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To: Interested Persons

From: Laura W. Murphy, Director, American Civil Liberties Union Washington Legislative Office
Michael German, Policy Counsel, ACLU WLO

Re: The 10-year Term Limit for FBI Directors

Date: June 7, 2011

The ACLU believes that there are four primary reasons why Congress should refuse to extend the FBI Director's term by statute.

- I. Extending the term signals endorsement for the erosion of checks and balances on the intelligence gathering authorities of the FBI**
- II. Extending the term would set a poor precedent, and give short shrift to the very reasons that term limits were established in the first place.**
- III. The excessive secrecy within which the FBI exercises its authorities masks abuse and makes effective congressional oversight virtually impossible.**
- IV. The Constitution gives Congress the power to set term limits for the Director of the FBI.**

I. Extending the term signals endorsement for the erosion of checks and balances on the intelligence gathering authorities of the FBI.

Today's FBI wields investigative powers greater than at any time since J. Edgar Hoover's term in office, and due to advances in technology, the amount of detailed personal information the FBI can collect is exponentially greater. Post-Church Committee reforms designed to limit the FBI's authority and reduce its potential for abuse have been systematically removed or reduced. The Attorney General's Guidelines, first established in 1976, were amended in 2002 and again in 2008, to remove the requirement of a factual predicate raising a suspicion of wrongdoing before a person may be subjected to the FBI's intense glare.¹ The USA Patriot Act amended a myriad of statutes, such as

¹ See, Marvin J. Johnson, *Analysis of Changes to Attorney General Guidelines*, ACLU Interested Persons Memo, (Jun. 6, 2002), at: <http://www.aclu.org/national-security/interested-persons-memo-analysis-changes-attorney-general-guidelines>;

the Foreign Intelligence Surveillance Act, the Electronic Communications Privacy Act and the Right to Financial Privacy Act, to allow investigative tools once used only against hostile foreign agents to be used against Americans not suspected of any wrongdoing.²

These are only a few of the changes that have allowed the FBI to intentionally transform itself into a domestic intelligence agency with international scope, the likes of which this country has never seen. Not surprisingly, there is significant evidence the FBI has abused these powers. The FBI's targets are too often racial and religious minorities,³ civil rights organizations,⁴ political advocacy groups,⁵ immigrants,⁶ and political candidates. The longer one person holds the sole managerial role over an agency with such powers, the more difficult it becomes for that person to remain objective, and for overseers to retain effective control.

II. Extending the term would set a poor precedent, and give short shrift to the very reasons that term limits were established in the first place.

Director Robert Mueller is the first post-Hoover FBI Director to serve a full ten-year term. Extending the term of the Director by statute signals Congress's unwillingness to acknowledge important FBI history. The nation was tarnished by the failure to impose checks and balances on the concentration of power accumulated by the FBI under Hoover.

When Attorney General Harlan Fiske Stone appointed J. Edgar Hoover acting director of the Justice Department's Bureau of Investigation in 1924, it was a fledgling agency with less than 500 Special Agents who lacked arrest powers, did not carry guns and had few federal criminal statutes to enforce.⁷ Hoover would remain at the helm for the next 48 years as the Bureau of Investigation, renamed the Federal Bureau of Investigation in 1935, developed into the most powerful and sophisticated law enforcement and domestic intelligence agency in the United States.

Over the decades, Hoover used the FBI's robust investigative authorities to secretly amass dossiers on Americans not suspected of any crimes, based primarily on their political beliefs, activities and associations. The Senate Select Committee that investigated the FBI's intelligence abuses after Hoover's death (the Church Committee) found the covert nature of these illegal efforts to suppress political dissent were particularly nefarious because it left the targets of this abuse with no protection

and, *FACT SHEET: New Attorney General Guidelines*, ACLU Website, (Oct. 8, 2008), at: <http://www.aclu.org/national-security/fact-sheet-new-attorney-general-guidelines>

² See, *Reclaiming Patriotism: A Call to Reconsider the Patriot Act*, ACLU Report, (Mar. 2009), at: <http://www.aclu.org/national-security/fact-sheet-new-attorney-general-guidelines>

³ See, *ACLU Sues For Records About FBI Collection of Racial and Ethnic Data in New Jersey*, ACLU Press Release, (May 4, 2011), at: <http://www.aclu.org/national-security/aclu-sues-records-about-fbi-collection-racial-and-ethnic-data-new-jersey>

⁴ See, *Joseph Abrams, FBI Cuts Ties With CAIR Following Terror Financing Trial*, Fox News, (Jan. 30, 2009), at: <http://www.foxnews.com/politics/2009/01/30/fbi-cuts-ties-cair-following-terror-financing-trial/>

⁵ See Dep't. Of Justice, Office Of Inspector General, *A Review Of The FBI's Investigation Of Certain Domestic Advocacy Groups*, (Sept. 2010), at: <http://www.justice.gov/oig/special/s1009r.pdf>

⁶ See, Eric Lichtblau, *U.S. Report Faults the Roundup of Illegal Immigrants After 9/11*, New York Times, (Jun. 3, 2003), at: <http://www.nytimes.com/2003/06/03/us/threats-responses-government-report-us-report-faults-roundup-illegal-immigrants.html>

⁷ The position was made official later that year with an appointment by President Calvin Coolidge.

in the law. FBI headquarters opened over 500,000 domestic intelligence files between 1960 and 1974, and created a list of 26,000 individuals who would be “rounded up” in the event of a national emergency.⁸

Though never elected to public office, the power Hoover accumulated as head of the FBI over these decades overwhelmed his superiors at the Department of Justice and intimidated his overseers in Congress. Former Attorney General Nicholas Katzenbach admitted in Church Committee testimony that though he had the nominal power to fire Hoover, he was unwilling to use it. Katzenbach attributed his reticence to exert his authority to Hoover’s public popularity, the “clout” he had with Congress and with the presidents he served, as well as the FBI’s reputation for integrity. But his statement made clear that fear was a factor as well:

Anyone contemplating an investigation of Hoover’s Bureau would have had to face the strong likelihood that Mr. Hoover would have vigorously resisted. At least he would have asserted the investigation was unnecessary, unwise and politically motivated. At worst he would have denounced the investigation as undermining law and order and inspired by Communist ideology. No one risked that confrontation in his lifetime.⁹

Katzenbach also noted a practical problem preventing investigation of Hoover’s abuses, given the loyalty he demanded within the FBI workforce:

...to the extent proof of any such impropriety existed, it would have almost by definition been within the FBI’s possession and control – unreachable except with Bureau cooperation. This committee has heard testimony that the Director ordered that certain files were not to be released outside the Bureau, and that certain others were kept personally by Mr. Hoover and were destroyed upon his death.¹⁰

The reason Congress chose to limit the tenure of the FBI director was borne from this experience, when an unelected government official with access to the most powerful investigative tools a domestic intelligence agency could muster became so formidable that presidents and members of Congress feared to cross him. By setting a ten-year term for future FBI directors, Congress sought to protect both the FBI from undue political influence, and our democratic institutions from having an unelected official to hold such power to examine the lives of Americans, including elected overseers of the FBI, for too long.¹¹

III. The excessive secrecy within which the FBI exercises its authorities masks abuse and makes effective congressional oversight virtually impossible.

⁸ *Id.*, at 6-7.

⁹ Testimony of Nicholas deB. Katzenbach, HEARINGS BEFORE THE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, U.S. SENATE, 94TH CONG., VOL. 6, FEDERAL BUREAU OF INVESTIGATION, at 201 (Dec. 3, 1975).

¹⁰ *Id.*

¹¹ *See*, Pub. L. 94–503 (1976): “A Director may not serve more than one 10-year term.”

Today's FBI successfully resists outside investigations of its activities,¹² misleads Congressional overseers¹³ and thwarts Inspector General inquiries.¹⁴ During the recent Patriot Act reauthorization debate, Intelligence Committee member Senator Ron Wyden (D-OR) warned that the FBI was using secret interpretations of the law to expand the scope of its collection authorities, and he warned that: "When the American people find out how their government has secretly interpreted the Patriot Act, they will be stunned and they will be angry."¹⁵ Without effective internal, congressional and public oversight, continuing abuse should be expected, and the responsible officials within the agency have little incentive to root it out. Appointing new leadership to examine FBI activities will provide the opportunity for reassessment and reform.

IV. The Constitution gives Congress the power to set term limits for the Director of the FBI.

¹² See, Letter from Gene L. Dodaro, Acting Comptroller General, to Senators Charles E. Grassley and Richard C. Shelby, (Jun. 15, 2010), at: <http://www.fas.org/sgp/gao/access.pdf>

¹³ In 2005, when Congress was debating whether to extend expiring provisions of the Patriot Act, Attorney General Alberto Gonzales and FBI Director Robert Mueller testified that there had been no "substantiated" allegations of abuse of Patriot Act authorities (See, Statements of Alberto R. Gonzales, Attorney General of the United States and Robert S. Mueller, III, Director, Federal Bureau of Investigation *USA PATRIOT Act of 2001: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. 97, 100 (2005)). Later audits by the Department of Justice Inspector General revealed thousands of violations of law and policy (See, Dep't. Of Justice, Office Of Inspector General, *A Review Of The Federal Bureau Of Investigation's Use Of National Security Letters* (Mar. 2007), at <http://www.usdoj.gov/oig/special/s0703b/final.pdf>). The audits also revealed that between 2003 and 2005 the FBI had self-reported 19 possible legal violations regarding its use of National Security Letters to the President's Intelligence Oversight Board. The *Washington Post* reported that Attorney General Gonzales received at least six reports detailing FBI intelligence violations, including misuse of NSLs, during the three months prior to his Senate testimony (See, John Solomon, "In Intelligence World, A Mute Watchdog," *Washington Post* (Jul. 15, 2007), at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/14/AR2007071400862.html>).

¹⁴ In 2006, an ACLU Freedom of Information Act request exposed inappropriate FBI spying on political activists, including surveillance of a peaceful anti-war protest by the Thomas Merton Center for Peace and Justice in Pittsburgh, Pennsylvania (See, ACLU Releases First Concrete Evidence of FBI Spying Based Solely on Groups' Anti-War Views, ACLU Press Release, (Mar. 14, 2006), at: <http://www.aclu.org/national-security/aclu-releases-first-concrete-evidence-fbi-spying-based-solely-groups%E2%80%99-anti-war-vie>). To deflect criticism, FBI officials concocted a false story claiming the surveillance was related to a separate, validly-approved terrorism investigation (See Dep't. Of Justice, Office Of Inspector General, *A Review Of The FBI's Investigation Of Certain Domestic Advocacy Groups*, p. 35 - 59 (Sept. 2010), available at: <http://www.justice.gov/oig/special/s1009r.pdf>). The FBI presented this false story to the public in press releases and to Congress through testimony by FBI Director Robert Mueller. When Senator Patrick Leahy requested documentation supporting the FBI's claims, the first false story fell apart and FBI officials developed a second false story which was sent to Sen. Leahy in statements for the record. When the IG investigated the matter, the FBI refused to provide internal e-mails that may have identified who in the FBI concocted the false stories (Id., footnote 79, p. 53).

¹⁵ Charlie Savage, "Senators Say Patriot Act is Being Misinterpreted," *New York Times*, (May 26, 2011), at: <http://www.nytimes.com/2011/05/27/us/27patriot.html>. Also, in 2010, the Obama DOJ issued a secret OLC opinion that re-interpreted the Electronic Communications Privacy Act (ECPA) to allow the FBI to ask telecommunications companies to provide them with certain telephone records on a voluntary basis, even where there is no legal process or emergency situation (See Dep't. Of Justice, Office Of Inspector General, *A Review Of The Federal Bureau Of Investigation's Use Of Exigent Letters And Other Informal Requests for Telephone Records*, p. 264, (Jan. 2010), available at: <http://www.justice.gov/oig/special/s1001r.pdf>). Ironically, the FBI sought the OLC opinion after the DOJ Inspector General criticized the FBI for using "exigent letters" and other informal requests to illegally obtain communications records in violation of ECPA. The IG report said, "we believe the FBI's potential use of [REDACTED] to obtain records has significant policy implications that need to be considered by the FBI, the Department, and the Congress" (Id., at 265). Unfortunately, DOJ has not released the OLC opinion, so the public has no way of understanding how the government can obtain their telephone records without legal process.

James Madison described the Constitution's appointment power as a shared legislative and executive authority, designed to limit the power of both branches:

The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an Executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it. We ought always to consider the Constitution with an eye to the principles upon which it was founded. In this point of view, we shall readily conclude that if the Legislature determines the powers, the honors, and emoluments of an office, we should be insecure if they were to designate the officer also. The nature of things restrains and confines the Legislative and Executive authorities in this respect; and hence it is that the Constitution stipulates for the independence of each branch of the Government.¹⁶

And indeed, Congress has been enacting statutory qualifications for executive officers since the First Congress, and the Supreme Court has deemed this practice constitutional.¹⁷

Conclusion

The ten-year term limit for FBI directors is a reasonable limitation on the accumulation of power within an agency that is given remarkably intrusive tools to peer into the lives of ordinary Americans. Unfortunately, Congress has consistently given the FBI the authority to employ these tools without adequate public accountability. That is why the Congress should carefully consider President Obama's request. The ten-year term is one of the few means Congress has to prevent passive unchecked expansion of power of the nation's most important domestic intelligence gathering agency. The ten-year term limit is a modest safeguard for our democracy so that the FBI is not corrupted by the breathtaking power it wields.

Current FBI Director Robert Mueller took office just days before the terrorist attacks of September 11, 2001, and his term is set to expire in September 2011. President Obama has requested that Congress extend his term for two additional years. Congress should thank Director Mueller for his service under extraordinary challenges, but politely decline the President's request to extend his term.

¹⁶ 1 ANNALS OF CONGRESS 581-82 (Joseph Gales ed., 1834).

¹⁷ See, Judiciary Act of 1789, 1 Cong. Ch. 20, § 35, 1 Stat. 73, 93 (1789); *Myers v. United States*, 272 U.S. 52, (1926); *Bowsher v. Synar*, 478 U.S. 714, (1986).