

A Legal Guide To What Happens Next In US Atty Berman Saga

By **Daniel Levy** (June 29, 2020, 3:39 PM EDT)

Last week's tumult in the U.S. Department of Justice and the Southern District of New York led to the unfortunate ouster of U.S. Attorney Geoffrey Berman for no stated reason.

As detailed in my previous Law360 guest article, uncertainty as to whether President Donald Trump could lawfully fire Berman was likely what forced Attorney General William Barr to blink in the standoff and, ultimately, what led to Berman's ability to pass the baton to his then-Deputy U.S. Attorney Audrey Strauss.



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The attorney general has now indicated that he anticipates, at least as of June 20, that Strauss would serve until a permanent successor is in place, but, in so doing, he cited only the president's authority to remove U.S. attorneys.[1]

Of course, the attorney general's letter is nothing more than a statement of his then-present intent and far from a commitment, let alone an enforceable one. As a result, the chess match may not be over.

Indeed, the president has repeatedly proclaimed that appointing acting officials was his preference because of his perception that such appointments gave him flexibility. As he said in August 2019 about the lack of permanent appointments in non-DOJ positions:

No, I like the word "Acting." I think Acting is great. As far as I'm concerned, "Acting" to me is good. ... And if I like the people, I make them permanent. I have Acting. And Acting gives you great flexibility that you don't have with permanent. So I'm okay with the word "Acting." But when I like people, I make them permanent. But I can leave Acting for a long period of time.[2]

Here is your legal guide to what might happen next and the legal terrain on which the president might exercise that flexibility.

How are U.S. attorney vacancies filled?

As with many offices that require presidential nomination and U.S. Senate confirmation, the Federal Vacancies Reform Act of 1998[3] is the means by which vacancies are filled.

Three categories of people may serve as acting U.S. attorney under the Federal Vacancies Reform Act of 1998 and in the absence of the attorney general's appointing someone under Title 28 of the U.S. Code,

Section 546(a), a subject discussed in last week's article.

First, in the event of a vacancy, under the Federal Vacancies Reform Act, the first assistant acts as U.S. attorney automatically, unless the president takes action to fill the position with an acting U.S. attorney.[4]

Second, if the president chooses to act, the president may appoint "a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate" as an acting U.S. attorney under Section 3345(a)(2). Basically, the president may appoint any presidentially nominated and Senate confirmed official currently in government to serve as acting U.S. attorney.

Third, the president can also choose to appoint a senior officer or employee of the same agency to be acting U.S. attorney, as long as the officer or employee has served in the agency for at least 90 days and is paid at a level of GS-15 or higher (a reasonably high-level official).[5]

Congress created this third category because it was concerned that, early in a presidential administration, there may be vacancies in first assistant positions and relatively few Senate-confirmed officers in government and because moving Senate-confirmed officers from one department to another could disrupt governmental functions.[6]

With that in mind, a few important questions come to mind.

How long could Audrey Strauss serve as acting U.S. attorney?

Unless she is nominated to serve as U.S. attorney — seemingly unlikely at this point — Strauss could, in general, serve for no longer than 210 days starting on the day of Berman's stepping down. If the president were to nominate someone (other than Strauss), she could also serve for the entire period that the nomination is pending.[7]

Assuming no nomination of a replacement for Berman, Strauss could theoretically serve until Jan. 17 (210 days after Berman's June 20 announcement that he would be leaving the Southern District immediately).[8]

Coincidentally, that is just a few days shy of Inauguration Day, Jan. 20, which raises the question of the impact that the presidential election might have on Strauss' tenure.

If Trump is reelected, the election would largely have no impact and Strauss' term would likely end on Jan. 17, if there is no prior nomination and confirmation. If the district court did not thereafter appoint a U.S. attorney pursuant to Title 28 of the U.S. Code, Section 546(a), any actions by Strauss at that point would have no force or effect and could not be ratified.[9]

If Trump is not reelected, then the 210-day period for which Strauss may serve as acting U.S. attorney is effectively extended, such that the 210-day period of her permissible service is deemed to have begun 90 days after the new president is inaugurated. In that case and absent nomination of a U.S. attorney for the Southern District of New York in a new administration — another seemingly unlikely event — Strauss would be permitted to serve until November 17, 2021.[10]

Could New Jersey U.S. Attorney Craig Carpenito still take over as acting U.S. attorney for the Southern

District?

Plainly, the attorney general's first choice to act as Berman's temporary replacement was Craig Carpenito.[11] Could Carpenito still be appointed acting U.S. attorney for the Southern District of New York?

The key facts here are that Carpenito, like Berman, was named by then-Attorney General Jeff Sessions as interim U.S. attorney for the District of New Jersey under Title 28 of the U.S. Code, Section 546.[12] and, like Berman, was court appointed as U.S. attorney, in Carpenito's case, by the U.S. District Court for the District of New Jersey.[13]

As a result, Carpenito has never be nominated by the president and never confirmed by the Senate, but, as a technical matter, he does serve in an office for which presidential nomination and Senate confirmation is required.

Could Carpenito be appointed acting U.S. attorney for the Southern District of New York because he "serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate" under Section 3345(a)(2), even though he was appointed U.S. attorney in New Jersey by the district court there and never presidentially nominated and Senate confirmed?

There is substantial uncertainty here. The plain import of Section 3345(a)(2) is that only presidentially nominated and Senate-confirmed officials could be appointed to a position requiring Senate confirmation. Indeed, when then-Sen. Joe Lieberman, D-Conn., described Section 3345(a)(2) in exactly those terms in 1998 when the Federal Vacancies Reform Act was passed.

In summarizing this mechanism of appointment, he said, "If the President so directs, a person who has already received Senate confirmation to another position can be made the acting officer in lieu of the first assistant." [14]

But that is not quite what Section 3345(a)(2) says. It does not refer to someone who has been nominated and confirmed. It refers only to someone serving in a position for which nomination and confirmation is required. And Carpenito is not an acting U.S. attorney. He is a "fully powered United States Attorney." [15]

If Carpenito were appointed, the question of the legality of his appointment would not be solely academic and would surely be litigated. For example, a District of New Jersey criminal defendant would challenge the validity of an indictment, conviction or sentence on the basis that Carpenito had not been lawfully appointed. [16]

Indeed, the legality of the appointment of Matthew Whitaker as acting attorney general is still being considered by the U.S. Court of Appeals for the D.C. Circuit, even though he has not been in that position for more than 16 months. [17]

The residence requirement for U.S. attorneys — that they live in the district in which they serve — is more flexible for Southern District U.S. attorneys, who can live up to 20 miles from the district. This would not likely disqualify Carpenito. [18]

Could Jay Clayton be named acting U.S. attorney and then nominated to be U.S. attorney?

Trump and Barr's first choice for permanent U.S. attorney for the Southern District of New York was Jay Clayton, currently chairman of the U.S. Securities and Exchange Commission.[19]

If Jay Clayton were named acting U.S. attorney, despite the seeming political winds and his lack of experience as a prosecutor, could he then be nominated to be U.S. attorney?

The short answer here is no, but there is a work-around that the Trump administration has already used for another high-profile DOJ appointment, such that the administration could make this happen, if it wanted to.

Under Section 3345(b)(1), a person may not serve as acting U.S. attorney if, in the year preceding the vacancy, he or she did not serve as first assistant (in the case of the Southern District, did not serve as deputy U.S. attorney) or served as first assistant for fewer than 90 days, and the president then nominated the person. The obvious intent of Congress here was to prefer first assistants to take over upon vacancies and to allow for their subsequent nomination.

Not having served as first assistant in the Southern District, Clayton could not be named acting U.S. attorney and then nominated for the position.

The Trump administration could easily sidestep this requirement by naming someone else to serve as acting U.S. attorney, while Clayton's nomination was pending and move Clayton to another DOJ position temporarily. The analogy to musical chairs comes to mind.

The Trump administration has done this before. When Noel Francisco was named acting solicitor general and the president sought to nominate him as permanent solicitor general, Francisco had to assume another DOJ role while another solicitor general's office lawyer assumed temporary command of the solicitor general's office until Francisco's confirmation.[20]

The Trump administration has deployed the Federal Vacancies Reform Act in similarly creative ways in other personnel decisions.[21]

Conclusion

In chess, everyone knows how the pieces are permitted to move. The only thing complicated about chess then is the order in which the pieces are played.

In the chess game begun by the attorney general's precipitous announcement that Berman was stepping down and the attorney general's decision to allow Strauss to assume the role of acting U.S. attorney, the next moves are largely, although not completely, circumscribed by the Federal Vacancies Reform Act. Only time will reveal the order in which the pieces are played.

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[1] 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>) (citing 28 U.S.C. § 541(c)).

[2] See <https://factba.se/transcript/donald-trump-press-gaggle-marine-one-departure-august-30-2019>; see also <https://factba.se/transcript/donald-trump-remarks-border-wall-otay-mesa-california-september-18-2019> ("I like having non-permanent, to a certain extent. It gives me more flexibility. I like having acting. I like the word 'acting,' because it gives me great flexibility. But at a certain period of time, we'll be making permanent positions.").

[3] 5 U.S.C. §§ 3345-3349a.

[4] 5 U.S.C. § 3345(a)(1).

[5] GS ("General Schedule") pay rates are available here: <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/2020/general-schedule/>. This is probably more than you want to know, but AUSAs and other employees of United States Attorney's Office are paid under an entirely different pay scale (one that is "Administratively Determined" or "AD"). See <https://www.justice.gov/usao/career-center/salary-information>; <https://www.justice.gov/usao/career-center/salary-information/administratively-determined-pay-plan-charts>.

[6] See 144 CONG. REC. S12822 (daily ed. Oct. 21, 1998) (statement of Sen. Fred Thompson) (available at <https://www.congress.gov/crec/1998/10/21/CREC-1998-10-21-pt1-PgS12810-6.pdf>) ("Thompson Statement").

[7] 5 U.S.C. § 3346(a).

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

[9] 5 U.S.C. § 3348(d)(1) ("An action taken by any person who is not acting under section 3345, 3346, or 3347, or as provided by subsection (b), in the performance of any function or duty of a vacant office to which this section and sections 3346, 3347, 3349, 3349a, 3349b, and 3349c apply shall have no force or effect."); 5 U.S.C. § 3348(d)(2) ("An action that has no force or effect under paragraph (1) may not be ratified.").

[10] 5 U.S.C. § 3349a(b) ("With respect to any vacancy that exists during the 60-day period beginning on a transitional inauguration day, the 210-day period under section 3346 or 3348 shall be deemed to begin on the later of the date occurring -- (1) 90 days after such transitional inauguration day or (2) 90 days after the date on which the vacancy occurs.").

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

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

[13] <https://www.justice.gov/usao-nj/pr/statement-us-attorney-craig-carpenito-appointment-us>

district-court.

[14] 144 CONG. REC. S11022 (daily ed. Sept. 28, 1998) (statement of Sen. Joseph Lieberman) (emphasis added) (available at <https://www.congress.gov/crec/1998/09/28/CREC-1998-09-28-pt1-PgS11021.pdf>); see also Thompson Statement ("A third category of 'acting officer' is now permitted apart from first assistants and presidentially designated persons who have already received Senate-confirmation to hold another office.") (emphasis added). My former colleague Andrew McCarthy agrees. See <https://www.nationalreview.com/2020/06/president-trump-fires-us-attorney-geoffrey-berman/>.

[15] *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).

[16] See, e.g., *United States v. Castillo*, 772 F. App'x 11, *13 & n.5 (3d Cir.), cert. denied, 140 S. Ct. 508 (2019) (refusing to vacate sentence on basis that Attorney General had been unlawfully appointed); *United States v. Baldwin*, 541 F. Supp. 2d 1184, 1191 (D.N.M. 2008) (denying motion to dismiss indictment on the basis of claim that appointment of United States Attorney was unlawful.).

[17] See *Firearms Policy Coalition, Inc. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, No. 19-5304 (D.D.C.) (considering whether Federal Vacancies Reform Act and the Appointments Clause permitted the President to direct a senior employee of the Department of Justice to serve as Acting Attorney General in the event of a vacancy).

[18] 28 U.S.C. § 545(a) ("Each United States attorney shall reside in the district for which he is appointed, except that these officers of the District of Columbia, the Southern District of New York, and the Eastern District of New York may reside within 20 miles thereof. . . . Pursuant to an order from the Attorney General or his designee, a United States attorney or an assistant United States attorney may be assigned dual or additional responsibilities that exempt such officer from the residency requirement in this subsection for a specific period as established by the order and subject to renewal."). The Office of Legal Counsel has not been particularly flexible in interpreting the residence requirement as it applies to Assistant United States Attorneys. See Department of Justice, Office of Legal Counsel, Opinion, Residence Requirement for Assistant United States Attorneys Under 28 U.S.C. § 545(a), Nov. 20, 2012 (available at <https://www.justice.gov/opinion/file/833581/download>).

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

[20] See <https://www.scotusblog.com/2017/03/opinion-analysis-court-limits-acting-appointments-fill-vacancies/>; Marcia Coyle, Noel Francisco, Trump's Solicitor General Pick, Is Sidelined for Now, *Nat'l Law J.*, Apr. 6, 2017 (available at <https://www.law.com/nationallawjournal/almID/1202783127057/>).

[21] See Steve Vladeck, *Slate*, Trump Is Abusing His Authority to Name 'Acting Secretaries', Apr. 9, 2019 (available at <https://slate.com/news-and-politics/2019/04/trump-acting-secretaries-dhs-fvra-senate-reform.html>) (discussing appointments of Acting Secretary of Homeland Security, Acting Attorney General, and Acting Director of Consumer Financial Protection Bureau); Steve Vladeck, *Lawfare*, Ken Cuccinelli and the Federal Vacancies Reform Act of 1998, June 10, 2019 (available at <https://www.lawfareblog.com/ken-cuccinelli-and-federal-vacancies-reform-act-1998>) (discussing appointment of Acting Director of the Bureau of Citizenship and Immigration Services).