

NAAUSA Quarterly



For Members of the National Association of Assistant United States Attorneys

HOUSE AND SENATE AUSA RETIREMENT BILLS INTRODUCED - June Washington, D.C. Fly-in Planned

On May 22, Representative Ileana Ros-Lehtinen (R-FL) introduced H.R. 2260, the "Assistant United States Attorneys Retirement Benefit Equity Act of 2003." The introduction of the House bill followed the introduction of the Senate bill, S. 640, which is sponsored by Senator Patrick Leahy (D-VT) and Senator Orrin Hatch (R-UT). This is the earliest in the first session of a Congress that both House and Senate bills have been introduced.

When Senator Leahy introduced S. 640, he talked at length about how the bill "would correct an inequity that exists under current law, whereby federal prosecutors receive substantially less favorable retirement benefits than nearly all other people involved in the federal criminal justice system... Assistant United States Attorneys... are not eligible for [the enhanced] benefits. This exclusion is unjustified." The full text of Senator Leahy's remarks are printed in the Congressional Record on page S3885. S. 640 has been referred to the Governmental Affairs Committee, chaired by Senator Susan Collins (R-ME).

In addition to Senators Leahy and Hatch, Senator Barbara Mikulski (D-MD) and Senator Richard Durbin (D-IL) are original cosponsors of S. 640.

Representative Ileana Ros-Lehtinen sent a "Dear Colleague" letter to all members of the House **before** she introduced H.R. 2260. As a result, H.R. 2260 has 15 original cosponsors. In her "Dear Colleague" letter,

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ALL ABOUT LAW ENFORCEMENT RETIREMENT FOR AUSAs

1. Question: Why are Assistant United States Attorneys seeking a different retirement plan?

Answer: The high turnover of AUSAs clearly demonstrates an ongoing serious "brain drain" of federal prosecutors throughout the United States. Many mid-career (8 to 12-year) AUSAs are turning to the private sector to better fund their retirement and to secure their financial futures. The federal government is losing talented, experienced federal prosecutors who would prefer to continue their public service but cannot see a way to do that and still plan for the future. Other significant factors include:

- The prominent role AUSAs have in federal law enforcement.
- Congressional and Department of Justice recognition of the increasingly complex and broadening investigative role of AUSAs.
- The documented threats/assaults on AUSAs and their families.
- The need to provide some form of compensation for the loss of income associated with government employment.
- The increasingly complex prosecutions which are necessary to meet the threat of sophisticated criminal activity which respects no political or geographic borders.

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Representative Ros-Lehtinen said that "AUSAs are responsible for prosecuting all terrorists with connections to the terrorist attacks of 9/11 and prosecuted the cases against Timothy McVeigh and Terry Nichols...." H.R. 2260 has been referred to the Subcommittee on Civil Service and Agency Reorganization. The current chair of the Subcommittee, Jo Ann Davis (R-VA) cosponsored the NAAUSA retirement legislation in the 107th Congress. The current chair of the full Government Reform Committee, Tom Davis (R-VA) was the sponsor of the NAAUSA's legislation in the 105th, 106th and 107th Congresses.

The 15 original cosponsors of H.R. 2260 are:

- Rep Boucher, Rick [D-VA-9]
- Rep Brown, Corrine [D-FL-3]
- Rep Conyers, John, Jr. [D-MI-14]
- Rep Diaz-Balart, Lincoln [D-FL-21]
- Rep Jones, Stephanie Tubbs [D-OH-11]
- Rep LaTourette, Steve C. [R-OH-14]
- Rep Lynch, Stephen F. [D-MA-9]
- Rep Matheson, Jim [D-UT-2]
- Rep Meek, Kendrick B. [D-FL-17]
- Rep Napolitano, Grace F. [D-CA-38]
- Rep Pomeroy, Earl [D-ND]
- Rep Sessions, Pete [R-TX-32]
- Rep Weller, Jerry [R-IL-11]
- Rep Wexler, Robert [D-FL-19]
- Rep Woolsey, Lynn C. [D-CA-6]

Within days of the introduction of H.R. 2260, the NAAUSA Board of Directors started planning for a lobby day fly-in to quickly add cosponsors to the House and Senate bills. In 2002, two separate Washington, D.C. fly-ins were held, one in April and one in June. The combined impact of these lobby days was a major reason why the 107th Congress ended with 196 cosponsors of the House bill and 11 cosponsors of the Senate bill.

2002 Lobby Days

More than 20 AUSAs participated in the April 2002 lobby days. After numerous meetings with members of Congress and their staffs, the number of cosponsors increased from 102 cosponsors to 156. NAAUSA members who participated in the April 2002 lobby effort were:

- Igou M. Allbray, ED of New York
- John L. Caudill, WD of Kentucky
- Benjamin Daniel, SD of Florida
- Richard L. Delonis, ED of Michigan
- John G. Duncan, ND of New York
- Michael R. Hardy, WD of Texas
- William R. Hogan, Jr., ND of Illinois
- Lawrence J. Leiser, ED of Virginia
- Mark W. Lester, SD of Florida
- Sherry L. Muncy, ND of West Virginia
- Robert E. Mydans, District of Colorado
- John E. Nordin, II, CD of California
- Deborah J. Rhodes, SD of California
- Michael L. Roden, MD of Tennessee
- Gregory M. Shogren, ED of Washington
- Rita R. Valdrini, ND of West Virginia
- Susan Roark Waldron, MD of Florida

Just a few weeks later NAAUSA managed another lobby day activity. Thanks in no small part to the \$25,000 in contributions from NAAUSA members, the June lobby days again included more than 20 NAAUSA members. Their efforts increased the number of cosponsors by another 48 House members. NAAUSA members who participated in the June 2002 lobby effort were:

- Daniel A. Brown, SD of Ohio
- E. Eugene Harrison, WD of Missouri
- Jeffrey R. Levenson, SD of Florida
- George F. May, SD of Alabama
- Robin W. Morey, SD of New York
- Robert E. Mydans, District of Colorado
- Brian E. Pawlak, ED of Wisconsin
- L. Felipe Sanchez, ND of Illinois
- William I. Shockley, ND of California
- Ronald J. Sievert, WD of Texas
- Rita R. Valdrini, ND of West Virginia
- Mark K. Vincent, District of Utah



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The Newsletter for Members of the National Association of Assistant United States Attorneys

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The NAAUSA Quarterly reports on views of Assistant United States Attorneys in their capacity as members of NAAUSA and not as employees of the Department of Justice.

From Retirement, page 1

2. Question: Is there a recruitment problem with AUSAs?

Answer: No. Many bright young lawyers come to the Department of Justice and stay for 4-7 years or so to perform public service and to obtain trial experience they cannot obtain elsewhere. Few, however, stay for a career, leading to a substantial retention problem.

3. Question: What are the statistics on AUSA retention?

Answer: Data from DOJ reveals that the average length of service for AUSAs was seven years during the period from 1990-92, and eight years for 1993-96. The average length of service for other DOJ employees was 19 years in 1996.

- There was 25% turnover of AUSA personnel for the 5 years from 1997-2001.
- Only 105 AUSAs actually retired nationwide in the past five years. That is 20 AUSAs per year reaching retirement nationwide.
- 11 AUSAs leave DOJ before retirement for every single AUSA that stays to retirement.
- The statistics are set forth in the following chart:

AUSA Separation Data				
	Retirements	Resignations	Other Separations	Total
FY1997	13	182	31	226
FY1998	29	194	30	253
FY1999	15	193	34	242
FY2000	27	253	32	312
FY2001	21	237	34	292
Total	105	1,059	161	1,325

Source: U.S. Department of Justice, Executive Office for United States Attorneys

4. Question: But the trend is for more AUSAs to stay to retirement, isn't this so?

Answer: The numbers are up slightly, but only 105 AUSAs retired from the job in the five-year period ending in FY 2001. That's about 20 per year nationwide, when there are currently about 4800 AUSAs. So less than half of one per cent actually retire from the job.

This is why NAAUSA believes the "brain drain" is at a critical stage.

5. Question: Who else in government gets this or a similar enhanced retirement plan?

Answer: Law enforcement officers, firefighters, air-traffic controllers, Members of Congress and congressional staff. [FEDERAL PERSONNEL GUIDE AT 118 (KEY COMMUNICATIONS GROUP, INC.)(2001)]

6. Question: What is this retirement plan? How does it differ from regular civil service retirement today under FERS?

Answer: This group of employees listed above receives an unreduced retirement benefit at age 50 with 20 years of service, and they contribute an extra .5% of salary to the basic annuity component of FERS. The annual annuity is based upon the following formula:

- 1.7% of the high-three average pay times the years of service up to 20 years, plus
- 1% of the high-three average pay times the years of service exceeding 20 years.
- Thus the basic annuity would be 34% after 20 years at age 50.

Generally, for FERS regular civil service retirement, the basic annuity component is 1% of the employee's high-

three average salary times the years of service. This group of employees receives an unreduced retirement benefit at age 60 with 20 years of service or at age 55 with 30 years of service.

Thus for a FERS employee, the enhanced retirement means the basic annuity component would be 34% of high three average salary at age 50 after 20 years of service, whereas regular FERS civil service retirement provides 20%

of high three average salary at age 60 after 20 years of service.

FEDERAL PERSONNEL GUIDE AT 118 (KEY COMMUNICATIONS GROUP, INC.)(2001)

7. Question: How does the retirement plan differ for the older employees still covered under CSRS?

Answer: Under either pending bill, employees would receive an unreduced retirement benefit at age 50 with 20 years of service, and they would contribute an extra .5% of salary towards their annuity. The annual annuity is based upon the following formula: 2.5% times the average high-three salary

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for the first 20 years plus 2%
for service in excess of 20
years.

For CSRS regular civil
service retirement, the
annuity is the high-three
average salary times 1.5%
times the first five years;
times 1.75% times the next
five years; and 2% times
service over ten years. This
group of employees receives
an unreduced retirement
benefit at age 60 with 20
years of service or at age 55
with 30 years of service.

Thus for a CSRS
employee, the enhanced
retirement means the annuity
would be 50% of high three
average salary at age 50 after
20 years of service, whereas
CSRS civil service retirement
provides 36.25% of high
three average salary at age
60 after 20 years of service.

CSRS employees do not
receive any matching
government contributions to
a 401K and receive reduced
social security benefits upon
retirement.

SOURCE: FEDERAL PERSONNEL
GUIDE AT 83-84. (KEY
COMMUNICATIONS GROUP,
INC.)(2001)

THE BOTTOMLINE:

According to a federal
benefits firm, the enhanced
retirement benefits will mean
that an AUSAs annuity will
increase by \$10,000 to
\$20,000 *per year*.

**8. Question: What is the
Department of Justice's
position on the legislation?**

Answer: The Department of
Justice has taken no official
position on the legislation.
Deputy Attorney General
Larry Thompson has stated
informally to NAAUSA
leadership that the Depart-

ment would be supportive of
legislation that was good
and fair for federal prosecu-
tors. He cautioned however,
that any legislation like H.R.
2260 or S. 640 must be
funded by the Congress.

**9. Question: What are the
key differences between
H.R. 2260 and S. 640?**

Answer: H.R. 2260 covers
AUSAs only, not federal
prosecutors in general. The
Department's contribution
for past service as well as the
individual AUSA's contribu-
tion for past service, would
both be paid by DOJ.

S. 640 covers AUSAs
and DOJ attorneys (as
designated by the Attorney
General) with similar respon-
sibilities working in Wash-
ington or throughout the
country. The Department
would pay its contribution
for past service, while
individual federal prosecu-
tors would pay their own
contribution for past service.

**10. Question: What is the
cost of the legislation?**

Answer: There are two
different Congressional
Budget Office estimates
(called "scoring the bill").

There has not been a
CBO score on H.R. 2260 or S.
640. In the last Congress,
CBO did score S. 1828, the
Senate bill, at an average of
about \$118 million per year
for the first 10 years.

According to CBO, the
five-year cost of H.R. 1090
was projected to be \$713
million.

According to Govern-
ment Retirement and
Benefits, Inc. (GRB), a
Washington firm that
specializes in federal

employee benefits, the
estimated five-year cost of
including AUSAs in Law
Enforcement Officer (LEO)
retirement under H.R. 1090
would have been \$290
million.

**11. Question: What
Committee action has been
taken on the legislation?
Has there been committee
mark-up?**

Answer: H.R. 2260 was
referred to the House Civil
Service Subcommittee,
House Committee on
Government Reform. S. 640
was referred to the Senate
Governmental Affairs
Committee. No actions have
been taken by the Subcom-
mittees.

There has been no mark-up
of the legislation.

**12. Question: What is the
equity AUSAs seek?**

Answer: Congress has
recognized that law enforce-
ment officers (LEOs) face
dangers, challenges and
stress factors not common to
routine civil service employ-
ment. From the time that an
arrest occurs and the person
comes into contact with the
federal criminal justice
system until the time that
individual leaves that
system, the only persons
that the individual comes
into contact with who are not
afforded LEO status for
retirement purposes are the
federal Magistrates and
Judges and the AUSAs who
prosecute the case. All other
contacts, whether it be the
agent, the pretrial services
officer, the deputy U.S.
Marshal, the probation
officer or the prison staff –
receive enhanced retirement
benefits as law enforcement

officers.

The magistrates and
judges have their own
retirement systems, leaving
the federal prosecutor at the
center of a system that does
not recognize his or her role
as a law enforcement officer
for purposes of retirement.
Assistant United States
Attorneys work side-by-side
with Special Agents of the
federal law enforcement
agencies, targeting, investi-
gating and prosecuting the
more serious law violators in
America. On top of all those
distinctions, it is generally
recognized that top pay for
AUSAs is less than the
starting salaries offered by
the nation's large law firms.

**13. Question: If this is so
inequitable, how did it come
about?**

Answer: The profes-
sionalization of Special
Agents began during the era
of J. Edgar Hoover, when it
was recognized that the
problems associated with
organized crime required the
coordinated efforts of
highly-trained professional
law enforcement officers.
Youth and physical fitness
were recognized as highly
desirable characteristics for
federal law enforcement
officers.

In contrast, the United
States Attorneys Offices
remained political up to the
1990s, when the protections
of the Merit Systems
Protection Board were
afforded to AUSAs. At one
time, it was standard practice
for all Assistant United
States Attorneys to tender
their resignations after an
election. Now, although the
change of administration
often results in AUSAs

going into private practice, it is a career choice and not a political mandate.

The increasing complexities of criminal investigations, prosecutions, and civil litigation required continuity of personnel in order to be effective. AUSAs began to stay longer on the job. However, the Department of Justice was slow to adjust to the concept of career AUSAs, which is somewhat of a rare commodity even today. AUSAs were not ever afforded the benefits of the other personnel with whom they toiled on a daily basis.

Assistant United States Attorneys routinely work nights and weekends without extra remuneration or compensatory time off, while they are surrounded by other professionals who receive one or the other, plus an enhanced retirement. Including the aspect of danger inherent in the job of an AUSA, these are the key reasons for an enhanced retirement system.

14. Question: Aren't there other groups seeking law enforcement retirement?

Answer: Yes, and there always will be. However, right now there is a critical situation in federal law enforcement caused by the high turnover rate and short tenure of AUSAs. It is in the nation's interest to have experienced journeyman litigators available for cases that are critical to the national interest, as those now ongoing against, for example, Zacarius Moussaoui and Richard C. Reid.

15. Question: I hear your arguments, but I think the bill is too expensive.

Answer: As some Members of Congress have said: "you get what you pay for." NAAUSA believes Congress ought to encourage a greater number of the bright young attorneys who are being hired by the Department to stay for a career. Greater pay is not necessarily the answer, because the pay gap between attorneys in private practice and federal prosecutors in public practice will always be great. But by providing a fair retirement system that recognizes the dangers, tedious investigative work, and sacrifices made by our nation's prosecutors on a daily basis, Congress can encourage more career service. We can afford no less for the safety and security of our local communities and America as a nation.

16. Question: The bills provide that the law enforcement retirement would be retroactive. Does this mean that AUSAs who have already retired with 20 years of AUSA service would be covered by the new system?

Answer: No. Only AUSAs who are employed by the Department on the day the President signs the bill into law would be eligible for the benefits under law enforcement retirement. The retroactive provision means that once the bill becomes law, all time as an AUSA would be counted toward the enhanced retirement system.

OPM COLLECTING DATA ON FEDERAL LAW ENFORCEMENT EMPLOYEES

On April 24, the Office of Personnel Management (OPM) issued a memorandum to federal agencies asking them to submit certain information regarding federal employees with law enforcement duties. The OPM memo was in response to a joint request by the House Committee on the Judiciary, the House Committee on Government Reform, and the Subcommittee on Crime, Terrorism and Homeland Security. The agencies were asked to submit the data to OPM by May 28, 2003.

The OPM request asks agencies to submit information on Law Enforcement Officers (LEOs) and employees who have the authority to make arrests under federal law but who are not classified as LEOs. OPM refers to this last category as "non-LEOs." NAAUSA will ask for a copy of the report to determine if AUSAs were included as "non-LEOs" and discover the occupational groups included as LEOs.



FLEXIBLE SPENDING ACCOUNTS

Most federal agencies will begin flexible spending accounts starting July 1, 2003. Employees interested in signing up for the accounts should apply at www.fsafeds.com/fsafeds. Flexible Spending Accounts allow employees to set aside up to \$3,000 in pre-tax dollars to pay for health care costs, such as insurance deductibles, prescription drugs and dental and vision care. In addition, \$5,000 in pre-tax dollars can be set aside to pay for child and dependent care costs. Contributions will be made by payroll deduction. Some agencies will not be able to process the payroll deduction until January 2004. Federal employees pay for the services and are reimbursed from the accounts. Current IRS rules require the money to be forfeited if reimbursement is not claimed during the plan year. Legislation is pending in Congress to allow employees to carry over the money set aside instead of losing it.



Find Your Senators and Representatives

The following web sites provide comprehensive directories of the Members of Congress by state delegation.

Find your federal Representative at www.house.gov/writerep/

Find your federal Senator at www.senate.gov/senators/index.cfm

Government manual at www.access.gpo.gov/nara/browse-gm-01.html

In addition to H.R. 2260 and S. 640, NAAUSA's retirement legislation, the following legislation being considered by Congress is of interest to NAAUSA.

House Passes Legislation Establishing Pay-for-Performance System

In spite of the concerns of many members of Congress, federal employee unions, and a number of scholars, the House has passed the Administration's proposal to establish a \$500 million pay-for-performance fund. The President's 2004 budget proposed a 2 percent cost-of-living increase effective January 2004. The formula for determining federal pay increases would have set the increase at 2.7 percent.

Opponents of the new performance system believe the difference in the "formula rate" and the Administration's proposal provides the funds for the pay-for-performance fund.

Under the Administration's plan, the Office of Personnel Management would administer the fund and agencies would be required to submit plans to OPM detailing how they planned to use money in the fund to reward performance and meet agency performance goals. Agencies could use the money from the fund to reward employees for performing extra duties, suggesting ideas that save money, or for managerial duties. In addition, the money in the fund could be used for recruiting and retaining employees, such as those with specialized skills. Individual employees or groups of employees would be eligible for payouts from the fund. Payments from the fund would be permanent increases to an employee's pay.

At press time, the Senate was considering possible changes to the Administration's proposal.

Military/Civilian Pay Increase Parity

The 2004 Defense authorization bill passed by the House includes a provision which states civilian and military pay raises will be adjusted at the same rate. The Administration opposes this provision. Congress overruled the Administration on this issue for the 2003 pay increase.

Reservist Pay

Legislation introduced by Robert Wexler (D-FL), H.R. 217, would entitle a person who is absent from his/her federal government position due to serving in the military or National Guard to receive pay from his/her agency so that, when added to the pay and allowances for serving in the military or Guard, the total amount would equal the basic pay he/she would have received while in the government position.



On Capitol Hill

Income Tax Payments on Student Loans

Representative Tom Davis (R-VA), Chairman of the House Government Reform Committee, has introduced legislation that would eliminate the tax on money federal agencies give to employees to pay off student loans. The legislation, Generating Opportunity by Forgiving Debt for Service (GOFEDS), was introduced in the last Congress, but was never approved by the Committee. A similar bill has been introduced in the Senate.

Increasing the Limit on Total Pay for Federal Criminal Investigators

H.R. 1676, introduced by Representative Michael Rogers (R-MI) and cosponsored by Representative Jo Ann Davis (R-VA), Chair of the House Civil Service Subcommittee, would exclude availability pay for federal criminal investigators from the limitation on premium pay and would modify levels of special pay adjustments for federal law enforcement officers in certain high cost areas. (Congressman Rodgers is a former FBI agent.)

House Approves DoD Plan to Pay Executives Up to \$198,600

Before the House left for the Memorial Day District Work period, it approved the Department of Defense plan to abolish the civil service system and replace it with a pay-for-performance system. The DoD plan would abolish the 15-grade GS pay scale, eliminate special pay rates that apply to all employees and create a pay-for-performance system that rewards employees for their work. If Congress approves the DoD plan, implementation could begin in the fall of 2003.

The proposed changes are the most significant changes to the current civil service system (which was developed in the late 19th century). Many people in and outside of government expect the DOD plan to become the model for changing the pay system for all federal employees.

The DOD plan is of interest to NAAUSA because it authorizes senior staff to be paid much higher total pay than the current limits on AUSAs. The Internal Revenue Service, the Securities and Exchange Commission, the National Institutes of Health, and the Department of Homeland Security are also able to pay senior level executives and managers more than the current annual cap on federal pay – \$134,000. Under the DOD plan there would be a separate pay plan for managers and senior executives with the pay capped at \$198,600.



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1*03

RETIREMENT BILL MEANS \$387,640 MORE FOR RETIREMENT

Many AUSAs do not realize the financial impact of law enforcement retirement for AUSAs. One AUSA said, “I was left with the impression that it really wasn’t going to make that big of a difference to me...but for whatever reason, I decided to use the FERS retirement calculator at www.seniors.gov/calstart.html and discovered that the difference is actually huge! Calculating the difference just up to age 62, I will be eligible for law enforcement officer benefit payments totaling \$670,456 (starting at age 50) and as regular FERS, just \$282,816 (starting at age 57), a difference of \$387,640!” The actual amount is likely to be higher because LEOs receive cost-of-living adjustments from the start. As a regular federal employee, however, AUSAs only receive cost-of-living adjustments starting at age 62.

	High-Three \$75,000 50 years old, 20 years of service			High-Three \$100,000 57 years old, 25 years of service		
	Regular Retirement <u>Annuity</u>	Retirement Annuity Under <u>NAAUSA Bill</u>	<u>Difference</u>	Regular Retirement <u>Annuity</u>	Retirement Annuity Under <u>NAAUSA Bill</u>	<u>Difference</u>
CSRS	\$24,504	\$37,500	\$12,996	\$46,248	\$60,000	\$13,752
FERS	\$15,000	\$25,500	\$10,500	\$18,852	\$39,000	\$20,148

Source: From calculations by Government Retirement and Benefits, Inc., 5999 Stevenson Ave., Suite 403, Alexandria, VA 22304.



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