

## Will SDNY's Independent Streak Falter Without Bharara?

By **Sindhu Sundar**

*Law360, New York (March 13, 2017, 10:09 PM EDT)* -- As Manhattan's top prosecutor, Preet Bharara chased Wall Street traders, Albany legislators and even small-town narcotics gangs, upholding the headstrong tradition of a U.S. Attorney's Office nicknamed "the Sovereign District of New York" for its unique independence from the Justice Department.

Now, some former prosecutors say the murky circumstances of his exit raise questions about whether a successor appointed by the Trump administration will allow the elite office to retain its de facto autonomy from Washington.

Bharara emerged as an unexpected casualty of the White House's call for the resignations of 46 U.S. Attorneys appointed under the Obama administration. Although such a purge is not unusual — previous presidents including Bill Clinton had similarly pushed for such resignations — Bharara had reportedly been asked by President Donald Trump in November to stay on.

With little explanation from the White House for its apparent reversal of course, former prosecutors at the Southern District of New York questioned whether Trump's replacement would maintain the same standards of independence that historically shaped the office.

"There's a real concern about the independence of the SDNY's office, and I think who they appoint next will be telling," said a former prosecutor at the Southern District of New York, who spoke on the condition of anonymity in order to speak freely about the office.

"If it's someone who worked in that office and understands its tradition, then I'll be confident that they'll meet the highest standards of that office. But if it is someone without that level of experience and connection to the office, and someone that the current AG and his staff want to control, that would be troubling," the source added.

Bharara marked his tenure with an emphasis on securities fraud and public corruption cases. By the time of the Second Circuit's 2014 decision in *U.S. v. Newman*, widely perceived as a blow to his office since it required prosecutors to produce more evidence in such cases, its investigations had already led to the convictions of more than 75 insider traders since Bharara took over in August 2009.

Beyond the likes of Galleon Group founder Raj Rajaratnam and former Goldman Sachs board member

Rajat Gupta, Bharara's office has also felled roughly a dozen New York state legislators who were convicted on corruption charges. His office most notably won the convictions of former New York assembly speaker Sheldon Silver and former state Senate majority leader Dean Skelos, two of three pillars of power in Albany besides Gov. Andrew Cuomo.

It was Bharara who set the enforcement agenda for the office, cultivating its public corruption unit by devoting more attorneys to that team and choosing the best prosecutors for it, according to former attorneys in his office.

Bharara also generally boosted the office's investigative capabilities by continuing to expand the use of wiretaps, confidential informants and consensual recordings in securities crime investigations, a precedent that had been set before his leadership of the office, albeit to a lesser degree.

The 2011 Rajaratnam trial in particular, in which a federal jury in New York heard damning wiretapped conversations where he discussed tips and concealment tactics with his associates, served as a warning to potential wrongdoers. A complaint that Bharara's office launched in May 2015 against Dean Skelos and his son Adam Skelos on corruption charges illuminated the scope of that anxiety.

Prosecutors had overheard the younger Skelos complaining to his father in a wiretapped phone call that "it's like f----- Preet Bharara is listening to every f----- phone call. It's just f----- frustrating."

Bharara's direction of the office's priorities and aggressive uses of all the investigative tools at its disposal followed in its long tradition of independence, former prosecutors said. From the start, Bharara made a point of trying to forge personal relationships with the office's roughly 200 Assistant U.S. Attorneys, impressing his "follow the evidence" mantra on them, former prosecutors said.

"The SDNY has always been of the mindset of looking at a case and figuring out how best to investigate and prosecute that case," said Jessica Ortiz of MoloLamken LLP, a former chief of the SDNY's narcotics unit. "There is no discrimination or selective application techniques in its investigations and prosecutions, and Preet always sought truth and justice and did so without regard for the stature of individuals, politics or any other sort of influence."

Former prosecutors also described Bharara as unfazed by defeat. After the Second Circuit's Newman decision, the office continued to file insider trading charges against investment bankers even as the ruling resulted in the reversal of earlier guilty pleas.

Bharara tended to play an active role in investigations, scrutinizing the government's theories and the strength of its evidence. And if he believed the evidence demonstrated a crime, he would stand by his prosecutors' investigation regardless of its ultimate outcome, an approach former prosecutors said encouraged attorneys to pursue challenging cases even when victory was far from assured.

"He wasn't afraid of losing, and I think that made a big difference and inspired confidence in the prosecutors who worked for him," said Arlo Devlin-Brown of Covington & Burling LLP, the former chief of the SDNY's public corruption unit. "If as a prosecutor, if you're worried about hurting your own standing if you don't obtain a guilty verdict, that may make you hesitant in pursuing cases."

The office's independence meant not just that it was empowered to pursue big fish targets, but also that it could address a wider variety of crimes, particularly in newer areas where evidence may be less fully developed.

In September 2015, Bharara's office announced that it had charged several members of a drug distribution chain that peddled synthetic marijuana, a title he said was a misnomer, since it was made of potentially toxic artificial chemicals rather than plants. In a statement at the time, Bharara said that the drugs were sending "thousands upon thousands to emergency rooms in New York City and around the country."

Bharara drove the office to build a case over the novel drug at a time when there were few federal prosecutions over it, said Ortiz.

"Preet viewed that as an opportunity for us to step in," she said. "It was a new phenomenon, but he was not scared to push limits and get to the sources — the manufacturers and the importers into the New York area. And we worked with other agencies to seize them from where they were, even grocery stores."

In a series of tweets since Saturday, Bharara himself alluded to some of the messy politics behind his departure, saying first that he had been fired after refusing the White House's call for his resignation. His tweet on Sunday ratcheted up the intrigue: "By the way, now I know what the Moreland Commission must have felt like."

The remark was a reference to an investigative panel convened by Cuomo in 2013, before he himself dismantled it only nine months later, with The New York Times subsequently reporting that Cuomo had intervened against certain subpoenas the commission had issued.

Cuomo had disbanded the Moreland Commission as part of a budget compromise that included lawmakers agreeing to pass stronger laws against public bribery. But a New York Times report at the time suggested that the commission's investigators had targeted at least one company that Cuomo had been a client of.

The story asserted that Cuomo had interfered with that and other inquiries by the commission before shutting it down. Bharara's office then investigated the circumstances behind the dissolution of the commission, but found "insufficient evidence to prove a federal crime" in its shuttering, according to a statement in January 2016.

Bharara's sudden termination has evoked a similar sense of an investigation abruptly cut short, prompting some observers to speculate about the White House's motives.

"@realDonaldTrump talked a big game about getting corruption out of gov. But he wants a bunch of tame prosecutors who won't investigate him," Sen. Elizabeth Warren tweeted on Saturday. "Preet Bharara had authority over Trump Tower. @realDonaldTrump called him directly, breaching protocol. 24 hrs later he was asked to resign."

But some former SDNY prosecutors suggest that Attorney General Jeff Sessions' professed commitment to aggressive prosecutions of white collar crime — in 2007, he opposed a proposal by fellow Republican Sen. Arlen Specter to block the DOJ from seeking the waiver of attorney-client privilege in corporate investigations — should allay some of those concerns.

"People appropriately worry after the tumult of the recent changes, and the circumstances are particularly muddy here, though I think the surprise is more that Trump had asked Bharara to stay," said

Daniel Richman, a Columbia University professor who previously led the SDNY's appellate division in the early 1990s. Richman had testified about the attorney-client privilege proposal in 2007 to a panel that included then-Sen. Sessions.

"But I remember that during his time as a senator, [Sessions] put himself forward as an ardent defender of the DOJ and its traditions and the white collar crime prosecutions of the Southern District," he said. "I don't foresee a massive U-turn on tradition here, although, this has been a year of surprises."

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