NAAUSA NEWS

THE ONLY NEWSLETTER EXCLUSIVELY REPORTING ON ISSUES AFFECTING ASSISTANT UNITED STATES ATTORNEYS

Jul/Aug 2018 • Vol. 25, No. 2

NAAUSA Advocacy Leads to Higher APRs Payouts

As reported in the last newsletter, in April 2018 NAAUSA urged the Executive Office for United States Attorneys (EOUSA) to use the windfall in extra FY 2018 funding that United States Attorney Offices received from Congress to increase the minimum and Q-2 levels in every grade level of the AD pay schedule and move to close the large pay gap between AUSAs and equivalent-tenure DOJ trial attorneys.

The FY 2018 appropriations law passed earlier this spring by Congress included $102 million more for United States Attorney Offices than the FY 2017 appropriation and $41 million more than DOJ had requested. "There may never be another opportunity to enact such significant structural reforms in the AD pay system," NAAUSA President Larry Leiser said in his April 2, 2018 letter to EOUSA Director James Crowell in support of the pay increases.

NAAUSA's letter arrived at EOUSA while deliberations were underway to determine the amount of the APRs and the Director, EOUSA, responded by noting that plans were being made for

NAAUSA asks Deputy Attorney General to eliminate pay disparity during July 23 meeting. Pictured, left to right, Dennis Boyd, Executive Director, Larry Leiser, President, DAG Rod Rosenstein, Steve Wasserman, Vice President and Bruce Moyer, Counsel.

See **APRS**, page 2

President Trump Issues Executive Orders Stressing Employee Accountability

President Trump issued three executive orders on May 25, 2018 that underscore federal employee accountability, streamline the firing process, and aim to limit the influence of federal employee unions.

The first order dealing with employee accountability has the greatest impact upon AUSAs and the workplace. Titled "Promoting Accountability and Streamlining Removal Procedures Consistent with Merit System Principles," it sets forth principles for agencies to apply in the discipline and removal of employees due to misconduct or poor performance. Those principles include: (i) not requiring progressive discipline; (ii) not prohibiting discipline in one situation because it was not applied in another; (iii) not suspending employees if removal is appropriate; and (iv) taking into account past work history and disciplinary record.

The Order also directs agencies to streamline the firing process by standardizing performance improvement plans (PIPs) to 30 days. Currently, PIPs vary between agencies and generally run from 60 to 120 days. Additionally, the Order seeks to exclude appeals of firings from review by negotiated grievance procedures, although current union contracts will need to be renegotiated to provide for that. Where new regulations are required to further these principles, the Order also directs OPM to propose such regulations.

The second Order deals with federal employee labor unions and limits the use of "official time" through which federal employees are compensated by their agency for performing their representational union duties instead of their regular work. The Order limits union officials to spending no more than 25% of their work hours on official time. It also limits official time to one hour per bargaining unit employee per year, down from three hours currently. It also prevents use of official time for lobbying or to prepare or pursue grievances brought against the agency. This order also prohibits union access of agency resources, including office space, meeting rooms and computers, unless paid for by the union.

The third Order also deals with federal employee unions and aims to limit the scope and influence of their collective bargaining agreements with government agencies. (Federal employee unions are prohibited by law from negotiating over pay and are only able to arrive at collective bargaining agreements over working conditions.) The Executive Order calls for all collective bargaining agreements (CBAs) to be opened for negotiation at the earliest possible

See **ORDERS**, page 3

NAAUSA NEWS

NAAUSA News provides members of the National Association of Assistant United States Attorneys with information on legal, congressional and federal employee developments affecting AUSAs.

ISSN# 1094-6608

Address changes should be sent to:

NAAUSA
5868 Mapledale Plaza, Suite 104
Woodbridge VA 22193
1-800-455-5661
or (703) 491-4309
1-800-528-3492 FAX
E-Mail: info@naausa.org
Web Address: www.naausa.org

A maximum of three full pages of advertising is accepted in each issue of the *NAAUSA News*. Contact the NAAUSA office for rates.

NAAUSA News reports on the views of NAAUSA members, not in their capacity as Assistant United States Attorneys.

Layout by Six Penny Graphics
www.sixpennygraphics.com

APRS from page 1

a "substantial pay raise." And on April 6, 2018, EOUSA Director Crowell announced that FY 2018 APR funding for AUSA pay raises would be set at 1.75% of non-capped salaries. NAAUSA President Leiser said: "This is the second time that NAAUSA's advocacy is responsible for pay increases for AUSAs, first in April 2016 and now in April 2018. However, that while NAAUSA's letter influenced increased pay increases for all AUSAs, we still need to close the $30,000+ pay gap between many AUSAs and all other DOJ attorneys."

APR funding pays for mandatory career-ladder increases for AUSAs with nine years or less of attorney experience and additional discretionary increases for AUSAs, as designated by their United States Attorney. EOUSA calculates the size of the APR funding pool each year as a percentage of total non-capped AUSA salaries. New EOUSA guidance issued to all United States Attorney offices now permits United States Attorneys to use available funds from their direct allocations to supplement APR funding, and bars United States Attorneys, for the first time, from dipping into APR funds to pay other office expenses.

Although the Department was provided significant funds to begin eliminating pay inequity, the Department announced plans to significantly expand the ranks of AUSAs, hiring 300 more AUSAs in the next year, referring to the hires as the "largest increase in decades."

While the APR funding represents a significant increase over the 2017 amount, it does not address the significant and long-standing pay inequity between AUSAs and all other Department attorneys (*e.g.*, FBI, DEA, BOP, etc.) and in the litigating divisions (*i.e.* criminal, civil, antitrust, ENRD).

The pay variance between AUSAs and DOJ attorneys is confirmed by a comparison of average salary figures of AUSAs and DOJ attorneys over the past decade. The average salary for an AUSA with ten years' experience in FY 2015 was $114,385, but by FY 2017, average AUSA pay at ten years **dropped** to $112,011. Over the same time period, average pay for a trial attorney in DOJ's civil division with ten years' experience **rose** from $119,115 in FY 2015 to $143,160 in FY 2017. Some of this disparity may be attributable to locality pay factors, but that does not fully explain the significant stagnation in AUSA salaries that has occurred.

One of the biggest factors in the widening pay gap between AUSAs and other DOJ attorneys has been historically meager APR funding. This year's APR funding pool is larger than FY 2017 and FY 2015 allocations at 1.25%, but pales in comparison to the FY 2016 allocation of 3.0%. Overall, insufficient APR funding for salary increases has suppressed AUSA salaries, while pay for trial attorneys in the litigating divisions and other attorneys throughout the Department covered by the General Schedule has continued to rise.

Conversion of AUSAs to the General Schedule, where AUSAs once were covered before the AD pay plan was created, represents the fairest approach toward eliminating the pay gap, a course recommended by NAAUSA to Attorney General Sessions. According to DOJ estimates, it would cost approximately $42 million to convert AUSAs to the General Schedule, a number, oddly enough, roughly equal to the price tag of hiring the additional 300 AUSAs and support staff that Department plans to bring on the rolls. The Department in early June said it will add 190 violent crime AUSAs, 86 civil enforcement AUSAs and 35 immigration AUSAs.

Commenting on the situation, NAAUSA President Larry Leiser said, "We appreciate the attention and resources that EOUSA devoted to FY 2018 APR funding and the new rules that will assure that APR funds are now fully used. However, significant disparities remain in how the Department pays its AUSAs compared to other Department attorneys. NAAUSA has written several letters to the Department over the years and has held several meetings with the Attorney General's office and EOUSA on AUSA pay inequity. While the Department has acknowledged that the problem exists, it has lacked the resolve to seek the funds necessary to eliminate the disparity. NAAUSA will continue to work with the Department of Justice, the Attorney General's Advisory Committee and Congress to assure that fairness in pay for all AUSAs is rightfully achieved."

NAAUSA is working on issues that affect every AUSA. Join NAAUSA at www.join.naausa.org

President's Column:

NAAUSA Priorities: Work-life or Policy or Both?

By Larry Leiser

Should NAAUSA be a professional association that primarily focuses on pay and work-life issues, or should it be an association that primarily spends its time and resources on policy related issues? Over the years NAAUSA has sought to answer that question by surveying its members. Our last survey conducted in 2017 brought the same results as our previous surveys. The majority of our members want NAAUSA to focus on both work-life and policy issues. That does not mean that we don't have priorities.

Clearly, NAAUSA's highest priority is to eliminate the disparity in pay between AUSAs and other Department of Justice (DOJ) attorneys, whether they are "trial attorneys" or attorneys that work for the Bureau of Prisons, the Federal Bureau of Investigation, Drug Enforcement Agency, U.S. Marshal's Service, etc. All are paid under the "General Schedule" (GS), while AUSAs are paid under the "Administratively Determined" pay schedule. Without getting into the "weeds" on the issue, the results are clear, and are now undisputed by DOJ. In the early years of service, GS-paid attorneys make as much as $30,000 more than similarly qualified and tenured AUSAs. After years of denial, DOJ now acknowledges the variance in pay, which they claim would cost approximately $42 million dollars to correct.

NAAUSA has proposed to Attorney General Sessions that all AUSAs, like all other DOJ attorneys and many other federal employees, be paid under the General Schedule, and that the Department seek the funding from Congress to realign AUSA salaries to their rightful levels under the General Schedule. (The NAAUSA website contains NAAUSA's correspondence with the Attorney General on the issue.) We are also beginning to educate Congressional oversight and funding committees on the pay issue to cultivate support for corrective funding.

NAAUSA also has continued to devote attention to work-life flexibility arrangements (compressed time, flex-time, and telework) and their availability. NAAUSA recently urged the Attorney General's Advisory Committee to make flexible worklife arrangements available to all AUSAs in all districts.

In addition, NAAUSA has devoted attention to policy and legislative issues that impact the day-to-day responsibilities of AUSAs and the pursuit of justice. Most recently NAAUSA, along with other national law enforcement organizations, expressed concerns about prison reform legislation approved by the House of Representatives that would increase "good time" credits for federal prisoners retroactively and thereby release 4,000 convicted federal prisoners. The legislation would diminish "truth in sentencing" by the reduction of many federal sentences by almost 50% through credits for participation in a wide variety of prison programs.

I believe NAAUSA's current mix of work-life issues and policy issues is carrying out the will of our members. NAAUSA's engagement on policy issues has considerably raised our stature and significance in the Congress, with the press, and at the Department. We are hopeful that exposure will pay dividends on work-life issues.

Finally, our success on work-life and policy issues is directly impacted by the number of AUSAs who are members of NAAUSA. The greater our membership, the greater our chances of success on all issues and policies we pursue on your behalf. Please encourage all your colleagues to join NAAUSA so it can effectively work on their behalf, and remind them that we are all in this together as AUSAs, and that there is no voice on their behalf other than NAAUSA.

OPM Proposes adding four areas to Locality Pay

On June 29, 2018 the Office of Personnel Management (OPM) proposed adding four areas to the list of locality pay for 2019: Birmingham-Hoover-Talladega, Alabama; Burlington-South Burlington, Vermont; San Antonio-New Braunfels-Pearsall, Texas; and Virginia Beach, Virginia. Earlier this year, the Federal Salary Council proposed adding areas of Corpus Christi, Texas and Omaha, Nebraska to the list of locality pay areas. Federal employees in locality pay areas receive higher pay increases in addition to the across-the-board pay increase.

House and Senate do not agree on 2019 Pay Increase

In late June, the Senate Appropriations Committee approved a 1.9% federal employee increase in January 2019 The House Appropriations Committee did not include any pay increase for federal employees, agreeing to the Administration's proposal of a pay freeze in January 2019. This means that the Administration, the Senate and the House will need to negotiate the amount of the increase, if any. Normally, Congress agrees to the President's proposal on pay; this will be the first time in many years that Congress will be involved in the amount of the federal pay raise. A raise of 2.6% for military personnel is working its way through Congress, and some Democrats have been seeking a 3% increase. The Senate bill does not provide additional funding for the pay increase, which means agencies will need to reduce expenses in other areas to pay for the increase

The Administration proposed a $1 billion performance award fund to increase pay for some federal employees. Neither the House nor the Senate has approved the award fund.

ORDERS from page 1

date, and for renegotiations to be concluded within a year. It also calls for accelerating CBA negotiations by setting time limits on the process and restricting which topics are eligible for bargaining. It sets forth policy and principles, such as greater employee accountability, for the new CBAs to achieve. The order also directs the creation of a Labor Relations Group to aid in the negotiation and renegotiation of CBAs.

Legal challenges to the orders have been brought by a number of federal employee unions. Their challenges have been combined into one lawsuit in the District Court for the District of Columbia, with a hearing on their motions for summary judgment planned for July 25, 2018.

What You Need to Know About the New Executive Order

- The Executive Order Promoting Accountability & Streamlining Removal Procedures Consistent with Merit System Principles attempts to better hold Federal employees accountable for performance & conduct issues
- The order also helps streamline disciplinary actions to encourage managers to be proactive in addressing such issues
- It places pressure on leadership to take more frequent and stricter actions against poor performers or incidents of misconduct
- This means, regardless of intent, you are more vulnerable to allegations, investigations, and discplinary actions against you- even for what may have been simple mistakes or oversights
- Even baseless allegations require agencies to investigate, leading to interviews, fact-findings, affidavits, temporarily suspended duties, and possible adverse action
- You may find yourself needing legal representation outside of the agency in order to assist you with any allegations against you

Despite the worrisome implications of the new Executive Orders, you can still maintain peace of mind. Professional Liability Insurance provides you with your own personal attorney to advise and defend you when the everyday responsibilites of your role are questioned.

FEDS Protection $1,000,000 policy
is just $280 annually
Use discount code "NAAUSA"

FEDS®
FEDERAL EMPLOYEE DEFENSE SERVICES

Professional Liability Insurance
www.fedsprotection.com
866.955.FEDS

Survey Finds Connection Between Use of Work-Life Programs and High Performance

In early 2017, OPM administered the first Government-wide Federal Work-Life Survey. The survey was designed to evaluate the relationship between work-life programs and organizational benefits, and help individual agencies understand their employees' work-life needs and priorities. According to OPM, the data presented in the report provides strong evidence of the positive association between employee use of work-life programs and high organizational performance, retention, and job satisfaction. NAAUSA believes these findings have strong applicability to AUSA work-life and U.S. Attorney Office management practices. The key findings from the survey are summarized below.

Work-Life Programs have a Positive Impact on Recruitment, Retention, and Performance

Federal employees that use workplace flexibilities and participate in health and wellness programs are more likely to exceed performance standards and positively impact other organizational needs: Employees who telework (76%) or participate in agency wellness programs (74%) were significantly more likely to report ratings that indicate exceeding the standards on their last performance appraisal. Additionally, those who engaged in telework, work schedule flexibilities, or health and wellness programs were more likely to be satisfied with their jobs (75% to 79%).

The survey revealed that employees are satisfied with their use of work schedule flexibilities (80%), telework (76%), and employee assistance programs (60%), but considerably less satisfied with health and wellness programs (38%) and family and dependent care programs (30%).

Work Life Conflict

Most employees (83%) report that their professional and personal and/or family life needs interfere with each other to some degree. Also, approximately one out of every three employees report having little to no flexibility to manage his or her work schedule, use an alternative work schedule, or take time off to manage personal and family responsibilities.

Multiple survey items asked employees whether they desired to use a variety of work-life programs, if they were available. Across all of the items, nearly all of Federal employees (96%) expressed the desire to use one or more work-life programs, highlighting the importance of 1) offering a variety of work-life programs, and 2) understanding the specific needs of employees. The number of employees with adult dependent care responsibilities (i.e., elders, adult dependents) is expected to double over the next five years (from 14% to 31%), while the number of employees with child care responsibilities is expected to remain virtually the same (from 36% to 33%).

Barriers to Work-Life Program Participation

The survey found that supervisors are supportive of employee needs, but not work-life programs: The majority of employees (82%) perceive their immediate supervisor as responsive to and understanding of employees' personal needs. However, only about half of employees (46%) indicate they experience positive supervisory support for the use of work-life programs.

Lack of awareness of program availability among all employees is a primary barrier to program participation. The lack of perceived supervisory support for programs may be a contributing factor. Increased program awareness and a greater understanding on how to strategically use programs to support organizational and employee needs may help overcome this barrier. Managers recognize the benefits of telework, but indicate they lack the competencies to effectively manage the performance of teleworkers: The majority of teleworkers in the Federal workforce report their participation in telework improved their performance. Likewise, both non-supervisors and supervisors identify "minimizing distractions" and "maximizing productivity" as the most important reasons they telework. However, only half (53%) of supervisors agree that telework supports their employees' ability to perform work. This may be due to the fact only 48% of supervisors reported being able to manage and assess the performance of teleworkers.

NAAUSA Delegate Survey Shows Telework and Work-Life Availability Varies Widely Among Offices

NAAUSA Board Member Marc Wallenstein (HI) conducted a survey of delegates in mid-June to assess authority for and use of telework in the U.S. Attorney's offices. The NAAUSA survey, completed by about 66% of delegates, revealed that:

- 47% of offices have a written policy that allows AUSAs to telework, and 45% do not allow telework or telework is prohibited, although situational or ad hoc telework is permitted for AUSAs in 81% of offices.
- 51% of AUSAs who work during a vacation must take annual leave during the hours worked, while 32% are not required to take annual leave while on vacation during the hours worked. 17% of AUSAs are not allowed to work while on vacation.
- 42% of AUSAs can use compressed work schedules, while 29% cannot and 23% can use flexible work schedules while 12.5% cannot.

NAAUSA Endorses Paid Parental Leave Bill

On July 9, NAAUSA's Vice President for Operations and Membership, Allison Bragg (ED AR) wrote to Representative Comstock (R-VA) to announce NAAUSA's endorsement of her legislation, H.R. 6275, to provide federal employees twelve weeks of paid leave after the birth, adoption, or foster placement of a child. The letter said: "Parents should not be forced to choose between caring for their newborn baby or paying their bills." The letter pointed to a recent survey of 58 major national law firms finding that and each firm polled offers at least eight weeks of paid parental leave, and the majority offer at least 16 weeks of such leave. Bragg's letter said that: "As a federal employee and mother of two small children, I can personally attest to the hardship of giving birth and caring for a newborn without paid leave. It is almost impossible. Were it not for my strong belief in our mission as prosecutors, the lack of paid parental leave would have sent me running to private practice long ago."

NAAUSA Opposes Sentence Reductions under Proposed Prison Measure

NAAUSA has communicated to Congress its concerns about prison-related legislation that would dramatically cut the federal prison sentences of convicted drug traffickers, including those selling and distributing heroin and fentanyl, as well as other violent criminals.

Writing to the Senate on June 4, 2018, NAAUSA President Larry Leiser expressed NAAUSA's opposition to the FIRST STEP Act (H.R. 5682), as approved by the House of Representatives, noting that the legislation is based upon state prison programs with track records less successful than current federal prison programs and that it violates the principle of truth-in-sentencing. The legislation will result in the immediate release of 4,000 federal prisoners, without regard to their security risk, through retroactive sentence reductions. The measure also had been rushed through the House in May without any hearings or Congressional Budget Office assessment of its costs, Leiser pointed out. (Read President Leiser's letter to the Senate on the NAAUSA website, www.naausa.org)

Significant sentence reductions—almost by one-half—under the FIRST STEP Act would occur through retroactive and prospective credit for prisoner participation in rehabilitation programs, in addition to credits prisoners already receive for good behavior. While NAAUSA supports the expansion and improvement of current Bureau of Prisons education and reentry programs to prepare federal inmates for release, Leiser pointed out that it opposes legislation like the FIRST STEP Act that would eviscerate the principle of "truth in sentencing" by concealing from the public significant sentence reductions for convicted felons after they have been meted out.

Retroactive sentence reductions, Leiser said, "represent a disservice to the men and women who risk their lives to enforce our federal laws, our Assistant United States Attorneys who devote their professional careers to see that justice is fairly served, and to the federal judges who make sentencing determinations," Leiser wrote. "Most of all, it is a fraud upon the public." Leiser added, "Assistant United States Attorneys, whom we represent, will gladly embrace and support any proven program that will protect the public and contribute to the safe and productive reentry of prisoners into our communities and the reduction of recidivism." "We believe that responsible public policy-making in this area requires study and validation of proposed prison reform initiatives, followed by testing on a limited basis, with close monitoring of costs and effectiveness, prior to nationwide implementation, whether through legislation or BOP policy."

As of early July, the FIRST STEP Act remained before the Senate Judiciary Committee, with some lawmakers opposed because of the concerns raised by NAAUSA and other law enforcement groups. Others felt the legislation did not go far enough and favored the addition of additional sentencing-reduction measures.

AUSAs Protected by National Blue Alert Network – Partnerships Wanted

No matter how accustomed we become to news of violence, the intentional killing of a law enforcement officer continues to register as a shock and exacerbates societal anxieties about the vulnerability of those who keep us safe. Violent attacks on law enforcement officers constitute an assault on the American way of life and erodes the actual and perceived safety of affected communities and our nation as a whole. Premeditated ambush style attacks are particularly disturbing and pernicious. They contribute to a worrisome desensitization of evil acts that were largely considered taboo except by the most depraved. It is difficult to think of a time when the dangers of police work have felt so real and immediate.

The National Blue Alert Network is an important Department of Justice resource to enhance officer safety, including AUSA safety, and hasten the capture of those who would kill or seriously injure law enforcement officers in the line of duty. The protections of the National Blue Alert Network extend to all law enforcement officers including, but not limited to police, corrections, probation, parole, AUSAs, and other judicial officers.

Blue Alerts are emergency messages (similar to AMBER Alerts) which can be transmitted to television and radio stations; to cellphones and wireless devices; and to overhead highway message signs. Blue Alerts can serve as an immediate warning to thousands or even millions of innocent persons in an area where an extremely violent offender is thought to be. Warnings provide instructions to keep law enforcement and the community safe, and information on what to do if a suspect is spotted.

The National Blue Alert Network came about through the Rafael Ramos and Wenjian Liu National Blue Alert Act of 2015, Pub. L. No. 114-12 (34 U.S. C. § 50502 – National Blue Alert). The Act establishes a voluntary nationwide communications system to give police an early warning of threats against law enforcement officers and to aid in the apprehension of suspects who have killed or seriously injured an on-duty officer—or when an on-duty officer is missing under suspicious circumstances.

The Department assigned the Office of Community Oriented Policing Services (COPS Office) the honor of overseeing implementation of the Blue Alert Act and to create the National Blue Alert Network, based on our extensive work on officer safety and wellness. The COPS Office Director serves as the National Blue Alert Coordinator. The National Blue Alert Network works to encourage, enhance, and integrate Blue Alert plans throughout the United States. There are currently 31 states with Blue Alert plans.

The COPS Office provides resources and technical assistance to states, territories, law enforcement agencies, and tribes seeking to establish or enhance Blue Alert plans. The COPS Office will maintain voluntary activation guidelines, examples of legislation, policies, and forms gathered from around the nation in a central data repository.

The COPS Office is seeking to expedite the dissemination of Blue Alert Network information and technical assistance to all 56 states and territories and to encourage local law enforcement agencies to create Blue Alert policies that are aligned

See **BLUE** page 10

NAAUSA Presents Testimony Before United States Sentencing Commission

On March 14, 2018, NAAUSA member Lauren Jorgensen presented the following testimony before the United States Sentencing Commission at its Public Hearing on Proposed Amendments Regarding "First Offender" and Zones B and C Consolidation:

On behalf of the National Association of Assistant United States Attorneys[1], I thank you for the opportunity to appear before the Sentencing Commission to discuss the important proposed amendments relating to first offenders.

The National Association of Assistant United States Attorneys (NAAUSA) represents the interests of 5,800 Assistant United States Attorneys who are responsible for the prosecution of federal crimes and civil cases and witness on a daily basis the real consequences of these amendments.

Creation of a New "First Time Offender" Status Under §4C1.1

The proposed amendment adding a special category of criminal history for "true" first time offenders would create a set of special new benefits for offenders who have no prior conviction, further reducing their offense level by one or two levels. Yet carving out an entirely new category for offenders with zero criminal history points would unnecessarily weaken the deterrent value of the Sentencing Guidelines for offenders who already are subject to sentencing at the lowest range available for their offense conduct. Given the fact that judges already have the discretion to vary downward in extraordinary cases of uncharacteristic criminal conduct, NAAUSA believes this new class of low-level offenders is not warranted and should be rejected.

One claim made by those in favor of this reduction for offenders with no prior criminal conviction is that they have a lower recidivism rate than those with one criminal history point. However, the Sentencing Commission's own report, Recidivism Among Federal Offenders: A Comprehensive Overview (2016), does not support this reasoning. In fact, according to that study, offenders with no convictions still reoffend at a rate of over 30%, and the average rate of recidivism for all those in Criminal History Category I (including individuals with zero or one criminal history point) is only slightly higher at 33.9%.

One area where the proposed amendment would wreak particular havoc involves the prosecution of individuals who supply a large number of the firearms utilized by violent felons. As has been well documented, the majority of firearms used to commit serious felonies were either stolen, or were obtained through the use of a non-prohibited "straw purchaser" by the convicted felon or firearms trafficker. Due to the need for the straw firearm buyer to pass a federal background check, this person is, of necessity, a "first time offender." Yet as drafted, this proposed amendment would make no exception to the reduction of such an offender's offense level by one or two levels, as a reward for having a clean criminal history, even though the guideline range for providing even dozens of firearms to a felon or felons typically falls within only 12 to 18 months' imprisonment.

In the economic crime context, creating this new category would offer a windfall to offenders who commit a wide range of white collar crime, from tax fraud to Medicare fraud, and from consumer-targeting mail fraud to public corruption crimes. Many, if not most, white collar offenders have no prior scoreable offenses for sentencing purposes, and come to federal court for the first time having committed serious and significant fraud. Even in cases where other enhancements apply, such as those for aggravating role, and where the fraud loss is substantial, these offenders would be handed lower sentencing ranges solely because they had no prior conviction.

If, however, the Commission intends to move forward with this proposed amendment, we strongly recommend the use of Option 2 to award first offender status only where the offender has "no prior convictions of any kind," since offenders with "stale" prior criminal convictions obviously present a higher recidivism risk than true first offenders. We also urge the Commission to limit the reduction to one level for all offenders in this category, rather than granting two levels for those who fall at offense level 16 or below.

Creating a Presumption of No Prison Time for "First Offenders"

The proposed amendment would go even farther, providing that for "first offenders" who fall within Zone A or B of the Sentencing Table, for which the court "ordinarily should impose a sentence" other than prison, would be perhaps the most powerful prize for white collar offenders in the current package of proposed amendments. These perpetrators bring financial ruin to hundreds and sometimes thousands of people, and creating a presumption of no jail time sends the wrong message not only in terms of deterrence but also to crime victims—that the harm to them just doesn't matter enough to warrant prison time for the people who ruined their financial futures.

Faced with 64,000 overdose deaths in 2016 in the United States, many of which were a direct result of drug dealing, NAAUSA strongly disagrees with any characterization of drug trafficking crimes as "non-violent" for purposes of the presumption of no jail time for first time offenders. If, however, the Commission moves forward with this amendment to §5C1.1, we highly recommend the definition in the second option be used, "where the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense," and to avoid using the term "crime of violence" in this context due to the problems associated with the categorical approach.

Collapsing Zones B & C Into One Zone

Finally, NAAUSA respectfully urges the Commission to reject the proposed amendment to eliminate Zone C, which will further reduce the sentences of offenders on the cusp of higher guidelines indicating more serious criminal conduct than those in Zone B. In 2010 the Commission increased the reach of Zones B and C by

1 Lauren Jorgensen serves as Chair of the Sentencing Committee for the National Association of Assistant United States Attorneys, as well as on the NAAUSA Board.

See **TESTIMONY**, page 10

New DOJ iReporting Requirements may Infringe on First Amendment Rights

By James Benedetto, NAAUSA Member, Guam

On July 2, 2018 DOJ initiated new reporting requirements collectively called "iReport," mandating that all AUSAs and USAO support staff report a variety of circumstances directly to DOJ. Many of the requirements are not new; for example, reporting one's arrest, bankruptcy, or allegations of misconduct has long been required. And many of them will be familiar to those of us who hold Top Secret or Top Secret + SCI security clearances, such as the requirement to report a marriage to a foreign national. However, iReport takes some of the more stringent reporting requirements—mandatory reporting of personal foreign travel and unofficial contacts with foreign nationals—and extends them to other categories of Department employees who do not hold security clearances. Reports such as these, routinely required from U.S. State Department personnel working in our Embassies overseas, make virtually no sense when applied to domestic employees without access to classified information.

According to DOJ, the purpose of these new reporting requirements is merely to allow Department personnel to "recognize and avoid personal behaviors and activities that may adversely impact their continued national security eligibility." DOJ believes that by instituting these new requirements, department personnel may be protected from "blackmail, coercion, or negative actions that may impact an individual's ability to safeguard national security or sensitive information."

These are laudable goals. However, some of the new reporting requirements may prove unduly burdensome, and will have a chilling effect on the exercise of important, constitutionally protected, First Amendment rights.

For example, iReport requires all DOJ employees to report all unofficial, i.e., personal, contacts with foreign nationals. "Contacts" includes more than face-to-face meetings; it also encompasses written correspondence, emails, and even interactions on social media. Many Department employees have foreign national spouses, and foreign national in-laws. They are now required to report contacts with those family members, or risk losing their security clearance, access to classified information, or eligibility for continued employment.

The new iReport policy also requires those holding "noncritical-sensitive positions," and those with a secret clearance or above, to report unofficial personal travel. If you want to take your kids to see Niagara Falls, you will need to report your trip and obtain approval from DOJ 30 days in advance. You will have to report the dates of your travel, the type of transportation you will use, the identity of any carriers, and the places you intend to visit. If you obtain approval, you must report any and all "unplanned contacts with foreign nationals."

The new iReport policy also requires department personnel to report coworkers who they suspect may be unwilling to comply with the new policy. For example, if any reader of this commentary interprets it as evidence of the author's skepticism about the need to report all contacts with foreign nationals or to seek prior approval from DOJ for personal foreign travel, that reader would be required to report the author, or risk losing his or her eligibility for continued employment.

The problems with this new policy are obvious. First, it is incredibly overbroad. Most AUSAs do not routinely access classified information, and most do not hold a security clearance. Support staff in USAOs are even less likely to access such information. Notwithstanding, even persons holding noncritical-sensitive positions (essentially anyone who works in the USAO) are now subject to the more stringent requirements. What possible rational basis could there be for requiring domestic employees who do not access classified information to adhere to standards heretofore reserved for our diplomats abroad?

Second, the iReport policy puts AUSAs in the untenable position of having to choose between two bad options. On the one hand, AUSAs can compliantly report their contacts with foreign nationals and thereby risk losing friends and alienation from family members; on the other, they can choose potentially career-ending disciplinary sanctions for failing—unintentionally or otherwise—to report such contacts.

The sheer number of such reports may well prove unduly burdensome, particularly for AUSAs in cosmopolitan districts where many foreign nationals reside. Several of my colleagues have parents or siblings that are foreign nationals, and several married foreign nationals. For them, any large family gathering is sure to involve hours of reporting, and probably good note-taking about who attended.

In summary, the new iReport requirements raise some issues of grave concern for employees who value their privacy and that of their friends and family. Some of the requirements will have a chilling effect on employees' First Amendment freedom of association rights.

If you are concerned about these new policies, and the effect they will have on you, your family, friends and social acquaintances, please volunteer to serve on the NAAUSA Committee that is being assembled to formulate the Association's response. Participation in NAAUSA is an approved activity.

The author does not speak on behalf of the Department of Justice. His views are entirely his own.

Improvements Made to Public Safety Officers' Benefits (PSOB) Program

Several years ago, in response to a letter from NAAUSA, the Department of Justice indicated that criminal AUSAs were eligible for benefits under the PSOB program. The PSOB program provides death and education benefits to the eligible survivors of fallen law enforcement officers and disability benefits to officers catastrophically injured in the line of duty. The Department recently made some changes to the program to streamline claims related to certain heart attack, stroke, and vascular rupture cases. More information on the program is available at https://psob.bja.ojp.gov/

NAAUSA finds More Evidence of Unfair DOJ Attorney Pay Practices

NAAUSA continues to document more examples of AUSA pay inequity. Information from the Department of Justice Fact Book provides further evidence that attorneys, other than AUSAs, have received larger average pay increases over the last 12 years.

The Department's own charts for average attorney salary by years of experience for FY 2005–FY2017 detail the fact that pay increases for AUSAs for all years of experience have been less, in some cases much less, than the percentage increases for other attorneys. For example, over the 12-year period, the pay of AUSAs with 10 years of experience decreased by an average of 2%, while the average increase for criminal division attorneys was 21%, for civil division attorneys 20% and US Trustee attorneys 21%.

There is not one case during the period FY 2005–FY 2017 where the pay increases for AUSAs averaged more than the pay increases for all other attorneys and only one case, involving AUSAs with 20 years of experience, where the average increase was equal to the average increase for criminal division attorneys.

These striking differences in average pay increases are the result of AUSAs being paid under the Administratively Determined (AD) pay system and other DOJ attorneys being paid under the General Schedule (GS) pay system. The two different pay systems have significant differences. For example, GS attorneys with five years of experience earn starting pay of $105,123, while an AUSA with five years of experience earns starting pay of $61,257, a difference of $43,866. GS attorneys receive automatic within grade increases in set amounts; AUSAs receive APRs that are based on the amount of money available.

NAAUSA has repeatedly asked the Attorney General to convert AUSAs to the GS pay system to eliminate the unfair attorneys pay practices. The AG has the authority to make the change, which does not need congressional approval.

History of DOJ Attorney Pay Increases FY 2005–FY 2017

Years of Experience	Assistant US Attorney Percent Salary Change	Criminal Division Percent Salary Change	Civil Division Percent Salary Change	Assistant US Trustee Percent Salary Change
2	-27%	4%	1%	-13%
3	11%	10%	1%	29%
4	6%	9%	6%	2%
5	1%	10%	5%	N/A
6	5%	6%	12%	13%
7	1%	19%	16%	6%
8	0%	19%	16%	7%
9	5%	19%	18%	13%
10	-2%	21%	20%	21%
11	2%	21%	21%	26%
12	4%	19%	21%	27%
13	6%	21%	16%	27%
14	8%	15%	21%	15%
15	8%	15%	16%	13%
16	7%	22%	17%	13%
17	13%	16%	18%	17%
18	9%	21%	20%	23%
19	11%	15%	20%	23%
20	12%	12%	21%	20%
21+	16%	19%	19%	25%

Source: DOJ Fact Book

TESTIMONY from page 7

one level, to "expand the availability of alternatives to incarceration" to offenders at these higher levels. NAAUSA sees no need for yet another dilution of the requirement of incarceration under the guidelines applied to offense levels 12 and 13.

Conclusion

We at the National Association of Assistant United States Attorneys greatly appreciate the opportunity to express our views on these critical proposed amendments. Thank you for your consideration.

NOTE: Following the hearing, on April 12, 2018, the Sentencing Commission voted to adopt a new application note providing that judges should consider alternative sentencing options for "nonviolent first offenders" whose applicable guideline range falls within Zones A or B. The good news is that under the new guideline, eligible defendants must not have any prior convictions and must not have used violence, credible threats of violence, or possessed a firearm or other dangerous weapon in the offense.

On another issue on which NAAUSA presented written recommendations, the Commission voted to adopt a new guideline definition of the term "fentanyl analogue." The change effectively raises the guideline penalties for fentanyl analogues to a level more consistent with the current statutory penalty structure. To address the severe dangers posed by fentanyl, the Commissioners also voted to adopt a four-level sentencing enhancement for knowingly misrepresenting or knowingly marketing fentanyl or fentanyl analogues as another substance (which equates to an approximate 50% increase in sentence). These and other new amendments will go into effect on November 1, 2018.

NAAUSA will continue to present its views on sentencing issues important to prosecutors in the field whenever invited to weigh in on proposed priorities or amendments to the current guidelines.

In the past, NAAUSA has partnered with a law firm to provide an hour of free consultation each year and a discounted hourly fee for additional legal work regarding Office of Professional Responsibility (OPR) allegations of prosecutorial misconduct and other legal consultation. NAAUSA is pleased to announce that we have once again arranged for similar legal services for our members. The law firm of McSweeney Cynkar & Karhouroff has agreed to provide one hour of free consultation and a 25% reduction in their hourly fee to NAAUSA members only. Learn more about the firm on their website at: http://www.mck-lawyers.com.

BLUE from page 6

with statewide systems. Although not specifically addressed in the Blue Alert Act, the COPS Office has extended outreach efforts to include tribal law enforcement.

Through our partnership with NAAUSA, the COPS Office wants to work closely with U.S. Attorneys' Offices to promote awareness of the National Blue Alert Network and to identify key individuals in states and territories who may be interested in supporting/promoting the National Blue Alert Network. Specifically, we are looking for those who are willing to act as Blue Alert 'ambassadors' within their respective jurisdictions. These individuals can assist by sharing information about the National Blue Alert Network and the resources available at the COPS Office. (https://cops.usdoj.gov/bluealert)

The protection and wellness of law enforcement officers is a Department priority requiring an 'all hands on deck' approach. As the Attorney General often says, "We back the blue" and it is our co-responsibility to support the brave men and women of law enforcement. U.S. Attorneys' Offices are uniquely positioned to facilitate communication between local jurisdictions and the Department in support of the National Blue Alert Network. The COPS Office welcomes all suggestions on how we can support and partner with U.S. Attorneys' Offices to bring the protections of the National Blue Alert Network to every state and community. For more information or to discuss partnership opportunities, please contact:
Vince Davenport, Deputy National Blue Alert Coordinator—vince.davenport@usdoj.gov 202-598-1171; or
Shanetta Y. Cutlar, Senior Counsel to the Director—Shanetta.Cutlar@usdoj.gov 202-514-0195.

Why every AUSA should be a NAAUSA member

NAAUSA's advocacy is a major reason AUSAs received a pay increase in 2016 and again in 2018. The two increases increased pay by thousands of dollars a year for the majority of AUSAs. In some cases, the increases are more than 50 times the cost of NAAUSA dues.

NAAUSA is the only organization working to eliminate the $30,000+ pay gap between AUSAs and DOJ attorneys with the same years of experience.

NAAUSA is the only organization that is urging EOUSA to generally allow all AUSAs in all offices to have access to the Department's flextime, compressed work schedules and other family friendly worklife programs.

According to the Office of Personnel Management, "[the number of members]... is a meaningful and objective indicator of employee interest in and support of an association." NAAUSA's influence is based on the number of AUSAs who are NAAUSA members.

NAAUSA is the only voice for AUSAs before Congress on pay, benefits and criminal and civil issues that affect the day-to-day work of AUSAs.

Attorneys, investigators and judges have professional associations as their principal advocates: e.g., the National District Attorneys Association, the FBI Agents Association, the Federal Magistrate Judges Association, and the American Association of Justice, formerly the Association of Trial Lawyers of America. AUSAs have NAAUSA.

NAAUSA members are part of an organization that CNN referred to as "…the powerful National Association of Assistant US Attorneys…"

AUSAs work less than three hours in an entire year to pay the annual cost of NAAUSA membership. NAAUSA dues are just $.41 a day and joining is easy. Complete the application in minutes at www.join.naausa.org.

NAAUSA NEWS

5868 Mapledale Plaza
Suite 104
Woodbridge, VA 22193

NAAUSA's Accomplishments: Another Reason to Join a Great Organization

Pay Increases. In response to considerable advocacy by NAAUSA for higher AUSA pay, EOUSA in March 2016 announced increases in almost every level of the AD pay scale. The changes increased some AD pay maximums by almost $10,000.

		Jan 2016 Before NAAUSA Advocacy	Apr 2016 After NAAUSA Advocacy	AUSA Pay Increase
AD-21	Mid-Point	$62,008	$ 69,945	$ 7,937
AD-23/24	Mid-Point	$67,977	$ 75,152	$ 7,175
AD-25	Mid-Point	$74,519	$ 80,748	$ 6,229
AD-26	Mid-Point	$81,689	$ 86,759	$ 5,070
AD-27	Mid-Point	$89,552	$ 93,220	$ 3,668

Comp time for travel. AUSAs and all other DOJ attorneys would not be entitled to comp time for off-duty official travel if NAAUSA had not questioned the rationale for a February 2005 DOJ decision to deny DOJ attorneys comp time. NAAUSA secured Congressional reversal of DOJ's decision to deny comp time to attorneys in legislation that signed by President Bush in 2006.

Defending AUSA professionalism. As part of its mission to uphold the reputation and integrity of AUSAs, NAAUSA helped secure the reversal of DOJ suspensions of two AUSAs blamed for discovery-related errors associated with the conviction of the late Senator Ted Stevens. NAAUSA's amicus brief filed with the Merit Systems Protection Board helped to portray the integrity of the two AUSAs and the sacrificial nature of their proposed suspensions.

Half-price liability insurance. NAAUSA secured professional liability insurance reimbursement for AUSAs—a benefit that exceeds NAAUSA dues for AUSAs with less than five years of service! NAAUSA successfully lobbied Congress in 1999 to include AUSAs in the legislation, which authorized federal agencies to pay half the cost of professional liability insurance. NAAUSA Members are entitled to a $10.00 discount on professional liability insurance through FEDS.

Countering the Defense Bar. NAAUSA fought "asset forfeiture reform" "grand jury reform" and "criminal justice reform" legislative initiatives proposed by the National Association of Criminal Defense Lawyers, the ACLU and others that would undermine the work of AUSAs.

Defeating Legislation. NAAUSA defeated legislation that would have transferred responsibility for investigating allegations of misconduct against AUSAs from the Office of Professional Responsibility to the DOJ Inspector General.

These accomplishments would not have occurred if NAAUSA had not lobbied for them. Join NAAUSA at www.join.NAAUSA.org.