STATEMENT OF BRUCE FEIN

BEFORE THE HOUSE ARMED SERVICES COMMITTEE

RE: PRESIDENTIAL SIGNING STATEMENT REGARDING THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008

MARCH 11, 2008

Dear Mr. Chairman and Members of the Committee:

I am pleased to share my views on President George W. Bush's signing statement issued on January 28, 2008 in conjunction with H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008 (NDAA). The statement signaled to Congress and the public that he would ignore four provisions of the bill that he had signed into law because he believes they unconstitutionally encroach on presidential powers, for example, his claimed authority as Commander in Chief to initiate warfare anywhere in the Milky Way against any perceived danger to the United States, whether imaginary or authentic. The theory of executive power implicit in the signing statement indicates that President Bush believes Congress is impotent to prevent him from a preemptive war against Iran to crush or cripple its nuclear ambitions.

I recently served on the American Bar Association's Task Force on Presidential Signing Statements, which culminated in a report sharply protesting their issuance as unconstitutional. They are tantamount to absolute line-item vetoes, which the United States Supreme Court held violated the Constitution's provisions for the enactment of laws in Clinton v. New York. President George Washington, who was present at the Constitution's creation, understood that a bill passed by Congress must be either signed or vetoed in its entirety, just as Members vote in favor or against a bill in its entirety. A President presented with a bill that he believes is unconstitutional in whole or in part is obligated to veto the entire legislation. He may ask Congress to delete the allegedly offending provisions. Congress may override the veto by two-thirds majorities, make the requested deletions, or acquiesce in the veto, simpliciter. Signing statements unconstitutionally frustrate the legislative option of Congress to bundle various provisions

in a single bill and confront the President with an awkward political choice of either "taking the good with the bad" or vetoing the entire legislation. I have testified before the Senate Judiciary Committee on presidential signing statements and suggested methods for blunting their mischief or challenging their use through litigation.

I consider the NDAA signing statement the most alarming in President Bush's mushrooming roster. If accepted as a correct interpretation of executive power, the Republic would retrogress more than three centuries to the Stuart Monarchs in Great Britain. The congressional power of the purse—a power which James Madison celebrated as an invincible instrument for redressing grievances against the President—would be crippled or dead.

Mr. Bush's signing statement may seem innocuous to the uninitiated in power struggles between the Congress and the President, but it is not. The statement declares:

"Today, I have signed into law H.R. 4986, the National Defense Authorization Act for Fiscal Year 2008…

Provisions of the Act, including sections 841, 846, 1079, and 1222, purport to impose requirements that could inhibit the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect the national security, to supervise the executive branch, and to execute his authority as Commander in Chief. The executive branch shall construe such provisions in a manner consistent with the constitutional authority of the President."

It speaks volumes that the President does not assert that the identified sections are ambiguous, i.e., he does not know what they mean. On that score, the President is truthful. Section 841 establishes a legislative-executive commission to study reconstruction, logistical, and security contracting for Iraq and Afghanistan; and, to conduct hearings and take testimony towards that end. It does not seek to override any putative executive privilege to withhold information. Section 846 expands whistleblower protection for government contractor employees for providing information reasonably believed to be evidence of gross mismanagement of a DOD contract or grant, a gross waste of DOD funds, a substantial and specific danger to public health or safety, or a violation of law related to a DOD contract (including the competition for or negotiation of a contract) or grant. Section 1079 regulates the assertion of executive privilege by various heads of the intelligence community by requiring its invocation by the President when the House or Senate Armed Services Committee requests intelligence assessments, reports, estimates, or legal opinions. Section 1222 speaks in exceptionally lucid language in prohibiting expenditures authorized by the NDAA to establish permanent military bases in Iraq or to control its oil resources, foreign policy or national security judgments well within the jurisdiction of Congress. The section declares:

"No funds appropriated pursuant to an authorization of appropriations of this Act may be obligated or expended for a purpose as follows:

(1) To establish any military installation or base for the purpose of providing for the permanent stationing of United States Armed Forces in Iraq.

(2) To exercise United States control of the oil resources of Iraq."

The signing statement does not say that President Bush does not know what section 1222 means. It protests, however, that it may inhibit or circumscribe his decisions as Commander in Chief to fight the ongoing war against Iraq or to protect the national security. But insofar as President Bush is insinuating section 1222 may unconstitutionally invade his prerogatives, the insinuation is fatuous.

Article I, section 8, clause 18 of the Constitution—the Necessary and Proper Clause—empowers Congress to regulate the exercise of all constitutional authorities in whatever branch, including the President's exercise of national security or war powers. The only limitation is that Congress must avoid exercising an "overriding" influence over a presidential prerogative, as James Madison explained in describing the Constitution's separation of powers in The Federalist Papers.

The Constitution, moreover, makes Congress a full partner with the President in national security affairs. A law that restricts the president's military or national security discretion does not raise constitutional eyebrows. Laws setting personnel ceilings on the armed forces may be contrary to what the President believes is prudent for national security or fighting wars, but they have never been deemed unconstitutional for that reason. Congress may slash the DOD budget proposed by the President in a manner which he believes will jeopardize the national security, but the slashes have never been held unconstitutional for that reasons. Congress declares war, raises, supports, and enacts rules for the military, and determines what military expenditures are permitted. In each endeavor, the President may believe Congress has undermined the national security. But that does not make the legislation unconstitutional. The Founding Fathers gave the President a qualified veto as a safeguard against imprudent legislation. They

did not create an absolute monarch with powers asserted by the Stuart Kings to tax and spend for military purposes without parliamentary authority and to suspend the enforcement of laws they disliked. Both practices were explicitly prohibited by the English Bill of Rights of 1688—a full century before the drafting of the United States Constitution.

Practice confirms what the plain language of the Constitution indicates: Congress is empowered to enact laws that circumscribe the President's national security or Commander in Chief powers. An early Congress limited the power of President John Adams to seize ships sailing from France. Congress established the policy for Reconstruction after the Civil War. Congress prohibited President McKinley from annexing Cuba. Congress enacted neutrality legislation in the 1930s which inhibited President Roosevelt's ability to aid forces fighting fascism or dictatorship abroad. Congress decides on the draft, not the President. Congress decides on whether to make the CIA's budget public, not the President. Congress prohibited President Nixon from extending the Vietnam War into Laos, Cambodia, or Thailand. Congress prohibited covert CIA action in Angola with the Clark Amendment. The various iterations of the Boland Amendment limited President Reagan in assisting the Nicaraguan resistance to Daniel Ortega and the Sandanistas. The Supreme Court in Hamdan v. Rumsfeld held that Congress had denied President Bush authority to create military commissions for the trial of war crimes allegedly perpetrated by Al Qaeda detainees. The Military Commissions Act of 2006 was necessary to justify the President's exercise of that power.

In sum, Congress routinely enacts laws that limit the President's national security strategy or tactics. But these limitations raise no constitutional anxieties. Congress was under no constitutional obligation to fund the Manhattan Project irrespective of how essential FDR thought an atomic bomb would be to ending World War II. The aggregate number of congressional national security or war limitations on the President since the inception of the Constitution may be as high as several thousand.

The signing statement declares that the executive branch "shall construe [the enumerated sections] in a manner consistent with the constitutional authority of the President." But the sections leave nothing for construction. The English language is not capable of greater exactitude. Section 1222, for instance, plainly prohibits the expenditure of money authorized by the NDAA for the purpose of establishing permanent United States military bases in Iraq. Even a child could discern the demarcation line between authorized and unauthorized expenditures pivoting on whether a permanent military base in Iraq was the objective. What the signing statement really means is that President Bush will interpret section 1222 as a nullity and ignore its limitations on the absurd constitutional theory that Congress is powerless to enact any law that the President believes might "inhibit" his ability to safeguard the national security or to wage war. In customary usage, inhibit means to hold back or restrain. The core purpose of the Constitution's checks and balances, however, is to insure that each branch hold back or restrain the other branches to prevent tyranny or abuses short of exercising an "overriding" influence. President Bush's signing statement reads checks and balances out of the Constitution in favor of an omnipotent executive, a revolutionary shift that might be likened to the Roman Republic's bow to Roman Emperors.

Suppose Congress determines that a United States invasion of Iran to destroy its nuclear facilities would be folly. It would unify the Iranian people behind the fanatical or corrupt mullahs; and, it would frustrate a democratic dispensation in Iran building on the model of Prime Minister Mohammed Mossadegh, whom the United States overthrew in 1953. Congress thus enacts a law prohibiting the expenditure of any monies of the United States to invade Iran. Under the theory of executive power asserted in the signing statement accompanying H.R. 4986, President Bush would ignore the prohibition and invade Iran if he believed the invasion would bolster the national security.

President Bush believes whatever the President does under the umbrella of Commander in Chief is legal even if in contravention of what Congress has ordained, just as President Nixon maintained that if the President does it, it's legal, a proposition that occasioned three articles of impeachment by the House Judiciary Committee. There might be some solace in presidential supremacy if presidents were infallible; and, congressional vetting and regulation were invariably vexatious. But presidents chronically and monumentally err: the overthrow of Mossadegh in favor of the Shah; the Bay of Pigs; the Vietnam War; post-Saddam Iraq, etc. It took the Fulbright hearings to expose the delusions of President Johnson's Vietnam War road map. Without congressional checks, presidents will inflate danger manifold and project the United States military everywhere because executive power expands in times of real or perceived emergencies. The downfall of every empire has been executive arrogance and usurpations.

The instruments available to Congress to overcome President Bush's signing statement are uninviting, but necessary if the Constitution is to be preserved undefiled, a preservation which every Member of Congress has taken an oath to ensure. The President or his designated representative should be asked to testify before this Committee whether section 1222 is constitutional and will be faithfully enforced by the executive branch, for example, by a presidential instruction to the Secretary of Defense to spend no money authorized by the NDAA with the objective of permanent military bases in Iraq and requiring periodic audits to insure compliance. If the executive branch insists on silence, then impeachment by the House of Representatives would be in order. Silence would signal the President's intent to violate his oath to faithfully execute the laws. And the Nixon impeachment proceedings established that the President's non-responsiveness to congressional requests for information when impeachment is at stake is itself an impeachable offense.

The Committee could also recommend that no executive official who declines to answer congressional questions about the implementation of section 1222 shall receive a salary or other compensation from funds appropriated by Congress.

Supreme Court decisions make clear that constitutional practice far more than logic or text is decisive in interpreting checks and balances and the separation of powers. If President Bush's signing statement goes unchallenged and unrebuked by Congress, it will be the law. Congress will have been reduced to an ink blot in national security matters. It will possess lesser power to check the executive than was granted the British Parliament in 1688, or three hundred and twenty years ago.