U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

August 15, 2011

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

Dear Mr. Chairman:

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

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

Sincerely,

for Ronald Weich
Assistant Attorney General

Enclosure

cc: The Honorable Charles Grassley
Ranking Minority Member

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

Questions Posed by Senator Franken

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

Response:

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

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

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

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

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

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

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

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

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

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

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

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

Response:

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

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

Response:

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

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

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

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

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

Questions Posed by Senator Grassley

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

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

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

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

Response:

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

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

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

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

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

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

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

Response:

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

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

Response:

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

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

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

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

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

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

Response to subparts a through d:

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

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

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

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

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

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

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

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

Response to subparts a and b:

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

FBI's double standard in the disciplinary process

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

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

Response:

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

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

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

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

Fort Hood Shooting by Major Hasan

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

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

Response:

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

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

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

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

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

Response:

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

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

Response:

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

Salt Lake City FBI Office

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

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

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

Response:

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

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

Response:

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

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

Response:

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

FBI Sentinel Case Management System

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

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

Response:

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

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

Response:

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

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

Response:

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

year.

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

Response:

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

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

Response:

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

Questions Posed by Senator Coburn

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

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

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

Response to subparts a and b:

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

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

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

Response:

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

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

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

Response:

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

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

Response:

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

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

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

Response:

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

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

Response:

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

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

Response:

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

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

Response:

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

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

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

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

ENCLOSURE

QUESTION 21

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

U.S. Department of Justice

Office of Legal Counsel

Office of the Principal Deputy Assistant Attorney General

Washington, D.C. 20530

June 20, 2011

MEMORANDUM FOR KATHRYN H. RUEMMLER
COUNSEL TO THE PRESIDENT

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

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

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

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

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

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

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

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

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

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

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

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

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

---

[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.

---

[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

---

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