The original documents are located in Box 37, folder "Pay (3)" of the Philip Buchen Files at the Gerald R. Ford Presidential Library.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.: Personnel Pay

Date: August 29, 1975 Time:

FOR ACTION: cc (for information):

Jim Cannon
Jack Marsh
Rod.Hills

FROM THE STAFF SECRETARY

DUE: Date: August 29, 1975 Time: IMMEDIATELY

SUBJECT:

Lynn Memo 8/28/75 re General
Schedule Pay Raise
Message to Congress and alternative plan

ACTION REQUESTED:

____ For Necessary Action
____ Prepare Agenda and Brief
__X__ For Your Comments
__X__ For Your Recommendations
____ Draft Reply
____ Draft Remarks

REMARKS:

This is the highest priority of - hoping to announce this A.M.

Our approval was communicated verbally on 8/29/75
T.

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

Jim Connor
For the President

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

August 28, 1975

MEMORANDUM TO THE PRESIDENT

FROM: JAMES T. LYNN

SUBJECT: General Schedule Pay Raise

To implement your decision of August 27 that the general schedule pay raise should be held to 5%, there are attached (1) a message to Congress and (2) an "alternative plan."

Legally, these must be signed and transmitted to Congress "before September 1," which is next Monday. However, your advisors favor a Friday announcement.

To help expedite such an announcement, we also are transmitting a fact sheet on this matter to the White House press office.

There are attached, for transmittal to the Congress, copies of the reports of the pay agent and the Advisory Committee on Federal Pay.

You have also received a decision memo from Rod Hills and me as to whether to mention the constitutional problem and to urge statutory action to effect the 5% increase. The attached message and fact sheet will be modified if your decision on such memo issue requires it.

Attachments

TO THE CONGRESS OF THE UNITED STATES:

Consideration of an adjustment in Federal white collar pay comes at a time when, although the economy is recovering, unsettling conditions are still adversely affecting the Nation's general welfare.

Under the Pay Comparability Act of 1970, an adjustment in Federal white collar pay will be required on October 1.

I have reviewed the report of my "pay agent" and the recommendations of the Advisory Committee on Federal Pay relative to a pay adjustment. Their findings indicate that an 8.66 percent increase will be required to achieve comparability with the private sector. I would normally order such a pay raise in recognition of the loyal service given the country by the Government's civilian and military personnel.

However, pay comparability must be viewed in the light of the country's current economic situation. Inflation, unemployment and recession continue to cause hardships on American consumers, workers and taxpayers -- with inflation showing a new spurt which hits hardest at the jobless and the disadvantaged.

I have attempted to curtail inflation by proposing Federal cost-saving measures and drawing the line at a $60 billion deficit. However, with Congressional inaction on the expenditure reduction proposals made in my budget, this proposed deficit has already been exceeded by more than $1 billion and will increase month after month unless there is new fiscal restraint.

A Federal white collar pay increase at the proposed 8.66 percent figure would add more than $3-1/2 billion to Federal expenditures. A five percent increase, as I proposed in my budget, would reduce these expenditures by about $1.6 billion.

Over the past several months, I have had to veto legislation involving a number of programs because of the costs involved. This meant some curtailment in the future expectations of many Americans. However, the cost impact of these proposals would have added to inflationary pressures and thus proven to be a hoax rather than a help.

My overriding objective is to achieve national economic stability for all Americans. Full comparability pay, at this time, is inconsistent with my course of action to build a strong and stable economy and to bring inflation under control. Therefore, the size of the proposed pay raise must be temporarily restrained for the economic well-being of the Nation as a whole.

The pay act gives me the authority to propose whatever alternative pay adjustment I consider appropriate in the light of "economic conditions affecting the general welfare." The pay increase I have chosen will allow the Federal Government to lead the fight against inflation by example, and not just words alone.

It is my considered judgment that the salary adjustment should level off at the five percent increase which I called for last January. I strongly urge the Congress to support the alternative recommendation which is attached.

THE WHITE HOUSE,

FEDERAL PAY COMPARABILITY ALTERNATIVE PLAN

In consideration of economic conditions affecting the general welfare, I hereby transmit to the Congress the following alternative plan, as authorized and required by Section 5305(c)(1) of Title 5, United States Code:

> The adjustments in the rates of pay of each Federal statutory pay system to become effective on the first day of the first applicable pay period that begins on or after October 1, 1975, shall be limited to a 5% increase in lieu of the overall average of 8.66% determined under the comparability procedures set forth in Section 3(a) of the Federal Pay Comparability Act of 1970 (5 U.S.C. 5305).

OFFICE OF MANAGEMENT AND BUDGET
OFFICE OF THE DIRECTOR

8/28/75

To : Phil Buchen

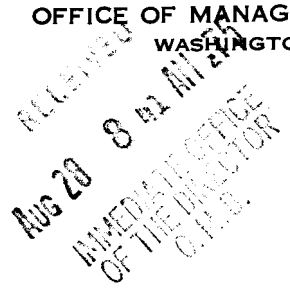
From: James T. Lynn

If you agree, please so advise President because he wondered about this.

I advised the President on 8/2/75

P.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503



AUG 28 1975

MEMORANDUM FOR THE DIRECTOR

From: William M. Nichols

Subject: Increases in Congressional Salaries

This is in response to your question as to whether or not members of either House of Congress are constitutionally prohibited from increasing, by law, their salaries for the term for which they were elected.

They are not.

Article I, Section 6, of the Constitution provides that the "Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law ...." and that no "Senator or Representative shall, during the Time for which he was elected, be appointed to any civil office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; ...." These provisions clearly indicate, and no court opinions contradict, that the salaries of Congressmen are set and adjusted by laws of their own making, but they are precluded from being appointed to other offices in the same term during which the office was created or embellished.

Consequently, the Congress is not precluded from adjusting salaries of its own members, whether by direct action - i.e., passage by both Houses with the acquiescence of the President - or by a Constitutionally acceptable delegation of that legislative authority.

DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

Department of Justice
Washington, D.C. 20530

August 20, 1975

MEMORANDUM FOR RODERICK M. HILLS
Counsel to the President

Re: Pay Comparability Act

Complying with Mr. Scalia's instructions prior to his departure Friday evening for his vacation, I am forwarding herewith a draft opinion of the Attorney General on the single-House clause in the legislation. The Attorney General has seen this draft and approves it in substance upon the basis of his earlier discussion with Mr. Scalia.

While Mr. Scalia has seen only the first portion in a somewhat earlier version, the draft does incorporate his views if not his language.

Leon Ulman
Acting Assistant Attorney General
Office of Legal Counsel

My dear Mr. President:

This is in response to your request for my opinion concerning the constitutionality of the provision in subsection (c)(2) of section 5305, Title 5, United States Code,[1] which enables one House of Congress to disapprove an alternative pay adjustment plan prepared and transmitted to the Congress by the President pursuant to subsection (c)(1) of that section. You have also inquired about the effect the unconstitutionality of that provision has on the remainder of the subsection. It is my opinion that the one-House disapproval provision unconstitutionally encroaches on the powers and duties of the President and, consequently, is invalid. I conclude, moreover, that such invalidity extends to the remainder of subsection (c) and deprives the following subsections (subsections (d)-(m)) which implement it of any significance, but does not affect the rest of section 5305, in particular not subsection (a).

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[1] Section 5305 is derived from section 3(a) of the Federal Pay Comparability Act of 1970, Public Law 91-656, 84 Stat. 1946.

Section 5305, as amended by section 202(c) of the Executive Salary Cost-of-Living Adjustment Act, Title II of the Act of August 9, 1975, Public Law 94-82, [1] establishes a semi-automatic system designed to keep federal pay rates comparable with private enterprise pay rates for the same levels of work. Subsection (a) of section 5305 provides that the President shall, on the basis of a report submitted to him by his "agent," [2] annually adjust the rates of pay of each statutory pay system on a basis of comparability with private enterprise, effective as of the beginning of the first applicable pay period commencing on or after October 1

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[1] The 1975 Act extends the Pay Comparability provisions of 5 U.S.C. 5305 to the Executive, Legislative, and Judicial officials described in 2 U.S.C. 356.

[2] The President's "agent" are the Director, Office of Management and Budget, and the Chairman of the Civil Service Commission. See Executive Order No. 11721, § 201.

of each applicable year, and shall transmit a report of his action to the Congress.[1]

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[1] The text of 5 U.S.C. 5305(a), as amended by Pub. L. 94-82, reads as follows:

"Annual pay reports and adjustments.

"(a) In order to carry out the policy stated in section 5301 of this title, the President shall--

"(1) direct such agent as he considers appropriate to prepare and submit to him annually, after considering such views and recommendations as may be submitted under the provisions of subsection (b) of this section, a report that--

"(A) compares the rates of pay of the statutory pay systems with the rates of pay for the same levels of work in private enterprise as determined on the basis of appropriate annual surveys that shall be conducted by the Bureau of Labor Statistics;

"(B) makes recommendation for appropriate adjustments in rates of pay; and

"(C) includes the views and recommendations submitted under the provisions of subsection (b) of this section;

"(2) after considering the report of his agent and the findings and recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title, adjust the rates of pay of each statutory pay system in accordance with the principles under section 5301(a) of this title, effective as of the beginning of the first applicable pay period commencing on or after October 1 of the applicable year; and

"(3) transmit to Congress a report of the pay adjustment, together with a copy of the report submitted to him by his agent and the findings and

(Continued)

Subsection (c), the constitutionality of which is involved here, authorizes the President to prepare and to transmit to Congress before September 1 of any year "such alternative plan with respect to a pay adjustment as he considers appropriate," if, because of a national emergency or economic conditions affecting the general welfare, he considers it inappropriate to make the pay adjustments required by subsection (a). The President's alternative plan, however, does not become effective if, prior to the expiration of a period of thirty days of continuous session of Congress, either House of Congress

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_/ (Continued from preceding page)

recommendations of the Advisory Committee on Federal Pay reported to him under section 5306(b)(3) of this title. The report transmitted to the Congress under this subsection shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems."

adopts a resolution disapproving the alternative plan.[1] In that event, the President is to make the pay adjustments required by subsection (a). 5 U.S.C. 5305 (m).

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[1] The text of 5 U.S.C. 5305(c), as amended by Pub. L. 94-82, reads in pertinent part:

> "(c)(1) If, because of national emergency or economic conditions affecting the general welfare, the President should, in any year, consider it inappropriate to make the pay adjustment required by subsection (a) of this section, he shall prepare and transmit to Congress before September 1 of that year such alternative plan with respect to a pay adjustment as he considers appropriate, together with the reasons therefore (sic), in lieu of the pay adjustments required by subsection (a) of this section. The report transmitted to the Congress under this/section shall specify the overall percentage of the adjustment in the rates of pay under the General Schedule and of the adjustment in the rates of pay under the other statutory pay systems."
>
> "(2) An alternative plan transmitted by the President under paragraph (1) of this subsection becomes effective on the first day of the first applicable pay period commencing on or after October 1 of the applicable year and continues in effect unless, before the end of the first period of 30 calendar days of continuous session of Congress after the date on which the alternative plan is transmitted, either House adopts a resolution disapproving the alternative plan so recommended and submitted, in which case the pay adjustments for the statutory pay systems shall be made effective as provided by subsection (m) of this section. . . ."

I.

The basic problem raised by subsection (c)(2) of section 5305 is whether Congress is constitutionally empowered to limit the statutory authority of the President by action taken by a single House. It is my conclusion that such a provision violates Article I, section 7, clauses 2 and 3 of the Constitution, which provide in pertinent part:

> "(2) Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . .
> "(3) Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

These provisions lay down a fundamental requirement. Before legislative action can become law, the action must be concurred in by both Houses of Congress and presented to the President, and, if disapproved by the President, it must be repassed by a two-thirds vote of each House.[1] Subsection (c)(2) violates this basic constitutional precept in two respects: It does not provide for presentation to the President, and does not require the concurrent action of both Houses.

The records of the Constitutional Convention testify to the great importance the Founding Fathers attributed to the requirement that all legislative action be presented to the President. Indeed, the third clause of Article I, section 7 of the Constitution, quoted above, was specifically designed to prevent evasion of the presentation requirement.

The purpose of the requirement, and of the President's veto power, was explained by Gouverneur Morris as intended to guard against "[e]ncroachment [on the Executive] of the

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[1] Congressional action seeking to nullify a Presidential plan prepared pursuant to statutory authority is clearly of a legislative nature. Indeed, if it were not, Congress would lack the authority to take it. See 37 Op. A.G. 56, 58-62 (1933).

popular branch of the Government." The Constitutional Convention had before it numerous examples of such encroachment that had occurred in Pennsylvania and foreign countries. Farrand, Records of the Federal Convention, Vol. II, pp. 299-300. The Presidential approval requirement was also explained by James Madison as designed "1. to defend the Executive Rights, 2. to prevent popular or factious injustice, . . . to check legislative injustice and incroachments." Id., at 587. In The Federalist No. 73, Hamilton states that the primary reason for granting the President the veto power is to "enable him to defend himself."

During the debate on what is now Article I, section 7, clause 2 of the Constitution, Mr. Madison pointed out that, "if the negative of the President [i.e., the presentation requirement] were confined to bills, it would be evaded by acts under the formal name of Resolution, vote, etc." Farrand, op. cit., Vol. II, pp. 301-305. The Convention thereupon adopted the third clause of Article I, section 7 extending the presentation requirement

to "every Order, Resolution or Vote to which the concurrence of the Senate and House of Representatives may be necessary."[1]

There is a substantial body of subsequent authority that a resolution which has not been presented to the President, even if adopted by both Houses of Congress, is of no legal effect. Thus, the Senate Judiciary Committee in S. Rept. 1335, 54th Cong., 2nd Sess., pp. 5-6, states that concurrent resolutions--

> "have not been used . . . for the purposes of enacting legislation, but to express the sense of Congress upon a given subject, to adjourn longer than three days, to make, amend, or suspend joint rules, and to accomplish similar purposes in which both Houses have a common interest, but in which the President has no concern. . . .
>
> ". . . They have never embraced legislative provisions proper, and hence have never been deemed to require Executive approval."

And further--

> ". . . the general question submitted to us, to wit, 'whether concurrent resolutions are required to be submitted to the President of the United States,' must depend, not upon

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[1] The concurrence of both Houses of Congress is required for the exercise by Congress of its legislative powers. See S. Rept. 1335, 54th Cong., 2nd Sess., p. 8.

> their mere form, but upon the fact whether they contain matter which is properly to be regarded as legislative in its character and effect. If they do, they must be presented for his approval; otherwise, they need not be. . . . (at p. 8)

Another formulation is to be found in Congressman Mann's statement that a concurrent resolution has no force beyond the confines of the Capitol. 42 Cong. Rec. 2661 (1908). Similarly, in Quintana v. Holland, 255 F.2d 161, 164-166 (C.A. 3, 1958), the court held that a concurrent resolution not presented to the President does not have the force of law and therefore does not have the effect of changing the statute to which it purports to apply.

These considerations apply even more forcefully to a one-House disapproval provision in that it also violates the second branch of Article I, section 7--the requirement that legislative action of the Congress must be concurred in by both Houses. It is no answer to say that because Congress could have wholly denied the President the authority to submit an alternative plan, it therefore was empowered to attach conditions to the exercise of

that authority--even a condition not envisioned by the Constitution. That the greater power, viz., to deny absolutely, does not necessarily include a lesser power is best explained by an analogy from the law of property: A person is entirely free under the common law to refuse to sell his real property, but if he chooses to sell it he cannot subject it to continuing restrictions, so-called "restraints on alienation," which are inconsistent with full title in the new owner. So also, the Congress has authority to deprive the President completely of substantive powers in a number of fields; but unless it is willing to take that drastic step, it cannot leave the powers intact and yet subject them to formal restrictions other than those that can subsequently be imposed by the normal legislative process.

Otherwise the constitutional doctrine of the separation of powers would be subverted. That doctrine, which, as James Madison stated during the first session of the First Congress, is the most sacred principle in our Constitution and, indeed, in any free Constitution. (Annals of Congress, First Cong., col. 581) necessarily

requires that after Congress has enacted a statute its power is at an end, and that the law is to be executed free from Congressional interference except, of course, by the enactment of new legislation. See, e.g., James Madison, id., at col. 582; Senator Davis, Cong. Globe, 39th Cong., 1st Sess., p. 186 (1866).

The need for the doctrine that Congress can not subject a grant of powers to the President to control by a resolution not presented to him should be obvious: Without it the carefully drawn legislative procedure of the Constitution could be entirely evaded by a congressional grant of enormously broad powers and authorities to the President, subject to the condition that neither House of Congress shall disapprove their exercise by the Executive. The effect of such development would be that Congress could elude the constitutional responsibility to write specific laws and that the law of the land would be the implementing regulations written by the Executive over which Congress merely holds a power of

disapproval.—/ This is not the constitutional system the Founding Fathers sought to establish.

—/Such a system seems to exist in the United Kingdom where much legislation merely authorizes a Minister of the Crown to draft regulations which are subject to disapproval by either House of Parliament under the Statutory Instruments Act of 1946 (9 & 10 Geo. 6 c 36).

Concededly, at the time of the enactment of the Federal Pay Comparability Act in 1971, there did exist some precedent legislation granting powers to the President subject to disapproval of their exercise by a single House. Two provisions of that type were section 6 of the Reorganization Act of 1949, 5 U.S.C. 906[1] and the legislation relating to the Commission on Executive, Legislative, and Judicial Salaries, 2 U.S.C. 359. I recognize that constitutional power may be established by practice in appropriate circumstances. These circumstances, however, are lacking here.

First, a constitutional practice presupposes some frequency of usage. In 1971, when the Federal Pay Comparability Act was approved, clauses providing for disapproval of Presidential action, however, were relatively recent and exceedingly rare. They consisted of the two referred to above and a handful of scattered statutes dealing largely with the disposal of surplus property.

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[1] This Act expired March 31, 1973, 5 U.S.C. (Supp. III) 905(b).

The proliferation of the one-House disapproval clause is a fairly recent phenomenon.

Second, although a generally accepted practice may give conclusive content to a vague or ambiguous constitutional provision, it cannot overcome the explicit language of the text. McPherson v. Blacker, 146 U.S. 1, 27 (1892), cited in United States v. Midwest Oil Co., 236 U.S. 459, 473 (1918); Inland Waterways Corp. v. Young, 309 U.S. 517, 525 (1940). Here the pertinent text (Article I, section 7 of the Constitution) is unambiguous. Every Congressional action which is to have legislative effect must be concurred in by both Houses of Congress and be presented to the President.

This is particularly the case where the historical practice of Congress itself prior to 1949 supports the clear text of the Constitution. I have already referred to the 1897 report of the Senate Judiciary Committee (S. Rept. 1335, supra), which concluded, on the basis of the constitutional practices extending from the First Congress to the end of the nineteenth century, that the

only Congressional action which need not be presented to the President is that in which "the President has no concern" (p. 6), and that the requirement of presentation hinges on the fact whether the matter "is properly to be regarded as legislative in character and effect." (p. 8.) I have also mentioned Congressman Mann's statement to the effect that Congressional resolutions not presented to the President are of "no force beyond the confines of the Capitol."

Moreover, the significance of usage as an indication of interpretation depends substantially upon how voluntary and unconstrained that usage has been. There are many indications that Presidential acceptance of a one-House clause has not been based on the recognition of its constitutionality but rather has been the price reluctantly paid for legislation deemed vital. For recent examples, see the following signing statements: President Nixon, Congressional Budget and Impoundment Control Act of 1974, Public Law 93-344, Weekly Compilation of Presidential

Documents, Vol. 10, p. 800; President Ford, Trade Act of 1974, Public Law 93-618, id., vol. 11, p. 10; and AMTRAK Improvement Act of 1975, Public Law 84-25, id., vol. 11, p. 560.

In sum, if any credit is to be given to the efficacy of constitutional practice, the balance weighs heavily against the validity of one-House disapproval clauses. The tradition requiring presentation to the President of all Congressional action which is of concern to him and legislative in character and effect which began with the adoption of the Constitution and remained generally recognized until relatively recent years is entitled to far greater weight than a disputed practice of recent origin.

Assuming arguendo that modern governmental practices involving the grant of broader discretionary powers to the Executive branch require closer supervision by the Congress, the nature of that supervision must nonetheless comply with the Constitution. McPherson v. Blacker, supra, at 36.

II.

Having concluded that the one-House disapproval provision in subsection (c)(2) violates Article I, section 7 of the Constitution, the question arises whether and to what extent the remainder of the statute is viable. Even where a statute, such as the Pay Comparability Act, does not contain a separability clause, the unconstituionality of one of its provisions does not necessarily invalidate the whole. United States v. Jackson, 390 U.S. 570, 585 (1968). As said in Champlin Mfg. Co. v. Commission, 286 U.S. 210, 234 (1932), quoted with approval in Jackson:

> "The unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." (Emphasis added.)

My predecessors have made use of this principle in the past to excise similar encroachment provisions. See 37 Op. A.G. 56, 66 (1933); 41 Op. A.G. 230, 235 (1955).

The complex legislative history of the Federal Pay Comparability Act reveals no discussion of the constitutional impact of subsection (c)(2) on the remainder of the act

prior to the debate on the conference report. H.R. 13000, 91st Cong., 1st Sess., the bill which ultimately emerged as the Pay Comparability Act, passed the House of Representatives in October 1969. It provided in essence for a permanent method of pay adjustment by a commission, subject to a one-House disapproval. The Senate passed the bill in an amended form in December 1969, providing basically only for a single flat pay increase. The bill then remained in conference for approximately a year. In July 1970 the House Committee on Post Office and Civil Service held hearings on two bills, H.R. 18403, introduced by Congressman Udall, which provided for a method of pay adjustment similar to the one contained in H.R. 13000, and H.R. 18603, introduced by Congressman Corbett, the ranking Republican member of the House Committee on Post Office and Civil Service. 116 Cong. Rec. 44284 (Udall) and 44290 (Dulski). H.R. 18603 had been prepared by the Civil Service Commission and contained the basis of the present legislation, including the provision for the President's alternative plan and the one-House disapproval

clause. During the hearings Chairman Hampton of the Civil Service Commission and Associate Director Weber of the Office of Management and Budget, testified on H.R. 18603 and compared it with H.R. 18403. Their testimony, however, does not shed any light on the specific question as to whether the President's alternative plan and the one-House disapproval provision constituted an indispensable part of the statutory plan proposed by the Administration.[1] The conference report on H.R. 13000 (H. Rept. 91-1685), dated December 9, 1970, examined the substantial differences between H.R. 18603 and the bill ultimately agreed upon. The report briefly mentions the one-House disapproval provision of 5 U.S.C. 5305(c) but does not elaborate.

It was not until consideration of the conference report by the House and the Senate that the alternative plan provisions were discussed. The debates indicate

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[1] See Compensation in the Federal Classified Salary System, Hearings before the Subcommittee on Compensation of the House Committee on Post Office and Civil Service, 91st Cong., 2d Sess., on H.R. 18403 and H.R. 18603, Serial No. 91-26, pp. 53-79. H.R. 18603 is printed at pp. 40-46.

that the President's authority to submit an alternative plan and the one-House disapproval provision are inextricably intertwined. Thus, Congressman Udall, the House floor manager of the bill, explained:

> "If that [statutory comparability] policy is carried out, that is the end of it. There is no point in coming back to the Congress, ...
>
> "If, however, the President . . . makes any decision other than to achieve the comparability policy, then it will have to come back to us, and the bill guarantees that we will have a vote on it." 116 Cong. Rec. 44284.

and further (at 44285):

> "Part and parcel to the alternate (sic) plan procedure is the congressional review procedure."

Senator McGee, who was in charge of the bill in the Senate, similarly observed (at 44104):

> "In cases where the President may have thought otherwise [i.e., where he submits an alternative plan], it is necessary for the Senate and the House to determine.—/

—/ See also Senator McGee's statement at p. 44099:

> "Mr. McGEE. If the recommendation is that there should be a 5-percent adjustment because of rising costs, whatever it is, this becomes the automatic increase for those Federal employees on October 1 of that year. If the President decides that is too much because of the times or because of some national emergency that it should not be allowed at all, and he so decides, in that case it has to be bucked back to Congress for both Houses for judgment, and either House can decide to take it."

Hence, in the language of the Supreme Court, it is "evident" that Congress would not have given the President the power to submit an alternative plan under subsection (c)(1) without reserving to itself the concomitant power to control such Presidential action. I conclude that the constitutional invalidity of subsection (c)(2) carries with it the invalidity of the entire subsection.

It is, however, not equally "evident" that Congress would not have enacted, nor the President disapproved, the Pay Comparability Act without the alternative plan provision of subsection (c). As indicated above, the committee hearings and the Conference Report were silent on this point, as were the Congressional debates on the Conference report. I am aware of the colloquy on the floor of the House of Representatives between the Minority Leader and Congressman Udall, which indicated that the President had opposed the original version of the bill because it gave him no role whatsoever in the pay adjustment procedure, but that the bill as reported by the Conference Committee met the President's objections. 116 Cong. Rec. 44283.

In my estimation, the role allotted to the President under subsection (a) was sufficient to comply with the desires of the Executive branch. While the President may have believed that the alternative plan provision was desirable, there is nothing to indicate that he considered it indispensable.

I therefore conclude that it would be inappropriate for you to submit an alternative plan pursuant to subsection (c). If you believe that because of a national emergency or of economic conditions affecting the general welfare it would be inappropriate to make the full pay adjustments required by the Act, the proper procedure is to ask Congress for remedial legislation.

Respectfully,

OFFICE OF THE VICE PRESIDENT

WASHINGTON

October 8, 1975

MEMORANDUM FOR PHILIP BUCHEN

FROM: Peter J. Wallison

Following up our discussion of yesterday afternoon about the President's Panel on Federal Compensation:

1. I have talked to Nino Scalia whose staff will prepare a brief memo on the constitutionality of setting Federal wage levels through the device of an independent commission. Nino's first reaction was that this would be constitutional, although politically difficult.

2. I am returning your copy of Arch Patton's article. Norm Hurd and the staff of the Panel have consulted extensively with Patton and will continue to do so.

Thanks very much.

Attachment

Thursday, July 10 --- 2 p.m.

Meeting with Arch Patton

ARCH PATTON
1700 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006

July 10, 1975

Dear Mr. Buchen:

I appreciate the opportunity of chatting with you this afternoon and trust our few moments together imparted the feeling I have that a great opportunity exists to reorganize the Federal pay system.

Attached is a reprint of the series of articles on this subject I wrote for Business Week some time ago. I hope you find it of interest.

Sincerely yours,

Arch Patton

Mr. Philip Buchen
Counsel to the President
The White House
Washington, D.C. 20500

Enclosure

Business Week

Ideas and trends:

An uneasy look at the federal pay system

The federal salary structure would create a motivational mess in most businesses

Government's pay disincentive

By Arch Patton

The thing that most impresses the student of the federal pay system—particularly one with a personnel background in industry—is not its size, although it has 2.7-million nonmilitary employees and a $33-billion payroll; it is not its growth, although the federal payroll has expanded three times faster than the gross national product in the past decade; it is not even its complexity, although it has developed administrative rituals that are quite different from anything to be found in industry.

What is most remarkable about the federal pay system, in my view, is the enormous difficulty a student finds in developing evidence to prove or disprove the working effectiveness of some aspect of the system. The substantial body of technical knowhow—laws and regulations—that needs to be brought to bear is truly impressive.

But I believe a more important impediment to developing evidential hypotheses is the strong temptation on the part of researchers with an industrial background to seek answers that equate with industry norms. The federal employee, with little or no industry experience, finds it difficult to be helpful in this case—for the two sides do not really speak the same language. So the researcher frequently ends up frustrated, wondering why so much of the overwhelming volume of statistics available on every hand in Washington is so useless.

The structures. Any practical assessment of the federal pay system should start with a description of the government's two major salary structures. I have come to think of the first of these as the Executive Structure, for it includes all members of the executive branch subject to Presidential appointment. However, it also includes all federal and Supreme Court judges and members of both houses of Congress—in other words, the top officialdom of all three branches of the government. Only the President, Vice-President, and majority and minority leaders of both houses, and the Chief Justice stand above this structure. This is the $100-million tip of the $33-billion nonmilitary payroll iceberg (which substantially exceeds the $22-billion payroll of the Army, Navy, and Air Force).

The second and most costly of the federal pay structures is the so-called General Schedule. This structure establishes salary rates for the federal Civil Service and, by linkage, for the Foreign Service, the Veterans Administration, and the military.

While the Executive Structure is a minuscule part of the total federal payroll, it is vitally important because it includes the leadership of our government; it is the apex of the federal pyramid. The Executive Structure is divided into five "levels," as the grades are called. A sampling of the positions in each level and the current salary paid, is as follows:

Level I: $60,000

Cabinet Secretaries/Supreme Court justices

Level II: $42,500

Members of Congress/Major agency heads; e.g., Veterans Administration, Atomic Energy Commission, Comptroller General/Judges, circuit and claims courts

Level III: $40,000

Under Secretaries; e.g., Labor, Commerce/Assistant Comptroller General/Judges, district and customs courts

Level IV: $38,000

Assistant Secretaries; e.g., Air Force, Agriculture, Interior/Capitol Architect/Librarian of Congress

Level V: $36,000

Heads of minor agencies; e.g., Panama Canal, Renegotiation Board, Indian Claims Board/Deputies of Capitol Architect and Librarian of Congress

Several things are immediately apparent from this tabulation. The pay differentials from Level II through Level V average less than 6%, and the number two man in the typical government organization is only one level below his boss. Both conditions would be motivationally disastrous in most industry situations. Who would want the vastly greater responsibility of the top job if he were only paid a 6% premium for the greater responsibility and risk? Those familiar with compensation levels among large industrial companies will also find the salary offered those key federal positions quite low.

Among the several problems to be found in the Executive Structure, the most important is the fact that it controls the pay of congressmen, who find it extraordinarily difficult to vote themselves pay increases. The pay of congressmen, in turn, controls that of the entire Executive Structure, except Level I. This Congressional bashfulness has resulted in a second weakness, for the Congress-passed law establishing the Executive Structure provides that it be revised only once every four years. (This infirmity was further exacerbated when President Nixon, in keeping with the spirit of the Economic Stabilization Act of 1972, added a fifth year to the waiting period.) Since inflation has been boosting living costs by about 5% annually during recent years, the five-year withholding of salary increases to those in the Executive Structure has meant a loss of 25% of the purchasing power of their salaries.

A ceiling. Inflation itself represents still a third problem, for the law creating the Executive Structure provides that no salary in the General Schedule (the Civil Service structure) may exceed the lowest salary in the Executive Structure. Since salaries in the General Schedule are increased each year, and the Executive Structure has been unchanged for nearly five years, real "compression" has developed among the senior Civil Service executives as a result of this "ceiling." At the present time, for instance, all executives in the top GS grades, 18, 17, and most of those in 16, are paid $36,000—the lowest level in the Executive Structure.

Should Congress fail to raise Executive Structure salaries this spring—and the present inflation rate in the GS continues until 1977—virtually all executives in GS 15 through GS 18, and some in GS 14, will be paid the same salary when the next review period comes for the Executive Structure three years hence. If this occurs, some 30,000 federal executives will all be paid $36,000. Even today, three to four echelons of executives reporting one to the other are paid the same. Three years hence, if the ceiling is not removed, five reporting levels, all paid $36,000, are likely to be fairly common. This would, of course, be a motivational nightmare.

Other less obvious problems plague the Executive Structure. For example, there is no standing body in our federal government with responsibility for reviewing job relationships within the five levels. This means that a Level III position that may have been important when it was first added to the structure umpteen years ago, tends to stay at that level indefinitely even if there is a steady decline in its relative value to the national well being. A good example of this was the Subversive Activities Control Board, which remained a Level V job from the time it was organized in the 1950s until it was abolished in 1973. The board members had done little but draw their pay for many years, but there was no policing body with responsibility for changing job relationships within the structure.

Furthermore, the present system provides no means for equating job values between the Executive Structure and the Civil Service Structure. It simply assumes all politically appointed positions in Level V are worth more than all Grade 18 jobs (at least until inflation pushes Civil Service salaries up to the pay level of appointed officials in Level V). It is widely recognized that some Level V jobs are actually less important—hence worth less—than some Grade 18 positions.

Equal pay. Then, too, there are those who think it is a mistake to pay all congressmen the same (except the Speaker and Minority Leader) as is now done, when some committee chairmen obviously have greater responsibility than the newest freshman Congressman. All Cabinet officers, it is also frequently noted, are paid the same, although some have substantially greater responsibilities than others. And, of course, the system provides no reward for individual performance except promotion. With pay-for-responsibility relationships being as casual as they are at the political level in the government, even promotion has its problems. The story is told that after President Nixon "promoted" George Shultz from Secretary of Labor (at $60,000) to Director of the Office of Management & Budget (at $42,500), Mrs. Shultz commented, "One more promotion like this, George, and we'll have to borrow money to live."

But it is the retirement provisions of the Executive Structure that are most difficult for the businessman to understand. It is almost as though each of the three branches worked for a different employer. Officials of the executive branch, for example, have 7% deducted from their pay for retirement purposes, and most of them have it returned, without interest, when they leave government service. The reason: few have worked the five years necessary to receive a pension.

Members of the two houses of Congress have 8% deducted from their paychecks for retirement. The average congressman, however, receives a pension for 17 years service.

Federal judges, the third branch of this Executive Structure, have lifetime jobs at full pay. They are paid full salary in retirement, whereas all other government employees receive varying percentages of their final salary in retirement, depending on length of service, and very rarely top one-half their salary. As a result of this arrangement, judges have nothing deducted from their salaries to support a pension program. A district judge, holding a Level III position, actually receives more cash income than a Senator or congressmen whose jobs are evaluated one level higher.

Furthermore, the 8% of salary a judge does not contribute for a pension has a career value as spendable income approximating $250,000 when compound interest is applied to this added income over the period of service. And finally, the lifetime salary of the average judge vs. the sharply reduced pension of the average Senator or congressman is worth an additional several hundred thousand dollars in real income to the individual judge over a career.

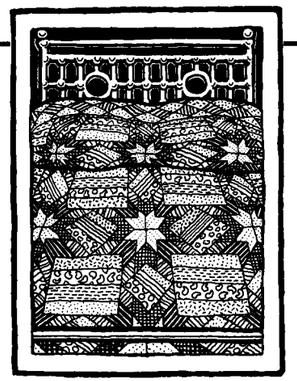
The confusion. All this adds up to a confused, contradictory compensation structure for the appointed and elected officials of the federal government, a system crusted with inherited anomalies and so full of negative motivation features that it would probably paralyze a private corporation.

But the Executive Structure is a model of simplicity and rationality by comparison with the General Schedule, which determines the pay of the great majority of nonmilitary government workers. And since political power means less to the Civil Service than to the appointed executives, this is where an inadequate pay system can do great damage.

Uncle Sam wants you, but his pay system will make you think twice

Arch Patton, director of McKinsey & Co., served as chairman of the recent Presidential Commission on Executive, Legislative & Judicial salaries. In this series of four articles, he identifies some of the most glaring inconsistencies and contradictions of the federal compensation structure.

Drawings by Robert P. Van Nutt



The General Schedule, a patchwork of rates, 'evolved from at least four diverse pay systems that covered virtually every type of job'

Fallacies in federal pay standards

By Arch Patton

All but $100-million of the federal government's $33-billion nonmilitary payroll is disbursed in accordance with a mind-boggling set of regulations covering the General Schedule. When the knowledgeable but uninitiated student first examines the General Schedule and these regulations, he is likely to mutter: "I don't believe it. Even Topsy never grow'd like this."

What those of us unfamiliar with the history of federal pay don't understand is the patchwork quilt from which the GS structure evolved. It was put together from at least four quite diverse pay systems that covered virtually every type of job known to man except the blue-collar variety. It covers clerks, doctors, lawyers, executives, technical specialists, and a variety of others. The compromises deemed necessary during the evolutionary process that created it, I am sure, fathered many of the problems found in the GS system today.

There are 18 grades in the GS structure, starting with the unskilled messengers in Grade I and moving up to executives in Grade 18, who may supervise thousands of subordinates and spend billions of dollars annually—on military hardware, for example. This structure is really two structures, for there are 10 clerical grades, with 11 so-called professional grades partially interspersed among and about them. The intergrade percentage differentials between the two systems, stack up like this:

Clerical grades		Professional grades*	
GS	1	GS	5
	2	13.2%	7	23.7%
	3	12.8	9	22.0
	4	12.3	11	20.5
	5	11.8	12	19.2
	6	11.4	13	18.1
	7	11.0	14	17.2
	8	10.6	15	16.5
	9	10.3	16	16.0
	10	10.0	17	15.7
			18	15.7

*There are no grades 6-8-10 in this structure; promotees advance two grades.

The dual structure has some unique aspects. It is one of the very few I have seen that has decreasing between-grade percentage differentials as job responsibilities increase. The reverse is more frequently the case, because promotion is so much more rapid in the lower grades that a smaller differential between grades has been found to provide adequate financial motivation.

Moreover, it is the only pay structure I have ever seen with grade differentials exceeding 20% in the lower supervisory and professional ranks. (This is what the term "professional grades" really means, for this structure includes accountants, personnel men, and supervisors as well as lawyers, engineers, doctors, etc. Indeed, I am told it includes all college graduates.) Grade differentials of such magnitude for jobs paying $10,000 to $15,000 a year are well above the normal promotional increase given in industry at this level of responsibility. Furthermore, unless the promotion rate is unusually well controlled, the sharply higher-than-average grade differential can add significantly to payroll costs. And there is some evidence that promotion control may be loose in the GS system.

Higher costs. For an organization of a given size, a 10% grade differential permits twice as many grades in the structure as a 20% differential. Since the natural tendency of administrators is to "grade up" rather than "grade down" in the evaluation process, the fewer grades in the 20% structure normally mean higher costs.

The GS salary structure has a longevity feature I have never encountered in industry. Each grade in the structure, except GS 16, 17, and 18, has 10 steps. Theoretically, these steps are for two purposes: for rewarding performance and for continuing to work for the government. Practically, however, reward-for-performance usage is rare—less than 4% of the Civil Service employees received such merit increases in each of the last two years. These "step rate" increases are awarded almost exclusively for getting older. The first three steps are given annually to the new employee. The second three steps are then awarded every other year, and the final steps every three years. Since the turnover in Civil Service jobs is negligible after the first year, the value to the government of this longevity award is questionable. And, with 2.7-million employees, the 3% added to payroll costs by each longevity increase becomes expensive. Each step increase in the federal payroll structure now costs nearly $200-million if all employees advance.

But it is the pricing of the GS structure that has resulted in the most widespread criticism of federal pay practices. Critics argue that many federal employees—perhaps a majority—are paid substantially above the average employee in the U. S. for whatever job they hold.

The compensation of nonclerical federal employees just a few years ago was substantially below any reasonable competitive market level. To correct this inequity and upgrade the quality of federal executives, Congress passed a series of laws to make federal pay "comparable" with "private enterprise rates for the same levels of work" and to establish "pay distinctions in keeping with work distinctions."

The payline. What evolved to meet the objectives established by Congress—in very simplified terms—is an annual survey conducted by the Bureau of Labor Statistics, covering "private enterprise" jobs matching a broad cross section of government jobs. This survey is then used by the President's "pay agents"—the chairman of the Civil Service Commission and the director of the Office of Management & Budget—to establish a grade-by-grade "payline" for the GS schedule each year. This payline establishes the annual pay increase for federal employees.

Obviously, the weakest link in this chain is the survey. If the jobs surveyed are skewed to include an unbalanced number of high- or low-paid positions, in high- or low-paying industries, in high- or low-cost geographic areas, then the results are likely to be skewed. And a number of criticisms are heard that a high-pay skew is, in fact, built into the survey.

By law, the survey is national in scope, hence completely ignores regional pay differentials—and regional differences for clerical jobs often exceed 100%. If everyone is paid at high-cost-area rates, of course, payroll costs get out of line. Furthermore, experience indicates that when a national average sets the pay scale for lower-level jobs, the scale is so low in high-cost areas that employees are recruited from "the bottom of the barrel," hence are likely to be less productive than the average. In low-cost areas, on the other hand, higher quality talent is recruited than the job requires, which has the effect of increasing turnover (for talent and jobs are mismatched) and of making it difficult and expensive for local industry to hire talent in areas with large numbers of federal employees.

It is also generally agreed that the BLS survey excludes some relatively low-paid groups that compete directly for employees with the federal government—private hospitals, state and local governments, and the service trades. The rationale for their exclusion is that they are not "private enterprises" and are therefore outside the target group established by Congress. Their inclusion would almost certainly bring down the average pay level reported by the survey.

Because of the problem of finding reasonably comparable jobs in both the public and private sector, certain highly paid jobs receive unusual weight in the BLS survey. For example, GS 15, with some 23,000 employees, is represented in the survey only by lawyers, engineers, and chemists, three of the highest-paid professional positions in private industry. Yet GS 15 also includes a large number of medical, accounting, personnel, and administrative positions—nearly 75% of the total—which receive the same average $30,000 salary without any justification in the competitive marketplace for inclusion in this grade.

The flaws. The whole survey effort aimed at achieving "comparability" with private enterprise is flawed, in my view, by the fact that jobs important to government tend to be out of the mainstream for much of industry. For example, only five benchmark jobs are used to price executive-level positions from GS 12 to GS 14. They are: accountant, attorney, personnel director, chemist, and engineer. As we have seen, only three are used for GS 15.

Note that the two most important and highly paid jobs in industry are missing: sales/marketing and manufacturing. These two job groups are normally the most numerous in the average industrial company, and also the most critical to the success of the enterprise. Note, also, that attorneys, chemists, and engineers are not jobs that every company has in substantial numbers, and in many companies they contribute only modestly to success or failure of the enterprise.

The BLS surveys a broad cross section of industry, with manufacturing and trade dominating. It is just this type of company that has sales/marketing and manufacturing jobs in its mainstream, while attorneys, chemists, and engineers are few in number and occupy primarily supportive roles.

One important consequence of this condition is that the average company surveyed by the BLS tends to pay its smaller groups of supportive skills (attorney, chemist, engineer) on the basis of what the individual is thought to be worth. Where supportive skills are concerned, there is a common tendency to "get the man we want, whatever he costs."

The net result of the survey approach is to place a relatively high market value on most benchmark jobs in the upper GS grades. Since the value of these jobs determines the pay of the majority of all jobs that are not surveyed, this could be very expensive indeed.

Decision makers. It is worth noting also that the Bureau of Labor Statistics survey uses the job-matching technique. My experience working with industrial companies has been that evaluating executive jobs in the $25,000-and-up bracket requires something more sophisticated than job-matching. The process attempts to eliminate judgment by using words to describe what the incumbent of the position is supposed to do. But these words rarely describe the decision-making process, specifying who is responsible for what decisions—in other words, where the buck finally stops.

One final point about the survey and its use: The people who make the survey, and those who use it, have their own salaries adjusted to reflect its findings. I recognize the professional pride involved in the groups concerned, but there is surely a conflict of interest in the whole process if this term means anything at all. There must be some outside, disinterested body—like the President's Advisory Committee on Federal Pay—that could at least monitor the effort. A few millions spent in this way might well pay enormous dividends.

'Evaluating executive jobs in the $25,000-and-up bracket requires something more sophisticated than job-matching'

Drawings by Robert Van Nutt

By Arch Patton

Reform will cover salary structure, job evaluation, the idea of job comparability, administration

To reform the federal pay system

Even a brief examination of the federal pay system indicates the urgent need for improvement. The patchwork salary pattern—derived from a five-level Executive Structure for appointive jobs and a General Schedule for Civil Service with 10 clerical grades and 18 professional grades—is so seriously flawed that it probably would be paralyzing for a private corporation. Granting that the government employment tends to be a world of its own where some of the rules of the private sector do not apply, it still is possible to identify at least three major deficiencies in the present pay structure:

Government salaries are out of line with the pay patterns of private industry, even though Congress has established "comparability" and "pay distinctions in keeping with work distinctions" as the basic objectives of the system. The government tends to pay too much at the lower and middle levels where the great majority of its 2.7-million nonmilitary employees are found. At the top, government salaries are below what private industry pays for jobs involving comparable responsibility for decision-making.

The system is full of "demotivators," drags on the productivity of federal employees. Almost all the managers in the federal system are unwilling to discriminate in salary administration between the outstanding, average, and poor performer. Except for promotion, all tend to be treated alike—and there is even some taint on promotion. Less than 4% of the Civil Service employees received merit increases in each of the past two years, and less than 1% had pay increases withheld for inadequate performance. When the hard worker and the sluggard are treated alike, the motivation to excel suffers.

The federal job evaluation process tends to promote a continuous "upward float" of positions within the structure. Evaluation is handled by the technicians of the Civil Service Commission without involving line or functional managers. So the line managers are tempted to build up the importance of their own jobs by trying to upgrade the status of those reporting to them.

Reforming the federal pay system involves some special problems, not the least of which is politics—the art of the possible. Nevertheless, the building of a more discriminating system—one that distinguishes in its rewards between the outstanding, average, and poor performer—is the keystone of a more productive federal environment. Reform of these deficiencies means changes in the salary structure, the position evaluation process, the salary survey, the administrative approaches.

The pay structure. The fact that a single pay structure—although separated into clerical and professional groups—provides the basis for administering the salary of millions of widely disparate federal jobs is almost certainly one of the major problems facing the system. My instinct argues for a multiple-structure pay system. Perhaps this could be limited to clerical, professional, and executive categories, but further study might even increase this breakdown.

These new structures will not help much unless they are valued to reflect what the big users of the various skills are willing to pay for such skills, with the jobs "slotted" into the salary structure to reflect this valuation.

I suspect the federal structure has too few grades to accommodate the huge variety of jobs found in the system, particularly at the top. For example, it is hard to believe that three "super grades," accommodating 4,869 executives, are adequate to provide reasonable supervision for the 168,900 employees in grades 13, 14, and 15.

The current between-grade salary differentials are much too large. At the top levels, these run 15% and 16%. These spreads are so broad that they make it necessary to double up at least two job values in a single grade if all the jobs are to be accommodated. The intergrade differential is even wider between the lower professional grades than it is at the top, exceeding 20% between grades 9 and 11.

Adding grades will make it possible to reduce the salary spread between grades. This not only would permit a more reasonable salary distinction between jobs having varying values but also would save money in the long run by setting a more realistic salary for the overvalued jobs now in these grades. A between-grade spread in the neighborhood of 10%—about half the present spread—would provide a considerably sharper focus on job values.

In addition to adding grades, it may also be necessary to raise the top of the Civil Service structure. This would mean overlapping some of the bottom grades in the Executive Structure, which is now prohibited by law. At least some of the top Civil Service supergrade jobs are obviously more important than many Level IV and Level V jobs in the Executive Structure.

Position evaluation. Changing the number of job grades and integrating job values between the bottom of the Executive Structure and the top of the General Schedule virtually requires a new approach to evaluating government positions. The evaluation process as it now exists is generally recognized as a paperwork maze in which the routine is considered more important than the decisions made and influenced, or both, by the job incumbent. For all practical purposes, the technicians evaluate the jobs in the government system, and the line or functional management must accept their judgments. Industry reverses the process. The line or functional managers—who certainly know the jobs best—evaluate the various positions and tell the technicians in personnel where they should be valued in the structure.

Any job evaluation process has two parts: deciding relative position value and monitoring changes that occur. In the government system, the Civil Service Commission is responsible for both. A more effective system would result from involving the line or functional manager in the evaluation decisions and having someone neutral monitor changes in job values. This would require a major overhaul of the present system, but it would sharply reduce the upward float of positions in the structure by strengthening the line manager's belief in the evaluation process. When it becomes his evaluation and not the decision of some technician whose judgment he instinctively questions, the manager will tend to accept the values as established and be less tempted to beat the system by upgrading the positions that report to him.

The salary survey. Conducted annually by the Bureau of Labor Statistics, the salary survey is intended to help the President's pay agents establish pay levels for each Civil Service grade each year. Having had two decades of personal experience with surveys, I have serious reservations about the practicality of the so-called comparability principle on which the survey is based. Some industries—frequently very profitable ones—pay their executives considerably less than the average paid by industry generally. This is a widely recognized fact in executive salary administration. The most important reason some industries compensate executives well above the average is that the quality of executive decisions is what makes for profit in that business. Thus in capital intensive industries such as airlines and utilities, executives tend to be paid below the industry average. Yet financial executives in the utility industry are paid above the norm for that industry because money costs have such an impact on company profit. Civil Service positions are seldom concerned with profit, and few government executives resign to accept jobs in industry. Equally few are fired. These considerations suggest that comparability be reexamined to find whether it is a principle—or a mislabeled idea.

Comparability would have been less of a problem if the architects of the federal system had used job-family pricing to at least check, if not establish, the validity of the federal salary structure. As it is, many of the benchmark jobs used to compare government and business at the executive level—the lawyers, chemists, engineers—are not truly representative of management positions. It would be far more logical to compare the salary of these jobs paid by the organizations who use these professions in large numbers, even though they involve other public organizations such as state and local governments.

Such surveys would give the government's job evaluation process sound underpinning. Building on this basis, it should then be possible to clear up some of the more technical flaws in the system. The present survey, for instance, makes no allowance for regional differences in pay scales. Nor does it take account of the fact that two-thirds of the industrial companies pay bonuses as well as salaries to their executives. The job-matching survey used by the BLS has obvious weaknesses that should be corrected.

Administration. The lubricant that makes an organization operate is administration. Unfortunately, a number of the administrative practices of the government are inconsistent with high productivity; indeed, they are strongly demotivational.

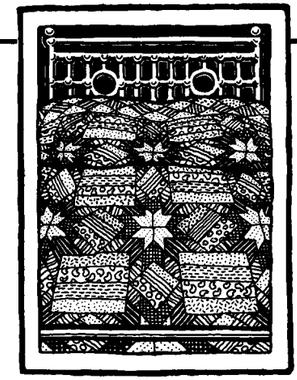
Salary administration is certainly high on the list of things that should be changed. There is no reason for better-than-average performers to receive only an average salary increase when poor performers get the same raise. A merit increase system requires discrimination between individuals who contribute more or less than the average. A real effort should be made to administer salaries on the merit principle.

This will require a dramatic change in the present way of doing things. It means that the employee does not have the right to a salary increase each year just for coming to work. He must earn it. If he is one of the 10% to 20% doing relatively poor work—but not bad enough to be fired—he should get no increase. If he is one of the 10% to 20% doing above average work, his salary boost might top the average increment by 50% or more.

Such a performance-oriented appraisal system could go a long way toward providing federal executives with an incentive to control salary costs, which simply does not exist today.

In shifting to a performance-related administration of salary, I think it would be advisable to fold the 10-step longevity system of automatic pay boosts into the merit fund. It is motivationally inconsistent with performance-based salary administration to grant sizable pay increases for no other reason than the fact that someone lived a year or so longer.

The legalistic Civil Service "rights" that protect the employee's job are the principal barrier to getting rid of poor performers. Any changes will be viewed by many present job holders as a threat to their pay. Still, I suspect the federal Civil Service is closer to the "mediocrity brink" than is comfortable. But my present assessment is far more hopeful than it was just a few months ago. I find that many civil servants are aware of the need for a major change. They appear ready to welcome an approach that places a higher premium on performance than on longevity, and that penalty is the other side of the coin called reward.



The patchwork salary pattern in the government is so seriously flawed that in industry it would be paralyzing

Congress has added so many expensive options that costs will be at least double what the figures show

The hidden costs of federal pensions

By Arch Patton

On the face of it, the current pension cost of the federal Civil Service system looks about the same as the outlays for employee retirement by a representative cross section of industry. For example, a Bureau of Labor Statistics survey of fringe-benefit costs reports that the government spends 10% of its payroll on the Civil Service retirement annuity plan, while industry pays 9.1% of payroll into retirement plans and an additional 0.4% on savings and thrift plans that are usually designed to add to the employee's retirement income. This is a reasonably close fit.

The key word in these assessments of costs, however, is "current." In fact, the reported costs of federal pensions are based on assumptions that are demonstrably unrealistic. The real costs that taxpayers will eventually pay are almost certainly at least double those of industry. And they are rising far more rapidly than industry's costs.

Indeed, the difference between the real costs of supporting the Civil Service annuity plan and the reported cost is so great that the consulting actuaries of the Civil Service pension system told Congress in January, 1973, that "by all standards set by the government for nongovernmental pension funds, the retirement system is not adequately financed, with the result that considerable present expense is being passed on to future generations of taxpayers."

It is perfectly true, of course, that the burden of future commitments cannot be shifted from the next generation of taxpayers to the present. Unlike private pension funds, the government under present laws cannot accumulate a portfolio of stocks and bonds that will pay dividends and interest. Even in a fully funded system, the reserves would have to be held in the form of Treasury securities—like the Social Security reserves—and the interest would have to be paid by future taxpayers.

The point is that by failing to fund its pension obligations, the government gives a misleading impression of the true costs of those obligations. It is thus encouraged to make more and more open-ended commitments that will add up to a staggering load in the future.

The hidden costs. The cost of the Civil Service pension program is financed by the employee's contribution of 7% of his salary to the annuity fund, with the government matching this payment. The typical federal employee, therefore, undoubtedly considers that he is paying for one-half of his pension. Furthermore, he probably wonders why he should pay so much when few industrial companies require so large a contribution and many pay the full pension cost. Actually, the evidence indicates that the civil servant is paying considerably less than one-half the real cost of his projected pension today. In addition, his benefits substantially exceed those received by his opposite number in industry.

The reason for his misconception lies in the hidden costs of the federal pension system. The most important of these is a provision in the law prescribing that pensioners are to receive cost-of-living increases. Since 1970, Congress has authorized cost-of-living boosts for annuitants—without provision to finance these payments—as follows: 5.6% in 1970, 4.5% in 1971, 4.8% in 1972, 6.1% in 1973, 5.4% in 1974 (to date).

When compounded, these cost-of-living increases mean that federal pensions—hence, pension costs—have been raised 30%. Since their introduction, more than $10-billion of unfunded—unpaid for—liabilities have been added to future costs.

Premium upon premium. In addition to the advantage over the industrial pensioner stemming from regular cost-of-living increases, the Civil Service retiree is paid a premium of nearly one-third over the inflation rate. This results from a provision of the law that requires any cost-of-living increase of 3% to be supplemented by another 1% payment. Some wags have suggested that the one-third premium explains why Washington has done so little about curbing inflation: All the Civil Service employees make a profit on it.

Until recently, no provision was made to include in pension costs an interest charge on the huge, unfunded liabilities for past-service—which now total $63-billion. Even today, only one-third of the interest on these unfunded billions is included in reported pension outlays. It will be 1980—in 10% increments—before the full interest charge is reflected in reported costs.

This single item of interest on unfunded liabilities would approximately double the reported present cost of federal pensions if full interest charges were paid, according to Civil Service Commission actuaries.

Another huge addition to Civil Service pension costs is noted in the report of the system's actuaries to Congress. It points out that an average annual increase in living costs of 3% during the remaining service of covered employees—which, with the 1% premium means a 4% advance in pensions—will raise the so-called "normal" cost of annuities to 21.13% of payroll vs. the 14% now collected. Actually, the average annual cost-of-living increase in recent years has been close to 6%. A continuation of this rate of advance, of course, would raise the real costs to nearly 30% of payroll.

Furthermore, the consulting actuaries point out that such a 3% cost-of-living increase would more than double the present level of unfunded liabilities owed by the annuity system to approximately $135-billion. The interest cost of these extra billions would add yet another 10% of total payroll to annuity costs.

A new trend is also pressing upward on pension costs: early retirement. The average age of voluntary federal retirees in 1963 was 64.3; it was 62.9 in 1969 and is reported to have been 61.4 in 1973. Thus, in the last decade, three years—or nearly 5%—have been shaved off the average voluntary retirement age.

The early-retirement trend is particularly acute among the senior executives of Civil Service, those in the so-called supergrades. The percentage of retirees in these top three grades has risen from 5.6% in 1970-71 to 8.7% in 1972. It is projected at 11.6% for 1973, based on actual retirements in the first eight months.

While the system actuaries make no official estimate of the cost of the early retirement trend, they comment, "If the trend continues, assumptions will need to be strengthened with a substantial increase in the 12.95% 'normal' cost rate."

One thing underlying this development is the pay freeze on upper-echelon civil servants resulting from the ceiling on their salaries imposed by the arbitrary rule that top Civil Service pay cannot exceed the lowest level established for appointive posts. But the arithmetic favors early retirement at lower levels as well. Cost-of-living increases boosted retirement annuities 11.5% in the six months ended Jan. 1, 1974, and 16.3% in the latest 18 months, while salaries for the system as a whole rose 10%. This meant that a great many long-service employees found the big pension advance more attractive than actual or potential salary increases.

At the top levels, the combination of the pay freeze and the cost-of-living pension adjustments produces a nonsense result: A man can actually get a larger pension by retiring early. Take, for example, a 55-year-old GS-18 employee with 30 years service at Dec. 31, 1973. If he retired on that date, assuming 5.5% cost-of-living increases for each of the next three years, his annual annuity on Jan. 1, 1977, would be $25,120. If he works the additional three years, he will contribute $7,560 to the retirement fund and receive $1,477 a year less when he finally retires because his pension will be based on the salary, which is frozen, and cost-of-living adjustments do not begin until retirement.

The benefits. Civil Service pensions approximate 56% of the top three years' pay of a 30-year employee's career. This compares with executive pensions in industry, which a survey by Bankers Trust estimates at 52% of the individual's compensation, including a 12% Social Security payment. The basis usually is the final five working years. Thus, retirement benefits of Civil Service and industry appear reasonably close, since government employees do not receive Social Security.

However, the comparison does not allow for the fact that federal employees have cost-of-living raises added to their pensions. A Civil Service man who retired in 1970 with a 56% pension has seen this figure rise to 73% (130% of 56%) of his final pay as a result of these adjustments.

There are other built-in cost escalations in the Civil Service system. One is the "second career" syndrome. The system encourages—at great expense—early retirement of its employees. A man with 30 years' service may retire at full pension at age 55. He can then get another job and have two paychecks.

Disability epidemic. Another outsized cost borne by the federal system lies in the unusually large number of employees retired "on disability." Only 16.5% of those receiving Social Security payments were retired on disability, which is regarded as a reasonable measure of experience elsewhere in our society (although many industrial companies claim that 10% or less retire for this reason). But 28% of the Civil Service annuitants retire on disability.

Thus, early retirement for disability is 70% greater in Civil Service than for the whole economy and well over double the average reported by many companies. This is a hugely expensive aberration in the federal system.

Obviously, there are advantages to early "disability" retirement. The most important is a tax advantage: The first $5,200 of such income is tax-free. The facts suggest that the government may be a bit relaxed in deciding just what "disability" really means.

Pensions are but one of the fringe benefits of the federal civil servant that top those offered employees by private industry. For example, a recent study by the BLS compared certain federal and industry benefit costs as a percent of payroll as follows:

	Federal	Industry
Vacations	8.1%	5.3%
Holidays	2.9	3.2
Personal leave	0.6	0.3
Sick leave	3.3	1.1
Health, life, accident insurance	1.8	4.4
	16.7%	**14.3%**

This survey indicates that federal employees enjoy 50% more paid time off than their counterparts in industry. Only legal holidays fall below the industry average. However, the civil servant does have less insurance protection, unless he provides it himself.

I think it would be revealing to have a top-flight actuarial group determine what the government's fringe benefits—especially pensions—would cost when based on the same assumptions they use for such representative large companies as Du Pont, General Electric, AT&T, Exxon, and General Motors. My own estimate is that the real costs of federal benefits that must ultimately be paid by the taxpayers are substantially above industry outlays.

The facts suggest that government may be a bit relaxed in deciding what 'disability' means

Drawings by Robert Van Nutt

Pay

Appointment of Congressman to another position

THE WHITE HOUSE
WASHINGTON

11/25/75

Eva:

Ken asked whether Mr. Buchen wants him to draft a bill re the attached.

Thanks!

dawn

Refer in "Congressman's Appointment to other Office"

November 15, 1975

Buchen

DICK:

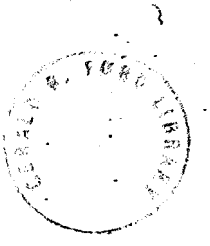
Attached is a copy of the legislation that Griffin gave us that would be a general statute. I have given it to you and given it to Lynn in the past but nothing has happened on it. It strikes me that someone ought to do something about it.

DR

cc J. C?

Notwithstanding any other provision of law, if a Member of Congress resigns to accept appointment to any other civil office under the authority of the United States, the compensation and emoluments available during the remainder of the time for which he was elected shall not exceed the level of compensation and emoluments which would have been available for service in such office at the beginning of the time for which he was elected.

(See Article I, Sec. 6, Clause 2 of the U. S. Constitution.)



8. Civil arrest or process

United States Senator while serving in official capacity is not exempt from service of civil process in District of Columbia under constitutional privilege from "arrest." Long v. Ansell, 1934, 69 F.2d 386, 63 App.D.C. 68, 94 A.L.R. 1466 affirmed 55 S.Ct. 21, 293 U.S. 76, 79 L.Ed. 208.

The privilege given by the last clause of this section does not protect from liability for libel based on the distribution by him of copies of the Congressional record containing a report of a defamatory speech made on the floor of the Senate. Id.

A member of Congress is entitled to exemption from service of process upon him, although it is not accompanied with the arrest of his person. Miner v. Markham, C.C.Wis.1886, 28 F. 387.

Defendant, who willfully failed to obey subpoena in supplementary proceedings, though a United States Representative, was guilty of civil contempt, and he would be fined $250 and would be sentenced to 30 days in jail, but he would be excused from imprisonment if he should appear for examination. James v. Powell, 1966, 274 N.Y.S.2d 192, 26 A.D.2d 295, affirmed 277 N.Y.S.2d 135, 18 N.Y.2d 931, 223 N.E.2d 562, motion granted 279 N.Y.S.2d 972, 19 N.Y.2d 813, 226 N.E.2d 705.

In view of provision giving to Senators and Representatives immunity from arrest, except in certain cases, during attendance at sessions and in going to and returning therefrom, member of Congress must respond to civil process and is liable for all consequences of disregarding civil process except that he cannot be subjected to arrest, and consequently there is no immunity from service of subpoena, since a subpoena is not an "arrest." Id.

Immunity under this clause giving to Senators and Representatives immunity from arrest, except in certain cases, during attendance at sessions and in going to and returning therefrom is immunity from civil arrest, and there is no exemption from civil process short of arrest. Id.

Congressman's immunity from arrest did not make him immune from service of summons based on claim that he had diverted certain payments to his wife to hinder, delay and defraud creditors. People on Complaint of James v. Powell, 1963, 243 N.Y.S.2d 555, 40 Misc.2d 593.

Immunity of Congressman from arrest does not render him immune from service of process. Id.

9. Status of Congressman

Count of indictment charging defendants with conspiracy to defraud United States by having defendant Congressman make speech in Congress was unconstitutional as applied to defendant Congressman because of this clause providing that for any speech or debate in either House, Senators and Representatives shall not be questioned in any other place, but this clause did not apply to defendants who were not members of Congress. U. S. v. Johnson, C.A. Md.1964, 337 F.2d 180, affirmed 86 S.Ct. 749, 383 U.S. 169, 15 L.Ed.2d 681, certiorari denied 87 S.Ct. 44, 134, 385 U.S. 846, 889, 17 L.Ed.2d 77, 117.

Constitutional privilege granted Senators and Representatives from arrest under this clause during their attendance at session of their respective houses did not apply to judgment debtor, a Congressman, against whom creditor sought order of arrest based on acts committed by debtor during period when Congress was not in session. James v. Powell, 1964, 250 N.Y.S.2d 625, 43 Misc.2d 314.

This provision applies to a delegate from a territory as well as a member from a state; he is entitled to a seat on the floor of the House as the representative of the people of the territory, elected with all the powers, rights, and privileges of a member from a state, except the power to vote, and with this exception he is a member of the House of Representatives, and entitled to the same constitutional privileges. Doty v. Strong, 1840, 1 Pinn. (Wis.) 84.

10. —— Determination

Judgment creditor of member of House of Representatives could not maintain quo warranto proceeding to determine right or title of member to office merely because of her status as judgment creditor who was unable to obtain arrest of member because of his congressional immunity. Application of James, D.C.N.Y. 1965, 241 F.Supp. 858.

Section 6, Clause 2. Holding other offices

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority

of the United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Notes of Decisions

Appointment during tenure 2
Nature and scope of prohibition 1
Resignation and forfeiture of office 3
Service in armed forces 4

Library references
Officers ⇐30.3.
United States ⇐12, 61.
C.J.S. Officers § 23.
C.J.S. United States §§ 18, 84.

1. Nature and scope of prohibition

The incompatibility is not limited to exercising an office and at the same time being a member of either house of Congress; but it equally extends to the case of holding—that is, having, keeping, possessing, or retaining—an office under such circumstances. Hammond v. Herrick, Cl. & H.El.Cas. 287-289.

2. Appointment during tenure

Where a person was elected and qualified as a United States senator for a term expiring in March, 1883 and in March, 1881, he resigned to accept the position of secretary to the interior, which office he soon thereafter resigned, after his second resignation the office of tariff commissioner was created by Act of Congress, and the attorney-general advised that this section of the Constitution disqualified him for appointment as commissioner. Appointment to Civil Office, 1882, 17 Op.Atty.Gen. 365.

The nomination and confirmation of a person who at the time is ineligible, for the office by force of this clause, cannot be made the basis of his appointment to such office after his ineligibility ceases. Appointment to Civil Office, 1883, 17 Op. Atty.Gen. 522.

A representative in Congress does not become a member of the House until he takes the oath of office as such representative; therefore, he may lawfully hold any office from his election until that time. 1874, 14 Op.Atty.Gen. 408.

One accepting and holding an office incompatible with that of representative in Congress is ineligible to the latter office. Bowen v. De Large, Smith El.Cas. 99.

3. Resignation and forfeiture of office

Where a person holding an office incompatible with that of senator is elected to the latter office, his resignation of the former before offering to assume the duties of the latter will remove any objection founded on this clause. Stanton v. Lane, Taft El.Cas. 205.

Continuing to execute the duties of an office under the United States after one is elected to Congress, but before he takes his seat, is not a disqualification; such office being resigned prior to the taking of the seat. Earle, Cl. & H.El. Cas. 314.

If one, after election to Congress, accepts a state office, and subsequently resigns the same before his term in Congress is to begin, he will not thereby be rendered incapable of holding his seat in Congress. Washburn v. Ripley, Cl. & H. El.Cas. 679-682.

The acceptance by any member of any office under the United States, after he has been elected to and taken his seat in Congress, operates as a forfeiture of his seat. Van Ness, Cl. & H.El.Cas. 122.

If the office to which a person is appointed does not in fact exist, such appointment will not render him ineligible to election as senator. Stanton v. Lane, Taft El.Cas. 205.

The formal resignation of an office held by a member-elect is not necessary if the duties of it have so far ceased as to have operated a virtual abolition of the office. Munford, Cl. & H.El.Cas. 316.

4. Service in armed forces

It would be a sound and reasonable policy for the Executive Department to refrain from commissioning or otherwise utilizing the services of Members of Congress in the armed forces, and the Congress by exemptions in the Selective Training and Service Act of 1940, 50 U. S.C.A.App. § 305 [now covered by 50 U. S.C.A.App. § 456], has recognized the soundness of this policy. 1943, 40 Op. Atty.Gen. Dec. 23.

Both the House and Senate, exercising their constitutional prerogative, have determined upon occasions in the past that service with the armed forces of the

FOR IMMEDIATE RELEASE December 16, 1975

Office of the White House Press Secretary

THE WHITE HOUSE

FACT SHEET

REPORT OF THE PANEL ON FEDERAL COMPENSATION

The President today released the report of the Panel on Federal Compensation.

BACKGROUND

The Panel on Federal Compensation was appointed by President Ford on June 12, 1975. The Panel was to review the major Federal compensation systems and submit policy recommendations on changes needed to the President by November 1. The President later extended the Panel's assignment to December 1975.

MEMBERSHIP OF THE PANEL

Vice President Nelson A. Rockefeller was Chairman of the Panel on Federal Compensation, and Robert E. Hampton, Chairman of the Civil Service Commission, served as Vice Chairman. Other members of the Panel included John Dunlop, the Secretary of Labor; James T. Lynn, Director of the Office of Management and Budget; Michael H. Moskow, Director of the Council on Wage and Price Stability; and William Brehm, Assistant Secretary of Defense for Manpower and Reserve Affairs. Dr. T. Norman Hurd was Special Assistant to the Chairman and Robert R. Fredlund of the Department of the Treasury was Executive Director of the Panel.

The President designated as advisors to the Panel James M. Cannon, Executive Director of the Domestic Council; Alan Greenspan, Chairman of the Council of Economic Advisors; L. William Seidman, Assistant to the President for Economic Affairs; and Jerome M. Rosow, Chairman of the Advisory Committee on Federal Pay.

THE PANEL'S MAJOR RECOMMENDATIONS ARE:

1. The many separate Federal civilian pay systems should be reviewed, and combined with other pay systems or eliminated if no longer needed

2. The principle of comparability with the private sector should be reaffirmed as the basis for Federal pay-setting

3. Consideration should be given to conducting major Federal pay surveys less frequently than once a year, with interim adjustments based on an appropriate statistical indicator

4. The principle of comparability should be extended to include benefits as well as pay. Development and testing should take place over the next two years to determine the best approach to implementation

5. The present General Schedule, which covers white-collar employees, should be replaced by a Clerical/Technical Service and a Professional/Administrative/Managerial/ Executive Service

more

6. The Clerical/Technical Service should be paid local or other geographical rates

7. The executive branch should be authorized to establish special occupational schedules and personnel systems when the regular schedules hamper management's ability to recruit and manage a well-qualified workforce

8. Merit, rather than length of service, should be the principal basis for within-grade pay advancement for employees in the Professional/Administrative/Managerial/ Executive Service

9. Pay rates for the Executive Schedule should be increased so that the rate for level V is above the current "comparability" rate for GS-18

10. Federal pay laws should be amended to permit the inclusion of State and local governments in Federal pay surveys when needed

11. The President's Agent should continue its effort to improve the statistical techniques used in the white-collar survey design and pay rate determination processes

Certain statutory provisions of the Federal Wage System should be repealed or amended to:

12. eliminate the requirement that out-of-area data be used, under certain circumstances, in setting local wage rates;

13. permit the establishment of night shift differentials in accordance with local prevailing practices;

14. permit step-rate structures to be established in accordance with predominant industry practice;

15. eliminate the fixed payline step; and

16. permit the inclusion of State and local governments in wage surveys when needed

17. The Civil Service Commission should develop appropriate legislative and regulatory proposals to provide more equitable premium compensation to all Federal employees working under similar circumstances

18. The President's Agent, the Federal Employees Pay Council, and the Advisory Committee on Federal Pay should meet jointly on a regular basis throughout the year to discuss and resolve the issues in the pay-setting process, with a view to formulating a common recommendation to the President

19. The present roles in the pay-setting processes of the Federal Wage System should be continued

20. The Advisory Committee on Federal Pay should be assigned the responsibility for an ongoing review of the interaction between the Federal compensation system and the private sector marketplace

# # #

FOR IMMEDIATE RELEASE December 16, 1975

Office of the White House Press Secretary

THE WHITE HOUSE

TEXT OF A LETTER FROM THE PRESIDENT
TO THE VICE PRESIDENT

Dear Nelson:

I thank you and the other members of the President's Panel on Federal Compensation for your report of the Panel's recommendations. All of you are to be commended for the tremendous effort you put into this study.

Your assessment of the current Federal Compensation System is very important and timely. It provides the Administration with a valuable tool to improve the Federal pay system so that it is equitable and fair to both Government employees and the American public.

Once again, thank you for a job well done.

Sincerely,

GERALD R. FORD

The Honorable Nelson A. Rockefeller
The Vice President
of the United States
Washington, D.C.

# # # #

Pay

Wednesday 12/15/76

Meeting
12/15/76
5:30 p.m.

9:50 Nell will invite Dick Cheney, Jim Lynn and Mike Duval to the 5:30 meeting today(12/15) with the President and the Chief Justice.

(If Lynn should not be invited, she can uninvite him.)

I called the Chief Justice's office and asked if they would call when he leaves his office and that you would meet him in the West Lobby.