

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same as extending the term of an appointee because it does "not extend the term of an officer who otherwise would have been replaced by a new appointee."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, Yateamein—wet

noodles—and chop suey, were eaten by miners, the “after-theater” crowd, and prominent citizens alike. It always catered to non-Chinese clientele, many of whom in the early days were curious to get a glimpse of Chinatown. Over time, the noodle parlor came to incorporate a good complement of American food on its menu, while retaining its Chinese food specialties. Among the attractions were the narrow, beadboard booths which allowed semiprivate dining. A seating arrangement that is maintained to this day by Hum Yow’s nephew, Ding Tam, who is also known as Danny Wong.

While the restaurant business continued upstairs, items from previous establishments were stored below. This rare collection of artifacts, some dating as early as the 1910s, narrates the position of the Hum/Tam family in Butte and among Chinese communities in the western United States and China. Butte-Silver Bow Public Archives presents in the exhibit, *One Family-One Hundred Years*, a story of family commitment, rather than an emphasis on Chinese illegal drugs and prostitution. Displays provide insight into Chinese social organizations, gambling, herbal medicine, and the continuing Chinese influence in Butte, MT, by the Pekin Noodle Parlor.

The information follows:

A LOOK INSIDE THE EXHIBIT

The Tam family’s roots in Montana extend to the 1860s, almost 50 years before the opening of the Pekin Noodle Parlor. Although his name has been forgotten, the first family member to come to the U.S. delivered supplies to the Chinese camps and communities at various places in the American West. Butte was among those camps. By the late 1890s, his son came to Butte, where he and others ran a laundry on South Arizona Street for many years. The Quong Fong Laundry was a staple on Arizona well into the mid-1950s even after the Tam family member had returned to China.

The next generation of family immigrants gained considerable prominence in Chinatown and the community of Butte at large. Hum Yow and Tam Kwong Yee, close relatives from the same district near Canton, China, forged a successful alliance that spanned most of the first half of the twentieth century. After erecting a building at the east edge of Chinatown at 115/117/119 South Main, Hum Yow & Co. established a Chinese mercantile there, to at least the late 1910s. By 1914, a Sanborn map shows Hum Yow’s noodle parlor on the second floor, while Tam Kwong Yee managed a club room on the first floor facing onto China Alley.

The inhabitants of Butte’s Chinatown formed social clubs that were similar to other fraternal organizations of that time. The purpose of these organizations, according to their articles of incorporation, was to provide for “. . . mutual helpfulness, mental and moral improvement, mental recreation . . .” and so on. Artifacts from three known Chinese clubs were found in the basement of the Pekin. Along with the clubs’ signs, such items as membership rosters, instruments, maps and photos tell part of the story of these long-gone associations.

In the new country, where the Chinese population was predominantly single men who knew little English, gambling was not only a tradition that continued but also became a major form of recreation during social gath-

erings. As gambling drew in other ethnic groups to Chinatown, the gambling parlors eventually gained entrances on Main Street proper. On the face of the Pekin building, it was in the form of a “cigar store” called the London Company at 119 South Main. Hum’s Pekin Noodle Parlor and Tam’s London Company gambling hall were staples of Butte’s Chinatown until gambling was closed across Montana in 1952.

Unlike many of his countrymen in Butte, Hum Yow married while in the U.S. His wife, Sui (Bessie) Wong, was born and raised in San Francisco. Shortly after marrying in 1915, the Hums began their family, raising their three children in the Pekin building. Tam Kwong Yee, on the other hand, had left his wife and children behind in China but remained close to them, providing financially for both basic needs and advanced education.

As a model of his family values, Tam had been trained as an herbal doctor in China before emigrating to the U.S. It was many years, however, before he had the opportunity to practice his trade in Butte. There were several Chinese herbal doctors in Butte over the years. The most well-known of those from the early twentieth century was Huie Pock, who had his business in the next block of South Main from the Pekin. Several years after Huie’s death in 1927, Tam acquired his collection of Chinese herbs.

By 1942, Tam opened his business, “Joe Tom’s Herbs,” on the first floor of the Pekin Noodle Parlor building (at the 115 South Main address). The business name suggests that Tam specialized in dispensing herbs rather than diagnoses. His on-site advertising, however, promoted “free consultation” as well.

In 1947, Tam’s grandson, Ding Tam joined the older man in Butte. Just as thousands of Chinese immigrants before him, Ding came to the U.S. to make money to support his family back home. He quickly became known by the more Americanized name of Danny Wong, the last name taken from Bessie Wong’s family. Several years later he took over the Pekin Noodle Parlor while his grandfather continued working as a Chinese herbal doctor. Danny married Sharon Chu on August 9, 1963, and raised five children in Butte, passing down the Tam family’s appreciation for higher education, commitment to hard work, and business savvy.●

100TH ANNIVERSARY OF MARYLAND LEGAL AID

● Mr. CARDIN. Mr. President, today I wish to recognize the 100th anniversary of the Legal Aid Bureau in Baltimore, MD. Legal Aid was founded in 1911 in Baltimore to provide legal representation for the poor. In 1929, Baltimore attorneys H. Hamilton Hackney and John A. O’Shea took over leadership of Legal Aid. Mr. Hackney believed that justice should not be a matter of charity. He believed that people should be secure in the knowledge “that their poverty does not necessarily mean that they will be in a position of inequality before the law.” As a result of Hackney and O’Shea’s efforts, Legal Aid evolved from a charity organization to an independent, private, nonprofit corporation.

During the Great Depression, Legal Aid’s poverty practice mushroomed. By 1932, it was serving 3,200 clients a year. In 1941, the staff consisted of five lawyers. In 1949, the caseload had grown to 7,000 a year and Legal Aid helped its

100,000th client. In 1953, Baltimore City built its new People’s Court Building at Fallsway and Gay streets, with the third floor dedicated to Legal Aid’s use.

The 1960s were a period of change. In 1964, Congress passed the Economic Opportunities Act and launched the war on poverty, funneling funds for legal services to the Nation’s cities. In 1971, Legal Aid established three offices outside of Baltimore and later in the decade, across the State.

In 1974, one of President Nixon’s last acts in office was to sign into law the National Legal Services Corporation Act; the next year the Legal Services Corporation, LSC, was established, and legal services organizations across the country continued a rapid expansion. Starting in the late 1970s, Legal Aid began to champion the cause of migrant farm workers, sued the steel industry to eliminate practices that prevented women and minorities from getting higher paying jobs, and targeted the cause of mentally disabled people.

In the 1980s, President Reagan sought to eliminate LSC, submitting seven straight budgets without an appropriation for the corporation. While some of the funding was restored by a sympathetic Congress, Legal Aid lost \$1.2 million in funding in 1982, forcing staffing cuts in most offices. In response to the cuts, under my leadership, the Maryland General Assembly established the Maryland Legal Services Corporation and provided funding through the Interest on Lawyer Trust Accounts, IOLTA, Program to provide additional funding to Legal Aid and other legal services programs representing the poor.

Under the leadership of Wilhelm H. Joseph, Jr., who took the helm in 1996, Legal Aid has grown to be one of the Nation’s largest and most respected legal services organizations. Today, there are more than 250 staff members in 13 offices statewide. Last year, more than 60,000 people from across the State were served, including residents of subsidized and public housing, the elderly, migrant farm workers, and neglected and abused children.

I would ask my colleagues to join me in congratulating Legal Aid for its outstanding achievements and service to the people of Maryland over the past 100 years, reminding us of the importance of the words inscribed over the entrance to the U.S. Supreme Court, “Equal Justice for All.”●

TRIBUTE TO WILLIAM A. HAWKINS

● Ms. KLOBUCHAR. Mr. President, today I honor and pay tribute to a true leader from my home state of Minnesota, William A. Hawkins. Bill most recently retired with distinction as the chairman and CEO of Medtronic, the world’s leading medical technology company. He is an individual whose life personifies the Medtronic Mission Statement.