS.—Section 403(c) of the Federal Employees Pay Comparability Act of 1990 (5 U.S.C. 5305 note; Public Law 101–509) is amended by striking all after "provision of law)" and inserting "and shall be basic pay for all purposes. The rates shall be adjusted at the time of adjust-

ments in the General Schedule to maintain the step linkage set forth in subsection (b)(2).".

(c) PAY RETENTION.—Subject to any regulations the Office of Personnel Management may prescribe, any employee in a covered pay schedule who is receiving a retained rate under section 5363 of title 5, United States Code, or similar authority on the effective date of this Act shall have the pay of that employee converted on that date. The newly applicable retained rate shall equal the formerly applicable retained rate as adjusted to include any applicable locality-based payment under section 5304 of title 5, United States Code, or similar provision of law. Any employee in a covered pay system receiving a rate that exceeds the maximum rate of the highest applicable basic pay rate range for the employee's position (as defined under section 5361(8) of that title, as amended by this Act) under any authority shall be considered to be receiving a retained rate under section 5363 of that title.

TITLE III—REFORMS RELATING TO FEDERAL EMPLOYEE CAREER DEVELOPMENT AND BENEFITS

SEC. 301. AGENCY TRAINING.

(a) TRAINING TO ACCOMPLISH PERFORMANCE PLANS AND STRATEGIC GOALS.—Section 4103 of title 5,

United States Code, is amended by adding at the end the following:

"(c) The head of each agency shall—

"(1) evaluate each program or plan established, operated, or maintained under subsection (a) with respect to accomplishing specific performance plans and strategic goals in performing the agency mission; and

"(2) modify such program or plan to accomplish such plans and goals.".

(b) AGENCY TRAINING OFFICER; SPECIFIC TRAINING PROGRAMS.—

(1) IN GENERAL.—Chapter 41 of title 5, United States Code, is amended by adding after section 4119 the following:

"§ 4120. Agency training officer

"Each agency shall appoint or designate a training officer who shall be responsible for developing, coordinating, and administering training for the agency.

"§ 4121. Specific training programs

"In consultation with the Office of Personnel Management, each head of an agency shall establish—

"(1) a comprehensive management succession program to provide training to employees to develop managers for the agency; and

"(2) a program to provide training to managers on actions, options, and strategies a manager may use in—

"(A) relating to employees with unacceptable performances; and

"(B) mentoring employees and improving employee performance and productivity.".

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 41 of title 5, United States Code, is amended by adding at the end the following:

"4120. Agency training officer.
"4121. Specific training programs.".

SEC. 302. ANNUAL LEAVE ENHANCEMENTS.

(a) ACCRUAL OF LEAVE FOR NEWLY HIRED FEDERAL EMPLOYEES WITH QUALIFIED EXPERIENCE.—

(1) IN GENERAL.—Section 6303 of title 5, United States Code, is amended by adding at the end the following:

"(e)(1) In this subsection, the term 'period of qualified non-Federal service' means any equal period of service performed by an individual that—

"(A) except for this subsection would not otherwise be service performed by an employee for purposes of subsection (a); and

"(B) was performed in a position—

"(i) the duties of which were directly related to the duties of the position in an agency that such individual holds; and

"(ii) which meets such other conditions as the Office of Personnel Management shall prescribe by regulation.

"(2) For purposes of subsection (a), the head of an agency may deem a period of qualified non-Federal service performed by an individual to be a period of service performed as an employee.".

(2) EFFECTIVE DATE.—This section shall take effect 120 days after the date of enactment of this Act and shall only apply to an individual hired on or after that effective date.

(b) SENIOR EXECUTIVE SERVICE ANNUAL LEAVE ENHANCEMENTS.—

(1) IN GENERAL.—Section 6303(a) of title 5, United States Code, is amended—

(A) in paragraph (2), by striking "and" at the end;

(B) in paragraph (3), by striking the period at the end and inserting "; and"; and

(C) by adding after paragraph (3) the following:

"(4) one day for each full biweekly pay period for an employee in a position paid under section 5376 or 5383, or for an employee in an equivalent category for which the minimum rate of basic pay is greater than the rate payable at GS–15, step 10.".

(2) REGULATIONS.—Not later than 120 days after the date of enactment of this Act, the Office of Personnel Management shall prescribe regulations to carry out the amendments made by this subsection.

(3) EFFECTIVE DATES.—

(A) IN GENERAL.—Paragraph (1) shall take effect 120 days after the date of enactment of this Act.

(B) REGULATIONS.—Paragraph (2) shall take effect on the date of enactment of this Act.

○

108TH CONGRESS
2D SESSION

H. R. 3737

To increase the minimum and maximum rates of basic pay payable to administrative law judges, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 28, 2004

Mrs. JO ANN DAVIS of Virginia introduced the following bill; which was referred to the Committee on Government Reform

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A BILL

To increase the minimum and maximum rates of basic pay payable to administrative law judges, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Administrative Law Judges Pay Reform Act of 2004".

SEC. 2. INCREASED LIMITS.

(a) BASIC PAY.—Section 5372(b)(1)(C) of title 5, United States Code, is amended by striking "level IV" each place it appears and inserting "level III".

(b) LOCALITY-BASED COMPARABILITY PAY.—Paragraph (2) of section 5304(g) of title 5, United States Code, as amended by section 1125(a)(1)(A) of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108–136), is amended to read as follows:

"(2) The applicable maximum under this subsection shall be—

"(A) level III of the Executive Schedule for—

"(i) positions under subparagraph (A) or (C) of subsection (h)(1); and

"(ii) any positions under subsection (h)(1)(D) which the President may determine; and

"(B) level II of the Executive Schedule for positions under subsection (h)(1)(B).".

(c) TECHNICAL CORRECTION.—Section 5304(h)(2)(B)(i) of title 5, United States Code, as amended by section 1125(a)(1)(C)(i)(II) of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108–136), is amended by striking "(vii)" and inserting "(vi)".

(d) APPLICABILITY.—

(1) IN GENERAL.—The amendments made by this Act shall—

(A) for purposes of computing any rate of compensation for service performed in any pay

period beginning before the date specified under paragraph (2), be treated as if they had never been enacted; and

(B) for purposes of computing any rate of compensation for service performed in any pay period beginning on or after the date specified under paragraph (2), take effect as if included in the enactment of Public Law 108–136.

(2) DATE SPECIFIED.—The date specified under this paragraph shall be the earlier of—

(A) the first day of the first pay period beginning at least 90 days after the date of the enactment of this Act; or

(B) such other date (not earlier than the date of the enactment of this Act) as the Office of Personnel Management may determine.

○

II

Calendar No. 428

108TH CONGRESS
2D SESSION

S. 129

[Report No. 108–223]

To provide for reform relating to Federal employment, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 9, 2003

Mr. VOINOVICH introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

JANUARY 27, 2004

Reported by Ms. COLLINS, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To provide for reform relating to Federal employment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

~~**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**~~

~~(a) SHORT TITLE.—This Act may be cited as the "Federal Workforce Flexibility Act of 2003".~~

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

TITLE I—FEDERAL HUMAN RESOURCES MANAGEMENT INNOVATIONS

SEC. 101. STREAMLINED PERSONNEL MANAGEMENT DEMONSTRATION PROJECTS.

Chapter 47 of title 5, United States Code, is amended—

(1) in section 4701—

(A) in subsection (a)—

(i) by striking "(a)";

(ii) by striking paragraph (1) and inserting the following:

"(1) 'agency' means an Executive agency and any entity that is subject to any provision of this

title that could be waived under section 4703, but does not include—

"(A) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Imagery and Mapping Agency, the National Security Agency, and, as determined by the President, any Executive agency or unit thereof which is designated by the President and which has as its principal function the conduct of foreign intelligence or counterintelligence activities; or

"(B) the General Accounting Office;";

(iii) in paragraph (4), by striking "and" at the end;

(iv) by redesignating paragraph (5) as paragraph (6); and

(v) by inserting after paragraph (4) the following:

"(5) 'modification' means a significant change in 1 or more of the elements of a demonstration project plan as described in section 4703(b)(1); and"; and

(B) by striking subsection (b); and

(2) in section 4703—

(A) in subsection (a)—

(i) by striking "conduct and evaluate demonstration projects" and inserting "conduct, modify, and evaluate demonstration projects";

(ii) by striking ", including any law or regulation relating to—" and all that follows and inserting a period; and

(iii) by adding at the end the following: "The decision to initiate or modify a project under this section shall be made by the Office.";

(B) by striking subsection (b) and inserting the following:

"(b) Before conducting or entering into any agreement or contract to conduct a demonstration project, the Office shall ensure—

"(1) that each project has a plan which describes—

"(A) its purpose;

"(B) the employees to be covered;

"(C) its anticipated outcomes and resource implications, including how the project relates to carrying out the agency's strategic plan, including meeting performance goals and objectives, and accomplishing its mission;

~~"(D) the personnel policies and procedures the project will use that differ from those otherwise available and applicable, including a specific citation of any provisions of law, rule, or regulation to be waived and a specific description of any contemplated action for which there is a lack of specific authority;~~

~~"(E) the method of evaluating the project; and~~

~~"(F) the agency's system for ensuring that the project is implemented in a manner consistent with merit system principles;~~

~~"(2) notification of the proposed project to employees who are likely to be affected by the project;~~

~~"(3) an appropriate comment period;~~

~~"(4) publication of the final plan in the Federal Register;~~

~~"(5) notification of the final project at least 90 days in advance of the date any project proposed under this section is to take effect to employees who are likely to be affected by the project;~~

~~"(6) publication of any subsequent modification in the Federal Register; and~~

~~"(7) notification of any subsequent modification to employees who are included in the project.";~~

(C) in subsection (c)—

(i) by striking paragraph (1) and inserting the following:

"(1) any provision of chapter 63 or subpart G of part III of this title;";

(ii) by redesignating paragraphs (4) and (5) as paragraphs (6) and (7), respectively;

(iii) by inserting after paragraph (3) the following:

"(4) section 7342, 7351, or 7353;

"(5) the Ethics in Government Act of 1978 (5 U.S.C. App.);"; and

(iv) in paragraph (6) as redesignated, by striking "paragraph (1), (2), or (3) of this subsection; or" and inserting "paragraphs (1) through (5);";

(D) by striking subsections (d) and (e) and inserting the following:

"(d)(1) Unless terminated at an earlier date in accordance with this section, each demonstration project shall terminate at the end of the 10-year period beginning on the date on which the project takes effect.

"(2) Before the end of the 5-year period beginning on the date on which a demonstration project takes effect,

the Office shall submit a recommendation to Congress on whether Congress should enact legislation to make that project permanent.

"(c) The Office may terminate a demonstration project under this chapter if the Office determines that the project—

"(1) is not consistent with merit system principles set forth in section 2301, veterans' preference principles, or the provisions of this chapter; or

"(2) otherwise imposes a substantial hardship on, or is not in the best interests of, the public, the Government, employees, or eligibles."; and

(E) by striking subsections (h) and (i) and inserting the following:

"(h) Notwithstanding section 2302(c)(1), for purposes of applying section 2302(b)(11) in a demonstration project under this chapter, the term 'veterans' preference requirement' means any of the specific provisions of the demonstration project plan that are designed to ensure that the project is consistent with veterans' preference principles.

"(i) The Office shall ensure that each demonstration project is evaluated. Each evaluation shall assess—

"(1) the project's compliance with the plan developed under subsection (b)(1); and

"(2) the project's impact on improving public management.

"(j) Upon request of the Director of the Office of Personnel Management, agencies shall cooperate with and assist the Office in any evaluation undertaken under subsection (i) and provide the Office with requested information and reports relating to the conducting of demonstration projects in their respective agencies.".

SEC. 102. EFFECTIVE DATE.

This title shall take effect 180 days after the date of enactment of this Act.

TITLE II—REFORMS RELATING TO FEDERAL HUMAN CAPITAL MANAGEMENT

SEC. 201. RECRUITMENT, RELOCATION, AND RETENTION BONUSES.

(a) BONUSES.—

(1) IN GENERAL.—Chapter 57 of title 5, United States Code, is amended by striking sections 5753 and 5754 and inserting the following:

"§ 5753. Recruitment and relocation bonuses

"(a) In this section, the term 'employee' has the meaning given that term under section 2105, except that such term also includes an employee described under subsection (c) of that section.

"(b)(1) The Office of Personnel Management may authorize the head of an agency to pay a bonus to an individual appointed or moved to a position that is likely to be difficult to fill in the absence of such a bonus, if the individual—

"(A)(i) is newly appointed as an employee of the Federal Government; or

"(ii) is currently employed by the Federal Government and moves to a new position in the same geographic area under circumstances described in regulations of the Office; or

"(B) is currently employed by the Federal Government and must relocate to accept a position stationed in a different geographic area.

"(2) Except as provided by subsection (h), a bonus may be paid under this section only to an employee covered by the General Schedule pay system established under subchapter III of chapter 53.

"(c)(1) Payment of a bonus under this section shall be contingent upon the employee entering into a written service agreement to complete a period of employment with the agency, not to exceed 4 years. The Office may, by regulation, prescribe a minimum service.

"(2)(A) The agreement shall include—

"(i) the length of the required service period;

"(ii) the amount of the bonus;

"(iii) the method of payment; and

"(iv) other terms and conditions under which the bonus is payable, subject to subsections (d) and (e) and regulations of the Office.

"(B) The terms and conditions for paying a bonus, as specified in the service agreement, shall include—

"(i) the conditions under which the agreement may be terminated before the agreed-upon service period has been completed; and

"(ii) the effect of the termination.

"(3) The agreement shall be made effective upon employment with the agency or movement to a new position or geographic area, as applicable, except that a service agreement with respect to a recruitment bonus may be made effective at a later date under circumstances described in regulations of the Office, such as when there is an initial period of formal basic training.

"(d)(1) Except as provided in subsection (e), a bonus under this section shall not exceed 25 percent of the annual rate of basic pay of the employee at the beginning of the service period multiplied by the number of years (or fractions thereof) in the service period, not to exceed 4 years.

"(2) A bonus under this section may be paid as an initial lump sum, in installments, as a final lump sum upon the completion of the full service period, or in a combination of these forms of payment.

"(3) A bonus under this section is not part of the basic pay of an employee for any purpose.

"(4) Under regulations of the Office, a recruitment bonus under this section may be paid to an eligible individual before that individual enters on duty.

"(e) The Office may authorize the head of an agency to waive the limitation under subsection (d)(1) based on a critical agency need, subject to regulations prescribed by the Office. Under such a waiver, the amount of the bonus may be up to 50 percent of the employee's annual rate of basic pay at the beginning of the service period multiplied by the number of years (or fractions thereof) in the service period, not to exceed 100 percent of the employee's annual rate of basic pay at the beginning of the service period.

"(f) The Office shall require that, before paying a bonus under this section, an agency shall establish a plan for paying recruitment bonuses and a plan for paying relocation bonuses, subject to regulations prescribed by the Office.

"(g) The Office may prescribe regulations to carry out this section, including regulations relating to the repayment of a recruitment or relocation bonus in appropriate circumstances when the agreed-upon service period has not been completed.

"(h)(1) At the request of the head of an Executive agency, the Office may extend coverage under this section to categories of employees within the agency who otherwise would not be covered by this section.

"(2) The Office shall not extend coverage to the head of an Executive agency, including an Executive agency headed by a board or other collegial body composed of 2 or more individual members.

"§ 5754. Retention bonuses

"(a) In this section, the term 'employee' has the meaning given that term under section 2105, except that such term also includes an employee described in subsection (c) of that section.

"(b) The Office of Personnel Management may authorize the head of an agency to pay a retention bonus to an employee, subject to regulations prescribed by the Office, if—

"(1) the unusually high or unique qualifications of the employee or a special need of the agency for

the employee's services makes it essential to retain the employee; and

"(2) the agency determines that, in the absence of a retention bonus, the employee would be likely to leave—

"(A) the Federal service; or

"(B) for a different position in the Federal service under conditions described in regulations of the Office.

"(c) The Office may authorize the head of an agency to pay retention bonuses to a group of employees in 1 or more categories of positions in 1 or more geographic areas, subject to the requirements of subsection (b)(1) and regulations prescribed by the Office, if there is a high risk that a significant portion of employees in the group would be likely to leave in the absence of retention bonuses.

"(d) Except as provided in subsection (j), a bonus may be paid only to an employee covered by the General Schedule pay system established under subchapter III of chapter 53.

"(e)(1) Payment of a retention bonus is contingent upon the employee entering into a written service agreement with the agency to complete a period of employment with the agency.

"(2)(A) The agreement shall include—

"(i) the length of the required service period;

"(ii) the amount of the bonus;

"(iii) the method of payment; and

"(iv) other terms and conditions under which the bonus is payable, subject to subsections (f) and (g) and regulations of the Office.

"(B) The terms and conditions for paying a bonus, as specified in the service agreement, shall include—

"(i) the conditions under which the agreement may be terminated before the agreed-upon service period has been completed; and

"(ii) the effect of the termination.

"(3)(A) Notwithstanding paragraph (1), a written service agreement is not required if the agency pays a retention bonus in biweekly installments and sets the installment payment at the full bonus percentage rate established for the employee with no portion of the bonus deferred.

"(B) If an agency pays a retention bonus in accordance with subparagraph (A) and makes a determination to terminate the payments, the agency shall provide written notice to the employee of that determination. Except as provided in regulations of the Office, the employee shall continue to be paid the retention bonus through the end of the pay period in which such written notice is provided.

"(4) A retention bonus for an employee may not be based on any period of such service which is the basis for a recruitment or relocation bonus under section 5753.

"(f)(1) Except as provided in subsection (g), a retention bonus, which shall be stated as a percentage of the employee's basic pay for the service period associated with the bonus, may not exceed—

"(A) 25 percent of the employee's basic pay if paid under subsection (b); or

"(B) 10 percent of an employee's basic pay if paid under subsection (c).

"(2) A retention bonus may be paid to an employee in installments after completion of specified periods of service or in a single lump sum at the end of the full period of service required by the agreement. An installment payment may not exceed the product derived from multiplying the amount of basic pay earned in the installment period by a percentage not to exceed the bonus percentage rate established for the employee. If the installment payment percentage is less than the bonus percentage rate, the accrued but unpaid portion of the bonus is payable as part of the final installment payment to the employee after completion of the full service period under the terms of the service agreement.

"(3) A retention bonus is not part of the basic pay of an employee for any purpose.

"(g) Upon the request of the head of an agency, the Office may waive the limit established under subsection (f)(1) and permit the agency head to pay an otherwise eligible employee or category of employees retention bonuses of up to 50 percent of basic pay, based on a critical agency need.

"(h) The Office shall require that, before paying a bonus under this section, an agency shall establish a plan for paying retention bonuses, subject to regulations prescribed by the Office.

"(i) The Office may prescribe regulations to carry out this section.

"(j)(1) At the request of the head of an Executive agency, the Office may extend coverage under this section to categories of employees within the agency who otherwise would not be covered by this section.

"(2) The Office shall not extend coverage under this section to the head of an Executive agency, including an Executive agency headed by a board or other collegial body composed of 2 or more individual members.".

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 57 of title 5, United States Code, is amended by striking the

item relating to section 5754 and inserting the following:

"5754. Retention bonuses.".

(b) RELOCATION PAYMENTS.—Section 407 of the Federal Employees Pay Comparability Act of 1990 (5 U.S.C. 5305 note; 104 Stat. 1467) is repealed.

(c) EFFECTIVE DATE AND APPLICATION.—

(1) EFFECTIVE DATE.—Except as provided under paragraphs (2) and (3), this section shall take effect on the first day of the first applicable pay period beginning on or after 180 days after the date of enactment of this Act.

(2) APPLICATION TO AGREEMENTS.—A recruitment or relocation bonus service agreement that was authorized under section 5753 of title 5, United States Code, before the effective date under paragraph (1) shall continue, until its expiration, to be subject to section 5753 as in effect on the day before such effective date.

(3) APPLICATION TO ALLOWANCES.—Payment of a retention allowance that was authorized under section 5754 of title 5, United States Code, before the effective date under paragraph (1) shall continue, subject to section 5754 as in effect on the day before such effective date, until the retention allow-

ance is reauthorized or terminated (but no longer than 1 year after such effective date).

SEC. 202. STREAMLINED CRITICAL PAY AUTHORITY.

Section 5377 of title 5, United States Code, is amended—

(1) by striking subsection (e) and inserting the following:

"(e) The Office of Personnel Management, in consultation with the Office of Management and Budget, may, upon the request of the head of an agency, grant authority to fix the rate of basic pay for 1 or more positions in such agency in accordance with this section.";

(2) in subsection (e)(1), by striking "Office of Management and Budget" and inserting "Office of Personnel Management";

(3) by striking subsections (f) and (g) and inserting the following:

"(f) The Office of Personnel Management may not authorize the exercise of authority under this section with respect to more than 800 positions at any 1 time, of which not more than 30 may, at any such time, be positions the rate of basic pay for which would otherwise be determined under subchapter II.

"(g) The Office of Personnel Management shall consult with the Office of Management and Budget before

making any decision to grant or terminate any authority under this section.''; and

(4) in subsection (h), by striking ''The Office of Management and Budget shall report to the Committee on Post Office and Civil Service'' and inserting ''The Office of Personnel Management shall report to the Committee on Government Reform.''.

SEC. 203. CIVIL SERVICE RETIREMENT SYSTEM COMPUTATION FOR PART-TIME SERVICE.

Section 8339(p) of title 5, United States Code, is amended by adding at the end the following:

''(3) In the administration of paragraph (1)—

''(A) subparagraph (A) of such paragraph shall apply to any service performed before, on, or after April 7, 1986;

''(B) subparagraph (B) of such paragraph shall apply to all service performed on a part-time or full-time basis on or after April 7, 1986; and

''(C) any service performed on a part-time basis before April 7, 1986, shall be credited as service performed on a full-time basis.''.

SEC. 204. CORRECTIONS RELATING TO PAY ADMINISTRATION.

(a) IN GENERAL.—Chapter 53 of title 5, United States Code, is amended—

(1) in section 5302, by striking paragraph (8) and inserting the following:

"(8) the term 'rates of pay under the General Schedule', 'rates of pay for the General Schedule', or 'scheduled rates of basic pay' means the unadjusted rates of basic pay in the General Schedule as established by section 5332, excluding additional pay of any kind; and";

(2) in section 5305—

(A) by striking subsection (a) and inserting the following:

"(a)(1) Whenever the Office of Personnel Management finds that the Government's recruitment or retention efforts with respect to 1 or more occupations in 1 or more areas or locations are, or are likely to become, significantly handicapped due to any of the circumstances described in subsection (b), the Office may establish for the areas or locations involved, with respect to individuals in positions paid under any of the pay systems referred to in subsection (c), higher minimum rates of pay for 1 or more grades or levels, occupational groups, series, classes, or subdivisions thereof, and may make corresponding in-

creases in all rates of pay range for each such grade or level. However, a minimum rate so established may not exceed the maximum rate of basic pay (excluding any locality-based comparability payment under section 5304 or similar provision of law) for the grade or level by more than 30 percent, and no rate may be established under this section in excess of the rate of basic pay payable for level IV of the Executive Schedule. In the case of individuals not subject to the provisions of this title governing appointment in the competitive service, the President may designate another agency to authorize special rates under this section.

"(2) The head of an agency may determine that a category of employees of the agency will not be covered by a special rate authorization established under this section. The head of an agency shall provide written notice to the Office of Personnel Management (or other agency designated by the President to authorize special rates) which identifies the specific category or categories of employees that will not be covered by special rates authorized under this section. If the head of an agency removes a category of employees from coverage under a special rate authorization after that authorization takes effect, the loss of coverage will take effect on the first day of the first pay period after the date of the notice.";

(B) in subsection (b), by striking paragraph (4) and inserting the following:

"(4) any other circumstances which the Office of Personnel Management (or such agency as the President may designate) considers appropriate.";

(C) in subsection (d)—

(i) by striking "President" and inserting "Office of Personnel Management"; and

(ii) by striking "he" and inserting "the President";

(D) in subsection (e), by striking "basic pay" and inserting "pay";

(E) by striking subsection (f) and inserting the following:

"(f) When a schedule of special rates established under this section is adjusted under subsection (d), a covered employee's special rate will be adjusted in accordance with conversion rules prescribed by the Office of Personnel Management or by such agency as the President may designate.";

(F) in subsection (g)(1)—

(i) by striking "basic pay" and inserting "pay"; and

(ii) by striking "President (or his designated agency)" and inserting "Office of Personnel Management (or such agency as the President may designate)";

(G) by striking subsection (h) and inserting the following:

"(h) An employee's entitlement to a rate of pay established under this section terminates when the employee is entitled to a higher rate of pay (including basic pay as adjusted to include any locality-based comparability payment under section 5304 or similar provision of law).";

and

(H) by adding at the end the following:

"(i) When an employee who is receiving a rate of pay established under this section moves to a new official duty station at which different pay schedules apply, the employee shall be entitled to the rates of pay applicable in the new pay area based on the employee's position, grade, and step (or relative position in the rate range) before the movement, as determined under regulations prescribed by the Office of Personnel Management or other agency designated by the President under subsection (a). Such pay conversion upon geographic movement shall be effected before processing any other simultaneous pay action (other than a general pay adjustment).

"(j) A rate established under this section shall be considered to be part of basic pay for purposes of subchapter III of chapter 83, chapter 84, chapter 87, subchapter V of chapter 55, section 5941, and for such other purposes as may be expressly provided for by law or as the Office of Personnel Management may by regulation prescribe.";

(3) in section 5334—

(A) in subsection (b), by adding at the end the following:

"If an employee's rate after promotion or transfer is greater than the maximum rate of basic pay for the employee's grade, that rate shall be treated as a retained rate under section 5363. The Office of Personnel Management shall prescribe by regulation the circumstances under which and the extent to which special rates under section 5305 (or similar provision of law) or locality-adjusted rates under section 5304 (or similar provision of law) are considered to be basic pay in applying this subsection."; and

(B) by adding at the end the following:

"(g) When an employee moves to a new official duty station at which different pay schedules apply, the employee shall be entitled to the rates of pay applicable in the new pay area based on the employee's position, grade, and step (or relative position in the rate range) before the

movement. Such pay conversion upon geographic movement shall be effected before processing any other simultaneous pay action (other than a general pay adjustment).";

(4) in section 5361—

(A) by striking paragraphs (3) and (4) and redesignating paragraphs (5) through (7) as paragraphs (3) through (5), respectively;

(B) in paragraph (4), as redesignated, by striking "and" at the end;

(C) in paragraph (5), as redesignated, by striking the period and inserting a semicolon; and

(D) by adding at the end the following:

"(6) 'rate of basic pay' means—

"(A) the rate of pay prescribed by law (including regulations) for the position held by an employee before any deductions or additions of any kind, but including—

"(i) any applicable locality-based payment under section 5304 or similar provision of law;

"(ii) any applicable special salary rate under section 5305 or similar provision of law; and

"(iii) any applicable existing retained rate of pay established under section 5363 or similar provision of law; and

"(B) in the case of a prevailing rate employee, the scheduled rate of pay determined under section 5343;

"(7) 'former highest applicable rate of basic pay' means the highest applicable rate of basic pay payable to the employee immediately before the action that triggers pay retention under section 5363; and

"(8) 'highest applicable basic pay rate range' means the range of rates of basic pay for the grade or level of the employee's current position with the highest maximum rate, except as otherwise provided in regulations prescribed by the Office of Personnel Management in cases where another rate range provides higher rates only in the lower portion of the range.";

(5) in section 5363—

(A) in subsection (a), by amending the matter following paragraph (4) to read as follows:

"is entitled to pay retention under the conditions set forth in this section. Notwithstanding any other provision of

law, this section may not be applied to employees whose rate of basic pay is reduced solely because of the recomputation of pay upon movement to a new official duty station at which different pay schedules apply. When a geographic move is accompanied by a simultaneous pay action that reduces the employee's rate of basic pay after the employee's pay has been recomputed to reflect the geographic move, this section shall be applied, if otherwise applicable.''; and

(B) by striking subsections (b) and (c) and inserting the following:

''(b)(1) If an employee is entitled to pay retention under subsection (a), paragraphs (2) and (3) shall apply in determining the employee's rate of pay.

''(2) If the employee's former highest applicable rate of basic pay is less than or equal to the maximum rate of the highest applicable basic pay rate range for the employee's current position, the employee is entitled to the lowest payable rate of basic pay in that rate range that equals or exceeds the former rate, and pay retention ceases to apply.

''(3) If the employee's former highest applicable rate of basic pay exceeds the maximum rate of the highest applicable basic pay rate range for the employee's current

position, the employee is entitled to a retained rate equal to the lesser of—

"(A) the employee's former highest applicable rate of basic pay; or

"(B) 150 percent of the maximum rate of the highest applicable basic pay rate range for the employee's position.

"(c) An employee's retained rate shall be increased at the time of any increase in the maximum rate of the highest applicable basic pay rate range for the employee's position by 50 percent of the dollar increase in that maximum rate.

"(d) The rate of pay for an employee who is receiving a retained rate under this section and who is moved to a new official duty station at which different pay schedules apply shall be determined under regulations prescribed by the Office of Personnel Management consistent with the purposes of this section.

"(e) A retained rate shall be considered part of basic pay for purposes of this subchapter and for purposes of subchapter III of chapter 83, chapters 84 and 87, subchapter V of chapter 55, section 5941, and for such other purposes as may be expressly provided for by law or as the law or as the Office of Personnel Management may by regulation prescribe. For other purposes, the Office

shall prescribe by regulation what constitutes basic pay for employees receiving a retained rate.

"(f) Subsections (a) through (e) do not apply (or shall cease to apply) to an employee who—

"(1) has a break in service of 1 workday or more;

"(2) is entitled by operation of this subchapter or chapter 51 or 53 to a rate of basic pay which is equal to or higher than, or declines a reasonable offer of a position the rate of basic pay for which is equal to or higher than, the rate to which the employee is entitled under this section; or

"(3) is demoted for personal cause or at the employee's request."; and

(6) in section 5365(b) by inserting after "provisions of this subchapter" the following: "(subject to any conditions or limitations the Office may establish)".

(b) SPECIAL RATES FOR LAW ENFORCEMENT OFFICERS.—Section 403(c) of the Federal Employees Pay Comparability Act of 1990 (5 U.S.C. 5305 note; Public Law 101–509) is amended by striking all after "provision of law)" and inserting "and shall be basic pay for all purposes. The rates shall be adjusted at the time of adjust-

ments in the General Schedule to maintain the step linkage set forth in subsection (b)(2).".

(c) PAY RETENTION.—Subject to any regulations the Office of Personnel Management may prescribe, any employee in a covered pay schedule who is receiving a retained rate under section 5363 of title 5, United States Code, or similar authority on the effective date of this Act shall have the pay of that employee converted on that date. The newly applicable retained rate shall equal the formerly applicable retained rate as adjusted to include any applicable locality-based payment under section 5304 of title 5, United States Code, or similar provision of law. Any employee in a covered pay system receiving a rate that exceeds the maximum rate of the highest applicable basic pay rate range for the employee's position (as defined under section 5361(8) of that title, as amended by this Act) under any authority shall be considered to be receiving a retained rate under section 5363 of that title.

TITLE III—REFORMS RELATING TO FEDERAL EMPLOYEE CAREER DEVELOPMENT AND BENEFITS

SEC. 301. AGENCY TRAINING.

(a) TRAINING TO ACCOMPLISH PERFORMANCE PLANS AND STRATEGIC GOALS.—Section 4103 of title 5,

United States Code, is amended by adding at the end the following:

"(c) The head of each agency shall—

"(1) evaluate each program or plan established, operated, or maintained under subsection (a) with respect to accomplishing specific performance plans and strategic goals in performing the agency mission; and

"(2) modify such program or plan to accomplish such plans and goals.".

(b) AGENCY TRAINING OFFICER, SPECIFIC TRAINING PROGRAMS.—

(1) IN GENERAL.—Chapter 41 of title 5, United States Code, is amended by adding after section 4119 the following:

"§ 4120. Agency training officer

"Each agency shall appoint or designate a training officer who shall be responsible for developing, coordinating, and administering training for the agency.

"§ 4121. Specific training programs

"In consultation with the Office of Personnel Management, each head of an agency shall establish—

"(1) a comprehensive management succession program to provide training to employees to develop managers for the agency; and

"(2) a program to provide training to managers on actions, options, and strategies a manager may use in—

"(A) relating to employees with unacceptable performances; and

"(B) mentoring employees and improving employee performance and productivity.".

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 41 of title 5, United States Code, is amended by adding at the end the following:

"4120. Agency training officer.
"4121. Specific training programs.".

SEC. 302. ANNUAL LEAVE ENHANCEMENTS.

(a) ACCRUAL OF LEAVE FOR NEWLY HIRED FEDERAL EMPLOYEES WITH QUALIFIED EXPERIENCE.—

(1) IN GENERAL.—Section 6303 of title 5, United States Code, is amended by adding at the end the following:

"(e)(1) In this subsection, the term 'period of qualified non-Federal service' means any equal period of service performed by an individual that—

"(A) except for this subsection would not otherwise be service performed by an employee for purposes of subsection (a); and

"(B) was performed in a position—

"(i) the duties of which were directly related to the duties of the position in an agency that such individual holds; and

"(ii) which meets such other conditions as the Office of Personnel Management shall prescribe by regulation.

"(2) For purposes of subsection (a), the head of an agency may deem a period of qualified non-Federal service performed by an individual to be a period of service performed as an employee.".

(2) EFFECTIVE DATE.—This section shall take effect 120 days after the date of enactment of this Act and shall only apply to an individual hired on or after that effective date.

(b) SENIOR EXECUTIVE SERVICE ANNUAL LEAVE ENHANCEMENTS.—

(1) IN GENERAL.—Section 6303(a) of title 5, United States Code, is amended—

(A) in paragraph (2), by striking "and" at the end;

(B) in paragraph (3), by striking the period at the end and inserting "; and"; and

(C) by adding after paragraph (3) the following:

~~"(4) one day for each full biweekly pay period for an employee in a position paid under section 5376 or 5383, or for an employee in an equivalent category for which the minimum rate of basic pay is greater than the rate payable at GS–15, step 10.".~~

~~(2) REGULATIONS.—Not later than 120 days after the date of enactment of this Act, the Office of Personnel Management shall prescribe regulations to carry out the amendments made by this subsection.~~

~~(3) EFFECTIVE DATES.—~~

~~(A) IN GENERAL.—Paragraph (1) shall take effect 120 days after the date of enactment of this Act.~~

~~(B) REGULATIONS.—Paragraph (2) shall take effect on the date of enactment of this Act.~~

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Federal Workforce Flexibility Act of 2003".

(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

TITLE I—REFORMS RELATING TO FEDERAL HUMAN CAPITAL MANAGEMENT

SEC. 101. RECRUITMENT, RELOCATION, AND RETENTION BONUSES.

(a) BONUSES.—

(1) IN GENERAL.—Chapter 57 of title 5, United States Code, is amended by inserting after section 5754 the following:

"§ 5754a. Recruitment and relocation bonuses

"(a) In this section, the term 'employee' has the meaning given that term under section 2105, except that such term also includes an employee described under subsection (c) of that section.

"(b)(1) The Office of Personnel Management may authorize the head of an agency to pay a bonus to an individual appointed or moved to a position that is likely to be difficult to fill in the absence of such a bonus, if the individual—

"(A)(i) is newly appointed as an employee of the Federal Government; or

"(ii) is currently employed by the Federal Government and moves to a new position in the same geographic area under circumstances described in regulations of the Office; or

"(B) is currently employed by the Federal Government and must relocate to accept a position stationed in a different geographic area.

"(2) Except as provided by subsection (h), a bonus may be paid under this section only to an employee covered by the General Schedule pay system established under subchapter III of chapter 53.

"(c)(1) Payment of a bonus under this section shall be contingent upon the employee entering into a written service agreement to complete a period of employment with the agency, not to exceed 4 years. The Office may, by regulation, prescribe a minimum service.

"(2)(A) The agreement shall include—

"(i) the length of the required service period;

"(ii) the amount of the bonus;

"(iii) the method of payment; and

"(iv) other terms and conditions under which the bonus is payable, subject to subsections (d) and (e) and regulations of the Office.

"(B) The terms and conditions for paying a bonus, as specified in the service agreement, shall include—

"(i) the conditions under which the agreement may be terminated before the agreed-upon service period has been completed; and

"(ii) the effect of the termination.

"(3) The agreement shall be made effective upon employment with the agency or movement to a new position or geographic area, as applicable, except that a service agreement with respect to a recruitment bonus may be made effective at a later date under circumstances described in regulations of the Office, such as when there is an initial period of formal basic training.

"(d)(1) Except as provided in subsection (e), a bonus under this section shall not exceed 25 percent of the annual rate of basic pay of the employee at the beginning of the service period multiplied by the number of years (or fractions thereof) in the service period, not to exceed 4 years.

"(2) A bonus under this section may be paid as an initial lump sum, in installments, as a final lump sum upon the completion of the full service period, or in a combination of these forms of payment.

"(3) A bonus under this section is not part of the basic pay of an employee for any purpose.

"(4) Under regulations of the Office, a recruitment bonus under this section may be paid to an eligible individual before that individual enters on duty.

"(e) The Office may authorize the head of an agency to waive the limitation under subsection (d)(1) based on a critical agency need, subject to regulations prescribed by the Office. Under such a waiver, the amount of the bonus may be up to 50 percent of the employee's annual rate of basic pay at the beginning of the service period multiplied by the number of years (or fractions thereof) in the service period, not to exceed 100 percent of the employee's annual rate of basic pay at the beginning of the service period.

"(f) The Office shall require that, before paying a bonus under this section, an agency shall establish a plan for paying recruitment bonuses and a plan for paying relocation bonuses, subject to regulations prescribed by the Office.

"(g) The Office may prescribe regulations to carry out this section, including regulations relating to the repayment of a recruitment or relocation bonus in appropriate circumstances when the agreed-upon service period has not been completed.

"(h)(1) At the request of the head of an Executive agency, the Office may extend coverage under this section to categories of employees within the agency who otherwise would not be covered by this section.

"(2) A bonus may not be paid under this section to an individual who is appointed to, or who holds—

"(A) a position to which an individual is appointed by the President, by and with the advice and consent of the Senate;

"(B) a position in the Senior Executive Service as a noncareer appointee (as such term is defined under section 3132(a)); or

"(C) a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character.

"(i)(1) The Office of Personnel Management shall submit an annual report on bonuses paid under this section to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform of the House of Representatives.

"(2) Each report submitted under this subsection shall include the use by each agency of recruitment and relocation bonuses, including, with respect to each agency and each type of bonus, the number and amount of bonuses by grade (including the General Schedule, the Senior Executive Service, and positions on the Executive Schedule).

"(j)(1) An individual may not be paid a recruitment bonus under this section and a recruitment bonus under section 5753.

"(2) An individual may not be paid a relocation bonus under this section and a relocation bonus under section 5753.

"§ 5754b. Retention bonuses

"(a) In this section, the term 'employee' has the meaning given that term under section 2105, except that such term also includes an employee described in subsection (c) of that section.

"(b) The Office of Personnel Management may authorize the head of an agency to pay a retention bonus to an employee, subject to regulations prescribed by the Office, if—

"(1) the unusually high or unique qualifications of the employee or a special need of the agency for the employee's services makes it essential to retain the employee; and

"(2) the agency determines that, in the absence of a retention bonus, the employee would be likely to leave—

"(A) the Federal service; or

"(B) for a different position in the Federal service under conditions described in regulations of the Office.

"(c) The Office may authorize the head of an agency to pay retention bonuses to a group of employees in 1 or

more categories of positions in 1 or more geographic areas, subject to the requirements of subsection (b)(1) and regulations prescribed by the Office, if there is a high risk that a significant portion of employees in the group would be likely to leave in the absence of retention bonuses.

"(d) Except as provided in subsection (j), a bonus may be paid only to an employee covered by the General Schedule pay system established under subchapter III of chapter 53.

"(e)(1) Payment of a retention bonus is contingent upon the employee entering into a written service agreement with the agency to complete a period of employment with the agency.

"(2)(A) The agreement shall include—

"(i) the length of the required service period;

"(ii) the amount of the bonus;

"(iii) the method of payment; and

"(iv) other terms and conditions under which the bonus is payable, subject to subsections (f) and (g) and regulations of the Office.

"(B) The terms and conditions for paying a bonus, as specified in the service agreement, shall include—

"(i) the conditions under which the agreement may be terminated before the agreed-upon service period has been completed; and

"(ii) the effect of the termination.

"(3)(A) Notwithstanding paragraph (1), a written service agreement is not required if the agency pays a retention bonus in biweekly installments and sets the installment payment at the full bonus percentage rate established for the employee with no portion of the bonus deferred.

"(B) If an agency pays a retention bonus in accordance with subparagraph (A) and makes a determination to terminate the payments, the agency shall provide written notice to the employee of that determination. Except as provided in regulations of the Office, the employee shall continue to be paid the retention bonus through the end of the pay period in which such written notice is provided.

"(4) A retention bonus for an employee may not be based on any period of such service which is the basis for a recruitment or relocation bonus under section 5753 or 5754a.

"(f)(1) Except as provided in subsection (g), a retention bonus, which shall be stated as a percentage of the employee's basic pay for the service period associated with the bonus, may not exceed—

"(A) 25 percent of the employee's basic pay if paid under subsection (b); or

"(B) 10 percent of an employee's basic pay if paid under subsection (c).

"(2) A retention bonus may be paid to an employee in installments after completion of specified periods of service or in a single lump sum at the end of the full period of service required by the agreement. An installment payment may not exceed the product derived from multiplying the amount of basic pay earned in the installment period by a percentage not to exceed the bonus percentage rate established for the employee. If the installment payment percentage is less than the bonus percentage rate, the accrued but unpaid portion of the bonus is payable as part of the final installment payment to the employee after completion of the full service period under the terms of the service agreement.

"(3) A retention bonus is not part of the basic pay of an employee for any purpose.

"(g) Upon the request of the head of an agency, the Office may waive the limit established under subsection (f)(1) and permit the agency head to pay an otherwise eligible employee or category of employees retention bonuses of up to 50 percent of basic pay, based on a critical agency need.

"(h) The Office shall require that, before paying a bonus under this section, an agency shall establish a plan for paying retention bonuses, subject to regulations prescribed by the Office.

"(i) The Office may prescribe regulations to carry out this section.

"(j)(1) At the request of the head of an Executive agency, the Office may extend coverage under this section to categories of employees within the agency who otherwise would not be covered by this section.

"(2) A bonus may not be paid under this section to an employee who holds—

"(A) a position to which an individual is appointed by the President, by and with the advice and consent of the Senate;

"(B) a position in the Senior Executive Service as a noncareer appointee (as such term is defined under section 3132(a)); or

"(C) a position which has been excepted from the competitive service by reason of its confidential, policy-determining, policy-making, or policy-advocating character.

"(k)(1) The Office of Personnel Management shall submit an annual report on bonuses paid under this section to the Committee on Governmental Affairs of the Senate and the Committee on Government Reform of the House of Representatives.

"(2) Each report submitted under this subsection shall include the use by each agency of retention bonuses, includ-

ing, with respect to each agency, the number and amount of bonuses by grade (including the General Schedule, the Senior Executive Service, and positions on the Executive Schedule).

"(l) An employee may not be paid a retention bonus under this section and a retention allowance under section 5754.".

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 57 of title 5, United States Code, is amended by inserting after the item relating to section 5754 the following:

"5754a. Recruitment and relocation bonuses.
"5754b. Retention bonuses.".

(b) EFFECTIVE DATE AND APPLICATION.—This section shall take effect on the first day of the first applicable pay period beginning on or after 180 days after the date of enactment of this Act.

SEC. 102. STREAMLINED CRITICAL PAY AUTHORITY.

Section 5377 of title 5, United States Code, is amended—

(1) by striking subsection (c) and inserting the following:

"(c) The Office of Personnel Management, in consultation with the Office of Management and Budget, may, upon the request of the head of an agency, grant authority to fix

the rate of basic pay for 1 or more positions in such agency in accordance with this section.";

(2) in subsection (e)(1), by striking "Office of Management and Budget" and inserting "Office of Personnel Management";

(3) by striking subsections (f) and (g) and inserting the following:

"(f) The Office of Personnel Management may not authorize the exercise of authority under this section with respect to more than 800 positions at any 1 time, of which not more than 30 may, at any such time, be positions the rate of basic pay for which would otherwise be determined under subchapter II.

"(g) The Office of Personnel Management shall consult with the Office of Management and Budget before making any decision to grant or terminate any authority under this section."; and

(4) in subsection (h), by striking "The Office of Management and Budget shall report to the Committee on Post Office and Civil Service" and inserting "The Office of Personnel Management shall report to the Committee on Government Reform.".

SEC. 103. CIVIL SERVICE RETIREMENT SYSTEM COMPUTATION FOR PART-TIME SERVICE.

Section 8339(p) of title 5, United States Code, is amended by adding at the end the following:

"(3) In the administration of paragraph (1)—

"(A) subparagraph (A) of such paragraph shall apply to any service performed before, on, or after April 7, 1986;

"(B) subparagraph (B) of such paragraph shall apply to all service performed on a part-time or full-time basis on or after April 7, 1986; and

"(C) any service performed on a part-time basis before April 7, 1986, shall be credited as service performed on a full-time basis.".

SEC. 104. RETIREMENT SERVICE CREDIT FOR CADET OR MIDSHIPMAN SERVICE.

(a) CIVIL SERVICE RETIREMENT SYSTEM.—Section 8331(13) of title 5, United States Code, is amended by striking "but" and inserting "and includes service as a cadet at the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy, or as a midshipman at the United States Naval Academy, but".

(b) FEDERAL EMPLOYEES' RETIREMENT SYSTEM.—Section 8401(31) of title 5, United States Code, is amended

by striking "but" and inserting "and includes service as a cadet at the United States Military Academy, the United States Air Force Academy, or the United States Coast Guard Academy, or as a midshipman at the United States Naval Academy, but".

(c) EFFECTIVE DATE AND APPLICATION.—The amendments made by this section shall apply to—

(1) any annuity, eligibility for which is based upon a separation occurring before, on, or after the date of enactment of this Act; and

(2) any period of service as a cadet or midshipman at the military service academy of the Army, Air Force, Coast Guard, or Navy, occurring before, on, or after the date of enactment of this Act.

SEC. 105. SENIOR EXECUTIVE SERVICE AUTHORITY FOR WHITE HOUSE OFFICE OF ADMINISTRATION.

Chapter 2 of title 3, United States Code, is amended—

(1) in section 107(b)—

(A) in paragraph (2), by striking "section 3101" and inserting "sections 3101 and 3132"; and

(B) by adding at the end the following:

"(3) Any permanent Senior Executive Service position established under paragraph (2) shall be a career reserved position.";

(2) in section 114—

(A) by redesignating that section as subsection (a);

(B) by amending that subsection, as so redesignated, by striking "minimum rate of basic pay then currently paid for GS–16" and inserting "maximum rate of basic pay then currently paid for GS–15"; and

(C) by adding at the end the following:

"(b) The limitation established in subsection (a) shall not apply to an individual appointed under the authority in section 107(b)(2), in accordance with section 3132 of title 5.".

TITLE II—REFORMS RELATING TO FEDERAL EMPLOYEE CAREER DEVELOPMENT AND BENEFITS

SEC. 201. AGENCY TRAINING.

(a) TRAINING TO ACCOMPLISH PERFORMANCE PLANS AND STRATEGIC GOALS.—Section 4103 of title 5, United States Code, is amended by adding at the end the following:

"(c) The head of each agency shall—

"(1) evaluate each program or plan established, operated, or maintained under subsection (a) with re-

spect to accomplishing specific performance plans and strategic goals in performing the agency mission; and

"(2) modify such program or plan to accomplish such plans and goals.".

(b) AGENCY TRAINING OFFICER; SPECIFIC TRAINING PROGRAMS.—

(1) IN GENERAL.—Chapter 41 of title 5, United States Code, is amended by adding after section 4119 the following:

"§ 4120. Agency training officer

"Each agency shall appoint or designate a training officer who shall be responsible for developing, coordinating, and administering training for the agency.

"§ 4121. Specific training programs

"In consultation with the Office of Personnel Management, each head of an agency shall establish—

"(1) a comprehensive management succession program to provide training to employees to develop managers for the agency; and

"(2) a program to provide training to managers on actions, options, and strategies a manager may use in—

"(A) relating to employees with unacceptable performances; and

"(B) mentoring employees and improving employee performance and productivity.".

(2) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 41 of title 5, United States Code, is amended by adding at the end the following:

"4120. Agency training officer.
"4121. Specific training programs.".

SEC. 202. ANNUAL LEAVE ENHANCEMENTS.

(a) ACCRUAL OF LEAVE FOR NEWLY HIRED FEDERAL EMPLOYEES WITH QUALIFIED EXPERIENCE.—

(1) IN GENERAL.—Section 6303 of title 5, United States Code, is amended by adding at the end the following:

"(e)(1) In this subsection, the term 'period of qualified non-Federal career experience' means any equal period of service performed by an individual that—

"(A) except for this subsection would not otherwise be service performed by an employee for purposes of subsection (a); and

"(B) was performed in a position—

"(i) the duties of which were directly related to the duties of the position in an agency that such individual holds; and

"(ii) which meets such other conditions as the Office of Personnel Management shall prescribe by regulation.

"(2) For purposes of subsection (a), the head of an agency may deem a period of qualified non-Federal career experience performed by an individual to be a period of service performed as an employee.".

(2) EFFECTIVE DATE.—This section shall take effect 120 days after the date of enactment of this Act and shall only apply to an individual hired on or after that effective date.

(b) SENIOR EXECUTIVE SERVICE ANNUAL LEAVE ENHANCEMENTS.—

(1) IN GENERAL.—Section 6303(a) of title 5, United States Code, is amended—

(A) in paragraph (2), by striking "and" at the end;

(B) in paragraph (3), by striking the period at the end and inserting "; and"; and

(C) by adding after paragraph (3) the following:

"(4) one day for each full biweekly pay period for an employee in a position paid under section 5376 or 5383, or for an employee in an equivalent

category for which the minimum rate of basic pay is greater than the rate payable at GS–15, step 10.".

(2) REGULATIONS.—Not later than 120 days after the date of enactment of this Act, the Office of Personnel Management shall prescribe regulations to carry out the amendments made by this subsection.

(3) EFFECTIVE DATES.—

(A) IN GENERAL.—Paragraph (1) shall take effect 120 days after the date of enactment of this Act.

(B) REGULATIONS.—Paragraph (2) shall take effect on the date of enactment of this Act.

SEC. 203. COMPENSATORY TIME OFF FOR TRAVEL.

(a) IN GENERAL.—Subchapter V of chapter 55 of title 5, United States Code, is amended by adding at end the following:

"§ 5550b. Compensatory time off for travel

"(a) Notwithstanding section 5542(b)(2), each hour spent by an employee in travel status away from the official duty station of the employee, that is not otherwise compensable, shall be treated as an hour of work or employment for purposes of calculating compensatory time off.

"(b) An employee who has any hours treated as hours of work or employment for purposes of calculating compensatory time under subsection (a), shall not be entitled to

payment for any such hours that are unused as compensatory time.

"(c) Not later than 30 days after the date of enactment of this section, the Office of Personnel Management shall prescribe regulations to implement this section.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—The table of sections for chapter 55 of title 5, United States Code, is amended by inserting after the item relating to section 5550a the following:

"5550b. Compensatory time off for travel.".

Calendar No. 428

108TH CONGRESS
2D SESSION

S. 129

[Report No. 108–223]

A BILL

To provide for reform relating to Federal employment, and for other purposes.

JANUARY 27, 2004

Reported with an amendment

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Mr. DAVIS OF ILLINOIS. Thank you very much, Madam Chairwoman. I'm pleased to join with you in convening this hearing and in welcoming our witnesses today.

Given the increased demand by Federal agencies and some Members of Congress for human capital flexibilities in the Civil Service system, I'm not surprised that the first hearing of this session is to consider legislation that would give Federal agencies flexibilities for recruitment and retention bonuses, relocation allowances, personnel management demonstration projects, training, and direct hire authority.

This hearing is timely. Last week we began to see the results of granting Federal agencies human capital flexibilities that do not address the problems the flexibilities portend to correct. Federal Aviation Administration received exemptions from Title 5 in 1995 so it could establish its own personnel system. Though the 1995 legislation initially exempted FAA from Chapter 71 of Title 5, which sets forth the rules for collective bargaining and labor/management relations, in 1995 Congress restored FAA's coverage under Chapter 71.

For reasons my staff is researching and trying to comprehend, Congress has also created a separate bargaining procedure whereby if the FAA labor and management reach an impasse in their negotiations, matters being negotiated must be transmitted to Congress for a final determination. Last month the FAA transmitted their unresolved labor/management issues to Congress. If Congress does not act within 60 days, management's proposal for its personnel system is implemented. Members of Congress and staff must get into the minutia of the labor/management agreement and do so within 60 days or management automatically gets what it wants. This process clearly creates more problems than it solves.

Last year congressional Democrats and employee organizations saw the wolf in sheep's clothing and fought the human capital provisions in the Department of Defense reauthorization bill, but to no avail. Last week DOD briefed our staff on the draft proposal for its new personnel system. It was an outrage. Under the draft proposal, DOD employees could still join unions, but under a new fee-for-service arrangement. Employees would pay a fee to contract with Union representation. DOD argued it needed broad exemptions from existing personnel laws for national security reasons. What impact do union dues have on national security?

The proposal also calls for excluding additional groups of employees from collective bargaining. No reasonable explanation was given for the exclusions.

Granting Federal agencies flexibilities that do not address well documented problems are not clear solutions to these problems and a disservice to Federal employees and the taxpayers. We can and should do better by Federal employees who have devoted their lives to serving the American public.

Again, Madam Chairwoman, I thank you for holding this hearing and look forward to the testimony of our witnesses.

[The prepared statement of Hon. Danny K. Davis follows:]

STATEMENT OF THE HONORABLE DANNY K. DAVIS
AT THE SUBCOMMITTEE ON CIVIL SERVICE
AND AGENCY ORGANIZATION
HEARING ON
ESPIRIT DE CORPS: RECRUITING AND RETAINING AMERICA'S
BEST FOR THE FEDERAL CIVIL SERVICE
February 11, 2004

Chairwoman Davis, I look forward to working with you this session as we work to support and strengthen the civil service.

Given the increased demand by federal agencies and some Members of Congress for human capital flexibilities in the civil service system, I am not surprised that the first hearing of this session is to consider legislation that would give federal agencies flexibilities for recruitment and retention bonuses, relocation allowances, personnel management demonstration projects, training, and direct hire authority.

This hearing is timely. Last week we began to see the results of granting federal agencies human capital flexibilities that **do not** address the problems the flexibilities portend to correct.

The Federal Aviation Administration (FAA) received exemptions from Title V in 1995 so it could establish its own personnel system. Though the 1995 legislation initially exempted FAA from Chapter 71 of Title V, which sets forth the rules for collective bargaining and labor management relations, in 1995, Congress restored FAA's coverage under Chapter 71.

For reasons my staff is researching and trying to comprehend, Congress also created a separate bargaining procedure whereby if FAA labor and management reach an impasse in their negotiations, the matters being negotiated must be transmitted to Congress for a final determination. Last month, FAA transmitted their unresolved labor-management issues to Congress. If Congress does not act within 60 days, management's proposal for its personnel system is implemented.

Members of Congress and staff must get into the minutiae of a labor-management agreement and do so within 60 days or management automatically gets what it wants. This process clearly creates more problems than it solves.

Last year, Congressional Democrats and employee organizations saw the *wolf in sheep's clothing* and fought the human capital provisions in the Department of Defense (DOD) Reauthorization bill but to no avail. Last week, DOD briefed our staff on their draft proposal for its new personnel system. It was an outrage.

Under the draft proposal, DOD employees could still join unions, but under a new "fee-for-service" arrangement. Employees would pay a fee to contract with union representation. DOD argued it needed broad exemptions from existing personnel laws for "national security" reasons. What impact does union dues have on national security?
The proposal also calls for excluding additional groups of employees from collective bargaining. No reasonable explanation was given for the exclusions.

Granting federal agencies flexibilities that **do not** address well-documented problems or are not clear solutions to these problems is a disservice to federal employees and the taxpayers.

We can and should do better by federal employees who have devoted their lives to serving the American public.

Ms. DAVIS OF VIRGINIA. Thank you, Mr. Davis. It is always a pleasure to have you here as our ranking minority member, and you always bring so much to the table.

I would like to ask Ms. Norton if you have an opening statement.

Ms. NORTON. Thank you very much, Madam Chairwoman. I appreciate the bipartisan way in which you have worked with us on this committee. When I saw the name of this hearing, I am sure we—and, indeed, I'm sure that it is your intent that we deal with a major problem in the Federal work force. As it says, "Esprit de Corps: Recruiting and Retaining America's Best Civil Service," yet when I came to the hearing and saw people lined outside, Madam Chairwoman, I wondered if we were giving away money the way you see people lined outside the Appropriations Committee. No, we are not giving away money. It looks like the administration is taking away rights. And the walls are lined, as well they should be.

We had a very troublesome full committee set of events on both DOD and the new Homeland Security Committee, and it looks like we are in for another set of troublesome hearings. I don't stoop to the pejorative very often, but the notion of saying to a union that it has to receive the votes of "X" number—in this case 50 percent—in order to qualify to represent workers must be unprecedented in the history of labor/management relations in the United States of America.

I recognize that this is only a proposal, but I think we ought to send a shot across the bow back from where this proposal came that it is high time to sit down with the people who represent the people who work for the Federal Government and try to get proposals that have some bipartisan content before you make your way to the Congress. I haven't seen the proposal, but it has already been leaked and aired in the paper and the workers know about the proposal and are absolutely outraged at the proposal, and I just hope that as we now are in the beginning of a new hearing year that we can dispose of matters like this by sending them home and telling them to try again.

Thank you very much, Madam Chairwoman.

Ms. DAVIS OF VIRGINIA. Thank you, Ms. Norton.

I ask unanimous consent that all Members have 5 legislative days to submit written statements and questions for the hearing record, and that any answers to written questions provided by the witnesses also be included in the record.

Without objection, it is so ordered.

I ask unanimous consent that all exhibits, documents, and other materials referred to by Members and the witnesses may be included in the hearing record, and that all Members be permitted to revise and extend their remarks.

Without objection, it is so ordered.

On the first panel we are going to hear from Mr. Ronald Sanders, Associate Director for Strategic Resources Policy at the Office of Personnel Management.

It is standard practice for this committee to administer the oath to all witnesses. If all the witnesses could please stand, I will administer the oath. I'm going to go ahead and do it for both panels so that we can just take care of it all at one time.

Raise your right hands.

[Witnesses sworn.]

Ms. DAVIS OF VIRGINIA. Let the record reflect that the witnesses have answered in the affirmative.

You may be seated.

Mr. Sanders, we have your written testimony in the record, and I will ask you if you'd like to summarize it. We will recognize you for 5 minutes.

STATEMENT OF RONALD P. SANDERS, ASSOCIATE DIRECTOR FOR STRATEGIC HUMAN RESOURCES POLICY, OFFICE OF PERSONNEL MANAGEMENT

Mr. SANDERS. Yes, ma'am. Thank you. Madam Chairwoman, I appreciate the opportunity to appear before you today to address H.R. 1601, the Federal Workforce Flexibility Act of 2004. It has also been introduced in the Senate, with certain differences that I will address, as S. 129. I will also speak to H.R. 3737, the Administrative Law Judges Pay Reform Act.

I propose to discuss each of the specific provisions of these bills, providing OPM's views on each. I'll begin with those that are common to the House and Senate bills, address those that are unique, and then treat H.R. 3737 last.

Both House and Senate versions of the bill provide Federal agencies additional flexibility in offering financial incentives to recruit, retain, and relocate top talent. We strongly support these flexibilities. By allowing agencies to pay larger incentives and to provide them in different ways—for example, in lump sums or installments—the proposed legislation would materially improve our ability to compete for the best and brightest, one of Director James' top priorities. In fact, she specifically mentioned the use of incentives in this regard as part of her top 10 list of things agencies can do to improve hiring issued just yesterday.

Except for its extension of these authorities to political appointees, we would prefer the House version of the bill, which simply replaces existing flexibilities with new ones without adding any new reporting requirements. OPM strongly supports most other provisions that are common to both House and Senate versions of the bill. Both bills would provide OPM with the responsibility for granting and reporting individual agency requests for critical pay for their superstars. The bills also establish a higher annual leave accrual rate for senior executives and professionals, and allow agencies to credit non-Federal work experience to establish a higher annual leave accrual rate for new mid-career entrants.

Finally, both bills would eliminate potentially anomalous annuity computations that disadvantage employees when part-time service is involved.

However, we do not believe it necessary at this time for the bill to require that agencies establish and appoint a training officer, especially since the Chief Human Capital Officers Act of 2002 is relatively new. According to that act, training and development are among a Chief Human Capital Officer's principal responsibilities, and on the merits we believe that that is exactly right. That's the only way to achieve an integrated approach to strategic management of an agency's human capital, and CHCOs should be given time to tackle this very important issue.

The House includes a number of very complicated technical provisions that would correct anomalies that have resulted from the implementation of locality pay under the Federal Employees Pay Comparability Act. These anomalies have to do with complex interrelationships between locality pay and special rates—that's an under-statement—and the impact on pay retention when employees are covered by one or both. These provisions were in the President's original Managerial Flexibility Act and we urge their passage. We also thank you for your leadership in continuing to champion them.

The House bill also includes streamlined personnel demonstration project authority. Madam Chairwoman, that authority is fine as far as it goes. It is based on a strategy for making incremental improvements in our Civil Service system that can be traced back to the late 1970's. While we always appreciate more flexibility to deal with outmoded personnel rules, a new model has also emerged. First embodied in the Homeland Security Act and since continued in DOD's National Security Personnel System, that model sets forth the principles and process for modernizing our Civil Service system without compromising any of the core rights and protections that make it so great.

Madam Chairwoman, you have been one of the architects of this new approach, and we thank you for your leadership in that endeavor. We urge you to continue to work with us to explore making our Civil Service system the best in the world.

The Senate version of the bill would provide Federal employees with additional compensatory time off for each hour spent in travel status away from their duty station. We do not support this proposal. At present there are provisions in Title 5 U.S. Code and case law under the Fair Labor Standards Act to require compensation for Federal employees in travel status under certain circumstances, and there is no compelling business case to provide additional compensatory time off in this regard.

We do support the technical amendments to S. 129 that confirm the longstanding practice of interpreting the term "military service" to include service as a cadet or midshipman at the Air Force, Army, Coast Guard, and Naval Academies. This practice has been brought into question by appeals court decisions, and we believe this legislation is necessary to leave no doubt.

Finally, let me address the stand-alone provisions of H.R. 3737, which would reform the pay system for administrative law judges by increasing the minimum and maximum pay rates. The statutory minimum and maximum rates of basic pay would be linked to the rates for level III of the executive schedule instead of level IV. More importantly, the maximum rate of locality adjusted basic pay would be increased from the rate for level III to the rate for level II of the executive schedule, which is the rate payable to Federal district court judges. We oppose this bill.

While the impetus behind this legislation is to provide parity with the new Senior Executive Service pay for performance system, comparisons with that new system are just not appropriate. The new SES system is exclusively performance based. There are no more automatic or across-the-board increases, and in that light it would be unfair to do so for ALJs.

Moreover, while there is compression, there is no compelling evidence of a recruiting or retention problem amongst ALJs sufficient to warrant such extraordinary treatment.

We sincerely value the contributions of the ALJ corps, but for the reasons set forth above and in my written statement we must oppose H.R. 3737.

Madam Chairwoman, thank you for the opportunity to testify on these important matters. I would be happy to answer any questions.

Ms. DAVIS OF VIRGINIA. Thank you, Mr. Sanders. It is always a pleasure to have you here as one of our witnesses.

[The prepared statement of Mr. Sanders follows:]

Statement of
Dr. Ronald P. Sanders
Associate Director for Strategic Human Resources Policy
U.S. Office of Personnel Management

before the

Subcommittee on Civil Service and Agency Organization
Committee on Government Reform
U.S. House of Representatives

on

"*Esprit de Corps*: Recruiting and Retaining America's Best for the Federal Civil Service"

February 11, 2004

Madam Chair, I am Ronald P. Sanders, the Office of Personnel Management's (OPM's) Associate Director for Strategic Human Resources (HR) Policy, and I appreciate the opportunity to appear before you today to address the Federal Workforce Flexibility Act of 2004 (H.R. 1601, introduced in the Senate with certain differences as S. 129) and the Administrative Law Judges Pay Reform Act of 2004 (H.R. 3737).

As a general matter, Director James, on behalf of the Administration, strongly supports any measure that provides additional flexibility for Federal managers, and the legislation before the subcommittee today is no exception. H.R. 1601 and S. 129 provide an array of new tools to assist agencies in the strategic management of their human capital, many of which can be traced to the President's proposed Managerial Flexibility Act, introduced early in his Administration. However, while we support the general objectives of these bills (and thank you Madam Chair for leading these provisions through the legislative process), we do suggest modifications to some

elements. In addition, there are some provisions that we do not support. We also oppose H.R. 3737, the Administrative Law Judges Pay Reform Act of 2004.

Madam Chair, I propose to discuss each of the specific component provisions of these bills, providing OPM's views on each. I will begin with those provisions that are common to both House and Senate bills and then address those that are unique to each. I will conclude with our views on H.R. 3737.

Provisions Common to H.R. 1601 and S. 129 (as reported)

Both House and Senate versions of the Act provide Federal agencies additional flexibility in offering financial incentives to recruit, retain, or relocate top talent. First provided by the Congress in the early 1990s, these incentives have been extremely useful; however, they need to be "modernized" to reflect the needs of today's Federal Government. We believe that the proposed amendments would do just that, and as a consequence, we strongly support them.

By allowing agencies to pay larger incentives, and to provide them in different ways (for example, in lump sums or installment payments), the proposed legislation would materially improve our ability to compete for the best and brightest, one of Director James' top priorities. Except for its extension of these authorities to political appointees, we would prefer the House version of the bill, which simply replaces existing flexibilities with the new ones, without adding any new reporting requirements.

OPM strongly supports other provisions that are common to both House and Senate versions. Both bills would provide OPM with the responsibility for granting (and reporting) individual agency requests for "critical pay" (up to the rate for level I of the Executive Schedule, currently $174,500) for their superstars; and while the authority itself is not new, streamlining its approval will make it more readily available to agencies that can make the business case for this

flexibility. Similarly, by establishing a higher annual leave accrual rate for senior executives and senior professionals, and by allowing agencies to credit non-Federal work experience to establish a higher annual leave accrual rate for new mid-career entrants, the legislation will make the Federal Government far more attractive to top external talent. These too have been high on Director James' list of priorities, and we appreciate your leadership in championing them in the Congress.

Both bills would also eliminate potentially anomalous annuity computations that disadvantage employees when part-time service is involved, especially at the end of an employee's Federal career. We support this correction; it will make part-time service a more useful (and attractive) tool in an agency's succession planning toolkit.

However, we do not believe it necessary at this time to require that agencies establish and appoint a Training Officer, especially since the Chief Human Capital Officers (CHCO) Act of 2002 is still relatively new. That Act required each major agency to appoint a CHCO as the single senior point of accountability for its human resources. According to that Act, training and development is one of the CHCO's principal responsibilities, and on the merits, we believe that this is exactly right--that is the only way to achieve an integrated approach to the strategic management of an agency's human capital. In this regard, we believe that it is premature to dilute the promise of this approach; Congress should wait until the CHCO Act has had a chance to firmly take root before modifying it.

Provisions Unique to H.R. 1601

The House bill includes a number of very complicated technical provisions that would correct anomalies that have resulted from the implementation of locality pay under the Federal Employees Pay Comparability Act of 1990; these anomalies have to do with the complex interrelationship between locality pay and special pay rates, and the impact on pay retention when employees are covered by one or both. These provisions were in the President's original Managerial Flexibility Act, and we thank you for your leadership in continuing to champion them.

The House bill also includes streamlined personnel demonstration project authority. Madam Chair, Director James believes that this authority is fine as far as it goes. It is based on a strategy for making incremental improvements in our civil service system that can be traced back to the late 1970s, and while we always appreciate more flexibility to deal with outmoded personnel rules, experience under that model has exposed some flaws. Now we also believe that a new model, first embodied in the Homeland Security Act (and since continued with DoD's National Security Personnel System), sets forth the principles and the process for "modernizing" our civil service system without compromising any of the core rights and protections that make it so great. Madam Chair, along with Director James, you have been one of the architects of this new approach, and we thank you for your leadership in that endeavor. We urge you to continue to work with us to explore making our civil service system the best in the world.

Provisions Unique to S. 129

The Senate version of the bill would provide Federal employees with additional compensatory time off for each hour spent in a travel status away from their duty station. We do not support this proposal. At present, there are provisions in title 5, U.S. Code, and case law under the Fair Labor Standards Act that require compensation for Federal employees in a travel status, under certain conditions, and there is no compelling business case to provide an additional compensatory time off benefit to the mix. This is a benefit not typically found in the private sector (a recent survey of private employers found only 28 percent provide compensatory time off for travel). There is a reason for this--such a benefit has a significant cost, not directly, but in terms of lost productivity.

We also support the technical amendment in S. 129 that confirms the longstanding practice of interpreting the term "military service" as including service as a cadet or midshipman at the Air Force, Army, Coast Guard, and Navy service academies. This practice has been brought into question by appeals court decisions.

The Administration may have further views on this bill, which we will communicate to the Congress separately.

Provisions of H.R. 3737

Finally, let me address the stand-alone provisions of H.R. 3737, which would "reform" the pay system for administrative law judges (ALJs) by increasing their minimum and maximum pay rates. The statutory minimum and maximum rates of basic pay would be linked to the rates for level III of the Executive Schedule, instead of level IV. The maximum rate of locality-adjusted basic pay would be increased from the rate for level III of the Executive Schedule to the rate for level II, which is the rate payable to Federal District Court judges. We oppose this bill.

While the impetus behind this legislation is to provide ALJ "parity" with the new Senior Executive Service (SES) pay-for-performance system, comparisons between these two categories of employees are not appropriate. The SES system is performance-based; there are no more automatic or across-the-board pay increases. Moreover, it is no easy thing for an individual SES member to exceed level III of the Executive Schedule, much less reach level II. He or she must first work for an agency that has demonstrated that it can and will make "meaningful distinctions" in performance, as certified by OPM and the Office of Management and Budget, and then that SES member must demonstrate the very highest levels of performance in order to reach that upper limit.

We expect relatively few SES members will do so, but that is the nature of the new system. Those who perform, who set stretch goals and exceed them, who manage thousands of people and millions (sometimes billions) of dollars, who achieve results that the American people can be proud of--those are the ones who will reach level II, and with all due respect, it is patently unfair to them to give ALJs a "pass" to that level. By law, ALJs must remain independent of

their employing agencies; they are exempt from any sort of evaluation based on performance, and thus, it would be inappropriate to link their pay levels to the new SES pay system. Moreover, there is no evidence of a recruiting or retention problem among ALJs sufficient to warrant such extraordinary treatment. We sincerely value the contributions of the ALJ corps, but for the reasons set forth above, we must oppose H.R. 3737.

We recognize that some pay compression currently exists with respect to the top two ALJ levels, AL-1 and AL-2, where all receive the rate for level III of the Executive Schedule (currently $144,600); however, such pay compression problems are not uncommon in the Federal environment in which pay limits often apply to highly compensated officials. Increasing maximum pay levels for ALJs will simply create other problems, including pay compression with respect to other categories of Federal officials with broader authority and more significant responsibilities. In the end, we are not persuaded that there is a strong strategic rationale for increasing pay levels for all ALJs.

Madam Chair, thank you for the opportunity to testify on these important matters; I would be happy to answer any questions you may have.

Ms. DAVIS OF VIRGINIA. I'd like to now move to the question and answer period, and I will yield first to our Civil Service Subcommittee ranking member, Mr. Davis.

Mr. DAVIS OF ILLINOIS. Thank you very much, Madam Chairwoman.

Mr. Sanders, based upon the briefing that DOD has given to us, it has been pretty clear that there was no real collaboration with OPM. I didn't get the impression that there was. As Federal agencies receive more flexibilities from Title 5, how does OPM see itself maintaining or holding on to some oversight authority or responsibility?

Mr. SANDERS. I think the Congress, Mr. Davis, in both cases—Homeland Security and DOD—has provided OPM a central and pivotal role in that regard. I will only hearken back to something that Mrs. Davis said. This process is just now beginning, and OPM and DOD have begun their internal collaborations, and then DOD and OPM will begin their collaborations with labor unions and other employee organizations, so while this was preliminary and was briefed as such, I think there is a long way to go.

Mr. DAVIS OF ILLINOIS. I don't want to appear that I've got more confidence in OPM than I do some of the agencies, but I guess I really do. I'm wondering, do you think that maybe we need to provide OPM with more authority as a part of its role and mission—that is, if we are going to be able to comprehensively develop approaches to dealing with the entire Federal system, as opposed to some agencies operating perhaps one way and other agencies operating another way, which means that employees would not across the board have the same system that they're working under.

Mr. SANDERS. I know that Director James takes her responsibility under both the Homeland Security Act and the National Security Personnel System authorizing legislation very seriously. That role is virtually identical. It provides in both cases for the Cabinet Secretary and the OPM Director to jointly prescribe the establishing regulations. That's a pretty important and pretty powerful role and, as I said, I think Director James understands the charge she has been given both by the President and by the Congress to ensure that those rights that are enumerated in both pieces of legislation are protected and preserved, at the same time ensuring and affording those agencies the flexibility they need to deal with their particular missions. It is that balance that I think OPM has been charged with striking, and I think the role that the statute provides for the Director strikes that right balance.

Mr. DAVIS OF ILLINOIS. In his written testimony Mr. DeMaio, president of the Performance Institute, suggests that Congress should wait until the Department of Homeland Security and Department of Defense implement their new systems before granting Federal agencies additional pay flexibilities. Do you agree or disagree with that? Or do you think that it might be prudent for us to get a look at what happens? I've always been told that seeing is believing, and that sometimes having experience to base a decision upon—do you think it might be helpful if we were to wait and see what happens there before moving further ahead?

Mr. SANDERS. That is certainly Congress' prerogative, but, with all due respect, I think we have had lots of experience with at least

various models of, for example, pay reform, and literally about a quarter century worth, and there has been lots of fine tuning. You mentioned FAA. There are a number of other agencies that have been experimenting with this, that have been perfecting this, and to the extent that those two efforts build on that experience—and I believe they have and will—then I'm not sure that it is necessary to wait to simply add more to what we already know. I think we have known now for some time that the General Schedule needs to be reformed.

Mr. DAVIS OF ILLINOIS. Ms. Norton mentioned in her opening statement the fact that there were so many people here, and more than we are accustomed to seeing. What do you attribute this to, or would you attribute anything about this particular hearing and the numbers of people that have expressed an interest?

Mr. SANDERS. I know this is AFGE's annual legislative conference, so I suspect they are in town and want to see our congressional process at work.

Mr. DAVIS OF ILLINOIS. Thank you very much. [Laughter.]

Ms. DAVIS OF VIRGINIA. We will have order, please.

Mr. DAVIS OF ILLINOIS. Thank you very much, Madam Chairwoman. Thank you, Mr. Sanders.

Ms. DAVIS OF VIRGINIA. Thank you, Mr. Davis.

I would like to remind the Members and the witnesses, that this hearing is on H.R. 1601 and H.R. 3737, which actually has nothing to do, as such, with pay for performance. It is looking at ways to recruit and retain.

Mr. Sanders, in that regard, how many recruitment, retention, and relocation bonuses are paid per year under current law? Do you have any idea?

Mr. SANDERS. I don't have that number off the top of my head. We can provide it for the record.

I can tell you that it is not many. For a variety of reasons—and I think generally good ones—they are used sparingly. There are funding constraints, but I think that is generally a good thing because when they are used they are used for critical purposes. I've had experience in a couple of agencies where we've used them, where we have managed to find the money because the job or the individual was that important to us, and I think the situation the way it exists today with these added flexibilities would provide just the right tools we need to compete.

Ms. DAVIS OF VIRGINIA. Do you believe that we will see expanded use of recruitment, retention, and relocation bonuses under the new authority that is in H.R. 1601 and if funding may be a major obstacle? Do you think it would be used? And do you think it is necessary to recruit and retain?

Mr. SANDERS. I think it is necessary. I think it will be used. Again, I don't think it is going to be used so much in such a widespread way that someone would suggest abuse. Again, where there is a will there is a way, and when the job is important enough and the individual is talented enough to recruit, retain, or relocate, these incentives have been used. I think what this bill will do is provide a lot more room for creativity in their use.

Let me underscore one thing. As the Congress has done in the bill, there is a service payback commitment, so the Government is

going to get a return on that investment, either through the individual's service, or if the individual leaves prematurely under certain circumstances, through a payback requirement. So I think that is the right balance there, as well.

Ms. DAVIS OF VIRGINIA. How does OPM view the merits of the payment of bonuses as opposed to increasing the pay grade?

Mr. SANDERS. I think the two have to be looked at together, because increases in grade or permanent promotions or pay adjustments to base salary are permanent. I mean, the typical strategy is to reward high performance with a bonus 1, 2, or 3 years until it is clear that the individual is going to sustain that high level, and then award that individual a base pay adjustment—I think that's the way it has worked for many years—so that we can, in fact, recognize high performers for one-time acts and over a sustained period. I think that combination will work very well.

Ms. DAVIS OF VIRGINIA. So OPM prefers the bonuses as opposed to raising the scale, pay grade?

Mr. SANDERS. I think certainly the flexibilities here will help complement base pay adjustments, as opposed to sort of playing games with the classification process and raising grades artificially. This certainly would be preferable.

Ms. DAVIS OF VIRGINIA. I think I've got another minute or two. Let me go to—I heard you say in Senate bill S. 129 that OPM opposes the amendment that they put in there with regard to compensation for travel. I'm not so sure I'm in agreement with OPM on this one. It sounds like a good proposal to me. It is my understanding that if an employee were to be able to get compensated for traveling early in the morning for that time for travel, that maybe they would not then go the night before and incur hotel costs, meals, etc. So why would it not be better to give them time off for having to leave early in the morning and go? I'm just trying to see why you oppose it.

Mr. SANDERS. Madam Chairwoman, let me say this. This issue has recently been raised with Director James. She's willing to take a fresh look, and in so doing she is going to reach out to all of the interested stakeholders, including this subcommittee, so stay tuned.

Ms. DAVIS OF VIRGINIA. If you could ask her to take a close look at it and just get back to me with exactly why you would oppose it, because just at first glance it sounds like a reasonable amendment to me and I tend to agree with it.

I am going to yield now to Ms. Norton.

Ms. NORTON. Thank you, Madam Chairwoman.

I have a question on the ALJs. I'm really trying to understand the role of OPM since the restructuring of Federal agencies began, and that is the context in which I look at everything now because increasingly it sounds to me as though they may be downsizing agencies in their personnel, but it looks like OPM is being downsized in its mission.

I would like to know the nature of the collaboration you have had, very specifically what role you have played in the proposed DOD proposal—"you" meaning OPM.

Mr. SANDERS. As I said, that process is just now beginning. To be quite candid about it, our attentions have been focused prin-

cipally on bringing the Homeland Security system home, which I believe is imminent. That has absorbed the attentions of my staff and myself for many, many months, and we are just now beginning to turn our attention to DOD.

I can tell you that in this bill OPM's role is pretty clear and pretty firm. In every case, the Congress has authorized the Director to issue implementing regulations, and in many cases that authority is very, very broad, and we appreciate that because some of the problems addressed here are so complex that legislation would be problematic. So I see nothing in the Workforce Flexibility Act that diminishes OPM's role in any way whatsoever.

Ms. NORTON. I appreciate your answer on the Workforce Flexibility Act, but my question was about the DOD proposal, and your answer was that you have been so busy with Homeland Security that you have had zero role in that proposal. Let me tell you why that—you know, if you want to revise that answer—you changed the subject from the question I asked. If you want to revise that answer, I'm pleased to hear it.

Mr. SANDERS. As I said, we——

Ms. NORTON. Did you play any role—were you in any meetings with the DOD when they prepared the proposal that has been leaked to the press and that is now in the newspapers?

Mr. SANDERS. We have seen the proposal, yes, ma'am.

Ms. NORTON. You know, I saw it, too, but that was not my question.

Mr. SANDERS. As I indicated——

Ms. NORTON. Let me tell you why I——

Mr. SANDERS [continuing]. We have just now begun——

Ms. NORTON [continuing]. Am asking the question. I'm not trying to embarrass you. I'm sorry you weren't in it, frankly. But when we are restructuring huge parts of the Federal Government, when we are changing the 100-year-old Civil Service system, I think the very least the public and the Congress has a right to expect is that somebody who has been in touch with that system be in on the ground floor when you change that system. I don't know how—I mean, when the Homeland Security Department was set up, they were given the authority to go out and look for their own buildings. You know what they did? They quickly came back to the GSA because they said, "You know, we don't know anything about finding space and GSA does," and even though we have our own authority they asked the GSA to help them. Now, the DOD doesn't know squat about Civil Service, about what protects Federal workers, about what the Federal Government is entitled to, and yet without any experts from the OPM in the room they sit down and they write a proposal and they say, "Look, you take a look at this." It seems to me it might have been the other way around. You write the proposal and you say, "You take a look at this and adjust this to your needs." If we don't go on record saying that now, we are going to have another whole year where agencies write their proposals, strip workers of their rights, come in with asinine proposals even relating to their own efficiencies, and we're not going to stand for it. You know, you've done it twice. We're not going to stand for it.

[Applause.]

Ms. DAVIS OF VIRGINIA. I will say once again this is a hearing and it will be conducted that way. There will be no outbreaks of applause. Thank you.

Ms. NORTON. Let me ask something about the ALJs. I just think you ought to carry back to OPM that I am not speaking just for myself. Let me ask a word about ALJs. I chaired the EOC. I have the greatest respect for ALJs and what they do. I take it—let me ask you, do you agree that the ALJ is a judge?

Mr. SANDERS. I think the title is appropriate. It is an administrative law judge. They are different from judges in the judicial branch of our Government.

Ms. NORTON. Do you care to elaborate on that?

Mr. SANDERS. Administrative law judges do exactly what their title says they do—they interpret administrative rules and statutes as part of——

Ms. NORTON. No. I mean the difference is that one interprets administrative rules and statutes and the other interprets law. OK. But the reason we have a system, a special system for them—and we do have a special system. Civil servants, of course, can be disciplined in an entirely different way from an ALJ. Everything has to be on the record. Because, after all, these people handle administrative law decisions in the same way that a district court judge handles legal decisions. One thing that we're trying to let everybody—and they're bringing it all around the world—know is we have an independent judiciary. One of the ways in which we make them independent is we do not mess with their pay. I'll tell you something. There are some judges whose pay I would like to compress and mess with. But we have an independent system, and so do we in the administrative system have an independent system.

I want to know how you would reconcile the pay compression which you concede does exist with ALJs with the notion of an independent judiciary within the administrative process.

Mr. SANDERS. All you're doing, Ms. Norton, is changing the point of compression, and in so doing you have created a fundamental unfairness with the SES pay for performance system and members of the Senior Executive Service, that system now just being implemented, because what will happen with the ALJ reform bill is that, with the capping raised to executive level III plus locality pay, the vast majority of judges will go to the base pay limit of level III, they'll get locality pay on top of that, and most of them will move to level II. They'll move to level II automatically without any regard to performance or quality or anything else.

Contrast that with the SES pay for performance system. There are two very difficult steps for members of the Senior Executive Service to get anywhere near level II. First, agencies have to be certified as having performance appraisal systems that make meaningful distinctions. Those are Congress' words. We are about to issue the certification criteria. Not every agency is going to be certified. That is a high bar. And even when agencies pass that bar it doesn't mean that every SES member is going to go from level III to level II. It is only for the few that earn it. It is performance based, no more automatic, no more across the board. And it is that fundamental unfairness that I think is the principal opposition to the ALJ bill, that ALJs will suddenly move to that level without

any regard to performance, and we're telling Senior Executive Service members, "You can't, you won't, you have to earn it."

Ms. NORTON. And are you saying you believe that the ALJ system should be performance based in that sense?

Mr. SANDERS. I think there has to be a way to find an analog.

Ms. NORTON. And so what is the—given the independence that an ALJ needs, what is the appropriate analog? I mean, I'd like to find a way into the Federal judiciary, as well, but I don't think I deserve a way into that through the pay system.

Mr. SANDERS. I don't know what the analog is at this time. I do know that independence and performance are not mutually exclusive.

Ms. NORTON. But pay and judicial independence have been exclusive in our independent system.

Let me just—I'm very worried that we will not be able to recruit ALJs of the quality we have been able to recruit in the past. For example, in this new bill you assert that you've had no problems recruiting ALJs. In the new Medicare prescription bill that has just been passed by the Congress, we are informed we will need 350 ALJs simply to adjudicate Medicare benefit appeals. I can tell you, given this bill, you are going to need a whole lot more ALJs, because you are going to get all kinds of difficulties from this bill.

Are you wiling to sit there this afternoon and tell me you think that there will be no recruitment problems whatsoever given the unhappiness of the present roster of ALJs and given the recruitment and retention problems we already have in the Federal Government where you can take that skill and go to the private sector today and earn often a great deal more money? Are you willing to say that you are going to have no trouble getting 350 ALJs for the Medicare prescription drug bill and that the status of ALJs would have no effect upon retention and maintenance? And let me add, 91 percent of your ALJs are already at retirement age. With that context, I'd like your answer.

Mr. SANDERS. I am willing to say that, as far as the data has shown to date, there are no recruiting or retention difficulties.

Ms. NORTON. But, of course, the role of the OPM is to prepare for recruitment. Recruitment, by definition, means you are looking into the future in order to be able to draw people in. Let me ask you then very specifically, you know about the new Medicare prescription drug bill. Have you looked into the question of whether or not you will be able to recruit ALJs to administer that bill?

Mr. SANDERS. I can tell you that my testimony was circulated to all agencies, including those that employ ALJs, and they concurred with the testimony.

Ms. NORTON. With the testimony that what? Answer my question, sir.

Mr. SANDERS. That we oppose the ALJ pay reform bill as it is currently structured.

Ms. NORTON. You know, I just want to say this. You're not going to get away with not answering my questions by answering some other question. My question again is: has the OPM, whose job is recruitment and maintenance, looked to see whether or not it will be able to recruit ALJs knowing that a whole new body of ALJs is necessary for the prescription drug bill? Have you looked at that

yet? And I'd like you to answer that question, not some other question that you have decided to answer.

Mr. SANDERS. That is our job, and we have, and we base the conclusion on two pieces of data. One, historically there are no recruiting or retention problems. They, in fact, are less than for the Senior Executive Service. Two, we have to ask the agencies that actually employ ALJs. They are in a far better position than we are to make those judgments. They, too, have concurred that the way as it is currently written, the ALJ pay reform bill is not something that we can support.

Ms. NORTON. That bill was written—I understand my time is up, Madam Chairwoman—that bill was written before the prescription drug bill was passed, and I am going to ask you to go back to the OPM and ask them to do a specific planning and recruitment study to make sure that, in fact, there are enough ALJs at the HHS to administer this new bill. Could I get that promise from you?

Mr. SANDERS. If you require us to do that, we will certainly comply.

Ms. NORTON. I'm requiring you to do it, sir.

Ms. DAVIS OF VIRGINIA. If you would take that back to Director James and ask her to get it back to us, we will make sure that the members of the committee have the answer to it.

Let me just clarify one thing. You were comparing ALJs to SESers. The SESers do have performance based but ALJs do not, correct?

Mr. SANDERS. Yes, ma'am.

Ms. DAVIS OF VIRGINIA. I just wanted to clarify that.

And let me just say one thing, because we tend to keep going to something other than what is the issue of this hearing today. You know, any of you who were here when we had—most of you probably were—when we had the hearings on the DOD personnel transformation, many of us, including the Chair, were not happy with the way the bill came down, and I cannot honestly say I am 100 percent happy with the bill as it passed; however, we will—and I will tell you, Ms. Norton, that we will do everything in our power before any other changes are made with our Federal workers, that we will continue to fight to make sure that it comes to the jurisdiction of this committee and that we have fair and open hearings so that we know both sides of the issue, and we will do our best to fight and make sure it is done in a fair manner.

Ms. NORTON. Thank you, Madam Chairwoman.

Ms. DAVIS OF VIRGINIA. Again, I thank you, Mr. Sanders, and I appreciate your being here today.

With that, we will go to the second panel.

Mr. SANDERS. Thank you.

Ms. DAVIS OF VIRGINIA. I would like to point out, to those of you who are interested in the DOD personnel transformation, which I think is probably 99.9 percent of you in the room here, I have spoken to the Secretary of the Navy, Secretary Gordon England, and he has been charged with working with the unions to make sure that this transition, this transformation, is done in a way that is fair and open to the unions, so if he has not been in touch with you yet, be assured that he will be. He has been appointed as the

point man by the Secretary of Defense. His name is Gordon England, by the way.

If the second panel will come forward—I'd like to thank our second panel of witnesses. The record will show that I have sworn you in previously, so we will first hear today an opening statement from Judge Kevin Dugan, vice president of the Association for Administrative Law Judges.

Judge Dugan, thank you for being here. Again, for all of you we have your written statements in the record, so I would ask you to summarize your statements in 5 minutes.

STATEMENTS OF KEVIN DUGAN, VICE PRESIDENT, ASSOCIATION FOR ADMINISTRATIVE LAW JUDGES; JOHN GAGE, NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES; COLLEEN M. KELLEY, NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION; AND CARL DE MAIO, PRESIDENT, THE PERFORMANCE INSTITUTE

Mr. DUGAN. Thank you. Good morning, Chairwoman Davis and members of the subcommittee. I am Kevin Dugan, Association of Administrative Law Judges vice president. I currently am an administrative law judge in the Office of Hearing Appeals in Charlotte, NC, with the Social Security Administration.

The Association of Administrative Law Judges represents the professional interests and concerns of approximately 1,000 administrative law judges in the Social Security Administration and the Department of Health and Human Services. On behalf of the administrative law judge community and the ALJ-related associations that join in support of my testimony, let me extend our appreciation, Chairwoman Davis, for today's hearing and this opportunity to testify.

My association and all other Federal ALJ groups strongly supports your legislation, H.R. 3737, which would address ALJ pay compression problems that diminish the capacity of the Federal Government to recruit and retain the finest candidates and incumbents in the administrative law judiciary. There are approximately 1,300 administrative law judges in 28 Federal agencies and departments. They conduct trial-type hearings for cases brought under Federal statutes. In fact, the Supreme Court has declared that Federal administrative law judges are functionally similar to Federal trial judges.

The impact of ALJ decisions is considerable. Their jurisdiction includes a wide range of significant and diverse regulatory matters, including areas from anti-trust to banking practices to environmental matters, food and drug safety, and so on. These cases may involve millions or even billions of dollars and have considerable impact on the national economy.

Equally important, ALJs also adjudicate hundreds of thousands of individual cases each year that determine personal entitlement to recompense or benefits. These cases, more personal in nature, are of considerable and equal importance to the millions of Americans involved. For many, this is the first and only contact they will have with the adjudicatory authority of the Federal Government.

I think it important to realize that the SSA disability adjudication system is the largest legal system in America—over half a mil-

lion cases a year. Despite the importance of the administrative legal system to the American public, a significant problem exists with ALJ pay. The ALJ pay system was changed in 1991 when the basic pay levels were tied to specific percentages of executive schedule level IV. Because of the linkage, administrative law judges failed to receive annual cost of living adjustments for four straight years, and ALJ pay fell considerably behind that of other Federal employees.

Further, we must also recognize that ALJ locality pay is capped at the pay level for executive level III, impacting many current ALJs.

A very telling point is that in 1991 entry level pay for an ALJ was equal to a GS–15, step 5/6. Today that is at a GS–14 step 7/8 level, a virtual—almost a full grade pay cut. And this does not even take into account bonuses and awards available to GS employees which properly are not authorized for ALJs.

As a result of these pay compression problems, the Federal Government is at a distinct competitive recruiting disadvantage. It is well recognized that the pay for Federal administrative law judges has not kept pace with salaries in the private sector. Now we see that they have not even kept pace with the Government's own GS pay schedule.

The problem has become so extreme that Federal Energy regulatory chairman Pat Wood wrote to President Bush that we are having difficulty attracting and retaining the high quality of administrative law judges that we need to handle our challenging case load. That is why we are so pleased to speak on behalf of this bill. H.R. 3737 would respond to these pay problems by revising the minimum and maximum levels of pay. You may wish to refer to Chart B. The availability of locality pay adjustments would also be assured.

In view of the benefits and reasonableness of this approach, we urge the subcommittee to approve H.R. 3737.

This concludes my statement. Once again, Madam Chairwoman, on behalf of the ALJ community we thank you for your continued interest and support.

Ms. DAVIS OF VIRGINIA. Thank you, Judge. You have my vote. You did it in less than your 5 minutes.

[The prepared statement of Mr. Dugan follows:]

TESTIMONY OF
KEVIN DUGAN
VICE PRESIDENT, ASSOCIATION OF ADMINISTRATIVE LAW JUDGES

BEFORE
THE SUBCOMMITTEE ON CIVIL SERVICE
AND AGENCY REORGANIZATION
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

FEBRUARY 4, 2004

Chairwoman Davis and Members of the Subcommittee:

I am Kevin Dugan, vice-president of the Association of Administrative Law Judges. I serve as an Administrative Law Judge in the Office of Hearings and Appeals of the Social Security Administration in Charlotte, North Carolina.[1] The Association of Administrative Law Judges represents the professional interests and concerns of the approximately 1,000 administrative law judges in the Social Security Administration. These adjudicatory officers constitute the vast majority of ALJs in the federal government and represent the largest constituency of ALJs in any federal department or agency.

On behalf of the Administrative Law Judge community and the ALJ- related associations that join in support of my testimony[2], let me extend our appreciation, Chairwoman Davis, for today's hearing in focusing upon additional federal human resource management tools to meet the challenges of the 21st century.

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[1] This statement is presented in my personal capacity as an officer of the Association of Administrative Law Judges and does not necessarily reflect the official view or position of the Social Security Administration.

My association and all other federal ALJ groups strongly support your legislation, H.R. 3737, which would address the ALJ pay compression problem that diminishes the capacity of the federal government to recruit and retain the finest candidates and incumbents in the administrative law judiciary. The legislation would increase the minimum and maximum rates of basic pay for administrative law judges and continue the availability of annual locality pay increases for ALJs equivalent to those provided to General Schedule employees. This legislation represents a reasonable approach toward the ALJ pay compression problem by moderately raising the pay cap, yet retaining the same general framework that confers discretion upon the President to provide annual pay adjustments to ALJs consistent with those given to employees under the General Schedule.

Before further addressing the bill's merits, let me briefly describe the size and nature of the federal government's administrative law judiciary, as well as the importance of the adjudicative work it performs. The federal government currently employs approximately 1300 administrative law judges in nearly 30 federal departments and agencies. They hear and decide cases under federal statutes that require adjudicatory hearings governed by the procedures of the federal Administrative Procedure Act of 1946. All ALJs conduct trial-type hearings. In fact, the Supreme Court has declared that federal administrative law judges are functionally similar to federal trial judges.[3]

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[2] My testimony is endorsed by the Association of Hearing Office Chief Administrative Law Judges, Federal Administrative Law Judge Conference, The Forum of United States Administrative Law Judges and the Judiciary Division of the Federal Bar Association.

[3] Butz v. Economou, 438 U.S. 478 (1978); Federal Maritime Com'n v. South Carolina State Ports Authority, 535 U.S. 743 (2002) ; Rhode Island Dept. of Environmental Management v. U.S., 304 F.3d 31(1st Cir.(R.I.), 2002) (finding that like ALJs at the FMC, Department of Labor ALJs are functionally equivalent to Federal District Court judges); Mullen v. Bowen, 800 F.2d 535, (6th Cir.,1986) (finding that a Social Security ALJ is entitled to deference, while the Social Security Appeals Council is not).

The impact of the actions and decisions of ALJs is considerable. They adjudicate cases involving a range of significant and diverse regulatory matters, involving antitrust, banking practices, commodity futures, education grants, environmental degradation, food and drug safety, housing violations, interstate and retail pricing of electricity, oil, and natural gas utilities, immigration law, international trade, labor, mine safety, occupational workplace conditions, postal rates, telecommunications licensing, and unfair labor practices. The cases heard and decided by ALJs may involve millions, even 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 also adjudicate hundreds of thousands of cases each year determining personal entitlement to black lung, Social Security and disability benefits. These cases, more personal in nature, are of considerable and equal importance to the millions of Americans involved. For many, it is their first and only contact with the adjudicatory authority of the federal government.

Under the Administrative Procedure Act, administrative law judges are hired by their respective agencies on a merit basis to ensure fair and impartial on-the-record hearings. They are selected from a register of candidates maintained by the Office of Personnel Management, after submission of a lengthy and detailed application which demonstrates at least seven years of qualifying experience, the taking of written and oral examinations, and a review of their references.

How ALJs are paid has evolved over time. Prior to 1990, Federal administrative law judges were classified in the General Schedule as GS-15, GS-16, GS-17 or GS-18. In 1990, the Federal Employee Comparability Act removed General Schedule coverage of ALJs and

established a professional pay system modeled upon the Senior Executive Service. Basic pay levels were tied to specific percentages of Level-IV under the Executive Schedule and the maximum basic pay was set at 100% of Executive Level IV pay.

Because of the statutory linkage of the Executive Schedule to Congressional pay, administrative law judges failed to receive annual cost-of-living adjustments for four straight years, from 1994-97 when Congress refrained from giving itself a pay raise. The pay of ALJs accordingly fell considerably behind that of other Federal employees during the 1990's. This prompted Congress in 1999 to enact legislation (P.L. 106-97) providing the President the authority to provide annual pay adjustments to ALJs, similar to that already accorded the Senior Executive Service, and to adjust Administrative Law Judge salaries within a broadband range of 65% to 100% of Executive Level IV pay.

Under current law, ALJ basic pay ranges between a minimum of 65% of EL IV (adjusted to approximately 66.6% by OPM) and 100% of EL IV (see Chart A). Entry-level pay is at the minimum level. Only five Chief Judges are paid at AL-1, the equivalent of EL IV. Approximately 30 Chief and Deputy Chief Judges are paid at AL-2, about 97% of EL IV. The pay of all other judges ranges between the entry level of AL3-A to the AL3-F level, with the largest number paid at AL-3F (92.1% of EL IV). The Administrative Procedure Act prohibits the payment of performance bonuses and awards to all ALJs in order to ensure their decisional independence.

Despite the 1999 legislation providing ALJ parity with the General Schedule, administrative law judge salaries have not been restored to a point comparable to their prior standing within the General Schedule in 1991.

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In addition to basic pay, administrative law judges are currently eligible to receive locality pay, which is capped at the pay for Executive Level III (currently $144,600). At present, the pay of all AL-1 ALJs (chief judges at major agencies), AL-2 (deputy chief judges at major agencies and chief judges at other agencies), and AL-3F administrative law judges in nine[4] of the 32 localities designated by the President's Pay Agent (including the "Rest of United States" category) are capped at this figure. This represents the total maximum pay that an ALJ may receive because ALJs properly are prohibited by law and regulation from receiving any merit-based performance bonuses.

Each year that Executive Level III pay does not advance at the same pace as that of the General Schedule, more administrative law judges become capped at the Executive Level III pay. Indeed, the pay of AL-3F administrative law judges in nine other localities are within 2% of the Executive Level III pay cap,[5] and that of AL-3F administrative law judges in all localities are within 5% of the cap.

As a result of these pay compression problems, the federal government is at a distinct competitive disadvantage in recruiting competent, experienced private and federal sector attorneys into the federal administrative law judiciary. It is well-recognized that the pay for federal administrative law judges has not kept pace with salaries in the private sector. More startling, basic pay for administrative law judges has not even kept pace with the basic pay of senior government attorneys. The basic pay of GS15/step 10 attorneys exceeds that of entry level administrative law judges by over 24% ($21,846). Even the basic pay of a GS14/step 7

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[4] Boston, Chicago, Denver, Detroit, Hartford, Houston, Los Angeles, New York and San Francisco.

[5] Miami, Minneapolis, Philadelphia, Portland (Oregon), Sacramento, San Diego, Seattle and Washington, D.C.

Federal attorney ($90,610) exceeds that of the entry-level administrative law judge. Moreover, this does not take into consideration that government attorneys are statutorily eligible for merit bonuses which increase their pay.

Given the current federal salary landscape, mid-level government attorneys are more inclined to pursue a position in the Senior Executive Service than the administrative law judiciary as a career choice. Recruitment of the most senior career-level government attorneys to serve as administrative law judges will likely become more difficult because of recent changes to the Senior Executive pay system, which raised the pay cap for SES members to $157,000. In comparison, the highest base pay for administrative law judges – accorded to only a relative handful of chief administrative law judges at major departments and agencies -- currently stands at $136,000. The greatest number of ALJs are capped at the AL-3F base pay level, at $125,300. Thus, it is unlikely that an attorney in the Senior Executive Service would seek to become an administrative law judge. Federal attorney disinterest in the pursuit of entry into the ALJ ranks is only likely to increase, as higher pay under expanding pay-for-performance coverage becomes available. As noted previously, ALJs are necessarily prohibited by law and regulation from receiving merit-based performance compensation to protect their judicial independence.

The impact of pay upon the recruitment patterns of administrative law judges during the past several years has been clouded by the unavailability of qualified ALJ candidates through the OPM-maintained register of candidates. The *Azdell* litigation, now pending before the Supreme Court on writ of *certiorari*, contests the validity of scoring methods used by OPM in its maintenance of the register. The litigation has precluded agencies from hiring new ALJs from the register, making it difficult to reach definitive judgments about recruitment patterns. Nonetheless, anecdotal evidence suggests that the quality of ALJ candidates has declined,

presumptively in large part to due to pay concerns by qualified attorneys over joining the ALJ ranks.

Administrative law judges who assisted the Office of Personnel Management in scoring the written examinations of the last group of applicants found that many of the candidates were not capable of performing the tasks required of administrative law judges. Moreover, under the prior scoring formula, the Office of Personnel Management chose not to exclude anyone, so these applicants are included in the large number of names currently on the administrative law judge Register.

In an October 30, 2001, letter to President Bush, Federal Energy Regulatory Chairman Pat Wood described the problem facing the agency's recruitment and retention of able administrative law judges:

> "[W]e are having difficulty attracting and retaining the high quality of Administrative Law Judges that we need to handle our challenging caseload. [I urge you to] broaden the basic compensation for [administrative law judges] to eliminate pay compression so we can retain our most experienced judges (most of whom are eligible for retirement) and enable us to attract the best and brightest senior attorneys as new judges."

H.R. 3737 would respond to the pay compression problem faced by all government departments and agencies employing administrative law judges by revising the minimum and maximum levels of pay payable to ALJs (see Chart B). It would establish the minimum entry-level of basic pay at 65% of EL III and maximum basic pay at EL III. Within this range, Chief Judges at major agencies would be paid at the maximum of EL III, Chief Judges at other agencies and Deputy Chief Judges at major agencies would be paid at about 97.4% of EL III, and the most senior ALJ would be paid at about 92.1% of EL III. Entry level ALJs would receive about 66.5% of EL III. The availability of locality pay adjustments also would be assured. In

view of the benefits and reasonableness of this approach, we urge the Subcommittee to approve H.R. 3737 as soon as possible.

This concludes my statement. Once again, Madame Chair, on behalf of the administrative law judge community, thank you for your continued interest and support. I am available to answer any questions you may have.

CHART A

2004 Administrative Law Judge Pay Schedule

AL	Basic Pay
1	$136,000
2	$132,400
3F	$125,300
3E	$118,300
3D	$111,400
3C	$104,400
3B	$ 97,400
3A	$ 90,500

Established by under E.O. 13322 (December 30, 2003)

CHART B

HR 3737 would establish the following levels of ALJ basic pay, assuming linkage of the current percentages to the Executive Schedule, as established by the Office of Personnel Management.

AL	CURRENT PAY	PAY UNDER HR 3737	DIFFERENCE
1	$136,000	$144,600	$8,600
2	$132,400	$140,900	$8,500
3F	$125,300	$133,200	$7,900
3E	$118,300	$125,900	$7,600
3D	$118,600	$111,400	$7,200
3C	$111,100	$104,400	$6,700
3B	$ 97,400	$103,600	$6,200
3A	$ 90,500	$ 96,200	$5,700

Ms. DAVIS OF VIRGINIA. Next we will hear from two of our very popular today, I believe, employee groups, Mr. John Gage, the national president of the American Federation of Government Employees, and after him will be Ms. Colleen Kelley, national president of the National Treasury Employees Union. As always, it is a pleasure to have both of you back before this subcommittee.

Mr. Gage, we have your written testimony in the record, so if you could summarize your testimony in 5 minutes it would be appreciated.

Mr. GAGE. Thank you, Madam Chairwoman. On behalf of the 600,000 Federal employees represented by AFGE, I thank you for the opportunity to testify today.

In my written statement I have explained our union's views of the bills under consideration today. AFGE strongly prefers Senate bill 129 as marked up because the broad demonstration project authorities that remain in the House bill have been eliminated. I urge the committee to take similar action with regard to the House bill. At a minimum, we consider expansions in demonstration project authority unnecessary in light of the enormous and radical experiments being undertaken at the Department of Homeland Security and Department of Defense.

Last Friday the DOD put forth its plans for the so-called "National Security Personnel System." It is a deceitful document from top to bottom, starting with its name, since it has nothing whatsoever to do with national security. As you know, AFGE strongly opposed the legislation that gave the Secretary of Defense the authority to rewrite the pay and labor relations system in the agency. And, Madam Chairwoman, you no doubt recall that when Dr. David Chu testified before your committees to argue his case, he insisted that Secretary Rumsfeld had no intention of eliminating collective bargaining and replacing it with something inferior. He promised that all we wanted to do, all we needed was efficiency, national bargaining instead of local bargaining over 1,300 contracts when the issue was one that affected the entire agency.

It is my understanding, Madam Chairwoman, that you specifically intended for collective bargaining to be protected under the statute. While we disagreed over the exact legislative language, I believe that your goals and our goals with regard to protecting collective bargaining were the same.

During the debate over the legislation, AFGE repeatedly warned that if Congress gave Secretary Rumsfeld the authority sought that he would abuse that power, and indeed he has. His proposal states that bargaining will be accomplished through a form of consultation both at the local and national level, but bargaining cannot be accomplished through consultation. It can only be replaced by it. Consultation merely allows employees to present comments to the agency and presumes the agency's right to ignore them. They'll talk to us, and then they'll implement. Bargaining, on the other hand, requires the change of good faith proposals that may differ, and when agreement or compromise is not achieved the impasse is resolved through a neutral third party.

In his bill or in his proposal he puts a thing out there that he calls "We'll talk with you when it is a significant change to the bargaining unit." I have been down this road before. So when a work-

ing condition change applies to a smaller group within a large bargaining unit—and some of our bases have very large bargaining units, but when it affects maybe 100 electricians or whatever he'll say, "No, we're not going to talk about that because it doesn't significantly affect the whole bargaining unit." I've seen it before, and that's exactly what is contained in this proposal.

Mr. Rumsfeld would replace collective bargaining and collective bargaining agreements with regulations that he issues unilaterally. In his blueprint, he decrees that management issuances, whatever that is, will supersede contracts, as well as past practice. That is, there will be no contracts. He further decrees, "The new labor relations system will not employ any provisions of 5 U.S.C. Chapter 71," which is the section of the law that grants union rights, collective bargaining rights, and the right to have grievances heard by a neutral third party.

This proposal treats the men and women who serve this Nation as civilian employees of the Defense Department as errant children who don't deserve anything more than, "Because I said so" as justification for decisions made by management. This management is not infallible. The pillars of this system outlined by DOD will be management by fear, intimidation, and coercion, and the resulting loss to the public's interest will be discrimination, crony-ism, favoritism, and patronage.

I have been talking to a lot of DOD employees recently, and this is already—the horse is out of the barn. Jobs that they have been working for and trying to compete for, promotions are already being filled by people who are brought in, and as you investigate it you see a little connection here on the crony-ism type of basis. I think that's something that has to be stopped immediately.

We submit that there is no national security rationale for eliminating collective bargaining and neutral third party oversight, but Mr. Rumsfeld has thrown up an additional set of proposals for which no conceivable connection to national security could ever be asserted. He wants to dictate the number of people who have to vote in union elections before he will declare them valid. He wants to immunize DOD from any responsibility for failure to process union dues payments. He has ruled out restitution as a remedy for employees if DOD should ever find itself in violation of its own regulations. To top it off, he has decided to exclude whole categories of employees from the benefits of union representation, including anyone whose job requires certification, such as fire fighters, electricians, contracting officers, and attorneys, all of whom would be eligible for union membership if they worked for any other employer in the United States, public or private.

The very human impact of a negotiated contract achieved through collective bargaining is that employees will be able to have their benefits, their working conditions, their opportunities for promotions, flexible working conditions, and the standards for discipline encapsulated in a written document that has been agreed to by the employee representatives, as well as management. This document, precisely because it is in writing, is transparent to the workers, but most of all it is enforceable.

Ms. DAVIS OF VIRGINIA. Mr. Gage, I don't mean to interrupt you, but you are about 1 minute over your 5 minutes already, and I've

heard you speak on the bills. Did you have anything else that you wanted to say on the two bills that are the subject of this hearing?

Mr. GAGE. Well, I think if we are talking about retaining and recruiting employees, I think we really have to look at the road we are going down, Madam Chairwoman. Something has to be done about this. You can't let a personnel system be based on this type of union busting, and that is what is happening here. None of these provisions result in any type of safeguard to national security. But I appreciate the time and I appreciate the opportunity to testify.

Ms. DAVIS OF VIRGINIA. And I don't mean to interrupt you, but we do have your full statement in the record, and I would assume all the Members have read it, but we do have other witnesses that we want to testify, and we wanted to be able to get to the questions, because I'm sure many of the Members want to ask questions.

[The prepared statement of Mr. Gage follows:]

STATEMENT BY

JOHN GAGE
NATIONAL PRESIDENT
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

BEFORE

THE SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY OPERATION
HOUSE COMMITTEE ON GOVERNMENT REFORM

REGARDING

THE NEED TO PROVIDE FAIR COMPENSATION TO THE FEDERAL WORKFORCE

ON

FEBRUARY 4, 2004

American Federation of Government Employees, AFL-CIO
80 F Street, NW, Washington, D.C. 20001 ★ (202) 737-8700 ★ www.afge.org

about alternatives to the General Schedule. Indeed, the results of pay-for-performance projects were distorted and important facts such as funding levels, and the views of employees, particularly those who are members of racial minorities, were omitted. The "best practices" DoD identifies are not best practices from the perspective of employees' aspirations be treated fairly, judged according to objective criteria, and have opportunities to hold management accountable for demonstrated evidence of discrimination in pay and/or assignments.

The fact that the results of pay for performance demonstration projects were not presented in a fair or balanced way in the debates over expanded managerial authorities for DoD or DHS makes us especially cautious regarding proposals to expand demonstration projects' size or ubiquity. Further, it elevates the importance of making certain that the baseline pay system is not caricatured, and that its virtues as well as its weaknesses are well-understood.

As proponents of pay for performance put forth their propaganda, it is worth recalling that the General Schedule system they seek to eliminate and replace has considerable pay for performance components. The basic structure of the General Schedule is a 15-grade matrix with ten steps per grade. Movement within a grade or between grades depends upon the satisfactory performance of job duties and assignments over time. That is, an employee becomes eligible for what is known as a "step" increase each year for the first three years, and then every three years thereafter up to the tenth step. *Whether or not an employee is granted a step increase depends upon performance*

the same time, it undermines the role of Congress in setting the terms and conditions of federal employment.

The language that removes the numerical limits on demonstration projects makes it possible to put almost the entire federal government under a "demonstration project." Likewise, whole agencies or groups of agencies could be part of one "demonstration project." Although AFGE has long supported the use of demonstration projects that were genuine experiments and had the consent and support of affected employees, as expressed through the collective bargaining process, our recent experience in Congressional debates over the DHS and DoD personnel systems has given us reason to be more cautious. In addition, putting entire agencies, groups of agencies, entire occupational series, or other very large groups under these projects risks doing away with the General Schedule, the Federal Employees Pay Comparability Act (FEPCA), and the classification system as a substantial baseline against which to measure the success or failure of the project.

The fact is that the DHS and DoD personnel systems will constitute enormous demonstration projects, since not only do they cover roughly 900,000 federal employees (half of the total Executive Branch employment), but they also will be implementing systems that have never "demonstrated" any kind of success. Indeed, one of the most frustrating aspects of the debate over whether to grant open-ended authority to DoD with regard to the design and implementation of new pay and classification systems was DoD's insistence that its past experience with demonstration projects had taught it all it needed to know

employees. The Defense Department was granted these authorities before anything was known about the personnel system that will be implemented in the Department of Homeland Security (DHS) which has similar authorities, or whether the DHS experiment will turn out to be a success or failure. AFGE strongly opposed the DoD bill and continues to consider DoD's approach highly dangerous and ill-advised. There is no question that the more than 200,000 federal employees AFGE represents within DoD recognize the agency's actions and intentions as hostile to their interests. They know and understand that the "pay for performance" schemes that DoD intends to impose will involve substantial financial sacrifice for them and their families.

AFGE's members who work in DHS and DoD are on the front lines every day ensuring the safety of our nation and its citizens. It was unconscionable that the Administration chose to punish these workforces at the very moment that they were engaged in helping to respond to heightened security threats and mobilize for the war with Iraq. They are still stunned by the charge that their efforts to protect their civil service union rights were evidence that they constituted a lazy, unreliable, unpatriotic, and unmotivated workforce eager to undermine our nation's security.

It is in that context that we view the provisions of H.R. 1601 relating to demonstration project authority, which were stripped from S.129. The House bill and the original Senate bill eliminate the cap on the number of federal employees in a demonstration project. But eliminating the 5,000 employee maximum undermines not only the concept of demonstration projects as experiments. At

agency missions or long-term cost to taxpayers. We will never know what portion of the workload these 400,000 federal employees performed was contracted out. Some portion of the work was simply taken on by the survivors whose salaries continued to languish in the shadow of FEPCA's unrealized promise.

And then came the present Administration's privatization quotas. Although the most recent rhetoric from the Office of Management and Budget (OMB) casts the current version of the quotas as requiring certain numbers of large and small competitions carried out under certain time frames, rather than specific numbers of jobs to be outsourced, the impact is the same. Privatization quotas, which require every Executive Branch agency to privatize or review for privatization 850,000 federal jobs that have been deemed "commercial" has been as destructive of the federal workforce and the reputation of the federal government as an employer as the repeated failure to fund or implement FEPCA. Compliance with President Bush's privatization quotas, along with the implementation of the OMB's controversial rewrite of Circular A-76 (which sets forth the rules for deciding whether and how to privatize government work) have combined to worsen dramatically the prospects of solving the government's human capital crisis.

In November 2003, President Bush signed into law legislation that gave the Secretary of Defense broad new authorities affecting collective bargaining, the pay and classification, appellate rights, and rules regarding hiring, assigning, reassigning, detailing, transferring, promoting, and reducing numbers of

This crisis is entirely of the government's own making, and can be reversed by implementing the proper policies.

We believe that the place to start with respect to crafting a solution is to identify what caused the human capital crisis, and implement policies that would reverse and repair the actions that led us to this point. The retirement wave that constitutes the material end of this crisis was foreseen more than a decade ago and was what gave rise not only to the establishment of the Federal Employees Retirement System (FERS) in 1983, but it is also a big part of what motivated the enactment of FEPCA in 1990.

FEPCA presented a moderate and gradual approach to what was then the single biggest problem facing federal employees and those who hoped to recruit and retain them: inferior salaries that lagged behind those in the private sector by an average of about 30%. FEPCA's promise of closing the pay gaps by locality over a ten-year period was never realized because two successive administrations have failed to fund the system. The Clinton Administration cited undisclosed "methodological" problems after the economic emergency loophole became ludicrous in the face of large budget surpluses and the longest economic expansion on record. The Bush Administration has simply refused to comply, insisting that they are only interested in federal pay adjustments awarded on an individual by individual basis at managers' discretion.

As federal employees endured year after year of broken promises regarding comparability, some 400,000 federal jobs were eliminated as part of a politically inspired downsizing campaign that was implemented without regard to

It's a windfall for the hypothetical employee, quite an expensive experiment for taxpayers, and quite an insult to the thousands of rank and file federal employees who are taken for granted and denied competitive salaries, benefits, or any form of job security. The question is: Is it a reasonable response to the "human capital" crisis? Will it allow the government to replace the more than 50% of federal employees who will be eligible to retire within the next 5 years with a new generation of employees who exhibit the same level of skill, dedication, and reliability as our nation has relied upon in the past? What chance is there that employees in the existing workforce who have as good or better skills than those hired under the authorities being contemplated will share in the kind of "critical need" bounty to be lavished on new workers who are either discarded within a short period of time, or expected to leave?

We urge those looking for a way to address the human capital crisis to stop looking for short-term fixes. The government's need for a high quality workforce and comprehensive in-house capacity are neither temporary nor short-term, and the government as well as the employees deserve to have the security and continuity that a workforce with full civil service protections and fully-funded, competitive salaries convey. Taxpayers' interests are best served by knowing that career federal employees, sworn to uphold the public good and work in the public interest for the long term, perform government work.

Human capital crises are not like the weather; they do not just happen. The retirement wave is not a problem because America's workforce is smaller today than it was 30 years ago, the American workforce grows larger each year.

The legislative proposals make the following scenario possible: a recent graduate is hired "directly" for a position at a university job fair, effectively beating out three other candidates who had applied for the position through normal competitive procedures (among the three were a veteran with relevant experience and the same degree from the same university, a disabled veteran with 10 years of federal employment and a similar degree, and a recent graduate from another university with the same type of degree but a higher GPA who mistakenly thought the best route to federal employment was to follow procedures and fill out a Standard Application Form 171). To encourage the direct hire person to accept the position, he is promised bonuses worth 50% of salary each year for two years (indeed, he must also accept a service agreement wherein he agrees to work for the agency for a period of two years). During that two-year period, the agency would repay the employee's student loans. At the end of the service agreement, the employee threatens to leave in the middle of a project. The agency wants to keep him, so a retention bonus of 25% of salary, for two years, is authorized because a "critical need" is identified. At the end of this period, the privatization quotas catch him in their evil vise, and his job is directly converted to contract. Over four years, this employee has received about five and a half years of salary, plus student loan repayment. And the expertise and experience he has built up over that period is lost to the agency. But the authorities and the privatization agenda remain, so the agency can go through this song and dance all over again.

should be a model employer, exemplifying the high road, a positive standard for fair treatment and fair compensation.

AFGE does support the use of bonuses and other financial incentives to reward federal employees. Yet they should never be used as substitutes for a fully funded regular pay system. The "human capital" crisis these bonuses are ostensibly meant to alleviate is in part a result of the repeated failure to implement and fund FEPCA.

We are concerned that neither the marked up version of S.129, nor H.R. 1601 provides funding for either the payment of bonuses, or the expansion of critical pay authority. And it is difficult to pretend that, if enacted, these provisions would improve the government's ability to recruit and/or retain federal employees. Bonus payments do not count as basic pay for purposes of retirement or other salary adjustments. They are a poor substitute for the provision of competitive salaries and regular salary increases that allow employees to maintain decent living standards.

Before implementing a bonuses-for-some (and super-sized salaries for a lucky few) instead of an adequate-salaries-for-all approach, we ask you to consider the following: Should employees who are loyal and have made a decision to dedicate their careers to public service be penalized financially relative to those whose only loyalty is to their individual paycheck? Should the federal pay system reward only those willing to extort a bonus from an agency by continually threatening to leave in the middle of an important project? Or should the federal government pay adequate, competitive salaries to *all* its employees?

again and again by respondents, was that there was no separate funding for them.

AFGE considers the approach to financial incentives for recruitment and retention contained in this legislation to be at best incomplete, at worst, misplaced. Federal salaries are too low not just for prospective employees, or for employees the agencies expect to employ only for a short period. Salaries are too low for all employees. There are market-driven reasons why the federal government should pay competitive salaries, and there are values-driven reasons why the federal government should pay competitive salaries. While market-driven reasons such as recruitment and retention may on the surface only appear to apply to prospective employees and "flight risks," they in fact apply to all employees.

In addition, the federal government should pay competitive salaries and wages to both its blue- and white-collar workforces because it is the right thing to do. The U.S. government and WalMart are today our nation's two largest employers. WalMart indisputably represents the low road in compensation and working conditions. Its strategy of minimal wages, erratic just-less-than full time schedules designed to evade Fair Labor Standards Act (FLSA) requirements and health insurance subsidy eligibility, aggressive union avoidance, unchecked managerial flexibility and its attendant lawsuits charging racial, gender, and ethnic discrimination, constant turnover, and low morale is one the federal government should not even try to emulate. Indeed, the federal government

- paying travel and transportation expenses for new job candidates and new hires
- allowing new hires up to two weeks advance pay as a recruitment incentive
- allowing time off incentive awards
- paying cash awards for performance
- paying supervisory differentials to GS supervisors whose salaries were less than certain subordinates covered by non-GS pay systems
- waiver of dual compensation restrictions
- changes to Law Enforcement pay
- special occupational pay systems
- pay flexibilities available to Title 5 health care positions, and more.

The marked up version of S.129, and H.R.1601, merely increase the size of the bonuses managers are authorized to offer and streamline critical pay authorities. One might conclude from this that its sponsors believe that the size of the bonuses authorized by FEPCA is all that stands between current law and a resolution of the human capital crisis. Yet how do we know that the size of bonuses managers are authorized to pay has been an obstacle to the successful recruitment and retention of federal employees? The Office of Personnel Management (OPM) surveyed agencies in 1999, almost a decade after this broad range of flexibilities had been authorized. The OPM report found that less than 1% of eligible federal employees had ever benefited from the exercise of these authorities. The reason the flexibilities had been so rarely used, cited

infer that the federal government only values employees in their first two years or employees who repeatedly threaten to leave? Where is the recognition that they have been deprived of the promise of federal salaries that are comparable to private sector salaries? The Federal Employees Pay Comparability Act (FEPCA), passed in 1990 with bipartisan support and signed into law by the first President Bush, promised not only pay comparability, but a comparability that would recognize difference in local metropolitan labor markets.

FEPCA introduced a long list of pay flexibilities that managers were authorized to use not only for recruitment and retention, but also for performance management. What follows is not an exhaustive list of FEPCA's flexibilities, yet it does give some perspective to the claim that introduction of "flexibilities" into what has (wrongly) been described as an inflexible and antiquated system for compensating federal employees will be the answer to the human capital crisis. FEPCA introduced:

- locality pay adjustments
- special pay rates for certain occupations
- critical pay authority
- recruitment and retention flexibilities that allow hiring above the minimum step of any grade
- paying recruitment or relocation bonuses
- paying retention bonuses of up to 25% of basic pay

authorities would therefore come at the expense either of hiring adequate numbers of employees to handle an agency's workload, or denying salary adjustments to other employees (or groups of employees) who are either not new or are not willing to extort a big bonus by threatening to leave.

One must question the wisdom of diverting money from a finite salary account to large bonuses for new employees who may stay only for the length of their two or four year service periods, especially in light of the fact that the "human capital crisis" is occasioned by the government's need to replace its retiring *career* workforce. Does an agency come any closer to resolving any portion of the problem presented by the retirement eligibility of half the federal workforce if payment of a jumbo recruitment bonus means abolishing a position in order to attract someone who only plans to stay for two years? Common sense suggests that this will only worsen the human capital crisis, not alleviate it. What can agencies expect newly recruited employees to do after eligibility for 50% bonuses expires?

Will such employees, who would not have accepted the federal position absent the 50% bonus (otherwise why pay it?), stay when their annual incomes decline by one third? One expects that they will not. Any investment in training and any hoped for succession from the earlier generation will have been lost. All the agency will be able to do is go through the whole process again, a constant churning through inexperienced new recruits.

Meanwhile, what are career federal employees who have dedicated themselves and their careers to federal service supposed to think? Are they to

Since the joint hearing on S.129 and H.R.1601 last April, the Senate marked up S.129 and made several improvements. Indeed, the only problematic elements of S.129 that remain are the unfunded recruitment and retention bonus authorities. AFGE strongly prefers S.129 as marked up because the broad demonstration project authorities discussed below have been eliminated. We urge the Committee to take similar action with regard to H.R. 1601.

The fact is that most of the provisions of S.129 and H.R.1601 are not highly objectionable in themselves, unless one measures them against their stated goal of helping to address the government's self-inflicted "human capital crisis," or considers them in the context of the far more pressing needs of federal employees and agencies. Given the myriad problems affecting federal employees and federal agencies, one must ask whether paying some new employees three years worth of salary over their first two years is an optimal use of resources. Should the government put its resources into paying bonuses worth 50% of base salary to those who threaten to leave either for another federal job or a job outside government if they don't get what they want? Are these strategies preferable to paying all federal employees competitive base salaries throughout their careers, rather than just for the first two years or in years when they can manage to mount a credible threat to leave their agency in the lurch? These are the first questions that arise in contemplation of the bonus provisions in both H.R. 1601 and S.129 as marked up.

The resource question is central because the issue of funding in connection with the expanded bonus is neglected in both bills. Exercise of those

Madam Chairwoman, and Members of the Subcommittee: My name is John Gage, and I am the National President of the American Federation of Government Employees, AFL-CIO (AFGE). On behalf of the more than 600,000 federal employees across the nation and around the world represented by AFGE, I thank you for the opportunity to testify today on proposed legislation to address what some call the federal government's human capital crisis.

The Administration insisted on depriving the 170,000 federal employees reallocated to the Department of Homeland Security (DHS), and some 700,000 civilian employees of the Department of Defense (DoD) of many longstanding rights and protections under title 5, including the rights established in the chapters covering pay, classification, performance appraisal, appellate rights with respect to adverse actions, and the right to union representation through collective bargaining. Finally, the Administration has repeatedly questioned the patriotism and loyalty of federal employees who are union members, despite their demonstrated love of country, commitment to public service, and history of heroism both day to day and in moments of national emergency, before, on, and since September 11.

Privatization, union busting, pay stagnation, repeal of civil service protections, and questioning of patriotism – these are facts that define the present milieu for federal employees. Unfortunately, this is the milieu into which S. 129 and H.R. 1601 were introduced, bills that purport not only to expand managers' authorities further, but also, optimistically, to make federal employment more attractive to prospective job candidates.

(specifically, they must be found to have achieved "an acceptable level of competence"). If performance is found to be especially good, managers have the authority to award "quality step increases" as an additional incentive. If performance is found to be below expectations, the step increase can be withheld.

The federal position classification system, which is separate and apart from the General Schedule and would have to either continue or be altered separately and in addition to any alteration in the General Schedule, determines the starting salary and salary potential of any federal job. As such, a job classification determines not only initial placement of an individual and his or her job within the General Schedule matrix, classification determines the standards against which individual worker's performance will be measured when opportunities for movement between steps or grades arise. **And most important, the classification system is based upon the concept of "equal pay for substantially equal work", which goes a long way toward preventing federal pay discrimination on the basis of race, ethnicity, or gender.**

The rationales offered by proponents of pay for performance in the federal government have generally fallen under one of four headings: improving productivity, improving recruitment prospects, improving retention, and punishing poor performers. Perhaps the most misleading rationale offered by advocates of pay for performance is that its use has been widespread in the private sector. Those who attempt to provide a more substantive argument say they support

pay for performance because it provides both positive and negative incentives that will determine the amount of effort federal workers put forward. Advocates of pay for performance wisely demur on the question of whether pay for performance by itself is a strategy that solves the problem of the relative inferiority of federal salaries compared to large public and private sector employers. That is to say, when pay for performance is referred to as complying with the government's longstanding principle of private sector comparability, what they seem to mean is comparability in *system design*, and not comparability in salary levels.

Does a pay system that sets out to reward individual employees for contributions to productivity improvement and punishes individual employees for making either relatively small or negative contributions to productivity improvement work? The data suggest that they do not, although the measurement of productivity for service-producing jobs is notoriously difficult. Measuring productivity of government services that are not commodities bought and sold on the market is even more difficult. Nevertheless, there are data that attempt to gauge the success of pay for performance in producing productivity improvement.

Although individualized merit pay gained prominence in the private sector over the course of the 1990's, there is good reason to discount the relevance of this experience for the federal government as an employer. Merit based contingent pay for private sector employees over the decade just past was largely in the form of stock options and profit-sharing, according to BLS data.

The corporations that adopted these pay practices may have done so in hope of creating a sense among their employees that their own self interest was identical to the corporation's, at least with regard to movements in the firm's stock price and bottom line. However, we have learned more recently, sometimes painfully, that the contingent, merit-based individual pay that spread through the private sector was also motivated by a desire on the part of the companies to engage in obfuscatory cost accounting practices.

These forms of "pay for performance" that proliferated in the private sector seem now to have been mostly about hiding expenses from the Securities and Exchange Commission (SEC), and exploiting the stock market bubble to lower actual labor costs. When corporations found a way to offer "performance" pay that effectively cost them nothing, it is not surprising that the practice became so popular. However, this popularity should not be used as a reason to impose an individualized "performance" pay system with genuine costs on the federal government.

Jeffrey Pfeffer, a professor in Stanford University's School of Business, has written extensively about the misguided use of individualized pay for performance schemes in the public and private sectors. He cautions against falling prey to "six dangerous myths about pay" that are widely believed by managers and business owners. Professor Pfeffer's research shows that belief in the six myths is what leads managers to impose individualized pay for performance systems that never achieve their desired results, yet "eat up enormous managerial resources and make everyone unhappy."

The six myths identified by Professor Pfeffer are:

(1) labor rates are the same as labor costs;

(2) you can lower your labor costs by lowering your labor rates;

(3) labor costs are a significant factor in total costs;

(4) low labor costs are an important factor in gaining a competitive edge;

(5) individual incentive pay improves performance; and finally,

(6) the belief that people work primarily for money, and other motivating factors are relatively insignificant.

The relevance of these myths in the context of the sudden, urgent desire to impose a pay for performance system on the federal government is telling. Professor Pfeffer's discussion of the first two myths makes one wish that his wisdom would have been considered before the creation of the federal "human capital crisis" through mindless downsizing and mandatory, across-the-board privatization quotas. Pfeffer's distinction argues that cutting salaries or hourly wages is counterproductive since doing so undermines quality, productivity, morale, and often raises the number of workers needed to do the job. Did the federal government save on labor costs when it "downsized" and eliminated 300,000 federal jobs at the same time that the federal workload increased? Does the federal government save on labor costs when it privatizes federal jobs

to contractors that pay front-line service providers less and managers and professionals much, much, much more?

Salaries for the 1.8 million federal employees cost the government about $67 billion per year, and no one knows what the taxpayer-financed payroll is for the 5 million or so employees working for federal contractors. But as a portion of the total annual expenditures, it is less than 3%, according to Congressional Budget Office (CBO) projections. Regarding the relevance of low labor costs as a competitive strategy, for the federal government it is largely the ability to compete in labor markets to recruit and retain employees with the requisite skills and commitment to carry out the missions of federal agencies and programs. Time and again, federal employees report that competitive salaries, pensions and health benefits; job security, and a chance to make a difference are what draw them to federal jobs. They are not drawn to the chance to become rich in response to financial incentives that require them to compete constantly against their co-workers for a raise or a bonus.

Professor Pfeffer blames the economic theory that is learned in business schools and transmitted to human resources professionals by executives and the media for the persistence of belief in pay myths. These economic theories are based on conceptions that human nature is uni-dimensional and unchanging. In economics, humans are assumed to be rational maximizers of their self-interest, and that means they are driven primarily, if not exclusively by a desire to maximize their incomes. The inference from this theory, according to Pfeffer, is that "people take jobs and decide how much effort to expend in those jobs based

on their expected financial return. If pay is not contingent on performance, the theory goes, individuals will not devote sufficient attention and energy to their jobs."

Further elaboration of these economic theories suggest that rational, self-interested individuals have incentives to misrepresent information to their employers, divert resources to their own use, to shirk and "free ride", and to game any system to their advantage *unless* they are effectively thwarted in these strategies by a strict set of sanctions and rewards that give them an incentive to pursue their employer's goals. In addition there is the economic theory of adaptive behavior or self-fulfilling prophesy, which argues that if you treat people as if they are untrustworthy, conniving and lazy, they'll act accordingly.

Pfeffer also cites the compensation consulting industry, which, he argues, has a financial incentive to perpetuate the myths he describes. More important, the consultants' own economic viability depends upon their ability to convince clients and prospective clients that pay reform will improve their organization. Consultants also argue that pursuing pay reform is far easier than changing more fundamental aspects of an organization's structure, culture, and operations in order to try to improve; further, they note that pay reform will prove a highly visible sign of willingness to embark on "progressive reform." Finally, Pfeffer notes that the consultants ensure work for themselves through the inevitable "predicaments" that any new pay system will cause, including solving problems and "tweaking" the system they design.

In the context of media hype, accounting rules that encourage particular forms of individual economic incentives, the seeming truth of economic theories' assumptions on human nature, and the coaxing of compensation consultants, it is not surprising that many succumb to the temptation of individualized pay for performance schemes. But do they work? Pfeffer answers with the following:

> Despite the evident popularity of this practice, the problems with individual merit pay are numerous and well documented. It has been shown to undermine teamwork, encourage employees to focus on the short term, and lead people to link compensation to political skills and ingratiating personalities rather than to performance. Indeed, those are among the reasons why W. Edwards Deming and other quality experts have argued strongly against using such schemes.
>
> Consider the results of several studies. One carefully designed study of a performance-contingent pay plan at 20 Social Security Administration (SSA) offices found that merit pay had no effect on office performance. Even though the merit pay plan was contingent on a number of objective indicators, such as the time taken to settle claims and the accuracy of claims processing, employees exhibited no difference in performance after the merit pay plan was introduced as part of a reform of civil service pay practices. Contrast that study with another that examined the elimination of a piece work system and its replacement by a more group-oriented

compensation system at a manufacturer of exhaust system components. There, grievances decreased, product quality increased almost tenfold, and perceptions of teamwork and concern for performance all improved.[1]

Compensation consultants like the respected William M. Mercer Group report that just over half of employees working in firms with individual pay for performance schemes consider them "neither fair nor sensible" and believe that they add little value to the company. The Mercer report says that individual pay for performance plans "share two attributes: they absorb vast amounts of management time and resources, and they make everybody unhappy."

One further problem cited by both Pfeffer and other academic and professional observers of pay for performance is that since they are virtually always zero-sum propositions, they inflict exactly as much financial hardship as they do financial benefit. In the federal government as in many private firms, a fixed percentage of the budget is allocated for salaries. Whenever the resources available to fund salaries are fixed, one employee's gain is another's loss. What incentives does this create? One strategy that makes sense in this context is to make others look bad, or at least relatively bad. Competition among workers in a particular work unit or an organization may also, rationally, lead to a refusal on the part of individuals to share best practices or teach a coworker how to do something better. Not only do these likely outcomes of a zero-sum approach

[1] "Six Dangerous Myths about Pay", by Jeffrey Pfeffer, Harvard Business Review, May-June 1998 v. 76, no.3, page 109 (11).

obviously work against the stated reasons for imposing pay for performance; they actually lead to outcomes that are worse than before.

What message would the federal government be sending to its employees and prospective employees by imposing a pay for performance system? At a minimum, if performance-based contingent pay is on an individual-by-individual basis, the message is that the work of lone rangers is valued more than cooperation and teamwork. Further, it states at the outset that there will be designated losers – everyone cannot be a winner; someone must suffer. In addition, it creates a sense of secrecy and shame regarding pay. In contrast to the current pay system that is entirely public and consistent (pay levels determined by Congress and allocated by objective job design criteria), individual pay adjustments and pay-setting require a certain amount of secrecy, which strikes us as inappropriate for a public institution. An individual-by-individual pay for performance system whose winners and losers are determined behind closed doors sends a message that there is something to hide, that the decisions may be inequitable, and would not bear the scrutiny of the light of day.

Beyond compensation consultants, agency personnelists, and OPM, who wants to replace the General Schedule with a pay for performance system? The survey of federal employees published by OPM on March 25 may be trotted out by some as evidence that such a switch has employee support. But that would be a terrible misreading of the results of the poll. AFGE was given an opportunity to see a draft of some of the poll questions prior to its being implemented. We objected to numerous questions that seemed to be designed to encourage a

response supportive of individualized pay for performance. We do not know whether these questions were included in the final poll. The questions we objected to were along the lines of: Would you prefer a pay system that rewarded you for your excellence, even if it meant smaller pay raises for colleagues who don't pull their weight? Do you feel that the federal pay system adequately rewards you for your excellence and hard work? Who wouldn't say yes to both of those questions? Who ever feels adequately appreciated, and who doesn't secretly harbor a wish to see those who *appear* to be relatively lazy punished? Such questions are dangerously misleading.

The only question which needs to be asked of federal employees is the following: Are you willing to trade the annual pay adjustment passed by Congress, which also includes a locality adjustment, and any step or grade increases for which you are eligible, for a unilateral decision by your supervisor every year on whether and by how much your salary will be adjusted?

It is crucial to remember that the OPM poll was taken during a specific historical period when federal employees are experiencing rather extreme attacks on their jobs, their performance, and their patriotism. The Administration is aggressively seeking to privatize 850,000 federal jobs and in many agencies, is doing so in far too many cases without giving incumbent federal employees the opportunity to compete in defense of their jobs. After September 11, the Administration began a campaign to strip groups of federal employees of their civil service rights and their right to seek union representation through the process of collective bargaining. The insulting rationale was "national security"

and the explicit argument was that union membership and patriotism were incompatible. Some policy and lawmakers used the debate over the terms of the establishment of the Department of Homeland Security and DoD's National Security Personnel System as an opportunity to defame and destroy the reputation, the work ethic, loyalty, skill and trustworthiness of federal employees. And out of all of this has come an urgent rush to replace a pay system based upon objective criteria of job duties, prerequisite skills, knowledge, and abilities, and labor market data collected by the BLS with a so-called pay for performance system based on managerial discretion.

In this historical context, federal employees responded to a survey saying that they were satisfied with their pay. In fact, 64% percent expressed satisfaction and 56% believed that their pay was comparable to private sector pay.

But as the representative of 600,000 federal employees, AFGE would suggest that they are satisfied with their pay system, not their actual paychecks. Since the alternatives with which they have been threatened seem horrendous by comparison, expression of satisfaction with the status quo in a survey sponsored by an agency determined to give managers discretion or "flexibility" over pay is no surprise.

Perhaps more important for the subject of pay for performance in the context of the survey is the fact that 80% report that their work unit cooperates to get the job done and 80% report that they are held accountable for achieving results. Only 43% hold "leaders" such as supervisors and higher level

management in high regard; only 35% perceive a high level of motivation from their supervisors and managers, and only 45% say that managers let them know what is going on in the organization.

In this context, it seems reasonable to ask if the majority of employees are relatively satisfied with their pay, why the frantic rush to change? If federal supervisors and managers are held in such low regard, how will a system which grants them so much new authority, flexibility, unilateral power, and discretion be in the public interest? How will a pay system that relies on the fairness, competence, unprejudiced judgement, and rectitude of individual managers be viewed as fair when employees clearly do not trust their managers? Given that less than a third of respondents say managers do a good job of motivating them, is pay for performance just a lazy manager's blunt instrument that will mask federal managers' other deficits?

No discussion of federal pay is complete without consideration of funding. To the extent that pay for performance is proposed as a replacement for the General Schedule that would be "budget neutral" and exclude additional funding, AFGE will work in opposition. Federal salaries are too low, and they are too low not just for prospective employees, or employees in "hard to fill" positions or employees who intend to stay in government for short periods – federal salaries are too low for all federal employees. There may be legitimate disputes about the size of the gap between federal pay and non-federal pay, but it is indisputable that federal salaries are too low across-the-board.

As I mentioned, we are grateful and supportive of Congressional attention toward the inadequacy of federal compensation. We are also supportive of those who are looking for ways to reward federal employees financially for excellent and extraordinary performance. But at the same time we caution that rewards for excellence and extraordinary acts must be supplements to a fully funded regular pay system, not substitutes; and these supplements must be fully and separately funded. In addition, we support the provisions in S.129 and H.R. 1601 that provide training for managers and other employees. We applaud the recognition that failure to deal appropriately with poor performance is not a matter of the absence of authority or flexibility on the part of management, but rather a problem of either reluctance or poor training. Further, this provision recognizes that dealing with poor performance is a management problem and a discipline problem, not a pay system problem.

Our recommendations for a set of policies that would truly resolve the government's human capital crisis by facilitating a transition from one generation of well-trained, professional, and apolitical civil service employees to another are as follows:

1. Predicate authorization to exercise any of the enhanced management flexibilities described in S.129 and H.R. 1601 on the implementation of FEPCA's pay comparability provisions. Funding competitive salaries for all federal employees, and allowing the locality pay system to operate in order to bring federal salaries up to 90% of comparability should be the trigger that

allows expansion of authority to pay large recruitment or retention bonuses in exceptional circumstances.

2. Enact legislation that would put an immediate end to the ruinous and irrational practice of mandatory privatization quotas. Require that federal employees be given an opportunity to compete for a fraction of new government work and the same proportion of government work that has already been contracted out as is competed for work currently performed by federal employees, require that federal employees be given the opportunity to submit their best bids in the form of Most Efficient Organizations (MEO) in public-private competitions, and make sure that contractors be forced to at least promise a minimum cost savings prior to being allowed to take over government work as a means of bringing some integrity and accountability to federal service contracting.

3. Pass legislation that improves the funding formula for the Federal Employees Health Benefits Program (FEHBP) so that this benefit more closely resembles the health insurance programs that successful, large public and private sector organizations provide their employees. Some 250,000 federal employees are uninsured altogether in spite of their eligibility to participate in FEHBP. Their uninsured status is because they cannot afford the high premiums and high share of premiums required by FEHBP. Legislation introduced by Representative Steny Hoyer (D-Md.), H.R. 577; and Senator Barbara Mikulski

(D-Md.), S. 319; would improve FEHBP funding to an 80% employer-20% employee premium split. We believe that passage of this legislation would go a long way toward making the federal government a more attractive employer. In addition, require all FEHBP carriers to purchase prescription drugs from GSA's Federal Supply Schedule (FSS). Requiring FEHBP plans to purchase some of the prescription drugs they cover would go a long way toward restraining the growth of premiums in the program, which is important not only for making health insurance more affordable for federal employees, but will also allow in-house teams to be more competitive on behalf of taxpayers in public-private competitions.

4. We urge the Subcommittee to resist the temptation to jump on the anti-employee pay for performance bandwagon, whether for the Department of Defense, the Department of Homeland Security, or any other federal agency or department. Pay for performance schemes are, for the many reasons discussed above, a dangerous recipe for mismanagement, discord, discrimination, and destruction of morale and public sector ethos. We urge the Subcommittees to reject these schemes, and all requests for either agency by agency, or governmentwide authority to abandon the General Schedule and waive related chapters of title 5 that have successfully kept the civil service apart from politics, and allowed the federal workforce to be hired, fired, paid, promoted, disciplined, and communicated with on the basis of merit system principles. These laws exist to prevent our government

agencies and programs from falling prey to a spoils system, and we urge Members of the Subcommittee to retain your ability to make sure that they continue to be strong and successful in that endeavor.

This concludes my testimony, and I would be happy to answer any questions Members of the Subcommittee may have.

Ms. DAVIS OF VIRGINIA. The one thing I would urge you to do is to make sure that you talk to Secretary England, the Secretary of the Navy. I spoke to him on the phone not too long ago, maybe 1½ hours or 2 hours ago, and he is very interested in working with the unions. The only thing I would ask you to do is to talk to him, work with him, and if you have problems report back to me and we'll try to take it from there.

Mr. GAGE. Well, we have been trying. We have been calling and trying to talk to anyone in the Department of Defense and we have been shut out.

Ms. DAVIS OF VIRGINIA. Now you have a name. Secretary of the Navy is the point man, and he, with his own words, said to me on the phone that he is willing to work with the members of the unions. So if you would just make sure that you get with him and get back to us on how it goes, I'd certainly appreciate it.

Mr. GAGE. Thank you, Madam Chairwoman.

Ms. DAVIS OF VIRGINIA. Ms. Kelley, as always it is a pleasure to have you back before this committee. We have your written testimony in the record, so if you would summarize your testimony we'll recognize you for 5 minutes.

Ms. KELLEY. Thank you. On behalf of the 150,000 employees represented by NTEU, I appreciate the invitation and the opportunity to be here today. I must, however, begin by saying how disappointed NTEU is at the proposed new National Security Personnel System that was unveiled by the Department for this reason that is focused on this hearing: if implemented as written, this will have a negative impact on the ability to recruit and retain employees in the Department of Defense based on the environment that it would create for those employees.

When the legislation was debated, NTEU questioned the need for such broad discretion and we raised concerns as to whether it would be exercised fairly. It is now clear that our fears were well founded. The proposal severely limits collective bargaining, but it also sets up a fox guarding the hen house approach to due process for employees. Probably most interestingly, it establishes a system for union elections that, if it were applied to current elected Federal officials today, most could not meet the test.

It was never clear what the problem was that the legislation sought to address, but what is clear is that this committee needs to revisit this matter. I appreciate your interest in the issue and your commitment to ensure the unions' involvement in the process.

Let me say on another note how much we appreciate, Madam Chairwoman, your commitment to agencies having the proper tools to allow them to hire and to inspire the best work force. An honest process for setting Federal pay is a key first step, and we thank you for your support of pay parity and for all of the members in attendance at this hearing on this important issue. Unfortunately, because the President did not act in accordance with the bipartisan will of Congress, just as they did in 2003, Federal civilian employees must again wait for the full amount of their 2004 pay raise, the raise that their uniformed counterparts have already received.

Health insurance is another consideration for prospective employees. Premiums for FEHB plans have risen 45 percent since 2001, alone. The Government pays 72 percent of the premium.

Most employers pay 80 percent. NTEU supports bipartisan legislation to increase the Government's share of the premium to 80 percent. I understand that you, Madam Chairwoman, are planning to hold hearings later this year on the FEHB plan, and NTEU looks forward to working with you on this.

A disincentive to Federal employment today is the administration's march to contract out as much work as possible. Family friendly programs and new rewards and incentives will do little to attract employees if we cannot convince them that we are interested in their commitment to a career in public service. NTEU members tell me that contracting out has eroded morale, disrupted agency operations, and discouraged prospective employees from applying. Employees are appalled at the lack of oversight and accountability in contracting out. Congressman Van Hollen's amendment to the 2004 Treasury appropriations bill tried to bring order to the Government's contracting process. I want to personally thank you, Chairwoman Davis, and all Members who are here today for your support of that amendment.

NTEU worked closely with Senators Voinovich and Akaka on S. 129, the Federal Workforce Flexibility Act. We are pleased that you plan to move H.R. 1601, as well. Federal employees are increasingly required to conduct business travel on their own time and can only be compensated in limited circumstances, so I was very pleased to hear your question of OPM and their commitment to take a re-look at this.

Let me give you two examples. An IRS employee is assigned a case over 150 miles away. The taxpayer would like to meet at 1:30 p.m., and the employee is unable to complete their work by the end of the business day. However, they stay an extra hour or two to complete the assignment. As you noted, they would be paid hotel expenses and per diem if they stayed, but instead most employees would choose to travel home, in effect donating several hours of work and travel time to the Federal Government. These employees cannot be compensated for travel under current law. They cannot be. However, had the employee elected to stay, the Government would have paid these other expenses.

Here's another example. An employee in Missouri reports his work often goes beyond a normal working day, and his alternative is to leave early and have to come back the next day and risk leaving an undesirable impression on the taxpayer and the taxpayer's attorney and to make the IRS appear unprofessional, something he has too much pride in his work to allow to happen.

So in these cases, the employees cannot keep the best interest of the Government in mind, present a professional appearance, and avoid lodging and per diem costs for the Government. The provision added to S. 129 authorizes compensatory time for travel to perform work assignments. It does not apply to normal commuting travel or any time that would be for commuting, and it could not be converted to money. It would purely be compensatory time for time spent on the job.

NTEU is very pleased that the legislation discussed today draws attention to the Government's need to train employees, also. NTEU hopes that you will work to ensure that agency training budgets are properly funded. The bills also propose additional flexibilities

in the use of recruitment, relocation, and retention bonuses. Limited funding is what hampers most agencies' ability to put these bonuses to better use, and NTEU hopes that a dedicated stream of funding can be found for this purpose.

I thank you again for the opportunity to appear today and would welcome any questions you might have.

Ms. DAVIS OF VIRGINIA. Thank you, Ms. Kelley.

[The prepared statement of Ms. Kelley follows:]

Testimony
of

Colleen M. Kelley
National President
National Treasury Employees Union

on

Recruiting and Retaining America's Best

For the Federal Civil Service

February 4, 2004
10:30 a.m.

House Subcommittee on Civil Service and Agency Organization
2154 Rayburn Building

Chairwoman Davis, Ranking Member Davis, thank you very much for giving me the opportunity to come before you today to discuss the need for improved recruitment and retention tools in the federal government. I am Colleen Kelley, the National President of the National Treasury Employees Union (NTEU) and I appear today on behalf of the more than 150,000 federal employees and retirees represented by NTEU.

I, as well as the NTEU members I speak for, appreciate the fact that as Chair of the House Civil Service Subcommittee, you have made clear your intention to work to make sure federal agencies have the proper tools to allow them to not only hire, but inspire the best workforce in the Nation. Turning the federal government's human capital crisis around will require determination and resources and I look forward to working with you toward that goal.

NTEU continues to believe that a major step toward making the federal government the employer of choice is a commitment by Congress - and the Administration - to establish an open and honest process for setting federal salaries. As you know, Congresswoman Davis, for two years in a row now, despite a bipartisan and bicameral commitment to pay parity between the

Nation's military and civilian employees, the President has chosen to implement a smaller pay raise for civilian employees, only to see that raise overturned by subsequent Congressional action.

In 2003, Congress made clear its belief that because federal civilian employees work side-by-side with the men and women of our armed forces to ensure the security of the United States, they deserve the same recognition and the same pay raise. I want to take this opportunity to thank you for your support of pay parity and for your cosponsorship of H.Con.Res.19, the Pay Parity Resolution.

Despite the early and consistent bipartisan support for this established concept from you and others, when Congress did not complete action on the 2003 appropriations bills before the end of the calendar year, the Administration ignored Congress' intent and implemented a lower pay raise for the federal workforce. Although the 4.1% pay raise was ultimately signed into law and granted to federal civilian employees, it took months for that raise to reach their pocketbooks.

The enormous waste of taxpayer money associated with recalculating federal pay raises was only the tip of the iceberg. The message that federal employees received - that they are not

as important, that they are not valued and that their work is somehow less important than that of their uniformed counterparts - that is where the real damage was done.

In 2004, Congress again affirmed its support for the concept of pay parity, granting both uniformed and civilian employees an average 4.1% pay increase. Again, the Administration ignored Congress' intent, implementing a 2% federal pay raise. I am sure you would agree that the message federal employees have taken from these incidents is **not** the message any of us would choose to send.

Once again, federal civilian employees must wait for the pay raise their uniformed counterparts have already received. While the pay raise is retroactive to the first pay period of 2004, before it can take effect, another Executive Order must be issued. Then the Office of Personnel Management (OPM) must issue new salary tables. Only then can retroactive pay adjustments begin to be programmed into pay systems. I am told that it could be several months before all federal employees receive the full pay raises Congress approved.

As you know, another key consideration for prospective employees considering career options is the availability - and cost - of health insurance. Unfortunately, this is another area

where the federal government is often not able to effectively compete with its private sector counterparts. Health insurance premiums for plans within the Federal Employees Health Benefits Program (FEHBP) have risen sharply in recent years - rising 45% since 2001 alone. These rate increases far outpace federal salary increases during the same period, forcing an increasing number of enrollees to examine whether or not they can continue to afford the coverage.

The federal government as an employer pays an average of 72% of the health insurance premium for its employees. A great many state, local and private sector employers recognize the importance of health insurance to their benefits packages and absorb a greater share of the premiums than the federal government does. Most large employers pay an average of 80% of the health insurance premium for their employees and NTEU believes the federal government should follow suit. NTEU continues to support bipartisan legislation pending before both the House and the Senate (H.R.577, S.319) that seeks to increase the federal government's share of the premium from an average of 72% to an average of 80%. It is my understanding, Chairwoman Davis, that you plan to hold hearings later this year on the FEHBP and NTEU looks forward to working with you on the many critical issues surrounding the federal health benefits program.

NTEU believes that this Administration's march to contract out as much of the work of the federal government as possible is yet another disincentive to federal employment. Student loan forgiveness and continuing education programs, child care subsidies, family friendly programs and new and creative rewards and incentives will do little to attract the Nation's youth to the next generation of federal employees if we cannot convince them that we are interested in their committing to a career in public service.

Too often, the view I hear from the employees NTEU represents is that contracting out without rhyme or reason has gone on for too long now. That it has eroded the morale of the best employees the federal government has to offer. That it has disrupted agency operations and discouraged prospective employees from applying. That there is so little oversight and accountability in the contracting already occurring that it turns employees stomachs.

Congressman Van Hollen attempted to bring some order to the federal government's contracting process last fall with the amendment he successfully added to the FY 04 Treasury Appropriations bill. I want to personally thank you, Congresswoman Davis, for your support of that amendment. The Treasury Appropriations bill was ultimately folded into the

Omnibus Appropriations measure and much of the contracting language that sought to level the playing field for federal employees was stripped from the final product in a post-conference effort by the Administration to exert their will. Nonetheless, NTEU appreciates your recognition of the fact that there is room for improvement in the contracting out of federal jobs. We hope to continue to work with your office to enact much-needed reforms in this area.

NTEU also wants to comment on the bills pending before this Subcommittee today. NTEU worked closely with Senator Voinovich and Senator Akaka's offices on the version of S.129, the Federal Workforce Flexibility Act, that has been approved by the Senate Governmental Affairs Committee and we are pleased that your Subcommittee plans to move the House counterpart, H.R.1601, as well.

The General Accounting Office (GAO) has undertaken a number of studies focusing on the importance of designing and using effective human capital flexibilities. In one recent report (GAO-03-2), the GAO found that the flexibilities that are most effective in managing the federal workforce are those such as time off awards and flexible work schedules. In other words, flexibilities that allow employees to take time off from work - when it is most convenient for both the agency and the employee -

and better balance their work life and family responsibilities.

NTEU is particularly pleased that S.129 contains language that we believe will go a long way toward addressing these family and work life responsibility issues. As the Chairwoman knows, federal employees are increasingly required to travel for official business on their own time and under current law, can be compensated for travel time that is outside their regular working hours only in limited circumstances. The provision that is now part of S.129 would provide federal employees with compensatory time off for time spent in official travel status that is not otherwise compensated.

Under current law, employees covered by the Fair Labor Standards Act (FLSA) who are required to travel on official business, are compensated for their travel time as long as that time is within the employee's regular duty hours, even if the travel occurs on a Saturday or Sunday. In other words, if an employee regularly works 9 to 5, then travel between 9 and 5, even if it occurs on a Sunday would be compensated. An employee who elects to travel early on a Monday morning for a Monday meeting would receive no compensation for his or her travel time if that travel took place before 9 am. If, on the other hand, the employee elected to travel on Sunday, the travel time would be compensated as long as it occurred between 9 and 5. This is

particularly nonsensical because the employee who elects to travel on Sunday will also cost the federal government hotel and per diem expenses by having to spend the night away from home prior to the Monday meeting.

Not all federal employees are covered by FLSA rules, and instead are covered by the Federal Employee Pay Act (FEPA). Federal employees covered by FEPA receive no compensation for time spent on official government travel unless the time falls within the employee's regular workweek or unless other conditions are met. Most notably, that travel time can only be considered work if it results from an event that could not be scheduled or controlled administratively. Because travel to perform work assignments or attend trainings or continuing education courses is considered administratively controllable, the travel time outside an employee's regular working hours is not considered work time. Simply traveling for one's job, even though the individual may be required to do so as a condition of his or her employment, is generally not considered work. This increasingly puts federal employees in the position of donating their time to the federal government.

NTEU members have shared many examples with me of how current rules have impacted their working lives. For example, an IRS employee in Lincoln, Nebraska is required to visit a taxpayer

in Columbus, Ohio. The taxpayer requests a 1:30 pm meeting which results in the employee being unable to complete the work prior to the end of the business day. The employee elects to work an extra hour or two and complete the assignment in one day. By the time the employee returns home for the evening, he has effectively donated several hours of work and travel time to the federal government. Had the employee elected to spend the night in Columbus and finish the job the following day instead, the government would have paid the employee's lodging and per diem costs.

Another employee from Missouri points out that when required to visit taxpayers in nearby cities, he is often required to work beyond his normal hours to complete the job. The alternative, he points out, is to end his meeting early (to avoid traveling on his own time) and risk leaving an undesirable impression on the taxpayer and the taxpayer's attorney as well as make the IRS appear unprofessional, something he has too much pride in his work to allow to happen.

In instances such as these, it is almost impossible for employees to keep the best interests of the federal government in mind, present a professional appearance and do their best to avoid unnecessary lodging and per diem costs without putting themselves at a financial disadvantage.

The provision included in S.129 seeks to address these situations. It would authorize compensatory time for travel to perform work assignments, attend authorized training or conferences and for other legitimate purposes. It does not apply to normal home to work commuting time and the compensatory time could not be converted to payment. The Senate report accompanying S.129 (Senate Report 108-223) makes clear that the Committee believes that federal employees are entitled to compensation while traveling on the government's business, especially in light of the fact that work-life programs are among the most effective recruitment and retention tools the government has at its disposal. NTEU heartily agrees with this assessment and hopes that the Civil Service Subcommittee will include this provision in its version of the Workforce Flexibility Act as well. I look forward to working with you towards this end.

NTEU also welcomes the fact that the legislation before the Subcommittee today draws long overdue attention to the federal government's need to properly train its employees. An investment in training and workforce development will reap rewards for federal employees and agencies alike. Often, employees don't receive the proper training to either perform their missions effectively or enhance their abilities and prepare them for advancement within their agencies. Without proper training,

everyone loses. Customers do not receive the best service and employees do not find their work rewarding or challenging. While NTEU supports the training initiative contained in the legislation, we hope that its sponsors will work to insure that agency training budgets are properly funded. In recent years, unrealistic agency funding levels have restricted agencies' ability to adequately train their employees, often forcing agencies to rob from other accounts to perform necessary training.

The legislation also proposes providing additional flexibility to agencies in the use of recruitment, relocation and retention bonuses. Here again, limited agency funding continues to hamper most agencies ability to put these bonuses to better use. Without a dedicated stream of funding for these recruitment and retention tools, the only way agencies will be able to make use of them is by further gouging their training and salary and expense budgets. This is of great concern to NTEU and I encourage the Subcommittee to take steps to ensure that adequate funding is provided for these new bonus options as well.

The legislation also shifts oversight of the federal government's critical pay authority from the Office of Management and Budget (OMB) to OPM, seeks to correct retirement benefit calculations for part-time federal service and reform annual

leave rules for certain new federal employees and members of the Senior Executive Service. This provision would permit the head of an agency to deem a period of qualified non-federal experience as federal service for annual leave purposes. I understand that this provision would apply to mid-career federal employees and that OPM would have the authority to extend similar benefits to other categories of employees. NTEU continues to believe that if annual leave limits are in fact a barrier to hiring, the entire leave system should be reviewed with an eye toward its overhaul. We hope to continue to work with the Subcommittee toward that end.

In conclusion, I want to thank you again for the opportunity to appear before you today. It is vitally important that your Subcommittee continue to hold hearings like this one today so that we may jointly explore solutions to the problems we know the federal government and its employees face. I look forward to continuing to discuss these issues with you and continuing to work together to make the improvements we both know are so necessary.

Ms. DAVIS OF VIRGINIA. I'll just use this moment to say that in our manager's amendment we already plan to take the demo project out of H.R. 1601, and we plan on adding in the compensatory time that the Senate has added in, so that will be in our manager's amendment before it ever goes before the floor for a vote.

Ms. KELLEY. I thank the Chair.

Mr. VAN HOLLEN. Madam Chairwoman, if I may——

Ms. DAVIS OF VIRGINIA. Yes.

Mr. VAN HOLLEN. Unfortunately, I've got to run to another hearing, but I wanted to commend you on your initiative in the legislation before us and also lend myself to some of the remarks that have been made. It is important to move forward without, at the same time, taking two steps back. Your legislation is a step forward. I think some of the other things we are seeing going on with respect to the implementation of the Defense Department of the legislation we passed, which, while there were differences, I think that the way it has been implemented is really contrary to how either side would have interpreted. So I hope we'll have ongoing oversight with respect to that in this committee.

I thank you, and I apologize for having to leave.

Ms. DAVIS OF VIRGINIA. That's OK, Mr. Van Hollen. We certainly appreciate your input.

Let me just clarify one thing, and I did check with staff to make sure. It hasn't been implemented yet. As I understand it, when DOD met with the staff, they met with them with strictly concepts. It is not a done deal. It is strictly concepts. It is what they're thinking. So now is the time to speak up to them and get them to correct or work with you. That's why I said please talk to the Secretary of the Navy, because he has been appointed as the point man, if you will, and is willing to work with you, so let him know your frustrations and what you are unhappy with.

Again, it is just a concept is what I have been told. It's just concepts, it isn't in stone yet, so now is the time to fix it before it gets in stone.

Thank you, Mr. Van Hollen.

Mr. VAN HOLLEN. Thank you, Madam Chairwoman.

Ms. DAVIS OF VIRGINIA. Sorry to keep you waiting, Mr. DeMaio.

We have the pleasure to hear from Mr. Carl DeMaio, president of patient, and last but not least.

You have been recognized for 5 minutes. Again, we have your written testimony in the record, so if you would summarize your testimony in 5 minutes.

Mr. DEMAIO. Madam Chairwoman, members of the subcommittee, I appreciate the opportunity to be here this morning. I am president of the Performance Institute, a private think tank that focuses on reforming government through the principles of performance, accountability, transparency, and competition. We have extensive expertise in the area of Federal human resources management and recent reforms.

Last year the Institute surveyed all major Federal agencies to catalog best practices in recruitment and retention. We compiled those best practices in a report entitled, "Strategic Recruitment for Government: Ten Innovative Practices for Designing, Implement-

ing, and Measuring Recruitment Initiatives in Government." As noted in our report and has been shown to the leadership of this subcommittee, the Federal Government has a major human capital crisis on its hands, and it is not just an issue of recruitment and retention, it is a crisis of getting the right people with the right skills in the right position at the right time to perform the right function with the right compensation, all to be reviewed by the right employee performance evaluation.

Now, that's a lot of rights to get right, and many agencies are still struggling in getting those rights right. But no matter how it is spun, the reality is that more than half of all Federal employees are now or in the next 5 years will be eligible to retire. Something to note is that we have been talking about the human capital crisis for many years, and GAO Comptroller General David Walker has shown amazing leadership in this regard. We have not yet seen the crisis materialize because of the downturn in the labor market. As the economy recovers, the Federal Government will be facing a monumental challenge in recruitment and retention.

This subcommittee has shown exemplary leadership on these issues. I do hope that the focus on retention, recruitment, and relocation bonuses, the subject of the legislation, will not get overwhelmed by other H.R. issues facing the Federal Government. These issues are very important for this committee to act on and to deliberate over.

The subcommittee is considering legislation, H.R. 1601 and S. 129, to provide Federal agencies more flexibility in setting pay rates for employees, providing bonuses for recruitment and retention and relocation, and improving the management of Federal training. Proposed legislation has noble and worthy objectives; however, it addresses only 2 of the 10 innovative practices for recruitment or retention.

Now, no legislation has to touch on all issues, but we do want to propose several refinements to the legislation that we do support.

First, emphasize performance, not across-the-board pay increases. We are very supportive of the flexibilities for recruitment, retention, and relocation bonuses for this very reason, but this subcommittee really should set as one of its objectives that through its work Federal employees will start talking about my pay increase rather than the pay increase. Across-the-board increases in Federal salaries does nothing to recognize individual contributions to agency success. And if we are going to recruit and retain, we are going to do it one individual at a time by valuing each individual's contribution to agency mission.

For this very reason, I encourage this subcommittee to explore other legislative vehicles to improve pay for performance. The committee could also look to the human capital performance fund as an example. The President proposed a $300 million human capital performance fund in his fiscal year 2005 budget, and we encourage members of the committee to work to ensure that this funding survives the appropriations process intact.

We would urge the committee to consider alternatives to the General Schedule system. Proposed legislation only provides flexibility within the existing GS system of pay grades. Many, including

our organization, argue that a one-size-fits-all pay system with rigid pay grades is not conducive to winning the war for talent. For example, the Department of Defense wants to abandon the GS schedule in favor of universal pay banding, the proposal that we've talked about several times this morning, and it wants to give managers the ability to hire candidates on the spot for hard-to-fill positions.

We consider this proposal a first step in moving toward customized pay systems for each Federal agency reflective of their agency's mission, reflective of the labor market each individually face.

Also, the subcommittee should consider market-based pay formulas. Again, currently in the Federal Government we ask OPM to look at pay and look at locality adjustments and they apply a one-size-fits-all schedule. Merely raising the pay grades can increase the government's overall cost without a clear return on investment. It is worth pointing out here that employee recruitment and retention battles we are going to face aren't really going to be with the private sector for most positions in most agencies. What we are going to have to do is be ready to battle with the nonprofit center and academics for our talent.

There is a different type of individual who comes into government—people who want to serve their community. They want to help with social problems and have a sense of accomplishment or purpose, whereas in the private sector there really is a profit or bottom line basis. The only other area that these candidates or these individuals can go to are the nonprofit world and academics, so we have encouraged benchmarking pay against those two sectors of society.

Finally—and this is very important to consider for this legislation—we need to link all HR initiatives to a fundamental strategic human capital plan for each agency. We need accountability, and we also need a set number of strategies that agencies need to pursue for winning the war for talent, and so we encourage you to adopt language in the bill that would require each agency, when providing a recruitment, retention, or relocation bonus, to measure the effectiveness and the impact of those bonuses on recruitment and retention and to tie that to skills gaps identified in the human capital plan.

If the committee can act on these issues, you can strengthen this bill which is already addressing very important issues.

Ms. DAVIS OF VIRGINIA. Thank you, Mr. DeMaio.

[The prepared statement of Mr. DeMaio follows:]

The Performance Institute
1515 N. Courthouse Rd. • Suite 600 • Arlington, VA 22201
Tel: 703-894-0481 • Fax: 703-894-0482 • www.PerformanceWeb.org

CONGRESSIONAL TESTIMONY

Providing Performance-Based Flexibilities to Improve Recruitment in Government

Testimony Before the House Committee on Government Reform
Subcommittee on Civil Service and Agency Organization
February 11, 2004

Carl DeMaio
President, The Performance Institute

Madame Chairman, members of the subcommittee, I appreciate the opportunity to be here this morning. The Performance Institute—a private think tank that focuses on reforming government through the principles of performance, accountability, transparency and competition—has extensive expertise in the area of federal human resources management. Last year, the Institute surveyed all major federal agencies to catalogue best practices in recruitment in government and published in a report in April 2002 entitled "*Strategic Recruitment for Government: 10 Innovative Practices for Designing, Implementing, and Measuring Recruitment Initiatives in Government.*"

As noted in our report, the federal government has a human capital crisis on its hands, and it's not merely an issue of recruitment or retention. It's a crisis of getting the right people, with the right skills, in the right position, at the right time, to perform the right function, with the right compensation, and to be reviewed by the right employee performance evaluation. That's a LOT of rights to get right.

No matter how it's spun, the reality is that more than half of all federal employees are now or will in the next five years be eligible to retire. It's even worse in the Senior Executive Service—the senior leader-managers in the federal government. Seventy percent of the SES is now or will soon be eligible to retire. With the bad economy giving the federal government a temporary reprieve, agencies must sharpen their human capital tools NOW to get ready for the anticipated exodus of talent—and battle for talent—when the economy fully recovers.

This committee has shown exemplary leadership on these issues. Today, this committee is considering legislation (HR 1601 and S129) to provide federal agencies more flexibility in setting pay rates for employees, providing bonuses for recruitment and retention, and improving the management of training. The proposed legislation has noble and worthy objectives. However, it only addresses two of the 10 innovative practices outlined in our report.

While legislation need not address all 10 (indeed for many of the 10 practices, legislative action is not required) we would like to propose refinements to the proposed legislation being considered today.

- **Emphasize Performance, Not Across-the-Board Pay Increases**: The federal government has a big problem when employees talk about "THE" pay increase rather than "MY" pay increase. By relying too much on GS pay scales rather than setting pay on individual levels based on performance, there is little opportunity to place a value on individual contribution to agency success. Although the current language allows managers to reward employee performance with more pay, it overlooks the need for a more mature system of performance-based pay. At the very least, in exchange for bonuses, a system for measuring individual performance should be integrated into the provisions for granting those bonuses, thereby requiring results-based goals and milestones. The Committee could also look to the Human Capital Performance Fund as an example. I encourage you to support the President's new proposal for a $300 million Human Capital Performance Fund and work to ensure it survives the appropriations process this year.

- **Consider Waiting for Completion of Existing Flexibility Studies:** Overall, it might not be the best time for Congress to act on changing the federal pay system. The federal government is already modeling pay system transformation at the departments of Defense and Homeland Security. Incredible lessons will be learned from the DOD and DHS overhauls and Congress may want to wait a year to learn from them.

- **Consider Alternatives to GS System:** The proposed legislation only provides flexibility within the existing General Schedule system of pay grades. Many (including the Performance Institute) argue that a one-size-fits-all system with rigid pay grades is not conducive to winning the war for talent. For example, using the legislative flexibility noted above, the Department of Defense wants to abandon the General Schedule in favor of universal pay-banding, and it wants to give managers the ability to hire candidates on the spot for hard-to-fill positions. The same is true for the Department of Homeland Security, where an entirely new personnel system that covers hiring, pay classification, labor relations, employee evaluations, disciplinary action and appeals – a brand-new system will soon be unveiled.

- **Consider Market-Based Pay Formulas**: The legislation would allow OPM to increase pay for specific categories of employees. Overall, it is important to note that the pay is not the only ingredient for successful recruitment in government. Moreover, merely raising pay grades can increase government costs without a clear return-on-investment. It's worth pointing out here that the employee recruitment and retention battles we're going to face aren't going to be with the private sector, but primarily with non-profits and associations. They can offer a "serve-your-community" role similar to the lure that draws people to the civil service (and offer them money, better hours and perhaps a better commute). The legislation could improve on the existing pay evaluations by articulating a clearer "market-based" approach for OPM to use that focuses more on non-profit pay comparisons rather than private-sector ones.

- **Improve the Linkage to Strategic Human Capital Plans:** Absent from the current language is a mandate for formalized human capital planning. Think of a tree for a moment – the flexibilities being granted and the money being authorized here are like branches, but without a trunk. They serve no greater purpose and benefit only

themselves. The trunk is the human capital plan – it's what brings all of an agency's human capital activities together and keeps agencies moving in one direction.

- **Require a Commitment for Lump-Sum Bonuses**: It is curious that the bills require a length-of-service contract be signed for lump-sum bonuses, but not for bonuses paid in biweekly installments. It seems that ANY breakaway from the current pay grades should be lassoed with a contract.

We offer the comments above as suggestions for improving legislation—which we believe can greatly assist federal agencies in winning the war for talent.

Should you decide to try to integrate any of our recommendations into the legislation, I and the director of The Performance Institute's Center for Human Capital Strategy, Tara Shuert, stand ready to help you and your staff. We look forward to supporting the committee's efforts to improve workforce management in government.

Thank you for your time.

The Performance Institute *is a private think tank seeking to improve government performance through the principles of competition, accountability, performance and transparency. The Institute serves as the nation's leading authority and repository on performance-based management practices for government. Its mission is to identify, study and disseminate the leading management innovations pioneered by "best-in-class" organizations.*

Carl DeMaio *is President and Founder of the Performance Institute. He is a nationally recognized expert in government reform and performance-based management.*

Contact Information:
Tara Shuert
Director, Center for Human Capital Strategy
The Performance Institute
1515 N. Courthouse Road, Suite 600
Arlington, VA 22201
703-894-0481 fax 703-894-0482
shuert@performanceweb.org

Ms. DAVIS OF VIRGINIA. I just want to make sure that I understood you correctly when you said that these people would not—people who work for the Federal Government would not go to private organizations, they would go to nonprofits. Are you comparing pay grades there or what?

Mr. DEMAIO. We're looking at the types of individuals who consider government service, and we have seen some polling done by the Partnership for Public Service, Merit Systems Protection Board has done some survey of Federal workers, as has OPM, and to basically suggest that we need to compete directly for every single position with the private sector pay is not an appropriate comparison. There are some areas where certainly—for example, an accountant at the Department of Treasury very well could go into the private sector and get an accountancy job, but in other areas like Health and Human Services their alternatives usually are going to be nonprofit organizations or academic organizations and institutions. So one-size-fits-all pay comparisons is not what we are suggesting. We would like to see, on each position that the agency is trying to recruit for, what is the competition offering, and sometimes that is going to be a set of nonprofit organizations.

Ms. DAVIS OF VIRGINIA. I guess I will, No. 1, thank all four of you for your testimony, and I guess I will just yield to myself for questions.

Judge Dugan, can I ask you what percentage of ALJs now are eligible for retirement and how many will be eligible in 5 years? Do you have that?

Mr. DUGAN. Well, the figure we got—and we got it from OPM—is that 91 percent are eligible. Now, I don't—that's figures we got from OPM. I can't speak for them.

Ms. DAVIS OF VIRGINIA. Eligible now?

Mr. DUGAN. That's what we were told. Yes, that's correct.

Ms. DAVIS OF VIRGINIA. OK. I guess that answers my next question then.

Mr. DUGAN. And then I looked around my office, and there were a bunch of old people there. [Laughter.]

Ms. DAVIS OF VIRGINIA. You were the youngest guy in the room, right?

Mr. DUGAN. Just about.

Ms. DAVIS OF VIRGINIA. Have you heard from any other agencies or organizations? Have you heard any companies that ALJs decisions has declined because of recruiting and retention problems occasioned by the pay compression?

Mr. DUGAN. Well, I cited the FERC letter, but I don't think we have any particular studies that can quantify that. The problem is that the register, OPM register, has been closed for over 5 years, so when they talk about their views on recruitment it is a bunch—it is guesswork, because right now the register is still closed and they are right now creating a new test, so there really is no way to know the quality that we're going to get ultimately. The Commissioner of Social Security testified to Congress that she was light about 200 ALJs because she hasn't been able to hire. OPM, at the urging of Congress——

Ms. DAVIS OF VIRGINIA. She's short 200?

Mr. DUGAN. Right, short 200.

Ms. DAVIS OF VIRGINIA. Which agency was that?

Mr. DUGAN. This was Commissioner Barnhart who testified before the Social Security Subcommittee in September, and they were asking about addressing the backlog, of course. But what been done now is OPM, through pressure from Congress, reopened the old register that they have been holding and said they would give her some names; however, she has expressed concerns about the quality of the remaining candidates and is only going to fill about 10 positions right now to fill that out.

In addition to that, we also have some major hiring that's going to have to be done because of the Medicare Act that has been passed by Congress, so we're looking somewhere between 400 to 500 ALJs we're going to be needing as soon as possible. I think the Medicare Act comes into effect in October 2005, the transfer to CPMS.

Ms. DAVIS OF VIRGINIA. Do you know why the register was closed for 5 years?

Mr. DUGAN. Well, it started off because of litigation, the Azdel litigation, and there was a stay put on it by the Merit Systems Protection Board, but that ultimately was resolved and then OPM did not reopen it. I don't know why, but they said they were redoing the test and they were going to put out a whole new type of test for administrative law judges. So why they did not reopen it under the old test I don't know.

Ms. DAVIS OF VIRGINIA. What do you hear from amongst your colleagues? Is pay a reason for them to leave and retire?

Mr. DUGAN. Well, the reason for the pay problem is more in the cities that you were announcing. I'm in Charlotte, so the compression is not hitting us there, but the entry level, the new ones that come in, we're having a problem because if you are a GS–15 attorney you're going to have to—you're not coming in at the level. It's a 14 step 7 or 8 now. It's almost a whole grade pay cut, so it has to hurt. Even though we don't have figures and OPM's was guess work, it just obviously has to hurt with recruitment.

Ms. DAVIS OF VIRGINIA. Thank you, Judge Dugan. We'll do everything we can to work this bill through, but, as you heard, the administration is against this so it is an uphill battle.

Mr. Gage, you mentioned the demo project that you didn't like. Besides that, are there any other provisions of the bill, because we want to be open with you and we want to know what you like and what you don't like.

Mr. GAGE. Well, in everything that I think we are going to be looking at—and I'm sorry to harp on this again, but we hear a lot of good-sounding cliches that end up in workers rights being abrogated, so we are going to go through everything that we hear with new personnel changes, new ideas, pay for performance, and we're going to be looking at things very hard with the idea that these can't be excuses or high-sounding names for taking away employee rights.

Ms. DAVIS OF VIRGINIA. Well, if you'll take a good look at H.R. 1601 and compare it to S. 129 and let us know what you think before it is too late, I'd appreciate it.

Ms. Kelley, have you received a lot of complaints about the problems now experienced by the Federal employees who must travel

for work yet receive no compensation other than the two that you mentioned to me?

Ms. KELLEY. This is very far-reaching, particularly in the IRS. It has been a longstanding problem, and as the IRS has reorganized into business units so the taxpayers are served by specific business units, it has required even more travel by employees than ever before, so these instances are multiplying every day. They are not decreasing. And, as I said, I know OPM has said there are circumstances where they can be compensated. There are, but not these employees. There is no way under the current law that the employees who are doing this travel can be compensated for doing the work of the IRS, and that is what we were hoping to have made fair.

Ms. DAVIS OF VIRGINIA. From the examples you gave me—I mean, I haven't studied it that closely, but just from hearing it it seems to me like we'd be saving taxpayer dollars if we reimbursed them for their time.

In your written testimony, as I read it, you didn't say anything about objecting to the demo project in H.R. 1601. I've already told you I plan on taking it out of the manager's amendment because I'm not sure about it. Do I take it that you support it?

Ms. KELLEY. No. I wouldn't necessarily take that. We have been working with Senators Voinovich and Akaka on the many pieces that are in this bill, because there are a lot of moving parts in it, and there were, you know, things that we should have preferred not, but as part of the package we were trying to work together as we did with your office as you move toward the H.R. version, so it is fine with us if you make the manager amendment.

Ms. DAVIS OF VIRGINIA. I'm going to charge you with the same thing I charged Mr. Gage with. I would ask you to go through the bill with a fine-toothed comb word by word, line by line, and if there is any provision that is objectionable to you and your employees, let us know before it is too late.

Ms. KELLEY. I will do that. Thank you.

Ms. DAVIS OF VIRGINIA. Mr. DeMaio, in your view are there any flexibilities in H.R. 1601 that you believe that we shouldn't—I've heard that you believe there is more we should be enacting, but are there any provisions in there now that you think we should not be enacting?

Mr. DEMAIO. Well, we are for more flexibilities, but the flexibilities that you are offering in the bill need to be accountable. We have to show results with these recruitment, retention, relocation bonuses, and so we do suggest not only the basis for all the bonuses to be tied back to the strategic human capital plan, but tied to performance measures and evaluation, so if the agency is providing recruitment bonuses over a period of time for a specific position class in their agency and it is not working, then they need to look at other alternatives.

We also suggest longer-term contracts for employees who get bonuses. In one respect for the recruitment bonus you do require a time of service contract, but for the retention bonus there is no time of service. We would like to see some of those accountability provisions woven into the flexibilities. It is OK to be flexible, but you have to show results, and that's what we are advocating.

In terms of the demonstration projects, that really is the context that we place our recommendation that the committee may want to see the DOD and the Department of Homeland Security progress. We think what is going on at DOD and Department of Homeland Security is innovative, will provide substantial flexibility and substantial incentives for recruitment, retention, and employee management. That's why we are, as of right now, supportive of the proposals that we have seen. We think that they probably will offer a template to take governmentwide and to have an overall change in the Civil Service system based upon our experiences in those two agencies.

Ms. DAVIS OF VIRGINIA. And, in my opinion, they may well do that. Had I had my way, I would rather have waited to see if it worked for DHS before we expanded it to the largest agency for Civil Service employees, but I didn't have my way.

Mr. DEMAIO. I think that's our—our position here today is consistent with that. Let's get these two massive restructurings under our belt, let's learn from them, and then let's see where they would apply elsewhere in the Federal Government. It may be that you would want to take those two systems governmentwide or it may be that you want to continue with the demonstration project route of allowing individual agencies to customize their own system. I in the past testified on our discomfort with having a choose-your-own adventure Civil Service system where each agency comes up with their own rules of the road.

Ms. DAVIS OF VIRGINIA. You're not the only one uncomfortable with that. That's why I said that we will try to make sure that any agency that's wanting to make a change, that it's looked at very closely by this subcommittee, and I think I've said it in the past, and I know I've probably said it to you, Ms. Kelley, that I would like to see a model that we use agency-wide before we go willy-nilly here and there and do something where folks don't know what's hitting them tomorrow. But, again, I would hope that we don't do anything too quick. And I appreciate the comments that you've made.

I will tell you that I don't think we can go any broader in scope with the bill that we have than what we have right now. We were biting off a little bit at a time, but trying not to do anything that damages or harms our——

Mr. DEMAIO. And I think that's a role of good government groups like ours. Our role is to try to present provocative ideas, knowing that Congress will probably have to moderate a number of interests and probably do something that moves us forward and gives us progress.

Ms. DAVIS OF VIRGINIA. I'll give you a for instance. I didn't see anything wrong with the ALJ bill, but I've met with resistance within our Congress in great amounts, which surprised me.

Mr. DEMAIO. If I could point something out, also in response to the testimony on the administration's competitive sourcing initiative and contracting out, we have studied that initiative and——

Ms. DAVIS OF VIRGINIA. You might not want to talk about that in this room right now.

Mr. DEMAIO. We have concluded that competitive sourcing actually is a tool for the human capital process, and if done properly

can be used to redeploy agency workers to areas where we have a recruitment challenge, and so that's the way we look at competitive sourcing. Rather than looking at arbitrary targets for out-sourcing or privatization, which we do not support, we want to see competition as re-deploying agency work, human capital, to the area where it is needed.

Ms. KELLEY. Madam Chairwoman, if I could just comment, I'm glad you identified your suggestions as provocative. I don't want to start——

Ms. DAVIS OF VIRGINIA. I don't think anybody is going to disagree with that.

Ms. KELLEY. This is try—my point, the suggestions that have come forth from Mr. DeMaio have to do with measuring, monitoring, ensuring that progress is made, that there are measures in place. There is not a strong track record of that within agencies on anything, whether it is on contracting out, and the list can go on and on. And so if the agencies proceed with these various implementations, assistance from other such as your group on insisting on the measuring, the monitoring, the moving slowly before implementing would be very much appreciated, because I know of no agency that has a good track record with doing this, and they just don't know how, and we all have to help to make sure that happens.

Ms. DAVIS OF VIRGINIA. I totally agree with you, Ms. Kelley.

Mr. DeMaio, one last question for you. Are there any weaknesses in the President's management agenda in the Government Performance and Results Act which call for strategic human capital planning that we should correct by legislation?

Mr. DEMAIO. Well, we believe that legislation exists, the entire management agenda exists in legislation, and that agencies have the statutory tools they need for effective management. The question now becomes: are we applying consequences for agencies that are not engaging in performance-based management? I think the President's management agenda's big impact is in that area. The initiatives are not new. They have been in the Government for many, many years, competitive sourcing since the Eisenhower administration. But what is needed is accountability. What is needed is that results demonstration through performance evaluation, and so that is where we are focusing, is on the implementation of the President's management agenda within agencies.

The Congress could formalize the development of strategic human capital plans in legislation. That has not happened. The creation of a human capital officer is certainly a very important step. What it does is it brings HR to the management table in a way that the chief financial officer and the chief information officer have been brought to the table, but, just like with the Clinger-Cohen Act, which does the IT plan, and the GPRA, which does the performance plan, the strategic plan, maybe that human capital officer should be responsible for developing in legislation, not just an administration initiative, a strategic human capital plan with specific goals based on a comprehensive work force assessment of how many employees do we have today, what are their skill sets like today, and what is our mission going to require we have in 5 years, so it would encompass recruitment, retention, training, succession

planning, developing the next generation of government leaders. All of these issues have to be spoken to in a formal way and in an accountable way through human capital plan. I think this committee could enact that in this bill and require that recruitment and retention, relocation flexibilities be tied to an analysis and a set of goals and strategies articulated in a comprehensive plan.

We don't know whether the next administration will require human capital plans. We would like to see that formalized through congressional action.

Ms. DAVIS OF VIRGINIA. Just so you know, we are having a hearing in May to address these issues and to see if we're doing right and what we need to do.

There's a lot going on right now that affects all of our Federal employees, and if we're going to make the changes that apparently seems to be the will of many around here to do—not necessarily in this room—maybe this is the time to do it as we are having so many people retire, so we don't lose any of the current work force that we have. Rather than going in and doing away with everybody or anybody, just let people go by attrition and make our changes at that point. But in doing so I want to work with all of you to make sure that we do it right and that we don't harm the quality of life of our Federal employees, because you are a valuable asset to us and not one that we want to lose.

I thank you all for being here today. Again, Judge Dugan, if you have any comments about the legislation for the ALJs, anything you want us to look at more closely?

Mr. DUGAN. I just wanted to add that the whole performance issue and the SES issue, that was all mixing apples and oranges.

Ms. DAVIS OF VIRGINIA. That's why I tried to point it out.

Mr. DUGAN. It really, really wasn't getting to what we are dealing with, APA hearings and—I think you understand that.

Ms. DAVIS OF VIRGINIA. That's why I tried to clarify with Mr. Sanders that SESers are performance based. ALJs are not even allowed to be.

Mr. DEMAIO. Madam Chairwoman, if I could indulge, we did not include our report in the committee record, but we include our Web site address, www.performanceweb.org, where agencies can download the report, suggestions on how to win the talent war. Ms. Tara Short is our director of human capital strategy at the Institute and is available for questions just by going to the Web site.

Ms. DAVIS OF VIRGINIA. Thank you, Mr. DeMaio. Again, thank you all for being here.

The hearing is adjourned.

[Whereupon, at 1:03 p.m., the subcommittee was adjourned, to reconvene at the call of the Chair.]

[Additional information submitted for the hearing record follows:]

Questions from Subcommittee on Civil Service and Agency Organization (H.R. 1601, S. 129, H.R. 3737)

1. Am I correct in understanding that rather than expanding the demonstration project authority, you believe we should follow the mode of DHS?
   - Do you have any particular agencies in mind?
   - How soon will we be seeing an Administration proposal for another agency or agencies?

   Response. The short answer is, yes, we do believe the Department of Homeland Security (DHS) model is the way of the future for agencies. As they become more strategic in linking their activities to their missions, agencies' need for change and reform may become more pronounced than the current demonstration project authority can address. However, we do believe there is room for both options in the Federal Government.

   For example, there may be instances when there is a demonstrated need on the part of the agency for change where following the DHS model may be the most appropriate method to quickly implement an entirely new personnel system. Alternatively, sometimes agencies may wish to explore certain options for their personnel systems on a limited basis before deciding to implement agency-wide change. In this instance, a demonstration project may be the most appropriate option for the agency.

   Better strategic planning and management of human capital can lead to the need for reforms comparable to those of DHS in order to allow agencies to be more flexible and responsive to their changing mission needs. For example, the National Aeronautics and Space Administration recently obtained legislation that will enable it to implement needed changes to its personnel system to allow it to more successfully meet the demands of its mission. In addition, the Office of Personnel Management's (OPM's) Human Capital Leadership & Merit System Accountability Division is currently working closely with the Department of Education to develop a project plan for a demonstration project to test certain innovations to their personnel system. We anticipate this plan proposal will be finalized in this fiscal year.

2. At the hearing you indicated that you would supply the subcommittee with data regarding approximately how many recruitment, retention and relocation bonuses are paid per year under current law.

   Response. OPM's Central Personnel Data File (CPDF) shows that approximately 6,200 Federal employees received a recruitment bonus and approximately 1,200 Federal employees received a relocation bonus under 5 U.S.C. 5753 in Fiscal Year 2003. In addition, the CPDF shows that approximately 13,200 Federal employees were receiving retention allowances under 5 U.S.C. 5754 as of September 2003. This reflects an increase of about 19 percent over the number of employees receiving retention allowances in September 2002. (Because retention allowances are paid

biweekly, the CPDF provides a point-in-time snapshot of the number of retention allowance recipients, rather than the number of retention allowances paid over a period of time.)

3. In the provision of annual leave enhancement for mid-career employees, does OPM intend to allow current employees to receive this higher leave accrual rate, or just new hires after the effective date of the change?

   Response. This flexibility would apply to new hires who come to the Federal Government with considerable non-Federal experience that is relevant to their new Federal positions. Such individuals may be reluctant to accept Federal employment when it means losing their private sector leave accrual rate. An agency would be able to offer an experienced mid-career employee a leave accrual rate comparable to his or her private sector vacation earnings, giving agencies an additional tool with which to recruit highly qualified individuals to Federal service.

   If only new hires qualify, will that create an unfair situation for some current employees with similar non-Federal experience who will not get credit for it?

   Response. The leave enhancement provisions provide an added incentive to attract employees who might otherwise not consider Federal service. We do not envision it as an automatic entitlement for every new mid-career employee, but rather as a recruitment tool, just as recruitment bonuses and superior qualifications appointments are recruitment tools, for those mid-career employees who have high qualifications and/or are needed to fill critical positions. Agencies would use this leave enhancement authority judiciously on a case-by-case basis.

5. At the hearing, you said that the Director of OPM will be revisiting the issue of compensation for travel done early in the morning in place of travel done the night before. Does OPM remain opposed to this measure, and if so, why?

   Response. At this time, the Administration remains opposed to the proposal to grant compensatory time off for otherwise uncompensated travel time. We oppose the current proposal for several reasons. First, this kind of benefit is not common among private sector employers. Since the Federal Government already offers relatively generous paid time off benefits, we do not think it is needed for competitive reasons. Second, granting compensatory time off for uncompensated travel could adversely affect agency operations and productivity through loss of work hours. Third, we do not view travel hours as equivalent to actual work hours; thus, granting full hour-for-hour credit for all uncompensated travel time seems overly generous. Fourth, some employees could accrue large balances, and work demands may make it difficult for the employing agency to grant these employees all the accrued compensatory time off. This would lead to pressure to amend the provision to provide monetary compensation for hours that do not constitute hours of actual work. Finally, we are not convinced that providing this time off benefit would actually significantly reduce

hotel and per diem expenses by enough to justify the lost productivity.

6. Do you disagree with any part of Judge Kevin Dugan's testimony or the answers he provided at the hearing?

   Response. (Testimony lines 1378-1386) Mr. Dugan states that a GS-15 attorney takes a grade pay cut upon entry into the Administrative Law Judge (ALJ) system because the entry salary falls between the rates for GS-14, steps 7 and 8. While it is true that the minimum entry-level ALJ basic rate (AL-3/A) of $91,200 falls between the rates of basic pay for GS-14, steps 7 and 8, agencies have the flexibility to set pay higher than this entry level rate.

   Section 930.210(g)(1) of title 5, Code of Federal Regulations, provides agencies with the authority (**without** prior OPM approval) to set ALJ pay at a rate higher than AL-3/A, not to exceed the lowest rate in AL-3 that equals or exceeds the applicant's highest previous rate of Federal pay. Under this rule, GS-15 attorneys need not suffer a reduction in basic pay upon movement into an AL-3 position.

   Section 930.210(g)(2) of title 5, Code of Federal Regulations, provides agencies with the authority (**with** prior OPM approval) to set ALJ pay at a rate higher than AL-3/A, up to rate F, based on the superior qualifications of the applicant. This flexibility can be used to set pay for a new or current Federal employee upon movement into an ALJ position.

7. Since you oppose H.R. 3737 and agree that there is a pay compression problem with ALJs, please tell me what administrative solution OPM has to relieve the ALJ pay compression.

   Response. The pay compression situation affecting ALJs is not as serious as that affecting the Senior Executive Service (SES), nor is it serious enough to warrant the automatic pay increases that would result from enactment of H.R. 3737. Moreover, the current pay situation does not appear to have had any effect on the Government's ability to recruit qualified ALJs.

   The primary applicant pool for ALJ positions is Government attorneys at the GS-15 level, and the pay range for ALJs is similar to that established for senior-level employees ($104,927 (minimum rate of basic pay) - $145,600 (maximum locality pay rate)). We believe the current pay structure is more than adequate to meet projected demands for these positions. Indeed, we have seen no shortage in applicant interest for ALJ positions, and agencies are actively hiring qualified candidates from the competitive register. Furthermore, there is relatively low turnover among the current population of ALJs.

8. Why didn't the Administration recommend that ALJs keep up with the Senior Executive Service when you sent up the provision to revamp SES pay?

Response. OPM did not recommend that ALJs "keep up with the Senior Executive Service" when the provision to revamp SES pay was forwarded, because we do not believe ALJ positions, as a whole, are equivalent to SES in terms of their duties and responsibilities. From a classification perspective, we find that many ALJ positions are more closely aligned with the criteria established for the GS-15 level. Moreover, ALJ positions are not characterized by the executive leadership requirements of SES positions (i.e. directing the work of an organizational unit, accountability for the success of specific programs/projects, monitoring progress towards organization goals, etc.).

OPM nevertheless recognizes that some ALJs perform duties that are arguably classified above the GS-15 level. Accordingly, the ALJ pay system resembles the one developed for the Government's senior-level employees. The senior-level pay system was designed to replace grades 16, 17 and 18 of the General Schedule positions which are classified above GS-15, but which do not meet the executive criteria characteristic of the SES.

9. Why should the SES, who can receive bonuses and increases in pay based on performance **receive** a pay increase and the ALJs who cannot receive bonuses nor pay for performance **not receive** a pay increase?

   Response. In pursuing recent pay reforms, it was the Administration's intent to create a system that would make the Government's SES leadership corps more performance sensitive. Consequently, SES members are no longer eligible to receive locality payments or automatic structural pay increases. SES pay adjustments are now wholly discretionary and must be based on an assessment of individual performance and contribution to the agency. Moreover, access to the higher base pay and aggregate caps is contingent upon joint OPM/OMB certification that the agency's performance management system, "as designed and applied, makes meaningful distinctions in relative performance." In this way, SES pay has been linked directly to individual job and organizational performance, providing greater accountability and assurance to the American people. Although SES members may receive bonuses and pay increases, these actions are based solely on assessments of individual performance and contribution.

   In contrast, ALJs and senior-level employees continue to receive locality payments and related structural pay increases without regard to their performance or contribution. (ALJs did receive pay increases in 2004, ranging from 2.2 percent to 4.8 percent, depending on locality pay area.) Although OPM has not conceded that a meaningful performance management system for ALJs is impracticable, we see no reason to grant them unchecked access to SES-equivalent pay caps.

10. At the hearing, you were asked to do a recruitment and planning study regarding the number of ALJs the Department of Health and Human Services will need to cover the newly passed Medicare bill. Has any progress been made on looking into this issue?

If so, what has been the proposed resolution?

Response. We are currently engaged in a review of the current staffing and projected hiring requirements with the principal employers of ALJs. Our review so far reveals that the Social Security Administration recently hired 19 ALJs and is now using OPM's ALJ register to fill an additional 33 ALJ positions. We have seen no shortage in applicant interest for ALJ positions. With more than 1600 eligible candidates on OPM's competitive register, there are more qualified candidates than needed to accommodate even a substantial surge in hiring activity that may be required with Medicare reform. In addition, OPM's regulations provide a degree of pay flexibility for initial appointments to a position at AL-3. Instead of an appointment at the minimum rate, agencies may provide a higher starting rate based on prior Federal service or, with OPM's approval, superior qualifications (e.g., having legal practice before the hiring agency, having practice in another forum with legal issues of concern to the hiring agency, or having an outstanding reputation among others in the field). In sum, the number of available qualified candidates and projected staffing needs do not support a need for higher ALJ pay.

11. What are OPM's plans to revitalize the register?

Response: OPM has already instituted plans that reactivated and updated the ALJ register. Specifically, OPM reactivated the ALJ register and updated scores based on the 1996 scoring formula in August 2003. Since that time, OPM resumed processing applications that were pending during the stay, which has resulted in adding another 84 individuals to the register. Another 50 plus applicants have nearly completed the process and will be added to the register. In addition, eligibles already on the register were permitted to submit updated resumes for use by agencies. As of now, there are a total of 1,620 eligible candidates on the register.

OPM is currently working on the development of a new ALJ examination. Development of new test components is necessary to ensure that the tests reflect the latest content of the field. At this point, the completion date of that process is unknown. When the new ALJ examination is completed and announced, the current register will be terminated. Any individual on the existing register who wishes to remain an ALJ candidate will have to re-apply and participate in all parts of the new examination.

12. With an enormous amount of experienced federal judges eligible for retirement, will passage of H.R. 3737 facilitate retention of experienced ALJs?

Response. Even in the event that a majority of the current ALJ population were to exercise their retirement option, now or in the near future (and there is no indication that this will happen), there are sufficient numbers of qualified candidates on the competitive register (1600+), which will allow for responsive recruitment and replacement. Moreover, we have seen no shortage in applicant interest for ALJ

positions, and agencies are actively hiring qualified candidates from the competitive register.

13. Once OPM resumes recruitment of candidates for appointment as ALJs, don't you agree that H.R. 3737 will facilitate the appointment of the best and brightest senior attorneys as ALJs?

Response. OPM has already resumed recruitment for ALJs. SSA recently hired 19 and has requested an additional 33 new hires. As mentioned above, we have seen no shortage in applicant interest for ALJ positions, and agencies are actively hiring qualified candidates from the competitive register.

The Honorable Jo Ann Davis
Madame Chairwoman
Subcommittee on Civil Service and Agency Organization
U.S. House of Representatives
Washington, D.C. 20515

February 25, 2004

Dear Madame Chairwoman:

The Professional Services Council (PSC) is pleased to submit this letter for the record of the hearing you held on February 11, 2004 on the challenges facing the Federal government as it seeks to attract and retain a world-class workforce. This is a critically important issue about which all Americans should be concerned.

The Professional Services Council is the principal national trade association of government technology and professional services firms. As the government's "partners" in the provision and delivery of a very wide range of services to the public, PSC's member companies are both highly interested in, and strongly support, practices and strategies that will help the government better compete for, train, and retain the workforce it needs.

There is little question that the government faces a formidable set of human capital challenges. Even in the post-9/11 environment, while survey after survey has reflected broad appreciation for the role of civil servants (most particularly police, fire, rescue and other first responders), the government is not an employer of choice and continues to lose the battle for talent with the private sector. Nonetheless, federal workforce demographics clearly portend a significant retirement exodus over the near term. As such, your committee's leadership in this vital area is both timely and greatly needed.

One witness at the February 11 hearing suggested that there is a cause and effect relationship between the administration's competitive sourcing initiative and the government's difficulty in attracting new talent. As explained below, such an assertion does not bear up well under analysis. However, competitive sourcing and human capital are inextricably linked in other ways, and can and should serve as complements to a broader strategy of modernizing government and improving performance on behalf of the American people. This fact was clearly articulated by the congressionally-mandated Commercial Activities Panel (CAP), chaired by the Comptroller General and on which I was privileged to serve.

PSC offers several observations on the links between competitive sourcing and the government's human capital challenges.

- **The relationship between competitive sourcing and the government's ability to recruit and retain a highly skilled workforce**

This issue is especially important given the enormous federal retirement wave that is inevitable over the next several years.

Many surveys, including those conducted by Paul Light of the Brookings Institution, clearly demonstrate that the government generally is not an employer of choice. These findings are mirrored by surveys of current government employees as well, large majorities of who express frustrations about the government's overly bureaucratic human resources processes and the lack of a real incentive and reward system. While job security and stability is always an issue, the evidence strongly suggests that it is not as central to the government's human resource challenges as some might believe. Thus, your leadership on issues associated with civil service reform, particularly as it relates to those factors that most directly drive successful recruitment and retention, is of immeasurable importance.

Yet in the private sector, job stability and security is non-existent, competition is a way of life, and change is constant. Clearly, those factors are of less significance in a potential private sector employee's job criteria than some believe. Moreover, most private sector human resource professionals agree that the best and most highly skilled workers are those who, among other things, are most adaptable to a continually changing environment, competition, and challenge. For potential new hires, the most important attributes of a job opportunity include professional and personal development, an employer's system of reward and incentives, and the quality of the work environment. As several major private sector labor unions have publicly stated, one of the hallmarks of private sector collective bargaining agreements is the training and development programs that are offered to their workforces. Such programs are almost non-existent in the government. Hence, private sector unions including the Laborers' International Union, the International Union of Operating Engineers, and the International Federation of Professional and Technical Engineers have consistently opposed restrictions on government competitive sourcing and outsourcing. Among their concerns is that their employees would be denied such important training and developmental opportunities if the work they are performing under a federal contract were brought back "in-house."

- **The relationship between competitive sourcing and strategic human capital planning**

The first and foremost of the CAP's unanimously recommended principles is that federal sourcing policy must be a strategic exercise and not one governed by arbitrary quotas or goals, or equally arbitrary limitations. While much of the discussion surrounding this principle has centered on the administration's competitive sourcing goals, there is much more to it. Indeed, in making decisions as to whether a function can or should be performed by either the public or private sector, agency management must take into account the human resource realities it faces. In cases where the government is simply not competing well for the "best in class" in important skill areas, competitive outsourcing is clearly in the best interests of the government. In fact, this

is one of the most critical of all strategic considerations to be factored into an agency's sourcing decision.

In short, an agency's analyses of answers to two questions are essential to its sourcing strategies:

- Does the agency have in place a workforce that has the requisite skills to perform the function at an optimal level? Indeed, if an agency has or will have a real struggle attracting and retaining the highly skilled workforce needed, and the work must continue to be done, why not outsource the work?

- Realistically, does the agency have the resources to fully support and develop a workforce in this functional area? One reason many companies have moved increasingly to outsourcing is their recognition that, with resources always limited, they can only provide adequate support and development for their employees performing the company's core competencies. If they retain too much work in-house, the available resources for professional development must be spread across a larger number of people, thus diluting their ability to focus on those functions that must be performed in house. The same is true for the federal government.

It is precisely because of the importance of these matters that external mandates to always conduct public/private competitions, or to place arbitrary limitations on outsourcing, are a disservice to the agencies and the taxpayer. Moreover, while the Commercial Activities Panel did endorse an approach in which public/private competitions would be the norm for assessing work currently being performed by government employees, the CAP also stated clearly that the mere fact that either sector could perform the work should not mandate that such competitions always be conducted, and that the determination as to when such competitions should be conducted should be "consistent with these sourcing principles." Examples of such strategic decisions (conducted in a manner that also advantages the affected federal workforce) can be found at NSA, the Army and elsewhere.

- **The relationship between outsourcing and overall compensation and benefits for affected federal workers**

This issue has been studied numerous times, including by the General Accounting Office, and each objective study has reached the same conclusion: there is no evidence that, overall, outsourcing results in significant job loss, reduced pay or benefits. Indeed, Federal employee unions base their campaign for higher federal wages and benefits on the "pay gap" between the public and private sectors. The "pay gap" is almost certainly real. At the professional levels especially, government contractors are competing with the rest of the private sector for the same, contemporary skill sets. At the lower end of the wage scale, where the greater concern might exist, workers are typically protected by the Service Contract Act, which is specifically designed to ensure that wage grade employees—the most vulnerable of all workers—are paid a fair wage and given fair benefits. Those wages and benefits are based on the government's assessment of compensation for a given job in a given region.

As demonstrated by the National Security Agency's "Groundbreaker" procurement, the Army's "Wholesale Logistics Modernization Initiative" and elsewhere, when a public/private competition is NOT conducted, and the employee's interests and benefits are made a significant source selection factor in the competition between private sector bidders, federal employees can be substantially advantaged through outsourcing. Such benefits cannot occur, of course, when the workforce is one of the competitors. There is growing evidence that the very existence of public/private competitions can and does significantly limit the opportunities available to federal employees affected by an outsourcing decision.

Unfortunately, because their "addressable market" is determined solely by the number of federal employees, the federal employee unions are adamant in their refusal to both acknowledge this fact and to allow alternatives to be pursued. While their "market" concern is understandable, it is simply not a sound basis on which Congress should make national policy; occasionally, it even places the unions' best interests in direct conflict with their memberships' best interests.

- **The relationship between outsourcing and government employee levels over the last decade**

Looking across the government, it is clear that there is little relationship between full time equivalent federal employee levels and outsourcing activities.

According to the Federal Procurement Data System, from 1991 to 2001, service contracting across the civilian agencies grew by some 33% (an average growth of just over 3% per year). However, according to the Congressional Budget Office, over that same decade, civilian employment levels in the civilian agencies fell by a total of less than 3%. At the Department of Defense, the converse was true. During the period 1991 to 2001, service contracting grew by only 14%, while civilian employment levels dropped by over 35%, most of which was due to general DoD downsizing and several rounds of base closures. Despite the constant rhetoric to the contrary, on a macro level, the government has not been undergoing a massive civilian downsizing in favor of contracting to the private sector. While there may be discrete components of the government where this has happened, the data clearly shows that it is not the norm.

- **The "Shadow Workforce"**

No discussion of competitive sourcing or the government's human capital needs is complete without some exploration of the myth of the so-called "shadow workforce", a term commonly assigned to the government contractor workforce. As the data above indicate, the government is far from having outsourced itself, despite the rhetoric of some.

Some have blithely claimed that the contractor workforce numbers as much as 8 million—more than four times the size of the federal workforce. In fact, that number is derived from a Department of Commerce econometric model that measures both direct (i.e., contractor) and indirect employment. It therefore includes not only the actual contractor and subcontractor workforce, but also the many layers of economic/employment impact resulting from those direct contracts. While an excellent tool for other purposes, it is not a model that offers insight into the

actual size of the direct contractor workforce. If anything, the model demonstrates the very positive, broad impacts of government contract spending and its ripple effects on the economy.

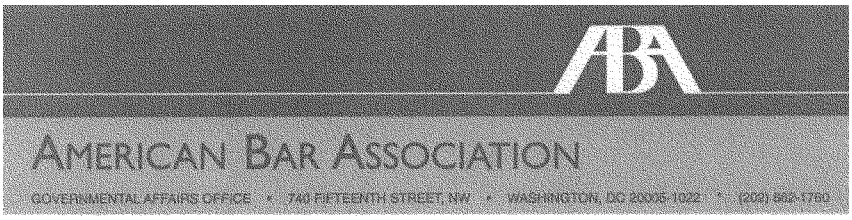
Second, the suggestion that the contractor workforce could be that large is further diminished by simple math. Today, the federal civilian workforce is approximately 1.9 million, and costs an estimated $150 billion in wages, benefits, etc. Total government spending on federal services contracts is roughly $130 billion. It is simply inconceivable that for 15% less money, government contractors are directly employing four times as many people as the government. Indeed, when one includes the reality of pay parity (as discussed earlier) in this analysis, it becomes even clearer that the so-called "shadow workforce" is nowhere near the size suggested.

Madame Chairperson, the relationship between human capital and competitive sourcing is very important. As the committee continues its deliberations on these issues, we look forward to further opportunities to work with you and your staff on appropriate policy measures that will serve the interests of the government and the taxpayer. In the meantime, if you have any questions, the members of the Professional Services Council, and I, are available at your convenience.

Thank you for your time and consideration of our views.

Sincerely,

Stan Soloway
President



STATEMENT

of the

American Bar Association

on

H.R. 3737

THE ADMINISTRATIVE LAW JUDGES PAY REFORM ACT OF 2004

submitted for the

hearing record of the

SUBCOMMITTEE ON CIVIL SERVICE AND AGENCY REORGANIZATION

COMMITTEE ON GOVERNMENT REFORM

UNITED STATES HOUSE OF REPRESENTATIVES

February 2004

The American Bar Association is pleased to have the opportunity to submit this statement to the Subcommittee on Civil Service and Agency Reorganization for the record of the February 11, 2004 hearing on recruiting and retaining federal workers. We are particularly thankful that Chairwoman Davis is willing to address the pay issues facing the administrative judiciary and has included an examination of H.R. 3737, the *Administrative Law Judges Pay Reform Act of 2004* within the scope of this hearing. While we are aware of the many challenges facing this subcommittee as it examines various legislative proposals to avert a human capital crisis in the federal workforce, this statement will focus on the administrative judiciary and our support for H.R. 3737.

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.

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, these 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. In his written statement to this subcommittee, OPM Associate Director, Dr. Ronald P. Sanders, minimized the effect of pay compression, dismissing it as only affecting ALJs paid at the top two tiers (AL-1 and AL-2) of the salary scale. Were this true, only about 35 administrative law judges out of a cadre of approximately 1300 would be at their salary cap. However, pay compression results from both the statutory caps on basic salary for each level of ALJ pay as well as the statutory cap on

locality pay. Most ALJs are paid at the AL-3F level and over 2/3 of them are no longer eligible for COLAs because they are up against their basic salary cap. Further, according to the Association of Administrative Law Judges, AL-3F administrative law judges in nine of the 32 localities designated by the President's pay agent also have reached the statutory cap on locality pay and all other AL- 3F administrative law judges are within five per cent of the cap.

The American Bar Association supports H.R. 3737 because it offers a solution to pay compression and provides a statutory framework for addressing pay adequacy issues while at the same time respecting the unique function of the administrative judiciary within the Executive Branch.

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. Secs. 930.211 and 930.215(b).

Congress 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. The U.S. Supreme Court, likewise, affirmed the unique status of ALJs within the Executive Branch in 1978, stating that ALJs are comparable to federal judges for pay an compensation purposes (Butz v. Economou, *438 U.S. 478*) and, more recently, in Federal

Maritime Com'n v. South Carolina State Ports Authority, 535 U.S. 743 (2002), by its assertion that ALJs are the functional equivalent of other federal trial judges.

Because of the unique, judicial position of ALJs within the Executive Branch, we believe it is inappropriate to compare the value of service rendered by the administrative judiciary with the service rendered by the SES (or other segments of the federal workforce) or to model ALJ pay-setting mechanism reforms on the newly revised SES pay system. Similarly, the ABA categorically objects to any attempt to link pay for performance for ALJs because it would jeopardize their decisional independence and threaten the integrity of the administrative hearing process. Finally, we are not swayed by the argument that pay compression problems facing the administrative judiciary should not be rectified now because pay compression afflicts other factions of the federal workforce.

Our ability to analyze recruitment trends and determine the degree to which pay compression and salary erosion are affecting the composition of the administrative judiciary continues to be hampered by the Adzell litigation, which has prevented agencies from hiring new ALJs from the register for the last several years. Nonetheless, while some may demand objective substantiation that the integrity, quality and diversity of the administrative judiciary are adversely affected by inadequate and stagnant salaries, few could argue with the premise that the dual problem of ALJ pay compression and salary erosion puts the federal government at a distinct competitive disadvantage in recruiting competent, experienced private- and federal-sector attorneys into the federal administrative judiciary.

The current inadequacy of ALJ pay and the severity of the problem of pay compression should not be measured by the number of ALJs who are resigning at present. 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, or reluctance to retire when the ALJ knows that his or her agency will be precluded from hiring a replacement because of the ongoing Adzell litigation. Even absent these considerations, that form of analysis would be short-sighted and side-steps the fact that it is inequitable to deny more than two-thirds of the administrative judiciary 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.

H.R. 3737 is a well-crafted, reasonable bill that has the potential to strengthen the federal administrative judiciary and thereby confer benefits on all the government departments and agencies employing administrative law judges. We urge the subcommittee to act promptly and approve this legislation.

The ABA stands ready to answer any questions that you might have regarding ALJ pay. Please contact Denise Cardman, Senior Legislative Counsel, at: cardmand@staff.abanet.org or by phone at: 202/662-1761.

Thank you.