

TEN-YEAR TERM FOR FBI DIRECTOR

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Mr. ROBERT C. BYRD, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 2106]

The Committee on the Judiciary, to which was referred the bill, (S. 2106), to amend title VI of the Omnibus Crime Control and Safe Streets Act of 1968 to provide for a ten-year term for the appointment of the Director of the Federal Bureau of Investigation, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of the bill is to achieve two complementary objectives. The first is to insulate the Director of the Federal Bureau of Investigation from undue pressure being exerted upon him from superiors in the Executive Branch. The second is to protect against an FBI Director becoming too independent and unresponsive. The bill would amend title VI, section 1101 of the Omnibus Crime Control and Safe Streets Act of 1968 by inserting "(a)" after the section designation and by adding at the end thereof the following new section:

(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 be reappointed in accordance with subsection (a) of this section for only one additional term.

STATEMENT

EXISTING PROVISIONS FOR THE APPOINTMENT OF THE FBI DIRECTOR

In 1968, the Congress passed Public Law 90-351, Title VI, section 1101 of the Omnibus Crime Control and Safe Streets Act of 1968

which amended title 28, United States Code, section 532, making the Director of the Federal Bureau of Investigation a Presidential appointment subject to advice and consent by the Senate. Prior to that time the FBI Director was merely a bureau chief within the Justice Department; and he could be appointed and removed at the sole discretion of the Attorney General. The 1968 legislation recognized the vital importance of the office of FBI Director for the administration of Federal justice. The Congress asserted its obligation to evaluate the qualifications of persons nominated for this most sensitive position. Two confirmation hearings were held during 1973 to consider nominees for the post of FBI Director. The nomination of Mr. L. Patrick Gray was withdrawn; and the nomination of the present FBI Director, Mr. Clarence Kelley, was approved by the Committee on the Judiciary and confirmed by the Senate.

There was no provision in the 1968 statute as to the duration of the appointment of the FBI Director. At present the only statutory limit on the Director's term of office is contained in the provisions of subsections (a)-(c) of section 8335 of Title 5, United States Code, establishing the mandatory Federal retirement age of 70. In the case of the late FBI Director J. Edgar Hoover, the mandatory retirement age was waived by executive orders of President Johnson and President Nixon. Mr. Hoover served as Director for a period of forty-eight years from 1924 until his death in 1972. Director Clarence Kelley has recommended that retirement for the FBI Director be mandatory at 70 years of age, no matter what the health or capability of the Director might be. However, it is possible that the retirement age might be waived by the President for a future FBI Director.

The Congress has expressed no desire that the President consider any period of time as an appropriate length of service for a Director. Without a limit on the duration of his term in office, a Director may hold his position for as long as he is able to maintain the confidence, or satisfy the wishes, of succeeding Presidents. In addition, the Congress has made no determination that, because of the non-political nature of the Director's responsibilities, the office ought not to change hands automatically with the election of a new President. In the absence of Congressional guidance, a newly elected President may feel free to replace the Director with a nominee of his own choosing, subject to the advice and consent of the Senate, immediately upon taking office.

Consequently, the existing provisions governing appointment of the FBI Director do not strike a proper balance between the need for responsiveness to the broad policies of the Executive Branch and, at the same time, independence from any unreasonable or unjustifiable requests made by the Director's superiors. There is legitimate concern that a Director might build up so much power through long service that he would become, in effect, politically unremovable by the President. It is important to give the Director some degree of protection from dismissal without good reason, as well as to avoid an appointment of a new Director with each new President. No institutional arrangement can guarantee with certainty that any official will exercise governmental authority with integrity and good judgment. Nevertheless, there are especially sensitive positions which require

the greatest care on the part of the Congress in creating an environment for the responsible use of power. It is the great value of the FBI as a criminal investigative agency, as well as its dangerous potential for infringing individual rights and serving partisan or personal ambitions, that makes the office of FBI Director unique.

THE PROPOSED 10-YEAR TERM

Various periods have been proposed for the length of the term of the FBI Director's appointment. One early suggestion was a four-year term, with the possibility of reappointment and reconfirmation. If the sole purpose were to contribute to Congressional oversight of the FBI, then such a short period might be preferable. However, there are several drawbacks. Former Acting FBI Director and Deputy Attorney General William Ruckelshaus has stated that—

there needs to be some significant period of time in which a Director is assured, as long as he serves with good purposes, is assured as being in charge of the FBI because the policies that he wants to implement for that law enforcement agency need some time to take hold. The people, the agents in the Bureau itself need to have some continuity in the directions they are receiving from the top. So that I think a more extended period of time than is usual in the executive branch in the FBI would be beneficial. [Hearing, p. 38.]

Moreover, a four-year term could encourage rather than discourage political responsiveness on the part of any Director who wished to be reappointed. The position is not an ordinary Cabinet appointment which is usually considered a politically oriented member of the President's "team."

A ten year term would overlap the tenure of a two-term President and would eliminate many of the pressures that could be brought to bear on the Director if he were to be reappointed every four years, and even if he were to be reappointed every seven years, since that could fall within the term of the same President who first appointed the Director. Any political loyalties a Director might have, or might acquire, in one administration would be counterbalanced by the prospect of continued service under a succeeding President.

The stated durational requirement, in the nature of things, will coincide at some time or other with a quadrennial election, and thus raise the prospect of some of the problems sought to be obviated by the bill.

Such a possibility is not inherent in the ten-year period as such, but flows from any numerical durational standard since the office for a variety of reasons (retirements, resignation, death) may become vacant before then and coincident with a presidential election. It should be noted that if Director Kelley serves until he reaches the mandatory retirement age, then the ten-year term of his successor will begin in 1981. In the final analysis, any legislation in this area has to be premised on mitigating or forestalling negative political consequences, not precluding them altogether. The latter almost by definition appears to be beyond human capability.

In his statement before the Committee on Judiciary in June 1973, Director Kelley indicated that nine years would be a proper term for the FBI Director. Testifying at the hearing on this bill, Director Kelley stated:

I originally mentioned a term of nine years since I believed that period would minimize occasions when the appointments would coincide with a change in administrations. Whether the term is for nine years, or ten years, makes little difference to me as long as this consideration is taken into account. Either period would provide the incumbent a sufficient feeling of independence. [Hearing, p. 4.]

THE MANDATORY RETIREMENT AGE

Serious consideration has been given to adding the following provision to this bill:

The provisions of subsections (a)-(c) of section 8335 of Title 5, United States Code, shall apply to any individual appointed under this section.

There is strong opinion that the bill should not act as a waiver of the mandatory retirement age. Although such a waiver is not the intent or purpose of the bill, it may be argued that enactment of the proposal may have that effect. This point was raised in the hearing by Director Kelley, who stated with respect to the bill's application to his own appointment:

I think that at seventy years of age retirement should be mandatory, and my term should not be extended an additional two years. [Hearing, p. 7.]

In addition, it is not the intent of the Committee to make subsection (g) of section 8335 of Title 5, United States Code applicable to the Director of the Federal Bureau of Investigation. Public Law 93-350, approved July 12, 1974, amended section 8335 of Title 5, United States Code by adding a new subsection (g) which states:

(g) A law enforcement officer or a firefighter who is otherwise eligible for immediate retirement under section 8336(c) of this title shall be separated from the service on the last day of the month in which he becomes 55 years of age or completes 20 years of service if then over that age. The head of the agency, when in his judgment the public interest so requires, may exempt such an employee from automatic separation under this subsection until that employee becomes 60 years of age. The employing office shall notify the employee in writing of the date of separation at least 60 days in advance thereof. Action to separate the employee is not effective, without the consent of the employee, until the last day of the month in which the 60-day notice expires.

However, the report of June 19, 1974 [Report No. 93-948] from the Committee on Post Office and Civil Service which accompanied H.R. 9281 [Public Law 93-350] states:

H.R. 9281, as passed by the House of Representatives, provides for the mandatory retirement of law-enforcement officers at age 55 as explained above. The Committee intends that the head of the agency, Department, or Bureau in which the subject personnel are employed should be excluded from this requirement.

Therefore, while it is the intent of the Committee to have the provisions of subsections (a)-(c) of section 8335 of Title 5, United States Code apply to the Director of the Federal Bureau of Investigation, it is not the intent of the Committee to make applicable to the Director the provisions of subsection (g) of section 8335 of Title 5, United States Code.

REAPPOINTMENT TO A SECOND TERM

The second ten-year term provision is subject to different interpretations as to its effectiveness to achieve the goals of the bill. Alternative proposals include a second five-year term and a single ten-year term without reappointment. In the one case the bill might be amended to read, "A Director may be reappointed in accordance with subsection (a) of this section for only one additional term, which shall be limited to five years." In the other case the amendment would read, "A Director may not serve more than one ten-year term."

The original terms of the bill—ten-year appointment with Senate confirmation, and a second ten-year reappointment and reconfirmation possible—may be a satisfactory outside limit to check the impulse of an FBI Director to be too independent and autocratic in the future. If the provision is kept intact, it has the advantage of giving a competent Director another relatively long period of tenure to continue his programs. The prospect of facing reconfirmation hearings might have a positive effect. Mr. Ruckelshaus has stated:

I think that the fact that the Director of the FBI knew at some time he was going to have to come back up to Congress for reconfirmation would be an inhibiting force on his acting in an irresponsible or too independent manner. [Hearing, p. 38.]

The Director would not be so insulated after his original confirmation that his power could be virtually unchecked during his term in office.

Others see a single ten-year term as a better limit for service in such a sensitive post. A second ten-year term would give a Director a total of twenty years as head of the FBI—a long tenure which could allow a centralization of power in one man. A Director who was anxious to be renamed might, during the later years of his first term, attempt to curry favor with the President and/or the Congress in order to ensure his reappointment. It is contended that a single ten-year term is long enough to provide him time to implement his programs and free himself from fear of Executive Branch reprisal for independent action, but not lengthy enough to establish an unresponsive FBI due to a Director who has remained in office too long. Although concern has been expressed that twenty years of service is necessary for a Director to be eligible for maximum retirement benefits, it is unlikely

that this factor would be a significant barrier to securing the most capable persons to serve for ten years as FBI Director.

A possible middle-ground between the single term and two full ten-year terms is an initial ten-year term with a single five-year reappointment subject to Senate reconfirmation. This retains the flexibility and accountability of a second term without extending a Director's tenure to a sufficient number of years to raise serious concerns.

IMPACT ON PRESIDENT'S REMOVAL POWER

The bill does not place any limit on the formal power of the President to remove the FBI Director from office within the ten-year term. The Director would be subject to dismissal by the President, as are all purely executive officers. However, the setting of a ten-year term of office by the Congress would, as a practical matter, preclude a President from arbitrarily naming a new FBI Director for political reasons without showing good reasons for dismissal of his predecessor since the chances for confirmation by the Senate of a new nominee would be remote. The bill is a cautionary message to the President to the effect that whereas his power to remove a Director of the FBI is formally unlimited, nevertheless, by virtue of its power to ratify the appointment of a successor, the Senate retains a large measure of influence over this removal power and will tolerate its exercise for good reason only.

The President may well have illimitable constitutional power to remove an FBI Director, as that office is presently constituted by law. *Myers v. United States*, 272 U.S. 52 (1926). The Supreme Court has upheld the authority of Congress to limit the President's removal power in the case of "quasi-legislative or quasi-judicial agencies" like the Federal Trade Commission.

Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers. * * *

Humphrey v. United States, 295 U.S. 602, 631-632 (1935). That the Director of the FBI is within the class of officials subject to the President's illimitable power of removal is highly likely. The Federal Bureau of Investigation is the investigative arm of the Department of Justice—a Department which is "an executive department of the United States." See section 533, title 28, United States Code.

No compelling case has yet been made for the FBI to be made independent of the Justice Department or for its policies to be removed from the supervision of the Attorney General. Director Kelley stated at the hearing on this bill:

Since the FBI is, and I feel should remain, part of the Department of Justice, the Director should be answerable to and take direction from the Attorney General of the United States." [Hearing, p. 3.]

If the President and his Attorney General find that the FBI Director has demonstrated over a substantial period of time significant disagreement and inability to cooperate with the law enforcement policies of the Executive Branch, they would be justified in seeking a replacement. The President and the Attorney General would be expected to justify the mid-term removal of an FBI Director on such grounds, and not merely for the reason that a new President desires his "own man" in the position. The FBI belongs in the Justice Department under the Attorney General, as long as the Director has sufficient practical autonomy based on the kind of congressional support represented by this bill. As Director Kelley stated:

I would not object to legislation setting a definite term since it might contribute toward countering the impression that an appointment of any Director was for political purposes. I also feel that the position of Director should not necessarily change hands with each administration which will give the incumbent a greater sense of independence. [Hearing, p. 4.]

APPLICATION TO THE INCUMBENT

There seems little doubt that making the bill applicable to the incumbent is constitutionally valid. Notwithstanding that the Congress on occasion has exempted incumbent officials from fundamental changes affecting their offices in some regard, such grace is not required in the case of statutorily created positions. Although this precise issue has not been raised in reported Federal adjudication, state cases on point are fairly common.

One of the most recent expositions of the general rule was by the Court of Appeals of New York in *Lanza v. Wagner*, 229 N.Y.S. 2d 380, 11 N.Y. 2d 317, 183 N.E. 670 (1962). Judge Fuld, writing for the majority, stated as follows regarding the legislative's power to shorten the term of offices created by statute:

The office held by each of the plaintiffs was concededly created by the Legislature, not by the Constitution, and there is no constitutional inhibition against the mere shortening of the term of an existing statutory office by legislation aimed at the office rather than at its incumbent. . . . Public offices are created for the benefit of the public, and not granted for the benefit of the incumbent, and the office holder has no contractual, vested or property right in office. Absent any express constitutional limitation, the Legislature has full and unquestionable power to abolish an office of its creation or to modify its term, or other incidents attending it, in the public interest, even though the effect may be to curtail an incumbent's unexpired term . . . 183 N.F. 2d, at 683.

The court subsequently considered the bill of attainder and related arguments and disposed of them as follows:

We may be equally brief in dealing with the plaintiffs' attack on the statute as a bill of attainder. Such a bill has been defined as a legislature act which applies either to named or easily identifiable individuals in such a way as to inflict

punishment or impose penalties upon them without a judicial trial. . . . Stated even more succinctly; punishment is a prerequisite: There is not the slightest warrant in the present case for the charge that either the purpose or the effect of the statute was to punish or impeach the plaintiffs or any other incumbent member of the former board or to render them ineligible for consideration as potential appointees to the new board. . . . *Id.*, at 674.

We feel that the aforementioned conclusions apply in the case under consideration. In addition to the matters examined by the court in *Lanza*, the sole remaining objection to making S. 2106 applicable to the present Director is that such action interferes with the President's power of removal. Such an objection does not present a substantial difficulty since the fixing of a specified term, without more, does not limit the power of the President to remove before the expiration of the term. *Parson v. United States*, 167 U.S. 324 (1897).

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill as reported, are shown as follows (new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

TITLE 28. UNITED STATES CODE

CHAPTER 33. FEDERAL BUREAU OF INVESTIGATION

* * * * *

§ 532. Director of the Federal Bureau of Investigation

(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).

(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 be reappointed in accordance with subsection (a) of this section for only one additional term.*

RECOMMENDATION

The Committee believes that S. 2106 is meritorious and recommends that the bill do pass.

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