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RESTORING CHECKS AND BALANCES IN THE CONFIRMATION PROCESS OF U. S. ATTORNEYS
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My name is John Smietanka. I currently practice law in Western Michigan in the firm of Smietanka, Buckleitner, Steffes and Gezon. While the majority of our practice is in civil work, federal and state, we also handle a substantial number of federal and state criminal cases.

My Background

I am admitted to practice law in the States of Michigan and Illinois, as well as the federal courts of those two states, the United States Sixth Circuit Court of Appeals and the United States Supreme Court.

Berrien County, Michigan Prosecutor

For 25 years of my career I was a prosecutor, first as an assistant county prosecutor in Berrien County, Michigan for 4 years, and then as Berrien County Prosecuting Attorney for almost 8 years. I was also President of the Prosecuting Attorneys Association of Michigan. During my time as county prosecutor, I was also involved in politics as a member of the Republican Party at both the local and state levels. I was elected 3 times as Prosecuting Attorney by the people of Berrien County.

United States Attorney for the Western District of Michigan

In 1981, the presidentially-appointed United States Attorney for Western Michigan (appointed by President Carter) James Brady, resigned to go into private practice, and, under the law as it existed at the time, the federal district judges in the Western District appointed Robert Greene as Interim United States Attorney. Bob had been an assistant United States Attorney in the office for many years. He served as the Interim United States Attorney until I was confirmed and commissioned in October 1981.

Later in 1981 President Reagan nominated me and the United States Senate confirmed me as the United States Attorney for the Western District of Michigan. In 1985, I was renominated and confirmed for a second four year term. When President George H.W. Bush was elected in 1988, I continued to serve as United States Attorney until January 1, 1994.

I resigned effective on January 1, 1994, upon the confirmation of my successor, Michael Dettmer, the presidentially-appointed United States Attorney of former President Clinton.

I served as U.S. Attorney for 3 Presidents (Reagan, Bush and Clinton) and 5 Attorney Generals (Smith, Meese, Thornburgh, Barr and Reno) and several acting Attorney Generals.

The transitions of the United States Attorney's Office in Western Michigan from the Carter to Reagan/Bush to Clinton United States Attorneys were almost seamless, with each of us cooperating completely and enthusiastically to ensure a smooth and effective transition. Jim Brady and Bob Greene remain good friends of mine.

I mention this to emphasize two points.

- Transitions of an extremely sensitive and powerful political office such as United States Attorney can and should be as smooth as possible, with the goal that the work of the office continue as unaffected as possible.
- As every current and former United States Attorney that I have ever met (and that has been hundreds) has said, this is the best job any lawyer in America can have. We develop a loyalty to our office and the entire Department of Justice that borders on that given to one's family. Like many others, I am a member of the National Association of Former United States Attorneys which is dedicated to ensuring that the Department of Justice continues to live up to its best traditions and goals.

Principal Associate Deputy Attorney General

I also had a unique honor in 1990. I was asked by then United States Deputy Attorney General William P. Barr to take a temporary detail to Main Justice as his Principal Associate. Later, when he became Attorney General in 1991, I was one of his Assistants in that office. In that role, I learned even more of how that department of many diverse divisions and offices, with 88,000 persons working there, functioned. My responsibilities included being the liaison between the Deputy and all of the departmental components (save for the Criminal Division and the Federal Bureau of Investigation, the responsibilities of later Deputy Attorney General George Terwilliger). My area of concern thus included all the United States Attorneys in the country.

Occasionally I participated in the interview process for the candidates for United States Attorney positions, but was never a part of the selection process in the White House.

United States Court of Appeals Nominee

In 1992, President George H. W. Bush nominated me for a vacancy on the United States Sixth Circuit Court of Appeals. However, it was a presidential election year and over 60 nominees for judicial appointments did not get hearings before the Senate Judiciary Committee that year and our nominations died on the last day of that Congress. I was left with the consolation that it wasn't personal, that very qualified people in our group (now Chief Justice of the United States Supreme Court John Roberts and former Governor of Oklahoma Frank Keating were with me) went on with their lives, and that, as John Roberts said, "We are now entitled to the acronym after our names: AJO: Almost Judge Once.".

Candidate for Michigan Attorney General

In 1994, and again in 1998, I ran unsuccessfully for the position of Michigan Attorney General as the Republican nominee.

In our family we were taught to respect government, politics and politicians. A great aunt of mine once said of our family, "We were raised on politics, sports and cigar smoke." Now, I confess, I am a recovering politician.

With this background the Committee may appreciate a little how much I love the Department of Justice. It also may show that I have no grudge against politics and politicians.

Therefore it troubles me when the word "politics" is sneered at, and is used as a dirty adjective in common speech. And it truly offends me when I hear prosecutors wrongfully tarred with that adjective when undeserved. Finally it causes me the most concern if there is any apparent basis in the actions of politicians, prosecutors or judges for their placing partisan or personal considerations above the honest and effective creation, execution and judging of the law.

The Office of United States Attorney

Let me briefly highlight the history of the United States Attorneys as part of our federal system of law.

The position was first created in the Judiciary Act of 1789, one of the first laws of our country.

> And there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court in the district in which that court shall be holden. And he shall receive as compensation for his services such fees as shall be taxed therefor in the respective courts before which the suits or prosecutions shall be. . . .

Judiciary Act of 1789, Section 35.

The same law created the position of Attorney General, but did not create a relationship between the two offices, rather assigning the majority of federal legal work to the United States Attorneys, and designating the Attorney General as legal advisor to the United States and its representative in the United States Supreme Court.

In 1870 the Department of Justice was created by Congress and the folding of the United States Attorneys into it took place.

While the process of filling the office of United States Attorney on a 4-year-term basis has been stable for over a century, the method of appointing temporary replacements has varied since my appointment in 1981.

Appointment of Interim or Acting United States Attorneys

For many decades, the appointing of United States Attorneys has been covered by 28 USC § 541.
· Prior to 1986, it was left to the federal district judges to select an "Interim" United States Attorney until a

permanent presidentially-appointed person was fully-qualified.
· From 1986 to 2006, the Attorney General was given the first crack at an "interim" U.S. Attorney, and if a new person was not qualified within 120 days, the district court had the discretion to appoint such a person without time limitation (but only until a new presidentially-appointed person was qualified).
· In 2006, the section and the practice were changed to allow the Attorney General's choice to remain in office until a successor was senatorially confirmed.

In addition there is another approach to filling the vacancy, the **Vacancies Reform Act, 5** USC §§ 3345-3349d. This provides in the broadest terms for such person as the First Assistant United States Attorney then serving in the office where the vacancy occurs for a period of 210 days.

Practical considerations in reviewing 28 USC § 546:

The position of United States Attorney has always been and should continue to be a political position, that is, a "policy" or non-career appointment.
It guarantees some sensitivity for the distinct culture and history of the people in the district when making discretionary legal decisions.
Examples include:

· Working to achieve proper integration and cooperation between federal, state and local law enforcement authorities (Law Enforcement Coordinating Committees from the 1980s);

· Proper allocation of legal resources in a district that meets local needs (gun, obscenity, drug etc. cases);
· A proper sensitivity to how state and local governmental cultures can be checked for abuses of power (public corruption prosecutions);
· A presumed comfort with the public relations aspect of the United States Attorney's job.

Furthermore, while I have the greatest respect for the career civil servants, we benefit by the responsiveness to the public and the accountability that goes with being a political officer.

With great power should go great accountability.
We do need public scrutiny of the types of people that wield governmental authority, especially those who exercise the powerful investigative and prosecutorial tools that Congress has authorized and funded, and the Executive uses, to enforce federal laws.

· Although nomination by a President of suitable persons to be United States Attorneys has its own perils, it does at least cause administrations to be more careful that the persons that they ultimately choose are going to pass congressional and public scrutiny.
· While the current process of "advice and consent" by the United States Senate is not perfect (it can be brutally unfair and partisan, and has permanently negatively affected nominees' lives), it does prepare them and others for the rough and tumble world of federal law enforcement.
· While both aspects of this process do in fact deter good and qualified people from subjecting themselves to it, for the most part it replicates the world of electoral politics where candidates voluntarily expose themselves to "the slings and arrows of outrageous fortune". Hopefully it develops in the survivors a thick skin covering a humbled ego with a certain empathy to the staffs and Assistant United States Attorneys they supervise, the agents and courts they work with, the victims and defendants they must protect, the media they are examined by and the public they serve.

The appointment of successors to the presidentially-appointed United States Attorneys under any legislative and/or executive scheme has dangers that have arisen in the past:

· **Court appointment**: When the courts were the sole appointers of Interim U.S. Attorneys, the danger was that the person so designated would have had a too-close relationship to the court and have allegiance to it rather than the policies and practices of the President, Attorney General or the Department of Justice.
· **Delay by the President or Senate**: When the Administration or the Senate unduly delayed the nomination of a successor, interim or "acting" United States Attorneys could stay in that category for years. (See the extraordinarily difficult situation in **Puerto Rico** from **1993 to 1999** described in the trial and appellate court decisions in United States v. Fermin Hilario, 83 F. Supp. 2d 263 (D.P.R. 2000), and United States v. Del Rosario, 90 F. Supp. 2d 171 (D.P.R. 2000). See also the First Circuit's reversal of the trial court in United States v. Hilario, 219 F.3d 9 (2000). In those cases the acting or Interim United States Attorney was in place for 6½ years. This problem has occurred during different administrations, as witness the years of successive acting/interim United States Attorneys in the **Virgin Islands** in the **1980s**.
· **Temporary appointments for political favoritism**: A danger arises also if a

temporary appointment of the Attorney General is not followed by some action to identify and move a successor through the process. It is most of concern where a perception may exist that the Interim United States Attorney is put in place to accomplish a purely partisan political goal. Every administration in the past 30 years has published extensive criteria for identifying the most professionally qualified candidates for U.S. Attorney positions.

· **Changes in the leadership of an organization send messages**. Whenever and for whatever reason one United States Attorney leaves and another comes in, there is profound uncertainty in the career staff of assistants and staff. Sometimes that is good, as when poor management skills or criminality is attacked, or a complacent office needs new ideas and energy; sometimes it is bad, as when the competent office leader is removed without apparent good reason. But sudden and apparently arbitrary changes at the top cannot help but affect the troops. This danger is most apparent in mass actions, such as the approximately 86 same-day terminations of U.S. Attorneys during the Clinton administration, and to a lesser extent, perhaps only by numbers, in the current situation.

The appropriate work of a United States Attorneys' Office must go on without improper or undue interference

Sensitive investigations and prosecutions, most especially those of political or other public figures should never be improperly derailed by a change of administration in the United States Attorney of a district. The best way for that to occur is for the departmental leadership, including both those in Main Justice and the local office itself, to commit themselves to seamless transitions. Unnecessary jerking of the reins distract the most compliant horses.

Judging the reasons for the replacement of a United States Attorney must be done with great care and circumspection

This is the most difficult of all considerations to apply in real life. Resignations are often the method of resolution of conflict giving both the employer and employee a way of avoiding undue embarrassment. In addition it would do the work of no United States Attorney's Office any good, in my judgment, to undergo the stress of a public airing of personality conflicts, odd personal traits or the management quirks of the boss or her or his workers.

When the reason for a hasty departure is the potential criminal behavior of the incumbent, that is a different story. And sometimes non-criminal but tortious behavior occurs and can be fair game for the public and for reason for firings.

In the case of the 7 resignations under scrutiny here, I have absolutely no knowledge of what led to them. I have, nor do I need for my policy comments, no reason to deal with the merits of any of these cases. These 7 resignations and the 86 in 1993, are unique in my experience.

The President has a right to qualified political appointees in her or his administration who will promote good government and the administration's policy priorities

A concomitant right is to dismiss or seek the resignation of those who do not want to follow the lawful directives of that administration's leadership. Again I emphasize I do not know what caused these resignations. If a United States Attorney is charged with enforcing a policy or a decision to do something which is illegal or morally repugnant, that person has a right, or perhaps even a duty, to oppose it internally. If internal opposition is unavailing, the proper course would be to resign rather than to perform illegal or morally repugnant acts.

On the other hand, the President and the Attorney General have the right to remove a United States Attorney who is not doing a good job. To take that power away from the Chief Executive would be of questionable constitutionality, and certainly very bad government.

In any event, the Congress, the Judiciary, the media and the public have continually exercised their prerogatives to evaluate just how well the President appoints and removes.

The appropriate way of appointing Interim United States Attorneys is the process that prevailed from 1986 to 2006

No way to handle this situation is perfect. Each approach has dangers of abuse, inefficiency, favoritism and treading on toes. However, it seems to me that the most effective way is to allow the Attorney General to appoint for a period of time (120 days is a fair number, though not worthy of Mount Rushmore enshrinement), and, if the President fails to nominate or the Senate fails to confirm a candidate, the court could (though not required to) step in. The court could, if the appointee of the Attorney General is doing a good enough job, reappoint that person. The one thing that is certain is that if the Administration were to put in as Interim United States Attorney someone who was then to fail to be confirmed by the Senate, 28 USC 546 would bar that person from holding the office later. This would militate against an Attorney General immediately putting in a controversial political person that could be forced out ignominiously and forever within 120 days.

This checks-and-balances process would put a premium on the administration, the court, the Senate and the "recommenders" of potential new United States Attorneys working together to speed the process along. Such an approach would be the best guarantee of as little disturbance of the work of the office.

Therefore I endorse the approach of the Berman bill now before this Committee, which restores the principle that:

1 An interim U.S. Attorney may be appointed by the Attorney General for 120 days; and

2 If a senatorially confirmed U.S. Attorney is not commissioned by then, the district court may appoint an Interim U.S. Attorney.

I am grateful for the opportunity to address the Committee on this issue and am available to answer any questions that you might have.

Respectfully submitted,

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