June 6, 2010

Mr. Chairman and Honorable Members of the Senate Judiciary:

My name is William Van Alstyne, and I am currently the Lee Professor of Law at the Marshall-Wythe Law School, in Williamsburg, Virginia, having joined its law faculty eight years ago to accept that chaired appointment, after having served full time on the Duke University Law School faculty for four decades, during the last three decades of which I held the Perkins Chair of Law, at Duke. It has been my privilege previously to have appeared before this Committee on a dozen occasions, in response to invitations to offer professional testimony on: nominees for the Supreme Court; the Constitution's distribution of powers respecting the initiation of war; the scope of Congressional power in respect to the jurisdiction of the Supreme Court; questions of "federalism" (i.e., the extent to which the Constitution vests particular legislative powers in Congress); and constitutional questions concerning Congress and the Bill of Rights.

Today's hearings are concerned with a pending proposal that would extend the current term of the Director of the FBI for an additional two-year period, even as the President has suggested is desirable. And the issue with respect to which the views of interested and informed parties have been invited, is whether the enactment of the pending bill, once signed by the President (or otherwise simply allowed to take effect without his signature), will per se permit the Director to remain until the date provided in the pending bill, or whether, to the contrary, it would require his new "nomination" by the President as well as Senate consent, as a necessary step to confirm his "appointment" under the new, extended term as provided in the pending bill.

I frankly have no doubt that successful passage of the current bill will suffice. In preparing for these hearings, moreover, I downloaded and read several documents provided by the Committee's staff. Two of these, one of which was prepared by Walter Dellinger as head of the Office of Legal Counsel (after which he also served as acting Solicitor General) and another, provided by the research office of the Library of Congress, conclude that enactment of the pending bill, signed by the President, are clearly constitutionally sufficient. Rather than "plagiarize" from their respective Memoranda in this, my own written submission, or simply recite the same sources and materials on which each of them rightly relied, I will simply incorporate each of their respective previous submissions, as I do. Here, I mean merely to stress some few additional basic thoughts I respectfully hope the Committee will likewise consider as well.

It is, of course, by the Constitution that the President appoints the Director of the FBI. And the indubitable constitutional source of power, pursuant to which he does so is readily found in Article II, Section 2, Clause two, pursuant to which the current director was appointed and confirmed. The office itself was created by act of Congress, of course. That one who holds that office, however, necessarily serves at the pleasure of the President who, virtually from day to day, may remove him and may do so wholly without regard to what Congress might think to be "just cause." This is so, simply because no one doubts that the nature of the responsibilities reposed in the Director of The Federal Bureau of Investigation are indubitably "executive" in nature, and not either "legislative" or "judicial." And it was settled nearly a century ago, in Myers v. United States, 272 U.S. 52 (I926), that all those holding positions in the "executive" rather than the

"legislative" or "judicial" branches of government, are removable by executive will alone. Effectively, then, all who serve in the executive branch, including the director of the FBI, serve at the pleasure of the President. Congress may of course say what such offices there shall be (as it did, beginning with the "Secretary of State" and the "Secretary of War"–later modified to "Defense") but insofar as these offices are lodged within the executive branch and were created to render it more feasible for the President to discharge his obligations as set forth in Article II, the power vested in Congress so to provide for those offices is itself expressly provided in the "sweeping" clause, i.e., the "necessary and proper" clause as expressly set forth in Article I, Section Eight, in the final clause that so provides as follows:

[And–The Congress shall have Power] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Among the expressly vested powers of the President, of course, is the provision in Article II, Section 3, namely that he

"...shall take care that the Laws are faithfully executed... "

And it is pursuant to the "necessary and proper" clause that Congress established the Federal Bureau of Investigation, provided for a Director, appointed by the President, for such term of service as Congress may provide for that office holder, the Director necessarily serving at the pleasure of the President, however, whose power of removal is complete and not subject to congressional restriction.

To be sure, where an "office" may have mixed responsibilities, such as those commingled within the several independent administrative agencies (such as the NLRB which "makes" laws (interstitially) as well as "enforces" the laws (through bringing cases of alleged "unfair" labor practices, and "adjudicates" them – at least in preliminary fashion, then, to be sure, to the extent that the personnel of such an agency are delegees of Congress' "law-making" power and not solely those of the President, of an executive nature, its authority to limit the bases for the President to remove such an "officer" may be–and is–accordingly, substantial. *See*, for example, Humphrey's Executor v. United States, 295 U.S. 602 (I935).

What the FBI does, however, is just as its formal title suggests: it "investigates" and does so to determine whether any (federal) laws may have been violated, and so also to determine whether appropriate grounds exist to make arrests, to support indictments and appropriate prosecution, or even civil actions in appropriate courts. And it is the director who oversees the Bureau, as its highest ranking officer in respect to these executive functions.

It follows from these several straightforward observations, therefore, in my own professional view, that insofar as a particular person, as properly appointed and *implicitly* enjoying the continuing confidence of the President at whose pleasure he serves as director for whatever term Congress itself prescribes, *properly* serves as FBI director. That Congress may now vote to extend the Director's term for an additional two years, consistent with the President's continuing

confidence in the director himself, assuredly satisfies our constitutional requirements in my view, as I hope this distinguished committee will itself concur in.

Additionally, in this regard, I think it useful also to suggest the following. If there are those, whether in the Senate or the House, who-for *any* reason–may deem it ill-advised to continue the current director (despite the President's satisfaction with a decision so to extend his term), they may of course register their sentiment simply by voting "no," and, should they carry the day, and the incumbent director's ten-year term expire–as it does–this year, they would indeed have their way.

I also suppose that as a practical matter, since the current "closure" rules of the Senate require sixty votes (to close further debate and bring a matter promptly to a vote), it is even possible for those with misgivings about the current director, essentially to have their way by simple "filibuster" on *the pending bill* itself. While I do not harbor such misgivings, either personally or professionally, I concede that nothing in the Constitution forbids such a strategy.

On the other hand, for the reasons I have but briefly summarized, as well as those profiled in the longer documents the Committee already has on hand, of which the essential arguments and sources provided in those materials I do approve and do mean hereby also to incorporate by this express reference, I do not doubt either the constitutionality of, or the intended effect of the bill as currently before you.

In brief, I unreservedly believe that if you are individually satisfied with the current director's discharge of his duties and of the wisdom of not discontinuing him when either ongoing or additional investigations and/or indictments may yet be found on solid grounds, enactment of the pending bill is desirable as well as wholly constitutional, as with the President's own approval, it may t hen take full effect.

Respectfully submitted,

William Van Alstyne
Lee Professor of Law

P.S.: Simply as a postscript, I might remind the committee that in a similar case, namely, the extension provided by Congress for ratification of the "Equal Rights" Amendment(from an original seven years to ten years), was done without significant controversy and certainly without successful challenge. It was regarded as quite sufficient that, in the judgment of Congress at the time, a three-year extension was deemed well warranted. So, equivalently, here as well. Again, albeit contrary to what we know, if in the President's view, the proposed extended term for the incumbent director of the FBI is deemed ill-advised, he may communicate that view and/or simply dismiss the director, or merely "veto" the bill and send it back. And oppositely, he may equally signal his approval of the director's ongoing performance of his wholly executive responsibilities, either by encouraging favorable action on the pending bill and then by promptly signing it or by

merely allowing it to take effect without his signature.

Again, in my professional view, the committee should have *complete confidence* in the pending measure **as well within its constitutional discretion**, and promptly report it for debate and vote in the full Senate in this month of June itself.

William Van Alstyne
June 6, 2011