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A BILL TO EXTEND THE TERM OF THE INCUMBENT DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION

JUNE 21 (legislative day, JUNE 16), 2011.—Ordered to be printed

Mr. LEAHY, from the Committee on the Judiciary, submitted the following

R E P O R T

[To accompany S. 1103]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 1103), to extend the term of the incumbent Director of the Federal Bureau of Investigation (FBI), having considered the same, reports favorably thereon, with an amendment, and recommends that the bill, as amended, do pass.

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I. BACKGROUND AND PURPOSE OF THE BILL

On May 12, 2011, the President announced that he was seeking a two-year extension of the term of FBI Director Robert S. Mueller, III. The President requested that Congress provide a limited exception to the statutory limit of 10 years on the service of the FBI Director.

99–010

A. BACKGROUND

1. Director Mueller's Initial Nomination Process

Robert Mueller was nominated by President George W. Bush on July 18, 2001. The Judiciary Committee received Mr. Mueller's paperwork on July 24, 2001. The Committee held a hearing and favorably reported the nomination to the Senate on August 2, 2001. The Senate confirmed him that same day by a vote of 98–0. President Bush signed his appointment to a 10-year term on August 4, 2001.

Director Mueller was well qualified for the position of FBI Director at the time he was first nominated. Director Mueller served as the United States Attorney in both Massachusetts and Northern California. In all, he spent 12 years in United States Attorney's Offices. In his capacity as a Federal prosecutor, he handled cases on major financial fraud, terrorism, public corruption, narcotics conspiracies, and international money laundering. Director Mueller also served as the Assistant Attorney General for the Criminal Division at the Justice Department, and as the acting Deputy Attorney General at the beginning of the George W. Bush administration.

Director Mueller served for three years in the United States Marine Corps. He led a rifle platoon in Vietnam and earned a Bronze Star, two Navy Commendation Medals, the Purple Heart, and the Vietnamese Cross of Gallantry. Director Mueller graduated from Princeton University, earned a master's degree in International Relations at New York University, and a law degree from the University of Virginia Law School.

After a medical procedure in August 2001, Director Mueller assumed leadership of the FBI in early September 2001. A week later, the United States was attacked on September 11, 2001. Director Mueller has served our nation for the 10 years following 9/11 and has helped trasnform the agency into an effective counterterrorism organization.

2. Legislative History of the Ten-Year Term Limit of the FBI Director

The FBI was formed in 1908 as a Bureau within the Department of Justice. The leader of the FBI has been titled "Director" since 1919, and has answered directly to the Attorney General since the 1920s. In 1924, J. Edgar Hoover was selected as FBI Director not by the President, but by Attorney General Harlan Fiske Stone. Born in 1895, Mr. Hoover served as Director until his death in 1972, at the age of 77, a total of 48 years.

The Senate twice passed bills to require a presidential appointment of the FBI Director,[1] but those bills did not pass in the House of Representatives. In 1968, as part of the Omnibus Crime Control Act and Safe Streets Act of 1968, Congress finally mandated that the FBI Director be appointed by the President and confirmed by the Senate.[2]

In a 1974 report on a bill to provide for a 10-year term of the Director, the Senate Judiciary Committee discussed the need for

[1] S. 603, 88th Cong., 1st Session (1963); and S. 313, 89th Cong., 1st Session (1965).

[2] Omnibus Crime Control Act and Safe Streets Act of 1968, Pub. L. No. 90–3351 (Jun. 19, 1968).

the FBI Director to maintain a proper balance between responsiveness to the Executive Branch and independence from any unreasonable requests made by superior officials.[3] The report continued:

> 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 responsive 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 the FBI Director unique.[4]

In 1976, Congress passed a law limiting the service of an FBI Director to a single term of 10 years.[5] Senator Robert Byrd of West Virginia was the lead sponsor of this legislation. He had initially proposed a 10-year term with the possibility of re-appointment for a second 10-year term. After considering possible alternatives, including a 10-year term with the possibility of a five-year renewal term, Senator Byrd ultimately decided that 10 years was sufficient.

3. The President's Request for a Two-Year Extension

President Obama explained in a May 12, 2011, statement: "Given 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."[6] The President asked Congress "to join together in extending that leadership for the sake of our nation's safety and security."[7]

The President's request was made at a time of considerable change in leadership in key national security positions of the U.S. Government. Secretary of Defense Robert M. Gates announced his retirement, and Leon Panetta, who was then the Director of Central Intelligence, was nominated to replace him. General David Petraeus was nominated to succeed Mr. Panetta as the Director of Central Intelligence. On May 30, 2011, the President nominated Army Gen. Martin Dempsey to be Chairman of the Joint Chiefs of Staff. The Director of the National Counterterrorism Center, Michael E. Leiter, announced his intention to step down in July 2011. In addition, the nominations of two critical nominees to the Department of Justice with national security responsibilities remain pending: James Cole, nominated to serve as Deputy Attorney General, and Lisa Monaco, nominated to serve as Assistant Attorney General for the National Security Division.

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[3] "Ten-Year Term for the FBI Director," U.S. Senate Committee on the Judiciary, S. Rep. No. 93–1213 (93rd Cong., 2nd Session), at 2.

[4] *Id.*, at 2–3.

[5] Pub. L. No. 94–503; 28 U.S.C. § 532 note (Oct. 15, 1976).

[6] Statement of the White House, "President Obama Proposes Extending Term for 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.

[7] *Id.*

4. The Current Threat Environment and Need for Continuity in Leadership of the FBI

On May 12, 2011, the President stated:

> Bob [Mueller] transformed the FBI after September 11, 2001 into a pre-eminent counterterrorism agency, he has shown extraordinary leadership and effectiveness at protecting our country every day since. He 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. I am grateful for his leadership, and ask Democrats and Republicans in Congress to join together in extending that leadership for the sake of our nation's safety and security.

The threats against the United States are expected to increase around the tenth anniversary of the September 11, 2001 attacks. Indeed, evidence collected at the compound in Abbottabad, Pakistan, that served as bin Laden's hideout demonstrated that al Qaeda was planning to make attempts on American soil in connection with the tenth anniversary of the September 11, 2001 attacks. Accordingly, anxiety has heightened in light of the successful operation against Osama bin Laden on May 1, 2011, and recent threats of retaliation against the United States.

The Committee heard testimony about these threats from Director Mueller and others. In the June 8, 2011, hearing on the requested extension of his term, Director Mueller testified:

> 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 [improvised explosive devices] in public squares and subways intent on mass murder.[8]

Director Mueller also spoke of the threat posed by radical "adversaries, like Anwar Alaqui, who are engaged in efforts to radicalize people in the United States to commit acts of terrorism."[9] In addition to terrorist threats, Director Mueller testified to threats from organized crime, drug cartels, fraud, and a host of others.

At the same hearing, former Deputy Attorney General James B. Comey echoed Director Mueller's assessment. Mr. Comey stated 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."[10]

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[8] The President's Request to Extend the Service of Director Mueller of the FBI until 2013: Hearing before the S. Comm. on the Judiciary, 112th Cong. (June 8, 2011) (statement of Robert S. Mueller, III, Director of the FBI, at 1).

[9] *Id*. at 1–2.

[10] The President's Request to Extend the Service of Director Mueller of the FBI until 2013: Hearing before the S. Comm. on the Judiciary, 112th Cong. (June 8, 2011) (statement of James B. Comey, former Deputy Attorney General, at 2).

Mr. Comey also discussed the value in keeping Director Mueller in place as Director at this particularly challenging moment in time. He stated:

> 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.[11]

While the exact plans of al Qaeda have not been revealed, intervening events suggest that the threat from the terrorist group has not subsided. On June 15, 2011, the general command of al Qaeda, announced that Sheikh Ayman al-Zawahiri would take control of the leadership of the organization. Al-Zawahiri was indicted in the 1998 embassy bombings in East Africa and has called for attacks on American targets.[12]

B. PURPOSE

1. Congressional Response to the President's Request

The Senate responded to the President's request to extend the term of Director Mueller on May 26, 2011, by introducing a narrowly drafted bipartisan bill, S. 1103, that would authorize an extension of the 10-year term of the FBI Director. The bill was cosponsored by the Chairman and Ranking Member of the Senate Committee on the Judiciary and the Chairman and Vice Chairman of the Senate Select Committee on Intelligence. House Judiciary Committee Chairman Lamar Smith (R–TX) and Senate Minority Leader Mitch McConnell (R–KY) have both publicly expressed support for President Obama's decision to extend Director Mueller's term for an additional two years.

Senator Grassley, the Judiciary Committee's Ranking Member, requested a full Committee hearing on the matter on behalf of certain members of the minority of the Judiciary Committee, and the Chairman scheduled such a hearing on June 8, 2011.

2. The Reported Bill Does Not Represent any Intent to Affect the President's Plenary Removal Authority

In response to some concerns voiced in that hearing, Chairman Leahy prepared a substitute amendment that emphasized in Findings that the bill was a direct response to the President's request, which the Congress found to be appropriate in light of the need for continuity and stability at the FBI in the face of ongoing threats to the United States. The substitute was adopted by the Judiciary Committee and reported favorably to the Senate. The bill reported by the Judiciary Committee does not diminish in any manner the President's authority to remove a Director of the FBI. The bill makes clear that the incumbent FBI Director may continue to serve only at the request of the President. Current law and policy on that matter will in no way be affected if S. 1103 is enacted into law. The sitting FBI Director agrees. In the June 8, 2011, hearing, Senator Grassley asked Director Mueller, "As director of the FBI

[11] *Id.* at 1.
[12] New York Times, "Bin Laden's No. 2, Zawahiri, Takes Control of Al Qaeda," June 15, 2011.

with a fixed term, under what circumstances can the president remove you?" Director Mueller responded, "I think I serve at the pleasure of the president."[13]

3. The Reported Bill Represents a One-Time Exception to the Ten-Year Statutory Term Limit

The substitute makes clear in the Findings that the President has requested only a one-time exception to the 10-year term limit, and that such an extension is based upon the exceptional circumstances facing the Nation at this time. The findings state explicitly that the bill is not intended to create a precedent. That intent has also been stated by the bill's sponsors. By allowing the term of the Director to be extended this once, from 10 years to 12, the bill would have no effect on the nature of the fixed term appointment.

4. The Reported Bill Is Not Intended to Assert Any Congressional Power to Appoint Executive Officers

In this bill, Congress asserts no authority to appoint officials in violation of the President's appointment authority. The findings and the operative text of the bill both state clearly that the extension of the Director's term is authorized by Congress at the request of the President. The bill also makes clear that such authorization is directly linked to the President's request and the justifications provided for that request. It is effective in authorizing an extended term, but implemented as the President determines.

C. CONSTITUTIONAL CONCERNS RAISED

During the course of the Committee's consideration of this bill, some raised concerns that the legislation could be vulnerable to constitutional challenges and protracted litigation. The notion that enactment of this legislation would somehow impinge upon the authority of the President under the Appointments Clause to choose his own nominee to be Director of the FBI is incorrect. Given that this legislation was expressly requested by the President in order that the *President's* choice for FBI Director—Robert S. Mueller III—could continue in office, and that it does nothing to diminish the President's authority to remove the FBI Director at will, such concerns lack merit.

1. Constitutional and Legal Framework

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."[14] Accordingly, the Supreme Court has held that the Appointments Clause prohibits Congress from independently exercising the power to appoint "Officers of the United States."[15]

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[13] The President's Request to Extend the Service of Director Mueller of the FBI until 2013: Hearing before the S. Comm. on the Judiciary, 112th Cong. (June 8, 2011) (testimony of Robert S. Mueller, III).

[14] U.S. Const., art II, § 2.

[15] *See Buckley* v. *Valeo,* 424 U.S. 1, 126 (1976).

The Appointments Clause is not offended, however, when Congress merely acts to extend the term of service of an executive branch officer who serves at the pleasure of the President, particularly when Congress acts at the specific request of the President. This basic principle has been reaffirmed on several occasions by the Department of Justice through legal opinions dating back six decades.[16] In 1951, for example, the Attorney General's office issued an opinion affirming the constitutionality of an amendment that extended the terms of members of the Displaced Persons Commission, which Congress had created through statute in 1948.[17] Writing in response to an inquiry by the President whether the amendment constituted "an infringement on the President's constitutional power of appointment," the opinion concluded that the legislation presented "no constitutional difficulties," and instead was "an example of the Congress and the Executive acting in cooperation."[18] Central to this conclusion was the fact that nothing in the legislation required the President to continue the incumbent commissioners in office. Accordingly, the opinion affirmed "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."[19]

The Office of Legal Counsel of the Department of Justice issued a similar opinion in 1994, this time assessing the constitutionality of a legislative extension of the terms of members of the United States Parole Commission.[20] In its opinion, the Office of Legal Counsel acknowledged the potential tension that arises when Congress extends the term of an office and seeks to apply the extension to an incumbent officeholder.[21] The opinion noted that a law extending the tenure of an officer whom the President may remove only "*for cause*" was a "classic example" of legislation that runs afoul of the Appointments Clause.[22] Conversely, when Congress passes legislation "that extends the term of an office, including its incumbent, the holder of which is *removable at will*," the opinion noted the longstanding 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."[23]

This conclusion was reiterated by the Office of Legal Counsel in a 1996 memorandum providing an overview of constitutional sepa-

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[16] *See* Attorney General and Office of Legal Counsel opinions in Appendix.

[17] *See* 41 U.S. Op. Atty. Gen. 88 (1951).

[18] *Id.* at 90 (internal citations omitted).

[19] *Id.* The opinion continued by citing several precedents of this type of "joint action by the Executive and the Congress." 41 U.S. Op. Atty. Gen. 88, 90 (1951). These precedents included the legislative extensions of the terms of office for five Commissioners of the Atomic Energy Commission in 1948, as well as the 1948 extension of the terms of office for directors of the Reconstruction Finance Corporation. *Id.* at 91.

[20] *See Constitutionality of Legislation Extending the Terms of Office of United States Parole Commissioners,* 18 U.S. Op. Off. Legal Counsel 166 (1994).

[21] *Id.* at 168.

[22] *Id.* (emphasis added).

[23] *Id.* (emphasis added). The 1994 OLC opinion expressly rejected and withdrew a prior 1987 opinion that reached a different conclusion regarding the constitutionality of similar legislative extensions. Citing the 1987 opinion's lack of credible reasoning and the fact that the 1987 opinion ran counter to a long-standing OLC position, the 1994 OLC opinion deemed the 1987 opinion as "irredeemably unpersuasive." 18 U.S. Op. Off. Legal Counsel 166 note 3 (1994).

ration of powers issues.[24] In the 1996 memorandum, the Office of Legal Counsel reaffirmed the approach taken in its 1951 opinion regarding members of the Displaced Persons Commission, stating that "the extension of tenure of officers serving at will raises no Appointments Clause problem."[25] Indeed, the OLC memorandum labeled as "constitutionally harmless" legislation that extends the term of an officer who is subject to removal at will.[26]

On June 20, 2011, the Office of Legal Counsel issued a memorandum opinion expressly reaffirming the "longstanding" view 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."[27]

Much of this constitutional analysis and historical precedent has been summarized by the Congressional Research Service (CRS) in a report titled *FBI Directorship: History and Congressional Action,* included in the Appendix to this report.[28] The CRS report details the historical "precedent of not formally re-appointing an individual whose term of office is to be extended."[29] In addition, the CRS report notes that "[c]onstitutional analysis of an extension of [an officer's] term depends on how the extension reads and whether the President would retain the plenary authority to remove [that officer]."[30] Significantly, in its review of relevant case law and other legal authorities, CRS was apparently unable to identify a single case, opinion, or other legal authority to support the notion that a legislative extension such as S. 1103 might violate the Appointments Clause. On the other hand, CRS identified the case of *In re Benny,* in which the United States Court of Appeals for the Ninth Circuit concluded: "Congress may prospectively alter terms of office without running afoul of the Appointments Clause," adding that this power to extend terms of office "can be implied from its power to add to the duties that are germane to its original duties."[31]

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[24] *See The Constitutional Separation of Powers Between the President and Congress,* 20 U.S. Op. Off. Legal Counsel 124 (1996).

[25] *Id.*

[26] *Id.* Even when dealing with legislative extensions of the tenures of officers removable only *for cause,* the 1996 OLC memorandum urged a "functional analysis" that assessed whether the legislation had "the practical effect of frustrating the President's appointing authority or amount[ed] to a congressional appointment." 20 U.S. Op. Off. Legal Counsel 124 (1996). Referencing a 1994 OLC opinion concerning the extension of terms of members of the United States Sentencing Commission, the 1996 OLC memorandum noted that even where a statute extends the terms of officers removable only for cause, the statute might still not function to violate the President's appointment power. *Id.* (citing *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. Off. Legal Counsel 33 (1994)). Notably, the 1994 OLC opinion regarding the Sentencing Commission noted that the effect of that legislation could actually have been to *augment* the President's power by giving him "the option of retaining the holdover officer until he chooses to nominate a successor." 18 Op. Off. Legal Counsel 33 (1994) (emphasis added).

[27] *Constitutionality of Legislation Extending the Term of the FBI Director,* ____ U.S. Op. Off. Legal Counsel ____, 2–3 (June 20, 2011).

[28] Congressional Research Service, *FBI Directorship: History and Congressional Action,* CRS Report R41850, June 7, 2011, (hereinafter "CRS Report").

[29] *Id.,* at 5–6, 11.

[30] *Id.,* at 7.

[31] *In re Benny,* 812 F.2d 1133, 1141 (9th Cir. 1987). Some have cited to Judge Norris's concurring opinion in *In re Benny* as support for the argument that legislation like S. 1103 violates the Appointments Clause. The facts of *In re Benny* are distinguishable from the instant case in important respects. First, in the case of the bankruptcy judges at issue in *In re Benny,* the President did not—as he has with Director Mueller—specifically request that the judges continue serving. Second, Judge Norris himself noted that bankruptcy judges under the relevant statute could only be removed for "incompetence, misconduct, neglect of duty or physical or men-

Taking into account the various opinions from the Department of Justice spanning 60 years, the operative constitutional and legal premise remains clear: "Legislation extending the term of an officer who serves at will does not violate the Appointments Clause."[32]

2. Constitutionality of S. 1103—No Appointments Clause Concern

The bill to extend the term of the incumbent FBI Director by two years, S. 1103, is constitutionally sound and an example of the type of "joint action by the Executive and the Congress" deemed legitimate by the Office of Legal Counsel on a number of prior occasions.[33] The President has expressly requested that Congress enact legislation enabling the incumbent FBI Director to serve an additional two years, and the bill does just that without impinging in any way on the President's plenary authority to remove the FBI Director at will. In light of the legal opinions from the Department of Justice dating back six decades, as well as the relevant case law, the constitutionality of the bill cannot seriously be questioned.

As an initial matter, the bill makes clear that the incumbent FBI Director may continue to serve only at the request of the President, and does nothing to diminish in any way the President's removal authority under the Constitution. As Director Mueller himself testified at the June 8, 2011, hearing, his service as FBI Director continues only "at the pleasure of the President."[34] That will remain true after enactment of this legislation. The CRS Report referenced above also concluded that "the President may remove the Director of the FBI at will," and cited the firing of FBI Director William Sessions in July 1993 by President Clinton as an example.[35] The Office of Legal Counsel recently reaffirmed this conclusion unequivocally, noting that "the FBI Director is removable at the will of the President."[36]

Perhaps most instructive on this point is the legislative history of the statute establishing the 10-year term limit on the FBI Director. In a 1974 committee report on the FBI Director term limit bill pending at the time (S. 2106), the Senate Judiciary Committee concluded: "The bill does not place any limit on the formal power of the President to remove the FBI Director from office," and that the "Director would be subject to dismissal by the President, as are all purely executive officers."[37] Moreover, since enactment of the 10-year term limit on the FBI Director in 1976, there have been no laws enacted or cases decided imposing any type of removal restrictions on the President with regard to the FBI Director, such that the functional analysis described in *Morrison* v. *Olson*, would be required. Put simply, the President can decide to replace the FBI Director at any time, for any reason.

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tal disability." 812 F.2d 1133, 1143 note 5. Accordingly, given that the FBI Director is unquestionably serving the President at will, reliance on Judge Norris's concurring opinion is misplaced.

[32] *Constitutionality of Legislation Extending the Terms of Office of United States Parole Commissioners,* 18 U.S. Op. Off. Legal Counsel 166, 171 (1994).

[33] *See, e.g.,* 41 U.S. Op. Atty. Gen. 88, 90 (1951).

[34] Oral testimony of Robert S. Mueller, III, June 8, 2011, Hearing before the Senate Judiciary Committee.

[35] CRS Report at 9.

[36] *Constitutionality of Legislation Extending the Term of the FBI Director,* ____ U.S. Op. Off. Legal Counsel ____, 3 (June 20, 2011) (internal citation omitted).

[37] "Ten-Year Term for the FBI Director," U.S. Senate Committee on the Judiciary, S. Rep. No. 93–1213 (93rd Cong., 2nd Session), at 6.

In light of the President's plenary authority to remove the incumbent FBI Director, no credible argument can be made that Congress, through this legislation, might somehow infringe upon the President's constitutional appointment power. To the contrary, this bill responds directly to the President's request for legislation that would allow him to continue exercising his appointment power; in other words, to keep as FBI Director the individual that *the President* wants to serve in that position. Common sense and a plain reading of the relevant legal precedents demonstrates that an Appointments Clause problem arises when Congress acts in a way that imposes its will upon the Executive, installing or keeping in office an individual whom the President did not choose and cannot remove. That is not the case here. The President has chosen Director Mueller to lead the FBI for the next two years, but the President can also decide to remove him at any time. The removal authority is a prerogative of the Executive, and nothing in this bill changes that. Through enactment of S. 1103, Congress would simply provide the statutory exemption needed for Director Mueller to continue his public service as head of the FBI.[38]

As specifically set forth in the text of S. 1103, Congress cannot by itself *cause* Director Mueller to begin another two years as head of the FBI, just as Congress cannot in any way guarantee that Director Mueller will remain in office for the entire two years. Instead, Section 2(a) of S. 1103 provides that the incumbent FBI Director *may* continue in office, but only *at the request of the President*. Similarly, the bill imposes no limit on the authority of the President to remove the current incumbent FBI Director at any time. Thus, while Congress may provide the statutory mechanism that *allows* Director Mueller to continue serving past August 3, 2011, his continued service is contingent upon a request by the President, as well as his prerogative to choose a successor at any time. As such, the provisions of this bill do not in any way usurp the President's appointing authority.[39]

3. Unfounded Fears of Litigation

Without citation to a single court opinion that has found legislation similar to S. 1103 to be of any constitutional concern, opponents of the bill argue that enactment of the bill would give rise to a spate of litigation that could mire the FBI in protracted lawsuits and cast uncertainty on the legitimacy of the FBI Director's actions during his extended term. These concerns are unfounded.

Congress should not pursue legislation that would unduly hamper the law enforcement, counterterrorism, and intelligence functions of the FBI. During the June 8, 2011 hearing, however, when Director Mueller was asked by Senator Coburn to comment on the

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[38] *See Constitutionality of Legislation Extending the Term of the FBI Director*, ____ U.S. Op. Off. Legal Counsel ____, 4 (June 20, 2011) ("Director Mueller holds an office, and if his term is extended by Congress, he will continue to hold that office by virtue of an appointment by President Bush, with the advice and consent of the Senate, in strict conformity with the requirements of the Appointments Clause.")

[39] The testimony of Professor John Harrison fails to account for these facts or considerations, nor does Professor Harrison affirmatively cite a single authority supporting his views. The President's Request to Extend the Service of Director Mueller of the FBI until 2013: Hearing before the S. Comm. on the Judiciary, 112th Cong. (June 8, 2011) (statement of John Harrison, Professor of Law, University of Virginia). Indeed, the June 20, 2011 memorandum opinion by the Office of Legal Counsel specifically addresses and rejects the arguments made by Professor Harrison. *See Constitutionality of Legislation Extending the Term of the FBI Director*, ____ U.S. Op. Off. Legal Counsel ____, 4–6 (June 20, 2011).

possible risk of constitutional challenges as a result of this bill, he responded as follows:

> I have heard nothing in my discussions with the Department [of Justice] 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.[40]

Aside from speculation based on unfounded constitutional arguments, there has been nothing presented to the Committee that would suggest any operational concerns with the bill. The FBI has presented no operational concerns.

The lack of any real litigation risk is underscored by the fact that the Director of the FBI has only limited direct involvement with the routine investigatory and surveillance functions of the Bureau. Those functions are typically carried out by Special Agents who perform their duties in their own capacity as duly sworn law enforcement agents with arrest authority. Accordingly, the risk of litigation from defendants in criminal cases and targets of national security investigations is virtually nonexistent, given that the Director is not typically the affiant on search warrants, wiretap applications, or criminal complaints, nor does he typically provide supervisory authorization for routine investigatory techniques. Similarly, unlike Federal prosecutors in the U.S. Attorney's Offices or elsewhere in the Department of Justice, the FBI Director does not have any direct involvement with the prosecution of defendants. Thus, concerns about possible litigation and the effect on the ability of the FBI to function are purely speculative and unfounded.

II. History of the Bill and Committee Consideration

A. Introduction of the Bill

A bill to extend the term of the incumbent Director of the Federal Bureau of Investigation, S. 1103, was introduced on May 26, 2011, by Chairman Leahy, Senator Grassley, Senator Feinstein, and Senator Chambliss.

B. Hearing

On June 8, 2011, the Committee convened a hearing titled "The President's Request to Extend the Service of Director Mueller of the FBI until 2013." Director Mueller testified on the first panel, describing threats to the United States and his efforts over the past 10 years to reform the FBI.

A second panel of witnesses included James B. Comey, former Deputy Attorney General, now with Bridgewater Associates, who spoke of the need for continuity of leadership at the FBI in light of the continuing threats facing the United States. Mr. Comey also praised Director Mueller's leadership of the agency and his achievements in transforming the FBI from a domestic criminal investigative agency into one that is equally devoted to intelligence and the prevention of terrorist attacks.

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[40] The President's Request to Extend the Service of Director Mueller of the FBI until 2013: Hearing before the S. Comm. on the Judiciary, 112th Cong. (June 8, 2011) (testimony of Robert S. Mueller, III).

The second panel also included testimony from William Van Alstyne, Lee Professor of Law at the Marshall-Wythe Law School, who stated that the bill, S. 1103, is "clearly constitutionally sufficient."[41] Finally, the Committee heard testimony from John C. Harrison, Professor of Law, at the University of Virginia.

C. LETTERS OF SUPPORT

The Committee received letters in support of the extension of Director Mueller's term from the National Fraternal Order of Police, the National Association of Police Organizations, and the International Association of Chiefs of Police. *See* Appendix.

D. EXECUTIVE BUSINESS MEETING

The bill, S. 1103, was placed on the agenda for an Executive Business Meeting on June 9, 2011, but was held over for one week. It was considered by the Committee on June 16, 2011.

Chairman Leahy offered a substitute amendment to S. 1103, which contained findings and an extension of the incumbent Director's term from 10 years to 12 years. The amendment was accepted.

Senator Coburn offered a substitute amendment that would have authorized an extension of two years of the 10-year term, but would have required the Director to be nominated to serve the additional two years. The Coburn amendment was cosponsored by Senators Hatch, Graham, Cornyn, and Lee.

After debate, Chairman Leahy moved to table the Coburn amendment. The motion to table was accepted by a rollcall vote. The vote record is as follows:

Tally: 11 Yeas, 7 Nays

Yeas (11): Kohl (D–WI), Feinstein (D–CA), Schumer (D–NY), Durbin (D–IL), Whitehouse (D–RI), Klobuchar (D–MN), Franken (D–MN), Coons (D–DE), Blumenthal (D–CT), Grassley (R–IA), Leahy (D–VT).

Nays (7): Hatch (R–UT), Kyl (R–AZ), Sessions (R–AL), Graham (R–SC), Cornyn (R–TX), Lee (R–UT), Coburn (R–OK).

The Committee then voted to report favorably S. 1103. The vote record is as follows:

Tally: 11 Yeas, 7 Nays

Yeas (11): Kohl (D–WI), Feinstein (D–CA), Schumer (D–NY), Durbin (D–IL), Whitehouse (D–RI), Klobuchar (D–MN), Franken (D–MN), Coons (D–DE), Blumenthal (D–CT), Grassley (R–IA), Leahy (D–VT).

Nays (7): Hatch (R–UT), Kyl (R–AZ), Sessions (R–AL), Graham (R–SC), Cornyn (R–TX), Lee (R–UT), Coburn (R–OK).

III. SECTION-BY-SECTION SUMMARY OF THE BILL

Section 1. Findings

This section finds that the President requested that Congress extend the term of the FBI Director to maintain continuity of leader-

[41] The President's Request to Extend the Service of Director Mueller of the FBI until 2013: Hearing before the S. Comm. on the Judiciary, 112th Cong. (June 8, 2011) (statement of William Van Alstyne, Lee Professor of Law, Marshall-Wythe Law School, at 1).

ship at the FBI during a time of extraordinary threat to the United States. This section also finds that Congress intends the extension to be a one-time exception to the 10-year statutory limit on the term of his position.

Section 2. Extension of the Term of the Incumbent Director of the Federal Bureau of Investigation

This section modifies the Omnibus Crime Control and Safe Streets Act of 1968 (28 U.S.C. 532 note) to allow a one-time statutory extension of the 10-year term of the current Director of the FBI at the date of enactment at the request of the President. The change would allow the incumbent Director of the FBI to serve an additional two years until August 3, 2013.

IV. Congressional Budget Office Cost Estimate

The Committee sets forth, with respect to the bill, S. 1103, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

JUNE 17, 2011.

Hon. PATRICK J. LEAHY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1103, a bill to extend the term of the incumbent Director of the Federal Bureau of Investigation.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

S. 1103—A bill to extend the term of the incumbent Director of the Federal Bureau of Investigation

S. 1103 would extend the term of the current director of the Federal Bureau of Investigation by two years. Under current law, the term of the director will expire in August. CBO estimates that implementing this bill would have no significant cost to the federal government. Enacting S. 1103 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

S. 1103 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Mark Grabowicz. The estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

V. Regulatory Impact Statement

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that under S. 1103, as reported, no substantial regulatory impact will be incurred by implementing the provisions of this legislation.

VI. Conclusion

A bill to extend the term of the incumbent Director of the Federal Bureau of Investigation, S. 1103, was reported favorably to the Senate from the Committee on the Judiciary. The bill provides, at the request of the President, a one-time exception to the statutory limit on the 10-year term of the FBI Director. The bill will allow the incumbent Director to serve an additional two years, until 2013, and is not intended to create a precedent. Because of leadership transitions of critical national security positions at Federal agencies and the need for stability and continuity at the FBI, the Committee recommends swift action on S. 1103 as reported.

VII. Changes to Existing Law Made by the Bill, as Reported

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 1103, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

* * * * * * *

PART II—DEPARTMENT OF JUSTICE

* * * * * * *

SECTION 532. DIRECTOR OF THE FEDERAL BUREAU OF INVESTIGATION.

The Attorney General may appoint a Director of the Federal Bureau of Investigation. The Director of the Federal Bureau of Investigation is the head of the Federal Bureau of Investigation.

Note:

Confirmation and Compensation of Director; Term of Service

(a) Effective as of the day following the date on which the present incumbent in the office of Director ceases to serve as such, the Director of the Federal Bureau of Investigation shall be appointed by the President, by and with the advice and consent of the Senate, and shall receive compensation at the rate prescribed for level II of the Federal Executive Salary Schedule [section 5313 of Title 5, Government Organization and Employees].

(b) Effective with respect to any individual appointment by the President, by and with the advice and consent of the Senate, after June 1, 1973, the term of service of the Director of the Federal Bureau of Investigation shall be ten years. A Director may not serve more than one ten-year term. The provisions of subsections (a) through (c) of section 8335 of title 5, United States Code [section 8335(a) through (c) of Title 5], shall apply to any individual appointed under this section.

(c) With respect to the individual who is the incumbent in the office of the Director of the Federal Bureau of Investigation on the date of enactment of this subsection, subsection (b) shall be applied—

(1) in the first sentence, by substituting "12 years" for "ten years"; and

(2) in the second sentence, by substituting "12-year term" for "ten-year term".

VIII. APPENDIX

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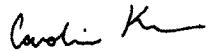
this section do not apply to—(1) an individual named by a statute providing for the continuance of the individual in the [civil] service."); Federal Executive Pay Act, Pub. L. No. 84-854, § 5(d), 70 Stat. 736, 749 (1956) ("The automatic separation provisions of this section shall not apply to any person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

20 U.S. Op. Off. Legal Counsel 124, 1996 WL 876050 (O.L.C.)

Office of Legal Counsel
U.S. Department of Justice

*1 I. THE CONSTITUTIONAL SEPARATION OF POWERS BETWEEN THE PRESIDENT AND CONGRESS

May 7, 1996

This memorandum provides an overview of the constitutional issues that periodically arise concerning the relationship between the executive and legislative branches of the federal government. Although that relationship is shaped in part by the policy and political concerns of the President and Congress of the day, the political interaction between the President and Congress takes place within an enduring constitutional framework that confers powers and responsibilities on both elected branches. In this memorandum we discuss the general principles underlying separation of powers analysis, and we address certain specific questions that have arisen in the past. Any set of examples is necessarily illustrative rather than exhaustive, however, and the Office of Legal Counsel is always available to assist in reviewing legislation or other congressional action for potential separation of powers issues. FN;Ba1[FNa1]FN;Fa1

MEMORANDUM FOR THE GENERAL COUNSELS
OF THE FEDERAL GOVERNMENT

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The Constitution reflects a fundamental conviction that governmental "power is of an encroaching nature, and that it ought to be effectually restrained from passing the limits assigned to it." The Federalist No. 48, at 332 (James Madison) (Jacob E. Cooke ed., 1961), quoted in Metropolitan Washington Airports Auth. ("MWAA") v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273 (1991). The founders, not content to rely on paper definitions of the rights secured to the people, "viewed the principle of separation of powers as a vital check against tyranny." Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam). In order to safeguard liberty, therefore, the Constitution creates three distinct branches of government -- Congress, the President, and the federal judiciary -- and assigns to them differing roles in the exercise of the government's powers. The resulting division of governmental authority is not a mere set of housekeeping rules indicating which branch presumptively performs which functions; it is, rather, a fundamental means by which the Constitution attempts to ensure free, responsible, and democratic government. See MWAA, 501 U.S. at 272 ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."). The constitutional separation of powers advances this central purpose by "assur [ing] full, vigorous, and open debate on the great issues affecting the people"; FN;B1[FN1]FN;F1 by "placing both substantive and procedural limitations on each [branch]"; FN;B2 [FN2]FN;F2 and by maintaining a "system of . . . checks and balances" among the three branches. FN;B3[FN3] FN;F3

***2** Although the structure of the Constitution is designed to obviate the danger to liberty posed by each of the branches, FN;B4[FN4]FN;F4 the founders were particularly concerned with the Congress's potential for im-

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provident or overreaching action: "the tendency of republican governments is to an aggrandizement of the legislat[ure] at the expense of the other departments." The Federalist No. 49, at 315-16 (James Madison) (Clinton Rossiter ed., 1961), cited in United States v. Brown, 381 U.S. 437, 444 n.17 (1965). Many specific aspects of the Constitution's separation of governmental powers embody the founders' "profound conviction . . . that the powers conferred on Congress were the powers to be most carefully circumscribed" and the founders' recognition of the particular "'propensity'" of the legislative branch "'to invade the rights of the Executive.'" INS v. Chadha, 462 U.S. 919, 947 (1983) (quoting The Federalist No. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961)). Executive branch lawyers thus have a constitutional obligation, one grounded not in parochial institutional interests but in our fundamental duty to safeguard the liberty of the people, to assert and maintain the legitimate powers and privileges of the President against inadvertent or intentional congressional intrusion. As Attorney General William Mitchell put it long ago:

> Since the organization of the Government, Presidents have felt bound to insist upon the maintenance of the Executive functions unimpa[i]red by legislative encroachment, just as the legislative branch has felt bound to resist interferences with its power by the Executive. To acquiesce in legislation having a tendency to encroach upon the executive authority results in establishing dangerous precedents.

Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 64 (1933). FN;B5[FN5] FN;F5

The Constitution, however, "by no means contemplates total separation of each of these three essential branches of Government." Buckley, 424 U.S. at 121. Instead, "'[w]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.'" Mistretta v. United States, 488 U.S. 361, 381 (1989) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). The Constitution thus guards against "the accumulation of excessive authority in a single Branch" not by providing mutually exclusive lists of executive, legislative, and judicial powers, but by imposing on each of the three branches "a degree of overlapping responsibility, a duty of interdependence as well as independence." Id. at 381. FN;B6[FN6]FN;F6 The constitutional boundaries between the powers of the branches must be determined "according to common sense and the inherent necessities of the governmental coordination." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928).

***3** Some general observations on the sources and methodology we employ in analyzing separation of powers questions are appropriate. We believe that the constitutional structure obligates the executive branch to adhere to settled judicial doctrine that limits executive and legislative power. While the Supreme Court's decisions interpreting the Constitution cannot simply be equated with the Constitution, we are mindful of the special role of the courts in the interpretation of the law of the Constitution. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

The Supreme Court's decisions interpreting the constitutional separation of powers among Congress, the President, and the courts recognize the founders' basic concern over the "encroaching nature" of power, as well as their specific belief that Congress is potentially the most dangerous branch. "It is this concern of encroachment and aggrandizement that has animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.'" Mistretta, 488 U.S. at 382 (citation omitted). The Court's decisions have employed three distinct principles in resolving separation of powers disputes. First, where "[e]xplicit and unambiguous provisions of the Constitution prescribe and define . . . just how [governmental] powers are to be exercised," Chadha, 462 U.S. at 945, the con-

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stitutional procedures must be followed with precision. Second, where the effect of legislation is to vest Congress itself, its members, or its agents with "'either executive power or judicial power,'" the statute is unconstitutional. MWAA, 501 U.S. at 274 (citation omitted). FN;B7[FN7]FN;F7 Finally, legislation that affects the functioning of one of the other branches may be unconstitutional if it prevents the affected branch "from accomplishing its constitutionally assigned functions." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (legislation affecting the executive branch); accord CFTC v. Schor, 478 U.S. 833, 851, 856-57 (1986) (legislation affecting the judiciary). FN;B8[FN8]FN;F8

Our analyses are guided and, where there is a decision of the Court on point, governed by the Supreme Court's decisions on separation of powers. At the same time, the executive branch has an independent constitutional obligation to interpret and apply the Constitution. FN;B9[FN9]FN;F9 That obligation is of particular importance in the area of separation of powers, where the issues often do not give rise to cases or controversies that can be resolved by the courts. This is due in part to the limits of jurisdiction and justiciability that Article III places on the courts. In addition there may be legislation that violates one of the three principles outlined above and yet is unlikely to reach the courts in a form or context in which the judiciary will be able to identify or remedy the constitutional problem. FN;B10[FN10]FN;F10 The Attorneys General and this Office have a long tradition of carrying out this constitutional responsibility, one that dates back to Attorney General Edmund Randolph's 1791 opinions on the constitutionality of a national bank. See The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions (publication forthcoming in 18 Op. O.L.C. (1994)) (reprinting, with commentary, the bank opinions). FN;B11[FN11]FN;F11 We believe therefore that it is important in addressing separation of powers matters to give careful consideration to the views of our predecessors and to what seems to us to be the import of the Constitution's text, history, and structure. FN;B12[FN12]FN;F12

***4** To be sure, respect for the legislative branch of the government requires a degree of deference to legislative judgments. FN;B13[FN13]FN;F13 However, it is also the President's "duty to pass the executive authority on to his successor, unimpaired by the adoption of dangerous precedents." Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. at 65. FN;B14[FN14]FN;F14 Our constitutional analyses are informed by both of these concerns. FN;B15[FN15]FN;F15

A. Express Procedures: The Bicameralism and Presentment

Requirements and the Appointments Clause

While the expression "separation of powers" does not appear in the Constitution, the Constitution does require both separation and interdependence on some matters by specifying, expressly and precisely, the procedures that must be followed. Where the constitutional text is unequivocal as to the manner in which the branches are to relate, any attempt to vary from the text's prescriptions is invalid. FN;B16[FN16]FN;F16 The Court has identified two such express procedures relating to the separation of executive and legislative powers: the bicameralism and presentment requirements for legislation, and the Appointments Clause.

Congress's broad authority to take action that has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," INS v. Chadha, 462 U.S. 919, 952 (1983), is limited by the procedural requirements of Article I. With a few express exceptions found or rooted in the constitutional text, Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 n.21 (1991), FN;B17[FN17]FN;F17 Article I requires that Congress take such action "in accord with a single, finely wrought and exhaustively considered, procedure" -- bicameral passage and presentation to the

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President followed by presidential signature or bicameral repassage by a two-thirds majority. Chadha, 462 U.S. at 951; see U.S. Const. art. I, §§ 1, 7. The classic and often-repeated violation of this express textual requirement is the "legislative veto" mechanism invalidated in Chadha. FN;B18[FN18]FN;F18

The Supreme Court has applied a similar analysis to the Appointments Clause of Article II, Section 2. In Buckley v. Valeo, 424 U.S. 1, 138-39 (1976) (per curiam), the Court concluded that "Congress' power under [the Necessary and Proper] Clause is inevitably bounded by the express language of Art. II, § 2, cl. 2," and that consequently Congress cannot provide for the appointment of "'Officers of the United States,'" except through a procedure that "comports with" the Appointments Clause. FN;B19[FN19]FN;F19 Pursuant to the language of the Clause, principal officers must be appointed by the President with the advice and consent of the Senate, while Congress is limited in providing alternative means for the appointment of inferior officers to the "possible repositories for the appointment power." Freytag v. Commissioner, 501 U.S. 868, 884 (1991). (Those repositories are "the President alone, . . . the Courts of Law, or . . . the Heads of Departments." U.S. Const. art. II, § 2, cl. 2.)

***5** The rules of law derived from the requirements of bicameralism/presentment and the Appointments Clause have the clear and powerful effect of invalidating any inconsistent congressional action. Congress may not employ any mode of exercising legislative power other than through bicameralism and presentment. The Appointments Clause's list of those who may appoint officers is exclusive, and Congress cannot authorize anyone else to appoint officers of the United States. The major difficulty in applying the bicameralism/presentment and Appointments Clause requirements lies in determining whether a particular action falls within the scope of the prescribed procedures. In section II of this memorandum, we discuss questions that have arisen concerning the scope of both requirements.

B. The Anti-Aggrandizement Principle

Although the founders were concerned about the concentration of governmental power in any of the three branches, their primary fears were directed toward congressional self-aggrandizement, FN;B20[FN20]FN;F20 and the Supreme Court's decisions call for careful scrutiny of legislation that has the purpose or effect of extending Congress's authority beyond the legislative process. Just as the textual requirement of bicameralism and presentment limits the means by which Congress may legislate, so the anti-aggrandizement principle limits the means by which Congress may influence the execution (or adjudication) of the laws. FN;B21[FN21]FN;F21 The Constitution affords Congress great latitude in making policy choices through the process of bicameral passage and presentment. However, "once Congress makes its choice in enacting legislation, its participation ends," and "Congress can thereafter control the execution of its enactment only indirectly -- by passing new legislation." Bowsher v. Synar, 478 U.S. 714, 733-34 (1986). While Congress may inform itself of how legislation is being implemented through the ordinary means of legislative oversight and investigation, the anti-aggrandizement principle forbids Congress, directly or through an agent subject to removal by Congress, FN;B22[FN22]FN;F22 from intervening in the decision making necessary to execute the law. See id. at 733-34; FEC v. NRA Political Victory Fund, 6 F.3d 821, 827 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994). FN;B23[FN23]FN;F23

In Bowsher, the Court held that a provision of the Gramm-Rudman Deficit Reduction Act was unconstitutional because it vested in the Comptroller General (an official "removable only at the initiative of Congress," 478 U.S. at 728) the power to make post-enactment decisions about how the executive branch should implement budget reduction legislation. The Court rejected the argument that self-aggrandizing legislation can be upheld when it is as a practical matter harmless or de minimis and dismissed as beside the point Justice White's vigor-

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ous argument that "[r]ealistic consideration of the nature of the Comptroller General's relation to Congress . . . reveals that the threat to separation of powers . . . is wholly chimerical." 478 U.S. at 774 (White, J., dissenting); see also Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 269 n.15 (1991) ("the likelihood that Congress" actually would exercise its authority to remove the members of the review board under consideration in MWAA was "irrelevant for separation-of-powers purposes"). In contrast, the Court upheld the validity of the laws challenged in Morrison v. Olson, 487 U.S. 654 (1988) (independent counsel provisions of Ethics in Government Act of 1978), and CFTC v. Schor, 478 U.S. 833 (1986) (regulations implementing section of the Commodity Exchange Act), in part because the Court saw no reason to view those laws as examples of legislative aggrandizement. FN;B24[FN24]FN;F24

***6** Like the express requirements of the bicameralism/presentment process and the Appointments Clause, the anti-aggrandizement principle puts a powerful constraint on congressional power: legislative action that falls within the scope of the principle is unconstitutional. FN;B25[FN25]FN;F25 The complementary limit on the principle is that, as the Court understands it, the principle applies only to congressional action that amounts to formal or direct self-aggrandizement -- for example, the placement of congressional agents on a body with prosecutorial or law enforcement powers -- no matter how limited the power thereby seized by Congress. See NRA Political Victory Fund, 6 F.3d at 826-27. The Court reviews legislation that arguably increases Congress's power indirectly by weakening the executive politically under the less stringent general separation of powers principle. See Morrison, 487 U.S. at 694. A significant difficulty in applying the anti-aggrandizement principle arises from the uncertain line between minor (but unconstitutional) aggrandizements and (constitutional) exercises of Congress's broad investigative and oversight powers. FN;B26[FN26]FN;F26 In section II, we discuss some of the questions that have arisen.

C. The General Separation of Powers Principle

Legislation that affects the constitutional separation of powers but is consistent with the requirements of bicameralism/presentment, the Appointments Clause, and the anti-aggrandizement principle is subject to less searching scrutiny. FN;B27[FN27]FN;F27 While some older judicial opinions used language suggesting that any overlap between the powers wielded by the different branches is illegitimate, FN;B28[FN28]FN;F28 the modern Supreme Court interprets the general principle of separation of powers in light of Madison's assertion that the separation necessary to free government is violated only "'where the whole power of one department is exercised by the same hands which possess the whole power of another department.'" Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 442 n.5 (1977) (quoting The Federalist No. 47, at 325-26 (James Madison) (Jacob E. Cooke ed., 1961) (emphasis in original)). FN;B29[FN29]FN;F29 Therefore, "in determining whether [an] Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." Id. at 443. Cf. CFTC v. Schor, 478 U.S. 833, 856-57 (1986) ("the separation of powers question presented in this litigation is whether Congress impermissibly undermined . . . the role of the Judicial Branch"). An affirmative answer to the question of whether Congress has prevented the executive or judiciary from accomplishing its functions, furthermore, would not lead inexorably to the judicial invalidation of the statute: in that case, the Court has stated, it would proceed to "determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." Administrator of Gen. Servs., 433 U.S. at 443. FN;B30[FN30]FN;F30

***7** The Court's current understanding of the general principle of separation of powers is illustrated by Morrison v. Olson, 487 U.S. 654 (1988). FN;B31[FN31]FN;F31 In Morrison, the Court concluded that the restrictions in the independent counsel statute on the executive's supervisory and removal powers did not violate the principle.

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While the Court acknowledged that the statute rendered the independent counsel "free from Executive supervision to a greater extent than other federal prosecutors," it was unpersuaded that the limitations placed on that supervision meant that the President would not be able "to perform his constitutionally assigned duties." Id. at 696. FN;B32[FN32]FN;F32 In light of the narrow range of the independent counsel's jurisdiction, her essential insulation from any significant policy-making role, and the well-established principle that Congress can limit the removal authority of a head of department when granting that officer the power to appoint subordinates, the Court concluded that the independent counsel statute did not fundamentally undermine the executive's constitutional authority.

The Supreme Court's basic formulation of the general principle of separation of powers is consistent with the approach taken by most Attorneys General in the past, and it accords with what we find to be the most persuasive scholarship on the original understanding and early practice of the separation of powers under the United States Constitution. FN;B33[FN33]FN;F33 However, given the very emphasis the general principle places on evaluating constitutional questions in light of the overall structure and functioning of the federal government, the principle's application to specific questions is unavoidably difficult, and the answers we or the courts reach ordinarily should be viewed as quite specific to context. FN;B34[FN34]FN;F34 Furthermore, although the general principle marks the boundary of the law of separation of powers, it is inappropriate for the executive to regard this as defining the outer limit of proper separation of powers policy objections to legislation. FN;B35[FN35]FN;F35 The Constitution's very structure suggests the importance of maintaining the hallmarks of "executive administration essential to effective action" FN;B36[FN36]FN;F36 as well as the accountability to the public that stems from vesting ultimate authority in a single, politically responsible officer. FN;B37[FN37]FN;F37 Several quite common types of legislation threaten the structural values protected by the general separation of powers principle even if the courts are unlikely to invalidate them. Examples of such legislation may include burdensome reporting requirements, attempts to dictate the processes of executive deliberation, and legislation that has the purpose or would have the effect of "micromanaging" executive action. Executive branch agencies should be careful to object to any legislation that unduly reduces the accountability of officials or agencies to the President, or that unnecessarily interferes with the flexibility and efficiency of executive decision making and action. Such legislation undercuts the constitutional purpose of creating an energetic and responsible executive branch.

II. Common Separation of Powers Issues

A. Bicameralism/Presentment Questions

***8** The Supreme Court's holding in INS v. Chadha, 462 U.S. 919 (1983), was emphatic: Congress can exercise "the legislative power of the Federal Government" only "in accord with a single, finely wrought and exhaustively considered, procedure" -- passage by both houses and presentment to the President. FN;B38[FN38]FN;F38 Id. at 951. Applying that rule, the Court struck down a statutory mechanism in the Immigration and Nationality Act by which a single house of Congress could override decisions of the Attorney General. The effect of the Court's decision was to invalidate the similar "legislative veto" provisions found in many other statutes. FN;B39 [FN39]FN;F39 In addition to the classic legislative veto mechanism invalidated by Chadha, we think that the requirement of bicameralism and presentment is infringed whenever a single house, committee, or agent of Congress attempts to direct the execution of the laws, to determine the "final disposition of the rights of persons outside the legislative branch" or to promulgate rules or standards intended to bind the actions of executive or administrative officials that have not been approved by both houses and presented to the President. See, e.g., Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1108 (9th Cir. 1988), modified as to attorney fees, 893 F.2d 205 (1989) (en banc); FN;B40[FN40]FN;F40 cf. Mistretta v. United States, 488 U.S. 361, 396 (1989)

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(distinguishing Sentencing Guidelines from political policy making on the grounds that "they do not bind or regulate the primary conduct of the public").

For many decades, the congressional Joint Committee on Printing ("JCP") has attempted to exercise the legislative authority to promulgate rules and procedures binding on the executive branch's activities relating to printing, publication, and (more recently) data storage. In 1920, President Wilson vetoed an appropriations bill because it purported to confer on the JCP the power to promulgate regulations governing printing by executive officials or agencies: Congress has no power, he explained, to "endo[w] a committee of either House or a joint committee of both Houses with power to prescribe 'regulations' under which executive departments may operate." Veto Message on Legislative, Executive and Judicial Appropriation Bill, H.R. No. 764, 66th Cong., 2d Sess. 2 (1920), reprinted in 59 Cong. Rec. 7,026 (1920); see Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 62-63, 65 (1933) (quoting and endorsing President Wilson's reasoning). In 1984, we concluded that legislation granting the JCP authority to promulgate regulations that "would require executive departments to submit annual plans outlining their intended activities and to seek advance approval of all projected goals, policies, strategies, purchases, publications, and means of distribution" with respect to printing, word processing, and data storage and retrieval was unconstitutional. Constitutionality of Proposed Regulations of Joint Committee on Printing, 8 Op. O.L.C. 42, 42 (1984). The proposed regulations would have established general rules binding the conduct of executive officials without those rules being approved by both houses of Congress and presented to the President, in plain violation of Article I's procedural requirements. FN;B41[FN41]FN:F41 We have also advised that the statutory provision authorizing the JCP "unilaterally to create exceptions to the [statutory] rule that all printing must be accomplished through the GPO [Government Printing Office]" has no lawful force under Chadha. Id. at 51 & n.14; see also Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. at 58-60 (bill subjecting Treasury Department decisions on tax refunds to review and disallowance by congressional joint committee would be unconstitutional).

***9** The requirement of bicameralism and presentment also can be violated in more convoluted ways. Section 431 of the General Education Provisions Act, for example, subjected final regulations of the Department of Education to a forty-five day report-and-wait provision FN;B42[FN42]FN:F42 and provided that the final regulation would not become effective if Congress "by concurrent resolution, find[s] that the final regulation is inconsistent with the Act . . . and disapprove[s] such final regulation." 20 U.S.C. § 1232(d) (Supp. IV 1980). Concurrent resolutions are not legislation within the meaning of the Constitution, see U.S. Const. art. I, § 7, cl. 3, because they are not presented to the President. Accordingly, Attorney General Civiletti advised the Secretary of Education that the subjection of the Education Department's delegated lawmaking authority to congressional control and revision by means other than those required by Article I was unconstitutional. "[O]nce a function has been delegated to the executive branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation." Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4A Op. O.L.C. 21, 27 (1980) (opinion of the Attorney General).

Similarly, while Congress has near-plenary authority in deciding to grant, limit or withhold appropriations, the Department of Justice has long contended that the appropriations power may not be used to circumvent the restrictions the Constitution places on the modes of legislative action. See, e.g., Authority of Congressional Committees to Disapprove Action of Executive Branch, 41 Op. Att'y Gen. 230 (1955) (opining that legislation authorizing congressional committees to disapprove Defense Department contracts is unconstitutional). Several years before Chadha, for example, this Office advised that Congress could not validly provide for the indirect implementation of a legislative "veto" by an appropriations rider that would prospectively deny funding for the

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implementation of any regulation disapproved in the future by such a "veto." See Appropriations Limitation for Rules Vetoed by Congress, 4B Op. O.L.C. 731 (1980). Our reasoning in that opinion is equally applicable to appropriations provisions that attempt to cut off funding that would otherwise be available on the basis of any future expression of disapproval by Congress that does not take the form of new legislation. The same analysis would apply, as well, to a provision prohibiting the expenditure of funds for some purpose, but allowing a future expression of approval by committee action to remove the prohibition.

In carrying out its legitimate legislative functions, Congress "enjoys ample channels to advise, coordinate, and even directly influence an executive agency [including by] direct communication with the [agency]." FEC v. NRA Political Victory Fund, 6 F.3d 821, 827 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994). As a practical matter, therefore, congressional committees and individual members of Congress often are able to sway the decisions of the executive officials with whom they deal. In addition, congressional committees can exercise limited but legally coercive authority over persons outside the legislative branch through the power to issue subpoenas to compel testimony. FN;B43[FN43]FN;F43 In light of the capacity of Congress to extend its influence beyond the legislative sphere by informal means that are sometimes troubling although not unlawful, it is imperative that the executive branch consistently assert the rule of constitutional law that formal control of executive decision making and administration is subject to the requirements of Article I, and especially to the constitutional authority of the President to participate in the legislative process through the presentment mechanism. The executive branch has a constitutional obligation not to accede to legislative action that does not conform to Article I. Advising the Secretary of Education that she could validly implement departmental regulations despite a legislative "veto," Attorney General Civiletti wrote that "recognition of these concurrent resolutions as legally binding would constitute an abdication of the responsibility of the executive branch, as an equal and coordinate branch of government with the legislative branch, to preserve the integrity of its functions against constitutional encroachment." Congress' Disapproval of Agency Regulations, 4A Op. O.L.C. at 29.

B. Appointment Clause and Related Questions

***10** The Appointments Clause 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: but 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 Departments.

U.S. Const. art. II, § 2, cl. 2. FN;B44[FN44]FN;F44 In Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), the Supreme Court held that the terms of the Appointments Clause set out the only means by which Congress may provide for the appointment of "Officers of the United States." FN;B45[FN45]FN;F45 Id. at 124-37. Principal officers must be appointed by the President with the advice and consent of the Senate; inferior officers will be appointed in the same manner unless Congress by statute provides for their appointment by the President, the "Head[] of [a] Department[]," or the courts. Id. at 132; FN;B46[FN46]FN;F46 see also Freytag v. Commissioner, 501 U.S. 868, 878 (1991) ("the Constitution limits congressional discretion to vest power to appoint 'inferior Officers' to three sources"). Despite the apparent clarity of its language, however, the Appointments Clause has provided the occasion for many opinions of the Attorneys General and of this Office. FN;B47[FN47]FN;F47

1. Who is Required to Be an "Officer of the United States"? Not everyone who performs duties for the federal government is an "officer" within the meaning of the Appointments Clause. From the early days of the Republic,

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this term has been understood to embrace the ideas of "tenure, duration, emolument, and duties." United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868). Because Hartwell has long been taken as the leading statement of the constitutional meaning of "officer," FN;B48[FN48]FN;F48 that statement is worth repeating in full:

> An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties.
>
> The employment of the defendant was in the public service of the United States. He was appointed pursuant to law, and his compensation was fixed by law. Vacating the office of his superior would not have affected the tenure of his place. His duties were continuing and permanent, not occasional or temporary. They were to be such as his superior in office should prescribe. A government office is different from a government contract. The latter from its nature is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other.

Id. at 393.

Hartwell and the cases following it specify a number of criteria for identifying constitutional officers, and in some cases it is not entirely clear which criteria the court considered essential to its decision. Nevertheless, we believe that from the earliest reported decisions onward, the constitutional definition of officer has involved at least three necessary conditions.

***11** a. Employment by the Government: The Distinction between Appointees and Independent Contractors. An officer's duties are permanent, continuing, and based upon responsibilities created through a chain of command rather than by contract. Underlying an officer is an "office," to which the officer must be appointed. As Chief Justice Marshall, sitting as circuit justice, wrote: "Although an office is 'an employment,' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer." United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747). Chief Justice Marshall speaks here of being "employed under a contract"; in modern terminology the type of non-officer status he is describing is usually referred to as that of independent contractor. In Hartwell, this distinction shows up in the opinion's attention to the characteristics of the defendant's employment being "continuing and permanent, not occasional or temporary," as well as to the suggestion that with respect to an officer, a superior can fix and then change the specific set of duties, rather than having those duties fixed by a contract. 73 U.S. at 393.

The distinction between employees and persons whose relationship to the government takes some other form also appears in later decisions. FN;B49[FN49]FN;F49 The question in United States v. Germaine, 99 U.S. 508 (1879), concerned whether a surgeon appointed by the Commissioner of Pensions "to examine applicants for pension, where [the Commissioner] shall deem an examination . . . necessary," id. at 508 (quoting Rev. Stat. § 4777), was an officer within the meaning of the Appointments Clause. The surgeon in question was "only to act when called on by the Commissioner of Pensions in some special case"; furthermore, his only compensation from the government was a fee for each examination that he did in fact perform. Id. at 512. The Court stated that the Appointments Clause applies to "all persons who can be said to hold an office under the government" and, applying Hartwell, concluded that "the [surgeon's] duties are not continuing and permanent and they are occasional and intermittent." Id. (emphasis in original). The surgeon, therefore, was not an officer of the United States. Id. FN;B50[FN50]FN;F50

The Court employed the same reasoning in Auffmordt v. Hedden, 137 U.S. 310 (1890). Pursuant to statute, an

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importer dissatisfied with the government's valuation of dutiable goods was entitled to demand a reappraisement jointly conducted by a general appraiser (a government employee) and a "merchant appraiser" appointed by the collector of customs for the specific case. Despite the fact that the reappraisement decision was final and binding on both the government and the importer, id. at 329, the Court rejected the argument that the merchant appraiser was an "inferior Officer" whose appointment did not accord with the requirements of the Appointments Clause.

> ***12** He is an expert, selected as such. . . . He is selected for the special case. He has no general functions, nor any employment which has any duration as to time, or which extends over any case further than as he is selected to act in that particular case. . . . He has no claim or right to be designated, or to act except as he may be designated. . . . His position is without tenure, duration, continuing emolument, or continuous duties . . . . Therefore, he is not an 'officer,' within the meaning of the clause.

Id. at 326-27.

We believe that under its best reading, Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), reflects and endorses this distinction, and that suggestions to the contrary misread the opinion. First, Buckley cites both Germaine and Auffmordt approvingly. See id. at 125-26 & n.162. Second, in several of its statements of the definition of "officers," Buckley, sometimes citing Germaine explicitly, says that the term applies to appointees or appointed officials who exercise significant authority under federal law, thus recognizing the possibility that non-appointees might sometimes exercise authority under federal law. See, e.g., 424 U.S. at 131 ("Officers" are "all appointed officials exercising responsibility under the public laws"). It is true that at other points in its opinion, the Buckley Court used language that, taken in isolation, might suggest that the Appointments Clause applies to persons who, although they do not hold positions in the public service of the United States, exercise significant authority pursuant to federal law. See id. at 141. However, we think such a reading of Buckley is unwarranted. So understood, Buckley must be taken to have overruled, sub silentio, Germaine and Auffmordt -- cases upon which it expressly relies in its analysis, see id. at 125-26 & n.162 -- and its repeated quotation of the Germaine definition of "officer" as "all persons who can be said to hold an office under the government" would make no sense. The apparently unlimited language of some passages has a simpler explanation: there was no question that the officials at issue in Buckley held "employment[s]," Maurice, 26 F. Cas. at 1214, under the federal government, and thus the question of the inapplicability of the Appointments Clause to persons not employed by the federal government was not before the Court. FN;B51[FN51]FN;F51 The Supreme Court's decision in Buckley, we conclude, did not modify the long-settled principle that a person who is not an officer under Hartwell need not be appointed pursuant to the Appointments Clause. FN;B52[FN52]FN;F52

b. The Exercise of Significant Authority. Chief Justice Marshall's observation that "[a]lthough an office is 'an employment,' it does not follow that every employment is an office," United States v. Maurice, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice), points to a second distinction as well -- although not one that was at issue in Maurice itself. An officer is distinguished from other full-time employees of the federal government by the extent of authority he or she can properly exercise. As the Court expressed this in Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam):

> ***13** We think that the term "Officers of the United States" as used in Art. II, defined to include "all persons who can be said to hold an office under the government" in United States v. Germaine, [means] that any appointee exercising significant authority pursuant to the laws of the United States . . . must . . . be appointed in the manner prescribed by [the Appointments Clause].

Id. at 125-26 (emphasis added). FN;B53[FN53]FN;F53 In contrast, "[e]mployees are lesser functionaries subordinate to officers of the United States." Id. at 126 n.162.

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The distinction between constitutional officers and other employees is a long-standing one. See, e.g., Burnap v. United States, 252 U.S. 512, 516-19 (1920) (landscape architect in the Office of Public Buildings and Grounds was an employee, not an officer); Second Deputy Comptroller of the Currency -- Appointment, 26 Op. Att'y Gen. 627, 628 (1908) (Deputy Comptroller of the Currency was "manifestly an officer of the United States" rather than an employee). At an early point, the Court noted the importance of this distinction for Appointments Clause analysis. See Germaine, 99 U.S. at 509. FN;B54[FN54]FN;F54

The Supreme Court relied on the officer/employee distinction in its recent decision in Freytag v. Commissioner, 501 U.S. 868 (1991). In Freytag, the Court rejected the argument that special trial judges of the Tax Court are employees rather than officers because "they lack authority to enter a final decision" and thus arguably are mere subordinates of the regular Tax Court judges. FN;B55[FN55]FN;F55 Id. at 881. The Court put some weight on the fact that the position of special trial judge, as well as its duties, salary, and mode of appointment, are specifically established by statute; FN;B56[FN56]FN;F56 the Court also emphasized that special trial judges "exercise significant discretion" in carrying out various important functions relating to litigation in the Tax Court. Id. at 881-82.

Applying the same understanding of the distinction between officers and employees, this Office has concluded that the members of a commission that has purely advisory functions "need not be officers of the United States" because they "possess no enforcement authority or power to bind the Government." Proposed Commission on Deregulation of International Ocean Shipping, 7 Op. O.L.C. 202, 202-03 (1983). For that reason, the creation by Congress of presidential advisory committees composed, in whole or in part, of congressional nominees or even of members of Congress does not raise Appointments Clause concerns.

Since employees do not wield independent discretion and act only at the direction of officers, they do not in their own right "exercis[e] responsibility under the public laws of the Nation," Buckley, 424 U.S. at 131. FN;B57[FN57]FN;F57 As a constitutional matter, therefore, an employee may be selected in whatever manner Congress directs. Conversely, "any appointee" in federal service who "exercis[es] significant authority pursuant to the laws of the United States" must be an officer in the constitutional sense and must be appointed in a manner consistent with the Appointments Clause. FN;B58[FN58]FN;F58 424 U.S. at 126. Congress and the President may not avoid the strictures of the Clause by vesting federal employees with the independent or discretionary responsibility to perform any "significant governmental duty." Id. at 141. FN;B59[FN59]FN;F59

***14** c. Appointment to a Position of Employment within the Federal Government. Finally, United States v. Hartwell, 73 U.S. (6 Wall.) 385 (1868), and the other major decisions defining "Officers of the United States" all reflect the historical understanding that a constitutional officer is an individual who is appointed to his or her office by the federal government. The Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors. FN;B60[FN60]FN;F60 In Hartwell the Court stated, "[a]n office is a public station, or employment, conferred by the appointment of government. . . . The employment of the defendant was in the public service of the United States." Id. at 393; see also United States v. Germaine, 99 U.S. 508, 510 (1879) (founders intended appointment pursuant to the Appointments Clause only for "persons who can be said to hold an office under the government about to be established under the Constitution"). It is a conceptual confusion to argue that federal laws delegating authority to state officials create federal "offices," which are then filled by (improperly appointed) state officials. Rather, the "public station, or employment" has been created by state law; the federal statute simply adds federal authority to a pre-existing state office. Accordingly, the substantiality of the delegated authority is immaterial to the Appointments Clause conclusion. FN;B61[FN61] FN;F61 An analogous point applies to delegations made to private individuals: the simple assignment of some

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duties under federal law, even significant ones, does not by itself pose an Appointments Clause problem. FN;B62[FN62]FN;F62

In our view, therefore, the lower federal courts have been correct in rejecting Appointments Clause challenges to the exercise of federally derived authority by state officials, FN;B63[FN63]FN;F63 the District of Columbia City Council, FN;B64[FN64]FN;F64 qui tam relators under the False Claims Act, FN;B65[FN65]FN;F65 and plaintiffs under the citizen suit provisions of the Clean Water Act. FN;B66[FN66]FN;F66 The same conclusion should apply to the members of multinational or international entities who are not appointed to represent the United States. FN;B67[FN67]FN;F67 We believe that the Appointments Clause doubts sometimes voiced about legislation requiring the concurrence of state or local officials, Indian tribes, or private persons as a condition precedent to federal action are equally without merit. FN;B68[FN68]FN;F68

Determining whether an individual occupies a position of private employment or federal employment can pose difficult questions. The Supreme Court recently set forth rules for making this determination in Lebron v. National Railroad Passenger Corp., 115 S. Ct. 961 (1995). There, the Court found itself faced with the question of whether Amtrak is a private corporation or an agency of the government. Amtrak is chartered by Congress and incorporated under the District of Columbia Business Corporation Act. Id. at 967. The organic statute expressly provides that Amtrak "shall be operated and managed as a for-profit corporation, and is not a department, agency, or instrumentality of the United States Government." 49 U.S.C. § 24301(a)(2)-(3). The Court ruled that this provision "is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress' control . . . . But it is not for Congress to make the final determination of Amtrak's status as a government entity for purposes of determining the constitutional rights of citizens affected by its actions." 115 S. Ct. at 971.

***15** However, the Court held that an entity is "what the Constitution regards as the Government," if the entity is government-created and government-controlled. Id. at 971. Because Amtrak was created "by special law for the furtherance of governmental objectives," it is government-created. FN;B69[FN69]FN;F69 Id. at 974. Because federally appointed members of Amtrak's governing board hold "voting control" and there is no provision for this government control to sunset, Amtrak is government-controlled. The Court contrasted Conrail, which it determined is not what the Constitution regards as the government. By statute the federal government appoints a voting majority of Conrail's board of directors. Nevertheless, the Court held that Conrail is not part of the government, because the government's voting control will shift to the private shareholders if Conrail's debt to the federal government falls below half of its total indebtedness and because "'[t]he responsibilities of the federal directors are not different from those of the other directors -- to operate Conrail at a profit for the benefit of its shareholders' -- which contrasts with the public-interest 'goals' set forth in Amtrak's charter." Id. (quoting Regional Rail Reorganization Act Cases, 419 U.S. 102, 152 (1974)). FN;B70[FN70]FN;F70

d. Summary. An appointee (1) to a position of employment (2) within the federal government (3) that carries significant authority pursuant to the laws of the United States is required to be an "Officer of the United States." Each of these three conditions is independent, and all three must be met in order for the position to be subject to the requirements of the Appointments Clause.

We recently applied this principle in determining whether the Appointments Clause represents a blanket proscription against participation by the federal government in binding arbitration. Typically, arbitrators are private individuals chosen by the parties to the dispute. In a binding arbitration, the decision of the arbitrators is mandatory upon the parties, subject only to limited judicial review. The view that the Appointments Clause prohibits

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federal government participation in binding arbitration proceeds from the misinterpretation of Buckley discussed above. We reasoned that although it is "beyond dispute that arbitrators exercise significant authority, at least in the context of binding arbitration involving the federal government," FN;B71[FN71]FN;F71 the standard binding arbitration mechanism does not implicate the Appointments Clause. Arbitrators

> are manifestly private actors who are, at most, independent contractors to, rather than employees of, the federal government. Arbitrators are retained for a single matter, their service expires at the resolution of that matter, and they fix their own compensation. Hence, their service does not bear the hallmarks of a constitutional office -- tenure, duration, emoluments, and continuing duties. Consequently, arbitrators do not occupy a position of employment within the federal government, and it cannot be said that they are officers of the United States. Because arbitrators are not officers, the Appointments Clause does not place any requirements or restrictions on the manner in which they are chosen.

***16** Memorandum for John Schmidt, Associate Attorney General, from Walter Dellinger, Assistant Attorney General, re: Constitutional Limitations on Federal Government Participation in Binding Arbitration, at 10 (Sept. 7, 1995). FN;B72[FN72]FN;F72 The only case that to our knowledge addresses this question agreed with our analysis and conclusion, and held that the Appointments Clause does not prohibit the federal government from entering into binding arbitration. See Tenaska Washington Partners v. United States, 34 F. Cl. 434, 440 (1995) ("the OLC Memorandum is a thorough and persuasive analysis").

2. Who May Be an Inferior Officer? Since all officers of the United States may be appointed by the President with the advice and consent of the Senate, the only Appointments Clause significance to the distinction between principal and inferior officers lies in Congress's ability to provide for the appointment of inferior officers by one of the alternative means listed in the Clause. The Supreme Court has observed that "[t]he line between 'inferior' and 'principal' officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn." Morrison v. Olson, 487 U.S. 654, 671 (1988). Unfortunately, the Court's own decisions provide only modest additional guidance. In Morrison, the Court declined to "attempt . . . to decide exactly where the line falls" because it found that the independent counsel "clearly falls on the 'inferior officer' side of that line." Id. at 671. The Court advanced several factors that pointed to that conclusion: (1) The counsel was removable by the Attorney General, thus making her "to some degree 'inferior' in rank and authority." Id. (2) The counsel's duties were limited, particularly with respect to policy making and administration. (3) The counsel's tenure was limited to the particular "mission that she was appointed for." Id. at 672. FN;B73[FN73]FN;F73 The Court's other recent Appointments Clause decisions shed little additional light on the subject. FN;B74[FN74] FN;F74

We agree with the court of appeals in Silver v. United States Postal Service, 951 F.2d 1033 (9th Cir. 1991), that the particular factors Morrison discussed do not constitute an exhaustive or exclusive list. See id. at 1040 ("The nature of each government position must be assessed on its own merits."). The Silver court noted that the official at issue in that case, the Postmaster General, "performs many tasks and has many responsibilities," but determined the office to be an inferior one because the Postmaster General "does not have 'control'" and "serv[es] at the pleasure of the" Board of Governors of the Postal Service. Id. This approach is consistent with the one we have taken in the past. For example, in concluding that United States Attorneys are inferior officers whose appointment could be vested in the Attorney General, we rejected the argument that the constitutional term "inferior" means "'petty or unimportant'"; instead, we concluded that the term connotes amenability to supervision by the superior "in whom the power of appointment is vested." United States Attorneys -- Suggested Appointment Power of the Attorney General -- Constitutional Law (Article 2, § 2, cl. 2), 2 Op. O.L.C. 58, 58-59 (1978) (quoting Collins v. United States, 14 Ct. Cl. 568, 574 (1878)); see also Department of Housing and Urb-

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an Development -- Delegations of Authority -- 42 U.S.C. § 3533, 3535, 2 Op. O.L.C. 87, 89 (1978) (deputy assistant secretary, who is subject to direction by an assistant secretary, is "unquestionably" an inferior officer). In determining whether an officer may properly be characterized as inferior, we believe that the most important issues are the extent of the officer's discretion to make autonomous policy choices and the location of the powers to supervise and to remove the officer. While an officer responsible only to the President for the exercise of significant discretion in decision making is probably a principal officer, an officer who is subject to control and removal by an officer other than the President should be deemed presumptively inferior.

***17** 3. Who May Appoint Inferior Officers? The Appointments Clause does not define "Heads of Departments" or "Courts of Law," and questions have arisen about which entities are included by these terms within the "possible repositories for the appointment power." Freytag v. Commissioner, 501 U.S. 868, 884 (1991). Earlier Attorneys General have accorded these terms a broad construction. See, e.g., Authority of Civil Service Commission to Appoint a Chief Examiner, 37 Op. Att'y Gen. 227 (1933). The same is true of the courts, FN;B75 [FN75]FN;F75 which have held that the Tax Court, FN;B76[FN76]FN;F76 a special division of a court of appeals created primarily for the purpose of appointing independent counsels, FN;B77[FN77]FN;F77 and the Governors of the Postal Service (as a collective head of department), FN;B78[FN78]FN;F78 can be vested with appointments power. The interpretive difficulties lie in determining exactly how broadly the term "Department" should be read.

We think that the "Departments" to which the Appointments Clause refers are not limited to those major divisions of the executive branch that are headed by members of the President's cabinet. FN;B79[FN79]FN;F79 In 1933, Acting Attorney General Biggs opined that Congress could authorize the Civil Service Commission to appoint an inferior officer. Authority of Civil Service Commission to Appoint a Chief Examiner, 37 Op. Att'y Gen. 227 (1933). His opinion noted that the Commission "ha[d] certain independent executive duties to perform," was "responsible only to the Chief Executive," id. at 229, and was "not a subordinate Commission attached to one of the so-called executive departments," id. at 231. As "an independent division of the Executive Branch," he concluded, the Commission was a "Department" for Appointments Clause purposes and its three commissioners, collectively, "the 'head of a Department' in the constitutional sense." Id. The fact that the commissioners were not members of the Cabinet was not controlling, the Acting Attorney General concluded, because the Cabinet itself is not a creation of the Constitution. Id. FN;B80[FN80]FN;F80 We find this opinion persuasive and note that the Court's opinion in Freytag ultimately reserved the question of whether the heads of entities other than cabinet-level departments can be vested with the power to appoint inferior officers. See Freytag, 501 U.S. at 887 n.4. FN;B81[FN81]FN;F81 Cf. United States v. Germaine, 99 U.S. 508 (1879) (Commissioner of Pensions, as head of a bureau within the Interior Department, was not a "Head of Department"). FN;B82[FN82]FN;F82

We would apply the reasoning of the 1933 opinion in concluding that it is constitutional for Congress to vest the power to appoint inferior officers in the heads of the so-called independent agencies -- those agencies whose heads are not subject to removal at will by the President and that conventionally are understood to be substantially free of policy direction by the President. Except for the attenuated nature of the President's supervisory authority, most of the independent agencies are clearly analogous to major executive agencies. They exercise governmental authority without being subordinated to any broader unit within the executive branch, and Congress has implicitly characterized them as "Departments" for Appointments Clause purposes by permitting their heads to appoint officials who plainly are inferior officers. FN;B83[FN83]FN;F83 Nothing in the original history of the Clause suggests any intention to exclude from the scope of the Clause separate establishments that are not subject to plenary presidential control. FN;B84[FN84]FN;F84 Finally, in reserving the question of appointments by "the head of one of the principal agencies," the Freytag Court itself included as examples of those agencies

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the "independent" FTC and the SEC as well as the clearly executive CIA, which suggests that the Court did not perceive a difference between the two types of agencies, at least in the Appointments Clause context. 501 U.S. at 887 n.4. We see no reason to exclude the independent regulatory agencies from the class of entities that are "Departments" for Appointments Clause purposes.

***18** We note that, even accepting the reasoning of the 1933 Justice Department opinion, some entities may exercise governmental authority in so limited a manner that they need not be viewed as "Departments" even though their heads are responsible only to the President. For example, the Committee for Purchase from People Who Are Blind or Severely Disabled, the members of which are appointed by the President alone, 41 U.S.C. § 46(a), appears to exercise significant authority but is subordinate to no larger executive agency. Id. §§ 46-48c. Given the narrow scope of the Committee's powers, however, we do not think that the Committee necessarily should be analyzed as a collective head of a department for Appointments Clause purposes.

4. Legislation Lengthening the Tenure of an Officer. As the Court held in Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam), the Appointments Clause by its terms and its structure prohibits Congress from itself exercising the power to appoint "Officers of the United States." The text and structure of the Clause reflect a deliberate constitutional choice to deny to the legislature the power to select the individuals who exercise significant governing authority as non-legislative officers of the federal government. See id. at 129-31 (reviewing the debates in the Philadelphia convention). FN;B85[FN85]FN;F85 This choice to exclude Congress as such from the appointments process can be set at naught by means other than legislation overtly vesting in Congress the power of appointment. Accordingly, the executive branch has traditionally viewed statutes that constitute an effective exercise by Congress of the power to appoint as violations of the Appointments Clause.

This issue sometimes arises in connection with statutes that attempt to extend the tenure of an officer with a set term, thus potentially denying the President the power he or she would otherwise have to reappoint the officer or select someone else. In 1951, for example, the President requested the Justice Department's views on the validity of a statute extending the terms of the members of a commission. See Displaced Persons Commission -- Terms of Members, 41 Op. Att'y Gen. 88 (1951). According to the original legislation creating the commission, the terms were to expire in June 1951, but prior to that date Congress amended the legislation to extend the commissioners' tenure to August 1952. Acting Attorney General Perlman advised the President that, while he did not think "there can be any question as to the power of the Congress to extend the terms of offices which it has created," this legislative power is subject "to the President's constitutional power of appointment and removal." Id. at 90. However, because the legislation did not attempt to restrict the President's authority to remove the commissioners at will, it was constitutionally harmless: the President remained free to exercise his appointment power simply by removing the incumbents from office at any time. See id. ("As so construed, the [extension legislation] presents no constitutional difficulties."); see also Pension Agents and Agencies, 14 Op. Att'y Gen. 147, 148-49 (1872) (discussing President's power to remove officer serving a term extended by statute). FN;B86 [FN86]FN;F86

***19** We think that the Department's 1951 opinion adopted the correct approach to this issue: while the power to lengthen the tenure of an incumbent officer is incident to Congress's general power to create, determine the duties of, and abolish offices, FN;B87[FN87]FN;F87 that power cannot legitimately be employed to produce a result that is, practically speaking, a congressional reappointment to office. On this reasoning, the extension of tenure of officers serving at will raises no Appointments Clause problem, but lengthening the term of an officer who may be removed only for cause would be constitutionally questionable. FN;B88[FN88]FN;F88 However, this conclusion, which we think sound in principle, has been rejected by the courts in at least one context. The

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Bankruptcy Amendments and Federal Judgeship Act of 1984 extended the tenure of bankruptcy judges, who can be removed only for cause, and that provision has been sustained repeatedly against constitutional challenge. The leading case, In re Benny, 812 F.2d 1133 (9th Cir. 1987), held that a statutory extension of tenure "becomes similar to an appointment" only "when it extends the office for a very long time." Id. at 1141; see also In re Investment Bankers, Inc., 4 F.3d 1556, 1562 (10th Cir. 1993) (agreeing with Benny and noting that the contrary Appointment Clause argument "has been rejected by every court that has considered it"), cert. denied, 114 S. Ct. 1061 (1994). We do not find especially persuasive the reasoning of Benny, FN;B89[FN89]FN;F89 and it is possible that the doctrine of Benny is limited to its factual context. FN;B90[FN90]FN;F90 However, the reasoning set forth in Benny and the cases that follow it is susceptible to general application, and it is unclear that the courts could repudiate Benny's conclusion with respect to other officers without undercutting the legitimacy of those cases.

The relevant precedents contemplate a continuum. 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, constitutionally objectionable even under Benny, 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.

Our recent opinion on legislation extending the terms of members of the United States Sentencing Commission is illustrative of this functional approach. After the Sentencing Commission had been appointed, Congress enacted legislation "to provide [that] a member of the United States Sentencing Commission may continue to serve until a successor is appointed or until the expiration of the next session of Congress." Pub. L. No. 102-349, 106 Stat. 933 (1992). Commissioners may be removed only for cause. 28 U.S.C. § 991(a). We concluded that the statute did not function to violate the President's appointment power. See 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 (Apr. 5, 1994) (publication forthcoming in 18 Op. O.L.C. (1994)). The statute left the President free to "nominate whomever he want[ed] at precisely the same time as he could before [the statute was enacted]." Id. at 10. We noted that the effect of the legislation could actually be to augment the President's power by giving him "the option of retaining the holdover officer until he chooses to nominate a successor." Id.

***20** We acknowledged the argument that the statute might give Congress the opportunity to appoint, in effect, an incumbent to a new term because the President's removal authority is statutorily restricted and the Senate might refuse to confirm any presidential nominee in order to retain a congressionally favored incumbent. Id. But this argument was unavailing for two reasons. First, the argument is unduly speculative insofar as it hypothesizes contumacious conduct on the part of the Congress, and whatever danger such a possibility might entail was mitigated by the limitation on the period for which a holdover may continue to serve. Second, we noted that the holdover provision is unarguably valid as applied to Sentencing Commissioners who took office after the statute's enactment. We concluded that "[i]t is simply not persuasive to argue that the President's appointment power is effectively frustrated when incumbent commissioners hold over but not when subsequent commissioners hold over." Id.

We also found it significant that the holdover statute was neutral in its application. We reserved the question of

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whether a holdover statute "might amount to a prohibited congressional designation, even if the holdover period is for a short time," if the statute "would create or repeal holdover provisions for selective members of the same commission or for classes of members on the same commission, e.g., those appointed on a certain date or those from a particular political party." Id. at 14 n.8.

5. Legislation Imposing Additional Duties on an Officer. The executive branch has consistently maintained that a statute creating a new office and conferring it and its duties on the incumbent of an existing office would be unconstitutional under the Appointments Clause. FN;B91[FN91]FN;F91 Congress's recognized authority to alter the duties and powers of existing offices could be employed to achieve substantially the same result if the legislature were unconstrained in the duties it could add to an office. FN;B92[FN92]FN;F92 The Supreme Court accordingly has interpreted the Constitution to limit the legislature's discretion. The leading case, Shoemaker v. United States, 147 U.S. 282 (1893), concerned a statute that created a commission to select the land for Rock Creek Park in the District of Columbia. Three of the five members were to be appointed by the President and confirmed by the Senate; the persons holding two existing federal offices, the chief of engineers of the Army and the engineer commissioner of the District, were declared members ex officio. The Court rejected an Appointments Clause challenge to the assignment of the two engineers to the new commission:

> [W]e 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. It cannot be doubted, and it has frequently been the case, that Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed.

***21** Id. at 301. The legislation at issue was valid, the Court concluded, because the new duties assigned to the engineers "cannot fairly be said to have been dissimilar to, or outside of the sphere of," the engineers' existing responsibilities. Id.

The Shoemaker rule ensures "that Congress [is] not circumventing the Appointments Clause by unilaterally appointing an incumbent to a new and distinct office." Weiss v. United States, 114 S. Ct. 752, 759 (1994). For the imposition of new duties on an officer to be valid under Shoemaker, two requirements must be met. First, as in Shoemaker itself, the legislation must confer new duties on "offices, . . . [not] on any particular officer." Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183, 1192 (D.D.C.) (emphasis in original), appeal dismissed as moot, 903 F.2d 837 (D.C. Cir. 1990). "Had the Chief of Engineers of the United States Army or the Engineer Commissioner of the District of Columbia resigned from office after the commission was established, he would no longer have served on the commission -- the new Chief of Engineers or Engineer Commissioner would have taken over those duties." Id. at 1192-93 (discussing facts in Shoemaker). The statute at issue in Olympic Federal, in contrast, abolished certain offices (the three-person Federal Home Loan Bank Board) while simultaneously defining the duties of a new office (the Director of OTS) and designating as the first Director the holder of one of the abolished offices (the chair of the Federal Home Loan Bank Board). See id. at 1186. The Olympic Federal court correctly determined that by doing so the statute in effect appointed the particular individual who was chair of the old board to a new position. Id. at 1193. FN;B93[FN93] FN;F93

The second facet of the Shoemaker rule is the requirement that the new duties be "germane to the offices already held by" the affected officers. 147 U.S. at 301. This inquiry is necessarily case-specific. In Weiss, the Court examined closely the specific duties of military judges and the general responsibilities of military and naval officers and concluded that they are so intertwined that the selection by the Judges Advocate General of certain

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military and naval officers to serve for a time as military judges is consistent with the germaneness requirement. 114 S. Ct. at 759-60. In giving advice on this issue, we also have looked at the reasonableness of assigning the new duties "in terms of efficiency and institutional continuity," and we have asked whether "it could be said that [the officers'] functions . . . [with the additional duties] were within the contemplation of those who were in the first place responsible for their appointment and confirmation." Legislation Authorizing the Transfer of Federal Judges from One District to Another, 4B Op. O.L.C. 538, 541 (1980).

The Weiss decision may have weakened judicial enforcement of Shoemaker's germaneness requirement by suggesting that some legislation that adds new duties is valid regardless of whether it satisfies the requirement. The opinion of the Court stressed the fact that "[i]n Shoemaker, Congress assigned new duties to two existing offices, each of which was held by a single officer. This no doubt prompted the [Shoemaker] Court's description of the argument as being that 'while Congress may create an office, it cannot appoint the officer.' . . . But here the statute authorized an indefinite number of military judges, who could be designated from among hundreds or perhaps thousands of qualified commissioned officers." 114 S. Ct. at 759. For that reason, the Court concluded, there was "no ground for suspicion here that Congress was trying to both create an office and also select a particular individual to fill the office." Id. The Court nevertheless went on to consider the germaneness issue and concluded that the duties of military judges are adequately related to the duties of the commissioned officers from whom the judges are selected. Id. at 760.

***22** In a separate opinion, Justice Scalia argued that "'germaneness' is relevant whenever Congress gives power to confer new duties to anyone other than the few potential recipients of the appointment power specified in the Appointments Clause," because "taking on . . . nongermane duties . . . would amount to assuming a new 'Offic[e]' within the meaning of Article II, and the appointment to that office would have to comply with the strictures of Article II." Id. at 770 (Scalia, J., concurring in part and concurring in the judgment). We find Justice Scalia's reasoning persuasive and believe that in an appropriate setting the executive branch should urge the Court expressly to accept it. In light of the Weiss Court's detailed examination of the germaneness issue, this may not require the Court in fact to modify the doctrine of that case because it is unclear to us that the Court actually intended to hold germaneness constitutionally irrelevant in Weiss-type circumstances. The Court may instead simply have been emphasizing the fact that assignment of new and nongermane duties to a few specific officers not only violates the Appointments Clause per se, but also fails under the more general anti-aggrandizement principle of its decisions. We believe that it is appropriate, therefore, to review proposed new-duties legislation for germaneness even where the new duties are assigned to large or indefinite groups.

6. The Ineligibility and Incompatibility Clauses. The Constitution places two important restrictions on the universe of persons who may be appointed to serve as officers of the United States. U.S. Const. art. I, § 6, cl. 2. FN;B94[FN94]FN;F94 The Ineligibility Clause states that "[n]o Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time." Id. The Clause "restricts the President's power to appoint Members of Congress," and "[i]t has long been settled within the executive branch that the President, in exercising his powers of appointment under Article II, § 2, cl. 2, will not make an appointment in violation of the . . . clause." Members of Congress Holding Reserve Commissions, 1 Op. O.L.C. 242, 244 (1977). The most common problem under the Ineligibility Clause arises from legislation that creates a commission or other entity and simultaneously requires that certain of its members be Representatives or Senators, either ex officio or by selection or nomination by the congressional leadership. Unless the congressional members participate only in advisory or ceremonial roles, or the commission itself is advisory or ceremonial, the appointment of members of Congress to the commission would violate the Ineligibility Clause.

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FN;B95[FN95]FN;F95

The Incompatibility Clause provides that "no Person holding any Office under the United States, shall be a Member of either House during his continuance in Office." U.S. Const. art. I, § 6, cl. 2. The Clause is primarily a restriction on Congress and its members: the Incompatibility Clause "disqualifies individuals who have already been appointed from assuming or retaining seats in Congress." Reserve Commissions, 1 Op. O.L.C. at 244; cf. Members of Congress Serving in the Armed Forces, 40 Op. Att'y Gen. 301 (1943). FN;B96[FN96]FN;F96 However, the President's duty to take care that the law of the Incompatibility Clause is observed requires him or her to ensure that appointments FN;B97[FN97]FN;F97 and legislation creating governmental positions are consistent with the Clause. See, e.g., Case of the Collectorship of New Orleans, 12 Op. Att'y Gen. 449, 451 (1868) ("in view of the" Incompatibility Clause, an executive officer's acceptance of a seat in Congress "must be considered as having the legal character of a resignation of the office"); Appointments to the Commission on the Bicentennial of the Constitution, 8 Op. O.L.C. 200, 207-08 (1984) (providing advice about "various structural arrangements within the Commission that might be designed to respect the Incompatibility Clause"). FN;B98 [FN98]FN;F98

***23** 7. The Recess Appointments Clause. With respect to officers of the United States, the Constitution vests the President with the "Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." U.S. Const. art. II, § 2, cl. 3. "A long line of opinions of the Attorneys General, going back to 1823 . . . and which have been judicially approved . . . has firmly established that . . . [t]he President's power to make recess appointments . . . extends to all vacancies existing during the recess regardless of the time when they arose." Recess Appointments -- Compensation, 3 Op. O.L.C. 314, 314 (1979) (citations omitted); accord Executive Authority to Fill Vacancies, 1 Op. Att'y Gen. 631 (1823). FN;B99[FN99]FN;F99 Although there was some early uncertainty about the President's power to make appointments under the Recess Appointments Clause during intrasession recesses, that question was settled within the executive branch by an often-cited opinion of Attorney General Daugherty concluding that the President is so authorized. Executive Power -- Recess Appointments, 33 Op. Att'y Gen. 20 (1921). The most difficult problem of interpretation under the Clause today is determining how substantial an intrasession recess must be to give rise to the President's power. FN;B100[FN100]FN;F100 Attorney General Daugherty concluded that a twenty-eight-day recess was sufficient, but cautioned that "the term 'recess' must be given a practical construction." Id. at 24-25. We agree with his view that the President has discretion to make a good-faith determination of whether a given recess is adequate to bring the Clause into play. FN;B101[FN101]FN;F101 Giving advice on how the President may properly exercise that discretion has proven a difficult task. See Recess Appointments During the Recess of the Senate Beginning January 3, 1992, 16 Op. O.L.C. 15 (1992) (preliminary print) (eighteen-day recess a sufficient period, particularly in light of fact that except for a brief formal session on January 3 the Senate would actually be absent for fifty-four days); Recess Appointments, 3 Op. O.L.C. at 316 (President may make recess appointments "during a summer recess of the Senate of a month's duration").

8. Acting and Interim Appointments. Early Attorneys General repeatedly opined that the President enjoyed a constitutional power of appointment empowering the President to make temporary or ad interim appointments to offices in cases of need without conforming to the requirements of the Appointments or Recess Appointments Clause. FN;B102[FN102]FN;F102 Their initial reaction to congressional legislation on the subject of vacancies was therefore to view it as having neither the purpose nor the effect of supplanting the President's preexisting constitutional authority. See Office and Duties of Attorney General, 6 Op. Att'y Gen. 326, 352 (1854) ("Perhaps the truer view of the question is to consider the . . . statutes as declaratory only, and to assume that the power to make such temporary appointment is a constitutional one."). After the enactment of the Vacancies Act of 1868,

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15 Stat. 168, however, the Attorneys General treated the Act as providing the exclusive means of making temporary appointments to those offices covered by the statute. See, e.g., Appointments Ad Interim, 17 Op. Att'y Gen. 530 (1883); Appointments Ad Interim, 16 Op. Att'y Gen. 596, 596-97 (1880) (authority to fill vacancy in the office of Navy Secretary is "a statutory power," and when the power is exhausted, "the President is remitted to his constitutional power of appointment"). A 1904 opinion attempted to synthesize the older and the more recent views, treating as reasonable and legitimate Congress's wish to cabin presidential discretion to make interim appointments while the Senate is in session, but describing as a "fundamental right as Chief Executive" the President's authority "to make such a temporary appointment, designation, or assignment of one officer to perform the duties of another whenever the administration of the Government requires it." Temporary Recess Appointments, 25 Op. Att'y Gen. 258, 261 (1904); see also Promotion of Marine Officer, 41 Op. Att'y Gen. 291, 294 (1956) (President has constitutional authority to appoint "key military personnel to positions of high responsibility" without following statutory procedures).

***24** There is little modern caselaw on the President's power to make temporary appointments to offices requiring Senate confirmation. FN;B103[FN103]FN;F103 The "leading" judicial decision is a brief per curiam court of appeals opinion denying a motion for a stay of the district court's mandate pending appeal, Williams v. Phillips, 482 F.2d 669 (D.C. Cir. 1973) (per curiam). FN;B104[FN104]FN;F104 Because of its procedural posture, Williams did not actually resolve the constitutional issue, but it suggested somewhat obliquely that what nonstatutory power the President possesses to make interim appointments to offices requiring Senate confirmation can be employed only for a "reasonable time required by the President to select persons for nomination." Id. at 671. Looking to the thirty-day period that was, at the time, permitted temporary appointments under the Vacancies Act for an indication of what a reasonable period would be, Williams concluded that even if the implied power existed, a four-and-a-half-month period without any nomination was unreasonable. Id. at 670-71. FN;B105[FN105]FN;F105 Since Williams was decided, the Vacancies Act has been amended to provide for an initial appointment period of 120 days. Up to two extensions, each lasting 120 days, may be made depending on the specific circumstances of the vacancy. Moreover, the Vacancies Act also tolls the running of these periods when particular conditions obtain. See 5 U.S.C. § 3348. Thus, the Vacancies Act allows temporary appointments, in appropriate circumstances, of durations well in excess of even one year. Accordingly, we would not currently view a four-and-a-half-month temporary appointment as necessarily exceeding a reasonable duration, provided that a nomination is submitted to the Senate.

On the assumption that Williams can be read to indicate that "[t]o keep the Government running calls for the designation of acting officials to fill vacancies in the absence of express statutory authority," Department of Energy -- Vacancies, 2 Op. O.L.C. 113, 117 (1978) (citing Williams), we have argued that the reasonableness of a given interim appointment should be measured not by a per se rule but by a variety of pragmatic factors. Those factors include "the difficulty of finding suitable candidates," id. at 118, "the specific functions being performed by the [interim officer]; the manner in which the vacancy was created (death, long-planned resignation) . . . and particular factors affecting the President's choice [such as] a desire to appraise the work of [the interim officer] or the President's ability to devote attention to the matter." Status of the Acting Director, Office of Management and Budget, 1 Op. O.L.C. 287, 290 (1977). However, given the ambiguity of the Williams opinion, we have urged caution, even when the relevant department head has statutory authority to designate another official to serve in an acting capacity. See Acting Officers, 6 Op. O.L.C. 119, 121-22 (1982).

We recently revisited the vacancies question in relation to the United States Commission on Civil Rights. The Commission is headed by an eight-member committee that works on a part-time basis, while its day-to-day functioning is administered by a staff director. The statute creating the position of staff director vests the authority to

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appoint the staff director in the President, subject to the concurrence of a majority of the members of the Commission. In keeping with the Department of Justice's long-standing position, we concluded that, when confronted with a vacancy in the position of staff director, the President has constitutional authority to appoint an acting staff director, unless Congress had statutorily limited this authority. We stated:

> ***25** The President's take care authority to make temporary appointments rests in the twilight area where the President may act so long as Congress is silent, but may not act in the face of congressional prohibition. See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Thus, the Vacancies Act, 5 U.S.C. §§ 3345-3348, constitutes a restriction on the President's authority, as opposed to a source of power. If it applies to a given position, the Vacancies Act constitutes the sole means by which a temporary appointment to that position may be made.

Appointment of an Acting Staff Director of the United States Commission on Civil Rights, at 3 (Jan. 13, 1994) (publication forthcoming in 18 Op. O.L.C. (1994)).

We concluded that Congress had not limited the President's constitutional authority with respect to the appointment of an acting staff director of the Civil Rights Commission. The Vacancies Act does not apply to the position of staff director. FN;B106[FN106]FN;F106 In addition, the statute creating the position is silent on the subject of temporarily filling a vacancy in that position. Consequently, we concluded that the President was free to exercise his constitutional authority to appoint an acting staff director. FN;B107[FN107]FN;F107

9. Other Issues of Combined, Collective, and Interbranch Authority and the Appointments Clause. The Appointments Clause prohibits Congress or the President from obscuring the lines of authority and responsibility within the federal government: the political branches cannot vest the power to perform "a significant governmental duty" of an executive, administrative, or adjudicative nature in any federal official who is not appointed in a manner consistent with the Clause. Buckley v. Valeo, 424 U.S. 1, 141 (1976) (per curiam). The Clause, however, does not prohibit creative combinations of officers and authorities as long as a person or body with legitimate appointing authority under the Clause has appointed -- and therefore is accountable for -- all federal officials with such power. Cf. Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring); Silver v. United States Postal Serv., 951 F.2d 1033, 1040-41 (9th Cir. 1991).

The Appointments Clause therefore does not forbid the exercise of authority by a decision-making body with a collective head that consists of principal officers and an inferior officer removable by them. See Silver, 951 F.2d at 1040-41. Nor is the Clause offended by the delegation of concurrent authority to a Senate-confirmed officer and her deputy when the latter is appointed by a head of department. See Department of Housing and Urban Development -- Delegations of Authority, 2 Op. O.L.C. 87, 89-91 (1978). In both cases all of the officials performing significant governmental duties are validly appointed officers.

The exercise of authority by a group of principal officers, some of whom serve at the President's pleasure while others are removable by the President only for cause, presents no Appointments Clause issue: once again, the Clause's procedures for appointing federal officials so that they may wield "significant authority" have been met. The Clause's strictures are likewise satisfied by arrangements in which a head of department, pursuant to a statute, designates a subordinate to sit in his or her stead on a commission or board: if the designation by the head were authorized by statute, then it would itself be an appointment in conformity with the Clause, and even if it were not, the designee would be acting for or on behalf of the head of department, whose actions, for constitutional purposes, are the head's.

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***26** Finally, the Appointments Clause does not invalidate commissions composed of members or appointees from more than one branch of the government. Mistretta v. United States, 488 U.S. 361, 412 (1989), upheld the constitutionality of the Sentencing Commission, which includes at least three federal judges and the Attorney General as an ex officio non-voting member, while Buckley concluded that a commission consisting of a mixture of presidential appointees and members of Congress selected by the Speaker and President pro tempore can validly exercise "powers . . . essentially of an investigative and informative nature," 424 U.S. at 137. Interbranch entities are subject to constitutional review on other grounds, including the anti-aggrandizement and general separation of powers principles, but their interbranch nature does not in itself raise any Appointments Clause question.

C. Removal Power Issues

1. The Executive's Removal Power. The first great constitutional debate in the First Congress concerned the power to remove officers of the United States. A wide range of views was expressed over the respective roles -- or lack thereof -- of the President and Congress in removal matters, FN;B108[FN108]FN;F108 but ultimately, as the Supreme Court has interpreted the "Decision of 1789," Congress rejected a legislative role in removal in favor of recognizing plenary presidential power over officers appointed by the President with the advice and consent of the Senate. See Bowsher v. Synar, 478 U.S. 714, 723-24 (1986); see also Myers v. United States, 272 U.S. 52, 111-44 (1926) (discussing debates and subsequent acquiescence in the legislative decision).

The nineteenth-century Justices interpreted the First Congress's actions as illustrative of a more general principle that "the power of removal [is] incident to the power of appointment." Ex parte Hennen, 38 U.S. (13 Pet.) 230, 259 (1839). Thus, it was determined that inferior officers appointed by a department head were not removable by the President (absent statutory authorization to do so) but by the secretary who appointed them and that a new appointment by the proper officer amounted to a removal of the previous incumbent by operation of law. Id. at 260-61; accord The President and Accounting Offices, 1 Op. Att'y Gen. 624 (1823). In United States v. Perkins, 116 U.S. 483 (1886), the Court held that, "when Congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest." Id. at 485. Although the Court did not address any questions about presidential removal powers, its reasoning about Congress's authority to limit department heads' removal power could logically be applied to the President with respect to inferior officers whose appointment is vested by statute in the President alone. FN;B109[FN109] FN;F109 The power to suspend an officer, finally, was held to be "an incident of the power of removal." Burnap v. United States, 252 U.S. 512, 515 (1920) (relying primarily on nineteenth-century precedents). The Court's conclusions in Hennen, Perkins, and Burnap remain good law. FN;B110[FN110]FN;F110

***27** The seminal twentieth-century cases on removal, Myers and Humphrey's Executor v. United States, 295 U.S. 602 (1935), both addressed the power to remove officers appointed by the President with the advice and consent of the Senate. Myers held unconstitutional a statute requiring Senate approval of the President's decision to remove certain postmasters. The Court based its holding in part on its interpretation of the "Decision of 1789" and on its understanding of the President's constitutional role. "Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet it the disciplinary influence upon those who act under him of a reserve power of removal. . . . Each head of a department is and must be the President's alter ego in the matters of that department where the President is required by law to exercise authority." 272 U.S. at 132-33. An illimitable removal power, Myers concluded, is a necessary incident to the President's power and responsibility to take care that the laws are faithfully executed. Id. at 163-64. FN;B111[FN111] FN;F111

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Any suggestion in Myers that the Supreme Court would invalidate all limitations on the President's power to remove officers appointed with the advice and consent of the Senate was firmly repudiated less than a decade later by Humphrey's Executor. The case concerned the President's power to remove a member of the Federal Trade Commission on the grounds of policy differences, despite the existence of a for-cause removal provision in the statute establishing the Commission. FN;B112[FN112]FN:F112 The Court dismissed Myers as inapposite because a postmaster is "an executive officer restricted to the performance of executive functions," and "the necessary reach of the decision" only "goes far enough to include all purely executive officers [and] no farther." 295 U.S. at 627-28. FN;B113[FN113]FN:F113 By contrast, the Court examined the functions of the FTC and concluded that it was "an administrative body" exercising "quasi-legislative or quasi-judicial powers," rather than an agency of the executive branch. Id. at 628. The Court reasoned that Congress possesses the authority in creating such a body "to require [it] to act in discharge of [its] duties independently of executive control." Id. at 629. FN;B114[FN114]FN:F114 In Wiener v. United States, 357 U.S. 349 (1958), the Court extended the scope of Humphrey's Executor by inferring the existence of a for-cause limitation on the President's power to remove an officer with quasi-adjudicatory functions, even in the absence of an express statutory removal restriction. FN;B115[FN115]FN:F115

The rationale in Humphrey's Executor for upholding Congress's power "to forbid [the commissioners'] removal except for cause" was in fact identical to that for recognizing the President's plenary removal power over "purely executive officers." "[I]t is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." 295 U.S. at 629. The constitutionality of congressional limitations on presidential removal authority thus depended under Humphrey's Executor on the legitimacy of a legislative decision to reduce or eliminate the President's control over a particular agency or officer, and that in turn depended on the nature of the functions performed by the agency or officer. FN;B116[FN116]FN:F116

***28** In Morrison v. Olson, 487 U.S. 654 (1988), the Supreme Court upheld a provision of the Ethics in Government Act that forbids the removal of an independent counsel appointed under the Act except for cause. The Court explained that under "[t]he analysis contained in our removal cases," the constitutional question is whether Congress has "interfere[d] with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed.'" Id. at 689-90. Morrison reasoned that the Attorney General retained adequate control over the independent counsel to safeguard "the President's ability to perform his constitutional duty." Id. at 691.

Morrison's broader significance is defined by the office in question. The removal restriction upheld in Morrison concerned an inferior officer with a sharply limited and highly unusual function, the investigation of particular allegations about the conduct of high-ranking executive branch officials. In that context, although it declined to decide "exactly what is encompassed within the term 'good cause,'" the Court held that "because the independent counsel may be terminated for 'good cause,' the Executive . . . retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act." 487 U.S. at 692. The Morrison Court thus had no occasion to consider the validity of removal restrictions affecting principal officers, officers with broad statutory responsibilities, or officers involved in executive branch policy formulation. FN;B117[FN117]FN:F117

The Supreme Court's removal cases establish a spectrum of potential conclusions about specific removal limitations. At one end of the spectrum, restrictions on the President's power to remove officers with broad policy responsibilities in areas Congress does not or cannot shelter from presidential policy control clearly should be

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deemed unconstitutional. We think, for example, that a statute that attempts to limit the President's authority to discharge the Secretary of Defense would be plainly unconstitutional and that the courts would so hold. FN;B118[FN118]FN;F118 As the Court stated in Morrison, Myers "was undoubtedly correct . . . in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." 487 U.S. at 690. FN;B119[FN119]FN;F119 At the other end of the spectrum, we believe that for cause and fixed term limitations on the power to remove officers with adjudicatory duties affecting the rights of private individuals will continue to meet with consistent judicial approval: the contention that the essential role of the executive branch would be imperiled by giving a measure of independence to such officials is untenable under both precedent and principle.

Between these two extremes, the arguments are less clear, and it is imperative that the executive branch carefully examine removal limitations in pending legislation for their impact on the President's ability to exercise his or her constitutional powers and carry out his or her duties. In situations in which Congress does not enact express removal limitations, we believe that the executive branch should resist any further application of the Wiener rationale, under which a court may infer the existence of a for-cause limit on presidential removal, except with respect to officers whose only functions are adjudicatory. FN;B120[FN120]FN;F120 In reviewing pending legislation, furthermore, we should be aware that legislative silence about the President's removal power over administrative agency officers invites judicial policy choices that may be contrary to those the President or Congress intended.

***29** 2. Congressional Removal Power. Unless it limits its own discretion by statute, Congress enjoys plenary authority to remove its own officers, as do the individual houses of Congress. FN;B121[FN121]FN;F121 In addition, Congress has the general authority to legislate in ways that in fact terminate an executive branch officer or employee's tenure by defunding a position, for example, or by legislating mandatory retirement rules that apply to incumbents. FN;B122[FN122]FN;F122 The executive branch, however, has long maintained that the Constitution does not permit this legislative authority to be deployed abusively as a de facto removal power. See Civil Service Retirement Act -- Postmasters -- Automatic Separation from the Service, 35 Op. Att'y Gen. 309, 312-15 (1927) (deeming mandatory retirement statute constitutional because it could not fairly be viewed as an encroachment on the President's removal power). The Supreme Court's decisions confirm the executive position. In Myers v. United States, 272 U.S. 52 (1926), the Court at one point portrayed the issue before it in terms of congressional aggrandizement, id. at 161, and modern decisions have redescribed the enduring rationale of Myers in anti-aggrandizement terms. See Morrison v. Olson, 487 U.S. 654, 686 (1988) ("the essence of the decision in Myers was the judgment that the Constitution prevents Congress from 'draw [ing] to itself . . . the power to remove"'); Bowsher v. Synar, 478 U.S. 714, 724-26 (1986). Legislation that can properly be described as exercising the power of removal is unconstitutional, therefore, because it amounts to an attempt on Congress's part "to gain a role in the removal of executive officials other than its established powers of impeachment and conviction." Morrison, 487 U.S. at 686. FN;B123[FN123]FN;F123 We think, for example, that "ripper" legislation that ostensibly abolished an office while simultaneously proceeding to recreate it would be a transparent, and unconstitutional, attempt to remove the officer in question and therefore would violate the anti-aggrandizement principle. See Constitutionality of Proposed Legislation Requiring Renomination and Reconfirmation of Executive Branch Officers Upon the Expiration of a Presidential Term, 11 Op. O.L.C. 25, 26 (1987).

The executive branch also has resisted attempts by the Senate to "reconsider" the nomination of an officer to whose appointment that body has already given its advice and consent once the President has taken steps to complete the appointment. In 1931, for example, President Hoover declined to return to the Senate resolutions notifying him that it had confirmed three nominees to the Federal Power Commission. The President explained

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that "the return of the documents by me and reconsideration by the Senate would be ineffective to disturb the appointees in their offices. I cannot admit the power in the Senate to encroach upon Executive functions by removal of a duly appointed executive officer under the guise of reconsideration of his nomination." Message to Senate, January 10, 1931, quoted in United States v. Smith, 286 U.S. 6, 28 n.3 (1932); see also United States v. Smith, 286 U.S. 6, 37-48 (1932) (discussing historical practice). Such senatorial action is both an unconstitutional attempt to remove the officer and a violation of the anti-aggrandizement principle, in that it is a legislative attempt to exercise power after the constitutionally prescribed role of the legislative body has been completed. FN;B124[FN124]FN;F124

D. Issues Involving the Boundaries of the Legislative Sphere

***30** The Supreme Court decisions articulating the Court's anti-aggrandizement principle make it plain that Congress's formal authority is limited to the enactment of legislation and activities in aid of the legislative process such as investigation and oversight. The Gramm-Rudman Act's vesting in a congressional agent of the power to exercise policy-making control over the post-enactment decisions of executive officials is the paradigmatic example of congressional action in violation of this limitation. See Bowsher v. Synar, 478 U.S. 714 (1986) (invalidating the relevant provision of the Act). Respect for Congress's legitimate and broad authority to legislate is consistent with our duty as officials of the executive branch to identify instances in which Congress transgresses the boundaries of its constitutional sphere of operations.

1. The Paradox of the Congressional Agencies. From reading the bare text of the Constitution, one might not expect there to exist any formally separate entities within the legislative branch other than the two houses themselves. From an early date, however, Congress has created distinct agencies, under its special supervision, for various purposes. Some of these agencies, or the officers who head them, exercise authority that seems incompatible or at least difficult to reconcile with the Supreme Court's anti-aggrandizement decisions. Of special interest are the Smithsonian Institution (and its subordinate bureaus, such as the John F. Kennedy Center for the Performing Arts ("J.F.K. Center")), the Library of Congress, the General Accounting Office ("GAO") (headed by the Comptroller General), the Government Printing Office ("GPO"), and the Office of the Architect of the Capitol. FN;B125[FN125]FN;F125 The head of each of these agencies exercises authority with respect to executive officials or private persons that could be seen as problematic under Bowsher v. Synar, 478 U.S. 714 (1986), which held unconstitutional the Comptroller General's exercise of controlling authority over executive branch budgeting.

We believe that many of the powers currently exercised by the presently existing congressional agencies may be deemed constitutionally harmless. Most of the functions undertaken by the Library of Congress, the basic accounting tasks of the GAO, and all of the duties of the Architect of the Capitol can comfortably be described as in aid of the legislative process. See Springer v. Government of the Philippine Islands, 277 U.S. 189, 202 (1928). The activities undertaken by the Smithsonian and its bureaus also seem to fit under a broad construction of that concept, a construction that is supported by historical practice stretching far back into the antebellum Republic. Cf. Springer, 277 U.S. at 211 (Holmes, J., dissenting) ("Congress long ago established the Smithsonian Institution, to question which would be to lay hands on the Ark of the Covenant"). The GPO's involvement in executive branch printing is also supported by a substantial historical pedigree, see Joint Res. No. 25, 36th Cong., 1st Sess., 12 Stat. 117 (1860), but in the twentieth century the executive branch has repeatedly been compelled to resist congressional attempts to empower the GPO to exercise genuine discretion over executive decisions. FN;B126[FN126]FN;F126 The review authority of the Librarian of Congress over the Copyright Arbitration Royalty Panel, see 17 U.S.C. §§ 801-803, is permissible because the Librarian's tenure is not protected by

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an explicit for-cause removal limitation, and we therefore infer that the President has at least the formal power to remove the Librarian at will. FN;B127[FN127]FN;F127 We note that the historical lineage of, and long-standing acquiescence of the Presidents in, these legislative agencies and most of their activities are important to our conclusion that those activities are constitutionally permissible: we think it highly doubtful that Congress constitutionally could create new legislative agencies with operational powers, or afford existing agencies novel powers, with respect to executive officials or private persons.

***31** Our conclusion about the limits on Congress's authority to create legislative branch agencies with powers reaching beyond the legislative branch is consistent with the decision in Hechinger v. Metropolitan Washington Airports Authority, 36 F.3d 97 (D.C. Cir. 1994), cert. denied, 115 S. Ct. 934 (1995), where the court of appeals held unconstitutional Congress's response to the Supreme Court's decision in Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991). After MWAA struck down a congressionally constituted board with the power to review and reverse the decisions of the Airports Authority, Congress created a similar, congressionally controlled board of review with the power to delay, but not to control, the Authority's implementation of decisions. The court rejected the argument that the new board's powers were constitutional because of this distinction: the very purpose of this board was to bring congressional policy views to bear on the decisions of the Authority by enabling congressional agents to participate directly in the Authority's decision-making processes. Under the Supreme Court's rigorous understanding of the anti-aggrandizement principle, any such extension of legislative power beyond the legislative sphere is invalid. We therefore believe that Hechinger was correctly decided.

2. Reporting Requirements. Many statutes empower executive branch agencies to take certain actions only after a specified period following the provision of notice or of a report to Congress. The Department of Justice has long acknowledged the constitutionality of such report-and-wait provisions, see, e.g., Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 63 (1933) ("[n]o one would question the power of Congress to provide for delay in the execution of . . . an administrative order"), and the Supreme Court in INS v. Chadha, 462 U.S. 919 (1983), "specifically recognized" report-and-wait requirements "as a constitutionally acceptable alternative to the legislative veto." Implementation of the Bid Protest Provisions of the Competition in Contracting Act, 8 Op. O.L.C. 236, 246 (1984); see Chadha, 462 U.S. at 935 n.9, 955 n.19. While individual instances of congressional investigation and oversight may be objectionable on policy grounds, and in certain situations may involve information with respect to which the President is constitutionally entitled to assert executive privilege, the conduct of investigation into, and oversight concerning, executive actions is generally well within the power of Congress. See Buckley v. Valeo, 424 U.S. 1, 137-38 (1976) (per curiam). FN;B128[FN128]FN;F128 Report-and-wait provisions generally are constitutional means of assisting Congress in carrying out these legitimate activities. FN;B129[FN129]FN;F129

Simple reporting requirements, which again are sometimes objectionable on policy grounds, are clearly constitutional as a general matter. "Congress may at all times call on [the heads of executive departments] for information or explanation in matters of official duty." Office and Duties of Attorney General, 6 Op. Att'y Gen. 326, 344 (1854); see Chadha, 462 U.S. at 955 n.19; see also Duties of the Attorney General, 1 Op. Att'y Gen. 335, 336 (1820) (Congress could by legislation require Attorney General to prepare report on claims against the United States). In the past, this Office has made constitutional objections to so-called "concurrent" reporting provisions that require an executive agency to submit a given report simultaneously to the President and Congress. See Constitutionality of Statute Requiring Executive Agency to Report Directly to Congress, 6 Op. O.L.C. 632 (1982); Inspector General Legislation, 1 Op. O.L.C. 16, 17 (1977). The argument is that such provisions interrupt the lines of responsibility within the executive branch and interfere with a presidential prerogative to

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control the presentation of the executive branch's views to Congress. On the other hand, advocates of such provisions might argue that a concurrent reporting provision does not, as a formal matter, enlarge congressional powers at the expense of the executive, because the power to require information is well within Congress's legitimate legislative authority.

***32** We think that concurrent reporting requirements are best analyzed under the general separation of powers principle. That principle first requires an inquiry into "the extent to which" a given reporting provision "prevents the Executive Branch from accomplishing its constitutionally assigned functions." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (citation omitted). Many conceivable concurrent reporting requirements, particularly ones touching on the President's responsibility for the conduct of foreign affairs and for national defense, would have a serious negative impact on the President's performance of his "constitutionally assigned functions." A statutory requirement that the Secretary of State report simultaneously to the President and Congress on the status of United States relations with a given foreign power, for instance, would fall within that description. FN;B130[FN130]FN;F130 Similarly, legislation that attempted to impose concurrent reporting requirements across a broad spectrum of executive branch activities might well constitute so serious an interference with the President's fulfillment of his obligations under the Take Care Clause, U.S. Const. art. II, § 3, that it should be deemed invalid. The courts, however, might uphold the validity of a concurrent reporting requirement imposed for a legitimate congressional purpose on a specific agency with limited, domestic, and purely statutory duties.

As a practical political matter, concurrent reporting requirements clearly weaken the President's control over the executive branch and by doing so increase congressional leverage on the President and other officials of the executive branch. By doing so they impair the Constitution's "'great principle of unity and responsibility in the Executive department.'" Myers v. United States, 272 U.S. 52, 131 (1926) (quoting James Madison). For this reason, we think the presumption should be that the executive branch will object to any concurrent reporting provision in proposed legislation.

3. Congressional Agents in Non-Legislative Contexts. The Supreme Court's decisions make it clear that legislation placing members or agents of Congress on a board or commission that is outside the legislative branch is immediately suspect. The constitutional "location" of a given entity is not a matter of congressional fiat; Congress cannot define away an anti-aggrandizement problem simply by declaring that a given entity is within or without the legislative branch. FN;B131[FN131]FN;F131 The question is, we think, a matter of the relationship between the entity's functions and the formal powers Congress can assert over and through it. In Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991), for example, the board at issue was the board of review of an entity, the Airports Authority, created by a compact between Virginia and the District of Columbia, and the review board members were appointed by the Authority. However, by federal legislative mandate, the Authority was compelled to appoint a review board made up exclusively of members of Congress selected from a pool determined by Congress. See id. at 268-69. Congress's agents on the board thus were able to exercise ultimate control over important operational decisions of the Authority, in violation of the Constitution's constraints on the exercise of congressional power. Id. at 275-77.

***33** The Court of Appeals for the D.C. Circuit recently came to a similar conclusion in FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994), in striking down part of a section of the Federal Election Campaign Act, 2 U.S.C. § 437c(a)(1). That section provides that the Secretary of the Senate and Clerk of the House or their designees are to be members of the Federal Election Commission "ex officio and without the right to vote." The Secretary and the Clerk are self-evidently agents of Congress, but the

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Commission argued that their presence was constitutionally harmless because their only formal role was informational and advisory. The court rejected the argument, reasoning that the very point of placing the Secretary and Clerk on the Commission was to influence the Commission's actions and that

> Congress must limit the exercise of its influence, whether in the form of advice or not, to its legislative role. . . . What the Constitution prohibits Congress from doing, and what Congress does in this case, is to place its agents "beyond the legislative sphere" by naming them to membership on an entity with executive powers.

6 F.3d at 827 (citation omitted). We believe that NRA Political Victory Fund was correctly decided: however modest the ability of Congress's agents to influence the Commission's actions may have been formally, the statute placed the agents intended to communicate that influence within the very heart of an agency charged with enforcing federal law. The anti-aggrandizement principle properly can be interpreted to forbid even modest attempts by Congress to intervene in the enforcement of the laws once "its participation [in the passage of legislation] ends." Bowsher v. Synar, 478 U.S. 714, 733 (1986). E. The General Separation of Powers Principle

The proper application of the general separation of powers principle is highly specific to context, and thus few generalizations are possible. For example, in the past we have expressed concern that legislation delegating federal authority to state or local officials or private persons could undermine the executive branch's ability to carry out its functions and thereby violate the principle. See, e.g., Constitutional Limitations on "Contracting Out" Department of Justice Functions under OMB Circular A-76, 14 Op. O.L.C. 106, 114-15 (1990) (preliminary print). FN;B132[FN132]FN;F132 We continue to believe that such delegations can raise questions with respect to the constitutional separation of powers, FN;B133[FN133]FN;F133 and that in certain circumstances, a congressional delegation of authority to non-federal officials or to private parties might have a significant impact on the executive branch's ability to fulfill its constitutional functions. If so, the delegation might be invalid under the general separation of powers principle. FN;B134[FN134]FN;F134

F. Statutory Construction

Issues involving the constitutional separation of powers between the President and Congress most often arise in the context of a statute that raises or proposed legislation that would raise questions under one of the three headings we have identified. For this reason, it is worth recalling the "cardinal principle" of statutory interpretation that statutes be construed to avoid raising serious constitutional questions, where such a construction is reasonably available. See, e.g., Crowell v. Benson, 285 U.S. 22 (1932).

***34** An important subset of these questions relate to statutes that do not plainly state that they apply to the President. The Supreme Court and this office have adhered to a plain statement rule: statutes that do not expressly apply to the President must be construed as not applying to the President, where applying the statute to the President would pose a significant question regarding the President's constitutional prerogatives. See, e.g., Franklin v. Massachusetts, 505 U.S. 788, 800-01 (1992); Memorandum for Jack Quinn, Counsel to the President, from Walter Dellinger, Assistant Attorney General, re: Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges (Dec. 18, 1995). This principle has two sources in the constitutional context within which the Congress drafts statutes. The first is the interpretive canon of avoiding serious constitutional questions. See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

The second source is the constitutional principle of separation of powers. The purpose of the constitutional separation of powers is to prevent an excessive accumulation of authority in any of the three branches of the federal

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government. The plain statement safeguards "the 'usual constitutional balance'" of power. Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)); see Franklin, 505 U.S. at 800-01. Given the central position that the separation of powers doctrine occupies in the Constitution's design, this rule also serves to "assure[] that the legislature has in fact faced, and intended to bring into issue, the critical matters" of the balance of power between the three branches of the federal government. See United States v. Bass, 404 U.S. 336, 349 (1971).

This plain statement rule has been applied frequently by the Supreme Court as well as this office with respect to statutes that might otherwise be susceptible of an application that would affect the President's constitutional prerogatives, were one to ignore the constitutional context. For instance, in Franklin the Court was called upon to determine whether the Administrative Procedure Act, 5 U.S.C § 701, authorized "abuse of discretion" review of final actions by the President. The APA authorizes review of final actions by an "agency," which it defines as "each authority of the Government of the United States." 5 U.S.C. § 701(b)(1). From this definition, the APA expressly exempts Congress, the courts, the territories, and the DC government.

Even though the statute defined agency in a way that could include the President and did not list the President among the express exceptions to the APA, Justice O'Connor wrote for the Court,

> [t]he President is not explicitly excluded from the APA's purview, but he is not explicitly included, either. Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.

***35** 505 U.S. at 800-01 (emphasis added). To amplify, she continued, "[a]s the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements." Id. at 801. Numerous other Supreme Court decisions employ this approach. See, e.g., Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) (holding that the Federal Advisory Committee Act does not apply to committees that advise the President on the discharge of his exclusive constitutional functions because doing so would raise serious separation of powers questions); Sale v. Haitian Centers Council, Inc., 113 S. Ct. 2549 (1993) (refusing to give the Refugee Act extraterritorial application because doing so could conflict with the President's constitutionally committed authority); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (President was immune from suit because Congress had failed to create a cause of action expressly against the President of the United States).

In addition to the Supreme Court precedents, this office has frequently applied the plain statement rule in the context of the separation of powers between the executive and legislative branches. For example, we were asked whether the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621-634, prohibits the President from considering the age of judicial candidates when determining whom to nominate for federal judgeships. See Judges -- Appointment -- Age Factor, 3 Op. O.L.C. 388 (1979). We concluded that the ADEA should not be read to apply to the presidential appointment of federal judges:

> The power to appoint Federal judges, who hold office on good behavior, is by tradition and design one of the most significant powers given by the Constitution to the President. It provides one of the few administrative mechanisms through which the President can exert a long-term influence over the development and administration of law in the courts. The President's present power to exert that influence to the fullest by preferring candidates for appointment who are likely to have long, rather than short, careers on the bench is therefore a matter of constitutional significance. Whether Congress could deny the President that power by requiring him to disregard utterly the age of candidates for appointment has never been considered by the

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> courts, but because of the gravity of the constitutional questions it raises, we would be most reluctant to construe any statute as an attempt to regulate the President's choice in that way, absent a very clear indication in the [statute].

Id. at 389. FN;B135[FN135]FN;F135

III. Constitutional Requirements and Policy Concerns

The conclusion that a particular provision of proposed legislation probably would not be held unconstitutional by the courts is not equivalent to a determination that the legislation is constitutional per se. The judiciary is limited, properly, in its ability to enforce the Constitution, both by Article III's requirements of jurisdiction and justiciability and by the obligation to defer to the political branches in cases of doubt or where Congress or the President has special constitutional responsibility. FN;B136[FN136]FN;F136 In such situations, the executive branch's regular obligation to ensure, to the full extent of its ability, that constitutional requirements are respected is heightened by the absence or reduced presence of the courts' ordinary guardianship of the Constitution's requirements. Furthermore, even where on any view the letter of the Constitution is satisfied, the Constitution's intention to separate the federal government's powers can appropriately be invoked as a sound reason for objecting to legislation that undermines or imperils that separation. The constitutional separation of powers, to make the point in a different way, is a political as well as a legal principle. FN;B137[FN137]FN;F137

***36** The Constitution demands of the executive and legislative branches alike an "ethic of institutional responsibility" in defending their respective roles in the overall constitutional structure. FN;B138[FN138]FN;F138 For example, legislation that attempts to structure the very details of executive decision making, or that imposes onerous and repetitive reporting requirements on executive agencies, is troubling from a separation of powers standpoint even if the individual statutes could not easily be described in themselves as unconstitutional. The overall effects of such micromanagement for the constitutional separation of powers obviously can be tremendous, and yet it is unlikely that judicial intervention can or would preserve the constitutional balance. The executive branch thus has the primary responsibility for presenting, in as forceful and principled a way as possible, the separation of powers problems with all legislation that has such effects. In carrying out this Office's various roles in the executive's review of existing and proposed legislation, we intend to bear this obligation in mind, and we are pleased to be of assistance to other components of the executive branch in their efforts to analyze, from a policy standpoint as well as from a strictly legal basis, the impact of legislation on the constitutional separation of congressional and presidential powers.

Walter Dellinger
Assistant Attorney General

FNa1 This memorandum supersedes a 1989 memorandum that the Office of Legal Counsel provided to the General Counsels' Consultative Group. See Common Legislative Encroachments on Executive Branch Constitutional Authority, 13 Op. O.L.C. 299 (1989) (preliminary print). While we agree with many of the conclusions of that document, we have determined that subsequent decisions by the Supreme Court and certain differences in approach to the issues make it appropriate to revisit and update the Office's general advice on separation of powers issues.

FN1 Bowsher v. Synar, 478 U.S. 714, 722 (1986).

FN2 MWAA, 501 U.S. at 272.

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FN3 Morrison v. Olson, 487 U.S. 654, 693 (1988). James Madison described the "policy" lying behind "distributions of power" -- "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other." The Federalist No. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961), quoted in Buckley, 424 U.S. at 122-23.

FN4 See INS v. Chadha, 462 U.S. 919, 951 (1983) (the Constitution's separation of powers is designed to counteract the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power").

FN5 The Attorney General noted that "[t]he first presidential defense of the integrity of the powers of the Executive under the Constitution was made by Washington himself" and that "[f]rom that day to this the Presidents, with very few exceptions, have felt the necessity for refusing to overlook encroachments upon the executive power." 37 Op. Att'y Gen. at 64.

FN6 The Supreme Court repeatedly has rejected the "'archaic view of the separation of powers as requiring three airtight departments of government.'" Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977) (citation omitted). In doing so, the Court has noted that such a view is "inconsistent with the origins of th[e] doctrine" as well as with "the contemporary realities of our political system." Id. at 441; see also id. at 442 & n.5 (noting that James Madison in The Federalist No. 47 and Justice Joseph Story in his famous treatise on the Constitution rejected the claim that the Constitution requires an absolute separation).

FN7 We shall refer to this theme in the Supreme Court's separation of powers jurisprudence as "the anti-aggrandizement principle."

FN8 We refer to this line of reasoning as "the general separation of powers principle."

FN9 Indeed, Article II specifically requires the President to take an oath or affirmation "to preserve, protect and defend the Constitution." U.S. Const. art. II, § 1, cl. 8.

FN10 An example of such legislation would be an enactment that does not, when viewed in isolation, violate the constitutional principles we have identified, but as to which constitutional difficulties arise when the statute is examined in conjunction with other similar enactments. Because, absent a refusal by the executive to enforce any of these cumulative enactments, the courts may not have an opportunity to review the statute in its full context, it is incumbent upon the executive to object to such legislation before it becomes law. Burdensome reporting requirements may illustrate this problem. Even if no single reporting requirement violates the general separation of powers principle, see Administrator of Gen. Servs., 433 U.S. at 443, the cumulative effect of many such requirements might prevent the executive from acting with the dispatch and efficiency that the Constitution intends and that, indeed, Congress expects.

FN11 Persuaded by Secretary of the Treasury Hamilton's opinion defending the validity of the legislation, President Washington declined to accept the Attorney General's arguments that the bank bill was unconstitutional and signed it into law. The Supreme Court upheld the President's conclusion that Congress could charter a national bank in M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

FN12 For an example of an opinion that is, in our view, an exemplary model of the approach this Office should take in interpreting the Constitution, see Article II, Section 2, Clause 3 -- Recess Appointments -- Compensation (5 U.S.C. § 5503), 3 Op. O.L.C. 314 (1979).

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FN13 From the beginning of the Republic, the executive branch has interpreted the Constitution with a due regard for the constitutional views of Congress. See, e.g., Thomas Jefferson, The Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791) (Opinion of the Secretary of State), in 5 Writings of Thomas Jefferson 284, 289 (Paul L. Ford ed., 1895) (arguing that the President should not veto a bill on constitutional grounds, "if the pro and the con hang so even as to balance his judgment," out of "a just respect for the wisdom of the legislature"). Respect for Congress also demands that the executive, like the judiciary, construe statutes so as to avoid constitutional problems. See, e.g., Appropriations Limitation for Rules Vetoed by Congress, 4B Op. O.L.C. 731, 732 n.3 (1980) ("It is our practice to interpret statutes in ways that avoid constitutional infirmities, whenever possible.").

FN14 Thus, for example, in declining to comply with a request from the House of Representatives that he deemed an intrusion on the treaty power, President Washington explained that "as it is essential to the due administration of the government, that the boundaries fixed by the [C]onstitution between the different departments should be preserved: A just regard to the Constitution and to the duty of my Office . . . forbids a compl[i]ance with your request." Message to the House of Representatives (Mar. 30, 1796), reprinted in 35 Writings of George Washington 5 (John C. Fitzpatrick ed., 1940).

FN15 The correct resolution of separation of powers questions demands that due respect be given to two distinct constitutional axioms. The first axiom is that the Constitution's creation of a vigorous executive and an independent judiciary must not be undermined by legislative encroachment. The second axiom is that the Constitution delegates to Congress broad power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Congress], and all other Powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." U.S. Const. art. I, § 8, cl. 18 (emphasis added). The Necessary and Proper Clause thereby authorizes Congress not only to choose any appropriate means of exercising the legislative powers it has been delegated, but also "to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government" as a whole, M'Culloch v. Maryland, 17 U.S. at 420, including the powers vested in the President. In our analyses, we fully acknowledge the broad sweep of Congress's powers while insisting, as we must, that those powers cannot be legitimately employed so as to undermine the constitutional authority of the executive branch.

FN16 In such circumstances "the balance" between the branches "already has been struck by the Constitution itself" in the text. Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring).

FN17 The House of Representatives has the power to impeach any civil officer of the United States, see U.S. Const. art. I, § 2, cl. 5; id. art. II, § 4, and the Senate to try and, if convinced that the officer is guilty of "high Crimes and Misdemeanors," to remove him or her from office, id. art. I, § 3, cls. 5, 6; id. art. II, § 4. The Senate also acts on its own in exercising its advice and consent powers with respect to treaties and the appointment of officers. Congress and congressional committees, furthermore, may take certain actions in aid of Congress's legislative tasks that have legal consequences for specific persons outside the legislative branch; a congressional committee, for example, may issue a subpoena to a witness. See Lear Siegler, Inc. Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1108 (9th Cir. 1988), modified as to attorney fees, 893 F.2d 205 (1989) (en banc). We disagree with the Lear Siegler court's application of this principle to the question before it.

FN18 The statute at issue in Chadha provided for a one-house "veto" of certain decisions by the Attorney General. A two-house "veto" satisfies bicameralism but is inconsistent with the requirement of presentment, and soon

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after Chadha the Court summarily invalidated a statute employing this mechanism. See United States Senate v. FTC, 463 U.S. 1216 (1983) (mem.). These Supreme Court decisions vindicated the executive branch's long-held objections to any form of legislative "veto." See Memorandum for the Attorney General from President Franklin D. Roosevelt (Apr. 7, 1941), reprinted in Robert H. Jackson, A Presidential Legal Opinion, 66 Harv. L. Rev. 1353, 1357-58 (1953) (concurrent resolution); Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 60-62 (1933) (joint congressional committee); Constitutional Issues Raised by Inter-American Convention on International Commercial Arbitration, 4B Op. O.L.C. 509, 512-13 (1980) (one-house veto of "private" action).

FN19 Buckley vindicated the long-standing constitutional view of the executive branch. See, e.g., Constitutionality of Resolution Establishing United States New York World's Fair Commission, 39 Op. Att'y Gen. 61 (1937).

FN20 See Mistretta v. United States, 488 U.S. 361, 411 n.35 (1989) (distinguishing Bowsher v. Synar, 478 U.S. 714 (1986), as resting on "the special danger recognized by the Founders of congressional usurpation of Executive Branch functions").

FN21 The fact that the anti-aggrandizement principle does not rest on a particular provision of the Constitution does not make it any less important and legitimate a feature of the law of separation of powers than those features such as bicameralism and presentment that do have specific textual loci.

> The Framers regarded the checks and balances they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other. . . . This Court has not hesitated to enforce the principle of separation embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it. Buckley v. Valeo, 424 U.S. 1, 122-23 (1976) (per curiam).

FN22 "The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." Bowsher, 478 U.S. at 726. An officer subject to removal by Congress is subordinate to Congress as a matter of constitutional law and must be viewed as an agent of Congress for separation of powers purposes. Id. at 730. The Constitution expressly prescribes the only means by which the houses of Congress may participate in the removal from an ongoing office of a non-legislative official -- impeachment by the House and trial by the Senate. Id. at 723.

FN23 Bowsher upheld the view of the Constitution long maintained by the executive branch. See, e.g., Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att'y Gen. 56, 56 (1933) (unconstitutional for Congress to give a joint committee of Congress authority "to approve or disapprove executive acts").

FN24 Morrison, 487 U.S. at 694 ("We observe first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch."); Schor, 478 U.S. at 856 ("Unlike Bowsher, this case raises no question of the aggrandizement of congressional power at the expense of a coordinate branch.").

FN25 The bicameralism/presentment and anti-aggrandizement requirements converge when Congress attempts to vest in itself or its agents the power to take action with legal effects outside the legislative branch by some means other than the textually prescribed procedure of bicameral passage of a bill and presentation to the President. Such an attempt is unconstitutional regardless of whether one views the attempt as a violation of the bicameralism/presentment requirement for legislation or as a self-aggrandizing intrusion into the sphere of activity of another branch. See MWAA, 501 U.S. at 274-77. However, the two requirements do not always work in tandem. A statute providing that the President can exercise additional authority over some issue with the approval of a

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single house of Congress would not amount to congressional self-aggrandizement but would violate the bicameralism requirement. Similarly, it is difficult to view the designation by statute of agents of Congress to be non-voting members of an extra-legislative decision-making body as leading to the exercise of legislative authority in violation of Chadha, but such designation may well run afoul of the anti-aggrandizement principle. See, e.g., NRA Political Victory Fund, 6 F.3d at 826-27.

FN26 Compare NRA Political Victory Fund, 6 F.3d at 826-27 (unconstitutional for Congress to place agents within an entity exercising final decision-making authority) with McGrain v. Daugherty, 273 U.S. 135 (1927) (constitutional for Congress to issue subpoenas).

FN27 Legislation impinging on the President's responsibilities in the areas of foreign affairs and national defense poses unique issues in the application of the general principle of separation of powers, requiring a more searching examination of the validity of congressional action.

FN28 See, e.g., Springer v. Philippine Islands, 277 U.S. 189, 201 (1928) (discussing the "exclusive character of the powers conferred upon each of the three departments"). On the present Court, Justice Scalia adheres to a version of this view. See, e.g., Morrison v. Olson, 487 U.S. 654, 703-04 (1988) (Scalia, J., dissenting) (criticizing the Court for focusing on "such relatively technical details as the Appointments Clause and the removal power" rather than on "the principle of separation of powers").

FN29 Madison's language about "the whole power of [a] department" should not be construed in a woodenly literalistic manner. As the Supreme Court's decisions indicate, the point is that the principle of separation of powers safeguards the overall constitutional role and function of the affected branch. Indeed, this would seem to have been Madison's view as well: during the great debate in the First Congress over the President's authority to remove executive branch officers, Madison argued against congressional power to limit the President's authority on the ground that such limitations would distort the constitutionally ordained role of the executive. See Myers v. United States, 272 U.S. 52, 131 (1926) (quoting Madison).

FN30 Although most of the Court's decisions applying the general separation of powers principle have concerned legislation arguably interfering with the executive or judiciary, the Court's approach is applicable in other circumstances as well. For example, United States v. Nixon, 418 U.S. 683 (1974), addressed the argument that a subpoena duces tecum addressed to the President in the course of a criminal proceeding was a judicial encroachment on the executive's autonomy. The Court rejected the argument, holding in the circumstances of the case that the President's "generalized interest in confidentiality" was outweighed by "the demonstrated, specific need [of the courts and the accused] for evidence in a pending criminal trial." Id. at 713. The threat to the President's constitutionally based interest posed by compelled disclosure in such (presumably rare) circumstances was slight, the Court concluded, while "the allowance of the privilege to withhold evidence . . . would . . . gravely impair the basic function of the courts." Id. at 712. The Court built on its reasoning in United States v. Nixon in formulating the test set out a few years later in Administrator of General Services, under which it examined the impact of an adverse decision on the constitutional functions of the executive and judicial branches.

FN31 See also Mistretta v. United States, 488 U.S. 361 (1989). Mistretta upheld the validity of Congress's decision to create the Sentencing Commission as an independent entity within the judicial branch composed, in part, of Article III judges against the claim that the Commission violated the general separation of powers principle. Id. at 383. As in Morrison, the Court looked to the impact of the challenged legislation on the ability of the affected branch to fulfill its duties and concluded that the legislation posed no real threat to the integrity or

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authority of the judiciary. Id. at 384.

FN32 The Court also addressed the statute's imposition of a for-cause requirement on the Attorney General's power to remove an independent counsel, arguably a violation of the rule of Myers v. United States, 272 U.S. 52 (1926) (holding unconstitutional a statute requiring Senate advice and consent to the presidential removal of certain postmasters). Morrison distinguished Myers as based on what we have called the anti-aggrandizement principle, 487 U.S. at 686 (like Bowsher v. Synar, 478 U.S. 714 (1986), Myers involved "Congress' attempt to involve itself in the removal of an executive official"), and rejected the argument that the constitutionality of a for-cause removal requirement depends on whether an official is classified as "purely executive," id. at 689. The proper inquiry, the Court concluded, was the compatibility of the restriction on the executive's removal power with the general separation of powers principle that Congress cannot legislate in such a way that the President cannot carry out his constitutional functions. Ultimately, the Court was "simply [unable to] see how the President's need to control the [counsel's] exercise of . . . discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." Id. at 691-92.

FN33 While we do not rest any conclusions on the potentially shifting ground of scholarly consensus, we note the existence of a number of impressive studies arguing that the principle of separation was originally understood to be flexible, open-ended, and consistent with a variety of actual institutional relationships among the three branches. Furthermore, it seems undeniable that early practice under the Constitution reflected a loose rather than strict understanding of the required separation. See, e.g., Susan Low Bloch, The Early Role of the Attorney General in our Constitutional Scheme: In the Beginning There was Pragmatism, 1989 Duke L.J. 561; Gerhard Casper, An Essay in Separation of Powers: Some Early Versions and Practices, 30 Wm. & Mary L. Rev. 211 (1989); William B. Gwyn, The Indeterminacy of the Separation of Powers and the Federal Courts, 57 Geo. Wash. L. Rev. 474 (1989); Lawrence Lessig & Cass R. Sunstein, The President and the Administration, 93 Colum. L. Rev. 1 (1994); Peter M. Shane, Independent Policymaking and Presidential Power: A Constitutional Analysis, 57 Geo. Wash. L. Rev. 596 (1989).

FN34 Once again, we note that the areas of foreign relations and national defense present unique considerations, in light of the President's much greater constitutional authority to act in those areas.

FN35 In analyzing the validity of congressional action, we are mindful of the respect it is appropriate for the executive branch to pay to an equal and coordinate branch of the government. However, the executive branch is not bound by precisely the same rules of deference that guide the courts in exercising their power of judicial review. Judicial deference to the legislative choices embodied in statutes is one of the means by which the courts themselves avoid interfering improperly with the constitutional powers of the politically responsible branches. (In the case of most statutes, judicial review involves scrutinizing the legal and policy judgments of the President who signed the legislation into law as well as those of the Congress that enacted it.) The courts, it should be remembered, are also deferential to purely executive branch decisions, and for the same basic reason: the constitutional structure makes the President, like Congress, politically responsible. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 865 (1984) ("[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices").

FN36 Myers, 272 U.S. at 134.

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FN37 Rejecting the argument that it was unsafe to delegate the executive power to a single official, Alexander Hamilton wrote that "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults, and destroy responsibility." The Federalist No. 70, at 476 (Alexander Hamilton) (Jacob E. Cooke ed., 1961), cited in In re Sealed Case, 838 F.2d at 527 n.27 (Ginsburg, R.B., J., dissenting). Then-Judge Ginsburg explained that "[t]he unity of the executive branch was intended to serve the ends of responsibility and accountability." Id.

FN38 As a matter of practical reality, much of the federal government's legislative activity is undertaken by officers and agencies outside the legislative branch (in the form of regulations), but as a rule such entities act under statutory delegation from Congress. The delegating legislation is, for Chadha purposes, the congressional exercise of legislative power. See Chadha, 462 U.S. at 953 n.16.

FN39 A statutory provision conditioning the executive's ability to take action on approval by one or both houses of Congress or by a congressional committee is as invalid as a provision enabling one of these bodies to "veto" executive action, and for the same reason: it is a legislative attempt to exercise authority beyond the legislative sphere in a mode not conforming to the requirements of bicameralism and presentment. See, e.g., American Fed'n of Gov't Employees v. Pierce, 697 F.2d 303, 306 (D.C. Cir. 1982).

FN40 We agree with the court of appeals in Lear Siegler that many separation of powers issues can properly be analyzed under either the Chadha rule (forbidding Congress to exercise legislative power except by bicameralism and presentment) or the anti-aggrandizement principle (forbidding Congress to exercise executive power). Attempts to resolve constitutional issues by categorizing an exercise of authority as "in its essence, 'legislative' or 'executive'," can be confusing and, in any event, miss the point that under either analysis, "the critical issue is whether Congress or its agent seeks to control . . . the execution of its enactments without respect to the Article I legislative process." 842 F.2d at 1108 (emphasis in original). In Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 (1991), the Supreme Court concluded that it was unnecessary to resolve the categorization issue because the exercise of authority was unconstitutional however it was viewed.

FN41 We also determined that the proposed regulations were not authorized by any of the statutes concerning the JCP. 8 Op. O.L.C. at 43-46. That point was not relevant to the constitutional analysis, however, since Congress cannot circumvent the bicameralism and presentment requirement by delegating legislative authority to a part or agent of itself even by means of a statute itself duly passed and presented.

FN42 In themselves report-and-wait mechanisms usually are valid, as we discuss more fully later in this memorandum.

FN43 The Supreme Court has reasoned that the "congressional power of inquiry" is necessary to "'enable [Congress] efficiently to exercise [the] legislative function[s] belonging to it under the Constitution.'" Barenblatt v. United States, 360 U.S. 109, 111 (1959) (quoting McGrain v. Daugherty, 273 U.S. 135, 160 (1927)). Like Congress's substantive powers to legislate -- which it exists only to serve -- the power of inquiry is "subject to the limitations placed by the Constitution on governmental action," id. at 112, including the anti-aggrandizement and general separation of powers principles.

FN44 As the language of the Appointments Clause suggests, offices in the constitutional sense "are only those established or recognized by the Constitution or by act of Congress." Inventions International Exposition, 18 Op. Att'y Gen. 171, 171 (1885); see also id. ("the President cannot create an office").

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FN45 The officers at issue in Buckley were the six voting members of the Federal Election Commission, four of whom were appointed by congressional officials and two by the President, subject to the approval of the Senate and the House of Representatives. The statutory scheme thus violated the Appointments Clause in two distinct ways, by vesting appointment power in officials not listed in the Clause and by subjecting presidential nominees to confirmation by the House. 424 U.S. at 126-27.

FN46 See Appointment of Assistant Secretary of State, 6 Op. Att'y Gen. 1, 1 (1853) ("without there be[ing] express enactment to the contrary . . . the appointment of any officer of the United States belongs to the President, by and with the advice and consent of the Senate").

FN47 We do not state anything novel in observing that the Appointments Clause sometimes presents difficult questions of interpretation. Attorney General Legaré remarked in an 1843 opinion that "[n]o points of our fundamental law are more difficult than those involved in this whole subject of appointments." Appointment and Removal of Inspectors of Customs, 4 Op. Att'y Gen. 162, 164 (1843).

FN48 In an opinion discussing an Appointments Clause issue, Attorney General Kennedy referred to Hartwell as providing the "classical definition pertaining to an officer." Communications Satellite Corporation, 42 Op. Att'y Gen. 165, 169 (1962). Hartwell itself cited several earlier opinions, including United States v. Maurice, 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747) (Marshall, Circuit Justice), see 73 U.S. at 393 n.†, and in turn has been cited by numerous subsequent Supreme Court decisions, including United States v. Germaine, 99 U.S. 508, 511-12 (1879), and Auffmordt v. Hedden, 137 U.S. 310, 327 (1890). These latter two decisions were cited with approval by the Court in Buckley v. Valeo, 424 U.S. 1, 125-26 & n.162 (1976) (per curiam).

FN49 In this memorandum, the term "officer" will be used to refer exclusively to "Officers of the United States" in the constitutional sense; other full-time government servants will be called "employees."

FN50 Germaine clearly was discussing the concept of "officer" in the constitutional, and not simply a generic, sense: the alternative basis for the holding was that the surgeon was not an officer because he was appointed by the Commissioner who, as the head of a bureau within the Interior Department, could not be a "Head of Department" with the authority to appoint officers. Id. at 510-11.

FN51 The post-Buckley Supreme Court has often assessed the validity of statutes that would starkly pose Appointments Clause issues if, in fact, the Court had adopted the position that wielding significant authority pursuant to the laws of the United States, without more, requires appointment in conformity with that Clause. In none of these cases has the Court even hinted at the existence of an Appointments Clause issue. See, e.g., Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985) (upholding statutory requirement that registrants under a federal regulatory scheme submit to binding arbitration conducted by a panel of arbitrators who are private individuals not appointed by one of the methods specified in the Appointments Clause and are subject only to limited judicial review); FERC v. Mississippi, 456 U.S. 742 (1982) (upholding requirement that states enforce federal regulatory scheme relating to utilities); Lake Carriers' Ass'n v. Kelley, 456 U.S. 985 (1982) (mem.), aff'g 527 F. Supp. 1114 (E.D. Mich. 1981) (three-judge panel) (upholding statute that granted states authority to ban sewage emissions from all vessels); Train v. National Resources Defense Council, Inc., 421 U.S. 60 (1975) (construing provision of Clean Air Act that gave states authority to devise and enforce plans for achieving congressionally defined, national air quality standards).

FN52 Some recent opinions of this Office have read Buckley more broadly as repudiating the historical understanding of the Appointments Clause and endorsing the proposition we reject here -- that is, that all persons ex-

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ercising significant federal authority, by virtue of that fact alone, must be appointed pursuant to the Appointments Clause. We are aware of four opinions in which our disagreement with this understanding of Buckley would cause us to reach a different conclusion on the Appointments Clause question presented. See Constitutionality of Subsection 4117(b) of Enrolled Bill H.R. 5835, the "Omnibus Budget Reconciliation Act of 1990," 14 Op. O.L.C. 170, 171 (1990) (preliminary print) (statutory scheme under which congressional delegations and physicians' organizations of certain states exercise "significant authority" violates Appointments Clause); Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 249, 264-65 (1989) (preliminary print) (provisions of False Claims Act authorizing qui tam suits by private parties violate Appointments Clause because qui tam relators exercise "significant governmental power"); Representation of the United States Sentencing Commission in Litigation, 12 Op. O.L.C. 21, 31-33 (1988) (preliminary print) (private party acting as counsel for United States agency must be appointed pursuant to Appointments Clause); Proposed Legislation to Establish the National Indian Gaming Commission, 11 Op. O.L.C. 73, 74 (1987) (Appointments Clause problems raised where state and local officials given authority to waive federal statute). Our conclusion that the more limited historical understanding of the Appointments Clause is correct requires us to disavow the Appointments Clause holdings of those opinions. To the extent that our current reading of Buckley is inconsistent with the Appointments Clause reasoning of other opinions of this office, that reasoning is superseded. See Common Legislative Encroachments on Executive Branch Constitutional Authority, 13 Op. O.L.C. 299, 300 (1989) (preliminary print).

FN53 See Appointments in the Department of Commerce and Labor, 29 Op. Att'y Gen. 116, 118-19, 122-23 (1911) (official authorized to perform all the duties of the Commissioner of Fisheries, who was appointed by the President and confirmed by the Senate, was an officer; scientists, technicians, and superintendent of mechanical plant in the Bureau of Standards were employees rather than officers); Second Deputy Comptroller of the Currency -- Appointment, 26 Op. Att'y Gen. 627, 628 (1908) ("The officer is distinguished from the employee in the greater importance, dignity, and independence of his position"; official authorized to exercise powers of the Comptroller of the Currency in the absence of the Comptroller was clearly an officer).

FN54 The status of certain officials traditionally appointed in modes identical to those designated by the Appointments Clause is somewhat anomalous. For instance, low-grade military officers have always been appointed by the President and confirmed by the Senate and understood to be "Officers of the United States" in the constitutional sense; in Weiss v. United States, 114 S. Ct. 752, 757 (1994), the Supreme Court recently indicated its agreement with that understanding. It is at least arguable, however, that the authority exercised by second lieutenants and ensigns is so limited and subordinate that their analogues in the civil sphere clearly would be employees. There are at least three possible explanations. (1) Congress may make anyone in public service an officer simply by requiring appointment in one of the modes designated by the Appointments Clause. The Clause, on this view, mandates officer status for officials with significant governmental authority but does not restrict the status to such officials. This apparently was the nineteenth-century view, see, e.g., United States v. Perkins, 116 U.S. 483, 484 (1886) (cadet engineer at the Naval Academy was an officer because "Congress has by express enactment vested the appointment of cadet-engineers in the Secretary of the Navy and when thus appointed they become officers and not employees"). While recognizing that Congress may make anyone in the public service an officer, Attorney General Kennedy rejected the argument that Congress evinces and effectuates such an intention merely by providing for the public servant to be appointed by a method that coincidentally conforms with the Appointments Clause. See Communications Satellite Corporation, 42 Op. Att'y Gen. 165, 167 (1962) ("it does not follow" from the Constitution that "every appointment authorized by law which is preceded by nomination and confirmation necessarily renders the appointee an officer"). (2) Certain officials are constitu-

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tional officers because in the early Republic their positions were of greater relative significance in the federal government than they are today. Cf. Buckley, 424 U.S. at 126 (postmasters first class and clerks of district courts are officers). (3) Even the lowest ranking military or naval officer is a potential commander of United States armed forces in combat -- and, indeed, is in theory a commander of large military or naval units by presidential direction or in the event of catastrophic casualties among his or her superiors.

FN55 In fact, as the Court pointed out, the chief judge of the Tax Court can assign special trial judges to render final decisions in certain types of cases, a power that the government conceded rendered them, in those circumstances, "inferior officers who exercise independent authority." The Court rejected the argument that special trial judges could be deemed inferior officers for some purposes and employees for others. 501 U.S. at 882.

FN56 The text of the Appointments Clause implies that offices in the sense of the Clause must be established in the Constitution or by statute. See U.S. Const. art. II, § 2, cl. 2 (specifying certain officers and then referring to "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law").

FN57 That an employee may not exercise independent discretion does not, of course, mean that his or her duties may not encompass responsibilities requiring the exercise of judgment and discretion under the ultimate control and supervision of an officer. In Steele v. United States (No. 2), 267 U.S. 505, 508 (1925), the Supreme Court noted that a "deputy marshal is not in the constitutional sense an officer of the United States," yet "is called upon to exercise great responsibility and discretion" in "the enforcement of the peace of the United States, as that is embraced in the enforcement of federal law." But deputy marshals act at the direction of "the United States marshal under whom they serve," id., who is an officer in the constitutional sense.

FN58 See Appointment and Removal of Inspectors of Customs, 4 Op. Att'y Gen. 162, 164 (1843) (Congress may not provide for the appointment of "any employe [e], coming fairly within the definition of an inferior officer of the government," except by a mode consistent with the Appointments Clause).

FN59 Buckley illustrates this last point. The FEC commissioners appointed by congressional officials were undoubtedly employees of the federal government but they could not constitutionally exercise the enforcement powers the statute attempted to grant them because their mode of appointment precluded them from being officers. 424 U.S. at 137-41.

FN60 The delegation to private persons or non-federal government officials of federal-law authority, sometimes incorrectly analyzed as raising Appointments Clause questions, can raise genuine questions under other constitutional doctrines, such as the non-delegation doctrine and the general separation of powers principle. Compare Confederated Tribes of Siletz Indians v. United States, 841 F. Supp. 1479, 1486-89 (D. Or. 1994) (confusing Appointments Clause with separation of powers analysis in holding invalid a delegation to a state governor) with United States v. Ferry County, 511 F. Supp. 546, 552 (E.D. Wash. 1981) (correctly dismissing Appointments Clause argument and analyzing delegation to county commissioners under non-delegation doctrine).

FN61 See Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power & Conservation Planning Council, 786 F.2d 1359, 1365 (9th Cir. 1986) ("because the Council members do not serve pursuant to federal law," it is "immaterial whether they exercise some significant executive or administrative authority over federal activity"), cert. denied, 479 U.S. 1059 (1987).

FN62 One might also view delegations to private individuals as raising the same considerations as suggested by

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the distinction drawn earlier between appointee and independent contractor -- so long as the statute does not create such tenure, duration, emoluments and duties as would be associated with a public office, the individual is not the occupant of a constitutional office but is, rather, a private party who has assumed or been delegated some federal responsibilities.

FN63 See, e.g., Seattle Master Builders, 786 F.2d at 1364-66. The particular state officials at issue were serving on an entity created by an interstate compact established with the consent of Congress, but that fact is not significant for Appointments Clause purposes. The crucial point was that "[t]he appointment, salaries and direction" of the officials were "state-derived": "the states ultimately empower the [officials] to carry out their duties." Id. at 1365. The Supreme Court's recent decision in New York v. United States, 112 S. Ct. 2408 (1992), which held that Congress cannot "commandeer" state officials to serve federal regulatory purposes, reenforces this conclusion. Where state officials do exercise significant authority under or with respect to federal law, they do so as state officials, by the decision and under the ultimate authority of the state.

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991), does not suggest a different conclusion. The constitutional issue in that case was the validity of a statutory provision subjecting the Airports Authority "to the veto power of" a Board of Review composed of members of Congress purportedly "acting 'in their individual capacities.'" Id. at 270. The Supreme Court held that the Board in fact acted as an agent of Congress and that the Board's veto power therefore represented an unconstitutional enlargement of congressional authority. Nothing in the Court's opinion suggests that there would have been any constitutional problem if Congress had delegated the same power to the Authority subject to review by the executive branch.

FN64 See Techworld Dev. Corp. v. D.C. Preservation League, 648 F. Supp. 106, 115-17 (D.D.C. 1986).

FN65 We believe that United States ex rel. Kelly v. Boeing Co., 9 F.3d 743, 757-59 (9th Cir. 1993) (rejecting Appointments Clause challenge to False Claims Act), cert. denied, 114 S. Ct. 1125 (1994), reached the correct result but through an incorrect line of analysis. See id. at 758 (Clause not violated because of the relative modesty of the authority exercised by the relator). The better analysis, in our view, is that of the court in United States ex rel. Burch v. Piqua Engineering, Inc., 803 F. Supp. 115 (S.D. Ohio 1992), which held that "because qui tam plaintiffs are not officers of the United States, the FCA does not violate the Appointments Clause." Id. at 120. We now disapprove the Appointments Clause analysis and conclusion of an earlier opinion of this Office, Constitutionality of the Qui Tam Provisions of the False Claims Act, 13 Op. O.L.C. 249 (1989) (preliminary print) (arguing that the qui tam provisions violate the Clause).

FN66 Here the Court phrased its analysis in terms of separation of powers, but the challenge to the statute was, at its core, based on the Appointments Clause. See Chesapeake Bay Found. v. Bethlehem Steel Corp., 652 F. Supp. 620, 624 (D. Md. 1987) (Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), "does not stand for the proposition . . . that private persons may not enforce any federal laws simply because they are not Officers of the United States appointed in accordance with Article II of the Constitution").

FN67 At least where these entities are created on an ad hoc or temporary basis, there is a long historical pedigree for the argument that even the United States representatives need not be appointed in accordance with Article II. See, e.g., Alexander Hamilton, The Defence No. 37 (Jan. 6, 1796), reprinted in 20 The Papers of Alexander Hamilton 13, 20 (Harold C. Syrett ed., 1974):

As to what respects the Commissioners agreed to be appointed [under the Jay Treaty with Great Britain], they are not in a strict sense OFFICERS. They are arbitrators between the two Countries. Though in the

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Constitutions, both of the U[nited] States and of most of the Individual states, a particular mode of appointing officers is designated, yet in practice it has not been deemed a violation of the provision to appoint Commissioners or special Agents for special purposes in a different mode. The traditional view of the Attorneys General has been that the members of international commissions hold "an office or employment emanating from the general treaty-making power, and created by it and" the foreign nation(s) involved and that members are not constitutional officers. Office -- Compensation, 22 Op. Att'y Gen. 184, 186 (1898).

FN68 Some of our prior opinions express such concerns. Because that view, we now conclude, cannot be reconciled with Appointments Clause principles or caselaw, we expressly disavow it.

FN69 The Court also referred to this as a "policy-implementing" role. Id. at 973. This is to distinguish government agencies and instrumentalities, such as Amtrak, from truly private corporations that, though created pursuant to statutory authority, do not implement any government policy, but instead pursue profit and the policies of their shareholders.

FN70 In some passages, the Court spoke in terms of the First Amendment and individual rights, for instance:

We hold that where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment. Id. We do not, however, believe that the Court meant to imply that it is within Congress's power to exempt federal instrumentalities from the Constitution's structural requirements, such as the Appointments Clause and the separation of powers doctrine, that apply to all other federal agencies. We believe instead that the references to individual rights are explained by two considerations. First, the issue in the case was whether Amtrak had violated the petitioner's First Amendment rights, and so did not raise any structural issues. Second, the Constitution imposes certain obligations on all government entities, state as well as federal. In other words, not all government entities, within Lebron's definition, are part of the federal government; many are part of a state or local government or of an interstate compact. See id. at 973 (citing Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957) (per curiam)). These latter entities are not subject to the separation of powers doctrine or the Appointments Clause. Because the Court was concerned with all entities that the Constitution regards as within the government, not just the federal government, it naturally phrased its opinion in terms of the obligations that apply to all organs of government, not just the organs of the federal government. Ultimately, we can conceive of no principled basis for distinguishing between the status of a federal entity vis-a-vis constitutional obligations relating to individual rights and vis-a-vis the structural obligations that the Constitution imposes on federal entities. See Brief of Appellant United States, Wilkinson v. United States, Nos. 95-5144, 91-5174 (D.C. Cir. Nov. 22, 1995). It therefore is not surprising that the Court did not consistently limit its language to individual rights. See, e.g., Lebron, 115 S. Ct. at 973 ("It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form."). Thus, we do not believe that Congress may evade the "solemn obligations" of the doctrine of separation of powers by resorting to the corporate form any more than it may evade the obligations of the Bill of Rights through this artifice.

FN71 Memorandum for John Schmidt, Associate Attorney General, from Walter Dellinger, Assistant Attorney General, re: Constitutional Limitations on Federal Government Participation in Binding Arbitration, at 10 (Sept. 7, 1995).

FN72 We nevertheless noted that it is possible for a theoretical binding arbitration mechanism to run afoul of the

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Appointments Clause. As indicated, arbitrators whose sole or collective decisions are binding on the government exercise significant authority. If any such arbitrator were to occupy a position of employment within the federal government, that arbitrator would be required to be appointed in conformity with the Appointments Clause. See Freytag v. Commissioner, 501 U.S. 868, 881 (1991). Thus, if a federal agency were to conduct binding arbitrations and to employ arbitrators with whom it provided all relevant attributes of an office, all such arbitrators would be required to be appointed in conformity with the Appointments Clause. See Federal Government Participation in Binding Arbitration, at 13.

FN73 The Court also compared the independent counsel's status to that of other officials who had been considered inferior officers in earlier decisions. See 487 U.S. at 672-73 (discussing cases dealing with vice-consuls, election supervisors, and United States commissioners). The Court also took note of its "reference in United States v. Nixon, 418 U.S. 683, 694, 696 (1974), to the Office of Watergate Special Prosecutor -- whose authority was similar to that of [the independent counsel] -- as a 'subordinate officer'" and concluded that this characterization was "consistent" with its conclusion that independent counsels are inferior officers. See 487 U.S. at 673.

FN74 Buckley simply asserted that the members of the FEC were "at the very least" inferior officers. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam). In Freytag, no one claimed that the special trial judges at issue were principal, as opposed to inferior, officers; instead, the case involved the distinction between inferior officers and employees. Freytag v. Commissioner, 501 U.S. 868, 880-82 (1991). The military judges under review in Weiss, like all commissioned officers in the armed forces, were appointed with the advice and consent of the Senate. Weiss v. United States, 114 S. Ct. 752, 757 (1994). Justice Souter concurred in the Court's opinion on the understanding that the military judges at issue there are inferior officers. Id. at 763. He reasoned that there were substantial points to be made on either side of the question whether they were principal or inferior officers and concluded that the Court should defer "to the political Branches' [implicit] judgment" that the military judges were inferior officers. Id. at 769. Although Justice Souter's admonition that "it is ultimately hard to say with any certainty on which side of the line" between principal and inferior status a given officer may fall, id., is indubitably correct, the executive branch cannot invoke the principle of judicial deference he properly used to decide the issue in Weiss.

FN75 The exception to this broad reading of the Clause was Buckley's unsurprising conclusion that "neither Congress nor its officers [are] included within the language 'Heads of Departments.'" Buckley v. Valeo, 424 U.S. 1, 127 (1976) (per curiam).

FN76 Freytag, 501 U.S. at 892. The Court in Freytag concluded that it is constitutional for the chief judge of the Tax Court to appoint special trial judges because the Tax Court, though an Article I legislative court, "exercise [s] judicial power and perform[s] exclusively judicial functions" and thus is a "Court[] of Law" within the meaning of the Clause. Id. Justice Scalia argued in a concurring opinion that the Tax Court should be treated as a "Department" and the chief judge as its "Head." Id. at 914-22 (Scalia, J., concurring in part and concurring in the judgment). Justice Souter recently has suggested that the opinion of the Court in Freytag did not actually resolve the question of whether the judges of the Tax Court, including the chief judge, are principal officers. Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring).

FN77 Morrison v. Olson, 487 U.S. 654 (1988). In Morrison, the Court indicated that there is some "constitutional limitation on 'incongruous' interbranch appointments," id. at 677, despite the broad language the Appointments Clause uses in describing Congress's discretion on the subject. A statute vesting in a court the power to appoint officers acting in areas in which judges "have no special knowledge or expertise," id. at 676

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n.13, for example, might create tension between the court's normal functions and "the performance of [its] duty to appoint." Id. at 676. We think that this limitation is probably of little practical significance with respect to presidential appointments in light of the fact that it is difficult to conceive a plausible argument that vesting the power in the President to appoint any officer (other, perhaps, than some legislative officers) could ever be constitutionally "incongruous."

FN78 Silver v. United States Postal Serv., 951 F.2d 1033, 1038 (9th Cir. 1991).

FN79 The Appointments Clause thus differs from Section 4 of the Twenty-fifth Amendment, the language and history of which confirm that the "principal officers of the executive departments" it mentions are the members of the Cabinet. U.S. Const. amend. XXV, § 4; see Freytag, 501 U.S. at 886-87; id. at 917 (Scalia, J., concurring in part and concurring in the judgment).

FN80 "The Cabinet, as such, was not provided for by the Constitution and it follows therefore that the interpretation of the Constitution cannot depend upon such consideration." 37 Op. Att'y Gen. at 231; accord Freytag, 501 U.S. at 916-17 (Scalia, J., concurring in part and concurring in the judgment).

FN81 While the opinion of the Court in Freytag rejected the argument that "every part of the Executive Branch is a department," 501 U.S. at 885, we do not think that the Court's reasoning is inconsistent with the 1933 Justice Department opinion. The Court's chief concern was that part of the Appointments Clause's purpose is to prevent "the dangers posed by an excessively diffuse appointment power." Id. The Court observed that "[g]iven the inexorable presence of the administrative state, a holding that every organ in the Executive Branch is a department would multiply indefinitely the number of actors eligible to appoint." Id. We do not think that our view that entities other than cabinet-level agencies can be "Departments" for the purposes of the Appointments Clause leads to this constitutionally troublesome result. We assume the continuing validity of United States v. Germaine, 99 U.S. 508 (1879), which held that the head of a bureau within an executive branch department was not the head of a department. Most of the discrete units of the executive branch in fact are subordinate to some larger executive agency, and therefore are not departments under Germaine. The Federal Bureau of Investigation, for example, wields far-reaching law enforcement authority, but as a component of the Justice Department it is not itself a "Department" for purposes of the Appointments Clause. Legislation authorizing the appointment of inferior officers by a subordinate officer within a department with the approval of the head of the department, see United States v. Hartwell, 73 U.S. (6 Wall.) 385, 392-94 (1868); see also Germaine, 99 U.S. at 511 (explaining Hartwell), does not transgress this principle because for constitutional purposes the appointment should be deemed to be made by the department head. We also note that the four concurring Justices in Freytag expressly adopted the reading of the Appointments Clause set forth in the 1933 Attorney General's opinion: that "the term 'Departments' means all independent executive establishments." 501 U.S. at 919 (Scalia, O'Connor, Kennedy, & Souter, JJ., concurring in part and concurring in the judgment).

FN82 The court of appeals in Silver found no constitutional problem with a statute vesting the power to appoint an inferior officer, the Deputy Postmaster General, in an entity consisting of the Governors of the Postal Service (principal officers who are collectively the "head of a Department") and the Postmaster General (an inferior officer appointed by the Governors). See 951 F.2d at 1036-41. This conclusion might be justified on either of two rationales. (1) As Justice Souter recently noted, it remains unresolved whether "the Appointments Clause envisions appointment of some inferior officers by other inferior officers," Weiss v. United States, 114 S. Ct. 752, 768 (1994) (Souter, J., concurring), and it may be that there is no constitutional objection to designating one or more inferior officers to be the head of a department with the power to make appointments. (2) It might be ar-

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gued that although as a general matter the head of a department must be a principal officer and a collective head of department must consist of exclusively principal officers, the association of an inferior officer with a collective head of department in making a specific appointment is constitutionally harmless.

FN83 See Freytag, 501 U.S. at 918 (Scalia, J., concurring in part and concurring in the judgment) (noting that most inferior officers in independent agencies are appointed by neither the President nor a Cabinet official).

FN84 In late-eighteenth century English, the term "department" had no specialized governmental or organizational meaning. For example, Dr. Johnson defined "department" as "[s]eparate allotment; province or business assigned to a particular person," 1 Samuel Johnson, A Dictionary of the English Language (1755), to which Webster added the gloss "in which a class of duties are allotted to a particular person." 1 Noah Webster, American Dictionary 58 (1828), quoted in Freytag, 501 U.S. at 920 (Scalia, J., concurring in part and concurring in the judgment) (founders chose "Department" to connote "separate organization"). In its foundational legislation, the First Congress used the word both for the Departments of Foreign Affairs (later, State) and War and for the Department of the Treasury, even though it pointedly did not term Treasury an "executive department" as it did State and War. Compare Act of July 27, 1789, ch. 4, 1 Stat. 28-29 (establishing the Department of Foreign Affairs) and Act of Aug. 7, 1789, ch. 7, 1 Stat. 49-50 (establishing the Department of War) with Act of Sept. 2, 1789, ch. 12, 1 Stat. 65-67 (establishing the Department of the Treasury). A substantial body of scholarship views this terminological choice as reflecting an intention to make Treasury at least partially independent of the President, although by means other than limiting the latter's removal power. See Lawrence Lessig & Cass R. Sunstein, supra note 33, at 27-29; Gerhard Casper, supra note 33, at 240-42; Peter M. Shane, supra note 33, at 615-16.

FN85 Buckley noted that the Constitution expressly authorizes the selection of the Speaker of the House and the President pro tempore of the Senate from among the membership of those bodies, see U.S. Const. art. I, § 2, cl. 5 ; id. art. I, § 3, cl. 5, and held that nothing in the Constitution forbids Congress from appointing non-members as legislative branch officials to "perform duties . . . in aid of those functions that Congress may carry out by itself." 424 U.S. at 127-28, 139.

FN86 In this circumstance, Congress's action in lengthening an officer's term does not have the effect of usurping the power of appointment the Constitution vests in the President rather than in Congress. Cf. In re Benny, 812 F.2d 1133, 1142-43 (9th Cir. 1987) (Norris, J., concurring in the judgment):

> [T]he 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 the incumbents and more traditional forms of congressional appointments. Both implicate the identical constitutional evil -- congressional selection of the individuals filling nonlegislative offices.

FN87 See Crenshaw v. United States, 134 U.S. 99 (1890); Civil Service Retirement Act -- Postmasters -- Automatic Separation from the Service, 35 Op. Att'y Gen. 309, 314 (1927) ("If, as stated in [Embry v. United States, 100 U.S. 680, 685 (1879),] Congress may at any time add to or take from compensation fixed, it may also, it would seem, by analogy, at any time shorten or lengthen a term of office.").

FN88 In 1987, this Office issued an opinion that may be read to hold that legislation extending the term of any officer, even one serving at the pleasure of the President, is unconstitutional. See Reappointment of United States Parole Commissioners, 11 Op. O.L.C. 135 (1987). At the time it was issued, that opinion was directly contrary to long-standing executive branch precedent. See, e.g., Displaced Persons Commission -- Terms of

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Members, 41 Op. Att'y Gen. at 90-91. We recently revisited the question presented in the 1987 opinion and concluded that it was in error. See Legislation Extending the Terms of Office of United States Parole Commissioners (July 15, 1994) (publication forthcoming in 18 Op. O.L.C. (1994)). We therefore reaffirmed the traditional view that legislation extending the term of an officer subject to removal at will does not violate the Appointments Clause and disavowed our 1987 suggestion to the contrary.

FN89 Benny asserted that Wiener v. United States, 357 U.S. 349 (1958), implicitly rejected any Appointments Clause argument against term-extension legislation. 812 F.2d at 1141. We think that this overstates Wiener. Wiener dealt only with the President's removal power and did not consider any issue regarding the Appointments Clause. The date on which the President removed the plaintiff in Wiener%u from office was in fact within the term of office for which the plaintiff was originally appointed, although part of the backpay the plaintiff ultimately recovered was for a period after his original term would have expired. See 357 U.S. at 350-51 (term should have expired on March 1, 1954 as the law stood at the time plaintiff was appointed; President removed plaintiff on December 10, 1953; plaintiff recovered backpay for four months after March 1, 1954, because commission's authorization was extended after his appointment). The additional Supreme Court cases that Benny and other opinions have cited are distinguishable. See, e.g., Benny, 812 F.2d at 1141 (citing Shoemaker v. United States, 147 U.S. 282 (1893), which upheld legislation imposing additional duties on an officer); In re Tom Carter Enters., 44 B.R. 605, 607 (C.D. Cal. 1984) (citing Shoemaker%u and cases dealing with issues under the Contracts Clause and the Philippine Organic Act). Benny also pointed out that the First Congress twice extended the tenure of the first Postmaster General. 812 F.2d at 1142. While we agree that this fact supports the argument that Congress generally possesses the power to extend terms, the original Postmaster General served at the pleasure of the President, and thus the First Congress's actions placed no practical limitation on the appointments power.

FN90 The result reached in the Benny line of cases was as a practical matter much less troublesome than its reverse, which would have put in question an enormous number of decisions within the bankruptcy system. It is therefore possible to characterize these decisions as a sensible resolution of a legal quandary, which may have compromised constitutional logic but did so at no real cost to the ultimate purposes of the Constitution. However, while this view of the cases may be quite sensible from a political-science perspective, it leaves the constitutional law on the subject in some disarray.

FN91 See, e.g., President Buchanan's signing statement dated June 25, 1860, relating to the Civil Appropriations Act for fiscal year 1861, in 5 Messages and Papers of the Presidents, 1789-1897, at 597-98 (1897) (construing Act to avoid the constitutional problem).

FN92 The same possibility is not presented by Congress's power to reduce or limit the duties of an officer. Except with respect to (certain) constitutional officers, Congress has plenary authority to eliminate offices altogether, subject to the general separation of powers principle. The lesser-included power to take away part of an officer's authority does not in itself enable Congress to choose which individual will exercise authority and thus does not implicate the Appointments Clause. See United States v. San Jacinto Tin Co., 125 U.S. 273, 284 (1888) (Congress, as "the legislative body which created the office" of Attorney General, has the authority to put "restrictions . . . upon the exercise of [the Attorney General's] authority").

In Crenshaw v. United States, 134 U.S. 99 (1890), the Supreme Court upheld a statute that affected undergraduates ("cadet midshipmen") at the Naval Academy by redesignating them as "naval cadets" and restricting the circumstances in which they would be commissioned upon graduation. The Court concluded that "Congress did not thereby undertake to name the incumbent of any office. It simply changed the name, and

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modified the scope of the duties." Id. at 109.

FN93 The Olympic Federal court thought the legislation would have been valid if Congress had created a three-person directorate for the OTS and designated the members of the former board as the directors. (The court reasoned that the germaneness requirement of Shoemaker would be satisfied because OTS was absorbing the duties of the old board as well as acquiring other, related ones.) 732 F. Supp. at 1193. We reached a similar conclusion in 1980 in opining that Congress could merge the Court of Claims and the Court of Customs and Patent Appeals and designate the members of those courts to serve as members of the merged court. See Legislation Authorizing the Transfer of Federal Judges from One District to Another, 4B Op. O.L.C. 538, 541 (1980). The "merger situation . . . involves the end of one institution and the continuance of its major functions in another," and it was reasonable for Congress "to provide in this context for the relocation of experienced and capable judicial personnel, and for their continuing to perform the functions of the office to which they were originally appointed." Id.

FN94 One possible restriction is notable for its absence from the Constitution: although Articles I and II and the Twelfth Amendment establish citizenship and age requirements for serving as a member of Congress, the President, or the Vice President (and also set varying minimum age requirements), see U.S. Const. art. I, § 2, cl. 2 (Representatives); id. art. I, § 3, cl. 3 (Senators); id. art. II, § 1, cl. 4 (the President); id. amend. XII (Vice President), the Constitution places no such limitations **on anyone who becomes an officer through one of the processes prescribed by the Appointments Clause.**

FN95 After FEC v. NRA Political Victory Fund, 6 F.3d 821 (D.C. Cir. 1993), cert. dismissed, 115 S. Ct. 537 (1994), it appears that designating a member of Congress to serve on a commission with any executive functions, even in what was expressly labeled a ceremonial or advisory role, may render the delegation of significant governmental authority to the commission unconstitutional as a violation of the anti-aggrandizement principle. See id. at 826-27.

FN96 The Incompatibility Clause does not prohibit members of Congress from serving in positions that are not offices in the constitutional sense. See, e.g., Proposed Commission on Deregulation of International Ocean Shipping, 7 Op. O.L.C. 202, 202-03 (1983) (members of Congress may serve as members of a "purely advisory" commission because the members need not be officers).

FN97 Cf. Special Deputization of Members of Congress, at 1 n.1 (May 25, 1994) (publication forthcoming in 18 Op. O.L.C. (1994)) (recognizing Incompatibility Clause requirement but finding it unnecessary to reach that issue).

FN98 The suggestion in this Office's 1977 opinion on the Clause that "exclusive responsibility for interpreting and enforcing the Incompatibility Clause rests with Congress," Reserve Commissions, 1 Op. O.L.C. at 242, thus was an overstatement.

FN99 The most thorough judicial treatment of the issue, which quotes extensively from Attorney General Wirt's 1823 opinion, is United States v. Allocco, 200 F. Supp. 868 (S.D.N.Y. 1961), aff'd, 305 F.2d 704 (2d Cir. 1962), cert. denied, 371 U.S. 964 (1963).

FN100 There must be a vacancy in order for the President to exercise the authority granted by the Recess Appointments Clause. See Recess Appointments, 3 Op. O.L.C. at 317 (the power to make a "recess appointment presupposes the existence of a vacancy," and an appointment cannot in itself remove an incumbent so as to cre-

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ate a vacancy). In many situations, whether a vacancy exists will depend on the correct interpretation of a holdover provision in the statute creating the office. The scanty caselaw on this issue -- which is a matter of statutory construction rather than of constitutional law -- is not easily reconciled. Compare Staebler v. Carter, 464 F. Supp. 585 (D.D.C. 1979) with Mackie v. Clinton, 827 F. Supp. 56 (D.D.C. 1993), vacated as moot, Nos. 93-5287 & 93-5289, 1994 WL 163761 (D.C. Cir. Mar. 9, 1994).

FN101 "In this connection I think the President is necessarily vested with a large, although not unlimited, discretion to determine when there is a real and genuine recess making it impossible for him to receive the advice and consent of the Senate. . . . But there is a point, necessarily hard of definition, where palpable abuse of discretion might subject his appointment to review." 33 Op. Att'y Gen. at 25.

FN102 See, e.g., Appointment of Acting Purser, 6 Op. Att'y Gen. 357, 365 (1854) (executive power of "filling up a vacancy by an appointment of one to act ad interim, and for a particular exigency, in a distant service" could be exercised to make temporary appointment of acting purser despite statutory prohibition on anyone acting as purser prior to Senate confirmation); Executive Power of Appointment, 4 Op. Att'y Gen. 248, 248 (1843) (appointment power is derived from President's Take Care Clause duty, "an obligation imposed by the constitution, and from the authority of which no mere act of legislation can operate a dispensation," although President could not pay interim appointees without an appropriation).

FN103 Indeed, at least one court has indicated a judicial willingness to defer to the views of the Attorney General on the President's authority to make temporary appointments. See Olympic Federal Sav. & Loan Ass'n v. Director, Office of Thrift Supervision, 732 F. Supp. 1183, 1197-98 (D.D.C.) ("The Attorney General is charged with responsibility for ensuring that only lawfully appointed officials act on behalf of the United States, and consequently his interpretation of law on this subject is entitled to great deference."), appeal dismissed as moot, 903 F.2d 837 (D.C. Cir. 1990).

FN104 Williams was a challenge to the legality of actions taken by the acting director of the Office of Economic Opportunity on the grounds that the President lacked authority to appoint an acting director of that office and to continue the interim appointment for over four months without submitting to the Senate any nomination to the position of director. The district court declared the President's action unlawful. The court of appeals refused to grant a stay of the district court's order because in its judgment the acting director had failed to show the requisite likelihood of success on the merits. The brief discussion in Williams of the merits emphasized that Article II "unequivocally requires an officer of the United States to be confirmed by the Senate unless different provision is made." The court nevertheless observed that "[i]t could be argued" that the President has "an implied power, in the absence of limiting legislation . . . to appoint an acting director for a reasonable period of time before submitting the nomination of a new director to the Senate" 482 F.2d at 670.

FN105 Our opinions have struggled with the meaning of Williams. See, e.g., Power of the President to Designate Acting Member of the Federal Home Loan Bank Board, 1 Op. O.L.C. 150, 151-52 (1977) (court of appeals' opinion in Williams "can perhaps be read as disagreeing with" the argument that the President has no nonstatutory authority or "as perhaps agreeing" that he does have such authority, "in the absence of a limiting statute," subject, of course, to the condition that he must submit a nomination within a reasonable time).

FN106 The Vacancies Act only applies to temporary appointments "[w]hen an office[]" is vacant. 5 U.S.C. § 3346 (emphasis added). Because the staff director for the Commission on Civil Rights is not a constitutional officer, the Vacancies Act does not apply. See Olympic Fed. Sav. & Loan Ass'n v. Director, Office of Thrift Su-

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pervision, 732 F. Supp. 1183, 1195 (D.D.C.) (finding that "officer" as used in the Vacancies Act, 5 U.S.C. § 3346, means "constitutional officer"), appeal dismissed as moot, 903 F.2d 837 (D.C. Cir. 1990). Indeed, since the Commission is an exclusively investigatory and advisory body, see Hannah v. Larche, 363 U.S. 420, 441 (1960), none of the positions at the Commission are constitutional offices. See Statement on Signing the United States Commission on Civil Rights Act of 1983, 2 Pub. Papers 1634, 1635 (Nov. 30, 1983) (Statement by the Department of Justice). Accordingly, the Vacancies Act does not apply to the Commission at all.

FN107 A federal district court ruled to the contrary, but its decision has been vacated. See George v. Ishimaru, 849 F. Supp. 68 (D.D.C. 1994), vacated as moot, No. 94-5111 1994 WL 517746 (D.C. Cir. Aug. 25, 1994).

FN108 Professor Gerhard Casper has identified seven "major positions [in the First Congress] on the question of the location of the removal power," ranging from the view that the President has illimitable authority to remove any non-judicial officer to the argument that Congress has plenary discretion over removal issues under the Necessary and Proper Clause. See Gerhard Casper, supra note 33, at 234-35.

FN109 "The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. The head of a Department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto." Perkins, 116 U.S. at 485. The President similarly "has no constitutional prerogative" to make appointments without senatorial advice and consent "independently" of congressional authorization -- that is, the President may make appointments without the advice and consent of the Senate only if Congress authorizes the President to do so. See Myers, 272 U.S. at 161-62 (noting without deciding the question).

FN110 We do not read Morrison v. Olson, 487 U.S. 654 (1988), to cast any doubt on the continuing vitality of these decisions. See id. at 689 n.27, 690 n.29 (implicitly reaffirming Perkins).

FN111 The Court dismissed the argument that the rationale for giving the President plenary removal authority over heads of department and other great officers of state simply did not apply to postmasters with the observation that Congress could extend civil service tenure protection to the latter simply by vesting their appointment "in the head[] of department[] to which they belong." 272 U.S. at 174.

FN112 The statute establishing the FTC included a provision stating that a commissioner "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office," which the Court construed as intended "to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here." Humphrey's Ex'r, 295 U.S. at 623, 626.

FN113 Humphrey's Executor expressly repudiated the language in Myers suggesting that the President's general executive powers and Take Care Clause responsibilities rendered it unconstitutional for Congress to reduce or eliminate presidential control over the administration of federal law. "In the course of the opinion [in Myers], expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved." Humphrey's Ex'r, 295 U.S. at 626.

FN114 See also id. at 628:

> The FTC was created by Congress to "carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other special duties as a legislative

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or judicial aid. . . . Its duties are to be performed without executive leave and, in the contemplation of the statute, must be free from executive control."

FN115 The rationale of Wiener, which is essentially that Congress must have implied a for-cause removal restriction when the Court believes that the functions of the agency demand such tenure protection, 357 U.S. at 353-56, seems questionable. There would be nothing illogical in a legislative decision, for example, to protect against review or revision of the decisions of the agency, see id. 354-55, while placing the agency's decision makers within the control of the President. Congress has made such decisions from the beginning of the Republic. To the extent that Wiener assumes that control is and ought to be a binary matter -- either plenary or nonexistent -- its reasoning is difficult to reconcile with more recent separation of powers decisions that reject such an either/or approach to presidential control. See, e.g., Morrison v. Olson, 487 U.S. 654 (1988). Despite these possible flaws in its logic, however, Wiener's holding continues to be followed. See FEC v. NRA Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993) (concluding that the members of the Federal Election Commission probably are removable only for cause despite the absence of an explicit statutory restriction on removal), cert. dismissed, 115 S. Ct. 537 (1994).

FN116 Congress's decision was considered legitimate in Humphrey's Executor because the Court viewed the FTC as "a body of experts" "charged with the enforcement of no policy except the policy of the law" and concluded that "[s]uch a body cannot in any proper sense be characterized as an arm or an eye of the executive". 295 U.S. at 624, 628. We do not find the Court's reasoning in Humphrey's Executor completely persuasive. The Court's assertion about the FTC's "enforcement of no policy except the policy of the law," id. at 624, does not differentiate the FTC, except perhaps as a matter of degree, from the many undoubtedly executive agencies upon which Congress imposes mandatory duties. The Court also stated that an FTC member is "an officer who occupies no place in the executive department," but the Court may only have meant that the FTC is "an agency of the legislative or judicial departments of the government," id. at 628, in which case questions would arise under current constitutional doctrine as to the legitimacy of an Article I entity exercising law-making authority without following bicameralism and presentment, see INS v. Chadha, 462 U.S. 919 (1983), or of an Article III nonjudicial entity "bind[ing] or regulat[ing] the primary conduct of the public," Mistretta v. United States, 488 U.S. 361, 396 (1989). We do not think that the "independent" regulatory agencies could be viewed today as within the legislative or judicial branches. See id. at 386 n.14 (SEC is "not located in the Judicial Branch").

FN117 A much older decision, Shurtleff v. United States, 189 U.S. 311 (1903), had held that a for-cause provision did not oust the President's power, derived from the power of appointment, to remove an officer at will, but after Humphrey's Executor, Shurtleff appeared confined to its factual setting (where the official's tenure had no fixed termination). See Kalaris v. Donovan, 697 F.2d 376, 395 & n.76 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983). Bowsher, however, cited Shurtleff in connection with a more general suggestion that "the enumeration of certain specified causes of removal" may not "exclud[e] the possibility of removal for other causes." 478 U.S. at 729. Bowsher and Morrison together suggest that a generous reading of the President's (or a department head's) power to remove an inferior officer for cause may be essential to the constitutionality of removal restrictions concerning even those officers whose functions are narrow.

FN118 The Tenure of Office Act of 1867, ch. 154, 14 Stat. 430 (1867), expressly provided the Secretaries of War and the Navy, among others, with terms longer than that of the President who appointed them, subject only to presidential removal with the consent of the Senate. President Andrew Johnson's attempt to remove the Secretary of War was the legal basis for his impeachment and near-removal from office. (The Act had been passed over President Johnson's constitutionally based veto.) GR

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FN119 With respect to an officer serving at the President's pleasure, the President may remove the incumbent by direct order or by appointing his or her successor after receiving the advice and consent of the Senate. See, e.g., Quackenbush v. United States, 177 U.S. 20, 25 (1900); Presidential Appointees -- Resignation Subject to the Appointment and Qualification of a Successor, 3 Op. O.L.C. 152 (1979).

FN120 On the basis of precedent, and in light of the understandable tendency of Article III judges to value tenure protection positively, it is safe to assume that courts will continue to apply Wiener with respect to officials whose primary duties involve the adjudication of disputes involving private persons.

FN121 The two houses of Congress also have complementary roles in the congressional power to impeach and remove any civil officer of the United States. See U.S. Const. art. I, § 2, cl. 5; id. art. I, § 3, cl. 6.

FN122 Congress's authority in this regard is bounded, to be sure, by independent constitutional limitations such as the Bill of Attainder Clause, U.S. Const. art. I, § 9, cl. 3. See United States v. Lovett, 328 U.S. 303 (1946) (provision in appropriations statute prohibiting the payment of compensation to three specified executive branch employees because of their political beliefs was an unconstitutional bill of attainder).

FN123 One could also describe the reasoning directly in terms of the impeachment and removal powers. See U.S. Const. art. I, § 2, cl. 5 (House has "sole Power of Impeachment"); id. art. I, § 3, cl. 6 (Senate has "sole Power to try all Impeachments"); id. art. II, § 4 ("President, Vice President and all civil Officers" are subject to impeachment and removal). These powers stem from "[e]xplicit and unambiguous provisions of the Constitution [that] prescribe and define" the only means by which Congress may remove officers. INS v. Chadha, 462 U.S. 919, 945 (1983).

FN124 In Smith the Supreme Court rejected a challenge to the right of one of President Hoover's appointees to sit on the Federal Power Commission, but based its holding on its construction of the Senate's rule permitting reconsideration. The Court thus did not reach the executive's constitutional arguments. See 286 U.S. at 34 ("we have, therefore, no occasion to consider the constitutional objection").

FN125 The composition of the Smithsonian's Board of Regents and of the Board of Trustees of the J.F.K. Center presents a separate problem under Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam), because members of Congress serve on these boards through appointment by the Speaker and the President pro tempore. See 20 U.S.C. § 42 (Regents of Smithsonian); Id. § 76h(a) (Trustees of J.F.K. Center).

FN126 Under the modern understanding of the separation of powers, we do not think that Congress validly can empower the GPO to play any role that is not purely ministerial with respect to the executive branch.

FN127 Formal removal authority is sufficient to render the Librarian subject to the President's control for constitutional purposes. See Bowsher v. Synar, 478 U.S. 714, 726-27 (1986). We think that under Bowsher the fact that a President is highly unlikely to remove a Librarian is legally irrelevant. Id. at 727 n.5.

FN128 The Constitution presupposes that all executive branch action is taken under the legal authority of officers of the United States and that it is those officers (and not their subordinates) who are constitutionally responsible for those actions. See U.S. Const. art. II, § 4 (civil officers may be impeached). It is our view, therefore, that the executive branch is generally entitled to resist congressional demands that employees be questioned about their actions and that as a matter of constitutional comity Congress ordinarily is obligated to respect an executive decision to send a superior officer to present testimony and answer questions about the actions of a

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subordinate officer. (The last statement does not apply to congressional investigations connected with impeachment or with other legitimate investigations into the actions of specific officers.) Although the details of executive responses to congressional demands for information have changed somewhat, the general principle that Congress ought not employ its powers of investigation to disrupt the lines of responsibility and authority within the executive branch is very old. See Thomas Jefferson, Opinion of the Cabinet (Apr. 2, 1792), in I The Writings of Thomas Jefferson 304 (Andrew A. Lipscomb ed., 1903) (advising President Washington "that neither the committee nor [the] House [of Representatives] had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President").

FN129 This is not to say that an unconstitutional report-and-wait provision cannot be imagined. A provision that imposed so lengthy a delay as to in effect nullify the executive's power to take action substantively authorized by the Constitution or a statute might be invalid as a violation of the anti-aggrandizement or general separation of powers principle.

FN130 Moreover, such a provision ought to fail the courts' final test under general separation of powers analysis -- whether the statute's impact on the executive "is justified by an overriding need to promote objectives within the constitutional authority of Congress." Administrator of General Services, 433 U.S. at 443. The hypothesized reporting requirement could seriously impair the President's ability to formulate foreign policy and conduct negotiations and addresses an area in which Congress's constitutional authority is limited.

FN131 The result in Bowsher v. Synar, 478 U.S. 714 (1986), for example, would not be changed by a statute providing that the General Accounting Office is an executive branch agency. Through the Comptroller General, an official removable by Congress, the legislature would still be exercising ultimate authority over executive decisions. In fact, the Comptroller General does have obligations to the executive branch as well as to Congress. See Bowsher, 478 U.S. at 746 (Stevens, J., concurring in the judgment).

FN132 The delegation question actually at issue in our 1990 opinion concerned OMB requirements to contract out governmental work. Executive branch delegations to non-federal entities, we now think, are properly analyzed as raising issues about the executive's statutory authority to delegate.

FN133 In theory, Congress's authority to delegate law-making authority to anyone, including the President, is limited by the non-delegation doctrine, which prohibits standardless grants of legislative power. That doctrine is, however, essentially moribund in the courts. See, e.g., Yakus v. United States, 321 U.S. 414 (1944) (upholding broad delegation). In any event, the problem of delegation in the separation of powers context is not, or not primarily, one of congressional failure to specify the limits and standards relevant to the delegated authority, but rather the interference with executive (or judicial) branch functions created by the bestowal of federal-law authority on non-federal entities. Cf. Currin v. Wallace, 306 U.S. 1, 15-16 (1939) (upholding statute requiring supermajority vote by participants in regulated activity before executive branch could take certain action).

FN134 A common form of "delegation" -- the grant of authority to state, local, or tribal officials or to private parties to stop federal action by declining to consent to it -- is unlikely to present a constitutional problem. Such legislation merely sets a condition on the executive branch's exercise of authority that the executive would not possess at all in the absence of the legislation. In upholding a statute requiring a supermajority of regulated farmers to agree before the Secretary of Agriculture could exercise certain powers, the Supreme Court rejected the argument that the statute impermissibly delegated legislative power, reasoning that such legislation does not,

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strictly speaking, involve a delegation of authority to the farmers at all. See Currin v. Wallace, 306 U.S. 1, 15-16 (1939). By requiring the Secretary, as one of the prerequisites to the exercise of power granted him by statute, to ascertain the agreement of a certain percentage of those who would be affected, the statute at issue in Currin had done nothing but add another condition to the availability of the power. Id. at 15 ("Congress has merely placed a restriction upon its own regulation by withholding its operation as to a given market "unless two-thirds of the growers voting favor it."').

A recent district court opinion that reached the opposite conclusion illustrates, in our judgment, the fallacy involved in attempting to discern a separation of powers problem in this sort of legislation. See Confederated Tribes of Siletz Indians v. United States, 841 F. Supp. 1479 (D. Or. 1994) (appeal pending). The statute at issue prohibits the location of gaming establishments on land acquired by the Department of the Interior in trust for the benefit of a Native American tribe when the land in question is off-reservation. The statute permits the Secretary to grant a waiver of the prohibition, but requires him or her to obtain the concurrence of the relevant state governor before finally approving the waiver. The district court denied that the act was similar for constitutional purposes to the legislation upheld in Currin or the False Claims Act provisions sustained in the qui tam cases: "Instead we have a statute in which Congress delegates to a state official the power to veto a favorable determination by an official of the Executive Branch who was legislatively charged with making that determination." 841 F. Supp. at 1488. Therefore, the court concluded, the provision requiring the governor's concurrence violated the Appointments Clause and the general separation of powers principle. Id. at 1489. We think that the district court went wrong in its description of the legislation it was reviewing: the only final determination the Secretary is "legislatively charged with making" under 25 U.S.C. § 2719(b)(1)(A) is a determination that the statutory conditions -- inter alia, that the relevant governor concurs in the Secretary's findings that granting the waiver will be beneficial to the tribe and harmless to its neighbors -- have been satisfied. The governor's concurrence, from the Secretary's perspective, is as much a fact about the world as the predicted effects of the casino (or the concurrence of the supermajority of farmers at issue in Currin) -- it is one more condition that must be met before the Secretary can exercise the waiver power Congress has provided, albeit a condition that the Secretary may be able to satisfy using different methods (persuasion, for example) than those employed in satisfying other conditions (economic forecasts of the impact of a casino, for example).

For somewhat similar reasons, there is no separation of powers problem with legislation that defines a federal rule of law by reference to state or foreign law. The Supreme Court held in United States v. Sharpnack, 355 U.S. 286 (1958), that the Constitution permits Congress to provide for the application, as bases for federal prosecution, of subsequently enacted state criminal laws in federal enclaves. The Court concluded that such a prospective congressional adoption of "future state legislative action in connection with the exercise of federal legislative power" does not involve "a delegation by Congress of its legislative authority to the States" at all. Id. at 294. On the basis of Sharpnack's reasoning, we think that no special separation of powers issues are raised by the role of the states under such legislation. The courts of appeals have applied the rationale of Sharpnack to a variety of federal statutes that require consideration of state or foreign laws in determining the application of federal law. See, e.g., United States v. Rioseco, 845 F.2d 299, 302 (11th Cir. 1988) ("Congress has delegated no power, but has itself set out its policies and has implemented them").

FN135 See also Memorandum for Jack Quinn, Counsel to the President, from Walter Dellinger, Assistant Attorney General, re: Application of 28 U.S.C. § 458 to Presidential Appointments of Federal Judges (Dec. 18, 1995); Constraints Imposed by 18 U.S.C. § 1913 on Lobbying Efforts, 13 Op. O.L.C. 361, 366-68 (1989) (preliminary print); Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Ex-

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ecutive Privilege, 8 Op. O.L.C. 101 (1984); Memorandum for Richard T. Burress, Office of the President, from Laurence H. Silberman, Deputy Attorney General, re: Conflict of Interest Problems Arising out of the President's Nomination of Nelson A. Rockefeller to be Vice President under the Twenty-Fifth Amendment to the Constitution, at 2, 5 (Aug. 28, 1974); Memorandum for Egil Krogh, Staff Assistant to the Counsel to the President, from William H. Rehnquist, Assistant Attorney General, re: Closing of Government Offices in Memory of Former President Eisenhower (Apr. 1, 1969).

FN136 This last point is true not only with respect to true "political questions," i.e., constitutional issues the resolution of which is committed by the Constitution to (one of) the political branches, but also as to areas which, although not absolutely insulated from judicial review, demand extraordinary judicial respect for the decisions of a coordinate branch. See, e.g., United States v. Butenko, 494 F.2d 593, 603, 605 (3d Cir. 1974) (en banc) (broad presidential power to order covert surveillance for foreign affairs and national security purposes does not "justify completely removing" judicial enforcement of the Fourth Amendment; however, the "strong public interest" in "the efficient operation of the Executive's foreign policy-making apparatus" should make a court "wary of interfering").

FN137 Justice Robert Jackson once wrote that "[i]t is hard to conceive a task more fundamentally political than to maintain amidst changing conditions the balance between the executive and legislative branches of our federal system." Robert H. Jackson, The Supreme Court in the American System of Government 62 (1955).

FN138 See Richard A. Champagne, Jr., The Separation of Powers, Institutional Responsibility, and the Problem of Representation, 75 Marq. L. Rev. 839, 844 (1992).

20 U.S. Op. Off. Legal Counsel 124, 1996 WL 876050 (O.L.C.)

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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,

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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,

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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 of-

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fice 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 pa-

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role 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. Con-

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sequently, 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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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

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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

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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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FBI Directorship: History and Congressional Action

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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, five 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 may not be reappointed. There are no statutory conditions on the President's authority to remove the FBI Director. One Director has been removed by the President since 1972. The current FBI Director, Robert S. Mueller III, was confirmed by the Senate on August 2, 2001, and his term of office is set to expire in September 2011. In May 2011, President Barack Obama announced his intention to seek legislation that would extend Mr. Mueller's term of office for two years.

This first part of this report provides some legislative history surrounding the enactment of the 1968 and 1976 amendments to the appointment of the FBI Director, as well as information on the nominees to the FBI Directorship since 1972. The second part of the report discusses precedent for lengthening the tenure of an office and the constitutionality of the current proposal to extend the tenure of the Directorship for the current incumbent, and addresses whether it would be necessary for Mr. Mueller to be reappointed a second time.

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Overview

Federal statute provides that the Director of the Federal Bureau of Investigation (FBI) is to be appointed by the President by and with the advice and consent of the Senate.[1] 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.[2]

Prior to the implementation of the current nomination and confirmation process, J. Edgar Hoover was Director of the FBI for nearly 48 years.[3] He held the position from May 10, 1924, until his death on May 2, 1972.[4] 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.[5] The proposal for a presidentially appointed Director had been introduced and passed in the Senate twice previously,[6] 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.[7] In 1976, the 10-year limit for any one incumbent was added as part of the Crime Control Act of 1976.[8] As with the previous measure, the Senate had introduced and passed this provision twice previously,[9] but it had failed to pass the House.

Since 1972, five nominees have been confirmed by the Senate for FBI Director, including the most recent, Robert S. Mueller III, and two other nominations have been withdrawn. Each of these nominations is shown in **Table 1** and discussed below.[10]

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[1] 28 U.S.C. § 532 note.

[2] *See also* CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki.

[3] Since 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.").

[4] For further information on the history and development on the FBI, *see* the FBI history web page, *available at* http://www.fbi.gov/gbihistory.htm.

[5] 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.

[6] S. 603, 88th Cong., 1st sess. (1963) and S. 313, 89th Cong., 1st sess. (1965).

[7] *See Cong. Record*, vol. 114, May 14, 1968, at 13181-13184.

[8] P.L. 94-503, § 203; 90 Stat. 2407, 2427 (1976).

[9] S. 2106, 93rd Cong., 1st sess. (1974) and S. 1172, 94th Cong., 1st sess. (1975).

[10] 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 1. FBI Director Nominations and Confirmations, 1973-present

Nominee	Nominating President	Date of Nomination[a]	Committee Action[b]	Final Disposition[c]	Elapsed Time[d]
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

Sources:

a. Date of 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*, and the *Congressional Record*.

c. Information provided in this column was obtained from the *Journal of Executive Proceedings of the Senate*, and the *Congressional Record*, and the *Weekly Compilation of Presidential Documents*.

d. Includes all days from nomination to confirmation.

FBI Nominations and Confirmations, 1973–Present

L. Patrick Gray III. On the day after the death of long-time Director J. Edgar Hoover, L. Patrick Gray was appointed acting Director.[11] 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,[12] 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.[13] 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.[14] The Senate Committee on the Judiciary approved the nomination unanimously vote the following day. He was sworn in by the President on July 9, 1973.[15] 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.[16]

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 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.[17] He served as Director of the FBI until he was appointed as Director of the Central Intelligence Agency (CIA) in May 1987.

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[11] 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.

[12] *See, e.g.*, Sen. Roman L. Hruska, "The Nomination of L. Patrick Gray to be Director of the FBI," remarks in the Senate, *Cong., Record*, vol. 119, Feb. 21, 1973, at 4863; Sen. Lowell P. Weicker, Jr., "The Nomination of L. Patrick Gray III," remarks in the Senate, *Cong. Record*, vol. 119, Mar. 20, 1973, at 8685.

[13] *See, e.g.*, Sen. Robert C. Byrd, "Political Partisanship Should Have No Place in the FBI," remarks in the Senate, *Cong. Record*, vol. 119, Feb. 19, 1973, at 4349; Sen. Robert C. Byrd, "Executive Privilege and Mr. Gray," remarks in the Senate, *Cong. Record*, vol. 119, Mar. 19, 1973, at 8352.

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

[15] U.S. President Nixon, "Director of the Federal Bureau of Investigation," *Weekly Compilation of Presidential Documents*, vol. 9, July 16, 1973, at 893-894.

[16] Carolyn Mathiasen, ed., *Cong. Quarterly Almanac: 95th Cong., 1st sess. ... 1977*, (Washington: Congressional Quarterly, 1977) at 568.

[17] U.S. President Carter, "Director of the Federal Bureau of Investigation," *Weekly Compilation of Presidential*
(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 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.[18]

Sessions has been the only FBI Director removed from office to date. 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.[19] Some Members of Congress questioned the dismissal,[20] but they did not prevent the immediate confirmation of Sessions' 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' removal. The 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,[21] 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.[22] 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.[23] Under President George Bush, Mueller was in charge of the Department of Justice's criminal division during the investigation of the bombing of Pam Am Flight 103 and the prosecution of Panamanian leader Manuel Noriega.[24]

(...continued)

Documents, vol. 14, Feb. 27, 1978, at 396-97.

[18] U.S. President Reagan, "Federal Bureau of Investigation," *Weekly Compilation of Presidential Documents*, vol. 23, Nov. 9, 1987, at 1261-1263.

[19] 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.

[20] On the floor of the Senate, Senator Orrin G. Hatch praised Sessions' service and characterized the Administration's reasons for removing the director as "vague." Sen. Orrin G. Hatch, remarks in the Senate, *Cong. Record Quarterly Almanac: 103rd Cong., 1st sess. ... 1993* (Washington: Congressional Quarterly, 1994) at 309.

[21] U.S. President Clinton, "Remarks on the Swearing-In of Federal Bureau of Investigation Director Louis Freeh," *Weekly Compilation of Presidential Documents*, vol. 29, Sept. 6, 1993, at 1680-1862.

[22] "Robert S. Mueller III to be Director of the Federal Bureau of Investigation," *Congressional Record*, daily edition, vol. 147, Aug. 2, 2001, at S8680-S8691.

[23] 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.

[24] Peter Slevin, "Nominee Vows to Restore Faith in FBI," *Washington Post*, July 31, 2001 at A4.

Congressional Action

Mr. Mueller, who was appointed in 2001, is expected to finish his ten-year term as Director in September 2011. 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 leadership transitions take place at other intelligence agencies.[25] The extension would only apply to Mr. Mueller. This section discusses precedent for lengthening the tenure of an office, the constitutionality of the current proposal to extend the tenure of the Directorship for the current incumbent, and addresses whether it would be necessary for Mr. Mueller to be reappointed a second time and be subject to Senate confirmation hearings.

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.[26] 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.[27] 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.[28] Citing prior incidences where Congress extended terms of offices for certain commissions,[29] 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

[25] 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.

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

[27] 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.'").

[28] 41 Op. Att'y Gen. 88 (1951) (released for publication January 30, 1958).

[29] *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.

years.[30] 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.[31] 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.[32] Even though the existence of the Commission was extended several times thereafter,[33] 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.[34] This action "reinstituted" 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 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.[35] For example, Commissioner Vincent J. Fechtel, Jr., served for a total of 13 years from November 1983 to April 1996.[36]

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 five years, subject to approval by Congress,[37] and a four-year term with the right to re-appoint for additional four-year terms.[38] 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.[39] In the aftermath of J. Edgar Hoover's

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

[31] 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.").

[32] 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.").

[33] 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). 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).

[34] 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.").

[35] 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.

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

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

[38] "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.

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

near 50 years as Director of the FBI and the inherent political sensitivities of the position,[40] 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."[41]

Constitutionality of Proposal to Extend the FBI Director's Term of Office

Constitutional analysis of an extension of the Director's term depends on how the extension reads and whether the President would retain the plenary authority to remove the Director.[42] 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."[43] It has long been recognized that "the power of removal [is] incident to the power of appointment."[44] 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.[45] 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,[46] and other presidentially appointed executive officers, so long as Congress does not expressly provide otherwise.[47] 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.[48]

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[40] "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).

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

[42] 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.

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

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

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

[46] *Id.* at 176.

[47] *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*.

[48] 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.[49] 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.[50] 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."[51] 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."[52] 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.[53]

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.[54] 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.[55]

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.[56]

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

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

[51] *Id.* at 627.

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

[53] *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.*

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

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

[56] *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...)

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."[57] 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."[58] 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."[59]

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."[60] 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."[61] 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."[62] 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

(...continued)

various sorts.").

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

[58] *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).

[59] "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).

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

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

[62] 41 Op. Att'y Gen. 88 (1951) (released for publication January 30, 1958).

contradiction with its 1951 opinion.[63] 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."[64] 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.[65]

Notably, however, the Bankruptcy Amendments and Federal Judgeship Act of 1984,[66] which extended the tenure of bankruptcy judges who can be removed only for cause, has been repeatedly upheld.[67] 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."[68] 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 time."[69] Judge Norris, concurring with the holding on other grounds, 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).[70] 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.'"[71] 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

[63] 18 Op. Off. Legal Counsel 166, 167 (1994) (*citing* 11 Op. Off. Legal Counsel 135 (1987)).

[64] 18 Op. Off. Legal Counsel at 168 n. 3.

[65] 20 Op. Off. Legal Counsel 156 (1996).

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

[67] *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).

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

[69] *Id.*

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

[71] *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.").

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.[72]

Lastly, given the precedent of not formally 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.[73] While there would probably be no need for a second confirmation hearing, the Senate, at its discretion, could invite Mr. Mueller to answer questions as it has periodically done with various agency officials.

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, 93rd Cong., 1st sess., Feb 28, 1993; Mar. 1, 6, 7, 8, 9, 12, 20, and 22, 1973 (Washington: GPO, 1973).

___. *Nomination of Clarence M. Kelley, of Missouri, to be Director of the Federal Bureau of Investigation*, Hearings, 93rd Cong., 1st 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, 95th Cong., 2nd sess. Jan. 30 and 31, 1978; Feb. 7, 1978 (Washington: GPO, 1978).

___. *Nomination of William S. Sessions, of Texas, to be Director of the Federal Bureau of Investigation*, Hearings, 100th Cong., 1st sess., Sept. 9, 1987 (Washington: GPO, 1990).

___. *Nomination of Louis J. Freeh, of New York, to be Director of the Federal Bureau of Investigation*, Hearings, 103rd Cong., 1st sess., July 29, 1993 (Washington: GPO, 1995).

Reports

___. *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, 95th Cong., 2nd sess., Exec. Rept. 95-14, Feb. 7, 1978 (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, 100th Cong., sess., Exec. Rept. 100-6, Sept. 15, 1987 (Washington: GPO, 1987).

[72] 20 Op. Off. Legal Counsel at 155 n.90.

[73] 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.

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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

International Association of Chiefs of Police
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Philip A. Broadfoot
Chief of Police
Danville Police Department
Danville, VA

Executive Director
Daniel N. Rosenblatt
Alexandria, VA

Deputy Executive Director Chief of Staff
James W. McMahon
Alexandria, VA

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

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NATIONAL HEADQUARTERS

WILLIAM J. JOHNSON
Executive Director

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