Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Interim and Acting U.S. Attorneys Raise Open Legal Questions

August 1, 2025

There are 93 U.S. Attorneys' Offices across the country, charged with enforcing federal law and representing the United States in federal courts. The U.S. Attorneys at the head of these offices are appointed to four-year terms through presidential nomination and Senate confirmation. As political appointees, U.S. Attorneys often step down during a transition to a new President. Until new U.S. Attorneys can be confirmed, the functions of these vacant offices are often performed temporarily by officials who are not confirmed to the offices. Two statutes potentially allow temporary service for U.S. Attorneys: the Federal Vacancies Reform Act of 1998 (Vacancies Act) and 28 U.S.C. § 546. (U.S. Attorney offices may also be filled temporarily by recess appointment, though this constitutional power has not been used since 2012.) This Legal Sidebar discusses these two federal statutes and Congress's options to amend them, including possible constitutional limitations on Congress's ability to do so.

Statutes Governing U.S. Attorney Vacancies

Vacancies Act

The Vacancies Act, discussed in detail in a CRS report, broadly governs acting service in vacant Senate-confirmed positions across the executive branch. The law outlines who can serve and for how long.

Who Can Serve

The Vacancies Act authorizes three classes of people to serve temporarily: (1) the first assistant, (2) Senate-confirmed officials, and (3) certain senior agency officials. As a default rule, under 5 U.S.C. § 3345(a)(1), the first assistant to an office automatically becomes the acting officer. The term "first assistant" is not defined in the Vacancies Act, and the statutes governing U.S. Attorneys do not designate a first assistant. A general Department of Justice regulation provides that if an office has "a position of Principal Deputy," that principal deputy is the first assistant; otherwise, the first assistant is designated in writing by the Attorney General. In 2003, the Justice Department asserted that "only the occupant of" the "First Assistant United States Attorney" position could serve as first assistant under the Vacancies Act. This 2003 opinion said these first assistants are the principal deputies for the positions.

Congressional Research Service
https://crsreports.congress.gov
LSB11345

One debated question is whether the executive branch can install a new first assistant during a vacancy. Most recently, the executive branch has asserted that it can. For instance, in July 2025, John A. Sarcone III indicated that he was serving as Acting U.S. Attorney for the Northern District of New York after he was named Special Attorney to the Attorney General and in that position, newly designated as the U.S. Attorney's first assistant. In a different context, one trial court held that a newly created principal deputy position could not qualify as first assistant because the principal deputy position terminated at the end of the vacancy. The person serving in that position, therefore, "never did and never will serve" as an "assistant" to anyone. This opinion suggests that, in one court's view, for a position to constitute a "first assistant" under the Vacancies Act, the position and its status as "first assistant" must endure beyond the vacancy. It is unclear whether Sarcone's position of "Special Attorney to the Attorney General" or its status as first assistant will last beyond the vacancy.

While the first assistant is the default acting officer, the President may invoke 5 U.S.C. § 3345(a)(2) or (3) to override this default and select another eligible acting officer. First, the President may direct a Senate-confirmed official to serve as acting officer. Second, the President can select a senior employee from the agency, if that employee served in the agency for at least 90 days during the year preceding the vacancy and is paid at a rate equivalent to at least a GS-15 on the federal pay scale. (GS-15 is the top of the federal pay scale for nonpolitical appointees. Members of the Senior Executive Service are above a GS-15 and thus qualify.) The Vacancies Act therefore provides the President with qualified discretion to select and replace an acting officer, so long as the time limits for acting service have not expired.

Length of Service

The Vacancies Act also specifies certain periods for acting service. An eligible acting officer may serve (1) for a limited period running from "the date the vacancy occurs"—either 210 days, or 300 days during a presidential transition period—and (2) during the pendency of a first or second presidential nomination to that office, with extensions if the nomination is rejected, withdrawn, or returned without action at the end of a session. Thus, for any U.S. Attorney position vacant on January 20, 2025, or that became vacant within 60 days thereafter, an eligible person could serve as Acting U.S. Attorney (1) for a 300-day period starting on the date the vacancy occurred (likely Inauguration Day unless the former Senate-confirmed U.S. Attorney resigned later); (2) if a first nomination to the office is submitted, for the entire time the nomination is pending; (3) if the first nomination is rejected, withdrawn, or returned, for 210 additional days; (4) if a second nomination to the office is submitted, for the entire time the nomination is pending; and (5) if the second nomination is rejected, withdrawn, or returned, for a final 210 days.

Nominations to the Position

As discussed, once the initial period of 210 or 300 days has ended, the President can extend the time for acting service by nominating someone to the vacant U.S. Attorney position. At the same time, the person who is nominated might not be able to serve as Acting U.S. Attorney. Specifically, the Vacancies Act, 5 U.S.C. § 3345(b), provides that if a person is nominated to an office, that person "may not serve as an acting officer" for that office. There are certain exceptions to this rule. As relevant here, first assistants to U.S. Attorneys could continue to serve as Acting U.S. Attorneys after being nominated if they served as first assistants for at least 90 days during the year preceding the vacancy.

According to some reporting, 5 U.S.C. § 3345(b) is why the President withdrew Alina Habba's nomination to serve as U.S. Attorney for the District of New Jersey in July 2025. The Attorney General appointed Habba as Special Attorney to the Attorney General and First Assistant U.S. Attorney, potentially allowing her to serve as Acting U.S. Attorney for at least 210 days following the withdrawal of her nomination on July 24, 2025. Habba's nomination prevented her from serving as U.S. Attorney because she was not the first assistant to the position for at least 90 days prior to the vacancy. In 2023, some Members of Congress argued that under the Vacancies Act, a person "may not serve as an acting

officer" once her nomination is submitted, regardless of whether that nomination is later withdrawn. Under this reading of the statute, Habba would not be authorized to serve under the Vacancies Act because the prohibition on service "survives a withdrawal of a nomination." In contrast, in recent litigation, the Department of Justice has argued the statute bars only someone who is "presently nominated," highlighting the statute's use of the present tense.

28 U.S.C. § 546

Another statute, 28 U.S.C. § 546 (Section 546), specifically addresses vacancies in the office of U.S. Attorney. Provisions governing U.S. Attorney vacancies were first adopted in 1898, 30 years after the original version of the Vacancies Act. Section 546 authorizes the Attorney General to appoint a U.S. Attorney to serve until "the expiration of 120 days after appointment." This 120-day period runs from the date of appointment, not the date the vacancy occurs. Section 546(d) further provides that if the 120-day appointment expires, "the district court for such district may appoint a United States attorney to serve until the vacancy is filled." Section 546 does not limit who may serve as interim U.S. Attorney except to say the Attorney General may not appoint someone "the Senate refused" to confirm to the position. Officials serving temporarily under Section 546 have often been designated as "interim" U.S. Attorneys rather than "Acting" U.S. Attorneys. One appeals court said that for constitutional purposes, it viewed U.S. Attorneys appointed under Section 546(d) as more similar to Senate-confirmed U.S. Attorneys than to "subordinates assuming the role of 'Acting' United States Attorney."

Successive Attorney General Appointments

Arguably, Section 546 contemplates a straightforward series of events: the Attorney General appoints an interim U.S. Attorney to serve for 120 days, and if needed, the district court then reappoints or appoints a new interim U.S. Attorney who can serve until a permanent U.S. Attorney is installed. However, there are historical examples where the Attorney General has made multiple interim appointments. It is unclear whether Section 546 allows such successive appointments. The Justice Department's Office of Legal Counsel (OLC) has opined that "if an interim United States Attorney resigns, is removed, or dies," and therefore the initial appointment does not "expire[]" after a full 120 days, then "the Attorney General may appoint another interim United States Attorney for a 120-day term." Courts largely have not considered the legality of successive 120-day appointments, though one trial court said in 1987 that "it appears reasonable to interpret § 546(a) to permit . . . a second interim appointment where . . . [the] nomination by the President is presently pending before the Senate without any formal action yet taken, and where the district court . . . has expressly declined to exercise its power under § 546(d)."

In 2005, a dispute over successive Attorney General appointments came to a head in the District of South Dakota after the executive branch and the district court disagreed on the appropriate appointee. On December 22, 2005, the first interim U.S. Attorney resigned before the end of her 120-day term, and the Attorney General appointed a second interim U.S. Attorney. The district's chief judge argued the Attorney General did not have authority to make a second 120-day appointment. Accordingly, the court entered an order naming someone else as interim U.S. Attorney, citing Section 546(d). The executive branch disagreed with this view and on January 9, 2006, sent a letter to the court's appointee purporting to remove him from the role. The President then made a recess appointment of the Attorney General's pick, effectively resolving the controversy. (The Supreme Court has held that a valid appointment has the effect of removing an office's prior occupant.)

Legislative history on successive appointments is also unclear. The 120-day limitation has existed for most of the history of Attorney General interim appointments. In 2006, Congress briefly experimented with removing the 120-day limitation on Attorney General appointments but reverted to the current scheme in 2007. Witnesses and Members addressing the 120-day limit in committee said the time limit

provided "a practical incentive for the President to nominate a new U.S. attorney." Senate and House consideration of the 2007 act suggested at least some Members of Congress wanted to prevent indefinite interim appointments by the Attorney General. At the same time, one Senator who was concerned the bill did not go far enough to rein in the executive branch asserted that it allowed the Attorney General to make "multiple consecutive appointments of the same interim U.S. attorney."

Judicial Appointment and Presidential Removal

As the 2005 dispute over the U.S. Attorney in South Dakota suggests, Section 546 has sometimes given rise to disputes between the executive and judicial branches. Some have argued the judicial appointment of executive officials violates the constitutional separation of powers. Lower courts that have considered Section 546(d) have rejected separation-of-powers challenges to the appointments scheme, approving of district court appointments of interim U.S. Attorneys.

Another source of possible contention under the statute's appointment scheme concerns removal—in particular, whether the President can remove an official appointed by a district court. Certain statements in Supreme Court and federal appeals court cases instruct that, as a general principle, officials can be removed only by the person who appointed them. This principle suggests that an interim U.S. Attorney appointed by a court could be removed only by that court and not by the President. Nonetheless, recent Supreme Court decisions underscore the President's power to remove officials exercising executive power. Pending litigation may offer courts an opportunity to weigh the extent of presidential control against the general principle that removal power is vested in the appointing official.

Looking specifically at U.S. Attorneys, one federal appeals court concluded that Section 546(d) did not grant district courts "authority to supervise or remove an interim United States Attorney" and further said another statute gave the President authority to "override the judges' decision and remove an interim United States Attorney." As discussed, the President purported to remove the court-appointed U.S. Attorney for the District of South Dakota in 2006. A controversy also arose in 2020 regarding whether the Attorney General or President could fire the court-appointed U.S. Attorney for the Southern District of New York, but he ultimately resigned.

Interaction of the Two Statutes

The Vacancies Act generally authorizes and limits acting service in Senate-confirmed offices, while Section 546 specifically addresses U.S. Attorney vacancies. OLC has taken the position that both statutes are available to fill U.S. Attorney vacancies. This conclusion is consistent with judicial interpretations of how other position-specific statutes interact with the Vacancies Act: Both statutes may simultaneously apply. This interpretation grants the executive branch wide latitude, as it can effectively choose which statute to invoke. For example, a First Assistant U.S. Attorney might serve automatically as Acting U.S. Attorney under the Vacancies Act for 300 days after a presidential transition, and the Attorney General could then invoke Section 546 to appoint the same person as interim U.S. Attorney for a 120-day term. As another example, if the executive branch wanted to appoint an interim U.S. Attorney who was not eligible to serve under the Vacancies Act, the Attorney General might invoke Section 546.

While the Attorney General might be expected to defer to the President's invocation of the Vacancies Act, courts may have different incentives. For instance, the President has the power to remove the Attorney General but not to remove judges. Judicial appointments under Section 546(d) therefore present the possibility for interbranch conflict over who is serving as interim or Acting U.S. Attorney. If an interim 120-day appointment expires under Section 546, a court could attempt to make an appointment under Section 546(d) at the same time that the President invokes the Vacancies Act.

Considerations for Congress

In 2007, one Senator argued that amendments to Section 546 did not go far enough to prevent long-term temporary service in U.S. Attorneys' offices. Others claimed that 120 days was not enough time to install a Senate-confirmed U.S. Attorney. If Congress wanted to expand or restrict acting or interim service, it could amend either Section 546 or the Vacancies Act, subject to constitutional limitations on the appointment and removal of officers.

As one example, Congress could choose to make Section 546 the exclusive means for appointing temporary U.S. Attorneys, if it believed having two alternate methods vested too much discretion in the executive branch or was otherwise inappropriate. Alternatively, Congress could repeal Section 546 so that only the Vacancies Act applied, if it believed the judicial branch should not play a role in such appointments or otherwise preferred that scheme. If Congress retained Section 546, it could clarify whether and under what circumstances the Attorney General can make multiple 120-day appointments under Section 546, either to expressly allow or to expressly disallow such a practice.

Statutes governing temporary service in U.S. Attorney offices may be subject to constitutional limits. The Appointments Clause provides that, as a default, "Officers of the United States" must be appointed through presidential nomination and Senate confirmation. An "officer" is an official who exercises significant, continuing authority pursuant to federal law. The Appointments Clause further provides that Congress may change the appointment method for "inferior Officers," as distinct from principal officers. Specifically, Congress may vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." By contrast, a principal officer—one who has no supervisor other than the President—must be appointed with Senate confirmation. To complicate matters, some case law suggests acting service might be viewed differently for constitutional purposes, given its temporary nature. The courts that have considered the issue have held it is constitutionally permissible for an inferior officer to temporarily perform the duties of a principal officer.

Two appeals courts have rejected constitutional challenges to the appointment of interim U.S. Attorneys under Section 546, holding that U.S. Attorneys are inferior officers and Congress could therefore choose to vest their appointment in the Attorney General or district courts. Acting service under the Vacancies Act could raise more serious constitutional questions if it allows an official to serve who was not appointed by the President, a department head, or a court of law. Accordingly, in considering amendments to the laws governing temporary service in U.S. Attorney offices, Congress might consider ensuring that acting or interim officials are appointed by the President, a department head such as the Attorney General, or courts. Congress might also consider whether the official is serving "for a limited time and under special and temporary conditions" or is an inferior officer subject to Attorney General supervision.

Statutory provisions governing removal can also raise constitutional questions. In 2007, Members of Congress responded to President Bush's allegedly politically motivated removals of U.S. Attorneys by investigating the issue and, in some instances, expressing the view that "Federal prosecutors are supposed to be independent." If Congress agreed with this view, it might seek to amend Section 546 to limit the removal of either permanent or interim U.S. Attorneys. However, such a limitation—for instance, providing that a court-appointed U.S. Attorney can be removed only by a court—could raise questions under principles governing constitutional removal and the separation of powers. In the 1988 case *Morrison v. Olson*, the Supreme Court upheld provisions stating that the Attorney General could remove the independent counsel, an inferior officer, only for "good cause." Since 2010, however, the Supreme Court has emphasized the President's constitutional authority to remove officials exercising executive power. In 2022, the Supreme Court characterized *Morrison* as allowing removal protections "for inferior officers with limited duties and no policymaking or administrative authority." It is unclear whether U.S. Attorneys would meet this description.

Members of Congress might also think the President should have more control over interim U.S. Attorney appointments and removal. Notwithstanding lower court decisions upholding court appointments under Section 546(d), Congress could take the view that courts should not appoint prosecuting officials that represent the executive branch in court. In line with this view, Congress could amend Section 546 to disallow district court appointments or authorize the President to name interim U.S. Attorneys.

Author Information

Valerie C. Brannon
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.