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Senator Arlen Specter
Chairman
Committee on the Judiciary
Washington, DC 20510

RE: Hearing on Signing Statements

Dear Chairman Specter:

Please find my answers to the Committee's questions regarding my testimony below.

Question (of Senator Kennedy):

The administration has been particularly bold in claiming an absolute right to nullify any parts of laws that intrude on what the president seems to view as his absolute right to control all aspects of the military. This position is plainly at odds with the Constitution, which grants Congress the power to declare war, the right to raise and support armies, the power to control funding for the military, and the right "[t]o make rules for the government and regulation of the land and naval forces".

Despite the Constitution's plain provisions about governing and regulating the military, the President rejected the ban on torture which Congress passed with overwhelming support. The President rejected the ban on using U.S. troops in combat operations in Colombia, despite at least four statements saying he can't.

President Bush didn't invent interpretive signing statements, but is it fair to say that he is applying them in a way that's unprecedented in its scope? When such statements expand executive power and blatantly trample on the plainly worded powers of Congress, what can Congress do to protect its constitutional responsibilities?

Answer:

President George W. Bush has employed signing statements to exercise the equivalent of unconstitutional line-item vetoes much more frequently and boldly than did his predecessors. For example, he negotiated intensely with Congress over the Detainee Treatment Act of 2005, signed the bill into law, and concurrently in a signing statement declared his intent to commit torture nonetheless in contravention of the Act as an inherent constitutional power if he unilaterally concluded that the crime might yield

useful foreign or military intelligence.

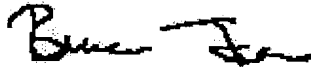
On the other hand, presidential signing statements suffer the same constitutional infirmities irrespective of the frequency of their use. Article I, section 7 and the presidential oath in Article II requires a president to veto bills he believes are unconstitutional in whole or in part. That was the original intent of the Founding Fathers and the practice of President George Washington, who presided over the constitutional convention. In *Clinton v. New York* (1998), the United States Supreme Court was emphatic that a line-item veto is unconstitutional. It results in the President's enforcement of a law that Congress did not enact. A signing statement declaring that the President will not enforce provisions of a bill he has signed into law that he believes are unconstitutional is indistinguishable. Moreover, a signing statement in lieu of a veto denies Congress the opportunity to override the President as contemplated by the Presentment Clause. And it blurs the President's political accountability by clouding public knowledge that he intends to sabotage part of what he ostensibly approved.

Congress enjoys at least two avenues to protect against signing statement usurpations. First, it might enact a law conferring standing on itself to seek a declaratory judgment to challenge the President's claimed constitutional power to nullify provisions of bills he has signed into law if he unilaterally declares them unconstitutional. The law of standing is foggy, but I believe the chances are better than 50 percent that the Supreme Court would sustain congressional standing because of the clear textual prohibition of line-item vetoes. Only one case in the Supreme Court would be needed to definitively resolve the signing statement issue.

Congress might also enact a statute employing the power of the purse to prevent

the President from enforcing a law that Congress did not pass. The statute would stipulate that no monies of the United States could be expended to enforce any law that the President in a signing statement declared contained unconstitutional provisions that he would not obey. This remedy would require the President to either enforce all of the provisions of a bill he has signed or none at all, as the Presentment Clause intended. It has the disadvantage, however, of denying Congress the opportunity to override a veto. That opportunity would arise if the President honored his constitutional obligation to veto any bill that he believes is unconstitutional in whole or in part.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Fein", with a stylized flourish at the end.

Bruce Fein