

COST OF LIVING ADJUSTMENT IN THE PAY OF ADMINISTRATIVE LAW JUDGES



HEARING

BEFORE THE
SUBCOMMITTEE ON
COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES
ONE HUNDRED SIXTH CONGRESS

FIRST SESSION

ON

H.R. 915

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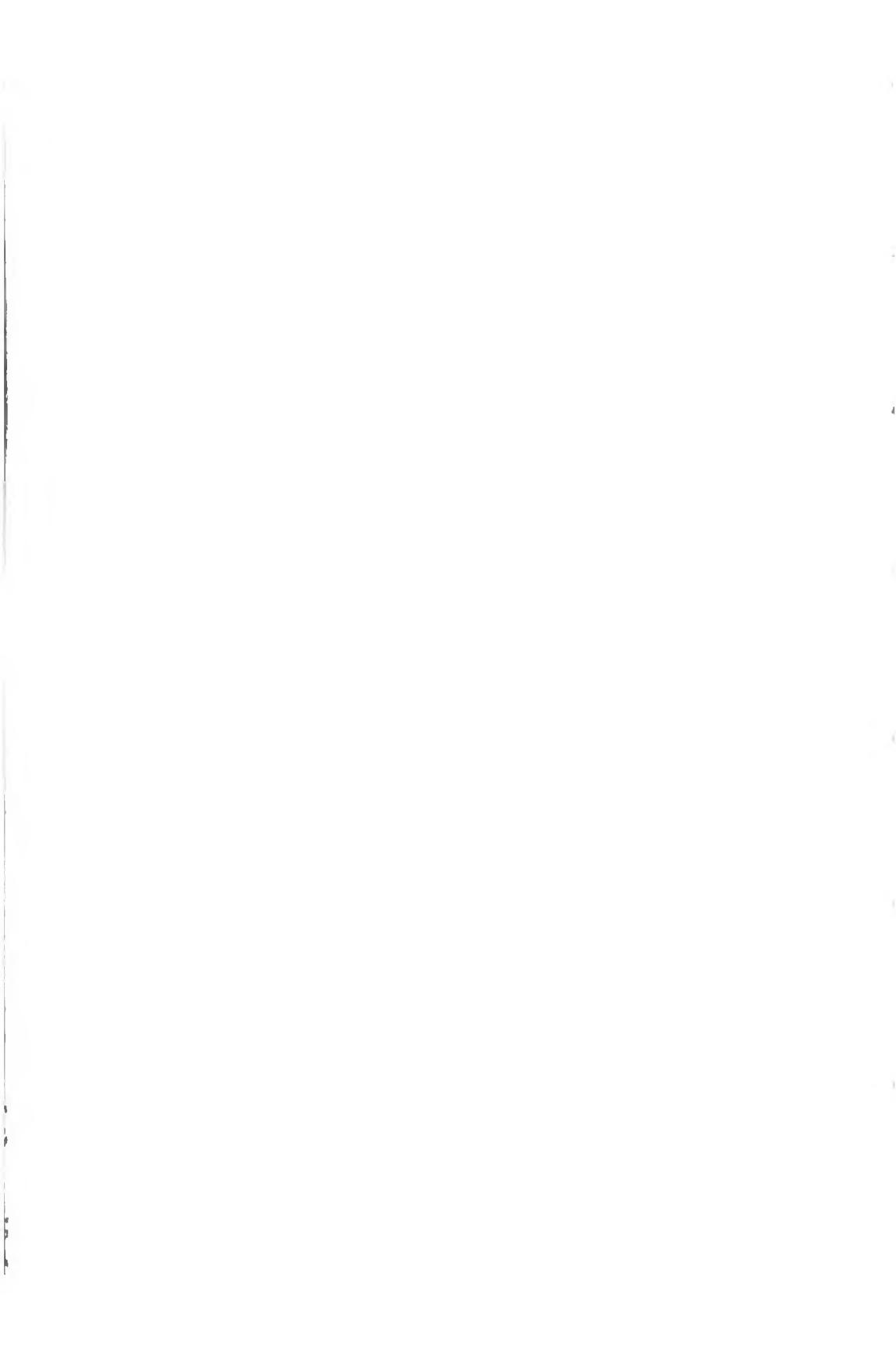
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COST OF LIVING ADJUSTMENT IN THE PAY OF ADMINISTRATIVE LAW JUDGES

THURSDAY, MAY 27, 1969

**HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCIAL
AND ADMINISTRATIVE LAW,
COMMITTEE ON THE JUDICIARY,
*Washington, DC.***

The subcommittee met, pursuant to call, at 10 a.m., in Room 2226, Rayburn House Office Building, Hon. George W. Gekas [chairman of the subcommittee] presiding.

Present: Representatives George W. Gekas, Ed Bryant, Lindsey O. Graham, Jerrold Nadler, Tammy Baldwin, Melvin L. Watt, Anthony D. Weiner, William D. Delahunt.

Staff present: Raymond V. Smietanka, Chief Counsel; Susan Jensen-Conklin, Counsel; Sarah Zaffina, Staff Assistant; David Lachmann, Minority Professional Staff Member.

OPENING STATEMENT OF CHAIRMAN GEKAS

Mr. GEKAS. The hour of 10 having arrived, the committee will come to order. Pursuant to the rules of the House of Representatives and those that pertain to committee functions, a hearing quorum is established when two members are present.

Because there happens to be only one now at his seat in the committee, we will have to recess until the next individual member appears. What we have done is keep faith with our effort to start every committee meeting on time. We have succeeded in that; we have failed to acquire a quorum. We stand in recess.

[Recess.]

Mr. GEKAS. The time of the recess has expired. Let the record indicate that the working quorum has been achieved through the attendance of the gentleman from New York, Mr. Weiner, and the chairman of the committee, thus constituting the necessary numbers for proceeding with this hearing.

Everyone who is here, and we should make the record clear that this is a revisited issue, has been interested for a long period of time now in trying to achieve equitable pay status for the administrative law community in the Federal establishment.

As everyone knows, by a quirk of legislative oversight, shall we say, the executive schedule, which was to cover, and does cover, the Federal judges, the Congress and others, was also the place where administrative law judges were to reside for the purposes of pay.

Then, lo and behold, once that was accomplished, in order to enhance their status, so to speak, what happened was that the Con-

gress, in its wisdom—I say that with quotes—chose not to append the COLA that would be regularly appendable to those scheduled salaries.

So the administrative law judges, having happily at first been attached to the Federal judges, suffered because of that. That is what we are trying to correct by the legislation that is before us. The testimony that we will hear will tune us into that same project, and we hope that the members of the committee will be eager to cement on this new phase for the administrative law judges.

[The bill, H.R. 915, follows:]

106TH CONGRESS
1ST SESSION

H. R. 915

To authorize a cost of living adjustment in the pay of administrative law judges.

IN THE HOUSE OF REPRESENTATIVES

MARCH 2, 1999

Mr. GEKAS (for himself, Mr. GILMAN, Mr. DAVIS of Virginia, Mr. FILNER, Mr. WOLF, and Mrs. MORELLA) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To authorize a cost of living adjustment in the pay of administrative law judges.

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

SECTION 1. PAY OF ADMINISTRATIVE LAW JUDGES.

Section 5372(b) of title 5, United States Code, is amended—

(1) in paragraph (1), by inserting "(A)" after "(1)" and by striking the second sentence and inserting the following:

"(B) Within level AL-3, there shall be 6 rates of basic pay, designated as AL-3, rates A through F, respectively. Level AL-2 and level AL-1 shall each have 1 rate of basic pay.

"(C) The rate of basic pay for AL-3, rate A, may not be less than 65 percent of the rate of basic pay for level IV of the Executive Schedule, and the rate of basic pay for AL-1 may not exceed the rate for level IV of the Executive Schedule.;"

(2) in paragraph (3)(A), by striking "upon" each time it appears and inserting "at the beginning of the next pay period following"; and

(3) by adding at the end the following:

"(4) Subject to paragraph (1), effective at the beginning of the first applicable pay period commencing on or after the first day of the month in which an adjustment takes effect under section 5303 in the rates of basic pay under the General Schedule, each rate of basic pay for administrative law judges shall be adjusted by an amount determined by the President to be appropriate."



[The prepared statement of Mr. Gekas follows:]

PREPARED STATEMENT OF HON. GEORGE W. GEKAS, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA, AND CHAIRMAN, SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

Today's hearing will consider an issue of basic fairness to our federal administrative law judges which I have long sought to rectify.

Under current law both Article III Federal judges and administrative law judges are paid under the Executive Schedule, as are Members of Congress. For the years 1993, 1994, 1995 and 1996, neither ALJs nor federal judges received cost of living adjustments because the Congress restricted the Executive Schedule from receiving a COLA by denying themselves the annual approximately 3 per cent raise.

I certainly think Members of Congress are entitled to COLAs but our salaries and those of federal judges are equal and considerably higher than the salary of administrative law judges who are paid but a percentage of the Executive Schedule rates. Unlike federal judges who receive their full salary for life, ALJs over the last five year actually lost salary by being withheld increases of 12 per cent of their salary, which is used to calculate their retirement benefit of 50 per cent of their salary.

About 99 per cent of the approximately 1400 ALJs earn a salary between 65 per cent and 90 per cent of Level IV of the Executive Schedule—most at the lower end. Even the top ALJ rate is considerably less than salaries paid to federal judges and Members of Congress.

Prior to 1990, ALJs were paid under the General Schedule as GS-15 and GS-16. The Federal Employee Pay Comparability Act of 1990 was intended as a pay increase by placing them under the Executive Schedule but, unfortunately, it has turned out to be in essence a pay decrease. Because the General Schedule has received COLAs from 1993 through 1996 that ALJs did not, ALJ-3 rates A, B, and C pay is now less than GS grade 15 step 10. This has resulted in recently appointed ALJs now making less than their former colleagues in federal agencies.

ALJs are different from others in the Executive Schedule in that they are Merit System selected from a competitive examination and are required to have seven years of litigation experience. Thus most ALJs are older, experienced litigators when they enter federal service and retire under the Civil Service retirement system. Loss of COLAs for any year not only reduces their annual salary forever but also reduces their pension as well, unlike federal judges.

Many members of the Executive Schedule are political appointees who enter government for a short time not for careers and do not expect to rely on government retirement. ALJs are hard working career, civil service employees, the only merit based administrative judiciary in the world who have suffered long enough from our parsimony.

Mr. GEKAS. Does the gentleman from New York have an opening statement?

Mr. WEINER. No, I don't, Mr. Chairman. I thank you for convening the hearing.

Mr. GEKAS. We will proceed then with the large panel that we have. Panel number one consists of Mr. Romero, who has a long biographical introduction for the record, which we will place in the record; but suffice it to say that he now represents the Office of Personnel Management as the associate director of Workforce Compensation Performance Service. He is responsible for developing and administering compensation classification and performance programs and policies for the approximately 1.8 million employees of the executive branch. That qualifies him as an expert for the purposes of this and many other issues.

Let the record indicate now that the lady from Wisconsin, Ms. Baldwin, and the gentleman from Massachusetts, Mr. Delahunt, have joined the committee, and we have more than the hearing panel quorum that is required.

We will proceed with the testimony of Mr. Romero. We will allot the normal 5 minutes and hope that you can summarize within that time. In the meantime, without objection, your written statement will be accepted for the record.

Mr. ROMERO. Thank you.

Mr. GEKAS. Please proceed.

**STATEMENT OF HENRY ROMERO, ASSOCIATE DIRECTOR,
WORKFORCE COMPENSATION AND PERFORMANCE SERVICE,
OFFICE OF PERSONNEL MANAGEMENT**

Mr. ROMERO. Mr. Chairman and members of the subcommittee, as you indicate, I am Henry Romero, the Associate Director for Workforce Compensation and Performance at the U.S. Office of Personnel Management. I appreciate the opportunity to appear before you today to discuss H.R. 915, which would change the method currently used to adjust the basic pay of Federal administrative law judges, or ALJs.

Currently, the law fixes rates of basic pay for ALJs at various percentages of the basic pay rate for Level IV of the Executive Schedule. The Level IV rate itself, currently \$118,400 per year, applies to numerous Federal executives, including Assistant Secretaries of Cabinet departments and members of regulatory boards and commissions. ALJ pay ranges from 65 percent of this Level IV to the full Level IV rate.

The difficulty with those linkages historically has been that when Executive Schedule pay remains unchanged so does basic pay for ALJs. Consequently, ALJ pay levels have not kept pace with those of other groups of Federal employees, such as the General Schedule, GS, and the Senior Executive Service, SES.

The last big increase in Executive Schedule pay rates occurred in 1991, the same year in which the current ALJ pay system was established. Since then, ALJ basic pay rates have been increased only 3 times, by 3.5 percent in 1992; 3.2 percent in 1993; and by 2.3 percent in 1998. Of course, it should be noted that overall pay for ALJs has been increased on more than just those three occasions and by more than those amounts.

When pay for GS employees is adjusted, the President's pay agent, under delegated authority from the President, must decide whether to extend the locality payments for those employees to other groups as well.

Each year since the locality pay system was first established in 1994, the pay agent has extended those adjustments to ALJs. However, even with those adjustments, net pay increases for ALJs have lagged significantly behind those for the SES and white-collar employees generally.

H.R. 915 would provide an alternative pay adjustment plan for ALJs in recognition of this disparity. As proposed under this bill, the pay adjustment process for ALJs would mirror the process for setting the basic pay rates for the SES. We believe this is a sound fundamental principle on which to base a new system, since both groups are already subject to the same upper limit on pay and because both groups have consistently received the locality pay adjustments.

Under H.R. 915, the basic structure of the ALJ pay system would remain unchanged with three pay levels and six rates within the lowest pay level. Just as the law sets only the minimum and maximum basic pay rates for the SES, the bill would retain the minimum and maximum rates for the ALJ pay range, while eliminating the specific linkages to executive pay within that range.

The President would be authorized to adjust ALJ pay within the pay range at the same time SES basic pay rates are adjusted,

which is the time of the annual GS pay adjustment. The top ALJ pay rate could still not exceed the statutory maximum, which would remain the rate for executive Level IV.

As a result, instead of adjusting ALJ rates only when there is an increase in executive pay, the President could adjust any ALJ pay rate which had not reached that statutory maximum.

Currently, the Office of Personnel Management is undertaking a long-term study of Federal compensation, including the relationship among various groups of employees. Pending the completion of that study, we believe that placing administrative law judges on the same pay adjustment footing as the Senior Executive Service is an appropriate step to take at this time. Accordingly, we would support the enactment of H.R. 915.

Mr. Chairman, thank you again for the opportunity to address this issue. I would be pleased to answer any questions you may have.

Mr. GEKAS. Yes, thank you.

[The prepared statement of Mr. Romero follows:]

PREPARED STATEMENT OF HENRY ROMERO, ASSOCIATE DIRECTOR, WORKFORCE COMPENSATION AND PERFORMANCE SERVICE, OFFICE OF PERSONNEL MANAGEMENT

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

MY NAME IS HENRY ROMERO. I AM THE ASSOCIATE DIRECTOR FOR WORKFORCE COMPENSATION AND PERFORMANCE AT THE OFFICE OF PERSONNEL MANAGEMENT. I AM ACCOMPANIED TODAY BY MARY LOU LINDHOLM, OUR ASSOCIATE DIRECTOR FOR EMPLOYMENT. WE APPRECIATE THE OPPORTUNITY TO APPEAR BEFORE YOU TODAY TO DISCUSS H.R. 915, WHICH WOULD CHANGE THE METHOD CURRENTLY USED TO ADJUST THE BASIC PAY OF FEDERAL ADMINISTRATIVE LAW JUDGES (ALJ'S).

CURRENTLY, THE LAW FIXES RATES OF BASIC PAY FOR ALJ'S AT VARIOUS PERCENTAGES OF THE BASIC PAY RATE FOR LEVEL IV OF THE EXECUTIVE SCHEDULE. THE LEVEL IV RATE ITSELF, CURRENTLY \$118,400, APPLIES TO NUMEROUS FEDERAL EXECUTIVES, INCLUDING ASSISTANT SECRETARIES OF CABINET DEPARTMENTS AND MEMBERS OF REGULATORY BOARDS AND COMMISSIONS. ALJ PAY RANGES FROM 65 PERCENT OF LEVEL IV TO THE FULL LEVEL IV RATE.

THE DIFFICULTY WITH THOSE LINKAGES, HISTORICALLY, HAS BEEN THAT WHEN EXECUTIVE SCHEDULE PAY REMAINS UNCHANGED, SO DOES BASIC PAY FOR ALJ'S. CONSEQUENTLY, ALJ PAY LEVELS HAVE NOT KEPT PACE WITH THOSE OF OTHER GROUPS OF FEDERAL EMPLOYEES, SUCH AS THE GENERAL SCHEDULE (GS) AND THE SENIOR EXECUTIVE SERVICE (SES).

THE LAST BIG INCREASE IN EXECUTIVE SCHEDULE PAY RATES OCCURRED IN 1991, THE SAME YEAR IN WHICH THE CURRENT ALJ PAY SYSTEM WAS ESTABLISHED. SINCE THEN, ALJ BASIC PAY RATES HAVE BEEN INCREASED ONLY THREE TIMES, BY 3.5 PERCENT IN 1992, BY 3.2 PERCENT IN 1993, AND BY 2.3 PERCENT IN 1998.

OF COURSE, IT SHOULD BE NOTED THAT OVERALL PAY FOR ALJ'S HAS BEEN INCREASED ON MORE THAN JUST THOSE THREE OCCASIONS AND BY MORE THAN THOSE AMOUNTS. WHEN PAY FOR GS EMPLOYEES IS ADJUSTED, THE PRESIDENT'S PAY AGENT, UNDER DELEGATED AUTHORITY FROM THE PRESIDENT, MUST DECIDE WHETHER TO EXTEND THE LOCALITY PAYMENTS FOR THOSE EMPLOYEES TO OTHER GROUPS AS WELL. EACH YEAR SINCE THE LOCALITY PAY SYSTEM WAS FIRST ESTABLISHED IN 1994, THE PAY AGENT HAS EXTENDED THOSE ADJUSTMENTS TO ALJ'S.

HOWEVER, EVEN WITH THOSE ADJUSTMENTS, NET PAY INCREASES FOR ALJ'S HAVE LAGGED SIGNIFICANTLY BEHIND THOSE FOR THE SES AND WHITE-COLLAR EMPLOYEES GENERALLY. H.R. 915 WOULD PROVIDE AN ALTERNATIVE PAY ADJUSTMENT PLAN FOR ALJ'S, IN RECOGNITION OF THIS DISPARITY.

IN THE SCHEME ESTABLISHED UNDER THIS BILL, THE PAY ADJUSTMENT PROCESS FOR ALJ'S WOULD MIRROR THE PROCESS FOR SETTING THE BASIC PAY RATES FOR THE SES. WE BELIEVE THIS IS A SOUND FUN-

DAMENTAL PRINCIPLE ON WHICH TO BASE A NEW SYSTEM, SINCE BOTH GROUPS ARE ALREADY SUBJECT TO THE SAME UPPER LIMIT ON PAY, AND, BECAUSE BOTH GROUPS HAVE CONSISTENTLY RECEIVED THE LOCALITY PAY ADJUSTMENTS.

UNDER H.R. 915, THE BASIC STRUCTURE OF THE ALJ PAY SYSTEM WOULD REMAIN UNCHANGED, WITH THREE PAY LEVELS AND SIX RATES WITHIN THE LOWEST PAY LEVEL. JUST AS THE LAW SETS ONLY THE MINIMUM AND MAXIMUM BASIC PAY RATES FOR THE SES, THE BILL WOULD RETAIN THE MINIMUM AND MAXIMUM RATES FOR THE ALJ PAY RANGE, WHILE ELIMINATING THE SPECIFIC LINKAGES TO EXECUTIVE PAY WITHIN THAT RANGE.

THE PRESIDENT WOULD BE AUTHORIZED TO ADJUST ALJ PAY WITHIN THAT PAY RANGE AT THE SAME TIME SES BASIC PAY RATES ARE ADJUSTED, WHICH IS THE TIME OF THE ANNUAL GS PAY ADJUSTMENT. THE TOP ALJ PAY RATE COULD STILL NOT EXCEED THE STATUTORY MAXIMUM, WHICH WOULD REMAIN THE RATE FOR EXECUTIVE LEVEL IV.

AS A RESULT, INSTEAD OF ADJUSTING ALJ RATES ONLY WHEN THERE IS AN INCREASE IN EXECUTIVE PAY, THE PRESIDENT COULD ADJUST ANY ALJ PAY RATE WHICH HAD NOT REACHED THAT STATUTORY MAXIMUM.

CURRENTLY, THE OFFICE OF PERSONNEL MANAGEMENT IS UNDERTAKING A LONG-TERM STUDY OF FEDERAL COMPENSATION, INCLUDING THE RELATIONSHIP AMONG VARIOUS GROUPS OF EMPLOYEES. PENDING THE COMPLETION OF THAT STUDY, WE BELIEVE THAT PLACING ADMINISTRATIVE LAW JUDGES ON THE SAME PAY ADJUSTMENT FOOTING AS THE SENIOR EXECUTIVE SERVICE IS AN APPROPRIATE STEP TO TAKE AT THIS TIME. ACCORDINGLY, WE WOULD SUPPORT THE ENACTMENT OF H.R. 915.

THANK YOU AGAIN FOR THE OPPORTUNITY TO ADDRESS THIS ISSUE. WE WOULD BE PLEASED TO ANSWER ANY QUESTIONS YOU MAY HAVE.

Mr. GEKAS. The Chair will allot itself 5 minutes for the purpose of posing some questions.

Would it be better if the ALJs were put into the executive schedule and allotted the COLAs as they applied every year automatically, or to allow the President to exercise discretion?

Mr. ROMERO. We would be—

Mr. GEKAS. As proposed in the current bill.

Mr. ROMERO. I think that the current bill would provide a more equitable treatment of the ALJs in terms of the relationship with other groups of Federal employees, primarily the Senior Executive Service.

Mr. GEKAS. Do you base your opinion that this is the best way to go on your faith that the President, this President or any future President, will exercise that discretion in favor of the ALJs?

Mr. ROMERO. It is hard to predict what the President would do in future years, but traditionally there has been an extension of those kinds of flexibilities to other groups of employees. Whenever there is a General Schedule pay increase, locality pay has been extended to other groups of employees, and I think that we are very optimistic that there would be that exercise taken.

Mr. GEKAS. Did the OPM take an official position in favor of this bill and authorize you to so state?

Mr. ROMERO. Yes. OPM has been cleared to support H.R. 915.

Mr. GEKAS. I have no further questions. Does the gentleman from New York have any questions?

Mr. WEINER. I have no questions, Mr. Chairman.

Mr. GEKAS. The gentleman from South Carolina?

Mr. GRAHAM. No.

Mr. GEKAS. The gentleman from Massachusetts?

Mr. DELAHUNT. No.

Mr. GEKAS. The lady from Wisconsin?

Ms. BALDWIN. No.

Mr. GEKAS. I have a crick in my neck here.

Mr. DELAHUNT. We just wanted to see your reaction, Mr. Chairman. That was the intent of the silence.

Mr. GEKAS. The panel is extinguished.

Mr. ROMERO. Thank you.

Mr. GEKAS. We thank you, Mr. Romero.

The second panel consists of the presidents of the two major associations of Federal administrative law judges who have come together for a joint statement. Judge Ronald G. Bernoski is president of the Association of Administrative Law Judges, who will deliver the statement. Joining him will be Judge Judith A. Dowd, president of the Administrative Law Judges Conference.

Judge Bernoski is well known to the committee. He was born in Phillips, Wisconsin; received his undergraduate degree from the University of Wisconsin, Stevens Point, in 1962; and his LL.B. from the University of Wisconsin in 1965. He was in the private practice of law until becoming an administrative law judge with the Social Security Administration in 1980 where he continues to serve. He has been the president of the Association of Administrative Law Judges for the past 3 years.

Perhaps the lady from Wisconsin would wish to enter her personal greetings to the gentleman, Judge Bernoski?

Ms. BALDWIN. Most certainly. Welcome to Washington.

Judge BERNOSKI. Thank you very much.

Ms. BALDWIN. We look forward to your testimony.

Mr. GEKAS. Judge Judith A. Dowd graduated with a BA degree from Dumbarton College after spending her junior year at the University of London, the London School of Economics. She received her law degree from Georgetown University. Upon graduating from law school, Judge Dowd was employed as an attorney in the U.S. Department of Justice Office of Legal Counsel. She then became an assistant corporation counsel for the District of Columbia, where her last position was chief of the special litigation division.

Judge Dowd began specializing in labor law and was awarded a degree in labor law from George Washington University School of Law. She then became an appellate attorney for the National Labor Relations Board. At the time of her appointment as administrative law judge, she was a supervisory attorney in the appellate court division of the NLRB.

Judge Dowd served as an administrative law judge at Social Security as well as the U.S. Postal Service and the National Labor Relations Board before accepting her current position with the Federal Energy Regulatory Commission.

And joining them is Judge Rich Frank, who is the president of the Board of Veterans Appeals Association, whom we met earlier today and who is, if not already, will soon be a renowned author. We will look to the bestseller list, and maybe we will have some influence at the New York Times seated at the table to help that a little bit.

In any event, we now will begin with the statement of Judge Bernoski.

Mr. BERNOSKI. Thank you, Mr. Chairman.

Mr. GEKAS. Before we do, I want the record to reflect the attendance of the gentleman from Tennessee, Mr. Bryant, and the gentleman from New York, Mr. Nadler.

I now implore the members of the committee to remain attached to their seats for the purpose of hearing this panel and then immediately moving into markup, because we now have the necessary markup quorum available, if you remain seated.

Mr. GEKAS. Judge Bernoski.

STATEMENT OF RONALD BERNOSKI, PRESIDENT, SOCIAL SECURITY ADMINISTRATION, OFFICE OF HEARINGS AND APPEALS, MILWAUKEE, WI, ON BEHALF OF THE ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC.

Mr. BERNOSKI. Thank you, Mr. Chairman. I appear as the President of the Association of Administrative Law Judges in support of H.R. 915. This statement is made on behalf of our association and the Federal Administrative Law Judges Conference.

Mr. Chairman, we thank you for conducting this hearing and for your continued interest in administrative law judge issues over the past years. We support H.R. 915, which provides needed corrections to the current administrative law judge pay system. It will bring our pay closer to parity with that of other executive branch employees.

Our pay has fallen behind the pay of other comparable government employees, as Mr. Romero so carefully described. This has been caused by the fact that we have not received pay adjustments as other Federal employees have.

Instead, over the past 10 years we have received mostly locality pay adjustments, while other comparable employees have received both cost-of-living adjustments and locality pay adjustments.

Mr. Romero's statement notes this, but I want to bring to the attention of the committee that locality pay adjustments have been put into the system to make up for the deficiency in the cost-of-living adjustments.

We have generally not received a cost-of-living adjustment, but only the deficiency, which is usually a very small amount. Last year, for instance, I received five-tenths of 1 percent locality pay, while the normal cost-of-living adjustment was over 3 percent for government employees.

Mr. Chairman, H.R. 915 does not cost additional money. It does not require an appropriation request, but only provides authority to access funds that have been already granted to the agency and are continued in the budget request of the administration. This is not a pay bill. It is an authorization to the President to have jurisdiction over the pay of administrative law judges appointed under the Administrative Procedure Act.

The pay adjustments are not automatic, but are only authorized in amounts determined by the President to be appropriate. The bill does not raise the current pay cap for administrative law judges. Our maximum level of pay remains the same. For example, the chief judges of the agencies will continue to receive approximately \$125,000 a year salary, which is our maximum level of pay.

The current pay system affects our status in two important ways: First, our salaries have failed to keep pace with other comparable

government employees; and, second, our pensions have also fallen behind because they are based in part on our base salary. We do not receive the full salary for life.

Mr. Chairman, the decline in the administrative law judge system will also have an adverse effect on the administrative law judge program. For example, better qualified attorneys will not compete for this position because of its lower pay. Government attorneys in the GS-15 range will be reluctant to become administrative law judges because the loss of pay adjustments will soon cause their pay to fall behind that of their former colleagues. It is thereby to their advantage to remain as GS-15 attorneys rather than becoming administrative law judges.

This result is contrary to the intent of the 1990 Pay Act, which was to raise administrative law judge pay above the GS-15 level. Now, administrative law judges in the lowest levels of our pay receive less pay than GS-15 step 10 grade. Our administrative law judges enter the system at about \$80,000 a year, and it takes 4 years for them to reach the comparable pay of a GS-15, step 10, which is about \$103,000.

Also, recruiting of attorneys from the Office of Assistant U.S. Attorney, will be affected. I personally know of one Assistant U.S. Attorney in Madison, Wisconsin, who became an administrative law judge several years ago, and he now receives less pay than his former colleagues in the Office of the U.S. Attorney because they have received pay adjustments and he has not.

Attorneys in private practice will also be severely affected by the system because they enter the ALJ system at the lowest possible tier, which is about \$80,000. This practice will discourage private practice attorneys from coming into the system, which is also contrary to the intent of the drafters of the Administrative Procedure Act because they intended administrative law judges to have a broad variety of legal backgrounds and experiences to avoid an agency culture from dominating agency adjudications.

In closing, Mr. Chairman, this bill has received broad support from many legal and judicial organizations, including the American Bar Association, the Federal Bar Association, FORUM, the National Association of Women Judges, and the Board of Veterans Appeals Judges Professional Association.

It has the official government support of OPM and has bipartisan congressional support. We thereby respectfully request that the committee take favorable action on this legislation.

Mr. GEKAS. We thank you, Judge Bernoski.

[Recess.]

Mr. GEKAS. We will return to the testimony of the judges, because we want the record to reflect some of the main statements and also whatever questions may be posed by members of the committee.

Mr. NADLER. Mr. Chairman.

Mr. GEKAS. Does the gentleman from New York wish to pose any questions?

Mr. NADLER. No. I just wish to make a statement. I am sorry I can't stay for the testimony of Judge Dowd. There is a markup going on in the Transportation Committee, and I have to be there. That is why I asked that we take the vote right away, and I would

simply like to say on the bill, for one moment, the basic problem is caused by the fact that Congress lacks the political courage to let our COLAs go through every year.

That then extends the damage to the Federal judges and to other people, and I support the bill because I see no reason not to minimize the damage caused by our own lack of political courage. So we should take as many people out of the damage zone as possible. That is why I voted for the bill.

Mr. GEKAS. I thank the gentleman for his courage.

Mr. DELAHUNT. Mr. Chairman.

Mr. GEKAS. The gentleman from Massachusetts.

Mr. DELAHUNT. I too have a markup ongoing, but I would like the Chair's indulgence for a moment to echo the sentiments expressed by the Ranking Member, Mr. Nadler, in terms of your particular situation. It is indeed unfortunate, and listening to the testimony today I think really underscores how debilitating it is to morale and the capacity to attract people of quality for these positions. It is absolutely so vital.

I am sure that you are aware that last year this committee adopted unanimously a bill to delink the salaries of Members of Congress from not just ALJs but from all members of the judiciary, and it received unanimous support.

The Chair of the Full Committee, Mr. Hyde, advocated the proposal with his leadership. Unfortunately, the rule for consideration of this bill did not allow the proposal to proceed, but I hope this year, with the efforts of Mr. Gekas and Chairman Hyde, we will have better success. I hope so. Thank you very much.

Ms. DOWD. Thank you, Mr. Delahunt.

Mr. GEKAS. We will return to some of the questions that we might want to pose to the panel. First, does Judge Dowd or Judge Frank have a written statement of any type that they wish to enter into the record?

Ms. DOWD. I had a joint written statement with Judge Bernoski, which we have submitted.

Mr. GEKAS. Without objection, that statement will be submitted for the record. Does Judge Frank have a written statement?

Judge FRANK. No, Mr. Chairman, I don't. I wanted to indicate on behalf of my organization I certainly endorse everything that Judge Bernoski, of course, has said.

Mr. GEKAS. Yes. We thank you for that. Judge Bernoski and I have been through this mill for a long time now.

I want to place in the record the understanding that I have, which I think is shared by Judge Bernoski, that the framework of this piece of legislation reflects a greater level of acceptability in the Senate of the United States. Does the gentleman agree with me on that?

Mr. BERNOSKI. Yes, sir. The fact that the bill allows for the pay to be increased according to the discretion of the President, yes, sir. Yes, Mr. Chairman.

Mr. GEKAS. So that whatever roadblocks, large or small, that we encountered in the past, those, in your judgment, as well as mine, have been removed, we should have the record show. Is that correct?

Mr. BERNOSKI. Yes, sir. The fact that OPM now has—that we have really accepted and deferred to their expertise and this is, in fact, their bill, it seems as though that that should make the bill acceptable at all levels.

Mr. GEKAS. This bodes well for action on this bill before the Judiciary Committee as a whole, because all the members will be apprised of the smooth pathway that you have created for eventual passage of this legislation. So this record will be very helpful.

Do Judge Dowd or Judge Frank wish to add anything else?

STATEMENT OF JUDITH DOWD, PRESIDENT, FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE, WASHINGTON, DC

Ms. DOWD. I just have a few comments really mostly underscoring what Judge Bernoski has already said. Particularly, I want to take a few minutes to thank the chairman of this committee, Congressman Gekas, for all of his support for administrative law judge pay equity and for inviting us to speak today in favor of H.R. 915.

Congressman Gekas' support on behalf of ALJs pay equity issues actually dates back to H.R. 1240, the previous legislation that would have allowed us to have those increases automatically. The current bill is somewhat more—it is a little bit more restrictive in the sense that we do not get them automatically.

To put our problem in perspective, the Pay Reform Act of 1990 was intended to put Federal administrative law judges in a somewhat higher pay category than the General Schedule employees GS-1 through 15.

That intent of Congress has been thwarted by the unintended consequences of linking our salaries to a percentage of the executive Level IV pay scale. Over the past 10 years, as Judge Bernoski has stated, administrative law judges have received only three COLAs while the General Schedule and SES employees have received them during most of those years.

The only increases that we have seen on a consistent basis are the comparatively small locality pay adjustments. As a result, pay for administrative law judges has eroded in comparison to comparable employees. The entry level salary, for example, for an administrative law judge in this area is now about \$83,000; while a top level GS-15 attorney is paid over \$100,000.

One of the effects of this pay imbalance is that it will be increasingly difficult to attract the best qualified attorneys from the public and private sector to undertake the arduous task of qualifying for an administrative law judge position.

There are a number of things which H.R. 915 does not do. It does not affect the pay cap which will still keep our chief judges at the same pay level.

Mr. GEKAS. What did you say, Judge Dowd?

Ms. DOWD. It does not affect the pay cap, the current cap, so that, you know, the chief judges who are at the highest level will still remain at that place and they will not exceed the EL-IV level. So that does not address this issue.

H.R. 915 will not require a new appropriation. The funds needed to pay the annual increases for administrative law judges are already in the agency budgets, and I think that is a very important

point. If we do not get these increases, the agencies have the discretion to do something else with the money.

And then finally, H.R. 915 does not make our annual increases automatic. It is at the discretion of the President, which I think is an important point, too.

I also wanted to add that I am proud of the work that I do, and I want to see the best qualified attorneys applying for ALJ positions to assure the continuation of judicial excellence to which we all aspire.

We are gravely concerned that without the passage of H.R. 915 the quality and even the quantity of administrative law judges will continue to decline to the detriment of the agencies, the citizens involved in administrative litigation, and ultimately to our entire Federal structure, legal structure, of which we are an integral part.

I again wish to express our sincere thanks to the chairman for all of the efforts he has made on our behalf.

Mr. GEKAS. We thank the lady.

[The prepared statement of Judge Bernoski and Judge Dowd follows:]

PREPARED STATEMENT OF RONALD BERNOSKI, PRESIDENT, SOCIAL SECURITY ADMINISTRATION, OFFICE OF HEARINGS AND APPEALS, MILWAUKEE, WI, ON BEHALF OF THE ASSOCIATION OF ADMINISTRATIVE LAW JUDGES, INC. AND JUDITH DOWD, PRESIDENT, FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE, WASHINGTON, DC

I. INTRODUCTION

This joint statement in support of H.R. 915 is presented on behalf of the Association of Administrative Law Judges and the Federal Administrative Law Judges Conference. These two organizations represent the interests of most of the nearly 1400 federal administrative law judges currently serving the U.S. Government. The Association of Administrative Law Judges has a membership of about 700 administrative law judges who adjudicate cases for the Social Security Administration. The Federal Administrative Law Judge Conference has a membership of about 300 administrative law judges who perform adjudicative functions at various federal agencies. This bill and its predecessor bill (H.R. 1240) have received wide support from concerned legal and judicial organizations, including the American Bar Association, the Federal Bar Association, FORUM, the National Association of Women Judges and the Board of Veterans Appeals Judges Professional Association. This bill has also received official government support from the Office of Personnel Management and has bipartisan Congressional support.

Similar legislation was introduced in the 105th Congress (H.R. 1240). The prior legislation provided an automatic pay adjustment for administrative law judges, as a matter of law, when members of the General Schedule received a pay adjustment. The bill was included in the Judicial Reform Act of 1998 (H.R. 1252) and was passed by the full House Judiciary Committee in March 1998. The prior bill was also included in the discussion draft of the 1998 Civil Service Reform Bill by Chairman Mica in April 1998. The Office of Personnel Management prepared comments to the discussion draft of the 1998 Civil Service Reform Bill, which comments are now incorporated in H.R. 915, making this bill less broad in scope than the prior legislation.

II. STATEMENT

H.R. 915 authorizes an adjustment to the pay of administrative law judges in the same manner that pay is adjusted for Senior Executive Service employees. This legislation provides a needed correction to the current pay system for administrative law judges and will bring their pay system closer to parity with other members of the federal executive branch workforce. The legislation does not require an appropriation request but simply provides the authority to access funds that have already been granted to the agencies and are continued in the Administration's budget request. The pay adjustments are not automatic under the bill but will only be authorized in an amount to be determined by the President. The bill does not provide for

lifting the "cap" on administrative law judge pay and the maximum level of pay remains unchanged.

Administrative law judges are appointed pursuant to the Administrative Procedure Act (5 U.S.C. Sec. 3 105) and they are employed by federal agencies as independent decisionmakers under procedures promulgated by that Act. The Office of Personnel Management has the regulatory responsibility for the administrative law judge system. The United States Supreme Court has defined the status of administrative law judges under the Administrative Procedure Act. The Court stated that the Congress had intended to make administrative law judges (then hearing officers) "a special class of semi-independent subordinate hearing officers" by vesting control of their compensation, promotion and tenure in the Civil Service Commission (now Office of Personnel Management) to a much greater extent than in the case of other federal employees.¹ The control of compensation by the Office of Personnel Management was intended to insure administrative law judge independence from undue agency influence and control.

Administrative law judges were originally compensated as federal employees under the General Schedule. The Federal Employee Pay Comparability Act of 1990 removed administrative law judges from the General Schedule and established a separate pay schedule to provide greater professional recognition and to equate their salaries more closely with that of the Senior Executive Service. The salaries for these judges are computed on a formula based on level IV of the Executive Schedule. The administrative law judge salary schedule provides three levels of pay, all calculated as percentages of the salary payable to Executive Level IV (EL IV), as follows:

- a. AL-1, the salary is computed at 100 percent of the EL IV salary, 5 chief judges at the larger agencies are paid at this level;
- b. AL-2, the salary is computed at 95 percent of the EL-IV salary, about 32 chief judges, deputy chief judges and regional chief judges are paid at this level; and
- c. AL-3, the salary is established at six levels (A through F) computed at a range of 65 to 90 percent of the EL IV salary. About 1300 administrative law judges are paid at this level. Normally administrative law judges will begin their service as AL-3A (65 percent), with progression to level F over a period of seven years.

During the passage of the 1990 Pay Act, the Office of Personnel Management determined that administrative law judges should not be classified as Senior Executive Service employees because, under the terms of the Administrative Procedure Act, it would be inappropriate to compensate administrative law judges with bonus awards for decisionmaking. The 1990 Pay Act contemplated that annual pay adjustments would be made to the General Schedule and to the salaries of Executive Level personnel. While since 1990, annual pay adjustments have been made to the General Schedule, they have been withheld from salaries of Executive Level personnel. This has resulted in a stagnation of administrative law judge salaries because those salaries are calculated as percentages of a non-increasing Executive Level. For most years during this same period, the President, by Executive Order, has also authorized annual pay adjustments for the Senior Executive Service. These adjustments to both the General Schedule and the Senior Executive Service salaries have caused the salaries of administrative law judges to fall behind the salaries of other government employees, contrary to the intent of the 1990 Pay Act. The attached graph, prepared by the Office of Personnel Management, shows the lag in pay of administrative law judges as compared to employees of the General Schedule and Senior Executive Service. Prior to the 1990 Pay Act, administrative law judges were paid under the General Schedule (GS) at the GS-15 and GS-16 rates and the 1990 Pay Act placing administrative law judges under the Executive Schedule was intended to be a pay increase—not a decrease. In fact, because the General Schedule has had pay adjustments and administrative law judges have not, AL-3 rates A, B and C are now less than GS grade 15 step 10 at \$94,287. This has resulted in recently appointed administrative law judges now receiving less pay than their former colleagues in federal agencies.

The decline in pay of administrative law judges, as compared to other government employees, will have an adverse effect on the administrative law judge corps. The quality of the administrative law judge corps will deteriorate because better qualified attorneys will decline to compete for the position because of its lower pay. Federal attorneys in the GS-15 pay grade will be reluctant to become administrative

¹ *Ramspeck et al. v. Federal Trial Examiners Conference et al.*, 345 U.S. 128 (1953).

law judges, because although they may enter the administrative law judge corps at a salary comparable to their former pay, the loss of pay adjustments will soon cause their salaries to fall behind that of their former colleagues. For example, an Assistant U.S. Attorney who accepted appointment as an administrative law judge soon had his salary fall behind that of his former colleagues because they continued to receive pay adjustments to their base pay while he did not. The current administrative law judge pay system severely discriminates against attorneys who are in private practice, because they enter the pay schedule at the lowest level (low \$80,000's), while federal workers have the advantage of moving laterally into the pay schedule at a comparable salary. This will discourage attorneys in private practice from becoming administrative law judges and frustrates the intent of the drafters of the Administrative Procedure Act. The drafters intended that administrative law judges be selected from attorneys with a variety of legal experiences to avoid an "agency culture" dominating the adjudication function of each agency. The eligibility requirements to qualify for a position as an administrative law judge include a minimum of 7 years of trial experience or administrative law experience. The salary structure for administrative law judges should be at a level commensurate with the years and level of legal experience necessary to qualify for the position.

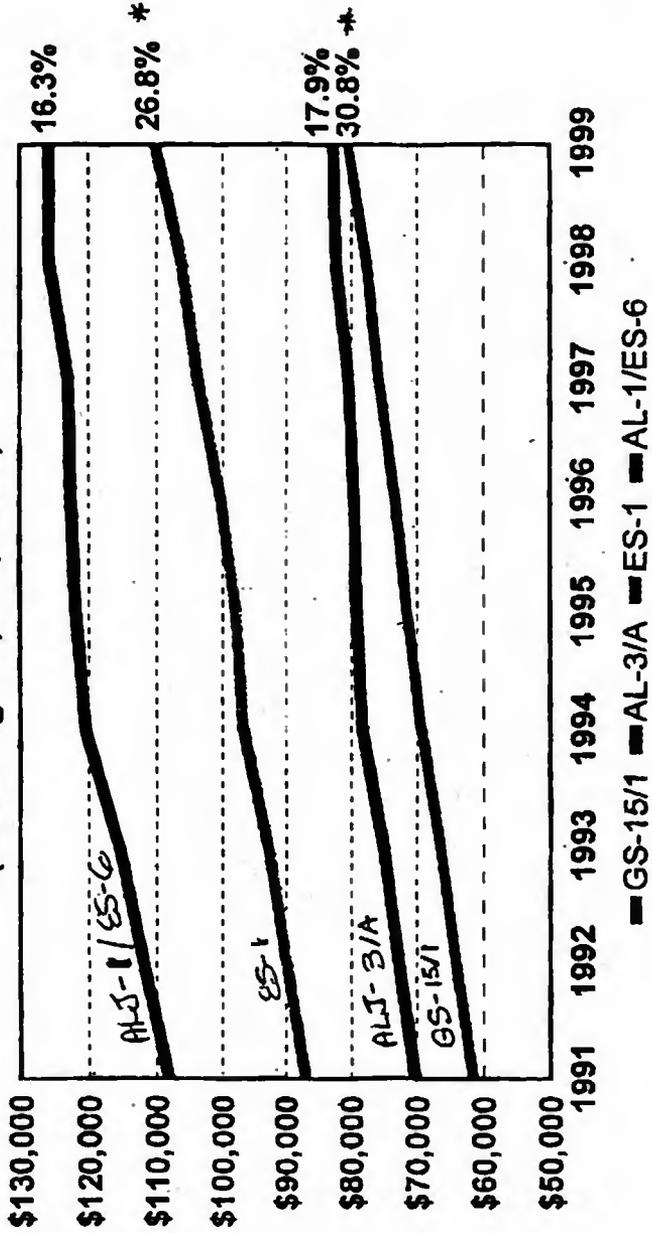
Administrative law judges are more closely comparable to federal employees in the General Schedule and the Senior Executive Service than they are to elected government officials or political appointees. They are a merit selected administrative career judiciary who insure fair treatment for those citizens and corporate litigants who are parties to a variety of cases involving federal agencies. Most administrative law judges enter this service with the intention of devoting the remainder of their professional careers to agency adjudication. Administrative law judges should have a pay and retirement system which more fairly compensates them for their services. The current administrative law judge pay system is inequitable in at least two ways. First, administrative law judge salaries have been stagnating and have failed to keep pace with the salaries of other comparable government employees. Second, the pensions for administrative law judges, which are computed in part on their base salary (and are not a full salary pension for life), have similarly fallen behind. No other group of federal employees has experienced the same pay disincentives as administrative law judges.

We therefore respectfully request that the Committee take favorable action on this legislation.

JUDITH A. DOWD, *President,*
Federal Administrative Law Judges Conference

RONALD G. BERNOSKI, *President,*
Association of Administrative Law Judges.

ALJ, SES, AND GS PAY INCREASES SINCE 1991 (Washington, DC, Area)



Mr. GEKAS. Attorney Belle Cummings first made me aware of the fact that the monies are appropriated and just sitting there and all that has to be done is to implement it through our or similar legislation. So I think we are on a good, steady course for success in this venture.

Does the lady from Wisconsin have any comments or questions?

Ms. BALDWIN. No. Thank you.

Mr. GEKAS. Unless someone forces me to stay here any longer, this meeting is adjourned.

Ms. DOWD. Thank you very much.

Mr. GEKAS. We will reopen for the purpose of entering into the record, without objection, two statements, one by the Federal Bar Association supporting the legislation and one from the American Bar Association individual, Philip Anderson, the President, also in support of the legislation.

[The letters referred to follow:]

FEDERAL BAR ASSOCIATION,
OFFICE OF THE PRESIDENT,
Washington, DC, May 24, 1999.

Hon. GEORGE W. GEKAS, *Chairman,*
Subcommittee on Commercial and Administrative Law,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN GEKAS: We are writing on behalf of the Federal Bar Association and its Judiciary Division to communicate our strong support for your bill, HR 915, to revise the method used in the adjustment of the basic pay of administrative law judges. Your legislation represents a sensible and meritorious improvement in the ALJ pay system through the establishment of Presidential discretionary authority to grant annual cost-of-living adjustments to administrative law judges in the same manner currently applicable to members of the Senior Executive Service.

The Federal Bar Association is composed of 15,000 members actively involved as federal agency and court practitioners and judges, some of whom are administrative law judges. The Association has grown increasingly concerned over the growing threat to the quality and retention of the administrative judiciary due to the statutory framework that stymies their eligibility, unlike those in the General Schedule and the Senior Executive Service, to receive modest annual adjustments. Enactment of the provisions of HR 915 would remedy this difficult situation.

As you know, because of the current link-age of ALJ basic pay to Executive Level IV of the executive schedule, the pay levels of administrative law judges have not kept pace with those of other groups of federal employees, due to the infrequency of adjustments in the executive schedule. The last significant increase in executive schedule pay occurred in 1991, the same year in which the ALJ pay system was established. Since then, ALJ basic pay rates have been increased only three times, by 3.5 percent in 1992, by 3.2 percent in 1993, and by 2.3 percent in 1998. Although locality pay adjustments have occurred, the net pay increases for ALJs have fallen significantly behind those of the Senior Executive Service and the General Schedule.

H.R. 915 provides for much-needed modification of the ALJ pay system. The bill retains the minimum and maximum rates for the ALJ pay range, in a fashion similar to the SES pay system, while eliminating the specific linkages to executive pay within that range. Under the bill, the President is authorized to adjust ALJ pay annually within that pay range at the same time SES basic pay rates are adjusted. The top ALJ pay rate still would not exceed the statutory cap, which would remain the rate for Executive Level IV.

By correcting the pay system for administrative law judges, Congress will abate the growing pay and retirement disparity between administrative law judges and other groups of federal employees. More important, it will keep pay for members of the Federal administrative law judge corps competitive with other senior Government attorney positions.

As the foremost professional association representing the views of practitioners and judges in federal agencies and the courts, the Federal Bar Association thanks you for your efforts to accomplish thoughtful and pragmatic reform of the pay sys-

tem for administrative law judges through HR 915. We urge speedy approval of the legislation by the Subcommittee.

Sincerely,

ADRIENNE A. BERRY, *National President*
HON. MICHEL LEVANT, *Chair, Judiciary Division.*

cc: Hon. Jerrold Nadler, Ranking Minority Member

AMERICAN BAR ASSOCIATION,
Chicago, IL, May 10, 1999.

HON. GEORGE W. GEKAS, *Chairman,*
Subcommittee on Commercial and Administrative Law,
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR CHAIRMAN GEKAS: I write on behalf of the American Bar Association to commend your leadership in addressing the salary equity issues of the federal administrative judiciary, and to express ABA support for your bill, H.R. 915, to authorize a cost of living adjustment in the pay of administrative law judges. The Association has long advocated that the compensation of the administrative judiciary be appropriate to its judicial status and functions.

We join in your concern over the fairness and impact of routinely denying Administrative Law Judges COLAs. Providing pay parity for the federal administrative judiciary remains elusive. Not even the separate pay scale enacted by Congress in 1990 for Administrative Law Judges and for Judges on Boards of Contract Appeals has proven effective in maintaining the parity which previously existed with the compensation levels of other senior executive personnel.

ALJ salaries are linked to the Executive Schedule, and because of that linkage, ALJs have received only two COLAs in the last eight years. The lost cost of living adjustments also unfairly reduce ALJ retirement pay as well. H.R. 915 recognizes the COLA disparity between ALJs and other federal employees, and would help to ameliorate the inequity by giving the President discretionary authority to treat ALJs and employees in the Senior Executive Service equally for purposes of COLA adjustments.

The ABA urges that H.R.915 be enacted and that this opportunity to provide more equitable salaries for the administrative judiciary not be missed.

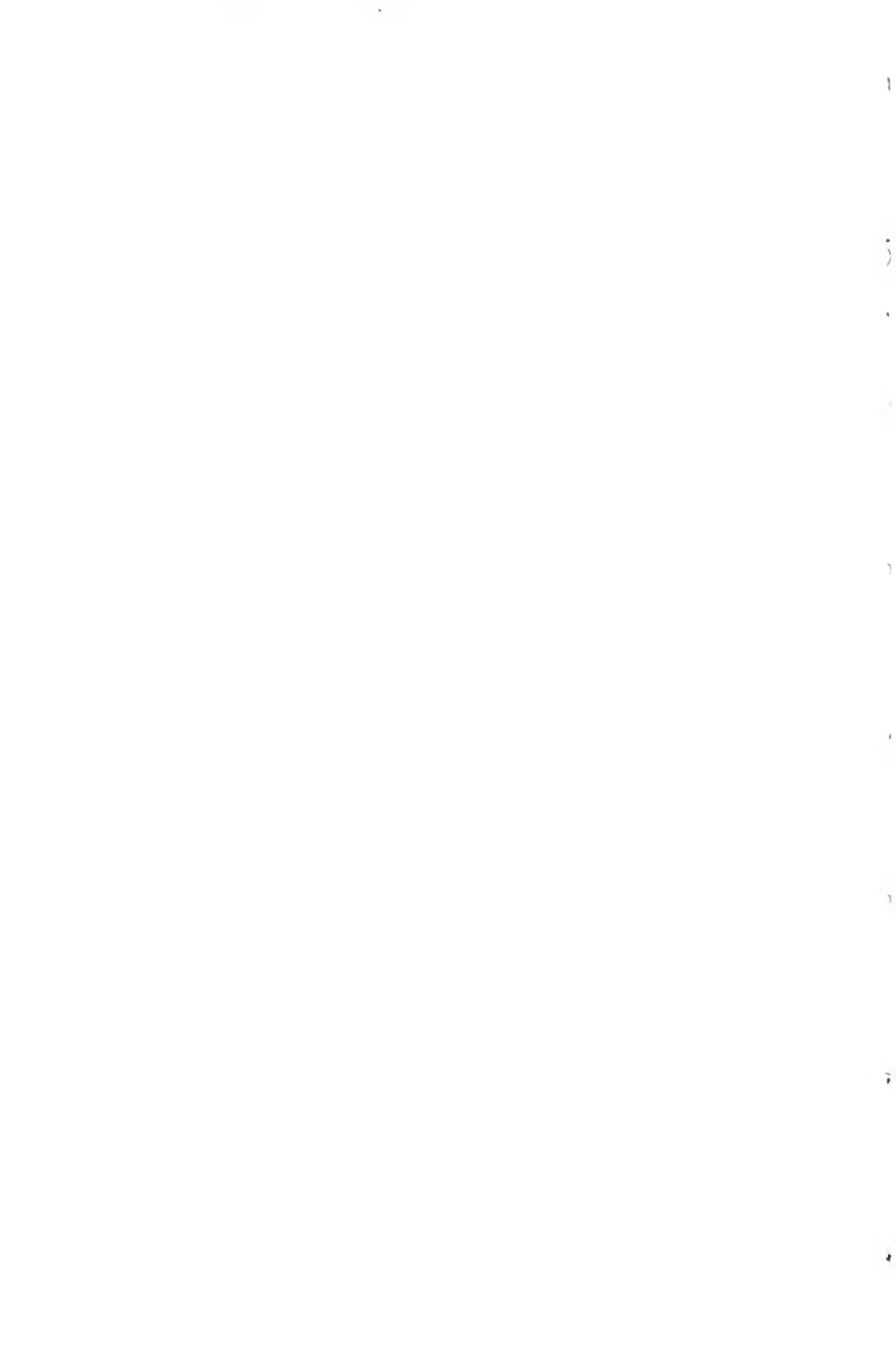
Sincerely,

PHILIP S. ANDERSON, *President.*

Mr. GEKAS. We thank everyone, and this hearing is now adjourned.

[Whereupon, at 11 a.m., the subcommittee was adjourned.]







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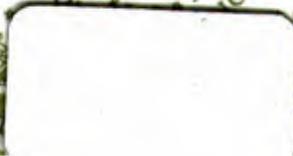


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