

Why Did Congress Set a Ten-Year Term for the FBI Director?

Andrew Kent, Susan Hennessey, Matthew Kahn | Wednesday, May 17, 2017, 4:45 PM

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The revelation only adds more to existing reasons for suspicion in the wake of Comey's dismissal: the brazenly pretextual DOJ rationale for the firing; Trump's stunning admission that he had the Russia investigation in mind when he acted; and reports Trump demanded Comey pledge loyalty to him personally. Now the public learns that Trump's conduct with regards to Flynn might well constitute criminal obstruction of justice.

One important element risks getting lost amid the swirling scandals: It is a very big deal, under any circumstances, for a president to fire an FBI director.

Comey had served fewer than four years of his ten-year term. This was only the second time a director has been fired in the history of the Bureau. Yet, congressional Republicans offered astonishingly muted statements on the significance of Comey's firing—at least until the compounding scandals began to pile up. Now, Trump has signalled that he intends to swiftly appoint a new director. Jack and Ben noted earlier this week that three of Trump's proposed candidates are partisan figures, and thus per se unacceptable as a breach of the long-standing norm of non-political FBI directors.

The Senate will have to confirm Trump's nominee and therefore has the ability to insist on a choice that minimizes the damage caused by the rapidly cascading breaches of norms by the President over the past week.

In gauging the severity of Trump's breach and deciding how to respond and whether to support Trump's nominee, Congress should look to its own history. Why did Congress set the FBI director's ten-year term in the first place?

As Bobby described last week, Section 203 of the Crime Control Act of 1976 restricts the FBI director to a single ten-year term and prohibits the reappointment of an incumbent. Below is an examination of what the legislative history and political context reveal about Congress' motives in passing that law. It is clear that Congress viewed the operation of the statute as both a ceiling and a floor: a limit on the president and a limit on the director. It's also clear that Congress viewed political influence on specific FBI investigations as violative of important norms developed to prevent the recurrence of dangerous abuses.

Congress first considered a law to require Senate confirmation and term limits for an FBI director in the closing years of J. Edgar Hoover's directorship. Hoover was the FBI's first director and was appointed by the Attorney General and not the president. He served 48 years until his death in 1972. Congress approached the issue in the context of Hoover's extraordinarily long tenure, during which he consolidated control of the FBI and carried out substantial abuses of power.

In one sense, limiting an FBI director's tenure to a single ten-year term should be understood as a check on the director's power. Congress' was concerned with the rise of another unscrupulous and excessively powerful director, and term limits were one way to prevent that. There is simply less one can do in ten years than in forty-eight, be it amassing influence or violating civil liberties.

In another sense, the term limit acts as a check on presidential power. Congress passed the ten-year term limit in the shadow of the abuses of President Richard Nixon and White House aides. The Senate Judiciary Committee held hearing on FBI oversight and a bill to establish a ten-year term in March 1974, the same month a federal grand jury indicted the "Watergate Seven" and named Nixon an unindicted co-conspirator. Nixon's acting FBI Director and nominee for the permanent post, L. Patrick Gray, had resigned in 1973 after it was revealed that he was giving the White House daily briefings on the FBI's Watergate investigation and that he destroyed documents relevant to the inquiry.

Congress wanted to address the Scylla and Charybdis of Nixon and Hoover: the risk of political interference in FBI investigations, and use of the Bureau for political purposes, on the one hand, and on the other, the danger of an imperial FBI director whose long tenure—and the secrets and political chits accumulated during that tenure—allows him to act without accountability.

When recommending enactment of the ten-year term, the Senate Judiciary Committee wrote a comprehensive report of its rationale, including:



The purpose of this bill is to achieve two complementary objectives. The first is to insulate the Director of the Federal Bureau of Investigation from undue pressure being exerted upon him from superiors in the Executive Branch. The second is to protect against an FBI Director becoming too independent and unresponsive.

As Chairman of the Judiciary subcommittee overseeing the FBI, Senator Robert Byrd said during a hearing on the ten-year term legislation that the FBI director must not use the Bureau as “a political action agency for the President,” but cannot be allowed to turn the Bureau into a personal “empire.”

The problem for Congress seeking to reform the FBI was that solving the Nixon problem might exacerbate the Hoover problem, and vice versa.

The ten-year term, as described by a Senate Judiciary Committee report, was intended to strike a sensible balance. Various proposals were floated in Congress at the time, such as one four-year appointment with a presidential option of a second. Another proposal for two ten-year terms was nixed as too long. Ten years —non-renewable so there would be no careerist incentive to curry favor with the president—was settled upon.

The Senate Judiciary Committee was clear that “the Director’s responsibilities” are and must be “non-political.” According to the Committee, “[t]he position is not an ordinary Cabinet appointment which is usually considered a politically oriented member of the President’s ‘team.’” If the director served as an ordinary political appointee, there is too much risk of “infringing individual rights and serving partisan or personal ambitions.” A ten-year term allows the director to serve longer than a two-term president, and takes the directorship vote off of the four-year presidential election cycle.

At the same time, the Committee viewed it as appropriate for the director to be “responsive[] to the broad policies of the Executive Branch.” Professor Milton Lowenthal was quoted during the hearing to the effect that law enforcement “necessarily involves policy decisions, selectivity, and value judgments which should, within limits, be subject to the control of the democratic process.”

To this end, Congress was clear that the FBI director could be fired by the president. Byrd had raised the possibility of making the FBI an independent agency, which would mean for-cause limits on removal of the director. Senators and Representatives conceded on the record, however, that it would probably be

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unconstitutional under Supreme Court precedent concerning the president's removal power—notably the Myers and Humphrey's Executor cases—to try to limit the president's power remove a core executive official. As the Committee report put it, “[t]he bill does not place any limit on the formal power of the President to remove the FBI Director from office within the ten-year term,” and it would be “highly likely” unconstitutional if it had purported to do so.

But Congress did think there were limits on presidential removal. As the Committee wrote:

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The bill is a cautionary message to the President to the effect that whereas his power to remove a director is formally unlimited, nevertheless, by virtue of its power to ratify the appointment of a successor, the Senate retains a large measure of influence over this removal power and will tolerate its exercise for good reason only.

The report also describes the conditions under which it would be appropriate to remove a director mid-term:

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If the President and his Attorney General find that the FBI Director has demonstrated over a substantial period of time significant disagreement and inability to cooperate with law enforcement policies if [sic] the Executive Branch, they would be justified in seeking a replacement. The President and Attorney General would be expected to justify the mid-term removal of an FBI Director on such grounds, and not merely for the reason that a new President desires his “own man” in the position.

In both 1974 and 1975, the Senate unanimously passed bills setting a ten-year term only to have the legislation die in House committees for lack of interest. The provision ultimately passed in 1976 as an amendment to a larger crime-fighting bill, and it passed both chambers and was.

Although Congress did not attempt to codify restrictions on the president's power to remove the FBI director, there are limits on that power, in addition to the need to satisfy a Senate asked to appoint a replacement that a mid-term change of directors was justified. Congress has the power to impeach and remove from office a president who commits, in the words of the Constitution, "treason, bribery, or other high crimes and misdemeanors." The history of the adoption of the Constitution and the practice of Congresses over our history make clear that impeachable offenses need not be violations of law. Technically legal but abusive, dangerous, dishonest, or unethical conduct can be impeachable.

A president's removal of an FBI director in an attempt to shield himself and his allies from a criminal or counter-intelligence investigation could easily constitute a high crime or misdemeanor. In addition, generally applicable congressional statutes can be understood to place limits on removal in certain contexts. For example, the obstruction of justice criminal statute suggests the wrongfulness of removing the FBI director if done with the intent to corruptly "influence, obstruct, or impede the due and proper administration" of justice in an FBI criminal or counter-intelligence investigation.

Even in independent agencies, which by design are given some protection from political control by the White House, agency heads can be fired by the president for good cause. For instance, a commissioner of the Federal Trade Commission "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." The one instance prior to Comey when an FBI director was fired involved this kind of good cause. During Bill Clinton's first year in office, Director William Sessions was fired after he refused the president's request that he tender his resignation. This came after a Justice Department investigation begun during the administration of George H.W. Bush which found that Sessions abused FBI resources and funds for personal gain. It seems plainly appropriate to remove an FBI director for malfeasance that would satisfy a for-cause statute protecting an independent agency head. Notably, then the idea of the ten-year term as a ceiling has been largely uncontroversial, even when tested. In 2011, the Senate agreed to President Obama's request that Congress extend Robert Mueller's term for an additional two years, citing the need for continuity in addressing a changing threat landscape.

The legislative and political history leading to the ten-year term for the FBI director does in fact provide important context for assessing the propriety of President Trump's actions, and gauging how Congress—if it puts principle above party—should respond. There are good reasons to be critical of how Comey handled the Clinton email investigation. But Comey as director was very, very far from being a Hoover, Pat Gray, or William Sessions. This is not to say that a president could never have been justified in removing Comey for missteps during the presidential campaign. But given all of the surrounding context, and the stench of corrupt intent emanating from this President, the mid-term removal of Comey

seems to flagrantly violate Congress' expectations about the proper relationships between the president and the FBI director. As the Senate Judiciary Committee warned in the wake of Watergate, the FBI director can never again be allowed to be a partisan member of a president's team. That is especially true with this president.

No White House since Nixon's has needed to be overseen by a truly independent FBI the way the current one does.



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