



## Is This a Constitutional Crisis?

**Legal experts size up the Comey firing.**

May 9, 2017

As the news broke late this afternoon, the politicos of Washington stared into their smartphones, stunned, struggling with what to make of it. TV networks cut into their regularly scheduled programming. Chyrons promising “breaking news” actually delivered it: President Donald Trump had fired FBI Director James Comey.

Though the story is still developing and our understanding of it is evolving, we know a few basic facts. We know that Trump cited Comey’s handling of the inquiry into Hillary Clinton’s emails as a reason for his firing. We know that Comey’s FBI had been investigating whether members of the Trump campaign colluded with Russia to influence the outcome of the 2016 election. What we don’t know is where all this ends.

Is this a constitutional crisis? If not, what is it, and how dangerous? POLITICO MAGAZINE asked an all-star panel of legal minds to offer their insights and tell us just what to make of it.

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### **It’s either ‘comforting’ or ‘alarming’**

*Cass Sunstein is professor at Harvard Law School. From 2009 to 2012, he was administrator of the White House Office of Information and Regulatory Affairs.*

There are two ways to understand President Trump’s firing of James Comey, and neither is unreasonable. The first is that in light of the multiple controversies that came to surround Comey, he was rightly fired. The FBI director needs to be widely trusted by the American people. Comey is not widely trusted. For the FBI, a fresh start is a good idea.

The second is that Trump does not want an independent FBI director; he wants someone who is fully subservient to him. Everyone should agree that Comey is not a subservient type. Like him or not, he is no one’s lackey. When Comey is in charge of an investigation, he goes where the facts take him (by his own lights). He insists on exercising his own judgment.

The first understanding is comforting; the second is alarming. Whether one or the other is right (or both), it is the responsibility of the Senate to ensure that the new FBI director is a person of unimpeachable professionalism, nonpartisanship and integrity. At this point in our history, the

United States is struggling with unusually high levels of polarization and distrust, and the FBI is engaged in investigations that involve the White House itself. The Senate's responsibility has never been more solemn.

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**'The rule of law will disintegrate'**

*Robert Post is a professor at Yale Law School and a member of the American Philosophical Society and the American Law Institute.*

Faith in the integrity of government institutions is a precious social resource. No society can run without it. That integrity depends upon trust, and trust is as much a matter of appearance as it is of reality. No one can know the inner workings of the president's mind. But we can know that he consistently acts in ways that flout the creation of trust. The firing of FBI Director Comey, at a moment when Comey was investigating the president, is simply the latest and most egregious example of Trump's disregard for appearances.

If the president continues to act in this way, we shall rapidly descend into a terrifying state of social dissolution. The rule of law will disintegrate. That will endanger everyone who cares about this country. If ever there was a time for politicians to put the interests of the nation above those of partisan self-interest, it is now.

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**'Trump's actions were entirely constitutional'**

*Josh Blackman is a constitutional law professor at the South Texas College of Law in Houston, an adjunct scholar at the Cato Institute, and the author of Unraveled: Obamacare, Religious Liberty, and Executive Power.*

Under the Constitution, the president has the absolute power to fire principal officers, such as Director Comey, at will. In that sense, Trump's actions were entirely constitutional. Indeed, the termination was accompanied by a fairly elaborate set of reasons by the deputy attorney general.

As for whether there is a crisis, we must keep in mind that Comey's replacement must be approved and confirmed by the Senate. Both Republicans and Democrats will have a say in who heads the agency going forward. At bottom, this is a political question, which ultimately the electorate can decide.

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**'Trump made the only legally correct call'**

*Elizabeth Price Foley is a professor of law at Florida International University.*

The FBI director, like all other officers of the executive branch, is an at will employee, which means he can be fired at any time, at the sole discretion of the president. When the deputy attorney general concluded that Director Comey usurped the role of the Department of Justice in his decision not to recommend prosecution of Hillary Clinton, President Trump made the only legally correct call, to fire the director. The country deserves an FBI director who respects his

limited role as an investigator, and whose reputation is not sullied by inappropriately political behavior. If there is any ongoing FBI investigation into any of Trump's associates, this investigation can and will continue unabated. This is far from a constitutional crisis--it is a confirmation that the Constitution is working exactly as it should.

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**'It's a deeply unsettling moment'**

*Michael Waldman, president of the Brennan Center for Justice at NYU School of Law, is the author of The Fight to Vote and The Second Amendment: A Biography.*

It's a deeply unsettling moment.

This has every appearance of a brazen cover-up, a possible act of obstruction of justice, just as much as Richard Nixon firing the Watergate special prosecutor Archibald Cox in October 1973. That's the only comparable historical precedent. That led to a constitutional crisis and a public outpouring of anger. Will this?

Trump's rationale is transparently, laughably absurd. Does anyone actually believe that Donald Trump fired Comey because Comey was unfair to Hillary Clinton during the campaign?

Let's be very clear what happened here. For all his flaws and mistakes, Comey is leading an investigation of extraordinary gravity: possible collusion between Trump, his campaign and administration, and a hostile foreign power. Remember, Jeff Sessions recused himself from the investigation because he himself lied to Congress about conversations with Russia. So he did the next best thing, recommending that the person leading the investigation--Comey--be fired.

It comes a day after the former Acting Attorney General clearly implied there was an ongoing FBI investigation of Michael Flynn. It comes before Comey was due to testify again.

Comey made many errors. But does anyone trust Trump to nominate his successor, the person who will effectively lead the investigation? How can Americans have trust in their government without even the pretense of independence for key investigations?

This is an extraordinary test of our democracy and its institutions. Will the Republicans in Congress stand up for the rule of law and independent investigations, at a time when a hostile foreign power has tried to interfere in our democracy? Will they stand up for country or party?

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**'We are not at crisis yet'**

*Robert Chesney is a professor at the University of Texas School of Law, cofounder of the Lawfare Blog, and senior editor for the Journal of National Security Law & Policy.*

Trump was clever here in two respects. First, the timing. He chose a moment of sharply renewed anger on the left regarding Comey's role in the election, and took pains to frame his justification in part in those exact terms. Most of us understand that this is not at all why he fired Comey, of course, but the fact remains that this somewhat wrong-footed his critics. Second, note the critical

role played by issuing the memo from Deputy Attorney General Rod Rosenstein alongside the firing letter. Rosenstein is a respected law-and-order figure, with far more credibility than Attorney General Jeff Sessions acting alone.

All that said, we are not at crisis yet. What matters is who comes next and what happens with the Russia and Flynn investigations. If the Trump team is smart, they will have an established law enforcement professional to nominate. At any rate, it will all come to a head in the Senate Judiciary Committee at that point. Paging Chairman Grassley: The Republic will be looking to you!

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**‘It’s a constitutional crisis’**

*David Cole is the National Legal Director of the ACLU and the Honorable George J. Mitchell Professor in Law and Public Policy at the Georgetown University Law Center.*

Anytime a sitting president fires the person responsible for investigating his campaigns potential criminal activities, it is a matter of grave public concern. When that criminal investigation involves collaboration with Russia to undermine the U.S. democratic process, it’s a constitutional crisis. And when the president offers the most blatant pretext for his action, it is a challenge to the credulity of the American people. Does anybody really believe that he fired the FBI director over his part in resuscitating Trump’s campaign? This is the dénouement of the cover-up. But the truth will out, and democracy will prevail, if we insist upon it.

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**‘James Comey needed to be ousted’**

*Saikrishna Prakash is a professor of law at the University of Virginia and a senior fellow at the Miller Center.*

James Comey needed to be ousted, whoever was in the White House. His mishandling of the Clinton investigation and his usurpation of prosecutorial decisions reflected poor judgment and something of a messianic complex. President Trump must be faulted for failing to come to this conclusion months ago. Count on more controversial firings.

Whether the ouster was related to the investigation of Russian hacking is unclear. But the new FBI Director will have to make all sorts of pledges to conduct an independent investigation in order to secure the Senate’s consent. Even as there are profound disagreements about the effects of the hacking and leaks on the election, I believe that there is a firm bipartisan consensus to determine what Russia did during the election and to take steps to ensure it does not happen again. The numerous investigations will continue, albeit without James Comey.

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**‘We should reserve judgment’**

*Jamal Greene is Dwight professor of law at Columbia Law School.*

Allusions to the Saturday Night Massacre are irresistible but premature. President Trump's firing of James Comey is not a constitutional crisis—yet. We don't have all the facts, and there is much Congress could do to learn them.

Given the FBI's ongoing investigation into contacts between Trump campaign personnel and agents of the Russian government, it is crucial that responsible members of Congress from both sides of the aisle are fully briefed—including by Comey himself—on the status of that investigation and how it will be handled going forward.

We should reserve judgment until that happens—or doesn't.

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**'We won't really know ... until we know whom Trump nominates'**

*Dan Farber is the Sho Sato Professor of Law at the University of California, Berkeley.*

It's premature but understandable that some people are calling James Comey's firing a constitutional crisis. Comey violated clear Justice Department norms by his conduct while investigating Hillary Clinton's emails. He compounded the offense by making false statements to Congress about Huma Abedin's allegedly massive forwarding of sensitive emails to her husband, Anthony Weiner. If another president had fired another FBI director for such conduct in a high-profile case, few questions would be raised.

But this is not just any president or any high-profile case. The real concern here is that Trump has abused the power of his office to protect his political associates from criminal investigation. It's not paranoia to think that Comey's conduct concerning the Clinton investigation is merely a pretext for firing him, given that Trump applauded much of that conduct at the time. But we also have no proof that the justifications were pretextual.

We won't really know how to interpret the Comey firing until we know whom Trump nominates to replace him. If Trump nominates an independent, respected figure to replace Comey, well and good. If he nominates someone who is compromised by associations with Trump or who lacks credibility as an objective investigator, then it will be fair to start making comparisons to Richard Nixon. That would be the point to start worrying in earnest about a constitutional crisis.

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**'Not a constitutional crisis' but it 'might turn into a major political crisis'**

*Sanford V. Levinson is a professor of government at the University of Texas and a member of the American Law Institute.*

No, this is not (yet) a constitutional crisis, since there's no doubt about his authority to fire Comey. It would be far closer to a constitutional crisis if Sessions overtly intervened in the investigation or tried to shut it down.

It might (and I hope will) turn into a major political crisis, which is different. The political crisis arises if and when several major Republicans express significant concern and, among other things, indicate they'll vote to subpoena Trump's tax returns. One must assume that most

Republicans would in fact prefer Mike Pence as president. He is definitely not “impeachment insurance” in this context.

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**It may not be a constitutional crisis yet, ‘but it probably will be soon’**

*John Culhane is H. Albert Young Fellow in constitutional law and co-director of the Family Health Law & Policy Institute at Delaware Law School (Widener University).*

Trump’s firing of James Comey isn’t a constitutional crisis yet, but it probably will be soon. That’s because the Republican majority in the U.S. Congress seems to have abandoned any sense of their constitutional responsibility, and are operating solely in service of temporal, political goals. For distressing evidence of this tendency, look back no further than yesterday’s Senate Judiciary Committee hearing: Republicans did their best to deflect attention from the administration’s failure to fire National Security Adviser Mike Flynn immediately after former acting Attorney General Sally Yates told the White House counsel that Flynn could be blackmailed by Russia. Nothing, it seems, will compel the GOP to look at the swelling evidence of possible corruption staring them in the face.

Whatever Comey’s mistakes might have been in the handling of Hillary Clinton’s email investigation, it’s crazy to think that issue had anything to do with firing him. A few Republicans, like Arizona Senator Jeff Flake, seem to have had enough. Flake tweeted that he can’t find “an acceptable rationale for the timing of Comey’s firing.” So I have some hope that the party’s officeholders might finally buckle under the weight of public opinion—and their constitutional duties—and demand a truly independent investigation of the Trump’s campaign’s possible ties to Russia. That’s our only chance of avoiding a crisis in which the law succumbs to this president, rather than the other way around.