



U.S. Department of Justice

Office of Legal Counsel

Office of the
Assistant Attorney General

Washington, D.C. 20530

January 26, 1993

MEMORANDUM FOR STUART M. GERSON
Acting Attorney General

Re: Removal of the Director of the
Federal Bureau of Investigation

You have asked whether the Director of the Federal Bureau of Investigation (FBI) may be removed from office before the expiration of his 10-year term. We conclude that the statute providing a fixed term of office for the Director does not preclude the President from removing the Director at his pleasure before the expiration of that term.

The Director of the FBI is appointed by the President with the advice and consent of the Senate. Pub. L. No. 90-351 § 1101, 82 Stat. 197, 236 (1968) (superseding 28 U.S.C. § 532), as amended, reprinted in 28 U.S.C. § 532 note. The statute provides that "the term of service of the Director of the [FBI] shall be ten years." Pub. L. No. 94-503 § 203, 90 Stat. 2407, 2427 (1976), reprinted in 28 U.S.C. § 532 note. The current Director of the FBI was appointed in 1987.

Under the statute providing for his appointment, the Director is removable at the pleasure of the President. Although the statute does not expressly provide for removal, the long-established rule is that "[i]n the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment." Keim v. United States, 177 U.S. 290, 293-94 (1900) (citing Ex parte Hennen, 38 U.S. (13 Pet.) 230, 259 (1839); Parsons v. United States, 167 U.S. 324 (1897)); see also Myers v. United States, 272 U.S. 52 (1926); Sampson v. Murray, 415 U.S. 61, 70 n.17 (1974); 6 Op. O.L.C. 180, 188 (1982); 7 Op. O.L.C. 121, 127-28 & n.7 (1983) (preliminary print). A narrow exception to this rule may exist for officials who act in a quasi-legislative or quasi-judicial capacity. See Weiner v. United States, 357 U.S. 349, 353 (1958); 5 Op. O.L.C. 337, 342 (1981). But see Morrison v. Olson, 487 U.S. 654, 689-90 (1988) (rejecting analysis based on distinct categories of "executive," "quasi-legislative" and "quasi-judicial" officials in favor of determining whether Congress "interfere[s] with the President's

exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."). Whether that exception remains valid after Morrison, however, the Director of the FBI is not a quasi-legislative or quasi-judicial officer, but rather performs what Weiner would characterize as "purely executive" functions.

Thus, absent a specific provision to the contrary, the President as the appointing official may remove the Director for any reason or for no reason at all. The mere specification of a term of office is not such a specific provision limiting the power of removal. See Parsons, 167 U.S. at 342 (construing a specified term as a limitation on tenure rather than a grant of it). Similar provisions specifying terms of office apply to U.S. Attorneys and Marshals. See 28 U.S.C. §§ 541, 561. In both instances, the terms have been construed to place a maximum term of service without reappointment, rather than to restrict the President's power to remove the officer at will. See Chabal v. Reagan, 841 F.2d 1216 (3d Cir. 1988) (U.S. Marshals); In re Sealed Case, 838 F.2d 476, 528 n.30 (D.C. Cir.) (U.S. Attorneys), rev'd on other grounds sub. nom. Morrison v. Olson, 487 U.S. 654 (1988). Nor does the requirement that the Senate advise and consent to the appointment limit the President's removal authority. See Myers, 272 U.S. at 119-25.

Moreover, the legislative history could not be clearer on the President's removal authority. Upon introducing the 10-year term limit on the floor of the Senate, Senator Robert C. Byrd, Jr., stated that the Director's specific term of office was not meant to limit the President's removal power:

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. The Director would be subject to dismissal by the President, as are all purely executive officers.

122 Cong. Rec. 23809 (1976) (emphasis added). Senator Byrd also entered into the record a hearing on a previous proposal to establish a 10-year term for the Director, where he observed:

This bill's primary goal is not to guarantee a 10-year job for the Director of the FBI. The FBI 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.

This bill does not change that.

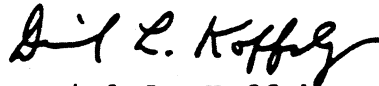
Id. at 23811 (emphases added). The provision was instead intended to operate as a "practical" impediment to politically motivated removals. Id. at 23809, 23811. No other member of the

Senate disagreed with Senator Byrd's explanation, see id. at 23818, nor was the 10-year term subject to debate in the House. Therefore, although the 10-year term may be designed to create a political expectation of continued service, it gives no legal protection to the Director's tenure.¹

Because we reach this conclusion as a statutory matter, we need not address the serious constitutional issues that might arise if Congress attempted to restrict the President's removal authority. See Morrison, 487 U.S. at 691 (Congress may not impose restrictions that "impede the President's ability to perform his constitutional duty" to take care that the laws are faithfully executed); Humphrey's Executor v. United States, 295 U.S. 602, 631 (1935) ("Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition that power by fixing a definite term and precluding removal except for cause, will depend upon the character of the office.").

¹ The statute governing the Director's appointment also incorporates by reference parts of a statute relating to mandatory retirement at age 70. See 28 U.S.C. § 532 note. The requirements contained in the provisions referred to, as in effect at the time the statute was enacted, see 5 U.S.C. § 8335(a) - (c) (1976), included that the employee receive notice 60 days before his mandatory separation, id. § 8335(b). Those provisions were later struck from the U.S. Code. See Pub. L. No. 95-256 § 5(c), 92 Stat. 189, 191 (1978). Assuming that those provisions nevertheless still apply to the Director, see Curtis Ambulance of Fla., Inc. v. Board of County Comm'rs of Shawnee, Ks., 811 F.2d 1371, 1378-79 (10th Cir. 1987) (generally, a "statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, [and] repeal of the statute referred to will have no effect on the reference statute"); H.R. Conf. Rep. No. 950, 95th Cong., 2d Sess. 10-11, reprinted in 1978 U.S.C.C.A.N. 528, 532 (concerning the repeal of the sections: "[the bill] eliminat[es] the upper age limitation for most civilian Federal employees, but does not affect certain Federal employees whose retirement is required or otherwise authorized by statute."), we do not believe that the Director must have 60-day notice in the event that the President elects to remove him, because the statute does not purport to impose the notice requirement on any separations other than those on account of age pursuant to section 8335. This conclusion is consistent with the legislative history, which indicates that the President may remove the Director "at any time." 122 Cong. Rec. 23811 (1976).

We conclude that under well accepted principles applicable to the President's removal power, confirmed by the legislative history of the applicable statute, the Director's 10-year term is merely a maximum term of service. The Director therefore serves at the pleasure of the President during that time.



Daniel L. Koffsky
Acting Assistant Attorney General
Office of Legal Counsel