S. HRG. 112–94

THE PRESIDENT'S REQUEST TO EXTEND THE SERVICE OF DIRECTOR ROBERT MUELLER OF THE FBI UNIT

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED TWELFTH CONGRESS

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WEDNESDAY, JUNE 8, 2011

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m., Room SD–226, Dirksen Senate Office Building, Senator Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Durbin, Klobuchar, Franken, Blumenthal, Grassley, Sessions, Lee, and Coburn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Chairman LEAHY. Good morning, everybody. Good morning, Director Mueller. At our last hearing here, I prematurely complimented you. I said, well, this is the last time you have to come to a hearing and put up with the Senate Judiciary Committee. But welcome back.

Over a month ago, I met with the President on this topic. He has requested the Congress authorize a limited extension of Robert Mueller's service as Director of the FBI. The public probably knows that we have a law that normally limits the FBI directorship to one 10-year term. This law was enacted to span Presidential terms, and will give the position the kind of independence that somebody in this position in law enforcement needs.

President Obama spoke of the ongoing threats facing the United States, as well as the leadership transitions at other agencies, like the Defense Department and Central Intelligence Agency. He asked us to join together in extending Director Mueller's leadership for the sake of our Nation's safety and security.

I was convinced of the call that the President made. Following the death of Osama bin Laden, I urged all Americans to support our President and his efforts to protect our Nation and to keep Americans safe. With the tenth anniversary of September 11th, 2001 attacks approaching, and in the face of continuing threats, threats both within and without our borders, we must all join together for the good of the country, and all Americans.

I'm pleased that in a law enforcement matter like this, we've kept out of any kind of partisanship. Republicans and Democrats have expressed support for the President's request to maintain

vital stability and continuity in the national security leadership team.

Senator Grassley, this Committee's ranking Republican, joined me, along with Senators Feinstein, Chambliss, chair and vice chair of the Select Committee on Intelligence, introducing a bill to permit the incumbent FBI Director to serve for up to two additional years. Chairman Lamar Smith of the House Judiciary Committee has spoken to me. He supports the President's request. And I was encouraged to see reports that Senator McConnell, the Senate Republican Leader, supports the President's request.

A bipartisan bill on the Committee's agenda provides for a limited exception to the statutory term of the service of the FBI Director, and it will be on our agenda tomorrow morning. It will allow Director Mueller to continue to serve for up to two additional years, until September 2013, at the request of the President. This extension is intended to be a one-time exception and not a permanent extension or modification of the statutory design.

The President could have nominated a new Director of the FBI, someone who could serve for 10 years and would be there well after President Obama's own term of office expired. Instead, the President is asking Congress to extend the term of service of a proven leader for a brief period, given the extenuating circumstances and threats facing our country.

Bob Mueller served this Nation with valor and integrity as a Marine in Vietnam, as a Federal prosecutor at all levels. He again answered the call of service when President Bush nominated him in July of 2001 to serve as Director of the FBI.

I was Chairman of the Committee at that time. I expedited that nomination through the Senate. He was confirmed in just 2 weeks, from the nomination to the confirmation. Since the days just before September 11, 2001, Bob Mueller has served tirelessly and selflessly as the Director of the FBI. I felt that President Bush, even though of a different party than I, had made a very good choice and I saw no need, once we had the hearing, to hold up that nomination. We moved very, very quickly.

Director Mueller has handled the Bureau's significant transformation since September 11, 2001 with professionalism and focus. He's worked with Congress and this Committee, testifying as recently as March 2011 in one of our periodic oversight hearings. It was very evident at that hearing, if I could just be personal for a moment, that Bob Mueller was ready to lay down the burdens of this office and spend time with his family.

But, as he has done throughout his career, Bob is now answering duty's call. I should tell you, Director, what the President said to me when I asked him if he had talked to you about this idea. He said, "Not yet." But Bob Mueller is a Marine and he answers the call to duty. This is the President's request as a patriotic American. Bob Mueller is willing to continue to serve a grateful Nation.

Senator Grassley asked that Director Mueller appear at today's hearing. Director Mueller has characteristically cooperated, and I thank him.

Today we also welcome back to the Committee Jim Comey, who served as a U.S. Attorney for the Southern District of New York, and for 2 years as Deputy Attorney General during the George W.

Bush administration, when he worked closely with Director Mueller. I told Mr. Comey earlier, a few minutes ago, it was nice to have him back in this room where he's spent a lot of time.

And the Committee will also hear testimony about the constitutionality of passing an exception to the statute, which authorizes a 10-year term. I thank Senator Grassley for his cooperation and I hope we now have the hearing and we'll be able to report the bill in the form that Senator Grassley suggested without unnecessary delays.

I yield to Senator Grassley, then we'll go to Director Mueller.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Well, thank you very much for holding this hearing. And welcome back, Director Mueller.

This hearing is the first hearing in 37 years to specifically address the 10-year term of Director of FBI. In 1968, Congress passed a law requiring an FBI Director to be appointed with advice and consent of the Senate. Despite the passage of this law, Director Hoover served until his death in 1972.

Following Hoover's death, a number of high-profile scandals with the FBI came to light. This Committee held a hearing in 1974 to address legislation limiting the term of the FBI Director, to provide for additional Congressional oversight of the FBI Director, and most importantly, to insulate the office from political control of the President.

In 1976, Congress acted by limiting the Director of FBI to the current 10-year non-renewable term. Congress did so to prevent the accumulation of excess power by the Director, as well as to provide some political independence for the FBI. The statute expressly prohibits reappointment of a Director.

Despite knowing about Director Mueller's impending term limit and initiating a search for a successor led by the Attorney General and Vice President Biden, President Obama chose not to send the Senate a nomination for Director of FBI. Instead, the President has decided that, notwithstanding those statutory provisions, Director Mueller should continue to serve in this position for another 2 years.

Although I do not think that our position on legislation to permit this result should depend on personalities, Director Mueller has performed admirably as FBI Director. With the recent death of bin Laden and the approaching 10-year anniversary of the September 11 attacks, we do in fact have unique circumstances warranting a one-time limited extension of the term of this particular Director.

Against this backdrop, and somewhat with a heavy heart, I join in co-sponsoring S. 1103, a bill that would extend the term of the current FBI Director for 2 years. But 2 years is as far as I will go. Director Mueller has done a fine job, but he is not indispensable and the likely continuation of the war on terror for many years is not so singularly a circumstance to justify extending the FBI Director's term. In 2 years, no matter what, someone else will be nominated and confirmed for this job.

Although I support this bill, I have resisted efforts to simply pass it with minimal deliberation. Given the substantial precedential

value of any extension of the FBI Director's terms, we have a duty to ensure that the regular order is followed for the consideration of this bill.

First, I believe that the 10-year limit has achieved its intended purpose. Until Director Mueller, no director subject to the limit has served the full 10 years. The limit has been successful in reducing the power of the Director and in preserving the vital civil liberties of all Americans.

Second, the 10-year limit has provided important political independence for the FBI Director. Only one director has been fired in this period, and this did not occur for political reasons.

Third, the prohibition on reappointment has also served the Director's independence by eliminating any potential that the Director will attempt to curry favor with a President to be reappointed. We should proceed cautiously in setting a precedent that a 10-year term can be extended. If we are going to extend Director Mueller's term, we should establish a precedent that doing so will be difficult and that unique circumstances necessitating it exists, as those are circumstances at this particular time.

We didn't just introduce a bill and hold it at the desk. Instead, we introduced a bill that would amend existing law. We are holding a hearing. As in 1974, we have called the Director of the FBI to testify. We are pointing out the special circumstances behind the bill and recognizing the constitutional issues that may arise in extending the Director's term, and without actually voting to advise and consent to his serving an additional term we have called experts to address constitutional. We will hold a Committee mark-up, and if successful, we'll seek floor time to pass the bill. That is how we should proceed. Changing the 10-year term limit is a one-time situation that will not be routinely repeated. Acting responsibly requires no less.

For all these reasons, Mr. Chairman, I especially thank you for holding this hearing. I thank Director Mueller for testifying, and all the other witnesses that have come. Thank you.

Chairman LEAHY. Thank you very much, Senator Grassley.

Director Mueller, the floor is yours again.

STATEMENT OF HON. ROBERT S. MUELLER III, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Director MUELLER. Well, thank you Chairman Leahy, Ranking Member Grassley, and the other members of the Committee who are here today. I thank you for your introductions and for the opportunity to appear before the Committee today.

As you pointed out, my term as FBI Director is due to expire later this summer. However, in early May the President asked if I would be willing to serve an additional 2 years. Upon some reflection, discussion with my family, I told him that I would be willing to do so.

Now the President has asked that Congress pass the legislation necessary to extend that term and, if this Committee and Congress see fit to pass the required legislation, I look forward to continuing to work with the men and women of the FBI.

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As the Committee is well aware, the FBI faces a complex threat environment. Over the past year we have seen an array of national security and criminal threats from terrorism, espionage, cyber attacks, and traditional crimes. These threats have ranged from attempts by Al Qaeda and its affiliates to place bombs on airplanes, to lone actors seeking to detonate IEDs in public squares and on subways.

A month ago, as the Chairman pointed out, the successful operation in Pakistan led to Osama bin Laden's death, and yet created new urgency concerning this threat picture. While we continue to exploit the material seized from bin Laden's compound, we know that Al Qaeda remains committed to attacking the United States.

We also continue to face a threat from adversaries like Anwar al-Awlaki and Yemen, who are engaged in efforts to radicalize persons in the United States to commit acts of terrorism. And in the age of the Internet, these radicalizing figures no longer need to meet or speak personally with those they seek to influence. Instead, they conduct their media campaigns from remote regions of the world, intent on fostering terrorism by lone actors here in the United States.

Alongside these ever-evolving terrorism plots, the espionage threat persists as well. Last summer, there were the arrests of 10 Russian spies, known as "illegals," who secretly blended into American society in order to clandestinely gather information for Russia. And we continue to make significant arrests for economic espionage, as foreign interests seek to steal controlled technologies.

The cyber intrusions at Google last year, as well as other recent intrusions, highlight the ever-present danger from an Internet attack. Along with countless other cyber incidents, these attacks threaten to undermine the integrity of the Internet and to victimize the businesses and people who rely on it.

And in our criminal investigations, the FBI continues to uncover massive corporate and mortgage frauds that weaken the financial system and victimize investors, homeowners, and ultimately taxpayers. We are also rooting out health care fraud based on false billings and fake treatments that endanger patients and cheat government health care programs.

The extreme violence across our Southwest border to the South also remains a threat to the United States, as we saw with the murders last year of American consulate workers in Juarez, Mexico, and the shooting early this year of two Federal agents in Mexico. Likewise here in the United States, countless violent gangs continue to take innocent lives and endanger our communities, and throughout, public corruption undermines the public trust.

In this threat environment, the FBI's mission to protect the American people has never been broader and the demands on the FBI have never been greater. To carry out this mission, the FBI has taken significant steps since September 11 to transform itself into a threat-based intelligence-led agency.

This new approach has driven changes in the Bureau's structure and management, our recruitment, hiring, and training, and our information technology systems. These changes have transformed the Bureau into a national security organization that fuses the traditional law enforcement and intelligence missions. And as this

transformation continues, the FBI remains committed to upholding the Constitution, the rule of law, and protecting civil liberties.

Now, of course the FBI's transformation is not complete, as we must continually evolve to meet the ever-changing threats of today and tomorrow. And as I discuss the transformation of the Bureau, I must say I am uncomfortable about much of the attention that has been placed on me or put on me by reason of this being the end of my term. The credit for these changes goes to the men and women of the FBI who have responded remarkably to the challenges that I have laid out, both in the past and present.

Let me conclude by thanking the Committee on behalf of all FBI employees for your continued support of the FBI and its mission. The Committee has been an essential part of our transformation and its legislation has contributed greatly to our ability to meet today's diverse threats.

Thank you. I look forward to answering any questions you may have.

Chairman LEAHY. Thank you. Your full statement will be placed in the record.

[The prepared statement of Director Mueller appears as a submission for the record.]

Chairman LEAHY. My questions will be brief. You and I talk often, as you do with other members, and you have always been available. I remember when you testified at an oversight hearing on March 30 of this year. You talked about the terrorism threats facing our Nation. Your remarks, well-spoken and prepared, expanded on that topic today.

Tell us about the unique role the FBI plays in preventing and prosecuting terrorist activity as compared to our other intelligence and law enforcement agencies, all of which have a role. What is unique about the FBI?

Director MUELLER. Well, uniquely, the FBI has domestic responsibility, acting under the Constitution, the applicable statutes, and the Attorney General guidelines, to first of all identify those individuals who might be undertaking terrorist threats within the United States, along with our State and local law enforcement, the other Federal agencies.

We also have the responsibility for working with the intelligence agencies to identify threats from overseas that may impact the domestic United States, and to assure that we gather and analyze and disseminate that intelligence and efforts to thwart those attacks.

If indeed an attack takes place, obviously our responsibility then is to identify those persons responsible for the attack, gather the evidence against them, and pursue the case through indictment, conviction, and incarceration.

Uniquely, we have the responsibility—the broad responsibility—domestically for undertaking this particular aspect of the response against international terrorism, as well as against domestic terrorism, which often may well be overlooked.

Chairman LEAHY. And one of the things I talked with the President and others about, is the desire to have continuity in the national security team. There are a number of changes going on. Leon Panetta is leaving as CIA Director to become Secretary of Defense;

General Petraeus is coming in to the CIA; the head of the Joint Chiefs term runs out in the next couple of months and there will be a new head of the Joint Chiefs; we have nominations pending for Deputy Attorney General, and also a nomination pending for the Assistant Attorney General in charge of the National Security Division.

Now, in that team, I assume the FBI Director or your designee is a major part of the team. Is that correct?

Director MUELLER. I believe that to be the case, yes. Also, particularly Sean Joyce, the head of our National Security Branch, as well as myself, are both part of the team.

Chairman LEAHY. This is not a 9:00 to 5:00 job, I would assume. I suspect you probably get a few calls in the middle of the night.

Director MUELLER. We do. It's somewhat continuous. But that's part of the job.

Chairman LEAHY. You served the FBI for nearly 10 years. We've talked about a number of the things you've tried to reform in the Department and other things you want to upgrade. I know just a few weeks ago you were contemplating leaving as FBI Director. Since then, assuming this legislation passes, which I assume it will, what would you want to build on? Given two more years, what would be a top goal in your mind?

Director MUELLER. The areas of concentration—let me put it that way—for the next 2 years should continue to be terrorism, particularly in the wake of the death of bin Laden, the impact that will have on his adherents, his followers. Quite obviously, what is happening in Pakistan, what is happening in Yemen, what is happening in Somalia, that bears on the threats to the United States, along with domestic terrorism. That will continue to be a focus.

I will tell you that we will increasingly put emphasis on addressing cyber threats in all of the variations. Part of that is making certain that the personnel in the Bureau have the equipment, the capability, the skill, the experience to address those threats, and not just the cadre of individuals that we have to date who can address any of those threats, not just to the United States but around the world, but all those in the Bureau have a sufficient understanding of the cyber background to be able to work in a variety of programs and understand how those programs fit into the cyber arena.

We have done, I believe, a very good job in terms of advancing our information technology. We have to finish off the Sentinel project that has been ongoing for a number of years and has been the subject of discussion with this Committee, and I anticipate that we'll be coming to conclusion on that project in the fall.

In the meantime, we have kept up-to-date in terms of giving our agents, our analysts, and our professional staff the information technology tools they need to do the job, but we have to continue to be on the forefront, on the cutting edge of that technology.

In terms of legislation, one area which we have raised with this Committee, and that is what we call "going dark", where we have a court order, whether from a national security court, the FISA court, or a District court, based on probable cause to believe that somebody is using a communications device to further their illegal goals. Often now, given the new technology, the persons, the recipi-

ents, the carriers of those communications do not have the solution, the capability, to be responsive to those court orders. We have to address that increasing gap, given the new technologies, through legislation. So, I would anticipate that that would be an issue we'd want to address in the next couple of years.

Chairman LEAHY. Well, thank you. I'm going to put in the record letters of support from a number of people at the National Fraternal Order of Police, the National Association of Police Organizations, and so forth. But one I'm very pleased to put in is a statement from John Elliff, who is sitting behind you a couple rows back, a former detailee to my staff.

But the reason I especially wanted to note Mr. Effiff's statement is that he testified at the 1974 hearing on the bill creating the 10-year term for Director. I wasn't a Senator. I was running for the Senate. I was a prosecutor at the time. But Mr. Elliff helped me a great deal once he came here as a detailee, with an institutional memory that is extraordinary.

[The letters appear as a submission for the record.]

Chairman LEAHY. I know that the Deputy Majority Leader has to leave for something else. Do you want to just make one remark? And I thank Senator Grassley for that.

Senator DURBIN. It has been my honor to work with Director Mueller for the last 10 years. You are an honest, honorable man and you've dramatically transformed our Nation's premier law enforcement agency. I'm glad that the President recognizes that talent and America is fortunate that you are willing to continue to serve. I fully support this extension.

Thank you, Mr. Chairman.

Director MUELLER. Thank you, Senator.

Chairman LEAHY. Senator Grassley.

Senator GRASSLEY. The President has stated that he believes that continuity and stability at the FBI is critical at this time. He emphasized "at this time". As I said, I'm not in support of extending your term just because the President has many leadership transitions occurring at the same time. There are things a President can control, like when to change leadership at DoD and CIA, and things the President cannot control, like the 10-year anniversary of 9/11 or the recent death of bin Laden and the revolutions in the Middle East.

So my first question, Director Mueller, would you agree that the threat environment alone is sufficient reason to extend your term for 2 years?

Director MUELLER. I leave that determination to others. As you point out, no one is indispensable. I do agree that during a transition there is time spent on that transition process. We certainly have been spending time on it. But to the extent that either I or somebody else should be part of that team, I leave that to someone else. The President asks that I stay. As I said, based on—after reflections and talking to my family, I decided to do that.

I will tell you that, as I said, nobody is indispensable. Some of the calculus was, should I really stay? Often the person who is in that position is the worst person to make that decision. So I did go out and try to talk to other persons, both in the Bureau and outside the Bureau, to get a more objective view as to whether or not

it would be the best thing for the agency for me to stay for this time, even though the President asked that that be done.

Senator GRASSLEY. Well, the legislation on your position is meant to, and for the last 30 or 40 years, give level of independence to the Director, but at the same time, recognize the President could fire a Director for any reason. I'm not sure that that's fully understood, so I ask these questions of you: as Director of the FBI with a fixed term, under what circumstances can the President remove you?

Director MUELLER. I think I serve at the pleasure of the President.

Senator GRASSLEY. OK. Would you support changing the law so that the FBI Director could be removed only for cause, so you'd have greater independence?

Director MUELLER. I believe and support the law, including the 10-year term limit.

Senator GRASSLEY. OK. Would you support legislation requiring the President to provide notice to Congress 30 days prior to removal of an FBI Director, similar to the way the law requires removal of an Inspector General?

Director MUELLER. I really have not thought about that, Senator.

Senator GRASSLEY. OK. The FBI's Intelligence Analyst Association supports the President's request to extend your term. The FBI Agents Association appears to me to be a little less enthusiastic. If you're extended, how would you intend to bridge a gap—you might not agree that there's a gap, but I guess that's the basis of my question—and manage the agents who believe you are creating a double standard by extending your tenure, while you limit theirs to your up-and-out policy?

Director MUELLER. Well, I do believe that there is—I understand the concern on certain agents' part. I do think there's—it's a different issue. The issue of having a maximum time for service as a supervisor in the Bureau was a part of a plan to develop leadership. After looking at how you develop leaders in the military, how you develop leaders in corporate America, and how you give incentives and push persons, the best leaders in the organization, to the top.

We had had some problems with that in the past and, after much discussion, the decision was made to enact this. It was one of the hardest decisions I probably had to make as a Director during this period of time. But it has, in my mind, had the beneficial effect, although we did lose some very, very good supervisors who decided either to step down or retire.

I have, over the years, explained the thinking behind the decision. I have, over the years, sought out opportunities to discuss the import and impact of that decision, and I will continue to do so.

Senator GRASSLEY. Thank you.

Chairman LEAHY. Thank you very much.

Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Director Mueller, I want to start off today by associating myself with Senator Durbin's remarks and by commending you for your tremendous service to this nation. It is in large part because of your tenacity and leadership that we haven't seen another major

terrorist attack on our soil since 9/11. That is no small achievement, and I want you to know that I am grateful for all you've done to reshape the FBI's counterterrorism strategy.

But I don't think it should come as a surprise that your Department has been heavily criticized over the last 10 years for significant misuse of the Department's surveillance powers and for other major civil liberties violations. I think you've done an extraordinary job, but I also believe that term limits exist for a good reason. Term limits are like sunshine laws; they force us to bring in new leaders who take a fresh look at things. That is almost always a good thing.

I'd like you, if you could, to take a minute to talk about some of the most controversial aspects of your tenure or of the FBI during your tenure. How do you think you've addressed the problems that arose with the FBI's misuse of surveillance authorities granted under the PATRIOT Act and the Foreign Intelligence Surveillance Act? Specifically, I would like you to address the concerns raised by the Inspector General about the Department's abuse of national security letters.

Director MUELLER. Let me separate national security letters out from the general discussion of surveillance. I do not believe that we have abused our powers in any way, with maybe one or two isolated examples and the additional authorities that have been given us under the PATRIOT Act over the years, and I don't believe the IG has found such substantial misuse.

With regard to national security letters, we did not do what was necessary to assure that we were in compliance with the applicable statutes. It was brought to our attention by the Inspector General. As I know you were aware, national security letters enable us to get not content, but information relating to the existence of a communication. There was a statutory framework for that and we should have set up a much more thorough compliance program to assure that we were dotting the i's and crossing the t's, and we did not.

As soon as we learned of the IG's scrutiny on this and the problems that were pointed out, we moved to fix them. The first thing we did, is make certain we had new software capability and data base capability that assured that all of our agents, in seeking national security letters, will have given all the information that is required under the statute. We put out comprehensive guidance to the field and additional training. We assured that national security letters are signed off on by the chief lawyer in each of our Divisions.

But perhaps as important if not more important, is we set up a compliance program to address not just security letters, but other areas such as national security letters where we could fall into the same pattern or habits. So the national security letters, I believe we addressed appropriately at the time and it was used as a catalyst to set up a compliance program that addresses the concern in other areas comparable to what we had found with national security letters.

Senator FRANKEN. In addition to those concerns, a number of civil liberties groups have raised serious questions about the FBI's misuse of the material witness statute, mishandling of the Ter-

rorist Watch List, infiltration of mosques, and surveillance of peaceful groups that have no connection to criminal activity. If your term were extended, do you believe that you would be in a position to give these concerns a fresh airing without being mired in the past?

Director MUELLER. I am not certain it needs a fresh look because I am very concerned whenever those allegations arise. I will tell you that I believe, in terms of surveillances of religious institutions, we have done it appropriately and with appropriate predication under the guidelines and the applicable statutes, even though there are allegations out there to the contrary. I also believe that when we have undertaken investigations of individuals expressing their First Amendment rights, we have done so according to our internal guidelines and the applicable statutes.

So whenever these allegations come forward, I take them exceptionally seriously. I make certain that our Inspection Division or others look into it to determine whether or not we need to change anything. I will tell you that addressing terrorism and the responsibility to protect against attacks brings us to the point where we are balancing, day in and day out, civil liberties and the necessity for disrupting a plot that could kill Americans. It's something that we keep in mind day in and day out.

The last thing I would say is, as our agents go through our training classes, the importance of adhering to the Constitution, civil liberties, is drilled into them day in and day out. Every agent—and this was established by Louis Freeh, my predecessor—goes through the Holocaust Museum before they become a new agent to understand what can happen to a police power that becomes unreigned and too powerful. So, we take that and those allegations very seriously.

Senator FRANKEN. Thank you.

Mr. Chairman, my time is up. I would just like to say that there are exceptions that prove rules, and these are, I think, a unique set of circumstances with the new CIA Director, the new Defense Secretary, and Admiral Mullen retiring. I should note that President Obama could nominate a new Director who would be there for 10 years, and by extending you for 2 years, he may not be the President. I think that bears mention. Thank you.

Chairman LEAHY. Thank you very much.

Dr. Coburn.

Senator COBURN. Director Mueller, first of all, let me thank you for your service.

Chairman LEAHY. Is your microphone on?

Senator COBURN. Yes, it is.

Chairman LEAHY. OK.

Senator COBURN. I think it is. The light's on, so we'll try that.

We're going to hear testimony in the next panel about some questionable constitutionality of what we're trying to do in meeting the President's request. I have some concerns about that because, if in fact there can be a legal challenge to what we're doing based on previous statutes—and let me give you an example.

With the 2005 extension to the PATRIOT Act, we had an additional requirement on 215 orders for certain sensitive business records, such as library patron lists, book sales, firearm sales

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records, and tax return records that are relevant to terrorism investigations. They can only be obtained by the approval of you, your Deputy Director, or the Executive Assistant Director for National Security.

Could you envision a questionable constitutional challenge to a Section 215 order that was approved by yourself during your 2-year extension, and could that be related to the possible unconstitutionality of this extension legislation?

Director MUELLER. I would say at the outset that I'm not a constitutional scholar.

Senator COBURN. Nor am I.

Director MUELLER. And I have heard nothing in my discussions, with the Department or otherwise, of a constitutional issue that would make that a problem down the road. If that were a substantial problem quite obviously then I would be concerned, but I have not heard that to be the case.

Senator COBURN. Well, my hope would be that after your testimony, you'd have somebody here to listen to the second panel.

Director MUELLER. And I do. Absolutely.

Senator COBURN. Because I have some concerns. I have no objection to you continuing in this position at all, but I do have concerns that we could get mired in court battles over a questionable constitutional challenge on this that could actually make you ineffective in carrying out your job.

With that, Mr. Chairman, I have no other questions.

Chairman LEAHY. Thank you very much.

Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. Welcome, Director. It's good to see you. Thank you for all your good work.

My question is really, I remember when we met earlier at the FBI about some of the challenges you face, particularly I'm very focused on some of the white collar crime investigations, as you know, the resources necessary for those, and how that played in with the necessary steps you had to take after 9/11 to shift resources over to investigating terrorism. So with that in mind, what do you see as the biggest challenges facing the FBI over the next 2 years?

Director MUELLER. Quite obviously, it's a continuation of addressing the threat from terrorism, both international terrorism and domestic terrorism, and increasingly in that area is the radicalization of individuals over the Internet, where the radicalizers can be offshore and the individuals can be in their bedrooms here in the United States. They need not meet or have any other personal contact, but persons can be radicalized through the Internet.

I mentioned before the cyber—the increase of cyber as a mechanism for conducting—Internet mechanism for conducting all sorts of crimes, but also it being a highway to extracting our most sensitive secrets or extracting intellectual property from our commerce. We, as an organization, need to continue to grow the capability of addressing that arena in the future.

From the criminal perspective, making certain that we minimize whatever crime can come from south of the border in the South-

west border area, and of course as you point out we have still a backlog of mortgage fraud cases and substantial white collar criminal cases that we are assiduously working through.

Senator KLOBUCHAR. And so you're concerned about budget cuts that could affect local law enforcement that have been taking up some of the slack here?

Director MUELLER. I do. And if you talk to State and local law enforcement, you understand their concerns in terms of budget cuts all the way down the line. I think we're all in agreement that we are much more effective working together. Consequently, for all of us the increase in task forces where we combine our areas of expertise and knowledge is going to have to be at least a partial answer to the budget cuts that we see coming down the road.

And always my encouragement to the appropriators is that, in giving monies, give monies in such a way that that's an incentive for us to work together in task forces as opposed to a disincentive for persons to go and start their own look at a particular area.

Senator KLOBUCHAR. Exactly. And as you and I have discussed, we've had some tremendous success in Minnesota with some of these combined efforts. You brought up the cyber crime issue. I think it's very important that we start getting something done in this area and start to be sophisticated in our laws as those that are breaking them.

I've heard that because of new technologies and outdated laws, there's a growing gap in the FBI's ability to get court-ordered information from communications and Internet service providers. In prior statements you have referred to this as "going dark". Could you talk more about this problem and how you see we could help to fix it?

Director MUELLER. Yes. I did refer to it briefly before. Where we have the authority to go to a court and get a court order directing that a communications carrier of some ilk provide ongoing communications to the Bureau in a terrorism case, a white collar criminal case, a child pornography case—could be any number of cases—what we increasingly find, given the advent of all these new technologies, is that the carrier of that communication no longer, or does not have the solution in order to be responsive to that court order.

So my expectation is that legislation will be discussed, and perhaps introduced that would close that gap for us. So we cannot afford to go dark in the sense that we have a legitimate authorized order from a court directing a communications carrier to provide us with certain conversations related to criminal activity and not be able to get those conversations because a communications carrier has not put in place a solution to be responsive to that court order.

Senator KLOBUCHAR. That makes a lot of sense.

Two things I just wanted to mention at the end. First, I want to thank the Bureau for the help with the synthetic drug issue. Senator Grassley, Senator Schumer and I have been working on this. Senator Grassley has a bill to include some of these new synthetic drugs. We had a kid die from a synthetic drug in Minnesota and a number of people get sick. I don't think people realize the power of these drugs and the increase we're seeing in the use of those drugs.

Second, I want to thank you for your having Kevin Perkins at a hearing that I held earlier on the ways we can help law enforcement find missing children. This is the issue of trying to be as narrow as we can in getting exception to the tax laws so that you don't have local law enforcement trying to find a kid when it is in fact a family abduction, and then you have one arm of the government, the IRS, that knows exactly where that kid is, where that family is, and trying to put an exception in place that doesn't hurt privacy interests but is, like many of the exceptions that are already in that law, so law enforcement only can access it.

So, thank you.

Director MUELLER. Thank you, ma'am.

Chairman LEAHY. Senator Lee, I understand the questions have been asked that you were interested in.

Then Director Mueller, we'll excuse you with our thanks for your service. But I should also thank Ann Mueller.

Director MUELLER. Yes.

Chairman LEAHY. Because she doesn't get thanked enough for the support she gives you, as do your daughters in this. I appreciate that very much. I appreciate that she said yes to the President's request, too.

Director MUELLER. Thank you. Thank you. She certainly appreciates that acknowledgement. It's much—deserved.

Chairman LEAHY. Well, she's a remarkable woman, as you know. I appreciate that.

We'll take a three- or 4-minute break while we set up for the next panel. Thank you.

Director MUELLER. Thank you.

[Pause]

Senator KLOBUCHAR. OK. Are we ready to swear in the next panel? If you could stand, please.

[Whereupon, the witness was duly sworn.]

Senator KLOBUCHAR. Thank you.

It's good to have all of you here for a second panel. I'm going to introduce our first witness here. This is Jim Comey, who served as the Deputy Attorney General of the United States from 2003 through 2005. Prior to becoming Deputy Attorney General, Mr. Comey was the U.S. Attorney for the Southern District of New York. He is a graduate of the University of Chicago Law School, and is now a member of the Management Committee at Bridgewater Associates.

I should tell everyone assembled here that Mr. Comey and I were in the same law school class. We graduated together. We've known each other for a long time. I think maybe our classmates would have not expected that we would be sitting in these roles back when we graduated in 1985. But it is certainly great to have him there today.

Mr. Comey.

STATEMENT OF HON. JAMES B. COMEY, FORMER DEPUTY ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. COMEY. Thank you, Senator Klobuchar. Senator Grassley and distinguished members of this Committee, thank you for invit-

ing me to testify here today. It is great to be back in this room before this distinguished Committee, and especially to offer my voice in support of an extension of Director Bob Mueller's term for 2 years.

I know Bob Mueller very well and believe he is one of the finest public servants this Nation has ever seen. In his decade as Director, I think he has made huge strides in transforming the FBI and has contributed enormously to the safety of the American people.

When I was Deputy Attorney General during those 2 years, I spoke to Bob Mueller nearly every day and I watched as his remarkable combination of intellect and tenacity drove the FBI's counterterrorism efforts. Because the Director's standards were so high, everybody's work had to be better.

His relentless probing, which was rooted in an almost encyclopedic knowledge of the enemy and our capabilities to respond to the enemy, rippled through the FBI and the rest of the national security community. Everyone around Bob Mueller knew their work had to be good because he would test it, he would compare it to other work he had seen, and he would press very, very hard.

The President—now two Presidents—could count on Bob to offer sound advice and to prudently do what was best to protect the country. I don't think there's ever a great time to change FBI Directors because something is always lost in a transition as the new Director climbs the learning curve and learns about the threat, and also about our capabilities to respond to the threat.

But I think there are bad, and even potentially dangerous, times to change an FBI Director, and I think that this is one of them. I no longer have access to threat intelligence, but common sense and the publicly available information tells me that the combination of the successful raid on bin Laden's compound and the approaching tenth anniversary of 9/11 make this an unusual and unique threat environment.

In the middle of that, as Senators have mentioned, the leadership is changing at two of the pillars of our National security community, at the CIA and Defense. I think at this moment it makes good sense to ask Bob Mueller to continue his leadership of the organization, which is primarily responsible for protecting our homeland from terrorist attack.

To the extent that I have seen criticism of this idea, it has been focused not on the man, but on the purpose of the 10-year term, which I support very much, to reduce the risk of abuse by a long-serving and too-powerful FBI Director.

But I think in this circumstance the man is the answer to that criticism. There is no one that I have ever met who is better suited to the responsible use of power than Bob Mueller. I know firsthand his commitment to the rule of law, and frankly I believe he is what we wish all public servants could be. I think there are no politics in this decision, just as there are no politics in Bob Mueller. This is as he is: only about doing what's in the best interests of our country. I join my fellow Americans in being both grateful and awestruck at his willingness to continue to serve and sacrifice for our country.

Thank you again for the opportunity to discuss this important issue, and I look forward to answering any questions you might have. Thank you.

[The prepared statement of Mr. Comey appears as a submission for the record.]

Senator BLUMENTHAL. Thank you very much. Now I'd like to introduce Professor Van Alstyne, who was appointed Lee Professor of Law at the Marshall Wythe Law School at the College of William & Mary. In 2004, he previously served in the Civil Rights Division at the Department of Justice and has appeared before this Committee several times.

Professor.

STATEMENT OF WILLIAM W. VAN ALSTYNE, LEE PROFESSOR OF LAW, WILLIAM & MARY LAW SCHOOL, WILLIAMSBURG, VA

Professor VAN ALSTYNE. Thank you very much. I have submitted a statement and I'll just summarize parts of it.

First, I would like to say hello to Senator Grassley particularly, since it's been some time since I was before this distinguished Committee but remember his own participation well from prior hearings. I look forward also to saying hello to Senator Leahy, and even Senator Hatch, but I understand they're just not with us today.

I've submitted my statement. I want, briefly, to simply summarize it and offer what may seem to be a bolder view than is even reflected in my remarks with respect to which I have no doubt of the constitutional propriety of the proposed extension.

It is odd, but as I've thought about this more, rather, I've tentatively concluded that the only reasonable doubt to have is whether or not it's within the authority of Congress to put an outside limit on the service of a purely executive officer.

They may abolish the office by legislation—don't misunderstand me—but I'm now in doubt as to whether they can actually limit the term of service because if it is exclusively an executive office, as I regard this office to be for reasons I've put on paper and I will shortly summarize, then in my own view he necessarily—or she—serves at the pleasure of the President.

So long as that service is deemed acceptable to the President in the delegation of that modicum of executive power which the President lodges, as permitted by an act of Congress, in the subordinate executive official, I've come to doubt seriously the authority of Congress to put a limit on the service of that person so long as they continue to enjoy the confidence of the President.

So my position is not merely that the extension will clearly be constitutional and well-advised given the President's express confidence in the officer who now holds it, but has come to the conclusion that's not even stated in my memorandum. I'm not at all confident that Congress has the authority to restrict the term in which one who has been approved by the Senate, once nominated by the President and who holds a purely executive position under the direction of the President, has the authority to limit the number of years which they may hold that office as long as the President is pleased to retain that person.

Now, as we are mutually aware, briefly to summarize this somewhat maverick position of mine—I'm sure you've not heard it previously—when incoming administrations come in and they represent a different political party, it is customary for the President to request the resignation of many executive officials. He may sometimes accept some of those letters of resignation and that terminates their particular holding of the office. It opens the office for fresh nominations to be submitted for those respective posts to come before the Senate for confirmation or rejection. I completely understand that and completely approve it.

On the other hand, the President, often for good reason, declines to accept the letter of resignation that he himself has requested. Being satisfied with the continuing performance of the officer who is serving in a purely subordinate executive capacity, then the resignation is politely refused and so the individual stays on. Now, don't misunderstand me. It may be the individual may resign the post, but if the resignation is not accepted then they continue to answer the responsibility of the office until something else happens.

Now, if one believes the President is acting corruptly in refusing a letter of resignation, that is for the Impeachment Committee of the House to decide, in whether or not the President has acted with some corrupt motive worthy of being deemed an impeachable offense under that clause. But it may seem strange to this group. It is, rather, that I have no doubt of the constitutionality of the proposed modest extension of the current Director's purely executive service. It is, rather, frankly, ladies and gentlemen, that I've come to doubt the authority of Congress to restrict the President so long as he has confidence in those who are serving in a purely subordinate executive capacity.

Now, I move, briefly, to the mainstream of my remarks. It is quite different with regard to the delegation of legislative authority. To the extent, for instance, that Congress wants to vest a certain interstitial lawmaking authority in the independent agency, such as the National Labor Relations Board, then to the extent that the NLRB itself makes law, albeit on a mini scale, they make substantive regulations. They do not hold hearings.

The regulations are published in the *Federal Register* and they become the operative law that may now describe more finely in a retail fashion what will be deemed to constitute, for instance, and unfair labor practice under the Wagner or Taft-Hartley or LMRA acts.

So they are acting in a quasi-legislative capacity in that regard. Their authority to do so is delegated by Congress, as we mutually know. So long as Congress identifies appropriate criteria according to which they may make those substantive rules and provides for the substantive reviewability to say whether they've acted within those boundaries in the Federal courts, then that degree of delegated legislative authority is within the prerogative of Congress.

But since the NLRB and similar agencies are also lawmaking bodies, obviously Congress may determine the terms of those who will serve in that quasi-legislative capacity. Now I go back to my main observation. The Constitution, among other things, assigns to

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the President the power that he shall take care faithfully to executive the laws of the United States.

In discharging that obligation, Congress has provided him with certain services, certain help. One is the Office of the Attorney General, who serves at the pleasure of the President. Another is the Federal Bureau of, what, not "legislation," not "adjudication," but of "investigation." The FBI. It's director serves as the director of the investigations conducted under the authority granted by Congress to the Department, established a long time ago.

It is purely an executive function. It is impossible for the President of the United States to acquit himself and his manifold Article 2 obligations, including among them that he shall take care that the law shall be faithfully executed, unaided.

So Congress has provided him the means, and they do so under Article 1, Section 8, the ultimate clause. It is called the Necessary and Proper Clause, sometimes called the Elastic Clause, that they shall have power to enact all laws necessary and proper to carry into execution the foregoing powers, their own legislative authority, and all other powers vested in the government of the United States or any office or department thereof. That's the office of the presidency.

So Congress has passed a variety of laws helpful to the President in his capacity to carry out his obligations. The earliest of these were those that established the respective offices of the Secretary of State and of Defense. Am I clear? They are purely executive officials. They are today. The Secretary of State represents the United States in foreign relations. That person is the deputy of the President in the power to make treaties.

Now, the treaty does not become effective, as we all recognize, until consented to by the Senate, not even including the House, but they are made under the authority of the President. Indeed, there are lesser kinds of executive agreements that I'm sure we mutually recognize that do not require even the consent of the Senate. But the duty of the authority to make the treaty, to dicker with a foreign country, whether on matters of trade or defense alliances and things of that kind, that is an executive power. It's established in Article 2. Then under the Necessary and Proper Clause, this Congress has seen fit to aid the President in the efficient discharge of that power and that duty by providing a Department of State. It then establishes an office called Secretary of State. The President then nominates and, with the advice and consent of the Senate, approves or does not, and that is that. That's the end of the story in my respectful constitutional view.

Senator BLUMENTHAL. Thank you very much.

Professor VAN ALSTYNE. Congress may not require the dismissal of the Secretary, and in my view that I now take, I don't believe that the Congress can set a limit to the service of any individual. As long as the person occupying the position, having been nominated and approved by the Senate of the United States, retains the confidence of the President, then indeed they should be able to retain the office and discharge the confidence that the President places in him. For those reasons and those that I've reflected in my memorandum, I have no doubt about the constitutionality of continuing Mr. Mueller in service, and I have come to what may seem

to be the novel and somewhat more radical view that I even doubt whether or not the more generous limit itself is within the authority of the Congress itself to stipulate and enforce.

Senator BLUMENTHAL. Thank you.

Professor VAN ALSTYNE. I thank you for your time.

Senator BLUMENTHAL. Thank you very much.

[The prepared statement of Professor Van Alstyne appears as a submission for the record.]

Senator BLUMENTHAL. We will now turn to Professor Harrison, who is a graduate of the University of Virginia Law School. He served for 10 years in Department of Justice in a variety of positions and he's currently James Madison Distinguished Professor of Law at the University of Virginia Law School. Thank you for being here, Professor Harrison.

STATEMENT OF JOHN C. HARRISON, JAMES MADISON DISTINGUISHED PROFESSOR OF LAW, UNIVERSITY OF VIRGINIA SCHOOL OF LAW, CHARLOTTESVILLE, VA

Professor HARRISON. Thank you, Senator.

Senator BLUMENTHAL. You might want to turn on your microphone.

Professor HARRISON. There we go. The red light? Yes, sir. Thank you.

Director Mueller is a distinguished public servant, so it is with some hesitation that I say that I think that this mode of extending his term for 2 years would be unconstitutional because it would be an attempt by Congress to exercise, directly through legislation, the appointments power.

But the Appointments Clause of Article 2 provides that officers of the United States, including, for example, the Director of the FBI, are appointed either by the President with the advice and consent of the Senate, or if they're inferior officers, which I think the Director of the FBI is not, by the President alone, by head of Department, or a court of law. Congress may not appoint officers. That is quite clear from the Supreme Court's cases.

It can't do so through its own officers, it can't do so directly through legislation. But a statute like S. 1103 would, in a situation in which an office otherwise would be vacant, cause a particular individual, through a legal act of Congress, to hold that office, to be the incumbent of that office.

That is an appointment and that is something that Congress cannot do. That has to be done through the Appointments Clause by the President, with the advice and consent of the Senate for a superior office of the United States. So just as a formal matter, a statute like this would constitute an appointment and would be inconsistent with the Appointments Clause.

It's also true, I think, that something like this is inconsistent with the principles underlying the Appointments Clause which are conjoined. There are two of them, primarily: power and responsibility, which always go together. The Appointments Clause is designed so that the President's responsibility for all appointments to superior offices is absolute. Only the President can nominate, only the President can appoint. He has to have the concurrence of the Senate, but he alone must do either one of those. He has what

amounts to an absolute veto, and that means that he has absolute responsibility. That's true with respect to appointments. It's not true with respect to legislation.

The President has an important role with respect to legislation, but he does not have absolute responsibility for every particular part of a bill that he signs because he may decide that it's a compromise and that he has to accept parts he doesn't like in order to get parts he does like. That's how legislation works. That is not the way appointments work. The Appointments Clause is designed to focus responsibility strictly on the President. Doing it through legislation can relieve him of that responsibility. It may not in any particular case, but it can in principle.

It's also true that a Congressional exercise of the power to appoint is an intrusion into the power of the President. That is the flip side of responsibility. Again, the two always go together. If the Congress is appointing, the President is not appointing.

There is a 1994 opinion from the Office of Legal Counsel that goes into this matter and that takes the position that a direct Congressional appointment which otherwise would be troublesome, at least, is permissible as long as the President can remove the officer at his pleasure, that there is in effect a constitutional remedy for the intrusion into the President's appointment power.

I think that argument isn't persuasive because it assumes that the power to remove an officer is, practically speaking and for political purposes, the equivalent of the power to decide not to reappoint that officer. But as a political matter, as is well known, that is not true. It is certainly not true with respect to U.S. Attorneys.

Firing a U.S. Attorney, although within the President's power, is a politically much more controversial act and hence a politically much more costly act for the President than is deciding not to reappoint a U.S. Attorney. The power to remove is not a complete substitute for the power not to reappoint, and so the reasoning that as long as the President can remove a Congressional reappointment is permissible I think is unpersuasive. So as a matter both of the form of the Constitution and the underlying principles, Congressional appointment, which this amounts to, is not consistent with the Constitution.

Another important point I want to make is, there is a constitutional way to accomplish this, which is through a combination of legislation providing for a new 2-year term and a new nomination, confirmation, and appointment of Director Mueller pursuant to the Appointments Clause.

The other point I want to make and the point on which I'll conclude is that, as Senator Coburn's question earlier indicated, deviations from the Constitution, as judged by the courts, can be highly disruptive and have been highly disruptive from time to time.

In 1978, Congress created a new system of bankruptcy courts. Four years later, the Supreme Court decided that they were inconsistent with Article 3 and Congress spent the next couple of years trying to come up with a way to solve the problem and keep the bankruptcy adjudication system operating.

More recently, a similar problem under the Appointments Clause. In this case, the disruption created by a single District

Court opinion happened with respect to the transition from the Federal Savings & Loan Insurance Corporation to the Office of Thrift Supervision.

More recently, Congress has had to restructure the administrative law judges for the Patient & Trademark Office because it was discovered that their mode of appointment was inconsistent with the Appointments Clause. This can be highly disruptive and there is an easy way, a constitutional way, to avoid the dangers. Thank you.

[The prepared statement of Professor Harrison appears as a submission for the record.]

Senator BLUMENTHAL. Thank you to all the members of the panel. I'll begin with a question to Professor Harrison. You discuss the *Benny* case in your written testimony—you haven't just now—and you distinguish it based on the idea that the acts at issue in *Benny* applied to the entire system, all the bankruptcy court judges as opposed to a single individual. Aren't the principles, though, in *Benny and Shoemaker* still applicable here?

Professor HARRISON. Well, two things, Senator. First, of course, *Benny* is a Ninth Circuit decision and so its persuasive authority is elsewhere, its precedential authority only in *Benny*. But as to the difference between a large reappointment and the reappointment of a single individual, the Supreme Court itself in the *Weiss* case, which is another Appointments Clause case, indicated that at least for some of the justices—and I think some did not agree with this—there is a difference between legislation that, as the bankruptcy legislation tried to fix the problem that the Supreme Court discovered in *Northern Pipeline*, the legislation that operates across a wide range of officers might not be an appointment, an impermissible exercise of the appointments power, whereas, again, this is what *Weiss* suggested—whereas, one that operates as to a single individual might be, that the numbers involved are different.

And I don't agree with that but I can understand it, thinking that a larger class is more like legislation, whereas the core of the Appointments Clause itself is the appointment of a single individual. But here we're dealing with a single individual. So insofar as *Weiss* indicates that that's one of the indications of what constitutes an appointment, I think the fact that it's just one person makes it more problematic.

As to *Shoemaker*, let me say that *Shoemaker*, I think, is a case that creates a problem for this mode of proceeding because *Shoemaker* is a case from the late 19th century—is one of the cases that is regarded as standing for the proposition, and the court has recently suggested that it stands for this proposition, that statutory changes in the duties of an officer, if they go so far as in effect to create a new office, can require a new appointment. So actually, although *Shoemaker* creates some room for Congress to operate when it changes the duties of an officer, those two—the officers there were—no need to—I'm sorry. No need to get into that. Congress has some leeway there.

But *Shoemaker* pretty clearly stands for the proposition that there is a point beyond which Congress cannot go, and I think one point beyond which it cannot go is a simple extension of the term. Because again, *Shoemaker* is about changing the duties of an office

not operating on the term itself, and even there the court indicated it is possible to go to the point where the office is so changed that a new appointment would be required.

Senator BLUMENTHAL. And in *Shoemaker*, the nature of the change in duties and the nature of the office was very different from what we have here, wasn't it?

Professor HARRISON. In *Shoemaker* it was a quite small addition to the duties of the offices that were involved, that involved creating Rock Creek Park. It was, A) small, and B), in the Supreme Court's own terms it was germane to the office that already existed.

Whereas, what we're talking about here is a change in a fundamental feature of the office, which is its term, and is much more like an appointment than the change that was involved in *Shoemaker*, precisely because it causes someone who otherwise would not be in the office at all to continue to be in the office. This is very different from what the Supreme Court said was all right in *Shoemaker*.

Senator BLUMENTHAL. But wouldn't it be fair to say that we have no direct, clear guidance from the Supreme Court at least on the issues at stake here?

Professor HARRISON. Not clearly here. The main point on which I think we can say that *Shoemaker* can be relied is that legislation that is not in form of an appointment nevertheless can run afoul of the Appointments Clause. On that point, I think *Shoemaker* is reasonably clear. Exactly what kind of legislation does that, we don't know as well. That's correct, sir.

Senator BLUMENTHAL. Thank you.

I'm going to turn to Senator Grassley.

Senator GRASSLEY. Thank you all for your testimony. Mr. Chairman, before I ask questions I have a paper from the Congressional Research Service that I'd like to put in the record. Also, three opinions on the topic issued by the Office of Legal Counsel, DOJ, that I'd like to have put in the record.

Senator BLUMENTHAL. Without objection.

[The prepared statement of the Congressional Research Service appears as a submission for the record.]

[The prepared opinions from the Office of Legal Counsel, Department of Justice appears as a submission for the record.]

Senator GRASSLEY. OK. I'm going to start with Professor Van Alstyne, your written testimony states that legislation extending the term of a sitting appointment is clearly constitutional. Conversely, Professor Harrison argues that such legislation should pass absent a new confirmation hearing for the appointment. A court could find invalid any reported exercise of government power by the Director of the FBI serving pursuant to the statute, like 1103.

My first question is, do you agree with Professor Harrison's statement, and if not, why not?

Professor VAN ALSTYNE. Well, for reasons I thought I'd made clear in my opening remarks, but let me say this as well to amplify on those statements. Even if I agreed with Professor Harrison, as I emphatically do not at all, it seems to me that insofar as the proposal has come here and it carries an expression by the President

of his continuing confidence in the Director who is now the incumbent, to the extent that the President has already expressed his confidence, a compatible view with this would be that if this bill is reported favorably then it carries along the President's approval of continuing him in his office. It then becomes a nomination in its own right and consistent with the approval of the Congress of this particular bill that would confirm the appointment, so that any residual doubt, which I do not personally entertain, would be eliminated. That would be if I agreed with Professor Harrison.

I still think it would be quite arguable that, given the message from the President that he wants Mr. Mueller to continue to occupy this office, then by approving the bill where the President expressed his confidence in this person, that's effectively a nomination and would become effective with the approval of this bill for the new term.

But I don't think that's a necessary way of looking at it. Indeed, for reasons I've already shared with you, I now seriously entertain doubts. I understand the background of the notion of the term limit. Mr. Hoover was the original Director of the FBI. He was continued under administration after administration after administration.

Now, I do remember a little bit. Perhaps, Senator Grassley, and perhaps if he were here Senator Hatch, some are too old—one or two old-timers might remember that Mr. Hoover exerted unusual power and it became almost an extortionist power at some point. Indeed, he would sometimes communicate to the President of the United States and some Senators of this Senate privately that he had certain information about certain misconduct on their part, but—they could trust to his discretion, it would never get out. This was effectively, de facto, extortion by the Director.

The Director also had these peculiar habits. He was a cross-dresser. He dressed up in women's underwear, as it were, and he was seen disporting himself in that respect. It was a terrible scandal. The difficulty with Mr. Hoover was that he was continued administration after administration, partly because, gentlemen, I put it to you candidly, if you look at the history of this affair and the longevity of the particular Director, the original first Director, he became very powerful and, by a threat to both the President and to members of this body, was able to avoid the idea that he would simply be asked to resign or fired. Under the circumstances, he induced a certain fear.

That is the trigger for the original bill that set this 10-year period. I understand and I appreciate that very much. It was, I think—while Mr. Hoover, in the early years of the FBI, was an admirable person, he became inflated with his own power and because of his very peculiar sexual tastes abused his office and had a horrendous private life. But he retained his office, frankly through the threat power that he wielded informally with regard to members of this body, members of the House of Representatives, and frankly with the President of the United States. They would not dare touch him, so he lingered on through administration after administration.

Senator GRASSLEY. My time is up, Mr. Chairman.

Professor VAN ALSTYNE. I beg your pardon.

Senator GRASSLEY. My time is up.

Professor VAN ALSTYNE. I merely meant to suggest that that was the origin of wanting to put a limit on these things.

Senator BLUMENTHAL. Thank you. Thank you very much.

Professor VAN ALSTYNE. And I respect that limit, though I might have my doubt about the limit itself rather than the validity of continuing the appointment under an extended term.

Senator BLUMENTHAL. The time of the Senator from Iowa has expired. I'm going to turn to Senator Lee.

Professor VAN ALSTYNE. Certainly.

Senator LEE. Thank you, Mr. Chairman.

I've got a question for Professor Van Alstyne. So, Professor Harrison has acknowledged, if I'm understanding him correctly, that there is a way to do this while resolving any constitutional questions. If we can invoke for a minute the Doctrine of Constitutional Doubt for purposes of this Committee, we might do so and in this instance resolve any such doubt simply by taking a two-step process rather than a one-step process, one in which we would first amend the existing legislation making clear that this Director could serve an additional 2 years, and then having the President re-nominate Director Mueller to an additional 2-year term, subject to Senate confirmation.

Given the questions that have been raised and given the fact that Congress could do this reasonably without all that much burden, why shouldn't we just do that?

Professor VAN ALSTYNE. Well, you may if you want. I just think it's quite unnecessary. The President has already expressed his desire to have Mr. Mueller continue in the office. If you are not comfortable merely in complying with his wishes, which I am very comfortable with and find supported by the majority of the testimony you've received in submitted form, I want to suggest the alternative I've already suggested to you, and that is that in reporting favorably you are also acting on the President's recommendation that he wants this man to continue in office for the additional 2-year period.

That itself, it seems to me, satisfies the nomination requirement so that by the approval of the bill, with the understanding that the President wishes Mr. Mueller to occupy that position for that term, then you do it in a single step. We do not go through the ordeal of having to put it back and have the President formally submit the matter, we go through hearings again with Mr. Mueller.

I've heard no reproach to his fitness to serve in this role, nor reservations about the assiduousness with which he's performing his exclusively executive duties. So I'm not hostile to this suggestion, I just think it's gratuitous and it rests on a constitutional point of view that I do not share and do not think others that have submitted material to you that you've heard before and has come to your attention, Chair, either.

I think what has been proposed is sound. It meets the President's need, it meets the country's need, and is utterly constitutional. I don't object to the two-step procedure that you've suggested, but I do suggest to you, implicit in what you're doing now is that step itself, if you thought that appropriate and necessary, as I do not.

Senator LEE. Thank you.

Professor Harrison, one question I've had that I've never been really clear on is what exactly constitutes an appointment, when does an appointment arise. Do you have—for instance, what if you had an Attorney General who had been confirmed by the Senate and that Attorney General was asked at the conclusion of one Presidential administration and the beginning of another to remain on and not to resign as typically happens, would that person remain on with the previous confirmation during the previous President's administration or would that be an appointment?

Professor HARRISON. That is not a new appointment because the term of the Attorney General, as contrasted with the term of the Director, is indefinite. The Attorney General simply serves at the pleasure of the President. So I think it was Attorney General Wirt, sir, in the early 19th century, served for something like 12 years. The reason for that is simply because the initial appointment was to an indefinite term. And although we think of Cabinet offices as turning over at the end of Presidential terms, routinely the statutes don't actually provide for that and so there's no need to have a new appointment again because of the terms of the initial appointment.

Senator LEE. So in that circumstance the President's authority to remove that person is sufficient because of the fact that it started out indefinite, it started out as something that could carry on perpetually?

Professor HARRISON. The President's authority to remove the Attorney General, for example, is sufficient to provide the President with control over the Attorney General. And if you think as I do—I know this is a matter of some controversy—that the Constitution requires that the President have that control, the removal power is adequate to create it, and indeed many people think the removal power is constitutionally required, in order to give Presidential control.

It's important to see that the Presidential control over executive offices and the appointments clause, although they overlap to some extent, are not identical. It's completely constitutionally permissible to have an appointment that continues through many Presidential terms, and the reason that's not problematic from the standpoint of Presidential control is precisely the removal power, or if there's some substitute for it, like a Presidential directory authority over the officer.

Senator LEE. So the President's removal power has a different effect, whereas here Congress has set the term to a——

Professor HARRISON. Here, Congress has set a specific term, the Director serves for 10 years. Therefore, there is about to be a vacancy in the Office of the Director. I think—I am not sure if this is a definition or just a sufficient condition for what constitutes an appointment—but in a situation where there otherwise will be a vacancy in an office, an act that causes someone to hold that office is an appointment. Normally the President does that. The problem is that this statute would do it.

Senator LEE. OK. Thank you.

Senator BLUMENTHAL. Senator Coburn.

Senator COBURN. Thank you.

Mr. Comey, we've heard testimony conflicting as to the constitutionality of this, or at least the potential for some mischief. Would you see any problem with us doing this a different way so that we don't allow for the potential risk of carrying out of the duties of the FBI Director? Would you see any problem if we could figure out a way to do this where we wouldn't see a constitutional challenge?

Mr. COMEY. As with Director Mueller, I'm no constitutional scholar so I'm not in a position to evaluate the merits of the disagreement.

Senator COBURN. All I'm saying is, wouldn't it make sense that we would do this in a way where we're not going to see a challenge? You know, there are some pretty savvy people out there that are going to use any angle they can to challenge some of the direct and proper duties of the Director of the FBI. Would you not agree that we should try to do it in such a way to minimize that?

Mr. COMEY. I would agree. If you can do it in a way that makes it bulletproof, especially against the kind of litigation that you've spoken of, that would be better.

Senator COBURN. All right.

Professor Van Alstyne, your testimony earlier was that you think that the 10-year statutory term is unconstitutional.

Professor VAN ALSTYNE. Well, I've come to doubt it, that's all. In the course of thinking about the Committee's responsibilities and the opportunity to appear before you, I originally was only concerned with the question that——

Senator COBURN. I know. But in your testimony you said you didn't think it was constitutional. That's what you just said.

Professor VAN ALSTYNE. I think that there is a more severe doubt about the constitutionality of Congress presuming to limit the term of service of a subordinate, purely executive officer than there is reason to doubt the capacity to extend the term with the—with the—with the——

Senator COBURN. So if that's the case——

Professor VAN ALSTYNE. Yes.

Senator COBURN.—then why would a 2-year term be any less vulnerable to your doubts?

Professor VAN ALSTYNE. It would not be as a theoretical constitutional proposition. I think it is far more seriously arguable, gentlemen, that you may not restrict the term of office of a purely subordinate executive officer as you might with regard to one who is serving in a quasi-legislative capacity who receives a delegation of interstitial lawmaking power from this body. That is, to me, now an open question.

Senator COBURN. Well, I don't think it's an open question because the term has not been challenged constitutionally.

Professor VAN ALSTYNE. No. I appreciate that.

Senator COBURN. Professor Harrison, would you repeat again how you could suggest we do this so that we don't end up with a constitutional challenge so that we can have that very clear in the record?

Professor HARRISON. Senator, I think an unquestionably constitutional way to accomplish this goal would be for Congress to amend the 1968 statute that creates the current structure for the Director, saying that in some short time period to begin sometime soon the

President may nominate someone to a 2-year term, to say that such person would not be subject to any restriction, to the 10-year restriction created by the earlier statute, for the President—to have that expire so could only be done in a narrow window, say this summer, to have the President then nominate Director Mueller, the Senate give its advice and consent, the President appoint Director Mueller to the new 2-year term. That would be, I believe, clearly constitutional. I think that would be bullet-proof and that would not make it possible for any person who is the subject of the authority of the Director of the FBI to raise in court an objection to the Director's capacity to execute the laws.

Senator COBURN. Thank you very much.

Thank you, Mr. Chairman.

Senator BLUMENTHAL. Thank you, Senator Coburn.

Senator Sessions.

Senator SESSIONS. Thank you, Mr. Chairman.

I thank all of you. This is an excellent, excellent panel, and thoughtful discussion that's important for us every now and then to think about.

Professor Van Alstyne, I believe you one time spoke to the Eleventh Circuit——

Professor VAN ALSTYNE. Yes, I did.

Senator SESSIONS.—Court of Appeals in conference to those judges. I was a U.S. Attorney in the crowd and remember distinctly—perhaps not so distinctly, but as I remember what you said—you said if you truly respect the Constitution you will enforce it as written, the good and bad parts. Is that somewhat similar to what you said?

Professor VAN ALSTYNE. I'm so flattered that you'd remember that. That remains my view, almost religiously today. In fact, the most recent article that I've written and will be published this fall in the Cato Supreme Court review is called "Conflicting Visions of a Living Constitution", and I take the view that was best espoused, I think, in those remarks and also on the court by Justice Hugo Black, whose name certainly should be familiar to you, Senator, from that region in the country, and I hope to everyone in this room.

Hugo Black's view was that you take the Constitution very seriously. You do not read into it phantom clauses, even though you wish they were there. They're not there. You apply the clauses according to the best understanding the text suggests, as it may them be illuminated by the discussions that accompany the drafting in its original enactment. This is sometimes described as a form of originalism, but in simplest terms it means you take the document as it is seriously.

As it is, it may have defects from a variety of points of view. They're not all of the clauses that we would like to see. I for one regret that the so-called Equal Rights Amendment narrowly did not pass, even after an extended period, originally 7 years, extended to 10 years. It could not muster the 38 State ratifications. I think that's a constitutional loss, but respect it. I don't think the court should read into other clauses the substance of that particular amendment. As it is, we now have a different Twenty-Sev-

enth Amendment. In my opinion it's rather trivial, but it's all right. To the extent that it was enacted, it should be respected.

So I'm with Hugo Black on these matters. We take the Constitution as it is, we do not read out clauses which we regret are there and we don't over-read the clauses that are there. We have a sense of documentary integrity about it.

Now, I've tried to base my own teaching and writing very much on that thesis. I have great respect for the Constitution. I have great respect for Professor Harrison. I just disagree with him in this matter and don't think that this two-step is necessary. In fact, even if I were to concede to his views—which I do not, in all frankness—it seems to me that his views are all compressed in the proposal, because what you have is a proposal signifying the President's desire to have Mr. Mueller continue for the 2-year period.

If, then, you can couple those in this one item, I don't think it takes a whole new series of interviews and submissions to do it. It's implicit in what the President has submitted and in your adoption of the bill. You will then be approving Mr. Mueller within the 2 years of the limit that is provided here. I don't think it's necessary to review that—review it—view the matter that way, but it's a perfectly logical, coherent way.

I have no doubt that whichever way you do it, this one-step which I believe to be eminently sound, or his proposed two-step which may be somewhat more time consuming but it's perfectly possible it will completely withstand any kind of challenge, I have no doubt about that professionally at all. If I did or if it turns out that I'm a bad prophet, I'll probably resign my tenured chair post.

[Laughter.]

Professor VAN ALSTYNE. At least, and apologize promptly to Professor Harrison, because I think very well of him in general.

Senator SESSIONS. Well, thank you. Your remarks about the Equal Rights Amendment were remembered me from 16, 18 years ago. I thought it was a very thoughtful approach you gave. If you check the Congressional record, your name has been mentioned with this quote probably 10 times since I've been in this Senate, because I think when we wrestle with these issues we need to understand that even the good government crowd—and that's what this bill was passed for——

Professor VAN ALSTYNE. Yes.

Senator SESSIONS.—is to make America better. We wouldn't have a long-serving Attorney General. We somehow thought that it ought to be limited. Just like some of the campaign finance, the greatest intent in the world to make America better.

Professor VAN ALSTYNE. Right.

Senator SESSIONS. But in the long run, we're better off following that document. If you don't follow it as written, you weaken it, in my view.

Mr. Harrison, as just a matter of policy, and we deal with policy here as well as constitutional law, your proposal would make it somewhat easier, would it not—excuse me. It would make it somewhat more difficult and thereby make it—have it require more thought and care from the President's point of view before he would exercise this little plan to extend a term limit. In other words, it would require a little more effort and work and might in

that regard be more faithful to the intent of the people who drafted the statute.

Professor HARRISON. Not only the people who drafted the statute, but the Constitution. One thing I'd like to emphasize is, the Constitution's formalities have to be complied with and a request for legislation by the President is not a nomination. It's not what the Constitution calls for here, even if in some circumstances it's the equivalent of a nomination. Nominations—and in fact, they normally get more scrutiny from the President. One thing that the *Chadha* case—the case about the legislative veto—stands for is the proposition that formalities in the process of legislation, or here, nomination and appointment, have to be complied with.

One of the questions in *Chadha* was whether the legislative veto process, which involved a recommendation by the Attorney General, and inaction by both the House and the Senate, was the functional equivalent of legislation. Justice White said it was a functional equivalent of the legislation, but he was dissenting. The majority in *Chadha* said, I think correctly, that the formalities are the formalities and it is necessary to use them.

One reason to use the two-step process rather than treating this as its equivalent is precisely that the two-step process uses the formalities, whereas saying that this is the same thing—this kind of legislation is the same thing as a nomination belies the formalities and says, well, it's pretty much the same. It's the functional equivalent. I think that's not correct in principle. And again, *Chadha*, I think, stands strongly for the proposition that it's not correct. I should say I always hesitate greatly to disagree with Professor Van Alstyne, who is one of the giants in our field.

Senator SESSIONS. Thank you, Mr. Chairman. I appreciate that.

I would just say, Mr. Comey, that I share your respect for Mr. Mueller. When I was in the Department of Justice, nearly 15 years, if you had taken a poll of the top three or four prosecutors in America in terms of professionalism, experience, judgment, and proven track record of important matters, and then later as a supervisor and a leader, Bob Mueller would have been one of the top. Wouldn't you agree?

Mr. COMEY. Yes, sir.

Senator SESSIONS. I mean, he was universally recognized in that way. He was appointed by President Clinton, I guess, to the U.S. Attorney post in California.

Mr. COMEY. San Francisco.

Senator SESSIONS. And he had been U.S. Attorney in——

Mr. COMEY. Boston.

Senator SESSIONS. Boston.

Mr. COMEY. Yes, sir.

Senator SESSIONS. And then held a high post in the Department of Justice. But more than that, he tried a lot of cases personally. I mean, he knows how you have to prepare a case, present a case. He knows your integrity is on the line every single day as a prosecutor. I've always felt that President Obama—you know, I'm pleased that President Obama has seen forward—seen fit to renominate him, and I hope we can do that lawfully in a way that works. Perhaps it would work. I do think there was some reason behind the limit and we ought not to ignore that entirely.

So, thank you, Mr. Chairman.

Senator BLUMENTHAL. Thank you, Senator Sessions. I share your views about Director Mueller, and want to thank the panel for being here today. We will stand adjourned. The record will remain open for a week for any additional comments. Thank you again for your very insightful, thoughtful, and valuable comments.

We stand adjourned.

[Whereupon, at 11:43 p.m. the hearing was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Responses to Questions for the Record from Senator Coburn
Professor John Harrison
Hearing before the United States Senate Judiciary Committee
"The President's Request to Extend the Service of Director Robert Mueller of the FBI until 2013"
June 15, 2011

1. *Do you have any constitutional concerns about Congress placing limits on the terms of service of executive appointments of the President?*

I think that Congress has the power to set the term of an executive office when it does so with respect to office-holders yet to be appointed at the time the relevant statute is adopted. Whether Congress may impose a term limit on an incumbent by amending a statute under which the incumbent was appointed to an indefinite term, or to a longer term, is a more difficult question, but one not presented by S. 1103 or similar legislation.

When Congress creates an office, it has wide latitude in defining the office. As the Constitution itself demonstrates, the law governing an office, in addition to setting out its powers and duties, routinely sets out a term. Article II confers various powers and duties on the President, and sets his term at four years. Setting a term for an office, such as Director of the FBI, is thus an exercise of legislative power given to Congress under Article I.

Setting a term of years for an executive office does not constitute appointment to that office, because it does not cause any particular individual to hold it. It does not constitute a removal, because it does not operate with respect to any particular incumbent. (Whether Congress may remove an executive officer by statute is a matter of dispute, but it is not necessary to resolve that point because a term of years is not a removal, at least with respect to officers yet to be appointed when the term is established.)

Term limits for executive officers also are consistent with presidential control over the execution of the laws. They do not limit the President's authority, including removal authority, with respect to the current incumbent of the office. United States Attorneys serve for a four-year term subject to removal at the President's pleasure, and the removal power gives the President the same control over them that it gives him over the Attorney General, who serves wholly at the President's pleasure. It is true that a term limit can prevent the President from filling an office with the nominee of his choice, when it creates a vacancy and the Senate refuses the confirm the President's nominee, but that is a consequence of the Appointments Clause itself. The requirement of Senate confirmation for superior officers, and Congress' power to require it for any officer, superior or inferior, mean that the President is not wholly free to choose those who will execute the laws under his direction. The fact that a limited term brings that constitutional rule into operation does not make the limited term an impermissible interference with presidential control over the executive department.

There is respectable authority to the contrary. In addition to Professor van Alstyne, both Thomas Jefferson and James Madison believed that limited terms for executive officers are constitutionally problematic. They objected on constitutional grounds to the Tenure of Office

Act of 1820, which for the first time provided limited terms for executive officers; that statute is the source of the current four-year term for United States Attorneys. See Leonard D. White, The Jeffersonians: A Study in Administrative History, 1801-1829 at 387-390 (1956). But while the Senate's power over executive personnel does to some extent limit the President's ability to achieve his goals, for example by requiring him to appoint an officer in whom the President reposes less confidence than in someone else and who therefore will require closer supervision, that power is rooted in the Appointments Clause itself.

2. *If the term of the Director Mueller is extended in a manner similar to S. 1103, could you envision a situation where aspects of an FBI investigation could be challenged in court based on questions of constitutionality of the Director's appointment?*

Yes. The Right to Financial Privacy Act of 1978, codified at 12 U.S.C. 3401 et seq., provides an example. It imposes limits on government access to private persons' financial information while also granting authority to the government to obtain that information in specified circumstances and through specified procedures. One of those grants of authority, 12 U.S.C. 3414(a)(5), authorizes the Director of the FBI, and certain of his subordinates who have been designated by the Director, to require financial institutions to provide their customers' financial information to the government when the Director (or his designee) certifies that the information is needed for foreign counter-intelligence purposes to protect against international terrorism or clandestine intelligence activities.

Were Director Mueller to be continued in office by statute without a new appointment, a financial institution could refuse to honor an information request under Section 3414(a)(5) on the grounds that Mr. Mueller had no valid appointment and hence could not exercise government power, such as the power to compel a private person to surrender information in its custody. Were the government to bring a legal action to compel compliance, or to penalize non-compliance, the argument based on the Appointments Clause would provide a defense.

The Supreme Court recognized that a private person may raise an Appointments Clause challenge to a purported officer's legal authority in such a defensive posture in Morrison v. Olson, 487 U.S. 654 (1988). *Morrison* also involved a government effort to compel the disclosure of information by a private person. Independent Counsel Alexia Morrison, appointed to that office by the Court of Appeals for the District of Columbia Circuit, sought to compel testimony before a grand jury by former Assistant Attorney General Theodore Olson. Olson refused to comply with the subpoena on the grounds that Morrison was not authorized to exercise government power. One of his arguments was that her appointment was not in accordance with the Appointments Clause, both because the office of Independent Counsel was not an inferior office within the meaning of the clause and because a court may not appoint an executive officer under the clause. The Supreme Court rejected Olson's arguments on their merits. It regarded Olson's litigation posture, in which he relied on the Appointments Clause in refusing to comply with a government attempt to coerce disclosure of information, as an appropriate one for bringing the constitutional question before a court. A financial institution declining to comply with an order under Section 3414(a)(5) would be in a very similar posture and could rely on the Appointments Clause in its defense.

3. *Could anyone who is subject to an exercise of government power by the Director challenge his appointment if the Director was serving under legislation such as S. 1103?*

a. How would they establish standing?

b. What effect would a successful challenge have?

c. Are there any examples in judicial precedent of an appointment being challenged in court, whether or not it was successful?

A party objecting to an exercise of official authority by Director Mueller would establish standing by showing that a decision by the Director had adversely affected, or would adversely affect, the party's legally-protected interests. For example, the private parties in Shoemaker v. United States, 147 U.S. 282 (1893), objected to a taking of their property through eminent domain by a board of commissioners, two members of which had been placed on the board in a manner the private parties alleged was inconsistent with the Appointments Clause. Although the Court rejected that argument on its merits, it expressed no doubt as to the standing of private persons whose property was to be taken by the government. As discussed above, the interest in informational privacy provided standing in *Morrison*, v. *Olson*, where the Court decided the Appointments Clause issue on the merits.

The effect of the judgment in a successful challenge would be to relieve the private party of the burden imposed by Mr. Mueller's exercise of government authority. A financial institution that successfully challenged an order under 12 U.S.C. 3414(a)(5), for example, would have no obligation to comply with it. A decision by a federal court of appeals would have the additional effect of setting a binding precedent on which other private parties could rely with respect to possible litigation within that court's jurisdiction. A decision by the Supreme Court of the United States would set a binding precedent for the entire country.

As I have mentioned, cases in which the Supreme Court reached the merits of an Appointments Clause challenge to an officer's authority include *Shoemaker* and *Morrison* v. *Olson*. The Court similarly decided Appointments Clause issues on the merits in three cases in the 1990s involving the military justice system: Weiss v. United States, 510 U.S. 163 (1994), Ryder v. United States, 515 U.S. 177 (1995), and Edmund v. United States, 520 U.S. 651 (1997). In all three cases, the private parties were defendants whose standing came from the personal rights, including liberty, that were in jeopardy in their criminal trials. In *Weiss* and *Edmund*, the Court rejected the Appointments Clause challenges on the merits. In *Ryder*, it agreed that the appointment to the Coast Guard Court of Military Review at issue was not consistent with the clause, and that the purported officer's exercise of government authority was invalid. As a result, Ryder was entitled to a new hearing before a properly constituted Coast Guard appellate tribunal.

In Landry v. FDIC, 204 F. 3d 1125 (D.C. Cir. 2000), the Court of Appeals for the District of Columbia Circuit resolved on its merits a challenge to an order against Michael Landry removing him as an officer of a bank in Hammond, Louisiana, that was based on a hearing before an FDIC administrative law judge whose appointment, Landry argued, was not consistent with the Appointments Clause. Landry's standing derived from the liberty and property interests that were in jeopardy because of the FDIC's order. The court of appeals concluded that the

administrative law judge had not exercised significant government power, and so did not have to have been appointed an officer of the United States under the Appointments Clause.

In another case involving a financial regulatory agency, the United States District Court for the District of Columbia Circuit agreed with a challenge based on the Appointments Clause. Olympic Federal Savings & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183 (D.D.C. 1990), *appeal dismissed as moot*, 903 F. 2d 837 (D.C. Cir. 1990). Congress had adopted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) in response to severe difficulties in the savings and loan business. FIRREA substantially overhauled both the structure and substance of federal regulation of savings and loan associations. Part of the overhaul was the abolition of the Federal Home Loan Bank Board (FHLBB) and the Federal Savings and Loan Insurance Corporation, and their replacement with the Office of Thrift Supervision, a component of the Treasury Department, and the Savings Association Insurance Fund. Under FIRREA, the Director of the Office of Thrift Supervision was appointed by the President with the advice and consent of the Senate to a five-year term.

FIRREA also provided that the then Chairman of the FHLBB would become the first Director of the Office of Thrift Supervision, without a new nomination, confirmation, and appointment. Olympic Federal Savings and Loan Association, which faced a significant threat of being subjected to a conservatorship by order of the Director, sought an injunction against any such order on the grounds that the statutory transformation of the Chairman of the FHLBB into the Director of the Office of Thrift Supervision was an impermissible statutory appointment. Olympic Federal's interest in continuing its business provided it with standing. The District Court agreed that the FIRREA provision at stake constituted an impermissible congressional appointment, and granted a preliminary injunction barring the appointment of a receiver or conservator for Olympic Federal. Before the government's appeal could be decided on the merits, Olympic Federal's claim was mooted by the appointment by the President, with the advice and consent of the Senate, of a new Director of the Office of Thrift Supervision who could, consistent with the Appointments Clause, issue an order appointing a receiver or conservator for Olympic Federal. The court of appeals then dismissed the appeal as moot.

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 15, 2011

The Honorable Patrick Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Enclosed please find responses to questions for the record arising from the appearance of FBI Director Robert Mueller, at a hearing before the Committee on June 8, 2011, entitled "The President's Request to Extend the Service of Director Robert Mueller of the FBI Until 2013."

We hope this information is of assistance to the Committee. Please do not hesitate to contact this office if we may provide additional assistance regarding this, or any other matter. The Office of Management and Budget has advised us that from the perspective of the Administration's program there is no objection to submission of this letter.

Sincerely,

for Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Minority Member

Responses of the Federal Bureau of Investigation to Questions for the Record Arising from the June 8, 2011, Hearing Before the Senate Committee on the Judiciary Regarding The President's Request to Extend the Service of Director Robert Mueller of the FBI Until 2013

Questions Posed by Senator Franken

1. On April 29th, the FBI reported it had issued over 24,000 national security letters requesting information on over 14,000 U.S. persons. This is more than double the number of people from the previous year, and the FBI's requests for business records is more than four times the number of requests filed in 2009. How can you explain these increases, and how can we trust that they're appropriate?

Response:

The chart below reflects three years of data regarding National Security Letters (NSLs).

Year	# of NSL Requests	# of Different USPERs
2008	24,744	7,225
2009	14,788	6,114
2010	24,287	14,212

As reflected in the chart, although the aggregate numbers of NSLs increased from 2009 to 2010, 2009 may be an anomalous year.[1]

The FBI has robust policies and procedures in place to ensure that NSL usage is lawful and appropriate. An automated workflow tool deployed in 2008 requires the drafter of an NSL to enter information establishing that there is an appropriately opened investigation and that the information sought by the NSL is relevant to that investigation. The workflow tool requires the NSL and the justification for the NSL to be reviewed and approved by supervisory FBI employees, including an FBI attorney, before the NSL can be issued. The final approval by a high-ranking FBI official includes the procedural protections contained in the NSL statutes, all of which require an FBI certification of

[1] Data in years before 2008 were gathered in a different way and are not as reliable as the data beginning in 2008. Accordingly, comparing prior data to determine whether 2009 was anomalous or simply consistent with year-to-year variation is not possible.

relevance to the investigation before any record may be requested through an NSL.

The FBI and the Department of Justice (DOJ) National Security Division (NSD) regularly review the use of NSLs, further insuring this tool is used appropriately and that NSLs are issued in strict compliance with the statutory grants of authority. While not at zero, the instances of noncompliance associated with NSLs have been exceedingly low since the deployment of the automated workflow tool in 2008. This dual pronged approach – implementing clear policies and procedures and after-the-fact auditing – works to ensure that NSL usage is appropriate.

The use of the business records provision of the Foreign Intelligence Surveillance Act (FISA) has increased steadily since the FBI was given expanded authority in 2001 to obtain records during national security investigations. As with NSLs, the number of business record orders obtained in any given year is largely a function of the needs of national security investigations being conducted during that year. The FBI also believes the increasing use of this tool is a function of increased employee knowledge of how to use the tool and their comfort level in obtaining such orders.

In addition, over the last two years, the FBI has increasingly had to rely on business records orders to obtain electronic communications transactions records that historically were obtained with NSLs. Beginning in late 2009, certain electronic communications service providers no longer honored NSLs to obtain electronic communication transaction records because of an ambiguity in 18 U.S.C. § 2709 and, as a result, the FBI has had to use the business records provision to obtain these records. As an example, over the first 3 months of 2011, more than 80 percent of all business record requests were for electronic communications transactional records, which would previously have been obtained with National Security Letters. This change accounts for a significant increase in the volume of business records requests.

In all cases, a number of controls operate to insure that the business records provision is being used appropriately. In addition to the review of every request by the FBI's Office of the General Counsel (OGC), all of these requests are also reviewed by an attorney from DOJ's NSD, signed by a high ranking official in the FBI (generally a Deputy General Counsel), and approved by a judge of the Foreign Intelligence Surveillance Court.

2. One source of confusion and frustration surrounding the FBI's use of surveillance authorities and other tools is that the American public does not know and has never seen the legal interpretations that the executive branch relies on when interpreting the scope

and breadth of PATRIOT Act powers. Would you support an effort to disclose the executive branch's legal interpretation of the PATRIOT Act?

Response:

The FBI supports making available to the public as much information regarding the use of national security tools as is possible without disclosing sensitive sources and methods and properly classified information.

3. The FBI plans to issue a new edition of its Domestic Investigations and Operations Guide, which will give FBI agents more latitude to investigate persons with no evidence of wrongdoing or ties to criminal or terrorist organizations. How would you respond to criticisms by civil liberties groups that easing restrictions on agents' abilities to conduct surveillance makes it more difficult to detect inappropriate behavior and could invite abuse? What steps will you take to assure that FBI agents are acting appropriately and are not using these expanded powers to target innocent Americans or to engage in racial profiling?

Response:

The Attorney General Guidelines (AG Guidelines) and FBI policy contained in the Domestic Investigations and Operations Guide (DIOG) are designed to ensure that FBI activities are conducted with respect for the constitutional rights and privacy interests of all persons in the United States. The DIOG contains numerous measures designed to ensure that investigative authority, whether in an assessment or in a predicated investigation, is used properly. Although an effort is under way to revise the prior version of DIOG (issued in 2008), the revision will not provide "FBI agents [with] more latitude to investigate persons with no evidence of wrongdoing or ties to criminal or terrorist organizations." FBI agents must always have a proper purpose for their activities; FBI policy is very clear that employees cannot initiate investigative activities based solely on an individual's exercise of First Amendment rights or on protected characteristics such as race, ethnicity, national origin, or religious affiliation or on a combination of only those factors.

Furthermore, the AG Guidelines and the DIOG authorize only minimally intrusive investigative techniques in assessments. Specifically, except in the context of an assessment designed to recruit a human source, during an assessment the FBI can obtain publicly available information; access data in government databases or files; use online services and resources; use and recruit human sources; interview, request information and accept information from the public; engage in observation or surveillance that does not require a court order (*i.e.,* that does not intrude into any reasonable expectation of privacy); and may use a grand jury subpoena for the limited purpose of obtaining telephone

subscriber or electronic mail subscriber information. These techniques must be used in conformance with all federal laws, including the Privacy Act of 1974. In order to use more intrusive techniques (*e.g.*, mail covers; consensual monitoring of conversations; closed-circuit television; compulsory process), the FBI must have a predicated investigation open, meaning there is some indication that the target is engaged in wrong doing.

The AG Guidelines regarding assessments designed to recruit sources are slightly different and provide the FBI greater latitude. Here again, however, the FBI has implemented specific policies that are designed to protect privacy. While under the AG Guidelines any investigative technique can be used in such an assessment, the FBI has made the policy decision to allow only two techniques to be used that are not generally available during assessments: polygraph examinations and searches not requiring a court order (e.g., trash covers). Moreover, even these techniques can only be used if an assessment has been opened – which means that a supervisor has approved assessing the particular person as a source because he or she is believed to have "placement and access" to information that would be of value to the United States.

In addition to setting policy that is respectful of privacy and civil liberties interests, the FBI has also designed a number of compliance mechanisms to ensure that the rules are followed and there is adequate oversight of the process. Investigations involving defined "Sensitive Investigative Matters" must be reported to DOJ. DOJ's National Security Division, in conjunction with the FBI's Office of the General Counsel, conduct regular reviews of all aspects of FBI national security and foreign intelligence activities, including assessments. The FBI's Inspection Division conducts annual audits of assessments. The results from both types of reviews are reported to the FBI's Office of Integrity and Compliance, which considers whether new policies, training or controls need to be implemented.

Questions Posed by Senator Grassley

FBI's plan to construct the Domestic Communications Assistance Center (DCAC)

The President's fiscal year 2012 budget requests $15 million to establish the Domestic Communications Assistance Center (DCAC). This center will allegedly establish a relationship with the communications industry and assist state and local law enforcement by facilitating the sharing of information. The FBI appears to be moving forward on this center, even without Congress' consideration or consent. FBI Chief Counsel Valerie Caproni testified before the U.S. House of Representatives, Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security that "due to the immediacy of these issues, DOJ is identifying space and building out the facility now."

The Justice Department Inspector General recently released a report that exposed numerous deficiencies in the FBI's ability to conduct national security cyber intrusion investigations. The report also admonished the FBI for failing to share information with partner agencies on the National Cyber Investigative Joint Task Force. The Homeland Security and Government Reform Committee also released a report that recommends the FBI "more convincingly share information and coordinate operations with other federal, state, and local agencies."

4. Given that the Inspector General found deficiencies in the FBI's ability to share information, including withholding information from agencies they partner with, why should Congress honor the FBI's request and authorize the FBI to construct the new Domestic Communications Assistance Center?

Response:

The April 2011 report by DOJ's Office of the Inspector General (OIG) discusses the fact that certain legal and policy restrictions affect how participants in the National Cyber Investigative Joint Task Force (NCIJTF), including the FBI, share information with participating agencies that have not signed Memoranda of Understanding (MOUs) governing their participation. The OIG Report did not address the FBI's ability to conduct, or to assist its federal, state, and local partners in conducting, lawful electronic surveillance intercepts.

The Domestic Communications Assistance Center (DCAC) is vital to law enforcement's overall effort to close the gap in electronic surveillance capabilities identified through the "Going Dark" Initiative. From the perspective of law enforcement, the significant expansion of communications technologies coupled with the complexity of processing those communications into a readable format are outpacing any single agency's ability to meet, let alone get ahead of, investigative demands. In particular, the rapid growth of wireless and internet-based communications services and the migration of traditional carriers to internet-based technology have contributed significantly to the increasing intercept capability gap. Providers often lack technical intercept solutions that meet the electronic surveillance needs of law enforcement.

From the standpoint of industry, communications providers have identified the varying demands of thousands of federal, state, and local law enforcement agencies as a challenge they are trying to address on an ongoing basis. Agencies often make isolated, non-standardized, and duplicative requests for assistance from providers that result in the inefficient use of scarce technical resources and missed opportunities to deploy existing intercept solutions. To compound matters, law enforcement agencies often lack insight into new services offered by

providers, while providers often lack an understanding of the needs of law enforcement.

The DCAC would address the law enforcement needs by: creating a technical resource center; establishing a call-in and website Help Desk; providing training; organizing forums, meetings, and working groups; and engaging in other activities that will assist the law enforcement community in identifying areas of consensus. The DCAC will also facilitate the sharing of technical solutions, expertise, best practices, equipment, facilities, and other forms of assistance among law enforcement entities, providing a single entity through which federal, state, and local law enforcement can leverage resources by making technical expertise and capabilities easily accessible and shareable.

At the same time, the DCAC will reduce the burden on the communications industry by creating a single entity that can serve as a conduit between law enforcement and industry and can improve the efficiency and effectiveness of information exchanges by ensuring that they are conducted in a more consistent, standardized manner. The DCAC will also be able to prioritize law enforcement requests to industry for technical solutions that are important at a national level, standardize common requests for assistance, develop automated practices, reduce duplicative communications, and identify other ways to lower costs, create efficiencies, and improve relationships between law enforcement and the communications industry.

5. Do you feel it is appropriate for the Department of Justice to begin "identifying space and building out the facility now" given that the fiscal year 2012 budget has not yet been agreed upon?

Response:

To date, the FBI has identified space requirements for the DCAC but has not taken any further steps to secure or build such a facility.

6. What congressionally authorized funding has the FBI used to begin "building out the facility now"? Please provide the current costs associated with the identification and "building out" of the DCAC.

Response:

The FBI has neither used any funds, nor been granted any funds, to build a DCAC facility. Further, the FBI has not tasked the General Services Administration (GSA) to secure a facility. The FBI has estimated that $7.1 million is necessary to acquire and retrofit an appropriate building.

7. FBI personnel have stated that the DCAC will prioritize subpoena requests from state/local law enforcement to the communications industry and will further decide when that law enforcement agency ultimately receives their requested information.

a. Do you agree that allowing the FBI to decide how and when partnering agencies receive the information they legally requested via a subpoena is problematic and potentially creates unnecessary conflict? If not, why not?

b. How does the FBI anticipate this process working? What investigations will be prioritized? What agencies will receive priority (federal/state/local)?

c. Do you envision the Domestic Communications Assistance Center becoming the "one voice" to and from law enforcement to the communications industry? If so, why is that necessary?

d. Would the FBI support working with industry representatives and encouraging them to create law enforcement liaison positions as opposed to spending tax payer dollars on this facility?

Response to subparts a through d:

As planned, neither the FBI nor any other agency participating in the DCAC will prioritize the service of process requests. The discussion of subpoena requests relates to an effort to standardize and automate law enforcement's interactions with telecommunications carriers to make the process more efficient and less costly. The automated subpoena process is an example of a capability developed by one agency that can and should be shared with others through the DCAC. While the DCAC can facilitate the sharing of such a capability, the DCAC will not take a role in prioritizing the decisions made by participating investigative agencies.

The DCAC is envisioned to be a centralized resource for interaction between law enforcement and the communications industry at the national level on matters concerning the challenges associated with electronic surveillance based on new technologies. It will provide consistency in addressing the concerns of law enforcement with industry but will not replace the individual relationships law enforcement agencies may have with members of industry that are necessary to address individual operational concerns.

There is a great need for a Center with the DCAC's capabilities. Currently, the relationship between industry and law enforcement is comprised of numerous discrete relationships between individual service providers and individual law enforcement agencies. The uncoordinated nature of these relationships leads to duplicative efforts, inefficiencies in the allocation of resources, and

misunderstandings. Today's diverse and rapidly evolving communications technologies demand a broader and more efficient industry liaison arrangement, especially with IP-based communications service providers and emerging third-party entities that facilitate communications. Industry has repeatedly raised concerns about the burdens created by large numbers of law enforcement agencies making an increasing number of non-standardized requests for electronic surveillance and/or records-related assistance.

The DCAC will establish a central point of contact for industry to initiate discussions necessary to address law enforcement requirements and it will reduce the burden industry currently faces by having to respond to numerous law enforcement agencies with varying requirements and degrees of technical sophistication. In this capacity, the DCAC will organize forums, meetings and working groups, engage in other activities that are designed to standardize common requests for assistance, develop automated capabilities and make them widely available, encourage industry to comply with lawfully authorized requests for electronic surveillance in a timely, cost-effective way, work with industry to find other opportunities to improve efficiencies, and ensure that effective industry-developed solutions are made widely known throughout the law enforcement community.

8. Will information related to other agencies' investigations be stored at the DCAC facility? If so, how long will that information be stored?

a. Will the FBI use the DCAC to assist with national security investigations?

b. Will any national security information be retained at the DCAC?

Response to subparts a and b:

We do not expect the DCAC to have an investigative role in cases, and there is no intent to store investigative information in DCAC facilities. The DCAC will, instead, be focused on supporting federal, state, and local partners as they execute legal process and court orders.

FBI's double standard in the disciplinary process

In 2009, the Inspector General found that employees at the FBI continue to perceive a double standard in the disciplinary process. That report found that 83% of disciplinary action appeals for high ranking SES employees resulted in some form of mitigation. On the other end, only 18% of disciplinary action appeals were mitigated for non-SES, or lower ranking employees.

9. What is the FBI doing to fix both the perception of a double standard of discipline, and the discrepancy in mitigation?

Response:

The 2009 finding by DOJ's OIG of a perceived double standard was based on a survey of about 800 (less than 3 percent) of the FBI's approximately 32,000 employees. Of those who responded to this question, 33 percent agreed with the survey's premise that there is a double standard, 11 percent believed there was no double standard, 16 percent were neutral (they believed it as likely that there is a double standard as that there is not a double standard), and 39 percent did not know (they lacked the information to form an opinion). Accordingly, the FBI does not believe the survey supports the conclusion that there is a perception of a double standard in the disciplinary process.

During the more than three-year period of the audit, there were only six cases involving Senior Executive Service (SES) officials that were appealed to the Disciplinary Review Board (DRB). Although the OIG disagreed with the ultimate outcome in three of the six cases, so few cases present an insufficient sample to draw conclusions regarding the overall fairness of the process. Moreover, only one of those three cases was adjudicated following the August 31, 2007, implementation of the FBI's current disciplinary process. Under the new process, the deliberations in disciplinary cases must be witnessed by three non-SES observers, including representatives from the FBI's OGC and Office of Equal Employment Opportunity Affairs. All DRB proceedings are tape-recorded to ensure transparency in the appellate process.

Disciplinary actions are initially appealed to the Appellate Unit (APU) in the FBI's Human Resources Division, which is composed entirely of non-SES attorneys and paralegal specialists. The APU analyzes appellate cases in strict adherence with a substantial evidence standard of review and recommends appropriate action to the FBI's appellate decision-makers. While we do not believe this appellate process results in the perception of a double standard, we believe that, even if this were true, the FBI cannot fail to take necessary corrective action on appeal based on the fear that this may generate such a perception.

Privacy Act restrictions and other factors prevent the open discussion of disciplinary cases. Consequently, inaccurate perceptions may be formed by those not directly involved in the appellate process based on rumors and half-truths. Because appellate decision-makers are not free to discuss the specific circumstances of any given case, it is difficult to dispel inaccurate perceptions that may be created when the penalty imposed on a higher-ranking executive is modified on appeal.

Fort Hood Shooting by Major Hasan

The Senate Homeland Security and Government Affairs Committee released a report on February 3, 2011, that outlined lessons learned from the government's failure to prevent the Fort Hood attack by Major Nidal Hasan. The Committee reported that a "lead" came in to the FBI, but was not even assigned for 6 weeks. Then the investigator, waiting until the 90th day deadline arrived, did a superficial job on his report. To compound the problem, because this investigator was from the Department of Defense, even though he was on the joint terrorism task force, he was not provided full access to a key database that contained Hasan's communications, which likely would have sparked a more in-depth inquiry. The report recommends that the FBI "more convincingly share information and coordinate operations with other federal, state, and local agencies." The FBI recently submitted a report to the Committee pursuant to the Intelligence Authorization Act of 2010 assessing the transformation of the FBI's intelligence capabilities.

10. Do all analysts, agents, and intelligence specialists on joint terrorism task forces have access to all FBI databases?

Response:

Yes. All Joint Terrorism Task Force (JTTF) participants have access to FBI investigative databases once they complete required training and obtain the necessary security clearances.

Certain databases used by JTTF personnel are classified at the Top Secret/ Sensitive Compartmented Information level. Access to these systems is limited to those with an articulable need for access. The baseline suite of databases typically used by JTTF personnel, however, are classified at the Secret or Unclassified level and being assigned to a JTTF or counterterrorism matter is typically sufficient to obtain access to these databases.

The FBI's internal review after the Fort Hood attack identified a need to improve database training for JTTF members. To address this concern, the FBI initiated a surge in training to ensure that all on-board JTTF personnel – FBI employees and non-FBI task force officers, alike – received baseline training on and access to the databases identified as integral to JTTF investigations and operations. To accomplish this task, in January 2010 the FBI mandated that each field office send representatives to the FBI's training facility at Quantico, Virginia, to complete database training as part of a "train-the-trainer" program. Once trained, these individuals were tasked with training all of the JTTF members in their home divisions. By May 2010, when the surge was completed, 3,732 task force members had completed the training.

In order to ensure that new task force members receive timely and appropriate training going forward, the National Joint Terrorism Task Force has refined the JTTF orientation and training curriculum and developed a tracking mechanism to ensure that all JTTF members receive the training and access they need to use these databases effectively.

11. If so, why did the FBI limit the access to critical databases for the Defense Department employee as outlined by the Homeland Security Committee report? If not, why not?

Response:

As recognized in the report by the Senate Committee on Homeland Security and Governmental Affairs and as diagnosed shortly after the attack during the internal FBI review, the task force officer's lack of access to the FBI database at issue was not due to a policy of denying task force members such access. Rather, the lack of access was a training issue that has since been resolved, as described in response to Question 10, above. The task force officer in the case involving Major Hasan was unaware of a particular FBI database and thus did not seek or obtain access to it.

12. If agents and analysts on the task force don't have access to necessary databases what is the purpose of the joint terrorism task force and what are you doing to address this issue?

Response:

The FBI strives to provide each JTTF member with the training and tools necessary to perform the job. Each task force member, whether from the FBI or from a partner agency or department, must have the appropriate clearances and complete required training as a prerequisite to obtaining access to databases that contain sensitive information. Since the attack at Fort Hood, the FBI has taken steps to ensure that all task force members receive the training and access necessary to make efficient use of all available data sets.

Salt Lake City FBI Office

There are allegations from FBI whistleblowers that FBI policies and procedures regarding classified documents have been neglected at their Salt Lake City field office. These allegations include allowing classified documents to be removed from the office's Secret Compartmented Information Facility (SCIF). The FBI whistleblowers also allege that procedures for securing the office's SCIF have been extremely careless. Moreover, the whistleblowers assert that security for the SCIF, such as ensuring office windows are covered and access to the room is controlled, are almost non-existent. Additionally, the field office has failed to ensure only authorized personnel possess the authority to even

access the field office. Several whistleblowers have described individuals no longer associated with law enforcement who are still in possession of high-level credentials. These credentials could potentially allow these individuals 24 hour access to the FBI field office. The allegations involving mismanagement at the FBI, Salt Lake City field office have been reported by various news organizations. The FBI whistleblowers are concerned that their attempts to notify supervisors of these potentially egregious acts have gone ignored.

13. Does the FBI agree that these accusations involve serious national security implications and obviously should not be dismissed or ignored?

Response:

The FBI agrees that these accusations, if substantiated, raise serious concerns.

14. Do you also agree that an investigation of the mishandling of classified information is certainly necessary and entirely warranted?

Response:

The FBI is currently conducting an inspection of the Salt Lake City Division and these allegations are being reviewed as part of that inspection. The FBI has verified that the Salt Lake City Sensitive Compartmented Information Facility (SCIF) was properly accredited in accordance with Director of Central Intelligence Directive 6/9 and Intelligence Community Directive 705 for the safeguarding of classified materials, including the installation of appropriate window coverings and access control mechanisms. The ongoing inspection will include a review of the security program and any deficiencies in security controls and compliance.

15. Will the FBI commit to referring this matter to your Office of Professional Responsibility?

Response:

As noted above, the FBI is currently conducting an inspection of the Salt Lake City Division. This inspection includes review of the Division's security program, including the implementation of proper security controls related to the SCIF and compliance with those controls. Any misconduct identified through this inspection would be referred to the FBI's Office of Professional Responsibility for adjudication and appropriate action.

FBI Sentinel Case Management System

The FBI initiated a computer upgrade to their information technology case management system from 2000-2005, originally referred to as Virtual Case File (VCF). This unsuccessful project was ultimately abandoned at approximate $100 million cost to American taxpayers. The FBI then created a new case management computer system, known as Sentinel. This project was scheduled to be finished in December 2009 at a cost of no more than $451 million. An October 2010, Department of Justice, Office of Inspector General report discovered that the project was $100 million over budget and two years behind schedule. The FBI has not provided an updated schedule or cost estimate for completing the project. Moreover, IG auditors stated the project could potentially take "another $350 million and take six years to complete."

16. Will the FBI provide the completion date and the total cost to the American taxpayer for the Sentinel project?

Response:

The FBI has completed development of the core Sentinel forms, workflow, basic search, and electronic record keeping capabilities. The FBI expects to deploy this capability to all users by the fall. By the end of the year, Sentinel anticipates completing the remaining functionalities, including advanced search, report generation, and evidence management. We expect Sentinel will be completed within its $451 million budget.

17. Will the FBI ask Congress for any additional funding in order to complete the Sentinel project?

Response:

The FBI expects Sentinel will be delivered within the $451 million budget and maintained through May 2012 as originally contracted. We do not anticipate seeking additional funding to complete this project.

18. Have Phases 3 and 4 of the Sentinel project been completed?

Response:

Phase 3 and 4 plans were transitioned to an integrated team of developers last year. This team was established in October 2010 and is using the Agile development methodology, working in two-week-long "sprints" and demonstrating measurable milestones every two weeks. The team is concentrating on delivering the functionalities of Phases 3 and 4 and, based upon the accomplishments to date, the FBI expects to deliver Sentinel by the end of the

year.

19. Can FBI agents and analysts use the Sentinel case management system to manage evidence?

Response:

The ability to use Sentinel to manage evidence is expected in the final release of the program.

20. Has the FBI corrected the issue of the Sentinel system not employing an "auto-save" function so that partially completed forms and hours of work are not lost?

Response:

Yes. The Sentinel system will include an "auto-save" function.

Questions Posed by Senator Coburn

21. At the hearing on June 8th, you said that you have heard of nothing, in your discussions with the department or otherwise, regarding a constitutional issue with your re-appointment that would make for a problem down the road. You also indicated that you had people at the hearing to listen to the second panel of constitutional scholars testify about the issue.

a. After hearing the testimony of the law professors on the second panel, do you foresee any constitutional challenges or problems with extending your term?

b. Do you agree with former Deputy Attorney General James Comey that if there is a "bullet proof" method for reappointing you for two years that avoids all constitutional challenges, we should do it that way?

Response to subparts a and b:

The FBI defers to DOJ's Office of Legal Counsel (OLC) as to whether there is any constitutional infirmity inherent in the proposed approach. OLC's opinion, dated June 20, 2011, is enclosed.

22. How closely do you work with the heads of the Central Intelligence Agency and the Department of Defense?

a. Do you think our national security would be at risk if all three of those departments transitioned their top leadership at the same time?

Response:

The FBI is a member of the U.S. Intelligence Community. In addition, the FBI is responsible for domestic intelligence and counterterrorism operations. The FBI derives much of its homeland threat reporting from the Central Intelligence Agency (CIA) and the Department of Defense (DoD) and, therefore, interacts on a daily basis with those entities and their components. Part of FBI's interaction with the CIA and DoD involves the Director working with their leadership.

As of early May 2011, the FBI was planning for the transition to a new Director in a manner calculated to minimize the potential impact on its operations. The FBI is not aware of the specific details of the transition plans at the CIA and DoD or the extent to which those transitions will affect their operations.

b. Is there a transition plan in place should the heads of all three departments fall ill at the same time or be the victims of a terrorist attack?

Response:

The FBI is prepared to continue operations in the event the Director falls ill or is the victim of a terrorist attack. The FBI is not aware of the continuity plans at the CIA or DoD.

c. Prior to May 12, 2011 when President Obama asked you to continue your tenure at the FBI for two more years, did you have a transition plan in place to facilitate transitioning to a new Director?

Response:

As of early May 2011, the FBI was planning for transition to a new Director.

23. In 2010, the budget for the Department of Justice included $6,000 for the Federal Prison System for "receptions and representation." It also included $8,000 for U.S. Attorney's Offices and $40,000 for the Bureau of Alcohol, Tobacco and Firearms for the same purpose. The Attorney General himself received $50,000 for this purpose. Yet, the FBI received $205,000 for "receptions and representation," far more than any other agency.

a. For what purpose do you use this "receptions and representation" money?

Response:

Reception and Representation (R&R) funds are used to advance the FBI's mission both domestically and internationally. These funds are reserved for use by executive management across FBI headquarters, the 56 Field Offices, and 62 Legal Attaché (Legat) offices. During FY 2010, the FBI coordinated over 370 visits between FBI program executives and senior foreign partners in the USA. The FBI's R&R expenses have risen as our relationships with our foreign counterparts have increased dramatically since the 2001 attacks. Many of our foreign partners host working meetings and events at which refreshments are served, and our ability to continue these valuable relationships could be adversely affected if we were perceived as being less than full partners.

b. How much of the money allocated to this fund was actually spent in 2010?

Response:

The FBI spent approximately $195,000 in reception and representation funds, with over half that amount funding international initiatives that support the FBI's national security, cyber, and criminal missions.

c. The President's 2012 budget requests $205,000 again for receptions and representation; do you believe the FBI needs this allocation, given the current fiscal position of the United States?

Response:

Yes. As noted above, these funds are necessary to continue our productive relationships with our international and domestic partners. In the foreign arena, the Legats' efforts to implement and execute the FBI's international mission are dependent on their abilities to develop effective liaison relationships with their foreign counterparts. Furthermore, periodic receptions are commonplace and expected in the international diplomatic communities. During FY 2010, FBI Legats held 2,862 liaison meetings with high/mid-level foreign officials and/or leaders outside the United States.

24. The FBI's total budget request for FY 2012 is $8.075 billion, an increase of $131 million over their FY 2011 request and a 4% increase over their FY 2010 budget ($7.75 billion). The FBI says they need 181 new positions, including 81 new special agents, 91 professional staff, and 3 intelligence analysts. Yet you had 10,000 fewer cases pending at the beginning of 2011 than you did in 2010. After serving as Director of the FBI for ten years, can you propose any budget cuts that can be made at the FBI given our country's fiscal situation?

Response:

The case number decline cited in the question was caused by a methodology

change in how source files are categorized, not by a reduction of cases.

We appreciate the support Congress has provided to the FBI. This support has enabled the FBI to undergo significant transformations, especially within its national security programs. Our nation continues to face ever increasing numbers of complex criminal and national security threats. In fact, we experienced the highest number of terrorism threats in one year during FY 2010.

The FBI understands that the current fiscal environment presents challenges and we are continuing our efforts to identify and pursue cost savings initiatives, as evidenced by the $69.8 million in FBI program offsets included in the President's FY 2012 budget. The FBI recently launched its own version of the government-wide SAVE initiative to collect cost savings ideas from employees. Since February 2011, the FBI has received over 1,500 ideas pursuant to this initiative and we are currently evaluating these ideas. These initiatives will enable the FBI to identify resources that can be redirected to our highest priorities.

ENCLOSURE

QUESTION 21

JUNE 20, 2011, MEMORANDUM FOR KATHRYN H. RUEMMLER COUNSEL TO THE PRESIDENT FROM THE DEPARTMENT OF JUSTICE OFFICE OF LEGAL COUNSEL RE: CONSTITUTIONALITY OF LEGISLATION EXTENDING THE TERM OF THE FBI DIRECTOR

U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

June 20, 2011

MEMORANDUM FOR KATHRYN H. RUEMMLER
COUNSEL TO THE PRESIDENT

Re: Constitutionality of Legislation Extending the Term of the FBI Director

You have asked whether it would be constitutional for Congress to enact legislation extending the term of Robert S. Mueller, III, as Director of the Federal Bureau of Investigation ("FBI"). We believe that it would.

President George W. Bush, with the Senate's advice and consent, appointed Mr. Mueller Director of the FBI on August 3, 2001. The statute providing for the Director's appointment sets a 10-year term and bars reappointment. *See* Omnibus Crime Control and Safe Streets Act, Pub. L. No. 90-351, § 1101, 82 Stat. 197, 236 (1968), as amended by Crime Control Act, Pub. L. No. 94-503, § 203, 90 Stat. 2407, 2427 (1976) (codified as amended at 28 U.S.C. § 532 note (2006)). A bill now pending in Congress would extend Mr. Mueller's term for two years.

Under the Constitution, *see* U.S. Const. art. I, § 8, cl. 18, Congress has the power to create offices of the United States Government and to define their features, including the terms during which office-holders will serve:

> To Congress under its legislative power is given the establishment of offices, the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, *and the fixing of the term for which they are to be appointed*, and their compensation—all except as otherwise provided by the Constitution.

Myers v. United States, 272 U.S. 52, 129 (1926) (emphasis added). In the exercise of this authority, Congress from time to time has extended the terms of incumbents. Opinions of the courts, the Attorneys General, and this Office have repeatedly affirmed the constitutionality of such extensions. *See In re Investment Bankers, Inc.*, 4 F.3d 1556, 1562-63 (10th Cir. 1993); *In re Benny*, 812 F.2d 1133, 1141-42 (9th Cir. 1987); *In re Koerner*, 800 F.2d 1358, 1366-67 (5th Cir. 1986); *Constitutionality of Legislation Extending the Terms of Office of United States Parole Commissioners*, 18 Op. O.L.C. 166 (1994) ("*Parole Commissioners*"); *Whether Members of the Sentencing Commission Who Were Appointed Prior to the Enactment of a Holdover Statute May Exercise Holdover Rights Pursuant to the Statute*, 18 Op. O.L.C. 33 (1994); *Displaced Persons Commission—Terms of Members*, 41 Op. Att'y Gen. 88, 89-90 (1951) ("*Displaced Persons Commission*"); *Civil Service Retirement Act—Postmasters—Automatic Separation from the Service*, 35 Op. Att'y Gen. 309, 314 (1927) ("*Retirement Act*"); *see also The Constitutional*

Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 153-57 (1996) ("*Separation of Powers*") (discussing the opinions).

Although Congress has the power to set office-holders' terms, this power is subject to any limits "otherwise provided by the Constitution." *Myers*, 272 U.S. at 129. Under the Appointments Clause, art. II, § 2, cl. 2, the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States"; in the case of inferior officers, Congress may vest the appointment in the President alone, the heads of Departments, or the courts of law. If the extension of an officer's term amounts to an appointment by Congress, the extension goes beyond Congress's authority to fix the terms of service. *See Parole Commissioners*, 18 Op. O.L.C. at 167 (citing *Buckley v. Valeo*, 424 U.S. 1, 124-41 (1976)); *Shoemaker v. United States*, 147 U.S. 282, 300 (1893).

The traditional position of the Executive Branch has been that Congress, by extending an incumbent officer's term, does not displace and take over the President's appointment authority, as long as the President remains free to remove the officer at will and make another appointment. In 1951, for example, the Acting Attorney General concluded that Congress by statute could extend the terms of two members of the Displaced Persons Commission: "I do not think . . . that there can be any question as to the power of the Congress to extend the terms of offices which it has created, subject, of course, to the President's constitutional power of appointment and removal." *Displaced Persons Commission*, 41 Op. Att'y Gen. at 90 (citation omitted). The Acting Attorney General "noted that such joint action by the Executive and the Congress in this field is not without precedent," *id.*, and gave as examples the extensions of the terms of members of the Reconstruction Finance Corporation, *see* Reconstruction Finance Corporation Act, ch. 334, § 2, 62 Stat. 261, 262 (1948), and the Atomic Energy Commission, *see* Atomic Energy Act, ch. 828, § 2, 62 Stat. 1259, 1259 (1948). In both instances, "no new nominations were submitted to the Senate and the incumbents continued to serve." *Displaced Persons Commission*, 41 Op. Att'y Gen. at 91.

In 1987, without discussing this traditional view, this Office reversed course and concluded that a statute extending the terms of United States Parole Commissioners was "an unconstitutional interference with the President's appointment power," because "[b]y extending the term of office for incumbent Commissioners appointed by the President for a fixed term, the Congress will effectively reappoint those Commissioners to new terms." *Reappointment of United States Parole Commissioners*, 11 Op. O.L.C. 135, 136 (1987). Seven years later, however, we returned to the earlier view, finding that Congress could extend the terms of Parole Commissioners. *See Parole Commissioners*, 18 Op. O.L.C. at 167-68. We noted that the extension of an incumbent's term creates a "potential tension" between Congress's power "to set and amend the term of an office" and the prohibition against its appointing officers of the United States, 18 Op. O.L.C. at 167-68, but that whether any conflict actually exists "depends on how the extension functions," *id.* at 168. In particular, "[i]f applying an extension to an incumbent officer would function as a congressional appointment of the incumbent to a new term, then it violates the Appointments Clause." *Id.* "The classic example" of a statute raising the potential tension would be one lengthening the tenure of an incumbent whom the President may remove only for cause. *Id.* On the other hand, if Congress extends the term of an incumbent whom the President may remove at will, "there is no violation of the Appointments Clause, for here the

President remains free to remove the officer and embark on the process of appointing a successor—the only impediment being the constitutionally sanctioned one of Senate confirmation." *Id.* In these circumstances, the "legislation leaves the appointing authority—and incidental removal power—on precisely the same footing as it was prior to the enactment of the legislation." *Id.* (citations omitted). Because Parole Commissioners were removable at will, we concluded that the extension of their terms was constitutional. *See id.* at 169-72.

The courts have gone even further in sustaining congressional power to extend the terms of incumbents. They uniformly rejected the argument that Congress could not extend, by two to four years, the tenure of bankruptcy judges, even though those judges were removable only for cause. In the most prominent of these cases, *In re Benny*, the Ninth Circuit held that "the only point at which a prospective extension of term of office becomes similar to an appointment is when it extends the office for a very long time." 812 F.2d at 1141. Because of our concerns about Congress's extending the terms of officers with tenure protection, we have questioned the reasoning of that opinion, *see Separation of Powers*, 20 Op. O.L.C. at 155 & nn.89, 90, but the opinion does support the power of Congress to enact legislation that would lengthen the term of the incumbent FBI Director.[1]

In any event, even under the longstanding Executive Branch approach, which makes it relevant whether a position is tenure-protected, Congress would not violate the Appointments Clause by extending the FBI Director's term. As we have previously concluded, the FBI Director is removable at the will of the President. *See* Memorandum for Stuart M. Gerson, Acting Attorney General, from Daniel L. Koffsky, Acting Assistant Attorney General, Office of Legal Counsel, *Re: Removal of the Director of the Federal Bureau of Investigation* (Jan. 26, 1993). No statute purports to restrict the President's power to remove the Director. Specification of a term of office does not create such a restriction. *See Parsons v. United States*, 167 U.S. 324, 342 (1897). Nor is there any ground for inferring a restriction. Indeed, tenure protection for an officer with the FBI Director's broad investigative, administrative, and policymaking responsibilities would raise a serious constitutional question whether Congress had "impede[d] the President's ability to perform his constitutional duty" to take care that the laws be faithfully executed. *Morrison v. Olson*, 487 U.S. 654, 691 (1988). The legislative history of the statute specifying the Director's term, moreover, refutes any idea that Congress intended to limit the President's removal power. *See* 122 Cong. Rec. 23809 (1976) ("Under the provisions of my amendment, there is no limitation on the constitutional power of the President to remove the FBI Director from office within the 10-year term.") (statement of Sen. Byrd); *id.* at 23811 ("The FBI

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[1] Concurring in the judgment in *In re Benny*, Judge Norris argued that there was no "principled distinction between congressional extensions of the terms of incumbents and more traditional forms of congressional appointments," because "[b]oth implicate the identical constitutional evil—congressional selection of the individuals filling nonlegislative offices." 812 F.2d at 1143 (footnotes omitted). This argument would seem to deny that any extension of an incumbent's term could be constitutional. Judge Norris's reasoning, however, may depend in part on the protected tenure of the bankruptcy judges in *In re Benny* whose terms were extended: "By extending the terms of known incumbents, Congress can guarantee that its choices will continue to serve for as long as Congress wishes, *unless the officers can be removed.*" *Id.* at 1143 (emphasis added). A footnote to this sentence discusses the circumstances in which Congress may confer tenure protection on officers, *id.* at 1143 n.5, but does not acknowledge the President's power to remove an officer who is serving at will.

Director is a highly placed figure in the executive branch and he can be removed by the President at any time, and for any reason that the President sees fit.") (statement of Sen. Byrd).[2]

Here, therefore, the issue is whether we continue to believe that the approach outlined in our earlier opinions and particularly in *Parole Commissioners* is correct. In connection with the pending bill, it has been argued that any legal act causing a person to hold an office that otherwise would be vacant is an "Appointment" under the Constitution, art. II, § 2, cl. 2, and thus requires use of the procedure laid out in the Appointments Clause. According to the argument, if legislation appoints an officer, the President's authority to remove him does not cure the defect. The Constitution forbids the appointment, whether or not the President may later act to undo it, and in practice the political costs of undoing the extension through removal of the incumbent may be prohibitive. Furthermore, whereas the process under the Constitution of nomination, confirmation, and appointment places on the President alone, with the advice and consent of the Senate, the responsibility for selection of an individual, legislation enabling an office-holder to serve an extended term without being reappointed diffuses that responsibility among the President and the members of the House and Senate.[3]

We disagree with this argument. We begin with the fundamental observation that legislation extending a term "does not represent a formal appointment by Congress." *Separation of Powers*, 20 Op. O.L.C. at 156. Director Mueller holds an office, and if his term is extended by Congress, he will continue to hold that office by virtue of appointment by President Bush, with the advice and consent of the Senate, in strict conformity with the requirements of the Appointments Clause. Rather than an exercise of the power to select the officer, the pending legislation, as a formal matter, is an exercise of Congress's power to set the term of service for the office. That the legislation here would enable Director Mueller to stay in an office he would otherwise have to vacate does not in itself constitute a formal appointment, any more than Congress makes an appointment when it relieves an individual office-holder from mandatory retirement for age, thereby lifting an impending legal disability and enabling him to retain his position.[4] In neither situation has Congress prescribed a method of appointment at variance with the Appointments Clause. *Cf. Buckley,* 424 U.S. at 124-41.

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[2] President Clinton, in fact, did remove FBI Director William S. Sessions. *See* Memorandum for Senate Committee on the Judiciary, from Vivian Chu, Legislative Attorney, Congressional Research Service, *Re: Director of the FBI Position and Tenure* at 5 & n.39 (June 1, 2011).

[3] *See The President's Request to Extend the Service of Director Robert Mueller of the FBI Until 2013 Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of John Harrison, Professor of Law, University of Virginia).

[4] For example, section 704 of the National Defense Authorization Act, Fiscal Year 1989, provided that "[n]otwithstanding the limitation" otherwise requiring retirement for age, "the President may defer until October 1, 1989, the retirement of the officer serving as Chairman of the Joint Chiefs of Staff for the term which began on October 1, 1987." Pub. L. No. 100-456, 102 Stat. 1918, 1996-97 (1988). Without that legislation, the Chairman would have had to retire from active service, and the office of Chairman of the Joint Chiefs of Staff would have become vacant. Similarly, section 504 of the National Defense Authorization Act for Fiscal Year 1998, provided that a service Secretary could "defer the retirement . . . of an officer who is the Chief of Chaplains or Deputy Chief of Chaplains of that officer's armed force," as long as the deferment did not go beyond the month that the officer turned 68 years old. Pub. L. No. 105-85, 111 Stat. 1629, 1725 (1997). Congress, moreover, has twice enacted statutes contemplating that, by specific later legislation, it would raise the retirement age of individual officers in the civil service. *See* Pub. L. No. 89-554, § 8335(d), 80 Stat. 378, 571 (1966) ("The automatic separation provisions of

Nor is the term-extension contemplated by the pending legislation *functionally* the equivalent of a congressional appointment. Whether the extension of a term functions as an appointment depends on its effect on the President's appointment power. If the extension of a term were to preclude the President from making an appointment that he otherwise would have the power to make, Congress would in effect have displaced the President and itself exercised the appointment power. We believe that such a displacement can take place when Congress extends the term of a tenure-protected officer. *See Parole Commissioners*, 18 Op. O.L.C. at 168. If, however, "the President remains free to remove the officer and embark on the process of appointing a successor—the only impediment being the constitutionally sanctioned one of Senate confirmation," *id.*, the President has precisely the same appointment power as before the legislation. Congress has not taken over that power but has acted within its own power to fix the term during which the officer serves. Because the President is free at any time to dismiss the FBI Director and, with the Senate's advice and consent, appoint a new Director, the pending legislation does not functionally deprive the President of his role in appointing the Director under the Appointments Clause.

The proposed legislation, moreover, would leave with the President the "sole and undivided responsibility" for appointments. *The Federalist No. 76* at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961). If the President signs the bill and allows the incumbent to remain in office, the "sole and undivided responsibility" of a single official, as well as the Senate's advice and consent, will still have been exercised in the incumbent's appointment—here, when President Bush appointed Director Mueller. Under the pending legislation, Director Mueller for the next two years would continue to serve as a result of that exercise of responsibility, just as he has since January 20, 2009, when President Obama took office. Throughout that time, each President sequentially will have had an additional "sole and undivided responsibility" for Director Mueller's service, because each President will have been able to remove him immediately, with or without cause.[5]

We also disagree that term-extension legislation violates the Appointments Clause because as a hypothetical matter it might impose some new political cost on the President. The relative political cost to the President of removing a term-extended incumbent as compared to the costs presented by other decisions involving appointment matters is speculative. In any event, the Appointments Clause does not prohibit all measures that might impose a political cost, but rather insures that Congress leave "scope for the judgment and will of the person or body in whom the Constitution vests the power of appointment." *Civil-Service Commission*, 13 Op. Att'y Gen. 516, 520 (1871). The pending legislation allows the exercise of the President's

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this section do not apply to—(1) an individual named by a statute providing for the continuance of the individual in the [civil] service."); Federal Executive Pay Act, Pub. L. No. 84-854, § 5(d), 70 Stat. 736, 749 (1956) ("The automatic separation provisions of this section shall not apply to any person named in any Act of Congress providing for the continuance of such person in the [civil] service.").

[5] *See The President's Request to Extend the Service of Director Robert Mueller of the FBI Until 2013 Before the S. Comm. on the Judiciary*, 112th Cong. (2011) (statement of William Van Alstyne, Professor of Law, Marshall-Wythe Law School).

"judgment and will" with respect to who shall serve as Director of the FBI and for that reason is consistent with the Appointments Clause.

Nor do we believe that we should depart from our earlier view because the present bill would apply only to Director Mueller, while the earlier extensions applied to multi-member groups. In this respect, the pending bill might be thought more like an individual appointment. But in *Displaced Persons Commission*, the terms of only two commissioners were extended, *see* 41 Op. Att'y Gen. at 88, and our opinion in *Parole Commissioners* stated that as few as three commissioners might benefit from the extension, *see Parole Commissioners*, 18 Op. O.L.C. at 167. The difference between those cases and this one does not appear significant. To be sure, the grounds for the extensions at issue in those cases do not seem to have included, at least expressly, the merits of the individual office-holders. But although Director Mueller's personal strengths are a key reason for the pending legislation, the need for stability in the Nation's efforts against terrorism is also a significant part of the justification. As the President said in announcing the proposal, "[g]iven the ongoing threats facing the United States, as well as the leadership transitions at other agencies like the Defense Department and Central Intelligence Agency, I believe continuity and stability at the FBI is critical at this time." Press Release, Office of the Press Secretary, The White House, *President Obama Proposes Extending Term for FBI Director Robert Mueller* (May 12, 2011). We do not believe (and, to our knowledge, no one has argued) that high regard for an office-holder disables Congress from extending his term.

Please let us know if we may be of further assistance.

Caroline D. Krass
Principal Deputy Assistant Attorney General

SUBMISSIONS FOR THE RECORD

STATEMENT OF

JAMES B. COMEY

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

HEARING ON

"THE PRESIDENT'S REQUEST TO EXTEND THE SERVICE OF DIRECTOR ROBERT MUELLER OF THE FBI UNTIL 2013"

JUNE 8, 2011

Chairman Leahy, Senator Grassley, and distinguished Members of the Committee:

Thank you for inviting me to testify today. It is a pleasure to be back before this distinguished Committee to endorse legislation extending FBI Director Mueller's term by two years.

I know Bob Mueller well and he is one of the finest public servants this country has seen. In his decade as Director, he has made huge strides toward transforming the FBI and has contributed enormously to the safety of the American people. During my tenure as Deputy Attorney General, I spoke to him almost every day, and watched as his remarkable combination of intellect and tenacity drove the FBI's counter-terrorism efforts. Because the Director's standards were so high, he made everyone around him better. His relentless probing, rooted in vast personal knowledge of both the enemy and our capabilities, rippled through the Bureau, and the rest of the national security community. Everyone knew their work had to be good because the Director would test it, compare it to other work he had seen, and press hard. And the President could count on Bob to offer sound advice and take prudent action to best defend the country.

There is never a great time to change Directors. Something is always lost in a transition, as a new leader comes to know the threats, and understand the capabilities of those around him. But there are bad, and even potentially dangerous, times to change Directors, and this is one of them. I no longer have

access to threat intelligence, but common sense and the publicly available information tell me that the combination of the successful raid on Bin Laden's compound and the approaching 10th anniversary of 9/11 creates an unusual threat environment. And in the middle of that, leadership is changing at two of the pillars of our national security community – Defense and CIA. At this moment, it makes good sense to extend Bob Mueller's leadership of the organization primarily responsible for protecting our homeland from terrorist attack.

To the extent there has been criticism of this idea, it has not focused on the man, but on the purpose of the ten-year term – reducing the risk of an abuse of power by a long-serving Director. But the man is the answer to that criticism. There is no person better suited to the responsible use of power than Bob Mueller. I know firsthand his commitment to the rule of law. He is what we wish all public servants could be.

There are no politics in this decision, just as there are no politics in Bob Mueller. This is, as he is, only about doing what is best for our country. Like so many of my fellow Americans, I am grateful for his willingness to continue to serve.

Thank you again for the opportunity to discuss this important topic with you today and I look forward to answering any questions you might have.

MEMORANDUM June 1, 2011

To: Senate Committee on the Judiciary
Attention: Nick Podsiadly

From: Vivian Chu, Legislative Attorney, x74576

Subject: **Director of the FBI Position and Tenure**

This memorandum is prepared in response to your request for an overview of the legal provisions governing the appointment of the Director of the Federal Bureau of Investigation (FBI), and discussion of the constitutionality of the current proposal to extend the tenure of the Directorship for the current incumbent, Robert S. Mueller III.[1]

The current appointment scheme for the Director of the FBI was established in 1968 and 1976.[2] The Omnibus Crime Control and Safe Streets Act of 1968 required the Director of the FBI to be appointed by the President, with the advice and consent of the Senate.[3] In 1976, Congress subsequently established that "the term of service of the Director of the Federal Bureau of Investigation shall be ten years," and that "[a] Director may not serve more than one ten year term."[4]

The current FBI Director, Robert S. Mueller III, was appointed by President George W. Bush and confirmed by the Senate on August 2, 2001. His 10-year term is slated to expire on September 4, 2011.[5] In May 2011, President Barack Obama announced his intention to seek legislation that would permit Mr. Mueller to stay for an extra two years, citing the need for continuity in national security at the FBI while

[1] The analysis provided in this memorandum may be used in future CRS reports.

[2] Since the its beginning in 1908, the FBI was headed by a single individual known as the "Chief." During the term of William Flynn in the 1920s, the title to the position was changed to the "Director." The Director of the FBI had been appointed by the Attorney General. This was codified in statute in 1966. *See* 28 U.S.C. § 532; P.L. 89-554 § 4(c) (1966) ("The Attorney General may appoint a Director of the Federal Bureau of Investigation. The Director ... is the head of the Federal Bureau of Investigation.").

[3] 28 U.S.C. § 532 note; P.L. 90-351, title VI, § 1101 (1968). The statute did not apply to J. Edgar Hoover, the incumbent who had been serving for almost 50 years, but was worded to apply to future directors, beginning with his successor. This measure had been introduced and passed in the Senate twice previously, but never made it through the House of Representatives. *See* S.603, 88th Cong., 1st sess. (1963) and S.313, 89th Cong., 1st sess. (1965).

[4] P.L. 94-503, title II, § 203 (1976). As with the 1968 measure, the 1976 measure also had been considered and passed by the Senate twice, but failed to clear the House of Representatives. *See* S.2106 93rd Cong., 1st sess. (1974) and S.1172 94th Cong., 1st sess. (1975).

[5] Associated Press, *Obama will ask Congress to expand 10-year term for FBI Director Mueller by 2 years*, Washington Post (May 12, 2011), *available at*, http://www.washingtonpost.com/politics/obama-will-ask-congress-to-expand-10-year-term-for-fbi-director-mueller-by-2-years/2011/05/12/AFMOH6zG_story.html.

leadership transitions take place at other intelligence agencies.[6] The extension would only apply to Mr. Mueller.

Congress has previously lengthened the term of office for incumbents. For example, Congress extended the terms of the members serving on the Displaced Persons Commission for purposes of permitting the Commission to finish carrying out its duties. The original act, passed in 1948, established a Commission consisting of three commissioners, appointed by the President with the advice and consent of the Senate, whose terms were to end June 30, 1951.[7] Prior to June 30, Congress subsequently amended the act to extend the terms of the commissioners, and that of the Commission, through August 31, 1952.[8] The Attorney General issued an opinion in response to the President's inquiry as to whether two incumbent commissioners' existing appointments were valid until August 31, 1952, or if the commissioners would cease to hold office on June 30, 1951.[9] Citing prior incidences where Congress extended terms of offices for certain commissions,[10] the Attorney General concluded there would be no need for the President to submit new nominations to the Senate, and that the two commissioners would continue to hold office validly after June 30.

Congress has also extended the life of the United States Parole Commission (Parole Commission) several times and the tenure of its commissioners twice. Although its history dates back to the 1930s, Congress, in 1976, established the Parole Commission as an independent agency within the Department of Justice, with nine commissioners to be appointed by the President with the advice and consent of the Senate for a term of six years. Under the statute, a commissioner can holdover until his successor is nominated and qualified, but may not serve for longer than 12 years.[11] Although Congress enacted a law to abolish the Parole Commission in 1984, it effectively extended, on a temporary basis, the life of the Parole Commission and the terms of offices for an additional five years from the time the sentencing guidelines became effective.[12] This meant that beginning in 1987, the incumbent commissioners, whose terms would have otherwise expired in six years, could serve for an additional five years. With the Parole Commission and the terms of office slated to expire in 1992 per the five year extension, Congress, again, lengthened the life of the commission and the tenure of the incumbent officers for another five years through 1997.[13] Even though the existence of the Commission was extended several times thereafter,[14] Congress, in 1996,

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[6] *Id.*

[7] P.L. 80-774; 62 Stat. 1012 (1948).

[8] P.L. 81-555; 64 Stat. 225 (1950) ("Section 8 of the Displaced Persons Act of 1948 is amended by striking out the date 'June 30, 1951' in the first sentence and inserting in lieu thereof the date 'August 31, 1952.'").

[9] 41 Op. Att'y Gen. 88 (1951) (released for publication January 30, 1958).

[10] *Id.* at 90-91. The opinion noted the extension for incumbent directors of the Reconstruction Finance Corporation from January 22, 1950 to June 30, 1950. *See* P.L. 72-2; 47 Stat. 5 (1932) and P.L. 80-548; 62 Stat. 262 (1948). It also cited the extension for commissioners of the Atomic Energy Commission from August 1, 1948 to June 30, 1950. *See* P.L. 79-585; 60 Stat. 756 (1946) and P.L. 80-899; 62 Stat. 1259 (1948). Notably, the Atomic Energy Commission was formally abolished in 1974 by the Energy Reorganization Act of 1974. P.L. 93-438; 88 Stat. 1233 (1974). The Attorney General's opinion stated that in both of these extensions the incumbents continued to serve and that no new nominations were submitted to the Senate.

[11] P.L. 94-233; 90 Stat. 219 (1976), codified at 18 U.S.C. § 4202 (repealed).

[12] P.L. 98-473; 98 Stat. 2032 (1984) (Section 235(b)(2) "Notwithstanding the provisions of section 4204 of title 18, United States Code, as in effect on the day before the effective date of this Act, the term of office of a Commissioner who is in office on the effective date is extended to the end of the five-year period after the effective date of this Act.").

[13] P.L. 101-650; 104 Stat. 5115 (1990) (Section 316 "For the purposes of section 235(b) of Public Law 98-473 ... each reference in such section to 'five years' or a 'five-year period' shall be deemed a reference to 'ten years' or a 'ten-year period', respectively.").

[14] Congress passed the Parole Commission Phaseout Act of 1996, which extended the life of the Commission for another five years, from 1997-2002. P.L. 104-232; 110 Stat. 3055 (1996). In 2002, Congress passed the 21st century Department of Justice Authorization Act of 2002 to extend the life of the commission for another three years. P.L. 107-273; 116 Stat. 182, 195 (2002). (continued...)

when it extended the life of the Commission for another five years through 2002, repealed the provision that would have simultaneously extended the terms of the commissioners' offices.[15] This action "reinstituted" the 12-year time limitation, meaning that some of the long-standing incumbent officers would not be able to continue serving. Because of the lengthened tenures, a few of the commissioners, who otherwise would have had to be re-appointed after their sixth year (assuming they were not staying pursuant to the holdover clause), continued to hold office validly without re-appointment or a second confirmation hearing.[16] For example, Commissioner Vincent J. Fechtel, Jr., served for a total of 13 years from November 1983 to April 1996.[17]

It is also worth noting that when Congress considered the single 10-year term limit for the FBI Director, which became law, other proposed term limitations raised during the Senate debate included: a single 10-year term with an additional five years, subject to approval by Congress,[18] and a four-year term with the right to re-appoint for additional four-year terms.[19] It also appears that the original bill (S.2106) as introduced by Senator Robert C. Byrd in the 93rd Congress would have permitted the FBI Director to serve no more than two 10-year terms.[20] In the aftermath of J. Edgar Hoover's near 50 years as Director of the FBI and the inherent political sensitivities of the position,[21] Senator Byrd stated that "after much reflection, that 20 years is too long a time for any one man to be Director of the Federal Bureau of Investigation. ... [s]o S.2106, if it is amended, I believe will erect a valuable check upon the possible abuse of executive power."[22]

Regarding the constitutionality of the proposal to extend the current FBI Director's term by two years, it is necessary to review the relevant constitutional principles governing the President's plenary authority to remove the Director.[23] The Appointments Clause states that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[24] It has long been recognized

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(...continued)

In 2005, Congress passed the U.S. Parole Commission Extension Authority Act to extend the life of the commission another three years from 2005 to 2008. P.L. 109-76; 119 Stat. 2035 (2005). Most recently, Congress passed the U.S. Parole Commission Extension Act of 2008, which extended the commission through 2011. P.L. 110-312; 122 Stat. 3013 (2008).

[15] P.L. 104-232; 110 Stat. 3055, 3056 (1996) (Section 4 "Section 235(b)(2) of the Sentencing Reform Act of 1984 (98 Stat. 2032) is repealed.").

[16] For example, two longstanding commissioners were Victor M.F. Reyes, who served from December 1982 through December 1992, and Jasper R. Clay, Jr., who served from October 1984 through October 1986. Each commissioner was only nominated and appointed one time.

[17] USDOJ: USPC Our History, *available at* [http://www.justice.gov/uspc/history.htm].

[18] "Ten Year Term for FBI Director," *remarks* Sen. Roman L. Hruska vol. 120 *Cong. Record*, 34085 (October 7, 1974).

[19] "Ten Year Term for FBI Director," *remarks* Senator William L. Scott vol. 120 *Cong. Record*, 34086 (October 7, 1974). Senator Scott offered the four-year term proposal as an amendment, which was voted on and not adopted by the Senate. Senator William Brock also mentioned, but did not offer as an amendment, his proposal of a six-year term subject to the possibility of re-appointment.

[20] "Ten Year Term for FBI Director," *remarks* Senator Robert C. Byrd vol. 120 *Cong. Record*, 34084 (October 7, 1974).

[21] "If there is one thing that must not happen again in this country, it would be the transition of the FBI into a political police force or into a politicized organization in any fashion," *remarks* Senator Robert C. Byrd vol. 120 *Cong. Record*, 34084 (October 7, 1974).

[22] "Ten Year Term for FBI Director," *remarks* Senator Robert C. Byrd vol. 120 *Cong. Record*, 34084 (October 7, 1974).

[23] Though not discussed in detail here, it should also be noted that as a civil officer of the United States, the FBI Director could be impeached by Congress for "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const., art II, § 4.

[24] U.S. Const., art. II, § 2, cl. 2.

that "the power of removal [is] incident to the power of appointment."[25] This maxim was addressed more fully in *Myers v. United States*, where the Supreme Court addressed the President's summary dismissal of a postmaster from office, in contravention of a statute requiring that the President obtain the advice and consent of the Senate prior to removal.[26] In *Myers*, the Supreme Court ruled that the President possesses plenary authority to remove presidentially appointed executive officers who have been confirmed by the Senate,[27] and other presidentially appointed executive officers, so long as Congress does not expressly provide otherwise.[28] Clarifying the scope of the appointment power, the Court noted that while Congress can imbue cabinet officers with the power to appoint inferior officers and place incidental regulations and restrictions on when such department heads can exercise their power of removal, Congress may not involve itself directly in the removal process.[29]

Notwithstanding the seemingly clear limitations on the ability of Congress to interfere with the President's appointment and removal power, the Supreme Court, in *Humphrey's Executor v. United States*, unanimously upheld a law that restricted the President's ability to remove an agency official.[30] Specifically at issue was a provision of the Federal Trade Commission (FTC) Act, which provided that the President could remove an FTC Commissioner only on the basis of inefficiency, neglect of duty, or malfeasance in office.[31] To distinguish the case at hand, the Court held that *Myers* was limited to "purely executive officers," as "such an officer [i.e., the postmaster] is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is."[32] Thus, the holding in *Myers* did not reach and could not include officers not in the executive department or those who exercised "no part of the executive power vested by the Constitution in the President."[33] Explaining that the FTC was not an executive body, but rather functioned as a "quasi-legislative or quasi-judicial" agency, the Court ruled that Congress possessed the authority to control the terms of removal for such officers.[34]

This approach to removal shifted in *Morrison v. Olson*, where the Supreme Court clarified that the proper inquiry regarding removal power questions should focus not an officer's status as either "purely executive" or "quasi-legislative," or "quasi-judicial," but rather, on whether a removal restriction

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[25] Ex Parte Hennen, 38 U.S. (13 Pet.) 230, 259 (1839).

[26] Myers v. United States, 272 U.S. 52, 106-107 (1926).

[27] *Id.* at 176.

[28] *Id.* at 161. In at least one instance, the court has applied "for cause" removal protection to a statute that did not otherwise provide for such protection. The Securities and Exchanges Commission's enabling legislation is silent as to the removal of commissioners; however, reviewing courts have held that commissioners may not be summarily removed from office. *See* SEC v. Blinder, Robinson & Co., Inc., 855 F.2d 677, 681 (10th Cir. 1988). In *Blinder*, while the court noted that the Chairman of the SEC served at pleasure of the President and therefore may be removed at will, it determined that commissioners may be removed only for inefficiency, neglect of duty, or malfeasance in office. *Id.* Given that the conclusion in *Blinder* is generally seen to be applicable only to multi-member boards or commissions whose purpose is to be independent from the executive branch, it is unlikely that any "for cause" removal protection could be read as applying to the statute establishing the time and term restriction on the FBI Director. *See also* President Clinton dismissal of FBI Director William Session, *infra*.

[29] Myers, 272 U.S. at 161.

[30] Humphrey's Executor v. United States, 295 U.S. 602 (1935).

[31] *Id.* at 619-620.

[32] *Id.* at 627.

[33] *Id.* at 627-628.

[34] *Id.* at 628-629. The duties of the commission included conducting investigations and making pertinent reports to Congress, as well as acting as "a master in chancery under rules prescribed by the court." *Id.* Accordingly, the Supreme Court ruled that the legislative and judicial functions envisioned by the statute necessarily placed the FTC outside the scope of complete executive control. *Id.*

interferes with the ability of the President to exercise executive power and to perform his constitutional duty.[35] Applying this maxim to the statute at issue, which provided that an independent counsel could only be removed for "good cause" by the Attorney General, the Court found that the independent counsel lacked significant policymaking or administrative authority despite being imbued with the power to perform law enforcement functions. As such, the Court in *Morrison* determined that removal power over the independent counsel was not essential to the President's successful completion of his constitutional duties.[36]

The Court's decision in *Morrison* appeared to further weaken the standard delineated in *Myers* because *Morrison* essentially established that there are no formal categories of executive officials who may or may not be removed at will. As a result, any inquiry in a removal case where Congress places a restriction on the President's power to remove, such as a given "for cause" removal requirement, will necessarily focus on whether the restriction impermissibly interferes with the President's ability to perform his constitutionally assigned functions.[37]

Accordingly, the principles discussed above establish that the President may remove the Director of the FBI at will, given that the "power of removal [is] incident to the power to remove."[38] Indeed, President Bill Clinton exercised this removal power on July 19, 1993, by firing FBI Director William S. Sessions. In particular, upon receiving a recommendation from Attorney General Janet Reno that Sessions be removed, President Clinton informed Sessions: "I am hereby terminating your service as Director of the Federal Bureau of Investigation, effective immediately."[39] It should also be noted that during Senate consideration of the 1976 measure, Senators Byrd and Hruska emphasized several times that "there is no limitation on the constitutional power of the President to remove the FBI Director from office within the 10-year term. The Director would be subject to dismissal by the President as are all purely executive officers."[40]

Even though the Administration has asked Congress to extend the FBI Director's tenure, such congressional action may give rise to constitutional concerns. A court would likely evaluate such a proposal under the principles discussed above, specifically whether such an extension would be seen as a congressional intrusion on the appointments process and whether such action would "impede the President's ability to perform his constitutional duty."[41] A court reviewing a proposed extension may find that such action does not violate the Appointments Clause or impermissibly interfere with the President's

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[35] Morrison v. Olson, 487 U.S. 654 (1988).

[36] *Id.* at 693-696.

[37] *Id.* at 693-96. Although the power to remove officers is generally vested in the Executive Branch, Congress still retains the ability to remove a validly appointed executive officer if it invokes its impeachment power. *See* U.S. Const., art. I, § 2, cl. 5 ("The House of Representatives ... shall have the sole Power of Impeachment"); U.S. Const., art. I, § 3, cl. 6 ("The Senate shall have the sole Power to try all Impeachments"). *But cf.* Saikrishna Prakash, *Removal and Tenure in Office*, 92 Va. L. Rev. 1779, 1785-1814 (2006) (relying on textual and structural arguments, Prakash argues that Congress has the power to remove because the Constitution's Necessary and Proper Clause "makes Congress the creator, provider, and terminator of other offices. Under this powerful authority, Congress can enact removal statutes of various sorts.").

[38] Ex Parte Hennen, 38 U.S. (13 Pet.) at 259.

[39] *See* Michael Isikoff, Ruth Marcus, *Clinton Fires Sessions as FBI Director*, Washington Post, at A1 (July 20, 1993); *Text of Letter From Clinton to Sessions*, Washington Post, at A11(July 20, 1993).

[40] "Ten Year Term for FBI Director," *remarks* Sen. Robert C. Byrd vol. 120 *Cong. Record*, 34083 (October 7, 1974). *See also* "[T]he record should be made clear that the stability which we are attempting with this legislation will not interfere with the Presidential power of removal. ... Should the President seek to remove a Director of the FBI, and executive officer, prior to the expiration of the 10-year term, he would be free to do so," *remarks* Sen. Roman L. Hruska vol. 120 *Cong. Record*, 34086 (October 7, 1974).

[41] Morrison, 487 U.S. at 691.

ability to perform his constitutionally assigned functions, because the President would still have the plenary authority to remove the Director during the extended two years. Moreover, a court could find that such a proposal would not be constitutionally questionable, given the generally accepted principle that the legislature has the power to "create or abolish [offices], or modify their duties, [and to] shorten or lengthen the term of service."[42] If, however, the Director's term had an existing statutory "for cause" removal protection, then it is possible that a proposed extension could be viewed as being equivalent to congressional re-appointment, and therefore in violation of Appointments Clause and separation of powers principles. Opinions of the Attorneys' General and the Department of Justice's Office of Legal Counsel (OLC), espousing the views of the executive branch, traditionally have concluded as much. With the 1951 Attorney General opinion addressing the Displaced Persons Commission and the 1994 OLC opinion addressing the Parole Commission, the Department of Justice has consistently concluded that the lengthening of an officer's tenure "presents no constitutional difficulties," because nothing in those statutes "requires [the President] to continue the incumbents in office."[43] In 1994, the OLC addressed the second five-year extension of the Parole commissioners' tenure and explicitly disavowed an earlier 1987 opinion, which viewed the first extension of the Parole commissioners' terms of office as unconstitutional, finding it in contradiction with its 1951 opinion.[44] It stated that its 1987 opinion made "no effort to explain how legislation extending the term of an officer who serves at will impinges on the power of appointment, and we can conceive of no credible argument that an infringement rising to the level of a constitutional violation may result from such legislation."[45] A 1996 OLC opinion, which summarized its view on the constitutionality of lengthening the tenure of an office, stated:

> At the one end is constitutionally harmless legislation that extends the term of officer who is subject to removal at will. At the other end is legislation ... that enacts a lengthy extension to a term of office from which the incumbent may be removed only for cause. Legislation along this continuum must be addressed with a functional analysis. Such legislation does not represent a formal appointment by Congress and, absent a usurpation of the President's appointing authority, such legislation falls within Congress's acknowledged authority—incidental to its power to create, define, and abolish offices—to extend the term of an office. As indicated, constitutional harm follows only from legislation that has the practical effect of frustrating the President's appointing authority or amounts to a congressional appointment.[46]

Notably, however, the Bankruptcy Amendments and Federal Judgeship Act of 1984,[47] which extended the tenure of bankruptcy judges who can be removed only for cause, has been repeatedly upheld.[48] Unlike the aforementioned Department of Justice opinions, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) in *In re: Benny* did not distinguish between "at will" versus "for cause" positions in deciding the constitutionality of the act. Rather, without detailed analysis, it concluded that "Congress' power to extend prospectively terms of office can be implied from its power to add to the duties of an office other duties that are germane to its original duties."[49] The Ninth Circuit found that the extension of a term of office "becomes similar to [a congressional] appointment ... when it extends the office for a very long

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[42] Crenshaw v. United States, 134 U.S. 99, 106 (*citing* Newton v. Commissioners, 100 U.S. 548, 557-58).

[43] 41 Op. Att'y Gen. 88 (1951) (released for publication January 30, 1958).

[44] 18 Op. Off. Legal Counsel 166, 167 (1994) (*citing* 11 Op. Off. Legal Counsel 135 (1987)).

[45] 18 Op. Off. Legal Counsel at 168 n. 3.

[46] 20 Op. Off. Legal Counsel 156 (1996).

[47] P.L. 98-353; 98 Stat. 333 (1984), *codified at* 28 U.S.C. § 152.

[48] *In re: Benny*, 812 F.2d 1133 (9th Cir. 1987). *See also In re: Investment Bankers*, 4 F.3d 1556, 1562 (10th Cir. 1993), *cert. denied* 510 U.S. 1114 (1994); *In re: Koerner*, 800 F.2d 1358, 1362-67 (5th Cir. 1986).

[49] *In re: Benny*, 812 F.2d at 1141 (*citing* Shoemaker v. United States, 147 U.S. 282, 300-01 (1893)).

time."[50] Judge Norris, though concurring with the holding of the majority opinion, expressed disagreement, stating: "I believe the *Appointments Clause* precludes Congress from extending the terms of the incumbent officeholders. I am simply unable to see any principled distinction between congressional extensions of the terms of incumbents and more traditional forms of congressional appointments" (emphasis in the original).[51] He further disagreed with the majority's distinction between a "short" and "long" extension as prompting a violation of separation of powers principles, noting that "the Supreme Court has implicitly rejected the notion that the Constitution proscribes appointments only if they are 'long' rather than 'short.'"[52] While the holding in this case or the reasoning of Judge Norris could be applied in the future, the 1996 OLC opinion stated that it found the reasoning in *Benny* unpersuasive and that the doctrine may be limited to its factual context, given that "an enormous number of decisions within the bankruptcy system," might have been put into question had the court had reached the opposite conclusion.[53]

Lastly, given the precedent of not re-appointing an individual whose term of office is to be extended, it is likely that the incumbent Director would not need to be nominated or appointed a second time.[54]

[50] *Id.*

[51] *Id.* at 1142-43 (Norris *concurring*).

[52] *Id.* at 1145-46. ("In *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)] the Court considered the constitutionality of legislative appointments for terms ranging between six months to six years and, without making any distinction between 'short' and 'long' appointments, the Court declared unconstitutional *all* legislative appointments of officers of the United States.").

[53] 20 Op. Off. Legal Counsel at 155 n.90.

[54] Consideration, however, should be given to the wording of the proposed extension of office, so as to avoid any construction that could give rise to the aforementioned constitutional issues.

STATEMENT OF JOHN T. ELLIFF
HEARING ON THE PRESIDENT'S REQUEST TO EXTEND THE SERVICE OF
DIRECTOR ROBERT MUELLER OF THE FBI UNTIL 2013
COMMITTEE ON THE JUDICIARY, UNITED STATES SENATE
JUNE 8, 2011

Mr. Chairman and Members of the Committee:

Thank you for the opportunity to provide a statement on the President's request to extend the service of Director Robert Mueller of the FBI until 2013. This proposal would amend the statute establishing a ten-year term for the FBI Director to permit Director Mueller to serve an additional two years beyond the end of his ten-year term.

It was my privilege to testify at the 1974 hearing on a ten-year term for the FBI Director before the Subcommittee on FBI Oversight of the Judiciary Committee. The hearing was chaired by Senator Robert C. Byrd, who was sponsoring the ten-year term bill and had sponsored the 1968 amendment to the Crime control and Safe Streets Act requiring Senate confirmation of the FBI Director. Before 1968 the head of the FBI and its predecessor organizations was appointed and removed at the discretion of the Attorney General.

At the time of the 1974 hearing I was Assistant Professor of Politics at Brandeis University and was engaged in a study of the FBI and its domestic intelligence functions. Subsequently, I became head of the Domestic Intelligence Task Force on the staff of the Select Committee chaired by Senator Frank Church in 1975-76 to investigate U.S. intelligence activities and then served on the staff of the Senate Select Committee on Intelligence during 1977-92. I later held senior executive positions at the Department of Defense (1992-95) and the Intelligence Community Management Staff (1995-2005). In the latter position I was detailed for one year to the Judiciary Committee staff (2001-2) and for two years to the FBI Directorate of Intelligence (2003-5). After retirement I worked as an independent contractor for the FBI until 2010.

My statement today reviews the circumstances that led to enactment of a ten-year term for the FBI Director. Most attention focused on the concern that an FBI Director not have the unlimited tenure that allowed J. Edgar Hoover to hold the office for 48 years from 1924 until his death in 1972. In 1974, however, there was equal concern that a President should not have the ability to appoint his "own" person as Director.

Upon the death of Director Hoover, President Nixon had named L. Patrick Gray as Acting Director and after the 1972 election had nominated Mr. Gray to be Director. The Judiciary Committee hearings on Mr. Gray's nomination became the first step in Senate examination of what became known as the Watergate affair. Questions were raised at Mr. Gray confirmation's hearings about public speeches he delivered in the fall of 1972 that appeared to support the Nixon re-election campaign. More serious concerns resulted from Mr. Gray's testimony that he regularly reported to the White House

Counsel on details of the FBI's initial investigation of the Watergate break-in. As his nomination became controversial Mr. Gray withdrew his name from consideration. Shortly thereafter he told Watergate investigators that he had destroyed documents given to him by senior presidential aides from the safe of a Watergate break-in suspect in the Executive Office Building. (In 1975 the Watergate Special Prosecutor's office closed its investigation of this incident and a separate allegation that Mr. Gray had testified falsely at his confirmation hearing regarding knowledge of FBI wiretaps on journalists and executive officials conducted for President Nixon under Director Hoover to find sources of leaks to the press.)

My testimony in March 1974 was based largely on disclosures from the initial Watergate investigations and related press reporting. At the time of the hearing the Senate Watergate investigation led by Senator Sam Ervin and Senator Howard Baker had been completed; the Watergate Special Prosecution Force criminal investigations were intensifying; the House Judiciary Committee's impeachment investigation was getting underway; and the Senate Foreign Relations Committee was looking into the FBI wiretaps for the Nixon White House. While these investigations concentrated on the Nixon Administration, credible reports of questionable ties between the FBI and the White House under previous Administrations surfaced in the media, partly as a result of efforts to show "it didn't start with Nixon."

A major purpose of my 1974 testimony was to summarize information that had come to light about the special relationships between FBI Director Hoover and succeeding Presidents. The FBI's authority for domestic intelligence surveillance of "subversive activities" was based on presidential directives dating to President Franklin D. Roosevelt, and the FBI was directed to expand intelligence gathering on domestic groups under President Lyndon Johnson. The press was reporting that Director Hoover had done special favors for both President Roosevelt and President Johnson. These reports put into context Director Hoover's agreement to wiretap reporters and executive officials for President Nixon.

The story was complicated, however, by information that Director Hoover had terminated a decades-long practice of FBI covert "black bag job" searches in the mid-60s and had resisted implementing a plan approved by President Nixon to resume such practices in 1970. The senior FBI official responsible for FBI intelligence activities under Director Hoover, Assistant to the Director William C. Sullivan, was reported to have intrigued with Nixon Administration officials to become Director Hoover's successor. FBI records of wiretaps for the Nixon White House had been kept in Mr. Sullivan's office. In anticipation of Mr. Sullivan's dismissal by Director Hoover in 1971, President Nixon approved the transfer of the wiretap records to the office of a senior presidential aide. These extraordinary events suggest the kinds of unprecedented disclosures that continued to emerge from Watergate investigations and from subsequent Congressional investigations of FBI intelligence activities.

In this setting the Judiciary Committee had the difficult task of framing a measure that would ensure sufficient independence of the FBI from improper presidential

influence while at the same time preventing the FBI from having the degree of autonomy that Director Hoover had gained over the years – in some measure through special relationships with succeeding presidents. Although the Committee reported Senator Byrd's ten-year tem bill in October 1974, action was held over until the next Congress.

The Judiciary Committee's 1974 report framed the need for a fixed term for the FBI Director as follows:

> "Without a limit on the duration of his term of office, a Director may hold his position for as long as he is able to maintain the confidence, or satisfy the wishes, of succeeding Presidents. In addition, the Congress has made no determination that, because of the non-political nature of the Director's responsibilities, the office ought not to change hands automatically with the election of a new President. In the absence of Congressional guidance, a newly elected President may feel free to replace the Director with a nominee of his own choosing, subject to the advice and consent of the Senate, immediately upon taking office.
>
> "Consequently, the existing provisions governing appointment of the FBI Director do not strike a proper balance between the need for responsiveness to the broad policies of the Executive Branch and, at the same time, independence from any unreasonable or unjustifiable requests made by the Director's superiors. There is legitimate concern that a Director might build up so much power through long service that he would become, in effect, politically unremovable by the President. It is important to give the Director some degree of protection from dismissal without good reason, as well as to avoid an appointment of a new Director with each new President. No institutional arrangement can guarantee with certainty that any official will exercise governmental authority with integrity and good judgment. Nevertheless, there are especially sensitive positions which require the greatest care on the part of Congress in creating an environment for the responsible use of power. It is the great value of the FBI as a criminal investigative agency, as well as its dangerous potential for infringing individual rights and serving partisan or personal ambitions, that makes the office of FBI Director unique."

The Committee report specifically addressed the impact of the ten-year term on the president's removal power:

> "The 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. The Director would be subject to dismissal by the President, as are all purely executive officers. However, the setting of a ten-year term of office by the Congress would, as a practical matter, preclude a President from arbitrarily naming a new FBI Director for political reasons without showing good reasons for dismissal of his predecessor wince the chances for confirmation by the Senate of a new nominee would be remote. The bill is a cautionary message to the President to the effect that whereas his power to remove a Director of the FBI 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."

This statement of the Judiciary Committee's intent became particularly relevant with the election of President Jimmy Carter in 1976 after the enactment of the ten-year term law. As a presidential candidate Governor Carter criticized then-Director Clarence Kelley, but newly-elected President Carter did not ask for Director Kelley's resignation. Director Kelley announced his intention to retire at the end of 1977, and Attorney General Griffin Bell formed a blue ribbon panel to search for a successor. According to a credible press account, Director Kelley told a meeting of FBI officials that a desire to prevent the FBI from becoming "politicized" was one reason he was staying in office for another year. Director Kelley was concerned that retiring as part of the presidential transition could set a precedent for a change in FBI directors every time a new party takes control of the White House. Director Kelley said essentially the same thing in his 1974 testimony to the Judiciary Subcommittee on the ten-year term bill.

As introduced by Senator Byrd and reported by the Judiciary Committee in 1974, the ten-year term bill provided for the reappointment of a Director for one additional ten-year term. As enacted, the reappointment provision was dropped. A third option that was considered would have allowed reappointment for one additional term of five years rather than ten years. The Committee report stated that the additional term would have "the advantage of giving a competent Director another relatively long period of tenure to continue his programs." The five-year extension was a "middle ground" that would retain "the flexibility and accountability of a second term without extending a Director's tenure for a sufficient number of years to raise serious concerns."

My testimony in 1974 supported a single ten-year term, basically for reasons stated in the Committee report:

> "A second-ten year term would give a Director a total of twenty years as head of the FBI—a long tenure which could allow a centralization of power in one man. A Director who was anxious to be renamed might, during the later years of his first term, attempt to curry favor with the President and/or the Congress in order to ensure his reappointment. It is contended that a single ten-year term is long enough to provide him time to implement his programs and free himself from fear of Executive branch reprisal for independent action, but not lengthy enough to establish an unresponsive FBI due to a Director who has remained in office too long."

I do not recall specifically why the single ten-year term was finally chosen and the provision for reappointment deleted. However, the decision may have been influenced by more disclosures in 1975 of highly controversial FBI activities under Director Hoover. For example, the Church Committee's hearings revealed in some detail the extent and nature of the FBI's COINTELPRO operations to disrupt and discredit domestic groups, the FBI intelligence surveillance and harassment of Dr. Martin Luther King, Jr., and FBI

wiretaps for the Truman White House and the Kennedy Administration. The single ten-year term sent a message that future FBI Directors must not have the unchecked power of Mr. Hoover or an incentive to maneuver to keep the job.

Today's proposal for a two-year extension of Director Mueller's service does not run those risks. Instead, there is some concern that postponing the decision on nomination of the next Director to the year after the 2012 presidential election might increase the risk of politicization of the office. If a new president takes office in 2013, there may be pressure to take ideological interests or political service into account in selecting the nominee. Consideration of the two-year extension for Director Mueller gives the Judiciary Committee an opportunity to affirm that there continues to be agreement that the position of FBI Director should be nonpartisan. Neither ideological agendas nor political connections should play a role in the nomination. The Committee should make clear that it will adhere to these standards in considering any nominee to succeed Director Mueller.

Finally, I have a general observation. The FBI has been tasked by the President with the support of Congress to be both a criminal law enforcement agency and a national security intelligence agency. This dual responsibility was not seriously questioned in the late 1970s when an Executive Order included FBI intelligence activities under Attorney General guidelines within the U.S. Intelligence Community, when FBI electronic surveillance to collect intelligence was brought under statutory control and judicial checks by the Foreign Intelligence Surveillance Act of 1978 (FISA), and when the budget for FBI intelligence activities came to be included in annual Intelligence Authorization Acts. After the passage of FISA the Judiciary Committee and the Select Committee on Intelligence gave serious consideration to a legislative charter for the FBI's intelligence mission, although that effort was set aside in 1980. Since then the Judiciary and Intelligence Committees, along with the FBI's Appropriations Subcommittee, have continued to share oversight of the FBI. That oversight will be important in the future to maintain confidence that the FBI will perform both its intelligence and law enforcement assignments effectively and properly under the constitution and laws of the United States.

Thank you for considering my statement.

Statement of
John C. Harrison
Professor of Law
University of Virginia

Committee on the Judiciary
United States Senate

The President's Request to Extend the Service of Director Robert Mueller of the FBI
Until 2013

June 8, 2011

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The Committee has asked for my views regarding the constitutionality of a statutory extension of the term of the current Director of the Federal Bureau of Investigation (FBI), an extension that would involve no new nomination and appointment. A bill providing for such an extension, S. 1103, has been introduced, and I will use it as an example of the kind of legislation under consideration.

I believe that a statute like S. 1103 would be inconsistent with the Constitution because it would seek to exercise through legislation the power to appoint an officer of the United States, a power that may be exercised only by the President, a head of department, or a court of law.

Under current law, the Director of the FBI is appointed by the President with the advice and consent of the Senate to a ten-year term. See 28 U.S.C. 532 note. The statute provides that a Director is not eligible for reappointment. The ten-year term of the current Director is nearing its end. S.1103 would extend that term for another two years, without a new nomination and confirmation.

The Appointments Clause of Article II of the Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law." It goes on to provide that "the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of department." U.S. Const., Art. II, sec. 2, para. 2. Although the point is not essential to my conclusion, I will assume that the office of Director of the FBI is a superior or principal office, not an inferior office, so that only the President may nominate and appoint to it.

As the Appointments Clause assumes, Congress has substantial power to create offices and prescribe their powers, duties, and terms. The statute creating the office of Director of the FBI is an exercise of that power. While many officers serve at the pleasure of the President, and thus indefinitely, others, like the Director, serve for a specified term of years.

Despite Congress' power with respect to offices, it may not designate who is to hold them through legislation. "The position that because Congress has been given explicit and plenary authority to regulate a field of activity, it must therefore have the power to appoint those who are to administer the regulatory statute is both novel and contrary to the language of the Appointments Clause." Buckley v. Valeo, 424 U.S. 1, 132 (1976). The reasoning underlying this well-established principle is that the Appointments Clause, which deals specifically with the selection of officers, is a specific provision that limits the more general grant of power to Congress regarding offices.

The Supreme Court has implicitly recognized the distinction between permissible exercises of congressional authority with respect to offices and impermissible congressional appointments. In 1890 Congress by statute provided for the creation of Rock Creek Park in the District of Columbia, and created a commission to select the land that would comprise it. Shoemaker v. United States, 147 U.S. 282 (1893). The commission consisted of the Chief of Engineers of the Army, the Engineer Commissioner of the District of Columbia, and three

individuals appointed by the President with the advice and consent of the Senate. *Id.* at 284. Private owners whose property the commission proposed to take with the power of eminent domain raised a number of constitutional objections to the commission's proceedings, one of which was that the provision designating the Chief of Engineers and the Engineer Commissioner was invalid because "while Congress may create an office, it cannot appoint the officer." *Id.* at 300.

The Court responded that the Chief of Engineers and the Engineer Commissioner at the time the statute passed were already "officers of the United States who had been theretofore appointed by the President and confirmed by the Senate," *id.* at 301. The Court went on, "we do not think that, because additional duties, germane to the offices already held by them, were devolved upon them by the act, it was necessary that they should be again appointed by the President and confirmed by the Senate." *Id.* While recognizing that Congress may change the powers and duties of an office without thereby creating a new office requiring a new appointment, the Court indicated that the addition of new duties not germane to those already in place could constitute a new office for which a new appointment would be necessary. If Congress' power to change the content of an office could never run afoul of the Appointments Clause, germaneness would not be required. But if there is a constitutionally significant difference between changing an existing office and making a new one, the line between what is germane and what is not is a reasonable place to locate that difference.

The Court recently confirmed this understanding of *Shoemaker*. "In *Shoemaker*, Congress assigned new duties to two existing offices, each of which was held by a single officer. This no doubt prompted the Court's description of the argument as being that 'while Congress may create an office, it cannot appoint the officer.' By looking to whether the additional duties assigned to the offices were 'germane,' the Court sought to ensure that Congress was not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office." Weiss v. United States, 510 U.S. 163, 174 (1994).

Insofar as an act of Congress constitutes an appointment, it is thus inconsistent with the Constitution. An appointment is a legal act that causes someone to hold an office that otherwise would be vacant or held by someone else. A statutory extension of the term of an incumbent causes the current incumbent to hold an office that otherwise would be vacant upon the expiration of the incumbent's term. It is thus a statutory appointment, just as is a change in the powers and duties of an office so substantial as to make it a new one. It is just like a statute that provides that a named person is hereby appointed to a specified office.

For some constitutional interpreters, this fact alone is enough to make legislation like S. 1103 inconsistent with the Constitution, without any further inquiry into constitutional purpose. Inquiry into purpose in fact reinforces the conclusion, because legislative appointments, including legislative extensions, are inconsistent with a fundamental constitutional principle that underlies the Appointments Clause in particular: with power comes responsibility.

The President alone nominates superior officers, and the President alone appoints them. The Senate must give its advice and consent. but cannot itself make a nomination, nor indeed can it complete the process; even when the Senate has consented, the President retains the discretion

whether finally to make the appointment. With respect to superior officers, as with treaties but not with laws, the President thus has what amounts to an absolute veto. He thus has absolute responsibility, and can be held to account for a bad nomination or appointment, with no possibility of blaming some other participant in the process.

By contrast, laws have many parents. They need not, and routinely do not, originate with the President, whose formal involvement in the legislative process occurs only at the beginning, if he recommends legislation, and at the end, when it is presented to him. The President may sign a statute, parts of which he dislikes, in order to obtain the parts he supports. Because so many participate in the law-making process, and the President's veto is not absolute, his responsibility for any part is diffused, as the law's objectionable features can be attributed to someone else. If statutes could include appointments, there could be appointments for which the President was not fully and personally responsible.

This difference between appointments and acts of Congress appears on the face of the Constitution, and the rationale for it that I suggest is as old as the document itself. Alexander Hamilton, in *The Federalist*, argued that with respect to appointments "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will on this account feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them." The Federalist No. 76, at 510-511 (Jacob Cooke ed., 1961). Dilution of the President's sole responsibility for nomination and appointment is inconsistent with constitutional principles.

The Senate of course has a central role in appointments of superior officers, for which its advice and consent is required. That role imposes a responsibility on the Senate too, a responsibility reflected in the process it has created for the careful scrutiny of appointments. The legislative process, which involves the House of Representatives, is distinct, and does not produce the accountability for the Senate as an institution and for individual Senators that confirmation does.

As the foregoing suggests, with respect to legislation like S. 1103 interference with the President's power is not the only, and perhaps not the main, source of constitutional difficulty, because focusing solely on power leaves out accountability. Interference with the President's power, though, is itself also inconsistent with constitutional principles. Focusing on that aspect of the problem, Assistant Attorney for the Office of Legal Counsel Walter Dellinger concluded in a 1994 opinion that legislative extensions of officers' terms are permissible when the officer in question may be removed at the President's pleasure. Memorandum for the Attorney General, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, Re: Whether Members of the Sentencing Commission Who Were Appointed Prior to the Enactment of a Holdover Statute May Exercise Holdover Rights Pursuant to the Statute (April 5, 1994). The opinion reasons that although the Constitution is designed "to deny to the legislature the power to select the individuals who exercise significant governing authority," *id.* at 6, a legislative appointment of an officer the President may freely remove is "constitutionally harmless," *id.*, because the President may exercise his appointment power after removing the person appointed by Congress.

The President's ability to undo a congressional appointment, however, does not keep an appointment from happening, much as the availability of a remedy does not negate the occurrence of a wrong. Whether or not the President can do anything about it, a person appointed by statute will have been appointed by statute, which the Constitution does not contemplate.

Moreover, the argument proceeds from an incorrect premise: that for practical purposes the power to remove is the same as the power not to nominate or appoint. But they are different, and in many circumstances the former is in practice less useful to the President than the latter. Removing an incumbent is often politically more controversial than declining to reappoint one, a fact sometimes manifest with respect to United States Attorneys, who serve for a term of years but may be removed by the President at any time. For that reason, a statutory appointment combined with a presidential power to remove can be a practical restriction of the President's ability to choose the person who will hold an office. The fact that in any particular case, such as this one, the President may support an extension for the individual involved does not obviate that difficulty. In this matter the Constitution operates through rules designed to cover a wide range of cases which cannot be sorted out one at a time. At the level of rules, the question is not whether congressional appointment always limits the President's discretion in choosing officers, but whether it can sometimes. Because it can, it is not the practical equivalent of the process set out in the Appointments Clause, and so is not consistent with the Constitution.

Support for the constitutionality of a statute like S. 1103 can be found in the Ninth Circuit's decision in *In re Benny*, which upheld statutory extensions of the terms of bankruptcy judges appointed under the Bankruptcy Reform Act of 1978, and in cases following it. In re Benny, 812 F. 2d 1133 (9th Cir. 1987). The extension statutes were temporary measures adopted in response to the Supreme Court's decision in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which a majority of the Justices concluded that the 1978 act had granted non-life-tenured bankruptcy judges authority that could be exercised only by the life-tenured judges of the Article III courts. A majority of the court of appeals in *Benny* rejected a constitutional challenge to the extensions of term. Judge Norris concurred in the judgment, finding that the term extensions were unconstitutional under the Appointments Clause, but that the bankruptcy judge whose decision was at issue in the case could continue to serve under the hold-over component of his original appointment.[1]

While *Benny* upheld statutory extensions of terms, its persuasive force is limited, as the sources on which it relies do not truly support its conclusion. The court of appeals stated that, "The Supreme Court has implied that Congress may prospectively alter terms of officers without running afoul of the Appointments Clause," 812 F. 2d at 1141, citing Wiener v. United States, 357 U.S. 349 (1958). That inference is highly tenuous. *Wiener* involved a constitutional challenge to President Eisenhower's removal of a judge of the War Claims Commission. The legislation creating the commission originally provided that the agency would terminate three

[1] "My principal disagreement with the majority's position is that I believe the Appointments Clause precludes Congress from extending the terms of incumbent officeholders. I am simply unable to see any principled distinction between congressional extensions of the terms of incumbents and more traditional forms of congressional appointments." 812 F. 2d at 1142-1143 (Norris, J., concurring in the judgment) (footnote omitted).

years after the expiration of the time for filing claims, 357 U.S. at 350; the filing date was twice extended, once to March 31, 1951, then to March 31, 1952, and the commission's own expiration date was extended along with it, *id.* The Supreme Court addressed the President's removal authority, and concluded that the statute permissibly protected a quasi-judicial officer like Wiener from removal at the President's pleasure, *id.* at 356. The Court did not pass on the constitutionality of Congress' decision to continue the commission's existence beyond its originally scheduled sunset date.

Even if *Wiener* is read as implicitly approving that congressional decision, it does not imply that legislation like S. 1103 is permissible. The statutes prolonging the existence of the War Claims Commission did not extend the term of an officer who otherwise would have been replaced by a new appointee because the officer's term had expired. Rather, they extended the statutory life of an agency, and the service of the agency's members along with it. Members of the commission continued to serve under their original appointments. Those appointments were not for a term of years like that of the Director of the FBI, but were tied to the existence of the commission itself.[2]

The court in *Benny* also reasoned that "Congress' power to extend prospectively terms of office can be implied from its power to add to the duties of an officer other duties that are germane to its original duties," 812 F. 2d at 1141, relying on *Shoemaker*. As noted above, the Court in *Shoemaker* distinguished between germane and non-germane duties in order to distinguish permissible changes in an office from the creation of a new office that would require a new appointment. That case did not involve an extension of an incumbent's term. When new and germane duties are added, the same individual holds the same office for the same term. That fact does not imply that a term extension that causes someone to hold an office he otherwise would cease to hold is not an appointment to the new period.

A court that followed *Benny* might nevertheless find the bankruptcy extension statutes that it addressed importantly different from legislation like S. 1103. The acts at issue in *Benny* applied to all of the country's bankruptcy judges. An extension of the current FBI Director's term would apply to him alone. Because nomination and appointment are particularized acts involving specific individuals, the extension of a single individual's term by statute is more like an appointment than is the extension of the terms of dozens of officers. Indeed, the Supreme Court in *Weiss* indicated that there is a distinction for Appointments Clause purposes between general and individualized statutes. 510 U.S. at 174.

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[2] The same is true of early congressional treatment of the Post Office, on which *Benny* also relied, 812 F. 2d at 1141-1142. Before it comprehensively legislated with respect to the Post Office, Congress enacted temporary legislation authorizing the President to appoint a Postmaster General who would, under the President's direction, continue the postal system established under the Articles of Confederation. Act of September 22, 1789, ch. xvi, 1 Stat. 70. That act provided that it would expire at the end of the next session of Congress. *Id.* Congress twice extended that date, once to the end of the next session of Congress as of August, 1790, Act of August 4, 1790, ch. xxxvi, 1 Stat. 178, then to the end of the next session as of March, 1791, Act of March 3, 1791, ch. xxiii, 1 Stat 218. As with the War Claims Commission, Congress, by extending the life of an agency, was not extending the term of an officer who otherwise would have ceased to serve to be replaced by a new appointment. Instead, it made it possible for the appointee to continue to serve pursuant to his original appointment. Unlike the Director of the FBI, the first Postmaster General served indefinitely, not for a specified term of years.

In this connection, it is important to bear in mind that the although the courts do not lightly find that acts of Congress are unconstitutional, in the past they have enforced the Appointments Clause by holding invalid the actions of purported officers whose appointments did not comport with it. *Buckley* is an example, as is Ryder v. United States, 515 U.S. 177 (1995). Ryder, an enlisted member of the Coast Guard, was convicted of several drug-related offenses by a court martial, and appealed that conviction to the Coast Guard Court of Military Review. Two of the judges on that court's three-judge panel were civilians appointed to serve by the General Counsel of the Department of Transportation. Because the General Counsel is not a Head of Department and civilians hold no military commission from the President that can empower them to act as military judges, the appointments were inconsistent with the Appointments Clause. 515 U.S. at 179-180. The Supreme Court rejected the argument that the Court of Military Review's decision should be left undisturbed under the so-called de facto officer doctrine, and concluded that Ryder was "entitled to a hearing before a properly appointed panel of that court." *Id.* at 188. In a properly presented case involving an individual subject to a purported exercise of government power by the Director of the FBI serving pursuant to a statute like S. 1103, a court thus could find that exercise of power to be invalid, either prospectively as in *Buckley* or retrospectively as in *Ryder*.

A statute like S. 1103 would not be consistent with the Constitution. If Congress wishes to make it possible for the current Director of the FBI to serve for an additional two years, but not for a new ten-year term, I believe it could do so by statute. It could provide a relatively brief period of time, beginning on the date of enactment of a new statute, during which the President could nominate someone to serve as Director of the FBI for two and not ten years, and could relieve such a nominee of any existing statutory term limit.[3] The President could nominate the current Director to that term, the Senate could confirm him, the President could appoint him, and the statute then could expire, so that the next appointment would be to a ten-year term.

My testimony addresses legal questions, and does not reflect any objection on my part, as a policy matter, to an extension of the term of the current Director of the FBI. It was prepared as a public service and reflects my own views. It is not presented on behalf of and does not represent the views of any client or my employer, the University of Virginia.

[3] I will not comment on the constitutionality of the current statutory limit on reappointment of the FBI Director.

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June 2, 2011

The Honorable Patrick J. Leahy
Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

On behalf of the International Association of Chiefs of Police (IACP), I am writing to express our strong support for your legislation to extend the term of FBI Director Robert Mueller for an additional two-year period.

Immediately following the September 11th attacks, Director Mueller made the critical decision to improve the FBI's cooperation, communication and coordination with state, tribal and local law agencies. Because of this commitment, the FBI – under Director Mueller's leadership - has been able to successfully meet the challenge of protecting our Nation from the threat of terrorism while at the same time remaining a vital partner to state, tribal and local law enforcement agencies in their daily efforts to protect their communities from crime and violence.

In addition, the IACP strongly agrees with President Obama that Director Mueller "... has impeccable law enforcement and national security credentials, a relentless commitment to the rule of law, unquestionable integrity and independence, and a steady hand that has guided the Bureau as it confronts our most serious threats."

For these reasons, the IACP urges Congress to approve your legislation in a timely fashion and extend Director Mueller's term for an additional two years.

Thank you for your attention to this matter. Please let me know if the IACP can be on any assistance.

Sincerely,

Mark A. Marshall
President

Statement Of Senator Patrick Leahy (D-Vt.)
Chairman, Senate Judiciary Committee,
Hearing On The President's Request
To Extend The Service Of FBI Director Robert Mueller
June 8, 2011

Nearly one month ago, the President requested that Congress authorize a limited extension of Robert Mueller's service as the Director of the FBI. President Obama spoke of "the ongoing threats facing the United States, as well as the leadership transitions at other agencies like the Defense Department and Central Intelligence Agency." He asked us "to join together in extending [Director Mueller's] leadership for the sake of our nation's safety and security."

Following the death of Osama bin Laden, I urged all Americans to support our President in his continuing efforts to protect our Nation and keep Americans safe. With the tenth anniversary of the September 11, 2001, attacks approaching, and in the face of continuing threats, we must all join together for the good of the country and all Americans.

I am pleased that Republicans and Democrats have expressed support for the President's request to maintain vital stability and continuity in the national security leadership team. Senator Grassley, this Committee's ranking Republican, joined me, along with Senators Feinstein and Chambliss, the Chairman and Vice Chairman of the Select Committee on Intelligence, in introducing a bill to permit the incumbent FBI Director to continue to serve for up to two additional years. Chairman Lamar Smith of the House Judiciary Committee supports the President's request. I was encouraged to see reports that Senator McConnell, the Senate Republican leader, supports the President's request.

The bipartisan bill on the Committee's agenda tomorrow provides for a limited exception to the statutory term of service of the FBI Director. It would allow Bob Mueller to continue his service for up to two additional years, until September 2013, at the request of the President. This extension is intended to be a one-time exception and not a permanent extension or modification of the statutory design.

The President could have nominated a new director of the FBI, someone who could serve for 10 years, long after President Obama's own term of office expired. Instead, the President is asking Congress to extend the term of service of a proven leader for a brief period, given the extenuating circumstances facing our country.

Bob Mueller served this Nation with valor and integrity as a Marine in Vietnam and as a Federal prosecutor at all levels. He again answered the call to service when President Bush nominated him in July 2001 to serve as the Director of the FBI. As chairman of this Committee, I expedited that nomination through the Senate and he was confirmed just two weeks later. Since the days just before September 11, 2001, Bob Mueller has served tirelessly and selflessly as the Director of the FBI.

Director Mueller has handled the Bureau's significant transformation since September 11, 2001, with professionalism and focus. He has worked with Congress and this Committee, testifying as

recently as March at one of our periodic oversight hearings. As was evident at that hearing, Bob was ready to begin the next phase of his life. But, as he has done throughout his career, Bob is now again answering duty's call. It was not Director Mueller's idea to serve another two years. This is the President's request and, as a patriotic American, Bob Mueller is willing to continue his service to a grateful Nation.

Senator Grassley asked that Director Mueller appear at today's hearing and he has characteristically cooperated with us by doing so. I thank him and welcome him back to the Committee. Today, we also welcome back to the Committee Jim Comey, who served as the U.S. Attorney for the Southern District of New York and for two years as Deputy Attorney General during the George W. Bush administration, when he worked closely with Director Mueller. The Committee will also hear testimony about the constitutionality of passing an exception to the statute by which Congress created the 10-year term for the Director.

I thank Senator Grassley for his cooperation and hope that the hearing we are holding today at his request will help us to consider and report the bill in the form he suggested without unnecessary delays. I look forward to this Committee and the Congress acting favorably on the President's request.

# # # # #

Department of Justice

STATEMENT FOR THE RECORD OF

ROBERT S. MUELLER, III
DIRECTOR
FEDERAL BUREAU OF INVESTIGATION

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

AT A HEARING ENTITLED

"THE PRESIDENT'S REQUEST TO EXTEND THE SERVICE OF DIRECTOR ROBERT MUELLER OF THE FBI UNTIL 2013"

PRESENTED

JUNE 8, 2011

STATEMENT OF ROBERT S. MUELLER, III
DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION
BEFORE THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

"THE PRESIDENT'S REQUEST TO EXTEND THE SERVICE OF DIRECTOR ROBERT MUELLER OF THE FBI UNTIL 2013"

June 8, 2011

Good morning Chairman Leahy, Ranking Member Grassley, and members of the Committee. Thank you for the opportunity to appear before the Committee today.

As you know, my term as FBI Director is due to expire later this summer. In early May, the President asked if I would be willing to serve an additional two years, and I told him I would be honored to do so.

The President has further asked that Congress pass the legislation necessary to extend my term, and the Committee is considering that legislation at today's hearing. If my term is extended, I look forward to working with the Committee and the men and women of the FBI to meet the challenges that face us in the years to come.

The FBI has never faced a more complex threat environment than it does today. Over the past year, we have seen an extraordinary array of national security and criminal threats from terrorism, espionage, cyber attacks, and traditional crimes. These threats have ranged from attempts by al Qa'ida and its affiliates to place bombs on airplanes bound for the United States to lone actors seeking to detonate IEDs in public squares and subways intent on mass murder.

A month ago, the successful operation in Pakistan leading to Osama Bin Laden's death created new urgency for this threat picture. While we continue to exploit the materials seized from Bin Laden's compound, one of the early assessments from this intelligence is that al Qa'ida remains committed to attacking the United States. In addition, we are focused on the new information about the homeland threat gained from this operation.

We also continue to face the threat from adversaries, like Anwar Alaqui, who are engaged in efforts to radicalize people in the United States to commit acts of terrorism. In the age of the Internet, these radicalizing figures no longer need to meet or speak personally with those they seek to influence. Instead, they conduct their media campaigns from remote regions of the world, intent on fostering terrorism by lone actors here in the United States.

Alongside these ever-evolving terrorism plots, the espionage threat persists as well. Last summer, there were the arrests of ten Russian spies, known as "illegals," who secretly blended

into American society in order to clandestinely gather information for Russia. And we continue to make significant arrests for economic espionage as foreign interests seek to steal controlled technologies.

The cyber intrusion at Google last year highlights the ever-present danger from a sophisticated Internet-attack. Along with countless other cyber incidents, these attacks threaten to undermine the integrity of the Internet and to victimize the businesses and people who rely on it.

In our criminal investigations, the FBI continues to uncover massive corporate and mortgage frauds that weaken the financial system and victimize investors, homeowners, and ultimately taxpayers. We are also rooting out insidious health care scams involving false billings and fake treatments that endanger patients and fleece government health care programs.

The violence in Mexico remains a threat for the United States, as we saw with the murder of three individuals connected to the U.S. Consulate in Ciudad Juarez in March 2010 and the shooting earlier this year of two DHS Immigration and Customs Enforcement agents in Mexico.

And throughout, we are confronted with instances of corruption that undermine the public trust and violent gangs that continue to take innocent lives.

In this threat environment, the FBI's mission to protect the American people has never been broader and the demands on the FBI have never been greater.

To carry out this mission, the FBI has taken significant steps since 9/11 to transform itself in to a threat-based, intelligence-led agency. This new approach has driven changes in the Bureau's structure and management; our recruitment, hiring, and training; our information technology systems; and even our cultural mindset. These changes have transformed the Bureau into a national security organization that fuses traditional law enforcement and intelligence missions. As this transformation continues, the FBI remains committed to upholding the Constitution, the rule of law, and protecting civil liberties.

Of course, the FBI's transformation is not complete, as we must continually evolve to meet the ever-changing threats of today and tomorrow. If my term is extended, I look forward to working with the Committee and the men and women of the FBI to continue the Bureau's transformation in the years to come.

Chairman Leahy and Ranking Member Grassley, let me conclude by thanking you and the Committee on behalf of all FBI employees for your continued support of the FBI and its

mission throughout my tenure. The Committee has been an essential part of our transformation and has directly contributed to our ability to meet today's increasingly diverse threats.

I look forward to any questions you may have.

NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC.

Representing America's Finest

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June 7, 2011

The Honorable Patrick Leahy
United States Senate
437 Russell Senate Office Building
Washington, D.C. 20510

Dear Senator Leahy:

On behalf of the National Association of Police Organizations (NAPO), representing 241,000 rank-and-file police officers from across the United States, I am writing to advise you of our endorsement of the nomination of Robert Mueller for reappointment as Director of the Federal Bureau of Investigation. Serving as the Director since being appointed by President George Bush on September 4, 2001, Mr. Mueller has played a critical role in continuing the Department's relationship with state and local law enforcement.

Before being appointed Director, Mr. Mueller served in the United States Department of Justice as an assistant to the Attorney General where he also headed the Criminal Division. Before his career at the Department of Justice, Mr. Mueller joined the U.S. Marine Corps and then practiced law.

Shortly after Mr. Mueller's appointment, the FBI established the Office of Law Enforcement Coordination (OLEC) to create new partnerships and strengthen and support existing relationships between the FBI and state and local law enforcement. Mr. Mueller's success in bringing the state and local enforcement and criminal justice communities to the table over the past nine years is evident and NAPO looks forward to furthering this commitment.

NAPO strongly believes Mr. Mueller's distinguished career and institutional knowledge qualify him for reappointment as the Director of the FBI. We respectfully urge you to confirm this nomination. If you have any questions on how NAPO can support your efforts, please feel free to contact me, or NAPO's Director of Government Affairs, Rachel Hedge, at (703) 549-0775.

Sincerely,

William J. Johnson
Executive Director

NATIONAL
FRATERNAL ORDER OF POLICE®

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CHUCK CANTERBURY
NATIONAL PRESIDENT

JAMES O. PASCO, JR.
EXECUTIVE DIRECTOR

3 June 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senator Grassley,

I am writing on behalf of the members of the Fraternal Order of Police to advise you of our enthusiastic support for extending the term of Robert S. Mueller III as Director of the Federal Bureau of Investigation.

For the past ten years, Bob Mueller has been a tough and dynamic leader for the FBI in a nation and a world changed by the attacks on the United States just a few weeks after his confirmation. His commitment to protecting Americans and their civil rights is second to none. He rebuilt the Bureau's relationship with State and local law enforcement and his deft leadership of the FBI was vital at a time when this relationship became so critical in the fight against terrorism. Bob Mueller has been and will continue to be an outstanding FBI Director.

It is our hope that your Committee will act swiftly to make the appropriate changes to Federal statute or regulation that would enable Director Mueller to continue his service to our nation. Given his record and the universal respect he commands from the law enforcement community, I very much expect that Congress will strongly support this effort.

On behalf of the more than 330,000 members of the Fraternal Order of Police, I thank you for your consideration of our views on this important issue. We regard Director Mueller as one of our own and sincerely believe that losing him as FBI Director because of an arbitrary term-limit will only weaken our nation's coordinated efforts to fight terrorism and crime. Please do not hesitate to contact me or Executive Director Jim Pasco if I can provide any additional information or support for Director Mueller.

Sincerely,

Chuck Canterbury
National President

—BUILDING ON A PROUD TRADITION—

41 U.S. Op. Atty. Gen. 88, 1951 WL 2340 (U.S.A.G.)

United States Attorney General

**1 DISPLACED PERSONS COMMISSION—TERMS OF MEMBERS

JUNE 12, 1951.*

The Displaced Persons Act of 1948 (June 25, 1948, sec. 8, c. 647, 62 Stat. 1009, 1012) created the Displaced Persons Commission composed of three members whose terms of office were to end June 30, 1951, coterminously with the life of the Commission itself. By amendment of June 16, 1950, c. 262, 64 Stat. 219, their terms were extended to August 31, 1952, as was also the life of the Commission.

It is concluded that Congress has the power and intended to extend the terms of offices which it has created in the Displaced Persons Commission, subject to the President's constitutional power of appointment and removal. Nothing in the amendment, however, requires the President to continue the incumbents in office. There is no necessity for submitting new nominations to the Senate and the two members of the Commission involved will continue to hold office validly after June 30, 1951.

THE PRESIDENT.

MY DEAR MR. PRESIDENT:

I have the honor to refer to your memorandum dated May 17, 1951, transmitting a request from the Chairman of the Displaced Persons Commission for my opinion concerning the status of the appointments of two members of the Commission after June 30, 1951.

I am advised that the two Commissioners involved were appointed members of the Commission by you on October 12, 1949, by and with the advice and consent of the Senate, their commissions specifying that their appointments were 'for a term ending June 30, 1951.' At the time of their nomination and appointment, section 8 of the Displaced Persons Act of 1948, 62 Stat. 1012, pursuant to which they were appointed, provided:

89 'Sec. 8. There is hereby created a Commission to be known as the Displaced Persons Commission, consisting of three members to be appointed by the President, by and with the advice and consent of the Senate, for a term ending June 30, 1951, and one member of the Commission shall be designated by him as chairman. * * *' Section 8 of the Displaced Persons Act of 1948 was amended on June 16, 1950, by section 8 of Public Law 555, 81st Congress, 'by striking out the date 'June 30, 1951' in the first sentence and inserting in lieu thereof the date 'August 31, 1952.' The question presented is whether the appointments of the two Commissioners are valid until August 31, 1952, or, if these Commissioners are not reappointed, they cease to hold office on June 30, 1951.

In explaining the amendment to section 8 of the Displaced Persons Act of 1948, the conference report on H. R. 4567, 81st Congress (which became Public Law 555), states (H. Rept. 2187, 81st Cong., 2d sess., p. 14):

'Under the existing law, visas may be issued up to but not beyond June 30, 1950, and the Displaced Persons Commission's term of office continues until June 30, 1951. Under the amendatory legislation, visas will be issued as late as

July 1, 1952, under section 3 (war orphans) and section 10 (German expellees and refugees). The Displaced Persons Commission is made responsible for the disbursement of certain funds until July 1, 1952. Therefore the Commission's term of office is continued until August 31, 1952, as provided in the Senate bill, to permit of orderly liquidation of its functions and to enable it to submit the final report required by the act.'

**2 While the conference report refers to the amendment as an extension of the 'Commission's term of office,' in the context it seems clear that the committee of the conference was referring to the Commission as the body constituted by its three members and was not purporting to extend the life of the Commission apart from the terms of its then-existing members. This is so because under the act, both before and after its amendment, the terms of the members of the Commission were coterminous with the life of the Commission itself. The act did not purport to establish a governmental body of indefinite or definite duration whose members were to hold office for some term shorter than the life of the *90 agency itself. I conclude, therefore, that the Congress in Public Law 555 intended to extend the terms of the thenexisting members of the Commission to August 31, 1952.

I do not think, moreover, that there can be any question as to the power of the Congress to extend the terms of offices which it has created, subject, of course, to the President's constitutional power of appointment and removal. See *Higginbotham* v. *Baton Rouge*, 306 U. S. 535, 538.

There remains for consideration the question whether the amendment made to the Displaced Persons Act by Public Law 555 constitutes an infringement on the President's constitutional power of appointment. For the following reasons I am of the opinion that it should not be so construed. It is true that the commissions which you issued to the two members of the Commission specified that their appointments were 'for a term ending June 30, 1951.' It seems clear that the terms were so stated in the commissions because at that time the statute itself so limited the terms and not necessarily because you desired that the members of the Commission not be continued in office after that date. The statute has since been amended, with your approval. As I construe it, the amendment extended the terms of the then-existing members of the Commission to August 31, 1952. I see nothing in the amendment, however, which requires you to continue the incumbents in office. As so construed, the amendment presents no constitutional difficulties. It is an example of the Congress and the Executive 'acting in cooperation.' (*Hirabayashi* v. *United States*, 320 U. S. 81, 91.)

It may be noted that such joint action by the Executive and the Congress in this field is not without precedent. For example, the statute creating the Reconstruction Finance Corporation (act of January 22, 1932, 47 Stat. 5) provided for directors whose terms—'shall be two years and run from the date of the enactment hereof * * *.' By section 2 of the act of May 25, 1948, 62 Stat. 261, 262, it was, in part, provided that: 'The term of the incumbent directors is hereby extended to June 30, 1950,' the purpose of the Congress in extending the term from January 22 to June 30, 1950, being to make the terms of office of directors coterminous with the fiscal year of the Corporation. No new nominations were submitted to the Senate and the incumbents continued to serve.

**3 *91 A situation even more closely resembling that involving the Displaced Persons Commission also arose in 1948 in connection with the Atomic Energy Commission. There, five Commissioners had been appointed and issued commissions for terms of office which were to expire on August 1, 1948, in accordance with a provision of section 2 of the Atomic Energy Act of 1946 (60 Stat. 756) which at that time read: 'The term of office of each member of the Commission taking office prior to the expiration of two years after the date of enactment of the Act [August 1, 1946], shall expire upon the expiration of such two years.' On July 3, 1948, before the expiration of the specified 2-year period, this provision was amended to read: 'The term of office of each member of the Commission taking office prior to June 30, 1950, shall expire at midnight on June 30, 1950 (act of July 3, 1948, 62 Stat. 1259). Again, no new nominations were submitted to the Senate and the incumbents continued to serve.

In the light of the foregoing, I am of the opinion, that, in the absence of any action on your part and without the necessity of the submission of new nominations to the Senate, the two members of the Displaced Persons Commission here involved will continue to hold office validly after June 30, 1951.

Respectfully,
PHILIP B. PERLMAN,
Acting Attorney General.

FN* Released for publication January 30, 1958.

41 U.S. Op. Atty. Gen. 88, 1951 WL 2340 (U.S.A.G.)

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OPINION OF THE OFFICE OF LEGAL COUNSEL

REAPPOINTMENT OF UNITED STATES PAROLE COMMISSIONERS

1987 OLC LEXIS 47; 11 Op. O.L.C. 173

November 2, 1987

SYLLABUS:
[*1]

A statute providing for the automatic extension of the term of a Presidential appointee unconstitutionally interferes with the President's authority under the Appointments Clause.

ADDRESSEE:

MEMORANDUM OPINION FOR AN ASSOCIATE DEPUTY ATTORNEY GENERAL

OPINIONBY: McGINNIS

OPINION:

This responds to your request for this Office's opinion as to whether, under § 235(b)(2) of Pub. L. No. 98-473, 98 Stat. 1837, 2032 (1984), the terms of the United States Parole Commissioners who are on duty as of November 1, 1987 will automatically be extended for a five-year period without the necessity of new Presidential appointments. More specifically, you inquired as to whether the term of office for one of the Commissioners which expires at the close of business November 1, 1987, will automatically extend through November 1, 1992. For the reasons discussed below, we have concluded that § 235(b)(2) is unconstitutional, but that it is in the President's discretion to allow the Commissioner to continue service as a Commissioner as a holdover appointee.

Section 235(b)(2) of Pub. L. No. 98-473, the Sentencing Reform Act of 1984 (Act), provides that the term of office of a United States Parole Commissioner who is in office on the effective [*2] date of the Act is extended to the end of the five-year period after the effective date. Section 235(b)(2) thus purports to extend to November 1, 1992 the terms of office for those Commissioners in office on November 1, 1987.

The President has the sole authority to appoint members of the Parole Commission. The Appointments Clause of the Constitution, art. II, § 2, cl. 2, provides that "Officers of the United States" must be appointed by the President by and with the advice and consent of the Senate. The methods of appointment set forth in the Appointments Clause are exclusive; officers of the United States therefore cannot be appointed by Congress, or by congressional officers. *Buckley v. Valeo, 424 U.S. 1, 124-41 (1976).* Persons who "exercise significant authority pursuant to the laws of the United States" or who perform "a significant governmental duty . . . pursuant to the laws of the United States" are officers of the United States, id. at 126, 141, and therefore must be appointed pursuant to the Appointments Clause. This Office has consistently found that the Parole Commissioners are purely Executive officers charged by Congress with the exercise of administrative [*3] discretion. n1 Accordingly, the Parole Commissioners must be appointed by the President in accordance with the Appointments Clause.

n1 See Memorandum for the Associate Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (Jan. 13, 1982); Memorandum for the Associate Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel (Aug. 11, 1981).

We find that § 235(b)(2) is an unconstitutional interference with the President's appointment power. By extending the term of office for incumbent Commissioners appointed by the President for a fixed term, the Congress will effectively reappoint those Commissioners to new terms. Because the authority to appoint members of Parole Commissioners lies exclusively in the President, § 235(b)(2) is an unconstitutional encroachment by Congress on that authority.

The constitutional problems with § 235(b)(2), however, do not preclude Commissioner Batjer from continuing to serve past the expiration date of his current appointment. We note that *18 U.S.C. § 4202* provides that upon the expiration of a term of office of a Commissioner, the Commissioner shall continue to act until [*4] a successor has been appointed and qualified, except that no Commissioner may serve in excess of twelve years. Under this provision, the Commissioner can serve on a holdover basis unless and until the President appoints a successor who is confirmed by the Senate. n2

n2 Section 235(b)(2) is operative "notwithstanding the provisions of § 4202 of Title 18," the section that creates the Parole Commission and establishes its structure, including the holdover mechanism. This language is properly read to suspend operation of § 4202 only to the extent that such suspension is necessary to give effect to the extended terms of office for incumbent commissioners. Accordingly, if § 235(b)(2) is unconstitutional, *18 U.S.C. § 4202,* including its holdover provision, would remain operative. Indeed § 235(b)(1)(A), which is clearly severable from § 235(b)(2), expressly extends the operation of § 4202.

In sum, we recommend that if the President wishes to have the Commissioner continue to serve as a member of the United States Parole Commission, the Commissioner should be treated as a holdover appointee. This course of action will preserve the Executive Branch position on the unconstitutionality [*5] of congressional reappointment provisions such as § 235(b)(2) and, at the same time, allow the President's choice for the Commissioner position to continue serving in that position without renomination.

John O. McGinnis

Acting Deputy Assistant Attorney General

Office of Legal Counsel

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18 U.S. Op. Off. Legal Counsel 166, 1994 WL 813351 (O.L.C.)

Office of Legal Counsel
U.S. Department of Justice

**1 CONSTITUTIONALITY OF LEGISLATION EXTENDING THE TERMS OF OFFICE OF UNITED STATES PAROLE COMMISSIONERS

July 15, 1994

Because United States Parole Commissioners may be removed by the President at will, legislation extending the terms of office of certain Parole Commissioners, does not violate the Appointments Clause.

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

You have asked for our opinion as to whether Pub. L. No. 101-650, § 316, 104 Stat. 5089, 5115 (1990), which extends the terms of United States Parole Commissioners to November 1, 1997, violates the Appointments Clause of the Constitution. U.S. Const. art. II, § 2, cl. 2. We conclude that it does not.

I.

The United States Parole Commission ("Parole Commission") is an "independent agency in the Department of Justice," 18 U.S.C. § 4202, and is vested with authority to establish the organizational structure for receiving, hearing, and deciding requests for parole; to grant or deny an application for parole; to impose reasonable conditions on an order granting parole; to modify or revoke an order paroling any prisoner; to request probation officers and any other appropriate individuals or entities to assist or supervise parolees; and to issue rules and regulations for effectuating these powers. *Id.* § 4203. In addition, the Chairman of the Parole Commission has the authority to appoint and fix the compensation of the Parole Commission's employees, including hearing officers, to assign duties among officers and employees of the Parole Commission, and to otherwise administer the Parole Commission. *Id.* § 4204. The Parole Commission comprises nine Commissioners appointed for six year terms. *Id.* § 4202. The statute also includes a holdover provision under which Commissioners continue to serve until a successor is appointed, "except that no Commissioner may serve in excess of twelve years." *Id.*

The Sentencing Reform Act of 1984 ("SRA"), Pub. L. No. 98-473, 98 Stat. 1837, 1987 (1984), abolished parole for all federal offenders sentenced under its provisions. To accomplish this, the SRA repealed the parole provisions, including the provision establishing the Parole Commission, of title 18 of the United States Code, effective November 1, 1987. In order to accommodate those prisoners sentenced under the sentencing system in place before enactment of the SRA -- and therefore still eligible for parole -- the SRA specifically provided that the parole ***167** provisions would remain in effect for five years after the SRA's effective date. It added that, § 4202 notwithstanding, " the term of office of a Commissioner who is in office on the effective date is extended to the end of the five year period after the effective date of this Act." Pub. L. No. 98-473, § 235(b)(2), 98 Stat. at 2032. In 1990, Congress realized that there would be a need for the Parole Commission beyond the five year extension period and amended § 235(b) to provide a ten year period, Pub. L. No. 101-650, 104 Stat. at 5115, which apparently will carry the Parole Commission through to November 1, 1997. *See* Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Michael A. Stover, General Counsel, United States Parole Commission (June 2, 1994).

**2 In 1987, this office issued an opinion concluding that the five year extension in SRA § 235(b)(2) was unconstitutional, apparently on the grounds that any legislation purporting to extend the term of an incumbent officeholder violates the Appointments Clause. *See Reappointment of United States Parole Commissioners*, 11 Op. O.L.C. 135 (1987). The opinion concluded, however, that since the pre-existing holdover provision at 18 U.S.C. § 4202 is valid, incumbents whose terms expired could remain in place for up to a total of twelve years, unless a successor was sooner appointed. We are informed that this twelve year period will elapse in early 1995 for at least three Commissioners who were in office on the effective date of the SRA. *See* Memorandum for Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, from Jamie S. Gorelick, Deputy Attorney General, *Re: Request for Opinion on Term Lengths of United States Parole Commissioners* at 2 (June 1, 1994). Because we conclude that the term extension at SRA § 235(b)(2) is in fact valid, any Commissioners who were validly in office on the effective date of the SRA may continue in office until November 1, 1997. FN;B1[FN1]FN;F1

II.

A.

The Constitution prohibits Congress from exercising the power to appoint officers of the United States. U.S. Const. art. II, § 2, cl. 2; *Buckley v. Valeo*, 424 U.S. 1, 124-41 (1976). On the other hand, the Constitution endows Congress with authority to create and structure offices. U.S. Const. art. I, § 8, cl. 18. This power has been taken to encompass the authority to add germane duties to an office, *see Shoemaker v. United States*, 147 U.S. 282 (1893), and to set and amend the term of an office. *See In re Investment Bankers Inc.*, 4 F.3d 1556 (10th Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994); *In re Benny*, 812 F.2d 1133 (9th Cir. 1987), *cert. **168 denied*, 510 U.S. 1029 (1993); *In re Koerner*, 800 F.2d 1358 (5th Cir. 1986); *Civil Service Retirement Act -- Postmasters -- Automatic Separation from the Service*, 35 Op. Att'y Gen. 309, 314 (1927).

These provisions are placed in potential tension when Congress extends the term of an office and seeks to apply the extension to the incumbent officeholder. Whether any tension actually results depends on how the extension functions. If applying an extension to an incumbent officer would function as a congressional appointment of the incumbent to a new term, then it violates the Appointments Clause. The classic example of legislation that raises this tension is an extension of the tenure of an officer whom the President may remove only "for cause." FN;B2[FN2]FN;F2

At the other end of the continuum is legislation that extends the term of an office, including its incumbent, the holder of which is removable at will. In this instance, it has long been the position of the Office of Legal Counsel and the Department of Justice that there is no violation of the Appointments Clause, for here the President remains free to remove the officer and embark on the process of appointing a successor -- the only impediment being the constitutionally sanctioned one of Senate confirmation. In short, such legislation leaves the appointing authority -- and incidental removal power -- on precisely the same footing as it was prior to the enactment of the legislation. *See* Sentencing Commission Opinion at 7-9 ("In sum, the extension of tenure of officers serving at will raises no Appointments Clause problem"); *Displaced Persons Commission -- Terms of Members*, 41 Op. Att'y Gen. 88, 89-90 (1951). FN;B3[FN3]FN;F3 This office has opined that Parole Commissioners are removable at will. *See* Memorandum for Rudolph W. Giuliani, Associate Attorney General from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, *Re: The President's Power to Remove Parole Commissioners* (Aug. 11, 1981) ("Parole Commisioner Removal Memorandum"). If we adhere to this view, the extension of the Parole Commissioners' terms does not violate the Appointments Clause.

**169 B.

**3 The statute establishing the Parole Commission provides that it is an independent agency within the Department of Justice and that the Commissioners are to serve six-year terms. 18 U.S.C. § 4202. The statute, however, is silent as

to whether the President may remove the Commissioners at will or only "for cause." As indicated, we have opined that Parole Commissioners are removable by the President at will. Our conclusion had two bases -- first, that there was no indication that Congress intended to limit the President's removal authority and, second, that any attempt to limit the President's removal authority would be unconstitutional since the Commissioners are "purely executive" officers. *See* Parole Commissioner Removal Memorandum. The second basis of our conclusion followed then-applicable Supreme Court precedent on the constitutionality of restrictions on the President's authority to remove officers.

The Supreme Court first addressed the question of such removal restrictions in *Myers v. United States*, 272 U.S. 52 (1926), which involved a statute that required the President to obtain the Senate's advice and consent before removing a Postmaster of the first, second, or third class. The *Myers* Court held that Congress may not limit the President's authority to remove any officer who is appointed by the President by and with the advice and consent of the Senate. *Id.* at 159. Several years later, the Court narrowed this holding significantly, ruling that the Constitution only prohibits removal restrictions with respect to "purely executive" officers. *See Humphrey's Executor v. United States*, 295 U.S. 602, 627-28 (1935). The Court held that, as to offices that are essentially quasi-legislative or quasi-judicial in nature, Congress may limit the President's removal authority. Some years later, the Court addressed the related question of whether, in the absence of an express statutory provision, a removal restriction could be inferred. The Court ruled that such restrictions could be inferred with respect to quasi-legislative or quasi-judicial offices "whose tasks require absolute freedom from Executive interference." *Wiener v. United States*, 357 U.S. 349, 353 (1958). Following this framework, we opined that Parole Commissioners -- whose term is fixed by a statute that is silent on the topic of removal -- are purely executive officers; therefore, inferring a limit on the President's authority to remove them would violate the Constitution. As such, we concluded that Parole Commissioners must be removable at will.

In the interim, the Supreme Court has abandoned this mode of analysis. Specifically, *Morrison v. Olson*, 487 U.S. 654 (1988), determined that Congress could place an express "for cause" limitation on the President's removal authority even with respect to "purely executive" officers. *See id.* at 689-93. The Court refused simply to apply the category-driven approach that *Humphrey's Executor* had been taken to institute. Instead, the Court recast its prior references to the category of an office's functions as merely a shorthand for the animating concern in such cases -- whether a given removal restriction violates separation of powers principles. Specifically,***170** under the Court's current formulation, "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." *Morrison*, 487 U.S. at 691.

****4** In devising this formulation, the Court recharacterized the references to functional categories in its earlier opinions as simply a means of examining whether the office and its functions were of such a nature as to require that they be vested in an officer who is subject to a high degree of presidential control; that is, one who may be removed at will. *Id.* at 687-91. It is important to note that, under the *Morrison* formulation, the nature of an office and its functions remain essential factors in determining whether a removal restriction violates separation of powers; however, the category with which those functions might be labeled does not end the inquiry.

The statute establishing the Parole Commission is silent regarding removal, *see* 18 U.S.C. § 4202, and therefore we must determine whether it is appropriate to infer such a restriction. *Morrison*, however, spoke directly only to the constitutionality of an explicit removal restriction. It therefore only expressly rejected the label-driven approach in that context. Nevertheless, the *Wiener* Court stated that its holding followed logically from *Humphrey's Executor*. *See* 357 U.S. at 356. We view *Morrison*, then, as doing away with the label-driven analysis in the context of inferred removal restrictions as well.

In *Morrison*, the Court looked to what the earlier decisions were trying to accomplish by inquiring into the nature of the office and functions at issue to resolve whether, and when, Congress may expressly limit the President's removal authority. Taking a similar approach in the context of implied removal restrictions, we are persuaded that *Wiener* turned on the Court's determination that the Commission could not have effectively carried out its functions unless the Commission was "'entirely free from the control or coercive influence, direct or indirect,' of either the Executive or

the Congress." *Wiener*, 357 U.S. at 355-56 (quoting *Humphrey's Executor*, 295 U.S. at 629).

Therefore, our inquiry regarding inferred removal restrictions will focus on whether it is necessary in order for the entity in question to be able to perform its statutory mission that it be "free from the control or coercive influence, direct or indirect, of either the Executive or Congress." Only where this level of independence is necessary will we infer that Congress intended the President's removal authority to be limited. FN;B4[FN4]FN;F4 Here again, the type of function being performed is a relevant consideration, but it is not dispositive. FN;B5[FN5]FN;F5

***171** Under this standard, we have no trouble adhering to our 1981 opinion that the President may remove Parole Commissioners at will. Because the power to remove is incident to the power to appoint, we begin with the presumption that the President has authority to remove Parole Commissioners at will. *See, e.g.*, *Removal of Members of the Advisory Council on Historic Preservation*, 6 Op. O.L.C. 180, 188 (1982); 1 Annals of Cong. 496 (Joseph Gales ed., 1789) (statement of James Madison) ("the power of removal result[s] by a natural implication from the power of appointing"). Our 1981 opinion analyzed the Parole Commission's functions and concluded that the Commission is purely executive in nature. This is an important indication, though not determinative, that it is not necessary to the Commission's function that it have the level of independence that "for cause" removal protection entails. Our earlier opinion also searched the legislative history and examined the statutory language and concluded that "[n]either . . . disclose[d] a Congressional intent to limit the President's implied power to remove the Commissioners." Parole Commissioner Removal Memorandum at 2. FN;B6[FN6]FN;F6 We see no reason to revisit any of these conclusions.

****5** We find compelling the history of the discharge of the parole function. "[P]arole originated as a form of clemency; to mitigate unusually harsh sentences, or to reward prison inmates for their exemplary behavior while incarcerated." S. Rep. No. 94-369, at 15 (1975), *reprinted in* 1976 U.S.C.C.A.N. 335, 336. Clemency, like the correctional functions it at least partially supports, has long been and typically remains a power exercised by or under the direction of a politically accountable executive official. *Cf.* U.S. Const. art. II, § 2, cl. 1 (vesting the pardon power in the President).

Until the relatively recent establishment of the Parole Commission, the function of administering the federal parole system was discharged by the Board of Parole. This board was a component of the Department of Justice, and its members were clearly removable at will. *See* Act of Sept. 30, 1950, ch. 1115, 64 Stat. 1085, 1085 ("There is hereby created in the Department of Justice a Board of Parole . . . ."); Act of June 25, 1948, ch. 645, 62 Stat. 683, 854 (containing no provision of a fixed or abbreviated term). The legislative history contains no indication that the threat of removal at will or other political pressures played any role in the operations of the Board of Parole or motivated the establishment of the Parole Commission. *See* S. Rep. No. 94-369, at 15, *reprinted in* 1976 U.S.C.C.A.N. at 336. In the face of this long-standing practice of entrusting the administration of the federal parole system to officers who are removable at will, we cannot say that a limitation on the President's authority to remove Parole Commissioners is necessary to allow the Commission effectively to carry out its statutorily prescribed functions.

***172** III. Conclusion

Legislation extending the term of an officer who serves at will does not violate the Appointments Clause. As stated, we adhere to our opinion that the President may remove Parole Commissioners at will. Consequently, Pub. L. No. 101-650, § 316, 104 Stat. at 5115, which extends the terms of office of certain United States Parole Commissioners, does not violate the Appointments Clause, and we recede from our earlier opinion (*Reappointment of United States Parole Commissioners*, 11 Op. O.L.C. 135 (1987)) to the extent that it contradicts this conclusion.

WALTER DELLINGER
Assistant Attorney General

Office of Legal Counsel

FN1 The question we have been asked to address is the general one of whether the Appointments Clause stands as a bar to the operation of § 235(b)(2). Answering this question does not depend upon the specific circumstances of any particular Commissioner. Moreover, we have not been provided any such information, and thus do not draw any conclusions as to how or whether § 235(b)(2) applies to any specific Commissioner.

FN2 While such a statute "is constitutionally questionable," it would not represent a per se violation of the Appointments Clause. *See* Memorandum for the Attorney General from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, *Re: Whether Members of the Sentencing Commission Who Were Appointed Prior to the Enactment of a Holdover Statute May Exercise Holdover Rights Pursuant to the Statute* at 9 (Apr. 5, 1994) ("Sentencing Commission Memorandum"); *see also Benny*, 812 F.2d at 1141.

FN3 Our 1987 opinion asserts that an extension of the term of an officer violates the Appointments Clause. It does not discuss any distinction between offices held at will and those that include removal protection. Since the only two Office of Legal Counsel opinions cited in the 1987 opinion both held that Parole Commissioners are removable at will by the President, *see Reappointment of United States Parole Commissioners*, 11 Op. O.L.C. 135, 136 n.1 (1987), the best reading of the opinion is that it meant that every legislative extension of the term of an incumbent officer violates the Appointments Clause. This assertion was, at the time it was made, contrary to this Department's long-standing position, *see, e.g.*, 41 Op. Att'y Gen. at 89-90; 35 Op. Att'y Gen. at 314, and has not been followed since that time, *see* Sentencing Commission Opinion. Moreover, and most importantly, the 1987 opinion is irredeemably unpersuasive. It makes no effort to explain how legislation extending the term of an officer who serves at will impinges on the power of appointment, and we can conceive of no credible argument that an infringement rising to the level of a constitutional violation may result from such legislation. Consequently, we withdraw the holding in the 1987 opinion that any legislation extending the term of an officer who is removable at will violates the Appointments Clause.

FN4 We have no doubt that, even after *Morrison*, courts will continue to infer removal restrictions with respect to offices charged primarily with the adjudication of disputes between private individuals. However, it is less clear what other circumstances, if any, would justify inferring a limitation on the President's removal authority.

FN5 If it is determined that an implied removal limitation is necessary, we must then examine whether such a limitation would violate the doctrine of separation of powers by "imped[ing] the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691.

FN6 The opinion expressly considered and persuasively rejected arguments that either the provision creating the Commission as an independent agency in the Department of Justice or establishing fixed terms for the Commissioners could support an inference of a restriction on the President's removal authority. *Id.* at 1-4.

18 U.S. Op. Off. Legal Counsel 166, 1994 WL 813351 (O.L.C.)

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June 6, 2010

Mr. Chairman and Honorable Members of the Senate Judiciary:

My name is William Van Alstyne, and I am currently the Lee Professor of Law at the Marshall-Wythe Law School, in Williamsburg, Virginia, having joined its law faculty eight years ago to accept that chaired appointment, after having served full time on the Duke University Law School faculty for four decades, during the last three decades of which I held the Perkins Chair of Law, at Duke. It has been my privilege previously to have appeared before this Committee on a dozen occasions, in response to invitations to offer professional testimony on: nominees for the Supreme Court; the Constitution's distribution of powers respecting the initiation of war; the scope of Congressional power in respect to the jurisdiction of the Supreme Court; questions of "federalism" (i.e., the extent to which the Constitution vests particular legislative powers in Congress); and constitutional questions concerning Congress and the Bill of Rights.

Today's hearings are concerned with a pending proposal that would extend the current term of the Director of the FBI for an additional two-year period, even as the President has suggested is desirable. And the issue with respect to which the views of interested and informed parties have been invited, is whether the enactment of the pending bill, once signed by the President (or otherwise simply allowed to take effect without his signature), will per se permit the Director to remain until the date provided in the pending bill, or whether, to the contrary, it would require his new "nomination" by the President as well as Senate consent, as a necessary step to confirm his "appointment" under the new, extended term as provided in the pending bill.

I frankly have no doubt that successful passage of the current bill will suffice. In preparing for these hearings, moreover, I downloaded and read several documents provided by the Committee's staff. Two of these, one of which was prepared by Walter Dellinger as head of the Office of Legal Counsel (after which he also served as acting Solicitor General) and another, provided by the research office of the Library of Congress, conclude that enactment of the pending bill, signed by the President, are clearly constitutionally sufficient. Rather than "plagiarize" from their respective Memoranda in this, my own written submission, or simply recite the same sources and materials on which each of them rightly relied, I will simply incorporate each of their respective previous submissions, as I do. Here, I mean merely to stress some few additional basic thoughts I respectfully hope the Committee will likewise consider as well.

It is, of course, by the Constitution that the President appoints the Director of the FBI. And the indubitable constitutional source of power, pursuant to which he does so is readily found in Article II, Section 2, Clause two, pursuant to which the current director was appointed and confirmed. The office itself was created by act of Congress, of course. That one who holds that office, however, necessarily serves at the pleasure of the President who, virtually from day to day, may remove him and may do so wholly without regard to what Congress might think to be "just cause." This is so, simply because no one doubts that the nature of the responsibilities reposed in the Director of The Federal Bureau of Investigation are indubitably "executive" in nature, and not either "legislative" or "judicial." And it was settled nearly a century ago, in Myers v. United States, 272 U.S. 52 (1926), that all those holding positions in the "executive" rather than the

"legislative" or "judicial" branches of government, are removable by executive will alone. Effectively, then, all who serve in the executive branch, including the director of the FBI, serve at the pleasure of the President. Congress may of course say what such offices there shall be (as it did, beginning with the "Secretary of State" and the "Secretary of War"–later modified to "Defense") but insofar as these offices are lodged within the executive branch and were created to render it more feasible for the President to discharge his obligations as set forth in Article II, the power vested in Congress so to provide for those offices is itself expressly provided in the "sweeping" clause, i.e., the "necessary and proper" clause as expressly set forth in Article I, Section Eight, in the final clause that so provides as follows:

[And–The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Among the expressly vested powers of the President, of course, is the provision in Article II, Section 3, namely that he

"...shall take care that the Laws are faithfully executed... "

And it is pursuant to the "necessary and proper" clause that Congress established the Federal Bureau of Investigation, provided for a Director, appointed by the President, for such term of service as Congress may provide for that office holder, the Director necessarily serving at the pleasure of the President, however, whose power of removal is complete and not subject to congressional restriction.

To be sure, where an "office" may have mixed responsibilities, such as those commingled within the several independent administrative agencies (such as the NLRB which "makes" laws (interstitially) as well as "enforces" the laws (through bringing cases of alleged "unfair" labor practices, and "adjudicates" them – at least in preliminary fashion, then, to be sure, to the extent that the personnel of such an agency are delegees of Congress' "law-making" power and not solely those of the President, of an executive nature, its authority to limit the bases for the President to remove such an "officer" may be–and is–accordingly, substantial. *See*, for example, Humphrey's Executor v. United States, 295 U.S. 602 (I935).

What the FBI does, however, is just as its formal title suggests: it "investigates" and does so to determine whether any (federal) laws may have been violated, and so also to determine whether appropriate grounds exist to make arrests, to support indictments and appropriate prosecution, or even civil actions in appropriate courts. And it is the director who oversees the Bureau, as its highest ranking officer in respect to these executive functions.

It follows from these several straightforward observations, therefore, in my own professional view, that insofar as a particular person, as properly appointed and *implicitly* enjoying the continuing confidence of the President at whose pleasure he serves as director for whatever term Congress itself prescribes, *properly* serves as FBI director. That Congress may now vote to extend the Director's term for an additional two years, consistent with the President's continuing

confidence in the director himself, assuredly satisfies our constitutional requirements in my view, as I hope this distinguished committee will itself concur in.

Additionally, in this regard, I think it useful also to suggest the following. If there are those, whether in the Senate or the House, who-for *any* reason–may deem it ill-advised to continue the current director (despite the President's satisfaction with a decision so to extend his term), they may of course register their sentiment simply by voting "no," and, should they carry the day, and the incumbent director's ten-year term expire–as it does–this year, they would indeed have their way.

I also suppose that as a practical matter, since the current "closure" rules of the Senate require sixty votes (to close further debate and bring a matter promptly to a vote), it is even possible for those with misgivings about the current director, essentially to have their way by simple "filibuster" on *the pending bill* itself. While I do not harbor such misgivings, either personally or professionally, I concede that nothing in the Constitution forbids such a strategy.

On the other hand, for the reasons I have but briefly summarized, as well as those profiled in the longer documents the Committee already has on hand, of which the essential arguments and sources provided in those materials I do approve and do mean hereby also to incorporate by this express reference, I do not doubt either the constitutionality of, or the intended effect of the bill as currently before you.

In brief, I unreservedly believe that if you are individually satisfied with the current director's discharge of his duties and of the wisdom of not discontinuing him when either ongoing or additional investigations and/or indictments may yet be found on solid grounds, enactment of the pending bill is desirable as well as wholly constitutional, as with the President's own approval, it may t hen take full effect.

Respectfully submitted,

William Van Alstyne
Lee Professor of Law

P.S.: Simply as a postscript, I might remind the committee that in a similar case, namely, the extension provided by Congress for ratification of the "Equal Rights" Amendment(from an original seven years to ten years), was done without significant controversy and certainly without successful challenge. It was regarded as quite sufficient that, in the judgment of Congress at the time, a three-year extension was deemed well warranted. So, equivalently, here as well. Again, albeit contrary to what we know, if in the President's view, the proposed extended term for the incumbent director of the FBI is deemed ill-advised, he may communicate that view and/or simply dismiss the director, or merely "veto" the bill and send it back. And oppositely, he may equally signal his approval of the director's ongoing performance of his wholly executive responsibilities, either by encouraging favorable action on the pending bill and then by promptly signing it or by

merely allowing it to take effect without his signature.

Again, in my professional view, the committee should have *complete confidence* in the pending measure **as well within its constitutional discretion**, and promptly report it for debate and vote in the full Senate in this month of June itself.

William Van Alstyne
June 6, 2011