

## Comey and the Constitution

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

By the time this podcast posts, the controversy over the President’s May 9<sup>th</sup> firing of FBI Director James Comey will have gone through innumerable news cycles and countless commentaries.

So, what can a podcast committed to placing controversies in their “constitutional context” and bringing light rather than more heat seek to add? One contribution might be to explain the significant constitutional constraints that faced the 1976 Congress legislating a ten-year term for the FBI Director. After all, if Congress had been able to insulate the FBI Director from removal except “for cause” (that is, for serious “malfeasance” in office) – rather than leaving the Director subject to being fired at will – President Trump might have found it more difficult to justify removing Comey. At least those pushing back on the firing might not have so quickly admitted that the president had the legal authority to do it.

In a real sense, the president’s ability to fire the FBI Director at will traces to our constitutional “separation of powers”, by which the framers divided national powers into three distinct and often competing branches. Several Supreme Court decisions emphasize that, to fulfill his authority to “faithfully execute the laws of the United States,” the president must have the unfettered power to hire and fire – and thus command the loyalty of -- key officials performing executive-branch duties.

Of course, a different model of tenure and removal applies at the several multi-member agencies (such as the Federal Communications Commission). The members of these “independent regulatory commissions” are appointed for set terms and are only removable for cause – even though they ultimately make important law-enforcement decisions as part of their overall responsibilities. The Supreme Court legitimized this seeming “exception” to at-will presidential firings in the 1935 ruling in *Humphrey’s Executor v. United States*. In an opinion much-disputed by modern critics, the *Humphrey’s Executor* majority explained that multi-member federal commissions perform law-execution functions *as an ancillary part* of their broader “quasi-legislative” duties to make binding rules and regulations and their “quasi-judicial” responsibilities to adjudicate formal complaints that rules have been violated.

Another highly relevant example of officials being allowed to make decisions about law execution without being fireable at will by the president harks back to the 1978 Ethics in Government Act. (Congress allowed the Act to lapse in 1999.) This post-Watergate law authorized a panel of three federal judges to appoint and supervise an “independent counsel” to investigate accusations of illegality by high-ranking executive-branch officials.

The target of one independent-counsel investigation brought a lawsuit challenging the constitutionality of the independent-counsel law. The challenger argued that it illegally deviated from executive-branch (and, ultimately, presidential) control over prosecution. The justices decided 7-1 that the independent-counsel statute was constitutional as a general matter – and specifically despite the fact that counsel could only be impeached or fired “for good cause, physical disability [or] mental incapacity.” The majority emphasized in *Morrison v. Olson* that the limitation on executive-branch removal does not “unduly trammel[ ] on executive authority” because independent counsels have only “limited jurisdiction and tenure and lack[ ] policymaking or significant administrative authority.”

Because the FBI Director, by contrast, wields broad-gauge authority over the widest array of law-enforcement matters – and is first and foremost an executive, not a quasi-legislative or quasi-judicial official – Congress had to leave presidents free, through at-will termination, to undermine the government-reform impulses behind giving the FBI Director a ten-year term.

Of course, the ultimate lesson from the Comey firing may be that, just because officials have the basic constitutional authority to do something, that doesn’t prevent the wisdom of their doing it – at a particular moment in time – from being questioned in light of a host of other political and legal implications.