Testimony of

Mr. Bruce Fein

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STATEMENT OF BRUCE FEIN
BEFORE THE SENATE JUDICIARY COMMITTEE
RE: PRESIDENTIAL SIGNING STATEMENTS
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Dear Mr. Chairman and Members of the Committee:

I am grateful for the opportunity to share my views on presidential signing statements that declare the intent of the President to disregard or ignore duly enacted provisions of statutes that he has signed into law because he believes they encroach on presidential powers or are otherwise unconstitutional. These statements, which have multiplied logarithmically under President George W. Bush, flout the Constitution's checks and balances and separation of powers. They usurp legislative prerogatives and evade accountability. I will not address presidential signing statements that elaborate on the President's understanding of ambiguous legislative language for consideration by the judiciary in deciding cases and controversies, just as statements by congressional committees or individual Members are employed by the courts assist the interpretation of inexact statutory text. The latter seem to me legitimate contributions to legislative history, and do not raise the profound constitutional concerns of the former.

I. The Original Meaning of the Constitution
The Founding Fathers endowed the President with a qualified but not absolute veto, which can be overridden with by two-thirds majorities in the House and Senate. The Founding Fathers withheld line-item veto power from the President. As the United States Supreme Court explained in Clinton v. New York (1998): "Our first President understood the text of the Presentment Clause as requiring that he either 'approve all the parts of a Bill, or reject it in toto.'" The first President, George Washington, had presided over the constitutional convention. And as the Supreme Court underscored in Myers v. United States (1926), the views and practices of the demigods who were present at the creation of the Constitution are entitled to great deference. President William Howard Taft, a proponent of a strong presidency, also wrote that the President "has no power to veto part of a bill and let the rest become a law." Accordingly, the High Court held a line-item veto statute unconstitutional in Clinton.

In fashioning the constitutional balance between legislative and executive authority, the Founding Fathers chose not to hobble Congress with a single-subject rule for legislation which would impair its leverage with the President. In contrast, many States impose a single-subject rule on state constitutional amendments, which has proved vexing in application because virtually every bill or referendum arguably addresses more than one issue. For example, the Fair Labor Standards Act regulates minimum wages and maximum hours. Are wages and hours one subject or two? More important, a single-subject rule would remove from Congress a significant tactic to elicit the President's approval of legislation: namely, to confront the White House will a bill that contains provisions that the President covets and provisions that he opposes, and force him to take either all or nothing, and to accept political accountability for the choice. No Founding Father uttered a single syllable insinuating that such a wrenching political choice amounted to duress or coercion which should be counteracted with presidential power to refuse to enforce the parts of the bill he had signed into but which he disliked. As President Taft observed: "A President with the power to veto items in appropriation bills might exercise a good restraining influence in cutting down the total annual expenses of the government. But this is not the right way."

II. Vetoing Unconstitutional Laws
The Founding Fathers intended the veto power of the President to be employed primarily to thwart laws he believed were unconstitutional, whether because they encroached on executive branch powers or otherwise. As Alexander Hamilton amplified in Federalist 73, without a veto the President "might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote." Indeed, the presidential oath enshrined in Article II requires

the President to veto any law he believes is unconstitutional in whole or in part because it obligates him to defend the Constitution, not participate in its sabotage. The President does not enjoy a constitutional option of unilaterally pronouncing a provision he has signed into law as unconstitutional and refuse to enforce it on that count. The United States Court of Appeals for the Ninth Circuit in Lear Siegler v. Lehman, 842 F.2d 1102 (1988) explained: "Art. I, section 7 is explicit that the President must either sign or veto a bill presented to him. Once signed by the President,...the bill becomes part of the law of the land and the President must 'take care that [it] be faithfully executed.' Art. I, section 7 does not empower the President to employ a so-called 'line item veto' and excise or sever provisions of a bill with which he disagrees. The only constitutionally prescribed means for the President to effectuate his objections to a bill is to veto it and state those objections upon returning the bill to Congress. The 'line item veto' does not exist in the federal Constitution, and the executive branch cannot bring a de facto 'line item veto' into existence by promulgating orders to suspend parts of statutes which the President has signed into law." See also Ameron, Inc. v. U.S. Army Corps of Engineers, 787 F.2d 875 (3d Cir. 1986).

When the President vetoes a bill because of its asserted unconstitutionality, he accepts clear political accountability for his action. Thus, President Andrew Jackson vetoed bills to extend the charter of the Second Bank of the United States because he insisted the Bank was beyond the power of Congress to create. He accepted responsibility for scuttling the Band, and gained popular acclaim. A veto also enables Congress to override the President's decision, and to likewise accept responsibility for repudiating the President.

III. Presidential Signing Statements

Presidential signing statements are extra-constitutional and riddled with mischief, as two examples under President Bush highlight. The President Bush was harshly criticized by Members of Congress and others over allegations of torture or cruel, degrading, or inhuman treatment of detainees in the war against Afghanistan and international terrorism. The President's lawyers had fashioned legal theories that would justify torture as an inherent Article II power. But Mr. Bush ultimately capitulated to public opinion and Congress and negotiated the Detainee Treatment Act of 2005 as part of a larger Defense Department Supplemental Appropriations. The Act prohibits the Executive in all its branches and agencies from torture or cruel, inhumane, or degrading interrogations whether to obtain foreign intelligence or otherwise. After taking political credit for signing the bill, President Bush issued a statement declaring in substance that he would ignore it when he saw fit as an unconstitutional encroachment on his power to protect "the American people from further terrorist attacks." According to the signing statement, "The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks." While to the layman, the language of the signing statement may seem both Delphic and innocuous, to the initiated the words referring to a unitary executive and Commander in Chief powers clearly signify that President Bush is asserting that he is constitutionally entitle to commit torture if he believes it would assist the gathering of foreign intelligence. President Bush was nullified a provision of statute that he had signed into law and which he was then obliged to faithfully execute.

The Act did not create any private right to action for enforcement. Thus, the nullification will circumvent judicial review because Supreme Court decisions make dubious the standing of Members of Congress or congressional committees to challenge allegedly unconstitutional non-enforcement by the White House. President Bush's signing statement was tantamount to a constitutionally impermissible line item veto.

The Intelligence Authorization Act of 2005, like its predecessors, restricts the President's employment of military force in Colombia. It is modeled after statutes during the Vietnam War that prohibited expenditures for military force in Cambodia or Laos, and the so-called "Clark Amendment" which prohibited monies for covert operations in Angola. Section 502(c) declares: "No United States Armed Forces personnel or United States civilian contractor employed by the United States Armed Forces will participate in any combat operation in connection with assistance made available under this section, except for the purpose of acting in self-defense or during the course of search and rescue operations for United States citizens." Its objective is to keep the United States military out of Colombia's civil war with narco-terrorists. President Bush, however, issued a signing statement nullifying the law that he had signed. It asserted: "The executive branch shall construe the restrictions in that section as advisory in nature, so that the provisions are consistent with the President's constitutional authority as Commander in Chief, including for the conduct of intelligence operations, and to supervise the unitary executive."

If President Bush believed section 502 was unconstitutional, he was obligated to veto the entire Intelligence Authorization Act and to explain his veto to Congress. He could ask Congress to delete the allegedly offensive provisions, or Congress might override the veto. But his nullification of section 502 after signing it into law was without constitutional standing. The precedent is alarming. Suppose Congress were to enact a law forbidding the President to employ military force in Iran aiming to destroy its nuclear facilities. President Bush might sign the law but in a signing statement declare that he would treat it as advisory to preserve his Commander in Chief prerogatives. The ability of Congress to participate in shaping the foreign relations and national security of the United States would be crippled, and the express congressional authority to enact laws to regulate the constitutional powers of the President in Article I, section 8, clause 18 would be a dead letter.

President Bush's nullification of section 502 also evaded judicial review because of the problematic nature of discovering a plaintiff who would enjoy Article III standing.

IV. Remedies

I would recommend that Congress enact a generic law that prohibits the expenditure of any funds of the United States to enforce a bill that the President has signed into law but which he has declared in a signing statement that he will refuse to enforce in whole or in part because of its alleged unconstitutionality. That use of the power of the purse would transform such signing statements into the equivalent of a constitutional veto. It would force the President to accept either all of a bill or none, as the Founding Fathers intended.

I would further recommend that Congress enact a statute seeking to confer Article III standing on the House and Senate collectively to sue the President over signing statements that nullify their handiwork, at least in circumstances where there is no other plausible plaintiff who would enjoy standing.

Congress should also pass a resolution deploring signing statements as line item vetoes and urging the President to negotiate with congressional leadership a constitutional and politically accountable means for the White House to express its opposition to laws it believes are unconstitutional in whole or in part. One alternative might be a law allowing the Executive to decline to defend the constitutionality of a law challenged in litigation but authorizing Congress to marshal its defense.

If all other avenues have proved unavailing, Congress should contemplate impeachment for signing statements that systematically flout the separation of powers and legislative prerogatives. The epitome of an impeachable offense, as Alexander Hamilton amplified in the Federalist Papers, is a political crime against the Constitution.