

# POLITICO

## Why Trump Had to Fire Sally Yates

*The acting attorney general should have given the president her best advice, then resigned if he didn't listen.*

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Democrats are calling it the Monday Night Massacre. On Monday evening, Acting Attorney General Sally Yates announced that under her leadership, the Justice Department would not defend President Donald Trump's executive order on immigration. After acknowledging that the Office of Legal Counsel had reviewed the policy, and noting that the Civil Division could defend it in court, she personally rebuffed the president's judgment, which she did not find "wise or just." Yates, a career prosecutor appointed by Barack Obama, is now being hailed for standing up to a supposedly "tyrannical" president, according to a statement blasted out by the Democratic National Committee.

But this has it wrong. If Yates truly felt this way, she should have told the president her conclusions in confidence. If he disagreed, she had one option: resign. Instead, she made herself a political martyr and refused to comply. Trump obliged, and replaced her with the U.S. attorney for the Eastern District of Virginia, Dana Boente. While this late-night termination may bring to mind President Richard Nixon's infamous "Saturday Night Massacre," the analogy is inapt. This is a textbook case of insubordination, and the president was well within his constitutional powers to fire her. Call it the Monday Night Layoff instead.

Let's review the facts. In 1973, Attorney General Elliot Richardson appointed Archibald Cox as an independent special prosecutor to investigate the break-in at the Watergate Hotel. Cox, a former solicitor general, issued subpoenas to President Nixon for taped Oval Office conversations. Nixon refused. Under the law in effect at the time, the president could not fire the special prosecutor directly. Rather, the attorney general could fire Cox, but only "for cause," which required some neglect of duty. In other words, the prosecutor could not be fired because his investigation came too close to the Watergate cover-up.

After ignoring the subpoena, on Saturday, Oct. 20, 1973, President Nixon ordered Attorney General Richardson to fire Cox. However, the prosecutor had not engaged in any malfeasance,

and there was no “cause” to terminate him. Thus, the president’s order was against the law. Richardson refused to comply, and instead resigned. Shortly thereafter, Deputy Attorney General William Ruckelshaus assumed the position of acting attorney general. He too refused to fire Cox, and instead resigned. Third in line was Robert Bork. The solicitor general, now the acting attorney general, believed the president’s order was constitutional and appropriate. Bork complied, and fired the special prosecutor. It was a dramatic episode in constitutional history that gave rise to the independent counsel statute, and two decades later, President Bill Clinton’s impeachment.

Here’s why the feverish comparisons to Yates’ firing are off mark. First, the independent special prosecutor could only be removed for neglect of duty. Nixon had not demonstrated that Cox did anything wrong; rather, he was trying to shield his own cover-up. In contrast, Yates, as acting attorney general, could be removed at will. Firing her in no way violated any statutory prohibitions. Rather, the president could fire her merely because of a disagreement in policy—which is precisely what happened here. That is perfectly lawful.

Second, the president did not order his principal officer to violate the law. Yates acknowledged that there was a credible argument that the executive order was constitutional—she said only that she was not convinced by the OLC’s determination that it was lawful, hinting at the president’s campaign-trail calls for a “Muslim ban.” But many laws of dubious constitutionality are routinely, and zealously, defended in court by the Justice Department. Her objection, instead, was that the order was unwise or unjust. These may be valid points for a public citizen to raise, but the attorney general has a statutory duty to “[r]epresent the United States in legal matters generally,” regardless of her personal proclivities. Herman Pfleger, former legal adviser at the State Department, once explained, ““You should never say ‘no’ to your client when the law and your conscience say ‘yes’; but you should never, ever say ‘yes’ when your law and conscience say ‘no.’” If Yates’s conscience said ‘no,’ but the law said ‘yes,’ her choice was to proudly voice those opinions. Doing so would have been essential to maintaining the independence of the Justice Department. But if her entreaties were rebuffed, she should have resigned, and *then* publicly voiced her dissent.

Third, and most importantly, the Constitution entirely supported Yates’ removal. Article II imposes on the president the duty to “take care that the laws [are] faithfully executed.” Because he cannot perform this solemn responsibility alone, the Constitution grants him the power to appoint officers—with Senate confirmation—who can carry out his orders. But as Chief Justice Roberts recently observed, “to keep these officers accountable,” the president has a critical trump card: “removing them from office.” Perhaps no chief executive in American history is better prepared for this role than the longtime host of *The Apprentice*. Because Yates, who served as a principal officer, impeded the president’s duty of faithful execution, her removal was entirely justified.

While I defend Trump’s constitutional authority to remove the acting attorney general, his message accompanying the termination warrants a careful study. Announcing her firing, the president wrote that Yates had “betrayed the Department of Justice by refusing to enforce a legal order.” Charges of betrayal will only serve to chill voices of dissent within the Justice Department, and limit internal checks on the White House. Though Yates erred egregiously by making her opinion public, rather than resigning, others within the executive branch should feel

free to raise constitutional doubts to the White House. However, if those in the minority sense that they will be deemed traitors, the voices of reason within the government will be silenced for fear of persecution. I worry that Yates's foolish last stand will poison the well of President Trump's already-low estimation of lawyers that tell him "no." Her selfish act of painless self-flagellation—which will no doubt be rewarded by a lifetime of adulation from the left—will in the long run be counterproductive, and unfortunately inhibit dissent within an already skittish agency. Yates's plan backfired, big league.

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