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# FBI Director: Appointment and Tenure

**Vivian S. Chu**

Legislative Attorney

**Henry B. Hogue**

Specialist in American National Government

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## Summary

The Director of the Federal Bureau of Investigation (FBI) is appointed by the President by and with the advice and consent of the Senate. The statutory basis for the present nomination and confirmation process was developed in 1968 and 1976, and has been used since the death of J. Edgar Hoover in 1972. Over this time, seven nominations have been confirmed and two have been withdrawn by the President before confirmation. The position of FBI Director has a fixed 10-year term, and the officeholder cannot be reappointed, unless Congress acts to allow a second appointment of the incumbent. There are no statutory conditions on the President's authority to remove the FBI Director. Since 1972, one Director has been removed by the President.

Robert S. Mueller III was the first FBI Director to be appointed to a second term, and this was done under special statutory arrangements. He was first confirmed by the Senate on August 2, 2001, with a term of office that expired in September 2011. In May 2011, President Barack Obama announced his intention to seek legislation that would extend Mueller's term of office for two years. Legislation that would allow Mueller to be nominated to an additional, two-year term was considered and passed in the Senate and the House, and President Obama signed the bill into law (P.L. 112-24) on July 26, 2011. Mueller subsequently was nominated and confirmed to the two-year term, and he served until September 4, 2013.

On June 21, 2013, President Obama nominated James B. Comey Jr., a former Deputy Attorney General, to succeed Mueller. Comey was confirmed by the Senate on July 29, 2013, and he took office on September 4, 2013.

This report provides an overview of the development of the process for appointing the FBI Director, briefly discusses the history of nominations to this position, and identifies related congressional hearing records and reports.

Two appendixes to the report provide information and analysis concerning the 2011 extension of the Director's tenure. **Appendix A** documents the successive developments that enabled this extension, including the enactment of P.L. 112-24 and Mueller's nomination and confirmation. **Appendix B** provides a legal overview and analysis of extending a term of office.

This report will be updated as developments warrant.

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## Introduction

This report provides an overview of the development of the process for appointing the Director of the Federal Bureau of Investigation (FBI), briefly discusses the history of nominations to this position, and identifies related congressional hearing records and reports. Two appendixes provide background and legal analysis regarding a 2011 statute that allowed Robert S. Mueller III to be appointed to a second, two-year term.

## Overview

Federal statute provides that the Director of the FBI is to be appointed by the President by and with the advice and consent of the Senate.<sup>1</sup> When there is a vacancy or an anticipated vacancy, the President begins the appointment process by selecting and vetting his preferred candidate for the position. The vetting process for presidential appointments includes an FBI background check and financial disclosure. The President then submits the nomination to the Senate, where it is referred to the Committee on the Judiciary. The Committee on the Judiciary usually holds hearings on a nomination for the FBI Director. The committee may then vote to report the nomination back to the Senate favorably, unfavorably, or without recommendation. Once reported, the nomination is available for Senate consideration. If the Senate confirms the nomination, the individual is formally appointed to the position by the President.<sup>2</sup>

Prior to the implementation of the current nomination and confirmation process, J. Edgar Hoover was Director of the FBI for nearly 48 years.<sup>3</sup> He held the position from May 10, 1924, until his death on May 2, 1972.<sup>4</sup> The current process dates from 1968, when the FBI Director was first established as a presidentially appointed position requiring Senate confirmation in an amendment to the Omnibus Crime Control and Safe Streets Act of 1968.<sup>5</sup> The proposal for a presidentially appointed Director had been introduced and passed in the Senate twice previously,<sup>6</sup> but had never made it through the House. Floor debate in the Senate focused on the inevitable end of Hoover's tenure (due to his advanced age), the vast expansion of the FBI's size and role under his direction, and the need for Congress to strengthen its oversight role in the wake of his departure.<sup>7</sup> In 1976, the 10-year limit for any one incumbent was added as part of the Crime Control Act of 1976.<sup>8</sup> This provision also prohibits the reappointment of an incumbent. As with the previous measure,

<sup>1</sup> 28 U.S.C. §532 note.

<sup>2</sup> See also CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

<sup>3</sup> At 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.").

<sup>4</sup> For further information on the history and development on the FBI, see the FBI history web page, available at <http://www.fbi.gov/gbhistory.htm>.

<sup>5</sup> P.L. 90-351, §101; 82 Stat. 197, 236 (1968). The statute did not apply to Hoover, the incumbent at that time, but was worded to apply to future Directors, beginning with his successor.

<sup>6</sup> S. 603, 88<sup>th</sup> Cong., 1<sup>st</sup> sess. (1963) and S. 313, 89<sup>th</sup> Cong., 1<sup>st</sup> sess. (1965).

<sup>7</sup> See *Congressional Record*, vol. 114, May 14, 1968, at 13181-13184.

<sup>8</sup> P.L. 94-503, §203; 90 Stat. 2407, 2427 (1976).

the Senate had introduced and passed this provision twice previously,<sup>9</sup> but it had failed to pass the House.

Since 1972, seven nominations for FBI Director have been confirmed, and two other nominations have been withdrawn. Due to a 2011 statute allowing for the reappointment of a specific incumbent, two of the seven confirmed nominations were of the same person, Robert S. Mueller III. Each of these nominations is shown in **Table 1** and discussed below.<sup>10</sup>

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<sup>9</sup> S. 2106, 93<sup>rd</sup> Cong., 1<sup>st</sup> sess. (1974) and S. 1172, 94<sup>th</sup> Cong., 1<sup>st</sup> sess. (1975).

<sup>10</sup> This information does not include acting Directors. The FBI's list of its Directors and acting Directors can be found on the Internet at <http://www.fbi.gov/libref/directors/directmain.htm>.

Table I. FBI Director Nominations and Confirmations, 1973–2013

Nominee	Nominating President	Date of Nomination <sup>a</sup>	Committee Action <sup>b</sup>	Final Disposition <sup>c</sup>	Elapsed Time <sup>d</sup>
L. Patrick Gray III	Richard Nixon	Feb. 21, 1973	Hearings: Feb. 28, 1973; Mar. 1, 6, 7, 9, 12, 20, 21, 22, 1973.	Nomination withdrawn by the President. Message received Apr. 17, 1973.	
Clarence M. Kelley	Richard Nixon	June 8, 1973	Hearings: June 19, 20, 25, 1973. Approval and favorable report to the Senate on June 26, 1973.	Confirmed (96-0): June 27, 1973. Sworn-in: July 9, 1973.	19 days
Frank M. Johnson	Jimmy Carter	Sept. 30, 1977		Nomination withdrawn by the President. Message received Dec. 15, 1977.	
William H. Webster	Jimmy Carter	Jan. 20, 1978	Hearings: Jan. 30, 31, 1978. Approval and favorable report to the Senate on Feb. 7, 1978.	Confirmed (without objection): Feb. 9, 1978. Sworn-in: Feb. 23, 1978.	20 days
William S. Sessions	Ronald Reagan	Sept. 9, 1987	Hearing: Sept. 9, 1987. Approval and favorable report to the Senate: Sept. 15, 1987.	Confirmed (90-0): Sept. 25, 1987. Sworn-in: Nov. 2, 1987.	16 days
Louis J. Freeh	William Clinton	July 20, 1993	Hearing: July 29, 1993. Approval and favorable report to the Senate on Aug. 3, 1993.	Confirmed (unanimous consent): Aug. 6, 1993. Sworn-in: Sept. 1, 1993.	17 days
Robert S. Mueller III	George W. Bush	July 18, 2001	Hearing: July 30, 2001. Unanimous approval and favorable report to the Senate on Aug. 2, 2001.	Confirmed (98-0): Aug. 2, 2001.	15 days
Robert S. Mueller III	Barack Obama	July 26, 2011	Nomination was placed on the Executive Calendar upon its receipt pursuant to a unanimous consent agreement of July 21, 2011.	Confirmed (100-0): July 27, 2011.	1 day
James B. Comey Jr.	Barack Obama	June 21, 2013	Hearing: July 9, 2013. Unanimous approval and favorable report to the Senate: July 18, 2013.	Confirmed (93-1): July 29, 2013.	38 days

**Sources:**

- a. Date nomination was received by the Senate as indicated in the *Journal of Executive Proceedings of the Senate* or the *Congressional Record*.
- b. Some hearings information provided in this column was obtained from the respective hearings documents listed in this report. Additional committee action information is taken from committee reports, the *Journal of Executive Proceedings of the Senate*, the *Congressional Record*, and news reports from CQ.com.
- c. Information provided in this column was obtained from the *Journal of Executive Proceedings of the Senate*, the *Congressional Record*, and the *Weekly Compilation of Presidential Documents*.
- d. Includes all days from nomination to confirmation.

## FBI Nominations and Confirmations, 1973–2013

**L. Patrick Gray III.** On the day after the death of long-time Director J. Edgar Hoover, L. Patrick Gray was appointed acting Director.<sup>11</sup> President Richard M. Nixon nominated Gray to be Director on February 21, 1973. Over the course of nine days, the Senate Committee on the Judiciary held hearings on the nomination. Although Gray’s nomination was supported by some in the Senate,<sup>12</sup> his nomination ran into trouble during the hearings as others Senators expressed concern about partisanship, lack of independence from the White House, and poor handling of the Watergate investigation.<sup>13</sup> The President withdrew the nomination on April 17, and Gray resigned as acting Director on April 27, 1973.

**Clarence M. Kelley.** Clarence M. Kelley was the first individual to become FBI Director through the nomination and confirmation process. A native of Missouri, Kelley was a 21-year veteran of the FBI, becoming chief of the Memphis field office. He was serving as Kansas City police chief when President Nixon nominated him on June 8, 1973. During the three days of confirmation hearings, Senators appeared satisfied that Kelley would maintain nonpartisan independence from the White House and be responsible to their concerns.<sup>14</sup> The Senate Committee on the Judiciary approved the nomination unanimously the following day. He was sworn in by the President on July 9, 1973.<sup>15</sup> Kelly remained FBI Director until his retirement on February 23, 1978.

**Frank M. Johnson Jr.** With the anticipated retirement of Clarence Kelley, President Jimmy Carter nominated U.S. District Court Judge Frank M. Johnson Jr. of Alabama, on September 30, 1977. Johnson faced serious health problems around the time of his nomination, however, and the President withdrew the nomination on December 15, 1977.<sup>16</sup>

**William H. Webster.** In the aftermath of the withdrawn Johnson nomination, President Carter nominated U.S. Court of Appeals Judge William H. Webster to be Director on January 20, 1978. Prior to his service on the U.S. Court of Appeals for the Eighth Circuit, Webster had been U.S. Attorney and then U.S. District Court Judge for the Eastern District of Missouri. After two days of hearings, the Senate Committee on the Judiciary unanimously approved the nomination and reported it to the Senate. The Senate confirmed the nomination on February 9, 1978, and Webster was sworn in on February 23, 1978.<sup>17</sup> He served as Director of the FBI until he was appointed as Director of the Central Intelligence Agency (CIA) in May 1987.

<sup>11</sup> U.S. President Nixon, “Acting Director of the Federal Bureau of Investigation,” *Weekly Compilation of Presidential Documents*, vol. 8, May 8, 1972, at 819-820.

<sup>12</sup> See, e.g., Sen. Roman L. Hruska, “The Nomination of L. Patrick Gray to be Director of the FBI,” remarks in the Senate, *Congressional Record*, vol. 119, February 21, 1973, at 4863; Sen. Lowell P. Weicker Jr., “The Nomination of L. Patrick Gray III,” remarks in the Senate, *Congressional Record*, vol. 119, March 20, 1973, at 8685.

<sup>13</sup> See, e.g., Sen. Robert C. Byrd, “Political Partisanship Should Have No Place in the FBI,” remarks in the Senate, *Congressional Record*, vol. 119, February 19, 1973, at 4349; Sen. Robert C. Byrd, “Executive Privilege and Mr. Gray,” remarks in the Senate, *Congressional Record*, vol. 119, March 19, 1973, at 8352.

<sup>14</sup> See Mary Wilson Cohn, ed., *Cong. Quarterly Almanac: 95<sup>th</sup> Cong., 1<sup>st</sup> sess. ... 1977* (Washington: Congressional Quarterly, 1977) at 376-77.

<sup>15</sup> U.S. President Nixon, “Director of the Federal Bureau of Investigation,” *Weekly Compilation of Presidential Documents*, vol. 9, July 16, 1973, at 893-894.

<sup>16</sup> Carolyn Mathiasen, ed., *Cong. Quarterly Almanac: 95<sup>th</sup> Cong., 1<sup>st</sup> sess. ... 1977* (Washington: Congressional Quarterly, 1977) at 568.

<sup>17</sup> U.S. President Carter, “Director of the Federal Bureau of Investigation,” *Weekly Compilation of Presidential Documents* (continued...)

**William S. Sessions.** On September 9, 1987, President Ronald W. Reagan nominated William S. Sessions, Chief Judge of the U.S. District Court of Western Texas, to replace Webster. Prior to his service on the bench, Sessions had worked as chief of the Government Operations Section of the Criminal Division of the Department of Justice and as U.S. Attorney for the Western District of Texas. Following a one-day hearing, the Senate Committee on the Judiciary unanimously recommended confirmation. The Senate confirmed the nomination, without opposition, on September 25, and Sessions was sworn in on November 2, 1987.<sup>18</sup>

From 1973 through 2013, Sessions was the only FBI Director removed from office. President William J. Clinton removed Sessions from office on July 19, 1993, citing “serious questions ... about the conduct and the leadership of the Director,” and a report on “certain conduct” issued by the Office of Professional Responsibility at the Department of Justice.<sup>19</sup> Some Members of Congress questioned the dismissal,<sup>20</sup> but they did not prevent the immediate confirmation of Sessions’s successor.

**Louis J. Freeh.** President Clinton nominated former FBI agent, federal prosecutor, and U.S. District Court Judge Louis J. Freeh of New York as FBI Director on July 20, 1993, the day following Sessions’s removal. The Senate Committee on the Judiciary held one day of hearings and approved the nomination. The nomination was reported to the full Senate on August 3, and Freeh was confirmed on August 6, 1993. He was sworn in on September 1, 1993,<sup>21</sup> and served until his voluntary resignation, which became effective June 25, 2001.

**Robert S. Mueller III.** On July 18, 2001, President George W. Bush nominated Robert S. Mueller III to succeed Freeh, and he was confirmed by the Senate on August 2, 2001, by a vote of 98-0.<sup>22</sup> Mueller served as the U.S. Attorney for the Northern District of California in San Francisco, and as the Acting Deputy U.S. Attorney General from January through May 2001. The former marine had also been U.S. Attorney for Massachusetts and served as a homicide prosecutor for the District of Columbia.<sup>23</sup> Under President George Bush, Mueller was in charge of the Department of Justice’s criminal division during the investigation of the bombing of Pan Am Flight 103 and the prosecution of Panamanian leader Manuel Noriega.<sup>24</sup>

From 1973 through 2013, Mueller was the only FBI Director to be appointed to more than one term. P.L. 112-24, enacted on July 26, 2011, allowed the incumbent Director to be nominated for,

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(...continued)

*Documents*, vol. 14, February 27, 1978, at 396-97.

<sup>18</sup> U.S. President Reagan, “Federal Bureau of Investigation,” *Weekly Compilation of Presidential Documents*, vol. 23, November 9, 1987, at 1261-1263.

<sup>19</sup> U.S. President Clinton, “Remarks on the Dismissal of FBI Director William Sessions and an Exchange With Reporters,” *Weekly Compilation of Presidential Documents*, vol. 29, July 26, 1993, at 1373-1374.

<sup>20</sup> On the floor of the Senate, Senator Orrin G. Hatch praised Sessions’s service and characterized the Administration’s reasons for removing the Director as “vague.” Sen. Orrin G. Hatch, remarks in the Senate, *Congressional Record Quarterly Almanac: 103<sup>rd</sup> Cong., 1<sup>st</sup> sess. ... 1993* (Washington: Congressional Quarterly, 1994) at 309.

<sup>21</sup> U.S. President Clinton, “Remarks on the Swearing-In of Federal Bureau of Investigation Director Louis Freeh,” *Weekly Compilation of Presidential Documents*, vol. 29, September 6, 1993, at 1680-1862.

<sup>22</sup> “Robert S. Mueller III to be Director of the Federal Bureau of Investigation,” *Congressional Record*, daily edition, vol. 147, August 2, 2001, at S8680-S8691.

<sup>23</sup> U.S. President G. W. Bush, “Remarks on the Nomination of Robert S. Mueller to be Director of the Federal Bureau of Investigation,” *Weekly Compilation of Presidential Documents*, vol. 37, July 9, 2001, at 1012-1013.

<sup>24</sup> Peter Slevin, “Nominee Vows to Restore Faith in FBI,” *Washington Post*, July 31, 2001, at A4.



and appointed to, an additional two-year term.<sup>25</sup> After the bill was signed, Mueller was nominated for this second term by President Barack Obama, and he was confirmed the following day by vote of 100-0. Mueller's two-year term expired on September 4, 2013.

The legislative circumstances surrounding Mueller's reappointment are further detailed in **Appendix A**. Notably, the law passed by Congress to extend Muller's tenure raised legal questions that might arise again in the event of a similar situation. In view of this possibility, **Appendix B** discusses precedent for lengthening the tenure of an office and the constitutionality of extending the tenure of the directorship for the current incumbent. It further addresses whether it would have been necessary for Mueller to be appointed a second time and be subject to Senate confirmation hearings under such circumstances, given that an earlier version of the Senate bill would have allowed a two-year term without confirmation.

**James B. Comey Jr.** As Mueller's unique two-year term drew to a close, President Obama nominated James B. Comey Jr. to succeed him. Comey had previously served as United States Attorney for the Southern District of New York, from January 2002 to December 2003, and as Deputy Attorney General, from December 2003 to August 2005. The President submitted Comey's nomination on June 21, 2013. The Senate Committee on the Judiciary held a hearing on the nomination on July 9 and voted unanimously to report the nomination favorably to the full Senate on July 18. The Senate confirmed the nomination by a vote of 93-1 on July 29. Comey began his 10-year term of office on September 4, 2013.

## Hearings

U.S. Congress. Senate. Committee on the Judiciary. *Nomination of Louis Patrick Gray III, of Connecticut, to be Director, Federal Bureau of Investigation*. Hearings. 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., February 28, 1973; March 1, 6, 7, 8, 9, 12, 20, 21, and 22, 1973. Washington: GPO, 1973.

—. *Executive Session, Nomination of L. Patrick Gray, III to be Director, Federal Bureau of Investigation*. Hearing. 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., April 5, 1973. Unpublished.

—. *Nomination of Clarence M. Kelley to be Director of the Federal Bureau of Investigation*. Hearings. 93<sup>rd</sup> Cong., 1<sup>st</sup> sess., June 19, 20, and 25, 1973. Washington: GPO, 1973.

—. *Nomination of William H. Webster, of Missouri, to be Director of the Federal Bureau of Investigation*. Hearings. 95<sup>th</sup> Cong., 2<sup>nd</sup> sess., January 30 and 31, 1978; February 7, 1978. Washington: GPO, 1978.

—. *Nomination of William S. Sessions, of Texas, to be Director of the Federal Bureau of Investigation*. Hearings. 100<sup>th</sup> Cong., 1<sup>st</sup> sess., September 9, 1987. S.Hrg. 100-1080. Washington: GPO, 1990.

—. *Nomination of Louis J. Freeh, of New York, to be Director of the Federal Bureau of Investigation*. Hearings. 103<sup>rd</sup> Cong., 1<sup>st</sup> sess., July 29, 1993. S.Hrg. 103-1021. Washington: GPO, 1995.

<sup>25</sup> P.L. 112-24 (2011).

- *Confirmation Hearing on the Nomination of Robert S. Mueller, III to be Director of the Federal Bureau of Investigation*. Hearings. 107<sup>th</sup> Cong., 1<sup>st</sup> sess., July 30-31, 2001. S.Hrg. 107-514. Washington: GPO, 2002.
- Subcommittee on FBI Oversight. *Ten-Year Term for FBI Director*. Hearing. 93<sup>rd</sup> Cong., 2<sup>nd</sup> sess., March 18, 1974. Washington: GPO, 1974.

## Reports

- U.S. Congress. Senate. Committee on the Judiciary. *Ten-Year Term for FBI Director*. Report to accompany S. 2106. 93<sup>rd</sup> Cong., 2<sup>nd</sup> sess. S.Rept. 93-1213. Washington: GPO, 1974.
- *William H. Webster to be Director of the Federal Bureau of Investigation*. Report to accompany the nomination of William H. Webster to be Director of the Federal Bureau of Investigation. 95<sup>th</sup> Cong., 2<sup>nd</sup> sess., February 7, 1978. Exec. Rept. 95-14. Washington: GPO, 1978.
  - *William S. Sessions to be Director of the Federal Bureau of Investigation*. Report to accompany the nomination of William Sessions to be Director of the Federal Bureau of Investigation. 100<sup>th</sup> Cong., 1<sup>st</sup> sess., September 15, 1987. Exec. Rept. 100-6. Washington: GPO, 1987.
  - *A Bill to Extend the Term of the Incumbent Director of the Federal Bureau of Investigation*. Report to accompany S. 1103. 112<sup>th</sup> Cong., 1<sup>st</sup> sess., June 21, 2011. S.Rept. 112-23. Washington: GPO, 2011.

## Appendix A. Reappointment of Robert S. Mueller III

The 10-year term of Director Robert S. Mueller III was due to expire in August or September 2011.<sup>26</sup> In early May 2011, the White House announced that President Barack Obama would seek legislation to permit Mueller to stay for an extra two years, citing the need for continuity in national security at the FBI while leadership transitions take place at other intelligence agencies.<sup>27</sup> On May 26, 2011, Senator Patrick J. Leahy, chairman of the Senate Committee on the Judiciary, introduced S. 1103, a bill to extend the term of the incumbent Director of the FBI for an additional two years.<sup>28</sup> The bill would not have required renomination or reconfirmation of the incumbent. S. 1103 was cosponsored by the ranking Member of the committee, Senator Chuck Grassley, as well as the leadership of the Senate Select Committee on Intelligence, Chairman Dianne Feinstein and Vice Chairman Saxby Chambliss.

On June 8, 2011, the Senate Committee on the Judiciary held a hearing on the proposed extension of Mueller's tenure.<sup>29</sup> Mueller was the first witness, and responded to Members' questions about both the proposal to extend his term in office and substantive issues related to the policies and operations of the FBI. During the second, and final, panel of the hearing, the questions and statements of committee Members, as well as the testimony of witnesses, was primarily directed toward constitutional considerations related to the bill.

On June 16, 2011, the Senate Committee on the Judiciary considered the bill, and adopted, by unanimous consent, a substitute amendment offered by Chairman Leahy that added a section on findings to the original text. The committee tabled an amendment offered by Senator Tom Coburn that would have authorized an additional two-year term to which the current incumbent could be nominated and confirmed with the consent of the Senate.<sup>30</sup> The committee voted to report favorably the bill, as amended, and issued an accompanying report on June 21, 2011.<sup>31</sup> A few

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<sup>26</sup> According to the FBI website, Mueller "became the sixth Director of the Federal Bureau of Investigation on September 4, 2001." See <http://www.fbi.gov/about-us/executives/director>. A White House statement released on May 12, 2011, indicated that Mueller's term would expire on September 4, 2011. See <http://www.whitehouse.gov/the-press-office/2011/05/12/president-obama-proposes-extending-term-fbi-director-robert-mueller>. However, the Obama Administration reportedly determined that "Mueller's last day is likely to be Aug. 2, because President George W. Bush signed his appointment on Aug. 3, 2001." Charlie Savage, "Republicans Hold Up Vote on Extension of F.B.I. Term," *New York Times*, July 16, 2011, at A13.

<sup>27</sup> See White House Press Release, *President Obama Proposes Extending Term of FBI Director Robert Mueller*, May 12, 2011, available at, <http://www.whitehouse.gov/the-press-office/2011/05/12/president-obama-proposes-extending-term-fbi-director-robert-mueller>.

<sup>28</sup> S. 1103 (112<sup>th</sup> Congress).

<sup>29</sup> Information concerning this hearing, which was entitled "The President's Request to Extend the Service of Director Robert Mueller of the FBI Until 2013," may be found on the committee's website, available at, <http://judiciary.senate.gov/hearings/hearing.cfm?id=e655f9e2809e5476862f735da16dc8fb>. The description presented here was drawn from a transcript of the hearing created by CQ.com.

<sup>30</sup> The Coburn amendment was rejected by a 7-11 roll call vote.

<sup>31</sup> U.S. Congress, Senate Committee on the Judiciary, *A Bill to Extend the Term of the Incumbent Director of the Federal Bureau of Investigation*, report to accompany S. 1103, 112<sup>th</sup> Cong., 1<sup>st</sup> sess., June 21, 2011, S.Rept. 112-23 (Washington: GPO, 2011). The committee voted in favor of the bill by an 11-7 roll call vote.

days later, at the request of Senator Coburn, minority views on the bill were printed in the *Congressional Record* by unanimous consent.<sup>32</sup>

Subsequent news reports indicated that the Administration had agreed to the Coburn approach to renominate the Director for an extra two-year period.<sup>33</sup> Chairman Leahy, on July 18, 2011, remarked that he “was willing to proceed along the lines of an alternative approach” proposed by Senator Coburn because he “was assured by the Senator from Oklahoma that he would get unanimous consent to do all the short time agreements to get the bill passed, get his amendment passed, get it through the House and back, and get Director Mueller confirmed with a 2-hour time agreement.”<sup>34</sup>

Even though he had indicated earlier that this could be “an additional, unnecessary and possibly dangerous complication,” Chairman Leahy concluded that “if we did all of [the aforementioned before August 2, 2011], it would not be the best of solutions, but it would be better than what we have now.”<sup>35</sup>

Although reportedly subject of a hold that was eventually lifted,<sup>36</sup> the Senate, on July 21, 2011, took up the bill and amended it with the Coburn language. The bill, as amended, was then passed by unanimous consent. The Senate also agreed that, if the bill were passed by the House and signed into law, a subsequent nomination would receive expedited consideration

[I]f Robert S. Mueller, III, is nominated to be Director of the Federal Bureau of Investigation, the nomination be placed directly on the Executive Calendar; that at a time to be determined by the majority leader, in consultation with the Republican leader, the Senate proceed to executive session to consider the nomination; that there will be 2 hours for debate equally divided in the usual form; that upon the use or yielding back of time, the Senate proceed to vote without intervening action or debate on the nomination; the motion to reconsider be considered made and laid upon the table with no intervening action or debate; that no further motions be in order to the nomination; that any statements related to the nomination be printed in the Record; that the President be immediately notified of the Senate’s action, and the Senate resume legislative session.<sup>37</sup>

The House considered the bill under suspension of the rules, and it was approved by voice vote. On the following day, July 26, President Obama signed the bill into law (P.L. 112-24).

<sup>32</sup> “Minority Views—S. 1103,” *remarks* Sen. Tom Coburn in the Senate, *Congressional Record*, vol. 157, part 91 (June 23, 2011), at S4069-S4070.

<sup>33</sup> Charlie Savage, “Republicans Hold Up Vote on Extension of F.B.I. Term,” *New York Times*, July 16, 2011, at A13.

<sup>34</sup> “Extending Service of FBI Director Robert Mueller,” *remarks* Sen. Patrick J. Leahy in the Senate, *Congressional Record*, vol. 157, part 107 (July 18, 2011), at S4632.

<sup>35</sup> *Id.*

<sup>36</sup> Seth Stern, “Kentucky’s Paul Holds Up Effort to Extend FBI Director’s Term; Asks for Meeting,” *CQ Today Online News*, July 18, 2011, available by subscription at <http://www.cq.com/doc/news-3910161?wr=bGFldXRDRDVoG83OXVsbIQ2eTB1dw>. See also Sen. Patrick J. Leahy, “Extending Service of FBI Director Robert Mueller,” *remarks* in the Senate, *Congressional Record*, vol. 157, part 107 (July 18, 2011), at S4631-S4633. See also Seth Stern, “Bill to Extend Mueller’s Term as FBI Chief Heads to House After Passing in Senate,” *CQ Today Online News*, July 21, 2011, available at <http://www.cq.com/doc/news-3913526>.

<sup>37</sup> “FBI Director Extension Act, 2011,” *remarks* Sen. Harry Reid in the Senate, *Congressional Record*, vol. 157, part 110 (July 21, 2011), at S4780.

President Obama immediately nominated Mueller to a second, two-year term. The Senate considered the nomination pursuant to the terms of the July 21 agreement. On July 27, 2011, Mueller was confirmed by a vote of 100-0.<sup>38</sup>

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<sup>38</sup> “Nomination of Robert S. Mueller, III to be Director of the Federal Bureau of Investigation,” Senate debate, *Congressional Record*, daily edition, vol. 157, part 114 (July 27, 2011), pp. S4937-S4948.

## Appendix B. Legal Overview of Extending a Term of Office

This appendix first discusses precedent for lengthening the tenure of an office. It is followed by a discussion regarding the constitutionality of extending the tenure of the directorship of the FBI, as well as whether it would have been necessary for Mueller to be appointed a second time and be subject to Senate confirmation hearings under such circumstances.

### Appointment and Precedent for Extending a Term of Office

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.<sup>39</sup> Prior to June 30, however, Congress amended the act to extend the terms of the commissioners, and that of the commission, through August 31, 1952.<sup>40</sup> 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.<sup>41</sup> Citing prior incidents where Congress extended terms of offices for certain commissions,<sup>42</sup> 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 hold over until his successor is nominated and qualified, but may not serve for longer than 12 years.<sup>43</sup> 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.<sup>44</sup> This meant that

<sup>39</sup> P.L. 80-774; 62 Stat. 1012 (1948).

<sup>40</sup> 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.'").

<sup>41</sup> 41 Op. Att'y Gen. 88 (1951) (released for publication January 30, 1958).

<sup>42</sup> *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.

<sup>43</sup> P.L. 94-233; 90 Stat. 219 (1976), codified at 18 U.S.C. §4202 (repealed).

<sup>44</sup> 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 (continued...)

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.<sup>45</sup> Even though the existence of the commission was extended several times thereafter,<sup>46</sup> Congress, in 1996, 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.<sup>47</sup> This action "reinstated" the 12-year time limit, 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 reappointed after their sixth year (assuming they were not staying pursuant to the holdover clause), continued to hold office validly without reappointment or a second confirmation hearing.<sup>48</sup> For example, Commissioner Vincent J. Fechtel Jr. served for a total of 13 years from November 1983 to April 1996.<sup>49</sup>

It is also worth noting that when Congress considered the single 10-year term limit for the FBI Director, other proposed term limitations raised during the Senate debate included a single 10-year term with an additional 5 years, subject to approval by Congress,<sup>50</sup> and a 4-year term with the right to reappoint for additional 4-year terms.<sup>51</sup> It also appears that the original bill (S. 2106) as introduced by Senator Robert C. Byrd in the 93<sup>rd</sup> Congress would have permitted the FBI Director to serve no more than two 10-year terms.<sup>52</sup> In the aftermath of J. Edgar Hoover's near 50 years as Director of the FBI and the inherent political sensitivities of the position,<sup>53</sup> Senator Byrd stated that "after much reflection, that 20 years is too long a time for any one man to be Director

(...continued)

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.").

<sup>45</sup> P.L. 101-650; 104 Stat. 5115 (1990) (Section 316 "For the purposes of section 235(b) of P.L. 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.").

<sup>46</sup> 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 21<sup>st</sup> 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). 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).

<sup>47</sup> 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.").

<sup>48</sup> 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 1996. Each commissioner was only nominated and appointed one time.

<sup>49</sup> USDOJ: USPC Our History, available at <http://www.justice.gov/uspc/history.htm>.

<sup>50</sup> "Ten Year Term for FBI Director," remarks Sen. Roman L. Hruska vol. 120 *Congressional Record*, 34085 (October 7, 1974).

<sup>51</sup> "Ten Year Term for FBI Director," remarks Senator William L. Scott vol. 120 *Congressional 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 reappointment.

<sup>52</sup> "Ten Year Term for FBI Director," remarks Senator Robert C. Byrd vol. 120 *Congressional Record*, 34084 (October 7, 1974).

<sup>53</sup> "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 *Congressional Record*, 34084 (October 7, 1974).

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.”<sup>54</sup>

## Constitutionality of Extending the FBI Director’s Term of Office

The constitutionality of extending an officer’s fixed term of office, specifically the Director of the FBI, depends on how a proposed extension reads and whether the President will be able to retain plenary authority to remove such officer. It is first necessary to review the appointments framework established by the U.S. Constitution and the accompanying Supreme Court decisions that discuss Congress’s ability to place restrictions on the President’s ability to remove an officer. Next, these principles are applied to analyze whether there would be any constitutional implications in extending the FBI Director’s term of office.

### Appointments Clause Framework

The Appointments Clause of the U.S. Constitution 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.”<sup>55</sup> It has long been recognized that “the power of removal [is] incident to the power of appointment.”<sup>56</sup> 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.<sup>57</sup> 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,<sup>58</sup> and other presidentially appointed executive officers, so long as Congress does not expressly provide otherwise.<sup>59</sup> 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.<sup>60</sup>

<sup>54</sup> “Ten Year Term for FBI Director,” *remarks* Senator Robert C. Byrd vol. 120 *Congressional Record*, 34084 (October 7, 1974).

<sup>55</sup> U.S. Const., art. II, §2, cl. 2.

<sup>56</sup> *Ex Parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839).

<sup>57</sup> *Myers v. United States*, 272 U.S. 52, 106-107 (1926).

<sup>58</sup> *Id.* at 176.

<sup>59</sup> *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 (10<sup>th</sup> Cir. 1988). In *Blinder*, while the court noted that the Chairman of the SEC serves 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*.

<sup>60</sup> *Myers*, 272 U.S. at 161.



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.<sup>61</sup> 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.<sup>62</sup> 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."<sup>63</sup> 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."<sup>64</sup> 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.<sup>65</sup>

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 on an officer's status as either "purely executive" or "quasi-legislative," or "quasi-judicial," but rather, on whether a removal restriction interferes with the ability of the President to exercise executive power and to perform his constitutional duty.<sup>66</sup> 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.<sup>67</sup>

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.<sup>68</sup>

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<sup>61</sup> *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

<sup>62</sup> *Id.* at 619-620.

<sup>63</sup> *Id.* at 627.

<sup>64</sup> *Id.* at 627-628.

<sup>65</sup> *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.*

<sup>66</sup> *Morrison v. Olson*, 487 U.S. 654 (1988).

<sup>67</sup> *Id.* at 693-696.

<sup>68</sup> *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 (continued...)").

## Extending the Director of the FBI's Term of Office

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.”<sup>69</sup> 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.”<sup>70</sup> 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.”<sup>71</sup>

Even though the Administration asked Congress to extend the FBI Director's tenure, such congressional action could give rise to constitutional concerns.<sup>72</sup> 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.”<sup>73</sup> A court reviewing a proposed extension may find that such action does not violate the Appointments Clause or impermissibly interfere with the President's 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.”<sup>74</sup>

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

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(...continued)  
various sorts.”).

<sup>69</sup> *Ex Parte Hennen*, 38 U.S. (13 Pet.) at 259.

<sup>70</sup> 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). See also “Constitutionality of Legislation Extending the Term of the FBI Director,” 35 Op. Off. Legal Counsel \_\_\_, at 3 (June 20, 2011) (citing 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* (January 26, 1993)).

<sup>71</sup> “Ten Year Term for FBI Director,” remarks Sen. Robert C. Byrd vol. 120 *Congressional 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 *Congressional Record*, 34086 (October 7, 1974).

<sup>72</sup> The Senate Committee on the Judiciary report acknowledged that some constitutional concerns were raised by some Members and witnesses during the June 8, 2011, hearing. Concerns included that S. 1103 is unconstitutional notwithstanding the President's authority to independently remove the Director and the potential for protracted litigation challenging the constitutionality of the legislation. See “Minority Views—S. 1103,” remarks Sen. Tom Coburn in the Senate, *Congressional Record*, vol. 157, part 91 (June 23, 2011), at S4069-S4070.

<sup>73</sup> *Morrison*, 487 U.S. at 691.

<sup>74</sup> *Crenshaw v. United States*, 134 U.S. 99, 106 (citing *Newton v. Commissioners*, 100 U.S. 548, 557-58).

reappointment, 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."<sup>75</sup> 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 an 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.<sup>76</sup>

Although the Department of Justice views extension of a term of office from which the incumbent may be removed only for cause as constitutionally suspect,<sup>77</sup> courts have repeatedly upheld the Bankruptcy Amendments and Federal Judgeship Act of 1984,<sup>78</sup> a law that extended the tenure of bankruptcy judges who can be removed only for cause.<sup>79</sup> 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, the Ninth Circuit 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."<sup>80</sup> The court found that the extension of a term of office "becomes similar to [a congressional] appointment [only] ... when it extends the office for a very long time."<sup>81</sup> In a concurring opinion, Judge Norris disagreed and stated: "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).<sup>82</sup> He further disagreed with the majority's distinction between a "short" and "long" extension as prompting a

<sup>75</sup> 41 Op. Att'y Gen. 88 (1951) (released for publication January 30, 1958). 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. 18 Op. Off. Legal Counsel 166, 167 (1994) (citing 11 Op. Off. Legal Counsel 135 (1987)). 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." 18 Op. Off. Legal Counsel at 168 n. 3.

<sup>76</sup> 20 Op. Off. Legal Counsel 156 (1996).

<sup>77</sup> *Id.* at 154-55.

<sup>78</sup> P.L. 98-353; 98 Stat. 333 (1984), codified at 28 U.S.C. §152.

<sup>79</sup> *In re: Benny*, 812 F.2d 1133 (9<sup>th</sup> Cir. 1987). See also *In re: Investment Bankers*, 4 F.3d 1556, 1562 (10<sup>th</sup> Cir. 1993), cert. denied 510 U.S. 1114 (1994); *In re: Koerner*, 800 F.2d 1358, 1362-67 (5<sup>th</sup> Cir. 1986).

<sup>80</sup> *In re: Benny*, 812 F.2d at 1141 (citing *Shoemaker v. United States*, 147 U.S. 282, 300-01 (1893)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1142-43 (Norris, J., concurring).

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.’”<sup>83</sup> 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 reached the opposite conclusion.<sup>84</sup>

The OLC issued an opinion on June 20, 2011, concluding that it would be constitutional for Congress to enact legislation extending the term of the Director of the FBI. It reaffirmed that “[t]he 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.”<sup>85</sup> The OLC opinion emphasized that “legislation extending a term does not represent a formal appointment by Congress,” (quotation omitted) nor is it “*functionally* the equivalent of a congressional appointment” (emphasis in the original).<sup>86</sup> The opinion also dismissed as speculative any notion that a term-extension legislation violates the Appointments Clause because it may impose some political cost on the President.

Lastly, given the precedent of not formally reappointing an individual whose term of office is to be extended, it is likely that an incumbent Director would not need to be nominated or appointed a second time.<sup>87</sup> While there would be no need for a second confirmation hearing, the Senate, at its discretion, could invite Mueller to answer questions as it has periodically done with various agency officials.

## Author Contact Information

Vivian S. Chu  
Legislative Attorney  
vchu@crs.loc.gov, 7-4576

Henry B. Hogue  
Specialist in American National Government  
hhogue@crs.loc.gov, 7-0642

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<sup>83</sup> *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.”).

<sup>84</sup> 20 Op. Off. Legal Counsel at 155 n.90.

<sup>85</sup> “Constitutionality of Legislation Extending the Term of the FBI Director,” 35 Op. Off. Legal Counsel \_\_\_, at 2 (June 20, 2011).

<sup>86</sup> *Id.* at 5. The OLC opinion further commented that “If the extension of a term were to preclude the President from making an appointment that he otherwise would have the power 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.” *Id.*

<sup>87</sup> Consideration, however, should be given to the wording of any such measure to extend a term of office so as to avoid any construction that could give rise to the aforementioned constitutional issues.