

Calendar No. 370

117TH CONGRESS }
2d Session }

SENATE

{ REPORT
117-113 }

AIR AMERICA ACT OF 2021

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TO ACCOMPANY

S. 407

TO PROVIDE REDRESS TO THE EMPLOYEES OF AIR AMERICA



MAY 19 (legislative day MAY 17), 2022.—Ordered to be printed

U.S. GOVERNMENT PUBLISHING OFFICE

29-010

WASHINGTON : 2022

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Mr. PETERS, from the Committee on Homeland Security and
Governmental Affairs, submitted the following

R E P O R T

[To accompany S. 407]

[Including cost estimate of the Congressional Budget Office]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 407) to provide redress to the employees of Air America, having considered the same, reports favorably thereon with an amendment and recommends that the bill, as amended, do pass.

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I. PURPOSE AND SUMMARY

S. 407, the Air America Act of 2022, would qualify the service of employees of Air America, Inc., between 1950 and 1976 as creditable for retirement benefits under the Civil Service Retirement System (CSRS). Employees of Air America served the U.S. government in a covert capacity to help achieve foreign policy objectives during this time period, throughout the Cold War, Korean War, and Vietnam War. The employees lost access to retirement in 1985 when the Office of Personnel Management (OPM) made a change to the Federal Personnel Manual impacting federal contractors, which is how Air America operated publicly. The bill provides a

two-year window for Air America employees or their survivors to apply for retirement benefits, including retroactive benefits.

II. BACKGROUND AND NEED FOR THE LEGISLATION

In 1949, the Central Intelligence Agency (CIA) acquired Air America, Inc., initially for anticommunist operations in Asia.¹ Between 1950 and 1976, the CIA, Department of Defense, and Department of State directed and managed Air America and its related corporate entities to carry out a number of humanitarian and covert missions.² Air America employed over 5,000 individuals to support various projects around the world, including food drops, reconnaissance, and covert operations in Vietnam, Korea, and the Bay of Pigs.³ Over 131 Americans employed by Air America died during this time period, mostly due to job-related incidents, and eight were missing in action.⁴

Externally, Air America operated as a commercial entity that generated profits by fulfilling government contracts.⁵ Employees of such entities were entitled to federal retirement credit during the period when Air America operated. For example, the Federal Personnel Manual Supplement of 1978 specified that an exclusion to federal retirement coverage applied to:

Employees paid on a contract or fee basis, *except* employees who are citizens of the United States who are appointed by a contract between the employees and the Federal employing authority which requires their personal services and are paid on the basis of units of time.⁶

Air America dissolved in 1976, following the withdrawal of troops from Vietnam.⁷ Upon dissolution in 1976, Air America deposited around \$20 million into the U.S. Treasury.⁸ Of the total deposited, 60 percent was apportioned to the Civil Service Retirement Fund due to congressional appropriations process requirements.⁹

In 1985, OPM changed the relevant portion of the Federal Personnel Manual Supplement, replacing it with a policy to apply retroactively that states:

Employment under a personal services contract is creditable for civil service only if the individual is serving a federal function under federal supervision and Congress has given the agency the authority to appoint individuals by contract or OPM has specifically given an agency the

¹ Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, *Foreign and Military Intelligence, Book 1* (Apr. 1976) (S. Rept. 94-755) (www.intelligence.senate.gov/sites/default/files/94755_1.pdf) (accessed Mar. 16, 2022).

²*Id.*

³ Office of the Director of National Intelligence, *Report on the Retirement Benefits for Former Employees of Air America* (July 2011) (www.air-america.org/files/documents/201107_ODNI_Report.pdf) (accessed Mar. 16, 2022).

⁴*Id.* at 3.

⁵ Senate Select Committee, *supra*, note 1, at 209.

⁶ Civil Service Commission, *Federal Personnel Manual Supplement 831-1, Subchapter S2. Coverage, S2-3. Exclusions by Regulation* (Nov. 22, 1978).

⁷ Office of the Director of National Intelligence, *supra*, note 3, at 6.

⁸*Id.* at 29; Senate Select Committee, *supra*, note 1, at 239; and Central Intelligence Agency, *Liquidation Plan* (1976) (www.cia.gov/readingroom/docs/197616.pdf).

⁹ Air America, *Air America Declassified: New Insights into the Administration of Air America as an Instrument of U.S. Foreign Policy and the Ongoing Legislative Effort for Proper Federal Recognition* (May 31, 2019) (air-america.org/files/documents/symposium-booklet.pdf) (accessed Mar. 16, 2022).

authority to use a contract as an appointing instrument for the particular type of service involved.¹⁰

The change in OPM policy resulted in Air America employees losing access to federal retirement benefits, and the change was upheld in court.¹¹ Starting in 1962 and again in 1970, Air America employees were offered voluntary savings plans options.¹² However, declassified documents show that the CIA internally acknowledged that these voluntary savings options were only meant to be supplementary to rather than replacements for civil service retirement credit or the more robust retirement plans offered by the CIA.¹³

Congress has previously used legislative corrective action to protect the retirement benefits for individuals in unique employment scenarios while serving U.S. missions abroad. For example, the Foreign Service Act of 1980 included provisions to ensure employees' service with Radio Free Europe is creditable for the purpose of annuities under the Civil Service Retirement Acts.¹⁴

The structure of employment at Air America and subsequent impact on employee access to federal retirement has been complicated by the undercover nature of the work, as well as the covert government ownership and operation of the corporation. However, declassified documents pursuant to the Declassification Act of 2000 and additional materials the CIA posted online in 2017 shed more light on Air America's operations.¹⁵ The Air America Act of 2022 stems from the declassified information, responding to it by narrowly providing Air America employees and their survivors with hard-earned federal retirement benefits for their brave service to critical, and oftentimes hazardous, U.S. government operations during the Cold War.

III. LEGISLATIVE HISTORY

Senator Marco Rubio (R-FL) introduced S. 407, the Air America Act of 2021, on February 24, 2021, with 28 original cosponsors from both parties. The bill was referred to the Committee on Homeland Security and Governmental Affairs. Five Senators subsequently joined as cosponsors.

The Committee considered S. 407 at a business meeting on February 2, 2022. Ranking Member Rob Portman and Chairman Gary Peters offered a substitute amendment to clarify that there is a two-year window after the bill takes effect for eligible individuals to apply for benefits and add a rule of construction to note that the bill does not set any type of precedent for CSRS or any successor fund, among a few other technical changes. The substitute amendment was adopted by voice vote *en bloc*. The bill, as amended, was ordered reported favorably by voice vote *en bloc* with Senators Peters, Carper, Hassan, Sinema, Rosen, Padilla, Ossoff, Portman, Lankford, Scott, and Hawley present.

¹⁰ Office of Personnel Management, *Federal Personnel Manual Supplement 831-1, Subchapter S3-3(d)* (Mar. 29, 1985).

¹¹ See *Horner v. Acosta*, 803 F.2d 687 (Fed. Cir. 1986).

¹² Air America, *supra*, note 9, at 7.

¹³ *Id.*

¹⁴ See 5 U.S.C. § 8332(11); also see Comptroller General of the United States, *Decision; Matter of James McCarger—Entitlement to Leave* (B-204097) (www.gao.gov/assets/b-204097.pdf) (accessed Mar. 16, 2022).

¹⁵ Air America, *supra*, note 9, at 2.

IV. SECTION-BY-SECTION ANALYSIS OF THE BILL, AS REPORTED

Section 1. Short title

This section establishes the short title of the bill as the “Air America Act of 2022.”

Sec. 2. Air America

Subsection (a) includes findings describing the background and history of Air America, Inc., and the service of Air America employees.

Subsection (b) defines the terms “affiliated company,” “qualifying service,” “survivor,” “widow,” “widower,” “dependent,” and “child” in the context of this section.

Subsection (c) deems any period of qualifying service as creditable service for the purposes of CSRS. Qualifying service is service performed by U.S. citizen employees of Air America between 1950 and 1976, as documented in attorney-certified corporate records.

Subsection (d) authorizes individuals who performed qualifying service or survivors of such individuals to submit an application for retirement benefits to OPM within two years after the bill takes effect upon enactment. These individuals and survivors are entitled to the retirement benefits retroactively. If the individual who performed the creditable service became deceased before this bill’s enactment, survivors are eligible for a survivor annuity, which is 50 to 55 percent of the annuity that would have been paid to the deceased individual.

Subsection (e) deems the lump sum payment made by Air America into the U.S. Treasury, a significant amount of which was apportioned to the Civil Service Disability and Retirement Fund, as satisfying title 5 requirements related to deductions, contributions, and deposits.

Subsection (f) states that nothing in the bill shall be construed to set any type of precedent for purposes of credit toward CSRS or any successor fund.

Subsection (g) states that the bill shall take effect 30 days after the date of the bill’s enactment.

V. EVALUATION OF REGULATORY IMPACT

Pursuant to the requirements of paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee has considered the regulatory impact of this bill and determined that the bill will have no regulatory impact within the meaning of the rules. The Committee agrees with the Congressional Budget Office’s statement that the bill contains no intergovernmental or private sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no costs on state, local, or tribal governments.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, May 13, 2022.

Hon. GARY C. PETERS,
Chairman, Committee on Homeland Security and Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 407, the Air America Act of 2022.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Amber Marcellino.

Sincerely,

PHILLIP L. SWAGEL,
Director.

Enclosure.

At a Glance			
S. 407, Air America Act of 2022			
As ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on February 2, 2022.			
By Fiscal Year, Millions of Dollars	<u>2022</u>	<u>2022-2026</u>	<u>2022-2031</u>
Direct Spending (Outlays)	0	11	15
Revenues	0	0	0
Increase or Decrease (-) in the Deficit	0	11	15
Spending Subject to Appropriation (Outlays)	0	*	not estimated
Statutory pay-as-you-go procedures apply?	Yes	Mandate Effects	
Increases on-budget deficits in any of the four consecutive 10-year periods beginning in 2032?	< \$5 billion	Contains intergovernmental mandate?	No
		Contains private-sector mandate?	No
* = between zero and \$500,000.			

The bill would:

- Make former employees of Air America eligible to apply for a new civilian retirement benefit based on their years of service in that program
- Authorize payment of a new monthly retirement benefit under the Civil Service Retirement System to successful applicants
- Authorize payment of a retroactive lump sum payment to successful applicants for retirement benefits that would have been paid from the time of first retirement eligibility

Estimated budgetary effects would mainly stem from:

- New retirement benefits paid to Air America employees and certain survivors
- Lump sum payments to former Air America employees for retirement benefits accrued between the time of assumed retirement and the commencement of a new retirement annuity

Administrative costs to process the applications for new benefits of the eligible population

Bill summary: S. 407 would establish the service of certain former employees of Air America as creditable toward a federal civil service retirement annuity under the Civil Service Retirement System (CSRS). The bill also would allow surviving spouses or children of those employees to apply for survivor benefits.

Estimated federal cost: The estimated budgetary effect of S. 407 is shown in Table 1. The costs of the legislation fall within budget function 600 (income security).

TABLE 1.—ESTIMATED BUDGETARY EFFECTS OF S. 407

	By fiscal year, millions of dollars—											
	2022	2023	2024	2025	2026	2027	2028	2029	2030	2031	2022–2026	2022–2031
Increases or Decreases (–) in Direct Spending												
Estimated Budget Authority	0	7	3	1	1	1	1	1	1	1	11	15
Estimated Outlays	0	7	3	1	1	1	1	1	1	1	11	15
Increases or Decreases (–) in Spending Subject to Appropriation												
[Estimated] Authorization	0	*	*	*	*	n.e.	n.e.	n.e.	n.e.	n.e.	*	n.e.
Estimated Outlays	0	*	*	*	*	n.e.	n.e.	n.e.	n.e.	n.e.	*	n.e.

Components may not sum to totals because of rounding; n.e.= not estimated; * = between zero and \$500,000.

Basis of estimate: For this estimate, CBO assumes the bill will be enacted by the beginning of fiscal year 2023.

Direct spending: S. 407 would establish the service of certain former employees of Air America (or specified affiliated companies) between January 1, 1950, and December 31, 1976, as creditable toward a federal civil service retirement annuity under the Civil Service Retirement System (CSRS). CBO estimates that the additional retirement annuity and survivor benefit payments authorized by the bill would increase direct spending by \$15 million over the 2022–2031 period.

Annuity Payments: CBO's estimate is based on data collected in 2014 by the Air America Association (the most recent data available) and was adjusted for expected mortality. That data contains service record summaries for just over 400 former Air America employees. CBO estimates that about 80 members of that group are still living who would be eligible under S. 407 to begin receiving a federal retirement benefit based on their Air America (or related) service, provided that the period of service meets the eligibility requirements for a CSRS benefit. (There are several tiers of eligibility based on age and years of service that can confer eligibility for a CSRS annuity; five years of service is the minimum requirement.)

Using that data, CBO expects that the average person eligible to apply for a new CSRS benefit under S. 407 is now about 87 years of age and performed about nine years of Air America service at a salary of just under \$30,000. CBO estimates that the average CSRS benefit would have been about \$3,800 per year at the time of first retirement eligibility—about 25 years ago, on average. However, a new CSRS annuity that would begin under S. 407 would incorporate the annual cost of living increases (which have averaged about 2 percent per year) that would have applied in the

years since first eligibility. Including those annual adjustments, CBO estimates that the average new CSRS annuity under S. 407 would be about \$7,000. The total annual benefits paid to this group of people would decline over time because the number of eligible people cannot increase, they would have a limited time to apply for the new benefit (two years after enactment), and they are generally of advanced age. CBO estimates that new retirement benefits for former Air America employees would increase direct spending by about \$2 million over the 2022–2031 period, primarily in the first few years.

Lump-sum payments: In addition to a new monthly CSRS retirement benefit, the former Air America employees also would receive a retroactive lump-sum payment of the total benefits that have accrued since their first eligibility for retirement. CBO estimates that the average lump-sum payment would be about \$136,000 per person. Over the 2022–2031 period, CBO estimates that the lump-sum payments would increase direct spending by \$7 million (primarily in 2023).

Survivor benefits: In addition to retirement annuities for former Air America employees, S. 407 also would allow survivors (spouses or children) of former Air America employees who died before enactment of the bill to apply for a survivor benefit, at 55 percent of the former employee's full annuity amount. Using the information about the number of former Air America employees, CBO estimates that about 175 people would apply for a survivor benefit under the bill, and their average annuity would be about \$4,700 per year. CBO projects that, over the 2022–2031 period, annuity payments to survivors under this provision would increase direct spending by \$6 million.

Spending subject to appropriation: The Air America Association has collected identities and work history data for many former Air America employees; as a result of their outreach, CBO expects a moderately high participation rate if the bill is enacted. However, the administrative cost of successfully processing a benefit application for this group is likely to be significantly higher than for current federal employees. For Air America applicants, additional effort and time will be required for the Office of Personnel Management (OPM) to develop internal guidance and verification procedures based on information provided by individuals rather than employment records provided by an agency.

CBO estimates that the additional administrative costs associated with processing Air America applications, for former employees and survivors, under S. 407 would cost less than \$500,000 over the 2022–2026 period. That estimate is based on data from OPM. In 2021 (the most recent data available), OPM announced that the average unit cost of processing one type of civil service retirement (those occurring under Voluntary Early Retirement Authority or with Voluntary Separation Incentive Payments) is \$676.70 per application. Given the additional administrative work involved, OPM expects the processing cost for Air America applications to be higher than that average but does not have an estimate of how much higher.

Pay-as-you-go considerations: The Statutory Pay-As-You-Go Act of 2010 establishes budget-reporting and enforcement procedures for legislation affecting direct spending or revenues. The net

changes in outlays that are subject to those pay-as-you-go procedures are shown in Table 1.

Increase in long-term deficits: CBO estimates that enacting S. 407 would not increase on-budget deficits by more than \$5 billion in any of the four consecutive 10-year periods beginning in 2032.

Mandates: None.

Previous CBO estimate: On September 24, 2021, CBO transmitted a cost estimate for H.R. 1297, Air America Act of 2021, as ordered reported by the House Committee on Oversight and Reform on May 25, 2021. Both bills would provide eligible former Air America employees the opportunity to apply for and commence a civilian retirement benefit under CSRS, including a lump sum payment for retroactive benefits that would have been paid from time of first retirement eligibility. The Senate bill contains a provision that would provide benefits for eligible survivors of former Air America employees who have died prior to enactment of the bill; the House bill does not. CBO's estimates reflect those differences between the bills.

Estimate prepared by: Federal costs: Amber Marcellino; Mandates: Andrew Laughlin.

Estimate reviewed by: Christina Hawley Anthony, Chief, Projections Unit; H. Samuel Papenfuss, Deputy Director of Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

Because S. 407 would not repeal or amend any provision of current law, it would make no changes in existing law within the meaning of clauses (a) and (b) of paragraph 12 of rule XXVI of the Standing Rules of the Senate.