

TRUMP ADMINISTRATION ACCOUNTABILITY PROJECT



Possible Trump Administration Misconduct in the Firing of Geoffrey S. Berman, U.S. Attorney for the Southern District of New York

Potential Misconduct

Over a weekend in June of 2020, then-U.S. Attorney Geoffrey S. Berman was publicly ousted from his position by Attorney General William P. Barr. The unusual circumstances surrounding Berman's termination raise two possible questions of misconduct: (1) whether Berman's termination constitutes obstruction of justice; and (2) whether Berman's removal was proper in accordance with the statutory framework of 28 U.S.C. § 541 and § 546.

Facts

The U.S. Attorney's Office for the Southern District of New York "encompasses the boroughs of Manhattan and the Bronx in New York City, along with Dutchess, Orange, Putnam, Rockland, Sullivan, and Westchester counties."¹ The Office represents the United States government in both civil matters and criminal matters involving violations of federal laws,² and is led by a U.S. Attorney who has been appointed in accordance with 28 U.S.C. § 541 or § 546.³

Section 541 states that "the President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district" to serve a four-year term.⁴ Upon the expiration of that term, the U.S. Attorney is to continue performing the duties of the office until a qualified successor is appointed.⁵ However, § 541(c) specifies that "each United States attorney is subject to removal by the President."⁶

Section 546 states that "the Attorney General may appoint a United States attorney for the district in which the office of United States attorney is vacant."⁷ Persons appointed by the Attorney General under this section may serve until a new U.S. Attorney is appointed by the President under § 541, or until 120 days have passed since the appointment, whichever is earlier.⁸ If the appointment expires because 120 days have passed, "the district court for such district may appoint a United States attorney to serve until the vacancy is filled."⁹

Pursuant to § 546, in January of 2018, then-Attorney General Jeff Sessions appointed Geoffrey Berman as Interim United States Attorney for the Southern District of New York.¹⁰ After 120 days passed without a new appointment under § 541, the United States District Court for the Southern District of New York voted to appoint Berman to continue as U.S. Attorney.¹¹

Throughout Berman's tenure as U.S. Attorney, his office pursued several investigations with the potential to do political damage to the President, including investigations into the following:

1. Trump Inaugural Committee – Subpoenaed in February of 2019 as part of an investigation into how the Committee “raised and spent more than \$100 million on 2017 inauguration festivities.”¹²
2. Lev Parnas and Igor Fruman – Two known associates of Rudy Giuliani, President Trump’s personal lawyer, charged with conspiring to violate straw and foreign donor bans.¹³ Trump falsely denied knowing Parnas and Fruman, and later expressed hope that Giuliani would not also be indicted.¹⁴
3. Jeffrey Epstein – President Trump’s longtime social peer¹⁵ who was investigated and charged for the sex trafficking of minors and conspiracy to commit sex trafficking of minors.¹⁶ Berman announced that the investigation into Epstein’s associates would continue even after Epstein’s death in August of 2019.¹⁷
4. Michael Cohen – President Trump’s longtime lawyer who was investigated and charged with several criminal counts, including campaign finance violations for his role in the payment of hush money to former porn star, Stormy Daniels, ahead of the 2016 election.¹⁸ Notably, Berman had recused himself from participating directly in this investigation.¹⁹
5. Halkbank – Turkish bank charged with “fraud, money laundering, and sanctions offenses related to the bank’s participation in a multibillion-dollar scheme to evade U.S. sanctions on Iran.”²⁰ The announcement of the charges ended Attorney General Barr’s efforts to negotiate a settlement with the bank after President Trump had assured Turkish President Recep Tayyip Erdogan that Barr and Treasury Secretary Steven Mnuchin would “handle the issue.”²¹

Berman’s tenure came to an unusual end in June of 2020, giving rise to questions of potential misconduct discussed in this report. On June 19, 2020, Attorney General Barr released a statement thanking Berman for “stepping down” and announcing President Trump’s plan to nominate Jay Clayton, the current SEC Chairman, to serve as the next U.S. Attorney for the Southern District of New York, with Craig Carpenito, the current U.S. Attorney for the District of New Jersey, to act as Acting U.S. Attorney for the Southern District until Clayton could be confirmed by the Senate.²²

Shortly thereafter, Berman responded to the announcement with the following statement:

I learned in a press release from the Attorney General tonight that I was 'stepping down' as United States Attorney. I have not resigned, and have no intention of resigning, my position, to which I was appointed by the Judges of the United States District Court for the Southern District of New York. I will step down when a presidentially appointed nominee is confirmed by the Senate. Until then, our investigations will move forward without delay or interruption. I cherish every day that I work with the men and women of this Office to pursue justice without fear or favor—and intend to ensure that this Office's important cases continue unimpeded.²³

The following day, Attorney General Barr sent a letter to Berman stating that he “was surprised and quite disappointed” by Berman’s press statement.²⁴ Barr wrote, “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.”²⁵ Barr also stated that Berman’s Deputy U.S. Attorney, Audrey Strauss, would become the Acting U.S. Attorney until a permanent successor had been appointed.²⁶

Following receipt of Barr’s letter, Berman relented, explaining that: “With that concession [to appoint Strauss as Acting U.S. Attorney instead of Carpenito] and having full confidence that Audrey would continue the important work of the office, I decided to step down and not litigate my removal.”²⁷

Analysis

a. Potential Obstruction of Justice

18 U.S.C. § 1512(c) makes it a crime to corruptly obstruct, influence, or impede any official proceeding or attempt to do so.²⁸ The official proceedings must be anticipated at the time of the obstruction, but they need not be pending.²⁹ In this context, to act corruptly means to act with an improper purpose.³⁰

Under these facts, the Trump administration, through Attorney General Barr, may have committed obstruction of justice by removing Berman from his position if done so with the corrupt purpose of interfering with a lawful proceedings by Berman’s office for political reasons.³¹ While direct evidence has not yet been uncovered that would prove that Barr had a corrupt motive for firing Berman, the circumstances surrounding Berman’s termination certainly give rise to suspicion that his ousting was not done with completely pure intentions. The fact that Berman’s office had engaged in several investigations of President Trump’s known associates and the timing of Berman’s termination with respect to the impending 2020 election suggest that Barr’s motives may not have been completely proper.

These facts are similar to the controversy surrounding the abrupt dismissal of nine U.S. attorneys in 2006 by the Bush administration. In 2008, a report by the Justice Department’s Inspector General and Office of Professional Responsibility “found that at least three of the nine firings were politically motivated.”³² One firing in particular, that of David Iglesias, the former U.S. Attorney for the District of New Mexico, was especially suspicious as it was suspected that his termination was done out of retaliation for “his failure to bring criminal charges involving accusations of voter fraud and Democrats before the 2006 elections.”³³

An outside prosecutor, Nora Dannehy, was later appointed to conduct further investigation into Iglesias’s termination.³⁴ Dannehy ultimately recommended not to bring charges, concluding that while firing Iglesias for political reasons went against Justice Department principles, it was not illegal.³⁵ However, Dannehy distinguished the facts by stating that if Iglesias had been fired in order to influence an investigation that could harm Democrats, that would be illegal.³⁶ Dannehy’s report stated that there was “insufficient evidence that anyone in the White House or DOJ sought to influence Mr. Iglesias to bring a voter fraud or public corruption case in advance of the November 2006 election,” and “the evidence did not show that anyone sought Mr. Iglesias’s removal in order to replace him with a United States Attorney who would act in a manner aimed at influencing the due administration of justice.”³⁷

It is possible in Berman's case that Attorney General Barr's actions may be distinguished from those of the Justice Department in 2006. However, additional investigation will be required to uncover further evidence that speaks to Barr's motive at the time of Berman's dismissal. House Judiciary Committee Chairman Jerrold Nadler has announced that such an investigation will take place, though the results of that investigation are still unknown.³⁸

b. Attorney General Barr's Improper Attempt to Remove U.S. Attorney Berman

The process by which Berman was removed from his position also raises some potential legal issues. Since Berman was appointed by a district court pursuant to § 546(d), it is not immediately clear whether Attorney General Barr had the authority to attempt to remove Berman as he did in his initial announcement on June 19.

Sections 541 and 546 provide only limited guidance on this question. Section 541(c) states that "each United States attorney is subject to removal by the President," while section 546(d) specifies that court-appointed U.S. attorneys are "to serve until the vacancy is filled."³⁹ A 1979 opinion from the Justice Department's Office of Legal Counsel (OLC) concludes that the power to remove a court-appointed U.S. attorney rests with the President pursuant to § 541(c).⁴⁰ Though notably, OLC opinions are binding only on the Executive, they are not binding precedent for the courts.⁴¹

When Attorney General Barr falsely announced that Berman had agreed to step down and subsequently named U.S. Attorney Carpenito to be his temporary successor, it is quite possible that Barr was aware of the fact that only the President had the authority to remove Berman. This may be why Barr's announcement initially framed Berman's dismissal as a voluntary resignation, only to be corrected the following day by formally asking the President to remove Berman after Berman "called the attorney general's bluff."⁴²

As the courts have not yet provided much guidance on the questions surrounding proper removal and the naming of successors to court-appointed U.S. attorneys, these questions may arise again in future administrations. However, by choosing not to further litigate his dismissal, Berman, for now, has effectively closed the door to further judicial consideration of this statutory framework.

¹ United States Attorney's Office Southern District of New York, <https://www.justice.gov/usao-sdny>.

² *Id.*

³ 28 U.S.C. § 547.

⁴ 28 U.S.C. § 541(a), (b).

⁵ 28 U.S.C. § 541(b).

⁶ 28 U.S.C. § 541(c).

⁷ 28 U.S.C. § 546(a).

⁸ 28 U.S.C. § 546(c).

⁹ 28 U.S.C. § 546(d).

¹⁰ Press Release, U.S. Attorney's Office Southern District of New York, Attorney General Jeff Sessions Appoints Geoffrey S. Berman as Interim United States Attorney (Jan. 3, 2018), <https://www.justice.gov/usao-sdny/pr/attorney-general-jeff-sessions-appoints-geoffrey-s-berman-interim-united-states>.

¹¹ Press Release, U.S. Attorney's Office Southern District of New York, Statement of U.S. Attorney Geoffrey S. Berman on Appointment by Chief Judge (Apr. 25, 2018), <https://www.justice.gov/usao-sdny/pr/statement-us-attorney-geoffrey-s-berman-appointment-chief-judge>; Benjamin Weiser, *With No Nomination from Trump, Judges Choose U.S. Attorney for Manhattan*, N.Y. TIMES (Apr. 25, 2018), <https://www.nytimes.com/2018/04/25/nyregion/geoffrey-berman-us-attorney-manhattan.html>.

¹² Rebecca Ballhaus & Rebecca Davis O'Brien, *Trump Inaugural Committee Is Subpoenaed for Documents*, WSJ (Feb. 4, 2019), <https://www.wsj.com/articles/lawyers-for-trump-inaugural-committee-receive-subpoena-for-documents-11549325383>.

¹³ Press Release, U.S. Attorney's Office Southern District of New York, Lev Parnas and Igor Fruman Charged with Conspiring to Violate Straw and Foreign Donor Bans (Oct. 10, 2019), <https://www.justice.gov/usao-sdny/pr/lev-parnas-and-igor-fruman-charged-conspiring-violate-straw-and-foreign-donor-bans>.

¹⁴ Aruna Viswanatha, Rebecca Ballhaus, Sadie Gurman & Byron Tau, *Two Giuliani Associates Who Helped Him on Ukraine Charged with Campaign-Finance Violations*, WSJ (Oct. 10, 2019), <https://www.wsj.com/articles/two-foreign-born-men-who-helped-giuliani-on-ukraine-arrested-on-campaign-finance-charges-11570714188>.

¹⁵ Rosalind S. Helderman & Marc Fisher, *Before President Trump Wished Ghislaine Maxwell 'Well,' They Had Mingled for Years in the Same Gilded Circles*, WASH. POST (July 31, 2020), https://www.washingtonpost.com/politics/before-president-trump-wished-ghislaine-maxwell-well-they-had-mingled-for-years-in-the-same-gilded-circles/2020/07/31/f8d3f56a-d02f-11ea-8c55-61e7fa5e82ab_story.html.

¹⁶ Press Release, U.S. Attorney's Office Southern District of New York, Jeffrey Epstein Charged in Manhattan Federal Court with Sex Trafficking of Minors (July 8, 2019), <https://www.justice.gov/usao-sdny/pr/jeffrey-epstein-charged-manhattan-federal-court-sex-trafficking-minors>.

¹⁷ Press Release, U.S. Attorney's Office Southern District of New York, Statement of Manhattan U.S. Attorney on the Death of Defendant Jeffery Epstein (Aug. 10, 2019), <https://www.justice.gov/usao-sdny/pr/statement-manhattan-us-attorney-death-defendant-jeffrey-epstein>.

¹⁸ Press Release, U.S. Attorney's Office Southern District of New York, Michael Cohen Pleads Guilty in Manhattan Federal Court to Eight Counts, Including Criminal Tax Evasion and Campaign Finance Violations (Aug. 21, 2018), <https://www.justice.gov/usao-sdny/pr/michael-cohen-pleads-guilty-manhattan-federal-court-eight-counts-including-criminal-tax>.

¹⁹ Erica Orden & Nicole Hong, *Manhattan Federal Prosecutor Recuses Himself from Cohen Probe*, N.Y. TIMES (Apr. 10, 2018), <https://www.wsj.com/articles/manhattan-federal-prosecutor-recuses-himself-from-cohen-probe-1523399871>.

²⁰ Press Release, U.S. Attorney's Office Southern District of New York, Turkish Bank Charged in Manhattan Federal Court for Its Participation in a Multibillion-Dollar Iranian Sanctions Evasion Scheme (Oct. 15, 2019), <https://www.justice.gov/usao-sdny/pr/turkish-bank-charged-manhattan-federal-court-its-participation-multibillion-dollar>.

²¹ Eric Lipton, *Settlement Talks for Bank Followed Pressure on Trump by Turkey’s Leader*, N.Y. TIMES (Oct. 16, 2019), <https://www.nytimes.com/2019/10/16/us/politics/halkbank-trump-turkey.html>.

²² Press Release, U.S. Dep’t of Justice Office of Public Affairs, Attorney General William P. Barr on the Nomination of Jay Clayton to Serve as U.S. Attorney for the Southern District of New York (June 19, 2020), <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-nomination-jay-clayton-serve-us-attorney-southern-district>.

²³ @SDNYnews, TWITTER (June 19, 2020, 11:14 PM), <https://twitter.com/SDNYnews/status/1274178732476059650>.

²⁴ Letter from U.S. Attorney General William P. Barr to U.S. Attorney Geoffrey S. Berman (June 20, 2020), <https://int.nyt.com/data/documenthelper/7035-barr-geoffrey-berman/133501b8eec6e57cece6/optimized/full.pdf#page=1>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Karoun Demirjian & Ellen Nakashima, *Ousted U.S. Attorney Who Investigated Trump Associates Says Barr Pushed Him to Resign and Take Another Job*, WASH. POST (July 9, 2020), https://www.washingtonpost.com/national-security/geoffrey-berman-testimony-william-barr-president-trump/2020/07/08/9dc3f270-c089-11ea-9fdd-b7ac6b051dc8_story.html.

²⁸ 18 U.S.C. § 1512(c)(2).

²⁹ 18 U.S.C. § 1512(f)(1).

³⁰ *United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013) (quoting *United States v. Friske*, 640 F.3d 1288, 1291 (11th Cir. 2011)).

³¹ David Alan Sklansky, Robert Weisberg & Sharon Driscoll, *Stanford Criminal Law Experts on Firing of Geoffrey Berman, U.S. Attorney for Southern District of New York*, STAN. L. SCH. BLOGS (June 20, 2020), <https://law.stanford.edu/2020/06/20/stanford-criminal-law-experts-on-firing-of-geoffrey-berman-u-s-attorney-for-southern-district-of-new-york>.

³² Eric Lichtblau, *Prosecutor’s 2006 Firing Won’t Result in Charges*, N.Y. TIMES (July 21, 2010), <https://www.nytimes.com/2010/07/22/us/politics/22justice.html>.

³³ *Id.*

³⁴ Letter from Ronald Weich, Assistant Attorney General, to the Honorable John Conyers, Jr., Chairman of the House Judiciary Committee (July 21, 2010), [https://www.politico.com/pdf/PPM170_conyers.dannehy.ola.resp\(5\).pdf](https://www.politico.com/pdf/PPM170_conyers.dannehy.ola.resp(5).pdf).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Lauren Vella & J. Edward Moreno, *Nadler: House Judiciary Committee Will Open Investigation into Berman Firing*, THE HILL (June 20, 2020), <https://thehill.com/homenews/house/503748-nadler-says-house-judiciary-committee-will-open-investigation-into-berman>.

³⁹ 28 U.S.C. §§ 541, 546.

⁴⁰ Op. O.L.C. 79-83, Memorandum Opinion for the Acting Director, Executive Office for U.S. Attorneys, U.S. Attorneys—Removal of Court-Appointed U.S. Attorney (28 U.S.C. §§ 541, 546 (Nov. 26, 1979)), <https://www.justice.gov/file/22221/download>.

⁴¹ Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1464 (2010).

⁴² Charlie Savage, *Who Can Fire a Court-Appointed U.S. Attorney? An Abrupt Legal Fight, Explained*, N.Y. TIMES (June 20, 2020) (quoting former acting U.S. attorney Kelly T. Currie).