Testimony of The Honorable Patricia M. Wald, Former Judge and Chief Judge of the United States Court of Appeals for the District of Columbia Circuit

Chairman Frank, Committee Members:

Thank you for inviting me to testify about signing statements generally and with particular reference to the signing statement issued by President Bush on December 31, 2007 accompanying the signing into law of the Sudan Accountability and Divestment Act of 2007. Since I did not participate in the deliberations preceding the passage of the act, my comments on it will be based on a reading of the Act itself.

History of Signing Statements

Although the Constitution itself contains no reference to signing statements accompanying Presidential approval of a bill, the device has been in use since at least the early nineteenth century, although not always without criticism. House Member John Quincy Adams reacted to President John Tyler's signing statement expressing disagreement with a congressional redistricting bill by calling it an "extraneous document" that should "be regarded in no other light than a defacement of the public records and archives."[*] In the main, Presidents have used signing statements in a noncontroversial way to congratulate sponsors of the law or to highlight its importance. They have also used them to announce their "interpretation" of ambiguous provisions of the law. Where these statements have run into criticism, however, has been when they announce that the bill or a part thereof is in the President's view unconstitutional and that he will either interpret the law so as to obviate his objections or will not enforce it. The constitutional avoidance through interpretation technique goes back to President Grant and has been used by virtually every President since on occasion. Up to 1981, one historian writes, a Presidential announcement that he will not enforce the law had been used over 100 times but in practice carried out in only 12. Some Presidents, like Franklin Roosevelt in 1943, have "place[d] on record my view that this provision [dealing with an appropriations rider refusing to compensate government employees deemed "subversive" by congress] is not only unwise and discriminatory but unconstitutional" and hence not binding on the Executive. President Roosevelt however proceeded to enforce the law so that an opportunity for judicial resolution would occur, and told his Attorney General not to defend the law. In a subsequent suit, which found it unconstitutional, the Supreme Court cited *inter alia* the signing statement. United States v. Lovett, 238 U.S. 303 (1946).

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[*] A fuller history of signing statements and citations to principal authors and historians may be found in the ABA Report of the Task Force on Presidential Signing Statements; *see also* T. J. Halstead, CRS Report for Congress, Presidential Signing Statements, updated September 17, 2007.

During the Reagan Presidency, Attorney General Meese sought to advance the proposition that Presidential signing statements should be considered part of a statute's legislative history, and obtained their publication in the U.S. Code of Congressional and Administrative News. Nonetheless, despite occasional citations in judicial opinions, this practice is not frequent. In recent times, President Bush I and President Clinton used signing statements to comment on bills between 146 and 105 times, respectively.

In 1993, however, Walter Dellinger, then head of the Office of Legal Counsel, opined that a President's refusal to follow a law he believed to be unconstitutional on its face was justified on historical and constitutional grounds. This was followed by a 1994 memorandum to White House Counsel Abner Mikva that the President had an "enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional power of the Presidency." He cautioned, however, that the President should follow this route only if he both believed in his independent judgment that the provision was unconstitutional and also believed that the Supreme Court would find it so. Thus, Presidents have consistently refused to enforce legislative vetoes inserted into laws by Congress after the Supreme Court has declared them invalid. But the dispute as to whether a President may himself decide that a law is unconstitutional and declare that he will not enforce it or that he will interpret it against the clear intent of Congress in a way to alleviate his constitutional objections continues to this day.

The current President has used signing statements to indicate his belief that bills he signs into law risk being interpreted in a way that will infringe on his Article II executive powers in far greater numbers than his predecessors. As of his midsecond term, he has used them to challenge more than 800 provisions; prior presidents totaled fewer than 600 challenges. Substantial numbers related to perceived infringements on his power over foreign affairs or Commander-in-Chief powers or his "unitary executive" obligations. The most prominent ones have been attached to the signing of the McCain amendment, forbidding use of torture or cruel, inhuman or degrading treatment of U.S. captives in the war on terror, and the very recent ones attached to the National Defense Authorization Act of 2008, dealing with the use of tax money to establish permanent bases in Iraq.

Constitutional Issues Surrounding Signing Statements

The Constitution says nothing about signing statements. Article I, Section 7, cl 2 requires that bills passed by Congress shall be presented to the President; "if he approve, he shall sign it, but if not he shall return it, with his objections" and both houses shall reconsider it. If two-thirds of each House repasses it "it shall become a law." George Washington wrote that a bill must be approved in all of its parts or rejected in its entirety. (Writings of George Washington 96 (J. Fitzgerald ed., 1940)). Indeed, the Supreme Court has held in Clinton v New York, 524 U.S. 417 (1998) that even Congress cannot confer upon the President authority to do a line item veto. Justice Stevens wrote "Familiar historical materials provide abundant support for the conclusion that the power to enact statutes may only be exercised in accord with a single finely wrought and exhaustively considered procedure." *See also* U.S. v Smith, 27 F. Cas. 1192 (C.C.D.N.Y. 1806). The English Bill of Rights in 1688 accused King James II of "assuming and exercising a power of dispensing with and suspending of laws and the execution of laws without consent of Parliament" and deemed such conduct "illegal." On the bases of such history, many authorities, including the ABA Task Force, have opined that the President must veto a bill if he considers it unconstitutional, in whole or in part, or if the clear intent of Congress as to its interpretation renders it in his view unconstitutional.

This is not, however, the end of the debate. Not only President Bush' supporters but some of his critics as well dispute the absoluteness of this view. (Neil Kinkopf, Signing Statements and the President's Authority to Enforce the Law, Advance, Vol. 1, No. 2, 2007.) They point to the practical realities that face a President when Congress enacts massive bills encompassing hundreds of different provisions, most of which are unobjectionable and vitally necessary to governance. Politically and logically, they say, he cannot be asked to sacrifice the good of the country for one or two unacceptable items. Under Article II, he must "take care that the laws be faithfully executed," and "laws" includes the Constitution, so he must refuse to execute what he considers to be unconstitutional provisions. Presidents have been using signing statements to draw such lines since the early nineteenth century. Indeed, it needs pointing out that it is not the signing statement itself that is the core of the constitutional debate, but rather the authority of the President to refuse enforcement of laws he has signed on the ground that he believes them to be unconstitutional on their face, in part, or because he disagrees with Congress' clear intent as to their interpretation. Obviously, the President might act the same even if he did not issue any such statement. It is, however, also necessary to point out that some Bush critics who do not buy into an absolutist position stress that although the President may have authority to refuse enforcement of bills he signs, in whole or in part, he must make such decisions with due account to balancing the interests of affected individuals, executive prerogatives and the potential for obtaining judicial resolution. They oppose what they see as too frequent, ritualistic or mechanical use of the signing statements to announce intentions not to enforce or to interpret in a particular way clearly worded bills under a rubric of "unitary executive" or Article II Commander-in-Chief powers without detailed explanation of objections or indicia of reasoning. (President Bush has used the "unitary executive" phraseology more than 82 times in challenging

provisions). Thus far, there has been no controlling court decision on who is right. The absolutists do respond to the arguments above that the Supreme Court in INS v. Chadha, 462 U.S. 919 (1983) (the legislative veto case) remarked that "hard choices were consciously made by men who had lived under a form of government that permitted arbitrary government acts to go unchecked" and that they made "the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." Otherwise, separation of powers could be too easily evaded by the President, no matter how well motivated, who disagreed with Congress on constitutional interpretation. The ABA Task Force recommended that where the President goes ahead and issues a signing statement evidencing an intent not to enforce or to interpret against clear Congressional intent, minimally he should inform Congress in detail of his reasons and cooperate in an attempt to resolve the issue judicially.

There is of course constitutional debate about who can bring such a suit and under what conditions. The courts have said a true "case or controversy" is needed and have spelled out fairly strict requirements to meet that definition. Where individuals will be directly affected by a provision that is being enforced or have benefits or rights denied by a provision that is not being enforced – as has happened in the past in some signing statement situations – a judicial test may be feasible, and especially where, as in the case of President Roosevelt's announcement he would tell his Attorney General not to defend the law, the President is willing to cooperate. But on the other hand with other signing statements refusal to abide by a provision as in President Carter's expenditure of banned funds to implement his amnesty plan, the case was thrown out of court for lack of an appropriate plaintiff. The courts have so far been reluctant to acknowledge standing on the part of Congress or its members to bring such suits, although there is legislation now that attempts to overcome standing obstacles. *See, e.g.,* H.R. 2825 (giving standing to House and Senate collectively to file declaratory action on signing statements).

On a different tack, judicial recognition of signing statements has been relatively infrequent and usually confirmatory of other parts of judicial reasoning. In no case has it been determinative. *See, e.g.,* U.S. v Story, 891 F.2d 988 (2d. Cir. 1989); Newdow v. U.S. Cong., 328 F.3d 466 (9th Cir. 2002).

Commentary on the Darfur Signing Statement

There are several similarities but some important differences between the Darfur signing statement and the hundreds of other statements signed by President Bush. Like the "unitary executive" statements, it is cryptic and devoid of any detailed reasoning. We are told only that the law "risks being interpreted" in a way that would conflict with the "exclusive authority to conduct foreign relations" which the Constitution vests in the "Federal Government" and so the executive branch shall construe and enforce it in a manner that does not so conflict. But unlike the "unitary executive" challenges, the logic is more difficult to comprehend. In the "unitary executive" statements the President is typically defending an exclusive power to obtain information from subordinate executive officials. Here, however, the situation is different in that he does not appear to dispute – nor could he have, given the clear grant of authority in Article I, Section 8 to Congress to legislate on foreign commerce – that the exclusive power is in the Federal Government not in the Presidency. And of course Congress is the constitutionally-designated recipient of that power. So, paradoxically, the President is asserting authority to defend Congress' powers against the actions of the Congress itself. Such a rationale might be understandable only in an extreme case where Congress had given away its ceded powers in violation of the Constitution, but as Mr. Schwartz' testimony elucidates, there are numerous examples of Congress consenting to state compacts with foreign nations. Congress' authorization of state actions would seemingly have to interfere directly with the President's foreign relations powers before he became a legitimate spokesman for the challenge.

While the President certainly has Article II powers in the realm of foreign relations, I find it noteworthy that the Department of Justice letter setting out the Administration's objections to the law cites no examples of where this law might interfere with them – only a conceptual possibility. Without admittedly benefit of background knowledge my reading of the bill has not produced any reasonable possibilities either. The letter poses the perplexing rationale that the states may indeed do what they are doing now in divestment without any federal legislation so by passing the legislation Congress must be anticipating their doing something that will interfere with exclusive federal authority vested in Congress or the President. But they do not suggest what that would be; the law speaks (in the sections addressed here) only of divesting assets or prohibiting investment in assets. The letter also raises the spectre of conflict between state divestment and an array of statutes, treaties or executive orders but does not give us any specific illustration. I am left with the question of whether there is in fact any law on the books or even any realistic probability that a state divestment would conflict with any existing legal requirement or whether the federal government has any authority currently to prevent states from divesting on their own. In this sense, this signing statement is a good example of why the ABA Task Force recommendation that the President be required to send to Congress a detailed statement of his objections when he signs a bill into law but asserts the right to construe it selectively or to ignore it altogether is not only sound but necessary.

The DOJ letter also cites Supreme Court precedent, which is discussed at length in Mr. Schwartz' testimony. The cases cited seem distinguishable either because Congress had not expressly authorized the actions taken or because the powers under consideration had not been accorded by the Constitution exclusively or predominantly to Congress.

Regardless of whether, per the constitutional discussion in the prior section, one takes the view that the President may not declare in a signing statement that he will not enforce a law or that he will interpret it in a way so as to obviate what he considers an unconstitutional interpretation or whether one takes the more flexible view that he should weigh factors like the detriment to individuals or entities, the harm to separation of powers, and the likelihood of a judicial resolution before asserting a right to interpret it his way (what is happening in this case), this signing statement appears misconceived. For one thing, it is unclear what the President can do in a situation where he thinks there is a conflict – how can he stop the states from divesting? Surely he can advise them not to and I do not discount the deterrent effect of his advice or what measures, positive and negative, he might be able to back it up with in the federal-state arena, but ultimately he would have to initiate a stop suit on the part of the federal government to assure desistance. The theory or the required demonstration of injury on the part of the federal government is not at all clear at this point. What would Congress' role be in such a suit, even if allowed by the courts? If the constitutional objection is as real as the DOJ letter posits, would not a veto have been the straightforward choice to begin with? As it is, both states and Congress can only speculate widely as to when and how the Executive might act in carrying out its interpretive intentions. My guess as to what would happen in any situation that presented a real conflict between proposed state action and the exercise of legitimate executive foreign relations authority is that the states would recede or that the President could ask Congress to amend the statute. Since the statute refers only to Sudan, it is at this time hard to imagine such a situation.

So the result of the present situation is that the states are left with a nagging doubt about potential executive action under unknown circumstances despite Congressional authorization for their actions. Congress is equally (so far as I know) unsure about where potential landmines lie, and the principles of separation of powers and express constitutional delegations of power are clouded. This is the basic problem with signing statements challenging newly-passed laws, and this is one of the exacerbated examples thereof. I do not believe this is the way of governing our Founding Fathers contemplated.

Thank you.