

The Law Behind The Strange Departure Of US Atty Berman

By **Daniel Levy** (June 21, 2020, 4:57 PM EDT)

Friday night's news out of the U.S. Department of Justice was, in a word, confusing.

On the evening of June 19, Attorney General William P. Barr announced that the United States attorney for the Southern District of New York, Geoffrey S. Berman, had resigned and would be temporarily replaced by Craig Carpenito, currently United States attorney for the District of New Jersey, as acting United States attorney for the Southern District of New York, and that Berman would be succeeded by Jay Clayton, currently chairman of the U.S. Securities and Exchange Commission, upon confirmation.[1]



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About two hours later, Berman issued a statement contradicting the attorney general, the man who is technically his boss. Berman asserted that he had not resigned and had no intention of resigning.[2]

Things only got weirder the next day, June 20.

At some time Saturday afternoon, Barr wrote to Berman. The attorney general expressed his surprise about Berman's Friday evening statement and informed Berman:

Unfortunately, with your statement of last night, you have chosen public spectacle over public service. Because you have declared that you have no intention of resigning, I have asked the President to remove you as of today, and he has done so.[3]

But the executive branch did not speak with one voice on this issue. And that is putting it charitably. The same afternoon, the president himself disclaimed any role in the termination of Berman. At approximately 4 p.m. on Saturday, as he was leaving by helicopter for a campaign event in Tulsa, Oklahoma, the president had the following colloquy with a reporter:

Reporter: Why did you fire Geoffrey Berman, Mr. President? Why did you fire him?

President Trump: That's all up to the attorney general. Attorney General Barr is, uh, working on that. That's his department, not my department. Ah, but we have a very capable attorney general, so that's really up to him. I'm not involved.[4]

Still later Saturday afternoon, the attorney general capitulated in his effort to appoint his choice to be

acting United States attorney and respected the normal operation of law for filling United States attorney vacancies. Berman will be leaving and Audrey Strauss, previously deputy United States attorney, will now serve as acting United States attorney.[5]

Not only did the attorney general and the president not achieve their choice of an interim head of the Southern District, but, based on the initial press reports, it seems unlikely that their choice of United States attorney will be confirmed by the Senate.[6]

It is not particularly complicated for a neutral observer to see the true reasons behind the attorney general's actions. The United States Attorney's Office for the Southern District of New York has been true to its long-standing and well-deserved reputation of pursuing investigations independently of political considerations and without fear or favor. To the apparent dismay of the attorney general and the president, some prosecutions have implicated personal interests of the president (e.g., the investigation and prosecution of Michael Cohen), and, with an election upcoming in November 2020, some ongoing investigations further threaten to implicate the personal interests of the president. The attorney general has said nothing to suggest the existence of any reasons other than naked political considerations to replace Berman.

Whatever the reader's view of this unusual situation, however, it is useful to ask what law governs here. Why did the standoff end this way? And what does history teach us about the present circumstances?

What Law Governs

The key facts that largely drive the result here are that Berman was originally appointed to his position and was never nominated to be United States attorney. Specifically, in January 2018, Berman was appointed by then-Attorney General Jeff Sessions.[7]

The statute that permitted that appointment, Title 28 of the U.S. Code, Section 546(a), permits the attorney general to appoint a United States attorney in a district in which there is a vacancy (as long as the person appointed was not previously rejected for the position by the Senate). The vacancy in the Southern District of New York was created by the rather unceremonious firing in March 2017 of then-United States Attorney Preet Bharara.

Appointments by the attorney general under Section 546(a) are limited to 120 days from the date of appointment unless a United States attorney is confirmed prior to the end of the 120-day period under the standard procedure for installing United States attorneys (with the advice and consent of the Senate).[8]

At the end of the 120-period, Section 546(d) kicked in for Berman (and the other 16 people appointed on the same occasion, including Carpenito of New Jersey, who was the attorney general's initial choice for Berman's interim replacement).

Section 546(d) permits the district court to "appoint a United States attorney to serve until the vacancy is filled." [9] On April 25, 2018, the U.S. District Court for the Southern District of New York appointed Berman pursuant to Section 546(d).[10]

Under this mechanism of court appointment in April 2018, Berman was a "fully-empowered United States Attorney[], albeit with a specially limited term." He was "not [a] subordinate[] assuming the role of 'Acting' United States Attorney." [11]

This is exactly the principle Berman invoked in his June 19 response to Barr's "informing" Berman that he had resigned. Berman's statement reminded a candid world that he was "appointed by the Judges of the United States District Court for the Southern District of New York." [12]

In short, Berman's role as U.S. attorney was the result of judicial, not executive action.

When and How Does the Term of a Court-Appointed U.S. Attorney End?

This unique method of appointment and Sections 541 and 546(d) largely determined when and how Berman's term ended and how Strauss assumed her role.

Section 546(d) provides only that a court-appointed U.S. attorney's service ends when "the vacancy is filled" and provides no specific mechanism for removal. That said, the court's power to appoint almost necessarily includes the power to remove. [13]

Section 541 also determines how U.S. attorney vacancies may be filled. United States attorneys are appointed for four-year terms "by and with the advice and consent of the Senate." And "[o]n the expiration of his term, a United States attorney shall continue to perform the duties of his office until his successor is appointed and qualifies." [14]

And this procedure is exactly what Berman invoked in his Friday night statement: "I will step down when a presidentially appointed nominee is confirmed by the Senate." Berman was asserting, in essence, that his service by court appointment would end only when his successor is nominated by the president and confirmed by the Senate. [15]

Theoretically, however, the president retains the authority to remove (read: "fire") Berman under Section 541(c), which provides that "[e]ach United States attorney is subject to removal by the President." [16]

There is precious little guidance on this seeming conflict between Section 541(c)'s delegation of the power of removal of a U.S. attorney to the president and Section 546(d)'s provision that a court-appointed U.S. attorney's service ends when the vacancy is filled by Senate confirmation of a successor.

Although opinions of the Department of Justice's Office of Legal Counsel have no force of law, they are typically viewed as representing at least the Department of Justice's view of what the law is when the opinion was rendered. In 1979, the Department of Justice's Office of Legal Counsel opined that, because of the language of Section 541(c) and notwithstanding the court's power to appoint, a president had the power to remove a court-appointed United States attorney.

In the same opinion, however, the Office of Legal Counsel also concluded that an attorney general does not have the power to fire a court-appointed United States attorney:

We therefore are of the opinion that the power to remove a court-appointed U.S. Attorney rests with the President.

Your inquiry also asks whether the Attorney General has that power. We answer this questions [sic] in the negative in view of our interpretation of § 541(c) as constituting—at least in part—the specific exercise of legislative power under Article II, section 2, clause 2, vesting in the President the power of removing a court-appointed U.S. Attorney. [17]

Assuming he were to have followed the guidance of the Office of Legal Counsel, the president would have had to make the decision himself and would have to fire Berman himself. The attorney general could not have made the decision on his own.

The problem, of course, is that the president himself disclaimed any role in the firing. When the president was asked about the firing, he said that:

- The firing was "all up to the attorney general" and "really up to him";
- The attorney general is "working on that";
- The firing is the attorney general's department, not the president's; and
- The president was "not involved."^[18]

In justifying the firing, Barr cited *United States v. Solomon*^[19] and *United States v. Hilario*^[20] for the proposition that the president does have the authority to fire a court-appointed United States attorney. But this is weak precedent to justify the attorney general's efforts. Neither case actually involved a sitting president's attempt to fire a court-appointed United States attorney and, as a result, whatever holding in *Solomon* and *Hilario* there may be is arguably dicta. And *Solomon* considered a statute that was entirely different than the present-day Sections 546. Beyond that, there is compelling authority that the executive branch retains little authority to remove a court-appointed United States attorney.^[21]

In short, the authority to remove a court-appointed United States attorney is a highly debatable — and litigable — question. And the attorney general's citation of decisions of federal courts as the basis for his answer would suggest that even the Department of Justice would not regard this as a political question, that is, a nonjusticiable issue that involves policy choices and value determinations constitutionally committed for resolution to the executive and legislative branches.

Later Saturday afternoon, these complicated questions of statutory interpretation were rendered moot. And it became unnecessary for the president to button up the attorney general's legally questionable letter purporting to fire Berman on behalf of the president.

The standoff was resolved (and largely in Berman's favor). Although he would be leaving, he announced in the same breath that the attorney general had decided to "respect the normal operation of law and have Deputy United States Attorney Audrey Strauss become Acting U.S. Attorney."^[22]

Berman was quite right that it is normal procedure for the second-in-command of a component of the Department of Justice to assume command in the event of a vacancy.^[23]

Why Does the Independence of United States Attorneys Matter? What Does History Teach Us?

In announcing that the attorney general had, in effect, blinked in walking away from his chosen replacement, Berman invoked "the Southern District's enduring tradition of integrity and independence."^[24]

History is on his side and very much supports the notion that United States attorneys have, and should have, a significant degree of independence. There are numerous examples in the history of specific Southern District prosecutions to demonstrate why that is so. The list of those important cases is long.

But the history of independence of United States attorneys is also present in the very mechanism by

which United States attorney vacancies are filled.

Since the Civil War, the district court had an important role in appointing local prosecutors to fill vacancies. Indeed, from the time of the Civil War to 1986, the judiciary exclusively held the authority to fill vacancies in the offices of local federal prosecutors until the president appointed, and the Senate confirmed, a new local federal prosecutor.[25]

This changed for the first time in 1986. At that time, Congress created a mechanism by which the executive and judicial branches shared authority to fill such vacancies. At that time, Congress permitted the attorney general to appoint interim United States attorneys, but only for 120 days and, upon expiration of that period, the local district court had the authority appoint United States attorneys until the president nominated, and the Senate confirmed, a replacement.[26]

For only a brief period was the district court divested of all authority to appoint interim United States attorneys. In 2006, Congress quietly passed, as part of the USA PATRIOT Act reauthorization, a version of Section 546(c) that allowed for attorney general appointments of United States attorneys for unlimited periods and entirely removed the role of the court in appointing United States attorneys.[27]

In 2007, Congress enacted the current version of Section 546(c) and 546(d) as the Preserving United States Attorney Independence Act of 2007.[28]

The 2007 statute was passed as a result of the December 2006 firing of seven United States attorneys during the George W. Bush administration. At the time, the Department of Justice claimed that these U.S attorneys were being removed for performance-related reasons, although these reasons were largely absent and ultimately revealed to be pretextual.

The words of Congress in 2007 that explained and justified the return to the sharing of authority for appointment of United States attorneys between the executive and judicial branches ring as true today as when they were written more than a dozen years ago.

At the time, Congress stressed that removing a United States attorney "as a result of political displeasure or for political reward ... would undermine the confidence of the Federal judiciary, Federal and local law enforcement agencies, the public, and the thousands of Assistant United States Attorneys working in those offices." [29]

Beyond that sort of damage, the influence of political considerations in removing sitting United States attorneys hurts specific ongoing investigations. As former United States Attorney Mary Jo White testified at the time:

Changing a United States Attorney invariably causes disruption and loss of traction in cases and investigations in a United States Attorney's Office. This is especially so in sensitive or controversial cases and investigations where the leadership and independence of the United States Attorney are often crucial to the successful pursuit of such matters, especially in the face of criticism or political backlash.[30]

Those concerned with good government should lament that the attorney general forced out of office a person who has served honorably and pursued investigations, including ones that the president may have wished never took place, fairly. At the same time, they should take comfort that his successor is steeped in the traditions of the United States Attorney's Office for the Southern District of New York and

will not be cowed into walking away from those very same cases, and that hundreds of current assistant United States attorneys will be right there with her.

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[1] <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-nomination-jay-clayton-serve-us-attorney-southern-district>.

[2] <https://www.justice.gov/usao-sdny/pr/statement-us-attorney-geoffrey-s-berman-announcement-attorney-general-barr>.

[3] Letter from Attorney General Barr to U.S. Attorney Berman, dated June 20, 2020 (available at <https://www.cnn.com/2020/06/20/politics/william-barr-geoffrey-berman-letter-fired-trump/index.html>).

[4] <https://factba.se/transcript/donald-trump-press-gaggle-marine-one-departure-june-20-2020>

[5] <https://www.justice.gov/usao-sdny/pr/statement-geoffrey-s-berman>

[6] <https://thehill.com/homenews/senate/503711-graham-signals-he-wont-take-up-us-attorney-pick-without-schumer-gillibrand>; <https://thehill.com/homenews/senate/503702-schumer-calls-on-clayton-to-withdraw-from-consideration-to-be-us-attorney>.

[7] <https://www.justice.gov/opa/pr/attorney-general-sessions-appoints-17-current-and-former-federal-prosecutors-interim-united>.

[8] 28 U.S.C. § 546(c)(2); see Department of Justice, Office of Legal Counsel, Opinion, Starting Date for Calculating the Term of an Interim United States Attorney, 24 Op. O.L.C. 31, 31-32 (2000) (available at <https://www.justice.gov/olc/file/626926/download>).

[9] 28 U.S.C. § 546(d).

[10] <https://www.justice.gov/usao-sdny/pr/statement-us-attorney-geoffrey-s-berman-appointment-chief-judge>.

[11] *United States v. Gantt*, 194 F.3d 987, 999 n.5 (9th Cir. 1999), overruled on other grounds by, *United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008).

[12] <https://www.justice.gov/usao-sdny/pr/statement-us-attorney-geoffrey-s-berman-announcement-attorney-general-barr>.

[13] 28 U.S.C. § 546(d).

[14] 28 U.S.C. § 541(a-b).

[15] <https://www.justice.gov/usao-sdny/pr/statement-us-attorney-geoffrey-s-berman-announcement-attorney-general-barr>.

[16] 28 U.S.C. § 541(c).

[17] See Department of Justice, Office of Legal Counsel, Opinion, Memorandum Opinion for the Acting Director, Executive Office for U.S. Attorneys, 3 Op. O.L.C. 448, 448-450 (Nov. 26, 1979) (available at <https://www.justice.gov/file/22221/download>).

[18] <https://factba.se/transcript/donald-trump-press-gaggle-marine-one-departure-june-20-2020>

[19] *United States v. Solomon*, 216 F. Supp. 835, 836, 843 (S.D.N.Y. 1963) (considering constitutional challenge to 28 U.S.C. § 506, statute under which judiciary had sole authority to appoint local federal prosecutors upon a vacancy, and concluding that President may remove judicially appointed United States Attorney).

[20] *United States v. Hilario*, 218 F.3d 19, 27 (1st Cir. 2000) ("For one thing, the President may override the judges' decision and remove an interim United States Attorney.").

[21] See, e.g., *United States v. Sotomayor Vazquez*, 69 F. Supp. 2d 286, 291 (D.P.R. 1999) ("While the Attorney General may suspend an interim United States Attorney, she does not possess the statutory authority to remove one appointed in accordance with 28 U.S.C. § 546(d).").

[22] <https://www.justice.gov/usao-sdny/pr/statement-geoffrey-s-berman>

[23] See generally Department of Justice, Office of Legal Counsel, Opinion, Temporary Filling of Vacancies in the Office of United States Attorney, 27 Op. O.L.C. 149, 149-151 (Sept. 5, 2003) (available at <https://www.justice.gov/olc/file/477026/download>); see also 28 CFR § 0.137(b-c); 5 U.S.C. § 3345(a)(1). This regulation and statute both refer to a "first assistant." The United States Attorney for the Southern District of New York has not typically had a person with the title "First Assistant," but rather a Deputy United States Attorney, which is the functional equivalent under applicable law.

[24] <https://www.justice.gov/usao-sdny/pr/statement-geoffrey-s-berman>

[25] See, e.g., An Act to Give Greater Efficiency to the Judicial System of the United States of March 3, 1863, 12 Stat. 768, § 2 ("In case of a vacancy in the office of marshal or district attorney in any circuit, the judge of such circuit may fill such vacancy, and the person so appointed shall serve until an appointment shall be made by the President, and the appointee has duly qualified, and no longer") (available at <https://www.loc.gov/law/help/statutes-at-large/37th-congress/session-3/c37s3ch93.pdf>); 62 Stat. 869, 909, ch. 31, § 506 (June 25, 1948) (enacting 28 U.S.C. § 506) (available at <https://www.loc.gov/law/help/statutes-at-large/80th-congress/session-2/c80s2ch646.pdf>); Pub. L. 89-554, 80 Stat 378 (Sept. 6, 1966) (available at <https://www.govinfo.gov/content/pkg/STATUTE-80/pdf/STATUTE-80-Pg378.pdf>).

[26] Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. 99-646, § 69, 100 Stat. 3592 (Nov. 10, 1986) (available at <https://www.govinfo.gov/content/pkg/STATUTE-100/pdf/STATUTE-100-Pg3592.pdf>).

[27] USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177, § 502, 120 Stat. 192 (Mar. 9, 2006) (striking prior version of 28 U.S.C. § 546(c-d) and inserting version of Section 546(c) that provided for unlimited service of interim United States Attorney until nomination and confirmation of successor) (available at <https://www.govinfo.gov/content/pkg/PLAW-109publ177/html/PLAW-109publ177.htm>).

[28] Preserving United States Attorney Independence Act of 2007, Pub. L. 110-34, § 2, 121 Stat. 224 (available at <https://www.congress.gov/110/plaws/publ34/PLAW-110publ34.pdf>)

[29] Interim Appointment of United States Attorneys, H.R. Rep. No. 110-58, at 5-6 (Mar. 20, 2007) (available at <https://www.congress.gov/110/crpt/hrpt58/CRPT-110hrpt58.pdf>) ("2007 Report"); see also Cong. Rec. (May 22, 2007) p.H5553-5556 (statements of Reps. John Conyers, Ric Keller, Howard Berman, Zoe Lofgren, Linda Sanchez) (available at <https://www.congress.gov/crec/2007/05/22/CREC-2007-05-22-pt1-PgH5553.pdf>).

[30] 2007 Report at 5.