

*NAAUSA RESPONSES TO QUESTIONS ON AUSA RETIREMENT LEGISLATION*

**1. *Should Main Justice Attorneys Also Receive Equitable Retirement Benefits?***

According to the DOJ's Executive Office for United States Attorneys:

The United States Attorneys' offices conduct a majority of the criminal prosecutions and civil litigation handled by the Department of Justice. The offices investigate and prosecute a wide range of criminal activities, including domestic and international terrorism, organized drug trafficking and firearms crimes, and white collar crime and regulatory offenses. In the civil arena, the United States Attorneys' offices defend federal government agencies, such as in tort suits brought by those who allege suffering as a result of government actions, or alleged medical malpractice by federal employees. The United States Attorneys also initiate civil cases against individuals or businesses to enforce the law, such as in civil health-care fraud cases, or to represent the government's interests, such as in bankruptcy actions. \* \* \*

. . . [T]he significant liaison work performed by the United States Attorneys' offices with federal, state, and local law enforcement entities on initiatives, such as Project Safe Neighborhoods, as well as with victims of crime, local communities, schools, and other organizations, cannot be quantified. Since the role of the United States Attorneys is to see "that justice shall be done," (Berger v. United States, 295 U.S. 88 (1935)), the true and comprehensive accomplishments of the United States Attorneys cannot be tabulated statistically. \* \* \*

The United States Attorneys serve as the nation's principal litigators. . . .

The United States Attorneys are responsible for . . . the collection of debts owed the federal government which are administratively uncollectible. \* \* \*

Assistant United States Attorneys constituted 56 percent of all Department attorneys and about 70 percent of those Department attorneys with prosecution or litigation responsibilities. Most new Assistant United States Attorneys have prior litigation experience with a prosecuting attorney's office, a law firm, or another government agency. In addition to their prior legal experience, Assistant United States Attorneys nationwide have an average of 11 years of experience in United States Attorneys' offices.

*United States Attorney's Annual Statistical Reports, Fiscal Year 2006, Message from the Director and pages 1 and 3.*

Attorneys who work at "Main Justice" are just as professional as the Assistant United States Attorneys (AUSAs) who work in the 94 United States Attorneys Offices. In fact, the

experienced gained at Main Justice allows many attorneys to be eventually hired as AUSAs. Nevertheless, with a few exceptions, there are differences between Main Justice attorneys and AUSAs. It is the AUSA who works, on a daily basis, with local and federal law enforcement officers. It is the AUSA who, at 2:00 A.M., prepares a search warrant or authorizes an arrest warrant. It is the AUSA who is held responsible by the District Judge for the conduct of litigation, even if a Main Justice attorney is participating in the case. In contrast, Main Justice attorneys, despite lesser experience, frequently have a greater salary. They generally have much greater supervision and specialize in a relatively narrow field. Living in the D.C. Metropolitan area, they generally have substantially greater employment opportunities with other federal agencies or large law firms. Despite these differences, NAAUSA does not object to amending H.R. 2878, if DOJ desires, to include a provision which would allow the Attorney General to select any group of Main Justice attorneys for inclusion within the Act.

**2. Would DOJ be immediately liable for \$1.2 billion in retroactive agency-share contributions?**

5 U.S.C. § 8348(f) (for Civil Service Retirement System employees) and 5 U.S.C. § 8423(b)(2) (for Federal Employees Retirement System employees) permits the *retroactive* agency-share contributions to be amortized over 30 years.

There is no reasonable doubt that the Fund would, with the possible exception of the first one or two years, provide more than sufficient funds to pay for the cost of enhanced judgment enforcement and *current* agency-share contributions.

Our projections show that the Fund would, with the possible exception of the first two or three years, provide more than sufficient funds to pay for the cost of enhanced judgment enforcement, *current* agency-share contributions, and *retroactive* agency-share contributions amortized over 30 years.

In addition to amortizing the retroactive agency-share contributions, there are two additional methods to *reduce* the amount of retroactive agency share contributions and one method to *ensure* that the Fund would fully pay for the retroactive agency-share contributions.

First, the effective date for AUSA retirement, under the Bill, should be delayed for up to two years from enactment of Title I (the Enhanced Financial Recovery Fund portion of the Bill). This would ensure that the Fund had more than sufficient funds on hand to fully pay for enhanced judgment enforcement, current agency-share contributions and at least some portion of the retroactive agency-share contributions.

Second, the Minimum Retirement Age (MRA) for AUSAs should be the same as provided for FERS employees, which ranges from 55 years of age to 57 years of age, depending on the year of the employee's birth. For employee born after January 1, 1970, the MRA is 57. This would provide a reduction in retroactive agency-share contributions because more AUSAs

would retire under the existing retirement scheme rather than wait the additional years and because AUSAs would be receiving retirement payments for fewer years.

Most important, we recommend that Section 104(e) of the Bill be substantially amended so that there would be only three types of withdrawals that could be made from the Fund:

- (1) the amount necessary for enhanced judgment enforcement;
- (2) an amount equal to the amount necessary for current agency-share contributions;

(3) *the entire remaining balance* of the Fund toward the amount due as the retroactive agency-share contributions, until that obligation is paid in full. Language should be added which would limit DOJ's liability for the retroactive agency-share contributions to the remaining balance of the Fund. This should result in the retroactive liability being paid, in full, well before 30 years. When the retroactive agency-share contribution is paid in full, the entire remaining balance of the Fund should be paid first to rebate the agency's offsets, and then to the Treasury's General Fund.

***3. Would the cost on current agency-share contributions, plus \$20 million for enhanced judgment enforcement, possibly be charged against the funds appropriated for United States' Attorneys, resulting in less money for the United States Attorney's Offices.***

DOJ needs a total of approximately \$105 million per year deposited into the Fund: up to \$85 million to pay for *current* agency-share contributions, as estimated by DOJ, and \$20 million for enhanced judgment enforcement.

From FY 1997 to FY 2006, the yearly increase in collections has averaged 17.08%. From FY 2003 through FY 2006, DOJ reports show that collections have averaged \$4.06 billion. Through a combination of 5% late fees and offsets of 2% to 5%, even though not applied uniformly to all collections, DOJ can deposit more than \$105 million per year in the Fund.

From FY 2003 to FY 2006, more than \$3.0 billion per year was collected from civil cases or restitution to federal agencies. Had the proposed offsets applied then, DOJ would have brought in more than \$65 million in offsets per year. There is no reason to believe that in FY 2008 and beyond DOJ cannot continue to bring in more than \$65 million in offsets.

In addition, the Bill provides for late fees (or surcharges) not only on criminal fines, federal restitution and non-federal restitution, but also on civil judgments. Granted, the late fee can only apply to new judgements not paid within 15 days of entry, because of *Ex Post Facto* considerations. But billions of dollars in uncollected debt are added each year. In order to deposit into the Fund \$40 million, from the late fees, all DOJ has to do is collect \$800 million per year from judgments covered by the Act and not paid within 15 days of judgment. Five percent of \$800 million is \$40 million.

Because of *Ex Post Facto* considerations, it is likely that DOJ cannot bring in at least \$40 million in late fees during the first year, and possible that DOJ cannot bring in the amount during the second year. Some of the short-fall would probably be satisfied by offsets in excess of \$65 million. In order to further ensure that there are sufficient amounts in the Fund, NAAUSA proposes, as stated above, that the effective date for AUSA retirement, under the Bill, be generally delayed for two years from enactment of Title I. This would ensure that the Fund had more than sufficient funds on hand to fully pay for enhanced judgment enforcement, current agency-share contributions and at least some portion of the retroactive agency-share contributions.

Additionally, we suggest that the Bill include a provision that permits a deferral of the agency-share contribution from one fiscal year to the next if the amount in the Fund is not sufficient to pay the full cost of enhanced judgment enforcement and current agency-share contributions. While it is likely that such a contingency would never have to be invoked, this provision would ensure that U.S. Attorney's operating appropriations would not assume the cost of equitable AUSA retirement.

#### ***4. Would the late fees cause a permanent 5% loss to all crime victims and federal agencies?***

It would be unimaginable that the late fees will permanently, or even temporarily, cause a 5% loss to all crime victims and federal agencies.

The 5% late fee would not apply to fines, restitution obligations and civil judgments paid within 15 days of judgment. As many such judgments are paid in full within 15 days of judgment, there would not be a 5% loss to all crime victims and federal agencies. As the Bill gives defendants an incentive to pay as much as possible, including the full amount if that is possible, within 15 days, even more judgments will be paid within 15 days of entry. The 5% late fee will provide a deterrent against unnecessary delay.

When imposed, the 5% late fee would be fully recovered when the defendant satisfied the judgment (including the late fee) in full. As judgments are enforceable for at least 20 years, many defendants, eventually, pay their judgment in full. As this Bill provides for enhanced judgment enforcement resources, more defendants will, eventually, pay their judgment in full.

The real question is whether crime victims and federal agencies suffer a permanent loss because inadequate resources are currently applied to pursue the \$50 billion in judgments currently due? As this Bill would provide DOJ with at least \$20 million additional to pursue those judgment debtors who have failed to satisfy their debts to crime victims and the United States, this Bill works to the substantial financial benefit of crime victims and the United States.

#### ***5. Would this Bill punish the poor?***

The Bill increases the special assessment for misdemeanor offenses, up to \$100 for a

Class A misdemeanor offense, such as an assault, theft, or driving while intoxicated. The Bill also increases the special assessment for corporations, up to \$1000 for a felony. The Bill's proposed increase to \$200 for each felony offense committed by an individual should be deleted. The proposed increases for misdemeanor offenses and corporations are not undue burden when compared to the cost borne by society on account of the underlying criminal activity.

Additionally, the Bill imposes a 5% late fee for those defendants who fail to timely satisfy a criminal judgment imposing a fine or restitution obligation, or fail to timely satisfy a civil judgment. Current delinquent and default penalties, which total up to 35% of the amount due, would be repealed.

We propose that there be no late fee on special assessments. Special assessments are imposed in every case, regardless of a defendant's ability to pay. In many criminal cases, perhaps the majority of cases, only a special assessment is imposed. Eliminating the late fee on special assessments will substantially reduce the cost of administering the Bill.

Fines are imposed only to the extent of a defendant's ability to pay. 18 U.S.C. § 3572(a). A 5% late fee on a fine, which the Court has already determined is within the defendant's ability to pay, is not an undue burden.

Restitution is generally imposed without regard to a defendant's ability to pay. 18 U.S.C. § 3664(f)(1)(A). If a late fee imposes such a burden on a defendant that it requires him to give priority to the satisfaction of his restitution obligation to the victims of crime, the burden is not undue. It is hard to see how a 5% late fee can really be considered an undue burden. Most defendants who do not pay a restitution obligation immediately pay in installments. A defendant who owes \$1000 as restitution may very well pay \$100 per month. In the 11<sup>th</sup> month, on account of the late fee, an additional \$50 would be due. If the Court finds that the burden is undue, the Court may offset the burden by waiving interest, waiving a fine, or permitting payments in accordance with a payment schedule. The Court may even remit the restitution obligation, upon motion of the United States Attorney, when the obligation is uncollectible. 18 U.S.C. § 3664(m)(1)(A) incorporating § 3573.

Fundamentally, we reject the notion that all criminal defendants are ready, willing, maybe even anxious to immediately pay all criminal monetary penalties imposed by the Court, but are unable to do so because of a financial inability to pay. The reality is that many defendants, regardless of their ability to pay, seek to hide and retain whatever assets they possess upon entering into the criminal justice system. Many defendants more readily accept incarceration over the liquidation of their assets. DOJ needs additional resources to pursue those defendants who owe substantial sums to the victims of crime or the United States, who have the ability to pay, and refuse to pay.

***6. Would the Bill create an appearance of conflict of interest for DOJ?***

Assistant United States Attorneys are adamant in their refusal to accept any proposal which might compromise their professional responsibility. The Bill clearly does not create even the possible appearance of a conflict of interest for individual Assistant United States Attorneys. Section 104(e) of the Bill states: "The availability of amounts from the Fund shall have no effect on the implementation of title II or the amendments made by title II." Thus, AUSAs would receive the Title II retirement benefits regardless of Title I collection reforms.

NAAUSA agrees, however, Section 104(e) of the Bill should be re-written to eliminate any amount of the Fund being paid to DOJ, except for the \$20 million necessary for judgment enforcement efforts. As the \$20 million would be paid for by offsets from other federal agencies, and as that amount is a trivial portion of the amount that DOJ already collects (\$20 million of \$4.06 billion equals 0.05%), no one could reasonably suggest that DOJ was pursuing a case in order to enhance its own judgment enforcement resources.

#### **7. *Would provisions of the Bill violate the Ex Post Facto clause?***

"In the case of continuing offenses . . . the *Ex Post Facto* clause is not violated by application of a statute to an enterprise that began prior to, but continued after, the effective date of the statute." United States v. Jennings, 487 F.3d 564, \_\_\_ (8<sup>th</sup> Cir. 2007) *quoting* United States v. Garfinkel, 29 F.3d 1253, 1259 (8th Cir.1994). The Bill would extend to "any offense involving conduct that continued on or after the date of the enactment of this Act." Section 105(a). While we believe, as drafted, the language fully comports with the *Ex Post Facto* clause, in order to ameliorate the concern raised, we suggest that the word "including" be substituted for the word "involving."

#### **8. *Should Federal Public Defenders be included in the Bill?***

We have great respect for federal public defenders. We understand the unique responsibility that they have to their clients and how they could not allow their relationship to be possibly tainted by even the most fanciful assertion that they were the beneficiaries of funds collected from convicted defendants. Thus, it would be impossible to permit the Fund to be used to provide an offset for the cost of extending retirement benefits to federal public defenders.

We take no formal position on whether the retirement benefits of federal public defenders should be enhanced. If the federal public defenders are interested in pursuing such a benefit, we suggest that the Administrative Office of United States Courts be directed to conduct a study of the issue and provide a report to Congress.