

Good Choice, Sir

Let's try a truly merit-based system for picking U.S. attorneys.

BY TIMOTHY J. HEAPHY

The scathing report released last month by the Justice Department's internal watchdogs confirms what months of media coverage have suggested—that politics, in part or in whole, lay behind the dismissal of several U.S. attorneys in 2006. The Sept. 29 report paints a picture of a department filled with “loyal Bushies” who placed ideology above principle.

Sens. Barack Obama and John McCain have both promised to do things differently. Obama pledges that in his administration, “every official will have to rise to the standard of proven excellence in the agency’s mission.” McCain says that he “will see to it that the institutions of self-government are respected pillars of democracy, not commodities to be bought, bartered, or abused.”

These are admirable but empty words, unless they come with an actual plan to fix the Justice Department. In pursuit of that goal, the next president would be well-advised to start with an idea put forth years ago by then-presidential candidate Jimmy Carter—a merit-based selection process for U.S. attorneys. The establishment of independent nominating commissions as the sole means by which U.S. attorneys are chosen would help remove the taint of politicization and restore Justice’s reputation for independence.

MERIT OVER POLITICS

Carter articulated his simple yet radical idea of merit-based selection in the summer of 1976: “All federal ... prosecutors should be appointed strictly on the basis of merit without any consideration of political aspects or influence. Independent blue ribbon ... selection committees should be established to give recommendations to the President of the most qualified persons available for positions when vacancies occur.”

Unfortunately, President Carter was never able to implement his vision. Senators were unwilling to give up any of their influence in the naming of federal prosecutors. Sen. Lloyd Bentsen (D-Texas) summed up the prevailing view when he famously declared, “I am the merit commission for Texas.” Some senators did establish commissions to make recommendations for U.S. attorneys and

other positions. But most refused and continued to exercise their traditionally exclusive control over these appointments.

The next president will have to be a more convincing salesman than Carter if he is to succeed in elevating merit over politics in the selection of U.S. attorneys. The series of troubling reports about the Justice Department should, however, help sell a merit-based selection process that would potentially work something like this:

- *Nominating commissions:* The president by executive order would establish a panel of individuals in each state and the District of Columbia to solicit and screen applicants for the position of U.S. attorney. Each commission should be diverse in membership, including prominent members of the bar and other individuals with criminal justice experience. The commissions should also include nonlawyers, who would bring a less institutional perspective to the appointments process.

- *Candidate evaluation:* Each commission would seek nominations for open U.S. attorney positions in that state. The commission would consider written submissions, interviews with candidates, and discussions with references and others familiar with the applicants. Each commission would be explicit about its criteria, which would include standards articulated by the incoming administration as well as local and regional priorities. At the end of the process, the commission would recommend one to three names for a particular position.

- *Advice and consent of the Senate:* The commission’s nominees would be submitted to the state’s senior senator (or other top-elected official) from the party then controlling the White House. The senator would immediately solicit the views of the other members of the state’s congressional delegation on the nominees.

After such consultation, the senator could reject a particular nominee or nominees, but only on the basis of credentials and/or fitness to serve as U.S. attorney. In the event that the senator rejected all the forwarded nominees, she could request additional names. She could not, however, unilaterally replace a nominee with an alternate selection. Lacking specific objections, the senator would forward at least one name to the White House.

Because U.S. attorneys serve “at the pleasure of the President,” the White House would remain free to reject a commission’s

choice or remove a particular U.S. attorney. The president would not, however, be able to circumvent the nominating commissions. In the event of rejection or removal, the commission process would simply start anew, ensuring that the merit-based system was the exclusive means of selecting U.S. attorneys.

The system would be constitutional and easy to implement. The nominating commissions could be established by executive order, and that order would make explicit the president's commitment not to circumvent their authority. Congress' constitutionally mandated powers of advice-and-consent and confirmation would remain.

THE BENEFITS

The use of nominating commissions applying merit-based criteria would have several significant advantages over the current politicized system.

- *Quality candidates.* First and most significantly, nominating commissions would elevate excellence over political influence in the selection process. In the current system, a future U.S. attorney's political connections play an outsized role in whether he is nominated. In a merit-based system, the focus would shift to each candidate's qualifications and personal qualities.

Beyond his relevant experience, each candidate would be required to articulate to the commission a vision of what he would do as U.S. attorney, what priorities he would pursue, and how he would promote justice. Additional voices would be heard as the commission solicited the views of others outside Washington about the candidates. The winners of that competition would be those with the best ideas and experience, rather than those who gave the most money or had the most influential friends.

Nominating commissions would open up the selection process to a deeper pool of candidates. In an open call for nominations, the commissions would hear about individuals with outstanding qualifications but no political connections.

The most direct beneficiaries of a merit-based process might be those already serving within U.S. attorneys' offices. They are uniquely qualified to assess the needs of a particular district and to articulate an effective vision for change. Today these inside candidates are often not competitive because their government service precludes active involvement in politics.

- *Uniformity of process.* Today senators vary widely in how they choose U.S. attorneys. The establishment of nominating commissions in every state would eliminate that patchwork approach.

Congress has long prioritized consistency in the application of law. The federal sentencing guidelines are perhaps the most dramatic manifestation of that goal, as they attempt to ensure that a crime committed in Texas is punished in much the same way as a similar crime committed in Massachusetts. A system that relies on nominating commissions would likewise ensure that a U.S. attorney in Texas was chosen in much the same way as a U.S. attorney in Massachusetts.

- *Enhanced discussion of policy.* A merit-based selection has the potential to prompt policy discussions that could energize and inform the criminal justice system.

In the course of evaluating aspiring U.S. attorneys, the nominating committees would look at a myriad of proposals put forth by the applicants. Within the commissions themselves, this

would force a healthy give-and-take about those proposals and the overall quality of justice.

That discussion might also lead to legislative proposals and innovative programs within the Justice Department. The U.S. attorney who emerged from this process would apply the lessons of that dialogue to his individual office. New ideas would circulate within the department and spread to other districts.

- *Insulation from political pressure.* This merit-based system for selection would also protect U.S. attorneys from removal from office for purely political reasons. While the president could still fire a U.S. attorney at his pleasure, he could not guarantee that the next U.S. attorney would be someone with greater loyalty to the White House.

Merit-based selection would thus provide a measure of job security for the U.S. attorneys. No longer would they feel pressure to please political patrons or risk dismissal, as the Sept. 29 report concludes occurred in the current administration. Prosecutors would be free to base their decisions on the facts and the law, unencumbered by the political ramifications of those decisions.

- *Improved morale and public confidence.* Former Deputy Attorney General Eric Holder Jr., a potential attorney general in an Obama administration, recently observed of the Justice Department: "Internally, there is a morale problem the likes of which I have never seen before. Externally, there is a crisis of confidence that the nation has with regard to the department." Holder's diagnosis has been echoed by many observers. Enacting a merit-based system would go a long way toward restoring morale within the department and public confidence across the country.

The 93 U.S. attorneys' offices are filled with career prosecutors who exercise their considerable discretion with integrity and impartiality. These professionals are discouraged when political affiliation affects hiring decisions and diminished when their investigations are tainted by politics. U.S. attorneys who emerge from a more rigorous nominations process would engender more respect among their line assistants, and thus receive greater internal support for their ideas and decisions.

People outside the department would be similarly encouraged by the elevation of merit over politics. The establishment of nominating commissions would emphatically demonstrate that our next president's Justice Department was fair and impartial. Investigations conducted and decisions reached by the department would have more credibility. The removal of politics from the nominations process would make it more difficult to question prosecutors' motives. The criminal justice system would be held in greater respect.

Both presidential candidates and numerous members of Congress have complained loudly about the politicization of the U.S. attorneys. With a nod toward Jimmy Carter, our next president and the Senate should turn their words into deeds by establishing a truly merit-based system for appointing these important officials.

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