



NAAUSA

National Association of
Assistant U.S. Attorneys

Board of Directors

Steven B. Wasserman
President
(DC)

Adam E. Hanna
Vice President
(S.D. IL)

Mark Vincent
Treasurer
(UT)

Karen Escobar
Secretary
(E.D. CA)

Kevan Cleary
(E.D. NY)

Joseph Koehler
(AZ)

Melanie Speight
(E.D. NY)

November 17, 2023

VIA FEDERAL eRULEMAKING PORTAL
(<http://regulations.gov>)

U.S. Office of Personnel Management
1900 E Street, N.W.
Washington, D.C. 20415

**Re: NAAUSA comments on OPM proposed rule, “Upholding Civil Service
Protections and Merit System Principles,” RIN 3206-AO56, Docket No. 2023-
19806**

The National Association of Assistant U.S. Attorneys (NAAUSA)—representing the interests of the more than 6,000 federal prosecutors and civil attorneys across the nation’s 94 U.S. Attorney Offices—writes to voice our **strong support** for the proposed rule “Upholding Civil Service Protections and Merit System Principles.”

The fair, equal, and apolitical administration of justice relies on a strong career cadre with deep knowledge of the law and insulation from political retaliation. The merit hiring system ensures only qualified AUSAs are handling federal cases. The civil service protections in place ensure AUSAs are only fired for their incompetence, not their refusal to execute a political demand.

Although AUSAs were not explicitly covered under the original Civil Service Reform Act of 1978 (CSRA),¹ the Merit Systems Protection Board (MSPB) ruled in 2002 that AUSAs fired for misconduct were entitled to civil service protections under the law.²

The CSRA sought to clarify the patchwork of employee protections in existence since the Pendleton Act of 1883, which largely eliminated the government spoils system in favor of a merit system.³ The Act entitled public employees to continued employment unless removed for cause or unacceptable performance. In establishing this entitlement, the Act protected public employment as a property interest which cannot be removed without due process.⁴

While the President retained control over the highest level of officials in the executive branch, lower-level employees were insulated from political pressure. As a result, in 2006, AUSAs served an average of eleven years, far exceeding the average term prior to gaining civil service protections.⁵ By professionalizing AUSAs and insulating them from executive political pressure, Congress ensured AUSAs can independently administer justice.

This also significantly improved the administration of justice. Complex cases—

Executive Director
Kelly Reyes

Washington Reps.
Jason Briefel
Natalia Castro

Counsel
Debra Roth

¹ 28 U.S. Code § 542.

² *Hamlett v. Department of Justice*, 90 M.S.P.R. 674 (MSPB 2002).

³ Congressional Research Service Report “The Civil Service Reform Act: Due Process and Misconduct-Related Adverse Actions” March 27, 2017, 1–2.

⁴ *Id.* at 3–4.

⁵ James Eisenstein “The U.S. Attorney Firing of 2006: Main Justice’s Centralization Efforts in Historical Context” *Seattle University Law Review*, 2008/

including cases involving international drug and human trafficking crimes, domestic terrorism, and large-scale financial crimes—require long-term investigations, intimate knowledge of the facts, and experienced litigation. Ensuring AUSAs stay in their roles to see these cases through substantially improves the chances of successful prosecution.

Each U.S. Attorney's Office already has a Presidentially appointed and Senate confirmed U.S. Attorney leading the policy of the office.⁶ U.S. Attorneys, in consort with political leaders at the Department of Justice, provide a necessary political voice in our system. Different administrations regularly prioritize and deprioritize the enforcement of different laws. Political appointees provide a space for these policy views to be heard and these leaders are subject to a political check—a presidential election every four years. But politics should never play a role on the front line. Politics should never decide an investigation. And politics should never decide a prosecution. The merit protections offered AUSAs and the strict enforcement of prohibited personnel practices in the framework established in the CSRA ensure this is a reality.

Our nation was recently racked by accusations of political interference in the investigative process. Luckily, the American people can rest assured knowing that if there is a legitimate claim of political interference, there is a strict and well-enforced process within our federal government for handling these claims and protecting whistleblowers who raise them. However, if a president can unilaterally reclassify federal employees and strip them of their protections without justification, there is no longer a safeguard against political interference.

Our nation should not support a system of justice where a president can simply fire a prosecutor who refuses to take a case or hire one that will act based on the president's demands. Such a system does not align with the equal and consistent application of the rule of law nor the founding concept that we are a nation of laws, not of people.

For this reason, the proposed rule is critical to ensuring our government can identify and combat potential abuses of power and retain a strong cadre of apolitical federal prosecutors and civil attorneys. We applaud OPM for taking this step and urge OPM to act expeditiously to finalize this rule.

Thank you for considering NAAUSA's perspective.

Sincerely,



Steven Wasserman
President

⁶ 28 U.S. Code § 541.