

## **The Administration Is Illegally Firing Court-Appointed US Attorneys**

*The reason to require judicial appointment in the absence of Senate confirmation is clear: to deny the president unfettered power to appoint unqualified U.S. attorneys. The judicial imprimatur of quality stands in lieu of Senate approval.*

By Gregory L. Diskant

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The U.S. Department of Justice isn't winning many friends on the front lines of the federal judiciary, the U.S. district courts. Besides repeatedly violating court orders, the DOJ is also thumbing its nose at the district courts when they attempt to appoint qualified persons to serve as U.S. attorneys in the absence of a Senate-confirmed nominee. Recent headlines tell the story: "[U.S. Attorney Chosen to Replace Trump Pick Is Quickly Fired by White House](#)" and "[DOJ fires US attorney hours after judges appoint him.](#)"

The terminations by Todd Blanche, the deputy U.S. attorney general, are graceless and bombastic:

"Judges don't pick U.S. Attorneys, @POTUS does. See Article II of our Constitution. [You are fired](#), Donald Kinsella."

"Here we go again. [Eastern District of Virginia] judges do not pick our US Attorney. [POTUS does](#). James Hundley, you're fired!"

These statements are simply wrong. Both the Constitution and federal law permit the district court to make these appointments. Sadly, this is yet another lawless assault on the rule of law and the historical requirement that men and women of independent stature—as confirmed by either the Senate or the district court—serve as the chief federal prosecutor in each judicial district.

The preferred course is to appoint a U.S. attorney who is nominated by the president and confirmed by the Senate. As Hamilton wrote in Federalist 76, the confirmation requirement is designed to prevent "the appointment of unfit characters," including those of such shameful "pliancy" as to render them "obsequious instruments" of the president's "pleasure." But for this president, obsequious prosecutors are the candidates of choice.

Fortunately, the Senate has failed to ratify some of his worst choices. What then? In 28 U.S.C. § 546, federal law provides that if the office of U.S. attorney is vacant, the attorney general may appoint an interim prosecutor, but only for 120 days. If the office is not then filled by a Senate-confirmed appointment, the district court "may appoint a United States attorney to serve until the vacancy is filled."

Blanche insists—loudly, but wrongly—that the appointment power is reserved only for the president. "See Article II of our Constitution," he says. Good idea. Article II, section 2, clause 2,

provides that, for so-called inferior officers of the United States, such as U.S. attorneys, “Congress may by Law vest the Appointment . . . in the President alone, in the Courts of Law, or in the Heads of Departments.” In short, there is nothing wrong with the statutory scheme that allows district courts to appoint U.S. attorneys when there is no Senate-confirmed prosecutor.

The reason to require judicial appointment in the absence of Senate confirmation is clear: to deny the president unfettered power to appoint unqualified U.S. attorneys. The judicial imprimatur of quality stands in lieu of Senate approval. That much is clear from the history surrounding the provision. The law allowing the courts to appoint U.S. attorneys when one has not been Senate confirmed goes back to 1863, but in 2005, seemingly inadvertently, it was deleted.

The immediate result was the ouster of eight U.S. attorneys and their replacement with partisan appointees, skipping that irritating step of Senate confirmation. The public outcry led to the Preserving United States Attorney Independence Act of 2007, which passed with overwhelming bipartisan support and which restored the courts’ ability to appoint a U.S. attorney when there is no Senate-confirmed appointee. As explained by the chair of the House Judiciary Committee, “[W]hat this measure does is to restore the checks and balances that have historically provided a critical safeguard against politicization of the Department of Justice and the United States attorneys, limiting the attorney general’s interim appointments to 120 days only, then allowing the district court for that district to appoint a U.S. attorney until the vacancy is filled, with Senate confirmation required, as historically has been the case.”

In compliance with the law, when confronted after 120 days with an interim appointee whom they view as unqualified, district courts around the country have replaced that appointee with an experienced interim prosecutor. In response, they get juvenile tweets from Blanche purporting to fire their appointees. Then, bypassing Senate confirmation altogether, the DOJ purports to appoint its own “interim” prosecutors using a variety of bureaucratic shell games, sometimes calling them “Special Assistants,” sometimes “First Assistant U.S. Attorneys.” This gamesmanship violates the statutory scheme, as then-Deputy Assistant U.S. Attorney General Samuel Alito Jr. advised in 1993: “The statutory plan discloses a congressional purpose that after the expiration of the 120-day period further interim appointments are to be made by the court rather than by the attorney general.”

The issue is now alive in Seattle, where the court is reportedly looking for a U.S. attorney willing to sue the Trump administration if—and when—he or she is fired. One can hope that happens. The administration shows no signs of backing down, and the issue is of fundamental importance to the quality of law enforcement in our country.

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