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ADMINISTRATIVE LAW JUDGES, HEW EXECUTIVE
LEVEL POSITIONS, AND SALARY ADJUSTMENT
FOR DIRECTOR OF OFFICE OF MANAGEMENT
AND BUDGET



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HEARINGS
BEFORE THE
SUBCOMMITTEE ON
EMPLOYEE ETHICS AND UTILIZATION
OF THE
COMMITTEE ON
POST OFFICE AND CIVIL SERVICE
HOUSE OF REPRESENTATIVES
NINETY-FIFTH CONGRESS
FIRST SESSION
ON
H.R. 2387, H.R. 3685, AND
H.R. 5723

MAY 3, 4, AND 5, 1977

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(Charles Knull, Subcommittee Staff Director, Room 603 HOB Annex I—Ext. 54025)

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ADMINISTRATIVE LAW JUDGES, HEW EXECUTIVE LEVEL POSITIONS, AND DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

TUESDAY, MAY 3, 1977

HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON EMPLOYMENT ETHICS AND UTILIZATION,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 311, Cannon House Office Building, Hon. Patricia Schroeder (chairwoman of the subcommittee) presiding.

Mrs. SCHROEDER. The subcommittee is called to order.

This morning, the subcommittee will be receiving testimony on five proposals:

First: The Civil Service Commission's request for 100 additional administrative law judges.

Second: The Department of Health, Education, and Welfare's request for nine additional executive level V or IV positions.

Third: On H.R. 5723 which proposes to convert, by statute, approximately 180 individuals who presently hold temporary administrative law judge positions at GS-14 to statutory administrative law judge positions at GS-15.

Fourth: On H.R. 2387 which increases the salaries of the Director and Deputy Director of the Office of Management and Budget and the Chairman and members of the Board of Governors of the Federal Reserve System.

And finally, on the Administrative Office of U.S. Courts' proposal to provide authority to the Director to place 15 positions in grades 16-18 of the general schedule.

On Wednesday and Thursday, we will be hearing from agencies advocating these positions.

Raymond Jacobson, who is the Executive Director of the Civil Service Commission, is with us this morning.

We are delighted to have you with us again, Mr. Jacobson, and are interested in hearing your position on this.

Thank you very much.

Mr. JACOBSON. Thank you, Madam Chairwoman.

I have with me Mr. Charles Dullea who is the head of our Office of Administrative Law Judge Examination.

If I may, Madam Chairwoman, I would prefer to deal with each of these bills without necessarily reading everything in my statement and submit the statement for the record.

Mrs. SCHROEDER. You may proceed in any way you like.

STATEMENT OF RAYMOND JACOBSON, EXECUTIVE DIRECTOR,
U.S. CIVIL SERVICE COMMISSION

Mr. JACOBSON. Thank you.

On the two proposals relating to administrative law judges, I would like to first discuss the Civil Service Commission's proposal to increase the number of administrative law judges at grade 16 from 240 to 340.

That proposal is one that stems from an authorization back in 1963 in which the Commission was authorized to establish a specific number of supergrade positions, 2,754, and in addition, 240 hearing examiners in the supergrades. That title has since been changed to administrative law judge.

These 240 ALJ positions were distributed back in 1963 to meet the needs of the 14 agencies and departments that had such positions allocable, classifiable, at that GS-16 level.

During these last 14 years, there has been no additional supergrade slots authorized for ALJ's in spite of the fact that the number of agencies conducting formal hearings has expanded by 64 percent and the number of supergrade positions has also increased.

The Commission has had to meet this requirement by borrowing supergrade slots which had been earmarked for other classes of employees from the Government-wide pool for ALJ's.

The net result of this has been that we have borrowed so far 40 positions from the overall Government-wide pool to increase the number of the absolute minimum needs for administrative law judges at GS-16.

There presently are 280 such positions which means that we have drawn into the general pool by 40. But we have about reached our limit in being able to do this. And the agencies needs are continuing to increase.

For example, we have been informed by the National Labor Relations Board that its allotment of ALJ's is absolutely insufficient to cope with its mounting case load.

Other agencies have informed the Commission that their ALJ's are insufficient for their expanding work and some pending legislation such as the strip mining bill, will create new requirements for additional administrative law judges.

So the Commission feels that at this point in time an increase in the 240 authorized supergrade positions for ALJ's is really essential.

We urge that the law be amended to provide for an increase of 100, from 240 to 340. If favorable action is taken on this request, the Commission would first reimburse the Government-wide pool by returning the 40 jobs it has been obliged to borrow in recent years. And after that, we would manage the remaining jobs and distribute them only in situations where need for additional positions was clearly established because of new legal requirements that the Congress imposes, putting new programs under the Administrative Procedures Act requirements, or mounting case loads as in the case of, for example, the National Labor Relations Board.

So we feel rather strongly a need to help us ease this situation by asking for this increase from 240 to 340.

If I may now, I would like to turn to H.R. 5723. Here the Commission, speaking for the administration, must express its strong disapproval and urge rejection of this bill because, in our judgment, it extends preferential treatment to a small group of employees.

The history of this situation is recited briefly in my statement. Let me just highlight it. With the advent of the SSI program under title XVI of the Social Security Act, the Social Security Administration began recruiting attorney examiners back in 1974 and 1975. About 125 such persons were appointed at grade 13. And in addition, a number of examiners were handling claims under the Federal Coal Mine Health and Safety Act; the so-called black lung cases were added.

In 1975, a concern developed over this expanding case load in the disability area covered by title II of the Social Security Act. And the total case load there was estimated at that time to be in the range of about 107,000.

In order to permit the attorney examiners to be used on certain disability cases, the Congress enacted legislation in January of 1976 which converted those people to a temporary ALJ status with their employment to terminate in December of 1978, at the end of a 3-year period.

The intention then, as expressed in the report of the committee was that the employees would, by 1978, have acquired the necessary experience and if their performance had indicated so, they would be afforded the opportunity to go on the register for a regular ALJ appointment under the regular civil service rules.

Additionally at that time, the Social Security Subcommittee of the House Ways and Means Committee, expressed the view that the added work might merit a higher classification than GS-13, and in April of last year, the Commission approved that classification, and these jobs are now at GS-14.

Just 16 months after the legislation which provided for a term of 3 years, this new proposal would grandfather these people, give them permanent ALJ status without competitive processes and reclassify them legislatively from GS-14 to GS-15.

We have been following the legislative direction in Public Law 94-202, which establishes temporary jobs and we have been examining the applications of many of these temporary ALJ's. Out of the total of 214 presently on board, 154 have applied to the Civil Service Commission in the ALJ examination, 45 have already been appointed to grade 15 positions, or their names are on the register and they are available for appointment.

We have some 69 people who have not yet met the experience or other qualifications to qualify and 60 of these people have never applied for the examination as yet.

We feel that the proposal of H.R. 5723 to convert all of these people, including those who have been rated ineligible as well as those who have not yet applied, to permanent status with all of the protections provided by the APA, is an unwise move and urge

rejection of that request as unfair to others who now make up the ALJ corps and the eligibles on the register. We have more than 200 eligibles now on the register who have established their qualifications and obviously would be interested in being considered for appointment.

That concludes my remarks on that bill.

The remaining bills I would like to deal with quite briefly.

One is H.R. 2387 which deals with the compensation of the positions of Director of OMB and Deputy Director, and the Chairman of the Board of Governors of the Federal Reserve System and the members of the Board.

Basically, the administration feels that the Director of OMB since particularly it has been strengthened in Public Law 93-250, and with the prior reorganization plan and Executive order, that this position really is considered comparable to that of a Cabinet officer, and the administration feels that equity is served by placing this position in executive level I.

With regard to the Deputy Director of OMB, it would seem to make sense to include this position in level II, as comparable to Deputy Secretary positions; two in the Department of Defense and one in the Department of State, Agriculture, Treasury, Transportation, and the Deputy Attorney General.

Likewise, the administration is in favor of the change from level II to level I for the Chairman of the Board of Governors of the Federal Reserve System, and level III to level II for the members of that Board because of its greater independence and the importance of the Chairman's responsibility particularly for the monetary credit operating policies of the U.S. Government.

Next, a proposal of HEW that six of their currently established executive level spaces from the Presidential pool be returned and legislation be approved designating these same levels to the Department. We certainly find no objection to this, and we defer here to HEW.

This request does not increase the overall number of 23 executive level jobs presently authorized for that Department.

And finally, the legislation, H.R. 3685 which primarily deals with the need for additional judgeships does contain a section which authorizes the Director of Administration of the U.S. Courts to place a total of 15 positions in grades 15, 16, 17, and 18 in lieu of the four supergrade positions authorized by existing law, and in lieu of three positions we allotted to the Courts some time ago, back in 1970. We advised the Director of the Administrative Office of U.S. Courts to seek a separate statutory allotment of supergrades spaces, and particularly since it is obviously in the judicial branch and not the executive branch, we think the control should not really come out of the executive branch pool.

I think that concludes my comments. I would be very happy to answer any questions you have.

Mrs. SCHROEDER. Thank you very much. I appreciate that.

Let me start with just a few questions on your position on H.R. 5723. As you know, the Ways and Means Committee has felt very strongly about this bill and they are coming at it from a different

aspect, mainly the tremendous backlog of cases over in Social Security.

So let me ask you, as the Civil Service Commission, some questions to help us as we deal with this: When you have processed administrative law judge positions, how many people reviewed the application? What stages does that application go through? How long is the process if the applicant meets all of the tests and passes everything? In other words, were we to go to the register and do it in the proper manner, how long are we going to be holding up these different cases?

Mr. JACOBSON. Well, Madam Chairman, Mr. Dullea can answer that question better than I can, but before I ask him to do that, let me make a couple of points.

No. 1: The backlog, of course, is large. It has been very substantially reduced in the last 2 years, from well over—close to 110,000 to I believe something in the order of 80,000 now.

My understanding is that the efficiency of the operation itself requires a significant number of cases to be pending in the system in order for the ALJ's to be able to function effectively.

And we have just received and are responding today to a request from the Social Security Administration for an additional certification, an additional 50—enough people to fill an additional 50 positions of ALJ's in this program. And that certificate will be issued, as I understand it, this afternoon.

There are a substantial number of eligibles on the list, and we can issue that certificate without going through a complete examination process.

So that in terms of meeting the Social Security Administration's needs, it seems to be that we can be responsive without delay and in fact are responding promptly to their requests.

So now the process itself, the examination, is one that is undergoing very careful scrutiny. The Civil Service Commission appointed a special advisory committee, mainly people outside the Government, to look at the ALJ examination process. And they are looking at several things in addition to the examination process; the problem of utilization, efficiency, and effectiveness of the function of ALJ's and so on.

But the efficiency of the examination process itself was the first subject of concern and that advisory body is making certain recommendations to the Commission, I understand, within the immediate future, within the next month.

But in general, the preliminary findings as I understand it, were that the process itself, while rather time consuming, was necessary because of the importance of the jobs and the importance of making sound decisions. I just wanted to give you that background.

Now, if you would like a specific response in terms of time, a statement on the process itself, I believe Mr. Dullea would be glad to deal with that.

Mrs. SCHROEDER. Maybe we really don't need that. What I think I hear you saying is that there are adequate numbers of people who are going through this process which goes on continually, the examination process, and there is a register of their names all

prepared. And all you need to know is how many they need and could send them up. So it would be unfair for social security to blame you and say that it will take months and months if we don't get this legislation; is that what I am hearing?

Mr. JACOBSON. That is the thrust of my response, yes.

Mrs. SCHROEDER. I think on that basis that is really all we need. How many people are on this register; you say about 200?

Mr. JACOBSON. We have about 200 at this time, Mr. Dullea?

Mr. DULLEA. We have two registers; the GS-15 and the GS-16. Today on the GS-15 register, approximately 105 names are eligible and in excess of 125 people are eligible on the GS-16 register.

Mrs. SCHROEDER. Thank you very much.

Do you have any questions, Mr. Lehman?

Mr. LEHMAN. No questions.

Mrs. SCHROEDER. Any questions, Mr. Corcoran?

Mr. CORCORAN. Yes. I have one question.

First of all, I appreciate your testimony.

I would like to ask a question regarding H.R. 5723. You criticize the preferential treatment that would be provided several of the attorney examiners who have never applied and who would be affected directly by this legislation. One of the points you make, if I understand your testimony, is that they have never applied for the testing that would be involved in order to be elevated in status.

Could you elaborate a little bit more on what that testing procedure is, and whether or not you would be in favor of any changes to encourage them to upgrade themselves.

Mr. JACOBSON. In the first place, Mr. Congressman, I want to be clear that I did not mean my comments to be taken as critical of those people who have not applied, because as in any other examination, people who apply generally are applying on the basis of, first, looking at the requirements and then deciding whether it makes sense for them at this point in their career and with their amount of experience and so forth, to apply. If they feel they should wait awhile, that's fine. We keep the exam open all the time. They can apply at any time. So I don't mean to be critical of them or to be heard that way.

The examination itself consists of an evaluation of education and experience and the requirements and there is no written test. The requirements are very carefully spelled out in a very detailed announcement which we would be very happy to supply for the information of the committee.

In addition to simply requiring a certain amount of experience and training, there is a requirement that we get references from a significant number of people who have knowledge of the kind of work the applicant has done in administrative law particularly.

So we secure reference information from a number of people, including judges before whom the attorney has practiced, competing attorneys and others who would express a judgment on the judicial temperament, the quality of analysis, legal analysis, and so on. That is all part of the basic requirements of this job.

So basically, the final evaluation really rests heavily on the kinds of detailed information that are furnished about that individual's career once they meet the minimum requirement, which the standard sets forth, which itself is rather high.

Mr. CORCORAN. I realize, Mr. Jacobson, in your testimony that you have certainly not criticized these affected attorney examiners. But as you pointed out, they have not applied for this elevation in status.

Could you speculate as to why they might not have applied? Is there something that they lose in the way of outside practice, or something of that sort?

Mr. JACOBSON. In the first place, these are all people who are presently employed under the terms of the law with a term that will expire in December 1978. They are all employed as temporary administrative law judges, GS-14. So they are presently Federal employees.

Mr. CORCORAN. Is that a full-time position?

Mr. JACOBSON. Yes; that is a full-time position. And they do not perform all of the adjudicatory work that is performed by the regular administrative law judges in the Social Security Administration who are classified at GS-15.

My speculation as to their reasons for not applying, quite frankly are these—and I will have to admit it is speculation: They do have this 3-year period during which they are gaining additional experience that is obviously relevant in qualifying them. And that experience may not be quite enough at this point, but they know that they have another year and a half to go at this time. And I would assume that they would want to wait until they were sure they met the minimum requirement before they proceeded to file. That is my speculation and I must admit it is speculation.

Mr. CORCORAN. Thank you very much.

Mrs. SCHROEDER. I noted in the Federal Register of April 22, that the Civil Service Commission Advisory Committee on Administrative Law Judges is going to be meeting May 13 and they will be making recommendation to the Commission for improvements in managerial effectiveness and utilization of administrative law judges.

So I am wondering if the request for 100 additional administrative law judges might not be premature; also, in light of the fact that many areas are supposedly reorganizing under the President's plan.

Mr. JACOBSON. We would feel this way on that. I think we do have a real concern for the advice of this committee. And as you point out, that notice is in the Federal Register; those are public meetings. We do have testimony from a wide range of sources.

The main concern we have is that we are already 40 below; we have already taken 40 from the regular ceiling. We are short enough on that ceiling. As you know, we had asked for additional increases in years past. This year we are not asking for additional increases until the new administration has a chance to size up the total supergrade situation.

But that 40 does hurt. We have directly on the books real needs from several agencies. I mentioned the National Labor Relations Board because it is the one that is most vivid in my mind, because their caseload is simply mounting at a very, very rapid rate. And they can quite accurately predict the need for as many as 20 or 25 additional ALJ's in the months immediately ahead.

So my feeling would be that barring massive change and withdrawal of legal requirements for regulatory hearings under the Administrative Procedures Act—and I do not see that trend being established—there is clearly a need for something well over what we now have; the 40 gap, plus, beyond that.

Now obviously, we do have a concern and we feel we have a responsibility, a special responsibility in the case of administrative law judges, for effective utilization and management of that rather scarce resource. And we are hoping that this advisory committee will come up with some new ideas and will perhaps be proposing either legislative change or other change that will enable us to cope with this mounting problem.

But I really would think of it as one that is a containment problem, not one that would roll back needs that are presently on the books.

Mrs. SCHROEDER. Are there any administrative law judges on the advisory committee?

Mr. JACOBSON. Yes. We could provide a list if you would like, of the membership of that committee. In fact, I have with me today, although he is not at the table with me, Mr. Burnett, our deputy general counsel, who is executive secretary of that committee. If you would like to go into that, I would like to ask him to join us.

Mrs. SCHROEDER. I think that would be very helpful.

There would be no need to go into it here, but if we could have the names of the people on the council and what they are doing.

Mr. JACOBSON. We will provide that for the record and a brief description of the charter of the committee.

[The information follows:]

ALJ ADVISORY COMMITTEE MEMBERSHIP

- Mr. Robert S. Burk, Deputy General Counsel, Interstate Commerce Commission, Twelfth & Constitution Avenue, N.W., Washington, D.C. 20423.
 Professor Robert G. Dixon, Washington University, School of Law, P.O. Box 1120, St. Louis, Missouri 63130.
 Richard A. Green, Esquire, Rowley, Green, Hochberg & Fairman, 1990 M Street, N.W., Washington, D.C. 20036.
 Honorable Daniel H. Hanscom, Chief Administrative Law Judge, Federal Trade Commission, Pennsylvania Avenue & 6th Street, N.W., Washington, D.C. 20580.
 Jack L. Lahr, Esquire, Chairman, Administrative Law Judge Committee, Administrative Law Section (ABA), 1100 Federal Bar Building, 1815 H Street, N.W., Washington, D.C. 20006.
 Honorable Donald P. Lay, United States Court of Appeals for the Eighth Circuit, P.O. Box 1538, Omaha, Nebraska 68101.
 Mrs. Betty Southard Murphy, Commissioner, National Labor Relations Board, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570.
 Honorable James H. Nease, Administrative Law Judge, Social Security Administration, Department of Health, Education, and Welfare, Suite 6300, 6300 Building, East Gate Center, Chattanooga, Tennessee 37411.

Honorable Paul H. Roney, United States Court of Appeals for the Fifth Circuit, 601 Federal Office Building, 144 First Avenue South, St. Petersburg, Florida 33701.

Professor Victor G. Rosenblum, Northwestern University, School of Law, 357 E. Chicago Avenue, Chicago, Illinois 60611.

Mr. Antonin Scalia, American Enterprise Institute, 1150 17th Street, N.W., Washington, D.C.

Honorable Joseph Zwerdling, Chief Administrative Law Judge, Federal Power Commission, 825 North Capitol Street, N.W., Washington, D.C. 20426.

Mr. Carl F. Goodman, General Counsel, U.S. Civil Service Commission, 1900 E Street, N.W., Washington, D.C. 20415.

ADVISORY COMMITTEE ON ADMINISTRATIVE LAW JUDGES CHARTER

A. Official Designation. The Advisory Committee on Administrative Law Judges is hereby established by the Chairman of the Civil Service Commission under the authority of 5 U.S.C. § 1305 and pursuant to the applicable provisions of the Federal Advisory Committee Act, P.L. 92-463.

B. Objectives and Scope. The purpose of the Committee is to make recommendations to the Civil Service Commission for improvements in managerial effectiveness and utilization of Administrative Law Judges in the Federal Government in connection with recruitment and selection, selective certification procedures, classification, administrative support and facilities, productivity (including processing time and quality of decisional work), standards of performance (including discipline), and trends in legislation requiring formal APA hearings and increase in the number of Administrative Law Judges. To assist the Committee, the Commission will make available for its study and evaluation the entire files accumulated during the Administrative Law Judge fact-finding study completed in July 1974.

C. Duration. The duration of this Committee is for two years. A new determination as to its need will be made not more than 60 days nor less than 90 days prior to May 1, 1978.

D. Responsible Agency and Officials. The Advisory Committee advises the Commissioners of the Civil Service Commission.

E. Agency Providing Support. The Civil Service Commission provides the necessary support for the Advisory Committee.

F. Committee Responsibilities. The Committee is responsible for recommending to the Commission:

1. Procedures for improving recruitment and selection of Administrative Law Judges, the desirability of the selective certification practice, and classification levels (grade structure).

2. Improvements needed in connection with administrative support and facilities for Administrative Law Judges.

3. Methods to increase productivity, including processing time from the assignment of a case to an Administrative Law Judge to decision or recommendation and the quality of decisional work.

4. Positions the Commission should take with reference to trends in legislation, the need for increase in the number of Administrative Law Judges, and the potential use of non-APA hearing officers in some governmental programs.

5. Any other methods or procedures which may be implemented to improve the managerial effectiveness of the Administrative Law Judge system and the utilization of Administrative Law Judges.

G. Estimated Annual Operating Costs. It is estimated that approximately \$6,327.00 will be expended for travel, subsistence and other actual expenses incurred by members of the Committee in connection with coming to Washington, D.C. for meetings.

H. Meetings. It is estimated that the Committee will meet approximately four (4) to six (6) times per year at intervals of two (2) to three (3) months.

Mrs. SCHROEDER. But your position is that the caseloads of these different agencies have grown as rapidly as their requests for administrative law judges has? You would say that they are synchronized?

Mr. JACOBSON. Yes. And in fact, in some cases, there have been some gains in efficiency. I think that we have seen instances in which agencies have reorganized their administrative procedures so that now an administrative law judge is able to handle a larger number of cases effectively in the same period of time.

A very specific example is the Civil Aeronautics Board, which has been able to reduce its needs for administrative law judges over a 30-year span. That is a long time. That's how long we have had them; from 30 back in 1947 to 17 in 1977. So we have had a significant reduction.

Alcohol and Tobacco Tax used to have four; now they only have one.

So there have been some gains in efficiency during this period. And there is more and more attention being paid by agency heads; that is, the chairman of the important commissions in their attempt to deal with the need for greater efficiency there. We are still seeking for further improvement. But we think it has been pretty well in balance.

Mrs. SCHROEDER. Besides the administrative law judges and the 240 pool that we are talking about, or thereabouts, do you have figures that might be available on any other nonpool administrative law judges? In other words, have they been created by any other laws, with other supergrades, where they have been tacked on, or sandwiched in, added to; do you know of any?

Mr. JACOBSON. Mr. Dullea, do you know of any? I don't know of any.

Mr. DULLEA. Two pieces of legislation have created additional administrative law judge positions at GS-16. In 1971, legislation established the Occupational Safety and Health Review Commission which contained a provision providing supergrade positions for that agency.

Additionally, in 1972, there were amendments to the Federal Coal Mine Health and Safety Act, and that legislation contained a rider providing supergrade positions for the Department of Interior administrative law judges.

Other than that, I think they have all been out of this. That is the only two instances that we know of outside the pool.

Mrs. SCHROEDER. Congressman Gilman, do you have any questions?

Mr. GILMAN. Thank you, Madam Chairwoman.

I am curious about the fact that you are proposing an additional 100 administrative law judges and yet are objecting to H.R. 5723, which provides for the conversion of 189 temporary ALJ's to permanent status to handle the serious SSI which I understand is backlogged.

First of all, can you tell me, what is the size of the backlog? Are you aware of the serious backlog in SSI cases?

Mr. JACOBSON. My understanding—and I don't want to pretend to have expert and detailed knowledge on this—but my understanding is that that backlog is now running in the order of 80,000 cases nationally. It has been reduced from something like 110,000 2 years ago.

Mr. GILMAN. The reduction came about because of the hiring of these temporary ALJ's to reduce the size of the backlog; isn't that right?

Mr. JACOBSON. That is certainly a significant element. There were some 180 doing that work; yes.

Mr. GILMAN. What is the average waiting time for the disposition of an SSI claim once it has been filed?

Mr. JACOBSON. I don't really have that information, Mr. Congressman.

Mr. GILMAN. My constituents tell me that it is running anywhere from 6 months to a year, which seems to me to be an unduly lengthy period of time to dispose of a relatively uncomplicated social security disability claim.

If there is some way of alleviating this tremendous backlog—and I consider 80,000 cases to be rather substantial—I think we ought to try to dig in to do just that.

Mr. JACOBSON. Mr. Gilman, if I may, I would indicate to you that we do have a request for an additional 50 ALJ's from the Social Security Administration to increase their staff. And we are certifying those names to them immediately.

We will have people eligible—

Mr. GILMAN. Is 50 going to satisfy the need to dispose of this substantial backlog?

Mr. JACOBSON. My understanding from the Social Security Administration is that that is their estimate of their present needs.

I would point out that they have a total complement—

Mr. GILMAN. Let me focus our attention on the real issue.

Two years ago your backlog was about 100,000 cases. You then took 180 people and assigned them to these cases. In 2 years, you are down to 80,000. How are only 50 more people going to reduce this tremendous backlog?

Mr. JACOBSON. I must say, Mr. Gilman, that I have to obviously rely upon the requests from the bureau of hearings of appeals of Social Security, as to what their estimate is of their needs.

Mr. GILMAN. What will happen to the temporary ALJ's when these 50 ALJ's are appointed?

Mr. JACOBSON. They will remain on the rolls, and as I have pointed out, they will have every opportunity to compete for the permanent spaces in the future. They are guaranteed that by law.

Mr. GILMAN. But you are only allocating 50 additional permanent slots. You now have 180 temporary ALJ's at work, so you are going to reduce the work force from 180 judges down to 50 it seems to me.

Mr. JACOBSON. No, I am sorry. That is a misunderstanding. I did not mean to imply that.

Mr. GILMAN. Doesn't the appointment of these temporary ALJ's expire within a year?

Mr. JACOBSON. The temporaries expire by law in December of 1978; about a year and a half.

Mr. GILMAN. What will happen to them if they haven't been appointed to a permanent position by the time of the expiration date?

Mr. JACOBSON. If they have not been appointed as permanent and if there is no other action taken, then I would assume they will be out of appointment.

Mr. GILMAN. Out of a job? Right; they will be out of a job?

Mr. JACOBSON. Correct.

Mr. GILMAN. But you are only certifying 50 additional permanent slots, so that by 1978, if there are no additional permanent ALJ positions established, we will be reducing the personnel, the judicial personnel, from 180 down to 50, at a time when they have a backlog of 80,000; isn't that correct?

Mr. JACOBSON. No. May I try to explain this, Mr. Gilman.

Mr. GILMAN. I welcome hearing your explanation.

Mr. JACOBSON. In the first place, let me make a point about the difference between our request for an additional 100 and the question of 50 on a certificate.

The additional 100 is a request to increase the allotment of supergrades, that is: GS-16 ALJ's. The jobs in the Social Security Administration, the temporary jobs, are GS-14 and the permanent jobs are GS-15, because they have been adjudged to be not quite the level that merits a classification of GS-16.

Mr. GILMAN. How many of your 100 supergrades will be assigned to do the same kind of work these temporary ALJ's are doing?

Mr. JACOBSON. None of them, sir.

Mr. GILMAN. Then where are you going to get the personnel SSI needs to reduce their backlog?

Mr. JACOBSON. We have on board the temporary ALJ's who are doing a good job.

Mr. GILMAN. But they expire in 1978. We are talking about what happens after the expiration date in 1978.

Mr. JACOBSON. The original basis for establishing those temporary ALJ's was to provide a 3-year period during which they would have an opportunity to qualify for permanent employment. That 3-year period is about half over; 45 of them, some number like that, have already qualified and been appointed. Others are in the process and will be; the expectation is that as they gain experience, they will qualify for the GS-15 permanent ALJ positions.

Obviously, not every single person will so qualify. This will be a process of identifying those who do best in the temporary jobs and those who get the benefit of the permanent appointments, I assume.

Mr. GILMAN. Where do we go in 1978 when you only have, say, one-half of the temporary ALJ's qualified and you still have a substantial backlog?

Mr. JACOBSON. We have on the register right now well over 100 qualified ALJ's eligibles who have met all of the requirements for that job. And we are adding to that list regularly. We have ample numbers of well qualified people who are competing for these positions. There will be no need, we think, to have a decrease in the number of people assigned to do this work.

As I say, we have over 100 right now qualified.

Mr. GILMAN. What will your authorization level be by 1978, disregard what you have on the list? You are only authorizing 50 slots? It means the fall-off of some 78 or 80 slots altogether?

Mr. JACOBSON. There is no authorization limit on GS-15's. The only reason there is a limit on GS-16, 17, and 18's is because the Congress has required one. But there is no limit on the number of GS-15's. If the requirement was for 100, there is 100. If the requirement is for 200, there are 200. The slots have nothing to do with the GS-15 jobs. They are quite separate.

I must try to clarify what ever I said in that matter, so that you will understand. We are not talking about the same thing.

Mr. GILMAN. In classifying these temporary ALJ's who have been doing the job now for 2 years, how much weight do you give to actual on-the-job experience? They have been at it for 2 years now. In rating them for permanent status, what sort of weight do you give to the experience factor?

Mr. JACOBSON. We give a lot of weight to the experience. We also get information as to the quality with which they handled the cases in front of them. And we think that is important, too; the quality with which they do it. And part of the examination is an evaluation of that by peers, by people who have seen these people in operation and who have watched them do their work, and attorneys who appear before them and others are given the opportunity to provide information about the qualities, the judicial qualities, the judicial temperament, the rulings ability, their knowledge of the law and so on.

And we think that that is an important factor in evaluating the people before they become permanent ALJ's which have all kinds of permanent tenure rights that even go beyond the normal Civil Service Commission.

Mr. GILMAN. Mr. Jacobson, didn't most of these temporary ALJ's give up permanent career status in expectation of appointment to regular ALJ status, when they came on board as temporary ALJ's?

Mr. JACOBSON. I really couldn't answer that without a good deal of research. I don't know of my own knowledge.

Mr. GILMAN. Can you tell us what is the cost of converting these 189 temporary ALJ's to regular status?

Mr. JACOBSON. Well, I think I would have to answer that by giving you a cost on the examination figure; that is, how much it costs to conduct the examination, because the process I must say is not one of conversion; it is one of competitive examination. And the best of those are facing competition from people who are not presently in those jobs.

The whole concept, we feel of Administrative Law Judge requirements in the Administrative Procedures Act is that we have the very finest, able people we can get, and so there is an open competition in which these people may compete.

And obviously, their experience will stand them in very good stead, but that doesn't mean that it is an automatic process. And I will be glad to provide information for you as to the cost of that examination and the cost of each point.

Mr. GILMAN. At this point in the record I would welcome including the costs supplied by Mr. Jacobson.

[The following information was furnished:]

The costs of converting 189 temporary ALJ's to regular status: the costs for processing an application under the provisions of the examination announcement for fiscal year 1977, to date, have been \$199. For 189 applications, the cost of processing would be \$17,711.

Mr. GILMAN. Mr. Jacobson, just two more questions:

How many of the temporary ALJ's who have made application to be classified as permanent ALJ's have actually been classified as permanent? What percentage?

Mr. JACOBSON. Mr. Dullea will answer that question. He knows the facts better than I do.

Mr. DULLEA. We have a total of 214.

Mr. GILMAN. Who are temporary ALJ's?

Mr. DULLEA. Yes, sir; covered by the provisions of Public Law 94-202.

Mr. GILMAN. And how many of those have applied for permanent status?

Mr. DULLEA. One hundred fifty-four have applied.

Mr. GILMAN. And how many of them have gained permanent status?

Mr. DULLEA. There is either now on the register or already appointed, 45.

Mr. GILMAN. Forty-five out of 154, or about one-third of these temporary ALJ's who have been doing the job for 2 years. And what seems to be the lack of qualification?

Mr. DULLEA. That is not the complete story. If I may go further, sir, in addition to that 45, there are presently in process at various stages of the examination process, an additional 40 people. That brings us to 85. Sixty-nine have not met existing standards, and 60 of that group have not yet applied.

Mr. GILMAN. You are saying then that about one-half have qualified; is that right, and have been placed?

Mr. DULLEA. Forty-five, sir, have either been found qualified and/or appointed.

Mr. GILMAN. Then you talked about another—how many that are in the process?

Mr. DULLEA. Forty now in process.

Mr. GILMAN. All right. So then in round figures about roughly one-half of the people who have applied who are temporary ALJ's are found to be qualified?

Weren't these people all hearing officers at the time you made them temporary ALJ's?

Mr. DULLEA. Not really; some of them come out of the Federal agencies prior to joining the Social Security Administration; some are from the private sector, and some are from state and local agencies.

Mr. GILMAN. Most of them had hearing experience; did they not, administrative hearing experience?

Mr. DULLEA. I can't accept that, sir. Their background may have been in the private sector.

Mr. GILMAN. How many of the 200-some ALJ's, temporary ALJ's, had hearing experience when they were appointed? What percentage?

Mr. DULLEA. Well, all of them had been with the Social Security Administration prior to the time they were converted to temporary Administrative Law Judges.

Mr. GILMAN. It is my understanding they were hearing officers with the Social Security Administration; isn't that correct?

Mr. DULLEA. That is correct.

Mr. GILMAN. And they all had hearing experience; isn't that correct?

Mr. DULLEA. That is correct.

Mr. GILMAN. Well, what suddenly now disqualifies them as a permanent ALJ after 2 years of hearing the kinds of cases that you are rating them for, and at a rate of only one-half who apply?

Mr. DULLEA. 69, sir, did not meet the standards that have been established by the Civil Service Commission.

Mr. GILMAN. Then I think that certainly indicates the need for this kind of legislation. Here you have a hard working force with prior hearing experience. You assigned them the work. They are doing the work. And now suddenly you are weeding them out, as you say, near the end of their term.

I think that the merit of this legislation is underscored by the manner in which the classification process is being undertaken.

Do you have any comment with regard to that?

Mr. JACOBSON. I do. I think that that is not a completely fair appraisal of the situation.

Mr. GILMAN. I welcome, then, your response.

Mr. JACOBSON. The fact is that there is no question we have a rigorous process and a rigorous requirement for permanent status as administrative law judges at GS-15. I would make a point that there is a difference between the work being done by the temporaries at GS-14 and the work being done by the permanent jobs for which they are competing at GS-15.

Now those differences are in the first place significant enough to warrant an additional grade level which is a fair amount of money.

Mr. GILMAN. Mr. Jacobson, may I interrupt you. What is the difference in the work between GS-15 and GS-14? As I understand it, the work is pretty much similar. Can you point out the distinction?

Mr. JACOBSON. The main difference would be that the 15s are required to hear appeals by hospitals and various health care institutions and agencies dissatisfied with the determination that they don't meet the licensing or regulatory requirements, covering providers of services under title XVIII. That is one main difference. That is a type of case which has been judged, I think both by the agency and certainly by the Commission as more difficult and requiring a greater amount of experience and judgment.

There is an individual entitlement type of case, I gather, under title II, which is heard by the grade 15's that is not heard by the 14's.

Mr. GILMAN. What portion of the total caseload is in those categories?

Mr. JACOBSON. I cannot answer that.

Mr. GILMAN. Isn't it true that a very small portion of all of the caseload is in those two categories that you are talking about?

Mr. JACOBSON. I don't think there is a very small portion in that second category I talked about. I think it is rather high; that is, appeals under title II involving entitlement of individuals to old age and survivors benefits. I think that is a substantial caseload. But I would have to get the figures for you, sir.

Mr. GILMAN. Do you gentlemen have any alternatives in mind with reference to H.R. 5723 to assure us that as many of the temporary ALJ's as are qualified will be appointed to regular status? If you are opposed to H.R. 5723, and you are faced with a substantial backlog, and it doesn't appear likely that this backlog will be reduced very fast, and they are going to be out of jobs by next year, and you are only certifying 50 additional slots—what is your alternative?

Mr. JACOBSON. As I pointed out in the first place, we would make a larger allocation if the agency felt it could effectively absorb that larger allocation. They have asked us for 50 and we are giving them 50. If they ask us for more, they would get more.

Mr. GILMAN. But the fact remains, Mr. Jacobson, you are only certifying 50 additional slots. You now have approximately 200 temporary ALJ's working on these cases. By 1978, they are going to be out of jobs and you are going to end up with just some 50 people undertaking the work of 200 people.

Mr. JACOBSON. Let me go back to your first question, really, which I did not answer. I am sorry. That had to do with what is our suggestion as to the alternative. Our suggestion is that the alternative be what the law now provides and that the Congress provided in January of 1976 which was that there be this 3-year period. The 3 years was established for a purpose, because it was—

Mr. GILMAN. What was the purpose, Mr. Jacobson? Wasn't the purpose to reduce the backlog? Wasn't that the essential purpose that we were confronted with at that time, a massive backlog when the new SSA legislation was passed, and suddenly we had to do something of an emergency nature?

Mr. JACOBSON. That was the reason for establishing the temporary ALJ's, yes. I think that is quite clear.

Mr. GILMAN. Will the backlog be fully resolved by 1978?

Mr. JACOBSON. No. Well, I don't know if it would be fully resolved by 1978. I think a substantial amount of progress has been made toward resolving it. And I would point out that with a staff of well over 650, counting the new 50 that they will get, those 650 administrative law judges, either temporary or permanent combined, that the backlog represents a little over 100, 120 cases per ALJ. I believe that Mr. Trachtenberg, who is much more expert in this than I, as the Director of the Bureau of Hearing Appeals of the Social Security Administration, has testified before the House Ways and Means Committee that it would be an effective utilization of administrative law judges. A backlog of approximately 100 cases per ALJ, is a reasonable backlog.

Now that would dictate that a backlog of approximately 60,000 cases for 600 ALJ's would be approximately in balance if workload. And that is his judgment as the manager of the program.

And I am not going to second guess his judgment. He knows more about it than I do.

Mr. GILMAN. So then why is Mr. Trachtenberg supporting this legislation?

Mr. JACOBSON. I didn't know Mr. Trachtenberg was supporting it.

Mr. GILMAN. Mr. Jacobson, do you consider a 6-month to a 1-year delay in deciding SSI cases a reasonable delay for someone who is disabled?

Mr. JACOBSON. No.

Mr. GILMAN. Well, neither do I and I don't think that the Congress considers it reasonable, and that is why the temporary ALJ's were put in. And I don't see any solution to it by your reducing the 200 temporary slots down to some 50 permanent slots and not at the same time finding a way of certifying additional permanent personnel to meet this demanding situation.

I don't think that you are resolving the problem. I know I have overstepped my time, Madam Chairman. I thank you.

Mrs. SCHROEDER. Thank you, Mr. Gilman. Do you have any further questions?

Mr. CORCORAN. No.

Mrs. SCHROEDER. I thank you very, very much for your time and your opinions on this. I had some questions about some of the others, but I think its really unfair to ask when we will have the specific agencies coming in and you are just giving the Civil Service Commission's view about the requests.

So we will be looking at that and we appreciate what you are going to put in the record, the different things that we requested. Again, thank you.

Mr. JACOBSON. Thank you.

Mrs. SCHROEDER. The hearing is adjourned.

[Whereupon, at 10:35 a.m., the subcommittee meeting was adjourned.]

[The prepared statement submitted by Mr. Jacobson follows:]

PREPARED STATEMENT OF RAYMOND JACOBSON, EXECUTIVE DIRECTOR,
U.S. CIVIL SERVICE COMMISSION

Madame Chairwoman and Members of the Subcommittee, thank you for inviting me to appear today to present the Administration's views on several measures relating to positions at GS-16 through 18 and positions at executive levels:

(1) The Civil Service Commission's proposal to increase the number of Administrative Law Judges at GS-16 positions from 240 to 340;

(2) H.R. 5723, to provide that certain persons who were originally appointed as supplemental security income hearing examiners under pre-1976 provisions of Title XVI of the Social Security Act shall, without any restriction, be deemed appointed as administrative law judges;

(3) H.R. 2387, to increase compensation of the Director and Deputy Director of OMB and also for Chairman and the Board of Governors of the Federal Reserve Board;

(4) A request by the Department of Health, Education and Welfare for 6 positions to be placed at Executive Level 5 and 4; and

(5) On Section 3 of H.R. 3685, which places a total of 15 positions in grades 16, 17 and 18 of the General Schedule.

I appreciate the opportunity to appear before the subcommittee to present the views of the Administration on the Civil Service Commission's proposal

to increase the number of Administrative Law Judges at GS-16 positions from 240 to 340 and on H.R. 5723, to provide that certain persons who were originally appointed as supplemental security income hearings examiners under pre-1976 provisions of Title XVI of the Social Security Act shall, without any restriction, be deemed appointed as administrative law judges. In the light of the needs of various Departments and agencies, we urge favorable action on the former; it must, however, express its strong disapproval of H.R. 5723, a bill that extends preferential treatment to a particular group and is disruptive of sound classification practices. Moreover, it will be shown that there is no justification for H.R. 5723 and that it is inconsistent with the directives contained in legislation enacted just 16 months ago.

First, with respect to our legislative proposal, we urge favorable action to relieve the pressures in various Departments and agencies responsible for formal adjudicatory and rule-making proceedings required by the Administrative Procedure Act. A factor of no little influence in what is known as "regulatory delay" is the unavailability to these Departments and agencies of an adequate number of supergrade slots to cope with mounting caseloads.

In 1963 the CSC was authorized to establish 2,754 supergrade positions. This legislation, contained in 5 U.S.C. 5108(a), also authorized 240 such positions for Hearing Examiners (now ALJ's). After enactment, these 240 positions were distributed to meet the needs of 14 agencies and Departments with adjudicatory positions allocable at the GS-16 level. During the last 14 years no additional supergrade positions for ALJ's have been authorized; nevertheless, within this time-frame the number of agencies conducting formal proceedings has expanded by 64%; and the number of supergrade positions has also increased. Consequently, the CSC has had to meet this expansion by borrowing supergrade slots, which are earmarked for other classes of employees, from the government-wide pool of ALJ's.

In addition to the increase in agencies, existing agencies and Departments have been experiencing larger case loads and have been given, by legislation, new responsibilities which have expanded their adjudicative programs. As a result, the number of GS-16 positions has increased from 240 to more than 280, this expansion, to date, having been satisfied by borrowing from the pool. The CSC has, however, reached its limit in being able to draw positions from the pool to cope with the increasing needs of the agencies. Regarding the latter, the CSC has been informed by the NLRB that its allotment of ALJ positions is insufficient to cope with its mounting caseload; other agencies have informed the CSC that their ALJ allotments are insufficient for their expanding work. Pending legislation—such as the strip mining bill—will, if enacted, establish new adjudicatory programs for which additional ALJ's will be needed.

An increase in the 240 authorized supergrade positions for ALJ's is, in the circumstances, essential. The CSC urges that 5 U.S.C. 5108(a) be amended to provide a modest increase of 100. Should favorable action be taken on this request, the CSC would first reimburse the governmentwide pool by returning the 40 slots it has been obliged to borrow in recent years; thereafter, the CSC would manage the remaining slots and distribute them only in situations where a need for additional positions was clearly established.

Turning now to H.R. 5723, the CSC must express its strong disapproval and urge rejection of this bill—which extends preferential treatment, both in terms of status and classification, to a small group of employees.

In late 1974 and 1975 the SSA began recruiting Attorney-Examiners to handle SSI cases arising under Title XVI of the Social Security Act. Eligibility for these positions required four years of experience and a level of prior experience at GS-12. The SSA thereafter appointed approximately 125 persons as Attorney-Examiners at GS-13 and also added to this group a number of Examiners who handled claims arising under the Federal Coal Mine Health and Safety Act. In 1975 a concern developed over an expanding caseload in the disability area covered by Title II of the Social Security Act—a caseload estimated to be in excess of 107,000. Disability and other claims in the agency are handled by ALJ's appointed under the APA who are classified at the GS-15 level. In order to permit the Attorney-Examiners to be used on certain disability cases, legislation was enacted in January 1976 which converted the Attorney-Examiners to temporary ALJ status, this employment to terminate in December 1978. The report accompanying this legislation indi-

cated it was expected that these employees would by 1978 have acquired the necessary experience and as they did so would be afforded the opportunity to be placed on the register for regular ALJ appointment on a merit basis under regular civil service procedure. Additionally, the Social Security Subcommittee expressed the view (shared by others) that the added work might warrant a classification of GS-14. In April 1976, the CSC approved such an allocation and the positions were reclassified at GS-14.

Now, just 16 months after legislation which provided a term of three years for the temporary employees to gain the necessary experience to qualify for permanent status, this legislative proposal would "grandfather" the former Attorney-Examiners to regular ALJ status without competitive procedures and reclassify them legislatively from GS-14 to GS-15.

Pursuant to the legislative direction in P.L. 94-202, which established the temporary job, the Commission has examined the applications of certain of the temporary ALJ's who have applied for eligibility as permanent ALJ's. Out of a group of some 214 Attorney-Examiners and presiding officers who handle black lung cases, 114 applied to the Commission. Forty-five have met existing standards and have been appointed by the SSA and other agencies to permanent GS-15 ALJ positions or their names are now on the register. Sixty-nine applications have disclosed a lack of necessary experience or qualifications to qualify. Forty applications are now in various stages of processing. Sixty Attorney-Examiners have never applied. Whether they have the experience and qualifications to meet existing standards no one knows; yet it is proposed by H.R. 5723 to convert them, as well as those who have been rated ineligible, to permanent status with all of the protections provided by the APA—permanent status with all of the protections provided by the APA—permanent appointment, elimination of the Performance Rating Act, automatic acceptable level of competence increments, etc. The preferential treatment proposed for these employees is patently unfair to the thousands of attorneys who have applied for eligibility in recent years, to the 825 ALJ's who now make up the corps and the more than 200 eligibles on the register who have established their qualifications and are interested in these positions.

CHANGE IN COMPENSATION FOR THE DIRECTOR AND DEPUTY DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, AND THE CHAIRMAN AND BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

I am pleased to be here today to discuss H.R. 2387, a proposal to raise the compensation for the positions of Director of the Office of Management and Budget and Chairman, Board of Governors of the Federal Reserve System from Executive Level II to Executive Level I. It would also raise the compensation for the positions of Deputy Director of the Office of Management and Budget and Members, Board of Governors of the Federal Reserve System from Executive Level III to Executive Level II.

The Director of the Office of Management and Budget was first placed in Executive Level II in 1964. Since that time, through delegation of authority by Executive Order and Reorganization Plan, the Administration has continuously vested this position with broader management and policy concerns. In 1974 Public Law 93-250 was enacted, requiring Senate confirmation of the appointment of the Director. The legislative history of that law indicates that the Congress considered the position of Director to be comparable in importance to the other members of the Cabinet. I believe that equity will be served by placing this position in Executive Level I.

With regard to the Deputy position in the Office of Management and Budget, we agree that this important position should be established one grade lower than that of the Director. It makes sense generally to place in Level II the deputies to Level I officials. We note that this has already been accomplished in the case of the Deputy Secretary in the Department of Defense, the Department of State, the Department of Agriculture, the Department of the Treasury, the Department of Transportation, and the Deputy Attorney General.

The Commission also favors the proposed change from Level II to Level I for the Chairman of the Board of Governors of the Federal Reserve System and from Level III to Level II for the members of the Board. This group of positions functions as the principal architect of the monetary, credit, and

operating policies for the Federal Research System, and has also come to exert a unique influence over the Nation's economic and fiscal policies. The Federal Reserve System operates independently of the Executive branch, and is subject to only very limited congressional control. The Chairman and the Board Members must bear an awesome responsibility for coordinating the policies of the Federal Reserve System with economic programs of the President and the Congress.

HEW PROPOSAL FOR 6 POSITIONS AT EXECUTIVE LEVEL

We understand that the Department of Health, Education, and Welfare is proposing that six of their currently established Executive Level spaces from the Presidential pool under Title 5, Section 5317, be returned and legislation be approved designating those same levels to the Department. This request does not, at this time, increase the overall number of 23 Executive levels presently in the Department.

Five of the six proposals are for currently established positions. They are: Commissioner of Aging, EL-V; Assistant Secretary, Comptroller, EL-V; Administrator, Alcohol, Drug Abuse and Mental Health Administration, EL-IV; Administrator, Health Services Administration, EL-IV; and Deputy Commissioner, Social Security Administration, EL-V.

In the case of the sixth space, the proposal is to reassign the Executive Level IV from the position of Administrator, Social and Rehabilitation Service, to the new Administrator, Health Care and Finance Administration.

We find no objection to their proposal and we defer to HEW.

FIFTEEN POSITIONS IN GRADES 16, 17, 18 FOR THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS

I would also like to say a few words regarding H.R. 3685 that provides for the appointment of additional judgeships for the United States District Courts and Courts of Appeals, and for other purposes. Section 3 of this bill authorizes the Director of the Administrative Office of the United States Courts to place a total of fifteen positions in grades 16, 17, and 18 of the General Schedule, in lieu of the four supergrade positions authorized by existing law and three positions allotted by the Civil Service Commission. We fully support this provision. In fact, on March 20, 1970, our Chairman wrote to the Director of the Administrative Office advising him to seek a separate statutory allotment of supergrade spaces. This appears only proper since the Administrative Office of the United States Court is established in the judicial branch and not the executive branch.

PAY CHANGES IN CERTAIN OMB AND FEDERAL RESERVE SYSTEM POSITIONS

WEDNESDAY, MAY 4, 1977

HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE OF EMPLOYEE ETHICS AND UTILIZATION,
Washington, D.C.

The subcommittee met at 9:30 a.m. in room 311, Cannon House Office Building, Hon. Patricia Schroeder (chairwoman of the subcommittee) presiding.

Ms. SCHROEDER. The subcommittee is called to order.

This morning, the subcommittee will be receiving testimony on H.R. 2387. This bill will increase the salaries of the Director and Deputy Director of the Office of Management and Budget and the Chairman and members of the Board of Governors of the Federal Reserve System.

Our witnesses this morning are Representative Jack Brooks, who is the Chairman of the Government Operations Committee; Representative Edward Derwinski, who is the ranking minority of the Post Office and Civil Service Committee; and Governor David Lilly, who is a member of the Board of Governors of the Federal System. We are delighted to have all of you with us this morning.

I understand that Congressman Brooks' committee is scheduled to meet this morning at 10:00, so we will hear from him first.

But before we start, I would like to bring the members' attention to a copy of a letter I received yesterday from President Carter indicating his support for this bill. I would like to make it a part of the record if there are no objections.

[The letter follows:]

THE WHITE HOUSE,
Washington, May 3, 1977.

HON. PATRICIA SCHROEDER,
*Chairwoman, Subcommittee on Employee Ethics and Utilization,
603 House Office Building Annex I, Washington, D.C.*

It is my understanding that H.R. 2387 is shortly to be considered by your Subcommittee.

For the record I would like to state my strong feeling that the position of the Director of the Office of Management and Budget should be treated as a Cabinet level position.

Sincerely,

JIMMY CARTER.

Ms. SCHROEDER. Mr. Brooks, we are delighted to have you with us.

STATEMENT OF HON. JACK BROOKS, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF TEXAS

Mr. BROOKS. Madame Chairman, it is particularly a pleasure to be back in this gracious hearing room, so beautifully done. While it is old, it has grandeur and charm and grace that I feel none of the other hearing rooms in the Capitol have. That charm is added by yours as Chairman.

Ms. SCHROEDER. My goodness.

Mr. BROOKS. This legislation today I am speaking in behalf is not simply a pay raise for the individuals involved, although it would increase their salaries. Its main purpose is to establish a proper relationship between officials at the top level of Government.

It is an essential rule of good management that people performing comparable duties and carrying similar loads of responsibility should receive the same pay. By raising the Chairman of the Federal Reserve Board and the Director of Office and Management and Budget to level I in the executive pay schedule, which is the level for cabinet officers, H.R. 2387 achieves this end.

President Ford recommended this legislation as one of his final actions of office and was certainly in a position to judge the relationships between his cabinet advisers and the Chairman and Director of OMB.

In his letter transmitting his recommendation, President Ford pointed out that the Chairman and members of the Federal Reserve, through their control of monetary policy, "have a more pervasive impact on the economy and society as a whole on a day-to-day basis than any other comparable group in any department or agency."

As far as the Director of the OMB, there is no question that he is regarded as a cabinet officer. Congress undoubtedly intended him that rank when they adopted my legislation in 1974, requiring that the director be confirmed by the Senate just as cabinet officers must be.

The Quadrennial Commission on Executive Legislation in its comprehensive report on Federal compensation last year reached similar conclusions, "by any standard," the Commission said, "The Chairman of the Federal Reserve has responsibilities that one could argue are roughly equivalent to the Secretary of the Treasury."

The Commission described the Director of OMB as an official who constantly negotiates with cabinet members on critical budget matters, yet is still classified as a level II.

It should also be noted that the Chairman of the Federal Reserve Board and the board members used to be paid at the cabinet level. In 1949, and that is even before I was in Congress, the Congress reduced their pay levels and by an action that I think was misguided and which we now have an opportunity to correct.

I would urge the committee to support this legislation and thank them for their courtesy in scheduling this hearing, and their courtesy in allowing me to testify.

Thank you very much.

Ms. SCHROEDER. I thank you very much. As I have said, I have long awaited the day when I could ask the gentleman questions.

I understand that most of the ones I want to ask would not be germane, but on your bill for the pay hike for the tooth fairy, or whatever you want to call it, would you prescribe that it take effect in the next session, or would you have it take effect immediately?

Mr. BROOKS. This would be your choice. I think we can have it take effect immediately. These gentlemen, these people, are not doing that. I see no reason for waiting 4 years or 8 years to accord them the rank and the salary to which we feel they are entitled.

I just don't see any reason, Ms. Schroeder, why there would be any reason for delay. I know that you have people complaining about congressional activities, but these are people that theoretically work for us. They work for the Government. I think we should pay them now what they are worth today. They may die tomorrow and never receive it.

The truth of the matter is, in the instance probably of Mr. Burns and Mr. Lance, the present occupants of those two high offices, the net cost to the Government may not be but \$40 in their tax brackets. It is a negligible increase for them. And I think it is a matter of fairness and compensation, really moral compensation, not just financial compensation to these people.

Ms. SCHROEDER. Thank you very much.

Did you have any questions, Congressman Corcoran?

Mr. CORCORAN. No.

Ms. SCHROEDER. Congressman Lehman?

Mr. LEHMAN. No; except I agree with my colleague from Texas.

Ms. SCHROEDER. We will work hard on it. Thank you for coming by.

Mr. BROOKS. It will be a beautiful day.

Mrs. SCHROEDER. You look like you are in rare form.

Mr. Lilly, please. Welcome to the committee this morning.

STATEMENT OF DAVID M. LILLY, MEMBER, BOARD OF GOVERNORS, FEDERAL RESERVE SYSTEM

Mr. LILLY. Thank you, Madam Chairman.

I appreciate the opportunity to appear before this subcommittee to express the Board's support of H.R. 2387—a bill that would raise to level I of the executive schedule the positions of the Chairman of the Board of Governors and of the Director of the Office of Management and Budget, and to level II the positions of the Board members and the Deputy Director of the Office of Management and Budget.

Let me state at the outset my recognition that an appearance before a subcommittee by an individual who is a principal beneficiary of proposed legislation could possibly raise a question of objectivity. I am serving as a member of the Board through January 31, 1978, having commenced service on June 1, 1976, after appointment to the unexpired portion of a 14-year term of office. As a consequence I have little to gain from the proposed legislation. However, my appearance before this subcommittee can, I believe,

provide you with an informed viewpoint on issues related to the legislation being considered, since my background includes not only membership on the Board of Governors but also service as a member of the Board of Directors of the Federal Reserve Bank of Minneapolis.

During my 5 years on the Bank's Board—2 years as Deputy Chairman, 3 years as Chairman—I endeavored to familiarize myself with System goals, responsibilities, and objectives. At that time, my perspective was that of a system director encountering the operating problems and responsibilities of a Reserve bank. In my present capacity as a member of the Board of Governors, I am required, in association with my colleagues on the Board, to deal with issues in the field of monetary policy, international finance, bank regulatory issues and consumer protection. This experience enables me, I believe, to appraise the importance of the Board's responsibilities regarding the stability of this Nation's economic and banking systems, and the corresponding justification for moving the positions of the Chairman and Board members to higher levels within the executive schedule. The fact that I have recently transferred from a high paying business career to an executive schedule, level III position as a member of the Board of Governors, perhaps lends a degree of emphasis to many of the comments I will make regarding the proposed adjustment to the executive schedule.

Let me now address the issue under consideration by this committee; namely, the merits of the executive schedule levels proposed by H.R. 2387, with emphasis on the positions of the Chairman and members of the Board of Governors. A decision in this regard requires an historical review of past actions affecting Board members' salaries, as well as a brief outline of the nature and expanding scope of Board member duties.

There is clear historical evidence that these considerations have been uppermost in the mind of Congress when similar legislation involving levels of Board members' compensation has been considered. For example, in the 1913 Federal Reserve Act originally establishing the Board, Congress recognized the importance of the new agency's responsibilities by providing compensation for Board members at a level equal to that of Cabinet officers, which at that time was \$12,000 per annum. This equality prevailed until 1925, when the salaries of Cabinet offices were increased to \$15,000 without a similar increase for Board members. However, in the Banking Act of 1935, compensation of Board members was increased to \$15,000, thus reestablishing the parity that was contemplated by the original Federal Reserve Act.

In 1949, Cabinet officers' compensation was increased from \$15,000 to \$22,500 per annum. At the same time, compensation of Board members, including the Chairman, was raised from \$15,000 to \$16,000 per annum.

In 1950, a subcommittee of the Joint Committee on the Economic Report stated that "every effort should be made to build up the quality and prestige of Federal Reserve officials," and recommended that the salary of the Chairman of the Board be raised to Cabinet officer level (then \$22,500) and that the salaries of other Board

members be increased to \$20,000 per annum. In 1952, this judgment of the importance of an appropriate salary base was reaffirmed by another subcommittee of the Joint Committee on the Economic Report. That subcommittee's report stated "it is of great importance that the Chairman and members of the Board of Governors should be persons of the highest caliber." The subcommittee then repeated the 1950 salary recommendations for the Chairman and Board members.

In 1956, the salaries of the Chairman and Board members were raised, respectively, to \$20,500 and \$20,000 per annum; but in the same year, the pay level of Cabinet officers was raised to \$25,000 per annum.

In 1962, President John F. Kennedy recommended that "the salary of the Chairman be fixed at \$25,000, equal to that of Department heads, and that the salary of other Governors be fixed at \$22,000." In a special message to Congress on April 17, 1962, President Kennedy said in support of his recommendation:

The Board of Governors has immense responsibilities for the health of the United States economy. The performance of its tasks requires specialized knowledge and good judgment in exceedingly complex fields of domestic and international economics and finance. The salaries of the Governors should be commensurate with their grave responsibilities, sufficient to attract outstanding men and to give them the prestige and status necessary for effective performance of their duties. As I said in my Economic Report, "The United States is behind other countries in the status accorded, by this concrete symbol, to the leadership of its "central bank," and I urge that the Congress take corrective action."

In 1964 the executive pay schedule was established, with the Chairman of the Board placed in level II and the Board Members placed in level III. The positions currently remain at these levels, still below that of Cabinet officers.

I believe that the original concept of executive pay schedule parity between Board members and members of the Cabinet was a sound one. Over the years this equality of compensation has been lost, although there have been frequent calls for correction of the discrepancy, particularly with respect to the Chairman's salary. The December 1976 Report of the Commission on Executive, Legislative and Judicial Salaries, which was submitted to President Ford, concluded that "a significant number of Federal Government jobs, both in the super grades and executive levels, are evaluated erroneously," and cited as examples of "the classification problems," the level II classifications of the Chairman of the Federal Reserve Board and the Director of the Office of Management and Budget. With respect to the Office of the Federal Reserve Board Chairman, the Commission's report concluded:

By any standard, the Chairman of the Federal Reserve Board has responsibilities that one could argue are roughly equivalent to the Secretary of the Treasury. His position has many aspects of a career job—given the fourteen year tenure. Thus, it does not offer the prospect of a short government career.

I submit that the broad range of responsibilities faced by the Board, particularly as those duties have increased in recent years, offers ample justification for the executive schedule adjustments contemplated for the Chairman and Board members in the bill before you.

The foremost responsibility of the Federal Reserve is the formulation and implementation of monetary policy that will ensure a sufficient availability of money and credit to facilitate the achievement of a rising standard of living within the United States. Toward that end, the Federal Reserve seeks to combat inflationary pressures, which have plagued the country in past years, while providing the financial basis for growing employment and output. The Federal Reserve has the additional responsibility, as a lender of last resort, to forestall national liquidity crises and financial panics. General monetary policy is carried out through the coordinated use of open market operations, the regulation of member bank discounting with the Federal Reserve Banks, and changes in member bank reserve requirements. The latter two activities are exercised pursuant to the direction or approval of the Board.

System open market operations—with transactions in Government securities last year averaging about \$2 billion per day, with a single day's high of \$9 billion—are achieved under the direction of the Federal Open Market Committee which is composed of the seven members of the Board and five Presidents of Reserve banks. In addition, the Board determines the margin requirements applicable to stock market credit transactions, and sets the maximum interest rates member banks may pay on time and savings deposits. The foregoing responsibilities are of an imperative and unique nature.

One indication of the weight of Board responsibilities is the fact that as of year end 1976, Federal Reserve System assets totaled \$133.4 billion. Government securities in the System's portfolio at yearend 1976 totaled \$105 billion, and produced 1976 total income of \$6.5 billion. Of the net System earnings, 98 percent or \$5.9 billion, was turned over to the Treasury by the System at yearend 1976.

A second responsibility of the Federal Reserve System is that of banker for the Federal Government. In this capacity, the Federal Reserve issues, redeems, and exchanges Government securities; handles a major portion of the Government's cash balances; and, as fiscal agent of the Federal Government, processes and handles tax payments and food stamps. More than 2 billion food stamps were processed by the Federal Reserve System in 1976—a 58.2 percent increase over the 1970 level.

The Federal Reserve, in close and continuous consultation and cooperation with the U.S. Treasury, engages in foreign currency operations, for the most part to counter disorderly conditions in foreign exchange market. Such foreign currency transactions are the responsibility of the Federal Open Market Committee, acting through its special manager at the Federal Reserve Bank of New York.

By statute, the Federal Reserve has a general regulatory and supervisory responsibility over all member banks. As of June 30, 1976, there were approximately 5,800 member commercial banks in the Federal Reserve System, holding \$586 billion of deposits. The Federal Reserve is responsible for examining about 1,000 state member banks and, as to any unsatisfactory conditions found to exist with respect to such banks, for effecting appropriate corrective action. In recent years, correction of unsafe or unsound banking

practices has involved the Federal Reserve System, under the Board's direction, in an increasing number of cease and desist proceedings under the Financial Institutions Supervisory Act.

The Federal Reserve System is also responsible for regulation of some 1,900 registered bank holding companies, which control banks holding roughly two-thirds of the banking deposits in the Nation. In the 14-year period, 1956 through 1970, the System acted upon 470 bank-holding company applications. Between 1971 and 1976, the number of applications increased to 5,079.

In the field of foreign activities of domestic banks, the Federal Reserve is responsible for processing applications by member banks to establish foreign branches and to make investments in foreign subsidiaries. We must also supervise their activities on a continuing basis. Assets of foreign branches of U.S. banks at yearend 1976 totaled \$180 billion, an increase of \$52 billion over the 1970 level. As the operations of U.S. banks continue to expand abroad, regulatory and supervisory responsibilities of the Board will increase correspondingly.

The Federal Reserve also provides services to the banking system and the general public through the issuance of currency and coin and the processing of checks. Presently, 50 million checks are processed daily by the System, an increase of 85 percent over the 1970 level. This has required the establishment of 11 new regional check processing facilities over the last 6 years.

With the enactment of the Truth in Lending Act in 1968, the Federal Reserve System has been assigned a major new area of responsibility in consumer credit protection. In increasing number and complexity, laws relating to some aspect of consumer protection have been enacted requiring the Board's direct involvement in the issuance of regulations and interpretations, consumer education activities, and enforcement procedures. In the past 3 years alone, there have been enacted the Fair Credit Billing, Equal Credit Opportunity, Consumer Leasing, Home Mortgage Disclosure, Real Estate Settlement Procedures, and the Federal Trade Commission Improvement Act.

I have taken the time to spell out the Board's major functions in the belief that this subcommittee, in considering the proposed adjustments to the executive schedule, would wish to take into account the quantity and nature of responsibilities assigned to these positions; the extent of discretionary judgment involved in the Board's decisionmaking authority; and the overall significance and impact of decisions made by the Board as a collegial body.

The executive schedule level assigned to the Chairman and members of the Board, as is the case with all Government officials, is indicative of the importance Congress places on the responsibilities it has assigned to a particular office or agency. It is my belief that if the responsibilities of the Chairman and members of the Board were purely of a regulatory or enforcement nature, their present levels would be appropriate. However, Board members have been assigned primary responsibility for the determination of national monetary and credit policies. Certainly, the degree of importance assigned to this function has not diminished since 1913, when Board

members were paid at Cabinet officer level. Nor has there been a diminution in the complex issues confronting Board members. Rather, the increasing complexities of both domestic monetary policy and international finance, and the leadership role now performed by this Nation in international monetary and economic matters had added to the importance of the role played by the Chairman and Board members as this Nation's central banking authority. Congress, itself, has evidenced its increasing attention to monetary policy and other responsibilities of the Board in its adoption of House Concurrent Resolution 133 and by its increasing requests for testimony of the Chairman and other Board members. The Chairman testified before congressional committees a total of 32 times in 1975 and 1976, and the other members of the Board appeared an additional 47 times during the same period. Only yesterday, Chairman Burns appeared before the Committee on Banking, Housing and Urban Affairs of the Senate to report on the condition of the national economy and the course of monetary policy.

To attract individuals of the highest qualification to the Board and to permit the Chairman and other members of the Board to be accorded appropriate recognition status in international financial circles, it would appear only logical to place the positions of the Chairman and Board members at the proposed executive schedule levels. This is obviously the intent of H.R. 2387 and a step which I believe is long overdue.

I might also point out a characteristic that distinguishes Board member positions from those of other Government officials. First, Board members are generally appointed for a term of 14 years—a period certainly constituting a major portion of an individual's professional career. To attract an individual to Government service for this length of time, particularly an individual with acknowledged expertise in one or more of the areas of endeavor specified in the Federal Reserve Act, Congress should compensate such individual at a realistic and equitable level. I have reviewed the service records of Board appointees for the 10-year period 1966-76 and found that in that time, of the 12 individuals appointed to the Board, five—all 50 years of age or younger—resigned prior to completion of their term of office. I am convinced that a primary factor contributing to the early departure of these individuals, was the financial strain they faced as Board members.

I would make a final observation regarding the treatment accorded the position of Chairman by this legislation. The Chairman's responsibilities as the Board's active executive officer—Section 10 of the Federal Reserve Act—his role as Alternate Governor to the International Monetary Fund, his position as Chairman of the Federal Open Market Committee, and other uniquely sensitive duties he performs, particularly warrant his classification at level I of the executive schedule. I wish to add, however, a word of qualification to this statement. While on each occasion that Chairman Burns has expressed himself on this subject, he has strongly endorsed the principal of increased salaries for the Chairman and members of the Board, he has also stated quite clearly that he did not wish to benefit personally from a higher salary for the office

of Chairman. Accordingly, he has requested that any new salary level established for the office of Chairman become effective with his successor. The Chairman has asked that this point of personal reservation be placed on the record of this hearing.

My statement supporting favorable action on H.R. 2387 has stressed the substantial character and scope of responsibilities of the Chairman and Board members and the increase in the volume and complexity of these responsibilities in recent years. The same rationale would, in my judgment, appropriately apply to the positions of Director and Deputy Director of the Office of Management and Budget. The responsibilities of these officials relating to preparation and admission of the annual budget, formulation of the Government's fiscal program, coordination of Executive Department views and recommendations on legislative matters, and development of improved coordinating and administrative procedures within the Executive Department, are highly significant in nature and greatly impact upon the performance of the entire Executive Branch. It would thus seem entirely appropriate to compensate the Director at level I of the executive schedule, and his Deputy at level II.

That concludes my statement, and thank you Madam Chairman.

Mrs. SCHROEDER. I find all your pay analysis very interesting, but what about the regional governors, how much money do they make?

Mr. LILLY. Each of the 12 regional Reserve banks are governed by a board of nine directors, three of whom are elected from banks by the bankers; three of whom are elected by the banks and are from commerce, and industry, and related activities; and three of whom are appointed by the Board of Governors here in Washington. They are all paid at the rate of \$100 a meeting.

Perhaps you are referring to the presidents of the Reserve banks?

Mrs. SCHROEDER. Yes. I am sorry.

Mr. LILLY. Their salaries are, in every case, in excess of the salaries paid to the Board of Governors. I have a list which I will be glad to submit for the record if you would like.

[The following information was furnished:]

11. Number and salaries of officers and employees of Federal Reserve banks, Dec. 31, 1976

Federal Reserve Bank (including branches)	President: annual salary (dollars)	Other officers		Employees			Total	
		Number	Annual salaries (dollars)	Number		Annual salaries (dollars)	Number	Annual salaries (dollars)
				Full-time	Part-time			
Boston.....	72,500	47	1,473,580	1,437	150	18,247,614	1,635	19,973,694
New York.....	97,500	124	4,879,000	4,869	143	65,747,295	5,137	70,723,795
Philadelphia.....	61,500	40	1,215,181	1,156	60	13,282,403	1,257	14,559,084
Cleveland.....	68,000	41	1,205,500	1,522	34	16,123,029	1,598	17,396,529
Richmond.....	58,750	63	1,903,300	2,099	74	22,246,859	2,237	24,208,909
Atlanta.....	74,000	63	1,805,050	2,443	57	24,942,038	2,564	26,821,088
Chicago.....	88,000	61	1,899,100	3,167	135	34,480,030	3,364	36,467,130
St. Louis.....	66,000	49	1,463,000	1,411	58	14,989,517	1,519	16,518,517
Minneapolis.....	69,000	31	980,900	921	18	10,271,975	971	11,321,875
Kansas City.....	55,000	53	1,515,500	1,592	78	16,428,455	1,724	17,998,955
Dallas.....	59,400	39	1,113,350	1,283	34	13,395,158	1,357	14,567,908
San Francisco.....	90,000	71	2,095,800	1,767	70	21,061,485	1,909	23,247,285
Total.....	859,650	682	21,549,261	23,667	911	271,215,858	25,272	293,624,769

Mrs. SCHROEDER. How did they end up making more than the Board of Governors?

Mr. LILLY. They are hired by the board of directors that I described, which must go out in the market in that region or country and find somebody competent to run that bank. Those salaries are the salaries that are necessary to command the type of person needed to operate the bank.

Mrs. SCHROEDER. So you have got kind of strange situation where people supposedly below you make more.

Mr. LILLY. That's correct.

Mrs. SCHROEDER. And even if we pass this legislation, it doesn't really correct that, I guess?

Mr. LILLY. I think that we are dealing with an operating system out there that is competitive with the banking system for operating executives.

Here in Washington, as Congressman Brooks has said, we are dealing more with comparability of job content in the executive and agency structure.

Mrs. SCHROEDER. I see. So you are trying to deal with comparability in Washington, really?

Mr. LILLY. Yes. I think it is difficult to go outside of Washington and try to achieve comparability.

Mrs. SCHROEDER. Right. Do you think that this bill would affect at all the independency of the Federal Reserve? Do you see that as any kind of a problem?

Mr. LILLY. I don't believe that this bill would impinge on our independence at all. In fact, I think it would enhance its independence.

Mrs. SCHROEDER. Thank you very much. Did you have something you wanted to add?

Mr. LILLY. In my statement that I submitted is a reservation of Chairman Arthur F. Burns, which he asked me to make regarding his own salary, and I would like to reemphasize it for the record.

Mrs. SCHROEDER. I believe we have had some communication from him also, asking it be made effective for the next term. Is that correct?

Mr. LILLY. I think that's correct.

Mrs. SCHROEDER. So you would prefer that this legislation take effect at the beginning of the next term?

Mr. LILLY. As far as the applicability of the salary to himself, but not as far as the applicability of the legislation to the other board members.

[The letter follows:]

CHAIRMAN OF THE BOARD OF GOVERNORS,
FEDERAL RESERVE SYSTEM,
Washington, D.C., March 15, 1977.

HON. ROBERT N. C. NIX,
Chairman, Committee on Post Office and Civil Service,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: I appreciate the opportunity to comment on H.R. 2387, a bill that would increase the salaries of the Chairman and Members of the Federal Reserve Board and of the Director and Deputy Director of the Office of Management and Budget I strongly endorse the proposed legislation in light

of the heavy responsibilities of the officials concerned. Those responsibilities have increased markedly as the Board of Governors and the Office of Management and Budget have assumed new duties over the course of recent years.

Before closing, I must add a word of qualification to the above statement: Since I do not wish to benefit personally from a higher salary for my office, I recommend that the new salary level for the Chairman of the Board of Governors become effective with my successor.

Sincerely yours,

ARTHUR F. BURNS.

Mrs. SCHROEDER. I thank you very, very much again for your coming, and taking the time to be with us this morning.

Mr. LILLY. It has been a pleasure. Thank you.

Mrs. SCHROEDER. Thank you.

Congressman Derwinski has gotten tied up somewhere else, so without objection, his statement will appear in the record as though read in full.

STATEMENT OF HON. EDWARD J. DERWINSKI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. DERWINSKI. Madam Chairman and members of the subcommittee, thank you for the opportunity to testify on H.R. 2387. My interest in this legislation lies in the elevation of the Director of the Office of Management and Budget to executive level I, rather than in the other offices included in it, so I will direct my remarks basically to that point.

Both in this Congress and the 94th Congress, I sponsored legislation to place the office of the Director of OMB at executive level I. I do not believe this is a political issue.

The office of Director of OMB meets every practical test of a Cabinet level position. Since its establishment in 1964, as Director of the Bureau of the Budget, the duties, functions, and complexity of this office have grown significantly and have increased in importance.

The responsibilities of the Office of Management and Budget may be specifically identified as follows:

To assist the President in his effort to develop and maintain effective government by reviewing the organizational structures and management processes of the executive branch to assure that they are capable of producing the intended results;

To assist the President in the preparation of the budget and the formulation of the fiscal program of the Government;

To supervise and control the administration of the budget;

To evaluate the performance of Federal programs and to serve as a catalyst in the effort to improve interagency cooperation and coordination;

To provide leadership in designing programs for the development of career executive talent through the Government;

To assist the President by clearing and coordinating departmental advice on proposed legislation and by making recommendations as to Presidential action on legislative enactments;

To assist in the consideration and clearance and, where necessary, in the preparation of proposed Executive orders and proclamations;

To plan and promote the improvement, development, coordination of Federal statistical services; and to provide leadership in the development of new information systems to provide the President with performance data; and

To keep the President advised of the progress of activities by agencies of the Government with respect to work proposed, work actually initiated, and work completed, together with the relative timing of work between the several agencies of the Government, all to the end that the work programs of the several agencies of the executive branch may be coordinated and that the moneys appropriated by the Congress may be expended in the most economical manner possible with the least possible overlapping and duplication of effort.

Madam Chairman, it is clear to me this is now a position equal in importance to the Cabinet level and the officer who holds it deserves the salary commensurate with the duties of the office.

Quite frankly, I have not studied the need or justification for increasing the salary and ranking of the other positions listed in H.R. 2387. However, if the Director of OMB is elevated, it seems reasonable to elevate the salary of the Deputy Director.

As to the Chairman and members of the Federal Reserve Board, I think we must give recognition to the levels of responsibilities of these positions as well, and therefore I support the whole bill.

Mrs. SCHROEDER. Thank you very much. The subcommittee is adjourned subject to the call of the Chair.

[Whereupon, at 10:25 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

SUPERGRADES FOR THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS AND CONVERSION OF CERTAIN ADMINISTRATIVE LAW JUDGES POSITIONS

THURSDAY, MAY 5, 1977

HOUSE OF REPRESENTATIVES,
COMMITTEE ON POST OFFICE AND CIVIL SERVICE,
SUBCOMMITTEE ON EMPLOYEE ETHICS AND UTILIZATION,
Washington, D.C.

The committee met at 9:30 a.m., in room 304, Cannon House Office Building. Hon. Patricia Schroeder (chairwoman of the subcommittee) presiding.

Mrs. SCHROEDER. The subcommittee will come to order.

The subcommittee has a pretty busy schedule this morning, so I'll make my opening statement brief.

Today we are going to receive testimony on the Administrative Office of U.S. Courts' request for a total of 15 supergrades. Our witness is Joe Spaniol, who is the Assistant Director for Legal, Legislative, and Special Reports at the Administrative Office of U.S. Courts.

Later we will be receiving testimony on H.R. 5723, which proposes to convert, by statute, approximately 180 individuals at the Social Security Administration who presently hold temporary administrative law judge positions at GS-14 to statutory administrative law judges at GS-15.

Our witnesses for this proposal are James A. Burke, Representative from Massachusetts, chairman of the Subcommittee on Social Security; Thomas McFee, who is the Acting Assistant Secretary for Personnel Administration at the Department of Health, Education, and Welfare, who will also testify on HEW's request for executive levels; William Fauver, who is Chairman of the Legislative Committee of the Federal Administrative Law Judges Conference; and John Sweeney, who is president of the Association of Temporary Administrative Law Judges.

I would also like to insert for the record copies of the statements from Representatives Jim Tucker and John Paul Hammerschmidt.

[The statements referred to follow:]

PREPARED STATEMENT OF HON. JIM GUY TUCKER, A REPRESENTATIVE FROM THE
STATE OF ARKANSAS

I am pleased to submit this statement today in enthusiastic support of H.R. 5723.

This is the third time in five years that Congress has tried to spur the Civil Service Commission to provide the Health, Education and Welfare Bureau of Hearings and Appeals with an ample number of administrative law judges to

handle social security appeals. The present backlog is 83,000 cases. It is getting worse instead of better. During March of this year there were 1,500 more cases filed than disposed. If this pattern continues, by the end of the year the total backlog will exceed 90,000 cases.

The Civil Service Commission has demonstrated that it is unable to supply the number of social security administrative law judges that the system demands. Let me outline what I believe are some of the reasons for this.

In November 1972 the Department of Health, Education and Welfare requested the Civil Service Commission to establish registers for administrative law judges to hear SSI cases pursuant to the newly enacted SSI law, P.L. 92-603. This was in keeping with the legislative history of the bill.

The floor debate on the SSI bill clearly shows that the hearings to which the bill refers would be subject to the Administrative Procedures Act, and that it was erroneous to contend otherwise.

Against this backdrop of legislative history the Civil Service Commission determined that the Administrative Procedures Act was not applicable to the SSI hearings process. The Civil Service Commission directed the Department of Health, Education and Welfare to recruit and hire a special type of hearings officer for SSI appeals cases.

The delays in the social security hearings process reached crisis proportions by mid-1975. After extensive hearings and exhaustive study, Congress passed and the President signed into law a bill which eliminated all distinctions among social security, medicare and SSI appeal procedures. It also authorized the conversion of the previously appointed SSI hearing examiners to temporary administrative law judge positions with the authority to hear all of these cases under the Administrative Procedures Act safeguards. The legislative history of P.L. 94-202 was crystal clear in stating that these temporary administrative law judges would virtually all be converted to permanent positions under the regular administrative law judge appointment procedures.

Despite warnings from the temporary administrative law judges that the Civil Service Commission would move in painstakingly slow steps, the Committee on Ways and Means and the Senate Finance Committee believed that the appointment to regular administrative law judge status should follow the normal administrative steps. However, at the same time, both the Senate and House Committee reports admonish the Civil Service Commission to move swiftly and to weigh heavily the SSI experience of the temporary administrative law judges in considering permanent appointments to regular administrative law judge position.

Once again, the Civil Service Commission failed to take the congressional "hint." While I appreciate the concern expressed by the Director of the Civil Service Commission Office of Administrative Law Judges, Mr. Charles Dullea, that social security appeals cases are unlike F.T.C. or I.C.C. cases, I wonder whether he appreciates the seriousness of the backlog in social security appeals or the necessity of providing traditional procedural safeguards and high quality decisions to low-income and disadvantaged people.

Many of these temporary administrative law judges left positions in private law practice to enter public service. After burning professional bridges behind them they are faced with the nearly insurmountable task of meeting requirements and qualifications based on considerations which do not directly relate to their on-the-job performance. These same elephantine regulations and requirements have been used unsuccessfully by the Civil Service Commission in attempting to fill the necessary number of social security hearing administrative law judges requested by the Bureau of Hearings and Appeals. The cumulative rejection rate of applicants for these positions is 60%.

One objection raised to the early permanent appointment of the temporary administrative law judges as regular administrative law judges is the fear that this unusual method may result in something less than top quality hearing examiners. Those who raise this concern should realize that the 189 temporary hearing officers received their appointments only after meeting the same type of standards and requirements that regular administrative law judges must meet.

The Bureau Director has the administrative authority to recommend removal for cause the judges who are not fulfilling their duties. Under the Administrative Procedures Act the Civil Service Commission must decide whether or not the recommended removal is justified. It is my understanding

that a number of permanent administrative law judges are possible subjects of such removal proceedings. I am not aware of any removal proceedings pending against the temporary administrative law judges. If, however, any administrative law judge—whether temporary or permanent—is failing to fulfill official duties, he or she should be removed.

Congress should resolve the dispute with the Civil Service Commission and get on with the business of serving the social security recipients and the general public by assuring the appointment of the temporary administrative law judges to permanent status as soon as possible. Because the Civil Service Commission has refused to do this the morale of the 189 temporary administrative law judges is at a record low. If we in Congress can not expeditiously resolve this conflict we will suffer the loss of a large group of well-qualified, dedicated public servants who will return to private life carrying with them ill feelings toward our Government. The Government will still be faced with a growing backlog of social security appeals, a shortage of judges and no demonstrated capability of filling the necessary positions.

PREPARED STATEMENT OF HON. JOHN PAUL HAMMERSCHMIDT, A REPRESENTATIVE
FROM THE STATE OF ARKANSAS

I am pleased to submit this statement in support of H.R. 5723 and its related legislation which has been co-sponsored by myself and over 70 other Members of Congress from both sides of the aisle. The reason I am in strong support of this bill is because the Civil Service Commission has continued to be unresponsive to the will of Congress in regards to the certification of Administrative Law Judges to the Bureau of Hearings and Appeals of the Department of Health, Education & Welfare. These judges conduct hearings primarily under the disability provisions of Title II and Title XVI of the Social Security Act, as amended.

The history behind this legislation extends back to H.R. 1 in 1971 (Public Law 92-603). In that Act it was the intent of Congress to put hearings under Title XVI of the Social Security Act under the Administrative Procedures Act and with the proceedings conducted thereunder to be conducted by APA Hearing Officers. The counsel for the Civil Service Commission ignored the intent of Congress at that time and classified the positions as non-APA Hearing Officers. The position was established at GS-13, two grades below the grade established for Administrative Law Judges in DHEW. Since the Department of Health, Education and Welfare was helpless to do anything administratively in view of the Civil Service Commission's position, they were required to hire Hearing Officers who did not come from a register established by the Civil Service Commission. It should be noted that the Department of Health, Education & Welfare established a division under the Bureau of Hearings and Appeals of the Social Security Administration which was headed by Mr. Wilson Matthews, a former head of the Office of Administrative Law Judges of the Civil Service Commission. Mr. Matthews established a selection process essentially identical to that presently conducted by the Civil Service Commission under Announcement No. 318 with the only exception being as to the number of years of legal experience required for qualifying experience. The announcement provided by DHEW specified a grade of GS-13 for persons with four (4) years of qualifying legal experience, and GS-14 for persons with six (6) years of legal experience. Virtually all of those persons hired qualified for the GS-14 position, but they were deprived of that grade by the stand taken by the Civil Service Commission after they had made irrevocable commitments to leave private law practice for government service. Approximately 200 persons were hired as Hearing Examiners at the GS-13 level. Most of these persons came from private law practice and joined the Bureau of Hearings and Appeals with the understanding that these positions were permanent career-absolute positions. It should be noted that with this two-tiered system of organization (regular GS-15 Administrative Law Judges and GS-13 Hearing Examiners) the Bureau of Hearings and Appeals was put under great pressure because certain cases, primarily all of those claims being made under Title II of the Social Security Act, could not be handled by the GS-13 Hearing Examiners as hearings thereunder required judges appointed pursuant to the APA. If a claimant had pending applications under

both Title II and Title XVI known as a concurrent claim), it required an APA hearing because of the Title II involvement even though the definition of "disability" under Title II and Title XXVI is identical. This created administrative havoc, and the backlog of cases pending hearings exceeded 113,000 in April, 1975.

In the 94th Congress, the Congress passed H.R. 10727 without opposition (House vote 370 to 0), and this became P.L. 94-202. In this legislation the position of GS-13 Hearing Examiner was changed to temporary Administrative Law Judge at the GS-14 level, with the temporary positions to expire no later than December 31, 1978. This legislation gave the new temporary ALJ's jurisdiction to hear cases under Title II and allowed DHEW to utilize them to proceed to reduce the backlog of cases pending hearings.

The legislation also was intended to emphasize the experience of the former hearing examiners and to further their expertise in social security administrative hearings. The committee report prepared by the Ways and Means of the House of Representatives Committee and endorsed by the Senate Finance Committee contained the following language as a directive to the Civil Service Commission:

"The Office of Administrative Law Judges should be mindful of its ministerial responsibilities in supplying registers from which adequate numbers of ALJ's can be hired by HEW to adjudicate social security claims. There are indications that in the past these registers have not been supplied with the speed and with the number of candidates thereon which HEW needed to get better control over the hearings backlog. In evaluating current SSI hearings examiners for regular ALJ appointments great weight should be given to experience in actually adjudicating Social Security cases and roadblocks should not be created in unduly lengthy and bureaucratic appointment procedures. Recent statistics show that of the 55 applications of SSI hearing examiners for the regular ALJ registers which have been acted upon by the Civil Service Commission, only 5 hearing examiners have been found eligible. This suggests to the Committee (Ways and Means) that the Office of Administrative Law Judges is applying its standards unrealistically. Now that a majority of the ALJ corps in the Federal Government are working under Social Security Act programs, the Civil Service Commission should reexamine its ALJ appointment standards to assure that they are relevant to the positions that have to be filled."

Since April, 1976, when DHEW effectuated P.L. 94-202, the temporary judges have been hearing essentially the same type of cases as have been the regular GS-15 ALJ's. Information furnished by the Social Security Administration indicates that the backlog has been reduced from the 113,000 cases previously mentioned to approximately 82,000 at the present time. It thus appears that the temporary judges have met the goal assigned to them by DHEW at a time when new requests for hearings were at an all time high.

In July, 1976, James B. Cardwell, Commissioner of Social Security, requested the Civil Service Commission to reevaluate its methods of rating those temporary Administrative Law Judges who made application under Announcement #318 for permanent GS-15 positions and to establish a special register for the temporary Administrative Law Judges. It is the Commission's policy to evaluate applicants by requiring the applicant to furnish the names of persons who could confidentially comment on the applicant's legal ability. Because Announcement #318 required the temporary Administrative Law Judges to furnish all recent experience, it became necessary for the applicant to furnish the names of attorneys who had prosecuted claims under the Social Security Act before the applicant. Mr. Cardwell stated that because many of the attorneys might have had unfavorable decisions from the applicant that this might cause the attorneys to give poor recommendations and, thus, would lead to Commission's denial of eligibility to the applicant. The Commission refused to accept Mr. Cardwell's suggestion and stated that preferential treatment for the temporary judges was not warranted.

In November, 1976, Mr. Robert Trachtenberg, the Director of the Bureau of Hearings and Appeals, submitted to the Civil Service Commission a justification for the conversion of the temporary Administrative Law Judges to permanent GS-15 positions under existing regulations of the Civil Service Commission. A copy of Mr. Trachtenberg's justification letter is attached. Section 930.203(d) of the Civil Service Commission Regulations covers the appointments of incumbents of new classified administrative law judge positions and provides as follows:

"(d) Appointment of incumbents of newly classified administrative law judge positions. An agency may appoint as an administrative law judge an employee who is serving in a position which is classified as an administrative law judge position on the basis of legislation, Executive order, or decision of a court if: (1) He has a competitive status or was serving in an excepted position under a permanent appointment; (2) He was serving in the position on the date of the legislation, Executive order, or decision of the court on which the classification of the position is based; (3) The Commission receives a recommendation for his appointment from the agency concerned not later than 6 months after classification of the position on the basis of the legislation, Executive order, or decision of the court; and (4) The Commission approves his qualifications for the position. In an emergency situation, when the needs of the service require it, the Commission may authorize the conditional appointment of an employee to an administrative law judge position pending final decision on his eligibility for absolute appointment under this paragraph."

Mr. Trachtenberg recommended the conversion because the temporary judges were a proven group of employees who had met the challenges of their jobs and had helped reduce the backlog of cases under enormous pressure. The Civil Service Commission refused to grant the request of the Bureau of Hearing and Appeals in January, 1977. Mr. Trachtenberg filed an appeal from this decision, and on April 20, 1977, the appeal was denied by the Civil Service Commission in a letter from Georgiana H. Sheldon, Acting Chairman of the Civil Service Commission. In her letter of denial, the Acting Chairman implied that if the Congress had intended for the temporary Administrative Law Judges to be in permanent positions, it should have done so in P.L. 94-202.

Because the Civil Service Commission has refused to grant any relief to the temporary Administrative Law Judges, the morale in this corps is at an all-time low. These temporary judges have now been at the GS-14 level for over one year, and they are facing a "dead-end street" with their appointments to expire no later than December 31, 1978. Without immediate action by the Congress, these highly trained judges will begin to leave government service, and their expertise will be lost. If this happens, we will see the backlog of cases again rise to unmanageable proportions as previously existed prior to P.L. 94-202, and the public interest will be thwarted.

The proposed legislation is intended to put this issue at rest once and for all. Chairman Burke, the sponsor, and the many cosponsors feel that the expertise of the temporary judges should not be lost, and that these persons should be allowed to remain in government service in permanent career-absolute positions as previously promised. It is our opinion that the public interest demands that H.R. 5723 be immediately considered favorably by the Congress, and that those persons covered by its scope will remain in positions of service to our constituents. A return to the past without the passage of H.R. 5723 will be a gross waste of the taxpayer's money, and a relinquishment of the responsibility placed in the Congress to demand efficient and timely service in the administrative hearing process under the Social Security Act.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
Washington, D.C., November 15, 1975.

Mr. CHARLES DULLEA,
Director, Office of Administrative Law Judges,
U.S. Civil Service Commission, Washington, D.C.

DEAR MR. DULLEA: This supplements my letter to you of August 23, 1976, and provides justification for the conversion of the 195 temporary administrative law judges to the permanent GS-15 administrative law judge position (Agency Position No. 6679).

Pursuant to Section 3 of Public Law 94-202, which was approved on January 2, 1976, persons who were appointed as hearing examiners in accordance with section 1631(d) (2) of the Social Security Act as in effect prior to enactment of Public Law 94-202, were deemed to be hearing examiners appointed under 5 U.S.C. 3105 and subject as such to all other pertinent provisions of title 5 applicable to individuals appointed thereunder. The appointments covered by Section 3 of Public Law 94-202 shall terminate not later than December 31, 1978.

Public Law 94-202 authorized these individuals to conduct hearings and render decisions with respect to requests for hearings under titles II, XVI, and XVIII of the Social Security Act, if the Secretary of Health, Education, and Welfare found that it would promote the achievement of the objectives of these titles. The Secretary, on March 3, 1976, determined that it would promote the achievement of titles II, XVI, and XVIII of the Act to have these individuals hold hearings and render decisions with respect to requests for hearings under such titles. The Secretary directed me to implement his finding, including the designation of specific categories of cases to be assigned to the new ALJs. I determined that the new ALJs would be utilized to hear and decide cases arising under title XVI and, in addition, under title II where the appeal involved issues under section 216(i) (period of disability) and section 223 (disability insurance benefits) of the Social Security Act. This decision was taken so that the new ALJs would become productive in the shortest period of time and to alleviate the need to provide the orientation necessary to handle the more complex issues.

The new ALJs were given the organizational designation of administrative law judge (temporary) and were promoted to GS-14 pursuant to a position description approved by your office on March 4, 1976. The effective date of the promotions for more individuals was April 11, 1976.

Public Law 94-202 also brought title XVI hearings under the Administrative Procedure Act, and the hearing examiners appointed under the former section 1631(d)(2) of the Social Security Act are deemed to be hearing examiners appointed under 5 U.S.C. 3105. Section 930.203(d) of the Civil Service Commission regulations covers the appointment of incumbents of newly classified administrative law judge positions and provides as follows:

"Appointment of incumbents of newly classified administrative law judge positions. An agency may appoint as an administrative law judge an employee who is serving in a position which is classified as an administrative law judge position on the basis of legislation **** if:

"(1) He has a competitive status or was serving in an excepted position under a permanent appointment;

"(2) He was serving in the position on the date of the legislation, **** on which the classification of the position is based;

"(3) The Commission receives a recommendation for his appointment from the agency concerned not later than six months after classification of the position on the basis of the legislation ****; and

"(4) The Commission approves his qualifications for the position.

"In an emergency situation, when the needs of the service require it, the Commission may authorize the conditional appointment of an employee to an administrative law judge position pending final decision on his eligibility for absolute appointment under this paragraph."

Although we are uncertain as to the complete import of the instant regulations as it applies to BHA's temporary ALJs, it clearly constitutes authority for making the converted ALJs permanent. Moreover, there are sound administrative reasons that provide the basis for making them permanent.

1. Public Law 94-202 now serves, and will continue to serve, an important function in helping BHA reduce both its backlog and processing times. However, it must also be recognized that while this statute has been of great assistance to BHA, there are now a substantial number of presiding officers with temporary positions, who previously held permanent tenure. This is naturally unsettling to those individuals and causes a serious morale problem. These generally high-producing judges could be even more productive if they had permanent positions.

2. We have recently been averaging 13,000 new requests for hearing each month, and it is highly unlikely that this number will decrease. In addition, BHA is periodically being assigned the responsibility for new programs. It is doubtful that either of those circumstances will change, so that a permanent corps of approximately 650 judges will be needed for the foreseeable future. Therefore, the Commission's exercise of authority in this instance would not result in the establishment of an unneeded and unnecessary workforce. Furthermore, our need for judges is not dependent on the results of any future studies. Regardless of the specific findings of the Center for Administrative Justice or the second tier LaMacchia group there will always be some type of hearing process for which the services of these individuals will be needed.

3. Despite the assurances in Chairman Hampton's recent letter to the Commissioner that a new evaluation will be instituted, we continue to believe, as stated in our July 16, 1976, letter, that vouchering of the present ALJs(T) is a real and not imagined problem, and it undermines the justice we administer. This problem will be eliminated if the Commission grants this request.

4. Finally, we have a proven group of employees who have met the challenges of their job in the SSI and black lung areas—and, as important, they are available to meet the challenges of the full range of Social Security programs. We are thus faced with a unique situation. If the Commission fails to utilize its authority, there will be an even greater negative impact on the incentive of the ALJs(T). The resulting harm to the public must be considered.

If we are correct regarding the applicability of the regulation to the issue of permanent appointment, then the question becomes the grade at which the position should be set.

As you know, the position description which we submitted to you limited the duties of the new administrative law judges (temporary) to cases arising under title XVI and II. In view of this limited jurisdiction, a GS-14 was approved for the position.

We soon realized, however, that the limited jurisdiction did not permit the most effective use of these persons, and it has already caused problems in hearing offices. It has resulted in some instances in delays and scheduling problems, particularly in those areas where the title XVI workload is relatively light, and in assigning cases in geographical areas wherein the presiding officer must do substantial travel to hearing sites. The individuals appointed under former section 1631(d)(2) have shown that they are fully competent to handle all categories of cases coming before this Bureau.

We feel strongly that the position must be classified no lower than GS-15, the journeyman level for permanent ALJs in BHA, for the many sound reasons you enunciated in opposition to a multi-level hearings officer corps when a previous proposal to that effect was submitted by the Department to CSC.

Although Public Law 94-202 states that the "appointments shall terminate *not later than* at the close of the period ending December 31, 1978," (emphasis added), that is not a bar to permanent noncompetitive appointments under the Civil Service Commission's existing regulations. Nor do we see it as doing violence to the legislative intent. Although the legislative history indicates that GS-14 would be an appropriate classification for those individuals affected by the bill, the actual classification, of course, is the responsibility of the Civil Service Commission, and your earlier classification decision establishing the grade at GS-14 was, as noted above, based upon a far more limited position description.

If you agree with our position regarding the applicability of the regulation, we may request that CSC consider granting an exception to the promotion restriction of the so-called "Whitten Amendment," or such other relief as may be appropriate for those ALJs who have not been in grade for one year. We would be pleased to supply any documentation you need as to the individual's qualifications, and would initiate a request to the Department to submit the appropriate documentation for those individuals who have not been in grade for one year upon approval of such a waiver.

It goes without saying that we did not realize either at the time that P.L. 94-202 was being considered or when the GS-14 position description was submitted to you for approval that the referenced regulation was applicable. Because it clearly is applicable and because the administrative reasons noted above support such a result, I am obliged to make the requests herein contained.

Your early approval of our requests will be appreciated.

Sincerely,

ROBERT L. TRACHTENBERG,

Mrs. SCHROEDER. Mr. Spaniol, thank you for coming. We welcome you at the witness table.

If you will put your statement in the record and give a summarization of it, that would be quite helpful.

Mr. SPANIO. I would be delighted to do that, Madam Chairman.

STATEMENT OF JOSEPH F. SPANIOL, JR., ASSISTANT DIRECTOR,
ADMINISTRATIVE OFFICE OF THE U.S. COURTS

We greatly appreciate this opportunity to present the needs of the Administrative Office of the U.S. Courts for 15 supergrade positions.

I should say, at the outset, that Mr. Rowland Kirks, the Director of the Office, regrets very much his inability to be here this morning. He was at Walter Reed Hospital yesterday, undergoing treatment that leaves him very debilitated; otherwise, he certainly would have been here. He asked me to represent him here at the hearing this morning.

I have with me Mr. William Weller who is a member of our staff and my colleague. I want to say, at the outset, that neither Mr. Weller nor myself will be affected by this legislation.

At the outset I would like to point out that we are requesting this authority legislatively rather than asking for authority from the Civil Service Commission because, in 1970, the Chairman of the Civil Service Commission advised us that it was proper for us to come to Congress and make this request.

At that time, we were requesting of the Commission three additional supergrade positions out of 150 that were allocated. We went to the Commission, and they were denied.

I'd like to read the statement from Mr. Hampton's letter to us. He said:

Since your office is not a part of the executive branch, but is in the judicial branch, we feel that it is proper for you to have a separate statutory allotment of supergrade spaces. We also feel that it would be proper for you to request Congress for an increase in your statutory allotment of spaces to meet your changing workload needs.

In view of the large number of judgeships that would be created by the judgeship bill now pending in the Senate before the Judiciary Committee, we felt that it would be appropriate at this time, in conjunction with that bill, to request the supergrades. The bill will increase the number of judgeships of the Federal judiciary by about 25 percent. It's really the largest judgeship bill in the history of the Nation. It will impose a great many additional duties on the Administrative Office.

At the present time we have four statutory positions at grade GS-17. We have one GS-18 position allotted by the Commission, and two GS-16 positions authorized by the Commission. That's a total of seven positions.

The 15 positions which we are requesting, would supersede this authority—so, the net increase is eight positions.

The four statutory GS-17 positions we now have were allocated by the Congress in an act passed in 1958. In 1959, the Civil Service Commission gave us two GS-18 positions as a result of a reorganization in our office.

Two assistant directors were appointed at that time, and we had one GS-18 for each of these assistant directors.

In 1963 we returned one of the GS-18 positions to the Commission in trade for a GS-16 because of a reorganization in the office.

Since 1958, when these supergrade positions were first authorized for the Administrative Office, the complement of judges and supporting personnel in the Federal judiciary has grown three-fold, and we have had new major legislation that has imposed significant additional duties on the Director of the Administrative Office.

My prepared statement lists three of these enactments. I would like to mention them:

First, the Criminal Justice Act of 1964 which authorized the payment of compensation to counsel appointed to represent indigent defendants in criminal cases, and the amendments to that Act of 1968 which authorized the establishment of public defender offices.

Second, in 1968, Congress passed the Federal Magistrates Act. That Act did away with the office of United States commissioner and substituted in its place, a system of full-time and part-time U.S. magistrates.

Thirdly, more recently, in 1975, by virtue of a provision in the Appropriations Act, the function of examining court offices was transferred from the Department of Justice to the Administrative Office of the United States Court.

Now, each of these three enactments required the Director of the Administrative Office to establish three new divisions in the office.

In addition, the Speedy Trial Act of 1974 placed many new administrative duties upon the Director, and these required him to establish a new position of assistant director for plans and analysis.

The result is that today the office is organized with three assistant directors and 12 separate divisions operating along functional lines.

My prepared statement, Madam Chairman, sets forth in capsule form the duties of each of the three assistant directors of the office, and gives a little capsule résumé of the duties of each of the 12 divisions in the office.

I'd like to mention the duties of four divisions:

First, is the Bankruptcy Division of our office. This division is responsible for the discharge of the duties imposed upon the director under the Bankruptcy Act, including surveys and recommendations for the creation of additional positions of referee in bankruptcy and the maintenance of the separate referees salary and expense fund.

Originally, the chief of this division was recruited from the ranks of referees in bankruptcy, but, in recent years, the position has been filled from promotion within the office by those who have been familiar with the work.

Today, the man who is in charge of the bankruptcy division has supervisory responsibility for the operation systemwide, and receives a salary approximately \$3,500 less than a full-time referee in Bankruptcy.

Second, our magistrates division is responsible for the administration of the Federal Magistrates Act passed in 1968.

The duties of his division include the recommendation of new magistrate positions, preparing operating and procedural manuals for the use of magistrates serving as judicial officers, and addressing the day-to-day problems arising in the system.

The chief of this division, at the present time, is paid \$10,000 less than the salary paid to the highest paid, full-time U.S. magistrate over whom he has supervision.

Third, our probation division is responsible for the discharge of the duties imposed upon the director by the probation and parole laws.

Approximately one-fifth of all the employees of the Federal judiciary are engaged in this probation and parole work.

The probation service operates rather inauspiciously, but it is, really, the largest part of the Federal Government's correctional program.

I'd like to emphasize this by pointing out that the Bureau of Prisons, under the Attorney General, has custody of approximately 29,000 inmates today. In comparison, the Federal probation service has 65,000 citizens of the Nation under its supervision.

Comparisons are difficult in this area, but I'd like to point out that the Director of the Federal Bureau of Prisons is classified statutorily at level V of the executive schedule, but the chief of the Federal probation service in our office is only classified at GS-17.

Finally, the financial division of our office is responsible for the financial affairs of the Federal judiciary, a budget of approximately \$430 million.

Some agencies in the Government have separate offices for such activities as budgeting, accounting, disbursing, and financial auditing. Within our office, and in the entire Federal judiciary, one single division is responsible for all financial affairs.

There are eight other divisions listed in my prepared statement and I will not go into those.

In addition to the 12 divisions, there is an office of special assistant to the Deputy Director of the Administrative Office responsible for numerous special studies and individual programs which cannot be absorbed within these other divisions.

In the last few years, the incumbent of this position has saved the Government several millions of dollars through a program of improved juror utilization in the district courts.

Now, all of these divisions in the office do not operate at the same level of responsibility. Some divisions carry out highly specialized activities—such as our bankruptcy division, our probation division, our clerks' division, our Criminal Justice Act division, and the magistrates division.

We call these divisions in our office our program divisions. The other divisions are our operating or administrative divisions. They frequently perform tasks in the Federal judiciary, which in executive departments are performed by separate units or even separate agencies.

The seven authorized supergrade positions are now distributed in the office, based on a combination of seniority and responsibility.

The other eight positions are classified, presently, at grade GS-15. Provision should be made so that each of these assistant directors and division chiefs may have a salary commensurate with his

responsibilities, and with salaries paid to judicial officers and employees of the judiciary over whom they have supervisory responsibility.

I'd like to add that the request for additional supergrade positions is a matter of allocation of positions only.

As we understand present law and procedure, the Civil Service Commission will retain its authority to determine the qualifications of individuals selected to fill these positions.

Except for the additional GS-16 supergrade position allocated by the Civil Service Commission several months ago, it has been almost 19 years since any additional supergrade positions have been authorized for the administrative office of the United States courts.

We ask the committee and the Congress to act favorably on our request.

Attached to my prepared statement is the statement Mr. Kirks submitted to the Senate Judiciary Committee on the same subject.

There is also attached a brief organizational chart of the office, and some other information showing the increase in the workload of the office in the last 6 or 7 years. That document was previously sent to the House Appropriations Committee.

Madam Chairwoman, that concludes my prepared remarks.

[The prepared statement follows:]

STATEMENT OF JOSEPH F. SPANIOL, JR., ASSISTANT DIRECTOR, ADMINISTRATIVE
OFFICE OF THE UNITED STATES COURTS

Madam Chairwoman and members of the committee, we greatly appreciate this opportunity to appear today to present our request and justifications for additional supergrade positions for the Administrative Office of the United States Courts. Mr. Rowland F. Kirks, the Director of the Administrative Office, regrets that for reasons beyond his control he is unable to be present this morning to testify personally. He asked that I represent him at this hearing.

At the outset, I should say that we are requesting legislative authority for new supergrade positions rather than depending upon a Civil Service Commission allocation, because in 1970 the Chairman of the Civil Service Commission, Robert E. Hampton, advised us that it was proper to do so. About that time we were seeking from Civil Service the allocation of three additional supergrades for our office out of an allocation of 150 new positions provided to Civil Service by Public Law 91-189. Mr. Hampton advised that the 150 additional spaces were provided by the Congress for the purpose of meeting the most pressing needs of programs of high Administration and Congressional importance, and that in view of this restriction, it was impossible to assign any additional supergrade spaces to the Administrative Office of the United States Courts. He went on to explain: "Since your office is not a part of the executive branch, but is in the judicial branch, we feel that it is proper for you to have a separate statutory allotment of supergrade spaces. We also feel that it would be proper for you to request Congress for an increase in your statutory allotment of spaces to meet your changing workload needs."

In view of the very large increase in the authorized number of United States judges provided for in H.R. 3685 (an increase exceeding 25 percent) and the increased burden of administration the bill would place upon the Administrative Office, it was felt that the request for additional supergrade positions should be made a part of this legislation. H.R. 3685 would authorize the Director of the Administrative Office of the United States Courts to place a total of 15 positions in grades 16, 17, and 18 of the General Schedule. This authority would supersede the present statutory authorization of four positions in grade GS-17, and the present allocation by the Civil Service Commission of one grade GS-18 and two grade GS-16 positions. The net increase in supergrade positions would thus be eight.

The four statutory GS-17 positions presently authorized were provided in an Act passed in 1958 (P.L. 85-462). In that year the office was reorganized under a new Director, two Assistant Directors were appointed, and the office was operating with four separate divisions acting under the Assistant Directors. Early in 1959 the Civil Service Commission authorized two grade GS-18 positions for the Assistant Director positions, and the chiefs of the four divisions were placed in grade GS-17. These arrangements were then adequate.

In 1963 the position of one Assistant Director was abolished and the position of General Counsel was established. The GS-18 allocation for the Assistant Director position was relinquished to the Civil Service Commission in return for the allocation of a GS-16 position for the General Counsel.

In 1970 the position of Assistant Director previously abolished was re-established and recently the Civil Service Commission, after several requests, allocated an additional GS-16 supergrade for a third Assistant Directorship required by developments related to the passage of the Speedy Trial Act of 1974.

Since 1958, when supergrade positions were first authorized for the Administrative Office, the complement of judges and supporting personnel in the federal judiciary has grown three-fold, and new major legislation has imposed significant additional duties on the Director of the Administrative Office. Three principal enactments were:

(1) The Criminal Justice Act of 1964 which authorized the payment of compensation to counsel appointed to represent indigent defendants in criminal cases before the district courts, and the amendments to that Act of 1968 which authorized the establishment of public defender or community defender offices in the district courts;

(2) The Federal Magistrates Act of 1968 which abolished United States commissioners and created a system of full-time and part-time United States magistrates with expanded jurisdiction; and

(3) The provision in the Appropriations Act for the Judiciary for 1975 transferring the function of examining court offices, from the Department of Justice to the Administrative Office.

Each of these enactments required the creation of a new division within the Administrative Office to assume these new functions. In addition, the Speedy Trial Act of 1974 placed new administrative duties upon the Director, which, as mentioned above, required him to establish the position of Assistant Director for Plans and Analysis.

Today the office is organized with three assistant directors and 12 separate divisions operating within function lines. If I may, I would like to outline briefly the duties and responsibilities of the three Assistant Directors and the 12 Divisions.

1. *Assistant Director for Legal Affairs.*—The incumbent of this position is responsible for all legal, legislative and special projects within the office. He maintains supervision over the work of the General Counsel and six divisions, including bankruptcy, probation, magistrates, management review, the Criminal Justice Act, and the legislative liaison office.

2. *Assistant Director for Business and Personnel.*—The responsibilities of this position include the supervision of the work of four divisions: personnel, financial management, management services, and the clerks' division.

3. *Assistant Director for Plans and Analysis.*—The incumbent of this position is responsible for liaison with the Federal Judicial Center in the work of introducing computer systems into daily operations of the United States courts, for improving the computer capability of the Administrative Office, and generally supervising the work of the Division of Information Systems.

The responsibilities of the three Assistant Directors require exceptional talent in specialized areas. The specific duties of each position are set out in the Organizational and Functions Manual, copies of which have been provided to the Committee.

I would like also to say a word about the functions of each of the 12 divisions within the office.

1. *Office of the General Counsel.*—In addition to serving as legal officer to the Director, advising him with respect to contractual obligations, drafting legislation, writing regulations and interpreting statutes, the General Counsel advises federal judges, probation officers, United States magistrates and other officers in the federal judiciary regarding their duties and responsibilities.

2. *Bankruptcy Division.*—This division is directly responsible for the discharge of the duties imposed upon the Director under the Bankruptcy Act, including surveys and recommendations for the creation of additional positions of referee in bankruptcy and the maintenance of the Referees Salary and Expense Fund. Originally the chief of this division was recruited from the ranks of referees in bankruptcy, but subsequently the chiefs of the division have been selected competitively from employees of the office familiar with the division's work. Although this division has supervisory responsibility for the operation of the bankruptcy system nationwide, the salary paid to the chief of the division is today approximately \$3,500 less than the statutory salary paid to a full-time referee in bankruptcy.

3. *Magistrates Division.*—This division is responsible for the administration of the Federal Magistrates System under the Act of 1968. Duties include the recommendation of new magistrate positions, preparing operating and procedural manuals for the use of magistrates serving as judicial officers, and addressing the day-to-day problems arising in the system. Yet the chief of this division receives a salary which is almost \$10,000 less than the salary paid the highest paid full-time United States magistrate.

4. *Probation Division.*—This division is responsible for the discharge of the duties imposed upon the Director by the probation and parole laws. Approximately one-fifth of the employees of the federal judiciary are engaged in probation and parole work. The probation service of the federal courts operates inauspiciously, but it is the largest part of the Federal government's correctional program. The Bureau of Prisons, under the Attorney General, has custody of approximately 29,000 inmates. In comparison, there are 65,000 citizens of the nation presently under the supervision of federal probation officers. Comparisons are difficult, but I should point out that the position of the Director of the Federal Bureau of Prisons is classified statutorily at Level V of the Executive Schedule, but the chief of the Federal Probation Service is presently classified at grade GS-17.

5. *Financial Management Division.*—The financial affairs of the federal judiciary (a budget of \$430 million annually) are the responsibility of this division. Some agencies have separate offices for budgeting, accounting, disbursing and financial auditing. Within the federal judiciary the division is responsible for all financial affairs.

6. *Management Services Division.*—The chief of this division is responsible for procurement, paper flow management, the printing of docket forms and other specialized judicial forms and for the provision of court quarters—a function that is carried on through liaison with the Public Buildings Service of the General Services Administration which leases space and constructs federal courthouses.

7. *Criminal Justice Act Division.*—This division oversees the creation of new public defender offices and provides services to lawyers appointed to represent indigent defendants. These duties were formerly scattered throughout the office and performed by officials at various levels, including the Deputy Director. In the past ten years the program has almost tripled and the cost today is approximately \$20 million.

8. *Division of Information Systems.*—This division is responsible for the statistical gathering duties of the Director and for many years operated the only computer within the federal judiciary. It was then responsible for providing computer services throughout the office, including payroll, accounting, and the disbursement of funds under the Criminal Justice Act. As the caseload of the federal courts has increased, the flow of information to the division on cases filed, terminated, and pending has risen enormously. The number of individual case reports now being processed exceeds 900,000 annually. This division is mainly responsible for preparing the comprehensive information on court operations contained in the Annual Report of the Director of the Administrative Office, and is responsible for separate publications required under the Speedy Trial Act, and under the Omnibus Crime Control and Safe Streets Act with respect to wiretap orders issued by state and federal courts.

9. *Personnel Division.*—This division maintains the personnel records for all officers and employees in the federal judiciary, and classifies all positions under the Judiciary Salary Plan. Under the Administrative Office Act the Director is required to fix the compensation of all employees in the federal judiciary whose salary is not otherwise fixed by law. Employees of the Administrative Office are of course appointed by the Director subject to the civil service laws.

10. *Management Review Division.*—This division examines the operation of all court offices to assure compliance with statutory and regulatory requirements, and audits the books and accounts of clerks of court and other judicial officers. These functions were previously performed by a unit in the Department of Justice and were transferred to the Administrative Office by a provision contained in the Appropriations Act of 1975. In the Department of Justice the chief of the unit conducting examinations was classified in a supergrade position.

11. *Clerks' Division.*—This division was established less than two years ago in recognition of the need to provide professional services to the clerks of court similar to those provided to referees in bankruptcy, probation officers, and United States magistrates by other divisions in the office. As yet the division is relatively small, but is expected to increase in responsibility as new programs are developed and expanded.

12. *Office of Legislative Liaison.*—Within the last few months a separate office of legislative liaison was created to provide a more thorough and prompt response from the ever-increasing requests from the Congress for information concerning the operation of the courts and to prepare replies to Congressional requests for the views of the Judicial Conference of the United States on pending legislation.

In addition to the above there is an office of special assistant to the Deputy Director of the Administrative Office responsible for numerous special studies and individual programs which cannot be absorbed within other divisions. In the last few years the incumbent of this position has saved the government several millions of dollars through a program of improved juror utilization in the district courts.

All divisions in the office obviously do not operate at the same level of responsibility. Some divisions carry out highly specialized activities such as the Bankruptcy Division, the Probation Division, the Clerks' Division, the Criminal Justice Act Division, and the Magistrates Division. We refer to these divisions as our program divisions. The other divisions are our operating or administrative divisions. They frequently perform tasks in the federal judiciary, which in executive departments and agencies would be divided among separate units or even separate agencies.

The seven authorized supergrade positions are now distributed among the senior staff based on a combination of seniority and responsibility. The other eight positions are classified at grade GS-15. Provision should be made, as provided in H.R. 3865, so that each of the assistant directors and division chiefs may have a salary commensurate with his responsibilities and with salaries paid to judicial officers and employees of the judiciary over whom they have supervisory responsibility.

I would like to add that the request for additional supergrade positions is a matter of allocation of positions only. As we understand present law and procedure, the Civil Service Commission will retain its authority to determine the qualifications of individuals selected to fill these positions.

Except for the additional GS-16 supergrade position allocated by the Civil Service Commission several months ago, it has been almost 19 years since any additional supergrades have been authorized for the Administrative Office of the United States Courts. We ask that the Committee and the Congress act favorably on this request.

Attached to this statement is the statement of Mr. Kirks submitted recently to the Senate Judiciary Committee in support of the need for additional supergrade positions in the Administrative Office. A summary chart showing the basic organization of the Administrative Office, and a separate statement previously furnished to the Appropriations Committee of the House of Representatives pertaining to the growth in functions and responsibilities of the office in the last six years are also attached.

STATEMENT OF ROWLAND F. KIRKS, DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

This opportunity to present written justifications for the additional supergrades requested for the Administrative Office of the United States Courts is sincerely appreciated. On two previous occasions in recent years, the Director of the Administrative Office has requested additional supergrade positions.

In January 1970 the Civil Service Commission was requested to allocate to the Administrative Office additional supergrade positions from a new allotment provided in P.L. 91-187. The Chairman of the Civil Service Commission denied the request pointing out that Congress had provided certain additional supergrades "for the purpose of meeting the more pressing needs of high administration and Congressional importance" and could not therefore assign any such spaces to the Administrative Office.

In his letter of denial, however, he made the following statement: "Since your Office is not a part of the executive branch but is in the judicial branch, we feel that it is proper for you to have a separate statutory allotment of supergrade spaces. We also feel that it would be proper for you to request Congress for an increase in your statutory allotment of spaces to meet your changing workload needs."

In 1973, a request was made to the Subcommittee on Manpower and Civil Service, Committee on Post Office and Civil Service of the House of Representatives and written justification for the allocation of 15 supergrade positions to the Administrative Office was made. No action was taken on this request.

My present request specifies 15 supergrade positions in the Administrative Office of the United States Courts. Actually, the request is for only eight additional positions since there are already seven supergrade positions authorized. There are three positions authorized by allocation of the Civil Service Commission—one at grade GS-18 and two at GS-16. In addition there are four positions at grade GS-17 authorized by statute enacted in 1958, 5 U.S.C. 5108 (3) (c). If the 15 positions requested at this time are approved, we would propose that this new authority would supersede the present authority for supergrade positions.

EARLY GROWTH AND RESPONSIBILITIES OF THE ADMINISTRATIVE OFFICE

Since the enactment of the Administrative Office Act in 1939, the Administrative Office of the United States Courts has been charged with the responsibility for the administrative affairs of the United States courts. In the 38 years since the enactment of this legislation, the duties and responsibilities of the office have steadily increased.

Originally the office was organized into two divisions—the Division of Procedural Studies and Statistics and the Division of Business Administration. The Division of Procedural Studies and Statistics compiled data on the workload of the courts, undertook the inspection of court dockets, conducted studies of court procedures and court organization, and made reports to the Judicial Conference of the United States and to the Judicial Councils of the various circuits which have the direct responsibility over matters pertaining to the courts within their respective circuits. The Division of Business Administration had the responsibility for preparing the budget for the entire federal judicial system (excluding the Supreme Court), disbursing funds, auditing vouchers, purchasing supplies and equipment and arranging for court quarters through the Public Buildings Service of the General Services Administration.

Two additional divisions were established in the office within the first two years of operation. The Division of Probation came into existence in 1941 upon the transfer of supervision over United States probation and parole officers from the Bureau of Prisons in the Department of Justice to the Federal Judiciary. Subsequently in 1942 a Division of Bankruptcy was established to supervise matters pertaining to the operation of the bankruptcy system in the United States district courts. In 1946 that division was expanded to supervise the administrative affairs for the newly established system of salaried referees in bankruptcy and to administer the new Referees Salary and Expense Fund which was designated to make the entire bankruptcy system self-supporting out of the fees and charges assessed in bankruptcy cases.

By 1958 the duties and workload in the Administrative Office had expanded to the point where a complete reorganization was necessary. Two assistant directorships were established—one for legal affairs and the other for management. At the same time a new Division of Personnel was created to supervise matters of personnel administration for 4,500 employees of the Judicial Branch of Government (other than the Supreme Court) scattered among approximately 300 locations in the 48 states and in the Territories of Alaska, Hawaii, the Virgin Islands, Guam and the Canal Zone. The chiefs of the four divisions, not including the then newly created Division of Personnel, were placed in

grade GS-17 and the two assistant directors were placed in grade GS-18. Subsequently, the position of Assistant Director for Legal Affairs was permitted to lapse. Later the position of General Counsel (in lieu of the position at grade GS-18) was established at grade GS-16).

MORE RECENT CHANGES IN THE JUDICIARY

The Federal judicial system since 1958 has experienced significant growth in terms of judges, their supporting personnel and in duties and responsibilities. Not a single session of Congress passes without the enactment of legislation which places additional burdens and responsibilities on the judiciary. Occasionally the change is very substantial. In 1968, for example, Congress abolished the offices of United States commissioners who were compensated by fees and established in their place a system of salaried United States magistrates with enlarged jurisdiction. To administer the duties of the Director under this new statute required the establishment of a separate Division of Magistrates within the Administrative Office.

In 1964 the Criminal Justice Act was passed, lodging in the Administrative Office the administration of the assigned counsel system. In 1970 the Criminal Justice Act of 1964 was amended to authorize the establishment of a system of full-time public defenders and community defenders. Subsequently a new division was established to discharge the duties of the Director under this statute.

The workload of the Federal Judiciary has continued to increase rapidly in the 1970's with concomitant increases in judiciary personnel. The staff of the Administrative Office increased from 220 permanent positions authorized in fiscal year 1971 to a proposed permanent staff of 448 for fiscal year 1977. Approximately 140 positions, or 61% of the 228 total additional permanent positions acquired by the Administrative Office since 1971, are directly attributable either to new legislation passed by the Congress (107) or to the legislative transfer of significant functions to the Administrative Office from other agencies (33). Of the other additional positions, 40 are due to new programs and management improvements, while the remaining 48 are attributable to general increase in workload.

A necessary part of our expansion has been the creation in recent years of five entirely new divisions: a Magistrates Division, a Criminal Justice Act Division, a Management Review Division, a Legislative Liaison Division and a Clerks Division.

WORKLOAD AND SCOPE OF DUTIES

The present organizational structure of the Administrative Office, including statements of mission and functions of its divisions is described in detail in Attachment A, the organization and functions booklet. This document indicates that the work performed in the Administrative Office of the United States Courts is critical to the operation of the Federal judicial system across the nation. It has been 19 years since any supergrade positions have been authorized by statute in the Federal Judiciary. In this interval the number of authorized judgeships and other officers and employees of the judiciary, for which the Administrative Office has administrative responsibility, has almost tripled, from approximately 4,500 to more than 12,200, including 674 United States judges.

Attachment A lists some 86 additional tasks which have been imposed upon the Administrative Office either by Congressional enactment or by resolution of the Judicial Conference. At the present time the Administrative Office supports the 11 United States courts of appeals, the 94 United States district courts, the Court of Claims, the Court of Customs and Patent Appeals, the Customs Court, the Temporary Emergency Court of Appeals and the Federal Judicial Center. It also furnishes assistance and staff support to 29 committees of the Judicial Conference of the United States (17 standing and general committees and 4 subcommittees, 2 special committees and 6 rules committees of the Judicial Conference—a responsibility shared by all divisions in the office).

As shown in Attachment A, the Administrative Office is organized—in addition to the Director and Deputy Director—with three Assistant Directors and 12 divisions (to the 11 divisions shown, as of March 1976 in Attachment A, a twelfth division was added in 1976—a Legislative Liaison Division).

It should be emphasized that the chiefs of the divisions in the Administrative Office have a direct supervisory function to perform over the administrative affairs of the court officers in their particular areas. Judicial officers such as circuit executives, bankruptcy judges, United States magistrates, clerks of court, federal public defenders and probation and parole officers are professional people who are well paid. It is important that those government officers who have supervisory responsibilities be equally as well paid if we are to attract to these positions talented people of the highest quality.

COMPARATIVE SITUATIONS

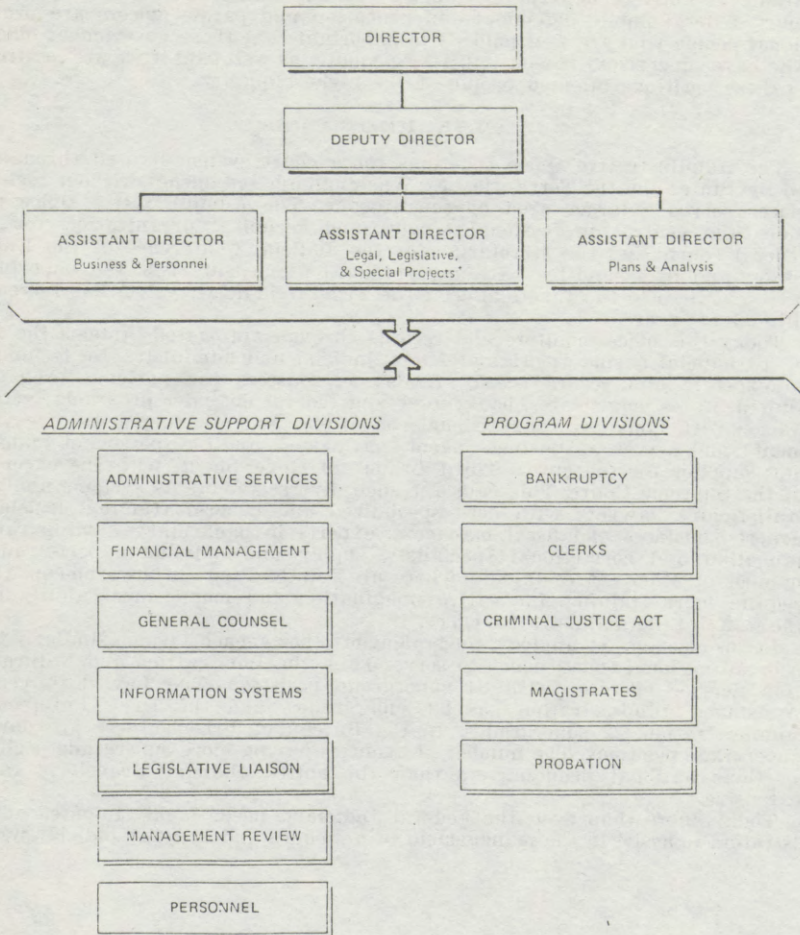
The Administrative Office functions for a court system located throughout all the States and the Territories. No Washington-based agency without regional offices serves a larger area or constituency. The Administrative Office provides the central professional service and technical organization for the federal courts and the secretariat for the Judicial Conference of the United States and its committees. By any standard of measurement the importance of its services to the functioning of the Federal judicial system has increased through the years.

Today this office monitors and records through automated systems the flow of all judicial business; originates new judicial and administrative techniques to expedite and secure speedy trials; administers the national probation, United States magistrates, bankruptcy and federal defender programs; acts as liaison with Congress, congressional committees and other agencies of government; and serves as business agent, paymaster, auditor, personnel manager and supplier for the entire Third Branch of Government, with the exception of the Supreme Court. This calls for such diverse talents as systems analysts, statisticians, lawyers with both specialized and general training, legislative experts, business and fiscal managers, experts in bankruptcy administration, probation and correctional specialists, supply and building experts, and a number of other scarce talents. There are few positions in government which require more training, innovative imagination and management ability than the staff of the Administrative Office.

Let us consider, by analogy, the staffing of other agencies which similarly have a broad national constituency to serve. Thus, the Immigration and Naturalization Service operates with 24 supergrade positions. The Law Enforcement Assistance Administration has 23 supergrades, and the Drug Enforcement Administration, 22 supergrades. In the Bureau of Prisons there are now 23 supergrade positions. The number of agencies having more supergrade positions in their national headquarters than the entire Judicial Branch is rather extensive.

Today, more than ever, the Federal Judiciary, needs highly talented administrators to assist in the management of a modern and growing judicial system.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS
ORGANIZATION CHART



*Includes a staff of two people comprising the EEO Unit --- answerable to the Assistant Director, Legal, Legislative & Special Projects.

ATTACHMENT A

Staffing Requirements of the Administrative Office
of the United States Courts 1971 - 1977

In fiscal year 1971 there were 220 permanent positions authorized for the Administrative Office. The proposed permanent staff of the Administrative Office for fiscal year 1977 is 448, which represents an increase of 228 positions over a period of six years. This growth in the staff of the Administrative Office is due to: (1) the direct impact of new legislation; (2) the transfer of functions from other agencies; (3) new programs and management improvements; and (4) a general increase in workload. The following summary table reflects the increase in personnel for each category:

Increases in Personnel Fiscal Year 1971
Through Fiscal Year 1977 (Proposed)

<u>Contributing Factor</u>	<u>Staffing Requirements (Permanent Positions)</u>
Impact of new legislation	107
Transfer of functions from other agencies	33
New programs and management improvements	40
General increase in workload	<u>48</u>
TOTAL	228

The following is a brief explanatory statement with respect to each of the above referenced contributing factors:

Impact of New Legislation

1. Speedy Trial Act of 1974, P.L. 93-619, approved January 3, 1975. (42 positions)

This Act imposed upon the Administrative Office new and extensive responsibilities, including support services to the courts during the planning process, the coordination of plans as approved by the Judicial Conference, the establishment of Pretrial Services Agencies, and the compilation of statistical data and publication of reports for the Judicial Conference and the Congress. The requirements relating to this Act were outlined in detail in a request for a supplemental appropriation for fiscal year 1975.

2. The Federal Magistrates Act, P.L. 90-578, approved October 17, 1968. (17 positions)

In fiscal year 1971 a new division was established to supervise administrative matters relating to the United States magistrates. Initially only 4 positions were authorized. The staffing requirements of the Magistrates Division for fiscal year 1977 is 12 positions. In addition to the personnel directly involved in administering the program, 9 additional positions were established in other organizational components of the Office to provide the administrative, financial and other logistical support services required by the magistrates and their supporting personnel.

3. An Act to provide for the Appointment of Additional District Judges, P.L. 91-272, approved June 2, 1970. (15 positions)

This Act created 61 additional district judgeships which in turn required the appointment of 318 supporting personnel, i.e., secretaries, law clerks, court reporters, and courtroom deputies. Fifteen additional positions were authorized for the Administrative Office of the United States Courts to perform the day to day fiscal, procurement, and personnel functions required incident to the appointment of these new judges and other personnel.

4. Amendments to the Criminal Justice Act, P.L. 91-447, approved October 14, 1970. (12 positions)

This Act provided for the creation of Federal Public Defender and Community Defender Organizations and expanded the scope of coverage under the Criminal Justice Act to include representation of probation and parole violators, habeas corpus and 2255 petitioners, material witnesses, and other persons entitled to representation under the Sixth Amendment. A recent decision of the Supreme Court (*Argersinger vs. Hamlin*) has further expanded the scope of coverage to include petty offense cases where there was a likelihood of a prison sentence. A Criminal Justice Act Division was established in the Administrative Office to provide staff support services to the Judicial Conference Committee for Administration of the Act and to coordinate and monitor the activities of the respective Defender Organizations. Three positions were authorized for this new Division. In addition, it was necessary to augment the staff of existing divisions to the extent of 7 positions to cope with the increased volume of appointments and to perform

the related budgetary and accounting functions. Two additional positions have been requested in the budget for fiscal year 1977 in anticipation of a continuing increase in the appointments of counsel.

5. Public Buildings Amendments of 1972, P.L. 92-313, approved June 16, 1972. (8 positions)

This Act imposed upon the Administrative Office the responsibility for the payment of rent for space occupied by the courts in Federal Buildings and in buildings under the control of the Postal Service. In addition, provision has been made for reimbursement to GSA for tenant alterations and other space related services, i.e., heating and air conditioning, cleaning and janitorial services, and protective services. It was necessary to augment the staff to exercise control over the expenditure of funds, the examination of vouchers, and for the related budgetary and accounting functions.

6. Organized Crime Control Act of 1970, P.L. 91-452, approved October 15, 1970.)

An Act Authorizing the Use of Community Treatment Facilities for Persons Placed on Probation, Parole, or Mandatorily Released, P.L. 91-492, approved October 22, 1970.)

Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, approved October 27, 1970.)

An Act Authorizing Care for Narcotics Addicts on Probation, Parole or Mandatorily Released, P.L. 92-293, approved May 11, 1972.)

(5 positions)

Public Laws 91-452 and 91-513 provided new and complex sentencing procedures for organized crime offenders and dangerous narcotics offenders. Both of these laws had a direct impact on the work of probation officers. Public Laws 91-492 and 92-293 also contributed to the workload of probation officers. All of these laws placed a substantial additional burden on the Probation Division of the Administrative Office in discharging their responsibility in supervising and monitoring compliance by the probation officers.

7. Equal Employment Opportunity Act of 1972, P.L. 92-261, approved March 24, 1972. (2 positions)

This Act brought Federal agencies and employees for the first time under the Civil Rights Act of 1964 as amended. This new legislation gave the Civil Service Commission broad regulatory and enforcement authority. Two additional positions were authorized for the Administrative Office to administer the Equal Employment Opportunity Program.

8. Economic Stabilization Act Amendments of 1971, P.L. 92-210, approved December 22, 1971. (1 position)

This Act created the Temporary Emergency Court of Appeals which was given exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under Title II of the Act or under regulations or orders issued thereunder. The life of this Court was recently extended and its jurisdiction expanded under the Energy Policy and Conservation Act, Public Law 94-163, approved December 22, 1975. The Court is being financed out of appropriations to the Federal Energy Administration. The funds are being transferred to the Administrative Office of the United States Courts which is responsible for providing all of the logistical support services in addition to performing the accounting and budgetary functions.

9. Amendments to the Federal Rules of Criminal Procedure, August 15, 1975. (1 position)

Rule 32(c) which was effective as of December 1, 1975, provides for a presentence investigation in every case prior to the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives such an investigation or the court finds that in the record it has sufficient information for sentencing purposes. This requirement has increased the workload of probation officers and in turn had a direct impact on the workload of the Probation Division.

10. An Act Providing for the Appointment of a Circuit Executive for each Judicial Circuit, P.L. 91-647, approved January 5, 1971. (1 position)

An additional position was authorized for the Office of the Deputy Director to coordinate all of its functions relating to the Judicial Conference, its 14 committees, and 4

regular subcommittees, as well as the respective circuit councils and circuit conferences. The creation of the position of circuit executive emphasized the need for such coordination by the Administrative Office.

11. An Act to Assist Federal Employees in Meeting Their Tax Obligations under City Ordinances, P.L. 93-340, approved July 10, 1974. (1 position)

This Act authorized the withholding of city taxes from the wages of government employees. The additional burden imposed upon the Payroll Section in the Administrative Office necessitated the addition of one employee.

12. An Act to Amend Title 5 of the United States Code with Respect to the Retirement of Certain Law Enforcement Personnel, P.L. 93-350, approved July 12, 1974. (1 position)

This Act relates to the minimum and maximum age limits for appointments to law enforcement positions and eligibility for retirement under the hazardous duty provisions of the Civil Service Retirement Act. An additional position is included in the fiscal year 1977 budget for our Personnel Division as a result of additional postings required and the need for additional annuity computations with respect to probation officers.

13. An Act to Amend Chapter 81 of Title 5, Relating to Compensation for Work Injuries, P.L. 93-416, approved September 7, 1974. (1 position)

This Act provides for extensive and liberalized benefits for employees injured in the performance of their official duties. It also provides for such benefits for the first time to grand and petit jurors. As a consequence, the Administrative Office will be required to process a substantially greater number of claims under the Federal Employees Compensation Act.

Transfers of Functions From Other Agencies

1. Examination of Court Offices. (30 positions)

The Division of Management Review was established in 1974 to examine court offices, a function previously performed by the Department of Justice. To date, 20 positions have been authorized and 10 additional positions have been requested for fiscal year 1977 which will permit the examination of court offices every 18 months.

2. Procurement of Furniture and Furnishings. (2 positions)

Prior to fiscal year 1975, the General Services Administration provided all of the furniture and furnishings required by court personnel out of direct appropriations to GSA. In fiscal year 1975 the Administrative Office assumed budgetary responsibility for this program, but with the understanding that the funds would be transferred to GSA and that agency would continue to perform the procurement and other related functions. It was necessary to augment the staff of the Financial Management Division of the Administrative Office to formulate the budget estimates, prepare budget justifications, and exercise control over the allocation of the resources.

3. Payment to Court Interpreters. (1 position)

The Department of Justice, after traditionally paying for interpreters required in court, now takes the position that these interpreters should be paid out of Judiciary appropriations pursuant to Rule 28 of the Federal Rules of Criminal Procedure. A position has been requested for fiscal year 1977 to provide for the processing of authorizations and payment of fees of interpreters.

New Programs and Management Improvements

1. Establishment of a Clerks Division. (9 positions)

In fiscal year 1976 a Clerks Division was established in the Administrative Office to oversee, coordinate and assist in the more efficient operation of clerks' offices. This Division is to act as a focal point for clerks immediate and long range problems, coordinate training programs for clerks and their deputies, recommend substantive or procedural policy changes, allocate new positions, and coordinate with other divisions those functions which impact on clerks' operations. Initially 5 positions were authorized for this Division and 4 new positions are included in the budget for fiscal year 1977.

2. Work Measurement Unit. (3 positions)

Provision has been made in the budget for fiscal year 1977 for 3 new positions for the purpose of establishing a Work Measurement Unit in the Administrative Services Division. This Unit will be responsible for planning, organizing and conducting work measurement surveys; tabulating and analyzing the data; developing, testing and maintaining

manpower standards for the purpose of determining the staffing requirements of the respective courts. This function is essential in that it assures an equitable distribution of resources.

3. Computer Systems Development. (14 positions)

In recognition of the need for the automation of many of the functions in the Administrative Office and in the courts, a Computer Systems Development Branch was established in the Division of Information Systems in 1972. This Branch is responsible for a continuous study of methods and procedures and for the development of new systems for the calendaring and assignment of cases, standardization of court docketing, selecting and accounting for jurors, filing procedures, and the like. Exclusive of the additional personnel authorized for implementation of the Speedy Trial Act, the staff of this Branch currently consists of 13 positions. One additional position has been requested for fiscal year 1977.

4. Accounting Systems and Planning Section. (6 positions)

In fiscal year 1974 a new Accounting Systems and Planning Section was established in the Financial Management Division for the purpose of developing and maintaining a comprehensive accounting system for the Administrative Office and for reviewing and recommending improvements in the accounting and fund control procedures in the clerks' offices and in procedures relating to the disbursement of funds by United States marshals. This Section is also responsible for planning, coordinating, and implementing changes in operating procedures (manual and automated) in compliance with the requirements of regulatory agencies, e.g., General Accounting Office, Treasury Department, and the Office of Management and Budget. The staff of this Section currently consists of 4 permanent positions. Two additional positions are included in the budget for fiscal year 1977.

5. Paperwork Management. (8 positions)

The Administrative Services Division was recently reorganized and a new Management Services Branch was established to provide management consulting services to the courts on a continuing basis, including a review of paperwork, and the implementation of controls and procedures relative to forms, reports and directives. It is believed that through the efforts of this new Branch, there can be a substantial savings of paperwork.

Initially 4 positions were authorized for this new Branch and 4 additional positions are included in the budget for 1977.

Increased Workload

Since fiscal year 1971 there has been a dramatic increase in the workload of the courts of appeals and district courts. It is expected that the workload will continue to increase in fiscal years 1976 and 1977. If the current trend continues, conceivably there will be over 22,000 filings in the courts of appeals in 1977 compared with 12,788 in 1971, an increase of 72 percent. Civil and Criminal filings in the district courts for fiscal year 1977 are projected at 190,000 compared with 136,553 in 1971, an increase of 40 percent. We are currently projecting 310,000 bankruptcy cases for fiscal year 1977 compared with 201,352 in 1971, an increase of 54 percent. The number of persons expected to be under the supervision of federal probation officers in 1977 is 74,000 compared with 42,549 in 1971, an increase of 74 percent. Probation officers are expected to conduct approximately 37,000 presentence investigations in 1974 compared with 23,479 in 1971, an increase of 58 percent. There have also been significant increases in the number of minor offense cases disposed of by United States magistrates, in the number of civil and criminal jury and non-jury trials, petitions for naturalization, and a significant impact on the work of clerks' offices in processing forfeitures of collateral or fines assessed by magistrates.

As a result of the increasing workload in the courts of appeals and district courts, there has been a substantial increase in the number of supporting personnel authorized for the courts. For fiscal year 1977 provision has been made for a total of 10,697 permanent positions (exclusive of the judges) which represents an increase of 69 percent over the number of positions authorized in 1971. The increase in caseload and the increase in personnel in the courts has a direct impact on the workload of the Administrative Office in that the new employees must be provided office space, supplies, equipment and other services. As a result of the growth of personnel in the field, the Administrative Office necessarily must process a greater number of personnel actions, payroll changes, examine and effect settlement of more expense vouchers and the like. Also, the increased caseload requires the processing and compilation of more statistical data by our Information Systems Division.

In contrast to the increased workload and personnel in the courts referred to above, the proposed staff for the Administrative Office for fiscal year 1977 represents an increase of 48 positions, or approximately 20 percent, as it relates to workload as distinguished from new and additional responsibilities, and new programs or management improvements.

Mrs. SCHRODER. Thank you very much for your very thorough presentation and very excellently written testimony.

Do you have any questions now, Congressman Gilman?

Mr. GILMAN. Thank you, Madam Chairwoman.

Mr. Spaniol, how do you propose to distribute the supergrade slots among the assistant directors in the divisions?

Mr. SPANIO. That, Mr. Gilman, has not been fully determined. The decision, of course, will be made by the director.

The present assistant directors will, probably, be classified in grade GS-18, and the other positions will be divided up among the division chiefs; probably half will be grade GS-17 and half will be grade GS-16.

Mr. GILMAN. Will you be assuring them of some salary equality with those whom they supervise? Will there be some equality of salary range?

Mr. SPANIO. Will there be—I'm sorry.

Mr. GILMAN. The distribution of supergrade slots—will this assure them of some equality of salary with those whom they will be supervising?

Mr. SPANIO. Yes: we will try to do that so that the chief of the bankruptcy division will have a salary as close to that of the referees in bankruptcy as we can make it.

Mr. GILMAN. Do these division heads perform the duties of allocating positions and setting salaries of hearing judges?

Mr. SPANIO. The officers in the district courts are supervised directly in their judicial duties by the judges of the court.

Our office determines the number of positions that should be in each court. For many of the officers—not for referees who have statutory salaries—but for the other employees, we determine their salaries.

The Administrative Office Act authorizes the director of the administrative office to fix all salaries of all the employees in the judiciary whose salaries are not fixed by law.

Each of these divisions carries a responsibility in that respect, to determine what the salaries should be. They also provide professional services to the judicial offices in the various courts by way of instructional material, operating manuals, procedural manuals, and things of that nature.

Mr. GILMAN. How much more in salary do the division heads make compared to the hearing judges?

Mr. SPANIO. At the present time the chief of the bankruptcy division receives a salary \$3,500 less than a full-time referee in bankruptcy.

The chief of our magistrates division is currently receiving a salary \$10,000 less than the salary of a full-time U.S. magistrate.

Mr. GILMAN. But how does the salary of the division heads compare to those whom they are supervising?

Mr. SPANIO. They're generally less at the present time. We want to raise them to the level of the people they supervise.

Mr. GILMAN. If H.R. 5723 was enacted, they would then be at a salary level equal to those whom they are supervising, or more?

Mr. SPANIO. No, Mr. Gilman; we still will not be able to do that. In some cases it may be a little bit more; in others it will be a little

bit less. Because the salary of a referee in bankruptcy is now \$48,500, even with this bill, we cannot put the chief of our bankruptcy division that high. The maximum would be \$47,500, so that there would still be some disparity.

Mr. GILMAN. Then you're saying to us that even after enactment of this measure, your division heads will be earning less, in some cases, than those people whom they are supervising?

Mr. SPANIOL. Yes: that's right.

Mr. GILMAN. Thank you.

Thank you, Madam Chairwoman.

Mrs. SCHROEDER. I want to just thank you.

In your request that you're asking for, is this hinging upon the 30 or 25 percent increase in judges?

Mr. SPANIOL. No, m'am, it is not. It hinges, primarily on the tremendous increase in duties that have been imposed on the judiciary and the administrative office since the year 1958.

These major enactments have caused the office to have to scramble to try fulfill the duties imposed by Congress, and, as the programs have grown, we've had to establish divisions to supervise their operation.

Our request is based, primarily, on that; but, also it's a projection of what's going to happen if we have 25 percent more judges—136 more judgeships.

Mrs. SCHROEDER. So, what you're saying is that with the increase in your workload, you need them whether or not the judgeships go through.

Mr. SPANIOL. Yes, m'am.

Mrs. SCHROEDER. Would you have any objection to having the Civil Service Commission make sure the standards for the GS-15, 16, 17, and 18 be the equivalent of the Civil Service?

As I read the bill right now, the administrative office would have the authority to do that; and I'm wondering if you would have any concern if we put in the bill that Civil Service would make sure that they are at least similar to the supergrades in the executive branch?

Mr. SPANIOL. I believe that's already taken care of by the Administrative Office Act, which authorizes the director to appoint employees subject to Civil Service laws.

As I indicated in my prepared testimony, it's our understanding that the Civil Service Commission will pass on qualifications for people that are appointed to these positions.

Mrs. SCHROEDER. So, you wouldn't have any objections to that if we find out that your interpretation of the Administrative Office Act is different; we could still put that in the law so that it's not—

Mr. SPANIOL. I don't really see any need for it, but I don't see any objection to it. The Civil Service Commission now monitors all of our employees.

Mrs. SCHROEDER. So it would just be continued?

Mr. SPANIOL. Just a continuation.

Mrs. SCHROEDER. Do you have any questions?

Mr. HARRIS. No.

Mrs. SCHROEDER. Do you have any more questions?

Mr. GILMAN. No.

Mrs. SCHROEDER. Thank you very much. We appreciate your being here.

Mr. SPANOL. Thank you very much for hearing us.

Mrs. SCHROEDER. Mr. McFee is the next witness, from the Department of Health, Education, and Welfare.

**STATEMENT OF THOMAS S. McFEE, ACTING ASSISTANT SECRETARY,
PERSONNEL ADMINISTRATION, DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE; ACCOMPANIED BY KENNETH
LEVINE, OFFICE OF LEGISLATION**

Mr. McFEE. Madam Chairman and members of the subcommittee, I am the Acting Assistant Secretary for Personnel Administration of the Department of HEW; and I have here with me today Mr. Kenneth Levine, who is from our office of Legislation.

We're here today to present the Department's views on two matters pending before this subcommittee: first, the proposals to authorize additional executive level pay positions for the Department; and the proposed legislation, H.R. 5723, which concerns administrative law judges.

With your permission I would like to address the executive position proposals first.

The Department is requesting that legislation be provided for six executive level positions which are currently authorized in the Department from the President's authority under 5 USC 5317, where 34 positions are authorized which may be made at his discretion, placing them in executive level IV and V area.

Our Department now has six of these positions: three at the executive level V, and three at executive level IV.

The executive level V positions include: our Commissioner on Aging, the Deputy Commissioner of the Social Security Administration, and the Assistant Secretary, Comptroller.

The level IV positions include: the Administrator of Alcohol, Drug Abuse, and Mental Health Administration; the Administrator of Health Services Administration; and the Administrator of Social and Rehabilitation Services, which is being reorganized, and I will mention that a little bit later.

We have attempted several times to have these positions removed from the President's pool and authorized by legislation, as they are very critical positions to the accomplishment of the Department's mission.

In fact, legislation was introduced in both Houses to provide these positions in 1974.

We feel that it is even more crucial at this time, as President Carter moves to emphasize reorganization and management improvements as a priority item for his new administration. The President needs to have these positions returned to his pool so that they can be available to him for use in his own management initiatives.

I may also add that, as we move in our steps in HEW to reorganize, these positions become very critical, and they are a permanent requirement.

You probably heard Secretary Califano announce on March 8 the very far-reaching reorganization of the Department; and it is only the beginning of what we hope will be a number of other restructurings of the Department's organization and management processes.

I'm afraid it is too early to provide to you a complete analysis as to what our total executive level position requirements as a result of these reorganizations; but at this time we urgently need the conversion of these six specific positions from the President's pool.

I also would like to explain that these various executive levels in the Department need to be made consistent with the relative responsibilities of the various jobs.

We hope that within the next few months we can provide you with additional information on our overall restructuring, but at this time we would like to be given discretionary authority to establish six positions at either the executive level IV or V—a sort of mini-pool for the Department in order to replace those positions which we now have from the President's pool.

And we would like to do this in order to maintain our flexibility for further Department reorganization. In fact, what we are asking is for you to give us the authority to reallocate the six positions at either IV or V level, depending upon our assessment of the need for the jobs at either of these levels.

And I would like to give you an example of why we need this flexibility. Currently, if you look at the health area, it is probably the best example I can think of.

Assistant Secretary for Health, which is the chief executive officer for the U.S. Public Health Services is an executive level IV; yet three of his subordinates running three of his major agencies, are also at executive level IV.

And of these three positions, the Administrator of the Health Services Administration is not a Presidential appointment; the other two are.

Four of the other Health Agency heads are not Presidential appointments, and they range in executive level from the Commissioner of Food and Drugs, which is established at level V, with the Director of the Center for Disease Control, the Administrator of the Health Resources Administration, and the Administrator of the Health Services Administration either at a level V or level IV, or occupied by a commissioned officer of the Public Health Service of the rank of the Assistant Surgeon General.

The best example of this is the current incumbent of the job of the Director of the National Institute of Health, Dr. Frederickson. He is a commissioned officer in the Public Health Service, and, therefore, we do not have to use the executive level IV position that we have that we can use in another area.

I think this brief example illustrates our need for flexibility as we begin to rationalize executive level assignments. We expect to be able to provide you with a complete assessment in the next few months. With your permission, I will discuss the positions currently allocated to the Department from the pool. These are representative of the type of positions that we would fill from our pool if authority is granted.

The Commissioner on Aging is a position established by law (Public Law 93-29). It was authorized as an executive level V from the President's pool on October 10, 1965, and has been filled three times at that level. From time to time, the individual named as commissioner on Aging has also served as special assistant to the President. We are not certain at this time, if the President intends to assign this collateral responsibility to the position. Appointment to the position requires Presidential appointment and Senate confirmation. The Commission on Aging assists the Secretary in all matters relating to problems of the aged and aging. The Commissioner is responsible for administering a \$401,600,000 program of nationwide interest involving nutrition projects, community services, research and training, and multidisciplinary centers on gerontology.

The position of Deputy Commissioner of the Social Security Administration was authorized by executive order in January 1967. Authority for appointment to this position is vested in the Secretary under schedule "C" authority. The position of Commissioner of Social Security Administration is authorized by law at executive level IV and the deputy position must be at executive level V to compensate for the level of difficulty assigned to the deputy. The Social Security Administration (SSA) has over 81,211 employees engaged in disability insurance, retirement and survivors insurance, and the supplemental security income program. The Secretary has now consolidated cash payments programs by adding to SSA the responsibility for the aid to families with dependent children (AFDC) program. Over 3.5 million single parent families are given assistance. An additional responsibility for the program for child support enforcement has been added also. The additional personnel, administrative and management responsibilities entailed in these additional responsibilities makes the necessity for a strong Deputy Commissioner even more urgent.

The position of Assistant Secretary, Comptroller (Management and Budget) was authorized from the President's pool in October of 1965. The position is in the competitive service and the Secretary has appointing authority. In the reorganization of March 8, 1977, the Secretary realigned the functions of the Department responsible for administration and management and these functions are now incorporated in an assistant secretary for management and budget position. This position functions as the HEW counterpart of the Office of Management and Budget and will have Department-wide oversight of budgeting, accounting, management improvement, reorganization planning, and business practices. The Department now has over 144,627 employees and a budget of about \$148 billion. At the same time the Secretary added these additional functions to the position, he assigned the audit functions to the new Office of Inspector General.

The position of Administrator, Alcohol, Drug Abuse and Mental Health Administration was authorized the Department by Executive Order of the President, September 2, 1975. Appointment to this position also requires Presidential appointment and Senate Confirmation (P.L. 93-282). This leadership position of the Alcohol, Drug Abuse and Mental Health Administration (ADAMHA) is respon-

sible for policy guidance and management of the Federal effort designed to assure the treatment and rehabilitation of persons with alcohol, drug abuse and mental health problems and to prevent such problems. Current staffing of ADAMHA is 6,157 and the agency funding level for 1977 with the supplemental appropriation is \$950,085,000.

The position of Administrator, Health Services Administration was authorized from the President's pool by Executive Order in January 1975. Appointment to the position is by the Secretary under Schedule "C" authority. The Administrator of the Health Services Administration is responsible for providing leadership and direction to the programs and activities of the Health Services Administration (HSA) in the conduct and improvement of health services for the people of all socio-economic levels in the United States. This involves administering formula grant supported health services programs, the management of the Indian Health Service and responsibility for the Public Health Service Hospitals and clinics. The Administrator has responsibility for leadership functions involving 17,361 people and administration of funds of \$1,599,727,000.

The position of Administrator, Health Care Financing Administration will be responsible for the oversight of the Medicare and Medicaid Programs and related quality control staffs. It is hoped and planned by the Department that through a vigorous program of reviews, audits and controls, that the Health Care Financing Administration (HCFA) will save hundreds of millions of dollars. HCFA will have a staff of approximately 3,800, including a group of 900 devoted to the quality control functions which are essential to detect and control fraud, abuse and overpayments. Medicare and Medicaid involve \$32 billion in Federal funds. The Secretary has selected a candidate for this position and will fill it at the Executive Level IV.

I would like to turn now to the second item on our agenda this morning, H.R. 5723.

As you know, this bill would provide that former supplementary security income hearing examiners, authorized to be administrative law judges through December, 1978 under Public Law 94-202, would be appointed to career-absolute positions as administrative law judges.

It also provides that the appointees would have the same authority and tenure and would receive the same compensation as hearing examiners, which, by the way, we now are calling administrative law judges because of the temporary authority appointed by the Social Security Administration directly under the United States Code 3105.

Now, Public Law 94-202 provided that these SSI hearings could be conducted under the Administrative Procedures Act—which were being conducted under the Administrative Procedures Act—by administrative law judges appointed pursuant to that special legislation.

It authorized the Secretary to utilize the SSI hearing examiners to conduct both supplemental security income hearings and also hearings under title II and title XVIII of the Social Security Act.

These individuals were authorized to be administrative law judges with their appointments to end no later than December 31, 1978.

This special legislation has helped immeasurably in reducing the hearings workload of the Social Security Administration. This work-

load has dropped from about 113,000 hearings pending in April 1975 to about 83,000 hearings which were pending at the end of March of this year.

Now, this has been accomplished by good leadership, hard work, and the special legislation to which I referred. However, the question we are now facing is what will happen when the appointments of the temporary administrative law judges terminate as of December 31, 1978.

In an attempt to solve this problem without the need for legislation, the Social Security Administration last summer formally recommended to the Civil Service Commission that a special qualifications register be established from which qualified temporary administrative law judges could be selected for permanent administrative law judge positions.

While selective certification was not specifically recommended by the Congress, we believed it would give recognition to the unique qualifications of these temporary administrative law judges and, at the same time, would take cognizance of the congressional intent that was expressed in the Ways and Means Committee report on H.R. 10727, which states—and I would like to quote that:

In evaluating current SSI Hearing Examiners for regular ALJ appointments great weight should be given to experience in actually adjudicating social security and black lung cases.

The report also expressed the hope that the requirements and procedures for placing candidates on the register for ALJ positions would be applied in a manner to effectively serve the needs of the social security program.

It is our belief that selective certification through a special register which includes temporary ALJ's determined to be eligible for appointment under the regular authority, would, in fact, effectively serve the needs of the social security program.

Unfortunately, the Civil Service Commission, in response, indicated that there was insufficient authority on which to take such an action for the temporary ALJ's.

The Commission added that a supply of hearings officers can be obtained from the incumbents who would meet the requirements for regular appointments, and that these incumbents would have an opportunity for placement on the register.

I believe the Commission restated these views when they presented the administration's views on this bill, Tuesday, at this subcommittee.

We believe that the present temporary authority should be extended for another 2 years, and if this occurs with respect to those now on board, this would provide time to explore other administrative avenues which would guarantee a sufficient, trained, administrative law judge corps to provide timely service to our clients.

We believe this could be done without having an adverse impact on the fundamentals of the classification system and without creating a precedent for the career ALJ system. We feel thus compelled to urge an extension of the present authority as indicated above for the following specific reasons:

First: The 189 temporary ALJ's are now performing the work of an ALJ, and are doing a reasonably satisfactory job, and are equaling, in many cases exceeding, the production of permanent ALJ's.

Second: The effect of temporary ALJ's, either not making the ALJ register or receiving such a low score as to be passed over, is that these individuals will be out of work on January 1, 1979. At the same time as these proven performers who, by the way, prior to the enactment of the special legislation, had permanent positions, inexperienced individuals would be selected simply because they were fortunate enough not only to make the register, but at a high score.

Third: It will take at least 9 months for the new ALJ's to be trained and productive, and even then there is no assurance that they can do as well as the temporary ALJ's whom SSA will have lost without this extension.

Fourth: Even though the termination date is more than 18 months away, the uncertainty of these judges is already having an impact on their morale and productivity. We cannot afford the luxury of waiting until January 1, 1979, before addressing this issue.

Without such extension, the loss of trained people and the relocation problem will, undoubtedly, result in a substantial increase in the hearing backlog.

As of March 31, 1977, as I mentioned before, there were 83,217 hearings pending in the Bureau of Hearings and Appeals.

It is projected that, based on current and projected receipts of hearing requests, 92,305 hearings will be pending by September 30, 1978.

Absent the proposed extension and the development of necessary administrative solutions during the extension period, it is estimated that, based on current and projected receipts, as well as the projected number of hearings in which dispositions are made, 161,064 hearings would be pending on September 30, 1979.

In more specific terms, the hearing workload will almost double within a year without some kind of relief.

This concludes my prepared statement, Madam Chairman. I would be glad to answer any questions that you or your committee might have.

Mrs. SCHROEDER. Congressman Gilman, do you have questions of Mr. McFee?

Mr. GILMAN. Yes; thank you, Madam Chairman.

Mr. McFee, in reference to this minipool that is needed at HEW, what would be the salaries for the six in the pool?

Mr. McFEE. It would be executive level IV and V.

Mr. GILMAN. What salary range?

Mr. McFEE. \$47,500 and \$50,000. May I say that the former incumbents of these positions were paid at these rates. We will not be raising the salaries or raising the level of the people.

We are asking for the authority to transfer these positions out of the President's pool into a pool of our own. One alternative would have been to transfer them and then put them in specific legislation with titles and executive level grades.

We are reluctant to do this because we don't want to be tied then to the specific jobs at the specific levels. There may be some of those that are now serving in executive level IV's that would be more appropriately in executive level V.

So, our suggestion to use the pool is to give us flexibility so that we not only can pay them at the IV and the V level, depending upon

the position that we use them, but that we can use the position for another title other than the title which it is now being used.

For example, if the director of NIH were to leave, and the President were to appoint someone who does not qualify, we would need a level IV position to use for that. And it would be that kind of flexibility that we ask for at this point.

Mr. GILMAN. The Presidential pool that you refer to, would then have six additional people available to it under this measure?

Mr. McFEE. I believe the legislation that is set up for the President's pool has a 34-position pool that can be paid either at level V or level IV. And as the President distributes these and uses them, he determines by Executive order as to which level to pay the position.

We would return the six positions to the President's pool. It would not increase the size of the President's pool.

Mr. GILMAN. Madam Chairman, I would like to address a question to our colleague from Virginia.

Mr. HARRIS, would this proposal to adjust the Presidential pool have any effect on your proposed legislation?

Mr. HARRIS. Not at all.

Mr. GILMAN. We're asked to create six additional executive positions by this legislation. I was just—

Mr. HARRIS. Oh, I beg your pardon; I didn't understand your first question.

I think H.R. 5544—if that's what you're referring to—the bill Mr. Udall and I introduced.

Mr. GILMAN. Yes.

Mr. HARRIS. Well, this really was one of the questions I wanted to pursue, whether these positions would be a part of the pool, or whether they are going to be separate from the existing pool of supergrades.

Is this in addition to the supergrades?

Mr. McFEE. These are not supergrades; they are the executive level jobs. They would not be within the statutory limitation on the number of supergrade jobs at GS-16 through GS-18.

Mr. HARRIS. Yes; we have no current legislative cap on the number of executive levels?

Mr. McFEE. Well, they are specifically authorized in legislation, and without them—that's why we're here today. There's no way to create them.

Mr. HARRIS. It's just a continuation of what we've been doing. Instead of creating supergrades law by law, we now create executive levels law by law, and we have no sort of coordinated approach to it. We're trying to make sure that the executive levels come through this committee, not just created by individual pieces of legislation as they have been in the past.

Mr. GILMAN. How long a period of time would the proposed executives in the minipool serve in their positions in HEW?

What would you project to be the amount of time that they would serve in their positions?

Mr. McFEE. As individuals.

Mr. GILMAN. As individuals.

Mr. McFEE. Well, all of these positions are exempt positions as far as the Civil Service Commission; and our political appointments—some Presidential appointments—are sent for confirmation, some

scheduled through authority which the Secretary has. And they would serve at the pleasure of either the Secretary or the President.

If you would like me to do an analysis of what the average turnover of political appointees is in HEW, it's been somewhere in the neighborhood of 19 to 22 months. Is that responsive to your question?

Mr. GILMAN. Well, Mr. McFee, what is the purpose, what is the need, for HEW to have more control than you ever have had—over Presidential pool appointees?

Mr. McFEE. The President is quite interested in using the 34 positions which he has in this pool for his own initiative. I do not know what these are; it is part of his reorganization. But he would like to have the capability to use some of these positions along with part of his reorganization.

As long as they are incumbent, and positioned out to the various departments, he does not have the flexibility.

Mr. GILMAN. Wouldn't it be more advantageous to have these six people—if you feel you need for the executive positions—to have them assigned to specific slots and train them for that purpose and have these filled in a permanent capacity?

Mr. McFEE. We actually will end up doing that, I believe, if the fact that at this point in time, and with the problems that I tried to explain concerning the use of other appointment authorities like the commissioned officer corps that are dependent upon the individual that you pick for the job, we would like the flexibility of not tying specifically—permanently—to a position—the example of the NIH director that I tried to use.

Mr. GILMAN. Is this being done in some of the other agencies, Mr. McFee?

Mr. McFEE. I do not know of a pool arrangement in any of the other agencies.

Mr. GILMAN. Well, I think that you have recommended—to go over to our other measure—a 2-year extension of Public Law 94-202 and you've also heard Mr. Burke's testimony.

Do you have any other proposals in regard to H.R. 5723, having heard Mr. Burke testify in apparent opposition to your extension as not being a satisfactory compromise solution to the problem?

Mr. McFEE. Mr. Burke's statement was not unfamiliar to me, and we have been groping with the problem that he describes for quite some time.

We believe that it is an administrative and a management problem, and we believe that this additional extension will allow us to solve these problems without the need for additional legislation other than the extension.

In all frankness, if I were in here a few months ago, based upon the past performance of the Civil Service Commission, I would have to tell you I have little hope that we would be able to solve this problem within existing administrative procedures.

But we have a new team in town, and that team includes the Civil Service Commission. We are developing very close relationships with them; in fact, Secretary Califano and Undersecretary Champion are having lunch today with Scotty Campbell, the new designate for the head of the Commission.

And I sincerely believe that with this new attitude, with a clear understanding of the problem we're facing—and may I say, Madam

Chairman, that with the effect of this hearing, which will have a positive effect, I believe that we can solve these problems administratively without the need for H.R. 5723.

But I do not believe that we can do that in time without some kind of an extension of the present termination of these temporary ALJ's on January 1, 1979.

And I'd like to again stress the point that even though it may look like we have 18 or 19 months before that date occurs, the toll is already being felt upon these temporary ARJ's.

And their uncertain future and their treatment, up to this point by the Commission, has led many of them to already seek other employment. And we have a present record of even productivity dropping because of this morale problem.

Mr. GILMAN. There's no question in your mind about the intent of Public Law 94-202, in both seeking to reduce the backlog and to encourage making the temporary ALJ's permanent? Is there?

Mr. McFEE. I understand; you can, very well, sir.

Mr. GILMAN. Do you have a specific compromise in mind that you are suggesting to the Civil Service Commission to try to solve this problem?

Mr. McFEE. It is very clear that the selective certification approach authority which they do have within their administrative discretion, and, possibly, a change in the way vouchering scores are determined, would succeed in placing the majority of these temporaries into permanent ALJ's in existing procedures.

Later on, I believe, you will hear from some of the organizations representing temporary ALJ's. I am not an attorney, but I would hate to be put into the position that we are putting many of these temporary ALJ's.

The longer they sit and hear cases, and the longer they perform effectively in adjudicating cases, the particular recommendations that make up the score on the voucher coming from the attorneys that represents clients before them—this relationship, it seems to me, is intolerable, and not only would involve the ability of the judge to be fair, knowing that, depending, if he keeps, the attorneys happy who are also going to be participating in his evaluation for a permanent score on the ALJ, is a situation which I think is absolutely unbelievable.

And I think the use of selective factors for experience, and also a change in the scoring system to give less weight to the opinions of those attorneys who, obviously, have developed bias in association with this judge, would be sufficient.

Mr. GILMAN. Your testimony projects, I think, a backlog of 161,000 cases by September 30, 1979 if the present system prevails. This is very disturbing to all of us who are quite concerned about reducing this backlog and attempting to expedite the consideration and disposition of these cases.

And after hearing the testimony of the Civil Service Commission on Tuesday, which was not very encouraging to me, I sincerely hope that SSA will be able to achieve greater success than what I believe is in the winds.

I didn't perceive much of a change in attitude of CSC. They seem to be pretty firm in their rating system, and have only accredited, I believe less than 40 percent of the temporary ALJs that they've rated so far.

And it didn't seem to me that there was anything being proposed by the Civil Service Commission to correct their rating process. How are you proposing to change all of that?

Mr. McFEE. I can only react that I spent some time on the phone yesterday afternoon with Mr. Jacobson, and I believe his appearance before this committee and your questioning, Mr. Gilman, had a profound effect upon him.

Mr. GILMAN. Well, I am pleased to hear that. I hope that you're equally successful in convincing the Commission of the need to do something.

You heard Mr Burke's eloquent presentation. I think it represents how many of us in Congress feel that we should cut through the red tape and achieve a fair disposition of these individual's applications for permanent status.

Thank you, Madam Chairman.

Mrs. SCHROEDER. Thank you.

Congressman Harris?

Mr. HARRIS. Thank you.

This would be a unique suggestion of creating a pool in an agency like HEW, wouldn't it? Is there any precedent before this—

Mr. McFEE. I don't know of any other than the President's pool.

Mr. HARRIS. Yes; and it is hardly analogous. The President has the flexibility, assuming this pool is funded for any place he wants to use it.

We would, in this case, be creating a pool within an agency; but we don't know what they're going to do but that agency could assign them, and it would be a fairly unique situation, wouldn't it?

Mr. McFEE. Yes; my personnel people tell me that they know of no other such pool arrangement.

Mr. HARRIS. Why do it that way? Why not just—if we need six more supergrades, why not just expand the President's pool under 5317?

Mr. McFEE. That would take care of our particular problem, but you'd have to check with the executive department to see how they would view that.

Mr. HARRIS. What do you mean, the executive department, OMB?

Mr. McFEE. I assume that it's OMB or the White House.

Mr. HARRIS. I just wonder where we go from here if each agency comes in and gets its own little pool to fool around with any way they want to.

Of course, we don't much—as I think he correctly pointed out—we don't have any real control over these executive levels anyway. There's probably all kinds of executive levels that should be IV's, and IV's that should be V's out there aren't there?

Mr. McFEE. Yes, sir.

Mr. HARRIS. Thank you. We do have H.R. 5544 that has been introduced. I have tried to bring some sense and order to the pool of supergrades, and I just wonder if there isn't something we should do about the pages of executive levels that are outside the pool—that may have been created years ago for one reason or the other on some specific pretext—not pretext, but for some specific reason or other.

And no one has ever reviewed it as far as I know. And it seems to me that we probably, if we're going to bring some sense or order

to the executive level position, that we ought, to the extent possible, get the pool concept so that we have some kind of rule or figure that we're dealing with, just as we've made the arguments on super-grades.

I'm interested in the testimony today that expanding 5317 would be just as responsive to the appeal, at least in some peoples' opinion, as taking one agency and giving them six executive levels to expand.

Mr. McFEE. May I observe, Mr. Harris, that I think your comments are very well taken. And as you look through that list of executive level jobs, and make the observation that many of them haven't been looked at—haven't been given the benefit of the kind of review that they ought to have—it is for that reason that we are arguing for the pool.

We do not want these jobs put into legislation with specific titles and specific levels which, in order to change them, will have to come back to you for legislation. And that is why we suggested the pool situation.

Mr. HARRIS. I can appreciate the fact that, by taking the one step—by pooling within the agency—you would attain greater flexibility with regard to assigning these positions. That makes sense.

But I have to observe that if that makes sense, it makes even more sense to have a pool for the whole executive branch rather than just one agency. And as I understood you, you sort of agreed with that.

Mr. McFEE. That's my personal opinion. I don't know what the administration's view on that subject is.

Mr. HARRIS. Thank you very much, Madam Chairman.

Mrs. SCHROEDER. Congressman Harris, did you want a pool? [Laughter.]

Mrs. SCHROEDER. I wanted to ask just a couple of quick questions. In the GAO report—about all the backlogs that came in October 1, 1976, and the tremendous backlogs of disability claims—they had a series of recommendations on page 31, and many of them were management recommendations.

I know you probably don't have these with you today. Could you get, for the record, how HEW has tried to implement any of these recommendations, if they have, because, as I say, many, many of these are not just dealing with the numbers of hearing officers. There are all sorts of efficiency problems and management problems.

Mr. McFEE. We will supply that.

Mrs. SCHROEDER. We will appreciate it.

Mrs. SCHROEDER. It appears to the subcommittee there's been some morale problems in some of the SSI offices—the regional offices around.

I have a memo here, dated April 11, 1977, and it's talking about all of the case transfers. And here we're talking about a tremendous backlog, but all of these cases were transferred out of the southern region—out of the Jacksonville, Fla. region—and I'm wondering if there's something that's going on in the agency. Do you have any idea?

Mr. McFEE. I know about it in general; I can't speak to the specific case that you brought up. But because the hearings workload is distributed, first, on the basis of having the case heard in the geograph-

ical location where the claimant in order to provide convenience, the workload is not always geographically distributed where we would like it.

And, so, sometimes because we have judges with a workload that is less because the claimants in that area just don't happen to be active at that time.

We do move cases around to be heard by other judges, and we move judges from various hearing offices to hear cases close to the claimant. And it is a dynamic process, which, by the way, I think is one of the good things GAO found out about our process.

We didn't use to do this. These are new procedures which we've put in to keep track of case loads and almost dynamically try to reallocate both the case load and the judges.

Mrs. SCHROEDER. I'm not quite sure how that works, because in this instance, this memorandum is from Mr. Hayes, who is the administrative law judge in charge of the Jacksonville, Fla. bureau.

But he says in here:

Our master calendar has been dessimated and the morale of the judges and employees who worked diligently to put this office in fine working order is not exactly too high.

And I'm very perplexed as to how you can have an 83,000-case backlog, and you're transferring cases out of the region that has its backlog caught up.

Mr. McFEE. I will have to provide for the record some response to that "memo." Is this a memorandum that I would have or have available?

Mrs. SCHROEDER. If not, we'll get you a copy of it.

Mr. McFEE. All right.

Mrs. SCHROEDER. We'll give it to you, and I really would appreciate something; because, as I say, that, with the GAO, leaves me in a little bit of a quandry.

Mrs. SCHROEDER. Do you have trouble getting ALJ's to go into certain regions?

Mr. McFEE. Yes, there is a geographical problem. In fact, that is one of the reasons why preserving the resource of the temporary ALJ's is very important; because they have relocated.

They live in these particular areas, and we would like to give higher score—someway allow them to compete for those particular jobs—instead of bringing someone in from another particular area.

Mrs. SCHROEDER. So, in other words, that allows you to deal with the geographical thing somehow, for being a hardship case—something like that?

Mr. McFEE. Well, I don't know that we have that in mind. The problem of having a judge located in a particular area, and having him available, trained and productive in that environment, weighs very heavily from a management standpoint against another judge which maybe has a score a little higher but would have to be reallocated.

Well, if he won't move, we don't have that problem.

Mrs. SCHROEDER. What about the 60 people, the temporary ALJ's, that have now applied for permanent status? Do you have any insight?

Mr. McFEE. I can really only speculate. Mr. Burke speculated that they felt that their peers had received such bad treatment that they decided not to, but I really can't give you the example or the reason.

Another speculation that we have is that the length of time that they've served may have something to do with it, and they're waiting until they have another year's experience to give them that much better evaluation.

Mrs. SCHROEDER. I noticed that in your statement you said that the temporary ALJ's were doing a reasonably satisfactory job. Could you expand on that? Is that compared to the permanents?

Mr. McFEE. I do not think that the comparison was to the permanent ALJ. In fact, in many cases we're finding that the preformance of these temporary ALJ's productivity-wise, case reversals, and these types of figures which we keep on them, are better than the permanent ALJ's that we now have on board.

And I really don't think that I can add anything more to that, and, possibly, reasonable is a poor choice of words.

Mrs. SCHROEDER. We have to recess momentarily for the vote on the House floor. Does anyone have any further questions of the witness?

Mr. HARRIS. I don't have any additional questions.

Mr. GILMAN. No questions.

Mrs. SCHROEDER. Thank you Mr. McFee.

[Short recess was taken.]

Mrs. SCHROEDER. I see Congressman Burke has arrived. Congressman Burke, we're delighted to have you with us.

**STATEMENT OF HON. JAMES A. BURKE, A REPRESENTATIVE FROM
THE STATE OF MASSACHUSETTS, ACCOMPANIED BY JAMES
KELLEY AND FRED ARNER, PROFESSIONAL STAFF, HOUSE WAYS
AND MEANS COMMITTEE**

Mr. BURKE. I am Congressman James A. Burke of Massachusetts, and will let my two associates here, identify themselves.

Mr. KELLEY. James Kelley, professional staff, Ways and Means Committee.

Mr. ARNER. Fred Arner, professional staff, Ways and Means Committee.

Mr. BURKE. Madam Chairman and subcommittee members, I recommended early action on H.R. 5723 on behalf of some 69 co-sponsors, because this appears to be the only feasible course of action to prevent the reoccurrence of the hearing crisis we were facing 2 years ago.

I might say that, at that time, we had a backlog of 113,000 cases waiting to be heard. The Nation faced a real crisis: here were people, totally disabled, waiting for months and years for hearings.

The Committee held hearings and passed this legislation to speed up the hearing process and to take care of these people.

I think this is the whole trouble with the Civil Service Commission. They fail to realize that we are dealing with human beings here. We're dealing with people.

As Members of Congress you know, you go back to your districts. I have people coming up to me when I hold meetings back in the district who drive up to the post office and they can't get out of the car—they're physically unable to get out. They've been waiting for months and years to get their cases adjudicated.

And that's what the Social Security Subcommittee tried to do when we enacted this legislation. But we seem to have some roadblocks down in the Civil Service Commission.

On one hand they seem to tell the people applying from outside Government that the temporary ALJ's will get the jobs and the positions, that Public Law 202 discriminated against them.

But the temporary ALJs believe that the Civil Service Commission is discriminating against them because they don't take into consideration their years of SSI experience, plus the fact that they meet the basic criteria to qualify.

The background of this crisis is outlined in the committee print prepared by our subcommittee staff, "Background Material on H.R. 5723: Conversion of Temporary Social Security ALJ's," which is attached to my testimony for incorporation into the record.¹

In enacting Public Law 202, the Ways and Means Committee refrained from grandfathering in the SSI hearing examiners as administrative law judges as they requested in 1975.

Instead, we consulted both with the members and the staff of your committee and went the merit system route. At that time it was our understanding that there was in existence a mechanism which was capable of fairly evaluating the temporary ALJ's and separating the obviously unqualified, but that the vast majority of them would be assured of being appointed as regular ALJ's.

Subsequent experience and examination of the present system indicates that this is not true. The mechanical application of standards which emphasize GS grade rating and status in practicing law and an anachronistic system of vouchering will not necessarily eliminate the unqualified.

Moreover, the most relevant experience to the position of a regular ALJ—actually deciding social security cases—is not being given the weight that was called for in Public Law 202 and should be receiving in the interest of building a competent corps of ALJ's to handle social security hearings.

As I understand it, they give the temporary ALJ's 50 or 55 points for experience ratings, but they give some others as much as 60 points.

This, to me, doesn't seem to be consistent, because these hearings officers are handling about 90 percent of their cases in the disability area and this will be exactly the type of case they will be hearing as regular ALJ's.

In many cases it's just this point differential which results in the individual not being able to make the register at all, or being so low on the register that the Bureau of Hearings and Appeals is unable to reach him for actual appointment to a position.

Now, I understand that Mr. Charles Dullea and Mr. Ray Jacobson were up before your committee on Tuesday to represent the views of the Civil Service Commission on H.R. 5723.

¹ Retained in subcommittee files.

Now, this isn't a personality clash. I don't know Mr. Dullea—I just heard him before our committee once or twice but I think he's more or less imbued with bureaucratic thinking.

And he's gotten to the point where he feels he's a one-man army down there; he can hold up the whole social security system of hearings and throw all kinds of roadblocks in the way, and just defy Congress on legislation, and just not move a whit.

But you and I have to go back to our districts and answer to these people who are waiting to be heard, on their social security case, and we have to make sure that they're qualified people in there. And they've got the qualified people there now, but they are discouraging their permanent appointments.

One of the things that has come to my attention is that an ALJ in social security has a GS rating of 15—that an ALJ of the NLRB has GS rating of 16.

I don't know who thought that one up, but you can well imagine that as a result, all those social security ALJ's would like to go to NLRB. I understand there are some of them now waiting on the GS-16 register to get over there if a position becomes vacant. This would create more vacancies in positions of needed social security ALJ's.

Now, I've got a statement here. I don't want to go over the whole thing. I believe I'd like to have unanimous consent to put the statement in the record. Since my time is very limited.

I have my staff members here who have been keeping me informed on everything that's taken place here. They are more acquainted with the problem than I am because they're closer to it.

I just want to get things moving. I don't know what the administration's view on this are; I haven't talked with them. But the administration has indicated that they're concerned about human rights. I hope they're concerned about human rights over here in America, too.

And one way we can help the human rights of others is by getting legislation like this through, and establishing proper morale among the ALJ's in the social security group, and at least show them that this government appreciates the service that they are giving, and that there is some chance for them.

It is unfortunate that one individual is able to throw a roadblock in the way, and act in defiance of what was written into law by Congress—the basic intent and purpose of the legislation. His job is to carry out the laws—and I think we found about that out last night.

So, sometimes we have to rule with our heads and not our hearts, and I hope this committee does.

[The statement follows:]

PREPARED STATEMENT OF HON. JAMES A. BURKE, A REPRESENTATIVE FROM THE
STATE OF MASSACHUSETTS

Madam Chairwoman and subcommittee members, I recommend early action on H.R. 5723 on behalf of some 69 co-sponsors because this appears to be the only feasible course of action to prevent the reoccurrence of the "hearing crisis" we were facing two years ago. The background of this crisis is outlined in the Committee print prepared by our Subcommittee staff—"Background Material on H.R. 5723: Conversion of Temporary Social Security ALJ's"—which is attached to my testimony for incorporation into the record.

In enacting Public Law 202, the Ways and Means Committee refrained from grandfathering in the SSI hearing examiners as Administrative Law Judges as they requested in 1975. Instead, we consulted both with the Members and staff of your Committee and went the "merit system" route. At that time it was our understanding that there was in existence a mechanism which was capable of fairly evaluating the temporary ALJ's to separate the obviously unqualified but that the vast majority of them would be assured of being appointed as regular ALJ's. Subsequent experience and examination of the present system indicates that this is not true. The mechanical application of standards which emphasize GS grade rating and "status" in practicing law and an anachronistic system of "vouchering" will not necessarily eliminate the unqualified. Moreover, the most relevant experience to the position of a regular ALJ—actually deciding Social Security cases—is not being given the weight that was called for in Public Law 202 and that it should receive in the interest of building a corps of competent ALJ's to handle social security hearings and appeals.

To me it does not make sense that any GS-16 Federal employees or equivalent in State office or private legal practice will automatically get 60 points for "experience" but an individual who as a GS-13 or GS-14 who has been adjudicating social security cases for years will automatically only get 50 or 55 points, respectively. This seems to disregard both Ways and Means and Finance Committee reports which stated "in evaluating current SSI hearing examiners for regular ALJ appointments great weight should be given to experience in actually adjudicating social security and black lung cases." In many cases it is just this point differential which results in the individual not being able to make the register at all or being so low on the register that the Bureau of Hearings and Appeals is unable to reach from him for actual appointment to a position.

Now I realize that Mr. Charles Dullea and Mr. Ray Jacobson were up before your Committee on Tuesday to represent the views of the Civil Service Commission on H.R. 5723. But I would like to set the record straight.

First, Mr. Jacobson left the impression that the work product of temporary ALJ's was substantially different from that of regular ALJ's and for that reason their experience is not directly relevant. He stated the legislation was enacted to permit "the Attorney-Examiners to be used on certain disability cases." This is wrong on a number of counts. Public Law 202 states unequivocally that such temporary ALJ's may conduct hearings under titles II (old-age, survivors, and disability insurance), XVI (Supplemental Security Income) and XVIII (Medicare). Moreover, these hearings will be conducted under all the provisions of the Administrative Procedure Act as are those hearings conducted by the regular ALJ's. It is true that the great bulk of the experience of the temporary ALJ's is in deciding disability cases. However, this is precisely what they will be doing as regular ALJ's inasmuch as 90% of the hearings workload is in this area. Incidentally, it is estimated that it takes at least nine months for an examiner inexperienced in disability adjudications to be fully productive.

Secondly, the Civil Service Commission witnesses misunderstood the reasoning behind the provision that the temporary ALJ's have appointments that run through 1978. We did this to allow the largely hypothetical case of an SSI hearing examiner with the bare minimum of 4 years legal experience who was appointed just at the time of the passage of Public Law 202 (January 1976) sufficient time to pick up the required 7 years of experience to qualify for the regular ALJ register. At the present time all but 4 of the 189 temporary ALJ's have been members of the bar for seven years and the great preponderance of them have the necessary seven years of administrative law or trial experience. It was never the intention of the Ways and Means Committee to hold up appointments of qualified temporary ALJ's until the end of the period and the Committee reports clearly stated that "roadblocks should not be created in unduly lengthy and bureaucratic appointment procedures." Nothing can disguise the fact that this group of temporary ALJ's has almost to a man met the seven-year requirement but as to this group the Civil Service Commission has an overall turn-down rate of 60%. And what is the reason for this? Are these people all incompetent? No—the reason is that they have not been given credit by the Civil Service Commission for the work which should be given the most weight—namely, deciding social security and SSI cases.

Finally, Congressman Gilman of your Subcommittee asked what alternatives to H.R. 5723 did the Civil Service Commission have to offer. The answer was the status quo—that is that the Commission will supply sufficient qualified names from the register so that Social Security will have an adequate number of ALJ's. But what is the track record?

In late 1975 when our Subcommittee was conducting its hearings on the appeals process, Mr. Dullea testified that he had supplied the Bureau of Hearings and Appeals (BHA) with over 100 names on the ALJ-15 register from which the BHA had stated it would try to hire 55 ALJ's in some 42 locations. Of over 100 individuals on the ALJ register who were questioned as to their availability less than 50 stated that they would take an appointment in any one of 42 locations throughout the United States. Moreover, 16 of these individuals said only one location was acceptable. Locations included Atlanta, Birmingham, Boston, Cleveland, Dallas, Detroit, Houston, Los Angeles, Milwaukee, New Orleans, Phoenix, Pittsburgh, Portland, Providence, Richmond, San Francisco, in addition to scores of smaller cities. But because of the inability to match candidates on the certificate with locations in which openings existed, only 25 ALJ's were appointed from this certificate.

About a month ago—because of an increasing workload—the Bureau of Hearings and Appeals requested a certificate of eligibles off the register to fill 50 ALJ positions in 28 locations. The BHA states that it needs these 50 ALJ's in addition to the 189 temporary ALJ's because its backlog increased by 1,500 cases in March and now stands at about 83,000 cases. This is in spite of a production rate for the Social Security corps of 27 cases per month in March. Just this week the Civil Service Commission sent the Bureau of Hearings and Appeals a list of 74 names to fill the 50 positions in 26 locations. If our 1975 experience is any kind of guide, the Bureau of Hearings and Appeals is going to find it very difficult to fill these positions with so few people and those on the list may not like the locations. Also, it should be noted that those non-ALJ's on the register who the Civil Service Commission stated, in their testimony to you, were being discriminated against by this legislation will have a full opportunity to be hired under this procedure if they really want employment as a Social Security ALJ.

Finally, your attention is called to the request for 100 GS-16 ALJ's for the regulatory agencies and the NLRB. I do not mean to indicate in any way that these additional ALJ's are not needed but I would point out to you a possibility which could make the ALJ Social Security problem even more critical. You will note on page 63 of the Committee print the GS-16 ALJ register which shows that over 30 Social Security ALJ's are eligible for appointment to these positions and many more may apply if the possibility for appointment exists under the new pay scales.

One member of the CSC Advisory Committee at the February 25, 1977 meeting stated that he sees the GS-15 Social Security ALJ as a good "farm system" from which the regulatory agencies can call up the most accomplished players. Needless to say, this type of thinking is deeply resented by career Social Security ALJ's who believe the Civil Service Commission already treats them as second-class citizens in grade classification.

Madam Chairwoman, I think you will agree after looking at all facts of the situation that our only prudent action at this juncture is to convert the temporary ALJ's to permanent status. We are playing Russian Roulette with a hearing system which safeguards the rights of literally millions of our citizens. The Civil Service Commission does not have the record to sustain its allegations that the present system will produce the hearing officers which Social Security requires. The morale of temporary ALJ's is not good at the present time and if nothing is done the alienation will grow. Madam Chairman, both our Subcommittees must act on H.R. 5723 without delay.

Mrs. SCHROEDER. Thank you, Congressman, for a marvelous statement. It's very hard to quarrel with anything that you have to say.

Mr. BURKE. There's something else that I might have pointed out here. I sent a letter down to Mr. Dullea on April 25, and I don't know what the figures are or the facts are, but I think this committee should look into it, about equal opportunity in this Nation.

I know you're a member of the woman's caucus, and I know there are other caucuses around here—blue collar caucus and other groups.

As a result of a request from a member of our committee, I sent a request to find out how many blacks, how many minorities, and how many women were serving as ALJ's and what their potential is and all that. I'd like to have permission to include that letter and the answer in the record.

Mrs. SCHROEDER. Without objection the letters will become part of the record at this point.

[The letters follow:]

APRIL 25, 1977.

CHARLES J. DULLEA, *Director,*
Office of Administrative Law Judges, Civil Service Commission,
Washington, D.C.

DEAR MR. DULLEA: The following request has been received from a Member of the Ways and Means Committee, the answer to which would be relevant to our present concerns in studying the Administrative Law Judge selection process.

For sometime, I have been concerned about opportunities for employment as Administrative Law Judges at the Social Security Administration for Blacks, women and other minorities. Please obtain for me the number of Blacks, the number of women, and the number of other minorities who are currently employed as Administrative Law Judges at the Bureau of Hearings and Appeals and what minority recruitment efforts have been made or affirmative action plans have been established by the Civil Service Commission as regards Administrative Law Judges at the Bureau of Hearings and Appeals. I would also be interested in obtaining the number of Blacks, women and other minority Administrative Law Judges who are employed at the Bureau of Hearings and Appeals in Memphis, Tennessee.

Your early attention to this matter would be greatly appreciated.

Sincerely,

JAMES A. BURKE,
Chairman, Social Security Subcommittee.

U.S. CIVIL SERVICE COMMISSION,
OFFICE OF ADMINISTRATIVE LAW JUDGES,
Washington, D.C., May 5, 1977.

HON. JAMES A. BURKE,
Chairman, Subcommittee on Social Security, Committee on Ways and Means,
House of Representatives, Washington, D.C.

DEAR MR. BURKE: This has reference to your letter of April 25, 1977, in which you ask for certain data relative to the employment of minorities in Administrative Law Judge positions in the Bureau of Hearings and Appeals of the Social Security Administration.

It should be noted that the temporary and permanent Administrative Law Judges are appointed and employed by the agency, not by the Commission; for this reason this office does not maintain statistical data of the type you are seeking. The information set forth below has been provided to the Commission by personnel representatives in the employing agency.

The Bureau of Hearings and Appeals employs approximately 420 permanent Administrative Law Judges appointed under the provisions of 5 U.S.C. 3105. Within this group, seventeen males represent minorities (six blacks, two Indian-Americans, one Asian-American and eight-Spanish-Americans). The permanent Administrative Law Judge staff also includes eleven females, one of whom is black and four are Spanish-Americans.

Temporary Administrative Law Judge positions were established in the agency by P.L. 94-202. There are approximately 190 temporary employees who were recruited and appointed by the agency. These positions are classified at GS-14. In this group there are five male minorities (one black, two Asian-Americans and two Spanish-Americans) and eight females.

As indicated above, the agency recruited and appointed the persons who fill the temporary Administrative Law Judge positions. With respect to the Administrative Law Judges appointed under 5 U.S.C. 3105, the Commission distributes announcements and other informational material at the conventions of the minority bar associations; representatives of the Commission and individual Administrative Law Judges have made presentations at these conventions and representatives of the Commission and individual Administrative Law Judges have also appeared and made presentations at minority law schools.

The latest information available to this office indicates that the Bureau employs five permanent and one temporary Administrative Law Judges in its Memphis office. We understand that the presiding officer personnel in this office does not contain any representative of minority groups.

I trust the foregoing is helpful. If I can be of any further assistance, please let me know.

Sincerely yours,

CHARLES J. DULLEA,
Director.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
Washington, D.C., May 11, 1977.

Hon. CHARLES A. BURKE,
*Chairman, Subcommittee on Social Security, Committee on Ways and Means,
House of Representatives, Washington, D.C.*

DEAR MR. CHAIRMAN: Thank you for your recent letter concerning minority and female representation in our Administrative Law Judge (ALJ) corps. As of December 31, 1976, a total of 637 ALJs were employed by the Bureau of Hearings and Appeals. Of these, 18 (3%) were females, 13 (2%) were black and 22 (4%) were persons from other minority groups. There are at present no minority or female judges in the Memphis Hearing Office.

As I am sure you know, the Civil Service Commission has primary responsibility for recruitment of individuals to become ALJs. BHA's own success in the recruitment of ALJs is limited by the constraints placed on such hiring by the Commission. Our selections must be from the registers certified to us by the Commission, a process which leaves us little control over selections. In January 1976, for example, the CSC certified 102 names to us for consideration in filling 25 ALJ vacancies. This listing included only six females within reach for appointment. Four of those declined positions, one failed to reply to our inquiry, and one was appointed. With respect to minorities, we of course cannot determine from the register the race or national origin of the persons listed. Therefore, though one Asian-American was selected from the list, we have no way of knowing the number of minorities actually certified.

At this time, we are preparing to hire another 50 ALJs who will be appointed this summer. The CSC register contains 74 names, only three of whom are women. Although I plan to make every effort to select these persons, even if all three accept positions, our overall posture will not change dramatically. I can offer even less assurance in the area of minority recruitment, as I have indicated earlier.

In the past, we have had representatives at national meetings of both the National Bar Association and the National Association of Black Women Attorneys to advise participants of career opportunities at the Bureau and to encourage their applications for employment. In addition, we have furnished information to make attorneys at such conferences aware of opportunities to serve as representatives of social security claimants. Our recruitment efforts were intensified during 1975 when we sought attorney-advisors for the newly-created Staff Attorney Support Program, and were directed at a number of colleges, universities, and law schools, as well as bar associations with significant minority populations. Although we are unable to directly measure the results of these efforts, it is believed that they are slowly bringing about a change that will impact on the number of minorities and females who qualify for CSC certification.

At present, we are in the process of preparing an exhibit booth for this year's annual conference of the National Association of Black Women Attorneys, which will be held this month. We hope also to be involved later this summer

in other conferences of national scope, including the upcoming convention of the National Bar Association.

Objectives concerning improving the representation of minorities and females in the ALJ corps through monitoring of selection actions are also included in our Affirmative Action Plan for fiscal years 1977 and 1978. I am advised by the Civil Service Commission that at present they are not contemplating any special initiatives to alleviate the situation.

I appreciate your interest in a matter which is also of concern to me. If I can provide any additional information, please let me know.

Sincerely yours,

ROBERT L. TRACHTENBERG,
Director.

Mr. BURKE. Oh, by the way, a letter came to me from a young lady in Massachusetts. I sent it down to Mr. Dullea. The lady is assistant attorney general in Massachusetts.

I guess she was offered an ALJ position a few years ago, but was unable to take it because of location. But the reply she received actually indicated that this bill here would prevent her from getting that, and my staff tells me that that's not true—that she still will be eligible for appointment.

I think they can take them from both this way.

Mr. KELLEY. Absolutely.

Mr. BURKE. Have you anything to say?

Mr. ARNER. No; I'm available for any questions.

Mr. BURKE. Well, why don't you say what you have to say, and the —

Mr. ARNER. Well, there's so much to say.

Mr. BURKE. I think it would be useful to summarize the results of qualifications of temporary ALJ's for the ALJ register.

Mr. ARNER. I think we might clarify the testimony of the Commission. We made an ALJ scorecard here that follows up on the testimony of the Civil Service Commission—on page 6—if I remember, of their testimony.

This summarizes the qualification of SSI hearing examiners and black lung judges—their qualification going back probably to 1974. During this period, 154 have been applied to the Commission, and 40 cases are still being processed.

Now, of this group, 114 cases have been already decided, and of the 114, 69 did not meet the standards—that's a 60-percent turndown rate—45 met the existing standards. But that isn't quite the whole story. Of the 45 that met the existing standards, only 22 have actually been appointed Social Security ALJ's, and one was transferred to another agency, three subsequently went to the Labor Department, and 20 are still on the register; and 15 are on that new certificate the Civil Service is just now sending over to BHA.

And, so, that gives you a more detailed breakdown. As to the other 60 that have not applied, we generally surmise that they haven't applied because they were convinced that it was a useless act to apply.

Mrs. SCHROEDER. One of the prior witnesses from HEW had advocated maybe a 2-year extension of the ALJ authority. How would you feel about that?

Mr. BURKE. Well, unless it's going to be carried out—

Mr. ARNER. I would say this: To make the system work, to actually appoint all these people, it will take an estimated 2 years.

Whether this would be fair to the temporary ALJ's would be a very serious question. They're been through quite a lot.

Mr. KELLEY. I think it would just be extending the period of doubt as to what their status is. I think we're facing the issue, and I don't see any reason why it can't be decided.

Mr. BURKE. If they extend it, I think the trouble is that the bureaucrats down there will continue what they're doing now, and we'll have the low morale factor down there continuing for the next 2 years.

And all Members of Congress take the heat. We're the ones that must go back into our district and see these totally disabled people applying for hearings and trying to get straightened away.

And here we have a man down there at Civil Service who's set himself up, practically, as a law in this country. The law has been written and the congressional intentions are there, and he's not carrying it out.

And it's a serious situation because there are, approximately, 83,000 cases backlogged right today.

Now, what to do with all these cases. The temporary ALJ's can be either very enthusiastic about their work, or we might kill their spirit. And right now one man is able to do that.

You know we have to show some interest in these people so that they'll carry out the work that they're supposed to do. This is one of the most sensitive areas in our Government. They're dealing with people who are totally disabled. We are dealing with human beings here.

Now, I don't know much about Mr. Dullea, but I think that he's been mistaken in what he's doing. I think it's up to the United States Congress to take some action to make sure that the intentions of the Congress are carried out.

If they're not, then we might as well fold up our tent and go home and let the bureaucrats run the Government—and forget about being representative Government and just let them run everything, which they are doing under this situation here where Congress has already spoken.

Madam Chairman, you are an elected representative of the people. You are here representing 470,000 people of your district, and Mr. Gilman is too. And you are aware of that.

Mr. Dullea is a paid employee of the Federal Government, supposedly carrying out the law. That's all we want him to do, is to carry out the law.

Mrs. SCHROEDER. Thank you.

Congressman Gilman?

Mr. GILMAN. Yes, thank you. Madam Chairman.

Mr. BURKE. I want to compliment you on your diligent and energetic activity on behalf of what I consider to be very important legislation.

There's no question that the delay in SSA appeals is abominable and to have a 6-month to a 1-year delay is abhorrent to the system and something that should be corrected.

The Department of HEW has testified, objecting to this legislation by saying that it bypasses the merit system. How do you counter that argument?

Mr. BURKE. Bypass the merit system? The temporary ALJ's—90 percent of the cases they're hearing they'll hear as regular ALJ's. They're hearing the same cases today. They've heard them for the past 3 or 4 years.

Any they talk about the merit system; well, the way this works out with the ALJ's working in social security at GS-15—just to show you the low regard they have for ALJ's in social security—one member of the CSC Advisory Committee on February 25th at a meeting, stated that this is a good farm system.

You know, it makes second class judges out of them. I think we might take it out of the hands of the Civil Service and put it in the hands of the President and let them appoint these men like they do Federal judges. But I realize the Civil Service Commission prepares the registers because of the Administrative Procedure Act.

And then, maybe we'll get the ones we need; they'll submit the list and they'll be approved forthwith.

And, incidentally, you have to be better qualified to serve as an ALJ in social security than you have to be qualified to serve on the Supreme Court of the United States.

You read the requirements—no such requirements for the Supreme Court of the United States. They've got them so rigid that there are practicing attorneys in this country that would never qualify. They're far better qualified for the Supreme Court; they wouldn't qualify here.

But this is the way the thing is. It's such a rigid situation, and they're using the rigid situation. The unfortunate part of it is that it reaches down and penalizes the totally disabled people of America.

Those are the ones I'm concerned about; that's why I'm here.

When we have 113,000 backlog of cases—and now we have about 83,000—these are the people we have to be concerned about. Some of these people go to their graves without ever having had a hearing.

Some of them must live for 8 or 9 months or a year after they've applied, and never have been processed, and the result is they go to the cemetery long forgotten.

Now, we're dealing with human beings here, and I'm here interested in those people who are applying for total disability and their rights. And their rights are being deprived as a result of bureaucratic action.

And I think it's incumbent upon us to do something about it and not listen to the smooth talking people. Some of them are very smooth talkers. They come down here and convince you of a lot of things.

But when you're back in your districts, take a look at that total disability problem. Take a look at your mail; talk to your staff people who handle that social security, and they'll tell you that 50 percent of the social security mail is on total disability cases—the hold up of it—the delays.

Mr. GILMAN. From my reading of the prior legislation, it seems that our intent was quite clear, that once having been appointed temporary ALJ's, the experience factor would be an important consideration in conversion to permanent appointments—isn't that correct?

Mr. GILMAN. There's no question about what the intent of Congress was in creating this group of temporary ALJ's: that we would try to convert them to permanent status at some later date. Is that right?

Mr. BURKE. That's correct. All we're asking the Commission is to move forward, take some positive action. This negative action, this obstruction, this idea of blocking everything that comes along—and who suffers? The totally disabled and the country; and that's why I'm here making this appeal.

Mr. GILMAN. We thank you for your argument, sir. If we were to act on H.R. 5723 today, would your subcommittee be moving forward concurrently?

Mr. BURKE. Yes, we'll move fast on whatever jurisdiction we have.

Mr. GILMAN. I thank the gentleman for his opinion. I want to again congratulate him for his effort and support.

Mrs. SCHROEDER. Congressman Harris, do you have anything?

Mr. HARRIS. Madam Chairman, thank you very much. I appreciate the testimony of the distinguished member from Massachusetts very much and agree with it, and I have no questions.

Mrs. SCHROEDER. Thank you again.

Mr. BURKE. You know, it's an interesting thing. The staff members of Congress don't have too much protection for total disability. You know, we have to certify to the fact that our staff members are working a full month and there's no good arrangement made to keep them on the payroll. After 60 days of sickness they could lose their pensions. But that's another matter we might have to cover.

Mrs. SCHROEDER. I appreciate your time. Thank you very much.

Mr. BURKE. Thank you, Madam Chairman.

Mrs. SCHROEDER. Is Judge Fauver here?

Judge FAUVER. Yes.

Mrs. SCHROEDER. Welcome. We're glad to have you here.

And you're chairman of the legislative committee, the Federal Administrative Law Judges Conference?

Judge FAUVER. Yes, I am.

Mrs. SCHROEDER. If you'd like to put your statement in the record like the others and summarize it that would be fine.

STATEMENT OF JUDGE WILLIAM FAUVER, CHAIRMAN OF THE LEGISLATIVE COMMITTEE, THE FEDERAL ADMINISTRATIVE LAW JUDGES CONFERENCE

Judge FAUVER. Thank you. Our conference greatly appreciates the opportunity to present our views on H.R. 5723.

The Federal Administrative Law Judges Conference is an association whose membership includes a large majority of the 825 administrative law judges who have been examined and qualified by the Civil Service Commission for this position under the Administrative Procedure Act.

Now, one of the fundamental interests of our conference is to preserve the integrity and quality of the process by which judges are qualified and selected. We, therefore, are strongly opposed to

any measure that would bypass the merit examination for any special group of attorneys.

As this committee is aware, under the APA and the Civil Service regulations, the administrative law judges appointed under the act must demonstrate to the Civil Service Commission their capacity to fill such positions by undergoing thorough screening under merit examination and judicial selection criteria, including a written and oral examination.

I might add that our research indicates, Madam Chairwoman and members of the committee, that this is the only merit examination in the United States that involves a written examination and oral examination for a judgeship.

It has been a system, now, that we think has been proven for many years. We simply see no sound reason why Social Security's temporary hearing officers should be given a lifetime appointment as a judge without going through this process to compete with attorneys both within and outside the Federal Government.

On that, I would add that we think the cross section of the Bar associations and the Government agencies, all competing together, make for better judges. We don't like the concept of inbreeding.

We don't like the concept of disadvantaging the private attorneys by giving special treatment for Government lawyers or vice versa.

We are proud of the legal profession, but we think, in the best competitive spirit, when everybody's treated fairly you'll get better judges.

I might say that even the Bureau of Hearings and Appeals has recognized that 15 to 20 percent of these temporary judges are not qualified to be permanent judges. The Civil Service Commission has already found about 60 percent do not qualify.

We say that to the claimant the most important contact with the U.S. Government is the judge. These cases involve an actuarial value of \$56,000.

It's like the joke: the fellow said, out West, "How long will this take?" He said, "It depends on which end of the branding iron you're holding."

When these claimants go before a judge, we want the best qualified judge to be there. We don't want a blanket provision that will bring in people who are not qualified.

Now, I don't want to go through my whole statement, but to summarize it: we submit that the merit examination system that the Civil Service Commission has developed through the years is the best effort, thus far, to get the best qualified people for this job.

It is not perfect; it needs to be changed. But this is why Congress left discretion in the Civil Service Commission. If it does need to be changed, we say that the appropriate course is either to negotiate with the Civil Service Commission, or have an outright oversight hearing on the quality and the fairness of their system.

Now, if the Civil Service Commission then balks, and does not make necessary corrections, that would be the time to make them.

But we urge you to make them fairly for all applicants—make them fairly for the whole Bar Association of the United States. Don't change them to give special treatment for a special group.

We come, then, to the question of what is the need for this, which we would say, is a drastic change in the established merit examination system?

Now, Madam Chairman, I would like, if I may, to comment on some of the testimony received today.

In the first place, the committee print that was referred to, from the Social Security Subcommittee, as this committee is aware, is not the committee report. It is a staff document prepared by the staff of the Subcommittee on Social Security.

And it should be noted that that staff report does not refer to the Comptroller General's report and recommendations, which we regard as the most objective study in the country on the issues. It does not refer to that.

Second, it does not refer to the fact that in Public Law 94-202, Congress authorized the Center for Administrative Justice to make a definitive study with recommendations on the very issues that are before your subcommittee.

That fact, if I read this thing right last night, is not in the staff's report. I submit that the staff report is not only incomplete, it is based on a false premise, and by false, I mean that it is inaccurate.

I know that the people genuinely perceived it this way, but I believe it's inaccurate. If I may, I would like to identify that premise.

Public Law 94-202 got off on the proposition which I submit was an erroneous one from the beginning, that the whole problem of the crisis of 113,000 cases in BHA is a problem of judges.

It has never been a problem of judges. In January, 1976, there were 615, approximately, judicial officers in BHA. Today there are 615 judicial officers in BHA. 94-202 never created one judgeship. It didn't fight a backlog by creating judgeships.

I think every serious student of this issue has recognized that the problems of that backlog depend on levels below the judges. A judge cannot decide a case if he doesn't have a developed case. If a judge doesn't have a case, he can't develop it.

I submit that the GAO report is moving in the right direction. Now, when we look at the GAO report recommendations, nowhere do we see a recommendation that recognizes the crisis as being a need for the increase in judges. All they say is it's up to BHA, officially to notify the CSC of its need for judges.

Now, we have contacted the Center for Administrative Justice, and we understand that that is a definitive study. It will be coming out in September of this year. It will be dealing with the very key issues of how to fight back this backlog.

When we consider the question of backlog, I urge the committee to note that the Comptroller General recognizes that the BHA is probably the largest adjudicatory system in the country dealing with the same subject matter. And he states that a case load of 100 per judge is the only way to have cruising speed without inefficiency.

So, it is not fair to say that thousands and thousands of cases are, per se, a backlog. You have a multi-million dollar budget over there, and you need 100 cases per judge to make the whole operation work.

So, we suggest that the GAO study indicates—and we think the Center for Administrative Justice will probably indicate—that in

the neighborhood of 61,000 cases is cruising speed for that operation. It's not a crisis backlog.

Second, the problem over there is delay, not the number of cases. I think there has been enough judges to decide the cases, but the problems are these:

And I commend to your consideration the very well thought out legislation proposed by your brothers, Levitas, of the Fourth District of Georgia, and Sisk of California.

They have responded, not to the staff report of the Social Security Subcommittee's concern—that if you get more judges you'll end the problem; they have looked at the GAO report.

They have made recommendations, and if I may summarize what I think are the values of these recommendations, Madam Chairman.

I don't think administrative law judges will take a second seat to anybody in their concern about the American claimants and people—the ones that come before us. We regard our job as being a temple of justice.

Now, these claimants of BHA, from the beginning, have gotten the runaround; and it's no doubt that the cases take so long.

I think that the record will show that when a disability claimant—and I believe he pays the highest taxes in this country, there are no deductions for social security taxes, that's right off the top.

And we resent even calling it welfare. We don't think they are welfare claimants. We think they are high tax paying American citizens.

When he thinks he has a claim, he goes, first, to the wrong office. He goes to the Federal office. He sees an employee there who is not trained to interview and to examine his weaknesses.

You know why she's there, to see if he can walk right; because that could be held against him. She's not a rehabilitation expert.

He pours his heart out to her, having paid all of these taxes. He fills out the forms and he leaves.

She sends the file across town, behind closed doors, where State people decide the case.

And what do they do when they decide it? They give him a boiler plate decision from the wrong office, which is the Federal Government again.

And no wonder the Federal Government is under such criticism. No Philadelphia lawyer could understand that boiler plate. It doesn't tell them the reasons why the claim is denied.

Now, the American people are a little litigious if you don't give them reasons—If they think they're getting fair treatment, they won't litigate, normally.

So, naturally, you are generating an unhappy claimant that doesn't know why he is turned down. Now, what happens when he is turned down?

He never appears before the State; he never meets his decision-maker. So, it's no wonder that when these cases finally get to the administrative law judge, you have a higher rate of reversal, because nobody has "eyeballed" that claimant to listen to his side of it.

Now, that is a number-one item which the GAO has recognized—which Levitas and which Sisk recognize. That's how you're going to cut down appeals.

I submit, on basic psychology, that the American people in large numbers will accept a deal if they think it's fair—if they can understand it.

And I submit, under the present system, they're getting a run-around. Now, it may be that the insurance companies' infusion into the thinking of some of these regulations—maybe they say, "Well, if you tell them right off, you're going to get into more trouble. A lot of them will just drop off because they loose heart."

I think that's a cynical view, but I'm not suggesting to you what should be a better view. That may be the philosophy.

In any event, it's understandable that you're going to have a long time that you're going to have people complaining because they don't know why they were turned down.

Now, what happens before the ALJ? One of the greatest mistakes, I think, made in this country, is trying to project this idea of putting three hats on one man. You cannot have a person who's going to defend the fund, represent the claimant, and be the judge at the same time.

What does it do? It takes a GS-15 who's gone through this whole screening process. He hears the claimant.

I can guarantee, if you check the records, wherever you have lawyers you're going to have more money coming from that fund, because the judge knows that if he questions too hard with a lawyer, he's going to have an affidavit of bias.

So, you don't really get an efficient examination, I submit, when you try to put it on one judge: Defending the fund, having the job of representing the claimant, and trying to judge the case.

And, more important, that judge has no remand authority. So, what does that mean? When he gets an incomplete file, he has to develop it. He can't send it back to the States to do the work.

I submit, Madam Chairman and members of this committee, that within about the last 10 years, this country took a direction of moving toward what it regarded as putting more confidence in State and local government. This is one of the best examples of how that doesn't work right.

I submit that the BHA has never supervised those State offices the way they should; that the doctor and the rehabilitation clerk behind the doors, who decide these cases—have never been asked to develop, I submit, the facts—to even get to a judge's case.

Now, these things are in the Levitas bill; the same concept is in the Sisk bill.

So, I submit, in the first place, it is ridiculous, in 1977, to think that you're going to create life-time judgeships by blanking in a group of unknown people, who 15 to 20 percent of the people who are close to them find aren't qualified, and the Civil Service Commission has found 60 percent of them to be unqualified.

I submit that that would be a really wrong thing to do unless there were compelling, drastic evidence requiring it. The reason it's not compelling here, is that you have the GAO study which indicates that's not really the problem.

Secondly, you have a congressionally authorized definitive study by an objective body in the Center of Administrative Justice, which is coming out in September—which would make such drastic action premature.

And, thirdly—now, I testified when they had 94-202. I urged the same thing. I really sounded like a prophet out of his own country, but I urged on the Social Security Subcommittee then, “Look at the state offices and put in those corrections and give them a try, and I think you’ll be surprised—that you won’t need more judges.”

And, finally, the compromise that was made in 94-202, I think, was a good agreement in the sense that it ought to be binding on both sides.

The compromise was this—they were talking about grandfathering back then. The compromise was: all right, we’ll make them temporary ALJ’s; we’ll give them 3 years to qualify. And that was the compromise.

Now, midstream, they’re back here with 14 months passed; 60 of them have not applied, and all you have on this record is the speculation that they were afraid of the results.

Let’s look at the 45 who did qualify. Most of those, or a substantial percentage of the 45 applicants who passed that examination did not have GS-14, one year in grade, to meet the Whitten amendment.

Then how did they become judges? They became judges because they had superior backgrounds and professional qualifications. And that’s what we want all of our judges to have.

So, I suggest that you look at those 60 nonapplicants. Don’t accept a speculation that they didn’t apply because they were distressed by the Civil Service Commission. It may be they didn’t have the background or professional qualifications that they thought could compete.

And, finally, I urge on this committee that, through this last campaign, and through Watergate and what we saw last night, if anything is clear in this country, it is that we don’t want arbitrary, special treatment for anybody. We want merit examination.

We want the best qualified people as public servants in this country that we can get. If there’s a better way of doing it, let’s tell the Civil Service how to do it; but don’t throw both the mother and the baby out with the bath water.

Thank you very much.

[The prepared statement follows:]

PREPARED STATEMENT OF WILLIAM FAUVER, OF THE FEDERAL ADMINISTRATIVE
LAW JUDGES CONFERENCE

As Chairman of its Legislative Committee, I have been asked to present the views of the Federal Administrative Law Judge Conference on H.R. 5723. I am past president of the FALJC and since 1970 have been an Administrative Law Judge at the Department of the Interior. Our Conference greatly appreciates this opportunity to present its views on this legislative proposal.

The Federal Administrative Law Judges Conference is an association whose membership includes a large majority of the 825 Administrative Law Judges who have been examined and qualified by the Civil Service Commission under Section 11 of the Administrative Procedure Act. One of the fundamental interests of our Conference is to preserve the integrity and quality of the

process by which APA judges are qualified and selected. We are therefore strongly opposed to the concept of bypassing the merit examination for any special group of attorneys.

H.R. 5723 has such a provision, which would, by fiat, declare nearly 200 temporary hearing officers of the Social Security Administration to be Administrative Law Judges with the statutory tenure and authority of that position without regard to the merit selection procedures established by the Civil Service Commission for such positions.

Under well-established standards, Administrative Law Judges appointed under the APA must demonstrate to the Civil Service Commission their capacity to fill such positions by undergoing thorough screening under merit examination and judicial selection criteria, including a written and oral examination and a thorough investigation of professional background and qualifications. Upon appointment, they are given statutory safeguards of judicial status, tenure, and independence not afforded any other employees in the Executive Departments and regulatory agencies.

There is simply no sound reason why Social Security's temporary hearing officers should not be required to compete equally with other attorneys—both within and outside the Federal Government—for a judicial position that has been established and protected under the Administrative Procedure Act for the last 30 years. Anything less than this would lessen the quality and integrity of the administrative law system in our country, to the detriment of the public interest and that of the litigants who seek independent and quality justice under the Social Security Act.

The temporary hearing officers who are the subject of H.R. 5723 were, by prior legislation, afforded a three-year period (until December 31, 1978) in which to pass the examination for CSC certification as permanent APA judges. We understand that of the original group of about 214 temporary hearing officers, 45 have passed the examination and have been certified on the CSC register of eligibles for appointment as APA judges; 69 have been found unqualified by the CSC but, as with other candidates, they will be entitled to reapply for examination in the future; 40 applicants are in the processing stage; and 60 of the temporary hearing officers have never applied for the examination.

We think it worth noting that the public will judge the quality of the administrative judiciary by its weakest not its strongest members and that it is incumbent, therefore, on everyone connected with the selection system to ensure that only the best qualified individuals are appointed to this position.

H.R. 5723 would declare as Administrative Law Judges those individuals who have not been found qualified for such positions as well as the additional 60 hearing officers who were not interested enough to compete on a merit selection basis for the position of Administrative Law Judge. Conferring the authority and tenure of a judgeship by legislative fiat would obviously be an unsound approach to filling judgeships. When another bill was construed as containing a similar grandfather provision for hearing officers in the Labor Department, President Ford vetoed the measure with strong objection to the concept of grandfathering APA judges. His veto message stressed the point that:

"These employees would by fiat be declared to be Administrative Law Judges without regard to their capacity to fill such positions. Since Administrative Law Judges hired in the usual manner must demonstrate such capacity, this feature would be contrary to all principles of a civil service system based upon merit and competition among candidates." [Veto Message, October 29, 1974, on H.R. 13342, The Farm Labor Contractor Registration Act Amendments of 1974.]

We therefore submit that the grandfather provision of H.R. 5723 is contrary to the principles of a civil service system for Administrative Law Judges based upon merit and competition among candidates. It would make a mockery of the competitive examination already administered to numerous private and government attorneys, and would be especially unfair to those who passed the exam and are awaiting vacancies for judgeships in the order of their examination scores. It would also set the clock back to the days when the Congress, the American Bar Association, and the public alike voiced strong objection to the practice of agency influence and inbreeding of personnel for appointment to adjudicatory positions. In these ways, H.R. 5723 would undermine public con-

fidence in the competence and integrity of the administrative judiciary, as well as the Civil Service Commission's independence in examining the qualifications of candidates for an APA judgeship.

There is no evidence, to our knowledge, that the Civil Service Commission has treated the temporary hearing officers in any way different from the processing of all other applicants for a judgeship. But even if there were a question as to the objectivity or fairness of CSC's qualifying examination, the better course would appear to be an oversight hearing evaluating the CSC examination process and not a radical measure of bypassing the examination for a special group of applicants.

At a time when the country is demanding the highest qualifications and standards of its public servants, H.R. 5723 stands out as an unwise retreat from established principles of merit examination and selection.

Mrs. SCHROEDER. Thank you very much, Mr. Fauver.

Congressman Harris, do you have some questions?

Mr. HARRIS. Thank you, Madam Chairman.

I want to compliment you on an excellent statement. From the workload in my particular office, I know there's something wrong with social security; and I've begun to understand, from your statement, what some of the problems are.

Your comments on the way some claimants are processed—I know that they are accurate because I've tracked a good many of them.

Have you a notion of whether or not the hearing officers in social security are productive?

Judge FAUVER. Mr. Congressman, I understand that the production rate is about the same for the permanent judges and the temporary judges.

I think it would be interesting to see whether the reversal rate was the same, and I don't know whether the reversal is the same. But I expect the production rate is about the same.

Mr. HARRIS. What is the production rate; do you know?

Judge FAUVER. To give you a "guesstimate," about 25 decisions a month.

Mr. HARRIS. Twenty-five a month?

Judge FAUVER. I think that's what it is.

Mr. HARRIS. Well, that would be 100 cases every 4 months. Notice how quickly I did that?

[Laughter.]

Judge FAUVER. Well, I'm not sure of the figures. They indicate they have 83,000 cases. They have 615 judges, so you're dealing with—

Mr. HARRIS. I don't know, I put down the figure 61,000.

Judge FAUVER. I said that's what GAO says is cruising speed for that operation.

Mr. HARRIS. And what is the backlog?

Judge FAUVER. They say it's 83,000, which would be a backlog, actually, of 23,000.

Mr. HARRIS. Yes.

Judge FAUVER. And, just from hearsay, I understand the production is about 25 a month, but I'm not sure of that.

Mr. HARRIS. That's about one-third backlog.

Judge FAUVER. I don't think the problem's the number of judges at all.

Mr. HARRIS. I don't know what's wrong. I just don't visualize this thing turning over every 4 months. It seems to me it takes longer than 4 months to move to hearing. I don't understand.

Judge FAUVER. I understand they have—the GAO pointed out a substantial timelag that needs to be corrected, and that's where the injury is to the claimant—in the timelag.

And it indicated that a lot of factors below the judges level, including management by BHA, are needed to improve that.

Mr. HARRIS. You're kind of firming your point a little bit, that the hold up is really before it gets to the judge rather than when it gets to the judge?

Judge FAUVER. Right, When it gets to the judge, and having a file that can be decided.

Mr. HARRIS. Well, the second point, it seems to me, would reflect itself in the judge being slower to act, or slower to act actively.

You say it's not being reflected that much; it isn't just moving the staff work down the lines?

Judge FAUVER. Well, first, I was comparing the "tempos" and the permanent. I think they're about the same in terms of production; but, again, I don't have knowledge of those figures.

As far as the judges' productive efforts, I understand that they're getting those results over there from the judges; not all of them, but they are getting the results from them. We've always been kind of proud of our contingent in the HEW.

Mr. HARRIS. Why do the proponents feel that this law is necessary? Why do we have to do it this way? Why don't we have to go through the normal process?

Judge FAUVER. I think the proponents misconceptualize. They don't cite the GAO report. They apparently aren't interested in waiting for the center for administrative justice's ideas on it.

I think the Levitas and Sisk bills should come first, before you ever consider the drastic measure of bypassing the merit examination for a lifetime appointment.

I would recommend tabling this bill until the Levitas and Sisk bills have been given a chance. And I believe that every serious commentator on the subject is in the same line as Sisk and Levitas. They are recommending management improvement of the system, not just the idea that you need more judges to do something.

Now, on the question of the Civil Service Commission, I think they've been badly maligned here today. Nobody has mentioned that the Civil Service Commission has referred 73 names from the GS-15 register to BHA for an upcoming class of 50 judges. There apparently didn't seem to be any problems in getting those names.

And on the question of giving selective certification, which is another bad feature, I think that we could show you many studies of the American Bar Association and many judges of our conference making recommendations over the years against agency selective certification.

We think better judges come from generalists, and we think the Civil Service Commission is moving in that direction. And you also get a broader outlook if you get a generalist, instead of just having the inbreeding of developing a claims adjuster into an adjudicator.

I'd like to say that there is one thing that we strongly agree with Congressman Burke on—and we've been on the same side of that issue with him for years, and there is a bill pending before your

larger committee on this issue—and that is we agree with Congressman Burke that the Social Security Administration has been unfairly used as a “farm,” it’s been unfairly used as a minor league, and that by using that GS-15 grade, so, after those judges proves themselves as GS-15, the regulatory agencies take them as 16.

We think that’s wrong. We think that the claimants before Social Security judges are entitled to the same qualified judge as Exxon is in the regulatory case.

So, we have proposed—and Congressman Duncan of Tennessee has introduced—H.R. 865, which would codify the resolution of our organization to eliminate the salary differential for all administrative law judges.

And I know a lot of regulatory judges who would love to work at HEW. It’s very important, gratifying work, but they don’t want to take a substantial reduction in income to do it. So, we think that would be an improvement, and we agree wholeheartedly with Congressman Burke that the pay differential should be eliminated.

Mr. HARRIS. Do you have a feeling as to whether or not we need additional judges in that agency?

Judge FAUVER. You’d have to flesh out the new changes. I think that if the Levitas or the Sisk bill were put in, you would, definitely, have a major reduction of appeals.

This has been proven. A key factor of both of those bills is the reconsideration conference. Now, this is requiring the State people to do some work.

In this situation, when the claimant gets his decision, he has the right to reconsideration, and he can go before the State decision-maker and sit down with him and show him his twisted arm or whatever it is he has, and explain it.

They found out, in making studies, that with this reconsideration conference it reduced the appeals requests.

So, I think that kind of test, if it proves out to work that way, you might even have a reduction of judges. So, we don’t know what the judges workload might be, but I think the record is clear: there is no crisis requiring more judges that would justify tampering with the merit examination.

Mr. HARRIS. Thank you, Madam Chairman.

Mrs. SCHROEDER. Thank you.

I want to ask a couple of questions. First of all, what do you think of HEW’s proposal that we extend the temporary ALJ’s?

Judge FAUVER. I respectfully disagree with it for these reasons, Madam Chairwoman. This was a compromise at best.

It is unfair to the applicants who are standing examination where you are going to get—some will be better qualified than the temporaries. It’s unfair to them; they’ve been on the waiting list. They’re interested in those jobs, those jobs that are now temporary.

I think if you extend it further, you’re putting it more into concrete. That’s No. 1.

No. 2: It is entirely premature. As I mentioned, the Commission has just furnished a list of 73 names for the next class of judges, so it’s not necessary to decide how to extend this thing 2 more years.

And we do think that it is a departure from the total integrity of merit examination.

Mrs. SCHROEDER. Well, I'm glad you mentioned the 73 names, because one of the things that was mentioned in the GAO report has been: They have said the problem is that in the past, when Civil Service provided social security with names, many of them have been on prior lists. They're eligible for higher salaried ALJ positions in other areas, or they don't want their seeking positions in certain locations and don't want to locate where the positions are that are open.

Now, have you any comment on that part of the GAO report?

Judge FAUVER. I've talked with some of the judges at HEW about the real problem of locating people—and I've never been to Podunk, but I'll just use Podunk—of locating people in small areas.

They tell me the answer to that is to raise the pay. They say if you raise the pay that a GS-16 judge will be about in the upper 2 or 3 percent of income in those small cities, and you wouldn't have any problem. That's their response to that.

The record does show, I think, that, regrettably, Civil Service and BHA develop adversarial positions, and there's a lot of silly correspondence between both of them that could have been avoided by better negotiation.

But I think, that with the new administration, and with the new approaches and Chairman Campbell and the other new personalities in both, that that really should not be difficult to overcome.

Mrs. SCHROEDER. Well, then, you feel the 73 will fill the 50 positions?

Judge FAUVER. I should think.

Mrs. SCHROEDER. You're not aware of the fact that over half of them are—more really—not serious candidates?

Judge FAUVER. Well, we just have to see how they respond to the list. And they have another 25, I think, on the register.

But that has been a problem of years, and, you know, bypassing the merit exam is not going to do that.

Mrs. SCHROEDER. Well, no; that's one of the things that we heard in the testimony: that that's why bypassing the merit exam was important, because then you already had people out in those locations.

Judge FAUVER. I would say the GS-16 money is a much better investment. Let's make sure we have the best qualified judges and try offering a little more money to those people to get them out there.

Mrs. SCHROEDER. OK, now, you testified that the temporaries really have not increased the number of judges. There are 615.

Judge FAUVER. Right.

Mrs. SCHROEDER. So, now, when temporary authority expires, how do we pick up the slack? You still think it can be done?

Judge FAUVER. I think when it expires they should take solely from the register, and if you have—by that time, if you start putting in Levitas or Sisk, and if you consider pay equity—the general morale problem over there is pay inequity, and that's serious.

If you do those two things, I think would be the time to examine it. But I really feel very convinced that if they get those States to meet with the claimants and develop those files, that those claimants are not going to be anything as litigious as they appear to be today.

Mrs. SCHROEDER. Now, one of the other things that I've heard as I've tried to put all of these together and make some sense out of it, that there was a definite feeling that the temporary ALJ's have been doing a very good job, and have been hearing the same kind of case and preparing the same kind of load, and on the merit system they were not being given sufficient credit for experience in the job.

Now, I think I heard you counter that by saying that your conference felt it was important to have generalists.

And then, I think the counter that I heard to that, from other witnesses, was that it took 9 months or more training of these generalists to give them enough specific background to be really worthwhile.

Now, how would you sort all of that out?

Judge FAUVER. Well, first, I would say that you have a proven system, through merit examination, and that 400 plus permanent judges did not have special treatment. They came in the regular way, off the register.

So, there's no question that it works well off the register. Now when you get to the question of how you can save some time or money by getting people who have prior agency experience, your trade off for that is inbreeding, and that takes us back to the days before the APA.

You could be more efficient, indeed; but it's a trade off. It's like saying a desk sergeant in a police station would be more efficient if he weren't bound by the fifth amendment. He would be. He could just drag people in and talk to them.

And we think the trade off isn't worth it, to have agency trained judges, and have, you know, an input into their scores when they're taking examinations for judges. We don't think that's a good approach to merit staffing.

Mrs. SCHROEDER. I don't know, sir. I have a real problem with that. I know the *Duke Power* decision and all that does not apply to the Federal Government, thank goodness. That could be real trouble with Civil Service.

But, now, I used to sit on a hearing board in the State where I came from, where we tried to devise these tests; and I don't quite have the confidence that you do that the register is really doing all the wonderful things you say it does.

We say it does, but I'm not sure that under *Duke Power* that implies that Federal and State examinations will hold up. What we would see happen would be all sorts of incredible tradeoffs that could be made.

Judge FAUVER. Well, presently, Madam Chairman, you have known situation, that is, setting aside for the moment the temporary ALJ's, you have a system that is now in its 31st year.

And I do think that inquiries would indicate that the profile of administrative law judges—in terms of their production, dedication, et cetera—is very good, and the Civil Service has received no credit, you know, before your committee on the work that they have done.

I think they have developed a rather good system. It can be improved, but where the temporaries fit in I don't know. I don't think

because someone is doing a good job is the basis for giving him a lifetime job.

Mrs. SCHROEDER. Do you have any kind of breakout as to where they came from? Do most of them come from the Social Security Administration?

Judge FAUVER. I don't know, Madam Chairman, on that. I do know that Wilson Matthews wrote a miniannouncement for the position, and that he used far lower standards than the regular announcement, but where he recruited them from I don't know.

It is important, I think, that the black lung people did not come under any standards. They were simply hired at the will of the agency, and a number of those you would be blanketing in as lifetime judges.

We just can't understand the concept of giving somebody a lifetime job without standards, and without the Civil Service Commission doing it rather than some other agency. It is beyond us.

Mrs. SCHROEDER. I totally agree. I think one of the problems, though, if you can mock the standards, then you begin to wonder where we go.

Judge FAUVER. What I would propose on that—I am also Chairman of our Civil Service Liaison Committee, and what I would propose on that, to take along with everyone else, is to take a real hard look at that Civil Service examination system and see where it can be improved. The *Bromberg* case in the seventh circuit and the district court in Chicago apparently thought that it was a good system.

And certainly it's not perfect, but I'm convinced from what I've heard here that our organization should try to work with Civil Service to improve it.

We would like to see all of the temporary ALJ's become permanent judges, as we would all private attorneys who are interested in the position, based on their merit.

Mrs. SCHROEDER. I understand your position. I appreciate how diligent you've been.

Did you have any questions, Congressman Gilman?

Mr. GILMAN. Yes, I do, Madam Chairman. Thank you.

Isn't it true, that prior to their appointment, those temporary ALJ's were put through a rigorous screening and testing process, which was almost identical to the present rating process used by CSC in rating an individual for a permanent position as an administrative law judge?

Judge FAUVER. There are two groups, Mr. Gilman. The black lung—the former black lung—were not tested in any way; they were just hired. There were no standards for them.

Mr. GILMAN. What percentage are we talking about in the black lung people?

Judge FAUVER. I don't know the numbers.

Mr. GILMAN. Well, roughly, what percentage are we talking about? I'm sure you have some idea.

Judge FAUVER. I really don't; I guess 10 to 20 percent.

Mr. GILMAN. You're talking about a small percentage of the total number.

Now, what about the hearing officers, the substantial portion—80 or 90 percent of this whole? Wasn't that a rigorous testing process?

Judge FAUVER. I would not say it was rigorous, Mr. Gilman. I talked to Wilson Matthews and he consulted me when he was setting up that exam.

Mr. GILMAN. Was it a written examination?

Judge FAUVER. It was a written examination, but it involved far lower levels of legal experience.

Mr. GILMAN. All right, could you explain that to us? Be more explicit: What were the lower levels that were allowed in this process as compared to the present process?

Judge FAUVER. I would have to look at his announcements. My recollection is that it went down to GS-12 in the Government, and a comparable lowering in private practice; and there was a smaller number of years required.

Mr. GILMAN. But isn't that the main point here. We're saying that in the selection process CSC is abrogating the experience factor?

You heard the testimony of Mr. Burke. You've probably seen the Ways and Means staff report that shows that the Civil Service Commission is not giving great weight to the experience factor as was suggested to them.

Judge FAUVER. I don't think that's been proven; I really don't. I think now 60 percent were found unqualified. That's about the same percentage of other applicants. It's a little lower.

Mr. GILMAN. Well, isn't it a fact, Mr. Fauver, that the Civil Service Commission is assigning only a 50-point credit for experience for these temporary judges, and in other areas they are assigning a 60-point credit?

Judge FAUVER. I don't think that's the case. I think these judges would get 55 with their GS-14 experience. I think they would get 55.

Mr. GILMAN. But that's not happening, is it?

Judge FAUVER. I don't know the details on how Civil Service is doing it; but I haven't seen anything written—and I've read a lot on this—that shows me they're being treated differently from other people.

Mr. GILMAN. Well, tell me, how do you overcome the intent of Congress, which was to try to have some judges appointed in a hurry to take care of the backlog of cases, and accordingly wrote into that statute our intent to convert these temporary ALJ's to permanent status as quickly as possible so that we would be able to satisfy the need at SSA.

And here we are, 2 years later or whatever the time is, and we've only reduced that backlog by about some 20,000 cases.

We have an administrator that comes before us today and projects that if we continue in the same system, we're going to double the backlog in 2 years.

We have also heard testimony that the temporary ALJ's are much more productive than the permanent ALJ's.

Now, what do you suggest for meeting that backlog and solving it? Does it mean more ALJ's?

Judge FAUVER. First, I suggest that 94-202 has not been given a fair chance. It was a 3-year bill.

Mr. GILMAN. Well, how long does it take to implement a statute of that nature, which says appoint some judges and reduce the backlog? And in 3 years we reduce it by only 20,000 cases, and now HEW projects we're going to double the backlog in another 3 years.

Judge FAUVER. I don't think the evidence indicates that hiring more judges is the problem in reducing the backlog.

Mr. GILMAN. What is the problem, sir?

Judge FAUVER. I don't think you were present, Mr. Gilman, when I testified.

Mr. GILMAN. Well, I've read your testimony, and you're saying that the GAO suggests we make some changes in the process. What is your suggestion?

Judge FAUVER. I think the recommendations of the GAO report and the provisions of the Sisk-Levitas bills would really cut down the appeals numbers in BHA, and the experience would probably indicate that you don't need any substantial increase in judges.

Mr. GILMAN. And we don't need any more ALJ's; is that what you're saying?

Judge FAUVER. A substantial increase—that would be my guess—if you will try those reforms that have been recommended by GAO and other people. And until you try them, you won't know and I won't know.

Mr. GILMAN. You're saying, do away with all the temporary ALJ's, don't appoint any more judges, revise the statutes, and we'll be able to take care of the whole matter.

Judge FAUVER. No. Levitas recommends that lawyers be employed to represent the fund and represent indigent claimants.

Now, one of the ways that the backlog was reduced, I believe, Congressman Gilman, was that they employed 250 staff attorneys to assist in the judges offices.

You could utilize temporary judges as lawyers representing the fund, which I think would improve the efficiency in the timing of these cases, and, if necessary, in cases for indigents they could represent indigents. They could also be brought on as staff attorneys. All of that would be qualifying experience for an ALJ position.

Mr. GILMAN. How many ALJ's are available to hear these backlog of cases today?

Judge FAUVER. You mean at BHA?

Mr. GILMAN. How many permanent ALJ's are available to hear the backlog of some 83,000 cases?

Judge FAUVER. I guess it's about 450.

Mr. GILMAN. And how many cases can an ALJ hear in in a year?

Judge FAUVER. The optimum seems to be a caseload, a working caseload, of 100 per judge. I guess they're deciding about 25 a year.

Mr. GILMAN. 25 a year?

Judge FAUVER. 25 a month.

Mr. GILMAN. 25 a month; and there are 400 of them?

Judge FAUVER. About 450, I'm not sure of that figure.

Mr. GILMAN. Well, that certainly isn't going to reduce the backlog, is it?

Judge FAUVER. The GAO says that if you get below 100 caseload per judge, you're not having efficient operation. That's the cruising speed for that operation.

Mr. GILMAN. But I say that's not going to reduce the backlog, is it?

Judge FAUVER. No; I think State reforms—

Mr. GILMAN. We're talking about at the outside some 135,000 cases that you're going to be hearing in a year, and we're still climbing in the rate of receipt.

Judge FAUVER. If you don't have a developed case, you can't decide it. And the work, I think, that is needed at the State level to develop these files and to tell these claimants what the reasons for the decisions are.

Until those things are tried, then I think you'll have a bad backlog situation.

Mr. GILMAN. You just told us, though, that the average monthly case load for a ALJ is 25, and you've got 450 judges.

Judge FAUVER. I think they're deciding about 25 decisions.

Mr. GILMAN. You're still not going to be able to decide all of the backlog in a year. How do you propose to reduce that backlog?

Judge FAUVER. I think the answer, first, is that the reforms that have been recommended by Levitas, Sisk, and GAO—and I think that we should look for the Center for Administrative Justice report coming out in September—all point to levels below the ALJ. They don't recommend big increases in ALJ's; they recommend reforms to benefit the speeding of these cases. And I think that is a fair premise, and it can be backed up by many authorities. And I commend your consideration of those authorities.

Mr. GILMAN. These reforms that GAO suggests to simplify the process, they certainly aren't going to make a substantial cut in the backlog, are they?

Judge FAUVER. I think the face-to-face conference will, Congressman. That's the problem. These claimants don't know why they're being turned down at the State level.

Mr. GILMAN. Mr. Fauver, I'm sure you've examined the backlogged litigation in some of our other courts. And I spent some time on temporary commissions in the courts of New York State.

We found that while reform does simplify and speed up the process, it still doesn't make a major dent in reducing the backlog of litigation. And what it boils down to is manpower and availability of manpower, and productivity of the manpower sitting up there on the bench.

And if you don't have enough judges, you're not going to dispose of the cases.

Judge FAUVER. I think it's the premise that really should be examined against these other improvements that Sisk, Levitas, and GAO have recommended.

Mr. GILMAN. Your chief concern, apparently, is with regard to the ability of these temporary ALJ's. Is that right?

Judge FAUVER. No, my chief concern is with the integrity of the selection process of judges.

Mr. GILMAN. But what I'm asking you again: don't we have an adequate way of protecting that integrity? Isn't there, for example, the opportunity for the administrative judge to dismiss or remove a judge if he is incompetent and does not perform his responsibility in a proper manner?

Judge FAUVER. I think there's only one in history, at most two. It's a very difficult procedure, Congressman, to do that. It's a life-time job, in effect. It's very difficult to do that.

Mr. GILMAN. But he has the authority to do it, does he not?

Judge FAUVER. You mean to dismiss the judge?

Mr. GILMAN. To remove a judge if he's not performing his responsibility properly.

Judge FAUVER. No, the agency can't do that; only the civil service can, and he's entitled to a full-blown trial. It's an extremely difficult process.

Mr. GILMAN. Thank you, Madam Chairman.

Mrs. SCHROEDER. I just have one quick question. Does the veterans preference apply to the ALJ's?

Judge FAUVER. Yes, I've sat on a number of their panels. They require a score of 80 before they allow the veterans preference; but if you get a score of 80, then you get the 10 or 5 points.

Mrs. SCHROEDER. Is that one of the reasons there are so few women?

Judge FAUVER. I think it is. And there have been a lot of recommendations over the years to deal with the veterans preference.

Mrs. SCHROEDER. I think maybe I'd like to make another one. [Laughter.]

Mrs. SCHROEDER. And I hope you would join us.

Thank you very much for your appearance, and we appreciate it.

Judge FAUVER. Thank you.

Mrs. SCHROEDER. Mr. Sweeney, who is the president of the Association of Temporary Administrative Law Judges is next.

We're glad to have you with us, Mr. Sweeney.

Mr. SWEENEY. Thank you.

Mrs. SCHROEDER. You may summarize your statement at this point.

STATEMENT OF JOHN T. SWEENEY, PRESIDENT, ASSOCIATION OF TEMPORARY ADMINISTRATIVE LAW JUDGES

Mr. SWEENEY. I'd like to say that you correctly called my name and my title, but I have also been known as the temporary president of the Temporary Judges Association of the Temporary ALJ's.

If there's one good, positive thing that might happen with this legislation it is that we'd get rid of the three temporaries and my presidency in the Association, and that's good efficiency.

I'm very happy to summarize not only my statement but to answer some of the points that were raised Tuesday; but I'd like to change my approach just a bit, in light of the previous testimony, which is very difficult to respond to because we've heard it so many times and because it's so simplistic.

Quite frankly, my statement does, to some extent, discuss the issue, and the reason that this situation arose in the first instance; and why the Social Security Administration had to quickly move to implement title XVI of the Social Security Act in order to provide hearing officers to hear a large number of cases that would be heard because of the passage of the SSI Act.

As you know the SSI Act deals with indigent people, and the fact is, that we should give them as good treatment as anyone, if not more so, because of the fact they have a special kind of a problem.

Mr. Fauver's previous statement is what Mr. Burke was talking about. He seems to be more concerned with reform and the shadow, or the ego and reputation of our business, than he does with people.

He even made the comment that we're just going to have to put up with the existing backlog. Well, that's just outrageous, and not satisfactory to you I'm sure. It isn't to us.

He talks about fairness, but he doesn't indicate that we're not Government attorneys; we're people who have been sitting on cases for last 3½ years. If there's a fairness, it is in the correcting of this situation.

He suggests that the register may have better qualified people. He has absolutely no basis for this statement. If anything, a reasonable view would judge that people sitting on the job for 3 to 3½ years, doing exactly the same work most certainly would be more qualified for the position.

He said that 15 to 20 percent aren't qualified by the Administration's own statements. I have never seen this figure and know not where it comes from, but I can't imagine a man getting up here and categorizing 15 to 20 percent of the people who are presently sitting in these positions, hearing cases, as being unqualified.

He indicates that the standards were far less than those in appointing the hearings examiners. Well, that's patently untrue.

As a matter of fact, the exact same standards were used to judge the SSI hearing examiners. The only difference was that instead of 7-years experience, in which certain kinds of experience had to be obtained, it was reduced to 5 years, and later 6 years.

But, in truth, each individual was required to have been a lawyer for at least 7 years. He was required to have shown competency in the areas that the announcement 318 discusses, and the qualification was almost exactly identical. It is just outrageous that a statement like this was made.

Now, as I suggested, I think it's unfortunate that this occurred, because it really brings to light again Mr. Burke's statement that we are here to hear people's cases, and anything we can do in order to assist or to process them more quickly is the correct answer, and one that I think is your concern.

Some other comments that I did have by way of summary, and also with respect to what happened last Tuesday, I think might be helpful, and I hope you'll bear with me.

First of all, we are concerned about the Civil Service process itself, and some questions have been raised about the delay.

I received a telephone call 2 days ago from a judge in Charleston, S.C., who indicated that not only was he waiting 16 months to get a review, but that two people in the Birmingham office—and I have their names and I have the permission to use their names—have been waiting 23 months to get a decision from the Civil Service Commission.

And these aren't just three special ones; people in New York and in other areas, indicate that many judges have been waiting 1 year and 1½ years just to get the vouchering process completed, let alone have indicated to them whether they passed or not.

And, by the way, I don't know if this shows inefficiency with the Civil Service Commission, but it does, possibly, mean that maybe this particular division is handling our applications a lot more differently.

And, with respect to the vouchering process, I must tell you that while the Bureau of Hearings and Appeals has not put any special pressure on us, and while we've had no special threats from attorneys, who practice in front of us, it is an insidious kind of pressure that is on us at all times.

Because we have to be concerned with a lawyer who may or may not write a letter or be ready to voucher us later on, we're always cognizant of the fact that that the Bureau might say at some time: "Well, you had a very high reversal rate."

The fact that we're temporary, indicates that these things can be said or be used against us.

One of our members received 78 last year, and later asked the Director of the Office of Administrative Law Judges to see his papers. He was shown by Mr. Dullea, only 11 of 12 of the vouchers, which were all complimentary to him. He was told that the 12th would not be shown because the individual indicated that he wanted to be kept confidential.

As best we can tell, and as best the individual can tell, the one bad voucher was a lawyer who appeared in front of him, and was not satisfied with a decision.

But 11 of 12 were positive and were for him; 1 wasn't. And he got a 78.

And that kind of situation is not, again, a rare case.

A second question that I would like to raise, and that I think is important, is the kind of work that we do.

I've been in Boston 3 years, and work with nine judges. In that time we've had 2 cases of the hospital license variety, and not more than 10 cases in all of special kinds of cases. In 3 years, each of these judges hears 20 cases a month, with no difference between the title II and title XVI cases.

In other words, all of us in Boston—three temporaries plus six permanent judges—are hearing 99.9 percent of the exact same cases, of the exact same work, and with the exact same kind of decisions forthcoming. To suggest otherwise is—to use the term again—an outrageous situation.

With respect to the cost of this conversion, we estimate that by giving the present permanent judges who are at Grade 14, step I's and II's, or III's, to give them the grade 15 at step I the cost would be something less than \$500,000, which is not a lot of money in a given fiscal year.

But even so, compare this cost with what it would cost to provide both training and travel to register, and process, and provide another 180 new judges in December 1978; or, if the caseload, as Mr. Gilman has indicated, goes up, the need for even more judges.

The fact is that our people are leaving the service, and they are leaving in numbers. They are leaving in large numbers. And not only will they not wait, or desire to wait, 2 more years if Mr. McFee's suggestion is granted, but I would think that if something isn't done by the first of next year, I would think that the good men—the really good men—would absolutely want to leave.

Why should they want to wait around and gamble for 1 more year and not know what will happen to their career or where they're going?

And, lastly, and most importantly perhaps, Madam Chairwoman, you've been asking, both Tuesday and today, what about those 60 who did not apply?

Well, I'm one of them. I have been a lawyer for 14 years in my State; I've been before the Supreme Court three times and once as head counselor in an important case involving the constitutionality of an amendment to the State Constitution.

I've been in every single court in my State, plus all commissions and other boards. I have also served as counsel to a quasi-judicial agency on children's service. I was in the work, it was good experience.

I have no intention of making application to Civil Service because I think that there is a possibility of gross discrimination being perpetrated by the Office of Administrative Law Judges with respect to my or all our applications.

We have eight cases, and I have the names—in fact, we submitted these names to the Subcommittee on Social Security—of people who, last year, were rated from 74 to 79, and, in almost every instance, the vouchering was good, the experience was similar—it was the SSI experience—but they just missed by 1 point or 2.

But even assuming that these people make the 80 level, it means now that they've been given a low mark and they can't be reached, on the register in case there is a register call. So, it's a nice way of saying: "Okay, we'll continue you on the register, but your mark is so low that we can't make the appointment."

And, thirdly, if one is a veteran and receives an additional 10 or 5 points by some miracle, through Mr. Dullea's office, and to get a higher rating, then he is on the register, and now subject to all kinds of personal, professional, or, if you will, political kinds of pressure that might be placed upon the Bureau not to hire the applicant.

You may have a personality conflict with the chief judge, or you may have difficulty with your regional chief judge.

For all kinds of reasons you may or may not be accepted by the Bureau even though you're on the register.

Let me just close by saying that last June we had a session—representatives of our association from all around the country who came together, or came to Washington so that we could discuss our problem.

At that session we asked Mr. Dullea to join us, and after going on at some length about the 1941 Attorney General opinions and the *Perales* case, he suggested that the APA was never intended for our hearings. I asked him, sitting next to him, I said that even if he was right about the *Perales* case that it was not necessary to provide for APA coverage in the disability hearings—even if he was right—and I did not indicate that I thought he was—would not the provisions of Public Law 94-202 make it clear once and for all that APA does protect and cover titles II or XVI?

He said, to me in front of 14 other people; "Well, you can read a law in many different ways."

When I asked him how he could possibly read 94-202 any differently from the way it was written, in the clear language that it was, and he said: "Well, they do it all the time in this town."

Now, that's the kind of difficulty—the impossible situation—that we face. It's the kind of arrogance that we have to face all the time. And it's a very, very discouraging thing.

How those 180 people came to be in this situation, 3½ years ago is still the issue. Maybe it shouldn't have been done the way. It was, but now we ask for correction of the process. There is no other approach.

Most of us came on board because we saw an opportunity when the SSI process passed. Most of us were outside of government and did not come from inside of government, and most of us were practicing attorneys—in almost every instance.

To take this job and find ourselves in this kind of position is very discouraging. We came to you 2 years ago and asked for help, and you gave it to us. We thought it was clear language then, and still do.

We come again for the same reason. Thank you very much.

[The prepared statement follows:]

PREPARED STATEMENT OF JOHN T. SWEENEY, PRESIDENT, ASSOCIATION OF
TEMPORARY ADMINISTRATIVE LAW JUDGES

Ms. Schroeder and members of the subcommittee, I appreciate the opportunity you have afforded me to address this subcommittee on behalf of the 180 temporary administrative law judges who have labored under difficult conditions for the past three years to provide a more rapid and fair hearing to citizens who are appealing a denial of Social Security or Supplemental Security Income claims. We are grateful for the attention you are giving H.R. 5723, the legislation sponsored by some 70 members of the House which is designed to clarify, once and for all, the status of these dedicated and experienced men and women who have been victims of a continuing battle between two federal bureaucracies.

In the reports of the House Committee on Ways and Means and the Senate Finance Committee which accompanied Public Law 94-202, and in the correspondence of Congressman James A. Burke of Massachusetts which is contained in your record, the history of the conflict between the Civil Service Commission and the Bureau of Hearings and Appeals is well documented. I would like to give you some idea of the morale-shattering consequences of having been in the middle of this protracted conflict.

The members of my association were given permanent career appointments as SSI hearing examiners after the SSI program began in January 1974. Prior to their appointment they were put through a rigorous screening and testing process which was virtually identical to that used by the Office of Administrative Law Judges of the Civil Service Commission. Wilson Matthews, a former director of the Office of Administrative Law Judges, copied the Civil Service Commission's screening process for the Bureau of Hearings and Appeals, as he stated when he testified in favor of Public Law 94-202.

The announcement of the SSI hearing examiner position stated that those who had more than six years of legal experience and were found to be qualified for the position would receive an appointment at the grade GS-14. The Civil Service Commission, however, well after a large number of our members had abandoned their law practices or made other irrevocable changes in their professional careers, decided to classify all the hearing examiners positions at a grade 13.

Following their appointment, and an intensive six week training program in Washington, our members began conducting hearings at their permanent duty stations. A number of them had taken assignments which necessitated moving, sometimes thousands of miles, from their former homes. Those who presided over SSI hearings found that some 80% of their cases involved determinations

of "disability" under Title XVI of the Social Security Act; precisely the same definition of "disability" was at the core of 80% of the cases heard by GS-15 Administrative Law Judges under Title II. Not only were our members performing essentially the same work as others who were classified at GS-15, but they were doing so in what had become a dead-end position, for the opportunity to seek a GS-15 appointment would be blocked by the Whitten Amendment and the belated decision of the Civil Service Commission not to permit classification of any hearing examiner positions at a grade 14.

The 94th Congress, faced with a nationwide uproar over the backlog of Social Security Appeals and recognizing that in the corps of hearing examiners it had an experienced and capable group of jurists who could assist in solving the crisis if they were given authority to hear the same cases as the administrative law judges, passed Public Law 94-202 in January 1976. It took until July 1976 in some cases before the Act was implemented, but once the Civil Service Commission classified the revised job description (still maintaining an artificial differentiation between our members and the other judges in the Bureau of Hearings and Appeals) the temporary administrative law judges joined with the permanent ALJ's to make significant inroads into the hearing backlog.

In the fifteen months since P.L. 94-202 was enacted our members have become increasingly convinced that the Civil Service Commission, particularly its Office of Administrative Law Judges, has toyed with our professional futures in pursuit of its on-going dispute with the Bureau of Hearings & Appeals. In July 1976 Social Security Commissioner James B. Cardwell proposed the creation of a special register to "recognize the unique qualifications of the temporary administrative law judges and take cognizance of the intent of Congress expressed in the House Ways and Means Committee's report on H.R. 10727 (H. Rept. 94-679) which states, 'In evaluating current SSI Hearing Examiners for regular ALJ appointments great weight should be given to experience in actually adjudicating Social Security and Black Lung cases . . .'" In August and November 1976 the Social Security Administration requested that our members be given permanent appointments as permitted by section 930.203(d) of existing Civil Service regulations; the Chairman of the Commission unilaterally denied this request a few days before he left the Commission, and the present acting Chairman reaffirmed the denial as recently as April 20, 1977.

Not only has the Commission arbitrarily denied these requests, but in evaluating the applications for the 15 register of individual temporary administrative law judges it has been guilty of unconscionable delays, refusal to give reasonable weight to the quality of experience acquired in hearing SSI cases, and the grossest sort of abuse of a vouchering system which is inherently unfair in the case of a sitting jurist because it calls for counsel who have received unfavorable decisions or unfavorable dispositions on fee petitions to pass judgement on the capability of the judge who rendered the unfavorable decision.

The Congress, in P.L. 94-202, put temporary administrative law judges under the Administrative Procedures Act to protect their independence and ensure that due process is received by every person who comes before the Bureau of Hearings and Appeals. It failed to realize, however, that by stripping our members of their permanent appointments and by not mandating equality of status between judges doing substantially identical work, it was creating enormous psychological pressures and creating a situation which mitigated against the independence the legislation was designed to foster. A temporary administrative law judge whose qualifications for a permanent position are to be passed upon by the supervising agency and by the individuals who come before him in an adversary role, can not be as independent as the Administrative Procedures Act seeks to make him. The interests of the public, and the need for justice in our administrative hearings system, requires that the legislation which is pending before your subcommittee be enacted into law. Its passage will enable our members to get on with doing the people's business.

Mrs. SCHROEDER. Thank you very much. I appreciate your testimony and your doing such an excellent job of presenting the case.

Does anyone have any questions?

Mr. Gilman?

Mr. GILMAN. Just one or two.

Thank you very much for your remarks, Mr. Sweeney.

Mr. SWEENEY. Thank you, sir.

Mr. GILMAN. If there were to be a compromise worked out with the various agencies involved, what do you think should be the key elements in such a compromise?

Mr. SWEENEY. Well, I don't think a compromise is possible any more, for the simple reason that 2 years ago we supported the selective register and were willing to wait until we got our appointments, even though it wasn't a question of being qualified at that time, because we were doing the work. We thought it was a fair resolution then. That was 2 years ago.

Last year we asked the Civil Service Commission, under their section 930.203(d), over a period of time, to provide for the permanent appointment—and, again, we'd be on the job for—1 year. And that didn't work out. It was refused.

Now, I think we've reached the point where at least with respect to the 60 of us, for instance, that there's anyway we're going to make the register; and if we ever are placed on the register, that, we would ever be appointed.

I don't know that those people would remain on the job. I certainly don't think that I would want to stay after the first of the year.

I think of what Congressman Burke said, and what the Congress did 2 years ago, and what's been asked by the administration, all fair kinds of requests. With these 2 years having gone by; I don't think that this kind of compromise is possible.

Mr. GILMAN. You don't think the additional 2-year delay, for example, is going to accomplish anything?

Mr. SWEENEY. I think it would probably be worse than telling us to forget about the job in 1978, because I think, that to have the kind of 2 more years similar to the last, with the insidious pressure over us in terms of our quality and quantity of work, with no way of telling what would happen to our future rating, being 70 or 80. It would just be an impossible suggestion.

Mr. GILMAN. You mentioned there were some eight cases where you thought there was some prejudice?

Mr. SWEENEY. Yes.

Mr. GILMAN. Could you supply the background for our subcommittee?

Mr. SWEENEY. Yes; I can, and I've already submitted it with the names available to the Subcommittee on Social Security, and I'll be very happy to send it to you.

Mrs. SCHROEDER. If there are no further questions of the witness, the subcommittee will adjourn.

[Whereupon the subcommittee adjourned, subject to the call of the Chair.]

[The following letters were received for inclusion in the record.]



NATIONAL LABOR RELATIONS BOARD

Washington, D.C. 20570

May 5, 1977

Chairwoman Patricia Schroeder
 Subcommittee on Employee Ethics & Utilization
 House Post Office and Civil Service Committee
 Room 603
 Congressional Hotel
 U.S. House of Representatives
 Washington, D.C. 20510

Dear Chairwoman Schroeder:

As Chairman of the National Labor Relations Board and on behalf of the Board and its General Counsel, John Irving, I am writing to express for the record our vigorous support for the Bill you introduced authorizing 100 additional Administrative Law Judge positions. We reviewed and fully support the testimony given by Executive Director Raymond Jacobsen of the Civil Service Commission requesting the creation of 100 additional GS-16 Administrative Law Judge positions, herein referred to as ALJs. When such Bill is enacted, the Civil Service Commission has promised to allocate 30 of these positions to the National Labor Relations Board to enable its Division of Judges to staff up to its approved budget level.

While we are cognizant that ours is not the only agency in need of additional ALJs, our Agency is in dire need of such additional positions to cope with the unprecedented volume of cases already docketed for trial in its ALJ Division and to handle the increase in the number of new cases which the Division will soon place on its trial docket. Our Agency's position may be illustrative of the need for such positions in other federal agencies as well. I would note at this point that during the month of March, 1977, and for the first time in its history, the Agency had more than 5,000 cases filed in one month. This represents an 11 percent increase over the charges filed for the same month a year earlier. When these cases are processed, the volume of cases to be docketed for trial and requiring the services of an ALJ will increase accordingly. Unless the Board's staff of ALJs is augmented by the appointment of enough judges to reach its approved budget level, the Agency will be severely handicapped in its effort to fulfill the objectives of the Act, namely, the prompt disposition of pending cases.

Although the Board's approved budget work program for fiscal year 1977 authorizes 116 ALJ positions, only 96 such positions have

been allowed the Agency by the Civil Service Commission. The Agency's approved budget for fiscal year 1978 authorizes 130 such positions. The necessity for such additional positions is not newly created. In September 1976, the Board sought the assistance of the Office of Management and Budget (OMB) to obtain the 130 positions justified by its budget.

The number of GS-16 ALJ positions allowed to the Board by the CSC still remains 96. However, whereas in September 1976 the Board's complement of ALJs was 86, it is now 93 and with pending appointments in the near future, will reach 95. Thus, the Board will in effect have only a single GS-16 ALJ unfilled position remaining. Meanwhile, the caseload crisis described in the above-mentioned September letter to OMB continues unabated. According to data from the General Counsel of the NLRB, recent record filings of new unfair labor practice charges will soon raise the caseload crisis to intolerable levels.

The understaffing of the Board's ALJs is highlighted by the 1,059 unfair labor practice cases docketed for trial on April 1, 1977. Former Chairman Murphy's letter to OMB notes that on September 1, 1976, the 1,053 unfair labor practice cases docketed for trial in the ALJ Division was an all time high. On January 1, 1977, 1,247 cases were docketed. Prodigious efforts by the Board's ALJs who have been disposing of record numbers of cases by trials and settlements obtained at trial have not succeeded in diminishing the backlog since September 1976. Moreover, the expected flood of new complaints to be issued by the General Counsel of the NLRB will soon raise the trial docket to a level far in excess of the January 1 figure. According to Agency projections, the backlog of cases set for trial in the ALJ Division, absent a staff increase, should by the end of fiscal year 1977 rise to more than 1500 cases.

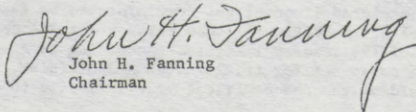
The demands upon the Board to provide speedy trials and to issue undelayed decisions in the unfair labor practice cases which come before it are constant. The response of the Board's ALJs to these demands which has produced greater than ever average numbers of cases heard, settlements obtained at hearings and decisions issued may quickly be dissipated by the counter-productive accumulation of records in cases on their desks awaiting decision. Experience shows that the highest number of cases which an ALJ should carry at one time to meet acceptable time targets for issuance of decisions is 2 to 4. At present they are backlogged with 6 to 9 records in closed trials awaiting decision. It may reasonably be anticipated that before the end of fiscal year 1977 they will be carrying 9 to 12 records in closed trials awaiting decision. The consequences of such overloading are disastrous. Numerous demands are daily received from impatient and frustrated parties for decisions long overdue from our ALJs. As their backlogs increase delays in decision issuance by the beleaguered ALJs will

become longer. The public's satisfaction with the Board's diligent and prompt case handling record will inevitably be dissipated and the Board's effective contribution to the maintenance of the Nation's industrial harmony will be seriously diminished.

It is our view that the Civil Service Commission's request for 100 additional ALJ positions is conservative and fully justified. After replacing 40 positions borrowed from the general pool and fulfillment of its commitment for 30 such positions to this Agency, the Civil Service Commission will have only 30 such positions for distribution to other federal agencies. In light of this conservative estimate, this Agency urges that authorization for the full 100 additional positions be maintained.

For all the foregoing reasons, I urge speedy and favorable action by your Subcommittee on your Bill for the creation by legislation of 100 GS-16 ALJ positions.

Sincerely,


John H. Fanning
Chairman



UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D.C. 20415

IN REPLY PLEASE REFER TO

YOUR REFERENCE

May 2, 1977

Honorable Robert N. C. Nix
 Chairman, Committee on Post Office
 and Civil Service
 House of Representatives
 Washington, D. C. 20515

Dear Mr. Chairman:

This is in further reply to your request for the Commission's views on H. R. 2387, a bill "To amend chapter 53 of title 5, United States Code, to increase the salaries of the Chairman and members of the Federal Reserve Board and of the Director and Deputy Director of the Office of Management and Budget."

In 1964 the position of Director, Bureau of the Budget was originally established in Executive Level II by P. L. 88-426. Since that time, a number of events have significantly increased the importance of the position. As a result of Reorganization Plan No. 2 of 1970 and Executive Order No. 11511 of July 1, 1970, the Bureau of the Budget was redesignated as the Office of Management and Budget, and its Director was vested with significantly broader management and policy concerns, with new responsibilities in such areas as program evaluation, interagency coordination, and inter-governmental relations. Additional responsibilities and functions have since been vested in the Director by such legislation as the Legislative Reorganization Act of 1970, the Federal Advisory Committee Act of 1973 and the Congressional Budget and Impoundment Act of 1974.

In 1974, the increased stature of the Director's job resulted in the enactment of Public Law 93-250, requiring Senate confirmation of the appointment of the Director. The Congressional hearings on that legislation indicate that the Congress, in requiring Senate confirmation, considered the position of Director to be comparable in importance to the other members of the Cabinet whose appointments are subject to Senate confirmation. Because the duties and responsibilities of this position are of similar importance to those of other executive branch positions at Executive Level I, and because the Director is the only member of the Cabinet whose appointment is subject to Senate confirmation but is not at that level, we believe that the position, as well as equity, fully warrants placement in Executive Level I.

In additional support of our position we note that the Quadrennial Commission report cites "existing, serious anomalies in the Federal pay structure," these being the Director of the Office of Management and Budget and the Chairman of the Federal Reserve Board. With regard to the former position, the report uses arguments similar to those presented above; with regard to the latter, the report also states that this position is roughly comparable in terms of responsibilities to the Secretary of the Treasury.

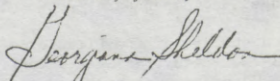
In assessing the proposed upgrade of the Deputy Director of OMB from Executive Level III to Executive Level II, we agree that this important position, which is also subject to Senate confirmation, should be one grade lower than that of the Director. Deputies to Level I cabinet officials increasingly are placed in Level II, e.g., the Deputy Secretary in the Department of Defense, the Department of State, the Department of Agriculture, the Department of the Treasury, the Department of Transportation, and the Deputy Attorney General. We therefore have no objection to this provision.

We also support the proposed change from Level II to Level I for the position of Chairman of the Board of Governors of the Federal Reserve System and from Level III to Level II for members of the Board. The Chairman is the chief executive officer of the Board of Governors, and this group of positions functions as the principal architect of monetary, credit, and operating policies for the Federal Reserve System, and has come to exert a unique influence over the Nation's economic and fiscal policies. The Federal Reserve System operates independently of the executive branch, and is subject to only very limited congressional control. The Chairman and members must bear an awesome responsibility for coordinating the policies of the Federal Reserve System with the economic programs of the President and the Congress. It appears to us that the responsibility these positions have for the country's economic well-being fully justifies the increases proposed.

We understand that from the standpoint of the Administration's program there is no objection to the submission of this report.

By direction of the Commission:

Sincerely yours,



George J. Sheldon

Acting Chairman

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE,
SOCIAL SECURITY ADMINISTRATION,
Washington, D.C., May 23, 1977.

HON. PATRICIA SCHROEDER,
*Chairwoman, Subcommittee on Employee Ethics and Utilization, Committee on
Post Office and Civil Service, House of Representatives, Washington, D.C.*

DEAR MADAM CHAIRWOMAN: I have read the transcript of the testimony before your Subcommittee on May 5, 1977, concerning H.R. 5723. I feel compelled to correct for the record some inaccurate statements made by William Fauver, Chairman of Legislative Committee, the Federal Administrative Law Judges Conference, in his testimony.

On page 64, lines six through eight, Mr. Fauver stated: "I might say that even the Bureau of Hearings and Appeals has recognized that 15 to 20 percent of these temporary judges are not qualified to be permanent judges." While I believe that I may have made such a statement more than a year ago—probably even longer ago—I am pleased to report that as a group the temporary administrative law judges' productivity and quality now compares favorably with our permanent administrative law judge corps. It did take a number of them a longer time to reach adequate productivity than was expected. Currently, only a minute number of the temporary administrative law judges' performance is questionable. The figure is nowhere close to the 15 to 20 percent stated by Mr. Fauver.

On page 86, lines 21 through 23, and page 88, lines five through eight, respectively, Mr. Fauver stated: "... I think that the black lung people did not come under any standards. They were simply hired at the will of the agency ..." and "... The black lung—the former black lung—were not tested in any way; they were just hired. There were no standards for the former black lung—" The candidates for the position of administrative law judge (black lung) had to meet qualification requirements which were almost identical to those required for permanent administrative law judges. I am enclosing a copy of the vacancy announcement that was used in connection with recruiting black lung administrative law judges. It contains the qualification requirements for the position. Prior to issuing this announcement, the position description and the qualification standards were forwarded to the Civil Service Commission for review.

I respectfully request that this letter be inserted in the record.

Sincerely yours,

ROBERT L. TRACHTENBERG,
Director.

Enclosure.

(Announcement of position vacancies in various locations east of the Mississippi River as well as St. Louis, Missouri.)

HEARINGS EXAMINER (TEMPORARY), GS-14, SALARY \$21,960

(Appointment not to exceed December 31, 1973. Details on pages 2-4.)

(U.S. Department of Health, Education, and Welfare, Social Security Administration, Bureau of Hearings and Appeals, January 1972.)

The Social Security Administration, Bureau of Hearings and Appeals, announces temporary position vacancies for Hearing Examiner, GS-935-14, not to exceed 12-31-73, at various locations East of the Mississippi River, as well as in St. Louis, Missouri.

These Hearing Examiners are needed to hear cases and write and issue decisions under title IV of the Federal Coal Mine Health and Safety Act of 1969.

Assignments to these positions will not exceed December 31, 1973. Applications will continue to be received until June 1, 1972. Preference in consideration will be given to those who file early.

Please send your application to: The Bureau of Hearings and Appeals, Social Security Administration, Post Office Box 2518, Washington, D.C. 20013.

The qualifications requirements for these positions are found on pages 3 and 4.

QUALIFICATIONS REQUIREMENTS

An applicant must meet the following qualifications in order to be considered for these positions:

In addition to being duly licensed and authorized to practice as an attorney for 6 years under the laws of a State or the District of Columbia, the Commonwealth

of Puerto Rico, or any territorial Court established under the Constitution, applicants must have had six years of experience in one or more of the following categories:

- A. Experience as judge, master, or referee of a court of record; or
- B. Experience as the head (or one of the heads) of a governmental regulatory body, responsible for (1) conducting, or supervising the conduct of, formal hearings and (2) making decisions on the basis of the record of such hearings; or
- C. Experience in a governmental regulatory body as an officer or employee presiding over formal hearings and making or recommending decisions on the basis of the record of such hearings; or
- D. Experience in the preparation of cases for, or their presentation at formal hearings conducted by governmental regulatory bodies or court proceedings relating thereto; or
- E. Experience in the preparation of cases for and their presentation at trial in courts of record of unlimited and original jurisdiction or the preparation and presentation of appeals therefrom; or
- F. Experience in the active professional supervision and direction of subordinates engaged in functions described in D above.
- G. Experience as a responsible official in a governmental regulatory body, whose duties require him to (1) review, analyze, evaluate, and recommend action to be taken by the head (or heads) of the body on decisions or recommended decisions on cases made by hearing officers on the basis of the record of formal hearings, or (2) render responsible assistance to the head (or heads) of the body in the preparation for, or hearing of, cases coming for a formal hearing before the head (or heads) of the body, or in the preparation of decisions by the head (or heads) of the body on such cases.

Quality of experience.—An Applicant must have had progressively responsible experience which demonstrates his ability to conduct hearings in a dignified, orderly, and impartial manner; determine credibility of witnesses; sift and analyze evidence, apply agency and court decisions; prepare clear and concise statements of fact, law, and order; and exercise sound judgment. Finally, an applicant must conclusively demonstrate that he has the judicial temperament and poise required for successful performance in a judicial or quasi-judicial position. At least one year of the qualifying experience must have been at the grade GS-13 level in the Federal service, or of a comparable level outside the Federal service.

How to apply.—Submit a Standard Form 171 listing all qualifying experience and education and (if within Government) any awards that might have been received. Also, furnish us with a list of at least ten (10) individuals who are familiar with your professional qualifications. In addition, if you claim veterans preference, please furnish proof of this preference. Individuals will be rated on their applications that are furnished. No additional information will be requested; therefore, it is necessary that these forms be as complete as possible.



