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Ex-US Attorneys See Risks In Working Under Gaetz

By **Chris Villani**

Law360 (November 19, 2024, 7:42 PM EST) -- Some prospective U.S. attorneys may think twice about joining the U.S. Department of Justice if Matt Gaetz ends up in charge, veterans of the position told Law360.

As President-elect Donald Trump's nominee for attorney general preps for a possible confirmation battle, potential U.S. attorney candidates around the country are likely beginning to explore whether they can land a position leading one of the nation's local prosecutorial offices. The job is highly sought after and can be a steppingstone to higher political office.

If Gaetz is the next attorney general, the U.S. attorneys who serve under him may have to navigate a Justice Department that's both "chaotic" and "vindictive," according to Carmen Ortiz, a former Massachusetts U.S. attorney and current Anderson Kreiger LLP partner.

"There are risks in the sense that this is an individual who has very limited experience, he is not really qualified," Ortiz said. "He has never been a prosecutor. I don't think he has much legal, litigative experience. His experience is primarily as a politician."

Gaetz was briefly in private practice before going into politics, first as a Florida state legislator and then as a member of Congress. He has been investigated by both the FBI and the U.S. House Ethics Committee for sex trafficking, drug use and bribery.

Gaetz, who resigned from Congress before the ethics committee released its findings, has maintained his innocence and was not criminally charged.

Ortiz, who served under President Barack Obama, said a U.S. attorney could receive marching orders from Gaetz, a close ally of Trump, that "come close to the line of 'Is this legal? Is this appropriate?'"

Both during the campaign and since the election, Trump and likely members of his administration have said there will be big shakeups at the DOJ. An attorney working with Trump's transition team, Mark Paoletta of Schaerr Jaffe LLP, said on social media that "career DOJ lawyers must be fully committed to implementing President Trump's policies or they should leave or be fired."

Trump has said special counsel Jack Smith, President Joe Biden, Vice President Kamala Harris and New York Attorney General Letitia James should be investigated and prosecuted. One Trump attorney insisted after the election that James should be put in prison "for conspiracy against rights."

Trump also became frustrated during his first term when his first attorney general, former U.S. Sen. Jeff Sessions, recused himself from an investigation into Russian interference in the 2016 election, which led to the appointment of special counsel Robert Mueller.

Trump later tapped a U.S. attorney, John Durham of Connecticut, as special counsel in a counter-investigation to Mueller's, allowing his work to continue even after Biden took office. Durham's probe resulted in charges against three people, two of whom were acquitted.

An earlier Connecticut U.S. attorney, Stanley Twardy Jr., who served under Ronald Reagan and George H.W. Bush, said that whether a U.S. attorney would be able to do what they want in a Gaetz DOJ would depend on the person and their reasons for seeking the job in the first place.

"Everybody is motivated by different things," Twardy, who is now of counsel at Day Pitney LLP, said.

"Those who are motivated solely to use the position as a political steppingstone will have to gauge how being a Gaetz U.S. attorney would affect him or her winning a primary within the Republican Party and then winning a general election."

Things could get more complicated for people who see the U.S. attorney role as a means to dispense justice.

"The issue there is going to be: Would an AG Gaetz request them to do things that they would not be comfortable doing?" Tardy said.

Robins Kaplan LLP partner Brendan Johnson, a former U.S. attorney for the District of South Dakota under Obama, said top prosecutors in smaller, more far-flung offices have a chance to distance themselves from Main Justice and work independently, albeit within the parameters set by the administration.

Johnson also pointed out that U.S. attorneys' primary contact would be with Gaetz's deputy attorney general. Trump has nominated one of his criminal defense lawyers, Todd Blanche, for the top deputy spot.

"I have litigated against Todd Blanche in private practice, and I think he is a very strong lawyer," Johnson said. "That is who, by and large, most of the U.S. attorneys are going to be working with on a daily basis."

He acknowledged that the Justice Department, if weaponized effectively to serve Trump, could look different from the one he served, recalling the first time he and his colleagues were called to the White House and were told by Obama that politics would play no part in any decisions they made in their duties.

"What has been suggested, at least during the campaign, that the DOJ might become — it's not one that I recognize," Johnson said. "It's vastly different."

Kevin O'Brien of Ford O'Brien Landy LLP, a former prosecutor in the Eastern District of New York, said there will likely be "plenty of room for ambitious Republicans who want to be U.S. attorneys to think they will have enough independence to do the job."

"That may be wrong at the end of the day, but I don't think there is going to be a crisis in terms of getting good applicants to fill those positions," O'Brien said.

He added that candidates tend to grow in U.S. attorney positions once they have the gig, and many become more independent in their thinking and actions over time. He said that qualified candidates are likely "making moves" now and starting to lobby for themselves with their respective U.S. senators and with their connections in D.C. and within the incoming administration.

Those candidates, according to O'Brien, will likely take a "wait and see" approach and wonder, "How bad is it going to get?"

"It could be terrible," he said. "But I'd like to think it won't be terrible. I think there will be enough independence for them to do their jobs."

--Editing by Brian Baresch and Covey Son.