timely vote, and limit opportunities for possible coercion by both employers and unions.

America's middle class is struggling. Hard-working families are finding it hard to make ends meet. We are recovering from the deepest recession since the Great Depression, and there are workers who are trying to achieve for their families what we all want: financial stability that keeps our families secure. However, as workers see their benefits, hours, and pay being cut, they feel powerless. Meanwhile, executives can and do negotiate their employment contracts. Where is the fairness?

Unions can level the playing field for workers, but the process for choosing a union is outdated. Current NRLB election procedures produce extensive delays, encourage litigious stall tactics, and provide opportunities for intimidation. Further, the organizational structure of the NLRB has created inconsistencies in the processing of the election petitions. It is time for the NLRB to address these important procedural shortcomings, and I am encouraged by their response.

The new rules do not advantage nor do they disadvantage unions. The rules merely create a uniform process for resolving pre- and post-election disputes. Both sides are given the opportunity to present arguments to allow a fair and well-informed vote. It is also important to note that these streamlining rules apply equally to both elections seeking to certify a union and elections seeking to decertify a union.

Workers deserve the right to choose a union or not to choose a union with a fair, timely, and well-informed up-or-down vote. The right to vote is central to our democracy, and we must continue to ensure that American workers are afforded this right without impediment or fear. Thus, I applaud the NLRB for their actions.

MINORITY VIEWS—S. 1103

Mr. COBURN. Mr. President, because our minority views were not included in the Senate Judiciary Committee's report on S. 1103, I ask unanimous consent to have them printed in the RECORD. We hope these views will be of use to Members of the Senate if this legislation is considered on the Senate floor.

There being no objection, the material was ordered to be printed in the RECORD, as follows.

MINORITY VIEWS OF SENATORS HATCH, SESSIONS, GRAHAM, LEE, AND COBURN

We fully support the President's request to extend FBI Director Mueller's time in office by two years, followed by a return to the previous practice of one ten-year term for each subsequent FBI Director. We also are committed to implementing this extension before Director Mueller's current ten-year term expires in August. The Senate must, however, pursue this extension in a constitutional manner.

1. CONSTITUTIONAL CONCERNS

Senators Hatch, Cornyn, Graham, Lee, and Coburn have proposed a method of extending FBI Director Mueller's time in office in a way that is universally agreed to be constitutionally unimpeachable. In contrast, a prominent legal scholar has called into question the constitutionality of the method of appointment that S. 1103 proposes. Setting aside the question of our duty to ensure the constitutionality of all legislation approved by our chamber of Congress, the practical consequences of a court declaring void Director Mueller's extension could have widespread ramifications. Any litigation challenging the constitutionality of S. 1103 would call into question the authority of the head of one of America's most important domestic counterterrorism and law enforcement agencies. Potential litigants could be numerous given the substantial number of suspects seeking to avoid criminal liability and those seeking to undermine our terrorism investigations and national security apparatus. For example, at the hearing, James Madison Distinguished Professor of Law at the University of Virginia School of Law John Harrison was asked about potential legal challenges to the validity of Section 215 orders for sensitive business records. Pursuant to the 2005 extension to the Patriot Act, these Section 215 orders must be authorized by one of three top government officials or their deputies. Professor Harrison testified that 215 orders were a good example of the potential problem that could result from challenges to Director Mueller's extension because a judge might find that orders signed by him were unauthorized.

Since at least one prominent legal scholar has testified that S. 1103 would unconstitutionally appoint Director Mueller to a new term, it is easy to imagine at least a few of our 677 Federal District Court judges coming to the same conclusion. In fact, even Senators Schumer and Whitehouse agreed this legislation is of questionable constitutionality. Senator Whitehouse said, ''with respect to the Appointments Clause, we are in a constitutionally gray area,'' and he said he could see the judicial decision ''going either way.'' Senator Whitehouse continued that if he ''were a clerk for a judge and was asked to'' he could ''write it going both ways.'' Senator Schumer agreed stating it is a ''fuzzy issue'' and ''there are merits on either side'' and ''it is a close question.''

Even assuming that such a ruling were overturned on appeal, during the intervening period, FBI operations could be stagnated as all official acts of the FBI Director since his extension began would be of questionable validity. This scenario could lead to a failure to gather critical intelligence or to the release of dangerous criminal and terrorism suspects.

The Majority argues that constitutional concerns are nonexistent because only one witness at the June 8, 2011 hearing raised constitutional concerns about S. 1103; however, the Minority would point out that due to longstanding committee practice, the minority is allocated a limited number of witnesses. In this case, the ratio on the panel was three to one. Our one witnesses testified as to concerns and these concerns are likely shared by other legal scholars who were not invited to testify. Notwithstanding, even if there is only a small chance that a judge might find S. 1103 unconstitutional, we believe that the Senate has a duty to avoid that contingency, which carries with it potentially severe consequences.

Fortunately, we have an ironclad alternative that would accomplish the same goals as S. 1103 in the form of the amendment Senator Coburn offered to S. 1103. We believe the supporters of S. 1103 have the burden of proof to show why we should not follow the undisputedly constitutional course, even if they believe there is only a small chance of a judge declaring an action taken by Director Mueller to be unauthorized. Given the opinions of Professor Harrison and other eminent scholars in addition to the lack of a U.S. Supreme Court decision directly on point, they cannot credibly claim there is no realistic chance at all. Indeed, at the Committee's June 16, 2011 business meeting, Senator Whitehouse stated that ''with respect to the Appointments Clause, we are in a constitutionally gray area'' and that he could see a judge ''going either way.'' Senator Schumer said this was a ''fuzzy issue,'' ''there are merits on either side,'' and ''it is a close question.'' Senator Coburn's simple alternative removes the gray fuzz, thus preserving our national security and law enforcement infrastructure from potential confusion.

2. S. 1103 VIOLATES THE APPOINTMENTS CLAUSE OF THE CONSTITUTION

The Appointments Clause's four methods

The Appointments Clause of the Constitution requires all Executive Branch appointments to be made by the President with the Advice and Consent of the Senate with only three exceptions: ''[T]he Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.'' Congressional appointments are not among the exceptions, and the majority report properly points out that Congress cannot make appointments of Executive Branch officials and that the FBI Director is an Executive Branch official. The question, then, is whether or not S. 1103 would allow Congress to extend the FBI Director's statutory ten year term for two additional years.

Professor Harrison testified that, ''An appointment is a legal act that causes someone to hold an office that otherwise would be vacant or held by someone else. . . . A statutory extension of the term of an incumbent causes the current incumbent to hold an office that otherwise would be vacant upon the expiration of the incumbent's term. It is thus a statutory appointment. . . . It is just like a statute that provides that a named person is hereby appointed to a specified office.'' We believe Professor Harrison's interpretation has merit and thus conclude that extending Director Mueller's term and causing him to hold an office that otherwise would be vacant on August 4, 2011, could violate the Appointments Clause.

The law currently requires Director Mueller to step down after his ten-year term ends and forbids his reappointment by the President. Thus, it could be argued that S. 1103 reappoints Director Mueller to a new two-year term by legislative decree in violation of the Appointments Clause. The Supreme Court has recognized that Congress cannot make Executive appointments, even if the President signs the law making those appointments. It is irrelevant that the President and almost all members of Congress wish Director Mueller to continue in office. Constitutional formalities must be followed. For example, if all members of both houses of Congress sent a letter to the President saying they thereby willed a certain bill to become law, and the President sent a letter in return saying that he too willed the bill to become law through his letter, it would not become law, and no court would treat it as law. We have a written Constitution for this very reason and Congress and the president must comply with its specific procedures. The Constitution requires that both houses vote on a bill and present it to the President for his signature before it can become law. The majority's emphasis on the President's desire that the FBI Director continue in office is immaterial. The President's only constitutional method of placing someone in office is by appointment.

3. THE CASELAW

The caselaw on statutory extensions of Executive officials' terms is unclear, making a clearly constitutional bill from Congress all the more imperative. The best the majority report could produce is In re Benny, a Ninth Circuit Court of Appeals case. In re Benny suffers from three flaws: it is binding in only one circuit, the circuit most often overturned by the Supreme Court; it came down before the Supreme Court's Morrison v. Olson decision on the subject of appointments and thus did not integrate the reasoning of that decision into its own; and as the majority admits, one of the concurring opinions in In re Benny does not support S. 1103's constitutionality. Judge Norris' opinion in In re Benny flatly states, ''My principal disagreement with the majority's position is that I believe the Appointments Clause precludes Congress from extending the terms of incumbent officeholders. I am simply unable to see any principled distinction between congressional extensions of the terms of incumbents and more traditional forms of congressional appointments.''

The disagreement even among the concurring judges in the Committee majority's list of supporting caselaw demonstrates the likelihood of litigation and the possibility of negative decisions in this ''gray'' and ''fuzzy'' area of law.

Further, In re Benny misinterpreted Supreme Court caselaw. As Professor Harrison points out, that case relied on Wiener v. United States, which merely allowed legislation restricting the President's ability to remove quasi-judicial officers to stand. Professor Harrison also notes legislation extending the life of an agency or commission is not the same as extending the term of an appointee because it does ''not extend the term of an officer who otherwise would have been replaced by a new appointee.''

Morrison is similarly gray and fuzzy. That case demonstrates the U.S. Supreme Court takes very seriously challenges to federal officials' authority based on the Appointments Clause and the Court is willing to contemplate voiding the actions of an official whose appointment violates the clause. In Morrison, the Court undertakes an extensive analysis of what authority the appointed official has, how that authority could interfere with presidential duties and prerogatives if that official was not appointed by the President or by someone under the President's control, and who appoints the official and from what section of the Constitution the appointing persons derive their authority to appoint. Rather than relying on bright-line rules, the Court weighs and examines many aspects of the Act involved and its practical effects in order to come to many of its conclusions. The Morrison Court upheld the constitutionality of having courts of law appoint independent counsels, but simple formulae are not employed to construct this decision, which is a distinct encouragement to future litigation since attorneys have many pathways to plausibly arguing unconstitutionality.

Justice Scalia in his dissent went so far as to assert that the Court had laid down no real guidance at all, and that decisions about the constitutionality of appointments would from now on be made ad hoc by the Court, certainly an invitation to future litigation:

Having abandoned as the basis for our decision-making the text of Article II that ''the executive Power'' must be vested in the President, the Court does not even attempt to craft a substitute criterion—a ''justiciable standard''. . . . Evidently, the governing standard is to be what might be called the unfettered wisdom of a majority of this Court, revealed to an obedient people on a case-by-case basis. This is not only not the government of laws that the Constitution established; it is not a government of laws at all.

The Morrison Court did not uphold congressional appointments as constitutional, which of course they are not, because it did not address that question. Moreover, a reasonable argument could be made that the Court would have considered the appointment of the FBI Director under S. 1103 to be unconstitutional under its analysis. The Court held that if the official in question had been a ''principal'' or ''superior'' officer instead of an ''inferior'' officer, ''then the Act [would be] in violation of the Appointments Clause.'' It is hard to imagine a court classifying the Director of the FBI as an ''inferior'' officer under the Appointments Clause rather than a ''superior'' one given the appointment process since 1968.

As further evidence of the Court's willingness to challenge the actions of those whose appointments are of questionable constitutionality, in Ryder v. United States the Court reversed the lower courts and threw out the conviction of a member of the Coast Guard because two of his judges were appointed contrary to the requirements of the Appointments Clause. The Court had also invalidated most of the powers of the members of the Federal Election Commission, as created by the Federal Election Campaign Act, because they were not appointed in conformity with the Appointments Clause.

4. DEPARTMENT OF JUSTICE OPINIONS

Given the lack of precedential caselaw and the novelty of the issues presented in S. 1103, the series of DOJ legal opinions that the majority cites in favor of S. 1103's constitutionality cannot be held to be determinative. Further, these opinions are inconsistent. As the CRS report on which the Majority relies says, ''In 1994, the OLC [Office of Legal Counsel] addressed the second five-year extension of the parole commissioners' tenure and explicitly disavowed an earlier 1987 opinion, which viewed the first extension of the Parole [sic] commissioners' terms of office as unconstitutional, finding it in contradiction with its 1951 opinion.'' Hence, the OLC endorsed the constitutionality of extensions, then repudiated it, then endorsed it again.

Regardless of OLC opinions, very few cases have been litigated concerning legislative extensions of officials' tenures. Unlike the appointees whose terms were extended by legislation cited by the majority, the FBI Director is a ''principal'' or ''superior'' officer, which may cause the courts to view his case differently, and we still have not heard anything definitive from the Supreme Court on this question.

5. THE RATIONALE

The jealous guarding of the President's power to appoint is crucial to preserving the separation of powers and promoting good government. As Alexander Hamilton wrote in Federalist No. 76,

The sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation. He will on this account feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them.

The President has an absolute veto over Executive Branch nominations because he initiates them, which also means he must take responsibility for them. Eliminating the formalities of the confirmation process which require a nomination by the president undermines that connection between president and nominee the assignment of political responsibility.

6. THE SOLUTION

We see a simple resolution to our disagreement that accomplishes the goals shared by the Majority, the President, and almost all members of Congress, including ourselves. The amendment cosponsored by five members of the Judiciary Committee would create a new two-year term to begin on or after the day that Director Mueller's current term expires. After this one-time two-year term concludes, the FBI directorship would return to the previous statutory ten-year term, and Director Mueller would not be eligible to serve beyond the new two-year term. The President may nominate Director Mueller to this two-year term or whomever else he chooses. We are committed to expediting Senate confirmation of Director Mueller's nomination and ensuring there is no gap in service at the top of the FBI. We are willing to waive a confirmation hearing for Director Mueller and also the Committee questionnaire. And, we will do what we can to ensure a speedy vote by the full Senate. To our knowledge, no one has raised any constitutional objections that could call into question Director Mueller's authority if our alternative is followed, and the experts we have consulted unanimously agree that there is no constitutional difficulty. As former Deputy Attorney General James Comey testified regarding the constitutionality of extending Mueller's tenure, ''If you can do it in a way that makes it bulletproof, especially against the kind of litigation that you've spoken of, that would be better.''

CONCLUSION

We do not assert that S. 1103 is clearly unconstitutional. We assert that its constitutionality has been called into question by respected experts and could expose Director Mueller's authority to dangerous litigation. We further assert that we have a duty to enact a constitutionally airtight alternative that would achieve the same goals.

ADDITIONAL STATEMENTS

RECOGNIZING THE PEKIN NOODLE PARLOR

• Mr. BAUCUS. Mr. President, today I wish to recognize a Butte institution. The Pekin Noodle Parlor has served generations of Montanans from all walks of life. My good friends, Danny and Sharon Tam, and their family have run the parlor for an astounding 100 years. For generations, the parlor has been a centerpiece of Chinatown and an evolving Butte community. The restaurant specializes in Chinese and American fare, and the lower level has housed a wide array of activities—from Chinese social organizations to herbal medicine. I also want to recognize the Butte-Silver Bow Public Archives for their unparalleled work collecting and preserving the treasured history of Butte-Silver Bow. In particular, their efforts to protect the cherished narrative of the Pekin Noodle Parlor will be recognized for years to come. I ask that their commemoration of the Pekin Noodle Parlor below be printed in the RECORD.

One hundred years ago, Hum Yow opened his Pekin Noodle Parlor on the second floor of the building at 115/117/119 South Main. The restaurant's offerings of local favorites, Yatcamein—wet