



AMERICAN BAR ASSOCIATION

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**STATEMENT OF
KAREN J. MATHIS
PRESIDENT OF THE AMERICAN BAR ASSOCIATION
before the
COMMITTEE ON THE JUDICIARY
of the
U.S. HOUSE OF REPRESENTATIVES
concerning
PRESIDENTIAL SIGNING STATEMENTS
JANUARY 31, 2007**

Good morning, Mr. Chairman, Ranking Member Smith and Members of the Committee.

My name is Karen J. Mathis, I am the President of the American Bar Association and a practicing attorney in Denver, Colorado. Thank you for the opportunity to testify before you today on behalf of the ABA and its more than 413,000 members.

The ABA Task Force on Presidential Signing Statements and the Separation of Powers Doctrine was appointed in June 2006 to examine the changing role of presidential signing statements, in which U.S. presidents articulate their views of provisions in newly enacted laws and to consider such statements in light of the Constitution and the law of the land. The Task Force consists of individuals with diverse ideological backgrounds including both conservatives and liberals, Republicans and Democrats, all of whom have substantial experience in government, the judiciary, and constitutional law. A list of the committee's members is appended to my testimony.

At the ABA's Annual Meeting last year, the House of Delegates adopted the unanimous recommendations of the Task Force as a comprehensive policy reflecting the views of the ABA on the use and potential misuse of presidential signing statements.

Specifically, the policy "opposes, as contrary to the rule of law and our constitutional system of separation of powers, the misuse of presidential signing statements" that claim the authority or state an "intention to disregard or decline to enforce all or part of a law the president has signed, or to interpret such a law in a manner inconsistent with the clear intent of Congress." In reaching this conclusion, the Task Force expressed concern that the practice of issuing presidential signing

statements that raise challenges to provisions of law has grown more and more serious over the course of the last 25 years.

Historically, presidents have used signings statements since President Monroe was in office. But what was once a rare and occasional use of signing statements to state objections to laws a president believed to be unconstitutional has, in recent years, become a more frequent occurrence and has expanded in scope. Recently, a controversial presidential signing statement was attached by the current administration to the Detainee Treatment Act, which cited the President's Commander in Chief authority to waive the requirements of the McCain amendment forbidding any U.S. officials to use torture or cruel, inhuman, or degrading treatment on prisoners if necessary to prevent terrorist attacks.

Another example of the expanded use of presidential signing statements is when President Clinton took aim at the Government Printing Office's attempts to control Executive Branch printing through a provision that "no funds appropriated may be expended for procurement of any printing of government publications unless through the GPO" in a 1995 appropriations bill. President Clinton instructed his subordinates to disregard the provision, but his position was never put to the test.

President George H.W. Bush also expanded the scope of signing statements by first arranging to have colloquies inserted into the congressional debates and then in signing statements relied on those colloquies to interpret statutory provisions despite stronger legislative evidence in favor of contrary interpretation. The first case involved a foreign affairs appropriations bill in which the Congress had forbidden sale of arms to a foreign government to further a foreign policy objective of the United States which the United States could not advance directly. Stating first that he intended to construe "any constitutionally doubtful provisions in accordance with the requirements of the Constitution," President Bush Senior said he would restrict the scope of the ban to the kind of "*quid pro quo*" exchange discussed in a specific colloquy his administration had arranged with congressional allies rather

than credit the broader range of transactions clearly contemplated by the textual definition which included deals for arms “in exchange for” furthering of a U.S. objective. “My decision to sign this bill,” he said in the statement, “is predicated on these understandings” of the relevant section, referring to the colloquy.

The potential for misuse in the issuance of presidential signing statements has reached the point where it poses a real threat to our system of checks and balances and the rule of law.

The Founding Fathers set forth in the Constitution a thoughtful process for the enactment of laws as part of the delicate system of checks and balances. The Framers required a president to either sign or veto a bill enacted by Congress in its entirety. Presidential signing statements that express the intent to disregard or effectively rewrite laws are inconsistent with this single, finely wrought, and exhaustively considered procedure.

Any attempt to refuse to enforce provisions of duly-enacted laws or to reinterpret them contrary to their clear meaning can be viewed as an attempt to achieve a line-item veto by other means. As you know, the U.S. Supreme Court held the line-item veto unconstitutional in *Clinton v. New York*, 524 U.S.C. 417(1998).

If a president issues a signing statement that nullifies a provision of a law without following constitutionally-proscribed procedures, he or she is usurping the power of the Legislative Branch by denying Congress the opportunity to override a veto of that law. Additionally, in some instances, a signing statement that declines enforcement of a provision on constitutional grounds could abrogate the power of the Judicial Branch to make its own determination of constitutionality.

The ABA’s policy goes beyond raising concerns about presidential signing statements and presents practical recommendations designed to improve transparency in the process and resolve any separation of powers issues that may accompany the use of presidential signing statements. The recommendations are

directed to the practices of various presidents and they represent a call not only to this President but to all his successors to fully respect the rule of law and our constitutional system of separation of powers.

These recommendations urge a president to:

- Communicate concerns about the constitutionality of any pending bills to Congress before passage, and to**
- Confine the content of signing statements to views regarding the meaning, purpose and significance of bills, and to veto a bill that he or she believes is unconstitutional.**

The recommendations also urge the Congress to enact legislation that:

- Requires a president to submit a report to Congress upon the issuance of statements that express the intent to disregard or decline to enforce a law the president has signed including an explanation of the reasons for taking that position, which report shall be made available on a database accessible to the public.**

Furthermore, the ABA recommendations urge the Congress to enact legislation that:

- Enables the President, Congress and other entities or individuals to seek appropriate judicial review when a president expresses the intent in a signing statement to disregard or decline to enforce a law he or she has signed.**

Such legislation may be necessary to overcome the barriers to judicial review such as standing and ripeness issues that have historically arisen in this context.

Today, national security issues dominate the agenda; and, because of the shared anti-terrorism responsibilities of the Executive and Legislative branches

under the Constitution, it is essential that our system of checks and balances be preserved. The involvement of an independent judiciary to resolve any disputes between the branches is a critical part of this process.

We must work together to resolve the unanswered questions surrounding the purpose and use of presidential signing statements to safeguard the separation of powers among the three branches of government. James Madison said it best: “The preservation of liberty requires the three great departments of power should be separate and distinct.”

We hope that the recommendations adopted by the ABA provide thoughtful guidance for the Congress and for all future presidents on how to achieve this goal.

Thank you for the opportunity to appear before the Committee and present the ABA’s views on this important subject. I look forward to your questions.

APPENDIX
ABA Task Force on Presidential Signing Statements
and the Separation of Powers Doctrine
Biographies

Chair

Neal R. Sonnett

Mr. Sonnett is a former Assistant United States Attorney and Chief of the Criminal Division for the Southern District of Florida. He heads his own Miami law firm concentrating on the defense of corporate, white collar and complex criminal cases throughout the United States. He has been profiled by the National Law Journal as one of the “Nation's Top White Collar Criminal Defense Lawyers,” was selected three times by that publication as one of the “100 Most Influential Lawyers In America,” and has been included in all 20 editions of The Best Lawyers in America.

Mr. Sonnett is a former Chair of the ABA Criminal Justice Section, which he now represents in the ABA House of Delegates, and a former President of the National Association of Criminal Defense Lawyers. He is the incoming President of the American Judicature Society and Vice-Chair of the ABA Section of Individual Rights and Responsibilities. He serves as Chair of the ABA Task Force on Treatment of Enemy Combatants, Chair of the ABA Task Force on Domestic Surveillance in the Fight Against Terrorism, and serves as the ABA’s official Observer for the Guantanamo military commission trials. He is also a member of the ABA Task Force on the Attorney-Client Privilege, the Task Force on Gatekeeper Regulation and the Profession, and he served on the ABA Justice Kennedy Commission. He is a Life Fellow of the American Bar Foundation and serves on the ALI-ABA Advisory Panel on Criminal Law and on the Editorial Advisory Boards of The National Law Journal and Money Laundering Alert.

Mr. Sonnett has received the ADL Jurisprudence Award and the Florida Bar Foundation Medal Of Honor for his "dedicated service in improving the administration of the criminal justice system and in protecting individual rights precious to our American Constitutional form of government." He has also received the highest awards of the ABA Criminal Justice Section, the National Association of Criminal Defense Lawyers, The Florida Bar Criminal Law Section, the Florida Association of Criminal Defense Lawyers (Miami), and the ACLU of Miami.

Members

Mark D. Agrast

Mark Agrast is a Senior Fellow at the Center for American Progress in Washington, D.C., here he oversees programs related to the Constitution, the rule of law, and the history of American progressive thought.

Before joining the Center for American Progress, Mr. Agrast was Counsel and Legislative Director to Congressman William D. Delahunt of Massachusetts (1997-2003). He previously served as a top aide to Massachusetts Congressman Gerry E. Studds (1992-97) and practiced international law with the Washington office of Jones, Day, Reavis & Pogue (1985-91). During his years on Capitol Hill, Mr. Agrast played a prominent role in shaping laws on civil and constitutional rights, terrorism and civil liberties, criminal justice, patent and copyright law, antitrust, and other matters within the jurisdiction of the House Committee on the Judiciary. He was also responsible for legal issues within the jurisdiction of the House International Relations Committee, including the implementation of international agreements on human rights, intercountry adoption, and the protection of intellectual property rights.

Mr. Agrast is a member of the Board of Governors of the American Bar Association and a Fellow of the American Bar Foundation. A past Chair of the ABA Section of Individual Rights and Responsibilities, he currently chairs the ABA's Commission on the Renaissance of Idealism in the Legal Profession.

Hon. Mickey Edwards

Mickey Edwards is a lecturer at Princeton University's Woodrow Wilson School of public and International Affairs and the Executive Director of the Aspen Institute-Rodel Fellowships in Public Leadership. He was a Republican member of Congress from Oklahoma for 16 years (1977-92), during which time he was a member of the House Republican leadership and served on the House Budget and Appropriations committees.

He was a founding trustee of the Heritage Foundation, former national chair of the American Conservative Union, and director of policy advisory task forces for the Reagan presidential campaign. He has taught at Harvard, Georgetown, and Princeton universities and has chaired various task forces for the Constitution Project, the Brookings Institution, and the Council on Foreign Relations. In addition, he is currently an advisor to the US Department of State and a member of the Princeton Project on National Security.

Bruce Fein

Bruce Fein graduated from Harvard Law School with honors in 1972. After a coveted federal judicial clerkship, he joined the U.S. Department of Justice where he served as assistant director of the Office of Legal Policy, legal adviser to the assistant attorney general for antitrust, and the associate deputy attorney general. Mr. Fein then was appointed general counsel of the Federal Communications Commission, followed by an appointment as research director for the Joint Congressional Committee on Covert Arms Sales to Iran.

He has authored several volumes on the United States Supreme Court, the United States Constitution, and international law, and has assisted two dozen countries in constitutional revision. He has been an adjunct scholar with the American Enterprise Institute, a resident scholar at the Heritage Foundation, a lecturer at the Brookings Institute, and an adjunct professor at George Washington University.

Mr. Fein has been executive editor of World Intelligence Review, a periodical devoted to national security and intelligence issues. At present, he writes a weekly column for The Washington Times devoted to legal and international affairs, guest columns for numerous other newspapers, and articles for professional and lay journals. He is invited to testify frequently before Congress and administrative agencies by both Democrats and Republicans. He appears regularly on national broadcast, cable, and radio programs as an expert in foreign affairs, international and constitutional law, telecommunications, terrorism, national security, and related subjects.

Harold Hongju Koh

Harold Hongju Koh, Dean and Gerard C. and Bernice Latrobe Smith Professor of International Law, is one of the country's leading experts on international law, international human rights, national security law and international economic law. He has received more than twenty awards for his human rights work.

A former Assistant Secretary of State, Dean Koh advised former Secretary Albright on U.S. policy on democracy, human rights, labor, the rule of law, and religious freedom. Harold clerked for both Judge Malcolm Richard Wilkey of the U.S. Court of Appeals for the D.C. Circuit and Justice Harry A. Blackmun of the United States Supreme Court. He worked in private practice in Washington, D.C. and as an attorney at the Office of Legal Counsel at the U.S. Department of Justice.

Dean Koh earned a B.A. from Harvard University in 1975, an Honours B.A. from Magdalen College, Oxford University in 1977, and a J.D. from Harvard Law School in 1980. He has been a Visiting Fellow and Lecturer at Magdalen and All Souls Colleges, Oxford University, and has taught at The Hague Academy of International Law, the University of Toronto, and the George Washington University National Law Center.

Charles J. Ogletree

Charles J. Ogletree is the Jesse Climenko Professor of Law at Harvard Law School and Founding and Executive Director of Harvard's Charles Hamilton Houston Institute for Race & Justice. He is a prominent legal theorist who has made an international reputation by taking a hard look at complex issues of law and by working to secure the rights guaranteed by the Constitution for everyone equally under the law.

The Charles Hamilton Houston Institute for Race and Justice

(<http://www.charleshamiltonhouston.org>), named in honor of the visionary lawyer who spearheaded the litigation in *Brown v. Board of Education*, opened in September 2005, and focuses on a variety of issues relating to race and justice, and will sponsor research, hold conferences, and provide policy analysis.

Stephen A. Saltzburg

Professor Saltzburg joined the faculty of the George Washington University Law School in 1990. Before that, he had taught at the University of Virginia School of Law since 1972, and was named the first incumbent of the Class of 1962 Endowed Chair there. In

1996, he founded and began directing the master's program in Litigation and Dispute Resolution at GW.

Professor Saltzburg served as Reporter for and then as a member of the Advisory Committee on the Federal Rules of Criminal Procedure and as a member of the Advisory Committee on the Federal Rules of Evidence. He has mediated a wide variety of disputes involving public agencies as well as private litigants; has served as a sole arbitrator, panel Chair, and panel member in domestic arbitrations; and has served as an arbitrator for the International Chamber of Commerce.

Professor Saltzburg's public service includes positions as Associate Independent Counsel in the Iran-Contra investigation, Deputy Assistant Attorney General in the Criminal Division of the U.S. Department of Justice, the Attorney General's ex-officio representative on the U.S. Sentencing Commission, and as director of the Tax Refund Fraud Task Force, appointed by the Secretary of the Treasury. He currently serves on the Council of the ABA Criminal Justice Section and as its Vice Chair for Planning. He was appointed to the ABA Task Force on Terrorism and the Law and to the Task Force on Gatekeeper Regulation and the Profession in 2001 and to the ABA Task Force on Treatment of Enemy Combatants in 2002.

Hon. William S. Sessions

William S. Sessions has had a distinguished career in public service, as Chief of the Government Operations Section of the Department of Justice, United States Attorney for the Western District of Texas, United States District Judge for the Western District of Texas, Chief Judge of that court, and as the Director of the Federal Bureau of Investigation. He received the 2002 Price Daniel Distinguished Public Service Award and has been honored by Baylor University Law School as the 1988 Lawyer of the Year.

Judge Sessions joined Holland & Knight LLP in 2000 and is a partner engaged primarily in Alternative Dispute Resolution procedures. He holds the highest rating assigned by Martindale-Hubbell and is listed in The Best Lawyers In America for 2005 & 2006 for Alternative Dispute Resolution. He serves as an arbitrator and mediator for the American Arbitration Association, the International Center for Dispute Resolution and for the CPR Institute of Dispute Resolution.

Since June 2002, Judge Sessions has served on The Governor's Anti-Crime Commission and as the Vice Chair of the Governor's Task Force on Homeland Security for the State of Texas. He is a past President of the Waco-McLennan County Bar Association, the Federal Bar Association of San Antonio, the District Judges Association of the Fifth Circuit, and he was a member of the Board of Directors of the Federal Judicial Center. He served as the initial Chair of the ABA Committee on Independence of the Judiciary, honorary co-Chair of the ABA Commission on the 21st Century Judiciary, and as a member of the ABA Commission on Civic Education and the Separation of Powers. He was a member of the Martin Luther King, Jr. Federal Holiday Commission and he serves on the George W. Bush Presidential Library Steering Committee for Baylor University.

Kathleen M. Sullivan

Kathleen M. Sullivan is the Stanley Morrison Professor of Law and the head of Stanford's new Constitutional Law Center. She previously served for five years as Dean of Stanford Law School, having raised over \$100 million in gifts to the School. She has taught at Harvard and USC Law Schools, and is a Visiting Scholar at the National Constitution Center. A nationally known constitutional law expert, she is co-author of the nation's leading casebook in Constitutional Law.

Ms. Sullivan has 25 years of experience in appellate advocacy, having litigated over 30 appeals in federal court and argued three cases in the US Supreme Court. She has represented the broadcasting, wine, and pharmaceutical industries as well as state and city governments including Boston, Honolulu, San Francisco, Berkeley, Puerto Rico and Hawaii. Ms. Sullivan has special expertise in first amendment and constitutional issues as well as experience in a variety of constitutional issues involved in white-collar criminal defense.

She has been named by the National Law Journal as one of the 100 Most Influential Lawyers in America and one of the 50 Most Influential Women Lawyers in America, and by the Daily Journal as one of the top 100 Most Influential Lawyers in California.

Thomas M. Susman

Tom Susman is a partner in the Washington Office of Ropes & Gray, LLP, where he conducts a diverse legislative and regulatory practice. Before joining Ropes & Gray he was general counsel to the U.S. Senate Committee on the Judiciary and various Judiciary subcommittees, and prior to that he served in the Office of Legal Counsel of the Department of Justice.

Presently serving as Delegate to the ABA House of Delegates, Mr. Susman has been on the Board of Governors and chaired the Section on Administrative Law and Regulatory Practice. He is on the Council of the Council on Legal Education Opportunity, on the Board of Trustees of the National Judicial College, and a member of the ABA Committee on the Law Library of Congress. He is also a member of the American Law Institute, chair of the Ethics Committee of the American League of Lobbyists, President of the D.C. Public Library Foundation, and Adjunct Professor at the Washington College of Law of the American University.

Mr. Susman frequently testifies before Congress and lectures in the U.S. and abroad on legislative process and lobbying, freedom of information, and administrative law. He received the U.S. Court of Federal Claims Golden Eagle Award for Outstanding Service to the Court and has been inducted into the Freedom of Information Hall of Fame. He earned his B.A. from Yale University and his J.D. from the University of Texas, and following law school he clerked for Fifth Circuit Judge John Minor Wisdom.

Hon. Patricia M. Wald

Patricia M. Wald served as a judge on the U.S. Court of Appeals for the D.C. Circuit from 1979-1999 and as its Chief Judge from 1986-1991. She then was appointed to the

International Criminal Tribunal for the former Yugoslavia where she served on the trial and appellate benches from 1999-2001. Prior to her judicial service, she was an Assistant Attorney General for Legislative Affairs in the Carter Administration.

Judge Wald most recently served as a member of the President's commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction. Judge Wald is currently a consultant on international justice, the Co- Chair of New Perimeter, a Board member of OSI-Justice Initiative and the American Constitution society. She is the recipient of the ABA Margaret Brant Award for Women Lawyers of Achievement and the American Lawyer Lifetime Achievement Award. She was recently named by the National Law Journal as one of the “100 Most Influential Lawyers in America.”

Special Adviser

Alan Rothstein

Alan Rothstein serves as General Counsel to the Association of the Bar of the City of New York, where he coordinates the extensive law reform and public policy work of this 22,000-member Association. Founded in 1870, the Association has been influential on a local, state, national and international level.

Prior to his 20 years with the Association, Rothstein was the Associate Director of Citizens Union, a long-standing civic association in New York City. Rothstein started his legal career with the firm of Weil, Gotshal & Manges. He earned his B.A. degree from City College of New York and an M.A. in Economics