



Court Says Interim U.S. Attorney was Unlawfully Appointed

December 2, 2025

On November 24, 2025, a federal district court judge dismissed the indictments of [New York Attorney General Letitia James](#) and [former FBI Director James B. Comey Jr.](#) The judge was not reviewing the substance of the federal charges. Instead, she was specially designated to adjudicate whether the prosecutor—interim U.S. Attorney Lindsey Halligan—was lawfully appointed. The judge concluded Halligan’s appointment was invalid, requiring the court to dismiss the charges. This Legal Sidebar explains that ruling and discusses potential next steps for the litigation.

Appointment of U.S. Attorney for the Eastern District of Virginia

[U.S. Attorneys](#) are Senate-confirmed officials who oversee federal prosecutions across the country. The U.S. Attorney for the Eastern District of Virginia (EDVA) [left office](#) on January 20, 2025, creating a vacancy. As a [prior Legal Sidebar discussed](#), two separate statutes might have authorized certain people to temporarily exercise the powers of that office during the vacancy: the [Federal Vacancies Reform Act](#) (Vacancies Act) and [28 U.S.C. § 546 \(Section 546\)](#). Section 546 authorizes the appointment of interim U.S. Attorneys. Specifically, Section 546 states that the Attorney General may appoint a U.S. Attorney to serve for 120 days starting on the date of the appointment, unless a permanent U.S. Attorney is confirmed before that period runs out. Section 546 says that if a 120-day appointment expires, the district court may appoint a U.S. Attorney to serve until the vacancy is filled.

In contrast to recent [litigation](#) involving Alina Habba’s service as Acting U.S. Attorney for the District of New Jersey, which turned largely on whether the Vacancies Act authorized her to serve, the executive branch invoked only Section 546 in the EDVA. Initially, on January 21, 2025, the Acting Attorney General [appointed](#) Erik Siebert as the Interim U.S. Attorney for the EDVA under Section 546. The district judges of the EDVA [reappointed](#) Siebert as U.S. Attorney after 120 days, and the President [nominated](#) Siebert to the position in early May. Siebert [left office](#) on September 20, 2025, however, and the President withdrew his nomination.

The Attorney General issued an [order](#) on September 22, 2025, “designat[ing] and appoint[ing]” Lindsey Halligan “to serve as the United States Attorney” for the EDVA for 120 days. On October 31, 2025, after Halligan’s appointment was challenged in the cases described below, the Attorney General entered an [order](#) “appoint[ing] Ms. Halligan to the additional position of Special Attorney, as of September 22, 2025,

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and thereby ratify[ing] her employment as an attorney of the Department of Justice from that date going forward.” That order asserted that as Special Attorney, Halligan had authority to conduct “any kind of legal proceeding” in the EDVA. The Attorney General also “ratif[ied] Ms. Halligan’s actions before the grand jury and [Halligan’s] signature on the indictments returned by the grand jury in each case.” Courts have historically [held](#) that a properly appointed official can ratify the earlier actions of an unlawfully appointed official, [so long as](#) the ratifier had the authority to take that action both “at the time the act was done” and “also at the time the ratification was made.” This ratification further distinguished the circumstances in the EDVA from the recent [appeals court decision](#) addressing Habba’s service in New Jersey, where (at least at the time of appeal) there was no attempt to ratify Habba’s actions.

Comey and James Prosecutions and Motions to Dismiss

As Interim U.S. Attorney, Halligan initiated prosecutions of [Comey](#) and [James](#). She appeared alone before the grand jury to present each case and was the only prosecutor to sign the resulting indictments. [Comey](#) and [James](#) both filed motions to dismiss their indictments, challenging the validity of Halligan’s appointment (and raising other issues not explored in this Legal Sidebar). In short, Comey and James [argued](#) that Section 546 authorizes the Attorney General to make only one 120-day appointment—in this case, Siebert’s appointment. After that appointment expired, the defendants argued, the only option under Section 546 was for the district court to appoint the interim U.S. Attorney. According to the defendants, therefore, the Attorney General’s second 120-day appointment of Halligan was invalid, and Halligan’s attempts to exercise the functions and duties of the U.S. Attorney were unlawful.

In response, the government [claimed](#) that Section 546 authorizes the Attorney General to make multiple 120-day appointments, emphasizing that there is no express language limiting additional appointments. In the government’s view, the Attorney General lawfully appointed Halligan under Section 546. The government alternatively [argued](#) that any possible infirmities in Halligan’s appointment were nullified by the Attorney General’s October 31 order retroactively appointing Halligan as Special Attorney and ratifying Halligan’s activity before the grand jury. In addition, the government [asserted](#) the grand jury indictment was valid even if no authorized prosecuting attorney had signed the indictment, saying the grand jury could make its own “independent decision to indict.” (For more information on federal grand juries, see [this CRS report](#).)

District Court Ruling

The defendants’ motions challenging Halligan’s appointment were assigned to a federal judge from South Carolina given the potential conflicts of interest stemming from the EDVA district court judges’ role in Section 546 appointments. The assigned judge agreed with the defendants’ arguments and dismissed the indictments in both [United States v. Comey](#) and [United States v. James](#). (The two opinions are similar, so for simplicity, this Legal Sidebar links below to citations from the *Comey* opinion.)

Citing various [canons of construction](#), the court [concluded](#) Section 546 allows only one 120-day appointment by the Attorney General, after which “appointment power (1) shifts to the district court . . . and (2) does not revert to the Attorney General if a court-appointed U.S. Attorney leaves office before a Senate-confirmed U.S. Attorney is installed.” The court [ruled](#) that in the EDVA, “[t]he 120-day clock began running” when Siebert was appointed, and once that clock expired, “so too did the Attorney General’s appointment authority.” The court [granted](#) dismissal of the indictments, stating that “all actions flowing from Ms. Halligan’s defective appointment, including securing and signing [the indictments], constitute unlawful exercises of executive power and must be set aside.”

The court further rejected the government’s alternative arguments seeking to cure the appointment defect, [expressing](#) doubt as to the Attorney General’s ability “to reach back in time and rewrite the terms of a past appointment” and reasoning that the Attorney General’s attempted ratification of the indictments [failed](#)

because the court had rejected Halligan's appointment: "the Attorney General 'could not have authorized' Ms. Halligan, who was not an attorney for the Government at the time [of the indictments], to present" the indictments. The court also [said](#) the ratification argument ran into an additional problem in Comey's case due to the [statute of limitations](#) for his prosecution. This issue is discussed in more detail below.

Finally, the court [rejected](#) the government's argument that the grand jury's "independent decision" to indict rendered any error in Halligan's appointment harmless. The Supreme Court has held that before a court may exercise [inherent supervisory authority](#) and dismiss an indictment prior to trial, the court must [engage](#) in a "harmless-error inquiry" unless the alleged error is fundamental. To obtain dismissal under the [harmless-error standard](#), the defendant must show that the alleged error "substantially influenced the grand jury's decision to indict," requiring "a particular assessment of the prejudicial impact" of the alleged error. In a [fundamental error](#) case, "the structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice." In *Comey and James*, the court [determined](#) that an unlawfully appointed prosecutor proceeding alone before a grand jury constituted a fundamental error that "necessarily affects the entire framework within which the proceeding occurs," particularly in light of "the near-complete control that prosecutors wield over the grand-jury process."

The court's decision to grant the defendants' motions to dismiss stands in some contrast to recent trial court rulings on acting U.S. Attorneys serving in other federal districts. In the [District of New Jersey](#), the [District of Nevada](#), and the [Central District of California](#), three trial courts said acting U.S. Attorneys overseeing cases were improperly appointed. In each of those instances, however, the courts granted the defendants' motions to disqualify the acting U.S. Attorneys from participating in their prosecutions but denied the defendants' motions to dismiss the cases. (An appeals court recently [affirmed](#) the New Jersey ruling but did not specifically weigh in on the motion to dismiss.) In the [Nevada](#) and [California](#) cases, the unlawfully serving U.S. Attorneys had not signed the indictments themselves and had stepped in later in the proceedings. Thus, the courts concluded there were no defects in the indictments. In [New Jersey](#), the unlawfully serving U.S. Attorney *had* signed the indictment, but the trial court concluded a defect in the signature alone was not a jurisdictional (i.e., fundamental) issue. The court accordingly conducted a harmless-error analysis and held that because the acting U.S. Attorney had no role in the investigation and grand jury proceedings preceding her signature, the court could "disregard" the invalid signature. In the *Comey* and *James* cases, by contrast, it appears that career prosecutors did not participate in the grand jury proceedings resulting in the indictments.

Possibility of Future Prosecution

The court in the *Comey* and *James* cases dismissed the indictments "without prejudice," meaning that the government is free to seek new indictments. Dismissal "with prejudice," by contrast, would prohibit the government from initiating new prosecutions. (The use of the term "prejudice" in this context is distinct from the inquiry described above as to whether a procedural error is harmless or prejudicial to the defendant.) In their arguments to the court regarding whether dismissal with prejudice was warranted, both *Comey* and the government cited the Ninth Circuit's decision in [United States v. Bundy](#) that dismissal with prejudice for prosecutorial misconduct requires "flagrant misbehavior," "substantial prejudice," and the absence of any "lesser remedial action." The court acknowledged the parties' arguments but declined to engage in prejudice analysis on these grounds—instead, the court [determined](#) that "the Supreme Court's Appointment Clause jurisprudence provides the answer to the with-or-without-prejudice question." After explaining that prior Supreme Court cases had "essentially unwound the actions taken by the unconstitutionally appointed officer and restored the affected party to the position the party occupied before being subjected to those invalid acts," the court found that dismissing the indictments without prejudice would likewise restore the status quo.

The dismissal of the indictments without prejudice leaves open the possibility that the government could seek new indictments. As a preliminary matter, the Attorney General has [announced](#) plans to appeal the rulings. The government may wait for the outcome of the appeals process before initiating new indictments. In the *Comey* case, whether the government can lawfully reindict is complicated by the fact that the [five-year statute of limitations](#) for the charged offenses expired on September 30, 2025. The court did not directly address whether the government would be time-barred from bringing the *Comey* prosecution again, but it did consider the statute of limitations issue in rejecting the government's ratification argument. Specifically, the government [argued](#) (in part) that the Attorney General was able to ratify *Comey*'s indictment on October 31 because she "could have 'personally obtain[ed] a new indictment'" on that date due to a "grace period" in [18 U.S.C. § 3288](#). The cited statute provides that if an indictment is dismissed after the statute of limitations has expired, "a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment."

The court rejected that argument on the grounds that when the Attorney General purported to ratify Halligan's actions the indictment had not been dismissed, and therefore [18 U.S.C. § 3288](#) by its own terms did not apply. In a footnote, the court observed that while typically the return of an indictment tolls the statute of limitations, an "invalid" indictment will not necessarily have that effect. This footnote could be read to suggest that the court would view any subsequent prosecution of *Comey* as time-barred. The question of whether the *Comey* indictment tolled the statute of limitations, however, is distinct from the question of whether the government could reindict at this stage of the proceedings. Additionally, a future court reviewing a new indictment would [not be bound](#) by the reasoning of this district court opinion. The *Comey* opinion's footnote cited two cases for the general proposition that an "invalid" or "void" indictment does not toll the statute of limitations: [United States v. Crysopt Corp.](#) and [United States v. Gillespie](#). *Crysopt* dealt with an indictment in which the court found the government had failed to allege an offense; the court held that the government's superseding indictment in that case was [time-barred](#) because the original indictment was not "[validly pending](#)" at the time the superseding indictment was presented. In *Gillespie*, the government obtained an indictment from a grand jury that was [sitting past its expiration date](#) and later obtained a superseding indictment for the same conduct (otherwise time-barred). Similar to the *Crysopt* court, the *Gillespie* court found that the [original indictment was void](#) and that, consequently, the superseding counts were [time-barred](#).

Both the *Crysopt* and *Gillespie* courts contemplated, however, that the prosecutions could potentially be resurrected pursuant to [18 U.S.C. § 3288](#). The *Crysopt* court [wrote](#) that, notwithstanding the underlying failure of the indictment to state an offense, and the court's consequent dismissal of the superseding indictment as time-barred, "the government appears empowered, under § 3288, to present the case to yet another grand jury." Similarly, the *Gillespie* court dismissed counts of a superseding indictment but [observed](#) the dismissal "gives *Gillespie* only temporary respite." The court [said](#) the dismissal of the original indictment "gives the government free rein, during the next six months, to submit the Count Three and Four charges to a regularly constituted grand jury under the authority of Section 3288." In another case, the district court that issued the *Gillespie* ruling [opined](#) that even if an indictment were invalid, Congress was within its authority "to give that piece of paper limited effect under Section 3288," saving a "new indictment from dismissal on limitations grounds."

Now that the *Comey* indictment has been dismissed, [18 U.S.C. § 3288](#) may control with respect to the statute-of-limitations question. The parties have staked out [positions](#) on [either side](#) of this issue. Whether [§ 3288](#) will allow for a new indictment may turn in part on whether a reviewing court determines that the dismissed indictment was adequate to trigger the application of [§ 3288](#), or whether the particular flaw to the indictment identified by the court—essentially rendering it void from the moment of its inception—bars the application of [§ 3288](#). (It appears, additionally, that the full grand jury may never have been [presented with](#) the operative indictment, which may give rise to a similar question.) The government may argue that by its plain terms, [§ 3288](#) applies to all indictments regardless of their validity. The defendant may counter that where an indictment is obtained by a person without authority to do so (or is not

presented in its final form to the full grand jury), it is not properly characterized as an indictment at all and therefore, much as it would not toll the statute of limitations under *Crysopt* and *Gillespie*, should not trigger the statutory grace period in § 3288.

The defendants had filed other [motions](#) to [dismiss](#) the indictments based on allegations of [selective and vindictive prosecution](#), which were pending at the time the court dismissed the indictments; while those motions are presumably now moot, the defendants could file them anew in the event the cases are brought again.

Considerations for Congress

Recent litigation over the validity of acting and interim U.S. Attorneys has highlighted potential ambiguities in the statutes authorizing temporary service. Additionally, at the moment, there are uncertainties regarding who is in charge in the EDVA. The Senate could choose to confirm or reject Halligan, the President's current [nominee](#) to the office. Meanwhile, federal law provides that the Attorney General may [conduct](#) and [supervise](#) all prosecutions. In the *Comey* and *James* opinions, the court [announced](#) that only the district court now has authority to appoint an interim U.S. Attorney for the EDVA under Section 546. The executive branch might instead [invoke](#) the Vacancies Act. While recent court [rulings](#) have held that a newly installed First Assistant U.S. Attorney could not take up the mantle, the President could instead [designate](#) a different Senate-confirmed official or certain senior agency employees as acting U.S. Attorney. The Attorney General might also be able to [delegate](#) some, if not all, of the office's duties to other attorneys in the EDVA.

As detailed in a [prior Legal Sidebar](#), Congress could amend the statutes governing temporary service to resolve uncertainty or counter any judicial rulings it disagrees with. For example, Congress could amend Section 546 to expressly allow the Attorney General to make multiple 120-day appointments, or to prohibit the practice. At the same time, litigation is ongoing. Many of the trial court decisions mentioned above have been appealed, and Congress could wait to see how federal appeals courts interpret the governing statutes before acting.

Congress could also amend 18 U.S.C. § 3288. Currently, § 3288 applies when an indictment is dismissed “for any reason,” except “where the reason for the dismissal was the failure to file” within the statute of limitations period or “some other reason that would bar a new prosecution.” Congress could choose to specify whether certain fatally flawed indictments fall outside the scope of § 3288 and what reasons “would bar a new prosecution,” or could leave those determinations to the discretion of the courts.

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