

Legal Sidebar

The Removal of FBI Director James Comey: Presidential Authority and the Senate's Role in the Appointment of the FBI Director

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On May 9, 2017, President Trump [removed](#) the Director of the Federal Bureau of Investigation (FBI), James Comey, from office. Comey had served as Director since September 2013. A 1976 federal law [provides](#) that the FBI Director is limited to a ten-year term of service and may not serve more than a single ten-year term. It does not, however, impose any restrictions on the President's authority to remove the Director. The only prior instance of a President removing an FBI Director before a term's expiration was in 1993, when President Clinton [removed](#) William Sessions after a report concluded that he had committed various ethics violations.

As a constitutional and legal matter, it is widely recognized that the President generally enjoys broad authority to remove the heads of executive branch agencies, including the FBI Director. The Department of Justice's Office of Legal Counsel [reached](#) this conclusion in a prior legal opinion. The Constitution balances this power, however, by [requiring](#) Senate confirmation of nominations of "principal officers" to vacant positions, a political process that can impact informal understandings of the requirements for certain federal government positions. Thus, while the President has the constitutional authority to terminate the FBI Director, the Senate will play a critical role in the appointment of a successor.

More broadly, the President enjoys significant discretion under the Constitution to oversee the executive branch. For example, Article II [vests](#) the executive power in the President and the Appointments Clause [requires](#) that principal officers in the federal government must be appointed by the President subject to Senate confirmation. Although not explicitly stated in the text of the Constitution, the principle that the power to remove is incidental to the power to appoint informed the Supreme Court's 1926 opinion in *Myers v. United States*. In *Myers*, the Court invalidated a statutory provision that prohibited the President from removing postmasters without the consent of the Senate. The Court ruled that Article II gives the President "general administrative control of those executing the laws, including the power of appointment and removal of executive officers."

On the other hand, certain statutes [require](#) that particular agency officials only be removable for certain reasons, or for "cause." The Supreme Court has [upheld](#) such restrictions for the heads of an "independent agency" (that is, an agency that engages in quasi-legislative or quasi-judicial functions), as well as limitations upon the President's ability to remove a term and duty-limited [independent prosecutor](#). However, the FBI is not an independent agency and the Director is not insulated from removal by a statutory provision. Given the core executive function the FBI plays in enforcing federal laws, reading the FBI's organic statute, by implication, to insulate the Director from presidential removal would likely raise substantial separation of powers concerns. Such a restriction arguably might [improperly intrude](#) on the President's powers and responsibilities to execute the law under Article II.

The Constitution [entrusts](#) Congress with important powers concerning the staffing of the executive branch beyond the removal of officers, including creating, funding, and overseeing federal agencies. As noted above, the Constitution preserves a role for Congress in the *appointment* of certain executive branch officials, [requiring](#) Senate confirmation for principal officers. Senators thus retain discretion to subject persons nominated to fill a principal office to questioning

and to vote against a nomination if various expectations or qualifications are not met. This interaction is ultimately a political process and may be informed by implicit understandings about the proper degree of independence agencies carrying out law enforcement and investigative functions should have. The Constitution thus balances the President's power to remove executive branch officials with the Senate's role in confirming nominees to replace those officials, ensuring that the executive branch is subject to a considerable amount of presidential control, but also is subject to congressional input as to who is qualified to serve in such positions.

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