

**A Public Hearing**

**Public Hearings of The National Commission on the Public Service: A Time of Crisis and Opportunity**

*Day One: Attracting the Best and Brightest To Federal and Judicial Service*

**July 15, 2002**

Brookings Institution  
Falk Auditorium  
1775 Massachusetts Avenue, NW  
Washington, D.C.

**PAUL VOLCKER:** Well, Chief Justice and Justice Breyer and ladies and gentlemen, this is a special occasion. In a way it's a launching of the National Commission on the Public Service. I think you all are aware or you wouldn't be here that the government has been in something of a problem in the United States. It has a problem not just today but over recent decades really of lack of trust; a kind of skepticism, which is healthy, has too often descended into a kind of cynicism about all parts of government, maybe least of all the judiciary but certainly in the administration. There was a burst of change, almost enthusiasm, after September 11th, something good coming out of that tragedy, but a lot of evidence, statistically and otherwise, suggests that in the months since then we've somehow reverted to a sense of cynicism, distrust, lack of interest in public service, all of which is confirmed by survey after survey from different points of view from those outside of government and in a way a discouraging thing from those inside of government.

That all gave rise to the idea of having a new Commission on Public Service. I think it's fair to say this grew out of the fertile minds and imagination of one Paul Light at Brookings who is special advisor to the Commission, but we have inveigled deliberately a small number of people, some 13 people to join this effort.

I am conscious and self-conscious about the fact that I thought we had a broad range of experience. We certainly do have a broad range of experience from the executive side, from the congressional side, from private life. We have had nobody from the judiciary serving on the Commission, so maybe that makes it particularly appropriate that this public hearing today will start with hearing from the most senior levels of the judiciary.

I want to make some note that Judge Robert Katzmann in New York was the earliest to I think bug us, if that's the right word, about the importance of dealing with the judiciary as well as the executive and congressional branches. I am joined by a rather lump group of our commissioners on the dais this morning, Ken Duberstein, experienced certainly in the White House on the executive side and some familiarity with the Congress, I would say; Connie Horner, who was head of OPM at one point, in and out of government, now at Brookings; Donna Shalala, who, you only had eight years in your last tour. Were you the only cabinet officer that stayed from beginning to end?

**DONNA SHALALA:** Two more.

**PAUL VOLCKER:** There are two more? Went down there, as far as the University of Miami, to have a champion football team right away. Success follows here around.

Bruce Laingen, who was the executive director of another Commission on the Public Service 15 years ago?

**BRUCE LAINGEN:** Another Volcker Commission.

**PAUL VOLCKER:** And Hannah Sistare, who came down from the Hill to be our executive director, and I know many others in the audience and elsewhere that are part of this team.

I just have one little disappointment. I've been looking forward to this for some time when the justices volunteered to come and testify, and I had this mental picture that I could be up here on the platform and they'd be down there. What other opportunity would I ever have of this sort? But I think perhaps I didn't get the word to the people who arranged the seating, but I think it's maybe more appropriate this way.

**MR.:** That means they've already gotten a raise.

**PAUL VOLCKER:** They've been very good though.

Obviously the judiciary is part of the government. Whether or not we have a member in our group, there are those who think they have especially exalted status, and I was interested in looking at the testimony, the written testimony of both the justices here that they went out of their way, while they have a particular interest in what's going on, the judiciary is only one branch of government, a co-equal branch.

But we are delighted to start with this important co-equal branch and I will just call on the Chief Justice, if I may, to start it off and thank you for being here.

**CHIEF JUSTICE WILLIAM H. REHNQUIST:** Thank you very much, Mr. Chairman, members of the national commission. I appreciate the opportunity to appear here today on behalf of the men and women serving as federal judges across the country, and I thank you on their behalf for the important work the commission is performing. I don't need to cite the statistics on falling judicial pay. We all know that the pay for federal judges, when adjusted for inflation, has fallen dramatically in the last 30 years and we're familiar with the spiraling compensation in the private practice of law. Nor do I need to recount the vastly increased workloads faced by our federal judges; it's easy to make the case that judges' pay should be increased. The 2001 report by the American Bar Association and the Federal Bar Association, entitled *Federal Judicial Pay Erosion: A Report on the Need for Reform* has done so. The June 14th letter of this year from the Secretary of the Judicial Conference of the United States to the Commission demonstrates the inadequacy of judicial pay.

Congress hears testimony about it virtually every year.

My colleague Justice Breyer will today present a compelling case that our judges are not fairly paid.

Rather than focus on the fact of inadequate pay for the federal bench, I want to focus first on the effect of inadequate pay on the federal bench and second on the need for a permanent solution to the periodic salary crises that continue to plague us.

The framers of our Constitution came up with two major contributions to the art of government. The first was the idea of an executive not dependent on the political support of the legislature. The second was the idea of the judiciary independent of the executive and legislative branches.

Many countries of Western Europe have adopted new Constitutions since World War II and the countries of Eastern Europe have followed suit after the Berlin Wall came down. The idea of a presidential as opposed to a parliamentary government has not caught on with these countries, but the idea of an independent judiciary has. Every year American lawyers and judges go to these countries to help them establish such a system. The American judicial system is admired throughout the world, but inadequate judicial pay undermines the strength of our judiciary. Article III of the Constitution promises federal judges tenure during good behavior, and to quote, a "compensation, which shall not be diminished during their continuance in office," close quote.

The Constitutional Convention the framers recognized the need for periodic increases in judicial salary. They also recognized that the judiciary would require persons of the "first talent" as they put it and that to attract them the pay would have to be substantial.

The original draft of the compensation clause of Article III contains a prohibition on either decreasing or increasing the salary of a sitting judge, but the delegates recognized that freezing judges' salaries would seriously compromise the protection of life tenure. They agreed that Congress needed the ability to increase salaries as circumstances might require.

Inadequate compensation seriously compromises the judicial independence fostered by life tenure. The prospect that low salaries might force judges to return to the private sector rather than stay on the bench risks affecting judicial performance. Instead of serving for life, those judges would serve the terms their finances would allow and they would worry about what waits them when they return to the private sector.

John Adams in 1776 warned that judges' minds should not be distracted with jarring inches, they should not be dependent upon any man or body of men.

According to the administrative office of the United States Courts, more than 70 Article III judges left the bench between 1990 and May, 2002 either under the retirement statute, if eligible, or simply resigning if not, as did additional numbers of bankruptcy and magistrate judges.

During the 1960s, on the other hand, only a handful of Article III judges retired or resigned. In January of this year alone four federal judges announced that they would leave the bench and two of them were not yet eligible to retire. Although we can't say that the judges who are leaving the bench are leaving only because of the inadequate pay, many of them have noted that financial considerations are a big factor. The fact that judges are leaving because of inadequate pay is underscored by the fact that most of the judges who have left the bench in the last ten years have entered private practice. It's no wonder that judges are leaving when law clerks who join big law firms in large cities can earn more in their first year than district judges earn in a year.

Inadequate pay has other serious effects on the judiciary. Director Meecham's June 14th letter to you makes clear that judges who have been leaving the bench in the last several years believe they were treated unfairly. For example, a former district judge said, "I couldn't feel secure about the future. We'd been assured we would receive cost of living increases, then Congress said no to the promised COLAs, cost of living allowances."

That sense of unfairness is not confined to those who have left the bench. A magistrate judge recounted the impact of Congress' failure to provide regular COLAs and noted, "Although I did not enter public service with any thought of becoming wealthy, I did enter with the hope that I would be treated fairly." That sense of equity has eroded the morale of our judges.

A career in federal judicial service has historically attracted excellent people, experienced in the life of the law, to resolve a constantly changing array of important disputes in the common law tradition. We don't want experienced judges to leave because they can't afford to put their children through college or because their salaries are eaten away by inflation.

Every time an experienced judge leaves the bench the nation suffers a temporary loss in judicial productivity. It takes time for a new judge to gain the experience necessary to judge well and manage an ever-increasing docket efficiently. The judicial system benefits from the infusion of new judges required when judges leave after a lifetime of service, but our system cannot long tolerate the regular loss of experienced, seasoned judges that's now occurring. Diminishing judicial salaries affect not only those who have become judges, but also the pool of those willing to be considered for a position on the federal bench. I'm not suggesting that there is a shortage of lawyers lined up to apply for a vacant judgeship; there isn't, but many of the very best lawyers, those with a great deal of experience are not willing to accept a job knowing that their salary will not even keep pace with inflation. Our judges will not continue to represent the diverse face of America if only the well to do or the mediocre are willing to become judges.

As the Commission on Public Service formed in 1987 noted, "If we cannot provide adequate pay recruitment risks becoming limited to the wealthy or the inexperienced."

Or, to paraphrase what George Mason said at the Constitutional Convention, the question will not be who is most fit to be chosen but who is most willing to serve, and these are two quite different questions. We cannot afford a judiciary made up primarily of the wealthy or the inexperienced.

I recognize that the salaries of federal judges are higher than those in many occupations and that some may be skeptical of the need to raise the salaries of judges, who already earn about \$150,000 a year at a minimum. But it is not fair to compare judges' salaries to salaries in other occupations. Those lawyers who are most qualified to serve as federal judge have opportunities to earn far more in private law practice or business than as judges.

I'm not suggesting that we match the pay of the private sector, but the large and growing disparity must be decreased if we hope to continue to provide our nation a capable and effective federal judicial system.

Providing adequate compensation for judges is basic to attracting and retaining experienced, well-qualified and diverse men and women to perform a demanding position in the public service. We need judges from different backgrounds and we want them to stay for life.

There are different routes to becoming a district or circuit judge. Promotion through the ranks is one. District court judges are appointed to the courts of appeals. Magistrate judges and bankruptcy judges are appointed to the district courts. State court judges are appointed to federal courts. The salary factor here is not a disincentive because most all of these judges earn less than district judges.

But we do not want this route to be the only path to Article III judgeship. Promotion of people who are already on a public payroll should not be the only source of federal judges. The federal judiciary in the past has been able to attract experience and able lawyers who have extended and successful experience in the private sector. Their experience in that sector brings a perspective and an independence, which is vital to the judiciary. But it is these potential candidates who are deterred by the current level of compensation. We cannot hope to come close to the amount they earn in private practice, but the appeal of public service makes up a good deal of the difference, but that appeal is not enough at the present level of compensation.

I have spoken for many years about the need to compensate judges fairly. One might say I've spoken till I'm blue in the face. In 1989 in testimony before Congress I described the inadequacy of judicial salaries as the single greatest problem facing the judicial branch today. Eleven years later in my 2002 year-end report on the federal judiciary I said that the need to increase judicial salaries had again become the more pressing issue facing the judiciary. In the late 1980s an earlier National Commission on the Public Service, also chaired by you, Mr. Volcker, documented the retention and recruitment problems for judges and other high-level government officials caused by inadequate pay. The commission noted an historic pattern of lengthy period of stagnation, relative decline of the purchasing power of judicial and other high-level governmental salaries, a decline of 35 percent from 1969 to 1988. Yet here we are in 2002 still caught in the same box, continuing to use an arrangement for setting pay that simply ignores the need to raise pay until judicial and other high-level governmental salaries are so skewed that inevitably a large and political unpopular increase is necessary.

This salary crunch also affects others in the public service by artificially compressing the salaries of those whose pay is tied to these higher salaries.

It's obvious that the current approach to judicial salaries doesn't work. The Commission on Executive, Legislative and Judicial Salaries, known as the Quadrennial Commission, was devised in 1967 to solve this problem. Its members, all from the private sector, would recommend to the president appropriate salary changes for the judiciary, as well as the Congress and senior executive branch officers.

The president would take these recommendations into account in making his salary recommendations to Congress. Unless Congress acted to disapprove them within 30 days, the salary rates recommended by the president would be implemented.

Over the years this approach has produced varying results, as the president noted in transmitting his 1989 salary recommendations to Congress.

Every one of the commissions that has met over the past 20 years concluded that a pay increase for key federal officials was necessary. The president then also noted that the 1989 commission had documented both a substantial erosion in the real level of federal executive pay since 1969 and the recruitment and retention problems that have resulted, especially for the federal judiciary.

Because neither the Quadrennial Commission's recommendations nor cost of living adjustments were regularly implemented, periodic crises in federal pay continue to arise.

The 1989 commission recommendation and the president's recommendation based upon it were not implemented, but they laid the groundwork for the enactment later that year of the Ethics Reform Act of 1989. It provided a cost of living adjustment that year, followed by a pay raise the following year for a total increase in judicial pay of nearly

35 percent. The act also provided for yearly upward adjustments, automatic unless rejected by Congress, based upon the Employment Cost Index.

I hoped at the time that we had found a real way to ensure the judges' salaries at least would keep pace with inflation but since 1993, nine years ago, there have been only four adjustments in the salaries of federal judges, resulting in an average annual cost of living allowance adjustment of about 1 percent.

Although the judiciary appreciates any upward adjustment, these small and infrequent increases have once again allowed federal judicial salaries and salaries for many others in public service to erode to an unacceptable level. The compensation of federal judges continues to lag far behind both inflation and the rising compensation of attorneys in private practice. Oliver Ellsworth, who resigned as chief justice of the United States in 1800 due to poor health, said, "Though our country pays badly, it is the only one in the world worth working for." Those words still ring true today. Because these problems are longstanding, however, it's not enough to simply muddle through the current crisis and then go back to business as usual.

I thank the commission for its work that it has undertaken and sincerely hope that it will devise and the government will implement a permanent solution.

Thank you, Mr. Chairman.

**PAUL VOLCKER:** Thank you, Mr. Chief Justice. We appreciate your presence. Justice Breyer?

**ASSOCIATE CHIEF JUSTICE STEPHEN G. BREYER:** Mr. Chairman and members of the commission, I'm certainly glad that you're looking into this problem, which I think is very important.

I'll summarize my testimony.

In the first part I simply say while I'm glad that you're here, I'm not all glad to be here myself. The fact that we are here I think reflects, first of all, that there is a problem and the chief justice has spelled it out. We give a lot of talks, as he said, to judges from other countries and we find all over the world people beginning to understand the importance of judicial independence. And when I say why, why is that, why is it important for people, the answer tends to be because people want to be prosperous and they're not going to be prosperous unless investment is protected, and investment will not be protected unless you have fair rules of contract and you won't have fair rules of contract unless you have independent judges who can enforce them.

In today's world more and more people want to protect basic human rights. That's certainly perhaps more important, and you won't get the basic human rights of individuals protected, very well anyway, without independent judges to enforce them.

So we normally say you see judicial independence for both those reasons, prosperity and basic liberty, is important to you and to people of your country.

Now, our founders recognized that. That's why they put in the Declaration of Independence, which we read perhaps some of us last week or ten days ago, one of their complaints was he, namely the king, has made judges dependent upon his will for the payment of their salaries. And right in the Constitution the framers wrote the words that judges would be paid a compensation that "shall not be diminished." That was an effort, not sufficient but I think it is necessary, an effort to try to help guarantee that independence.

Well, something's gone wrong with that, because real salaries have fallen, a lot.

Now, the other reason obviously I'm uncomfortable being here is I'm not and I think no person is a very good advocate in his own cause. This is all not to be for the judges; it's really to be for the public. And the people who have to explain to the American public the need for this kind of independence, and the need for compensation that is not diminished in order to help guarantee that are not the judges; people will think we're bias and they may be right

but that really should be the press, it should be the bar, it should be the professors, it should be people who take these matters seriously, the problems of American government and study them.

So for both those reasons I'm uncomfortable and sort of sorry to be here, but I think we're both here because we feel this problem is really important. And as far as judicial compensation is concerned, it's way out of line. It's reached a place where the institution is threatened with irreparable injury.

All right, now am I overstating that? Well, I'll provide a few figures here that I think show that I'm not overstating them.

Now, if you look at the first chart, this is real pay and real pay means what it says, real pay. And if that line goes down, it means your pay is being cut. There's absolutely no difference between pay that's cut minus a thousand dollars, minus two thousand or pay at a time of inflation that doesn't keep track.

Now, as you see, the average worker in America over these many years has had real pay increases so that today it stands about 12.5 percent in real terms above what it was in '69. The average judge, and I'd say Congress too and the top of the executive branch too has had nothing but real pay cuts and they're now 24 percent below the level of real pay that they were when we started.

Now, if you look at this and we break it down a little bit, we can break it down and it's the same story, sector by sector: doctors, administrative people, accountants, the military, architects, engineers, teachers, the federal civil service are up. They've seen their pay stay steady or increase. In fact, those are increases. But members of Congress and federal judges have seen it go down.

Now, you can make the comparison every which way. Here is a comparison with salaries of CEOs not of the private sector. I wouldn't even dream of talking about the private sector. These are CEOs of non-profit organizations, non-profits, hospitals, schools, charity. When you look at that what you see is they now are considerably higher than the chief justices' salary, the circuit judges, the district court judges. I think that shows something is out of line.

But to go a little further with it, I looked since I used to teach, I had a particular interest in what teachers made. And I always had thought when I was teaching, well what's the right amount. You know, God doesn't tell us what the right amount is. There are people all over America who are paid a lot less than what they rightly deserve, and it isn't just judges or others. I don't know what the right amount is but the rule of thumb as it used to be was that a district judge, a federal district judge would make about the same as a law professor made, a senior law professor, because that's about comparable in age, a senior law professor, what they'd be paid, not for consulting or on the side but just, say, an 11-month salary or a salary for teaching and writing. And I was right, that's what it used to be when we started in this, say, if we go back to 1969. The district judges had just gotten a pay increase; it was about 40,000. A dean at Harvard was paid 33 then and a senior law professor was paid 28,000. But they caught up a little bit and so I'd say it was roughly comparable, maybe the district judge a little ahead.

Well, let's see what it is today. Over here now we have the district judges at 150. There is our senior law professor, 250,000 and there's our law school dean, 325. Now, that's my informal survey of top law schools, which I'm forbidden to say who is what less jealousy break out among them, but you see that change. It's that dramatic a change, which is a comparison, I mean, I wouldn't even think of talking about the private lawyers. I'm talking there about the teaching profession and I'm not talking about their consulting part; I'm talking about their part for teaching and research.

There, of course, I can't resist—I can't resist comparing it to the private lawyer. There we are. You see if you look at that briefly, so if I call, I'd say there's a gap between the district judge now or the court of appeals judge and the non-profit sector. I tend to think of the difference between the district and circuit court of appeals, of the judges and my old friends and colleagues, the law professors, I call that a chasm. I mean, this is the Grand Canyon. I mean, this is a very big difference with the private sector, and that's why we're here now.

Our own law clerks, who will go out and earn more money the next year than we will on our court, and, of course, what matters is that on the court of appeals and on the district court the matters are far worse.

Now, I put in for purposes of comparison what other countries have done, and what you see there in England, Canada is that this simply shows that other countries do deal with the problem of inflation, and what they have done

over the course of time is that they, that's the red bar, have increased their judicial salaries more than inflation and that's because the country as a whole has become richer as of course ours has too.

But then here we see what happens in the United States and that's the same figures put in a different way, that inflation goes way up but the judges salaries have not kept track.

So today if we look at these other countries, whereas it used to be their judges were paid a lot worse, today they're all paid a lot better.

I use chief justices for comparison there because those are the numbers that were easiest to come by, but it is the same all the way down.

Well, those are the figures and what they're trying to show is that cut it upwards, downwards, sideways, diagonally, any way you want, things at this point have changed a lot, financially for the worse and they're pretty far out of line no matter how you measure it.

Well, you still could say so what. You'd say \$150,000 is a pretty good salary compared to what most Americans make and so why should Americans be asked to pay more. And I think the answer, as the Chief Justice pointed out here, has nothing to do with the merits of judges as individuals, and my own view, as I've said, there are millions and millions of Americans who are not paid what they're worth individually. It has everything to do with the nature of the institution and what the institution is designed to do for the rest of America.

So that if, in fact, you see happen what has happened, that judicial salaries in real terms have been cut and cut and cut, what will you find? You'll find, as the chief expressed in his letter that he read, tremendous financial insecurity, a kind of concern or fear in the judge's mind that you don't want this, and that can lead, say, to resignation as what would matter most to me I would call the college education of my children. And a judge will take the bench and he'll have planned for that. His or her eyes are open. They understand the situation they're getting into, but what they don't expect is the continuous cuts. And the continuous cuts have been particularly harmful in respect to college education, of course, because the price of college education has gone up much, much quicker than inflation and much higher and there are no scholarships for people who earn \$150,000 a year.

So fear of a certain kind or insecurity, followed by resignation and tremendous compression, pay compression for everybody in the judiciary including the court clerks or the U.S. attorneys or others, make about the same. And what happens if it's continuously out of line? Well, as was said, less attractive, you change the nature of the judiciary. It isn't that you won't have people flying to the jobs; it's that instead of a cross section of the profession, which to me was very important, you'll get a kind of maybe European style where it's, in fact, a bureaucratic occupation and people go into it and sort of rise within it or they come out of the lower pay parts of the profession or they have independent wealth and they've accumulated vast amounts of money.

Now, they're excellent people in all of those sectors that I've just described, but what is not excellent is if the judiciary is made up exclusively or almost exclusively of people who come out of that background. It should be widespread.

And what could be worse is you'll see it as a stepping-stone. Somebody can make a little bit more, go into the judicial office and later go into the private sector, and I think other parts of the government can tolerate that perhaps—I know it's controversial there—but I believe it spells death for the judicial system. It should never be a stepping-stone to some other more lucrative job in the private sector.

Now, as you said and as I would close by noting, we're not the only sector of the government with problems. There is really not anything to be said in terms of the seriousness of the problem that ours is any worse than that of Congress or in the executive branch or elsewhere. In my own experience in government, and I've worked in the other parts of the government too, that if you find people saying salaries don't matter they're wrong. Salaries do matter. If you keep cutting and cutting and cutting you will find the institutional strength sapped. You will find morale diminished. You will find it harder to attract and keep people. The reputation of the agency will fall. The public will become disenchanted. It will begin to distrust the organization. It will lose interest. And as a result, morale within the organization falls.

It's a kind of vicious circle. And I think we've progressed too far, whatever the part of government, along that circle if, in fact, we all know—I mean, the same is true of the forest service, the FBI, the Congress of the United States and the federal judicial branch. If you do not pay over a long period of time what seem to be fair salaries to the forest service you'll find that the wilderness suffers. And if you don't do the same for the FBI you will find in the long run that the effort to fight crime, to fight terrorism becomes more difficult.

And if in the case of the judiciary you do the same you will discover that eventually you'll wake up and the judiciary just won't be what it quite was, and the effort to be independent, the effort to have an effective judicial system that guarantees human liberty, among other things, will be seriously diminished.

So that's what I think the problem is and I appreciate your listening to it.

**PAUL VOLCKER:** Well, I think we appreciate even more the willingness of both of you to be here with these very eloquent statements of the problem that we have indeed been struggling with for a long time. As you say, I think we've been struggling with it for a long time, back to the early information we had 15 years ago and before that it was an issue. You made quite clear that some of these questions go back to the founding fathers and they saw the issue.

I was a little bit concerned in your statement when you pointed out Alexander Hamilton considered the possibility that the country might have recurrent bouts of inflation. I didn't know that Alexander Hamilton was weak on that point, but there he was ahead of as usual.

We've got a number of issues that I think we want to explore. I want to give Ken Duberstein a chance to maybe lead off because he's going to have to go before too long.

**KEN DUBERSTEIN:** Thank you, Mr. Chairman.

Your comments, Mr. Chief Justice and Associate Justice Breyer, your statement of the problem I think is truly extraordinary and frightening, but I have a few simple questions first to the Chief Justice. What do you think a federal judge should be paid? Let's cut to the chase.

**CHIEF JUSTICE WILLIAM H. REHNQUIST:** I have not done any sort of an examination of comparable salaries, that sort of thing. I think that a federal judge now should get an increase that will be substantially more than simply a cost of living adjustment, but I just don't know enough to say a federal judge should make 235,000 a year, 195,000. I think a commission like yours, which has access and is able to study related matters would be much better able to decide that than I would.

**KEN DUBERSTEIN:** Justice Breyer, do you want to comment on that?

**ASSOCIATE JUSTICE STEPHEN G. BREYER:** If you remember my background initially before government was teaching, so I started out thinking a district judge should be paid about what a senior law professor was paid for teaching and for writing. Now, that's a rule of thumb but I'd stick to that and I'd think maybe you go 10 percent up, 10 percent up, 10 percent up. But I have no pipeline to some supreme pay authority, but that's how I grew up. I grew up —

**KEN DUBERSTEIN:** Neither do we.

**ASSOCIATE JUSTICE STEPHEN G. BREYER:** That's what I'd stick with, the academic world.

**KEN DUBERSTEIN:** But what concerns me is knowing the way the system operates and being part of that 1989 recommendation when I had the honor of serving in the White House, I'm not sure, Justice Breyer, are you suggesting that federal judges should be paid more than members of Congress, and if so how does that operate and how do you get that accomplished?

**ASSOCIATE JUSTICE STEPHEN G. BREYER:** Do I think they should be paid more than members of Congress? Absolutely not. I don't have any reason to think the problem is any the less serious in Congress. I mean, I remember working there years ago and it's gotten a lot worse. There are congressmen and women who travel, let's say, from Alaska or Hawaii or Colorado, they're going back and forth every week, some of them are sleeping on their desks, some of them are having to buy an apartment here while they do something at home and they can't really talk about it because there are a lot of people in their districts who are a lot worse off, but my goodness they have a problem and how are they supposed to educate three children or two children at good universities.

And when I see in the newspaper, when I see Congressman so-and-so has said he just has to resign, Senator so-and-so has said he's going to take another job, I think, one, they can never talk about the salary. People just don't. It's somehow viewed as rude or not polite or just something you don't say. And two, I think to myself, I wonder if the salary problem doesn't have something to do with this. And then the third thing I wonder is, you know, there is Senator so-and-so or Congressman so-and-so; maybe he'd like to stay. And I believe the people in his district might still want him.

And I think when you're in one of these public offices like a senator or a congressman you're not just doing it for yourself, there are millions of people who want you and if those people want this person and would vote for him and he's not doing it because he just can't afford to educate his children, I think that's terrible.

**KEN DUBERSTEIN:** And yet the linkage is so clear between Congress and the judiciary. Perhaps you have some ideas of how to work out a delinkage that you might want to share with us.

**ASSOCIATE JUSTICE STEPHEN G. BREYER:** Linkage/delinkage is a technical matter that I think Congress would have to deal with. I can say exactly what the goal is, in my mind. This is my personal view. I'm not talking for anyone other than myself. The salaries of the Congress and the cabinet and the judiciary should be the same, all right, they should be approximately the same, making differences only like 10 percent or so in those levels that are a little bit higher or a little bit lower. The president's salary I guess should be higher and it was recently doubled. All right, now I don't see a difference between the branches in that respect. Now, how you get there I think is a matter for people who understand how to bring these things about in legislation and I would hope that Congress would come right along with the judges as with the cabinet.

**PAUL VOLCKER:** Let me make just one point for the benefit of those of you out there. We are talking about something important now, about salaries and pay for congressman, judges, presumably the principle executives of government. This is not a commission that is solely dedicated to talk about salaries. We're not talking today about salaries that are across government generally, where there's a big question about comparability and whether it's high or low. We're talking about a very limited number of people at the top of the structure of government where I think very clearly there is a very real problem.

But the commission will have to deal with that and make some recommendations, but it's going to be one of many recommendations going to the structure of government, recruiting, hiring, firing, how you induce interest in government and how you organize government.

This is not a commission devoted to judicial salaries alone or executive salaries alone. Its importance justifies this hearing and we're certainly delighted to have the justices here, but I just don't want any wrong impression that this is the whole of the commission. There's a certain cynical view that any commission discussing government is really a hiccough to a hidden agenda in only talking about salaries. That is not the case.

**KEN DUBERSTEIN:** I absolutely agree but think that part of this, the judicial salaries, congressional salaries, executive branch salaries at the top level certainly need to be part and parcel —

**PAUL VOLCKER:** No doubt about that.

**KEN DUBERSTEIN:**—of our deliberations and that's why I welcome the testimony of the justices.

**PAUL VOLCKER:** I had to struggle with this question in an early commission, which is what is the right level. You mentioned college tuition.

**MS.:** It might be easier to keep tuition down than it is—

**PAUL VOLCKER:** It might be easier to keep tuitions down, and to the best of my knowledge, since I have something to do with it—

**Mr.:** Is that part of our deliberations?

**PAUL VOLCKER:** Well, I've been unsuccessful there. When I used to be a college trustee I was told to shut up about this, but it's \$40,000 a year for a first-class university. After taxes, a 150,000 salary, I mean I think it demonstrates a problem. I don't think federal judges ought to be soliciting universities for scholarships for need for their children, or at least not for one child. So there we are, defend tuitions.

**MS.:** I'd rather ask the Chief Justice and Mr. Justice Breyer a question, because in some ways it's out of some of our experience to recruit for a lifetime job, which is a different culture actually than a lot of the rest of the public service, so at the upper level certainly I think the public servant is trying to recruit the key people for at least a major part of their careers.

What are the other things, other than salary, that need to be done to attract? I thought one of the more interesting points that you both made was a mix of people to the judiciary because you don't want just people coming from state courts or assistant U.S. attorneys. You really want a mix of people. And it's got to be not only resetting the salary and regular increases; there have to be some other things that attract people to something that's at least where we say it's a lifetime job.

**CHIEF JUSTICE WILLIAM H. REHNQUIST:** Well, I think one thing that makes the judiciary very attractive, although it doesn't completely compensate for the lack of compensation, is the mix of work that judges do. I mean, there are many people who are district judges and I think they feel they'd just as soon be district judges as judges of courts of appeal. They're two different kinds of work, but basically I think judges find their work quite satisfying. And if they didn't, we would really be in much worse shape than we are.

**ASSOCIATE JUSTICE STEPHEN G. BREYER:** I agree. This is somewhat of a statement against interests, but virtually all of the judges, whom I know, including myself absolutely love this job. I mean, you become, among other things, so patriotic. I mean, you sit there and see every possible person in America come into the courtroom and they have problems and their problems—I mean, we're talking about our problems but a lot of people have really serious problems and they're there in part to help solve them. And it's a privilege to do this job.

And so you could say well then what's the problem about the salaries? I'd say the problem is that there are a lot of people who ought to be there who feel they just can't do it. And I think the kind of people that you'd like and I think that it's terribly important in a sense to remove the issue of salary from their thinking. You don't have to pay people a lot to do that, but you do have to make it roughly comparable to the rest of the profession.

But when I think about your branch, the executive branch or the congressional branch I hope very much you go into some of these ethics rules. I hope very much you go into a whole host of rules that I know you know very, very well, because we've got into it, that make public service really quite difficult and could be rationalized.

But for us in the judiciary I think we have a fabulous job.

**PAUL VOLCKER:** Connie?

**CONSTANCE HORNER:** Thank you, Mr. Chairman.

Mr. Chief Justice, Justice Breyer, your testimony is overwhelmingly compelling on the merits, it seems to me, and the big elephant in the room that we're skirting is the overwhelming compelling political problem of the link with congressional pay, because members of Congress, not all of whom, most of whom do not come from big cities with high cost of living and high pay like lawyers and law school deans at urban universities, cannot ask their constituents to raise their pay to a level commensurate with what might be an appropriate level of pay for judges.

And that leads me to two questions. One is how can the commission help make the case that the judiciary needs to be honored with higher pay in a very meritocratic society? How can we make the case to the public that the judiciary is, if I could use the word, deserving, vital to the public's well-being?

And secondly, have you ever considered the executive branch modest attempt to solve the problem by going to a system of higher pay in higher localities, given the higher cost of living in those areas?

**CHIEF JUSTICE WILLIAM H. REHNQUIST:** Let me answer the last part of your question first as to whether there should be differentiated pay. I practiced law for 16 years in Arizona and when I first moved there in 1953, which I'm sure seems like ancient history to most of the people in this room, there was a differentiated salary, what we called the two metropolitan counties, which were Phoenix and Tucson were paid at one rate and the cow counties, where it was said there were more cows than people were paid at a different rate, but then most judges would come into Phoenix to try a case and they would say, "Well, now that we're in Phoenix we should get the same amount," and it just created all sorts of controversy, and I honestly don't think that that would work for judges. As to making the case to the public that the judges are special, I think that the observations that Justice Breyer made are very pertinent, where was is seen as special by people in Europe, the necessity, absolute necessity for any system of capitalism to be able to rely on the courts for adjudication of their dispute and the ability of anybody to come into court and assert a claim of human rights or individual rights and have it adjudicated, not by somebody who is indebted in any way to the parties who may be depriving them of that right but who is absolutely independent is a priceless thing, I think.

**CONSTANCE HORNER:** What institutions in society are capable of making this case on behalf of the judiciary and frankly given the required link as you see it on behalf of the members of Congress?

**CHIEF JUSTICE WILLIAM H. REHNQUIST:** Well, why don't you answer. You've got more feel for institutions than I have.

**ASSOCIATE JUSTICE STEPHEN G. BREYER:** I think for the judiciary it has to be the bar, because they have to explain why it is that this is a benefit to the public. And I think that the press has an interest in this. I mean, what sort of discourages me sometimes is one of the reasons I think it's so tough for Congress to stop cutting its own pay is because the articles that are written always say "Congress pay increase." They never say "Congress stops the pay cut caused by inflation." That's too many words. And yet when the president's pay was recently doubled I thought that the articles I read in the newspaper described it accurately. Every single one seemed to have a statement of what the salary used to be and how the real salary had been cut, and I didn't see any tremendous public outcry.

**CONSTANCE HORNER:** No, there wasn't any.

**ASSOCIATE JUSTICE STEPHEN G. BREYER:** So I think that I'm not the expert on this, that where you ask the people in the academic institutions, the bar, and actually that's where I would go first frankly.

**PAUL VOLCKER:** What is the bar saying?

**ASSOCIATE JUSTICE STEPHEN G. BREYER:** Well, I think the bar will say absolutely do it. The bar will say —

**CHIEF JUSTICE WILLIAM H. REHNQUIST:** The federal bar hasn't been very active.

**ASSOCIATE JUSTICE STEPHEN G. BREYER:** Oh, no, the bar hasn't been very active. Yes, I think it's active. I suspect if you ask them they'll come in and be very supportive.

The difficulty is they've been supportive, they've been quite supportive, at least since I first became a judge in 1980, but I haven't seen the board translate it into the stopping of the pay cuts.

But nonetheless I think they understand the need for this. After all, they understand the need for the protection of individual rights and they want to have judges in the courtroom whose decisions they respect, and they have an interest in a strong judiciary. I think they would be helpful.

**PAUL VOLCKER:** Bruce?

**BRUCE LAINGEN:** Mr. Chairman, I would just say that your earlier commission in the late '80s looked at this question. Paul Light knows that. He made recommendations then in the context of what we saw then as a disparity in pay. But the fact that you are holding this commission and that you got the chief justice of the United States and an associate justice here to testify simply speaks to the way in which this problem has worsened and needs attention.

**PAUL VOLCKER:** I agree. Your presence is compelling evidence of itself, apart from your eloquent statement. Let me just ask one technical, modest technical question inspired by your Supreme Court dissent on the case of the application of the 1989 Ethics Act. You were arguing I think that once Congress passed that law, which provided for keeping abreast and pursuing not with the cost of living but with other salaries, which is something I have maybe more instinctive sympathy for than the cost of living actually, once they made that decision and they didn't live up to it there was some constitutional question whether they were obeying the precepts of the Constitution. Now, suppose you got a step increase here that seemed more or less adequate and Congress at the same time said we're going to escalate it with other salaries or cost of living or something, does this then become an irrevocable congressional decision that we're going to have to live with for all eternity?

**ASSOCIATE JUSTICE STEPHEN G. BREYER:** I never give advice of the opinions. (Laughter.) But I would say that I thought that the statute in that case in my mind was absolutely ideal. It seemed to me that what that statute that Congress enacted said is the following: Judge, your salary will keep up with inflation—well, not quite, half a point below.

**PAUL VOLCKER:** Half a below wages.

**ASSOCIATE JUSTICE STEPHEN G. BREYER:** Wages, right. Provided that, because I'm just saying what your statement means in practice, provided that the average American keeps up with inflation and that the average civil servant keeps up with inflation, but if either the average civil servant or the average American does not keep up with inflation you won't either. Now that seems to me an ideally fair statute. And what a pity, I say from a policy point of view that Congress didn't just follow it.

**PAUL VOLCKER:** I just had a question raised with me about whether we can get questions from the audience, something I had not contemplated. Paul Light is shaking his head. He says no.

**PAUL LIGHT:** No.

**PAUL VOLCKER:** I had not contemplated it, so we'll make a ruling. Is there any urgent—I think we have already spoken about our gratitude that you have come here, spoken so eloquently about a very important issue for the judiciary, which obviously has consequences for others as well.

**CHIEF JUSTICE WILLIAM H. REHNQUIST:** We're grateful to you for hearing us and for the work you're doing.

**PAUL VOLCKER:** Thank you very much.

**CHIEF JUSTICE WILLIAM H. REHNQUIST:** Thank you.

**MS.:** Thank you.

(Break for panel change.)

**PAUL VOLCKER:** We get to equally important issues I think over an even wider area than the judiciary with our witnesses this afternoon, one clearly part of the administration. Kay Coles James, director of Office of Personnel and Management, is at the top of the personnel situation in government, human resource. We haven't renamed it yet in government, have we, but it is human resources and in a fundamental way what we were talking about and will be talking about are human resources and their management. We're delighted to have her with us.

And then we have David Walker, who can have a different perspective, technically from the Hill I guess or alongside the Hill as an instrument of the Congress as comptroller general of the United States, head of the General Accounting Office and has come from the private sector relatively recently, so brings that particular perspective, a very valuable perspective to our deliberations.

Without further ado I have the first name on my list anyway is Kay James so we'll start with you, Director James, and we appreciate it.

**KAY COLES JAMES:** Thank you, Mr. Chairman and indeed it's a privilege to appear with this distinguished panel, which has been commissioned to help strengthen and modernize the federal civil service. I want to begin by expressing my sincere appreciation to each of you for answering the call to public service by lending your valuable time and your tremendous depth of experience and expertise at this absolutely critical time in our nation's history.

The information that you're developing regarding federal employee pay levels, pay for performance, how to deal with poor performers, flattening hierarchies and other issues will be extremely important to the national debate. The reform of our civil service and the improved ability to respond to hostile threats to our freedom requires bipartisan cooperation and the wisdom represented by those of you who have already dedicated much of your professional careers to serving our nation.

I look forward to working with the commission on our many shared goals and opportunities. The deliberations of this commission are occurring against the backdrop of a continuing terrorist threat to our fellow citizens here at home and the largest federal government reorganization in modern time. Homeland security is on everyone's mind today and there are hearings on Capitol Hill this afternoon and tomorrow on the president's proposal to create a new and unified department to protect the people and the freedoms of the United States. I'd like to spend just a few minutes addressing that subject and then move to some of the larger issues. With the president's proposal to create a new department of homeland security we have a pressing and urgent need to accelerate beyond conceptual discussions of human capital management and focus our discussions on the existing and increased flexibilities needed to stand up a new cabinet department with a critical security mission. We cannot forget the fact that we are a nation at war.

The changes being contemplated for homeland security were prompted by cowards who flew airplanes of innocent travelers into the World Trade Center tower, the Pentagon and then to the hillsides of Pennsylvania. Clearly, in the aftermath of September 11th our overriding mission and responsibility as government officials must be to address current and emerging threats.

Through strategic analysis, the president and his team have searched the current enterprise and they found that the federal structured diffused responsibilities for homeland security and other agencies, and the president believes a strategic consolidation of these components is necessary.

Make no mistake, the development of the department of homeland security is a daunting task. This will be the most dramatic restructuring of the federal government since 1947. The creation of the department takes into account enormous challenges and important factors, such as the transfer of nearly 170,000 employees into the new department, the transfer of 22 cabinet agency or small agency components, each governed by varying personnel systems, employee pay and benefits managed by seven different payroll systems, some with compatible components and some with very different components, and 17 different unions represent employees being transferred to the department, each with a multitude of different bargaining agreements and negotiated provisions.

With a workforce entrusted with the most compelling public service mission of our generation, it's absolutely imperative that the new department of homeland security have a modern and effective personnel system, a system that gets the right people to the right job in the time it takes to make a difference.

Since those who threaten our country are relentless, the system we develop to run the agency must be flexible enough to anticipate and meet threats one, two or five years into the future.

The bill that the president sent to Congress creates a broad framework to allow the new department to retain the best aspects of the government's existing personnel system and to build on them.

The department of homeland security will be subject to the principles of merit and fitness.

The plan is to develop a world-class agency with a personnel system designed to attract and retain good people, to pay them at market rates, to offer incentives for exceptional contributions and to ensure accountability for individual performance.

For employees transferred to the new department of homeland security there is tremendous honor and tremendous responsibility inherent in their assignments.

The flexibility the president envisions for the new department is aimed at one result and one result only, ensuring the security of our homeland.

And under these proposals employees can expect this: They can expect to be treated with respect and be compensated appropriately, be protected when they disclose waste, fraud and abuse through whistleblower protection, receive veterans employment preference, be covered by generally applicable employment laws such as the Civil Rights Act, the Fair Labor Standards Act, the Social Security Act, Government Ethics Standards and the Hatch Act restrictions on political activities, and participate with collective bargaining agreements.

OPM is prepared and will work with the leadership of the new department to ensure that employees are not distracted by unfounded concerns about their pay and benefits, and our public servants must be able to concentrate on the department's critical mission of protecting our homeland.

The president's legislation allows the secretary of homeland security, working in conjunction with the director of OPM, to develop a new personnel system. The process for the development of this system will be fair, balanced, objective, with participation by all the stakeholders, including unions, interest groups and employees.

We consider it a top priority to ensure the new department's human resource's requirements are supported by the full scope of our system. This extends to realigning personnel, addressing compensation, staffing and retirement issues and ensuring the complete integrity and confidence of the workforce of this new department.

Having said all of that, while our efforts to develop a responsible personnel policy for the new homeland security department are a top priority for OPM, the sustaining work of government continues. OPM plays a key role in supporting the president's management agenda government wide through training and by driving the Human Capital Initiative and scorecards throughout government.

As the leader and managing partner of the Human Capital Initiative, OPM works hand in hand with our OMB colleagues to review each department's proposed human capital action plan.

The work that we have been doing to encourage strategic management of human capital has federal agencies poised to match successful private sector organizations in the use of compensation as a strategic tool. The shift already is visible in a wide variety of demonstration projects and alternative personnel systems that align agency pay practices and bonuses and award programs.

But agencies operating under the general schedule grade and step system run into a huge roadblock. The current system simply does not support strategic management very well. There's nothing strategic about lockstep advancement. The government is burdened with an outdated compensation system that has minimal ability to encourage and reward achievement and results. It does not reflect market pay levels and its prescribed procedures effectively preclude agencies from tailoring pay programs to their specific missions and labor markets.

When all is said and done, the fact remains that right now the federal government is operating with a 50-year old compensation system that was custom built for the process obsessed age of the file clerk. Continued reliance on this antiquated system is comparable to insisting that today's offices use carbon paper and manual typewriters.

There are many interrelated issues, which demand constant attention from a corporate HR perspective. OPM is in the process of further reorganizing our own structure to ensure better service and to respond to requests from our

agency customers. We are providing them with tools and advice to help recruit, hire and retain quality employees, to train and develop their workforces and manage performance.

Through our efforts, we have shared expertise and knocked down multiple barriers that prevented agencies from making better use of flexibilities available under current law.

In the past several months we've offered new models for senior executive service performance ratings, 30-day hiring plans and suggestions on performance management and better recruiting strategies.

All too often job seekers find the federal hiring process slow, bureaucratic, overly burdensome and unresponsive to applicants. The result is that we lose some of the best prospects, those talented and diverse citizens who would be working for America.

But since last fall OPM has been involved in an interagency project to modernize federal job vacancy announcements. We are reconnecting campuses to the federal government, enlisting more than 350 colleges and universities in a national call to serve. And further we are testing new and innovative ways to recruit and hire. Harnessing technology, we held the federal government's first ever virtual job fair in April, which drew more than 20,000 applications for 270 available jobs. We introduced major enhancements to the USAJobs Web site this month such as improved navigation and search tools that make the system even more accessible to our citizens. The USAJobs Web site redesign effort is a first step in improving job seeker services through recruitment one-stop, one of five e-gov initiatives that OPM is managing government wide. Together with e-clearance, e-training, enterprise HR integration and e-payroll, the federal government is developing an interlocking system that will play a very important role in streamlining and improving procedures for moving federal workers through the employee lifecycle, beginning with recruitment, continuing through all aspects of employment and training and culminating with retirement.

Not all of the changes needed to position the federal government as a world-class employer can be accomplished administratively. The administration is very pleased that Senator Voinovitch has taken major parts of the Managerial Flexibility Act and added them to his own bill and we're quite anxious to see and watch as that works its way through Congress.

There is no question that modernizing our outmoded, out of date system involves fundamental change, the kind of change that makes very many people very nervous. We must stay focused and keep the mission of public service uppermost in our minds to get us beyond the distrust, the fear and the uncertainty that exists. This is an issue of good government. We can and we must develop systems that respond better to the 21st Century organizational demands and employee concerns, systems that motivate rather than demoralize our best workers, and we must act now to position the federal government to capitalize on the resurgence of interest in public service that we currently see, especially among our young people.

At this time of national testing when our nation is on a war footing we cannot shy away from taking the steps necessary to reinvigorate the federal civil service. Too many people in this country and around the world are counting on us.

The mission of the new department of homeland security is unique but the commission will recognize the personnel challenges that are emblematic of the challenges confronting all of us concerned with the federal public service. And through your efforts to help drive the growing consensus that first the current system is indeed broken and it does not serve our modern workforce well; second, that now is the time to fix it, there is urgency evidenced by the threat to our national security and there is opportunity; and finally that we can and must create a better, fairer system based on and grounded in the merit principles, a system that will attract and motivate the best and the brightest of the rising generation to heed the call to public service.

So thank you again for the opportunity to be here today and thank you for the very important work of this commission.

**PAUL VOLCKER:** Well, thank you for your presence, Madame Director. You have set out an enormously ambitious program before us this afternoon. I have a feeling if you're successful you're doing all our work for us. We

wish you success, but I appreciate too the point you made, I think this crisis that we face in terms of domestic security provides an opportunity for rethinking programs and structures that are indeed half a century or more old and at this point need some revamping and we'll see whether we can take advantage of that opportunity in our thinking and in your doing.

Before we do the questions I think it probably makes sense to turn to David Walker. He is heading an agency that has, I'm going to say maybe one of the few in Washington that has maintained I think a high degree of public trust and acceptance and understanding and is going through a lot of change under your predecessor and I think continuing under your guidance, David, and we appreciate your being here to tell us what's been accomplished and what needs to be done.

**DAVID WALKER:** Thank you, Mr. Chairman and members of the commission. What I'd like to do, if I can, Mr. Chairman, is have my whole statement entered into the record and take about five minutes to summarize some of the key highlights.

I'm pleased to be here today to discuss the essential actions that the federal government needs to take in order to manage its most important asset, namely its people or human capital. The early years of the 21st Century have proven to be a period of profound transition for our world, our country and our government. Given recent trends and long-range fiscal challenges, the federal government needs to engage in a comprehensive review, reassessment and reprioritization of what it does, how it does business and who does the government's business.

We must reexamine a range of government policies, programs and operations. The status quo is simply unacceptable. The long-range numbers do not add up.

We must reexamine and debate, including our current human capital policies and practices. This reexamination will in turn require federal agencies to transform their cultures and shift their overall orientation in a number of fundamental ways, which I lay out in my testimony.

Leading public organizations here in the United States and abroad have found that strategic human capital management must be the centerpiece of any serious change management initiative and effort in order to transform the culture of agencies and entities.

Fortunately, we're now seeing an increased attention to strategic human capital management and a real and growing momentum for change is now evident since we've placed strategic human capital management on our high risk list, meaning GAO's high risk list.

The president, OMB and OPM are taking a number of steps and others and I think that is encouraging. Therefore, the key question today is how do we best seize the opportunity and build on the current momentum. A few preliminary comments:

Clearly, we must take steps to attract the best and the brightest to public service. One key will be to fix the current lengthy hiring process to come into government and for those who are interested. The current process is badly broken and must be fixed, especially for experienced hirers. Hundreds of thousands of people have wanted to come into federal government post 9/11; many never get the courtesy of a response.

This means not only hiring the best people but also retaining the best people. We must empower, enable and encourage employees in an equitable manner. One key element will be to modernize the government's outdated performance management system. They are terrible and will never enable us to maximize performance, assure accountability in the federal government unless they are fundamentally changed.

Leading organizations use their performance management systems as a key tool for aligning institutional, unit and employee performance, achieving results, accelerating change, managing the organization on a day to day basis and facilitating communication throughout the unit so that discussions about individual and organizational performance are integrated and ongoing.

In my opinion, modernizing agency performance, appraisal and management systems and linking them to agency strategic plans and desired outcomes should be a top priority and does not need any legislative change. Government wide agencies also need to place increased emphasis on holding senior executives accountable for defined organizational goals.

Ultimately, an effective performance management system must link pay and incentive programs to individual knowledge, skills and ability and contributions to achieving organizational results.

Efforts to link federal pay to knowledge, skills, abilities and performance should be part of a broader effort to align resource decisions to results. In this regard, holding managers accountable for results based upon a specific dollar allocation versus FTE caps would be a major step in the right direction.

As you know, I believe that much greater emphasis should be placed on skills, knowledge and performance in connection with all major federal employment, promotion and compensation decisions at all levels rather than the passage of time, the rate of inflation and the geographic location of an individual, which is all too frequently the case today.

Shockingly, over 80 percent of all pay adjustments in the federal government are due to the rate of inflation and geographic location. That is unbelievable.

The nature and scope of the cultural transformation that needs to take place in many agencies across the federal government will take years to accomplish, easily outrunning the tenures of most political appointees. One option for addressing the issues agencies face is to create a chief operating officer position for selected departments and agencies. The COO could provide the sustained management attention essential for addressing key stewardship responsibilities in an integrated manner, while helping to facilitate the transformation process within the agency and to bridge between administrations and leaders within administrations.

We also need to comprehensively reexamine opportunities for better using the federal government's career leadership, namely the SES. As the federal government's leading accountability organization we at the GAO have made a concerted effort to identify and encourage the implementation of human capital practices that improve the efficiency, effectiveness and accountability of the federal government.

In addition, to providing tools to help agencies help themselves, we believe it is our responsibility to practice what we preach and to lead by example. We believe that we are in the vanguard of the federal government's efforts to modernize existing human capital strategies and we are committed to staying in that position, and I'm very pleased to work with Director James, with OMB Director Daniels and deputy director designate Everson on these and many other management reform initiatives. The stars are really aligned and there is an opportunity to make some real progress.

We at GAO have implemented numerous initiatives, have others underway and others that are planned, a vast majority of which did not take any changes in federal law, although we do have some additional flexibilities made available to us first in 1980 and then the year 2000 that give us some ability to make additional progress that others may wish to have and may need to have eventually.

In summary, Mr. Chairman and members of the commission, I believe that there is no more important management reform than our human capital challenge. If we ever hope to maximize the performance of the federal government to assure its accountability and to engage in the transformation that is necessary for the 21st Century then the people strategy, the human capital strategy is the key. That will be the difference between success and failure.

Thank you, Mr. Chairman.

**PAUL VOLCKER:** Well, thank you. Thank you, both. I think we've had two very encouraging, energetic statements, I would say, from people who are on the firing line and are moving aggressively.

Ms. Horner, would you like to ask a question?

**CONSTANCE HORNER:** Yes, I would. I would like to ask the same question of both our witnesses. Let me say first, as someone who was fighting this battle 15 years ago, I am extremely happy to see the clarity and vigor you both bring to this and I am so encouraged that the argument at least has fallen on some fertile ground and perhaps is sprouting a little bit. That's the full extent of my optimism now, and to my question. And I say that regretfully and I hope I'm wrong.

I think there's no question that human capital is the key, if you can say there is one key, and that we need to go to a far more performance oriented, market-based system that allows the government to hire very good people timely, promote them on the basis of their performance, retain them, bring them in from the outside at different points in career.

There is a great deal of concurrence that that's the desirable goal. However, the Federal Employee Union values seniority greatly, are strongly committed to it, in my experience, and over time has persuaded their friends on Capitol Hill, and there are federal employees in every congressional district in the country, so they are persuasive, have persuaded them to protect seniority at the expense of performance. I may oversimplify here and I acknowledge that, but I think the bottom line is the argument seems in the past always to get down to that, and therefore performance-based systems have not been able to be legislated or when attempted administratively have been barred legislatively.

Why do you think we can do it now?

**DAVID WALKER:** Do you want me to go first?

**KAY COLES JAMES:** Sure.

**DAVID WALKER:** First, I think it's important to reinforce what we're not talking about. We're not talking about changing veterans preference, we're not talking about not recognizing that length of service has some value. We're not talking about moving away from the Webster's Dictionary definition of what merit is. I think one of the problems that we have in government is that we use terminology that if you look in Webster's you wouldn't find the same definition, words like merit, like tenure. We need to start using the plain English definition of some of these terms, and that's part of the disconnect.

I think one of the reasons that you haven't been able to get there is because people don't have a lot of trust and confidence that any performance appraisal system will be designed properly and implemented effectively, so that's been part of the problem.

The second part of the problem is I think if you look at most of our performance appraisal systems in the federal government they are not worthwhile for implementing any type of a performance based compensation system. Furthermore, I would argue that it's not just performance; it's also skills and knowledge. Most government agencies don't even know what are the skills and knowledge that they have in their workforce. And by the way, more years of experience presumably will translate into more knowledge and hopefully more skills.

And so therefore I think there are ways to be able to address some of these issues in a different way than has been the case in the past, but we're going to need to make that case and we're going to need to make sure that we've got the necessary support system, including performance appraisal systems, that have the credibility to be able to implement any type of system effectively.

**KAY COLES JAMES:** A very specific question: What makes us more optimistic now than in the past in terms of our ability to get it done? A couple of things: One, and I think David alluded to that when he talked a little earlier about sort of all of these stars aligning and I take every opportunity I have publicly to thank David for his leadership and making sure that the strategic management of human capital was on the high risk list. So having done that, that's one piece that's different that I think is driving things.

Two, I think we have for the first time in American history a president that has an MBA who understands management issues and has put the strategic management of human capital at the top of his list, and so somehow when those things are important to the boss they tend to get done.

And traditionally perhaps when administrations come in they are less concerned about management and perhaps more concerned about policy and in this administration we are, in fact, trying to drive both. And the president knows that you get more of what you measure, so all of us are, in fact, being measured on how well we do in terms of driving the management agenda.

Specifically what makes us think that we'll be able to gain some headway, particularly with unions in terms of seniority and some flexibility there, I think several things. We are a nation at war. Union members are some of the most patriotic people in America. The entire federal civil service I believe is. These are people who have a demonstrated love for this country because they have dedicated their lives to serving it. They don't do it in uniform. They serve this great nation through the civil service.

I think that if we can demonstrate in tangible ways an atmosphere of trust, mutual trust and respect, if we can demonstrate that there is no desire to diminish in any way a particular employee's rights and privileges but we are trying to balance national security as an example with this department and with any federal agency, not just with the new department, but if you have the best person for the job and that person is identified, whether they are in or outside of government, I think all of us as Americans want the right person in the job at the right time and balance that against what are the age old preferences for seniority.

So I think that we are in a different culture, we're in a different time. We have people who understand these issues more and better and that it's a priority all across government. And so I think for those reasons we are likely to see change take place.

**CONSTANCE HORNER:** Thank you. That's very encouraging. Both of your remarks are very encouraging and I wish you both well and continued vigor.

**PAUL VOLCKER:** If they do well enough we can collapse the commission.

**CONSTANCE HORNER:** Absolutely.

**PAUL VOLCKER:** I was struck by David's emphasis on performance appraisals. One of the interesting statistics that we run across from all these surveys is if you ask government employees how they think their fellow workers are doing, they say some high percentage are not doing very well, not very competent, they're not very energetic. If you look at the performance appraisals, Paul will remember the exact statistic, it's .5 percent of the performance appraisals say that the workers are not doing an effective job.

**KAY COLES JAMES:** Well, I discovered that as well and in my own department as well as across government and looking at the percentages of people who received outstanding ratings and then looking at whether or not we were actually accomplishing the visions and the mission and we realized that we really truly were not performance based, because it was sort of a routine annual exercise to call people in and give them their outstandings and then send them out without a real discussion of whether or not missions were being accomplished, jobs were being done, results were being driven.

And so there is a concerted effort throughout the federal government right now to do just that, and that is to tie performance and pay to make sure that people tie pay and results, that people understand the fact that this is a results driven administration.

And so we are providing the tools to the managers in the federal government right now to help them learn how to assess performance and tie pay and bonuses to that performance.

**DAVID WALKER:** Mr. Chairman, could I mention something real quick on that?

I think it's important to recognize that a vast majority of federal employees are dedicated public servants who are good people who are performing well. There is some percentage that don't meet that definition but frankly there's some percentage in the private sector that don't meet that definition either.

**PAUL VOLCKER:** There's a response to the question there and not all that large.

**DAVID WALKER:** Exactly. And I think that what we need to have is that we need to have a performance management system, of which a performance appraisal system is a subcomponent, that accomplishes three things: It helps everybody achieve their maximum potential, to make their maximum contribution to achieving positive results and outcomes. Secondly, it helps us to recognize and reward the top performers in various ways, not just money. And thirdly, it helps us to document and deal with those who aren't doing what they should. It's got to accomplish all three. The current systems, by and large, do not.

So how can you go to a performance based compensation reward system if you don't have an infrastructure that will support it?

**KAY COLES JAMES:** The infrastructure needs to be fixed but along with that I think that we have a serious problem with managers who don't know how to use the infrastructure that is in place. They are not trained how to do performance evaluations. They are not trusted by their employees because the employees see sometimes some disproportionate treatment and they are fearful of taking action within the current systems that we have. So I think it's not just the systems that need to be fixed, but we need to provide better training for managers and hold them accountable for how they work the systems that we have.

**CONSTANCE HORNER:** Well, I agree with that but I think the incentive structure is equally important. You can train a manager on how to run a performance system fairly and effectively and still have a manager who does not confront the poor performer. And until that manager's performance is rewarded by his team, his subordinates' performance, until his or her performance is rewarded on the basis of the quality of subordinates and therefore outcomes, I think the disincentives to take on the hard cases are still going to be there, no matter how much training there is, so that's a structural change.

**PAUL VOLCKER:** Ms. Shalala, you have had more experience in managing difficult institutions and have lately run into difficult—think of tenured professors.

**DONNA SHALALA:** Labor unions were easy compared to tenured professors. (Laughter.) I'll take the United States Senate any day to a faculty senate.

I was sitting here thinking how hard it is to do when you talk about these performance systems, and I had a different kind of question actually to ask the two of you, because so much of the emphasis on improving the civil service and public service performance is focused on attracting very high quality individuals, paying them accordingly and rewarding them when they do good work when, in fact, the way you move government agencies and change the culture is with groups of people where it's difficult to identify individual performance.

When I first went to the Department of Health and Human Services, at the awards ceremony that we had every year every single award went to an individual. When I left every award went to a group of people in which it would have been difficult, even though they were at different levels, to identify individual performance and yet they had moved mountains, streamlining the FDA drug approval process, the implementation of the Children's Health Insurance Program, the implementation of welfare reform. But it hadn't been in one agency; in fact, they were successful because they cut across agencies and the group was made up of people from different levels.

It seems to me the challenge is in the personnel system. We know what barriers we have to break down to recruit better people. We actually, because of extensive both public and private sector experience, know something about managerial systems for doing evaluations of individuals.

The question is how do we both change the culture of the institutions so that you can actually move, because it's 99 percent implementation, as far as I'm concerned, and reward the teams you need to reward by something other than a bonus system, because we've argued bonus systems now extensively and frankly the bonus system is the easiest thing to use when you're moving those groups and you can have the old fashioned civil service system and simply use a bonus system to reward what is high group performance.

So my mind has been changed over the last eight years, not that I want to stick with the old civil service system, but I see the challenge as very complex.

**KAY COLES JAMES:** I would agree, and it's not either/or; it's both/and. I think we have to find ways to recognize individual as well as group performance. And one of the ways that that happens I think is by identifying and having clear missions. It's amazing to me —

**DONNA SHALALA:** Even though the legislation itself may not be clear.

**KAY COLES JAMES:** That's right. That's right.

**DONNA SHALALA:** Take the Medicare legislation, for example, which is highly complex, it's very difficult to hold people to goals when the legislation is contradictory.

**KAY COLES JAMES:** But I think that's a part of what the management team does when they come in and set that kind of clear direction, those kinds of clear goals where they take complex legislation, which may be contradictory and together work together as a senior management team to come up with that. But I think you're right, you've got to find ways to both reward the individual and reward the team, the group, the process.

And I think that there are some interesting models of that going on around the federal government now, not just at HHS but at some of the other agencies as well, so I would agree.

**DAVID WALKER:** Can I comment? I would say two things: One, we have to recognize why people come to work in the federal government. It's fundamentally different than why they come to work in the private sector. I've been in both. Most people come to work in the government to improve their self worth not their net worth, and most of the people that come to work in the federal government have a stronger identity to the word "we" rather than the word "me."

And therefore that means that when you're designing these types of systems you do need a balance. You need something that recognizes individual performance based upon clearly defined objectives, competencies, et cetera, and you also need to recognize that many times to accomplish things you have to have teams, you have to work across boundaries and you want to encourage people to do that so you have to do both. And I think it's not one or the other; I think it's both.

**PAUL VOLCKER:** A direct question: You mentioned COOs, chief operating officers. Do you contemplate that as, say, a political appointment or —

**DONNA SHALALA:** We're talking about a permanent secretary like the grade system, I assume?

**DAVID WALKER:** Let me give you a concept, Mr. Chairman. This is a hybrid of what some countries have already done but applying it to the U.S. system, basically recognizing that when you're talking about change management, most authoritative literature will tell you it's a seven-plus year effort to effectively achieve change and implement it to the point where it can sustain a transition, no matter what sector you're in. Obviously presidents get elected for four years. They may or may not get reelected. But if you look below the president's level, cabinet secretaries come and cabinet secretaries go—secretary Shalala is an exception to the rule in that regard—and if you look below that, deputy secretaries, et cetera.

**PAUL VOLCKER:** It's a two-year rule.

**DAVID WALKER:** Right. Somebody has got to be focused on the infrastructure. Somebody has got to be focused on the longer range. Somebody has got to be focused on the integration. Somebody has got to be focused on the stewardship. Somebody has got to be focused on those good govern issues that it doesn't make any difference who's the president.

So I think there has to be consideration to somebody at the deputy level, like a deputy for management, and I'm not talking about what we used to have, like an assistant secretary for —

**PAUL VOLCKER:** So use a civil servant.

**DAVID WALKER:** Well, what I would suggest is the following: It would be a term appointment. They would be subject to a performance contract and they could either come from the civil service or they could come from the outside. And it could be one or the other, and obviously in the aggregate both, which is a hybrid of what some other countries have done in order to try to deal with some of these inherent issues that take years to do.

**PAUL VOLCKER:** Mr. Laingen.

**BRUCE LAINGEN:** I just wanted to say that I am less an expert on the federal pay structure than anyone in this room. I don't know much about it. I used to say when we had our first commission that if there is a real expert, someone who's really knowledgeable about the pay structure of the federal government somewhere I'd like to meet him or her.

I know enough about pay in the federal system, however, to have taken particular note, Mr. Walker, of your sentence in your testimony, and that's what we've been talking about, of course, the system needs to move toward a system that is based to a greater degree on the knowledge worker, skills, abilities and performance of the individuals involved.

Somehow that seems to damn obvious. Why can't that happen? I want to ask you that question. Fundamentally it seems to me it means effective management, and when I say management I mean leadership. We haven't used the term leadership much this afternoon, but that's critical in any organization and it certainly is in seeing that a system comes into place that does rely heavily on the knowledge, skills, abilities and performance of the individuals involved.

I wanted to ask a specific question of you, Mr. Walker. Does the GAO have a system that works like that?

**DAVID WALKER:** Yes, we have a system that is not perfect, it never will be perfect but we have made a number of changes that probably more than any other government agency that's based upon those concepts. And we're constantly working to try to improve it. I mean, for example, we have electronically inventoried the skills and knowledge of our people. We have redesigned our performance appraisal system so it is state of the art, not just for the public sector but for the private sector. It's competency based. It's linked to our strategic plan and our core values. It's focused on outcomes. We're in the process of implementing it at the present point of time.

That is a major change. There are elements of our workforce that love it. There are elements of our workforce that are very concerned about it. But I am absolutely convinced that it is the future.

I think Director James said something that was particularly noteworthy here, and that is much of the federal government system, whether it's pay, whether it's classifications, whatever, is based upon the federal workforce that existed in the '40s and '50s. And it may or may not have made sense in the '40s and '50s, given the nature of the workforce that existed then. It sure doesn't make sense today.

**KAY COLES JAMES:** And if I could just respond to that question, which is a very reasonable question, if it seems so sensible why haven't we changed. And the answer is because it is based in statute. The classification system, as burdensome and cumbersome as it is, the compensation system is based in statute, has not changed in over 50 years and when that system was implemented over 75 percent of federal workers were clerks. And so it may have made sense to have this complicated system where jobs were classified and to look at the manuals and you're right, there's somewhere in the federal government, I think there are two or three at OPM, there's somebody that really understands this.

I don't know, Connie, if you were able to before you left OPM.

**CONSTANCE HORNER:** Not a chance.

**KAY COLES JAMES:** I'm still working on it. But the answer to your question is it's based in statute. And why has David been able to do this? Because he's not bound by that statute and because the rest of the federal civil service is, which is why it's absolutely, absolutely essential to have the flexibilities within Title V not to be bound by those rigid classifications and compensation systems.

**DAVID WALKER:** I need to come on this and it's very important. Let me tell you what flexibility we have that others probably need, and that is we have broad-banding. We have broad-banding, which is a classification system. It's also a way to be able to deal with the compensation issue. And one has to be very careful about how you design and implement a broad banding system, because you can have positives and negatives if you don't do it the right way.

But in addition to that, even if you've got that legislative authority, if you don't know what the skills and knowledge of your people are, if you don't have a modern and effective performance appraisal system that achieves those three objectives, if you don't end up training your people, if you don't end up doing some of these other things, it really doesn't make any difference if you have the authority. You have to be able to deal with these other issues, too. And so what's different is that we not only have the authority but importantly we've done a number of things to take advantage of it and I think a lot of people need to do what they can within the context of current law and yes there need to be some additional flexibilities with adequate protections to prevent abuse.

**BRUCE LAINGEN:** I'd say it's a reality, Mr. Chairman, government is too damn big.

**PAUL VOLCKER:** I think it's too damn big but the objectives are not always so clear cut either. It may be conflicting and it's a little hard to get a performance appraisal when you're not quite clear what the objective is.

**CONSTANCE HORNER:** Well, and that's why so much of this has to be understood in context. We have large agencies in the government in which the legislation is so complex that instituting a performance based system on top of that with expectations that it's going to be straightforward is fundamentally unfair to the people there. I'd love some day, David, to pursue the issue of the chief operating officer, because I'm not sure that's the person that has the long-range vision. I think the experience of government agencies is that they're firefighters. While the secretary can go off and do other kinds of things, some good deputy secretaries have played that role where they have management experience, but often we don't put skilled managers in those deputy secretary positions.

**DAVID WALKER:** And if I can come back on that, I think that's important. I think we need the current deputy positions. I'm talking about something in addition to rather than in lieu of, but my experience, and I've headed three federal agencies, two in the executive, one in the legislative branch, the fact of the matter is that the deputy secretaries today, not all of them have the management experience, none of them have the interest in the issue. Furthermore, even if they do it's a fulltime job to be implementing the president's agenda and to be implementing the secretary's agenda and to being the alter ego of the secretary. That's a fulltime job.

And so from a practical standpoint you need somebody focused on this good government management kind of stuff and hopefully they'll be supportive as well, and clearly the secretary has to be or you're not going to get it done.

**CONSTANCE HORNER:** Mr. Chairman, I don't disagree with that. My only point is if you're administering the Defense Department or HHS, where you clearly have agencies with different missions and different cultures, what you have to be careful about is over centralization of personnel and budget systems that will interfere with the ability of an NIH, for example, to attract first-rate scientists and do better science or with the FDA in terms of their own competitiveness.

So that position has to be designed differently than the British approach, but I like the idea of strengthening that, combined with the chief information officer and some of the other roles.

**KAY COLES JAMES:** Mr. Chairman, could I just make one brief remark?

**PAUL VOLCKER:** Very brief.

**KAY COLES JAMES:** Very brief. I think one of the things that's emerging from this conversation is the incredible importance of engaging the Congress with the executive branch, with the civil service and the political leadership in developing a much keener understanding by Congress of the management challenges the federal government faces. Otherwise, it will not support the statutory change that's necessary.

**PAUL VOLCKER:** I think one of the things that emerges from this hearing for me is to emphasize and reiterate the fundamental importance of the fundamental change that we are inheriting a system that's 50 years or more old and there is unhappiness and justified unhappiness I think with a lot of performance of government and it's time to do something about it and getting Congress alerted to it is part of the problem and getting the public alerted to it is essential to get Congress alerted to it. So I think it's helpful of all of you participating so clearly and effectively and eloquently and thank you very much.

We will be back with you I'm sure. These problems do not have easy and fast solutions.